

WALTER MacEWEN
MALCOLM MacEWEN

IBLA 84-364

Decided June 18, 1985

Appeal from a decision of the Arizona State Office, Bureau of Land Management, declaring a mining claim null and void ab initio. A MC 214430.

Affirmed.

1. Administrative Procedure: Hearings -- Constitutional Law: Due Process -- Mining Claims: Generally -- Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Land

Mining claims located on lands closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required preliminary to a decision holding that such claims are invalid. The fact of such claims being void does not depend upon any act or decision of an administrative official.

APPEARANCES: Andrew L. Bettwy, Esq., Phoenix, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Walter MacEwen and Malcolm MacEwen appeal from a decision of the Arizona State Office, Bureau of Land Management (BLM), dated February 16, 1984, declaring the "Two Pilgrims" association placer mining claim, A MC 214430, null and void ab initio, because BLM records show that the land upon which the mining claim was located was included in exchange application, AR 034183, filed on September 8, 1964, and was therefore not open to location of mining claims at the time of location. The claim was located on February 1, 1984, and the notice of location was filed for recording with BLM on February 2, 1984.

In their statement of reasons for appeal appellants contend that mining claim A MC 214430 has been "selectively isolated for rejection while other claims have been allowed to stand of record." 1/ One of the appellants,

1/ The other claims referred to by appellants are listed by them as follows:

Dept	Dept Lead
Serial No.	File No.

Pilgrim Placer No. 1	180962	180962
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Walter MacEwen, states he had filed exchange application AR 034183, and he continues to seek and requests favorable action on the application. Noting that other claims located within the withdrawn lands had not been declared to be null and void, appellants state that "upon similar action being taken to declare [the other] claims * * * null and void AB INITIO * * * this appeal shall be deemed to have been withdrawn."

The BLM decision states as follows:

The land is included in exchange application AR 034183 filed September 8, 1964. The regulations in 43 CFR 2091.2-3 Exchange (36 Federal Register 22238, November 23, 1972) state: "The filing of a valid formal application for exchange under the regulations of Group 2200 of this Chapter will segregate the selected public land laws to the extent that they will not be subject to appropriation under the public land laws, including the mining laws" Group 2200 relates to exchanges-general procedures.

The law governing the segregative effects of exchanges was amended by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701, 1716 (1982). Consequently, the regulation, 43 CFR 2091.2-3 was deleted from the regulations on January 6, 1981. See 46 FR 1642. The current regulation, 43 CFR 2201.1(a) and (b), governing the segregative effect of exchanges provides:

(a) A notice of realty action offering to exchange certain lands which have, through the public land use planning process of the Bureau of Land Management, been determined suitable for acquisition and disposal by exchange, shall be published in the Federal Register * * *.

(b) The publication of the notice of realty action on an exchange proposal in the Federal Register may segregate the public lands covered by the notice of realty action to the extent that they will not be subject to appropriation under the public land laws, including the mining laws.

fn. 1 (continued)

Pilgrim Placer No. 2	180963	180962
Pilgrim Placer No. 3	180964	180962
Thanks Giving No. 1	180965	180962
Thanks Giving No. 2	180966	180962
Horshoe No. 1	195610	195610
Horshoe No. 2	195611	195610
Horshoe No. 3	195612	195610
Horshoe No. 4	195613	195610
Beebop No. 3	201490	201474
Beebop No. 4	201491	201474
Beebop No. 5	201492	201474
Beebop No. 6	201493	201474

Section 701 of FLPMA, 43 U.S.C. § 1701 note (1982), however, contains a savings clause which states "[a]ll withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect."

Since 43 CFR 2091.2-3 was the governing regulation at the time exchange application AR 034183 was filed, the segregative effects as outlined in that regulation govern. BLM's determination that the lands had been withdrawn was correct.

As to the other claims referred to by appellants, no property rights are created by the location of mining claims on lands not open to mineral entry, and if located after withdrawal such claims are void ab initio as a matter of law. Thus, no contest proceeding or hearing is required and the fact of such claims being void does not depend upon any act or decision of an administrative official. United States v. Consolidated Mines & Smelting Co., 455 F.2d 432 (9th Cir. 1971); Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966); see Lutzhizer v. Udall, 432 F.2d 328 (9th Cir. 1970) and IMCO Services, 73 IBLA 374 (1983).

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.

R. W. Mullen
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge

