Editor's note: Appealed -- dismissed without prejudice, Civ.No. R-86-202-ECR (D.Nev. Sept. 22, 1987)

PAUL VAILLANT ET AL.

IBLA 84-915 Decided January 30, 1986

Appeal from decisions of the Nevada State Office, Bureau of Land Management declaring unpatented lode mining claims null and void ab initio. N MC 134196 et al.

Affirmed.

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

   The Department does not have an affirmative duty to immediately adjudicate a mining claimant's recordation filings made pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976.

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

   Where mining claimants filed lode claims over a placer location previously made by them on the same land for the same mineral, the lode claims cannot legally be treated as an amendment of the placer claim.

3. Mining Claims: Location -- Mining Claims: Lode Claims -- Mining Claims: Placer Claims -- Mining Claims: Withdrawn Land

   Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

4. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Location -- Mining Claims: Placer Claims

   Failure by mining claimants to timely record the location notice of a placer claim located prior to 1976 resulted in the invalidation of their placer claim

pursuant to provision of sec. 314 of the Federal Land Policy and Management Act of 1976. The filing of assessment affidavits for invalid lode claims located over the placer claim could not operate to avoid the filing requirements of the Act.

APPEARANCES: Don Worden, Jr., Esq., Lewiston, Idaho, for appellants.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Paul Vaillant, Sergine Vaillant, Don Worden, Jr., and Charlotte M. Worden have appealed from September 4, 1984, decisions of the Nevada State Office, Bureau of Land Management (BLM), declaring six unpatented lode mining claims null and void ab initio. BLM found the claims were located on land which was segregated from mineral location and entry under the mining laws by a withdrawal made on February 27, 1975. The lode claims were designated the Sergine, Pine Cone, Sunshine, Jeanne Marie, Charlotte's Folly, and Goldbrick, and assigned BLM numbers N MC 43811, N MC 43812, N MC 43813, N MC 43814, N MC 134196, and N MC 134197 respectively.

On November 4, 1978, appellants filed location notices dated October 17, 1978, with BLM for the Sergine, Pine Cone, Sunshine, and Jeanne Marie claims. They filed notices of location for the Goldbrick and Charlotte's Folly claims on December 18, 1979. The group of claims is located in unsurveyed sections 22, 23, 26, and 27, T. 45 N., R. 26 E., Mount Diablo Meridian, Humboldt County, Nevada. Appellants filed evidence of assessment work for these claims through 1984. Prior to this however, on February 27, 1975, BLM had published a notice of lands withdrawn from location under the mining laws for evaluation of the wilderness potential of the Charles Sheldon Antelope Range. The withdrawal included secs. 26 and 27 as well as the S 1/2 S 1/2 sec. 22 and S 1/2 S 1/2 sec. 23, so as to totally encompass appellants' lode claims. 40 FR 8368 (Feb. 27, 1975).

In their statement of reasons on appeal, appellants allege the Sergine and Jeanne Marie claims were a 1978 relocation of an earlier placer claim, the "Hopeless," located in 1970. They recognize the 1975 wilderness withdrawal and concede the withdrawal negates their Pine Cone, Sunshine, Charlotte's Folly, and Goldbrick claims, as well as southern portions of the Sergine and Jeanne Marie lode claims. Portions of the Sergine and Jeanne Marie claims, however, are now said to lie within the boundaries of the earlier placer claim located by appellants in roughly the same area, the "Hopeless" placer claim. Appellants argue the portion of the Sergine and Jeanne Marie claims lying within the prior placer claim constitutes an amendment of the placer claim, which predated the withdrawal. According to appellants, they located the placer claim September 12, 1970. This argument and proof of the existence of the placer claim were not, however, presented to BLM, but are raised for the first time on appeal to this Board.

Appellants seek a fact-finding hearing, and argue they were damaged by BLM's failure to promptly reject the lode claims when they were first recorded with BLM in 1978. Had this been done expeditiously, appellants assert, they

would still have had time to make required filings for the placer claim mandated by the Federal Land Policy and Management Act of 1976 (FLPMA) so as to avoid its invalidation by the statutory deadline imposed by section 314 of FLPMA, 43 U.S.C. § 1744 (1982). They contend BLM is guilty of laches and should be estopped from rejecting their claims.

