

ABERDEEN IDAHO MINING CO.

IBLA 2000-22

Decided October 1, 2001

Appeal from a decision of the Idaho State Office, Bureau of Land Management, declaring lode mining claims null and void ab initio. IMC-17737, et al.

Decision affirmed; request for attorney's fees denied.

1. Board of Land Appeals--Bureau of Land Management--Rules of Practice: Appeals: Jurisdiction

The Bureau of Land Management has jurisdiction to issue a decision ruling that mining claims were located on lands that had, at the time of location, been patented to the State of Idaho. The Board of Land Appeals has jurisdiction to hear an appeal from such decision.

2. Mining Claims: Lands Subject To--Mining Claims: Location--Patents of Public Lands: Effect--School Lands: Grants of Land--State Grants--State Lands

BLM properly declares lode mining claims null and void ab initio where they were located entirely on lands which were not open to entry under the United States mining laws at the time of location either because they had been patented as mining claims or granted to the State of Idaho as part of grants of school sections. The fact that the State may have, on a date following the putative location of the claims, applied for other lands in lieu of lands within the section is irrelevant where such application was subsequently rejected and withdrawn, since the aborted lieu selection process did not, in the absence of publication and clear-listing, result in any waiver by the State of its rights in the lands in the section or in any lands being returned to the ownership of the United States.

APPEARANCES: John F. Magnuson, Esq., Coeur d'Alene, Idaho, for appellant; Christie A. Cunningham, Esq., Office of the Attorney General, State of Idaho, Boise, Idaho, for the State of Idaho; William M. Ferry, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Aberdeen Idaho Mining Company (Aberdeen) has appealed from the September 3, 1999, decision of the Idaho State Office, Bureau of Land Management (BLM), declaring 16 lode mining claims 1/ null and void ab initio because the lands on which they were located were not open to mineral entry on the date of location.

BLM's decision states that the claims were located principally in the N $\frac{1}{2}$ and N $\frac{1}{2}$ SW $\frac{1}{4}$ of section 16, T. 48 N., R. 3 E., Boise Meridian, Idaho, and a "small portion" of the S $\frac{1}{2}$ SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of section 9 in the same township. 2/ It indicates that the claims were located at various times from July 1940 through August 1951.

The decision ruled that the lands on which the claims were located were patented with no minerals reserved to the United States. BLM explained that the patents were issued from 1912 to 1923, prior to the dates of location. BLM declared the claims null and void ab initio because the lands within the S $\frac{1}{2}$ SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of section 9, and the N $\frac{1}{2}$ and the N $\frac{1}{2}$ SW $\frac{1}{4}$ of section 16, T. 48 N., R. 3 E., Boise Meridian, Idaho, were not open to mineral entry on the dates the claims were located.

Aberdeen timely appealed. By order dated February 23, 2000, we granted a request by the State, acting through its Idaho Land Board and Idaho Department of Lands, to intervene in the pending appeal as a full party, based on its assertion that it holds title to the lands in section 16 that are at issue here. 3/

The case record and appellant's pleadings confirm that Aberdeen or its predecessor-in-interest originally located the 16 mining claims at

1/ This case involves the Wilkie Nos. 21, 6, 19, 9, 10, 20, 19 Frac., 9 Frac., 12, 12 Frac., 8, 15 Frac., and 14 through 17 mining claims (IMC-17737, IMC-17744 through IMC-17752, and IMC-17754 through IMC-17759). Although the original location notices refer to some of the claims as the "Willkie" claims, we adopt the "Wilkie" spelling for the sake of uniformity.

2/ BLM's decision refers to "enclosed maps" that are unaccountably missing from the record forwarded to this Board for review. The situs of the claims is discernible from other documents in the record.

3/ On Feb. 14, 2000, appellant initiated a complaint in the District Court of the First Judicial District of the State of Idaho (captioned Aberdeen Idaho Mining Co. v. State of Idaho, No. CV-00-35604) seeking to quiet title in appellant to the 16 mining claims at issue here and against the State. We are also aware of an earlier proceeding in the same State court (captioned State of Idaho v. Sunshine Mining Co., No. 26876).

As the United States is and was not a party to either action, it is not bound by the State court's rulings therein. See State of California, 121 IBLA 73, 110-11, 98 I.D. 321, 341 (1991); Estate of Arthur C. W. Bowen, Deceased, 14 IBLA 201, 209-10, 81 I.D. 30, 33-34 (1974). Thus, any resolution of the State court proceeding will neither decide the question

issue here between July 6, 1940, and August 10, 1951. (Preliminary Statement of Reasons for Appeal (SOR) at 6.) It later filed copies of the notices of location with BLM on August 21, 1979, as required by section 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1994). Maps attached to the location notices confirm BLM's finding that all of the claims are in the S $\frac{1}{2}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 9 and the N $\frac{1}{2}$ and N $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 16, T. 48 N., R. 3 E., Boise Meridian, Shoshone County, Idaho. The situs of all of the claims, with the exception of the Wilkie No. 21 claim, is confirmed by Mineral Survey No. 3413, Idaho, which was approved by BLM on October 27, 1947.

With the exception of the Wilkie No. 8 claim, all of the claims are situated entirely in section 16. (SOR at 6; Notice of Appeal Ex. A.) The Wilkie No. 8 claim straddles the northern boundary line of section 16, extending slightly into section 9 of the same township. Appellant has not challenged BLM's holding that lands in sec. 9, T. 48 N., R. 3 E., Boise Meridian, Shoshone County, Idaho, had been patented with no reservation of any minerals to the United States, prior to the July 6, 1940, date of location of the claim, and thus were not available for mineral entry at that time. Appellant focuses the dispute on the availability of lands in section 16 of that township.

[1] BLM asserts that this Board may lack jurisdiction over this appeal. (BLM Answer at 9-10.) The jurisdiction of the Department (and thus of this Board) to adjudicate the nature and extent of the rights of mining and other claimants to the land extends only to lands to which the United States has title. Charles E. Crafts, 135 IBLA 211, 213 (1996); Rosander Mining Co., 84 IBLA 60, 62-63 (1984); George Antunovich, 76 IBLA 301, 308, 90 I.D. 464, 468 (1983). Where the United States has no title, the Department clearly has no jurisdiction. However, the question of whether the United States has title is justiciable before the Department. See, e.g., State of California, 121 IBLA 73, 98 I.D. 321 (1991). Furthermore, as the State points out (State Answer at 2-3), when the Department determines that the United States has no title in lands, it may properly declare mining claims located on such lands null and void ab initio as a matter of Federal law. See, e.g., David A. Smith, 128 IBLA 249 (1994); see also United States v. Boucher, 147 IBLA 236, 240 (1999). Such decision by BLM is appealable by right to this Board. 43 CFR 4.1(c).

[2] Turning to the merits of the appeal, we note that this Board has previously considered the history and status of ownership of

fn. 3 (continued)

of whether title to the land encompassed by appellant's 16 mining claims is held by the United States, rather than the State nor eliminate the need for these proceedings before the Board.

In any event, on Sept. 12, 2000, the State court issued an order staying any further proceedings "until the conclusion of the IBLA proceeding and any subsequent judicial review." (Opinion and Order, Aberdeen Idaho Mining Company v. State of Idaho, No. CV-00-35604, dated Sept. 12, 2000, at 4.)

section 16, T. 48 N., R. 3 E., Boise Meridian, Idaho, in State of Idaho, 101 IBLA 340, 95 I.D. 49 (1988). We rely generally on our findings therein.

The Idaho Admission Act of July 3, 1890, ch. 656, granted the State sections 16 and 36 in every township in Idaho for the support of common schools. 26 Stat. 215. However, under section 13 of the Idaho Admission Act, "mineral lands" were expressly exempted from school land grants, and the State was empowered to select an equal quantity of other unappropriated lands in lieu thereof for the use and benefit of the common schools.

It is established that "mineral lands" are lands that are "mineral in character." State of Idaho, 101 IBLA at 342, 95 I.D. at 50. The Department classified the lands in section 16 as "mineral-in-character" in August 1898 (id. at 351), and the State failed in State of Idaho to overcome BLM's finding in that case that the lands were in fact mineral-in-character. 4/ Id. at 354. Although BLM now argues that these lands were not mineral in character, we adhere to our holding in State of Idaho that they were so classified. Accordingly, they were not transferred by the Idaho Admission Act, as provided by section 13 thereof.

