

FEDERAL-AMERICAN PARTNERS

IBLA 78-554

Decided October 26, 1978

Appeal from decision of the Wyoming State Office, Bureau of Land Management, declaring mining claims null and void ab initio, in part. W MC 9104–W MC 9107.

Affirmed.

1. Mining Claims: Lands Subject to—Mining Claims: Generally

Land which has been patented without a reservation of minerals to the United States or which otherwise has been removed from the operation of the United States' mining laws is not available for the location of mining claims. Mining claims located on such land after it is so removed are null and void ab initio.

2. Mining Claims: Lands Subject to—Mining Claims: Withdrawn Land—Withdrawals and Reservations: Effect of

A mining claim, located at a time when the land is withdrawn from mineral entry, may be properly declared null and void ab initio without a hearing.

3. Patents of Public Lands: Effect

The effect of the issuance of a patent is to transfer the legal title from the United States and to remove from the jurisdiction of the Department consideration of all disputed questions concerning rights to the land.

APPEARANCES: John S. Kirkham, Esq., Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal is from a decision dated July 12, 1978, by the Wyoming State Office, Bureau of Land Management (BLM), which declared parts of designated mining claims null and void ab initio.

The claims at issue lie in the following described lands in Fremont County, Wyoming.
T. 33 N., R. 90 W.

W MC 9104	Arm 1	Sec. 36: SW 1/4 SE 1/4
9105	2	36: SE 1/4
9106	3	36: SE 1/4
9107	4	36: NE 1/4 SE 1/4

The decision stated with respect to these claims:

According to records on file in this office, a part of the claimed lands are privately owned and not subject to location under the Federal Mining Laws. Those portions of your claims lying outside the privately owned lands are not affected by this decision.

Appellants point out in their statement of reasons that section 36 was included in a grant to the State of Wyoming dated October 18, 1893, and that the United States retained no interest in the lands. Appellants argue, however, that a mining claimant may lay the lines of his claim upon patented lands and that the portion of a claim so situated, while giving the claimant no interest in the patented lands, is neither invalid nor void. Appellants assert further that the BLM action afforded neither an opportunity for a hearing nor the protection of due process of law. Appellants contend finally, that if the lands in section 36 are privately owned then BLM has no jurisdiction to rule on the validity of mining claims located thereon.

[1, 2] We find no merit in appellants' arguments that a mining claim may be located on land which has been patented without the reservation of any interest to the United States. Mining claims may only be located on lands open to the operation of the United States' mining laws. Land which has been patented without a reservation of minerals to the United States or which otherwise has been removed from the operation of the mining laws is not available for the location of mining claims. Paul S. Coupey, 33 IBLA 178 (1977). Mining claims located on such land after it is so removed are null and void ab initio. E.g., Floyd W. McCarty, 28 IBLA 246 (1976); J. P. Hinds, 25 IBLA 67, 70, 83 I.D. 275, 276 (1976); Montana Copper King Mining

Co., 20 IBLA 30 (1975). Appellants invoke the following cases: The Hidee Gold Mining Co., 30 L.D. 420 (1901); The Alice Lode Mining Claim, 30 L.D. 481 (1901); and Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898), as authority for the proposition that the location lines of a lode claim may be laid within, upon, or across the surface of patented agricultural land for the purpose of claiming the free and unappropriated ground within such lines and the veins apexing in such ground, and of defining and securing extralateral underground rights upon all such veins. Appellants seek to metamorphose that proposition to a holding that all areas within the lines so established may be considered as part of the mining claim, despite the fact that such land had been previously disposed of by the Federal Government.

