United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

Memorandum M-36990 NOV 12 1997

To: Director, Bureau of Land Management

From: Solicitor

Subject: Entitlement to a Mineral Patent Under the Mining Law of 1872

I. Introduction and Overview

Under the Mining Law of 1872, issuance of a "patent" conveys out of United States ownership fee simple title to the lands identified in the patent. Typically, the patent conveys fee simple title to the surface as well as the minerals, though there are exceptions.

During the 130 years since the Mining Law was first enacted,* the question of when and under what circumstances an applicant is entitled to a patent under the Mining Law has arisen in various contexts. One facet of that inquiry is a determination of when that entitlement ripens into a vested right, often referred to as "equitable title."

This issue arises in a variety of contexts such as when an applicant seeks to compel the Department of the Interior (Department) to issue a patent; when the Congress places a moratorium on patenting by legislation; when a valuable mineral deposit in land embraced in a patent application is exhausted during the patenting process; or in determining when a claimant need no longer perform assessment work, file affidavits of assessment work or pay the annual maintenance fee for each mining claim or millsite encompassed by a patent application.

For many years, the federal courts and the Department both identified the point at which equitable title vested as the date on which the Department accepted the purchase price and issued a final certificate, which served as the Department's determination that all conditions for the issuance of the patent were satisfied, including verification of a valuable mineral deposit. Recent decisions by the federal courts emphasize that an applicant does not have **a** vested right or entitlement in a patent until the Secretary of the Interior has determined that an applicant has complied with all the requirements of the Mining Law.

Nevertheless, the Bureau of Land Management's (Bureau or BLM) administrative process for reviewing patent applications authorizes acceptance of the purchase price and issuance of a

[1] The patent feature was first included in the Mining Law of 1866, 14 Stat. 86, and extended in 1870, 16 Stat. 217, before taking its basic current form in 1872, 17 Stat. 91.

"First Half-Mineral Entry Final Certificate" (FHFC) before the Secretary has completed his full review of the patent and confirmed the applicant's compliance with the statute's requirements. Thus, considerable litigation has arisen over whether and when an applicant has obtained a vested right in a mineral patent. Confusion has arisen in the legislative arena, as well, as Congress addresses proposals to amend the 1872 Mining Law.

This memorandum addresses this issue and recommends to the Bureau that it modify its mineral patent review process to more closely conform to federal law.

II. Background: Patenting Under the General Mining Law

The Mining Law opens much of the "valuable mineral deposits in lands belonging to the United States . . . to exploration and purchase, and the lands in which they are found to occupation and purchase . . . ." 30 U.S.C. § 22. It also provides the miner with the "exclusive right of possession and enjoyment of all the surface included within . . . [the] locations," and the right to extract minerals. 30 U.S.C. §§ 26, 29. Ownership of a valid unpatented mining claim confers a possessory right in the land, but not fee title. A patented mining claim, on the other hand, results in fee title passing from the government to the claimant.

A claim may be located by "distinctly mark[ing it] on the ground so that its boundaries can be readily traced." 30 U.S.C. § 28. Discovering a valuable mineral deposit is a crucial step in the mining claim and mineral patent process. Although the Mining Law provides that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located," 30 U.S.C. § 23, the courts have allowed claimants to physically locate mining claims prior to discovery. See Union Oil Co. v. Smith, 249 U.S. 337, 347 (1919). However, a discovery is vital to establishing the possessory rights attendant to a valid mining claim. Cameron v. United States, 252 U.S. 450, 464 (1920). The same requirements apply equally to claims based on the discovery of a placer deposit. 30 U.S.C. § 35. A patent may be obtained only "for any land claimed and located for valuable deposits." 30 U.S.C. § 29.

The Mining Law also permits the owner of a valid mining claim to appropriate non-mineral land as a dependent millsite. This statutory grant of non-mineral lands for millsites is expressly limited to land "used or occupied . . . for mining or milling purposes." 30 U.S.C. § 42(a). Like a valid mining claim, a valid millsite also may be patented. Id.

The basic requirements for securing patents are found in 30 U.S.C. §§ 29-30, 35, 37, and 42. Section 29 sets out the "paper" requirements for filing a patent application and receiving, under current BLM practices, an FHFC. This section provides that a patent "may be obtained" by filing an application "under oath, showing such compliance" with the requirements of the Mining Law and complying with several other technical and procedural provisions. The applicant must include a survey of the claim, 30 U.S.C. § 29, and post a copy of the survey and a notice of the patent application on the claim prior to filing the

application.[2] The applicant must then file a proof of the posting along with the patent application. Id. A notice of the application must then be published in a newspaper nearest to the claim and must be posted in the General Land Office (now Bureau of Land Management office). Id. The applicant must also file a certificate that $500 worth of labor had been expended upon the claim and that the plat is correct, and must furnish an accurate description of the claim. Id. At the end of the publication period, the applicant must file an affidavit showing that the plat and notice of application have been posted on the claim during the period of publication. Id.

III. The Department's Current Mineral Patent Review Process

The filing of an application with the BLM commences the mineral patent process. BLM reviews the application to ensure that the applicant has complied with all the paperwork requirements of the Mining Law. If BLM concludes that the paperwork is complete, it requests payment of the patent purchase price. Upon receipt of the purchase money, the BLM State Director forwards the application, together with evidence of posting, publication, payment of the purchase price, and the FHFC, to the Regional Solicitor's Office which provides legal services for BLM activities in that state. The Regional Solicitor conducts a legal review of the package, and then forwards it to the Solicitor for his concurrence in the issuance of the FHFC. The Solicitor then forwards the package to the BLM Director for concurrence in issuance of the FHFC; he,. in turn, passes it to the Assistant Secretary of Land and Minerals Management for further review and concurrence. See Memorandum from Acting Assistant Secretary for Land and Minerals Management to the Secretary, dated May 4, 1993 (attached hereto as Exhibit 1); Memorandum from Assistant Solicitor, Branch of Onshore Minerals, Division of Mineral Resources to BLM Director, dated October 6, 1995 (attached hereto as Exhibit 2).

With the concurrence of these officials, the Secretary signs an FHFC. The FHFC is the Department's internal administrative recordation of an applicant's compliance with the initial paperwork requirements of the Mining Law -- i.e. that the title, proofs, posting requirements, and purchase money have been submitted to the BLM. The FHFC informs the applicant that the "[p]atent may issue if all is found regular and upon demonstration and verification of a valid discovery of a valuable mineral deposit and subject to the reservations, exceptions, and restrictions noted herein." See First Half-Mineral Entry Final Certificate (attached hereto as Exhibit 3).

After the Secretary signs the FHFC, the patent application is returned to BLM for verification that the applicant has made a valuable mineral discovery, or, in the case of a millsite, that the applicant is using and occupying five acres or less of non-mineral land for

[2] Where an application is for a placer mining claim covering surveyed lands conforming to legal subdivisions, no further survey is required. 30 U.S.C. § 35; 43 C.F.R. 3863.1(a).

mining or milling purposes.[3] To that end, a certified BLM examiner completes a mineral examination of the claim or site and prepares a mineral report. BLM also considers other factors, including land status, reservations, conflicting property rights, and notification to grazing permittees, rights-of-way holders and state and local governments. See BLM Manual, H-3860-1, ch. VII. The BLM examiner may also ask for additional documentation from the applicant if the initial proof of discovery does not provide BLM with enough data to make a determination. If the mineral report verifies the discovery 'of a valuable mineral deposit (or, in the case of a millsite, that the land is non-mineral), and BLM believes that all other statutory requirements have been met, BLM recommends that the Secretary sign the Second Half-Mineral Entry Final Certificate (SHFC) and issue the mineral patent.

With BLM's recommendation, the patent follows a path similar to FHFCs: review for legal sufficiency of the mineral report, the SHFC and the patent by the Associate Solicitor for Mineral Resources, and review and concurrence in issuance of the SHFC and the patent by the Solicitor and the Assistant Secretary for Land and Minerals Management, before approval by the Secretary. See Exhibit 1. The SHFC expressly provides that, once the form is signed, the lands are approved for patenting. See Second Half-Mineral Entry Final Certificate (attached hereto as Exhibit 4).[4] Legal title to the land is transferred as of the date the Secretary signs the patent.

Until 1993, authority rested with BLM State Directors and District Managers to issue FHFCs, SHFCs and patents. That authority was revoked on March 3, 1993, by Secretary Babbitt. See Secretarial Order No. 3163, with extending amendments (attached hereto as Exhibit 5). Thereafter, the Secretary established the above-discussed procedures for Secretarial review before a patent could be issued. On December 16, 1996, the Secretary permanently reserved his authority for signing both final certificate documents and for issuing patents. See Amendment to Departmental Manual (attached hereto as Exhibit 6).

