No. 20-16401

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRAND CANYON TRUST, et al.,
Plaintiffs/Appellants,

v.

HEATHER PROVENCIO, et al.,
Defendants/Appellees

and

ENERGY FUELS RESOURCES (USA) INC., et al.,
Intervenor-Defendants/Appellees.

Appeal from the United States District Court for the District of Arizona
No. 3:13-cv-8045 (Hon. David G. Campbell)

FEDERAL APPELLEES' ANSWERING BRIEF

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INTRODUCTION

The Grand Canyon Trust, Center for Biological Diversity, and the Sierra Club ("the Trust") challenge the operation of a 17.4-acre uranium mine ("Mine") located on the Kaibab National Forest in Arizona and operated by Defendant-Intervenors Energy Fuels Resources (USA) Inc. and EFR Arizona Strip LLC ("Energy Fuels"). The Forest Service, an agency in the U.S. Department of Agriculture, approved the Mine's plan of operations in 1988.

The Mine went into standby status in the 1990s. In July 2009, the lands where the Mine is situated were temporarily segregated from entry and appropriation under the Mining Law of 1872, 30 U.S.C. §§ 22-54, when the U.S. Department of the Interior ("Interior") proposed to withdraw those lands for a 20-year period subject to valid existing rights. Interior withdrew the lands in 2012.

When Energy Fuels notified the Forest Service in 2011 that it planned to resume operations, the agency reviewed its existing analysis to ensure operations would continue to comply with environmental and other statutes, and the approved mine plan. Though no law, regulation, or policy required it to do so, the Forest Service examined the mining claims to determine whether they constituted valid existing rights that were not subject to the withdrawal. Whether a party has a valid existing right turns on whether the mining claims contain a discovery of a valuable mineral deposit. A mineral deposit meets this standard if a prudent person would justifiably expend more labor and money, with a reasonable chance of success of

developing a valuable mine. The Forest Service concluded in a report (referred to herein as the Valid Existing Rights or VER Determination) that, if mined, the uranium deposits would result in a cash flow of more than $29 million and would yield a high rate of return on the investment. The Forest Service therefore concluded that the mining claims contained a discovery of a valuable mineral deposit and so constituted valid existing rights unaffected by the withdrawal.

The Havasupai Tribe and the Trust challenged the Forest Service's conclusions. Three of the four claims raised by the Havasupai Tribe and the Trust were rejected on the merits by the district court, and this Court affirmed on appeal. *See Grand Canyon Trust v. Williams*, 98 F. Supp. 3d 1044, 1060-74 (D. Ariz. 2015), *aff'd in part by Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1163-65 (9th Cir. 2018). This appeal concerns the fourth claim, in which the Trust alleged that the Forest Service arbitrarily failed to consider environmental costs in the VER Determination. Although the district court initially rejected this claim on threshold grounds, this Court reversed and remanded for a determination on the merits. *See Grand Canyon Trust*, 98 F. Supp. 3d at 1055-60; *Havasupai Tribe*, 906 F.3d at 1165-67.

On remand, the district court granted summary judgment to the Forest Service and Energy Fuels. The district court concluded that the Forest Service was not arbitrary in its assessment of whether the mining claims constituted valid existing rights. As relevant here, the court held that it was reasonable for the Forest Service to exclude from its assessment the consideration of mining costs that were incurred

before the withdrawal was proposed in 2009. In declining to consider such costs, the Forest Service applied the standards developed by Interior in interpreting the Mining Law. Interior is charged with the administration of that law and its interpretation is owed deference. It was accordingly reasonable for the Forest Service to follow its interpretation. This Court should affirm the judgment of the district court.

STATEMENT OF JURISDICTION

(a) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because the Trust's claims arose under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2); the Mining Law of 1872, 30 U.S.C. §§ 22-54; and the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714. 1 Excerpts of Record (ER) 7. As explained further below pp. 20-22, however, the district court lacked jurisdiction under Article III because the Trust lacks standing.

(b) The district court's judgment was final because it disposed of all claims against all defendants. 1 ER 2-39. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The judgment was entered on May 22, 2020. 1 ER 2-3. Plaintiffs filed their notice of appeal on July 20, 2020, or 59 days later. 3 ER 506-09. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Does the Trust have standing under Article III when the Forest Service's decision was not legally required before mining operations could resume and therefore did not cause any redressable injury to the Trust?

2. Was it arbitrary for the Forest Service to exclude consideration of costs that were incurred before July 2009 when it assessed whether the mineral deposit on the mining claims was one that a prudent person would be justified in the further expenditure of resources, with a reasonable prospect of success in developing a valuable mine?

3. If the Forest Service's decision to exclude consideration of past costs was arbitrary, was such error so prejudicial that it affected the agency's determination that the mining claims constituted valid existing rights?

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and administrative decisions are set forth in the Addendum following this brief.

STATEMENT OF THE CASE

A. Statutory and regulatory background

Mining on National Forest System (and other federal) lands is governed by the Mining Law. *See* 16 U.S.C. §§ 482, 478; *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981). The Mining Law contains "an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits." *Union Oil Co. v. Smith*, 249 U.S. 337, 346 (1919); *see Andrus v. Shell Oil Co.*, 446 U.S. 657, 658 (1980). The Mining Law provides that "all valuable mineral deposits in lands belonging to the United States" that are not withdrawn "shall be free and open" "to exploration and

purchase, and the lands in which they are found to occupation and purchase," subject to applicable regulations and laws. 30 U.S.C. § 22.

The Mining Law also provides miners an opportunity to establish a property right to lands explored and occupied by "locating" mining claims. *Id.* §§ 23, 26, 35, 36; *see also United States v. Shumway*, 199 F.3d 1093, 1095 (9th Cir. 1999) (noting that mining claims are "vested possessory rights" and recognized interests in real property); *United States v. Locke*, 471 U.S. 84, 86 (1985). Miners locate a mining claim by following certain procedures, including posting notice, marking claim boundaries, recording with the county, and meeting other statutory or regulatory requirements. *Shumway*, 199 F.3d at 1099; 1 Supplemental Excerpts of Record (SER) 195.

To secure enforceable property rights, the mining claimant must also make a discovery of a valuable mineral deposit on the subject mining claim. 30 U.S.C. § 23; *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963). The Mining Law does not define what constitutes a discovery of a valuable mineral deposit. That question was entrusted to the Secretary of the Interior and, by delegation, the Bureau of Land Management ("BLM"), who have primary jurisdiction to administer the Mining Law on all federal lands. *Cameron v. United States*, 252 U.S. 450, 460 (1920). In this role, Interior functions in a quasi-judicial capacity in the nature of a special tribunal, s*ee Best*, 371 U.S. at 336, and through its administrative jurisprudence has developed the "prudent person" test (which the Supreme Court has upheld) to determine when a discovery has occurred. That test is summarized here and discussed at length below.

In short, a discovery is the identification of a mineral deposit that is valuable enough that a prudent person would justifiably expend *more* labor and money to develop it. *See United States v. Coleman*, 390 U.S. 599, 600-03 (1968). A mineral deposit that is able to be extracted, removed and marketed at a profit meets this standard. *Id.*; *Chrisman v. Miller*, 197 U.S. 313, 320-22 (1905). Interior generally uses the prudent person test to determine whether a discovery exists as of a certain critical date, which is referred to as the marketability date. *See* 65 Fed. Reg. 41,724, 41,725 (July 6, 2000) (setting forth the applicable marketability dates for validity determinations). When a mining claim is located on withdrawn lands, there are two marketability dates: the date of the withdrawal and the date of the mineral examination. *See id.*

When evaluating whether a mineral deposit may be extracted, removed, and marketed at a profit, Interior considers only costs that would be incurred in the future development and operation of a paying mine. Interior's jurisprudence does not require this economic analysis to consider costs that were incurred before the marketability date. These include costs that were incurred to explore for and locate a valuable mineral deposit, as well as "sunk costs"—that is, the "unrecoverable past capital costs of certain types of equipment that the claimant already owned or the costs of improvements already made before the marketability date." 3 ER 314, 325. Examples include "[e]xcavations, structures, and equipment affixed to the land and that cannot be removed, even for salvage value." 3 ER 325. Sunk costs "do not include ongoing equipment, improvement or maintenance expenses." *Id.*; *see also*

United States v. Feezor, 130 IBLA 146, 222 (1994); *United States v. Copple*, 81 IBLA 109, 129 (1984).

BLM has primary jurisdiction to determine the validity of a mining claim, *Cameron*, 252 U.S. at 460, even when miners locate claims on National Forest System lands, *see Clouser v. Espy*, 42 F.3d 1522, 1525 (9th Cir. 1994). *See also Rawls v. Sec'y of Interior*, 460 F.2d 1200, 1200-01 (9th Cir. 1972). A validity determination includes an on-the-ground mineral examination to sample and test for the presence of a valuable mineral deposit, as well as preparation of a mineral report that documents the agency's analysis under the prudent person test. *See Freeman v. U.S. Dep't of the Interior*, 83 F. Supp. 3d 173, 178-80 (D.D.C. 2015) (describing administrative process), *aff'd* 650 Fed. Appx. 6 (D.C. Cir. 2016).

The Forest Service has promulgated regulations governing mining operations' surface use. 36 C.F.R. Part 228A. These regulations require approval of plans of operations, environmental impacts analysis, and minimization of adverse impacts to the extent feasible, before significant-surface-disturbing operations may occur. *Id.* §§ 228.4, 228.5, 228.8. Plans govern activities expected to occur over substantial periods of time and accordingly contemplate that operators may suspend activities. *Id.* §§ 228.4(c)(3), 228.10.

The Forest Service is not authorized to dispose of minerals under the Mining Law. 1 SER 47-48; 16 U.S.C. § 472. By inter-agency agreement, however, it may conduct mineral exams, make validity determinations, and recommend that Interior

initiate an administrative contest proceeding to have mining claims declared invalid. 1 SER 192, 201, 228; 1 SER 177-86. The Forest Service has no authority to declare a mining claim invalid or, conversely, to confer any property rights on a mining claimant; only Interior may make final determinations concerning whether there has been a discovery of a valuable mineral deposit. *See Clouser*, 42 F.3d at 1528; 1 SER 195-96, 200, 213-15, 226-28.

Lands are generally open to the Mining Law unless withdrawn by Congress or the President. The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701, *et seq.*, which established "multiple-use management" of federal lands, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 877 (1990), authorizes Interior to withdraw federal land from the Mining Law. 43 U.S.C. § 1714. Any withdrawal by Interior, however, is "subject to valid existing rights." FLPMA, Pub. L. No. 94-579, § 701(h), 90 Stat. 2743, 2786 (1976) (codified at 43 U.S.C. § 1701 note). Mining claims containing the discovery of a valuable mineral deposit are considered valid existing rights. *See* 30 U.S.C. §§ 23, 26; *Locke*, 471 U.S. at 86.

B. Factual background

1. The initial approval of the Mine's plan of operations.

In the 1940s, uranium was discovered in association with many old copper mines in the Grand Canyon region, located in narrow, vertical geologic features known as breccia pipes. 2 ER 258. The region—containing some of the highest-grade

uranium ore in the nation—became the subject of uranium exploration and mining. 1 SER 45, 51; 2 ER 258.

In 1984, Energy Fuels' predecessor submitted to the Kaibab National Forest a plan of operations to mine uranium. 2 ER 213; 1 SER 43. Previous exploratory drilling had "confirmed the presence of a high quality deposit of uranium ore." 1 SER 132. Mining operations would require 17.4 acres of surface disturbance, with mining generally occurring at depths between 900 to 1,400 feet. 1 SER 43, 63; 2 SER 362; 2 ER 226. The Mine is located approximately six miles south of Grand Canyon National Park. 1 SER 44; 1 ER 212. The 12,362-acre area surrounding the Mine is a place of tribal cultural and religious significance. 2 ER 260-61, 267.

The Forest Service reviewed the plan under various environmental laws, including the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"). 1 SER 52, 66-69. The Forest Service considered religious, cultural, and environmental impacts of the mine, including groundwater impacts (which it concluded "were extremely unlikely"). *See* 1 SER 34, 118; *see generally* 1 SER 31-116; 1 SER 116-23; 2 SER 365. The Forest Supervisor approved the plan in 1986. 1 SER 114-28. The Havasupai Tribe challenged the approval in district court, but both the district court and this Court rejected the Tribe's claims. *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1475, 1485-90, 1493-1500, 1505 (D. Ariz. 1990), *aff'd*, 943 F.2d 32, 33-34 (9th Cir. 1991).

Energy Fuels' predecessor constructed surface structures at the Mine. 2 ER 213, 226; 1 SER 132. It began sinking the mine shaft, but stopped at 50 feet when it placed the mine into standby (inactive) status due to low uranium prices. 2 ER 213; 2 SER 402. The Forest Service's approval of the plan of operations does not have an expiration date and the plan of operations has remained in effect, with the operator maintaining a reclamation bond, consistent with 36 C.F.R. Part 228A. Energy Fuels (then named Denison Mines Corporation) acquired the Mine from its predecessor in 1997. 2 ER 213.

2. The withdrawal of lands from the Mining Law.

Uranium prices increased dramatically in the mid-2000s and thousands of new mining claims were located in the region. 2 ER 259. On July 21, 2009, Interior proposed to withdraw approximately 1 million acres of public and National Forest System lands from location and entry under the Mining Law, subject to valid existing rights, for 20 years. *Id.*; 74 Fed. Reg. 35,887 (July 21, 2009). Such lands were temporarily segregated from the Mining Law while the proposal was processed. The Forest Service consented to the withdrawal of the approximately 360,000 acres of National Forest System lands. 2 ER 257, 268. On January 9, 2012, Interior issued an order withdrawing such lands. 77 Fed. Reg. 2563, 2563-66 (Jan. 18, 2012); 2 ER 257-79. The withdrawal—which was made subject to valid existing rights—expressly contemplated that operations would continue at the Mine and three other previously approved mines on the withdrawn lands. 2 ER 261-62.

Meanwhile, Energy Fuels had notified the Forest Service in 2011 that it planned to resume operations. 2 SER 349-50. As a matter of policy, the Forest Service examines the validity of mining claims before approving *new* plans of operations on lands that have been withdrawn from the Mining Law. 1 SER 195-96, 213-15, 226-28. The Mine was not a new operation, as the Forest Service approved the plan in the 1980s. The agency nevertheless took a thorough approach and decided to review its prior environmental analysis to determine whether any law or regulation required a new or amended plan of operations. 2 SER 356-401; 2 SER 402-03. The agency also conducted a mineral exam to determine whether the mining claims constituted valid existing rights and documented its findings in the VER Determination.

3. The VER Determination and review of the mine.

The Forest Service completed the VER Determination in April 2012, finding that the mining claims were valid both as of the date of the withdrawal proposal (when the lands became segregated from the Mining Law), and under then-present economic conditions, and thus constituted valid existing rights unaffected by the withdrawal. 2 ER 208-53. Two Forest Service certified mineral examiners conducted the analysis and their findings were approved by a Forest Service locatable minerals specialist. 2 ER 208-09. The mineral examiners followed the approach set forth in BLM's Handbook for Mineral Examiners, H-3890-1 ("BLM Handbook"), 2 ER 223,

and additional BLM policy guidance, 65 Fed. Reg. at 41,725-26, 2 ER 232.[1] The critical dates for determining the validity of the mining claims were July 21, 2009 (the date when the lands were segregated from location and entry under the Mining Law) and January 11, 2012 (the date of the mineral exam). 2 ER 209, 213; *see also* 65 Fed. Reg. at 41,725-26 (explaining applicable "marketability dates").

The mineral examiners made multiple trips to the Mine and visited Energy Fuels' offices, its Arizona One Mine, and its White Mesa Mill. 2 ER 12-15. The mineral examiners verified the mine boundaries, documented development activities, evaluated samples from previous exploration drilling, and obtained and tested new samples. 2 ER 213, 221-23. The examiners analyzed geological reports and maps, and agency and business records. 2 ER 213-21. They evaluated the methods and results of the proposed mining and milling operations. 2 ER 224-25. They performed an economic evaluation based on the estimated tonnage and grade of the uranium ore to be mined, capital and operating costs, commodity pricing, and a cash flow feasibility analysis. 2 ER 225-31. In doing so, the examiners relied on both information provided by Energy Fuels and their own independent evaluation, analysis, and verification of that information. 2 ER 226-28, 230.

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[1] Although BLM's guidance does not have the force and effect of law, *see Burnett Oil Co.,* 122 IBLA 330, 332 n.2 (1992), the IBLA will generally uphold its application where such guidance is reasonable, consistent with the law, and applied on an agency- or state-wide basis, *see Jesse H. Knight*, 155 IBLA 104, 122 (2001).

The mineral examiners found that both past and present drilling samples at the Mine confirmed the presence of a breccia pipe containing more than 84,000 tons of high-grade uranium ore, which was expected to result in more than 1.6 million pounds of uranium. 2 ER 212, 222-23. The mineral examiners predicted that these production estimates would likely increase when the main shaft is completed, as doing so would allow for additional infill drilling from underground drill stations. 2 ER 226.

Various surface structures necessary to support the Mine had mostly been built by Energy Fuels' predecessor. 2 ER 226; 2 SER 347. This included "the main head frame, hoist house, warehouse and shop, sediment ponds, and power lines," 2 ER 226, as well as the groundwater monitoring well. The costs of building these structures were considered "sunk costs." *Id.* The underground structures at the Mine—which were not yet completed—would include a main vertical shaft at a depth of 1,500 feet, an escape shaft, and horizontal development levels at depths between 900 and 1,500 feet. 2 ER 224, 226. The mine was estimated to produce 623,940 pounds of uranium each year, with a minimal mine life of 5 years. 2 ER 227. Materials would be trucked for processing at Energy Fuels' White Mesa Mill, with processing expected to recover 95% percent of the uranium in the ore. 2 ER 227-28.

In conducting its analysis, the Forest Service applied the Mining Law consistent with Interior's adjudicatory decisions involving mining claim validity determinations on National Forest System and other federal lands. The Forest Service therefore did not include consideration of costs that were incurred before July 21, 2009. The Forest

Service obtained capital and operating cost estimates from Energy Fuels' recent experience at the nearby Arizona One Mine, which is located north of the Grand Canyon in a similar ore deposit. 2 ER 226. The total capital cost (including a $1.69 million contingency fund and $450,000 in reclamation costs) was estimated to be $19,109,161. 2 ER 226-27 (Table 3). Estimated operating costs for each ton of ore (material from which uranium may be extracted) was $110.42 for mining, $66.00 for haulage, $141.04 for milling, and $36.56 in indirect costs. The total operating cost was $354.02 per ton of ore and $17.36 per pound of U3O8 (a type of naturally occurring uranium). 2 ER 227-28 (Tables 4 and 5). The mineral examiners independently reviewed these projected costs and found them to be reasonable. 2 ER 226.

