Editor's Note: Reconsideration denied by Order dated March 28, 1997.

JACK J. SWAIN

IBLA 93-302 Decided December 30, 1996

Appeal of a decision by the California State Office, Bureau of Land Management, rejecting mining claim recordations. CAMC 57380 through CAMC 57382.

Affirmed as modified.

1. Administrative Procedure: Decisions--Contests and Protests: Generally--Hearings--Mill sites: Determination of Validity--Mineral Lands: Determination of Character of--Mining Claims: Mineral Lands--Res Judicata

   A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

2. Mining Claims: Generally--Mining Claims: Location-- Mining Claims: Relocation

   For the purpose of Departmental adjudication, an amended location is one made in furtherance of an earlier valid location, while a relocation is one which is adverse to the prior location. Where a mining claimant attempts to amend a void location, the amendment will fail. Where a mining claimant attempts to relocate an earlier claim, the location is not adverse to his own earlier location; therefore, the claim cannot be considered a relocation, but will be deemed an original location.

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

   Under the Mining Law of 1872, a mining claim is only locatable upon a discovery of a mineral deposit, which

> will be found in either lode or placer form. A certificate of location which attempts to classify mining claims as both placer and lode will fail, as the terms are mutually exclusive.
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> 4. Mill sites: Determination of Validity--Mining Claims: Mill sites
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> Where a mill site is used for mining and milling purposes in connection with a mining claim that is held to be invalid and the claimant does not show that the mill site is being used for mining and milling purposes in connection with any other mining claim, the mill site is properly declared to be invalid.

APPEARANCES: Jack J. Swain, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

Jack J. Swain has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated February 25, 1993, rejecting for recordation the Upper Leafington and Lower Leafington lode mining claims and the Lower Leafington mill site. BLM's decision states:

> [Location] * * * notices show that the Upper Leafington lode claim was located on June 20, 1952; the Lower Leafington was located on January 12, 1949; and the Lower Leafington mill site was located on August 6, 1949.
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> A review of the record shows that the aforementioned lode mining claims and mill site were declared null and void by an Administrative Law Judge on September 14, 1965 (copy enclosed). An appeal from the decision was dismissed on January 21, 1966 and the case was closed.
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> In view of the above, the recordation of the Upper Leafington and Lower Leafington lode mining claims and the Lower Leafington mill site * * * is hereby rejected.

The decision additionally states that the claims may be relocated "[s]ubject to valid intervening rights of third parties or the United States."

A review of the record submitted by BLM reveals that Swain originally located the Lower Leafington lode claim on January 12, 1949, the Lower Leafington mill site on August 6, 1949, and the Upper Leafington lode claim on June 20, 1952.

Swain eventually filed a patent application (Statement of Reasons (SOR) at 5). BLM subsequently filed a mining contest challenging the

validity of the claims. On September 14, 1965, Rudolph Steiner, a Hearing Examiner for BLM, held the claims "null and void" under section 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. § 611 (1994)), which provides:

> No deposit of common varieties of sand, stone, gravel, pumice * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * *.

Citing to Departmental opinions interpreting this section, the Hearing Examiner held that although Swain had located his claims prior to the effective date of the Act, he had not demonstrated that the minor sales made prior to July 23, 1955, generated a sufficient profit to "establish that these particular materials were marketable at that time." Furthermore, the Hearing Examiner found that the substances removed by Swain at that time--materials for road surfaces, fill, and agricultural purposes--were not valuable mineral deposits under the Mining Law of 1872, and that the lands are nonmineral in character. Hearing Examiner Steiner also declared the mill site null and void, finding that there was no evidence that "the mill site has ever actually been occupied or used for mining or milling purposes" (Decision of Hearing Examiner Steiner dated Sept. 14, 1965, at 7).

On October 22, 1979, pursuant to requirements imposed by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1994), 1/ Swain filed a notice of location with BLM entitled "Amended and/or Original Certificate of Location and/or New Lode and/or Placer Mines." Swain has named his claims the Lower Leafington and Upper Leafington (in the event his locations are deemed to have been amended) or the Nuleafington and Nuleafington #2 (in the event his locations are deemed to be relocations) lode and/or placer locations. The Lower Leafington and Nuleafington address the same location on the ground; the Upper Leafington and the Nuleafington #2 likewise address an identical location. The location notice states, in pertinent part:

> This Amended and/or Original Notice of Location is made in conformity with the original locations made by Jack J. Swain and Bonita R. Swain in the year 1949 and recorded as document No. 178 and located in the year 1953 and recorded as document No. 42546 of Quartz locations in the Office of the Recorder of

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1/ That section requires, in pertinent part, that

"[t]he owner of an unpatented lode or placer mining claim or mill or tunnel site located prior to October 21, 1976 shall, within the three-year period following October 21, 1976, file * * * a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground."

