Nos. 15-754, 15-15857

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAVASUPAI TRIBE, GRAND CANYON TRUST, SIERRA CLUB, and CENTER FOR BIOLOGICAL DIVERSITY,
Plaintiff-Appellants,

v.

HEATHER PROVENCIO*, Forest Supervisor, Kaibab National Forest, *et al.*,
Defendant-Appellees,

ENERGY FUELS RESOURCES (USA) INC., *et al.*,
Defendant-Intervenor-Appellees,

Appeal from the United States District Court for the District of Arizona
No. 3:13-cv-08045-DGC

RESPONSE BRIEF OF DEFENDANT-INTERVENOR-APPELLEES

HUNTON & WILLIAMS LLP
David J. DePippo (Ariz. Bar No. 028428)
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-7304
ddepippo@hunton.com

Counsel for Defendant-Intervenor-Appellees

GALLAGHER & KENNEDY, P.A.
Michael K. Kennedy (Ariz. Bar No. 004224)
Bradley J. Glass (Ariz. Bar No. 022463)
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000
mkk@gknet.com
brad.glass@gknet.com

Counsel for Defendant-Intervenor-Appellees

*Under FRAP 43(c), Heather Provencio is substituted for Bill Westbrook as Forest Supervisor.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(b), Defendant-Intervenor-Appellees Energy Fuels Resources (USA) Inc. and EFR Arizona Strip LLC state that they both are wholly-owned by Energy Fuels Holdings Corp., which is wholly owned by Energy Fuels Inc., a publicly-held corporation.

RESPECTFULLY SUBMITTED this 17th day of December, 2015.

GALLAGHER & KENNEDY, P.A.

HUNTON & WILLIAMS LLP

By: /s/*David J. DePippo*
HUNTON & WILLIAMS LLP
David J. DePippo (Ariz. Bar No. 028428)
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-7304
ddepippo@hunton.com

Counsel for Defendant-Intervenor-Appellees

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INTRODUCTION

Defendant-Intervenor-Appellees Energy Fuels Resources (USA) Inc. and EFR Arizona Strip LLC ("EFR") file this Response to the opening briefs of Appellant Havasupai Tribe ("Tribe") (DktEntry 20-1, No. 15-15754 ("Hav.Br.")), and Appellants Grand Canyon Trust, Center for Biological Diversity, and Sierra Club ("Trust") (DktEntry 20-1, No. 15-15857 ("Tr.Br.")).

The law regarding mining by private parties on public lands is well-established. A miner is authorized to mine on public lands upon (1) establishing an unpatented mining claim, which confers property (or mining) rights under the General Mining Law of 1872 ("Mining Law"), and (2) securing approval of a plan of operations by the federal agency managing the claimed lands. Mining rights are statutorily conferred based on the unilateral acts of the miner—going onto public lands, exploring for minerals, and staking and recording a claim (*i.e.*, *locating* (or establishing) an unpatented mining claim)—no government approval is necessary. They give the miner exclusive possession and enjoyment to mine the land. An approved plan of operations authorizes the use of mining rights on public lands. By 1986, EFR had mining rights and a U.S. Forest Service ("USFS")-approved plan of operations at its Canyon Mine ("Mine") ("Plan"), and has been authorized to mine ever since.

An unpatented mining claim provides a miner with the right of present and exclusive possession to mine, but fee title remains with the United States. As long as it does, the Bureau of Land Management ("BLM"), as representative of the Interior Department, which has plenary authority to administer the Mining Law, may check at any time to see if the claim is valid. For a mining claim to be valid, it must be properly *located* and have a *discovery* of valuable minerals. A discovery is made when minerals are found that a prudent person likely could mine, mill, and market at a profit.

As detailed below, *established unpatented mining claims are presumed to be valid until proven invalid*. BLM is the only agency authorized to declare mining claims invalid.[1] To do so, BLM must initiate a claim contest (*i.e.*, a formal hearing challenging the claims). This typically begins with a mineral exam, which is an internal assessment to see if the claim was properly located, and a discovery was made. The mineral exam does not confer or terminate any rights, or validate, invalidate, approve, or disapprove anything—it represents the examiner's opinion as to the merits of the claim. Mineral exams inform future actions by BLM or USFS regarding the claim (*e.g.*, whether BLM will contest it), and may be evidence in a claim contest.

[1] USFS follows BLM's rules and guidance when it performs Mining Law-related tasks on land it administers.

In 2012, the Interior Secretary withdrew certain public lands, including the lands where the Mine is located, from *location and entry*[2] under the Mining Law ("Withdrawal"). The Withdrawal is subject to valid exiting rights, and operates prospectively only to prevent the *location and entry* (*i.e.*, establishment) of new mining claims in withdrawn areas. It does not prevent mining on existing claims, or require existing claims to be validated. Under 43 C.F.R. § 3809.100 and related guidance, BLM only requires a mineral exam before it will approve a new plan of operations or an amendment to an existing plan for claims on withdrawn lands. BLM does not require a mineral exam for existing claims on withdrawn lands with an approved plan of operations, unless an amendment is sought or is necessary. USFS guidance follows BLM's direction.

In the case of the Mine, the unpatented mining claims are not only presumed to be valid, they are in fact valid, because a *discovery* has been made on the claims. The Mine's valid mining claims, as well as the approved Plan, are "valid existing rights" and hence are not subject to the Withdrawal.

[2] Location and entry refers to the acts of going on public land to establish a claim's boundaries and recording the claim with BLM and the State. ER008; 43 C.F.R. §§ 3832.1, 3832.11; DOI, Solicitor's Op. M-37010, 2003 DEP SO LEXIS 10, at *8 n.4 (Oct. 7, 2003) ("2003 Op."); *see Mt. Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 750 n.3 (D.C. Cir. 2007).

Against this backdrop, after Interior proposed the Withdrawal, EFR informed USFS that it was resuming active mining at the Mine after being on standby status for some time. To determine if changes to EFR's Plan were necessary since the Mine last operated actively, USFS performed an internal review of the Mine and the Plan ("Mine Review"). Simultaneously, it performed a mineral exam, which would be required under Section 3809.100 and BLM and USFS guidance *if* the Mine Review concluded that a Plan amendment was necessary. EFR remained authorized to operate the Mine, and proceeded with various activities to prepare for the resumption of active mining. To accommodate USFS, EFR voluntarily agreed to defer shaft sinking until USFS performed its internal reviews.

In the Mine Review, USFS concluded that no Plan amendments were necessary, and mining could continue without further approvals. Because no amendments were necessary, the mineral exam, which concluded the claims were valid, proved unnecessary.

Appellants assert that, after the Withdrawal, EFR could not continue mining until USFS validated EFR's existing mining rights. From this, they contend that USFS's decision to conduct an internal review of the validity of EFR's claims in a mineral exam constituted a required approval for EFR to mine that triggered compliance with the National Environmental Policy Act ("NEPA") and the

National Historic Preservation Act ("NHPA"). As the District Court concluded, Appellants have not "point[ed] to any statute, regulation, guidance document, or case" to support this theory. ER046.

Appellants claims have no legal support, and are contrary to over 140 years of Mining Law jurisprudence and administration. Properly *located* mining claims are valid until proven otherwise in a claim contest, and may be mined until such time. The Withdrawal neither changes that rule, nor transforms mineral exams into required government approvals of mining rights—mining rights are unilaterally obtained without government approval. Because mineral exams are not approvals (they do not approve, disapprove, validate or invalidate mining rights), and the Withdrawal did not require USFS to validate EFR's claims before EFR could continue mining under its existing claims and approved Plan, Appellants' NEPA and NHPA claims fail.

Pursuant to this Court's Order (DktEntry 16) and FRAP 28(b), EFR coordinated briefing with USFS, and incorporates its statements of jurisdiction, the issues, the case, and facts, standard of review, summary of arguments, and arguments. EFR provides additional statement of facts regarding the legal and factual backdrop relevant to Appellants' claims. Copies of treatises, Interior Department Solicitor's opinions, and legislative history are provided in a separately bound addendum.

STATEMENT OF FACTS

I. Factual and Procedural Background

EFR's Mine is a breccia pipe uranium mine located in a natural clearing on unpatented mining claims on USFS-managed lands in the Kaibab National Forest in northern Arizona. ER295-98.[3] The mining claims were *located* in 1978 under the Mining Law, 30 U.S.C. § 22 *et seq*. ER242. Exploratory work from 1978 to 1985 *discovered*[4] a "major deposit" of uranium, which USFS determined would be very profitable. ER242, 250-51.

In 1986, after a NEPA review in an Environmental Impact Statement ("EIS"), USFS approved EFR's Plan for operating the Mine under its mining regulations. ER034, 375-89; 36 C.F.R. Part 228A. The Tribe challenged the Plan, asserting religious, cultural, and environmental claims. All of those claims were rejected, and that decision affirmed. *Havasupai Tribe v. United States*, 752 F.

[3] Unlike open pit mines, breccia pipe mines result in minimal surface disturbance. ER296. The Mine's surface footprint is 17 acres, and the shaft dimensions are 8' x 18' at the surface. ER297; SER0087.

[4] A *discovery* is made when "minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." *Chrisman v. Miller*, 197 U.S. 313, 322 (1905) (citations omitted). This "prudent person" test was refined by the "marketability test," which emphasizes profitability. *Lara v. Dep't of Interior*, 820 F.2d 1535, 1541 (9th Cir. 1987).

Supp. 1471 (D. Ariz. 1990), *aff'd* 943 F.2d 32 (9th Cir. 1991). The Plan remains valid and is not challenged here. ER004.

After *Havasupai*, EFR's predecessor constructed all of the Mine's surface facilities and sank the shaft fifty feet. ER002. In 1992, due to unfavorable market conditions, the Mine was placed on standby and operated under the Plan's interim management plan. ER002-03.[5]

In 2009, the Interior Secretary, under the Federal Land Policy and Management Act ("FLPMA"), proposed to withdraw public lands in northern Arizona managed by USFS and BLM from location and entry under the Mining Law. 74 Fed. Reg. 35,887 (July 21, 2009) ("Segregation"). Interior finalized the Withdrawal as proposed in January 2012. 77 Fed. Reg. 2563 (Jan. 18, 2012). The Withdrawal is "[s]ubject to valid existing rights." *Id*.

After the Segregation, but before the Withdrawal, EFR notified USFS that it was returning the Mine to active operations under the Plan. SER0875. USFS informed EFR that it intended to conduct the Mine Review, and conduct a mineral exam of EFR's claims. SER1142-43. USFS informed EFR that its Plan was valid and that EFR was authorized to operate the Mine, but requested that EFR voluntarily postpone shaft sinking (but not other operations) to provide USFS time

[5] Mines may be placed on, and taken off, standby as the operator sees fit; interim management plans govern operations during standby. 36 C.F.R. §§ 228.4(c), 228.10.

to perform its internal reviews. SER1143. EFR agreed. *Id*. On April 18, 2012, USFS issued the mineral exam results in a mineral report ("Mineral Report" or "VER Determination"), which concluded the claims were valid. ER228. On June 25, 2012, USFS issued the Mine Review and concluded that no modification to the Plan was necessary. ER179.

In Claims 1 and 2, Appellants argue that USFS violated NEPA and the NHPA by not performing an environmental review or historic preservation consultation, respectively, when it prepared the Mineral Report. In Claim 3, the Tribe asserts that USFS applied the wrong NHPA consultation requirement for previously approved and ongoing undertakings. In Claim 4, the Trust alleges that USFS violated FLPMA or the Mining Law by failing to consider certain costs when preparing the Mineral Report.

The District Court rejected Claims 1 and 2, finding that the Mineral Report did not trigger NEPA or NHPA review because, among other reasons, it was not a required approval. ER022-30. It rejected Claim 3, finding USFS's application of the NHPA consultation requirements was consistent with the plain terms of the governing regulation. ER30-41. For Claim 4, it found that the Trust did not state a cause of action because its interests were outside of the zone of interests of the Mining Law, and FLPMA had no relevant law to apply. ER016-20.

II. The Mining Law and Establishing Valid Mining Claims

The Mining Law is rooted in the California Gold Rush, where miners staked claims to minerals within public lands and extracted them without permission from the government.[6] Miners developed their own rules and customs governing the staking and development claims.[7] Facing pressure to sanction mining not legally authorized but deemed socially valuable, Congress enacted the Lode Law of 1866, which codified miners' "rules and customs of the mining districts and gave the congressional stamp of approval for self-initiated, protected mining rights on the public domain." AMERICAN LAW OF MINING, 2D ED. § 4.11 ("AM. MINING"); *see High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1184 (10th Cir. 2006). This law confirmed that public lands were open for mineral exploration and appropriation, and property rights obtained thereunder were cognizable and enforceable. LINDLEY ON MINES, 3D ED. § 54-56 (1914) ("LINDLEY"); Davis, note 6, at 898-99. In 1872, Congress enacted the Mining Law to clarify aspects of the 1866 act. AM. MINING § 4.11.

The Mining Law "is an exercise of Congress' power under the Property Clause of the Constitution to 'dispose of and make all needful Rules and

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[6] William E. Colby, *Mining Law in Recent Years*, 33 CAL. L. REV. 368, 370-71 (1945); Bancroft G. Davis, *Fifty Years of Mining Law*, 50 HARV. L. REV. 897, 897-98 (1937).

[7] Colby, note 6.

Regulations respecting the Territory or other Property belonging to the United States.'" 2003 Op. at *30 (quoting U.S. CONST. ART. IV, § 3); AM. MINING § 9.02. Property disposal laws, or "general laws,"[8] "secure public advantages by inducing individuals to engage in costly operations on public lands." 2003 Op. at *31-32; LINDLEY §§ 202-03. The Mining Law's inducement is acquisition of property rights in public lands and minerals if statutory requirements are met—namely *location* and *discovery* of valuable minerals. 2003 Op. at *32-33. The Mining Law is a property rights transfer statute, with the United States as the grantor and miners as grantees. *High County*, 454 F.3d at 1182-87; *Davis v. Nelson*, 329 F.2d 840, 843-46 (9th Cir. 1964); DOI, Solicitor's Op. M-36584, 66 I.D. 361, 363-64 (Oct. 20, 1959).

Property rights under the Mining Law are self-initiated and obtained: "If the land is open for location and the prospector is qualified, she may seek 'valuable minerals' and, if she finds them, may initiate a vested right without the approval of anyone else, *including representatives of the government that owns the land.*" AM. MINING § 4.11 (emphasis added), § 30.01 ("The fundamental basis of the mineral location system is the right of self-initiation."); *see McMaster v. United States*, 731 F.3d 881, 885 (9th Cir. 2013) (same); *Davis*, 329 F.2d at 845-46 (mining rights are

[8] The Mining Law was one of many general laws inducing the development of the west and the Nation's resource, the most well-known being the Homestead Law. 2003 Op. at *32-33; Colby, note 6, at 380.

obtained through unilateral acts); 2003 Op. at *32-33 (same); LINDLEY § 204 (same).

The Mining Law property disposal scheme follows the sequence of exploration, *location*, *discovery*, and *patent*.[9] AM. MINING § 30.01. The miner's own actions unilaterally establish property rights. *Id*. These rights arise at different times based on the acts of the miner. Prior to *discovery*, a miner obtains possessory rights when it has possession of a defined portion of public land and is exploring for valuable minerals (called *pedis possessio*). These rights can be used to exclude third parties. AM. MINING § 30.05; *see Davis*, 329 F.2d at 845. A *location* supplements *pedis possessio* by providing color of title to the mining rights of exclusive possession and enjoyment to mine and market the minerals, and establishes the boundaries of the claim. 30 U.S.C. § 26; *Wilbur v. United States*, 280 U.S. 306, 316-17 (1930); *Davis*, 329 F.2d at 845; *In re Wilson*, 35 IBLA 349, 352-54 (1978) ("[a] valid location gives a claimant established rights"); AM. MINING § 34.02. This property interest, attendant to a valid mining claim, is a valid existing right. DOI, Solicitor's Op. M-36910, 88 I.D. 909, 912 (Oct. 5, 1981)

[9] A valid unpatented mining claim is a claim that may be *patented*. ER711. The claim owner, however, does not have to seek a patent—the process by which fee ownership is transferred. *Wilbur*, 280 U.S. 316-17.

("1981 Op."). [10] A *discovery* combined with *location* perfects the claim and creates "vested property rights in [it]." AM. MINING §§ 30.05, 36.01; 1981 Op., 88 I.D. at 912; *see Davis*, 329 F.2d at 845; *Alaska v. Thorson*, 83 IBLA 237, 243 (1984).

The Supreme Court described Mining Law property rights as follows:

> when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States.

Wilbur, 280 U.S. at 316-17 (citations omitted); *O'Connell v. Pinnacle Gold Mines Co.*, 140 F. 854, 855 (9th Cir. 1905) (mining rights confer the "right to extract and convert to his own use all the ores and precious metals which may be found within the borders of his claim"). These rights are good against the United States and third parties. AM. MINING §§ 30.05, 36.01, 36.03; *see Davis*, 329 F.2d at 844-45.

The administration and enforcement of the Mining Law rests in the sound discretion of the Interior Department (generally delegated to BLM). *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336-37 (1963). Interior, has "plenary authority" under the Mining Law. *Id*. (following *Cameron v. United States*, 252 U.S. 450, 459-60 (1920)). Until claims are patented, BLM may evaluate whether

[10] Valid existing rights also arise when, for example, USFS issues a permit, to the extent rights are granted therein. 1981 Op., 88 I.D. at 912.

unpatented claims are valid, and if not, seek to clear title from an invalid claim. *Cameron*, *supra*; *Davis*, 329 F.2d at 846. To do so, however, BLM must initiate a claim contest; BLM "has no power to strike down any claim arbitrarily," and must provide notice and an opportunity to be heard before declaring a claim invalid. *Best*, 371 U.S. at 335-38 (1963); *see Seldovia Native Ass'n Inc. v. Lujan*, 904 F.2d 1335, 1345 (9th Cir. 1990) (quoting 1981 Op., 88 I.D. at 912) (valid existing rights are "'immune from denial or extinguishment by the exercise of [Interior] [S]ecretarial discretion.'").

Under the Mining Law's system of conferring statutory rights based on the unilateral actions of miners, and the requirement of notice and opportunity to be heard before a claim is invalidated under *Best* and *Seldovia*, a miner's unpatented claims and the rights attendant thereto must be recognized and honored until the claims are invalidated—*that is, unpatented claims are presumed valid until proven otherwise in a claim contest*. *E.g.*, *United States v. Martinek*, 166 IBLA 347, 352-53 (2005). USFS's policy and guidance confirms that principle: a "claim may lack the elements of validity and be invalid in fact, but it must be recognized as a claim until it has been finally declared invalid by [Interior] or Federal courts." ER712; *see Davis*, 329 F.2d at 845-47. Until a claim contest "renders a final determination of invalidity, it is well established that the claimant will be permitted

to engage in mining and processing operations." *In re Ctr. for Biological Diversity*, 162 IBLA 268, 281 (2004); SER1076 (BLM guidance; same).

III. EFR Established Valid Existing Rights in its Mining Claims and Plan

EFR's claims were *located* in 1978 and have been maintained ever since. ER234. Valuable minerals were *discovered* in a "major deposit" of uranium following exploratory drilling from 1978 to 1983. ER232, 242, 250-51.[11] From 1983 to 1985, EFR's predecessor "delineate[d] the uranium mineralization … to determine the placement of the mine shaft." ER242. Based on the Mineral Report, this deposit will produce a profit of nearly $30 million. ER250. Valid mining claims were established no later than 1985. USFS approved EFR's Plan in 1986. ER375-89. It was upheld against administrative and judicial challenges, remains valid today, and authorizes EFR to exercise its mining rights on USFS-managed public lands. *Havasupai*, *supra*; 36 C.F.R. §§ 228.4, 228.5; ER002, 184-85, 216. By 1986, the valid mining claims and the Plan constituted valid existing rights.

IV. How FLPMA Did and Did Not Change the Mining Law

FLPMA is BLM's organic act and guides its management of public lands. 43 U.S.C. §§ 1701(a)(1), 1712. FLPMA focuses on BLM's administration of public lands, range management, grazing, rights-of-way, and designated

[11] This work confirmed "approximately 84,207 tons of uranium ore grading at 0.97% U308. This equates to roughly 1,633,345 pounds of uranium oxide." ER231, 244.

management areas. 43 U.S.C. §§ 1731-85. With four exceptions, FLPMA does not alter the Mining Law or rights created thereunder. Section 302(b) states:

> [e]xcept as provided in section 314, section 603, and subsection (f) of section 601 of this Act and in the last sentence of this paragraph, *no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress*.

Id. § 1732(b) (emphasis added).

These exceptions do not address or amend the Mining Law's core provisions discussed above, including the ability to self-initiate and obtain mining rights and the right to mine a located unpatented claim until it is proven invalid through a claim contest. Instead: Section 314 addresses recordation requirements; Section 603 addresses BLM's study and management of wilderness areas and mining claims therein; Section 601(f) addresses mining claims in the California Desert Conservation Area; and the last sentence of Section 302(b) requires BLM to manage public lands to prevent unnecessary or undue degradation. *Id*. §§ 1732(b), 1744, 1781(f), 1782. These exceptions are not relevant here.

V. Withdrawals Subject to Valid Existing Rights

A withdrawal is the setting aside of "certain lands from operation of particular public land laws," for the purpose of maintaining the *status quo* or reserving the land for a specific purpose. AM. MINING § 14.01. Withdrawals almost always "protect and preserve all valid existing rights or claims upon the

public domain." *Id*. § 14.04. Under FLPMA § 701, all actions of the Interior Secretary, including withdrawals, are "subject to valid existing rights." 43 U.S.C. § 1701 note (h). Thus, the Withdrawal is "[s]ubject to valid existing rights." 77 Fed. Reg. at 2563.

The phrase "subject to valid existing rights" shields valid existing rights from the withdrawal, and subjects the withdrawal to their superior right. *McMaster*, 731 F.3d at 889-90; *Aleknagik Natives, Ltd. v. United States*, 806 F.2d 924, 926-27 (9th Cir. 1986); *In re Goergen*, 144 IBLA 293, 297 (1998) (withdrawals do not become effective on lands with valid mining claims until such claims are terminated); *Alaska*, 83 IBLA at 243, 250 ("subject to" means subordinate to; existing claims are not extinguished); *Wilson*, 35 IBLA at 352-54) (existing rights are to be deferred to); *cf. Stockley v. United States*, 260 U.S. 532, 538, 544 (1923) (same); *Seldovia*, 904 F.2d at 1343-44 (same); AM. MINING § 14.04 (A "valid existing rights provision is an acknowledgment that property rights established at the time of a withdrawal will be recognized and honored.").

As the District Court found, the Withdrawal operates prospectively. ER007-08. It did not extinguish existing claims, or prohibit mining thereon; it only prohibited new "location and entry."[12] As the District Court stated: "The Withdrawal removed the land from [the] open exploration and claims process and

[12] *See supra* note 2.

thereby foreclosed the establishment of new mining claims in the future." ER008 ("This means that existing mines like the Canyon Mine could continue to operate"); *Coates-Lahusen*, 69 IBLA 137, 142 (1982) (same).

VI. Mineral Reports

A mineral report documents the conclusions and recommendations of a BLM or USFS mineral examiner following a mineral exam (an investigation of whether a mining claim is valid under the Mining Law). ER744; SER0528, 0593, 0597-98. As BLM explained:

> A mineral report serves two functions. One is to give a professionally prepared and technically reviewed report on the merits of the mining claim. . . . Secondly, the mineral report can be a powerful tool when submitted into evidence at a contest hearing. . . . A well-prepared report will assure quality control over the mineral examination process, and will help to ensure that the Government has a sound prima facie case to stand upon before issuing a contest complaint.

SER0457; *see* ER744.

A mineral report prepared by USFS may support a recommendation to BLM to initiate a claim contest to invalidate a claim.[13] SER0457, 0593. It is an internal, investigatory document that reflects a mineral examiner's opinion on whether a discovery has been made under the prudent person/marketability test, *supra* note 8,

[13] Because BLM, through Interior, has plenary power to administer the Mining Law, no adjudicative power has been given to USFS. USFS performs Mining Law activities consistent with BLM rules and guidance; if it concludes, based on the mineral exam, that a claim contest is appropriate, it may refer the matter to BLM and provide the mineral report as evidence. ER064, 121, 742-44; SER0438.

which is used to inform later agency decision-making. It is not a formal determination and has no legal effect. ER007-11, 120-23; *see* ER742-44 (mineral reports are "statements of belief and not formal determinations" that are used as a "basis for a decision on whether or not to contest the claim.").

Mineral reports play an important role as evidence in a claim contest because BLM bears the burden of presenting a *prima facie* case that the claims are invalid. *Lara*, 820 F.2d at 1542. BLM must meet this burden to shift the burden to the claim holder to show that the claims are valid. *Id*.

ARGUMENT

VII. The Mineral Report Does Not Trigger NEPA or NHPA Compliance (Claims 1 and 2).

Due to the Withdrawal, Appellants contend that EFR could not resume active mining until USFS completed the Mineral Report to purportedly "validate" its Mine's claims, and therefore, that the Mineral Report constitutes "major Federal action" triggering NEPA review, and an "undertaking," triggering NHPA consultation. Hav.Br. at 14, 17-18; Tr.Br. at 24-33. As the District Court found, Appellants have not "point[ed] to any statute, regulation, guidance document, or case" to support these theories. ER046.

A. The Mineral Report Was Not a Necessary Approval.

Mineral reports are not, and do not purport to be, formal determinations of claim validity, or approvals. Rather, they are internal agency documents that (1)

set out an expert mineral examiner's belief about the validity of mining claims, and (2) make recommendations to BLM or USFS about actions to take based thereon. *Supra* Section VI. The reports may be used as evidence in a claim contest. *Id.* Accordingly, as the District Court found in four opinions below, mineral reports have no legal effect. ER007-11, 045-47, 067-68, 120-23, 742-44 (mineral reports are "statements of belief and not formal determinations"); *supra* Section VI.[14] Without legal effect, they cannot be a required approval. This is apparent on the face of the Mineral Report, which says nothing about being an approval, ER228-52, and simply was transmitted within USFS for the Forest Supervisor's review. ER227. Moreover, properly located claims are presumed valid and may be operated until proven invalid by BLM in a claim contest. *Supra* Section II. Appellants nevertheless contend that the Withdrawal required that USFS validate EFR's claims before it could resume mining. This key premise of Claims 1 and 2 has no basis in the law.

The Withdrawal does not mandate mineral reports for existing claims or prohibit mining on existing claims until a mineral exam is completed. ER010 (the Withdrawal "says nothing about when or how a review of [mining] rights must occur"). It states only that certain public lands are not available for *location and*

[14] ER123 (following *Wilderness Soc'y v. Robertson*, 824 F. Supp. 947, 953 (D. Mont. 1993) and concluding that mineral reports function only to help verify whether Congressionally-provided mining rights have come into existence).

entry under the Mining Law, and that such limitation is subject to valid existing rights. 77 Fed. Reg. at 2563. Such withdrawals operate prospectively; they only end the right to prospect and establish new mining claims. *Lara*, 820 F.2d at 1542; ER008; *Coates-Lahusen*, 69 IBLA at 142; *supra* Section V. They do not extinguish rights established prior to the date of withdrawal. *McMaster*, 731 F.3d at 889-90; *Seldovia*, 904 F.2d at 1343-44; *supra* Section V. Thus, the "Withdrawal did not extinguish mining rights that already existed. To the contrary, it was 'subject to valid existing rights.' This means the existing mines like the Canyon Mine could continue to operate." ER008; *Coates-Lahusen*, 69 IBLA at 142 (same). As stated by BLM in the Withdrawal's Record of Decision ("ROD"):

> The withdrawal will withdraw all lands from location and entry under the Mining Law, subject to valid existing rights, regardless of surface ownership. This means that no new mining claims can be established to develop the locatable minerals in those lands or interests in lands.

ER269; ER008 (the Withdrawal's EIS acknowledged that the Mine would continue to operate).

The Trust cites *Hjelvik v. Babbitt*, 198 F.3d 1072 (9th Cir. 1999) and *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994) for the proposition that because the Withdrawal changed the "legal status" of the public lands in question, the Mineral Report was a "required approval." Tr.Br. at 26. Neither of these cases support the Trust. In *Hjelvik*, the Court reviewed the Interior Board of Land Appeals' finding that mining claims were invalid based on BLM's successful claim contest. 198

F.3d at 1074-75. *Clouser* involved miners' appeal of a USFS decision to modify their proposed plans of operations to permit access to their claims by pack animals only, and not by vehicles. 42 F.3d at 1524, 1534. These cases reflect the general principle, not in dispute here, that *if a claim contest is brought* against a claim on withdrawn lands, the claim must have been valid on the date of the withdrawal, as well as the date of the contest hearing. *Id*.; 198 F.3d at 1074-75. Neither held that existing claims must be validated, or that a mineral report is required to validate existing claims after a withdrawal absent the initiation of a claim contest, as the District Court found, and the Trust admitted below. SER1211-14.

The Trust cites FLPMA § 701(h) to support its argument that the Withdrawal triggered a requirement that USFS validate the Mine's claims before mining could resume. Tr.Br. at 26, 30. Section 701(h) states: "All actions by the Secretary concerned under this Act shall be subject to valid existing rights." 43 U.S.C. § 1701 note (h). This means that when the Interior Secretary acts under FLPMA, including withdrawals, that action is subject to valid existing rights. ER008-10; 77 Fed. Reg. at 2563. This Court's and Interior's decisions establish that "subject to valid existing rights" is a savings clause from the operation of the withdrawal, not a requirement that existing mining claims on withdrawn lands be subjected to valid existing rights determinations (*i.e*., mineral exams). *McMaster*, 731 F.3d at 889-90; *Aleknagik*, 806 F.2d at 926-27; *Goergen*, 144 IBLA at 297;

Alaska, 83 IBLA at 243, 250; *Coates-Lahusen*, 69 IBLA at 142. This theory also fails because FLPMA Section 302(b) makes clear that, aside from four sections not relevant here, FLPMA does not "amend the Mining Law of 1872 or impair the rights of locators or claims under that Act." 43 U.S.C. § 1732(b).

The Trust claims that policies in USFS's Manual confirm a validity finding was required. Tr.Br. at 27. Such manuals are not binding on USFS, or anyone else. *McMaster*, 731 F.3d at 889-90. In any event, the Manual does not say mineral reports must be prepared to validate existing claims in withdrawn areas. It says USFS policy is to: "Ensure that valid existing rights have been established before *allowing* mineral or energy activities in congressionally designated or other withdrawn areas." ER254 (Manual 2803(5)) (emphasis added). USFS "allows" mineral activities through its approval of a new plan of operations, or amendments to an existing plan, under its mining regulations. 36 C.F.R. pt. 228A; ER716, 724-38.[15] The policy should therefore be read to mean that USFS will conduct a mineral exam (to investigate the validity of the claims) before approving a new plan of operations for existing mining claims located in withdrawn areas, or an amendment to an existing plan for such claims.[16] ER010-11.

[15] USFS does not "allow," approve, or otherwise regulate the creation of rights under the Mining Law (neither does BLM nor any government agency)—those rights are self-initiated and obtained. *Supra* Section II.

[16] The same reasoning applies to USFS policy at Manual 2818.3. ER011.

That reading is consistent with BLM's 43 C.F.R. § 3809.100, which only requires a mineral report before BLM approves a new plan, or amendment to existing plan, for claims on withdrawn lands. *Id*. It also is consistent with USFS's policy "'to be consistent with BLM's direction.'" ER009-010 (quoting ER330).

BLM guidance interpreting Section 3809.100 confirms that:

> approved Plans of Operations that were in place prior to the withdrawal . . . *are not subject to the mandatory valid existing rights determination procedures at 43 C.F.R. § 3809.100(a).* These operations may continue as accepted or approved and do not require a validity determination unless and until there is a material change in the activity.

SER1076 (emphasis added). This is confirmed further by the Withdrawal's ROD, which only anticipated mineral exams for mining claims seeking a new plan of operations. ER008-09 (discussing ER271-72). USFS approved the Mine's Plan before the Withdrawal and it remains valid, without the need for amendment; a mineral exam was not required as a result of the Withdrawal.

The Trust argues that the District Court erred in concluding that the validity of an existing claim is presumed, noting that BLM has sole authority to determine claim validity. Tr.Br. at 28-29. The Trust is incorrect. As discussed, under *Best* and *Seldovia*, miners' claims are presumed valid until invalidated in a claim contest, even facing a withdrawal. *Supra* Section II. As such, USFS's policy states: a "claim may lack the elements of validity and be invalid in fact, but it must be recognized as a claim until it has been finally declared invalid by [Interior] or

Federal courts." ER712. The presumption of validity exists because the statutorily provided property rights under the Mining Law are not granted by an agency through an exercise of discretion, but are self-initiated and obtained by the unilateral acts of the miner—no agency determination is needed. *E.g.*, *Davis*, 329 F.2d at 845-46; *supra* Section II. When a miner has taken the acts (*e.g.*, possession, location, discovery) that give rise, at a minimum, to a color of title to mining rights, even though no agency determination of validity exists, those rights are valid, and their attendant claim cannot be struck down arbitrarily or through the exercise of agency discretion—notice and an opportunity to be heard must be provided. *Best*, 371 U.S. at 335-38; *Swanson v. Babbitt*, 3 F.3d 1348, 1353 (9th Cir. 1993) ("mining claims are 'private property' which enjoy the full protection of the Fifth Amendment"). Even a questionable claim is presumed to represent a valid mining claim, and thus a valid existing right, until demonstrated otherwise. *Davis*, 329 F.2d at 845-47. Consistent with a presumption of validity, until a claim contest "renders a final determination of invalidity, it is well established that the claimant will be permitted to engage in mining and processing operations." *Ctr. for Biological Diversity*, 162 IBLA at 281; SER1076 (same). Nothing about a withdrawal changes these rules. As demonstrated by the cases the Trust cites, *if* there has been a withdrawal, *and if* BLM decides, based on a mineral report or other information, that the claims may be invalid, BLM may initiate a claim

contest to attempt to invalidate them. Tr.Br. at 28-29 (citing *Hjelvik*, *supra*). Until then, claims remain valid.

The Trust asserts that the District Court "erroneously conflated the existence of an approved plan of operations with the validity requirement under FLPMA and the Withdrawal," and argues that "there is no reason to distinguish between mines with approved plans and those without." Tr.Br. at 30. As discussed, neither FLPMA nor the Withdrawal contains a "validity requirement." In any event, the administration of the Mining Law rests in the sound discretion of BLM, through Interior, who has "plenary authority" in deciding how and when to do so. *Best*, 371 U.S. at 336-37; *Cameron*, 252 U.S. at 459-60; *United States v. Schurtz*, 102 U.S. 378, 395-96 (1880) (courts defer to BLM's decisions regarding how to administer the Mining Law). BLM was well within its authority when it promulgated Section 3809.100 to require a mineral exam for claims on withdrawn land only when a new plan, or an amendment to an existing plan, is sought.[17] The District Court was justified in following the plain meaning of BLM's and USFS's regulations and guidance.

Even if BLM or USFS were required to conduct a mineral exam for every claim on withdrawn lands, it would not transform the Mineral Report from an

[17] The Withdrawal is consistent with BLM's and USFS's differentiation between claims with approved plans and those without. ER271-72.

internal agency document into a mandatory approval. Consistent with Section VI above, even under Section 3809.100, the results of a mineral exam simply inform what course BLM will take:

> If that assessment is yes and the other requirements for valid claims are met, the plan of operations will be approved if all other requirements of the 3809 regulations are met. If the answer is no, then BLM will initiate a contest proceeding alleging that no discovery has been made. The contest proceeding affords the claimant full due process and opportunity to be heard and make his or her case.

65 Fed. Reg. 69,998, 70,026 (Nov. 21, 2000). This is confirmed by BLM's and USFS's guidance. SER1075; ER716, 743-744. At no point is a mineral report ever an approval. In all circumstances, it represents only an expert's opinion regarding whether Congressionally-provided rights have come into existence based on the unilateral acts of a miner. *Wilderness Soc'y* 824 F. Supp. at 953.

Based on the foregoing and as the District Court found, the Withdrawal, FLPMA, case law, or agency policies did not mandate that USFS perform a mineral exam or prepare the Mineral Report, or transform the Mineral Report into a required approval. ER007-11. USFS's performance of the Mineral Report represented USFS exercising its discretion to check the validity of a claim at any time. *Best, Cameron, supra*. USFS's mineral examiner stated it was performed to take a conservative approach in case USFS's Mine Review found that a modification to EFR's Plan was necessary. ER590-91.

B. The Mineral Report is Not Major Federal Action under NEPA (Claim 1).

The Trust's only argument that the Mineral Report is major Federal action is that it was purportedly a required approval. Tr.Br. at 25. As found by the District Court, and as discussed above, it is not an approval, and thus, not major Federal action. ER023-27; 40 C.F.R. § 1508.18(b)(4).

As the District Court also found, and not challenged by the Trust, actions that do not change the *status quo*, leave nature alone, or take place as part of the continuation of approved activities and do not change the impacts therefrom, do not trigger NEPA. ER023-24 (following *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 646 (9th Cir. 2014)); *see also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1114 (9th Cir. 2002). The Mineral Report changes nothing on the ground regarding potential impacts from the Mine as approved under the Plan. It only provides evidence that a Congressionally-conferred right came into existence. It does not trigger NEPA. *Wilderness Soc'y*, 824 F. Supp. at 953.

The District Court also found that the Mineral Report did not trigger NEPA because the Mine was operating under the approved Plan, for which a full NEPA review had been performed and was concluded. At most, the Mineral Report was akin to the ministerial tasks this Court held were not major Federal actions because they did not approve a new project, but merely implemented an existing one.

ER025 (following *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1095-96 (9th Cir. 2013)).

Mineral reports also do not trigger NEPA because they are nondiscretionary, ministerial acts. *Wilderness Soc'y*, 824 F. Supp. at 953; *South Dakota v. Andrus*, 462 F. Supp. 905, 906-07 (D.S.D. 1978); *In re Kosanke Sand Corp.*, 12 IBLA 282, 286-99 (1973); *see Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) (nondiscretionary or ministerial actions do not trigger NEPA).

When USFS conducts a mineral exam it is not approving or denying a privilege (such as a permit), but is assessing whether rights "conferred by Congress have come into existence." *Wilderness Soc'y*, 824 F. Supp. at 953; ER123 (same). The results of a mineral exam may inform the future actions of the agency, but the exam is based on the application of objective criteria (the prudent person/marketability test), and not the exercise of discretionary authority. A NEPA review would not inform or alter the results of the exam, and thus, would serve no purpose for the exam itself.[18]

Swanson confirms that mineral exams are nondiscretionary and ministerial. 3 F.3d at 1353. In the context of a patent application, the Court stated:

> "The locator of a mining claim … holds his claim by virtue of an Act of Congress. Upon compliance with the requirements of the mining

[18] A NEPA analysis, of course, would inform a USFS decision to approve a plan of operations, as happened when the Plan was approved.

> laws, he is entitled to a patent, and [BLM] has no discretion to deny an application for a mineral patent *where all the requirements of law have been met*."

Id. (quoting *South Dakota*, 462 F. Supp. at 906). The existence of a valid claim is a patent requirement, which a mineral exam assesses.[19] *Swanson* confirms that a mineral exam is a nondiscretionary, ministerial act. *See Kosanke Sand*, 12 IBLA at 287-96 (NEPA does not apply to mineral exams and patent issuances because the Secretary has no discretion to consider the information NEPA might yield; if the statutory test for a valid claim is met, it must be honored).[20] Because USFS has no discretion to alter the outcome of a mineral exam based on what NEPA compliance might yield, NEPA compliance is not required. *Sierra Club*, 65 F.3d at 1512.[21]

When USFS decides to investigate the validity of a mining claim using a mineral exam, it is performing an act of enforcement. 65 Fed. Reg. at 70,026. If the mineral examiner believes a claim is not valid, she may recommend that USFS request that BLM initiate a claim contest. Thus, a mineral exam, as an internal

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[19] *Supra* note 9. Mineral exams are performed the same way and for the same reason, regardless of the context. SER0593.

[20] USFS has discretion in gathering and evaluating facts within the confines of the statutory test, *Kosanke Sand*, 12 IBLA at 298-99, but that does not create discretion to change the criteria of the statutory test. *Nat'l Ass'n of Homebuilders v. EPA*, 551 U.S. 644, 668-73 (2007).

[21] Were USFS to infuse NEPA's considerations into the statutory test for claim validity, it would be adding new requirements for the establishment of mining claims to those Congress established in the Mining Law. USFS has no such authority. *Id*.

investigatory tool, is part of a potential enforcement action (*i.e.*, a claim contest). Enforcement actions are excluded from the definition of major Federal action. 40 C.F.R. § 1508.18(a).

C. Even if the Mineral Report is Major Federal Action, There are No Impacts from the Mine that USFS Has Not Considered.

Contrary to the Trust's assertions, even if the Mineral Report were major Federal action, the Mine will not cause impacts that USFS has not considered. Tr.Br. at 33-34.

In *Havasupai*, the court upheld USFS's consideration of potential impacts to groundwater and area water resources from the Mine. 752 F. Supp. at 1500-03, *aff'd*, 943 F.2d at 34. The Withdrawal EIS concluded that the Mine would have no impact on the water quantity or quality of *any* springs fed by perched aquifers, and would have negligible to immeasurable impacts, if any, on one spring fed by the Redwall-Mauv aquifer, and no effect on two others. SER0904-07. That is consistent with USFS's review of groundwater in the Mine Review, which concluded that there was only one minor water-bearing aquifer unit near the Mine, which was determined to be small, thin, and discontinuous, and would not impact the lower aquifer, and that groundwater near the Mine flows away from the Grand Canyon. SER1107-08. The District Court reached this same conclusion when denying the Trust's motion for injunction pending appeal. ER050; *see* ER211-12 ("very little has changed since the 1986 [EIS] … there is no new information or

changed circumstances related to groundwater that would indicate the original analysis is insufficient").

Regarding Red Butte and cultural resources, *Havasupai* confirms that USFS consulted with the Tribe and considered its religious and cultural concerns related to Red Butte and the surrounding areas. 752 F. Supp. at 1486-88, 1495-1500 (USFS "took every reasonable step" to address the Tribe's concerns). That is confirmed by the record, and a declarant from the Tribe (Mr. Rex Tilousi). *E.g.*, ER379, 383-88 (USFS considered the Tribe's concerns at Red Butte and the surrounding areas, and modified the Plan to mitigate impacts therefrom); ER130. The District Court reviewed this information and found little basis to conclude that any impacts the Tribe might experience from future shaft sinking would be any different from impacts that have already occurred and were analyzed. ER051.

Regarding the California condor, USFS found that the Arizona population of condor is a "'nonessential experimental population' … whose loss would not be likely to appreciably reduce the likelihood of survival of the species." ER205-06. It concluded that the nearest potential condor nesting site was six miles from the Mine, and the Mine area presented only potential foraging habitat. ER206. Because of this, USFS worked with Fish & Wildlife Service to generate recommendations to reduce potential impacts to the condor. USFS determined that

the Plan contains the requirements and flexibility to address and implement these recommendations. ER 207-08.

D. The Resumption of Mining and the Mineral Report Do Not Trigger NHPA § 106 Consultation (Claim 2).

The Tribe asserts that USFS was required to consult under NHPA Section 106 when it prepared the Mineral Report. ER099. Section 106 consultation is required for "undertakings." 36 C.F.R. § 800.1(a). An undertaking is a "project, activity, or program . . . requiring a Federal permit, license or approval." *Id*. § 800.16(y). To trigger consultation, the Tribe must identify both a project or activity and a related federal license or approval. *Id*.; *see Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 759-60 (D.C. Cir. 2003). As the District Court concluded, the Tribe failed to identify either. ER028-30.

1. The Mineral Report is not a license or approval.

Like the Trust's NEPA claim, the Tribe argues the Mineral Report is an approval. Hav.Br. at 17-18. The Tribe relies on the same USFS policy (Manual 2803(5)) as the Trust, and the Mineral Report and a press release reiterating that policy. Hav.Br. at 17 (citing ER177, 231, 254). Those arguments fail for the same reasons the Trust's do. ER007-11, 022-028.

The Tribe cites a letter from USFS to EFR stating that the mineral exam is a "'requirement' for lands withdrawn from mineral entry." *Id*. (quoting ER290). The letter cites 74 Fed. Reg. 35,887 (July 21, 2009), which is the Segregation

notice. The notice does not say anything about requiring mineral exams, mineral exams being approvals, or that mining cannot proceed without a mineral exam approval. To the contrary, it says the Segregation, like the Withdrawal, is subject to valid existing rights. 74 Fed. Reg. at 35,887. Nothing in the letter says those things either. It says only that USFS will inform EFR of the results of the mineral exam.[22]

Based on its terms, the letter contains a fatal factual mistake or a misstatement about what USFS actually meant. The second half of the sentence stating that a mineral exam is required says that the mineral exam "must be completed prior to approving the plan of operation." ER290. EFR's Plan was approved in 1986, and EFR was not seeking approval of a new plan of operations. ER004, 179, 375-89; SER0875. Thus, as written, the letter mistakenly addresses a situation in which a miner would be seeking a new plan of operations for existing

[22] Similarly, the Tribe cites statements made by a USFS tribal liaison in teleconference and meeting notes about the Mine. Hav.Br. at 18 (citing ER464, 466, 472). These documents contain nothing to indicate that the Mineral Report was a required approval for mining to continue. They say only that a mineral exam was being performed and that EFR's claims would need to show valid existing rights. ER464, 472. That is an accurate statement about mineral exams. *Supra* Section VI. The language the Tribe quotes from ER466 is out of context. In whole, it says that in response to a question about what would happen if EFR could not show valid existing rights, USFS responded that EFR would not be able to move forward. As a truncated version of the law, that could be a correct statement, assuming USFS would refer the matter to BLM to initiate a claim contest and BLM prosecuted it successfully. *Supra* Sections II and VI.

claims located in a segregated (and eventually withdrawn) area. That mistake caused USFS to reference the wrong policy, and suggest that a mineral exam was required. It is more likely, however, that USFS's letter misstated its intent, and was meant to read that a mineral exam "must be completed prior to approving an amendment to EFR's existing Plan, if one is necessary." As discussed, in the Mine Review, USFS was evaluating whether an amendment to the Plan was necessary. If USFS had concluded one was necessary, then, as USFS's mineral examiner explained, the mineral exam would have been necessary too. ER590-91. In either event (a mistake or misstatement), the letter does not have the legal effect of transforming the mineral exam into an approval.

The Tribe argues that because the District Court found that the Mineral Report could have a practical effect that could satisfy the second prong of the *Bennett v. Spear* test for final agency action, that was enough to make the Mineral Report an approval. Hav.Br. at 18 n.5 (citing *Dugong v. Rumsfeld*, 2005 WL 522106, at *13, 16 (N.D. Cal. Mar. 2, 2005)).[23] In *Dugong*, the court assessed

[23] The Tribe asserts that USFS "prohibited [EFR] from resuming mining until [the mineral exam] was complete." That is not true. USFS never ordered EFR to suspend mining operations or prohibit any activities by EFR at the Mine. The record is clear that after USFS decided to conduct the Mine Review and Mineral Report, it *requested* that EFR voluntarily wait to resume active mining operations (*i.e.*, shaft sinking) until USFS completed its two internal reviews. SER1142-43. EFR agreed, but it continued other operations. SER0875-76, 1167, 1022-26, 1028-34, 1065-69; *see* 36 C.F.R. § 228.3(a) (mining "operations" is "[a]ll functions,

what kinds of actions qualified as undertakings in the context of the Defense Department's multi-faceted, phased effort to relocate a Marine Air Station. It does not address whether an activity with a practical effect on a regulated party rises to the level of an approval under 36 C.F.R. § 800.16(y).

Moreover, the District Court's conclusion that the Mineral Report had a practical effect under *Bennett* was driven by statements by USFS personnel in meetings and telephone conversations with tribes and EFR's agreement to cooperate with USFS. ER011-12, 21, 065-67. The Court emphasized that EFR was not prohibited from mining or waiting for an approval to proceed, and that record "communications make clear that [EFR] *chose* not to proceed with renewed operations until the [Mineral Report] was finished." ER012 (emphasis added). Because the communications in the case showed that USFS, EFR, and interested parties understood EFR agreed it would not resume shaft sinking until the Mine Review and Mineral Report were completed, the District Court held that the report had a practical effect that met *Bennett*'s second prong. *Id*. That conclusion is a far cry from a determination that a practical requirement, based on a few statements from agency officials and an agreement from a regulated party to cooperate voluntarily with the agency, stood as a required approval. SER0875. The Tribe's

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work, and activities in connection with" mining, not just shaft sinking, "regardless of whether said operations take place on or off mining claims.").

attempt to conflate the District Court's findings as to the *Bennett* issue with its conclusions regarding whether the Mineral Report was an approval should be rejected, just as the District Court did. ER006-11, 028.[24]

2. The resumption of mining is not a new undertaking.

The Tribe claims that the resumption of active mining at the Mine is the undertaking necessary to trigger NHPA consultation. Hav.Br. at 13-17. But, as USFS concluded in its Mine Review—a conclusion not challenged in this litigation—it long-ago approved the undertaking of mining when it approved EFR's Plan, after conducting full Section 106 consultation. ER028-29 (summarizing the Mine Review at ER187-204). A USFS-approved plan of operations, unless it has an expiration date, is good for the entire operation of the mine, even if mining may start and stop based on market or other conditions. ER185 (discussing 36 C.F.R. § 228.4(d)). USFS regulations allow mines to start and suspend operations as needed. 36 C.F.R. § 228.10. EFR's Plan does not have an expiration date; it is good for the life of the Mine. ER184-85. In approving the undertaking of mining under the Plan in 1986, USFS also approved the temporary

[24] The Tribe's citation to *Pit River Tribe v. U.S. Forest Service* is misplaced. Hav.Br. at 18-19. As the District Court explained (ER026), there, if USFS did not renew leases of federal land for a geothermal plant, the developer would have no rights in the land at all. Without the lease renewal approvals, the project could not go forward. 469 F.3d 768, 784-87 (9th Cir. 2006). Here, the Withdrawal preserved EFR's valid existing rights, which authorize mining. Unlike in *Pit River*, EFR was not faced with the loss of its rights unless USFS provided a new approval. ER026.

suspension and resumption of active mining, consistent with its regulations. Therefore, EFR's resumption of active mining is not a new undertaking; it is part of the same undertaking approved in 1986 for which consultation was completed.

The Tribe claims that the relevant question is not whether there is a new undertaking, but "whether the agency has an opportunity to require changes to mitigate adverse impacts." Hav.Br. at 16 (citing *Apache Survival Coal. v. United States*, 21 F.3d 895, 911 (9th Cir. 1994); *Vieux Carre Prop. Owners v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991); *Morris Cnty. Tr. for Historic Pres. v. Pierce*, 714 F.2d 271, 280 (3d Cir. 1983); and *WATCH v. Harris*, 603 F.2d 310, 326 (2d Cir. 1979)). These cases do not stand for the proposition that an agency is required to conduct full consultation, identical to what would be required for a new undertaking, at a subsequent stage of an approved undertaking because USFS might have an opportunity to require additional mitigation of adverse impacts. *WATCH* and *Morris* addressed only the initial question of whether the NHPA contains an ongoing consultation requirement at all, and found it did.[25] *Vieux Carre* agreed, and cited the NHPA's § 106 regulations as setting out the process and procedures for compliance with the ongoing consultation requirement. *Apache*

[25] It is the *Morris* court's language in making these conclusions that the Tribe paraphrases to form what it deems the relevant inquiry. 714 F.2d at 280; Hav.Br. at 16. As the discussion in the text demonstrates, the Tribe stretches that language well beyond its intended meaning and context in its attempt to support Claim 2.

summarized the issue by concluding that the "regulations promulgated by the Advisory Council" set out when the "obligation to undertake additional section 106 process is triggered." 21 F.3d at 911 (citing the regulation's post-review discovery provisions in Section 800.11(b)(2), which were moved to the current Section 800.13(b)). These cases stand only for the proposition that the NHPA contains an ongoing consultation requirement, the triggering and extent of which is set out in Section 800.13. That is consistent with the fact that compliance with the NHPA regulations is "how Federal agencies meet [their] statutory responsibilities." 36 C.F.R. § 800.1(a). These cases support USFS; it looked to, and complied with, the NHPA § 106 regulations to meet any ongoing consultation requirements it had. ER187-91.

Moreover, issues related to USFS's ongoing consultation requirements are the subject of the Tribe's Claim 3, which alleges USFS failed to properly discharge those obligations based on the designation of Red Butte and its surrounding area as a traditional cultural property ("TCP") after USFS's original consultation process in the mid-1980s. ER099-100. That claim is discussed below. With respect to Claim 2, however, the Tribe's various attempts to couple the legal standard triggering ongoing consultation with the substantive requirements triggered by a new undertaking has no basis in law and should be rejected.

VIII. USFS Correctly Applied 36 C.F.R. § 800.13(b)(3) (Claim 3).

USFS looked to the 36 C.F.R. Part 800 regulations to determine what, if any, ongoing NHPA obligations it has regarding mining at the Mine. ER187-91; *see Apache*, 21 F.3d at 911. Section 800.13(b) applies when "historic properties are discovered … after the agency official has completed the section 106 process." Subsection (b)(3) applies if USFS "has approved the undertaking and construction has commenced." Subsection (b)(1) applies if the undertaking has not been approved, or construction on an approved undertaking has not commenced. 36 C.F.R. §§ 800.13 (b)(1), (3); ER030. Following its Mine Review, USFS concluded the designation of the Red Butte TCP could be considered a new discovery of a historic property. ER187-91.[26] Because USFS approved mining and completed Section 106 consultation when it approved the Plan, and construction commenced thereafter, USFS found that Subsection 800.13(b)(3) applied. *Id*.

The Tribe argues that USFS erred and should have applied Subsection 800.13(b)(1) for two reasons. Hav.Br. at 20-26. First, it claims that Subsection

[26] The Tribe argues that Section 800.13 should not have applied at all because "no new historic properties had been 'discovered'" and Red Butte's importance to tribes was known. Hav.Br. at 24. EFR agrees, but because USFS's NHPA compliance is dictated by the terms of the Part 800 regulations, the logical conclusion is that no additional consultation is required because if there is no new discovery of a historic property, the 800 regulations do not impose additional continuing obligations for an approved undertaking at which construction commenced.

800.13(b)(3) only applies if construction has commenced *and is ongoing*. *Id*. at 23-26. The District Court twice rejected this argument because Subsection 800.13(b)(3) "is not ambiguous." ER034; 125-27. It applies after the undertaking is approved and construction has commenced: "no further limitation is imposed." ER034. The record shows that USFS approved the undertaking of mining in 1986, construction commenced thereafter, and by 1992 all surface facilities were built and the shaft sunk fifty feet. ER002, 032-34, 158, 189, 232, 375-389. The "situation at the Canyon Mine thus fell squarely within the plain language of subparagraph (b)(3)." ER034.

The Tribe argues that despite subsection 800.13(b)(3)'s terms, USFS should have deferred to a letter from the Advisory Council on Historic Preservation ("ACHP") stating that Subsection 800.13(b)(3) should only apply when construction has commenced *and is ongoing*. Hav.Br. at 24-25 (citing ER164). As the District Court found (ER034-36, 127), deference to an agency's interpretation of its regulation is due only when the regulation is ambiguous. *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000). Neither the Tribe nor ACHP have identified any ambiguity in Subsection 800.13(b)(3), and there is none.[27] The

[27] Even assuming there was, the ACHP's letter is not a regulatory interpretation, but is "tactical advice"; it does not fill a regulatory gap, and only warns that not following the advice might produce an "unproductive conflict" between USFS and tribes regarding the Red Butte TCP. ER035 (quoting ER164).

District Court walked through the language of Subsections 800.13(b), (b)(1), and (b)(3) and explained how and when each applied after the discovery of a historic property:

> Subparagraphs (b)(1) and (b)(3) thus cover all possible scenarios for discoveries of historical properties after a § 106 process is completed. If the undertaking is not yet approved, (b)(1) applies. If the undertaking is approved but construction has not yet commenced, (b)(1) applies. If the undertaking is approved and construction has commenced, (b)(3) applies. The Court sees no ambiguity in these provisions. Every eventuality is addressed.

ER036. Without ambiguity, deference to ACHP is inappropriate.

Contrary to the Tribe's and ACHP's argument that construction must be ongoing—that is, cannot have started, then stopped, and be preparing to start again—the regulations do "not make work stoppage a factor in deciding which subparagraph," applies. ER036. "If an undertaking has been approved and construction has commenced, the criteria for (b)(3) are fully satisfied." *Id*.[28]

[28] The Tribe's claim that the history of Subsection 800.13(b)(3) demonstrates it only applies when construction has commenced and is ongoing is wrong. Hav.Br. at 26. Courts do not look to regulatory history when the regulation is not ambiguous. *United States v. Williams*, 659 F.3d 1223, 1225 (9th Cir. 2011). Further, the text of the prior regulations is consistent with current Subsection 800.13(b)(3), and confirms that ACHP always mandated that post-discovery review applies after construction commencement, without a requirement that it be ongoing. ER033; 51 Fed. Reg. 31,115, 31,123 (Sept. 2, 1986) (applies "after beginning to carry out the undertaking"); 44 Fed. Reg. 6068, 6077 (Jan. 30, 1979) (applies "after construction has started").

Without ambiguity, the Tribe's and ACHP's construction would illegally create a new regulation. *Christenson*, *supra*.

The Tribe argues that subsection 800.13(b)(3) is limited to emergency situations, and tries to characterize Subsection 800.13(b)(3) as an abbreviated process not on regulatory par with the "ordinary Section 106 regulations." Hav.Br. at 20-21. It cites no support for that contention, and there is none. The Part 800 regulations implement *all* of an agency's NHPA § 106 consultation requirements, 36 C.F.R. § 800.1(a), which include: the step-wise process of identifying historic properties affected by an undertaking; determining and resolving adverse effects; and continuing obligations after these processes have occurred, and an undertaking is approved and moves forward. *Id*. §§ 800.4-.6, .13. The structure of ACHP's regulations demonstrate that each section plays an equally important role in maximizing the ability to address and mitigate adverse impacts, depending on the factual and legal circumstances surrounding the undertaking. That § 800.13(b)(3) provides the agency "great authority and discretion [to] 'carry out appropriate actions,'" (Hav.Br. at 20 (quoting Subsection 800.13(b)(3))), to resolve adverse effects to a newly discovered historic property after an undertaking is approved and construction has commenced is a recognition that in such circumstances an agency's authority or ability to institute mitigation measures may be factually and legally limited. That is ACHP's unambiguous approach regarding how best to

implement the NHPA's preservation goals when undertakings mature and move beyond the regulatory approval stage.

The plain language of Subsection 800.13(b)(3) demonstrates that it is not limited to emergency situations; it applies to all post-review discoveries made after the undertaking is approved and construction has commenced. ER034 ("No further limitation is imposed."). The Tribe contends that USFS understood that Subsection 800.13(b)(3) applied to emergency situations, notwithstanding its plain terms, and therefore erred by applying it in a non-emergency context. That is inaccurate. As USFS found, the regulation's intent

> is to allow for reasonable consideration of effects to historic properties if they were not anticipated or if new historic properties are 'discovered' after the 106 process has been completed, but before the undertaking has been completed and there is still an opportunity to avoid or minimize effects from the undertaking.

ER190. While it is "in a sense an emergency measure to ensure historic properties are not inadvertently damaged during project implementation," its timelines illustrate its focus on impact to projects, and "avoid[ing] project delays." *Id*. Project protection is consistent with the regulation only requiring the agency to "carry out appropriate actions" under the circumstances, because after a project is approved and construction has commenced, the ability to make changes to it may be limited and/or prohibitively expensive. Applying the regulation here makes

sense, as all the Mine's surface facilities had been constructed and the shaft sinking was well underway. SER1142; ER296 (photo).

The Tribe argues that USFS's conduct, which it claims did not comply with Subsection 800.13(b)(3)'s procedures, shows that the regulation was not applicable. Hav.Br. at 26-27. As the District Court found, the Tribe is wrong. ER038-41. The Tribe complains that it took USFS ten months to determine if Subsection 800.13(b)(3) applied, and disregarded the provision's 48-hour notice period. Hav.Br. at 26-27. The record reflects that USFS evaluated its ongoing NHPA obligations, and when it determined Subsection 800.13(b)(3) applied, it sent notices to tribes that same day (within the regulation's 48-hour timeframe). ER038 (citing ER187-95). Nothing in Section 800.13 sets a timeframe for agencies to determine its applicability.

After sending the notice, the record reflects a robust consultation effort by USFS, which is part of a twenty-year, ongoing consultation program USFS developed with the tribes in northern Arizona. ER038-40 (citing ER198; SER0511, 0683-751, 0754-819, 0923-24, 0933, 0948-49, 0952, 0955, 0961-62, 1116-17 and *Havasupai*, 752 F. Supp. at 1476-77, 1495). Despite this, the Tribe criticizes USFS's extension of time to respond to the notices from two days to thirty days. Hav.Br. at 27 (citing ER176). USFS's explanation for the extension

was reasonable and consistent with the NHPA. ER176 (providing additional time to consult and address potential impacts).

The Tribe accuses USFS of not implementing mitigation actions, taking into account mitigation actions proposed by tribes, or carrying out appropriate actions. Hav.Br. at 27. Until this litigation was filed, USFS worked in consultation to develop an agreement to implement appropriate mitigation. ER039, 41. The Tribe abandoned this process when it filed suit. *Id*. Under the circumstances, USFS's actions were reasonable and consistent with the NHPA. ER41.

IX. The Trust is Not Within the Mining Law's Zone of Interest (Claim 4).

The District Court held that the Trust was not within the zone of interests protected by the Mining Law, and thus, did not state a cause of action to challenge USFS's preparation of the Mineral Report under Claim 4. ER016-20 (also holding that FLPMA provided no law to apply and was not relevant). EFR agrees and provides the following to assist USFS's arguments on this issue.

To state a cause of action, the Trust must show that it is "arguably within the zone of interests to be protected or regulated by the statute that [it] says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2210 (2012) (citations and quotations omitted); *Bennett v. Spear*, 520 U.S. 154, 176 (1997) (the inquiry is focused on the specific statute that forms the legal basis of the complaint); *Air Courier Conf. of Am. v. Am. Postal Workers*

Union, AFL-CIO, 498 U.S. 517, 529 (1991) (the "relevant statute" is the one that forms the "gravamen" of the complaint).[29] The Trust asserts that the Mineral Report failed to consider certain costs required by the prudent person/marketability test—the test for evaluating claim validity. ER016, 100-101. The statute that creates that test is 30 U.S.C. § 22. ER017. It states:

> all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, . . . according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

The "valuable mineral deposit" language gives rise to the prudent person/marketability test. *United States v. Coleman*, 390 U.S. 599, 601-02 (1968).[30] The purpose and "obvious intent [of this statute] was to reward and encourage the discovery of minerals that are valuable in an economic sense." *Id*. at 602; *McKinley v. Wheeler*, 130 U.S. 630, 632-33 (1889) (the "object of the [Mining Law] … was to promote the development of the mining resources of the

[29] In addition to the specific provision's language, courts look to its purpose, intent, and context within the larger statute. Nevertheless, the focus remains sharply on the specific statute alleged to be violated. *Compare Patchak*, 132 S.Ct. at 2211 (focusing on § 465 of the Indian Reorganization Act) *and Nat'l Credit Union Admin. v. First Nat'l Bank & Tr.*, 522 U.S. 479, 492-95 (1998) (focusing on § 109 of Federal Credit Union Act) *with Air Courier*, 498 U.S. at 920-21 (rejecting claim to look beyond the provision at issue to statutes only marginally related to the relevant provision).

[30] The Trust agrees 30 U.S.C. § 22 is the relevant statute. Tr.Br. at 49.

United States. It is so expressed in its title, and such development is sought to be promoted by indicating the manner in which claims to mines can be established, and their extent, and by offering a title to the original discoverer or locator who should develop the mine discovered and located"); LINDLEY §§ 68-69 (same).[31]

The language, purpose, and context of Section 22 demonstrate that the interests it protects and regulates are those of miners seeking to obtain property rights in public lands, and those of the United States, as titled owner, by providing a standard against which the Mining Law's bargain is upheld—that is, the provision of property rights in public lands without compensation in exchange for the public benefit of the development of the Nation's minerals. *High Country*, 454 F.3d at 1182-87 (detailing the Mining Law's focus on the passing of title of public lands to miners); 2003 Op. at *32-33; LINDLEY §§ 202-03; AM. MINING § 9.02. This is consistent with the fact that the Mining Law is a property rights transfer statute, and nothing more. *Supra* Section II. Thus, as the District Court concluded, the interests it protects and regulates are those of parties with an interest in the mining rights at issue, and the economic development of minerals. ER018; *see High Country*, 454 F.3d at 1185-86 (it is "beyond doubt" that the Mining Law was concerned with the disposition of property rights; its impetus has everything to do with mining companies). Neither Section 22 or 23, nor anything else in the Mining

[31] The term discovery stems from 30 U.S.C. § 23.

Law, provides any indication it protects or regulates environmental interests in any way, or that the transfer of property rights thereunder considers or is dependent on those interests.[32] Those interests are protected by other laws, such as NEPA. *Id*.

The Trust asserts that Section 22's requirement to discover valuable minerals protects public lands from "unfettered exploitation," thereby advancing its environmental interests. Tr.Br. at 49-50.[33] As discussed, this suggestion is not compelled by the language of Section 22, or its role within the Mining Law in light of the structure and purpose of that act. Indeed, the history of the act reveals that Section 22's requirement to discover valuable minerals was not of Congress's making, but was a centerpiece of the miners' system of self-regulation that Congress adopted into the Mining Law. LINDLEY § 335 (discovery was the

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[32] *High Country*, 454 F.3d at 1192 (holding that the Mining Law's focus on title and property rights precluded judicial review under the Administrative Procedure Act of claims challenging BLM patent decisions by third parties with no interest in the land at issue). Concluding that environmental interests are outside the Mining Law's zone of interests based on the act's language, history, and structure is consistent with *High Country*.

[33] This argument stems from the Trust's misreading of *National Credit*, which it claims supports the proposition that "a law that defines one group's rights places parties with interests adverse to those rights within the zone of interests of that law." Tr.Br. at 39. Initially, such a rule would be limitless and have no basis in any statutory language. Regardless, in *National Credit*, it was not the adversity of plaintiff-banks to the defined rights of defendant-credit unions under the statute at issue that placed the banks within the statute's zone of interests, but that both the banks and credit unions (as competitors) had interests in the same banking markets impacted by the statute. 522 U.S. at 492-94. The market impacted by the Mining Law is the use of public lands for mining, and as the District Court found, the Trust has no interest in mining, unlike competitor miners would. ER018-20.

recognized basis of mining rights and privileges, the "primary source of title to mining claims"); *supra* Section II. That further solidifies that in enacting Section 22 and the Mining Law, Congress had no intent to protect (or even consider) environmental interests. Thus, the Trust's argument that Congress could have opened up mining to all without the discovery requirement, but did not, falls flat and proves Defendants' point—Congress did not include the discovery requirement for environmental purposes or to prevent "unfettered exploitation," it used it to codify the miners' system of mining rights and title, and to ensure the *quid pro quo* of the inducement. AM. MINING §§ 4.10, 4.11. The Trust's interests are not arguably, let alone marginally, related to these interests. *Patchak*, 132 S.Ct. at 2211.

The Trust's cited cases (Tr.Br. at 50) do not compel a different conclusion. The discussion in *Cameron* shows that the court was focused on Interior's plenary power to administer the Mining Law, and the reference to derogation of the public's rights was in reference to the rights to obtain the benefit of valid claims (economic development of minerals), which does not flow from invalid claims. 252 U.S. at 460. At no point in this seminal Mining Act case is there any reference to the protection of public lands for environmental, conservation, or other interests, based on Section 22's discovery requirement. The citation to *Mineral Policy v. Norton*, is irrelevant, as that case involved a challenge to BLM's surface

management regulations. 292 F. Supp. 2d 30 (D.D.C. 2003). *Coleman* concerns Interior's addition of marketability to the prudent person test, and provides no suggestion that that test protects non-mining interests in public lands. 390 U.S. at 601-02.

The Trust claims its interests are protected because the prudent person/marketability test includes the costs of complying with environmental laws along with all other costs considered in a mineral exam. Tr.Br. at 49. The Trust is wrong. The purpose of the test is to determine one thing—whether the minerals are valuable based on whether a prudent person would be able to develop the claims at a profit. *Coleman, supra*. A prudent person would consider the cost of compliance with all laws, including environmental laws, just as she would consider all operational costs, such as the cost of fuel to transport ore to a mill, in determining whether she could mine at a profit. Doing so does not implicate or protect the interests of oil producers or truck drivers any more than it does the interests of the Trust. The inquiry is one of totaling projected development costs, totaling projected receipts in light of mineral resources and commodity prices, and comparing the two. ER244-50. BLM's twin handbooks regarding mineral exams, SER0516-65, 0566-682, make clear this economic evaluation only protects mining and property rights interests.

The Trust argues that the Multiple Use Act of 1955 ("Act") confirms that the Mining Law protects its interests because it limited a miner's right to exclusive possession of the surface of mining claims, and permitted multiple uses of surface resources. Tr.Br. at 51 (citing 30 U.S.C. § 612). The Act did nothing to amend or change the Mining Law's property disposal scheme, including the requirement to discover valuable minerals under Section 22. 30 U.S.C. §§ 601, 603, 611-15; *Converse v. Udall*, 399 F.2d 616, 617 (9th Cir. 1968) (the Act "did not intend to change the basic principles of the mining laws"). It changed only the scope of mining rights by limiting their *use* to mining activities, and by allowing the United States and its licensees access to those lands. 30 U.S.C. § 612(b). Congress continued to prefer mining rights, and limited other uses so as not to "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto."[34] *Id*. The Act provides no evidence that the Mining Law protects the Trust's interests. *See High Country*, 454 F.3d at 1190 (rejecting the idea that the Act, and other Mining Law amendments, impacted its core provisions and purpose). Indeed, it applies to all mining claims, regardless of validity. In light of its tangential nature to Section 22, consideration of the Act

[34] S. Rep. No. 84-554 at 2, 8 (1955) (the Act "safeguards all of the rights and interests of bona fide prospectors and mine operators" and "emphasizes the committee's insistence that this legislation not have the effect of modifying long-standing essential rights springing from location of a mining claim").

should be disregarded because to accept this "level of generality in defining the 'relevant statute' could deprive the zone of interests test of virtually all meaning." *Air Courier*, 498 U.S. at 529-30.

The Trust spends pages arguing that Claim 4 is a FLPMA claim. Tr.Br. at 40-48. As the District Court found, the Trust does not, and cannot, point to any provision within FLPMA that requires the discovery of valuable minerals or creates a prudent person/marketability test. ER007-11, 019. The full extent of FLPMA's relationship with mining and the Mining Law is set forth in FLPMA § 302(b). 43 U.S.C. § 1732(b). As discussed, the four sections identified in Section 302(b) do not address the validity of mining claims, and FLPMA disclaims amending the Mining Law or impairing the rights of miners under the Mining Law. *Id*.; *supra* Section IV.

The Trust's argument that FLPMA § 204 allows withdrawals is beside the point. 43 U.S.C. § 1714. Nothing in Section 204 addresses mining, let alone the discovery of valuable minerals requirement. The Trust's reliance on Section 701 also is misplaced. That statute applies to "[a]ll actions" by the Interior Secretary, and does not address mining. 43 U.S.C. § 1701 note (h). It requires that acts of the Secretary, not acts of miners or anyone else, are "subject to valid existing rights." *Id*. As discussed, that means that all the Secretary's acts give way, and are subordinate to, others' valid existing rights. *Supra* Section V. This includes the

Withdrawal. 77 Fed. Reg. at 2563. Nothing in FLPMA provides any standard against which USFS's Mineral Report could be measured.[35] ER019. For those same reasons, neither does the Withdrawal.[36] FLPMA is not the relevant statute for purposes of the Trust's zone of interests.

X. USFS Was Not Arbitrary and Capricious in Preparing the Mineral Report (Claim 4).

Assuming the Trust could challenge the Mineral Report, its claim has no merit.[37] The Trust argues that the Mineral Report is faulty because it asserts that USFS did not consider the costs of groundwater monitoring and wildlife conservation measures imposed by EFR's Plan. DktEntry 10-1 at 4-5. Not so. EFR, an experienced miner, submitted comprehensive cost estimates for the development and operation of the Mine in accordance with the Plan and all applicable laws. SER1120. Monitoring costs were included in mining site and general and administrative costs (budgeted at $9,298,136.94 (costs of operating

[35] Thus, the Trust's suggestion that FLPMA's test for validity is "based on the same test developed under the Mining Law" is absurd—FLPMA contains no such test. Tr.Br. at 43, 47.

[36] That the Withdrawal may have prompted USFS to exercise discretion to consider the validity of the Mine's claims also is beside the point. *Id*. at 47. The Withdrawal only ended location and entry under the Mining Law, prospectively. *Supra* Section V. It did not change the fact that it is the Mining Law that allows for the establishment of mining claims on public lands, and sets the conditions therefor.

[37] If the Court finds that the Mineral Report is not mandated by the Withdrawal, it need not address Claim 4 because the outcome will have no impact on any party.

under the Plan at $110.42/ton)), and conservation costs were covered as surface facility costs (budgeted at $508,000). A $1.7 million contingency also was included. *Id*. ER244-47; SER1186-87.[38] Consistent with BLM's mineral exam guidance (SER0653), USFS verified those costs, compared them to costs from EFR's similar, nearby mines,[39] and performed an economic evaluation of the costs to develop the Mine, as compared with the value of mineral resources based on commodity prices. ER244-50. It concluded that the Mine could be developed with a profit of $29,350,736, and thus, that the claims were valid. ER250.

Even if the Trust's asserted costs were not included, the 1986 EIS calculated those activities would cost $131,060. SER0144. At triple that amount ($393,180), overly accounting for inflation, those costs are well within the Mine's $1.7 million contingency, and not enough to off-set the Mine's projected profit of nearly $30 million. Even if USFS erred as the Trust asserts, it would be harmless error; it would not change the conclusion that the claims were valid. *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765 (9th Cir. 1986).

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[38] EFR provided SER1186-87 to explain where the costs at issue were included in the estimates it provided. This extra-record evidence is permitted because it explains a technical issue, and is provided by a person involved in preparing the document. *Friends of Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993).

[39] *Converse*, 399 F.2d at 620 (the agency can compare a mine to other similar mines when applying the prudent person/marketability test).

XI. An Injunction is Not Appropriate.

The Tribe seeks to enjoin mining until USFS complies with its NHPA obligations. Hav.Br. at 28-29. If the Court finds an NHPA violation, it should remand the merits and injunction issues to the District Court. *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 732 (9th Cir. 1995) (when injunctions "raise intensely factual issues," the matter should be decided by the district court). The District Court denied the Tribe's request for injunction pending appeal, weighing many factual issues, finding it failed to show the balance of the harms tipped in its favor. ER051. This Court also rejected the Tribe's injunction request. DktEntry 16. The Tribe's harm alleged here is no different than previously offered. The substantial harm EFR would sustain if mining were enjoined was recognized by the District Court, ER049; *see* SER1145-46, 1190-91, 1274-77, and such harm remains now. The facts, however, have changed: EFR is, and will continue, shaft sinking, and USFS reengaged in consultation with the Tribe. During the appeal, these and other facts will continue to develop. Any injunction should be based on an up-to-date understanding of the facts.

On the merits, enjoining mining is not appropriate. The Tribe only challenged USFS's issuance of the Mineral Report—an internal agency document. As discussed, EFR remains in possession of existing mining claims that are valid until proven otherwise, and its Plan is valid and unchallenged. It is authorized

fully to mine. This Court has considered the Tribe's alleged harms, *Havasupai*, 943 F.2d at 33-34; as the District Court found, current operations have no greater impacts than what was at issue in *Havasupai*, and such harms did not justify an injunction. ER051-52. There is no indication that the Tribe's exercise of its religion or access to sacred places has ever been compromised, and the Tribe has continued its practices at Red Butte. ER052, 220-23. USFS has consulted with the Tribe for over twenty years to address issues related to mining, among other things. ER038-41; 192, 197–204. These efforts minimize impacts in a complex land management regime that allows potentially-conflicting uses. As a matter of policy, Congress has given mining "a special place in our laws relating to public lands," such that operations usually "may not be prohibited." *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981). Courts cannot "override Congress' policy choice, articulated in a statute." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001). That policy favors allowing mining to proceed.

CONCLUSION

For the reasons above, and in USFS's response, the Court should affirm the District Court's decision granting summary judgment for Defendant-Appellees on all Claims.

RESPECTFULLY SUBMITTED this 17th day of December, 2015.

GALLAGHER & KENNEDY, P.A. &
HUNTON & WILLIAMS LLP

By: /s/*David J. DePippo*

Gallagher & Kennedy, P.A.

Michael K. Kennedy
Bradley J. Glass
2575 East Camelback Road
Phoenix, AZ 85016
(602) 530-8000
mkk@gknet.com
brad.glass@gknet.com

Hunton & Williams LLP
David J. DePippo
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-7304
ddepippo@hunton.com

Counsel for Defendant-Intervenor-Appellees

CERTIFICATES

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. of App. P. 32(a)(7)(C), I hereby certify that this brief contains 13,992 words in 14-point Times New Roman font according to Microsoft Word, and therefore, complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B).

STATEMENT OF RELATED CASES

This response brief is submitted in two related cases, both contained within the style set out on the caption on the cover. These cases are: 1) *Havasupai Tribe v. Williams*, No. 15-15754; and, 2) *Grand Canyon Trust v. Williams*, No. 15-15857.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 17, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *David J. DePippo*
Gallagher & Kennedy, P.A.
Michael K. Kennedy
Bradley J. Glass
2575 East Camelback Road
Phoenix, AZ 85016
(602) 530-8000
mkk@gknet.com
brad.glass@gknet.com

Hunton & Williams LLP
David J. DePippo
Riverfront Plaza, East Tower

951 East Byrd Street
Richmond, Virginia 23219
(804) 788-7304
ddepippo@hunton.com

Counsel for Defendant-Intervenor-Appellees

Nos. 15-754, 15-15857

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAVASUPAI TRIBE, GRAND CANYON TRUST, SIERRA CLUB, and CENTER FOR BIOLOGICAL DIVERSITY,
Plaintiff-Appellants,

v.

HEATHER PROVENCIO*, Forest Supervisor, Kaibab National Forest, *et al.*,
Defendant-Appellees,

ENERGY FUELS RESOURCES (USA) INC., *et al.*,
Defendant-Intervenor-Appellees,

Appeal from the United States District Court for the District of Arizona
No. 3:13-cv-08045-DGC

ADDENDUM TO RESPONSE BRIEF OF DEFENDANT-INTERVENOR-APPELLEES

HUNTON & WILLIAMS LLP
David J. DePippo (Ariz. Bar No. 028428)
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-7304
ddepippo@hunton.com

Counsel for Defendant-Intervenor-Appellees

GALLAGHER & KENNEDY, P.A.
Michael K. Kennedy (Ariz. Bar No. 004224)
Bradley J. Glass (Ariz. Bar No. 022463)
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000
mkk@gknet.com
brad.glass@gknet.com

Counsel for Defendant-Intervenor-Appellees

*Under FRAP 43(c), Heather Provencio is substituted for Bill Westbrook as Forest Supervisor.

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1-4 American Law of Mining, 2nd Edition § 4.10

Author

Updated by John C. Lacy

§ 4.10 The Mining Laws of 1866 and 1870

There was little direct federal interference with the Western miners between 1848 and 1866. Generally speaking, Western interests were inclined to continue with as little federal interference as possible, so that the rights which miners had assumed they had acquired would not be disturbed and free acquisition of such rights could be continued. On the other hand, Eastern interests thought that there should be some financial return to the government for the mining activities and that such return might be accomplished by, for example, sale of mineral lands.[1]

No definitive federal legislative action was taken until 1866 when the Senate passed a bill favoring a free mining policy.[2] It was eloquently argued that the miners should have the right to buy their claims, that their product greatly enhanced the nation's wealth and even that of the world, that most miners never made the big strike although a few did, and that the product of the mines should not be taxed as such for this would be like taxing the product of farms and would not be conducive to further development.[3] Efforts to incorporate a permanent royalty or tax on the production of the mines died and the resulting legislation in 1866 is based on the notion that the mineral wealth of the public lands should be available to those who seek and find it and that the public lands should be free and open for such exploration and development.[4]

In the debate preceding passage of the Act, it had been argued that it was essential to the nation to continue development of its mineral resources and that for this continued development four conditions must exist: transportation, a scientific knowledge of mining, abundance of capital, and security of title.[5]

The 1866 statute, which was adopted after full debate, went a long way toward satisfying the need for security of title. It stated the policy of having the public domain open for exploration for minerals by citizens and citizens declarant, subject to local law not in conflict with the federal law. It incorporated in part existing mining district rules. It validated previously made claims on veins, provided a patenting procedure for lode claims, and limited the length of lode claims to two hundred feet per locator with an additional such claim for the discoverer of the lode. It also contained a provision for extralateral rights under adjoining land, "which land adjoining shall be sold subject to this condition." Additionally, the statute provided for the recognition of water rights for "mining, agricultural, manufacturing, or other purposes," which had vested priority of possession under "local customs, laws, and the decisions of courts."[6]

It was a lode location law, ignoring placer claims, perhaps because by the time Congress got around to acting, placer claims had temporarily faded in importance. This omission of placer claims was rectified by an 1870

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[1] *See* Swenson, "Legal Aspects of Mineral Resources Exploitation," in P. Gates, *History of Public Land Law Development* 711-19 (1968).

[2] *Cong. Globe*, 39th Cong., 1st Sess. 3224-37 (1866).

[3] *Cong. Globe*, 39th Cong., 1st Sess. 3224-37 (1866).

[4] *Cong. Globe*, 39th Cong., 1st Sess. 3224-37 (1866).

[5] *Cong. Globe*, 39th Cong., 1st Sess. 3228 (1866).

[6] Lode Law of 1866, ch. 262, § 9, 14 Stat. 251, 253.

amendment which provided for the entry and patenting of "[c]laims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place, … under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."[6.1] The act provided that two or more persons could make joint claims and that association claims could not exceed 160 acres.[7]

[6.1] Act of July 9, 1870, ch. 235, 16 Stat. 217.

[7] Act of July 9, 1870, ch. 235, 16 Stat. 217.

1-4 American Law of Mining, 2nd Edition § 4.11

Author

Updated by John C. Lacy

§ 4.11 The Mining Law of 1872

[1] Statutory Provisions

The Lode Law of 1866[1] incorporated the basic rules and customs of the mining districts and gave the congressional stamp of approval for self-initiated, protected mining rights on the public domain, but the system was neither as complete nor as integrated as might have been desired. A rather complete rewriting resulted in the Mining Law of 1872.[2] Although there have been some substantial modifications, the 1872 law is today the basic starting point for the acquisition of hardrock minerals on public domain lands.

The Mining Law of 1872 provided for location of valuable mineral deposits, not merely minerals;[3] provided for a larger lode claim and an area of land, not simply the lode;[4] specifically reaffirmed the basic placer claim location provisions of 1870 and provided that no association placer claim could include more than 20 acres for each claimant;[5] provided for annual assessment work of $100 per claim per year, for lack of which the claim would be open to relocation by others;[6] provided for mill sites;[7] and provided for tunnel locations.[8] The Mining Law of 1872 continued the notion of extralateral rights for lode claims[9] and the validity of mining district rules not inconsistent with federal or state law.[10]

Additionally, the Mining Law of 1872 Act provided for forfeiting out co-owners who failed to contribute to annual assessment work,[11] for patenting of both lode and placer claims,[12] and for the situation in which a lode is found within a placer location.[13] The act carried forward the idea of self-initiated rights by the prospector. If the land is open for location and the prospector is qualified, he may seek “valuable minerals” and, if he finds them, may initiate a vested right without the approval of anyone else, including representatives of the government that owns the land.

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[1] Act of July 26, 1866, ch. 262, 14 Stat. 251 (codified at 30 U.S.C. §§ 43, 46, 51 (1976)).

[2] Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 22-47 (scattered sections) (1976)).

[3] Ch. 152, 17 Stat. 91, § 1 (codified as amended at 30 U.S.C. § 22 (1976)).

[4] Ch. 152, 17 Stat. 91, § 2, 30 U.S.C. § 23.

[5] Ch. 152, 17 Stat. 91, § 10, 30 U.S.C. § 35.

[6] Ch. 152, 17 Stat. 91, § 5, 30 U.S.C. § 28.

[7] Ch. 152, 17 Stat. 91, § 15, 30 U.S.C. § 42 (a mill site is, generally speaking, nonmineral ground used for mining or milling purposes).

[8] Ch. 152, 17 Stat. 91, § 4, 30 U.S.C. § 27 (a tunnel location is a means of priority for one exploring via a tunnel).

[9] Ch. 152, 17 Stat. 91, § 3, 30 U.S.C. § 26.

[10] Ch. 152, 17 Stat. 91, § 1, 30 U.S.C. § 22.

[11] Ch. 152, 17 Stat. 91, § 5, 30 U.S.C. § 28.

[12] Ch. 152, 17 Stat. 91, § 6, 30 U.S.C. § 29.

[13] Ch. 152, 17 Stat. 91, § 11, 30 U.S.C. § 37.

The final establishment of rights under the Mining Law of 1872 was the procedure to obtain patent (or fee title) from the United States. The law establishes a procedure for notice, proof of title, establishment of the existence of "valuable mineral," and, finally, payment of a nominal purchase price.[13.1] Under the Department of the Interior and Related Agencies Appropriations Act, 1995,[13.2] the Department of the Interior was prohibited, as of September 30, 1994, from processing patent applications, except for those applications that had been filed "with the Secretary on or before the date of the enactment of this Act."[13.3] This moratorium remains in effect. The absence of this patenting procedure has raised the question of what rights might be considered as "valid existing rights" when the mining law is amended. The Solicitor of the Interior published a memorandum on November 12, 1997,[13.4] wherein it was expressed that "the right to a mineral patent does not vest in the applicant until the Secretary of the Interior determines that the applicant has met all the terms and conditions of the patent, including verification that the applicant has discovered a valuable mineral claim." This question will likely be a focus of future litigation.

The Mining Law of 1872 has received a considerable fleshing out by court decisions, administrative decisions, and administrative rules and regulations, all of which are fully treated at appropriate places in this treatise.

[2] Application to Nonmetalliferous Deposits

The Mining Law of 1872 does not define valuable mineral deposits.[14] More detailed definitions have been developed by the courts and administrative agencies. Their treatment constitutes a substantial portion of this treatise. In addition to court and administrative development of the definition of valuable minerals, Congress has enacted a few specific statutes on this topic, one of which was the Building Stone Act of 1892,[15] enacted, according to one authority, because land department rulings on the issue of the locatability of building stone were not uniform.[16]

Petroleum also initially presented a problem. A General Land Office decision in 1896 that petroleum was not within the scope of the mining law was reversed the next year.[17] Almost simultaneously, congressional reaction to the initial decision prompted the enactment of the Oil Placer Act of 1897,[18] which specifically included such hydrocarbons as locatable minerals under the placer location laws. Presidential withdrawals of petroleum lands within a few years of these two decisions and the subsequent placing of oil and gas under the Mineral Lands Leasing Act of 1920 made this issue moot.[19]

[13.1] Ch. 152, 17 Stat. 91, § 6, 30 U.S.C. § 29; *see* Chapter 51, *infra*.

[13.2] Pub. L. No. 103-332, § 113, 108 Stat. 2499 (1994).

[13.3] Pub. L. No. 103-332, § 113, 108 Stat. 2499 (1994).

[13.4] Memorandum from John D. Leshy, Solicitor, Dep't of the Interior, to Director, Bureau of Land Mgmt. (Nov. 12, 1997), GFS(MIN) SO-2 (1997).

[14] Ch. 152, 17 Stat. 91, § 1, 30 U.S.C. § 22 (simply "valuable mineral deposits"); 30 U.S.C. § 23 ("gold, silver, cinnabar, lead, tin, copper, or other valuable deposits").

[15] Ch. 375, 27 Stat. 348, §§ 1, 3, 30 U.S.C. § 161.

[16] 1 *Lindley on Mines* § 210 (3d ed. 1914).

[17] Union Oil Co., 25 Pub. Lands Dec. 351 (1897).

[18] Ch. 216, 29 Stat. 526.

[19] Ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 181–226-3).

Another special mining statute was the Saline Placer Act of 1901,[20] in which salt springs and salt deposits were brought under the placer mining law, but with the limitation of only one location per person.[21]

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[20] 30 U.S.C. § 162.

[21] Other than this limitation in the Saline Placer Act, it would appear that there have been no legal limitations since the passage of the 1872 mining law on the number of locations, lode or placer, which a qualified locator can initiate.

1-9 American Law of Mining, 2nd Edition § 9.02

American Law of Mining, 2nd Edition **>** ***TITLE II Federal Lands and Minerals*** **>** ***CHAPTER 9 FEDERAL RESERVED MINERALS***

Author

Earl M. Hill
Updated by Stuart R. Butzier and Christina C. Sheehan

§ 9.02 Effects of Statutory Grants and Limitations Upon Patents

[1] Congressional Power and Public Lands—The Property Clause

The source of Congress's power to dispose of public lands is the *Property Clause*, which provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. …"[1] The authority the *Property Clause* grants to Congress has been held to be "without limitations"[2] but appears to be somewhat circumscribed by restrictions imposed by other provisions in the Constitution.[3] The authority is both proprietary and legislative,[4] and thus is greater than that of an "ordinary proprietor."[5]

Because Congress has full power under the *Property Clause* to dispose of public lands,[6] no person may appropriate such lands or acquire any rights therein except under such terms as Congress provides.[7] The power of Congress under the *Property Clause* includes the power to lease[8] as well as the power to protect public lands

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1 U.S. Const. art. IV, § 3, cl. 2.

2 Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987); United States v. San Francisco, 310 U.S. 16, 29 (1940); United States v. Gratiot, 39 U.S. 526, 537 (1840). *See* Kleppe v. New Mexico, 426 U.S. 529, 536 (1976); Downes v. Bidwell, 182 U.S. 244, 268 (1901) ("general and plenary").

3 *See* Dorr v. United States, 195 U.S. 138, 143 (1904) (congressional power to legislate for territories depends upon relationship of particular territory to the United States, e.g., whether the territory has been "incorporated into the United States as a body politic"); Pollard v. Hagan, 44 U.S. 212, 230 (1845) (Property Clause conferred no power upon Congress to grant title to submerged soil under navigable river within state's borders after the state, upon admission to Union, acquired such soil); United States v. San Francisco, 310 U.S. 16, 30 (1940) (Property Clause does not authorize "an exercise of a general control over public policy in a State").

The Property Clause does not necessarily exempt federally owned lands from state regulation; states are free to enforce their criminal and civil laws so long as those laws do not conflict with federal law, thereby invoking the Supremacy Clause, U.S. Const. art. VI, cl. 2. *See* Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987). *But see* S.D. Mining Ass'n v. Lawrence Cnty., 155 F.3d 1005, 1011 (8th Cir. 1998) (local ordinance having effect of de facto ban on mining on federal lands within the county preempted by federal law).

4 United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915); Kleppe v. New Mexico, 426 U.S. 529, 540 (1976).

5 Kleppe v. New Mexico, 426 U.S. 529, 540 (1976) (power to control occupancy and use of lands, protect them from trespass and injury, prescribe conditions under which others may acquire rights therein; extent to which Congress might go in exercising Property Clause power to be measured by exigencies of particular case).

6 *See* United States v. Maxwell Land-Grant Co., 121 U.S. 325, 382 (1887); Van Brocklin v. Tennessee, 117 U.S. 151, 168 (1886).

7 United States v. Fitzgerald, 40 U.S. 407, 421 (1841); Kissell v. Bd. of President & Dirs. of St. Louis Public Schools, 59 U.S. 19, 25 (1856). *See* Utah Power & Light Co. v. United States, 243 U.S. 389, 403–04 (1917).

8 United States v. Gratiot, 39 U.S. 526, 538–39 (1840). *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936).

from trespass and injury,[9] even to the extent of proscribing conduct on private lands that imperils the uses for which the public lands are held.[10]

By express constitutional grant, the disposition of minerals in lands owned by the United States is the responsibility of Congress.[11] Congress may delegate regulation and management of public lands to the executive.[12] In the Federal Land Policy and Management Act of 1976 (FLPMA), Congress delegated to the Secretary of the Interior authority to correct patent documents "where necessary in order to eliminate errors."[13] This authority applies only to errors of fact, not errors of law.[14] Purported grants[15] or reservations[16] not authorized by statute are inoperative. Agencies' powers are limited to those delegated to them by statute.

[2] Grant in Excess of Statutory Authority

The government lacks authority to issue a patent omitting a reservation required by statute.[17] Statutes requiring reservation to the United States of specific minerals,[18] or all minerals,[19] in patents conveying public lands out of federal ownership have expressed such reservations with varying degrees of particularity.[20] In general, these statutes have required that patents contain reservations of specific minerals, or all minerals,[21] or that any conveyances shall be subject to a mineral reservation that must appear in the patent.[22] This statutory emphasis

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[9] Kleppe v. New Mexico, 426 U.S. 529, 540 (1976); Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917).

[10] United States v. Alford, 274 U.S. 264, 267 (1927); Minnesota v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981). *See* Camfield v. United States, 167 U.S. 518, 525 (1897); Jennifer Pruett Loehr, "Expansive Reading of Property Clause Upheld," 23 *Nat. Res. J.* 197 (1983). *But cf.* Burlison v. United States, 2006 U.S. Dist. LEXIS 62820 (W.D. Tenn. Aug. 31, 2006) (while private fences may be regulated to protect adjoining public lands, government may not limit access to private property without specific congressional authorization), *aff'd in part, rev'd in part*, 533 F.3d 419 (6th Cir. 2008).

[11] Mountain States Legal Found. v. Andrus, 499 F. Supp. 383, 394 (D. Wyo. 1980); Honchok v. Hardin, 326 F. Supp. 988, 992 (D. Md. 1971). *See* Butte City Water Co. v. Baker, 196 U.S. 119 (1905); United States v. Gratiot, 39 U.S. 526, 538 (1840).

[12] Mountain States Tel. & Tel. Co. v. United States, 499 F.2d 611, 613 (Ct. Cl. 1974); Sierra Club v. Hickel, 433 F.2d 24, 28 (9th Cir. 1970), *aff'd sub nom.* Sierra Club v. Morton, 405 U.S. 727, 748 (1972); Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1234 (10th Cir. 2011) (the Organic Act of 1897 delegates management of national forests to the U.S. Forest Service); Chisum v. U.S. Dep't of the Interior, 2007 U.S. Dist. LEXIS 84036, at *5 (D. Ariz. Oct. 31, 2007) (BLM has been appropriately delegated Congress's plenary power to regulate mines and mining on the public lands).

[13] 43 U.S.C. § 1746.

[14] Foust v. Lujan, 942 F.2d 712, 715 (10th Cir. 1991); Wood v. United States, No. 2:04-cv-00897, 2006 U.S. Dist. LEXIS 74706, at *9–10 (E.D. Cal. Sept. 29, 2006); 43 C.F.R. § 1865.0-5(b).

[15] *See generally* § 9.02[2], *infra*. Absent an express or implied delegation of congressional power under the Property Clause, subordinate officers of the United States have no power to release or otherwise dispose of federal property. Royal Indem. Co. v. United States, 313 U.S. 289, 294 (1941).

[16] *See generally* § 9.02[3], *infra*.

[17] Swendig v. Wash. Water Power Co., 265 U.S. 322, 332 (1924); Morton v. Nebraska, 88 U.S. 660, 674–75 (1874); Proctor v. Painter, 15 F.2d 974 (9th Cir. 1926).

[18] *See generally* § 9.03[2], *infra*.

[19] *See generally* § 9.03[3], *infra*.

[20] *See generally* § 9.03, *infra*.

[21] *See, e.g.*, Coal Lands Act of 1909, ch. 270, 35 Stat. 844, 30 U.S.C. § 81; Agricultural Entry Act of 1914, ch. 142, § 2, 38 Stat. 509, 30 U.S.C. § 122; Act of Mar. 3, 1925, ch. 462, 43 Stat. 1145, 43 U.S.C. § 299. Initially, the statutes required reservation only of specific minerals for which the land had been classified as valuable. *See generally* § 9.03[2], *infra*. Later acts expanded the scope of the reservation to encompass "all minerals" or some variant thereof. *See generally* § 9.03[3], *infra*.

[22] *See, e.g.*, Stock-Raising ***Homestead*** Act of 1916 (SRHA), ch. 9, § 9, 39 Stat. 862, 43 U.S.C. § 299.

on including reservations in patents might suggest that the severance of minerals depends on the presence of the reservation in the patent, and that in the absence of such a reservation the patent conveys the minerals. On the contrary, when a statute requires a reservation of minerals, the government lacks power under that statute to convey any mineral rights, and therefore a patentee acquires no mineral rights even though the patent does not contain the mineral reservation.[23]

[3] Inclusion in Patent of Reservation Not Authorized by Statute

Generally, a reservation not authorized by statute, but which appears in a patent, is void.[24] It is presumed that a patent issued by the United States was regularly and lawfully issued.[25] Because the government's agents are under a duty to ascertain that all conditions precedent have been met before issuing any patent,[26] it is presumed that all such conditions have been met.

[4] Required Mineral Reservation Not Reflected in Local Records

A search of local land records[27] may not disclose a mineral reservation affecting a tract of land either because the patent as recorded erroneously does not contain the reservation or because the patent containing the reservation

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[23] Swendig v. Wash. Water Power Co., 265 U.S. 322, 332 (1924) (reservation for power line right-of-way read into patent despite failure of patent to state that patentee's title was subject to the right-of-way); Proctor v. Painter, 15 F.2d 974 (9th Cir. 1926) (although patent omitted reservation of coal as required by act pursuant to which patent was issued, patentee did not acquire title to the coal). *See* Argo Oil Corp. v. Lathrop, 72 N.W.2d 431 (S.D. 1955) (mineral reservation prescribed by state statute deemed to be part of deed). *See generally* Loren L. Mall, *Public Land and Mining Law* 378 (3d ed. 1981).

[24] Shaw v. Kellogg, 170 U.S. 312, 342–43, 18 S. Ct. 632, 42 L. Ed. 1050 (1898). *See* Burke v. S. Pac. R.R. Co., 234 U.S. 669, 688–89, 34 S. Ct. 907, 58 L. Ed. 1527 (1914) (railroad grant patent for land conclusively deemed nonmineral; therefore, in absence of fraud, patent conveys minerals not known to exist at time of issuance); Thomas v. Union Pac. R.R. Co., 139 F. Supp. 588, 593–95 (D. Colo. 1956), *aff'd*, ***239 F.2d 641 (10th Cir. 1956)*** (mineral reservations were read out of railroad grant patent, which, absent fraud, was immune to attack by those claiming lands were known to be mineral in character at time of issuance); Knight v. The Devonshire Co., 736 P.2d 1223 (Colo. App. 1986) (vendor's title not unmarketable due to purported reservation of "mineral rights" in federal patent of lands to railroad (citing *Burke*, 234 U.S. at 688–89)). A patent issued pursuant to the ***Homestead*** Act of May 20, 1862, ch. 75, 12 Stat. 392 (1862), *as amended* (repealed 1976), provides for no reservation of minerals to the United States and thus cannot be construed to reserve any minerals. No lands encompassed by such patents are available for location under the mining laws. Merrill G. Memmott, 100 IBLA 44, 46 (1987), GFS(MIN) 14(1988); Lee E. Williamson, 48 IBLA 329, 332, GFS(MIN) 164(1980).

[25] St. Louis Smelting & Refining Co. v. Kemp, 104 U.S. 636, 646, 26 L. Ed. 875 (1881). *See* Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transp. Co., 196 U.S. 337, 348 (1904).

[26] Peabody Gold Mining Co. v. Gold Hill Mining Co., 111 F. 817, 819 (9th Cir. 1901). In *United States v. Price*, 111 F.2d 206 (10th Cir. 1940), the patent as issued contained no mineral reservation and conveyed land that had been open to entry under either the SRHA, which required a reservation of minerals, or the Enlarged ***Homestead*** Act of 1909 (EHA), ch. 160, 35 Stat. 639 (repealed 1976), which did not. In seeking a judicial declaration that the patent did not convey any right to minerals, the United States did not contend that the patent should be modified or cancelled or that a trust should be impressed upon the mineral rights. Noting that the patent was regular on its face, the court refused to examine proceedings underlying issuance of the patent and held that the patentee owned the mineral rights. Inferences to be drawn from *Price* include: (1) had the patent recited that it was issued under the SRHA while omitting the mineral reservation, the court would have read the statutory reservation into the patent; and (2) had the action been one to cancel or modify the patent, the court might have reviewed the administrative proceeding underlying its issuance. In *Conrad Luft*, 63 Interior Dec. 46 (1956), the patent contained a reservation of all minerals, but the patentee's successor argued that the patent had been issued under the EHA, not the SRHA, and sought a supplemental patent without a mineral reservation. Noting that the patent was entirely regular on its face and that the reservation was not unauthorized, but at most erroneous, the Department of the Interior held that only a review of proceedings underlying the issuance of the patent would disclose any defect, and refused to issue the supplemental patent.

[27] The local land records are usually found in county offices—typically the office of the county recorder, the county clerk and recorder, or some similar office. Tract indexes, if available, are a convenient starting point. In the public land states, reference to the land records in the state office of the Bureau of Land Management usually provides a lead to the statute pursuant to which

has not been recorded.[28] The former situation is discussed above,[29] where it is shown that the omitted reservation is read into the patent as a matter of law. In the latter situation, the mineral reservation, as well as the patent of which it is a part, is read into the chain of title, because the patent can convey no more and no less than was authorized by the statute pursuant to which it was issued.[30]

Accordingly, a careful title examiner will not rely upon the absence of a mineral reservation from a federal patent in the local land records to conclude that no reservation of minerals by the United States exists. When inception of private title is a federal patent, recourse to the underlying statute is essential to determining the rights conveyed, excepted, or reserved.[31]

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the land was patented and its required reservations, if any. *See* Thomas J. Nance, "Title Examination of Fee Lands Including Severed Mineral Interests," *Mineral Title Examination* 3-1 (Rocky Mt. Min. L. Fdn. 1977). *See generally Nuts & Bolts of Mineral Title Examination* (Rocky Mt. Min. L. Fdn. 2015).

[28] Certified copies of patents may be obtained online from the Bureau of Land Management at http://www.glorecords.blm.gov.

[29] *See generally* § 9.02[2], *supra*.

[30] *See* Swendig v. Wash. Water Power Co., 265 U.S. 322, 332 (1924); Proctor v. Painter, 15 F.2d 974, 975 (9th Cir. 1926). *See generally* § 9.02[2]–[3], *supra*.

[31] *See* Richard H. Bate, "Mineral Exceptions and Reservations in Federal Public Land Patents," 17 *Rocky Mt. Min. L. Inst.* 325, 358–62 (1972).

1-14 American Law of Mining, 2nd Edition § 14.01

Author

John L. Watson and Kevin M. O'Brien, Updated by Patrick G. Mitchell and G. Braiden Chadwick

§ 14.01 Scope of Chapter

This chapter focuses on the nature and effect of withdrawals of public lands—the segregation of certain lands from operation of particular public land laws, generally for the purpose of maintaining the status quo—and the establishment of reservations—the dedication of public land for a specific predetermined purpose.[1] The first area to be examined is the promulgation of withdrawals and reservations. In this section, the sources of authority—constitutional, statutory, and nonstatutory—and the procedures for making withdrawals and reservations will be reviewed, as will the impact of the Federal Land Policy and Management Act of 1976[2] in these areas.[3] The focus of the chapter will then shift to the effect of withdrawals and reservations on the availability of public domain for mineral development and the impact of such actions on existing mineral rights.[4] Procedures for revoking withdrawals and reservations are then discussed.[5] The chapter concludes with discussions of specific withdrawals and reservations.[6]

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[1] This definition of the distinction between withdrawals and reservations is based on that set forth in George C. Coggins et al., *Federal Public Land and Resources Law* 416 (6th ed. 2007) (emphasis added):

> In federal land law history, a "withdrawal" is a generic term referring to a statute, an executive order, or an administrative order that *changes the designation of a described parcel of federal land from "available" to "unavailable" for certain kinds of activities*, usually involving resource extraction or use. It is a protective measure used to preserve the status quo and prevent specified future uses in specified land. A withdrawal can be made by Congress or the Executive, and it can be temporary or permanent. A "reservation" means a *dedication of withdrawn land to a specified purpose*, more or less permanently.

The terms "reservation" and "withdrawal" appear to have been used interchangeably in the Pickett Act, ch. 421, § 1 (repealed 1976), 36 Stat. 847 (1910). Similarly, the Supreme Court, in *United States v. Midwest Oil Co., 236 U.S. 459 (1915)*, did not draw a clear distinction between the terms. The Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at *43 U.S.C. §§ 1701–1782* and in scattered sections of Title 43 and various other titles) does not define "reservation." The Act's definition of "withdrawal," however, may be said to be broad enough to include reservations. *43 U.S.C. § 1702(j)*.

[2] Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at *43 U.S.C. §§ 1701–1782* and in scattered sections of Title 43 and various other titles).

[3] *See § 14.02, infra.*

[4] *See §§ 14.03, 14.04, infra.*

[5] *See § 14.05, infra.*

[6] *See § 14.06, infra.*

1-14 American Law of Mining, 2nd Edition § 14.04

Author

John L. Watson and Kevin M. O'Brien, Updated by Patrick G. Mitchell and G. Braiden Chadwick

§ 14.04 Effect of Withdrawals and Reservations on Existing Mining Locations and Mineral Leases

[1] Effect on Existing Mining Locations

[a] Valid Existing Rights Protected

Withdrawals and reservations, whether they have been accomplished by statute, executive order, or public land order, invariably purport to protect and preserve all valid existing rights or claims upon the public domain under the public land laws of the United States. For example, all national park acts contain a provision substantially as follows:

> [N]othing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States, whether for homestead, mineral right of way, or any other purposes whatsoever, or shall affect the right of any such claimant, locator, or entryman to the full use and enjoyment of his land.[1]

The statute authorizing the President to establish national monuments protects tracts "covered by a bona fide unperfected claim or held in private ownership."[2] Generally any lands withdrawn under a public land order are also "subject to valid existing rights."[3]

The valid existing rights provision is an acknowledgment that property rights established at the time of a withdrawal will be recognized and honored.[4] A valid existing right may be less than a legal right. It includes the equitable, possessory right of the owner of a validly located unpatented mining claim, even though the government holds legal title to the claim in trust for the locator.[5] A mining claim established under the Mining Law of 1872 is a vested property right,[6] and has been held to be real property "in the fullest sense."[7] Those who follow in an unbroken chain of title to a valid existing claim on withdrawn lands will succeed to those rights.

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[1] *See, e.g.*, ch. 437, § 3, 45 Stat. 1435, 1436, 16 U.S.C. § 21d (elec. 2011) (amendment to Yellowstone National Park Establishment Act).

[2] Ch. 3060, § 2, 34 Stat. 225, 16 U.S.C. § 431 (elec. 2011).

[3] *See, e.g.*, Pub. Land Order No. 5,250, 37 Fed. Reg. 18,730 (1972); Pub. Land Order No. 5,179, ***37 Fed. Reg. 5579 (1972)***.

[4] Harry H. Wilson, 35 IBLA 349, 352, GFS(MIN) 64 (1978).

[5] Cameron v. United States, 252 U.S. 450, 40 S. Ct. 410, 64 L. Ed. 659 (1920); Lutzenhiser v. Udall, 432 F.2d 328 (9th Cir. 1970).

[6] Union Oil Co. v. Smith, 249 U.S. 337, 39 S. Ct. 308, 63 L. Ed. 635 (1919); Shell Oil Co. v. Andrus, 591 F.2d 597, 603 (10th Cir. 1979), aff'd, 446 U.S. 657, 100 S. Ct. 1932, 64 L. Ed. 2d 593 (1980); United States v. Etcheverry, 230 F.2d 193 (10th Cir. 1956).

[7] Cole v. Ralph, 252 U.S. 286, 295, 40 S. Ct. 321, 64 L. Ed. 567 (1920). *See* California Portland Cement Corp., 83 IBLA 11, GFS(MIN) 128 (1984), wherein the IBLA considered the application of § 601(f) of FLPMA, 43 U.S.C. § 1781(f) (elec. 2011), which requires that patents issued on mining claims within the California Desert Conservation Area contain a stipulation subjecting the patented land to protective regulations of the Secretary of the Interior. The BLM had rejected the request of California Portland to remove the stipulation language in the patent issued for three gypsum placer claims. The claims had been originally located in 1968 and substantially all of the requirements for the patent had been completed prior to the passage of FLPMA. The IBLA reversed the BLM rejection, holding that § 601(f) must be applied only to mineral locations "which had not been perfected prior to the passage of FLPMA." The inclusion of the stipulation in the California Portland patent was held to be improper. *See also* Chapter 36, *infra.*

However, if the prior claim has been void and closed, or the chain of title is otherwise broken, a new claimant will not have any rights under the prior valid claim.[8]

[b] Establishing Validity of Existing Mining Locations

When land is closed to location under the mining laws subsequent to the location of a mining claim, the claim will not be recognized as valid unless all the requirements under the mining laws, including discovery of a valuable mineral deposit, are met at the time of the withdrawal and at the time of the adjudication of the claimant's rights.[9] The validity of the claim will be tested by determining the value of the mineral deposit at the time of withdrawal, as well as on the date of the hearing.[10] Although there may have been a proper discovery at the time of withdrawal, or at some other time in the past, a mining claim cannot be considered valid unless the claim is supported by sufficient discovery at the time the validity of the claim is adjudicated.[11] A loss of the discovery, whether through exhaustion of minerals, changes in economic or market conditions, or other circumstances, results in the loss of the location.[12]

Similarly, if the requisite discovery is made upon a mining claim subsequent to withdrawal of the land from mineral location, such discovery cannot validate the claim or serve to except the land from the withdrawal.[13] A claim cannot become valid after withdrawal by any additional exploratory work or through an increase in mineral value due to a change in the market.[14] A request by a mining claimant to drill on mining claims after the land has been withdrawn from mining is properly denied when the work would constitute an attempt to make a valid discovery rather than to confirm or corroborate a discovery made prior to the withdrawal.[15] To permit further exploration toward discovery after the land has been withdrawn would negate the withdrawal order.[16] On the other hand, if a mining claimant can show that sufficient mineralization existed on a claim prior to withdrawal so that further testing is necessary only to confirm and corroborate the extent of a preexisting discovery, the claim cannot be declared null and void without the government allowing further testing by the claimant.[17]

By withdrawing the land from mineral entry, the government has prohibited the initiation of new claims and has prevented the curing of substantive defects in claims located prior to the withdrawal.[18] However, withdrawal of land subject to a prior valid mining claim may not preclude the filing of an amended location of the claim upon the same land. An amended location of a claim is a subsequent location intended to further the rights acquired

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[8] *See, e.g.*, ***Richard L. Goergen, 144 IBLA 293***, GFS(MIN) 77 (1998), ***J&J Building Supply, 145 IBLA 196***, GFS(MIN) 93 (1998).

[9] Udall v. Snyder, 405 F.2d 1179, 1180 (10th Cir. 1968); United States v. Chappel, 72 IBLA 88, GFS(MIN) 97 (1983); United States v. Jones, 72 IBLA 52, GFS(MIN) 93 (1983); United States v. Kuretich, 54 IBLA 124, GFS(MIN) 119 (1981); United States v. Wood, 51 IBLA 301 (1980), GFS(MIN) 20 (1981). *See* Chapter 35, *infra,* for comprehensive discussion of discovery under the mining law.

[10] United States v. Jones, 72 IBLA 52, GFS(MIN) 93 (1983); ***United States v. Rouse, 56 IBLA 36***, GFS(MIN) 190 (1981).

[11] United States v. Chappel, 72 IBLA 88, 93, GFS(MIN) 97 (1983).

[12] United States v. Wood, 51 IBLA 301, 312 (1980), GFS(MIN) 20 (1981).

[13] Cameron v. United States, 252 U.S. 450, 40 S. Ct. 410, 64 L. Ed. 659 (1920); Udall v. Snyder, 405 F.2d 1179, 1180 (10th Cir. 1968); Doria Mining & Engineering Corp. v. Morton, 420 F. Supp. 837, 839 (C.D. Cal. 1976), vacated on other grounds, 608 F.2d 1255 (9th Cir. 1979); United States v. Kuretich, 54 IBLA 124, 126–27, GFS(MIN) 119 (1981).

[14] United States v. Jones, 72 IBLA 52, 56, GFS(MIN) 93 (1983).

[15] 72 IBLA 52, 56–57.

[16] United States v. Chappel, 72 IBLA 88, 94, GFS(MIN) 97 (1983).

[17] United States v. Jones, 72 IBLA 52, 56.

[18] Coates-Lahusen, 69 IBLA 137, 142 (1982), GFS(MIN) 19 (1983).

by the locator while making some change in the location, such as changing the name of the claim, its record owners, or excluding excess acreage.[19] In contrast to a relocation, which is adverse to the original location, an amended location relates back to the date of the filing of the original notice of location.[20] Therefore, the filer of an amended location may preserve the rights associated with the original location, including its superiority in right to subsequent withdrawals, to the extent that the amended location furthers rights acquired by a prior subsisting location and does not include any new land.[21] A 1996 IBLA decision required an additional burden on the claimant to establish that the amended claim had not been invalidated.[22] Further, if preexisting claims are abandoned, claims amending the formerly grandfathered claims are ineffective and void *ab initio*.[23]

The relocation, or "top-filing" over, of a claim located prior to a withdrawal does not create an exception to the withdrawal of land from mineral location by relating back to the original location.[24] Withdrawals "subject to valid existing rights" provide exceptions to the withdrawal only on behalf of those claimants, or their successors in interest, who themselves held valid rights at the time of withdrawal. An adverse top-filing claimant who enters the withdrawn land after the effective withdrawal date cannot base his claim on a prior, valid claim held by another party in interest.[25]

[c] Locations of Leasable and Common Variety Minerals

The Mineral Lands Leasing Act of 1920[26] effectively withdraws lands known to be valuable for coal, phosphate, sodium, potassium, sulfur, oil, gas, and oil shale from location, entry, and patent under the general mining laws. The Act contains its own savings clause,[27] which has been interpreted to mean that so long as the locator of a claim made prior to the passage of the Act meets the requirements of the Mining Law of 1872, he may proceed to patent his claim under the terms of that statute.[28]

Similarly, the Common Varieties Act of 1955[29] is, in effect, a withdrawal of common varieties of sand, stone, gravel, pumice, pumicite, cinders, and petrified wood, and of lands known to be valuable therefor, from location,

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[19] Rhinehart Berg, 71 IBLA 131, GFS(MIN) 71 (1983); ***R. Gail Tibbetts, 43 IBLA 210***, GFS(MIN) 92 (1979).

[20] Rhinehart Berg, 71 IBLA 131, GFS(MIN) 71 (1983); ***R. Gail Tibbetts, 43 IBLA 210***, GFS(MIN) 92 (1979). See Chapter 38, *infra,* for comprehensive discussion of relocation and amendment of unpatented mining claims and the confusion that still surrounds use of these terms.

[21] United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 441, 449 (9th Cir. 1971); Grace P. Crocker, 73 IBLA 78, GFS(MIN) 124 (1983); Rhinehart Berg, 71 IBLA 131, 133, GFS(MIN) 71 (1983); ***R. Gail Tibbetts, 43 IBLA 210, 219***, GFS(MIN) 92 (1979). *See also* William H. Nordeen, 129 IBLA 369, 371, GFS(MIN) 36(1994); Patsy A. Brings, 119 IBLA 319, GFS(MIN) 42(1991). To show that a location of a mining claim made after a withdrawal is an amendment of a location made before the withdrawal, the claimant must show that: (1) the earlier location included the portion of the claim subject to the withdrawal, (2) the claimant has an unbroken chain of title with the original locator, and (3) the location predating the withdrawal was properly made. Jack T. Kelly, 113 IBLA 280, 283, GFS(MIN) 18 (1990).

[22] Steven A. Beld, 136 IBLA 142, 145, GFS(MIN) 59 (1996).

[23] Cotter Corp., 127 IBLA 18, GFS(MIN) 26 (1993).

[24] ***R. Gail Tibbetts, 43 IBLA 210, 215–19***, GFS(MIN) 92 (1979).

[25] Harry H. Wilson, 35 IBLA 349, GFS(MIN) 64 (1978).

[26] Ch. 85, 41 Stat. 437 (codified as amended in scattered sections of 30 U.S.C. §§ 181–263).

[27] 30 U.S.C. § 181.

[28] Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306 (1930), *disapproved on other grounds by* Hickel v. Oil Shale Corp., 400 U.S. 48 (1970). *See also* Ickes v. Virginia-Colorado Dev. Corp., 295 U.S. 639 (1935), *disapproved on other grounds by* Hickel v. Oil Shale Corp., 400 U.S. 48 (1970).

[29] Ch. 375, § 3, 69 Stat. 368 (§ 3 of the Multiple Surface Use Act of 1955), 30 U.S.C. § 611.

entry, and patent under the general mining laws. Again, the Act contains a savings clause for valid claims located prior to the effective date of the Act.[30]

[2] Effect on Existing Mineral Leases

Mineral leases fall within the protection afforded "valid existing rights" in typical withdrawals and reservations.[31] Hence the holder of a federal mineral lease will retain rights in the leasehold if the land is subsequently withdrawn or reserved.[32] Such leasehold rights, however, may be subject to the federal government's right to attach stipulations or conditions to the lease, and thus to limit mineral development activities.[33]

Attempts to "withdraw" land subject to an existing lease may lead to substantial contract damages against the United States. In *Mobil Oil Exploration and Producing Southeast v. United States*,[33.1] the plaintiff oil companies held lease contracts giving them the right to explore for and develop oil off of the North Carolina coast. These rights were conditioned on the companies obtaining a series of subsequent governmental approvals.[33.2] While the companies were in the midst of obtaining the approvals, the Outer Banks Protection Act (OBPA) went into effect, and thereby prevented the Department of the Interior from granting discretionary approvals for drilling activity in the area covered by the leases.[33.3] The U.S. Supreme Court held that through passage of the OBPA the United States had effectively repudiated the contracts, and awarded the plaintiffs over $150 million in restitutionary damages.[33.4] Although not a "withdrawal" in the general sense, scholars have suggested that a refusal to grant a discretionary lease is tantamount to a withdrawal.[33.5]

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[30] Ch. 375, § 3, 69 Stat. 368 (§ 3 of the Multiple Surface Use Act of 1955), 30 U.S.C. § 611. The effective date of the Act is July 23, 1955.

[31] *See* Cameron v. United States, 252 U.S. 450 (1920); Lutzenhiser v. Udall, 432 F.2d 328 (9th Cir. 1970).

[32] *See* Solicitor Op., *The Bureau of Land Management Wilderness Review and Valid Existing Rights,* 88 Interior Dec. 909, 911-13 (1981), GFS(MIN) SO-3 (1982).

[33] Solicitor Op., *The Bureau of Land Management Wilderness Review and Valid Existing Rights,* 88 Interior Dec. 909, 911-13 (1981), GFS(MIN) SO-3 (1982). *See also* Sierra Club v. Peterson, 12 Envtl. L. Rep. 20,454 (D.D.C. 1982), *rev'd on other grounds*, 717 F.2d 1409 (D.C. Cir. 1983).

[33.1] Mobil Oil Exploration and Producing Se. v. United States, 530 U.S. 604, 607–08 (2000).

[33.2] Mobil Oil Exploration and Producing Se. v. United States, 530 U.S. 604, 609–10 (2000).

[33.3] Mobil Oil Exploration and Producing Se. v. United States, 530 U.S. 604, 613 (2000).

[33.4] Mobil Oil Exploration and Producing Se. v. United States, 530 U.S. 604, 624 (2000).

[33.5] *See generally* George C. Coggins et al., *Federal Public Land and Resources Law* 434–35 (6th ed. 2007).

1-30 American Law of Mining, 2nd Edition § 30.01

Author

Updated by Robert D. Comer

§ 30.01 Basis of the Location-Patent System

The essential tenets of the present system of federal mining law were first developed and applied by the early miners who worked on the uncharted public domain starting in the late 1840s. The local customs they established and the mining district rules they adopted were incorporated into the Lode Law of 1866[1] and the Placer Act of 1870.[2] Soon after these two Acts, the first federal mining laws with general applicability were repealed in part by the enactment of the Mining Law of 1872.[3] The 1872 law, along with the surviving portions of the 1866 and 1870 acts, as interpreted by thousands of judicial and administrative opinions, modified by more than a dozen federal statutes, and supplemented by state law and administrative regulations, form the location-patent system of today.

The location-patent system created by the early mining laws is the foundation for the establishment of private mining rights to locatable minerals[4] on federal lands.[5] The major alternatives are the leasing systems under the Mineral Leasing Act,[6] the Mineral Leasing Act for Acquired Lands,[7] and other leasing acts by which certain nonmetallic minerals were removed from location and made subject to leasing by the federal government or were subsequently made available to leasing by statute.[8] Other programs include the sales system by which nonmetallic minerals of widespread occurrence may be sold under authority of the Materials Act of 1947[9] and the Common Varieties Act.[10]

The fundamental basis of the mineral location system is the right of self-initiation. Unless mineral entry has been restricted,[11] subject to federal surface management regulations,[12] a mineral prospector may enter the public domain at will (subject to access restrictions), search for minerals, and establish ownership rights in available deposits of locatable minerals he finds. In essence, the location system provides that the first mineral claimant who finds a valuable mineral deposit on vacant, unappropriated, unreserved, and non-withdrawn public domain, and who locates a mining claim and diligently pursues the find, is protected against rivals, is entitled to produce all the

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1 Act of July 26, 1866, ch. 262, ***14 Stat. 251*** (remaining provisions codified at 30 U.S.C. §§ 43, 46, 51; 43 U.S.C. § 661).

2 Act of July 9, 1870, ch. 235, 16 Stat. 217 (remaining provisions codified at 30 U.S.C. §§ 35, 36, 38, 47, 52; 43 U.S.C. §§ 661, 766).

3 Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified at 30 U.S.C. §§ 22–24, 26–28, 29–30, 33–35, 37, 39–42, 47).

4 *See* Chapter 8, *supra*.

5 *See* Chapter 6, *supra*.

6 30 U.S.C. §§ 181–263 (covering such diverse minerals as coal, oil, gas, potash, and phosphate, among others). *See* Chapter 20, *supra*.

7 30 U.S.C. §§ 351–360. *See* Chapter 20, *supra*.

8 *See* Act of June 30, 1950, 64 Stat. 311 (codified at 16 U.S.C. § 508b) (making hardrock minerals subject to leasing laws in Minnesota national forests).

9 30 U.S.C. §§ 601–604. *See generally* Chapter 21, *supra*.

10 30 U.S.C. § 611.

11 *See* § 36.01[1], *infra*. *See generally* Chapter 14, *supra*.

12 *See generally* Chapter 173, *supra*.

minerals from the deposit without being required to purchase fee simple title from the United States, and, in certain circumstances may be able to obtain fee simple title by means of a patent issued by the United States government. The many refinements of this core of the mining laws constitute the location-patent system and the subject matter of the chapters that follow.

American Law of Mining, 2nd Edition

1-30 American Law of Mining, 2nd Edition § 30.05

American Law of Mining, 2nd Edition **>** ***TITLE IV Mining Claims*** **>** ***CHAPTER 30 INTRODUCTION TO FEDERAL MINING LAW***

Author

Updated by Robert D. Comer

§ 30.05 Location Under the Mining Law of 1872

[1] Locators

The Mining Law of 1872 extends the rights of exploration and purchase of public domain lands containing valuable mineral deposits to those who are citizens of the United States or who have declared their intent to become citizens.[1] The same requirement of citizenship applies to those who locate mining claims as well as to those who purchase or inherit them, or who apply to the United States for a conveyance of the land by patent.[2] Citizenship extends to individuals, whether minors or not, and for purposes of the federal mining laws, citizenship is recognized in corporations, unincorporated associations, and governmental bodies.[3]

Aliens may not locate mining claims on the public domain or seek a patent unless they have declared their intent to become citizens.[4] Nevertheless, only the United States can question the citizenship of a locator, mining claim owner, or patent applicant, and conveyance of a claim by an alien to a citizen vests the latter with valid title.[5]

[2] Prediscovery Rights—*Pedis Possessio*

Exploration is necessary for the discovery of minerals and requires occupation of the land. Accordingly, courts have, by judicially created doctrine, adopted the early custom of miners and protected the possessory rights of miners who are in actual occupation of a particular portion of the public domain and diligently searching for a mineral deposit.[6] These possessory rights prior to discovery are referred to as *pedis possessio* rights. Under the doctrine of *pedis possessio*, no rights can be acquired by a forcible, fraudulent, or clandestine intrusion upon the possession of a diligent explorer.[7] If, however, another explorer enters the land peaceably, either with consent or by acquiescence, and makes both a discovery and a location of a claim, the *pedis possessio* rights of the prior explorer are lost.

In order to obtain *pedis possessio*, a prospector must establish actual and physical occupation of a portion of the public domain that is open to mineral entry and location, continue to diligently search it in good faith for a mineral discovery, and exclude other prospectors.[8] The traditional rule is that these requirements apply to each claim in a group, although it has been held by one court that *pedis possessio* of a group of claims may be established by

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[1] 30 U.S.C. § 22. *See* Chapter 31, *infra*.

[2] *See* § 31.01, *infra*.

[3] *See* § 31.02, *infra*.

[4] *See* § 31.04, *infra*.

[5] *See* § 31.04, *infra*.

[6] *See* § 34.01, *infra*.

[7] *See* § 34.02[2], *infra*.

[8] *See* § 34.03, *infra*.

diligent and systematic exploration on some of these pursuant to an overall work program for the entire area claimed.[9]

[3] Types and Characteristics of Locations

Four distinct types of mining locations may be made pursuant to the Mining Law of 1872.[10] These are lode claims,[11] placer claims,[12] mill sites,[13] and tunnel sites.[14] In addition, lode deposits existing within placer locations may be acquired by the placer locators or by others, depending on the circumstances.[15]

A lode deposit is a mineralized zone or belt of rock in place that has reasonable trend and continuity and is separated from the neighboring country (nonmineralized) rock by reasonably distinct boundaries on either side.[16] A placer is defined negatively as a mineral deposit that is not a lode deposit.[17] To err in locating a deposit as a lode or a placer, while sometimes difficult to avoid, is fatal to a claim because a lode deposit will not sustain a placer location and vice versa.[18]

Mill sites of up to five acres are authorized to provide additional surface on which to work mining claims or process ore from claims.[19] A mill site must be located on nonmineral land.[20] A tunnel site, although seldom located now, is authorized to facilitate underground exploration by granting rights to minerals discovered in a tunnel.[21]

[4] Location Procedures

A mining claim is located by compliance with the location procedures specified by the Mining Law of 1872, as supplemented by federal and state law and local customs.[22] The acts of location may be performed in any order, but a mining location is not perfected and possessory rights do not attach to lode and placer locations until there has been a discovery of a valuable mineral deposit.[23]

The acts of location by which rights in a lode or placer claim are determined include discovery of a mineral deposit,[24] posting notice of the location on the ground,[25] marking the claim on the ground,[26] discovery or

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[9] *See* § 34.05, *infra*.

[10] *See* § 32.01, *infra*.

[11] *See* § 32.03, *infra*.

[12] *See* § 32.04, *infra*.

[13] *See* § 32.06, *infra*.

[14] *See* § 32.07, *infra*.

[15] *See* § 32.05, *infra*.

[16] *See* § 32.02[2], *infra*.

[17] *See* 30 U.S.C. § 35.

[18] *See* § 32.02, *infra*.

[19] *See* § 32.06, *infra*. For a discussion of the mill site controversy, see § 32.06[2][b], *infra*.

[20] *See* § 32.06[2], *infra*.

[21] *See* § 32.07, *infra*.

[22] *See* § 33.01, *infra*.

[23] *See* § 33.02, *infra*.

[24] *See* Chapter 35, *infra*.

[25] *See* § 33.03, *infra*.

development work,[27] and filing a notice or certificate of location with the county recorder's office[28] and the U.S. Bureau of Land Management (BLM) state office.[29] After August 10, 1993, new locations also require payment of a location fee.[30]

Placer claims must, as much as possible, conform with the United States system of public land surveys and the rectangular subdivisions of said surveys.[31] Association placer claims are limited to 20 acres per locator (i.e., an association of two locators may locate 40 acres, and an association of three may locate 60 acres). The maximum area of an association placer claim is 160 acres, requiring eight or more locators.[32] As a general rule, claimants whose locations fail to conform in shape or size may be allowed to cure those defects before BLM declares that the claim is invalid, assuming that the defect was inadvertent.[33]

The same requirements for locating a lode or placer claim apply, in general, to mill sites and tunnel sites. The major difference for mill sites is that no discovery of a mineral deposit is required because mill sites must be located upon nonmineral land. Rights vest when the site is used or occupied for mining or milling purposes.[34] There are special requirements for location of a tunnel site.[35]

On October 24, 2003, BLM issued final rules for location of mining law claims.[36] The significant provisions related to location of mining claims include: (1) mill site acreage should be limited to that which is "reasonably necessary to be used or occupied for efficient and reasonably compact mining or milling operations";[37] (2) in a certificate of location, a lode claim description must be given in metes and bounds;[38] (3) claimants are allowed 30 days to file an amended location certificate in the event the claim is oversized;[39] (4) a claim amendment may not be used to enlarge an existing claim or site;[40] and (5) location defects, resulting forfeiture of claims, and instances when defects can be corrected are clarified.[41]

[5] Discovery of a Valuable Mineral Deposit

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[26] *See* § 33.04, *infra*.

[27] *See* § 33.05, *infra*.

[28] *See* § 33.09, *infra*.

[29] *See* § 33.10, *infra*.

[30] 30 U.S.C. § 28g. As of February 2015, the location fee is $37, which amount should be confirmed upon payment. 43 C.F.R. § 3830.21(a)(2).

[31] 30 U.S.C. § 35; 43 C.F.R. § 3832.12.

[32] 30 U.S.C. §§ 35, 36. *See also* 43 C.F.R. §§ 3832.12, .22.

[33] For an example of BLM treatment of irregularly shaped placer claims, see *Melvin Helit*, 157 IBLA 111, GFS(MIN) 18 (2002).

[34] *See* §§ 32.06[4], [5], 33.06, *infra*.

[35] *See* §§ 32.07[6], 33.07, *infra*.

[36] 68 Fed. Reg. 61,046 (Oct. 24, 2003) (codified at 43 C.F.R. pts. 3710, 3730, 3810, 3820, 3830–3840, 3850).

[37] 43 C.F.R. § 3832.32.

[38] 43 C.F.R. § 3832.12.

[39] 43 C.F.R. §§ 3830.94(b), 3832.91.

[40] 43 C.F.R. § 3833.21.

[41] 43 C.F.R. §§ 3830.90–.97.

Discovery of a valuable mineral deposit is the *sine qua non* of a valid mining claim. The term "valuable mineral deposit" is the statutory predicate for the law defining both materials locatable under the mining laws[42] and the law of discovery, which governs the qualities a deposit must have to sustain a lode or placer location.[43]

Two rules form the core of the law of discovery.[44] The prudent man rule provides that when the evidence of mineralization is such that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine" a discovery has been made.[45] The marketability rule requires that a mineral deposit be of such value that, given its accessibility, the costs of its development, its proximity to a market, and the demand for the mineral, the deposit can be mined and sold at a profit.[46]

A discovery must be made on unappropriated federal land open to the location of mining claims.[47] In a dispute between rival locators over possession of an area covered by claims made by both, the prudent man rule applies, but courts are generally liberal in finding that the first locator's evidence of a discovery is sufficient to meet the test.[48] In controversies between a mineral claimant and the United States, both the prudent man and marketability rules are applied.[49] In a contest proceeding,[50] the discovery must be shown to exist as of the date of the hearing, and, if the land has been withdrawn from location, also shown to exist prior to the date of withdrawal as well as reasonably continuously since the withdrawal.[51] To support a patent application,[52] a discovery must exist as of the date of application as well as of the date of mineral entry.[53]

[6] Ownership Interests in Valid Unpatented Mining Claims

When a locator has made a discovery of a valuable mineral deposit and completed the required acts of location, he acquires vested property rights in the mining claim. These rights are intraliminal rights, that is, rights exercisable wholly within the vertical boundaries of the claim, and extralateral rights, that is, the right to follow outside the vertical side lines of the claim the dip of veins or lodes that apex within the claim boundaries.[54]

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[42] *See* Chapter 8, *supra*.

[43] *See* Chapter 35, *infra*.

[44] See *Skaw v. United States*, 13 Cl. Ct. 7 (1987), for a discussion of the two rules.

[45] Castle v. Womble, 19 Pub. Lands Dec. 455 (1894). *See* § 35.11, *infra*.

[46] *See* §§ 35.11, 35.12, *infra*. *See also* Great Basin Mine Watch, 146 IBLA 248 (1998), GFS(MIN) 1A (1999) (costs of compliance with federal and state laws proper consideration in determining whether mineral deposit is marketable at a profit); Agri Beef Co., 148 IBLA 52, GFS(MIN) 28 (1999) (present existence of access and cost of access to a mineral deposit are appropriate factors to consider in determining whether a valid discovery has been made).

[47] *See* § 35.09, *infra*.

[48] *See* § 35.10[2], *infra*.

[49] *See* § 35.10[1], *infra*. More recently, the marketability test also has been applied in challenges between mining claimants and grantees of rights under other laws. *See* § 35.10[4], *infra*.

[50] *See* Chapter 50, *infra*.

[51] *See* § 35.08[1], *infra*.

[52] *See generally* Chapter 51, *infra*.

[53] *See* §§ 35.08[2], 51.10, *infra*.

[54] *See* § 36.01, *infra*.

Intraliminal rights extend by statute to both the surface and subsurface of a claim, but the exercise of these rights has been limited by federal multiple use and surface occupancy legislation.[55] The incidents of ownership of a valid mining claim are the rights of possession and enjoyment of the minerals as well as the surface ground,[56] equitable ownership that follows from complying with the requirements for patent and paying the purchase price to the United States,[57] and the inchoate right to obtain a patent from the United States for a valid location based upon discovery of a valuable mineral deposit.[58]

In a conflict of overlapping surface area, a senior location prevails over a junior location if the senior claim has been perfected by a discovery. Conflicts as to subsurface mineral rights to veins, however, are determined by the ownership of the apex of the vein rather than by priority of location.[59]

[7] Extralateral Rights

Extralateral rights granted by the Mining Law of 1872 give the locator or patentee of a lode claim the exclusive right to all veins throughout their entire depth if the top or apex lies within the surface lines of the claim extended downward vertically.[60] In order to follow a vein in its downward course outside the vertical extension of a claim's side lines, its apex must be within the boundaries of the claim, the vein at depth must be continuous with the apex within the claim, and the end lines of the claim must be parallel.[61]

Locators often do not know the true course of the vein when they establish their locations. The maximum extent of extralateral rights exists when the location runs generally parallel with the course of the vein and passes out of the location at each end line. In other circumstances, the extent of extralateral rights will be less than the maximum possible.[62] Extralateral rights are recognized for secondary veins that apex within a location regardless of the extent or existence of extralateral rights obtainable in the discovery vein.[63]

The locator or patentee of a lode mining claim containing an apex has extralateral rights under other mining claims regardless of the priority of location.[64] However, extralateral rights do not extend into previously patented nonmineral lands because a conclusive presumption that these lands are nonmineral arises when patent issues.[65]

When veins owned by different parties intersect, the senior location is entitled to all ore in the intersection, but the junior location is entitled to a right-of-way through the intersection to follow his vein.[66] If two or more veins unite, the senior location is entitled to the vein below the union.[67]

[8] Relocation and Amendment of Unpatented Mining Claims

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[55] *See* § 36.03[1], *infra*.

[56] *See* § 36.03[1], *infra*.

[57] *See* § 36.03[2], *infra*.

[58] *See* § 36.03[3], *infra*.

[59] *See* § 36.05, *infra*.

[60] 30 U.S.C. § 26. *See* § 37.01, *infra*.

[61] *See* § 37.02, *infra*.

[62] *See* § 37.03, *infra*.

[63] *See* § 37.04, *infra*.

[64] *See* § 37.05[1], *infra*.

[65] *See* § 37.05[2], *infra*.

[66] *See* § 37.05[3], *infra*.

[67] *See* § 37.05[4], *infra*.

Mining claims may be amended or relocated for various reasons by their owners or by subsequent locators.[68] The distinction between an amended location and a relocation has been and continues to be a source of confusion due in part to jurisdiction-specific use of the terms.[69] A significant federal administrative decision held that an amended location makes a change in an earlier valid location and may or may not take in different or additional ground, but it cannot include new ground if adverse rights have been established; and a relocation is a subsequent location made adverse to an original location.[70] The use of these terms under state law, however, may be different.[71] The distinction can be significant in determining whether the amended location or relocation relates back to the effective date of an earlier location.[72] Relation back is critical when priority of location determines either the better right between competing locators or the validity of a location before the land was withdrawn from mineral location.[73] BLM has clarified this issue for federal purposes in its section 3809 regulations.[74]

State statutes generally control the amendment and relocation of mining claims, whether done by the owner of a claim[75] or by a subsequent locator upon abandonment or forfeiture of a prior location.[76] However, the right of a locator to amend or relocate his claim exists independently of any statute.[77]

[9] Maintenance Fee and Assessment Work Requirements

Historically, valid unpatented mining claims were maintained by the performance of $100 of labor or improvements per claim per year.[78] Claimants were required to perform assessment work intended to develop and facilitate extraction of ore from the claim. Work was permitted on one claim for the benefit of a group of claims if the work tended to benefit all of the claims in the group.[79]

In 1992, Congress enacted an appropriations bill that changed the long-standing assessment work requirement by establishing an annual $100 maintenance fee for each mining claim, mill site, or tunnel site in lieu of assessment

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[68] *See* § 38.01, *infra*.

[69] *See* § 38.01[3], *infra*.

[70] ***R. Gail Tibbets, 43 IBLA 210, 216–17***, GFS (MIN) 92 (1979). *Accord* Patsy A. Brings, 119 IBLA 319, 325, GFS(MIN) 42 (1991) (defining an amended location as "a location made in furtherance of an earlier valid location and relates back to the date of the original location as long as no adverse rights have intervened"). *See* § 38.01[3], *infra*.

[71] *See* § 38.01[3], *infra*.

[72] *See* § 38.01[4], *infra*. *See also Brings*, 119 IBLA at 325, GFS(MIN) 42 (1991) ("A location notice cannot be considered an amended location, so as to relate back to a location which predates a segregation of lands from mineral location, to the extent such location notice describes new land not included in the original location. Such a location notice must be considered a new location or a relocation as to those added lands, not an amended location, and the locator's rights as to the added lands date from the date of the amended location.").

[73] *See* § 38.01[4], *infra*.

[74] *See, e.g.*, 43 C.F.R. § 3832.21.

[75] *See* § 38.02, *infra*.

[76] *See* § 38.04, *infra*.

[77] *See* § 38.01[2], *infra*.

[78] *See* 30 U.S.C. §§ 28–28e. *See also* § 45.03, *infra*; United States v. Locke, 471 U.S. 84 (1985) (unpatented mining claim declared void due to failure to file notice of intent to hold or proof of assessment work performed by December 30 of the calendar year as required by section 314(a) of FLPMA); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 317 (1930) ("The owner is not required to purchase the claim or secure patent from the United States; but, so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of $100 annually, a failure to do so does not ipso facto forfeit the claim, but only renders it subject to loss by relocation.").

[79] *See* § 45.04[7], *infra*.

work unless the claimant qualifies for the small miner exception.[80] To qualify for the small miner exception, the claimant can hold no more than 10 mining claims, mill sites, and/or tunnel sites by August 31 of the year for which the waiver applies.[81] A claimant qualifying for a fee waiver under this exception must perform assessment work, file an affidavit of assessment work,[82] and be wary of potential pitfalls.

Where assessment work continues to be performed, such as with the small miner exception, the assessment work requirement terminates upon entry in patent proceedings,[83] and it may be deferred or excused in certain limited situations.[84] Unexcused noncompliance with the assessment work requirement subjects the claim to relocation by a subsequent locator,[85] and may subject the claim to cancellation by the United States.[86]

Failure to pay the mining claim maintenance fee within the prescribed time limits results in statutory abandonment and forfeiture.[87] This nonrefundable fee is due on or before September 1 of each year in order to maintain a claim for the upcoming year.[88]

Most states have provided for the filing of affidavits that the assessment work was performed,[89] and federal law requires annual filings of either an affidavit of assessment work or a notice of intention to hold a claim.[90] Failure to comply with the federal filing requirement is fatal, resulting in a conclusive presumption that the claim has been abandoned.[91]

[10] Abandonment and Forfeiture

Like other property, an unpatented mining claim may be abandoned.[92] Abandonment requires a subjective intent by the claim's owner to abandon and an objective act that carries the intent into effect.[93] Whether an abandonment has occurred is a question of fact and, if disputed, must be proved by the party asserting abandonment.[94]

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[80] As of February 2015, the maintenance fee was $155, which amount should be confirmed upon payment. 43 C.F.R. § 3830.21(a)(3). See Chapters 44, 45, *infra*, for an exhaustive discussion of the maintenance fee and assessment work requirements. This requirement has been codified at 30 U.S.C. § 28f(a).

[81] See § 44.03[3], *infra*, for a more complete discussion. *See also* 43 C.F.R. pt. 3835.

[82] 30 U.S.C. § 28f(d). *See also* 43 C.F.R. § 3834.11.

[83] *See* § 45.06, *infra*.

[84] *See* § 45.07, *infra*.

[85] *See* § 45.08[1], *infra*.

[86] *See* § 45.08[2], *infra*.

[87] 30 U.S.C. § 28i; 43 C.F.R. § 3830.91.

[88] 30 U.S.C. § 28f(a). *See* Majuba Mining, Ltd. v. Pumpkin Copper, Inc., 299 P.3d 363 (Nev. 2013); Art Anderson (On Reconsideration), 182 IBLA 27, GFS(MIN) 2 (2012), *vacating* Art Anderson, 181 IBLA 270, GFS(MIN) 14 (2011); Consolidated Golden Quail Res. (On Judicial Remand), 183 IBLA 250, GFS(MIN) 7 (2013) (mine claims void for failure to pay maintenance fees), *aff'g* Consolidated Golden Quail Res., Ltd. v. United States, No. 2:11-cv-01853, 2012 U.S. Dist. LEXIS 145099 (D. Nev. Oct. 9, 2012), *aff'g* Consolidated Golden Quail Res., 179 IBLA 309, GFS(MIN) 14 (2010). *See also* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 430, ***125 Stat. 786***, 1047 (2011).

[89] *See* § 45.05[1], *infra*.

[90] *See* § 45.05[2][a], *infra*.

[91] *See* § 45.05[2][a], *infra*.

[92] *See* § 46.01, *infra*.

[93] *See* § 46.01[2], *infra*.

[94] *See* § 46.01[8], *infra*.

A mining location may also be forfeited to a subsequent locator, a co-owner, or the U.S. government. Forfeiture to a subsequent locator occurs only when the ground has been relocated, thereby effectuating the forfeiture to the subsequent relocator,[95] and, in general, such a relocation may be made only after failure of the claim's owner to pay the maintenance fee or perform annual assessment work and before the claim owner has resumed work on the claim, as required.[96] Forfeiture to a co-owner can occur when one co-owner fails to contribute his share of the expense of performing the required annual assessment work.[97] A statutory procedure of "advertising out"[98] must be followed to effectuate such a forfeiture. A location may also be forfeited to the United States due to exhaustion of the minerals on the claim, loss of discovery, failure to pay maintenance fees or perform annual assessment work, or failure to make required filings with the BLM.[99]

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[95] *See* § 46.03[1], *infra*.

[96] 30 U.S.C. § 28. *See* § 46.03[3], *infra*.

[97] *See* § 46.04[1], *infra*.

[98] *See* § 46.04[1], *infra*.

[99] *See* § 46.05, *infra*.

2-34 American Law of Mining, 2nd Edition § 34.02

Author

Updated by Karol L. Kahalley

§ 34.02 *Pedis Possessio* Rights

[1] Nature of *Pedis Possessio* Rights

The purpose of the doctrine of *pedis possessio,* which excludes others from an area possessed by a prospector who is diligently searching for mineral, is to reward diligence and to promote peaceful competition for mineral discoveries, the keynotes of the mining law.[1] The doctrine was given its fullest statement by the Supreme Court in *Cole v. Ralph*:

> In advance of discovery an explorer in actual occupation and diligently searching for mineral is treated as a licensee or tenant at will, and no right can be initiated or acquired through a forcible, fraudulent or clandestine intrusion upon his possession. But if his occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral, and another enters peaceably, and not fraudulently or clandestinely, and makes a mineral discovery and location, the location so made is valid and must be respected accordingly.[2]

Neither before nor after discovery does a locator have the right to exclude parties other than competing mineral locators from his claim. The Multiple Surface Use Act of 1955 entitles many other government licensees to enter claims so long as they do not unreasonably interfere with mineral activities.[3] Before he makes a discovery, a prospector obtains no rights against the United States under the Mining Law of 1872.[4] Consequently, the federal government may withdraw its land from mineral entry or dispose of it under appropriate laws and regulations regardless of the *pedis possessio* of a prospector.[5] Among other methods of disposal, the United States might grant a permit or lease of leasable minerals under the Mineral Lands Leasing Act of 1920,[6] thus authorizing another mineral operator to also use the same land for mining purposes.[7]

It is critical to distinguish the rights afforded a prospector before discovery by the judicial doctrine of *pedis possessio* from the vested rights accorded by the Mining Law of 1872[8] to a locator who has discovered and properly located a valuable mineral deposit. A prospector has only a right to be protected in his occupation, and his right is dependent upon strict compliance with requirements developed by the courts.[9] Only the concurrence of a discovery of a valuable mineral deposit and compliance with applicable location procedures perfects a location

[1] Ranchers Explor. & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 727 (D. Utah 1965).

[2] 252 U.S. 286, 294-95, 40 S. Ct. 321, 64 L. Ed. 567 (1920).

[3] Act of July 23, 1955, ch. 375, § 4, 69 Stat. 367, 368 (codified at 30 U.S.C. § 612 (elec. 2010)). *See* § 36.03 [1], *infra.*

[4] Davis v. Nelson, 329 F.2d 840, 845 (9th Cir. 1964).

[5] United States v. Midway N. Oil Co., 232 F. 619, 625 (S.D. Cal. 1916) (oil placer location); L.W. Lowell, 40 Pub. Lands Dec. 303 (1911) (oil placer location).

[6] *See* § 4.18, *supra,* on the Mineral Lands Leasing Act of 1920.

[7] *See* § 4.18, *supra,* on the Multiple Mineral Development Act of 1954.

[8] *See* 30 U.S.C. § 26 (elec. 2010).

[9] *See* § 34.03, *infra*.

and vests a property right in a locator.[10] Discovery is the source of a claimant's title, and upon making a discovery, he acquires the right to make a location and perfect it within a prescribed time.[11] If he does not do so, he has no title or right of possession[12] except as may accrue by virtue of his *pedis possessio.*[13]

In order to define the area in which a prospector expects to explore for minerals, it is now customary to make a location prior to making a discovery.[14] This establishes the specific ground which is claimed under the doctrine of *pedis possessio,* but, without a discovery, does not establish vested rights in the location.[15]

If a claim is declared invalid for failure to meet the requirements of the applicable rule of discovery,[16] a question arises as to whether the claimant is liable for removing minerals during the time he was in possession under the doctrine of *pedis possessio.* It appears that so long as the ground was open to location, the minerals removed were locatable, and the claimant acted in good faith, removing minerals prior to a declaration of invalidity should not give rise to an action for trespass.[17]

A prospector's prediscovery rights, like the vested rights which accrue upon discovery, are valuable rights which may be conveyed to another.[18] Prediscovery rights, resting as they do upon actual possession, may be transferred only by transferring actual possession along with a deed, lease, or assignment of the color of title acquired by locating and recording the claim.[19] The transferability of a prospector's prediscovery rights has been recognized by Congress.[20]

[2] Protection Against Adverse Entry

[10] Davis v. Nelson, 329 F.2d 840, 845 (9th Cir. 1964). *Accord* Cole v. Ralph, 252 U.S. 286, 296, 40 S. Ct. 321, 64 L. Ed. 567 (1920); Gwillim v. Donnellan, 115 U.S. 45, 49, 5 S. Ct. 1110, 29 L. Ed. 348 (1885).

[11] Doe v. Waterloo Mining Co., 70 F. 455, 459-60 (9th Cir. 1895); McCleary v. Broaddus, 14 Cal. App. 60, 111 P. 125, 127 (1910). Time allowances are discussed in Chapter 33, *supra.*

[12] Lockhart v. Johnson, 181 U.S. 516, 527-28, 21 S. Ct. 665, 45 L. Ed. 979 (1901); Walsh v. Henry, 38 Colo. 393, 88 P. 449 (1906); Gohres v. Illinois & Josephine Gravel Mining Co., 40 Or. 516, 67 P. 666 (1902). A subsequent locator who prevents a prior locator from perfecting his location within the prescribed time cannot initiate any right which would defeat the rights of the prior locator. Erhardt v. Boaro, 113 U.S. 527, 534-35, 5 S. Ct. 560, 28 L. Ed. 1113 (1885).

[13] Adams v. Benedict, 64 N.M. 234, 327 P.2d 308, 319-20 (1958); M. Craig Haase, "Non-Record Title Examination of Unpatented Mining Claims," *Mineral Title Examination* III 8-1 (Rocky Mt. Min. L. Fdn. 1992).

[14] *See* § 34.04[2], *infra.*

[15] Phillips v. Brill, 17 Wyo. 26, 95 P. 856, 859 (1908).

[16] Discovery rules are discussed in Chapter 35, *infra.*

[17] *See* Reeves, "Liability for Mining on a Void Mining Claim," 16 *Rocky Mt. Min. L. Inst.* 505, 514 (1971).

[18] Consolidated Mutual Oil Co. v. United States, 245 F. 521, 525 (9th Cir. 1917); Rooney v. Barnette, 200 F. 700, 710, 3 Alaska Fed. 884 (9th Cir. 1912); Frazier v. Consolidated Tungsten Mines, 80 Ariz. 261, 296 P.2d 447, 450 (1956); ***Miller v. Chrisman, 140 Cal. 440, 73 P. 1083, 1086 (1903)***, aff'd on other grounds, 197 U.S. 313, 25 S. Ct. 468, 49 L. Ed. 770 (1905); United W. Minerals Co. v. Hannsen, 147 Colo. 272, 363 P.2d 677 (1961) (lease). *Cf.* H.H. Yard, 38 Pub. Lands Dec. 59, 64 (1909) (gold placer location of 160 acres located by eight people cannot be perfected by discovery made by single transferee).

[19] Davis v. Nelson, 329 F.2d 840, 845 (9th Cir. 1964).

[20] Act of Mar. 2, 1911, ch. 201, § 1, ***36 Stat. 1015*** (codified at 30 U.S.C. § 103 (elec. 2010)). *Cf.* United States *ex rel.* United States Borax Co. v. Ickes, 98 F.2d 271, 278-79 (D.C. Cir. 1938).

Only those prospectors who bring themselves within the doctrine of *pedis possessio* are entitled to the aid of a court for protection against forcible, fraudulent, or clandestine intrusions.[21] The decision in *Ranchers Exploration & Development Co. v. Anaconda Co.* [22] is particularly instructive on this issue. The court stated that in the absence of discovery by, or *pedis possessio* of, a first locator, a rival claimant who proceeds, in good faith and in accordance with the mining law, toward location and mineral discovery has an equal right to be upon the public domain, and forceful resistance by the first locator to prospecting by the second would be equally or even more unjustifiable than a forcible, fraudulent, or clandestine intrusion by the second.[23] The court added:

> [I]t cannot be accepted that the guns of the [first locator] could be substitutes for picks, shovels or drills or for proceeding diligently with discovery, or that roving guards patrolling several square miles of desert could be in actual occupancy for the purpose of discovery within the meaning of the doctrine. One seeking to maintain an unlawful possession by force is not entitled to the court's protection on that account.[24]

An entry is not forcible merely because it is upon land in the actual possession of another.[25] Even in the absence of consent by the one in possession, an adverse entry may be made if done peaceably without forceful, fraudulent, or clandestine conduct.[26] The prediscovery rights of a prior claimant will not prevail against one who so enters and perfects a location.[27] Any other rule would make the wrongful occupation of public land superior in right to a lawful entry by a locator acting in accordance with the Mining Law of 1872.[28]

A prospector who is in *pedis possessio* is also entitled to protection against fraudulent intrusions.[29] If the intruder seeks

> to obtain possession by questionable means amounting to a demonstration of bad faith, either in the sense that he has unconscionably improved his position at the expense of his competitor, or unfairly worsened his competitor's position to his own aggrandizement, he does not qualify as a locator against such competing interest.[30]

It has been held that one who uses information obtained as an employee and also through negotiations, which were ostensibly for the purchase of mining claims, in order to invade, overstake, and make discoveries in an area

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[21] Ranchers Explor. & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 725 (D. Utah 1965); Terry N. Fiske, "Pedis Possessio—New Dimensions or Back to Basics?," 34 *Rocky Mt. Min. L. Inst.* 8-1 (1988).

[22] 248 F. Supp. 708, 725 (D. Utah 1965).

[23] Ranchers Explor. & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 725-26 (D. Utah 1965).

[24] Ranchers Explor. & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 726 (D. Utah 1965).

[25] *See* Belk v. Meagher, 104 U.S. 279, 287-88, 26 L. Ed. 735 (1881); Nevada Sierra Oil Co. v. Home Oil Co., 98 F. 673, 680 (C.C.S.D. Cal. 1899).

[26] Belk v. Meagher, 104 U.S. 279, 287, 26 L. Ed. 735 (1881); Hanson v. Craig, 170 F. 62, 65, 3 Alaska Fed. 293 (9th Cir. 1909); Thallmann v. Thomas, 111 F. 277, 278-79 (8th Cir. 1901); Nevada Sierra Oil Co. v. Home Oil Co., 98 F. 673, 680 (C.C.S.D. Cal. 1899).

[27] Cole v. Ralph, 252 U.S. 286, 40 S. Ct. 321, 64 L. Ed. 567 (1920); Belk v. Meagher, 104 U.S. 279, 287-88, 26 L. Ed. 735 (1881); Horswell v. Ruiz, 67 Cal. 111, 7 P. 197 (1885).

[28] Thallmann v. Thomas, 111 F. 277, 279 (8th Cir. 1901).

[29] Cole v. Ralph, 252 U.S. 286, 294-95, 40 S. Ct. 321, 64 L. Ed. 567 (1920); Union Oil Co. v. Smith, 249 U.S. 337, 347, 39 S. Ct. 308, 63 L. Ed. 635 (1919). *See also* § 34.04, *infra.*

[30] Ranchers Explor. & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 728 (D. Utah 1965).

previously located was not acting in good faith.[31] Bad faith was also imputed to the principal who could acquire no rights through the overstaked claims.[32] It would seem that the bad faith of the agent amounted to fraudulent intrusion, against which courts uniformly state protection will be granted.

No rights may be acquired by a second claimant who intrudes clandestinely upon a claim as to which a prospector has *pedis possessio* rights.[33] An example of clandestine entry upon the prospector's possession is one made "while he is asleep in his cabin, or temporarily absent from his claim." [34] Nevertheless, a clandestine nighttime intrusion onto a claim not held by *pedis possessio* has been approved by one court as a means to avoid a violent confrontation with the armed guards of the first locator.[35]

[3] Use of Surface Resources

Courts have not distinguished the rights of an explorer occupying land under *pedis possessio* to possess and enjoy the surface resources of a mining claim from those of a locator who has perfected his claim with a discovery. Despite the Mining Law of 1872's broad language that locators "shall have the exclusive right of possession and enjoyment of all the surface" included within their location,[36] the courts have limited those rights to uses reasonably related to mining operations.[37] Congress has imposed similar restrictions by the Multiple Mineral Development Act of 1954[38] and the Multiple Surface Use Act of 1955,[39] and it has required locators to file plans of operation with the Forest Service pursuant to the Organic Administration Act of 1897[40] and with the Bureau of Land Management pursuant to the Federal Land Policy and Management Act of 1976[41] in order to minimize adverse environmental impacts.[42]

Subject to these limitations, an explorer who has established *pedis possessio* by being in actual occupancy and diligently exploring for mineral is entitled to construct such improvements on the area claimed as reasonably

[31] 31 Ranchers Explor. & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 725 (D. Utah 1965). *Cf.* Thallmann v. Thomas, 111 F. 277 (8th Cir. 1901).

[32] Ranchers Explor. & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 731 (D. Utah 1965). The prior claimant was held not to have established *pedis possessio* except on a few claims in a large block covering an area of more than five square miles, but possession was denied the overstaking intruder because of bad faith.

[33] In *Springer v. Southern Pac. Co.,* 248 P. 819 (1926), the intruder, before or near daylight and long before working hours, entered the improperly located claims of a locator who had been in actual possession for 20 years and was diligently engaged in developing the mineral deposit. The court considered the intrusion to be clandestine and surreptitious and held that the first locator prevailed, although the holding was based on the adverse possession statute, 30 U.S.C. § 38, rather than the more obvious doctrine of *pedis possessio. See* Sparks v. Mount, 207 P. 1099, 1101 (Wyo. 1922).

[34] Nevada Sierra Oil Co. v. Home Oil Co., 98 F. 673, 681 (C.C.S.D. Cal. 1899). *See* Davis v. Dennis, 85 P. 1079, 1080 (Wash. 1906); Sparks v. Mount, 207 P. 1099 (1922) (temporary absence). *Compare* the two opinions in Hanson v. Craig, 161 F. 861, 3 Alaska Fed. 86 (9th Cir. 1908) , rev'd, 170 F. 62, 3 Alaska Fed. 293 (9th Cir. 1909).

[35] Ranchers Explor. & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 726 (D. Utah 1965).

[36] 30 U.S.C. § 26 (elec. 2010).

[37] *See* § 110.02[2][a], *infra.*

[38] 30 U.S.C. §§ 521–531 (elec. 2010). *See* 110.02[2][b], *infra.*

[39] 30 U.S.C. §§ 601, 603, 611–615 (elec. 2010). *See* § 110.02[2][b], *infra.*

[40] 16 U.S.C. §§ 473–482, & 511 (elec. 2010).

[41] 43 U.S.C. §§ 1701-1782 and scattered sections of Title 43 and various other titles of U.S.C. (elec. 2010).

[42] *See* § 110.02[2][c], *infra.*

necessary for exploration.[43] A prospector without *pedis possessio* is not entitled to compensation for his improvements when his possession is lost to another with a better right.[44] An explorer who holds under *pedis possessio* is only a licensee or tenant at will, however,[45] so his ownership of improvements is at risk of loss to the United States upon revocation of his possessory right.[46] The mining law does not entitle a mineral claimant to use water which may be found on the claim, and acquisition of water rights, even those necessary for mining, must be obtained separately under the laws regulating the appropriation of water.[47]

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[43] *See* Cole v. Ralph, 252 U.S. 286, 300-01, 40 S. Ct. 321, 64 L. Ed. 567 (1920) (ownership and guarding of an inoperable mill and other buildings for mining purposes, standing on a claim on which prospecting had been recently conducted, established *pedis possessio* for at least the ground where the buildings were located).

[44] Deffeback v. Hawke, 115 U.S. 392, 407, 6 S. Ct. 95, 29 L. Ed. 423 (1885); Sparks v. Pierce, 115 U.S. 408, 413, 6 S. Ct. 102, 29 L. Ed. 428 (1885).

[45] Cole v. Ralph, 252 U.S. 286, 294-95, 40 S. Ct. 321, 64 L. Ed. 567 (1920).

[46] *See* § 110.02[4] [d], *infra,* pointing out that an explorer who cannot establish *pedis possessio* has no rights and may be subject to prosecution for waste or trespass.

[47] Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 98 S. Ct. 2002, 56 L. Ed. 2d 570 (1978).

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American Law of Mining, 2nd Edition > ***TITLE IV Mining Claims*** > ***CHAPTER 36 OWNERSHIP INTERESTS IN VALID UNPATENTED MINING CLAIMS***

Author

Updated by Robert D. Comer

§ 36.01 General Nature of Rights in a Valid Unpatented Mining Claim

[1] Background

From early in the history of mining on the public domain, courts have held that when a discovery of a valuable mineral deposit[1] coincides with an appropriation of it by means of a mining location,[2] the locator holds a valid unpatented mining claim[3] and has acquired vested property rights that are enforceable against both third parties and the United States.[4] Discovery coupled with appropriation converts the right of a prospector to occupy a portion of the public domain in search of minerals protected only by his *pedis possessio*[5] into the much more substantial interest of an owner of property rights based on a statutory grant.[6] In a leading case, the U.S. Supreme Court has said:

> [W]hen the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is "real property," subject to the lien of a judgment recovered against the owner in a state or territorial court. The owner is not required to purchase the claim or secure patent from the United States; but, so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent.[7]

The purpose of the statute granting possessory rights[8] is to preserve to the owner of a claim the full benefit of his discovery.[9] Thus, an owner has the right, even without acquiring a patent, "to extract and convert to his own use all the ores and precious metals which may be found" within his surface lines without payment to the U.S. government.[10] This right, however, is limited in that it must give way to the properly asserted extralateral rights of

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[1] Requirements for a discovery are discussed in Chapter 35, *supra*.

[2] Location procedures are discussed in Chapter 33, *supra*.

[3] The term "valid unpatented mining claim," as used herein, refers to an unpatented mining claim that has been properly located, perfected by a discovery of a valuable mineral deposit, and maintained thereafter as required.

[4] *See* Best v. Humboldt Placer Mining Co., 371 U.S. 334, 83 S. Ct. 379, 9 L. Ed. 2d 350 (1963); Swanson v. Sears, 224 U.S. 180, 32 S. Ct. 455, 56 L. Ed. 721 (1912); Gwillim v. Donnellan, 115 U.S. 45, 5 S. Ct. 1110, 29 L. Ed. 348 (1885).

[5] *See* Chapter 34, *supra*.

[6] 30 U.S.C. §§ 26, 35. *See* Union Oil Co. v. Smith, 249 U.S. 337, 348–49, 39 S. Ct. 308, 63 L. Ed. 635 (1919); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 50 S. Ct. 103, 74 L. Ed. 445 (1930); Belk v. Meagher, 104 U.S. 279, 26 L. Ed. 735 (1881).

[7] *Krushnic*, 280 U.S. at 316–17 (citations omitted).

[8] 30 U.S.C. § 26.

[9] Butte & Bos. Mining Co. v. Societe Anonyme des Mines de Lexington, 58 P. 111, 113 (Mont. 1899).

[10] O'Connell v. Pinnacle Gold Mines Co., 140 F. 854, 855 (9th Cir. 1905); Forbes v. Gracey, 9 F. Cas. 401 (C.C.D. Nev.), *aff'd*, 94 U.S. 762, 24 L. Ed. 313 (1877).

other locators.[11] The rights that accrue to owners of valid unpatented mining claims, whether lode or placer, encompass the right of possession and enjoyment of both the surface and subsurface.[12]

Even though a patent has not issued, the right of possession and enjoyment of the owner of a valid unpatented mining claim allows for use rights that are tantamount to complete title,[13] so long as the claim is maintained in compliance with the mining laws. The interest of the owner of a valid unpatented mining location, however, is subject to defeasance for failure to pay annual maintenance fees or perform annual assessment work and recording,[14] inability to prove a discovery of a valuable mineral deposit,[15] and compliance with required acts of location.[16]

[2] Inchoate Right to Patent Limited by Patent Moratorium

A valid, unpatented mining claim carries with it an inchoate right to the issuance of a patent by the United States,[17] conditioned upon the performance of statutory requirements.[18] Historically, if the statutory requirements were met, the right to have the patent issue was absolute, not discretionary with the United States.[19] The fact that many years elapsed after the original location of a mining claim does not affect its validity;[20] there is no obligation to ever apply for patent.[21] An unpatented mining claim may be held for an indefinite time under the exclusive right of possession and enjoyment granted by statute,[22] so long as there is a valid discovery and the claim is maintained in accordance with federal statutory requirements.[23]

In 1994, Congress through an appropriations measure[24] imposed a moratorium on processing, and hence issuance, of any mining or mill site patents after September 30, 1994, except for applications that had been

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[11] Extralateral rights are discussed in Chapter 37, *infra*.

[12] *See* § 36.03[1], *infra*.

[13] *See* § 36.03[2], *infra*.

[14] See Chapters 44 and 45, *infra*, discussing annual maintenance fees and assessment work.

[15] *See* Chapter 35, *supra*.

[16] *See* §§ 33.03[1], [7], 33.04[1], [8], 33.05[1], 33.09[1], 33.10[1], *supra*.

[17] An inchoate interest in real estate is one "that has not yet vested." *Black's Law Dictionary* (Rev. 9th ed. 2009). *See* Erhardt v. Boaro, 113 U.S. 527, 534–35, 5 S. Ct. 560, 28 L. Ed. 1113 (1885).

[18] United States v. Etcheverry, 230 F.2d 193, 195 (10th Cir. 1956); Bowen v. Chemi-Cote Perlite Corp., 432 P.2d 435, 438 (Ariz. 1967).

[19] Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 318–19, 50 S. Ct. 103, 74 L. Ed. 445 (1930); Noyes v. Mantle, 127 U.S. 348, 8 S. Ct. 1132, 32 L. Ed. 168 (1888); United States *ex rel.* Krushnic v. West, 30 F.2d 742, 746–47 (D.C. Cir. 1929), modified, 280 U.S. 306, 50 S. Ct. 103, 74 L. Ed. 445 (1930); United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, GFS(MIN) 79 (1973); ***Suessenbach v. First Nat'l Bank, 41 N.W. 662 (Dakota Terr. 1889)***.

[20] Clipper Mining Co. v. Eli Mining & Land Co., 194 U.S. 220, 224, 24 S. Ct. 632, 48 L. Ed. 944 (1904).

[21] Union Oil Co. v. Smith, 249 U.S. 337, 349, 39 S. Ct. 308, 63 L. Ed. 635 (1919); United States v. Carlile, 67 Interior Dec. 417, 421 (1960); Nash v. McNamara, 93 P. 405, 410 (Nev. 1908) ("So long as $100 is expended each year upon the claim … , the owner's right to exclusive possession and to extract and exhaust the ore is as complete as if he held a patent, for which he may never apply unless he desires.").

[22] 30 U.S.C. § 26.

[23] *See* Clipper Mining Co. v. Eli Mining & Land Co., 194 U.S. 220, 227, 24 S. Ct. 632, 48 L. Ed. 944 (1904); Gwillim v. Donnellan, 115 U.S. 45, 49, 5 S. Ct. 1110, 29 L. Ed. 348 (1885).

[24] Department of the Interior and Related Agencies Appropriations Act, 1995, ***Pub. L. No. 103-332, 108 Stat. 2499***.

forwarded to the Secretary of the Interior prior to that date.[25] The moratorium has been extended through the 2014 fiscal year.[26] The patent moratorium limits the inchoate right to obtain a patent in the present. However, absent a change to the 1872 law, the right continues to exist, even if currently suspended. When and if the patent moratorium is lifted, the owner of an unpatented mining claim may lose the inchoate right to a patent by failing to file an adverse claim in patent proceedings before the Department of the Interior, even though such proceedings are initiated by a junior locator.[27] Issuance of a patent removes the possibility of defeasance of title through forfeiture of the claim to the United States,[28] which retains the legal title until patent issues.[29] Issuance of a patent transfers legal title to the patentee and eliminates the prerogatives retained by the United States as holder of the paramount title.[30]

Technically, the issuance of a patent does not confer greater rights against third parties than are acquired by the location of a valid, perfected mining location.[31] As a practical matter, however, the issuance of a patent terminates the ever-present threats of overstaking by other locators and contests by the United States or private parties.[32] Thus, it cannot be said, as it was in the past, that the possessory right afforded by an unpatented location provides as much security of ownership as does the legal title obtained by a patent.[33] As has been noted by the U.S. Supreme Court, "A locator who does not carry his claim to patent does not lose his mineral claim, though he does take the risk that his claim will no longer support the issuance of a patent."[34]

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[25] Patent applications are first processed by the Bureau of Land Management (BLM), yielding what is termed a "first half-mineral entry final certificate," which establishes equitable title in the patent applicant, leaving only the mineral examination to be conducted. Until 1993, BLM state directors and district managers had authority to issue first-half and second-half certificates and patents. *See* Solicitor's Memorandum M-36990 (Nov. 12, 1997), GFS(MIN) SO-2 (1997). On March 3, 1993, BLM authority to conduct the mineral examination was revoked by Secretarial Order No. 3163, and that authority was reserved by the Secretary of the Interior.

[26] *See* Department of the Interior, Environment, and Related Agencies Appropriations Act, 2014, Pub. L. No. 113-76, § 405, ***128 Stat. 5***, 337–38. It is uncertain how long this moratorium will be continued.

[27] Bowen v. Chemi-Cote Perlite Corp., 432 P.2d 435 (Ariz. 1967). *See also* Pac. Oil Co. v. Udall, 273 F. Supp. 203 (D. Colo. 1967).

[28] Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428, 430, 12 S. Ct. 877, 36 L. Ed. 762 (1892).

[29] United States v. Rizzinelli, 182 F. 675, 681 (D. Idaho 1910).

[30] *See* § 36.04, *infra*.

[31] *See* Mt. Rosa Mining, Milling & Land Co. v. Palmer, 56 P. 176, 178 (Colo. 1899).

[32] *See* Chapter 50, *infra* (on contests). *See, e.g.*, Andersen v. Echols, No. 2:11-cv-01995CMK, 2013 U.S. Dist. LEXIS 104513 (E.D. Cal. July 25, 2013) (suggesting less than noble acts of would-be claim jumper that "appeared driven by 'evil motive and intent' ").

[33] Wilbur v. United States *ex rel*. Krushnic, 280 U.S. 306, 317, 50 S. Ct. 103, 74 L. Ed. 445 (1930); Chambers v. Harrington, 111 U.S. 350, 353, 4 S. Ct. 428, 28 L. Ed. 452 (1884).

[34] Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336, 83 S. Ct. 379, 9 L. Ed. 2d 350 (1963).

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American Law of Mining, 2nd Edition > ***TITLE IV Mining Claims*** > ***CHAPTER 36 OWNERSHIP INTERESTS IN VALID UNPATENTED MINING CLAIMS***

Author

Updated by Robert D. Comer

§ 36.03 Ownership Interests in a Valid Unpatented Mining Claim

[1] Rights of Possession and Enjoyment of Minerals and Surface

The Mining Law of 1872 extends to the locator of a valid unpatented lode mining location, and to his heirs and assigns, the "exclusive right of possession and enjoyment" of all surface areas, as well as all "veins, lodes, and ledges throughout their entire depth" that have apexes within the mining claim.[1] While the statute refers only to lode mining claims, the same exclusive right of possession and enjoyment of surface areas has been judicially extended to placer mining claims.[2] Thus, the statute is, in effect, a grant by the United States of a right of present and exclusive possession[3] of the surface,[4] as well as minerals under the surface,[5] of both lode and placer mining locations, subject to certain qualifications. The statute grants a possessory right, a term that is more correct than possessory title,[6] because the United States retains the equitable title until application has been made for patent and the purchase price paid and retains the legal title until patent is issued.[7] The nature of the possessory estate to an unpatented location that includes the discovery of a valuable mineral deposit is such that actual physical or continuous possession of the location is not necessary.[8]

The rights of possession and use of the surface of an unpatented mining claim or the surface resources on it have always been qualified by courts to require a reasonable relationship to mining purposes.[9] Subject to this

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[1] 30 U.S.C. § 26. See also 30 U.S.C. §§ 35, 37 as to the statutory grant applicable to placer claims.

[2] *See* Clipper Mining Co. v. Eli Mining & Land Co., 194 U.S. 220, 227, 229, 24 S. Ct. 632, 48 L. Ed. 944 (1904); State *ex rel.* Andrus v. Click, 554 P.2d 969, 973 (Idaho 1976) (the exclusive rights of possessory title and the exclusive rights of possession and enjoyment of the surface of mining claims granted to lode locators under 30 U.S.C. § 26 are equally applicable to placer locators under 30 U.S.C. § 35).

[3] Wilbur v. United States *ex rel*. Krushnic, 280 U.S. 306, 316, 50 S. Ct. 103, 74 L. Ed. 445 (1930); Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 83, 18 S. Ct. 895, 43 L. Ed. 72 (1898) (every other person may be excluded); Belk v. Meagher, 104 U.S. 279, 283, 26 L. Ed. 735 (1881).

[4] *E.g.*, Butte City Water Co. v. Baker, 196 U.S. 119, 122, 25 S. Ct. 211, 49 L. Ed. 409 (1905); *Clipper*, 194 U.S. at 226; King v. Amy & Silversmith Mining Co., 152 U.S. 222, 227, 14 S. Ct. 510, 38 L. Ed. 419 (1894); Noyes v. Mantle, 127 U.S. 348, 351, 8 S. Ct. 1132, 32 L. Ed. 168 (1888); *Belk*, 104 U.S. 279.

[5] St. Louis Mining & Milling Co. v. Mont. Mining Co., 194 U.S. 235, 236–37, 24 S. Ct. 654, 48 L. Ed. 953 (1904).

[6] Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp., 601 P.2d 1339, 1341 (Ariz. 1979).

[7] United States v. Rizzinelli, 182 F. 675, 681 (D. Idaho 1910). See § 36.03[2], *infra*, on equitable ownership of valid, unpatented mining location and Chapter 54, *infra*, on legal title acquired by patent.

[8] Union Oil Co. v. Smith, 249 U.S. 337, 349, 39 S. Ct. 308, 63 L. Ed. 635 (1919); Bradford v. Morrison, 212 U.S. 389, 394, 29 S. Ct. 349, 53 L. Ed. 564 (1909); *Belk*, 104 U.S. 279.

[9] *See, e.g.*, United States v. Nogueira, 403 F.2d 816 (9th Cir. 1968) (use of claim for residence denied); United States v. Etcheverry, 230 F.2d 193 (10th Cir. 1956) (use of surface for grazing denied); Teller v. United States, 113 F. 273, 274–81 (8th Cir. 1901) (timber harvesting barred); Bradley-Turner Mines, Inc. v. Branagh, 187 F. Supp. 665, 666 (N.D. Cal. 1960) (use of land and timber limited to mining purposes); *Rizzinelli*, 182 F. 675 (construction of saloon on claim denied). *See also* §§ 110.01 & 110.02, *infra*.

requirement, the possessory right to a valid mining claim was exclusive in its owner prior to 1953. In order to make it legally possible for both mining locators and mineral lessees of the United States to explore and develop the same land for locatable and leasable minerals at the same time,[10] Congress enacted the Act of August 12, 1953,[11] allowing for the first time the location of mining claims on public lands previously subject only to mineral operations for leasing act minerals. Subsequently, in 1954, the Multiple Mineral Development Act[12] made public domain lands on which mining claims are located available for mineral leasing, requiring the mining locator and the mineral lessee to share use of the land.[13]

In order to eliminate abuses of the mining laws, Congress substantially reduced the former rights of locators to exclusive possession and use by the Act of July 23, 1955 (Multiple Surface Use Act).[14] This act limits the use of mining claims, prior to patent, to operations and uses reasonably incident to mining, reserves to the United States the right to manage and dispose of the vegetative and other surface resources, and authorizes use of the surface by the United States, its permittees, and licensees.[15] Regulations adopted under authority of the Forest Service Organic Administration Act of 1897[16] and the Federal Land Policy and Management Act of 1976 (FLPMA)[17] require mineral operators to file plans of operations with the Forest Service and the Bureau of Land Management (BLM), respectively, in order to minimize adverse environmental impacts.

Locators must comply with BLM surface management regulations designed to implement FLPMA's mandate that the Department of the Interior (DOI) "take any action necessary to prevent unnecessary or undue degradation" of the public lands.[18] BLM's surface management regulations underwent significant amendments in the final days of the second Bill Clinton Administration, including alteration of a long-standing interpretation of the "unnecessary or undue degradation" standard. Prior to amendment, DOI interpreted the standard to turn primarily on whether a plan of operation would result in "disturbance greater than what would normally result when an activity is being accomplished by a prudent operator."[19] The Clinton amendments revised the interpretation to turn on whether a plan of operation would result in "substantial irreparable harm" to a "significant" scientific, cultural, or environmental

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[10] *See* Loren L. Mall, *Public Land and Mining Law* 356–59 (3d ed. 1982).

[11] 67 Stat. 539 (codified at 30 U.S.C. §§ 501–505).

[12] 30 U.S.C. §§ 521–531.

[13] *See* 30 U.S.C. § 526. The United States, as the owner of the nonlocatable minerals, reserves the right to grant mining leases for and authorize exploration and development of leasable minerals under unpatented claims as well as under patented claims and mill sites from which leasable minerals have been reserved by the United States. 30 U.S.C. § 524. Similar reservations are made by the 1953 act. *See* 30 U.S.C. § 502. *See also* § 110.02[2][b], *infra*.

[14] 69 Stat. 367, 368–373 (codified at 30 U.S.C. §§ 611–615); *see also* 43 C.F.R. subpt. 3715 (restricting occupancy to that which is reasonably incident to mining, and requiring Bureau of Land Management's prior concurrence to proposed occupancy).

[15] 30 U.S.C. § 612. However, a mining locator may use timber and remove vegetative resources from the claim as required for his mineral operations. 30 U.S.C. § 612(c). The uses allowed to licensees and permittees of the United States include broad recreational uses under an implied license of the public to use lands in the public domain. United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277 (9th Cir. 1980). The Multiple Surface Use Act provides that uses allowed others are "not to endanger or materially interfere with prospecting, mining, or processing operations" of the locator. 30 U.S.C. § 612(b). *See also* § 110.02[2][b], *infra*. The same limitation applies to activities on the surface of a mining claim carried out by a federal agency. ***Robert E. Shoemaker, 110 IBLA 39***, GFS(MIN) 82 (1989).

[16] 16 U.S.C. §§ 473–478, 479–482, 551; *see* 36 C.F.R. pt. 228.

[17] 43 U.S.C. §§ 1701–1782; *see* 43 C.F.R. pt. 3800.

[18] 43 C.F.R. subpt. 3809 (requiring, among other things, posting of reclamation bonds and removal of equipment from inactive claims). *See also* Robert D. Comer & Lance C. Wenger, "The Role of the 'Unnecessary or Undue Degradation' Standard in Protecting Public Lands Under FLPMA," 54 *Rocky Mt. Min. L. Inst.* 10-1 (2008).

[19] 45 Fed. Reg. 78,902, 78,910 (Nov. 26, 1980).

resource value of the public lands that could not be "effectively mitigated."[20] As a practical result, BLM could subsequently deny a plan of operation if it considered the location unsuitable for mining, even if the project involved no unnecessary or undue degradation of the surrounding landscape. The George W. Bush Administration overturned the Clinton regulations and adopted a hybrid standard that includes performance standards and a requirement that activities are "reasonably incident" to exploration, mining, or processing operations.[21]

Solicitor John D. Leshy issued a significant opinion at the close of the second Clinton Administration regarding ancillary uses of unpatented mining claims, and mill sites in particular, concluding that the 1872 Mining Law limited to five acres the amount of land that could be claimed for a mill site associated with a particular mining claim.[22] The Leshy opinion directed BLM to deny plans of operation that involved the use of more than five acres per claim for mill site purposes, unless the additional land was procured through other means. The implications were crippling for modern mining operations that require large mill operations to process lower grade ores. Although not binding on a court, the opinion was highly controversial due to potential deference that a court might afford and its binding effect on the Interior Board of Land Appeals.

On October 7, 2003, Deputy Solicitor Roderick E. Walston issued a Solicitor's Opinion[23] that explicitly overturned the Leshy opinion. The Walston opinion concluded that

> the mill site provision [of the 1872 Mining Law] does not categorically limit the number of mill sites that may be located and patented to one for each mining claim and that the Department's traditional practice of not applying such a numerical limitation is in conformity with the requirements of the Mining Law.[24]

The Walston opinion cited administrative practice and interpretation that the five-acre provision in the Mining Law of 1872 regarding mill sites does not impose a numeric limitation. Secretary of the Interior Gale Norton concurred with the Walston opinion, restoring the ability to use unpatented mining claims for mill sites capable of supporting modern mining.

So long as a mining locator complies with federal and state laws and regulations in good faith, his mining claim, if valid, is segregated from the public domain[25] and is protected from intrusion.[26] His possessory right prohibits adverse location of the claim[27] as well as mineral exploration by others within the boundaries of the claim, except

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[20] 65 Fed Reg. 69,998, 70,116 (Nov. 21, 2000).

[21] 66 Fed. Reg. 54,834, 54,860 (Oct. 30, 2001) (codified at 43 C.F.R. § 3809.5).

[22] Solicitor's Opinion M-36988, "Limitations on Patenting Millsites under the Mining Law of 1872" (Nov. 7, 1997), GFS(MIN) SO-1 (1997).

[23] Solicitor's Opinion M-37010, "Mill Site Location and Patenting under the 1872 Mining Law" (Oct. 7, 2003), GFS(MIN) SO-1 (2003).

[24] M-37010, at 23.

[25] ***St. Louis Mining & Milling Co. v. Mont. Mining Co., 171 U.S. 650, 655, 19 S. Ct. 61, 43 L. Ed. 320 (1898)***; Bagg v. New Jersey Loan Co., 354 P.2d 40, 46 (Ariz. 1960). See also § 31.08, *supra*, discussing the good faith required of locators.

[26] ***Miller v. Chrisman, 73 P. 1083, 1086 (Cal. 1903)***, *aff'd*, 197 U.S. 313, 25 S. Ct. 468, 49 L. Ed. 770 (1905). *See also* Jualpa Co. v. Thorndyke, 4 Alaska 207, 210 (1910); Garthe v. Hart, 15 P. 93, 94 (Cal. 1887); Bramlett v. Flick, 57 P. 869, 872–73, 875 (Mont. 1899).

[27] Cole v. Ralph, 252 U.S. 286, 295, 40 S. Ct. 321, 64 L. Ed. 567 (1920) ("A location based upon discovery gives an exclusive right of possession and enjoyment, is property in the fullest sense, is subject to sale and other forms of disposal, and so long as it is kept alive by performance of the required annual assessment work prevents any adverse location of the land."); Swanson v. Sears, 224 U.S. 180, 181, 32 S. Ct. 455, 56 L. Ed. 721 (1912); Gwillim v. Donnellan, 115 U.S. 45, 49, 5 S. Ct. 1110, 29 L. Ed. 348 (1885); Belk v. Meagher, 104 U.S. 279, 284, 26 L. Ed. 735 (1881).

as permitted by multiple mineral development legislation.[28] Likewise, the mining claim is also closed to entry under the homestead laws.[29] Possession of a valid unpatented claim may be maintained as against all other persons,[30] including the United States,[31] subject, prior to the issuance of patent, to use by the United States and persons authorized by it for certain purposes that do not materially interfere with the locator's mineral operations.[32] Thus, a mining locator can maintain an action for quiet title or trespass[33] and can seek all the usual remedies available to a landowner for protection of his rights.[34]

[2] Equitable Ownership

A citizen locating a mining claim on the public domain may at various times hold one of three possible estates: (1) by locating the claim in compliance with the statutes and regulations he acquires a possessory right, with title

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[28] *See* Clipper Mining Co. v. Eli Mining & Land Co., 194 U.S. 220, 230, 24 S. Ct. 632, 48 L. Ed. 944 (1904) (prospecting upon a prior valid placer location for unknown lodes vests no title to lodes discovered and located within the placer, "unless the placer owner has abandoned his claim, waives the trespass, or, by his conduct, is estopped to complain of it" (quoting ***Clipper Mining Co. v. Eli Mining & Land Co., 68 P. 286, 289 (Colo. 1902))***; United States v. 237,500 Acres of Land, 278 F.2d 584 (9th Cir. 1960).

[29] Ainsworth Copper Co. v. Bex, 53 Interior Dec. 382 (1931); Layman v. Ellis, 52 Pub. Lands Dec. 714, 722 (1929). Homesteading in the continental United States was ended by executive orders issued in 1934 and 1935 under authority of the Taylor Grazing Act, 43 U.S.C. §§ 315–315o-1. These orders withdrew the remaining public domain in the western United States from further homestead entries unless classified by the Secretary of the Interior for the purpose of homesteading. Very little land was so classified. Loren L. Mall, *Public Land and Mining Law* 83–84 (3d ed. 1982). The homestead laws were repealed on October 21, 1976, by section 702 of FLPMA, except for Alaska, where the repeal was delayed until October 21, 1986.

[30] Mt. Rosa Mining, Milling & Land Co. v. Palmer, 56 P. 176, 177–78 (Colo.1899). *See also* Duguid v. Best, 291 F.2d 235, 239 (9th Cir. 1961); United W. Minerals Co. v. Hannsen, 363 P.2d 677, 680–81 (Colo. 1961).

[31] Gwillim v. Donnellan, 115 U.S. 45, 49, 50, 5 S. Ct. 1110, 29 L. Ed. 348 (1885); Coleman v. United States, 363 F.2d 190, 196 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 599, 88 S. Ct. 1327, 20 L. Ed. 2d 170 (1968); United States v. Carlile, 67 Interior Dec. 417, 421 (1960); Coos Bay Timber Co. v. Bigelow, 365 P.2d 619, 620 (Or. 1961). *See also* Best v. Humboldt Placer Mining Co., 371 U.S. 334, 83 S. Ct. 379, 9 L. Ed. 2d 350 (1963).

[32] Unpatented claims, patented claims, and mill sites from which leasable minerals have been reserved by the United States are subject to exploration and development of leasable minerals by lessees and permittees of the United States under the Act of August 12, 1953 and the 1954 Multiple Mineral Development Act. Public lands, including mining claims, which are subject to the Federal Power Act, 16 U.S.C. §§ 791a–825r, and the Mining Claims Rights Restoration Act of 1955 (Engle Act), 30 U.S.C. §§ 621–625, are subject to the right of the United States to develop and use power sites for the development of electrical power. Mining claims located on lands subject to the Stock-Raising Homestead Act of 1916, 43 U.S.C. §§ 299, 301, are subject to the surface owner's right to use his estate, and the mining claimant may use the surface only insofar as reasonably required for mining purposes. Locators of mining claims on public lands regulated according to other special laws are subject to various restrictions on the exploration and development of claims. *See* Chapter 17, *supra*.

[33] Gillis v. Downey, 85 F. 483 (8th Cir. 1898); Black v. Elkhorn Mining Co., 49 F. 549, 552 (C.C.D. Mont. 1892).

[34] Lindsey v. Moyle, 358 F.2d 727 (9th Cir. 1966); *Duguid*, 291 F.2d 235 (trespass action seeking damages against irrigation district respecting right-of-way); Walkeng Mining Co. v. Covey, 352 P.2d 768 (Ariz. 1960) (forcible entry and detainer action is possessory in character and may be maintained by unpatented mining claimant); Consol. Tungsten Mines, Inc. v. Frazier, 348 P.2d 734 (Ariz. 1960) (quiet title action); Bowen v. Sil-Flo Corp., 9 Ariz. App. 268, 451 P.2d 626 (1969) (declaratory judgment and quiet title action); Velasco v. Mallory, 427 P.2d 540 (Ariz. Ct. App. 1967) (quiet title action as to unpatented mining claims may be maintained by tenant in common without joining cotenant); ***Lightner Mining Co. v. Lane, 120 P. 771 (Cal. 1911)*** (action to recover damages for removal of ore); Smpardos v. Piombo Constr. Co., 244 P.2d 435, 438 (Cal. Ct. App. 1952) ("trespasser is liable for the reasonable value of the use of said property, together with any other damage that said trespasser may have caused to the locator"); Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 59 P. 607 (Colo. 1899), *aff'd*, 182 U.S. 499, 21 S. Ct. 885, 45 L. Ed. 1200 (1901) (enjoining trespass); Lewiston Lime Co. v. Barney, 394 P.2d 323 (Idaho 1964) (quiet title action); White v. Ames Mining Co., 349 P.2d 550 (Idaho 1960) (in an action to quiet title plaintiff must succeed on the strength of his own title and not on the weakness of that of his adversary); W. Standard Uranium Co. v. Thurston, 355 P.2d 377 (Wyo. 1960) (quiet title action).

remaining in the United States; (2) after complying with the requirements for patent[35] and paying the required purchase price, he acquires the "equitable title"; and (3) he may obtain a patent, thus divesting the United States of all interest, both legal and equitable.[36] Because the statute grants the "exclusive right of possession and enjoyment,"[37] the locator of a valid unpatented mining claim has a "possessory right" rather than "equitable ownership." The equitable title to an unpatented mining location does not pass until the owner of a valid claim has completed the required improvements, filed an application for patent, and paid the purchase price.[38]

Prior to the initiation of patent procedures, a locator with a valid location acquires a vested property right[39] in real property,[40] with full attributes and benefits of ownership exercisable against third parties,[41] but with the fee remaining in the United States.[42] Once moved to patent, however, based upon a valid application and payment of

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[35] Patent proceedings are discussed in Chapter 51, *infra*.

[36] United States v. Rizzinelli, 182 F. 675, 681 (D. Idaho 1910) (noting that a bare possessory right is a distinct and vested property right).

[37] 30 U.S.C. § 26 (lode claims). See § 36.03[1], *supra*, as to placer claims.

[38] Benson Mining & Smelt. Co. v. Alta Mining & Smelt. Co., 145 U.S. 428, 431–32, 12 S. Ct. 877, 36 L. Ed. 762 (1892). *See also* Wyoming v. United States, 255 U.S. 489, 497–98, 41 S. Ct. 393, 65 L. Ed. 742 (1921) (state's waiver of right to equitable title analogous to cash consideration).

[39] Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transp. Co., 196 U.S. 337, 342, 25 S. Ct. 266, 49 L. Ed. 501 (1905); Davis v. Nelson, 329 F.2d 840, 845 (9th Cir. 1964) (upon compliance with the legal requirements of location and discovery of a valuable mineral deposit, "the locator has acquired a vested property right … . Such vested right may be prosecuted to patent."); O'Connell v. Pinnacle Gold Mines Co., 131 F. 106, 110, 111 (C.C.D. Wash. 1904), *aff'd*, 140 F. 854 (9th Cir. 1905); Oil Shale Corp. v. Udall, 261 F. Supp. 954, 965 (D. Colo. 1966) (valid mining location "creates a vested property right"); Walkeng Mining Co. v. Covey, 352 P.2d 768, 771 (Ariz. 1960) (locator obtains "vested property right").

[40] Wilbur v. United States *ex rel*. Krushnic, 280 U.S. 306, 316, 50 S. Ct. 103, 74 L. Ed. 445 (1930); Bradford v. Morrison, 212 U.S. 389, 394, 29 S. Ct. 349, 53 L. Ed. 564 (1909). *Accord* Kasey v. Molybdenum Corp. of Am., 336 F.2d 560, 563–64 (9th Cir. 1964) (unpatented mining claims, mill sites, and appurtenances and improvements thereto are real property within the meaning of California civil procedure statute defining such as "coextensive with lands, tenements, and hereditaments"); Humboldt Placer Mining Co. v. Best, 293 F.2d 553, 555 (9th Cir. 1961) (valid mining claim is an interest in real property that cannot be taken under eminent domain power except upon payment of just compensation), *rev'd on other grounds*, 371 U.S. 334 (1963); Bagg v. N.J. Loan Co., 354 P.2d 40, 44 (Ariz. 1960) (A mining locator's interest "is regarded as real property and accorded that protection").

[41] United States v. Etcheverry, 230 F.2d 193, 195 (10th Cir. 1956):

> The law is well settled by innumerable decisions that when a mining claim has been perfected under the law, it is in effect a grant from the United States of the exclusive right of possession to the same. It constitutes property to its fullest extent, and is real property subject to be sold, transferred, mortgaged, taxed, and inherited without infringing any right or title of the United States.

The case cites all of the principal U.S. Supreme Court decisions that have established this proposition. *See, e.g.*, Ickes v. Va.-Colo. Dev. Corp., 295 U.S. 639, 55 S. Ct. 888, 79 L. Ed. 1627 (1935); *Krushnic*, 280 U.S. 306; Clipper Mining Co. v. Eli Mining & Land Co., 194 U.S. 220, 24 S. Ct. 632, 48 L. Ed. 944 (1904); ***St. Louis Mining & Milling Co. v. Mont. Mining Co., 171 U.S. 650, 19 S. Ct. 61, 43 L. Ed. 320 (1898)***; Belk v. Meagher, 104 U.S. 279 (1881).

[42] Union Oil Co. v. Smith, 249 U.S. 337, 348–49, 39 S. Ct. 308, 63 L. Ed. 635 (1919):

> But … a discovery of mineral by a qualified locator upon unappropriated public land initiates rights much more substantial as against the United States and all the world. If he locates, marks, and records his claim in accordance with section 2324 [30 U.S.C. § 28] and the pertinent local laws and regulations, he has, by the terms of section 2322 [30 U.S.C. § 26], an exclusive right of possession to the extent of his claim as located, with the right to extract the minerals, even to exhaustion, without paying any royalty to the United States as owner, and without ever applying for a patent or seeking to obtain title to the fee; subject, however, to the performance of the annual labor

the purchase price, equitable title rests with the purchaser,[43] and only naked legal title remains in the government.[44] Nevertheless, until legal title passes to the applicant, the Secretary may order further inquiry into the validity of claimed rights to public land.[45] Legal title is held "in trust" for conveyance to the beneficial owner, the mining locator,[46] upon compliance with the statutory requirements for patent issuance, and is without the usual incidents of proprietorship.[47] Hence, a locator may extract, process, and market the minerals in the deposit for which the location is made without infringing any right or title of the United States.[48] When compliance with the statutory requirements has occurred during patent proceedings and the full equitable title has vested in the purchaser, the duty to pay maintenance fees or perform annual assessment work ceases, based on the issuance of a final certificate that generally precludes the initiation of adverse claims.[49]

Even after the United States has allowed a mineral locator to acquire the equitable title, it retains significant prerogatives to protect its legal title. These include the rights, under the Act of July 23, 1955 (Multiple Surface Use Act),[50] to manage and dispose of the surface resources not reasonably required for mining and to have access to the claim for the agents of the United States, its permittees, and licensees. These statutory provisions codify earlier judicial decisions,[51] which held that the mining laws imply that the United States has the right to protect the land from waste,[52] the right to dispose of timber thereon,[53] and the right to require entry of mineral surveyors.[54] The prerogatives of the United States also include the right to prescribe the procedure that any claimant must follow in order to obtain rights in public lands, including administrative proceedings for determining the validity of mining claims.[55] By the multiple mineral development acts, the United States requires a mineral locator to develop its minerals by methods which, so far as reasonably practical, avoid damage to deposits of leasable minerals and facilities for mineral operations related to such deposits.[56] Also, before a patent is issued, the government may at any time conduct a validity examination of the mining claimant's discovery of minerals, maintenance fee payment,

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specified in section 2324, for upon his failure to do this the claim is open to relocation by others at any time before resumption of work upon it by the original locator.

Accord Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 98 S. Ct. 2002, 56 L. Ed. 2d 570 (1978) (dictum); Oil Shale Corp. v. Morton, 370 F. Supp. 108, 124 (D. Colo. 1973); Walkeng Mining Co. v. Covey, 352 P.2d 768, 771 (Ariz. 1960).

43 McKnight v. El Paso Brick Co., 120 P. 694, 698 (N.M. 1911); Sweet v. Rivers, 318 P.2d 260, 264 (N.M. 1957).

44 *Smith*, 249 U.S. at 349; Union Oil Co. v. Udall, 289 F.2d 790, 791–92 (D.C. Cir. 1961); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Mulligan, 177 F. Supp. 384 (D. Or. 1959); *Walkeng*, 352 P.2d 768; Watterson v. Cruse, 176 P. 870, 872 (Cal. 1918).

45 *Udall*, 289 F.2d at 792.

46 Noyes v. Mantle, 127 U.S. 348, 8 S. Ct. 1132, 32 L. Ed. 168 (1888); Bowen v. Chemi-Cote Perlite Corp., 432 P.2d 435, 443 (Ariz. 1967); Bagg v. N.J. Loan Co., 354 P.2d 40, 44 (Ariz. 1960).

47 Forbes v. Gracey, 9 F. Cas. 401 (C.C.D. Nev.), *aff'd*, 94 U.S. 762, 24 L. Ed. 313 (1877).

48 *Smith*, 249 U.S. at 349; *Forbes*, 9 F. Cas. 401; United States v. Kosanke Sand Corp., 12 IBLA 282, GFS(MIN) 79 (1973).

49 Wyoming v. United States, 255 U.S. 489, 41 S. Ct. 393, 65 L. Ed. 742 (1921); Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428 (1892).

50 30 U.S.C. §§ 611–15. *See* § 4.19, *supra*.

51 *See* United States v. Richardson, 599 F.2d 290 (9th Cir. 1979).

52 Teller v. United States, 113 F. 273 (8th Cir. 1901). *Accord* United States v. Etcheverry, 230 F.2d 193 (10th Cir. 1956).

53 Bradley-Turner Mines, Inc. v. Branagh, 187 F. Supp. 665 (N.D. Cal. 1960). *See also* § 4.19, *supra*.

54 United States v. Fickett, 205 F. 134 (9th Cir. 1913) (unpatented mining claim is still public domain within the protection of an act of Congress forbidding interference with mineral surveyors).

55 Best v. Humboldt Placer Mining Co., 371 U.S. 334, 340 (1963) (administrative determination of validity of mining claims upheld notwithstanding pending judicial action).

56 *See* 30 U.S.C. §§ 526, 612. See also § 4.18, *supra*, on the multiple mineral development statutes.

or performance of assessment work and filing,[57] and other statutory requirements.[58] Nevertheless, because the estate granted to a mining locator is vested when his possessory right has been perfected by location and discovery, even the United States as legal title holder cannot deprive a locator of his rights without making just compensation.[59] Hence, the government does not destroy the perfected rights of a locator when it withdraws lands from mineral location and entry or places them into a government reservation.[60] Furthermore, the government cannot dispose of land by sale prior to a proper finding of invalidity of any mining claims on it.[61]

The Department of the Interior may also at any time before patent issues, and on its own initiative, inquire into the validity of mining locations,[62] the effect of which is to remove the cloud on the title of the United States that an invalid mining claim casts.[63] A locator's title is further qualified in that it is subject to defeasance upon failure to timely pay annual maintenance fees, or to perform and file for completion of annual assessment work, as required. Beginning in 1993, Congress substantially altered the requirements for maintaining an unpatented claim through an appropriations act[64] that replaced the annual assessment work requirement with a claim maintenance fee. Subsequent appropriations acts have continued the claim maintenance fee regime, which remains in effect through the 2012 fiscal year.[65] Notably, "small miners" who hold 10 or fewer unpatented mining claims are exempt from the claim maintenance fee requirement and may perform traditional assessment work (and file associated documentation) in lieu of paying the maintenance fee.[66] The small miner exemption has been strictly construed and does not apply to multiple entities that own fewer than 10 claims and are related by common directors or

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[57] Adams v. United States, 318 F.2d 861, 872 (9th Cir. 1963). *See also* Chapters 44 and 45, *infra*, for an exhaustive discussion of maintenance fees and assessment work.

[58] Union Oil Co. v. Udall, 289 F.2d 790 (D.C. Cir. 1961) (patent applicant required to bring a private contest against a lessee under the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181–263, to establish the validity of the claims as against the lease); United States v. Mulligan, 177 F. Supp. 384 (D. Or. 1959) (action in equity to determine validity of claims, enjoin removal of timber, and recover treble damages for timber sold). See Chapter 51, *infra*, on patent proceedings.

[59] United States v. N. Am. Transp. & Trading Co., 253 U.S. 330, 40 S. Ct. 518, 64 L. Ed. 935 (1920) (due compensation required to owner of placer claim appropriated by United States for part of military post); Humboldt Placer Mining Co. v. Best, 293 F.2d 553 (9th Cir. 1961) (valid mining claim on public land, though unpatented, is an interest in real property that cannot be taken under power of eminent domain except upon payment of just compensation), *rev'd on other grounds*, 371 U.S. 334 (1963).

[60] Oil Shale Corp. v. Morton, 370 F. Supp. 108 (D. Colo. 1973); United States v. 9,947.71 Acres of Land, 220 F. Supp. 328 (D. Nev. 1963); Van Ness v. Rooney, 116 P. 392 (Cal. 1911), writ of error dismissed, ***231 U.S. 737, 34 S. Ct. 316, 58 L. Ed. 460***. *See* Secretary's instructions of Jan. 13, 1904, 32 L.D. 387, 388 (withdrawal of arid lands); Reservation of Land for Public Purposes, 17 Op. Att'y Gen. 230 (1881).

[61] Mrs. Marion E. Beresford, A-30015 (1964), GFS MIN-SO-1965-42.

[62] United States v. Zweifel, 508 F.2d 1150, 1154–56 (10th Cir.), *cert. denied sub nom*. ***Roberts v. United States, 423 U.S. 829, 96 S. Ct. 47, 46 L. Ed. 2d 46 (1975)***.

[63] Cameron v. United States, 252 U.S. 450, 40 S. Ct. 410, 64 L. Ed. 659 (1920). See Chapter 50, *infra*, on government contests. *See also* Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964).

[64] Department of the Interior and Related Agencies Appropriations Act, 1993, ***Pub. L. No. 102-381, 106 Stat. 1374*** (Oct. 5, 1992); *see also* 43 C.F.R. subpt. 3833. See Chapters §§ 44 and 45, *infra*, for an exhaustive discussion of maintenance fees and assessment work.

[65] Department of the Interior, Environment, and Related Agencies Appropriations Act, 2012, Pub. L. No. 112-74, § 573, ***125 Stat. 786***, 986.

[66] *See* 43 C.F.R. pt. 3835.

officers.[67] Strict implications for noncompliance remain intact: failure to pay the fee or properly qualify for the small miner exception results in defeasance of the locator's unpatented claim.[68]

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[67] *See* Black Bear Mines Co., 152 IBLA 387, GFS(MIN) 29 (2000) (commonality of directors and officers rendered claims ineligible for small miner exemption).

[68] *See, e.g.*, Jones v. United States, 121 F.3d. 1327 (9th Cir. 1997) (upholding forfeiture of unpatented mining claim for failure to pay annual maintenance fees against due process and equal protection challenges); Lee H. & Goldie E. Rice, 128 IBLA 137, GFS(MIN) 9 (1994) (holding that BLM could not consider mitigating factors, even in the case of "tragic incidents," where locators had failed to timely submit claim maintenance fees); *but see* Gary L. Carter (On Reconsideration), 132 IBLA 46, GFS(MIN) 12 (1995) (holding that a bank error acknowledged by the bank justified reinstatement for prompt payment of claim rental fees).

Department of Interior Solicitor's Opinions

October 07, 2003

M-37010

Opinion **By:** **[*1]** Roderick E. Walston
Deputy Solicitor [1]

Opinion

I. Introduction

The Mining Law of 1872 (hereinafter "Mining Law") allows miners to locate and patent lode and placer mining claims, subject to certain restrictions regarding the size of the claims. *30 U.S.C. §§ 23*, *29*, *35*, *36*. The Mining Law also allows miners to locate and patent nonmineral lands for mill sites. *30 U.S.C. § 42*. A mill site consists of a parcel of nonmineral land that is used or occupied for mining or milling purposes in association with lode or placer claims. *Id*. [2] Under the Mining Law, a mill site may not exceed five acres. *Id*. This provision of the Mining Law will be referred to as the "mill site provision" or "five-acre mill site provision."

[*2]

In 1997, former Solicitor John D. Leshy issued an ***opinion***, concurred in by former Secretary of the Interior Bruce Babbitt, that concluded that the mill site provision hot only limits the size of mill sites to five acres, but also limits the *number* of mill sites that may be located and patented to no more than one five-acre mill site in association with each mining claim. *Limitations on Patenting Millsites under the Mining Law of 1872*, M-36988 (Nov. 7, 1997) (hereinafter "1997 ***Opinion***"). [3] The 1997 ***Opinion*** advised that "the Department should reject those portions of millsite patent applications that exceed" five acres per associated placer or lode claim and "should not approve plans of operations which rely on a greater number of millsites than the number of associated claims being developed unless the use of additional lands is obtained through other means." 1997 ***Opinion***, at 2.

[*3]

The 1997 ***Opinion*** represented a departure from the Department's long-standing administrative practice and interpretation that the mill site provision does not limit mill sites to one per mining claim. The Bureau of Land

[1] The Solicitor has recused himself from involvement in the matters discussed in this ***opinion***.

[2] Claimants may use mill sites for a wide range of purposes related to mining or milling. The structures and activities on mill sites include, among other things, water treatment facilities, overburden storage, crushing units, warehouses, equipment maintenance buildings, employee parking, top soil storage for reclamation use, mineral processing pads, and air-quality and other environmental monitoring stations. *Alaska Copper Co., 32 Pub. Lands Dec. 128, 131 (1903);* 2 *Lindley on Mines* § 523, at 1178-80 (1914); Terry S. Maley, *Mineral Law* 395-405 (6th ed. 1996). Under the mill site provision, there are two types of mill sites. Independent or custom mill sites are used for quartz mills or reduction works. Dependent mill sites are used for mining or milling purposes in association with mining claims and are the most common type. Unless otherwise noted, future references to mill sites in this ***opinion*** are to dependent mill sites.

[3] Strictly speaking, the 1997 ***Opinion*** concluded that the mill site provision limits claimants to locating and patenting five acres of nonmineral lands in association with each mining claim, allowing that more than one mill site may be located for each mining claim as long as the aggregate acreage of the mill sites does not exceed five acres. The practical effect of this interpretation in most cases is to limit the number of mill sites to one for each associated claim. In this memorandum, we will often characterize the interpretation of the 1997 ***Opinion*** as a categorical or numerical limitation that limits claimants to locating one mill site for each mining claim. In such instances, we are referring to a five-acre mill site. The 1997 ***Opinion*** also relied on this shorthand, stating that the statute "imposes a limitation that only a single five-acre millsite may be claimed in connection with each mining claim. " 1997 ***Opinion***, at 4-5.

Management (BLM), which is charged with enforcement responsibility for the mill site provision, issued written guidance in 1954 that clearly provided that more than one mill site could be located for each mining claim. The BLM has consistently followed this written guidance in administering the mill site provision for nearly a half century prior to the 1997 ***Opinion***. Consequently, the 1997 ***Opinion*** departed from nearly a half century of settled administrative practice regarding the mill site provision.

Indeed, Congress has recognized that the 1997 ***Opinion*** represented a departure from the Department's settled administrative practice and interpretation, and has taken action to restore that administrative practice with respect to prior and pending mining plans and patent applications. In 1999, Congress enacted legislation expressly prohibiting the Department of the Interior from applying the 1997 ***Opinion*** to deny patent applications and plans of operation submitted before **[*4]** the date of the law's enactment on grounds that they contain more than one mill site for each mining claim. Pub. L. No. 106-31, § 3006, 113 Stat. 57, 90-91 (1999); Pub. L. No. 106-113, § 337, 113 Stat. 1501, 1501A-199 (1999). According to the Conference Report, the 1997 ***Opinion*** was "particularly troubling because both the Bureau of Land Management and the Forest Service have been approving patents with more than one five-acre millsite per patent based on procedures outlined in their operations manuals." H.R. Conf. Rep. No. 106-143, at 90 (1999). As a result of the 1999 enactments, the 1997 ***Opinion*** has not been applied as the basis for denying a proposed mining plan or a patent application.

After reviewing the matter, we conclude that the mill site provision does not categorically limit the number of mill sites that may be located and patented to one for each mining claim and that the Department's traditional practice of not applying such a numerical limitation is in conformity with the requirements of the Mining Law. Accordingly, we conclude that the 1997 ***Opinion***, in reaching the **[*5]** opposite conclusion, does not properly interpret the mill site provision and improperly departs from the Department's traditional practice and interpretation. Our conclusion is based on analysis of the Mining Law, its legislative history, the congressional purpose, and the Department's settled administrative practice and interpretation.

First, although the mill site provision of the Mining Law expressly limits the size of mill sites, the provision does not expressly limit the *number* of mill sites that may be located for a mining claim. Absent some other indication of congressional intent, a statute should not be construed as containing an implied limitation that does not appear in the statute itself. The absence of any numerical limitation in the mill site provision is particularly important in light of the fact that, as Congress knew in enacting the Mining Law in 1872, mining companies at that time used many more than five total acres of land for milling purposes to support a single mining claim, as in the case of a Comstock Lode mine in Nevada. If Congress had intended to overturn this existing mining practice by precluding mining companies from locating more than a single five-acre **[*6]** mill site, Congress presumably would have expressly so provided in the Mining Law. The absence of any such language strongly indicates that no such result was intended.

Second, other provisions of the Mining Law limit the size of lode and placer mining claims, and these provisions have been held by the courts not to limit the number of such claims that may be located and patented by an individual claimant. Since these other provisions do not categorically limit the number of lode or placer claims, the mill site provision should not be construed as categorically limiting the number of mill sites that may be located and patented for each mining claim. Under settled rules of statutory construction, the overall context of the Mining Law should be considered in interpreting its provisions, and similar provisions should be construed harmoniously.

Third, the congressional purpose of the Mining Law was to encourage the development of the nation's mineral resources. This congressional purpose is not served by artificially limiting the number of mill sites that may be located and patented with mining claims. Otherwise, mill sites would, in many cases, be inadequate to develop the mineral resources **[*7]** located within the mining claims. It is unlikely that Congress intended to limit categorically the availability of milling capacity to develop the minerals that Congress itself had opened for exploration and purchase. To construe the Mining Law as containing such a restriction would impair the congressional goal of encouraging development of the nation's mineral resources.

Fourth, as noted above, the Department's prevalent administrative practice and interpretation has been in accordance with the view that the five-acre mill site provision does not impose a numerical limitation on mill sites,

and under settled rules of statutory construction the interpretation of a statute by an agency charged with its enforcement is relevant in construing the statute.

Although the mill site provision does not preclude locating and patenting multiple mill sites for each mining claim, the provision does restrict the amount of mill site acreage a claimant may locate and patent to that which is "used or occupied . . . for mining or milling purposes . . . ." 30 U.S.C. § 42. This provision of the Mining Law will be referred to as the "use-or-occupancy requirement." Under **[*8]** this provision, the Department of the Interior may limit excessive mill sites by challenging the validity of mill sites that claimants do not actually need for mining or milling purposes.

Based on these factors, we conclude that the mill site provision does not categorically limit the number of mill sites to one for each mining claim, and that the 1997 ***Opinion*** erred in concluding otherwise. Accordingly, the Department should return to its prevalent, pre-1997 administrative practice and interpretation, under which the mill site provision was interpreted as not imposing such numerical restrictions.

II. The Mill Site Provision

Under the Mining Law, claimants may locate [4] and patent [5] lode claims and placer claims. 30 U.S.C. §§ 23, 29 (lode claims); *id*. §§ 35, 36 Placerr claims). The Mining Law also provides for locating and patenting mill sites that are attendant to lode claims and, as amended in 1960, attendant to placer claims as well. The mill site provision states:

(a) Where nonmineral land not contiguous to the vein or *lode* is *used or occupied* by the proprietor of such vein or lode for mining **[*9]** or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no *location made on and after May 10, 1872 of such nonadjacent land shall exceed five acres* , and payment for the same must be made at the same rate as fixed by sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of Title 43 for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

(b) Where nonmineral land is needed by the proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim, and is *used or occupied* by the proprietor for such purposes, such land may be included in an application for a patent for such claim, and may be patented therewith subject to the same requirements as to survey and notice as are applicable to players. *No location* **[*10]** *made of such nonmineral land shall exceed five acres* and payment for the same shall be made at the rate applicable to placer claims which do not include a vein or lode.

[4] "Location" is the act of taking or appropriating a parcel of land. St. Louis Smelting & Refining Co. v. Kemp, 104 U.S. 636, 649 (1881). The act of "location" includes posting a location notice on the mining claim or mill site, recording the location notice, and marking the mining claim or mill site boundaries on the ground. Smith v. Union Oil Co., 135 P. 966, 968 (Cal. 1913), *aff'd* 249 U.S. 337 (1919). A "lode" claim is a location made upon a vein or lode of quartz or other "rock in place" bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits. 30 U.S.C. § 23. A Placerr" claim includes all forms of deposit except veins of quartz or other rock in place and is characterized by mineral deposits formed by sedimentary processes. *Id*. § 35; United States v. Iron Silver Mining Co., 128 U.S. 673, 678-79 (1888). In order to have a valid mining claim location, there must be a discovery of a valuable mineral deposit within the boundaries of the claim. 30 U.S.C. § 23. Before beginning mining activities, a mining claimant must submit a notice for surface disturbance of five acres or less or obtain agency approval of a plan of operation that complies with the BLM's surface management regulations, under which BLM applies the "unnecessary or undue degradation" standard found in the Federal Land Policy and Management Act. 43 C.F.R. subpart 3809; 43 U.S.C. § 1732(b).

[5] A patent is the instrument by which the United States conveys legal title to a parcel of federal land. The Mining Law allows a mining claimant to seek to obtain a patent to mining claims and mill sites. 30 U.S.C. §§ 29, 35, 42. A mining claimant does not need to obtain a patent for a mining claim or mill site before beginning mining activities on the claim or site. United States v. Locke, 471 U.S. 84, 86 (1986); Independence Mining Co. v. Babbitt, 105 F.2d 502, 509 (9th Cir. 1997).

30 U.S.C. § 42 (emphasis added). Subsection (a) establishes requirements for mill sites located in association with lode claims and subsection (b) establishes requirements for mill sites located in association with placer claims. The requirements of the two subdivisions are virtually identical. That is, both subdivisions provide that mining claimants may locate and obtain a patent for mill sites in association with mining claims if (1) the land is nonmineral in character, (2) the land is used or occupied by the claimant for mining or milling purposes, and (3) the location of the nonmineral land does not exceed five acres. [6] Neither subdivision contains any language explicitly limiting the number of mill sites to one for each mining claim. [7]

[*11]

[*12]

As we now explain, the mill site provision does not categorically restrict the number of mill sites that may be located and patented for each mining claim. This construction is supported by the statutory language, the overall context of the Mining Law, the congressional purposes underlying the statute, and the Department's prevalent, long-standing administrative practice and interpretation.

A. Statutory Language

The mill site provision expressly limits the size of individual mill sites by providing that a mill site may not exceed five acres. 30 U.S.C. § 42. Also, the provision provides that mill sites may be located only for lands that are "used or occupied" for mining or milling purposes. *Id*. The provision does not, however, contain any language limiting the number of mill sites per mining claim. Presumably if Congress had intended to impose such a limitation, it would have added language providing that "no more than one mill site may be located per mining claim. " No such language appears in the statute. We are reluctant to construe the statute as containing an implied limitation that does not appear on the face of the statute, at least **[*13]** in the absence of other indications that Congress intended for such a restriction to apply. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108-09 (1980) ("Absent a clearly expressed legislative intention to the contrary, th[e] language [of the statute itself] must ordinarily be regarded as conclusive . . . . We are consequently reluctant to conclude that Congress' failure to include [certain language] was unintentional."). As we now explain, we do not believe that Congress either imposed or intended to impose a numerical limitation on the mill sites that may be located and patented for each mining claim.

B. Overall Statutory Context: Lode Claims, Placer Claims and Mill Sites

Under established rules of statutory construction, the provisions of a statute must be construed in light of the overall statutory context and purpose rather than considered in isolation. The "literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use. In short, 'the meaning of statutory language, plain or not, depends on context.'" **[*14]** Bell Atl. Tel. Cos. v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (quoting Bailey v. United States, 516 U.S. 137, 145 (1995)); *see also* Defenders of Wildlife v. Browner, 191 F.3d 1159, 1164 (9th Cir. 1999) (quoting Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1173 (9th Cir. 1999) ("Rather than focusing just on the word or phrase at issue, we

[6] Mill sites located in association with lode claims also must be noncontiguous or nonadjacent to a vein or lode. 30 U.S.C. § 42(a).

[7] The 1997 ***Opinion*** argued that the use of the word "such" in the millsite provision supports a conclusion that the provision "imposes a limitation that only a single five-acre millsite may be claimed in connection with each mining claim. " 1997 ***Opinion***, at 4-5. If we replace the four instances of the word "such" in the provision with the language to which it refers, however, it becomes evident that the mill site provision limits the size but not the number of mill site locations a claimant may locate and patent per mining claim:

> Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of *the noncontiguous* vein or lode for mining or milling purposes, *the nonmineral* non-adjacent surface-ground may be embraced and included in an application for a patent for *the noncontiguous* vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of *nonmineral* non-adjacent land shall exceed five acres.

look to the entire statute to determine Congressional intent.")); *see also* Sutherland Stat. Const. § 46.05 (6th ed. 2000). Accordingly, the overall context of the Mining Law must be considered in construing the mill site provision. We now consider the overall statutory context by examining the related provisions governing lode claims, placer claims and mill sites.

1. Lode and Placer Claims

The Mining Law contains separate provisions relating to the location and patenting of lode claims and placer claims. Regarding *lode* claims, the Mining Law states that a mining claim located after May 10, 1872, "whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length **[*15]** along the vein or lode . . ." and "[n]o claim shall extend more than three hundred feet on each side of the middle of the vein at the surface . . . ." 30 U.S.C. § 23. [8] Regarding *individual placer* claims, the Mining Law states that "no such location shall include more than twenty acres for each individual claimant . . . ." *Id*. § 35. Regarding so-called "*association placer* " claims, the Mining Law provides that "no location of a placer claim . . . shall exceed one hundred and sixty acres for any one person or association of persons . . . ." *Id*. § 36.

Therefore, the Mining Law expressly limits the size of lode and placer claims. Under these limitations, a lode claim may not exceed 1500 feet in length and 600 feet in width (approximately twenty acres) , an individual placer claim may not exceed twenty acres, and **[*16]** an association placer claim may not exceed 160 acres.

The Department's contemporaneous construction of the Mining Law was that since the statute does not limit the number of lode or placer claims that may be located, no such numerical limitation should be deemed to exist. In 1873, shortly after the Mining Law's enactment, the Commissioner of the General Land Office concluded that the Mining Law does not limit the number of mining claims that a claimant may locate on a given lode deposit. The Commissioner stated:

> [T]here is no provision of law to prevent parties from locating other claims upon the same lode, outside of the first location made on the lode or vein.
>
> If a lode or vein three thousand feet in length is discovered, two locations may be made, each of fifteen hundred feet, thereon.

Letter from Acting Commissioner, General Land Office, to Messrs. Hoyt and Brothers (June 17, 1873), Henry N. Copp, *Decisions of the General Land Office and Secretary of the Interior* 207 (1873-1874). This conclusion was reaffirmed in the Commissioner's annual report in 1875. That report concluded that although the Mining Law prohibited an individual from locating more than twenty acres **[*17]** and an association from locating more than 160 acres for placer claims, "[t]here is nothing in the mining acts of Congress forbidding one person or an association of persons purchasing as many *separate and distinct locations* as he or they may desire, and embracing in one application for patent the entire claim . . . ." Annual Report of the Commissioner of the General Land Office for the Fiscal Year Ending June 30, 1875, at 97 (1875) (emphasis in original).

In 1881, shortly after the Commissioner of the General Land Office issued his report, the United States Supreme Court held that the Mining Law does not impose numerical limitations on the number of mining claims that a person may locate and patent, at least in cases where the miner purchased the claims from others. St. Louis Smelting & Refining Co. v. Kemp, 104 U.S. 636 (1881). There, the St. Louis Smelting & Refining Company brought an action against the defendant, Kemp, arguing that Kemp was interfering with its rightful possession of certain land in Leadville, Colorado. *Id*. As proof of its ownership, St. Louis Smelting produced a United States patent issued in 1879 to Thomas Starr, St. Louis **[*18]** Smelting's predecessor in interest. *Id*. The patent was issued for several placer locations amounting to 164.61 acres. Id. at 636-38. The defendant argued that the General Land Office

[8] A lode claim that is 1500 feet long and 600 feet wide, as provided for in the Mining Law, amounts to just over twenty acres in size or 20.661 acres exactly.

had issued the patent in error because the patent included more acreage -164.61 acres-than could be permissibly patented to one person or association under the Mining Law.

The Supreme Court, reviewing the matter, upheld the patent on grounds that the Mining Law did not impose any limitation on the number of mining claims that may be patented by an individual. *Id. at 648.* The Court stated that the patent "is regular on its face, unless some limitation in the law, as to the extent of a mining claim which can be patented, has been disregarded." *Id*. The Court concluded that:

> [T]here is nothing in the acts of Congress which prohibits the issue of a patent for that amount [164.61 acres] . They are silent as to the extent to a mining claim. They speak of locations and limit the extent of mining ground which an individual or an association of individuals may embrace in one of them. There is nothing in the reason of the thing, or in the language **[*19]** of the acts, which prevents an individual from acquiring by purchase the ground located by others and adding it to his own.

Id. The Supreme Court explained that before the Placer Act of 1870, "Congress imposed no limitation to the area which might be included in the location of a placer claim. " *Id. at 649.* After 1870, however, Congress "provided that no location of a placer claim thereafter made should exceed one hundred and sixty acres for one person or an association of persons." *Id. at 651.* Moreover, the Court noted that the 1872 Mining Law "declared that a location of a placer claim subsequently made should not include more than twenty acres for each individual claimant. " *Id*. The Court stated that "[t]hese are all the provisions touching the extent of locations of placer claims . . . . A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, *nor upon the number which may be included in a patent. " Id*. (emphasis added). Thus, the Court held that although the Mining Law limited the size of individual mining claims, the statute did not **[*20]** prevent a mining claimant from obtaining a patent for more than one mining claim by purchasing the claims from others.

Addressing the policy reasons for this result, the Supreme Court stated that "it is difficult to perceive what object would be gained, what policy subserved, by a prohibition to embrace in one patent contiguous mining ground taken up by different locations and subsequently purchased and held by one individual." *Id. at 651-52.* The Court stated further that an individual "can hold as many locations as he can purchase, and rely upon his possessory title." *Id. at 652.* The Court also noted that "[e]very one, at all familiar with our mineral regions, knows that the great majority of claims, whether on lodes or on players, can be worked advantageously only by a combination among the miners, or by a consolidation of their claims through incorporated companies." *Id. at 654.* The Court noted that the "object in allowing patents is to vest the fee in the miner, and thus encourage the construction of permanent works for the development of the mineral resources of the country" and "[r]equiring **[*21]** a separate application for each location . . . where several adjoining each other are held by the same individual, would confer no benefit beyond that accruing to the land-officers from an increase of their fees." *Id. at 653.* [9]

Although the Supreme Court's decision in *St. Louis Smelting* concluded that individual claimants may *purchase* multiple mining locations, later courts made clear that individual claimants may also *locate* multiple mining claims as well. In 1904, the United States Court of Appeals for the Ninth Circuit held:

> The fact that one individual, company, or **[*22]** corporation locates or acquires many such claims is wholly unimportant. Congress has never yet seen proper to put a limit on the number of such claims that one individual, company, or corporation may locate or acquire. Whether, in view of its well-known policy to encourage the development of the mineral wealth of the country, it shall ever deem it wise to do so, rests with Congress, and is a matter with which the courts have nothing to do.

[9] Although not noted by the Supreme Court, the Mining Law's patenting provision explicitly provides that patent applications may include more than one claim, stating that patent applications must include a "plat and field-notes of the claim *or claims in common* . . . showing accurately the boundaries of the claim *or claims* . . . ." *30 U.S.C. § 29* (emphasis added).

Last Chance Mining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 131 F. 579, 583 (9th Cir. 1904), *cert. denied*, *200 U.S. 617 (1906).*

Likewise, in 1919, the United States District Court for the Southern District of California held:

> There is so far no law of Congress or regulation made in pursuance thereof limiting the number of placer mining claims an individual or association of individuals may make. On the contrary, the policy of the government seems to be to encourage the development of its mineral resources and to offer every facility for that purpose.

United States v. Cal. Midway Oil Co., 259 F. 343, 351-52 (S.D. Cal. 1919), *aff'd* **[*23]** *279 F. 516, 521 (9th Cir. 1922)* ("[S]o far Congress has never fixed any limit to the number of locations that may be made by the same person or persons-its policy having always been to encourage the exploration of the public lands and the discovery and development of such mineral as may be found in them."), *aff'd mem*. *263 U.S. 682 (1923).* *See also* *Consol. Mut. Oil Co. v. United States, 245 F. 521, 523 (D. Cal. 1917);* *United States v. Brookshire Oil Co., 242 F. 718, 721 (S.D. Cal. 1917)* ("It is true there is no limitation as to the number of mining claims an individual or association of individuals may locate . . . ."); *The Riverside Sand & Cement Mfg. Co. v. Hardwick, 120 P. 323, 324 (N.M. 1911);* 2 *Lindley on Mines* § 450, at 1062-68 (1914).

Thus, the courts have unequivocally held that an individual miner may locate more than one mining claim, whether the claim is acquired by purchase or otherwise. In accordance with these decisions, the Department of the Interior adopted regulations in 1935 declaring that "United States mining **[*24]** laws do not limit the number of locations that can be made by an individual or association." *Mining Claims on the Public Lands, Circular No. 1278, 55 Interior Dec. 235, 236 (1935).*

2. Mill Sites

As noted above, both judicial and administrative authority holds that the Mining Law limits the size of lode and placer locations but does not categorically limit the number of such claims that may be located and patented by an individual. The mill site provision was constructed similarly to the lode and placer claim provisions. The provision states that, for mill sites located along with lode claims, "no location made on and after May 10, 1872 of such nonadjacent land shall exceed five acres . . . ." and that, for mill sites located along with placer claims, "[n]o location made of such nonmineral land shall exceed five acres . . . ." *30 U.S.C. § 42*.

Since the mill site provision was constructed similarly to the lode and placer claim provisions, the mill site provision should be interpreted similarly to those provisions. Just as the Mining Law expressly limits the size but not the number of lode and placer claims, the Mining **[*25]** Law should be construed as also limiting the size but not the number of mill sites. Since these provisions are parallel, they should be interpreted in the same way, rather than inconsistently. In construing the lode and placer claim provisions as not imposing numerical limits, the Ninth Circuit in the *Last Chance Mining* case held that Congress has adopted a "well-known policy to encourage the development of the mineral wealth of the country" and said that the responsibility to change the policy "rests with Congress." *Last Chance Mining, 131 F. at 583.* By the same reasoning, the congressional policy of encouraging the "development of the mineral wealth of the country" supports the conclusion that Congress did not intend to restrict mill sites to an unworkably small acreage. Absent a clear indication that Congress intended to differentiate between lode claims, placer claims and mill sites with respect to numerical limitations, we are reluctant to construe these similarly-constructed provisions as imposing different limitations. Thus, the overall context of the Mining Law supports the conclusion that the five-acre mill site provision does not preclude **[*26]** more than one mill site being located and patented for a mining claim, assuming that the other requirements of the mill site provision are met. This construes parallel provisions of the Mining Law congruently, and harmonizes the various statutory provisions.

Indeed, it would have been illogical for Congress to place no limit on the number of mining claims that a claimant may locate or patent but limit the number of mill sites that may be used to support the mining claims. Congress

presumably intended that the lode and placer claims it authorized would be effectively mined, and these claims cannot be effectively mined if there are insufficient mill sites to support the extraction of the minerals from the claims. It makes little sense that Congress would have enacted the Mining Law for the purpose of fostering mineral development on the public lands, only to constrain miners from operating large mines by restricting mill space to an unworkably small area. Congress can hardly have intended to prevent miners from using the number of mill sites necessary to support the mining claims that Congress itself had authorized. Such a result cannot be reconciled with the congressional purpose, **[*27]** as described by the Supreme Court in *St. Louis Smelting*, of "encourag[ing] the construction of permanent works for the development of the mineral resources of the country." *St. Louis Smelting & Refining Co., 104 U.S. at 653.*

The 1997 ***Opinion*** reached the opposite conclusion by focusing on the mill site provision in isolation, and made no attempt to reconcile its conclusion with related provisions governing lode and placer claims. Viewing the mill site provision in isolation, the 1997 ***Opinion*** argued that "[c]onstruing the statute to permit multiple millsites without regard to the aggregate size limit would vitiate the five-acre statutory limit on the size of millsites. " 1997 ***Opinion***, at 5. On the contrary, since the location of more than one lode or placer claim by a mining claimant does not vitiate the statutory limitations on the size of such claims, the location of more than one mill site for each mining claim does not vitiate the statutory limitation on the size of mill sites. By failing to consider the overall context of the Mining Law, the 1997 ***Opinion*** interpreted the various provisions of the statute inconsistently.

Nonetheless, the Mining Law **[*28]** does contain another provision that practically limits the number of mill sites that a claimant may locate and patent. Under the mill site provision, a claimant may locate mill sites only on nonmineral land that is "used or occupied" by the claimant for mining or milling purposes. *30 U.S.C. § 42*. This use-or-occupancy requirement precludes a claimant from locating and patenting more mill sites than are used or occupied for mining or milling purposes and authorizes the Department to challenge the validity of mill sites that are not used or occupied for mining and milling purposes. [10] In determining whether a claimant is properly using or occupying a mill site, the Department must verify whether the claimant needs the mill site for mining or milling purposes. *United States v. Swanson, 14 IBLA 158, 173-74 (1974)* ("[A] claimant is entitled to receive only that amount of land needed for his mining and milling operations" and "the Government is entitled to require efficient usage, so that only the minimum land needed is taken."). The use-or-occupancy requirement is the only provision in the mill site provision that effectively **[*29]** limits the number of mill sites a claimant may locate and patent.

C. Legislative History

The legislative history and congressional purposes of the Mining Law are relevant in construing the mill site provision. "'As in all cases of statutory construction, [a court's] task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.'" *Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 118 (1983)* (second alteration in original) (quoting *Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979)).* We must "look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States, 494 U.S. 152, 158 (1990).* In particular, a statute **[*30]** should not be construed in a way that undermines the manifest purpose of the statute. Sutherland Stat. Const. § 363 (6th ed. 2000). The courts "'must reject administrative constructions of [a] statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.'" *Sec. Indus. Assoc. v. Bd. of Governors of the Fed. Reserve Syst., 468 U.S. 137, 143 (1984)* (alteration in original) (quoting *FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981)).*

Although the legislative history of the mill site provision is scant and provides little guidance regarding congressional intent, the legislative history of the Mining Law itself is copious and generally clarifies Congress' purpose in enacting the statute. The Mining Law is an exercise of Congress' power under the Property Clause of the Constitution to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3. The primary purpose of the Mining Law, as

[10] Nothing in this memorandum is intended to change the way in which administrative and judicial case law has defined what is appropriate mill site use and occupancy under the Mining Law.

explained in the congressional debates that led to its passage, is **[*31]** to exercise Congress' disposal authority under the Property Clause "to promote the development of the mining resources of the United States." 45 Cong. Globe, 42d Cong., 2d Sess. 395 (1872). The Supreme Court has recognized the legislative purpose of developing the nation's mining resources, stating that:

> Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense.

United States v. Coleman, 390 U.S. 599, 602 (1968) (footnote omitted). Congress viewed the nation's mineral resources as an important national resource, and intended to encourage development of this important national resource and to reward those who actually developed it.

The 1997 ***Opinion*** cited a 1957 Supreme Court decision for the proposition that "grants of federal land are to be 'construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.'" 1997 ***Opinion***, at **[*32]** 15 (quoting *United States v. Union Pac. Ry. Co., 353 U.S. 112, 116 (1957)).* Subsequently, however, the Supreme Court has construed certain federal land grants more broadly when the congressional purpose is to secure public advantages by inducing individuals to engage in costly operations on the public lands. The Supreme Court has stated:

> [P]ublic grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. . . .
>
> . . . When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in **[*33]** favor of the *purposes* for which it was enacted.

Leo Sheep Co. v. United States, 440 U.S. 668, 682-83 (1979) (omissions in original) (emphasis added) (quoting *United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14 (1893)).*

The Mining Law is such a general law. In order to accomplish its goal of promoting development of the nation's mineral resources, Congress enacted a general law that offers inducements to individuals to undertake enterprises of a *quasi* public character by mining on the nation's public domain lands in order to supply the nation's mineral needs. Under the Mining Law, Congress authorized individuals to acquire property rights by discovering valuable mineral deposits on the federal lands and by complying with certain procedural requirements. *See* *30 U.S.C. §§ 22-54*. These self-initiated property rights were for the broad national purpose of encouraging development of the nation's mineral resources. The Mining Law should be construed to effectuate this broad public purpose. If that public purpose is to be changed, the responsibility **[*34]** for making the change belongs to Congress.

We now examine the legislative history of the Mining Law in more detail. As will be explained, earlier versions of the Mining Law included specific limitations on the number of mining claims that could be individually located and patented. The Mining Law adopted in 1872, however, including the mill site provision, contained no such numerical limitations. Since the earlier versions contained numerical limitations and the Mining Law of 1872 did not, the absence of numerical limitations in the 1872 enactment must be regarded as purposeful rather than accidental. It appears that Congress consciously decided not to limit categorically the number of claims and mill sites.

1. 1850 Mining Bill: 30-Foot-Square Placers and One-Acre Lodes

Senator John C. Fremont proposed the first mining bill in 1850. The bill would have provided for two kinds of permits: [11] 30-foot-square placer mineral deposits and, as Senator Fremont described it, one-square-acre "mines" (for gold deposits discovered in lodes or veins) . 19 Cong. Globe App., 31st Cong., 1st Sess. 1362, 1370 (1850). The bill also stated that "no person can have two permits at the same time, it **[*35]** being for the public interest to avoid monopolies." *Id*. at 1363. Therefore, the Fremont bill contained a provision expressly limiting the number of mining permits that could be acquired by an individual at any given time.

Senator Fremont explained that his bill would authorize small permits because of the "great value of the land, in order to give an opportunity to all people to get possession of some place to work upon. . . . and if we now give too large a quantity of lands, we may exclude many individuals from the mines by giving so large a space to those that are occupied. " *Id*. at 1362. In addition, Senator Fremont stated that "[t]he quantity allowed to each person is ample, considering **[*36]** the privilege he has of changing his location as often as he pleases, and selling his lot when he is offered a good price." *Id*. at 1370. Nonetheless, Senator Fremont acknowledged that the permit size would be inadequate for future development, stating that "[t]he machinery necessary to work a mine will eventually cover a large space; but in the meantime one man may get possession of too much." *Id*. at 1362. He stated further that "[i]n a mineral country, reputed to be of such extraordinary richness, these dimensions were considered abundantly large for the mine itself, and sufficiently so to afford room for temporary buildings in the beginning of operations." *Id*. at 1370. He warned, however, that "when the mineral districts shall be better known, and the locality of the lodes or veins precisely marked out, larger contiguous spaces may be granted to miners for the construction of the buildings absolutely necessary for extensive works." *Id*. Senator Fremont's bill, which would have precluded an individual miner from obtaining more than one mining permit, was not enacted. At the same time, his concern for adequate "machinery" space foreshadowed the adoption of the mill **[*37]** site provision.

2. The 1866 Lode Law: 200-Foot Lode Claims

In 1866, Congress enacted the Lode Law, which provided for lode claims of 200 feet in length along the vein for each locator. The Lode Law allowed the discoverer of the lode or vein to locate an additional claim of 200 feet in length, "together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules . . . ." Lode Law of 1866, ch. 262, sec. 4, 14 Stat. 251, 252 (1866). In addition, the Lode Law expressly limited the number of lode claims that each person could locate and patent by providing that "no person may make more than one location on the same lode . . . ." *Id*. Although the House of Representatives originally considered a bill that would have restricted lode claims to forty acres, [12] Congress ultimately passed the Senate bill that provided for 200-foot lode claims, and that became known as the Lode Law.

[*38]

The Senate Committee on Mines and Mining stated that one of the purposes of the Senate proposal was "to provide the most generous conditions looking toward further explorations and development." S. Rep. No. 39-105, at 1 (1866). Senator Stewart, one of the bill's principal proponents, argued that the law would grant miners "such reasonable amount of surface as the miners shall determine by local rules to be necessary for the working of the same." 36 Cong. Globe at 3227 (statement of Sen. Stewart). Another senator explained that this allowed "as much land on either side of that lode as is necessary to carry on his operations, which is determined by the local law." *Id*. at 3952 (statement of Sen. Conness). This was viewed to allow a miner to take unlimited amounts of land on either

[11] The term "mining claim" seems not to have entered legislative jargon until 1870, when Congressman Sargent, who, in proposing the Placer Act amendments to the 1866 Lode Law, referred to miners "proving up their preemptions, or 'claims,' as they are called in mining parlance." 42 Cong. Globe, 41st Cong., 2d Sess. 2028 (1870).

[12] The House bill stated that "[n]o person, corporation, or association shall be permitted to purchase at public or private sale more than forty acres of any such mineral lands . . . ." and "no such mining lot shall contain more than forty acres . . . ." 36 Cong. Globe, 39th Cong., 1st Sess. 4049 (1866); *see also* H. Rep. No. 39-66, at 11 (1866).

side of the vein, if necessary, to carry on mining operations. *See* 45 Cong. Globe, 42nd Cong., 2d Sess. 534 (1872). [13]

[*39]

3. The 1870 Placer Act Amendments to the Lode Law: 160-Acre Placer Claims

In 1870, Congress enacted the Placer Act, which amended the Lode Law by adding provisions for locating and patenting placer claims. Placer Act of 1870, ch. 235, sec. 12, 16 Stat. 217 (1870). The 1870 Act provided that "no location of a placer claim" was to "exceed one hundred and sixty acres for any one person or association of persons . . . ." *Id*. The purpose for the Act was to extend the principle of the homesteading preemption laws to placer mines in the same way Congress had applied the principle to lode mines. 42 Cong. Globe, 41st Cong., 2d Sess. 3054 (1870). The Senate floor debates reveal differing opinions regarding the amount of land each placer miner would be able to locate and patent. Senator Cole reminded the Senate that the Lode Law "restricted the amount upon any lode or vein that could be taken by any one person to two hundred feet, and with an additional two hundred feet to the discoverer of the mine, and it restricted associations, no matter how numerous the members of them might be, to three thousand feet. " *Id*. He then proposed to "restrict the amount that **[*40]** may be taken in any placer mine to ten acres, " which was, in his judgment, "a very large amount to award to any one person in the mining regions." *Id*. Congress ultimately chose a 160-acre size for placer claims because it was equivalent to the acreage allowed to an agricultural entryman under the homestead or preemption laws. *See id*. at 2028, 4402.

4. The 1872 Mining Law: Twenty-Acre Mining Claims and Five-Acre Mill Sites

On January 15, 1872, Congressman Sargent introduced the bill that would, after further amendment, become the Mining Law. 45 Cong. Globe at 395. The proposed maximum size for lode claims was to be the same as that of the Lode Law-200 feet long-but with a width restriction of 300 feet on each side of the middle of the vein at the surface. *Id*. at 532. For placer claims, the bill proposed to keep the 1870 Placer Act, including its claim size requirements, "in full force." *Id*. at 533. Representative Sargent explained that "[t]he bill [as proposed] does not make any important changes in the mining laws as they have heretofore existed. . . . It does not increase or decrease the amount of lands or extent of lands that a miner may acquire under the mining **[*41]** laws." *Id*. at 534.

The Senate substantially amended the House bill in several significant ways. First, the Senate amended the 1870 Placer Act provisions by creating two classes of placer claims: 20-acre individual placer claims and 160-acre association placer claims. For individual placer claims, the Senate's amendment stated that "no such location shall include more than twenty acres for each individual claimant . . . ." *Id*. at 2460; *see also* Mining Law of 1872, ch. 152, sec. 10, 17 Stat. 91, 94 (1872) (codified at *30 U.S.C. § 35*). At the same time, the Senate retained the existing, and conflicting, language of the Placer Act which states that "no location of a placer claim . . . shall exceed one hundred and sixty acres for any one person or association of persons . . . ." *30 U.S.C. § 36*. In addition, the Senate amendment changed the length of lode claims from 200 feet to 1500 feet, while retaining the width-300 feet on each side-contained in the House bill.

More importantly here, the Senate amendment effectively terminated the restriction that each person could locate and patent **[*42]** only a single mining claim on the same lode. As noted above, the 1866 Lode Law had expressly

[13] Senator Stewart also expressed the need to "guard[] against every form of monopoly, and requir[e] continued work and occupation in good faith to constitute a valid possession." 36 Cong. Globe at 3226 (statement of Sen. Stewart). Congress' intent, he argued, was to recognize "the obligation of the Government to respect private rights which have grown up under its tacit consent and approval." *Id*. at 3227. Despite his concerns about monopolies, Senator Stewart objected to specific size requirements in the legislation. He argued that "[i]n exploring for vein mines it is a vein or lode that is discovered, not a quarter section of land marked by surveyed boundaries," *id*. at 3226, and that "[i]n working a vein more or less land is required, depending upon its size, course, dip, and a great variety of other circumstances not possible to provide for in passing general laws." *Id*. Nonetheless, the Lode Law that was finally passed limited both the size and number of claims that a person could locate and patent.

provided that "no person may make more than one location on the same lode. " Sec. 4, *14 Stat. at 252.* The Mining Law, as enacted, provided instead that:

> A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located.

Sec. 2, *17 Stat. at 91* (codified at *30 U.S.C. § 23*). Although the Mining Law imposed size limitations on mining claims, the statute removed the restriction of the Lode Law that "no person may make more than one location on the same lode. " One senator recognized that this provision would "allow every individual to take up a claim of fifteen hundred feet" and "any number may afterward combine." 45 Cong. Globe, 42d Cong., 2d Sess. 2458 (1872) (statements of Sen. Cole). The congressman who introduced the bill **[*43]** expressed the belief that "a quartz lode of fifteen hundred feet will be perhaps as much as any company can profitably work." *Id*. at 2898 (statement of Rep. Sargent). Nonetheless, the important point is that the Mining Law removed the 1866 Lode Law's specific restriction against a person locating more than one mining claim on the same lode.

When the bill that became the Mining Law was introduced, the bill contained no provision for mill sites. The Senate added a provision to the bill, now known as the mill site provision, that allows claimants to patent nonmineral land for mill sites in association with lode claims. *Id*. at 2457. The provision stated that where "non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes," the land may be included in the application for a patent for the lode claim, provided that "no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this act for the superficies of the lode. " *Id*. This provision established both the use-or-occupancy requirement for mill site locations, **[*44]** and also the requirement that mill sites cannot exceed five acres. Importantly, the provision did not expressly limit the number of mill sites that a person could locate and patent in conjunction with a mining claim, just as the Mining Law did not limit the number of lode and placer claims that a person could locate and patent. The legislative history does not discuss the mill site provision, as the 1997 ***Opinion*** notes. 1997 ***Opinion***, at 7 n. 15. In fact, Congress did not mention the subject of mill sites in the legislative history until shortly before the Mining Law was enacted, and, except for minor word changes, the mill site provision was enacted in essentially the same form in which it was introduced.

Although the legislative history does not mention the mill site provision, it was well known at the time of the Mining Law's enactment in 1872 that mining companies used more than five total acres of surface land for mill site purposes to support a single mining claim. In 1863, for example, the Gould and Curry Gold and Silver Mining Company recorded a survey of a 272.72-acre claim that it used for milling purposes to support a 608-foot length of the most famous mining lode in the **[*45]** West-the Comstock Lode near Virginia City, Nevada. Elliot Lord, *Comstock Mining and Miners* 124-25 (Howell-North ed., 1959) (1883); Dennis J. Mahoney, *The History of the Comstock Mines: The Gould and Curry, in* Individual Histories of the Mines of the Comstock: A Joint Project of the W.P.A. Nevada State Writer's Project and The Nevada State Bureau of Mines, at 94 (Max Crowell & Robert W. Prince eds., 1941); abstract from Comstock Mining Services, April 7, 2001. This demonstrates that, contrary to the 1997 ***Opinion***, mining companies even in 1872 used more than five total acres for mill-site purposes to develop individual mining claims, and that this practice is not simply a modem phenomenon. In the Mining Law, Congress clearly set the size of individual mill sites at five acres. It is doubtful, however, that Congress intended to preclude mining companies from obtaining more than one mill site per mining claim, in light of the historical fact, as in the case of the Comstock Lode, that mining companies were using much more than five total acres for milling purposes for individual claims. If Congress had intended to stop this existing practice in the 1872 Mining Law, Congress presumably **[*46]** would have made its intent clear in the legislative history, if not the statute itself. The silence of the statutory language and legislative history suggests that Congress did not mean to fundamentally alter this practice.

5. The 1960 Amendment

In 1960, Congress amended the Mining Law to allow mining claimants to locate five-acre mill sites for placer claims. Pub. L. No. 86-390, 74 Stat. 7 (1960) (codified at 30 U.S.C. § 42(b)). [14] As noted, the 1872 Mining Law authorized five-acre mill sites only for lode claims; the 1960 amendment extended the same authorization to placer claims. The 1960 amendment, similarly to the original mill site provision for lode claims, did not expressly limit the number of mill sites that could be located and patented per mining claim.

[*47]

The legislative history of the 1960 amendment indicates that Congress adopted the recommendations submitted by the Department of the Interior, through the Assistant Secretary for Public Land Management. S. Rep. No. 86-904, at 2 (1959). The Assistant Secretary stated that the amendment was necessary to allow placer claimants to obtain mill sites under the same terms as lode claimants. *Id*. at 3. In addition, the Assistant Secretary recommended deletion of the words "for each individual claimant" in the bill, because "permitting the location of [the originally proposed] 10 acres 'for each individual claimant' would . . . permit a number of individual claimants to band together to receive far more than 10 acres at one site. " *Id*. The Senate Committee on Interior and Insular Affairs accepted the recommendation "so as to impose a limit of one 5-acre mill site in any individual case preventing the location of a series of 5-acre mill sites in cases where a single claim is jointly owned by several persons." *Id*. at 2. The Senate Report also explained that modem placer mining "is now primarily concerned with the production of nonmetallic minerals for industrial purposes, such as gypsum, **[*48]** limestone, quartzite, bentonite, and related clay minerals and building materials," and "[t]hese minerals generally require substantial plants for their processing, and the investment in the necessary installations often involves millions of dollars." *Id*. at 1-2.

This legislative history shows that the Assistant Secretary and the Senate committee did not want to allow several placer claimants to "band together" to locate a single mining claim and thereby become automatically entitled to multiple mill sites, without regard to whether the claimants actually needed to use or occupy the mill sites to develop the claim. This history does not indicate, however, that the Assistant Secretary and the Senate committee intended to limit categorically the number of mill sites that could be located and patented per mining claim. In fact, the statutory language contains no explicit restriction on the number of mill sites for each placer claim. Moreover, when the Assistant Secretary recommended that the mill site provision for placer claims be added to the Mining Law, the BLM Manual contained a provision interpreting the Mining Law as authorizing multiple mill sites for lode claims. According **[*49]** to the BLM Manual, "[m]ore than one mill site may be located, provided each tract is of no more than 5 acres of nonmineral land and that each is needed and used for mill site purposes." BLM Manual, ch. 5.2.15 B. (Nov. 19, 1958). It is unlikely that the Assistant Secretary would have supported proposed legislation that would overturn the Department's settled administrative practice, or that Congress would have altered this settled practice without comment. Indeed, since the Senate committee recognized that the development of placer claims "require substantial plants for their processing, and the investment in the necessary installations often involves millions of dollars," *see* S. Rep. No. 86-904, at 1-2 (1959), Congress can hardly have intended to deny claimants the requisite number of mill sites necessary to process their placer claims and protect their investments. Therefore, it does not appear that Congress intended to impose a restriction of one mill site for each placer claim.

The Senate Committee on Interior and Insular Affairs stated that the 1960 amendment "merely grants to holders of placer claims the same rights to locate a 5-acre mill site as has been the case since **[*50]** 1872 in respect to holders of lode claims." *Id*. at 2. This demonstrates that Congress intended to apply the same requirements for placer-related mill sites that already applied under the Mining Law to lode-related mill sites. Since the Mining Law

[14] The 1960 amendment provides:

(b) Where nonmineral land is needed by the proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim, and is used or occupied by the proprietor for such purposes, such land may be included in an application for a patent for such claim, and may be patented therewith subject to the same requirements as to survey and notice as are applicable to players. No location made of such nonmineral land shall exceed five acres and payment for the same shall be made at the rate applicable to placer claims which do not include a vein or lode.

Pub. L. No. 86-390, 74 Stat. 7 (1960) (codified at 30 U.S.C. § 42(b)).

imposed no numerical limits on lode-related mill sites, the 1960 amendment imposed no numerical limits on placer-related mill sites. Since the Department was contemporaneously applying the Mining Law as not categorically restricting the number of lode-related mill sites that could be located and patented, Congress obviously did not intend to adopt a different result for placer-related mill sites, by applying numerical restrictions to the latter that did not apply to the former. Congress intended to conform the mill site requirements for both kinds of claims, and thus did not intend to impose numerical mill site restrictions for either kind of claim.

6. Summary of Legislative History

The legislative history indicates that the Mining Law of 1872 does not categorically limit the number of mill sites that a claimant may locate and patent per mining claim. The fact that the 1866 Lode Law, as well as the original 1850 Fremont bill, contained **[*51]** express provisions limiting the number of mining claims that an individual could locate and patent-but that these limitations did not appear in the Mining Law enacted in 1872-indicates that the Mining Law was not intended to prevent individual claimants from locating and patenting multiple mining claims, as the courts have held. The absence of numerical restrictions in the mill site provision similarly indicates that the provision does not prevent mining claimants from locating and patenting multiple mill sites per mining claim.

To imply that the mill site provision contains a numerical limitation of one mill site per mining claim would frustrate the congressional purpose of the 1872 Mining Law, which was "to promote the development of the mining resources of the United States . . . ." 45 Cong. Globe, 42d Cong., 2d Sess. 395 (1872). Such a numerical limitation would make it difficult in many cases for miners to develop the minerals that Congress itself had opened for exploration and development, because a single five-acre mill site is in many cases inadequate to serve the associated mining claim. For example, most low-grade-ore-deposit mines on the public lands require more than five **[*52]** acres of nonmineral mill site lands in order to develop the mineral deposits encompassed by a twenty-acre mining claim. [15] Thus, much of modem mining could not take place if mill sites were limited to one five-acre site per mining claim. This does not suggest that the Mining Law should be interpreted simply to harmonize with modem mining practices. As indicated earlier, mining practices at the time of the Mining Law's enactment in 1872 relied on more than five acres for milling purposes for individual mining claims, as in the case of the Comstock Lode. The Mining Law should not now be interpreted in a way that makes modem mining practices infeasible and interferes with the congressional goal of promoting development of the nation's mineral resources, unless Congress indicated that it intended this result. No such indication appears in the legislative history of the Mining Law. On the contrary, the legislative history indicates that Congress intended to impose no numerical restriction on locating and patenting either mining claims or mill sites.

[*53]

The use-or-occupancy requirement of the mill site provision disallows claimants from locating and patenting more mill sites than are necessary for mining or milling purposes. This requirement authorizes the Secretary to exercise discretion in challenging the validity of mill sites that are unnecessary for mining or milling purposes, while not precluding claimants from locating and patenting multiple mill sites if each site satisfies the use-or-occupancy requirement. This construction furthers the congressional purpose of encouraging mineral development of the public lands and also disallows miners from using the public lands in a wasteful manner or for purposes unrelated to mining or milling. The 1997 ***Opinion***, on the other hand, would preclude the Department from approving a proposed mining plan to develop federal mineral resources if the plan proposes to use more than one five-acre mill site per mining claim, even though the applicant could show that a single five-acre mill site was inadequate to

[15] Today, "most of the large mines in this country are operating on ore so low in grade that it would have been back-filled or thrown over the dump not many years ago." J.B. Knaebel, "Land Acquisition for Mining Development," *Symposium on American Mineral Law Relating to Public Land Use* 63 (1966). According to Knaebel, a miner would need 252 acres of surface area to excavate a 23-acre low-grade disseminated-copper ore body from under 400 feet of overburden. *Id*. at 70. Miners have been developing low-grade copper, lead, gold, and iron ore deposits since use of froth flotation began in the early 20th Century. Frederick Merck, *History of the Westward Movement* 495-500 (1978); J.M. Lucas, "Gold," *Mineral Facts and Problems* 323 (Bureau of Mines 1985); Janice L.W. Jolly, "Copper," *Mineral Facts and Problems* 204-05 (Bureau of Mines 1985).

effectuate the mining plan. The 1997 ***Opinion***'s categorical approach cannot be reconciled with Congress' goal of promoting development of mineral resources on the public lands.

If the 1997 **[*54]** ***Opinion*** were in effect, mining companies apparently would be able to avoid a numerical restriction on mill sites simply by subdividing their mining claims into smaller, contiguous claims, so that they could locate more mill sites to obtain adequate mill site acreage for their proposed operations. This is possible because the Mining Law imposes no automatic *minimum* limitation on the size of a mining claim. [16] Prior to the 1997 ***Opinion***, no mining company in fact subdivided its mining claims for this purpose, obviously because the Department's administrative practice did not limit the owner of a mining claim to a single mill site. After the 1997 ***Opinion*** was issued, however, at least one mining company subdivided its maximum-sized lode claims into several smaller contiguous claims so the company could keep all of its otherwise multiple mill sites. The company's effort was successful because the Department has concluded that the subdivided lode claims are valid. BLM Mineral Report for Glamis-Imperial Gold Company (Sept. 27, 2002). Thus, the 1997 ***Opinion***'s conclusion that a claimant may locate only a single mill site per mining claim could be easily circumvented, which demonstrates **[*55]** that Congress likely did not intend to impose such a limitation. If Congress were concerned about allowing claimants to locate and patent only one mill site per mining claim, it presumably would have placed a minimum-size limitation on mining claims to prohibit subdividing mining claims to obtain additional mill site acreage. The Mining Law, however, contains no such limitation.

[*56]

Although the legislative history does not indicate why Congress chose to limit the size but not the number of mining claims and mill sites, Congress presumably intended to require mining claimants to demonstrate that they are entitled to or need more than one mining claim or mill site of a specified size for mineral purposes. By imposing this burden on claimants, Congress required them to establish each claim on a discrete, parcel-by-parcel basis, thus preventing them from attempting to patent huge swaths of federal lands. Under the Mining Law, a mining claimant must demonstrate that the lands included in each mining claim contain a discovery of a valuable mineral deposit, *30 U.S.C. § 23*, and a mill site claimant must demonstrate that the lands included in each mill site location are used or occupied for mining or milling purposes. *Id*. § 42. The size limitations adopted by Congress ensure that mining and mill site claimants are able to patent only the minimum amount of public domain land necessary or appropriate to support their claims. Thus, for example, one who proposes to patent a 100-acre parcel for mill site use to support a 500-acre mining **[*57]** parcel must show that *each* 5-acre segment of nonmineral land is necessary for mill site use, rather than claiming the entire 100-acre parcel as a single mill site. This ensures that claimants must demonstrate their good faith while disallowing them from gaining title to huge tracts of public lands for purposes altogether unrelated to mining, such as for agricultural use. [17]

Congress may also have intended to standardize the amount of surface lands conveyed for mining claims or mill sites by preventing conveyances of grossly disproportionate amounts of public lands for individual claims or mill sites. The size limitations **[*58]** altered the practice the Department adopted after the 1866 Lode Law of conveying wildly variant amounts of surface acreage along with the vein or lode. *See* 1 *Lindley on Mines* § 59, at 97-99 (describing various amounts of surface acreage the Department conveyed with a vein or lode, including "around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a

[16] While the Mining Law provides that the maximum width of a lode claim is six hundred feet, it also allows the Department to limit the width of lode claims to fifty feet. *30 U.S.C. § 23*. Assuming a five-acres-per-claim limitation, had the Department ever chosen to exercise this authority, claimants would have automatically gained rights to locate and patent twelve mill sites in association with twelve fifty-foot-wide claims in place of the one mill site in association with one six-hundred-foot-wide claim. Consequently, doling out mill sites based on the number of mining claims makes little sense given the lack of any uniform claim size.

[17] The Mining Law contains additional provisions that require claimants to demonstrate good faith, such as the requirements that claimants perform at least $ 100 worth of labor annually to maintain the claim and expend at least $ 500 worth of labor on each claim before the claim qualifies for patenting. *30 U.S.C. §§ 28*, *29*.

narrow strip extending therefrom as the handle of the broom," and lands "covering a few hundred feet of a lode, embraced within irregular surface boundaries which covered an area of several hundred acres").

By requiring claimants to demonstrate their good faith and actual need or entitlement, and by standardizing the size of claims and sites, Congress provided for more efficient administration of the Mining Law. Certainly it is administratively easier, for example, to apply the use-or-occupancy requirement by focusing on discrete, size-limited segments of federal land to determine the actual needs of the claimant, rather than evaluating a claim seeking title to a virtually unlimited expanse of federal lands. There are various plausible explanations for why Congress decided not **[*59]** to place numerical restrictions on mill sites, and these explanations would not, as argued in the 1997 ***Opinion***, "vitiate the five-acre statutory limit on the size of mill sites. " 1997 ***Opinion***, at 5. We need not determine why Congress reached its decision. The overall structure of the Mining Law and its legislative history indicate that Congress decided not to impose numerical limits, and our conclusion is consistent with that congressional intent.

III. The Department's Administrative Practice and Interpretation

The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *Chevron, U.S.A. Inc., v. NRDC, 467 U.S. 837, 844 (1984).* Indeed, courts give considerable respect to the interpretation given a statute "'by the officers or agency charged with its administration.'" *Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980)* (quoting *Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978)).* The Supreme Court has recognized that "execution of the laws regulating **[*60]** the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department . . . ." *Cameron v. United States, 252 U.S. 450, 459-60 (1920).* As we now explain, the Department of the Interior's prevalent administrative practice and interpretation has been that the mill site provision limits the size of individual mill sites but does not categorically limit the number of mill sites that a claimant may locate and patent per mining claim. The Department has administered the mill site provision in accordance with that view.

A. The Department's Regulations

Turning first to the Department's regulations, the regulations adopted by the Department regarding the mill site provision mirror the statutory language. [18] A patenting regulation, promulgated in 1872 and unchanged since then, describes a mill site as "a piece of nonmineral land not contiguous [to a vein or lode] for mining or milling purposes, not exceeding the quantity allowed for such purpose by *section [42 of the Title 30 of the United States Code*] . . . ." *See, e.g.*, *43 C.F.R. § 3864.1-1(b) (2002)* **[*61]** ; *id*. § 3864.1-1(b) (1992); *id*. § 3460.1(b) (1969); *id*. § 185.65 (b) (1964); *37 Pub. Lands Dec. 757, 771 (1909);28 Pub. Lands Dec. 594, 605 (1899);25 Pub. Lands Dec. 561, 581 (1897);see also* 1997 ***Opinion***, at 6 n.12. The regulatory subpart that deals with locating mill sites, 43 C.F.R. subpart 3844 (2002), contains two sections, one of which simply quotes the statutory mill site section, *id*. § 3844.0-3, and the other of which requires claimants to use or occupy mill sites for mining or milling purposes "in connection with the lode or placer claim with which it is associated," and also provides that claimants may locate independent mill sites for quartz mills or reduction works. *Id*. § 3844.1. Another regulatory provision, published in 1970, states that "[n]o one millsite may exceed five acres . . . ." for placer claims, *43 C.F.R. § 3864.1-1(c)(2002)*. These regulations are broadly written and allow for the Department's past prevalent practice and interpretation of the mill site provision, as described below. The Department has acted appropriately **[*62]** under these regulations to allow claimants to locate and patent more than one mill site per mining claim if each mill site does not exceed five acres in size and is used or occupied for mining or milling purposes.

B. The BLM Guidance and Practice

[18] The Department's first Mining Law regulations stated that the "law expressly limits mill-site locations made from and after its passage to *five acres* , but whether so *much* as that can be located depends upon the local customs, rules, or regulations." Mining Regulations § 91, June 10, 1872, Henry N. Copp, *United States Mining Decisions* 170, 192 (1874) (emphasis in original). This early regulation, since rescinded, clearly limited each mill site location to five acres but did not limit claimants to one mill site per mining claim.

As we now show, the BLM, which is charged with administering and enforcing the mill site provision, has consistently interpreted the mill site provision as allowing claimants to locate and patent more than one mill site for each mining **[*63]** claim if the mill site is used or occupied for mining or milling purposes. This interpretation is reflected in the BLM's extant written guidance from 1954 to the present and in the BLM's administrative practice through its state offices conforming with the written guidance. In some instances, this interpretation is also reflected in departmental documents that list the statutory requirements for mill sites without mentioning any categorical limit on the number of mill sites. The failure to mention any categorical limitation on the number of mill sites reflects an assumption that the mill site provision does not impose such a limitation.

1. BLM Guidance

For nearly a half century, the BLM's written guidance has reflected the view that the mill site provision does not categorically limit the number of mill sites that may be located and patented for each mining claim. The BLM Manual, adopted in 1954, sets forth three requirements for mill sites to qualify for patenting: (1) the lands must be nonmineral in character, (2) the mill site cannot be contiguous to a vein or lode, and (3) "[t]he mill site does not include an area exceeding 5 acres. " BLM Manual, ch. 3.3.2 (Apr. 20, 1954). **[*64]** The 1954 BLM Manual contained no restriction on the number of mill sites that may be located for a mining claim. Additionally, the BLM in 1954 issued a document entitled "Mining Locations, Entries and Patents, " which stated, on page 28, that "[i]t has been held that more than one mill site may be embraced in an application for a patent, provided each such tracts [sic] keep within the restriction of 5 acres of non-mineral land and that each is needed and used for mill site purposes." Similarly, a BLM Manual issued in 1958 stated, "More than one millsite may be located, provided each tract is of no more than 5 acres of nonmineral land and that each is needed and used for millsite purposes." *Id*. ch. 5.2.15 B. (Nov. 19, 1958). Thus, the BLM guidance and accompanying documents made clear that the Mining Law imposes no categorical restrictions on the number of mill sites that may be located and patented for each mining claim.

The BLM continued to adhere to this view. In 1966, a BLM minerals specialist prepared a summary of mill site requirements. Under the topic heading "Number of Millsites, " the minerals specialist stated, "Although there is no number specified, it has been held that **[*65]** as many millsites as are actually needed for the operation can be located. There must be a clear showing of need and use if more than one millsite is taken. This also applies to custom mills." Memorandum from Minerals Specialist, PSC, to Chief, Mining Staff, Washington Office, BLM 1 (May 11, 1966). In another 1966 document entitled "Mineral Patents-Information Relative to the Procedure for Obtaining Patent to a Mining Claim, " the BLM stated, "Lands entered as mill sites may be for an area of not more than 5 acres for each mill site and must be shown to be nonmineral in character and not contiguous to a vein, lode, or placer. " Mineral Patents-Information Relative to the Procedure for Obtaining Patent to a Mining Claim 13 (1966). These documents support the view that the five-acre mill site provision defines the size of individual mill sites but does not limit their number.

In 1976, the BLM Manual stated that a mineral examiner, in conducting a field examination, must make certain determinations regarding mill sites: (1) the lands must be nonmineral in character, (2) the claim must be occupied and used for mining or milling purposes; and (3) there must be a quartz mill or reduction **[*66]** works on the claim if for custom mill. BLM Manual § 3930.14 C (Oct. 8, 1976). The BLM Manual also stated, "The maximum size of a mill site claim is 5 acres. However, several mill site claims may be embraced in a single application, provided the total acreage does not exceed 5 acres per mill site. " *Id*. § 3864.11 B (Oct. 6, 1976). Again, the BLM Manual articulated limitations on the size of mill sites but not their number, except to the extent it applied the use-or-occupancy requirement.

In 1980, the BLM Washington Office issued a "Mineral Survey Procedures Guide" that stated, on page 26, "There is no limit to the number of mill sites that may be located, so long as they are necessary for the operation of a mine or mill." Today, BLM's Handbook for Mineral Examiners provides that "[a]ny number of millsites may be located but each must be used in connection with the mining or milling operation." BLM Handbook for Mineral Examiners, H-3890-1, Ch. III § 8 (Mar. 17, 1989). Additionally, the BLM Manual states that "[a] mill site cannot exceed 5 acres in size. There is no limit to the number of mill sites that can be held by a single claimant. " BLM Manual § 3864.11 B (1991).

Thus, the BLM **[*67]** has, through its written guidance, consistently interpreted the five-acre mill site provision as limiting the size of individual mill sites but not as precluding claimants from locating and patenting multiple mill sites in association with a single mining claim.

2. BLM Practice: 1996 Survey

In order to assess BLM's ongoing practice, BLM's Deputy Director in 1996 conducted a survey of all BLM state offices to determine the practice of each office regarding patenting and approving plans of operations involving more than one five-acre mill site per mining claim. Memorandum from Mat Millenbach, Deputy Director, BLM, to Assistant Directors and State Directors, BLM (Mar. 5, 1996). Although the 1997 ***Opinion*** stated that "BLM's survey responses revealed no general or uniform policy or practice among the BLM State Offices on this question," 1997 ***Opinion***, at 1 n.2, the state office responses in fact reveal that BLM's widely-accepted practice was to treat the five-acre requirement in the mill site provision as a limit on the size of individual mill sites and nothing more. Indeed, the survey responses reveal that the state offices frequently have patented more than one mill site per associated **[*68]** mining claim. The survey responses also demonstrate that BLM's principal concern regarding mill site validity is in determining whether claimants are using or occupying each mill site for mining or milling purposes.

A summary of the responses of the state offices is provided in the Appendix attached to this ***opinion***. We will now give some examples of the responses to demonstrate the extent to which the state offices have followed a policy of issuing patents or approving plans of operations that involve multiple mill sites when the applicant is able to demonstrate that each mill site is necessary for mining or milling purposes. [19]

The California State Office stated that "[i]t has been common practice in California to issue **[*69]** patents for multiple millsites. " Memorandum from Leroy M. Mohorich, Acting Deputy State Director, Division of Energy and Minerals, California State Office, BLM, to Director, BLM 3 (Apr. 10, 1996). The office reported having issued thirty-two patents for 455 mill sites since 1966, and that it had at least fifteen multiple-mill-site patent applications pending. *Id*. The office also reported having approved two plans of operations for large open-pit, heap-leach operations wherein the mill-sites-to-mining-claims ratio was 3 to 1 and 6 to 1. *Id*. According to the California office:

> In the decision *Utah International, Inc. (36 IBLA 219 (1978)),* the IBLA recognized multiple mill sites in a patent application, most of which were approved. Some confusion may have been generated from earlier decisions where the Land Office stated that only one mill site was needed for a particular operation. The decisions were not based on any rule related to one mill site per mining claim, but that only one mill site was needed.

Id at 2.

The Nevada State Office reported having 20 pending multiple-mill-site patent applications. Memorandum from Thomas V. Leshendok, **[*70]** Deputy State Director, Mineral Resources, Nevada State Office, BLM, to Director, BLM Attach. 8-1 (Apr. 23, 1996). According to that office:

> Patenting and use authorizations for multiple millsites is common in Nevada. Use authorizations started on January 1, 1981, the effective date of the 43 CFR 3809 regulations. It is not known when the patenting of multiple mill sites first occurred. Available records show that the practice was occurring by June 1, 1964.

Id. at 1. The Nevada State Office stated further that in reviewing patent applications and plans of operations, "the ratio of mill sites to associated mining claims is not determined." *Id*. In mill site patenting review, the state office evaluates "the mineral character, need and current use of each mill site. " *Id*. Although not mentioned by the

[19] In describing the state office findings, we will refer to a patent application or a plan of operations that encompasses more than one five-acre mill site in association with each mining claim as a "multiple-mill-site patent application" or "multiple-mill-site plan of operations," respectively.

Nevada State Office in its response to the 1996 survey, the Nevada State Office has apparently issued at least nine patents since 1979 that include more mill sites than mining claims. *See Effect of Federal Mining Fees and Mining Policy Changes on State and Local Revenues and the Mining Industry: Hearing Before the House Comm. on Natural Resources*, 106th Cong. 5-6 (2001) **[*71]** (statement of Richard W. Harris, Attorney at Law, Harris & Thompson, based on his own research in the BLM Nevada State Office). The average mill-sites-to-mining-claims ratio in those patents was nearly seven mill sites to one mining claim. *Id*.

The Idaho State Office reported having six pending multiple-mill-site patent applications and having issued a multiple-mill-site patent in 1985. Memorandum from J. David Brunner, Deputy State Director, Resource Services Division, Idaho State Office, BLM, to Director, BLM 1 (Apr. 22, 1996). The office stated that "we do not review patent applications or plans of operation with respect to a strict ratio of millsites to associated claims." *Id*. at 2. It also reported having refused to patent mill sites included in two patent applications because they were not associated with any mining claims and did not meet the requirements for independent mill sites. *Id*.

The Oregon State Office stated that "[p]atenting of multiple millsites has been an accepted practice in this office, as far back as the mid to late sixties." Memorandum from Associate State Director, Oregon & Washington State Office, BLM, to Roger Haskins, Senior Specialist, Mining **[*72]** Law Adjudication, Solid Minerals Group, Washington Office, BLM 2 (Apr. 30, 1996).

Several other state offices affirmed that they examine mill site applications by considering the use-or-occupancy requirement, but that they do not impose any "set ratio" of mill sites to associated mining claims. *See, e.g*., App. at 1 (Arizona, Colorado), 2 (Montana). Significantly, none of the state offices indicated that they limited mill sites to one per claim.

This survey indicates that BLM state offices charged with enforcement responsibility have interpreted and applied the mill site provision as limiting the number of mill sites to those that are reasonably necessary to support mining operations, but not as categorically restricting the number of mill sites to one for each mining claim. The BLM state offices have applied the mill site provision in conformity with the BLM's extant written guidance since at least 1954, which allows claimants to locate and patent multiple mill sites per mining claim if each mill site is properly used and occupied. Hence, the Department's prevalent interpretation and application of the mill site provision for at least a half century has been that the provision **[*73]** does not preclude claimants from locating and patenting multiple mill sites so long as each mill site is used or occupied for mining or milling purposes.

3. Forest Service Guidance

The Forest Service's practice and interpretation of the mill site provision has been similar to the BLM's. Under the 1897 Organic Act and the Surface Resources Act of 1955, the Secretary of Agriculture manages the surface of National Forest System lands, including surface disturbance from mining activities. *16 U.S.C. §§ 478*, *482*, *551*; *30 U.S.C. §§ 611*-*14*; 36 C.F.R. Part 228, Subpart A. The BLM manages the mineral estate for purposes of the Mining Law. *16 U.S.C. § 472*; *43 U.S.C. § 1457*. Under a memorandum of understanding between BLM and the Forest Service dated April 1, 1957, the Forest Service conducts validity examinations for mining claims and mill sites located on National Forest System lands. As a result, the Forest Service has developed a minerals **[*74]** and geology manual for its mineral examiners. Since at least 1990, the Forest Service manual has stated that:

> The number of millsites that may be legally located is based specifically on the need for mining or milling purposes, irrespective of the types or numbers of mining claims involved.

Forest Service Manual § 2811.33 (1990). Therefore, the Forest Service's written guidance recognizes that the mill site provision does not limit mill sites to one per mining claim.

C. The Department's Administrative Decisions

The Department's administrative decisions indicate that--similarly to the BLM written guidance and the practice of the BLM state offices--the Department has relied on the use-or-occupancy requirement to regulate the amount of

mill site acreage a claimant may locate and patent. As we have noted, this requirement provides that a mining claimant's mill site acreage for lode claims is limited to the amount of nonmineral land "used or occupied . . . for mining or milling purposes," and for placer claims, the amount of nonmineral land that is "needed . . . for mining, milling, processing, beneficiation, or other operations . . . and is used or occupied . . . for such purposes **[*75]** . . . ." 30 U.S.C. § 42. An early departmental decision recognized the importance of this requirement, stating that the "manifest purpose of Congress [in the mill site provision of the Mining Law] was to grant an additional tract to a person who required or expected to require it for use in connection with his lode; that is, to one who needed more land for working his lode or reducing the ores than custom or law gave him with it." *Charles Lennig, 5 Pub. Lands Dec. 190, 192 (1886).* The Interior Board of Land Appeals has recognized that the "essence of the millsite appropriation is use or occupancy." *United States v. Swanson, 93 Interior Dec. 288, 299 (1986).* The factual controversies involved in administrative mill site validity or patenting cases have, almost without exception, turned on application of the use-or-occupancy requirement, that is, on whether the claimants used or occupied or expected to use or occupy the mill sites for mining or milling purposes. *See, e.g., United States v. Rukke, 32 IBLA 155, 160 (1977);United States v. Dietemann, 26 IBLA 356, 364-65 (1976);* **[*76]** *United States v. Pressentin, 71 Interior Dec. 447, 458 (1964);Ash Peak Mining Co., 47 Pub. Lands Dec. 580, 581 (1920);Alaska Mildred Gold Mining Co., 42 Pub. Lands Dec. 255 (1913);Alaska Copper Co., 32 Pub. Lands Dec. 128 (1903);Gold Springs & Denver City Mill Site, 13 Pub. Lands Dec. 175 (1891);Peru Lode & Mill Site, 10 Pub. Lands Dec. 196 (1890);Rico Town Site, 1 Pub. Lands Dec. 556, 557 (1882).* [20] Over one hundred administrative and judicial decisions have examined the validity of mill sites by determining whether the claimant was properly using or occupying the mill sites at issue. The controversies regarding the mill site provision have almost always focused on the use-or-occupancy requirement, and not on whether the provision imposes numerical limitations on mill sites.

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The 1997 ***Opinion*** stated that "[t]he Department has never held . . . that a claimant may patent more than five acres of land for a millsite in connection with one mining claim. " 1997 ***Opinion***, at 11. In fact, we have seen that the BLM's written guidance clearly takes the view that more than one mill site may be located for each mining claim-assuming that the use-or-occupancy requirement is met--and this written guidance has been followed in actual practice by BLM state offices for nearly a half century, as the 1996 survey shows. Indeed, the 1996 survey reveals that the Department has often patented more than five acres of nonmineral lands in connection with a single mining claim. *See* Appendix. The 1997 ***Opinion*** acknowledged that "[v]ery few reported federal or state court cases concern the millsite provision of the Mining Law, and none addresses how many millsites may be located." *Id*. at 8 n.16. The dearth of judicial and administrative cases may be explained by the fact that the patentees have no reason to challenge the Department's view that numerical limitations do not apply. This strengthens the conclusion that the Department has never imposed this requirement in administering **[*78]** the mill site provision.

In support of its argument to the contrary, the 1997 ***Opinion*** cited several administrative decisions rendered by the Department of the Interior that purportedly concluded that the mill site provision restricts mill sites to one for each mining claim. 1997 ***Opinion***, at 8-11. Closer examination of these decisions reveals that they do not support this conclusion. As we have seen, most administrative decisions regarding mill site validity turned on whether the mill sites were being properly used or occupied and did not mention a numerical limitation. As will be seen, at least one administrative decision appeared to assume that the claimant could locate and patent more than one mill site per claim, contrary to the 1997 ***Opinion***. Other decisions, particularly some early ones, appeared to assume the opposite, *i.e.*, that the claimant could *not* locate or patent more than one mill site per claim. In the latter decisions, however, the question did not arise factually and the decisions were reached on other legal grounds. Consequently, any statements in the latter decisions regarding the number of mill sites per claim were dicta, in that

[20] *See also* Richard W. Harris & Richard K. Thompson, *Millsites: Current Law and Unanswered Questions*, 38 Rocky Mtn. Min. L. Inst. § 12.03[3] (1992)) ("The greatest number of IBLA decisions concerning millsite claims center around the doctrine of 'present use and occupancy.'"); Richard W. Harris, *The Law of Millsites: History and Application*, 9 Nat. Res. Law. 103, 122 n.101 (1976) ("Failure to demonstrate present use or occupancy appears to be the leading cause of millsite invalidation, as a brief reading of the *Gower Federal Service -- Mining* will show.").

they were unnecessary to **[*79]** the decisions. Just as the courts are not bound to apply dicta from earlier decisions, the Department is not bound by dicta appearing in its administrative decisions. George H. Smith (On Review), 10 Pub. Lands Dec. 184, 186 (1889) ("Any remarks made by the court upon questions outside the one under consideration, and not necessary to a decision in the case then before it may properly be considered *obiter dicta* and consequently not binding upon other courts or this Department."); *see also* U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 24 (1994) (describing as customary the Supreme Court's refusal to be bound by dicta).

We now examine chronologically the administrative decisions cited by the 1997 ***Opinion*** to demonstrate that, outside of dicta appearing in some early decisions, they do not support the conclusion of the 1997 ***Opinion***.

1. J.B. Hoggin, 2 Pub. Lands Dec. 755 (1884). The 1997 ***Opinion*** stated that *J.B. Hoggin* is the only reported case that "directly addresses the question of how many millsites may be located in connection with a mining claim. " 1997 ***Opinion***, at 8. **[*80]** In fact, the combined acreage of the two mill sites at issue in the case did not exceed five acres. 2 Pub. Lands Dec. at 755. The General Land Office Commissioner had canceled the entry for one of the two mill sites. On appeal, the Secretary asked "whether, keeping within the restriction of 5 acres of nonmineral land, more than one mill site may be embraced in an application for a vein or lode and patented therewith." *Id*. [21] The Secretary concluded that "since the amount in both locations does not exceed five acres, I think in this instance both mill-site entries should be permitted to stand." *Id*. at 756. The decision held that patenting two mill sites that do not exceed five acres combined does not violate the Mining Law's requirements. Although the Secretary assumed in the analysis that the law restricts mill site acreage in a patent application to five acres per lode claim, this assumption was irrelevant to the holding, because the two mill sites together did not exceed five acres.

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2. Hecla Consolidated Mining Co., 12 Pub. Lands Dec. 75 (1891). The 1997 ***Opinion*** stated that Hecla "reaffirmed the five-acre millsite limit." 1997 ***Opinion***, at 9. In that case, however, the applicant sought a patent for a mill site that was neither dependent on a mining claim nor used as an independent mill site. The Secretary affirmed the Commissioner's decision cancelling the mill site entry, concluding that the independent mill site clause "makes no provision for acquiring land as mill sites additional to or in connection with existing mill sites, but on the contrary expressly limits the amount of land to be taken in connection with a mill to five acres. " 12 Pub. Lands Dec. at 77. The Secretary, to be sure, stated that the proprietor of a quartz mill or reduction works may locate only one five-acre independent mill site under the mill site section's second clause, relating to independent mill sites. The Secretary did not rely on this assumption in denying the mill site application, however, and instead denied the application on grounds that a claimant may not locate mill sites that are not dependent on any mining claims or **[*82]** that do not contain a quartz mill or reduction works. *Id*.

3. Mint Lode and Mill Site, 12 Pub. Lands Dec. 624 (1891). The 1997 ***Opinion*** argued that this decision "took a strict 'one-for-one' view of the relation between a dependent millsite and the mining claim with which it is associated." 1997 ***Opinion***, at 10. Although the decision refers to five lode claims and five mill sites, the case involved the validity of a single mill site that was associated with a single lode claim. [22] Consequently, the mill site, in order to be patented, had to be used or occupied for mining or milling purposes related to the associated lode claim. The Acting Secretary invalidated the mill site on grounds that there was no evidence that the "mill site is

[21] We note that at the time of this decision and until 1885, the departmental regulations provided that "[n]o [patent] application will be received or entry allowed which embraces more than one lode location." 2 Pub. Lands Dec. at 725. In 1885, the Secretary overruled this regulation and recognized that patent applications may embrace more than one location. Good Return Mining Co., 4 Pub. Lands Dec. 221, 224-25 (1885) (citing St. Louis Smelting & Refining Co. v. Kemp, 104 U.S. 636 (1881)).

[22] The decision is not clear regarding whether the five referenced lode claims were contiguous to each other or whether the claimant had located them in separate areas. In order to apply for a patent for a group of mining claims, they must be contiguous. *Charles House*, 33 1BLA 308, 309-10 (1978). If a mining claim is not contiguous to any others, a claimant must file a separate patent application for that claim.

used for mining or milling purposes in connection with the Mint lode. " Mint Lode & Mill Site, 12 Pub. Lands Dec. at 625. He also opined that the statute "evidently intends to give to each operator of a lode claim, a tract of land, not exceeding five acres in extent, for the purpose of conducting mining or milling operations thereon, in connection with such lode. " *Id*. Since the latter **[*83]** statement was unnecessary to the conclusion that the mill site was not being used for mining or milling purposes, the statement was dictum.

4. *Alaska Copper Co*., 32 Pub. Lands Dec. 128 (1903). The 1997 ***Opinion*** argued that this decision "adopted a rule that generally allowed only one five-acre millsite in connection with a *group* of lode claims"--which, although not consistent with the 1997 ***Opinion***'s view that mill sites are limited to one for each mining claim , at least would be contrary to the view that the mill site provision contains no numerical restriction. 1997 ***Opinion***, at 10 (emphasis **[*84]** added). The *Alaska Copper* case, however, turned on whether a mill site could be located on certain lands reserved by Congress for purposes unrelated to mining, and did not turn on an interpretation of the mill site provision. The patent application in the case involved eighteen lode claims and eighteen mill sites. As the 1997 ***Opinion*** noted, "[t]he evidence indicated that only one of the millsites was even arguably being used for mining purposes." *Id*. at 11. The Acting Secretary cited numerous objections regarding the validity of the mill sites at issue, including a dispute over interpretation of the mill site provision; "[w]hilst no fixed rule can well be established, it seems plain that ordinarily one mill site affords abundant facility for the promotion of mining operations upon a single body of lode claims." 32 Pub. Lands Dec., at 130. The Acting Secretary ultimately concluded, however, in the judgment at the end of his decision, "All other considerations aside, the mill-site claims in question should not have been allowed to pass to entry in the positions in which they are located" because Congress had withdrawn the shoreline on which the claimant **[*85]** had located the mill sites. 32 Pub. Lands Dec. at 131. Congress had reserved a roadway for public use along all navigable waters in Alaska, excepting on mineral lands, *id*., and had reserved the lands on which the mill sites were located. Since the claimant could not properly locate the mill sites on the reserved lands, the Acting Secretary canceled the entry. *Id*. [23] The case did not involve the question whether more than one mill site could be located for each claim. Moreover, the Acting Secretary's extraneous comments suggested only that one mill site is "ordinarily" needed to develop a group of claims and that "no fixed rule can well be established," *id*. at 130, thereby appearing to suggest that the question ultimately turns on the facts of the case rather than a categorical rule limiting a group of claims to a single mill site.

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5. Hard Cash and Other Mill Site Claims, 34 Pub. Lands Dec. 325 (1905). The 1997 ***Opinion*** cited this case for the proposition, with which we agree, that when a patent application includes more than one mill site, the applicant must show that all of the acreage is necessary. 1997 ***Opinion***, at 11. In this case, the Secretary appeared to adopt the view that the mill site provision does not categorically provide that only one mill site may be located for a group of claims. The Secretary considered an appeal from a decision by the Commissioner of the General Land Office canceling entry for four mill sites that were related to four lode claims, because the applicant had not posted a patent application notice on each mill site. Id. at 327. The Secretary affirmed the cancellation on different grounds, concluding that "the mill-site claims are not used or occupied for mining or milling purposes in connection with the lode claim as required by law . . . ." Id. at 328. Although the decision was based on the use-or-occupancy requirement, the Secretary suggested a flexible interpretation of the mill site **[*87]** provision, stating that "if more than one mill-site is applied for in connection with a group of lode claims, a sufficient and satisfactory reason therefor must be shown." Id. at 327. Thus, the Secretary suggested that--assuming that a "sufficient and satisfactory reason" exists--more than one mill site may be located for an operation.

[23] The Department later refused to disallow mill site locations within lands withdrawn under the Act of May 14, 1898. Alaska Mildred Gold Mining Co., 42 Pub. Lands Dec. 255, 258 (1913). In the *Alaska Copper Co*. decision and many other decisions discussed in this section, the decisions from which the appeal arises are decisions canceling the mining claimant's "entry" in the lands. "Entry" is a term used to refer to a step in "the statutory procedure required to obtain the fee simple title from the Government . . . ." Alaska Copper Co., 43 Pub. Lands Dec. 257, 259 (1914). Significantly, while canceling entry serves to reject the patent application, it "does not declare that the mill site claims or locations were invalid nor does it purport to affect the claimant company's possessory rights or ownership in the premises." *Id*.

6. *Yankee Mill Site, 37 Pub. Lands Dec. 674 (1909).* The 1997 ***Opinion*** cited this case as support for the conclusion that a "single mining claim could support multiple millsite locations only where the combined area of the millsites was five acres or less." 1997 ***Opinion***, at 9. In particular, the 1997 ***Opinion*** quoted language from the decision stating that the Mining Law limits mill sites "by acreage and not by dimensions." *Id*. In this case, the Commissioner of the General Land Office had canceled a mill site entry because the mill site was contiguous to one of the four lode claims in the patent application. The Secretary reversed the Commissioner's decision, ruling that a mill site located contiguous to a lode claim is not objectionable if the mill site embraces only nonmineral land. Although **[*88]** the Secretary stated that the law limits mill sites by acreage, the Secretary did not state that a claimant is limited to one mill site per mining claim. According to the Secretary:

> It seems to the Department, upon further consideration, to be but a logical conclusion, that when by the act of 1872, whereunder a definite superficial area was made available in the case of every lode mining location, a new provision for an additional area, "for mining or milling purposes," was made, with a limitation by acreage and not by dimensions, the prohibition in that connection against the contiguity of the so-called mill-site with "the vein or lode" was intended, in the light of the previously existing practice, to prevent the appropriation within any such area of a further segment of the actual vein or lode upon which the mining claim itself was to be predicated.

Yankee Mill Site, 37 Pub. Lands Dec. at 677. The statement that the mill site provision limits mill sites "by acreage and not by dimensions" refers to the lack of any dimensional requirements for mill sites. In other words, the mill site provision does not require mill sites to be, for example, square **[*89]** in shape; rather, the provision limits mill sites by acreage, allowing mill sites to assume various shapes. Accordingly, the Secretary determined only that the contiguity requirement was intended to "prevent the appropriation within any such area of a further segment of the actual vein or lode" that may be mined, and did not address the question whether the mill site provision limits mill sites to one per claim.

7. *United States v. Swanson*, 14 EBLA 158 (1974). The 1997 ***Opinion*** quoted from this decision--which was rendered well after BLM adopted written guidance that the mill site provision does not limit mill sites to one per claim--as support for the view that the provision limits mill sites to one per claim. 1997 ***Opinion***, at 11. In fact, this decision holds only that the Mining Law does not automatically allow claimants to patent all five acres of a mill site if the claimant is using or occupying less than five acres. According to the decision:

> The Secretary's interpretation of how the statute should be administered clearly indicates that a claimant is entitled to receive only that amount of land needed for his mining and milling operations, and this amount can embrace a **[*90]** tract of less than five acres. Furthermore, there is nothing within the statute which prevents the Government from granting less than five-acre tracts when need for a lesser amount of surface area is indicated. The statute states that the location shall not "exceed five acres. " Webster's New World Dictionary, College Edition (1973) defines exceed as follows: "to go or be beyond (a limit, limiting regulation, measure, etc.) * * *." The reference to five acres in the statute is clearly a ceiling measure, not an absolute, automatic grant.

Id. at 173. The decision did not consider whether more than one mill site may be located and patented per claim, if needed. The decision demonstrates that the Department has historically relied on the use-or-occupancy requirement in administering the mill site provision, rather than categorically restricting mill sites to one per claim.

8. *Utah International, Inc., 36 IBLA 219 (1978).* In this decision, the Department appears to have recognized that the mill site provision does not impose a categorical limitation on the number of mill sites per mining claim. The applicant filed two patent applications for 201 mill **[*91]** sites associated with a uranium mine. [24] *Id. at 220.* The

[24] In addition to the two applications at issue, the relevant mineral reports also examined 113 mill sites included in two other patent applications filed by Utah International, Inc. *Utah International, Inc., 36 IBLA 219, 220 n.1 (1978).*

BLM wholly rejected one application, and partly rejected the other one. *Id*. In rejecting the applications, the BLM reasoned that the Secretary has discretion to deny applications even if an applicant has met all patenting requirements. *Id. at 223, 225.* The patent applicant appealed to the IBLA. The IBLA upheld both applications and overturned the BLM decision. *Id. at 227.* The IBLA did not consider whether the applicant was seeking more than one mill site for each associated lode claim. Instead, the IBLA considered only whether the applicant had met other requirements of the mill site provision, *i.e*., whether the claimant was using or occupying the mill sites for mining or milling purposes and whether the land was nonmineral in character. *Id. at 225-26.* After concluding that the applicant had met these requirements, the IBLA ordered the issuance of the patent. *Id. at 226.*

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If the IBLA in *Utah International* had taken the view that an applicant may not locate and patent more than one mill site per claim, the IBLA obviously would have considered, as a threshold matter, whether each of the mill sites included in the applications was associated with a separate mining claim. The fact that the IBLA granted the applications without making this inquiry demonstrates that the IBLA did not consider the issue relevant, and it could have drawn this conclusion only if it believed that the mill site provision does not limit the number of mill sites to one per claim. Indeed, since the applicant had submitted applications for 201 mill sites, the IBLA would have likely held invalid at least some of the mill sites if it had believed that the mill site provision imposed such numerical restrictions. The 1997 ***Opinion*** attached little weight to the decision because it did not specifically consider the number of associated mining claims. 1997 ***Opinion***, at 13 n.21. On the contrary, the fact that the decision did not specifically consider the issue is highly significant, because it demonstrates that the IBLA believed that the issue was not relevant since the mill site provision **[*93]** did not impose numerical restrictions. [25]

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To summarize, the Department's administrative decisions have not definitively addressed or resolved the legal question whether the mill site provision limits claimants to one mill site per claim. None of the existing administrative case law is based on a factual dispute that raised the issue. Indeed, no administrative decision of which we are aware has denied a plan of operations or a patent application on grounds that the plan or application included more than one mill site for each mining claim, except for the denial of the Crown Jewel mine plan, which occurred after the 1997 ***Opinion*** and was later rescinded. *See infra* note 29. These administrative decisions do not establish any kind of cognizable administrative practice or interpretation sufficient to contravene the Department's clear policy--reflected in the BLM's written guidance and consistently followed by BLM state offices--that interprets the five-acre mill site provision as not limiting the number of mill sites that may be located in association with a mining claim. [26]

[25] The 1997 ***Opinion*** also relied on the concurring ***opinion*** of an administrative law judge in *United States v. Collord, 128 IBLA 266 (1994).* 1997 ***Opinion***, at 9. In that case, the IBLA heard an appeal from an Administrative Law Judge (ALJ) decision invalidating two lode claims and two mill site claims. *Id. at 267.* The ALJ invalidated the two mill site claims because the claimant failed to use or occupy them for mining or milling purposes. *Id. at 292.* The IBLA, although reversing the ALJ on one of the lode claims, affirmed the ALJ's invalidation of the other lode claim and the two mill sites. *Id*. One of the administrative judges who concurred in the decision stated, as an alternative basis for his decision, that "at least one of the millsites is also invalid as a matter of law, since the applicable statute . . . permits only a single appropriation of additional land, not to exceed 5 acres, per mining claim. " *Id. at 314* (Burski, J., concurring) (citation omitted). This statement by the concurring judge did not represent the IBLA majority decision, was not based on any citation of authority, and in any event was dictum because the IBLA holding was that a claimant must use or occupy a mill site for mining or milling purposes in order to obtain a patent for a mill site.

[26] The 1997 ***Opinion*** also refers to a handful of treatises, concluding that "there appears to have been little doubt among miners and mining lawyers that the law allowed no more than five acres" of mill site land per mining claim. 1997 ***Opinion***, at 12. Many of the treatises cited merely reflect the dicta found in the administrative case law that we have already discussed. For example, the 1997 ***Opinion*** quotes certain language from *Lindley on Mines* that is merely a restatement of dictum from the *Hoggin* decision. In his treatise, Curtis H. Lindley also restates the dicta from the *Alaska Copper Co*. and *Hard Cash and Other Millsite Claims* cases. 2 *Lindley on Mines* § 520, at 1173-75 (1914). Quoting dicta in legal treatises cannot imbue that dicta with added significance. Some mining lawyers have expressed the view that the Mining Law allows mining claimants to locate more than

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D. Solicitor's Office Staff Opinions

Prior to the 1997 ***Opinion***, various offices within the Solicitor's Office of the Department of the Interior have on occasion briefly opined on the mill site provision. Although some of the opinions support the view that the provision does not categorically limit mill sites to one for each claim, the language of some other opinions can be construed as taking a contrary view. None of the opinions contains an extensive, authoritative discussion of the issue supported by citations of authority. Therefore, none of the opinions can be construed as altering the Department's long-standing policy of interpreting the mill site provision as imposing no categorical limitation, as this policy is reflected in the BLM's written guidance and followed by BLM state offices in administering the provision. We now examine each of these Solicitor's Office staff opinions more closely.

In 1960, the Field Solicitor in Reno, Nevada, issued a memorandum expressing the view that the mill site provision does not limit the number of mill sites that may be located for each mining claim. The memorandum, sent to the State Supervisor of the BLM's Arizona State Office, stated: **[*96]**

> More than one mill site may be embraced in a single application for patent. There appears to be no requirement that the total acreage of several mill sites, embraced in a single application, may not exceed five acres. A mill site located under the first provision of [*30 U.S.C. § 42*] . . . must be used and occupied by the proprietor of a vein or lode for mining or milling purposes.

Memorandum from Otto Aho, Field Solicitor, Reno, Nevada, to State Supervisor, Arizona State Office, BLM 2 (Aug. 17, 1960). The Field Solicitor also stated that:

> The cited law speaks of location in the singular. It does not say "no location or a group of locations * * * shall exceed five acres. ". . . [I]t is my view that the total acreage of several mill sites, embraced in a single application, may exceed five acres. However, each mill site may not exceed five acres.

Id. at 8.

In 1974, the Field Solicitor in Phoenix, Arizona, also expressed the same view in a memorandum to the Chief of the Branch of Minerals in the BLM's Arizona State Office. The memorandum listed the requirements for mill site locations and pointedly did not mention any limitation on the number **[*97]** of mill sites per mining claim. Memorandum from the Field Solicitor in Phoenix, Arizona, to the Chief, Branch of Minerals, Arizona State Office, BLM 1 (Mar. 27, 1974). [27]

one mill site per mining claim. As the 1997 ***Opinion*** acknowledged, the second edition of *American Law of Mining* stated that "[i]n theory, an unlimited number of millsites might be appropriated by a single mining operator and held or patented as long as each independently meets the requirements of the law." *Id*. at 13 (citing 1 *Am. L. Mining* § 32.06[4] (2d 3d. Rev. 1987). In addition, another commentator stated that "[i]t is first to be noted that the statute does not limit the millsite locator to only one millsite. It merely says that no location may exceed five acres. " Gary L. Greer, "Millsites: Nonmineral Mining Claims," 13 Rocky Mtn. Min. L. Inst. 143, 169 (1967)). Another mining lawyer has stated that "[s]ince the statute does not limit the millsite locator to a single claim, the obvious response is to locate several millsites, thereby acquiring enough land for all present and future needs." Richard W. Harris, *The Law of Millsites: History and Application*, 9 Nat. Res. Law. 103, 121 (1976). More importantly, the viewpoints expressed by lawyers in privately-published treatises and articles, no matter what position they take, do not provide a persuasive basis for changing the Department's prevalent practice and interpretation of the mill site provision.

[27] Three years earlier, the same Field Solicitor responded to a question from the BLM Arizona State Office regarding the propriety of patenting mill sites located in an area withdrawn for the San Carlos Irrigation Project. Interestingly, although the patent application at issue contained 130 mill sites, the Field Solicitor did not raise any concerns regarding the large number of mill sites. Memorandum from Field Solicitor, Phoenix, Arizona, to Chief, Branch of Minerals, Arizona State Office, BLM (Feb. 11, 1971).

On the other hand, we have discovered a 1962 memorandum from the Regional Solicitor in Portland, Oregon, not mentioned in the 1997 ***Opinion***, that contains language suggesting a contrary view. The memorandum, sent to the Chief of the Division of Lands and Minerals Management in the BLM Oregon State Office, stated:

> "[N]eed" is a governing **[*98]** factor as to how many millsites may be patented to one corporation. Of course, it must be remembered that each millsite application must be linked to a placer patent application so that the number of millsites should not exceed the number of placer claims. Also, it must be shown that each millsite is actually being occupied or used for purposes specified by the statute. . . . It therefore appears that the number of millsites which may be patented by an owner of placer claims must be determined by investigation of the facts as to how many millsites are "needed" by the owner of the placer claims "for mining, milling, processing, beneficiation, or other operations in connection with such claims . . . and whether the millsites are actually "used or occupied" for such purposes by the owner of the claims.

Memorandum from John L. Bishop, Assistant Regional Solicitor, Office of the Regional Solicitor, Portland, Oregon, to the Chief, Division of Lands & Minerals Management, Oregon State Office, BLM 5-6 (May 11, 1962). Although the memorandum stated that "the number of millsites should not exceed the number of placer claims," it cited no authority in support of this conclusory remark. As **[*99]** a result, the ***opinion*** lacks probative value regarding whether the mill site provision categorically limits the number of mill sites.

Finally, the Associate Solicitor for the then-Division of Public Lands sent a memorandum in 1963, also not mentioned in the 1997 ***Opinion***, that expressed the view that more than one independent mill site may be located. The memorandum responded to an inquiry from the BLM Director regarding whether it is "permissible to issue [a] patent for two or more contiguous millsites not associated with patented mining claims when the milling operation occupies two or more contiguous millsites. " Memorandum from the Associate Solicitor, Division of Public Lands, Office of the Solicitor, to Director, BLM 1 (July 1, 1963). The Associate Solicitor acknowledged that some view the mill site provision as limiting claimants to one five-acre mill site per lode claim, but the Associate Solicitor did not endorse the view for independent mill sites, stating:

> It is sometimes said that under the first sentence [of *section 42 of Title 30 of the United States Code*], even though multiple nonmineral locations may be permitted, there can be no more **[*100]** than one five-acre nonmineral location for each lode location. Such a restriction can have to applicability to the second sentence [of section 42, pertaining to independent mill sites] since there can be not even one lode location in connection with a mill site sought thereunder. We hold that the second sentence, by incorporating by reference the requirements of the first sentence where not necessarily inconsistent with the explicit words or intent of the second sentence, permits the patenting of two or more contiguous five acre locations where collectively they form a mill site.

Id. at 3-4. In other words, the Associate Solicitor concluded that even if the mill site provision disallows locating more than one five-acre dependent mill site per associated mining claim --a view that the Associate Solicitor did not necessarily endorse--the mill site provision does not so limit the number of independent mill sites, because independent mill sites are not associated with any particular mining claim. *See supra* note 2 (discussing distinction between dependent and independent mill sites) .

IV. Congressional Response to 1997 *Opinion*

Congress recognized that the 1997 ***Opinion*** represented **[*101]** a significant departure from the Department of the Interior's established practice regarding the mill site provision. In May 1999, Congress enacted a statute prohibiting the Department from relying on the 1997 ***Opinion*** to deny patent applications and plans of operation submitted before the date of the law's enactment. Pub. L. No. 106-31, § 3006, 113 Stat. 57, 90-91 (1999). The Conference Report and several senators objected that the 1997 ***Opinion*** constituted an improper amendment of existing law, and was an attempt to change the Department's practice without going through the necessary rulemaking process. According to the Conference Report, the 1997 ***Opinion*** "is particularly troubling because both the Bureau of Land

Management and the Forest Service have been approving patents with more than one five-acre millsite per patent based on procedures outlined in their operations manuals." H.R. Conf. Rep. No. 106-143, at 90 (1999). [28] The 1999 statute did not explicitly expire at the end of the 1999 fiscal year and apparently remains in effect.

[*102]

In November 1999, Congress enacted legislation limiting the 1997 ***Opinion*** for fiscal years 2000 and 2001 by prohibiting the Department from expending appropriated funds to deny, based on the 1997 ***Opinion***, any patent application that is grandfathered from the patenting moratorium or any plan of operations that an operator had submitted before November 7, 1997, or that the Department had approved before November 29, 1999. Pub. L. No. 106-113, § 337, 113 Stat. 1501, 1501A-199 (1999). This legislation stated that neither the May 1999 legislation nor the November 1999 legislation could "be construed as an explicit or tacit adoption, ratification, endorsement, approval, rejection or disapproval of the ***opinion*** dated November 7, 1997, by the Solicitor of the Department of the Interior concerning millsites. " *Id*.

Since Congress has prohibited the Department from denying any plan of operations or patent application submitted before the 1999 law was enacted based on the 1997 ***Opinion***, the Department has not applied the 1997 ***Opinion*** to any patent application or plan of operations. [29] This explains the absence of any legal challenge to the **[*103]** 1997 ***Opinion***, as well as the absence of any administrative decision carrying it out.

The 1997 ***Opinion***, if followed by the Department, would effectively subject mining claimants and operators to significant, new requirements respecting their mining operations. **[*104]** Under existing case authority, when federal agencies adopt new substantive rules and policies that represent a significant departure from long-established and consistent administrative practice, the agencies are required to comply with the Administrative Procedure Act (APA), *5 U.S.C. § 553*, which requires notice and an opportunity for public comment. *Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 630 (5th Cir. 2001).* If an agency fails to follow these APA requirements in promulgating a rule, the industry cannot be required to follow the rule. *Id*. In *Alaska Professional Hunters Ass'n v. FAA, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999),* the United States Court of Appeals for the District of Columbia Circuit concluded that consistent policy guidance given out by staff in the Federal Aviation Administration's Alaska Region for almost thirty years constituted authoritative interpretation that could be changed only through notice and comment rulemaking. The court stated that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, **[*105]** the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Id. at 1034.*

V. Conclusion

Based on the foregoing analysis, we conclude the mill site provision restricts the size of a mill site to five acres, but does not categorically preclude the location of more than one mill site for each associated mining claim. This conclusion is supported by several factors. First, the statutory language expressly limits the size of mill sites but does not expressly limit the number of mill sites per mining claim. Additionally, other provisions of the Mining Law limit the size but not the number of mining claims an individual claimant may locate and patent; since these

[28] The Conference Report incorrectly describes the 1997 ***Opinion*** as limiting the number of mill sites to one five-acre mill site *per patent* . In fact, the 1997 ***Opinion*** would have limited the number of mill sites to one five-acre mill site *per associated mining claim* . The mill site section provides that nonmineral land "may be embraced and included in an application for a patent for such vein or lode. " *30 U.S.C. § 42*. This has been interpreted to mean that mining claimants may seek to patent mill sites concurrently or subsequently to associated mining claims. *United States v. Shiny Rock Mining Corp., 112 IBLA 326, 360 (1990).* It does not mean that claimants may include only one mill site in any one patent application.

[29] By letter dated March 25, 1999 (hereinafter "Crown Jewel decision letter"), the Department denied a proposed plan of operations for the Crown Jewel mine in Washington State based on the 1997 ***Opinion***. Shortly thereafter, Congress enacted a law prohibiting the Department from applying the 1997 ***Opinion*** to the Crown Jewel project and instructing the Department to apply instead the mill site provisions in BLM's Handbook for Mineral Examiners. Congress also instructed the Department to approve the plan of operations and reinstate the Record of Decision as soon as practicable. Pub. L. No. 106-31, § 3006, 113 Stat. 57, 90-91 (1999). The Department did so. The instant ***opinion*** supersedes the Crown Jewel decision letter.

statutory size limitations are constructed similarly and do not impose numerical limitations on mining claims, the statutory size limitation for mill sites should not be construed as a numerical limitation on mill sites. If the result were otherwise, a claimant would be unable to locate and patent more than one mill site to serve a mining claim, even though the claimant could show that more than one mill site is necessary to develop and process the minerals **[*106]** from the claim. The Mining Law has sufficient flexibility to allow for evolving mining practices,[30] and does not, at least in the mill site provision, impose rigid limitations that would make modern mining practices unworkable. The congressional purpose of the Mining Law was to encourage development of the nation's mineral resources, and a limitation of one mill site per mining claim would frustrate that congressional purpose by obstructing the development of mineral resources in particular areas. If this congressional policy is to be changed, it must be changed by Congress.

In fact, Congress has reaffirmed its historic policy of encouraging development of the nation's mineral resources. In 1970, Congress enacted **[*107]** the Mining and Minerals Policy Act, 30 U. S .C. § 21a, which provides:

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining . . . [and] the orderly and economic development of domestic mineral resources . . . .

See also National Materials and Minerals Policy, Research and Development Act of 1980, *30 U.S.C. § 1602*.

Finally, an interpretation that the mill site provision categorically restricts the number of mill sites is inconsistent with the Department's prevalent, long-standing interpretation of the provision. The BLM's state offices have consistently followed BLM's written guidance, which provides that the mill site provision limits the size of individual mill sites but does not limit the number of mill sites that may be located for each mining claim. On the other hand, the Department has traditionally used the use-or-occupancy requirement of the mill site provision to limit the number of mill sites that may be located for mining claims, by providing that mill sites may **[*108]** be located only where miners demonstrate that they reasonably need the lands for mining or milling purposes. There is no evidence that the Department has acted inconsistently with BLM's written guidance since it was adopted. The Department's prevalent interpretation, from at least the time that the BLM adopted its written guidance in 1954 until the 1997 ***Opinion*** was issued, has been that the mill site provision places no numerical limitations on the mill sites that may be located and patented in association with a mining claim.

For these reasons, we believe that the mill site provision authorizes the Department of the Interior to regulate mill sites by requiring claimants to show that they are using or occupying the nonmineral lands for mining or milling purposes, but that the provision does not categorically limit claimants to one mill site for each mining claim. The Department's traditional practice of applying the mill site provision without limiting mill sites to one per mining claim is in conformity with the requirements of the Mining Law. The Department should continue its traditional practice as described in this ***opinion*** and as reflected in the BLM's written guidance prior to **[*109]** the 1997 ***Opinion***. This ***opinion*** supersedes all previous Solicitor's Office opinions and any other departmental decisions that conflict with this ***opinion***.

Roderick E. Walston

Deputy Solicitor

Oct. 8, 2003

Date

[30] *See* Karen Hawbecker & Peter J. Schaumberg, *Patent Pending: Department of the Interior Administration of the Mining Laws*, 46 Rocky Mtn. Min. L. Inst. § 16.01 (2000) ("[T]he Secretary's authority over the public lands is broad enough to allow for wide variations in Mining Law administration.").

Attachment

APPENDIX (1996 SURVEY OF BLM STATE OFFICE PRACTICE)

Alaska. The Alaska State Office indicated that in its practice, it looks "at the current use and occupancy of the millsite to insure it is mining related. If the millsite is not in use (vacant or use other than mining related) we don't consider it valid." Memorandum from Nolan Heath, Deputy State Director, Lands, Minerals, and Resources, Alaska State Office, BLM. to Director, BLM 2 (Mar. 20, 1996). The Alaska State Office stated that it had only one pending multiple-mill-site patent application.

Arizona. The Arizona State Office stated that "patents and use authorization for multiple millsites have always been evaluated based on the appropriate use and need for millsites." Memorandum from Michael A. Ferguson, Deputy State Director, Resource Planning, Use and Protection, Arizona State Office, BLM, to Director, BLM 2 (Apr. 25, 1996). This state office stated further that, in its practice, there "is no set ratio of millsites **[*110]** to associated mining claims. The patent review and plan of operation approval are based on authorized uses and the number of millsites necessary to accommodate the mining and milling needs." Id. The Arizona State Office noted that it had nine pending multiple-mill-site patent applications. Id. at 1.

California. The California State Office stated that it had at least fifteen multiple-mill-site patent applications pending. Memorandum from Leroy M. Mohorich, Acting Deputy State Director, Division of Energy and Minerals, California State Office, BLM, to Director, BLM 1-2 (Apr. 10, 1996). It stated:

> In the decision Utah International, Inc. (36 IBLA 219 (1978)), the IBLA recognized multiple mill sites in a patent application, most of which were approved. Some confusion may have been generated from earlier decisions where the Land Office stated that only one mill site was needed for a particular operation. The decisions were not based on any rule related to one mill site per mining claim, but that only one mill site was needed.

Id. at 2. Moreover, the California State Office stated that "[i]t has been common practice in California to issue patents for multiple millsites." Id. at **[*111]** 3. It reported having issued 32 patents for 455 mill sites since 1966. Id. It also reported having approved two plans of operations for large open-pit, heap-leach operations wherein the mill-sites-to-mining-claims ratio was 3 to 1 and 6 to 1. Id.

Colorado. The Colorado State Office stated that it had one multiple-mill-site patent application pending. Memorandum from Richard Tate, Colorado State Office, BLM, to Director, BLM 1 (Apr. 12, 1996). With regard to reviewing patents and plans of operations for a mill-sites-to-mining-claims ratio, the state office stated that "we do not make such inquiries." Id. at 2. It reported having issued a multiple-mill-site patent in 1984. Id. at 1.

Idaho. In Idaho, the state office reported having six pending multiple-mill-site patent applications and having issued a multiple-mill-site patent in 1985. Memorandum from J. David Brunner, Deputy State Director, Resource Services Division, Idaho State Office, BLM, to Director, BLM 1 (Apr. 22, 1996). It stated that "we do not review patent applications or plans of operation with respect to a strict ratio of millsites to associated claims." Id. at 2. It also reported having refused to patent mill **[*112]** sites included in two patent applications because they were not associated with any mining claims and did not meet the requirements for independent mill sites. Id.

Montana. The Montana State Office similarly reported having patented two multiple-mill-site applications in 1980 and 1987. Memorandum from Larry E. Hamilton, State Director, Montana State Office, BLM, to Director, BLM 4 (Apr. 19, 1996). The state office explained that "discussions with several retired mineral examiners suggest that the practice [of patenting multiple mill sites] was common when they started their careers in the late 1950s." Id. at 2. It stated further that:

> [W]e have never looked at a specific ratio of millsites to associated mining claims. We do, however, verify that any lands being sought are, in fact, being used and occupied for mining and milling purposes, and that the land

> configuration is reasonably compact such that the minimum of land required for the operation to effectively function is patented.

Id.

Nevada. In Nevada, the state office reported having 20 pending multiple-mill-site patent applications. Memorandum from Thomas V. Leshendok, Deputy State Director, Mineral Resources, Nevada **[*113]** State Office, BLM, to Director, BLM Attach. 8-1 (Apr. 23, 1996). It stated:

> Patenting and use authorizations for multiple millsites is common in Nevada. Use authorizations started on January 1, 1981, the effective date of the 43 CFR 3809 regulations. It is not known when the patenting of multiple mill sites first occurred. Available records show that the practice was occurring by June 1, 1964.

Id. at 1. The Nevada State Office stated further that in reviewing patent applications and plans of operations, "the ratio of mill sites to associated mining claims is not determined." Id. In mill site patenting review, the state office evaluates "the mineral character, need and current use of each mill site." Id. Although not mentioned by the Nevada State Office in its response to the 1996 survey, the Nevada State Office has apparently issued at least nine patents since 1979 that include more mill sites than mining claims. See Effect of Federal Mining Fees and Mining Policy Changes on State and Local Revenues and the Mining Industry: Hearing Before the House Comm. on Natural Resources, 106th Cong. 5-6 (2001) (statement of Richard W. Harris, Attorney at Law, Harris & Thompson, based on **[*114]** his own research in the BLM Nevada State Office). The average mill-sites-to-mining-claims ratio in those patents was nearly seven mill sites to one mining claim. Id.

New Mexico. The New Mexico State Office reported that it had a mill site patent application pending but that it did not contain multiple mill sites. Memorandum from Robert S. Armstrong, Deputy State Director, Resource Planning, Use and Protection, New Mexico State Office, BLM, to Solid Minerals Group, Washington Office, BLM 1 (Apr. 25, 1996). The state office stated that the "last mill site patents were issued in the early 1970s" and "[t]hey were multiple millsites." Id.

Oregon. The Oregon State Office reported two pending multiple-mill-site patent applications. Memorandum from Associate State Director, Oregon & Washington State Office, BLM, to Roger Haskins, Senior Specialist, Mining Law Adjudication, Solid Minerals Group, Washington Office, BLM 1 (Apr. 30, 1996). It stated that "[p]atenting of multiple millsites has been an accepted practice in this office, as far back as the mid to late sixties." Id. at 2.

Utah. In Utah, the state office reported six pending multiple-mill-site patent applications. Memorandum **[*115]** from Robert Lopez, Deputy State Director, Natural Resources, Utah State Office, BLM, to Director, BLM 1 (undated). It reported having patented only 40 mill sites since 1962 but does not make clear whether those patents included multiple mill sites.

Wyoming. The Wyoming State Office stated that it had never issued a multiple-mill-site patent, having issued patents for only 13 mill sites since 1962, but "[i]f the applicant could show 'reasonable need' and the mill sites were necessary to the mining and milling operation, the mill sites would most likely have been patented if all other requirements were met." Memorandum from Dale Wadleigh, Wyoming State Office, BLM, to Roger Haskins, Senior Specialist, Mining Law Adjudication, Washington Office, BLM 1-2 (Mar. 21, 1996).

End of Document

Department of the Interior

October 05, 1981

M-36910 (Supp.)

Opinion By: COLDIRON

Opinion

OPINION BY OFFICE OF THE SOLICITOR

TO: SECRETARY

FROM: SOLICITOR

SUBJECT: THE BLM WILDERNESS

REVIEW AND VALID EXISTING RIGHTS

1. INTRODUCTION

On Sept. 5, 1978, the Solicitor issued opinion *M-36910, 86 I.D. 89 (1979),* interpreting sec. 603 of the Federal Land Policy and Management Act (FLPMA), *43 U.S.C. § 1782.* In addition, two supplementary memoranda have been issued. The first, the memorandum of Aug. **[*910]** 7, 1979 ("Palmer Oil/ Prairie Canyon"), reviewed the "grandfather clause" of sec. 603. The second, **[**2]** the memorandum of Feb. 12, 1980 ("Further Guidance on FLPMA's section 603"), discussed the Bureau of Land Management's Interim Management Plan and valid existing rights in the context of mining claims located pursuant to the general mining laws.

This opinion addresses the relationship between valid existing rights and the wilderness review requirements of sec. 603. [1] It modifies Solicitor's Opinion No. M-36910 and incorporates the memorandum of Feb. 12, 1980.

II. THE NONIMPAIRMENT STANDARD AND ITS EXCEPTIONS AND LIMITATIONS

Congress has delegated to the **[**3]** Secretary general and comprehensive authority to manage the public lands. As the Supreme Court has noted, the Secretary "has been granted plenary authority over the administration of public lands * * * and * * * has been given broad authority to issue regulations concerning them." *Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963).* See also *Cameron v. United States, 252 U.S. 450, 459-60 (1920); Boesche v. Udall, 373 U.S. 472, 477-78 (1963).* See generally *30 U.S.C. §§ 22,* 189; *43 U.S.C. §§ 2,* 1712. With the enactment of FLPMA, Congress has restricted the Secretary's discretion in managing the public lands by imposing two standards to guide management decisions. The first is a general standard applicable to all management activities: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary and undue degradation of the lands." *43 U.S.C. § 1732*(b). The second and more stringent limitation is part of the wilderness review mandated by sec. 603 of FLPMA. *43 U.S.C. § 1782.*

Under sec. 603 of FLPMA, the Secretary is directed to review the public lands and identify those areas that meet the wilderness criteria **[**4]** contained in sec. 2(c) of the Wilderness Act, *16 U.S.C. § 1131*(c). Those areas that have wilderness characteristics are then to be studied to determine their suitability for inclusion in the National Wilderness Preservation System. The Secretary is required to make recommendations on their suitability or

[1] This opinion formalizes and is consistent with the position adopted by the Department on appeal from the decision of *Rocky Mountain Oil & Gas Association v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980),* appeal docketed, No. 81-1040 (10th Cir. Jan. 5, 1981). Although consistent with the result reached by the court in regard to allowing activities on oil and gas leases issued prior to Oct. 21, 1976 (pre-FLPMA leases) , this opinion does not adopt the court's rationale.

nonsuitability to the President by Oct. 21, 1991. In turn, the President makes recommendations to the Congress which decides which areas will be designated wilderness.

Sec. 603(c) establishes a specific management standard, known as the "nonimpairment standard," applicable **[*911]** only during this wilderness review:

During the period of review of such [wilderness study] areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act: PROVIDED, That, in managing the public lands the Secretary **[**5]** shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

43 U.S.C. § 1782(c) (italics added). See generally *Solicitor's Opinion M-36910, 86 **I.D**. 89, 109-11 (1979).*

There is, however, an exception to and a limitation on the nonimpairment standard. The exception is the section's grandfather clause which authorizes the continuance of existing mining, grazing, and mineral leasing uses, "in the manner and degree" in which they were occuring on Oct. 21, 1976, the date of enactment of FLPMA. This grandfather clause was analyzed in both the initial Solictor's Opinion and the supplemental memorandum of Aug. 7, 1979.

The limitation on the nonimpairment standard, and the subject of this opinion, is the savings clause of sec. 701(h) of FLPMA. This section provides:

All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

43 U.S.C. § 1701 note.

The clause limits the applicability of the nonimpairment standard by specifying that the standard cannot be applied in a manner that would prevent the exercise of any "valid existing **[**6]** rights. "

III. VALID EXISTING RIGHTS

Although the legislative history is largely silent on the scope of this term, [2] it is not unique to FLPMA. The term has an extensive history both in the Department and the courts.

In defining "valid existing rights, " the Department distinguishes three terms: "vested rights, " "valid existing rights, " and "applications" or "proposals." [3] "Valid existing rights" are distinguished from "applications" because such rights are independent of any secretarial discretion. They are property interests rather than mere expectancies. Compare *Schraier v. Hickel, 419 F.2d 663, 666-67 (D.C. Cir. 1969)* and *George J. Propp, 56 **I.D**. 347, 351 (1938)* with *Udall v. Tallman, 380 U.S. 1, 20 (1965),United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 420 (1931),* and *Albert A. Howe, 26 I.B.L.A. 386, 387 (1976).* "Valid existing rights" are distinguished from "vested rights" by degree: they become vested rights when all of the statutory requirements required to pass equitable or legal title

[2] See generally H.R. Rep. No. 1724, 94th Cong., 2d Sess. 65 (1976), reprinted in Senate Comm. on Energy & Natural Resources, 95th Cong., 2d Sess., Legislative History of the Federal Land Policy and Management Act of 1976 at 871, 935 (Comm. Print 1978)

[3] Each of these terms applies only to third parties. They do not apply to interests of federal agencies, departments, or agents. See, e.g.,*Townsite of Liberty, 40 I.B.L.A. 317, 319 (1979).*

have been satisfied. [4] Compare *Stockley v. United States, 260 U.S. 532, 544 (1923)* with *Wyoming v. United States, 255 U.S. 489, 501-02 (1921)* and *Wirth v. Branson, 98 U.S. 118, 121 (1878).* Thus, "valid existing rights" are those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion.

[8]**

Valid existing rights may arise in two situations. First, a statute may prescribe a series of requirements which, if satisfied, create rights in the claimant by the claimant's actions under the statute without an intervening discretionary act. The most obvious example is the 1872 Mining Law: a claimant who has made a discovery and properly located a claim has a valid existing right by his actions under the statute; the Secretary has no discretion in processing any subsequent patent application. Second, a valid existing right may be created as a result of the exercise of secretarial discretion. For example, although the Secretary is not required to approve an application for a right-of-way, if an application is approved the applicant has a valid existing right to the extent of the rights granted. Similarly, the Secretary has discretion to approve, deny, or suspend an application for an oil and gas lease. Once the lease is issued however, the applicant has valid existing rights in the lease.

Valid existing rights are not, however, absolute. The nature and extent of the rights are defined either by the statute creating the rights or by the manner in which the Secretary chose **[**9]** to exercise his discretion. [5] See, e.g., *Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963);Continental Oil Co. v. United States, 184 F. 2d 802, 807 (9th Cir. 1950).* Thus, it is not possible to identify in the abstract every interest that is a valid existing right; the question turns upon the interpretation of the applicable statute and the nature of the rights conveyed by approval of an application. Because of the importance of the individual approval and its stipulations, a review of each approval **[*913]** document will be required to determine the precise scope of an applicant's valid existing rights where such rights are created by an act of Secretarial discretion.

[10]**

IV. REGULATION OF VALID EXISTING RIGHTS UNDER SEC. 603 OF FLPMA

The determination that a particular interest is a "valid existing right" is a limitation on the congressionally mandated management standard applicable to activities occurring within wilderness study areas. Although the nonimpairment standard remains the norm, this standard cannot be enforced if to do so would preclude recognition of the right or, in the case of an issued lease, would preclude development under the right. In general, restrictions on the right designed to protect wilderness values may not be so onerous that they unreasonably interfere with enjoyment of the benefit of the right. In other words, regulations may not be "so prohibitively restrictive as to render the land incapable of full economic development." *Utah v. Andrus, 486 F. Supp. 995, 1010 (D. Utah 1979).*

The resolution of specific cases under these general guidelines is dependent upon an analysis of two variables. The first is the scope of developmental rights actually conveyed by the person's actions under the statute or by the Department's issuance of the lease or other document. The second variable is the site-specific conditions confronting **[**11]** the right holder. In general, however, the nonimpairment standard governs activities unless this would unreasonably interfere with enjoyment of the valid existing rights. When the nonimpairment standard

[4] "Vested rights" has a narrower meaning within public land law terminology than in other areas of the law. In public land law, "vested rights" typically applies to legal or equitable rights to a fee title. See e.g., *Wyoming v. United States, supra at 501-02.* Oil and gas leases, which do not convey fee title, have not been couched in terms of the traditional "vested right" usage.

[5] For example, there are interests less than leaseholds that are"valid existing rights. " These include noncompetitive (preference right) coal lease applications that were preserved by the "valid existing rights" clause of sec. 4 of the Federal Coal Leasing Act Amendments of 1976, 90 Stat. 1085, amending *30 U.S.C. § 201*(b) (1970). The Secretary does not have the discretion to reject these applications if the applicant can meet the statutory test for lease issuance. Nevertheless, the right to a lease does not accrue until that determination has been made. *NRDC v. Berklund, 609 F.2d 553 (D.C. Cir. 1979); Utah International, Inc. v. Andrus, 488 F. Supp. 962, 969 (D. Utah 1979).* The right preserved is to an adjudication and, if that adjudication is favorable, to a lease.

would unreasonably interefere with the use of the rights conveyed, the holder of the rights may exercise the rights although it impairs the area's suitability for preservation as wilderness. For example, under such circumstances a claimant with a valid mining claim under the Mining Law of 1872 may develop the claim even if this impairs the area's suitability for wilderness preservation. Similarly, the holder of an oil and gas lease or a right-of-way authorization issued prior to the enactment of FLPMA may develop the leasehold or right-of-way to the extent authorized by the issuance or approval document.

It is important to note the distinction between pre- and post-FLPMA leases and authorizations. With the enactment of FLPMA on Oct. 21, 1976, the Secretary was required to manage the public lands under wilderness review "so as not to impair the suitability of such areas for preservation as wilderness. " *43 U.S.C. § 1782*(c). Thus applicants who received a lease or other use authorization **[**12]** after Oct. 21, 1976, for lands within an area under wilderness review did not receive an unlimited right to develop since after that date the Secretary had authority **[*914]** only to issue those leases, permits, and licenses that would not impair an area's suitability for preservation as wilderness. See generally *Utah v. Andrus, 486 F. Supp. 995, 1006 (D. Utah 1979).*

The right to develop even if it impairs an area's suitability does not, however, mean that the right is unlimited. The Secretary remains under a statutory mandate to manage these areas and their resources: "in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. " *43 U.S.C. § 1782*(c). [6] By implication, this standard allows the Secretary to authorize uses or activities necessary to the purposes of the valid existing rights subject to reasonable mitigating measures to protect environmental values. The requirement that the Secretary regulate uses and activities to prevent unnecessary and undue degradation and to afford environmental protection is consistent **[**13]** with the power of the Federal Government to regulate property interests. Since the regulation extends at a minimum only to prohibiting activities that are not necessary or that are excessive or unwarranted, the taking issue is not implicated. [7]

[14]**

V. CONCLUSION

Valid existing rights may be created by operation of a statute or an act of secretarial discretion. A valid mining claim, an oil and gas lease, and a right-of-way authorization are examples of valid existing rights. If such rights were created prior to the enactment of FLPMA, they limit the congressionally imposed nonimpairment standard. Although the nonimpairment standard remains the norm, valid existing rights that include the right to develop may not be regulated to the point where the regulation unreasonably interferes with enjoyment of the benefit of the right. Resolution of specific cases will depend upon the nature of the rights conveyed and the physical situation within the area. When it is determined that the rights conveyed can be enjoyed only through activities that will permanently impair an area's suitability for preservation as wilderness, the activities are to be regulated to prevent unnecessary and undue degradation or to afford environmental protection. Nevertheless, even if such activities impair **[*915]** the area's suitability, they must be allowed to proceed.

WILLIAM H. COLDIRON Solicitor

[6] See also*43 U.S.C. § 1732*(b).

[7] These management requirements are compatible with the concept of valid existing rights. First, such rights may constitutionally be regulated and their value diminished for a proper governmental purpose. See, e.g., *Andrus v. Allard, 100 S.Ct. 318 (1979); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Goldblatt v. Hempstead, 369 U.S. 590 (1962).* Since the management standard prohibits only "unnecessary and undue degradation, " it does not raise constitutional issues. Second, the rights granted by the United States are often explicitly limited by the government's authority to regulate. For example, the 1872 Mining Law provides that "all valuable mineral deposits in lands belonging to the United States * * * shall remain free and open to exploration and purchase * * * under regulations prescribed by law." *30 U.S.C. § 22.* See generally *30 U.S.C. § 189; Boesche v. Udall, 373 U.S. 472, 477-78 (1963); United States v. Richardson, 599 F.2d 290 (9th Cir. 1979),* cert. denied, *444 U.S. 1014 (1980).*

Department of the Interior

October 20, 1959

M-36584

Opinion By: FRITZ

Opinion

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

You have asked whether a mining claimant, who builds a road to his mining claim across public land, may be charged a fee for the use of such road, where no exclusive right-of-way is applied for or granted by the United States.

In the particular case to which you call my attention it is alleged that mining locations were made on public land more than 50 years ago and the claimant, to provide access to his claims and a way for hauling ore from the claims, constructed a road over public lands. Your inquiry will be discussed in the light of these allegations. Your **[*362]** inquiry results because the regulations in 43 CFR, 1954 Rev., 115.154-179 may be susceptible of the construction that such a charge must be made. These regulations relate only to rights-of-way for train roads granted under the act of January 21, 1895 (28 Stat. **[**3]** 635; 43 U.S.C., 1952 ed., sec. 956), and the act of August 28, 1937 (50 Stat. 874; 43 U.S.C., 1952 ed., sec. 1181a), and apply, primarily at least, to purchasers of timber on the Oregon and California Railroad Grant lands. Unless there is reason for saying that the act of August 28, 1937, contains provisions under which a charge may be made for using a road even though it is not a right-of-way granted under the 1895 act the principle or right to charge for the use of any road on public lands by any user as it is said the regulations applicable to the Oregon and California lands may indicate to be, would apply equally to the public lands generally. Since it has traditionally been customary for mining locators, homestead and other public land entrymen to build and/or use such roads across public lands other than granted rights-of-way as were necessary to provide ingress and egress to and from their entries or claims without charge, the question whether a fee may be charged for such use is not only of broad, general interest but to make such a charge now would change a long practice.

I do not believe that a charge may be made in such cases. The general authority of the Secretary **[**4]** and the Director, Bureau of Land Management, over the public lands (5 U.S.C., 1952 ed., sec. 485; 43 U.S.C., 1952 ed., sec. 7 [see note fol.]) might be construed to permit it, were it not for the fact that legislation providing for the making of entries and locations necessarily presupposes a right of passage as an incident to the other rights granted, and the general rule that free passage over the public lands has always been recognized. Until recent years free use of the public range was the custom. See *Buford v. Houtz, 133 U.S. 320 (1890)* and *McKelvey v. United States, 260 U.S. 353 (1922).* Prior to the enactment of the mining laws, minerals in such lands were freely exploited by the public without hindrance. (1 Lindley, Mines, secs. 46 and 56, 3d ed. 1914, and cases cited.) The Taylor Grazing Act (43 U.S.C., 1952 ed., sec. 315) took away the free grazing privilege previously sanctioned by custom just as the mining laws of 1867 and 1872 took away the implied license to mine. But in both of these cases the changes were made by legislation, not by executive action. The Taylor Grazing Act and subsequent legislation have established a policy of management of the public lands similar, **[**5]** although, with minor exceptions, not as comprehensive or as rigid as that provided by law for certain reservations. Perhaps the control provided by law for national forest reserves more nearly approaches that provided for the Oregon and California Railroad Grant lands, and to a lesser degree the public domain grazing districts. As to such **[*363]** national forest lands, Congress in the act of June 4, 1897 (30 Stat. 36; 16 U.S.C., 1952 ed., sec. 478), expressly reserved the right of ingress and egress to settlers, and to others for "all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof," subject to compliance with the rules and regulations covering such national forests. The Department of Agriculture in its regulations, 36 CFR, 1949 ed., 251.5(c) (Supp.) does not even require the constructor of a road in such cases (said to have a "statutory right" of access), to obtain a permit, but, with minor exceptions, does require that permission be obtained by others. Thus the practice of that

Department is directly contrary to the proposal discussed here. With respect to public lands in grazing districts the law reserves **[**6]** the right of ingress and egress and provides that nothing in it "shall restrict" mining activities, in substantially the same language as is used in the 1897 act, supra. The only applicable regulations of the National Park Service relate to Death Valley National Monument, 36 CFR, 1949 ed., 20.26(a)(4) (Supp.) and Mt. McKinley National Park, 36 CFR, 1949 ed., 20.44 (Supp.). Those regulations require only that a miner obtain a permit and as to Death Valley Monument, keep his road in good repair while using it. No fee is charged. Although not so stated as in the national forest regulations, the basis for the free use appears to be the "statutory right" of access.

In general Congress has recognized the right of "free passage or transit over or through public lands; * * *" and has enacted penal legislation to prevent its obstruction. Section 3, act of February 25, 1885 (23 Stat. 322; 43 U.S.C., 1952 ed., sec. 1062). It has also provided relief to the owners of mining claims where access was denied for any reason. Act of June 21, 1949 (63 Stat. 214; 30 U.S.C., 1952 ed., sec. 28b).

The genesis and history of the mining laws make it clear that Congress intended to give the miner free **[**7]** access to minerals in the public lands and to leave him free to mine and remove them without charge. Congress in the 1860's failed to go along with an executive recommendation for disposing of the minerals by lease in order to raise revenue. It has consistently since then left the miner free and untrammeled so far as his mineral rights are concerned. In recent years it has subsidized the miners of certain strategic and critical minerals. Further, Congress, in effect, confirmed the miner's rights previously exercised under sufferance as much as it granted mining rights. It declared the minerals to be "free," 30 U.S.C., 1952 ed., sec. 22, and by section 38 of that title it is declared, in effect, that a location need not be recorded in order to acquire the right to mine so far as the United States is concerned, adverse possession being sufficient. It has always **[*364]** been recognized that the policy of Congress is to encourage the development of minerals and every facility is afforded for that purpose. *United States v. Iron Silver Mining Co., 128 U.S. 673 (1888)* and *Steel v. Smelting Company, 106 U.S. 447 (1882).*

Congress knew, when it enacted the mining laws, that miners **[**8]** necessarily would have to use public lands outside of the boundaries of their claims for the running of tunnels and for roads. In effect, it provided only for a procedure where possession could be maintained and patent to the land could be obtained. Otherwise the clear intent was that the miner should have the right to appropriate the minerals and convey them to market. Lindley in his 3d edition on Mines, volume 2, sections 629 and 631, points out that roadways are necessary as an adjunct to working a claim and as a means toward removing the minerals.

The Department has recognized that roads were necessary and complementary to mining activities. It early adopted the policy of recognizing work done in the construction of roads to carry ore from mining claims as legitimate development work accreditable to the claims as assessment and patent work. *Emily Lode, 6 L.D. 220 (1887).* In *Douglas and Other Lodes, 34 L.D. 556 (1906),* it held that such roadways were not applicable. But in *Tacoma and Roche Harbor Lime Co., 43 L.D. 128 (1914),* after discussing a number of pertinent court and departmental decisions, the Department adopted the rule as stated in Lindley on Mines and allowed **[**9]** credit toward patent expenditures to a trail subject only to proof of the applicability of the trail work to specific locations. The principle was applied to an aerial tramway in *United States v. El Portal Mining Co., 55 I.D. 348 (1935),* citing the Tacoma case, supra. These cases obviously recognize the right of a mining claimant to construct roads across public lands for necessary use in mining operations even to the point of crediting expenditures made in that connection toward meeting the requirements of the statute. And, as already indicated, it has preserved that right in express terms in at least two general laws providing for Federal use of public lands.

We may reasonably apply here a principle that the courts have frequently applied in cases measuring the powers of the United States to legislate in relation to matters within the exclusive jurisdiction of a State, and the reverse. Executive action along the line proposed could be used to completely destroy the rights granted by Congress under the mining laws. It is true that where a tramway right-of-way is granted under the 1895 act, supra, the Department, for more than 20 years, has charged an annual rental. But that **[**10]** charge is made under the discretionary power granted by Congress to the Secretary under the act. Such rights when granted in the **[*365]** past have vested an exclusive right of user in the mining claimant. A road constructed by a mining claimant for purposes connected with his claim, without the benefit of such a grant is not exclusive and there is no specific law

giving the Secretary discretionary authority to grant that right-of-way "under general regulations" as under the 1895 act.

It appears that the presumed authority to charge a fee is based on 43 CFR, 1954 Rev., 115.171(b) (Supp.) providing for the payment by a permittee for the use of a road "constructed or acquired" by the United States. There is also authority to charge for tramroad rights-of-way, granted pursuant to 43 CFR, 1954 Rev., 244.52, in section 244.21 (Supp.). But both sections 115.171(b) and 244.21 pertain to granted rights-of-way. They do not apply to roads constructed by an entryman or locator solely to provide access to his entry or claim. The road was not built by the United States nor can it be deemed to have been acquired by it in the sense contemplated by section 115.171(b). Even if the word "acquired" **[**11]** as there used is given its broadest possible meaning it is not believed that it would encompass an access road of the kind discussed here. It is true that the title to the land is in the United States but the road is in the nature of a "private road" across another's land which is primarily used by one or more persons but which may be used by anyone. The United States can no doubt use such a road or permit its permittees or licensees to do so at least to the extent that it does not unduly interfere with its use for the legitimate purpose for which it was built. If it is abandoned for that purpose it falls in the public domain if used as a public road, otherwise it is the sole property of the United States.

In practice the Bureau of Land Management has granted tram road rights-of-way on the public domain elsewhere than on the Oregon and California Grant lands only where miners or others have desired an exclusive right of user. On the Oregon and California Grant lands, and interspersed public lands, the need for the use of such granted rights-of-way by a class of persons no doubt is such as to require all users to participate in their maintenance and this may well be justified, **[**12]** if not under the 1895 act certainly under the 1937 act, but this may be done without extending the fee principle to roads constructed under clearly implied statutory authority as ways of necessity, unless such extension is required or authorized by law.

With respect to timber roads on the Oregon and California Railroad Grant lands, it is noted that the regulation governing the grant of rights-of-way under the 1895 act also cites the 1937 Timber Management Act, supra, as statutory authority. The latter act gives the Secretary **[*366]** broad authority in the management and sale of timber whereas the later act of April 8, 1948 (62 Stat. 162), extends the mining laws to the area with only two qualifications: (1) that the ownership and management of the timber is reserved to the United States and (2) that mining claimants must record their locations and assessment work affidavits in the land office. Beyond this the law vests no discretionary authority over such claims in the Secretary. This is a further reason for believing that Congress intended that, except as provided in the law, miners' rights on such land would be the same as on other public domain land. It is true that neither **[**13]** the 1937 act nor the 1948 act contains language respecting the right of passage similar to that in the National Forest and Taylor Grazing Acts. But this is far from conclusive of a different intent. In the light of the history of the 1948 act it seems likely that Congress did not then feel that it had intended in 1937 to affect mining rights in those lands at all. They had been consistently protected everywhere else. The 1948 act clearly intended to restore the status quo and to give to miners everything they enjoyed on public lands except as otherwise expressly provided.

I cannot agree with the State supervisor in his belief that the act of August 31, 1951 (65 Stat. 290; 5 U.S.C., 1952 ed., sec. 140), applies here. That act requires Federal agencies to charge for --

any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency * * *. (Italics added.)

The grant of the minerals with all incidents thereunto pertaining is direct from Congress to the miner. The act contains no **[**14]** language that could be construed to authorize a Federal agency to make a charge in such case. The act does not require that the Department examine all grants made by Congress and amend them so as to impose charges for rights freely granted, whether expressly as the right to locate and mine, or by reasonable, if not necessary, implication, as the right of passage.

The Bureau of Land Management has made no grant nor performed any service. The miner built the road by implied authority from Congress. He is liable in damages if he unnecessarily causes loss or injury to the property of the United States and, as previously stated, his right to use the road, even though he built it, is not exclusive but his right to use it for mining purposes is as evident as his right to mine.

Although no charge may be made on a road as constructed and used as a necessary incident to the maintenance of a mining location and its development, a miner who wishes to use a road built or acquired by the United States must comply with the applicable regulations. And, if he applies for and obtains a right-of-way under the 1895 act he must **[*367]** pay whatever fee is required by the regulations. And, of **[**15]** course, any person who uses public land within the Oregon and California Grant lands area must comply with all applicable and reasonable regulations issued under the act of August 28, 1937, supra, as amended, for the management of the area, but that act does not supersede the mining laws.

EDMUND T. FRITZ,

Acting Solicitor.

A TREATISE

ON THE

AMERICAN LAW RELATING TO MINES AND MINERAL LANDS

WITHIN THE

PUBLIC LAND STATES AND TERRITORIES

AND

GOVERNING THE ACQUISITION AND ENJOYMENT OF MINING RIGHTS IN LANDS OF THE PUBLIC DOMAIN

BY

CURTIS H. LINDLEY
Of the San Francisco Bar

THIRD EDITION

IN THREE VOLUMES

VOLUME I

"I hold every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereto."

Bacon's Tracts.

"Et opus desperatum, quasi per medium profundum euntes, cœlesti favore jam adimplevimus."

—From Dedication of Justinian's Institutes.

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1914

many mining properties, rights to which attached prior to its repeal. To this extent it is still operative.[3]

§ 54. Essential features of the act.—No one has ever claimed that this act was a model piece of legislation. It is faulty and crude in the extreme, and the embarrassments surrounding its proper interpretation are still encountered in the courts, where property rights arising under it come in conflict with those acquired under the later laws. Yet the mining communities accepted it as being a step in the right direction. Mr. Yale says of it:—

> As the initial act of the legislation which must necessarily follow, it is more commendable as an acknowledgment of the justice and necessity which dictated it, and its expediency as a means to the advancement of the material interests of the state and nation, than for the perfection of its provisions or their exact adaptation to the accomplishment of the object intended. We must not, however, find fault with the law on account of its imperfections or the introduction of objectionable features in the mode to be followed in acquiring a title under it. These imperfections can be remedied, the rights of the parties amplified in many particulars, and the system so changed as to work with more facility than now anticipated.[4]

It is certainly due to Senators Stewart and Conness, the authors of the bill, to explain that at the time of its passage it was extremely difficult to secure the consideration of any measure touching the subject of mineral lands. Eastern sentiment was divided on questions of governmental policy, and the delegations from the western states were not harmonious. If subsequent experience has shown defects to exist in the law, the authors and friends of the measure are entitled to

[3] The full text of the act will be found in the appendix.

[4] Yale on Mining Claims and Water Rights, pp. 9, 10.

the gratitude of those engaged in the mining industry for the establishment of at least three important and beneficent principles:—

First—That all the mineral lands of the public domain should be free and open to exploration and occupation.

Second—That rights which had been acquired in these lands under a system of local rules, with the apparent acquiescence and sanction of the government, should be recognized and confirmed;[5]

Third—That titles to at least certain classes of mineral deposits or lands containing them might be ultimately obtained.

§ 55. Declaration of governmental policy.—By the first of these provisions, the government, for the first time in its history, inaugurated a fixed and definite legislative policy with reference to its mineral lands. It forever abandoned the idea of exacting royalties on the products of the mines,[6] and gave free license to all its citizens, and those who had declared their intention to become such, to search for the precious and economic minerals in the public domain, and, when found, gave the assurance of at least some measure of security in possession and right of enjoyment. What had theretofore been technically a trespass became thenceforward a licensed privilege, untrammeled by governmental surveillance or the exaction of burdensome conditions. Such conditions as were imposed were no more onerous than those which the miners had imposed upon themselves by their local systems. That such a declaration of governmental policy stimulated and encouraged the

[5] Jennison v. Kirk, 98 U. S. 453, 458, 25 L. ed. 240; Blake v. Butte S. M. Co., 101 U. S. 274, 25 L. ed. 790.

[6] Ivanhoe M. Co. v. Keystone Cons. M. Co., 102 U. S. 167, 173, 26 L. ed. 126.

development of the mining industry in the west is a matter of public history.

§ 56. Recognition of local customs and possessory rights acquired thereunder.—As was observed in the preceding chapter, the federal government had practically acquiesced from the beginning in the system of local rules established in the various mining districts. That is to say, no overt act was done by the government to overthrow or repudiate the system. No attempt was made to interfere with mining upon the public domain. The process by which these primitive systems came to be recognized, first by the states, and then by the national government, was natural. When mineral discoveries were made in other territories and states, the system inaugurated in California was adopted to govern and regulate the new mining districts.[7]

Local legislatures and local courts followed the precedent set in California, by enacting and upholding laws confirming the right in the newly discovered mineral districts to establish rules governing the mining industry. As the supreme court of the United States said, before the act of 1866 was passed:—

> We cannot shut our eyes to the public history which informs us that under the legislation (state and territorial), not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital and contributing largely to the prosperity and improvement of the whole country.[8]

The unqualified legislative recognition of these local systems was a simple act of justice. Any other course would have involved a practical confiscation of prop-

[7] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 650, 26 L. ed. 875.

[8] Sparrow v. Strong, 3 Wall. 97, 104, 18 L. ed. 49. See, also, Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 62, 18 Sup. Ct. Rep. 895, 43 L. ed. 72.

erty acquired and developed by the tacit consent of the government. That this act was such unqualified recognition has been abundantly established by the highest judicial authority.[9]

§ 57. Title to lode claims.—It may seem strange that the first mining law under which title to mining property could be absolutely acquired was limited in its operation in this direction to lode, or vein, claims. All mineral lands, whatever the forms in which the deposits therein occurred, were thrown open to exploration; but only lode claims could be patented. We are at a loss to understand the reason for this, unless it is accounted for by the state of the industry at the time the act was passed. Placer mining, which had occupied the attention exclusively of the early miners of California, was on the decline, and the quartz, or lode, mining was in the ascendency. The auriferous quartz veins of California were being developed to an important extent. Nevada, with its great Comstock lode, was attracting the attention of the civilized world. Much expensive litigation had arisen there,[10] and the necessity for some law giving a degree of certainty to mining titles was urgent. In addition to this, important quartz veins of great value had been discovered in other portions of Nevada, and in Colorado, Idaho, Montana, and other of the precious metal bearing states and territories. All these facts considered,

[9] Jennison v. Kirk, 98 U. S. 453, 459, 25 L. ed. 240; Broder v. Natoma Water Co., 101 U. S. 274, 25 L. ed. 790; Chambers v. Harrington, 111 U. S. 350, 352, 4 Sup. Ct. Rep. 428, 28 L. ed. 452; N. P. R. R. Co. v. Sanders, 166 U. S. 620, 629, 17 Sup. Ct. Rep. 671, 41 L. ed. 1139; Titcomb v. Kirk, 51 Cal. 288, 289, 294.

[10] The surveyor-general for the state of Nevada, in his report for 1865, expressed the belief that one-fifth of the output of the Comstock, estimated up to that date by Mr. J. Ross Browne at forty-five millions of dollars, was spent in litigation. (Mineral Resources of the West, 1867, p. 32.)

CHAPTER V.

FOURTH PERIOD: FROM THE ENACTMENT OF THE LAW OF MAY 10, 1872, TO THE PRESENT TIME.

§ 68. The act of May 10, 1872.—On May 10, 1872, congress passed a law entitled "An act to promote the development of the mining resources of the United States," which reaffirmed the policy of the government as to the exploration, development, and purchase of its mineral lands by its citizens, or those who had declared their intention to become such, yet, particularly with respect to lode claims, it made a radical departure. This act is embodied in the Revised Statutes of the United States, and, to all intents and purposes, constitutes the present system. It is printed in full in the appendix, where will also be found the various sections of the revision embodying its terms. It is not our purpose here to deal with it analytically. The entire treatise will practically be devoted to a discussion and exposition of it. It is our present purpose to simply outline its salient features, draw attention to the changes in the law made by the act, and give it its proper place in the history of mining legislation.

§ 69. Declaration of governmental policy.—With reference to the declaration of governmental policy, it

embodies the spirit of the preceding enactments, making such changes in expression as were necessitated by substituting one enactment, embracing all classes of mineral lands, for two practically separate ones, dealing with two distinct classes.

The act of 1866 declared that the mineral lands of the public domain should thenceforward be free and open to exploration and occupation by all citizens and those who had declared their intention to become such, and granted the privilege to the claimants of a vein, or lode, of obtaining title to the *mine*. The act of 1870 extended like privileges to the owners of placer and other forms of deposit. The act of May 10, 1872, declares that all *mineral deposits* in land belonging to the United States are hereby open to exploration and purchase, and the *lands in which they are found to occupation and purchase*.[1] The language in italics, particularly the last sentence, "the lands in which they are found," seems to disclose the intent of the act in its radical departure from the method theretofore in vogue of locating lode claims. As a declaration of policy, however, we can see no essential difference in the spirit of the old and that of the new. The latter was, to all intents and purposes, a reaffirmance of the former. Let us briefly examine and discuss the changes made by the act in other respects, bearing in mind that it is not our present intention to critically discuss the latter law in all its aspects. We simply wish to invite attention to the principal modifications of the old system, and enumerate the salient features of the new.

[1] Campbell v. Ellet, 167 U. S. 116, 119, 17 Sup. Ct. Rep. 765, 42 L. ed. 101; Calhoun G. M. Co. v. Ajax G. M. Co., 182 U. S. 499, 508, 21 Sup. Ct. Rep. 885, 45 L. ed. 1200; Doe v. Waterloo M. Co., 54 Fed. 935, 937; Parrot S. & C. Co. v. Heinze, 25 Mont. 139, 64 Pac. 326, 329.

drawal discussed in the previous section. If the withdrawal was invalid, the location heretofore assumed to have been made was valid, and congress could not by retroactive legislation destroy the property right arising from a perfected valid location.[87]

Construing the acts either as *in pari materia* or as distinct and unrelated enactments, there is no serious ground for the contention that they or either of them were intended to confirm, ratify or declare valid the previous withdrawals.

ARTICLE IX. HOMESTEAD AND OTHER AGRICULTURAL CLAIMS.

§ 202. Introductory.—We have no particular concern with the manner of acquiring title to lands of the public domain, other than those falling within the purview of the mining laws, except in so far as the administration of the public land system requires the adjustment of controversies between mineral claimants and those asserting privileges under the homestead and other laws applicable to public lands which are nonmineral in character. Incidentally, we are called upon to investigate the general scope of the latter class of laws, the character of lands to which they relate, the

[87] *Post*, § 539.

rules governing the determination of conflicts arising between mineral and other claimants, and the point of time in the proceedings seeking the transmission of title when these controversies are to be finally determined.

§ 203. Classification of laws providing for the disposal of the public lands.—The existing laws providing for the disposal of the public domain may be thus classified:—

(1) Those regulating the acquisition and enjoyment of rights upon public mineral lands, including in this designation laws applicable to coal and salines;

(2) The townsite laws;

(3) The homestead laws;

(4) Laws regulating the sale of lands chiefly valuable for timber or stone;

(5) Laws applicable to desert lands;

(6) The appropriation of lands by "covering" with bounty land warrants, agricultural college, private land, and other classes of "scrip," or lieu selections under special laws.

The pre-emption laws which, in one form or another, existed from an early period of our history until March 3, 1891, were repealed on that date,[88] and no longer form a part of our public land system, except so far as may be necessary to preserve and perfect rights accruing prior to the passage of the repealing act.

The timber-culture laws, originally enacted March 3, 1873,[89] a substitute for which was passed June 14, 1878,[90] were abrogated by section 1 of the same act, which effected the repeal of the pre-emption laws.

As to sales at public auction, they are no longer per-

[88] 26 Stats. at Large, p. 1093; Comp. Stats. 1901, p. 1531.

[89] 17 Stats. at Large, p. 605.

[90] 20 Stats. at Large, p. 113.

mitted,[91] except in cases of abandoned military or other reservations, isolated and disconnected fractional tracts authorized to be sold by section twenty-four hundred and fifty-five of the Revised Statutes,[92] and other lands under special acts having local application.[93]

Since March 2, 1889, with the exception of lands in the state of Missouri and in other specified localities, no sales or locations by private entry are allowed.[94]

As to the townsite laws, we have in a preceding article [95] fully discussed their provisions, and it is unnecessary to further consider them.

For the purposes announced in the introduction to this article, we need devote our attention only to those branches of the public land system which deal with homesteads, timber and stone lands, desert lands, and scrip locations. For certain illustrative purposes, we may also include in the category deserving consideration the repealed pre-emption laws.[96]

§ 204. Manner of acquiring homestead claims.— The homestead laws secure to the head of a family, of lawful age, who is a citizen of the United States, or who has declared his intention to become such, the

91 Act of March 3, 1891, §§ 9, 10; 26 Stats. at Large, p. 1099; Comp. Stats. 1901, pp. 1443, 1617; 6 Fed. Stats. Ann. 331.

92 Amended June 27, 1906, 34 Stats. at Large, 517; Comp. Stats. (Supp. 1911), p. 627; Fed. Stats. Ann. (Supp.), p. 543; Instructions, 39 L. D. 10; 40 L. D. 363.

93 See act of March 28, 1912, permitting land too rough or mountainous for cultivation to be sold even if not isolated. Circular Instructions, 40 L. D. 584.

94 25 Stats. at Large, p. 854; Comp. Stats. 1901, p. 1445; 6 Fed. Stats. Ann. 334.

95 *Ante*, art. v, §§ 166–177.

96 Act of May 18, 1898, abolishes the distinction previously obtaining between offered and unoffered lands. All are to be treated hereafter as unoffered (Missouri excepted). 30 Stats. at Large, p. 418; Comp. Stats. 1901, p. 1446; 6 Fed. Stats. Ann. 335.

right to settle upon, enter, and acquire title to not exceeding one hundred and sixty acres of unappropriated nonmineral public lands, by establishing and maintaining residence thereon, and improving and cultivating the land for the continuous period of three years,[97] reduced recently from five years.[98]

[97] Rev. Stats., §§ 2289–2294; 6 Fed. Stats. Ann. 285–304; 10 Fed. Stats. Ann. 358; Rev. Stats., §§ 2296–2302; 6 Fed. Stats. Ann. 307–321; Act of March 3, 1879; 20 Stats. 472; Comp. Stats. 1901, p. 1401; 6 Fed. Stats. Ann. 315; Act of May 14, 1880; 21 Stats. 140; Comp. Stats. 1901, p. 1392; 6 Fed. Stats. Ann. 300; Act of June 8, 1880; 21 Stats. 166; Comp. Stats. 1901, p. 1395; 6 Fed. Stats. Ann. 302; Act of March 3, 1881; Act of March 2, 1889; 25 Stats. 854; Comp. Stats. 1901, p. 1445; 6 Fed. Stats. Ann. 334; Act of August 30, 1890; 26 Stats. 391; Comp. Stats. 1901, p. 1404; 6 Fed. Stats. Ann. 313; Act of March 3, 1891; 26 Stats. 1095; Comp. Stats. 1901, p. 1535; 6 Fed. Stats. Ann. 497; Act of June 3, 1896; 29 Stats. 197; Comp. Stats. 1901, p. 1409; 6 Fed. Stats. Ann. 318; Act of May 17, 1900; 31 Stats. 179; Comp. Stats. 1901, p. 1618; 6 Fed. Stats. Ann. 320; Act of June 5, 1900; 31 Stats. 267; Comp. Stats. 1901, p. 1405; 6 Fed. Stats. Ann. 319; Act of June 6, 1900; 31 Stats. 683; Comp. Stats. 1901, p. 1393; 6 Fed. Stats. Ann. 301; Act of January 26, 1901; 31 Stats. 740; Comp. Stats. 1901, p. 1620; 6 Fed. Stats. Ann. 320; Act of May 22, 1902; 32 Stats. 203; Comp. Stats. (Supp. 1911), p. 733; 6 Fed. Stats. Ann. 321; Act of March 4, 1904; Act of April 28, 1904; 33 Stats. 527; Comp. Stats. (Supp. 1911), p. 597; 10 Fed. Stats. Ann. 359; Act of March 3, 1905; Act of February 8, 1908; 35 Stats. 6; Comp. Stats. (Supp. 1911), p. 600; Fed. Stats. Ann. (Supp.), p. 547; Act of May 29, 1908.

The acts of February 19, 1909, 35 Stats. 639, Comp. Stats. (Supp. 1911), p. 601, Fed. Stats. Ann. (Supp.), p. 560, and June 17, 1910, 36 Stats. 531, Comp. Stats. (Supp. 1911), p. 602, 1 Fed. Stats. Ann. (Supp.), p. 316, provide for enlarged homesteads in certain states of three hundred and twenty acres of arid land suitable for "dry farming." See, also, Instructions, 37 L. D. 546; Id. 697; 38 L. D. 361.

§§ 2304, 2305, 2307, 2309, Rev. Stats., 6 Fed. Stats. Ann., pp. 322, 323, 327, 328, provide for soldiers and sailors' homesteads.

Consult various circulars and instructions concerning homesteads issued from time to time by the department of the interior, especially "Suggestions to Homesteaders," approved September 24, 1910; 40 L. D. 39 (amending Circular, 39 L. D. 232); Circular No. 46, dated August 18, 1911, and Circular No. 142, dated July 15, 1912.

Agricultural lands in forest reserves may be taken up as homesteads under certain conditions. See Circular, 38 L. D. 278.

[98] Act of June 6, 1912.

To obtain an inceptive right to a homestead, the applicant files with the register of the local land office an application, stating his qualifications, and describing the land he desires to enter. If it appears from the tract-books that the land is of the character subject to entry under the law, and is clear,—that is, unappropriated,—the applicant is permitted to make entry of the land;[99] the receiver of the land office issues a receipt for the fees paid for filing the application, a record is made in the local office, and the fact reported to the general land office. If the lands are returned as mineral, and borne on the tract-books as such, the homestead claimant will not be permitted to initiate his right until a hearing is had for the purpose of determining the character of the land. To use the common expression, the mineral must be "proved off," before any right to the land can be inaugurated under the agricultural land laws.[100] If there has been one hearing and an adjudication that the land is mineral, it is improper to allow a homestead application to be filed until a hearing has been had as to conditions arising subsequent to the former adjudication.[1] The prior adjudication is conclusive, and the department will not order another hearing as to the conditions existing prior to first adjudication.[2] If, upon a hearing, land is adjudged to be agricultural, the burden is upon a

[99] As to practice in this regard, see Germania Iron Co. v. James, 89 Fed. 811, 32 C. C. A. 348.

[100] The report of the United States Geological Survey determining lands to be mineral in character has been accepted and such report given the effect of a surveyor general's return. Instructions, 37 L. D. 17.

[1] Coleman v. McKenzie, 28 L. D. 348; S. C., on review, 29 L. D. 359; Caldwell v. Gold Bar M. Co., 24 L. D. 258.

[2] Mackall v. Goodsell, 24 L. D. 553; Leach v. Potter, 24 L. D. 573.

mineral claimant thereafter asserting the mineral character to prove that fact.[3] Whatever may be the effect of the surveyor-general's return as evidence in litigated cases involving the character of the land,[4] the land officers in administering the land laws accept such return as controlling their action in the first instance.

Exceptions to the general rule governing the character of land which may be taken up as a homestead are found in the act of June 22, 1910,[5] which provides that surface rights to coal lands which have been withdrawn or classified as coal may be acquired by homesteaders, and the act of August 24, 1912,[5a] which permits similar entries on oil and gas lands, the latter act, however, being limited in its application to the state of Utah. Of course, no rights to the underlying minerals of these classes are obtained by such filings, the title to such minerals remaining in the United States subject to disposal in such manner as congress may determine. These exceptions are the result of the general policy of conservation which has assumed such prominence in the past few years.

§ 205. Nature of inceptive right acquired by homestead claimant.—It would seem that the estate acquired by a homestead claimant who has filed his application and received his preliminary receipt from the receiver of the land office is similar to that acquired by filing a declaratory statement under the pre-emption laws.[6] By the pre-emption laws the United States did

[3] Majors v. Rinda, 24 L. D. 277.

[4] *Ante*, §§ 105–107.

[5] 36 Stats. 583; Comp. Stats. (Supp. 1911), p. 614; 1 Fed. Stats. Ann. (Supp.), p. 317.

[5a] 37 Stats. at Large, —.

[6] Shiver v. United States, 159 U. S. 491, 495, 16 Sup. Ct. Rep. 54, 40 L. ed. 231; Norton v. Evans, 82 Fed. 804, 807, 27 C. C. A. 168.

A TREATISE

ON THE

AMERICAN LAW RELATING TO MINES AND MINERAL LANDS

WITHIN THE

PUBLIC LAND STATES AND TERRITORIES

AND

GOVERNING THE ACQUISITION AND ENJOYMENT OF MINING RIGHTS IN LANDS OF THE PUBLIC DOMAIN

BY

CURTIS H. LINDLEY
Of the San Francisco Bar

THIRD EDITION

IN THREE VOLUMES

VOLUME II

"I hold every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereto."

Bacon's Tracts.

"Et opus desperatum, quasi per medium profundum euntes, cœlesti favore jam adimplevimus."

—From Dedication of Justinian's Institutes.

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1914

ARTICLE III. THE DISCOVERY.

§ 335. Discovery the source of the miner's title.—Discovery in all ages and all countries has been regarded as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries the great consideration for granting mines to individuals is *discovery*. "Rewards so bestowed," says Gamboa, "besides being a proper return for the labor and anxiety of the discoverers, have the further effect of stimulating others to search for veins and mines, on which the general prosperity of the state depends."[98]

While in some of the older countries of Europe, as in France and Belgium, the nature of the reward to the discoverer was something less than an absolute preference in the right of enjoyment, yet in Spain and Spanish-America there was guaranteed to him "an absolute right of property in the mine which he discovers if he will take the proper measures to denounce

[98] Halleck's De Fooz on the Law of Mines, p. xxvi. Text quoted in Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 343, 25 Sup. Ct. Rep. 266, 49 L. ed. 501; Lawson v. United States Mining Co., 207 U. S. 1, 13, 28 Sup. Ct. Rep. 15, 52 L. ed. 65; Rapp v. Heirs of Healey, 38 L. D. 387.

it and have it duly registered. No one can have any preference over him, and he loses the rights which result from his discovery only through his own neglect to make it publicly known in the manner in which the law directs."[99]

This wise and liberal policy which pervaded the Mexican system at the time of the conquest and the acquisition of California by the United States became the recognized basis of mining rights and privileges as they were held and enjoyed under the local rules and regulations established by the miners occupying the public mineral lands within the newly acquired territory, and in all subsequent legislation, whether congressional, state, or territorial, discovery is recognized as the primary source of title to mining claims.[100]

As was said by Halleck in his introduction to De Fooz on the "Law of Mines,"[1] "*Discovery* is made the source of title, and *development*, or working, the condition of the continuance of that act."

Whatever may be the rule governing the acquisition of title to "claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place," of which we treat in a subsequent chapter, there can be no valid appropriation of a lode claim unless there has been an antecedent discovery. "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."[2]

[99] Halleck's De Fooz on the Law of Mines, p. xxvii.

[100] Erhardt v. Boaro, 113 U. S. 527, 535, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472.

[1] San Francisco, 1860.

[2] Rev. Stats., § 2320; Comp. Stats. 1901, p. 1432; 5 Fed. Stats. Ann. 8; Chrisman v. Miller, 197 U. S. 313, 321, 25 Sup. Ct. Rep. 468, 49 L. ed. 770; Garabaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 425, 426.

Calendar No. 559

84TH CONGRESS, 1st Session } SENATE { REPORT No. 554

AMENDING THE ACT OF JULY 31, 1947 (61 STAT. 681), AND THE MINING LAWS TO PROVIDE FOR MULTIPLE USE OF THE SURFACE OF THE SAME TRACTS OF THE PUBLIC LANDS

JUNE 15 (legislative day, June 14), 1955.—Ordered to be printed

Mr. ANDERSON, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

together with

INDIVIDUAL VIEWS

[To accompany S. 1713]

The Committee on Interior and Insular Affairs, to whom was referred the bill (S. 1713) to amend the act of July 31, 1947 (61 Stat. 681), and the mining laws to provide for multiple use of the surface of the same tracts of the public lands, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

Public hearings were held on the measure, and a number of witnesses, representing mining, lumbering, conservation, and wildlife and sportsmen's groups, were heard. All but one of the witnesses expressed support for the basic principles and purposes of the proposed legislation, although several urged amendment. All proposals for amendment were carefully considered, and a number were adopted.

In addition, the committee received and considered scores of communications from all parts of the country on the bill. By far the greater part were favorable. The executive agencies that would have responsibility for carrying out the provisions of the measure strongly urge passage, and the attention of the Senate is directed to their reports which are set forth in full.

PURPOSE OF THE MEASURE

The purpose of S. 1713 is to permit multiple use of the surface resources of our public lands, to provide for their more efficient

administration, and to amend the mining laws to curtail abuses of those laws by a few individuals who usually are not miners.

At the same time, the measure faithfully safeguards all of the rights and interests of bona fide prospectors and mine operators. In no way would it deprive them of rights and means for development of the mineral resources of the public lands of the United States under the historic principles of free enterprise and private ownership of the present mining laws.

To achieve these objectives, the bill would—

(1) Provide that deposits of common varieties of sand, building stone, gravel, pumice, pumicite, and cinders on the public lands, where they are found in widespread abundance, shall be disposed of under the Materials Act of 1947 (61 Stat. 681), rather than under the mining law of 1872.

(2) Amend the Materials Act to give to the Secretary of Agriculture the same authority with respect to the common, widespread mineral materials (including, but not limited to, common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay) and vegetative materials (including, but not limited to yucca, manzanita, mesquite, cactus, and timber or other forest products) located on lands under his jurisdiction as that which the Secretary of the Interior has with respect to lands under the jurisdiction of the Secretary of the Interior.

(3) Amend the general mining law to prohibit the use of any hereafter located unpatented mining claim for any purpose other than prospecting, mining, processing, and related activities for development of mineral resources.

The bill would vest in the responsible United States administrative agency authority to manage and dispose of vegetative surface resources on such locations, to manage other surface resources thereof (except minerals subject to the mining laws), and to use so much of the surface as is necessary for management purposes or for access to adjacent lands.

Any such surface use, however, is limited in specific terms to those activities which do not endanger or materially interfere with mining operations or related activities; it is the intent of the proposed legislation that mineral resource development shall remain the dominant use of lands under mining claim.

(4) Establish, with respect to mining claims located prior to enactment of S. 1713, particularly as to invalid, abandoned, dormant, or unidentifiable claims, an in rem procedure in the nature of a quiet-title action, whereby the United States could expeditiously resolve uncertainties as to surface rights on such locations.

The holder of any claim in existence at the time of enactment of this legislation could retain all present rights to any and all surface resources on the claim by establishing, under prescribed procedures, his need for such surface resources for development of the claim's mineral resources. On a claim located after enactment, the locator would have full right to all surface resources of the claim which may be needed for carrying on mining activities.

His rights to subsurface resources remain unchanged on claims located both before and after enactment. Upon proceeding to patent, he would have full title in fee simple absolute as heretofore to both surface and subsurface.

BACKGROUND OF THE LEGISLATION

The broadest possible use of all of the resources of our public lands and forests for the benefit of the American people is a matter of great national import. The rapidly expanding population and economy of our Nation, and of the Western States in particular, have been accompanied by an ever-growing need for more general and more intensive use of our natural resources. The high tempo of our housing industry has brought about heavy demands for timber; stock growers need more grazing area to meet the increasing consumption of meat, leather and wool; our mining industry is under the constant necessity of exploring for and developing additional sources of new and old minerals to meet the ever-increasing requirements of our national security and industrial economy; and our growing population requires expanded recreational areas.

Conflict between surface and subsurface uses of our publicly owned lands is as old as the West itself, where most of the remaining public domain lies. Surface uses include stock grazing, forestry, soil-erosion control, watershed purposes, fish and wildlife preservation, and recreational areas. The subsurface use is that of development of the minerals that have been a basis for our great industrial and economic development.

As long as there was plenty of land that could be dedicated to each use, separately, the results of conflicts between surface and non-surface uses were generally local and minor in character.

However, in recent years our security needs, the growth of our population, and the expansion of our economy have brought about a situation in which it is no longer in the national interest that the public domain should be used for one of the uses to the exclusion of the other. This developing situation has been greatly intensified within the past few years by our incalculable needs for domestic sources of uranium and other fissionable "source materials" for atomic energy.

Historically, the mining law of 1872 has encouraged individual prospecting, exploration, and development of the public domain. The incentive for such activity has been the assurance of ultimate private ownership of the minerals and lands so developed. Under these laws, a prospector can go out on the public domain not otherwise withdrawn, locate a mining claim, search out its mineral wealth and, if discovery of mineral is made, can then obtain a patent which gives him full title to both the surface and subsurface of the land and its resources. The property, with issuance of patent, becomes the individual's to develop or sell, according to his initiative or desire.

A statement of the historic approach of Congress to this development of our mineral resources is to be found in section 1 of the act of May 10, 1872 (17 Stat. 911; 30 U. S. C. 22):

> * * * all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

ABUSES UNDER THE MINING LAWS

Over the past several years, the committee has received an increasing number of reports of growing abuses of the mining laws by persons whose primary interest in filing claims was not mining. The most serious of these abuses is that relating to mining claims in national forests whereby claimants have been able to obtain a color of title to hundreds of thousands of acres of valuable timber belonging to the people of the United States at virtually no cost to themselves and subject to little or no control, in fact, by the Forest Service.

The attention of the Senate is directed to the following extract from the report of the Department of Agriculture on S. 1713, which is set forth in full at the end of this report:

As of January 1, 1952, there were 36,600 mining patents on the national forests, covering 918,500 acres. Only about 15 percent of these mining patents have been or are commercially successful mines. As of the same date, there were approximately 84,000 claims, covering 2.2 million acres. Only 2 percent of these claims were producing minerals in commercial quantities and probably not more than 40 percent could be considered valid under the requirements of the mining laws. Yet, on these national-forest claims, there was tied up over 8 billion feet of commercial sawtimber, valued at about $100 million which the Government could not sell without consent of the claimant. In other words, national-forest timber exceeding in quantity and value that cut from all national forests in any one year is tied up on mining claims and cannot be sold by the Government. The two tables attached to this report supply these basic statistics by States.

The effect of this situation is increased costs of administration, obstruction of orderly management and competitive sale of timber, and obtaining high-value, publicly owned surface resources by a few individuals at nominal cost.

In the last 3 years there has been a tremendous increase in the number of mining claims on the national forests, principally as the result of prospecting for uranium and other fissionable materials. For example, as of January 1, 1955, it is estimated that there were 166,000 claims on the national forests, covering nearly 4 million acres or about a 100-percent increase in the past 3 years. At the rate claims are currently being filed, we estimate that by the end of this calendar year there will be about 225,000 mining claims on the national forests. It is also estimated conservatively that there are now over 10 billion board-feet of timber tied up on national-forest mining claims, having a current stumpage value of $112 million.

* * * * * * *

The number of claims is "snowballing" so fast that the situation on the national forests is rapidly getting out of hand. The above summary, for example, shows that there are nearly 7 times as many mining claims in Arizona as 3 years ago, and nearly 4 times as many in New Mexico and Utah. The increase has been large in other States, too. Equitable corrective action as would be provided by S. 1713 is urgently needed. It is needed quickly because new claims are being filed at the rate of about 5,000 per month.

Similarly, the Department of the Interior states in its report:

S. 1713 is designed to meet a situation which has arisen because of more intensive Federal use of the public lands in recent years. Under the existing mining laws various abuses have been possible. For example, it has been possible for persons who have unpatented claims under the mining laws to prevent orderly management and disposition of valuable timber and other surface resources, and also to block access to such resources on unlocated Federal land while paying little or no attention to mining. Moreover, many claims have been based on deposits of the mineral materials listed in section 1 which, although technically of sufficient value to justify a location, are actually of minor worth as compared to other natural resources of the land Another example of these abuses may be seen in the fact that it has been possible to acquire a color of right, through a mining location. for nonmining purposes, such as summer homesites.

This bill is designed to strike at these abuses, which violate the spirit of the mining laws. The bill provides that deposits of common minerals such as ordinary varieties of sand, stone, gravel, pumice, pumicite, and cinders shall not be deemed valuable mineral deposits within the meaning of the mining laws. Secondly, it

prohibits the use of a claim for any nonmining purpose prior to the issuance of patent.

The type of practice against which this bill is directed has drawn the disapproval of the mining industry generally, conservation groups, and other public land users. The national interest in encouraging the discovery of minerals dictates that the mining industry should have a continued opportunity to locate mining claims, to mine minerals found there, to discover and develop commercial deposits, and, if fortunate, to make a profit, but the national interest is not served by preventing the use of the surface of unpatented claims for other desirable uses which do not substantially interfere with mining operations and related activities. This legislation is based upon this sound premise, in our view.

At the same time as the proposed legislation would meet the wishes of the mining industry, it would also give full recognition to the vital importance of the forest and range resources of the public lands and the national forests, for the bill provides for the multiple use of the surface of mining claims and thus permits the conservation and wise use of all surface resources in the public interest.

As pointed out, even on perfectly valid mining claims in national forests, such claims often have the effect, even though unintended, of blocking access to adjacent tracts of mature and merchantable Federal timber resulting in waste of this resource and loss to the local and national treasuries.

On nonforest lands, mining locations made under existing law may, and do, whether by accident or design, frequently block access to water needed for grazing on public lands, to valuable recreational areas, and to agents of the Federal Government desiring to reach adjacent lands for purposes of managing wild-game habitat or improving fishing streams so as to thwart the public enjoyment and proper management of fish and game resources on the public lands generally, both on the located lands and on adjacent lands.

The evidence shows that some locators, in reality, have filed mining claims solely for commercial enterprises such as filling stations, curio shops, cafes, or for residence or summer camp purposes, and as private hunting and fishing preserves. If application is made for residence or summer camp purposes under Federal law other than the mining laws, sites usually embrace small tracts, that is, 5-acre tracts; on the other hand, mining locations provide for control and utilization of approximately 20-acre tracts. Fraudulent locators can get color of title to 20 acres instead of 5 acres.

The effect of nonmining activity under color of existing mining law results in uncontrolled waste of valuable resources of the surface on lands embraced within claims which might satisfy the basic requirement of mineral discovery, but which were in fact, made for a purpose other than mining. The activities of a relatively few individuals have reflected unfairly on the legitimate mining industry.

The committee has received convincing evidence that the present situation, with the vastly more numerous and complex problems that have arisen from the widespread search for domestic uranium, requires the type of new legislative approach provided by S. 1713.

EXISTING REMEDIES INADEQUATE

Strict Federal enforcement of existing laws over the past several years could, in theory at least, have eliminated many of the abuses outlined above. But the existing legal and administrative machinery has been slow and cumbersome, and personnel for adequate enforcement insufficient.

Problems raised by abuses under the mining laws have for some time been recognized by the mining industry, by the Federal agencies

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responsible for administration of the public's resources, and by private groups and individuals sincerely interested in wise conservation and utilization of all of our surface and subsurface resources.

If fradulent locations are made, under present law the United States has the right to refuse patents (if application is made), or to contest such locations by individual administrative action, or attack them in court.

Modification of presently authorized administrative action alone does not appear the answer. Presently available remedies are time-consuming, are costly, and, in the end, are sometimes not conclusive. Where a location is based on discovery, it is extremely difficult to establish invalidity on an assertion by the United States that the location was, in fact, made for a purpose other than mining.

The American Mining Congress, a national organization composed of both large and small producers of all metals and minerals mined in the United States, included the following statement in its declaration of public land policy adopted at the annual meeting in San Francisco in September 1954:

> We believe * * * that suitable amendments can be made in the general mining laws which, with proper use of available procedures, will simplify enforcement and minimize bad-faith attempts through pretended mining locations to serve objectives other than the discovery and development of minerals. We believe that this can be accomplished in a manner which will protect the incentive and reward now inherent in the mining laws.

The nonprofit, noncommercial, educational American Forestry Association, with more than 25,000 members, echoes this position of the mining industry. With some 800 natural-resource leaders present, the Fourth American Forest Congress, in October 1953. adopted by an overwhelming referendum vote of the association as section III D of its new program for American forestry, under the heading "Mining on Public Lands." this language:

> Efficient management of many millions of acres of Federal public lands, including the discovery and development of new or known mineral resources, is in the public interest. The ligitimate miner and prospector should be encouraged to carry on such work. However, widespread abuses under the existing mining laws as a means of acquiring Government lands for other than mining purposes should be stopped. We therefore recommend that Congress revise the Federal mining laws to prevent their abuse by claimants or patentees who use their claims to tie up more valuable timber or other resources than they legitimately need to develop the minerals.

The committee is convinced that enactment of S. 1713, as amended, would be of great assistance in solving the growing problems outlined above. It cites, as a precedent for the handling of a somewhat similar problem in some respects, its bill in the 83d Congress that became Public Law No. 585 (68 Stat. 708). This law permits multiple use of the subsurface of public domain, permitting development of mineral deposits to go forward under the mining laws and the mineral leasing acts on the same tracts at the same time. S. 1713 is similar in philosophy and purpose with respect to surface and subsurface uses, and adopts some of the procedural mechanisms set up in Public Law 585, 83d Congress.

SECTIONAL ANALYSIS OF S. 1713

1. Amendment of Materials Act

Section 1 of S. 1713, with section 3, would amend section 1 of the act of July 31, 1947 (61 Stat. 681; 43 U. S. C. 1185), to provide for disposal of common varieties of sand, common stone, gravel, pumice, pumicite, cinders, and clay under the Materials Act of 1947. Section 3 provides that, in the future, these commonly occurring materials cannot be the object of location and removal under the general mining law.

The committee amendments extend the provisions of the section to the revested Oregon and California railroad grant lands, and the Taylor Grazing Act is specified as being included among the laws under which disposal of materials is not to be affected by S. 1713.

The Secretary of Agriculture is given, by section 1, the same authority with respect to mineral materials and vegetative materials located on lands under his jurisdiction as that which the Secretary of the Interior has with respect to lands under his jurisdiction.

The provisions of section 1 of the 1947 act, as thus amended, will, by the terms of this bill, apply in the future to national forest and title III Bankhead-Jones lands.

The provisions of section 1 of the 1947 act will remain inapplicable to national parks and national monuments or to Indian lands, or lands set aside or held for the use or benefit of Indians, including lands withdrawn for Indian use by Executive order.

Section 1 of the bill does not affect rights under existing valid mining claims.

2. Receipts from materials disposal

Section 2 would amend section 3 of the 1947 act (43 U. S. C. 1187) to provide that moneys received from the disposal of materials thereunder shall be subject to disposition under the same provisions as moneys received from the sale of public lands, except that moneys received from the disposal of materials by the Secretary of Agriculture would be disposed of in the same manner as are other receipts from the lands from which the materials are removed. The committee amendment to this section provides that receipts under the Materials Act from the O. and C. lands will be disposed of as are other receipts from those lands.

Receipts from disposal of materials from Alaska school section lands will be treated as income from such lands presently is treated.

3. Removal of common materials from mining location

Section 3 of the bill specifically states that a deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws so as to give validity to any mining claim hereafter located under such mining laws.

Attention is called to two additional clauses contained in this section.

The proviso in this section reading—

> * * * nothing herein contained shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit—

has been incorporated in the bill to make clear the committee intent to not preclude mining locations based on discovery of some mineral other than a common variety of sand, stone, etc., occurring in such materials, such as, for example, a mining location based on a discovery of gold in sand or gravel.

The last sentence of this section declares that—

"Common varieties" as used in this act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

This language is intended to exclude from disposal under the Materials Act materials that are commercially valuable because of "distinct and special" properties, such as, for example, limestone suitable for use in the production of cement, metallurgical or chemical-grade limestone, gypsum, and the like.

Section 3 of the bill applies only to locations made after enactment, does not affect rights under existing valid mining claims.

4. Rights of future locators to surface resources

Section 4 of the bill delineates the rights, limitations, and restrictions which would apply to any unpatented mining claim located after the effective date of the act.

Subsection (a) specifically provides that, prior to issuance of patent, no mining claim hereafter located could be used for any purpose other than prospecting, mining, or processing operations and uses reasonably incident thereto. This subsection states affirmative rights—mining claims can, in the future, be used for activities related to prospecting, mining, processing and related activities, though not for unrelated activities.

Subsection (b) of section 4 provides that hereafter located claims under the mining laws shall be subject, prior to patent issuance, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof, so long as such management and disposition does not endanger or materially interfere with the prospecting, mining, or processing operations, or uses reasonably incident to such mineral development activities.

This subsection would also make such claims subject, prior to issuance of patent, to the right of the United States, its permittees and licensees, to use so much of the location surface as may be necessary for access to adjacent land.

With respect to the reservations in the United States to use of the surface and surface resources as set out in the two preceding paragraphs attention is called to the proviso which qualifies them:

* * * any use of the surface of any such mining claim by the United States, its permittees, or licensees, shall be such as not to endanger or materially interfere with prospecting, mining, or processing operations or uses reasonably incident thereto.

This language, carefully developed, emphasizes the committee's insistence that this legislation not have the effect of modifying long-standing essential rights springing from location of a mining claim. Dominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator; the United States would be authorized to manage and dispose of surface resources, or to use the surface for access to adjacent lands, so long as and to the extent that

these activities do not endanger or materially interfere with mining, or related operations or activities on the mining claim.

The first committee amendment to the subsection provides that mining operations shall not suffer because the Federal Government has sold off the timber on a claim in accordance with the authorization in the bill. Up to the amount of timber of the same type and quantity removed from the claim, the claim holder has a right to other Federal timber which he needs in his mining operations.

The second proviso endeavors to make plain the committee's intent that no provision of S. 1713 shall be construed as relating in any way to control under State law of surface waters on mining claims heretofore or hereafter located.

Subsection (c) of section 4 of the bill specifically imposes restrictions on the locator's use of surface resources not related to mining or related activities.

It prohibits removal or use, by the mining claimant, of timber or other surface resources made subject, by subsection (b) of section 4, to management and disposition by the United States; again, it will be noted—

> Except to the extent required for the mining claimant's prospecting, mining, or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States * * *.

This language, read together with the entire section, emphasizes recognition of the dominant right to use in the locator, but strikes a balance, in the view of the committee, between competing surface uses, and surface versus subsurface competing uses.

Finally, subsection (c) requires that any timber cutting by the mining claimant, other than that to provide clearance, shall be done in accordance with sound principles of forest management.

The foregoing rights, reservations, limitations, and restrictions apply only to claims hereafter located, and operate only prior to issuance of patent.

After patent, the patentee, as under traditional law which has existed since 1872, with respect to most lands acquires full title to the mining claim and its resources, surface, and subsurface. Acquisition of patent requires compliance with the mining laws as to location, payment to the United States of the purchase price, and a determination by the Department of the Interior as to claim validity and full compliance with the law.

5. Procedure for resolving title uncertainties on claims located prior to date of the act

At the present time, agencies administering federally owned lands encounter many difficulties in the administration of lands under their jurisdiction because of the presence of unpatented mining claims concerning the very existence of which there are grave doubts and uncertainties. This undesirable situation would be alleviated by the procedure provided in section 5 for the expeditious determination of title uncertainties resulting from mining claims located prior to the enactment of the bill. Not only is it necessary that some means be established for an expeditious determination of claims, but also, if section 4 of S. 1713 is to have the desired effect upon the management and use of the surface resources of unpatented mining claims, a

procedure to identify which unpatented claims will be subject to the restrictions of section 4 is necessary. The in rem procedure which would be established by section 5 answers this need, for it would permit a determination of those valid claims existing prior to the enactment of the bill with respect to which surface rights are asserted adverse to those established in the United States by this measure.

The committee understands that this section does not impair authority under existing law to declare mining claims null and void for failure to comply with provisions of law governing such claims, and that nothing in this section or elsewhere in the bill would prevent the taking by the United States of any mining claim under the right of eminent domain.

Proceeding in a manner similar to that provided in the act of August 13, 1954 (Public Law 585, 83d Cong., 2d sess.; 68 Stat. 708), the Secretary of the Interior, at the request of the Federal department or agency having the responsibility for administering the surface of United States lands in a given area, shall initiate action for a determination of surface rights thereto. Under this procedure, a holder of a claim located prior to enactment could assert and establish his rights in the lands covered by his claim, and the claim would be unaffected by the proceeding.

If such a claimant fails to establish his rights, or fails to assert his rights, or if he voluntarily waives his rights to the surface, he will be in the same position as a holder of a claim located after enactment of this bill.

The procedure does not affect the right of a claimant to apply for patent, and if patent is granted he would acquire the same title as he would under the existing law.

Initiating proceedings.—Subsection (a) of section 5 would permit setting in motion this chain of events: The responsible Federal administrator would file with the Secretary of the Interior a request for publication of notice to mining claimants for the determination of surface rights to a described area.

The bill requires that such request be accompanied by affidavits of persons who had examined the lands involved in an effort to ascertain whether or not any persons were in possession of, or engaged in working, the lands. The affidavit would state the names and addresses of all persons so found, or if none were found, a statement to that effect.

It is further required that there accompany such request the certificate of an attorney, a title abstractor, or a title or abstract company, based upon an examination of tract indexes in the county office of record, setting forth the name of any person appearing in those records as having an interest in the lands involved under an unpatented mining claim.

Notice by publication, and registered mail, or in person.—Upon receipt of such request, accompanied by the required affidavits and certificate of records abstract, the Secretary of the Interior, at the expense of the requesting department or agency, will publish notice to mining claimants in a newspaper of general circulation in the county in which the lands involved are situated.

If published in a daily newspaper, the bill requires publication in the Wednesday issue for 9 consecutive weeks; if in a weekly paper, in 9 consecutive issues; if in a semiweekly or triweekly paper, in the issue of the same day of each week for 9 consecutive weeks.

In addition, each person shown by name and address in the affidavits required will by registered mail or in person receive, within 15 days after first publication, a copy of the published notice; so too will persons whose names and addresses are set out in the required certificate of records abstract, and those filing requests for such notices under subsection (d) of section 5.

Summary of notice requirements.—Summarized, the detailed requirements of subsection (a) of section 5 as to notice of pendency of the "quiet title" proceeding would require a preexamination of the lands, to ascertain, if possible, any parties in possession. Notice must be published in a newspaper of general circulation in the county in which the lands involved are situated. A copy of the notice must be personally delivered or sent by registered mail: (1) To each person found to be in possession or engaged in working the lands involved in the proceeding, and (2) to each person who has filed in the county office of record a request for such notice as contemplated under subsection (d), and a copy of the notice must be mailed by registered mail to each person who is shown by a title search to have an interest in the lands.

Effect of failure to assert rights.—Subsection (b) of section 5 establishes a time deadline for assertion of rights to lands involved, and spells out the consequences of failure on the part of claimants to act.

Any person asserting rights under an unpatented mining claim in lands involved would be required to submit, within 150 days from the date of first publication, a statement setting forth pertinent information as to his claim. The filing of such a statement gives him a statutory right to a hearing on any rights to surface uses about which there is any doubt.

Any claimant failing to submit such a statement would be conclusively deemed, except as provided in subsection (e) of section 5:

(1) to have waived and relinquished any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 4 of the act as to hereafter located unpatented mining claims;

(2) to have consented that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 4 as to hereafter located unpatented mining claims; and

(3) to have precluded any right in himself to thereafter, prior to issuance of patent, assert any right or title to, or interest in or under, such mining claim contrary to or in conflict with the limitations or restrictions specified in section 4 of the act as to hereafter located unpatented mining claims.

Hearing on determination of rights.—Subsection (c) of section 5 provides that if a mining claimant asserts rights contrary to or in conflict with the provisions relating to the use and management of surface resources, as set forth in section 4 of this bill, the Secertary of the Interior shall hold a hearing to determine the validity of such rights.

Such hearings would, under the bill, follow the established general procedures and rules of practice of the Department of the Interior with respect to contests or protests affecting public lands.

To limit the length of the hearing and cost of transcripts, the bill limits any single hearing to a maximum of 20 mining claims, unless the parties otherwise stipulate.

Assurance of receiving notice.—Subsection (d) of section 5 permits a mining claimant to assure himself in advance of receiving notice of a proposed proceeding affecting his claim if the claimant files in the county office of record a request for a copy of any such notice, giving his name, address, and certain data as to each unpatented mining claim under which he asserts rights.

Effect of failure to notify.—Subsection (e) of section 5 provides that the publication of notice shall be wholly ineffectual as to any person entitled to be served with, or to be mailed a copy of, the published notice, if the notice is not in fact so served upon or mailed to him.

6. Waiver or relinquishment of surface rights

Section 6 has as its objective permitting and encouraging cooperation and avoidance of controversy.

It permits the owner of any unpatented mining claim, heretofore located, if he so desires, to waive and relinquish all rights thereunder which are contrary to or in conflict with the limitations and restrictions specified in section 4; effect of such waiver and relinquishment would, in other words, result in such a claim having a surface rights status applicable to mining claims hereafter located.

This section specifically declares that such a waiver or relinquishment will not constitute any concession as to the validity of the owner's claim, or as to the date of priority of rights under the claim.

7. General construction section

Section 7 restates the scope of the proposed legislation, setting forth affirmatively that—

1. The bill shall not be construed to limit or restrict, now or in the future, any valid existing rights under the mining law except those surface rights not necessary to mineral development which may be subject to actions under section 5, or as the result of waiver under section 6.

2. No patent issued under the mining laws for any mining claim, whether located prior to or subsequent to enactment of the bill, shall contain any reservation, limitation, or restriction not otherwise authorized by law. That is, S. 1713 will not impose, and does not authorize imposition, of any restriction or reservation in any patent to a mining claim.

3. However, existing law under which such reservations may now be made, such as with respect to patents on claims in certain forest lands, is not repealed by the bill, nor is the reservation to the United States of minerals subject to the leasing acts, as provided in Public Laws 250 and 585, 83d Congress, affected.

THE COMMITTEE AMENDMENTS

All of the amendments adopted by the committee to S. 1713 are perfecting or clarifying of the intent and purpose of the bill as introduced. None change the substance or philosophy of the measure.

The changes recommended by the Departments of the Interior and Agriculture, as set forth in their reports printed herein, were adopted for the reasons given. In addition, the committee adopted several amendments the need for which developed from the hearings.

Attention is directed to the amendment to section 4 (b), page 5, providing that a locator on a claim on which the timber has been

disposed of under this act must be supplied with other timber, of like kind and quantity, that he needs to develop the mineral resources of his claim, up to the amount of timber of the same type disposed of by the Federal agency. As stated previously, S. 1713 would make no change in the full ownership of the surface and all of its resources, as well as the resources of the subsurface, of a mining claimant who proceeds to patent his holdings.

The purpose of the amendment set forth in the second proviso to section 4 (b) on page 6 is to make certain that surface rights to waters reserved to the United States, as well as those assured to mining claimants, will continue to be regulated and controlled by the provisions of State law to the same extent and degree as they are at present.

With respect to the last amendment in section 7, the committee wishes to make clear its intent that S. 1713 shall leave unaffected the rights of reservation to the United States and the multiple mineral development under the mining laws and the leasing acts established by Public Law 250 and Public Law 585 of the 83d Congress.

SUPPORT FOR S. 1713

The language of the bill, as reported, has been developed with the active support and cooperation of both the Departments of Agriculture and the Interior, and of the mining and lumbering industries as well as conservationist and sportsmen's groups.

Included in a long list of National, State, and local groups and individuals supporting this legislation are the following:

American Mining Congress; American Federation of Labor; Independent Timber Farmers of America; The American Forestry Association; Western Lumber Manufacturers; National Wildlife Federation; Sports Afield; National Lumber Manufacturers Association; National Farmers Union; Wildlife Management Institute; the Izaak Walton League of America; the National Grange; Northwest Mining Association; Northern Rocky Mountain Sportsmen's Association; Western Forest Industries Association; Western Forestry and Conservation Association; United States Chamber of Commerce; Society of American Foresters; and the American Nature Association.

Three States—California, Oregon, and Arizona—through conservation organizations, have endorsed its enactment, along with numerous other industry, labor, civic, educational, conservation, and hunting and fishing organizations and individuals.

EXECUTIVE AGENCY REPORTS

The favorable reports of the Departments of the Interior and Agriculture, and that of the Bureau of the Budget, are set out following.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington 25, D. C., May 17, 1955.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington 25, D. C.

MY DEAR SENATOR MURRAY: This is in reply to your request for the views of this Department on S. 1713, a bill to amend the act of July 31, 1947 (61 Stat. 681), and the mining laws to provide for the multiple use of the surface of the same tracts of the public lands and for other purposes.

We recommend that S. 1713 be enacted, and suggest that it be amended as indicated hereinafter.

S. 1713, if enacted, would make a number of significant changes in existing laws governing mining and the disposal of materials on the public lands particularly insofar as surface uses and rights are concerned. Briefly summarized, the bill may be said to provide as follows: (1) The first three sections would exclude certain minerals from among those on which claims under the mining laws may be based, and would provide a means for the disposal of the materials so excluded; (2) section 4 would limit the rights of a holder of an unpatented mining claim hereafter located to the use of the surface and surface resources; and (3) sections 5 and 6 would provide a procedure for the clarification of surface rights appurtenant to mining claims existing at the time of the bill's enactment. Existing rights would be protected by section 7.

Section 1 of the bill would amend section 1 of the act of July 31, 1947 (61 Stat. 681; 43 U. S. C., sec. 1185), to add certain common minerals to the materials subject to disposition under that act. Also, the Secretary of Agriculture would be given the same authority with respect to mineral materials, including, but not limited to, sand, stone, gravel, pumice, pumicite, cinders, and clay, and vegetative materials, including, but not limited to, yucca, manzanita, mesquite, cactus, and timber or other forest products, located on lands under his jurisdiction as that which the Secretary of the Interior has with respect to lands under his jurisdiction. The provisions of that section would remain inapplicable to national parks and monuments and to Indian lands, but would in future be applicable to national forests.

Section 2 would amend section 3 of that act, as amended (43 U. S. C., sec. 1187), to provide that moneys received from the disposal of materials thereunder would be subject to disposition under the same provisions as moneys received from the sale of public lands, except that moneys received from the disposal of materials by the Secretary of Agriculture would be disposed of in the same manner as are other receipts from the lands from which the materials are removed. Moneys received from the disposal of materials from school section lands in Alaska would be treated as income from such school section lands is ordinarily treated.

Section 3 specifically states that a deposit of common varieties of sand, stone, gravel, pumice (except block pumice), pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws so as to give effective validity to any claim located thereunder.

Section 4 provides that, prior to the issuance of patent, no mining claim located subsequent to the enactment of S. 1713 could be used for any purpose other than prospecting, mining, or processing operations, and uses reasonably incident thereto, and all rights under the claim would be subject to the right of the United States to manage and use the surface; moreover, prior to the issuance of patent, no claimant could sever, remove, or use vegetative or other surface resources, except to the extent required by mining operations or uses reasonably incident thereto.

At the present time, agencies administering federally owned lands encounter many difficulties in administering the lands under their jurisdiction because of the presence of unpatented mining claims of the existence of which they may not even be aware. This undesirable situation would be alleviated by the procedure which section 5 of S. 1713 would provide for determining expeditiously title uncertainties resulting from the existence of abandoned, invalid, dormant, or unidentifiable mining claims, located prior to the enactment of the bill. Not only is it necessary that some means be established for the expeditious determination of these uncertainties resulting from the existence of such claims, but, if section 4 of this bill is to have the desired effect upon the management and use of surface resources of unpatented mining claims, a procedure to identify which unpatented claims will be subject to its provisions is necessary. In our opinion, the procedure to be established by section 5 would answer this need for it would permit a determination of those valid claims existing prior to the enactment of the bill with respect to which claimants are asserting surface rights adverse to the United States. We do not interpret the provisions of section 5 as impairing authority under existing law to declare mining claims null and void for failure to comply with provisions of law governing such claims. We have also assumed that nothing in the bill would prevent the taking by the United States of any mining claims under the right of eminent domain.

The procedure which section 5 would establish would commence with the secretary of any Federal department, responsible for administering the surface resources of any lands belonging to the United States, filing with the Secretary of the Interior a request for publication of notice to mining claimants for the determination of surface rights. The filing of a request of that nature would be accom-

panied by affidavits of persons who had examined the lands involved in an effort to ascertain whether or not any persons were in possession of or engaged in working the lands; the affidavits would state the names and addresses of all persons so found or, if none were found, would state that fact.

The request would also be accompanied by the certificate of an attorney, a title abstractor, or a title or abstract company, based upon an examination of tract indexes in the county office of record, setting forth the name of any person appearing in those records as having an interest in the lands involved under an unpatented mining claim. The Secretary of the Interior would, upon the receipt of such a request, publish notice to mining claimants in a newspaper having general circulation in the county wherein the lands involved are situated. Any person asserting an unpatented mining claim in those lands would be required to submit, within 150 days, a statement setting forth pertinent information as to his claim, and any claimant failing to submit such a statement would be conclusively deemed to have waived any rights to his claim which would be contrary to the limitations set forth in section 4 of the bill with respect to the use of the surface and to have consented to the subjection of his claim to the provisions of that section. Upon publication of notice in a newspaper, a copy of that notice would be delivered, either in person or by registered mail, to each person whose name and address appear in the affidavits and certificates submitted with the request for publication.

The bill also would provide a method by which any person desirous of receiving notice with respect to any particular lands might file a request for such notice in the appropriate county office of record. If any statement should be filed by a claimant in response to the publication or delivery of notice, the Secretary of the Interior would hold hearings to determine the validity and effectiveness of any right or title to that mining claim, or interest in or under that claim, which is contrary to or in conflict with the provisions relating to the use and management of surface resources, set forth in section 4 of the bill. Such hearings would follow the established general procedures and rules of practice of the Department of the Interior with respect to contests or protests affecting public lands. If, with respect to any person, the requirements as to personal delivery or mailing of notice should not be complied with, that person's rights would be affected in no way by the publication of notice.

Section 6 provides that, while any owner of an unpatented mining claim may waive or relinquish all rights thereunder contrary to or in conflict with the restrictions of section 4, such a waiver or relinquishment will not constitute any concession as to the validity of his claim or as to the date of priority of rights under that claim.

Section 7 provides that the bill will in no way limit or restrict existing rights under any valid mining claim except insofar as those rights are limited or restricted in actions taken pursuant to sections 5 and 6, nor will the bill authorize the inclusion in patents thereafter issued for mining claims of any limitations or restrictions not otherwise authorized by law.

S. 1713 is designed to meet a situation which has arisen because of more intensive Federal use of the public lands in recent years. Under the existing mining laws various abuses have been possible. For example, it has been possible for persons who have unpatented claims under the mining laws to prevent orderly management and disposition of valuable timber and other surface resources, and also to block access to such resources on unlocated Federal land while paying little or no attention to mining. Moreover, many claims have been based on deposits of the mineral materials listed in section 1 which, although technically of sufficient value to justify a location, are actually of minor worth as compared to other natural resources of the land. Another example of these abuses may be seen in the fact that it has been possible to acquire a color of right, through a mining location, for nonmining purposes, such as summer homesites.

This bill is designed to strike at these abuses, which violate the spirit of the mining laws. The bill provides that deposits of common minerals such as ordinary varieties of sand, stone, gravel, pumice, pumicite, and cinders shall not be deemed valuable mineral deposits within the meaning of the mining laws. Secondly, it prohibits the use of a claim for any nonmining purpose prior to the issuance of patent.

The type of practice against which this bill is directed has drawn the disapproval of the mining industry generally, conservation groups, and other public land users. The national interest in encouraging the discovery of minerals dictates that the mining industry should have a continued opportunity to locate mining claims, to mine minerals found there, to discover and develop commercial deposits, and, if fortunate, to make a profit, but the national interest is not served by preventing

the use of the surface of unpatented claims for other desirable uses which do not substantially interfere with mining operations and related activities. This legislation is based upon this sound premise, in our view.

At the same time as the proposed legislation would meet the wishes of the mining industry, it would also give full recognition to the vital importance of the forest and range resources of the public lands and the national forests, for the bill provides for the multiple use of the surface of mining claims and thus permits the conservation and wise use of all surface resources in the public interest.

We have discussed above the need for a procedure for establishing the existence of unpatented mining claims and for determining the respective rights of the United States and holders of unpatented mining claims. Certainly, the procedure which section 5 would establish would eliminate many of the problems relating to ownership and management of surface resources which arise in the case of Government timber sales, grazing permits, and watershed and recreational development. Under the procedure which would be provided by this bill, it is hoped that an area in which a timber sale, for example, was contemplated could be subjected to a conclusive determination of surface rights within a reasonably short time.

We believe that the bill should be amended so that the provisions of sections 1 and 2 would be specifically applicable to the revested Oregon and California Railroad grant lands and the reconveyed Coos Bay Wagon Road grant lands. The other sections of S. 1713 are already applicable to these lands, and there is no reason why these lands should not be subject to the same provisions of law as other public lands in these respects. We suggest, therefore, that there be inserted immediately after "United States," at page 2, line 2, the following: "including for the purposes of this Act land described in the Acts of August 28, 1937 (50 Stat. 874) and of June 24, 1954 (68 Stat. 270),". For the same reason, we also suggest that there be inserted, immediately after "except" at page 3, line 22, the following: "that revenues from the lands described in the Act of August 28, 1937 (50 Stat. 874) and the Act of June 24, 1954 (68 Stat. 270) shall be disposed of in accordance with said Acts and except".

It is also suggested that the language used at the beginning of Section 5 requires clarification. Though the later language of section 5 clearly indicates that its provisions apply to all departments and agencies, the phraseology in the first sentence of the section could well be interpreted as limiting the section's scope to the executive departments only. We suggest, therefore, that all of line 3, page 6, be deleted and the following substituted in its place: "The head of a Federal department or agency."

Certain existing statutes limit or restrict mining activities upon lands owned by the United States, as, for example, the act of April 8, 1948 (62 Stat. 162), which opened the revested Oregon and California Railroad grant lands and the reconveyed Coos Bay Wagon Road grant lands to exploration, location, entry, and disposition under the general mining laws, but which limited, with respect to the timber on those lands, the rights of persons making entry on those lands. We believe it essential that nothing in S. 1713 be interpreted as repealing or amending any of those laws imposing such special limitations or restrictions. Though the existing language of the bill may afford such a guaranty, we suggest that the period at the end of section 7 be replaced by a comma and the following added: "or to limit or repeal any existing authority to include any limitation or restriction in any such patent."

The Bureau of the Budget has advised that there is no objection to the presentation of this report to your committee.

Sincerely yours,

FRED G. AANDAHL,
Assistant Secretary of the Interior.

DEPARTMENT OF AGRICULTURE,
Washington, D. C., May 17, 1955.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate.

DEAR SENATOR MURRAY: Reference is made to your request of April 20 for a report on S. 1713, a bill to amend the act of July 31, 1947 (61 Stat. 681), and the mining laws to provide for multiple use of the surface of the same tracts of the public lands and for other purposes.

We strongly recommend early enactment of S. 1713 with one clarifying amendment as subsequently described.

S. 1713 is identical to H. R. 5561, 5563, 5572, 5595, 5742, and almost identical to H. R. 5577.

This bill would apply to all lands of the United States subject to the general mining laws. Its major provisions are—

(1) Common varieties of sand, stone, gravel, pumice, pumicite, and cinders would be removed from the purview of the United States mining laws and made subject to disposal only under the provisions of the Materials Act of July 31, 1947 (61 Stat. 681), by the Secretary of Agriculture for lands under his jurisdiction and by the Secretary of the Interior for other public lands of the United States.

(2) Mining claims located after enactment of the bill could not, prior to patent, be used for other than mining purposes without authorization from the United States, and such locations would be subject to the right of the United States to manage and dispose of the vegetative surface resources, to manage other surface resources thereof (except minerals subject to the mining laws) and to use so much of the surface as necessary for such purposes or for access to adjacent land; provided that any use of the surface by the United States, its permittees or licensees, could not endanger or materially interfere with mining uses. Mining claimants could not use surface resources subject to management and disposal by the United States except to the extent required for mining purposes, and any timber cut for such purposes, except for clearance, must be in accordance with sound principles of forest management.

(3) Under a procedure similar to that provided in Public Law 585 of the 83d Congress, the Secretary of the Interior shall, at the request of the Federal department having the responsibility for administering the surface of lands of the United States, initiate action for a determination of surface rights as to a given area. Under this procedure, a holder of a claim located prior to enactment of this bill could assert and establish his rights in the lands covered by his claim, and such claim would be unaffected by the proceedings. If such a claimant fails to establish his rights, or fails to assert his rights, or if he voluntarily waives his rights to the surface, he will be in the same position as a holder of a claim located after enactment of this bill. The procedure does not affect the right of a claimant to apply for patent, and if patent is granted he would acquire the same title as he would under the existing law.

We believe S. 1713, if enacted, would go far toward correcting some of the very difficult problems confronting this Department in its administration of those national forests and title III Bankhead-Jones lands subject to the general mining laws of the United States. We also believe that for the first time an area of agreement has been reached on this problem between the administrators of public lands under the jurisdiction of both the Departments of the Interior and Agriculture, representatives of the mining industry, and conservation groups.

The Department of Agriculture desires to encourage legitimate prospecting and effective utilization and development of mineral resources of the national forests and title III lands. We would not favor legislation which would interfere with such development of minerals nor work hardship on the bona fide prospector or miner. We also recognize that the mining industry does not condone the use of mining claims on the public lands for other than mining purposes.

However, on the national forests the mining laws are sometimes used to obtain claim or title to valuable timber, summer home sites, or lands blocking access to Government timber and to water needed in the grazing use of the national forests.

As of January 1, 1952, there were 36,600 mining patents on the national forests, covering 918,500 acres. Only about 15 percent of these mining patents have been or are commercially successful mines. As of the same date, there were approximately 84,000 claims, covering 2.2 million acres. Only 2 percent of these claims were producing minerals in commercial quantities and probably not more than 40 percent could be considered valid under the requirements of the mining laws. Yet, on these national-forest claims, there were tied up over 8 billion feet of commercial sawtimber, valued at about $100 million which the Government could not sell without consent of the claimant. In other words, national-forest timber exceeding in quantity and value that cut from all national forests in any 1 year is tied up on mining claims and cannot be sold by the Government. The two tables attached to this report supply these basic statistics by States.

The effect of this situation is increased costs of administration, obstruction of orderly management and competitive sale of timber, and obtaining high-value, publicly owned surface resources by a few individuals at nominal cost.

In the last 3 years there has been a tremendous increase in the number of mining claims on the national forests, principally as the result of prospecting for uranium and other fissionable materials. For example, as of January 1, 1955, it is estimated that there were 166,000 claims on the national forests, covering nearly 4 million acres, or about a 100-percent increase in the past 3 years. At the rate claims are currently being filed, we estimate that by the end of this calendar year there will be about 225,000 mining claims on the national forests. It is also estimated conservatively that there are now over 10 billion board feet of timber tied up on national-forest mining claims, having a current stumpage value of $112 million.

Following is an estimate of the number of claims and included acreage by States in the national forests as of January 1, 1955:

State	Thousand claims	1955 claims as multiple of 1952 claims	Thousand acres	1955 acreage as multiple of 1952 acreage
Arizona	34.3	6.9	684	6.2
California	21.0	1.1	602	1.0
Colorado	16.7	1.8	375	1.5
Idaho	18.4	1.2	408	1.2
Montana	14.6	2.1	282	2.1
Nevada	5.2	1.8	108	2.3
New Mexico	8.7	3.7	223	2.8
Oregon	6.7	.9	215	.8
South Dakota	4.8	1.9	103	2.0
Utah	28.4	3.6	583	3.2
Washington	5.3	1.8	94	1.3
Wyoming	2.1	2.5	78	2.4
Total	166.2	2.0	3,755	1.7

The number of claims is "snowballing" so fast that the situation on the national forests is rapidly getting out of hand. The above summary, for example, shows that there are nearly 7 times as many mining claims in Arizona as 3 years ago, and nearly 4 times as many in New Mexico and Utah. The increase has been large in other States, too. Equitable corrective action as would be provided by S. 1713 is urgently needed. It is needed quickly because new claims are being filed at the rate of about 5,000 per month.

We suggest the following be added after the word "except" in line 22, page 3: "that revenues from the lands described in the act of August 28, 1937 (50 Stat. 874), and the act of June 24, 1954 (68 Stat. 270), shall be disposed of in accordance with the provisions of such acts, and except".

The purpose of this amendment is to make it clear that revenues from O. and C. lands under the administration of the Department of the Interior and lands administered by the Department of Agriculture under the 1954 act will be placed in the O. and C. fund.

To effectively implement the provisions of S. 1713, particularly those of section 5, it is estimated that about $750,000 to $1 million would be needed annually by this Department for roughly a 10-year period, after which costs would drop to a relatively small amount. After claims located prior to enactment of the bill had been processed in accord with section 5, costs relating to this bill would be limited primarily to costs of issuing permits for disposal of materials under the Materials Act. Such costs would be offset in whole or in part by revenues from such permits.

In summary, this Department recommends enactment of S. 1713 since it will do much to solve the serious problems presented by mining claims in the management of public lands and resources. It will correct deficiencies in the mining laws and prevent many of the abuses by other than bona fide miners, but it will not obstruct or interfere with bona fide mineral prospecting, mining, and development. The Department is anxious to see these measures taken and strongly endorses the bill. However, S. 1713 does not include all of the changes in the mining laws which would be desirable from a good public land management standpoint and some problems would remain with respect to mining on the national forests and title III lands that this bill would not correct.

The Bureau of the Budget advises that, from the standpoint of the program of the President, there is no objection to the submission of this report.

Sincerely yours,

TRUE D. MORSE, *Under Secretary.*

Estimated number of unpatented mining claims on the national forests (as of Jan. 1, 1952)

State	Number of claims	Acres	Estimated percent which are producing minerals in commercial quantities	Estimated percent considered valid under the mining laws	Timber on claims	
					Volume (thousand feet, board measure)	1951 value
Arizona	5,000	95,400	9.0	22	70,000	$700,000
California	19,640	582,700	.8	30	3,460,000	50,177,000
Colorado	9,450	256,000	1.0	37	80,000	368,000
Idaho	15,840	355,100	4.3	42	1,170,000	8,425,000
Montana	6,860	132,660	1.7	46	85,000	440,000
Nevada	2,940	50,700	2.0	60	225,000	2,000,000
New Mexico	2,350	81,700	3.0	24	2,301,000	36,307,000
Oregon	7,780	267,300	1.8	55	81,000	542,000
South Dakota	2,600	52,500	4.5	30	7,000	40,000
Utah	7,810	185,300	2.0	50	751,000	4,111,080
Washington	2,920	71,700	2.2	52	36,000	417,000
Wyoming	860	32,900	.6	55		
Total	84,050	2,163,900	2.0	40	8,266,000	103,527,000

Patented mining claims on the national forests (as of Jan. 1, 1952)

State	Number of claims	Acreage	Estimated percent which are or have ever been commercial mining operations
Arizona	1,110	53,370	5
California	3,068	134,807	14¾
Colorado	17,000	300,000	12
Idaho	3,203	80,802	28
Montana	5,124	116,575	17½
Nevada	675	12,205	50
New Mexico	706	24,498	16
Oregon	1,370	26,634	22
South Dakota	1,000	74,000	7
Utah	1,359	57,210	10
Washington	1,184	20,738	8
Wyoming	761	17,687	1½
Total	36,560	918,526	14¾

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington 25, D. C., May 17, 1955.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington 25, D. C.

MY DEAR MR. CHAIRMAN: This is in reply to the request from your committee for the views of the Bureau of the Budget with respect to S. 687, to authorize the Secretary of Agriculture to protect the timber and other surface values of lands within the national forests, and for other purposes, and S. 1713, to amend the act of July 31, 1947 (61 Stat. 681), and the mining laws to provide for multiple use of the surface of the same tracts of the public lands, and for other purposes. It is our understanding that S. 1713 supersedes S. 687, therefore, our remarks are directed to S. 1713.

This bill would remove common varieties of sand, stone, gravel, pumicite, and cinders from the purview of the United States mining laws and make them subject to disposal only under the provisions of the so-called Materials Act of July 31, 1947 (61 Stat. 681). Disposal of such materials would be by the Secretary of Agriculture for lands under his jurisdiction and by the Secretary of the Interior for other public lands.

Mining claims located after enactment of the bill could not, prior to patent, be used for other than mining purposes and such locations would be subject to the right of the United States to manage and dispose of the vegetative surface re-

sources, to manage other surface resources (except minerals subject to location under the United States mining laws) and to use so much of the surface as necessary for such purposes or for access to adjacent land. However, any use of the surface by the United States, its permittees and licensees, must not endanger or materially interfere with mining uses. Locators of mining claims could not use surface resources subject to management and disposal by the United States except to the extent required for mining purposes, and any timber cut for such purposes, except for clearance, must be in accordance with sound principles of forest management. Upon issuance of a patent the owner of the claim would receive the same title to the land, including timber if any, as he would under existing law.

The bill would set forth a procedure whereby the Secretary of the Interior shall, at the request of the Federal Department having the responsibility for administering the surface of the lands, initiate action for a determination of surface rights. Under this procedure, a holder of a claim located prior to enactment of this bill could assert and establish his rights in the lands covered by his claim, and such claim would be unaffected by the proceeding. If the claimant fails to establish his rights, or fails to assert his rights, or if he voluntarily waives his rights to the surface, he will be in the same position as a holder of a claim located after enactment of the bill.

It is our understanding that general agreement has been reached among the mining industry, some conservation groups, and the Federal agencies concerned, and that this general agreement is reflected in the provisions of the bill, which would be of material aid in the management of public lands and their resources in the future.

This Bureau would have no objection to the enactment of S. 1713.

Sincerely yours,

DONALD R. BELCHER,
Assistant Director.

CHANGES IN EXISTING LAW

In compliance with the Cordon rule (subsec. (4) of rule XXIX of the Standing Rules of the Senate), changes in existing law made by the bill, S. 1713, as reported, are shown as follows (existing law proposed to be repealed is enclosed in black brackets, additions to existing law are italicized; existing law in which no change is proposed is shown in roman):

SECTION 1 OF THE ACT OF JULY 31, 1947 (61 STAT. 681)

[That the Secretary of the Interior, under such rules and regulations as he may prescribe, may dispose of materials including but not limited to sand, stone, gravel, yucca, manzanita, mesquite, cactus, common clay, and timber or other forest products, on public lands of the United States if the disposal of such materials (1) is not otherwise expressly authorized by law, including the United States mining laws, (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such materials may be disposed of only in accordance with the provisions of this Act and upon the payment of adequate compensation therefor, to be determined by the Secretary: *Provided, however*, That, to the extent not otherwise authorized by law, the Secretary is authorized in his discretion to permit any Federal, State, or Territorial agency, unit or subdivision, including municipalities, or any person, or any association or corporation not organized for profit, to take and remove, without charge, materials and resources subject to this Act, for use other than for commercial or industrial purposes or resale. Where the lands have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may make disposals under this Act only with the consent of such Federal department or agency or of such State, Territory, or local governmental unit. Nothing in this Act shall be construed to apply to lands in any national forest, national park, or national monument or to any Indian lands, or lands set aside or held for the use or benefit of Indians, including lands over which jurisdiction has been transferred to the Department of the Interior by Executive order for the use of Indians.]

The Secretary, under such rules and regulations as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following:

sand, stone, gravel, pumice, pumicite, cinders and clay) and vegetative materials (including but not limited to yucca, manzanita, mesquite, cactus, and timber or other forest products) on public lands of the United States, if the disposal of such mineral or vegetative materials (1) is not otherwise expressly authorized by law, including the United States mining laws, and (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such materials may be disposed of only in accordance with the provisions of this Act and upon the payment of adequate compensation therefor, to be determined by the Secretary: Provided, however, That, to the extent not otherwise authorized by law, the Secretary is authorized in his discretion to permit any Federal, State, or Territorial agency, unit or subdivision, including municipalities, or any person, or any association or corporation not organized for profit, to take and remove, without charge, materials and resources subject to this Act, for use other than for commercial or industrial purposes or resale. Where the lands have been withdrawn in aid of a function of a Federal department or agency other than the Department headed by the Secretary or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary may make disposals under this Act only with the consent of such other Federal department or agency or of such State, Territory, or local governmental unit. Nothing in this Act shall be construed to apply to lands in any national park, or national monument or to any Indian lands, or lands set aside or held for the use or benefit of Indians, including lands over which jurisdiction has been transferred to the Department of the Interior by Executive order for the use of Indians. As used in this Act, the word "Secretary" means the Secretary of the Interior except that it means the Secretary of Agriculture where the lands involved are administered by him for national forest purposes or for the purposes of title III of the Bankhead-Jones Farm Tenant Act or where withdrawn for the purpose of any other function of the Department of Agriculture.

SECTION 3 OF THE ACT OF JULY 31, 1947 (61 STAT. 681), AS AMENDED BY THE ACT OF AUGUST 31, 1950 (64 STAT. 571)

[SEC. 3. All moneys received from the disposal of materials under this Act shall be disposed of in the same manner as moneys received from the sale of public lands, except that moneys received from the disposal of materials from school section lands in Alaska, reserved under section 1 of the Act of March 4, 1915 (38 Stat. 1214; 48 U. S. C., sec. 353), shall be set apart as separate and permanent funds in the Territorial Treasury as provided for income derived from said school section lands pursuant to said Act.]

All moneys received from the disposal of materials under this Act shall be disposed of in the same manner as moneys received from the sale of public lands, except that moneys received from the disposal of materials by the Secretary of Agriculture shall be disposed of in the same manner as other moneys received by the Department of Agriculture from the administration of the lands from which the disposal of materials is made, and except that moneys received from the disposal of materials from school section lands in Alaska, reserved under section 1 of the Act of March 4, 1915 (38 Stat. 1214), shall be set apart as separate and permanent funds in the Territorial treasury, as provided for income derived from said school section lands pursuant to said Act.

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INDIVIDUAL VIEWS OF SENATOR RICHARD L. NEUBERGER, OF OREGON

I have joined in the committee's report on S. 1713, which I believe makes some long-needed improvements in public-land administration in areas where prospecting is prevalent. I want to make it clear, however, that in my own view the bill fails to go far enough and should not be mistaken for a permanent solution to the problems of the multiple use of the surface and subsurface of the public lands.

This bill fails to correct one glaring defect in the mining laws. It will still be legal, by proving a mining patent to public land, to convert to commercial gain the timber growing on that land—even though the timber has no relation to the mineral deposits, the discovery and development of which are the justification of the patent.

The committee report recognizes that this practice is against the public interest and deters sound conservation practices, and that in a number of national forests the separation of surface rights from mineral rights has by law been extended to mining patents as well as mining claims. I believe this loophole should be closed by general legislation for all federally owned timberlands.

RICHARD L. NEUBERGER.

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Calendar No. 559

84TH CONGRESS, 1st Session | SENATE | REPT. 554, Part 2

AMENDING THE ACT OF JULY 31, 1947 (61 STAT. 681), AND THE MINING LAWS TO PROVIDE FOR MULTIPLE USE OF THE SURFACE OF THE SAME TRACTS OF THE PUBLIC LANDS

JUNE 22, 1955.—Ordered to be printed

Mr. MALONE, from the Committee on Interior and Insular Affairs, submitted the following

MINORITY VIEWS

[To accompany S. 1713]

The purpose of the amendment to the 1872 mining law set forth in S. 1713 is, according to its sponsors, to prevent:

1. Clearly invalid mining locations, unsupported by any semblance of discovery, and
2. Mining locations having mineral disclosures which might satisfy the basic requirement of discovery, but which were in fact made for a purpose other than mining.
3. To make it easier for the Federal bureaus to bring up for review claims and claimants which in their judgment includes land more valuable for another purpose.

That is the statement of the principal witness, Mr. Raymond B. Holbrook, an attorney employed by the United States Smelting Refining & Mining Co. for 17 years, and who is the chairman of the public lands committee of the American Mining Congress. Mr. Holbrook was the nearest approach to a mining man who appeared for the bill.

LEGITIMATE OBJECTIONS COVERED BY MINING LAWS AND DECISIONS

The first purpose is amply covered by the present mining law as interpreted over the years by the Supreme Court of the United States. Both the public and the prospector are fully protected, with recourse to the courts.

The second and third are clearly an imposition on the rights of the prospector since they open the door for the first time in more than 80 years for a Government bureau employee to allege that the land is more valuable for another purpose than mining and bring the case before his own bureau where the only appeal is to a higher employee or official in that same bureau.

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CONGRESS COULD DESTROY INCENTIVE

Since it is even conceivable that evidence might show that the value for other purposes might temporarily be greater than the immediate value of a small mining property, it is inconceivable that the Congress would allow a bureau official, in no way connected with mining, such as the Forest Service or the Bureau of Land Management, and having no first hand knowledge of the industry, to be the complainant, judge, and jury.

The history of mining is clear that you must have prospects before you have small mines and you must have small mines before you can have big mines—and that it often requires many years before the larger bodies of ore can be developed, even after they are known to exist.

FIRST LOCATOR SELDOM PROFITS

History also shows that the property may change hands many times through the first locators "going broke" and either relinquishing the claim to another locator or selling out for what they can get because of their inability to continue working the property, or because of lack of "assessment" work simply losing to another locator. Rarely does the first locator profit from the discovery.

There used to be a byword in the ranching business—that it was the third or fourth homesteader of a homestead that made it stick. The mining business is even tougher.

GOVERNMENT BUREAUS

The principal witness, Mr. Holbrook, further testified that—

> We have had the pleasure of working with the Forest Service and the Bureau of Land Management and understand their position is that these problems could not be entirely met by effective administration of existing laws for the following reasons:
> 1. The available remedies are slow, expensive and not conclusive, and
> 2. There is great difficulty in establishing the invalidity of a location, supported by discovery, on the basis that the location was made for a purpose other than mining.

The weight of evidence of the witnesses called—all but one holding some Government position—was that the Government bureaus should be given the clear power to determine the validity of a mining location within their own department.

This power in the hands of the bureau officials would destroy the prospector and reverse the Supreme Court decisions for more than 80 years.

They would also have the authority to determine whether or not the land is more valuable for another purpose than mining.

OBJECTIVE—LEASING SYSTEM

It is clear that the Government bureaus are still moving toward a leasing system which they have continually advocated for two decades.

DESTROY LAW INTENT AND COURT DECISION

The prospector can be moved under the 1872 law if he has not complied with it, which is the intent and the extent of the original law.

The Supreme Court decisions, for more than 80 years, have clarified and established the law.

It has been established that if the prospector has complied with the law in setting up his monuments—in filing with the county recorder—and has done the required "assessment" work that a Government department cannot move him or interfere with his work by alleging that "a reasonably prudent man would not expend his money and his effort in the hopes of developing a mine" (Holbrook, p. 91, May 18, 1955).

The amended act opens the door for continual interference by Government officials.

It limits the locators' inherent rights prior to patent—since when patent issues there is no change in the fee-simple ownership—and the timber, forage, and all other assets go to the patentee. It does not make sense to allow the Government to deplete his claim in accordance with their judgment before patent.

There may have been abuses under the law—but when investigated it will generally be found that the Government has not met its responsibilities under existing law and that the law itself or court decisions provide the remedy.

PROSPECTOR ON THE DEFENSIVE

As it now stands the Government must initiate any proceedings to prove the location invalid—which is exactly what was intended and must be maintained—under the proposed law the prospector will be on the defensive and will be continually harried and tormented by inexperienced and irresponsible bureau officials.

HEARINGS IN MINING AREAS

It is abundantly clear that hearings should be held in the mining areas of this Nation before any action is taken, since no real miners were heard and the mining associations of the several States were clearly intimidated through threats of more severe legislation unless they accepted the proposed legislation as written.

LAST STAND OF SMALL CAPITAL

The present simple location system for acquiring prospecting ground for mining is the last stand for the man of small capital.

It requires no money—just a sack of beans and some coffee and many of them have been known to dispense with the coffee until they can show enough to acquire a "grubstake" from someone who is willing to gamble with them.

They can build a rock mound or stick up a stake and lodge the location notice on it—then set up the corners within 30 days and start the location work.

The ground is then his own as long as he does the required annual assessment work and files proof of it in the county recorder's office of his county.

It is not necessary to have a surveyor or an accurate placing of the corners of his property. If he inadvertently takes in too much territory then, when there is a conflict, which there will most certainly be

when and if he makes a strike, he can only hold the 1,500 by 600 feet of the regulation mining claim.

MINING IS A GAMBLE—NO PRUDENT MAN

Mining is a gamble—it is also a disease, which once acquired means that they will "hit" a mine or die broke. Where a very limited few develop a mine, thousands die broke, but it is the incentive of "striking it rich" that keeps them in the hills where the ore is to be found.

Probably 90 percent of the digging done by prospectors is on ground where no prudent man would dig—and this Nation can thank God that they have continued to dig on such ground, because most of the prospects developing into mines are discovered by these miners confirmed in the faith.

The testimony by Government witness, and witnesses inexperienced in the actual prospecting operation, was to the effect that many mining claims are located on ground where no prudent man would dig—prospectors are not prudent men.

ONLY ONE MINING MAN HEARD

There was only one mining man at the hearing who testified and his testimony was emphatically against the bill unless modified—and he recommended that hearings be held in the mining areas before it was reported to the Senate floor. The witness was Mr. Robert S. Palmer, Secretary-Treasurer of the Colorado Mining Association, which is one of the largest and most important of such associations in this Nation.

NO PRECEDENT

Several witnesses have testified that a precedent for this proposed legislation was set in the passage of Public Law No. 250, 83d Congress, amending the 1872 Mining Act.

There could have been no precedent set in the previous legislation for this type of bill since it only dealt with coordinating the use of the same mining claims for different minerals—petroleum, uranium, and other minerals. The amended act provided that you could mine uranium on an oil claim but the petroleum producer had the priority and you could not interfere with him, and that you could develop and produce oil on a uranium claim but that you could not interfere with the operation of the prior locator.

PRECEDENT WOULD BE SET

It positively had nothing to do with timber or forage or sagebrush. It had absolutely nothing in common with S. 1713, which does set a precedent for leasing ground for materials.

HEARINGS IN MINING AREAS

Certainly hearings should be held in the mining areas. Let the miners have a chance to help work it out.

CAN BE WORKED OUT

I believe that if this is done a satisfactory piece of legislation can be worked out that will benefit all concerned, and that will not curb the prospector, and that will not discourage independent investors and "grubstakers" interested in locating, developing and producing minerals.

SHOULD BE CONFINED TO FOREST AREAS

If the legislation is to be voted on today as set up without hearings in the mining areas of the country, then its application should certainly be confined to the forest reserve areas where most of the testimony before the committee applied.

GEORGE W. MALONE.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 17, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *David J. DePippo*
Gallagher & Kennedy, P.A.
Michael K. Kennedy
Bradley J. Glass
2575 East Camelback Road
Phoenix, AZ 85016
(602) 530-8000
mkk@gknet.com
brad.glass@gknet.com

Hunton & Williams LLP
David J. DePippo
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-7304