

SCOTT BURNHAM

IBLA 92-91

Decided September 16, 1992

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, dismissing protest of mineral patent application. W-80886.

Affirmed as modified.

1. Mining Claims: Location--Mining Claims: Patent--Mining Claims: Withdrawn Land

BLM properly dismissed a protest challenging a mineral patent application for the reason that the mining claim was not properly located because it was staked on land withdrawn from mining where the record established as a fact that the claim was staked after revocation of the withdrawal.

APPEARANCES: William N. Heiss, Esq., Casper, Wyoming, for appellant; R. Dennis Ickes, Esq., Salt Lake City, Utah, for American Colloid Company.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Scott Burnham has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated October 9, 1991, dismissing his protest to mineral patent application (W-80886) of American Colloid Company (American Colloid). Only one claim, the Sho No. 4, is at issue in the appeal before us. We find that the claim was properly located and affirm so much of the decision under review as supports that conclusion. In doing so, we reject arguments by the parties and an explanation provided by BLM for the decision under review that assume that this case concerns the practice of "prestaking," or marking of mining claims on the ground by monuments or other means prior to revocation of a withdrawal order preventing mineral entry on the land, and then "adopting" those stakes when the withdrawal from mineral entry ends.

The Sho No. 4 claim is situated in the N½ lot 1, sec. 5, T. 57 N., R. 96 W., sixth principal meridian, Big Horn County, Wyoming. That land was originally withdrawn from mineral entry for reclamation purposes by an April 21, 1903, order of the Secretary of the Interior (as modified), issued pursuant to section 3 of the Act of June 17, 1902, ch. 1093, 32 Stat. 388 (1901-03). On September 4, 1981, the Assistant Secretary, acting on an application by American Colloid, issued Public Land Order No. 5995, revoking

the 1903 withdrawal and opening the subject land to location under the general mining laws "at 10 a.m. on October 10, 1981." 46 FR 46134 (Sept. 17, 1981).

Burnham is the locator, along with John Armstrong, of a rival placer mining claim, the Foxx No. 18 (WMC-225806), which encompasses the same land as the Sho No. 4 claim. The Foxx No. 18 claim was located on December 11, 1983, after the 60-day period for the filing of adverse claims which followed publication of the notice of the filing of American Colloid's patent application pursuant to 30 U.S.C. § 29 (1988). The claim was filed for recordation with the county and BLM following the date of location. The land sought by both American Colloid and Burnham purportedly contains a valuable deposit of bentonite clay.

Before the opening date, but after publication of the September 1981 notice in the Federal Register, American Colloid began activity in preparation for location of the Sho group of placer mining claims on a large tract of land which includes the N½ lot 1, sec. 5. On September 19 and 20, 1981, its employees placed unpainted 4- by 4-inch posts at the corners of what would become 118 20-acre placer mining claims, including the Sho No. 4 claim. As explained by American Colloid, these posts were to constitute "survey reference points" which would facilitate the location of 20-acre placer mining claims once the land was opened to mineral entry (Response to Statement of Reasons (SOR) at 10). American Colloid also drilled 10 to 15 exploratory holes, to a maximum depth of 50 feet, in the area of the intended claims. No drilling occurred within what would become the Sho No. 4 claim since it has visible outcrops of bentonite. Location notices were prepared, but were not placed on any of the intended claims.

On October 10, 1981, the day that the land was opened to mineral entry, American Colloid sent employees to the land to complete the location of 92 Sho placer mining claims at exactly 10 a.m. At that time, an employee placed a signed location notice at the discovery point on each claim, including the Sho No. 4. New, white-painted 4- by 4-inch posts were also placed at the corners of the claim. American Colloid officially located the Sho No. 4 claim on October 10, 1981, following the opening of the land to mineral entry. However, since October 10 was a Saturday and the county recorder's office was closed, the claim location notice was filed with that office on October 12. A copy of the location notice was filed for recordation with BLM on October 13, 1981. The location notice states that the "surface boundaries of said claim have been designated by substantial posts at each corner thereof."

