

Appeal from a decision of the Arizona State Office, Bureau of Land Management, rejecting mineral patent application A 7967 and declaring mining claims null and void ab initio.

Vacated and remanded.

1. Mining Claims: Location -- Mining Claims: Lode Claims -- Mining Claims: Placer Claims

A mining claimant who has met certain fundamental requirements of the mining law, such as discovery, citizenship, and expenditure, and who has exclusively held and worked his claim for the period prescribed by the applicable statute of limitations for mining claims is entitled to a patent, regardless of the fact that the claim may have been improperly located as lode or placer, assuming no intervening loss of discovery.

2. Mining Claims: Common Varieties of Minerals: Generally

The standards set forth in United States v. U.S. Minerals Development Corp., 75 I.D. 127 (1968), as modified by McClarty v. Secretary of Interior, 408 F.2d 907 (9th Cir. 1969), are applicable in determining whether a particular substance is a common variety of mineral.

3. Act of August 4, 1892 -- Mining Claims: Placer Claims

Under the provisions of the Act of Aug. 4, 1892, 30 U.S.C. § 161 (1976), a person authorized to enter lands under the mining laws of the United States may enter lands chiefly valuable for building stone under the provisions of the law in relation to placer mining claims.

4. Mining Claims: Location -- Mining Claims: Relocation

No amended location of a mining claim is possible if the original location was void.

APPEARANCES: W. Scott Donaldson, Esq., Phoenix, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Frank Melluzzo appeals from a decision of the Arizona State Office, Bureau of Land Management (BLM), dated October 27, 1980, rejecting mineral patent application A 7967 and declaring six mining claims null and void ab initio. The mining claims at issue, the Buffalo Ridge Nos. 2 through 5, 7, and 8 are situated in sec. 27, T. 4 N., R. 3 E., Gila and Salt River meridian, Maricopa County, Arizona.

BLM's rejection of mineral patent application A 7967 was based upon its finding that the Buffalo Ridge claims had been improperly located as lode claims when, in fact, they should have been located as placer claims. The claims were first located in 1953 and 1954 as lodes and are alleged to contain "high quality decomposed granite and landscaping boulders" (Application for patent at 2).

On July 15, 1971, location notices designated as "amended" were filed with Maricopa County for the Buffalo Ridge Nos. 2, 3, 4, 7, and 8. These notices announced the amended location of these claims as placer claims and in some cases described new claim boundaries. The area described by the Buffalo Ridge No. 2 claim, for example, increased from 20 acres to 35.56 acres. The area described in notices for claim Nos. 3 and 4 was enlarged from 20 acres each to 56 acres and 43 acres respectively. The Buffalo Ridge No. 5 claim, 1/ originally described as situated in the NE 1/4 sec. 27, was now described as situated in the NW 1/4 sec. 27, and the acreage decreased from 20 acres to 12.88 acres. Only claims No. 7 and 8 appear to have undergone no appreciable change of area. 2/

The State Office found that the attempt to amend the Buffalo Ridge location notices amounted to a relocation of these claims. It also quoted from appellant's mineral patent application wherein appellant stated that "no known lodes exist within the boundaries of said claims." If appellant concedes that no known lodes exist within the claims, BLM reasoned, appellant's locations in 1953 and 1954 for lode claims were null and void ab initio.

1/ The amended location notice for the Buffalo Ridge No. 5 was filed on Jan. 3, 1974, for the stated purpose of correcting errors in the original location notice.

2/ The description of claim No. 8, as set forth in the patent application, is wholly at variance with that contained in the location notices. A likely typographical error exists in this instance.

The State Office held that decomposed granite and landscaping boulders were locatable prior to July 23, 1955, only as placer claims. Cole v. Ralph, 252 U.S. 295 (1920), was cited for the proposition that a placer discovery will not sustain a lode location, nor a lode discovery a placer location. There being no valid locations in 1953 and 1954, the attempt to amend the claims in the 1970's to relate back to the earlier "locations" was of no effect, BLM concluded.

BLM also noted that on April 26, 1973, all unpatented land in sec. 27 was classified for disposal under the Recreation and Public Purposes Act of June 14, 1926, 43 U.S.C. § 869 (1976). The effect of this classification, the decision states, is to segregate the affected lands from all forms of appropriation and entry under the public land laws, including the mining laws. BLM further noted that lands occupied by the Buffalo Ridge No. 7 and by part of the No. 5 claim were covered by a free use permit from April 1, 1964, to March 31, 1974.

In his statement of reasons on appeal, appellant maintains that BLM is obligated to consider the validity of his patent application pursuant to 30 U.S.C. § 38 (1976). Section 38 states:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claim for such period shall be sufficient to establish a right to a patent thereto under this chapter * * *.

Appellant cites United States v. Haskins, 505 F.2d 246 (9th Cir. 1974), in support of his contention that the purpose of section 38 is to obviate the necessity of proving formal compliance with the requirements for locating a claim, including requirements as to posting and recording notices of location.

