

INTERIOR BOARD OF LAND APPEALS

Mount Royal Joint Venture and Pete and Maxine Woods

144 IBLA 277 (June 11, 1998)

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MOUNT ROYAL JOINT VENTURE
PETE AND MAXINE WOODS

IBLA 96-77, 96-112

Decided June 11, 1998

Appeals from decisions issued by the Montana State Office, Bureau of Land Management, declaring lode mining claims MTMMC 200643, MTMMC 200644, MTMMC 200645, MTMMC 200646, MTMMC 200647, MTMMC 200648, and MTMMC 200973 null and void ab initio.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Withdrawals–Mining Claims: Lands Subject to–Mining Claims: Withdrawn Land–Withdrawals and Reservations: Generally

Pursuant to 43 U.S.C. § 1714(b)(1) (1994) and 43 C.F.R. § 2310.2, publication of a notice in the Federal Register stating that a withdrawal application has been made or a withdrawal proposal submitted to the Secretary, segregates the lands described in the application or proposal from entry for 2 years from the date of publication unless the segregative effect is terminated sooner. A notice published immediately prior to the termination of a 2-year segregation period giving notice that a new withdrawal proposal has been made affecting substantially the same lands, but for a different purpose, will segregate the lands for an additional 2-year period. Mining claims located on the segregated lands during the period that the segregation is in effect are null and void ab initio.

APPEARANCES: William L. MacBride, Jr., Esq., and James B. Lippert, Esq., Helena, Montana, for Appellants.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Mount Royal Joint Venture (Mount Royal) has appealed an October 4, 1995, decision issued by the Montana State Office, Bureau of Land Management (BLM or Bureau), declaring the Jennifer #1, Jennifer #2, Patricia #5, Patricia #6, Patricia #12, and Patricia #13 lode mining claims (MTMMC 200643-MTMMC 200648) null and void ab initio because the claims had been

located on lands closed to mineral entry at the time of location (IBLA 96-77). Pete and Maxine Woods have appealed a November 30, 1995, decision issued by the Montana State Office, BLM, declaring the Chrome #1 lode mining claim (MTMMC 200973) null and void ab initio because it had been located on lands segregated from location and entry under the mining laws (IBLA 96-112). Because the issues raised in the two appeals are virtually identical, we have consolidated the appeals for review. ^{1/}

On August 3, 1993, the Montana State Office, BLM, published a notice in the Federal Register announcing the proposed withdrawal from location and entry under the mining laws of approximately 19,684.74 acres of public land within the Sweet Grass Hills Area of Critical Environmental Concern (ACEC), Toole and Liberty Counties, Montana. 58 Fed. Reg. 41289, 41290 (Aug. 3, 1993). The purpose of the proposed withdrawal was "to protect high value potential habitat for reintroduction of endangered peregrine falcons, areas of traditional religious importance to Native Americans, aquifers that currently provide the only potable water in the area, and seasonally important elk and deer habitat." Id. The notice also stated that the described lands, which included lands within sec. 24, T. 36 N., R. 4 E., and secs. 19 and 30, T. 36 N., R. 5 E., principal meridian, Liberty County, Montana, would be segregated from location and entry under the mining laws for a period of 2 years from the date of publication unless the application was denied or cancelled or the withdrawal was approved prior to that date. Id.

On June 29, 1995, BLM published notice that the temporary 2-year segregation of the proposed withdrawal area would expire on August 2, 1995, and that on that date the lands would be opened to mining. 60 Fed. Reg. 33845 (June 29, 1995).

