

**Editor's note: Appealed -- aff'd, Civ. No. C-3941 (D.Colo. Mar. 22, 1973)**

UNITED STATES  
v.  
CHRISTIAN F. MURER

IBLA 70-217

Decided January 11, 1972

Appeal from a decision by the Chief, Branch of Mineral Appeals, Bureau of Land Management, affirming the decision of John R. Rampton, Jr., hearing examiner, in Colo. Contest 389 holding that six millsites are null and void.

Affirmed.

Mining Claims: Millsites

Millsites that are not being used or occupied for milling or mining purposes are properly declared invalid; a prospective or intended use for such purposes is not enough to validate the locations.

The United States can at any time withdraw its consent to disposition of public land under the mining laws by withdrawal of the land or by bringing adverse proceedings against a millsite or mining location, requiring the determination of the validity of claims.

APPEARANCES: Christian F. Murer, pro se.

OPINION BY MR. STUEBING

Mr. Christian F. Murer has appealed from a decision dated June 26, 1970, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed the decision of a hearing examiner dated November 20, 1969, which declared the Bald Mountain millsite and the Bald Mountain Nos. 1 through 5 millsites null and void for the reason that they were not being used for mining and milling purposes prior to the withdrawal of the land from location and entry under the mining laws of the United States.

The contested millsites are located in the SW 1/4 of the SW 1/4, sec. 5, T. 5 S., R. 80 W., 6th P.M., (within the White River National Forest), north of Gore Creek in the vicinity of Spraddle Creek, Eagle County, Colorado. The Bald Mountain and the Bald Mountain No. 1 millsites were located on May 4, 1961, and the Bald Mountain Nos. 2, 3,

4, and 5 millsites were located on June 20, 1961. On October 18, 1961, the land covered by the millsites was withdrawn from location and entry under the mining laws of the United States, pursuant to Public Land Order 2785, 27 F.R. 10256 (October 19, 1961). It is alleged that the millsites were located in conjunction with the Bald Mountain and the Bald Mountain Nos. 2, 3, 4, 5, and 7 lode mining claims, which lie to the north of the millsites.

Contest proceedings were initiated upon a recommendation of the Forest Service, United States Department of Agriculture, charging that the millsites are not valid because:

- (a) there is no mill on the millsites,
- (b) the millsites are not being used for mining or milling purposes in connection with valid mining claims,
- (c) the millsites are located on lands that have been withdrawn from entry under the public land laws since October 18, 1961, and the millsites were not being used for mining and milling purposes prior to said date, and
- (d) the millsites were not located and are not now being held in good faith for mining and milling purposes.

After a hearing was held on May 5, 1969, at Denver, Colorado, the hearing examiner issued a decision declaring the millsites null and void, concluding that the sites had been maintained for prospective or speculative use. He found that the only use of the sites had been storage of a box of hand tools (buried on one of the claims) and 200 claim posts for the purpose of staking or posting prospective mining claims, and which were scattered and hidden in the brush on the millsites. He stated that even if such use would satisfy the millsite requirements, six 5-acre millsites would be absurdly excessive acreage. He further found that the millsites were located for possible future use if ore could be successfully mined from the claims, most of which did not and still do not exist.

Murer appealed to the Director, Bureau of Land Management, asserting that two of the contested millsites were located 134 days prior to the effective date of Public Land Order 2785, that the other four millsites were located only 118 days prior to the withdrawal of the land from location under the mining laws, that the claims were recorded only 76 days prior to the withdrawal, and that a Forest Service employee visited and surveyed the millsites just 55 days before the withdrawal. The major implication of his appeal was that the withdrawal was made "subject to valid existing rights," and that he had allegedly established "valid existing rights" prior to the time of the withdrawal of the land from location and entry under the mining laws.

The Bureau concurred with the examiner's conclusions that the millsites were not being used for mining and milling purposes prior to withdrawal of the land. The Bureau's decision emphasized that the prospective use of public land as a millsite is not enough to validate a claim and a millsite location that is based only on an intended use is invalid. United States v. S.M.P. Mining Company, 67 I.D. 141 (1960).

On appeal to the Secretary, appellant merely reiterates the arguments made below and presents no new evidence or novel questions. He asserts that these millsites were located in good faith and that the withdrawal of the land shortly thereafter for development of a large ski area (Vail) was subject to his prior existing rights. He alleges that his use of the millsite was also prevented by action of the Colorado Highway Department in building an interchange for Interstate 70 directly on the land in question and that the permit issued to the Highway Department by the Forest Service also provided for "prior existing rights."

We have again reviewed the entire record, carefully considering the decision of the Office of Appeals and Hearings, Bureau of Land Management, which summarizes the evidence and discusses the points raised by the appellant, and we conclude that the discussion and findings are correct. In view of the fact that appellant has not presented any new issues on appeal to the Secretary, there is no need to repeat the discussion and findings. It is sufficient to state that we find no error in the Bureau's decision, which affirms the hearing examiner's decision holding the contested millsites invalid.

One point deserves additional emphasis. Although appellant asserts that he has established a "valid existing right" prior to the withdrawal order, to achieve such status he would have had to show validity prior to the date of the withdrawal. Under the mining laws, one may take possession of vacant public land open to location under those laws and retain that possession against all except the government while he is in diligent prosecution of his efforts to discover valuable minerals therein or, in the case of millsites, to initiate milling or other qualifying use. While he is in possession of the land, he is not regarded as a trespasser because he is on the land with the passive consent of the government. However, when the government withdraws that consent, either by withdrawing the land from the operation of the mining laws or by the institution of adverse proceedings against a claim, the locator must show that he has then satisfied the requirements of law in order to retain his possession. When the government withdraws the land, qualification

after the withdrawal will not serve to validate the claim. United States v. Everett Foster et al., 65 I.D. 1; United States v. Harold Dale, A-30465 (January 20, 1966). The lands involved in this proceeding were withdrawn prior to the government's challenge of the validity of appellant's claims. Appellant has in no way shown compliance with the law prior to the date of the withdrawal and therefore he has no basis for his assertion of a "valid existing right," exempting his millsites from the withdrawal order.

Therefore, pursuant to the authority delegated to the Office of Hearings and Appeals, Board of Land Appeals, by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Edward W. Stuebing, Member

We concur:

Martin Ritvo, Member

Anne Poindexter Lewis, Member.

