

STEVEN R. HEADY  
BRUCE G. HEADY

IBLA 88-114

Decided August 31, 1989

Appeal from a decision of the California State Office, Bureau of Land Management, declaring the Morrison Cabin Placer mining claim null and void ab initio. CA MC 9508.

Affirmed as modified.

1. Mining Claims: Location -- Mining Claims: Lands Subject to --  
Mining Claims: Possessory Right -- Mining Claims: Recordation

A mining claim located in a powersite at a time when the land was withdrawn from mineral entry is null and void ab initio. While the claimant may establish a new location pursuant to 30 U.S.C. § 38 (1982) by holding and working the claim for a specific period of time while the land is open to location, such a location must be recorded pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982). Failure to comply with the recordation provisions shall render any such location abandoned and void.

APPEARANCES: Richard Keith Corbin, Esq., Sacramento, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Steven R. Heady and Bruce G. Heady have appealed from an October 23, 1987, decision of the California State Office, Bureau of Land Management (BLM), declaring the Morrison Cabin placer mining claim (CA MC 9508) null and void ab initio.

On February 24, 1978, the Headys, in accordance with section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1982), filed with BLM a copy of a notice of location for the Morrison Cabin placer mining claim. The notice of location states that the claim was located on August 12, 1940, by J. W. Wise and Ida Wise. The record shows that thereafter the Wises transferred their interest in the claim. Subsequently, Ida Wise repurchased the claim and quitclaimed her interest to the Headys on August 15, 1957. The claim is situated in the SW 1/4

of sec. 5, T. 36 N., R. 11 W., Mount Diablo Meridian (unsurveyed), Trinity County, California, within the Shasta-Trinity National Forest.

By letter dated July 31, 1986, BLM informed the Headys that its records showed that the lands embraced by the claim had been withdrawn from mineral entry by inclusion in Power Project 608 on May 11, 1925. <sup>1/</sup> BLM stated that in accordance with the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1982), the lands had been reopened to mineral entry on August 11, 1955. BLM also advised that, effective September 28, 1984, the lands were designated as part of the Trinity Alps Wilderness and included as part of the National Forest Wilderness, and, therefore, withdrawn from the operation of the mining law. See 43 CFR 3823.4.

BLM concluded that the lands were not open to mineral entry at the time of the 1940 location; however, BLM extended to the Headys the opportunity to establish that they had a valid location in accordance with 30 U.S.C. § 38 (1982), which provides:

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; but nothing in such sections shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

BLM explained:

This means that if you prove you worked the claim during the statute of limitations; in California - any 5 year period between August 11, 1955 and September 27, 1984, we can accept your original location notice for recordation. But, the date of location will commence at the end of the proven 5 years. [Emphasis in original.]

In response to that letter, the Headys submitted on November 12, 1986, the affidavit of Paul A. Heady and eight slides, with processing dates of "AUG78," "SEP80," "AUG81," "JUL82," "SEP83," "JUL85," "JUL 85," and "OCT86," depicting mining activity. The cover letter to the Headys' submissions was signed by an attorney and stated that the Headys were providing the information "supporting their claim that the mining claim in question has been worked continuously since 1978." Paul A. Heady states in the affidavit:

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<sup>1/</sup> Lands withdrawn or classified for powersite purposes were withdrawn from mineral entry by section 24 of the Federal Power Act of June 10, 1920, as amended, 16 U.S.C. § 818 (1982).

That I worked the referenced claim continuously since 1978, in particular I worked the mine on the following weeks: 8/78, 9/80, 8/81, 7/82, 9/83, 7/85, 10/86. The attached dated photographs [slides] were taken during those time frames (as dated on the back of each photograph) and attest to the work.

On October 23, 1987, BLM declared the claim null and void ab initio because it was located when the lands were closed to mineral entry. The decision made no mention of 30 U.S.C. § 38 (1982), nor did it undertake an analysis of the information submitted by the Headys in response to BLM's July 31, 1986, letter. The Headys filed a timely appeal of BLM's decision.

[1] Resolution of this appeal turns on the recordation requirements of section 314 of FLPMA, 30 U.S.C. § 1744 (1982), and its implementing regulations. Appellants recorded their notice of location for the Morrison Creek placer claim with BLM in 1978 in accordance with the recordation requirement in 43 U.S.C. § 1744(b) (1982). BLM's official records showed that at the time of location, 1940, the lands were not available for location under the mining law, having been withdrawn for powersite purposes in 1925. That fact was the basis for BLM's decision, and it has not been challenged on appeal. It is well settled that mining claims which are located on land which is closed to mineral entry are null and void ab initio. Kathryn J. Story, 104 IBLA 313, 315 (1989), and cases cited therein.

Appellants maintain, however, that they have a valid location, pursuant to 30 U.S.C. § 38 (1982), since they held and worked the claim for the requisite number of years during a period when the land was open to mineral entry. <sup>2/</sup> This Board has held that where the original location is null and void ab initio because the land was closed to entry when the original location occurred, a new location is effectively established if the claimants meet the hold and work requirements of 30 U.S.C. § 38 (1982) during a subsequent period when the land is open to entry, and that such a location can be the basis for a valid claim, if the claim embraces a discovery. Arthur W. Boone, 32 IBLA 305 (1977); Ralph Page, 19 IBLA 255 (1975); Gardner C. McFarland, 8 IBLA 56 (1972); Merritt N. Barton, 6 IBLA 293, 79 I.D. 431

