

**Editor's note: Reconsideration granted; decision reversed -- See Kerr-McGee Nuclear Corp. (On Reconsideration), 43 IBLA 348 (Oct. 29, 1979)**

KERR-MCGEE NUCLEAR CORP. ET AL.

IBLA 79-44

Decided June 22, 1979

Appeal from determination by the Wyoming State Office, Bureau of Land Management, suspending the processing of mineral patent applications W-65341, W-65342, W-65343, and W-61910.

Affirmed as modified.

1. Mining Claims: Patent -- Mining Claims: Title -- Regulations: Generally

The regulations of this Department have the force and effect of law, and are binding upon the Secretary and those who exercise his delegated authority. Where a patent application regulation requires "full, true, and complete abstracts," and the surface of the mining claim has not been patented, the processing of patent applications accompanied only by limited abstracts is properly suspended, pending compliance with the regulation. Where, however, the surface of the mining claim has been patented, e.g., under the Stock-Raising Homestead Act, 43 U.S.C. §§ 291-300 (1970), the abstract generally need only reflect transactions affecting the mineral estate. A certificate of title is acceptable in lieu of an abstract in either situation.

APPEARANCES: R. Lauren Moran, Esq., Lohf and Barnhill, P.C., Denver, Colorado, for appellants; Harold H. Baer, Jr., Esq., Regional Solicitor's Office, Department of the Interior, Denver, Colorado, for appellee, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Kerr-McGee Nuclear Corp. (Kerr-McGee), Getty Oil Company (Getty) (W-65341, W-65342, and W-65343), and The Cleveland-Cliffs Iron Company (Cleveland) (W-61910) have appealed from letter decisions dated

October 2 and 3, 1978, of the Wyoming State Office, Bureau of Land Management (BLM). The Kerr-McGee and Getty decision appealed from denied appellants' request for advance publication in connection with the above enumerated mineral patent applications on the ground that appellants had not submitted "full, true, and complete" abstracts of title as required by 43 CFR 3862.1-3, and because BLM was not satisfied that persons other than the appellants had no interest in the applied for mineral estate. 1/ The Cleveland-Cliffs decision was far less onerous in its requirements. 2/

1/ The abstracts for Cleveland-Cliffs Iron Company (W-61910) were not considered in the decision appealed from. They were returned to appellants on June 5, 1978, for expansion and completion.

2/ The Cleveland decision read in pertinent part as follows:

"Your protest makes objection to five specific categories of information. To the extent that we do or do not require the abstract to provide information in these five categories, we provide the following point-by-point discussion:

"PROTEST: 1. Where surface patent has issued to the subject lands, documents reflecting the chain of title to the surface estate other than and subsequent to the patent issued.

"RESPONSE: The abstract should indicate whether the surface estate has been patented and remains in private fee ownership, and, if so, the statute under authority of which the surface estate may have been patented. We also need to know if any subsequent document purports to convey any interest [sic] in the mineral estate.

"PROTEST: 2. Documents reflecting existence of rights to, action concerning or the chain of title to oil, gas, coal and other Leasing Act minerals.

"RESPONSE: We do not need to receive documents pertaining to federal mineral leases which would already be of record in this office. However, any document concerning what purports to be a privately granted lease for oil, gas, coal or other leasable mineral should be discussed in the abstract.

"PROTEST: 3. Documents pertaining to royalty interests and the ownership and the chain of title to them.

"RESPONSE: We do not need to receive documents pertaining to royalty interests in federal mineral leases. As mentioned in point number 2, we do need to know about any conflicting mineral ownership claims derived from a privately granted lease, to include any royalty interests and their chains of title.

"PROTEST: 4. Documents reflecting existence of mortgages or other financing arrangements or transactions.

"RESPONSE: We do not need to know about mortgages or other documents having to do with financing arrangements or transactions except in so far as the documents purport to create a security interest in the mineral estate.

43 CFR 3862.1-3, Evidence of title, provides as follows:

(a) Each patent application must be supported by either a certificate of title or an abstract of title certified to by the legal custodian of the records of locations and transfers of mining claims or by an abstracter of titles. The certificate of title or certificate to an abstract of title must be by a person, association, or corporation authorized by the State laws to execute such a certificate and acceptable to the Bureau of Land Management.

(b) A certificate of title must conform substantially to a form approved by the Director.

(c) Each certificate of title or abstract of title must be accompanied by single copies of the certificate or notice of the original location of each claim, and of the certificates of amended or supplemental locations thereof, certified by the legal custodian of the record of mining locations.

(d) A certificate to an abstract of title must state that the abstract is a full, true, and complete abstract of the location certificates or notices, and all amendments thereof, and of all deeds, instruments, or actions appearing of record purporting to convey or to affect the title to each claim.

(e) The application for patent will be received and filed if the certificate of title or an abstract is brought down to a day reasonably near the date of the presentation of the application and shows full title in the applicant, who must as soon as practicable thereafter file a supplemental certificate of title or an abstract brought down so as to include the date of the filing of the application.

---

fn. 2 (continued)

"PROTEST: 5. Documents evidencing conflicting, overlapping or adverse claims or adverse rights which may exist by reason of any encroachment of other mining claims onto the concerned claims or of any overlapping of the boundaries of said claims unto other claims.

"RESPONSE: This category of information is precisely the type of information which the abstract should discuss completely and illustrate in detail. This office must be informed of all rival or conflicting possessory claims to the mineral estate described in the application for mineral patent.

Our processing of mineral patent application W-61910 is hereby suspended until this office receives a complete abstract of all claims to and interests in the mineral estate described in the application as required by 43 CFR 3862.1-3."

The Kerr and Getty decision appealed from states in pertinent part:  
By this decision you are informed that a "full, true, and complete" abstract which can be certified as evidence of title under the requirements of 43 CFR 3862.1-3, must show all documents of record which evidence any effect on or attempt to affect any interest in the mineral estate described by the mineral patent applications. The abstract must include all documents which mention the mineral estate in any manner.

\* \* \* \* \*

As to advance publication, the BLM Manual provides at 3862.4 as follows:

Ordinarily, publication is not ordered until title opinion is received from Solicitor showing full title vested in the applicant as of the date of filing the application. However, if the applicant so requests, publication may be authorized at an earlier date if the applicant agrees to publish at his own risk. [Emphasis added.]

\* \* \* \* \*

Because the abstracts of title submitted with mineral patent applications W-65341, W-65342, and W-65343 were "limited abstracts" which do not comply with 43 CFR 3862.1-3, and because this office is not satisfied that persons other than the applicant have no interest in the applied for mineral estate, your request for permission for advance publication is hereby denied.

In their statement of reasons, appellants concede they submitted "limited abstracts," omitting therefrom the following categories of documents:

1. Where patent to the surface estate has issued, with reservation of minerals to the United States, any documents reflecting transactions with respect to or reflecting the chain of title to the surface estate subsequent to issuance of such patent.
2. Documents reflecting existence of, rights to, action concerning or the chain of title to oil, gas, coal and other leasing act minerals.
3. Documents reflecting royalty interests or the ownership thereof or the chain of title to royalty interests.

4. Documents reflecting existence of mortgages, deeds of trust or other financing arrangements, or transactions or actions taken with respect to any such security interests not resulting in change of ownership.

5. Documents evidencing conflicting, overlapping or adverse claims, or adverse rights which may exist by reason of any encroachment of other mining claims onto the concerned claims or of any overlapping of the boundaries of said claims onto other claims.

Appellants include in their statement of reasons a discussion of their reasons as to why these types of documents need not be submitted as part of an abstract. We quote these reasons as summarized on pp. 23-25 of their statement:

1. The determination to be made by the BLM is whether or not patent should issue. In no place in the governing statutes or regulations is any requirement imposed that as a part of its adjudicatory function the BLM should make any determination of rights existing in the land other than the ownership by the applicant of the subject mining claims.

2. A complete abstract would require inclusion of all instruments pertaining to land affected by the subject mining claims. Where, as is often the case, such claims encroach upon adjacent fee land, inclusion of all instruments pertaining to such land would be necessary. The mining claimants would not and could not assert any right to such fee land. Exclusion of any such parcels of land from the patent application and from the patent is necessary as a part of the proceedings. Such documents would, therefore, serve no purpose.

3. The regulations make full provision for recognition and preservation of the rights of the surface owner. The devolution of title to the surface estate and the ownership thereof have no bearing upon issuance of patent and no provision for any showing thereof is made in either the statute or the regulations. The BLM would have neither jurisdiction nor power to purport to make adjudication or determination of rights existing in the surface estate at time of issuance of patent or within patent issued.

4. Complete provisions are made in the statutes and in the regulations for reservation of Leasing Act minerals where such reservation is applicable. No requirements are imposed nor is any provision made for showing of actions taken with respect to such minerals. They are either reserved or they are not. Whether and under what circumstances such reservation shall be made is dictated by the

statute. Documents reflecting transactions with respect thereto serve, therefore, no purpose in the patent proceedings.

5. Reserved royalty interests are not adverse to but subsist with the estate of the mining claimant. Regardless of ownership or extent of division they affix to the estate of the mining claimant represented in the patent issued. No purpose material to issuance of patent is served by inclusion of documents related to them.

6. Financing and security transactions are governed by considerations the same as those relating to royalty interests. Such interests subsist with the estate of the mining claimant and attach to the estate granted by the patent. Inclusion of such documents serves, therefore, no purpose, and no provision with respect to determination of their existence is made in either the statute or the regulations.

7. Patent proceedings are in the nature of a quiet title action, or quasi in rem and are binding upon the world. The recourse available to and the procedure to be followed by any person asserting adverse claims are prescribed by statute and by regulations. Notice by publication and posting are provided for. The burden is upon the adverse claimant to come forth and to assert his claim. The nature of the proceedings being established, jurisdictional requirements having been met and the duty of positive action having been imposed, no purpose is served by inclusion within the abstract of overlapping, conflicting and encroaching claims of third parties which may or may not be the subject of active interest. Such claims must either be asserted under procedures prescribed or, for purposes of patent, they do not exist.

Appellants have attached to their statement of reasons the affidavit of Roy Witcher, of the Abstracting Firm of Deister, Ward, and Witcher. At the behest of appellants, Mr. Witcher conducted an examination of the county records pertaining to one of the applications herein, W-65341, embracing 31 claims. The affidavit states that the purpose of the examination

was to calculate the number of pages which would be included within the direct chain of title to such claims, consisting of all original and amended certificates of location, affidavits of assessment work, assignments, conveyances and agreements and other instruments directly affecting the title to such claims, and the number of pages which would be required in a complete abstract of title to such claims and the land area included within them.

The abstracter's conclusion was that the cost of a "direct chain of title abstract only" would be \$490 and run to 136 pages, whereas the cost of a "complete abstract" would be \$3,745 and would consist of 1,137 pages.

Appellants contend that a limited abstract setting forth all instruments reflecting the direct chain of title is sufficient under the regulation for patent procedures.

Appellants explain in a footnote why a certificate of title was not used. They assert that the Solicitor of the Department in Denver

[i]ssued a ruling that certificates of title may not be accepted as proof of title to mining claims situated in the States of Wyoming or Colorado. Such ruling, while believed to be erroneous, has not been resisted and is enforced by the Wyoming State Office. Thus an abstract of title is required.

Appellants do not challenge that portion of the decision denying their request for advance publication.

[1] The issue before us is whether the limited abstracts submitted by appellants afford compliance with 43 CFR 3862.1-3. We think they do not in all cases except Cleveland. The regulation is clear and straightforward in its provision that "[a] certificate to an abstract of title must state that the abstract is a full, true, and complete abstract." The certificates to appellants' abstracts contain notes referring to the limitations therein, and appellants freely concede that their abstracts are limited. The fact that compilation of complete abstracts would involve greater expense and a large volume of documents cannot be asserted to justify circumvention of the regulation, which has the force and effect of law and is binding upon the Secretary and those who exercise his delegated authority. Keith S. Rush, 36 IBLA 76 (1978).

Appellee's brief, concedes sub silentio part of appellants' arguments by asserting that "an abstract of title must include all documents of record which affect or purport to affect title to the mineral estate for which patent is being asked." Footnote two herein, containing portions of the Cleveland decision is fully consonant there-with and that decision is affirmed as modified herein. We reiterate that unless the United States still retains the legal title to the surface of a mining claim, the abstract must reflect all transactions affecting the land in any way. This requirement, admittedly onerous, can be avoided by the furnishing of a certificate of title discussed infra.

The regulation here at issue also provides the option of submitting a certificate of title rather than an abstract. We find no merit in appellants' unsupported assertion that the choice of submitting a

certificate of title was precluded by ruling of the Denver Solicitor. The record does not show, nor do appellants contend that they attempted to exercise this option in order to comply with the regulation. We hasten to point out that regulations of the Department are binding on all its personnel. It follows that the use of a certificate of title would be proper in the circumstances.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified herein.

Frederick Fishman  
Administrative Judge

I concur specially:

Joseph W. Goss  
Administrative Judge

## ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur that proper certificates of record title, filed as authorized by 43 CFR 3862.1-3, would be an appropriate compliance with regulatory requirements. As to abstracts of title, however, it is clear that the Wyoming State Office in its Cleveland-Cliffs decision, October 2, 1978, W-61910 (943), recognizes that it may exercise a degree of discretion as to what would be required for a full abstract. That decision is in accord with El Paso Brick Company v. McKnight, 233 U.S. 250, 258 (1913), in which the Supreme Court recognized the Department's authority to waive unimportant irregularities so long as the substantial requirements of the law are met. In the Kerr-McGee/Getty decision, the State Office requires substantially more material.

Obviously, where there has been substantial compliance, the Department has no interest in burdening its files with irrelevant materials or causing unnecessary expense to mineral locators. I would affirm the Cleveland-Cliffs decision as modified with regard to the certificate of title and affirm the Kerr-McGee/Getty decision modified as appropriate to conform therewith.

Joseph W. Goss  
Administrative Judge

## ADMINISTRATIVE JUDGE HENRIQUES DISSENTING IN PART:

I must respectfully dissent from so much of the view expressed by the majority, affirming the BLM decision, that the evidence of title by the mineral patent applicant must be by an abstract of title certified as showing all documents which have any effect on or which may affect the mineral estate described in the patent application. I agree with the majority that a properly certified certificate of title may be substituted for the abstract of title.

A mineral patent application must be supported by either a certificate of title or an abstract of title certified to by the legal custodian of the records of locations and transfers of mining claims or by an abstracter of titles. The certificate of title or certificate to an abstract of title must be by a person, association, or corporation authorized by the state laws to execute such a certificate and acceptable to BLM. 43 CFR 3862.1-3(a). A certificate of title must conform substantially to a form approved by the Director, BLM. *Id.* 3862.1-3(b). The certificate to an abstract of title must state that the abstract is a full, true, and complete abstract of the location certificates, instruments, or actions appearing of record purporting to convey or to affect the title to each claim. *Id.* 3862.1-3(d). Each certificate of title or abstract of title must be accompanied by single copies of the certificate or notice of the original location of each claim and the certificate or amended or supplemental location of each claim, certified to by the legal custodian of the record of mining locations. *Id.* 3862.1-3(c).

As I read the pertinent regulation, 43 CFR 3862.1-3, I come to the conclusion that the required evidence of title relates only to the claims named in the patent application. There is no requirement for information relating to other claims in or to the subject land.

If, as here, the certificate to the abstract indicates that the possessory right to the named mining claims is in the patent applicant, I would reverse the BLM decision, and direct publication, 43 CFR 3862.4-1.

Douglas E. Henriques  
Administrative Judge

