

Editor's note: See also 101 IBLA 212 (Feb. 26, 1988); Appeal filed, sub nom. Northwest Silver Corp. v. Hodel, Civ.No. 88-1301, aff'd under Civ.No. 88-4090, (D.Id. Sept. 26, 1989)

FLETCHER De FISHER
FISHER INTERNATIONAL INC.

IBLA 85-413

Decided July 15, 1986

Appeal from decisions of the Idaho State Office, Bureau of Land Management, declaring five unpatented mining claims and eight unpatented millsite claims null and void a agnate. I MC 43132 et al.

Affirmed.

1. Millsites: Determination of Validity -- Mining Claims: Lands Subject to -- Mining Claims: Location -- Mining Claims: Withdrawn Land

A mining or millsite claim located on land previously withdrawn from mineral entry is null and void ab initio.

2. Mining Claims: Location -- Mining Claims: Withdrawn Land -- State Laws

A mining claim must be located in accordance with the applicable laws of the state in which the claim is located. A location which is not recorded in the time specified by state law is subject to intervening rights, and an unrecorded claim cannot be revived by an amendment recorded subsequent to withdrawal. An attempted amendment of a previously unrecorded claim must be treated as a new location as to the rights of an intervenor.

3. Evidence: Burden of Proof -- Mining Claims: Location -- Mining Claims: Withdrawn Land -- Rules of Practice: Appeals: Burden of Proof

Where BLM declares a mining claim null and void because it was located on land previously withdrawn from mineral entry, the burden of proof of error in the decision appealed rests with the appellant and, in the absence of such a showing, the decision will be affirmed.

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-- Constitutional Law: Due Process -- Mining Claims: Hearings -- Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Land

Mining claims located on lands closed to mineral entry are null and void ab initio as a matter of law, and no property rights are created. Therefore, no contest proceeding or hearing is required prior to a decision holding a claim null and void ab initio

APPEARANCES: Royce B. Lee, Esq., Idaho Falls, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Fletcher De Fisher and Fisher International, Inc., have appealed from two January 28, 1985, decisions of the Idaho State Office, Bureau of Land Management (BLM), declaring five unpatented mining claims and eight millsite claims null and void a agnate. The claims in question are located in the Sawtooth National Recreation Area (Sawtooth NRA), Custer County, Idaho. Mining claim recordation documents filed with the Idaho State Office, BLM, on October 22, 1979, state the lode mining claims are amendments of claims located in 1956. The recordation documents for the millsite claims also purport to be notices of amendment. However, there is nothing on the face of the millsite location notices which would give any indication of the date of location of the original claims. The "amended" notices were executed in September and October 1979. 1/

On August 22, 1972, the Sawtooth NRA was established by P.L. 92-400, 86 Stat. 612 (1972). Section 10 of this Act withdrew all Federal lands in the Sawtooth NRA from location, entry, and patent under the mining laws of the United States, subject to valid existing rights. Pursuant to this Act, a detailed description of the Sawtooth NRA lands was published in the Federal Register. 38 FR 2992-3 (Jan. 31, 1973).

In its first decision BLM declared the Carbonate No. 1 through 5 millsite claims null and void ab initio. The following facts were set forth as a basis for BLM's decision:

During a critical review of Custer County records, the U.S. Forest Service found instrument 127390, Claim of Mill Site. This notice states Clayton Silver Star Mines, Inc., claimed a parcel of land in Custer County * * * [description omitted].

We are unable to determine the number preceding "8 carbonate mill sites." The location notice is signed and recorded September 9, 1969, as follows:

1/ A more detailed listing of location and recordation information is set forth in Appendix "A" to this opinion.

Clayton Silver Star Mines, Inc.
By Fletcher De Fisher
Alfred Fisher
Loren Schlafke Sec-Tres

On August 10, 1972, Alfred V. Fisher, Leona Fisher, Fletcher De Fisher and Thelma M. Fisher quitclaimed numerous mining claims, including "Carbonate 20 claims, 5 millsites" to Fisher International, Inc.

On October 1, 1979, Fisher International, Inc., recorded the location notices cited above as instruments 151596 through 151600. Copies of these instruments were filed with the Bureau of Land Management on October 22, 1979.

The first location notice, instrument 127390, claims five mill sites on one location notice. Section 47-608, Idaho Code, states the following:

No location notice shall claim more than one location, whether the location is made by one or several locators, and if it purport[s] to claim more than one location it is absolutely void.

Federal regulation 43 CFR 3831.1 states the following:

A location is made by (a) staking the corners of the claim . . .
(b) posting notice of location thereon, and (c) complying with the State laws, regarding the recording of the location in the county recorder's office, discovery work, etc.

