

FLOYD R. BLEAK

IBLA 76-483

Decided September 9, 1976

Appeal from decision of the Arizona State Office, Bureau of Land Management, rejecting mineral patent application A-7214.

Affirmed.

1. Applications and Entries: Generally -- Applications and Entries:
Amendments -- Mining Claims: Patent -- Patents of Public Lands:
Amendments

The execution of an application for patent to a mining claim by an attorney in fact for the claimant, at a time when the claimant himself is both resident of and physically within the land district in which the mining claim is located, is unauthorized, and such an application is invalid. The defect cannot be cured by an amendment signed by the claimant.

APPEARANCES: Hale C. Tognoni, Esq., Phoenix, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

At the request of the Forest Service, U.S. Department of Agriculture, the Arizona State Office, Bureau of Land Management, issued a complaint on July 7, 1970, serial A-4602, challenging the validity of the More Sand and Moon Sand Placer Mining Claims located in section 24, T. 23 N., R. 7 E., G&SRM, Arizona. A hearing on the complaint was held before Administrative Law Judge John R. Rampton, Jr., and on June 12, 1975, he issued a decision declaring that a discovery of a valuable mineral deposit exists within the limits of each claim. Accordingly, he dismissed the complaint and directed that patent should issue to the claims.

In the interim, on July 28, 1972, the claimant, Floyd R. Bleak, by Hale C. Tognoni, his Attorney in Fact, filed Mineral Patent Application A-7214 for the two claims. The application was held in abeyance pending the outcome of contest A-4602. The case record

indicates that claimant Floyd R. Bleak was a resident of Flagstaff, Arizona, at the time the patent application was filed.

By decision of January 21, 1976, the Arizona State Office rejected the patent application as invalid on the ground that the execution and filing of an application by an agent at a time when the claimant was a resident within the land district in which the mining claims are located is unauthorized. The decision was based on language in section 6 of the Act of May 10, 1872, 30 U.S.C. § 29 (1970), as amended by the Act of January 22, 1880. The first sentence of 30 U.S.C. § 29 reads:

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person * * * authorized to locate a claim under this chapter and sections 71 to 76 of this title, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter and sections 71 to 76 of this title, may file in the proper land office an application for a patent, under oath, showing such compliance * * *.

The 1880 Act added the following sentence:

* * * Provided, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits. [Emphasis added.]

The decision also relied on C. C. Drescher, 41 L.D. 614, 615 (1913), and F. E. Robbins, 42 L.D. 481, 484 (1913), for the proposition that verification of an application for patent to a mining claim by an attorney in fact, at a time when the claimant himself is both resident and physically within the land district, is unauthorized, and entry allowed upon such application is invalid.

Floyd R. Bleak appealed the decision rejecting mineral patent application A-7214. He accompanied the appeal with an amended application signed by himself and asked for leave to amend. In support of his request for leave to amend the application, appellant advanced numerous arguments, none of which are tenable, with the exception of his statement that the oath requirement for applications has been repealed. This is true. At the time of Drescher and Robbins, applications had to be executed under oath. However, the oath requirement for written statements in public land matters

was eliminated "unless the Secretary of the Interior shall, in his discretion, so require," by the Act of June 3, 1948, 43 U.S.C. § 1211 (1970). By regulation the Secretary eliminated the oath requirement with certain specified exceptions none of which are applicable here. See 43 CFR 1821.3-1. However, this has no effect on the other requirement of 30 U.S.C. § 29 that the application must be made by the claimant if he is a resident of or within the land district wherein the mining claim is located.

[1] It has been repeatedly held that a mineral patent application executed by an agent at a time when the claimant is a resident of and physically present within the land district is invalid and cannot be cured by filing a new application, nunc pro tunc, and such an application must be rejected. F. E. Robbins, supra; C. C. Drescher, supra; Crosby and Other Lode Claims, 35 L.D. 434, 435-36 (1907); Rico Lode, 8 L.D. 223 (1889); MacDonald v. Cuff, 206 P.2d 730, 68 Ariz. 369 (1949); 2 AMERICAN LAW OF MINING, Title IX, § 9.2 (1974 rev.); cf. North Clyde Quartz Mining Claim and Mill Site, 35 L.D. 455, 456 (1907). In appropriate cases, the Department has rejected such applications without prejudice to the rights of the mining claimants to begin patent proceedings de novo. C. C. Drescher, supra (at 615); Crosby and Other Lode Claims, supra at 436. ^{1/} Therefore, appellant's request for leave to amend his original application is denied.

However, in order to relieve the applicant of the necessity of repeating work already performed, the documents filed in connection with the original patent application may be resubmitted with his new application to the maximum extent possible.

^{1/} The cases not only find such applications invalid but also hold them so defective that they cannot be considered for equitable adjudication. As the Secretary stated in Crosby and Other Lode Claims, supra:

"A further and alternative contention is that the entry should be submitted for equitable consideration and action under sections 2450 to 2456, inclusive, of the Revised Statutes [now 43 U.S.C. §§ 1161-1163; 43 CFR Part 1870].

"Entries directed by those sections to be decided 'upon principles of equity and justice as recognized in courts of equity' are only those entries 'where the law has been substantially complied with, and the error and informality arose from ignorance, accident or mistake which is satisfactorily explained.' In this case, in the filing of the application for patent, the law was not substantially complied with and the omission is not one that may be denominated a mere 'error or informality.' In fact, in this respect, the law was not complied with at all. The case therefore does not come within the provisions of the sections referred to. See Alaska Placer Claim (34 L.D. 40).

"The decision of your office is affirmed, without prejudice, however, to the right of the applicants to begin patent proceedings de novo." 35 L.D. at 436.

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 without prejudice to the right of the applicant to begin patent proceedings anew.

Martin Ritvo
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Joan B. Thompson
Administrative Judge

