

EVERETT E. WILDER, ET AL.

IBLA 74-45

Decided February 25, 1974

Appeal from a decision of the California State Office, Bureau of Land Management, dismissing the protest to an application for patent under the Indian Allotment Act, 25 U.S.C. §§ 334, 337 (1970).

Affirmed as modified.

Indian Allotments on Public Domain: Generally--Regulations: Applicability--Rules of Practice: Appeals: Dismissal--Rules of Practice: Private Contests

Where a protest against the issuance of a patent under the Indian Allotment Act, 25 U.S.C. §§ 334, 337, (1970), is premised upon the protestants' assertion that if a certain private instrument of conveyance were construed in a particular way it could be interpreted to show that the Indian allotment is within an old, unpatented mining claim and that the protestants have a fractional interest therein, such protest is properly rejected, as a private contest is the only administrative procedure available to the protestants under such circumstances.

Contests and Protests: Generally--Mining Claims: Contests--Rules of Practice: Private Contests

The holder of an interest in an unpatented mining claim who objects to the proposed issuance of patent to another person under a different law must prove that the mining claim is valid, since an invalid claim will give such holder no rights against the Government which would prevent the issuance of patent to another person.

Contests and Protests: Generally--Mining Claims: Contests--Rules of Practice:
Private Contests

The Government will not be bound by the results of a private contest with respect to the validity of a mining claim where it is not a party to the proceedings.

APPEARANCES: Edward P. Sautter, Esq., Eureka, California, for appellants.

OPINION BY MR. STUEBING

Everett E. Wilder and Benjamin H. Wilder have appealed from the June 29, 1973, decision of the California State Office, Bureau of Land Management (BLM), dismissing their protest against an application for patent to approximately 2.25 acres of land located in the Six Rivers National Forest, Humboldt County, California. The patent application was filed by Gertrude Wilder Mollier pursuant to the Indian Allotment Act, 25 U.S.C. § 337 (1970). The protest of Everett E. Wilder and Benjamin H. Wilder was based on the alleged ownership of a 1/3 undivided interest in an unpatented mining claim which allegedly encompasses the 2.25 acres of land in Gertrude Wilder Mollier's patent application.

That portion of the unpatented mining claim which once included the land in the patent application is situated within Sec. 1: SW 1/4, Sec. 2: SE 1/4, T. 10 N., R. 5 E., Humboldt Meridian. The mining claim, known as the Rough and Ready Extension, was located in 1916 by Albert and Lillian Wilder, the parents of Gertrude Wilder Mollier, and by Everett E. Wilder, a brother of Albert Wilder and one of the protestants in these proceedings. In 1957 Albert and Lillian Wilder conveyed their 2/3 interest in the mining claim to their son, Stanley Wilder. In 1963, Stanley Wilder conveyed this 2/3 interest in the mining claim to Everett E. Wilder and Benjamin H. Wilder, by an instrument containing the following provision:

Reserving to Stanley Wilder three acres of flat land in the Northwest corner of The Rough and Ready Extension Placer Mining Claim, along with all necessary water for domestic purposes.

In 1967 Stanley Wilder purportedly conveyed these remaining three acres to Gertrude Wilder Mollier, his sister, who, in connection with her Indian allotment application, quitclaimed them to the United States.

Protestants argue that they still have a 1/3 undivided interest in that three-acre portion of the mining claim for two reasons. First, they assert that the reservation of the three acres to Stanley Wilder in the 1963 conveyance was not really a reservation, but an exception. They admit that if the conveyance is construed in its technical, common law sense as a reservation, then it would operate as a grant back from the grantees to the grantor of the entire interest in the three acres. This would have severed the three acres from the mining claim. Protestants argue, however, that the conveyance was intended as an exception, and that protestants therefore still have a 1/3 undivided interest in the three acres, since an exception merely "excepts" something from passing from the grantor to the grantee. And since Stanley Wilder had only a 2/3 interest in the claim, that is all that could be excepted. By so interpreting the provision it might also be found that the three acres were not severed from the claim.

Alternatively, protestants argue that the 1963 conveyance reserved three acres of "flat land" to Stanley Wilder. Accordingly, they assert, since this land is not flat, it could not have been the land passed by that conveyance.

Protestants, however, have not chosen the correct method for objecting to the issuance of a patent. The regulations provide that:

Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land * * * may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.
43 CFR 4.450-1.

Where the elements of a contest are not present any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances.
43 CFR 4.450-2 (Emphasis added).

Since the objection is an assertion of title or interest adverse to the patent application, it should have been initiated and treated as a private contest in the manner provided for in the pertinent regulations.

By appellant's own analysis, a "reservation" is always of something taken back out of that which is clearly granted, while an "exception" is of some part of the estate not granted at all. Lewis v. Standard Oil Co. of California, 88 F.2d 512, 514 (9th Cir. 1937). At the time the deed from Stanley M. Wilder was prepared he owned two-thirds of the mining claim and appellants owned one-third. Therefore, by Stanley Wilder's conveyance to appellants, appellants owned the full possessory title to the entire claim, subject only to the effect of the provision. If the provision for the three acres was a reservation which operated as a conveyance back from appellants to Stanley Wilder, as described above, then Stanley Wilder was invested with full possessory title thereto, separate and apart from the Rough and Ready Extension. Those three acres would be considered a separate mining claim. United States v. Gibbs, 13 IBLA 382, 385 (1973). On the other hand, if the provision for the three acres were treated as an "exception" there would be no severance of the claim and appellants would hold the full possessory title to the entire claim except for the three acres, as to which appellants would own an undivided two-thirds interest and Stanley Wilder would have retained an undivided two-thirds interest. However, we note in passing that the language of the provision speaks of "reserving" rather than "excepting" the three acres, and also that Stanley Wilder's 1967 quitclaim to his sister refers to "the three acres of flat land reserved to Stanley M. Wilder." (Emphasis supplied.)

To determine whether a reservation or an exception has been made, we must look to the substance of the right excepted or reserved and make an independent determination, regardless of whether the right is termed an exception or reservation in the instrument. Lewis v. Standard Oil Co. of California, supra. This requires the presentation of testimony and other evidence in the trial-type proceeding afforded, in an administrative setting, by the contest and hearing. The Board of Land Appeals is not the proper forum to make such an independent determination initially.

Without deciding the merits of protestants' assertions, we are not persuaded that they have demonstrated an interest in the subject land of which the United States must take cognizance. Therefore, we will not consider an appeal by protestants unless and until private contest proceedings have been held and a decision rendered by an Administrative Law Judge. See United States v. O'Leary, 63 I.D. 341 (1956).

In order to qualify to initiate a private contest against the Indian allottee it will be necessary for the contestants to show a justifiable basis for claiming title to or an interest in the land. Kasey v. Molybdenum Corp. of America, A-31006 (June 10, 1969). At

the hearing of such contest it will be the obligation of the contestants not only to prove that the claim includes the land in question and that they have an interest therein, but also that the claim is valid. Stanley v. State of California, A-27928 (June 15, 1959). However, a showing of the claim's validity in such a contest would not bind the Government where it was not a party to the proceedings. See United States v. U.S. Minerals Development Corp., 75 I.D. 127, 136 (1968); cf. Perego v. Dodge, 163 U.S. 160, 168 (1896).

Therefore, if the appellants do not file contest proceedings within 60 days of publication of intent to issue patent, patent may issue in due course to Gertrude Wilder Mollier if all else be regular.

Finally, we note that the record seems to indicate that a small portion of the land applied for in Gertrude Wilder Mollier's patent application may be covered by a power site withdrawal. If that is the case, no patent as to that area may issue without the approval of the Federal Power Commission as provided for in section 24 of the Federal Power Act, 16 U.S.C. § 818 (1970) and 43 CFR 2344.2 and 2344.3. However, a notation on the land status report indicates that such approval may already have been granted.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the California State Office is affirmed as herein modified.

Edward W. Stuebing, Member

We concur:

Anne Poindexter Lewis, Member

Frederick Fishman, Member