[1] Appellants' argument that an equitable estoppel may be based upon the failure of BLM to take immediate action upon their FLPMA filings is without merit. BLM does not have a duty to immediately determine the legal status of every claim filed with the agency and to notify claimants of its conclusions. See Hugh B. Fate, 86 IBLA 215 (1985); Mac A. Stevens, 84 IBLA 124, 126 (1984); 43 CFR 3833.5(f). Further, the elements of an estoppel are clearly not present here, since there is no argument made, nor any indication that appellants were misled by some act or representation of a federal employee. See United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978) cert. denied, 442 U.S. 917 (1979).

Section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1982), requires the owner of a mining claim located after October 21, 1976, to file with BLM a copy of the location notice and a description of the claim within 90 days of location. 43 CFR 3833.1-2. The owner of a mining claim located before October 21, 1976, had until October 22, 1979, to file a copy of his location notice with BLM, or his claim would be deemed conclusively to be abandoned by the owner. 43 U.S.C. § 1744(c) (1982). The United States Supreme Court upheld the validity of the recording provisions of FLPMA in United States v. Locke, 105 S. Ct. 1785 (1985).

Mining claims located on lands previously segregated or withdrawn from entry and location under the mining laws are invalid. Hanson Properties, Inc., 74 IBLA 364 (1983). Appellants concede, and this Board finds, the Pine Cone, Sunshine, Goldbrick, and Charlotte's Folly locations were located on withdrawn lands and were properly declared null and void. The BLM decision appealed from is affirmed as to those four claims. Appellants argue, however, that to the extent the Sergine and Jeanne Marie claims embrace land in an earlier location, they are not invalid, but should be treated as amending a valid, prior claim established by appellants. Appellants explain this position in their statement of reasons:

> In 1970 Paul Vaillant, Charlotte Worden and Don Worden Jr. discovered a valuable mineral deposit and filed a 60-acre claim thereon perfecting same by constructing the required markers and making the required recordings. This claim was named "The Hopeless".
>
> Thereafter, in each and every year the required assessment work was done and improvements made. By 1978 the locators felt that enough knowledge had been gained of the extent and direction of the main ore body to reduce the original 60-acres to approximately 42-acres prior to making the required filings with the BLM. In making the reduction the Jeanne Marie and Sergina [sic]

> were located and filed. The reasons for laying out the Jeanne Marie and Sergina [sic] were as follows:
>
> (a) We felt the land on the extreme west boundary of "The Hopeless" had too much overburden and that on the extreme east was barren and that the course and direction of the ore body was more central.
>
> (b) We had learned that other claims originally filed as placer were going to patent as lodes. These claims were on formations identical to ours for the same valuable mineral.
>
> (c) We were tired of explaining to people why we called it "The Hopeless" when it did not reflect the true nature of the property.
>
> (d) Since we were unaware of the withdrawal order we were afraid that third parties would attempt to file lodes over "The Hopeless" and embroil us in litigation.
>
> The Jeanne Marie and Sergina [sic] are entirely upon the original "Hopeless" with the exception of the south 180 feet.

Statement of Reasons at 1, 2.

[2] Placer and lode claims are not merely technical variants of the same claim of right, but are different kinds of claim. As was pointed out in Cole v. Ralph, 252 U.S. 286 (1920), while both placer and lode claims require the discovery of a valuable mineral, they are distinct and differing in nature. The Court observed at page 295:

> While the two kinds of location -- lode and placer -- differ in some respects, * * * a discovery within the limits of the claim is equally essential to both. But to sustain a lode location the discovery must be of a vein or lode of rock in place bearing valuable mineral * * * and to sustain a placer location it must be of some other form of valuable mineral deposit * * * one such being scattered particles of gold found in the softer covering of the earth. A placer discovery will not sustain a lode location, nor a lode discovery a placer location. (Footnote and citations omitted.)

The distinction between placer and lode mining claims was considered in detail by this Board in United States v. Haskins, 59 IBLA 1, 88 I.D. 925 (1981), where it was observed that it is important to correctly distinguish between the two types of claims, because failure to do so "could result in the invalidation of the claim." Id. at 44, 88 I.D. at 947. And as appellants recognize in their statement of reasons quoted above, it is not unusual to find both types of claims on the same piece of ground, since a valid placer claim does not exclude location of lode claims until patent.

