

R. M. POLK
GENE L. BROWN

IBLA 80-843

Decided August 25, 1981

Appeal from the decision of the Oregon State Office, Bureau of Land Management, declaring placer mining claims, OR MC 18528-18531, null and void.

Set aside and remanded; hearing ordered.

1. Administrative Procedure: Hearings -- Mining Claims: Hearings -- Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Land -- Rules of Practice: Hearings

Mining claims located on land previously withdrawn from mineral entry are null and void ab initio. However, where there are factual questions relating to whether action taken subsequent to a withdrawal is in the nature of an amendment to a previous location or whether it constitutes a relocation, the mineral claimant will be granted the opportunity to show that the subsequent action was a permissible amendment.

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

OPINION BY ADMINISTRATIVE JUDGE BURSKI

R. M. Polk and Gene L. Brown appeal from the decision of the Oregon State Office, Bureau of Land Management (BLM), dated July 10, 1980, declaring the Polk #1 through #4 placer mining claims, OR MC 18528 through OR MC 18531, null and void because the claims were not located on Federal lands open to location under the mining laws.

On August 20, 1979, appellants timely filed notices of location for each claim as required by section 314 of the Federal Land Policy and Management Act, 43 U.S.C. § 1744 (1976). 1/ The notices indicate

1/ Evidence of assessment work for the 1979 assessment year was also timely filed for each claim on Oct. 19, 1979, as required by FLPMA.

that the claims were located on July 29, 1970. They encompass the west and center two-thirds of lots 2 and 3, sec. 31, T. 39 S., R. 6 W., Willamette meridian, Josephine County, Oregon. However, Public Land Order No. 4289, dated October 5, 1967 (32 FR 14101, Oct. 10, 1967), withdrew lots 2 and 3 from all forms of appropriation under the public land laws, except mineral leasing, subject to valid existing rights. The order reserved the lands for the proposed Illinois Valley Division, Rogue River Basin Reclamation Project.

In their statement of reasons, appellants urge that the BLM decision be vacated and the case remanded for hearing to permit evidence to be heard on the factual question of whether appellants had a valid existing right to the lands in question prior to the date of the withdrawal and on the issue of the validity of the claims. They claim that the 1970 location notices were intended to "amend the claims to correct their boundaries" to conform to a survey which appellant Polk had done. They allege that they have made discoveries of gold and that the claims have long been recognized as valuable. Finally, appellants report that the Corps of Engineers had found that construction of a dam downstream from their claims as part of the reclamation project would not be feasible. They argue that, therefore, BLM should release the lands from the effects of the withdrawal.

[1] In proceedings before the Department to determine the validity of a mining claim, notice and an opportunity for a hearing are required only where there is a disputed question of fact. Where the validity of a claim turns on the legal effect to be given facts of record concerning the status of the land when the claim was located, no hearing is required. United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971); H. B. Webb, 34 IBLA 362 (1978). Thus, ordinarily a mining claim located at a time when the land is withdrawn from mineral entry may properly be declared null and void without a hearing. The Heirs of M. K. Harris, 42 IBLA 44 (1979); Edward L. Macauley, 35 IBLA 202 (1978).

But where there are factual questions relating to whether an action taken subsequent to a withdrawal is an amendment to an earlier location or whether it is a relocation of the claim adverse to previous possessors, a mineral claimant will be granted the opportunity to show that the subsequent action was a permissible amendment. R. Gail Tibbetts, 43 IBLA 210, 86 I.D. 538 (1979).

The location notices submitted herein give no indication that they were intended to be amendments, and, therefore, we may infer that such was not the intent. R. Gail Tibbetts, *supra* at 228-29, 86 I.D. at 547. On appeal, however, appellants assert that they filed the notices intending to amend the claims to correct boundaries. They also claim that their "possessory title related back to the rights of the predecessors from whom rights to the ground were acquired prior to the withdrawal." If this is so, then the 1970 locations may well relate back to locations made by appellants' predecessors, and the claims

would not be null and void. United States v. Consolidated Mines & Smelting Co., *supra* at 441.

The following factual matters are in dispute: (1) Whether appellants held title to the claims prior to the 1967 withdrawal; and (2) whether appellants intended the 1970 locations to be amendments to earlier locations, relocations, or new locations. 2/ These matters are best determined at a hearing. Appellants have the burden of showing that the 1970 location notices represent amended locations rather than new locations or relocations.

Finally, we note that neither appeal to this Board nor the hearing ordered herein is the proper vehicle for arguing that a Secretarial withdrawal should be revoked and the land be restored to entry. Harry H. Wilson, 35 IBLA 349, 359-60 (1978); J. P. Hinds, 25 IBLA 67, 72, 83 I.D. 274, 277 (1976). Moreover, such a relocation would not validate a claim located when the land was not open to entry.

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 set aside and the case file referred to the Hearings Division for the assignment of an Administrative Law Judge.

James L. Burski
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Douglas E. Henriques
Administrative Judge

2/ The distinctions between these actions are set forth in detail in R. Gail Tibbetts, *supra*.

