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Conclusiveness of United States Oil Shale Placer Mining Claim Patents

By GEORGE E. LOHR*

A significant amount of land in western Colorado containing deposits of oil shale is privately owned.[1] Title to much of this land is derived under United States patents based on oil shale placer mining claims. The recent intensification of efforts to develop an oil shale industry has given new importance to the question whether these patents are vulnerable to attack by the United States or by others. Most of the authorities bearing on this question have long been part of the public land law and apply to Federal public land patents of all kinds, but a new facet relating specifically to oil shale patents has been added by the April 17, 1964, decision of the Solicitor of the Department of the Interior in *Union Oil Co. of California.*[2]

This article represents an attempt to distill from the cases some conclusions concerning the present status of the law governing the conclusive effect of oil shale placer mining claim patents. Based upon these conclusions, some suggestions will be made concerning the scope of examinations of title to privately owned property, title to which is derived under such patents.

EFFECT OF A UNITED STATES PATENT, IN GENERAL

The issuance of a United States patent passes to the patentee legal title to the property therein described.[3] It divests the Department of the Interior of further jurisdiction over that property, with the result that a patent cannot be cancelled by administrative action.[4] Any challenge to the validity of a patent must be made in a judicial proceeding, taken in the name of the government for that special purpose.[5]

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[1] Approximately 335,000 acres, according to HANNA, *Oil Shale* 12 (1964), a reprint of articles appearing in The Denver Post, Aug. 30, 1964, through Sept. 6, 1964. This estimate is stated to be based on a rough estimate by the staff of Lowell M. Puckett, then Director of the Colorado Land Office of the United States Bureau of Land Management.

[2] 71 Interior Dec. 169 (1964).

[3] *E.g.,* Steel v. St. Louis Smelting & Ref. Co., 106 U.S. 447 (1882). Provided, of course, that the Department of the Interior had jurisdiction over the disposition of the lands. See, *e.g., ibid.*

[4] *E.g., ibid;* Germania Iron Co. v. United States, 165 U.S. 379 (1897).

[5] Steel v. St. Louis Smelting & Ref. Co., 106 U.S. 447 (1882); see United States v. Stone, 69 U.S. 525 (1865). An exception exists in the case of void patents. See discussion at footnote 45 *et. seq. infra,* Attacks by the United States, Relief for Lack of Jurisdiction to Issue Patent.

The issuance of a United States patent necessarily involves consideration of the qualifications of the applicant, the acts he has performed to secure title, the nature of the land, and whether it is of a class which is open to sale.[6] The issuance of a patent by the Department of the Interior is a judgment of a special tribunal upon such matters.[7] It also is an adjudication of compliance with relevant state statutes relating to perfection of mining claims.[8] Issuance of a United States patent creates a presumpion that all preceding steps required by law were duly taken.[9]

Attacks by the United States

I. *Grounds for Relief:*

The United States may attack a United States patent on any one of three grounds:[10] (1) fraud by the patentee in inducing issuance of the patent;[11] (2) mistake by the Department of the Interior in issuing the patent;[12] and (3) lack of jurisdiction in the Department of the Interior to issue the patent.[13]

The United States cannot avoid its patent for irregularities or defects of procedure.[14]

The Attorney General of the United States has the authority to bring actions in the name of and on behalf of the United States to cancel United States patents.[15]

A. Relief for Fraud

A patent obtained by fraud is not void, but is voidable upon

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[6] Steel v. St. Louis Smelting & Ref. Co., 106 U.S. 447 (1882).

[7] *Ibid;* St. Louis Smelting & Ref. Co. v. Kemp, 104 U.S. 636 (1882); see El Paso Brick Co. v. McKnight, 233 U.S. 250 (1914).

[8] Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation Co., 196 U.S. 337 (1905).

[9] Diamond Coal & Coke Co. v. United States, 233 U.S. 236 (1914) (presumption rebutted); St. Louis Smelting & Ref. Co. v. Kemp, 104 U.S. 636 (1882) (presumption conclusive against collateral attack).

[10] The three categories adopted provide a convenient grouping for the purpose of discussion of remedies available to the United States. Most, if not all, cases of attacks by the United States on its land patents are based on grounds which are described accurately by one of these categories.

[11] Diamond Coal & Coke Co. v. United States, 233 U.S. 236 (1914); United States v. Minor, 114 U.S. 233 (1885).

[12] Germania Iron Co. v. United States, 165 U.S. 379 (1897) (patent approved by clerk in ignorance of pending proceedings based on conflicting claims); see Williams v. United States, 138 U.S. 514 (1891) (inadvertent certification when administrative decision on conflicting claim was pending).

[13] United States v. Stone, 69 U.S. 525 (1865) (land within the limits of a military reservation created by executive order).

[14] See Wight v. Dubois, 21 Fed. 693 (D. Colo. 1884). As examples of procedural defects the court suggested the time of publication of notice, the filing of the plat, and the discovery of mineral in the discovery shaft.

[15] United States v. Beebe, 127 U.S. 338 (1888); United States v. San Jacinto Tin Co., 125 U.S. 273 (1888).

suit by the United States.[16] The United States has the same right to avoid a patent issued on the basis of fraudulent inducements as does an individual grantor to avoid a deed for such cause.[17]

The history of disposition of public lands by the United States is replete with cases in which the United States has sought judicial relief to avoid patents obtained by fraud. In some of these cases lands were alleged to have been acquired by "dummy" entrymen for the benefit of persons not qualified by law to acquire such lands.[18] In others, false representations were allegedly made concerning satisfaction of requirements of the homestead laws, including settlement and construction of improvements,[19] and concerning the amount of other land owned by the applicant.[20] Still other cases involve charges of false representations that land was not known mineral land within the meaning of laws excluding such land from disposition thereunder.[21] This list is by no means exhaustive.

In an action by the United States to cancel a United States patent allegedly issued as a result of fraud, the United States has the burden of proving the fraud.[22] To carry this burden, the evidence must command respect and produce conviction[23] — that is, it must be clear, convincing, and unambiguous.

If property has been transferred to a third person by a patentee who obtained his patent by fraud, the United States can recover from the third person the property so patented,[24] provided that the third person is not a bona fide purchaser.[25]

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[16] Diamond Coal & Coke Co. v. United States, 233 U.S. 236 (1914).

[17] United States v. Minor, 114 U.S. 233 (1885); see United States v. San Jacinto Tin Co., 125 U.S. 273 (1888). United States v. Minor, *supra,* contains the suggestion that the right of the United States to avoid a patent may be greater than that of the individual grantor, at least where the United States must rely on proofs furnished by the entryman because of the impracticability of independently checking the facts.

[18] Exploration Co. v. United States, 247 U.S. 435 (1918); Diamond Coal & Coke Co. v. United States, 233 U.S. 236 (1914); United States v. Bighorn Sheep Co., 9 F.2d 192 (D. Wyo. 1925); United States v. Booth-Kelly Lumber Co., 246 Fed. 970 (D. Ore. 1917).

[19] Colorado Coal & Iron Co. v. United States, 123 U.S. 307 (1887); United States v. Minor, 114 U.S. 233 (1885); United States v. Jones, 242 Fed. 609 (9th Cir. 1917); United States v. Norris, 222 Fed. 14 (8th Cir. 1915); United States v. Albright, 234 Fed. 202 (D. Mont. 1916); United States v. Cooper, 217 Fed. 846 (D. Mont. 1914) (construction of improvements only).

[20] United States v. Christopher, 71 F.2d 764 (10th Cir. 1934).

[21] Diamond Coal & Coke Co. v. United States, 233 U.S. 236 (1914); United States v. Southern Pac. R.R., 11 F.2d 546 (S.D. Cal. 1926).

[22] Diamond Coal & Coke Co. v. United States, 233 U.S. 236 (1914); Colorado Coal & Iron Co. v. United States, 123 U.S. 307 (1887).

[23] Diamond Coal & Coke Co. v. United States, 233 U.S. 236 (1914); United States v. San Jacinto Tin Co., 125 U.S. 273 (1888); Colorado Coal & Iron Co. v. United States, 123 U.S. 307 (1887); United States v. Maxwell Land-Grant Co., 121 U.S. 325 (1887).

[24] See Colorado Coal & Iron Co. v. United States, 123 U.S. 307 (1887).

[25] *Ibid.*

The United States may elect to affirm a patent obtained by fraud and to recover damages for the fraud from the patentee[26] or from a subsequent owner of the property who is not a bona fide purchaser.[27] It is implicit in these decisions that the administrative officials have the authority to decide to elect the damage remedy, although the effect is to permit disposition of public lands in a manner not authorized specifically by Congress. Transfer of the property by the patentee does not extinguish the right of the United States to recover from him damages resulting from the fraud.[28]

Under some circumstances, an action by the United States to cancel a patent based on fraud may result in an election of remedies by the United States, either confirming the patent or electing to rescind it.[29]

It would seem that the measure of damages for fraud should be the difference between the value of the lands patented, measured as of the time of patent, and the amount paid by the patentee to the United States, and there is authority to this effect.[30] Measure of damages in these fraud cases has not received extensive consideration by the courts, however, and no completely consistent rule is established by the cases. In absence of other evidence of value, a purchaser from the patentee has been held liable for the amount for which such purchaser had agreed to sell the land, plus interest (in lieu of rents and profits), for the time such purchaser had possession.[31] If the patentee has improved the lands subsequent to patent and prior to sale to a third party, the value of the improvements must be deducted from the sale price if that price is to be used as a guide to establish the value of the land for the purpose of measuring damages.[32] In absence of proof of value of the lands, the government has been limited to the minimum government price of the lands.[33]

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[26] United States v. Whited & Wheless, 246 U.S. 552 (1917); United States v. Jones, 242 Fed. 609 (9th Cir. 1917); Bistline v. United States, 229 Fed. 546 (9th Cir. 1916); United States v. Koleno, 226 Fed. 180 (8th Cir. 1915).

[27] Pitan v. United States, 241 Fed. 364 (8th Cir. 1917).

[28] Bistline v. United States, 229 Fed. 546 (9th Cir. 1916); United States v. Koleno, 226 Fed. 180 (8th Cir. 1915).

[29] United States v. Oregon Lumber Co., 260 U.S. 290 (1922); *cf.* Bistline v. United States, 229 Fed. 546 (9th Cir. 1916); United States v. Bellingham Bay Improvement Co., 6 F.2d 102 (9th Cir. 1925). No full treatment of the election of remedies doctrine as applied to voidable patents is attempted here.

[30] Pitan v. United States, 241 Fed. 364 (8th Cir. 1917) (not considering specifically the time as of which the land should be valued); see United States v. Norris, 222 Fed. 14 (8th Cir. 1915).

[31] United States v. Cooper, 217 Fed. 846 (D. Mont. 1914). No mention was made of deduction of the amount received by the United States for the land. The court created a lien on the patented lands to secure to the United States the payment of the damages.

[32] United States v. Norris, 222 Fed. 14 (8th Cir. 1915).

[33] *Ibid.* But had not the government already received this amount upon entry?

B. Relief for Mistake

A patent issued by mistake is not void but is voidable upon suit by the United States.[34]

Some of the instances of mistake considered in the cases are issuance of an agricultural land patent based upon erroneous diagrams furnished by the surveyor general which failed to show a conflict with a prior mining claim as to which a patent application proceeding had been commenced;[35] issuance of a patent at a time when there was in effect an order of the Land Department suspending action on the entry pending resolution of disputes concerning conflicting claims;[36] and issuance of a patent at a time when a decision of the register and receiver rejecting the claim was on appeal to the Commissioner of the General Land Office.[37]

Issuance of a patent to lands reserved from disposition for public purposes or previously disposed of, based upon a mistake of fact or law, might be considered as a form of mistake,[38] but in view of the difference in applicable rules of law obtaining in such cases, these and similar types of "mistake" are considered separately under the category of lack of jurisdiction.

In an action to cancel a United States patent based on mistake, the United States should have the burden of proving the mistake upon which its claim for relief is based. The patentee cannot defend successfully on the basis that, notwithstanding the mistake, the facts presented to, but not yet passed on by, the Department of Interior entitle him to a patent.[39] These matters must be considered by the Department of the Interior, the tribunal entrusted by the law with jurisdiction over such matters.[40]

The United States can recover lands patented by mistake from a third person to whom they have been conveyed by the patentee, provided that person is not a bona fide purchaser.[41]

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[34] Germania Iron Co. v. United States, 165 U.S. 379 (1897).

[35] See Empire Star Mines Co. v. Grass Valley Bullion Mines, 99 F.2d 228 (9th Cir. 1938). No proceedings to cancel the agricultural land patent were ever instituted, although the United States had invited the mining claim owner to request institution of such proceedings.

[36] Germania Iron Co. v. United States, 165 U.S. 379 (1897). The "Land Department" is sometimes referred to in this article. Its functions are among those now performed by the Department of the Interior.

[37] United States v. Southern Pac. R.R., 43 F.2d 591 (S.D. Cal. 1930), *aff'd*, 51 F.2d 873 (9th Cir.), *cert. denied*, 284 U.S. 675 (1931).

[38] See, *e.g.*, United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447 (1908).

[39] Germania Iron Co. v. United States, 165 U.S. 379 (1897); see Southern Pac. R.R. v. United States, 51 F.2d 873 (9th Cir.), *cert. denied*, 284 U.S. 675 (1931).

[40] Germania Iron Co. v. United States, 165 U.S. 379 (1897); Southern Pac. R.R. v. United States, 51 F.2d 873 (9th Cir.), *cert. denied*, 284 U.S. 675 (1931).

[41] Germania Iron Co. v. United States, 165 U.S. 379 (1897).

The United States may elect to affirm a patent issued by mistake and to recover from the patentee the value of the land so patented,[42] at least where the land was conveyed to a bona fide purchaser prior to discovery of the mistake.[43] If this election may be made in all cases by the administrative officials in their discretion, the effect of election of the compensation remedy will be to permit disposition of public lands in a manner not authorized specifically by Congress.

The amount which the United States may recover in case of election of the compensation remedy probably is measured by the value of the land patented at the date of patent,[44] perhaps less the amount paid by the patentee on entry, but no cases have been discovered in which the measure of damages has received detailed consideration.

C. Relief for Lack of Jurisdiction to Issue Patent

A patent issued by the Department of the Interior when that Department has no jurisdiction over the lands patented is void.[45]

Lack of jurisdiction cases include situations where the land has been reserved from disposition as a result of Presidential order,[46] or treaty reservation.[47] They also include situations where the land is not public property, no provision has been made by Congress for its sale, or it has been previously disposed of or has been reserved from sale by Congress.[48] These patents pass no title and may be attacked directly[49] or collaterally.[50]

Legal actions to obtain adjudications that patents are void are appropriate[51] and are not uncommon. Often the facts establishing that a patent is void are not apparent from the face of the patent,[52] and even when a patent is void on its face it may be desirable to obtain a judicial decree confirming that fact.

Appropriate cases for collateral attack on void patents would seem to be limited to circumstances where private rights could be obtained in the land. Otherwise a claimant would have no interest on the basis of which to maintain an action. Such appropriate cases

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[42] Southern Pac. R.R. v. United States, 200 U.S. 341 (1906).

[43] *Ibid.*

[44] See *ibid.*

[45] See United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447 (1908).

[46] Stone v. United States, 69 U.S. 525 (1865); see Louisiana v. Garfield, 211 U.S. 70 (1908) (grant by approved list rather than by patent).

[47] United States v. Minnesota, 270 U.S. 181 (1926); Northern Pac. Ry. v. United States, 227 U.S. 355 (1913).

[48] See St. Louis Smelting & Ref. Co. v. Kemp, 104 U.S. 636 (1882).

[49] Stone v. United States, 69 U.S. 525 (1865).

[50] See St. Louis Smelting & Ref. Co. v. Kemp, 104 U.S. 636 (1882).

[51] See, *e.g.*, United States v. Minnesota, 270 U.S. 181 (1926).

[52] See *ibid.*

might include situations where land has been patented twice or where a withdrawal in effect at the time of inception of rights on the basis of which a patent issued was subsequently cancelled.

It has been held that the United States can elect to leave void patents uncancelled and sue the patentee for the value of the lands sold by it,[53] although this is conceptually inconsistent with the doctrine that void patents pass no title.

If the United States is barred from attacking a void patent by reason of a statute of limitations, as discussed herein, any person claiming through the United States based upon rights initiated subsequent to the patent is barred as well.[54]

II. *Defenses to Attacks by the United States:*

The defenses of bona fide purchase and statute of limitations have been asserted frequently in actions in which the United States has attacked patents.

A. Bona Fide Purchase

Bona fide purchase is a defense to an action by the United States to recover lands from a purchaser from a patentee, where such action is based on fraud in inducing issuance of the patent[55] or on mistake.[56] Presumably it is no defense where the action is based on an assertion that the patent is void because of lack of jurisdiction of the Land Department to issue the patent, the patent in such case being void rather than voidable. No case has been discovered where that defense has been asserted in such a situation.

The elements of bona fide purchase are valuable consideration, absence of notice, and presence of good faith.[57] A transferee who paid no consideration cannot qualify as a bona fide purchaser.[58] A purchaser is not required to inquire behind the patent into the circumstances surrounding its issuance, and is not deemed to have constructive notice of such matters.[59] The good faith of a purchaser from the patentee is not impaired by information contained in the

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[53] United States v. Minnesota, 270 U.S. 181 (1926). The value was held to be the amount the United States would have received for the lands for the benefit of Chippewa Indians under the act by which the Chippewas ceded the lands to the United States.

[54] Hogan v. United States, 72 F.2d 799 (9th Cir. 1934), *cert. denied,* 295 U.S. 752 (1935).

[55] See Colorado Coal & Iron Co. v. United States, 123 U.S. 307 (1887).

[56] See Germania Iron Co. v. United States, 165 U.S. 379 (1897); United States v. Winona & St. P. R.R., 165 U.S. 463 (1897); United States v. Krause, 92 F. Supp. 756 (W.D. La. 1950).

[57] United States v. Winona & St. P. R.R., 165 U.S. 463 (1897); United States v. California & Ore. Land Co., 148 U.S. 31 (1893).

[58] United States v. Cooper, 217 Fed. 846 (D. Mont. 1914)..

[59] See United States v. California & Ore. Land Co., 148 U.S. 31 (1893).

patent application file, where the purchaser had no actual knowledge of such information.[60] Anyone purchasing land actually occupied by settlers claiming rights under the homestead laws is charged with notice of the settlers' claims.[61] Close association with an entryman under the homestead laws, visible conditions on homesteaded lands, and proximity of purchaser's ranches, business, and residence to the homesteaded lands are sufficient to place a purchaser on notice that the entryman did not meet the requirements of actual residence and construction of improvements, as required by the homestead laws.[62] Under familiar legal principles, a principal is charged with knowledge acquired by his agent who was empowered to purchase property on behalf of the principal.[63]

Knowledge that the opinion of officials of the government has changed concerning a question of law on which turned the validity of previously issued patents is not sufficient to take away the protection of good faith.[64] A transfer of ownership of a majority of stock of a corporation to persons having no knowledge of fraudulent acquisition of a patent by a person who acted for, and transferred the property to, the corporation does not enable the corporation to contend successfully that it is a bona fide purchaser.[65] If a mortgagee of a patentee can establish that it is a bona fide purchaser, its interest will be protected in an action by the United States to cancel a patent based on fraud of the patentee.[66] The burden of proving bona fide purchase is on the one asserting that defense.[67]

B. Statute of Limitations

In 1891 there was enacted the following statute of limitations of general applicability to patents for public lands of the United States, including patents issued for placer mining claims:

> Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents.[67a]

When early considered by the courts, this statute was read literally and broadly to bar any action by the United States after the

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[60] United States v. Krause, 92 F. Supp. 756 (W.D. La. 1950).

[61] United States v. New Orleans Pac. Ry., 248 U.S. 507 (1919).

[62] United States v. Cooper, 217 Fed. 846 (D. Mont. 1914).

[63] United States v. Smith, 181 Fed. 545 (D. Ore. 1910), *aff'd sub nom.* Linn & Lane Timber Co. v. United States, 196 Fed. 593 (9th Cir. 1912), *modified on other grounds,* 203 Fed. 394 (9th Cir. 1913), *aff'd,* 236 U.S. 574 (1915).

[64] United States v. Southern Pac. R.R., 184 U.S. 49 (1902). All past decisions of courts justified the view that the patents were valid; bona fide purchase was expressly provided by statute as a defense.

[65] United States v. Booth-Kelly Lumber Co., 246 Fed. 970 (D. Ore. 1917).

[66] United States v. Grover, 227 Fed. 181 (N.D. Cal. 1915).

[67] United States v. Cooper, 217 Fed. 846 (D. Mont. 1914).

[67a] 26 Stat. 1093 (1891), 43 U.S.C. § 1166 (1964).

statutory period had run, regardless of any mistake or error of the Land Department or any fraud or misrepresentations of the patentee, provided only that the land was public land of the United States and open to sale and conveyance through the Land Department.[68]

The landmark case of *United States v. Chandler-Dunbar Water Power Co.*[69] established that the statute bars an action by the United States even if the patent was void at its inception because it purported to convey land reserved for public purposes. The reasoning would apply equally to validate patents void for any reason where the United States owned the land at the time the patent issued.

At an early date, however, it was held that the statute does not begin to run until discovery of fraud where the fraud is actively concealed or is self-concealing in nature.[70] This is in accord with equitable principles long held applicable in construing other Federal statutes of limitations.[71] The burden is upon the United States to prove that (1) the fraud was concealed or self-concealing so as not to fall within the statute of limitations, and (2) it remained so for the appropriate period.[72] The United States must be specific in pleading the manner in which the fraud was effected and the steps taken to achieve secrecy.[73] Possession of the means of obtaining knowledge of the fraud is tantamount to knowledge itself,[74] and the United States may be precluded by laches from asserting that the statute was tolled for the necessary period.[75]

In a number of cases courts have considered whether fraud was concealed or self-concealing, and whether the United States was guilty of laches in not discovering the fraud. The character of land as mineral land can be considered concealed where the proofs include applicant's affidavit that the land is not mineral land.[76] The most common type of fraud involved in this group of cases is misrepresentation of ownership of the beneficial interest in a claim under homestead laws or under coal land laws so as to conceal the fact that the beneficial owner is not qualified to receive

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[68] See United States v. Winona & St. P. R.R., 165 U.S. 463 (1897). The statute was not applicable in that case, so the language is dictum.

[69] 209 U.S. 447 (1908).

[70] Exploration Co. v. United States, 247 U.S. 435 (1918).

[71] Bailey v. Glover, 88 U.S. 342 (1875) (construing a statute of limitations section in a bankruptcy act).

[72] United States v. Bighorn Sheep Co., 9 F.2d 192 (D. Wyo. 1925).

[73] United States v. Christopher, 71 F.2d 764 (10th Cir. 1934).

[74] See United States v. Christopher, 71 F.2d 764 (10th Cir. 1934).

[75] United States v. Diamond Coal & Coke Co., 255 U.S. 323 (1921).

[76] United States v. Southern Pac. R.R., 11 F.2d 546 (S.D. Cal. 1926).

lands under those laws.[77] Unrecorded conveyances,[78] and use of nominees or trustees[79] have been found to be devices for actively concealing true ownership. Denial of fraud in response to inquiries also constitutes concealment.[80]

The United States is not placed on inquiry of fraud through knowledge that land was conveyed by the entryman within nine months after patent,[81] or through examination of books containing disguised indications of fraud where the examination was conducted for another purpose,[82] and perhaps not through information appearing in county real estate records of which information the government had no actual knowledge.[83] Knowledge that coal land was occupied by a coal company disqualified to acquire the land at the time the land was patented to an individual entryman probably puts the United States on inquiry notice of fraud.[84]

No cases have been found suggesting that failure to discover mistake or failure to discover lack of jurisdiction can be used as a basis to toll the statute of limitations.

The statute of limitations is part of the public land laws and is applicable only to public lands subject to acquisition under the laws enacted for the disposition of the public domain.[85] It does not apply to lands withdrawn from disposition under a swamp lands act by treaty obligating the United States to apply the land and the proceeds of its sale exclusively to the use, support and civilization of certain Indians.[86] It does not apply to lands as to which possessory rights have been earlier acquired by individual Indians,[87] to reserved

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[77] See United States v. Diamond Coal & Coke Co., 255 U.S. 323 (1921); cases cited note 18 *supra*.

[78] United States v. Booth-Kelly Lumber Co., 246 Fed. 970 (D. Ore. 1917).

[79] United States v. Diamond Coal & Coke Co., 255 U.S. 323 (1921); Exploration Co. v. United States, 247 U.S. 435 (1918).

[80] United States v. Booth-Kelly Lumber Co., 246 Fed. 970 (D. Ore. 1917).

[81] United States v. Albright, 234 Fed. 202 (D. Mont. 1916). *But see* United States v. Diamond Coal & Coke Co., 255 U.S. 323 (1921), involving a pattern of conveyances from entrymen to the corporation almost immediately following the initiation of the right to purchase.

[82] United States v. Booth-Kelly Lumber Co., 246 Fed. 970 (D. Ore. 1917).

[83] See United States v. Diamond Coal & Coke Co., 255 U.S. 323 (1921); United States v. Christopher, 72 F.2d 375 (10th Cir. 1934). In each of these cases the question was posed by the court, but not decided.

[84] See Diamond Coal & Coke Co. v. United States, 233 U.S. 236 (1914).

[85] United States v. Minnesota, 270 U.S. 181 (1926); LaRoque v. United States, 239 U.S. 62 (1915); Northern Pac. Ry. v. United States, 227 U.S. 355 (1913); see Cramer v. United States, 261 U.S. 219 (1923).

[86] United States v. Minnesota, 270 U.S. 181 (1926).

[87] Cramer v. United States, 261 U.S. 219 (1923).

[88] LaRoque v. United States, 239 U.S. 62 (1915); Northern Pac. Ry. v. United States, 227 U.S. 355 (1913).

Indian lands,[88] or to acquired lands as to which there was no legislation authorizing sale.[89]

The statute of limitations has been found inapplicable in certain other fact situations. It does not bar an action by the United States to impose a constructive trust on property in aid of a prior decree, operating on the equitable owners only, holding the United States to be the rightful owner.[90] It does not apply to actions brought by the United States for the benefit of third parties.[91] The statute does not apply to bar an action by the United States to establish a breach of a condition subsequent in a grant based on legislation which made no provision for confirmatory patents.[92] One case has held the statute inapplicable to an action by the United States to have the title holder declared to be a trustee ex maleficio for the benefit of the United States.[93] This accomplishes indirectly what the United States could not do directly; it has never been followed on this point and probably should be regarded as an anomaly.[94]

Where an individual claims rights in lands derived through the United States and allegedly initiated subsequent to issuance of a patent to another and which could be given effect only by cancellation of that patent, the bar of the statute of limitations can be asserted successfully against the individual.[95]

An important and interesting question which apparently has never been decided, although it has been adverted to many times, is whether the statute of limitations applies to titles derived under certifications of lands to the states, pursuant to statute, rather than under patents.[96]

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[89] United States v. Stewart, 121 F.2d 705 (9th Cir. 1941). The court found the case "readily distinguishable" from United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447 (1908). It seems questionable whether the distinction between acquired lands not authorized to be sold and reserved public domain should have any relevance for the purpose of determining the applicability of the statute of limitations.

[90] Independent Coal & Coke Co. v. United States, 274 U.S. 640 (1927); United States v. Carbon County Land Co., 46 F.2d 980 (10th Cir. 1931), *aff'd*, 284 U.S. 534 (1932).

[91] Cramer v. United States, 261 U.S. 219 (1923) (an action for the benefit of Indian wards of the United States).

[92] Kern River Co. v. United States, 257 U.S. 147 (1921).

[93] United States v. Amalgamated Sugar Co., 48 F.2d 156 (10th Cir. 1931).

[94] The only case cited by the court to support this creation of a constructive trust is United States v. New Orleans Pac. Ry., 248 U.S. 507 (1919), cited in the concurring opinion. In that case, the beneficiaries of the trust were homestead claimants to whom the United States owed a statutory duty to protect their rights. This case falls within the exception noted at note 91 *supra*.

[95] Hogan v. United States, 72 F.2d 799 (9th Cir. 1934), *cert. denied*, 295 U.S. 752 (1935).

[96] Independent Coal & Coke Co. v. United States, 274 U.S. 640 (1927); Louisiana v. Garfield, 211 U.S. 70 (1908); United States v. Winona & St. P. R.R. Co., 165 U.S. 463 (1897). Dictum in the latter case indicates a view that the statute of limitations is applicable, but subsequent cases indicate that the question is an open one.

In conformity with the principle that the United States, asserting rights vested in it as a sovereign government, is not bound by any statute of limitations unless Congress has clearly manifested its intention that it should be so bound, 43 U.S.C. § 1166 is not applicable to an action for damages for obtaining a patent by fraud,[97] or to an action to recover the value of property patented by mistake.[98]

III. *Attacks by the United States on Oil Shale Patents:*

A. History of Issuance of Patents Covering Oil Shale Placer Mining Claims

Prior to the Mineral Leasing Act,[99] enacted on February 25, 1920, oil shale was a mineral subject to location under the mining laws of the United States. Many placer mining claims based on discovery of oil shale were located prior to that time.[100] The Mineral Leasing Act withdrew oil shale from the operation of the mining laws and made it subject to disposition by leasing only.[101] That Act did not impair the effectiveness of valid oil shale placer mining claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated.[102]

In *Emil L. Krushnic,*[103] the Land Department held that failure to perform annual assessment work on an oil shale placer mining claim was a failure to maintain the claim in compliance with the laws under which initiated and automatically subjected the claim to cancellation by the government. The United States instituted contests against many of these claims on that basis and obtained a number of administrative rulings declaring specific oil shale placer mining claims void for failure to perform annual assessment work.[104] The question was pursued to the Supreme Court of the United States, where it was held that the United States could not challenge the validity of oil shale placer mining claims on the basis of failure to perform annual assessment work.[105] In that case the claimant had resumed assessment work before the contest was instituted, and the

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[97] United States v. Whited & Wheless, 246 U.S. 552 (1918).

[98] See *ibid.* Mistake is not considered specifically, but the reasoning applies equally to cases involving mistake.

[99] 41 Stat. 437 (1920), 30 U.S.C. § 181 (1964).

[100] See Emil L. Krushnic (On Rehearing), 52 Interior Dec. 295, 298 (1928); *vacated* 53 Interior Dec. 45 (1930).

[101] 41 Stat. 451 (1920), 30 U.S.C. § 193 (1964).

[102] *Ibid.*

[103] 52 Interior Dec. 282 (1927); *rehearing denied,* 52 Interior Dec. 295 (1928); *vacated,* 53 Interior Dec. 45 (1930).

[104] See Union Oil Co. of California, 71 Interior Dec. 169 (1964); see also Schmidt, *Status of Unpatented Claims,* QUARTERLY OF THE COLORADO SCHOOL OF MINES, July 1964, p. 125.

[105] Wilbur v. Krushnic, 280 U.S. 306 (1930).

decision left some doubt whether this fact was essential to the result. The Land Department took the position that it was[106] and continued to contest and declare void oil shale placer mining claims upon which annual assessment work had not been performed during some period after enactment of the Mineral Leasing Act and had not been resumed prior to initiation of the contest. About five years passed before a challenge to the validity of this position of the Land Department reached the United States Supreme Court. That Court held, in *Ickes v. Virginia-Colorado Development Corp.*,[107] that the Land Department's position was incorrect and that the United States could not challenge oil shale placer mining claims based on failure to perform assessment work whether or not assessment work had been resumed prior to the time of initiation of a contest.

As a result of the Supreme Court decisions in the *Krushnic* and *Virginia-Colorado* cases and the Land Department contests which preceded them, there were many oil shale placer mining claims with respect to which administrative decisions had been entered holding the claims invalid on grounds found in the *Krushnic* and *Virginia-Colorado* cases to reflect an erroneous view of the law.

The Land Department then recalled and vacated the administrative decision involved in the *Virginia-Colorado* case.[108] Subsequently, United States patents have issued covering a number of claims without any action to vacate the decisions of invalidity entered in the earlier contest proceedings.[109] This procedure appears to have reflected a view by the Land Department that *Virginia-Colorado* rendered those contest proceedings of no effect[110] even though only two of the many contests were directly involved in that case.

On February 16 and 23, 1962, a number of mineral patent applications were rejected by decisions of the Manager of the Colorado Land Office.[111] These applications related to oil shale placer mining claims in Garfield and Rio Blanco Counties, Colorado, which had been declared invalid in contests instituted between 1930

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[106] See Instructions, 53 Interior Dec. 131 (1930), *recalled and vacated sub nom.* The Shale Oil Company, 55 Interior Dec. 287 (1935).

[107] 295 U.S. 639 (1935).

[108] The Shale Oil Company, 55 Interior Dec. 287 (1935), *recalling and vacating* Virginia-Colorado Development Corp., 53 Interior Dec. 666 (1932). The Shale Oil Company, *supra,* held that all other department decisions in conflict with the decision of the Supreme Court of the United States in the Virginia-Colorado case were "overruled."

[109] See Schmidt, *Status of Unpatented Claims, supra* note 104 at p. 126.

[110] See Union Oil Co. of California, 71 Interior Dec. 169 (1964), at Appendices C-1 to C-6, inclusive; see also The Shale Oil Company, 55 Interior Dec. 287, 290 (1935).

[111] *E.g.,* Union Oil Co. of California, C-07667, Decision of Manager of Colorado Land Office, Bureau of Land Management.

and 1933 based on failure to perform annual assessment work.[112] The Manager of the Colorado Land Office held the claims invalid, not on the basis that the decisions in the earlier contest proceedings were correct, but that, under principles of finality of administrative action, estoppel by adjudication, and res judicata, they cannot now be challenged.[113] This position was sustained by the Solicitor on April 17, 1964, in *Union Oil Co. of California,*[114] subject to resolution of a question with respect to some of the claims as to whether the claimants had been afforded proper notice in the original contest proceedings.[115]

The following discussion of the validity of oil shale placer mining claim patents considers the general principles relating to attacks on patents and the special implications which the foregoing historical background has for the conclusive effect of oil shale placer mining claim patents.

B. Conclusiveness of Oil Shale Patents

In the absence of special circumstances which might exist in particular cases, there seems to be no basis upon which it could be maintained seriously that oil shale placer mining claim patents were issued as a result of fraudulent inducements by the patentees. The fact that a particular claim had been declared void in a pre-*Virginia-Colorado* contest would appear on the government's own records. Absent an affirmative representation by the applicant that no such contest existed, there would be no basis to charge the patentee with fraudulent concealment of such a contest. Prior to the 1962 decisions of the Colorado Land Office, the Department of the Interior was issuing patents in which a history of such contests appeared,[116] so there is no reason to believe that an applicant for patent would have attempted to conceal the existence and results of such a contest. The evidence of discovery of oil shale would be fully set forth in the patent application in the usual case, so an allegation of fraudulent concealment of absence of discovery should not be supportable.

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[112] See Union Oil Co. of California, 71 Interior Dec. 169, 170 (1964).

[113] *E.g.,* Union Oil Co. of California, C-07667, Decision of Manager of Colorado Land Office, Bureau of Land Management.

[114] 71 Interior Dec. 169 (1964).

[115] The Solicitor explained that the effect of the statement in The Shale Oil Company, 55 Interior Dec. 287 (1935) that departmental decisions inconsistent with the decision of the Supreme Court of the United States were "overruled" was to destroy the value of these cases as precedent but not to vacate the decisions. It noted that The Shale Oil Company decision specifically "recalled and vacated" the decisions in the two cases directly involved in that proceeding. The Shale Oil Company decision also states that the adverse proceedings and decision of the Commissioner in that case "must be held as without authority of law and void."

[116] See Schmidt, *Status of Unpatented Claims, supra* note 104 at p. 126.

The Department of the Interior might assert that issuance of an oil shale placer mining claim patent resulted from mistake, in a situation where the claim's history includes a pre-*Virginia-Colorado* contest resolved unfavorably to the claimant. The argument would be that by mistake of law the Department of the Interior officials considered themselves compelled by law to issue patents notwithstanding such contests, and that this mistake became apparent only upon decision of *Union Oil Company of California.* There is only technical merit in this argument. A counter-argument could be made that until legal title passes from the United States, the Department of Interior is free to reconsider and reopen any proceeding at any time,[117] and that the issuance of a patent in these circumstances operated as a withdrawal of the determination in the earlier contest. If an attack is based on mistake, bona fide purchase would be a good defense.[118] If other elements of bona fide purchase are present, the existence of the possibility that the legal arguments which prevailed in *Union Oil Co. of California* might be made would not impair the bona fide purchaser status of one who purchased prior to that decision.[119] This is true even if the purchaser knew at the time of purchase that the Department of the Interior contemplated attacks on patents on such basis.[120] Furthermore, some of the arguments used by the Department of the Interior to support its decision in *Union Oil Co. of California* could be used in defending against an attack based on mistake.[121]

Lack of jurisdiction would seem to provide a stronger basis for attacks by the Department of Interior on these oil shale placer mining claim patents. The government's contention would be that when a contest is decided adversely to a claimant, and the claimant fails to appeal, the decision becomes final. The result is that the claim at that point is no longer valid, the land becomes part of the public domain and is subject to the congressional withdrawal of oil shale as a locatable mineral as effected by the Mineral Leasing

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[117] See West v. Standard Oil Co., 278 U.S. 200 (1929); Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C. Cir. 1962), *cert. denied,* 375 U.S. 822 (1963); see also Union Oil Co. of California, 71 Interior Dec. 169, 181 (1964).

[118] See cases cited at note 56 *supra.*

[119] See United States v. Southern Pac. R.R., 184 U.S. 49 (1902).

[120] See *ibid.*

[121] Thus, it could be argued that the change in interpretation of the requirements of the law since the patent should not be given retroactive effect. Union Oil Company of California, 71 Interior Dec. 169, 175 (1964). Also, the issuance of a patent being an adjudication of a special tribunal as to the validity of the claim, it could be argued that it is res judicata on this issue, at least where the Department of the Interior has acquiesced through failure to complain for a number of years. *Id.* at p. 176.

Act.[122] Therefore, the argument would proceed, the Department of the Interior was without jurisdiction to issue the patent, and it is void. The ability of the Department of the Interior to reconsider past decisions is limited to situations where the Department retains jurisdiction of the land.[123] It has no such jurisdiction as to withdrawn land, at least for the purpose of disposing of the land under the mining laws as land valuable for oil shale. Were this argument to prevail, bona fide purchase should provide no defense.[124]

Absent a successful frontal attack on *United States v. Chandler-Dunbar Water Power Company,*[125] section 1166 of 43 U.S.C. bars the United States from recovery of lands patented more than six years prior to attack where the attack is founded on mistake or lack of jurisdiction. No authority has been discovered holding that the statute can be tolled where these are the bases of attack. The United States would have a compensation remedy in these cases, but compensation should be based on the value of the land at the date of the patent less the amount paid by the patentee.[126] Bona fide purchase would insulate an owner from such remedy if the claim is founded on mistake.[127] Although no authority has been found, there is no reason to believe that bona fide purchase would provide a defense where the claim is based on lack of jurisdiction.

Serious concern is justified that an oil shale placer mining claim patent less than six years old, covering a claim held to be void in a pre-*Virginia-Colorado* contest, can be successfully attacked by the United States. Patents older than six years should be successfully insulated from attack by *United States v. Chandler-Dunbar Water Power Co.* Present owners of properties covered by those patents may be subject to a compensation claim by the United States without

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[122] A similar argument, based on Executive Order No. 5327, which withdrew for purposes of investigation, examination, and classification all oil shale deposits owned by the United States, from lease or other disposal, subject to valid existing rights, was made but not pursued to its logical conclusion in Union Oil Company of California, 71 Interior Dec. 169, 183 (1964).

[123] See West v. Standard Oil Co., 278 U.S. 200 (1929).

[124] See text following note 56 *supra.*

[125] The possibility of such an attack cannot be discounted entirely. Cases which could be regarded as making inroads in the philosophy, although not the holding, of the case, include Exploration Co. v. United States, 247 U.S. 435 (1918) (holding that concealed fraud tolls the statute of limitations); and United States v. Whited & Wheless, 246 U.S. 552 (1918) (holding that the statute of limitations does not apply to an action to recover damages for fraud).

[126] As discussed above, the measure of damages has not received extensive consideration in the reported cases.

[127] The defense of bona fide purchase should apply in actions for compensation under the same reasoning applicable in actions to recover lands. See cases cited at note 56 *supra.*

regard to their status as bona fide purchasers.[128] In view of the aggressive attitude which the Department of the Interior has exhibited toward oil shale placer mining claims in the past, there is no reason to expect that attacks on oil shale patents will not be initiated and vigorously prosecuted.

Final evaluation of the effect which *Union Oil Co. of California* will have upon the conclusiveness of oil shale placer mining claim patents must be reserved until it is seen how the rules of law stated in that decision fare in the courts.[129]

ATTACKS BY INDIVIDUALS CLAIMING NO RIGHTS IN THE PATENTED CLAIM

The United States mining laws prescribe a procedure which must be followed by a claimant seeking to obtain a patent to a mining claim.[130] This procedure includes the following steps: (1) a copy of the notice of application for patent, and a copy of the survey plat, if applicable,[131] must be posted in a conspicuous place on the claim or claims covered by the application, (2) a copy of the notice of application for patent must be filed in the Land Office by the applicant and must be posted in the Land Office by the register and (3) a notice that application for patent has been made must be published by the register in a newspaper designated by the register as being published nearest the claim. The statute and the rules of the Department of the Interior[132] prescribe the length of time during which such posting and publication shall continue.

Notice given pursuant to statute is essential to vest in the Department of the Interior jurisdiction to issue the patent.[133] The notice affords all persons having an adverse claim the opportunity

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[128] See Schmidt, *Status of Unpatented Claims, supra* note 104 at 127, where it is said:

> It is our view as title examiners in the State of Colorado that we will be forced to note on all title opinions concerning oil shale patents that, if the Department of Interior's present decisions as outlined on February 16, 1962, and April 17, 1964, are allowed to stand, all the patents heretofore issued with a history of such contests could be subject to suit by the Government to recover the land or the value thereof.

[129] Discussion of the merits of the Union Oil Co. of California decision and the present status of judicial actions which have been initiated to test the validity of the rules of law stated therein are not within the scope of this article. The only reported result to date is the denial of a motion by the United States to dismiss a complaint raising these issues. Oil Shale Corporation v. Udall, 235 F. Supp. 606 (D. Colo. 1964).

[130] 21 Stat. 61 (1880), 30 U.S.C. § 29 (1964).

[131] See 26 Stat. 1097 (1880), 30 U.S.C. § 35 (1964).

[132] See 43 C.F.R. § 3453.1 (1965).

[133] Silver King Coalition Mines Co. v. Conkling Mining Co., 255 U.S. 151 (1921); El Paso Brick Co. v. McKnight, 233 U.S. 250 (1914).

to be heard in opposition to the issuance of the patent.[134] This opportunity is not limited to claimants under the mining laws.[135]

It has been held that personal notice is not required to be given to conflicting claimants even if the applicant knew or could have determined from Land Office records the names and addresses of the conflicting claimants.[136] Notice given by publication brings all adverse claimants into the patent application proceedings.[137] It has been stated that notice so given is due process of law.[138] Failure of any claimant to file an adverse claim in the patent proceedings precludes the adverse claimant from contesting the patent, regardless of the substantive merit of his claim.[139]

No one can successfully attack a patent collaterally,[140] unless that patent is void.[141] Thus, it would seem that the only time a third party can attack a patent when the Department of the Interior had no jurisdiction to issue the patent, as where the lands never were the property of the United States, no legislation authorized their sale, or they had been previously disposed of or reserved from sale.[142]

In a limited area, however, a third party can maintain an action to have the patentee declared to be a constructive trustee for the benefit of the third party. This requires that the aggrieved party possess such an equitable right to the premises as would give him the title if the patent were out of the way,[143] or that through the fraud of the patentee the aggrieved pary who had a superior claim was kept in ignorance of the patent proceedings[144] or was fraudulently induced not to file an adverse claim,[145] in a situation

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[134] El Paso Brick Co. v. McKnight, 233 U.S. 250 (1914).

[135] Northern Pac. R.R. v. Cannon, 54 Fed. 252 (9th Cir. 1893), *appeal dismissed on appellant's motion,* 166 U.S. 17 Sup.Ct. 997 (1896) (memorandum decision).

[136] *Ibid.*

[137] Wight v. Dubois, 21 Fed. 693 (C.C.D. Colo. 1884); Kannaugh v. Quartette Mining Co., 16 Colo. 341, 27 Pac. 245 (1891).

[138] Golden Reward Min. Co. v. Buxton Min. Co., 79 Fed. 868 (C.C.D.S.D. 1897).

[139] Golden Reward Min. Co. v. Buxton Min. Co., 79 Fed. 868 (C.C.D.S.D. 1897); Wight v. Dubois, 21 Fed. 693 (C.C.D. Colo. 1884); Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240 (1891); see Gwillim v. Donnellan, 115 U.S. 45 (1885).

[140] Steel v. St. Louis Smelting & Ref. Co., 106 U.S. 447 (1882); Putnam v. Ickes, 78 F.2d 233 (D.C. Cir.), *cert. denied,* 296 U.S. 612 (1935).

[141] See St. Louis Smelting & Ref. Co. v. Kemp, 104 U.S. 636 (1882).

[142] See *ibid.*

[143] St. Louis Smelting & Ref. Co. v. Kemp, 104 U.S. 636 (1882); see Leonard v. Lennox, 181 Fed. 760 (8th Cir. 1910). This does not require that the claimant establish that at the moment patent issued it should have been awarded to him. It is enough if he has brought himself so far within the laws as to entitle him, if not obstructed or prevented, to complete his claim. Duluth & Iron Range R.R. v. Roy, 173 U.S. 587 (1899).

[144] Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240 (1891).

[145] See Golden Reward Min. Co. v. Buxton Min. Co., 79 Fed. 868 (D. S.D. 1897).

where such party had a prior right.[146] Laches is a defense to claims of this nature.[147] State statutes of limitations may also provide defenses in appropriate cases.[148]

Placer mining patents must yield to extralateral rights of lode claims, and any question concerning such rights is not concluded by a patent but must be resolved by the courts.[149]

ATTACKS BY INDIVIDUALS CLAIMING A PRE-PATENT INTEREST IN THE PATENTED CLAIM

If a patent issues to fewer than all the owners of a mining claim, the patentee will be considered to hold title as trustee for the owners not named in the patent to the extent of their respective interests.[150] These latter persons can maintain an equitable action to enforce the trust.[151]

The same reasoning should result in a conclusion that easements, liens, and other interests in an unpatented mining claim, in appropriate proceedings, should be assertable as interests in legal title to the claim on issuance of patent. No cases considering this situation have been discovered.

Statutes of limitations requiring adverse possession or exclusive possession for creation of limitation title are of little value in defending against an alleged co-owner in Colorado, for the possession of one co-tenant is, under usual conditions, considered not to be adverse to other co-tenants.[152] Until actual ouster of a co-tenant has been established by conduct apart from mere use and occupation of the land, the statute based upon a claim of adverse possession does not run.[153]

In proceedings involving Colorado lands, Colorado Revised

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[146] See United States v. Throckmorton, 98 U.S. 61 (1878) for a discussion of the types of fraud which will permit re-examination of a decree of court; see also Vance v. Burbank, 101 U.S. 519 (1880).

[147] United States v. Marshall Silver Mining Co., 129 U.S. 579 (1888).

[148] See *e.g.* (in the case of Colorado lands) COLO. REV. STAT., §§ 87-1-15; 118-7-8, -9, -11 (1963).

[149] Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co., 36 Nev. 543, 138 Pac. 71 (1914); see Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 114 Fed. 420 (9th Cir. 1902), *cert. denied*, 186 U.S. 482 (1902).

[150] Turner v. Sawyer, 150 U.S. 578 (1893); Ballard v. Golob, 34 Colo. 417, 83 Pac. 376 (1905).

[151] *Ibid.* These constructive trust proceedings are not technically attacks on validity of the patent; the effect of the patent to pass title from the United States is not challenged in these cases.

[152] Fallon v. Davidson, 137 Colo. 48, 320 P.2d 976 (1958); Rose v. Roso, 119 Colo. 473, 204 P.2d 1075 (1949).

[153] Fallon v. Davidson, 137 Colo. 48, 320 P.2d 976 (1958).

Statutes 87-1-15 (1963)[154] offers the best promise for a defense based upon a statute of limitations. To start this statute running, it is necessary that the trust be repudiated and the fact of that repudiation be made known to the beneficiary.[155] A conveyance by the trustee probably would effect repudiation of the trust.[156]

Recordation of the conveyance probably would not assure constructive notice to the beneficiary, for the constructive notice effect probably would be limited to persons acquiring interests after recordation of the conveyance.[157] The burden of proving that the cause of action accrued within less than five years before the suit was begun is upon the person denying the applicability of the statute.[158]

Special Considerations in Examining Title to Properties Title to Which Is Derived Under Oil Shale Placer Mining Claim Patents

In any transaction for the sale or encumbrance of patented oil shale placer mining claims where the values involved justify maximum care and caution, the scope of the customary examination of title to patented lands can be expanded to obtain additional information which will be helpful in evaluating the possibility that the patents could be challenged successfully.

Of course, no examination of official records could be expected to disclose actual fraud. The authorities with respect to bona fide purchase provide the only effective insulation from this infirmity.

I. *Abstracts of Title:*

A complette abstract of title should be examined rather than an abstract limited to that period of time beginning with the issuance of the patent. (This is not to suggest that such a limitation is ever advisable.) This will disclose any recorded claims of co-owners or of holders of other interests in the patented claim which were not recognized in issuance of the patent. Under the Colorado recording act[159] subsequent purchasers undoubtedly are on constructive notice of such recorded interests.

It is suggested that photographic abstracts be obtained, or that

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[154] Colo. Rev. Stat. § 87-1-15 (1963) provides:
> In certain trusts, five years limitation. — Bills of relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not provided for in this article, shall be filed within five years after the cause thereof shall accrue, and not thereafter.

[155] Ballard v. Golob, 34 Colo. 417, 83 Pac. 376 (1905).

[156] Vanderwiele v. Vanderwiele, 110 Colo. 556, 136 P.2d 523 (1943); see Ballard v. Golob, note 155 *supra.*

[157] The Colorado recording act is found at Colo. Rev. Stat. § 118-6-9 (1963).

[158] Cliff v. Cliff, 23 Colo. App. 183, 128 Pac. 860 (1912).

[159] Colo. Rev. Stat. 118-6-9 (1963).

the examination of non-photographic abstracts be supplemented by a comparison with the original county records, to minimize the possibilities for error.

II. *Status Reports:*

Status reports based upon the Bureau of Land Management records in the applicable state office of the Bureau of Land Management and upon the Bureau of Land Management records in Washington, D. C., can be obtained. These reports can be prepared on the basis of personal examination of the records, but, in the case of the Washington, D. C., records, it is usually more convenient to cause them to be prepared by attorneys in that city.

Such reports would reveal whether the lands were subject to disposition by the United States at the relevant times and whether any adverse claims under the mining laws or other laws had been perfected in the Bureau of Land Management prior to issuance of the mining claim patent. They would also help reveal whether any contests had been conducted against the claim being examined prior to issuance of the patent, as discussed in more detail below.

Perhaps this step could be omitted without significant practical risk, in reliance on the usual check made by the Bureau of Land Management prior to patent.

III. *Patent Application Files:*

The files covering the patent applications can be examined to assure that no jurisdictional step was omitted. This is particularly important if the abstract discloses conflicting mining claims located prior to patent or if there are indications, in the status reports or elsewhere, of other conflicting claims of any kind. The notice and publication procedures prescribed by statute are jurisdictional and must have been followed to assure that such conflicting interests have been effectively extinguished. In many cases the patent application file will be in the National Archives in Washington, D. C., or in the Bureau of Land Management records in or near that city. In such cases the only feasible approach may be to cause the files to be examined by Washington, D. C., attorneys. Specific instructions concerning the matters to be checked should be provided to them.

Perhaps no significant practical risk would be involved in omitting this examination, for Bureau of Land Management officers would not knowingly have issued a patent if the essential preliminary steps had not been taken.

IV. *Contests:*

It is essential to determine to the extent possible whether the

claim on which the patent is based was previously held invalid in a contest based on failure to perform annual assessment work. This will determine whether there is danger that the patent can be attacked by the United States and whether the present owner may be subject to a claim by the United States for compensation. There is no easy way to ferret out these contests. Reference to contests found in the tract books and plat books in Denver and tract books in Washington, D. C., cannot be relied upon as complete. An unofficial tract book is maintained in Washington, D. C., relating solely to oil shale placer mining claims and sets forth references to contests and to patents issued in connection with oil shale placer mining claims. A large contest docket and a card file are maintained by the Bureau of Land Management in Denver. The latter probably is not complete. The former should be reliable and should disclose any such contest, but the contests are listed serially by contest numbers, with no index by claim name or legal description. Thus, examination of these books is an extensive and time-consuming task. If there is an easy way to determine whether a claim has ever been contested the author has not discovered it.

Once a contest is discovered, the file relating to the contest should be examined, if possible, to ascertain the outcome and, if adverse to the claimant, whether proper notice was given to interested parties.

V. *State Records:*

As an extra precaution, the records in the office of the State Board of Land Commissioners of the State of Colorado can be checked to assure that no claim to the lands is asserted by or under the State. Any such claim should be revealed by the federal records, but this additional check can be made quickly and provides further assurance that no such claim exists.

VI. *Miscellaneous:*

In addition to checking the above matters, which have particular relevance to the question of the conclusiveness of patents, other usual steps in title examination should be followed, such as surface inspection; geological inspection for known lodes; examination of the patent to ascertain the nature of reservations contained therein; examination of a certificate of taxes due; examination of a plat of a boundary survey; and examination of plats and field notes of the government surveys, to the extent this latter step is necessary to solve any special problems which may exist.

CONCLUSION

Although the title problems of owners of patented oil shale mining claims are not great in comparison with the problems of the owners of unpatented oil shale claims and in comparison with the problems involved in evolving a policy for development of federally-owned oil shale lands, they are nonetheless real. The fate of *Union Oil Co. of California* in the courts, and clarification of the policy which the Department of the Interior will adopt toward patented oil shale claims must be awaited before the questions concerning the conclusiveness of patented oil shale placer mining claims can be answered with confidence.