



Mr. L. H. Lehn

April 10, 1980

Ken McManigal

Dean D. Macari, et al. - YT 101995
Petition for Redetermination

This is in response to your memorandum concerning the Macari, Macari and Hardie - Lucky Larry and Minnie D matter wherein liability was established by an October 19, 1978, Field Billing Order, a Notice of Determination was issued on November 8, 1978, and Mr. Macari responded by letter on November 28, 1978, which letter was acknowledged as a petition for redetermination.

Briefly restated, Dean Macari, Katheryn Macari, and Frieda Hardie held the Lucky Larry and Minnie D mining claims in the Allegheny Township of Sierra County. By letter dated September 6, 1977, Katheryn Macari provided one Michael Miller with "proper authorization to cut and remove timber on the Minnie D and Lucky Larry Quartz claims" to facilitate the construction of a road across the vein system of the claims. Thereafter, by Timber Sale Agreement dated October 4, 1977, Miller, as Seller, guaranteed he was the owner or agent of property in Allegheny, California, and he purported to sell 60,000 MBF of certain standing timber located on that property to one Andrew Cortez in return for road access to the Minnie D Mine portals and 20,000 MBF of lumber for mining purposes. By a later Understanding and Agreement dated October 12, 1977, however, Miller agreed to pay Cortez \$5,500 in return for the road access and for 60,000 MBF of lumber for mining purposes. And the Notice of Timber Operations, Exemption From Timber Harvesting Plan Requirement, received by the California Division of Forestry on October 24, 1977, indicated as follows:

- Timber Owner - Katheryn Macari and Frieda M. Hardie
- Timberland Owners - Same as Above
- Timber Operator - Andrew J. Cortez
- Responsible person to be contacted - Michael M. Miller

TT

Legal description or location: On Kanaka Cr. Road
beyond Allegheny

Sub Sec.	Section	Township	Range	County	Approx. Acreage
Portions	34	19N	10E	Sierra	2

(Lucky Larry & Minnie D. Patented Mining Claims within the Allegheny Townsite)

Mr. Cortez then harvested, by your estimates, over 100,000 MBF of timber but, apparently, not according to the Notice of Timber Operations. And he apparently sold the timber rather than returning the lumber for mining purposes and did not pay any of the proceeds derived from the sale to the Macaris, Hardie, and Miller, or any of them. Subsequent inquiries disclosed that the Sierra County Superior Court held title to Section 34, Township 19N, Range 10E, in Sierra County (April 23, 1979, letter from Sierra County Clerk) and that the Lucky Larry and Minnie D claims were unpatented rather than patented mining claims held by Macari, Macari, and Hardie (October 30, 1978, letter from Sierra County Assessor).

That the Lucky Larry and Minnie D mining claims were unpatented has been confirmed by the Bureau of Land Management, Land Laws and Land Management, Sacramento, whose records indicate that Lucky Holmes and Minnie D mining claims are unpatented claims in Section 34, Township 19N, Range 10E in Sierra County. Although BLM's records refer to the "Lucky" claim as Lucky Holmes rather than as Lucky Larry, the section, township, and range thereof are identical to those set forth in the Notice of Timber Operations for the Lucky Larry claim. And per BLM, only unpatented mining claims are filed with it, and mining claims are either unpatented or patented, not both.

With respect to unpatented mining claims, the extent of the surface rights must be determined by the laws existing at the time of the location of the claims. Thus, possession of a claim in accordance with Title 30 U.S.C.A. Section 26 (1872) confers the rights, subject to certain limitations and conditions, upon a locator to work the claim for precious metals and to possess and enjoy all the surface included within his location, but confers no right to take timber, except so far as it may be reasonably necessary for mining purposes (Teller v. United States, (1901) 113 Fed. 273, 280). Or, possession of a claim in accordance with the more restrictive Title 30 U.S.C.A. Section 612 (1955) confers the right upon a locator only to prospect, mine or conduct processing operations, subject to the government's

rights to manage and dispose of the vegetative surface resources and to manage all other surface resources; except that the locator may use timber to the extent required for mining or processing operations, required for the construction of buildings or structures in connection therewith, required for providing clearance for his operations or uses, or authorized by the government.

With respect to timber and unpatented mining claims then, locators have the right to take and use timber reasonably necessary for mining purposes. Per BLM, Macari, Macari, and Hardie are successors to the locator or locators of the Minnie D claim, first located on May 14, 1898, and of the Lucky Larry (Lucky Holmes) claim, first located on January 1, 1913. Thus, as possessors of claims in accordance with Title 30 U.S.C.A. Section 26, Macari, Macari and Hardie had the right to some timber thereon.

Typically, locators of unpatented mining claims acquire possessory title only thereto, with both the equitable and legal title remaining in the government (United States v. Rizzinelli, (1910) 182 Fed. 675; United States v. Deasy, (1928) 24 F. 2d 108). As to severed timber, while case law is not specific as to the "title" thereto acquired by locators who have taken and used timber for mining purposes, several cases do indicate that such "title" is, at the least, beneficial title, which is all that is required under Section 38104 of the Code: (The settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build a house, outbuildings and fences, and, perhaps, to exchange such timber for lumber to be devoted to the same purposes (Shiver v. United States, (1895) 159 U.S. 491; timber cut from the surface of an unpatented mining claim and used to build a cabin on the locator's adjacent private property constituted use for purposes of operating the claim, not theft of government property (United States v. Cruthers, (1975) 523 F. 2d 1306.) Thus, the first person or persons who acquired either the legal title or beneficial title to that felled or downed timber from the Lucky Larry and/or Minnie D claims which was to be used for mining purposes were the timber owners liable for applicable timber yield taxes (Rev. & Tax. Code Sections 38115, 38301 and 38104).

Such persons were Macari, Macari, and Hardie. Although by the October 4, 1977, Timber Sale Agreement Miller, as Seller, purported to sell 60,000 MBF of certain standing timber located on property in Allegheny to Cortez, for such to have been possible, Macari, Macari and/or Hardie would first have to have had a grant deed or other indicia of ownership for such

timber from the Sierra County Superior Court or from a previous holder of title to the property. There is no evidence of such a deed or other indicia of ownership, and neither is such a likely consideration in light of the fact that Macari, Macari and Hardie had only unpatented mining claims on the property. In any event, the October 12, 1977, Understanding and Agreement clarified, if not modified the October 4, 1977, Timber Sale Agreement to indicate, among other things, that Miller wanted the entire 60,000 or so MBF of timber from the Minnie D claim cut, milled, and returned for use for mining purposes, and the Notice of Timber Operations showing Macari and Hardie as timber owners and Cortez as the timber operator was consistent with the Understanding and Agreement and with their right to take and use timber from their unpatented mining claims to the extent necessary for mining purposes.

As to the timber volume attributable to Macari, Macari and Hardie, since the Timber Sale Agreement and Understanding and Agreement contemplated the harvesting of 60,000 or so MBF of timber for use for mining purposes, and since over 100,000 MBF of timber was actually harvested, 60,000 MBF should be used. (If Macari, Macari and Hardie never received the lumber or proceeds from Cortez, it would appear that they could bring civil actions against Cortez. Such has no bearing on their liability for applicable timber yield taxes, however.) As for the balance of the timber harvested, such appears to be a matter of trespass or conversion, and per your file the Sierra County District Attorney advised in February 1979 that he had filed a complaint against Cortez (unsuccessful) and that he would be filing a complaint against Miller.

Finally, we do not agree with Dean Macari's December 19, 1978, analysis of the matter, that because Cortez filed the harvest plan, did the logging, received the benefit of the sale of the logs and agreed to pay timber yield taxes, Cortez is the timber owner for purposes of Section 38104 since he acquired beneficial title to the timber. In our view, "legal title or beneficial title", as used in Section 38104, contemplates some kind of title transfer from an exempt person or agency, some transfer of an ownership interest in or a right to use timber, to the person acquiring it. Here, pursuant to the Timber Sale Agreement and Understanding and Agreement, Cortez only obtained possession of the timber provided for therein and, similarly, he only obtained possession of any additional timber which he cut:

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Timber wrongfully cut or removed from public lands remains the property of the government, and the person who cuts it acquires no property interest therein. One who purchases timber wrongfully cut from the public domain acquires no better title than that of the vendor thereof (United States v. Bagnell Timber Co., (1910) 178 Fed. 795).

We are returning your file herewith. If you have any questions or need further assistance, please advise. Otherwise, this will end our involvement in this matter, unless you and petitioners cannot resolve it, in which case a preliminary hearing will have to be scheduled.

JKM:fr
Attachment