

Editor's note: Reconsideration denied; decision reaffirmed by order dated Oct. 19, 1978 -- See 36 IBLA 234A th C below.

UTAH INTERNATIONAL, INC.

IBLA 77-252 and 77-256

Decided August 8, 1978

Appeal from decisions of Wyoming State Office, Bureau of Land Management rejecting, in part, application for millsite patent W-30586 and rejecting in its entirety application for millsite patent W-36502.

Reversed in part; set aside and remanded in part.

1. Environmental Quality: Generally -- Millsites: Determination of Validity -- Millsites: Patents

Where the primary reason for the State Office rejection of a millsite application appears to be that the Environment Protection Agency has recommended against the issuance of a patent because of possible adverse effects on the environment which the federal government will not be able to control if patent issues, the decision of the State Office will be reversed where the applicant shows that he has fulfilled the requirement of 30 U.S.C. § 42 (1970), and where the State having jurisdiction over the operation after patent issues has a strict environmental protection law with safeguards against possible adverse effects on the environment.

APPEARANCES: George M. Straw, Esq., Hochstadt, Straw & Davis, P. C.; and Joseph L. Sweeney, Esq., Reidy and Sweeney, Denver, Colorado, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Utah International, Inc. (Utah), appeals from decisions of the Wyoming State Office, Bureau of Land Management (BLM), dated

February 24, 1977, rejecting, in part, application for millsite patent W-30586 and rejecting in its entirety application for millsite patent W-36502, each filed pursuant to 30 U.S.C. § 42 (1970).

The rejections were based on the fact that BLM interpreted 30 U.S.C. § 42 as giving the Government discretion as to whether a patent should issue, and in its assumed discretion it found that Utah's use of the lands was temporary and did not warrant a patent.

The applicable part of 30 U.S.C. § 42 (1970) reads as follows:

(a) Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith * * *.

Application W-30586 includes Shirley Basin Millsite Claims 41 through 220, some of which were located on November 13, 1968, the others on May 15, 1969. They are situated in sections 21, 26, 27, 28, 34, and 35, T. 28 N., R. 78 W., sixth principal meridian, Carbon County, Wyoming. The application for patent was filed on August 20, 1971.

Application W-36502 is comprised of Shirley Basin Mill Site Claim Nos. 370 through 392 inclusive, designated as Mineral Survey No. 660, situated in sec. 21 and located on July 24, 1969; Shirley Basin Mill Site No. 3, part of Mineral Survey No. 648 in sec. 21 located on August 21, 1962, and Mill Site No. 410 covering the SW 1/4 NW 1/4 NE 1/4 NE 1/4, W 1/2 SE 1/4 NW 1/4 NE 1/4 NE 1/4, E 1/2 SE 1/4 NE 1/4 NW 1/4 NE 1/4 located in sec. 28, T. 28 N., R. 78 W., sixth principal meridian, Carbon County, Wyoming located on July 20, 1971. The application for patent was filed August 16, 1972.

Two mineral reports were filed in this case. ^{1/} The first was submitted by mining engineer W. C. Ackerman in 1972. On pages 38 and 39 of this report, Ackerman summarized his findings as follows:

On the basis of the field examination conducted during the week of August 1, 1972, examination of technical

^{1/} In addition to the applications in issue, W-30586 and W-36502, the mineral reports also included an examination of claims in Utah's patent applications W-29048, W-31660. A total of 314 claims are involved in the 4 patent applications.

literature, maps and data submitted by the applicant, it is the opinion of the examiner that the applicant has shown good faith and has perfected the subject lands as mill sites in accordance with R.S. 2337 (30 U.S.C. 42).

Utah International has demonstrated that the area underlain by the mill sites is non-mineral in character. They have demonstrated that the 314 mill sites under four patent applications are properly utilized for the purpose of processing and milling of uranium bearing ores from the properties in close proximity to their mill.

The mill site examination involved a field examination to determine the mineral in character of the land which involved the study of the strata of sediments underlying these sites which strata are related to the ore bearing formations of the contiguous and adjacent lode mining claims. Secondly, the examination was to determine the use and occupancy of these 314 mill site claims. Examination of radiometric drill hole logs indicated a few shows of mineralization, however, not substantial in quality or quantity to classify the underlying strata as mineral-in-character.

The Environmental Protection Agency (EPA) has addressed the Bureau of Land Management by letter * * * with some concern of patenting mill site claims with tailings ponds which contain radioactive material having a half life of 1016 years. Their concern is that after a pond is abandoned, it dries, and the material may be used for other purposes such as land fill. This particular hazard was brought to light in land fill programs at Grand Junction, Colorado and Riverton, Wyoming. Normally, as stated above, a mill site invariably proceeds to patent if the criteria is met. That is (1) The land is non-mineral in character and (2) The land is occupied for mining and milling purposes. It is the opinion of the EPA that these lands should be retained under Federal ownership in order that they may be under surveillance, that is (1) beyond the life of the operation and (2) beyond the life of the applicant receiving the patent.

Continuing on page 39 of his report, Ackerman made the following recommendation:

It is recommended that a portion of the mill site application W-30586 * * * including the following claims proceed to patent consisting of the mill buildings and the fresh water pond:

154, 155, 156, 157, 158, 159, 172, 173, 174, 175, 176, 177, 178, 190,
191, 192, 193, 194, 195, 196, 207, 208, 209, 210, 211, 212, 213.

Ordinarily, if management does not foresee any reason that the EPA has a valid argument in regard to the remaining mill site claims under application W-29048 * * *; W-31660 * * *; W-36502 * * * and the remaining claims under W-30586 * * * these claims are recommended to proceed to patent in view of meeting the criteria (1) occupancy and (2) non-mineral in character.

A second report dated May 11, 1976, was prepared by Alan J. Ver Ploeg. Ver Ploeg's report differed from Ackerman's on the question of mineralization. Ver Ploeg reported at page 45 that examination of radiometric logs indicated a few shows of mineralization, but that only one (claims 78, 127, and 128 within application W-30586) was considered to be of sufficient quality and quantity to be classified as mineral-in-character. Regarding use and occupancy, Ver Ploeg concluded that except for areas which are planned for future use, the land in question was being used for the purpose of processing and milling of uranium-bearing ores from the properties in close proximity to the mill.

Ver Ploeg's recommendation for the applications reads as follows at pages 46-47:

On the basis of the field examination conducted during the week of November 3, 1975 and data supplied by the applicant, it is the opinion of the examiner that * * * portions of application W-30586 be contested * * * for failure to comply with the requirements set forth in R.S. 2337 (30 U.S.C. 42). The remainder of the claims in application W-30586 (excluding those encompassing the mill, office, and maintenance facilities) and all of W-36502 should be contested also. Although the company is utilizing these lands (W-36502 and remainder of W-30586) for mining purposes including primarily stockpiling overburden and tailings ponds; these uses are considered temporary in nature after which the land is reclaimed as required by Wyoming State law. This temporary use of the land does not warrant the issuance of patent to these claims. In addition, EPA has requested these lands be retained in Federal ownership to allow for monitoring the radioactive materials and chemical waste * * *. Only those claims encompassing the mill, office, and maintenance facilities are recommended to proceed to patent.

* * * * *

Within millsite application W-30586, claims 121 - 126, 142 - 147, 162 - 167 and 181 - 186 should be contested for failure to meet the second criteria. As of the week of November 3, 1975, these claims had not been used or occupied for mining and/or milling purposes. Also within application W-30586, the portion encompassed by claims 78, 107, 108, 127, 128, 129, 148, 149, 168 and 169 should be contested for failure to meet the requirements of the first criteria, [sic] i.e., the claims are considered mineral in character. [2/] The remainder of application W-30586 (excluding those claims encompassing the mill, office and maintenance facilities) and all of application W-36502 are recommended for contest based on EPA's request and opinion that the uses identified for the lands are temporary in nature and do not warrant the issuance of patents. It is recommended that claims 156 - 158, 174 - 178, 191 - 196 and 208 - 213 within application W-30586 (mill, office and maintenance facilities) proceed to patent in view of meeting the two basic criteria outlined previously * * *. The uses identified for these lands are considered of a more permanent nature warranting the issuance of patent to the claims.

