

FRED G. WELKER

IBLA 85-696, 85-697

Decided October 27, 1987

Appeal from two decisions of the Arizona State Office, Bureau of Land Management, declaring lode mining claims and millsite null and void ab initio. A MC 62722, et al.

Set aside and remanded.

1. Mining Claims: Lode Claims -- Mining Claims: Placer Claims -- Mining Claims: Special Acts

A mining claim cannot be declared null and void ab initio for the reason that the claimant failed to perfect his location by performing a condition precedent set forth in the order opening the land to mineral entry pursuant to sec. 1 of the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), where that condition precedent is no longer required at the time BLM adjudicates the claim.

APPEARANCES: Fred G. Welker, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Fred G. Welker has appealed from two decisions of the Arizona State Office, Bureau of Land Management (BLM), dated May 15, 1985. The appeal from the decision declaring seven lode mining claims null and void ab initio is docketed IBLA 85-697. The appeal from the decision which declared the millsite null and void ab initio is docketed IBLA 85-696.

Appellant's millsite, known as the Winter Gold Mill Site (A MC 62722), was located June 12, 1962, by William C. Falk and filed for recordation with BLM September 13, 1979, pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982). The millsite was transferred to appellant on February 12, 1985. Appellant's lode mining claims, known as the Laramie (A MC 83503), Gunsmoke (A MC 83504), Rawhide (A MC 83505), Rifleman (A MC 83506), Wagon Train (A MC 83507), Maverick (A MC 83509), and Bonanza (A MC 83510), were located February 17, 1962, by William C. Falk and filed for recordation with BLM October 19, 1979. The claims were transferred to Elizabeth J. Clay on October 12, 1979, and then to appellant on September 12, 1984. All of the claims and the millsite are situated in sec. 2, T. 1 N., R. 8 E., Gila and Salt River Meridian, Pinal County, Arizona.

On August 21, 1909, the Acting Secretary of the Interior withdrew all of the land in unsurveyed sec. 2, T. 1 N., R. 8 E., Gila and Salt River Meridian, Arizona, "from public entry," pursuant to a first form reclamation withdrawal. The withdrawal was "in connection with the erection and maintenance of a power transmission line on the Salt River project." By order dated September 16, 1939, Assistant Secretary Chapman "opened" the land in sec. 2 "to location, entry, and patent under the general mining laws," subject to valid existing rights, pursuant to section 1 of the Act of April 23, 1932, 43 U.S.C. § 154 (1982). The land was specifically opened "subject to the terms of the following stipulation to be executed, acknowledged, and recorded in the county record, and in the United States land office by applicant, before any rights attach in his favor thereto." The stipulation required the applicant to conduct mining and milling operations in such a manner as to protect the "Salt River bottom lands" from "all tailings, debris and harmful chemicals." The stipulation also reserved to the United States the right to construct, operate, and maintain dams, dikes, and other structures for the benefit of the United States. In Public Land Order (PLO) No. 2897, dated January 29, 1963, Assistant Secretary Carver revoked the original August 1909 withdrawal with respect to the following described land in sec. 2: lots 1, 2, 3, and 4, N 1/2 SW 1/4, SE 1/4 SE 1/4, S 1/2 SW 1/4 SE 1/4, SW 1/4 NE 1/4, and S 1/2 NW 1/4 and opened these lands "to location under the United States mining laws" on July 30, 1963. 28 FR 1045 (Feb. 2, 1963). PLO No. 5070, dated June 16, 1971, withdrew SE 1/4 NE 1/4, S 1/2 SW 1/4, N 1/2 SE 1/4, and N 1/2 SW 1/4 SE 1/4 sec. 2, T. 1 N., R. 8 E., Gila and Salt River Meridian, Arizona, "from appropriation under the mining laws (30 U.S.C. Ch. 2)." 36 FR 11731 (June 16, 1971). It appears from the map provided by appellant which depicts the location of his claims on the ground that the claims are situated on lands described in both of these PLOs.

In its May 1985 decisions, BLM declared appellant's mining claims and millsite null and void ab initio because, according to "public records," neither the original locator nor a subsequent owner had filed the reclamation stipulation required by the September 1939 order for claims located between September 16, 1939, and July 30, 1963, citing Wayne M. Mann, 54 IBLA 8 (1981), and Red Mountain Mining Co., 85 IBLA 23 (1985). BLM noted that the land in sec. 2 was "classified under A 19224 on June 24, 1984, for Recreation and Public Purposes," which classification "segregates all of the lands in the section from mining location."

In his statement of reasons appellant contends that the claims and millsite were properly located and filed for recordation. Appellant recognizes that no stipulations were filed. He argues, however, that since no time limit for filing the stipulations was provided, and since the location of the claims and millsite were of record in 1963 when the 1939 Order was revoked, the claim and millsite are in good standing because the stipulations were no longer required. Appellant argues that his rights attached on July 30, 1963, and that the claims and millsite have since been properly maintained. 1/

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1/ As appellant points out, revocation of the August 1909 withdrawal in 1963 did not affect all of his claims in their entirety. The record indicates that some of the land in appellant's claims remained subject to the 1909 reclamation withdrawal.

He alleges that the claims have been worked for 22 years, that a discovery of valuable minerals was made during the period the land was open to entry, assessment work was done, and affidavits of labor filed. Appellant contends that if filing the reclamation stipulations was "of the essence," this requirement expired within his first assessment year, and, in any case, BLM failed to notify him of his deficiency for 22 years. <sup>2/</sup>

[1] As noted earlier, BLM's decisions cite Red Mountain Mining Co., *supra*, and Wayne Mann, *supra*, among others, as support for its adjudication. In these cases the Board affirmed BLM in holding mining claims null and void ab initio. In the case at bar, unlike the cases relied on in the BLM decision, the requirement to file the stipulations was eliminated prior to the withdrawal of the land.

Proper disposition of the appeal before us requires that a distinction be made between a voidable mining claim and one which is null and void ab initio. A claim in the latter category is incapable of giving rise to any rights or obligations. An unperfected or voidable claim, on the other hand, is one as to which a claimant may lose his rights if he fails to do all the law states to be necessary to have a valid mining claim.

Herein, there is no question that the claims were located on lands open to mineral entry at the time of location, and that, except for filing the stipulations, the acts necessary to perfect the claims were done. The failure to file the stipulations could preclude the claimant from obtaining "rights" only until July 30, 1963, when that requirement was eliminated. Thereafter, any claimant could enter the subject lands and perfect locations without filing stipulations. Appellant's claims, however, were already located. After July 30, 1963, they could not logically be adjudicated null and void for nonperformance of an act which the law did not require. At that point, assuming all other necessary acts had been performed, the unperfected claims became perfected and for this reason survived the withdrawal of land 21 years later. Thus, with respect to the claims located on land described in the 1939 Opening Order, BLM's adjudication erred on two counts: 1) It declared the claims null and void ab initio; and 2) It voided the claims on the ground that the claimant had failed to perform a condition precedent no longer required by law.

The decision was correct, however, with respect to those claims or portions thereof which are located on lands described in PLO No. 5070. Those lands continued to be subject to the 1939 Opening Order requiring the filing of stipulations at the time of the subsequent withdrawal from mining. Claims located on these lands were properly declared null and void ab initio in the absence of evidence of the filing of the stipulation. See Thomas L. Lee, 98 IBLA 149 (1987).

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<sup>2/</sup> Appellant has requested a hearing. In view of our disposition, no hearing is necessary and appellant's request is therefore denied.

As proper adjudication of the claims is determined by their location in relation to PLO No. 2897 and PLO No. 5070 the case must be remanded to BLM.

Therefore, 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 set aside and the case is remanded for further proceedings consistent herewith.

Gail M. Frazier  
Administrative Judge

We concur:

Franklin D. Arness  
Administrative Judge

C. Randall Grant, Jr.  
Administrative Judge

