

Editor's note: Aff'd, Civ. No. 94-CV-184-D (D. Wyo. Dec. 26, 1996), appeal filed, Civ. No. 97-8018 (10th Cir. Feb. 25, 1997), aff'd, (May 27, 1998), 145 F.3d 1152

AMERICAN COLLOID CO.

IBLA 90-344

Decided March 4, 1994

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, declaring placer mining claims null and void ab initio. WMC 62780 and others.

Affirmed.

1. Act of Apr. 23, 1932—Mining Claims: Special Acts— Mining Claims: Withdrawn Land—Withdrawals and Reservations: Reclamation Withdrawals

It is proper to declare mining locations null and void ab initio where the locations were not perfected by performance of the condition precedent set forth in the order opening lands in a reclamation withdrawal to mineral location and entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1988).

2. Rules of Practice: Statement of Reasons

Where an appellant does not state with some particularity the reason for appeal, and, as appropriate, support the allegation with argument or evidence showing error, the appeal will not be favorably considered. Conclusory allegations of error, standing alone, do not discharge this burden.

APPEARANCES: R. Dennis Ickes, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

American Colloid Company has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated April 19, 1990, to the extent it declared four placer mining claims located in T. 52 N, R. 102 W., sixth principal meridian, Park County, Wyoming, null and void ab initio in whole or in part. Specifically, appellant appeals the decision concerning the portion of the Beulah #4 claim located July 20, 1956 (WMC 62780) in the S $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ and the SE $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 27; the portion of the Beulah #4 claim located March 27, 1976 (no serial number) in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 27; and the Bethel Nos. 1 and 2 claims (no serial numbers), both located on April 16, 1954, in sec. 28.

By Secretarial Order dated May 2, 1919, various lands in T. 52 N., R. 102 W., were withdrawn from public entry under a first-form withdrawal issued pursuant to section 3 of the Act of June 17, 1902, 43 U.S.C. § 416 (1988) (amended by section 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA)), 90 Stat. 2792), for the Shoshone Reclamation Project. Included in this withdrawal were all lands in sec. 28. On February 26, 1954, the S¹/₂ NE¹/₄, N¹/₂ SE¹/₄, SE¹/₄ SE¹/₄, and lot 5, sec. 28 were opened to location and entry under the mining laws, effective 35 days thereafter, subject to the requirement that a stipulation be executed and recorded before a mineral location was made. 19 FR 1225 (Mar. 4, 1954). The Bethel Nos. 1 and 2 claims, recorded in Park County, Wyoming, on April 17, 1954, by location notices filed in Book 189, pages 463-64, were among a number of claims originally recorded by appellant on behalf of its predecessors- in-interest under section 314 of FLPMA, 43 U.S.C. § 1744 (1988), on December 29, 1978. See American Colloid Co., 112 IBLA 228 (1989).
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BLM's April 1990 decision stated that the lands embraced by the Bethel Nos. 1 and 2 claims were opened to mineral entry pursuant to the BLM order dated February 26, 1954, "provided a stipulation of right-of-way was filed with BLM prior to the location of claims" in accordance with the Act of April 23, 1932 (emphasis in original). The decision declared the claims null and void ab initio because the stipulation was not filed.

The Act of April 23, 1932, 43 U.S.C. § 154 (1988), provides:

Where public lands of the United States have been withdrawn for possible use for construction purposes under the Federal reclamation laws, and are known or believed to be valuable for minerals and would, if not so withdrawn, be subject to location and patent under the general mining laws, the Secretary * * * may, in his discretion, open the land to location, entry, and patent under the general mining laws, reserving such ways, rights, and easements over or to such lands as may be prescribed by him and as may be deemed necessary or appropriate, * * * and/ or the said Secretary may require the execution of a contract by the intending locator or entryman as a condition precedent to the vesting of any rights in him, when in the opinion of the Secretary same may be necessary for the protection of the irrigation interests. * * * The Secretary may prescribe the form of such contract which shall be executed and acknowledged and recorded in the county records and United States local land office by any locator or entryman of such land before any rights in their favor attach thereto, and the locator or entryman executing such contract shall undertake such indemnifying covenants and shall grant such rights over such lands as in the opinion of the Secretary may be necessary for the protection of Federal or private irrigation in the vicinity. Notice

1/ Bethel No. 1 is located in the NW¹/₄ SE¹/₄, SE¹/₄ SE¹/₄, lot 5, sec. 28; Bethel No. 2 is located in the S¹/₂ NE¹/₄, NE¹/₄ SE¹/₄, sec. 28. In American Colloid Co., *supra*, we reversed BLM's decision holding these claims null and void ab initio on other grounds. Id. at 230, 232.

of such reservation or of the necessity of executing such prescribed con- tract shall be filed in the Bureau of Land Management and in the appropriate local land office, and notations thereof shall be made upon the appropriate tract books, and any location or entry thereafter made upon or for such lands, and any patent therefor shall be subject to the terms of such con- tract and/or to such reserved ways, rights, or easements and such entry or patent shall contain a reference thereto. [Emphasis supplied.]

Under authority of this Act, in its February 26, 1954, order opening lands in sec. 28, BLM stated:

Subject to valid existing rights and the provisions of existing withdrawals, the following described lands shall * * * be open to location, entry and patenting under the United States mining laws, subject to the stipulation quoted below, to be executed and acknowledged in favor of the United States by the locators, for themselves, their heirs, successors and assigns, and recorded in the county records and in the United States Land and Survey Office at Cheyenne, Wyoming, before locations are made:

* * * * *

The locator agrees that all prospecting,, mining and other use and operations on the lands covered by his mining location shall be subject to the reservation of right of way to the United States according to the proviso of the act of August 30, 1890 (26 Stat. 391; 43 U.S.C. sec. 945).

The Act of August 30, 1890, 43 U.S.C. § 945 (1988), provides:

In all patents for lands taken up after August 30, 1890, under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States.

In its statement of reasons (SOR), appellant does not argue that the stipulation was filed; rather, it argues that it is not required to perfect the location of the claims. Appellant argues that the stipulation is superfluous because the reservation for ditches or canals is already required by 43 U.S.C. § 945 (1988); that 43 U.S.C. § 154 (1988) does not require the Secretary to impose a condition that such a stipulation be filed but makes it discretionary; that if the stipulation is required, failure to file it can be cured by filing it after the location of the claims because it is a non-fatal defect; and that BLM's decision does not indicate the Secretary has filed notice with BLM and noted on the tract book that the filing of a stipulation is required under 43 U.S.C. § 154 (1988).

[1] Appellant acknowledges we have held "it is well settled that when a location was not perfected by performance of a condition precedent set

forth in the order opening the lands in a reclamation withdrawal to mineral entry pursuant to * * * 43 U.S.C. § 154 (198[8]), such mining claims are properly declared null and void ab initio." Thomas L. Lee, 98 IBLA 149, 151 (1987). "Indeed, 43 U.S.C. § 154 (198[8]) provides that the stipulation must be executed and recorded 'by any locator or entryman of such land before any rights in their favor attach thereto.' (Emphasis added.)" Red Mountain Mining Co., 85 IBLA 23, 26 (1985). See also Wayne M. Mann, 54 IBLA 8 (1981); Yearl Martin, 18 IBLA 234 (1974).

Appellant endeavors to distinguish these cases. The orders opening lands to mineral entry in Mann and Martin required that before a location was made the locator file with BLM and the county recordation office a stipulation stating that, if the land were used for reclamation purposes, the United States would not pay the locator for the use and any improvements that may interfere with reclamation would be removed or relocated without expense to the United States. Wayne M. Mann, *supra* at 9; Yearl Martin, *supra* at 235. The stipulation in Lee required that the locator would prevent tailings, debris and harmful chemicals from being carried into the Salt River bottom lands. Thomas L. Lee, *supra* at 150. In Red Mountain the stipulation also provided for the protection of the Salt River bottom lands from the runoff from mining and milling operations and reserved to the United States the right to construct, operate, and maintain dams, canals, electric transmission lines, roadways and other structures, subject to certain conditions. Red Mountain Mining Co., *supra* at 24. "Where [these] cases had stipulations that placed the locator on notice of possible other- wise unexpected requirements of the locator, the present case had a stipulation that simply placed the locator on notice of the obvious and of the already legislated requirement concerning right-of-way for ditches or canals," appellant argues (SOR at 9).

Further, appellant argues, "the Board did not conclude in those cases that the Secretary had a mandatory duty to require a stipulation or contract in each instance" (SOR at 8). "The implication contained in the Act was that the Secretary may deem it unnecessary for an opened area to have any special reservations or stipulations. Apparently, the opening of the subject lands was such a situation inasmuch as the only thing that the Secretary required was the locator's adherence to the 1890 Act. If the Secretary had not required the locator to file and record the stipulation stated in the PLO he could have nonetheless held the locator to the same obligation otherwise stated in the stipulation. In sum, the stipulation accomplished nothing. To require Colloid or its predecessor-in-interest to file and record such a stipulation before its rights as a locator vested would require Colloid to perform an absurdity" (SOR at 7-8).

It is of course true that 43 U.S.C. § 154 (1988) authorizes but does not oblige the Secretary to "require the execution of a contract by the intending locator or entryman as a condition precedent to the vesting of any rights." The Secretary "may" do so when it "may be necessary for the protection of the irrigation interest." It may be necessary to require the execution of a contract by the intending locator before a notice of mineral location s filed on reclamation lands because the 1890 Act, 43 U.S.C. § 945

(1988), by its terms only requires the reservation of a right-of-way for ditches or canals constructed by the authority of the United States in all patents for lands west of the 100th meridian, not for "any rights" less than a patent, such as the rights to possess, explore, and extract minerals from a claim that are obtained by the locator of a mining claim. It would thus be true that the stipulation required by the February 26, 1954, BLM order, which subjected "all prospecting, mining and other use and operations on the lands covered by [the] mining location" to the reservation of a right-of-way for canals or ditches, would not simply replicate the requirements of 43 U.S.C. § 945 (1988). In any event, the discretion provided by 43 U.S.C. § 154 (1988) was exercised, the stipulation was required, and the stipulation is not capricious even if it accomplishes nothing more than a restatement of the requirements of 43 U.S.C. § 945 (1988), so it does not avail appellant to argue that the stipulation might not have been necessary.

Nor does it avail appellant to argue that:

[E]ven if the stipulation described in the subject Public Land Order ("PLO") is found to be required, the stipulation may be filed as a curative document to correct a non-fatal defect in the claim location. This is true in light of the wording in the February 26, 1954, PLO which required the claim locator to agree to subject his claim to the reservation of certain right-of-way pursuant to an existing federal law. How is it possible to subject a claim to a reservation without first making a claim location? * * * To accomplish the apparent purpose of the stipulation the sequence must be to first locate the claim and then file a stipulation which pertains to the specific claim.

(SOR at 9-10). "Even if the stipulation is required, the claims are valid, provided that Colloid file the stipulation of record upon a determination to this effect by this Board. It would be nonsensical to construe the BLM Order to require the filing of the stipulation before the claim was located." *Id.* at 11.

Calling the failure to execute and record the agreement required by the February 26 order a non-fatal defect does not make it one. The statute calls these actions a "condition precedent" and states they must be done "by any locator or entryman * * * before any rights in their [sic] favor attach." 43 U.S.C. § 154 (1988). It is the essence of a condition precedent that unless the condition is performed, no estate will vest. Bouvier's Law Dictionary, Vol. I (8th ed, 1914) at 584. The wording of the February 26 order is equally plain: it says that the stipulation is "to be executed and acknowledged in favor of the United States by the locators, for themselves, their heirs, successors and assigns, and recorded in the county records and in the United States Land and Survey Office at Cheyenne, Wyoming, before locations are made." (Emphasis added.) When BLM publishes an order opening the lands, as in this case, presumably this would be done by preparing the agreement with a description of the land to be located, signing it, recording it with the county recorder and filing it with BLM before locating the claim. If the intending locator filed an application that the lands be opened, the procedures in 43 CFR Subpart 3816 would apply.

Finally,, appellant argues that 43 U.S.C. § 154 (1988) authorizing the opening of reclamation lands to mineral entry requires the Secretary to file notice of the contract or stipulation requirement both in the Wyoming county recordation office and in the appropriate BLM office and to make "notations upon the appropriate tract books." Appellant claims: "Compliance with these provisions must occur before the Secretary can require compliance with a stipulation by the locator. The BLM decision does not represent that these acts were done by the Secretary" (SOR at 2).

The BLM decision referred to and enclosed a copy of the order of February 26, 1954. The record demonstrates that this order was noted on page 11 of the historical index for T. 52 N., R. 102 W. of the sixth principal meridian and published in the Federal Register (19 FR 1225, Mar. 4, 1954). Appellant and its predecessors-in-interest were on constructive notice of its contents. Jack Hammer, 114 IBLA 340, 343 (1990); Wayne M. Mann, *supra* at 10; Vearl Martin, *supra* at 238.

[2] Appellant's notice of appeal also referred to BLM's decision insofar as it declared the portion of the Beulah #4 claim located July 20, 1956 (WC 62780) in the S $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ and the SE $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 27, and the portion of the Beulah #4 claim located March 27, 1976 (no serial number) in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 27, T. 52 N., R. 102 W., sixth principal meridian, Park County, Wyoming, null and void ab initio. Appellant's SOR does not, however, give any reasons for appeal of BLM's decision concerning these claims. The record on appeal shows that all of sec. 27 was withdrawn from mineral entry pursuant to the Secretarial Order dated May 2, 1919, and contains no indication that the lands in the SE $\frac{1}{4}$ of sec. 27 where these claims are in part located were subsequently reopened to mineral entry. Where an appellant does not state with some particularity the reason for appeal, and, as appropriate, support the allegation with argument or evidence showing error, the appeal will not be favorably considered. Add- Ventures, Ltd., 95 IBLA 44, 50 (1986). Any party appealing from a decision of an officer of BLM has the burden of establishing error in the decision under appeal, by a preponderance of the evidence. Conclusory allegations of error, standing alone, do not discharge this burden. Shama Minerals, 119 IBLA 152, 155 (1991).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

^{1/} The Secretarial Order of May 19, 1930, referred to in BLM's decision, revoked the May 2, 1919, Secretarial Order only as to the N $\frac{1}{2}$ NW $\frac{1}{4}$ and lot 1 of sec. 27 and these lands were opened to mineral entry on Oct. 21, 1930. The May 19, 1930, Secretarial Order also revoked the May 2, 1919, Secretarial Order as to all of sec. 26, where a portion of the Beulah No. 4 claim located on Mar. 27, 1976, is located, and sec. 26 was opened to mineral entry on October 21, 1930.

ADMINISTRATIVE JUDGE MULLEN CONCURRING:

I agree with Judge Irwin's conclusion that the claims are null and void, but find it necessary to address one point in further detail to avoid an interpretation of his decision that could lead to further appeals to this Board and litigation between rival claimants.

There are two principal elements to a mining claim. The first is a discovery of mineral in place, and the second is location. Location has been described as the series of acts by which the right of exclusive possession of the mineral estate is vested in the locator. Creed & Cripple Creek Mining & Milling Co. v. Uinta Mining Tunnel Co., 196 U.S. 337, 346 (1905). Location is equivalent to appropriation and no rights vest in the person discovering valuable mineral in place until the person has completed the acts necessary to complete location. Cole v. Ralph, 252 U.S. 286 (1920); Erhardt v. Boaro, 113 U.S. 527 (1885). To perfect a location a claimant must comply with the requirements of the General Mining Law, 30 U.S.C. §§ 21-54 (1988), other applicable Federal laws, ^{1/} and applicable state laws. Del Monte Mining Co. v. Last Chance Mining Co., 171 U.S. 55, 67 (1898). In this case we are addressing a requirement for location on land subject to a reclamation withdrawal, but opened to mineral entry. Completion of all of the steps necessary for location is a condition precedent to the vesting of any rights. However, when the person locating the claim does all things necessary for location, these rights vest and no intervening rights can attach.

Early in the history of the mining law the courts recognized that a claimant who has discovered a valuable mineral deposit cannot immediately do all of the acts necessary to locate a claim. ^{2/} If no specific time period is called for, a reasonable amount of time is allowed for carrying out the acts prescribed by Federal and State law, and what is reasonable has been found to be dependent upon the circumstances. Doe v. Waterloo Mining Co., 70 Fed. 455 (9th Cir. 1895). This important recognition of the time necessary to complete location has led to an important doctrine applicable to location of a mining claim. When all of the acts necessary to perfect a location are carried out, the date of location (appropriation) relates back to the date of discovery. Doe v. Waterloo Mining Co., *supra*; McGinnis v. Egbert, 5 Pac. 652 (Colo. 1885). If this were not the case a

^{1/} Examples can be found at 43 U.S.C. §§ 154 and 1744 (1988).

