

MOUAT NICKEL MINES, INC., ET AL.

IBLA 2002-359, 2002-360, & 2002-362

Decided April 28, 2005

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting mineral patent applications. MTM 81597, MTM 82332.

Vacated and remanded.

1. Mining Claims: Patent

Issuance of a first half final certificate by the Secretary when adjudicating a mineral patent application certifies that the applicant has satisfactorily complied with the paperwork requirements of the Mining Law, grants equitable title to the claimant (subject to confirmation of a discovery on the claims), and segregates the land from all forms of entry and appropriation under the public land laws.

2. Mining Claims: Patent

When the Secretary of the Interior has adjudicated the issues involved by issuing a first half final certificate for mineral entry in response to a mineral patent application, the review authority of the Board on appeal is limited to determining whether the Secretary's decision has been properly applied and implemented. A BLM decision which is inconsistent with the Secretary's decision in the matter will be vacated.

APPEARANCES: Don H. Sherwood, Esq., Denver Colorado, for appellants; Karen L. Dunnigan, Esq., Office of the Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought by Mouat Nickel Mines, Inc., William G. Mouat, Shirley M. Mouat, and the Bryan Paul O'Doriso and Laurene Sue O'Doriso Family Trust from an April 30, 2002, decision of the Montana State Office, Bureau of Land Management (BLM), rejecting their mineral patent applications (MTM 81597 and MTM 82332). Patent application MTM 81597, encompassing the Gay 4, Gay 5, Gay 10, Gay 14, Amy 109, and Amy 110 lode mining claims, was filed with BLM on October 14, 1992. Application for patent to the New 5, New 6, and New 8 lode mining claims (MTM 82332) was filed with BLM on July 13, 1993.

Both of the applications identified the applicants for mineral patent as Mouat Nickel Mines, Inc., William G. Mouat, Shirley M. Mouat, and the Bryan Paul O'Doriso and Laurene Sue O'Doriso Family Trust. The certificate of title which accompanied each application verified that title to the mining claims involved is held by the applicants. Both applications were signed on behalf of the applicants by William G. Mouat as attorney-in-fact. The patent application in MTM 81597 was accompanied by a power of attorney executed by the trustees of the Bryan Paul O'Doriso and Laurene Sue O'Doriso Family Trust and by the President of Mouat Nickel Mines, Inc., granting the authority to William G. Mouat, a resident of Billings, Montana, to undertake all actions necessary to pursue the application for mineral patent. A similar power of attorney granted to William G. Mouat regarding application MTM 82332 was executed by the same parties on August 9, 1993, and filed with BLM on August 13, 1993. Each of the patent applications contained an affidavit executed by William G. Mouat as attorney-in-fact for the applicant certifying that written notice was posted in a conspicuous place on the claims notifying adverse claimants of the applicants' intention to apply for patent to the mining claims and that any adverse claims would be barred in the absence of filing within the period allowed by law.

Subsequently, each of the patent applications was transmitted by the Montana State Director, BLM, to the Director, BLM, in Washington, D.C., with a cover memorandum. In the cover memorandum dated July 8, 1993, regarding patent application MTM 81597, BLM recited that:

The applicants listed above filed an application for mineral patent pursuant to 30 [U.S.C. §] 29 \* \* \* on November 14, 1992. \* \* \*

The application was properly filed and adjudicated. Publication ended on April 4, 1993, and no adverse claims were filed within the statutory 60-day publication period. Final proofs and statements and the purchase price for the land applied for were submitted by the applicant on April 12, 1993.

I hereby certify that the above mentioned applicants and this office of the [BLM] have fully complied with the mining law (30 [U.S.C. §§] 22-54) and implementing Departmental regulations (43 CFR subparts 3862 - 3864) in reaching the point of issuing the first half of the mineral entry final certificate, confirming that mineral entry was allowed and occurred upon the date of acceptance of the purchase price required by law (30 [U.S.C. §§] 29 and 30) on April 12, 1993, for the land applied for in Mineral Patent Application MTM 81597.

(Memorandum of July 8, 1993, at 1-2.) A similarly worded memorandum dated March 4, 1994, was issued regarding patent application MTM 82332, noting that the application was filed and adjudicated; “[p]ublication ended on September 15, 1993”; “no adverse claims were filed within the statutory publication period”; and final proofs, statements, and the purchase price were tendered on October 13, 1993. Each memorandum was accompanied by a concurrence page which ultimately included the dated signatures of the Solicitor for the Department; the Director, BLM; and the Assistant Secretary for Lands and Minerals Management. Subsequently, first half final certificate (FHFC) for mineral entry MTM 81597 (date of entry April 12, 1993) was signed by the Secretary of the Interior on December 1, 1994.<sup>1/</sup> In the case of patent application MTM 82332 (date of entry January 25, 1994), the FHFC was signed by the Secretary on June 7, 1995.

In the meantime, on September 30, 1994, Congress imposed a moratorium on processing mineral patent applications when it enacted the Department of the Interior and Related Agencies Appropriation Act of 1995, Pub. L. No. 103-332, 108 Stat. 2499 (1994). Section 112 of that Act, 108 Stat. 2519, precluded the expenditure of funds to accept or process applications for patent for mining or mill site claims for the 1995 fiscal year from October 1, 1994, through September 30, 1995. The Act provided, however, that patent applications filed with the Secretary on or before September 30, 1994, for which all statutory requirements for patent had been met by that date would be excepted from the statutory moratorium. Id.; see American Colloid Company, 162 IBLA 158, 161 (2004). Pursuant to BLM Instruction Memorandum (IM) No. 95-01, this exception to the moratorium was construed to include mineral patent applications such as those involved in these appeals in which a FHFC was pending in Washington, D.C., as of September 30, 1994. Mount Emmons Mining Co. v. Babbitt, 117 F.3d 1167, 1169 (10th Cir. 1997). Both the moratorium and its exceptions have been extended every succeeding fiscal year and are still in effect. See Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 307, 118 Stat. 2809, 3093 (Dec. 8, 2004) (fiscal 2005).

<sup>1/</sup> Secretarial Order 3163 (Mar. 2, 1993) revoked the authority of subordinate officials to issue FHFC’s and reserved that authority to the Secretary. Silver Crystal Mines, Inc., 147 IBLA 146, 149 (1999).

Years after the FHFC's were signed by the Secretary of the Interior, the Montana State Office, BLM, citing its "ongoing adjudication of the applications," issued an interlocutory decision dated August 24, 2001. In that decision, BLM notified the applicant that it had no evidence that Shirley M. Mouat had either signed the patent applications or signed a power of attorney authorizing a signature on her behalf. Regarding a power of attorney, BLM noted that in view of her residence in the land district where the claims are located, this option was only available to her if she was absent from the jurisdiction at the time of making application. Hence, BLM called upon the applicant to provide an affidavit showing that Shirley M. Mouat was out of the jurisdiction (or legally incapacitated) at the time the patent applications were signed and a copy of her power of attorney granted to William G. Mouat.

Counsel for applicant responded by letter of October 9, 2001. Enclosed with the letter was a power of attorney dated October 9, 2001, executed by Shirley M. Mouat indicating that she had granted William G. Mouat, her husband, authority to act on her behalf in filing the respective patent applications and that this authority was granted prior to the time the applications were filed, thus confirming the existence of this authority to act in her behalf. Affidavits by William G. Mouat indicating that he acted on behalf of his wife as her husband and her attorney<sup>2/</sup> in filing the patent applications have also been filed. In addition, affidavits by Shirley Mouat have been filed confirming that the patent applications were executed by her husband on her behalf.<sup>3/</sup> Further, counsel asserted that William Mouat and Shirley Mouat, as husband and wife, constitute a mining association entitled to apply by its authorized agent.

The applications were thereafter rejected by BLM on the ground that the Mining Law of 1872, as amended by the Act of January 22, 1880, 30 U.S.C. § 29 (2000), requires that a patent application be made by the claimant if the claimant resides within the land district in which the claim is located. (BLM Decision at 1.) Finding from the applications that Shirley Mouat is a resident of Billings, Montana, and that she did not sign the applications, BLM held the applications invalid and rejected them. Id. at 2. In its decision, BLM also discounted the efficacy of a power of attorney dated August 24, 2001, subsequent to execution of the patent applications, to support the signature of William Mouat on the patent applications on behalf of Shirley Mouat. Id. at 2. The appealed BLM decision was unclear about the

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<sup>2/</sup> In addition to his status as attorney in fact and her husband, William Mouat indicates that he is an attorney at law authorized to act on behalf of his wife.

<sup>3/</sup> Shirley Mouat's affidavits do not address her presence in the jurisdiction at the time the applications were filed. In the cover letter, it is noted that as many years had passed since the applications were filed, she "cannot state whether she was or was not physically out of the land district." (Letter of Oct. 9, 2001, at 1.)

actual basis for disregarding the power of attorney filed in October 2001, noting both that it was executed long after the mineral patent application was signed and that Shirley Mouat was a resident of the land district in which the claims are located.<sup>4/</sup> Summarizing its own decision, BLM rejected the mineral patent applications in their entirety because “all of the applicants failed to sign the mineral patent applications.” Id.

In their statement of reasons (SOR) for appeal, appellants contend that the real issue is whether the association of husband and wife has filed an application and whether the necessary supporting oath has been filed. (SOR at 4.) It is asserted that when one spouse files an application for a married couple naming both spouses, an association has filed. Id. Regarding the required supporting oath, appellants note that Shirley Mouat provided the necessary affidavits as to citizenship. Id. at 5. Appellants argue that issuance of the FHFC of mineral entry for these patent applications coupled with payment of the purchase price establishes compliance with the paper work requirements and vests equitable title in the applicant, subject to confirmation by a mineral examiner of a discovery of a valuable mineral deposit. Id. at 5-7. Thereafter, appellants contend that any defect in the paperwork is curable. Id. at 7. In a supplemental filing appellants have cited the case of Samual B. Fretwell, 154 IBLA 201 (2001), for the principle that a signature of a claimant by his attorney-in-fact is acceptable when a copy of the power of attorney verifying the authority of the agent to sign for the claimant is provided in response to a request by BLM.

Appellants argue that the cases relied upon in the BLM decision, Floyd R. Bleak, 26 IBLA 378 (1976), and Salmon Creek Association, 151 IBLA 369 (2000), are distinguishable from this case. (SOR at 8-9.) In the Bleak case, appellants note that there is no indication that the FHFC of mineral entry issued or that the purchase price was paid by claimant and, further, there was no patent application filed by a member of an association of claimants. With respect to the Salmon Creek case, appellants point out both that no FHFC was apparently issued and that, unlike the present case involving lode claims, association placer claims raise an additional concern to ensure there are no dummy locators for each 20 acres included in the placer claim. Id.

In its answer, BLM notes that the relevant provision of the Mining Law of 1872, as amended, regarding application for patent to land located as a mining claim provides that, where the applicant is not a resident of the land district in which the mining claim is located, the patent application and required supporting affidavits may

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<sup>4/</sup> It appears from the Aug. 24, 2001, interlocutory decision requiring additional information that BLM takes the position that a signature by an agent holding a power of attorney is unacceptable when the claimant is present in the district at the time of application. (BLM Decision of Aug. 24, 2001, at 1-2.)

be made by claimant's authorized agent. 30 U.S.C. § 29 (2000). Thus, BLM contends that the signature of the claimant on the application is required to verify the application was made by the actual claimant, citing the Bleak and Salmon Creek cases. (BLM Answer at 3.) Further, BLM asserts the absence of either the statutorily required signature or a power of attorney executed prior to filing the application is a substantial defect in jurisdiction, citing Lyle W. Talbot, 136 IBLA 177 (1996), for the premise that the defect is not curable by subsequent filings. (BLM Answer at 4.) Finally, BLM argues that rejection of the application was not untimely despite the amount of time which had passed, citing the regulation at 43 CFR 1810.3(a) for the proposition that the authority of BLM officials to enforce a public right or protect a public interest cannot be lost by laches or neglect of duty. Id. at 5.

Statutory provisions of the Mining Law of 1872 regarding application for mineral patent provide in pertinent 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 under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of Title 43, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of [the previously-cited sections of the Mining Law] may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims \* \* \* showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land in the manner following: The register of the land office \* \* \* shall publish a notice that such application has been made, for the period of sixty days, in a newspaper \* \* \*. If no adverse claim shall have been filed with the register of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of \$5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of [the previously-cited sections of the Mining Law]. 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 (2000). Based upon the last sentence quoted authorizing a claimant to file a patent application by an agent when the claimant does not reside or is not present within the land district, BLM concluded that an application filed by an attorney-in-fact on behalf of a claimant when there is no evidence that the applicant is not a resident or not within the land district is an invalid application which must be rejected.

[1] In deciding this case, we need not address whether, with respect to William Mouat and Shirley Mouat, who are husband and wife, the application is filed by an association which may be represented by William Mouat as a member of the association or as attorney-in-fact. Resolution of this appeal is aided by reference to the procedures utilized by BLM in adjudicating mineral patent applications, as well as legal precedents regarding such adjudications. After the publication of notice, receipt of the publisher's affidavit, receipt of final proof of compliance with the Mining Law, and acceptance of the purchase price, BLM causes the FHFC to be completed. (BLM Manual, at 3860, Glossary (Release 3-266, July 9, 1991)). Issuance of the FHFC grants equitable title to the claimant and segregates the land from all forms of entry and appropriation under the public land and mineral laws. *Id.*; see International Silica Corp., 124 IBLA 155, 160 (1992); Scott Burnham, 100 IBLA 94, 109-110, 94 I.D. 429, 437 (1987). Issuance of the FHFC “[c]ertifies that the applicant has satisfactorily complied with all of the ‘paperwork’ requirements of the Mining Law (title, proofs, posting requirements, purchase money).” (BLM Manual, H-3860-1, ch. VI. A. 2 (Release 3-265, April 17, 1991)); see United States v. Shumway, 199 F.3d 1093, 1099 (9th Cir. 1999); United States v. Garcia, 161 IBLA 235, 238 (2004); Solicitor’s Opinion, M-36990 (Nov. 12, 1997).<sup>5/</sup>

[2] In the context of the present case, we must recognize, as pointed out above, that the patent applications, including applicant’s compliance with the paperwork requirements of the mining law, have previously been adjudicated by the Secretary of the Interior to the point of issuance of FHFC allowing mineral entry.<sup>6/</sup>

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<sup>5/</sup> A vested right to a mining claim is not established by issuance of the FHFC since this does not adjudicate issues not resolved by reference to the application itself and its supporting documents, such as the discovery of a valuable mineral deposit on the mining claim(s). See Solicitor’s Opinion, M-36990 at 5-6.

<sup>6/</sup> The cases cited by BLM, including Bleak, Salmon Creek, and Talbot, as well as the (continued...)

It is well established that this Board has no jurisdiction to review a decision of BLM which has been approved by the Secretary of the Interior. 43 CFR 4.410(a)(3); see Blue Star, Inc., 41 IBLA 333, 335-36 (1979) (The Board lacks jurisdiction to review a decision issued or approved by an Assistant Secretary prior to the filing of any appeal because the Assistant Secretary exercises the full authority of the Secretary on matters within his delegated authority.) The corollary of this principle is that when the Secretary of the Interior, the chief executive officer of the Department, has ruled on the issues presented in an appeal to this Board, the review authority of the Board is limited to determining whether the Secretary's decision has been properly applied and implemented. Stauffer Chemical Co., 49 IBLA 381, 386 (1980); see Susan Delles, 66 IBLA 407, 409 (1982); Texas Oil & Gas Corp., 46 IBLA 50, 52 (1980). While the continuing authority of the Secretary to correct or reverse an erroneous decision of his subordinates or predecessors as long as patent has not issued is widely recognized, e.g., Ideal Basic Industries v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976), we know of no authority for BLM adjudicators to overrule the decision of the Secretary. See Robert C. LeFaivre, 155 IBLA 137, 139 (2001); Simons v. BLM, 135 IBLA 125, 128-29 (1996).<sup>Z/</sup> Since the BLM decision is inconsistent with the decision of the Secretary in this case, the decision is properly vacated.

Therefore, 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 vacated and the cases are remanded to BLM.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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Christina S. Kalavritinos  
Administrative Judge

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<sup>6/</sup> (...continued)

older precedents relied upon in Bleak and Salmon Creek, are distinguishable in this respect.

<sup>Z/</sup> To the extent BLM seeks further adjudication of the issue in the context of these applications, it would have to request the Secretary to reconsider the matter.