

ALASKA PLACER CO.

IBLA 77-375

Decided December 21, 1977

Appeal from the decision of the Alaska State Office of the Bureau of Land Management holding for rejection appellant's mineral patent application F-13922.

Reversed.

1. Administrative Procedure: Adjudication -- Administrative Procedure: Decisions

Where a decision calls upon an applicant to supply certain documents and make certain showings in support of its mineral patent application or face rejection of the application, and on appeal it is established that all of the documents and evidence called for had already been furnished by the applicant and incorporated in the case record, where they were apparently overlooked by those who examined the application, the decision will be reversed.

2. Conveyances: Generally -- Mining Claims: Generally -- Mining Claims: Possessory Right -- Mining Claims: Special Acts

Where a corporation allegedly acquired a group of unpatented mining claims, but the instruments of conveyance and the

abstract of title are subject to various objections by the Government's title examiner, which the corporation finds are difficult or impossible to cure, the corporation nonetheless may receive a patent to the claims pursuant to the Act of July 9, 1870 (R.S. § 2332; 30 U.S.C. § 38 (1970)), by demonstrating its qualifications under that Act.

3. Mining Claims: Possessory Right -- Mining Claims: Special Acts

Where it becomes necessary for a corporate applicant for mineral patent under R.S. § 2332, 30 U.S.C. § 38 (1970) to demonstrate that it and its predecessors have held and worked the subject mining claims for a specific term of years, the applicant may tack the predecessor's period of possession to its own if there was a privity of interest between them which was demonstrated by any agreement, conveyance or understanding, the purpose of which was to transfer the right and possession of the previous adverse claimant to the successor, and this is accompanied by actual delivery of possession.

4. Mining Claims: Possessory Right -- Mining Claims: Special Acts

An applicant for a mineral patent under 30 U.S.C. § 38 (1970) may be credited with actual possession and working of the claims for the period when the claims were occupied and worked by the claimant's lessee who recognized the title asserted by the claimant.

5. Mining Claims: Possessory Right -- Mining Claims: Special Acts

An applicant for a mineral patent under 30 U.S.C. § 38 (1970) may be credited with actual possession and working of the claims for the period when the claims were occupied and worked by others under a conditional

contract of sale with the claimant, as well as the period after the claimant lawfully declared the contract forfeited but the putative purchasers continued to hold and work the claims, contending the continued validity of the sales contract, during the course of the claimant's litigation to eject them, which ultimately was successful.

APPEARANCES: Risher M. Thornton, Esq., Anchorage, Alaska, for the appellant.

#### OPINION BY ADMINISTRATIVE JUDGE STUEBING

On May 12, 1971, Alaska Placer Company (Alaska Placer) filed its application for patent for nine placer mining claims embracing a total of 172.167 acres in the Port Clarence Mining District near Nome, Alaska. The claims were included in what was known as the Cape Creek Group, which was the subject of Mineral Survey No. 2199, completed on December 12, 1957, and approved and certified May 15, 1957. The claims at issue were located at various times from 1935 to 1952, and are allegedly based upon discovery of valuable deposits of tin, consisting of cassiterite pebbles and sand. Alaska Placer asserts title to the claims through a deed dated March 1, 1965. However, when the abstract of title was examined by the Assistant Regional Solicitor, Anchorage, in November 1971, he found that the

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1/ Following the BLM report of mineral examination Alaska Placer withdrew the Valley claim, comprising 34.514 acres, from the application for patent. Therefore, we are here concerned with an application for only eight claims embracing 137.653 acres.

instruments of conveyance by and to the several predecessors in interest were so irregular and deficient that he could not confirm that record title to the unpatented claims was reposed in Alaska Placer Company. Accordingly, in his opinion dated November 9, 1971, he described the specific title objections he had identified and the curative material which Alaska Placer would have to provide to overcome them. Upon being apprised of these objections and the nature of the required curative material, Alaska Placer determined that to procure the curative instruments would be extremely difficult, if not impossible. It therefore made an election to pursue its application for patent under the Act of July 9, 1870, R.S. § 2332, 30 U.S.C. § 38 (1970). This statute requires that a mineral patent applicant provide evidence of having possessed and worked the claims for the period of time equal to that prescribed by the statute of limitations for mining claims in the State or Territory where the claims are sited. In Alaska the statutory period is 10 years. Alaska Stat. § 09.10.030.

The processing of the application proceeded on that basis, and Alaska Placer supplemented the record with additional materials calculated to demonstrate its entitlement under 30 U.S.C. § 38. In March 1977, these were referred to the Office of the Regional Solicitor, together with the case file, with a request for an opinion as to whether the record was legally sufficient to show possessory title.

In an opinion dated March 25, 1977, the attorney to whom the matter was referred found that the application was still deficient in a number of respects and specified a number of requirements which Alaska Placer must meet in order to cure the alleged deficiencies.

[1] The major portion of this 1977 title opinion was incorporated verbatim in the text of the decision by the Alaska State Office of the Bureau of Land Management, from which this appeal is taken. The decision, dated April 15, 1977, held that Alaska Placer has not satisfied the requirements to obtain mineral patent, and it allowed the company 60 days in which to file submissions in support of seven enumerated requirements, failing in which Alaska Placer's patent application would be rejected without further notice.

In its appeal from that decision Alaska Placer maintains that it has already met each of the seven specified requirements. We will examine each of them in a sequence of our own choosing.

First, the Regional Solicitor's 1977 title opinion and the decision states, "a certificate of incorporation must be filed to satisfy the citizenship criterion. 43 CFR section 3862.2-1." In response appellant says: "The decision is in error in requiring the filing of a certificate of incorporation as to ALASKA PLACER COMPANY. A certificate of incorporation and a certificate of good standing from the State of Alaska were filed with the original patent application, and are contained in the BLM files."

A perusal of the case record reveals that appellant is correct. Not only are the certificates contained in the record, but also a certified copy of the articles of incorporation. The Bureau's receipt stamp shows that these documents were filed on May 12, 1971. The certificates bear the seal of the Department of Commerce, State of Alaska, and are signed by the Commissioner, and appear otherwise to be in good order. Accordingly, the decision is reversed as to this issue.

Next, the title opinion and the decision state: "The Company must establish that discovery of a valuable mineral occurred at the mining site. 43 CFR 3863.1-3. United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974); United States v. Haskins, 505 F.2d 246 (9th Cir. 1974). The agency determines whether a discovery was made."

In its statement of reasons for appeal Alaska Placer responds: "The decision is in error in denying that a valuable discovery has occurred. Discovery has already been allowed on all claims included in the original application except for the valley [sic] claim, as to which the company withdrew the application on June 27, 1974, at the request of the Bureau."

Appellant is correct. The case file contains the report of mineral examination dated January 11, 1973, performed jointly by the

BLM's Minerals Specialist for the State of Alaska and a BLM mining engineer. It concludes that a discovery of a valuable mineral has been made on eight of the nine claims, but finds no discovery on the "Valley" claim. After a "technical review" and a "management review" the report was approved as supplemented on February 2, 1973. The report recommends that the other eight claims "be clearlisted for patent, all else being regular." The Anchorage office of BLM advised Alaska-Placer of these findings and informed the company that contest proceedings would be initiated against the Valley claim, whereupon the company withdrew the Valley claim from the application on June 27, 1974. It thus appears that "the agency" has determined that a discovery has been made on each of the eight claims remaining in the application and that appellant is under no obligation to make any further showing in this regard. Accordingly, the decision is reversed as to this issue. 2/

The title opinion and the decision then state: "A statement showing proof of improvements must be filed."

