

FLORIAN L. GLINESKI
MIKE GILLERAN

IBLA 84-11

Decided June 25, 1985

Appeal from a decision of the Montana State Office, Bureau of Land Management, declaring mining claim M MC 56516 null and void ab initio.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Recordation

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file with the proper office of BLM a copy of the official record of the notice or certificate of location and a copy of the evidence of assessment work on or before Oct. 22, 1979. Failure to make the required filings constitutes an abandonment of the claim by the owner.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Recordation -- Mining Claims: Relocation

Rights acquired under a relocation of a mining claim extinguished pursuant to 43 U.S.C. § 1744 (1982) will not relate back to the date of location of the original claim but only to the date of the relocation.

3. Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Reclamation Withdrawals

A mining claim is properly declared null and void if the land at the time of the location is withdrawn from appropriation under the mining laws by a first-form reclamation withdrawal. Once land has been withdrawn from mineral entry, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn.

4. Mining Claims: Lands Subject to -- Mining Claims: Placer Claims

A placer mining claim partially located on land patented without a reservation of minerals to the United States is properly declared null and void to the extent it includes such land.

APPEARANCES: Alan L. Joscelyn, Esq., Helena, Montana, for appellants.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Florian L. Glineski and Mike Gilleran have appealed from the August 26, 1983, decision of the Montana State Office, Bureau of Land Management (BLM), declaring the Sapphire Placer Mining Claim null and void ab initio. The decision stated the claim was located on February 9, 1980, and was null and void ab initio in its entirety because it was located on land withdrawn by a first-form reclamation withdrawal effective March 15, 1946, made pursuant to section 3 of the Reclamation Act, ch. 1093, 32 Stat. 388 (1902). ^{1/}

On October 23, 1979, appellants filed with BLM a copy of the certificate of location for Sapphire Placer (originally located in 1939) together with certificates of location for other claims. These filings were intended to effect compliance with section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA) 43 U.S.C. § 1744 (1982), which required owners of claims located before October 21, 1976, to record the claims with BLM on or before October 22, 1979. BLM informed appellants by decision dated November 15, 1979, that because the certificates of location had not been filed with BLM on or before October 22, 1979, appellants' failure to timely file the notices "shall be deemed conclusively to constitute an abandonment of the mining claim." Appellants did not appeal from this decision. Instead, appellants attempted to relocate those claims. However, BLM determined that the land embraced by the Sapphire Placer had been withdrawn from mineral entry prior to the time of appellants' attempted relocation.

Appellants contend the withdrawal should not apply to prevent them from relocating their claim. They assert no new rights are initiated by their relocation as the boundaries are the same, and the rights derived from the 1980 relocation are no greater than those derived from the original location. They further assert that the combination of the conclusive presumption of abandonment created by 43 U.S.C. § 1744 (1982) and the 1946 withdrawal order imposes such a severe consequence on them as to constitute a denial of due process. Appellants state their belief that Congress intended that persons whose claims became abandoned and who did not intend such a result should be able to relocate the claims.

^{1/} This section was codified as 43 U.S.C. § 416 (1970). Section 704 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2792, deleted the Secretary's authority to make reclamation withdrawals under 43 U.S.C. § 416 (1970). However, section 204 of FLPMA, 43 U.S.C. § 1744 (1982), provided that repeal did not affect the reclamation withdrawals existing on the date of enactment. Vincent Barnard, 66 IBLA 100, 102 n.1 (1982).

Appellants also assert the Secretary has not fulfilled his obligation under section 3 of the Reclamation Act, to restore to public entry any of the lands withdrawn when, in his judgment, such lands are not required for the purposes for which they were withdrawn. Appellants note that the irrigation works for which the withdrawal was made have long been completed.

Finally, appellants note the 1946 withdrawal order relies in part on the Act of June 26, 1936, ch. 842, 49 Stat. 1976, (1936), which amended the Taylor Grazing Act and provided that lands withdrawn under that provision will remain open to entry under the mining laws. Appellants contend that even though the order also refers to section 3 of the Reclamation Act, the order is too ambiguous and confusing to give public notice of withdrawal of the lands from mineral entry, and cannot provide the basis for cancellation of a constitutionally protected property right.

This appeal, therefore, requires us to consider the following questions: (1) the effect of appellants' late filing of the notices of location required by FLPMA, (2) whether the rights acquired by relocation of their claims relates back to the original claims, and (3) the effect of the first-form reclamation withdrawal.

[1] Pursuant to 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on or before October 21, 1976, was required to file a copy of the official record of the notice of location of the claim and a copy of the evidence of annual assessment work with the proper BLM office on or before October 22, 1979. Failure to make these filings in a timely manner constitutes conclusive presumption of abandonment of the claim by the owner. Appellants' arguments concerning the constitutionality of this requirement and the conclusive presumption of abandonment were considered by the Supreme Court in its recent decision in United States v. Locke, 105 S. Ct. 1785 (1985), a case in which the mining claimants were also 1 day late in making a filing required by 43 U.S.C. § 1744 (1982). The Court held that the deadline must be enforced, stating: "Faced with the inherent arbitrariness of filing deadlines, we must, at least in a civil case, apply by its terms the date fixed by the statute." Id. at 1792; see also Max Lair, 87 IBLA 106 (1985).

Appellants' arguments that Congress did not intend that their claims be lost was expressly rejected by the Supreme Court: "[W]e find that Congress intended in § 314(c) to extinguish those claims for which timely filings were not made. Specific evidence of intent to abandon is simply made irrelevant by § 314(c); the failure to file on time, in and of itself, causes a claim to be lost." United States v. Locke, supra at 1795-96.

[2] In view of the foregoing, the rights established by appellants' relocation of the claim can be no greater than the rights of any relocation where the prior claim has been abandoned or "extinguished." A leading treatise makes it quite clear that when a claim has been abandoned, the relocated claim cannot relate back to the date of location of the original claim:

Upon the abandonment of a mining claim, the right of possession of the claimant is absolutely lost, and the claim is to him as though he had never owned or occupied it. The former claimant

cannot reclaim the ground or reacquire any interest in the claim by resumption of work or by any act short of making a new location. Rights acquired under a relocation of an abandoned claim, whether by the former claimant or another, will not relate back to the date of location of the original claim, but only to the date of the relocation. [Footnotes omitted.]

2 Rocky Mountain Mineral Law Foundation, American Law of Mining, § 8.6 (1983). The appeal of Marvin Johnston, 81 IBLA 295 (1984), also involved claims relocated after BLM had declared the original locations abandoned and void for failure to file the instruments required by 43 U.S.C. § 1744 (1982). In that case we noted:

The fact that appellant's earlier mining claims are void precluded a finding that the present claims constitute amended locations, [i.e., that they relate back to the date of location of the prior claims]. As we said in R. Gail Tibbets, 43 IBLA 210, 218, 86 I.D. 538, 542 (1979):

No amended location is possible, however, if the original location was void. See Brown v. Gurney, 201 U.S. 184, 191 (1906). A void claim would be one in which a locator has failed to comply with a material statutory requirement. Flynn v. Vevelstad, 119 F. Supp. 93 (D. Alaska 1954), aff'd, 230 F.2d 695 (9th Cir. 1956).

See also Frank Melluzzo, 71 IBLA 178 (1983). Accordingly, appellant's mining claims, A MC 183666 through A MC 183669, are not considered amended locations of claims located prior to establishment of the Lake Mead National Recreation Area.

Id. at 297 n.1. Therefore, any rights appellants have in the Sapphire mining claim can date only from the relocation of the claim in 1980.

In United States v. Locke, supra at 1790, the Court expressly recognized that there are circumstances in which it is impossible to relocate a claim abandoned pursuant to 43 U.S.C. § 1744(c) (1982). In that case, the claimants were barred from relocating their claims because the claims were located for sand and gravel, minerals no longer subject to location. The Court held the claimant's "mineral deposits thus escheated to the Government." Id.

We now turn to consideration of the effect of the withdrawal of the land described by appellants' location. 2/ The record contains a copy of a

2/ The claim is described as being situated in sec. 4, T. 10 N., R. 1 W., Principal Meridian. The 1980 location notice does not describe the quarter section in which the claim is situated; however, the 1939 location notice refers to it as the northwest quarter. Although the decision under appeal refers to it as the northeast quarter, it is undisputed that this irregularly shaped claim (it has 15 corners) is situated at the mouth of Oregon Gulch on the east bank of the Missouri River. The only public lands in that part of sec. 4 are indicated on the official plat of survey as W 1/2 E 1/2 of lot 2, W 1/2 of lot 2, and lots 3, 6, 7, and 8.

recommendation for a first-form reclamation withdrawal including certain land, including that on which appellants' claim is located. On March 15, 1946, this recommendation was approved by the Acting Secretary. The effect of this withdrawal order was considered by the Board in Ronald B. McLean, 77 IBLA 380, 382 (1983). We held that a mining claim located on land previously withdrawn from appropriation under the mining laws by a first-form reclamation withdrawal is null and void ab initio. See also Pat Ray McClane, 85 IBLA 241 (1985). The withdrawal from mineral entry effected by the first form reclamation withdrawal is not vitiated by the fact that the withdrawal order also cited a provision of the Taylor Grazing Act in addition to section 3 of the Reclamation Act.

Appellants' argument that the land is not being used for the purpose for which it was withdrawn and should be restored to entry is unavailing. Once land has been withdrawn, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn. Raymond D. Dilley, 87 IBLA 150 (1985); see Samuel P. Speerstra, 78 IBLA 343 (1984). Were the Secretary to exercise his authority to revoke a reclamation withdrawal, such revocation would not relate back to the time when appellants relocated their claims. See Vincent Barnard, 66 IBLA 100, 104-05 (1982).

[4] The map submitted by appellants shows this claim not only includes land within the reclamation withdrawal but also land conveyed by patent No. 2242. The status plat indicates that this patent reserved no minerals. It is well established that the issuance of a patent transfers title from the United States and removes the land from the jurisdiction of the Department of the Interior. Henry J. Hudspeth, Sr., 78 IBLA 235 (1984). A placer claim partially located on land patented without a reservation of minerals to the United States is properly declared null and void to the extent it includes such land. See Pat Ray McClane, *supra*. Because appellants' claim is located entirely on land that was either withdrawn or patented, it is properly declared null and void.

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 as modified.

R. W. Mullen
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Franklin D. Arness
Administrative Judge