In its decisions dated February 24, 1977, the State Office rejected application W-36502 in its entirety and application W-30586 as to the following claims:

Numbers 41 through 77 inclusive, 79 through 106 inclusive, 109 through 120 inclusive, 130 through 141 inclusive, 140 through 155 inclusive, 159 through 161 inclusive, 170 through 173 inclusive, 179, 180, 187 through 190 inclusive, 197 through 207 inclusive, and 214 through 220 inclusive. These lands are part of Mineral Survey No. 657, T. 28 N. R. 78 W., 6th P.M., and consist of 559.75 acres.

The State Office said that unlike a locator of a lode or placer mining claim, a millsite claimant's rights do not "vest" at the time he fulfills the requirements for perfecting his claim. Reed v. Bowron, 32 L.D. 383, 386 (1904). Furthermore, the State Office interpreted the language of the statute "may be patented" as being directory or permissive as distinguished from "shall be patented" which is mandatory or imperative. Based on this construction, the State Office concluded that while the statute permits occupancy of nonmineral lands for millsite purposes which occupancy must be

2/ We note that a complaint was filed against Utah on February 24, 1977, in which the Government made charges suggested by Ver Ploeg.

respected by the Government, the statute does not require the issuance of a patent for such claims. The State Office noted that the lands are being used primarily for stockpiling, overburdens and tailings ponds, and concluded that since these uses are temporary they do not warrant the issuance of a patent. It commented that appellant would be required to reclaim these lands in accordance with Wyoming law.

The State Office referred to a letter dated May 4, 1973, addressed to the Director, Denver Service Center, Bureau of Land Management (BLM), in which the EPA recommended that ownership of land on which radioactive tailings are stored be retained by the Federal Government in order that the lands may be under constant surveillance beyond the life of the operation and beyond the life of the applicant receiving patent. In light of that recommendation, the State Office rejected that part of the application for patent in issue without prejudice to the applicant's right to continue to make legal mining and/or milling uses of the lands embraced within the subject millsite claims.

In its Statement of Reasons, appellant asserts that it has complied with all the requirements of 30 U.S.C. § 42 in that the lands in question are nonmineral, not contiguous to a vein or lode, and are used or occupied by Utah for mining or milling purposes.

Appellant makes reference to the fact that the Government's only argument as to the criteria of the statute not being met is that stockpiling and tailings pond use is temporary in nature and does not warrant the issuance of a patent. In response to the argument appellant points to Charles Lennig, 5 L.D. 190 (1886), a case in which it was held in dicta that if the land is used for depositing tailings or storing areas, it would be used for mining or milling purposes.

In support of its assertion that it has met the requirements of the law, appellant quotes from pages 38 and 39 of Ackerman's report (set forth, supra, in this decision) concerning his findings from the field examination and his recommendation that patent should issue.

Appellant further contends that compliance with the statute vests in it an absolute right to a patent and the Government's refusal to issue a patent in this case is arbitrary, capricious, without Congressional sanction, an abuse of discretion and therefore unconstitutional.

Appellant's argument focuses on the Government's interpretation of "may be patented" in 30 U.S.C. § 42 as meaning that the Government has discretion whether or not to issue a patent even if the statutory requirements have been met. Based on this interpretation BLM refused to issue the patent because, in its discretion, it considered the

"millsite" use as only temporary and thus, on the recommendation of EPA, it decided that title should remain in the Government. Appellant contends that EPA cannot empower the BLM to do what it has no statutory authority to do, *i.e.*, deny a patent to a millsite once the statutory prerequisites are met. Appellant asserts that "may be patented" as used in 30 U.S.C. § 42 does not vest the BLM with discretion to refuse to issue a patent.

Appellant comments that an Environmental Impact Statement (EIS), which included potential radiation effects on the environment with respect to the claims in issue has been filed with the EPA. This report was approved in 1974 simultaneously with the issuance of an operating license for the uranium mill by the Atomic Energy Commission (AEC) the governmental body having jurisdiction at that time. The EIS was subsequent to both the patent application and Ackerman's report. Appellant notes that Ackerman anticipated the effects of radioactivity on the environment and still recommended patent.

Appellant claims that approval by the EPA, AEC, and BLM with awareness of possible adverse environmental effects constitutes a waiver by the Government of all objections to such adverse effects and is an estoppel in pais of both EPA and BLM to raise this objection.

The crux of the argument in this case is whether or not the phrase "may be patented" as used in 30 U.S.C. § 42 (1970) is correctly interpreted to mean that the Government has discretion whether or not to issue a patent to a millsite when the requirements of the law have been met.

The history of cases in this area of the law shows that patents for millsites are denied, or millsite claims are contested because the applicant has not fulfilled the requirements of the law. Commonly, the Government charges in a contest complaint that the claimant has not used or occupied the lands embraced within the claim for mining or milling purposes. United States v. Rukke, 32 IBLA 155, 160 (1977); United States v. Dietemann, 26 IBLA 356, 364-365 (1976).

It often happens that the claimant can show past use of the claim for mining or milling purposes or plans to use the claim in the future for such purposes, but these assertions have been held to be insufficient to meet the requirements of the law, and the claim is declared null and void. United States v. Dietemann, *supra*; United States v. Cuneo, 15 IBLA 304, 81 I.D. 262 (1974). Claims have also been declared null and void when the requirements of the law have not been met as of the time the lands embraced by the claim are withdrawn from location. United States v. Almgren, 17 IBLA 295 (1974); United States v. Cuneo, *supra*.

The body of law in millsite cases does not reveal any cases in which the requirements of the law have been fulfilled but the Government refuses to issue patent for other reasons. Ackerman aptly summarized the usual BLM procedure in these cases when he said on page 39 of his report: "Normally, * * a mill site invariably proceeds to patent if the criteria is [sic] met. That is (1) the land is nonmineral in character and (2) the land is occupied for mining and milling purposes."

In its decision the State Office says that a patent is not warranted in this case because the lands are being used for stockpiling, overburden and tailing ponds and such uses are temporary. In commenting on the word "use" as it appears in the statute, Secretary Lamar, in the case of Charles Lennig, 5 L.D. 190, 192 (1886), said that if a claimant used the land for depositing tailings or storing ores, he thought it was clear that the claimant would be using it for mining or milling purposes. Moreover, this Board expressly ruled in United States v. Swanson, 14 IBLA 158, 81 I.D. 14 (1974), that storage of ore was a validating use under the millsite provisions of the mining laws. See United States v. Swanson, supra, 166-83, 81 I.D. at 17-26. We surmise, however, that the real thrust behind the rejection is BLM's concern, prompted by EPA's letter, that these uses may cause adverse environmental effects.

If Utah receives a patent for these lands, its mining operations will come under the scrutiny of the State of Wyoming. In reviewing that State's environmental protection statute (Wyoming Stat., 1975 Cum. Supplement §§ 35-502.1 to 35-502.56) we find that there are detailed and forceful provisions regarding mining operations and subsequent reclamation. Specific standards for backfilling, recontouring, and revegetation are coupled with strict requirements for the disposal of toxic or radioactive waste to make the statute more exacting than any comparable Federal control. We note, moreover, that the civil and criminal penalties for noncompliance appear to be drafted so as to assure a maximum deterrent effect and, thus, a maximum amount of protection for the environment.

[1] In conclusion, we find that appellant has met all the applicable requirements of 30 U.S.C. § 42, supra, and a patent must therefore issue. The concerns expressed by EPA regarding radioactive waste on the sites seem to be addressed more than adequately by Wyoming's environmental statute and the EPA recommendation should thus constitute no bar to appellant's application. In light of these determinations it is unnecessary for us to reach the question of the authority of the Department to refuse to issue a patent for a millsite where all of the conditions of the millsite law have been met.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

State Office's decision rejecting application W-36502 is reversed and its decision partially rejecting W-30586 is reversed as to those parts of the application which were rejected.

Douglas E. Henriques
Administrative Judge

I concur:

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING IN THE RESULT:

I agree with the result reached but question certain facets of the main opinion.

The thrust of the main opinion implicitly suggests that (1) the millsite law, 30 U.S.C. § 42 (1970), authorizes, but does not require, the Department to issue a patent for a millsite where an applicant has demonstrated he has complied with the law; (2) environmental factors may be considered by the Department in exercising that discretion; and (3) such discretion may be exercised by the Department without affording the patent applicant an opportunity for a hearing.

It is my view that all three propositions are fallacious for the reasons set forth below.

The millsite law as set forth in 30 U.S.C.A. § 42 reads as follows:

§ 42. Patents for nonmineral lands; application, survey, notice, acreage limitation, payment-Vein or lode and mill site owners eligible

(a) Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter and sections 71 to 76 of this title for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

Placer claim owners eligible

(b) Where nonmineral land is needed by the proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim, and is used or occupied by the proprietor for such purposes, such land may be included in an application for a patent for such claim, and may be patented therewith subject to the same requirements as

to survey and notice as are applicable to placers. No location made of such nonmineral land shall exceed five acres and payment for the same shall be made at the rate applicable to placer claims which do not include a vein or lode. [Emphasis supplied.]

The State Office, in its decisions, equated the language "may be patented" with discretionary authority in contradistinction to a mandate. It is true that ordinarily the word "may" as used in statutes is permissive only. Ocean Accident & Guarantee Corp. v. Milford Bank, 33 S.W. 2d 312, 313, 236 Ky. 457 (1970); Western Distributing Co. v. Public Service Commission, 58 F.2d 239, 241 (D. Ky. 1931). This construction has been applied to the Mineral Leasing Act. Burglin v. Morton, 527 F.2d 486, 488 (9th Cir. 1976); and the authority to lease state school lands embodied in an Act of Admission. Mayor v. Board of Land Commissioners, 192 P.2d 403, 411, 64 Wyo. 409 (1948). However, the word "may" in statutes has also been given a mandatory construction. In Adoption of Bascom, 246 P.2d 223, 226 (Mont. 1952), the court stated:

In Simpson v. Winegar, 122 Or. 297, 258 P. 562, 563, the court said: "It is well settled that, where even the word 'may' is used, and the rights of the public or of a third party are affected, the language is mandatory, and must be strictly obeyed. In Kohn v. Hinshaw, 17 Or. 309, 311, 20 P. 629, 631, Mr. Justice Strahan said: '* * * It is a general principle in statutory construction that, where the word "may" is used in conferring power upon an officer, court, or tribunal, and the public or a third person has an interest in the exercise of the power, then the exercise of the power becomes imperative.'"

See Cantey v. McLain Line, 40 F. Supp. 887, 888 (S.D.N.Y. 1941); Egan v. Donaldson Atlantic Line, 37 F. Supp. 909, 910 (S.D.N.Y. 1941); Lamar-Delta County Levee Improvement Dist. No. 2 v. Dunn, 42 S.W. 2d 872 (C.C.A. Tex. 1931); Fisk v. Grider, 106 S.W.2d 553, 555, 171 Tenn. 565 (1937); Anthony A. Bianco, Inc. v. Hess, 339 P.2d 1038, 1045, 86 Ariz. 14 (1959). In State v. Christianson, 229 N.W. 313, 316, 179 Minn. 337 (1930), the court stated that the use of the words "may" and "shall" in a statute is not controlling on the question whether a statute is mandatory or directory since either word may be held mandatory or directory and courts will consider language used, subject matter, instance of provisions, and object intended to be secured and thus ascertain legislative intent.

The State Office's view that reference to the words of the statute alone affords a sufficient predicate for resolution of

the meaning of the statute calls to mind Justice Frankfurter's dissent in United States v. Monia, 317 U.S. 424, 431-432 (1943), in which he stated:

This question cannot be answered by closing our eyes to everything except the naked words of the Act of June 30, 1906. The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage (see Plucknett, A Concise History of the Common Law, 2d ed., 294-300; Amos, the Interpretation of Statutes, 35 Col. L. Rev. 519), to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice. E.g., United States v. Fisher, 2 Cranch 358, 385-86; Boston Sand Co. v. United States, 278 U.S. 41, 48; United States v. American Trucking Assns., 310 U.S. 534, 542-44. A statute, like other living organisms, derives significance and sustenance from its environment from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning. And so we must turn to the history of federal immunity provisions. [Emphasis supplied.]

We, therefore, look at the construction given to the statute for the more than a century it has been operative. Diligent research has failed to uncover any decisions of the department holding that the issuance of a millsite patent is discretionary. I respectfully suggest that reliance by the State Office on Reed v. Bouron, 32 L.D. 383, 386 (1904), is misplaced. The holding in Reed is simply that until patent issues, the Department has jurisdiction to determine whether an entry conforms to the law, e.g., that a millsite embraces land nonmineral in character. This is quite discrete from the concept of discretion. Entitlement to a patent for a millsite is recognized in Silver Peak Mines v. Valcada, 79 F. 886, 889 (C.C.D. Nev. 1897), aff'd, 86 F. 90, (9th Cir. 1898).

To buttress my conclusion that the issuance of a patent for a millsite is mandatory where the applicant has complied with the

law, I advert to United States v. Elmer M. Swanson, 1/ 14 IBLA 158, 182-3, 81 I.D. 14, 25-6 (1974), in which we stated:

As to the Government's third contention that no patents may be granted on appellant's valid millsite claims because they are located within the Sawtooth National Recreation Area, we must agree. The Act creating this recreation area provides in section 12 that:

Patents shall not hereafter be issued for locations and claims heretofore made in the recreation area under the mining laws of the United States.

(Act of August 22, 1972, 86 Stat. 615.)

Appellant argues that section 12 was not meant to have a retroactive effect but was only intended to apply to patent applications made after the enactment period. As appellant's millsites were located and challenged prior to the enactment of the Act, appellant claims that the section does not apply to his claims.

Appellant's interpretation of section 12 is incorrect, [footnote omitted] Congress intended that this section should, in fact, preclude the issuance of patents to claimants holding valid, existing interests prior to enactment of the Act. In describing the impact of section 12, Representative Roy A. Taylor, member of the Committee on Interior and Insular Affairs and Chairman of the National Parks and Recreation Subcommittee stated:

As I have pointed out, any person holding a valid claim is entitled to proceed to patent and thereby acquire fee title to the lands involved. Section 12, in effect, extinguishes that right with respect to lands located within the recreation area. While this probably creates a right to some compensation, its value may not be too significant since the right to prospect, develop, and mine the claim is protected by the terms of the bill.

(Congressional Record, H. 325, Jan. 26, 1972).

1/ Quit in the Federal District Court of Idaho, Cir. 4-74-10, dismissed without prejudice.

Section 12 of the Act of August 22, 1972, 86 Stat. 612, revoked the authority of the Secretary of the Interior to issue patents for locations and claims in the Sawtooth National Recreation Area. Accordingly, those millsite claims of the contestee subsequently found to be valid may not go to patent.

It seems clear in the light of the foregoing that there was Congressional recognition of the mandatory requirement to issue patent where a millsite patent applicant had demonstrated his compliance with the millsite law.

In Coeur D'Alene Crescent Mining Co., 53 I.D. 531, 534-5 (1931), the Department explicitly recognized and reaffirmed an earlier holding that a qualified claimant had the right to purchase (read patent) a millsite, saying:

In James W. Nicol (44 L.D. 197), the department in holding that the act of June 4, 1887 (30 Stat. 11, 35, 36), confers the right to locate and purchase a mill site under the mining laws of the United States within a national forest, quoted this provision of that statute-

It is not the purpose or intent of these provisions or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes * * * Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Provided, That such persons comply with the rules and regulations covering such forest reservations * * * and any mineral lands in any forest reservation which have been or may be shown to be such and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto shall continue to be subject to such location and entry notwithstanding any provisions herein contained.

and stated as follows (p. 198):

The act of May 10, 1872, carried forward in the Revised Statutes, had as its purpose, as set forth in its title, "To promote the development

of the mining resources of the United States." The mill site provision, quoted above, from section 2337, Revised Statutes, is an essential part of the present system of mining laws. A mill site claim may be embraced in the same application for patent and be patented with the vein or lode in connection with which it is used. Such application is subject to the same requirements as to survey and notice as are applicable to veins and lodes; payment is made at the same rate as for the lode claim; and, further, a location of a mill site must be made in the same manner as a mineral claim. (Rico Townsite, 1 L.D., 556.)

The purpose and intent of the act of June 4, 1897, was to promote the mineral development of the public lands within national forests. The mineral lands were made subject to entry under the existing mining laws of the United States. As an element of the mineral development of said lands, it is necessary that the lode locator, or entryman, should be permitted to have the ancillary right of locating and purchasing a mill site. The right to locate a mill site is one granted by the existing mining laws, and is an incident under the facts in this case to the right to make mineral entry. By necessary implication, therefore, the act of June 4, 1897, supra conferred the right to locate or purchase a mill site in connection with a lode claim within a national forest. The Department also understands that the practice of the General Land Office, previous to the decision here in question, has been in harmony with the above view, and similar mill sites have been patented. [Emphasis supplied.]

I construe the language in 30 U.S.C. § 42 "and the same may be patented therewith" to simply mean that a millsite can be included in the same patent application embracing the vein or lode under 30 U.S.C. § 42(a), or embracing the placer claim under 30 U.S.C. § 42(b). The millsite law as to lodes and veins requires that a millsite include only "nonadjacent surface ground" to the vein or lode. Ordinarily, a single application for patent under the mining laws may not include noncontiguous lands. Charles House, Mrs. Leonard Skinner, 33 IBLA 308 (1978). Therefore, express statutory authority is required, and supplied, by the quoted language to permit the same patent application to include the mining claim and millsite. Cf. Yankee Mill Site, 37 L.D. 674 (1909).

As indicated earlier, the main opinion directs the issuance of patent based upon the rationale that Wyoming law adequately safeguards the environment when the lands pass into private ownership. I respectfully submit that possible environmental damage is not a cognizable factor in the adjudication of a millsite patent application. The millsite law is simply a portion of the United States mining laws. See United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 80 I.D. 538, 540-546 (1973). The consistent posture of the Department since 1971 has been "that the General Mining Act of 1872 do[es] not admit of environmental considerations." Id. at 541. However, costs to satisfy environmental requirements of Federal, State, and local laws and regulations are properly considered in determining the feasibility of an operation relating to mining. United States v. Pittsburgh Pacific Co., 30 IBLA 388, 84 I.D. 282 (1977), suit pending. Pittsburgh Pacific adheres to the view enunciated in Kosanke that a NEPA statement is not required to be prepared by Government agencies in connection with nondiscretionary actions 30 IBLA at 413.

Moreover, in the proceedings below appellant was not afforded notice and opportunity for a hearing. Instead, BLM denied the patent application without proper procedural safeguards.

A millsite, since it falls within the ambit of the United States mining laws, is a claim to property which may not be declared invalid without proper notice and opportunity for adequate hearing in accordance with due process. See United States v. Keith O'Leary, 63 I.D. 341 (1956).

Even if discretionary authority were present as to adjudication of millsite applications, I believe that the exercise of that discretion could be employed only after notice and opportunity for hearing had been afforded the millsite applicant to establish the factual milieu. See Stickelman v. United States, 563 F.2d 413 (9th Cir. 1977), vacating the Department's discretionary denial (9 IBLA 327 (1973)) of a request for a second extension of the life of a desert land entry. Cf. Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

Frederick Fishman
Administrative Judge

October 19, 1978

IBLA 77-252, 77-256	:	36 IBLA 219
	:	
UTAH INTERNATIONAL, INC.	:	Petition for Reconsideration
	:	
	:	Decision reaffirmed

ORDER

On August 8, 1978, this Board issued its decision, Utah International, Inc., 36 IBLA 219 (1978), reversing the decisions of the Wyoming State Office, Bureau of Land Management, in so far as those decisions rejected mill site patent applications # 36502 in total, and W 30586 in part.

By memorandum dated August 21, 1978, Patricia Boleyn Walker of the Office of the Regional Solicitor, Denver, Colorado, entered her appearance as Department Counsel and requested the Board to reconsider its decision, Utah International, Inc., *supra*.

Departmental regulations, at 43 CFR 41.21(c), provide in pertinent part, as follows:

No further appeal will lie in the Department from a decision of the Director or an Appeals Board of the Office of Hearings and Appeals. Unless otherwise provided by regulation, reconsideration of a decision may be granted only in extraordinary circumstances where, in the judgment of the Director or an Appeals Board, sufficient reason appears therefor. Requests for reconsideration must be filed promptly, or within the time required by the regulations relating to the particular type of proceeding concerned, and must state with particularity the error claimed.

By a subsequent memorandum dated September 27, 1978, Ms. Walker expended her request for reconsideration in an attempt to satisfy the regulation, above cited, stating:

36 IBLA 234A

Upon reviewing this decision, it is believed that some of the language in the conclusion could be interpreted as being inconsistent or contradictory to the findings and holdings in the main portion of the decision.

More particularly, the Board held "It often happens the claimant can show past use of the claim for mining or milling purposes or plans to use the claim in the future for such purposes, but these assertions have been held to be insufficient to meet the requirements of the law, and the claim is declared null and void. United States v. Cuneo, 15 IBLA 304, 81 I.D. 262 (1974)." [at page 225] However, at page 226 of the decision, the Board states that "we find that appellant has met all the applicable requirements of 30 U.S.C. §42, supra, and a patent must therefore issue."

In a memorandum dated September 29, 1978, Joseph L. Sweeney, Esq., and George N. Straw, Esq., counsel for Utah International, opposed the request of the Solicitor on the ground that the initial request for reconsideration did not satisfy the requirements of 43 CFR 4.21(c), and the amended request was not filed "promptly," being submitted some 50 days after the Board's decision.

We believe that the Solicitor's office has misconstrued the term "past use." Obviously, any adjudication of a mill site patent application must necessarily devolve upon its use or nonuse as such in the past. Remote past use is, of course, of no consequence. Similarly, terminated use of the mill site is a question of fact, to be determined by the contest procedures set forth in the Department's procedures.

In the decision at issue, the Board relied on the record before it, which record showed compliance on a current basis by Utah International with the requisite statutory requirements, as well as recommendations from BLM mineral engineers that a patent issue in each case on appeal. On the basis of the records, the Board overruled the State Director's decision not to issue patents in these cases.

The Board's holding did not alter the well-established rule that the Secretary of the Interior has the authority and duty to investigate into the validity of mining claims before issuing patent, as expressed in Cameron v. United States, 252 U.S. 450 (1920). The record in each case before the Board discloses that such investigation had been made, with favorable recommendations for issuance of patent from the mineral examiners.

The petitioner's arguments have not adduced any error in the decision of the Board based on the records before it at the time the decision was reached, nor identified any error which would warrant reconsideration thereof. Accordingly, since there are no extraordinary circumstances and in the absence of demonstrated error, the decision Utah International, Inc., 36 IBLA 219 will not be reconsidered.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is denied.

Douglas E. Henriques
Administrative Judge

We concur:

Jame L. Burski
Administrative Judge

Frederick Fishman
Administrative Judge

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