INTERIOR BOARD OF LAND APPEALS

Paul Tobeler

133 IBLA 361 (September 14, 1995)

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Editor's Note: aff'd, Civ. No. CV-S-95-1194-LDG(RJJ), (D. Nev. March 31, 1997)

PAUL TOBELER

IBLA 92-470 Decided September 14, 1995

Appeal from a decision of the Nevada State Office, Bureau of Land Management, declaring mining claims null and void ab initio in part. NMC 129256, NMC 129265.

Affirmed.

1. Act of November 9, 1921–Act of August 27, 1958–Mining Claims: Lands Subject to–Mining Claims: Placer Claims--Rights-of-Way: Federal Highway Act

   Those portions of mining claims located on lands subject to a material site right-of-way grant issued pursuant to sec. 317 of the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), and a material site right-of-way granted under the Act of Nov. 9, 1921, 23 U.S.C. § 18 (1946), are properly declared null and void ab initio.

APPEARANCES: Earl M. Hill, Esq., Reno, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Paul Tobeler has appealed the April 17, 1992, decision of the Nevada State Office, Bureau of Land Management (BLM), declaring the Nevada Serpentine (NMC 129256) and the Nevada Lotus (NMC 129265) mining claims null and void ab initio in part. The claims were located on December 11, 1961, and recorded with BLM on November 16, 1979. 1/

In its decision BLM declared that part of the Nevada Lotus claim located in the SW¼ NE¼ sec. 5, T. 15 S., R. 67 E., Mount Diablo Meridian, null and void ab initio because the lands are held by the State of Nevada

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1/ We note there is an amended notice of location for the Nevada Serpentine claim that corrected an erroneous land description.

under Highway Material Site Right-of-Way CC-018308 "F" which was granted November 17, 1934, pursuant to the Federal Highway Act of November 9, 1921, 42 Stat. 212, 216, 23 U.S.C. § 18 (1946). Similarly, BLM declared that part of the Nevada Serpentine claim located in lot 2, N½ SW¼ NE¼ sec. 6, T. 15 S., R. 67 E., Mount Diablo Meridian, null and void ab initio because the lands are held by the State of Nevada under Material Site Right-of-Way NEV-051855 which was granted April 27, 1959, pursuant to the Federal Aid Highway Act of August 27, 1958, 72 Stat. 885, 916, 23 U.S.C. § 317 (1988). 2/ BLM stated that lands transferred to the State Highway department as a material site are not open to mineral entry or location.

In his statement of reasons Tobeler refers to Departmental decision Nevada Department of Highways, A-24151 (Sept. 17, 1945), in which the Department set forth the principle that the appropriation and transfer to a State highway department of materials for road purposes would bar the subsequent initiation of a placer claim for similar materials so long as the appropriation of the material site remained in force. Tobeler contends that this principle is no longer valid because common varieties of mineral materials were removed from location under the 1872 mining laws by the Surface Resources Act of July 23, 1955 (SRA), 30 U.S.C. §§ 601-615 (1988), and were subject to lease and sale under the Materials Act of 1947, 30 U.S.C. §§ 601-603 (1988). Tobeler reasons that since this principle is no longer valid, there is no legal impediment to locating a mining claim on a material site. Tobeler believes that the prior right of the state under a material site is fully protected prior to patent by the SRA as well as under mining plans of operation that are required by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1988). Tobeler contends that a reservation of the material site in a patent or lease would fully protect the interest of the state. He notes that the practice of reserving a material site in a nonmineral patent, or the reservation of leasable minerals within Federal Aid Highway rights-of-way upon patent of a mining claim or nonmineral disposal has been found acceptable by the Department and the courts.

[1] It is well established that material site rights-of-way created under the provisions of the Federal Highway Act and the Federal Aid Highway Act effectively withdraw the lands affected from entry and location under the mining law. Robert J. Collins, 129 IBLA 341 (1994); William Peterson, 113 IBLA 19 (1990); Russell Avery, 99 IBLA 22 (1987); Ralph Memmott,

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2/ The Act of Nov. 9, 1921, was repealed by section 2 of the Act of Aug. 27, 1958, 72 Stat. 919. However section 4 of the Act of Aug. 27, 1958, 72 Stat. 921, provides that any rights existing under prior Acts shall not be affected by the repeal of prior Acts.

61 IBLA 116 (1982); James F. Pepcorn, 50 IBLA 414 (1980); Sam D. Rawson, 61 I.D. 255 (1953).

The right-of-way grant to the Nevada Department of Highways (Nev-051855) dated April 27, 1959, includes lands located in lot 2, N½ SW¼ NE¼, sec. 6. The master title plat included in the case file also depicts the material site as embracing this land description. 3/ The master title plat shows material site CC-018308 in the SW¼ NE¼, sec. 5. Page 4 of the historical index lists the same land description with November 17, 1934, as the "date of action."

Tobeler's contention that the principle of barring the location of mining claims on lands appropriated for material sites is invalid since the passage of the SRA is to no avail. In Sam D. Rawson, supra, prior to the adoption of the SRA, the Solicitor stated:

> The Federal Highway Act under which the permit [to the Oregon State Highway Department] was issued provides that land necessary as a source of materials for highway construction to a State highway department may be "appropriated and transferred" to such a department. (23 U.S.C., 1946 ed., sec. 18.) Land so "appropriated and transferred" to a State highway department necessarily is not open to mining location under section 2319 of the Revised Statutes. (30 U.S.C., 1946 ed., sec. 22.) The Department has so ruled in Nevada Department of Highways, A-24151 et al. (September 17, 1945); and the basis upon which the appeal in that case was decided has been upheld in a recent court decision. [Footnote omitted.]

Id. at 257. In footnote 2, the Solicitor referred to United States v. Schaub, 103 F. Supp. 873 (D. Alaska 1952), which held that a special- use permit issued by the Regional Forester on National forest lands reserving land for use of the Bureau of Public Roads as a source of road-building material under regulations promulgated under section 17 of the Federal Highway Act, 23 U.S.C. § 18 (1946), and the Act of March 30, 1948, 48 U.S.C. § 341 (1946 ed. Supp V) was sufficient to be a valid withdrawal and appropriation of the land and to render it closed to entry or location under the mining laws. United States v. Schaub, supra at 875-76. The Department has continued to follow this holding subsequent to the passage of the SRA in 1955. See William Peterson, supra; Russell Avery, supra. Therefore, BLM properly declared those portions of the mining claims on which the material sites were located null and void ab initio.

3/ Page 6 of the historical index describes the material site NEV-051855 as including the N½ SW¼ SE¼ rather than the N½ SW¼ NE¼. This appears to be an erroneous notation.

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.

Will A. Irwin
Administrative Judge

I concur:

James L. Burski
Administrative Judge