



CASEY E. FOLKS, JR. *ET AL.*

183 IBLA 24

Decided September 20, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

CASEY E. FOLKS, JR. *ET AL.*

IBLA 2011-216, *et al.*

Decided September 20, 2012

Appeal from decisions of the Nevada State Office, Bureau of Land Management, declaring certain mining claims null and void *ab initio*.
NMC 1038350, *et al.*

Reversed.

1. Federal Land Policy and Management Act of 1976:
Withdrawals--Mining Claims: Lands Subject to--Mining
Claims: Withdrawn Lands--Withdrawals and Reservations:
Authority to Make--Withdrawals and Reservations: Effect
of--Withdrawals and Reservations: Revocation and
Restoration

Although 43 C.F.R. § 2091.6 states that land within a withdrawal that expires does not automatically become open but is opened by publication in the *Federal Register* of an opening order, the Board has long recognized that there are withdrawals for which this statement is *not* true. Whether land automatically becomes open upon the expiration of a withdrawal or must be restored by an opening order depends on the provisions of the statute under which the withdrawal occurred.

2. Federal Land Policy and Management Act of 1976:
Withdrawals--Mining Claims: Lands Subject to--Mining
Claims: Withdrawn Lands--Notice: Generally--Public
Records--Withdrawals and Reservations: Authority to
Make--Withdrawals and Reservations: Effect of--
Withdrawals and Reservations: Revocation and
Restoration

Under 44 U.S.C. § 1507 (2006), publication in the *Federal Register* imparts constructive notice of the contents and requirements in documents so published. Because the

withdrawal and opening of lands are matters that must be published in the *Federal Register*, the notice imparted by documents so published cannot be negated by notations on land office records. In cases where no opening order is required, the fact that BLM has not corrected its records to reflect the expiration of a withdrawal cannot negate the notice imparted by earlier publication of the expiration date in the *Federal Register* and does not effectively extend the withdrawal.

3. Federal Land Policy and Management Act of 1976:
Withdrawals--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Lands--Withdrawals and Reservations: Authority to Make--Withdrawals and Reservations: Effect of--Withdrawals and Reservations: Revocation and Restoration

Congress provided in 43 U.S.C. § 1712(e)(3) (2006) that public lands shall be removed from or restored to the operation of the mining law only by withdrawal action pursuant to 43 U.S.C. § 1714 (2006) or other action pursuant to applicable law. Congress then significantly narrowed the scope of applicable law by repealing 29 statutes that authorized the Executive to create, modify, or terminate withdrawals, and by expressly repealing the “implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress.” Instead, Congress authorized the Secretary to “make, modify, extend or revoke withdrawals but only in accordance with the provisions and limitations” of § 1714. Thus, BLM can no longer withhold land from location pursuant to administrative practices that are based solely on the implied authority that Congress repealed.

4. Federal Land Policy and Management Act of 1976:
Withdrawals--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Lands--Withdrawals and Reservations: Authority to Make--Withdrawals and Reservations: Effect of--Withdrawals and Reservations: Revocation and Restoration

In enacting the withdrawal provisions of FLPMA, Congress sought to avoid the problem of “interminable ‘temporary’ withdrawals” by requiring that withdrawals have a specific duration and by establishing specific requirements in 43 U.S.C. § 1714(f) that must be met before a withdrawal may be extended. To hold that BLM may continue to withhold land from location after a withdrawal made pursuant to FLPMA has expired simply by failing to issue an opening order would thwart the very purpose of these provisions by enabling the interminable temporary withdrawals that Congress sought to eliminate.

APPEARANCES: Gregory J. Walch, Esq., Las Vegas, Nevada, for appellant; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

These are consolidated appeals¹ from decisions dated August 8, 2011, October 4, 2011, October 17, 2011, and October 21, 2011, issued by the Nevada State Office, Bureau of Land Management (BLM), declaring certain mining claims null and void *ab initio*. Appellants² located their claims on land previously

¹ IBLA 2011-216, *Casey E. Folks, Jr.* (NMC 1038350 - 53); IBLA 2011-217, *Resource Management Group, Inc.* (NMC 1027038 - 43); IBLA 2011-222, *Eric Brannstrom* (NMC 1038772); IBLA 2011-223, *Diane Lee DeLauer* (NMC 1038349); IBLA 2011-224, *James Gardiner* (NMC 1034924 - 26); IBLA 2011-225, *Casey E. Folks, Jr.* (NMC 1038901); IBLA 2011-226, *G. Wayne Perry* (NMC 1038956); IBLA 2011-227, *Gary Vosburg* (NMC 1036663 - 65); IBLA 2011-228, *Gary Vosburg* (NMC 1027109 - 115); IBLA 2011-229, *Everett Merz* (NMC 1038917); IBLA 2011-230, *Everett Merz* (NMC 1040709 - 11); IBLA 2011-232, *Kevin J. Vosburg* (NMC 1038938); IBLA 2011-241, *Resource Management Group, Inc.* (NMC 1036253 - 54); IBLA 2012-15, *Kevin Bunderson* (NMC 1038306, 1038936); IBLA 2012-23, *James Gardiner* (NMC 1046376 - 78); IBLA 2012-24, *Matthew Harber* (NMC 1049732 - 33); and IBLA 2012-28, *Cody Ehlers* (NMC 1049660). A related appeal, IBLA 2012-16, *Kevin Bunderson* (NMC 1049364 - 66), originally was consolidated under IBLA 2011-216, but has been resolved by the Board in a separate Order.

² We note that the Notice of Appeal (NOA) for IBLA 2011-222, *Eric Brannstrom* (NMC 1038772), identifies the appellant as Casey E. Folks, Jr., even though the listed mining claim is owned by Eric Brannstrom and the NOA caption identifies

(continued...)

withdrawn under section 204 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1714 (2006), for the Yucca Mountain nuclear waste repository in Nevada. Although the claims were located after the withdrawal expired on January 31, 2010, BLM's decisions hold that under 43 C.F.R. § 2091.6, the land remains closed to mineral location until an opening order is published.

Appellants disagree, asserting that the land at issue was open to locating their mining claims because the withdrawal was not extended in accordance with section 204(f) of FLPMA. Their appeal questions whether BLM can continue "withholding an area of Federal land from settlement, sale, location, or entry," see 43 U.S.C. § 1702(j) (2006), after a withdrawal issued under section 204 of FLPMA has expired and has not been extended in accordance with that provision.

BACKGROUND

The development of nuclear energy and its application to civilian uses began decades ago, but the controversy over the disposition of nuclear waste continues to this day. In 1982, Congress enacted the Nuclear Waste Policy Act (NWPA) that assigned the Department of Energy (DOE) responsibility for selecting a test site and designing and operating a repository for permanently disposing of nuclear waste. 42 U.S.C. §§ 10101-10270 (2006). In 1987, Congress amended the NWPA and directed that the nuclear waste program focus exclusively on the Yucca Mountain site. 42 U.S.C. §§ 10133(a), 10172(a) (2006). If studying the site required an authorization such as a right-of-way (ROW) from BLM, BLM was required to issue the ROW "at the earliest practicable date." 42 U.S.C. § 10140 (2006); see *Nevada v. Burford*, 918 F.2d 854, 855 (9th Cir. 1990). On January 6, 1988, the Bureau granted DOE an ROW for 51,632 acres near Yucca Mountain.³ 918 F.2d at 855.

² (...continued)

Brannstrom as the appellant. Although the appeal is subject to dismissal for failure to correctly identify the appellant, the misidentification of the appellant appears to be an inadvertent clerical error resulting from the multitude of consolidated cases, and the proper appellant is otherwise clear from the NOA. Accordingly, we decline to dismiss the appeal. See, e.g., *Simo v. Union of Needletrades, Indus. & Textile Employees, Southwest Dist. Council*, 322 F.3d 602, 610 (9th Cir.), cert. denied, 540 U.S. 873 (2003).

³ This ROW expired in Jan. 2001, but was renewed and is now scheduled to expire on Dec. 31, 2014. Government Accountability Office (GAO), *Yucca Mountain: Information on Alternative Uses of the Site and Related Challenges* (GAO Report) at 25 n.25 (2011).

The site includes land under the management of BLM, the Air Force, and the DOE, and most of the land within the ROW had already been withdrawn.⁴ GAO Report at 30 n.33. However, it was not until September 1990 that the Department, under section 204 of FLPMA, withdrew an additional 4,255.50 acres of the land that BLM administers “to maintain the physical integrity of the subsurface environment to ensure that scientific studies . . . by the Department of Energy at Yucca Mountain are not invalidated or otherwise adversely impacted.” Public Land Order No. (PLO) 6802, 55 Fed. Reg. 39152 (Sept. 25, 1990). This is the land we are concerned with here. The withdrawal was to expire 12 years later, unless extended pursuant to section 204 of FLPMA. *Id.* The Secretary extended the withdrawal, until January 31, 2010. PLO 7534, 67 Fed. Reg. 53359 (Aug. 15, 2002). DOE later proposed to extend the withdrawal for an additional 12-year period until January 31, 2022. 73 Fed. Reg. 53041 (Sept. 12, 2008). However, the notice expressly stated that if the extension was not approved, the withdrawal would expire on January 31, 2010. The withdrawal was not extended.⁵ How the entire test site will be used in the future is under review.⁶

The appellants located mining claims in the area of Yucca Mountain after the withdrawal expired, and on November 22, 2010, BLM sent a notice to one of the claimants, Gary Vosberg, seeking clarification of the situs of his claims. Statement of Reasons (SOR), Ex. 1. The notice explicitly stated that the area of the test site withdrawal that expired on January 31, 2010, “would allow mineral location,” but other land in DOE’s test site remained withdrawn and not subject to location, citing

⁴ For specific information about these earlier withdrawals, see BLM Master Title Plats (MTPs) for Ts. 12 - 14 S., Rs. 48 - 49 E., Mount Diablo Meridian, Nye County, Nevada.

⁵ In February 2010, the President proposed to eliminate funding for the project, and in March 2010, DOE unsuccessfully attempted to withdraw its construction license application it had filed with the Atomic Safety Licensing Board (ASLB) for the Yucca Mountain repository. *See In re U.S. Dep’t of Energy (High-Level Waste Repository)*, Docket No. 63-001, ASLBP No. 09-892-HLW-CAB04 (United States Nuclear Regulatory Commission) (June 29, 2010) at 3. Litigation over the propriety of DOE’s efforts continues. *See, e.g., In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011).

⁶ On Sept. 16, 2011, the GAO submitted the GAO Report to Senator Harry Reid of Nevada. The Report refers to the mining claims now under appeal and notes that litigation over their validity could adversely affect alternative uses of the site. GAO Report at 25-30. Although BLM initially concluded the land where the claims were located was open to location after the withdrawal had expired, GAO’s inquiry prompted BLM to consult with the Office of the Solicitor and later conclude that the lands were still closed to entry because no opening order had been issued. Under those circumstances, the claims would be invalid. *Id.* at 28.