

W.J.M. MINING AND DEVELOPMENT COMPANY

IBLA 72-77

Decided February 20, 1973

Appeal from a decision of the Arizona State Office, Ariz. 6391 of July 21, 1971, holding a placer mining claim void ab initio.

Set aside and remanded.

Mining Claims: Contests

A mining claim located on land not open to mineral entry at the time of the mining claim location is void ab initio and may be declared so without a hearing. However, that is true only if there is no dispute as to the facts underlying the determination of the invalidity.

APPEARANCES: Hale C. Tognoni, Esq., of Tognoni and Pugh, Phoenix, Arizona, for contestee.

OPINION BY MR. STUEBING

This is an appeal by the W.J.M. Mining and Development Company, Inc., from a decision of the Arizona State Office of July 21, 1971, holding the Enterprise No. 33 placer mining claim null and void ab initio.

The Enterprise No. 33 was located April 25, 1955, as recorded by amended location notice on June 13, 1961, in the records of Maricopa County, Arizona. The claim was stated to embrace the W 1/2 of lot 1, sec. 3, T. 2 N., R. 3 E., G.&S.R.M., Maricopa Country, Arizona.

The lands covered by the amended location notice were included in Homestead Entry Patent No. 1033969 issued January 13, 1930, without reservation of minerals to the United States. Therefore, on the land described in that location notice, there was no mineral estate open to location under the mining laws on the date of the location of the Enterprise No. 33 claim in 1955.

On the basis of these facts the State Office declared the Enterprise No. 33 to be null and void ab initio, citing United States v. United States Borax Company, 58 I.D. 426 (1943).

The decision below did not take into account, as appellant points out in its statement of reasons, that an amended location notice was filed on June 15, 1971, for the Enterprise No. 33 correcting its legal description to a portion of the E 1/2 SW 1/4, sec. 31, T. 3 N., R. 4 E., G.&S.R.M., Maricopa County, Arizona.

Appellant sets out as its reason for appeal that the first amended location notice contains an incorrect description. It is asserted that the claim does not in fact occupy the land described in the first amended location notice, but rather, is located on the land described in the second amended location notice. The second amended location notice was of record prior to the July 21, 1971, decision of the State Office. Appellant argues that the mere absence of a recorded location notice with the proper description on April 25, 1955, is not grounds for declaring the subject claims null and void ab initio.

Appellant does not challenge the finding below that a claim located on land homesteaded and patented prior to the time of the establishment of the mining location is void ab initio. Instead, appellant relies on its amendment which was on file prior to the State Office decision.

It is well established that a mining claim located on land not open to mineral entry is void ab initio and may be declared so without a hearing where the records of the Department show that at the time of the location the land was not open to mineral entry. David, W. Harper, et al., 74 I.D. 141 (1967); Ralph Page, 2 IBLA 262, 78 I.D. 167, (1971).

However, it is also the rule that a mining claim may only be declared null and void without a hearing if there is no dispute as to the facts underlying the determination of invalidity. Mr. and Mrs. Ted R. Wagner, 69 I.D. 186 (1962); John D. Archer, Steven P. Smoot, 67 I.D. 181 (1960); Wesley Laubscher, 4 IBLA 246 (1972).

Here, appellant asserts that its claim does not lie within the boundaries of the area set out in the decision below, but that the description given there was in error and was amended by a later location notice on file before the decision rendered by the State Office. From the documents on file in the record it is apparent that all the facts available to the State Office were not considered in ruling on the Enterprise No. 33. Without deciding the effect of the filing of an amended location notice, or any other

points bearing on the question of the validity of the claim at issue, we remand so that any factual matters in dispute may be decided.

In so doing, we make the following observations with reference to other matters which will bear further inquiry: (1) The Acting State Director reports that a search of the records of Maricopa County indicates that there is no recorded original location notice for the Enterprise No. 33; (2) The "second amended location notice," dated June 11, 1971, was appended as an exhibit to appellant's statement of reasons, which described it as "a certified copy." The document is a machine-reproduced copy of an original which appears to have been created by joining several cut-out component sections. On this copy the property description has been overwritten in blue ink by a broad-tipped instrument, perhaps a felt pen, almost totally obliterating the property description which appeared on the original document, although it can be discerned that the letter "E" on the original has been superimposed by the letter "W" at one point. Also, the signature of Mulluzzo on the exhibit copy has obviously been added and did not appear on the original. The character of the exhibit copy as a "certified copy" therefore has dubious probative value; (3) The 1971 amended location notice places the claim nearly three and one-half miles from the site described in the 1961 "amended" location notice, in a different township, section and in different subdivisions. The two descriptions bear no similarities at all. Even the dimensions and areas are different. This is attributed by appellant to a "failure of communications."

Under the circumstances appellant will assume a heavy burden of persuasion in order to establish that an error of such character and magnitude was simply inadvertent, and that the claim has been properly located as described by the description overwritten on the "certified copy" of the "second amended location notice" since April 25, 1955.

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 set aside and remanded for consideration consistent with this opinion.

Edward W. Stuebing, Member

I concur:

Newton Frishberg, Chairman

I concur in the result:

Martin Ritvo, Member.