The mineral examiners then performed a feasibility analysis using a software program specifically designed for the economic evaluation of mining projects. They concluded that the Mine would yield a net cash flow of $29,350,736 based on a U3O8 value of $56.00 per pound. 2 ER 230-31 (Table 6). The Mine would have a 78% rate of return and a one-year payback period. 2 ER 331. Using a conservative price of $42.00 per pound, the Mine would still be profitable with a 36% rate of return. *Id.* The minimum rate of return for the mining industry is about 12%. *Id.*

Based on the foregoing analysis, the VER Determination concluded that a discovery of a valuable mineral deposit existed on both applicable marketability dates: the date of segregation on July 21, 2009 as well as under economic conditions as of the date of the mineral examination on January 11, 2012. 2 ER 232. The Forest

Service subsequently completed its environmental review, in which it found that Energy Fuels had not proposed any changes in its operations and that nothing required a plan modification, further environmental analysis, or additional approval before mining could resume. 2 SER 356-63.

C. Prior proceedings

The Havasupai Tribe and the Trust jointly filed suit in March 2013. 3 ER 515. As relevant here, the Trust challenged the Forest Service's determination that the mining claims constituted valid existing rights, alleging that the Forest Service failed to consider environmental costs of mining operations. 2 ER 198-99, ¶¶ 89-92. Energy Fuels intervened. *See* 3 ER 518-19. In April 2013, Energy Fuels resumed mining, though it placed the mine into standby status again shortly thereafter. 1 SER 3, ¶ 5.

The district court entered summary judgment on April 7, 2015 in favor of the Forest Service and Energy Fuels. 2 ER 131-71. Among other things, the court found that the VER Determination was not legally required and did not approve mining; the approval occurred when the Forest Service initially approved the plan of operations in 1986. 2 ER 150-51. The court nevertheless held that the VER Determination was reviewable final agency action under the APA because Energy Fuels had agreed, as a practical matter, not to resume mining until the Forest Service determined that the subject mining claims constituted valid existing rights. *Id.* The district court determined, however, that it could not review the claim on the grounds that the Trust

sought to protect environmental interests that fall outside of the Mining Law's zone of interests. 2 ER 146-50. The Havasupai Tribe and the Trust appealed. 3 ER 535.

This Court initially affirmed on all grounds. *See Havasupai Tribe v. Provencio*, 876 F.3d 1242 (9th Cir. 2017). In October 2018, however, this Court withdrew its original decision and entered an amended order that affirmed the district court's decision in all respects except for its holding that the Trust's challenge to the VER Determination was unreviewable. *Havasupai Tribe*, 906 F.3d at 1163-65. This Court affirmed the district court's determination that the claim falls outside the Mining Law's zone of interests, but concluded that "FLPMA, and not the Mining Act, forms the legal basis of [that] claim," *id.* at 1166, and the claim that "the VER determination was in error remains a claim under the FLPMA." *Id.* at 1167. This Court remanded the case for consideration of the merits of the Trust's claim that the Forest Service's valid existing rights determination should have included the consideration of environmental costs in its profitability analysis of the mining claims. *Id.*

On remand, the Trust renewed its claim that the VER Determination was invalid under the APA because the Forest Service did not consider environmental costs in estimating the mine's value, and also added a new argument about sunk costs. After additional briefing and a telephonic hearing, the district court granted summary judgment to the Forest Service and Energy Fuels. The district court first ruled that the Trust had standing under Article III to bring its challenge. 2 ER 8-10. Because the VER Determination was not legally required before mining operations could resume,

however, the court held that the Trust would have no basis to enjoin mine operations if the VER Determination was set aside. 2 ER 10-11. The court next reviewed the VER Determination, detailing the types of costs that the Forest Service considered. 2 ER 12-20. The court held that the Forest Service need not consider certain costs identified by the Trust—such as the cost of remediating groundwater contamination—because the possibility that groundwater would become contaminated was too remote and speculative. 2 ER 21-23. With respect to the costs of environmental monitoring, elk habitat restoration, and installation of netting to protect condors, the court assumed (without concluding) that the Forest Service did not consider these environmental costs, but that any failure to do so amounted to harmless error because such costs (totaling $216,000 when adjusted for inflation) were "relatively modest" and would not make mining unprofitable. 2 ER 21-31.

After considering the agency's treatment of environmental costs, the district court held that it was also reasonable for the agency to decline to consider sunk costs. 2 ER 31-37. The decision to exclude sunk costs "was consistent with guidance from the BLM Handbook," as well as prior agency decisions applying the Mining Law. 2 ER 31. It was reasonable for the Forest Service to follow the Handbook and those decisions. 2 ER 31-34. The Trust did not present any case law that would require consideration of sunk costs. 2 ER 34-37. And finally, even if the Forest Service should have considered sunk costs, the error was harmless where consideration of such costs would not have rendered the mine unprofitable. 2 ER 37; 2 ER 26-31.

The Trust appealed. 3 ER 506.

SUMMARY OF ARGUMENT

1. The Trust lacks Article III standing to challenge the VER Determination because its asserted injury (the resumption of mining operations) is not caused by that decision and vacatur would therefore fail to redress its injury. The Forest Service approved the Mine's plan of operations in the 1980s and it is that approval—not the VER Determination—which authorized mining operations. Moreover, because the Forest Service was not required to prepare the VER Determination and has no authority to adjudicate whether the mining claims constitute valid existing rights, the Trust's injuries will not be redressed by vacatur of the VER Determination.

2. The Trust and the Forest Service agree that the prudent person test governs the inquiry of whether the mining claims constitute valid existing rights. At issue here is whether it was arbitrary or capricious under the APA for the Forest Service to exclude sunk costs from its prudent person analysis. The Forest Service's exclusion of sunk costs is not arbitrary because it is consistent with Interior's interpretation of the Mining Law. The Mining Law is silent on how to evaluate whether a claim contains a "discovery of a valuable mineral deposit." Congress explicitly delegated authority to Interior to fill in the gaps. Interior has interpreted the Mining Law to not require consideration of sunk costs. This interpretation is reasonable and does not conflict with the Mining Law. To the extent this Court reviews Interior's interpretation, it should do so under the deferential standard

outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S 837, 842-843 (1984). Given that Interior is the expert agency charged with administering the Mining Law, it cannot be said that the Forest Service's decision to act in accordance with Interior's decisions was arbitrary or capricious under the APA.

3. The Trust identifies three sums that it asserts represent costs that the Forest Service should have considered and contends that, if the agency had considered such costs, it would not have concluded that there was a discovery of a valuable mineral deposit. Assuming (for the sake of argument) that the Forest Service should consider sunk costs, the agency need not have considered all of the sums identified by the Trust. Some of the expenses occurred in the exploration phase in an effort to locate a valuable mineral deposit, and so those expenses would not be considered in the investment decision-making process regarding whether further expenditures required for the subsequent mining of that deposit would be justified. Additionally, some of the costs identified by the Trust represent expenses that were incurred for the same activities by different mining companies (that were predecessors in interest to Energy Fuels), and so it would be inappropriate in any event to double-count those expenses. Finally, even if the Forest Service should have considered the costs identified by the Trust, its failure to do so was not so prejudicial as to affect its determination that the mining claims constituted valid existing rights. The Forest Service's analysis shows a significant net positive cash flow. The projected cash flow is

so large that the mine would still be considered profitable even accounting for the costs identified by the Trust.

ARGUMENT

I. The Trust lacks standing to challenge the VER Determination.

To demonstrate standing under the Article III of the Constitution, a plaintiff must show it has suffered an actual injury that can be traced to the defendant's conduct and that it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Trust asserts that it is injured by the continuation of mining operations. *See* Pls.' Mot. for Summary J. & Mem in Supp. 6, ECF No. 226. But, as the district court and this Court have both held, it was the Forest Service's approval of the plan of operations in the 1980s that authorized mining operations, not the VER Determination. *See* 2 ER 137-41; *Havasupai Tribe*, 906 F.3d at 1163. Interior's subsequent withdrawal in 2012 did not affect the validity of the approved plan of operations (and in fact anticipated that the Mine would continue to operate). 2 ER 267-68. The Trust's injury is therefore not traceable to the VER Determination—it stems from the original approval of the plan of operations.

Nor would the Trust's injuries be redressed if the Court were to vacate the VER Determination. No law, regulation, or policy requires the Forest Service to conduct a VER Determination for mining claims within an already-approved plan of operations, even if the land is subsequently withdrawn from the Mining Law. *See supra*

pp. 4-8, 11. Thus, if the VER Determination were vacated, the Forest Service would be under no duty to complete a new one. Even if the Forest Service voluntarily decided to do so and determined that the mining claims did not constitute valid existing rights, it is not the Forest Service, but Interior, who has plenary authority to determine the validity of the mining claims. *See supra* pp. 4-8. The Forest Service could at most request that Interior initiate a contest. But the Trust's alleged injury would remain unredressed unless and until Interior (along with any subsequent judicial review) declared the mining claims invalid, since only at that point could the Forest Service take any action to prevent mining under the plan of operations based on a lack of valid existing rights. Whether the Trust's injury would be redressed by a favorable decision here is therefore too speculative to support standing. *Defenders of Wildlife*, 504 U.S. at 560.

II. The Forest Service's VER Determination was consistent with applicable law.

The question before the Court is whether the Forest Service was arbitrary and capricious under the APA when it excluded sunk costs from its prudent person analysis in the VER Determination. The Forest Service's exclusion of sunk costs is not arbitrary because it is consistent with Interior's interpretation of the Mining Law. Interior is charged with administering the Mining Law and Interior's position is therefore entitled to deference. If anything, it would have been arbitrary for the Forest

Service to have applied the Mining Law in a manner different from Interior. This Court should reject the Trust's arguments to the contrary.

A. This Court should review the VER Determination deferentially.

Judicial review of the VER Determination is governed by the APA. Under the APA, this Court may reverse the Forest Service's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That standard is highly deferential. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.,* 463 U.S. 29, 43 (1983). The Court presumes the validity of the decision, *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008), *overruled on other grounds by*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008), and may not substitute its judgment for that of the Forest Service, *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 376-78 (1989).

The Trust asks (at 25-29) this Court to decide de novo the question whether sunk costs should be considered in the prudent person analysis because the Forest Service is not the agency charged with interpreting the Mining Law and because (in its view) Interior's interpretation is not entitled to deference. As the district court correctly held, this standard of review is incorrect. *See* 1 ER 32-34, 40-41. The decision under review is the VER Determination. 2 ER 199. Therefore the "question posed by Plaintiffs' claim is not whether [Interior's] decisions and BLM Handbook

are incorrect, as Plaintiffs suggest, but whether the Forest Service's reliance on these [Interior] sources in the VER Determination was arbitrary and capricious." 1 ER 32.[2]

Courts review with substantial deference the decisions of agencies in situations similar to the one here. In *CTIA-Wireless Association v. Federal Communications Commission*, 466 F.3d 105 (D.C. Cir. 2006), for example, the D.C. Circuit found that regulations promulgated by the Advisory Council on Historic Preservation (that implemented the NHPA) were owed deference under *Chevron* and that it was in turn reasonable for the Federal Communications Commission to apply a definition included in those regulations to its decision-making process. 466 F.3d at 106, 115-18. The Supreme Court similarly rejected a challenge to an agency's application of the Council on Environmental Quality's (CEQ) regulations implementing NEPA on the basis that those regulations are entitled to "substantial deference." *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354-55 (1989). The Court should therefore

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[2] It is also worth noting that the Trust's complaint focused only on the Forest Service's alleged failure to consider costs of *environmental* compliance and did not challenge the exclusion of sunk costs. Nor did the Trust raise the issue of how the Forest Service treated sunk costs in its initial motion for summary judgment. *See* Pls.' Mot. for Summary J. & Mem in Supp., ECF No. 140 (Oct. 15, 2014). It presumably did not challenge the treatment of sunk costs because those costs have little to do with the environmental interests it seeks to protect. The Trust did not raise the issue until it had a second opportunity for summary judgment briefing in 2019 and sought access to redacted information concerning sunk costs—five years after it filed its amended complaint. *See* 3 ER 529, 539. The Trust's tardiness provides an independent basis to reject the Trust's claims. *See Apache Survival Coal. v. United States*, 21 F.3d 895, 91-12 (9th Cir. 1994) (issue raised in briefing not properly considered when not included in complaint due to inexcusable delay).

ask whether it was arbitrary and capricious for the Forest Service to apply Interior's interpretation of the Mining Law under the highly deferential standard of the APA. This question is easily answered. Interior—and not the Forest Service—has been delegated authority to implement the Mining Law. It would therefore be arbitrary for the Forest Service to do anything other than to apply Interior's interpretation.

The Trust has not challenged any final agency action on the part of Interior under the APA and Interior is not named as a defendant in this lawsuit. The validity of Interior's interpretation is therefore not before this Court. *See, e.g., White v. Dep't of Homeland Sec.*, 2012 WL 4815470, at *1 (D.D.C. Oct. 10, 2012) (dismissing a suit where the plaintiff failed to name as a defendant the agency that issued the decision under review). Nevertheless, to the extent that the Court considers Interior's interpretation of the Mining Law as a part of its review of whether the VER Determination was prepared in violation of the APA, any such consideration should occur under the highly deferential second step of the two-part test set forth in *Chevron*. In step one, a court looks to whether Congress has clearly expressed its intent in a statute. If so, then an agency "must give effect to that unambiguously expressed intent." *Akootchook v. United States*, 271 F.3d 1160, 1166 (9th Cir. 2001) (citing cases). If the statute is not clear on the precise question at issue, then the second step involves an inquiry into "whether the agency's answer is based on a permissible construction of the statute." *Id.* A court should affirm so long as the interpretation is not "manifestly contrary to the statute." *Chevron*, 467 U.S at 842. The interpretation

must also have the "force of law," which it has when it is developed after "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 226-227, 230 (2001); *see also High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir. 2004) (holding that an agency's decision is entitled to *Chevron* deference if it has the force of law).

The two cases cited by the Trust (at 28) suggesting that de novo review could apply are inapposite, as both acknowledged *Chevron* deference is appropriate where an agency has interpreted a statute that it administers—as Interior has done here. *See Connors v. National Transportation Safety Board*, 844 F.3d 1143, 1145 (9th Cir. 2017); *Sauer v. Dep't of Educ.*, 668 F.3d 644, 650 (9th Cir. 2012). The Trust also contends (at 28) that the language of the APA requires the Court to decide legal issues do novo. The APA provides that "the reviewing court shall decide all relevant questions of law" "[t]o the extent necessary to decision and when presented." 5 U.S.C. § 706. The APA does not, however, require the Court to consider legal questions without any deference to an agency's interpretation. This Court should not depart from the arbitrary and capricious standard of review when reviewing the VER Determination under the APA.

B. Interior's interpretation of the Mining Law is consistent with the statute and past precedent.

The Mining Law does not define what constitutes a discovery of a valuable mineral deposit and is silent on the question whether sunk costs should be considered when evaluating whether the requirements of a discovery have been met. It simply says that "all valuable mineral deposits in lands belonging to the United States" "shall be free and open to exploration and purchase," 30 U.S.C. § 22, and provides property rights to "locators of all mining locations" so long as various requirements are met, *id.* § 26. It further specifies that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." *Id.* § 23.[3] Given the statute's silence on the pertinent questions, any consideration of Interior's interpretation would be guided by the second step in *Chevron* in which this Court would defer unless the interpretation is "not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845.

Congress delegated plenary authority to Interior to determine issues pertaining to the Mining Law with the force of law. *See Best*, 371 U.S. at 336; *West v. Standard Oil Co.*, 278 U.S. 200, 219 (1929); *Cameron*, 252 U.S. at 459-60. Interior has accordingly

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[3] The Trust erroneously contends 30 U.S.C. § 22 describes how property rights may be acquired under the Mining Law. That section merely contains the statutory authorization to remove "valuable mineral deposits" and does not confer any property rights under the Mining Law. Nor is the concept of "discovery" found in that section. Rather, the applicable section of the Mining Law is 30 U.S.C. § 23 governing the location of lode claims for "other valuable deposits" upon "the discovery of the vein or lode within the limits of the claim located."

developed a substantial and longstanding body of adjudicatory decisions on what considerations go into the determination of whether a mineral deposit warrants a determination that a valid discovery has been made and a property right can be recognized. Many of these decisions were issued by the IBLA, which is part of Interior's Office of Hearings and Appeals, which in turn is a component of the Office of the Secretary of the Interior. The Office of Hearings and Appeals is authorized to hear, consider, and determine matters within the jurisdiction of Interior, 43 C.F.R. § 4.1(a), including contests involving "any cause affecting the legality of validity of any entry or settlement or mining claim," *id.* § 4.451-1. "[R]ules of law established by prior Departmental decisions," including those of the IBLA, "are binding precedent." *United States v. Jones,* 106 IBLA 230, 246 (1988); *see* 3 ER 337. Courts have accordingly deferred to statutory interpretations set forth in these adjudicatory decisions.[4]

Since 1894, Interior has held that to qualify as a "discovery of a valuable mineral deposit" sufficient to support recognition of property rights under the Mining

[4] *See, e.g., Coleman*, 390 U.S. at 602 (deferring to Interior's interpretation of the Mining Law and discussing other cases doing the same); *Akootchook*, 271 F.3d at 1168 (deferring to an IBLA decision); *Brandt-Erichsen v. Interior*, 999 F.2d 1376, 1381 (9th Cir. 1993) ("[D]ecisions of the [IBLA] on the meaning of a [statute it is charged with administering] should be given substantial deference."); *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 754-55 (D.C. Cir. 2007) (applying substantial deference to the IBLA's interpretation of FLPMA); *Hoyl v. Babbitt*, 129 F.3d 1377, 1385-86 (10th Cir. 1997) (deferring to IBLA's interpretation of a statute); *Williams v. Babbitt*, 115 F.3d 657, 660 n.3 (9th Cir. 1997) ("A statutory interpretation adopted by an agency in the course of adjudicating a dispute is entitled to *Chevron* deference so long as the agency has the power to make policy in the area.").

Law, a mineral deposit must be of such 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." *Castle v. Womble*, 19 Pub. Lands Dec. 455, 457 (1894); *see Chrisman v. Miller*, 197 U.S. 313 (1905) (adopting Interior's "prudent person" standard for discovery). In an effort to "identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is 'valuable,'" Interior refined the prudent person test to require a showing that the minerals can be extracted, removed, and marketed at a profit. *See Coleman*, 390 U.S. at 602. This showing is relevant because a "prudent man would not be justified in developing a mineral deposit if the extracted minerals were not marketable." Marketability Rule, M-36642, 69 Interior Dec. 145, 146 (1962). The Supreme Court has affirmed Interior's use of the prudent person test (including the marketability aspect) as a reasonable interpretation of the Mining Law. *Coleman*, 390 U.S. at 602.[5]

Among those factors to be considered in the prudent person analysis are the "current estimates" of the:

> (a) expected costs of the extraction, beneficiation, and other essential costs of the operation necessary to mine and sell the mineral, including capital and labor cost; (b) quantity of mineable mineral on the claims; (c) average grade or quality of mineral on the claim; and (d) price at which the mineral will be sold, and expected returns.

[5] Portions of the Trust's brief (at 17-20, 36) appear to suggest that it is the Supreme Court that developed the marketability aspect of the prudent person test when, in fact, the Supreme Court affirmed Interior's interpretation of the Mining Law.

United States v. McKenzie, 20 IBLA 38, 45 (1975); *see also* 3 ER 314-15 (Interior Handbook listing considerations).

Neither the "[a]ctual successful exploitation of a mining claim," *Barrows v. Hickel*, 447 F.2d 80 (9th Cir. 1971), nor the "proved ability to mine the deposit at a profit" need to be shown for "further expenditure" of "labor and means" to be justified. *Adams v. United States*, 318 F.2d 861, 870 (1963); *see also United States v. Foresyth*, 100 IBLA 185, 226-27 (1987); *United States v. Anderson*, 57 IBLA 256, 261 (1981) ("The mining laws do not require that the values shown must be such as will demonstrate that a claim can be worked at a profit or that it is more probable than not that a profitable mining operation can be brought about."); *United States v. Mannix*, 50 IBLA 110, 117 (1980). Instead, "[w]hat is required is that there be, at the time [of] discovery, a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence." *Barrows*, 447 F.2d at 83. The test developed through Interior's administrative case law asks whether—based on what is known about the mineral deposit at a particular moment in time—"a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed." *Adams*, 318 F.2d at 870; *Anderson*, 57 IBLA at 260-61.

Accordingly, Interior explained in *United States v. Mannix* that when the agency evaluates whether a discovery of a valuable mineral deposit exists, it only "looks at present marketability, not past or future prospects." *See* MT-31412 at 9 (Feb. 14, 1979) (ALJ decision citing judicial and administrative decisions and stating that

"[n]one of the definitions refer to past expenditures, only to present and future potential"), *aff'd by* 50 IBLA 110, 119 (1980); *United States v. Armstrong*, 184 IBLA 180, 216 (2013) ("[E]vidence of past success in extracting and marketing a mineral from a mining claim is of limited evidentiary value—a mining claim cannot be considered valid unless the claim is at present supported by a sufficient discovery."). A claimant need not establish that all past expenses incurred in the development of a claim prior to the marketability date will be "recouped before it can be said that the mine is a profitable venture." *Mannix*, 50 IBLA at 119. The relevant question is whether "*further* expenditures" would be justified given the quantity and quality of a mineral deposit and the present marketability of those minerals. *Id.* at 119 (emphasis added). IBLA decisions have consistently applied the interpretation set forth in *Mannix*. *See United States v. Clouser*, 144 IBLA 110, 131-32 (1998); *United States v. Collord*, 128 IBLA 266, 288 n.24 (1994); *United States v. Copple*, 81 IBLA 109, 129 (May 30, 1984). BLM has also issued guidance that is consistent with these decisions. *See* 3 ER 314, 325.

The reasoning behind excluding sunk costs from the prudent person analysis is sound and consistent with the Mining Law. Miners cannot obtain any property rights until they have discovered a valuable mineral deposit. 30 U.S.C. §§ 23, 26. Miners may spend substantial sums of money to explore for and develop minerals before the deposit is sufficiently identified to constitute a discovery that would justify the government's recognition of a valid mining claim. *See, e.g., United States v. Collord*, I-20886 at 4-5 (Feb. 23, 1989), *aff'd by* 128 IBLA at 266 (discussing difference between

the presence of minerals worth exploration and a discovery); *see also Anderson*, 57 IBLA at 260-61 (same). "The money spent by prudent and reasonable men to conduct *exploration* activities" is akin to "the first best or call in a poker game." *United States v. Gunsight Mining Co.*, 5 IBLA 62, 69 (1972) (emphasis added) (explaining that pre-discovery expenditures do not constitute proof of a valid discovery); *Mannix*, MT-31412 at 9. Until a valuable mineral deposit has been discovered, "the further expenditure of labor and means would not be directed toward the development of a deposit which has been found but would be directed toward the finding of a deposit which the evidence indicates might be found and could be developed." *Barton v. Morton*, 498 F.2d 288, 289-90 (9th Cir. 1974). The prudent person test therefore "comes into play only after a mineral deposit has been discovered, not before; and it is then applied to determine whether the discovered deposit is 'valuable.'" *Id.* at 290-91.

For this reason, "[i]n determining then whether a discovery has been made, past expenditures are irrelevant, and since the future is unknowable and speculative, the determination must be made on present facts and cost factors." *Mannix*, MT-31412 at 4, 9 (declining to take into consideration the expenditures made to date in the development of the claims); *United States v. Wichner*, 35 IBLA 240, 246 (1978) ("[I]t must appear as a *present* fact that there would be a reasonable prospect of success in developing an operating mine that would yield a reasonable profit.") (emphasis added). This reasoning comports with economic decision making generally, where "sunk costs are treated as bygone and are not taken into consideration when deciding

whether to continue an investment project." *See* Peter Bondarenko, Sunk cost, Encyclopedia Britannica, available at https://www.britannica.com/topic/sunk-cost.

A (non-precedential) concurring opinion authored by Administrative Judge Burski in a subsequent IBLA decision further elaborated the reasoning underlying the exclusion of sunk costs in *Mannix*. The concurrence explained that the *Mannix* claimants had made "substantial" capital expenditures which "would never be recouped even if they successfully mined the deposit." *Collord*, 128 IBLA at 304. In "hindsight, no prudent man would have proceeded to construct the underground workings and, absent these workings, a prudent man would clearly not have been justified in further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine." *Id.* The claims were therefore arguably "not valid since there was virtually no chance that a paying mine (one which would recoup all of the claimants' expenditures) would result." *Id.* The IBLA declined to invalidate the claims in *Mannix*, however, because the lands were not withdrawn from the Mining Law and "nothing would prevent the appellants from relocating new claims" that "would not be burdened with the necessity of recouping past expenditures made under prior locations." *Id.* As a matter of practicality, where "land remain[s] presently open to mineral location, where expenditures which might properly be seen as imprudent had already been incurred, a mining claimant could show the existence of a valuable mineral deposit without establishing that those already-made expenditures would be recovered." *Id.*

Judge Burski theorized that the outcome in *Mannix* would have been different, however, if the claims were located on lands that were withdrawn *and* the "expenditures relating to infrastructure development ha[d] not yet been made" before the lands were withdrawn (as was the case in *Collord*). *Id.* at 304-05. This is because claims on withdrawn lands must satisfy all requirements of the Mining Law not only as of the date of the mineral exam, but also as of the earlier date of the withdrawal. *Id.* at 268; *United States v. Collord*, I-20886 at 4-5 (Feb. 23, 1989); *see also Wichner*, 35 IBLA at 246. Combined, the *Mannix* and *Collord* decisions make clear that on lands that are withdrawn, Interior does not consider in its prudent person analysis any expenditures that were incurred prior to the date of the withdrawal. *See, e.g., Copple*, 81 IBLA at 129 (excluding costs that were incurred prior to the withdrawal).

C. The Forest Service's decision to apply Interior's interpretation was reasonable.

The Forest Service was not writing on a blank slate when it prepared the VER Determination. The Forest Service recognized that the Mining Law is comprised of the statute and the "decisions of the courts and of the Department of the Interior, which interpret and apply the statutes to specific cases." 3 ER 337. It was therefore reasonable for the Forest Service be follow these decisions and in particular to apply Interior's interpretation that sunk costs need not be considered. 2 ER 226; *see CTIA*, 466 F.3d at 115-18. The Forest Service's decision to apply Interior's interpretation is entitled to great deference under the APA. *See supra* pp. 22-25.

The Trust asserts (at 37-39) that the Forest Service erred because, in its view, Interior applies (or should apply) a different definition of profitability for claims located on withdrawn lands than for claims located on open lands, one that includes consideration of all costs incurred before the lands were withdrawn. As the discussion above (pp. 26-33) makes clear, however, Interior does not consider costs that were incurred before the relevant marketability date. This reasoning is consistent with *Mannix* and *Collord* because a prospector may relocate mining claims on open lands so that they are unburdened by prior expenditures up until the date such lands are withdrawn. There is no support in either of those decisions for the proposition advanced by the Trust that the Forest Service should have considered expenditures that were incurred before the date of the withdrawal. Indeed, Judge Burski's concurrence in *Collard* suggested that the outcome out have been different if the claimants there had incurred the expenses prior to the withdrawal. 128 IBLA at 304-05. The position advocated by the Trust would have the effect of imposing a substantively "different and more onerous standard," *Coleman*, 390 U.S. at 603, for claims located on withdrawn lands that is inconsistent with the longstanding way in which Interior has applied the prudent person test.

D. The Court should reject the Trust's arguments.

The Trust incorrectly contends that this Court should reject Interior's construction as insufficiently explained, as well as inconsistent with the statute and prior case law. Interior's longstanding decisions make plain the reasoning behind the

exclusion of sunk costs. And its interpretation does not conflict with the Mining Law nor with any of the relevant cases. This Court should reject the Trust's arguments.

1. Interior sufficiently explained its interpretation of the Mining Law.

The Trust asserts (at 29-31) that *Chevron* deference to Interior's interpretation is inappropriate because *Mannix* did not provide sufficient analysis. But the interpretation was adopted in the context of an adjudication where the agency was delegated interpretive authority, the interpretation is clear, and the reasons for it are sound. *Chevron* requires nothing more. An "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *See Mead Corp.*, 533 U.S. at 226-227. IBLA adjudicatory proceedings meet that standard. *See supra* pp. 26-27. Moreover, the Supreme Court decision cited by the Trust (that required additional explanation for an agency's position) addressed a situation in which an agency had changed its position and additional reasons were required to explain the change, not the interpretation itself. *See Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016). Interior has made no such change here. In any event—to the extent that any explanation is required—a "minimal level of analysis" should suffice. *Id.* The rationale provided by Interior more than meets that standard.

In *Mannix*, the IBLA explained that "the law does not require a guaranteed profit to constitute a discovery"—instead, a discovery exists where "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." 50 IBLA at 117-18 (emphasis added) (*citing Castle*, 19 Pub. Lands Dec. at 457). Evidence concerning "expected costs of the extraction, beneficiation, and other essential costs of the operation necessary to mine and sell the mineral" should "focus on *current* estimates of costs and prices." *Id.* at 118 (emphasis added) (*citing McKenzie*, 20 IBLA at 45). The IBLA continued:

> We would address the question of mining at a profit. The Government argues that all earlier expenses in development of the property must be considered, *e.g.*, the cost of constructing cabins, sheds, and an access road and the purchase of rail and ore cars, and that such expenses must be recouped before it can be said that the mine is a profitable venture. We think the Government errs in its argument and analysis. Absent a prior withdrawal, if the mineral material may be now mined, removed, and marketed at a present profit over and above the costs of such operations, we would hold that the requirements of discovery have been met. There is no case law of which we have knowledge, nor has the Government adduced any, that compels consideration of the above mentioned development costs in determining if an ongoing operation is presently profitable. *Cf. Andrus v. Shell Oil Co.*, [446 U.S. 657 (1980)].

50 IBLA at 119.

The IBLA's rationale in eliminating the consideration of sunk costs is therefore based on the premise that a guaranteed profit is not required to constitute a discovery; *present* marketability (that is, a showing that current expected costs and the price, quality, and quantity of the identified mineral justify further expenditures) is what

matters.[6] The ALJ decision that the IBLA reviewed and affirmed provides further explanation that is detailed above at pp. 27-31. *See Mannix*, MT-31412 at 8-9; *Mannix*, 50 IBLA at 120 (affirming ALJ decision); *IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals*, 206 F.3d 1003, 1009 (10th Cir. 2000) (considering the decision of the subordinate agency division that was under review by the IBLA, as well as the IBLA's decision). Further explanation is also found in *Collord*. *See supra* pp. 32-33. This explanation is more than sufficient.

2. Interior's interpretation is consistent with the text of the statute.

The Trust contends that Interior's interpretation is inconsistent with the text of the Mining Law. The Trust points out (at 16, 20-21, 33-35) that the requirement to make a discovery of a valuable mineral deposit is objective and focuses on the value of the mineral deposit at issue. From this premise, the Trust concludes that the question of marketability should assess profitability over the entire life of a mining operation. As further support, the Trust contends (at 17-18) that the term "profit" requires an assessment of all past costs. There are several flaws in this reasoning.

This Court should reject the Trust's contention that Interior's interpretation is inconsistent with the text of the Mining Law because, as explained above, p. 26, there

[6] Contrary to the Trust's contentions (at 31-33), *Andrus* supports the IBLA's position by affirming that it is appropriate to evaluate the present marketability of a mineral deposit. *See* 446 U.S. at 672-73 n.11; *see supra* pp. 28-29.

is no language in the statute that requires consideration of sunk costs when assessing whether a discovery exists. This should end this Court's inquiry under *Chevron*.

Instead of any statutory language, the Trust points to the prudent person test, which derives from Interior's jurisprudence. But the prudent person test asks whether—at the relevant date—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." *Coleman*, 390 U.S. at 602 (citing *Castle*, 19 Pub. Land. Dec. at 457) (emphasis added). The phrase "further expenditure" makes clear that the test does not focus on costs that were incurred prior to the marketability date. The Trust claims that an objective analysis of profitability should include a look at whether a mineral deposit (rather than any particular mining operation) can be profitably mined, but the objectivity identified by the Trust comes into play by asking whether an *ordinary* person would be justified in making further expenditures, not by asking whether any particular person would be willing to make such expenditures. *United States v. Whitney*, 51 IBLA 73, 84 (1980) ("Appellants' willingness to make a small profit is not sufficient to meet the prudent man test. The prudent man test is an objective not a subjective standard."); *see also United States v. Garcia*, 184 IBLA 255, 270 (2013) (same). The concept of an objectively-applied test therefore has no bearing on whether sunk costs should be taken into account.

The Trust contends (at 17-18, 35-37) that the phrase "further expenditures" does not imply that past costs should be ignored because the prudent person test asks

whether further expenditures would be justified in developing a profitable mine, and that the term "profit" necessarily requires the inclusion of all past and future costs associated with the mineral deposit. While it might be true that the question whether a business is profitable over its entire life would turn on an evaluation of all of the expenses incurred over the life of the business, there is nothing in the prudent person test that requires an evaluation of profitability over the entire life of a mineral deposit (or even a particular mine) from initial prospecting and exploration activities (to delineate the deposit) to the actual development and mining of that deposit. Interior's longstanding decisions make plain that it uses the concept of "profit" in a particular way—to capture whether "at the time [of] discovery," there is "a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence." *Barrows*, 447 F.2d at 83; *see supra* pp. 26-33. We can find no published decision in which Interior has required a showing of profitability over the entire history of a mineral deposit in order to establish that a particular mining claim is valid. *See Mannix*, 50 IBLA at 119. To the contrary, Interior (and the courts) have expressly held that claimants need not show "that a claim can be worked at a profit or that it is more probable than not that a profitable mining operation can be brought about." *Anderson*, 57 IBLA at 261; *see supra* p. 29.

The Trust contends (at 18-20) that *Coleman* requires consideration of past costs. But the Trust points to no language in *Coleman* (or in any other case, for that matter)

that requires the consideration of past costs before a property right in a mining claim can be recognized. The Supreme Court simply stated that

> the facts of this case—the thousands of dollars and hours spent building a home on 720 acres in a highly scenic national forest located two hours from Los Angeles, the lack of an economically feasible market for the stone, and the immense quantities of identical stone found in the area outside the claims—might well be thought to raise a substantial question as to respondent Coleman's real intention.

390 U.S. at 603. This language in no way circumscribed Interior from refining its analysis to exclude the consideration of sunk costs.

Moreover, review of Interior's decision in *Coleman* makes clear that Interior did not consider the claimant's capital expenditures as part of its prudent person analysis; rather, that inquiry was related to the contest charge that the claimant had failed to satisfy the statutory requirement that a claimant complete at least $500 worth of improvements on each mining claim for which he is seeking a patent. *See United States v. Coleman*, A-28557 at 2-4, 6-8 (Mar. 27, 1962); 30 U.S.C. § 29.[7] This requirement has nothing to do with the prudent person test. *Compare* 30 U.S.C. § 29 *with* 30 U.S.C. §§ 23, 26; 2 Am. L. of Mining §§ 25.14[2][e], 35.11[4] ("The expenditure of time, effort, and money in operations on a claim is material to the claimant's subjective good faith but not to the objective determination of whether a discovery was made.").

[7] The contest was partially based on charges that "the land in the claims [was] non mineral; that minerals had not been found in sufficient quantities to constitute a valid discovery; and that $500 had not been expended in improvements on [certain] claims." *Coleman*, A-28557 at 2.

In applying the prudent person test, Interior considered the fact that the minerals were of widespread occurrence, the paucity of sales, the lack of profit, and the limited potential market. *Coleman*, A-28557 at 5, 8-10. Interior's discussion of operating costs did not include sunk costs. *Id.* at 8-9.[8] Neither the Supreme Court's nor Interior's decision in *Coleman* requires consideration of sunk costs.

It is also worth noting that *Coleman* involved a very different situation than the one present here. There, Interior rejected an application for a 720-acre patent based on the purported discovery of a very common type of mineral and it appeared as though the claimant—who had few sales and could not make a profit from his so-called mining operations—sought to obtain title to the "highly scenic" National Forest System lands for purposes other than mining. *Coleman*, 390 U.S. at 600, 603. By contrast, there is no evidence in the record suggesting that Energy Fuels is attempting to use the 17.4-acre mine site for any purpose other than mining uranium. *See, e.g.,* 2 SER 347. Nor is Energy Fuels attempting to acquire a patent.[9] The concerns animating *Coleman* (and echoed by the Trust, at 22-23) simply are not present here.

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[8] The decision references the amortization of the costs of acquiring heavy equipment, but money spent acquiring equipment is not considered a sunk cost. *See* 3 ER 314, 325; *Armstrong*, 184 IBLA at 216-19.

[9] Because the lands at the Mine are still in federal ownership, Energy Fuels must maintain its discovery in order to continue to assert a valid existing right. The Forest Service or BLM can conduct a mineral exam (and, if warranted, initiate a contest hearing) at any time. Moreover, the VER determination does not insulate Energy Fuels from the requirement to pay annual maintenance fees, or the automatic forfeiture that would result if it failed to do so. *See* 30 U.S.C. §§ 28f, 28i.

3. Interior's interpretation is consistent with the purpose of the Mining Law.

The Trust theorizes (at 23-24, 34-35) that Interior's interpretation is contrary to the purpose of the Mining Law in that it makes it too easy for claimants to obtain title to public land for purposes other than mining. In addition to being irrelevant to this case, which does not involve patenting, this concern is largely hypothetical, as Congress has for decades imposed a moratorium on processing patent applications. *See, e.g., R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1064 (9th Cir. 1997); Pub. L. 116-94 § 404(a) (Dec. 20, 2019). In any event, it is the interpretation advanced by the Trust that is inconsistent with the purpose of the Mining Law. The Mining Law encourages prospecting for minerals and Interior has acknowledged that much of that effort will ultimately yield no profit. *See supra* pp. 30-31. The view advanced by the Trust could discourage prospecting in areas where valuable minerals are hard to locate or extract. If various miners attempted to locate minerals in a particular area without success, others would have little incentive to try if the cost of the previous efforts would be included in determining whether they had discovered a valuable mineral deposit. The test advanced by the Trust would also be exceedingly impractical to apply. Contrary to the Trust's assertion (at 23), the government does not keep an "accounting ledger" for mineral deposits. For more than 100 years miners prospected and explored without needing to obtain authorization or even notify the government, and even today are not required to provide the government with documentation of any expenses they

have incurred (at least unless or until a mineral examination is conducted). Consequently, neither the Forest Service nor Interior could ever truly know how much money had been spent on previous efforts to locate and develop a particular mineral deposit if that money was spent by someone other than the current claimant. The Trust may wish for Interior to take a different approach, but the purpose of the Mining Law is not disserved by looking at present marketability to determine whether a property right should be recognized. Congress has entrusted Interior with the authority to ensure that the rights of the public are preserved before title to federal lands passes under the Mining Law. *See supra* pp. 6-7, 26-27.

The Trust also contends (at 21-23, 31-33) that Interior's interpretation improperly rewards speculators who imprudently fund mining work hoping for a future bonanza. But—as explained above—it is precisely the purpose of the Mining Law to encourage the exploration of minerals, including exploration that is speculative. *See supra* pp. 4-5, 31; *see also* U.S. Dep't of Agriculture, Forest Service, *Anatomy of a Mine from Prospect to Production*, INT-GTR-35 at 2 (Feb. 1995), *available at* https://www.srs.fs.usda.gov/pubs/7509 ("Only a very small percentage of prospects develop into producing mines."). To address the concerns identified by the Trust, Interior has developed the prudent person test so that it may distinguish situations in which a speculator has identified merely the potential that a mineral deposit might "at some future date" become valuable from those in which a valuable mineral deposit has already been discovered. *Barton*, 498 F.2d at 290; *Barrows*, 447 F.2d at 83; *Garcia*,

184 IBLA at 270; *see supra* pp. 30-32. The government may also initiate contest proceedings and eject those who seek to abuse the public lands, irrespective of how much money has been invested in the search for a valuable mineral deposit. *See, e.g., Coleman*, 390 U.S. at 600-03.

* * * *

In sum, it was not arbitrary for the Forest Service to apply Interior's interpretation when conducting its prudent person analysis. Interior has primary jurisdiction to interpret the Mining Law and it did so here in adjudicative decisions that have the force and effect of law. Interior's interpretation is consistent with the Mining Law. When analyzing the mining claims under the prudent person test, the Forest Service would therefore have no reason to depart from Interior's precedent. The Court should affirm the Forest Service's decision to exclude sunk costs from its analysis as reasonable.

III. Any (hypothetical) error on the part of the Forest Service is harmless.

A court should affirm an agency's action when it finds that error on the agency's part is harmless. 5 U.S.C. § 706; *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009). Harmless error occurs when the error has "no bearing on the procedure used or the substance of [the] decision reached." *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631

F.3d 1072, 1092 (9th Cir. 2011).[10] The Trust contends (at 39-56) that the Forest Service's decision not to consider sunk costs was prejudicial in that consideration of such costs might have led the agency to conclude that the mining claims did not contain a discovery and that a contest should be initiated. The Trust, however, has not met its burden of showing that the alleged error was prejudicial. *Sanders*, 556 U.S. at 409. Assuming (for the sake of argument) that the Forest Service should have considered sunk costs, its failure to do was harmless.

A. The mineral deposit in the mining claims is highly valuable and is expected to yield a substantial profit.

As explained above, p. 14, the Forest Service determined that the mineral deposit contained in the claims underlying the Mine would yield a net sum cash flow of $29,350,736 (if the uranium were sold at the conservative estimate of $56.00 per pound). 2 ER 231. The net sum cash flow "is the stream of income generated by the project as a function of time" and shows whether "the proposed mining operation would result in a profit or loss." 2 ER 231. This sum was derived by assessing the revenue from the production and sale of uranium "within the limits of the claim[s] located" on a yearly basis, and then deducting the cash operation costs of mining,

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[10] The Trust contends (at 50-56) that the district court's harmless error analysis was flawed in that it placed too high a burden on the Trust. The decision shows, however, that the district court applied the correct standard. *See* 1 ER 26-31, 37. In any event, the Court need not consider the question whether the district court applied too strict a standard because review of whether an error is harmless is de novo. *See Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995)

milling, transportation, and administration. 2 ER 231. Other costs (including various taxes and capital investments) were also deducted. 2 ER 231. Among others, these costs included a $1.69 million contingency for unknown expenses. *See* 2 ER 227.

The Forest Service further discounted the net sum cash flow at three different rates to determine the net present value of the cash flow—that is, the present value of cash inflows and outflows from mining operations over a period of time. 2 ER 231. At a discount rate of 10%, the net present value was $22,250,758; at a discount rate of 15%, the net present value was $19,336,119; and at a 20% discount rate, the net present value was $16,755,429. 2 ER 231. Finally, the Forest Service balanced the net present value of expenditures against the net present value of receipts to identify the internal rate of return on the investment. 2 ER 231. The internal rate of return is used as another measure of the economic viability of the project. 2 ER 231. At a price of $56.00 per pound, the internal rate of return for the mining operation was 78%. 2 ER 231. Even at a lower price of $42.00, the Forest Service found that mining would still be profitable with an internal rate of return of 36%. 2 ER 231.

These estimates were conservative in several respects. The mineral examiners used a conservative estimate of the amount of ore that would be produced; additional ore was expected to be found once the mine shaft was completed. 2 ER 224-25. And in estimating the price per pound for uranium, the mineral examiners declined to use the highest price that they could have reasonably relied upon. The mineral examiners calculated an average price for uranium using the 36-month period preceding the

marketability dates. 2 ER 228. When applied to the June 2009 marketability date, this method produced an average uranium price of $70.79 per pound. *Id.* When applied to the January 2012 marketability date, it produced an average price of $49.69 per pound. *Id.* Energy Fuels' long-term contracts between January 2009 and January 2012 varied between $61 and $57 per pound. Its short-term prices were $52 per pound. *Id.* Instead of relying on the highest price per pound, the examiners calculated an average of the price per pound of Energy Fuels' contracts—$56 per pound—and used it in the analysis. The takeaway from the foregoing discussion is that the mineral deposit within the mining claims would result in a very profitable mine and that there is significant room to include additional expenses without changing the determination that the mining claims contained a discovery of a valuable mineral deposit and thus constituted valid existing rights exempt from the withdrawal.

B. The expenses cited by the Trust would not change the determination that the mining claims constitute valid existing rights.

The Trust cites (at 39-56) to three expenses that it asserts would have affected the Forest Service's conclusion. A review of each shows that the Trust has not met its burden to show that the consideration of sunk costs would have had any bearing on the Forest Service's determination.

The Trust first cites (at 40-44, 51-52) to an October 1987 affidavit filed by Energy Fuels' predecessor in the previous litigation stating that $8.2 million would be spent in "exploration and site preparation activities" through 1987. 3 ER 353. The

Trust asserts that, with inflation, the amount would equal $16.1 million in 2012. As an initial matter, the Forest Service looked at validity as of July 2009, when the lands at issue were segregated by publication of the withdrawal proposal. Therefore, for purposes of the argument, the correct sum adjusted for inflation through July 2009 would have been $15.3 million.[11]

There are other problems with the Trust's reliance on this affidavit. First, the affidavit does not establish what portion of the $8.2 million sum was actually spent. 3 ER 351, 353. And there is no way for the Forest Service to know with any certainty because claimants are not required to provide ongoing receipts or accounting for funds spent on exploration. *See supra* pp. 42-43. Second, the affidavit was not meant to be used in a mineral exam to determine whether valid existing rights exist. It accordingly includes expenses that are not typically considered in the prudent person analysis. Of the $8.2 million in expenses, approximately $4 million was apparently incurred between 1978 and 1985, during the "exploration phase" of the Mine. 2 ER 349. Exploration costs are not considered in assessing whether there has been a discovery of a valuable mineral deposit because those costs are incurred in order to *identify* a mineral deposit—before the prudent person test comes into play. *See supra* pp. 30-31; *see also* 2 ER 324-27 (nowhere identifying pre-discovery costs to include in the prudent person and marketability analysis). The affidavit further explained that

[11] See Bureau of Labor Statistics, CPI Inflation Calculator (Apr. 5, 2021) available at https://www.bls.gov/data/inflation_calculator.htm.

$600,000 had been spent on permitting the mine (including developing the plan of operations), and anticipated that $3.5 million would be spent in connection with site preparation activities in 1987. 3 ER 351. The affidavit therefore can be understood to state that Energy Fuels' predecessors spent *at most* $4.1 million in costs that could be included as sunk costs in the Forest Service's analysis. Adjusted for inflation through July 2009, this amounts to $7.65 million. Deducting $7.65 million from the anticipated $29.35 million net sum of cash flow projected by the Forest Service would still yet a net sum of cash flow of $21.7 million.

The Trust contends (at 47-50) that the Forest Service's financial model would not have simply deducted the costs from the net sum of cash flow and that this warrants remand. It is true that mere subtraction of sunk costs from the net sum cash flow oversimplifies the agency's analysis. Nevertheless, this exercise demonstrates that consideration of the costs identified by the Trust would not change the agency's determination. Even assuming the Forest Service applied further discount rates to the net sum cash flow of $21.7 million, the pre-discounted sum is so substantial that it is clear that the mining operations would still be profitable (and the mining claims would still be found to be valid existing rights exempt from the withdrawal). The sum exceeds by several million dollars the low end of the lowest 2012 value that the Forest Service assigned to future cash flows ($16.8 million) and still concluded would be profitable. *See* 2 ER 231. With such a substantial anticipated profit, there is no support

for the Trust's assertion that the methods used by the Forest Service to account for the time value of money would change the agency's determination.

The Trust also asks (at 44-45, 53-54) this Court to consider a 2013 declaration stating that Energy Fuels "spent in excess of $6 million acquiring, developing, permitting, and operating" the Mine (since 1997) and that its predecessors spent more than that. 2 ER 206-07. This declaration is extra-record and therefore outside of the Court's scope of review. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014). It was also prepared for litigation purposes—not for use in a mineral exam—and therefore does not delineate how much of the $6 million would be attributable to exploration (or how much of the $6 million was spent after the relevant marketability dates). Most important, considering both the aforementioned costs identified in the 1987 affidvait *and* the $6 million identified in the 2013 declaration (as the Trust asks) would effectively double-count money that two different companies spent on the same activities. This is because the cost of "acquiring" the Mine necessarily included the costs of acquiring the existing capital improvements. Those capital improvements would be accounted for in the $4.1 million (in 1987 dollars) identified in the 1987 affidavit. Even if it were appropriate to consider sunk costs, the Trust presents no reason why it would be appropriate to count the same costs twice. If anything, this approach would be inconsistent with the prudent person test's focus on objectively evaluating the costs that an ordinary person would spend to develop a paying mine. *See supra* pp. 38-39.

Regardless, assuming the Court were to consider the $6 million that Energy Fuels spent and assuming (most favorably to the Trust) that Energy Fuels spent all $6 million in 1997, this amount would be equivalent to $8.1 million in July 2009. Deducting $8.1 million from the anticipated $29.35 million net sum of cash flow projected by the Forest Service would still yet a net sum of cash flow of $21.25 million. Again, this figure is still several million dollars higher than the lowest 2012 value that the Forest Service assigned to future cash flows.

Finally, the Trust contends (at 45-47) that the exclusion of sunk costs from the analysis becomes more prejudicial when considering the district court's assumption that the Forest Service did not consider approximately $261,000 in environmental expenses (adjusted for inflation) related to monitoring and wildlife conservation measures, 1 ER 21-24, 29-30. As an initial matter, the Forest Service did include these costs in its analysis. While it is true that the agency did not specifically identify individual costs of groundwater monitoring and wildlife conservation measures, the Trust points to no law that required the agency to have done so. BLM's Handbook, which the Forest Service followed, requires the consideration of environmental compliance costs. 2 ER 325. Those costs were included in the agency's consideration of operating costs and costs related to permitting and surface facilities. *See* 2 ER 226-28; 3 SER 769-75. In any event, considering an additional $216,000 (or even $1 million—as the Trust suggests, p. 46) in costs would not affect the agency's determination. Deducting $1 million from the net sum cash flow of $21.25 million

would still yield a net sum cash flow of $20.25 million. This is still almost three million dollars more than the lowest 2012 value assigned by the agency to future cash flows.

As the district court correctly found, the Trust has not shown that consideration of sunk costs would have any bearing on the Forest Service's conclusion that a person of ordinary prudence would be justified in the further expenditure of resources, with a reasonable prospect of success in developing a valuable mine.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Thekla Hansen-Young

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April 5, 2021
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ADDENDUM

committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law. Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

CHAPTER 2—MINERAL LANDS AND REGULATIONS IN GENERAL

§ 21. Mineral lands reserved

In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

(R.S. § 2318.)

CODIFICATION

R.S. § 2318 derived from act July 4, 1866, ch. 166, § 5, 14 Stat. 86.

§ 21a. National mining and minerals policy; "minerals" defined; execution of policy under other authorized programs

The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.

For the purpose of this section "minerals" shall include all minerals and mineral fuels including oil, gas, coal, oil shale and uranium.

It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section.

(Pub. L. 91–631, title I, § 101, formerly § 2, Dec. 31, 1970, 84 Stat. 1876; Pub. L. 104–66, title I, § 1081(b), Dec. 21, 1995, 109 Stat. 721; renumbered title I, § 101, Pub. L. 104–325, § 2(1), (2), Oct. 19, 1996, 110 Stat. 3994.)

AMENDMENTS

1995—Pub. L. 104–66 in last par. struck out at end "For this purpose the Secretary of the Interior shall include in his annual report to the Congress a report on the state of the domestic mining, minerals, and mineral reclamation industries, including a statement of the trend in utilization and depletion of these resources, together with such recommendations for legislative programs as may be necessary to implement the policy of this section."

SHORT TITLE

Pub. L. 91–631, § 1, Dec. 31, 1970, 84 Stat. 1876, provided: "That this Act [enacting this section] may be cited as the 'Mining and Minerals Policy Act of 1970'."

§ 22. Lands open to purchase by citizens

Except as otherwise provided, 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.

(R.S. § 2319.)

CODIFICATION

R.S. § 2319 derived from act May 10, 1872, ch. 152, § 1, 17 Stat. 91.

Words "Except as otherwise provided," were editorially supplied on authority of act Feb. 25, 1920, ch. 85, 41 Stat. 437, popularly known as the Mineral Lands Leasing Act, which is classified to chapter 3A (§ 181 et seq.) of this title.

SHORT TITLE

Sections 22 to 24, 26 to 28, 29, 30, 33 to 35, 37, 39 to 43, and 47 of this title are based on sections of the Revised Statutes which are derived from act May 10, 1872, ch. 152, 17 Stat. 91, popularly known as the "General Mining Act of 1872" and as the "Mining Law of 1872".

§ 23. Length of claims on veins or lodes

Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, located prior to May 10, 1872, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the 10th day of May 1872, 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. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May 1872 render such limitation necessary. The end lines of each claim shall be parallel to each other.

(R.S. § 2320.)

CODIFICATION

R.S. § 2320 derived from act May 10, 1872, ch. 152, § 2, 17 Stat. 91.

§ 24. Proof of citizenship

Proof of citizenship, under 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, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

(R.S. § 2321.)

REFERENCES IN TEXT

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, referred to in text, were in the original "this chapter", meaning chapter 6 of title 32 of the Revised Statutes, consisting of R.S. §§ 2318 to 2352.

CODIFICATION

R.S. § 2321 derived from act May 10, 1872, ch. 152, § 7, 17 Stat. 94.

§ 25. Affidavit of citizenship

Applicants for mineral patents, if residing beyond the limits of the district wherein the claim

is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record or before any notary public of any State or Territory.

(Apr. 26, 1882, ch. 106, § 2, 22 Stat. 49.)

§ 26. Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

(R.S. § 2322.)

CODIFICATION

R.S. § 2322 derived from act May 10, 1872, ch. 152, § 3, 17 Stat. 91.

§ 27. Mining tunnels; right to possession of veins on line with; abandonment of right

Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

(R.S. § 2323.)

CODIFICATION

R.S. § 2323 derived from act May 10, 1872, ch. 152, § 4, 17 Stat. 92.

SHORT TITLE

This section is popularly known as the Tunnel Site Act.

§ 28. Mining district regulations by miners: location, recordation, and amount of work; marking of location on ground; records; annual labor or improvements on claims pending issue of patent; co-owner's succession in interest upon delinquency in contributing proportion of expenditures; tunnel as lode expenditure

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, that is granted a waiver under section 28f of this title, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12:01 ante meridian on the first day of September succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872;

UNITED STATES DEPARTMENT OF THE INTERIOR

Stewart L. Udall, *Secretary*

Frank J. Barry, *Solicitor*

DECISIONS OF THE UNITED STATES DEPARTMENT OF THE INTERIOR

Edited by

E. M. Kimball

Vera E. Burgin

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Therefore, pursuant to authority delegated to the Solicitor by the Secretary of the Interior [sec. 210.2.2A (3) (a), Departmental Manual, 24 F.R. 1348], the action of the Superintendent, disapproving the will dated October 12, 1953, and the codicil thereto dated August 3, 1954, is affirmed, and the appeal is dismissed.

EDWARD W. FISHER,
Deputy Solicitor.

MARKETABILITY RULE

Mining Claims: Determination of Validity

When a nonmetallic mineral is not of extremely wide occurrence and when a general demand for that mineral exists, it may be enough, instead of showing an actually existing market for the products of that particular mine, to show that a general market for the substance exists of a type which a reasonably prudent man would be justified in regarding as one in which he could dispose of those products.

M–36642 *September 20, 1962*

To: ASSISTANT SECRETARY, PUBLIC LAND MANAGEMENT.

SUBJECT: REVIEW OF THE "MARKETABILITY RULE" AS APPLIED TO THE LAW OF DISCOVERY.

Your memorandum to the Secretary requesting a review of this rule has been referred to this office for reply.

After giving careful consideration to this subject, it is our conclusion that there is no basis for making any change in the test which the Department applies to mining claims in determining whether there has been a valid discovery. However, we believe that, since our decisions may have been misunderstood and an undue rigidity may have been ascribed to them, we should explain the position taken.

The test which we apply, the prudent man test, is based upon the provision in R.S. 2319 (30 U.S.C. sec. 22) that only "valuable mineral deposits" may be located. A valuable mineral deposit, it has been held, is one the discovery of which would justify a man of ordinary prudence in the further expenditure of time and money with a reasonable prospect of success in the effort to develop a paying mine.

Castle v. *Womble*, 19 L.D. 455 (1894); *Chrisman* v. *Miller*, 197 U.S. 313 (1905).

The marketability rule about which you have particularly asked our views is merely one aspect of this test. The Department and the courts have, we believe, rightly held that a prudent man would not be justified in developing a mineral deposit if the extracted minerals were not marketable. This marketability test is in reality applied to all minerals, although it is often mistakenly said to be applied solely to nonmetallic minerals of wide occurrence. Many minerals are deemed intrinsically valuable.

An intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral usually meets the test of marketability. On the other hand, where we are concerned with a nonmetalic mineral found in a great many places, application of the prudent man test requires that a market for the mineral be shown by the locator. The extreme example is probably sand and gravel, which are found in every State. There is a demand for sand and gravel, but in many areas the available deposits far exceed the market. In such cases we must insist that the locator show that there is a market actually existing for his minerals. To validate any sand and gravel claim proof of present marketability must be clearly shown.

Other cases fall between the two extremes of the intrinsically valuable mineral on the one hand and sand and gravel on the other hand. Each case must be judged on its own merits. When a nonmetallic mineral is not of extremely wide occurrence and when a general demand for that mineral exists, it may be enough, instead of showing an actually existing market for the products of that particular mine, to show that a general market for the substance exists of a type which a reasonably prudent man would be justified in regarding as one in which he could dispose of those products.

There are two points which we wish to stress. The first is that the marketability test is only one aspect of the prudent man test, albeit a very important aspect since in the absence of marketability no prudent man would seem justified in the expenditure of time and money. The second is that each case must be judged on its own facts. Too rigid application of rules mistakenly interpreted from departmental decisions could lead to incorrect decisions in the field.

FRANK J. BARRY,
Solicitor.

UNITED STATES
V.
ALFRED COLEMAN

A-28557 Decided MAR 27 1962

Mining Claims: Common Varieties of Minerals--Mining Claims: Discovery--Mining Claims: Determination of Validity

To satisfy the requirement for a discovery on a building stone claim located before July 23, 1955, it must be shown that the exposed materials, a common variety of stone, appearing within the limits of a claim could have been extracted, removed, and marketed at a profit prior to that date, and where such a showing is not made the mining claim is properly declared null and void.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

A-28557

United States v. Alfred Coleman	: Contest No. 6833 (Los Angeles); mineral patent application, Los Angeles 0137951. : Placer mining claims held valid in part and null and void in part. : Affirmed in part; reversed in part.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Alfred Coleman has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated June 22, 1960, which modified a hearing examiner's conclusion holding null and void 13 of the 18 placer mining claims and holding the remaining 5 claims to be valid. The Acting Director held an additional claim and 20 acres of another, null and void, thus sustaining the validity of only 3 claims and part of a fourth claim.

The claims, which comprise 720 acres situated in the dry bed of Baldwin Lake and on an adjoining steep mountain, are in the San Bernardino National Forest in California. They were located for quartzite which outcrops on all the claims and is thought to extend 1000 feet below the surface. The claims, designated as the Baldwin Lake Quarry Claims Nos. 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, were located and relocated in the

period 1949-1955. Application for patent was filed in January 1956, and on February 25, 1958, a contest was commenced on charges that the land in the claims is nonmineral; that minerals had not been found in sufficient quantities to constitute a valid discovery; and that $500 had not been expended in improvements on claims 7, 9, 11, 12, 13, 14, 15, 16, 17, 18 and 19. A hearing was held on September 16, 1958.

At the hearing, Coleman testified that he had devoted all of his time and effort to development of the claims during the 10 years since the location. He said, however, he felt that proper development would require removal of rock from the top of the mountain downward and, therefore, he had devoted his efforts to the construction of a home which would permit him to live on one of the claims, to the development of sewage disposal facilities and a water supply for domestic use and for quarrying and processing operations at a later time, and to the building of roads to provide access to the higher claims. He used weathered rock fragments in the construction of his house and in fencing the area of the spring and for fill in the dwelling area. He sold an estimated 1000 tons over the 10-year period, but did not attempt to commence active quarrying operations although he installed some rock processing equipment. He said that he needed title to all of the claims to be able to provide a complete range of colors of ornamental rock for construction use and as security for loans that he might need

in the future, as well as for proper development of the claims. He said he did not want to attempt extensive sales until he was fully equipped to offer a wide selection of colors and certain delivery. Shortly before the hearing, he entered into a lease permitting his lessee to process and dispose of sand, gravel and other severed rock products not including building stone. The lessee testified that he installed his own equipment and that he sold in excess of $4000 worth of sand, gravel, lateral rock for septic tank leaching fields and fill material in the first 2½ months of operations under the lease.

Coleman did not controvert the charge that less than $500 worth of work had been done on many of the claims, but he contended that the requirements of the mining laws had been met by the placing on some of the claims of extensive improvements which are of value to all of them. On cross examination, he gave what he termed as wild estimates of the value of the improvements placed on and of the materials removed from all of the claims. His total valuation for improvements on the 18 claims was $17,200; for materials removed $15,990. He admitted that the improvements on 11 of the claims did not exceed $150 in value. He claimed $1500 on 3 claims, $4000 for roadwork on one claim; and $6500 for his combined home, garage and shop on one of the claims. On the remaining 2 claims, he gave values of $200 and $750. He also admitted no removals of rock or rock products from 6 of the claims; removals valued at $60 from one claim;

from $100 to $120 from 3 claims; $240, $250 and $350 from 3 others; $1350, $1500 (from each of 2 claims) and $2000 from 4 more; and $8400 from one over the 10-year period.

The government's witnesses testified that there are large quantities of quartzite of various colors on the claims and in the area of 28,000 acres of which the claims are a part; that such rock can be used for construction purposes; that there is not a great demand for it because it is very heavy and, therefore, expensive to handle; that it splits unpredictably so that there is a great deal of waste which can be utilized for gravel only with considerable expense for crushing because of its hardness; and that it cannot be split into thin layers for facing and surfacing, which greatly increases the weight of the quantity of material required for covering a given area over the requirements for other accessible rock. Coleman's estimate of sales amounting to $12,000 over a 10-year period was not questioned, nor his report of sales amounting to $1025 in 1957, but a government's witness stated that he felt that the roads on the claims evidenced lesser values than Coleman claimed. He concluded that the possible demand for rock from the claims and the evident increasing difficulty of producing disposable rock as the more usable fractions are removed could not justify a prudent man in spending time and money with a reasonable chance of success in developing a valuable enterprise.

The hearing examiner summarized all of the evidence presented at the hearing, noting the very widespread occurrence of the stone claimed as a discovery, the limited potential market and the paucity of the claimant's sales. He concluded, however, that the Colemans[1/] had "established a limited market for the types of building stone found upon their claims" and had in good faith developed claims numbered 1, 4, 5, 8 and 10. He, therefore, declared these 5 claims validated by discovery and the 13 other claims null and void. On appeal, the Acting Director noted that Coleman's sales have not afforded him any recompense for his continuous labor over a 10-year period, but concluded that there is a market for a limited amount of building stone from 3 claims and a portion of one other claim that are most fully developed, and from which the bulk of his sales have been made, so that continued sales at the rate shown for the first 10 years of operations will produce a profit over and above the value of Coleman's labor in removing the stone from these claims. Accordingly, he approved the examiner's judgment as to a valid discovery on claims numbered 1, 5, 8 and the portion of No. 10 described as the $N\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$ of section 7, T. 2N., R. 2 E., S. B. M. He added claim No. 4 and the west one-half of claim No. 10 to the list of null and void claims.

1/ The contest was brought against Mr. and Mrs. Coleman but Mrs. Coleman died while the appeal was pending before the Director.

In its successive appeals from the validation of some of the claims, the Forest Service has contended that there has been no discovery of a valuable mineral deposit on any of them because of Coleman's inability to sell anything removed from the claims at a price which includes the reasonable value of his labor. It points out that because the claims are located in a national forest, the evidence of their validity should be clear and unequivocal, citing the Department's decision in United States v. Duvall, 65 I. D. 458, 661 (1958).

In his appeals, Coleman contends that the charges against his claims of nonmineral land and no discovery have no validity in view of the 720 acres of solid rock fully exposed to view and that his evidence of improvements shows clearly that sufficient expenditures have been made on some of the claims for the benefit of all of the claims. He urges that the charges be dropped and that the land office conclude the patent proceedings without further delay.

It is well-established that a mining claimant is entitled to a patent to his mining claim if he has made a discovery of a valuable mineral deposit within the limits of the claim (30 U. S. C., 1958 ed., secs. 23, 35). The act of August 4, 1892 (30 U. S. C., 1958 ed., sec. 161), expressly authorizes the location of mining claims for building stone. Therefore, it was essential in this contest that Coleman show that he has made a discovery of building stone within the limits of his claims. This Department held early

in the history of proceedings under the mining laws that a validating discovery is shown by reasonable evidence of a finding of minerals of such 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 (Castle v. Womble, 19 L. D. 455 (1894)), and this standard has been sanctioned by the courts. Chrisman v. Miller, 197 U. S. 313 (1905); Cameron v. United States, 252 U. S. 450 (1920); Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959). When the mineral claimed as a discovery is one of wide occurrence the Department has held that the characterization of a deposit of such material as a valuable mineral is dependent upon a showing that it can be extracted, removed and marketed at a profit. Layman et al. v. Ellis, 52 I. D. 714 (1929); United States v. Barngrover et al., 57 I. D. 533 (1942); see also Ickes v. Underwood, 141 F. 2d 546, 549 (D. C. Cir. 1944). To justify his possession of public land, the mineral locator must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand and other factors, a deposit of materials such as building stone or sand and gravel is of such value that it can be processed, removed and disposed of at a profit. Solicitor's opinion, 54 I. D. 294, 296 (1933); United States v. Strauss et al., 59 I. D. 129 (1945); United States v. Foster et al., 65 I. D. 1 (1958), aff'd Foster et al. v. Seaton, supra. See also United States v. Estate of Hanny, 63 I. D. 369,

373 (1956); United States v. Black, 64 I. D. 93, 96 (1957); United States v. Fife et al., A-28386 (September 19, 1960).

Furthermore, since the Congress withdrew common varieties of building stone, sand and gravel from location under the mining laws on July 23, 1955 (30 U. S. C., 1958 ed., sec. 611), it was incumbent upon Coleman to show that all the requirements for discovery of a valuable mineral deposit, including a showing that these materials could have been extracted, removed, and marketed at a profit, had been met by that date. United States v. Fife, et al., (supra).

In view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a "common variety" within the meaning of the act.

It is very clear that Coleman did not make the showing required as to the undeveloped claims which the Acting Director declared to be null and void. Whether expenditures for improvements on other claims may or may not be credited to these claims is immaterial because it is abundantly clear that there was no marketing of any products from these claims in 1955 or even in 1958 when the hearing was held. Coleman presented evidence of sales from the four claims upon which the bulk of his improvements were placed. However, he admitted that he did not make any profit on his rock sales. He testified to estimated removals of rock, not all of which was sold, valued at $15,990. He also testified to labor on the claims (more than 3000 days from 12 to 18 hours in length at

$3.50 per hour) of the value of at least $157,500. (Tr. 116, 117.)[2/] It is not clear that his estimate of the value of his labor included the costs of obtaining and operating the equipment by which it was accomplished; in the absence of an explanation it is reasonable to assume that $3.50 per hour was not intended to cover the use of trucks, bulldozer and blasting equipment. But even if it were possible to amortize the costs of acquiring his heavy equipment, the great disparity between his own estimate of the value of the mineral actually marketed from the claims and the costs of doing so indicates the absence of any element of profit.

The only issue in dispute at the hearing on September 16, 1958, was the existence of a market for profitable sales before July 23, 1955. The testimony of the government's mineral examiner, describing an examination of the claims in Coleman's company and of his sales records, and that of a producer and distributor of stone products, describing the market for rock and stone in southern California, are sufficient to constitute a prima facie showing of invalidity. The burden was upon Coleman to show by a preponderance of the evidence that each of his claims was validated by a discovery of a valuable mineral deposit within its boundaries. Foster v. Seaton, supra. He was required to show that by reason of all pertinent factors, including the existence of a present demand before July 23,

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2/ This reference is to the pages of the transcript of the testimony offered at the hearing.

1955, the deposit upon which his claim of discovery was based could be mined, removed and disposed of at a profit. See United States v. Philip Jungert, A-28199 (April 14, 1960); United States v. Jacobo Armenta et al., A-28248 (June 22, 1960). I am unable to find evidence which supports such conclusion as to any of the claims.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Acting Director is affirmed in so far as that decision held 14½ of Coleman's Baldwin Lake quarry mining claims null and void and reversed in so far as it held 3½ of his claims validated by discovery. All of the Baldwin Lake quarry placer mining claims are hereby held to be null and void.

Edward W. Fisher

DEPUTY Solicitor

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

HEARINGS DIVISION
6432 FEDERAL BUILDING
SALT LAKE CITY, UTAH 84138-1194
(PHONE: 801-524-5344)

February 23, 1989

UNITED STATES OF AMERICA,	:	Contest Number I-20886
	:	
Contestant	:	Involving the Golden Bear
	:	Nos. 1 and 2 lode
v.	:	mining claims and the
	:	Lost Dutchman and
JAMES COLLORD and	:	Golden Bear Millsites,
MARJORIE COLLORD,	:	situated in Sections 5,
	:	7, and 8, T. 21 N.,
Contestees	:	R. 11 E., Boise Meridian,
- - - - - -	:	Valley County, Idaho,
	:	within the Payette
IDAHO CONSERVATION LEAGUE,	:	National Forest.
INC.,	:	
	:	
Intervenor-Protestant	:	

DECISION

Appearances: Erol R. Benson, Esq., Office of the General Counsel, U.S. Department of Agriculture, Ogden, Utah, for contestant;

Jeffrey C. Fereday, Esq., Givens, McDevitt, Pursley, Webb & Buser, Boise, Idaho, for contestees.

James C. Weaver, Esq., Law Offices of Steven J. Millemann, McCall, Idaho, for intervenor-protestant.

Before: Administrative Law Judge Sweitzer

This proceeding involves the validity of two lode mining claims and two associated millsite claims located under the General Mining Law of 1872, as amended, 30 U.S.C. § 22 et seq. within the Payette National Forest, Valley County, Idaho. The area including these claims was designated as part of the Frank Church--River of No Return Wilderness Area pursuant to Section 3 of The Central Idaho Wilderness Act of 1980, Pub. L. No. 96-312, as amended,

94 Stat. 498, and withdrawn from mineral entry as of midnight December 31, 1983, pursuant to Section 4(d)(3) of the Wilderness Act of 1964, 78 Stat. 890, 894-895. Contestees' application for patent to these claims is pending.

The United States of America, acting by and through the Idaho State Office, Bureau of Land Management, U.S. Department of the Interior, at the request and on behalf of the U.S. Forest Service, Department of Agriculture, initiated this proceeding by contest complaint dated February 25, 1987, pursuant to 43 CFR 4.451. The complaint alleges:

> a. Minerals have not been found within the limits of Golden Bear No. 1 and Golden Bear No. 2 lode claims in sufficient quantity and quality to constitute a valid discovery within the meaning of the mining laws.
>
> b. The Golden Bear No. 1 and Golden Bear No. 2 lode claims do not exhibit a discovery of a valuable mineral deposit as of the January 1, 1983[1] closure date of the Frank Church--River of No Return Wilderness and as of the June 20, 1985, mineral examination date.
>
> c. The Lost Dutchman Millsite and Golden Bear Millsite have no reduction mill or reduction works thereon.
>
> d. The Lost Dutchman Millsite and the Golden Bear Millsite are not needed, used, or occupied by the claimants for mining, milling, processing, beneficiation purposes, or other operations in connection with any valid mining claim.
>
> e. Neither the Lost Dutchman Millsite nor the Golden Bear Millsite contains a custom mill or reducing works.

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[1] The date properly should be January 1, 1984, in accordance with the provisions of Section 4(d)(3) of the Wilderness Act of 1964. See, e.g., Tr. 307, 315-316; see also, Tr. 698. Contestees do not appear to have been prejudiced in the presentation of their case by the erroneous date.

Background

James Collord located the subject lode mining and millsite claims on September 1, 1979, within the Payette National Forest. At the time Mr. Collord located the claims they were situate in an area of the Forest designated as "primitive." Subsequently the area has been redesignated "wilderness." Under both classifications access has been restricted and proposals to construct a road to the claims (over a distance of some 10 miles) have been rejected.

Contestees applied for patent to the claims in May 1984. On January 12, 1987, the Idaho Conservation League, Inc., filed a protest against issuance of patent to the claims. Subsequently, the Wilderness Society also filed a protest against the Collords' patent application on January 15, 1987, as did the Colombia River Inter-Tribal Fish Commission on February 23, 1987.

Meanwhile, based upon examinations of the claims conducted by its forest mineral examiners, the U.S. Department of Agriculture recommended by letter dated February 18, 1987, that the claims not be cleared for patent and that validity contests should be initiated against them. The validity contest complaint issued February 25, 1987.

Although none of the protestants was an initial party to the contest, each was mailed a courtesy copy of the complaint. Only the Idaho Conservation League (ICL) sought and was granted permission to intervene.[2]

Hearing was held pursuant to notice in Boise, Idaho, on June 20-22, 1988, and July 13-15, 1988, inclusive. At the close of the hearing, the participants were granted an opportunity to file written briefs. Both parties have done so; ICL has merely indicated its support for contestant's position. Subsequently, contestees proposed several corrections to the transcript, which were approved by my Order dated September 7, 1988. Thereafter, contestees also sought permission to file proposed findings of fact and

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[2] ICL petitioned for permission to intervene as a party to the contest on April 27, 1987. During the extensive briefing of the issues, ICL clarified that it did not seek to intervene as a contestant but rather as a protestant. My Order dated July 2, 1987, granted limited intervention, sufficient to participate in the proceedings, but without deciding if such intervention would afford ICL standing to appeal any ruling contrary to its perceived interests. (See also Tr. 1265.)

conclusions of law after the time set for filing briefs had run. My Order dated October 6, 1988, afforded all parties an opportunity to file proposed findings of fact and conclusion of law. Only contestees did so. In the interests of clarity and brevity, I decline to address each proposed finding and conclusion separately. United States v. Corns, 53 IBLA 5 (1981). Where appropriate, portions of the parties' briefs and proposed findings may be incorporated herein verbatim without attribution.

Applicable Law

A mining claimant acquires no vested rights to a mining claim vis-a-vis the United States unless and until the claim is shown to be supported by a discovery of a valuable mineral deposit within the boundaries of the claim. 30 U.S.C. § 23; United States v. Coleman, 390 U.S. 599 (1968). The mining claimant must establish a discovery for each mining claim he seeks to validate. United States v. Williamson, 45 IBLA 264, 87 I.D. 34 (1980). In the lexicon of mining law, a "discovery" is the exposure of a locatable mineral deposit that contains commercially valuable mineralization in such quantity and of such quality as to warrant the further expenditure of labor and means by a person of ordinary prudence in the reasonable expectation of developing a profitable mining operation. Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455 (1894). This so-called "prudent man test" has been refined by the so-called "marketability test" (See, e.g., Solicitor's Opinion, 54 I.D. 294 (1933)) which requires that the commercial value of the mineral deposit presently exposed exceed the costs of extracting, processing, transporting and marketing the deposit. The "marketability test" has also been approved by the highest court. United States v. Coleman, 390 U.S. 599 (1968).

The "prudent man test" is objective, not subjective. Although a particular mining claimant may be willing to work a claim for a meager return, it does not follow that a person of ordinary prudence would be justified in so doing. United States v. Johnson, 59 IBLA 207 (1981); United States v. Slater, 34 IBLA 31 (1978); United States v. Barrows, 76 I.D. 299 (1969), aff'd sub nom., Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971).

A sharp distinction is drawn between the discovery of a valuable mineral deposit and the mere detection of a valuable mineral or mineralization that may warrant further prospecting or exploration with the hope of finding a valuable deposit. Clearly, a discovery has not been made under the mining law simply because the facts might warrant

the continued search for such a deposit or further efforts to ascertain whether the extent and quality of mineralization might be sufficient to justify mining. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Wood, 51 IBLA 301, 87 I.D. 628 (1980).

Where land is withdrawn from location under the mining laws subsequent to the location of a mining claim, in order for the claim to be valid, all requirements of the mining laws, including discovery of a valuable mineral deposit, must have been met as of the date of the withdrawal (and also as of the date of the hearing).[3] The rule was set out with some elaboration in United States v. Wichner, 35 IBLA 240 (1978):

> The cases are legion which firmly establish the principle that where a mining claim occupies land which has been subsequently withdrawn from the operation of the mining laws the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as of the date of the hearing. * * * If the claim was not supported at the dates of the segregation and withdrawal by a qualifying discovery of a valuable mineral deposit, the land within its boundaries would not be excepted from it and the claim could not thereafter become valid even though the value of the deposit increased due to a change in the market.[4]

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[3] The Board recognized in U.S. v. Whittaker (On Reconsideration), 102 IBLA 162 (1988) that in a patent contest, such as this, the inquiry properly focuses on the date of withdrawal and the date of issuance of final certificate, if any. If no final certificate has issued, the inquiry properly focuses on the dates set forth in the text accompanying this note.

[4] This statement of the law has since been refined to allow for historic price and cost factors as in the cyclic fluctuations in the value of gold. In re Pacific Coast Molybdenum, 75 IBLA 16, 90 I.D. 352, 359-361 (1983). Furthermore, the "prudent man" test does not require a guarantee of success, but only a reasonable prospect of developing a market and paying mine. United States v. Foresyth, 100 IBLA 185, 227, 94 I.D. 453 (1987). Nevertheless, it remains true that a qualifying discovery must be made prior to the date of withdrawal.

Id. at 243; see also United States v. Pool, 74 IBLA 37, 41 (1983), citing Cameron v. United States, 252 U.S. 450 (1920). The effect of a withdrawal of public land is to preclude any further acquisition of rights by private parties in such lands. See United States v. Heirs of John D. Stack, A-28157 (March 28, 1960).

When the Government contests the validity of a mining claim on the basis that there is no discovery of a valuable mineral deposit, it bears only the initial burden of establishing a prima facie case that such a discovery has not been made within the boundaries of the claim. United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir.), cert. denied sub nom., Roberts v. United States, 423 U.S. 829, reh'g denied, 423 U.S. 1008 (1975); United States v. Springer, 491 F.2d 239 (9th Cir.), cert. denied, 419 U.S. 834 (1974); United States v. Jones, 67 IBLA 225 (1982). The Government establishes a prima facie case for lack of discovery when a qualified mineral examiner testifies to the effect that he or she has examined the claim(s) and concludes in light of the "prudent man" and "marketability" tests that the mineral values are insufficient to support the discovery of a valuable mineral deposit as of any or all pertinent time(s). United States v. Husman, 81 IBLA 271, 275 (1984); United States v. Imperial Gold, 64 IBLA 241 (1982); United States v. Hooker, 48 IBLA 22 (1980).

"Prima facie" has been declared to mean that the case is adequate to support the Government's contest of the claim and that no further proof is needed to nullify the claim. If the Government shows that even one essential criterion of the test of validity was not met, it has established a prima facie case. United States v. Taylor, 19 IBLA 9, 28, 82 I.D. 68, 75 (1975).

In examining a mining claim, a Government mineral examiner is obliged neither to explore or sample beyond the mining claimant's workings nor to perform sufficient work to reach a definite conclusion as to whether or not a valuable mineral deposit exists somewhere within the limits of the mining claim. If a valuable mineral deposit does exist, it is incumbent upon the claimant to discover it. The function of the Government mineral examiner is merely to verify, if feasible, whether the claimant has, in fact, made a discovery of a valuable mineral deposit. Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); United States v. Chappell, 72 IBLA 88 (1983). Where a claimant fails to keep his discovery points open and safely available for sampling by the Government's examiner, or declines to accompany the examiner on the claim, he assumes the risk that the Government examiner will be unable to verify the asserted discovery of a valuable mineral deposit. United States v.

Russell, 40 IBLA 309 (1979), aff'd sub nom., Russell v. Peterson, 498 F. Supp. 8 (D. Ore. 1980); United States v. Knecht, 39 IBLA 8 (1979); United States v. Bechthold, 25 IBLA 77 (1976).

After the Government has established its prima facie case, the mining claimant, who seeks the benefits of the mining law, then bears the ultimate burden of establishing by a preponderance of the evidence that the claimant's claim does meet the requirements of the provisions of the mining law that have been placed in issue by the evidence. McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980), cert. denied sub nom., McCall v. Watt, 450 U.S. 996 (1981); Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); United States v. Springer, 491 F.2d 239 (9th Cir.), cert. denied, 419 U.S. 834 (1974); United States v. Porter, 37 IBLA 313 (1978); United States v. Hooker, 48 IBLA 22 (1980). The reason is that:

> While, on the face of it, it may appear that the United States, when it initiates a contest of the validity of a mining location, is "the proponent of a rule or order," this is not the law. Many public land laws, including the mining laws, give a person a right to initiate a claim to the public lands by his ex parte act of entry. If he thereafter complies with all requirements of the law, his initial entry may ripen into an enforceable claim to title as against the United States. The entryman is the true proponent of the rule or order * * *.

United States v. Springer, 491 F.2d at 242 (citations omitted); see also 5 U.S.C. § 556(d).

Provided that there has been an exposure of a valuable mineral on the claim, geologic inference may be used to establish that the extent of mineralization on the claim is sufficient to meet the "prudent man" test and thereby prove that the claimant has made a discovery of a valuable mineral deposit on the claim. The Board reconciled and clarified its earlier statements of the rule in United States v. Feezor, 74 IBLA 56, 90 I.D. 262 (1983), modified in other respects by U.S. v. Feezor (On Reconsideration), 81 IBLA 94 (1984).

The Board distilled the rule in United States v. Dresselhaus:

> [Geologic inference] can be used to show the extent of the deposit. The claimant must be able to demonstrate two important physical facts in

> order to use geologic inference. The first is the existence of mineralization on the claim of sufficient quality to warrant development of a mine. The second requirement is structural evidence on the claim which would justify the inference of a known ore body of sufficient quantity to justify a prudent man in expending labor and means with a reasonable prospect of success in developing a paying mine. See United States v. Feezor [supra] and cases cited therein.

United States v. Dresselhaus, 81 IBLA 252, 268 (1984) (emphasis added). Thus, even if the mineral deposit on which the validity of the claim is based has been exposed, geologic inference alone cannot establish continuity of values at depth. Geologic inference may be used, however, in conjunction with other evidence (e.g,. physical structure) to establish those values. Feezor, 74 IBLA at 78, 79.

There are two classes of millsites which can be located and patented under the millsite statute, 30 U.S.C. § 42. The first class is a millsite which must be used or occupied by the proprietor of a lode or placer claim for mining, milling or other operations in connection with such proprietor's specific claim or claims. The second class is a millsite which has upon it a quartz mill or reduction works, not necessarily associated with any particular mining claims. To establish the validity of a millsite of the first class, the owner must hold a valid mining claim in association with the millsite and the millsite must be used or occupied distinctly and explicitly for mining and milling purposes in connection with the valid mining claim with which it is associated. To establish the validity of a millsite of the second class, there must be a quartz mill or reduction works located on the lands. United States v. Dietemann, 26 IBLA 356 (1976). The owner of the quartz mill or reduction works need not be the owner or proprietor of an associated mining claim. United States v. Cuneo, 15 IBLA 304, 81 I.D. 262 (1974); Alaska Copper Company, 32 L.D. 128 (1903).

Contestant's complaint charges that contestee has not met the requirements of either class of millsites under the statute. Contestee's amended answer admits there is no quartz mill or reduction works on either millsite claim. Therefore, the validity of the millsite must be determined by whether it meets the requirements of the first class of millsites, as set forth above.

When the Government contests the validity of a millsite of the first class, the contest complaint implicitly raises

the issue of the validity of any mining claims associated with the millsite. United States v. Paden, 33 IBLA 380 (1978). In this proceeding the question of validity is also raised explicitly by the contest complaint.

The contestees' anticipation, even if warranted, that if and when a sufficiently valuable mineral deposit is found within an associated lode mining claim, the millsite claim will then be used for mining or milling purposes does not satisfy the requirements of the law.

> The act clearly contemplates that * * * [at the time of contest proceedings], the land in question is used or occupied for mining or milling purposes. The act does not contemplate the performance of conditions subsequent, or the future compliance with law. No mill site entry should be allowed unless it is shown that the conditions of the law have been complied with.

Hudson Mining Company, 14 L.D. 544 (1892). "[A] vague intention to use the land at some future time does not satisfy the requirements of the statute." United States v. Werry, 14 IBLA 242, 81 I.D. 44, 49 (1974).

Even if an associated mining claim is found to be valid, the millsite will nevertheless be invalid if it is found that it is not being used or occupied distinctly and explicitly for mining and milling purposes. Alaska Copper Company, 32 L.D. 128 (1903). In that case the Acting Secretary asserted:

> A mill site is required to be used or occupied distinctly and explicitly for mining or milling purposes in connection with the lode claim with which it is associated. This express requirement plainly contemplates a function or utility intimately associated with the removal, handling, or treatment of the ore from the vein or lode. Some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy the mill site * * * to come within the purview of the statute.

Id. at 131 (emphasis in original).

With respect to a validity contest against a millsite claim, the Government also has the initial burden to present sufficient evidence to establish a prima facie case of invalidity. After the Government has made such a prima

facie case of invalidity, the claimant has the burden of overcoming the contestant's prima facie case by presenting sufficient evidence to show by a preponderance that the claimant's claim does satisfy the requirements of the mining laws that have been placed in issue and that the claim is valid. United States v. Paden, 33 IBLA 380, 383-384 (1978); United States v. Swanson, 14 IBLA 158, 180, 81 I.D. 14 (1974).

Discussion

There is no dispute that the several samplings conducted on the Golden Bear claims have yielded fairly consist high values of gold on the surface (see, e.g., Exhs. 6, 49A, H, I, and K). There is little doubt that the vein extends longitudinally some 1,100 or more feet through the lode claims. Contestee believes the vein is continuous; contestant believes the vein may be broken at the so-called "unnamed drainage" (see Tr. 206-210). Mr. Collord himself testified that "most of the vein length has to be extrapolated" (Tr. 648).

In any case, there is no doubt that contestees have found a valuable mineral on each of the two lode claims. The question to be answered is whether they have discovered a valuable mineral deposit. The answer depends upon an analysis of what ore reserves may be shown to be present.

The U.S. Geological Survey and the Bureau of Mines use the following definitions in classifying reserves:

> Measured.--Reserves or resources for which tonnage is computed from dimensions revealed in outcrops, trenches, workings, and drill holes and for which the grade is computed from the results of detailed sampling. The sites for inspection, sampling, and measurement are spaced so closely and the geologic character is so well defined that size, shape, and mineral content are well established. The computed tonnage and grade are judged to be accurate within limits which are stated, and no such limit is judged to be different from the computed tonnage or grade by more than 20 percent.
>
> Indicated.--Reserves or resources for which tonnage and grade are computed partly from specific measurements, samples, or production data and partly from projection for a reasonable distance on geologic evidence. The sites available for inspection, measurement, and

> sampling are too widely or otherwise inappropriately spaced to permit the mineral bodies to be outlined completely or the grade established throughout.
>
> Demonstrated.--A collective term for the sum of measured and indicated reserves or resources.
>
> Inferred.--Reserves or resources for which quantitative estimates are based largely on broad knowledge of the geologic character of the deposit and for which there are few, if any, samples or measurements. The estimates are based on an assumed continuity or repetition, of which there is geologic evidence; this evidence may include comparison with deposits of similar type. Bodies that are completely concealed may be included if there is specific geologic evidence of their presence. Estimates of inferred reserves or resources should include a statement of specific limits within which the inferred material may lie.

Principles of the Mineral Resources Classification System, Geological Survey Bulletin 1450-A at A3-A4, quoted in United States v. Feezor, 74 IBLA at 84; see also Exh. P at p. 472.[5]

Both measured reserves and indicated reserves may be used to establish sufficient quantity and quality of a mineral deposit to constitute a discovery. United States v. Hooker, 48 IBLA 22, 35-36 (1980). Subsequently the Board also ruled that:

> To the extent that such an estimate [of inferred reserves] is based on assumed continuity or repetition for which there is geologic evidence, we feel such a[n inferred] reserve base can properly be considered [as evidence of a discovery * * * but] an "inferred" reserve whose existence is dependent solely on geologic inference cannot serve as a predicate for finding quantity and quality sufficient to support a discovery.

United States v. Feezor, 74 IBLA at 85 (emphasis in original).

---

[5] See also proposed Exh. Q at pp. 486-488, but contestant did not offer "Exh. Q" into evidence; Tr. 1218-1219, 1226-1227.

Both Mr. Collord and the Forest Service have calculated reserves on the claim based on the rule of thumb that the depth of the vein is estimated to be approximately one-half the length of the vein (see, e.g., Tr. 1130; Exhs. 16, 49 at p. 4, 73 and 73A at 21). Their estimates of recoverability and profitability have varied depending on other assumptions made. Nevertheless, all estimates of ore reserves have been made without any real evidence of depth.

For example, Exhibit 66A, which was prepared by E.J. Collord during the hiatus in the hearing of this contest, concludes, inter alia: "There are no underground workings to sample which would have provided third dimension data points. * * * Ore reserve calculations have been completed based on the surface sample values and diversions * * *." (Id. at 18; see also Tr. 1135). Mr. E.J. Collord has a master's degree in geology and substantial experience in mining. He testified that estimates of the ore reserves on the claim are reliable and they are properly categorized as "probable."

CROSS-EXAMINATION

BY MR. WEAVER:

Q. Do you recognize that?

* * * * * * *

THE WITNESS: [E.J. Collord] Yes, it's titled, "Mining Geology by Hugh Exton McKinstry, Professor of Geology, Harvard University, copyright 1948.

Q. MR. WEAVER: Well, do you know if there's a later edition to that volume or not?

A. No, I do not. * * *.

Q. Right. Could you turn to Page 372?

A. I'm there.

Q. Okay. At the -- near the bottom of the page there's a paragraph heading entitled "Empirical Rules for Depth Extension"?

* * * * * * *

A. Would you like me to read it?

Q. Go ahead.

A. "Certain rules have been used in mine valuation as a basis for calculations that involve probable extension of an individual oreshoot in depth. It is common practice, in estimating the amount of ore that may be counted on with reasonable safety, to assume that the ore will extend downward for a distance of at least equal to half the horizontal length of the shoot as exposed on the bottom level. This assumption has some support from actual experience and is a safe guide in the sense that if applied to the large number of ore bodies in different districts it will not lead to an overestimate. However, it can be badly wrong in individual cases and it can lead to seriously incorrect conclusions if used for the purpose of predicting the maximum amount of ore that exists." * * *

* * * * * * *

Q. BY MR. WEAVER: My next question is, do you agree with that statement you just read?

A. Generally, yes.

Q. Okay. In what case do you disagree with it, if any?

A. The practice of geology and practice of ore reserve estimation is essentially an art and it is dependent upon individual experience levels, individual knowledge of ore body throughout time, and is personal experience.

The ore reserves have been classified at various times in various ways and essentially ore reserves are essentially a spectrum from something that's unknown, or not only speculative to something you have high confidence in, and upon that continuum, you have to apply your knowledge of a particular deposit. And you also have to look at who you are and who is looking at it and for what purpose. That is a broader definition of my estimate of all ore reserve estimation.

Q. Now, in the case of the Golden Bear, you state at Page 4 of your Exhibit 66A your Golden Bear project evaluation feasibility study -- excuse me, at Page 5 you state that, "The reserves on the Golden Bear would best be classified as

probable as there are no underground workings in which to sample the vein at reasonable depth." You make that statement after having quoted, I take it, from a Forest Service publication called "Anatomy of a Mine" in which the definitions are quoted for "Proven or Measured" reserves "Probable or Indicated" reserves and "Possible or Inferred" reserves.

My first question regarding that statement in your report is, why do you consider the Golden Bear reserves as best classified as probable using those three definitions?

* * * * * * *

[MR. E.J. COLLORD:] I chose the category of probable for Golden Bear reserves because I felt there was sufficient data, admittedly only surface data, and there is sufficient geologic evidence the vein was continuous. There is sufficient geologic evidence, the wall rock suggested, that the vein was continuous. There was also sufficient evidence that this was a mesothermal vein, which, by character, has great potential for continuity, both horizontally and vertically. And based on that, and the amount of sampling that was done, I would conclude that that probable category, admitting that the ore reserve essentially ranges from category of possible through proven, and you can establish, if you wish, a personal opinion on where you are in the probable or proven or possible range.

So, again, it is an individual judgment. It is an individual professional judgment, and by my professional judgment I placed it in the probable categories at this stage. Admittedly underground workings, less so drill holes, would provide additional information, no question about that. And I think if the situation had been different there would be a tunnel on that vein.

Q. That would be my next question. You have told me that there are no samples whatsoever at depth, at least at any depth greater than the bottom of a sample hole currently exist. No samples whatsoever of that vein other than those at depth?

A. That is correct.

* * * * * * *

Q. Throughout your testimony you, and I believe Mr. Kemp who -- correct me if I'm wrong, used the word "inferred" throughout in reference to your estimate of depth of this vein, is that accurate?

A. Infer is a general term, yes.

Q. Okay. Does the fact that the definition of possible under the Anatomy of a Mine definition, has in parenthesis the word "inferred" give you any cause to believe that reasonable minds, be it reasonable geologic minds, might differ as to whether or not the depth of Golden Bear vein is inferred or -- or possible or probable?

A. Absolutely. Every professional is entitled to his opinion based on his experience and his observation, no question about that.
* * *.

Tr. 1129-1135.

Forest Service mineral examiner Carol Thurmond disagreed:

Q. BY MR. BENSON: Based upon your review of the ore deposit, testimony you've heard and the definitions which you find in the publication before you, will you tell us in which category you would place the Golden Bear vein as far as ore blocking is concerned?

A. [BY MS. THURMOND:] Based on that, and on the description in this Contestant's Exhibits P, I would say that the Golden Bear vein would be classified as inferred ore. This is from the description on Page 472.

Q. Are you able to classify it under any of the categories shown on Page 470?

A. Yes. Based on the categories shown on Page 470 or for positive ore which is the same as ore blocked out, second category probable ore and third category is possible ore, and I feel like the Golden Bear vein fits that description more closely than the other two.

Q. Which description is that description?

A. The description for possible ore. This is, "Ore exposed on only one side, its other dimensions being a matter of reasonable projection. Some engineers use an arbitrary extension of the 50 to 100 feet. Others assume extension for half the exposed dimension."

This is similar to the description which I -- or the term I used a few months ago from Page 472. I said I considered the vein on Golden Bear to be inferred ore. The description for inferred ore is that, "Ore for which quantitative estimates are based largely on broad knowledge of the geologic character of the deposit for which there are few, if any, samples or measurements. The estimates are based on an assumed continuity or representation for which there is geologic evidence; this evidence may include comparison deposits of similar type." Then it goes on to discuss bodies that are concealed.

I feel like the following paragraph is important also and it says, "This classification leaves room for considerable deduction from geological background. It is well suited to its intended purpose, the estimation of the reserves of a district or nation. It is less satisfactory for valuing a single mine."

Tr. 1217-1218.

Based on the absence of any significant sampling below the surface and the absence of any regularly spaced sampling program along the entire length of the vein, I find that the estimate of ore reserves is properly classified as "inferred" according to the U.S. Geological Survey definition set forth above.

The next question to be addressed is whether or not there is sufficient geologic evidence to support the inference of values and quantity at depth. That is to say, is the inference sufficiently reliable to show a discovery of a valuable mineral deposit?

At the hearing, testimony from Mr. James Collord indicated that at one time there may have been some underground work on the vein:

Q. BY MR. WEAVER: Mr. Collord, I'm going to hand you one of your Exhibits now, it's Contestees' Exhibit No. 9. It's admitted into evidence, and ask you a couple of questions about

it. It is a letter from you to Earl Dodds dated January 19th, 1982, is that right?

A. [BY JAMES COLLORD:] January 19th, 1982 is correct.

Q. Okay. The last paragraph if I read it correctly, you're telling Earl Dodds that the Golden Bear would really make a, I think you meant, "real good small gold mine if these values continued down dip to the 300 foot level;" is that correct?

A. That's correct. That's what I have here.

Q. Okay. Did you know, as of January 19th, 1982, whether the values continued down to the 300 foot levels?

A. Yes, I did.

Q. How did you know that?

A. Because there's another vein. There's another opening on it lower on the hill, it's caved now.

Q. Okay. Let's talk about that for a minute.

A. All right.

Q. I didn't realize that there had been any underground work at all.

A. I'm assuming it's a Golden Bear vein.

Q. When did you first discover that?

A. 1932 when they worked on it.

Q. Did you -- tell me what the nature of it is. Is it a drift going into the vein?

A. Yes, it is, right on the vein.

Q. And how deep is it from the surface of the vein?

A. They started on a chunk of float there, and this was Roy Elliott, White Horse Heart, Fisk,

and Ernest Elliott and they hauled this ore by pack train up to -- by a five stamp mill, and my assumption is that it's on strike, but I -- the claims were not mine, they belonged to Whitmore and, therefore, I couldn't open it or look at it.

Q. Okay. We're still talking Golden Bear here?

A. Right, Golden Bear vein, sir.

Q. Right. Where did this drift go into the mountain?

A. About halfway up.

Q. Could we look at the map here of the vein?

A. No, I can't show you on the map.

A. Or the photograph?

THE COURT: Mr. Weaver, one thing you'll want to ascertain, maybe you already have to your satisfaction, is what he's speaking of [a]s the Golden Bear vein is, in fact, on one or both of the Golden Bear claims. Maybe you're already satisfied to that.

MR. WEAVER: No, I'm not. This is the first time I've heard that there's been any underground workings at all on there and I'm trying to find out.

THE WITNESS: I told you this was an assumption on my part.

Q. BY MR. WEAVER: An assumption?

A. Underground, right.

Q. Did you ever talk to the people who constructed the drift as to what they found?

A. I worked in it.

Q. And what did you see in there?

A. I saw two feet of 11 ounce ore.

Q. And when did you see it?

A. 1932.

Q. And you don't remember where the drift is?

A. I do remember where the drift is. I said the drift is caved, totally.

Q. Okay. But what I'm asking you, I guess, is if I might approach these aerial photographs --

A. Yes, you can't see where it's caved. I tell you the drift is caved completely.

* * * * * * *

Q. BY MR. WEAVER: Jim, you've just indicated, and I have marked on the map [Exh. 77B] that the opening of this drift is off the claim, but just north -- excuse me -- yeah, just north of the green road marking on this map, and I have marked a spot where the drift opens with a small X with a circle around it. Is that where the drift was?

A. I would assume that's close. That's within 150 feet.

Q. Okay. Now, the strike of the vein comes down the middle of the Golden Bear No. 2, crosses into Golden Bear No. 1, continues in exactly the same strike in a straight line down to that mark as far as you know?

A. That's pure assumption.

Q. But that's what you're guessing?

A. Yes, on strike.

THE COURT: Where you've been just touching, you started at Golden Bear 2, which is the northernmost of the two claims, and then what did you do?

MR. WEAVER: Then I came down right through the middle of Golden Bear No. 1, cross -- excuse me, right down the middle of Golden Bear No. 2, crossed in the Golden Bear No. 1 and continued in exactly the same line down off the claim, Golden Bear No. 1 straight down to the small X with a circle around it. Now, Mr. Collord's told us that

he believes the strike runs that direction, it's an assumption, but that's what he believes.

Q. BY MR. WEAVER: Now, Mr. Collord, from the drift opening that we've marked on this Contestees' Exhibit No 77[B], how many feet along your assumed strike distance does this drift go?

A. Less than 50 feet.

Q. Does the drift go onto the claim at all? Do you know?

A. No, I would say not. No, that would be 300, 400 feet, and it's not in a line.

* * * * * * *

Q. Okay. did you, at the time that you went into that drift -- let me back up. You helped build it, is that what you told me?

A. No, I went down there and worked. * * *

Q. To your knowledge did anybody ever take a sample out of there?

A. Oh, yes, in '32 there were several samples, pack strings with samples went out of there. * * *.

* * * * * * *

Q. Did you ever find out what the result of that milling was?

A. The results of the milling was dismal. It was terrible because there was not free milling, and they were putting the product through the screen, which, as I remember, it was about a 40 mesh screen, they were using amalgamation plates and it will not amalgamate.

Q. Did you ever tell anybody before today from the Forest Service about the existence of that drift and --

A. Earl Dodds knew where the drift was.

THE COURT: Wait until he's through.

MR. WEAVER: That's okay, I'll go ahead and ask the question and then you can answer, Jim.

Q. BY MR. WEAVER: Did you tell anybody from the Forest Service about the existence of this drift and what has been found out about it by others?

A. I assumed it was common knowledge. Dan LaVan (sp), then Ranger in the Big Creek District, knew it real well. And Neal Routsen, who was alternate Ranger, knew it, and Earl Dodds in later years. He came in there in 1952, he knew it. I thought everybody in the Forest Service knew it.

Q. Did Morris Hubbard know about it?

A. I think I told Morris about it?

Q. How about --

A. I'm not sure of that, Jim. I'm not real sure because it's -- the tunnel was caved, but I must have because I think I told everybody on the hill about it.

Q. Did Wayne Kemp know about it?

A. No, sir, Wayne Kemp went down to look at the Golden Bear vein that I had located after the claims were put on them.

Q. Is this vein that we're talking about exposed there in drift, part of the Golden Bear claim -- part of the Golden Bear vein?

A. That's pure assumption on my part.

* * * * * * *

Q. I referred to the last paragraph, and my question had been that started all this, you were telling Earl Dodds in this letter that this would really make a good real small gold mine if these values continued down dipped to 300 foot level, and I asked you if you knew if they continued down to the 300 foot level and you said yes, is that right?

A. That is correct. Again that again is my assumption.

Tr. 789-799.

Because no evidence of the asserted drift remains, and because it is conceded to be outside the boundaries of the claims (assuming it existed), it cannot be used as evidence to support the inference of depth. United States v. Feezor, 74 IBLA at 77; United States v. Russell, supra.

In 1982, Mr. Collard proposed plans for "prospecting the claims."

* * * * * * *

> My plan is to drive a crosscut from the end of the proposed road asked for in the permit to intersect the GB vein at a depth of 300 feet below the outcrop. If the vein is found at this depth and the values found on the surface obtain at this point, certainly an operation could be expected to follow. I would expect the values at this depth to be in a sulphide ore, and the actual treatment of this type ore would have to be evaluated before a mill could be established. I would also expect to drift along the strike of the vein, if found, for some length; probably in the range of 500 feet. * * *. I would not expect any great body of ore * * *.
>
> I would, at this time, be very reluctant to name tonnages * * *. The first thing, in my plans, would be to find the ore at this proposed depth. If the vein is in place here, and carries the values that occur on the surface, enough total revenue would show to let us do some hard planning * * *.

Exhs. 12; ICL-A.

In 1983, Hall and Deitz opined in their report of the claims:

> Before a proper evaluation of the claims can be completed, it will be necessary to test the tenor of ore and width of vein at depth by diamond drilling. The entire vein structure should be mapped and sampled in detail.
>
> * * * * * * *
>
> While the Golden Bear claims have impressive gold values and the potential to be a small underground gold mine, the property is at a very early stage of development.

Exh. 24 at p. 7 (emphasis added).

In 1984, Mr. Collord again proposed further exploration.

> The four hundred fifty (450) feet long portion yielding the best grade and averaging 2.1 feet in width would contain approximately seventy two (72) tons per foot of depth. If the ore grade mineralization extended to a depth of three hundred (300) feet, down dip, a total of 21,600 tons of ore is probable. This would contain 13,600 ounces of gold.
>
> Additional exploration potential exists along the remainder of the strike length of the Golden Bear vein. No assumption of grade can be made for this additional 1600 feet of vein. This end of the vein is poorly exposed, and covered with talus at the surface. * * *
>
> * * * * * * *
>
> A four-hole diamond drill hole program would be necessary to adequately test the best portion of the vein, i.e.; the 450 feet thoroughly chip sampled. * * *
>
> * * * * * * *
>
> [Alternatively, a] drift could be started on the vein where it is exposed in Little Ramey Creek. The tunnel would be designed to drift on the vein for a distance of 300 - 500 feet. This would provide a very accurate test of the continuity and grade. * * *

Exh. 30.

In his report of the claims based on sampling conducted in 1986, Kemp asserted that "the down dip continuation of the Golden Bear vein can only be estimated given its present exposure * * *. [R]eserve estimates based on outcrop and shallow sampling above should be considered cautiously because there is very little control in the down dip direction."

Exh. 59 at p. 8 (revised as of July 11, 1988).

Geologic evidence sufficient to support the inference of continuity of values and the extent of the vein at depth is lacking. Contestees' projections of ore reserves are therefore inherently unreliable and cannot serve as evidence

of a discovery. United States v. Feezor, 74 IBLA at 85. The claims cannot be determined to be valid.

Inasmuch as the lode claims are not valid, the associated millsites must also fail because there is no valid mining claim with which they are associated. United States v. Paden, 33 IBLA 380 (1978). Furthermore, even assuming that the associated lode claims were valid, the millsites would still not satisfy the requirements of the law. As the Board stated in United States v. Werry:

> The only noticeable activity of any description on the lode claims was the gathering of samples which is not "mining activity" as envisioned by the drafters of the statute. None of the mines were being operated so it is apparent that the millsite claims were not used for mining or milling purposes in connection with the lode claims. United States v. S.M.P. Mining Company, 67 I.D. 141 (1960); United States v. Skidmore, 10 IBLA 322 1973).

United States v. Werry, 14 IBLA 242, 81 I.D. 44, 48-49 (1974).

Conclusion

Although the evidence adduced clearly indicates a valuable prospect, it is wholly inadequate to show that a discovery of a valuable mineral deposit has been made on either claim at the present time or prior to withdrawal. As Administrative Judge Stuebing once put it:

> Legend has it that banks have loaned large sums to the holders of strong poker hands, based upon the calculated and reasonable probability that such hands will prevail. By contrast, no prudent investor would be likely to enter an economic partnership with the holder of a pair of deuces with a reasonable expectation that the luck of the draw would convert that meager showing into a winning hand, although it is entirely conceivable that that might occur. The money spent by prudent and reasonable men to conduct exploration activities cannot be referred to as proof of the prudence and reasonableness of an effort to develop a mine thereafter. That money may be likened to the ante and first bet or call in a poker game. It is money spent in an effort to gain the essential information on which to formulate an informed judgement as to whether

> additional investment is more likely to yield a profit or be lost. The development of a mine on any or all of the contested claims in the hope that the excavations might encounter commercially valuable ore bodies, as yet unknown, and thereby justify the risk, would be the act of a gambler and not that of a reasonable, prudent man.

United States v. Gunsight Mining Co., 5 IBLA 62, 69 (1972).

Thus, although the evidence developed to date indicates valuable mineralization sufficient to warrant the further expenditure of time and money in an effort to determine whether the development of a mine would be warranted, the evidence adduced is not sufficient to show the discovery of a valuable mineral deposit. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Wood, 51 IBLA 307, 87 I.D. 628 (1980).

The Golden Bear Nos. 1 and 2 lode mining claims are hereby declared to be invalid for lack of a discovery of a valuable mineral deposit. The Lost Dutchman and Golden Bear Millsites are hereby declared to be invalid because they are not associated with any valid mining claims and are not presently being used for mining or milling purposes within the meaning of the law. The pending patent applications for each claim should be and are hereby denied.

Harvey C. Sweitzer
Administrative Law Judge

Appeal Information

Any party adversely affected by this decision has the right of appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures).

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

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February 14, 1979

UNITED STATES OF AMERICA,	:	MONTANA 31412
	:	
Contestant	:	Involving the mineral
	:	locations of the Peggy
v.	:	Ann I and Peggy Ann
	:	II lode mining claims,
CORNELIUS E. MANNIX,	:	Mineral Survey 10940,
	:	situated in the E1/2,
Contestee	:	Section 24, T. 13 N.,
	:	R. 7 W., Montana Prin-
	:	cipal Meridian, Helena
	:	National Forest, Lewis
	:	and Clark County,
	:	Montana.

DECISION

Appearances: Lawrence M. Jakub, Esq., and Mark D. Lodine, Esq., Office of the General Counsel, U. S. Department of Agriculture, Missoula, Montana, for Contestant;

Paul T. Keller, Esq., Helena, Montana, for Contestee.

Before: Administrative Law Judge Rampton.

The claims in issue are located within the Helena National Forest approximately 40 miles from Helena, Montana.

There are extensive workings on the claims which are fairly old, dating back to the thirties or before. These workings

were found by the mining claimant in the fall of 1951 while he was on a hunting trip. The location for the Peggy Ann I claim was made on May 31, 1952; an amended location was filed June 14, 1974; and a second amended location was recorded on July 13, 1974. The Peggy Ann II lode claim was located by Mr. Mannix on September 17, 1973.

Since recording the original location certificate for the Peggy Ann I claim, the contestee and members of his immediate family have expended about $48,000 on improvements to the buildings which were on the land at the time of filing, construction of new buildings, cleaning out and retimbering of the underground workings previously excavated, placement of lights in the underground workings, replacement of 1600 feet of mine track, and advancement of the face of the underground workings approximately 70 feet. Included in the $48,000 expenditure is approximately $15,000 for mining equipment and supplies.

The Government initially became aware of the contestee's presence on the Peggy Ann I claim in the mid-1950's and the claim was examined on two occasions in 1957 for the purpose of determining its validity. Apparently, at that time, the Forest Service decided not to contest the claim but recommended that periodic checks be made of the claimant's progress.

In 1970, the claim was reexamined by the Forest Service and, as a result of the examination, it was recommended that contest action be initiated and a complaint was filed (Montana Contest 1840) on January 19, 1973. A scheduled hearing was continued indefinitely due to the death of the contestee's consultant.

The claim was again examined on September 25, 1973. Prior to this, however, the contestee had filed the second claim, the Peggy Ann II, on August 17, 1973, and had requested from the Bureau of Land Management an order for a mineral survey. This order was issued on October 26, 1973, and when a contest was scheduled for hearing, the Forest Service requested the contest action be withdrawn temporarily in light of contestee's desire to obtain a mineral survey, apply for patent, and ship a bulk sample to a smelter to determine values. Pursuant to this request, Montana Contest 1840 was dismissed.

The mineral survey MS 10940 was approved by the BLM on January 28, 1975, and the contestee filed mineral patent application M-31412 with the BLM on June 13, 1975. A final certificate was issued on November 12, 1975.

The present contest was initiated by filing a complaint dated May 2, 1977, in which the United States alleged:

1. No discovery of a valuable mineral deposit sufficient to support a mining location has been made upon or within the limits of the Peggy Ann I and Peggy Ann II claims.

2. The lands within the limits of the Peggy Ann I and Peggy Ann II claims are nonmineral in character.

3. The Peggy Ann I and Peggy Ann II claims have not been properly located, and mineral survey 10940 is improperly executed in that the actual lode line is located more than 300 feet from the SE sideline of both claims.

Two geologists, Robert Newman and James Whipple, testified for the Government. Both of them had examined the claims on several occasions: Newman on June 1-3, 1976, June 1 and June 13, 1978. Whipple examined the claims on September 25, 1973, in company with John Stentz, a Forest Service mineral examiner who has since retired, June 1-3, 1976, and June 13, 1978. Each testified in detail how the various examinations had been conducted, the extent of their examinations, the sampling methods used, location of samples taken, and the assay results of those samples. In addition, Mr. Newman presented testimony relative to the economic feasibility of operating the claims, which was agreed to by Mr. Whipple. They described the vein exposed by the workings as a single quartz vein extending almost entirely along the existing workings, offset numerous times by small shears or faults. At the face of the working the vein enters two or three feet of heavy fault gouge and Helena limestone. It cannot be determined without further exploration whether the vein terminates in the limestone or is merely displaced.

As a result of their examinations, each was of the opinion that a person of ordinary prudence would not be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine on either of the claims. (Tr. 36, 73). This testimony, supported by the various assay reports submitted into evidence, was sufficient to establish the Government's prima facie case. United States v. Webb, 16 IBLA 345, 346 (1974).

Upon the establishment of the Government's prima facie case, the burden of proof shifted to the contestee to show by a preponderance of the evidence that the claims were in fact valid. Foster v. Seaton, 271 F.2d 836, 838 (D. C. Cir. 1959).

The contestee called two expert witnesses, Mr. Willis M. Johns, a mining engineer and geologist who visited the property on July 30, 1977, and again on August 22, 1977, and Mr. John F. Byrd, an independent mine operator, who has worked in the mines within the vicinity of the Peggy Ann claims since he was 12 years old and who has helped the Mannixes mine and ship the first shipment of ore that was sent to the East Helena Smelter.

Mr. Johns is the Chief of the Economic Geology Division of the Montana Bureau of Mines at Montana Tech. He has a B.S. and an M.S. in geology and has worked in various mines in Montana, Idaho and Arizona and has performed considerable sampling and testing for private organizations since his employment with the Montana Bureau of Mines. As a result of the sampling done by him, Mr. Johns identified within the workings a body of ore which he called Block 1 and stated that this ore could be removed at a profit. Eight samples were taken from across the vein in this block which averaged .37 oz. gold and 7.47 oz. silver. (Tr. 105). He computed that there were approximately 372 tons of ore in place within the block. (Tr. 115). After checking with the smelter in Helena, he computed the smelter charge at $10 per ton. Deducting two hundredths in gold which the smelter requires from the .37, and assuming 95% recovery, he reached a gold content of $63.55 per ton. On the basis of a 7.47 oz. showing of silver per ton and deducting 1 oz., which the smelter requires, he calculated a value for the silver content of $33.68 per ton. Although the vein contains copper and lead, the values were too low and no money would be paid by the smelter for these minerals. He calculated the crushing and delivery charges at $5 a ton, for a net smelter payment of $82.23 a ton. (Tr. 117). Haulage charges to the smelter at a rate of 20 cents a mile for a distance of 40 miles is $8 a ton. Powder, fuse, primers, electric power, assaying, and equipment rental came to $10.30 a ton, for a total mining and trucking cost of $18.30 per ton. The operator would receive a net of $63.83 per ton. The profit for 372 tons of ore would amount to $23,744. (Tr. 119).

Further, based upon his examination, but using geological inference only, it is his opinion that the block of ore probably extends below the adit level.

In determining that a commercial venture could be successful, he did not consider the expenditures made to date in the development of the claims.

Mr. Byrd, who helped the Mannixes mine and ship the first bulk sample which went to the East Helena Smelter, stated that the purpose was to find out the average quality of the ore. The

ore was taken on the upper level and from his experience in the mines in that area, where there is a lead with a pitch to it and depth, there is usually a secondary enrichment. Better than 50% of the time, the lead or vein will widen out. In his opinion, a 100-foot shaft should be sunk within Block 1 and as the shaft is sunk and the mine is developed, the paying ore should be saved.

Both men were in agreement that selective mining methods would have to be used as the values along the vein vary. Mr. Byrd stated that qualitative samples could be taken by crushing and panning and has helped the contestee and his sons in learning that method.

One other expert witness testified for the contestee. Mr. Dale E. Scholz, who has a B.S. in geological engineering with a mining option and who visited the claims when they were being examined by the Forest Service personnel, testifed as to a method of heap leaching of oxide gold. Under this method, the ore is placed on a impervious pad, sprayed with a diluted cyanide solution which dissolves the gold and silver. It is then processed to remove the clays and slimes and then into a de-aeration tower to remove the dissolved oxygen. Zinc dust is added, which replaces the gold and silver which precipitates and is collected into the filter presses. The overall recovery, he stated, is nearly 100% and the process works well with a small mine of 50 or 60 tons on each pad. Since the experts agree that the vein is highly shattered quartz with no clays, he stated the process would work very well in recovering gold and silver from the Peggy Ann claims and is cheaper than shipping the ore to a smelter. The transportation and smelter charges are therefore eliminated and the total cost of the materials used would be in the neighborhood of 80 cents per ton.

The testimony of Mr. Scholz as to the heap leaching process fails to shed much light on a determination of the validity of the claims. No testimony was given as to the cost of construction of the pads or the cost of the equipment necessary to use this process. Mr. Johns' economic analysis as to the profitability of mining the claims did not take into consideration the possible use of this process as compared to the cost of shipping and smelting at the East Helena Smelter, and as it stands, the evidence as to the feasibility of this method is too sketchy to make findings of fact on the economic viability of heap leaching on the ores from the claims in issue. The issue as to the validity of the claims then narrows down to whether the block of ore as defined and described by Mr. Johns constitutes a valid discovery on each claim.

All of the experts agree that the block straddles the two claims. The dividing line between the claims is at the raise from which Block 1 extends on both sides. All of the experts agreed that the others' sampling was performed properly and none questioned the qualifications of those who took the samples. There was some disagreement as to the average width of the exposed vein with Mr. Newman estimating it as an average of 6 inches while Mr. Johns estimated the average width to be 12 inches. The values shown in the assays of the samples taken, however, varied widely.

Mr. Newman stated that samples 1, 2, 3, 4, 5 and 8, taken by him, were within or along the edge of Block 1 and the average value of these samples would be $8.38 per ton gold and $18.54 per ton silver, totalling $26.92. The samples taken in the 1973 Forest Service examination by Mr. John C. Stentz, a retired Forest Service mineral examiner, and in which Mr. Whipple participated, averaged total gold and silver values of $46.34 per ton. Mr. Johns' samples within the block averaged $97.23 per ton. When questioned as to the reasons for the significant variations in the values obtained by the samples, Mr. Newman stated that it could occur in the sample collecting procedure, in the assaying process, contamination of the samples intentionally or unintentionally after they were taken, and finally, and the most obvious, the natural variation in the metal content along the vein, either in a horizontal or vertical direction. (Tr. 269-70). Since none of the experts could fault the others' methods and since there is no way to determine from the evidence presented whether there was a variation in the assaying process or contamination of the samples, I can only find that the vein does vary considerably throughout its width in metal content and that, therefore, as Mr. Johns stated, the ore can be mined successfully, if at all, only through a careful selective process.

In his economic analysis, Mr. Newman used a smelter treatment charge of at least $20 a ton and, as basis for this estimate, referred to the bulk sample shipped to the smelter by the Mannixes in 1973, for which smelter charges of $20 per ton was deducted from the total payment. The evidence shows, however, that only a portion of the bulk sample was taken from Block 1. Mr. Johns' estimate of $10 per ton smelter charges was based on the high siliceous content of the samples taken by him and contact with Mr. Stan Lane at the East Helena Smelter, who informed him that the smelter charges would be $10 a ton.

Both Mr. Newman and Mr. Johns were in agreement as to a shipping charge of $6 to $8 per ton to the smelter. Where they disagreed completely was in the cost of extraction. Mr. Newman estimated the cost of mining at $70 per ton with direct labor

costs of $2,520 per month of a miner at $8 per hour and a helper at $7 per hour, or union scale. There would also be costs of explosives, primers, fuses, bits, timber, assaying and sampling. He also said that contract miners will take a job based on a unit of advance or a certain amount per foot and it now runs anywhere from $100 to $150 per foot of advance, with the contractors supplying all of the material needed.

Mr. Johns took a different approach and assumed that because of the high labor costs, the narrowness of the vein, and the necessity for careful selective mining, that the Mannix family would mine the ore themselves. He calculated that working on weekends or eight days per month underground at 7-1/2 tons per day production, they would produce 60 tons a month and the block would last for six months. He did not calculate the amount per hour received by the Mannixes for their work. However, if his figures are correct, and Mr. Mannix and his two sons worked a total of 144 eight-hour days, or a total of 1,152 hours with a net return of $23,744, their wages for their labor would be approximately $20 per hour. Even were one to assume that Mr. Johns' average values were high, that his smelter charges were low, that the selective mining process would not be entirely successful, and that the net profit might be halved, the Mannixes would be receiving as wages for their effort an hourly wage considerably higher than union scale.

I am inclined to accept Mr. John's economic analysis for two reasons. First, he has considerably more experience than the two Government experts in the practicalities and economics of mining. Second, his samples were taken entirely within Block 1, while not all of Mr. Newman's were taken within the block itself. The evidence does not show with preciseness where the Whipple-Stentz samples were taken, but it appears that the three samples showing the highest values, gold 0.5, .32 and .20 and silver 4.0, 16.7, and 2.2, were taken at the upper adit and along the raise and within Block 1. These samples are comparatively equal in values shown to the eight John's samples which averaged in content gold .367 and silver 7.47. The two Whipple-Stenz samples which showed much lower values were taken outside the block at the far end of the adit. (Tr. 69-70; Govt. Ex. 18).

Admittedly, Mr. John's analysis contains variables, and the Mannixes are not guaranteed a profit. They must mine selectively and with a minimum of dilution, but if they are successful and eliminate the lower value ore, their profit would be higher than as above calculated. In any event, the law does not require a guaranteed profit to constitute a

discovery. The prudent man rule first enumerated by the Department to define a discovery in Castle v. Womble, 19 L.D. 457 (1894), states that a discovery exists where:

> ... 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,...

The many factors currently considered in determining the validity of a mining claim under the prudent man rule were enumerated recently by the Interior Board of Land Appeals:

> In order to meet [the prudent man test, the claimant] will have to show there is a likelihood that the minerals on the claims can be mined, removed and disposed of at a profit. Among the factors he must show for each claim by the probative evidence are:
>
> (a) Expected costs of the extraction, beneficiation, and other essential costs of the operation necessary to mine and sell the mineral, including capital and labor costs;
>
> (b) quantity of mineable mineral on the claims;
>
> (c) average grade or quality of mineral on the claim; and
>
> (d) price at whch the mineral will be sold and expected returns.
>
> The above evidence should focus on current estimates of costs and prices. United States v. Howard S. McKenzie, 20 IBLA 38, 45 (April 17, 1975).

The total evidence presented in the present case covers the cost of extraction, transportation, smelting charges, qualtity of mineable mineral, average grade or quality of mineral and the price at which the mineral can be sold. Taken as a whole, the evidence indicates a reasonable expectation of mining the ore contained upon the two claims at a profit.

In Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971), the court said:

> Actual successful exploitation of a mining claim is not required to satisfy the "prudent-man test."

The same court in Adams v. United States, 318 F.2d 861 (1963), stated:

> But value, in the sense of proved ability to mine the deposit at a profit need not be shown.

And the Department held in the case of United States v. Gould, A-30990 (May 7, 1969):

> The Department does not require a mining claimant to prove a discovery by showing that he is actually engaged in a profitable mining operation or even that profitable operations are assured, ...

The prudent man test, as refined by the "marketability test," has been stated in the case of Barrows v. Hickel, supra, as follows:

> What is required is that there be at the time of discovery, a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence.

The finding that there is on the claims in question mineral which can be marketed at a profit does not take into consideration the $48,000 expended to date on labor, materials, and improvements by the contestee. However, all of the case law involving definitions of what constitutes a discovery of a valuable mineral sufficient to satisfy the requirements of the Mining Act of May 10, 1872, as amended, refer to present marketability, not past or future prospects. Had Mr. Mannix known before the monies and labor were expended that he could not recover his expenses, he would not then have been considered prudent. As it stands today, he would not be prudent were he to abandon the claims and leave the ore now blocked out.

None of the definitions refer to past expenditures, only to present and future potential. In determining then whether a discovery has been made, past expenditures are irrelevant, and since the future is unknowable and speculative, the determination must be made on present facts and cost factors.

The Government cites a series of cases holding that lack of development of the claims over several years with little or no attempted development or operations raises a presumption against discovery. Presumptions can, however, be rebutted. Mr. Mannix, the contestee, testified that he had never removed the ore in Block 1 because to him it is better than money in the bank. If he takes it out he would be exploring with no reserve, and at present he and his family are capable of earning money for further exploration.

Mr. Mannix then is holding the mineable ore in reserve and has done so while he has acquired modern tools and a working knowledge of panning so that the mine can be intelligently explored further and mined successfully. He, like thousands of mining locators on public domain, has a dream, a dream that excavation of a few feet more of vein material will show ore containing richer values. That dream has sustained him and his family for many years and provided the incentive to expend much hard labor and considerable sums of money. He is not retaining the claims as a recreation or homesite. Unlike the vast majority of mining locators, Mr. Mannix has ore in place which he can if he wishes remove and sell with a reasonable expectation of receiving more money for the ore than it would cost to mine and ship. Further, based on geological inference, he has the possibility, yet unproven, of finding beneath the present block, ore of higher values, and by further exploration at the face of the workings, regaining the fault-shifted vein. Whatever anyone who reviews the evidence in this case may feel about the prudence of Mr. Mannix' past actions is not in issue. His prudence must be judged on what he can do at present based on the results of sampling done by qualified experts. There is a valuable deposit present on both claims, which he can either keep in reserve for his retirement and as a legacy to his family, or mine to defray the costs of further exploration.

The final issue raised in the pleadings is whether the location is improper. Mr. Newman testified that the side lines of the claims, as surveyed in mineral survey 10940, are not equidistant from the trace of the vein on the surface. The distance to one of the side lines is approximately 370-380 feet and to the other 220-230 feet. (Govt. Ex. 1). Both Mr. Newman and Mr. Johns agreed that, while the underground vein conformed relatively well to the center line of the claims, the vein structure dips into the earth at an angle other than perpendicular.

The Act of May 10, 1872, states that no claim shall extend more than 300 feet on each side of the middle of the vein at the surface. It also provides that no claim shall be limited

by any mining regulation to less than 25 feet on each side of the middle of the vein at the surface. As a lode location is limited to 300 feet on each side of the vein, Mr. Mannix has two choices. He can, if there are no intervening rights, amend his location. If he does not amend, he can hold or gain title only to land narrower in width than the permitted 600-feet maximum claim. In the case of the Peggy Ann claims, the maximum permitted west side line would be 230 feet from the trace of the vein at the surface and an east side line 300 feet from the vein, for a maximum width of 530 feet. For practical purposes, however, this would not affect the mining claimant's activities, for he can follow extralaterally the outcropping at the surface wherever it may lead so long as it is continuous. Cheesman v. Shreve, 40 Fed. 793; Iron Co. v. Cheesman, 116 U.S. 531.

For the reasons stated, except for the allegation as to the improperly located side lines and executed mineral survey, I conclude that the charges of no discovery and nonmineral character of the land are not supported by the evidence. As to these allegations, the complaint is dismissed.

John R. Rampton, Jr.
Administrative Law Judge

APPEAL INFORMATION

The parties adversely affected by this decision have the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict compliance with the regulations in 43 CFR Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken by the contestant, the adverse party can be served by service upon Paul T. Keller, Esq., at the address listed on page 12.

If an appeal is taken by the contestee, the adverse party can be served by service upon the Office of the General Counsel at the address listed on page 12.

Enclosure: Information Pertaining to Appeals Procedures

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