> Said County, and it is made for appropriating all minerals in or on the ground within the boundaries or limits of the claims hereinbefore described and of more definitly [sic] describing the situation and boundaries of the Lode Claims, correcting any irregularities, informalities or errors, supplying any omissions and correcting any defects which may have existed in the original locations or the record thereof, hereby waiving NO RIGHTS aquired [sic] under and by virtue of said original Placer and/or Lode Mining Locations, and if the Original Locations or the Certificates thereof are actually void or invalid then and then only shall this Location Notice be an Original Location Notice and this Instrument an Original Instrument.
>
> Additional Lode Discovery having been made at the date of this Location and prior thereto said discovery indicates good possibility of developing a paying mine by further exploration for valuable minerals of the Platinum Group, Gold, Silver, Talc, and their related minerals as well as the fluorescent minerals.
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> * * * * * * *
>
> Retroactive to Date of Original Discovery-1949 and in 1953.
>
> Date of Amended Locations or of the Nuleafington 2, & Nuleafington Lode Locations Dec. 2, 1967.

To this document Swain attached a copy of the August 6, 1949, mill site location notice.

Swain has timely filed documentation required by section 314 of FLPMA since 1979 pertaining to these claims, and the mill site. 2/ In his proof of labor forms, he has referred to the claims as the Upper Leafington, the Lower Leafington, and the Lower Leafington mill site.

In his SOR, Swain argues that the record shows he has not abandoned his claims (SOR at 2-3); that his amended location notice relates back to the original location, making his claims valid (SOR at 3); that he may legitimately succeed himself as locator for purposes of relocating the claims (Id.); and that his mill site has been "in compliance with the letter of the law even as far back and prior to the 1960's" (SOR at 4). Swain contends that the Hearing Examiner's 1965 decision was in error; therefore, his claims have been valid since their original location (SOR at 5-8). Finally, he alleges that, contrary to the Hearing Examiner's decision, his claims hold valuable mineral deposits, particularly gold, platinum, and manganese.

2/ The record before us was filed with the Board on Apr. 13, 1993; our assessment of the status of Swain's annual filings is current through filing year 1992.

[1] The stated basis for BLM's decision is that Swain's 1979 recordation ignores the ruling of Hearing Examiner Steiner's decision declaring the claims null and void, and, therefore, the recordation must be rejected. 3/ The legal issues presented by Swain's filing, however, are somewhat more complicated.

Swain has attempted to locate claims on lands that were declared nonmineral in character as the result of a 1967 contest to which Swain was a party. This raises the question whether doctrines of res judicata and administrative finality preclude Swain from locating the claims. The Board has addressed this question most recently in United States v. Richard N. Stone, 136 IBLA 22 (1996). That case was decided under the Mining Claims Rights Restoration Act, 30 U.S.C. § 621(b) (1994), but also relied upon the Board's decision in Helit v. Gold Fields Mining Corp., 133 IBLA 299, 97 I.D. 109 (1990), in reaching its result. In Stone, we stated:

> In Helit v. Gold Fields Mining Corp., * * * we examined the applicability of the doctrine of res judicata in the context of mining locations made subsequent to a contest determination that the land involved was nonmineral in character. Therein, relying on prior Departmental precedents (see, e.g., Shire v. Page, 57 I.D. 252 (1941); Gorda Gold Mining Co. v. Bauman, 52 L.D. 519 (1928)), the Board held that a final determination rendered after a hearing as to the mineral character of the land in one proceeding "is binding as res judicata between the parties to the contest as to the status of the lands at the date of the hearing." Id. at 311, 97 I.D. at 115. While such a determination would not be completely preclusive of subsequent locations by the mineral claimant, the claimant would be required to show that exploration and development since the time of the last hearing had disclosed mineral values sufficient to support a finding that the land was mineral in character.

United States v. Richard N. Stone, 136 IBLA at 27. Thus, under Helit and Stone, and absent other defects or conditions rendering the locations invalid, BLM must give Swain an opportunity to show that his exploration and development since 1967 had yielded a valuable mineral deposit, and cannot invalidate them solely upon the Hearing Examiner's 1967 findings. 4/

3/ BLM's decision is entitled "Recordation Rejected." As the text of this decision reveals, BLM's decision would more properly be styled simply as a decision declaring mining claims null and void.

4/ In Stone we also noted that Helit contained the following cautionary statement for mining claimants who adopt this course of action:

"'In the absence of a showing of substantial evidence of mineral discovery not previously disclosed, the filing of new locations for the same ground which was the subject of a prior contest hearing which resulted in a finding that the land was nonmineral in character would leave the locator vulnerable to a charge that the claims were not located or held in

We must therefore determine whether Swain's locations are otherwise valid. We find that they are not.

[2] Swain's efforts notwithstanding, his location notice describes neither an amended location nor a relocation.

An amended location is a location made in furtherance of an earlier valid location and relates back to the date of the original location as long as no adverse rights have intervened. Patsy A. Brings, 119 IBLA 319, 325 (1991); R. Gail Tibbetts, 43 IBLA 210, 216-17, 86 I.D. 538, 541-42 (1979), overruled in part on other grounds, Hugh B. Fate, Jr., 86 IBLA 215 (1985); see also United States v. Johnson, 100 IBLA 322, 337 (1987). A relocation, by contrast, is adverse to an original location, and does not relate back to the date of the original location. United States v. Johnson, supra; American Resources, Ltd., 44 IBLA 220, 223 (1979).

Swain's notice fails as an amended location because his earlier location was void. A mining claimant may not amend a void mining claim. Melvin Helit, 110 IBLA 144, 150-51 (1989); Jon Zimmers, 90 IBLA 106, 110 (1985); R. Gail Tibbetts, 43 IBLA at 218, 86 I.D. at 542. In Zimmers, the Board stated:

> A void claim is generally one where the claimant has failed to comply with a material statutory requirement. Flynn v. Vevelstad, 119 F. Supp. 93 (D. Alaska 1954) aff'd, 230 F.2d 695 (9th Cir. 1956). A crucial statutory requirement, of course, is the discovery of a "valuable mineral [deposit]." 30 U.S.C. § 22 (1982). Where a mining claim is not supported by such a discovery it is properly declared null and void. Chrisman v. Miller, 197 U.S. 313 (1905). Accordingly, it follows that where an original location is declared null and void for lack of discovery, the claimant may not then amend that claim. If the attempted amendments are to survive, they must stand on their own merits.

Jon Zimmers, 90 IBLA at 110.

Swain's notice fails as a relocation because he cannot establish himself as having an adverse interest in a claim which was his own earlier

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fn. 4 (continued)
good faith. See United States v. Prowell, 52 IBLA 256, 260 (1981).' Id." United States v. Richard N. Stone, 136 IBLA at 27 n.4. See also Jon Zimmers, 90 IBLA 106 (1985). Thus, BLM's statement in the decision that the claims may be relocated "[s]ubject to valid intervening rights of third parties or the United States" must be assessed with some amount of circumspection.

original location. The authority cited by appellant in his SOR is not contrary to this axiom.

[3] The 1967 notice must, therefore, attempt to describe original locations. The locations must fail, however, because Swain has not designated each claim as either a placer or a lode claim, but has, instead, attempted to combine both claims into one location notice, and has designated them as both placer and lode claims, which is impossible under the mining laws. Under the Mining Law of 1872, a claim is only locatable upon a discovery of a mineral deposit, which will be found in either lode or placer form. 30 U.S.C. §§ 23, 35 (1994); see generally, United States v. Haskins, 59 IBLA 1, 39-42, 88 I.D. 925, 944-45 (1981), aff'd, Haskins v. Clark, No. CV-82-2112-CBM (C.D. Cal. Oct. 30, 1984). Moreover, "[a] placer discovery will not sustain a lode location nor a lode discovery a placer location." Cole v. Ralph, 252 U.S. 286, 295 (1920); United States v. Haskins, 59 IBLA at 44, 88 I.D. at 946-47 (1981). 5/ In practical terms, this means that, in order to stake valid claims, Swain should have located each claim as either a placer or a lode claim, depending upon the type of discovery he made on the property. A certificate of location which attempts to classify mining claims as both placer and lode will fail, as these terms are mutually exclusive.

[4] Swain claims that the mill site is occupied by "my 24 inch rock crusher and motor which was installed on a heavy duty Steel Frame set in a solid concrete loading dock to be used in Mining and Milling Operations" (SOR at 4). He has provided a photograph of the crusher (SOR, Exh. 4). The mill site, however, is also invalid.

Where a mill site is used for mining and milling purposes in connection with a mining claim that is held to be invalid, and the claimant does not show that the mill site is being used for mining and milling purposes in connection with any other mining claim, the mill site is properly declared to be invalid. United States v. Northwest Mine & Milling Inc., 11 IBLA 271, 273-74 (1973); see also United States v. Larsen, 9 IBLA 247, 274 (1973), aff'd, Civ. No. 73-119 (D. Ariz. Sept. 24, 1974). Moreover, appellant has not demonstrated that he has located an independent mill site pursuant to 30 U.S.C. § 42(a) (1994). See United States v. Northwest Mine & Milling Inc., supra.

5/ The proper way for Swain to have protected his interest in both placer and lode claims on the same land would have been to "double stake;" that is, to stake placer claims first, then stake any lode claims found within the placer locations. See Earl M. Hill, "Placer Mining Claims -- Selected Problems and Suggested Solutions," 23 Rocky Mountain Mineral Law Institute 385, 395-96 (1977); John W. Shireman, "Mining Location Procedures," 1 Rocky Mountain Mineral Law Institute 307, 312-13 (1955).

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.

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James L. Byrnes
Chief Administrative Judge

I concur:

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James F. Roberts
Acting Administrative Judge