

Appeal from a decision of the Oregon State Office, Bureau of Land Management, rejecting mineral patent application. OR-42971.

Decision affirmed as modified; appeal dismissed.

1. Administrative Procedure: Decisions--Bureau of Land Management--Mining Claims: Patent--Words and Phrases

"Holding for rejection." A decision properly "holds an application for rejection" only when BLM does not actually reject the application as of the date of the decision, but indicates that it will do so if specified defects are not cured as directed. Under this procedure, the decision is rejected only after the end of the period allowed for compliance, and the appeal period does not commence until after the compliance period has run. Where BLM mischaracterizes its decision as one holding for rejection an application for mineral patent, it is properly modified on appeal.

2. Administrative Procedure: Decisions--Bureau of Land Management--Mining Claims: Patent--Words and Phrases

Where a 10-day deadline for filing a mineral patent application has irrevocably passed so that the applicant can do nothing to prevent rejection of his untimely application, it is not proper for BLM to "hold the application for rejection" by providing a compliance period to allow the applicant to conform his application to specified requirements, since compliance with the time limit is impossible, and since there is no longer any application pending before BLM to be cured. In these circumstances, BLM should reject the application as untimely (subject to an immediate appeal), and advise the applicant what it would require if and when he re-executes his application or files an amended application. BLM can then adjudicate whether any new or re-executed application complies with its filing requirements.

3. Mining Claims: Patent

Under 43 CFR 1821.2-2(a), BLM properly rejects an application for a mineral patent executed more than 10 days prior to filing.

4. Mining Claims: Patent--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Standing to Appeal

In the absence of an appeal directly presenting the propriety of BLM's demands for additional information in the context of a pending mineral patent application (such as an appeal from a decision rejecting a mineral patent application as containing information insufficient to confirm compliance with governing law), the Board of Land Appeals lacks authority to consider them.

APPEARANCES: G. Donald Massey, pro se.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

G. Donald Massey has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated December 24, 1987, rejecting his application for mineral entry and patent, OR-42971, with respect to the Page Creek Mine placer mining claim, ORMC-49000, and providing advisory notice as to supplemental information required for any amended or re-executed application.

The subject placer mining claim, situated in Josephine County, Oregon, within the Siskiyou National Forest, was originally located on April 9, 1981, relocated on December 28, 1981, and filed for recordation with BLM on January 6, 1982. On July 24, 1987, Massey filed his application for mineral entry and patent for the claim, which had been signed by him on July 1, 1987, along with various supporting documents.

In its decision, BLM held that Massey's application had been filed more than 10 days after execution in violation of 43 CFR 1821.2-2(a). BLM stated in the body of its decision that the application was "rejected" because of this failure, although (as discussed below) elsewhere in the decision BLM stated that it "held the application for rejection" pending re-execution of the application and compliance with additional filing requirements described in the decision.

BLM noted that the certificate of title would need to be "brought down through the date of filing" and certified by the county recorder, as legal custodian of the record of mining locations. BLM went on to list, "for [Massey's] convenience," additional specific information and/or documentation required to be filed, including a statement that title was not sought to control water courses or valuable timber; an affidavit that there are no known lodes; a detailed showing as to the nature of the mineral deposit, methods for mining, processing and transporting the raw material, and as

to the estimated profitability of the mining operation; and an agreement for publication of a notice of the mineral entry and patent application.

Massey has appealed, challenging many of the additional requirements imposed by BLM, asserting either that he had previously complied or that the requirements were not authorized by "law or regulation." Massey has not challenged BLM's decision insofar as it rejected his application under 43 CFR 1821.2-2(a).

[1] We first consider the procedure BLM adopted in its decision. The decision's caption notes that Massey's application was "held for rejection." The term "holding for rejection" is properly used to mean that BLM does not actually reject the application as of the date of the decision, but indicates that it will do so if specified defects are not cured as directed. Under this procedure, the application is rejected only after the end of the period allowed for compliance, and the appeal period does not commence until after the compliance period has run. ^{1/}

Notwithstanding its caption, BLM's decision did not, in fact, hold the application for rejection, but rejected it outright, since it was filed more than 10 days after it was executed, in violation of 43 CFR 1821.2-2(a). The decision states, in paragraph 1, that "[t]he application is therefore rejected, subject to the right of appeal and to the right to file a new and properly executed application" (emphasis supplied). Insofar as it was mischaracterized as a decision holding Massey's application for rejection, BLM's decision is modified.

