

INTERIOR BOARD OF LAND APPEALS

Charles Q. Cassella, et al.

130 IBLA 338 (September 13, 1994)

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Appeal from a decision of the California State Office, Bureau of Land Management, declaring the Frigid Star 1, 2, and 3 placer mining claim CAMC 259648 null and void ab initio in part.

Affirmed.

1. Mining Claims: Lands Subject To--Mining Claims: Placer Claims--Mining Claims: Withdrawn Land--Mining Claims Rights Restoration Act--Powersite Lands--Withdrawals and Reservations: Powersites

A mining claim located on land within an outstanding preliminary permit issued pursuant to the Federal Power Act is properly declared null and void ab initio.

APPEARANCES: Charles Q. and Lyone M. Cassella, Mokelumne Hill, California, and Charles and Sandra M. Leonetti, Sacramento, California, pro sese.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Charles Q. Cassella, Lyone M. Cassella, Charles Leonetti, and Sandra M. Leonetti have appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated January 4, 1994, declaring the Frigid Star 1, 2, and 3 placer mining claim (CAMC 259648) null and void ab initio. The claim is located in secs. 1 and 6, T. 5 N., Rs. 11-12 E., Mount Diablo Meridian. The basis for BLM's decision was its finding that a portion of appellants' mining claim lies within Project 137 licensed by the Federal Energy Regulatory Commission (FERC) and within Preliminary Permit No. 11171 issued by FERC. 1/

1/ BLM describes Project 137, also known as the Mokelumne River Project, as an active project licensed to Pacific Gas and Electric Company (PG&E). The Project is depicted on Exhibit K-32, a plat (137-187) accompanying PG&E's application for license made on Oct. 3, 1972. Preliminary Permit No. 11171 was issued to the Mokelumne River Water and Power Authority on Dec. 30, 1991. Lands within this permit are set forth in a Supplemental Project Map for the Middle Bar Water and Power Project.

The Frigid Star 1, 2, and 3 claim was located on May 10, 1993, well after FERC granted the license and permit at issue. BLM's decision notes that appellants filed their claim under P.L. 359, the Mining Claims Rights Restoration Act of August 11, 1955, 30 U.S.C. § 621 (1988). This Act provides in part:

SEC. 2. All public lands belonging to the United States heretofore, now, or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands * * * And provided further, That nothing contained herein shall be construed to open for the purposes described in this section any lands (1) which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress, or (2) which are under examination and survey by a prospective licensee of the Federal Power Commission, if such prospective licensee holds an uncanceled preliminary permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands and such permit has not been renewed in the case of such prospective licensee more than once.

BLM found that the above-quoted proviso was applicable in the present case and served to render the lands within Project 137 and Preliminary Project No. 11171 closed to location at all relevant times. BLM's finding was consistent with a determination by FERC that the proviso is applicable to lands within these projects. 2/

A master title plat in the record indicates that lands occupied by the claim are within an Executive order, dated December 12, 1912, which withdrew lands described therein from settlement, location, sale, or entry and reserved such lands for water-power sites. 3/

In their statement of reasons (SOR), appellants state that Project 137 authorizes Pacific Gas & Electric Company (PG&E) to place transmission lines along a 40-foot right-of-way (20 feet on each side of the centerline.) Appellants contend that this "right-of-way does not come within this distance from any existing power pole to the water line along the Mokelumne River" where appellants' suction dredging operations would occur. PG&E has

2/ A misreading of FERC's determination caused this Board to issue a stay of BLM's decision on Mar. 30, 1994. By order of May 13, 1994, the stay was lifted.

3/ President Taft signed this Executive order on Dec. 12, 1912. In the absence of this order, lands within a proposed project shall from the date of application be reserved from location until otherwise directed by the Federal Power Commission (now FERC) or by Congress. 16 U.S.C. § 818 (1988). Robert Farchi, 88 IBLA 273 (1985); James H. Cosgrove, 61 IBLA 376, 378 n.2 (1982).

been contacted, appellants note, and has advised appellants and other mining claimants that Project 137 does not fall within the boundaries of the Frigid Star 1, 2, and 3 claim or other claims nearby. Exhibit K-32, a plat depicting Project 137, does not clearly show the position of PG&E's transmission lines or support poles near the river and should not, appellants contend, be used by BLM to deny dredging (SOR at 1).

