

MONTANA COPPER KING MINING CO., ET AL.

IBLA 74-308

Decided April 16, 1975

Appeal from a decision of the Montana State Office, Bureau of Land Management, declaring the Lucky Strike, Trade Dollar and Dixon lode mining claims null and void ab initio, M-28355.

Affirmed as modified.

1. Act of April 23, 1904 -- Indian Lands: Generally -- Mining Claims: Lands Subject to

Section 8 of the Act of April 23, 1904, 33 Stat. 302, providing for survey and allotment of lands within the Flathead Indian Reservation, excepts from mineral entry those lands classified as "timber land" by a Presidential Commission, and the Department of the Interior has no authority to overturn such classification and declare the "timber lands" more valuable as "mineral lands."

2. Indian Lands: Generally -- Mining Claims: Lands Subject to

Lands set apart as an Indian reservation cease to be a part of the public domain. A mining claim located on Indian lands not opened to entry is void ab initio.

3. Indian Lands: Generally

Unless there is an express provision to the contrary effect, lands contained in an Indian reservation are segregated for the benefit of the Indians, and withdrawn from the operation of the public land laws, including the mining laws.

4. Federal Employees and Officers: Authority to Bind government --  
Mining Claims: Generally

The authority of the Government to proceed with the determination of the validity of a mining claim is not barred by laches, because Government property is not to be disposed of contrary to law, despite any acquiescence, laches, or failure to act on the part of its officer or agents.

APPEARANCES: Earl F. Elstone, Esq., Spokane, Washington, for appellants; Richard A. Baenen, Esq., Wilkinson, Cragun & Barker, Washington, D.C., for Intervenor-Respondent, Confederated Salish and Kootenai Tribes.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

This matter is appealed to the Board 1/ as to the Dixon and Trade Dollar lode mining claims by Green Mountain Mining Co., as owner and Kootenay Copper Mines, Inc., as lessee and as to the Lucky Strike claim by Montana Copper King Mining Co., and Ms. Mabel Ashcroft from a decision of the Montana State Office, Bureau of Land Management, dated April 25, 1974, declaring these claims, as well as a number of other claims, 2/ null and void ab initio because the claims had been located on lands within the Flathead Indian Reservation, classified as "timer lands" and excepted from disposition under the mineral laws.

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1/ Earl F. Elstone, representing Green Mountain Mining Co., as owner, and Kootenay Copper Mines as Lessee of the Dixon and Trade Dollar lode mining claims, filed their appeal dated May 20, 1974. Separate appeals were filed by Elstone representing Montana Copper King Mining Co., and Ms. Mabel Ashcroft on May 23, 1974, and May 22, 1974, respectively.

On July 9, 1974, an order was entered permitting the Confederated Salish and Kootenai Tribes to intervene. A reply brief, dated August 2, 1974, was filed by Richard A. Baenen on behalf of intervenor-respondent, the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

An amended reply brief, dated August 26, 1974, was filed by Elstone representing all appellants.

A supplemental brief of intervenor-respondent dated September 19, 1974, was filed.

2/ The other mineral locations included in the State Office decision were: Blue Eyed Nellie, New Deal, Lucky Mart, Little Joe and Isabel Mining claims situated in sec. 19, T. 18 N., R. 23 W., and sec. 24, T. 18 N., R. 24 W., and Blue Ox, Slow Poke, Eagle and May Flower Mining claims situated in sec. 4, T. 17 N., R. 22 W., and sec. 33, T. 18 N., R. 22 W., P.M., Sanders County, Montana. In the absence of any appeal, the State Office decision holding these claims null and void has become final.

The Flathead Indian Reservation was established by the Treaty of Hellgate dated July 16, 1855, 12 Stat. 975. The Lucky Strike, Trade Dollar and Dixon claims were originally located in SE 1/4 SW 1/4, SW 1/4 SE 1/4 sec. 33, T. 18 N., R. 22 W.; W 1/2 NE 1/4, E 1/2 NW 1/4 sec. 4, T. 17 N., R. 22 W., P.M., Sanders County, Montana, by William Drake. Drake posted his location certificate on the Dixon claim on May 3, 1910, built a cabin, and shipped 28 tons of ore to the smelter that year. He posted an amended location notice on May 3, 1911. The Lucky Strike claim was located on May 2, 1910, the Trade Dollar on June 12, 1910, with amended locations dated June 12, 1911. Evidence was submitted by appellant that Drake and other associates shipped ores, through 20 of the next 28 years, having a gross value of \$75,542.33. Records of the Green Mountain Mining Co., successor claimant to Drake, indicate a production of copper, silver, gold and platinum having a gross value of \$157,773.47, prior to 1950. No production has been reported since 1954.