Appellant suggests that, since the lands in section 16 were not transferred to the State by the Idaho Admission Act, the State received instead only the right to select an equal quantity of other unappropriated lieu lands elsewhere in the state. (Petition to Suspend Proceedings (Petition) at 2.) Appellant thus disregards the Act of January 25, 1927 ("An Act Confirming in States and Territories Title to Lands in Aid of Common or Public Schools") 44 Stat. 1026, which extended grants in aid of common or public schools to lands that were mineral in character. 43 U.S.C. §§ 870 and 871 (1994). Under that Act, title over lands that were mineral in character (and not otherwise exempted from the conveyance) passed in praesenti to the State by "statutory conveyance" on January 25, 1927. See State of Idaho, 101 IBLA at 354, 359; Margaret Scharf, 57 I.D. 348 (1941). 5/

4/ In the instant case, BLM does an about-face, not conceding that the land in section 16 was mineral-in-character on November 29, 1912, since it feels that the land may have passed to the State under the 1890 grant on that date when the lands were surveyed. BLM's Master Title Plat for T. 48 N., R. 3 E., Boise Meridian, Shoshone County, Idaho, notes that section 16 is subject to "SG [(State Grant)] 11/29/1912." It is irrelevant to the present case whether title passed to the State in 1912 (as BLM now asserts), 1927 (as we ruled in State of Idaho), or 1938 (as the State asserts (see n.5, below)), since the first of appellant's claims was not located until 1940.

5/ We recognize that the 1927 Act provides for exceptions to the statutory grant of mineral lands, viz.: "Any lands * * * subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled, * * * are excluded from the provisions of this section." 43 U.S.C. § 870(c)(1994). We also recognize that the State has asserted that some

Unlike in State of Idaho, supra, it is unnecessary in the context of the present appeal to consider the status of ownership of the lands in section 16 between the date of survey in 1912 (the earliest date title could have passed) and 1935 (the latest). 6/ It is accordingly clear that the lands in section 16 were not available for mineral entry at the time of location of appellant's mining claims between July 6, 1940, and August 10, 1951.

Appellant nevertheless contends that title to the land later returned to the United States in 1952, and that its claims were revitalized when that occurred. Thus, appellant notes that, on April 17, 1952, the State filed Indemnity School Land Selection List No. 853 (Indemnity List 853), naming as base lands 640 acres in section 16, selecting instead 640 acres as lieu lands. Appellant asserts that the State thereby "relinquished all of this section 16" and "waived" its right to the section 16 lands, pursuant to the Act of February 28, 1891 (the Indemnity Lieu Selection Act), 43 U.S.C. §§ 851 and 852 (1994).

Appellant concedes that BLM formally disapproved Indemnity List 853 in November 1953 and that the State withdrew it shortly afterwards. It nevertheless argues that there was a 19-month "window" between the filing of Indemnity List 853 in April 1952 and its withdrawal by the State in November 1953 during which the land was available for mineral entry, and that all of its claims (which had previously been located when the land was not available) were validated at that time. (SOR at 8; Petition at 3.) This argument does not withstand scrutiny.

The basis for its argument that the State's filing of Indemnity List 853 in 1952 opened lands in section 16 to mineral entry is the language of the Indemnity Lieu Selection Act, as amended, which provided in part in 1952:

And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the

fn. 5 (continued)

of the lands in section 16 were covered by unpatented mining claims, such that the statutory grant of title to those lands did not occur until the claims were abandoned or relinquished, which, the State avers, did not occur until 1938. See State Objection to Appellant's Petition to Suspend Proceedings (Objection), dated Mar. 22, 2000, at 2.

For the purposes of this decision, the only question that need be resolved is whether the grant of section 16 to the State was effective prior to 1940, when the first of Appellant's claims was located. Even assuming arguendo that the State is correct as to when it received title to these lands, it is clear that the claims were located after title transferred to the State. 6/ If the lands were not mineral in character (as BLM now claims), they passed to the State upon survey in 1912. If the lands were mineral in character (as appellant claims and as we found in State of Idaho, supra), they passed to the State either in 1927 or in 1938 if (as the State claims) some of the lands were subject to valid mining claims in 1927.

provisions of section 852 of this title, by said State where sections 16 or 36 * * * are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections 16 and 36, * * * the selection of such lands in lieu thereof by said State * * * shall be a waiver of its right to said sections.