By operation of law, the Carbonate mill sites located by instrument 127390 were "absolutely" void because more than one mill site was claimed on one location notice.

In R. Gail Tibbetts et al, 43 IBLA 210, 86 ID 538, p. 541-542, the Interior Board of Land Appeals defined an amended location as "a location which is made in furtherance of an earlier valid location and which may or may not take in different or additional ground." The Board also stated that "no amended location is possible, however, if the original location was void."

The location notices recorded as instruments 151596 through 151600, Carbonate Nos. 1-5 mill sites, which are annotated "amended," are actually original locations or relocations.

Carbonate Nos. 1-5 are located in secs. 16 and 21, Revised Protraction Diagram No. 81, Unsurveyed T. 10 N., R. 16 E., B.M., Idaho. This township and range was withdrawn from mineral entry through enactment of Public Law 92-400 (86 Stat. 612). This law established the Sawtooth National Recreation Area.

As Carbonate No. 1 Mill Site, Carbonate No. 2 Mill Site, Carbonate No. 3 Mill Site, Carbonate No. 4 Mill Site, and Carbonate No. 5 Mill Site were located in 1979 after the land was closed to mineral entry, they are invalid and declared null and void a agnate. Because the land was not open to mineral entry when the claims were located, the Government does not have to initiate formal contest proceedings (U.S. v. Rudolph Chase, et al, 8 IBLA 351 (1972)).

BLM's second decision, relating to the five Low Boy mining claims and the three Low Boy millsites, includes the following statements as a basis for the decision:

Each of the lode mining location notices contains the following statement:

Such Mining claim was amended on the 16th day of October 1979, from the original (sic) location of 1956 by survey.

Each of the mill site location notices contains the following statement:

The above tract of ground is amended as a Mill Site * * *.

A critical review of Custer County records by the U.S. Forest Service revealed original location notices are not on file for the Low Boy lode or mill site claims. The only location notices recorded with Custer County are those cited above, which were labeled "amended" and recorded October 19, 1979.

Federal regulation 43 CFR 3831.1 states the following:

A location is made by (a) staking the corners of the claim * * * (b) posting notice of location thereon, and (c) complying with the State laws, regarding the recording of the location in the county recorder's office, discovery work, etc.

Section 47-604, Idaho Code, states the following:

Within ninety (90) days after the location of the claim the locator or his assigns must file for record in the office of the county recorder of the county in which the claim is situated, a copy of his notice of location. Failure to file notice of location for record within ninety (90) days after location of the claim shall constitute an abandonment of the claim.

In R. Gail Tibbetts et al, 43 IBLA 210, 86 ID 538, p. 541-542, the Interior Board of Land Appeals defined an amended location as "a location which is made in furtherance of an earlier

valid location and which may or may not take in different or additional ground." The Board also stated that "no amended location is possible, however, if the original location was void."

Because location notices for Low Boy Nos. 6-10 and Low Boy Nos. 1-3 mill sites were not recorded with Custer County at any time before 1979, the claims were deemed abandon [sic] by operation of State law. In H. B. Webb, 34 IBLA 362, the Board reiterated the "right to a mining claim rests upon the laws of the United States and upon the laws of the state in which the claim is situated." Therefore, the location notices recorded October 19, 1979, are considered original locations or relocations of Low Boy Nos. 6-10 and Low Boy Nos. 1-3 mill sites.

Low Boy Nos. 6 and 7 are located in secs. 24 and 25, Revised Protraction Diagram No. 81, Unsurveyed T. 10 N., R. 15 E., B.M., Idaho. Low Boy No. 8 is located in sec. 24 and 25, Revised Protraction Diagram No. 81, Unsurveyed T. 10 N., R. 15 E., B.M., and secs. 19 and 30, Revised Protraction Diagram No. 81, Unsurveyed T. 10 N., R. 16 E., B.M., Idaho. Low Boy Nos. 9 and 10 are located in secs. 19 and 30, Revised Protraction Diagram No. 81, Unsurveyed T. 10 N., R. 16 E., B.M., Idaho. Low Boy Nos. 1-3 mill sites are located in secs. 18 and 19, Revised Protraction Diagram No. 81, Unsurveyed T. 10 N., R. 16 E., B.M., Idaho.

On August 22, 1972, Revised Protraction Diagram No. 81, Unsurveyed T. 10 N., R. 15 E., B.M., and Unsurveyed T. 10 N., R. 16 E., B.M., were withdrawn from mineral entry through enactment of Public Law 92-400 (86 Stat. 612). This law established the Sawtooth National Recreation Area.

Counsel for appellants argues that Idaho law authorizes amendments and gives the right to make technical corrections to claims. He asserts the Government misinterpreted the original Carbonate location document to claim five claims rather than one, and that Government review of county records is not sufficient to support a declaration of invalidity. Appellants' counsel states the claims were consolidated and renamed. He further states there are issues of fact which require a hearing and views the Government's action as a taking without due process of law. In a cover letter to the statement of reasons dated March 19, 1985, counsel for appellants states that supplementary material in support of the appeal would be submitted within 60 days. None was submitted.

[1] Mining claims located on lands which have been withdrawn or segregated from mineral party entry are null and void ab initio. Such claims confer no rights on the locator. McCarthy Mining & Development Co., 87 IBLA 172 (1985); Mineral Life Corp., 81 IBLA 103 (1984). Similarly, millsite claims located on land closed to mineral entry at the time of location are properly declared null and void ab initio. Clara Halloway Sanson, 87 IBLA 143 (1985). Thus, if the October 1979 location notices filed with BLM evidence original location or relocation of mining or millsite claims the claims evidenced by the October 1979 notices are null and void ab initio. The withdrawal for the Sawtooth NRA predates the 1979 notices.

It is true, as counsel points out, that Idaho law provides for amended locations of valid claims (Idaho Code § 47-605 (1977)). However, if the original location notice is void (rather than voidable), an attempted amendment cannot relate back to the date of the original. Morrison v. Regan, 8 Idaho 291, 67 P. 955, 960 (1902). An amended location cannot cure a fatal deficiency in the original location. R. Gail Tibbetts, 43 IBLA 210, 218, 86 I.D. 538, 542 (1979), overruled in part on other grounds, Hugh B. Fate, Jr., 86 IBLA 215 (1985).

If the October 1979 notices evidence amendment of earlier valid claims, the date of amendment will relate back to an earlier location date. If the location date of the original claims was prior to the date of withdrawal, the claims would not be null and void ab initio. Withdrawal of land, subject to valid existing rights, does not prevent a subsequent amendment of the claim. However, if the original claim is void at the time of amendment, there can be no amendment as there is nothing to amend. United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 449 (9th Cir. 1971). In such case the attempted amendment is considered to be a new location and the date of the attempted amendment does not relate back to the date of the original claim. Fairfield Mining Co., 89 IBLA 209, 213-14 (1985). The attempted amendment could not be considered a relocation because there can be a relocation only if there is a prior valid claim. Id. at 213. It is therefore obvious that, considering whether a claim has been amended or relocated, the validity of the prior location becomes a matter of prime concern. Thus, it is necessary for us to examine the record regarding appellants' original locations.

[2, 3] Mineral locators are subject to state location requirements, consistent with the laws of the United States. 30 U.S.C. § 26 (1982); Kendall v. San Juan Silver Mining Co., 144 U.S. 658, 664 (1892); United States v. Zwiefel, 508 F.2d 1150 (10th Cir. 1975). Idaho law requires:

Within ninety (90) days after the location of the claim the locator or his assigns must file for record in the office of the county recorder of the county in which the claim is situated, a copy of his notice of location. Failure to file notice of location for record within ninety (90) days after location of the claim shall constitute an abandonment of the claim.

Idaho Code § 47-604 (1977).

Although the documents appellants filed with BLM for the Low Boy 6-10 lode mining claims were marked as being "amended" location notices and referred to a 1956 location, the search of Custer County records did not disclose the recordation of any such notices. Similarly, no earlier notice was found for the Low Boy 1-3 millsite claims. Although ample time was afforded, appellants offered no proof of the existence of the claims at the time of withdrawal. In the absence of any evidence that the claims had been perfected prior to withdrawal of the land, this Board must presume any earlier locations were never perfected.

The case law dealing with the failure to file a location notice with the county recorder or comparable local government agency when state law mandates recordation on penalty of forfeiture, follows one of two lines of

precedence. The first and most commonly adopted is that a location notice must be recorded before a subsequent valid location, nonmineral entry, or withdrawal of the land. See Harvey v. Havener, 135 Mont. 437, 340 P.2d 1084 (1959); Perley v. Goar, 22 Ariz. 146, 195 P. 532 (1921); Brady v. Husby, 21 Nev. 453, 33 P. 801 (1893); Thomas Stoelting, 70 IBLA 231 (1983); R. Gail Tibbetts, supra; H. B. Webb, 34 IBLA 362 (1978). (See also the discussion of the effect of intervening rights and cases cited below.) The other line of cases construing statutory provisions similar to those found in the Idaho Code is that the failure to record renders the claim void. See Gustin v. Nevada-Pacific Development Corp., 125 F. Supp. 811 (D. Nev. 1954), aff'd, 226 F.2d 286 (9th Cir. 1955), cert. denied, 351 U.S. 930, reh'g denied, 351 U.S. 990 (1956). Appellants have not submitted any document which would demonstrate that the locations allegedly made prior to withdrawal of the land were ever perfected by recordation. 2/ The withdrawal of the land effectively extinguished appellants' right to perfect the claims and thus extinguished the claims. This being the case, the October 1979 notices are not amendments of mining claims or millsites in existence at the time of amendment. Therefore, they must be treated as new locations.