[2] We note that, as the 10-day deadline had been irrevocably missed as of the date of BLM's decision, Massey could do nothing to prevent rejection. There was, therefore, no point in providing him a "compliance period" in these circumstances. The best BLM could do to assist Massey was to notify him that he could re-execute his application and then refile it within the mandatory 10-day time frame after execution. Since BLM's

^{1/} There is a fundamental difference between, on the one hand, rejecting an application because of the failure to comply with a regulatory requirement and, on the other hand, "holding an application for rejection" subject to the right to comply within a certain time period. See Carl Gerard, 70 IBLA 343, 346-47 (1983); see also John R. Anderson, 71 IBLA 172, 176-77 (1983) (Stuebing, A.J., concurring). In the former instance, the appellant is afforded no opportunity to comply prior to rejection of his application. Rather, the BLM decision is final and subject only to the right to immediate appeal to the Board. In the latter instance, the BLM decision is interlocutory and not subject to the right to appeal to the Board, and the appellant is afforded an opportunity to comply prior to rejection of his application. Only at the conclusion of the specified time period for achieving compliance does the right to appeal to the Board arise. See Luella S. Collins (On Reconsideration), 101 IBLA 399, 400 (1988), and cases cited therein.

decision rejecting Massey's application obviously adversely affected him, he therefore had an immediate right to appeal it to this Board.

In the latter part of its decision, BLM did give Massey advisory notice of what it required from him in any amended or re-executed application for entry. As the earlier application was rejected and had to be refiled, any defects in it could not, technically, be "remedied." Here also, it was incorrect for BLM to provide a "compliance period," since there was no longer any application pending before BLM. While we do not fault BLM for providing Massey with advisory notice of what his application should contain, we rule that it was improper to provide a "compliance period" in these circumstances. To the extent that it did so, BLM's decision is also modified.

Rather, BLM should have simply rejected Massey's application for noncompliance with 43 CFR 1821.2-2(a), subject to an immediate appeal. Then, BLM could simply have advised Massey what it required from him if and when he re-executed his application or filed an amended application. BLM could then review any new or re-executed application and determine whether it complied with the requirements it listed in its July 1987 decision.

[3] What, then, is the present status of the dispute? Although Massey did appeal, he did not challenge BLM's holding rejecting his application for failure to comply with 43 CFR 1821.2-2(a). Moreover, we hold that BLM properly rejected his application for this reason. Under 43 CFR 1821.2-2(a), BLM "will reject all applications to make entry which are executed more than 10 days prior to filing." Thus, BLM was required to reject Massey's application, since it was not filed timely. See 2 American Law of Mining § 51.07[2] (2d ed. 1989).

[4] Massey's appeal consists of specific and pointed objections to some of the requirements that BLM indicated would be imposed on any new or re-executed application that he would file in the future. However, as discussed above, it does not appear that there was any mineral patent application pending at the time he appealed, since BLM's decision had properly rejected application OR-42971. The Board's authority is limited to deciding appeals from decisions which adversely affect a party; the Board does not issue advisory opinions. See 43 CFR 4.410(a); Tennessee Consolidated Coal Co. v. OSMRE, 99 IBLA 274 (1987). Accordingly, in the absence of an appeal directly presenting the propriety of BLM's demands for additional information in the context of a pending mineral patent application, we lack authority to review these requirements. The present appeal must therefore be dismissed. 2/

2/ An appeal from a BLM decision rejecting a mineral patent application for failure to provide sufficient information would provide an appropriate context for resolving this matter. If Massey refuses to comply with BLM's directives regarding further information, and BLM rejects his application, the matter would become ripe for our review upon the filing of a timely notice of appeal, statement of reasons, and answer.

However, we note that, were we to reach this issue, we would affirm BLM. Our review of the December 1987 BLM decision does not disclose any impropriety in BLM's requiring Massey to submit the listed information and documentation in order to adjudicate his mineral patent application. First, BLM requires the submission of certain information in conjunction with the general regulatory requirement set forth in 43 CFR 3863.1-3(a) that an applicant for patent for a placer mining claim submit, "in detail, such data as will support the claim * * * that title is sought not to control water courses or to obtain valuable timber but in good faith because of the mineral therein." Specifically, BLM requires Massey to fully describe the natural features of the land, particularly the streams (their courses, amount of water carried, and fall within the claim) and timber (amount and adaptability to mining and other uses). The information that BLM requires to be supplied regarding streams and timber is appropriate to permit it to adjudicate whether Massey is impermissibly seeking title to control water courses or to obtain valuable timber. The regulation itself specifies that this information must be provided.

