

**Editor's note: Appealed -- aff'd, Civ. No. S-78-51 (E.D.Cal. Feb. 1, 1979)**

JACK D. CANON ET AL.

IBLA 77-7

Decided May 2, 1977

Appeal from decision of the California State Office, Bureau of Land Management, declaring appellants' mining claims null and void ab initio. CA 3851.

Affirmed.

1. Mining Claims: Generally! ! Withdrawals and Reservation: Effect of! ! Public Records

Where a mining claim is located on lands at a time when the official records of the Bureau of Land Management showed such lands to be subject to a proposed withdrawal from operation of the mining laws, that mining claim is null and void ab initio.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellants.

#### OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Jack D. Canon, Billie B. Canon, C. Fred Underwood, Chloe Underwood, Donald W. Canon, Susan Canon, David A. Underwood, and Ann Underwood appeal from an August 23, 1976, decision of the California State Office, Bureau of Land Management (BLM), declaring their Block Pumice Association Placer Nos. 1, 2, 5, 6, 9, 10, 13, 14, 15, and 16 mining claims null and void ab initio. The claims, all of which are unpatented, are situated in T. 43 N., R. 2 E., M.D.M., Siskiyou County, California, and were located by the above! named parties on October 30, 1975. According to official BLM records, the lands embraced within the claims are included in the Little Glass Mountain, Pumice Stone Mountain, and Paint Pot Crater Geological Areas.

By authority of Executive Order No. 10355, the Department of Agriculture on March 27, 1975, filed an application CA 2833 for withdrawal of said geological area from further location and entry

under the mining laws. The area in question is presently under study to determine if it qualifies as a national landmark area due to the presence of significant historical and archaeological phenomena. The application for withdrawal was noted on the official BLM records on April 3, 1975, and the decision below held that this action effectively withdrew the land from entry and location as of that date, thus rendering all subsequent mining locations thereon null and void from the beginning. Claimants appeal from that decision.

Claimants, by their attorney, have filed a rather extensive brief raising a detailed series of objections to the holding below. We shall consider these exceptions in the order in which they are presented in this brief, beginning with the contention that the State Office decision is invalid because it violates due process, being entered without notice or hearing.

At the outset it is asserted by the claimants herein that a discovery of a valuable deposit of block pumice was made on each claim before the date of the request for withdrawal. We note that the Pumice Stone Mine claim Nos. 1, 2, 5, 6, 9, 10, 13, 14, 15 and 16 of some of the present appellants and involving the identical land as the Block Pumice Association placer mining claim Nos. 1, 2, 5, 6, 9, 10, 13, 14, 15 and 16 (herein discussed), were the subject of a mineral contest, California 448. Following a hearing before an administrative law judge, a decision was issued holding each of the Pumice Stone Mine claims null and void for the reasons that the pumice present on each claim is a common variety mineral, and that no discovery of a valuable mineral deposit existed on or prior to July 23, 1955, when common variety pumice was removed from location under the United States mining laws, 30 U.S.C. § 611 (1970). Following an appeal, this Board affirmed that decision in United States v. Underwood, 22 IBLA 62 (1975). We are aware that judicial review of the Board's decision is pending in an action styled Underwood v. Secretary of the Interior, Civil No. S-76-91, E.D. California, filed February 9, 1976. The Board's deliberations herein are related only to the Block Pumice Association placer mining claims located in October 1975.

While it is quite correct, as appellants note, that both the Administrative Procedure Act, 5 U.S.C. §§ 554, 556 (1973), and the Fifth Amendment to the Constitution of the United States guarantee a "due process" or adjudicative hearing when the property rights of private parties are the subject of agency action, appellants are not in a position to claim the protection of these guarantees since they have not acquired any protectable property interest by virtue of their purported mineral locations. It is a fundamental axiom of federal mining law that a mining claim located on land withdrawn

from location under the mining laws is null and void ab initio, i.e., without legal effect from the very outset. Robert L. Beery, 25 IBLA 287 (1976), 83 I.D. 249; J. P. Hinds, 25 IBLA 67 (1976), 83 I.D. 275; Leo J. Kottas, 73 I.D. 123 (1966), aff'd sub nom. Lutzenhiser v. Udall, 432 F.2d 328 (9th Cir. 1970). Appellants, citing 5 U.S.C. § 558(b), appear to suggest that the decision below imposes a "sanction" in a manner other than "as authorized by law." This contention is mistaken, for there has been no "sanction" imposed where, as here, agency action leaves the private party with exactly those entitlements which he possessed before the action was taken, i.e., no entitlement whatever.

The departmental decisions cited by appellants in support of their claim to a hearing are all inapposite. None of the cases cited deal with withdrawals from mining entry and thus none are controlling in the present situation. While it is correct, as appellants state, that "the Department has consistently ruled and conceded that mining claimants are entitled to notice, hearing, and trial in accordance with the Administrative Procedure Act," this policy has never extended to instances where it is clear from the face of the official BLM records that a particular claimant never owned any interest in the withdrawn federal lands. Claimants cite Adams v. Witmer, 271 F.2d 29 (9th Cir. 1959), in support of their argument that a full hearing was a necessary prerequisite to cancellation of their entry, but the court in that case (Adams, supra, p. 35, footnote 10) specifically noted that, "The record does not disclose whether the forest reserve was established before or after these particular locations." The present case, in contrast to Adams, involves no controverted factual issues. It is clear as a simple matter of law that appellants have no interest in the claims at issue and thus the BLM may declare the claims void without a hearing.

