



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF LAND APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

BLM-AK-020  
JUL 20 7 51 AM '87

RUSSELL AVERY AND DOUGLAS E. NOLAND

IBLA 86-851

Decided August 25, 1987

Appeal from a decision of the Nevada State Office, Bureau of Land Management, declaring mining claims N MC 297635 and N MC 297643 null and void ab initio.

Affirmed.

1. Act of August 27, 1958—Mining Claims: Lands Subject To—Rights-of-Way: Federal Highway Act

Mining claims located on lands subject to a valid, on-going, and pre-existing material site right-of-way granted to the State of Nevada pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

APPEARANCES: Rhonda L. Cavin, Esq., Las Vegas, Nevada, for appellants.

### OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Russell Avery and Douglas E. Noland have appealed from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated February 20, 1986, declaring the Gem #1 and Gem #9 placer mining claims (N MC 297635 and N MC 297643) null and void ab initio. The claims are situated in the SW 1/4 SW 1/4 sec. 29, and the SE 1/4 SE 1/4 sec. 30, T. 28 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada. They were located December 20 and 21, 1983, and recorded with BLM on February 9, 1984.

BLM declared the claims null and void ab initio stating:

Records of the Nevada State Office, Bureau of Land Management, show that these lands are held by the State of Nevada under Highway Material Site Right-of-Way NEV-59097 (December 21, 1962). Lands which are appropriated and transferred to a State highway department as a material site are not open to mineral entry or location.

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The record includes the State right-of-way file, which contains a copy of a December 21, 1962, BLM decision granting material site right-of-way (Nev-059097) to the State of Nevada Department of Transportation as a source of material for use on Federal Aid Highways. The right-of-way was granted pursuant to section 317 of the Act of August 27, 1950, 23 U.S.C. § 317 (1982), and encompasses the SW 1/4 SW 1/4, sec. 29; the SE 1/4 SE 1/4, sec. 30; and the NW 1/4 NW 1/4, sec. 32, T. 28 S., R. 63 E., Mount Diablo Meridian, Nevada.

Appellants assert on appeal that before locating the claims "we personally checked with the local BLM in Las Vegas and found this area to be open for the location of mining claims." They contend they have expended time and effort to develop water rights and have been negotiating with the State of Nevada Department of Transportation for the use of the material site.

[1] It is well established that material site rights-of-way created under the Federal Aid Highway Act, August 27, 1950, 23 U.S.C. § 317 (1982), effectively withdraw the lands affected from entry and location under the mining law. Ralph Memmott, 61 IBLA 116 (1982); James F. Peccorn, 50 IBLA 414 (1980); Sam D. Rawson, 61 I.D. 255 (1953). Accordingly, BLM properly declared the claims null and void.


Appellants indicate that the claims in question are crucial to their mining operation, and that they are in contact with the State and working towards the mutual use of the site. However, no rights in these claims could be obtained through any grant or recognition by the Department of Transportation, as the lands are unavailable for entry under the Federal mining law. It also appears that the State has a continued need for materials from the site. In a March 14, 1986, letter to appellant Noland, the State's supervisor for right-of-way engineering states:

In response to your letter of March 4, 1986, the Department has made a review of the needs for the above referenced material site with the following conclusions. The State of Nevada has an on going construction project south of Searchlight, Nevada which is presently utilizing our material site. We have on our project schedule at least two more projects in the near future. The uncertainty of federal monies makes it impossible to say when the Nevada Department of Transportation's need for this site would end.

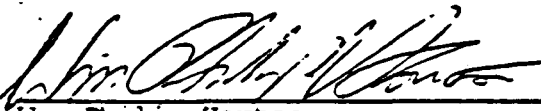
Although we are sympathetic with your plight, there is nothing we can do for you in the near future.

Although appellants maintain they checked with BLM before locating the claims and found the area to be open to mineral entry we note that the master title plat, and serial register pages for T. 28 S., R. 63 E., reflect that the lands at issue in secs. 29, 30, and 32 were subject to Nev-59097 material site. Thus, appellants were placed on notice that these lands were not open to entry.

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.

  
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Gail M. Frazier  
Administrative Judge

We concur:

  
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Wm. Philip Horton  
Chief Administrative Judge

  
\_\_\_\_\_  
E. W. Mullen  
Administrative Judge



# United States Department of the Interior

## BUREAU OF LAND MANAGEMENT

Alaska State Office  
701 C Street, Box 13  
Anchorage, Alaska 99513

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February 3, 1984

Instruction Memorandum No. AK 84-202  
Expires 9/30/85

To: DM's and DSD's  
From: State Director, Alaska  
Subject: Rights of Mining Claimants on Lands Conveyed to Native Corporations

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Questions have arisen concerning the rights of mining claimants whose unpatented claims are on land selected by a Native Corporation pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. S 1601, et seq. The answers vary, depending on whether the claimants file an application for mineral patent or survey within the deadlines set by ANCSA and the implementing regulations.

Section 22(c) of ANCSA, 43 U.S.C. 1621(c), gave mining claimants five years from passage of ANCSA to apply for mineral patent to any land selected by a Native corporation. If patent is applied for, the land will be excluded from conveyance. Even though the five-year period has expired, mining claimants may still have their claims excluded from a conveyance if they file for mineral patent or survey prior to the date of interim conveyance. 43 CFR 2650.3-2(c).

Mining claimants who do not file for mineral patent or survey before the land is conveyed do not lose their claims. All that happens is that the United States' interest in the land is conveyed to the Native corporation. In addition, the claimant will no longer be entitled to a federal mineral patent.

Exactly how mining claimants are to hold and develop their claims in this new status has not been defined by either the statutes or the courts. ANCSA, in section 14(g) does state that, "all conveyances made pursuant to this Act shall be subject to valid existing rights." The only reported court decision touching on the matter is Alaska Miners

	CHIEF B/W AGENT
	PRE AUDIT
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Association v. Andrus, 662 F.2d 577 (9th Cir. 1981). That decision does not address the rights of mining claimants. Rather, it holds that lands containing unpatented mining claims may be conveyed under the provisions of ANCSA. However, the Federal District Court, which was affirmed by the Ninth Circuit Court of Appeals, did specifically note that the possessory rights to mining claims were not altered by the conveyance of the land to a Native corporation. Alaska Miners V. Andrus, Civ. No. A76-263 (Unpublished Memorandum and Order of October 19, 1979). Various Departmental decisions have also noted the continuing possessory rights of the mining claimants. See, e.g., Oregon Portland Cement Co., 88 I.D. 760, 771 (1981).

In attempting to respond to individuals who ask what rights an owner of an unpatented mining claim has on land conveyed to a Native corporation, we may only say that those rights are undefined. It is certain, however, that, once the land is conveyed, the Secretary has no jurisdiction over the land or any dispute involving the land. The Secretary also lacks authority to impose restrictions on the Native corporations.

While this information may not be very helpful to the mining claimant, we should continue to advise claimants to do the same things they have done in the past, and especially to file an annual affidavit of assessment work in the local Recorder's Office. They should continue in this manner until such time as they may be advised by the Native corporation or the State of Alaska that a different procedure applies. This merely means that the mining claimants should protect themselves either by entering into an agreement with the Native corporation or continuing just as they did before.

Although we suggest filing annual affidavits of assessment work in the Recorder's Office, mining claimants should be advised that, since the mining claims are no longer on Federal land, BLM will not continue to accept or to record such documents. The files containing the documents filed pursuant to 43 U.S.C. 1744 are closed when the land is conveyed. Therefore, if anyone attempts to file an affidavit of assessment work or notice of intention to hold after that time, the BLM will return the document. Any inadvertent recording made by the BLM has no effect and will not alter the status of the claim.

  
Associate

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