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RECORD OF MINERAL RESERVATIONS IN PATENTS

A patent is an instrument issued by a state or the federal government to one to whom it has transferred or agreed to transfer land, in order to vest in the transferee the complete legal title.¹ A patent is roughly the equivalent of a deed given by the ordinary grantor, although as a deed of the government it has some peculiar characteristics worth considering. This paper will discuss two of these characteristics: reservations of mineral interests by the government, and the effect of recording in the federal land offices and in the local recording offices.

The first question to be considered is what is necessary for reservation of minerals to the government. In the United States, when title to public land passes by patent or grant to another, the right to the minerals generally passes with it² unless such right is reserved. The government, either state or federal, may in granting public lands, reserve title to the minerals therein. In each general classification of land for public entry, reservation of minerals to the federal government must be provided for by specific congressional enactment.³ There are, on the other hand, two different views taken by the courts as to whether statutory authority is necessary for inclusion of mineral reservations in patents issued by a state.⁴ A necessary corollary of the power of the government to reserve such interests is that where minerals are reserved, the reservation must generally carry with it the right to enter upon the land located by the individual in which minerals may be found, and to produce and carry them away.⁵

In the Rocky Mountain area reservations producing the greatest interest are those relating to the homestead acts, due to the fact that most of the patented lands in this area were taken up under the homestead laws. Under the homestead laws no title could be obtained to any lands known to be valuable for minerals.⁶ However, where lands open to settlement were not known to be of a mineral character, subsequent discovery of minerals after a patent was issued to the homestead claimant did not affect his title.⁷ Neither the Original Homestead Act, the act of May 20, 1862,⁸ nor the Enlarged Homestead Act, the act of February 19, 1909,⁹ subjected land entered thereunder to a reservation by the United States of minerals therein. The Act of December 29, 1916,¹⁰ commonly called the Stock-

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1. *Stinson v. Call*, 163 Mo. 323, 63 S.W. 729, 739 (1901).
 2. *Pacific Coast Mining & Milling Co. v. Spargo*, 16 Fed. 348 (C.C.Cal. 1883).
 3. *Burke v. Southern Pacific R.R.*, 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527 (1914).
 4. According to some cases, reservation of mineral interests may not be made in absence of statutory authorization for the inclusion of such reservation. *Walpole v. State Land Commissioners*, 62 Colo. 554, 163 Pac. 848 (1917). Other cases have held that it is not essential that express authorization for the inclusion of the reservation be given the board in charge of sales. *State v. Board of Land Commissioners*, 50 Wyo. 181, 58 P.2d 423 (1936), rehearing denied, 50 Wyo. 181.
 5. *Cowan v. Hardeman*, 26 Tex. 217 (1882).
 6. *Murray v. White*, 42 Mont. 423, 113 Pac. 754 (1911).
 7. *Shaw v. Kellogg*, 170 U.S. 312, 18 S.Ct. 632, 42 L.Ed. 1050 (1898).
 8. 12 Stat. 392 (1862), 43 U.S.C. § 161 et. seq. (1952 ed.).
 9. 39 Stat. 639 (1909), 43 U.S.C. § 218 (1952 ed.).
 10. 39 Stat. 862 (1916), 43 U.S.C. § 291 et. seq. (1952 ed.).

Raising Act, however, provided that all entries made and patents issued under it should be subject to and contain a reservation to the United States of all coal and other minerals in the lands entered and patented.

Another surface entry act under which a substantial number of entries were made is the United States Agricultural Entry Act of 1914. This Act provided that all entries and patents thereunder should be subject to a reservation to the United States of phosphate, nitrate, potash, and oil or gas, together with the right to prospect for, mine and remove the same and to dispose of the minerals in such lands in accordance with the mineral land laws in force at the time of such disposal.¹¹ Reservation of minerals to the federal government is now a policy which has been specifically provided for in all recent public land statutes.

A further question is whether a reservation of an interest to the government, provided for in legislation authorizing disposition of land, is effective when not contained within the patent instrument itself. No decisions bearing directly on this point could be discovered. Perhaps the only case directly involving an omission of a mineral reservation from the patent is *United States v. Price*.¹² The case involved the omission of a mineral reservation in a patent for land purportedly entered under the Stock-Raising Act of 1916. The lands in question had been classified and designated as subject to homestead entry under the Enlarged Homestead Act which did not reserve the mineral rights, and also under the Stock-Raising Act which did reserve the mineral rights. The government's position was that the entryman had exhausted all of his homestead rights except under the Stock-Raising Act,¹³ and that the terms of the Act with which a patentee complies and under which he intends to acquire title must govern his rights; therefore, the terms of the Stock-Raising Act reserving the minerals should prevail over any other recitals contained in the patent. The court pointed out, however, that the patent was issued under the Original Homestead Act, and all acts supplemental thereto, and that the patent did not make any specific reference to the Stock-Raising Act. The court concluded that failure to include a reservation of the mineral rights in the patent was in harmony with the Enlarged Homestead Act, but a wide departure from the Stock-Raising Act. In view of the fact that the land was subject to entry under either act, that the patent was regular on its face, and that it contained no reservations, the court could not go behind the patent and look to antecedent proceedings on which it was founded for the purpose of determining that the minerals were reserved under the provision of the Stock-Raising Act. It is quite probable that had the land disposed of by the patent not also been classified under the Enlarged Act of 1909, which did not reserve minerals, in addition to the Stock-Raising

11. 38 Stat. 509 (1914), 30 U.S.C. § 121 et. seq. (1952 ed.).

12. 111 F.2d 206 (10th Cir. 1940).

13. The entryman had previously acquired an acreage equal to the limit that he might acquire under the Enlarged Homestead Act, and therefore even though the land in question had been classified under the Enlarged Act, the government contended that such a classification could not benefit the entryman.

Act, the court would have been inclined to look behind the patent for the purpose of determining that the minerals were reserved under the provisions of the Stock-Raising Act. Such a conclusion would be in accordance with the general proposition that interests in public lands cannot be acquired except as authorized by specific congressional enactment.¹⁴

Proceeding to the question of recording, the effect of and necessity for, we find that acts of Congress provide for record of all patents for land in an office, and in books kept for that purpose.¹⁵ An officer called the recorder is appointed to make and keep these records.¹⁶ The recording officer is required to record every patent issued, and countersign the instrument to be delivered to the grantee. This is said to be the final record of the transaction, the legally prescribed act which completes the title by record, and when this is done the grantee is vested with that title.¹⁷

The conclusion appears to be then that once a patent, which is valid in other respects, is recorded in accordance with the acts of Congress prescribing such record, no further act or record is necessary to impart notice to and protect government reservations of minerals against third parties otherwise unaware of such record. In *Mathews v. Caldwell*,¹⁸ a question arose concerning a contract for the sale of minerals underlying certain land. According to the terms of the contract if title furnished by abstract was in any respect not a good, sufficient and merchantable title it was the purchaser's obligation to point out the defect. The purchaser objected that there was not any patent of record in the county in which the land was situated. In overruling the purchaser's objection the court said, "In 1880 when this patent was issued, as the abstract shows it was, patents were required only to be recorded in the General Land Office and were, if intrinsically good and if recorded in that office, valid against persons who otherwise would be innocent purchasers for value and, in fact, against the whole world."¹⁹ A further illustration of the principle stated in the *Mathews* case can be seen in the cases standing for the proposition that patents from the United States or from one of the states themselves are not within the purview of the state recording acts unless they are specifically included.²⁰ Although in a majority of the reported cases on this subject it has been seen that the state recording statutes appear permissive in nature as regards conveyances by the state or federal government, in an early case,²¹ a Minnesota court held that under the Minnesota recording statute, as it stood at that time, a recording of the patent in the United

14. *Williams v. Sherman*, 36 Idaho 494, 212 Pac. 971 (1922).

15. Act of April 25, 1812, c. 68, § 8, 2 Stat. 717, 43 U.S.C. § 6 (1952 ed.).

16. Act of July 4, 1836, c. 352, § 4, 5 Stat. 111, 43 U.S.C. § 5 (1952 ed.).

17. *United States v. Schurz*, 102 U.S. 378, 26 L.Ed. 167 (1880).

18. 258 S.W. 810 (Tex. 1924).

19. *Id.* at 813.

20. *David v. Rickabaugh*, 32 Iowa 540 (1871); *Sands v. Davis*, 40 Mich. 14 (1879); *Evits v. Roth*, 61 Tex. 81 (1884); *Sayward v. Thompson*, 11 Wash. 706, 40 Pac. 379 (1895).

21. *Coles v. Berryhill*, 37 Minn. 56, 33 N.W. 213 (1887).

States land office was not a recording within the meaning of the Minnesota statute.²²

The language of the Wyoming statute indicates that it too is merely permissive in nature. The Wyoming statute²³ provides in part:

Patents heretofore or hereafter issued by the United States, for lands and certificates of purchase or payment for public lands heretofore or hereafter issued by the receiver of any land office of the United States, shall be entitled to be recorded under the provisions of this chapter, and the record for all such instruments shall have the effect to all intents and purposes, as though same were acknowledged and otherwise executed as required by law. . . .

Only two Wyoming cases²⁴ touch on the area concerning delivery, acceptance and record of patents. In one of these cases²⁵ it was said, ". . . title passed from the United States when the patents were executed and were recorded in the office of the recorder of the General Land Office at Washington, and that neither a physical delivery of them nor any further act was essential to make them perfect or effective." This statement is consistent with, and a reiteration of similar statements made by the other courts which have considered these questions.

The question of whether the United States land office records must be checked in order to determine whether the mineral interests have been reserved to the government must yet be answered. The conclusion on this point is obviously yes, the United States land office records should be checked. It has been pointed out that once the patent is duly executed and recorded in the proper office no further acts, not even delivery, are necessary for effective passing of full legal title to the patentee,²⁶ or for giving notice to persons who would otherwise be purchasers for value.²⁷

State statutes in regard to recording, it has been seen, do not generally apply to conveyances by a state. Although such conveyances may be recorded, and generally are, their effect to vest title and to afford notice to third parties is not dependent upon their recording.²⁸ It is also clear that patents from the United States are not generally within the purview of the recording acts unless they are specially included.²⁹ Further it has been held that where there has been an entry upon land under the land laws sufficient to support an action of ejectment, and the entryman has complied with all the essentials necessary to entitle him to a patent, the

22. A prior unrecorded conveyance took priority over a judgment against the patentee here, because title to the land in question neither being in fact in the debtor, nor appearing of record in him, there was nothing to which the lien of the judgment could attach.

23. Wyo. Comp. Stat. § 66-117 (1945).

24. *Merrill v. Rocky Mountain Cattle Club*, 26 Wyo. 219, 181 Pac. 964 (1919); *Lonabaugh v. United States*, 179 Fed. 476 (8th Cir. 1910).

25. *Lonabaugh v. United States*, 179 Fed. 476, 481 (8th Cir. 1910).

26. *Ibid.*

27. *Mathews v. Caldwell*, 258 S.W. 810 (Tex. 1924).

28. *Patterson v. Langston*, 69 Miss. 400, 11 So. 932 (1892).

29. *Supra* note 20.

absence of a patent does not constitute a substantial defect in the title.³⁰ A similar conclusion was reached by an Illinois court³¹ in 1922 when it was indicated that the fact that an abstract did not show the issuance of any patent by the United States did not render such an abstract objectionable as failing to show marketable title.

It may be expected, on occasion at least, that evidence of a patent will not even appear in the local records, in which case of course, it would be necessary to check the land office records. On the other hand, although the patent appears in the local records; it may be an imperfect reproduction. Furthermore, as was previously pointed out, there does not appear to be any direct authority determining whether or not it is necessary for a reservation to appear on the face of the patent instrument in order to reserve mineral rights to the government. Because this point is apparently open to speculation, it must be concluded that in order to determine whether a particular patent is free from government reservation the United States land office records should be examined to determine whether a reservation appears on the face of the original instrument. If no reservation is apparent then the act under which the patent was issued should be studied to determine whether a mineral reservation was called for.

As previously pointed out,³² under the earlier acts no title could be obtained to lands known to be mineral in character. Patents issued for these lands were in effect a determination that the lands were non-mineral in character. These patents will contain no mineral reservations and none are necessary because the land was classified as non-mineral. Later patents issued under the non-mineral homestead acts might contain a reservation of minerals under the authority of statutes such as the acts of 1914³³ or 1916³⁴ for example, where the lands patented had been classified as valuable for minerals mentioned in these acts, or of course, the patent may have been issued under one of these later acts alone. Examination of the patent and the provisions of the act under which it was issued will disclose whether a reservation which should have been included in the patent that has been omitted. Should it appear that the land is subject to a reservation not contained in the patent there appears to be a strong possibility that if the question were litigated the court would find that the reservation is just as effective as if contained in the patent instrument itself.³⁵

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30. Metz v. Wright, 116 Mo.App. 631, 92 S.W. 1124 (1906).

31. Kincaid v. Dubrinsky, 225 Ill.App. 85, 89 (1922).

32. Supra note 6.

33. 38 Stat. 509 (1914), 30 U.S.C. § 121 et. seq. (1952 ed.).

34. 39 Stat. 509 (1916), 43 U.S.C. § 291 et. seq. (1952 ed.).

35. Consider, for example, the case of Swendig v. Washington Water Power Co., 265 U.S. 322, 44 S.Ct. 496, 68 L.Ed. 1041 (1924), in which the Supreme Court of the United States read a reservation for a right of way for a power line into a patent even though no mention was made in the patent of the act providing for such a reservation.