[1] Mining claims are properly declared null and void ab initio where they are located on land which, on the date of location, was included in an application for withdrawal which previously had been noted on land office records. John Boyd Parsons, 22 IBLA 328 (1975). Since the invalidity of the claims can be determined by mere reference to the public records, this case is immediately distinguishable from the cases cited by appellants which require a hearing prior to administrative action affecting the property rights of private parties. We have, in the present instance, a case where no property right within the reach of the requirements of due process has ever accrued. We note furthermore that there is nothing in the Department of the Interior's regulations that would require a hearing under these circumstances. 43 CFR 4.451 (1974), which appellants read as requiring a hearing in this case, states merely that, "The Government may initiate contests for any

cause affecting the legality or validity of any entry or settlement or mining claim." (Emphasis supplied.)

Appellants suggest, as a second reason for reversal of the BLM decision, that the Department of Agriculture, through the Forest Service, is without jurisdiction or authority over mining claims within national forests.

This contention is not incorrect. The responsibility to determine the validity of mining claims on national forest lands is vested in the Secretary of the Interior. But we must point out that the Forest Service does have authority over operations which use the surface of national forest lands for mining purposes under 30 U.S.C. §§ 21-54 (1970), with its rules and procedures being set forth in 36 CFR Part 252. While under a Memorandum of Understanding between the Bureau of Land Management and the Forest Service, dated April 1, 1957, mining engineers employed by the Forest Service may perform all necessary examinations of mining claims on national forest lands incidental to the overall management of such lands, and, although a contest proceeding may be initiated by BLM at the request of the Forest Service, and prosecuted by employees of the Department of Agriculture, the hearing, if necessary, is held before an Administrative Law Judge of the Department of the Interior, and the ultimate administrative decision relating to the validity of the mining claims must be made by the Department of the Interior. See United States v. Dummar, 9 IBLA 308 (1973), and cases cited therein.

However, in this case, the Forest Service took no action against the mining claims. The Department of Agriculture, acting within statutory authority, requested the Department of the Interior to withdraw certain lands from operation of the mining laws. Authority for the Secretary of the Interior to withdraw public lands from entry was delegated by E.O. No. 10355 of May 26, 1952 (17 F.R. 4831), pursuant to authority vested in the President by the Act of June 25, 1910, 43 U.S.C. § 141 (1970). Such an application for withdrawal of lands from operation of U.S. mining laws now included in the subject locations, was duly filed by the Department of Agriculture in accordance with regulations in 43 CFR 2351.1. The segregative effect of such an application is set forth in 43 CFR 2351.3, as follows:

(a) The noting of the receipt of the application in the tract books or on the official plats maintained by the Land Office in which the application was properly filed or in the tract books maintained by the Washington Office of the Bureau of Land Management if there is no Land Office for the State in which the lands are located shall temporarily segregate such lands as provided in § 2091.2-5.

Section 2091.2-5 provides, in pertinent part, that:

(a) Application. The noting of the receipt of the application under §§ 2351.1 to 2351.6 in the tract books or on the official plats maintained in the proper office shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal.

Thus the segregation of the lands upon which appellants have located their claims was well within the clear statutory authority of the agency (i.e., Interior) which took the action which is challenged by this appeal. As noted above, when mining entries and locations are made on lands which have previously been noted on the official BLM records as the subject of a proposed withdrawal, such entries or locations are void and without effect from the beginning. 1/

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1/ We observe that the Federal Land Policy and Management Act of 1976, Public Law 94-579, 90 Stat. 2743, 43 U.S.C. §§ 1701 et seq., October 21, 1976, specifies a new procedure governing withdrawals. Section 204(b) of the Act, 90 Stat. 2751-2755, 43 U.S.C. § 1714, provides that on and after the date of the Act, the Secretary of the Interior may make, extend, modify or revoke withdrawals only in accordance with the provisions and limitations of this section. Notice of new applications for withdrawal and a statement as to the extent of segregation while the application is being considered must be published in the Federal Register. Upon publication, the land will become segregated from operation of the public land laws to the extent specified in the notice. The segregative effect of an application shall terminate upon rejection of the application, withdrawal of the land by the Secretary, or at the expiration of 2 years from the date of notice. Under subparagraph (g) all applications for withdrawal pending on the date of the Act shall be processed and adjudicated to conclusion within 15 years from the date of the Act. The segregative effect of any such pending applications not so processed shall terminate on that date.

Accordingly, 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.

Douglas E. Henriques  
Administrative Judge

We concur:

Edward W. Stuebing  
Administrative Judge

Joan B. Thompson  
Administrative Judge