American Colloid was not the only party to locate mining claims on the larger parcel of land. Claims were also located by the Fischer, Davis, Wilson, and Miller Groups. Various suits were instituted in the U.S. District Court for the District of Wyoming seeking, pursuant to 30 U.S.C. § 30 (1988), to determine the rights of possession between the rival locators. The suits (subsequently consolidated) are collectively entitled American Colloid v. Fischer, No. C82-074 et al. (D. Wyo.). The parties thereto entered into a settlement, approved by the court on September 9, 1983,

that gave American Colloid "exclusive possession" of the land covered by its claims, including the Sho No. 4. Final Order of Dismissal, American Colloid v. Fischer, No. C82-074 et al. (D. Wyo. Sept. 9, 1983), at 2. Thereafter, the conflicting claims of the other parties were abandoned.

On June 22, 1982, American Colloid filed mineral patent application W-80886 seeking title to the Sho Nos. 4, 5, and 16 placer mining claims. Burnham filed a protest to the patent application on February 16, 1984, asserting that the Sho No. 4 claim was not properly located because of the adoption of posts placed on the land prior to revocation of the 1903 withdrawal and, in general, taking exception to the practice of adoption. BLM dismissed Burnham's protest on December 12, 1984, holding that the question whether American Colloid properly located the Sho No. 4 claim by adopting the posts placed on the ground prior to revocation of the 1903 withdrawal was decided by the settlement in American Colloid. See Decision at 2. Further, BLM concluded that Burnham failed to establish that American Colloid had not complied with legal requirements for patent.

Burnham appealed to this Board, which, in Scott Burnham, 100 IBLA 94, 94 I.D. 429 (1987), aff'd, Scott Burnham (On Reconsideration), 102 IBLA 363 (1988), reversed the December 1984 BLM decision because the question whether American Colloid had properly located the Sho Nos. 4, 5, and 16 mining claims was not answered by the court-approved settlement in the case of American Colloid. See 100 IBLA at 132-35, 94 I.D. at 450-51. Rather, we found that it was "incumbent on the agency to independently decide whether the subject claims satisfy all legal requirements in response to the protest filed" and that had not been done. Id. at 137, 94 I.D. at 452.

The Board then remanded the case to BLM to determine the facts concerning American Colloid's activities on the land prior to revocation of the 1903 withdrawal and to adjudicate the question of the validity of the patent application in light of these activities. The court in American Colloid Co. v. Hodel, 701 F. Supp. 1537 (D. Wyo. 1988), dismissed American Colloid's challenge to the Board's 1987 decision as premature and remanded the case to BLM for further proceedings on the question of American Colloid's entitlement to a patent, to be decided in accordance with our decision.

The October 1991 decision, relying on a September 19, 1991, memorandum by the Regional Solicitor, dismissed Burnham's protest because American Colloid had "at all times acted in good faith in complying with the law, as spelled out in the Solicitor's Opinion." A copy of the memorandum from the Regional Solicitor was attached and incorporated into the October 1991 BLM decision by the statement that BLM "agree[d] with the legal advice and facts [contained in the memorandum]." Burnham appealed timely.

On appeal, he again contends that American Colloid failed to properly locate the Sho No. 4 claim and therefore acquired no rights under the general mining laws to the affected land because the location relied on adoption of posts emplaced prior to revocation. See SOR at 9. Burnham argues that a claimant must perform "all of the acts of location" after land is

restored to mineral entry and, therefore, cannot take advantage of certain of those acts done before revocation. He argues that to hold otherwise will give American Colloid an unfair advantage in the instant case and, in the future, encourage claimants to undertake such acts of location on withdrawn land, and will undermine the purposes of withdrawals.

[1] Generally speaking, the locator of a mining claim on Federal land is required by the general mining law to ensure that, at the time of the initiation of rights under that law, the "location [is] distinctly marked on the ground so that its boundaries can be readily traced." 30 U.S.C. § 28 (1988). In the instant case, this means that the corners of the claim must be "stak[ed]," as provided by Departmental regulation 43 CFR 3831.1. The nature of such staking is determined by State law, which requires that a claim be located "[b]y designating the surface boundaries by substantial posts or stone monuments at each corner." Wyo. Stat. § 30-1-110 (Supp. 1992). A claim is not validly located unless it is properly marked on the ground in accordance with Federal and State law. See Cole v. Ralph, 252 U.S. 286, 296 (1920); Roberts v. Morton, 549 F.2d 158, 161 (10th Cir. 1976), cert. denied, 434 U.S. 834 (1977).

To suggest that the Sho No. 4 was not properly located, Burnham refers to a statement in an answer brief filed by American Colloid in the American Colloid case to the effect that the large tract of land was blanketed by American Colloid's Sho claims in what was generally an alternating pattern of "white" and "orange" claims, the white claims being those staked after revocation. See Letter to BLM, dated Apr. 9, 1990, at 2. These claims are depicted as either shaded (orange) or unshaded (white) on a map attached to the March 22, 1983, deposition of Durtsche. According to the map, the Sho No. 4 claim is an "orange" claim. See also Map attached to Letter to BLM from William N. Heiss, dated July 14, 1990. American Colloid stated in its brief that, at the time of revocation of the 1903 withdrawal on October 10, 1981, it simply adopted corner posts already placed on the land in the case of orange claims. See Letter to BLM, dated Apr. 9, 1990, at 2-3. Durtsche stated that the Sho No. 4 claim was a claim where existing posts were adopted at the time of revocation. See March 22, 1983, Durtsche Deposition, at 156.

In establishing what was done when locating the Sho No. 4 claim, in response to the Board's direction on remand, American Colloid maintained that the corners of the claim were monumented "by physically placing corner posts * * * immediately after 10:00 a.m. [on October 10, 1981]" (Statement of Facts, dated Apr. 13, 1990, at 6). See also Response to SOR at 6, 33. This statement relied on an April 12, 1990, affidavit of Gary Ballenger, an employee of American Colloid who participated in the location of the Sho claims but was not actually present at the location of the Sho No. 4 claim. Ballenger stated that white posts were erected at each of the corners of the Sho No. 4 claim on October 10, 1981. See id. at 3. Attached to Ballenger's affidavit are photographs of three of those corner posts taken at about 11:45 a.m. on October 10, 1981, showing that a white post was present at each corner. Even if an unpainted post had been found at

each corner at the time of revocation and had then been adopted as the corner of that claim, the painted post erected to mark the corner of the adjacent claims would necessarily also mark the corner of the Sho No. 4 claim. Therefore, no adoption was necessary to designate that corner, because there was also present a marker emplaced after revocation.

So far as the adoption argument is concerned, American Colloid further stated that it did not adopt existing posts at the corners of the Sho No. 4 claim at the time of revocation of the 1903 withdrawal. See Statement of Facts at 14. This statement referred to another April 12, 1990, affidavit of Ballenger attached to the first affidavit. There he stated that, while American Colloid had placed unpainted posts on the land prior to October 10, 1981, "none of these survey markers was adopted for SHO Claim No[.]. 4." Id. at 2. This statement was deleted from a corrected version of the affidavit dated August 13, 1990. See Letter to BLM from R. Dennis Ickes, dated Aug. 13, 1990, at 2. Nevertheless, in view of the fact that American Colloid now asserts that the corners of the Sho No. 4 claim were marked by new white posts on October 10, 1981, it is clear that it no longer relies on adoption. See id. at 3 ("SHO [No.] 4 has no adopted corners").

Further direct evidence allows us to establish what actually occurred. American Colloid has provided the October 10, 1981, affidavit of Rex Glen Anderson, who located the Sho No. 4 claim. He states that, at exactly 10 a.m., he drove a steel rod with the attached location notice into the ground and, upon receiving acknowledgment of the performance of this act from his team leader, he "proceeded promptly to the four corners of the claim and confirmed that a six-foot 4 X 4 post was erected at each corner." Id. at 2. Since he states that no one else was on the claim at this time, it is clear that the posts he found were either the existing posts erected prior to October 10, 1981, or posts erected by the locators on the adjacent claims. The April 1990 affidavits of Ballenger (and attached photographs) establish that new posts were in fact placed at the corners of the Sho No. 4 claim not long after 10 a.m. on October 10, 1981. To the west and east are the Sho Nos. 3 and 5 claims (WMC-215129 and WMC-215131) and to the south is the Sho. No. 16 claim (WMC-215138). Thus, each of the four corners of the Sho No. 4 claim is shared with one of the corners of the three adjoining "white" claims. There is no dispute that posts were actually placed at the corners of each of the white claims at 10 a.m. on October 10, 1981. See March 22, 1983, Durtsche Deposition, at 156. Therefore, by virtue of the placement of posts at the corners of the Sho Nos. 3, 5, and 16 claims, a new corner post was necessarily placed at each of the four corners of the Sho No. 4 claim at or shortly after the time of revocation of the 1903 withdrawal. This was the conclusion of the Regional Solicitor in his September 1991 memorandum to the State Director. See Memorandum at 4-5. It was endorsed by BLM in the October 1991 decision here under review.

While Burnham contradicts American Colloid's assertion that all four corners of the Sho No. 4 claim were remonumented with painted posts at the time of revocation of the 1903 withdrawal, he has not presented any evidence in support of his position. With respect to the most telling evidence offered by American Colloid, i.e., the photographs of three of the

corners of the Sho No. 4 claim taken on October 10, 1981, Burnham speculates only that the absence of any unpainted posts is due to the fact that the photographs do not show Sho No. 4 corners or that the unpainted posts were removed before the photographs were taken. There is absolutely no evidence that the photographs do not depict what Ballenger, the custodian of the photographs, states that they represent, *i.e.*, three of the corners of the Sho No. 4 claim as they were marked shortly before noon on October 10, 1981.

Therefore, we hold that each of the corners of the Sho No. 4 claim was newly monumented at or after 10 a.m. on October 10, 1981. Because posts were placed at the corners of the claim, even though they may have been placed there with the intention of marking the boundaries of the adjoining claims, it is concluded that the boundaries of the Sho No. 4 claim were "distinctly marked on the ground" as required by 30 U.S.C. § 28 (1988). Nor can there be any question that the surface boundaries of the claim were designated by substantial posts, in accordance with Wyo. Stat. § 30-1-110 (Supp. 1992). *See Scoggin v. Miller*, 189 P.2d 677, 688-89 (Wyo. 1948). We therefore conclude that American Colloid properly located the Sho No. 4 placer mining claim by designating the boundaries of the claim with substantial posts following revocation of the April 1903 withdrawal of the N½ lot 1, sec. 5 at 10 a.m. on October 10, 1981.

Since we conclude that the corners of the claim were in fact staked after revocation, we do not address the question whether American Colloid properly located the claim by placing posts at the corners of the claim prior to revocation and then adopting them when it placed the location notice on the claim following the revocation. To the extent that the decision here under review indulged in such speculation, it is modified to reflect that no such determination was proper in this case in view of the facts as found. Nor would it have been permissible, as the Regional Solicitor's memorandum suggested, to make a holding in the alternative concerning the effect that an attempt to adopt prior staking might have had in this case, since that assumed situation has been shown to be without foundation in fact. We must therefore defer to another day the question whether a mining claim may be validly located by adopting a prestaked area that was withdrawn at the time of staking.

Since we conclude that new posts were placed on the land after revocation we also do not decide the question urged by the parties concerning whether BLM correctly ruled that the Sho No. 4 claim was located "in good faith." The charge of bad faith derived, after all, from an assertion by Burnham that American Colloid had adopted, at the time of revocation, posts previously placed on withdrawn land. *See* SOR at 9, 23. That charge lacks foundation because American Colloid did not rely on adoption of pre-existing posts to monument the claim. Similarly, the contention by American Colloid that Burnham has not acted in good faith is clearly beyond the purview of the instant case, which requires only that we adjudicate whether BLM correctly determined that American Colloid's location was proper. Moreover, it may not even be a matter for Departmental adjudication, being in the nature of a dispute between rival locators, a matter best usually left to adjudication by State courts.

Finally, we must decline to rule whether, as charged by Burnham (see SOR at 9), American Colloid's on-the-ground activities on the Sho No. 4 claim prior to October 10, 1981, constituted a trespass, since no such charge was brought or adjudicated by BLM. Nor will we decide whether those activities showed such bad faith that the location of the Sho No. 4 claim was tainted so that the claim should be declared invalid. Erection of posts prior to revocation was an action taken apart from the actual location of the claim. It has not been shown to have any connection to the location of the Sho No. 4.

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 by this opinion.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge