Road Law Handbook

Road Creation and Abandonment Law in Idaho

Christopher H. Meyer, Esq.

GIVENS PURSLEY LLP
601 West Bannock Street
Boise, ID 83702
Office: 208-388-1236
Fax: 208-388-1300
chrismeyer@givenspursley.com
www.givenspursley.com

January 23, 2018

b. Mining claims

Once a mining claim is patented, the land of course is privately held and no longer part of the federal domain. However, there are many events leading up to patent: discovery, location, record, and application for patent (aka entry).[68] A recent federal court decision noted, "the date of a patent's issuance is not necessarily the date the land is withdrawn from the public domain; indeed, it may be an earlier date." *Barker v. Bd. of County Comm'rs of the County of La Plata, Colo.*, 24 F. Supp. 2d 1120, 1128 (1998).

The Court did not find it necessary to pin down which earlier event was critical. Nor, apparently, has any appellate court addressed the question in the context of R.S. 2477.[69] However, secondary authorities identify the pivotal date for determining when land is segregated and removed from the public domain as the date of entry. Entry is the date on which an application for patent is entered.[70] Entry often occurs years well after the claim is located and after a valid discovery is made, perhaps years before patent is issued. Once a valid entry occurs, equitable title shifts to the entryman.[71]

Professor Bader of the University of Alaska stated in a seminal article on R.S. 2477 rights-of-way:

> Public Lands are those owned by the federal government and subject to sale or other disposal under the general land laws, excluding those to which any claims or rights of others have attached. An R.S. 2477 right-of-way cannot be established on public lands subject to any prior valid claim in which the rights of the general public have passed. Thus, the date of entry, not the date of actual patent, removes lands from the public domain for purposes of establishing public highways under the grant.

Harry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 Pace Envtl. L. Rev. 485, 490 (1994) (footnotes omitted) (emphasis supplied).

This conclusion is in accordance with a well-known early treatise on mining law, which notes that land is not segregated from the public domain until the filing of a mineral survey that has been followed by an application for patent:[72]

> Segregation from the Public Domain.

---

public domain, usually for a forest reserve or, after 1905, a national forest. Prospective homeowners almost always had to pay for those HES surveys, which were typically performed in locations that had not already been surveyed by the GLO due to the remote or rugged landscape. In contrast, ordinary homestead patents were not typically issued based on a metes and bounds survey because they were almost always in townships that had been surveyed by the GLO.

[68] R.S. Morrison & Emilio D. De Soto, *Morrison's Mining Rights* (14th Ed.) at 162 (1910).

[69] Although this case did not deal with R.S. 2477 rights-of-way, a U.S. Supreme Court case frequently cited on the general issue of when title to public lands passes is *Witherspoon v. Duncan*, 71 U.S. 210 (1866). *Witherspoon* arose in Arkansas and dealt with a special type of land entry known as a "donation entry." These entries were intended to compensate settlers who had been displaced by the ceding of land to the Cherokee Indians; displaced settlers where entitled to claim certain federal lands within the state simply by filing for them. In determining when title passed for tax purposes, the Court said: "In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained." *Id.* at 217. Consistent with the authorities discussed below, entry is identified as the critical event.

[70] In describing entry as the date of the patent application, this may refer to the date on which the miner files the application with the BLM (previously the General Land Office) or the date on which the government issues a certificate acknowledging the filing and receipt of the purchase money. The distinction is usually academic.

[71] "After entry in the land office, although title is still technically equitable, it amounts practically to the legal or fee simple . . . . The subsequent issue of the patent follows as a mere ministerial act . . . ." Morrison at 160.

[72] The date of entry is sometimes equated with the date of application. Terry S. Maley, *Handbook of Mineral Law* at 693 (1983).

> . . . The register of the land office, when application for patent is made, is supposed to except all previous surveys as noted in the approved field notes (where such surveys have been followed by application for patent), in his notice for publication, which is the first period at which the officers of the United States recognize the segregation of the claim from the mass of the public domain.

R.S. Morrison & Emilio D. De Soto, *Morrison's Mining Rights* (14th Ed.) at 162 (1910) (emphasis original).

The reader should be careful not to confuse the question of when land is segregated and removed from the public domain (which cuts off road creation under R.S. 2477) with the issue of who, between two competing mining claimants, has the more senior claim (which has no bearing on the issue of R.S. 2477 roads).

The latter question is addressed by the "doctrine of relation." Morrison at 162 ("Where successive steps are essential to perfect title, as discovery, location, record, application for patent, entry and finally patent; and during the progress of the time required to complete the series two hostile parties have taken some or all of these steps towards obtaining title to the same ground—the doctrine of relation may become material to determine between them the question of priority."). This doctrine provides that under appropriate circumstances, "relation will carry the junior entry back to the date of its senior application." Morrison at 163. This doctrine, however, relates solely to disputes between the two mining claimants, and does not affect the date on which the land was segregated from the public domain.[73] As Morrison states: "Many loose assertions are found in the cases on this topic of relation, not taking into consideration the conditions above attempted to be pointed out." *Id.*

Thus, in a contest between two miners, the one with the more senior location may defeat the junior locator (even if the junior is the first to file an application for patent). In contrast, a miner with a valid location who allows or suffers a public road to be constructed across the site may not subsequently defeat the road as an R.S. 2477 right-of-way by relying on the doctrine of relation. This is consistent with the limited rights to which a locator is entitled.[74]

In sum, until an appellate court rules to the contrary, the best rule of thumb appears to be that land subject to a mining claim remains part of the public domain until the date of mineral entry. This conclusion is consistent with the clearly established rule for homestead entries discussed above.

c. Lands subject to reserved mineral interest

Lands granted to private parties with mineral interests retained by the federal government do not constitute public lands for purposes of R.S. 2477. *Columbia Basin*, 643 F.2d at 602. However, this decision was drawn into question by *Sierra Club v. Watt*, 608 F. Supp. 305, 337 (E.D. Cal. 1985).

---

[73] For instance, the case of *Calhoun Gold Mining Co. v. Ajax Gold Mining Co*., 182 U.S. 499 (1901), has been cited by litigants seeking to cut off R.S. 2477 rights-of-way as of the date of location, based on the following dictum: "The patents were proof of the discovery and related back to the date of the locations of the claims." *Id*. at 510. However, the *Calhoun* case deals only with conflicts between competing mining claimants with overlapping locations; it has no bearing on and has never been cited for the proposition that lands are withdrawn from the public domain as of the date of location. Indeed, the very fact that multiple claimants are authorized to file overlapping locations demonstrates the opposite principle: mere location of a mining claim does not bar other members of the public from filing claims on that same land—or even establishing public roads under R.S. 2477. In other words, the land remains part of the public domain until an entry is made with the appropriate federal authority.

[74] "Pedis Possessio – A claimant in actual occupancy of a mining claim, even if he did not have a discovery, could hold against anyone who had no better title, so long as he was diligently engaged in seeking a discovery. The doctrine of pedis possessio was founded to provide such protection. However, these possessory rights are limited to protection against adverse locators or the general public. They are of no value against the United States who holds the superior title." Terry S. Maley, *Handbook of Mineral Law* at 697-98 (1983).