SETH M. REILLY
KEITH H. STOKES

IBLA 87-723 Decided January 4, 1990

Appeal from a decision of the Montana State Office, Bureau of Land Management, declaring placer mining claims null and void ab initio in part. M MC 75706, M MC 75707, and M MC 75708.

Affirmed in part, set aside and remanded in part.

1. Mining Claims: Location--Mining Claims: Placer Claims

   The boundaries of a placer claim may not be extended over patented land or land otherwise not open to location for the purpose of claiming unappropriated portions of land within the boundaries.

2. Mining Claims: Determination of Validity--Mining Claims: Lands Subject to

   Placer mining claims partially located on lands patented without a reservation of minerals to the United States are null and void ab initio to the extent they include such lands.

3. Mining Claims: Lands Subject to--Mining Claims: Powersite Lands--Mining Claims Rights Restoration Act--Withdrawals and Reservations: Effect of--Withdrawals and Reservations: Powersites

   Where BLM declares a mining claim null and void ab initio to the extent that it overlaps a prior powersite withdrawal and BLM has not considered the effect of 30 U.S.C. § 621 (1982), on the powersite withdrawal, the Board will set aside BLM's decision and remand the case for further action.

4. Mining Claims: Location--Mining Claims: Placer Claims

   Under 30 U.S.C. § 36 (1982), joint entry of a placer claim comprised of up to 160 acres may be made by two or more persons, or associations of persons, having

> contiguous claims of any size, although such claims may be less than 10 acres each. Because parcels of land within a placer claim must be contiguous, the owners of a placer mining claim which includes non-contiguous parcels must select which tract they wish to preserve under each claim.

APPEARANCES: Steve Reilly, Jefferson City, Montana, for appellants.

OPINION BY ADMINISTRATIVE JUDGE BYRNES

Seth M. Reilly and Keith H. Stokes have appealed from the July 15, 1987, decision of the Montana State Office, Bureau of Land Management (BLM), declaring their S and R Placer Mining Claims No. 1, No. 2, and No. 3 (respectively claim Nos. 1, 2, and 3) null and void ab initio in part for the stated reason that appellants' claims are located on lands not open to mineral entry. BLM specifically states that claim Nos. 1, 2, and 3 are located in part on lands which were patented without a reserva-tion of minerals to the United States under patent Nos. 33, 16471, 26725, 1/ and 835152. BLM also stated that claim No. 2 invades Powersite Reserve No. 349.

[1] Appellants recognize that their claims embrace land not open to mineral location but contend that the unappropriated land within the claims is properly located. Appellants correctly state that the boundaries of a lode claim may be extended onto land not subject to location for the pur-pose of claiming the free and unappropriated ground within the boundaries. See Del Monte Min. Co. v. Last Chance Min. Co., 171 U.S. 55 (1898); Santa Fe Mining, Inc., 79 IBLA 48 (1984). Nevertheless, appellants' claims are placers, not lodes. In Stenfield v. Espe, 171 F. 825, 827-28 (9th Cir. 1909), the court explained why the holding in Del Monte did not apply to placer claims:

> In [Del Monte, supra], the court, in answering the question whether any of the lines of a junior lode location may be laid within or across the surface of a valid senior location, alluded to the fact that it will often happen that lode locations which do not overlap are so placed as to leave between them irregular parcels of ground, and that a discoverer of mineral on such a parcel is unable to locate the same without making his end lines parallel, and unless he is permitted to place his end lines on territory already claimed by prior locators, and sustained the right to so invade land already located for the mere purpose of location. In so holding the court was controlled by the consideration that the location on the surface is not made with a view of getting the benefits from the use of the surface, the purpose being to reach the vein hidden in the depths of the earth, and the purpose of the location being to measure the rights beneath the surface. * * * [T]he court ruled that in order to comply with

1/ We note that while the BLM decision uses patent No. 27625, the record and master title plat (MTP) identifies this patent as No. 26725.

> the statute, which requires that the end lines of the claim shall be parallel, and in order to secure all the unoccupied surface to which it is entitled, with all the underground rights which attach to possession and ownership of the surface, a junior locator may place an end line within the limits of a prior location. This ruling is based on considerations which have no application whatever to placer locations. In the placer mine the surface is the thing located, and the possession of the surface is absolutely essential to the mining operations. In order to obtain the surface that is open to location, there is no necessity to invade the surface of other claims, or to place boundary lines thereon.

