



United States Department of the Interior

OFFICE OF THE SOLICITOR

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Memorandum

To: Secretary
Director, Bureau of Land Management

From: Solicitor

Subject: Use of Mining Claims for Purposes Ancillary to Mineral Extraction

I. INTRODUCTION

The Mining Law of 1872, 30 U.S.C §§ 22 et seq. (Mining Law), authorizes the location of mining claims on federal lands that contain valuable mineral deposits, It also authorizes the location of mill sites on nonmineral federal land that is not contiguous to the mineral deposits for use in supporting the development of the mineral deposits on the mining claims. See 30 U.S.C. § 42. In Limitations on Patenting Millsites under the Mining Law of 1872, M-36988 (Nov. 7, 1997) (Mill Site Opinion), we concluded that the Secretary may not patent. or approve plans of operations that involve. more than five acres of mill sites in association with a single valid mining claim.

In March 1999, the Acting State Director of the Arizona State Office of the Bureau of Land Management (BLM) requested our legal opinion concerning a proposal by the Yarnell Mining Company (Yarnell) to develop a gold mine near Wickenburg, Arizona. that would use some of Yarnell's thirty-two unpatented mining claims as sites for heap leach pads, waste rock dumps, and other facilities to support development of nearby mining claims.¹ Yarnell had not located any mill sites to be used in the proposed development. Instead, Yarnell had proposed to use some of its mining claims exclusively for what we will call in this Opinion "ancillary operations": i.e., operations intended to support mineral extraction from other mining claims or other lands. and not looking to extract minerals from these particular claims.

¹ Memorandum from Acting State Director, Arizona State Office, Bureau of Land Management, to Solicitor, United States Department of the Interior (Mar. 4, 1999).

Specifically, BLM asked for our legal advice on the following questions:

- (1) Whether the lode claims at issue may be used for mill site purposes as proposed in the Yarnell mining plan of operations.
- (2) If lode claims may not be used for mill site purposes, whether this is a reason for BLM to disapprove the proposed plan of operations.
- (3) If the company relocates some or all of its lode claims as mill sites, how the acreage limitations in the Mill Site Opinion would apply to this project.
- (4) Whether and under what authority BLM may authorize the use of the lands presently covered by lode claims if Yarnell's mill sites would exceed the limitations of the Mining Law, as explained in the Mill Site Opinion.
- (5) How the answers to the above questions affect the environmental analysis conducted under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (NEPA).

In answer to BLM's first and second questions, and as explained in more detail below, we find that the Mining Law does not prohibit altogether the use of mining claims for ancillary operations. In some circumstances, however, this type of use can call into question the validity of the mining claims so used, by suggesting that they are not supported by the discovery of a valuable mineral deposit. If the claims so used are invalid, the Secretary² may not approve the use of those mining claims for ancillary operations based on any rights that the Mining Law may otherwise be characterized as conveying. This is because a mining claim that is not valid carries no property right against the United States under the Mining Law. If the mining claim is not valid, the claimant's right to use the claimed lands is no greater nor more secure than the right of anyone else seeking to use the public lands. Although the proposed use for ancillary operations on invalid mining claims may not be approved as a matter of right under the Mining Law, the Secretary may, where appropriate, approve the use of federal lands under his jurisdiction for ancillary operations as a matter of discretion under the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 et seq. (FLPMA).

BLM's third question seeks our opinion regarding how the Mining Law's acreage limitations, as described in the Mill Site Opinion, would apply if Yarnell chose to relocate some or all of its mining claims as mill sites, assuming the total mill site acreage would exceed the five-acres-per-valid-mining-claim limitation under the Mining Law. In the more than three years since the Mill

² The Secretary has generally delegated his authority in this area to BLM, but because the applicable statutes give the authority to the Secretary, we refer to the Secretary in this Opinion whenever discussing grants of authority.

Site Opinion was issued, it has been the subject of considerable debate on the floor of both Houses of Congress.³ Ultimately, Congress addressed the Mill Site Opinion in the Consolidated Appropriations Act for Fiscal Year 2000. A section of that Act provided that, during Fiscal Years 2000 and 2001, the Opinion would apply only to (1) plans of operation submitted after the date the Opinion was issued (November 7, 1997) that were not approved before the date of the Act (November 29, 1999); and (2) pending patent applications that are not grandfathered from the patent funding moratorium. Consolidated Appropriations Act, 2000, Pub. L. No. 106-113 app. C. § 337(a), 113 Stat. 1501A-199 (1999). While this subsequent congressional action was by its express terms neither a rejection nor ratification of the Mill Site Opinion,⁴ it nevertheless left the substance of the Opinion intact (while limiting its application as described above).

We remain convinced that the Mill Site Opinion correctly states the law. Any proposal by Yarnell to use mill sites would, therefore, have to be limited to no more than five acres of mill site per associated valid mining claim being developed.⁵ Further, in evaluating Yarnell's proposed ancillary operations, the Secretary will not be able to give any weight to any property right that might otherwise attach to a valid mining claim under the Mining Law.

BLM's fourth question raises the issue of whether - if (a) Yarnell cannot use mining claims as a matter of right for ancillary operations, and (b) Yarnell cannot relocate the mining claims it proposed to use for ancillary operations as mill sites if the resulting acreage would exceed the limitations under the Mining Law as stated in the Mill Site Opinion - the Secretary may authorize the use by other means. As explained in the Mill Site Opinion and reiterated further below, the Secretary may authorize mine operators to use lands that do not contain valid mining claims or mill sites for ancillary operations by various means. The discussion 'below also answers BLM's last request for advice concerning how the NEPA process would be affected by the answers to the other questions.

To summarize what follows, where a claimant proposes to use a mining claim for ancillary operations in a manner that raises legitimate questions about whether the claim is valid, the

³ See, e.g., 145 Cong. Rec. H10680-85 (daily ed. Oct. 21, 1999); *id.* at S9348, S9352-54, S9356-59, S9361-69 (daily ed. July 27, 1999); *id.* at H5509-19 (daily ed. July 14, 1999).

⁴ Consolidated Appropriations Act, 2000, Pub. L. No. 106-113 app. C, § 337(b), 113 Stat. 1501A-199 (1999) ("No Ratification: Nothing in this Act ... shall be construed as an explicit or tacit adoption, ratification, endorsement, approval, rejection or disapproval of the opinion dated November 7, 1997, by the solicitor of the Department of the Interior concerning millsites.(").

⁵ Even though Yarnell submitted its initial plan prior to the date of the Mill Site Opinion, its initial plan contained no mill sites. If Yarnell could now relocate some of its lode claims as mill sites, it would require a new plan of operations or plan modification to be filed, which would then be subject to the limitations described in the Mill Site Opinion.

Secretary should make an initial inquiry into the validity of that mining claim. If this initial inquiry shows there are grounds for questioning the validity of the claim,⁶ the Secretary should not approve a plan of operations for the ancillary use of the claim until: (a) the Secretary performs a mineral examination and determines that the mining claim is valid notwithstanding its proposed use for ancillary operations; (b) the claimant relocates its mining claims as mill sites within the acreage limitations set forth in the Mining Law; or (c) the Secretary in his discretion authorizes the claimant's use of the public lands covered by the claim for those ancillary operations, not influenced by any claim of right under the Mining Law. The Secretary may also consider making the lands available by exchanging the public lands that the operator intends to use for ancillary operations for other lands of equal value not now in federal ownership.

II. DISCUSSION

A. The Mining Law Treats Mining Claims and Mill Sites Differently

The Mining Law makes “all valuable mineral deposits in lands belonging to the United States free and open to exploration and purchase.” 30 U.S.C. § 22. Under the Mining Law, persons can obtain the right to develop these minerals by staking or “locating” mining claims. *Id.* § 26. The Mining Law also allows mining claimants to locate mill sites on federal lands outside their mining claims for use in supporting development of mineral deposits in their mining claims. *Id.* § 42; see also *Mill Site Opinion*, *supra*, at n. 1 (stating the requirements for “dependent” or “associated” mill sites which are used for mining or milling purposes in conjunction with a specific mining claim).

Mill sites may be located only on “nonmineral land not contiguous to the vein or lode.” 30 U.S.C. § 42. These two requirements (nonmineral and noncontiguous) underscore that mill sites are to be used only to support mineral extraction on mining claims, not to gain rights to land that itself contains mineral deposits. As a Departmental decision put it nearly a century ago, those requirements seek “to prevent the appropriation within any such area of a further segment of the actual vein or lode upon which the mining claim itself was to be predicated.” *Yankee Mill Site*, 37 Interior Dec. 674, 677 (1909).

Although the size of each individual mining claim is limited to twenty acres. 30 U.S.C. § 23 (or 160 acres for so-called association placer claims, *id.* § 36), a single claimant may, consistent with the reasoning of some lower court opinions issued around 1920, locate any number of claims, so long as each claim is validly located. See, e.g., *United States v. California Midway Oil Co.*, 259 F. 343, 351-52 (S.D. Cal. 1919); *aff'd*, 279 F. 516 (9th Cir. 1922); *aff'd mem.*, 263 U.S. 682

⁶ A determination after this initial inquiry that there is no reason for questioning the validity of the mining claim based on the claim's use for ancillary operations should not be taken as a final determination that the claim is, in fact, valid. That is, the initial inquiry into whether a mining claim is valid is not equivalent to a formal validity determination.

(1923). Mill sites, on the other hand, are not only limited in size (that is, no more than five acres each) but also, as the Mill Site Opinion reiterated, limited in number.

The intent of the Congress in enacting the Mining Law seems clear. Mining claims may be located on federal lands that contain valuable mineral deposits for the purpose of extracting minerals from those claims. Mill sites may be located only on lands that do not contain valuable mineral deposits, and only for purposes of providing support for the extraction and processing of the minerals. These separate legal requirements indicate their distinct purposes. The fact that Congress specifically provided for mill sites as a separate - indeed, subordinate - type of claim, with their own individual requirements and limitations, illustrates that Congress did not intend for claimants to use mining claims for the sole purpose of supporting the extraction of minerals from other mining claims.

B. A Mining Claim May Be Invalid If Used Solely for Ancillary Operations

The issue before us is whether a mining claimant may, as a matter of right under the Mining Law, use all or part of a mining claim as a substitute for a mill site. For most of the history of the Mining Law, this was not an important question. In the long-ago era when the Mining Law was enacted, individual mining operations were usually extracting minerals from high-grade underground deposits that did not require extensive surface areas for ancillary operations. The mill site limitation in the Mining Law thus reflected contemporary mining practices.⁷ For many years thereafter, the five-acres-per-mining-claim limit on mill sites continued to be viewed as more than adequate.⁸

As rich deposits have been depleted, mining techniques and practices have evolved to require larger and larger amounts of land.⁹ Large modern mines may be open-pit operations encompassing a large, low-grade ore body that can produce enormous quantities of waste rock

⁷ See Office of Technology Assessment, Management of Fuel and Nonfuel Minerals in Federal Land 127 (1979) [hereinafter OTA Report].

⁸ See 2 Lindley on Mines § 520, at 1174 (1914) (“[I]t seems plain that ordinarily one millsite affords abundant facility for the promotion of mining operations upon a single body of lode claims.”) (quoting Alaska Copper Co., 32 Interior Dec. 128, 130 (1903)).

⁹ See, e.g., Bureau of Land Management, Yarnell Mining Project Draft Environmental Impact Statement S-4 (1998) (proposed mine pit would occupy only about 20% of the approximately 200 acres of projected disturbance); Bureau of Land Management, Ruby Hill Project Final Environmental Impact Statement 2-5 tbl. 2-1 (1998) (proposed mine pit would occupy only about 13% of the approximately 696 acres of disturbance); see also Howard Twitty et al., Nonfuel Mineral Resources of the Public Lands 1047 (1970).

and tailings which must be put somewhere.¹⁰

The Public Land Law Review Commission (PLLRC), chartered by Congress (and a majority of whose commissioners were members of that body), noted in 1970 that one of the Mining Law's "weaknesses from the standpoint of the [mining] industry" was its "inadequate provision for the acquisition of land for related purposes such as locating a mill." Public Land Law Review Commission, One Third of the Nation's Land 124 (1970). The PLLRC recommended that Congress take action to extend "[d]evelopment and production rights . . . to the area necessary for production of the mineral discovery" so as to "embrace use of enough land to meet all reasonable requirements for a mineral operation, such as settling ponds. mills. [and] tailings deposits." Id. at 128. Nearly a decade after the PLLRC Report was published. Congress's Office of Technology, Assessment (OTA) revisited the issue. It likewise concluded that "the Mining Law does not adequately provide for land needed for surface facilities and uses" related to mining operations. and described this as "[o]ne of the most serious problems involved in acquiring development and production tenure under the Mining Law." Office of Technology Assessment, Management of Fuel and Nonfuel Minerals in Federal Land 126-27 (1979). Various others. including some lawyers associated with the mining industry, have noted the same problems. See Mill Site Opinion, supra, at 12-13.

Congress has not paid heed to these recommendations (other than by placing some limits on the application of the Mill Site Opinion. as described above). This has left mining claimants still searching for ways to gain access to enough land to support their often extensive operations. and has left the Department with the task of administering and enforcing the Mining Law's provisions in accordance with the requirements Congress established nearly 130 years ago.

Because the Department of the Interior has not historically determined mining claim validity before approving plans of operation, and because the Mining Law limits the number of mill sites a claimant can locate, it was perhaps inevitable that mining enterprises would propose, as Yarnell has. to use the mining claims themselves to support such facilities. Using a mining claim for such ancillary operations raises the question whether the use comports with the Mining Law. and specifically, the requirement that mining claims be located only for discoveries of valuable minerals that will eventually be brought into production. In our view, the extent to which use of mining claims for ancillary operations can be authorized as a matter of right under the Mining Law turns on the Law's fundamental requirement that a mining claim must contain a "discovery" of a valuable mineral deposit in order to create any rights against the United States. 30 U.S.C. § 23.

¹⁰ OTA Report, supra note 7, at 127; American Mining Congress, The Mining Law and Public Lands 29 (1968) ("A mine having 500 acres of mining claims may. for example, require 5000 acres for surface plant facilities and waste disposal areas. It is obvious that such activities may not be acquired through live-acre millsites.").

1. A Mining Claim Is Not Valid If It Lacks a Discovery

The Mining Law states that a mining claim cannot be located on federal land “until the discovery of the vein or lode within the limits of the claim located.”¹¹ Despite this textual clarity, almost a half-century after the statute was enacted, the Supreme Court said, in effect, that a claim may be located before a discovery is made. Union Oil Co. v. Smith, 249 U.S. 337, 347 (1919). Nevertheless, absent a discovery, a mining claimant establishes no rights against the United States, even if the claimant otherwise complies with the posting, recordation, and other applicable statutory and regulatory requirements for claim location and maintenance. 30 U.S.C. § 23, including the payment of the \$100 annual maintenance fee required by law.¹²

As against other potential mining claimants (but not against the United States), a claimant without a discovery may have limited possessory rights under the doctrine of pedis possessio¹³ As against the United States, by contrast, a claimant with an invalid mining claim, including a claim where there is no discovery, has no rights under the Mining Law to use the federal land encompassed by that claim for any purpose, because “no right arises from an invalid claim of any kind.” Cameron v. United States, 252 U.S. 450, 460 (1920). As the Ninth Circuit has put it: “While location of a valuable mineral establishes a right to the possession of the deposit, and a surface use superior to any subsequent claimant, mere exploration, without discovery, does not confer a privilege to obstruct surface use.” United States v. Allen, 578 F.2d 236, 238 (9th Cir. 1978) (citation omitted). In other words, without a valid discovery, a mining claimant’s rights are no greater than those of any other member of the general public who wants to use the public lands, such as a recreationist, a utility, a fossil fuel producer, or a film maker.

So long as the land and minerals are in federal ownership, discovery is an ongoing requirement to

¹¹ 30 U.S.C. § 23 (emphasis added); see also Waskey v. Hammer, 223 U.S. 85, 90 (1912) (discovery is “a prerequisite to the location of a claim”). The Supreme Court has made it clear that placer as well as lode claims require a discovery. See Cole v. Ralph, 252 U.S. 286, 295-96 (1920).

¹² Congress first enacted the \$100 per claim annual fee in 1992. Interior and Related Agencies Appropriations Act for Fiscal Year 1993, Pub. L. No. 102-381, 106 Stat. 1374, 1378-79 (1992). Congress has extended it to require payment “on or before September 1 of each year for years 1999 through 2001[.]” Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-232, 2681-235 (1998).

¹³ Union Oil Co. v. Smith, 249 U.S. 337, 346-47 (1919) (pedis possessio doctrine entitles a mining claimant who remains in possession of the claim and works toward discovery “to be protected against forcible, fraudulent and clandestine intrusions upon his possession” by rival claimants, “at least for a reasonable time”).

maintain rights against the United States.¹⁴ Discovery may be lost, however, through a change in market conditions or regulatory requirements, or by exhaustion of the mineral deposit.¹⁵ Because discovery is an ongoing requirement, verification of discovery may be required at a later date. This later verification may be necessary even if BLM has determined at some previous date that a discovery existed on the claim. because “a mining claim cannot be considered valid unless the claim is at present supported by a sufficient discovery.”¹⁶ In addition, just as a claimant cannot rely on past discovery to show present marketability. speculation that there might be a market at some future date is not sufficient.¹⁷

2. The Proposed Use of a Mining Claim Solely for Ancillary Operations Raises a Serious Question as to the Validity of the Claim

The fact that a claimant proposes to use a mining claim for ancillary operations does not mean, a fortiori, that the mining claim is invalid. The Mining Law does not prohibit any and all uses of a mining claim for milling or processing activities. Indeed, a 1955 enactment of Congress specifically authorizes the use of mining claims for “prospecting, mining or processing operations and uses reasonably incident thereto.”¹⁸ But the 1955 amendment did not go so far as to create any surface use rights independent of the underlying mining claim. This is not surprising, because the overall thrust of the 1955 Act was to limit, not expand, mining claimants’ rights.¹⁹ The 1955 Act must therefore be read as not altering the principle that the right of a mining claimant to use the surface of a mining claim is derived from the right to mine the discovered mineral deposit.²⁰ In other words, although the 1955 Act authorizes “reasonably

¹⁴ See Best v. Humboldt Placer Mining, Co., 371 U.S. 334, 337 (1963) (“A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws.”).

¹⁵ Mulkern v. Hammitt, 326 F.2d 896, 898 (9th Cir. 1964); United States v. Reynders, 26 IBLA 131, 133 (1976).

¹⁶ Mulkem, 326 F.2d at 898 (emphasis added).

¹⁷ 2 Am. L. Mining 2d (MB) § 35.12[4], at 35-54 (Aug. 1999) (citations omitted); see also Mulkern, 326 F.2d at 898.

¹⁸ Surface Resources Act of 1955. 30 U.S.C. §§ 601, 603, 611-615; see also 43 C.F.R. § 3712.1(b).

¹⁹ See generally Clayton J. Parr & Dale A. Kimball, Acquisition of Non-Mineral Land for Mine Related Purposes, 23 Rocky Mtn. Min. L. Inst. 595, 635-36 (1977).

²⁰ See United States v. Etcheverry, 230 F.2d 193, 195 (10th Cir. 1956); Teller v. United States, 113 F. 273, 281 (8th Cir. 1901); see also 4 Am. L. Mining 2d, supra note 17,

incident” uses, discovery is still required on each claim in order to establish rights against the United States.²¹

Thus, the fundamental purpose of a mining claim under the Mining Law remains to secure in the claimant the right to extract the minerals contained in that claim. The expectation of the Congress that enacted the Mining Law was that every mining claim should eventually produce minerals. This is perhaps most pointedly illustrated by the fact that Congress gave mining operators a mechanism (mill sites) to secure rights to nonmineral federal lands for ancillary operations, rather than encumber or otherwise burden lands containing potentially valuable minerals with such uses. It is also illustrated by the Mining Law’s requirement that claimants perform annual assessment work on each claim,²² because the purpose of the assessment work requirement is to ensure that the “work [is] performed in good faith. tending to develop the claim and directly facilitate the extraction of minerals from it.”²³

Consequently, if a mining claim is proposed to be used solely for activities that are “reasonably incident” to extracting minerals from other lands - if it is used, in effect, as a substitute for a mill site - the question is legitimately raised whether the use is consistent with the Mining Law. The question takes on added force because federal courts have long and consistently held that a mining claimant’s right to use an unpatented mining claim is limited to purposes connected with the removal of minerals from that claim, and not for other purposes. See, e.g., Teller v. United States, 113 F. 273 (8th Cir. 1901); United States v. Rizzinelli, 182 F. 675 (D. Idaho 1910).

Lawyers with mining industry clients have recognized the problem for some years:

[S]everal commentators have raised the concern that the Mining Law of 1872 might have contemplated ancillary use only for the benefit of the claim on which the use occurs . . . The gist of this argument is that a

§ 110.02[2][d], at 110-13 to 110-16 (Aug. 1997).

²¹ See, e.g., United States v. Locke, 471 U.S. 84 (1985) (stating that discovery is required for a valid location).

²² The Mining Law requires that claimants perform assessment work of not less than \$100 per year for each claim. 30 U.S.C. § 28. Although the assessment work requirement has been replaced with a \$100 per-claim annual fee through Fiscal Year 2001 (except for claims granted a waiver under 30 U.S.C. § 28f(d)), see supra note 12 and accompanying text. there is no indication that this change was intended to abandon the notion that minerals on mining claims should be produced.

²³ 1 Am. L. Mining 2d, supra note 17, § 45.04[5][a], at 45-23 (Aug. 1996) (emphasis added) (quoting Terry Fiske, Character of the Labor or Improvements, Annual Assessment Work Manual 2-1, 2-11 (Don Sherwood ed., 1972)).

mining claim is meant to be mined, and the use of one claim for the benefit of another in absence of mining on it might be an abuse of the mining law.

. . . .

The most difficult situation in which to justify ancillary use [of a mining claim to benefit mining on other claims] is when the claim being used is, in fact, adversely affected. Here . . . the possibility of abuse of the mining law . . . becomes very real. In addition, the question of the operator's good faith in developing the claim comes directly into focus.²⁴

In the same vein:

[T]he use of the surface of an unpatented mining claim for mining and processing minerals removed from other lands may not be authorized. It appears that the use of the surface of unpatented mining claims would be more likely to be challenged if permanent damage is caused to the surface and no mining is conducted under the mining claim.²⁵

Still another commentator wrote:

Several early cases recognized the right of an operator to occupy and use unoccupied public domain in connection with mining operations. However, it is doubtful that such rights continue to exist in light of the comprehensive land use procedures adopted in the Federal Land Policy and Management Act of 1976. When ground is held by a mining claim that is not valid, an operator's rights are limited to those conferred under the doctrine of pedis possessio.²⁶

²⁴ 2 Am. L. Mining 2d, supra note 17, § 110.02[2][d], at 110-13 to 110-15 (Aug. 1997) (citations omitted).

²⁵ Richard G. Allen, Utilization of Adjacent Properties, Cross-Mining, and Commingling, 26 Rocky Mtn. Min. L. Inst. 419, 428 (1980); see also Parr & Kimball, supra note 19, at 634-36 (concluding that the "surface rights of the locator [of a mining claim are tied] to extraction of the mineral deposit contained within the boundaries of the claim." and therefore if a claim is being used for "dumping of waste, stripping, or some other similar use causing permanent surface disturbance" in connection with mining off that claim, it is questionable at best).

²⁶ 4 Am. L. Mining 2d, supra note 17, § 110.02[3][d] (Aug. 1997) (citations omitted).

C. The Secretary's Consideration of Proposed Uses of Public Lands on Which There Are No Valid Mining Claims or Mill Sites Is Discretionary

As explained above, the answer to the question of whether the use of a mining claim as a substitute for a mill site is consistent with the Mining Law turns on whether the claim is valid. Mining claim validity is important for at least three reasons, the first two being interrelated. First, the validity of the claim affects the discretion the Secretary has in considering whether to approve a proposed plan of operations. Second, it affects the kind of environmental analysis that must be carried out under NEPA. Third, on certain public lands, such as those withdrawn from the operation of the Mining Law, claim validity affects whether the Secretary has the authority to approve any mining activity at all.

When the Secretary considers a proposed plan of operations involving valid mining claims and valid mill sites, the Secretary must respect the rights that attach to these valid claims and mill sites while at the same time complying with the statutory mandate to “prevent unnecessary or undue degradation of the [public] lands.” 43 U.S.C. § 1732(b); cf. United States v. Weiss, 642 F.2d 296, 299 (9th Cir. 1981) (Forest Service may adopt “reasonable rules and regulations which do not impermissibly encroach upon the right to the use and enjoyment of placer claims for mining purposes.”). When reviewing a proposed plan of operations involving mining claims or mill sites that are not valid (or when unclaimed public lands are involved), however, the Secretary has broader discretion, because there are no rights under the Mining Law that must be respected.

This principle has been followed by the Interior Board of Land Appeals (IBLA):

[T]he mere filing of a plan of operations by a holder of a mining claim invests no rights in the claimant to have any plan of operations approved. Rights to mine under the general mining laws are derivative of a discovery of a valuable mineral deposit and, absent such a discovery, denial of a plan of operations is entirely appropriate. This, in fact, was the express holding in Southwest Resource Council, 96 IBLA 105, 123-23 [sic], 94 I.D. 56, 67 (1987). See also Robert L. Mendenhall, 127 IBLA 73 (1993); Southern Utah Wilderness Alliance, 125 IBLA 175, 188-89, 100 I.D. 15, 22 (1993).²⁷

The same point was made in the preamble to the revision of the hardrock mining regulations. 43 CFR subpart 3809 (the Part 3809 regulations), recently published by the Department:

It must be clearly understood, however, that persons who conduct operations on lands without valid claims or mill sites do not have the same

²⁷ Great Basin Mine Watch, 146 IBLA 248, 256 (1998) (emphasis in original); see also National Research Council, Hardrock Mining on Federal Lands 69 (1999).

rights associated with valid claims or sites. This means that BLM's decision whether to approve such activities . . . is not constrained or limited by whatever rights a mining claimant or mill site locator may have, and thus is of a somewhat different and more discretionary character than its decision where properly located and maintained mining claims are involved. For example, an operator [who] doesn't have a properly located or perfected mill site would not be able to rely upon a property right under the mining laws to place a tailings pile on unclaimed land. Such situations will be evaluated on a case-by-case basis in accordance with BLM policy.

65 Fed. Reg. 69,998, 70,047 (2000). This same idea was expressed in the Final Environmental Impact Statement on the Part 3809 regulation revisions:

If the operator has a legitimate and valid right to conduct the activity under the Mining Law, then the regulations are applied to make sure the operation does not result in unnecessary or undue degradation. But operators that are not conducting operations under the Mining Law are subject to other BLM land use regulations. Such situations would have to be evaluated on a case-by-case basis according to BLM policy.

2 Bureau of Land Management, Surface Management Regulations for Locatable Minerals (43 CFR 3809) Final Environmental Impact Statement 427 (1999).

In those situations where the "acreage authorized under the mining laws [is] insufficient to conduct [a proposed mining operation]," 65 Fed. Reg. at 70,013, the Secretary must consider a proposed mining plan under his other land management mandates, and may disapprove a plan if it is appropriate in light of competing values and federal responsibilities regarding the use of public lands. Consistent with this legal authority, the preamble to the recent revisions of the Part 3809 regulations makes clear that a plan requiring the use of invalid mining claims may be disapproved in order to serve the objectives of laws such as the National Historic Preservation Act, 16 U.S.C. § 470, or executive orders such as one protecting Native American sacred sites. See Exec. Order No. 13,007, 61 Fed. Reg. 26,772 (1996).

In accordance with the requirements of FLPMA, the Part 3809 regulations also make clear that operators "must take mitigation measures specified by BLM to protect public lands." 43 C.F.R. § 3809.420(a)(4), 65 Fed. Reg. at 70,122. Even where there are valid mining claims, the regulations give BLM the authority to disapprove plans of operation in what the preamble calls certain "exceptional circumstances," where unnecessary or undue degradation could result. 43 C.F.R. § 3809.411(d)(3)(iii); 65 Fed. Reg. at 70,048. However, where a proposed operation would use invalid mining claims or mill sites (or unclaimed lands), the "mitigation" required may be "avoiding the impact altogether by not taking a certain action or parts of an action," id. § 3809.5, because the claimant could not assert rights under the Mining Law. Instead, the federal land managers must fully take into account their "mandate for long-term productivity of the land.

protection of an array of uses and potential future uses. and management of the federal estate for diverse objectives.” See National Research Council, Hardrock Mining. on Federal Lands 40 (1999). Here, in other words, the decisionmaking is governed by the multiple use decisionmaking process described by the IBLA in National Wildlife Federation v. BLM, 140 IBLA 85, 99 (1997) (BLM must consider competing values “informedly and rationally” in the decisionmaking process “in order to determine whether a proposed activity is in the public interest”). See also BLM Instruction Memorandum 98-154 (1998) (plans of operations proposed for public lands not on valid mining claims or mill sites must be rejected if the plans pose “unacceptable resource conflicts”).

It also follows from the above discussion that, the broader the Secretary’s discretion, the wider the scope of reasonable alternatives the Secretary must consider during the process required under NEPA of considering environmental impacts. The “no-action” alternative (that is. a decision to deny the proposed plan of operations) is, a fortiori, a reasonable one in such circumstances.

The third reason the issue of claim validity is important is that it may affect the Secretary’s authority to approve a plan of operations at all. Specifically. in areas that have been withdrawn from the operation of the Mining Law. the Secretary may approve the use of the lands for mining purposes only where there are valid existing rights - that is. claims that were valid as of the date of the withdrawal and have since remained valid. If the mining claim is not valid. there are no valid existing rights to protect and the Secretary has no authority to approve the use of the invalid claim for mining purposes or ancillary operations within the withdrawn area. It is for this reason that the Part 3809 regulations require the Secretary to undertake a validity determination before approving plans of operations in such areas. See 43 C.F.R. § 3809.100; 65 Fed. Reg. at 70,116.

In sum, when a mining claimant proposes to use a mining claim in a way that may affect the claimant’s present ability to extract, remove, and profitably market any minerals that may be found on that claim, the Secretary has a responsibility to examine more closely the claim’s validity to determine the scope of his discretion to approve that use. This is particularly important with regard to uses for ancillary operations that significantly decrease the likelihood that minerals will be developed. Yarnell’s proposed plan, for example, is to site two waste rock dumps and a heap leach pad, each 100 to 200 feet high, on mining claims. not on mill sites. Bureau of Land Management, Yarnell Mining; Project Draft Environmental Impact Statement fig. 2-3 (1998). These uses plainly decrease Yarnell’s ability to extract and profitably market any minerals that might exist on these claims. It takes no great leap to infer that those mining claims are likely invalid. If they are invalid, the Secretary’s consideration of Yarnell’s proposed uses for that land would not be constrained by any rights Yarnell may assert under the Mining Law, because it would have none.

D . The Responsibilities of the Secretary in These Circumstances

We now turn to a more detailed discussion of how the Secretary should proceed when facing these situations. Historically, BLM has not always scrutinized the validity of mining claims on public lands when it considers whether to approve plans of operations, or modifications thereof. This is especially true when the lands are still open to location of mining claims. In those circumstances, contesting the validity of existing claims may be an empty exercise. That is, even if the validity determination demonstrates that the claims are invalid, and BLM institutes a contest against the claims and eventually prevails, the claimant (or someone else) may simply locate new claims on the land. This general practice of not examining the validity of claims has, however, been somewhat modified over time. See 43 C.F.R. § 3809.100: 65 Fed. Reg. at 70,116, discussed supra (requiring validity determinations before approving plans on public lands withdrawn from operation of the Mining Law).

Even though BLM does not routinely do validity determinations before decisions are made on proposed plans of operations, it is, for reasons explained above, important that the Secretary understand the amount of discretion that exists before making a decision whether to approve a proposed plan of operations. Therefore, at least a preliminary inquiry should be made regarding whether an operator's proposed use of its mining claims raises legitimate questions about whether the claims are valid. This preliminary inquiry should be relatively straightforward, based on an analysis of the information provided by the operator in a proposed plan of operations. No detailed examination on the ground and no full-blown mineral report or formal validity determination is necessary. What is necessary is for BLM to ensure that the proponent of the plan of operations shows what kinds of facilities and operations will take place on what claims or mill sites.

Whether the proposed use of a mining claim calls its validity into question will necessarily turn on the facts. If a proposed plan of operations would locate a large waste rock dump on a mining claim or a group of mining claims, that would be a fair indication that the operator does not plan to extract minerals from those claims, and is instead planning to use the claims only to support mineral development of other claims. One plan of operations submitted to the Department in recent years, for example, proposed to deposit about 24 million cubic yards of waste rock on 127 acres of land on which ten mining claims had been located. Bureau of Land Management, Crown Jewel Project Final Environmental Impact Statement S-15 (1997). Nothing in the plan indicated that the mining claims contained any minerals at all, much less that the operator had any intent to develop any minerals that might be found in the claims (such as might be mined by some technique that would remain practicable despite the presence of the waste rock dump). This proposed use of these claims would raise serious questions regarding the validity of these claims.

Use of mining claims for ancillary operations may not always raise such serious questions. The Yarnell mine proposal, for example, would house the mine office in a building on one of the mining claims, which would eventually be dismantled and removed and the land reclaimed. See

Yarnell DEIS, *supra*, at 2-47. Yarnell's plan does not contemplate extracting minerals from this claim, but a temporary use of the claim for a building is plainly of a different character than a gigantic waste rock dump or tailings pile that is a relatively permanent feature on the landscape. and which gives rise to the inference that the mining claim thus encumbered is unlikely to produce minerals. See also Crown Jewel FEIS, *supra*, at S-18, S-19 (use of parts of mining claims as a temporary soil stockpile).

III. CONCLUSION

For the reasons stated above, the Secretary should, when reviewing new plans of operation and plan modifications (including those pending review as of the date of this opinion), determine whether a claimant is proposing to use mining claims solely for ancillary operations, without any concurrent plans for marketable mineral extraction from those claims.

If the Secretary finds that a mining claimant is proposing to use a mining claim solely for ancillary operations in an area that has been withdrawn from mining activity, subject to valid existing rights, the Secretary must make a formal determination about the validity of the claim before making a decision on the plan of operations. If the claim is not valid, the Secretary should institute proceedings to contest the claim²⁸ and deny the plan of operations.

If the context is a plan of operations or a modification thereof in an area not withdrawn from mining, and if, after an initial inquiry, the facts give the Secretary reasonable grounds for questioning the validity of a mining claim the claimant proposes to use for ancillary operations, the Secretary should refrain from approving the plan of operations until one of the following things has occurred:

- (1) The Secretary performs a mineral examination and determines that the mining claim is valid notwithstanding its proposed use for ancillary operations (if it is invalid, the Secretary should institute a proceeding to contest the claims);
- (2) The claimant relocates the mining claim to be used for ancillary operations as a mill site, within the acreage limitations set forth in the Mining Law; or
- (3) The Secretary, after preparing a NEPA analysis of the reasonable alternatives available (including the no-action alternative), on the premise that the claim is

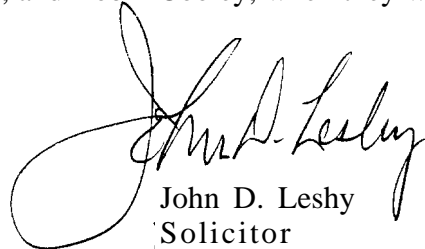
²⁸ See Best v. Humboldt Placer Mining Co, 371 U.S. 334, 336 (1963) (the Department has the authority to determine the validity of mining claims). In a mining claim contest proceeding, the Department bears the initial burden of going forward with evidence, see United States v. Bunkowski, 5 IBLA 102, 119 (1972), but once this burden is met, the tribunal must determine that the mining claim is null and void unless the claimant establishes by preponderance of the evidence that the claim meets the requirements of the mining laws. See McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980), *cert. denied*, 450 U.S. 996 (1981).

invalid and gives rise to no rights under the Mining Law against the United States. decides that the plan satisfies the requirements found in 43 CFR subpart 3809, and that approval of the plan of operations is an appropriate exercise of his discretion under the applicable public land laws.

The Secretary may also, after preparing appropriate NEPA documentation, exchange the public lands that the operator intends to use for ancillary operations for other lands of equal value in accordance with the requirements of applicable law, including FLPMA § 206, 43 U.S.C. § 1716.

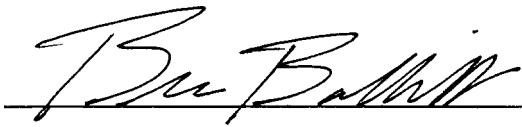
Finally, we note that an issue is raised here whether the Secretary must recover the fair market value for uses of public lands for purposes ancillary to mining when those uses will not take place on valid mining claims or mill sites. FLPMA's general policy and some of its specific parts require the recovery of fair market value in issuing permits for the use of public lands. FLPMA § 102(a)(9), 43 U.S.C. § 1701(a)(9); see also 46 Fed. Reg. 5772 (1981) (preamble to BLM's final rights-of-way regulations stating that "[t]here is no statutory authority for issuing land use authorizations under section 302 of [FLPMA] at less than fair market value"). This issue is left for more careful examination in a future opinion.

This Opinion was prepared with the substantial assistance of Kendra Nitta, Karen Hawbecker, and Peter Schaumberg, Division of Mineral Resources, Office of the Solicitor; S. Elizabeth Birnbaum, Associate Solicitor, Division of Mineral Resources, Office of the Solicitor, and formerly Special Assistant to the Solicitor; Mark Squillace, formerly Special Assistant to the Solicitor; and Amy Sosin, Kevin Tanaka, and Robin Cooley, when they were attorneys in the Solicitor's Honors Program.

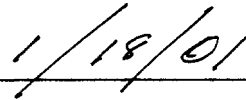


John D. Leshy
Solicitor

I concur in this Opinion:



Secretary of the Interior



Date