Amendment of a mining claim is allowable only in cases where the amendment is "made in furtherance of the original location and for the purpose of giving additional strength or territorial effect thereto." R. Gail Tibbetts, 43 IBLA 210, 216, 86 I.D. 538, 541 (1979) quoting from John C. Teller, 26 L.D. 484 (1898). A miner cannot amend a placer location by filing a lode location. The two claims are located for altogether different reasons. Cf. R. Gail Tibbetts, supra. Appellants may not amend their 1970 placer location by making later lode locations which overlap the prior placer claim.

[3] As a result, appellants' lode locations made in 1978, were invalid because they were located upon land previously withdrawn from location under the mining law. John F. Malone, 86 IBLA 170 (1985). The "Hopeless" placer mining claim was also invalidated the following year since appellants failed to comply with FLPMA mining claim recordation requirements on or before October 22, 1979. See 43 U.S.C. § 1744 (1982); United States v. Locke, supra. Despite these circumstances, appellants' statement of reasons indicates they seek to avoid total invalidation of their claims by another possible theory.

Appellants allege, in effect, that they have worked their claims diligently since 1970, developing their discovery and determining the extent of the minerals claimed. Although they do not disclose the nature of the minerals sought (their affidavits of assessment work suggest opals may be the valuable mineral on these claims), nor the reason which makes them now conclude the claims could be either lode or placer locations, their arguments indicate they may be asserting what amounts to a claim of right under provision of 30 U.S.C. § 38 (1982), which provides pertinently:

> 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 claims for such period shall be sufficient to establish a right to a patent thereto under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of title 43, in the absence of any adverse claim; * * *.

The full import of the statutory words "held and worked" was considered in Haskins, supra; these words require that the miners have remained in actual possession of the claim and have spent more effort in the development of their claims than performance of the minimum required annual assessment work. As the Haskins decision states: "the fact that claimants therein had performed assessment work, while a necessary prerequisite to the assertion of a claim under 30 U.S.C. sec. 38 (1976), was not, itself, dispositive of the question of 'holding.' This question has traditionally been deemed to be one of fact, determinable only by reference to the specific evidence in any case." Id. at 55, 88 I.D. at 952.

In Springer v. Southern Pacific Co., 248 P. 819 (Utah 1926), the Utah Supreme Court, relying upon language in Cole v. Ralph, supra, held section 38

is available to establish the existence of a valid claim in opposition to a later assertion of right by another. In this case, the "later asserted right" would be that made by the Departmental order withdrawing these lands from mining location. The right asserted is therefore one asserted by the United States. The difficulty with reliance upon this approach, is twofold: first, as pointed out by Lindley on Mines, 3d ed., § 688 (1914), 30 U.S.C. § 38 is operative to establish rights against all parties except the United States. Id. at 1717. Secondly, and most important, the same reasoning which was applied by the Supreme Court to the claim invalidated by the Locke decision also applies here.

[4] In Locke the Supreme Court established that the conclusive presumption of abandonment which results from failure to comply with section 314 of FLPMA extinguishes claims not maintained in conformity to the act. The Court held: "we 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." 105 S. Ct. at 1795-96. This analysis applies equally to the claims held in this case by appellants. The Locke claims also were being actively prosecuted up until the time they were declared invalid, and were in fact the basis for a going business. While section 314 has not repealed the provisions of 30 U.S.C. § 38, it is now clear that in order to have a valid claim under 30 U.S.C. § 38 a claimant must also have complied fully with section 314 of FLPMA. In this case, there was an abandonment of the placer claim as a matter of law when the appellants failed to make timely filings for their placer claim under the recording provisions of section 314 of FLPMA. The void lode locations, made after the lands upon which the placer was first located were withdrawn, could not be considered to be valid as amendments of the placer claim in the absence of timely filing of location notices, annual filing of affidavits, or statements of intention to hold thereafter. As a consequence, the placer claim was extinguished.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Franklin D. Arness
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Gail M. Frazier
Administrative Judge