Iv. Federal Law Governing Mineral Patents

The Supreme Court has long acknowledged the central role of the Secretary in administering the public lands and resolving the rights of applicants to patent of those lands. More than a

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[3] Applicants for patented millsites associated with placer mining claims also must demonstrate the millsite is necessary to the mining or milling operation. 30 U.S.C. § 42(b).

[4] Until 1958, BLM issued only one final certificate. Since 1958, however, BLM has split the final "certificate" into two parts: a first page and a second page, which were to be completed at different steps in the patent review process. In 1990, BLM split the components into two wholly separate documents. Whether known as the "first page" of the final certificate, or *as* a separate document, the FHFC or its equivalent has signified only that the applicant had completed the preliminary paperwork requirements and had paid the purchase price.

century ago, the Court described the Secretary's role in the "important matters relating to . . . the issuing of patents" as "the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States." Knight v. Land Association, 142 U.S. 161, 178 (1891) (pre-emption law case). The responsibility includes the "authority to review, reverse, amend, annul, or affirm all proceedings in the department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties." Id. Further, "[t]he secretary is the guardian of the people of United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it." Id. at 181.

The Secretary's general responsibility to examine the validity of a patent application applies with particular force with regard to mineral patents. Under the Mining Law, the Secretary is vested with the responsibility for "seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron, 252 U.S. at 459-60. This is so because a "mining location which has not gone to patent is of no higher quality than are . . . unpatented claims . . . . [N]o right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful appropriation in derogation of the rights of the public." Id.

The Secretary retains jurisdiction over mineral patent applications -- and thus the power to determine the validity of rights claimed -- until a patent issues and legal title is passed. Id. at 461; Ideal Basic Industries. Inc. v. Morton, 542 F.2d 1364, 1368 (9th Cir. 1976). Until the issuance of a patent, therefore, "[t]he United States, which holds legal title to the lands, plainly can prescribe the procedure which any claimant must follow to acquire rights in the public sector." Best v. Humboldt Placer Mining Co., 37l U.S. 334, 339 (1963).[5]

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[5] Although the patent conveys fee simple title to the claimant, obtaining a patent is not necessarily a prerequisite to extracting minerals from the land. As Judge Lindley observed:

> There is nothing in the mining law requiring a locator to proceed to patent at all. He may never do so . . .. An application for a patent is not essential to the acquisition or maintenance of a mining claim. The patent adds but little to the security of the locator. Certainly the failure to apply for one or the fact that one has not been issued in no way militates against the validity of the location.

2 Lindley on Mines § 542, at 1209 (3d ed. 1914) (citations omitted); see also California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 575 (1987) (noting that, once the statutory requirements have been met, the claimant "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations

It follows that the right to a mineral patent does not vest until the Secretary has determined that the patent applicant "has complied with all the terms and conditions entitling it to a patent." Independence Mining Co. v. Babbitt, 105 F.3d 502, 508 (9th Cir. 1997). Validity is the main condition that must be met. Id. Therefore, the right to a patent does not vest "pending a challenge to its validity." Id. (citing Swanson v. Babbitt, 3 F.3d 1348, 1354 (9th Cir. 1993)).

Swanson is illustrative. There, the court faced the question whether Swanson had, by virtue of the submission of a patent application, obtained a "vested right" to a patent on a millsite, such that passage of the Sawtooth National Recreation Area (SNRA), 16 U.S.C. § 460 et seq., which precluded the issuance of a patent in that area, constituted a taking of Swanson's property. Although Swanson had applied for a patent on his millsites, his application was being contested by the United States at the time Congress enacted the SNRA. Swanson argued that he had a vested right to a patent as of the date of application. The Court denied Swanson's taking claim, holding that he had not acquired a vested right to the patent before the withdrawal of land for the SNRA because, at the time of withdrawal, the Secretary was contesting the validity of the patent. 3 F.3d at 1353 (citing Cameron, 252 U.S. 450, 460).

Similarly, an applicant does not obtain a vested right in a patent while the Secretary is considering "whether to contest the patent claim." Independence Mining;, 105 F.3d at 508 (emphasis added); see also Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167 (10th Cir. 1997) (distinguishing between an applicant's completion of "paperwork requirements" and its entitlement to a patent); R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061 (9th Cir. 1997) (same).