^{2/} In Golden Fleece Gold v. Cable Consolidated Gold, 12 Nev. 329 (1877), the court found that it was the intent of Congress to apply rules in force among miners on the Pacific Coast, under which the posting of a notice would hold a claim on the vein for a reasonable time to allow him to tie the claim to natural monuments and mark the boundaries on the ground. In Murley v. Ennis, 2 Colo. 300 (1874), the Colorado court found that the discoverer of mineral was entitled to a reasonable time to complete his location.

party commencing location at a later date but completing the necessary acts first would hold a superior right to the minerals.

It is also well established that there is no essential order in which the several acts required by law must be performed. Erwin v. Perigo, 93 Fed. 608, 610 (8th Cir. 1899); Jupiter Mining Co. v. Bodie Consolidated Mining Co., 11 Fed. 666, 676 (9th Cir. 1881); 2 Lindley on Mines § 330 (3rd Ed. 914), and cases cited therein. The Act of April 23, 1932, 43 U.S.C. § 154 (1988), specifically states that the Secretary may prescribe the execution, acknowledgment, and recordation of a contract with the county recorder and BLM as a condition precedent to the vesting of any rights in the locator or entrymen. By adopting the same language used by the courts when addressing the requirements for location, Congress clearly intended to make the execution of a contract an act that must be completed before the right of exclusive possession of the mineral estate is vested in the locator. However, by making the execution and recordation of a contract necessary steps for vesting of rights, pursuant to the Act of April 23, 1932, Congress did not make the execution and recordation of a contract a prerequisite to undertaking any of the other acts necessary for the location of a mining claim. To hold otherwise would cause a location to be null and void ab initio if the claimant did any of the other steps necessary to locate a mining claim prior to execution of the contract. This is the interpretation I wish to dispel.

Prior to the passage of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 (1988), the courts generally held that the claimant had a reasonable time to perfect location, and, if not otherwise prescribed by law, a reasonable time was determined by examination of the facts of the case. Doe v. Waterloo, supra; 2 Lindley on Mines, supra at § 339. These early cases typically held that, barring the existence of intervening rights, the locator of the claim could perfect the location subsequent to when the time specified by law had expired. See, e.g., Jupiter v. Bodie, supra. However, the failure to perform an act necessary for location within the specified time was found to place the claim in jeopardy, with the claim being lost to intervening third parties who perfect their location within the prescribed time. See, e.g., Pelican & Dives Mining Co. v. Snodgrass, 12 Pac. 206 (Colo. 1886).

This policy has changed, however, and, following passage of FLPMA, the failure to perfect the claim within the prescribed time renders the claim null and void ab initio. Location is never perfected and no rights vest in the claimant. John & Maureen Watson, 113 IBLA 235 (1990); Kerry Shumway, 99 IBLA 156 (1987); Idaho Mining & Development, 92 IBLA 223 (1986).

Congress deemed a 90-day period to be sufficient to complete a location when it enacted the mining claim recordation provision of FLPMA, 43 U.S.C. § 1744 (1988), which imposed a 90-day deadline for carrying out the acts necessary for a location. This deadline also is applicable to compliance with the Act of April 23, 1932, by execution, acknowledgment, and recordation of the contract prescribed by the Secretary with the county recorder

and BLM. However, it should be noted that there is still no essential order for performing the several acts which must be performed to perfect discovery. See, e.g., August F. Plachta, 87 IBLA 223 (1985) (certificates of location may be filed with the state before, simultaneously with, or after being filed with BLM). All that is necessary is that the documents are to be filed within the 90-day period.

The record indicates that the location notices for the Bethel Nos. 1 and 2 claims were dated April 16, 1954, and the location notice for the Beulah No. 4 claim was dated July 20, 1956. American Colloid had a reasonable time to complete its location of those claims, but had not executed the contract called for in BLM's February 26, 1954, order opening the lands to mineral entry on April 19, 1990, when BLM issued its order deeming the claims abandoned and void ab initio because American Colloid had failed to complete location within a reasonable period. If 90 days has been deemed a reasonable period for completion of location since 1976 when FLPMA was passed, a failure to file for a period of 34 years is hardly reasonable.

R. W. Mullen
Administrative Judge

