

INTERIOR BOARD OF LAND APPEALS

Jerry D. Grover d.b.a. Kingston Rust Development

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JERRY D. GROVER d.b.a. KINGSTON RUST DEVELOPMENT

IBLA 94-654

Decided June 11, 1997

Appeal from a Decision of the Utah State Office, Bureau of Land Management, declaring certain oil shale mining claims abandoned and void and rejecting patent applications for those claims. UTU 66062, UTU 66063, and UMC 115655-UMC 115659.

Reversed.

1. Energy Policy Act of 1992: Notice--Notice: Generally--Oil Shale: Mining Claims

The notice requirement of 30 U.S.C. § 242(a) (1994) is satisfied by sending notice by registered mail to the last claim holder of record.

2. Energy Policy Act of 1992: Generally--Energy Policy of 1992: Oil Shale: Mining Claims--Mining Claims: Assessment Work--Mining Claims: Patent--Oil Shale: Mining Claims

The owner of a mining claim is required by 30 U.S.C. § 28 (1994) to make the expenditure of \$100 in assessment work on or for the benefit of a mining claim each year until patent. Before a patent can be obtained, the claimant must have made improvements valued at \$500 or more as required by 30 U.S.C. § 29 (1994), but the expenditure of \$500 does not terminate the ongoing requirement in 30 U.S.C. § 28 (1994), of expenditure of \$100 each assessment year.

3. Energy Policy Act of 1992: Generally--Energy Policy Act of 1992: Oil Shale: Mining Claims: Rental or Claim Maintenance Fees--Oil Shale: Mining Claims

Holders of unpatented oil shale claims who continue to prosecute their patent applications under subsection 30 U.S.C. § 242(c)(1) (1994) are not required by 30 U.S.C. § 242(e)(2) (1994) to pay a \$550 per claim maintenance fee.

APPEARANCES: Jerry D. Grover, Jr., Provo, Utah, pro se; David K. Grayson, Esq., Office of the Field Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Jerry D. Grover d.b.a. Kingston Rust Development has appealed from the May 26, 1994, Decision of the Utah State Office, Bureau of Land Management (BLM), declaring certain oil shale mining claims abandoned and void and rejecting patent applications for those claims. The Decision was issued to Production Industries, Inc., which conveyed a 60 percent interest to Kingston Rust Development in an August 1992 deed that was recorded with Uintah County, Utah on November 2, 1992. Patent applications UTU 66062 for the Vac No. 8 claim (UMC 115659) and UTU 66063 for the Vac Nos. 1, 2, 5, and 6 claims (UMC 115655-UMC 115658) were filed on September 25, 1989, but no final certificates had been issued at the time of BLM's Decision. That Decision was based on Grover's failure to pay \$550 per claim, which according to the Decision, is required by section 2511 of the Energy Policy Act of October 24, 1992 (EPA), 30 U.S.C. § 242 (1994).

Under 30 U.S.C. § 242(a) (1994), the Secretary was required to notify each holder of an unpatented oil shale claim of the requirements of the EPA within 60 days of October 24, 1992. Subsection (b) provided that claimholders who had filed a patent application and had received a "first half final certificate" by October 24, 1992, could receive a full patent. The term "first half final certificate" is not defined in the statute or in BLM's regulations, but the term is clarified in BLM Manual 3860, Glossary 4 (Rel. 3-266, July 9, 1991):

[F]inal certificate: Bureau form 1860-1, Mineral Entry Final Certificate (FC). The final certificate has two halves, each of which serves a purpose in the patent process. At the conclusion of the publication process, after receipt of the publisher's affidavit, receipt of the final proofs, and acceptance of the purchase price, the authorized officer causes the first half of the final certificate to be completed. The information includes the authority for the type of claims being patented, the names and numbers of the claims in the application, the legal description of the land, and any exceptions of land or claims from the application.

Issuance of the first half of the final certificate grants equitable title to the applicant, relieves the applicant of the requirement to perform assessment work, and segregates the land from all forms of entry and appropriation under the public land and mineral laws.

The second half of the final certificate is completed after the mineral examination report is written and approved and the mining

claims are clearlisted for patent. The second half becomes the master plat for the patent itself. It contains the names and descriptions of the claims cleared for patent and any reservations required by law to be included in the patent.

For all other claimholders (those who had filed patent applications and not received first half final certificate, and those who had not filed applications by October 24, 1992), the statute authorized only issuance of patents limited to the oil shale and associated minerals, with title to the surface and all other minerals remaining in the United States. Subsection 242(c) applies to claimholders who, like Grover, had filed a patent application by October 24, 1992, but had not received a first half final certificate by that date. Such a claimholder could either purchase the oil shale under a limited patent for \$2.50 per acre, as provided in subsection (c)(1), or, following appropriate action with respect to the application, maintain it under (c)(3) by paying the fee required by subsection (e)(2) in lieu of receiving a patent.

Subsection (d) applies to claimholders who had not filed a patent application by October 24, 1992. Within 180 days after receiving the "notice of election" required by subsection (a), they were required to file an election to either (i) proceed to limited patent, which would be issued upon payment of the "fair market value of the oil shale and associated minerals," as provided in subsection (e)(1); or (ii) maintain the claim by paying \$550 per year under subsection (e)(2).

Thus, the statute authorized patents in three distinct cases: (1) full patents for patent applicants who had received first half final certificates by October 24, 1992; (2) limited patents for only the oil shale and associated minerals, upon payment of \$2.50 per acre, where a patent application was filed by October 24, 1992, but no first half final certificate had been issued; and (3) limited patents, upon payment of the fair market value of the oil shale and associated minerals, for those who had not filed patent applications by October 24, 1992, but formally elected to do so.

To summarize his position on appeal, Grover asserts that he did not receive the notice required by subsection (a) of 30 U.S.C. § 242 (1994), that no fee was due, and that invalidating the claims without the required notice violates due process. He further asserts that his claims are not subject to the \$550 fee because the fee applies only to those electing to maintain their claim rather than proceed to patent, that assessment work is not required on these claims, and that the statute makes no provision for the abandonment of a claim for which the fee has not been paid. The Decision, however, appears to be based on a belief that the requirement of a \$550 annual payment extends to all unpatented oil shale claims and that failure to make this payment results in the abandonment of the claim. Grover's Appeal thus challenges that interpretation, but we will respond to his other arguments before reaching the issue.

[1] Contrary to Appellant's first argument, we find that BLM satisfied the notice requirement of 30 U.S.C. § 242(a) (1994), which required the Secretary to provide notice of the requirements of the EPA to each holder of an unpatented oil shale mining claim within 60 days of October 24, 1992. Although Grover may not have received this notice, he also was not the claimholder of record at the time the notice was due to be issued. The case file for UMC 115424 contains a signed return receipt card showing that a notice dated December 11, 1992, was received by Production Industries, Inc., the claimholder of record, on December 17, 1992. See Production Industries Corp., 138 IBLA 183 (1997).

We next consider Grover's argument that assessment work is not required on these claims. The argument is based upon the terms of 30 U.S.C. § 242(e)(2) (1994), which dispenses with the need to perform assessment work and requires the annual \$550 payment instead. Grover believes that if he is not obliged to perform assessment work, he is not obliged to pay the fee. As further support for his argument, Grover cites Marathon Oil Co. v. Lujan, 751 F. Supp. 1454, 1468 (D. Colo. 1990), aff'd in part, rev'd in part, 937 F.2d 498 (10th Cir. 1991), in which the court stated, among other things, that an oil shale claimant who has satisfied the \$500 patent work requirement of 30 U.S.C. § 29 (1994) complies with the substantial compliance provisions of 30 U.S.C. § 28 (1994).

The statutory provision that requires annual assessment work, 30 U.S.C. § 28 (1994), calls for the expenditure of \$100 in assessment work on or for the benefit of a mining claim each year until patent. This provision arguably appears to require the performance of assessment work until actual issuance of the patent instrument, but early in the history of the 1872 Mining Law, the Supreme Court adopted this Department's view that when a patent applicant had completed all acts then required to entitle him to a patent, *i.e.*, he had made final entry, paid the purchase price, and obtained a certificate of purchase, he was not thereafter required to perform assessment work. Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428 (1892). This disposition rested on the fact that a final certificate was not issued until the opportunity for filing adverse claims had expired. Continuation of assessment work precluded adverse claimants from initiating rights to a claim, and thus assessment work was not considered necessary after the possibility of initiating adverse claims had been eliminated.

As noted, in this case, Grover has filed patent applications, but no final certificates have been issued. Appellant may have satisfied the requirement of 30 U.S.C. § 29 (1994) that a claimant must have made improvements valued at \$500 or more before patent can be obtained, but the expenditure of \$500 does not terminate the ongoing requirement for expenditure of \$100 each assessment year specified in 30 U.S.C. § 28 (1994). Andrus v. Shell Oil Co., 446 U.S. 657, 658 n.1 (1980); Hickel v. The Oil Shale Corp., 401 U.S. 48, 54-55 (1970). In United States v. Herr, 130 IBLA 349, 357, 101 Interior Dec. 113 (1994), we adhered to our prior decision in United States v. Energy Resources Technology Land, Inc.,

74 IBLA 117 (1983), rev'd sub nom. Savage v. Hodel, Civ. No. 83-1838 (D. Colo., Nov. 19, 1983), vacated as moot, TOSCO Corp. v. Hodel, 826 F.2d 948 (10th Cir. 1987), where we observed that the requirements of 30 U.S.C. § 29 (1994) (performance of \$500 worth of assessment work as a prerequisite to the issuance of patent) and 30 U.S.C. § 28 (1994) (yearly performance of \$100 worth of assessment work) are only tangentially related. We stated:

[W]hile it is true that the requirement of section 29 can be satisfied by the performance of annual labor pursuant to section 28, the reverse is not possible. If it were, a claimant could do \$500 worth of improvement on his claim during the first year of location—before the obligation to perform assessment work had even accrued—and then hold the unpatented claim for the next 50 years without ever performing any of the annual assessment work required by section 28. Clearly the 1872 Act did not contemplate that once a claimant had accomplished \$500 worth of work he would thereafter be excused from any further work. The Congress must have been aware that many claims would not be patented within 5 or 6 years after their location, and yet it required in section 28 that the annual labor be performed on each claim, "until a patent has been issued therefor * * * during each year." Nothing could be more plainly stated.

Id. at 122.

[2] Since the decision in Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., *supra*, it has been clear that only the issuance of the final certificate relieves the claimant of performing the annual work required by 30 U.S.C. § 28 (1994), and Grover has received no final certificate. His reliance on Marathon therefore is misplaced, because that case involved claims for which final certificates had issued.

We note that issuance of a final certificate also affects a claimant's obligations under a provision of the Federal Land Policy and Management Act of 1976 (FLPMA) that requires the holder of an unpatented mining claim to file a copy of the notice of location with BLM and to file an affidavit of assessment work or notice of intention to hold the claim annually, failing in which the claim is conclusively presumed abandoned. 43 U.S.C. § 1744 (1994). To implement this provision, the Department published a regulation that relieved a claimant of the annual filing requirement established by 43 U.S.C. § 1744(a)(2) (1994), but only after an application for a mineral patent which complied with 43 C.F.R. Part 3860 had been filed and the final certificate had been issued. 43 C.F.R. § 3833.2-6. Thus, the filing of a patent application by itself does not relieve claimants of the obligation. U.A. Small, 108 IBLA 102 (1989).

We turn next to Grover's contention that the statute makes no provision for the abandonment of a claim in the circumstances here presented if the fee is not paid. Although BLM's Decision is predicated on a belief that failure to pay the fee conclusively constitutes an abandonment of the

claim, Grover correctly observes that the statute restricts this sanction solely to the failure to file a notice of election under subsection (d). 30 U.S.C. § 242(d)(2) (1994). ^{1/} Because Grover's claims in this case fall under subsection (c), they are not subject to the requirement to file a notice of election.

Grover recognizes that his claims are subject to subsection (c); he nevertheless contends that his failure to submit payment is not a defect, because the fee requirement set forth in 30 U.S.C. § 242(e)(2) (1994) does not apply to his claims. He contends that BLM has incorrectly construed the EPA:

No elections under the Energy Policy Act have been made on these claims, nor is any election required. Sec. 2511(e), titled "Effect of Election", applies only to those claim holders who were required to make a notice of election or those who chose to make an election to maintain a claim in lieu of receiving a patent as specified in (c)(3). Specific language is given stating that claim holders electing to maintain claims in lieu of receiving patent are required to follow (e)(2), which includes the \$550.00 fee. Sec. 2511(c)(2) states what is required of the subject claims prior to patent, and does not include the fee.

(SOR at 2.)

The statutory provision in question states:

Notwithstanding any other provision of law, a claim holder referred to in subsection (c) of this section or a claim holder subject to the election requirements of subsection (d) of this section who maintains or elects to maintain an unpatented mining claim shall maintain such claim by complying with the general

^{1/} Amendments proposed on May 27, 1992, before the House contained language that would have mandated a conclusive abandonment of claims where the holder failed to pay the claim maintenance fee. H.R. 776, 102d Cong., 2d Sess. § 2512(d)(3)(C), 138 Cong. Rec. H3760-61 (daily ed. May 27, 1992). Specifically, the proposed amendment, subsection (d)(3)(C), stated: "Failure to comply with the requirements of this paragraph shall be deemed to constitute a forfeiture of the oil shale claim and the claim shall be null and void." (Emphasis added.) Id. The referenced paragraph 3 of subsection (d) imposed several obligations: maintain the claim by complying with the general mining laws; annually pay at least \$1,000 per claim; comply with § 314(a)(1) of FLPMA (43 U.S.C. § 1744 (1994)) by filing annual affidavits of assessment work or notices of intention to hold the claims; and include the \$1,000 per claim maintenance fee payment with the FLPMA filings.

mining laws of the United States, and with the provisions of this section, except that the claim holder shall be no longer required to perform annual labor, and instead shall pay to the Secretary \$550 per claim per year for deposit as miscellaneous receipts in the general fund of the Treasury, commencing with calendar year 1993. Such fee shall accompany the filing made by the claim holder with the Bureau of Land Management pursuant to section 1744(a)(2) of Title 43.

30 U.S.C. § 242(e)(2) (1994) (emphasis added).

[3] However, prior to the issuance of the Decision under appeal, Appellant had not withdrawn his patent application and BLM had taken no adverse action against it for a reason relating to the sufficiency of the application, as distinguished from a reason relating to the validity of the claim. The record thus discloses no basis for concluding that Appellant's claims are subject to subsection (c)(3). *See, e.g.*, 43 C.F.R. §§ 3861.2-2, 3861.4-1, 3861.6-1, and 3862.6-1. We hold that where a claim holder filed a patent application by October 24, 1992, and that application legitimately is pending further appropriate action toward attaining patent issuance, such claim is governed by subsection (c)(2) and thus is not subject to the fee.

Had Congress intended to make the \$550 requirement applicable to all unpatented oil shale claims, one may presume that Congress would have said so clearly. Instead, Congress has laboriously articulated multiple distinctions based on whether patent applications have been filed, whether a first half final certificate has been issued, and whether claimants holding unpatented claims want to receive a limited patent. Within subsection (c), the only reference to subsection (e)(2) appears in subsection (c)(3). Nothing in the text of subsection (c) imposes the requirements of subsection (e)(2) on the holders of claims who await patent issuance. Indeed, subsection (c)(2) expressly states the opposite: "Maintenance of claims referred to in this subsection prior to patent issuance shall be in accordance with the requirements of applicable law prior to the enactment of this Act." (Emphasis added.)

Lastly, we return to BLM's reliance on 43 C.F.R. §§ 3833.1-5 and 3833.4(a)(2) (1993). The first regulation provides only that "oil shale claim holders shall pay an annual \$550 for each oil shale claim as described in section 2511 of the Energy Policy Act of 1992." (Emphasis added.) The second regulation provides in pertinent part that "[f]ailure * * * to pay the rental fee required by § 3833.1-5 * * * shall be deemed conclusively to constitute an abandonment of the mining claim[,] * * * which shall be void." The applicability of the second regulation depends on whether the first regulation is sufficient to support the construction urged by BLM, and that in turn is an issue of whether, as a matter of law, the statute itself imposes the fee in the manner prescribed in the regulations. Based upon our analysis of the EPA and for the reasons stated above, we reject this argument.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is reversed.

T. Britt Price
Administrative Judge

I concur.

Franklin D. Amess
Administrative Judge