The Act of April 23, 1904, 33 Stat. 302, provided for the survey and allotment of lands then within the Flathead Indian Reservation and the sale and disposal of all surplus lands after allotment. The following are pertinent sections of the Act:

Sec. 5. That said commissioners [appointed by the President] shall then proceed to personally inspect and classify and appraise \* \* \* all of the remaining lands embraced within said reservation. In making such classification and appraisal said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

Sec. 8. That when said commission shall have completed the classification and appraisal of all said lands and the same shall have been approved by the Secretary of the Interior, the lands shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes \* \* \*. (Emphasis added.)

Sec. 9. That said lands shall be open to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner

in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy or enter any of said lands, except as prescribed in such proclamation \* \* \*. (Emphasis added.)

Sec. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or non-mineral character of the same: Provided, That no such mineral location shall be permitted upon any lands allotted in severalty to an Indian. (Emphasis added.)

Sec. 11. That all merchantable timber on said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior, for cash, under sealed bids or at public auction, as the Secretary of the Interior may determine, and under such regulations as he may prescribe: Provided, That after the sale and removal of the timber such of said lands as are valuable for agricultural purposes shall be sold and disposed of by the Secretary of the Interior in such manner and under such regulations as he may prescribe.

On May 22, 1909, President William Howard Taft issued a Proclamation which provided that "\* \* all the nonmineral unreserved lands classified as agricultural lands of the 1st class, agricultural lands of the 2nd class and grazing lands within the Flathead Indian Reservation \* \* \* shall be disposed of under the provisions of the homestead act of the United States \* \* \* and be opened for settlement and entry \* \* \*"

Section 9 of the Proclamation provided that "[n]one of the lands opened to entry \* \* \* shall become subject to entry prior to the first day of September, 1910, except in the manner prescribed herein; \* \* \*. On September 1, 1910 all of said lands which have not been entered under this Proclamation will become subject to settlement and entry under the general provisions of the homestead laws and the said acts of Congress." (Emphasis added.)

In its decision of April 19, 1974, the State Office held the Trade Dollar and Dixon claims null and void ab initio for the reason

that they were located on lands classified as timber lands on May 6, 1910, and that in accordance with Section 8 of the Act of April 23, 1904, timber lands were excepted from disposition under the mineral laws.

The Lucky Strike claim was declared null and void ab initio for the reason that at the time it was located (May 2, 1910), there had been no Presidential Proclamation opening any of the surplus lands to any type of entry. Since the original location of the Dixon claim was made May 3, 1910, and the Trade Dollar claim was June 10, 1910, the Montana State Office should have similarly declared them null and void ab initio.

Appellants appeal on the basis that the claims were and are valid and existing claims and not void ab initio. They allege that in the 1904 Act, section 10 provides for mineral entry on lands not specifically classified as mineral whether designated by the Presidential Commission as mineral or otherwise, such classification by the Commission being only prima facie evidence of the mineral or non-mineral character of the land. (See section 10, supra.) Thus appellants interpret that Act as allowing location of mining claims on lands even if they had been classified as timber lands. They further allege that sufficient minerals have been demonstrated in the claims to rebut the classification of the lands as "timber land."

Appellants contend that the amended locations of the Dixon and Trade Dollar claims would serve as effective locations even though the original locations are invalid.

Appellants further allege that production on the claims is sufficient to constitute a discovery at the time of location down to the present and that the annual assessment work required has been maintained.

Appellants acknowledge that ordinarily land within an Indian Reservation is not subject to entry under the general mining laws. However, they allege that here a specific law of Congress was passed to classify the land, to allot land to the Indians, and to sell and dispose of the Surplus Lands by means of the Homestead Laws, the Town-Site Laws, sale of timber and timber lands and under the general provisions of the United States Mining Laws (with the proceeds to be turned over to the Indians).

Finally, appellants urge that their open and hostile claims of the lands for mining location constitute adverse possession. <sup>3/</sup>

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<sup>3/</sup> Apparently alluding to 30 U.S.C. § 38 (1970), appellants allege that the statute of limitations should be that of the state in which the claims are located. Montana has a 10 year statute of limitations for adverse possession.

Intervenor-respondent contends that appellants' mining claims are null and void ab initio because the land was never opened for entry by Presidential Proclamation and because the land upon which the claims were located at the time of location was classified as timber land and therefore was excepted from disposition under the mineral laws. Respondent contends the claims may not be established by adverse possession because title to the land was in the United States, in trust for the tribes, and never open for entry under the mining laws.

The primary issue raised is whether the State Office was correct in its assertion that the claims were void ab initio.