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<sup>2/</sup> For a discussion of the requirements necessary to satisfy 30 U.S.C. § 38 (1982), see United States v. Haskins, 59 IBLA 1, 49-56, 105-06, 88 I.D. 925, 949-53, 978 (1981), aff'd, Haskins v. Clark, No. CV-82-2112-CBM (C.D. Cal. Oct. 30, 1984). In Haskins, the Board made clear that "held" and "worked" are two discrete conditions of 30 U.S.C. § 38 (1982). Id. at 54, 88 I.D. at 951. In this case, appellants would be required to show compliance with those requirements for a period of 5 consecutive years. The photographic slides submitted by appellants demonstrated dredge mining activity at a location identified in the affidavit as the claim in question. Allegedly the activity occurred at the times indicated as the processing dates on the slides. Even accepting that the slides depict mining activity on the claim at the times asserted, they do not show that the claim was "worked" for any consecutive 5-year period, since there were no slides dated 1979 or 1984. In fact, three of the slides have processing dates after the land embraced by the claim was withdrawn by the 1984 wilderness designation.

(1972). See also Ernest Higbee (On Reconsideration), 79 IBLA 380 (1984). Thus, appellants' allegation that they possess a 30 U.S.C. § 38 (1982) claim does not affect the invalidity of the original 1940 location and BLM correctly declared the claim arising from that location null and void ab initio.

Although appellants assert that they have complied with the requirements of 30 U.S.C. § 38 (1982), and, therefore, established a valid location, we need not explore that allegation because even if it were so, appellants did not properly record the 30 U.S.C. § 38 (1982) claim with BLM, as required by law. <sup>3/</sup> The following analysis shows why that statement is true. <sup>4/</sup>

Assuming that appellants held and worked the Morrison Creek placer claim for a period of 5 years prior to October 21, 1976, appellants did not record that 30 U.S.C. § 38 (1982) claim with BLM on or before October 22, 1979. Appellants did record a 1940 location of the claim but, as noted above, that claim was properly declared null and void ab initio. Any 30 U.S.C. § 38 (1982) claim would have constituted a new location, and since appellants failed to record any pre-October 21, 1976, 30 U.S.C. § 38 (1982) claim with BLM, such a claim is by law conclusively deemed abandoned and void. See 43 CFR 3833.1-1.

Even if after October 21, 1976, but before withdrawal of the land from entry under the mining law in September 1984, appellants satisfied the 30 U.S.C. § 38 (1982) requirements, there is no evidence that such a claim was filed for recordation with BLM in accordance with the requirements of 43 CFR 3833.1-2(a). Failure to record constitutes conclusive abandonment of the claim and it is properly declared void. Kerry Schumway, 99 IBLA 156 (1987).

Appellants have made a number of other arguments on appeal, specifically that they come within the valid existing rights exception to the wilderness designation of the lands; that they have a valid claim under the Mining Claims Rights Restoration Act of 1955; that they have a valid claim under the equitable doctrine of "substantial compliance;" and that they have a valid claim under the common law principle of "adoption." Since the 1940 location of appellants' claim is null and void ab initio and any 30 U.S.C. § 38 (1982) claim was not recorded, all of these arguments must fail.

To have a valid existing right which would survive the wilderness designation of the land, appellants would have to have a valid location and

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<sup>3/</sup> As we stated in Hiram Webb, 105 IBLA 290, 305, 95 I.D. 242, 251 (1989): "While the provisions of 30 U.S.C. § 38 (1982) do permit the assertion of a location without proof of posting or recording, appellant is still required to comply with all other substantive provisions of the mining laws, including recordation of the claim under FLPMA."

<sup>4/</sup> It also reveals why BLM's statement in its July 31, 1986, letter to appellants was in error in indicating that the 1978 recordation of the 1940 location of the claim could satisfy the recordation requirements for a subsequent 30 U.S.C. § 38 (1982) claim.

meet the other requirements of the mining law. As set forth above, appellants do not have a valid location.

Appellants maintain that failure to file the documents required by section 4 of the Mining Claims Rights Restoration Act, 30 U.S.C. § 623 (1982), is neither grounds for declaring the claim null and void ab initio nor grounds for forfeiture of the claim. In support of this argument they cite MacDonald v. Best, 186 F. Supp. 217 (N.D. Cal. 1960). However, this is irrelevant as BLM did not base its decision on any failure to comply with 30 U.S.C. § 623 (1982). See B. E. Burnaugh (On Reconsideration), 67 I.D. 366 (1960). Nor does our decision turn on that fact.

Appellants cite Hickel v. Shale Oil Corp., 400 U.S. 48 (1970), for the proposition that substantial compliance with assessment work regulations is adequate to avoid forfeiture of the claim. Further, they allege that they were in full compliance with the assessment work requirements. Again, these allegations are irrelevant to resolution of this appeal, which turns on a failure to record. See E. J. Belding, Jr. & Melinda S. Belding, 109 IBLA 198, 209-11, 96 I.D. 272 (1989) (performance of assessment work confers no rights where there has been no valid location).

Finally, the principle of adoption, enunciated in Noonan v. Caledonia Gold Mining Co., 121 U.S. 393 (1887), cannot be utilized to validate appellants' claim. In Noonan, that principle was the basis for allowing mining claimants to adopt, after lands were open to mineral entry, acts of location performed while lands were closed to such entry in order to establish a right of possession over subsequent locators. The Board recently discussed the applicability of the principle in E. J. Belding, Jr. & Melinda S. Belding, supra at 204-06, 96 I.D. at \_\_\_\_ (1989), wherein we concluded that it does not apply against the United States. Thus, Noonan is not relevant in this case.

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 as modified.

Bruce R. Harris  
Administrative Judge

I concur:

C. Randall Grant, Jr.,  
Administrative Judge.