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2/ This is the second such mineral examination performed by BLM. The earlier examination was performed in 1959 in response to a previous patent application by Alaska Placer's predecessors in interest. The report of that examination, which is contained in the case file, declared that discovery of a valuable mineral deposit had been made on all nine claims originally listed in this application, including the Valley claim. Thus, BLM has twice verified the discoveries on the subject claims.

Alaska Placer responds as follows:

The decision is in error in finding that proof of improvements have not been filed. This proof has been included in the original patent application, and apparently has satisfied a field examination by the Bureau of Land Management. (See letter dated April 30, 1974, attached as "Exhibit A".) In addition to that reflected in the original filing, the possession affidavit of R. Kirk Dunbar, dated April 4, 1977, reflects an additional expenditure in excess of \$ 625,000.00 on the claims since 1974, and subsequent to the BLM examination.

Again, appellant is correct. The file is replete with evidence of the improvements to such a degree that anyone who carefully reviewed the record would be familiar with the place on a subsequent first visit. The report of the U.S. Mineral Surveyor describes in great detail the improvements as they existed in 1957. At that time he valued the expenditures at nearly \$ 200,000 exclusive of the eight buildings which he described but did not appraise. <sup>3/</sup> Appellant's patent application, which is notarized, devotes pages 9 through 16 to a description of the improvements on each of the claims. The BLM report of mineral examination verified the expenditure of the requisite amount, stating: "The statutory requirement of \$ 500 development work on each claim has more than been met with the drilling, road work and buildings constructed." The affidavit of R. Kirk Dunbar, President of Alaska Placer, dated February 4, 1977, does indeed describe expenditures of an additional \$ 625,000 on the eight claims

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<sup>3/</sup> There were 15 claims in this group at the time, and these values refer to the improvements on the entire group, rather than exclusively to the eight claims at issue here.

during the period from 1974 through September 1976. In addition, the case file contains maps showing the location of improvements and aerial and on-the-ground color photographs of the improvements. We find that there has been ample demonstration and verification of the required statutory expenditures. Accordingly, the decision is reversed as to this issue.

Next, the title opinion and the decision state:

[T]he Company must file affidavits that the annual assessment work has been performed. In Oliver v. Burg, 154 Ore. 1, 58 P.2d 245, 250 (1936) the court concluded that 30 U.S.C. section 38 -- "does not relieve the applicant of the necessity of showing performance of the necessary assessment work in addition to possession for the statutory period."

Failure to file affidavits is evidence that the assessment work has not been performed.

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The Company has filed only one affidavit of annual work filed in 1970. Additional proof of substantial compliance or evidence of resumption of work prior to a government contest proceeding must be presented to satisfy the assessment requirement.

To which the appellant has responded:

The decision is in error in finding that the Applicant has not satisfied the assessment requirement. Assessment work affidavits have been filed annually each year since the claims were located in 1935 as to five claims, 1947 as to two claims, and 1952 as to one of the claims. Copies of these affidavits were included in the abstract filed with the application for patent.

Yet again appellant is correct, and the title opinion and the decision are wrong. The affidavits of assessment work are included in the abstract of title, together with the Notices of Intention to Hold Mining Claims authorized by joint resolution of Congress in lieu of the performance of assessment work during and following World War II. These proofs of labor and notices of intention to hold comprise 35 pages in the abstract and could hardly be missed by anyone examining it. In addition, there is a second bound file of duplicates in the case record. All proofs and notices show recording data in the Nome (or Cape Nome) Recording District. Therefore, the decision is reversed as to this issue.

[2] The remaining issues relate to the general question of whether Alaska Placer has adequately demonstrated that it has "held and worked" the claims for a period of 10 years so as to qualify for patent under 30 U.S.C. § 38 (1970). The title opinion and the decision below hold that it has not shown that it has done so, and require certain additional proof. Alaska Placer argues that its showing, properly interpreted, is sufficient. The resolution of this question will require some analysis of the background.

The eight claims involved in this appeal were part of a group of 15 claims ostensibly acquired in 1957 by a partnership comprised of Ralph Lomen and H. G. Gabrielson. The claim of the partnership was based upon various transfers from diverse predecessors extending

back to the original locators. In 1962 Gabrielson died and his interest in the partnership passed to his widow, Pauline Gabrielson. In 1963 Mrs. Galbrielson gave her son-in-law, Kirk Dunbar, a special power of attorney with respect to the claims. Subsequently, Ralph Lomen did the same. (Dunbar was also the manager of Lomen and Gabrielson's mining operations in the Nome area.) On March 1, 1965, Pauline Gabrielson and Ralph Lomen conveyed all of the assets of the partnership, including the subject mining claims, to Alaska Placer Company. At the time of this conveyance to Alaska Placer, all of the outstanding stock of Alaska Placer Company was owned by Ralph Lomen and Pauline Gabrielson.

In 1960, prior to H. G. Gabrielson's death, the partners had executed a lease of the claims to Richard E. Lee. Under the terms of this agreement Lee was to work the claims and mine every year, but as of 1964 Lee had only stripped some of the overburden, and had not taken any ore out.

Alaska Placer having taken over the interest held by the partnership, Lee was notified that the company was dissatisfied with his failure to produce. A meeting ensued between Ralph Lomen and Kirk Dunbar with Richard Lee, and a new agreement was reached. Lee and his wife, Phyllis, contracted to purchase the claims for \$ 400,000 by paying \$ 2,500 cash, \$ 5,000 from smelter receipts for the coming 1965 production, and the balance in annual installments equal to

15 percent of the annual net mineral production of tin concentrates. The Lees were to work the claims to their full capacity during the season when mining was feasible, operating two 10-hour shifts per day and delivering 1,200 tons of ore per day to the washing plant for concentration. It was provided that Alaska Placer had the option to forfeit the Lee's interest in the property if they failed to perform.

During the 1965 mining season the Lees delivered only 3,500 tons to the washing plant, whereupon Alaska Placer gave them notice of the forfeiture of their interest on October 5, 1965. The Lees refused to vacate and a lawsuit ensued which was ultimately decided by the Supreme Court of the State of Alaska by its decision of June 4, 1969. Alaska Placer Co. v. Lee, 455 P.2d 218 (Sup. Ct. Alas. 1969). The Court held that Alaska Placer had properly exercised its right to terminate the agreement and that "[the Lees'] failure to vacate the mining claims after forfeiture of their interest made them trespassers," and it enjoined the Lees from continuing to occupy and mine the claims.

According to affidavits submitted to BLM by Alaska Placer in support of its patent application, when the Lees were evicted in 1969 Alaska Placer began working the claims for its own account. In 1974 Alaska Placer leased the claims to Len Grothe and C. T. Pearson. According to an affidavit by R. Kirk Dunbar, now president of Alaska

Placer, these lessees expended in excess of \$ 200,000 on these claims in 1974, in excess of \$ 250,000 in 1975, and \$ 175,000 during 1976 up to the month of September.

[3] The 1977 title opinion from the Regional Solicitor's Office and the BLM decision from which this appeal is taken hold that Alaska Placer may not be given credit for holding and working the claims for the statutory 10-year period for the following reasons:

1. The possession and development of the claims by Lomen and Gabrielson from 1957-65 cannot be tacked to the period of possession of Alaska Placer because although under 30 U.S.C. § 38 (1970) the possession of the claims by applicants' grantors may be counted, the instrument of conveyance from Ralph Lomen and Pauline Gabrielson merely conveyed "all of the business and assets of Lomen and Gabrielson" to Alaska Placer. The 1971 title opinion concluded that this was inadequate to serve as a deed to the claims.

2. Dunbar's affidavit "does not indicate precisely whether the Lees were successors in interest whose holding and working the claims can be tacked by the Company \* \* \*. Also, the litigation that arose in 1966 precludes the Company from tacking the Lees' possession of the claim from 1966 to 1969, since the Lees were adverse claimants during that period."

