

INTERIOR BOARD OF LAND APPEALS

James Aubert, et al.

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Appeal from a decision of the California State Office, Bureau of Land Management, declaring an association placer mining claim null and void in part and requiring the filing of an amended location notice. CAMC 246444.

Affirmed in part; reversed in part.

1. Mining Claims: Lands Subject to--Mining Claims: Placer Claims--Rights-of-Way: Federal Highway Act

BLM properly declared an association placer mining claim null and void ab initio in part to the extent the claim was located on lands subject to a highway right-of-way granted pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1988).

2. Act of June 25, 1910--Act of August 24, 1912--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Land--Withdrawals and Reservations: Authority to Make

A public land order, issued in 1963 pursuant to the authority of the Act of June 25, 1910, ch. 421, 36 Stat. 847 (1910), did not withdraw the land described therein from location for gold because section 2 of that Act provided that lands withdrawn under its authority were to remain open under the mining laws for metalliferous minerals.

3. Mining Claims: Placer Claims

Association placer mining claim locations made pursuant to 30 U.S.C. § 36 (1988) may not contain noncontiguous tracts of land within a single location.

APPEARANCES: James Aubert, Portland, Oregon, pro se.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

James Aubert, et al. have appealed from a February 7, 1992, decision of the California State Office, Bureau of Land Management (BLM), declaring the S. F. Tuolumne Rainbow association placer mining claim, CAMC 246444, null and void in part and requiring the filing of an amended location notice. 1/

On August 14, 1991, Aubert, as agent for himself and six others, filed for recordation with BLM, pursuant to the requirements of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1988), and the implementing regulations at 43 CFR 3833.1-2, the notice of location for the claim in question, which is located in the Stanislaus National Forest. The notice, dated June 6, 1991, identified the claim as encompassing 120 acres described as the SW¹/₄ SW¹/₄ sec. 28, NE¹/₄ SE¹/₄, NE¹/₄ SE¹/₄ SE¹/₄ sec. 29, NE¹/₄ NW¹/₄ NW¹/₄, W¹/₂ NE¹/₄ NW¹/₄ sec. 33, T. 1 S., R. 18 E., Mount Diablo Meridian.

In its decision, BLM declared appellants' claim null and void ab initio in part to the extent that the official records of the Department showed a road right-of-way for Route 78 (serialized as S 2932) traversing the NE¹/₄ SE¹/₄ sec. 29. BLM further stated that this right-of-way had been transferred to the State of California on October 3, 1969, "under the Federal Highway Act of August 8, 1958." 2/ BLM concluded the lands within the right-of-way were closed to location of mining claims on October 3, 1969, and remained closed at the time of attempted location.

BLM also found that part of the claim located within a U.S. Department of Agriculture, Forest Service, roadside zone (serialized as SAC 048180) to be null and void ab initio. BLM stated that Public Land Order No. (PLO) 3214, 28 FR 9820 (Sept. 7, 1963), withdrew from prospecting, location, entry, and purchase under the mining law a strip of land 200 feet on either side of the centerline, as surveyed on the ground, of the Big Oak Flat Forest Highway Route No. 39 (State of California Route No. 120) through secs. 28 and 29, T. 1 S., R. 18 E. The approximate location of that route was depicted on a map (Jawbone Ridge 7.5) accompanying the decision.

1/ In the notice of appeal, Aubert indicates that he is appealing on behalf of himself and six other individuals having an interest in the claim. It is not clear from the record whether Aubert is authorized under 43 CFR 1.3(b) to represent the interests of those individuals, although he would be if they all are involved in a mining partnership. However, we do not find that it is necessary to resolve that issue because he is clearly entitled to bring the appeal on his own behalf.

2/ This is an apparent reference to section 317 of the Federal Aid Highway Act of August 27, 1958, 23 U.S.C. § 317 (1988).

[1] The master title plat contained in the record clearly shows road right-of-way S 2932 crossing the NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 29 of the claim in question. ^{3/} In two recent cases, we have ruled that those portions of mining claims located on land subject to a pre-existing highway right-of-way granted to the State of California pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), are null and void ab initio to the extent they include those lands within the highway right-of-way. Robert J. Collins, 129 IBLA 341, 343-44 (1994); Jesse R. Collins, 127 IBLA 122, 124 (1993). We adhere to those rulings. BLM properly declared the claim in question null and void ab initio to the extent it encompasses land within highway right-of-way S 2932.