On July 28, 1995, the Assistant Secretary of the Interior published a notice announcing BLM's proposed 2-year withdrawal from location and entry under the mining laws of 19,764.74 acres of public lands in aid of legislation and for protection of the unique resources within the Sweet Grass Hills ACEC. 60 Fed. Reg. 38852 (July 28, 1995). The lands subject to the proposed withdrawal included all the lands identified in the August 3, 1993, proposed withdrawal and additional lands. Id. at 38852-53. The stated purpose of the proposed withdrawal was

to preserve the status quo for the above described lands which are either located within or border the Sweet Grass Hills [ACEC]. The specific objective of this proposal is to protect high value

^{1/} In a Feb. 15, 1996, memorandum to the Field Solicitor, the Deputy State Director, Montana State Office, BLM, recommended that the appeals be consolidated. Mount Royal opposed consolidation, objecting to any extension of BLM's time for answering its statement of reasons. The Bureau has not filed an answer in either appeal, and Mount Royal will suffer no disadvantage as a result of the consolidation of the appeals.

potential habitat for reintroduction of the endangered peregrine falcons, areas of traditional religious importance to Native Americans, aquifers that currently provide the only potable water in the area, and seasonally important elk and deer habitat, pending consideration of proposed withdrawal legislation introduced into the 104th Congress, 1st Session. This legislation would, among other things, protect the above described lands and associated resource values from the location of new mining claims.

Id. at 38853. The July 28, 1995, notice also advised that the lands would be temporarily segregated from location and entry under the mining laws for a period of 2 years from the date of the notice's publication unless the application was denied or cancelled or the withdrawal was approved prior to the end of the segregation period. Id.

On August 3, 1995, Mount Royal located the Jennifer #1, Jennifer #2, Patricia #5, and Patricia #6 lode mining claims in the S $\frac{1}{2}$ sec. 19, T. 36 N., R. 5 E., principal meridian, Liberty County, Montana. The next day, August 4, 1995, Mount Royal located the Patricia #12 and Patricia #13 lode mining claims in sec. 30, T. 36 N., R. 5 E., principal meridian, Liberty County, Montana. It recorded all six claims with BLM on September 11, 1995. The Woodses located the Chrome #1 lode mining claim in the NE $\frac{1}{4}$ sec. 24, T. 36 N., R. 4 E., principal meridian, Liberty County, Montana on September 15, 1995, and recorded the claim with BLM on November 8, 1995.

In its October 4, 1995, decision, BLM found that a portion of the Jennifer #1 and Jennifer #2 claims were situated on lands patented to private parties on April 9, 1892, with no mineral rights retained by the United States. Accordingly, BLM concluded that these lands were not open to mineral entry.^{2/} The Bureau further held that the remainder of the lands embraced by those claims, and the other four claims, including portions of the Patricia #6 and Patricia #12 claims (the surface of which had been patented on May 28, 1923, and subsequently reconveyed to BLM on December 12, 1982) fell within the boundaries of the lands segregated from mineral location and entry by the August 3, 1993, and July 28, 1995, proposed withdrawals. Therefore, BLM declared all six claims null and void ab initio, because they were located on lands not open to mineral entry.

On November 30, 1995, BLM issued its decision declaring the Chrome #1 lode mining claim null and void ab initio in its entirety because it was located on lands segregated from location and entry under the mining laws. The Bureau found that the claim was in the area withdrawn from mineral entry by the August 3, 1993, and July 28, 1995, proposed withdrawals.

^{2/} The Bureau noted that, although the lands had been deeded back to the United States on December 4, 1982, the grantors had reserved the minerals. Mount Royal does not challenge BLM's determination that these lands were not open to mineral entry when it located the Jennifer #1 and Jennifer #2 claims.

On appeal, none of the Appellants contends that the claims are not within lands described in the withdrawal proposals. Nor do they deny that the August 3, 1993, notice segregated those lands from location and entry under the mining laws for a 2-year period. They argue that the segregated area opened to mineral entry on August 2, 1995, when the segregative effect of the August 3, 1993, notice expired. As a basis for their contention, they state that under section 204(b)(1) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1714(b)(1) (1994), and 43 C.F.R. § 2310.2-1(d), the segregative effect of a withdrawal petition or application expires no later than 2 years after the date of the publication of a notice of the proposed withdrawal in the Federal Register. They assert that the substitution of a second withdrawal petition in an attempt to extend the segregation period violates FLPMA and constitutes an arbitrary and capricious act, citing a November 1, 1994, memorandum from the Associate Solicitor advising against a repetitive interim withdrawal proposal. See Statements of Reasons (SOR), Ex. D at 2-5. Although they acknowledge that the stated purposes of the two proposed withdrawals differ, they maintain that the objectives coincide. Mount Royal and the Woodses further contend that BLM cannot rely on the notation rule to nullify the claims because that rule does not apply to post-FLPMA withdrawals.^{3/} They submit that, because they located their claims after the segregation period expired on August 2, 1995, the claims were located on open ground and cannot be deemed null and void ab initio.