Appellants state that Project 11171, the Middle Bar Project, calls for construction of a dam four miles downstream from the Frigid Star 1, 2, and 3 claim. Although this claim may eventually be underwater as a result of the dam, appellants acknowledge, the coordinator of Project 11171 has stated that appellants are in no conflict with any work in progress or planned.

Appellants offer in the record two letters addressed to Randy Caine and Ralph D. Vogel, who apparently hold the Minerva & Bear mining claim upstream from appellants' claim on the Mokelumne River. One letter from PG&E, dated January 28, 1994, addressed Caine and Vogel's "mining claim request within the Mokelumne River from the SW1/4 of Section 32, T. 6 N., R. 12 E., MDM to the NE1/4 of Section 6, T. 5 N., R. 12 E., MDM." This letter states that PG&E has concluded that "your proposed mining activities are not within the boundaries of our FERC Project #137 as long as you stay 40 horizontal feet away from the 60kV project transmission line as shown on the attached Exhibit K-32 drawing. We do not object to your mining claim if you agree that all mining activities are outside the 40 horizontal foot project transmission line boundary."

A second letter, dated March 28, 1994, from the Mokelumne River Water and Power Authority (MRWPA) sets forth MRWPA's nonobjection to Caine's and Vogel's mining activities as long as such activities do not violate any State, Federal, or local laws or ordinances and do not interfere with FERC requirements for the preliminary permit held by MRWPA.

Our review of the master title plats for T. 5 N., Rs. 11-12 E., Mount Diablo Meridian, indicates that lands occupied by appellants' claim were withdrawn from location by Executive order of December 12, 1912. BLM's decision states that a portion of appellants' claim lies within Preliminary Permit No. 11171. Our review of the Supplemental Project Map for FERC Project No. 11171 indicates that appellants' claim lies within this project. The boundaries of Project 137 are more difficult to discern, but this fact does not alter the result here. We have not attempted to determine to what extent the claim lies within the boundaries of either project. To the extent the claim lies within the boundaries of either Project 11171 or 137, however, it is null and void ab initio. John Wright, 112 IBLA 233, 237-38 (1989). BLM's decision is properly affirmed.

[1] The case law is clear that P.L. 359 did not open for location lands within an uncanceled preliminary permit that has not been renewed in the case of the prospective licensee more than once. In Bill Hallock, 87 IBLA 126 (1985), this Board affirmed a BLM decision declaring null and void three claims located on the Mokelumne River near appellants' claim. Therein we stated, "The Act [P.L. 359] establishes that lands which are

covered by a preliminary permit issued by FERC are not open to mineral entry and location." 87 IBLA at 127. We reached this decision despite allegations that the "present project phase is merely the latest revision in a 'plan [that] has been under study for years, tying up the lands'." Id. at 128.

A similar result was reached in Robert Farchi, 88 IBLA 273 (1985). Appellant Farchi's claim was located on the northern boundary of the Wambo Bar Water Project for which a preliminary permit had issued. Farchi argued that his claim should not be held null and void because it would not be submerged by the proposed reservoir. The Board found such argument unpersuasive and held that the fact that a permittee may not ultimately use all of the land encompassed in its preliminary permit does not alter the fact that land embraced by a permit is not open to location. 88 IBLA at 274.

Farchi answers appellants' suggestion that both PG&E and MRWPA have no objection to the Frigid Star 1, 2, and 3 claim. Moreover, a careful review of PG&E's statement indicates that it was directed to a mining claim in SW $\frac{1}{4}$ sec. 32, T. 6 N., R. 12 E., Mount Diablo Meridian, and in NE $\frac{1}{4}$ sec. 6, T. 5 N., R. 12 E., Mount Diablo Meridian, a claim presumably held by Caine and Vogel. The Frigid Star 1, 2, and 3 claim is not located in these quarter sections, and thus PG&E's statement was not directed to appellants' claim as the SOR suggests.

Therefore, 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 California State Office is affirmed.

Will A. Irwin
Administrative Judge

R. W. Mullen
Administrative Judge