The reason for this rule is clear. As discussed above, the Mining Law requires discovery of a "valuable mineral deposit" before a mining claimant has a "valid" mining claim that would support the issuance of a patent. See 30 U.S.C. § 29. In addition, the Mining Law requires that millsites be located on lands that are non-mineral in character and that millsites be properly used or occupied. See 30 U.S.C. § 42. Without meeting these requirements, no rights can be acquired, and no patent can issue. Only after the discovery of a valuable mineral is verified (or, in the case of a millsite the land has been found to be non-mineral in character), and all other statutory requirements have been determined to have been met, does the Secretary execute the SHFC. At that point, the applicant is entitled to a patent.[6]

Thus, once the Secretary himself has determined that the statutory requirements have been met, he may not unreasonably delay in executing and issuing the patent. Thereafter, mandamus may lie to compel the Secretary to complete the ministerial act of issuing the

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although the United States retains title to the land").

[6] Once the Secretary has determined that the applicant is entitled to the patent, the patent applicant may assert those patent rights against other applicants or claim holders.

patent. See Marathon Oil Co. v. Lujan, 937 F.3d 498 (10th Cir. 1991) (holding that mandamus was appropriate to compel the Secretary "to exercise [his] discretion, . . . [but not to] dictate how that discretion is to be exercised" where the Secretary had completed his review and contemplated no further processing); c.f. Independence Mining, 105 F.3d 502 (holding that mandamus to compel the Secretary to issue patent was improper because Secretary had not completed patent validity determination).

Within this legal framework, some confusion has arisen from BLM's administrative practice of accepting the purchase money and issuing the First Half-Mineral Entry Final Certificate before BLM conducts a mineral examination to verify a discovery and before the Secretary completes his review of the application and determines that the requirements have been met.[7] One court recently rejected the Department's argument that a patent applicant had not acquired equitable title to a mineral patent because the Secretary had not yet determined that the application presented a valid claim. Cook v. United States, 37 Fed. Cl. 435, 1997 U.S. Claims LEXIS 52 (Ct. Cl. Mar. 14, 1997).

In Cook, the BLM signed the FHFC (which predated Secretarial Order No. 3163) but had not conducted a mineral examination nor signed a SHFC before Congress enacted the Jemez National Recreation Area Act, 16 U.S.C. § 460jjj, which prohibited the Department from granting new patents on public lands located within the Area's boundaries. As in Swanson, the Department argued in Cook that the language of the FHFC made clear that the issuance of the patent by the Secretary remained in his discretion, pending a determination of the validity of the application. The Court rejected this argument, stating that the language in the FHFC does not give BLM the option to withhold a patent when an applicant does satisfy the terms and conditions of the Mining Law. Id. at * 20. Further, the Court noted that BLM's own manual provides:

> The date of issuance (date of entry) of the first half of the final certificate must be the date of acceptance of the purchase price. This is because the date of acceptance of the purchase price . . . is the legal date of vesting of equitable title (a protected property right) in the applicant, and the final certificate is actually effective on that date.

[7] BLM is not obligated by either the statute or regulations to ask for or accept the purchase price until the validity determination is completed. BLM's regulations governing patent applications for lode mining claims state that BLM should permit the applicant to pay the purchase price only "if no objection appears" after the applicant fulfills the paperwork requirements. 43 C.F.R. § 3862.4-6. Because it is not known if an objection will be made until the Secretary completes the validity determination, BLM need not, and should not, accept the purchase price until then.

Id. at *15 (citing BLM Manual, H-3860(J) (7/9/91 Rev.)). Thus, the Court stated, the Department's "proposed interpretation of the effect of the signing of the first half final certificate is inconsistent with the apparent intent of the agency that designed and employed the certificate." Cook 1997 U.S. Claims LEXIS 52, at *16. The Court denied the Department's and the applicant's separate motions for summary judgment.

BLM's practice raises similar problems with respect to patent applications filed with but not fully acted on by the Department before October 1, 1994, the effective date of the Congressional moratorium on processing mineral. patent applications. The moratorium, included in the Interior and Related Agencies Appropriations Act of 1994, contained two important provisions. Section 112 prohibited the obligation or expenditure of funds for the acceptance or processing of applications for patents for any mining claims or millsites under the Mining Law or the issuance of new patents for any mining claims or millsites. Section 113 is the so-called "grandfather provision" that permits the Department to process those patent applications (1) filed on or before the date of enactment of the Act and (2) in full compliance with the statutory requirements under 30 U.S.C. §§ 29 and 30 for vein or lode claims. The moratorium was extended each year through the end of FY 97, and has been included in the Interior and Related Agencies Appropriations Act for FY 98.

