

LYLE W. TALBOT  
DAVID M. SNYDER

IBLA 93-214

Decided July 26, 1996

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting mineral patent applications MTM 81473 and MTM 81474.

Reversed and remanded.

1. Applications and Entries: Amendments--Mining Claims: Patent

Where applications for mineral patent are executed outside the land district where the mining claims were located, the defect is subject to correction and BLM's rejection of corrected applications will be reversed.

APPEARANCES: Barry Marcus, Esq., Boise, Idaho, for appellants.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Lyle W. Talbott and David M. Snyder appeal from a January 7, 1993, decision of the Montana State Office, Bureau of Land Management (BLM), rejecting mineral patent applications MTM 81473 and MTM 81474 because they were not executed within the land district where the lands applied for are situated.

On September 4, 1992, the Montana State Office received two mineral patent applications for mining claims located in Madison County, Montana. The first application, MTM 81473, was executed by Talbott for himself and involved the Garnet 1 through 6 and the Garnet 8 and 9 placer mining claims. The second application, MTM 81474, was executed by Talbott for himself and for Snyder, as attorney-in-fact, and involved the Garnet 7 placer mining claim. Talbott is a resident of Idaho and Snyder is a resident of Colorado; the notarized portions of the applications indicate that they were executed in Ada County, Idaho.

During ensuing discussions, BLM informed Talbott that the applications had not been executed within the appropriate land district. On October 23, 1992, Talbott submitted "Supplemental Applications" executed by Talbott within the State of Montana.

In the appealed decision, BLM rejected the applications without prejudice, finding them "invalid because they were not properly executed in the land district" by Talbot for himself or as attorney-in-fact for Snyder. BLM also rejected the supplemental applications, finding them "unacceptable because the filing of these documents cannot cure the invalidity of the applications." BLM's decision indicates that it based its rejections on a December 15, 1992, memorandum from the Field Solicitor, Billings, Montana (Field Solicitor's Opinion), set forth in relevant part below:

Under the Mining Law of 1872, a patent may be obtained by, inter alia, filing an application in the proper land office. 30 U.S.C. § 233. An agent may make the application if the claimant is not a resident of or within the proper land district. Id. Thus, when construed together, it is plain that Congress required that the application be made within the land district. In other words, either the claimant or, in his absence, an agent must be within the land district when application is made. See also BLM Handbook H-3869-1 ("Applications for mineral patent must be executed in the land district where the claim is located.")

In this case, there is no dispute that the questionable applications were not made in Montana, as required by law. The question is whether, despite execution in Idaho, the claimants complied with the substantial requirements of the law and should be allowed to cure the defects by supplemental filings. See El Paso Brick Co. v. McKnight, 233 U.S. 250, 258 (1914).

Although no cases exist on the issue of whether failing to make application in the land district is a fatal error, the cases turn on whether the error is jurisdictional and not subject to cure or whether the error is simply an irregularity in complying with a directory provision of the law. Id. If a requirement of the law is necessary to confer jurisdiction on the BLM to issue a patent, then the requirement is substantial and cannot be waived. Cases have found that if a claimant is present in the land district, an agent has no authority to make application and the error is fatal to the application. See, e.g., Floyd R. Bleak, 26 IBLA 378 (1976). Conversely, while posting the land is a jurisdictional requirement, the affidavit proving that the land has been posted is simply a directory provision and can be amended. El Paso Brick, 233 U.S. at 259; Stock Oil Co., 40 L.D. 198 (1911).

\* \* \* It follows that executing a patent application in the proper land district is a substantial requirement and confers jurisdiction mandatory not merely directory, and a defect is not curable

by supplemental proof, although a new application may be filed. In the present case, the applications were not made in Montana. They are, therefore, invalid and not subject to cure by supplemental proof. [Footnote omitted.]

(Field Solicitor's Opinion at 1-2).

In their statement of reasons, appellants argue that there is no requirement that the patent application must be signed by the claim owner in the district where the claims are located, and assert that Talbot's "physical location at the time he signed the application[s] bears no conceivable relation to the interests of the United States in processing the patent." Appellants argue that jurisdiction is dependent upon filing of the application with the proper office; therefore, the failure to sign the application within the land district is a curable, not fatal, defect.

Appellants challenge the Field Solicitor's reliance on the Board's decision in Bleak, arguing that unlike the case at hand, the patent application in Bleak was signed by the owner's attorney-in-fact, even though the owner was physically present within the land district in which the mining claims were located. Moreover, appellants argue that the present case is controlled by the Supreme Court's decision in El Paso Brick Co. which held that the signing of an affidavit of posting outside the land district was a curable defect. According to appellants, that holding is applicable here because, with respect to the location of execution, an affidavit of posting must be treated the same as an application for patent.

For the reasons set forth below, we reverse BLM's decision of January 7, 1993, and remand the case for processing the supplemental applications.

Section 6 of the Mining Act of May 10, 1872, 30 U.S.C. § 29 (1994), as amended, reads in relevant part: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim \* \* \* may file in the proper land office an application for patent, under oath, showing such compliance \* \* \*." The Act of January 22, 1880, 21 Stat. 61, added the following sentence:

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

30 U.S.C. § 29 (1994).

While we agree with appellants' assertion that the facts in Bleak can be distinguished from this case, the decision is instructive as to what constitutes a jurisdictional defect. In Bleak, an agent filed an application for patent of mining claims on behalf of the claimant who was, at the time of filing, a resident of the land district encompassing his claims. The claimant subsequently filed an amended application signed by himself with his appeal and asked the Board for leave to amend his application. The Board denied his request, holding that under 30 U.S.C. § 29 (1994) and Departmental case law "a mineral patent application executed by an agent at a time when the claimant is a resident of and physically present within the land district is invalid and cannot be cured by filing a new application, nunc pro tunc, and such an application must be rejected." 26 IBLA at 380. Thus, in Bleak the jurisdictional defect was the failure of the claimant to comply with the statutory filing requirement that he, not his agent, execute the patent application when the claimant was present within the land district where his claims were located.

The distinction between a jurisdictional defect and a defect which is subject to cure in a mineral patent application was examined by the United States Supreme Court in El Paso Brick v. McKnight, 233 U.S. 250 (1914). In that case, the Department had rejected an application for patent because an accompanying affidavit showing that notice had been posted on the land was executed before an officer residing outside of the land district. The Department's ruling was based on Rev. Stat. § 2335, which declared that all required affidavits relating to patent applications "may be verified before any officer authorized to administer oaths within the land district." See 30 U.S.C. § 40 (1994). The claimant filed a supplemental affidavit satisfying the requirements, but the Assistant Secretary held that the supplement could not cure the defect: "The defect is not a mere irregularity which may be cured by the subsequent filing of a properly verified affidavit. The statutory provisions involved are mandatory. Their observance is among the essentials to the jurisdiction of the local officers to entertain the patent proceedings." El Paso Brick Co., 37 L.D. 155, 159 (1908). Meanwhile, the lands were located by another, who sued for right of possession. Judgment was rendered in favor of the adverse mining claimant and affirmed on appeal to the Supreme Court of New Mexico. The Supreme Court of the United States reversed, stating:

The Government does not deal at arm's length with the settler or locator and whenever it appears that there has been a compliance with the substantial requirements of the law, irregularities are waived or permission is given, even on appeal, to cure them by supplemental proofs. United States v. Marshall Mining Co., 129 U.S. 579, 587. In the present case such proof by supplemental affidavits properly executed, showed that the land had been properly posted. But that fact was not allowed to have any effect because of the mistaken view that, as the original affidavit of posting had been signed before an officer residing

outside of the land district, the patent proceedings were absolutely void. This confused service by proper posting—which was jurisdictional,—with defective proof of such service which—like the defective return of an officer,—can be corrected. Under the law, jurisdiction depended upon giving notice by publication in a newspaper, by posting in the land office, and by posting on the land itself—the statute directing how the giving of such notice should be proved. But irregularities in complying with such directory provision could be cured, and when cured, as it was here, the patent should have issued. [Emphasis added.]

233 U.S. at 258-59.

We find that the above holding is controlling here. Appellants' applications for patent were properly executed, but were merely executed outside the land district where the claims were located. This error does not rise to the level of violating a substantial requirement of the law that existed in Bleak where the wrong person executed the application. Nor does it equate with the failure to properly post the land, which was cited in El Paso as an example of a substantial requirement that is jurisdictional. Rather, the error here is very similar to having the affidavit of posting signed before an officer residing outside the land district, an error which the Supreme Court in El Paso held was only an irregularity in complying with a directory provision, and therefore subject to correction.

We therefore conclude that the failure of appellants to have the applications for patent executed in the proper land district did not constitute a jurisdictional defect, but was merely an irregularity that was subject to correction. When appellants promptly filed supplements rectifying the noted defect, their supplemental applications should have been accepted for processing by BLM.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed, and the case is remanded for action consistent with this opinion.

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John H. Kelly  
Administrative Judge

I concur.

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James L. Byrnes  
Chief Administrative Judge