However, Massey argues that this language applies only in the case of placer mining claims for deposits of "building stone or other deposit than gold." 43 CFR 3863.1-3(a). We do not agree. The regulation states that the information provided by any placer applicant will "depend upon the character of the deposit and the natural features of the ground." The regulation sets forth the different information regarding character of the deposit the applicant must provide depending on whether the deposit is placer gold, on the one hand, or building stone or deposit other than gold, on the other hand. Next, the regulation states that the applicant "will also be required to describe fully the natural features of the claim" and then requires information regarding streams and timber. This requirement regarding a description of the natural features of the claim relates back to the statement regarding the information required of any placer applicant to aid BLM in the adjudication of whether any placer applicant seeks title merely to control water courses or to obtain valuable timber.

Second, BLM required the submission of "sufficient details for the mineral specialist of the U.S. Forest Service to determine whether a valuable mineral deposit has been found." Specifically, BLM required Massey to describe, among other things, the general geology, the quality and quantity of the mineral deposit, all discovery points, the results of drilling and sampling the claim and of analysis of the samples, the method of mining, processing, and transporting the raw material and the estimated profitability of the mining operation.

Massey objects to BLM's requirements, asserting that they run counter to the statement in 43 CFR 3863.1(a) that, where a placer mining claim is on surveyed land and conforms to legal subdivisions, "no further survey * * * will be required." Massey misconstrues that language, which only precludes a "survey" of the boundaries of a mining claim for which a patent is sought where the claim can already be described by legal subdivisions. See Dennis J. Kitts, 84 IBLA 338, 341 (1985). It does not preclude a mineral examination of a claim for the purposes of determining whether it contains a valuable mineral deposit, as required by the Mining Law of 1872,

30 U.S.C. § 22 (1982). ^{3/} The information that BLM required to be submitted is intended to aid in such a determination and, thus, may justifiably be required of a mineral patent applicant. The Board has made it clear that BLM has the authority, and responsibility, to ensure that it receives sufficient information from a mineral patent applicant to determine whether a mineral examination is required:

An applicant has an obligation to support his application for mineral patent with sufficient descriptive information and data to permit the BLM mineral examiner, on review in his office, to conclude that each claim was valid and that all prerequisites for patent had been met, subject only to confirmation upon field examination. In short, the patent applicant must make a prima facie showing that he is entitled to the patent he seeks. This is a reasonable requirement because, otherwise, BLM would be obliged to waste the valuable time of its mineral examiners to conduct costly field examinations based upon information which did not even show the patent application to be meritorious on its face. [Emphasis in original.]

Dennis J. Kitts, *supra* at 343.

Massey argues that the specific requirements are not found in the regulations. While the regulations do not specify the information which a placer applicant is to submit, nevertheless, what is required is "the recitals necessary in and to both vein or lode and placer applications." 43 CFR 3863.1-3(a); see 43 CFR 3862.1-1(a) (lode mining claims). Further, 43 CFR 3863.1-3(a) states that a placer application "should contain, in detail, such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits not in vein or lode formation." (Emphasis added.) Accordingly, we find BLM's requirements are consistent with the regulations. It could require that the information be submitted to supplement the application, so it may advise that it be submitted with the application. See Wilbur G. Hallauer, 52 IBLA 202, 204 (1981).

Massey asks us to grant him 60 days from notice of our ruling here in order to perfect his mineral patent application. There is no need to prescribe such time limit, as Massey remains free to seek a patent to the subject placer mining claim by submitting either a new or re-executed application. Owyhee Calcium Products, Inc., 72 IBLA 235, 241 (1983); Donald L. Clark, 71 IBLA 169, 171 (1983). To the extent that he believes, as he has indicated on appeal, that he has already adequately complied, Massey can simply re-present his information. BLM, in turn, may or may not reject his application for noncompliance with the requirements set out in the advisory notice portion of BLM's July 1987 decision. Any action by BLM to do so would be subject to appeal.

^{3/} Perhaps Massey is confusing a "mineral survey" with a "mineral examination." The former is an actual survey, on the ground, of the boundaries of the claimed area. The latter is a study of the minerals found on the claimed area to determine whether a discovery has been made there.

Therefore, 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, and the appeal is dismissed.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge