

UNITED STATES v. R. B. BORDERS, ET AL

A-28624

Decided OCT 23 1961

Mining Claims: Common Varieties of Minerals--Mining Claims: Patent

It is proper to declare mining claims located for sand and gravel prior to July 23, 1955, to be null and void and to reject an application for a mineral patent covering those claims where the locators fail to show that the deposits within the claims can be extracted, removed, and marketed at a profit.

Mining Claims: Possessory Right

Where an adverse claim brought against an application for a mineral patent results in the adverse claimant being decreed to have the right of possession to land within a mining claim, the mineral patent application must be rejected as to that land.

Mining Claims: Patent

Where a contest has been brought against a mining claim later included in an application for a mineral patent, it is not proper to reject the application for patent covering that claim in the absence of a final determination as to the validity of the claim.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

A-28624

United States v. R. B. Borders et al. : Nevada 025248.
: Contests 2476 and 2478
: (Nevada).
United States v. J. R. Osborne et al. :
: Mining claims held to be
: null and void and application
: for mineral patent rejected.
:
: Affirmed in part; reversed
: in part; and remanded.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by R. B. Borders, J. R. Osborne, and others from a decision of the Director of the Bureau of Land Management dated July 27, 1960, holding the Bradford Nos. 1 and 2 placer mining claims in sec. 32, T. 22 S., R. 61 E., M. D. M., Nevada, to be null and void in their entireties and rejecting mineral patent application Nevada 025248.

The appellants contend that they are entitled to patent covering the Bradford Nos. 1 and 2 claims as well as two other claims, the Bradford Nos. 3 and 4, included in mineral patent application Nevada 025248.

As that patent application has already been rejected with respect to certain of the lands included therein and as the decision appealed from purports to deal only with a portion of the other lands included in the patent application, although stating that the patent application is rejected, there is obviously some confusion as to the present status of the four mining claims covered by the application. Therefore, before determining whether the Director was correct in declaring two of the claims to be null and void, we shall review briefly the history of the four claims and the application for a mineral patent covering those claims.

The claims, located in June 1952, cover the entire section. Bradford No. 1 was located on the NE $\frac{1}{4}$, Bradford No. 2 on the SE $\frac{1}{4}$, Bradford No. 3 on the NW $\frac{1}{4}$, and Bradford No. 4 on the SW $\frac{1}{4}$. Adversary proceedings were brought by the Government in 1953 against all of the claims, charging, as to each claim, that minerals had not been found within the limits of the claim in sufficient quantities to constitute a valid discovery under the mining laws (30 U. S. C., 1958 ed., sec. 22 et seq.). While these proceedings were pending, the locators of the claims, on June 3, 1954, applied for a mineral patent covering the four claims.

Thereafter, beginning on November 30, 1954, a consolidated hearing was held on the charges preferred against the Bradford Nos. 1, 2, and 3 claims. On April 7, 1955, the hearings officer found that there was an outstanding oil and gas lease (Nevada 023272) on the NW $\frac{1}{2}$ NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ of sec. 32 when the Bradford Nos. 1 and 3 claims were located and that therefore the land embraced in Bradford No. 1, insofar as it covered the NW $\frac{1}{4}$ NE $\frac{1}{4}$, and Bradford No. 3 (NW $\frac{1}{4}$) was not open to mining location at the time those locations were made. He found that the locators had not filed for record amended locations of those claims within the time permitted in order to avail themselves of the benefits of the acts of August 12, 1953 (30 U. S. C., 1958 ed., secs. 501-505), and August 13, 1954 (30 U. S. C., 1958 ed., sec. 521 et seq.). Accordingly, he held that the Bradford No. 1 claim, insofar as it covered the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 32, and the Bradford No. 3 claim in toto were void ab initio and should not have been included in the contest proceedings. He held that the Government had failed to sustain the charges brought against Bradford No. 2 and that part of Bradford No. 1 which had been open to mining location and that, therefore, those claims were valid to that extent.