3. Dunbar also states that:

Beginning (in) 1966 ALASKA PLACER COMPANY performed all necessary assessment work and in 1969 once again went into actual possession of the claims, and operated them for its own account during the years 1965 through 1973. (Emphasis added.)

This statement could be interpreted to mean that the Company resumed possession in 1969, yet "operated" the claims from 1965 to 1973. What is needed is a clear statement, evidentially supported, that the Company held and worked the claim continuously from 1965 to 1973. Evidence is needed also to substantiate that Grothe and Pearson were lessees and that they worked the claim from 1973 to 1976.

In its brief on appeal with respect to item 1, supra, Alaska Placer asserts that the Lomen and Gabrielson possession can be tacked to the possession of Alaska Placer, noting that the "Agreement of Sale and Assignment" from Lomen and Gabrielson was a sale of all of the assets of the partnership, which included the subject mining claims, as well as a specific assignment to Alaska Placer of the lease of those claims which the partnership had given to Richard Lee. While appellant still asserts that this instrument was sufficient to pass good title to the claims, notwithstanding the Solicitor's title opinion, it points out quite effectively that it is not necessary

that the predecessor pass good title in order to tack the predecessor's period of adverse possession to the successor's, citing the majority rule relating to tacking and privity as stated in 3 Am. Jur. 2d, Adverse Possession § 60:

\* \* \* It is generally held that the privity necessary to support the tacking of successive possessions of property may be based upon any connecting relationship which will prevent a break in the adverse possession and refer the several possessions to the original entry. The continuity of the original adverse possession may be effected by any conveyance or understanding the purpose of which is to transfer to another the rights and the possession of the adverse claimant, when accompanied by an actual delivery of the possession. \* \* \* [Citing a number of cases from many different states.] [Footnotes omitted.]

Inasmuch as Lomen and Gabrielson owned all of the stock of Alaska Placer at the time they assigned all of the assets and business of the partnership to Alaska Placer, and since at that time Kirk Dunbar was not only the vice president of Alaska Placer, but also the general manager of Lomen and Gabrielson and attorney-in-fact for each of the partners, it is clear that there was a connecting relationship and a privity of interest between the partnership and the company. Therefore, the continuity of the adverse possession of the partnership was not broken by reason of any legal-technical deficiency in the conveyance to Alaska Placer, since "any conveyance or understanding," the purpose of which was to transfer possession of these claims, would be sufficient to preserve the continuity of possession under these circumstances. It cannot be doubted that it

was the intention of the partners to transfer and assign the claims to Alaska Placer, along with the mining lease held by Richard Lee at that time. For example, paragraph No. 3 of the instrument states:

3. The First Party [the partnership] hereby assigns to the Second Party [Alaska Placer] all of its rights and liabilities under that certain \* \* \* sublease entered into on April 6, 1960 by and between Lomen & Gabrielson and Richard E. Lee, of Nome, Alaska, and the Second Party hereby accepts all rights and liabilities under the said lease and sublease.

Paragraph No. 6 states:

6. It is understood that the rights and liabilities of the First and Second Parties under the said leases are of nominal value only at the present time but may increase in value due to future workings of the mining claims represented thereby. Any increase in value of said mining claims and leases will accrue to the First Party by virtue of the stock ownership of the Second Party.

Obviously, if Lomen and Gabrielson intended to realize the benefit of any increase in the value of the claims through the enhanced value of their stock in Alaska Placer, they must have contemplated that Alaska Placer would be the owner of the claims. Otherwise, the increase in the value of the claims would have accrued to them directly, as the owners.

The Court of Appeals for the Ninth Circuit, in construing the Alaska adverse possession statute, has applied the majority rule concerning privity and continuity of possession. In Ringstad v.

Grannis, 171 F.2d 170 (9th Cir. 1948), the Court held that "adverse possession may be by different occupants where privity exists between them," adding that if successive possessions are connected by any agreement or understanding which has for its object the transfer of the rights of the possessor, and is accompanied by a transfer of possession in fact, it is sufficient to constitute a continuous possession.

We are of the opinion that there was the requisite privity, agreement and intent between the partnership and Alaska Placer to bring Alaska Placer within the purview of this rule.

[4] We must now consider whether the actual physical occupation of the land by Richard Lee and his wife was in fact the occupancy and possession of the partnership and Alaska Placer, respectively, or whether the holding by the Lees interrupted the continuity of possession under the statute.

Richard Lee first took possession of the claims in 1960 pursuant to a mining lease issued by the partnership, and Lee remained in possession under authority of that lease until March 25, 1965, when Richard and Phylis Lee contracted to purchase the claims from Alaska Placer. Thus, Lee was in possession under the permission granted by the lease, and could not have been holding adversely against his

lessors. "It is elementary that adverse possession cannot be permissive. Conversely, permissive possession is not adverse." 3 Am. Jur. 2d Adverse Possession § 36. Yet the question remains, where the lessor is asserting title under 30 U.S.C. § 38 (1970), based upon a statute of limitations, can the lessor be credited with actual possession of the claims during the time they were being occupied and worked by his lessee? We find in the affirmative.

Actual possession of land consists of exercising acts of dominion over it, making the ordinary use of it, and taking the ordinary profits it is capable of producing in its present state. *Pedis possessio* is not indispensable to the necessary possession \* \* \*. The possession need not be by the claimant personally, but may be effected through another on his behalf.

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Accordingly, the requirement of actual possession may be met through possession on behalf of the adverse claimant by an agent, licensee, relative or tenant. If the possession is by tenant of the claimant it is in law the claimant's possession and he may avail himself of its benefits. The nature of the required possession is not altered when it is supplied through a tenant, however. In such case, the tenant is the means by which the necessary open, hostile, notorious, continuous, exclusive possession under a claim of right is achieved; in common parlance, the tenant flies the landlord's flag.

3 Am. Jur. 2d Adverse Possession §§ 13, 15 (1962) [Footnotes omitted]. See also 2 C.J.S. Adverse Possession, §§ 46, 47 (1972).

Actual possession by a tenant of the adverse claimant will inure to the latter's benefit and ripen into title in his favor. Combs v. Ezell, 232 Ky. 602, 24 S.W.2d 301 (Ct. of App., Ky., 1930).

Therefore, Richard Lee's occupation and working of the claims under the lease constituted possession of the claims, at first by the partnership and, subsequently, by Alaska Placer. Since we have held that the possession of Lomen and Gabrielson can be tacked to that of Alaska Placer, we are brought to a recognition of qualifying possession for the period from 1957, when the partnership first took possession, to March 1965, when the mining lease was supplanted by the conditional contract of sale by Alaska Placer to Richard and Phyllis Lee. Because a possession from 1957 to 1965 does not satisfy the Alaska 10-year statute, we must now determine whether the Lee's possession thereafter also can be regarded as the possession of Alaska Placer.

[5] During the Lees' operation of the claims during the 1965 mining season, Alaska Placer had its own representative on the ground in the person of Kimball Dunbar, Kirk Dunbar's son. It was apparently his function to observe and report on the progress of the work and the extent of the Lees' compliance with their contract obligations to Alaska Placer. About the end of that mining season, on October 5, 1965, Alaska Placer notified the Lees that it was invoking the forfeiture clause in the contract. However, the Lees failed to vacate the premises, and in March 1966 Alaska Placer brought an action in the state court to enjoin them from the claims. This litigation was finally concluded by the decision of the Supreme Court of the State of Alaska on June 4, 1969. Alaska Placer Co. v. Lee, supra. While the litigation was in progress the Lees remained in possession of the

claims, asserting that they had a right thereto by reason of their contract with Alaska Placer, which they maintained had not been breached. During this period the Lees continued to work the claims and produced and sold a considerable quantity of ore. <sup>4/</sup> In 1969, however, the Alaska Supreme Court held that the Lees had breached their contract in 1965, that Alaska Placer had properly invoked the forfeiture clause, and that "[the Lees'] failure to vacate the mining claims after forfeiture of their interest made them trespassers." *Id.*, at 455 P.2d 229.

There allowed litigation initiated by Alaska Placer to recover damages from the Lees for the proceeds from the smelter runs of ore mined and shipped by the Lees while they were resisting Alaska Placer's efforts to eject them. Alaska Placer Co. v. Lee, 502 P.2d 128 (Sup. Ct., Alas., 1972), and Alaska Placer Co. v. Lee, 553 P.2d 54 (Sup. Ct., Alas., 1976). Neither of these latter decisions concerned the title to the claims. Rather, they concerned the nature and character of the Lees' trespass on the claims and the consequent measure of damages to be applied.

The March 1977 title opinion by the Regional Solicitor's Office and the decision from which this appeal is taken expressed certain

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<sup>4/</sup> The Supreme Court found that the proceeds from the claims were:  
"1966 - \$ 75,943.39  
1967 - 80,245.91  
1968 - 105,620.17"  
553 P.2d at 62, N. 27.

misgivings about this litigation, stating: "[T]he decision in each of these suits and their effect on (1) The Company's ability to establish possession for the statutory period, and (2) The Lees' status as possible adverse claimants must be included in the narration of facts presented by the applicant."

As noted above, only the 1969 decision by the Supreme Court of Alaska was concerned with the question of the title and possessory rights to the claims, and it held in favor of Alaska Placer and declared the Lees to be trespassers. The two subsequent decisions had nothing whatever to do with the title or possessory interests.

With regard to "the Lees' status as possible adverse claimants," both the title opinion and the decision failed to take note of the fact that the Lees had on March 1, 1973, filed a formal protest against this patent application. By decision of the Alaska State Office dated May 30, 1975, the Lee's protest was dismissed, the State Office holding, in part, that "the parties of protest [the Lees] have failed to provide sufficient evidence to establish an adverse title or interest in the mining claims described." The Lees appealed to this Board from that State Office decision, and on October 30, 1975, their appeal was dismissed. Richard E. and Phyllis Lee, 22 IBLA 284 (1975). Therefore, the Lees' status as possible adverse claimants has already been administratively adjudicated, as reflected by the case record.

During the entire period of the Lees' possession and working of these claims they were asserting their right to be there on the basis of either the mining lease or the conditional sales contract. That is, they were there by virtue of their recognition of Alaska Placers' asserted paramount legal title. They were mining the claims not only for their own account, but also for the account of Alaska Placer. At no time prior to the filing of their 1973 protest did they assert a claim of title or interest independent from or exclusive of the title asserted by Alaska Placer. Their sole dispute with Alaska Placer was whether they had breached their conditional sales contract to the extent that Alaska Placer could properly declare their interest forfeited. The fact that Alaska Placer had entered into the conditional sales contract did not divest Alaska Placer of the title it was asserting. The contract only served to invest the Lees with a certain equity, which was subsequently vitiated by their failure of performance and forfeiture. In fact, the execution of the contract to sell to the Lees actually strengthened Alaska Placer's claim to an adverse possession of the claims, viz; "Also, adverse possession may be evidenced by such acts as conveying, leasing, mortgaging, or paying the insurance or taxes on the property; \* \* \*" 5 Thompson on Real Property, Adverse Possession, § 2544. [Emphasis added.]

Upon default by the Lees, Alaska Placer acted promptly and diligently to assert its claim of title and to evict them, as noted

by the Alaska Supreme Court in its 1969 opinion, supra. The Lees at all times material to this discussion recognized the title asserted by Alaska Placer and claimed their interest under that title. A substantial portion of the value of the ore mined by them was awarded by the court to Alaska Placer. In light of this, the occupancy and working of the claims by the Lees under the conditional contract of sale cannot be distinguished in any meaningful or material aspect from their working of the claims under the mining lease. Therefore, for the purposes of 38 U.S.C. § 38 (1970), we hold that the occupancy and working of the claims by the Lees from 1960 to 1969 was in law the possession of Alaska Placer, and it may avail itself of the benefit of such possession.

R. Kirk Dunbar filed in the Alaska State Office his affidavit dated February 4, 1977, wherein he states that in 1969 (after the Lees were enjoined from occupying the claims) Alaska Placer went into actual possession of the claims and operated them for its own account through 1973, when Alaska Placer granted a mining lease to Grothe and Pearson, who worked the claims from 1973 through 1976.

The title opinion and the decision appealed from require the submission of more evidence to substantiate these statements. We fail to see the necessity for this. The statements are the sworn, notarized declarations of the president of the applicant company, and there is nothing at all in the record to suggest that they are

untrue. If BLM has reason to doubt the veracity of the affidavit, it has a duty to require further evidence, but lacking any such reason it is pointless to demand further evidence of facts already verified.

Moreover, the affidavit of R. Kirk Dunbar was corroborated by the affidavit of Guy Rivers, president of Rivers C. & M. Co., a construction and mining firm. In this affidavit Rivers describes his familiarity with the claims since the 1950's, states that he knew both Ralph Lomen and H. G. Gabrielson, as well as R. Kirk Dunbar, and states that he has read Dunbar's affidavit and that the matters set forth therein are true and correct. Absent any reason for doubt, this submission would be adequate to satisfy the requirement for corroborative proof imposed by 43 CFR 3862.3-3.

We have held that the possession of Lomen and Gabrielson can be tacked to that of Alaska Placer under the privity rule, supra, and that the occupancy and working of the claims by the Lees in recognition of the title asserted by the partnership and the company was in law the possession of those who were asserting the title. We conclude, therefore, that Alaska Placer can be credited with occupancy and working of the claims from 1957 through 1976.

The only remaining question concerns Alaska Placer's compliance with 43 CFR 3862.3-2, which requires a court certificate that no suit or other action involving possession of the claims is pending, etc. The attorney employed by Alaska Placer to assist in the filing of

this application has submitted an affidavit of his own. In it he describes his efforts to procure the required certificate. He states that because "[t]he State of Alaska does not have any particular court which has jurisdiction of mining cases within the judicial district embracing the claims, the Clerk of the Alaska Trial Courts, situated in Nome, Alaska, refuses to make a certificate in accordance with Bureau of Land Management Regulation No. 3862-3.2." In substitution of such certificate, he then offers his own affidavit to the effect that no such actions are pending.

This poses something of a dilemma. This Board has no authority to compel the Court or any officer or employee thereof to execute a certificate in the face of such a refusal. On the other hand, the Department should not be obliged to waive its regulation simply to accommodate the personal recalcitrance of an individual who is beyond Departmental control. Accordingly, we must insist that either 1) the certificate be obtained and submitted, or 2) that the Clerk or superior officer of the Court having jurisdiction of civil actions in the area of the subject claims indicate in writing that the execution of such a certificate is refused, whereupon the certificate of some attorney in private practice, or officer of a title abstract company, or title insurance company, approved by the BLM, will be received in substitution thereof. If no written refusal to execute the certificate can be obtained, Alaska Placer will be left with no alternative but to seek to procure such certificate through an appropriate legal process such as mandamus or quo warranto.

When this final requirement is met we perceive no bar to the issuance of the patent applied for.

Accordingly, 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 reversed, and the case is remanded to the Alaska State Office, BLM, for further action consistent with this opinion.

Administrative Judge

Edward W. Stuebing

We concur:

Newton Frishberg  
Chief Administrative Judge

Douglas E. Henriques  
Administrative Judge

