

ED WUILLIEZ

IBLA 73-78

Decided July 27, 1973

Appeal from a decision by the Idaho State Office declaring a mining claim null and void ab initio.

Set aside and remanded.

Mining Claims: Lands Subject to -- Mining Claims: Power Site Lands -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Power Sites

A mining claim located before August 11, 1955, on land within an existing power site withdrawal is null and void because the land was then unavailable for mining locations.

Mining Claims: Hearings -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Effect of

Where the mineral claimant asserts that his claim is not located on land withdrawn from entry under the mining laws, or the record indicates that part of the claim is not on withdrawn land, the claim cannot be declared null and void ab initio for having been located on land withdrawn from mineral entry without a hearing to determine the facts.

Mining Claims: Determination of Validity -- Mining Claims: Hearings -- Mining Claims: Power Site Lands -- Mining Claims Rights Restoration Act -- Rules of Practice: Hearings -- Withdrawals and Reservations: Power Sites

The Bureau of Land Management, without holding an evidentiary hearing, may properly declare that a mining claim was null and void ab

initio when it was located while the land was within a power site withdrawal and no rights therein could be based upon the original locations. However, such a finding does not determine the validity of claims located after the lands were opened to mineral location by the Mining Claims Rights Restoration Act or held thereafter for the period prescribed by 30 U.S.C. §38 (1970).

APPEARANCES: Ed Wuilliez, pro se.

OPINION BY MR. RITVO

Ed Wuilliez has appealed from a decision dated July 12, 1972, by the Idaho State Office of the Bureau of Land Management declaring his Beach Placer mining claim null and void ab initio on the grounds that it was located on land closed to the location of mining claims.

The Beach Placer mining claim is located within section 21, T. 24 N., R. 3 E., B.M., Idaho, and is almost entirely within lot 5 of section 21. The original location was by Grace Wheeler on June 16, 1940. The Bureau of Land Management inspected the Idaho County, Idaho, records and failed to find any recorded conveyance of the claim by Grace Wheeler. There were five subsequent conveyances recorded including the one to Wuilliez's grantors, John F. and Ruth E. McDougal. Wuilliez is acquiring the claim under a contract to purchase from the McDougals.

According to the public land records, lot 5 was withdrawn under Powersite Reserve No. 8 on May 29, 1909. In 1920 lands subject to power site withdrawals were closed to location of mining claims pursuant to section 24 of the Federal Power Act of June 10, 1920, as amended, 16 U.S.C. §818 (1970). Leslie A. and Rita M. Folwell, A-31104 (August 18, 1969). Since there is no evidence that Grace Wheeler was not the original locator of the Beach Placer mining claim, the claim could not have been located prior to the Federal Power Act of June 10, 1920. Therefore, insofar as the Beach Placer mining claim lies within lot 5, it was originally located on land closed to mineral location and was null and void ab initio. Gardner C. McFarland, 8 IBLA 56 (1972); Lesley G. and Rita M. Folwell, supra; Armin Spectert, A-30854 (January 10, 1968); David W. Harper, 74 I.D. 141 (1967).

If the claim was on the powersite, it was proper for the bureau to declare, without holding an evidentiary hearing, that it was null

and void ab initio when it was located and no rights therein could be based upon the original location. Cf. Gardner C. McFarland, *supra*; The Dredge Corp., 65 I.D. 336, 341 (1958), *aff'd.* Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1968).

The appellant asserts, however, that his claim was not located in the power site reserve. If it was not, the land, of course, was not closed to mineral location for that reason. Whether, a claim is physically within a withdrawal is a question of fact, not determinable by an examination of the public records. The resolution of such an issue, if disputed by a claimant, must be resolved by a contest brought in the regular manner. W. J. M. Mining and Development Company, 7 IBLA 10 IBLA 1 (1973); Foster Mining and Engineering Company, 7 IBLA 299, 79 I.D. 599, 602 (1972).

We also note that the State Office's decision recognized that some of the mining claim is not in Lot 5. The part of the claim not in Lot 5 is not made invalid by a finding that the rest of claim land is closed to mineral location. Accordingly it was error to declare the claim invalid in its entirety without a hearing as to that portion which was open to mineral entry at the time of location. Wesley Laubscher, 4 IBLA 246 (1972).

For these reasons the State Office decision must be set aside.

In his appeal Wuilliez also relies on the Mining Claims Rights Restoration Act of August 11, 1955, 30 U.S.C. §621 (1970), which reopened certain withdrawn power site land to mineral entry, as subsequently validating the Beach Placer mining claim. ^{1/} Lot 5, whose northern boundary is the Salmon River, however, was again withdrawn from mineral entry in 1968 under the Wild and Scenic Rivers Act of October 2, 1968, 16 U.S.C. §1280(b)(1970), which withdrew from mineral location all lands within 1/4 mile of the Salmon River (and other rivers) as potential additions to the wild and scenic river system. Ralph Page, 8 IBLA 35 (1972).

Unless lot 5 was withdrawn from mineral location for purposes other than power purposes it was open to mineral location after

^{1/} It is well established that the Mining Claims Rights Restoration Act did not retroactively validate claims located prior to the Act while the land was in a power withdrawal so as to make claims effective as of the time of their original location. Gardner C. McFarland, *supra*; Day Mines, Inc., 65 I.D. 145 (1958); Howard W. Balsley, A-27920 (June 15, 1959).

the enactment of the Mining Claims Rights Restoration Act, subject to a reservation of power rights to the United States, and subject to certain conditions prescribed by the Act, until it was again withdrawn. Therefore, the only period open for valid location would have been during the 13 years from 1955 to 1968.

An inspection by the Bureau of Land Management of the county records produced no evidence of a relocation by any of the record owners from 1955 to 1968. The only location of the Beach Placer mining claim was that of Grace Wheeler in 1940. Thus, there is no location of record which could serve as a basis for a valid claim.

If the claim or part of it is properly held to be null and void ab initio, it might still be valid under any new location made by any holding pursuant to 30 U.S.C. §38, while the lands were open for mineral location under the Mining Claims Rights Restoration Act. Section 38 provides that where a person has held and worked a claim for a period equal to the time prescribed in the statute of limitations for mining claims in the state or territory in which it is situated, evidence of such possession and working should be sufficient to establish a right to a patent the claim under the mining laws. The claimant must, however, still demonstrate that there is a valid discovery on the claim. Cole v. Ralph, 252 U.S. 286, 307 (1920); Meritt N. Barton, 6 IBLA 293, 79 I.D. 431 (1972).

Further, sections 2 and 4 of the Mining Claims Rights Restoration Act, 30 U.S.C. §§621(b) and 623 (1970), prescribe certain conditions regarding mining locations on lands open to entry under the Act. Appellant has asserted that he has performed and filed notice of assessment work on the claim. However, from the present record it is impossible to determine whether actions by the mining claimant with respect to the claim since the 1955 Act have established any rights in it.

Finally, Wuilliez contends that his claim is a valid claim which contains mineral of commercial quality and quantity. This assertion is material only if all or any part of the claim was open to mineral location at the time the claim was first located or if a new location or substitute for a new location under section 38, supra, was accomplished for the part that became open to location in 1955. The existence of a discovery on the claim will, of course, be a major issue in any contest proceeding brought against the claim.

Therefore, pursuant to the authority vested in the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

decision of the State Office is set aside and the case is remanded for further proceedings consistent herewith.

Martin Ritvo, Member

We concur:

Douglas E. Henriques, Member

Newton Frishberg, Chairman