By Instruction Memorandum (IM) No. 95-01, dated October 4, 1994, BLM adopted the following interpretation of section 113:

> Only the following applications may be processed:
>
> (1) Those for which a FHFC was signed before October 1, 1994 and;
> (2) those for which a FHFC was pending in Washington, D.C., as of September 30, 1994.

Based on this IM, the Department determined that 386 applications were "grandfathered" and continued to process those claims; 240 other applications were determined to fall within the moratorium, and remain idle.

A few patent applicants, who had patent applications which the Department determined fell within the moratorium, sued, arguing that BLM misinterpreted the grandfather provision. In Mt. Emmons Mining, 117 F.3d 1167, Mt. Emmons had filed a patent application for ten lode mining claims on December 20, 1992. On September 15, 1994, a BLM land examiner in Colorado completed his initial review of the application, and requested in writing that Mt. Emmons pay the purchase price. Mt. Emmons did so immediately. Following receipt of the payment on September 19, 1994, the BLM land examiner prepared the application for the "chain of command" review leading to the Secretary's review of the FHFC. Before the package left the BLM State Office, the moratorium went into effect.

The Court held that the Secretary's interpretation of section 113, as applied to Mt. Emmons, was arbitrary and capricious under the Administrative Procedure Act because it excluded

from "grandfathering" an application for which the purchase price was paid but for which the Secretary had not determined whether the application was sufficiently complete to qualify for "grandfathering". Id. at 1170-72. The Court specifically acknowledged that failure to pay the purchase price would have made the application incomplete. Id. at 1171 (citing R.T. Vanderbilt, 113 F.3d 1061). However, because Mt. Emmons had paid the purchase price, the Court ordered the Secretary to continue processing Mt. Emmons' patent application to determine whether it is sufficiently complete to qualify for "grandfathering."

V. Conclusion and Recommendations

Under established federal case law, the right to a mineral patent does not vest in the applicant until the Secretary of the Interior determines that the applicant has met all the terms and conditions of the patent, including verification that the applicant has discovered a valuable mineral claim. In certain instances, however, BLM's practice of accepting the purchase price and issuing an FHFC before the Secretary makes his final validity determination has created confusion among applicants, the courts, and Congress. To avoid such confusion in the future, I recommend that BLM update its administrative practices to conform to current federal law.

In the event the moratorium is lifted, I recommend that BLM make the following changes to its administrative procedure for processing new patent applications and applications currently subject to the moratorium:[8]

1. When the BLM State Office has completed its initial review of a patent application and has determined that all paperwork requirements have been met, the State Office should not seek, nor should it accept, payment of the purchase price. Instead, the State Office should assign the application to a mineral examiner for verification of the applicant's proof of discovery of a valuable mineral deposit or, in the case of a millsite, that the land is non-mineral.

2. BLM should eliminate altogether the First Half-Mineral Entry Final Certificate.

3. When the Solicitor has approved the application for patenting, the Office of the Solicitor should inform the BLM State Office to accept the purchase price. After the BLM State Office notifies the Solicitor's Office that the purchase price has been paid, the Solicitor should then forward the patent application to the Assistant Secretary for concurrence. After the Assistant Secretary concurs, the Assistant Secretary should forward the patent application to the Secretary for final action on the Mineral Entry Final Certificate and the patent.

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[8] The following recommendations do not conflict in any way with the recommendations of the Inspector General as described in the Audit Report: Issuance of Mineral Patents, Bureau of Land Management, and Office of the Solicitor, Report No. 97-I-1300 (September 1997).

4 . The BLM Manual and all other BLM policy statements should be amended to eliminate discussion of "equitable title" or "mineral entry" except as approved by the Solicitor's Office. Until the BLM Manual is amended, I recommend that the BLM Director formally rescind the BLM Manual to the extent it is contrary with this Opinion, the Departmental Manual (209 DM 7.2), and Secretarial Order 3163.

5 . Even though BLM's existing regulations governing the mineral patent process are not explicitly at variance with this Opinion, those regulations date back to at least 1970, and should be revised to more 'fully reflect this Opinion.

This Opinion was prepared with the assistance of Karen Hawbecker, Division of Mineral Resources, Office of the Solicitor, Sharon Allender, formerly Assistant Solicitor, Onshore Minerals, Division of Mineral Resources, Office of the Solicitor, Monica Burke, formerly an attorney in the Office of the Solicitor, and Wendy Thurm, Special Assistant to the Solicitor.

John D. Leshy
Solicitor

I concur:

Secretary of the Interior

NOV 12 1997
Date