[1] In United States v. Guzman, 18 IBLA 109, 81 I.D. 685 (1974), this Board held that a mining claimant who has met certain fundamental requirements of the mining law, such as discovery, citizenship, and expenditure, and who has exclusively held and worked his claim for the period prescribed by the applicable statute of limitations for mining claims is entitled to a patent regardless of the fact that the claim may have been improperly located as lode or placer, assuming no intervening loss of discovery. See also United States v. Estate of Arthur C. W. Bowen, Deceased, 38 IBLA 390 (1979); Estate of Arthur C. W. Bowen, Deceased, 18 IBLA 379 (1975).

In the instant case, appellant alleges compliance with 30 U.S.C. § 38 (1976) and contends that he should be given the opportunity to prove such in a contest hearing. Case law of this Department points to Arizona's 5-year statute of limitations as prescribing the period for which appellant must prove that he held and worked the claims at issue. United States v. Estate of Arthur C. W. Bowen, Deceased, *supra* at 401; United States v. Boyle, A-034343 (Oct. 30, 1967). See also Birchfield v. Thiercof, 5 Ariz. App. 484, 428 P.2d 148 (1967); State v. Tracy, 76 Ariz. 7, 257 P.2d 860 (1953); and

Eagle-Picher Mining & Smelting Co. v. Meyer, 68 Ariz. 214, 204 P.2d 171 (1949).

The determination of the proper statute of limitations may be a critical factor in the instant case. If appellant cannot prove that the claims are located for an uncommon variety of mineral, *i.e.*, a deposit possessing distinct and special value, then the period of holding and working the claims under section 38 must have been completed prior to July 23, 1955. United States v. Guzman, *supra* at 135. On that date, 30 U.S.C. § 611 (1976) was enacted to provide as follows:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * * "Common varieties" * * * does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

Appellant does not allege that the locators through whom he asserts ownership worked and held the lands prior to April 22, 1953, when the first of the claims at issue was "located" as a lode. If this is an accurate date, then his ability to perfect his claim locations prior to July 23, 1955, is dependent upon a statute of limitations far shorter than that applied in the above-cited cases.

[2] Appellant, however, maintains that the minerals on his claims have a distinct and special value which removes them from the purview of 30 U.S.C. § 611 (1976) and allows them to be located as placer claims. Appellant should have the opportunity to prove this allegation. The standards set forth in United States v. U.S. Minerals Development Corp., 75 I.D. 127 (1968), as modified in McClarty v. Secretary of Interior, 408 F.2d 907 (9th Cir. 1969), are applicable. In addition, the opinion of the Ninth Circuit in Boyle v. Morton, 519 F.2d 551 (9th Cir. 1975), will prove instructive. See also Alyeska Pipeline Service Co. v. Anderson, 629 P.2d 512 (1981).

In demonstrating compliance with 30 U.S.C. § 38 (1976), appellant must take into consideration the withdrawal in 1973 of the land described as sec. 27 from appropriation under the mining laws, and must further bear in mind the effect of the free use permit granted to the State during the period April 1, 1964, to March 31, 1974. 43 CFR 3621.2; see also 43 CFR 3601.3.

[3] Although we vacate BLM's decision of October 27, 1980, we point out that BLM correctly held the Buffalo Ridge claims to have been improperly located as lode claims in 1953 and 1954. Claims located for granite have been traditionally located as placer claims. See, e.g., Layman v. Ellis, 52 L.D. 714, 719 (1929); United States v. Duvall, 65 I.D. 458, 461 (1958) (decomposed granite); United States v. Cardwell, A-29819 (Mar. 11, 1964) (decomposed granite). A further indication that the claims should have been located as placer claims is appellant's statement that the claims contain

building stone. The Act of August 4, 1892, 30 U.S.C. § 161 (1976), provides that "[a]ny person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mining claims." In United States v. Haskins, 59 IBLA 1, 43 n.27 (1981), this Board noted that use of the verb "may" by Congress should not be construed to give a locator the option of locating his claim as a lode or placer; the permissive verb "may" was used instead to acknowledge the option a locator would have to locate his claim pursuant to the Building Stone Act, 30 U.S.C. § 161 (1976), or make an entry under the Timber and Stone Act, Act of June 3, 1878, 20 Stat. 89.

[4] BLM was similarly correct in holding that the claim locations in 1971 and 1974 cannot relate back in time to the "locations" made in 1953 and 1954. No amended location is possible if the original location was void. R. Gail Tibbetts, 43 IBLA 210, 218, 86 I.D. 538, 542 (1979). An amended location is one made in furtherance of an original location. 43 IBLA at 215, 86 I.D. at 541. Where, as here, the original locations were void, the subsequent locations could not relate back in time to 1953 or 1954.

Moreover, if the claims are purportedly held under the Building Stone Act, supra, it must be shown that the lands are chiefly valuable for the building stone found thereon.

There remain the factual issues whether appellant can demonstrate his compliance with 30 U.S.C. § 38 (1976) for each individual claim and whether the claims contain an uncommon variety of deposit. BLM improperly rejected mineral patent application A 7967 without affording appellant a forum to develop his proof on these matters.

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 State Office is vacated and the record is remanded for action consistent herewith.

Anne Poindexter Lewis
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Edward W. Stuebing
Administrative Judge