In the interim between the consolidated hearing and the decision of April 7, 1955, notice of the filing of the mineral patent application covering the four claims was published from January 26 through March 23, 1955. On March 21, 1955, an adverse claim against two of the claims covered by the patent application insofar as those two claims covered the E $\frac{1}{2}$ E $\frac{1}{2}$ of sec. 32 was filed in the land office (30 U. S. C., 1958 ed., sec. 29).

On March 19, 1957, the Acting Director of the Bureau of Land Management affirmed the decision of the hearings officer insofar as that officer held that the Bradford No. 1, in part, and Bradford No. 3 claims were void ab initio and rejected the application for a mineral patent on the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ of sec. 32.

In discussing the claims which the hearings officer had found to be valid claims (a portion of Bradford No. 1 and all of Bradford No. 2), the Acting Director referred to the adverse claim which had been filed by Vivian Potter and others, as locators of the Highway No. 91 placer mining claim covering the E $\frac{1}{2}$ E $\frac{1}{2}$ sec. 32, against those portions of Bradford No. 1 and Bradford No. 2 in conflict with their claim. He stated that on April 18, 1955, the adverse claimants had instituted a suit in the Eighth Judicial District Court, Clark County, Nevada, to determine the right of possession to the E $\frac{1}{2}$ E $\frac{1}{2}$ sec. 32 and that at that time (March 19, 1957) the suit was still pending. The Acting Director held that the filing of the notice of the adverse claim in the land office (30 U. S. C., 1958 ed., sec. 29) and the institution of the suit by the adverse claimants (30 U. S. C., 1958 ed., sec. 30) had been timely and that determination of the validity of the remaining portion of the Bradford No. 1 claim and of the Bradford No. 2 claim would be suspended pending the outcome of the suit instituted to determine the possessory rights in the E $\frac{1}{2}$ E $\frac{1}{2}$ of the section as between the contestees and the adverse claimants.

In affirming the decision of the Acting Director, the Department, on May 16, 1958 (United States v. R. B. Borders, et al, A-27493), held:

"At the time the Bradford claims No. 1 and 3 were located, the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ of sec. 32 were not open to the operation of the mining laws because of the outstanding oil and gas lease. The claims were, therefore, void and of no effect from the date of location insofar as they covered that land. As the appellants did not meet the requirements of the acts of August 12, 1953, and August 13, 1954, by a timely posting and filing of amended notices of location, the claims remain void and of no effect to that extent."

The Department noted that in the contestees' appeal from the decision of the Acting Director they conceded that action on their mineral patent application, insofar as it covers those portions of the Bradford No. 1 and 2 claims in conflict with the adverse claim of Vivian Potter and others, must be suspended to await the outcome of the suit then pending in the Nevada Court, and that the Acting Director had taken no action with respect to the mineral patent application insofar as it covers the Bradford No. 4 claim in the SW $\frac{1}{4}$ of the section. The Department affirmed the action taken by the Acting Director in suspending action on the mineral patent application insofar as the application covers the NE $\frac{1}{4}$ NE $\frac{1}{4}$, the S $\frac{1}{2}$ NE $\frac{1}{4}$, and the SE $\frac{1}{4}$ of sec. 32 and remanded the case to the Bureau of Land Management for further appropriate action.

Thus when the matter was remanded to the Bureau, one claim (Bradford No. 3) and a portion of another (Bradford No. 1) had been declared to be void and of no effect and the mineral patent application had been finally rejected insofar as that application covered the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ of sec. 32.

The record now before the Department shows that by decision of August 25, 1958 (Mineral Contests Nos. 2468 and 2469), the Acting Director, Bureau of Land Management, because of irregularities which had occurred with respect to the first contest instituted against the Bradford No. 4 claim, directed that new contest proceedings be brought against that claim. However, there is nothing in the present record to show that any action has been taken pursuant to that decision.

On April 8, 1959, a copy of the judgment by the Nevada court in the matter of the adverse claim filed against the Bradford Nos. 1 and 2 claims was presented to the local land office with the request, on behalf of the locators of the Bradford claims, that patent issue. That judgment shows that the parties to the litigation had composed their differences with respect to the conflicts in their mining claims by stipulation. The court therefore decreed the plaintiffs in that case, Vivian Potter and others, to be the owners of the E $\frac{1}{2}$ of the Bradford No. 2 claim and J.R.Osborne, as agent for R.B.Borders and other named

parties, to be the owner of the remaining claims involved in that suit, that is the west half of the Bradford No. 2 claim (the $W\frac{1}{2}$ of the $SE\frac{1}{4}$ of sec. 32) and all of the Bradford No. 1 claim (the $NE\frac{1}{4}$ of sec. 32).

The Director's decision from which the present appeal was taken followed.

The Director considered only the two claims which had been the subject of the adverse suit and those claims only insofar as the patent application covering them had not been rejected and insofar as the Bradford claim locators had been determined by the Nevada court to have a possessory interest therein. Thus he considered the Bradford No. 1 claim to cover only the $NE\frac{1}{4}NE\frac{1}{4}$ and the $S\frac{1}{2}NE\frac{1}{4}$ and the Bradford No. 2 claim to cover only the $W\frac{1}{2}SE\frac{1}{4}$.

He reviewed the testimony introduced at the consolidated hearing on the Bradford Nos. 1, 2, and 3 claims and the decision of the hearings officer of April 7, 1955, holding that the claims covering those lands were valid claims. He found, contrary to the decision of the hearings officer, that the sand and gravel from these lands can not be extracted, removed, and marketed at a profit and that the locators had not shown by a preponderance of the evidence that the claims had been validated by discovery. He accordingly declared the two claims to be null and void in their entireties.

The evidence upon which the Director based his finding that the claims are without validity, set forth in the Director's decision, fully supports his finding. The locators of these two claims have not met the test of showing that these minerals of wide occurrence, because of the accessibility of the deposits, bona fides in development, proximity to market, and the existence of a present demand for the sand and gravel can be mined, removed, and disposed of at a profit. Without such a showing on the part of the locators, it was proper for the Director to declare the claims to be null and void. Foster v. Seaton, 271 F. 2d 836 (1959).

As the Nevada court had already determined that the Bradford claim locators did not even have possessory rights in the east half of the Bradford No. 2 claim, it was proper, too, for the Director to have declared that claim to be null and void in its entirety.

To recapitulate as to the status of the Bradford Nos. 1, 2, and 3 claims and the mineral patent application insofar as it covers the land embraced in those three claims, portions of those claims were declared to be null and void by departmental decision of May 16, 1958 (A-27493), and the mineral patent application rejected as to those portions. The remaining portions of those claims are now declared to be null and void and the mineral patent application rejected as to the lands covered by the remaining portions. Thus the locators of the Bradford Nos. 1, 2, and 3 claims are declared to have no interest in the $NE\frac{1}{4}$, the $SE\frac{1}{4}$, and $NW\frac{1}{4}$ of sec. 32, T. 22 S., R. 61 E., M. D. M., Nevada.

However, as, according to the present record, no determination has been made as to the validity of the Bradford No. 4 claim, against which a contest has been brought, it was not proper to reject mineral patent application Nevada 025248 as to the lands covered by that claim. Therefore, the case will be remanded to the Bureau of Land Management for appropriate action to determine whether the Bradford No. 4 claim is a valid claim under the mining laws upon which a mineral patent may issue.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Director, Bureau of Land Management, dated July 27, 1960, is affirmed in part and reversed in part and the case is remanded to the Bureau for further action consistent with this decision.

(Sgd) Edward W. Fisher
Deputy Solicitor