43 U.S.C. § 851 (1952) (Emphasis supplied.) Thus, appellant asserts that the State's filing of Indemnity List 853 was a "selection" that amounted to a "waiver of its right to" the lands listed as base therein, namely, section 16, T. 48 N., R. 3 E., Boise Meridian, Idaho.

We hold that the State's aborted lieu selection in 1952 did not constitute a "selection of such lands" under the Indemnity Lieu Selection Act. As expressly held in State of California, 28 L.D. 57, a selection by a state under the Indemnity Lieu Selection Act will "operate as a waiver by the [s]tate of its right to the tract" only "when approved." Id. at 61; accord, School Lands Within the Crow Indian Reservation, 49 L.D. 376, 380-81 (1922); In Re School Land Question, 30 L.D. 438, 441-42 (1901). Although the United States has no discretion to grant or deny a state the privilege of selecting other lands and waiving ownership, Federal land officers nevertheless have the duty to ascertain whether a state's waiver/selection meets the requirements of the enabling statute. No rights accrue unless and until a state's application is accepted, which occurs only upon full compliance with those requirements. See Wyoming v. United States, 255 U.S. 489, 496 (1921).

The State's 1952 lieu selection was never accepted. The lieu selection application process in 1952-53 consisted of two steps: (1) Issuance by BLM of a decision formally approving the lieu selection application, and publishing of a notice of the selection (43 CFR 270.10 (1949); see BLM Manual Vol. V Ch. 2.34.15 (1962)); and (2) after adjudicating any protests or appeals resulting from publication of notice of the selection and determining that all requirements had been satisfied, preparation by BLM of a clear list and certification in anticipation of the issuance of a patent for the lieu lands to the State. 43 CFR 270.18(c) (1949); see BLM Manual Vol. V Ch. 2.34.17 (1962).

On April 17, 1952, the State filed Indemnity List 853 (serialized as Idaho 02799) 7/ assigning "as base part of Section 16, T. 48 N., R. 3 E., [Boise Meridian], * * * alleging the cause of loss to be mineral land patented." BLM Answer Att. B (BLM Memo dated Nov. 27, 1953) at 1 (emphasis supplied); see State Answer Att. E at 2 (State Indemnity List No. 853). The State sought a full 640 acres of selected lands in lieu thereof.

On May 26, 1953, the BLM Directorate initially issued a decision approving the classification of the selected lieu lands as suitable for disposal to the State, thus segregating the selected lieu lands from

7/ The serial number also appears (apparently erroneously) as "Idaho 02709."

mineral and other forms of entry. BLM also returned the application (presumably to its local Idaho offices) "for allowance in the absence of record objection," and directing, following allowance, publication as contemplated by the BLM Manual and 43 CFR 270.10 (1954). (BLM Answer Att. A.) That appears to have been in compliance with the provisions of 43 CFR 270.10 (1949).

However, no publication or clear-listing ever occurred. On November 27, 1953, the BLM Directorate was advised as follows:

An examination of the plat of survey of the township accepted on November 29, 1912, shows that a number of the areas shown on the plat in section 16 are invaded by patented mining claims. * * *

The areas in the section which are embraced in the patented mining claims may be used as valid base in support of Indemnity School Selection No. 853, Idaho 02799 upon a proper showing that the State has not made any disposition of that land.

A determination has been made and it has been ascertained that the State of Idaho is entitled to 246.164 acres of allowable base in this selection because of the loss through the patenting of certain mining claims. Of the 651.24 acres included in section 16, 405.086 acres passed to the State under its original school land grant or under the act of January 25, 1927. See attached diagram which shows the separate areas of the several patented mineral surveys and of the approximate area of the subdivision invaded by the patented mineral surveys. [8/]

(BLM Answer Att. B (BLM Memo dated Nov. 27, 1953) at 1 (emphasis supplied).) Accordingly, also on November 27, 1953, the BLM Director vacated the May 26, 1953, decision, ruling instead that the State could select only 245.154 acres of lieu lands. 9/ That is, the State's lieu selection was limited to the losses from its grant for common schools resulting from the previous patenting of mining claims. As the State had

8/ The record does not contain a copy of the referenced diagram. The extent of the "invasion" of the patented mineral surveys is apparent from other documentation in the record.

9/ Although it has long been administratively final, we note that we regard BLM's 1953 ruling as correct. The State's lieu selection list had expressly sought additional lands in lieu of lands in section 16 that had been patented as mineral land. The selection could be granted only to the extent lands in section 16 had been sold or "otherwise disposed of," that is in this case, by being patented as mining claims. No justification appeared for a general exchange of all lands in section 16 for other lands. We agree with BLM that no general exchange was intended when the State filed its lieu selection in 1952. (BLM Answer at 5-6.) Certainly, no general exchange occurred as a result.

originally sought 640 acres of lieu lands, it was directed either to offer additional base lands or eliminate a portion of the selected lands. (State Answer Att. F (BLM Decision dated Nov. 27, 1953).)

In November 1953, the State withdrew Selection List 853. Significantly, the State expressly noted in its withdrawal that the withdrawal was "for the purpose of retaining Sec. 16 and the mineral rights attached" so that the State could collect royalty from private developers. Although BLM initiated the approval process in 1952, it was not completed. The selected lands were never clearlisted; no formal acknowledgment of any waiver by the State or return of waived lands to the United States occurred.

Since the State's 1952 selection was never approved and was formally withdrawn, the State never (as a result of 1952 lieu selection Idaho 02799) waived its rights to any lands in section 16. It follows that the State retained title to all unpatented lands in section 16 and that these lands were never "returned" to the United States as urged by appellant. As if to remove any doubt on this question, upon withdrawing the application, the State expressly indicated that it was keeping those lands. The State continues to maintain adamantly that it retains title over section 16. We agree: the lands simply never left the State's ownership. 10/

There is no question that all lands in section 16 were either patented to private parties as mining claims 11/ or transferred to the State before the claims at issue were located. Federal mining claims may only be located on "lands belonging to the United States." 30 U.S.C. § 22 (1994). That means that, even if we could find that the lands in section 16 had somehow been returned to the United States and opened to

10/ The opinion of the Supreme Court in California v. Deseret Water, Oil & Irrigation Co., 243 U.S. 415 (1917), is not to the contrary. We agree with the State (State's Answer at 7-8) that Deseret deals with the larger question whether a state has the right under the Indemnity Lieu Selection Act to waive title to the lands in question, not when the waiver occurs. Deseret concerns lands that were, at the time of decision, subject to pending lieu selection applications. See id. at 417. Further, at the time of the Deseret decision, the State of California had affirmatively waived title. Accordingly, it does not address the situation presented herein, where the selection application was officially disapproved, and where a state affirmatively advocates that it has not waived title.

Further, the decision expressly defers to the Department's decision in State of California, which contains the proviso that the State's waiver of any claims to school lands can occur only when its lieu selection is approved. 243 U.S. at 420-21.

11/ Part of the Wilkie No. 8 claim was located in section 9, on land which had been patented, with no mineral reservation. Part of the Wilkie Nos. 9, 9 Fraction, 10, and 19 Fraction were located in section 16 on land that had been patented, with no mineral reservation, prior to their July 28, 1945, and Oct. 9, 1946, original dates of location. (MTP, dated Nov. 16, 1992, for T. 48 N., R. 3 E., Boise Meridian, Shoshone County, Idaho; Plat, Mineral Survey No. 3413, Idaho, dated Oct. 27, 1947.)

mineral entry, appellant would still not prevail, as, in order for mining claims to be valid, the lands on which they are located must be open to mineral entry on the date of location. David A. Smith, 128 IBLA at 250; George Antunovich, 76 IBLA at 303, 90 I.D. at 465; Don P. Smith, 51 IBLA 71 (1980).

Nothing shows that the State ever transferred title to any lands in section 16 back to the United States. Appellant has simply failed to show that the United States owned lands in section 16 at the time of the location of its claims. BLM accordingly properly declared appellant's claims null and void ab initio.

To the extent not specifically addressed herein, appellant's other arguments, including his request for attorney fees, have been considered and rejected.

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:

Gail M. Frazier
Administrative Judge