In Swanson v. Sears, 224 U.S. 180, 181-2 (1912), Justice Oliver Wendell Holmes essentially disposed of that contention as follows:

The defendant in error Kettler applied for a patent for a mining claim. The plaintiff in error filed an adverse claim under Rev. Stat., § 2326, and then brought this complaint to establish his right of possession to the area in dispute. The facts are these: In 1881 the defendant's claim, then called Emma No. 2, was located, running north and south. In 1889 the plaintiff's claim, Independence No. 2, was located, running east and west, its westerly end overlapping the southerly end of Emma No. 2, and the discovery being within the overlapping part. Kettler, who then had Emma No. 2, failed, because of the illness of her daughter, to do the assessment work upon it for 1903, and, supposing that to be the only way to hold the ground, relocated it on January 1, 1904, as Malta No. 1, since which time she has done the required annual work. The only question is whether, on the failure of the defendant, as stated, for 1903, the plaintiff's location attached, or whether it was wholly void. The state courts gave judgment for the defendant, 17 Idaho, 321, and the plaintiff brought the case to this court.

The argument for the plaintiff is a vain attempt to reopen what has been established by the decisions. A location and discovery on land withdrawn quoad hoc from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right. Belk v. Meagher, 104 U.S. 279. Gwillim v. Donnellan, 115 U.S. 45. This doctrine was not qualified in its proper meaning by Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, for that case attributed effect to the overlapping location only for the purpose of securing extralateral rights on

the dip of a vein the apex of which was within the second and outside of the first; rights consistent with all those acquired by the first location. See Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation Co., 196 U.S. 337, 342. The principle of Belk v. Meagher was reaffirmed, 171 U.S. 78, 79, as it was again in Clipper Mining Co. v. Eli Mining and Land Co., 194 U.S. 220, 226, 227, and in Brown v. Gurney, 201 U.S. 184, 193. It is true that there is reasoning to the contrary in Lavagnino v. Uhlig, 198 U.S. 443, but in Farrell v. Lockhart, 210 U.S. 142, 146, 147, that language was qualified and the older precedents recognized as in full force. We deem it unnecessary to consider the distinctions attempted by the plaintiff between location and relocation, voidable and void claims, etc., as the very foundation of his right, the offer and permission of the United States under Rev. Stat., § 2322, was wanting when he did the acts intended to erect it. His entry was a trespass, his claim was void, and the defendant's forfeiture did him no good.

If a valid and subsisting mining claim is a sufficient bar to preclude a contradictory right, a fortiori, patented land is such a bar.

It is also well-settled that a mining claim may be declared null and void ab initio without a hearing where it is located on land at a time when the land is not subject to the mining laws. Edward L. Macauley, 35 IBLA 202 (1978). E.g., United States v. Consolidated Mines & Smelting Co., 455 F.2d 432 (9th Cir. 1971). In the case at bar, appellants themselves found from the public land records that the lands in question were the subject of a state grant in 1893. There is thus no disputed question of fact requiring an evidentiary hearing.

[3] Appellants' final argument fails to distinguish between jurisdiction to issue rulings and jurisdiction over lands. BLM offices issue a considerable volume of decisions denying various applications, claims, lease offers, etc., where the subject lands are no longer under their jurisdiction. BLM's authority to issue such rulings as to what constitutes public land is well established. Where BLM has determined that legal title to land has been transferred from the United States, consideration of disputed questions concerning rights to the land are removed from the jurisdiction of the Department. State of Alaska, 35 IBLA 140 (1978); Germania Iron Company v. U.S., 165 U.S. 379, 383 (1897); Fernie M. Rogers, 29 IBLA 192 (1977); Nadja Davis Gamble, 23 IBLA 128 (1975); Basille Jackson, 21 IBLA 54 (1975); Ethel Aguilar, 15 IBLA 30 (1974); Bryan N. Johnson, 15 IBLA 19 (1974); Norman M. Rehy, Sr., 13 IBLA 191 (1973); Dorothy H. Marsh, 9 IBLA 113 (1973); Clarence March, 3 IBLA 261 (1971); Everett Elvin Tibbets, 61 I.D. 397 (1964). BLM does have authority to determine whether lands are subject to the United States' mining laws.

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.

Frederick Fishman
Administrative Judge

We concur.

Joan B. Thompson
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