[2] We now turn to BLM's other ground for declaring parts of appellants' claim null and void ab initio. Those parts were described in PLO 3214 and in BLM's decision as the land 200 feet on either side of the centerline, as surveyed on the ground, of the "Big Oak Flat Forest Highway Route No. 39 (State of California Route No. 120)." As depicted on a copy of the map accompanying BLM's decision, Route No. 39 and Route No. 120 do not travel the same path across appellants' claim. That map indicates that Route No. 39 enters the eastern boundary of NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 29 at approximately the same location as Route No. 120, but that it immediately diverges from Route No. 120, looping to the north then turning south and crossing Route No. 120 and continuing into the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 29, before turning north again and joining Route No. 120 approximately halfway across the NE $\frac{1}{4}$ SE $\frac{1}{4}$. The map does not show Route No. 39 crossing any part of appellants' claim in sec. 28. ^{4/}

Appellants argue that the authority cited in PLO 3214 for withdrawal of the land was Exec. Order (EO) No. 10355, which delegates to the Secretary of the Interior the authority vested in the President by section 1 of the Act of June 25, 1910, commonly known as the Pickett Act, and that the Pickett Act does not apply to metalliferous metals. We agree.

Section 1 of the Act of June 25, 1910, commonly known as the Pickett Act, authorized the President to "temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States * * * and reserve the same for * * * classification of lands, or other public

^{3/} The maps in the case record and a map submitted by appellants show that S 2932 is actually State of California Route No. 120 as it passes through the NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 29.

^{4/} The map shows that at one point Route No. 39 does come close to the eastern boundary of sec. 29 such that a roadside zone extending from the centerline of that road might include a very small portion of land in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 28, which is land included in appellants' claim. However, based on the scale of the map, it is impossible for us to make that determination.

purposes to be specified in the orders of withdrawals." Ch. 421, 36 Stat. 847 (1910). ^{5/} That authority was delegated to the Secretary of the Interior by EO No. 10355 (17 FR 4831, May 26, 1952).

As originally enacted, section 2 of 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." Ch. 421, 36 Stat. 847 (1910); Jonathan Z. Herod, 121 IBLA 339, 342 (1991); Seth M. Reilly, 112 IBLA 273, 276 (1990). However, section 2 of the Pickett Act was amended by the Act of August 24, 1912, ch. 369, 37 Stat. 497, to substitute "metalliferous minerals" for "minerals other than coal, oil, gas, and phosphates." ^{6/}

Thus, at the time appellants located the claim in question the land was open to location for metalliferous minerals. On appeal, appellants state that they located the claim following a discovery of "auriferous gravels" (Statement of Reasons at 2), and that they proposed a subsurface dredging operation on the claim. We conclude that the record shows that appellants located the claim in question for gold, a metalliferous mineral. The PLO cited by BLM did not preclude such a location. Thus, BLM's decision must be reversed to the extent it found the claim to be null and void ab initio within the roadside zone of Route No. 39. However, where Route No. 39 and Route No. 120 cover the same ground in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 29, the claim is still null and void ab initio to the extent of the Route No. 120 right-of-way.

BLM stated that the road right-of-way and the roadside zone withdrawal had divided appellants' claim into noncontiguous parcels and that placer mining claims must be contiguous, citing 30 U.S.C. § 36 (1988) and 43 CFR 3842.1-3. BLM advised appellants to file an amended location notice to exclude noncontiguous parcels.

[3] It is clear from the above discussion that only the road right-of-way divides the claim into noncontiguous parcels, the roadside zone withdrawal not being a bar to appellants' location. However, the law is well settled that a single notice of location for an association placer claim cannot apply to noncontiguous parcels of land. Robert J. Collins, *supra* at 344; Jesse R. Collins, *supra* at 124, and cases cited therein;

^{5/} Section 1 of the Pickett Act was codified at 43 U.S.C. § 141 (1970), and was subsequently repealed by section 704(a) of FLPMA, 90 Stat. 2743, 2792 (1976). The repeal was made subject to a savings provision, which preserved withdrawals in effect as of Oct. 21, 1976. *See* 90 Stat. 2786 (1976); David E. Hoover, 99 IBLA 291, 293 (1987).

^{6/} Section 704(a) of FLPMA, *supra*, further amended section 2 of the Pickett Act to delete the entire phrase opening withdrawn lands to limited mineral entry. As amended, section 2 of the Pickett Act is codified at 43 U.S.C. § 142 (1988).

IBLA 92-272

30 U.S.C. § 36 (1988); 43 CFR 3842.1-3. Since the lands in sec. 29 described in appellants' location notice are divided into separate parcels by S 2932, those lands may not be included in a single location. BLM properly required the filing of an amended location notice.

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 from is affirmed in part and reversed in part.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

John H. Kelly
Administrative Judge