

NORMAN R. BLAKE
MILDRED L. BLAKE

IBLA 88-262

Decided April 25, 1991

Appeal from a decision of the Colorado State Office, Bureau of Land Management, declaring mining claims null and void. C MC-218267 through C MC-218272.

Affirmed as modified.

1. Mining Claims: Lands Subject to--Townsites

Mining claims located on land described by a townsite patent are properly declared null and void where the claimants, after being offered the opportunity to present evidence to show that their mining claims embrace lands within mining claims that were valid on the date of the townsite patent, fail to present proof that there was a valid discovery of a valuable mineral deposit on any such claims on the date of the townsite patent.

APPEARANCES: Norman R. Blake and Mildred L. Blake, Black Hawk, Colorado; pro sese, Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Norman R. Blake and Mildred L. Blake have appealed from a January 13, 1988, decision of the Colorado State Office, Bureau of Land Management (BLM), declaring the Blake Nos. 15-19 lode mining claims (C MC-218267 through C MC-218271) null and void. The claims were located in secs. 7 and 18, T. 3 S., R. 72 W., sixth principal meridian, Colorado, in January 1987, and recorded with BLM pursuant to 43 U.S.C. § 1744 (1988), on February 4, 1987. BLM found that title to this land was conveyed on April 25, 1877, under patent No. 146 to Central City and the City of Black Hawk, without a reservation of any minerals to the United States. The patent itself, however, states: "No title shall be hereby acquired to any Mine of Gold, Silver, Cinnabar, or Copper or to any Valid Mining Claim or possession held under existing Laws of Congress." This proviso is derived from two statutes enacted in 1867 and 1868. 1/

1/ The 1867 statute provided for the conveyance of public domain lands to towns for the benefit of the inhabitants, but provided that "no title shall

Appellants state that the town of Black Hawk is located near the original discovery of gold in Colorado made by John Gregory in 1859, and that there were mining claims on the land at issue when the townsite patent issued, the effect being that the lands were therefore excluded from the townsite patent. Appellants do not assert they are successors-in-interest to prior claimants. Rather, their 1987 locations are made on the premise that title to that land did not pass to Black Hawk when the patent was issued and remains public domain open to location.

BLM denies this premise, asserting that complete title passed under the patents when previous mining claims located on townsite land became invalid. BLM argues that in Davis v. Weibbold, 139 U.S. 507 (1891), Justice Field held that a similar proviso to that used in the instant case was not a reservation or exception by the United States. Relying on the Davis decision, BLM concludes that Congress did not intend to reserve or except any land or mineral estate when it created the 1867 and 1868 provisos, but intended to allow title to pass, subject to valid existing rights, and that when those rights expired, that the townsite grantee then took full title. 2/

Appellants correctly argue that Davis involved a mining claim located after rights vested under a townsite patent on land where no mining claims were known to exist. Appellants contend that this case differs from Davis because mining claims existed on the land at issue at the time of townsite entry. Appellants assert that BLM's decision under appeal departs from precedents going back to 1891, but they cite no decisions to support their

fn. 1 (continued)

be acquired under the provisions of this act, to any mine of gold, silver, cinnabar, or copper." 14 Stat. 541, 542. The following year, Congress amended the 1867 proviso by adding, among other things, the following: "And provided further, That no title under said act of March two, eighteen hundred and sixty-seven, shall be acquired to any valid mining claim or possession held under the existing laws of Congress * * *." 15 Stat. 67 (emphasis in original). Eventually, those two provisos were combined and codified at 43 U.S.C. § 722 (1970), repealed, Federal Land Policy and Management Act of 1976, § 703(a), 90 Stat. 2789.

2/ The Davis opinion concluded that the statutory language did not constitute a reservation, finding that such terms were, instead, exceptions. Although the terms reservation and exception are at times used interchangeably, technically they are different. A reservation is a creation of a new right issuing out of the thing granted which did not exist as an independent right, while an exception is something in existence at the time of sale, and which is excepted from the operation of the conveyance. See Elkins v. Townsend, 182 F. Supp. 861, 871-73 (W.D. La. 1960). The Davis opinion concluded, at page 519, concerning exceptions from the grant in these cases that "exceptions of mineral lands * * * are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant."

contention. Likewise, the Solicitor has identified no pertinent cases in support of BLM's decision.