Thus, the boundaries of a placer claim may not be extended over patented land or land otherwise not open to location for the purpose of claiming unappropriated portions of land within the boundaries.

[2] The boundaries of the claims are described by courses and distances, and a map based upon a private survey of the claims was submitted when they were recorded with BLM in 1981. The three claims are primarily situated in sec. 5, T. 7 N., R. 4 W., Principal Meridian, Montana. Claim No. 1 also extends into the NW¼, sec. 4, and claim No. 3 extends into the NW¼, sec. 8. These irregularly shaped claims may be characterized as gulch placers. 2/ BLM has provided copies of several patents and the powersite withdrawal as well as a master title plat for the township. Our comparison of these documents with appellants' map fully supports BLM's determination that the claims overlap land conveyed without a mineral reservation to the United States under the four patents identified in BLM's decision. The law is well established that placer mining claims partially located on lands patented without a reservation of minerals to the United States are properly declared null and void ab initio to the extent they include such lands. Kenneth Russell, 109 IBLA 180, 183 (1989); Santa Fe Resources,

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2/ Although descriptions of placer claims are required under 30 U.S.C. § 35 (1982), to "conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys," we observed in United States v. Haskins, 59 IBLA 1, 97, 88 I.D. 925, 973 (1981):

"Both the Department and the Courts have long recognized that situations occasionally occur wherein a placer claim is located along a ravine, canyon, or gulch, surrounded by precipitous and, in many cases, impassible canyon walls and cliffs, which themselves contain no mineral values, and that in these situations, unusual modes of location may be necessary."

However, entries or locations which cut the public domain in long narrow strips or grossly irregular and fantastically shaped tracts are not permitted. 43 CFR 3842.1-5(d); Snowflake Fraction Placer, 37 L.D. 250 (1908).

We note that early Departmental decisions cited the requirement that placer locations conform to the public land surveys as a reason for allow-ing placer claims to include land that had already been appropriated. E.g., Rialto No. 2 Placer Mining Claim, 34 L.D. 44 (1905). The authority of such decisions was expressly rejected in Stenfield v. Espe, supra at 828, and the Rialto decision was expressly overruled in Snowflake Fraction Placer, supra.

106 IBLA 374 (1989); Donald E. Stewart, 104 IBLA 48, 49 (1988); Merrill G. Memmott, 100 IBLA 44, 46 (1987); Leslie Corriea, 93 IBLA 346, 349 (1986); Lynn M. Sheppard, 90 IBLA 23, 25, 92 I.D. 612, 614 (1985).

It also appears possible that the claims may overlap other land patented without a mineral reservation, but this is not altogether clear. For example, claim No. 1 may include lot 14 of sec. 5 and the land in the NW¼ of sec. 4 embraced by patent No. 1111120. The minerals embraced by patent No. 1111120 were not reserved to the United States. Claim No. 3 may include among other lands the SE¼ SW¼ and lot 11 of sec. 5, the minerals in which were conveyed under patent No. 835152. Claim No. 2 may intrude upon mineral patent No. 15139 (Charlotte lode mining claim), a portion of which is situated in the NE¼ SE¼ of sec. 5.

Although BLM included an official MTP for the township and this plat depicts the status of land in sec. 5, the MTP refers to supplemental plats for secs. 4 and 8 and these supplemental plats were not included in the record. Not only do appellants' claims extend into these sections, but several patents included in the record impact lots within these sections. In the absence of the supplemental plats, however, we are unable to determine whether those patents affect that portion of the NW¼ of sec. 8 included by appellants in their No. 3 claim. Likewise, the impact of possible patents in sec. 4 upon claim No. 1 is not discernable in the absence of the supplemental plat.

In its decision, BLM also declared appellants' claim No. 2 invalid to the extent it invades the land reserved by the Executive Order of Withdrawal for Powersite Reserve No. 349 dated April 22, 1913. This determination must be set aside and the case remanded for further consideration. It is not clear that BLM properly determined which claims overlap the withdrawal, nor is it clear to what extent the withdrawal remains effective with respect to the land within appellants' claims.