Idaho law also provides: "No location notice shall claim more than one location, whether the location is made by one or several locators, and if it purports to claim more than one location it is absolutely void." Idaho Code § 47-608 (1977) (emphasis added). The only earlier location notice in the file indicating that a claim or claims were located prior to withdrawal is one recorded with Custer County on September 9, 1969 (Document No. 127390). This notice appears to claim five Carbonate millsites. Therefore, the claims described in the 1969 notice must be considered as absolutely void under Idaho law at the time of withdrawal. 3/ If there are intervening rights, an attempted amendment cannot relate back to invalidate those intervening rights. Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Dev. Co., 108 F. 189 (C.C.D. Idaho 1900), aff'd, 109 F. 538 (9th Cir. 1901). Withdrawal of the land is the exercise of such a right. See R. Gail Tibbetts, supra. The 1979 notices of location must be treated as new locations. Appellants have submitted no evidence to the contrary.

[4] Counsel for appellants has asserted the Government is unfamiliar with the facts, but has offered no evidence to contradict the Government's

2/ In fact, there is absolutely nothing in the record which would substantiate appellants' assertion that the claims were located prior to withdrawal other than the allegations made by them.

3/ In Waldron Enterprises Mining, 88 IBLA 54 (1985), the Board reviewed a BLM decision declaring 13 placer mining claims abandoned and void for failure to meet the recordation requirements. The claimant in Waldron had included all claims in one location notice filed with the State of Colorado. A copy of the notice was then filed with BLM. BLM found all claims abandoned and void because they were not filed with BLM on separate notices. The Board applied Colorado law to save one claim and found that under State law the remaining 12 claims were "absolutely void." Without reexamining the wisdom of the Waldron case at this time, we find this case distinguishable because of the intervening withdrawal. Appellants' right to cure the deficiencies in their location notices was terminated by the 1972 withdrawal.

findings. The case record supports the conclusions reached by BLM. See Alumina Development Corporation of Utah, 77 IBLA 366, 371 (1983). The burden of proof is on the appellants to show error in the decision on appeal, and in the absence of such a showing, the decision on appeal will be affirmed. See United States v. Connor, 72 IBLA 254 (1983). Appellants have not tendered any evidence which would give rise to a finding of error. The Government's determination that the claims were null and void ab initio was based upon a finding that there was no evidence of the existence of valid claims in the public records at the county recorder's office as required by Idaho law. Appellants have tendered no evidence to the contrary.

[5] Appellants have requested a hearing. No property rights were created when appellants attempted to locate mining claims on lands not open to mineral entry and location. The claims were null and void as a matter of law, and no contest proceeding or hearing is required. Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966). If there were any evidence of a prior valid mining claim we might entertain the idea of holding a hearing. ^{4/} However, after having been afforded an opportunity to tender any evidence regarding earlier locations, appellants have failed to do so. The logical assumption is that no such evidence exists.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Idaho State Office are affirmed.

R. W. Mullen
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge.

^{4/} We note the customary practice of referring to the book and page of recordation of the original claim on the face of the notice of amendment was not followed in this case. The only thing stated was that the lode claim amendments were of claims located in 1956. Assuming this to be true, the evidence in the record that the Forest Service failed to find a copy of the notice of location in public records and the appellants' failure to refute this evidence indicates that the location in the field was never perfected pursuant to Idaho law.

APPENDIX A

<u>Claim Name</u>	<u>IMC No.</u>	<u>Located</u> (Appellant indicated "amended")	<u>Recorded</u> <u>in Custer County</u>
Low Boy No. 6	43132	10/16/79	10/19/79
Low Boy No. 7	43133	10/16/79	10/19/79
Low Boy No. 8	43134	10/16/79	10/19/79
Low Boy No. 9	43135	10/16/79	10/19/79
Low Boy No. 10	43136	10/16/79	10/19/79
Low Boy No. 1 Mill Sit	43223	10/19/79	10/19/79
Low Boy No. 2 Mill Site	43224	10/19/79	10/19/79
Low Boy No. 3 Mill Site	43225	10/19/79	10/19/79
Carbonate No. 1 Mill Site	43218	9/29/79	10/1/79
Carbonate No. 2 Mill Site	43219	9/29/79	10/1/79
Carbonate No. 3 Mill Site	43220	9/29/79	10/1/79
Carbonate No. 4 Mill Site	43221	9/29/79	10/1/79
Carbonate No. 5 Mill Site	43222	9/29/79	10/1/79