

KENNETH RUSSELL

IBLA 87-803

Decided June 9, 1989

Appeal from a decision of the Montana State Office, Bureau of Land Management, declaring four placer mining claims null and void ab initio in part, finding the Department without jurisdiction over a portion of one of those claims, and declaring one placer mining claim null and void ab initio in its entirety. M MC 39945, M MC 39949 through M MC 39952.

Affirmed.

1. 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 ab initio to the extent that it includes such land.

2. Patents of Public Lands: Effect

When a patent without reservation of minerals to the United States is issued subsequent to the location of a placer mining claim on the same land, the effect is to remove from the jurisdiction of this Department the consideration of questions concerning rights to the land.

3. Estoppel--Mining Claims: Location

The United States is not barred by the equitable defense of estoppel from enforcing public land laws. Moreover, BLM owes no duty to mining claimants to promptly ascertain the legal status of every claim filed and inform such claimants of its findings.

4. Federal Land Policy and Management Act of 1976:
Generally--Mining Claims: Recordation

Where, in response to an inquiry from BLM regarding the exact situs of a mining claim, the claimant submits a professional survey map, along with a copy of a master title plat upon which the location of the claim has been depicted, BLM may rely on those documents to determine the location of the mining claim.

APPEARANCES: Kenneth Russell, Helena, Montana, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Kenneth Russell (appellant) has appealed from an August 18, 1987, decision of the Montana State Office, Bureau of Land Management (BLM), declaring placer mining claims Con Kelley and Con Kelley #4 through #6 null and void ab initio in part, and declaring the Con Kelley #7 placer claim null and void ab initio in its entirety. In addition, BLM found that it lacked jurisdiction over a certain portion of the Con Kelley claim which was patented subsequent to the location of that claim without a reservation of the minerals to the United States.

On October 10, 1979, Kenneth Russell and Earl Lutzenhiser (claimants) filed with BLM certificates of location for the Con Kelley (M MC 39945) 1/ and Con Kelley #1 through #7 (M MC 39946 through M MC 39952) 2/ placer mining claims, along with certain hand-drawn maps depicting the location of the claims. The location certificate for the Con Kelley claim listed March 27, 1935, as the date of location for that claim. The other location certificates gave October 5, 1979, as the date of location for the remaining claims.

By letter dated July 13, 1987, BLM notified claimants that their claims may have been located in areas not open to mineral location. It stated that it was unable, however, based on the maps and descriptions provided, to

1/ The filing for Con Kelley is a photocopy of a Mar. 27, 1935, certificate of location originally filed with the State of Montana by M.W. Cornelius. This document describes the location of the claim as the S\ SE^ NW^ of sec. 29, T. 11 N., R. 5 W., Lewis and Clark County, Montana, and specifies 20 acres as the size of the claim. The document also indicates that the claim is bordered on the north and east by the Henry Smith homestead (patent No. 1109710), on the south by the Vincent Scallon patent (patent No. 843576), and on the west by the Cecil Burt homestead (patent No. 1092940).

2/ The location certificate for each of the Con Kelley #1 through #7 claims identifies the location of the claim by section number within T. 11 N., R. 5 W., Lewis and Clark County, Montana, as well as by a description based on topographic features.

determine the exact location of the claims. BLM granted claimants 30 days from receipt of the notice to provide additional information regarding the location of the claims. It also forwarded to claimants a copy of a portion of the relevant master title plat and requested that claimants mark thereon the location of their claims. On August 10, 1987, claimants filed with BLM a professional survey map of the Con Kelley placer claim; additional maps of the Con Kelley #1 through #7; and the copy of the master title plat, upon which had been drawn the locations of the claims.

Based upon those submissions, BLM issued its decision. Therein, BLM found it was without jurisdiction as to that portion of the Con Kelley claim which overlaps lot 1 of sec. 29, since patent No. 1092940 which issued on October 21, 1937, after location of the Con Kelley claim, transferred title of lot 1 from the United States without reservation of mineral rights. It also declared null and void ab initio those portions of the Con Kelley and Con Kelley #4 through #6 claims which overlap various other patents issued without mineral reservations. Finally, it declared the Con Kelley #7 null and void ab initio in its entirety because it lies totally within land patented without reservation of mineral rights.

In his September 16, 1987, notice of appeal, appellant indicates that the Con Kelley claim does not overlap lot 1 of sec. 29, and that because the Con Kelley claim location predates patent No. 1109710, the mining claimants should be granted both surface and mineral rights to lot 3 of sec. 29. 3/ In an additional document filed on July 11, 1988, he argues that at the time of the original 1935 Con Kelley location the claim was described as falling between certain patented lands (see note 1 above), and that there was no mention at the time of any conflict with those patented lands. 4/

Although appellant states that he would like to keep those portions of the Con Kelley #1 through #3 claims which do not invade private property, BLM's decision did not address those claims; therefore, those claims are not at issue in this appeal. Further, as to the Con Kelley #4 through #7 claims, appellant states that he "will not file." Presumably, this is an indication that he is not appealing BLM's decision as it pertains to those four claims. However, even if he were, the record shows that much of the land encompassed by the Con Kelley #4 through #6 is patented without mineral

3/ BLM's decision did not relate to lands in lot 3 embraced by the Con Kelley claim, since the patent referred to by appellant (patent No. 1109710) was issued on Nov. 22, 1940, with a reservation of all minerals to the United States. We note, however, that those who hold unpatented mining claims are entitled to certain surface rights incidental to mining activities. United States v. McMullin, 102 IBLA 276 (1988); United States v. Zimmers, 81 IBLA 41 (1984).

4/ Appellant also mentions that the Con Kelley placer mining claim was granted water rights and that claimants' predecessors constructed a cabin on the site; however, these allegations are legally irrelevant to our determination, even if proven.

reservation, as is all of the land included in the Con Kelley #7. 5/ Thus, the only claim at issue in this appeal is the Con Kelley.

[1] It is well established that BLM may properly declare null and void ab initio those portions of a placer mining claim which are located on land which has been patented without a mineral reservation to the United States. Merrill G. Memmott, 100 IBLA 44 (1987); Santa Fe Mining Co., 79 IBLA 48, 52 (1984). Although the exact location of the Con Kelley claim was not discernible from the information provided by claimants prior to August 10, 1987, the maps submitted on that date clearly indicate that the Con Kelley claim does overlap certain areas of patent Nos. 16079 and 843576. 6/ These patents were issued prior to the location of the Con Kelley claim 7/ and without reservation of mineral rights to the United States. Consequently, we find that BLM properly declared null and void ab initio those portions of the Con Kelley placer mining claim which overlap patent Nos. 16079 and 843576.

[2] We also find that BLM properly determined the Department is without jurisdiction as to that portion of the Con Kelley claim which overlaps patent No. 1092940 (lot 1 of sec. 29). This Board has previously held the effect of the issuance of a patent without a mineral reservation subsequent to location of a mining claim on the same land is to transfer legal title from the United States and to remove from the jurisdiction of the Department the resolution of conflicting claims to the land. Silver Spot Metal, Inc., 51 IBLA 212, 214 (1980). The maps submitted by claimants on August 10, 1987, clearly reveal that a portion of the Con Kelley claim embraces land patented on October 21, 1937 (patent No. 1092940), subsequent to location of the Con Kelley claim, without a reservation of mineral rights to the United States. Thus, BLM properly decided that the Department lacks jurisdiction to resolve any land conflict concerning patent No. 1092940. 8/

5/ The relevant patent numbers are 1145243, 16079, 803916, and 854009. However, patent No. 1145243, which describes lands in sec. 32, did reserve to the United States all uranium, thorium, and other fissionable materials. Thus, to the extent appellant may be asserting a right to such materials in lands in sec. 32 embraced by the Con Kelley #4 claim and covered by that patent, that portion of the claim would not be null and void ab initio.

6/ While the description in the location notice for the Con Kelley claim conflicts with its location depicted on the maps provided by the claimants, the situs of the claim on the ground, as disclosed by its monuments, is controlling over a conflicting description in the location notice. United States v. Kincanon, 13 IBLA 165, 168 (1973).

7/ Patent Nos. 16079 and 843576 issued on Apr. 18, 1890, and Jan. 17, 1922, respectively.

8/ Although appellant asserts that he checked the corners of the Con Kelley claim and determined that it does not, in fact, overlap lot 1, the maps submitted by claimants on Aug. 10, 1987, contradict that assertion. BLM properly relied on those maps. See infra. However, even if there were no overlap, the statement in BLM's decision that it lacks jurisdiction "to the extent the Con Kelley claim is located in Lot one of Section 29" (Decision at 1) would have no impact on appellant.

[3] Appellant suggests that because the claimants were not notified at the time of filing that a portion of the claimed lands were closed to mineral entry, BLM's decision should be reversed. Apparently, appellant is asserting the equitable defense of estoppel. However, the record does not support a claim of estoppel because the fact that the lands in question were not available for mineral entry at the time they were located was a matter of public record. Therefore, claimants must be presumed to have had knowledge of that fact. See Ronald R. Graham, 77 IBLA 174, 180 n.8 (1983). Moreover, BLM is not required to provide notification that the land claimed is closed to mineral entry at the time a certificate of location is filed, nor can BLM's failure to promptly notify mining claimants serve to validate a claim which was null and void from its inception. Hugh B. Fate, Jr., 86 IBLA 215, 226 (1985); 43 CFR 3833.5(f).

[4] Appellant also argues that in the certificate of location the Con Kelley claim was described as falling between certain surrounding patents, and, therefore, these patents are all outside of the Con Kelley claim. This argument must be rejected. While the location certificate notes no conflict, the maps provided by claimants in response to BLM's inquiry, especially the professional survey map, clearly contradict this assertion by appellant. The Board has previously stated that the uses which may be made of location information submitted by mining claimants necessarily depend on the relative accuracy of the information. Outline Oil Corp., 95 IBLA 255, 259 (1987); Arley Taylor, 90 IBLA 313, 317 (1986). When mining claimants have submitted a professional survey map of a mining claim, 9/ and the claim location indicated therein is further verified by the location as drawn on a copy of the master title plat, BLM may rely on that information in determining the location of the mining claim.

Accordingly, 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.

Bruce R. Harris
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

9/ We note that there is no regulatory requirement that a mining claimant utilize the services of a professional surveyor to produce claim maps. See 43 CFR 3833.1-2(b)(7).