It is self-evident and has long been held that in order for a mineral claim to be valid the land on which it is must be open for entry. Oliver and Robert A. Reese, 4 IBLA 261 (1972). A crucial question is whether the Commission's determination that surplus land classified as "timber land" is conclusive, and, if so, whether such classification effectively removes the land from entry.

Although both the intent of the 1904 Act and the wording of this portion of the Act leave room for interpretation, we agree with the decision of the State Office in holding that the classification "timber land" operated so as to prevent such land from being opened for mineral location and entry.

Section 8 of the 1904 Act provides for disposal of lands within the Flathead Indian Reservation under certain conditions. We believe the intent of the section was to protect the Reservation from unnecessary interference while at the same time opening surplus land for its best use provided that adequate compensation was provided the Indians. The section, without contradictory language, clearly indicates that certain "surplus lands" may be used for entry under homesteading, town-site and mineral laws, except for lands classified as timber lands.

The clear intent of excepting timber land from any entry was set out in the opinion of the First Assistant Secretary, 54 I.D. 166 (1922). Comparing the 1904 Act to the subsequent Act of March 3, 1909, amended on May 18, 1916, 39 Stat. 123, 139, he stated:

The above provisions [of the 1909 act] are in entire accord with the provision in Section 8 of the act of April 23, 1904, which excepts lands classified as timber lands from disposal under the mining laws, showing that it could not have been contemplated by Congress in section 10 of said act to subject timber lands to mineral

entry, and this for the reason that provision was subsequently made for the disposal of such timber lands other than under the mining laws. 54 I.D. at 168.

Appellants, however, contend further that the classification of timber land is only prima facie evidence of the most valuable use of the land (Act of 1904, section 10, supra). They thus contend that land classified as "timber land" can be entered if it is proven that the land is more valuable as mineral land.

Appellants have misconstrued the intent and meaning of section 10. The clear meaning of the language is that future classification by the Commission of land as mineral is only prima facie evidence that the land has some mineral value and thus is open for exploration and not that the land has mineral value to the extent of a discovery. A second meaning is that the land classified other than as timber land (i.e., homestead, and town-site) could become more valuable as mineral land; thus entry for mineral exploration would not be precluded. Under section 8, timber land is specifically excepted from entry for other purposes.

[1] The inescapable conclusion is that until by Presidential Proclamation land on the Reservation was classified as other than timber land, there was no right of entry for mineral claims. Moreover, the Department of the Interior cannot overturn the classification and declare "timber land" more valuable as "mineral land" as appellant contends. Section 8 of the Act of 1904, supra, states that the exception to entry is for those lands classified as timber lands by the Presidential Commission. The classification by the Commission is the basis for exception and not any determination which may be made by the Secretary based on value. Even assuming the land in question was "incorrectly" classified as timber land rather than mineral land (which we do not) the result would not be altered.

[2] Moreover, land set apart as an Indian reservation ceases to be a part of the public domain. United States v. Bennett County, 265 F. Supp. 249 (D.S.D. 1967). A claim which has been located on Indian lands not yet opened to entry is void ab initio, and may be declared invalid without a hearing. High Meeks, 29 L.D. 456 (1900). Cf. The Dredge Corporation, 65 I.D. 336 (1958) and cases cited.

[3] Unless there is an express provision to the contrary effect, lands contained in an Indian reservation are segregated for the benefit of the Indians, and withdrawn from the operation of the public

land laws, including the mining laws. See Ernest Alpers, A-30627, (March 10, 1967); The Wilderness Act, 74 I.D. 97 (1967). Moreover, there is a well-established rule of statutory construction to favor Indians in case of doubt as to the meaning of words in treaties or legislation in their behalf. Navajo Tribe of Indians v. State of Utah, 12 IBLA 1, 80 I.D. 441 (1973).

Thus, the Lucky Strike, Dixon and Trade Dollar claims were null and void ab initio because at the time they were located, there had been no Presidential Proclamation opening the land to any type of entry. The amended Dixon and Trade Dollar claims were null and void ab initio because they were located on lands classified as timber lands, specifically excepted from disposition under the mineral laws.

[4] Finally, appellants contend the mining claims may be established by adverse possession even if the initial locations of the claims were invalid. Appellants base this argument on the contention that the land in question is open to mineral entry. Since we have held to the contrary, supra, it follows that appellants have no rights to their claims based on adverse possession under the mining laws. Furthermore, the authority of the Government to proceed with the determination of the validity of a mining claim is not barred by laches, because Government property is not to be disposed of contrary to law, despite any acquiescence, laches, or failure to act on the part of its officers or agents. United States v. Zweifel, 11 IBLA 53, 80 I.D. 323 (1973).

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 as modified.

Douglas E. Henriques  
Administrative Judge

We concur:

Administrative Judge  
Frederick Fishman

Joseph W. Goss  
Administrative Judge

