

Editor's note: Reconsideration denied by order dated June 1, 1973 and at Frank Zappia, 11 IBLA 111; Appealed -- aff'd, Civ. No. 84-1905 PHX PGR (D.Ariz. Nov. 11, 1985)

FRANK ZAPPIA

IBLA 72-135

Decided April 2, 1973

Appeal from a decision (A 6499) by the Arizona State Office, Bureau of Land Management, declaring mining claims null and void ab initio.

Affirmed.

Mining Claims: Generally -- Mining Claims: Land Subject to -- Mining Claims: Withdrawn Land --
Withdrawals and Reservations: Reclamation Withdrawals -- Withdrawals and Reservations:
Revocation and Restoration

Mining claims located on land in a first form reclamation withdrawal are properly declared to be null and void ab initio, and the subsequent restoration of the lands to mineral location pursuant to the Act of April 23, 1932, 43 U.S.C. § 154 (1970), will not breathe life into the invalid mining locations.

Mining Claims: Generally -- Mining Claims: Withdrawn Land -- Mining Claims: Special Acts
-- Withdrawals and Reservations: Reclamation Withdrawals -- Withdrawals and
Reservations: Revocation and Restoration

It is proper to declare mining locations null and void ab initio where the locations were not perfected by performance of the condition precedent set forth in an order opening lands in a reclamation withdrawal to mineral location and entry pursuant to the Act of April 23, 1932, 43 U.S.C. § 154 (1970).

APPEARANCES: William C. Marchiondo, Esq., of McAtee, Marchiondo and Berry. Albuquerque, New Mexico, for appellant.

OPINION BY MRS. LEWIS

Frank Zappia has appealed from a decision of the Arizona State Office, Bureau of Land Management (BLM), dated September 15, 1971, declaring null and void ab initio the Mica Flower Nos. 1 through 6 mining claims located in January or April 1941, and the Green Rock

No. 1 and the Take A Chance No. 1 mining claims both located on October 22, 1941. The stated reason for the invalidity of the Mica Flower Nos. 1 through 6 mining locations was that they were located when the lands were withdrawn from mining location under a first form reclamation withdrawal and they were not relocated between August 26, 1941, and April 8, 1943, while the lands were open to mineral location and entry, nor were the express stipulations executed and recorded, as required by the opening order. The reason given for the invalidity of the Green Rock No. 1 and the Take A Chance No. 1 mining locations was that, although the locations were made during the period the lands were open to mineral location, the required stipulations were not executed and filed for recordation.

Appellant contends that the decision below is in error for reasons which will be discussed hereinafter.

This matter arose in May 1970, when Frank Zappia through his present attorneys requested the BLM to furnish any documents or information filed in 1941 pertaining to certain enumerated sections in T. 9 S., Rs. 13 and 14 W., G&SRM, Arizona, indicating there was a connection with the Act of April 23, 1932 (43 Stat. 136; 43 U.S.C. § 154 (1970)). The BLM responded with copies of documents and advised that the Application for Restoration of Frank Zappia, Phoenix 080091, was being requested from storage. After further exchanges of correspondence, there was submitted on September 2, 1971, on behalf of Frank Zappia, copies of mining location notices for the Mica Flower Nos. 1 through 6, the Green Rock No. 1, and the Take A Chance No. 1. A decision in the matter was requested.

The records show that on April 9, 1941, Frank S. Zappia filed an application, Phoenix 080091, under the Act of April 23, 1932, supra, for the opening of secs. 7 and 18, T. 9 S., R. 13 W., and secs. 1, 2, 11 and 13, T. 9 S., R. 14 W., G&SRM, Arizona, to mining location, entry and patent. The lands described were in a first form reclamation withdrawal under the Act of June 17, 1902, 43 U.S.C. § 416 (1970), which precluded mining location, entry and patent.

On August 26, 1941, in response to the application of Frank S. Zappia, the Assistant Secretary of the Interior issued an order which reads:

ORDER OPENING LANDS TO MINING LOCATION, ENTRY AND PATENT.

Under authority and pursuant to the provisions of the act of Congress approved April 23, 1932 (47 Stat. 136; 43 U.S.C. 154), it is hereby ordered that, subject to valid existing rights, Secs. 7 and 18, T. 9 S., R. 13 W., and Secs. 1, 2, 11 and 13, T. 9 S., R. 14 W., G&SRM, Arizona, be, and the same are hereby opened to location, entry and patent under the general mining laws, subject to the terms of the following stipulations and to the regulations contained in circular 1275 (43 CFR 185.36), the stipulations to be executed in favor of the United States by intending locators, binding themselves, their heirs, successors and assigns, and recorded in the county records and in the United States district land office before locations are made and to be referred to in any patents issued on such locations:

In carrying on the mining and milling operations contemplated hereunder Locators will, by means of substantial dikes or other adequate structures, confine all tailings, debris, and harmful chemicals in such a manner that the same shall not be carried beyond the herein described lands by storm waters or otherwise.

There is reserved to the United States, its successors and assigns, the prior right to use any of the lands hereinabove described, to construct, operate, and maintain dams, dikes, reservoirs, canals, wasteways, laterals, ditches, telephone and telegraph lines, electric transmission lines, roadways, and appurtenant irrigation structures, without any payment made by the United States or its successors for such right, with the agreement on the part of the Locators that if the construction of any or all of such dams, dikes, reservoirs, canals, wasteways, laterals, ditches, telephone and telegraph lines, electric transmission lines, roadways, or appurtenant irrigation structures across, over, or upon said lands should be made more expensive

by reason of the existence of improvements or workings of the Locators thereon, such additional expense is to be estimated by the Secretary of the Interior, whose estimate is to be final and binding upon the Locators, and that within thirty days after demand is made upon the Locators for payment of any such sums, the Locators will make payment thereof to the United States or its successors constructing such dams, dikes, reservoirs, canals, wasteways, laterals, ditches, telephone and telegraph lines, electric transmission lines, roadways, or appurtenant irrigation structures across, over, or upon said lands. The Locators further agree that the United States, its officers, agents, and employees and its successors and assigns shall not be held liable for any damage to the improvements or workings of the Locators resulting from the construction, operation, and maintenance of any of the works hereinabove enumerated. (Emphasis added.)

By Public Land Order No. 97, dated March 26, 1943, all of T. 9 S., R. 13 W., and T. 9 S., R. 14 W., among other lands, were withdrawn, subject to valid existing rights, and reserved for the use of the War Department as an aerial gunnery and bombing range.

The then attorneys for Frank Zappia in a letter, dated June 11, 1943, addressed to the General Land Office, predecessor of the Bureau of Land Management, referred to the order of August 26, 1941, opening the described sections to mining location, entry and patent based on the application of Frank Zappia. This letter, regarding certain mining locations of Frank Zappia and others on those lands, admitted that the stipulations required under the order were not executed and recorded, and the letter pointed out that the claims could not be relocated because the land had again been withdrawn from location.

In response, by letter of June 26, 1943, the Commissioner, General Land Office, informed the attorneys for Frank Zappia that the lands restored to mining location by the order of August 26, 1941, under the Act of April 23, 1932, supra, pursuant to the application of Frank Zappia, were withdrawn by Public Land Order No. 97 issued on March 16, 1943, and stated that in view of the fact that the mining locations

made on the lands prior to the withdrawal of March 16, 1943, were not validated by the recording of the required stipulations prior to the withdrawal, they are invalid, and the filing of the stipulations would not cure this defect.

In correspondence prior to the decision below, and as a preface to his statement of reasons for his appeal, appellant suggests that neither this Board nor the Bureau of Land Management had jurisdiction to determine his interest in the purported mining locations here involved. He asserts his interest therein was the subject of eminent domain proceedings before a United States District Court in Arizona initiated in 1943 from which he was dismissed in 1948, and he is attempting to revive the matter.

There is no merit to the suggestion. In Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963), the Supreme Court found that the "Congress had entrusted the Department of the Interior with the management of the public domain and prescribed the process by which claims against the public domain may be perfected. The United States, which holds legal title to the lands, plainly can prescribe the procedure which a claimant must follow to acquire rights in the public sector." The Court further found "that the institution of the [condemnation] suit in the District Court was an appropriate way of obtaining immediate possession, that it was not inconsistent with the administrative remedy for determining the validity of the mining claims, and the District, Court acted properly in holding its hand until the issue of validity of the claims has been resolved by the agency entrusted by Congress with the task." Where a mining claim involved in a condemnation suit is administratively determined to be valid, thereafter the value of such claim for compensation purposes is within the jurisdiction of the court. This is what Justice Douglas was talking about when he said that the District Court acted properly in holding its hand, supra.

Appellant alleges he was not notified of the opening order which he maintains specifically directed the local land office to notify him of the government reservation of rights and the necessity of filing stipulations.

We fail to find any such directive in the opening order. The record, Phoenix 080091, shows that in September 1941 the Register of the local land office in a memorandum transmitting copies of the opening order was asked to send a copy of the opening order to Zappia by ordinary mail. The fact that in June 1943, the then attorneys for Frank Zappia in the letter to the General Land Office

mentioned above, identified with precision the date of the order, the legal description of the lands involved and the application serial number, and referred to the stipulations being required under the order, is strong persuasive evidence that Zappia was notified.

The opening order made mandatory, under the authority granted by Act of April 23, 1932, supra, that the express stipulations in favor of the United States "be executed * * * by the intending locators * * * and recorded in the county records and in the United States district land office before locations are made * * *." It placed upon the intending locator the burden of executing and recording the express stipulations before any right vests in the locator. The execution and recording of the required stipulations is clearly a condition precedent to the validity of any mining location made on the land involved. Almost 30 years ago appellant admitted he failed to execute and file the necessary stipulations.

Appellant asserts that his mining locations made on the land prior to the order opening the reclamation withdrawn land to mineral location and entry is not fatal to his claims because the land was opened to mineral location pursuant to his application for restoration and the directive issued to the land office clearly considered his locations had been proper.

This assertion is manifestly untenable. It is well established that a mining claim located on land subject to a first form reclamation withdrawal initiates no rights in the locator and is invalid from its purported inception. James C. Reed, 50 L.D. 687 (1924); R. J. Walter, A-27243 (March 15, 1956); A. L. Snyder, 75 I.D. 33 (1968). Moreover, the subsequent restoration or opening of the lands to mineral location will not breathe life into an invalid location. David W. Harper, 74 I.D. 141, 145 (1967); Norman A. Whittaker, 8 IBLA 17 (1972). Since the Mica Flower Nos. 1 through 6 mining claims involved in this appeal were located when the land was not open to mining location, they were invalid when made. It was proper for this reason alone to declare them null and void ab initio. Consequently, the lack of executed and recorded stipulations is a collateral reason for their invalidity.

In regard to the Green Rock No. 1 and the Take A Chance No. 1 mining claims located on October 22, 1941, during the period the land was open to mineral location, the locations were not perfected because the locator failed to execute and record the stipulations

as required by the opening order as a condition precedent to the vesting of any right in the locator. In these circumstances, the decision below properly declared these two mining locations null and void ab initio.

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.

Anne Poindexter Lewis, Member

We concur:

Martin Ritvo, Member

Frederick Fishman, Member.