[1] Section 204(a) of FLPMA, 43 U.S.C. § 1714(a) (1994), authorizes the Secretary to "make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section." The statute further provides that

[w]ithin thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice. The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of the lands by the Secretary, or (c) the expiration of two years from the date of the notice.

43 U.S.C. § 1714(b)(1) (1994); see also 43 C.F.R. §§ 2310.2(a) and 2310.2-1. Thus, if the published notice of a proposed withdrawal

^{3/} The notation rule does not extend the segregative effect of a withdrawal application beyond the 2-year limit provided by Congress in FLPMA. See Richard Borgen, 117 IBLA 239, 243-44 (1991); David Cavanagh, 89 IBLA 285, 300-302, 92 I.D. 564, 573 (1985). The Bureau did not rely on the notation rule when it declared the claims null and void ab initio.

specifies that the identified Federal lands are segregated from mineral location and entry, those lands are not open to mineral entry during the segregation period. Mining claims located on the withdrawn lands during that period are null and void ab initio. See, e.g., Dean Staton, 136 IBLA 161, 164 (1996), and cases cited.

The crux of the dispute before us centers on whether the July 28, 1995, proposed withdrawal notice segregated the lands previously segregated by the August 3, 1993, proposed withdrawal notice. We agree with Mount Royal and the Woodses that FLPMA and its implementing regulations limit the segregation period initiated by publication of notice of a proposed withdrawal to a maximum of 2 years after publication. However, we need not decide whether publishing a new notice of a proposed withdrawal contemporaneously with the expiration of the segregation period for an earlier proposed withdrawal continues the segregation for an additional 2-year period. The July 28, 1995, proposed withdrawal was not identical to the August 3, 1993, withdrawal proposal.

The statute and regulations do not prohibit proposing a new withdrawal covering substantially the same lands, but evidencing a different stated purpose than an earlier proposal. In this case, BLM published the August 3, 1993, proposed withdrawal to protect the unique resources within the Sweet Grass Hills ACEC. Two years later the Assistant Secretary recommended the July 28, 1995, withdrawal proposal that, among other things, was in aid of recently introduced Congressional legislation designed to protect the same resources.

The August 3, 1993, proposed withdrawal also envisioned a 20-year Secretarial withdrawal pursuant to 43 U.S.C. § 1714(c) (1994). The July 28, 1995, 2-year proposed withdrawal was intended to preserve the status quo pending congressional action on proposed legislation. Although Mount Royal and the Woodses discount these differences, we find them sufficient to justify giving the July 28, 1995, notice of proposed withdrawal segregative effect pursuant to 43 U.S.C. § 1714(b)(1) (1994).^{4/} Mount Royal and the Woodses located their claims on lands segregated from entry and location under the mining laws. Therefore, BLM properly declared those claims null and void ab initio.

To the extent not specifically addressed herein, Mount Royal's and the Woodses' other arguments have been considered and rejected.^{5/}

^{4/} Appellants rely on the Nov. 1, 1994, memorandum from the Associate Solicitor. This memorandum endorsed the use of a withdrawal in aid of legislation, if available. See SOR, Ex. D at 1, 7-8.

^{5/} This Board can review the procedural correctness of a withdrawal application. However, we have no authority to review the merits of a withdrawal. See City of Kotzebue, 26 IBLA 264, 266, 83 I.D. 313, 314 (1976), and cases cited.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are affirmed.

R.W. Mullen
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge