

WESLEY LAUBSCHER

IBLA 70-533

Decided January 12, 1972

Appeal from decision (AA5839) of Alaska state office, Bureau of Land Management, mining claim declared void ab initio.

Reversed and remanded.

Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Effect of

Mining claims located on land withdrawn from mineral entry are null and void ab initio.

Mining Claims: Hearings -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Effect of

Where the mineral claimant asserts that his claim is not located on land withdrawn from entry under the mining laws, and the record indicates that part of the claim is not on withdrawn land, the claim cannot be declared null and void ab initio for having been located on land withdrawn from mineral entry without a hearing to determine the facts.

APPEARANCE: Wesley Laubscher, pro se.

OPINION BY MR. RITVO

Wesley Laubscher has appealed to the Secretary of the Interior from the decision of the Alaska state office, Bureau of Land Management, dated March 30, 1970, holding his Big Bertha placer mining claim, AA 5839, to have been void ab initio, for the reason that it was located on land withdrawn from mineral entry.

On July 3, 1966, appellant located a gold placer mining claim on land in sections 26 and 27, T. 8 N., R. 1 E., Seward Meridian, Alaska. In his certificate of location he said that the claim was located on Bertha Creek a tributary of Granite Creek. He described the claim as follows: "Beginning at the initial post which is situated at the northeast corner which is 360 feet north of Bertha Creek and 1320 feet east of Seward-Anch. Highway extending thence in a Southerly

direction approximately 660 feet to Post No. 2; thence in a Westerly direction approximately 1320 feet, to Post No. 3; thence in a Northerly direction approximately 660 feet, to Post No. 4, thence in a Easterly direction, approximately 1320 feet to the initial post and place of beginning."

The Anchorage Seward Highway runs alongside Granite Creek through sections 34, 27, 26 and 23, T. 8 N., R. 1 E., Seward Meridian. Bertha Creek runs westerly from section 26 under the highway and into Granite Creek in section 27. Public Land Order 725, June 4, 1951 (16 F.R. 5444), withdrew from all forms of appropriation under the public land laws, including the mining laws, an area described as: "Granite Creek Roadside Zone. All lands within one-fourth mile on each side of the center line of the Seward Anchorage Highway. . . ."

In a memorandum dated December 11, 1969, R. F. Clark, Staff Forester, Recreation and Lands, Forest Service, advised the chief of the Anchorage land office that the claim, for the most part, lies within the Granite Creek Roadside Zone and asked that the claim be invalidated through administrative action.

In its decision, the land office stated that the claim notice description and evidence on the ground indicate that the major portion of the claim lies within the Granite Creek Roadside Zone. It then held that a mining claim located on land withdrawn from such entry is null and void ab initio, and confers no rights on the locator, citing N. G. Johnson, Nevada 1918 (September 23, 1968); David W. Harper et al, 74 I.D. 141 (1967).

In his appeal dated April 9, 1970, Laubscher noted that the claim had been properly registered, assessed and recorded. He then asserted that: "The description, both physically and as registered, indicate [sic] this claim to lie between the roadside boundary and the power line 1/ in a North-easterly and South-westerly direction. Clearly without any form of appropriation at the date of registration." He concluded that: ". . . [he was] more than willing to present any positive and substantial evidence required to prove his claim to be valid." To date, no such evidentiary showing has been made.

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1/ Maps in the case file show that a 50' right of way designated as "2170 Withdrawal Power Project" roughly parallels the easterly edge of the roadside zone at a distance of as much as 1/8 mile in the vicinity of Bertha Creek.

It is well established that a mining claim located on land withdrawn from mineral entry is null and void ab initio, and is properly declared so without a hearing where the records of the Department show that at the time of location the land was not open to mineral entry. Ralph Page, 78 I.D. 167 (1971); David W. Harper, *supra*.

However, it is equally well established that a mining claim can be declared null and void without a hearing only if there is no dispute as to the facts underlying the determination of invalidity. Weeds Point Mining Company, A-30709 (November 2, 1967); Ernest Alpers, A-30627 (March 10, 1967); Mr. and Mrs. Ted R. Wagner, 69 I.D. 185 (1962); John D. Archer et al., 67 I.D. 181 (1970).

Here appellant asserts that his claim does not lie within the withdrawn area. It is also noted that the land office found only that "the major portion" of the claim lies within the withdrawn area. Implicit in this conclusion is a finding that some of the claim lies on land open to mineral entry. It was plainly erroneous to declare the claim invalid without a hearing as to that "minor" portion. These are factual matters which can be determined only by a hearing held as a result of contest proceedings instituted against the claim.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is reversed and the case is remanded for further proceedings consistent herewith.

Martin Ritvo, Member

We Concur:

Edward W. Stuebing, Member

Joan B. Thompson, Member.

