

Appeal from the decision of the Anchorage District Office, Bureau of Land Management, declaring placer mining claim No. 11 Below Discovery, null and void ab initio.

Affirmed.

1. Alaska: Land Grants and Selections--Mining Claims: Location--
Mining Claims: Relocation

When BLM declares a mining claim null and void ab initio because the claim was located on land segregated from entry and location under the mining laws, the mining claimant may rebut that finding by showing that he merely amended a valid pre-segregation location of the claim. However, to do so, he must show that he is the owner of the claim through a regular chain of title. An unsupported allegation that the previous owner "gave" him the claim 24 years ago will not suffice. The United States has the right to invoke the statute of frauds in order to clear title to the public lands.

2. Estoppel--Laches

The United States is not barred by the equitable defenses of estoppel and laches from enforcing public land laws. Moreover, BLM owes no duty to mining claimants to promptly ascertain the legal status of every claim filed and inform such claimants of its findings.

OVERRULED IN PART: R. Gail Tibbetts, 43 IBLA 210, 86 I.D. 538 (1979).

APPEARANCES: Hugh B. Fate, Jr., pro se and for Marie Quirk Fate and Mary Jane Fate.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Hugh B. Fate, Jr., ^{1/} Marie Quirk Fate, and Mary Jane Fate (appellants) appeal the October 3, 1983, decision of the Anchorage District Office, Bureau of Land Management (BLM), declaring placer mining claim No. 11 Below Discovery (No. 11) on Dome Creek, T. 3 N., R. 1 W., Fairbanks Meridian, Alaska, null and void ab initio.

Hugh B. Fate, Jr., (Fate) and his father, the late Hugh B. Fate, Sr., filed a certificate of location for the placer mining claim on June 22, 1979, in the Fairbanks District Office, BLM, as required by section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). The certificate states claim No. 11 was located September 1, 1961.

On May 2, 1961, by application F-027651, the State of Alaska had selected the lands embraced by the mining claim as part of the vacant, unappropriated, and unreserved land granted to it under the Alaska Statehood Act of July 7, 1958, P.L. 85-508, 72 Stat. 339. The Federal regulation in effect in 1961 governing Alaska land selections, 43 CFR 76.16 (1961), currently codified at 43 CFR 2091.6-4, provided in relevant part: "Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office * * *." Therefore, Alaska's land selection application segregated the selected lands, including the lands embraced by appellants' mining claim, from subsequent entry and location under the Federal mining laws. Fred Thompson, 74 IBLA 231 (1983). In its October 3, 1983 decision, BLM stated: "Because the subject lands have been segregated from mineral entry under Federal law since May 2, 1961, the Number 11 Below Discovery mining claim is hereby declared null and void ab initio, and the recordation filing is rejected."

In his November 27, 1983, statement of reasons for appeal, Fate states:

The property was mined by my step-grandfather, Mr. Thomas Quirk, in partnership with H. Robbins in the early 1900's. The last year was 1917. Subsequently, the property passed into the hands of E. B. Collins, an old time local attorney. For many years, I (Hugh B. Fate, Jr.) did the assessment work for Mr. Collins as well as on my own claims #12 below and #13-14 below (an association Claim of 40 acres). These latter claims were owned in partnership with Marie Quirk Fate and Hugh B. Fate, Sr. In 1960, Mr. Collins gave me #11 below. Although he is long since gone and there were no deeds written, the affidavit's of Labor in the Fairbanks Recording office will substantiate these facts. [Emphasis added.]

^{1/}Hugh B. Fate, Jr., has filed this appeal on his own behalf and on behalf of the coowners of the mining claim, his mother, Mary Jane Fate, and his wife, Marie Quirk Fate, pursuant to 43 CFR 1.3(b)(3) which authorizes a person to practice before the Department "in connection with a particular matter on his own behalf or on behalf of (i) a member of his family."

Appellants further argue that a "new location had to be placed because E. B. Collins' name was still on the record of #11 below." Simply stated, appellants argue that the September 1961 location amends a prior location of No. 11, and since the prior location predates the May 1961 State land selection, their mining claim is not invalid.

[1] In the instant case, the claim is null and void ab initio, unless it is proved that the September 1961 location merely amends a valid mining claim that predates the State land selection. Rhinehart Berg, 71 IBLA 131 (1983). Thus, appellants must prove ownership of such prior claim through an unbroken chain of title to the original locators. Grace P. Crocker, 73 IBLA 78 (1983). Any transfer of the mining claim to appellants must be proven. Ronald R. Graham, 77 IBLA 174 (1983).

In R. Gail Tibbetts, 43 IBLA 210, 86 I.D. 538 (1979), we addressed the distinction between an "amended location," and a "relocation" of a mining claim. We noted that a relocation is "adverse to the original location." *Id.* at 217, 86 I.D. at 541. We defined an amended location as "a location which is made in furtherance of an earlier valid location." *Id.* at 216, 217, 86 I.D. at 541, 542. See also Ronald R. Graham, 77 IBLA at 178 (1983). We held that "to the extent that an amended location, *i.e.*, one made in furtherance of an original location, merely changes a notice of location without attempting to enlarge the rights appurtenant to the original location, such amended location relates back to the original." 43 IBLA at 219-20, 86 I.D. at 543. One example of an amendment of a location is a change in the record owners of a claim where such a change is reflective of an existing fact. R. Gail Tibbetts, 43 IBLA at 220, 86 I.D. at 543.

In addition, in Tibbetts, we concluded that withdrawal of land subject to existing rights will not preclude the amended location, provided the original claim was properly located. 43 IBLA at 219, 86 I.D. at 542, 543; Rhinehart Berg, 71 IBLA at 133. This principle applies as well to the instant case. Thus, an amended location would relate back to the preselection location, and would therefore be efficacious notwithstanding the segregative effect of the Alaska State land selection of May 1961. However, if Fate merely relocated the claim on September 1, 1961, as the certificate of location indicates, there could be no relation back to the Collins claim, and BLM's decision would be correct.

We find that appellants' September 1961 location of mining claim No. 11 does not amend the location of that claim predating the State land selection, but rather serves to relocate the mining claim. Since the relocation of the mining claim was subsequent to the State land selection, BLM properly declared this claim null and void ab initio. We so conclude because the evidence offered by appellants is not sufficient to prove that they derive their interests in the claim through the prior claimant. Moreover, we find Fate cannot so show because the asserted conveyance from Collins to Fate violated the statute of frauds and was, therefore, invalid.

The first link in the chain of title to Fate, examined in reverse chronological order, is the asserted conveyance of the claim from E. B. Collins to Fate in 1960. Fate states, "Mr. Collins gave me #11 below." He admits there is no deed of conveyance. Because there was no evidence in

the record substantiating Fate's assertions regarding chain of title to the mining claim, on July 10, 1984, we issued an order to Fate which stated in relevant part:

The Board grants appellant 30 days from receipt of this order to transmit to the Board certified copies of those affidavits from the Fairbanks Recording Office, and any other evidence which will support his assertion that he is the successor in interest to an unbroken chain of title to the mining claim, and that the claim was located prior to May 2, 1961. [Emphasis added.]

Hugh B. Fate, Jr., No. 84-111 (July 10, 1984) (order requiring supplemental evidence).

The evidence appellants forwarded to the Board pursuant to this order, consisting of affidavits of assessment work performed for the benefit of the mining claim, shows that Fate performed assessment work on the claim from 1956 through 1960, with the exception of 1 year, for the owner of the mining claim, E. B. Collins. None of appellants' submissions substantiates Fate's assertion that Collins gave him the mining claim in 1960. Nor has the Board received any evidence concerning the original location of claim No. 11. Nor is there any evidence otherwise documenting the chain of title from the original locators to Fate. Finally, it appears from his statement, "[Collins] is long since gone," that Collins cannot substantiate Fate's statements. Therefore, the evidence fails to show that Fate derives his interest in the claim through Collins.

With regard to the other appellants, Mary Jane Fate and Marie Quirk Fate, the record is muddled as to the basis for their interests in the claims, even after the Board issued the order of July 10, 1984, wherein we stated in relevant part: "Furthermore, appellant must establish whether he alone is asserting ownership or whether Mary Jane Fate, and/or Mary Quirk Fate, or Hugh B. Fate [Sr.] assert an interest in the claim, and, if so, the basis for their interests." Even if we assume Mary Jane Fate and Marie Quirk Fate derived their interests in the claim through the late Hugh B. Fate, Sr., or Hugh B. Fate, Jr., there is insufficient evidence to show that their interests are derived through an unbroken chain of title to the prior claimant, Collins.

In R. Gail Tibbetts, 43 IBLA at 230, 86 I.D. at 548, we granted a hearing to appellants to determine "whether appellants obtained title to the mining claims prior to the 1974 locations," and "whether the 1974 actions were intended to be amendments of the prior location, relocations, or new locations." In addition, in United States v. Consolidated Mining & Smelting Co., 455 F.2d 432, 441 (1971), the Ninth Circuit Court of Appeals stated that hearings were desirable "to ascertain the relationship between Consolidated's relocations, and prior locations made by persons through whom Consolidated claimed." The Court also stated, "[g]iven a disputed issue of fact, hearings were required before the Department could declare Consolidated's claims null and void." Id.

However, in other cases when appellants claimed through prior locators, we affirmed the BLM decision declaring the mining claims null and void ab

initio without granting a hearing to appellants. In Howard J. Hunt, 80 IBLA 396, 397 (1984), we stated:

When a party appeals a BLM decision, it is the obligation of the appellant to show that the determination is erroneous. Unless a statement of reasons shows adequate reasons for appeal and the allegations are supported with evidence showing error, the appeal cannot be afforded favorable consideration. United States v. Connor, 72 IBLA 254 (1983); Rocky Mountain Natural Gas Co., 55 IBLA 3 (1981). Appellants appear to assert a right to these claims acquired from former claimants, but they have neither identified the actual locations made by their alleged predecessors nor provided evidence of their chain of title thereto. The record before us contains no evidence of preexisting claims with which appellants can support their present locations.

* * * * *

Appellants have not presented evidence of a chain of title leading to them. None of the notices of location filed by appellants with BLM describe [sic] a relationship to other claims. If prior claims did exist, we must conclude, in the absence of evidence of transfer of the claims, that appellants' mining claims may only be treated as relocations. Ronald R. Graham, supra at 179. A relocater has no rights by relation back to the date and priority of the previous location. Henry J. Hudspeth, 78 IBLA 235 (1984). [Emphasis added.]

Furthermore, in R. J. Wall, 68 IBLA 122 (1982), we did not grant a hearing to appellants. We affirmed the BLM decision declaring the claims null and void ab initio, in part because:

None of the submissions filed by Wall with his appeal give any indication that the lands located in the mining claim location notices of 1979 are the same referred to in earlier documents other than that all the lands are situated in New Water Mining District and all are located in Yuma County, Arizona. Further, the lack of evidence of the original location notices, from which Wall purports to claim a chain of title; the lack of evidence showing conveyancing from J. R. Livingston and Alice Livingston to Evelyn Livingston, and from Evelyn Livingston to J. R. Wall; the fact that one quitclaim deed only conveys one-half interest in enumerated claims, together with the statements of Wall's attorney noted above, leave us with no choice but to conclude that Wall's location of these mining claims does not predate segregation of the lands in question from mineral entry. [Emphasis added.]

Id. at 126.

In both cases, there was insufficient evidence substantiating appellants' claims to justify an evidentiary hearing. The Board was able to

decide the cases based on the record before it. In the instant case, appellants have had two opportunities to produce evidence to substantiate their assertions, but have failed in both instances to come forward with such evidence. We must presume that no such evidence exists. Bald assertions do not give rise to disputed issues of fact, particularly when such assertions contradict the certificate of location which the claimant himself prepared and recorded. Therefore, the Board may dispose of this case without referring it to a hearing.

Furthermore, based on the record before us, we find the chain of title between Fate and the original locators cannot be proven. Fate cannot claim through an unbroken chain of title to the original locators of mining claim No. 11 because the asserted conveyance of this mining claim from Collins to Fate in 1960 violates the statute of frauds and is, therefore, invalid.

In Alaska, as elsewhere, a mining claim is an interest in real property. The Ninth Circuit Court of Appeals in Nygaard v. Dickinson, 97 F.2d 53, 56 (1938), with regard to mining claims in Alaska, held:

A mining claim is property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States, and when a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession so long as it is kept alive by the performance of the required annual assessment work. Although it is possessory in character and no written instrument [sic] is necessary to create it, it is, nevertheless, real property and a written instrument is necessary to convey an interest therein. [Footnotes omitted; emphasis added.]

The Alaska statute of frauds applicable at the time of the 1960 conveyance required that "an agreement, promise or undertaking shall not be enforceable unless it or some note or memorandum thereof be in writing and subscribed by the party to be charged." 1955 Alaska Sess. Laws, 206. This applied to the "sale of real property or any interest therein." *Id.* at 207. In fact, even where a deed to a mining claim in Alaska was given, it was held to be void because it was neither witnessed by two witnesses nor acknowledged by a proper officer. Alaska Exploration Co. v. Northern Mining & Trading Co., 152 F. 145 (9th Cir. 1907). In reversing a subsequent decision by the Ninth Circuit, Mr. Justice Holmes, writing for the Supreme Court said:

The act of Congress reads, "Every conveyance of real property within the district hereafter made which shall not be filed for record as provided in this chapter shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded." Act of June 6, 1900, C. 786, Tit. 3, § 98, 31 Stat. 321, 505. Code, Part V, § 98. The Circuit Court of Appeals went on the ground that a lease creates only a chattel interest and is not a conveyance and therefore is not within the protection of the statute. But it is obvious that in principle the right of a lessee is the

same as that of a purchaser in fee, and it would be a great misfortune, especially to mining interests, if a man taking a lease from those whom the record showed and he believed to be the owners, were liable, after spending large sums of money on the faith of it, to be turned out by an undisclosed claimant on the strength of an unrecorded deed. We find no words in the statute that require such a result. On the contrary, the word "conveyance" is defined, although for other purposes, as embracing every written instrument except a will by which any interest in lands is created.

Waskey v. Chambers, 224 U.S. 564, 565-66 (1912).

This opinion would be less than forthcoming if we failed to acknowledge that our research has disclosed a few early cases which hold that an oral conveyance of a mining claim is efficacious; most notably Mining Co. v. Taylor, 100 U.S. 37, 42 (1879), wherein it was stated:

[T]he ownership of Wood in 1862 was an ultimate fact, and even if Taylor had no other right to the possession than that which he derived from Wood by conveyance, it was not necessary to set forth the chain of conveyances by which Wood became the owner. A transfer of possession is sufficient. They would have been but evidence of Wood's ownership. Besides, a written conveyance is not necessary to the transfer of a mining claim. Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198. But Wood was in possession when he sold to Taylor, and Taylor then went into joint possession within. That possession is enough to justify a recovery by him against a disseisor. [Emphasis added.]

However, it must be noted that the claims and events at issue, both in that case and in the case relied upon by the Court, Table Mountain Tunnel Co. v. Stranahan, predated the Federal mining statutes of 1866 and 1872, and the nature of those mining claims was entirely different from that claim with which we are here concerned. That distinction is crucial to the holdings in those early cases. The opinion in Table Mountain Tunnel Co., supra, decided by the Supreme Court of California in 1862, concerned a claim located in 1855, and held, at 20 Cal. 209, as follows:

The Court considered a conveyance from the company necessary to invest the plaintiff with their rights, and the evidence was stricken out on the ground that no conveyance had been shown. We are of opinion that the Court erred in this respect, and that a conveyance by deed would have passed no greater interest than the plaintiff acquired by a transfer of the possession. Rights resting upon possession only, and not amounting to an interest in the land, are not within the statute of frauds, and no conveyance, other than a transfer of possession, is necessary to pass them. The rights of the company were of this character, and the transfer of possession was as effectual for the purpose intended as if it had been accompanied by a conveyance in writing. [Emphasis added.]

It is apparent from the foregoing that claims of that era were considered as "not amounting to an interest in the land." ^{2/} By contrast, it is indisputable that a modern mining claim located under the General Mining Law of 1872 is "property in the fullest sense"; an interest in the land which may be bought, sold, and conveyed, and which passes by descent. See, e.g., Best v. Humboldt Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 25 U.S. 450 (1920); Cole v. Ralph, 252 U.S. 286 (1920); Belk v. Meagher, 104 U.S. 279 (1881).

One Federal court decision and three Oregon decisions have held that in the absence of a state statute declaring that mining claims are interests within the statute of frauds, a claim located under the 1872 mining law may be transferred by verbal conveyance accompanied by a change of possession. Unfortunately, these decisions relied upon the holdings in Mining Co. v. Taylor, *supra*, and Table Mtn. Tunnel Co. v. Stranahan, *supra*, without recognizing the distinction between the nature of the rights created by pre-1872 claims and post-1872 claims, as set forth above. Doe v. Waterloo Mining Co., 70 F. 455 (9th Cir. 1895), cited only the Taylor and Stranahan decisions in support of its holding on this point. In Herron v. Eagle Mining Co., 61 P. 417 (Sup. Ct. Or. 1900), the court said that prior to becoming entitled to a patent, a mining claimant --

has a mere right of possession or possessory title, which is valuable, and will be protected by law, but is not real estate or an interest in land. This view finds support in the decisions in California that prior to the act of 1860, providing for the conveyance of mining claims they would pass by a verbal sale, if accompanied by an actual transfer of the possession of the ground, because the right to such claim rested on possession only, and did not amount to an interest in the land, and therefore [was] not within the statute of frauds. Paterson v. Mining Co., 30 Cal. 360; Tunnel Co. v. Stranahan, 20 Cal. 198. [Emphasis added.]

See also, to the same effect, Duffy v. Mix, 33 P. 807 (Sup. Ct. Or. 1893); Allen v. Dunlap, 33 P. 675 (Sup. Ct. Or. 1893).

It is clear that the foregoing decisions do not conform to the modern concept of the nature of post-1872 mining claims, and the Board declines to follow them. ^{3/} Besides, those cases turned on the absence of any state statute declaring mining claims to constitute an interest in the land; a consideration which has now been obviated by the many judicial pronouncements on the subject.

^{2/} In decisions subsequent to Table Mountain, the California Supreme Court has held that a written instrument is necessary for conveyance of an unpatented mining claim. See Moore v. Hammerslag, 41 P. 805 (1895); Garth v. Hart, 15 P. 93 (1887).

^{3/} By 1914 the requirement for a written instrument was so generally recognized that Professor Lindley stated, "At the present time, in every state and territory subject to federal mining laws, a perfected location is treated as real estate, and the same formalities are required to transmit title as in the case of other real property." Lindley On Mines, 3rd ed., § 642 (1914).

We further find that the United States may invoke the statute of frauds to challenge the validity of an alleged oral conveyance of a mining claim. This is contrary to our ruling on this point in Tibbetts. Therein, 43 IBLA at 277, 86 I.D. at 546, 547, we held:

The statute of frauds is intended for the benefit of the parties to an unwritten "agreement being designed to enable parties to certain types of transactions to escape liabilities assumed orally but not in writing." Mustard v. United States, 155 F. Supp. 325, 332 (Ct. Cl. 1957). For this reason it has been held that strangers to the agreement cannot plead the statute. Livingston v. Thornley, 74 Utah 516, 280 P. 1042, 1045 (1929). Even when the statute provides that an agreement is void, the general rule is that it is merely voidable at the option of a party to the agreement. See Ford Motor Co. v. Hotel Woodward Co., 271 F. 625, 627-28 (2d Cir. 1921).

In light of the above, we hold that the fact that transfers of mining claims are oral and not committed to writing does not, ipso facto, invalidate a subsequent amended location notice. Since the United States is essentially a stranger to the agreement, the fact that the agreement may be subject to the statute of frauds should not be used to invalidate the claim." [Emphasis added.]

We have reconsidered that holding in Tibbetts, and determine that the United States is in no sense a stranger to a purported oral agreement to convey a mining claim where the validity of that agreement determines the validity of the claim itself. True, a mining claim is a discrete property interest which may be sold, transferred, mortgaged, and passed by descent. Forbes v. Gracey, 94 U.S. 762, 767 (1876). It is an equitable estate in land where the United States retains legal title until patent is issued. Cameron v. United States, 252 U.S. 450, 461 (1919). ^{4/} It is, in essence, a claim against the title of the United States.

Notwithstanding the fact that the mining claim is a discrete property interest, the United States clearly has the right to determine whether it has possessory title, and to clear title to the public lands. The Supreme Court in Cameron v. United States said "the power of the department to inquire into the extent and validity of the rights claimed against the Government does not

^{4/} Initially, the locator of an unpatented mining claim acquires only the "possessory title" or "possessory interest" which, upon compliance with all the requirements of law, including payment of the purchase price, becomes "equitable title." See Forbes v. Gracey, 94 U.S. 762 (1876). However, this distinction is not germane to our holding here, as the courts have consistently held that possessory title is a claim to an interest in the land and "property in the fullest sense of the word." Id. Thus, for our purposes, it does not matter whether Collins held the possessory title or the equitable title, as the requirements for an efficacious conveyance were the same in either case.

cease until the legal title has passed." (Emphasis added.) Id. In addition, the Supreme Court stated:

[T]he Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved.

A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. * * * [N]o right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public. [Citations omitted; emphasis added.]
Id. at 460.

As noted above, an oral conveyance of the claim by Collins to Fate would have violated the State statute of frauds. The United States has a right to require mining claimants' compliance with State law which is applicable to claims on Federal lands. As held by the Court of Appeals for the Tenth Circuit, "substantial or colorable compliance with State location requirements has been enforced even in controversies between the [Federal] Government and private claimants. * * * State requirements have been held by us to apply in such controversies between the Government and mining claimants. See United States v. Zweifel, supra, 508 F.2d at 1153-54." Roberts v. Morton, 549 F.2d 158, 161-62 (10th Cir. 1977).

There are exceptions to the general rule that only parties to the oral contract of conveyance, and their privies, but not strangers to the contract, may take advantage of the statute of frauds. We find that the relationship between the claimant of an unpatented mining claim and the United States is unique in law (Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963)), and of such a nature as to afford the United States not only the right to assert the statute of frauds in these circumstances, but the duty to do so in the public interest.

One who has located a mining claim on public domain has a qualified property right only, which may be abandoned at any time or forfeited, and in such case the paramount ownership is in the Government; and upon abandonment or on his failure to comply with the conditions upon which his continued right of possession depends, his entire estate reverts to the Government, as it has retained the title with a valuable residuary and reversionary interest, and this interest it has the right to protect. Gabbs Exploration Company v. Udall, 315 F.2d 37 (D.C. Cir. 1963). United States v. Rizzinelli, 182 F. 675, 681 (D. Idaho 1910).

One exception to the general rule that only parties to the conveyance may assert the benefit of the statute of frauds is that where a landowner dies without heirs capable of inheriting, and a suit is brought to enforce his oral contract for the sale of the land, the State, as the successor to his title by escheat, may set up the defense of the statute of frauds. 73 Am. Jur. 2d, § 577; 27 Am. Jur. 2d, § 18. The Board finds this example to

be closely analogous to the instant case. 5/ Upon forfeiture or abandonment of Collins' interest in the claim, whatever possessory or equitable interest he may have had inured to, and was merged with, the paramount legal title of the United States, automatically by operation of law. The United States was then at liberty to withdraw the land from further mineral entry so as to make that land available to the State in partial satisfaction of its obligation under the Alaska Statehood Act. As the natural successor to the reversionary interest of Collins, the United States has the right to invoke the Alaska statute of frauds in defense against Fate's assertion that Collins made him a parol gift of the claim prior to departing.

There is ample justification for holding that the transfer of a mining claim must comport with the statute of frauds and that the United States may invoke the statute in cases where it would otherwise have perfect title to the land which has been withdrawn in aid of some other Federal purpose. This is particularly true in cases such as this where the alleged conveyance was by an oral gift, without consideration. In such cases the actual words used to express the intentions of the grantor would otherwise be critical to a determination of whether a conveyance actually occurred. For example, had Collins said to Fate, "I'm no longer interested in this claim; you can have it if you want," that would have only served as Collins' declaration that he was abandoning it, and his expression of disinterest in what became of it. It would have meant only that Fate was free to re-locate the claim without objection by Collins. On the other hand, absent a requirement to comply with the statute of frauds, had Collins said to Fate, "I hereby give and convey to you all of my right, title and interest in and to this mining claim," or words to that effect, he would have expressed an intention to transfer his interest in the claim to Fate. With nothing to memorialize or corroborate the event, there is no means by which we may know what was intended, what was actually said, or even on what date it occurred. 6/

Moreover, the Board finds it strange that the parties would attempt a conveyance by such a method. The "grantor" was a local attorney and the "grantee" is the holder of at least one advanced academic degree, and apparently well experienced in the acquisition and maintenance of mining claims. Each must have known that the conveyance of a claim requires more than a verbal transfer. If indeed Collins simply told Fate he could take the claim, without more, it would be incumbent on Fate to re-locate it in order to establish his title; which is apparently what he did in September 1961. However,

5/ Judge Burski's opinion indicates that the analogy to escheat is not apt. However, since this opinion was drafted, the Supreme Court has issued its decision in United States v. Locke, No. 83-1394, 53 U.S.L.W. 4433 (April 2, 1985), in which it held that certain mining claims were properly deemed to have been abandoned. The Court noted that, in consequence, "Appellees' mineral deposits thus escheated to the Government." (Emphasis added.) Slip op. at 6.

6/ Judge Burski's opinion states, "* * * the real question is whether or nor there was a gift in the first place," and then proceeds on the apparent assumption that there was indeed an actual parol conveyance by gift. We deny that is "the real question." The "real question" is whether it is necessary to decide "if there was a gift in the first place" in the absence of any written memorandum of the grant, signed by the grantor.

by then the land was closed to relocation or initial mineral entry. There is a significant difference between Collins simply abandoning the claim and telling Fate he could have it (which would have left it open to relocation by anyone), and Collins attempting to legally convey the claim to Fate by conventional means (which would have preserved it), but which was not done.

The United States, as the owner of the land which is the subject of an alleged parol conveyance, cannot be regarded as a stranger to the transaction, and is as vulnerable to a fraud as are the other parties to the alleged conveyance. Therefore, it is equally entitled to the protection of the statute.

We conclude that the United States has the right to invoke the statute of frauds to invalidate a purported parol conveyance of a mining claim when the validity of the conveyance obviously affects the title to the United States' public lands. To the extent that R. Gail Tibbetts, supra, holds otherwise, it is hereby overruled.

[2] Finally, in their August 13, 1984, response to our July order requesting supplemental evidence, appellants note they have spent over \$ 250,000 developing the claims and that machinery and buildings are still on the property. It is not clear, however, to what extent the expenditures and improvements have been made on the subject claim. In their statement of reasons for appeal, they state that since 1981, claim No. 11 has been active as a mining operation; to lose the claim would be "a tremendous hardship." Further, they state that both the Federal Government and the State of Alaska have had 22 years to inform them of the "alleged impropriety relative to the claim." Essentially, appellants are asserting the equitable defenses of estoppel and laches.

The Tenth Circuit Court of Appeals in Hallenbeck v. Kleppe, 590 F.2d 852, 855 (1979), citing United States v. California, 332 U.S. 19 (1947), held "even assuming some relaxation of the general rule that the government is not subject to such defenses of laches or estoppel in cases involving the public lands, these defenses were not established in the record." (Citation omitted; emphasis added.) Similarly, neither of appellants' defenses, estoppel nor laches, is justified by the record before the Board. Appellants cannot claim equitable estoppel because the fact that the lands were not available for location and entry at the time they located their claim was a matter of public record. Therefore, by law, appellants were presumed to know that the lands were unavailable for entry and location under the mining laws, effective May 2, 1961. Ronald R. Graham, 77 IBLA at 180 n.8. See also United States v. Consolidated Mines & Smelting Co., 455 F.2d at 447.

With respect to laches, the Supreme Court in United States v. California, 332 U.S. 19, 40 (1947), stated:

The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules [principles similar to laches, estoppel, or adverse possession] designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose

its valuable rights by their acquiescence, laches, or failure to act. [Footnote omitted; emphasis added.]

Moreover, BLM owes no affirmative duty to mineral locators to promptly check the legal status of every claim filed by them and apprise such claimants of its conclusions. Mac A. Stevens, 84 IBLA 124, 126 (1984); 43 CFR 3833.5(f). The accomplishment of such a task would be impossible in any event. In the instant case, the location notice was filed in the Fairbanks Recording District on September 5, 1961. The Legislative History of the Federal Land Policy and Management Act of 1976 (FLPMA) noted that there were an estimated six million unpatented mining claims located on public lands, not counting those located on national forest lands, where it may reasonably be assumed there are additional millions of claims also under the jurisdiction of this Department. See Senate Publication No. 95-99 (April 1978), at 130. United States v. Oneida Perlite Corp., 57 IBLA 373, 88 I.D. 772 (1981). Until October 1979 these millions of claims were not recorded by BLM, or any other Federal agency, but were filed of record in thousands of local recording offices throughout the States where the General Mining Laws are applicable. The Board is not informed as to the number of such claims subsequently recorded with the various BLM offices since the requirements of FLPMA were implemented, but it must be acknowledged that the volume of such recordings is huge, and constantly increasing. Clearly, BLM cannot be expected to determine accurately the legal status of each individual claim within a relatively brief period following its recordation; nor does any law or regulation impose such a requirement on the Bureau. As individual claims come to the attention of BLM personnel, determinations of their legal status can be made in the regular course of business. But a long delay between the recordation of a claim and BLM's determination of its status can never serve to validate a claim which was a nullity and void from its inception.

Thus, the Department is not barred by the equitable doctrine of laches from enforcing the pertinent public land laws and legal principles to invalidate this mining claim. United States v. Weber Oil Co., 68 IBLA 37, 58, 89 I.D. 538, 549 (1982); Montana Copper King Mining Co., 20 IBLA 30, 37 (1975). Therefore, BLM properly determined mining claim No. 11 was null and void ab initio.

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 affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge.

C. Randall Grant, Jr.,
Administrative Judge

R. W. Mullen
administrative Judge

ADMINISTRATIVE JUDGE IRWIN CONCURRING IN THE RESULT:

If we are going to adopt the theory that the United States may assert the statute of frauds to defeat the mining claim of one who alleges it was obtained by oral conveyance, as I think we may, then we should follow through with an analysis of the law of the statute of frauds in the state involved. It is clear that in Alaska a mining claim is a property interest that cannot be transferred without a writing subscribed by the transferring party. Cascaden v. Dunbar, 2 Alaska 408 (1905); Nygaard v. Dickinson, 9 Alaska 279, 97 F.2d 53 (9th Cir. 1938). It is also clear, however, that in Alaska if Collins had attempted to renege on his supposed oral conveyance to Fate, Fate could maintain his right to the claim by asserting the statute of frauds did not apply because after the oral conveyance he had done assessment work for the claim, thus constituting part performance, v. Dickinson, supra, 9 Alaska at 288, 97 F.2d at 57, or perhaps, because he had made improvements on the land, Mitchell v. Land, 355 P.2d 682, 686 (Alaska 1960). See generally, Treat v. Ellis, 6 Alaska 290, 305-316 (1920). If Fate could make these assertions against Collins, then he should be able to do so against the United States when it acts as Collins' surrogate. Whether he would succeed depends on whether he had, in fact, done assessment work after the oral conveyance but before the May 2, 1961, segregation of the land or on whether his possession and improvements during that period were adequate under Alaska law. Because the record contains an affidavit of assessment work by Fate for 1960, the United States might or might not prevail on a statute of frauds analysis. See Nygaard v. Dickinson, supra; Treat v. Ellis, supra; Tiffany on Real Property, § 1236. In any event, however, because Fate has not shown that his claim derives from Collins', he cannot prevail on the theory that in 1961 he amended a claim that existed before the land was segregated. BLM's decision must therefore be affirmed.

Will A. Irwin
Administrative Judge.

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

To the extent that the majority concludes that appellants have failed to show sufficient likelihood of establishing a chain of title which would prove that the location of the No. 11 Below Discovery placer mining claim on September 11, 1961, was an amendment of an earlier location made by individuals sometime in the early 1900's and conveyed to appellant Hugh B. Fate, Jr., by one E. B. Collins in 1960, such as would warrant the ordering of a fact-finding hearing, I agree with the majority. This ruling is, I believe, consistent with our past precedents. See e.g., Howard J. Hunt, 80 IBLA 396 (1984); R. J. Wall, 68 IBLA 122 (1982). However, to the extent that the majority rules that the failure of a mining claimant to record a transfer of the mining claim as required under a state statute of frauds gives rise to a right in the Government to, in effect, void the claim, my disagreement could not be sharper.

At the outset, I must confess that I do not find it particularly easy to understand either the basis of or the justification for what the majority purports to do. I think this confusion is intrinsic to the approach which the majority employs. Indeed, I believe that it is essential to systematically dissect the majority decision not only to understand its essential premises but also to lay bare the underlying fallacy which buttresses its entire conclusion.

The majority starts with the proposition that a mining claim is an interest in real property. With that, I have no problem, it having been established long ago in cases such as Forbes v. Gracey, 94 U.S. 762, 767 (1877), that where a mining claim is supported by a discovery, the possessory right thereby acquired is "property in the fullest sense of the word." From this starting point, the majority next concludes that transfer of a mining claim is subject to the state statute of frauds. I find this conclusion equally unremarkable. But, having made two observations which I think are well supported in the mining law, the majority continues on to hold that "we further find that the United States may invoke the statute of frauds to challenge the validity of an alleged oral conveyance of a mining claim." It is here that I believe the majority forges out into uncharted ground and promulgates a new rule which is not supported by a single relevant decision of either this Department or the Federal courts. Moreover, I would suggest that in doing so, the majority critically distorts the whole purpose of the statute of frauds to such an extent that it will actually work to the detriment of those whom it was designed to protect.

Initially, having first noted that the Department has a continuing authority to examine the validity of all unpatented mining claims on Federal lands, the majority then asserts that the United States "has a right to require mining claimant's compliance with State law which is applicable to claims on Federal lands," citing Roberts v. Morton, 549 F.2d 158, 161-62 (10th Cir. 1977). This proposition, at least insofar as it relates to enforcing the state statutes of frauds, is by no means as certain as the majority asserts.

In point of fact, the requirement that a mining claimant comply with state laws relating to location has been deemed the outgrowth of an express

regulatory provision, 43 CFR 3831.1. See United States v. Zwiefel, 11 IBLA 53, 76-77, 80 I.D. 323, 333-34 (1973), aff'd, Roberts v. Morton, supra. That regulation provides, in relevant part:

A location is made by (a) staking the corners of the claim, except placer claims described by legal subdivision where State law permits locations without marking the boundaries of the claims on the ground, (b) posting notice of location thereon, and (c) complying with the State laws, regarding the recording of the location in the county recorder's office, discovery work, etc. As supplemental to the United States mining laws are State statutes relative to location, manner of recording of mining claims, etc., in the State, which should also be observed in the location of mining claims.

I would suggest that this regulation does not contemplate the promulgation of a Federal rule that transfers of mining claims must be made in accordance with state law, including any statute of frauds. Indeed, the entire thrust of the regulation clearly relates to the initiation of a claim, and this was the sole matter decided in Roberts v. Morton, supra. Therefore, the majority's holding that state laws relating to the transfer of claims can be enforced by the Federal Government represents a ruling which cannot be premised on either the regulation or the court's decision in Roberts v. Morton.

Practically, whether or not the Federal Government could enforce the state statute of frauds was historically a matter of little importance. Section 7 of the 1872 Mining Act, 30 U.S.C. § 30 (1982), provided that adverse claims, based upon priority of possession, must be tried in the state courts. Therein, of course, the question of the state laws concerning transfer of mining claims would clearly come into play. Indeed, since the question as to who held the mining claim would, at least until this decision, have been expected to arise in a suit of one claimant against another, in which it might be expected that a party to an alleged transfer might plead the statute of frauds to avoid it, it would seem logical to assume that the state court was the proper forum for implementation of such a statute. Thus, even though I do not think the majority has established a valid basis for its assertion that state laws of transfer can be enforced by the Federal Government, this ruling would not be of particular effect were it not for the key ruling made, viz., that the Federal Government can independently assert the statute, even though it was not a party to the transfer.

The majority admits, of course, that the effect of its decision is to overrule R. Gail Tibbetts, 43 IBLA 210, 86 I.D. 538 (1979). The majority is more reticent, however, in mentioning that another effect of its decision may be to nullify the decision of the Ninth Circuit Court of Appeals in United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 441 (1971), since it is unclear from that decision whether the alleged conveyances at issue were oral conveyances or written conveyances which had been lost. Moreover, the majority ruling runs afoul of one of the key elements of the statute of frauds as it has developed, viz., that it may not be invoked by strangers to the agreement, and, in so doing, creates a rule of law which is simply incomprehensible in theory and unworkable in practice.

In order to understand the far-reaching ramifications of the majority decision, it is helpful to keep in mind the purposes of the statute of frauds as it developed. The statute of frauds was, as its name clearly indicates, not a creature of common law but rather the result of Parliamentary enactment. As is obvious from the original title of the 1677 Act, "Statute for the Prevention of Frauds and Perjuries," it was motivated by a fear that, inasmuch as the English courts had, since the 14th century, enforced oral agreements, it was becoming easier to perpetrate a fraud on the courts through the subornation of perjury. Accordingly, the statute, in effect, limited an individual's power to make enforceable contracts by requiring that, for certain types of agreements in which there was deemed to be a considerable likelihood of perjury, they be committed to writing. See generally, Corbin on Contracts § 275 (1950). Similarly, the statute also altered the common law by requiring that all conveyances of land, with certain exceptions, be in writing. See generally, American Law of Property § 12.14 (1952).

Having solved one problem relating to the solicitation of perjured testimony, however, it became clear, in a comparatively short time, that the statute of frauds generated another. Namely, it allowed individuals, even where it was admitted that an agreement had been made, to break these agreements with impunity, for the proven existence of the oral agreement or conveyance is irrelevant to the enforcement of the statute. ^{1/} As a result, courts almost immediately began to develop limitations on the scope of the statute. As Corbin has noted "it has been interpreted so strictly and applied so narrowly that its meaning as applied can now be determined only by a comparative study of the cases, not merely by the simpler methods of statutory interpretation." Corbin on Contracts, supra. Two of these limitations are of relevance herein: the rule that third parties to an agreement may not plead the statute, and the rule that part performance on an oral agreement takes the agreement out of the statute. I will deal with these concepts seriatim.

Our decision in R. Gail Tibbetts, supra, declined to rule, as the majority now does, that the United States could invoke the statute of frauds on the ground that, as a general proposition, strangers to an agreement cannot plead the statute, since an oral agreement under the statute is normally viewed as merely voidable at the option of one of the parties thereto. Id. at 227, 86 I.D. at 546. The reason for this limitation is obvious. Since the concern which animated the adoption of the statute was the procurement of perjuries to prove the existence of an oral agreement, where the parties to the agreement waived the statute, there was no need for concern that a fraud was occurring, and the fact that a stranger might object to such an agreement did not invest him with the right to invoke the statute. ^{2/} The majority does not dispute the existence of this general rule. Rather, it argues that the conveyance of a mining claim is simply an exception to this rule. No judicial

^{1/} As we noted in R. Gail Tibbetts, supra, the statute of frauds is "designed to enable parties to certain types of transactions to escape liabilities and duties assumed orally but not in writing." Id. at 227, 86 I.D. at 54, citing Mustard v. United States, 155 F. Supp. 325, 332 (Ct. Cl. 1957).decision, of course, has promulgated such an exception, so the majority is forced to support its novel theory by way of an analogy. The analogy, however, simply does not work.

^{2/} The statute of frauds is not concerned with transfers which may be fraudulent as to third parties. See American Law of Property § 11.2, n.4. 86 IBLA 231

decision, of course, has promulgated such an exception, so the majority is forced to support its novel theory by way of an analogy. That analogy, however, simply does not work.

The majority points out that an exception to the general rule that only parties to an agreement can invoke the statute exists where a landowner dies intestate and without heirs capable of inheriting. In such a situation, if a suit is brought to enforce an oral contract of sale, the majority notes that the State, as the successor to his title by escheat, may set up the defense of the statute. From this example (with which I do not quarrel), the majority argues:

Upon forfeiture or abandonment of Collins' interest in the claim, whatever possessory or equitable interest he may have had inured to, and was merged with, the paramount legal title of the United States, automatically by operation of law. The United States was then at liberty to withdraw the land from further mineral entry so as to make that land available to the State in partial satisfaction of its obligation under the Alaska Statehood Act. As the natural successor to the reversionary interest of Collins, the United States has the right to invoke the Alaska statute of frauds in defense against Fate's assertion that Collins made him a parol gift of the claim prior to departing.

86 IBLA at 225.

It should first be pointed out that the majority starts by positing its ultimate conclusion, that Collins either forfeited or abandoned his interest in the claim. What the Board has done is engage in a legal fiction that, where a donor has evidenced an intent to give the claim to another, he has basically "abandoned" the claim. In view of the majority's holding that the United States can assert the statute of frauds to nullify the transfer, the end result is that the United States becomes the beneficiary of the "abandonment," and the possessory title of Collins merges with the equitable title of the Government to give it the full title. I would suggest that calling either a conveyance or a gift an effective "abandonment" does grave injury to the concept of abandonment. Abandonment requires the subjective intent to abandon something. An intent to give or sell something to another clearly does not constitute an intent to abandon it. If Fate was a relative of Collins, would it make any real sense to argue that Collins intended to abandon his claim when he gave it to Fate? Of course not. Yet, implicit in the majority result is the holding that, if Collins did orally give his claim to Fate, he thereby abandoned it.

In fact, I would suggest that an abandonment would only occur if it is concluded that there was no gift from Collins to Fate. In essence, therefore, the majority has concluded that, since there was no gift, the Government can invoke the statute of frauds to prevent Fate from asserting that there was a gift. This is, to my mind at least, classical circular reasoning, since the real question is whether or not there was a gift in the first place.

Moreover, as a conceptual matter, the position of the State, having become the legal heir of the decedent by the laws of escheat, is fundamentally

different from that of the United States in seeking to enforce the statute in the instant situation. It has always been recognized that the privies or successors-in-interest of a party to an oral agreement have the same rights to invoke the statute as did the party himself. Having become heir to an individual by escheat, his rights inure to the State as part of the estate, and the State is at liberty to exercise them. What the majority seeks to do, however, is posit a situation where, if the United States can exercise a right to invoke the statute, it will acquire the mineral claimant's rights in the mining claim. What the majority fails to establish, unfortunately, is the authority for the United States to invoke the statute as an initial matter.

The fact that if the statute were enforced the United States would gain title to the land is irrelevant to the question whether the United States can enforce the statute. Thus, it has been held that where, pursuant to an oral contract for the sale of land, the vendor executes a conveyance after a judgment has been recovered against him or an execution levied on the land at the suit of one of his creditors, the judgment creditor cannot set up the defenses of the statute to defeat the conveyance. 73 Am Jur. 2d Statute of Frauds § 580 (1974). The fact that the creditor could argue that if the statute were invoked he could acquire the land does not give him authority to, in fact, invoke the statute. Why it should be different for the United States is unclear. I see no basis for the majority's assertion that the United States can invoke the statute in the instant case.

But, even were I to assume that the United States could invoke the statute as a general proposition, I think the record before the Board could lead one to the conclusion that the instant transaction is outside of the statute. As was noted earlier, among the limitations applicable to the statute of frauds is that derived from part performance of an oral contract to sell land. Indeed, it is generally recognized that part performance of an oral contract to sell land will take it "out of the statute of frauds." See American Law of Property § 11.7. ^{3/}

What exactly constitutes part performance varies from jurisdiction to jurisdiction. While the English rule (prior to the abrogation of the Statute of Frauds in Great Britain) was that the taking of possession of the property by the purchaser under circumstances referable to the contract was sufficient by itself to take the case out of the statute, it has been noted that, in the United States, there are five different theories as to when the taking of possession by the purchaser will take the case out of the statute. They are:

- (1) possession alone is sufficient; (2) possession must be accompanied by payment;
- (3) possession must be accompanied by the making of valuable and lasting improvements; and (4) there must be both possession and such change of position by the purchaser that irreparable injury will result unless the oral contract is enforced. A fifth view holds that no act of part performance will be recognized.

^{3/} Paradoxically, Corbin, while recognizing the result, argues that "[p]art performance of a contract for the transfer of land does not take the case out of the statute; but it may be of such a character that it will take the statute out of the case." Corbin on Contracts § 420 (1950).

American Law of Property, *supra*. See also Corbin on Contracts § 426. But, while there is a split between the relevant states as to the standard for determining part performance, it can still be concluded that "in nearly all jurisdictions an oral contract for the sale or lease of land will be made specifically enforceable if possession is taken under the contract and valuable and permanent improvements are made upon the land." Corbin on Contracts § 434; accord, American Law of Property § 11.7; Tiffany, The Law of Real Property § 966 (1975). I will assume, therefore, that Alaska follows this general rule, though I would point out that in future cases it will be necessary not only to ascertain the exact state statute of frauds involved but to determine the ambit of exceptions to the statute, as created by judicial decisions in that state, an exercise the majority does not even attempt herein with reference to Alaska. ^{4/}

I recognize, of course, that appellant does not assert an oral sale but rather an oral gift. Yet, here too, it has been recognized that the taking of possession and the making of substantial expenditures on the land in reliance on the gift will take the gift out of the statute. See Tiffany, The Law of Real Property, § 1236; American Law of Property § 15.25. Thus, if Fate took possession and made substantial expenditures on the land, his actions would take the oral gift out of the statute, so that even if the United States had authority to invoke the statute, it would not apply.

That Fate took possession is not controverted by the majority. Thus, the sole question is whether or not Fate made substantial expenditures on the claim in reliance on the parol gift. I would suggest that the performance of assessment work, which appellant asserts he did, might well constitute substantial expenditures so as to take the oral gift out of the statute of frauds. At this point, however, it becomes necessary to examine the majority decision since, the point in time in which the United States asserts the statute might well determine whether appellant's expenditures are substantial. As will be made clear, it is no easy task discerning when the gift and/or the claim, itself, is voided under the majority theory.

In analyzing this question, it is important to have clearly before us the nub of the majority's holding. The majority asserts that "the United States has the right to invoke the statute of frauds to invalidate a purported parol conveyance of a mining claim when the validity of the conveyance obviously affects the title to the United States' public lands."

First of all, it is clear that an argument can be made that the claim became invalid eo instante upon the making of the gift and the surrender of possession. Any valid claim, of necessity, "affects the title to the United States' public lands," a point the majority expressly makes earlier in its analysis. Under the implicit majority theory, either a parol gift or oral conveyance by the locator would, ipso facto, represent an abandonment by the donor or grantor of any further claim to the land. Indeed, we would have

^{4/} Thus, it is possible that all that the laws of the State of Alaska require is a surrender of possession, thus making further inquiry as to the nature of appellant's expenditures irrelevant.

here the two elements necessary to prove an abandonment of a claim: the surrender of possession and the subjective intent to abandon. Thus, the claim originally located has ceased to exist and appellant's occupancy is without the benefit of an actual location. Therefore, it could be concluded that the claim which Collins located terminated in 1960.

Indeed, this seems to be the operative legal theory which the majority applies. The majority notes, that

upon forfeiture 5/ or abandonment of Collins' interest in the claim, whatever possessory or equitable interest he may have had inured to, and was merged with, the paramount legal title of the United States, automatically by operation of law. The United States was then at liberty to withdraw the land from further mineral entry 6/ so as to make the land unavailable to the State in partial satisfaction of its obligation under the Alaska Statehood Act. [Emphasis added.]

86 IBLA at 225. It appears, therefore, the majority is positing a view of the case whereby Collins' claim became null and void prior to the withdrawal. In the factual construct of the instant case, that could only happen as of the date of the gift and surrender of possession. The difficulties attendant in assuming that this was the date that the United States acquired Collins' possessory interest in the claim are considerable.

The problem in ascertaining the relevant action which results in voiding the claim can be seen in an example. Let us assume that a claim, supported by a discovery, is located in 1952. It is then orally transferred in 1966. The transferee takes possession at that time and annually performs and records his annual assessment work. The land is withdrawn in 1972. The 1952 claim is recorded in 1979 under section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA). The claim is orally transferred in 1981 to another individual who takes possession and, in 1983, hoping to clear up any ambiguity of record, purports to file an amended location notice, substituting himself

5/ The issue of a forfeiture could arise only upon the making of a new location, since the mere occupancy of the land and performance of work would not meet the statutory requirement of a relocation (see 30 U.S.C. § 28 (1982)), unless the occupancy continued for a sufficient period so as to constitute a constructive relocation (see 30 U.S.C. § 38 (1982)). However, since a forfeiture, as that term is used in mining law, relates to the relocation of a prior claim by a subsequent locator justified by the failure of the first locator to perform assessment work, it is difficult to understand how the United States could acquire Collins' possessory rights when the actual act which terminates them is the acquisition of adverse rights by Fate.

6/ I must admit some confusion about this statement by the majority. As I understood the law, the existence of a valid mining claim does not prevent the withdrawal of land from subsequent location and, indeed, did not remove the land within the claim from the public domain. See United States v. Rizzinelli, 182 F. 675 (D. Idaho 1910). Thus, the United States could have withdrawn the land from further mineral location at any time and the existence of the claim would not have affected the efficacy of the withdrawal as to subsequent locators.

as the locator. In 1986, the Bureau of Land Management (BLM), citing the majority's decision in the instant appeal, declares the claim null and void. Is the claim null and void and, if so, at what point in time?

I think it clear that the majority would consider the claim null and void as of the date of the oral conveyance and surrender of possession. There are, however, a number of problems with a rule that asserts that a claim becomes abandoned as of the date of an oral conveyance within the statute of frauds. For one thing, the statute is not self-operative, but rather, must be plead as an affirmative defense. See generally, 73 Am. Jur.2d Statute of Frauds §§ 589-607. This is so even in the limited number of jurisdictions in which it is declared that an oral contract within the statute is a nullity. ^{7/} Moreover, a court may not, as a general rule, raise the issue sua sponte. *Id.* at § 592. It would seem, therefore, that the majority's intimation that the mere conveyance and surrender of possession effectuated a reversion to the United States cannot be credited, unless it is assumed that the mere fact equitable and legal title is in the United States constitutes a continuing invocation of the statute. There is, however, no basis in American jurisprudence for assuming this last proposition.

Additionally, the effect of a holding that the transfer is nullified upon the surrender of possession (and, concomitantly, the claim is abandoned by the donor or grantor at that time) is to effectively create an exception to the part performance exception. Thus, in a State like California where the rule is that possession alone is sufficient to take an oral conveyance out of the statute, the logical problem arises whereby the very act which would take the conveyance out of the statute is the same act which the Department now contends invokes the statute. Which comes first, the chicken or the egg? Moreover, in any state which required substantial expenditures in addition to actual possession, it is obvious that an oral conveyance of a mining claim could never be taken out of the statute since the conveyance would necessarily be voided before the donee or grantee could make any improvements on the claim. I would suggest that since the exceptions to the statute of frauds are the creation of the courts, it should be the courts, and not the Department of the Interior, which establishes exceptions to the exceptions.

It could, of course be argued that the withdrawal of the land in 1972 serves as the operative date. Under this approach, by withdrawing the land, the Government has effectively asserted the defense of the statute. Of

^{7/} In any event it is highly unlikely that Alaska follows the minority rule that a contract within the statute is a nullity. Thus, it appears from The American Law of Property, that only four States (North Carolina, Kentucky, Mississippi, and Tennessee) follow this rule. *Id.* at § 11.3. The case cited by the majority, Alaska Exploration Co. v. Northern Mining & Trading Co., 152 F. 145 (9th Cir. 1907), clearly did not hold, as the majority suggests, that a deed not properly witnessed, was void. Rather, it held that such a recorded instrument was insufficient to afford constructive notice and, in the absence of actual notice, a subsequent purchaser was not liable to the original grantee. In any event, this case involved a recording statute and not the statute of frauds, as the deed was clearly in writing.

course, by this time, the transferee under our hypothetical has been in possession for 6 years, and the likelihood of having made substantial improvements increases proportionately. Alternatively, it is possible that donee's possession of the land might constitute holding and working of the claim within the meaning of 30 U.S.C. § 38 (1982) so that even were it assumed that the original claim was a nullity, the donee might have a constructive relocation of a new claim. However, in this latter scenario it is likely that the claimant, viewing his right as emanating from the oral conveyance, recorded the 1952 claim as the origin of his rights, and did not submit proof of the constructive relocation. Therefore, upon a determination that the 1952 claim was abandoned in 1966, it would follow that the constructive relocation was statutorily abandoned under section 314 of FLPMA when appellant failed to record his relocation in 1979.

On the other hand, if we assume that sufficient documentation was submitted with the recordation of the 1952 claim so that the first donee might successfully argue that the relocated claim was, itself, recorded, this second claim could fall upon the subsequent oral transfer to the second donee, under the theory that the withdrawal instantaneously attached upon "abandonment" of the claim by the first donee.

For my part, even were I to agree that the Government can assert the statute of frauds in such circumstances, it would seem clear that the assertion occurred no sooner than the BLM decision in 1986. Therefore, in the posed hypothetical it would be necessary to ascertain whether the expenditures by the first donee as well as the expenditures of the second donee were sufficient to qualify under the part performance exception to the statute of frauds.

Applying this last analysis to the instant case, the statute of frauds could be deemed to have been asserted no sooner than October 3, 1983, and more realistically the operative date should be that of the instant decision. Thus, at a minimum, Fate has performed assessment work for more than 20 years on the subject claims. If the majority desires to assert the statute of frauds, I would suggest it is required to afford Fate an opportunity to show that his possession together with his developmental expenditures take the parcel out of the statute. Furthermore, since the proof of part performance would affect an interest of Fate which is "property in the fullest sense of the word," it would seem axiomatic that Fate must be afforded notice and an opportunity for hearing prior to the assertion of the statute of frauds as a basis for invalidating the claim. Thus, even assuming the correctness of the majority's legal theory, the majority has failed to grant Fate the due process of law to which he is entitled.

I find particularly troubling the majority discussion as to "the ample justification" which supports their holding that the United States may invoke the statute of frauds. This entire section clearly proceeds from the premise that because proof of an oral conveyance might be difficult to develop, the Government is justified in rigorously invoking the statute. This misses the whole point of the statute.

For purposes of the statute of frauds, it is irrelevant whether or not Fate can prove that an oral conveyance occurred. On the contrary, even if Collins were to testify under oath that everything which Fate said were true,

the invocation of the statute would nullify the transfer and invalidate the claim as one which has been abandoned. The majority rationale will be used to nullify claims where there is absolutely no question that a transfer did, in fact, occur.

In any event, even under the state of the law as it existed prior to the majority's emendations herein, a claimant in appellant's circumstances bore the burden of showing that his location was an amendment of a claim to which he was already entitled as a matter of right. If an appellant is unable to do so, his purported amendment is treated as relocation. See Tibbetts v. Bureau of Land Management, 62 IBLA 124 (1982). I cannot understand why we should be concerned with whether an appellant will be able to prove that a transfer has occurred since, if he cannot, his appeal will fail. We should decide issues of proof on that basis, and not try to construct a fanciful edifice so as to suggest that the result we reach is premised on a legal necessity as opposed to a factual conclusion.

Finally, whether or not Collins was an attorney or Fate "the holder of at least one advanced academic degree, and apparently well experienced in the acquisition and maintenance of mining claims" would seem to me functionally irrelevant to whether the statute of frauds applies, unless we are positing a rule that it applies only to "knowledgeable" individuals. Such a holding would create a most novel approach in future cases, where individuals would be forced to try to avoid the statute's effects by pleading ignorance, a plea which even the majority notes, is irrelevant, at least as far as estoppel is concerned.

Ultimately, the most unfortunate aspect of the majority's holding on the statute of frauds is that it is unnecessary to the result in the instant case, since the majority had already found that Fate had failed to submit a sufficient showing that an oral gift did occur to even warrant a hearing on that question. But, while the rule may be superfluous to the result in the instant case, it will, in short order, become the animating rationale in a number of cases where there is no question that an oral transfer or parol gift transpired. It may be, as the old saw goes, that hard cases make bad laws, but the majority decision in the instant case proves that easy cases can make worse ones.

To the extent that the majority decision purports to invalidate the instant claim based on an invocation of the statute of frauds, I most emphatically disagree.

James L. Burski
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Gail M. Frazier
Administrative Judge.

Bruce R. Harris
Administrative Judge