[1] Nevertheless, there are at least three decisions that recognize that in certain circumstances new claims can be located after issuance of townsite patents: Golden Center of Grass Valley Mining Co., 47 L.D. 25 (1919); Mill Side Lode, 39 L.D. 356 (1910); and Brady's Mortgagee v. Harris, 29 L.D. 426 (1900). Two of these cases cite Davis v. Weibbold, and one, Brady's Mortgagee, involves a townsite patent issued to Black Hawk. These decisions contradict BLM's view that when valid mining claims located in the townsite are abandoned, title vests in the townsite patentee.

In Brady's Mortgagee v. Harris, *supra*, the Department held that, in controversies between parties claiming public lands under the townsite and mining laws, the phrases, "lands known to be valuable for minerals" or "for mineral deposits" and "known mines" or "lands containing known mines" are equivalent in meaning, and no title to such lands will pass under a townsite entry if they are known to be of such character when the townsite entry is made. ^{3/} These three cases illustrate that the land described by the claims remains excluded from the townsite grant, even if the claims were later abandoned.

The Golden Center of Grass Valley Mining Co. decision establishes also that claimants must be provided an opportunity to present evidence on the issue whether land was excluded from a townsite patent. ^{4/} And the Mill Side Lode case makes clear that claimants under a townsite patent have

^{3/} In Brady's Mortgagee v. Harris the Department referred to townsite entry as the critical date for determining the existence of mines or valid mining claims. The Supreme Court in Davis, however, stated that the date of town-site patent is the proper date for such determinations. Also, in Deffeback v. Hawke, 115 U.S. 392, 404 (1885), the Supreme Court stated that "no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the * * * town-site laws." (Emphasis added.)

^{4/} In Golden Center of Grass Valley Mining Co., a company had filed a mineral patent application for a mining claim located in 1879, after the land at issue had been patented as a townsite. The land sought was the site of the Dromedary mine, the possessory right to which had been forfeited in 1878 for nonperformance of assessment work. On June 18, 1869, the Town of Grass Valley made a townsite entry. As reported in the decision at page 25,

"a hearing was had before the register and receiver, under instructions from the General Land Office, as to the character of the land embraced in the townsite application * * * in pursuance of what appears to have been at the time the practice of the General Land Office in case of application for a townsite." Subsequently, on July 3, 1871, the Commissioner of the General Land Office held the lands "to be more valuable for agricultural and townsite purposes than for the mineral contained therein. And subsequently a townsite patent issued for certain of said lands, including the area of the present mineral application." *Id.* at 26.

a right to present evidence on that question. ^{5/} Nevertheless, before a hearing can be ordered, as appellants have requested, there must first be a prima facie showing that there is a genuine issue of fact whether the land at issue is subject to location.

Therefore, when BLM proposes to declare null and void a mining claim located within the boundaries of a townsite patent, it must first allow the mining claimant to submit affidavits or other proof to show prima facie that, on the land in question, a mine for gold, silver, cinnabar, or copper existed on the date of townsite patent or that a valid mining claim existed on that date. BLM erred by failing to provide the Blakes with such an opportunity. However, the Board corrected that error by an order issued on October 12, 1990, that allowed appellants additional time to submit information in support of their claims. They have filed nothing. We therefore proceed to decide the appeal on the record before us.

We are not disposed to facilitate the recordation of new claims over abandoned claims on land described by townsite patents, unless there is

fn. 4 (continued)

It was concluded that:

"[T]he decision of 1871 was clearly not binding as to the ground embraced in a mine of gold or 'a valid mining claim or possession held under existing laws,' in view of the restrictive provisos quoted from the acts of 1867 and 1868, supra. Nor was the townsite patent issued

in pursuance of that decision operative to convey title to such ground, if any such was embraced in its description."

Id. at 26. The decision found that the company had made a "strong prima facie showing" through the affidavits of six individuals "cognizant of the local conditions in 1869, that its case falls within the protection of the provisos," and that the company was entitled to a hearing to show that the land was excepted from the townsite patent. Id. at 27.

^{5/} In Mill Side Lode, Idaho Consolidated Mines Company, Limited, filed an application for mineral entry for a mining claim located in 1900 for land patented as a townsite in 1884. The company sought to establish that its claim was located on ground that had been the subject of valid mining locations before townsite patent. The Department stated that one pursuing a mining claim within a townsite must show by the "clearest proof" that the land embraced by the claim falls within the language of the provisos. Id. at 358. The company presented affidavits that the Commissioner of the General Land Office found were insufficient to show that the minerals existed in the land in question at the critical date in such quantities as to justify working to extract them, but he afforded claimants additional time to apply for a hearing. On appeal to the Secretary, claimants argued that their evidence was sufficient. The First Assistant Secretary affirmed the Commissioner.

some showing that the land remained open to location. ^{6/} Evidence offered to show that the land was covered by mining claims at the time of the townsite patent, by itself, is insufficient as a matter of law to establish that it was excluded from the townsite patent. In Mill Side Lode, the Department explained what a mining claimant must show:

Conceding, however, that the land was known at the date of the townsite entry to contain some mineral, that fact alone would not warrant a conclusion that it was excepted from the townsite patent; for the Supreme Court, in the case of Dower v. Richards (151 U.S., 658, 663), held that--

In order to except mines or mineral lands from the operation of a townsite patent, it is not sufficient that the lands do in fact contain minerals, when the town-site patent takes effect; but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them--

and the Department itself has, in a number of cases recently decided, expressed its unwillingness to disturb, in favor of the lode mining applicants, titles based upon patents, presumptively complete, issued on townsite or placer entries where such patents, as appears to be the case here, had remained for many years unchallenged, except on the clearest proof that the conflicting area was known, at the date of the patented entry, to occupy such a status, or possess such a character, that complete title thereto could not be held to have passed thereunder.

Id. at 39 L.D. 358.

Therefore, regardless whether any prior claims on the subject land were properly located and recorded, they passed to the townsite unless they were valid by virtue of the discovery of a valuable mineral deposit. A discovery of a valuable mineral deposit exists where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894), approved in Chrisman v. Miller, 197 U.S. 313, 322 (1905). The existence of such deposits cannot be logically inferred from the fact claims exist. As Mill Side Lode holds, there

^{6/} Were the townsite grantee to take title to land covered by abandoned claims, the effect would be similar to that achieved pursuant to operation of 43 U.S.C. § 870 (1988), by which Congress conveyed mineral lands to states, excluding mining claims "unless or until such * * * claim * * * is extinguished, relinquished, or canceled." Id. at 870(c). No similar provision of law has been provided for townsite grants to permit the result for which BLM contends. Cf. State of Idaho, 101 IBLA 340, 95 I.D. 49 (1988), where this statute was applied.

must also be "the clearest proof" of the value and extent of the deposits. Otherwise, there is no reason to allow the recordation of appellants' claims to cloud the title of the townsite patent.

There has been no such showing here. In the absence of any proof that there was a valid discovery of valuable mineral at the time of townsite patent on any of the claims embracing the land now claimed by appellants, their claims must fail. There being no such proof in the record before us, we therefore find that the claims filed by appellants on the lands patented to the townsite are null and void. 7/

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 as modified by this decision, and appellants' claims are declared to be null and void.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

7/ In their notice of appeal appellants state that their claims "for the most part cover patented mines, that unless owned by us cannot be mined by us, or mines with mineral surveys but never went to patent, but have been on the tax rolls for 100 years, and tunnel sites that cannot be patented according to Federal law." To the extent the Blakes are claiming lands that have been previously patented, their claims are null and void for that reason, and to the extent they are seeking to obtain mineral rights to fractional areas which were never under claim, they can gain no rights to those from the Federal Government because that land passed under the townsite patent.