Powersite Reserve No. 349 withdrew 90 feet on either side of the centerline of the right-of-way granted to the Great Falls Power Company in various sections and townships, including secs. 4 and 5, from "settlement, location, sale or entry and reserved for the purpose of electrical transmission lines." The order withdrew the lands "pursuant to the provisions of the Act of Congress approved on June 25, 1910 (36 Stat. 847)." Seventy-five of the 90 feet were embraced by Great Falls Power Company Right-of-Way Application No. 05707 approved on January 6, 1913 (See Powersite Reserve at 1).

The Act of June 25, 1910, commonly referred to as the Pickett Act, granted the President authority to temporarily withdraw public lands "for water-power sites, irrigation classification of lands, or other public purposes." Ch. 421, § 1, 36 Stat. 847 (1910). As originally enacted, the Pickett Act provided that lands withdrawn under its authority were to remain open under the mining laws for the location of "minerals other than coal, oil, gas and phosphates." Id. at § 2. The Act of August 24, 1912, amended section 2 of the Pickett Act by substituting the words "metalliferous minerals" for "minerals other than coal, oil, gas, and phosphates." Ch. 369, § 2, 37 Stat. 497 (1912). The Pickett Act was codified at 43 U.S.C. §§ 141-143 (1970).

Section 704(a) of Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, § 704, 90 Stat. 2743, 2792 (1976), repealed the President's withdrawal authority under the Pickett Act (43 U.S.C. § 141 (1970)). Section 143 requiring the Secretary of the Interior to report all withdrawals to Congress was repealed by P.L. 86-533, 74 Stat. 245, 248 (1960). With the exception of two provisos, FLPMA repealed the limitation relating to mining locations for metalliferous minerals. David E. Hoover, 99 IBLA 291, 293 (1987).

However, the repeal of the Pickett Act did not invalidate withdrawals made under its authority. Section 701(c) of FLPMA, 43 U.S.C. § 1701 note (1982). Indeed, it has long been recognized as a matter of law that withdrawals made under the Pickett Act are effective until revoked. David E. Hoover, supra.

The Federal Power Act (FPA) of June 10, 1920 (41 Stat. 1063), created the Federal Power Commission to provide "for the improvement of navigation; the development of water power; the use of the public lands in relation thereto." 3/ Section 24 of the FPA superceded the Pickett Act, and as amended is codified at 16 U.S.C. § 818 (1982), along with implementing regulations 18 CFR 25 (1987). The FPA closed powersite lands to all mineral location, subject to restoration to entry for mining locations by order of the Secretary of the Interior upon recommendation of the commission under section 24. 4/

Under the terms of section 2(a) of the Mining Claim Rights Restoration Act (MCRRA), 30 U.S.C. § 621(a) (1982), Congress reopened lands withdrawn

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3/ The Federal Power Commission was terminated and its function, person-nel, and property were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission (FERC) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, the Public, Health, and Welfare. Specifically section 7172(a)(1)(A) transferred to FERC regulatory authority over that previ-ously held by the commission under 16 U.S.C. § 818 (1982).

4/ The FPA when originally enacted provided:

"That any lands of the United States included in any proposed project under the provisions of this Act shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress * * *. Whenever, the commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as powersites will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry or selection, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the commission, for the purposes of this Act, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes."
16 U.S.C. § 818 (1982).

or reserved for power development to entry for location and patent of min-ing claims, subject to various provisos. The first of these provisos is that the legislation does not open "any lands (1) which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act." In W. G. Singleton, 75 IBLA 168 (1983), we held that BLM properly declares the portion of a placer mining claim located within the boundaries of a preexisting power project to be null and void ab initio.

[3] Nevertheless, we cannot affirm this aspect of BLM's decision on the basis of this record as currently constituted. Although the claims are crossed by existing transmission lines, the licensed project of which these lines are presumably a part is not identified, so we are unable to determine whether the land remained closed to location after enactment of the MCRRA. In cases such as Lamar & Christine Burnett, 78 IBLA 349 (1984), and George L. Hawkins, 66 IBLA 390, 392 (1982), we stated that BLM decisions holding claims invalid on the basis of powersite withdrawals must consider the effect of any Secretarial restoration orders and the MCRRA. We see no reason to rule otherwise here.

If BLM determines on remand that the transmission lines are part of a licensed project, BLM must then determine what area remains within the "boundaries" closed to location. 5/ Although the withdrawal includes 90 feet on each side of the centerline of the right-of-way, the boundary of the right-of-way is only 75 feet.

There is reason to believe the area may be narrower than 75 feet. We note that appellants' placer mining claims Nos. 1 and 2 partially invade the SW¼ SW¼ of sec. 5 which was conveyed as a homestead under patent No. 1023897. This patent reserved all the coal and other minerals to the United States, and locatable minerals remained subject to appropriation under the mining laws. The patent also reserved "the right to enter upon, occupy, and use, any part or all of that portion * * * lying within 50 feet of the center line of the transmission line right of way of the Great Falls Power Company."

If BLM determines on remand that any part of the lands within Power-site Reserve No. 349 are within the bounds of a licensed project and, thus, closed to mineral entry, BLM should consider whether the other claims are affected as well as claim No. 2. Our comparison of the MTP submitted by BLM suggests that portions of all three of appellants' claims overlap Powersite Reserve No. 349.

[4] Furthermore, it appears as if the patents and withdrawals cited by BLM may split each of appellants' claims into distinct, noncontiguous parcels, particularly if BLM determines that the powersite withdrawal is effective. Appellants' No. 2 claim, for example, appears to be completely

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5/ The record in this case may be contrasted with the record in W. G. Singleton, supra, where there was a FERC map of the project boundaries. 75 IBLA at 169 n.2.

severed by the powersite withdrawal so that it consists of noncontiguous parcels. This may also be true of the other two claims. We note that each of the three claims as described contains more than 20 acres, and although no individual may locate a placer claim larger than 20 acres, see 30 U.S.C. § 35 (1982), joint entry of a claim comprised of up to 160 acres may be made by "two or more persons, or associations of persons, having contig-uous claims of any size, although such claims may be less than 10 acres each." 30 U.S.C. § 36 (1982) (emphasis added). Any parcels of land within such a claim, therefore, must be contiguous. See Stenfield v. Espe, supra; W. G. Singleton, supra at 170; United States v. Brittain Contractors, Inc., 37 IBLA 233 (1978); Tomera Placer Claim, 33 L.D. 560 (1905); Grassy Gulch Placer Claim, 30 L.D. 191 (1900).

The effect of the contiguity requirement on the instant appeal depends on the accuracy of BLM's delineation of the land within appellants' claims that was not subject to location, and, hence, the case must be remanded for BLM to more accurately identify the land not subject to location and the extent to which appellants' claims overlap such land. If the only land available for location within any claim consists of noncontiguous parcels, appellants must select which tract they wish to preserve under each claim. W. G. Singleton, supra; Tomera Placer Claim, supra at 561. 6/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed

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6/ Although the court in Stenfield v. Espe, supra, effectively held that no rights can be established to any portion of a placer claim by locating it in such a manner as to include noncontiguous parcels, the court's conclusion was premised upon the fact that the purpose of that location was not to appropriate the ground previously located but rather to claim isolated fractions of land within the perimeter of the placer claim that had remained unappropriated, the boundaries of which were evident on the ground. A literal application of this precedent would require us to hold that appellants' claims are null and void in their entirety to the extent that they may be bisected by lands within a licensed project, a circum-stance which BLM has failed to make clear in the record of this appeal. In Stenfield, the circumstances making the claim noncontiguous were appar-ent to the locator: the fractions open to location were clearly marked by the boundaries of the adjacent claims. The court expressly held that a subsequent locator should have to look no further to determine whether the fraction had been appropriated. This is not true here. We think the better rule enables the locators to preserve at least part of their claim on land open to location, particularly the portion on which the disclosure of minerals may have been made. Otherwise, there would be circumstances in which locators would be forced to risk the validity of an entire location by speculating whether or not a small portion remained open. We note that locators of placer claims containing excess acreage are not penalized by having their entire locations declared void. Consistent treatment is given to noncontiguous locations by applying Tomera and Singleton.

from is affirmed in part, set aside in part, and the case remanded for further action consistent with this opinion.

James L. Byrnes
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge