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Letter Opinion No. 62-50-L
R-121

REQUESTED BY: Howard Shelp, Right of Way Engineer
Arizona State Highway Department

OPINION BY: Robert W. Pickrell
The Attorney General

QUESTION: Is a placer mining patentee entitled to just compensation when a portion of the land embraced within the legal description of his patent is taken for highway purposes, where that land had formerly been conveyed to the State pursuant to the Taylor Grazing Act?

CONCLUSION: Yes: See body of opinion.

In order to understand the interests acquired under the patent in question it is necessary to trace the legislation under which the United States made the grant to him.

30 U.S.C. #37 is the general provision provided by Congress for the patenting of placer mining claims. The present act was derived from legislation enacted in 1872 and is the principal authority upon which the Bureau of Land Management issued a placer patent. All of the federally owned mineral land not withdrawn by Congress in some manner, is subject to location and patenting under the above cited section.

In 1934 Congress enacted what is commonly known as the "Taylor Grazing Act" (43 U.S.C. #315), which authorized the exchange or trade of federally owned land for state owned land. This Act, however, required the federal government in any such exchange, to reserve to itself for the purpose of allowing location and development, all minerals which might be contained in the land. Likewise, the states were allowed to reserve minerals in land conveyed to the federal government in such an exchange. The pertinent part of that act as it relates to the reservation of the mineral in the Federal Government is stated as follows:

"* * * Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for

or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon * * *."

The land embraced within the legal description of the Patent was land formerly wholly owned by the federal government, and conveyed by patent to the state in exchange for land owned by the state. Pursuant to the direction of the above referenced "Taylor Grazing Act", all minerals were reserved in the United States. That transaction occurred on October 25, 1940, between the State of Arizona and the federal government. Subsequently, on June 23, 1950, the patentee located the placer mining claims on the land in question. The patent thereto issued on February 11, 1955.

At first flash it might appear that the state having acquired its title first had some higher and better right to the surface. However, any right acquired by the state to any portion of the surface was, by the terms of the Taylor Grazing Act, subject to a defeasance upon the happening of a condition subsequent, to-wit, the discovery, location, and patenting by an individual of the mineral reserved in the federal government.

In the instant case the mineral in the subject land until conveyed to the patentee had always been owned by the federal government. Initially, it was owned by it as a part of the fee simple; following the conveyance of 1940 to the State of Arizona, the federal government still owned the mineral. But the federal government had reserved more than simply the title to the mineral. It had reserved, also, the power to defeat the interest of the state to certain of its rights in the surface. In other words, in the language of the Taylor Grazing Act itself, it provided that certain persons could:

"* * * enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of minerals therefrom, * * *."

And to remove all doubt that the general mining law would apply to the mineral reserved, the Taylor Grazing Act itself also provided that:

"* * *nothing contained in this chapter shall restrict prospecting, locating, developing, mining, entering, leasing or patenting the mineral resources of such districts under any law applicable thereto."

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In conclusion, it is the opinion of this office that the patentee acquired by his patent the right to use every square inch of the property embraced within the boundaries of his patent as he may require for prospecting for, mining or removing any mineral reserved. In taking any portion of the surface thereto for the construction of highways the use and enjoyment of his rights are taken or damaged and just compensation must be paid therefor.

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