

Attorney General

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Robert K. Corbin

January 15, 1987

Mr. John H. Jett, Director
Arizona Department of Mines
& Mineral Resources
Mineral Building, State Fair Grounds
Phoenix, Arizona 85007

Re: I87-011 (R86-089)

Dear Mr. Jett:

You have requested an opinion regarding real estate licensing requirements for persons who assist others in selling various types of mining claims. Specifically, you have asked us to consider whether a real estate license is required for:

1. The sale of a patented mining claim with one owner for both the surface and minerals.
2. The sale of a mining claim where the surface is patented, but the minerals are reserved for the federal government.
3. The sale of unpatented mining claims where the surface and minerals are both federal government land.
4. The sale of mining claims where mineral rights are owned by the federal government and the surface is state trust lands.

In addition, you have asked whether the number of claims in a proposed sale has any effect on the necessity for a real estate license. We conclude that a license is required to provide sales assistance for compensation regardless of the type of mining claim involved because mining claims, whether patented or unpatented, are interests in real property.

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A.R.S. § 32-2122 makes it unlawful for "any person to engage in the business of a real estate broker or real estate salesman" without being licensed. A real estate broker, as defined in A.R.S. § 32-2101(25), is:

a person . . . who, for another and for compensation:

(a) Sells, exchanges, purchases, rents or leases real estate.

(b) Offers to sell, exchange, purchase, rent or lease real estate.

(c) Negotiates or offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate.

(d) Lists or offers, attempts or agrees to list real estate for sale, lease or exchange.

(e) Auctions or offers, attempts or agrees to auction real estate.

(f) Buys, sells, offers to buy or sell or otherwise deals in options on real estate or improvements thereon.

(g) Collects or offers, attempts or agrees to collect rent for the use of real estate.

(h) Advertises or holds himself out as being engaged in the business of buying, selling, exchanging, renting or leasing real estate or counseling or advising thereon.

(i) Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, leasing or rental of real estate.

(j) Assists or directs in the negotiation of any transaction calculated or

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intended to result in the sale, exchange, leasing or rental of real estate.

(k) Negotiates or offers, attempts or agrees to negotiate a loan secured or to be secured by a mortgage or other encumbrance upon or transfer of real estate subject to the provisions of subsection C of § 32-2155. The provisions of this subdivision do not apply to mortgage brokers as defined in and subject to the provisions of title 6, chapter 9, article 1.

(l) Engages in the business of assisting or offering to assist another in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.

(m) Claims, demands, charges, receives, collects or contracts for the collection of an advance fee in connection with any employment enumerated in this section, including employment undertaken to promote the sale or lease of real property by advance fee listing, by furnishing rental information to a prospective tenant for a fee paid by such prospective tenant, by advertisement or by any other offering to sell, lease, exchange or rent real property or selling kits connected therewith. This shall not include the activities of any communications media of general circulation or coverage not primarily engaged in the advertisement of real estate.

(n) Performs any of the foregoing acts as an employee of, or in behalf of, the owner of real estate, or interest therein, or improvements affixed thereon, for compensation.

(Footnote omitted.) A real estate salesman, as defined as A.R.S. § 32-2101(27), is:

a natural person or a corporation engaged by or on behalf of a licensed real estate broker,

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or by or on behalf of a corporation which is licensed as a real estate salesman, to perform any act or participate in any transaction in a manner included in the definition of real estate broker.

A person must be licensed as a real estate broker or salesman to perform any of the services enumerated above with respect to a mining claim if that mining claim is real estate. A mining claim on public lands is a possessory interest in land. Best v. Humboldt Placer Mining Company, 371 U.S. 334; 335, 83 S.Ct. 379, 382, 9 L.Ed.2d 350, 353 (1963). Location is the foundation of possessory title to a claim to federal or state land. "While a locator's rights before patent are only possessory, his interest is regarded as real property" Bagg v. New Jersey Loan Company, 88 Ariz. 182, 188-189, 354 P.2d 40, 44 (1960); see also Bowen v. Chemi-Cote Perlite Corporation, 102 Ariz. 423, 432 P.2d 435 (1967). An unpatented claim involves only possessory rights and a patented claim carries with it a deed of title issued by the federal government or a state conveying some portion of the public domain. See, 30 U.S.C. §§ 22, 29; Roberts v. Morton, 389 F.Supp. 87, 90-91, (D.Colo. 1975), aff'd, 549 F.2d 158 (10th Cir. 1977), cert. denied, 434 U.S. 834. Consequently, patented and unpatented claims are both interests in real property and a real estate license is required to lawfully assist in the sale for compensation. Furthermore, nothing in the real estate licensing statutes permits a non-licensed person to conduct even a limited number of transactions. Therefore, licensing does not depend on the number of claims in a sale. See A.R.S. § 32-2121(A).

An additional basis for finding that licensing is required with respect to unpatented mining claims is subsection 1 of A.R.S. § 32-2101(25) which incorporates mining law concepts such as locating or entering upon state or federal lands into the definition of real estate broker. The Court of Appeals has held that a person engaged in the business of assisting others to file for federal oil and gas leases is acting as a real estate broker and must be licensed. Arizona Real Estate Department v. American Standard Gas & Oil Leasing Service, Inc., 119 Ariz. 183, 580 P.2d 15 (App. 1978). When a person receives compensation for assisting others to locate and enter public lands, the licensing requirements of the real estate statute apply.

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We therefore conclude that licensing is required when one is paid to assist others in the sale of any variety of mining claim.

Sincerely,



BOB CORBIN
Attorney General

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