*Draft*

# Mineral Law

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# Comments on April 1999 Draft Edition

**This document is a partially updated draft of the 1996 Sixth Edition of my *Mineral Law* book. With the exception of the sections on AClaim Recordation under FLPMA@ and ASurface Management Programs,@ which are now under revision, the book is current through March 1999. I have not had time to edit this manuscript for grammar, typographical errors and other inconsistencies; but, while doing so, I am making it available to anyone in BLM who would like an electronic copy. If you find errors, which is quite easy to do, please let me know by email and I will revise accordingly.**

**Because this draft document has no index, I suggest that you save it in a Word Perfect file so that you can manipulate the text and use Asearch and replace@ in the edit menu to find specific words or phrases. This document consists of approximately 1130 pages--so think twice before printing.**

# CONTENTS

**10.** INTRODUCTORY MATERIAL

HISTORICAL REVIEW OF THE FEDERAL MINING LAWS

For almost 200 years Congress has wrestled with the problem of mineral disposal. As early as March 3, 1807 (2 Stat. 448), a law was passed which authorized leasing of lead mines. Most mineral lands were disposed of by a leasing arrangement until the Acts of July 11, 1846 (9 Stat. 37), and March 1, 1847 (9 Stat. 146), authorized the sale of mineral lands.

In 1848, gold deposits were discovered in California. This stimulated tremendous controversies as to how the Federal minerals should be disposed. Most of the controversy was between the Federal Government and the State of California. During this time, many schemes on both sides were proposed concerning how such mineral lands should be disposed. There were

numerous proposals to tax the mines, lease mineral lands and sell permits to mine. California miners did not want minerals to be sold or leased by the Federal Government, but instead desired that the State of California administer the disposal of minerals.

All through this period of controversy, rules and regulations proposed and established by the miners allowed a reasonable amount of stability in the mining camps. These rules and regulations provided primarily for a system of location, specifying size of claims, location procedure and work required to hold a claim.

The Act of July 26, 1866 (14 Stat. 251), was based on the rules and regulations in common use by the miners. Not only did this law establish a single set of mining requirements but it also offered a means for the miners to obtain legal title to a mining claim upon expenditure of at least $1,000 per claim.

The Act of July 26, 1866, declared all mineral lands owned by the public open to exploration and location. Only one location up to 200 feet in length was allowed along each lode or vein. Payment for patent of lode claims was at the rate of $5.00 per acre.

The Act of July 9, 1870 (16 Stat. 217), amended the Act of July 26, 1866, to include placer locations. It limited placer locations to a maximum of 160 acres and required that such locations conform to legal subdivision on surveyed lands. Valid placer claims could be patented upon payment of $2.50 per acre.

The General Mining Law of May 10, 1872, replaced much of the 1866 and 1870 mining Acts. Although the 1872 mining law has been amended many times, it still remains surprisingly intact after more than 100 years. The 1872 law authorized placer and lode mining claims, mill sites and tunnel sites of specific dimensions. At least $100 worth of work was required on each claim annually in order to maintain a possessory title. Placer claims, lode claims and mill sites could be patented upon expenditure of $500 worth of work, provided the discovery requirements were met.

The Mineral Leasing Act of February 25, 1920 (41 Stat. 437), required that deposits of coal, phosphate, oil, oil shale, gas and sodium could be acquired only through competitive and noncompetitive leasing systems. The Act of April 17, 1926 (44 Stat. 301), made sulphur in public lands in New Mexico and Louisiana subject to the 1920 Mineral Leasing Act. The Act of February 7, 1927 (44 Stat. 1057), authorized that chlorides, sulphates, carbonates, borates, silicates or nitrates of potash be included as leasable minerals.

The Materials Act of July 31, 1947 (61 Stat. 681), authorized disposal of sand, stone, gravel and common clay through a contract of sale.

The Outer Continental Shelf Lands Act of August 7, 1953, authorized competitive leasing for all minerals on the Outer Continental Shelf in addition to asserting jurisdiction of the United States to the Outer Continental Shelf. This act was recently modified by the Outer Continental Shelf Lands Act Amendments of September 18, 1978 (92 Stat. 629).

The Act of July 23, 1955 (69 Stat. 367), removed common varieties of sand, gravel, cinders, pumice, pumicite or cinders from the category of locatable minerals and placed them under the Materials Act as salable minerals. This act also authorized multiple use of the surface resources on mining claims.

The Geothermal Steam Act of December 24, 1970 (84 Stat. 1566), established a competitive and noncompetitive leasing system for geothermal resources and associated by-products.

The Surface Mining Control and Reclamation Act of 1977 established a new Office of Surface Mining, Reclamation and Enforcement (OSM) in the Department of the Interior. This law requires reclamation of all surface mined coal lands.

At the present time, Federal minerals fall into one of three categories: (1) locatable minerals; (2) leasable minerals; and (3) salable minerals.

## CHRONOLOGICAL DEVELOPMENT OF THE FEDERAL MINING STATUTES

**Act of March 3, 1807; 2 Stat. 448**

Lead mines and sections contiguous to each are reserved for future disposal; mines discovered after the date of the act may be leased for a limited term.

**Act of February 15, 1811; 2 Stat. 617**

Salt springs and lead mines are reserved from sale in Louisiana.

**Act of May 65 1812; 2 Stat. 728**

Salt springs and lead mines are reserved from sale in the territories of Michigan, Illinois and Louisiana.

**Act of March 25, 1816; 3 Stat. 260**

Lead mines and salt springs on lands ceded to the United States are reserved from use except under presidential authority.

**Act of April 20, 1832; 4 Stat. 505**

Salt springs and hot springs are reserved to the United States in the territory of Arkansas. The Governor may lease such deposits.

**Act of July 11, 1846; 9 Stat. 37**

Reserved lead mines may be sold in Illinois, Arkansas, Wisconsin and Iowa.

**Act of March 1, 1847; 9 Stat. 146**

The Secretary of the Interior is to conduct geological surveys in Michigan to identify lands containing valuable ores. Such mineral lands are to be sold under supervision of the Secretary of the Treasury.

**Act of March 3, 1847; 9 Stat. 179**

Mineral lands in Wisconsin may be surveyed and sold.

**Act of September 26, 1850; 9 Stat. 472**

Mineral lands in the District of Michigan and the Chippewa District in Wisconsin are open to public sale.

**Act of February 27, 1865; 13 Stat. 440**

Mining titles may be recovered through possessory actions.

**Act of March 3, 1865; 13 Stat. 529**

Coal lands may be disposed from public lands. For actual coal mining operations, up to 160 acres of land may be acquired at a minimum rate of $20 per acre.

**Act of July 26, 1866; 14 Stat. 251**

All mineral lands of the public domain are declared open to exploration and occupation. The Act authorizes the location of lode mining claims and, upon expenditure of at least $1,000 in improvements, a patent may be purchased at the rate of $5.00 per acre. The law allowed only one location per lode and limited each location to 200 feet along the lode or vein.

**Act of July 9, 1870; 16 Stat. 217**

This Act amended the Act of July 26, 1866 to include placer locations. It allows placer claims to conform to legal subdivision on surveyed lands. Placer claims may not exceed 160 acres for any one person or association of persons. Payment for patent of placer claims is made at the rate of $2.50 per acre.

**Act of May 10, 1872; 17 Stat. 91**

This Act is the well known General Mining Law of 1872. It replaced much of the 1866 and 1870 laws. The 1872 law declared "all valuable mineral deposits in lands belonging to the United States ... to be free and open to exploration and purchase." It authorized placer and lode

mining claims to be located by a procedure that is largely unchanged to this day. The Act also requires that not less than $100 worth of work be performed on each claim per year. Patents may be issued for lands containing "valuable deposits" upon expenditure of $500 worth of work.

**Act of February 18, 1873; 17 Stat. 465**

The states of Michigan, Wisconsin and Minnesota were excepted from the mining laws.

**Act of March 3, 1873; 17 Stat. 607**

Entry may be made on vacant coal lands belonging to the United States.

**Act of May 5, 1876; 19 Stat. 52**

Mineral lands in Missouri and Kansas are excluded from the mining laws.

**Act of March 3, 1879; 20 Stat. 394**

The office of Director of the Geological Survey is established. Among other things, duties include geology and mineral resource studies and classification of the public lands.

**Act of March 3, 1881; 21 Stat. 505**

If title to mineral lands is contested, patent is not issued until title is perfected.

**Act of March 3, 1891; 26 Stat. 1104**

The President was authorized to appoint a mine inspector for each territory of the United States for the purpose of mine safety.

**Act of August 4, 1892; 27 Stat. 348**

Lands chiefly valuable for building stone may be located with placer mining claims.

**Act of May 14, 1898; 30 Stat. 413**

This Act gives a procedure for using affidavits of location including filing, publishing and posting of notices in Alaska.

**Act of May 14, 1898; 30 Stat. 415**

Canadians are given the same mining rights in Alaska as United States citizens are given in Canada.

**Act of June 6, 1900; 31 Stat. 327**

Mining laws of the United States are extended to Alaska. The Act specifies a 90-day time period and place for filing notices of location for mining claims in Alaska.

**Act of January 31, 1901; 31 Stat. 745**

Salt deposits may be located and purchased under the placer mining laws.

**Act of February 12, 1903; 32 Stat. 825**

Assessment work performed on any one of a group of contiguous placer claims located for oil lands will be credited to the claim group, but not to exceed five claims.

**Act of April 28, 1904; 3 Stat. 525**

Procedure is given for locating coal lands in Alaska.

**Act of May 28, 1908; 35 Stat. 424**

United States is given preference right to purchase coal in Alaska, if needed by the Army or Navy.

**Act of March 3, 1909; 35 Stat. 844**

If entry is made under nonmineral land laws on lands later classified as valuable for coal, the entryman may use such coal for domestic purposes, but the coal is reserved to the United States.

**Act of May 16, 1910; 36 Stat. 369**

Bureau of Mines is established with duties covering health and safety, conservation, research and prevention of waste.

**Act of June 25, 1910; 36 Stat. 847 (Pickett Act)**

The President is authorized to temporarily withdraw lands; but metalliferous minerals in withdrawn lands are to be open to exploration and purchase under the mining laws.

**Act of August 25, 1914; 38 Stat. 708**

This Act is concerned with temporary agreements between the Secretary of the Interior and applicants for patent on withdrawn lands in which there has been a discovery of oil and gas.

**Act of February 25, 1920; 41 Stat. 437**

The Mineral Leasing Act of 1920 provided that deposits of coal, phosphate, oil, oil shale, gas, and sodium could be acquired through a leasing system. This law specifies, among other things, royalty rates, rental rates, lease size, and term required for each kind of leasable mineral. The law also provides for issuance of prospecting permits prior to lease issuance and competitive bidding for certain deposits.

**Act of April 17, 1926; 44 Stat. 301**

This Act authorizes prospecting permits and preference-right leases for sulphur on public lands in New Mexico and Louisiana.

**Act of June 8, 1926; 44 Stat. 710**

The Secretary of the Interior may lease deposits of gold, silver or quicksilver deposits with preference to the grantee of lands that did not convey minerals.

**Act of June 25, 1926; 44 Stat. 768**

The Secretary of the Interior and the Secretary of Commerce are authorized to aid owners of private potash rights in exploration for such deposits. Upon production from such deposits, royalty shall be paid to the United States.

**Act of February 7, 1927; 44 Stat. 1057**

The Secretary of the Interior is authorized to grant prospecting permits and preference-right leases for chlorides, sulphates, carbonates, borates, silicates or nitrates of potash. This law amends the Act of February 25, 1920.

**Act of April 23, 1932; 47 Stat. 136**

Public lands withdrawn under the reclamation laws may be open to location and patent under the general mining laws with certain rights reserved to the United States. The President is authorized to temporarily withdraw lands; but metalliferous minerals in withdrawn lands are to be open to entry.

**Act of May 21 1932; 47 Stat. 14**

States that made lieu lands selections because the original grant lands were classified as valuable for minerals and may relinquish the lieu selections and acquire the mineral lands if still available.

**Act of July 17, 1914; 38 Stat. 509**

Lands withdrawn and classified as valuable for phosphate, nitrate, potash, oil or asphalt may be patented subject to a mineral reservation to the United States.

**Act of May 4, 1934; 48 Stat. 663**

The general mining laws of the United States are extended to Alaska.

**Act of June 16, 1934; 48 Stat. 977**

The Mineral Leasing Act of 1920 is amended to provide that if water in sufficient quality and quantity is discovered while drilling an oil and gas well that land is to be reserved as a water hole.

**Act of August 25, 1937; 50 Stat. 808**

This Act authorizes issuance of oil and gas prospecting permits and leases to applicants by listed serial numbers.

**Act of June 7, 1939; 53 Stat. 811**

The President is authorized to stockpile strategic and critical minerals and the Secretary of the Interior is authorized to investigate and develop new sources of such minerals.

**Act of May 7, 1941; 55 Stat. 177**

This Coal Mine Safety Act authorizes inspectors of coal mines and the distribution of health and safety information.

**Act of May 9, 1942; 56 Stat. 273**

The Secretary of the Interior is authorized to lease deposits of silica and other nonmetallic minerals in lands previously withdrawn by Executive Order No. 5105 of May 3, 1939.

**Act of September 27, 1944; 58 Stat. 745**

The Secretary of the Interior is authorized to dispose of sand, stone, and gravel on public lands.

**Act of August 8, 1946; 60 Stat. 950**

Reduction of royalties and assignments on oil and gas leases are dealt with in this law.

**Act of July 31, 1947; 61 Stat. 681**

The Materials Act of 1947 authorizes disposal of materials including, but not limited to,

sand, stone, gravel, and common clay on public lands through a sales system. If the appraised value of the material exceeds $1,000, it must be disposed by competitive bidding. The law also provides for free use of material by government agencies, municipalities or non-profit organizations, if the material is not to be used for commercial purposes.

**Act of August 7, 1947; 61 Stat. 913**

The Acquired Lands Act authorizes mineral leasing on acquired lands.

**Act of June 21, 1949; 63 Stat. 214**

Deferment of assessment work on mining claims may be approved if the claimant is unable to obtain access.

**Act of June 30, 1950; 64 Stat. 311**

Development of mineral resources is extended to certain public lands which were not open to such development at the date of this Act.

**Act of July 16, 1952; 66 Stat. 692**

This Act amends the Coal Mine Safety Act of May 7, 1941 by increasing the scope and authority of the 1941 Act. The 1952 Act also creates a Federal Coal Mine Safety Board of Review.

**Act of May 22, 1953; 67 Stat. 29**

The Submerged Lands Act of 1953, among other things, grants title of lands beneath navigable waters to the respective states. The Act also confirms the seaward boundary of the coastal states to extend three miles from the coastline of the state.

**Act of August 7, 1953; 67 Stat. 462**

The Outer Continental Shelf Lands Act of 1953 extends the jurisdiction of the United States to include that part of the continental shelf outside of the three mile zone. The Act also authorizes the Secretary of the Interior to grant mineral leases on the Outer Continental Shelf through a competitive bidding system.

**Act of August 12, 1953; 67 Stat. 539**

This act validates certain mining claims that were located on lands which, at the time of location, were under a prospecting permit or mineral lease. In the event a mineral patent should issue, a mineral reservation is made to the United States.

**Act of August 13, 1954; 68 Stat. 708**

This Act permits multiple development of both leasable and locatable minerals on the same tract of lands under the mineral leasing and mining laws. If a mineral patent should issue, a reservation is made to the United States for the leasable minerals.

**Act of August 30, 1954; 68 Stat. 934**

The Atomic Energy Commission is authorized to issue permits for exploration and mining of fissionable materials on public lands.

**Act of July 23, 1955; 69 Stat. 367**

Common varieties of sand, gravel, cinders, pumice, pumicite and clay are removed from the category of locatable minerals and are placed under the Materials Act of 1947. This 1955 Act also provides for multiple use of the lands and surface resources on mining claims.

**Act of August 11 9 1955; 69 Stat. 679**

This Act permits mining claims to be staked for uranium on lands classified or known to be valuable for coal.

**Act of August 11, 1955; 69 Stat. 681**

Approximately seven million acres of land that had previously been withdrawn or reserved for power development were restored to mining location.

**Act of July 20, 1956; 70 Stat. 592**

Reserved mineral deposits are subject to disposal under this law by mineral patent if located prior to the Mineral Leasing Act of 1920.

**Act of July 3, 1958; 72 Stat. 323**

This Act provides that oil and gas leases may be issued pursuant to the Mineral Leasing Act of 1920 for both lands beneath non-tidal, navigable, Alaskan waters.

**Act of August 23, 1958; 72 Stat. 829**

The period for doing assessment work is changed so that each year for assessment work begins on September I instead of July 1.

**Act of September 2, 1958; 72 Stat. 1701**

Geological, geochemical and geophysical surveys may be used to fulfill the annual labor requirements. These surveys may be used for two consecutive years, but may not exceed five years and must be conducted by qualified experts.

**Act of March 18, 1960; 74 Stat. 7**

This Act provides for location and patent of up to 5 acres of nonmineral lands in connection with a placer mining claim.

**Act of September 1, 1960; 74 Stat. 785**

This amendment to the Mineral Leasing Act of 1920 specifies new requirements for the leasing act minerals, including maximum leasehold per state, application procedures and assignment procedures.

**Act of September 2, 1960; 74 Stat. 781**

Extension of the primary term of noncompetitive oil and gas leases is authorized in this statute.

**Act of August 17, 1961; 75 Stat. 384**

This act authorizes the Secretary of the Interior to sell lands in Alaska with known coal, oil or gas deposits.

**Act of September 28, 1962; 76 Stat. 652**

Petrified wood is defined and removed from the category of locatable minerals. Limited quantities of petrified wood may be obtained from the public lands on a free-use basis.

**Act of October 23, 1962; 76 Stat. 1127**

The Mining Claim Occupancy Act of 1962 authorized the Secretary of the Interior to convey up to fee simple title to residential occupants of unpatented mining claims on which valuable improvements have been made.

**Act of August 31, 1964; 78 Stat. 710**

The Secretary of the Interior may authorize collective prospecting, development or operation of coal areas to conserve coal resources.

**Act of September 16, 1966; 80 Stat. 772**

Federal Metal and Nonmetallic Mine Safety Act was passed to increase requirements for mine safety.

**Act of December 24, 1970; 84 Stat. 1566**

The Geothermal Steam Act authorized the leasing of geothermal resources and associated byproducts in public lands through competitive and noncompetitive leasing systems.

**Act of September 3, 1974; 88 Stat. 1079**

The Geothermal Energy Research, Development, Demonstration Act of 1974 was passed to promote the development and utilization of geothermal resources.

**Act of August 4, 1976; 90 Stat. 1083**

The Federal Coal Leasing Amendments Act of 1975 substantially changed the procedure for leasing coal on Federal lands.

**Act of September 28, 1976; 90 Stat. 1342**

This Act withdraws certain national parks and monuments, places a moratorium on exploration and development activity and establishes new recordation requirements for mining claims in the park system.

**Act of October 21, 1976; 90 Stat. 2743**

The Federal Land Policy and Management Act of 1976 specifically affects locatable minerals by changing withdrawal procedures, requiring recordation of mining claims with the BLM and authorizing regulations for surface protection of the public lands.

**Act of August 3, 1977; 91 Stat. 445**

The Surface Mining Control and Reclamation Act of 1977 established a new Office of Surface Mining, Reclamation and Enforcement (OSM) in the Department of the Interior. This law requires reclamation of all surface mined coal lands.

**Act of November 9, 1977; 91 Stat. 1290**

The Federal Mine Safety and Health Amendments Act of 1977 repealed the Federal Metal and Nonmetallic Act of 1966 and amended the Federal Coal Mine Health and Safety Act of 1969. Responsibilities for enforcement of mine health and safety laws were transferred from the Department of the Interior (MESA) to the Department of Labor where it is called the Mine Safety and Health Administration (MSHA).

**Act of September 18, 1978; 92 Stat. 629**

The Outer Continental Shelf Lands Act Amendments of 1978 establishes new policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf.

**Act of June 28, 1980; 94 Stat. 553**

The Deep Seabed Hard Mineral Resources Act was passed by Congress to establish an interim legal regime under which technology can be developed and the exploration and recovery of hard mineral resources of the deep seabed can take place.

## LEGAL SOURCE MATERIALS

The major sources of law include: (1) Federal and state Constitutions; (2) Federal and state statutes; (3) interpretations of the Constitution and statutes by the state supreme courts, the U.S. Supreme Court and the inferior Federal courts; and (4) state and Federal administrative regulations and decisions.

### Federal Constitution

The Federal Constitution has been the supreme law of the Federal Government since its adoption on March 4, 1789. It presently contains seven articles and twenty-three amendments. The text of the Federal Constitution may be found in many sources, including the United States Code.

### State Constitutions

Each state has a state constitution with an organization similar to the Federal Constitution. State constitutions, the supreme law for the state government, may generally be found in a volume of the code for a specific state.

### Federal Law

The authority for the U.S. Congress to make laws is given in Article 1, Sec. 8, of the United States Constitution. Congress meets in two-year periods; for example, the period Congress met during 1975-1976 is referred to as the 94th Congress. During each two-year period of Congress, bills are introduced in both houses of Congress. A bill introduced in the Senate is identified by "S... ". A bill introduced in the House of Representatives is identified by "H.R. ... ". The number of the bill represents the order in which it was introduced during a congressional period as numbers are assigned in consecutive order by each house.

Bills are assigned to an appropriate committee after they are introduced. If the committee supports the bill it is reintroduced by the chairman, along with the committee recommendations. The bill is then "reported out of committee." After the bill is debated, a vote is taken. If the bill passed, it is sent to the other body for approval. If both senate and house approve the bill, it is submitted to the President for signature. If the President signs the bill, it becomes law. If the President vetoes the bill, the veto can be overridden by a two-thirds vote in both houses. If the veto is overridden, the bill becomes law.

As each law is enacted, it is published separately as a slip law by the U.S. Government Printing Office and is soon available in most libraries. Other standard sources of current laws are the *U.S. Law Week, Current Public Laws and Administrative Service,* and the *U.S. Code Congressional and Administrative News Service.*

All slip laws are published in chronological order at the end of each session of Congress in volumes called *Statutes-at-Large*. The *U.S. Statutes-at-Large* contain all laws enacted since 1789. One must be aware when using the Statutes-at-Large that a particular law may have been amended or repealed by a subsequent law.

The Federal law and most state laws have been codified to facilitate reference work on a specific subject. In the codification process, laws are arranged so as to bring all laws together on the same subject. New amendments are added in the appropriate places and all superseded, expired or repealed laws are eliminated. Statutes are commonly supplemented by a Apocket part" cumulative supplement which can be found at the back of each volume of the code.

Congress authorized the first codification of Federal law in 1866; and as a result, the *Revised Statutes* was published as a volume in 1875. This volume was submitted to Congress and handled as a bill; it was approved by both houses and signed by the President. One section of the bill repealed all laws that were incorporated in the *Revised Statutes of 1875.* In 1878, a second edition of the *Revised Statutes* was published to update the codification and to correct the inaccuracies found in the first volume.

The present codification of Federal law, the *United States Code,* was authorized by Congress in 1925. This codification arranged the Federal law in 50 titles and was published in 1926 as the *United States Code*, 1926 ed. The *U.S. Code* is kept current by cumulative supplement volumes published yearly. Every six years a new edition of the U.S. Code is published, incorporating the cumulative supplement volumes. Since the *U.S. Code* was never sent through the legislative process like the *Revised Statutes,* the *Statutes-at-Large* will prevail if there is a discrepancy in wording between the two.

Private publications of annotated codes are arranged and published with the same text as the *United States Code,* except that after each section, the annotated versions have digests of all the pertinent court decisions that have interpreted the section.

**State Laws**

States enact laws and publish them in a manner similar to that of the Federal Government. Most states hold annual meetings of the legislature; however, some still have biennial sessions. State legislative groups commonly are referred to as legislatures or general assemblies which are composed of two parts -- the senate and the house of representatives. State laws generally are published in code books and arranged by title according to subject matter. These code books are kept up-to-date with supplements or pamphlets giving all amendments or changes in the law. Session laws should be checked for the most recent changes in the law.

**Court Organization and Procedure**

Trial courts or courts of the first instance are the courts where the trial is first held. Although this is the lowest court, it is very important because it is here that the parties appear, witnesses testify and are cross-examined, and other evidence is entered in the record. The trial court or the jury, if one is used, has responsibility for determining questions of fact on the controversy, applying rules of law and rendering a decision. The party who receives the adverse decision has the right to appeal the decision to an appellate court.

The appellate courts do not decide questions of fact, only questions of law; and they must base their decision on the record made in the trial court. Upon appeal of a case to an appellate court, written briefs, including a summary of the facts and arguments on the points of law involved, are submitted by both parties. The appellate court then writes a decision which affirms, reverses or remands the case. Depending on the court structure, the adverse party may have the opportunity to appeal the decision to a higher court.

The states have municipal courts, district courts, which may or may not be appellate courts, and a final court of appeal generally called the state supreme court. An adverse decision from the state supreme court may be appealed to the United States Supreme Court.

For most cases related to mining litigation, the United States district court serves as the trial court. An adverse decision from the district court may be appealed to the United States court of appeal which is organized into ten circuits and the District of Columbia. The next and highest court of appeal is the Supreme Court of the United States.

**Federal Administrative Regulations**

Regulations are prepared and issued by Federal. agencies through delegation of authority by presidential executive order or by Federal statute. These regulations are the agency statement designed to interpret, implement and standardize the administration of a particular law.

Since 1936, the *Federal Register* has been an official source for publication of rules and regulations of Federal agencies. The Federal Register Act (49 Stat. 500) requires that for administrative rules and regulations to be legally effective, they must be published in the *Federal Register*. The *Federal Register* is published daily except Saturday, Sunday, Monday and days following holidays.

Although the *Federal Register* is an essential reference of new regulations, it is not useful for research on a given subject. The *Code of Federal Regulations* (CFR) is a codification by subject of all regulations of the *Federal Register* in force at a particular date. The CFR consists of 50 titles arranged by subject matter and an index volume. Every year each title is brought up-to-date with all the regulations in force at the time of publication and issued as follows: (1) Titles 1-16 are revised to January 1; (2) Title 17-27 are revised to April 1; (3) Titles 28-41 are revised to July 1; (4) Titles 42-50 are revised to October 1.

To determine whether there have been amendments since the revision date of the Code volume in which the user is interested, the following two lists must be consulted: the "*Cumulative list of CFR Sections Affected*" issued monthly and the "*Cumulative List of Parts Affected*" which appears daily in the *Federal Register*. These two lists will refer the user to the *Federal Register* page where the latest amendment of any given rule can be found.

**IBLA=s Authority to Examine Regulations**

In *Alamo Ranch Co*., 135 IBLA 61 (1996), the Board discussed it authority to examine regulations as well as the legal status of regulations. The Board said at 69 and 71:

> The ultimate question, of course, is whether or not the authority to examine a regulation to determine if it has been duly promulgated exists as part of the decisional authority of the Secretary which has been delegated to the Board. Preliminary to exploring this question, certain general observations are in order as to what is and what is not controversy.
>
> Thus, it is undisputed that a duly promulgated regulation has the force and effect of law and is binding not only on the public at large but on all of the constituent elements of the Department, including this Board. *See, e.g., McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955). On the other hand, it is equally clear that regulations Ain order to be valid, must be consistent with the statute under which they are promulgated.@ *United States v. Larionoff*, 431 U.S. 864, 973 (1977). *See also Planned Parenthood Federation of America v. Heckler*, 712 F.2d 650, 655 (D.C. Cir. 682 F.Supp. 599, 606-07 (D.D.C. 1988). * * *
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> The Board has held on numerous occasions that it is not required to follow an isolated Federal court decision in other cases where Athe effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion.@ *Conoco, Inc*., 110 IBLA 186 (1984); *see also Triple R Coal Co. v. OSM*, 126 IBLA 316 n. 4 (1993), and cases cited. * * *
>
> We conclude, therefore, that, consistent with the entire history of Departmental adjudications set forth above, the Board is vested with the authority to determine in the context of deciding an appeal whether or not a regulation as applied to an appellant is duly promulgated, i.e., that it is consistent with its statutory basis, and to direct that any

regulation which is clearly contrary to the statute upon which it is premised not be followed in a specific case.

**Legal Authority of Regulatory Preamble**

In *James R. Ragsdale,* 137 IBLA 243, 246 (1996), the Board pointed out that although a regulatory preamble does not have the force and effect of law, it may be used to interpret an ambiguous regulation:

> We recognize that the preamble language quoted above and relied on by BLM in this case and in *Taylor* would dictate a different result; however, a regulatory preamble, by itself, does not have the force and effect of law. *Ohio Manufacturers= Association v. City of Akron*, 628 F. Supp. 623, 634 (N.D. Ohio 1986), *rev=d on other grounds*, 801 F.2d 824 (6th Cir. 1986), *cert. denied*, 484 U.S. 801 (1987) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 315-16 (1979)). While a regulatory preamble may be used to interpret an ambiguous regulation, it cannot derogate the plain words of the regulations or enlarge their meaning. *See Ronald Valmonte,* 87 IBLA 197, 201 (1985). ARegulatory preambles * * * may be useful aids in the interpretation of an ambiguous regulation, but they cannot supplant the regulation, itself. In other words, we cannot say that the regulation says what it does not say or proscribes what it does not, in fact, prohibit.@ *Id*. At 201.

## LEGAL CITATIONS FOR MINERAL LAW

**Law**

In 1873, all laws then in force were categorized under seventy-four titles. In 1878 these laws were revised and called the *Revised Statutes*. The Mining Act of July 26, 1866 and the General Mining Act of May 10, 1872 were affected by this compilation. Although the Revised Statutes are still available, they are of limited use.

Citations to the *Revised Statutes*:

*Rev. Stat.* '1450

Section number
symbol for section
abbreviation for Revised Statutes

The *United States Statutes-at-Large* consists of a series of volumes that contain all the acts of Congress in a chronological order, arranged according to their date of approval. After each session of Congress, the laws passed during that session are printed in a bound volume. It is important to remember that the laws found in these volumes may have been amended or repealed by later laws. For example the General Mining Law of 1872 has been amended significantly by

numerous subsequent laws.

Citation to the *United States Statutes-at-Large*:

49 Stat.174

page number
abbreviation for *United States Statutes-at-Large*
volume number

The *United States Code* is a compilation of all the Federal laws in force as of a given date. These laws are categorized by subject matter under fifty titles. The volumes of the *Code* are published every six years but are kept up to date with annual supplements. Title 30 (Mineral Lands and Mining) contains most of the Federal mining laws in effect, so it is one of the most important reference materials concerning mining law.

Citation to the *United States Code*:

30 USC '181 et seq. (1970)

edition date
section number
abbreviation for *United States Code*
title number

Citation to *supplements of the United States Code*:

30 USC '181 et seq. (1870) (Supp. v. 1974)

The *United States Code Annotated* is a private publication containing all the Federal laws categorized by subject matter under titles and sections similar to the *United States Code*. The special feature offered in the *United States Code Annotated* is annotations following each section. These annotations consist of brief summaries of case law that interpret each section.

Citations to the *United States Code Annotated*:

30 USCA '181

section number
abbreviation for *United States Code Annotated*
title number

Almost every state has laws that govern mining. Those laws that directly involve mining, such as state location laws, state surface mining laws and state mineral leasing laws are generally categorized together under a single title or division of the code book. Most states have codified

their laws so that the laws are arranged by subject for easy reference. Many environmental laws that affect mining such as air and water quality, dam design and stream channel protection laws may be scattered throughout the code books appearing under numerous titles. Generally, officials in the state agency that administer the state surface mining act are able to offer guidance as to the laws and/or agencies with which a specific mineral operation might have to comply.

**Federal Regulations**

The *Federal Register* is the publication by which the Federal Government announces "notice to the world" of all new regulations, amendments to regulations, proposed rules and regulations, proposed land classifications, executive orders, public lands orders and many other miscellaneous items. State governments generally publish similar items in local newspapers; however, because no newspaper has sufficient circulation or distribution, the Federal Government has found it necessary to have a special publication to give legal notice.

Citation to the *Federal Register*:

39 FR 31317 (August 28, 1974)

publication date
page number
abbreviation for *Federal Register* volume number

The *Code of Federal Regulations* contains all Federal regulations arranged under 50 subject titles. These regulations give the detailed procedures and requirements needed to implement the various Federal laws. The Federal agency designated as the administering agency in a specific law has the responsibility to promulgate and administer the regulations for that law. For example, the Department of the Interior has responsibility for most of the regulations that affect exploration and mining.

Citation to the *Code of Federal Regulations*

43 CFR 3809

section number
abbreviation for *Code of Federal Regulations*
title number

Circulars are reprints of regulations as they appear in the *Code of Federal Regulations* and the *Federal Register*. They are available from most state offices of the Bureau of Land Management without charge. Each circular generally contains the regulations of a specific law, but commonly do not have the latest revisions.

**Interior Department Decisions and Opinions**

Secretary's decisions include all decisions rendered in the Office of Secretary of the Department of the Interior. On July 1, 1970, all of the Department's hearings and appeals were centralized in the Office of Hearings and Appeals in the Department of the Interior. Most appeals concerning lands and minerals are generally handled by the Interior Board of Land Appeals or the Interior Board of Mine Operations Appeals. Most of the decisions rendered by the Secretary's Office are unpublished; only the most significant decisions are published.

Beginning in 1881, decisions of the Department of the Interior were published in hardcover volumes. There were 52 volumes published before 1930 which contained decisions that concerned only public lands. The first 52 volumes are known as *Land Decisions*.

*Citations to Land Decisions*:

*Castle v. Womble*, 19 LD 455 (1894)

date decision rendered
page number
abbreviation for *Land Decisions*
volume number
parties involved

In 1930, beginning with volume 53, the subject matter of the volumes was expanded to include all functions of the Interior Department. These volumes are known as *Interior Decisions*.

Citations to *Interior Decisions*:

*United States v. Bohme*, 51 ID 535 (1980 )

date decision rendered
page number
abbreviation for Interior Decisions
volume number
parties involved

Decisions which are not published are given a serial number and prefixed by the letter A.

*United States v. Denison,* A-29884 (April 24, 1964)
date decision rendered
serial number
parties involved

Citations to decisions rendered by the Interior Board of Land Appeals follow the example below:

*United States v. Jack L.Gardener*, 18 IBLA 175 (1974)

date decision rendered
page number
Interior Board of Land Appeals
volume number
parties involved

Opinions of the Secretary are rendered by the Solicitor's Office which provides legal counsel for the Secretary. These opinions are called *Memorandum Opinions* and are handled the same as *Secretary's Decisions*. If the opinion is selected for publication, it will appear in the *Interior Decisions*.

All opinions rendered by the Solicitor's Office are given serial numbers and prefixed by the letter M.

Citation to *Memorandum Opinion*:

*Emergency Salvage Operations on Unpatented Mining Claims*, M-36636 (June 1962)

date opinion rendered
serial number
title of opinion

**Judicial Decisions**

Judicial decisions are rendered by the state and Federal courts. If the party adversely affected by a decision of the Secretary of the Interior desires to appeal, the appeal would be taken to a Federal district court. Decisions of Federal district court cases are reported in the Federal Supplement. There are approximately 90 Federal district courts in the United States.

Citations to the *Federal Supplement*:

*United States v. Standard Oil Co. of California*, 20 F. Supp. 127 (S.D. Cal. 1937)

date decision issued
district court
page number
*Federal Supplement*
volume number
parties involved

A party adversely affected by a decision rendered by the Federal district court may appeal the case to the United States circuit court of appeals. Decisions rendered by the eleven circuit courts in the United States are published in the *Federal Reporter* and the *Federal Reporter Second Series*.

Citations to the *Federal Reporter*:

*Smith v. Newell*, 86 F. 56

year decision issued
abbreviation of *Federal Reporter*
volume number
parties involved

Citation to the *Federal Reporter Second Series*:

*Foster v. Seaton*, 271 F2d 836 (D.C. Cir. 1959)

year decision issued
Circuit Court
page number
abbreviation *Federal Reporter Second Series*
volume number
parties involved

Following an adverse decision by the circuit court, a party may seek a review by the U.S. Supreme Court which is the highest court to which an appeal may be taken. If the Supreme Court considers the case, then the decision will be published in the *United States Reports* and the *Supreme Court Reporter*.

Citations to the *United States Reports*:

*United States v. Coleman*, 390 U.S. 599 (1968)

year decison issued
page number
abbreviation of *United States Reports*
volume number
parties involved

Citations to the *Supreme Court Reporter*:

*Erhardt v. Boaro*, 5 S.Ct. 560 (1885)

year decision issued
page number
abbreviation of *Supreme Court Reporter*
volume number
parties involved

# 2. SUBMERGED LANDS

## SUBMERGED LAND RESOURCES

The beds of navigable waters are owned by the individual states and are not public domain. However, unlike most categories of land, these beds are not to be sold by the states as they must be open as common highways. Whether or not a body of water is considered navigable depends on its condition at the date of a state's admission into the union. There are more than 84 million acres of submerged lands in the United States which are apportioned as follows:

| | |
|---|---|
| Lands under inland waters..... | 28,960,640 |
| Lands under Great Lakes..... | 38,595,840 |

Lands under marginal seas..... 17,029,120

**Definition of Navigability**

Where there is a controversy concerning navigability, it must be decided by the courts based on the facts and conditions of each water body as it exists at the date of statehood. The current Federal test for navigability was first articulated in *Daniel Ball*, 77 U.S. (Wall.) 557, 563 (1870):

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of be used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Another more modern version appeared in *U.S. v. Hot State Bank*, 270 U.S. 49 (1926), where the United States Supreme Court stated:

> The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had--whether by steamboats, sailing vessels or flatboats--nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, the stream in its natural and ordinary condition affords a channel for useful commerce.

**Equal-Footing Doctrine**

In the United States it has long been established that each new state created out of the public domain automatically, upon its admission to the union, becomes the owner of the beds of all waters then navigable and not previously conveyed by the Federal Government into private ownership under the equal-footing doctrine. In *Banal Cattle Co. v. Arizona*, 414 U.S. 313, 318 (1973), the Supreme Court discussed the origin of the equal-footing doctrine:

> When the original Colonies ratified the Constitution, they succeeded to the Crown's title and interest in the beds of navigable waters within their respective borders. As new States were forged out of the federal territories after the formation of the Union, they were "admitted [with] the same rights, sovereignty and jurisdiction...as the original States possess within their respective borders." * * * Accordingly, title to lands beneath navigable waters passed from the Federal

> Government to the new States upon their admission the Union, under the equal-footing doctrine.

The equal-footing doctrine is the basis for each new state to have sovereignty over the beds of navigable waters as it is admitted into the union. In *U.S. v. Texas*, 339 U.S. 707 (1950), the equal-footing doctrine is clearly explained:

> Yet the "equal-footing" clause has long been held to have a direct effect on certain property rights. Thus the question early arose in controversies between the Federal Government and the States as to the ownership of the shores of navigable waters and the soils under them. It was consistently held that to deny to the States, admitted subsequently to the formation of the Union, ownership of this property would deny them admission of an equal footing with the original States, since the original States did not grant these properties to the United States, but reserved them to themselves.

**Submerged Lands Act of 1953**

In addition to the numerous Federal court decisions which affirm the state's sovereignty over the beds of navigable waters, the U.S. Congress enacted the Submerged Lands Act of May 22, 1953 (67 Stat. 29; 43 U.S.C. 1301 *et. seq.*) with a legislative statement on the same principle. This Act declared title and ownership of the lands and natural resources within such lands and waters be vested to the respective states. "Natural resources" is defined in the Act as including without limitation, "oil, gas, and all other minerals" (43 U.S.C. 131(e)). The Act also authorized the states "to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable state law..." 43 U.S.C. 1311(a).

Section 1301(a) and (f) of the Act defines "lands beneath navigable waters" as follows:

> (a)(1) all lands within the boundaries of each of the respective states which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high-water mark as heretofore or hereafter modified by accretion, erosion and reliction.
>
> * * * * * * * *
>
> (f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person.

**Ordinary High-Water Mark**

Navigable bodies of water are segregated from the public lands at the ordinary high-water

elevation. The ordinary high-water mark or elevation is the line which the water impresses on the soil by covering it for sufficient periods to cause a lack of vegetation. The ordinary high-water mark of a river is a natural physical characteristic placed upon the bank by the action of a river. This mark is placed during the ordinary flow of the river and is not the effects or marks caused during peak or flood stage. On the other hand it is not established by a river running below normal flow. *U.S. v. Claridge*, 279 F. Supp. 87 (D.C. Ariz. 1966), *affirmed* 416 F.2d 933, *cert, denied*, 397 U.S. 961.

**Meander Line**

The meander line in a government survey of public lands bordering a body of navigable water, is not a true boundary, but is established to mark the sinuosities of the stream bank. *Horne v. Smith*, 159 U.S. 40 (895); *U.S. v. Elliott*, 131 F.2d 720 (CCA Okl 1942). A meander line is established by the cadastral surveyors by running a metes and bounds survey that traverses the margin of a permanent natural body of water.

Although it is a common practice in the various states to presume that those water bodies that have been meandered by the cadastral surveyor are navigable, the question of navigability may only be answered by the facts in a specific case and not action by the surveyor. In *Oklahoma v. Texas*, 258 U.S. 574 (1922), the U.S. Supreme Court ruled as follows:

> A legal inference of navigability does not arise from the action of surveyors in running meander lines along the banks of the river. Those officers are not clothed with power to settle the questions of navigability.

Rivers are meandered at the ordinary mean high-water mark on both banks where the right-angle width is 3 chains or greater. However, shallow streams and intermittent streams are not meandered even if they exceed 3 chains in width. Lakes with a surface area of 50 acres or more are also meandered Shallow or seasonal lakes are not meandered even though they may exceed 50 acres. *Manual of Survey Instructions*, 1973, Department of the Interior, Bureau of Land Management.

**Boundary Lines Versus Meander Lines**

Where a patented tract of land is riparian to a navigable body of water, the water line is the boundary line rather than the meander line. In other words, the patent conveys all and beyond the meander line to the water line. *Chester Ferguson*, 20 IBLA 224, 231 (1975); *Internal Improvement Fund of State of Florida v. Nowak*, 401 F.2d 708, 716 (5th Cir. 1968).

If there is no error or fraud in the survey, the water line and not the meander line is the boundary of the riparian land. *Fontenelle v. Omaha Tribe of Neb.*, 298 F.Supp. 855 (DC Neb. 1969), *affirmed*, 430 F.2d 143. A meander line is run for the purpose of computing the acreage of fractional lots. If these lots are patented and the Government survey plat shows that small areas of land lie outside the lot between the meander line and the water line, the water line is still the boundary and the riparian owner would have title to the small areas of land outside the fractional

lot. These small areas of land go with the lot only if failure to include them was not due to fraud or mistake, but was consistent with a reasonably accurate survey. *U.S. v. Lane*, 260 U.S. 662 (1923); *Producers Oil Co. v. Hanzen*, 238 U.S. 325, 338 (1915). However, this rule does not apply when it is conclusively shown that no body of water exists or existed at or near the place indicated or where there was no effort to survey the lands situated between the meander line and the water line. *Jeems Bayou Club v. U.S.*, 260 U.S. 561 (1923). Also, where the area of land between the meander line and water line is large compared with the fractional lot surveyed, it is not included in the patent. *Land v. Brockett*, 110 So 740, 162 La 519, *cert. denied* 273 U.S. 757.

The exceptions to the general rules were detailed by the Board in *Utah Power and Light Company*, 6 IBLA 79, 87, 79 ID 397, 400 (1972) and later quoted with approval in *Chester Ferguson, supra* at 231:

> These decisions establish three situations in which meander lines will serve as the boundary of a conveyance or grant rather than a water body: namely, where there is (1) fraud, or (2) gross error shown in the survey, or (3) where the facts and circumstances disclose an intention to fit a grant of conveyance to the actual traverse lines.

In *Chester Ferguson, supra* at 231, the Board gave four factors helpful in determining whether the exceptions apply:

1. the area of land omitted compared with the area patented;

2. the value of the land at the time of the original survey;
3. the difficulty in surveying the land due to its topography; and

4. the distance of the original meander line from the actual water line.

The Board also held that "where the area of the omitted land exceeds that the original surveyed land, such an omission is unquestionably large enough to be classified as either gross error or fraud in the original survey."

In *U.S. v. Ruby Co.*, 588 F.2d 697 (9th Cir. 1978, *cert. denied* 442 U.S. 917, a case involving a large area of omitted lands between the meander line and the water line, the Court determined that title remained with the United States because of the grossly inaccurate survey. The tract, according to the plat, contained 38.47 acres; however, if the meander line were extended to the water line, the tract would contain an additional 108.36 acres. it was also determined that where the meander lines crossed section lines, the meander lines coincided with the water line; however, between section lines, the meander line varied greatly from the present water line.

Again, the general rule is that meander lines are not run as boundaries, but to define the sinuosities of the banks of the stream or other body of water, and as a means of ascertaining the quantity of land embraced in the survey; the stream, or other body of water, and not the meander

line as actually run on the ground, is the boundary. *Manual of Surveying Instructions*, 1973, Department of the Interior, Bureau of Land Management at 93-94; *Producers Oil Co. v. Hanzen*, 238 U.S. 325 (1915).

**Title to Bed of Many rivers in Dispute**

Where there is a controversy on the navigability of a water body, the issue may only be settled by the Federal courts, based upon the facts and conditions in a specific case as they existed at the date of statehood. In many parts of the west, ownership of the beds of many major rivers is in dispute between the state and Federal governments. For example, the main Salmon River in central Idaho is an excellent example of such a controversy. Although there are several Idaho State Supreme Court cases holding that the State owns the river bed, no Federal court case has decided the matter; therefore the issue is unsettled.

**Accretion, Reliction, Erosion and Avulsion**

There are four types of water action that cause a physical change in the bed of a navigable water body:

1. **Accretion** is the gradual and imperceptible deposition of material along the bank of a body of water and the lands formed by this process.

2. **Reliction** is the gradual uncovering of land caused by the recession of a body of water. *Fontenelle v Omaha Tribe of Neb.*, 298 F.Supp. 855 (DC Neb 1969), *affirmed* 430 F.2d 143.

3. **Avulsion** is the sudden and rapid change of a stream channel, or some other body of water forming a boundary. In the event that a navigable river finds a new channel, the bed of the new channel resulting from avulsion continues to belong to the owner of the land encroached upon; and the bed of the former river still belongs to the state.

4. **Erosion** is the washing away or removal of the land by the sea or a river's flow. Generally considered to be a imperceptible action, the rate of erosion may be quite rapid in total effect and may be distinguished from avulsion by the absence of identifiable upland between the former and new channels.

**Accretion Defined**

In *Ralph F. Rosenbaum*, 89 ID 415, 418 (1982), the Board defined the process of accretion as "the gradual and imperceptible addition to the adjacent riparian land by the deposit of soil." The doctrine of accretion has been upheld in many Federal court cases, including the U.S. Supreme Court. In *Hughes v. State of Washington*, 389 U.S. 290 (1967), the Supreme Court ruled:

> A long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore...

**Legal Effect of Accretion and Reliction**

The legal effect on riparian titles by accretion and reliction is the same. In both cases the riparian owner acquires new land either by the uncovering of submerged lands (reliction or by the deposition of alluvium at the banks (accretion). This was stated in *Banal Cattle Co. v. Arizona*, 414 U.S. 313, 326-27 (1973):

> When there is a gradual and imperceptible accumulation of land on a navigable riverbank, by way of alluvion or reliction, the riparian owner is the beneficiary of title to the surfaced land.

**Erosion**

The term "erosion" as applied to navigable waters refers to the removal of land at the bank of a river or the edge of the sea by the wave or current action. The term apparently includes the loss of riparian land by the subsidence or covering of land by water. Subsidence, is of course, the opposite of emergence of reliction. Erosion, like reliction and accretion, is considered to take place at a gradual or imperceptible rate.

**Compensation Theory**

The "compensation theory" has been affirmed by the U.S. Supreme Court in many cases. *Philadelphia Co. v. Stimson*, 223 U.S. 605, 624 (1912). This theory says that because a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by accretions which are also beyond his control.

**Navigable Waters within Indian Reservations**

The United States holds title to the bed of navigable waters in trust for future states. Upon admission of a state to the union, the United States relinquishes to the state the ownership of the beds of navigable waters. Indian tribes do not have title to the beds of navigable waters that exist within their reservations. *Kootenai Tribes v.* Namen, 380 Supp. 452 (DC Mont. 1974), *affirmed* 534 F.2d 1376, *cert. denied* 429 U.S. 929.

**Mineral Rights Included in Navigable Waters Title**

At the time a state enters the union, title to navigable waters including tidelands passes to the state. No mineral rights in such lands are reserved to the United States. *Charles B. Reynolds*, 56 L.D. 60 (1937).

**Mining Claims Contiguous to Navigable Water Bodies**

If a mining claim abuts against a navigable body of water, the water line is the boundary of the claim rather than the meander line as shown on the mineral survey plat. *Alaska United Gold Mining Co. v. Cincinnati Alaska Mining Co.*, 45 LD 331 (1916). This of course presumes that the meander line follows as nearly as practicable the water line. All accretions and relictions that form after the patent is issued become the property of the patentee or his successors in interest.

**Artificial Changes in a River**

The doctrine of accretion applies to changes in the river caused by artificial as well as natural causes. *Banal Cattle Co. v. Arizona*, 414 U.S. 313, 327 (1973). Of course artificially induced accretion must occur at an imperceptible rate.

**Doctrine of Re-emergence**

The doctrine of re-emergence is an exception to the law of accretion. It is applied where riparian land has been submerged and then later re-emerges as a result of subsidence of the water. Because the same land that was submerged is again exposed by subsidence of the water rather than by deposition of new alluvium, title to the re-emerged land vests in the original riparian owner rather than the remote riparian owner. The doctrine of re-emergence does not apply where land has eroded away and is later restored through the process of accretion, because such land cannot be identified as the original. *Arkansas v. Tennessee*, 246 U.S. 158 (1918); *Ralph R. Rosenbaum*, 89 ID 415, 41 (1982).

Once riparian land is eroded away, whether it be an island or the bank of a river, it becomes part of the bed of a navigable river. In such cases the original owner is divested of title and the state acquires ownership. On the other hand, if any new land is created by accretion, the new riparian owner acquires all the riparian rights.

In a situation where accretion to a riparian lot on one bank of a river extends across a former riverbed and restores land on the opposite bank which had eroded away, title to the accretion which restored the eroded land goes to the owner to whose land the accretion attaches rather than to the owner of the eroded land. *Matthews v. McGee*, 358 F.2d 516 (8th Cir. 1966).

On the same principle, where the accretion to a riparian lot extends across a former riverbed and restores an island which had eroded away, title to the accretion which restored the island vests in the riparian owner to whose land the accretion attaches and not in the owner of the eroded island. *Edwin J. Keyser*, 61 ID 327 (1954); *U.S. v. 2,134.46 Acres of Land*, 257 F.Supp. 723 (D.N.D. 1966), *aff'd sub. nom; Peterson v. U.S.*, 384 F.2d 664 (8th Cir. 1967).

In *Ralph F. Rosenbaum*, 89 ID 415 (1982), the Board considered the question of title where land in a riparian lot has eroded completely away so that a formerly remote lot becomes riparian. Then by the process of accretion, the land is restored. This case involved a tract of land that is unpatented so that the question of title would be governed by Federal common law. State

law would apply if land involved in a riparian rights case were in private ownership. *California ex. rel. State Lands Commission v. U.S.*, 50 USLW 4672 (1982). In *Rosenbaum* the Board held that title is in the remote riparian owners and expressly overruled *Towl v. Kelly*, 54 ID 455 (1934) in which the Department determined that title vests in the original riparian owner.

**Avulsion**

Avulsion is the sudden and rapid change of a stream channel, or some other body of water forming a boundary. In order to establish that avulsion has occurred, conclusive evidence must be available to document the avulsion, otherwise the changes will be presumed to be caused by erosion and accretion. The effect on property boundaries by avulsions is given by the Supreme Court in *Nebraska v. Iowa*, 143 U.S. 359 (1892):

> When grants of land border on running water, and the banks are changed by the gradual process known as accretion, the riparian owner's boundary line still remains the stream; but when the boundary stream suddenly abandons its old bed and seeks a new course by the process known as avulsion, the boundary remains as it was, in the center of the old channel; and this rule applies to a state when a river forms one of its boundary lines.

In avulsion, the land between the old and new channels is little altered by this change of channel. This may be proven by photography, or other evidence showing the existence of improvements or vegetation before and after the change of channel. Most important however, there is no change in the boundary lines between the state and riparian owner. As stated in *Banal Cattle Co. v. Arizona*, 414 U.S. 313, 327 (1973), the "rational for the doctrine of avulsion is a need to mitigate the hardship that a shift in title caused by a sudden movement of the river would cause the abutting landowners were the accretion principal to be applied."

**Federal Government Possesses Navigational Servitude**

Although title to the beds of navigable waters are vested in the states, the Federal government has control over the navigable waters for the purpose of navigation. In *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375-76 (1977), the Supreme Court said:

> All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the constitution.

**Title to Riverbed Governed by State Law**

In *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), the Supreme Court held, in overruling the *Banal* decision, that the equal-footing doctrine did not require that the effect of a movement of a river upon title to the riverbed must be resolved under Federal

common law. Since the equal-footing doctrine vested title to a riverbed in a state as of the time of its admission into the union, such cases are properly determinable under state law. The rationale of *Corvallis* is that under the equal-footing doctrine, title to the beds of navigable bodies of water indefeasibly vested in the states at the time of their admission to the union. Thus a state may not be divested of title to the bed in favor of an upland owner by operation of Federal law, but may only divest itself of title through the operation of its own law. The *Corvallis* Court states at 376:

> ...[D]etermination of the initial boundary between a riverbed, which the State acquired under the equal-footing doctrine, and riparian fast lands [is to be determined]....as a matter of federal law rather than state law. But that determination is solely for the purpose of fixing the boundaries of the riverbed acquired by the State at the time of its admission to the Union; thereafter the role of the equal-footing doctrine is ended, and the land is subject to the laws of the State...

**Federal Minerals within Meander Lines of water Body**

Lands within the meander lines of a water body may be leased for oil and gas even though such lands are surveyed. The applicable regulations (43 CFR 3101.1-3) and 3101.1-4) require that the lands be described by metes and bounds connected to an official corner of the public land surveys.

In *David A Province*, 85 ID 154 (1978), the Board considered the question of whether the oil and gas deposits within the meander lines of the Yellowstone River are covered by an existing lease that covers the lot bounded by the meander line. The Board determined that the issue is the same regardless of whether the leased lands contiguous to the meander line are public domain or patented surface with Federally-owned oil and gas deposits. In several earlier decisions it was established that where the United States has patented lands subject to an oil and gas reservation, lands accreting to the patented lands are also subject to the reservation. *David W. Harper*, 74 ID 141 (1967); *David A. Province, supra*.

In *Province, supra* at 15, the Board held that the "lease extends only to the meander line and not the waterline." This conclusion was primarily based on an examination of the Mineral Leasing Act which indicates that a lessee should receive only a specific acreage.

**The Gulkana River Case**

On May 16, 1979, the BLM issued an administrative decision finding the 30 miles of the Gulkana river to be non-navigable and then the following month conveyed the same lands to Ahtna, Inc., an ANCSA regional corporation. On November 25, 1980, the State of Alaska filed suit to quiet title to the bed of the river. After the United States district Court for the district of Alaska entered summary judgment in favor of the State of Alaska, 622 F.Supp. 455, the native regional corporation appealed to the Ninth Circuit Court. *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 1949.

This case is significant because it contains a good description of the physical characteristics of the channel and the criteria by which it was held to be navigable. There was general agreement that the physical characteristics of the segment of the Gulkana River at issue, the lower 30 miles, had not changed since Alaska had become a State in 1959. This 30-mile segment of the Gulkana River has the following physical characteristics:

1. The shallowest part of the river is normally a foot and a half deep, diminishing to a foot during low-flow season.

2. On average the river along the lower 30 miles is 125-150 feet wide and 3 feet deep.

The Gulkana River is customarily used, or is susceptible to use, by the following types of watercraft:

1. Flat or round-bottom aluminum or fiberglass powerboats 16 to 24 feet long by 4 to 10 feet wide, capable of carrying loads between 900 and 2,000 pounds;

2. Inflatable rafts between 12 and 15.5 feet long by 4 to 7 feet wide, with a load capacity of 1,250 to 2,000 pounds; and

3. Square-sterned motorized freight canoes and double-ended paddle canoes 15 to 19 feet long, capable of carrying loads of 500 to 900 pounds.

The appellant contended that most of the uses of the Gulkana River have been recreational and that recreational uses do not support a finding of navigability. However, the Court said "we think the present use of the lower Gulkana is commercial and provides conclusive evidence of the lower Gulkana's susceptibility for commercial use at statehood." Moreover, "[t]o deny that this use of the River is commercial because it relates to the recreation industry is to employ too narrow a view of commercial activity." The Court affirmed the District Court decision and concluded that the lower Gulkana was susceptible for use as a highway for commerce at statehood. *Id*. at 1405.

**Conveyances Made Before Statehood Do Not Preclude State from Acquiring Navigable Waters**

Two Supreme Court decisions hold that conveyances made by the United States prior to statehood do not convey navigable waters unless such intention was clearly and specifically declared to convey navigable waters. *United States v. Hot State Bank*, 270 U.S. 49, 55 (1926); *Montana v. United States*, 45 U.S. 544, 552 (1981).

**Reservations Made Prior to Statehood Do Not Preclude State from Acquiring Navigable Waters**

In *Utah Division of State Lands v. United States*, 107 S.Ct. 2318 (1987), the Court held that title to the bed of Utah Lake passed to Utah upon that State's admission to the Union in 1896, despite the reservation of the lake as a reservoir site before statehood. As the Court said, "the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land" to demonstrate that the reservoir did not pass to the State.

**Basart Exception**

The "Basart Exception" to boundary rules did not originate in *Madison v. Basart*, 59 I.D. 415 (1947), but rather reiterated the holdings in a long line of Federal court decisions. In *Madison v. Basart*, the secretary said:

> It is a general rule that a meander line is not a line of boundary but one designed to point out the sinuosity of the bank or shore and as a means of ascertaining the quantity of the land in the fractional lot, the boundary line being the water line itself. But there are a number of exceptions to this general rule. Thus, if the meander line was run where no lake or stream calling for it exists, or where it is established so far from the actual shore as to indicate fraud or mistake, the meander line is held to be the true boundary line. Another well-established exception is that if, at the time of a homestead entry is made, a large body of land previously formed by accretion existed between the meander line and the waters of the stream, then the meander line will be treated as the boundary line of the grant, and the patent will be construed to convey only the lands within the meander line.

In *Eldon L.R. Johnson*, 82 IBLA 135, 138-39 (1984), the Board concisely stated the criteria for applying the Basart exception:

1. The accretion must have formed prior to homestead entry or other private acquisition.

2. The amount of the accreted land must be perceived to be "large" or "substantial," or "an acreage largely in excess of what the patent calls for."

3. Whether the equities of the situation favored or disfavored the entryman, including whether he knew at the time that he was occupying a considerably larger acreage than he had contracted to enter and pay for, and whether he was unjustly enriched thereby.

In *Eldon L.R. Johnson, supra*, the Board considered a case where approximately 79 acres were purchased and at least another 37 acres between the meander line and the water line were occupied. The Board held that the 37-acre excess was a "substantial" acreage and the criteria for

the "Basart exception" are met. Therefore, the accreted land is owned by the United States.

**Island Must Exist at Statehood**

An island, in existence in a navigable stream which is public land at the time a state is admitted to the Union, remains the property of the United States. *Texas v. Louisiana*, 410 U.S. 702, 713, *rehearing denied*, 411 U.S. 988 (1973); *Scott v. Latig*, 227 U.S. 229, 242-44 (1913). Conversely, if an island in a navigable stream, which is public land, washes away totally before statehood and then forms again in the same place after statehood, title to the island is in the state. *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191 (5th Cir.) *rehearing denied*, 191 F.2d 705 (5th Cir. 1951), *cert denied*, 342 U.S. 920 (1952).

**Unsurveyed Island in Navigable Water**

In *Scott v. Latig*, 227 U.S. 229 (1913), the Supreme Court held that an error in omitting to survey an island in a navigable stream does not divest the United States of title or preclude surveying it at a later date. An island within the public domain in a navigable stream and actually in existence both at the time of the survey of the banks of the stream and also upon admission to the union of the state within which is situated remains the property of the United States. Even though omitted from the survey, such land does not become part of the fractional subdivision on the opposite banks of the stream. Title to an island also remains in the United States and the island remains subject to survey despite the disappearance of the channel separating the island from the lots which were formerly riparian. *U.S. v. Severnson*, 447 F.2d 631 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972); *R.A. Mikelson*, 26 IBLA 1,9 (1976).

**Island Must Exist at Statehood to Be Public Lands**

An island must exist as an island on the date of admission of a state to the union; otherwise it would be state land. *Lee E. McDonald*, 68 IBLA 272 (1982). If sufficient evidence is available to raise a question of fact when such land was formed, the Interior Board of Land Appeals may order a hearing to resolve questions of fact to determine if title to a tract of land vests in the United States. *Eldin L.R. Johnson*, 47 IBLA 366 (1980). However, there is no right to a formal hearing on a protest against a survey of omitted lands. Again however, the Board may, in its discretion, order a hearing if questions of fact are not fully answered in the record.

**Accretion to Islands**

Although as a general rule the island owner owns accretion to the island, there are limitations on the rule depending on how far the accretions run and whether the accretions are deposited on a stream bed owned by one other than the island owner. *Houston v. United States Gypsum Co.*, 569 F.2d 880, 883 (5th Cir.), *rehearing denied*, 580 F.2d 815, 818 (5th Cir. 1978).

**Navigability of Lakes**

Navigability of lakes comes under the same rules as the navigability of streams. A lake

must, at the time of statehood, have been used or been susceptible to commercial use in its natural condition without modification of the lakebed. *United States v. Utah*, 183 U.S. 64 (1931).

In *State of Montana*, 80 I.D. 312 (1973), the Board ruled that a meandered lake in Montana is nonnavigable where it is located in a remote region and there is no evidence to show it has been used or is susceptible to being used as a highway for commerce. In *U.S. v. Oregon*, 295 U.S. 1 (1935), the Supreme Court held five bodies of water in Oregon to be nonnavigable, even though some 10,800 acres of one of the lakes were between 3 and 4 feet deep and in spite of evidence of some actual use of the lakes for boating. In *John Snyder*, 71 I.D. 527 (1965), the Department determined that a shallow lake in Montana approximately a mile long and a half-mile wide did not meet the test of a navigable body of water established by the Supreme Court. The Department has also held that an inland lake, two miles long and three-fourths of a mile wide, is not navigable in the sense that its waters can be put to a public use for the purpose of trade or commerce.

In *State of Montana*, 91 IBLA 104 (1986), the Board described the type of evidence necessary to establish that a lake is navigable:

> Evidence shall be reviewed concerning the navigability of Little Bitter Root Lake in 1889, on the date of Montana's statehood. The inquiry will consider whether, when Montana was granted statehood, the lake was navigable or susceptible to navigation in its natural state without need for modification of the waterway. Evidence of actual historical use, of susceptibility of the lake to such use, and of trade and commercial patterns in the vicinity are relevant to the inquiry to be conducted.

**Nonnavigable Bodies of Water**

Under certain conditions, nonnavigable bodies of water may be meandered, and of course, title to the beds of such lakes or rivers vests in the United States until sold. *U.S v. Oregon*, 295 U.S. 1 (1935). If the government conveys title to a fractional subdivision fronting upon a nonnavigable body of water, the patent generally gives ownership to the middle of the bed in front of the fractional subdivision. *Oklahoma v. Texas*, 261 U.S. 345 (1923). The fact that a body of water is meandered does not necessarily mean that it is a navigable body of water or that the meander line is a boundary line. As mentioned above, meander lines are not run as boundaries, but to define the sinuosities of the banks of the stream or lake, and as a means of ascertaining the quantity of land embraced in the survey.

Under Federal common law, the bed of a nonnavigable lake belongs to the shore owners in a pie-shaped fashion to the center of the lake. *Bougeois v. U.S.*, 545 F.2d 727, 730 (Ct. Cl. 1976). The beds of meandered nonnavigable water bodies are subject to appropriations under the United States mining and mineral leasing laws only when the abutting upland is unappropriated Federal land. *Lawrence F. Baum*, 67 IBLA 239 (1982).

In *Sam Viersen, Jr.*, 72 I.D. 251 (1965), the Solicitor considered the question of lease boundary lines bordering nonnavigable rivers. It was held that the common law of accretion and

relictions do not apply to determine the boundaries of oil and gas leases bordering nonnavigable rivers. It was held that the common law of accretion and relictions do not apply to determine the boundaries of oil and gas leases bordering nonnavigable waters. Therefore, the boundary of the lease is the meander line indicated on the official plat.

**Median Lines**

A median line is a continuous line, formed by a series of intersecting straight line segments, every point of which is equidistant from the nearest point on the opposite shore. It is used to define a line representing the limits of ownership between opposite banks. So in nonnavigable waters the median line will probably be the property line.

**Partition Lines**

Partition lines are established to connect the side boundaries of fractional lots fronting on the meander line to the medial line. Several standard methods are used to establish such lines. The instructions for surveying partition lines are given in 50 L.D. 216 (1923):

> In establishing the side boundaries of claims of riparian proprietors to the area between the original meander line on the north and the medial line of Red River in Oklahoma in accordance with the decision of the Supreme Court in the case of *Oklahoma v. Texas*, lines should be run from points representing the limits of frontage of the original claims on the meander line to points on the medial line at distances thereon proportionate to the lengths of frontage of the respective abutting owners.

**Oil and Gas Lease on Surveyed Lot Riparian to Nonnavigable River**

In *P & M Petroleum Management*, 140 IBLA 228 (1997), the Board considered a case where land was added by accretion to a surveyed lot of public land riparian to a nonnavigable body of water in which the United States has title to the bed to its medial line. An oil and gas lease of the upland lot, described according to the original plat of survey, covers only the land in the original lot to the meander line. A subsequent resurvey of that lot does not alter the boundaries of the lease. The Board said at 231:

> The effect of accretions occurring to existing riparian leases was originally examined in *Sam K. Viersen, Jr.*, A-30063 (June 30, 1965). In that decision, the Department affirmed the dismissal of a protest filed by Viersen, who held a lease described by legal subdivisions, against the issuance of a subsequent oil and gas lease to Ashland Oil and Refining Company under a metes and bounds land description for lands that Viersen claimed should be considered within his lease since they were accretions to lands described in his lease.
>
> While recognizing that the general rule with respect to patenting of Federal lands riparian to nonnavigable water bodies was that the patent conveyed any accreted lands

since the median thread of the water body rather than the meander line marked the limits of the conveyance, the Department determined that a different rule applied with respect to

mineral leases under the Mineral Leasing Act of 1920. As described in the syllabus of the *Viersen* decision, the Department held that

> [w]here land is added by accretion to a surveyed lot of public land riparian to a nonnavigable body of water in which the United States has title to the bed to its medial line, an oil and gas lease of the upland lot described according to the plat of survey covers only the land in the original lot to the meander line.

In essence, for purposes of oil and gas leasing, the meander line shown on the survey returns marks the limit of the lease. *Accord, James L. Harden*, 15 IBLA 187, 190 (1974)

**Riparian Lot Leased According to Plat of Survey Subsequently Covered by Nonnavigable Water Body**

In the situation where a lot of public land is leased according to the plat of survey and the lot is riparian to a nonnavigable body of water, the area covered by the original lot remains in the lease even though part of the lot is later covered by water. In *P & M Petroleum Management, supra* at 231 and 232, the Board said:

> * * * Thus, *Viersen* also explored the question of the effect of erosion on upland lessees. The decision in *Viersen* concluded that, while an upland lease conferred mineral rights only to the meander line of a nonnavigable water body as shown on the plat of survey, the subsequent submersion of part or all of the upland area did not vitiate the leasehold interest so long as Federal title to the mineral estate continued. In other words, since Federal ownership of both the surface and the mineral estate extended to the medial thread of a river, the mere submergence of uplands did not reduce or diminish rights conveyed under lease, *unless* those lands passed beyond the medial thread *and* out of Federal ownership.

**Leased Lands Cannot Be Diminished by Resurvey**

In *P & M Petroleum Management, supra*, where BLM had conformed leases to a subsequent survey, the Board emphasized that leases covering riparian lots to nonnavigable waters cannot be changed by resurvey. The only basis for diminishing an existing leasehold is where the land is eroded beyond the medial thread. The Board said at 232:

> We realize that BLM has also Aconformed@ existing leases to show the erosive effects of the San Juan River on its right bank. However, as noted above, the fact that the San Juan River has inundated lands shown to be upland in the 1900 survey has no effect upon existing leases unless the lands described in such leases have passed beyond the medial thread of the river. *See* note 3, *supra*. Only to the extent that land has eroded beyond the medial thread is there any basis for diminishing an existing leasehold and this

is done not because of the fact of resurvey, but rather because, through the process of erosion, the United States has been divested of title to both the surface and mineral estates in such land, and it may not lease what it does not own. On remand, BLM should examine the 1938 survey returns to determine which, if any, are now situated beyond the center thread of the San Juan River.

Note 3/ Thus, even if the United States owned the uplands on both sides of a nonnavigable river, the fact that the area under lease passed beyond the center thread would not be of any relevance to the leasehold estate. Where, however, as in the instant appeal, ownership of the uplands is divided between the United States and a third party (here, the Navajo Nation), a gradual erosion of land that ultimately results in the movement of the center thread of the riverbed past the limits of original upland lease would divest the United States of ownership of the mineral estate in those lands now situated on the other side of the medial thread and would, necessarily, vitiate any Federal oil and gas lease to similar extent.

Note 4/ Even were the San Juan River deemed navigable, the result would still be the same insofar as the question of the extent of an oil and gas lease is concerned. *See David A. Provinse*, 35 IBLA 221, 232-34 (1978).

**Authority of the United States to Correct Surveys**

The Department of the Interior, acting for the United States has the authority to extend or correct the surveys of the public lands as may be necessary, including the surveying of lands omitted from earlier surveys. *Kirwan v. Murphy*, 189 U.S. 35, 54 (1903); *R.A. Mickelson*, 26 IBLA 1 (1976).

**Patent Conveys Only Surveyed Lands**

A patent conveys only land which is surveyed, and when the surveyors have carried a survey only to a certain line, a grantee may not successfully challenge the correctness of their action or claim lands beyond that line under a patent issued in accordance with that survey. *Chester Ferguson*, 20 IBLA 224 (1975). Also, a patent of public lands has ownership according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground, or the patent description may be in error. *U.S. v. Heyser*, 75 I.D.14, 18 (1968).

**Conveyance of Omitted Lands Authorized by FLPMA**

Section 211(a) of FLPMA (43 U.S.C. 1721) authorizes the Secretary of the Interior to convey to states or their political subdivisions unsurveyed islands determined to be public lands. Such conveyance of an island may be made without survey or acreage limitation under the authority of the Recreation and Public Purposes Act (44 Stat. 741; 43 U.S.C. 869 *et. seq.*) as amended.

Section 211(b)(1) of FLPMA authorizes the Secretary to convey to states and their political subdivisions lands other than islands determined after survey to be public lands erroneously or fraudulently omitted from the original surveys. Any such conveyance must be made with survey but without regard to acreage limitations and under the authority of the Recreation and Public Purposes Act.

Section 211(b)(2) of FLPMA authorizes the Secretary to convey to the occupant of omitted lands which, after survey, are found to have been occupied and developed for a five-year period prior to January 1, 1975. Such conveyance must be in the public interest and at not less than fair-market value, including administrative costs.

**Recordable Disclaimers of Interest in Lands**

Section 315 of FLPMA (43 U.S.C. 1745), authorizes the Secretary of the Interior to issue a document of disclaimer of interest or interests in lands where the disclaimer will help remove a cloud on the title of such lands. To qualify under this section, the Secretary must determine that"(1) a record interest of the United States in lands has terminated by operation of law or is otherwise invalid; or (2) the lands lying between the meander line shown on a plat of survey approved by the Bureau or its predecessors and the actual shoreline of a body of water are not lands of the United States; or (3) accreted, relicted, or avulsed lands are not lands of the United States." Issuance of a document of disclaimer shall have the same effect as a quitclaim deed from the United States. *Ralph F. Rosenbaum*, 89 I.D. 415 (1982).

**Placer Claim on Bed of Navigable Water is Void**

In *Jack T. Kelly*, 113 IBLA 280, 282 (1990), the Board held that a placer mining claim located in the bed of a navigable river of a state is null and void ab initio. It is well established that title to the bed of navigable rivers passes to the state upon admission to the Union. *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987). Of course the placer claim would only be null and void to the extent that it embraces land underlying the navigable waters. *Jack T. Kelly, supra*, at 282. If a claim is located along or near a water body, two important and difficult questions arise: (1) is the water body navigable, and if so, (2) where is the mean high water line (the boundary line).

## TIDAL WATERS

**History of State Ownership Claims**

In *United States v. State of California*, 381 U.S. 139, 180 (1965), *rehearing denied* 382 U.S. 889, *opinion supplemented* 382 U.S. 448, the United States Supreme Court discussed the history of state ownership claims to submerged lands:

For many decades some of the States bordering on the sea had claimed dominion over

water and submerged lands lying off their shores. Their claims usually were stated as extending into the open sea a distance of three statute miles, three geographic miles, or three marine leagues from their "coast lines."

For many years the Federal Government raised no objection to the various States' claims that their boundaries, including claims to the marginal sea, extended outward for various distances into the sea. However, by the end of the 1930's it became apparent that the submerged lands off the shores of certain States contained rich and valuable oil reserves and other natural resources. In the late 1930's it was for the first time asserted that in spite of the States' historic claims the United States and not the respective coastal States, was the owner of all submerged lands lying both within and without the three-mile limits, except for land under "inland waters." California and other States claimed that they were the owners of all submerged lands within their historic boundaries dating back to their respective admissions to the Union, including of course both historic inland waters and a three-mile or three-league strip of marginal sea beyond.

**Truman Proclamation**

One of the first formal assertions by the United States to the seabed resources was the Truman Proclamation in 1945. In this proclamation, President Truman stated:

> Now therefore...the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, subject to its jurisdiction and control.

**Geneva Convention**

In 1958 the Geneva Convention on the continental shelf developed a treaty which was subsequently signed by 40 states and became effective in 1964. This convention established a legal definition of the continental shelf as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters, or beyond that limit, to where the depth of the superadjacent waters admits of the exploitation of the mineral resources.

On March 24, 1961, the United States ratified the Convention on the Territorial Sea and the Contiguous Zone (T.I.A.S. No. 5639O) and on September 10, 1964, when the requisite number of nations had ratified it, the Convention went into force.

The Convention provided for a choice of using a straight-base-line method or a 24-mile maximum closing line for bays and a "semicircle" test for determining inland waters claimed against other nations. A straight line not to exceed 24 nautical miles in length may be drawn across the mouth of a bay. The semicircle test requires that a bay must comprise at least as much water within its closing lines as would be contained in a semicircle with a diameter equal to the length of the closing line.

Because the United States has elected to use the 24-mile closing line together with the semicircle test, the individual states have no option but to use the same method. *United States v. State of California, supra* at 168. However, under the terms of the Convention, the 24-mile rule does not apply to "historic bays" over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations.

## THE SUBMERGED LANDS ACT

The Submerged Lands Act of May 22, 1953 (67 Stat. 29; 43 U.S.C. 1301 *et. seq.*) gave ownership of all lands and natural resources from the coastline to three geographic miles to the coastal states. Florida and Texas, which had historical boundaries in the Gulf of Mexico, were allowed seaward jurisdiction to nine geographical miles. There is no statement in the law relative to the seaward limit of the jurisdiction of the United States. This limit was defined in the 1964 treaty resulting from the 1958 United Nations Conference on the Law of the Sea in Geneva, Switzerland.

Section 1301(2) of the Submerged Lands Act contained the following language defining the term "lands under navigable waters" as it applies specifically to tidal waters:

> ...all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by the Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles...

These "tidal waters" are bounded on the landward side by the "coast line" and are limited in their seaward extension to three geographical miles, except for the extension of Florida and Texas to three marine leagues into the Gulf of Mexico. In section 1301(b) and (c) these boundaries are defined as follows:

> (b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union...but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;
>
> c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

The term "coast line" was also defined by the U.S. Supreme Court in *United States v. State of California, supra* at 180:

> But "coast line," as the term was used in many such claims and as it is used in modern geographic descriptions, does not mean simply the low-water mark of the mainland shore; rather, it means a legally recognized line which follows the low-water mark of the shore where the shore is relatively straight and facing open sea, and which at other points follows the recognized outside limits of "inland waters," which flow into the sea or form indentations in the land. Such "inland waters" may include certain estuaries, bays and harbors, and waters between a mainland and offshore islands.

The Act (43 U.S.C. 1312) allowed the seaward boundary of a state to go beyond three geographical miles if it was so provided by the state's constitution or laws before the time such state became a member of the union.

The "navigable sea" is divided into three zones; (1) landward and contiguous to the coastline are the "internal" or "inland" waters; (2) contiguous and seaward from the inland waters or coast line is the marginal or territorial sea; and (3) seaward from the territorial sea are the "high seas."

The boundary between the internal waters and the territorial seas is the coast line or the ordinary low-water mark along the coast. The seaward limits of permanent harbor works and qualifying islands may also qualify as the coast line. A straight line not to exceed 24 nautical in length may be placed across the mouth of a bay to form the coast line.

Internal waters are those that exist landward of the coast line. They are generally represented by bays and estuaries and are subject to complete sovereignty of the nation as though they were land territory. The determination of whether waters are inland depends on historical as well as geographical factors; it has been determined that other areas closely connected to the shore may have the status of inland waters based on historical treatment even though they do not meet a precise geographical test. *United States v. State of Louisiana*, 394 U.S. 11 (1969), *rehearing denied* 394 U.S. 994, *decree supplemented* 394 U.S. 836.

The territorial sea is bounded on the landward side by the coast line and extends three nautical miles seaward to a boundary with the high seas. Many coastal nations claim a zone 12 nautical miles wide for their territorial seas.

The coastal states own approximately 40,000 square miles. Although many states claim beyond the three-mile limit, the United States Supreme Court has accepted a 3-league (9 mile) claim for Texas and Florida into the Gulf of Mexico as the only exceptions to the standard three-mile limit for the coastal states. *United States v. States of La., Tex., Miss., Ala., and Fla.,* 363 U.S. 1, 121 (1960), *rehearing denied* 364 U.S. 856; *United States v. Florida,* 425 U.S. 791 (1976). Many of the coastal states have laws and regulations authorizing mineral leasing programs on these state-owned lands.

## OUTER CONTINENTAL SHELF

**Outer Continental Shelf Distinguished from Continental Shelf**

The legal term "Outer Continental Shelf" as defined above should be distinguished from the geographical term of "Continental Shelf." The continental shelf surrounds the continents in a zone with an average width of 47 miles. It extends from the low-water line and slopes gently seaward at a gradient of about 10 ft/mi to an abrupt increase in gradient which occurs at a depth of about 450 feet. However, in some parts of the ocean, the shelf break may occur at over 1000 feet in depth. This shelf break marks the boundary between the seaward limit of the continental shelf and the much steeper continental slope. The origin of the shelf is believed to be caused by shallow wave cutting about 15,000 to 20,000 years ago when the oceans occupied a level about 450 feet below its present level. Off the east coast of the United States the shelf is about 75 miles wide, whereas, off the west coast it is about 20 miles wide.

Although the geographic "continental shelf" and the legal "outer continental shelf" cover approximately the same portion of the ocean floor, there is a difference because the legal continental shelf covers a specifically described area; whereas, the geographic continental shelf varies in width, depth at the shelf break and grade of slope. Of course the width of the legal "outer continental shelf" varies also because the definition by international law provides for the exclusive right of exploitation by the coastal nation "to a depth of 200 meters or, beyond that limit, to where the depth of the super adjacent water admits of the exploitation of the natural resources of the said areas." Therefore, the seaward limit may be extended by advancing technology because the width of the legal outer continental shelf depends on its susceptibility to exploitation.

**Outer Continental Shelf Lands Act**

The Outer Continental Shelf Lands Act of 1953 (67 Stat. 462; 43 U.S.C. 1331 *et. seq.*) authorizes the Secretary of the Interior to establish a leasing system "for the exploration for, or development or removal of deposits of, oil, gas, or other minerals..." in submerged lands of the outer continental shelf. The detailed regulations that implement this leasing system are found in 43 CFR Group 3300.

**Mining Claims on the Outer Continental shelf**

From time to time, there are attempts to appropriate lands on the Outer Continental Shelf under the mining law of 1872. In *Ford MacElvain,* 50 IBLA 303 (1980), the Board affirmed a BLM decision declaring 105 mining claims null and void because the "Outer Continental Shelf Lands Act....provides the exclusive authority for the development of minerals on the outer continental shelf." *Id.* at 204.

**Outer Continental Shelf Lands Act Amendments of 1978**

The Outer Continental Shelf Lands Act of August 7, 1953 (43 U.S.C. 1331-1343), extended United States jurisdiction of the seabed seaward of state navigable waters as provided by the Submerged Lands Act of May 22, 1953 (43 U.S.C. 1303), and authorized for the first time competitive leasing for oil and gas and minerals in and on the seabed. The Outer Continental Shelf (OCS) Lands Act Amendments of 1978 (Public Law 95-372; 92 Stat. 629), represents a major amendment to the 1953 OCS Lands Act. At least 850,000 square miles of the Outer Continental Shelf lands are under United States jurisdiction and may be leased for mineral resources development.

### Deep Seabed Hard Mineral Resources Act

The Deep Seabed Hard Mineral Resources Act (30 U.S.C. 1401-1473) was passed by Congress on June 28, 1980, "to establish an interim legal regime under which technology can be developed and the exploration and recovery of the hard mineral resources of the deep seabed can take place until such time as a Law of the Sea Treaty enters into force with respect to the United States." 30 U.S.C. 1401(a)(16). The Act asserts jurisdiction for the United States citizens to engage in exploration and commercial recovery of hard mineral resources from the deep seabed but specifically does not assert sovereignty or exclusive jurisdiction over the deep seabed. 30 U.S.C. 1402(a). Deep seabed is defined in the Act as:

> The seabed, and the subsoil thereof to a depth of ten meters, lying seaward of and outside (A) the Continental Shelf of any nation; and (B) any area of national resource jurisdiction of any foreign nation, if such area extends beyond the Continental Shelf of such nation and such jurisdiction is recognized by the United States. 30 U.S.C. 1403(4).

## SWAMP LAND GRANTS

### Introduction

The Act of March 2, 1849 (9 Stat. 352), granted all public domain swamp and overflowed lands to the State of Louisiana for reclamation purposes. The Act of September 28, 1850 (9 Stat. 579) extended this grant to Alabama, California, Florida, Illinois, Mississippi, Missouri, Ohio, Indiana, Iowa, Michigan and Wisconsin. Minnesota and Oregon were later included in this grant by the Act of March 12, 1860. These grants included all swamp and overflowed lands which at the date of the granting were unappropriated public domain. Also at the date of the Act, these lands were required to be unfit for agriculture without construction of levees or drainage canals.

### Purpose of Swamp Lands Act

The purpose of the Swamp Lands Act of 1850 (9 Stat. 520; 43 U.S.C. 982) is clearly stated in *Leovy v. United States*, 177 U.S. 621, 623 (1900), where the United States Supreme Court noted:

> This legislation declares a public policy on the part of the government to aid the States in reclaiming swamp and overflowed lands, unfit for cultivation in their natural state, and is a recognition of the right and duty of the respective States , in consideration of such grants, to make and maintain the necessary improvements.

The Act was a recognition of the fact that much public land, due to its natural condition as swamp and overflowed land, was not, in its natural state, amenable to cultivation. In order to foster its reclamation, the United States granted to the various States the land with the understanding that the States had "the right and duty" to make and maintain the necessary improvements. There is a basic assumption which runs through the Act: that the land is made unfit for cultivation by reason of its swamp or overflowed character.

**Lands Not Suitable for Reclamation**

In *State of California*, 29 IBLA 132 (1977), the Board considered a case where the land could not be cultivated because of the salinity of the soil. The Board held that the lands did not qualify because the Act clearly presupposes the possibilities of reclamation for the purpose of cultivation. In *State of California*, 15 L.D. 428 (1892) Secretary Noble ruled that "if it is shown that the reclamation of such lands would not fit them for cultivation, but, on the contrary, would destroy their chief value and that it was not the intention of the State to reclaim them, its claim should be rejected." *Id.* at 430.

**Swamp Land Grant Is a Grant in Praesenti**

Soon after passage of the Act, the question arose as to when the grant took effect in each state: on the date of the Act or the date of issuance of a patent to a state. The question was settled by the Supreme Court which, after examining numerous Departmental and state court decisions, held that the Act granted swamp and overflowed lands *in praesenti*, passing title to the lands from the date of the Act, and required identification of the lands only to perfect title. *Wright v. Roseberry,* 121 U.S. 488 (1887).

It is generally stated that the grants of swamp and overflowed lands under the 1849 and 1850 Swampland Acts were *in praesenti*, and gave the states inchoate title to such lands that perfected on the dates of the Acts. When the lands were identified, legal title passed to the state under the procedures established by the Acts. *Work v. Louisiana,* 269 U.S. 250, 255 (1925). The Act of September 28, 1850, did not grant swamp and overflowed lands to states admitted into the Union after its passage.

**Two Methods for Designating Swamp Lands**

The respective states were allowed to elect one of two methods they would adopt for the purpose of designating swamp lands. A Circular dated March 17, 1896 and 43 CFR 2625.0-3(a) give the following information:

1. The field notes of Government survey could be taken as the basis for selections, and all lands shown by them to be swamp or overflowed, within the meaning of the act, which were otherwise vacant and unappropriated September 28, 1850, would pass to the States.

2. The States could select the lands by their own agents and report the same to the United States Surveyor general with proof as to the character of the same.

The following States elected to make the field notes of survey the basis for determining what lands passed to them under the grant, viz: Louisiana, Michigan, and Wisconsin. Later the State of Minnesota adopted this method of settlement.

The authorities of the following States elected to make their selections by their own agents and present proof that the lands selected were of the character contemplated by the swamp grant viz: Alabama, Arkansas, Florida, Illinois, Indiana, Iowa, Mississippi, Missouri, and Ohio. Later Oregon adopted this method.

The States of Alabama, Arkansas, Indiana, Mississippi, and Ohio adopted the second method at the beginning, but they changed to the first method, i.e., to the field notes of survey, as a basis of settlement, in recent years.

The authorities of California did not adopt either method, and the passage of the Act of July 23, 1866, rendered such action on their part unnecessary.

**Identification of Swamp and Overflowed Lands in California**

To resolve the numerous title disputes that arose because of the State's actions, the United States Congress passed "an Act to quiet Land titles in California," on July 23, 1866, which among other matters, changed the provisions of the 1850 Act relating to the identification of swamp and overflowed lands in California. 14 Stat. 218. Under this provision, title to swamp and overflowed lands vested upon approval of the township plat, whether prior to 1866 or after, rather than the subsequent date of certification by the land commissioner. *Tubbs v. Wilhoit,* 138 U.S. 134 (1891). In *Tubbs v. Wilhoit, supra*, the Court confirmed that title to swamp and overflowed lands is vested in the State by the 1866 Act simply by identification of land as swamp and overflowed on such plats. The Court found that once the Surveyor General approved the township plat, the duty of the Commissioner of the General Land Office to certify the lands represented as swamp and overflowed to the State is "purely ministerial" and failure to so certify cannot defeat title to the State. 138 U.S. at 146.

**Determination if Lands Are Swamp Lands**

It is clear that the Swamp Lands Act leaves to the Secretary of the Interior the right and duty to determine whether the land sought by the State meets the qualifications of the Act. *Work v. Louisiana*, 269 U.S. 250 (1925). The *in praesenti* grant did not become effective until the

Secretary made the determinations required of him under the Swamp Land Act. He had to decide (1) whether the land had been previously sold and (2) whether it was swamp in character.

In *State of California*, 51 IBLA 3 (1980), the Board held that "the burden of proof on the issue of swamp or overflowed character of land is on the swamp lands grant applicant.

**Mineral Lands Not Excluded**

The Supreme Court held in *Work v. Louisiana, supra at 260*, that mineral lands were not excluded from the swamp land grant to Louisiana, and the Secretary could not refuse to issue a patent to such land pending his determination of mineral character.

# 3. PUBLIC LAND RECORDS AND SURVEYS

## PUBLIC LAND SURVEYS

**Introduction**

Public land surveys are essential for proper management of the public domain. These surveys establish, on the ground, boundaries of subdivisions of the public lands in units that can easily be identified and recorded on official field notes and plats.

At one time the public domain included approximately 1.8 billion acres or about 78 percent of the total land area of the continental United States. Thus far, approximately 1.3 billion acres of land have been surveyed by the rectanguar system of sureys. As of 1970, 459,498,687 ares remain to be surveyed, 76 percent of which is in Alaska.

The Bureau of Land Management was established in the Department of the Interior on

July 16, 1946. The functions of the General Land Office were then placed in the new Bureau of Land Management. The Cadastral Survey creates or reestablishes marks, and defines boundaries of tracts of land. In the conduct of such surveys, the following components are established:

1. field-note record of the observations,

2. monuments, and

3. plat of the survey.

From time to time, the public lands may be resurveyed at the discretion of the director of the BLM; however, after the United States passes title, the survey is permanent and may not be changed. Physical evidence such as monuments placed in the field will prevail over directions and distances given in field notes and plats, in the event they shoud disagree.

**History of the Public Land Surveys**

The original public domain was acquired by the Federal government from the states, treaty and purchase. This original public domain land is now embraced by the states of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin and Wyoming. The rectangular system of surveys has been extended or is now in progress over this area and is the basis for the identification, administration and disposal of the public lands. The rectangular system of surveys is the basic cadastral reference system for all states except for 18 eastern States and the States of Hawaii and Texas.

In 1784 a committe led by Thomas Jefferson, was appointed to study and devise a survey system where the land could be subdivided and described so as to facilitate settlement. On May 20, 1785, the Land Ordinance was passed establishing a rectangular survey of land into townships containing 36 square miles.

The public land survey system was originally established to facilitate the settlement of the midwest, portions of the south including Florida and lands west of the Mississippi River except Texas. This orderly settlement was based on marked boundaries on the land and recorded titles. Thus, the Ordinance of 1785 required survey before settlement.

Thomas Hutchins, the first Geographer of the United States conducted the first survey under the Act of 1785 in eastern Ohio. Hutchins was replaced in 1796 by Rufus Putman, the first Surveyor General of the United States. Putman established the present method of numbering sections or lotting of townships along the north and west boundaries to compensate for deficiencies or excess of land in the township. As inadequacies in survey data became evident, in 1836 the General Land Office was reorganized to coordinate the work of the field offices and a set of standards was adopted.

**Definition of Cadastral Surveys**

"Cadastral surveys in general create, reestablish, mark, and define boundaries of tracts of land. Such surveys -- unlike scientific surveys of an informative character which may be amended with changing conditions, or because they are not executed according to the standards now required for accuracy -- cannot be ignored, repudiated, altered, or corrected, and the boundaries created or reestablished cannot be changed so long as they control rights vested in the lands affected. The official record of a cadastral survey ordinarily consists of a drawing or a map and written description of the fieldwork. The drawing represents the lines surveyed, showing the directions and length of each of such lines; the boundaries, descriptions, and area of the parcel of land; and, as far as practicable, a delineation of the culture and improvements with the limits of the survey." *Mr. and Mrs. John Koopmans*, 70 IBLA 75 (1983). It is well established by even the United States Supreme Court that a survey of public lands does not ascertain boundaries of lands but creates them. *Cox v. Hart*, 260 U.S. 427 (1922).

**Definition of Resurvey**

"A *resurvey* is a reconstruction of land boundaries and subdivisions accomplished by rerunning and re-marking the lines represented in the field not record or on the plat of a previous official surey. The field note record of the resurvey includes a description of the technical manner in which the resurvey was made, full reference to recover evidence of the previous survey or surveys, and a complete description of the work performed and monuments established. The resurvey, like an original survey, is subject to the approval of the directing authority." *Mr. and Mrs. John Koopmans, supra*. Although a resurvey of public lands is evidence

of location of the original line, it is not conclusive. *United States v. Hudspeth*, 384 F.2d 683 (CA Or 1967).

**Definition of Dependent Resurvey**

"A *dependent resurvey* is a retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners. The section lines and lines of legal subdivision of the dependent resurvey in themselves represent the best possible identification of the true legal boundaries of lands patented on the basis of the plat of the original survey. In legal contemplation and in fact, the lands contained in a certain section of the original survey and the lands contained in the corresponding section of the dependent resurvey are identical." *Mr. and Mrs. John Koopmans, supra*. This type of resurvey is applicable to those cases showing fairly concordant relation between conditions on the ground and the record of the original survey. Titles, areas and descriptions should remain absolutely unchanged in the typical dependent resurvey. *Paul N. Scherbel*, 58 IBLA 52, 56, 57 (1981).

**Original Survey Controls Over More Accurate Resurvey**

After a tract of land has been resurveyed and patented by the United States, a subsequent and more accurate survey does not affect ownership boundaries. *State of New Mexico v. State of*

*Colorado*, 267 U.S. 30 (1925) *petition to modify denied* 267 U.S. 582. Although the United States may resurvey the lands it owns and reestablish boundaries, such resurveys are only done for its own information and cannot affect the rights of owners on the other side of the line established by prior survey. *Lane v. Darlington*, 249 U.S. 331, 333 (1919). Thus, where two surveys conflict, the senior survey controls. *United States v. Doyle*, 468 F.2d 633 (CA Colo 1972).

The Interior Department has no power to correct errors in a survey of public lands after the lands have been sold to purchasers in good faith. The only remedy to such a mistake is for the Government to initiate a suite in the courts. *Murphy v. Kirwan*, 103 F. 104 (CC Minn 1900).

**Resurvey Cannot Affect Existing Patents**

The statute, 43 U.S. C. 722 (1982), provides that no resurvey shall be executed so as to impair the *bona fide* rights or claims of any claimant, entryman, or owner of lands affected by such resurvey. The Board stated in *Robert R. Perry*, 87 IBLA 380, 386 (1985):

> Prior to passing title from the United States, the Government has the right to establish boundaries on its own land. However, once patent has been issued, the rights of the patentee are fixed and the Government has no power to interfere with such rights by a corrective survey. *United States v. Reimann*, 504 F.2d 135 (10th Cir. 1974).

For example, in *State of New Mexico*, 51 L.D. 409 (1926), the Department stated the rule that the extent of a state's right to receive a school indemnity grant is limited to the acreage shown by the official surveys (or protraction diagrams for unsurveyed lands). Where indemnity lands have been granted by the United States for sections lost, the subsequent discovery of deficiencies in acreage caused by inaccuracies in the surveys will not provide a new basis for adjusting the grant.

In *Robert R. Perry, supra* at 388, the Board held that the AGovermnent cannot readjust the boundaries of section 36 by supplemental resurvey involving appellant's patented lands the where resurvey shows an excess of acreage over that taken with the survey returns at the time of disposal to the state and to appellant's predecessors in interest.@

**Independent Resurveys and Existing Patents**

An independent resurvey is the running of new section or township lines independent of and without reference to the corners of the original survey. In an independent survey, it is necessary to preserve the boundaries of the lands patented by legal subdivisions of the sections of the original survey. This is done even though the subdivisions of the original survey are not identical with the corresponding legal subdivisions of the sections of the independent resurvey. *Robert R. Perry, supra* at 385. This is accomplished by surveying out by metes and bounds those lands patented on the basis the original survey. These tracts represent the position and form of the patented lands on the basis of the original survey and located on the ground according to the best available evidence of their true original positions. *Id*. at 385.

**Challenge to Resurvey**

In challenging the Government resurvey, the appellant has the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey. *Bethel C. Vernon*, 37 IBLA 226 (1978). Where a Protestant does not meet this burden, the decision dismissing his protest will be affirmed. *See State of Oregon*, 78 IBLA 13, 20-21 (1983); *Crow Indian Agency*, 78 IBLA 7, 11 (1983).

**State Courts Have Jurisdiction over Boundaries Between Private Owners**

Disputes concerning boundaries between private owners are matters for the jurisdiction of the state court where the lands are located. *James Mitchell*, 104 IBLA 377, 380 (1988).

**Boundaries Control Over Acreage**

Where a plat of resurvey indicates that less land is included within the boundaries of a patented tract than is shown on the plat of original survey, the boundaries of a patented tract as established by the original survey rather than the acreage indicated on the plat of the original survey, determine the quantity of acreage. *Albert Freitag*, A-26258 (January 3, 1952); *Robert R. Perry*, 87 IBLA 380 (1985).

**Description Controls Over Acreage Figure in a Patent**

Section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1746 (1976) allows the Secretary to correct patents where necessary to eliminate errors. In *Elmer L. Lowe*, 80 IBLA 101, 105-06 (1984), the appellant sought a correction to a patent where the acreage calculation contained more land than the actual land described in the patent. Athe actual land described by the patent rather than the acreage calculation contained in the patent determines the amount of land conveyed."

**Order of importance to Calls Where Boundaries Are Uncertain**

In certain situations, boundary lines are uncertain so it is necessary to establish an order of importance to the various kinds of calls. In *Robert R. Perry*, *supra* at 384, the Board reiterated this long-established order of importance:

> Where the calls for the location of boundaries to land are inconsistent, calls to monuments, natural or artificial, are of paramount importance and will prevail over all other calls inconsistent therewith. Calls to boundaries are of secondary importance, and courses and distances must be altered if, as given, they will not reach the designated boundary, or run beyond it. Calls of courses take precedence over distances, so that where it is necessary to either change direction to reach a boundary or else reduce or extend the prescribed distance, the distance must yield to the course. The recital of quantity or area of land conveyed or retained will be least influential.

Summarizing the above, the order of importance beginning with the most important, is as follows:

1. Calls to monuments prevail over all others.

2. Calls to boundaries control over calls to distances.

3. Quantity or area of land.

**Intention of Parties Controls Where Location of Boundary Line Uncertain**

The intention of the parties control where the location of a boundary line is uncertain because of inconsistent or conflicting descriptive calls in the conveyance. *Robert R. Perry*, 87 IBLA 380, 385 (1985).

**Legal Subdivision Defined**

In *Jack K. Carter*, 142 IBLA 1, 4 (1997), the Board said A[i]t is well established that a >[l]egal subdivision,= under the U.S. rectangular public land survey system is generally an aliquot part of a township or section, i.e., a >section, quarter section, *** etc.= *Gary E. Strong*, 57 IBLA 306, 307 (1981) (quoting from *Glossary of Public Land Terms* (1949 ed.) at 27 (emphasis deleted)); *see Jacob N. Wasserman*, 74 Interior Dec. 392, 394-95 (1967).

**Legal Description Controls over Actual Amount of Land While in Public Ownership**

The amount of land that passes from Federal ownership by legal subdivision is the amount indicated by the legal description rather than the actual amount. For example, if the northeast quarter of section 6 is conveyed, for the purpose of disposition the patentee acquires 160 acres rather than the actual amount of land which may be more or less than 160 acres. However, this is true only while the legal subdivision remains public land. Once the land is conveyed and becomes private property, the actual amount of land controls. *Mason v. Cornwell (On Review*), 26 L.D. 369, 371 (1898); *Robert R. Perry, supra* at 385.

**Lost Corners**

In *Stoddard Jacobsen v. Bureau of Land Management*, 97 IBLA 182, 186 (1987), the Board described how a lost corner may be restored as well as the standard to be applied in determining whether a comer can be said to have been found:

> Where a corner cannot be considered existent or obliterated, it will be regarded as a lost comer, and restored by the method of proportionate measurement, i.e., reference to two or more interdependent corners, in harmony with the record of the original survey. The Survey Manual also establishes that the standard to be applied in determining

whether a corner can be said to have been found is proof beyond a reasonable doubt. By definition, a Alost corner is a point of a survey whose position cannot be determined, beyond a reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony that bears upon the original position." *Citations Omitted*. It is not necessary to show beyond a reasonable doubt that a comer is lost. It need only be established that there is a reasonable doubt as to its position.

**Collateral Evidence of Corner that Cannot Be Recovered by Evidence of Monuments or Accessories**

In *Stoddard Jacobsen, supra* at 186, the Board described how collateral evidence may be used to recover a corner:

> Corners which cannot be recovered by evidence of monuments or accessories are regarded as obliterated to the extent that they may still be recovered on the basis that their location has been Aperpetuated" or that collateral evidence establishes their location. Such collateral evidence is generally considered to be Aproper relation to known corners, and agreement with the field notes regarding distances to natural objects, stream crossings, line trees, and off-line tree blazes, etc., or unquestionable testimony."

**Standards for setting Aside Officially Approved Survey**

When the Department attempts to set aside an officially approved and filed survey as grossly erroneous, BLM must establish that the survey was grossly erroneous by clear and convincing evidence. *Lawyers Title Insurance Corp. v. Bureau of Land Management*, 117 IBLA 63 (1990). The reason for this high standard is that Aif an original survey is set aside, patents issued based on that survey for land presumed by the patentee to be riparian will no longer convey any riparian rights.@ *Id*. at 75.

**Survey on Ground Controls over Survey Plat or Patent Description**

A patentee of public land takes according to the actual survey on the ground, if the official survey plat does not show the tract as it is located on the ground. Also, the actual survey on the ground controls over an erroneous patent description such as errors in the course or distance or quantity of land stated to be conveyed. *Elmer L. Lowe*, 80 IBLA 101 (1984); *United States*
*v. Heyser*, 75 I.D. 14, 18 (1965).

**Mineral Segregation Surveys**

Mineral segregation surveys are made to delineate the boundary between public land and one or more claims by a metes-and-bounds survey. This is not to be confused with a mineral survey as the mineral segregation survey is made only where there is insufficient information to properly segregate mining claims from nonmineral public land. Mineral segregation surveys are generally initiated by two circumstances: (1) the official mineral survey is faulty; and (or) (2)

unsurveyed mining claims must be segregated because of a pending administrative action.

**Protracted Sureys**

The Bureau of Land Management has developed a system for protracted surveys to augment the public land survey system. Protracted surveys consist of lines drawn on maps that follow the public land survey system but are not based on a field survey with monumentation. The purpose of the protracted surveys is to provide a means for recording actions concerning the public lands and also provide a basis for land management. Although eventually lands under protracted surveys will be given an official survey, the Federal Government, in the meantime, is able to issue mineral leases for the vast unsurveyed areas in such states as Alaska.

**Manual of Survey Instructions**

Cadastral surveys are made according to instructions and specifications given in the *Manual of Surveying Instructions*. The manual was first issued in 1855 and reprinted as the *Manual of 1871*. The manual has been revised numerous times with editions published in 1881, 1890, 1894, 1902, 1930, 1947 and 1973. The current edition of the manual can be purchased from the following address:

U.S. Government Printing Office

Washington, D.C. 20402

Stock Number 024-011-00052-6

**Public Land States**

Thirty states have been carved out of the public domain. Original records of the public land sureys for these states are maintained in the individual states with Oklahoma being the only exception. The 30 public land states are given below:

**Alabama**

Title to U.S.: Included in territory of original 13 states.

Statehood: December 14, 1819 (3 Stat. 608)

Records: Secretary of State at Montgomery.

**Alaska**

Title to U.S.: Purchase from Russia in 1867.

Statehood: January 3, 1959 (72 Stat. 339)

Records: State office of BLM at Anchorage.

**Arizona**

Title to U.S.: Ceded by Mexico in 1848 and the Gadsden Purchase in 1853.

Statehood: February 14, 1812 (36 Stat. 557; 37 Stat. 1728)

Records: State Office of BLM at Phoenix.

**Arkansas**

Title to U.S.: Louisiana Purchase in 1803.

Statehood: June 15, 1836 (5 Stat. 50)

Records: Department of State Lands at Little Rock.

**California**

Title to U.S.: Ceded by Mexico in 1848.

Statehood: September 9, 1850 (9 Stat. 452)

Records: State offfice of BLM in Sacramento.

**Colorado**

Title to U.S.: Louisiana Purchase in 1803; additional land by(1) treaty with Spain in 1819, (2) lands annexed with Texas in 1845, and (3) lands ceded by Mexico in 1848.

Statehood: August 1, 1876 (18 Stat. 474; 19 Stat. 665)

Records: State office of BLM in Denver.

**Florida**

Title to U.S.: Ceded by Spain in 1819.

Statehood: March 3, 1845 (5 Stat. 742)

Records: Internal Improvement Trust Fund at Tallahassee.

**Idaho**

Title to U.S.: Acquired with Oregon Territory.

Statehood: July 3, 1890 (26 Stat. 215)

Records: State office of BLM in Boise.

**Illinois**

Title to U.S.: Included in territory of Original 13 States.

Statehood: December 3, 1818 (3 Stat. 536)

Records: Illinois State Archives, Secretary of State at Springfield.

**Indiana**

Title to U.S.: Included in territory of Original 13 States.

Statehood: December 11, 1816 (3 Stat. 399)

Records: Archivist, Indiana State Library at Indianapolis.

**Iowa**

Title to U.S.: Louisiana Purchase in 1803.

Statehood: December 28, 1846 (9 Stat. 117)

Records: Secretary of State at Des Moines.

**Kansas**

Title to U.S.: Louisiana Purchase in 1803, also lands annexed with Texas in 1845.

Statehood: January 29, 1861 (12 Stat. 126)

Records: Auditor of State and Register of State Lands at Topeka.

**Louisiana**

Title to U.S.: Louisiana Purchase in 1803; additional lands through treaty with Mexico.

Statehood: April 30, 1812 (2 Stat. 701)

Records: Register, State Land Office at Baton Rouge.

**Michigan**

Title to U.S.: Included in territory of the Original 13 States.
Statehood: January 26, 1837

Records: State Department of Treasury at Lansing.

**Minnesota**

Title to U.S.: Included in territory of Original 13 States; also Louisiana Purchase in 1803.

Statehood: May 11, 1858 (11 Stat. 285)

Records: Department of Conservation at St. Paul.

**Mississippi**

Title to U.S.: Included in territory of Original 13 States.

Statehood: December 11, 1817 (3 Stat. 472)

Records: State Land Commission at Jackson

**Missouri**

Title to U.S.: Louisiana Purchase in 1803.

Statehood: August 10, 1821 (3 Stat. 645)

Records: State Land Survey Authority at Rolla.

**Montana**

Title to U.S.: Louisiana Purchase in 1803 and Oregon Territory.

Statehood: November 8, 1889 (25 Stat. 676; 26 Stat. 1551)

Records: State office of BLM at Billings.

**Nebraska**

Title to U.S.: Louisiana Purchase in 1803.

Statehood: March 1, 1867 (14 Stat. 391, 820)

Records: State Surveyor at Lincoln.

**Nevada**

Title to U.S.: Ceded by Mexico in 1848.

Statehood: October 31, 1864 (13 Stat. 30, 749)

Records: State office of BLM at Reno

**New Mexico**

Title to U.S.: Lands annexed with Texas in 1845; lands ceded by Mexico in 1848; and Gadsden Purchase in 1853.

Statehood: January 6, 1912 (36 Stat. 557, 37 Stat. 1723)

Records: State office of BLM at Santa Fe.

**North Dakota**

Title to U.S.: Included in the territory of Original 13 States and with lands acquired under Louisiana Purchase in 1803.

Statehood: November 2, 1889 (25 Stat. 676; 26 Stat. 1548)

Records: State Water Conservation Commission at Bismark.

**Oklahoma**

Title to U.S.: Louisiana Purchase in 1803 and lands annexed with Texas in 1845.

Statehood: November 16 1907 (34 Stat. 267; 35 Stat. 2160)

Records: New Mexico State Office of the BLM at Santa Fe.

**Ohio**

Title to U.S.: Included in the territory of the Original 13 States.

Statehood: November 29, 1802 (2 Stat. 173)

Records: Auditor of State at Columbus

**Oregon**

Title to U.S.: Included in the Oregon Territory with title established in 1846.

Statehood: February 14, 1859 (11 Stat. 383)

Records: State office of BLM at Portland.

**South Dakota**

Title to U.S.: Included in the territory of the Original 13 States and with lands acquired under the Louisiana Purchase in 1803.

Statehood: November 2, 1889 (Stat. 676; 26 Stat. 1549)

Records: Commissioner of Schools and Public Lands at Pierre; plats of mineral surveys avaliable at the Montana State office of the BLM at Billings.

**Utah**

Title to U.S.: Ceded by Mexico in 1848.

Statehood: January 4, 1896 (28 Stat. 10; 29 Stat. 876)

Records: State office of the BLM at Salt Lake City.

**Washington**

Title to U.S.: Included in the Oregon Territory (1846).

Statehood: November 11, 1889 (25 Stat. 676; 26 Stat. 1552)

Records: Oregon State BLM office at Portland.

**Wisconsin**

Title to U.S.: Included in territory of the Original 13 States.

Statehood: May 29, 1848 (9Stat. 233)

Records: Department of Natural Resources at Madison.

**Wyoming**

Title to U.S.: Louisiana Purchase in 1803; lands annexed with Texas in 1845; with lands included in the Oregon Territory; and with lands ceded by Mexico in 1848.

Statehood: July 10, 1890 (26 Stat. 222)

Records: State office of BLM at Cheyenne.

## SURVEY MONUMENTS

The purpose of monumentation of a survey is to fix the corner positions so the position of the survey may be indefinitely known. The position and existence of monuments have been given considerable legal significance by the courts. The best evidence of the location of a corner is the corner monument. Field survey monuments are given controlling preference over recorded direction and lengths of lines as shown by the official plat and field notes. *Sala v. Crane*, 221 P. 556 (1923), *Error dismissed* 267 U.S. 585.

### Monuments Control over Description with Mining Claims

Where a discrepancy exists, it is a well established general rule that the position of the monuments on the ground prevail over the description of the claim on the location notice. This same rule applies in a mineral patent where the position of the mineral monuments controls over the patent description. *Cardoner v. Stanley Consol. Mining & MillingCo.*, 193 F. 517 (CC Idaho 1911). Federal law (30 U.S.C. 34) provides as follows:

> ....The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patent claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent description shall give way thereto.

### Location Monument

When a survey is situated in a district where there is no corner of the public survey and no other monument within 2 miles, a location monument is established. The site, when practicable, should be some prominent point, visible from every direction, where the permanency of the monument will not be endangered by snow, rock, or land movements or other natural causes.

The monument consists of an iron post similar to the type used for rectangular surveys or a stone not less than 30 inches long, 20 inches wide, and 6 inches thick, set three-fourths in the ground. The letters "USLM" followed by the number of the survey are marked on the brass cap

or plainly chiseled upon the stone. The exact reference point is indicated on the top of the

monument by a cross.

**Specifications for Monuments**

The Bureau of Land Management has authorized that a special post be used to monument public surveys. The post consists of a zinc-coated iron pipe, 30 inches in length with an outside diameter of 2.5 inches. A brass cap is fastened to the top and the bottom is split. Brass tablets are also attached to rock outcrops and set in concrete monuments. The tablet is 3.25 inches thick and 3.5 inches long. Under certain conditions, deviations from the standard monument may be allowed.

Stone may also be used instead of the iron pipe if the stone is durable and has a minimum volume of 1,000 cubic inches. Both iron posts and stone monuments are always set at a depth of three-fourths of their length if possible.

**Miscellaneous Types of Monuments**

A *reference monument* is used where a monument cannot be established because of potential destruction such as on a road bed. The site of the true corner will be marked and at least two reference monuments will be established outside the roadway.

A *witness point* has no particular relation to a regular corner; it is a monumental station on a line of survey used to mark an important position.

*Tree monuments* -- If the true point of a corner is occupied by a living tree, the tree is made the monument. If the tree is too small to be marked it is removed.

**Corners**

A *witness corner* is established only under circumstances where it is not practical to position the monument at the site of the corner. The witness corner is monumented and generally placed as closely as possible to the corner and on a line of the survey. The terms corner and monument are not synonymous. A "corner" is a point established by a survey; whereas, a "monument" is the physical structure such as a pot or pipe which marks the corner.

**Marks on Monuments**

A brass cap monument is marked so that it must be read while standing on the south side of the monument. The year the monument was positioned is marked on the south side. Section or township boundaries are indicated by groves on the surface of the brass cap and the appropriate section, townships and ranges are marked on the plate in their proper position relative to the boundary lines.

Marks on stone monuments are cut on the exposed faces or sides of the stone -- never on its top or end. In section corners located along the boundary of the township, the notches and grooves give the number of miles to the adjoining township corners. All other section corners in

the township give the number of miles from the monument to the south and east boundaries of the township.

## PLATS AND FIELD NOTES

### Early Requirement for Plat and Field Notes

Field notes and plats have always been required since the first cadastral surveys. The Act of May 18, 1796 (1 Stat. 464; 43 USC 75) states:

> These field-books shall be returned to the Surveyor General, who shall therefrom cause a description of the whole lands surveyed, to be made out and transmitted to the officers who may superintend the sales: He shall also cause a fair plat to be made of the townships, and fractional parts of Townships, contained in the said lands, describing the subdivisions thereof, and the marks of the corners. This plat shall be recorded in books to be kept for that purpose; a copy thereof shall be kept open at the Surveyor General's office, for public information; and other copies sent to the places of the sale, and to the Secretary of the Treasury.

The origins of this provision are found in the Land Ordinance of 1785, which is generally believed to have been drafted by Thomas Jefferson.

### Approval of Plat and Field Notes

The public lands are not considered surveyed or identified until approval of the survey and filing of the plat in the administering land office by direction of the Bureau of Land Management. *U.S. v. Cowlinshaw*, 202 Fed. 317 (1913). No subdivisions are to be "disposed of" until so identified. *U.S. v. Hurlburt*, 72 F.2d 427 (1934).

Once the plat and field notes are approved, in matters involving disposal or sale of the surveyed lands, the surveys are conclusive and binding on all parties concerned, including the Government. *Mann v. Tacoma Land Co*., 44 F 27 (CC Wash 1890), *affirmed* 153 US 273. As a general rule, the field notes are presumptively correct and are prima *facie evidence* that they are correct until disproved by a clear preponderance of the evidence. *Southern Development Co. v. Endersen*, 200 F 272 (DC Nev 1912).

### Survey Plat

The survey plat is a drawing which represents the lines surveyed, established, or resurveyed, showing the bearing and length of each line. Also shown are the description of the boundaries and area of each tract of land including the relationship to contiguous official surveys.

Topography and cultural features may be shown where practical.

**Field Notes**

The field notes are the written record of the survey. This record identifies and describes the lines and comers of the survey and the procedures by which they were established or reestablished. The new subdivisions to be platted (or replotted in the case of some resurveys) and the quantity of land in each unit are derived from the field notes.

**Field Notes and Plat as Evidence**

The subdivisions are based upon and are defined by the monuments and other evidences of the controlling official survey. As long as these evidences are in existence, the record of the survey is an official exhibit and, presumably, correctly represents the actual field conditions. If there are discrepancies, the record must give way to the evidence of the corners in place. In the absence of evidence, the field notes and plat are the best means of identification of the survey and they will retain this purpose. In the event of a resurvey they provide the basis for the dependent method and the control for the fixation of the boundaries of alienated lands by the independent method.

**Field Notes and Plat are Part of Grant or Deed**

The system of public land rectangular surveys, where lands are described by reference to designated subdivisions based upon the official cadastral surveys and shown on plats filed in a public office of record, has been affirmed by the United States Supreme Court. In the case of *Cragin v.. Powell* (128 U.S. 691, 696), the Court stated:

> It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, and the plat itself, with all its notes, lines, descriptions, and land marks, becomes as much a part of the grant or deed by which they were conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or grant.

**Original Survey Plats Maintained by BLM**

The original plats of survey are maintained on 35 mm aperture cards and held in the various state offices of the Bureau of Land Management. Paper copies of the microfilm may be purchased at a moderate price. The original township survey plat should not be confused with the master title plats or other survey plats. The master title plat is a composite of all the survey plats for a given township but is not a "survey" plat. It will also contain special surveys, mineral surveys, homestead surveys as well as many other types of surveys.

## TERMINOLOGY USED IN PUBLIC LAND SURVEYS

**Initial Points** - There are 37 independent initial points in the United States, each of which serves as the origin for public land surveys. The principal meridians and base lines originate from the initial points.

**Principal Meridian** - The principal meridian coincides with the true meridian, extending both north and south in both directions from the initial point. There are 36 principal meridians in the United States.

**Base Line** - The base line extends both east and west from the initial point on a true parallel of latitude crossing the principal meridian at right angles.

**Standard Parallels** - Standard parallels or correction lines are east-west lines, parallel to the base line and placed at intervals of 24 miles both north and south of the base line; they correct for convergence at the north and south poles.

**Guide Meridians** - Guide meridians are north-south lines, parallel to the principal meridian and placed at intervals of 24 miles both east and west of the principal meridian.

**Township Lines** - Township lines are east-west lines parallel to the base line and the standard parallels. Township lines are placed at intervals of six miles and are numbered to the north or south beginning with number 1 at the base line.

**Range Lines** - Range lines are north-south lines parallel to the principal meridian and guide meridians. Range lines are placed at intervals of six miles and are numbered to the east or west beginning with number 1 at the principal meridian.

**Township** - The primary limit of the rectangular survey is the township, six miles square. Townships are subdivided into 36 sections by placing parallel lines through the township from south to north and from east to west at intervals of one mile. The sections are numbered beginning with number 1 in the northeast section and proceeding west and east alternately through section 36.

**Section** - A section consists of one mile square or 640 acres. It is divided into quarter sections by straight lines connecting established quarter-section corners on opposite boundaries. Eight monuments are placed on each section - one on each corner and one midway between corners along the boundary lines.

**Lots** - Lots are fractional units caused by correction of survey error along the western and northen borders of the township or caused because of the existence of meanderable bodies of water or mineral claims. In order to make as many sections as possible represent square miles or 640 acres, north-south lines parallel to the east boundary of the township and at intervals of one mile are surveyed successively from east to west.

East-west lines parallel to the south boundary of the township and at intervals of one mile are surveyed successively from south to north. Thus if the township is not six miles square, the excess of deficiency is added to or deducted from the six sections along the northern boundary

and the six sections along the western boundary of the township. So if there is an excess or deficiency area along these boundaries, 25 sections may each contain 640 acres and 11 sections may each contain more or less than 640 acres. Along the boundary where an excess or deficiency of acreage occurs, the area is lotted so as to provide a maximum number of aliquot parts (40-, 80-, and 160-acre parcels). Lots are numbered counterclockwise within a single section, beginning in the northeast part of the section. The total acreage is given in each lot, generally slightly more or less than 40 acres at west and north boundary corrections. Fractional sections which are invaded by meanderable bodies of water or by approved mining claims, which do not conform to regular legal subdivisions, are also lotted.

## SUBDIVISION OF TOWNSHIPS AND SECTIONS

### Subdivision of Townships

The square mile, or section, is the unit of subdivision of a township. The normal township includes 36 sections of which only 25 contain 640 acres each. Sections against the north and west boundaries, except section 6, contain regular aliquot parts totaling 480 acres. The balance of these sections consist of a row of four fractional lots along the township boundary.

The amounts by which a section or its aliquot parts may vary from the ideal section (which is a square 5,280 feet on each side) and still be considered regular are referred to as the rectangular limits. For alinement the section's boundaries must not exceed 21 feet from cardinal in any part, nor may the opposite boundaries vary more than 21 feet. The distance between corners, to be normal, must not exceed 25 links in 40 chains.

The south boundary of a township is generally the governing latitudinal boundary, except where such boundary has a defective alignment. New corners are established by starting at the southeast corner of the township and are placed at regular intervals of 40 chains, counting from east to west. The excess or deficiency is placed in the west half mile. A sectional correction line is established if the south boundary is defective.

The east boundary of a township is generally the governing meridianal boundary, except where it is defective in alignment. New corners of the sections of the township are established by counting from south to north along the eastern boundary of the township at 40 chain intervals. A sectional guide meridian is required if the east boundary is defective in alignment.

The purpose of the above procedure is to establish the maximum number of normal sections that do not need to be lotted.

### Subdivision of Sections

Under the general land laws (43 U.S.C. 752, 753), the unit of administration is the quarter-quarter section of 40 acres. However, sections are not subdivided in the field by the Bureau of Land Management cadastral surveyor except under special circumstances. It is

common for sections to be subdivided upon the official plat by protraction.

**Subdivision by Protraction**

Boundaries of quarter sections are shown on the plat by broken straight lines connecting the opposite quarter-section corners. With the exception of section 6, sections which are bounded by the north or west boundary of a normal township are subdivided by protraction into two regular half-quarter sections and four lots. Section 6 has lots protracted against both the north and west boundaries. It contains seven lots, two regular half quarter sections and one quarter-quarter section.

Along the northern and western boundaries of the section, lots are numbered consecutively from east to west and from north to south, beginning with lot no.1 at the east or north corner of each section. The lots in section 6 are numbered starting with no. 1 in the northeast, then progressing in a counterclockwise direction to no. 7 in the southwest corner of the section.

Sections containing meanderable water bodies or approved claims which do not fit regular legal subdivisions are subdivided by protraction into regular and fractional parts. The lines subdividing the section are terminated at the meander line or claim boundary. In general, fractional sections are subdivided so as to contain as many aliquot parts as possible.

## WRITING LEGAL DESCRIPTIONS

Description of lands within the scope of the public-land rectangular surveys should conform to the accepted nomenclature of that system, citing the name of the proper reference meridian, the appropriate township and range numbers and, where necessary, the section and sectional subdivisions shown upon the official plat of survey. Each reference meridian has its own base line; and, therefore, the words "and base line" are usually omitted. The name of the reference meridian should be spelled in full. If the lands have not been surveyed, the description should conform to the legal subdivisions that will, when established, include the lands.

**Abbreviations**

When used in a narrative, such words as township, range, section, north, south, east, etc. may be written in full, but when such words are used in a land description, they should be abbreviated and capitalized as follows:

| | |
|---|---|
| Township(s) | T., Tps. |
| Range(s) | R., Rs. |
| Section(s) | sec., secs. |
| North | N. |

Southwest SW.

If two or more townships are contained in a description and all the townships have the same number north or south of the baseline, the plural abbreviations "Tps." should be used.

Example: Tps. 4 S., Rs. 15 and 16 E.

However, the term "range" is abbreviated as singular or plural depending on the meaning.

Example: Tps. 2 and 3 N., R. 11 W.

Tps. 7, 8 and 9 N., Rs. 3, 4, and 5 E.

**Preferred Order of Listing**

In writing the description for a tract of land, the proper order of listing is to begin with the lowest numbered section in each township. First give the lot numbers in order, then the subdivisions within each quarter section, beginning in the NE, then NW, SW and SE in a counterclockwise manner.

The order for giving townships, if more than one is included, is determined by the range number; begin with the lowest range number. However, within each range, begin with the lowest township number.

Where townships must be described that are both north and south of the base line and east and west of the reference meridian, it is preferred that those northeast of the initial point be described first followed by northwest, southwest and southeast.

**Area**

It is generally desirable to give a statement of the total land area following the description. If the lands have been surveyed, the acreage as given on the plats should be indicated. If the lands were not surveyed, the approximate area should be given in even acres.

The following statement should be used:

The area(s) described aggregate(s)_____ acres.

**Land Descriptions**

Where NE1/4NW1/4 sec. 22 and SE1/4NW1/4 sec. 22, are included, the resulting 80-acre unit can be designated El/2NW1/4 sec. 22. In using symbols, the usual punctuation is omitted.

(Note that the period is omitted after N, NE, S, SE, etc., and that there is no comma and no space between symbols indicating a quarter-quarter section (NE1/4SE1/4 sec. 10).

**Sample Description**

Lots 2 and 4, NW1/4NE1/4, S1/2NE1/4NW1/4, and SE1/4, sec. 31, T. 3S., R.lE., Black Hills Meridian. The areas described aggregate 255 acres.

(Note: no space or comma between symbols indicating a quarter-quarter section.)

## METES AND BOUNDS SURVEYS

Metes-and-bounds surveys are required to define the boundaries of irregular areas of land which are not conformable to legal subdivisions. This type of survey may involve mineral claims, small-holding claims, private-land grants, forest-entry claims, national parks and monuments, Indian reservations, lighthouse reservations, trade and manufacturing sites, homestead claims in Alaska, or the like.

In a metes and bounds survey, a tract of land is defined by a description of its boundary. This is done by utilizing natural or artificial monuments located at the corners and along the boundary lines. The lengths and directions of the lines connecting successive monuments are the basis of the description. If the described tract makes a common boundary with an adjoining tract of land, then the adjoining tract should be identified by the name of the owner and the survey designation. The bearings and distances of the lines connecting the corners of a tract are given in order around the perimeter, with the final traverse indicating a return to the point of beginning. If the point of beginning is an established corner of an official survey, it should be described by corner and survey number or other appropriate designation. The latitude and longitude are given unless the beginning point is a corner of the public land surveys or connected by survey to such a corner.

**Monuments**

A monument may consist of a natural or artificial object located at a corner of the tract. Objects used as monuments include lakes, rocks, peaks, trees, fences, ditches, posts, pipe and the confluence of two rivers or streams.

**Direction of Lines**

The direction of a line is normally established by giving the angle from the meridian within one of the four quadrants. This direction or "bearing" of the line may be given from the north or south point, depending on the direction (north or south) that you take to describe the successive monuments (e.g. N64EE; S121EW.).

**Lengths of Lines**

Horizontal distances are generally measured in land surveys at the mean elevation of the ground. In geodetic surveys, however, horizontal distances are adjusted to sea level. The foot unit is generally used in most metes and bounds surveys and in townsite and city subdivisions. The chain is the unit of length used in public land surveys although in certain special cases the meter is used. Standard abbreviations for units of distance are as follows:

| | |
|---|---|
| Chain(s) | ch., chs. |
| Link(s) | lk., lks. |
| Foot, feet | ft. |

**Sequence and Closure**

The bearings and distances of the courses connecting successive monuments or comers of a tract are given in a regular order. It is generally desirable to give each course on a separate line. If the course or corner of one tract should coincide with the course or corner of another, this should be specifically mentioned.

**Point of Beginning**

The position of a tract of lands must be stated in relation to established natural or artificial monuments of known position or by stating its geographic position in terms of latitude and longitude. When possible, it is desirable to tie a corner of a tract of land to a cadastral survey monument by giving the direction and distance from a specific corner of the tract to the cadastral monument.

**Natural and Artificial Boundaries**

In certain cases, the boundary of a tract may be defined by streams, lakes, divides and straight lines connecting topographic features. Where a river is used as a boundary, generally the middle of the channel or one bank is made the boundary. If you face downstream, the bank on your left side is termed the left bank and the one to your right is termed the right bank.

If rivers, lakes and tidal waters are used as boundaries, the elevation or level of the water should be specified (e.g. mean high-water line, low water mark, mean high tide). Artificial monuments such as roads, railroads, and ditches are commonly used.

**Area**

It is good practice to state the area of the tract in acres, following the description. For example, "the tract as described contains 35 acres.@

**Units of Distance Measurement**

The law prescribes the chain as the unit of linear measure for the survey of the public lands. All returns of measurements in the rectangular system are made in the true horizontal distance in miles, chains, and links.

The chain unit, devised in the seventeenth century by Edmund Gunter, an English astronomer, is so designed that 10 square chains are equivalent to one acre. In the English colonial area of the United States the boundaries of land were usually measured in the chain unit, but lengths of lines were frequently expressed in poles. One pole is equal to 25 links, and four poles equal one chain. The field notes of some early rectangular surveys in the southern States show the distance in "perches," equivalent to poles. The term now commonly used for the same distance is the rod.

Land grants by the French crown were made in arpents. The arpent is a unit of area, but the side of a square arpent came to be used for linear description. The Spanish crown and the Mexican Government granted lands which were usually described in linear varas. Both the arpent and the vara have slightly different values in different States.

*Units of Linear Measure*

1 chain = 100 links

= 66 feet

1 mile = 80 chains

= 5,280 feet

Units of Area

1 acre = 10 square chains

= 43,560 square feet

1 square mile = 640 acres

**Examples of Metes and Bounds Descriptions**

**Example No. 1**

Beginning at corner No. 1, a hemlock post, 4 in. square, 24 in. above ground, located on the Takotna Highway about 1/4 mile southeasterly from its intersection with the left bank of Kuskokwim River and in approximate latitude 62E 52' N., longitude 155E 40' W. Corner No. 2 of U.S. Survey 999 bears N.26E 59' W., 327.6 ft.

From corner No. 1, by metes and bounds,

S. 25E43' W., 1900 ft., to corner No. 2;

S. 57E30' W., 3000 ft., to corner No. 3;

S. 32E30' E., 830 ft., to corner No. 4;

N. 57E30' E., 4000 ft., to corner No. 5;

N. 25E43' E., 1650 ft., to corner No. 6;

N. 34E17' W., 550 ft., to corner No. 7;

S. 85E38' W., 871.6 ft., to corner No. 1, the place of beginning.

The tract as described contains 121.66 acres.

**Example No. 2**

Beginning at corner No. 1, on the south shore of Humboldt Harbor, at mean high tide, in latitude 55E19'12" N., longitude 160E31'07" W., from which U.S. Location Monument No. 1146 bears S. 79E32'51" W., 28.44 chs. distant.

From the initial point

South, 13.44 chs. to corner no. 2, identical with corner No. 3, U.S. Survey No. 1400;

N. 67E41' E., 15.93 chs. to corner No. 3;

North, 13.44 chs. to corner No. 4 on south shore of Humboldt Harbor at mean high tide;

Thence with meanders of Humboldt Harbor at mean high tide,

S. 70E26' W., 2.60 chs.,

S. 0E15' W., 1.50 chs.,

S. 59E31' W., 1.50 chs.,

S. 73E02' W., 5.00 chs.,

S. 75E22' W., 2.50 chs.,

S. 77E39' W., 3.90 chs. to corner No. 1, the place of beginning. The tract as described

contains 18.65 acres.

**Example No. 3**

Beginning at the confluence of the Chvilnuk and Yukon Rivers in approximate latitude 61E58'15" N., longitude 162E48'20 W.,

Thence northeasterly upstream along the center of Chvilnuk River to its source in the Tundadula Mountains;

Easterly along the summit of the Tundadula Mountains to the source of the Bonasila River;

Southeasterly downstream along the middle of the main channel of the Bonasila River to its junction with the Stuyahok River;

Southerly upstream along the middle of the main channel of the Stuyahok River to a point due west of the source of Mountain Creek;

East to the source of Mountain Creek;
Southerly downstream along the center of Mountain Creek to its junction with Tucker's Slough;

Southerly along the center of 'Ncker's Slough to its junction with the Yukon River;

Southerly and westerly downstream along the right bank of the main channel of the Yukon River at mean high-water mark to the mouth of the Chvilnuk River and the place of beginning.

The tract as described contains approximately 1,900,000 acres.

## SURVEY OF MEANDER LINES

The U.S. Supreme Court has stated many times that meander lines established by the cadastral surveyors are not ownership boundaries but are lines that delineate the banks of a stream or lake so as to determine the amount of water in the survey. When the bed of the body of water changes by action of water, the high-water mark changes, and the ownership of the adjoining land migrates with it. In *Railroad Co. v. Schurmeier*, 74 US 272 (1868), the Supreme Court gave the principles governing the use and purpose of meandering shores:

> Meander lines are run in surveying fractional portions of the public lands bordering on navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, which is to be paid for by the purchaser. In preparing

the official plat from the field notes, the meander line is represented as the border line of the stream, and shows to a demonstration that the watercourse, and not the meander line as actually run on the land, is the boundary.

**Meander Line**

All navigable bodies of water, including important rivers and lakes, are segregated from the public lands at mean high water elevation. A meander line may be defined as the traverse of the margin of a permanent natural body of water. Meander lines are run to determine the amount of land segregated by the water body. In order for a line to be called a meander line it must define the bank of a river or lake. The high-water mark is the line which the water impresses on the soil by covering it for sufficient periods to denude it of vegetation.

**Meander Corner**

A meander corner is established at every point where a standard, township, or section line intersects the bank of a navigable stream or other meanderable body of water.

**Rivers**

All rivers which have a right-angle width of 3 chains or greater (1 chain = 66 feet) are meandered on both banks, at the ordinary mean high-water mark. Shallow streams and/or intermittent streams that lack well-defined channels or banks are not meandered even though the right-angle width may be greater than three chains.

**Lakes**

All lakes are meandered if they contain an area of 50 acres or more. Artificial lakes and reservoirs are generally not segregated from the public lands but such water bodies are delineated on the plat to show their true position. Shallow or poorly-defined lakes such as desert playas or lakes that occur seasonally from wet weather are not meandered, even if such water bodies include over 50 acres.

**Islands**

All islands are meandered above the mean high-water elevation if they are surrounded by a body of navigable water. However, islands surrounded by a body of navigable water, but created after the state was admitted into the union, are not meandered. If an island was not part of the bed of a navigable body of water at statehood, the island remains public land, even though it may have been omitted from the original survey.

## LAND DESCRIPTIONS BY COORDINATES

It is possible to describe the location of a point on the surface of the earth by giving its

position on a well-established system of coordinates. In the United States, two systems of coordinates are in useBone using geographic positions or latitude and longitude; and another which is dependent on geographic positions, commonly called plane-coordinate (x and y) positions.

**Geographic Positions**

The United States is covered by a network of triangulation and traverse, which determines the latitudes and longitudes of thousands of marked points, based on a standard geodetic datum known as the North American datum of 1927. Any survey which is connected with at least two stations, whose positions are known on the North American datum of 1927, may be computed and recorded on that datum.

Where a boundary is defined by expressing the geodetic latitudes and longitudes of its corners, the forward and back azimuths and the lengths of the lines forming the boundary should be given. These data should be arranged in the tabular form generally adopted for such data by the various Federal survey bureaus. The descriptions of the station and corner sites, and of their monuments and marks should follow the table of positions, and be in short paragraphs arranged in the same sequence as the positions. The example is taken from the report of the International Boundary Commission, United States and Canada, Northwesternmost Point of Lake of the Woods to Lake Superior.

**State Plane Coordinate Systems**

For each State, certain territories, and the Commonwealth of Puerto Rico, the United States National Geodetic Survey has devised a system of plane-rectangular coordinates for the purpose of defining and stating the positions or locations of established monuments and other points with reference to a point of origin. Each such State system comprises one or more zones, each zone having its own plane-rectangular map projection, called a grid, derived from and mathematically dependent upon the North American datum of 1927, which is the standard geodetic datum for the horizontal control survey of the United States. Each grid is defined by naming the spherical map projection on which it is based, stating the geographic position of its origin and giving its scale relationship to the geodetic datum.

Where the survey of a tract of land has been connected by an acceptable survey to two monuments whose coordinates on a State system are known, the coordinates on the State system of all corners of the tract can be computed from the grid azimuths and lengths of the boundary lines by the usual methods of latitudes and departures.

Where a boundary is described by stating the plane coordinates of its corners on a State system, appropriate reference to the system used must be incorporated in the description. In a State whose plane coordinate system has been approved by act of legislature, the official title of the State system should appear in the description, and the statute cited. Example: "Maryland Coordinate System (chapter 628, Laws of Maryland, 1939)."

Where a description having the form of metes and bounds is supplemented by the addition of the plane coordinates of the land corners on a State grid, it is important that the descriptions show whether the metes and bounds are bearings and distances on the ground, as taken from the grant, survey, or deed records, or grid azimuths and lengths of lines, based upon the State plane coordinate system.

**Example of Plane Coordinate Positions**

A tract of land in Cherokee County, State of North Carolina, described as follows:

Beginning at a concrete monument with bronze tablet marked 472-7 in the Corporation line of the City of the coordinates of which referred to the North Carolina Coordinate System, are N. 1,470,588 and E. 416, 239; Zone (name or No., if applicable) From the iriitial corner,

N. 5E33' W., 1304 ft., to a TVA monument;

S. 89E19' E., 2664 ft., to a TVA monument;

S. 6E00' E., 1311 ft., to a TVA monument;

N. 89E1l= W. 2675 ft., to the point of beginning.

The tract as described contains 79.6 acres.

The position of monuments and direction of lines are referred to the North Carolina Coordinate System.

If a state has more than one zone the zone number or zone name must be given.

## PUBLIC LAND RECORDS

**Old Records System**

Section 8 of the Act of May 18, 1796 (1 Stat. 464) started the concept of maintaining a status plat on which tracts sold under the Act would be noted. Section 7 of the Act of May 10, 1800 (2 Stat. 73) directed the registers of the land offices to enter specified information on the book of surveys or the original survey plat. This Act also required that the book of surveys and the original plat be open to the inspection of all individuals.

Land status records were notated by manual postings consisting of abbreviations that evolved through the years by custom. Certain areas, reserved or withdrawn for a particular purpose such as military reservations and Indian reservations, were typically shown in color on the plat. The old status plats were survey plats with the status information overprinted on them.

The tract book portion of the land records was introduced by the entry book requirements prescribed by the Act of May 10, 1800, *supra*:

> The tract book system of recording was established on May 10, 1800 [fn. omitted] at the time that surveyed lands in Ohio were opened to entry and settlement. The tract books were designed primarily for the maintenance of a permanent reference for all transactions involving the surveyed public lands...
>
> ... The organization of the tract books is based upon administrative discretion and decision, and changes or modifications in the form, format, content, nature or designation of the tract books have been accomplished solely by administrative action.

Judicial decisions and the regulations of the Department of the Interior recognize the old tract books and status plats as the official land status records of the land offices. *Bly v. U.S.*, 3 Fed. Cas. 767, 768 (CCD Minn. 1877); *Nurnberger v. U.S.*, 156 Fed. 721, 727 (8th Cir. 1907).

**New Status Records**

BLM initiated a new land status records system for most of the 16 western states in 1955. This new system, which replaced the old tract books and status plats, consists of (1) a master title plat for each township (a status diagram at the scale of the survey plat, but not a survey plat), (2) an historical index for each township, and (3) use plats for each township. The new land status records have been recognized as the official records of the land offices by the administrative decisions of the Interior Board of Land of Appeals of the Department of the Interior. *See C. V Armstrong*, A-30889 (Feb. 28, 1968). However, the BLM land records have not been recognized by statute or regulations as the official land status records of the BLM land offices. The new land status system was not extended to the BLM Eastern States Office which serves the 13 easternmost public land states.

**Manuals**

The agency manual is an internal policy document in which agency directives are issued in a set of manuals with the contents organized by subject. For example, procedures on public land records are set forth in the 1200 section and minerals management procedures are given in the 3000 section of the manual. In *U.S. v. Humboldt Placer Mining Company and Del DeRosier*, 8 IBLA 417 (1972), the Board held that Amanual instructions which are issued for administrative purposes only, are neither published nor binding upon the public, and ordinarily, no one other than Bureau employees is expected to use the Manual."

**BLM Employees Are Required to Follow Agency Manuals**

In *Robert S. Glenn*, 124 IBLA 104, 108-09 (1992), the Board pointed out that although Instruction Memoranda and BLM Manual provisions do not have the force and effect of laws and are not binding on the IBLA or the Public, BLM employees are obliged to follow such policy manuals.

Forest Service employees are not under the same clear mandate to follow the Forest Service manual. The Board said at 109:

> So far as we have been able to learn, the U.S. Department of Agriculture has not established a similar rule by adjudication that would require FS personnel to follow the procedures in the FSM and the Handbook. If such a rule has not been established by adjudication then, in order for these procedures to have the force and effect of law and be binding on the Department as well as the public, they must be substantive rules affecting individual rights and obligations that have been issued by the agency pursuant to statutory authority and promulgated in accordance with the rule-making requirements of the Administrative Procedure Act, 5 U.S.C. 553 (1988), or other procedural requirements imposed by Congress.

**Where Regulation Is Contrary to Manual**

In *United States v. Lynn H. Grooms*, 146 IBLA 289 (1998), the Board ruled on an appeal where the regulation concerning the filing date of a complaint differed from the manual. The regulation, A43 CFR 4.450-6 specifically requires that answers to contest complaints must be filed within 30 days of receipt of the complaint.@ The Board held that where Athe BLM Manual provision is contrary to the applicable regulations, that provision will not be followed.@ *Id.* at 293.

**Handbook/Manual Do Not Have Force and Effect of Law**

"That Handbook, like the BLM Manual, is not a regulation. Accordingly, it does not have the force and effect of law, and is not binding on this Board." *Pine Grove Builders*, 126 IBLA 269, 276 (1993).

**Filing Documents with the BLM**

The state offices of the BLM are open to the public for the filing of applications and other documents and inspection of records on Monday through Friday during regular business hours, except holidays. Applications and other documents may not be filed out of regular office hours. 43 CFR 1821.2-1. Each office is furnished with a receipting machine for date-time receipting. When applications are filed in person during public filing hours, the exact date-time of receipt is stamped on the copies. It is a good practice when filing such documents as mining claim location notices or assessment work affidavits to get a copy of the filed instrument with the date-time stamp. Filings made before and after public filing hours are stamped when the office officially opens for filing. Most filings received during office hours are stamped with the date-time when received; however, mail filings received during closed office hours are stamped when the office opens. *BLM Manual* 1274.13.

**Federal Land Office Records**

The state office of the Bureau of Land Management is the source of all records regarding the title of Federal lands. This is also the source of information concerning public land surveys by the Cadastral Engineers.

**Types of Information**

A new record system is now in operation in the land offices of the Bureau of Land Management. These records include the following items: (1) ownership or master title plat; (2) historical index; (3) use plat; (4) serial register; (5) case file; (6) control document index; (7) survey records; and (8) status maps. The title and status records consist of 35 mm microfilm aperture cards which have been filmed from the original master township plats. These cards are available for viewing on a microfilm reader in the public room of the state land office. If desired, paper copies made from the microfilm may be purchased at a nominal charge. A few states do not have these master title plats on microfilm; however, the title information may be obtained by inspection of plat books. Plat books are generally acknowledged to be more convenient to use during a title search than the microfilm aperture cards.

**Survey Records**

The state office of the Bureau of Land Management maintains survey records for all public lands in the state. The BLM also maintains survey and ownership records for the entire United States in Washington, D.C. Copies of the survey plat and related field notes are available for inspection or purchase by the public. Mineral survey plats and associated field notes are also available for inspection or purchase.

**Serial Register Books**

The serial register is a case control record consisting of loose leaf serial pages bound in volumes. It is a daily record of the applications received in the land office. These serial registers also show all the actions taken on each application including the issuance of a lease or patent. If the application is withdrawn or rejected, the records are so annotated.

The serial register was established on July 1, 1908 as a digest of each serialized case. It is maintained in the public room of each state office and is available for inspection by the public. However, if it is established that any person is using the serial register books for improper purposes, access to the books may be denied to such person. 43 CFR 1813.2. Serial registers which are 15 years old and older are maintained on microfiche.

**Serial Register Page**

Each serial register page has a serial number which corresponds to a case file that contains all the documents relating to a case. The serial page is prepared and filed in the register as soon as possible after the filing receives a serial number. A time lag of no more than one working day is the maximum allowed, except for filings subject to special procedures. Most BLM offices have serial register pages microfilmed and available for viewing or purchase of

paper copy.

The serial number is a reference to a file, which consists of a one or two letter prefix, showing the office location and is followed by a number. A different prefix is assigned to each state in the following manner:

| | |
|---|---|
| Anchorage - AA | Nevada- N |
| Fairbanks - F | New Mexico - NM |
| Arizona - A | Oregon - OR |
| California - CA | Utah - U |
| Colorado - C | Wyoming - W |
| Idaho - I | Eastern States - ES |
| Montana - M | |

Beginning July 1, 1966, all state offices began numbering new cases consecutively starting with the number 1. Certain types of actions on a case require notation on the serial register pages. The following actions affect the status of a case and require notation:

1. Permits issued for 10 years ending

2. Entry canceled

3. Assignment approved

4. Lease extension granted

5. Contest initiated

6. Patent issued

7. Litigation initiated

Appeals to the Interior Board of Land Appeals are also noted on the serial register pages. This includes noting each appeal and the results of the final decision. The following types of actions are not noted:

1. Rental paid.

2. Application conflicts

3. Request for report

4. Assignment filed.

5. Application for extension filed.

6. Application to purchase filed.

7. Final proof filed.

**Serial Register Pages Are Not Status Records**

Serial register pages and case records do not serve as status records for the purposes of the notation rule. Serial register pages are not part of the land status records in the land offices but are instead part of the case record system. *See* Judge Burski's concurring opinion in *David Cavanaugh and Gary McCarthy*, 89 IBLA 285, 306 (1985).

**Master Title Plat**

A master title plat is prepared by first making a copy of the official township survey plat at a scale of 30 chains to the inch. However, the master title plat is not the official survey plat. The ownership or title information portrayed on the master title plat was collected from a variety of Federal documents, including withdrawal orders, patents and state selection lists. Microfilm copies of these documents are generally kept on file in the land office so that they may be inspected by the public and paper copies purchased, if desired.

The master title plat portrays the land which has been patented, with reservations, to the United States. This plat also shows withdrawals of all types (National Forests, Indian Reservations, rights-of-way, etc.), state grants, navigable waters, acquired lands, and, of course, vacant public domain land. The title information is shown by use of various weights and shapes of lines. Each action that affected title has a particular type of line that contains the affected area. The annotation that gives the nature of the action always is placed within the bounds of the line and at the lower extremity of the area involved.

**Supplemental Master Title Plat**

The supplemental master title plat depicts a congested section or sections of a master title plat at a scale providing the greatest utility in the records to adequately and clearly reflect current status. The same notations are shown on the supplemental master title plat as would have been shown on the master title plat.

**Use Plat**

Information concerning temporary uses does not appear on the master title plats. Applications for mineral leases and permits are shown on use plats. Use plats are reproductions of the master title plats, containing all permanent title information, with the pertinent use information overprinted. For example, the boundary of the lands embraced by an application or lease will be shown on the plat together with the application or lease numbers. Generally, the land office maintains a special microfilm aperture card for each use e.g., oil and gas leases, phosphate, geothermal resources, etc. No use plat will be maintained unless the township contains a mineral lease or application.

**Historical Index**

The historical index is an important tool for title history as it contains a chronological history of all actions that affect the use of or title to the public lands and resources within a township. This index shows all the transactions in any chain of title or change of status of the public lands. In addition, it contains material which will further explain or clarify annotations on the master title plats.

**Mineral Location and Contest Index**

The location and contest index is a listing, using historical index format, by township and range of (1) mineral location notices filed under special mining claim recording laws, (2) abandonments and relinquishments of mining claims secured by the Government, and (3) actions initiated to determine the validity of mineral, agricultural and other claims.

**Case Files**

Case files contain a record or copy of all the actions made affecting a given case. Generally each case has summary sheet attached to show all the actions taken. Most BLM state offices have a card index by name of applicant to assist in locating case records.

**Examination of Case Files by Public**

As a general rule the case files are open to inspection by the general public. BLM procedure requires that a form be completed giving the date and identity of the person examining the file. This form is placed in the case file as a permanent record of the inspection. If a person wishes to review a case that has been sent to the National Archive Records, the requester must write directly to the following address:

National Archives and Records Service
8th and Pennsylvania Avenue, N.W.
Washington, D. C. 20409

**Control Document Index**

The control document index consists of copies of patents and deeds which convey title to and from the United States. It also includes copies of documents which affect or have affected the availability of right or title to lands within the township. Copies of patents and other documents are on 35 mm film mounted on aperture cards. These cards are arranged by state, meridian, range, township and chronologically within townships.

**A. Types of Documents Included**

1. Patents

2 State Selections

3. Indemnity Lists

4. Conveyance Documents:

    a. Warranty Deeds

    b. Quit Claim Deeds

    c. Acquired Easement Documents

    d. Judgments in condemnations documenting acquired land title

5. Acts of Congress concerning specific interest in public lands

6. Public laws which affect public lands

7. Executive Orders which affect public lands

8. Proclamations which affect public lands

9. Public Land Orders

10. Any other document which affects or has affected public lands

**B. Types of Documents Excluded**

1. Applications for withdrawals

2. Allowed homestead entries.

3. Leases

4. Licenses

5. Permits

6. Rights-of-way granted

**How to Identify Mining Claims**

If a mining claim has been patented, a record of patent may be found on the master title plats in the state office of the Bureau of Land Management. Records of the original patents are generally on file in the county recorder's office. The county assessor may also have a record of patented mining claims because they are subject to property tax.

If an unpatented claim has been surveyed by an authorized mineral surveyor, an official survey plat would be on file in the land office of the BLM. These claims are generally delineated on an index sheet of surveyed mining claims. Every township in which there has been mineral surveys will have a separate index sheet.

State and Federal law requires that the notice of location of a mining claim must be recorded in the county recorder's office of the county in which the claim is located. Proof-of-Labor affidavits must be filed annually in the recorder's office. A claim may be open to relocation if no assessment work has been filed. Unfortunately, the location description on most location notices is generally too vague to allow indexing by land description. Most counties index claims by claim name and/or claimant.

One of the most important sources of information concerning unpatented mining claims would be a thorough search of the ground for evidence of existing mineral locations. Evidence that indicates the existence of a claim includes corner markers, discovery pits and any other evidence of mineral exploration or mining activity.

**BLM Records of Unpatented Claims**

Section 314 of the Federal Land Policy Management Act of 1976 (43 USC 1744) and regulations published in 43 CFR Subpart 3833 require recordation of unpatented mining claims with the state office of the Bureau of Land Management.

To meet the demands of the new recordation requirements and to improve efficiency, the BLM has installed computers in the state office that are tied into a data bank in BLM's Denver Service Center. Information on claims is available by serial number, township and range, name of the claimant and name of the claim.

**Mining Claim Records Maintained Under Section 314 of FLPMA**

Before FLPMA, title records concerning unpatented mining claims were generally available only through the county or local recorder as required by state statute. The disadvantages of a local recording system include: (1) necessity to travel to each county seat for mining claim title examinations; (2) diverse record systems maintained by local officials; and (3) difficult and time-consuming title examinations. With the advent of a Federal computerized system for the maintenance of mining claim records it is now possible to examine up-to-date microfiche containing the basic elements of a mining claim title. The microfiche as well as copies of the actual case files may be examined either in the public room of the BLM state office or ordered for home or office review. For example, one may wish to monitor mining claims in certain

geographic areas to determine if they are properly maintained under the annual filing requirements. With updated microfiche copies available every two or three months, it is now possible to ascertain that an area is open to mineral entry with a fair degree of confidence before expending exploration money or staking a claim. Of course, it is still necessary to examine local records in most cases.

**Documents on File with BLM and Available for Inspection or Purchase**

1. Case File Documents (organized by serial number):

    Location notices

    Amended location notices

    Transfers of interest

    Receipt for service fee

    Notices of intention to hold

    Geological, geochemical or geophysical reports Assessment work affidavits

    Deferment of assessment work

    Claim map or narrative description

    Correspondence

    Administrative decisions and other actions Notice of patent application

2. Microfiche Indexes:

    Claimant index - alphabetical order

    Claim index - alphabetical order by claim name

    Geographic index - legal description by quarter section

    Serial number - reference number for each case file

3. Information on Indexes:

    Claim name

    Claimant's name and address

Legal description of each claim

Serial number of each claim

Case type

County book and page or instrument number

Claim location date

Date of latest assessment year filing

Date case closed

**Automated Land and Mineral Record System (ALMRS)**

In 1970 the BLM developed a plan to modernize and automate the public land record system. In July of 1982, the Director of the BLM signed an order to implement the Automated Land & Minerals Record System (ALMRS). The automation of this system is an enormous undertaking and is not scheduled for completion until 1991.

The automated system replaces the manual historical index and master title plat system of the western states and a comparable system in the eastern states. The system covers all land records activity where the Federal Government has an interest. For example, if the United States issued a patent to lands but reserved an interest in oil and gas, the retained interest would be covered in the new record system.

The system includes the automated examination of lands and minerals cases currently affecting the Federal title as well as use authorizations to determine if conflicts exist relative to the adjudication of a case. The possibility of conflicts should be lessened by the faster updating and better maintenance of status records. Many elements of a case are entered into the system to provide for case counting, statistical reports and case adjudication. The data in one case can be compared for conflicts against all other cases, land description, or status information in the system.

Computer generated master title plats will allow storage, retrieval and updating of geographic data and land status information in graphic form. All BLM offices will have the ability to retrieve and display both alphanumeric and plat graphics data. Land descriptions, land and mineral status and geographic position data will be available in a variety of formats including screen display, printed list, plotted map, and map display on a terminal screen. All of this information will be available to the general public at "user stations" set up in the BLM offices. Also, because ALMRS is a Bureau wide system, files from one state will be available in another.

**Legal Effect of Automated Records**

By memorandum dated September 3, 1982, the Associate Solicitor of Energy and Resources advised the Director of the BLM that the entry of information into an automated land status record system will have the same legal effect as manual noting of the BLM land records. The Associate Solicitor also indicated that computer printouts of the official land status records normally can be expected to be admitted into evidence under the Federal Rules of Evidence so long as a proper foundation is laid for allowing the contents of the printouts to be admitted into evidence. Although the land records are now required to be maintained by law, the manner in which the records are maintained in the land offices is left to the Secretary's discretion.

**Notation Rule Amended for ALMRS**

Final rulemaking for 43 CFR 1810 was published in the *Federal Register* on July 26,1982 to amend existing regulations pertaining to notation of public land records by eliminating the requirement to note applications which do not segregate, designate or withdraw Federal lands from other forms of entry, application or location. The rulemaking continues to require notation of leases, easements and use authorizations in excess of one year at the time of issuance. Title transfers are noted upon issuance of patent.

The final rulemaking allows for the transition from manual notation of applications to entry into the automated system. It is intended that as data for lands and minerals applications are entered into the automated case records system, manual notation for those applications will be discontinued in phase with the automation process.

**Land Status Maps**

A Land Status Map at a scale of 1:5,000,000 is available for most of the western states in each state office of the BLM. Although this map may not be up to date and land status may be generalized, it is very useful for planning purposes. The BLM and Forest Service both have status maps for limited areas at a scale of one-half inch to the mile and one inch to the mile. These maps may be available at BLM district offices and Forest Service ranger districts. The BLM also prepares status maps at a scale of 1:100,000 overprinted on USGS 15 minute quadrangles. These BLM Surface/ Mineral Management Quads are available for sale at some BLM state and district offices in the area served at the cost of $2 per quad. Maps depict surface ownership in color and ownership of the mineral estate by line symbols and cross hatching.

**County Land Status Information**

The following county officials are standard sources of title information:

1. **County Recorder** - the county recorder maintains records of deeds, assignments, leases, mortgages, location notices and assessment work for unpatented mining claims.

2. **County Tax Assessor** - the tax assessor maintains records of land owners and addresses, land valuation and appraisal data and other tax-related information.

3. **County Planning Commission -** the planning commission is the organization responsible for administering zoning regulations and ordinances. Many counties require permits for mining activities.

**State Land Status and Title Information**

Most states have an agency or executive department responsible for maintaining title and status records on lands that are presently or were ever in state ownership. This includes ownership of mineral interests, easements, permits, use authorizations, leases, etc. Generally ownership and use plats are maintained in a manner similar to the master plats of the Federal Government. The following state agencies should be contacted for title information concerning state-owned lands:

# 4. FEDERAL ACTIONS AFFECTING MINERALS

## WITHDRAWALS

### I. PreFLPMA Withdrawals

Withdrawals may segregate completely, partially, or not at all. The authority used to establish the withdrawal determines the amount of segregation that may be established. There are four general sources for preFLPMA withdrawals:

1. The implied Executive authority of the President;

2. The Pickett Act; and

3. Act of Congress authorizing withdrawals -

a. in particular fields of activity.

b. for specific land to be used for specified purposes.

**Implied Executive Authority**

In 1909 President Taft withdrew as oil reserves more than 3 million acres of public lands from mining location using no statutory authority. These withdrawals were vigorously criticized by Congress as a usurpation of the legislative power by the executive Branch. However, Congress never passed legislation to rescind the withdrawals. The courts have consistently held that the President has the right to withdraw lands from entry, settlement, or other forms of appropriation without consent from Congress. *U.S. v. Midwest Oil Co*., 236 US 459 (1914); *Stockley v. U.S.*, 271 F 632 (CCA La 1921), *reversed on other grounds* 260 US 532. And that withdrawals by the Secretary of the Interior have the same effect as those by the President. *Wilbur v. U. S. ex. rel. Barton*, 46 F2d 217, *affirmed* 283 US 414. In *U.S. v. Midwest Oil Co., supra*, the Supreme Court first upheld the exercise of nonstatutorily based withdrawal authority by the President after examining congressional acquiescence in more than 250 instances of exercise of the power by various Presidents over a period of 80 years. 236 U.S. at 469-71. That decision was never overruled by the Court and the *implied authority recognized was repeatedly exercised by the President or his delegate. See Mason v. U.S.*, 260 U.S. 545, 553 (1922). This inherent right of the Executive also applies to withdrawal of public lands from appropriation under the mining law. *Portland General Elec. Co. v. Kleppe*, 441 F. Supp. 859 (DC Wyo. 1977).

**The Pickett Act**

The Pickett Act of June 25, 1910 (36 Stat. 847; 43 USC 141-143; 16 USC 471) was enacted as an outgrowth of the exercise of the "implied authority" used by President Taft. Congress felt the President needed authority to temporarily withdraw lands to protect the public interest; however, it believed that certain limitations should be placed on the President by restricting the amount of segregation to certain specific minerals.

The Act provides that the President may at any time in his discretion temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification, or other public purposes to be specified in the orders of withdrawal. These withdrawals are to remain in force until revoked by the President or an act of Congress.

The provisions of the Act of June 25, 1910, that all lands withdrawn under the Act

Ashall, at all times, be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates," is changed by the Act of August 24, 1912 (37 Stat. 497; 43 USC 142), so as to provide that all such lands "shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals." In other words, only metalliferous minerals such as gold, silver, copper, lead, iron, etc. are open to location under a Pickett Act withdrawal.

The Pickett Act has been used as an authority for numerous types of withdrawals. To determine the segregative effect of such a withdrawal, it is necessary to read the specific withdrawal order. Under the Pickett Act, mill sites on nonmineral lands in connection metalliferous deposits may be located on the withdrawn land. 55 LD 85.

**Delegation of Authority**

By executive Order No. 9337 of April 24, 1942, the President delegated all of his withdrawal authority vested in him by the Pickett Act and all other sources to the Secretary of the Interior. *Executive Order No*. 10,355 of May 26, 1952, 17 FR 4831.

**Pickett Act Partly Repealed by FLPMA**

Section 704(a) of the Federal Land Policy and Management Act (Pub. L. 94-579; 90 Stat. 2792) repealed Presidential authority under the Pickett Act (30 USC 14). Although future withdrawals will be made under authority of section 204 of FLPMA rather than executive authority, there are currently thousands of withdrawals effective on the public lands as a result of Pickett Act or executive withdrawals. For this reason, knowledge of the Pickett Act and court interpretations surrounding it is necessary for those who have a need to understand the effect of such withdrawals. Pickett Act withdrawals have been held as not limited to time, but continue in effect until revoked. *Wilbur v. U.S. ex. rel. Barton*, 46 F2d 217, *affirmed* 283 US 414.

**Legal Effect of Executive Orders as Withdrawal Authority**

In *City of Phoenix v. Reeves*, 14 IBLA 315 (1974), the Board discussed the legal effect of executive orders. In addition to having the force and effect of law, executive orders have a strong presumption against implied repeal. The Board said at 325-26:

> The withdrawal was by executive order. Executive orders have the force and effect of law, *Farkas v. Texas Instrument, Inc*., 375 F.2d 629, 632 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); *Feliciano v. United States*, 297 F. Supp. 1356, 1358 (D.P.R. 1969), *aff=d*., 422 F.2d 943 (1st Cir. 1970), and rules of statutory construction apply to them. Feliciano, *supra* at 1359; *United States v. Angcog*, 190 F. Supp. 696, 699 (D.C. Guam 1961). Repeal of an executive order or statute may be either express or implied. However, there is a strong presumption against implied repeal.
>
> In construing executive orders, the Department of the Interior has implicitly recognized

the presumption against implied repeal. Neither the mere passage of time nor accomplishment of an avowed purpose has been held to be a substitute for formal revocation of the withdrawal and restoration of the lands to location or entry under the mining or other public land laws.

**Withdrawal Authority of Pickett Act and Executive Orders**

In *Western Nuclear, Inc*., 55 IBLA 20 (1980), the Board held that where "an executive order issued solely pursuant to the Pickett Act of June 25, 1910, as amended, 43 U.S.C. ' 141, 142 (1976), withdraws land, the said land is open to exploration, discovery, occupation, and purchase under the mining laws of the United States so far as the same apply to metalliferous minerals." Therefore, if there is no authority for withdrawal in a public land order other than the Pickett Act, *supra,* then metalliferous minerals are open to location.

However, in *Glenn H. Brooks*, 45 IBLA 51 (1980), the Board ruled that lands withdrawn under the authority of *Executive Order* 10,355 were withdrawn from appropriation under the mining law. This "executive order has been construed as drawing upon both the authority conferred by the Pickett Act, *supra*, and the President's nonstatutory authority to make withdrawals." Therefore, lands under such a withdrawal would not be available for location of metalliferous minerals even though the Pickett Act is one of the authorities involved.

**Pickett Act Does Not Apply to Metalliferous Minerals**

In *James Aubert*, 130 IBLA 50 (1994), the appellant contended that authority for a public land order, Executive Order No. 10,355, which delegates to the Secretary of the Interior the authority vested in the President by section 1 of the Pickett Act does not apply to metalliferous metals. The Board agreed and explained at 53:

> As originally enacted, section 2 of the Pickett Act, provided that lands withdrawn under its authority were to remain open under the mining laws for the location of "minerals other than coal, oil, gas, and phosphates." Ch. 421, 36 Stat. 847 (1910); * * * However, section 2 of the Pickett Act was amended by the Act of August 24, 1912, ch. 369, 37 Stat. 497, to substitute "metalliferous minerals" for "minerals other than coal, oil, gas, and phosphates."

**Definition of Metalliferous under the Pickett Act**

In *David E. Hoover*, 99 IBLA 291 (1987), the Board dealt with an appeal where claims were based on a discovery of pozzolan. The question before the Board was whether or not pozzolan was a metalliferous mineral that would be open to location under a Pickett Act withdrawal. Pozzolan is a volcanic tuff generally used as a hydraulic cement. The appellants argued Athat because metallic oxides are necessary components of pozzolan, and because pozzolan contains metallic components, the mineral for which their claims were located should be considered a metalliferous mineral exempt from the 1933 withdrawal.@ *Id*. at 294.

The Board said that the Aproper and controlling standard" as to the definition of Ametalliferous" in the Pickett Act was adopted by the Department in 1918 when the issue was

first raised:

> If the mineral deposit contains a metal chemically and physically akin to the primary metals and is worked essentially for the production of that metal which is extracted and used in the trades as such, the deposit should be classed as metalliferous. On the other hand, where the metals contained in the deposit, or ore, are extracted and used mainly in the form of compounds with other elements, the classification should be metalliferous. *Consolidated Ores Mines Co*., 46 L.D. 468, 471 (1918)."

In keeping with the standard adopted in 1918, the Board concluded that pozzolan is a non-metalliferous mineral and cannot sustain valid locations on lands withdrawn under authority of the Picket Act. In conclusion the Board said at 294:

> The distinction between minerals which are mined for the purpose of extracting a metallic component to be used as a metal and minerals which are mined for a metallic component used in a compound form also seems to be in accord with both common and industry usages. For example, while calcium is a metallic element, neither limestone nor gypsum are commonly regarded as metals, nor is their extraction normally spoken of as the mining of a metal.
>
> It is also clear that appellants intended to produce and sell pozzolan as a nonmetalliferous mineral, and did not intend to use the mineral as raw ore for aluminum, iron, magnesium, or the other metals shown in their analysis.

## II. Withdrawals Under FLPMA

### Introduction

In response to a growing concern over the lack of statutory guidance on withdrawals, Congress established a comprehensive withdrawal procedure in Section 204 of the Federal Land Policy and Management Act of 1976. Congress also repealed the implied authority of the President to make withdrawals and reservations resulting from the acquiescence of the Congress. Because land withdrawals substantially limit the availability of mineral lands, the future direction of the Federal Government in this area is of great interest to those concerned with the management of mineral resources.

The Act grants the Secretary broad withdrawal authority, including the explicit authority to withdraw land from the operation of the mining and mineral leasing laws. This authority is subject to Congressional control and a number of statutory requirements must be satisfied.

The term "withdrawal" is defined in Section 103 of FLPMA to mean:

> ...withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a

particular public purpose or program...

**Publication of Proposed Withdrawals**

Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary of the Interior shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of the notice the land shall be segregated from the operation of the public land laws, including the mining laws for two years from the date of publication of the notice, unless terminated sooner. 43 CFR 2310.2(a).

**Withdrawal Distinguished from Segregation**

In *Stephen W. Fox*, 50 IBLA 186 (1980), the Board distinguished the effect of a segregation and a withdrawal under FLPMA. A published notice serves only to temporarily segregate the land from operation of the public land laws under 43 USC 1714(b); whereas, a withdrawal may be for a period of 20 years.

**Withdrawals Over 5,000 Acres**

On and after October 21, 1976 (FLPMA), a withdrawal aggregating five thousand acres or more may be made only for a period of not more than twenty years by the Secretary on his own motion or upon request by a department or agency head. The Secretary shall notify Congress of such withdrawal no later than its effective date. Congress may terminate the withdrawal within 90 days by concurrent resolution. The Department of the Interior must also submit an extensive report to support the withdrawal.

**Withdrawals Less Than 5,000 Acres**

A withdrawal aggregating less than five thousand acres may be made by the Secretary on his own motion or upon request by a department or an agency head under the following circumstances:

1. for such period of time as he deems desirable for a resource use; or

2. for a period of not more than twenty years for any other use, including but not limited to use for administrative sites, location or facilities, and other proprietary purposes; or

3. for a period of not more than five years to preserve such tract for a specific use then under consideration by the Congress.

**Emergency Withdrawals**

When the Secretary of the Interior or the Congress determines that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost, the Secretary shall immediately make a withdrawal and file notice of such emergency withdrawal with the Congress. Such emergency withdrawal shall be effective when made but shall last only for a period not to exceed three years.

**Pending Withdrawals**

All applications for withdrawal pending on October 21, 1976 shall be processed and adjudicated to conclusion within fifteen years. The segregative effect of any application not so processed shall terminate on that date.

**Extension of Existing Withdrawals**

All withdrawals and extensions, whether made before or after October 21, 1976, having a specific period, shall be reviewed by the Secretary toward the end of the withdrawal period and may be extended only upon compliance with the provisions of FLPMA, and only if the Secretary determines that the purpose for which the withdrawal was first made requires the extension, and then only for a period no longer than the length of the original withdrawal period. The Secretary shall report on such review and extensions to the Congress.

**Review of Existing Withdrawals**

Existing withdrawals in the eleven contiguous western states must be reviewed within 15 years. Certain withdrawals are excluded from the review: (1) withdrawals of BLM and National Forest lands that did not close the land to mining or mineral leasing; (2) withdrawals of BLM and National Forest lands in wilderness, natural, primitive, or national recreation areas, regardless of whether the withdrawals closed the land to mining and mineral leasing; and (3) withdrawals of land within certain systems as of October 21, 1976 (Indian reservations, National Forests, National Parks, Wildlife Refuges, Wild and Scenic Rivers, and National Trails).

**Notation Rule Does Not Apply to Withdrawals After FLPMA**

Withdrawal applications filed before the enactment of FLPMA are subject to the notation rule. However, section 204 of FLPMA (43 U.S.C. ' 1714 provides for a segregative effect to terminate in 2 years from the date of the Federal Register notice regarding the filing of a withdrawal application. Therefore if there is no acceptance or rejection of the application, the segregative effect automatically terminates at the end of the two year period, regardless of the notation rule. *David Cavanaugh*, 89 IBLA 285, 300-01 (1985).

**Withdrawal Created by Statute Can Only Be Extended by Congress**

Where Congress creates a withdrawal that terminates on a date specifically stated in the statute, the BLM has no authority to extend the withdrawal by taking the position that either (1) an opening order is necessary to make the lands available to location, or (2) that the segregative effect can be continued by the notation rule. *Richard Bargen*, 117 IBLA 239, 243 (1991); *David Cavanagh*, 92 I.D. 564, 573 (1985).

**History of the Northwest Federation Lawsuit and Its effect on Mining Claims**

On July 15, 1985, the National Wildlife Federation (N)W) filed suit in Federal district court challenging the Department of the Interior's termination of various land classifications and revocation of withdrawals which had taken place on or after January 1, 1981. On December 4, 1985, a preliminary injunction was issued and, subsequently vacated and finally reissued as modified on February 10, 1986. *National Wildlife Federation v. Burford*, 676 F.Supp. 271, *aff=d.* 835 F.2d 305 (D.C. Cir. 1987). The injunction prohibited the Department from taking any action inconsistent with a withdrawal of classification in effect on January 1, 198 1. The injunction was made effective on February 18, 1986. This decision was affirmed by the Court of Appeals for the District of Columbia Circuit on December 11, 1987.

In *National Wildlife Federation v. Burford*, 699 F. Supp. 327 (D.D.C.), a decision dated November 4, 1988, the court determined that NWF did not have the requisite interests to confer standing and dismissed the suit, vacated the preliminary injunction, and denied NWF's motion for a permanent injunction. In *National Wildlife Federation v. Burford*, 878 F.2d 422 (D.C. Cir. 1989), the Court of Appeals reversed the decision of the District Court. Finally, in *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990), The Supreme Court reversed the decision of the Court of Appeals.

As pointed out in *Shama Minerals*, 119 IBLA 152 (1991), "the mere fact that the injunction has been dissolved does not make it a nullity." Furthermore, "it is clear that the effect of the preliminary injunction in NWF was to reinstate the original order of withdrawal so that the lands covered therein were not available for appropriation between February 18, 1986, and November 4, 1988. *Id*. at 155.

In Anna Essayian, 129 IBLA 91 (1994), the Board considered a case where claims were located on lands subject to a small tract classification that had been terminated. However at the time of location, the classification was reinstated by the February 1986 injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986).

National Wildlife Federation v. Burford, 699 F. Supp. 327, 332 (D.D.C. 1988), rev'd, 878 F.2d the action supported the February 10, 1986, preliminary injunction and

dissolved that injunction on November 4, 1988, once again giving effect to the November 1981 termination of the March 1955 classification. Elimination of the injunction did reinstate termination of the small tract classification. However, termination of the classification on November 4, 1988 did not validate any claim located while the termination was suspended. Dissolution of the injunction did not nullify the injunction during the time it was in effect (Feb. 18, 1986, to Nov. 4, 1988). Rather the injunction reinstated the classification.

## NOTING WITHDRAWALS ON LAND RECORDS

### Noting Withdrawals or Reservations on Federal Land Status Records

The noting of the receipt of an application for land action that would ultimately segregate the lands from entry on the tract books or official plats has the effect of temporarily segregating such lands from location, lease or entry under the mining and mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. Action on all existing permit and lease applications would be discretionary; however, any mining claim in existence at the date of the records notation could maintain valid existing rights. The application may be amended by the initiating agency at any time to either include additional lands or delete lands from the application. The records are notated in response to amended applications in the same manner as original applications. Lands eliminated from such reservations or withdrawals will be relieved of their segregative effect by publication in the *Federal Register* specifying the date and hour that the lands will be available for mineral entry. 43 CFR
2091.2-5.

The Interior Board of Land Appeals has repeatedly held that the regulation of the Interior Department providing that the notation of the filing of an application for withdrawal shall segregate the land from disposal under the public land laws to the extent that the proposed withdrawal if effected, would prevent such disposal. *Lyla S. Lofgren*, A-28358 (July 20,1960); *Ethel H. Myers*, A-27560, 65 ID 207 (May 5, 1958). In U.S. v. Foresyth, 321 F.Supp. 761 (1971), it was held that "the effect of the withdrawal request and notation was to temporarily segregate the lands 'from settlement, location, sale, entry, lease, and other forms of disposal under the public land laws, including the mining ... laws'... pursuant to the regulations of the Secretary of the Interior, 43 CFR 2311.1-2." Once the lands are segregated from entry, lease and permit applications are accepted for filing but are rejected through the adjudication process. Applications cannot be held pending the possible availability of lands in the future. 43 CFR 2091.1.

If lands are available for leasing but are not notated on the public land records, a noncompetitive offer to lease the lands must be rejected until the error has been rectified. *R. E. Puckett*, 14 IBLA 128 (Dec. 28,1973). For example, land that is included in an oil and gas lease which terminates for failure to pay rental timely, is subject to filing of new oil and gas lease offers only after notation on the official record of the termination. *Ronald K. Robbins*, 17 IBLA 179 (Sept. 16, 1974).

**Federal Register Publication Segregates**

Publication in the *Federal Register* of a notice of classification under the Classification and Multiple Use Act of 1964, 43 USC 1411-1413, and the regulations in 43 CFR Subparts 2410 and 2411, will segregate the affected land to the extent indicated in the notice. *Wanda Lois Lee McKinney*, 53 IBLA 279 (1981); *Samuel Lee Clifford*, 53 IBLA 23 (1981). Publication in the *Federal Register* of a notice of a classification under the Classification and Multiple Use Act will also segregate the lands described from other forms of disposal unless the classification provides specifically that the lands shall remain open for certain forms of disposal. *Robert Dale Marston*, 51 IBLA 115 (1980).

**Parties are Charged with Knowledge of Public Records**

In *U.S. v. Alexander*, 17 IBLA 432 (1974), the Board emphasized that the public is responsible for knowing the status of the public lands as shown on the official records:

> The Bureau of Land Management maintains an elaborate system of public records of the status of the public lands. One who fails to inspect the status of public land in which he is financially interested is negligent at his peril, as he is charged with knowledge of their content. *James C. Forsling*, 56 I.D. 281, 285-86 (1938).

**Origin and Purpose of the Notation Rule**

The notation rule was first applied to homestead entries. It was held long ago that when a homestead entry is made, even though erroneously, the land is considered as withdrawn from further entry until such time as the entry has been cleared from the records. *Bunker Hill Co. v. United States*, 226 US 548, 550 (1913).

Historically then, no rights can be obtained in that part of the public domain which has been segregated by reason of a preexisting appropriation S even one subsequently found to be invalid. This same principle has long been applied by the Secretary to oil and gas leases. Within two years of the enactment of the Mineral Leasing Act, it was held in *Martin Judge*, 49 LD 171, 172 (1922) that "until an outstanding permit is canceled by the Commissioner and the notation of the cancellation made in the local office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application therefor, or by the posting of notice of intention to apply for such a permit." None of the numerous amendments of the Act since 1922 has questioned the Martin Judge decision which has been uniformly followed by the Department of the Interior. *Shiny Rock Mining Corporation (On Reconsideration*), 77 IBLA 62

(1983). In *Carmel J. McIntyre (On Judicial Remand*), 67 IBLA 317, 327 (1982), the Board stated:

> The notation rule is grounded, in part, on recognition that, considering the incredible amount of activity concerning the use and possible acquisition of Federal land, it is inevitable that errors will occur in noting the relevant records. Fairness to all members of the public dictates that, where records are improperly noted so as to appear to effectively foreclose the initiation of rights by individuals in a specific tract of land, the Department should treat the land in question as it is noted on the records, until such time as the records are changed to correctly reflect the true status of the land.

In *Jerry Lease*, 139 IBLA 332, 336 (1987) the Board gave the background on the notation rule at f.n. 2, pg. 336:

> The basics of the rule were encapsulized in the early Departmental decision *California and Oregon Land Co. v. Hulen and Hunnicut*, 46 L.D. 55 (97). That case involved cancellation of patented entries by court decree. The Commissioner of the General Land Office had affirmed a decision of the Roseburg, Oregon, land office allowing applications for homestead entry by Hulen and Hunnicut on the basis of settlement prior to the date that the restoration o the lands in the canceled entries was noted on the record. In reversing the commissioner=s decision, the First Assistant Secretary stated:
>
> > [T]he orderly administration of the land laws forbids any departure from the salutary rule that land segregated from the public domain, whether by patent, reservation entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office. *Id* at 57.
>
> The Department=s reliance on the notation rule was expressly affirmed in *Shiny Rock Mining Corp. v. Hodel*, 825 F.2d 216 (9th Cir. 1987).

**Notation Segregates Even Though Application Defective**

In *U.S. v. Foresyth*, 15 IBLA 43 (1974), the Board held that Aposting of the application to the records effects the segregation of the described land," even though the application for withdrawal was defective and did not comply with the regulations:

> The regulation speaks simply of an "application." This Department has consistently held that notation on tract records of prior appropriations effectively precludes the acceptance of a subsequent application, even though the notation itself is in error. We believe there is no justification for any departure from this practice because of those defects or deficiencies apparent in the application, herein. These defects cannot defeat the segregation effected by posting of the application to the land office records. The intent

that a withdrawal is being sought for land specifically described by legal subdivision is obvious from merely looking at the application. Protection of the public land and its resources from later adverse claims is of greater importance than meticulous attention to all details called for in the regulations before posting of the application to the records. We do not consider it to be an error that the posting of this withdrawal application was made prior to its complete compliance with the regulations, though the failure to fully comply, until remedied, would bar ultimate approval of the application.

**Application of the Notation Rule**

In *Shiny Rock Mining Corp*., 75 IBLA 136 (1983), the Board held that regardless of whether a public land order was properly issued or not (for the purpose of withdrawing land from mineral location), because the official BLM records reflected the status of the lands as withdrawn from mining location at the time the claim in question was located, BLM properly declared the claim null and void *ab initio*. The Board said:

> The Department has repeatedly held that the availability of land for appropriation or lease must at least initially be determined by recourse to the public records of BLM. Under this so-called "notation rule," if the BLM records have been noted to reflect the devotion of land to a particular use that is exclusive of another conflicting use, no incompatible rights in the land can attach by reason of any subsequent application until the record has been changed to reflect the availability of the land for the desired use. This rule generally applies even where the notation was posted to the records in error or where the segregative use so noted is void, voidable, or has terminated or expired.

**Segregative Effect of an Application Distinguished from Notation Rule**

In *John C. Thomas (On Reconsideration*), 59 IBLA. 364 (1981), the Board considered the segregative effect of the filing of a state selection application apart from the segregative effect of notating the filing on the public land records:

> ... the segregative effect of filing will operate regardless of the applicability of the notation rule. *citation omitted*. The only limitation is that the selection must be "regular on its face." *State of New Mexico*, 46 LD 217, 222 (1917), *overruled on other grounds*, 48 LD 97 (1921).
>
> The filing of a state selection application segregates the land from all subsequent appropriations, including locations under the mining laws regardless of whether the selection was valid, void, or voidable.

**Land Still Withdrawn if No Notice on Public Land Records**

It is well established by the cases discussed above that the notation of the public land records effectively segregates the land even if the withdrawal is erroneous. In *Foster Mining & Engineering Co*., 7 IBLA 305 (1972), the Board determined that a properly authorized

withdrawal has a segregative effect even if the land office records are not notated. The Board says at 311:

> Congress may provide for the appropriation or withdrawal of public lands as it sees fit "with or without notice, at least prior to the time that private rights had vested." *Lutzenhiser v. Udall*, 432 F.2d 328, 331 (9th Cir. 1970). No notice on the land office records has been prescribed here. No rights vested in the claimants where the lands were already appropriated under the preliminary permit. It is not essential that a permit be made a matter of record on the land office records at that time to have segregative effect under the law. Cf. *United States v. Schaub*, 103 F. Supp. 873, 875 (D. Alaska 1952), *aff=d., Schaub v. United States*, 207 F.2d 325 (9th Cir. 1953). We may note that lack of notice on the records of this Department of other appropriations of public lands under Congressional enactments is not fatal to their effectiveness where not expressly required by Congress. The most obvious example of such an appropriation would be a valid mining claim for lands open to location perfected under the mining law, yet the land office records will not reveal its existence.

**Notation Rule Applies Even Where Application is Irregular**

Two rather lengthy and almost identical cases involving the "notation" or "tract book" rule went before the Board in *B.J. Toohey*, 88 IBLA 66, 92 I.D. 317 (1985) and *David Cavanaugh*, 89 IBLA 285 (1985). In both *Toohey* and *Cavanaugh*, the BLM rejected placer mining claims filed for lands covered by state selections and a forest service withdrawal. The main significance of these cases is how the Board applied the notation rule.

The Board held that the state selection application is not regular on its face because the national forest lands were prohibited from selection by statute. However under the "notation" or "tract book" rule, mere notation or recording of the application has the effect of segregating the land to all subsequent locations under the mining law. *David Cavanaugh, supra* at 293.

**Notation Rule Does Not Apply to Selections by Regional Corporations**

In *Basil S. Bolstridge*, 90 IBLA 54 (1985), the Board quoted with approval the concurring opinion of Judge Burski in *David Cavanaugh*. In this opinion Judge Burski pointed out the problems with applying the tract rule to regional corporation selection applications under ANCSA. 43 U.S.C. ' 1611 (1982). For example, section 14 of ANCSA provides for segregation, whereas section 12 does not. Unless the statutory basis for the status of entries is given by the notation, it is impossible to know whether or not the selection segregates the land from later location. Therefore the notation rule cannot be applied to selections by regional corporations.

**Notation Is Prima Facie Evidence of Segregation**

The filing of state selection applications and the recordation of the filing on the master title plats results in *prima facie* evidence that all lands selected were segregated from subsequent appropriation. This *prima facie* segregative effect occurred even if the state selections were void or voidable. *David Cavanaugh, supra* at 299.

Although the Board may evaluate all of the land status records (e.g., the master title plat, historical index and other use plats) as a further method to determine whether the public lands were appropriated, this is only done where a conflict appears between the master title plat and other records.

**An Exception to the Notation Rule**

Where a public land order, published in the *Federal Register*, revokes a withdrawal on a specified future date, the revocation is effective even though the BLM serial register page, master title plat, use plats and the historical indices were not noted to show the restoration. In other words the "notation" or "tract book@ rule does not apply in cases where lands are open to the mining laws at a future date specified in public land orders published in the Federal Register. Therefore, a public land order, published in the *Federal Register* performs the same function as noting the land status records that the lands are restored and available for disposition. *Mary E. Brown*, 62 I.D. 107 (1955); *David W. Harper*, 74 I.D. 141 (1967).

**Notation Rule Does Not Apply If Conflict in Notations**

A conflict in notations removes the basis for the application of the notation rule. This allows the public to rely on the status records even when they are erroneous. "Thus, when the records conflict, the notation rule cannot operate to independently foreclose an appropriation not substantively foreclosed, since the factual premise of the rule, viz., that the records put people on clear notice, cannot be shown to exist.@ *Bavil S. Bolstridge*, 90 IBLA 54, 57 (1985).

**Notation Rule Upheld by 9th Circuit Court**

In *Shiny Rock Mining Corporation v. United States*, 825 F.2d 216 (9th Cir. 1987), the Court upheld the notation rule. Shiny Rock Mining Corporation had located claims in an area that was previously withdrawn from appropriation under the mining laws by a 1964 Public Land Order. The Court held that if Athe BLM records have been noted to reflect the devotion of land to a particular use that is exclusive of another conflicting use, no incompatible rights in the land can attach by reason of any subsequent application until the record has been changed to reflect the availability of the land for the desired use." *Id*. at 218.

**Segregative Effect Must Be Removed by the Same Type of Action That Caused It**

The notation rule requires that lands segregated by a particular action are restored by the same type of action. For example, if a segregative effect is established by noting the records, the segregative effect can only be removed by again noting the records. However, if the segregative effect of an application is noted in the *Federal Register*, the relinquishment of that application

must similarly be noted in the *Federal Register* before the segregative effect can be removed. *Boyad Tanner*, 113 IBLA 387, 391 (1990).

**Effect of a Withdrawal on the Materials Act**

Most withdrawal or segregation orders close land to one or more of the following by express reference: the public land laws, the mining laws or the mineral leasing laws. Although there is a variety of other language used in withdrawals, it is very rare for a withdrawal to specifically refer to the Materials Act of 1947.

In an opinion dated July 28, 1988, the Associate Solicitor of Energy and Minerals stated that any withdrawal or segregation that closes lands to the operation of the public land laws, and expressly includes the mineral leasing laws, should be construed to close lands to the operation of the Materials Act..." Furthermore, if the segregation is silent as to mineral leasing but has been construed to prohibit it, the land should be considered closed to the Materials Act also. Otherwise, withdrawn or segregated land remains open to the Materials Act.

**Notation of Mineral Patent Application Does Not Segregate**

The notation of a mineral patent application on the BLM records does not segregate the lands from mineral entry. *Scott Burnham*, 102 IBLA 363, 364 (1988). The "notation of an application on the proper BLM records has a segregative effect only when a statute or Departmental regulation provides that the filing of the application segregates the land.@ *Id*. at 364; *David Cavanagh*, 92 I.D. 564, 572 (1985), *aff=d sub nom. Cavanagh & McCarthy v. Hodel*,_ F. Supp._ (D. Alaska 1988).

**Effective Date of Congressional Withdrawal**

If a withdrawal is established by an Act of Congress, Athe withdrawal takes effect upon the affixing of the President=s signature, unless otherwise provided by the Act.@ *Jerry Lease*, 139 IBLA 332, 335 (1997). *Also see Lutzenhiser v. Udall*, 432 F.2d 328, 331 (9th Cir. 1970). The Board said in *Jerry Lease, supra* at 325:

> * * * Where Congress has withdrawn land by a legislative enactment, the Act of Congress, itself, gives notice to the world of the withdrawal. A failure to note the MTP or other public land records would merely prevent application of the Anotation rule@ as an independent basis for preventing entries on the land. It would not, however, vitiate the Congressional withdrawal which was effective independent from any notation.

**After Withdrawal Revoked, Lands Need Opening Order**

Under the regulations (43 CFR 209.6), lands included in a withdrawal that is revoked do not automatically become open, but are opened through publication in the *Federal Register* of a Public Land Order. *Palen Pass Resources, Inc*., 135 IBLA 38, 40 (1996).

## EFFECT OF WITHDRAWALS ON LEASING

### Withdrawals Closed to Leasing if Specified in Withdrawal Authority

In *Esdras K. Hartley*, 54 IBLA 38 (1981), the Board stated that "unless a withdrawal or reservation of public domain land specifically provides otherwise, the land withdrawn or reserved is presumed to be available for oil and gas leasing under sections 1 and 17 of the Mineral Leasing Act of 1920, as amended, 30 USC 181, 226 (1976). *Joseph C. Manga*, 9 IBLA 319, 320; *see Udall v. Tallman*, 380 US 1, 4 (1965).

The primary reason that most withdrawals are not specifically closed to the Mineral Leasing Act of 1920 is that the issuance of a lease is discretionary, unlike an appropriation under the Mining Law of 1872. Therefore, the Secretary may consider each lease application on a case-by-case basis.

### Lease Offers on Segregated Lands Suspended Until Withdrawal Application Canceled

If an oil and gas offer is filed while land has been segregated by a withdrawal application, the offer should be suspended pending final action on the withdrawal application. In the event the withdrawal application is canceled, the oil and gas offer may be processed on its merits. *Trent J. Parker*, 49 IBLA 209 (1980).

### Statutory Withdrawal from Leasing

Deposits of oil and gas within the limits of incorporated cities and towns cannot be leased under the Mineral Leasing Act of 1920, *supra*, because they are specifically excluded by the Act. *Ed Pendleton*, 45 IBLA. 398 (1980); *Hawthorn Oil Co*., 37 IBLA 91 (1978).

### BLM Makes Independent Determination on Lease Issuance

Where public domain land is withdrawn for administration by another agency for a particular purpose, BLM should consider the recommendations of the surface management agency regarding lease issuance and any required stipulations. However, this does not relieve BLM of the need to make an independent determination supported by the record of whether and under what conditions a lease may issue in the public interest consistent with multiple use values. *Stanley M. Edwards*, 83 ID 33 (1976).

### No Surface Occupancy Stipulation

In *Esdras Hartley*, 54 IBLA 38 (1981), the Board said that as a general rule a stipulation should not be so restrictive as to preclude enjoyment of the lease. However, a no surface occupancy stipulation may be appropriate if it is justified by the record and the applicant is willing to accept it.

### Secretarial Discretion to Issue Lease

Under the provisions of the Mineral Leasing Act of 1920, as amended, 30 USC 181 *et seq*. (1976), public lands are available for leasing at the Secretary's discretion. Section 17 of the Act provides that lands subject to disposition under the Act which are known or believed to contain oil or gas deposits "may be leased by the Secretary." 30 USC 226(a) (1976). The Act requires that if a lease is issued, it must go to the first qualified applicant, but "it left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 380 US 1, 4, *rehearing denied*, 380 US 989 (1963); *Schraier v. Hickel*, 419 F.2d 663, 666 (D.C. Cir. 1969). Such discretion may be exercised for conservation, wildlife protection, and other purposes in the public interest. *Kenneth F. Cummings*, 62 IBLA 206, 209 (1982).

The discretionary authority of the Secretary of the Interior to refuse to issue oil and gas leases for public domain lands applies even where the lands have not been withdrawn from operation of the mineral leasing laws. *Esdras Hartley*, 54 IBLA 38 (1981). A decision of the BLM refusing to issue a lease will be upheld provided it sets forth the reasons for doing so and provided the background data and facts of record support the conclusion that the refusal is required in the public interest. *Cartridge Syndicate*, 25 IBLA 57 (1976).

**Authority of Secretary to Cancel Lease**

lt is clear that the Secretary of the Interior generally has the authority to cancel any lease issued contrary to law because of the inadvertence of his subordinates. *Boesche v. Udall*, 373 U.S. 472 (1963). An example of this occurred in the BLM Utah State Office where employees erroneously offered in a simultaneous drawing, lands that were currently embraced within a valid lease. The Board held that the lands were not available for leasing and that the second lease was void. *Husky Oil Co*., 52 IBLA 41 (1981).

**Stipulations Should Be Considered Before Rejection**

BLM has the authority to require execution of special stipulations to protect environmental and other land use values when deciding to issue a lease. Rejection of an oil and gas lease offer is a more severe measure than the most stringent stipulation. The record where leasing has been refused should ordinarily reflect that BLM has considered whether leasing subject to clear and reasonable stipulations would be sufficient to protect the public interest concerns raised by the surface management agency. *Howard L. Ross*, 49 IBLA 87 (1980).

## MINING CLAIMS IN WITHDRAWALS

**The Mining Law Does Not Apply to All Lands Owned by the United States**

Although section 1 of the Act of May 10, 1872,17 Stat. 91, as amended, 30 USC 22 (1976), is expansive in scope, declaring that "all valuable mineral deposits in lands belonging to the United States ... shall be free and open to exploration and purchase," it has long been recognized that the general mining law does not apply to all land "belonging to the United States." Rather, "only where the United States has indicated that the lands are held for disposal

under the land laws does the section apply; and it never applies where the United States directs that the disposal be only under other laws." *Oklahoma v. Texas*, 258 US 574, 600 (1922).

**Mining Claims on Withdrawn Lands are Void**

No property rights are created by the location of mining claims on lands that are not open to mineral entry and location, and such claims are void as a matter of law. No contest proceeding or hearing is required, and such claims may be declared null and void by a BLM administrative decision which is appealable to the IBLA. *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432 (9th Cir. 1971).

**Mining Claims Not Validated by Revocation of Withdrawal**

In *Kelly R. Healy*. 60 IBLA 115 (1981), the board restated the well established requirement that "mining claims located on land withdrawn from operation of the mining laws are null and void *ab initio* and will not be validated by modification or revocation of the order of withdrawal thereafter. *David W. Harper*, 74 ID 141 (1967)."

In *Richard L. Goergen*, 144 IBLA 293, 398 (1998), the Board again noted that if a claim is located on withdrawn lands, the revocation of the withdrawal does not validate the claims:

> Lands included in a withdrawal remain withdrawn until the withdrawal is revoked, modified or terminated by appropriate official action. As we have observed in the past, A[e]ven assuming *arguendo* that revocation of the withdrawal subsequent to the date of the location of appellants= placer mining claims was accomplished, the revocation would not restore or validate appellants= claims.@ *Kathryn J. Story*, 104 IBLA at 315; *Ronald W. Ramm*, 67 IBLA 32 (1982); *Tenneco Oil Co.*, 8 IBLA 282 (1972).

**Segregation from Mineral Entry Without Mention of Mining Laws**

Pathfinder Mines Corporation (Pathfinder) located 22 lode claims in the Grand Canyon National Game Reserve in Kaibab National Forest on November 20, 1981. When Pathfinder recorded the claims as required by section 314 of the Federal Land Policy and Management Act (43 USC 1744), BLM determined that the lands located were closed to entry under the mining laws and declared the claims null and void *ab initio*.

The Grand Canyon National Game Reserve was withdrawn by a proclamation dated November 28, 1906, by President Roosevelt pursuant to the authority given him under the Act of June 29, 1906 (34 Stat. 607). The proclamation, which substantially incorporates the provisions of the authorizing statute, makes no mention of whether the land is open to mineral entry.

Pathfinder appealed the BLM decision and in *Pathfinder Mines Corp*., 70 IBLA. 264, 90 ID 10 (1983), the Board held that BLM correctly determined Pathfinder's claims to be null and void because the lands are closed to mineral location. The Board said at 13, 15 and 19:

> A number of decisions, however, make it clear that a statute or order may close land to

mineral entry without expressly mentioning the mining laws. If land was reserved from sale and set apart for public uses, that was sufficient to preclude location of claims under the mining laws. *See* 17 Op. Atty. Gen. 230 (1881). It has also been held that when a particular portion of a public domain is reserved or set aside for public use, it is severed from the public domain so that the laws which permit the acquisition of private rights in public land do not apply. See *Wilcox v. Jackson,* 13 U.S. 266, 13 *Peters* 498 (1839); *P & G Mining Co*., 67 I.D. 217, 218 (1960).

Under the reasoning of these cases, if land is set aside from the public domain, it is presumed that the land is no longer subject to laws permitting acquisition of title in the absence of an express provision to the contrary.

Since the issue raised in this appeal cannot be resolved merely by looking at the language of the statute and proclamation itself, we must look for other evidence of congressional intent and we must construe the Act in a manner that gives effect to the objectives set forth in the Act and its legislative history; we should not construe the Act in a manner which would frustrate the achievement of those goals.

In conclusion, we note that there are a number of statutes enacted in the early part of the century which, in setting aside public lands, have had the effect of segregating those lands from mineral entry without making express reference to minerals. We further note that statutes which authorize the setting aside of public land for the protection of game and wildlife have been construed as precluding mineral entry, and appellant has established no basis for construing the legislation authorizing the Grand Canyon Game Preserve or the proclamation creating it any differently.

*0. Glen Oliver,* 73 IBLA 56 (1983) involved a case like *Pathfinder Mines Corp., supra*, where the Board ruled that withdrawn lands segregated from appropriation under the, mining law even though there is no specific mention of segregation from the mining law. *In 0. Glen Oliver, supra,* the Board said:

> The lands at issue were segregated from "all forms of entry under the public land laws." The question presented is whether this segregation was effective to foreclose mineral location under the mining laws. We find that it was. The general rule is that the term "public land laws" does not include the mining laws. In *Udall v. Tallman,* 380 U.S. 1, 19 (1965), the Supreme Court stated:
>
> > [T]he term "public land laws" is ordinarily used to refer to statutes governing the alienation of public land, and generally is distinguished from both "mining laws," referring to statutes governing the mining of hard minerals on public lands, and "mineral leasing laws," a term used to designate that group of statutes governing the leasing of public lands for gas and oil.
>
> *See Dale E. Armstrong,* 53 IBLA 153, 156 (1981). However, in a situation such as that presented in this case, the intent of Congress in using the term "public land laws" must be

> gathered from the Act itself, the legislative history of the Act or by historical interpretations of the Department concerning the Act or other similar Acts.

In *John L. Grassmeier*, 77 IBLA 156, 158 (1983), the Board reviewed a case very similar to *Pathfinder Mines Corp., supra* and *0. Glenn Oliver, supra*. The lands were segregated by a Secretary's order from all forms of entry "under the public land laws" under the authority of the Act of March 6, 1958 (Public Law 85-339; 72 Stat. 31). Even though neither the order nor the Act of March 6, 1958, expressly referred to the mining laws, the Board upheld the BLM decision declaring mining claims null and void *ab initio*. The Board's consistent position on this issue is that "the location of mining claims on such lands would be inconsistent with or might materially interfere with the purpose for which the land was segregated." *0. Glen Oliver, supra* at 58.

It is well established that mining claims located on lands closed to entry and location under the mining laws by a withdrawal order (public land order) under the authority of the Alaska Native Claims Settlement Act are null and void *ab initio. John Elmore*, 84 IBLA 163 (1984). However in *Melan's Mining and Exploration, Inc.*, 88 IBLA 336 (1985), the Board considered a similar ANCSA withdrawal where the public land order said the lands are "withdrawn from all forms of appropriation under the public land laws including leasing under the Mineral Leasing Act of February 25, 1920,..." Since there is no Specific mention of "mining law" in the public land order, the general rule that the term "public land law" does not include the mining laws could apply. *See Udall v. Tallman*, 380 U.S. 1919 (1965).

In a similar case, *0. Glenn Oliver*, 73 IBLA 56, 58 (1983), the Board interpreted segregated from "all forms of entry under the public land laws@ to include location under the mining law. In *Oliver* the Board stated that "the intent of Congress in using the term 'public land laws' must be gathered from the Act itself, the interpretation of the Department concerning the Act or similar Acts.@ *Id*.

After a review of the interpretative aids in the Whelan's Mining and Exploration, Inc. case, the Board held that the public land order did not close the lands to location under the mining law. The Board gave the following rationale for its conclusion (88 IBLA at 339):

> .... Thus, the statute itself provides no guidance. However, we know that other public land orders issued by the Department under the same authority have, in fact, expressly provided that the land was being withdrawn from all forms of appropriation under the public land laws, including location under the mining laws. This is evidence that if the Department desired to include mineral locations in a withdrawal, it would do so expressly, and that in PLO 5548 it chose not to. Further support for such a result is the fact that PLO 5548, as well as the other three public land orders cited in note 2, specifically extends the withdrawal to mineral leasing.

In *Pathfinder Mines Corp. v. Clark*, 620 F. Supp. 336 (D. Ariz. 1985), the Federal district Court of Arizona affirmed the decision of the Interior Board of Land Appeals. The decision of the District Court was later affirmed by the Ninth Circuit Court of Appeals. In *Pathfinder Mines Corp. v. Hodel*, 811 F.2d 1288 (9th Cir. 1987), the Court stated:

> The absence of an express withdrawal does not cure the fundamental incompatibility of entry under the General Mining Law with the protection and propagation of game animals. A tenuous inference from Congressional silence may not defeat the express purpose of the Preserve. Indeed, the IBLA has ruled (in this case and others) that game preserve lands are withdrawn from entry where full exercise of rights under mining laws would Ajeopardize or impair or destroy the usefulness of the reserve as a wildlife refuge.@

**Claimants Have Constructive Notice of Withdrawals**

Claimants are charged with constructive knowledge of the existence of withdrawals. BLM is not required to promptly check the legal status of every claim to advise locators they are on lands not open to entry under the mining laws. In *John F. and Vickie Malone,* 89 IBLA 341, 344 (1985), the Board said the "BLM cannot be expected to promptly determine the legal status of each individual claim, considering the volume of records for unpatented mining claims it is expected to review.@

**Prestaking Mining Claims in Withdrawals**

When a withdrawal is to be revoked, a notice is placed in the Federal Register giving the time, date and description of lands to be available. Where highly sought after lands are to become available, there are in many cases hundreds of locators attempting to locate mining claims over the same lands at the same time. In order to get an advantage or priority in right many locators attempt to accomplish as much of the location work as possible before the lands are opened. The practice of prestaking Ais widely recognized as an unsettled issue in mining law." *Scott Burnham,* 102 IBLA 363, 370 (1988).

**Principle of Adoption Cannot Be Used to Validate a Claim**

The principle of adoption described in *Noonan v. Caledonia Gold Mining Co.,* 121 U.S. 393 (1887), cannot be used to validate a claim located in a withdrawal at a time when the land is not open to entry under the mining law. In *Noonan,* that principle was the basis for allowing mining claimants to adopt, after lands were open to mineral entry in order to establish a right of possession over subsequent locators.

The Board has held that the principle of adoption does not apply against the United States. E.J. *Belding, Jr. & Melinda Belding,* 109 IBLA 198, 96 I.D. 272 (1989). *Also see Steven* Heady, 110 IBLA 2459 249 (1989).

**Discovery Required at Withdrawal Date and at Present**

Although the claim may have been valid in the past because of a discovery of a valuable mineral deposit, it must be shown as a present fact at the time of the hearing that the claim is still valuable for minerals. In *U.S. v. Lee Western Inc.,* 50 IBLA 97, 98, 105 (1980), the Board said:

> When land is closed to location under the mining law subsequent to the location of a mining claim, the claim cannot be recognized as valid unless (a) all requirements of the mining law, including discovery of a valuable mineral deposit, were met at the time of the withdrawal; and (b) the claim presently, i.e., at the time of the hearing, meets the requirements of the law. *Citations omitted*.
>
> ... where a claimant does not have a discovery of a valuable mineral deposit on a mining claim at the time of a hearing on lands previously withdrawn from location, it is not essential for the Government to show a lack of discovery at the date of the withdrawal.

**Effect of Withdrawals on Mining Claims**

Where lands covered by mining claims are withdrawn from future entries Asubject to valid existing rights,@ the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by the mining claims. So long as the claims are valid, the withdrawal is ineffective as to the lands embraced by the claims. However, when the claims terminate, the withdrawal automatically becomes effective, to the lands covered by the entry, thus closing them to future entries. No further action is required to effect the withdrawal. *Jack Stanley*, 103 IBLA 392, 394 (1989).

**Claims Near Withdrawal Boundary**

Claims should not be invalidated for being embraced by a withdrawal if there is substantial doubt whether their position places them clearly within the withdrawal. *Marvin F. Johnston*, 81 IBLA 295 (1984).

**Boundaries of Lode Claims May Be Extended Over Appropriated Land**

In *Seth M. Reilly*, 112 IBLA 273 (1990) The Board discussed the well established rule that the boundaries of a lode claim may be extended onto land not subject to location for the purpose of claiming unappropriated ground with its boundaries. *Del Monte Mining Co. v. Last Chance Mining Co.*, 171 U.S. 55 (1898); *Santa Fe Mining Inc*., 79 IBLA 48 (1984).

**Trespass for Improvements on Void Claim**

In *William Snavely*, 136 IBLA 350 (1996), the appellant had located mill site claims on lands withdrawn from entry under the mining law and had placed equipment and material on the lands without authorization under 43 CFR 2920.1-1. The Board held that the Snavely was liable for trespass damages and related administrative charges under Section 303(g) the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1733(g) and 43 CFR 2920.1-2.

In *Douglas Noland*, 139 IBLA 337 (1997), the claimant had located placer claims over an existing Material Site Right-of-Way issued under authority of the Federal Aid Highway Act, 23 U.S.C. 317 (1994) and 43 CFR 244.to the Nevada Department of Transportation on December

21, 1962. In 1984, Noland and a partner located 21 placer claims which were declared null and void by the BLM on February 20, 1986. This decision was affirmed by the Board in *Russell Avery and Douglas E. Noland*, 99 IBLA 22, 23 (1987). On November 14, 1986 Noland again relocated claims on the same lands which were again declared null and void ab initio by the BLM. This decision was not appealed by Noland.

Noland had placed a mineral processing mill, two ground water wells, electrical lines and water lines. On May 31, 1994, BLM issued a trespass decision declaring Noland in trespass under the regulations (43 CFR Part 2800) and directed him to remove all water lines, electrical wiring, plug the wells, and reclaim all surface disturbances to match the contours of the surrounding area. In affirming the BLM action, the Board stated in *Douglas Noland, supra* at 342:

> It is proper for BLM to direct removal of improvements unintentionally erected in trespass on public land. *Clive Kincaid*, 111 IBLA 224 (1989). A trespasser must either Arehabilitate@ lands harmed by the trespass or pay the costs incurred by the United States in doing so. 43 C.F.R. 2801.3(b)(3).

**Claim Straddling Wilderness Boundary**

In *Fred E. Harding*, 140 IBLA 398, 400 (1997), the BLM had declared a claim null and void. On appeal, the Board remanded the case back to BLM because it appeared from the case record that the appellant=s claim may straddle the wilderness boundary rather than lie completely within the wilderness. The Avalidity of an overlapping claim depends upon whether the claim was supported by discovery on land which is open to mineral entry. *Leslie Corriea*, 93 IBLA 346, 349 (1986); *Timberline Mining Co*., 87 IBLA 264, 265 (1985).@ *Fred E. Harding, supra.* at 400. The following statement of the Board indicates that the BLM may be required to do a field examination to ascertain the position of the claim monuments relative to the wilderness boundary:

> Accordingly, the BLM Decision declaring the Harding Falls No. 1 lode mining claim null and void ab initio will be set aside and the case remanded to BLM for a determination of the extent to which this claim is located in the wilderness area. *Citations omitted*. If the evidence establishes that the lode claim is not located entirely on lands withdrawn from the operation of the mining laws, assuming the discovery point is located outside the withdrawn area, the claim is valid as to that portion located on land not withdrawn, with attendant extralateral rights, all else being proper. *In determining the location of the mining claim, it situs on the ground as disclosed by Appellant=s monuments will control over any conflicting descriptions or maps.* (Emphasis added.) *Id.* at 400.

**Partial Location of Placer Claims on Withdrawn Lands**

In *Seth M. Reilly*, 112 IBLA 273, 276 (1990), the Board said that the "law is well established that placer mining claims partially located on lands patented without a reservation of minerals to the United States are properly declared null and void ab initio to the extent they include such lands.@

**Amendment Versus Relocation of Claim in Withdrawal**

*Russell Hoffman (On Reconsideration*), 87 IBLA 146 (1985) gave the guidelines for establishing that the location of a mining claim made after a withdrawal is actually an amendment of a prior location made before the withdraw. A "claimant must show the earlier location included the portion of the claim subject to the withdrawal, that the person making the amended location had an unbroken chain of title with the original locators, and that the location predating the withdrawal was properly made.@ *Jack T. Kelly*, 113 IBLA 280, 283 (1991).

**Amended Location Relates Back to Prewithdrawal Location**

In order to establish possessory rights to a mining claim predating a withdrawal, a claimant must be able to establish that a location that postdates the withdrawal date is an amended location rather than a relocation. This is because an amended location would generally relate back to the date of an original location only if no adverse rights have intervened. Withdrawal of the land subject to valid existing rights will not prevent the amended location from relating back to the original location; a relocation, however, will not relate back to the date of the original location because a relocation is in effect a new location.

There is no requirement that an amended location or relocation state on its face that this is its purpose; however, the omission does give rise to an inference that such was not the intent. *R. Gail Tibbetts*, 86 ID 538, 547 (1979). In the *Tibbetts* case at page 543, the Board held:

> [T]o the extent that an amended location, i.e., one made in furtherance of an original location, merely changes a notice of location without attempting to enlarge the rights appurtenant to the original location, such amended location relates back to the original. Examples of such amended locations would be a change in the name of the claim (*Butte Consolidated Mining Co. v. Barker*, 35 Mont. 327, 89 P. 302, *aff=d on rehearing*, 90 P. 177 (1907); *Seymour v. Fisher*, 16 Colo. 188, 27 P. 240 (1891)), the exclusion of excess acreage so long as the original discovery point is preserved (*see Waskey v. Hammer*, ...[223 U.S. 85 (1912)]), and a change in the record owners of a claim where such change is reflective of an existing fact (*United States. v. Consolidated Mines & Smelting Co*., 455 F.2d 432, 441 (9th Cir. 1971).

A location that was valid when the land was withdrawn cannot be enlarged by amendment after the date of the withdrawal. *United States Phosphate Co*., 43 LD 232. To establish that a location is an amendment of a location made before a withdrawal, a claimant must show that the earlier location included that portion of the claim subject to the withdrawal. A claimant must also establish that the location predating the withdrawal was properly made, and

that the persons making the amended location have an unbroken chain of title with the original locators. *See R. Gail Tibbetts v. Bureau of Land Management*, 62 IBLA 124 (1982).

In *U.S. v. Consolidated Mines and Smelting Co., supra*, the court held that a hearing is required where there is a disputed issue of fact whether the interests of the present mining claimant are adverse to the interests of the prior locators (a relocation); or whether instead, the present owner was the successor to the earlier interest (an amendment). Before a hearing is held, however, a claimant should be required to submit a copy of the location filed prior to the withdrawal date which the new location is said to amend. A claimant should also be able to establish an unbroken chain of title from the location which predates the withdrawal date up to the new notice of location. *Grace P. Crocker*, 73 IBLA 78 (1983).

**Status of Land Where Prewithdrawal Claims Abandoned After Withdrawal**

In *Jack Stanley*, 103 IBLA 392 (1988), *aff'd sub nom. Ptarmigan Co. v. Dept. of the Interior*, No. 90-35369 (9th Cir. May 15, 1991), a claimant had mining claims located in 1960 and later covered by a 1972 public land order that withdrew the lands from mineral entry. These claims were later lost for failure to comply with section 314 of the Federal Land Policy and Management Act. In 1986 the same lands were relocated by the former claimant's son. The Board upheld BLM's null and void ab initio decision and stated at 394:

> * * * Where lands covered by the mining claims are withdrawn from future entries "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to *all* land described by the withdrawal, including the lands covered by the mining claims. So long as the claims are valid, however, the withdrawal is ineffective as to the lands embraced by the claims. However, when the claims terminate, the withdrawal automatically becomes effective, *eo instanti*, to the lands covered by the entry, thus closing them to future entries. No further action is required to effect the withdrawal.

In *Cotter Corp.*, 127 IBLA 18 (1993), while considering a similar case, the Board cited the *Stanley* case with approval:

> Thus, the PLO 459 withdrawal attached to the land in question on March 25, 1948, subject to the valid existing rights represented by the then existing mining claims. When those claims were abandoned, the withdrawal became effective, *eo instanti*, as to those lands....

**Section 38 Applied to Claims in Withdrawals**

There is a provision of the mining law, 30 USC 38 (1976), under which a person who has held and worked his mining claim for a period of time equal to the time prescribed by the statute of limitations for mining claims of the state where the claim is situated, during which period the

land was open to mining location, is considered to have made a location. *W. E Wicks*, 14 IBLA 356, 359 (1974). The holding and working a mining claim in open, notorious, adverse possession, for the period of time required to establish adverse possession of a mining claim, while the land is open to mining location, is regarded as tantamount to a new location or relocation. Under such a location there is no requirement for proof of location notices, recorded or otherwise. *U.S. u. Mike Guzman*, 81 ID 685, 695-96 (1974).

For example, if a withdrawal which closed lands to mineral entry was established on June 1, 1970, a claimant who did not have a location notice properly recorded prior to that date, might be able to establish that he had a valid existing claim at the date of the withdrawal. To do this, he would have had to held and worked his mining claim for a period of time equal to the time prescribed by the statute of limitations for mining claims of the state where the claim is situated (generally 5 to 7 years). The entire period would have to run while the land was open to location. In addition, a discovery of a valuable mineral deposit must exist within each claim at the date of the withdrawal. If possessory title is to be based on 30 USC 38, a claim still must have been recorded with the BLM on or before October 22, 1979 pursuant to section 314 of FLPMA (43 USC 1744). *See U.S. v. Haskins*, 59 IBLA 105, 106 (1981); *Philip Sayer*, 42 IBLA 296, 300-302 (1979).

**You Cannot Drill or Excavate to Make Discovery**

It is well established that you cannot drill, sample, excavate or conduct any activities to make a discovery after the date of withdrawal. However, such activities may be allowed to the extent they "may tend to support an assertion that valuable deposits of minerals had been physically disclosed within the boundaries of each of the claims prior to that date. *U.S. v. Gunsight Mining Co*., 5 IBLA 62, 64 (1972). In *United States v. Porter*, 37 IBLA 313, 316 (1978), the Board said:

> Contestees possessed no information on those drill holes in 1969, and to reopen them at a later date could not satisfy the requirement of a discovery as of the date of the withdrawal. Also, there is not exposed mineral on the claims to be sampled under the proposed redrilling program. One of the mining claimants testified that he had examined several of the holes and stated that there was "only one hole that showed any radioactivity, but it was meager" (Tr. 53). Thus, reopening of the holes would not be work aiming to confirm an existing discovery. Instead, it would be an effort to make a new discovery. As the land has been withdrawn, it is too late to permit the claimants to perform work to establish a discovery. That had to be accomplished prior to the withdrawal. Sampling and other testing of claims after a withdrawal is only allowed to confirm and corroborate the preexisting exposures of a valuable mineral deposit discovered prior to a withdrawal. Eg., *United States v. Foresyth*, 15 IBLA 43 (1974). At most we have here only a guess as to what the drill holes might show. There has been no exposure of sufficient mineralization to establish any discovery prior to the withdrawal to warrant further evidence solely for corroborative purposes. Thus, appellants' request for redrilling and reopening work was properly rejected.

Assays and drilling may be allowed after a withdrawal to confirm a discovery made before the withdrawal, *U.S. v. Foresyth*, 15 IBLA 43 (1974). It is still necessary for the mining claimant to show at the time of a hearing on the claim's validity that a discovery of a valuable mineral deposit was made as of the date of the withdrawal and had been maintained as a present fact.

The thousands of mining claims that exist within lands withdrawn from mineral location on December 31, 1983, pursuant to the Wilderness Act of 1964, will all be subjected to the requirement that a discovery be exposed within the limits of each claim as of December 31, 1983. Because any operations for future work on these will require an approved plan of operations, it is possible that the Forest Service may wish to verify the discovery prior to approval of such a plan. In the event a discovery could not be verified, the Government would have the option to initiate contest proceedings to invalidate a claim.

**Mining Claims Located on Outer Continental Shelf**

From time to time, there are attempts to appropriate lands on the Outer Continental Shelf under the mining law. In *Ford MacElvain*, 50 IBLA. 303 (1980), the Board affirmed a BLM decision declaring 105 mining claims null and void because they were located on the Outer Continental Shelf. The Board said at 304:

> The Outer Continental Shelf Lands Act, 43 U.S.C. '1331-56 (Supp. 11 1978), provides the exclusive authority for the development of minerals on the outer continental shelf. 43 U.S.C. ' 1332(a) (1976); *Lowe v. Union Oil Co. of California*, 487 F.2d 477 (9th Cir. 1973) *cert. denied*, 417 U.S. 931 (1974). Claims for mineral deposits on the outer continental shelf cannot be established under the general mining law, and such claims are therefore invalid. *Id*. Because the claims are clearly invalid, BLM properly refused to accept them for recordation under section 314 of FLPMA, 43 U.S.C. ' l744 (1976).

**Claimant Responsible for Knowledge of Withdrawal**

In *Arthur W. Boone*, 32 IBLA 308, 309 (1977), the Board discussed how a claimant is responsible for determining land status before location of a claim. No amount of work and expenditures on withdrawn lands will validate a claim:

> Appellant's contention that the validity of his claims is established by the failure of the Government to advise him that the land was closed to entry is in error. The fact that a mining claimant has held a claim for many years and performed work on the claim does not, by itself, create any rights against the Government which will estop the Government from determining the validity of the claim. It is incumbent upon the locator of a mining claim to exercise considerable care in ascertaining the status of the land embraced in the claim and the limitations upon his rights as the holder of an unpatented mining claim.

**Discovery Must Be Shown to Have Existed Prior to Withdrawal**

In *U.S. v. Foresyth*, 15 IBLA 43; 48 IBLA 49 (1974), the Board pointed out that a discovery must be shown to have existed rather than proven prior to a withdrawal. The Board said:

> There is, however, a great difference between requiring that a discovery be shown to have existed prior to a withdrawal and requiring that the discovery must be *proven* prior to the withdrawal. Acceptance of the latter proposition as the standard which must be met could well lead to the conclusion that samples taken from a claim prior to a withdrawal could not be considered in determining the validity of the claim unless the results of the assays were communicated to the mineral claimants before the land was withdrawn. We know of no justification for such a result.

**Discovery at Date of Withdrawal May Be Lost**

Even though it may be established that a discovery existed within a claim at the date of a withdrawal, that discovery may subsequently be lost. In *United States v. Fleming*, 20 IBLA 90 (1975), the Board said:

> Even though there may have been a proper discovery at the time of a withdrawal or at some other time in the past, a mining claim cannot be considered valid unless the claim is presently supported by a sufficient discovery. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, results in the loss of the location.

## FEDERAL ACTIONS AFFECTING MINERAL STATUS

### I. Alaska Native Claims Settlement Act

**Withdrawals Under ANCSA Segregate from Mining and Mineral Leasing Laws**

Sections 17(d) (1) and 17(d) (2) (A) of the Alaska Native Claims Settlement Act (ANCSA) states in part that "The Secretary is directed to withdraw from all forms of appropriation under the public land laws, including the mining and mineral leasing laws ... up to, but not to exceed, eighty million acres." Section 11(a) (1) of ANCSA, 43 USC 1610 (1976), provides that certain lands surrounding and adjacent to Native villages are withdrawn, subject to

valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act. Section 22(h), 43 USC 1621 (1976), provides that withdrawals made under the Act shall terminate within 4 years of December 18, 1971, provided that lands selected by village or regional corporations or by a Native group under section 1611 of the Act shall remain.

**Provisions for Mining Claims in ANCSA and Regulations**

Section 228 of the Alaska Native Claims Settlement Act (ANCSA), 43 USC '16218 (1976), provides:

> Mining claims; possessory rights, protection On any lands conveyed to Village and Regional Corporations, any person who prior to August 31, 1971, initiated a valid mining claim or location under the general mining laws and recorded notice of said location with the appropriate State or local office shall be protected in his possessory rights, if all requirements of the general mining laws are complied with, for a period of five years and may, if all requirements of the general mining laws are complied with, proceed to patent.

Departmental regulation 43 CFR 2650.3-2 governing mining claims on selected lands reads in part:

> (a)Possessory rights. Pursuant to section 228 of the act, on any lands to be conveyed to village or regional corporations, any person who prior to August 31, 1971, initiated a valid mining claim or location, including millsites, under the general mining laws and recorded notice thereof with the appropriate State or local office, shall not be challenged by the United States as to his possessory rights, if all requirements of the general mining laws are met. However, the validity of any unpatented mining claim may be contested by the United States, the grantee of the United States or its successor in interest, or by any person who may initiate a private contest. ...
>
> (b) *Patent requirements met.* An acceptable mineral patent application must be filed with the appropriate Bureau of Land Management office not later than December 18, 1976 on lands conveyed to village or regional corporations.
>
> * * *
>
> Patent requirements not met. Any mineral patent application filed after December 18, 1976, on land conveyed to any village or regional corporation pursuant to this act, will be rejected for lack of departmental jurisdiction. After that date, patent applications may continue to be filed on land not conveyed to village or regional corporations until such land is conveyed.

**Government May Convey Lands Subject to Claims**

The status of unpatented mining claims located before the enactment of ANCSA on land subsequently selected by a Native corporation has been reviewed by the United States Court of Appeals for the Ninth Circuit. In a suit brought by owners of such unpatented mining claims

seeking a declaratory judgment and injunctive protection against BLM's conveyance of their alleged vested property rights in the claims, the court examined section 22(c) of ANCSA and the Department's regulations and held that ANCSA permits the Federal Government to convey lands subject to validly located mining claims and that the 5-year time limitation on the ability to patent placed on such claims by ANCSA is constitutional. *Alaska Miners v. Andrus*, 662 F. 2d 577 (9th Cir. 1981). *Accord, United States Steel Corp*., 89 ID 293 (1982); *Also see Doyon, Ltd*., 90 ID 289 (1983).

**BLM Not Required to Adjudicate Claims Before Conveyance**

It is well established that BLM is not required to adjudicate claims before conveyance. *Theodore Almasy*, 69 IBLA 160,165 (1982). In *Doyon, Ltd., supra* at 292, the Board said:

> The Department's regulations expressly provided appellant the opportunity to exclude mining claims from the land described in its application or have those claims adjudicated. Under 43 CFR 2651.4(e), village or regional corporations were not required to select lands within an unpatented mining claim or millsite, and village or regional corporations were permitted to omit such mining claims from their applications. Since appellant chose not to have the claims excluded when it filed its application, appellant cannot fault BLM for failing to exclude them.
>
> One regulation in the part concerning Native selections, 43 CFR 2650.3-2(a), provides: "[T]he validity of any unpatented mining claim may be contested by the United States, the grantee of the United States or its successor in interest, or by any person who may initiate a private contest." The regulations governing such contest are set forth at 43 CFR 4.450. Appellant did not take advantage of these procedures before BLM issued its decision. Appellant's own failure to take advantage of the procedures provided for seeking adjudication of these mining claims makes it unnecessary for BLM to do so.

**Mining Claims Need Not Be Identified on Lands to be Conveyed**

In *Doyon, Ltd., supra* at 294-295, the Board held "that BLM is not required to identify or adjudicate unpatented mining claims on the land conveyed since no contest has been filed by appellant." The Board said:

> ... it would be improper to identify a mining claim whose validity had not been determined. In order for a mining claim to constitute a valid existing right, it must be established that a mining claim not only was located prior to the date of the withdrawal and maintained in accordance with the requirements of the mining laws, it must also be established that a valuable mineral deposit had been discovered on the claim prior to the withdrawal. *See United States v. Beckley*, 66 IBLA 357 (1982). It would be improper to identify a mining claim as a valid existing right unless the issue of discovery of a valuable mineral deposit is fully adjudicated. Since the court in *Alaska Miners, supra*, held that the Department is not required to adjudicate the validity of mining claims, it necessarily

follows that the Department cannot be required to identify them as valid existing rights in the absence of proof of a discovery of a valuable mineral deposit.

**Five Year Limit to Patent Affects Only Conveyed Lands**

Mineral patent applications may continue to be filed after December 18, 1976, on land selected by village or regional corporations until the land is actually conveyed. 43 CFR 2650.32(c). Section 228 of ANCSA prohibits the filing of such an application after December 18, 1976, only if the land had been conveyed before the patent application was filed. Therefore, the statutory provision establishing the 5-year limit affects only conveyed lands, not lands which have merely been selected but not yet conveyed. *Doyon, Ltd., Mint, Ltd., (On Reconsideration*), 78 IBLA 327 (1984).

**Right of Access to Claims within ANCSA Conveyance**

In *Herbert W. Stewart*, 82 IBLA 329 (1984), a case involving a mining claim within land conveyed to a Native corporation under section 14 of ANCSA, the appellant sought a reservation of a private right of access rather than the reservation of a public easement under section 17(b)(1) of ANCSA. There is no provision for the reservation of a private right of access to a mining claim in ANCSA. However, such right of access is protected as a valid existing right under section 17(b)(2) of ANCSA, as amended. 43 U.S.C. 1616(b)(2) (1976). *Id*. at 332.

**Section 12 of ANCSA Does Not Segregate**

The "notation@ or Atract book@ rule may not be used to give a segregative effect to a regional corporation selection filed under section 12 of the Alaska Native Claims Settlement Act. 43 U.S. C. 1611. The reason for this is neither the act nor the implementing regulations of the

Department provide that the filing of such a selection application segregates the land from other appropriation.

However, sections 11(a)(1) and 16(a) expressly withdrew lands eligible for Native village and regional corporation selection from any other appropriation. The preservation of such lands is for Native use only, subject to valid existing rights. *Basil S. Bolstridge*, 90 IBLA 54 (1985).

**Section 14 of ANCSA Does Segregate**

The filing of a Native regional corporation selection under section 14 of ANCSA, segregates the selected land Afrom all other forms of appropriation under the public lands, including the mining and mineral leasing laws." This segregative effect is accomplished by the regulations, 43 CFR 2653.2(d), not the notation rule. The segregative effect terminates when the application is rejected. *Basil Bolstridge*, 90 IBLA 54 (1985).

**II. Classification and Multiple Use Act**

The Classification and Multiple Use Act of September 19, 1964 (78 Stat. 986, 43 USC 1411) authorizes the Secretary of Interior to review the public lands to determine which lands shall be classified as suitable for disposal and which lands he considers to contain such values as to make them more suitable for retention in Federal ownership. *See* applicable regulations in 43 CFR 2461 and 2462. A notice of a proposed classification involving more than 2,560 acres will be published in the *Federal Register* and in a newspaper having general circulation in the area of the affected lands. After receiving comments on the published notice, the government may classify the lands any time after the expiration of 60 days following the publication of the proposed classification in the *Federal Register*. Once the actual classification is made, it is publicized in the same manner as the proposed classification. 43 CFR 2462.2.

**Classification Segregates from Mineral Entry**

"Publication of notice in the *Federal Register* by the Secretary of the Interior of a proposed classification under this subchapter shall have the effect of segregating such land from settlement, location, sale, selection, entry, lease, or other formal disposal under the public land laws, including the mining and mineral leasing laws, except to the extent that the proposed classification or subsequent notification thereof specifies that the land shall remain open for one or more of such forms of disposal under the public land laws." 43 USC 1414. However, publication will not change the "applicability of the public land laws governing the use of the lands under lease, license, or permit or governing the disposal of their mineral and vegetative resources, other than under the mining laws." 43 CFR 2462.4.

**Termination of Classification**

There are four ways by which the segregative effect of a proposed classification may be terminated (43 CFR 2462.4):

1. Classification of the lands within 2 years of publication of the notice of proposed classification in the *Federal Register*;

2. Publication in the *Federal Register* of a notice of termination of the proposed classification;

3. An Act of Congress;

4. Expiration of a 2-year period from the date of publication of the notice of proposed classification without continuance under the Classification and Multiple Use Act, or expiration of an additional period, not exceeding 2 years, if the required notice of proposed continuance is given.

The segregative effect of a classification for sale or other disposal may be terminated in

one of the following ways:

1. Disposal of the lands;

2. Publication in the Federal Register of a notice of termination of the classification;

3. An Act of Congress;

4. Expiration of 2 years from the date of publication of the proposed classification without disposal of the land and without the notice of proposed continuance under the Act.

**Mining Claims Located After Segregation are Null and Void**

Mining claims located after the land has been segregated from appropriation under the mining laws by notice of proposed classification under the Classification and Multiple Use Act of 1964 (43 USC 1411-18) published in the *Federal Register* are properly declared null and void *ab initio*. *Rudolph Chase and Raymond W. Voss*, 8 IBLA 351 (1972).

## III. Exchanges

**Mining Claims on Selected Lands May Preclude Exchange**

Where a private exchange application would require the United States to determine the validity of mining claims on the selected Federal lands, the application must be rejected if "it would not be in the interest of the United States to undertake the burden of clearing title to the selected lands." *Harry Yukon*, A-30762 (August 23, 1967).

**PreFLPMA Exchange Application Processed After FLPMA**

Since the passage of FLPMA on October 21, 1976, all applications must be processed under section 206 of the Act. 43 USC 1716 (1976). However, state exchange applications which were pending upon the passage of FLPMA may continue to be processed under the Taylor Grazing Act (43 USC 315g) only if the State had complied with all of the requirements necessary to vest rights to the exchange in the State, making any further action necessary by BLM purely ministerial. *Dale E. Armstrong*, 53 IBLA 153, 157 (1981). Although the Taylor Grazing Act, supra, was repealed by section 702 of FLPMA, the General Exchange Act of March 20, 1922 (16 USC 485), was not repealed. However, FLPMA exchange procedures are used for all exchanges.

**PreFLPMA and PostFLPMA Exchange Applications**

Both preFLPMA and postFLPMA exchange applications segregate the land from appropriation under the mining laws at the time the formal application is filed with BLM. *Charles A. Morriss*, 36 IBLA 372 (1978). Regulations issued pursuant to FLPMA, specifically 43 CFR 2201.1(b) (46 FR 1640 (Jan. 6, 1981)), provide for segregation of lands covered by an exchange proposal only upon publication in the *Federal Register* of notice to that effect and only for a period of 2 years from the date of publication. Significantly, the language pertaining to segregation in the new regulations is identical to that in 43 CFR 2091.23, that is, "publication of the notice... may segregate the public lands covered ... to the extent that they will not be subject to appropriation under the public land laws, including the mining laws."

In *Dale E. Armstrong*, 53 IBLA 153, (1981), the Board considered a case where the appellant had applied for an oil and gas lease for lands under application for exchange. Upon rejection of his lease application by the BLM, the appellant pointed out "that the phrase 'public land laws' ordinarily refers to statutes governing the alienation of public land and is generally distinguished from both the mining laws and the mineral leasing laws." Therefore, the segregative effect of 43 CFR 2091.2-3, barring appropriation under the public land laws, including the mining laws, would not bar an oil and gas lease under the mineral leasing laws.

In *Dale E. Armstrong, Id*. at 156, the Board held that a pending exchange application does not segregate the selected lands from availability for mineral leasing. The Board said:

> We do not agree that the language of 43 CFR 2091.2-3 can support the interpretation which BLM has given to it, and accordingly we reversed the decision below. BLM's interpretation expands the generally accepted meaning of the term "public land laws" to include the mineral leasing laws. In *Udall v. Tallyman*, 380 U.S. 1, 19 (1965), the Supreme Court said:
>
> > [T]he term "public land laws" is ordinarily used to refer to statutes governing the alienation of public land, and generally is distinguished from both "mining laws," referring to statutes governing the mining of hard minerals on public lands, and "mineral leasing laws," a term used to designate that group of statutes governing the leasing of public lands for gas and oil.

Thus, a pending land exchange does not segregate the selected lands from availability for mineral leasing, regardless of whether the exchange application is filed before or after FLPMA. *See Kerr-McGee Corp*., 46 IBLA 156 (1980) and *Lane Lasich*, 63 IBLA 192, 194 (1982) for similar cases.

**Lands Acquired Under Taylor Grazing Act Must Be Formally Opened Prior to Mineral Leasing**

The Department held in *Southern California Petroleum Corp*., 57 ID 61 (1959), that lands conveyed to the United States authorized by section 8 of the Taylor Grazing Act, *supra*, do not become available for offers to lease for oil and gas simply upon acceptance of title on behalf

of the United States, but only when an order is issued opening them to such disposition. In *Petro Leasco,* Inc., 42 IBLA 345 (1979), the Board said at 353-54:

> [W]e have discerned nothing in the legislative history of FLPMA which arguably suggested congressional intent to abolish the Department's administrative practice of issuing restoration and opening orders. Moreover, we do not choose to assume that the Congress was unaware of this long practice or precedent applicable thereto. In our view, mandates of the Act are best served by adhering to the sound policy of fair and orderly administration of the public lands, until such time as the Secretary may promulgate a different or contrary rule.
>
> ... We further hold that acquired lands administered by BLM are not subject to appropriation unless and until opening orders are duly noted on the land records in the manner prescribed and set forth in the *BLM Manual*, ...

In *Esdras K. Hartley*, 58 IBLA 329, 330 (1981), the Board again ruled that lands acquired under authority of section 8 of the Taylor Grazing Act must have a formal order opening the tract to oil and gas leasing under the Mineral Leasing Act of 1920 (30 USC 191 *et seq*.).

**Lands Acquired Under Act of 1922 Are Available for Leasing without Opening Order**

In *Petro Leasco, Inc., supra*, the Board considered a case where lands were acquired by forest exchange, authorized by the Act of March 20, 1922 (16 USC 485). The Board determined that lands acquired by the Secretary of Agriculture by forest exchange become part of the National Forest System upon acceptance of title, and are subject to all the applicable laws, rules and regulations. National forest lands are by statute open to mineral leasing. The Board also contrasted that with lands reconveyed to the United States under an exchange authorized by section 8 of the Taylor Grazing Act, *supra*, for which restoration orders are mandatory.

**IV. Indian Lands**

Indian land ownership has been acquired by various tribes by treaty, act of Congress, executive action, purchase, and aboriginal possession. Although the United States generally holds title to the reservations, the Indians have the right to use and occupy the land. A tribal council or similar authority governs each reservation and general supervision is given by the Bureau of Indian Affairs.

Unless the Federal Government reserved mineral rights in the reservation grant, the general mining laws and mineral leasing laws do not apply to reservations. Indian lands are generally considered to fall into one of two categories -- tribal lands and allotted lands.

**Tribal Lands**

Tribal lands are all the lands lying within the boundaries of an Indian reservation which

have not been allotted and are managed for the benefit and use of all members belonging to the tribe. Tribal lands are generally administered by a tribal council, or similar body, and the Bureau of Indian Affairs. The first legislative authorization to lease tribal minerals is the Act of February 28, 1891 (26 Stat. 795; 25 USC 397). The Act applied to reservations created by treaty that were not needed for agricultural or allotment purposes. Section 17 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 988; USC 477) provided that tribes organized under the Act could be issued a charter of incorporation by the Secretary of the Interior. This Charter, which must be ratified by a majority of the adult Indians living on the reservation, gave the tribe the authority to manage and dispose of its property, including mineral rights; but many charters are subject to approval of the Secretary of the Interior. The Act of May 11, 1938 (52 Stat. 347; 25 USC 396a-396f) further provided that unallotted lands within any Indian Reservation or lands owned by any tribe, group or band of Indians under Federal jurisdiction could be leased for mining purposes, except Crow Reservation, ceded lands of the Shoshone Reservation in Wyoming, Osage Reservation in Oklahoma, coal and asphalt lands of the Choctaw and Chicksaw Tribes in Oklahoma.

The Charters vary greatly among different tribes and should be inspected carefully prior to leasing so as to insure the lease is properly acquired or determine if approval must be obtained from the Secretary of the Interior. Charters are not limited by the mineral leasing laws of tribal lands.

Section 16 of the Indian Reorganization Act authorized the tribes to adopt constitutions and by-laws; however, these constitutions and by-laws do not give a tribe new power as is the case with a charter, but provides the tribe with a means of exercising its existing powers. So constitutions and by-laws may not go beyond the statutory requirements of tribal lands, but they should be reviewed for procedure. There are many treaties and statutes authorizing mineral leasing that apply to only one or several tribes.

**Allotted Lands**

The General Allotment Act of February 8,1887 (25 USC 331), allowed for allotment of designated areas of tribal lands in 40-, 80- and 160-acre tracts to individual Indians of each reservation. There was also a provision for allotments to be given to Indians whose tribe had no reservation. Then Congress passed the Act of March 3, 1909, that authorized issuance of mineral leases on allotted Indian lands. Following the General Allotment Act of 1887, there were numerous laws passed that gave allotments to specific reservations.

With approval of the Secretary of the Interior, the allottees were issued two types of patents -- "trust patents" and "restricted fee patents." In trust patents, the United States holds the title in trust for a period of 25 years, while the allottee has the right of exclusive possession and equitable title to the land. The 25-year period has been extended in many cases and much allotted land is still held in trust. In Restricted Fee patents, the legal title passes from the United States to the allottee; however, there are restrictions on the allottee's right to convey or encumber the title. Under certain circumstances and with approval of the Secretary of the Interior acting through the Bureau of Indian Affairs, allottees may obtain fee patents free of restrictions; in such

cases, the lands would no longer be classified as allotted lands. After passage of the Indian Reorganization Act of June 18, 1934, allotments were no longer made.

Leases for minerals other than oil and gas may be negotiated with the allottee if the superintendent gives his consent. Competitive leasing will be held if negotiation is not in the best interest of the tribe.

**Withdrawals for Indian Lands**

The Act of June 30, 1919 (14 Stat. 34; 30 USC 150) specifies that only by an act of Congress may public lands be withdrawn as Indian reservations. The President was specifically prohibited from making such a withdrawal by executive order or by any other means. *Sioux Tribe of Indians v. U.S.*, 94 Ct. Cl. 150, *aff=d*. 316 US 317 (1942). Withdrawn Indian lands are not subject to location, *Butz v. Northern Pacific Railroad Co*., 119 US 55, but the withdrawal excludes lands with valid existing mining claims and leases. *Navajo Indian Reservation*, 30 LD 515. Furthermore, an oil and gas lease offer filed for lands which at the time of filing have been withdrawn for Indian purposes by an Executive Order must be rejected. *Tenneco Oil Co*., 8 IBLA 282 (1972).

**V. Material Sale Contracts**

Materials sale contracts do not segregate the land from mining location, but such locations are subject to the outstanding contract of sale. 43 CFR 3610.1-d and 3611. If the land is withdrawn from all forms of appropriation under the public land laws, and neither the terms of the withdrawal order nor the purpose for which the lands was withdrawn suggest an intent to exclude disposals under the Materials Act from the scope of the order, a contract made after the effective date of the order and providing for the sale under the Materials Act of deposits of clay from the withdrawn land is not authorized. Also, clay may be sold under the Materials Act only if it is not subject to location under the mining laws. *Mrs. A. T Van Dolah*, A-26443 (Oct 14, 1952).

**VI. Military Withdrawals**

These lands are set aside for military and naval purposes and are normally not open to any of the public land, mining, or mineral leasing laws (*Scott v. Carew*, 196 US 100), but a valid location made before the effective date of a withdrawal can maintain valid existing rights. Fort Maginnis, 1 LD 552. Lands that have been withdrawn or reserved for the use of any agency of the Department of Defense are not subject to leasing under the terms of the Mineral Leasing Act without the consent of the Secretary of Defense. *Joseph E. Thompson*, A-28107 (Aug. 26, 1960).

**Military Withdrawals**

The Act of February 28, 1958 (72 Stat. 28), prohibits withdrawal, reservation, or restriction of more than five thousand acres after the date of the Act, except by congressional action. This Act applies to public lands withdrawn from settlement, location, sale, or entry for

the use of the Department of Defense purpose. 43 USC 156.

All withdrawals and reservations for the Department of Defense, excepting lands withdrawn or reserved specifically as naval petroleum, naval oil shale, or naval coal reserves, are "subject to the condition that all minerals including oil and gas are under the jurisdiction of the Secretary of the Interior and there shall not be disposition of, or exploration for, any minerals in such lands except under the applicable public, mining and mineral leasing laws." 43 USC 158. However, the Secretary of Defense may preclude disposition of or exploration for any minerals in such lands if it is determined that such use is inconsistent with the military uses of the withdrawn lands. 72 Stat. 30; 43 USC 158.

**Lease Offer in Military Withdrawal Improperly Rejected**

In *Howard L. Ross*, 49 IBLA 87 (1980), the Board considered a case where the BLM had rejected an oil and gas lease offer for public lands withdrawn for the Arizona National Guard for use as a rifle range. The Board remanded the case back to BLM for several reasons:

1. BLM gave no reason for the rejection.

2. There was no indication that BLM or the Guard officials made an independent determination whether leasing the land is or is not in the public interest.

3. There was no indication of how the Guard is presently using the land.

4. Stipulations were not considered as a means to protect the military interests prior to rejection of the lease.

The Board then said that "if it is ultimately decided to reject the offer as contrary to the public interest, the reasons for that decision must be enumerated in order to avoid a determination that the action is arbitrary, capricious, or an abuse of discretion." *Also see Stanley M. Edwards*, 24 IBLA 12, 83 ID 33 (1976).

**Vacated Military Reservations**

The Act of July 5,1884 (23 Stat. 104) provided that whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation, the same shall be disposed of exclusively under the mineral land laws of the United States. 43 USC 1074. This section was repealed by the Federal Land Policy and Management Act (Pub. L. 94-579; 90 Stat. 2789) as of October 21,1976, but did not terminate any valid lease, permit, or patent existing on October 21, 1976.

**Naval Petroleum Reserve of Alaska**

The National Petroleum Reserve in Alaska (National Petroleum Reserve No. 4) was established by Executive Order on February 27, 1923. The Naval Petroleum Reserves Production Act of 1976 (90 Stat. 303; 42 USC 6501 *et. seq*.) provides environmental control over the reserve. 43 CFR 2360. Subject to valid existing lights, all lands covered by the Reserve "are reserved and withdrawn from all forms of entry and disposition under the public land laws, including the mining and mineral leasing laws." 43 CFR 2361.0-7.

## VII. Multiple Mineral Development Act

### Introduction

The Act of August 13, 1954 (68 Stat. 708; 30 USC 521 *et. seq*.) was established to authorize multiple mineral development of locatable and leasable minerals on the same tract of the public land. Before the Act of August 12, 1953 (67 Stat. 539; 30 USC 501), and the Multiple Mineral Development Act of August 13, 1954 (30 USC 521 *et. seq*.), mining claims located after the Mineral Leasing Act of February 25, 1920 (30 USC 181 *et. seq*.), for lands which were known to be valuable for such minerals were regarded as null and void *ab initio*. This conclusion was based on the rationale that a tract of public land could not simultaneously be subject to leasing under the Mineral Leasing Act and be subject to a valid mining claim, which would embrace all minerals, because there was no authority to reserve the leasable minerals withdrawn from mining location by the Leasing Act. *Arthur L. Rankin*, 73 ID 305, 309 (1966); *United States v. U.S. Borax Co*., 58 ID 426, 432 (1943). The Multiple Mineral Development Act authorizes the location of mining claims on lands covered by a mineral permit or lease, or application for permit or lease, or which are known to be valuable for leasable minerals. However, the leasable minerals are reserved to the United States in such a mineral patent. 30 USC 502, 504. Furthermore, any relocation of a previously invalid mining claim, after the Multiple Mineral Development Act, would be subject to the terms and conditions of that Act, including a reservation in the patent of the leasable minerals to the United States.

For example, land which in 1946 was included in an oil and gas lease issued under the Mineral Leasing Act was not subject to mining location after that date. If there was no compliance with the Acts of August 12, 1953, or of August 13, 1954, mining claims located on such land are invalid. *Clear Gravel Enterprises*, 64 ID 210 (1957).

### Public Law 250

The Act of August 12, 1953 (67 Stat. 539) applies to mining claims located after July 31, 1939, and before January 1, 1953, which were at the time of location on lands (1) included in a Federal lease or permit; (2) covered by application for federal permit or lease; or (3) known to be valuable for one or more of the Federal Leasing Act minerals. Such lands would be considered

open to location under the mining laws if the owner of the claim had prepared within 120 days of August 12, 1953, an amended notice of location and posted a copy on the claim and filed a copy with the office of record. The notice must contain a statement that the notice is filed pursuant to the provisions of the Act.

**Reservation of Leasing Act Minerals**

Mining claims that qualify under the Act of August 12, 1953, as discussed in the above paragraph shall be subject to a reservation of Leasing Act minerals. The reservation of leasing act minerals shall also be contained in any patent issued for such claim (30 USC 502).

**The Multiple Mineral Development Act (Pub. L. 585**)

The Act of August 13, 1954 (68 Stat. 709) provides that any claim is validly located if located after July 31, 1939, and before February 10, 1954, on lands that at the time of location were (1) included in a Federal mineral lease or permit, (2) covered by an application for permit or lease, or (3) known to be valuable for leasing act minerals. In order to qualify under Pub. L. 585, the claimant must comply with the following:

1. The owner of a mining claim filed before January 1, 1953, must have posted and recorded an amended location notice as required by Pub. L. 250.

2. The owner of a mining claim located after December 31, 1952, and before February 10, 1954, must have posted and recorded an amended location notice within 120 days of the August 13, 1954. The notice must contain a statement that the amendment is filed pursuant to the requirements of Pub. L. 585.

An applicant for, or lessee of a uranium lease covered by such mining claim must withdraw the application or lease within 120 days after Pub. L. 585 and must record a notice of the withdrawal in the county records where the location notice of the claim is maintained. The claimed area is considered to be open to location even if it were withdrawn or reserved from entry after the location date of the claim but before February 10, 1954 (30 USC 521).

**Uranium Lessees or Lease Applicants**

The owner of any uranium lease application or of any uranium lease is authorized to locate mining claims for a period of 120 days after August 13, 1954, on the lands embraced by the application or lease. However this provision is subject to any rights acquired by an owner of any mining claim located before February 10, 1954, and valid on August 13, 1954.

No mining claim located after August 13,1954, shall be valid for any lands that were covered by a uranium lease or application at the time of location (30 USC 523).

As one can see from a careful review of Pub. L. 250 and Pub. L. 585, during the brief period from February 10, 1954, until August 13, 1954, lands of the United States which at the time of location are (1) included in a mineral lease or permit, (2) covered by an application for

lease or permit, or (3) known to be valuable for leasing act minerals are not open to mineral entry. However, after August 13, 1954, such lands are open to location under the mining laws (30 USC 525).

**Reservation of Leasable Minerals in Mineral Patent**

Mining claims and mill sites (1) that were located between July 31, 1939, and February 10, 1954, and qualified under Pub. L. 250 and (or) Pub. L. 585, or (2) that were located after August 13, 1954, are subject, before issuance of a patent, to a reservation of all leasing act minerals. This reservation also authorizes permittees, and lessees of the United States "to enter on the land covered by such mining claim or mill site and to prospect for, drill for, mine, treat, store, transport, and remove leasing act minerals and to use so much of the surface and subsurface of such mining claim or mill site as may be necessary for such purposes, and whenever reasonably necessary for the purpose of prospecting for, drilling for, mining, treating, storing, transporting and removing leasing act minerals on and from other lands. If patent should issue for any such mining claim or mill site, it should contain a reservation to lands which at the time of issuance of patent were (1) included in a permit or lease issued under the mineral leasing laws, (2) covered by an application for permit or lease under the mineral leasing laws, or (3) known to be valuable for minerals subject to disposition under the mineral leasing laws." 30 USC 524.

**Leasable Mineral Reservation (Pub. L. 585**)

The *Bureau of Land Management Manual* 3860 - Conveyance Instruments - Mineral Patents specifies that BLM adjudicators include the following reservation where appropriate:

> All deposits of coal, phosphate, sodium, potassium, oil, oil shale, native asphalt, solid and semi-solid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried) or gas, and to it, or persons authorized by it, the right to enter upon such land whenever reasonably necessary for the purpose of prospecting for, mining, treating, storing, and removing such minerals on and from other lands of the United State, sec. 4, Act of August 13, 1954, 68 Stat. 710 (30 USC 524).

**Key Definitions**

The Act of December 24, 1970 (Pub. L. 91-581; 84 Stat. 1573; 30 USC 530) amended Pub. L. 585 by giving definitions to several important terms used in the Multiple Mineral Development Act:

1. *Mineral Leasing Laws* - "the Act of February 25,1920; the Act of April 17, 1926; the Act of February 7, 1927; Geothermal Steam Act of 1970, and all acts heretofore or hereafter enacted which are amendatory of or supplementary to any of the foregoing acts."

2. *Leasing Act Minerals* - "all minerals which, upon August 13, 1954 are provided in the mineral leasing laws to be disposed of thereunder and all geothermal steam and associated geothermal resources which, upon the effective date of the Geothermal Steam Act of 1970, are provided in that act to be disposed of thereunder."

**Publication to Determine Claims to Leasing Act Minerals**

The Multiple Mineral Development Act gives a procedure through which a leasing act applicant, permittee or lessee may determine if claims located before August 13,1954 for leasing act minerals affect lands included within such application, permit or lease. 30 USC 527; 43 CFR Subpart 3742. This procedure involves recordation of notice of application, permit or lease, publication of notice, and a hearing held to determine the validity of the claim if a verified statement is filed by a claimant.

**Effect of P.L. 250 and P.L. 585 on the Validity of a Claim Location**

**Patent Application Rejected for Noncompliance with PL 250 & PL 585**

When a mineral patent application is adjudicated, it is examined for compliance with the Acts of August 12, 1953 (PL 250) and August 13, 1954 (PL 585). Where there were permits or leases or applications and no showing of compliance with the Act of August 12, 1953, or the Multiple Mineral Development Act of 1954, mining claims located on lands covered by permits, leases, or applications would be invalid. *Clear Gravel Enterprises, Inc*., 64 ID 210 (1957). However, in *Meritt N. Barton*, 79 ID 431 (1972), the Board considered a case where the claimant located claims in 1945 and 1952, but the Geological Survey did not report the lands were known to be valuable for leasable minerals until October 25, 1968. There was no permit or lease or application for leasable minerals when the claims were located. The Board ruled that a hearing was necessary "to determine if the land was known to be valuable for minerals subject to the mineral leasing laws when the claims were located." This case was initiated when Barton filed a mineral patent application for nine placer mining claims.

**Establishing Title Under 30 USC 38**

It is possible to establish entitlement to a patent pursuant to 30 USC 38 if a claim were located while lands were under a mineral permit, lease or application for lease or permit. To do this a claimant, in recognizing that the initial location was void, would need to establish that he has held and worked his claim for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory in which they are situated. However, the land must be open to location during the entire period of time the statute of limitations is running, Evidence of such possession and working of the claims for such period is sufficient to establish a right to a patent under the mining laws.

In *Cole v. Ralph*, 252 US 286, 307 (1920), the Supreme Court held that section 38 did not

eliminate the requirement for a mining claimant to make a discovery of a valuable mineral deposit in order to be entitled to a patent. The purpose of section 38 was only to eliminate the requirement for proof of the posting and recording a location notice. In *Ernest Higbe,* 60 IBLA 267 (1981) and *Meritt N. Barton, supra*, the appellants both attempted to establish a valid location under 30 USC 38 after having located claims while the lands were closed to mining claim location because of leasable minerals.

**No Reservation of Leasing Act Minerals if Leasable Minerals Not Available**

There can be no reservation of leasable minerals pursuant to Public Law 585 in a mineral patent if the leasable minerals are withdrawn from leasing and are not available. *Solicitors Opinion*, M-36787 (October 31, 1969). Judge Crocker of the United States District Court, Southern District of California, ruled in the case of *Kern County Land Company v. Udall* (No. 2525 N.D.) that the plaintiff was entitled to a patent for its mining claims in Death Valley without a reservation of Leasing Act minerals. Judge Crocker cited the legislative history of the Multiple Mineral Development Act and stated:

> Thus in light of the legislative intent of these statutes, the Multiple Mineral Development Act is only applicable if the minerals in issue are disposable under or subject to the Mineral Leasing Act of 1920. Since the Leasing Act specifically excludes national monuments, the Multiple Mineral Development Act has no application here. ...The Bureau of Land Management was without any power to reserve either all or any of these Leasing Act Minerals in the patented lode claims.

"**Unclaimed, Undeveloped" Issue Concerning Coal and Phosphate Prospecting Permits**

A published "*Solicitor's Memorandum* (M-36893) (Supp. 11), 88 ID 247, January 8, 1977, and its supplement of November 19, 1979, examined the effect of mining claims on the Secretary's authority to issue prospecting permits and preference-right leases for coal and phosphate. In this opinion, the solicitor discussed the meaning of the statutory limitation of coal and phosphate prospecting permits to "unclaimed, undeveloped" lands. The Solicitor stated at 252:

> Accordingly, it is my conclusion that the limitation of coal and phosphate prospecting permits to "unclaimed, undeveloped" lands restricts them to lands without existing, valid, vested rights which are legally adverse to the prospecting permit which is sought, and any preference right lease which might be earned pursuant to that permit. The determination is to be made as of the date of issuance of the permit. Thus, for example, any mining claim located prior to the effective date of the Multiple Mineral Development Act would be adverse to any prospecting permit issued after such location, if the claim was valid at the time of issuance of the permit. No mining claim located after that effective date would be adverse because it could not "ripen" into ownership of the mineral which is subject to the prospecting permit issued pursuant to the Mineral Lands Leasing Act. However, a prospecting permit may be properly issued for a mineral for which there is no valid adverse claim, notwithstanding the existence of non-adverse claims, entries or

leases based upon other minerals or authorizations. Prior or existing "development" which is not an incident or basis of an adverse interest does not preclude proper issuance of a prospecting permit. The issuance of a permit should be presumed to be regular if no interest to the contrary appeared in the land office records at the time of permit issuance.

However, the burden is on a lessee to establish that there was no conflicting adverse claim to a coal or phosphate prospecting permit or preference right lease because a lease may be canceled if such an adverse interest should later arise. The Board said:

> The burden of identification and resolution of conflicting adverse claims may be placed upon the permittee/applicant, such as by prosecution of private contest proceedings or use of provisions of Sec. 527 of 30 U.S.C. However, if no indication of any such vested, adverse claim is presented, then, in the absence of affirmative challenge, the preference right lease may be issued if otherwise proper. Such issuance is at the risk of the lessee that actual adverse interests may exist. Upon a later showing that at the time of issuance of the permit, the lease may be cancelled as to the land in conflict by the BLM upon its own motion or in accordance with advice or protests by others, as described in the 1979 supplement.

## VII. National Forests

### Legal History

The Department of the Interior initiated forest withdrawals based upon the President's executive power to do so. For example, in *George Herring*, 11 LD 60 (1890), the Department upheld a reservation to suspend from entry and sale an area covered by trees of the "*Sequoia gigantia*" variety.

Following increased national interest in the conservation of the natural resources of the country, Congress passed the General Revision Act of March 3, 1891 (26 Stat. 1905; 16 USC 471), also known as the Forest Reservation Act. Section 24 of the Act authorized the President to establish national forests by Presidential proclamation:

> [I]n any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and limits thereof.

Following passage of the Forest Reservation Act, the President and the Secretary of the Interior issued numerous proclamations and orders, respectively, withdrawing forest lands. However, withdrawals under the 1891 Act apparently neither authorized management or protection of the reserves nor allowed mining or lumbering. *See* G. Pinchot, *Breaking New Ground*, 85 (1947). Due to the complete nature of withdrawals of lands in forest reserves, a storm of protest arose charging the mining and lumbering industries were completely prohibited from operating in the forest reserves. At the same time conservationists were concerned over the

lack of protection to the reserves. A compromise between the two factions resulted in an amendment to a civil appropriations bill. The amended bill was enacted on June 4, 1897 (30 Stat. 11), and came to be known as the Forest Management Act or the Organic Administration Act. This Act states in part:

> Nothing herein shall be construed as prohibiting ... any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof....

In *Rose Gold Mining and Milling Co*., 30 LD 377, 378-80 (1900), the Department discussed the purposes of the 1897 Act and stated that Congress intended to provide a complete scheme for control and administration of the forest reserves in a manner which would not retard the development of the country by locking up and placing beyond lawful reach and utilization the timber, stone, mineral resources and waters found upon these reserves.

**National Forests Open to Mining and Mineral Leasing Laws**

Lands within the national forests are subject to location and entry under the general mining and mineral leasing laws pursuant to the Act of June 4, 1897. Mining claims cannot be located on lands in national forests acquired under the Act of March 1, 1911 (36 Stat. 962; 16 USC 513-515), known as the Weeks Act. However, the Department of the Interior is vested with jurisdiction to convey title to lands within a national forest and to grant easements running with the lands. *See U.S. v. Grimaud*, 220 US 506.

**Transfer of Administration of Forest Reserves**

By the Transfer Act of February 1, 1905 (33 Stat. 628), Congress transferred administration of the forest reserves to the Department of Agriculture. After the transfer, responsibility for surveying and for all mineral entries within the forests remained with the General Land Office (now Bureau of Land Management), Department of the Interior.

**Purpose of the National Forests**

The Department of Agriculture is vested with the management and regulation of the national forests. It is authorized to make such rules and regulations that will insure the objectives of the reservation. The general objectives are to improve and protect the forest within the boundaries, to secure favorable conditions of water flow and to furnish a continuous supply of timber for the use of citizens of the United States. 16 USC 475.

**IX. National Parks and Monuments**

Each national park has been withdrawn through a specific act of Congress. National monuments are established by Congressional action and Executive authorization. Many national monuments have been established by presidential proclamation under the Antiquities Act of June 8, 1906 (34 Stat. 225). Lands in national parks and national monuments are generally not subject

to mining location, except where specifically authorized by law. The Act of September 28, 1976, closed Crater Lake National Park, Mount McKinley National Park, Death Valley National Monument, Coronado National Monument and Organ Pipe Cactus National Monument to location under the Mining Law of 1872.

Lands in the National Park System are withdrawn from leasing, location, entry and patent under the mining and mineral leasing laws of the United States, unless the language creating the area specifically makes lands within the area subject to the mining laws. *Gene R. Blaney*, A-30894 (June 11, 1968); *Mining in National Park Service Areas*, M-36838, 78 ID 352 (Nov. 16, 1971).

Section 1 of the Mineral Leasing Act of 1920, as amended, 30 USC 181 (1976), provides:

> Deposits of ... oil ... or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands ... in national parks and monuments shall be subject to disposition in the form and manner provided by this chapter to citizens of the United States...

The exclusion of lands in national parks and monuments from oil and gas leasing is in 43 CFR 3101.1-1(a)(1).

Areas of the national park system as defined by 16 USC l(c)a are not open for mining unless the statute creating the area specifically makes the lands subject to the mining laws. *Tom Brown*, 37 IBLA 381 (1978) *aff=d., Brown v. United States*, 679 F.2d 747, 751 (8th Cir. 1982).

## IX. Powersite Withdrawals

### Mining Claims Rights Restoration Act

The purpose of the "Mining Claims Rights Restoration Act" (Public Law 84-359; 69 Stat. 681; Act of August 11, 1955; 30 USC 6219 was "to permit the mining, development, and utilization of the mineral resources of all public lands withdrawn or reserved for power development..." After enactment of the statute on August 11, 1955, such lands were "open to entry for location and patent of mining claims and for mining, development, beneficiation, removal and utilization of the mineral resources of such lands under applicable Federal statutes."

However, lands under license, permit or preliminary permit are not opened to entry by the Act. 30 USC 621(a). Mining claims which were located prior to August 11, 1955, in a powersite withdrawal were null and void from their inception and the Mining Claims Rights Restoration Act, *supra*, did not operate retroactively to validate claims which were void when located. *John C. Farrell*, 55 IBLA 42 (1981); *Day Mines, Inc.*, 65 I.D. 145 (1958).

### Pickett Act of 1910 Superseded by Federal Power Act

Many of the powersite withdrawals established prior to the Federal Power Act of 1920, 16 USC 818 (1976), were accomplished under the authority of the "Pickett Act" of June 25, 1910

(43 USC 142). Because the Pickett Act provided that withdrawn lands "shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals...,@ many locators of metalliferous minerals in powersite withdrawals contended that these locations were valid. *See Henry Stagnaro*, 31 IBLA 317 (1977) and *George Hawkins*, 66 IBLA 390 (1980). However, if the claims were located after the Federal Power Act of June 10, 1920, *supra*, which closed such lands to mineral location until enactment of the Mining Claims Rights Restoration Act of August 11, 1955, the claims would be null and void *ab initio* because the Pickett Act was superseded by the Federal Power Act.

The Federal Power Act provides that any lands of the United States included in an application for power development under that Act shall, from the date of filing of an application, be reserved from entry, location or other disposal under the laws of the United States until otherwise directed by the Federal Energy Regulatory Commission (FERC) or by Congress.

The precise question of whether mining location for metalliferous minerals could be made after June 10, 1920, on lands previously withdrawn for powersites under the Pickett Act was considered in the case of *Coeur d'Alene Crescent Mining Co*., 51 ID 531, 537 (1931). It was there held that the Act of June 25,1910, had been superseded by the Federal Power Act to the extent that the former authorized mining locations for metalliferous minerals on lands withdrawn as powersites. *Also see Addie Gibson Burton*, A-25457 (June 14, 1949); *John Roberts*, 55 ID 430, 433 (1935).

**The 60-day Filing Period and Notice of Hearing**

In *United States v. Phyrne Brown*, 124 IBLA 247 (1992), the BLM appealed an administrative Law Judge's decision directing issuance of an order granting general permission to engage in placer mining operations pursuant to the Mining Claims Rights Restoration Act of 1955 (MCCRA). The statute requires that notices bearing the notation that they are filed pursuant to MCCRA must be filed within one year of August 11, 1955, for preMCCRA claims or within 60 days for subsequent locations. As the Board observed, "these notices bore no notation that they were being filed pursuant to MCRRA." *Id*. at 249. And under the statute, only the filing of a notice by the locator initiates the running of the 60-day period. *Id*. at 250

If the BLM sends the claimant a notice of intention to hold a hearing within the 60-day period, operations are suspended until after the hearing is held and an order issued. If a notice were sent after the 60-day waiting period had run, a suspension would not be required. *Id*. at 250. In clarifying the long-standing confusion over the authority of the BLM to order a MCRRA hearing more than 60 days after a notice of location is filed, the Board said at 250:

> ...Nothing in the language or this provision prevents BLM from issuing a notice that there will be a MCRRA hearing more than 60 days after a notice of location is filed. The only effect of a tardy notice from BLM is to relieve the claimant of the restriction that operations must be suspended pending hearing.

Therefore, BLM may order a hearing long after the notice is filed. However, the claimant will

not be required to suspend operations until after the hearing. The Board pointed out that simply filing under FLPMA, 43 U.S.C. 1744 (1988), is not sufficient to satisfy the requirement that such location notices must be notated that they are filed to satisfy the requirement of 30 U.S.C. 623 (MCRRA). As the Board said at 251:

> ....But with the enactment of 43 U.S.C. 1744 (1988), the huge annual volume of filings of notices of location, as well as affidavits of assessment work, obscures the possibility that those location notices are also being filed pursuant to other statutes unless some clear notification appears on the face thereof. To suggest that the filing of unidentified location documents would initiate the 60-day period provided by MCRRA during which BLM is required to give notice of intent to hold a hearing would be absurd.

Any copy of a notice of location filed more than 60 days after the date of location cannot be considered to have been filed. Therefore "a late notice can never be said to have been filed 'pursuant to section 623'" and "a mining claimant who fails to file timely

a copy of his notice of location waives any objection to the tardiness of a notice from BLM of intent to hold a hearing." *Id*. at 251.

**Lands Covered by License or Preliminary Permit Not Open to Location**

Lands which are covered by a license relating to a power project or a preliminary permit as prescribed by 30 USC 621(a) (1976) and issued by FERC are not open to mineral location. Any mining claim located on such land is void *ab initio* unless that land has been restored to entry in accordance with section 24 of the Federal Power Act, *supra*. *Lairy D. Brookshire*, 56 IBLA 73 (1981) *Robert A. Pettigrew*, 54 IBLA 257 (1981). Section 2 of the Mining Claims Restoration Act (30 USC 621(a)) provides in part:

> ... that nothing contained herein shall be construed to open for the purposes described in this section any lands (1) which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other act of Congress, or (2) which are under examination and survey by a prospective licensee of the Federal Power Commission, if such prospective licensee holds an uncanceled preliminary permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands and such permit has not been renewed in the case of such prospective licensee more than once.

As a general practice, when a mining claim is recorded pursuant to the Mining Claims Restoration Act, the BLM adjudicator sends a letter to FERC to determine if the lands embraced by the location are under a license, permit or preliminary permit. If FERC reports that the claim is located within such an area, the adjudicator issues a decision declaring the claim null and void *ab initio*.

**Lands within Power Project Withdrawal Are Close to Location**

In *J & J Building Supply*, 145 IBLA 196 (1998), the appellant located a mining claim in a power project withdrawal that replicates the site of a claim that was lost for failure to pay the claim maintenance fee. The Board said that Alands described in a preliminary permit or license for a power project remain closed to mineral entry, and claims located on those lands are null and void ab initio. Id. at 197.

The filing of a notice of an offer for forest exchange with the authorized officer and the notation of such proposed exchange on the public land records segregated the National forest System lands included in the proposed exchange from appropriation, location, or entry under the general mining laws for a period not to exceed 5 years. Mining claims located on these lands while the segregative effect is in force are null and void ab initio. 43 CFR. 2202.1(b); *Thomas Daubert*, 143 IBLA 186 (1998).

In *Ronald C. Daugherty*, 143 IBLA 41 (1998), the appellant had located his claim before the date the records were noted or the date the segregative effect of the Forest Exchange began. The Board found that the BLM decision was in error in finding the mining claim null and void ab initio.

**Claims within Preliminary Permit or Licensed Project**

In *Charles Q. Cassella*, 130 IBLA 338, 340-41 (1994), the Board reaffirmed that Public Law 359 did not open for location lands within an uncanceled preliminary permit. In *Ernest Smart*, 131 IBLA 44, 46 (1994), the Board held that Section 2(a) of MCRRA, 30 U.S.C. 621(a) (1988), which reopened lands withdrawn or reserved for power development to entry for location of claims, did not open lands which are included in a licensed power project.

**Claims Void Where Preliminary Permit Not Notated on Land Office Records**

The effect on land status from the filing of the application for a preliminary permit is the same as the filing of the application for a license for a proposed power project. It is authorized by section 24 of the Federal Power Act, 16 USC 818 (1970), that any lands of the United States included in any proposed project under the Act.

> ... shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the [C]ommission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located... *Also see* 43 CFR 2320.0-3.

It is the practice of the Interior Department when FERC has sent notice of the filing of an application for a preliminary permit or a license to the land office to notate the land office public land status records to show a withdrawal of the land as of the date of the filing of the application with the Commission. *See Instructions*, 51 LD 613 (1926). However, in *Foster Mining & Engineering Company*, 7 IBLA 305 (1972), the Board held that even though the "notice of the

application for the permit, and the application for a license was not made on the land office records of public land status," the claims must be declared null and void *ab initio* because they were located when the land was within the area under preliminary permit.

**Recordation of Location Notice**

The owner of unpatented claims located prior to the Mining Claims Rights Restoration Act of August 11, 1955, must record the location notice within one year of the date of the Act in the BLM state office that has jurisdiction over the lands on which the claim is located. However, such a claim must have been located at a time when the lands were open to location such as before the effective date of the powersite withdrawal.

The owner of an unpatented claim located after August 11, 1955, in a powersite withdrawal must record the location notice within 60 days of the location date. "For identification purposes only, the copy of the location notice or certificate, filed in the land office... should contain a notation that it was filed under the Act of August 11, 1955." 43 CFR 3734.1(c).

**Annual Filing of Assessment Work**

Within 60 days after the expiration of the annual assessment year, the claimant must file a statement as to the assessment work done or improvements made during the previous assessment year. 43 CFR 3734.1.

**Failure to Record Did Not Cause Loss of Claim**

In *McDonald v. Best*, 186 F.Supp. 219 (DC ND Cal 1960), the district court held that the Mining Claims Rights Restoration Act of 1955 did not authorize forfeiture of mining claims because of failure of the claim owner to file for record in the land office within a year after August 11, 1955, a copy of the location notice of the claim. Although the Act required the filing of such notice within one year, it provides no penalty for failure to file. The Court reviewed a number of cases involving recordation statutes and determined that actual notice is an adequate substitute for recordation. The Court said at 222:

> Unless the recording statute expressly negatives such construction, actual notice (or constructive notice by possession) is an adequate substitution for recordation.
>
> ... In the instant case, defendants have, at all pertinent times, had actual notice of plaintiff's claims.

The Court also indicated that if a recording statute does not provide for forfeiture in explicit terms, forfeiture will not be read into a recordation statute by the courts.

Shortly after the *McDonald v. Best* decision was issued, the Secretary considered another case where the claimant failed to record his claims with the BLM. *B. E. Burnaugh*, 67 ID 366 (1960). In *Burnaugh*, the Department accepted the Court's decision in *McDonald v. Best* and did

not void locations where there was a failure to record.

**Hearing Held to Determine if Placer Mining Will Interfere with Other Uses of the Land**

Section 2(b) of the Act provides that the "locator of a placer claim ... shall conduct no mining operation for a period of sixty days after filing of a notice of location." Upon receipt of a notice of location of a placer claim, a determination is made by the BLM on whether placer mining operations on the land may substantially interfere with "other uses of the land included within the placer claim." 30 USC 621(b).

If it is determined that placer operations may substantially interfere with other uses, a notice of intention to hold a hearing will be sent to each of the locators by registered or certified mail within 60 days from the date of filing of the location notice. If the claimant is not notified of a notice of intention to hold a hearing within 60 days of recording the notice of location, the BLM will probably take no further action on the case.

In *United States v. Steward*, 54 IBLA 67 (1981), the Board held that "other uses" was not restricted to power development but could include timber harvesting and recreational uses of the land. The Board said at 70:

> ... all uses of the land are to be considered in determining whether placer mining operations will substantially interfere with the use of the land. *United States v. Cohan*, 70 I.D. 178, 179 (1963). In fact, the decisions considering whether to prohibit placer claims on power site classifications have been concerned with uses other than power sites or power development. *United States v. Western Minerals & Petroleum, Inc*., 12 IBLA 328 (1973) (use of the land for watershed); *United States v. Bennewitz*, 72 I.D. 183 (1965) (use of the land for recreational purposes); United States *v. Cohan, supra* (use of the land for recreational and homesite purposes). On the basis of the language of section 621(b) and the Departmental decisions which interpret it, it must be concluded that the "other uses" to which that section refers are not restricted to power development or power sites. Therefore, placer mining which would substantially interfere with timber harvesting or recreational use of the withdrawn land is properly prohibited. The issue before us is not whether *appellant's* mining operations would substantially interfere with other uses of the land, but rather whether *normal* placer operations carried on without restriction would so interfere.

Placer mining may be prohibited if there is a likelihood of substantial interference with the use of the land for fishing, hunting, recreation and archaeological values. *See Boyd McGinn*, 25 IBLA 188, 190-91 (1976); *United States v. Connolly*, 40 IBLA 30 (1979).

The preservation of important and critical habitats for wildlife is also a use warranting the prohibition of mining from an area in accordance with the Restoration Act. *United States v. Weigel*, 26 IBLA 183 (1976). In *Weigel*, there was evidence that the area was an important breeding ground for summer chinook salmon and steelhead trout, a critical winter habitat for big game animals, and the area had great aesthetic value for recreation. However in *United States v.*

*Mineral Economics Corp.*, 34 IBLA 258 (1978), the Board distinguished the *Weigel* case from a case where the Government contended that mining would cause a loss of dove production. The Board said that the Government did not support its position with "specific information and evidence which would establish the impact of the loss of this area for dove production in relation to the loss of the area for mining should it be prohibited." The Board then said at 261:

> However, in this case no value is ascribed to the land except the use for dove production. The most that has been shown is an estimated possible loss of a breeding and nesting area that might produce approximately .11 of 1 percent of the 1976 total hunters' kill of over 2-1/2 million doves in the State of Arizona. We do not discount an accumulative affect of the loss of dove breeding and nesting habitats. However, we have nothing by the Government, other than a general statement that nesting and breeding areas are being reduced, which could establish that this area should be considered as an important, critical, vital, or significant habitat for the production of doves. This case is thus clearly distinguishable from the *Weigel* case.

**Options and Limitations on Mining**

If a hearing is to be held, mining operations shall be suspended until a hearing is held and an administrative law judge issues an order providing for one of the following:

1. a complete prohibition of placer mining;

2. a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or

3. a general permission to engage in placer mining.

**The Milender Cases**

In *United States v. Milender*, 104 IBLA 207 (1988), the Board affirmed in part, reversed in part and modified in part its earlier decision of *U.S. Forest Service v. Milender*, 86 IBLA 181, 191, 91 I.D. 175 (1985). This most recent Milender decision represents a major interpretation of the Mining Claim Rights Restoration Act.

**No Prohibition of Placer Mining on Basis Unrestricted Mining Adversely Affects Land Uses or Values**

In *United States Forest Service v. Milender*, 92 I.D. 175, 86 IBLA 181 (1985), the Board of Land Appeals reversed a long-standing Departmental interpretation of the Act of August 11, 1955 (P.L. 359). The presumption has been under decisions such as *Bennewitz* that the Secretary under the Act could not limit or condition the claimant's right to mine thus engendering the term "unrestricted placer mining.@ If it were determined at a hearing that unrestricted placer mining would substantially interfere with the lands other uses and/or values, a complete prohibition of

mining would be ordered.

In *Milender*, the Board determined that Areliance on the term 'unrestricted placer mining' is unwarranted and conceptually improper." The term does not appear in the statute or its implementing regulations at 43 CFR Subpart 3730. The Board recognized that there is no such thing as unrestricted placer mining on the public lands of the United States. Today, placer mining statutes and regulations as well as judicial and administrative precedent restrict mining. In arriving at its decision the Board overruled in part *United States v. Cohan*, 70 I.D. 178 (1963).

The Board held that it is error to premise a P.L. 359 determination on the potential consequences of a hypothetical "unrestricted" or Aworst case@ placer mining operation. The proper standard of evaluating the potential effect of placer mining on other land use is the extent to which legal, normal, operations, subject to regulatory restraint, might interfere with such uses.

Since all land has some use or value which extensive placer mining operations would substantially interfere, placer mining has been prohibited in almost every case. However, this is contrary to the intent of Congress because powersite lands were already closed to mining, and the purpose of Public Law 357 was to open them to mining.

**General Permission to Engage in Placer Mining**

The most liberal alternative under PL 359 is "general permission@ to engage in placer mining. A Ageneral permission" to engage in placer mining means that Amining, development, beneficiation, removal, and utilization of the mineral resources of such lands * * * [are] all to be carried out under existing laws regulating such activities.@ *United States Forest Service v. Milender*, 104 IBLA 207, 214 (1988).

**Mining with Reclamation**

Under Section 2 of the Mining Claims Rights Restoration Act, the Interior Department has the "authority to precondition mining plan approval on the return of mined acreage to its pre-mining condition.@ *Id*. at 230. The issuance of an order requiring restoration of the surface to the condition that existed before mining "may prevent the most damaging effects of mining precisely because the costs of conducting the clean-up operation would exceed any profit obtained. By requiring restoration, the Department forces the mining claimant to absorb certain environmental costs. His right to mine the claim is made subordinate to his obligation to restore the surface upon the completion of mining. If this obligation ultimately precludes development of the claim, the claimant has no cause for complaint, since he has no right to mine unless and until he agrees to restore the land.@ *Id*. at 231. The Board also indicated that Ano costs can be attributable to the ultimate destruction of the surface because the claimant is required to restore the surface to the same condition which existed prior to mining.@ *Id*.

**Competing Uses Must Be Substantial if Used to Prohibit Mining**

In determining whether placer mining should be allowed under PL 359, the United States

must Asufficiently establish such a substantial use of the land for uses other than mining which warrants a prohibition of mining.@ 92 I.D. 175, 262 (1985). AAnd central to the balancing test to be applied is the concept that competing uses must be substantial if they are to be used to prohibit placer mining.@ 104 IBLA 207, 216. In other words "mining could be prohibited if the Secretary determined that mining would substantially interfere with other uses. *Id*. at 216.

**Substantial Interference with other Uses Does Not Require that Mining Be Prohibited**

A* * * But even should the Secretary find there to be substantial interference with other uses, nothing in the Act or in the legislative history of the Act prevents the Secretary from granting 'general permission to engage in placer mining,' provided that such an order be 'appropriate.' Such an order would be 'appropriate,' we find, when the competing surface use has less significance than a proposed placer mining operation. This requires that the importance of the competing interests be compared and judged on whatever grounds are relevant in the individual case.@ *Id*. at 216.

**Weighing Process or Balancing Test to Determine Substantial Interference**

In determining whether substantial interference had occurred, the decision in each case "must reflect a reasoned and objective evaluation of the potential detriments and benefits accruing from placer mining operations, with due regard for the extent to which such operations may be controlled, inhibited and/or mitigated by existing law and regulations.@ 92 I.D. at 188; 104 at 217. The "Department was required to undertake a weighing process in which the benefits of mining were to be set off against the injury to the other uses of the land.@ 104 at 218. "The

question in each case must therefore be whether the relative value of the land for full-scale mining can be calculated so as to exceed the value of the land for other purposes." *Id*.

**Mining Allowed Where Benefits of Mining Outweigh Benefits of Other Uses**

In *United States v. Phyrne Brown*, 124 IBLA 247 (1992), a case where BLM was directed to issue an order for a complete prohibition of mining, the Board described the balancing process to determine if mining should be allowed or prohibited:

> To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of 30 U.S.C. 621 (1988), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. *U.S. Forest Service v. Milender*, 104 IBLA 207, 218, 95 I.D. 155, 161 (1988). Mining may be allowed where the benefits of mining outweigh the benefits to other uses.

In the *Brown* case, the claims occupy a portion of the Merced River in California which was designated as a potential addition to the National Wild and Scenic River System in 1987. Even though the claims were located before the withdrawal, they are still subject to 30 U.S.C. 621 (1988) so the Board said it was proper to "determine whether placer mining operations

would substantially interfere with them." *Id*. at 253. The primary competing use to the land is recreational activity. This includes white water rafting, camping, fishing, picnicking, hiking, biking and swimming, involving approximately 10,000 visitor use days producing about $1,250,000 to $1,500,000 worth of income each year.

In *U.S. v. Robert G. McEwen*, 129 IBLA 99 (1994), the Board upheld a BLM decision that placer mining on land subject to a powersite withdrawal would interfere with recreational use of the land. Furthermore, the benefits of mining were outweighed by the benefits derived from recreational use.

**Factors Not Computed in Balancing Test**

The following factors are not computed within the balancing test. *Id*. at 228-29:

1. The removal of land from the forest base is not included because the claimant is responsible for returning land to its condition prior to mining.

2. The value of standing timber which is presently merchantable because claims located after the Surface Resources Act of July 23, 1955, can be harvested prior to mining.

All other timber that has not reached maturity would be a loss and timber that could not be grown on the land while mining was taking place would also be a loss. *Id*. at 229.

**Bonding Where Mining with Reclamation Is Required**

If a limited order (mining with reclamation) is issued by the Administrative Law Judge, the regulations in 43 CFR 3738.1 require the mining claimant to provide a bond. The amount of the bond is to be set by the ALJ Afor the purpose of assuring surface reclamation after mining is complete.@ *Id*. at 231.

**Hearing Is Discretionary**

Under PL 359, "the Secretary may hold a hearing to determine whether placer mining operations would substantially interfere with other uses of land included within a placer claim, although he need not do so.@ *Id*. at 216.

**Mining Claimant Has Burden of Proof**

The mining claimant bears the ultimate burden of showing by a preponderance of the evidence that benefits resulting from placer mining outweigh the injuries caused by mining to other uses of the land. The Government is required to put on a *prima facie* case that placer mining will substantially interfere with other uses of the land and then the burden devolves to the claimant to overcome this showing by a preponderance of the evidence. If he or she is unable to do so, for any reason, placer mining operations may properly be prohibited. 104 IBLA 207, 236-37.

**Powersite Withdrawals Not Affected by Injunction**

If the Federal Energy Regulatory Commission (FERC) does not object to the termination of a powersite classification made under sec. 24 of the Federal Power Act of 1920, as amended, 16 U.S.C. 818 (1982), BLM is required to restore the land to entry by revoking the withdrawal. The preliminary injunction order issued in *National Wildlife Federation v. Burford*, Civil No. 85-2238 (D.D.C. Feb. 10, 1986); *Aff=d* 835 F.2d 305 (D.C. Cir. 1987) did preclude the BLM from terminating powersite withdrawals because Aif statutory authority exists, other than FLPMA, to reclassify, modify, or terminate classifications, that statutory authority may still be used" (*Solicitor's Memorandum* of March 10, 1986, at 2); *James A. Maleski*, 102 IBLA 175, 179 (1988).

**Failure to Notate Records that Claim Is in Powersite Withdrawal When Recording Under FLPMA**

Under P.L. 359 (16 U.S.C. 792 *et seq.*; Act of August 11, 1955), owners of mining claims and sites had to identify these locations as being on land subject to these Acts. Failure to notify the BLM is not a fatal defect under FLPMA and does not cause the mining claim or site to be rejected. The 60-day period for prohibition of mining on placer claims shall start when the BLM discovers that the placer claim is located in a powersite withdrawal. *BLM Manual* 3833.12F.

**Financial Liability and Power Rights Reservation**

Section 3 of the Mining Claims Rights Restoration Act provides that prospecting and exploration within a powersite withdrawal shall be at the financial risk of the party or parties conducting the work. Furthermore, patents issued for location within powersite withdrawals must contain a reservation to the United States, its permittees or licensees of "the right to enter upon, occupy and use, any part of the lands for power purposes without any claim or right to compensation accruing to the locator or successor in interest from the occupation or use of any of the lands within the location, for such purposes." 43 CFR 3731.1. In addition, the patent must contain the following provision:

> The United States, its permittees and licensees shall not be responsible or held liable or incur any liability for the damage, destruction, or loss of any mining claim, mill site, facility installed or erected, income, or other property or investments resulting from the actual use of such lands or portions thereof for power development at any time where such power development is made by or under the authority of the United States, except where such damage, destruction, or loss results from the negligence of the United States, its permittees and licensees.

**XI. Public Water Reserves**

Numerous public water reserves are scattered across the public lands in the western states. By *Executive Order* of April 17, 1926, it was ordered "that every smallest legal subdivision of the public-land surveys which is vacant, unappropriated, unreserved, public land

and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry and reserved for public use" (43 CFR 2311.0-3) in accordance with the provisions of section 10 of the Act of December 29, 1916, 39 Stat. 865; 43 USC 300.

By *Executive Order* 5389 of July 7, 1930 as amended by *Public Land Order* 399 of August 20,1947, the same withdrawal criteria were applied to hot springs, or springs of water which possess curative properties provided by the Act of March 3,1925; 43 Stat. 1133; 43 CFR 2311.0-3(b).

The Act of March 3, 1925 (43 Stat. 1133; 43 USC 971) authorizes the issuance of leases for tracts of land near or adjacent to mineral, medicinal, or other springs located upon unreserved public lands or lands withdrawn for the protection of springs. These leases are issued for a duration of 20 years for the purpose of constructing bathhouses, hotels, or other improvements. Although 30 USC 300 was repealed by section 704a of FLPMA on October 21, 1976 (90 Stat. 2792), the following clause was not repealed:

> That the withdrawal from entry of lands necessary to insure access by the public to watering places reserved hereunder shall not apply to deposits of coal and other minerals in the lands so withdrawn, and that the provisions of section 299 of this title are hereby made applicable to said deposits in lands embraced in such withdrawals heretofore or hereafter made, but any mineral location or entry made hereunder shall be in accordance with such rules, regulations, and restrictions as may be prescribed by the Secretary of the Interior.

## XII. Reclamation Withdrawals

Section 3 of the Reclamation Act of June 17, 1902 (32 Stat. 388; 43 USC '416) provided for withdrawal of land for irrigation projects. Although these withdrawals segregated the land from mineral entry, the Act of April 23, 1932 (47 Stat. 136; 43 USC '143) authorizes the Secretary of the Interior, at his discretion, to open reclamation withdrawals to mining location and patent under the general mining laws. Prior to locating a mining claim within a reclamation withdrawal, an application to open land to location must be made according to the procedure given in 43 CFR Subpart 3816. Approximately seven million acres of land administered by the Bureau of Reclamation are in this category.

### First Form and Second Form Withdrawals

Section 3 of the Act of June 17, 1902 (32 Stat. 388; 43 USC 416) authorizes the withdrawal of lands from all disposition for construction and maintenance of irrigation projects and withdrawal of land susceptible to irrigation from a project. By administrative interpretation (33 LD 607, 1905) these withdrawals were considered to be of two types: (1) "Withdrawals under the first form" are those that may be necessary for use in construction and maintenance of irrigation works. After withdrawal, first form withdrawals "cannot be entered, selected, or located in any manner so long as they remain so withdrawn." 433 CFR 2322.1-1. "Withdrawals

under the second form" apply to those lands that are not needed for the construction and maintenance of irrigation works, but may possibly be irrigated from such works. "Second form" withdrawals were left open to the homestead laws. Secretary's instructions of October 6, 1906 (35 LD 216) were to the effect that no mineral entry should be allowed on "first form" withdrawals. Because "second form" withdrawals permitted homesteads, and since homestead lands were subject to mineral entry, all "second form" lands would be subject to mining location. *M. G. Johnson*, 78 ID 107 (1971).

**First Form Withdrawals Closed to Mineral Entry**

"First form" reclamation withdrawals made under the authority of the Reclamation Act of June 17, 1902 (32 Stat. 388; 43 USC 416) withdrew land from location, entry, and patent under the general mining laws. Any mining claim located subsequent to the date of the effective date of the withdrawal is null and void *ab initio. William C. Reiman*, 54 IBLA 103 (1981); *Susan E. Mitchell*, 53, IBLA 42 (1981).

**Location is Subject to Contract and Reservations in Patent**

The Act of April 23, 1932 (47 Stat. 136, 137; 43 USC 154) authorizes the Secretary of the Interior, at his discretion, to open lands withdrawn under the federal reclamation laws to location and patent under the general mining laws if such lands are known or believed to be valuable for minerals. To protect the interests of the Federal government relative to the withdrawal, the Secretary is authorized to reserve "such ways, rights, and easements over or to such lands as may be prescribed by him," and may require the execution of a contract by the intending locator before vesting in rights in him if necessary to protect irrigation interests. Any subsequent location made on such lands shall be subject to the terms of the contract and (or) reservations and any patent issued shall contain a reference to the contract and (or) reservations.

**No Restoration for Nonmineral Entries**

Reclamation withdrawals may not be opened under the Act of April 23, 1932, for nonmineral entries such as mill sites, unless other considerations are involved. For example, if a reclamation withdrawal is open to mining location, it is necessary that each 10-acre subdivision be mineral in character but it is not required that every acre of the 10-acre tract be mineral in character. Consequently, where. a tract of land is open to mining location and part of the land is nonmineral in character, that part of the land can be included in a mill site. *Rex N. and Mildred B. Anderson*, A-29881, 71 ID 140 (April 24, 1964).

**Withdrawal Authority Repealed by FLPMA**

The portion of section 3 of the Reclamation Act authorizing the Secretary to withdraw lands required for any irrigation works was repealed effective October 21, 1976, by section 704(a) of FLPMA, 90 Stat. 2792. However, this repeal did not affect reclamation withdrawals existing on this date, which are expressly continued, subject to review by the Secretary under

section 204 of FLPMA, 43 USC 1714 (1976).

**Application Procedure for Restoration**

The Act of April 23, 1932 (47 Stat. 136; 43 USC 154) gives the Secretary of the Interior discretionary authority to open to location, entry and patent lands that are included within the boundaries of a reclamation withdrawal. The procedure for making application to open reclamation withdrawals to mining location is contained in 43 CFR 3816.2:

1. Applications may be filed by a person, association, or corporation qualified to locate and purchase claims under the general mining laws.

2. The application must be filed in duplicate in the state office of the Bureau of Land Management.

3. The lands desired for location must be described by legal subdivision if surveyed, or by metes and bounds if unsurveyed.

4. The application must include the facts upon which is based the knowledge or belief that the lands contain valuable mineral deposits. The following information must be furnished:

    a. Description of general geology.

    b. Description of the mineral deposit, including areal extent, thickness, and character.

    c. Description of the quantity (reserves) and quality (grade) of the mineral deposit.

    d. Description of all workings and improvements on the subject lands.

    e. Description of the proposed mining and reclamation plan.

5. Each application must be accompanied by a $10 nonrefundable service charge.

**Agency Processing of Application**

When the application is complete, the Bureau of Land Management transmits the case to the Bureau of Reclamation with a request for report and recommendations. If the Bureau of Reclamation makes an adverse report on the application, the application will be rejected, subject to the right of appeal.

If the withdrawal is terminated or partially terminated, it is accomplished by a public land order signed by the Secretary of the Interior and published in the *Federal Register*.

**Rejection of Application for Restoration**

Ordinarily an application to restore land within a reclamation withdrawal to mineral entry will be rejected by the BLM where the Bureau of Reclamation makes an adverse report and recommends against restoration. 43 CFR 3816.3; *Surprise Venture Associates*, 7 IBLA 44 (1972). However, a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted on appeal by the appellant's showings and willingness to propose terms and conditions to protect the Government's interest. *Id*.

There is authority for the Department to take certain protective measures to mitigate possible environmental or other harm. The Act of April 23, 1932, *supra*, leaves it to the discretion of the Secretary of the Interior, "when in his opinion the rights of the United States will not be prejudiced thereby" to open lands withdrawn for reclamation purposes which "are known or believed to be valuable for minerals and would, if not so withdrawn, be subject to location and patent under the general mining law."

In *Joe Ashburn*, 66 IBLA 328 (1982), the Board considered an application under the Act of April 23, 1932 (43 USC 154,) to restore lands in a reclamation withdrawal to mineral entry. Although the BLM rejected the application based on a recommendation from the Bureau of Reclamation, the Board remanded the case back to BLM because such a recommendation must be based upon the public interest and reasons must be given to support the recommendations. The Board noted that there was no basis given for rejection in this case and that no objection was given to granting the application.

In *G. W Daily*, 34 IBLA 176 (1978), the Board remanded a case back to the BLM for further examination of the mineral deposit to ascertain if there are conditions under which the area could be restored to entry. The Board said:

> Appellant alleges that there is a valuable deposit of uranium. His application showed certain facts tending to corroborate this assertion. He appears willing to suggest proposals for a contract or reservations whereby his activities will not be harmful to the environment or prejudice the interests of the United States. He has done so in a general way. We believe this case should be remanded, as in *Surprise Ventures*, for an appropriate mineral examination and evaluation. Also, appellant may make more specific proposals and suggestions to the Bureau of Reclamation for conditions and terms to be imposed if the land were to be opened for mineral entry. The report of the mineral examination should be forwarded to the Bureau of Reclamation for its consideration and further recommendations on appellant's application. Upon such further report from that Bureau, BLM may take further appropriate action.

**Lands Must Be Known or Believed Valuable for Minerals**

The Act of April 23, 1932, as amended, 43 USC 154 (1970), authorizes the Secretary of

the Interior "in his discretion" to open to "location, entry, and patent under the general mining laws" public lands which have been withdrawn "for possible use for construction purposes under the Federal reclamation laws. Before the Secretary may exercise his discretion, the statute requires that the land must be "known or believed to be valuable for mineral" and that the rights of the United States must not be prejudiced.

The regulations concerning application under 43 USC 154 (1970) are set out at 43 CFR Subpart 3816. These regulations contain at 43 CFR 3816.2 the following requirements, among others:

> The application... must set out the facts upon which is based the knowledge or belief that the lands contain valuable mineral deposits, giving such detail as the applicant may be able to furnish as to the nature of the formation, kind and character of the mineral deposits. ...

In *Joe Ashburn*, 27 IBIA 229 (1976), the Board discussed in detail the types of evidence and facts necessary to demonstrate the "knowledge or belief the lands contain valuable mineral deposits:"

> Appellant has submitted no information concerning the nature of the formation, kind and character of the alleged mineral deposits. Instead, he merely stated that gold and silver are contained in water, sand and clay in the withdrawn area. The regulation, however, requires more than such an unsupported statement. Rather, it requires that the "facts" upon which the knowledge or belief is based be set out in some detail. On appeal, he contends that the 1941 Bulletin relied on by BLM is out of date and does not reflect more recent advances in metallurgy and technology, but he gives no specific information regarding such changes which might support his position. The assay reports submitted on appeal might offer some support to his belief that minerals may be recovered from the withdrawn lands if he related the character of the land sampled to that of the land sought to be opened to mining location. However, he gives no information which could relate these samples to an economic recovery of minerals from any portion of the withdrawn lands.
>
> In addition to showing a basis for his belief that there are valuable mineral deposits, the "facts" should also show how the deposits are "valuable." This connotes some showing concerning economic feasibility of extracting and disposing of the minerals. The application is deficient in this respect as well as failing to show facts which would serve as a basis for establishing a belief that minerals do, in fact, exist within the withdrawn lands. There is no other record information to support appellant's belief. Therefore, since his application fails to set out facts, rather than merely a statement of his belief, we affirm the rejection of the application.

**Claim Located Prior to Revocation of Withdrawal**

In *Lynn H. Grooms*, 99 IBLA 237 (1987), the BLM received a patent application for a mining claim which had been located in a first-form reclamation withdrawal. The withdrawal was opened to mineral entry as of 10:00 a.m. on July 22, 1983, pursuant to a public land order. On August 18, 1983, the BLM received a copy of the appellant's notice of location with a notation by the deputy county clerk that it was recorded on July 22, 1983, at 8:00 a.m. The BLM declared the claim null and void *ab initio* and rejected the patent application because the claim was located while the withdrawal was still in effect.

In the notice of appeal, the claimants stated they reposted the claims after the withdrawal was revoked to cure the invalidity. The Board responded that the reposting would not validate the original claim. *Id*. at 240.

**Contract by Bureau of Reclamation Does Not Open Lands to Entry**

In *Paul J. Des Fosses*, 102 IBLA 169 (1988), a claimant contended that a contract he signed with the Bureau of Reclamation (BOR) opened the lands to mining claim location. The Board pointed out that although BOR has the Arole of deciding whether opening the withdrawn land is consistent with the irrigation interests of the United States@ and also sets necessary conditions in the form of a contract if opening is recommended. The BOR itself does not have authority to open public lands to mining. *Id*. at 173. Furthermore, Athere is nothing in the terms of the statute or the regulations which would support construing the contract itself as opening the lands to entry.@ *Id*. at 174. Even though the BOR recommends the termination of a withdrawal, a mining claim may not be located until the actual revocation of the withdrawal. *Robert K. Foster*, A-29857 (June 15, 1964) *Aff=d, Foster v. Jensen*, 296 F. Supp. 1348 (S.D. Cal. 1966).

**Bureau of Reclamation Recommendation Should Be Based on Site Specific Determination and Mitigation Measures**

On many appeals concerning the denial of petitions to open reclamation withdrawals to mining claim location, the Board has noted that the Bureau of Reclamation is unresponsive in its recommendations. In *Robert Limbert*, 104 IBLA 154 at 159, 160 (1988), the Board described how the BOR should make its recommendation:

> The BOR recommendation on remand restates its previous objections without addressing the issue of whether the interests of the United States could be protected by limiting mining and related activities on the lands. In many cases, these interests can be protected by a limitation on use set forth in the order opening the lands, by restrictive covenants and bonding requirements contained in a contract to be executed by the party desiring to conduct mineral exploration, development, or extraction activities on the land, and enforcement of existing state and Federal law. Thus, a determination that the land should not be opened to mineral entry should be based on a site-specific determination, and take into consideration such mitigating measures as may be legally imposed to protect the irrigation interests.

**Record Inadequate to Support Decision Rejecting Restoration Application**

In *Kenneth Carter*, 98 IBLA 100 (1987), the Board considered an appeal from a BLM decision rejecting an application to restore land withdrawn for reclamation purposes to mineral entry. In its rejection, BLM had followed the report of the Bureau of Reclamation which recommended against restoration of the land to mineral entry. Where the Bureau of Reclamation recommends against restoration, the BLM is required to reject the application 43 CFR 3816.3. The Board concluded that BLM acted in an arbitrary and capricious manner and remanded the case to BLM because the "record is not adequate to support denial of the appellants application."

On remand the Board instructed the BLM to "seek additional information from the Bureau of Reclamation regarding how location, entry, and patent under the general mining laws would pose a threat of water-quality degradation or otherwise be contrary to the public interest, as well as whether necessary or appropriate reservations could be devised to protect the public interest or whether appellant could be required to execute a contract to protect irrigation interests.@ *Id*. at 103.

**Remand to BLM When Applicant Alleges Mineral Values and Is Willing to Accept Restrictions**

In *John Yule*, 96 IBLA 379 (1987), the BLM had rejected an application to open lands to mineral entry that were under a first-form reclamation withdrawal. The Board remanded the case to BLM for a mineral examination to determine Awhether the lands are known or believed to be valuable for minerals, and for further consideration by the Bureau of Reclamation of whether and how the rights of the United States may be protected by reservation of rights in the document opening the land to entry.@ *Id*. at 383. It has been the policy of the Board to remand this type of case "where the applicant (1) alleges the lands contain valuable minerals and (2) appears willing to accept necessary restrictions on his operation and to conduct the mineral operations in a way that will not harm the interests of the United States." *Id*. at 382.

**On-site Examination Not Desirable to Determine Whether Lands Are Valuable for Minerals**

*Robert Limbert*, 104 IBLA 154 (1988) was a case remanded to BLM for a determination of whether the land was valuable for minerals. BLM geologists sampled the placer deposit and concentrated the samples using a "Denver Gold Saver" and assayed the samples for free gold by amalgamation. Upon review of the BLM mineral report covering the investigation, the Board said at 160 and 161:

> ..... It was not our intent to require an onsite physical examination sufficient to determine whether a discovery of a valuable mineral deposit existed within the land described in the application. Such examination is both unnecessary under 43 U.S.C. 154 (1982) and inadvisable. Rather, it was our intent to have BLM determine whether the lands were 'known or believed to be valuable for minerals. * * * For example, a determination that lands are "believed@ to contain valuable minerals could be made by geologic inference.

There need not be a physical exposure of mineral in place in sufficient quality and quantity to support a discovery.

**Failure to Perfect Location by Performance of Conditions in Opening Order**

In *Thomas L. Lee*, 98 IBLA 149 (1987), the Board affirmed a BLM decision declaring a mining claim null and void *ab initio* where the claimant failed to comply with a Secretarial order opening lands to mineral location. On August 21, 1909, the land on which the mining claim was located was withdrawn from public entry under a first form reclamation withdrawal. On September 16, 1939, the Secretary opened these lands to mineral entry pursuant to the Act of April 23, 1932. The order provided that the lands were Aopened to location, entry, and patent under the general mining laws, subject to the terms of the following stipulation to be executed, acknowledged, and recorded in the county record, and in the United States land office by applicant, before any rights attach in his favor...@ The appellant's claim was located September 9, 1969, before the land was again withdrawn from location on September 9, 1969. BLM declared the claim null and void *ab initio* because the public records showed no stipulation had been filed as required by the 1939 order. In affirming the Board said that "it is well settled that when a location was not perfected by performance of a condition precedent set forth in the order opening the lands in a reclamation withdrawal to mineral entry pursuant to sec. 1 of the Act of April 23, 1932.... such mining claims are properly declared null and void *ab initio*.@ *Id*. at 151.

Claims Voided for Failure to Comply with Condition in Opening Order

In American Colloid Co., 128 IBLA 257 (1994), the BLM declared mining claims located in a first-form reclamation withdrawal null and void ab initio because of failure of the owner to file a stipulation required in a 1954 opening order. Also See Red Mountain Mining Co., 85 IBLA 23, 26 (1985). As the Board said at 261, "[i]t is the essence of a condition precedent that unless the condition is performed, no estate will vest."

**XII. Recreation and Public Purposes Act**

The Act of June 14,1926 (44 Stat. 741), as amended by the Act of June 4, 1954 (68 Stat. 173; 43 USC 869) commonly known as the Recreation and Public Purposes Act, authorizes the Secretary of the Interior to lease or convey public lands for recreational and public purposes. These public lands may be determined to be suitable for lease or sale under the Act by BLM motion in response to demonstrated public needs for public lands for recreational or public purposes during the planning process as described in section 202 of FLPMA. 43 CFR 2741.4.

**Classified Lands Not Open to Mining Location**

Lands classified under the Act for lease or disposition are not subject to mining locations and mining claims located on such lands are properly held null and void *ab initio*. *C. V Armstrong*, A-30889 (Feb. 28, 1968); *Gloria Ann Sandvik*, 73 IBLA 82, 84 (1983); *Ronald R. Graham*, 77 IBLA 174, 177 (1983). The Recreation and Public Purposes Act, *supra*, provides that lands classified for disposition "may not be appropriated under any other public land law unless the Secretary revises such classification or authorizes the disposition of an interest in the lands under other applicable law." 43 USC 869. The Department considered this language as it relates to mining claims on recreation and public purposes classified lands in *R. C. Buch*, 75 ID 140, 146 (1968), saying:

> If we were to hold in this case that the classification action was not effective to segregate the land despite the action taken, the intent of Congress to have such land free from appropriation under other public land laws would be frustrated. ...Thus, we must conclude that as there was a classification of the land under the Recreation and Public Purposes Act, it was effective to segregate the land from mining location.

That decision was upheld on appeal in *Buch v. Morton*, 449 F.2d 600, 605 (9th Cir. 1971), where the court stated:

> The reason for barring appropriation under the mining laws of lands classified for recreational or other public use was to prevent the defeat of the proposed disposition of a particular tract under the Recreation Act by locations, entries, or the acquisition of other interests after such classification.

A classification of land for disposition under the Recreation and Public Purposes Act segregates the lands from mineral location even if the classification is not published in newspapers or the *Federal Register* and is only noted on the land office supplemental plat. *R.C. Buch*, 75 ID 140 (June 4, 1968).

**Classified Lands Still Segregated After 18 Months**

The Act and implementing regulations provide that if no application is filed within 18 months from the issuance of the notice of classification, the Secretary shall restore the land for appropriation under the public land laws. However in *R..C. Buch, supra*, the Board held that such a provision is not self executing and the lands remain segregated from mineral location after the 18 month period, even if no action has been taken to restore the lands to appropriation under the mining laws. *Delmer McClean*, 40 IBLA 34 (1979); *Ronald R. Graham*, 77 IBLA 174, 177 (1983).

**Leasable Minerals**

Leasable minerals (30 USC 181 *et seq*.) are not affected by classifications under the Recreation and Public Purposes Act and such minerals may be leased even if the lands are

patented.

## XIV. Small Tract Act

Lands classified under the Small Tract Acts of June 1, 1938 (52 Stat. 609), as amended by the Act of June 8,1954 (68 Stat. 239; 43 USC 682a) are segregated from location or entry under the mining laws, unless provided otherwise in the order of classification. 43 CFR 2091.3-2. However, leasable minerals may be leased as provided by 30 USC 181 *et seq*.

### Effect of Classification

Classification of land as suitable for transfer under the Small Tract Act by Secretarial Order is sufficient to segregate lands from mineral entry and invalidate from the beginning any mining claim located after the effective date of the Act. *Osborn v. Hammit*, 377 F. Supp. 977 (DC Nev 1965). In *United States v. Harry E. Nichols*, A-28463, 68 ID 39 (1961), the Deputy Solicitor concluded that where an application is filed by a Small Tract applicant who gains a preference right to a lease or purchase of the tract as a result of the classification, a mineral location made after the application was filed but before the land was classified becomes invalid if the land is classified for Small Tracts pursuant to the application. *See Frank Melluzzo*, 72 ID 21 (1965).

### FLPMA Repeal of Small Tract Act

The Small Tract Act and regulations (43 CFR 2091.3-1) have been repealed by Section 703 of FLPMA (90 Stat. 2789). However, Section 7018 of FLPMA, 43 USC 1701 provided that "all withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under provisions of the Act or other applicable law." *Ernest L. Brewington*, 73 IBLA 167 (1983). Therefore, no new lands will be classified under the Act but existing withdrawals will continue as indicated above.

## XV. Special Use Permits: Forest Service

Special use permits issued by the Forest Service are open to entry under the mining and mineral leasing laws unless formal action by the Secretary of the Interior or some statutory authority was involved. The most recent Interior decision on this subject concerned a mining claim located after the grant of a special use permit by the Forest Service to the Oregon State Game Commission. *United States v. Williamson and Lapine Pumice Co*., 45 IBLA 264 (1980). In this case the Board held that "the Secretary of Agriculture, as a general matter, is neither expressly nor impliedly authorized to withdraw unimproved national forest lands from mineral location. *See* generally *United States v. Foresyth*, 15 IBLA 43, 49-54 (1974); *United States v. Bergdal*, 74 ID 245, 249-52 (1967); *United States v. Crocker*, 60 ID 285 (1949)." For the same reasons, the Board has also held that a special use permit does not prohibit mineral leasing of the land if the Government decides to lease it. *Raymond J. Hansen, Mrs. Louise Safarik*, A-30412 (August 27, 1965).

A transmission line right-of-way issued under the authority of 16 US 522 does not segregate from mineral entry. *A. W. Schunk*, 16 IBLA 191, 81 ID 401 (1974). A free use permit issued by the forest service to a state agency to remove mineral materials from public land also does not constitute a withdrawal or serve to segregate the land from appropriation under the mining laws, as does a material site right-of-way issued pursuant to the Federal-Aid Highway Act. *United States v. McClarty*, 17 IBLA 20, 81 ID 472 (1974).

**XVI. Stock Driveways**

The reservation of driveways for stock is authorized by the Act of December 29, 1926 (39 Stat. 862), as amended by the Act of January 29, 1929 (45 Stat. 1144; 43 USC 300; 43 CFR 3815), to insure access by the public to watering places and areas needed for the movement of stock to summer and winter ranges or shipping points. Stock driveways are open to mineral leasing and are subject to mineral entry under the mining law; however, any claim located after the effective date of a stock driveway withdrawal would be subject to the stock driveway. All prospecting and mining operations shall be conducted in such a manner as to cause no interference with the use of the surface of the land for stock driveway purposes. 43 CFR 3815.2.

**Patents**

Every application for patent for any minerals located subject to the Act must bear on its face, before being executed by the applicant and filed, the following notation (43 CFR 3815.8):

> Subject to the provisions of section 10 of the Act of December 29, 1916 (39 Stat. 862), as amended by the Act of January 29, 1929 (45 Stat. 1144).

**XVII. Taylor Grazing Act**

The Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), authorizes the Secretary of the Interior to create grazing districts from any part of the vacant and unappropriated public domain, which in his opinion is chiefly valuable for grazing. Lands in national forests, national parks, and monuments or Indian reservations may not be included in such districts.

Section 6 of the Act says that "[n]othing herein contained shall restrict the acquisition, granting or use of permits or rights-of-way within grazing districts under existing laws; or ingress or egress over the public lands in such districts for all proper and lawful purposes; and nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing or patenting the mineral resources of districts under law applicable thereto." *See* 55 L.D. 70.

Annual grazing permits issued pursuant to the Taylor Grazing Act constitute a mere privilege to graze livestock; and this privilege can be withdrawn without the payment of compensation. *Mollohan v. Gray*, 413 F2d 349 (CA Ariz 1969).

## XVIII. Wild and Scenic Rivers System

The Wild and Scenic Rivers Act, 16 USC 1271 *et seq*. (1976), was passed by the 90th Congress on October 2, 1968. The purpose of this Act was to preserve in a free-flowing condition selected rivers which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish, and wildlife, historic, cultural or other similar values. In the law, eight rivers were designated as components of the system; and 27 more rivers were designated for potential addition to the Wild and Scenic Rivers System. The law also authorizes the Secretary of Agriculture and the Secretary of the Interior to submit proposals to Congress for additional rivers to the system.

### Land Areas Withdrawn

Lands constituting the bed or bank or within one-quarter mile of the bank of any designated or potential additional river are specifically withdrawn from mineral entry as stated in 16 USC 1280:

> The minerals in any Federal lands which constitute the bed or bank or are situated within one-quarter mile of the bank or any river which is listed in section 1276(a) of this title are hereby withdrawn from all forms of appropriation under the mining laws during the periods specified in section 1278(b) of this title.

### Rivers Designated for Potential Addition

The rivers designated for potential addition to the Wild and Scenic Rivers System are withdrawn from all forms of appropriation under the mining laws for a period of five to eight years from the date of the Act while they are under consideration for inclusion into the system. The time elements spelled out in the original Act provided for a temporary withdrawal for 5 years after the date of the Act and for an additional period of 3 years in the case of study rivers. The original 5-year withdrawal period was extended for an additional 5 years to read "during the ten-year period following October 2, 1968" by an amendment to the Act. P.L. 93-279; Act of May 10, 1974; 16 USC 1278(b)(1) (1976).

The terms of the original Act clearly withdrew all designated and potential addition river areas through October 2,1973, and the cited amendment extended that withdrawal through October 2, 1978. It was not necessary for rivers named as potential additions to formally become a part of the National System to be allowed the same withdrawal protection. *Walter B. Freeman*, 25 IBLA 150 (1976).

The Act requires set procedures including written notice to Congress and publication in the *Federal Register* before either a formal approval or disapproval can be consummated. 16 USC 1275, 1278. *J. Pat Kaufman*, 71 IBLA 183 (1983).

In *Walter B. Freeman*, 25 IBLA 150 (1976), the Board held that "16 USC 1280(b) does

not operate to withdraw minerals in land near the tributary of a river designated as a potential addition to the Wild and Scenic Rivers System where tributaries are not expressly included."

**Patents**

Patents issued for valid existing claims at the date of the Act will convey only title to the mineral deposits with rights to use only that part of the surface necessary for mining operations.

**Patent Application for Claim in Wild and Scenic River**

In *Estate of John M. Lighthill*, 147 IBLA 25 (1998), the Board considered an appeal where the appellant had located a claim on April 30, 1933, embracing lands along the Scott River that were subsequently designated on January 19, 1981, as part of the National Wild and Scenic Rivers system by the Secretary of the Interior, pursuant to section 2(a) of the Wild and Scenic Rivers Act (W&SRA), as amended, 16 U.S.C. 1273(a) (1994). On February 5, 1988, the estate filed an application for mineral patent. The Board said that A[s]ince Appellant had not applied for a patent and complied with all the requirements for obtaining a patent under the Mining Law of 1872 prior to the inclusion of the Scott River in the Wild and Scenic Rivers system, there was no >valid existing right= to a patent to the surface estate so as to remove the claim from the patent limitations imposed by section 9(a)(ii) of the W&SRA.@ The Board went on to say that Aa claimant=s equitable title to the land arises only upon the tendering of the purchase price established by Congress. *See Swanson v. Babbit*, 3 F.3d 1348, 1350 (9th Cir 1993); *Teller v. United States*, 113 F. 273 (8th Cir 1901); *United States v. Rizzinelli*, 182 F. 675, 683 (D. Idaho 1910. Most importantly, it is established that Congress may remove the Department=s patent authority prior to the tendering of a patent application and purchase price and that loss of the opportunity or option to apply for a patent as a result of Congressional action is not an unconstitutional taking by inverse condemnation. The claimant suffers only the denial of opportunity to obtain greater property than that which he owned upon the effective date of the Act of Congress. That is not divestment of a property interest. Freese v. United States, 639 F.2d 754, 758 (Ct.Cl.), *cert. denied*, 454 U.S. 827 (1981).@ *Id.* at 30-31.

**State River Beds**

It is important to know that many of the rivers designated as part of the Wild and Scenic Rivers System are also "Navigable Waters" as defined in the Submerged Lands Act. The beds of these rivers may be owned by the state, with most of the lands on both sides of the river bed under Federal jurisdiction.

**XIX. Wilderness Act of 1964**

The Wilderness Act of September 3, 1964 (78 Stat. 890; 16 USC 1131 (1976)) provides

that from September 3, 1964, until December 31, 1983, lands classified under the National Wilderness Preservation System were to remain open to mining location. However, effective January 1, 1984, the wilderness was withdrawn from all forms of appropriation under the mining and mineral leasing laws. Valid existing rights on January 1, 1984, were preserved.

**Patents for Lands in the Wilderness System**

To qualify for a mineral patent in the Wilderness System, a claim must have been located and have valid and existing rights (a discovery) on or before December 31, 1983. Also, the claim must continue to have a discovery until patent issues. Two types of patents may be issued, depending on when the claim was located and when the discovery was perfected: (1) claims located on or before September 3, 1964, with valid existing rights as of that date, qualify for a patent to both mineral deposits and the surface; and (2) claims located after September 3, 1964, and on or before December 31, 1983, with valid existing rights as of December 31, 1983, qualify for a patent to only the mineral deposits.

It is important to point out that lands subsequently covered by wilderness areas established after September 3, 1964, will have different dates than those given above. Unless a specific statute establishing a wilderness area provides otherwise, a claim with valid existing rights at the date the wilderness area is established will qualify for a patent to both the surface and the mineral deposits.

The Wilderness Act and regulations (43 CFR 3823.3) provide for regulation of surface activities of claims which were patented for mineral deposits only. Any surface use of such a claim not reasonably required for prospecting or mining is prohibited.

**XX. Wildlife Refuges**

Fish and wildlife refuges are administered by the Fish and Wildlife Service. Although most of these refuges are withdrawn from the mining and mineral leasing laws, several are at least partially open. The pertinent executive order or public land order authorizing the withdrawal and the Interior Department regulations should be consulted. Although Congress has passed a few laws authorizing withdrawals for refuges, most have no statutory basis. Approximately 27 million acres of public land have been withdrawn for fish and wildlife refuges.

Section 17 of the Mineral Leasing Act of 1920, as amended (30 USC 181 *et seq*.) gives the Secretary of the Interior the discretionary authority to refuse to issue an oil and gas lease in the interest of conservation, wildlife protection, and other purposes in the public interest. Because lands in wildlife refuges are closed to noncompetitive oil and gas leasing by 43 CFR 3101.1l(a)(1), a lease that is erroneously issued for any such lands is a nullity. *Oil Resources, Inc*., 14 IBLA 333 (1974). This regulation provides that "no offers for oil and gas leases covering wildlife refuge lands will be accepted ... except as provided in 3101.3-1 (lands subject to drainage)." "Wildlife refuge lands" are defined as "those embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife with a particular area." 43 CFR 3101.3-3(a); *see also* 50 CFR 29.31. Therefore, 43 CFR 3101.3-3(a)(1)

precludes leasing only of lands embraced in a withdrawal for the protection of all species of wildlife within a particular area. *Stephen C. Helbing*, 76 ID 25 (1969); *Carol Lee Hatch*, 45 IBLA 4 (1980).

Oil and gas leasing is not precluded within areas of the national wildlife refuge acquired by the Secretary of the Interior as an inviolate migratory bird sanctuary pursuant to the Migratory Bird Conservation Act. 16 USC 715 (1976).

A "national wildlife refuge" is defined as "any area of the National Wildlife Refuge System except wildlife management areas." 50 CFR 25.12(a). Oil and gas leasing is not necessarily precluded in wildlife refuge areas. See 16 USC 668dd(c) (1976); 50 CFR 29.3. On the other hand, geothermal leasing is prohibited in a "wildlife refuge," a "wildlife management area, or waterfowl production area, or for lands acquired or reserved for the protection and conservation of fish and wildlife which are designated as rare and endangered species by the Secretary..." 43 CFR 32.1-6.

**Endangered Species**

The Secretary may exercise his discretion under the mineral leasing laws to reject oil and gas lease offers where the land is used as a habitat for endangered animals. *Carol Lee Hatch, supra*. *Dell K. Hatch*, 34 IBLA 274 (1978). Designation of an area as a critical habitat pursuant to section 7 of the Endangered Species Act of 1973, as amended, 16 USC 1536, does not necessarily preclude oil and gas leasing. The regulations in 50 CFR 402.01 provides that all Federal agencies will insure "that their activities or programs do not result in the destruction or adverse modification of critical habitat." "Destruction or adverse modification is defined as: "A direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for survival and recovery of a listed species.

## RIGHTS-OF-WAY

Rights-of-way are generally open to mining location, but mining rights are subject to use of the land for purposes of the right-of-way. This section contains a review of the more common types of rights-of-way; however, there are numerous other statutory authorities for rights-of-way that are not included.

**FLPMA Repeal of Law Relating to Rights-of-Way**

Section 706(a) of FLPMA repealed on the date of the Act (October 21, 1976) portions of a number of statutes that relate to rights-of-way. However, section 509(a) states that "nothing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted. However, with the consent of the holder thereof, the Secretary concerned may cancel such a right-of-way or right-of-use and in its stead issue a right-of-way pursuant to

the provisions of this title."

**Highways**

The Act of July 26, 1866 (14 Stat. 253; R.S. 2477; 43 USC 932) provided for the "right of way for the construction of highways over public lands, not reserved for public uses."

**44 LD 513 Easements**

The authority for 44 LD 513 easements to Federal agencies is *Secretary's Instructions*, 44 LD 513 (January 13, 1916). These instructions say that where Federal facilities have been constructed or where funds have been appropriated and the area needed for such improvements has been fixed and construction will take place immediately, the land is protected from adverse claims. Although mining claims may be located over such an existing easement, mining or prospecting operations must not interfere with the purposes of the easement, and mineral patents will contain a reservation of the easement.

**Act of September 26, 1954**

The Act of September 3, 1954 (68 Stat. 1146; 30 USC 931c) authorizes the federal government to grant permits, leases or easements for a fixed period not to exceed 30 years and at a fair market value. If the permit lease or easement should cease to be used for the purpose granted, it automatically terminates. This Act was repealed by the Act of October 21, 1976 (90 Stat. 2793) insofar as it applies to rights-of-way over, upon, under and through the public lands and lands in the National Forest System.

**Reservation in Patents of Rights-of-Way For Ditches and Canals**

All patents issued after August 30, 1890, under both the public land laws and mineral laws for lands west of the one hundredth meridian are required to contain the following reservation:

> There is reserved from the lands in said patent described a right-of-way thereon for ditches and or canals that may be constructed.

This reservation includes not only ditches and canals existing at the date patent was issued but any future ditches or canals that may be constructed. *United States v. Ide*, 277 F 373 (1921),

*affirmed*, 263 US 497. This reservation applies only to surface rights and does not include the title to mineral. *Northern Pacific Ry. Co. v. United States* 277 F2d 615 (1960).

The Act of March 3, 1891 (26 Stat. 1101) as amended by the Acts of March 4, 1917 (39 Stat. 1197), and May 28, 1926 (44 Stat. 668), authorizes a right-of-way through the public lands to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or

drainage. The Act also grants the "right to take from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch."

**Reservation for Transmission Lines and Miscellaneous Uses**

The Act of February 15, 1901 (31 Stat. 790), as amended by the Act of March 4, 1940 (54 Stat. 41), gave the Secretary of the Interior the authority to permit rights-of-way through the public lands, forest, and other reservations of the United States for electrical plants, powerlines, telephone lines, flumes, tunnels, water plants, dams, reservoirs used to promote irrigation or mining or quarrying or lumbering, or to supply water for beneficial uses. The right-of-way was not to exceed 50 feet on each side of the marginal limits of the above installations, and in the case of transmission lines, the right-of-way was not to exceed fifty feet on each side of the center line of such pipeline, electrical or telephone line. This law (43 USC 959) was repealed by the Act of October 21, 1976 (Pub. L. 94-579).

The Act of March 4, 1911 (36 Stat. 1253), as amended by the Act of May 27, 1952 (66 Stat. 95), authorized the grant of easements for rights-of-way over the public lands and reservations of the United States for a period not to exceed 50 years. The grant was made for transmission lines used for communications and electrical distribution and may be forfeited by a two-year period of nonuse.

**Rights-of-Way Under the Mineral Leasing Act**

Rights-of-way and temporary use permits authorized by the Leasing Act of 1920, as amended (30 USC 185; 43 CFR Part 2880), are limited to the purpose of construction, operation maintenance, and termination of pipelines. 43 CFR 2881.1-1. Such grants are a nonexclusive right not to exceed a period of 30 years. 43 CFR 2881.1(c). The width of the right-of-way may not exceed 50 feet plus the land area occupied by the pipeline or related facilities. 43 CFR 2881.1-1(c).

The United States reserves in a right-of-way grant or temporary use permit a continuing right of access and physical entry. It also reserves the right to issue "right-of-way grants, temporary use permits, easements, leases, licenses, contracts, patents, permits and authorizations to third parties for compatible uses, on, under, above or adjacent to federal lands subject to a right-of-way grant or temporary use permit." 43 CFR 2881.1-3.

Upon receipt of the application for a right-of-way grant, the government will publish a notice of the application in the *Federal Register*, unless the impacts are of minor nature. 43 CFR 2882.3. Public meetings or hearings may also be required, and if so, notice of such must be published in the *Federal Register*.

For right-of-way grants or temporary use permits in the national forest system, the Bureau of Land Management will not issue the grant or permit without the concurrence of the U.S. Forest Service. Also, the issuance of a grant or permit is discretionary to the United States, and

may be denied if it is determined that the right-of-way use would be inconsistent with the purpose to which the Federal lands involved have been committed, or would otherwise not be in the public interest. 43 US 2882.3.

**The General Railroad Right-of-Way Act of 1875**

After completion of the transcontinental railroads in 1869, public sentiment turned against continuing the practice of granting large tracts of public lands to railroad companies. Between 1871 and 1875 a series of individual authorizations for railroad rights-of-way over the public lands were passed by Congress; however, no land grants accompanied these authorizations.

In order to eliminate the need for individual Congressional authorization for rights-of-way, Congress adopted the General Railroad Right-of-Way Act of 1875, (Act of March 3, 1875; 43 USC 934 (1970)). This Act authorized a right-of-way through public lands to the extent of 100 feet on each side of the central line of the road, but granted no public lands as inducement for construction of the railroad. In fact, section 4 of the Act provided that all such lands over which the right-of-way passed would be disposed of "subject to such right-of-way."

**Title to Railroad Rights-of-Way Remained in United States**

In *Great Northern Ry. v. United States*, 315 US 262 (1942), the U.S. Supreme Court held that the right-of-way granted by the 1875 Act was "but an easement" granting "no right to the underlying oil and minerals." The Court also indicated that the minerals could be developed under a lease executed pursuant to the Act of May 21, 1930, *supra*. Then in 1956 the U.S. Supreme Court held that title to the mineral estate in pre-1971 rights-of-way also remained in the United States. *United States v. Union Pacific R.R.*, 353 US 112 (1957).

**Oil and Gas in Railroad Rights-of-Way May Only Be Leased Under 1930 Act**

In *Champlin Petroleum Co*., 89 ID 561 (1982), the Board considered an appeal where BLM rejected the lease application of Champlin Petroleum Company (Champlin) for lands underlying railroad rights-of-way pursuant to the Rights-of-Way Leasing Act of May 21, 1930. 30 USC 301-306 (1976). Champlin's applications were rejected because the lands had already been leased.

The subject lands were originally granted to the Union Pacific Railroad Co. (Union Pacific) under the Act of March 3, 1875, 43 USC 934-939 (1970) (repealed by FLPMA). Champlin had acquired Union Pacific's rights to acquire oil and gas leases under the Act of May 21, 1930, *supra*, by assignment.

After a thorough review of the legal history on railroad rights-of-way, the Board expressly held that "the Act of May 21, 1930, *supra*, is the exclusive authority for issuance of oil and gas leases for lands underlying railroad rights-of-way issued under the 1875 Act.@ *Champlin Petroleum Co*., at 570. The Board further stated at 569:

> The adjudicative rules which have guided the Department since the 1960 Solicitor's Opinion may be succinctly stated: Oil and gas deposits underlying rights-of-way (be they pre-1871 or post-1871) are subject to leasing only pursuant to the 1930 Act; other leasable minerals underlying such rights-of-way are subject to leasing pursuant to the Mineral Leasing Act of 1920. A consistent and considerable line of cases have religiously adhered to this approach. *See*, e.g., *R. C. Beveridge*, 50 IBLA 173 (1980); *Alice Hays*, 36 IBLA 313 (1978); *Amerada Hess Corp*., 24 IBLA 360, 83 I.D. 194 (1976); *George W. Zarak*, 4 IBLA 82 (1971), *aff'd sub nom. Rice v. United States*, 479 F.2d 58 (8th Cir.), *cert. denied*, 414 U.S. 858 (1973).

**Oil and Gas Lease Issued Under 1920 Act Cannot Cover Rights-of-Way**

If an oil and gas lease issued under authority of the Mineral Leasing Act of 1920 (30 USC 181 *et seq.*) describes lands covering a railroad right-of-way, the lease does not include the oil and gas deposits in the right of way. Oil and gas deposits may only be obtained by a lease issued under the Act of May 21, 1930, *supra*. *Champlin Petroleum Co., supra* at 570-573.

**Right-of-Way May Only Be Leased by Owner or His Assignee**

The Act of May 21, 1930, *supra*, and the applicable regulations (43 CFR 3100.0-3(d)(1)) require that leasing of oil and gas deposits in and under railroads and other rights-of-way acquired under any law of the United States is restricted to the owner of the right-of-way or his assignee. *A. A. McGregor*, 18 IBLA 74 (1974); *Republic Oil and Mining Co*., 35 IBLA 212 (1978). Furthermore, "so long as the rights-of-way herein continue to exist, BLM may not accept an application to lease for oil and gas the lands covered by the rights-of-way from other than the owner of the right-of-way or his assignee." *RDM Interests*, 57 IBLA 163 (1981).

**I. Railroad Rights-of-Way**

The Railroad Act of July 1, 1862 (12 Stat. 489), granted a right-of-way 400 feet in width and every alternate section of land for 10 miles on either side of the road.

The Railroad Act of July 2, 1864 (13 Stat. 358) granted a right-of-way 400 feet in width and every alternate section of land for 20 miles on either side of the road in states and for 40 miles on either side of the road in territories.

The General Railroad Right-of-Way Act of March 3, 1875 (18 Stat. 482) granted a right-of-way 200 feet in width.

**Acts Prior to March 3, 1871**

The railroads acquired no mineral interest other than coal and iron beneath rights-of-way

granted under all acts before March 3, 1871. *United States v. Union Pacific R. Co*., 353 U.S. 112 (1957). This is true even where the right-of-way passes through sections which were patented as place lands. *Brown W. Cannon, Jr*., 24 IBLA 166 (1976).

Minerals beneath a right-of-way are not acquired by homestead entryman where lands embracing a right-of-way are later patented. *Union Pacific R. Co*., 72 I.D. 76 (1966), *aff=d sub nom*., *Wyoming v. Utah*, 379 F. 2d 635 (10th Cir.), *cert denied*, 389 U.S. 985 (1967); *George W. Zarak*, 4 IBLA 82 (1972), *aff=d sub nom., Rice v. United States*, 479 F.2d 58 (8th Cir.), *cert. denied*, 414 U.S. 858 (1973).

**Rights-of-Way Acts between 1871 and 1875**

The railroad acquired no mineral interest beneath rights-of-way granted during this period. *Great Northern R. Co. v. United States*, 315 U.S. 262 (1942), and *United States v. Union Pacific R. Co*., 353 U.S. 112 (1957).

Minerals contained beneath rights-of-way passed to subsequent patentees providing minerals were not reserved in the patent under a mineral reservation such as the Stock-Raising Homestead Act. *Denver & Rio Grande R. Co*., 198 F. 137 (D. Colo. 1912) *aff=d* 222 F. 481 (8th Cir. 1915).

**Rights-of-Way Under 1875 Act**

Right-of-Ways under the 1875 Act are only easements so the Federal Government retains all minerals. *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942). A subsequent homestead patentee with a patent subject only to the right-of-way acquires all minerals beneath the 1875 right-of-way. *Amerada Hess Corp*. 83 I.D. 194 (1976).

**II. Acquiring Minerals in Railroad Rights-of-Way**

**Oil and Gas**

The Act of May 21, 1930 (30 U.S.C. 301 *et seq*.) and regulations, 43 CFR 3109.1-1, authorize leasing oil and gas to owner or assignee of the right-of-way.

**Other Leasable Minerals**

1. Rights-of-way prior to March 3, 1871:

All leasable minerals may be leased from the federal government under the 1920 Act, except coal and iron which may be leased from the owner of the right-of-way. *Solicitor's Opinion*, 67 I.D. 225 (1960).

2. Post-1871 rights-of-way:

Where lands containing post-1871 rights-of-way are patented, the patentee owns the minerals.

**Locatable Minerals**

1. Rights-of-way prior to March 3, 1871:

Pre-1871 rights-of-way should be open to mining claim location; however, there is no specific case on this. *See United States v. Union Pacific R. Co.*, 353 U.S. 112 (1957). Many early Interior cases indicate that mining claims cannot be located on limited fee rights-of-way.

2. Post-1871 Rights-of-Way:

Mining claims may he located on rights-of-way granted after March 3, 1871, unless lands were patented (except SRHS, etc.). If lands are patented without a mineral reservation, then see the private landowner for acquisition. *Grand Canyon Ry Co. v. Cameron*, 35 L.D. 495. 497 (1907).

**Reference to information on Railroad Rights-of-Way**

Ebner, David G., 1985, *Mineral Ownership Beneath Rights of Way*: Presentation at the 3lst Annual Rocky Mountain Mineral Law Institute, San Diego, California.

**Material Site Rights-of-Way Withdraw Lands from Mining Law**

In *Russell Avery and Douglas Noland*, 99 IBLA 22, 23 (1987), the Board held that Amaterial site rights-of-way created under the Federal Aid Highway Act, August 27, 1950, 23 U.S.C. 317 (1982), effectively withdraw the lands affected from entry and location under the mining law.@ *Also see Douglas Noland*, 139 IBLA 337 (1997**).**

Grants of rights-of-way are made to state governments for the removal of materials for the construction and maintenance of highways under the Federal Aid Highway Act of August 27,

1958. 23 USC 317 (1976); 43 CFR 244.54. In *Pepcorn and Reddekopp*, 50 IBLA 415 (1980) the Board stated:

> It is well established that material site rights-of-way created under this provision of law effectively withdraw the lands affected from entry and location under the mining law. *Carl M. Shearer*, A-30838 (Dec. 21,1967); *J. M. Keeney*, A-28865 (August 6, 1962); *see Schaub v. United States*, 103 F.Supp. 873 (D. Alaska 1952), *aff'd*, 207 F2d 325 (9th Cir. 1953); *Treva L. Bergor*, 31 IBLA 389 (1977); *A. W. Schunk*, 16 IBLA 191, 81 ID 401 (1974).

Portions of Claims in Highway Rights of Way

Portions of mining claims located on land subject to a pre-existing highway right-of-way granted to a state pursuant to the Federal Aid Highway Act, 23 U.S.C. 317 (1988), are null and void ab initio to the extent they include those lands within the highway right-of-way. Jesse R. Collins et al, 127 IBLA 122 (1993).

**Interior Has Authority over Material Site Right-of-Way**

In granting a right-of-way over public lands under authority of the Federal Aid Highway Act, 23 U.S.C. 317 (1982) the Secretary of the Interior does not give up administrative authority over the lands subject to the right-of-way. *See* 43 CFR 2803.4. In *Kenneth L. Ingram*, 96 IBLA 290 (1987), the Board stated at 292:

> A material site right-of-way does not transfer title to the lands. Title to and jurisdiction over the lands remains with the Secretary, who retains the authority to review the present and past circumstances of the grant. * * * While no cancellation authority is expressly created by 23 U.S.C. 317 (1982), the Secretary, in promulgating regulations implementing the Act, has recognized an inferred authority to cancel a material site right-of-way.

In *Douglas Noland*, 139 IBLA 337, 345-346 (1997), the Board said the Secretary cannot authorize mineral entries on material site rights-of-way but does have the Aauthority to determine whether additional rights-of-way or temporary use permits should be granted over the Federal lands subject to the material site right-of-way.@

**Material Site Right-of-Way Precludes Section 209 Conveyance**

In *Kenneth L. Ingram*, 96 IBLA 290 (1987), the BLM rejected an application for conveyance of Federally owned mineral interest because the mineral interests were already conveyed by a material site right-of-way. A material site right-of-way effectively renders the land unavailable for further appropriation or entry.

**State Courts Determine Whether a Road Is a Public Right-of-Way**

In *James Mitchell*, 104 IBLA 377, 381 (1988), the Board restated the Department's consistent position that, as a general proposition, state courts are the proper forum for determining whether a road is properly deemed to be a "public highway."

**Patented Mining Claim Does Not Give Right-of-Way Across Federal Land**

A mineral patent issued under the mining laws does not invest the owners with a Alegal right-of-way@ to the patented mining claim across Federal lands. *Bruce W. Crawford*, 92 I.D. 208 (1985); *Bob Strickler*, 106 IBLA 1, 4 (1988).

**R. S. 2477 Rights-of-Way**

Section 8 of the Act of July 26, 1866, 43 U.S.C. 932 (1970), R.S. 2477, provides that "[t]he right of way for construction of highways over public lands, not reserved for public uses, is hereby granted.@ This provision was repealed by section 7O6(a) of FLPMA, 90 Stat. 2793, effective October 21, 1976. Valid existing rights are recognized under authority of section 701(a) of FLPMA. The grant becomes effective when a public highway over unreserved public lands is established under the authority of laws of the state where the land is located. 43 CFR 2822.2-1 (1975). The R.S. 2477 right-of-way gives the public the right to use the lands for highway purposes only. Disposal of the land is subject to the R.S. 2477 easement regardless of whether or not a reservation is expressed in the conveyance document. *Leo Titus, Sr.*, 89 IBLA 323 (1985).

In *Alfred E. Koenig*, A-30139 (Nov. 25, 1964), the Department refused to adjudicate the claimed R.S. 2477 right-of-way across lands covered by an application to purchase small tracts:

> * * * However, in considering whether reservations or public roads granted pursuant to Rev. Stat. 2477 need be made in grants of public lands, this Department has long taken the position that it is unnecessary to include any reservation or exception for the right-of-way in a patent. *Herb Penrose*, A-29507 (July 26, 1963), and cases cited therein. The reason for this is that grants of public lands upon which there is such a public highway are subject to the easement despite the absence of a reservation in the patent or grant.

However, an exception to the rule prohibiting identification of a claimed R.S. 2477 right-of-way on patents issued under the public land and mineral laws has been recognized. This exception occurs where a determination by the Department is necessary to facilitate proper administration of the public lands. *Nick DiRe*. 55 IBLA 151 (1981).

**Interstate and Defense Highway Rights-of-Way**

Rights-of-way needed on public highways on the National System of Interstate and Defense highways are authorized by 43 USC 107 and 43 CFR 2821. The Secretary of Transportation has responsibility to designate what lands are necessary. The Act also authorizes source materials from the right-of-way may be used to construct and maintain the highway.

Although the Courts and the Interior Department have long sanctioned the rule that mining locations may be made over right-of-way easements, including highway rights-of-way acquired under the Act of November 9, 1921, as amended, a material site authorized by the same act is not subject to the same rule. The reason the Material Site is not open to mining location

relates to the fact that it confers the rights to take and remove a part of the realty which is inconsistent with the rights inuring to the locator of a mining claim. *Mining Locations on Federal Aid Rights-of-Way,* M-36554 (March 24, 1959).

**Rights-of-Way After FLPMA**

The new procedures for acquisition of rights-of-way over, upon, under or through public lands are covered in Title V, Federal Land Policy and Management Act of 1976 (843 USC 1761-1771) and implementing regulations published July 1, 1980 (45 FR 44526; 43 CFR Subpart 2800). These procedures apply to all types of rights-of-way, including reservoirs, canals, ditches, pipelines, tunnels, slurry lines, conveyor belts, electrical transmission lines, communication lines, roads, railroads and airways.

Type of interest granted will be either a right-of-way grant, or a temporary use permit. The term of a right-of-way grant may range from a month to perpetuity, depending on the need; whereas the temporary use permit shall not exceed three years. However the term will be based on the minimum time necessary to accomplish the purpose of the grant. 43 CFR 2801.1-1.

Neither the right-of-way grant or temporary use permit authorizes the holder of the permit to remove minerals from the public lands, without acquiring rights under the Materials Act (30 USC 601 *et. seq*.). However there is a provision in the regulations (43 CFR 2801.1(d)) to use materials along the right-of-way for construction of the project.

The application procedure for securing a right-of-way grant or temporary use permit is covered in 43 CFR Subpart 2802. At the discretion of the government, an environmental protection plan and detailed maps may be required to support the application. 43 CFR 2802.3-4 and 2802.3-6.

During processing of the application, the government will complete an environmental analysis as required by the National Environmental Policy Act and may hold public hearings on the application. 43 CFR 2802.4. Depending on the findings in the environmental analysis, an environmental statement may or may not be required.

The applicant will be required to reimburse the United States for administrative and other costs incurred while processing the application. 43 CFR 2803.1-1. These costs also include the preparation of environmental analyses and statements under NEPA (42 US 4321-4347).

After acquiring the right-of-way grant or temporary use permit, the holder is also required to reimburse the United States for costs incurred in monitoring the construction, operation, maintenance and termination of the facilities. 43 CFR 2803.1l(b)(1). Rental fees based on the fair market value of the facility must also be paid annually. A bond may be required to secure the obligations arising from the grant permit and regulations. 43 CFR 2803.1-3.

In *Patrick 0. Brown,* 55 IBLA 338 (1981) the Board stated that "Approval of an

application for a right-of-way under FLPMA is a discretionary matter. Department of the Army, 51 IBLA 26 (1980); *Lowell Durham*, 40 IBLA 209 (1979); *Stanley M. Leach*, 35 IBLA 53 (1978). A decision by BLM rejecting an application for a right-of-way will be affirmed where the record shows that the decision was a reasoned analysis of the factors involved and was made with due regard to the public interest.@ *Lowell Durham, supra*.

**Rights-of-Way Across Mining Claims**

Before the Act of July 23, 1955 (69 Stat. 367; 30 USC 601), no right-of-way across a valid, unpatented mining claim which would continue after patent could be initiated solely through construction by the United States. This Act, which reserved to the United States the right of access across unpatented mining claims, was limited in its effect to the period "prior to the issuance of patent" to the claim and cannot be construed to authorize such access across such a claim after issuance of patent. *Access Road Construction - Effect of Waivers and Determinations Given Under Public Law 167,* 84th Congress, M 36493, 65 ID 200 (1958).

In *United States v. Bess May Lutey*, A-30927 (March 4,1969), the Board described the effect of a forest service logging road constructed after the location of a mining claim without a discovery:

> In the absence of a valid discovery of a valuable mineral deposit within the claim, which under the mining laws is necessary in order to give a mining claimant rights to the land superior to the United States, the Forest Service was entitled to construct the logging road. Cf. *United States v. Coston*, A-30835 (February 23,1968); *United States. v. Seeley*, A-28127 (January 28, 1960), *affirmed Seeley v. Seaton*, Civil No. 41094 (N.D. Cal. 1964). The construction of the road constitutes an appropriation by the Government of the land within the mining claim covered by the road, road bed and necessary right-of-way and such is reserved from entry under the mining laws. *See United States v. Cohan*, 70 ID 178, 181 (1963) and cases cited therein. That construction of the road here may have interfered with appellants' mining operations thereafter does not give them any rights in the unappropriated portion of the claim in the absence of a valid discovery, nor does it constitute an excuse for failing to show a discovery.

The Board has also held that a free use permit by the Forest Service for a transmission line right-of-way under the authority of 16 USC 522 does not serve as a withdrawal or close the land to mineral location. *A. W. Schunk,* 16 IBLA 191, 81 ID 401 (1974).

**Rights-of-Way to Mining Claims**

The General Mining Law of 1872, gives to the locators and owners of mining claims, as a necessary incident, the right of ingress and egress across public lands to their claims for the purposes of maintaining the claims and as a means toward removing the minerals. Therefore, a right-of-way permit is not required to obtain access to an unpatented mining claim. *Rights of Claimants to Access Over Public Lands to Their Claims*, M-36584, 66 I.D. 361 (October 20, 1959). However, ingress and egress across public lands to a patented claim or other patented

property does require a right-of-way permit. In certain cases, isolated tracts of public land containing mining claims are completely surrounded by patented lands. If there is no right-of-way or easement specifically reserved by the Federal government across the patented land to the mining claims, then the claimants must negotiate with the owners of the surrounding lands for access to the claims.

# 5. MINERAL CLASSIFICATIONS AND RESERVATIONS

## MINERAL CLASSIFICATIONS AND RESERVATIONS

In *Watt v. Western Nuclear, Inc*., 103 S.Ct. 2218 (June 6, 1983), the Supreme Court discussed the history of the system of land classification and how the classification was used to determine whether land could be disposed of under the homestead acts. Until 1909, if a tract of land were found to be mineral in character, it was not available for disposal; however after 1909 there was a trend towards enacting statutes that allowed reservation of specific minerals to the United States so that a tract could be disposed of under the homestead acts. The Court describes how this shift from land classification led to enactment of the Stock-raising Homestead Act of 1916 which provided for a reservation of all mineral rights to the United States.

> The SRHA was the most important of several federal land-grant statutes enacted in the early 1900s that reserved minerals to the United States rather than classifying lands as mineral or nonmineral. Under the old system of land classification, the disposition of land owned by the United States depended upon whether it was classified as mineral land or non-mineral land, and title to the entire land was disposed of on the basis of the classification. This system of land classification encouraged particular uses of entire tracts of land depending upon their classification as mineral or non-mineral. With respect to land deemed mineral in character, the mining laws provided incentives for the discovery and exploitation of minerals, but the land could not be disposed of under the major land-grant statutes. With respect to land deemed non-mineral in character, the land-grant statutes provided incentives for parties who wished to use the land for the

purposes specified in those statutes, but the land was beyond the reach of the mining laws and the incentives for exploration and development that they provided.

For a number of reasons, the system of land classification came to be viewed as a poor means of ensuring the optimal development of the nation's mineral resources, and after the turn of the century a movement arose to replace it with a system based on mineral reservations. In 1906 President Theodore Roosevelt withdrew approximately 64 million acres of lands thought to contain coal from all forms of entry, citing the prevalence of land fraud and the need to dispose of coal "under conditions which would inure to the benefit of the public as a whole." 41 *Cong. Rec*. 2615 (1907). Secretary of the Interior Garfield reported to the President that "the best possible method ... is for the Government to retain the title to the coal," explaining that "[s]uch a method permits the separation of the surface from the coal and the unhampered use of the surface for purposes to which it may be adapted." Report of the Secretary of the Interior 15 (1907), H. R. Doc. No. 5, 60th Cong., lst Sess. 15. President Roosevelt subsequently urged Congress that "[r]ights to the surface of the public land... be separated from rights to forests upon it and to minerals beneath it, and these should be subject to separate disposal." Special Message to Congress, Jan. 22, 1909, 15 Messages and Papers of the Presidents 7266.

Over the next several years Congress responded by enacting statutes that reserved specifically identified minerals to the United States, and in 1916 the shift from land classification to mineral reservation culminated with the enactment of the SRHA. Unlike the preceding statutes containing mineral reservations, the SRHA was not limited to lands classified as mineral in character, and it did not reserve only specifically identified minerals. The SRHA applied to all lands the surface of which the Secretary of the Interior deemed to be "chiefly valuable for stockraising and raising forage crops," 43 USC '292, and reserved all the minerals in those lands to the United States.

**Misclassification**

During the 1800s and early 1900s, mineral classifications were accomplished by a variety of methods which generally relied on an opinion of a person who was neither educated nor experienced in mineral inventories and evaluations. Consequently, many tracts, classified as nonmineral in character and patented, were later found to contain valuable mineral deposits. However, during the last several decades, the Interior Department has required that a formal mineral report be written on each tract by a qualified mining engineer or geologist. Of course, if a deposit is buried and its existence cannot be established by geological inference, a classification of "nonmineral in character" would result. In *Watt v. Western Nuclear, Inc., supra*, the Supreme Court discussed the misclassification of land and the subsequent effect of such misclassification on the patent:

> Land was frequently misclassified as non-mineral. Misclassification resulted both from fraud and from the practical difficulties in telling at the time of classification whether land was more valuable for the minerals it contained than for agricultural purposes. *See Deffeback v. Hawke*, 115 US 392, 405 (1885). Classification depended largely upon

affidavits of entrymen, reports by surveyors, information available from field offices of the Land Department, and information provided by persons with an interest in contesting the classification of particular land as non-mineral. Frequent errors were inevitable. *See* 1 *American Law of Mining* '3.1 (1981); *West v. Edward Rutledge Timber Co*., 244 US 90, 98 (1917). If land was erroneously classified as non-mineral and conveyed under a land-grant statute, the patentee received title to the entire land, including any subsequently discovered minerals. *See Diamond Coal & Coke Co*. v. U.S., 233 US 236, 239-240 (1914); *Shaw v. Kellogg*, 170 US 312, 342-343 (1898). Absent proof of fraud, see *Diamond Coal & Coke Co. v. U.S., supra*, at 239-240, the Government had no recourse once title passed.

## I. Mineral in Character

### Land and Mineral Cases Requiring Mineral in Character Classifications

Prior to enactment of FLPMA on October 21,1976, disposals under the mining laws and public land laws required that the land be classified as either mineral in character or nonmineral in character. One exception to this requirement was disposals under the Stockraising Homestead Act. In this type of homestead, no mineral classification was necessary because all minerals were reserved to the United States.

### Land Disposals

A determination that lands are mineral in character generally results in a decision by the Interior Department rejecting the application for entry under the public land laws. Since passage of FLPMA, most of the homestead and land disposal laws requiring a mineral in character determination have been repealed. Among the few land actions that still require a mineral in character determination are Indian allotments, Carey Act grants, desert land entries, railroad selections and certain disposals in Alaska. Land sales under section 203 and 206 of FLPMA require a mineral potential report.

### Land Exchanges

Before FLPMA, all exchanges required a mineral in character determination. The purpose of this determination was to establish whether locatable, salable or leasable minerals existed in sufficient quantities to warrant a classification of mineral in character. Also if mineral values were present, they were appraised to ascertain their value. Either party may reserve minerals; however, where both the federal and the nonfederal lands are mineral in character and the values are comparable, neither party will reserve minerals.

**Mill Sites**

R.S. 2337, as amended by the Act of March 18, 1960 (30 USC 42) authorizes the location of mill sites only on lands non-mineral in character.

**Legal Basis for Mineral Reservation**

The legal basis for reserving mineral lands from disposal under the public land laws originates in the Act of July 4, 1866 (14 Stat. 86), where it is stated "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." RS 2318; 30 USC 21 (1976).

**Types of Minerals**

Mineral lands not only include metalliferous lands, but all lands that are chiefly valuable for deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture. *Northern Pacific Railway Co. v. Soderberg*, 188 US 526 (1903). In *Laden v. Andrus*, 595 F2d 482 (1979), the Court discussed the *Northern Pacific Railway* case as follows:

> The difficulty in ascribing a meaning to the word "mineral" in a given statutory context was early recognized in *Northern P. R. Co. v. Soderberg*, 1903, 188 US 526, 530. There the issue was whether a deposit of granite rendered certain lands "mineral" and as such excepted from a grant of territory from the United States to the plaintiff railroad. The Court said:
>
> > "The word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it. Upon the other hand, a definition which would confine it to the precious metals, gold and silver, would so limit its application as to destroy at once half the value of the exception. Equally subversive of the grant would be the definition of minerals found in the Century Dictionary: as >any constituent of the earth's crust;' and that of Bainbridge on Mines: 'All the substances that now form, or which once formed, a part of the solid body of the earth.'

**Definition of Mineral in Character**

There is no definition of "mineral in character" in the statutes; however, over the years, the courts have defined it in a variety of ways. Perhaps the most authoritative and enduring test

for determining the mineral character of land was announced by the United States Supreme Court in *Diamond Coal & Coke Co. v. U.S.*, 233 US 236 (1914). The Court said at 239-240:

> [I]t must appear that the known conditions ... were plainly such as to engender the belief that the land contained mineral deposits of such quality and quantity as would render their extraction profitable ind justify expenditures to that end.

This same test was quoted with approval in *United States v. Southern Pacific Co.*, 251 US 1, 14 (1919), *Laden v. Andrus*, 595 F2d 482, 488 (9th Cir 1979), *McCall v. Andrus*, 628 F2d 1185, 1188 (9th Cir 1980) and numerous other Interior Department and Federal court cases.

**Definition May Include Evidence for Determination**

In *Southern Pacific Co.*, 71 ID 224, 233 (1964), the Secretary published a definition that not only included the language used in *Diamond Coal & Coke Co., supra*, but also included the type of evidence that may be used to establish mineral in character. The basis for this evidence was derived from earlier court cases. The significance of the acceptable evidence for establishing mineral in character provided by earlier court cases is described in following several pages. The Secretary's definition of "mineral in character" in *Southern Pacific Co., supra* at 233 is consistent with the two Supreme Court cases cited above; and is probably a better and more complete definition because it includes the necessary evidence which was also held to be acceptable by the two Supreme Court cases. The Secretary stated at 233:

> It is not essential that there be an actual discovery of mineral on the land. it is sufficient to show only that known conditions are such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. Such belief may be predicated upon geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent and experienced men are shown to be accustomed to act.

This definition from *Southern Pacific Co., supra*, was recently quoted with approval in *United States v. Southern Pacific Transportation Co.*, 66 IBLA 191, 192-193 (1982).

**Evidence Supporting Mineral in Character**

In order to understand what is meant by "mineral in character," it is essential to have a good understanding of the types of evidence determined to establish mineral in character by the several important court cases. The applicable language from each of these cases is quoted below:

1. *Diamond Coal & Coke Co. v. United States*, 233 US 236, 248-249 (1914):

> An exposure to the eye of coal upon the particular lands was not essential to give

them a then present value for coal mining. They were all adjacent to the outcrop and above the plane of the coal-bearing strata dipping under the valley. In alternate even-numbered sections they substantially paralleled the outcrop for 7 miles, and in two places were separated from it by only a few rods. Those to the north were opposite the company's developed mine (No. 4), and those to the south were opposite the tract acquired through Lees, upon which good coal was disclosed. The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands. These conditions were open to common observation, and were such as would appeal to practical men, and be relied upon by them in making investments for coal mining. There is no fixed rule that lands become valuable only through actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate.

2. *United States v. Southern Pacific Co.*, 251 US 1, 14 (1919):

The observable geological and other physical conditions at the time of the patent proceedings, as shown by the evidence, were as follows: The area called the Elk hills was about 6 miles wide and 15 long, and constituted an anticlinal fold or elongated dome,-- an occurrence favorable to the accumulation and retention of oil. The lands in suit were about its center. From 5 to 10 miles to the west was the Temblor range, the main uplift of that region. Along the east flank of that uplift for a distance of 30 miles was a series of outcrops or exposures of Monterey (diatomaceous) shales, the source of oil in California, and porous sandstone in which oil generally finds its ultimate reservoir. These strata were of exceptional thickness, and it was apparent that oil in considerable quantity had been seeping or wasting from the sandstone. The dip of the strata was towards the Elk hills, and there were no indications of any faulting or thinning in that direction. Between the outcrop and the Elk hills upwards of two hundred wells had found the oil-bearing strata and were being profitably operated, several of the wells being on a direct line towards the lands in suit and within 3 or 4 miles of them. In and beyond the Elk hills were oil seepages and other surface indications of the existence of oil in the underlying strata, one of the seepages being near the lands in suit. Two wells had been sunk in the Elk hills, but obviously had not gone to an adequate depth and were not productive, although some oil was reached by one. Other geologists and oil operators, called by the company, gave it as their opinion that the lands were not, under the conditions stated, valuable for oil; but, as respects the testimony of some, it is apparent that they were indisposed to regard any lands as within that category until they were demonstrated to be certainly such be wells actually drilled thereon and producing oil in paying quantities after a considerable period of pumping. This is a mistaken test, in that it takes no account of geological conditions, adjacent discoveries, and other

external conditions upon which prudent and experienced men in the oil mining regions are shown to be accustomed to act and make large expenditures.

3. *Laden v. Andrus*, 595 F2d 482, 489-490 (9th Cir 1979):

There is no fixed rule that lands become valuable... only through ... actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate.

To paraphrase *Diamond Coal & Coke*, the relevant issue is whether the known conditions existing in 1901 were sufficient to engender the belief that the Wedekind tract contained minerals of a quantity and quality that would render their extraction profitable and justify expenditures to that end. Briefly summarized, the evidence supporting the D0I's finding that the conditions in 1901 were sufficient to engender such beliefs includes: (1) the Wedekind tract is located in the heart of the so-called Wedekind mining district, which bears the name of appellants' ancestor who, in 1896-97, located the first mining claim in the area on two sections of land adjacent to the Wedekind tract; this claim later yielded a producing mine; (2) an expert mining geologist and engineer testified that the areas which were most favorable for mineralization from a geological standpoint fully covered the Wedekind tract, as well as adjacent lands from which actual production was recorded; (3) extensive mine workings existed in 1901 on sections adjacent to the southeast corner of the Wedekind tract; (4) Wedekind and other family members located, bought, and sold mining claims covering portions of the Wedekind tract during the period between 1900-1901; (5) Wedekind located yet another mining claim extending into the Wedekind tract two months after he purchased the land from the CPRC: four months after his purchase, Wedekind sold his producing mine on the adjacent property along with the various mining claims which he had located that covered portions of the Wedekind tract; and (6) miners and prospectors other than the Wedekind family located and/or purchased mining claims on the Wedekind tract during the period between 1900-1902. This is enough to require that we hold substantial evidence supports the DOI's determination.

4. *United States v. Southern Pacific Transportation Co*., 66 IBLA 191, 195 (1982):

We agree with the Administrative Law Judge that the Government presented a prima facie case that the land in question was mineral in character between the date the railroad line was definitely fixed (1866) and the date of purchase by Birce (1888). The 1900 map by Lindgren indicates that the area was underlain by auriferous gravels, which also covered

> significant portions of the Gold Run Mining District. Past mining activity in the general vicinity indicates that these auriferous gravels contained significant values of gold which clearly "would render their extraction profitable and justify expenditures to that end." *See Southern Pacific Co., supra* at 233. Furthermore, part of the land involved in this patent application had been the site of past mining activity. Finally, in 1896, the Department canceled a patent application which included the lands in question because the land contained minerals. In view of the fact that the determination was fairly contemporaneous with the date of purchase (October 4, 1888), it is entitled to great weight.

The above-quoted cases all agree that actual discovery of minerals within the tract is not required; and that the following types of evidence support a determination of mineral in character:

1. discoveries or mines in adjacent land;

2. other external conditions that cause prudent and experienced men to act and make expenditures; and

3. favorable geological conditions within the tract.

**Sand and Gravel**

In *Norma L. McBride*, 73 IBLA 165 (1983), the Board held that a gravel deposit within a material site is sufficient to establish the land as mineral in character and cause the rejection of a Desert Land Entry Application. *Nancy M. Swallow*, 112 IBLA 321 (1990).

**Administrative Finality and Mineral in Character**

In *Melvin Helit v. Gold Fields Mining Corporation*, 113 IBLA 299, 314 (1990), the Board considered a case where a party was seeking a hearing through a private contest complaint on the mineral character of a tract of land. Where the mineral character of the land has been the subject of a prior Departmental hearing, the party making a hearing must make Aa distinct showing of development made since the prior hearing, such as, if supported by the evidence at the hearing applied for, would clearly demonstrate that since such prior hearing mineral has been discovered in such quantities, and by such thorough work on the premises, as to overcome the effect of the previous judgment as to the character of the land. *Shire v. Page*, 57 I.D. 252 (1941).@ Furthermore, Aa decision by the Department holding a tract of land to be either mineral or nonmineral in character will be considered conclusive up to the period covered by the hearing, but will not preclude further consideration of the character of the land based on subsequent exploration and development." *Id*. at 259-60.

Generally, concrete factual data and evidence that actual exploration and development subsequent to a hearing had shown lands to be mineral in character is required. Mere general

allegations are insufficient to secure a hearing to challenge the findings of a prior contest hearing. *Coleman v. McKenzie*, 28 L.D. 348, 353 *review denied*, 29 L.D. 255, 359 (1899).

**Relocation of Prior Contested Claims**

In *Melvin Helit v. Gold Field Mining Corp., supra* at 311, the Board discussed the situation where a claimant relocates the same ground that was found to be nonmineral in character during a previous contest:

> Thus, a hearing in a private contest at which evidence is taken leading to a final Departmental decision with respect to the mineral character of the land at issue is binding as *res judicata* between the parties to the contest as to the status of the lands at the date of the hearing. However, under Departmental case precedent, this would not preclude a showing that exploration and development since the time of the hearing have disclosed a mineral discovery sufficient to support new claim locations. In the absence of a showing of substantial evidence of mineral discovery not previously disclosed, the filing of new location for the same ground which was the subject of a prior contest hearing which resulted in a finding that the land was nonmineral in character would leave the locator vulnerable to a charge that the claims were not located or held in good faith. *See United States v. Prowell*, 52 IBLA 256, 260 (1981).

**Mineral in Character Not Established by Claim Location**

The Board has held in several cases that Athe mere fact of location of a mining claim does not establish the mineral character of the land. *Bobby L. Franklin*, 116 IBLA 29, (1990).@ *Nancy M. Swallow*, 112 IBLA 321, 323 (1990).

**Charge of Nonmineral in Character**

The charge that the lands are nonmineral in character in connection with a mining claim contest may either challenge the validity of the entire claim or be only applied to the 10-acre rule. In *United States v. Williamson*, 87 ID 34,50 (1980), the Board said:

> The charge that the lands embraced by a mining claim are not mineral in character can raise two discrete issues. First, it can challenge the validity of the entire claim. As such, it is normal adjunct to a charge of no discovery. Alternatively, it can be applied to placer claims which are supported by a discovery, with the effect that the claimant must show that each 10 acres of the claim is mineral in character. Thus, to the extent that a placer claim embraces 10-acre subdivisions which do not have the located mineral present, those portions which are nonmineral will be declared null and void.

**Final Certificate Is Not Evidence of Mineral Character**

The issuance of a "final certificate" in connection with a mineral patent application is neither evidence that a discovery has been made nor that the land is mineral in character. In *United States v. Harper*, 8 IBLA 364 (1972), the Board said:

> The same reasoning applies to the effect of the final certificate. Issuance of a final certificate, which consists of a statement that the claimant has deposited the purchase money for his claim and has ostensibly complied with the procedural requirements of the mining laws, in no way bars the Government from further inquiry into the validity of a claim. *Adams v. United States*, 318 F2d 861, 872 (9th Cir 1963). The certificate contains no determination, express or implied, of the mineral character of the land, and conditions the issuance of patent upon a finding that "all is found regular and upon demonstration and verification of a valid discovery of a valuable mineral deposit and subject to the reservations, exceptions, and restrictions noted herein." In the instant case the document is headed by the words: "Subject to a field examination by the U.S. Government."
>
> The issuance of a final certificate on a mineral entry does not impart that discovery of a valuable mineral has been made, a *sine quo non* for the issuance of patent, but rather only that the proper papers and fees have been submitted. *See* 43 CFR 3862.5-1. In contradistinction, a final certificate in a lands case imparts that all requirements of the governing law have been satisfied. See 43 USC ' 1165 (1970).

**Mineral Patent is Prima Facie Evidence of Mineral Character**

A mineral patent is prima facie evidence that a discovery exists and that the land is mineral in character. In *United States v. McCall*, 7 IBLA 31 (1972), it was held:

> A patent for a mining claim is an adjudication by the land department and a conveyance of title to the land which the patent describes and raises a presumption of right and regularity in all the proceedings antedating it. *United States v. Beaman et al*., 242 F. 876 (8th Cir 1917). So the action taken by the land office to issue patents for some land in each of the five claims herein contested is prima facie evidence of a discovery under the mining laws and of the mineral character of the lands described in the patents.

**The Oneida Perlite Case**

In *Oneida Perlite*, 57 IBLA 167 (1981), the Board discussed the application of "mineral in character" to two different situations:

1. Geologic conditions -- The lands may be nonmineral in character where the mineral does not exist in sufficient quality and (or) quantity for a 10-acre subdivision to be of commercial value.

2. Economic conditions -- The lands may be nonmineral in character where there is a superabundant supply of a mineral that has no market and thus no commercial value.

The Board discussed these two situations in terms of examples at 793-796:

> The term "mineral in character," or its antonym, "nonmineral in character" is unfortunately ambiguous as a term of art. It can be used interchangeably to describe either a geologic condition in the land or an economic condition. That is, "nonmineral in character" may describe land which is virtually barren of the mineral which is the subject of an alleged discovery, or it may describe land on which there are vast deposits of the mineral claimed which are of no commercial value because of the superabundant supply available to meet a limited demand. To illustrate this duality of usage of the same term, consider two hypothetical examples.
>
> First, a 160-acre association placer claim is located for gold based upon a discovery of placer gold in an alluvial wash. The gold is present in the wash and may be economically recovered and disposed at a profit. However, the wash occupies only parts of two 10-acre subdivisions of the 160-acre claim, while the remaining fourteen 10-acre subdivisions which comprise the upland portion of the claim are devoid of any trace of gold. Each such barren, upland 10-acre tract may be invalidated on the basis that it is "nonmineral in character," which clearly it is because the mineral which was discovered and served as the basis for the location of the claim simply does not exist on that portion of the claim.
>
> The second hypothetical example concerns two association placer claims of 80 acres each held by the same claimants and located prior to 1955 on a vast and extensive deposits of common pumice. The total reserves are estimated at not less than ten million tons, and perhaps as much as twenty million tons may be present on the two claims. There are two other operators of competitive sources active in the area. The only buyer is the local paving contractor, who uses the pumice as an additive in concrete to surface roads on jobs within a 40-mile radius. Beyond that distance there are plentiful additional sources which are cheaper for the contractor to use because of hauling costs. Any of the three local competitive producers could easily supply the contractor's entire needs from a single 20-acre pit for the next 50 years, but the contractor divides his purchases between them on the basis of which is closest to the particular job site. Even if the two competitors discontinued operations and the claimants gained the entire market, there is enough pumice on the two claims to supply that limited market for 250 years. The claimants are mining from a single pit on two 10-acre subdivisions of one claim. The remaining portions of the claim being operated and the additional claim not being operated are properly described as "nonmineral in character," despite the presence of great quantities of pumice on every portion of both claims. This is explained by the Ninth Circuit's decision in *McCall v. Andrus, supra*, where the Court took notice of the Department's finding that McCall had already been granted patents to public lands containing a reserve supply of mineral ample for 100 years; that he offered no evidence of a market for any more; that without

an expanded market it was not economically feasible to produce material from the contested tracts; and that consequently the additional material was without value as mineral.

Thus, because in the McCall case we were applying the "10-acre rule" to *portions* of claims which had been treated as valid otherwise, we regarded the *lands* containing the additional, unmarketable, valueless sand and gravel as Anonmineral in character," because the 10-acre rule provides for the elimination of aliquot 10-acre portion of *lands* which are "nonmineral in character" from otherwise valid placer claims. But in the *Baker* case we were eliminating two *entire claims* for the reason that the cinder *deposits* were unmarketable and valueless because the three other claims in that group contained more material than Baker's market could absorb over the next 200 years. Therefore, we characterized the *deposits* as Aexcess reserves." We might just as easily have said that the *lands* were "nonmineral in character."

Both terms relate to the absence of a "*valuable*," deposit of mineral.

In sum, the terms "mineral in character" and "nonmineral in character" refer to the *land* which is the subject of the claim, while the terms "excess reserves" and "reasonable reserves" refer, in certain circumstances, to the *deposit* of mineral which serves as the object of the claim. All of these expressions relate to whether or not there has been a qualifying discovery of a valuable deposit of mineral on that particular claim or portion thereof.

As we have heretofore explained at length, the term "excess reserves" is *not* a rule of law invented by the Department, nor does it represent a superimposition on existing law of some new test of the validity of a mining claim. It is merely a descriptive phrase used in certain circumstances to characterize *deposits* which are not "valuable" within the meaning of 30 USC ' 22 (1976) because the claimant already possesses an ample supply of such mineral to satisfy his share of a limited market for years into the future, and the additional deposits so described are consequently of no economic value because they cannot be presently marketed at a profit. Thus, claims located for deposits of such economically worthless minerals are invalid because they are not supported by a "discovery" of a "valuable" deposit of mineral within the boundaries of *each* claim.

It being understood that the term "excess reserves" is merely a descriptive phrase, there is no need that it be stricken from the lexicon of terms employed in the administration of the mining law, and references thereto shall not be deemed to have prejudicial effect.

In *Schlosser v. Pierce*, 93 ID 211, 226 (1986), the Board again distinguished between "discovery" and "mineral in character: "

Thus, the test as to whether land is mineral in character is essentially the same as the test for discovery, except for one important distinction. The mineral character of land may be based solely on less reliable inferential evidence, including geological conditions, discoveries of minerals in adjacent lands, and observable external conditions upon which a prudent and experienced person would rely.

**Distinction Between "Discovery" and "Mineral in Character"**

A small number of Interior and Federal court cases have distinguished between "discovery" and "mineral in character." One of the most recent Federal court statements on this subject is found in *McCall v. Andrus*, 628 F2d 1185 (1980), *cert denied* 450 US 996 (1981). The Court said at 1188 that "proof of 'discovery' requires a showing of an exposed mineral deposit on the claim while 'mineral in character' may be proved by geological inference coupled with marketability." Other pertinent cases on this subject are quoted below:

1. *State of California v. Rodeffer*, 75 ID 176, 178-179 (1968):

> Although it has been customary in contests of mining claims for the contestants to make the dual charges that no discovery has been made and that the lands embraced in mining claims are nonmineral in character, a finding on one of the issues is normally dispositive of a controversy and makes it unnecessary to make a finding on the other issue. The reason for this is fairly obvious. Proof of the discovery of a valuable mineral deposit is concurrent proof of the mineral character of the land on which the discovery is made, and, where a discovery is shown, there is no occasion to make a separate finding with respect to the mineral character of the land on which the discovery has been made. On the other hand, a finding that there has not been a discovery normally renders moot the question of mineral character, since the discovery of a valuable mineral deposit is indispensable to the validity of any mining claim and a finding that land in a mining claim is mineral in character can not validate the claim in the absence of a showing of discovery. A finding that land is not mineral in character, of course, is necessarily a finding that a discovery has not been made upon that land.

2. *United States v. Bechthold*, 25 IBLA 92 (1972):

> A finding that public lands were previously mineral in character does not constitute evidence of discovery. The tests, though somewhat similar conceptually, have different evidentiary standards. Furthermore, a finding of mineral in character fails to reach the issues of sufficient quantity and quality required under the prudent man test. *Converse v. Udall*, 399 F2d at 619. Also, changes in prices, costs, condition of the mine, et., must be considered since the time the previous determination was made.

3. *United States v. Harper*, 8 IBLA 364 (1972):

Although a finding that land is nonmineral in character is sufficient to invalidate a mining claim, the, reverse is not true. To establish the mineral character of land it is not necessary to show that the land contains a valid claim, whereas to prove the validity of a claim it must be shown that a discovery has been made of a valuable mineral deposit physically exposed within the limits of the claim. The character of a tract of land as mineral maybe inferred through geological inference, by the presence of minerals in substantial quantities on adjacent lands, or by other external conditions.

4. *United States v. Meyers*, 17 IBLA 313, 317 (1974):

Two elements must be shown under this test: (1) the quantity and quality of minerals on the claim; and (2) the prospect of success in removing, extracting and marketing the mineral. Unlike in those cases where discovery is an issue, *Henault Mining Co. v. Tysk*, 419 F2d 766 (9th Cir 1970), in a mineral character determination the quantity and quality of mineral on a claim may be established without the physical exposure of the mineral on the claim. A finding that land is mineral in character may be based wholly on inferential evidence: geological conditions; discoveries of minerals in adjacent land; and other observable external conditions upon which a prudent and experienced person would rely. *Southern Pacific Co.*, 71 ID 224, 233 (1964); *U.S. v. Tobiassen*, 10 IBLA 379, 383-84 (1973). The acceptance of these kinds of less reliable evidence to support a determination that land is mineral in character distinguishes this test from the discovery standard approved in *U.S. v. Coleman*, 390 US 599 (1968).

5. *Laden v. Andrus*, 595 F2d 482, 487 (9th Cir 1979):

... appellants argue that there must exist an actual "discovery" of valuable minerals on land before it may properly be classified as being "mineral" in character, and that the test for determining "mineral land" is more stringent than the test for proving a "discovery." Although it is true that a "discovery" has always been considered a prerequisite to the location of a mining claim under American mining law, "proof of known mineral character is not dependent upon a showing of actual discovery." *Standard Oil Co. v. U.S.*, 107 F2d 402, 414-15 (9th Cir), *cert. denied*, 309 US 654, 673.

**Mineral in Character and the Ten Acre Rule (Placer Claims Only)**

In *Ferrell v. Hoge*, 29 ID 12, 13, 15 (1889), The Secretary discussed the rationale for inquiring into the mineral character of placer mining claims upon establishing that a discovery is made on one portion of the claim:

It is contended ... that a discovery of placer mineral deposits will support a location of

twenty acres by a single individual or one hundred and sixty acres by an association of eight persons whether the mineral deposits extend throughout the entire claim or are confined to the immediate locality of the discovery.

Considering all the statutes relating to mining claims it seems clear that it was not their purpose to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent. Under the law discovery of mineral deposits is an essential act in the acquisition of mineral land, and while a single discovery is sufficient to authorize the location of a placer claim and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify the patenting thereof, such single discovery does not conclusively establish the mineral character of all the land included in the claim so as to preclude further inquiry in respect thereto.

It would not comport with the spirit of the mining laws to hold that where a placer mineral deposit is discovered in any forty acre subdivision of the public lands, an association of eight persons is authorized to embrace in a mining location founded upon such discovery three other contiguous forty acre subdivisions of nonmineral land and to receive a patent for the same as a part of their mining claim, and yet this would logically follow if the contention of these claimants were sustained.

In *U.S. v. Meyers*, 17 IBLA 313 (1974), the Board held that each 10-acre subdivision of an association placer claim must be mineral in character; if a 10-acre tract is nonmineral in character, it must be excluded from the patent. The Board also applied this 10-acre rule to an association gold placer claim. In this example the Board said:

A discovery on one 10-acre portion of an association placer mining claim does not establish the mineral character of the entire claim. Even though there is a discovery on one 10-acre portion, if any other 10-acre part is nonmineral in character, that part or parts of the claim must be excluded from the patent.

The gold-bearing gravels on the clear listed area are located on or near the S 1/2 SE 1/4 NW 1/4 NE 1/4 and appear to extend into that five-acre parcel (Tr. 43, Ex. 1). Certainly the inference that it does is properly drawn. In addition, in the northernmost trench on the 5-acre tract, Meyers testified that one sample taken in that area indicated values of $10 per cubic yard (Tr. 110), and other sampling also indicated gold values (Tr. 67). The presence of all these factors in combination is sufficient to engender the belief that this five-acre section is mineral in character even though there is insufficient exposure of minerals to justify the finding of a discovery. We find that the S 1/2 SE 1/4 NW 1/4 NE 1/4 is mineral land.

Although there are some differences in the proof available to show that the remaining 10-acre parcels are mineral lands, the proof for each is essentially similar. Limited sampling has revealed generally low gold values (i.e. from nothing to $.35 per cubic yard) and only small isolated pockets of potential gold-bearing values. These

values are in stark contrast to high values found on the clear listed portion or to the recovery of 100 ounces of gold on the parcel the Judge declared mineral in character. The stream below the bend from the center of the clear listed area to the south is almost entirely devoid of gravel (Tr. 25). The finding of traces of gold or low-grade gold-bearing gravels in limited quantities does not demonstrate, without more, that land is mineral in character.

In *McCall v. Andrus*, 628 F2d 1185 (9th Cir 1980), *cert. denied* 450 US 996 (1981), the Ninth Circuit Court upheld the ten-acre rule and also the rule that only one discovery is required for a claim, regardless of size. The Court said at 1188:

> ... 30 U.S.C. "35 and 36 restrict the maximum size of a placer mining claim to twenty acres per individual, up to 160 acres for an association claim. These sections do not provide, however, that land within a placer claim that does not contain valuable minerals can be purchased under ' 22. The Interior Department has held:
>
> > Considering all the statutes relating to mining claims it seems clear that it was not their purpose to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent.
>
> *American Smelting & Refining Co*., 39 ID 299, 301 (1910). The Department established a rule that, when challenged, the claimant must show that each ten-acre tract on his claim contains a valuable mineral. *Id*.; *U.S. v. Bunkowski*, 79 ID 43, 54-55 (1972). Since federal land is platted in ten acre tracts, ten acres is a reasonable unit. "A court faced with a problem of statutory construction should give great deference to the interpretation of a statute by the... agency charged with its administration." *Brubaker v. Morton*, 500 F2d 200, 202 (9th Cir 1974).
>
> The validity of a mining claim is established either by the granting of a patent upon application by the claimant or through contest proceedings initiated by the government. *See Ideal Basic Industries, Inc. v. Morton*, 542 F2d 1364, 1367-68 (9th Cir 1976). If the validity of the claim is contested, the claimant must prove that he has made a "discovery" of a valuable mineral deposit thereon. To do so, the claimant essentially must show that the mineral is "marketable" in that it can be mined, removed and disposed of at a profit. *Verrue v. U.S.*, 457 F2d 1202, 1203 (9th Cir 1972). Only one discovery per claim must be shown. 43 CFR '3842.1-1. However, if the character of the land is also challenged in the contest complaint, the claimant must show that each ten-acre tract contains a deposit of the mineral under the ten-acre rule. The rule does not require, as McCall argues, that a discovery be made on each ten-acre tract contrary to regulation.

**Ten-Acre Rule Applies to Individual Placers**

In *U. S. v. Lara*, 67 IBLA 48,50 (1982), it was held that "the 10 acre rule is equally applicable to individual and association placer claims." Therefore the Department should examine the mineral character of every 10-acre tract, even if the claim is an individual claim

consisting of only 20 acres.

**Quantity of Mineral**

Mineral lands do not include those vast areas of the country that contain precious metals in small quantities, but not in sufficient value to justify their exploitation. In *Davis v. Weibold*, 138 US 507, 519 (1891), it was said that the exceptions of mineral land from entry under the homestead laws or grants under the public land laws "are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant." In *Deffenback v. Hawk*, 115 US 392, 404 (1885), quoted with approval in *Diamond Coke & Coal v. U.S.*, *supra* at 240, the United States Supreme court also stated the following:

> We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable.

And in a more recent Interior Department case it was held that where land is shown to contain minerals in such limited quantities that their extraction would not justify the cost, the land is not mineral in character. *John M. DeBevoise*, A-28099, 67 ID 177 (1960).

**Agriculture v. Mining Purposes**

To determine whether land is agricultural or mineral in character depends on whether the land is more valuable for agricultural or mining purposes. *Barden v. Northern Pacific R. Co.*, 154 US 288 (1894). In *Davis v. Wiebbold*, 139 US 507, 521 the Court held that "... if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some measure of gold or silver."

It has never been the policy of Congress to dispose of mineral lands under the agricultural or nonmineral laws. *Ivanhoe Mining Co. v. Consolidated Mining Co.*, 102 US 167 (1880). And title to known mineral land cannot be acquired under an agricultural or nonmineral entry. *Deffeback v. Hawke*, 115 US 392, 402 (1885).

**Valuable for Minerals at Time of Sale**

In *Davis v. Weibold, supra* at 524, it was held that "the exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were, at the time of the grant, known to be so valuable for their minerals as to justify expenditure for their extraction." In *Deffeback v. Hawke, supra* the Supreme Court said the following:

> We say "land known at the time to be valuable for its minerals," as there are vast tracts of land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term "mineral"

in the sense of the statute is applicable.

**No Retroactive Effect if Minerals Later Found**

A decision by the Interior Department that lands are nonmineral in character will not be disturbed if the lands are patented and are later found to be mineral in character. *Lane v. Watts*, 1 App DC 139 (1913), *affirmed* 234 US 525. In *Deffeback v. Hawke*, *supra*, the Supreme Court said:

> We also say lands known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which years afterwards rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the preemption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term known to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued.

**Marketability Applied in Determining Mineral in Character**

In *McCall v. Andrus*, *supra* at 1188, it was held that "mineral in character may be proved by geological inference coupled with marketability." The Court expanded on the marketability requirement as follows:

> McCall's contention that the Board based its decision on the absence of actual mining is incorrect. The Board adopted the conclusion of the hearing examiner who stated:
>
> > It is only those tracts with a deposit which can be extracted, processed, and marketed at a profit in competition with other deposits that are valuable and mineral in character. The contestees believe that the caliche material can be blasted and processed at a competitive price at the present time. (The contestees) have received a patent for 230 acres which has over three and one-half million yards of sand and gravel in every ten feet of depth. If they had a market for this amount they would have a reserve supply for one hundred years.
> >
> > The contestees offered no evidence to suggest that they had a market for any more than this amount of material either in 1948, 1953, or 1955. Without an expanded market it was not economically feasible to produce the material on the contested tracts. Consequently it had no value as a mineral prior to July 23, 1955.
>
> This is a proper application of the test for determining whether land is mineral in character.

**Rule-of-Thumb for Mineral Reservations**

The general rule-of-thumb concerning the reservation of mineral lands in patents was given in *U.S. v. Smith*, 245 US 563 (1918). In this case the court held that "every grant of public lands whether to state or otherwise should be taken as reserving and excluding mineral lands, unless it is expressly stated that they are to be included."

**BLM Rejects Patent Application Because Lands Are Mineral in Character**

In *Mary Johansen*, 122 IBLA 344 (1992), the issue was where BLM could properly reject a Native Allotment application after equitable title has passed but before patent is conveyed. The application was rejected on the basis that the lands were determined to be mineral in character. Only nonmineral land may be disposed under the statute. The Board held that the Department has the authority to inquire into the propriety of conveying legal title at any time prior to issuance of patent. *Id*. at 347. However, "due process permits such action to be taken only after proper notice and hearing." *State of Wisconsin*, 65 I.D. 265, 272 (1958).

**Date of Passage of Equitable Title Is Critical Mineral in Character Date**

The critical date for determining the mineral character of land subject to a Native Allotment application is the date equitable title passes, because after that date, the United States loses the ability to condition the grant. *Mary Johansen, supra* at 347. In holding that the date of passage of equitable title is the critical mineral-in-character date, the Board stated at 347-48:

> ....Therefore, even if the United States completes a mineral-in-character report after equitable title has passed, the determinative date for such a report should be not later than the date of passage of equitable title. Thus we hold that the date of passage of equitable title to a Native allotment is the critical mineral-in-character date. *Ann Lynn Purdy*, 122 IBLA 209, 213-14 (1992). Accordingly, BLM must establish that "the facts in existence at the time equitable title passed required a determination that the land was mineral in character."

**Hearing Required before Rejecting Application Because of Mineral Character Classification**

Where an entry is rejected after equitable title has passed, based on a unilateral finding that the land is mineral in character, due process requirements must be followed. When BLM adjudicates a case involving a factual issue such as the mineral character of the land, the applicant must be afforded an opportunity to challenge that classification at a hearing. The proper procedure is for BLM to initiate a contest giving the applicant notice and an opportunity to appear at a hearing and to present evidence prior to rejection of the application. *Mary Johansen*, 122 IBLA 344 (1992).

**II. Reservation of Specific Minerals**

Until 1909, as a general rule there was no mineral reservation in United States land patents issued under the homestead laws. Since it had long been the policy of Congress to not allow disposal of mineral lands under the public land laws, lands classified as mineral lands were not available for entry under the homestead acts. However, because so much highly sought after lands were precluded from entry under this policy, Congress passed a series of laws that authorized patenting of lands if certain valuable specified minerals were reserved to the United States.

**Coal Reservation Authorized by 1909 Statute**

The Act of March 3, 1909 (35 Stat. 8; 30 USC 81) provides that persons who enter, in good faith, lands which after the date of entry are determined to be valuable for coal may receive a patent to such entry. However, the patent will contain a reservation to the United States of all coal in the lands with the right to prospect for, mine and remove the coal. 43 CFR 2093.1-2. This 1909 Act was the first statute authorizing a severance of the mineral title from the surface title under the homestead acts.

**Coal Reservation Authorized by 1910 Statute**

The Act of June 22, 1910 (30 USC 85) provides that lands, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, are subject to entry under the homestead and desert land laws. In a nonmineral patent, the coal is reserved to the United States, together with the right to prospect and mine. In 43 CFR 2093.2-4, the following reservation is given for insertion in nonmineral patents.

> Excepting and reserving, however, to the United States all the coal in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove the coal from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of June 22, 1910 (36 Stat. 583).

The Act of June 22, 1910, gives the owner of the coal deposits the right to enter and occupy as much of the surface as required for all purposes reasonably incident to mining and removal of the coal. The coal owner may either pay the surface owner for damages caused to the surface or post a bond.

**Phosphate, Nitrate, Potash, Oil, Gas or Asphaltic Minerals Reservation Authorized by 1914 Statute**

Section 1 of the Act of July 17, 1914 (38 Stat. 509; 30 USC 121), as amended, authorized the issuance of patents under the nonmineral land laws for lands which were withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits. Nonmineral patents issued for lands which were withdrawn, classified, or reported as valuable for one of these minerals contained a reservation of the specific mineral(s), together with the right to prospect for, mine, and remove the same. The Act of July 17,1914, applies to all public land states except the State of Alaska. The specific language of the mineral

reservation to be incorporated in the patent is given in 43 CFR 2903.3-4:

> Excepting and reserving, however, to the United States all the [deposit on account of which the lands are withdrawn, classified or reported as valuable-- phosphate, oil, or other mineral, as the case may be] in the lands so patented, and to it, or persons authorized by it, the right to prospect for mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat. 509).

The Act of July 17, 1914, gives the owner of the mineral deposits the right to enter and occupy as much of the surface as required for all purposes reasonably incident to mining and removal of the coal. The coal owner may either pay the surface owner for damages caused to the surface or post a bond.

**Sodium and Sulphur Reservation Authorized by 1933 Statute**

The Act of March 4, 1933 (47 Stat. 1570; 30 USC 124), provided that lands withdrawn, classified, or reported as valuable for sodium and/or sulphur may be patented under the nonmineral land laws under the same conditions as described in the Act of July 17, 1914. However, sulphur lands are limited to the State of New Mexico, pursuant to the Act of July 16, 1932 (47 Stat. 701; 30 USC 271, 276). The 1933 Act does not apply to Alaska.

**Reservation of All Minerals in Stockraising Homestead Patents**

Section 9 of the Act of December 29, 1916 (39 Stat. 864; 43 USC 299), requires that patents issued under the Stockraising Homestead Act shall contain a reservation to the United States of all coal and other minerals, together with the right to prospect for, mine, and remove the same. The following reservation is required by 43 CFR 2093.5-1 to be incorporated in all patents issued under the 1916 Act:

> Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove all the coal and other minerals from the same upon compliance with the conditions, and subject to the provisions and limitations, of the Act of December 29, 1916 (39 Stat. 862).

**Mineral Reservation Under Taylor Grazing Act Includes Sand and Gravel**

Reservation of all minerals to the United States in a patent of public lands pursuant to section 8 of the Taylor Grazing Act, as amended, 43 U.S.C. 315g (1970) reserves valuable deposits of sand and gravel. *United States v. Isbell Construction Co*., 4 IBLA 205, 212-15, 78 I.D. 385, 388-90 (1971); *H.E. Hunewill Construction Co.* Inc., 137 IBLA 101 (1996).

**Ownership of Reserved Minerals Construed on Basis of Intent of Congress**

In *Earl Williams*, 140 IBLA 295, 302-304 (1997), the Board considered a case where the BLM concluded that the Supreme Court=s holding in *Watt v. Western Nuclear*, construing section 9 of the Stock Raising Homestead Act (SRHA) and finding sand and gravel reserved in SRHA patents is also applicable to the mineral reservation in patents conveyed under the Pittman Underground Water Act of 1919. The Board pointed out that the intent of Congress , as reflected in the legislative history of the Act is more appropriate than reliance on analogous legislation when construing whether ownership of subsurface minerals passed to a patent-holder.

> We conclude that sand and gravel was reserved to the United States in Pittman Act patents. Our conclusion is based on the intent of Congress, as reflected in the legislative history of the of that Act.
>
> It is a well established rule of statutory construction that reliance on analogous legislation is of limited probative value when interpreting the intent of lawmakers:
>
> > Caution must be exercised in applying the rule that one statute will be interpreted to correspond to analogous but unrelated statutes for the reason that by way of contrast an inclusion or exclusion may show an intent or convey a meaning exactly contrary to that expressed by analogous legislation. Therefore, the rule tends to be of greater value where analogy is made to several statutes or a general course of legislation.
> >
> > The interpretation of one statute by reference to an analogous but unrelated statute is considered an unreliable means of discerning legislative intent. Consequently, the chief value of the rule is to be found in the fact that it serves as a criterion for showing the general course of legislative policy.
>
> (Footnotes omitted.) Norman J. Singer, 2B *Sutherland Stat Const* ' 53.05 (5th ed. 1992).
>
> Two additional canons of statutory construction should be considered at this point in our analysis. First, because A[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent, * * * each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.@ Norman J. Singer, 2A *Sutherland Stat Const* ' 46.05 (5th ed. 1992). Second, although the plain meaning rule focuses on the importance of a literal reading of the language of a statute, a Aliteral interpretation of the words * * * should not prevail if it creates a result contrary to the apparent intention of the legislature[.]@ Id. At ' 46.07. At the same time, the language and structure of a statute should be carefully considered, especially when the Act being considered is derived from carefully considered legislative compromises. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 n. 14 (1989).
>
> The legislative record indicates that the mineral reservation provisions of the Pittman Act were neither accidental inclusions nor mere boilerplate. They were carefully

crafted and thoroughly debated by the Congress. It is clear that Congress considered them to be a crucial part of the Act.

* * * The conclusion that sand and gravel is reserved to the United States by the reservation found in Pittman Act patents is consistent with the Congressional purpose of encouraging the concurrent development of the surface and subsurface estates and is in accord with Athe established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.@ *Watt v. Western Nuclear, Inc.*, *supra*, at 59, *quoting United States v. Union Pacific Railway Co.*, 353 U.S. 112, 116 (1957)

**Mineral Reservations Include Mineral Resources Not Contemplated at Date of Act**

In *Earl Williams*, 140 IBLA 295 15 (1997), the Board pointed out that the case of *United States v. Union Oil Company of California*, 549 F.2d 1271 (9th Cir. 1977), *cert. denied sub nom. Ottoboni v. United States*, 434 U.S. 930 (1977) held that patents issued under the Stock Raising Homestead Act reserved geothermal resources to the United StatesBa mineral not contemplated in 1916. The Board said at 314, f.n. 15:

* * * A review of the legislative history of the SRHA led the court to conclude that the mineral reservation in that Act Ais to be read broadly in light of the agricultural purpose of the grant itself, and in light of Congress=s equally clear purpose to retain subsurface resources, particularly sources of energy, for separate disposition and development in the public interest.@ Thus, the court found that patents issued pursuant to the SRHA reserved to the United States geothermal resources underlying the patented landsBresources not likely contemplated when the SRHA was enacted in 1916.

**Coal Reservation in Patents for Lands in Indian Reservations**

The Act of February 27, 1917 (39 Stat. 944; 30 USC 86), authorized the issuance of patents under the nonmineral land laws for lands which have been withdrawn or classified as coal lands or are valuable for coal deposits. In such patents, the coal deposits are reserved to the United States together with the right to prospect for, mine, and remove the same.

**Coal, Oil, and Gas Reservations Authorized in Alaska by 1922 Statute**

The Act of March 8, 1922 (42 Stat. 415), as amended by the act of August 23, 1958 (72 Stat. 730; 43 USC 376, 377), authorized the issuance of nonmineral patents for homesteads and certain other entries even though the lands are known to contain workable coal, oil or gas deposits or may be valuable for coal, oil or gas. Patents issued for such lands shall contain a reservation to the United States of all the coal, oil, or gas in the land patented together with the right to prospect for, mine and remove the same.

The Act of March 8, 1922, gives the owner of the coal, oil or gas the right to enter and

occupy as much of the surface as required for all purposes reasonably incident to mining and removal of the minerals. The mineral owner may either pay the surface owner for damages caused to the surface or post a bond. The purpose of the 1922 Act was to extend to Alaska the principles of the acts of March 3, 1909, June 22, 1910, and July 17, 1914.

**General Rules Regarding Mineral Reservations in Patents**

As a general rule it is important to remember that specific and general mineral reservations were not contained in United States patents until the particular statute authorized such reservation. The following table shows the earliest dates that specific minerals were reserved in patents issued under the homestead acts:

*The earliest date in Alaska would be March 8, 1922 for coal, oil and gas.

For example, by examining the above table, one may easily ascertain that you would not expect any mineral reservation in homestead patents issued prior to March 3, 1909. Also you would not expect to find that phosphate was reserved in any patent issued prior to July 17, 1914.

**No Mineral Reservation in Patents Before March 3, 1909**

The first statute authorizing the issuance of a patent with a mineral reservation was the Act of March 3, 1909, 35 Stat. 844, 30 U.S.C. 81 (1982), which provided for the reservation of coal deposits in certain lands classified as being valuable for coal. *Silver Buckle Mines, Inc*., 84 IBLA 306, 308 (1985). In *Silver Buckle Mines, supra* the Board concluded that "no mineral reservation could properly be applied to a patent issued prior to this date.@ Consequently, Athere is no basis for inferring a mineral reservation where the patent was issued pursuant to statutory authority which predates congressional authorization for the reservation of minerals.@ *Homestake Mining Co*., 104 IBLA 357, 361 (1988).

**Reservation of Radioactive Minerals Release to Surface Owner**

In 42 U.S.C. 2098(b) the statute provides for a reservation in a deed to a surface owner be released to that person:

> Any reservation of radioactive mineral substances, fissionable materials, or source material, together with the right to enter upon the land and prospect for, mine, and remove the same, inserted pursuant to *Executive Order* 9613 of September 13, 1945, *Executive Order* 9701 of March 4, 1946, the Atomic Energy Act of 1946 (42 U.S.C. 1801 *et seq*.), or *Executive Order* 9908 of December 5, 1947, in any patent, conveyance, lease, permit, or other authorization or instrument disposing of any interest in public or acquired lands of the United States, is released, removed, and quitclaimed to the person or persons entitled upon August 19, 1958, under the grant from the United States or successive grants to the ownership, occupancy, or use of the land under the applicable Federal or State laws:

**Definition of the Term "Valuable Mines"**

In *Homestake Mining Co*., 104 IBLA 357 (1988), the Board discussed the meaning of the term "valuable mines" at 361:

> Although the term Avaluable mines@ might have meant actual working mines Congress probably intended a broader interpretation. In *Colorado & Iron Co. v. United States*, 123 U.S. 307, 327 (1887), the Supreme Court first stated that in previous decisions it had limited the term Aknown mines" to mean Aat the time the rights of the purchaser accrued, there was upon the ground an actual and opened mine which had been worked or was capable of being worked." However, it then expanded they term, which Congress had excluded from preemption entries, to mean mineral deposits "of such an extent and value as to make the land more valuable to be worked as a * * * mine, * * * than for merely agricultural purposes.@ *Id*. at 328. As such, a determination that land contained "known mines," within the context of the statutory exclusion, constituted a determination that the land was mineral.

**Disposals Allowed if No Interference with Leasing**

Section 29 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 449; 30 USC 186), and the Act of March 4, 1933 (47 Stat. 1570; 30 USC 124), authorize the Secretary of the Interior, Bureau of Land Management to determine if a nonmineral application should be allowed. Disposals under the nonmineral land laws are allowed only if such action would not unreasonably interfere with operations under the Mineral Leasing Act. 43 CFR 2093.0-3.

If a lease, permit or application is outstanding at the date of a nonmineral application, the final certificate and patent will indicate that they are subject to the Act of March 4, 1933. If there is an outstanding lease or permit at the date of patent issuance, the final certificate and the patent will indicate that they are also subject to section 29 of the Act of February 25, 1920 (41 Stat. 449; 30 USC 186). 43 CFR 2093.0-6.

**Lessee of Reserved Minerals Liable to Surface Owner for Damages**

If the location date of a mineral claim is not prior to the date of the nonmineral patent, the mineral lessee or permittee is liable to the owner of the surface for damages to crops or improvements resulting from prospecting or mining operations. 43 CFR 2093.0-7.

# 6. FEDERAL LAND GRANTS

## RAILROAD GRANTS

Congress made two types of grants to the railroad companies to encourage the building of railroads: (1) outright grants in fee, and (2) a right-of-way.

### Grants in Aid

The grants in aid were made by giving a railroad company so many odd-numbered sections within 10 miles on each side of their right-of-way. In some cases this was extended by granting the odd-numbered sections within 20 miles of the railroad line. The extent of the grant, whether it be 10 or 20 miles, was called the "place limits" and the odd-numbered sections within these limits were called the "place land." Patents were issued in some cases where the railroad completed certain requirements. However, a patent is not necessary to accomplish the grant.

There has been much litigation over whether a railroad grant reserves mineral rights to the United States if minerals are later found after the effective date of the grant. However, under a railroad grant which provides that "all mineral lands be, and the same are hereby, reserved and excluded from the operation of this act, issued for lands, excepting and excluding all mineral lands should any such be found to exist (Act of July 27, 1866)," does not reserve to the Interior Department the power to subsequently inquire into the character of the lands.

When the Department has issued a patent to a railroad under its grant, title vests in the railroad and the Department has no further jurisdiction over the patented land. An unrestricted patent to a railroad under its grant includes the title to the surface of the land and the mineral deposits under it. If a reservation should exist in a railroad patent which purports to reserve the minerals to the United States, such reservation is void. *Sewell Thomas*, A-27106 (Dec. 22,1954). In fact a railroad land patent is taken as conclusive evidence of the nonmineral character of the land. *John Sherman Bagg*, A-28123 (Jan. 14,1960).

**Railroad Act of 1862**

Under the Act of July 1, 1862 (12 Stat. 489), as amended by the Act of July 2, 1864 (13 Stat. 356), the railroads were granted alternate sections of public land within a belt extending for a designated number of miles on either side of the railroad's line to be built in the future. Section 3 of the Act of July 1, 1862, states as follows:

> ... every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States... at the time the line of said road is definitely fixed: Provided, That all mineral lands shall be excepted from the operation of this act..." 12 Stat. 492.

Section 4 of the Act of July 2,1864, doubled the amount of land granted and provided additionally that:

> [A]ny lands granted by this act, or the act to which this is an amendment, shall not... include any government reservation or mineral lands... or any lands returned and denominated as mineral lands... 13 Stat. 358.

Under section 4, patents conveying title to railroad sections would issue as the railroad line was completed. The term "mineral land" was defined in section 4 of the Act of July 2,1864, as not including coal and iron land. It also stated that lands granted did not include mineral lands.

In *Central Pacific R. R. Co. v. Valentine*, 11 LD 238 (1890), the Secretary rules that if lands were determined to be mineral in character at any time before the issuance of a patent, such lands must be excepted from the grant. *Also see Barden v. Northern Pacific Railroad Co*., 154 US 288, 329-32 (1894).

Until 1903, patents issued under the Railroad Grant Acts in most instances contained language excepting mineral lands. Since this language might have been construed as allowing the Federal Government to reclaim lands for which patent issued if they later were found to contain mineral reserves, a railroad company requested that the Secretary of the Interior eliminate the excepting language from its patents. The Secretary reviewed pertinent decisions of the Supreme Court and concluded that the issuance of a patent under the Railroad Land Grant Acts is determinative of the nonmineral character of the lands for the purposes of the grant. *Northern Pacific Railway Co*., 32 LD 342, 344 (1903). The Secretary then issued a directive to the General Land Office to exclude the excepting language from future railroad land grant patents. In Burke v. *Southern Pacific R. R. Co*., 234 US 669 (1914), the Supreme Court reviewed the same issue. It concluded that the General Land Office was without authority to issue patents with language excepting mineral lands because the granting Act contemplated that only nonmineral lands would be patented and that the patents would unconditionally pass title.

**Minerals Discovered After Land Patented**

It was recognized early that the land office may not always make the proper characterization of lands involved in railroad grants. However, the discovery of minerals after issuance of a patent would have no retroactive effect on the conveyance. In *Barden v. Northern Pacific Railroad*, *supra* at 330, the Supreme Court stated:

> lt is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. ... The grant, even when all the acts required of the grantees are performed, only passes a title to nonmineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were nonmineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title.

Then somewhat later in *Burke v. Southern Pacific R. R. Co*., 234 US 669 (1914), the Supreme Court stated:

> But it is said that the Secretary of the Interior has no authority to patent mineral lands, and that a patent for lands, in fact mineral, would afford no protection to the railroad company in the event of the future discovery of precious metals therein. This is a mistake. After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals. ...

**Criteria for Mineral in Character**

In *Southern Pacific Company*, 71 ID 224, 233 (1964), the holding of the Supreme Court in *U.S. v. Southern Pacific Co*., 251 US 1 (1919) was discussed as it relates to criteria for mineral in character:

> ... *United States v. Southern Pacific Co*. ... sets forth the criteria for determining whether the land is mineral in character. It is not essential that there be an actual discovery of mineral on the land. It is sufficient to show only that known conditions are such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. Such belief may be predicated upon geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent and

experienced men are shown to be accustomed to act.

**Burden of Proof for Mineral in Character**

In an administrative hearing concerning the evidence which must be shown to establish mineral character, the first burden falls on the government to establish a *prima facie* case that the land is mineral in character. Then the burden shifts to the railroad to show by a preponderance of the evidence that the land in question was not mineral in character. *Mildred J. Tobiassen*, 10 IBLA 379, 383-384 (1973).

**Railroad In Lieu Selections**

To compensate for lost "place lands," the railroads were given indemnity lands. These lands were also limited to lands that were nonmineral in character and the lieu selection had to be from odd-numbered sections not more than 10 miles beyond the "place limits." The granting acts also excepted lands which had been entered or settled under the agricultural land laws. Again, Congress permitted the railroad companies to select lieu lands. These lieu lands usually had to be within 10 or 20 mile limits of the right-of-way, but were not always limited to the odd numbered sections. The Act of June 22, 1874 (18 Stat. 194), was passed to help the homesteaders who had established their settlement after a railroad grant by allowing the railroad companies to relinquish these illegally occupied lands and making available other lands of equal value in lieu of the lands lost. 43 USC 888. Because mineral lands are not subject to homestead entry, the relinquished lands were not mineral lands, and therefore the railroads should not receive mineral lands in their lieu selections. *Santa Fe Pacific R. Co. v. Work*, 267 US 511 (1925).

Although patents were generally issued for indemnity lands, in some cases the certification of the indemnity list conveyed the title without issuance of a patent.

**Reservations in Railroad Patents**

In all of the patents issued to the railroads between 1866 and 1904 under the grants in aid, one of the following exceptions will be found:

Excluding and excepting all mineral lands should any be found in the tract aforesaid.

OR

Yet excluding and excepting from the transfer of these presents all mineral land should any such be found to exist in the tracts described in this patent, this exception, as required by statute, not extending to coal or iron lands.

**1862 Railroad Rights-of-Way**

The ASupreme Court=s decision in *United States v. Union Pacific Railroad Co.*, 353 U.S. 112 (1957), in which the Court held that the exclusion of mineral lands from land granted

for construction of the main line of the railroad under section 2 of the Act of July 1, 1862, 12 Stat. 489, operated as a reservation of minerals beneath that right-of-way to the United States.@ *Stacy B. Good*, 113 IBLA 119, 121 (1995). Of course, these reserved federal minerals are not necessarily open to mineral location.

**Railroad Act of 1862**

In section 3 of the Act of July 1, 1862, 12 Stat. 489, Congress established a procedure of administrative determination of the mineral character of the alternate sections. The Supreme Court in *United States v. Union Pacific Railroad Co*., 353 U.S. 112 (1957) explained how this works at 116:

> The system which Congress set up to effectuate its policy of reserving mineral resources in the alternate sections of public land granted by ' 3 was by way of an administrative determination, prior to issuance of a patent, of the mineral or nonmineral character of the lands. Patents were not issued to land administratively determined to constitute mineral lands. And, the administrative determination was final. *Burke v. Southern Pacific R. Co*., 234 U.S. 669. Such an administrative system was obviously inappropriate to the right of way granted by ' 2.

In *Stacy B. Good*, 133 IBLA 119, 121 (1955) the Board commented on the finality of a determination that the lands were not mineral in character:

> ....Because the land on which the subject claims are located was patented as an alternate section, the patent itself evidences the final administrative determination that the land was not mineral in character and no mineral rights were reserved. Such patents cannot now be attacked by persons who had no interest in the lands at the time the patents were issued. *Joseph A. Barnes*, 78 IBLA 46, 55-56, 90 I.D. 550, 555 (1983), *aff=d, Barnes v. Hodel*, 819 F.2d 250 (9th Cir. 1987), *cert. Denied*, 484 U.S. 1005 (1988).

**Railroad Right-of-Way Is an Easement**

The General Railroad Right of Way Act of March 3,1875,18 Stat. 482, granting a right of way for railroads across the public lands outside Alaska, has been held to convey only an easement and not a fee interest in the land. *Great Northern Railway Co. v. U.S.*, 315 US 262 (1942). Section 1 of the Act provides in part as follows:

> [T]he right of way through the public lands of the United States is hereby granted to any railroad company... to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad, also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each

station, to the extent of one station for each ten miles of its road. General Railroad Right of Way Act of Mar. 3, 1875, ch. 152 '1, 18 Stat. 482 (repealed, Act of Oct. 21, 1976, P.L. 94579, '706(a), 90 Stat. 2793).

The Court noted that section 4 of the Act stated in part that all public lands over which the right-of-way passes "shall be disposed of subject to such right of way." 315 US at 271. The Court held that the reserved right to dispose of the lands subject to the right-of-way is inconsistent with the grant of a fee and persuasive that the grant of an easement was the intent of the statute. 315 US at 271. The location of a post-1871 railroad right-of-way across a tract of public land does not separate the servient estate from the public domain with the result that title to the servient estate passes without express mention in a subsequent grant by the United States of the traversed tract of public domain. *State of Wyoming v. Udall*, 379 F2d 6359 639-40 (10th Cir. 1967), *cert. denied*, 389 US 985 (1967).

In *State of Wyoming v. Andrus*, 602 F2d 1379 (10th Cir. 1979), the Court considered whether a railroad right-of-way grant under the 1862 and 1864 statutes entitled the State of Wyoming to indemnitee selections for such lands within school sections granted to the State under its Enabling Act. The Court held that the State was not entitled to indemnity selections for such lands. Instead the Court held it was the intent of Congress that Wyoming take the sections subject to the railroad right-of-way. *Id* at 1385.

In *The Alaska Railroad*, 65 IBLA 376 (1982), the Board held that a railroad's right-of-way "should not be considered to be appropriated or reserved at the time of State selection so as to be excluded therefrom. The decision correctly held that a right-of-way for railroad shall be reserved in any State selection patent issued."

**Innocent Purchaser for Value Under Transportation Act of 1940**

Section 321(b) of the Transportation Act of 1940, 49 USC 65(b) (1976), preserved existing Departmental authority under section 5 of the Act of March 3, 1887 (43 USC 898), to issue patents to innocent purchasers for value of mineral lands from railroads. *See Laden v. Andrus*, 595 F2d 482, 485 n. 3 (9th Cir. 1979). Section 321(b) of the Transportation Act of 1940, was repealed by section 4 of the Act of October 17, 1978; 92 Stat. 1466.

Under section 3 of the Act of July 1, 1862, the grant to the railroad took effect as of the date on which the railroad line was definitely located. As to the rights of an innocent purchaser for value under the savings clause in the Transportation Act of 1940, the Department has ruled that a patent may not be issued for railroad grant lands sold by the railroad if the lands were of known mineral character at any time between the date the railroad line was definitely located and the date of the sale by the railroad, unless the purchaser did not know and should not be held to have known of the mineral character at time of the purchase. *Southern Pacific Company*, 77 ID 177 (1970).

Therefore, even if it is established that the land was mineral in character at the date of purchase, and excepted from the grant to the railroad, an applicant may prevail if he can establish

that there was an innocent purchaser for value. *U.S. v. Southern Pacific Transportation Co.*, 66 IBLA 191 (1982). In *Laden v. Andrus, supra* at 490, the Court held that a purchaser will not be considered innocent where the facts show that he knew or should have known that the lands were mineral in character as of the date of his purchase or were of such character so as to have been excluded when the railroad line was definitely located or at any time prior to his purchase. As was said in *U.S. v. Central Pacific Railroad Co.*, 84 Fed. 218, 221 (1898):

> The status of a bona fide purchaser is made up of three essential elements: (1) a valuable consideration; (2) the absence of notice; and (3) the presence of good faith.

## STATE LAND GRANTS

### I. School Land Grants

The purpose of most of the land grants to the states by the federal government was to establish a source of support for public education. Through the Ordinance of May 20, 1785, Congress provided the first authorization of grants of public domain lands to states. In addition to requiring a rectangular system of surveys for public lands, this Ordinance also provided for reservation of lot number 16 of every township to be used to maintain public schools. The Act of April 30, 1802, which authorized the entry of Ohio into the Union, provided that section 16 of every township be granted to the inhabitants of each township for public schools. The Act of August 14, 1848, which established the organization of the Territory of Oregon, authorized both sections 16 and 36 to be granted to the states for use of schools. Certain states such as Utah and Arizona and New Mexico were granted four sections in each township for school purposes.

Altogether, approximately 328 million acres, or almost 18 percent of the original public domain has been granted to the various states. There are three basic categories of state land grants: (1) grants "in place" for public schools such as sections 16 and 36; (2) "quantity grants" or grants made on the basis of a total acreage in which states were allowed to select a specific acreage from the public domain to be used for institutional purposes; and (3) lieu-selection grants or indemnity grants where states are allowed to select lands from the public domain to compensate for lands lost because of reservations of prior appropriation of land by individuals under the public land laws. Most state lieu selections are made for lands lost (generally sections 16 and 36) in the National Forest Reserves.

#### Lands Subject to Quantity and Special Grant Selection

Selections made for quantity and special grants can generally be made only from the vacant, unappropriated, nonmineral, surveyed public lands within the state to which the grant was made. However, if the lands are otherwise available for selection, the states may select lands which are withdrawn, classified, or reported as valuable for coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, sodium, or sulphur. Of course such minerals must be reserved from the grant. 43 CFR 2622.0-8.

**Patents for Granted School Sections**

The Act of June 21,1934 (48 Stat. 1185; 43 USC 871a), authorizes the issuance of a patent to a state for the numbered school sections in place granted for the support of schools. The state must make application according to the procedures in 43 CFR 2624.1.

**School Land Grants Extended to Include Mineral Sections**

Section 1 of the Act of January 25, 1927 (44 Stat. 1026; 43 USC 870), allowed for grants to states of numbered sections for the support of schools to also include numbered sections that are mineral in character. The states of Arizona, California, Colorado, Idaho, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming benefited from this grant. This additional grant applies to school section lands known to be of mineral character at the effective date. It does not include school-section lands that were nonmineral in character at the time of the grant, but were later found to contain mineral deposits. There is no retroactive effect to such grants and mineral deposits discovered after the grant would belong to the state. *Wyoming v. U.S.*, 255 US 500, 501.

The Act of 1927 does not apply to indemnity of lieu selections or exchanges or the right to select indemnity for numbered school section in place lost to the state. School-section lands included within existing reservations for waterpower purposes and all lands in Alaska are also excluded from the Act.

The provision in the Act of January 25, 1927, that the states are granted mineral sections is effective at the date of the Act. Valid applications, entries, selections, locations, permits, leases, and other forms of filing, initiated or held according to existing laws of the United States prior to January 25,1927, embracing known mineral school-section lands, are protected under the Act. Upon relinquishment of the above-mentioned valid applications, claims, or rights, the additional mineral grant to the state will attach.

**Act of 1927 Requires that States Reserve Minerals in Land Disposals**

The additional grant of mineral sections by section 1 of the Act of January 25, 1927, is made under the express condition that Aall sales, grants, deeds, or patents for any of the lands so granted shall be subject to and contain a reservation to the state of all the coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same." The Act further provides that the mineral deposits in such lands may be leased by the state and that rentals and royalties from the leases must be used for the support of

the schools. In the event that a state should dispose of any lands or minerals contrary to the provisions of the Act of 1927, such lands or minerals shall be forfeited to the United States.

**Grants to the State of Alaska**

The Act of July 7, 1958 (72 Stat. 339-343), grants to the State of Alaska the right to select within 25 years from January 3, 1959, not to exceed 102,550,000 acres from the public lands in Alaska. The lands must be vacant, unappropriated, and unreserved at the time of selection. The Act of September 14, 1960 (74 Stat. 1024), defines vacant, unappropriated, unreserved public lands in Alaska to include the reserved interest of the United States in lands which have been disposed of with a reservation to the United States of all minerals or any specified mineral.

The Act of August 18, 1959 (73 Stat. 395), requires that any lease, permit, license, or contract issued under the Mineral Leasing Act of 1920 (30 USC 181 *et seq*.), as amended, or under the Alaska Coal Leasing Act of 1914 (38 Stat. 741; 30 USC 432 *et seq*.), as amended shall have the effect of withdrawing the lands from selection by the state. However, the state is allowed to select mineral lands so long as they are not covered by leases, permits, licenses, and contracts issued under the mineral leasing acts of 1914 and 1920.

If the State selects all the lands in a mineral lease, permit, license, or contract, issued under the mineral leasing acts of 1914 and 1920, the patent will convey all mineral deposits to the state. However, any such existing lease, permit, license or contract will remain valid and the interests and rights of the United States will be conveyed to the state with the patent. Therefore, after issuance of the patent, the State rather than the United States will receive rentals, royalties and other payments.

**State Indemnity Selections**

As a general rule, grants made by the Statehood Acts to the various states of sections 16 and 36 (also sections 2 and 32 in Arizona, New Mexico and Utah) become effective on the date of acceptance of approval of the plat of survey. If the acceptance or approval occurred before the date of admission of the state into the union, the grant attaches either on the date of approval of the plat or the date of admission into the union, whichever is the later date. However, if the land is appropriated at the date the grant would attach, the state does not receive the land and is entitled to indemnity for the lost lands.

Sections 2275 and 2276 of the *Revised Statutes*, as amended (43 USC 851 and 852) authorize the public land states, except Alaska, to select lands of equal acreage within their boundaries as indemnity for grant lands in place lost to the states. Lands may also be selected where the retained or reserved interest of the United States has been disposed of with a reservation to the United States of all minerals, or any specified mineral or minerals. States are entitled to indemnity for grant lands lost under two circumstances: (1) there was an appropriation before title could pass to the state; and (2) natural deficiencies result from such causes as fractional sections and fractional townships.

If the value of lands selected by the state is grossly in excess of the value of the base lands, the selection may be denied. This "grossly disparate value policy" has been fully litigated, and the United States Supreme Court reversed the Tenth Circuit and held that this policy is a

lawful exercise of the Secretary's power. *Andrus v. Utah*, 48 USLW 4562 (May 19,1980). *Also see State of New Mexico (On Reconsideration*), 50 IBLA 367 (1980).

Indemnity selections for lands lost because of natural deficiencies must be selected from the unappropriated, nonmineral, public lands. Indemnity selections for lands lost because there was an appropriation before title could pass may be selected from the unappropriated public lands subject to the following restrictions (43 USC 852):

1. No lands mineral in character may be selected except to the extent that the selection is made as indemnity for mineral lands.

2. No lands on a known geologic structure of a producing oil or gas field may be selected except where the selection is made as indemnity for lands on such a structure.

3. Lands subject to a mineral lease or permit may be selected, but only if the lands are otherwise available for selection; also none of the lands subject to that lease or permit are in producing or producible status. The law authorizes the selection of lands withdrawn, classified or reported as valuable for coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, oil shale, sodium, and sulphur and lands withdrawn by *Executive Order* 5327 of April 15,1930 if such lands are available for selection. However, if the base lands are not mineral in character, such minerals are not reserved to the United States.

   If all the lands subject to a mineral lease or permit are certified to a state, or if the state has previously acquired title to a portion of the lands subject to a mineral lease or permit, the state will succeed to the position of the United States as lessor or permitor. Only in the case where a portion of the lands subject to any mineral lease or permit are certified to a state, shall the United States retain for the duration of the lease or permit the minerals for which the lease or permit was issued. Until the Act of August 27, 1958 (Public Law 85-71), the states could not select mineral lands as indemnity lands, even if the original grant were mineral in character.

**Filing of State Selection Application Segregates the Land**

The filing of a state selection application segregates the land from all subsequent appropriations, including locations under the mining laws regardless of whether the selection was valid, void, or voidable. *John C. Thomas (On Reconsideration*), 59 IBLA 364, 367 (1981). Furthermore, the noting of a state selection application on a title plat amounts to a *prima facie* appropriation of the land. Such a *prima facie* appropriation segregates the land from all subsequent appropriations, including locations under the mining laws regardless of whether that selection was valid, void, or voidable. *Id*.

**No Mineral Reservation in State Selection**

In *George Antunovich*, 76 IBLA 301 (1983), the Board considered a case where lands were granted to the State of Nevada pursuant to its enabling act (Act of July 4, 1866; 14 Stat. 85). A mineral claimant contended that minerals were reserved to the United States because the lands were mineral in character at the time of the state selection. The Board held that there was no reservation of minerals and said:

> No reservation of minerals was made because no mineral lands were available for selection. Ordinarily, where an act granting public lands excludes those known to be mineral, the determination of the fact whether a particular tract is of that character rests with the Secretary of the Interior. The approval of the list of lands selected implies that all necessary prerequisites had been met. *West v. Standard Oil Co*., 278 US 200, 211-12, 218-19 (1929). Indeed, the Department was obligated at that time to determine whether the land was mineral in character.

**Mineral in Character Determination**

The determination of the mineral character of the lands lost to a state are made as of the date of application for selection and upon the basis of the best evidence available at that time. Pub. L. 89-470; 80 Stat. 220, as amended by the Act of June 24, 1966.

**Mining Claims Located Before States Title Vests**

In *State of Idaho*, 101 IBLA 340 (1988), the Board considered an appeal case where Big Creek Apex Mining Company filed an application on September 24, 1979, for mineral patent with the Idaho State Office of the Bureau of Land Management. The application included two lode claims situated in section 16 of a state school grantB the Snow Storm Claim located January 1, 1890, and the Snow Slide Claim located January 1, 1892. In Idaho, the Admissions Act of July 3, 1890, granted sections 16 and 36 in every township for the support of common schools. If the section was already surveyed, the grant was immediately effective. However, for lands that were not surveyed at the date of the Enabling Act, title did not vest until approval of the survey of the section. *United States v. Wyoming*, 331 U.S. 440, 443-44 (1947).

The cadastral survey for section 16 was approved on November 29, 1912. If section 16 was mineral in character on November 29, 1912, title did not pass to the State until January 25, 1927, when Congress extended grants in aid of the public schools to lands that were mineral in character, 43 U.S.C. 870 (1982). However, section 870 of the Act excludes Aany valid application, claim, or right initiated or held under any of the existing laws of the United States..@ Therefore in order for the Snow Storm and Snow Slide mining claims to be excluded from the grant, they must be shown to be valid on January 25, 1927. "Even if the claims were valid before that date, they could have become invalid by mining out the discovered mineral or by a market change making the mineral unmarketable at a profit. Under the clear provision of the 1927 Act, the State's title would attach at such time." *Id*. at 343.

The Board remanded the case for hearing as a private contest between the State of Idaho

and the mineral claimant. Because the State is the presumptive holder of legal title, the mineral claimant has the ultimate burden of proof.

**Granted School Section Is Mineral in Character at Date of Survey**

In *Homestake Mining Co. of California*, 136 IBLA 307 (1996), the Board considered an appeal from a decision of the California State Office of the BLM which had approved an application filed by the State of California for a confirmatory patent to 305.12 acres of land in a granted school section. Title would have passed to the state upon acceptance of the survey in 1875, unless the lands were at that time known to be mineral in character. A later discovery that the lands were mineral in character would not divest the State of title. *Id.* at 314. Based on the evidence discussed below, the Board concluded that the land was mineral at the time of approval of the survey in May 1875 and did not pass to the State. The Board said at 314:

> This Department has held in numerous cases that lands granted to a state were presumed to be of the character contemplated by the grant insofar as their then known mineral or nonmineral character was concerned. E.g. *Margaret Scharf*, 57 I.D. at 356-57, and cases cited therein. Such a presumption exists until the contrary is shown. *State of Idaho*, 101 IBLA 340, 347, 95 I.D. 49, 53 (1988). The strength of that presumption is evidenced by the following language from *State of Utah*, 32 L.D. 117 (1903):
>
> > A mere mineral return by the surveyor-general, however, does not have the effect to establish the character of the lands as chiefly valuable for minerals, and can not, therefore, in and of itself, operate to take lands out of the grant to the State, as mineral lands. This could only be done by proof clearly showing that the lands were, at the time when the right of the State would have attached, known to contain valuable deposits of minerals and to be chiefly valuable on account of those deposits.
>
> To the extent BLM states at page 1 of its decision that the lands in question did not pass to the State in 1875 solely on the basis of the surveyor=s return of these lands as mineral, it is in error. Nevertheless, that error is not determinative of the result of this appeal. To paraphrase from the quote from *Laden, supra*, the relevant issue in this case is whether the known conditions existing in May 1875 were sufficient to engender the belief that the land in question contained minerals of a quantity that would render their extraction profitable and justify expenditures to that end. If so, the presumption that the lands were nonmineral in character is rebutted; the land was mineral in character and did not pass to the State upon approval of the survey.
>
> Based on the record in this case, including the pleadings filed by the parties, we conclude that the lands in question were mineral in character at the time of approval of the survey in May 1875.
>
> While the surveyor=s return of the lands in question as mineral lands is, by itself, insufficient to overcome the presumption that the lands were nonmineral in character, it is

a factor to be considered and when supported by other evidence may justify a conclusion that the lands were mineral in character. In this case there is other evidence to support the surveyor=s return. Surveyor Tucker did not simply return the entire section as mineral or nonmineral. Instead, he specially identified certain lands as mineral, excluding the NE3 from that characterization. The exclusion of lands within the section indicates that Tucker had a basis for making such a distinction.

Further, SLC has provided a historical chronology of mining activities in the area, commencing with a June 1, 1862, AMining Location that covered a 1000 foot wide segment that ran diagonally across Section 36" (SLC Response at 3). The chronology also includes reference to a specific amount of production of quicksilver (mercury) in 1873 from the Reed Mine located in sec. 25, immediately north of sec. 36, as well as a statement that the United States issued a patent on October 17, 1874, to R.F. Knox and Joseph Osborn for the PORPHYRY Quicksilver Mine, partially located in the S2 of sec. 36.

**Status of Valid Claim in Granted Section Prior to 1927 Act**

In *Mangan & Simpson v. State of Arizona*, 52 L.D. 266 (1928), the claim in question was located in a granted section classified as mineral in character. The Secretary held that if the claim is valid Aand was located prior to January 25, 1927, the area of the claim is excepted from the force and effect of the grant of the later date, and the area is still public land of the United States, subject to an application for mineral entry." *Id*. at 268.

**Mining Claim in Section 36**

In *Butte Lode Mining Co*., 131 IBLA 284 (1994), Butte Lode Mining Company made recordation filings on October 5, 1979, for claims with a location date of 1896. The BLM declared three claims null and void *ab initio* because they were located in section 36 on school grant land. Title to school grant lands vests at statehood in California on March 3, 1853, or upon approval of the survey for that section, whichever is later. In this case the survey of section 36 was approved on January 19, 1856. On appeal to IBLA, the appellant asserted that section 36 did not pass to the State upon acceptance of survey because at that time the land was known to be mineral in character. The appellant filed a request for a hearing in the case.

In a 1898 quiet title action, *Wilson v. Grannis*, Equity No. 788 (C.C.S.D. Cal), the suit sought to quiet title in favor of the original claim locators of the AButte Quartz mine and mining claim@ and their successor Wilson, and against, F.R. Grannis and others, successors-in-interest to the State of California. The Court entered a consent decree, signed by the parties, which ruled in favor of Wilson on December 5, 1898.

With his appeal, the appellant provided depositional testimony in Wilson v. Grannis, supra, from two experienced mine operators indicating that a large portion of the surface of section 36 is highly mineralized, that it was mineral land and furthermore, that there would be no difference between the surface of the land between 1855 and today. Furthermore, in its consent decree the Court concluded that Asaid section Thirty-six, being in fact mineral land, and such

fact being apparent to any reasonable person going upon the ground in 1853, the same was excepted from the said grant to the State of California and was reserved by the Government of the United States to be disposed of under the laws governing the disposition of mineral lands belonging to the Government of the United States.@

The Board declined to make a definitive determination on the case because there was no evidence in the record concerning the position of the State of California or its successors-in-interest on the issue. The Board also indicated that the present record does not give sufficient basis for the BLM decision that the claims are null and void *ab initio*, partly because the appellant has provided persuasive evidence through the *Wilson v. Grannis* case that the lands embraced by the claims in question were mineral in character at the date of the survey. Therefore, the Board set aside BLM=s decision on the claims and referred the case the Hearings Division for assignment of an Administrative Law Judge to conduct a hearing to determine whether section 36 was mineral in character on January 19, 1856. The Board observed that if Ait is determined that section 36 was mineral in character on January 19, 1856, appellant=s claims may survive the Jones Act only if they were valid claims on January 27, 1927. *Id* at 291.

**Department Has No Jurisdiction if Lands Conveyed to State**

In the case of state indemnity selections where title is conveyed to a state by patent or approved clearlist, the Department is divested of jurisdiction and authority to make any determination of rights to the land. *Germania Iron Co. v. United States*, 165 U.S. 379, 383 (1897). This includes the maintenance of mining claim recordation files and acceptance of a mineral patent application. *Rosander Mining Co*., 84 IBLA 60, 63-64 (1984); *Ed Bilderback*, 89

IBLA 263, 269 (1985). The United States loses jurisdiction even if the claim is valid at the date of conveyance.

In the case of state school grant sections, if title to the land was conveyed either by the Statehood Act or by the Act of January 1927, the Department would have no jurisdiction over the land. Therefore mining claim recordation files could not be maintained or mineral patent applications could not be considered. *State of Idaho*, 101 IBLA 340, 347 (1988). However if it could be shown that a prior valid claim existed at the date of the enabling act or on January 25, 1927 (if the section were mineral in character), then the Department would have jurisdiction over lands embraced by the claim. *Id*.

**Mineral in Character Classification Not Binding on State if Made Before State's Title Vests**

A mineral in character classification made before the state's title vests (either statehood or approval of the official survey) is not binding on a state. Any failure of a state to protest could not constitute a waiver of its right to notice and an opportunity for a hearing on the mineral character of the section. *State of Idaho*, 101 IBLA 340, 352 (1988).

**Opportunity for Hearing before Mineral Classification Conclusive on State**

A "classification of ... land as mineral in character does not by itself operate to preclude passage of title under the Enabling Act." *State of Idaho*, 101 IBLA 340, 350 (1988). *In State of Idaho*, the Board pointed out that a state must be given a notice and an opportunity for hearing before a mineral in character classification can become conclusive as to a states interest in a school section. *Id*. at 349; *See State of Utah v. Bradley Estates*, 223 F.2d 129 (10th Cir. 1955). "It is not necessary that a hearing actually be held in such a matter; it is sufficient that a state be notified of the matter and be given an opportunity to be heard. *Mahogany No. 2 Lode Claim*, 33 L.D. 37, 38 (1904)." *State of Idaho, supra*.

**Mining Claimant Has Burden of Proof at Hearing on Mineral Classification**

A mining claimant, rather than the state, carries the burden of providing evidence of mineral character at the date of admission or the date of survey. *State of Utah*, 32 L.D. 117 (1903); *State of Idaho*, 101 IBLA 340, 349 (1988). Whether the issue to be decided is (1) the mineral character of the land at statehood or date of survey approval, or (2) discovery of a valuable mineral deposit in each claim on January 25, 1927, the mining claimant has the burden of proof at the hearing. However, the burden of going forward at the hearing is upon the state. *Id*. at 360.

**State Is Presumptive Holder of Legal Title**

There is a Apresumption, which exists until the contrary is clearly shown, that land granted to a state for school purposes was of the character contemplated by the grant insofar as its mineral or nonmineral character was concerned, and that title to a school section identified by survey has passed to the state." *State of Idaho*, 101 IBLA 340, 343 (1988); *Margaret Schar*f, 57 I.D. 348 (1941). In other words, at the enabling act or date of approved survey, there is a presumption that the section was nonmineral in character and passed to the state on January 27, 1927, even though a prior mining claim existed on the section. Therefore the claimant has the ultimate burden of proof in a contest proceedings because Athe state already is the presumptive holder of legal title to the land at issue." *State of Idaho, supra* at 359.

**Presumption of Mineral Title to State**

In *Butte Lode Mining Co*., 131 IBLA 284 at 289, the Board summarized its position that the mineral claimant within a state school land grant has the burden

of proving that the land was mineral in character at the date of statehood or approval of survey, whichever is later:

> We have stated that if a mining claimant contends that land within a state school land grant was mineral in character when the survey was completed, and was therefore excluded from the statutory grant, the mining claimant bears the burden of proving the land was mineral in character at that time.

**Procedure for State to Invalidate Claim**

In order to eliminate a mining claim located in a granted section prior to January 25, 1927, a state must follow the procedures given in *Mangan & Simpson v. State of Arizona*, 52 L.D. 266 (1928). "If and when an application to make mineral entry is filed the State will have an opportunity to proceed against the entry if of the opinion that the claim is not based on a valid discovery made prior to January 25, 1927; or if the mineral claimants continue in possession of claim or claims, the State may institute proceedings to declare the claims invalid.@ *Id*. at 269.

**State Indemnity Selections**

Interior Department regulations (43 CFR 2091.3-1(a)) provide that the filing of a state indemnity selection application shall segregate the affected land from entry under the mining laws for a period of two years from the date the application is filed. Before August 27, 1981, while indemnity applications were being processed, the selected lands were open to entry under the various public land laws. *Leo Rhea Partnership*, 80 IBLA 1 (1984); *Amoco Minerals Co*., 81 IBLA 23, 24 (1984).

**Preexisting Mining Claims in State Selection**

*Rosander Mining Co*., 84 IBLA 60 (1984), involves a case where the State of Alaska selected land under section 6(b) of the Alaska Statehood Act of July 7, 1958. The application for selection as filed February 1, 1972, and published in the local newspaper October 2, 1974, advised all persons adversely claiming the lands to file in the designated BLM office their objection to the selection. BLM tentatively approved the application January 19, 1976. By letter dated February 16, 1976, Colorado Creek Mining Company mailed a protest to the BLM indicating the company had preexisting claims in the area. BLM issued patent to the State of Alaska on August 13, 1976, which neither contained a mineral reservation nor recognized the claims in the area. Rosander Mining Company pointed out that section 6(b) of the Alaska Statehood Act extends only to those Federal lands Awhich are vacant, unappropriated and unreserved at the time of their selection and that the state selection cannot affect its valid existing mining claims.@

On October 12, 1979, Colorado Creek Mining Company recorded the claims with the BLM as required by section 314 of FLPMA. On October 5, 1982, Rosander Mining Company acquired title to the claims by quit claim deed. This case was appealed by Rosander Mining Company from a decision of the BLM rejecting the mining claim recordation filings.

The Board pointed out that the Interior Department looses Jurisdiction over the lands covered by the claims once patent is issued and the BLM may reject location notices filed under FLPMA. The Board stated at 63:

> It is well established that the issuance of a patent without a mineral reservation, even if it is issued by mistake or inadvertence, divests the Department of jurisdiction and authority to determine disputed questions of fact relating to the patented land or to make any determination of rights to that land. *Germania Iron Co. v. United States*, 165 U.S. 379, 383 (1897).

Although Rosander Mining Company attempted to get the state application reformed to exclude the lands embraced by the mining claims, the Board said this could not be done because the rights of the State of Alaska would be adversely affected. The Department cannot proceed under section 316 of FLPMA without the state's consent. *Rosander Mining Co., supra* at 64.

Although suit by the United States would be barred by the statute of limitation since more than 6 years have passed, this statute of limitations does not apply to the Rosander Mining Company. The company can seek judicial recognition of its rights to the mining claims that existed before the state selection. *Id*.

**Mining Claims in State Selection**

In a concurring opinion in *Ed Bilderback*, 89 IBLA 263, 269 (1985), Judge Mullin discussed the problems resulting from owning an unpatented claim with "valid existing rights" on lands conveyed to a state:

It is clearly recognized that, if the government has an obligation to an individual which cannot be fulfilled unless the individual recovers title, it is appropriate to set aside a patent or other conveyance. *Citation Omitted*. Thus for example, a claimant, after obtaining a judicial determination that the claim is a valid existing right contemplated by the Act, could apply for a patent to the claim. If the Department were to then reject the application because the lands were no longer owned by the Federal Government, a claimant could properly seek a court order directing the Government to set aside the conveyance to the state to the extent the conveyance conflicts with the claim.

**Application for State Selection that Did Not Segregate**

In *Donald H. Hale*, 96 IBLA 368 (1987), an Alaska Native Corporation filed an application to select land pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 (1982). Such a selection would normally segregate the selected land from any subsequent appropriation under the public land laws and mineral laws until the application is rejected or withdrawn. However, where such an application is irregular on its face because the land selected is not legally subject to selection, and no notation of the selection application is made upon the official tide and status records of the selected land, there is no segregative effect to the applications and mining claims located on the land while the application was pending cannot be declared null and void *ab initio*.

**Approval of List of State Selected Lands Transfers Title**

In *Merrill G. Memmot*, 100 IBLA 44 (1987), the Board held that "the effect of final approval of a list of state-selected lands is to transfer the legal title from the United States. *Utah v. Kleppe*, 586 F.2d 756 (10th Cir. 1978), *rev=d on other grounds sub nom.*, *Andrus v. Utah*, 446 U.S. 500 (1980)." *Id*. at 48.

**Alaska Statehood Act Precludes Entry for Period After Withdrawal Lifted**

Where a public land order revokes a prior withdrawal, sec. 6(g) of the Alaska Statehood Act (72 Stat. 340) requires the Secretary of the Interior to provide a 90-day period during which the State of Alaska is afforded a preference right to select the land. Any claim located within the 90-day period is null and void *ab initio* even though the language of the publicly opens the land to mineral location. *Dutch Creek Mining Co*., 98 IBLA 241 (1987).

**Survey**

Under the Act of June 24, 1966 (80 Stat. 220) the states were allowed to select unsurveyed lands; however, before conveyance of title, the lands must be surveyed. The states cannot acquire title to endowment lands until survey is approved. Acquisition is precluded if the lands were mineral in character or withdrawn from mineral entry. *State of Utah v. Work*, 273 US

649.

**Right to Sell**

States may sell endowment land or subject it to the ordinary incidents of title such as loss by adverse possession. *Alabama v. Schmidt*, 232 U.S. 168 (1914).

**Additional Grants to Certain States**

Because the value of the school land grants in certain states was considered to be relatively low, states such as Utah (Act of May 3,1902; 32 Stat. 188; 43 USC 853) and New Mexico (Act of March 16, 1908; 35 Stat. 44; 43 USC 854) and Arizona were granted sections 2 and 32 in addition to sections 16 and 36.

**Date of Selection versus Date of Approval**

It has been ruled that interest in indemnity lands selected under the Act of July 25, 1866 was established at the date of selection rather than the date of approval. *Central Pac. Ry. Co. v. Lane*, 1917, 46 App. D.C. 374, *Modified on other grounds*, 255 US 228.

**Executive Withdrawals**

Executive withdrawals consummated prior to statehood, withdraw beds of navigable waters and such lands remain Federal lands after statehood. *U.S. v. State of Alaska*, 423 F2d 764 (CA Alaska 1970), *cert. denied* 400 US 967.

**Use of Lands**

The obligation of the states to use endowment lands for school purposes is honorary only, once the state acquires legal title. *Cooper v. Roberts*, 59 US 173 (1855).

**Title by Grant**

Fee simple title passes to the states in all grants of school lands. RS 2449; 43 USC 859. A list of lands selected by the state as indemnity for the loss of school lands and certified by the Interior Department has the same effect as a patent. *Frasher v. O'Connor*, 115 US 102 (1885). To effect a grant of school lands to a state, no patent is necessary. *McNee v. Donahue*, 18 P 438, *affirmed* 142 US 587.

**II. Carey Act Grants**

Carey Act grants are authorized by section 4 of the Act of August 18, 1894 (28 Stat. 422),

as amended (43 USC 641 *et seq*.). The Carey Act was passed to aid public land states in the reclamation and settlement of desert lands.

The Carey Act authorizes the Secretary of the Interior to contract and agree to grant and patent to the states up to 1,000,000 acres of desert lands. After a state's application for a grant has been approved by the Secretary, the lands are segregated from the public domain for a period of 3 to 15 years. During this time the State should be involved in reclaiming the lands for irrigation. After reclamation, the lands are patented to the states or to settlers who are its assignees. If the lands are patented to the state, the state transfers title to the settler. Each entry is limited to 160 acres.

**Nonmineral Lands**

The lands shall be nonmineral, except that lands withdrawn, classified or valuable for coal, phosphate, nitrate, potash, sodium, sulphur, oil, gas, or asphaltic minerals may be applied for subject to a reservation of such deposit. 43 CFR 2610.0-8(b).

Lands patented under the authority of the Act may have a possible reservation of coal, phosphate, nitrate, potash, oil, gas, sodium, sulphur, or asphaltic minerals. Such reservations would be authorized by the Act of March 3, 1909 (35 Stat. 844; 30 USC 8 1), the Act of June 22, 1910 (36 Stat. 583; 30 USC 85), the Act of July 17, 1914 (38 Stat. 509; 30 USC 121) and the Act of March 4, 1933 (47 Stat. 1570; 30 USC 124). However, no other mineral can be reserved to the United States in a patent issued under the Act, including minerals locatable under the Mining Law of 1872 (30 USC 22).

# 6. FEDERAL LAND DISPOSALS

## PUBLIC LAND DISPOSALS

The public lands have been patented under numerous special and general land disposal laws. These include the preemption statutes, the public land sale laws and the homestead acts. As a practical matter, all of these numerous land disposal laws cannot be discussed in this section; however, the more important ones are covered, especially those that can offer a conceptual understanding of the nature of mineral reservations and exceptions in land patents.

### FLPMA Repeal of Homestead and Land Disposal Laws

Sections 702 and 703 of FLPMA (43 USC 1701 and 1702) give a detailed list of the homestead and land disposal statutes repealed by the Act. The repeal was effective on the date of the Act (October 21, 1976) except for the listed homestead laws that apply to Alaska which were to be effective ten years after the date of the Act. Repealed acts are discussed in this section along with those that are still effective because any patent issued under authority of a subsequently repealed act would not be affected by such repeal. The Desert Land Entry Act (43 USC 321) and the Recreation and Public Purposes Act (43 USC 869) are among the few authorities for land patents that were not repealed by FLPMA.

## PREEMPTION STATUTES

Article 4, Section 3, Clause 2, of the United States Constitution provides Congress with exclusive jurisdiction and control over the public lands. This authority allows Congress to make special grants or sales to individuals. The Act of March 2, 1799 gives the first general authority for contract purchasers to buy land from the government. Although this was the first preemption statute, many others were subsequently enacted by Congress. A preemption statute is an act that confers special privileges to purchase the public lands. One major preemption statute was the Act of September 4, 1841 (5 Stat. 453). The Act extended preemption rights upon surveyed public lands to every citizen who was the head of a family, or widow, or single man over the age of twenty-one years. One purpose of the preemption laws was to allow the earliest pioneers who moved west established settlements to select the finest 160-acre tracts of land.

### Reservations in Preemption Statutes

Lands containing any known salines or mines were generally excluded from entry under

the preemption statutes. However, if a patent were issued, it contained no reservation or exception to minerals. The preemption laws were repealed by the Act of March 3, 1891 (26 Stat. 1097) which predated the Act of March 3, 1909 (35 Stat. 844). Since the 1909 Act was the first statute to require a specific mineral reservation in a land patent issued under another statutory authority that had no provision for a mineral reservation, patents issued under the authority of the preemption acts generally contain no reservation of minerals.

## PUBLIC LAND SALE ACTS

### I. General Land Sale Acts

The Act of April 24,1820 (3 Stat. 566; 43 USC 672) was one of the earliest public land sale acts that gave authority for issuance of a large number of patents. This act required that lands subject to sale be first offered for sale at public auction and afterwards at private sale.

The Act of April 24, 1820, as well as other early land disposal statutes, contained no provision for reservation or exception for minerals. However, if public lands were sold under the authority of the Act of April 24, 1820, and the enactment of one of the statutes that authorize a mineral reservation (*see* Acts of March 3, 1909, June 22, 1910, July 17, 1914, and March 4, 1933), the patent issued may contain such reservations even though the Act of April 24,1820, authorizing the sale made no provision for a reservation. Therefore, when examining patents, not only is the date of the granting act important, but the date the patent was issued is also important to ascertain whether it could contain a mineral reservation. However, very few of the patents issued under the Act of April 24, 1820, and its amendments contain a reservation of minerals to the United States because most of the sales of public lands were made before the passage of the first Act requiring such reservations (Act of March 3, 1909).

Section 2455 of the Revised Statutes, as amended by Section 14 of the Act of June 28, 1934, and the Act of July 30, 1947 (61 Stat. 630; 43 USC 1171) authorized the sale of public lands. To qualify for disposal, lands must have been surveyed and nonmineral in character. The acts authorizing these public land sales were repealed by section 703 of the Federal Land Policy and Management Act of October 21, 1976.

Lands patented under the authority of the Acts cited above may have a possible reservation of coal, phosphate, nitrate, potash, oil, gas, sodium, sulphur, or asphaltic minerals. Such reservations would be authorized by the Act of March 3, 1909 (35 Stat. 844; 30 USC 81), the Act of June 22, 1910 (36 Stat. 583; 30 USC 85), the Act of July 17, 1914 (38 Stat. 509; 30 USC 121) and the Act of March 4, 1933 (47 Stat. 1570; 30 USC 124). However, no other mineral can be reserved to the United States in a patent issued under the Act, including minerals locatable under the Mining Law of 1872 (30 USC 22).

### II. Small Tract Act

Lands classified under the Small Tract Acts of June 1, 1938 (52 Stat. 609), as amended

by the Act of June 8,1954 (68 Stat. 239; 43 USC 682a) are segregated from location or entry under the mining laws, unless provided otherwise in the order of classification. 43 CFR 2091.3-2. However, leasable minerals may be leased as provided by 30 USC 181 et seq.

**Effect of Classification**

Classification of land as suitable for transfer under the Small Tract Act by Secretarial Order is sufficient to segregate lands from mineral entry and invalidate from the beginning any mining claim located after the effective date of the Act. *Osborn v. Hammit*, 377 F. Supp. 977 (DC Nev 1965). In *U.S. v. Harry E. Nichols*, A-28463, 68 ID 39 (196 1), the Deputy Solicitor concluded that where an application is filed by a Small Tract applicant who gains a preference right to a lease or purchase of the tract as a result of the classification, a mineral location made after the application was filed but before the land was classified becomes invalid if the land is classified for Small Tracts pursuant to the application. *See Frank Melluzzo*, 72 ID 21 (1965).

**Reserved Minerals Not Open to Location**

The Act June 8, 1954 (68 Stat. 239) specified that all tracts patented under the Act shall contain a reservation to the United States of "the oil, gas, and all other mineral deposits, together with the right to prospect for, mine, and remove the same under the applicable law and such regulations as the Secretary may prescribe." The Ninth Circuit Court held in *Dredge Corporation v. Penny*, 362 F.2d 889 (9th Cir. 1966) that it was a proper exercise of Secretarial discretion to establish regulations that precluded mineral entry and location of reserved minerals. The Court said at 890:

> The Act does not provide that reserved minerals shall continue open to entry and location. Instead it leaves to the Secretary the question of how and to what extent they shall be made available. In our judgment the Regulation was a proper exercise of administrative discretion under the Act.

**FLPMA Repeal of Small Tract Act**

The Small Tract Act and regulations (43 CFR 2091.3-1) have been repealed by Section 703 of FLPMA (90 Stat. 2789). However, Section 70 1 8 of FLPMA, 43 USC 1701 stated that "all withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under provisions of the Act or other applicable law." *Ernest L. Brewington*, 73 IBLA 167 (1983). Therefore, no new lands will be classified under the Act but existing withdrawals will continue as indicated above.

**Ill. Town Sites**

Lands occupied as a town site are segregated from entry and could be entered by incorporated towns and cities under sections 2387 to 2389, *Revised Statutes*. 43 USC 718-720; 43 CFR 2091.4. The President was authorized by R.S. 2380, Acts of March 3, 1863 (12 Stat. 7549) and March 3, 1877 (19 Stat. 392) to reserve townsites of any natural or prospective centers of population for the occupants. The law authorized that these town sites be surveyed into lots

and sold at public auction at not less than the appraised price. R.S. 2381; Act of October 28, 1921; 42 Stat. 208; March 3,1925; 43 Stat. 1145. The town-site acts were repealed by section 703 of the Federal Land Policy and Management Act of October 21, 1976.

**Town-Site Entries on Mineral Lands**

Town-site entries could be made on lands that were mineral in character at the date of entry; however, mining claims that had valid and existing rights at the date of entry were protected. The Act of March 3, 1891 states:

> Town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law.

**Town-Site Title Subject to Valid Existing Claims**

The Act of March 3, 1891, also authorizes that the title to town lots is subject to valid existing mining claims and that such claims may be patented. *Also see R. S.* 2386; Act of March 3, 1865; 13 Stat. 530.

**No Reservation of Minerals in Town-Site Patent**

A town-site patent carries absolute fee-simple title to the patentee of all lands if no mine or valid mining claim existed. *Dower v. Richards*, 73 Cal. 477, 15 P. 105 (1887). ln *Davis v. Weibbold*, 139 US 507 (1891), a patent was issued for a town-site, and minerals were subsequently discovered in the lands patented. But it was held that the title was not affected by such discovery, and that the provision of the Town-site Act (R.S. 2392) that "no title shall be acquired to any mine of gold, silver, cinnabar, or copper," does not apply where the mines were discovered after a patent has been issued. *George Antunovich*, 77 IBLA 307 (1983).

**Town Site Reservations Open to Location**

In *Steel v. Smelting* Co., 106 U.S. 447, the Supreme Court held that land embraced within a town site on the public domain when unoccupied, was open to the location of mining claims. However, once the United States grants a town site patent to a private individual, the land is no longer open to entry. In *Davis v. Weibbold*, 139 U.S. 507, 528 (1890), the Supreme Court stated:

> Proceedings for the acquisition of title to a mining claim within a town site commenced before the issue of a town-site patent, could undoubtedly be prosecuted to completion afterwards. The right initiated by the location of the mining claim would not be defeated by a subsequent conveyance of the title to the land in which the mining claim was situated. But it is not perceived where the jurisdiction exists under the laws of the United States to grant a patent for a mine on lands owned by private individuals B which was the case here B if the lots for which the defendant received a deed were included

within the town-site patent and the location of the mining claim was subsequently made.

**Location of New Claims on Lands Patented Under the Townsite Act**

The exception of mines or mineral lands from a Townsite patent allows that under certain circumstances, new claims may be located after the issuance of Townsite patents. *Norman R. Blake*, 119 IBLA 141 (1991). Because the Land Department is reluctant to disturb a Townsite patent that is presumptively complete, there must be "the clearest proof of the value and extent of the deposits.@ *Norman R. Blake, supra* at 145. "The existence of such deposits cannot be logically inferred from the fact claims exist.@ *Id*.

When BLM proposes to declare null and void a mining claim within the boundaries of a Townsite patent, "it must first allow the mining claimant to submit affidavits or other proof to show prima facie that, on the land in question, a mine for gold, silver, cinnabar, or copper existed on the date of townsite patent or that a valid mining claim existed on that date. If the claimant establishes a prima facie showing a hearing may be ordered.@ *Id*. at 144.

**Status of Land After Abandonment of Mining Claim**

In *Norman R. Blake*, 119 IBLA 141 (1991), the board recognized Athat even under a townsite patent, only land covered by a valid mining claim at the time of conveyance was excluded and remained open to subsequent location if that claim were later abandoned...@ *Stacy B. Good,* 133 IBLA 119 at 122 (1995).

**IV. Mining Claim Occupancy Act**

The Mining Claim Occupancy Act of October 23, 1962 (76 Stat. 1127; Pub. L. 87-851), as amended by the Act of October 23, 1967 (Pub. L. 90-111; 81 Stat. 311) authorized the Secretary of the Interior to convey to any occupant of an invalid mining claim, up to and including a fee simple title for as much as five acres of occupied land. In order to take advantage of this program, a qualified applicant must have applied before June 30, 1971 (43 USC 701). A qualified applicant is defined as "a residential occupant-owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitute a principal place of residence, *Jack J. Curtis*, 63 IBLA 306 (1982), and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962." 43 USC 702. In *Funderberg v. Udall*, 396 F2d 638 (CA Cal. 1968), it was held that temporary occupancy during the summer does not qualify as a Aprincipal place of residence."

The successful applicant was required to purchase the interest at fair market value as established by appraisal. The appraised price does not include the value of any improvements placed on the lands by the applicant or his predecessors in interest. 30 USC 705 (1976).

For all interests conveyed under the Mining Claims Occupancy Act, the mineral interests of the United States in the lands are reserved for the term of the estate conveyed. Locatable and salable minerals are withdrawn from all forms of entry and appropriation for the term of the

estate. The underlying oil, gas and other leasable minerals of the United States are reserved for exploration and development purposes, but without the right of surface ingress and egress, and may be leased under the mineral leasing laws. 76 Stat. 1128; 30 USC 707 (1976).

## HOMESTEAD ACTS

Before enactment of the first Homestead Act on May 20, 1862 (12 Stat. 392), public lands had been sold to the highest bidders, and to those who had a preemption claim. Under the homestead acts the intent of Congress was to encourage settlement of the public domain by rewarding the settlers with the land after they had proved up on it. Some of the more important homestead acts are listed below:

1. Original Homestead Act of May 20, 1862 (12 Stat. 392), as amended March 21, 1864 and March 3, 1891 (43 USC 161).

2. Commuted Homestead Entry of March 3, 1891 (26 Stat. 1098; 43 USC 173).

3. Soldiers and Sailors' Homestead Act of June 8, 1872 (17 Stat. 333; 43 USC 271).

4. Additional Homestead Entries:

    a. Act of March 2, 1889 (25 Stat. 854; 43 USC 214).

    b. Act of April 28, 1904 (33 Stat. 527; 43 USC 213).

    c. Act of February 20, 1917 (39 Stat. 925; 43 USC 215).

5. Enlarged Homesteads Act of February 19, 1909 (35 Stat. 639; 43 USC 218).

6. Enlarged Homesteads, National Forests under Act of March 4, 1923 (43 Stat. 1445; 43 USC 222).

7. Stock-Raising Homestead Act of December 29, 1916 (39 Stat. 862; 43 USC 291, 292).

With the exception of the Stock-Raising Homestead Act of 1916, none of the homestead acts contained a provision for reservations or exceptions of minerals in the patent. However, no entry was allowed if the lands were mineral in character.

With the exception of the Stock-Raising Homestead Act, lands patented under the authority of the homestead acts may have a reservation of coal, phosphate, nitrate, potash, oil, gas, sodium, sulphur, or asphaltic minerals. Such reservations would be authorized by the Act of March 3, 1909 (35 Stat. 844; 30 USC 81), the Act of June 22, 1910 (36 Stat. 583; 30 USC 85), the Act of July 17, 1914 (38 Stat. 509; 30 USC 121) and the Act of March 4, 1933 (47 Stat.

1570; 30 USC 124). However, no other mineral can be reserved to the United States in a patent under these homestead acts, including minerals locatable under the Mining Law of 1872 (30 USC 22).

The homestead acts were repealed by section 702 of the Federal Land Policy and Management Act of October 21, 1976 (43 USC 1701).

**No General Mineral Reservation in 1862 Homestead Act Patents**

Homestead patents issued under the Act of May 20, 1862, as amended, 43 U.S. C. 161 (1976) (repealed by section 702 of the Federal Land Policy Management Act of 1976, but with a savings clause as to patents issued prior to repeals) "provide for no mineral reservation to the United States. Such patents cannot be construed as reserving to the United States any minerals other than those specifically named, and as such the lands encompassed by the patents were unavailable for mineral location." *Merrill G. Memmot*, 100 IBLA 44, 46 (1987).

**I. Stock-Raising Homestead Act**

The Stock-Raising Homestead Act (SRHA) of December 29, 1916 (39 Stat. 862; 43 USC 299-299) provided for homestead entry of 640 acre tracts of nonirrigable land for the purpose of raising livestock. The lands were to be "chiefly valuable for grazing and raising forage crops, to not contain merchantable timber, are not susceptible of irrigation from any known source of water supply and are of such character that six hundred and forty acres are reasonably required to support a family." 43 USC 292 (1976).

Certain mineral lands were specifically excepted from entry by the Act, including (1) lands withdrawn or reserved solely as valuable for oil or gas, (2) lands within a geologic structure of a producing oil or gas field, and (3) naval petroleum reserves and naval oil shale reserves.

**Mineral Reservation Authorized by SRHA**

Section 9 of the Act of December 29, 1916 (39 Stat. 864; 43 USC 299) provides that patents issued under the Act shall contain a reservation to the United States of "all coal and other minerals in the lands so entered and patented together with the right to prospect for, mine, and remove the same." The Act also provided that the reserved minerals are subject to disposal in accordance with the mineral land laws in force at the time of disposal. Thus, minerals subject to the Mining Law of 1872 may be located, minerals subject to the Mineral Leasing Act of 1920, as amended, may be leased and minerals subject to the Materials Act of 1947 may be purchased.

**Reservation in SRHA Surface Patent**

A mineral reservation is incorporated in patents issued under the SRHA. The following reservation is authorized by 43 CFR 3814.2(a):

Excepting and reserving, however, to the United States all the coal and other minerals in

> the lands so entered and patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove all the coal and other minerals from the same upon compliance with the conditions, and subject to the provisions and limitations, of the act of December 29, 1916 (39 Stat. 862).

**Reservation in Mineral Patent**

A reservation must be incorporated in mineral patents where the surface has previously been patented under the SRHA. This reservation mentions the rights of the surface owner. The following reservation is authorized by BLM Manual 3814.22 (also see 43 CFR 3814.2(b):

> This patent application is subject to the provisions of the Act of December 29, 1916 (39 Stat. 862), with reference to disposition, occupancy, and use of the land as permitted to an entryman under said Act.

**Geothermal Resources: A Reserved Mineral**

Geothermal resources were held to be a reserved mineral in patents issued under the Stock-Raising Homestead Act of 1916. *U.S. v. Union Oil Co. of California*, 549 F2d 1271 (9th Cir 1977) *cert. denied*, 434 US 930, *rehearing denied*, 435 US 911. This case was initiated when the United States brought quiet title action under the Geothermal Steam Act of 1970 to determine whether the mineral reservation in patents issued under the SRHA reserved geothermal resources to the United States. The District Court held that geothermal resources were not reserved in such a patent. *U.S. v. Union Oil Company of California*, 369 F. Supp. 1289 (N.D. Cal 1973). On appeal, the Circuit Court (*U.S. v. Union Oil Co. of California*, 549 F2d 1271) reversed the District Court and held that geothermal resources were reserved minerals under the Act. The Court said:

> Geothermal resources contribute nothing to the capacity of the surface estate to sustain livestock. They are depletable subsurface reservoirs of energy, akin to deposits of coal and oil, which it was the particular objective of the reservation clause to retain in public ownership. The purposes of the Act will be served by including geothermal resources in the statute's reservation of "all the coal and other minerals." Since the words employed are broad enough to encompass this result, the Act should be so interpreted.

**Scoria is a Reserved Mineral Under SRHA**

In *Pacific Power & Light Co.*, 45 IBLA 127 (1980), the Board determined that scoria used for surfacing roads is a mineral reserved to the United States under the Stock-Raising Homestead Act. Scoria is defined in *Pacific Power & Light Co., supra*, as follows:

> Scoria as used in this appraisal is heat altered material also referred to as clinker or red dog. The reddish scoria beds are formed by melting, partial fusing and baking of overlying sandstone and shale by heat and gases rising from burning coal beds. The baked rock varies greatly in degree of alteration, some is dense and glassy while some is

vesicular and porous.

*The scoria described above is distinguished from a vesicular basaltic lava also termed scoria.*

On appeal, Judge Kerr of the Wyoming District Court affirmed *Pacific Power and Light Co., supra. Pacific Power & Light Co. v. Watt*, No. C80-073K (June 17, 1983). In light of the recent United States Supreme Court decision in *Watt v. Western Nuclear Inc*., 103 S. Ct. 2218 (June 6, 1983), Judge Kerr stated:

> Continuing with the contention that gravel and scoria are to be treated the same pursuant to congressional action, scoria must also be termed a mineral under the SRHA patent reservation.

**Reserved Mineral Must Have Separate Value and be Marketable**

In *Texaco, Inc*., 59 IBLA 155 (1981), the Board discussed the requirement that a material must be used in such a way that it has a value separate from the soil, and furthermore, that the material is marketable. The Board said at 161:

> .. . We held that the mineral reservation in a patent issued under that Act includes mineral substances which can be taken from the soil and which have a separate value, including those marketable minerals found at or near the surface, which have no rare or exceptional character, regardless of whether or not they are subject to disposition under existing statutory authority.
>
> Unlike the use of scoria for surfacing roads, Texaco's use does not automatically qualify the scoria as reserved because that use does not give it value separate from the soil. In order to establish that the scoria was a reserved mineral in a case in which it was used no differently from common earth, the record must demonstrate that the deposit has commercial value independent of appellant's use. Although the comparable sales provide a basis for determining the fair market value for scoria, they do not establish the marketability of this particular deposit.
>
> At the hearing, BLM shall have the burden of establishing the facts sufficient to support the trespass charge. In this particular case, BLM must show that Texaco used the material in a way which gave it a value separate from the soil itself, i.e., that the scoria was dedicated to a use for which soil would not have sufficed. Otherwise BLM must show that the material in question was marketable independent of the use to which appellant dedicated it, and the failure of BLM to establish the marketability of the material in question must result in dismissal of the trespass charge.

**The Western Nuclear Case: Sand and Gravel is a Mineral**

The Bureau of Land Management charged Western Nuclear with a trespass for removing gravel from lands patented under the Stock-Raising Homestead Act of 1916. A hearing was held before an Administrative Law Judge who determined that sand and gravel was a reserved mineral in such a patent. On appeal, the Interior Board of Land Appeals affirmed the decision in *Western*

*Nuclear v. Andrus*, 85 ID 129 (1978). Again on appeal, this ruling was affirmed by the United States District Court for Wyoming in *Western Nuclear v. Andrus*, 475 F. Supp. 654 (1979). However, the Court of Appeals for the Tenth Circuit reversed the District Court and held that the gravel extracted did not constitute a mineral reserved to the United States. *See Western Nuclear* v. *Andrus*, 664 F2d 234 (1981). The United States then filed a petition for a *writ of certiorari*, which was granted by the United States Supreme Court on May 24, 1982. 456 US 988 (1982). On June 6, 1983, the Supreme Court rendered its decision, *Watt v. Western Nuclear, Inc*., 103 S. Ct. 2218, in which it reversed the Court of Appeals and held that "gravel is a mineral reserved to the United States in lands patented under the Stock-Raising Homestead Act."

In *Watt v. Western Nuclear, supra*, the Supreme Court determined that a SRHA mineral reservation would include substances that:

1. are mineral in character,

2. are inorganic,

3. can be taken from the soil,

4. can be used for commercial purposes,

5. were not intended to be included in the surface estate,

6. have a separate value,

7. are not necessarily metalliferous, and

8. may not necessarily have a definite chemical composition.

The Court described these requirements as follows:

> Given Congress' understanding that the surface of SRHA lands would be used for ranching and farming, we interpret the mineral reservation in the Act to include substances that are mineral in character (i.e., that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate. *See 1 American Law of Mining, supra*, at '326. ("A reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and which have a separate value.@). Cf. *Northern Pacific R. Co. v. Soderberg*, 188 US, at 536-537 ("mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or for purposes of manufacture"); *United States v. Isbell Construction Co*., 78 Interior Dec., at 391 ("the reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and have a separate value") (emphasis in original). This interpretation of the mineral reservation best serves the congressional

purpose of encouraging the concurrent development of both surface and subsurface resources, for ranching and farming do not ordinarily entail the extraction of mineral substances that can be taken from the soil and that have separate value.

Insofar as the purposes of the SRHA are concerned, it is irrelevant that gravel is not metalliferous and does not have a definite chemical composition. What is significant is that gravel can be taken from the soil and used for commercial purposes.

The Supreme Court also concluded that gravel is a mineral reserved under the SRHA because (1) gravel has been consistently treated as a mineral under two Federal land-grant statutes which had similar mineral reservations to the United States; and (2) gravel has been treated as a mineral under the mining laws.

**Caliche Is Not a Reserved Mineral**

In *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676 (10th Cir. 1986), the Court reversed a New Mexico District Court ruling that caliche is a reserved mineral under section 8 of the Taylor Grazing Act of 1934 (43 U.S.C. 315g). The District Court had determined that the Supreme Court's ruling that gravel is a reserved mineral in a Stock-Raising Homestead grant would also be applicable to a mineral reservation under section 8 of the Taylor Grazing Act. *See Watt v. Western Nuclear*, 462 U.S. 36 (1983).

The patent reserved "all mineral deposits in the lands so patented.@ Caliche was defined by the Court as "...small rocks, dust, soil, and sand which had deposited in and on it and

carbonates washed from the air and carried into the crevices and pores of the rocks and soil." The Court based its determination that caliche is not a reserved mineral on the following:

1. Unlike all other statutory provisions for mineral reservations, the Anature and extent of the mineral reservation were left to the discretion of the Secretary.@As the Court said:

> New BLM views as to mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then prevailing practice decisions. The result otherwise would be a progressive series of changes dependent on the changes in the views of the officials or changes in personnel.

2. The grantee did not know or could not have known at the time of the exchange that the Government would later, on the basis of policy change, determine that caliche is a reserved mineral.

3. The BLM sold caliche as a "mineral material.@ The Court accused BLM of "attempting to create a special category of materials which are not 'common

varieties' and are not 'minerals'...to preserve the appearance that caliche is in the 'mineral' reservations in the patents ...' The Court also said "there is really no room for such a category. The position was inconsistent. Caliche cannot be both fish and fowl.@

4. Caliche has never been held administratively or by the courts to be a locatable mineral as gravel had been before the Surface Resources Act of 1955 (43 U.S. C. 611).

5. Under the Stock-Raising Homestead Act, Congress expected that the surface of the lands would be used for stock raising and raising crops; whereas, there can be no expectation of a particular surface use to be derived from lands acquired under the Taylor Grazing Act.

**Granite Is a Mineral**

In *Denman Investment Corp*., 78 IBLA 311 (1984), the Board held that granite is a mineral reserved to the United States under the Stock-Raising Homestead Act of 1916.

**Sand Is Reserved Mineral under the Stock-Raising Homestead Act**

In *Curtis Sand & Gravel Co*., 95 IBLA 144, 149 (1987), the Board said that deposits of sand are reserved to the United States in a Stock-Raising Homestead Act patent providing they have independent commercial value. *Also see Browne-Tankersley Trust*, 76 IBLA 48 (1983).

**Material Containing 71.43 Percent Sand and Gravel Is a Reserved Mineral**

*Lazy VD Land and Livestock Co*., 108 IBLA 224 (19 89) was a case where material was removed and sold by the surface owner of a Stock-Raising Homestead patent. The BLM tested the material and determined that it consisted of 25.69 percent cobbles (rocks larger than 1.5 inches); 20.62 percent pebbles (rocks 1.5 to .18 inches); 4.87 percent granules (rocks .18 to .075 inch); 45.94 percent sand (rocks .075 to .003 inch); and 2.96 percent silt and clay. Because at least 71.43 percent of the material listed was sand and gravel (excluding silt, clay and cobbles), the Board held that the material removed was sand and gravel. *Id*. at 229.

**Grants Are Construed in Favor of Government**

The Federal courts have consistently upheld the general rule that grants are construed in favor of the government. The Supreme Court stated in *Watt v. Western Nuclear, supra*:

Finally, the conclusion that gravel is a mineral reserved to the United States in lands patented under the SRHA is buttressed by "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in

clear language, and that if there are doubts they are resolved for the Government, not against it." *United States v. Union Pacific R. Co*., 353 U.S. 112, 116 (1957). *Citations Omitted*. In the present case this principle applies with particular force, because the legislative history of the SRHA reveals Congress' understanding that the mineral reservation would "limit the operation of this bill strictly to the surface of the lands." H. R. Rep. No. 35, *supra*, at 18 (emphasis added). *See also* 53 Cong. Rec. 1171 (the mineral reservation "would cover every kind of mineral;" "[a]ll kinds of minerals are reserved") (Rep. Ferris). In view of the purposes of the SRHA and the treatment of gravel under other federal statutes concerning minerals, we would have to turn the principle of construction in favor of the sovereign on its head to conclude that gravel is not a mineral within the meaning of the Act.

**Stock Raising Homestead Act Amended**

On April 16, 1993, "An Act to amend the Stock Raising Homestead Act to resolve certain problems regarding subsurface estates, and other purposes" (Public Law 103-23; 107 Stat. 60 was signed into law. The effective date of the law was October 13, 1993. Public Law 103-23 amends the Stock Raising Homestead Act of December 29, 1916 (43 U.S.C. 299). Regulations were made effective August 30, 1994, to implement the claim location section of the law. 43 CFR 3833.1-2. Detailed regulations to implement the operational aspects of the amendment will be issued in the near future. Some of the new provisions of this amendment include the following:

1. Written notification and greater financial compensation to a private surface owner by a mineral claimant.
2. Those who wish to explore SRHA lands for the purpose of locating a claim must file a Notice of Intent (NOI) to Locate a Mining Claim with the Bureau of Land Management. A copy of this NOI must also be sent to the surface owner at least 30 days before entry on the land. See 43 CFR 3833.1-2 for detailed information on compliance with this location requirement. The NOI segregates the land for a 90 day period during which no one, including the surface owner, may (1)file a NOI on any portion of the land; (2) explore for minerals or locate a mining claim on any portion of the land; and (3) file an application to acquire a mineral interest under section 209 of FLPMA.

3. The 90-day segregation period may be extended, if a plan of operations is filed with the Secretary during that 90-day period, until such time as the plan is approved or disapproved by the Secretary.

4. No person or an affiliate(s) of such person may have more than 6,400 acres of such land in any one State and 1,280 acres of such land of one surface owner.

5. All operations, other than casual use, require either surface owner consent or a plan of operations to be filed with and approved by the BLM before conducting surface disturbing activities.

6. The BLM has 60 days to review the plan; and, if it satisfies the requirements of the Act and the regulations (43 CFR 3809), it will be approved. The BLM may require modification of the plan to bring it into compliance with the Act, or disapprove the plan if it cannot be modified to bring it into compliance.

7. The BLM may also extend the 60-day review period if needed to comply with the requirements of the National Environmental Policy Act.

8. Before any plan is approved, a bond or other financial guarantee must be accepted in an amount necessary to insure the completion of reclamation and to ensure payment of compensation for losses to the surface owner. The surface owner may be compensated for any permanent damages to crops or tangible improvements. Furthermore, the surface owner may be compensated for any permanent loss of income as a result of loss or impairment of grazing or other uses of the land, including surface and ground water.

9. Final approval of the plan of operations requires payment of a fee to cover use of the surface during operations equivalent to the loss of income by the surface owner.

**Jurisdiction to Appeals Under SRHA Belong to the Board**

In *Richard Rudnick*, 143 IBLA 257, 260 (1998), the Board said a decision informing the parties that they could appeal a case involving operations on a Stock-Raising Homestead case to the State BLM Director was incorrect. The Board went on to say that Athe surface management regulations at Subpart 3809 do not apply to operations on Stock-Raising Homestead lands. Citation omitted. In any event, the appeal procedure set forth at 43 CFR 3809 applies only to operators, while other parties may appeal directly to the Board of Land Appeals. * * * Absent a specific regulation establishing a different procedure, decisions relating to the use and disposition of public lands are appealable to the Board. 43 CFR 4.1(b)(3). Consequently, jurisdiction over appeals of decisions issued under the Stock-Raising Homestead Act lies with this Board.@

**Payment for Loss of Income from Ranching Under Stock-Raising Homestead Act**

In *Richard Rudnick*, 143 IBLA 257, 264 (1998), the Board determined that the ABLM had failed to require payment of compensation for the loss of income from ranching as required by the Act.@ The Board said at 266:

> The amount of the bond is not determined by the nature or scope of the proposed operation, but is based upon the crops and improvements found on the lands covered by the mining claims on which the operations will occur and the value of the land for

grazing.

> * * * These amendments [to the SRHA] also prohibit other mineral related activities unless the claimant obtains either written consent of the surface owner or authorization from the Secretary. 43 U.S.C. 299(c) (1994). Secretarial authorization is conditioned upon: (1) filing a plan of operations which includes procedures for minimizing damage to crops and impovements and disruption of grazing and other land uses; (2) payment of a fee to the surface owner for the loss of income from ranching; and (3) posting a bond or other financial guarantee.

**BLM=s Responsibility in Administering Notices Submitted Under the SRHA Amendments**

In *Mt. Gaines Consolidated*, 144 IBLA 49 (1998), the Board agreed with the ABureau=s position that filing a location notice or proof of labor with BLM does not meet the requirements for a NOITL is consistent with SRHA, as amended, and the governing regulation.@ The Board said at 52, n. 3:

> * * * [I]t might appear that the provisions of 43 C.F.R. 3833.1-2(c)(3) impose an obligation on BLM to review all mining claim recordation filings to determine whether they concen split-estate lands under SRHA and, if so, to return certificates or notices of location where no NOITL has been previously filed. However, such reading would be completely inconsistent with 43 CFR 3833.5(f), discussed above. We regard 43 CFR 3833.1-2(c)(3) as instead imposing on BLM the duty to review all cases where a NOITL is filed to determine whether Athe claimant has complied with the requirements of this section,@ most notably the requirement that a copy of the NOITL be served upon the surface owner. If that requirement (or any of the other many requirements for the NOITL set out in 3833.1-2(d) is not met, BLM must return the documentation to the claimant without recording the claim.

**Claimant Required to Give Notice Before Locating Claim**

In *Karry Keith Klump*, 141 IBLA 166 (1997), the appellant had located a claim on lands patented under the Stock Raising Homestead Act (Act), as amended, 43 U.S.C. " 291-299 (1994), but had not complied with the notice requirements imposed by the 1993 amendment to the Act that became effective on October 13, 1993. BLM declared the claim null and void because Klump failed to give notice to the Department and the affected landowner before making his location as required by 43 U.S.C.' 299(b) (1994). The Board upheld the BLM=s decision because written notice must be given to the surface owner by registered or certified mail at least 30 days before entering the lands. *Id.* at 168-69.

**When Bond Is Required**

In *Smith Land Company*, 15 IBLA 280 (1974), the Board determined that any activity on the land following location of a claim would require a bond. The rationale for this is that since a discovery must precede the location of a claim, there would no longer be any reason to prospect

because the next activity should be re-entry for development or mining. The Board said at 282:

> A mineral prospector who locates a mining claim on stock-Raising homestead land, by virtue of his mining location, implies that he has made a discovery. Thus, he is no longer a prospector and, absent consent of or agreement with the surface owner, prior to re-entry he is required to post bond with compensatory protection of the surface owner. *A. J. Maurer, Jr.*, 15 IBLA 151 (1974).

**Protests by Surface Owner**

Most protests by surface owners involve the adequacy of the bond. Exhaustion of the administrative process, including appeal to the Interior Board of Land Appeals, leaves the matter to be settled by parties in a court of competent jurisdiction.

In some protests, the surface owner contends that the mining claimant has not made a discovery under the mining law. In this instance, the protest is dismissed and the surface owner notified that the issue may be determined by the initiation of a private contest in accordance with 43 CFR 4.450. Action on approval or disapproval of the bond is suspended until a final decision on the contest is issued.

**Surface Owner Appeals Insufficient Bond**

Smith Land Company, supra, involved a case where the BLM field office examined a property and appraised the statutory compensatory values and then recommended to the BLM state office that the amount of mineral bond be set at $13,000. However, the state office determined by decision that the $1,000 bond submitted by the claimant was adequate to protect the surface owner. The surface owner appealed on the basis that the $1,000 bond was insufficient for its compensatory protection. The board reversed the state office decision and held that the mineral claimant must post a bond in the amount of $13,000.

In *Elmer Silvera*, 42 IBLA 11, 15 (1979), the surface owner appealed a BLM decision establishing a bond at $1,000. The BLM field appraisal report indicated that neither agricultural crops or improvements existed within the subject lands. Although the surface owner claimed the grazing rights alone of the land are valued in excess of $10,000, the Board said that it "is a bare assertion controverted clearly by the record" and held that the amount of bond in the sum of $1,000 was adequate.

In *Soderberg Rawhide Ranch Co.*, 63 IBLA 260 (1982), the Board considered a case where Kerr-McGee Corporation located approximately 3100 acres of lode claims on land owned in part by Soderberg Ranch. Kerr-McGee then filed a bond for BLM's approval of the bond in the amount of $200,000. Soderberg Ranch filed an objection to BLM's approval and estimated the value of its estate as in excess of $2,000,000. Soderberg contended that mining would destroy its water supplies which would destroy the grazing operation and also that access routes would be destroyed.

Upon conducting a field examination, the BLM district office reported that the bond submitted by Kerr-McGee Corporation was sufficient to cover any possible surface damages and recommended approval of the bond. The BLM decision dismissed Soderberg's protest against approval of the bond. Upon receiving Soderberg's appeal, the Board vacated the case to BLM to readjudicate the appellant's protest. The BLM was required to develop a factual record to support approval or disapproval of the bond. In order to make an objective administrative review, the Board required a detailed report based on a field examination to establish a basis for the decision.

**Bond Need Not Be Sufficient to Cover Damages Outside Claim**

In *Elmer Silvera*, 42 IBLA 11 (1979), the Board placed a limitation on the amount of bond that must be posted. The Board said:

> ... sufficient in amount to cover only damage to crops, improvements, and the value of the land for grazing purposes. The bond need not be sufficient to cover damages outside the limits of the mining claim or to cover damages caused by a disruption of the surface owner's entire grazing operation.

**Liability May Exceed Amount of Bond**

In *Elmer Silvera, supra*, the Board held that "the amount of the bond does not, of course, limit the liability of the mining claimants to the surface owners." *See Holbrook v. Continental Oil Co*., 73 Wyo. 321, 278 P2d 798 (1955).

**Failure to Object to Bond Approval**

In *Visintainer Sheep Co*., 97 IBLA 63 (1987), a decision approving a bond filed by a mineral claimant was affirmed because the owner of the surface estate failed to file objections to issuance of the bond under 43 CFR 3814.1(d). Visintainer Sheep Company sought to have approval of the bond be stayed pending final determination of the two other unrelated proceedings against the mineral claimant. The Board held that the bond was properly approved because at the expiration of 30 days after his receipt of the copy of the bond, the owner of the land had not filed an objection with the authorized officer. *Id*. at 65.

**All Owners of Mining Claim Must Sign Bond**

All owners of record who have an interest in a mining claim located on SRHA lands must sign the Mineral Entry Claimants Bond. Where there are multiple owners of a mining claim on SRHA lands, all must sign the required bond. *Brock Livestock Co., Inc*., 101 IBLA 91 (1988).

**Bond Must Cover All Possible Damages Within Claim Boundaries**

In *William and Pearl Hayes*, 101 IBLA 110 (1988), BLM bonded a company for only the lands to be affected by initial exploration activity -- an area of approximately one acre. The Board found that this approach has "the potential to restrict the mineral claimant's right to

re-entry and fails to adequately protect the surface owner.@ *Id*. at 115. The mineral claimant would need "to return for further review of the bond amount each time it proposed new mining activities.@ However, the statute states that "upon bond approval the mineral claimant has the right to 'reenter and occupy so much of the surface * * * as may be required for all purposes reasonably incident to the mining or removal of the * * * minerals.=" Consequently, the "bond amount must be sufficient to cover possible damages within the boundaries of the claim." *Id*. at 115. Similarly, it was held in *Brock Livestock Co. Inc*., 101 IBLA 91, 98 (1988) that the bond must be based upon the *claims to be entered* rather than the *area of planned mining operations* proposed by the applicant. *Emphasis added*.

**Determination of Bond**

In *William C. Hayes*, 122 IBLA 68, 70 (1992), the Board held that in determining the amount of bond the BLM "must estimate the possible damages to crops, permanent improvements, and the grazing value of the land *within the boundaries of the mining claims* located by the mineral claimant." BLM may base this determination on the following:

1. Types of minerals located.

2. Mining methods proposed or normally used for such deposits.

3. Damages to crops, improvements and grazing values normally associated with such mining methods.

In establishing the amount of bond, the discounting of the value of future payments for damages is not appropriate. However, no discounting is warranted because the claimants are not obtaining present use of future obligations. "The correct procedure where a corporate bond is being provided is to simply multiply the annual loss by the projected 20-year period." *William C. Hayes, supra* at 75.

**When Surface Owner May Seek Damages**

In setting the bond amount, BLM should not take into account any period of time that the surface owner may remain uncompensated for damages because the surface owner may seek compensation immediately after damages are sustained. As the Board said in *William C. Hayes, supra* at 74:

> .....There is no language limiting when demand for compensation may be made. Therefore, demand may be made immediately after damages are sustained. In the event that the demand is not satisfied, the principal and surety are considered to be "in default" and the surface owners may then proceed on the bond.

**Bond Does Not Include Costs to Reclaim Land**

The amount of bond should not reflect the amount of money it will take to reclaim the land. The purpose of a surface protection bond is only intended to compensate the surface owner

for the costs of possible damages to crops, tangible improvements, and the value of the land for grazing purposes. The Stock-Raising Homestead bond is not intended to provide for reclamation of the land in the event that the mine operator fails to reclaim the land. *Id*.

*Note that the cases cited in this section interpreted the Stock-Raising Homestead Act before it was amended on April 16, 1993.*

**Surface Owner May Challenge Validity of Claim**

One established remedy available to a surface owner to terminate the rights of a mineral claimant is to challenge the validity of a claim. However, the surface owner has the burden of preponderating in a private contest. *See State of California v. Doria Mining and Engineering Corporation*, 17 IBLA 380 (1974).

The procedure for a surface owner of land, patented under the Stock-Raising Homestead Act of December 29, 1916, as amended, to challenge the validity of a mining claim for lack of a discovery of a valuable mineral is by the initiation of private contest under 43 CFR 4.450. In *Thomas v. Morton*, 408 F. Supp. 1361 (DC Ariz. 1976), *aff=d sub nom. Thomas v. Andrus*, 552 F2d 871 (9th Cir 1977), the district court addressed itself to the question saying:

> The Department of Interior, Board of Land Appeals, has recently dealt with the specific question involved here, i.e., whether a stock-raising homestead patentee may initiate a contest against mining claims pursuant to 43 CFR 4.450-1. *Sedgwick v. Callahan*, 9 IBLA (January 31, 1973). The Board stated at page 222:
>
> > The most compelling argument in support of the position that the surface owner under the Act has standing to bring a contest against a mining claimant can be made from the language of the Act itself. As set forth above, the Act makes a distinction between the mineral prospector and the claimant who has actually made a discovery of minerals. With respect to the mere prospector, the surface owner is stated to have the right to compensation for damages to the surface resources caused by prospecting activities. On the other hand, the claimant who has actually acquired title to a mineral deposit from the United States, either by patent or a showing that he has perfected a discovery of a valuable mineral deposit as contemplated by the general mining laws, *citations omitted*, may reenter and conduct mining activities only upon: 1. Securing the written consent of the surface owner; or 2. Agreement as to the amount of damages to the surface; or 3. Execution of a sufficient bond for the benefit of the surface owner to secure payment of such damages.
> >
> > Since the Department of the Interior is the proper tribunal to determine whether a valid discovery has been perfected in an unpatented mining claim, *Best v. Humboldt Placer Mining Co*., 371 U.S. 334, 83 S. Ct. 379, 9 L.Ed.2d 3501 (1963), the surface owner is entitled to bring an action in the Department for that purpose, so that he may know the proper course to follow in protecting his surface estate. *Branch v. Brittan, et al*., 50 L.D. 510 (1924). Accordingly, it is concluded

that the contestants have standing to bring these contests to determine whether valid discoveries have been perfected on the mining claims.

**Case Where Surface Owner Prevails in Private Contest**

In *Joanne M. Massirio v. Western Hills Mining Association*, 78 IBLA 155 (1983), the surface owner of lands patented under the Stock-Raising Homestead Act of 1916 (43 USC 299) initiated a private contest against the owner of a placer mining claim located for clay and other deposits. The Board agreed that the holder of the surface title has standing to challenge the validity of a mining claim for lack of a discovery of a valuable mineral deposit. The burden of proof is on the contestant (surface owner) to establish the invalidity of the claim by a preponderance of the evidence in a private contest; whereas, the burden is on the mineral claimant in a government contest to show by a preponderance of the evidence that a discovery has been made. In this case, the Board held that the lands embraced by the claim were nonmineral in character and thus null and void.

**Surface Lessee May Initiate Private Contests**

In *Continental Oil Company v. Azetec Exploration and Development Company*, 32 IBLA 1 (1977), the Board considered a case where a state was the surface owner of land patented under the SRHA. It was held that the surface lessee of the state has standing to initiate a private contest to determine the validity of unpatented mining claims. Of course the respective interest of the lessee and the mineral claimant were clearly and potentially conflicting.

**Trespass by Surface Owner**

In *Browne- Tankersley Trust*, 76 IBLA 240 (1983), the Board considered a case where the appellant had removed sand and gravel from its own surface and without authorization from the BLM. The Board held that the unauthorized removal constituted a trespass even though the lands involved were withdrawn from appropriation under the Act of July 31, 1947, by the Act of October 5, 1962 (76 Stat. 743).

On another issue the Board agreed with the appellant that the "requirement of compensation to the surface patentee necessarily reduces the value of any mineral found from that which might obtain if the Government owned both the surface and mineral estate. In other words, where the Government disposes of minerals on lands that it owns in fee, the price which it receives represents both the value of the mineral and the value of access rights and any residual damage to the surface estate."

The Board then ordered a factual hearing under 43 CFR 4.415 so that the appraisal could be adjusted to account for the fact that the appellant owned the surface estate because the surface owner is entitled to compensation for damage.

**No Authority to Dispose of Mineral Materials from Stock-Raising Homestead Lands**

The Interior Departments regulations (43 CFR 3601.1) state that "mineral material disposals@ may not be made from "public lands" on which there are "valid existing claims to the land by reason of settlement, entry, or similar rights obtained under the public lands laws.@ *See Watt v. Western Nuclear*, 51 L.W. 4664, 4673 (1983).

**Surface Owner Has Standing to Appeal Decision Even Though Not Served**

In *Lazy VD Land and Livestock* Co., 108 IBLA 224 (1989), the owner of land patented under the Stock-Raising Homestead Act had sold sand and gravel. The BLM had issued a notice of trespass to the buyer, but had not served a copy of the notice of trespass upon the surface owner. The Board determined that the surface owner had standing to appeal the decision.

**Surface Owner and Lessee Both Responsible for Trespass Drainages**

Where the surface owner of a SRHA patent leases sand and gravel to another party, BLM may properly proceed against both parties for the collection of trespass damages. *Curtis Sand & Gravel Co., supra* at 152.

**Purchase of Additional Sand and Gravel by Trespasser**

If a party removes sand and gravel from lands patented under the Stock-Raising Homestead Act in trespass, the party must comply with the provisions of 43 CFR 9239.0-98 in order to qualify for the purchase of additional sand and gravel from the Government. If the party does comply, BLM has the discretion to sell additional sand and gravel to the trespasser under the provisions of the Act of July 31, 1947, as amended, 30 U.S.C. 601 (1982), and its implementing regulations. *Curtis Sand & Gravel, supra* at 158-60.

**Calculation of Trespass Damages for Reserved Minerals**

In *Curtis Sand & Gravel Co., supra*, a nonwillful trespass of sand and gravel reserved to the United States occurred on lands patented under the Stock-Raising Homestead Act. In such a trespass the BLM is authorized to establish trespass damages in a manner consistent with state law. The damages should represent the fair market royalty value which would have been set by a willing buyer and seller in an arms-length transaction of a private lease. The Board criticized the BLM for using a royalty rate based on a private lease which grants more than just the right to remove sand and gravel and incidental surface use. These rights include assignment of an easement agreement, an option to purchase land at a fixed price, water rights and use of land for processing and manufacturing operators. The Board remanded the case back to BLM to recalculate the royalty rate used in the computation of trespass damages by factoring Aout such private rights and privileges to the extent they affected the royalty rate set in the private lease.@ *Id*. at 154-57.

## LAND SALES AFTER FLPMA

**No Land Sales If Existing Mining Claims**

If mining claims exist on lands prior to a land sale, such claims must be extinguished either by voluntary relinquishment or by a determination that the claims are invalid as the result of the initiation of a mining claim contest before a public sale can take place or patent issued. *William T Bertagnole*, 87 IBLA 34 (1985). As the Board said in *Hazel Anne Smith*, 82 IBLA 230, 233-34 (1984), Aunless and until the claim is abandoned (by agreement or action of the claimants), or declared to be invalid in a contest proceeding no public or modified public sale can take place.@

**I. Desert Land Entry**

The Act of March 3, 1877 (19 Stat. 377; 43 USC 321-323) as amended by the Act of March 3,1891 (26 Stat. 1096; 43 USC 321329) authorizes desert-land entries in the states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming.

**Mineral Reservation**

In order to be subject to entry under the desert-land law, public lands must be surveyed, unreserved, unappropriated and nonmineral in character. Even a large deposit of good quality gravel precludes entry under the Desert Land Act. *Guy Curtis*, A-28140 (Jan. 26,1960); *Norma L. McBride*, 73 IBLA 165 (1983).

Lands patented under the authority of the Act may have a possible reservation of coal, phosphate, nitrate, potash, oil, gas, sodium, sulphur, or asphaltic minerals. Such reservations would be authorized by the Act of March 3, 1909 (35 Stat. 844; 30 USC 81), the Act of June 22, 1910 (36 Stat. 583; 30 USC 85), the Act of July 17, 1914 (38 Stat. 509; 30 USC 121) and the Act of March 4, 1933 (47 Stat. 1570; 30 USC 124). However, no other mineral can be reserved to the United States in a patent issued under the Act, including minerals locatable under the Mining Law of 1872 (30 USC 22).

**II. Recreation and Public Purposes Act**

The Act of June 14, 1926 (44 Stat. 741), as amended by the Act of June 4, 1954 (68 Stat. 173; 43 USC 869) commonly known as the "Recreation and Public Purposes Act," authorizes the Secretary of the Interior to lease or convey public lands for recreational and public purposes. These public lands may be determined to be suitable for lease or sale under the Act by BLM motion in response to demonstrated public needs for public lands for recreational or public purposes during the planning process as described in section 202 of FLPMA. 43 CFR 2741.4.

**Classified Lands Not Open to Mining Location**

Lands classified under the Act for lease or disposition are not subject to mining locations

and mining claims located on such lands are properly held null and void *ab initio*. *C. V Armstrong*, A-30889 (Feb. 28, 1968); *Gloria Ann Sandvik*, 73 IBLA 82, 84 (1983); *Ronald R. Graham*, 77 IBLA 174, 177 (1983). The Recreation and Public Purposes Act, supra, provides that lands classified for disposition "may not be appropriated under any other public land law unless the Secretary revises such classification or authorizes the disposition of an interest in the lands under other applicable law." 43 USC 869. The Department considered this language as it relates to mining claims on recreation and public purposes classified lands in *R. C. Buch*, 75 ID 140, 146 (1968), saying:

> If we were to hold in this case that the classification action was not effective to segregate the land despite the action taken, the intent of Congress to have such land free from appropriation under other public land laws would be frustrated. . ..Thus, we must conclude that as there was a classification of the land under the Recreation and Public Purposes Act, it was effective to segregate the land from mining location.

That decision was upheld on appeal in *Buch v. Morton*, 449 F2d 600, 605 (9th Cir. 1971), where the court stated:

> The reason for barring appropriation under the mining laws of lands classified for recreational or other public use was to prevent the defeat of the proposed disposition of a particular tract under the Recreation Act by locations, entries, or the acquisition of other interests after such classification.

A classification of land for disposition under the Recreation and Public Purposes Act segregates the lands from mineral locations even if the classification is not published in newspapers or the *Federal Register* and is only noted on the land office supplemental plat. *R. C. Buch*, 75 ID 140 (June 4, 1968).

**Classified Lands Still Segregated After 18 Months**

Although the Act and implementing regulations provided that if no application was filed within 18 months from the issuance of the notice of classification, the Secretary shall restore the land for appropriation under the public land laws. However in *R. C. Buch, supra*, the Board held that such a provision is not self-executing and the lands remain segregated from mineral location after the 18 month period, if no action has been taken to restore the lands to appropriation under the mining laws. *Delmer McClean*, 40 IBLA 34 (1979); *Ronald R. Graham*, 77 IBLA 174,177 (1983).

**Effect of Reservation in Patent**

The Act states that "each patent or lease so issued shall contain a reservation to the United States of all mineral deposits in the lands conveyed or leased and of the right to mine and remove the same, under applicable laws and regulations to be established by the Secretary." 43 USC 869. This means that although the United States reserves "all mineral rights" in a lease or patent, these minerals are not open to entry until such time that laws or regulations to make such

minerals available are established by the Secretary of the Interior. In *Gloria Ann Sandvik, supra* at 85, the Board said:

> Therefore, in the absence of action by the proper authority to restore the land to entry, a recreation and public purpose classification segregates the land from appropriation under the public land laws, including the general mining laws. *Citations omitted*. Once the land was patented, it continued to be unavailable for mineral entry absent adoption of a regulatory provision allowing the location of claims.

*Also see George Schultz,* 81 IBLA 29, 37 (1984).

**Leasable Minerals**

Leasable minerals (30 USC 181 *et seq*.) are not affected by classifications under the Recreation and Public Purposes Act and such minerals may be leased even if the lands are patented.

**III. Public Land Sales Under FLPMA**

The Secretary of the Interior is authorized by section 206 of the Federal Land Policy and Management Act of 1976 (43 USC 1701, 1713; 43 CFR subpart 2710) to sell public lands where as a result of land-use planning, such lands are determined to meet specific disposal criteria. This provision of FLPMA was designed to be a consolidated land disposal program to supersede a variety of land disposal statutes repealed by FLPMA. Tracts are to be sold at not less than fair market value and through competitive bidding procedures.

**Mineral Reservation**

Patents and other conveyance documents issued under FLPMA shall contain a reservation to the United States of all minerals. Section 209(a) (43 USC 1719(a)) provides the following reservation:

> ... all minerals in the lands, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe,

However, section 209(b) of FLPMA (43 USC 1719(b); 43 CFR part 2720) allows for the conveyance of minerals with the surface under certain circumstances. See the section on "Conveyance of Federally-Owned Mineral Interests" for more information.

Section 208 of FLPMA (43 USC 1718; 43 CFR 2711.5-2) authorizes the Secretary to "insert in any such patent or other document of conveyance he issues, except in the case of land exchanges ... such terms, covenants, conditions, and reservations as he deems necessary to insure proper land use and protection of the public interest."

On all conveyances made under FLPMA, with the exception of section 206 exchanges and 209(b) sales, all minerals including the locatable minerals are reserved to the United States, together with the right to prospect for, mine and remove the minerals. However, mining claim locations cannot be made until the Bureau of Land Management has published rulemaking that would allow location and development. The leasing act minerals may be developed under existing regulations.

### IV. Forest Service Land Disposal Authority

The Act of January 12,1983 (Public Law 97-465; 16 USC 521), authorizes the Secretary of Agriculture "to sell, exchange, or interchange by quitclaim deed, all right, title, and interest, including the mineral estate, of the United States in and to National Forest System lands..." Section 3 of the Act requires that such lands meet very specific disposal criteria, including (1) a value of not more than $150,000, (2) less than forty acres, and (3) only isolated tracts. Considerations for such lands may come in the form of interests in lands, and/or cash payments, which is at least equal in value to the Federal lands, including the mineral estate.

## ALASKA LAND DISPOSAL

### I. Homestead Laws

A number of land disposal laws apply only to Alaska. However, the homestead laws were extended to Alaska by the Act of May 14, 1898 (30 Stat. 409; 43 USC 270), which was amended by the Acts of March 3, 1903 (32 Stat. 1028; 43 USC 270), July 8, 1916 (39 Stat. 352; 43 USC 270), June 28, 1918 (40 Stat. 632; 43 USC 270), April 13, 1926 (44 Stat. 243; 43 USC 270), and July 11, 1956 (70 Stat. 528; 43 USC 270). In general it was required that such lands be surveyed and nonmineral in character. A patent for such lands would include all mineral rights unless specifically reserved.

### Homesite Act of 1927

The Act of March 3, 1927 (44 Stat. 1364; 43 USC 687a), as amended, authorized the sale of homesites not to exceed 5 acres in size. The lands must be nonmineral in character except that lands valuable for coal, oil, or gas deposits are subject to disposition under the provisions of the Act of March 8,1922 (42 Stat. 415; 43 USC 270).

### Act of May 17, 1906

The Act of May 17,1906 (34 Stat. 197), as amended August 2, 1956 (43 USC 270), authorizes disposal of 160 acre tracts of unappropriated, unreserved, nonmineral land. Such disposals are subject to the Act of March 8,1922 which allows the specific reservation of oil, gas or coal.

**Trade and Manufacturing Sites Authorized by Act of 1898**

The Act of May 14,1898 (30 Stat. 413), as amended August 23, 1958 (72 Stat. 730; 43 USC 687a) authorizes the sale of tracts not to exceed 80 acres for trade and manufacturing sites. The lands must be nonmineral in character. However, if the lands are valuable for coal, oil, or gas, such deposits may be reserved under the Act of March 8, 1922 (42 Stat. 415; 43 USC 376).

**Reclamation Homesteads**

Reclamation Homesteads are authorized by the Act of February 18, 1911 (36 Stat. 917), as amended by the Act of August 13, 1914 (38 Stat. 689; 43 USC 436). To qualify for a reclamation withdrawal, lands must be nonmineral in character. However valuable leasable minerals may be specifically reserved in a patent pursuant to 30 USC 121-123. *See Avery S. Hobson*, A30332 (June 24, 1965); *Vincent Barnard*, 66 IBLA 100, 105 (1982).

**Alaska Native Claims Settlement Act**

The Alaska Native Claims Settlement Act (43 USC 1601) was passed by Congress on December 18, 1971. This Act was designed to settle aboriginal claims of the Alaska natives by providing compensation of $962.5 million and 40 million acres of land. See 43 CFR subpart 2650.

**Regional Corporations**

Alaska was divided into 12 geographic regions or regional corporations (43 USC 1606) which are incorporated under Alaska State law. Within each region, the Act provided for Village Corporations to be established. The Alaskan natives own and control the Regional and Village Corporations. The subsurface or mineral rights were conveyed to each Regional Corporation with the exception of the Melaktla Reservation and the Tlingit and Haida Indians.

**Village Corporations**

The Village Corporations receive title to the surface estate which they in turn may convey to a private individual (43 USC 1613). The receipt of the selection application for filing by the Bureau of Land Management shall operate to segregate the lands. 43 CFR 265 1.1 (b) (7). The Act provides that the rights to explore, develop, or remove minerals from the subsurface estate in the lands within the boundaries of any native village are subject to the consent of the Village Corporation.

**Mining Claims**

Mining claims may be included in lands selected under ANCSA; however such selections are subject to valid existing rights. An acceptable mineral patent application must be filed with the Bureau of Land Management by December 18,1976, for claims situated on lands conveyed to Village or Regional Corporations. 43 CFR 2650.3-2(b).

### Valid Existing Rights Reserved in Patents

Any conveyance issued for surface and subsurface rights under ANCSA will be subject to any lease, contract, permit, right-of-way, or easement. 43 CFR 2650.4. After issuance of the patent, the patentee becomes entitled to all interest of the lessor, contractor, permitter or grantor.

### III. Indian Allotments

Indian allotments are authorized by section 4 of the General Allotment Act of February 8, 1887 (24 Stat. 389; 25 USC 334), as amended by the Act of February 28, 1891 (26 Stat. 794) and section 17 of the Act of June 25, 1910 (36 Stat. 859; 25 USC 336). These allotments cannot exceed 40 acres of irrigable land, or 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land to any one Indian. For an allotment to be approved, the lands must be nonmineral in character. However, deposits of coal, oil and gas may be reserved in the patent.

## COLOR OF TITLE

### Land Held Under Color of Title

If a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant or his grantors under claim or color title, the claimant may qualify for patent under one of two circumstances: (1) such possession has been maintained for more than 20 years and valuable improvements have been placed on the land or a portion of the land has been cultivated; (2) or such possession has been initiated not later than January 1, 1901, to the date of application. Patents are limited to 160 acres at the rate of $1.25 per acre. Act of December 22, 1928; 45 Stat. 1069. The Act also provides that "coal and all other minerals contained therein are hereby reserved to the United States; that said coal and other minerals shall be subject to sale or disposal by the United States under applicable leasing and mineral land laws, and permittees, lessees, or grantees of the United States shall have the right to enter upon said lands for the purpose of prospecting for and mining such deposits." 43 USC 1068 (1976).

### Mineral Reservation

A claimant may request that the patent issued not contain a mineral reservation. This is only possible if the right of the claimant or his predecessors have initiated possession before January 1, 1901 to the date of the application. However, a mineral reservation will be made at the time of patent, if the lands are subject to an outstanding mineral lease. 43 USC 1068b; Act of December 22, 1928, as amended by the Act of July 28, 1953 (67 Stat. 228). Patents issued under the Act will have the following reservation (43 CFR 2542.4(b)):

> Excepting and reserving, however, to the United States, the coal and all other minerals in the land so patented, together with the right of the United States or its permittees, lessees, or grantees, to enter upon said lands for the purpose of prospecting for and mining such deposits as provided for under the act of February 23, 1932 (47 Stat. 53).

**Accreted Lands**

Land which has accreted to public land is not subject to acquisition under color of title. *Beaver v. U.S.*, 350 F2d.411965, *cert. denied*, 383 US 937.

**Patents in New Mexico Held Under Color of Title**

Lands in the State of New Mexico held under color of title may be patented if they are "not known to be mineral" and the applicant qualifies under the Act of June 8, 1926. 44 Stat. 709; 43 USC 177.

**Patents in New Mexico Contiguous to Spanish or Mexican Land Grants**

Public lands contiguous to a Spanish or Mexican land grant in the State of New Mexico may be patented under the Act of February 23, 1932 (47 Stat. 53; 43 USC 178) provided that "coal and all other minerals contained therein are reserved to the United States; that said coal and other minerals shall be subject to sale or disposal by the United States under applicable leasing and mineral land laws, and permittees, lessees, or grantees of the United States shall have the right to enter upon said lands for the purpose of prospecting for and mining such deposits." 47 Stat. 53; 43 USC 178.

**Mexican and Spanish Land Grants**

When the federal government received title to the public domain lands, it received only those rights, titles and interests held by the prior owners whether it be cessions from the several states or acquisition from foreign governments. If the acquired titles were encumbered by private land claims such as the Spanish and Mexican grant claims in the southwest, such claims were examined for validity. The Act of 1891 (25 Stat. 859) required that all such land claims be examined, and if approved a patent was awarded to the claimant.

In accordance with Spanish and Mexican law, the minerals were not conveyed to the patentee of a private grant unless specifically provided in the grant. *U.S. v. Castillero*, 2 US 17, 167 (1863). Conversely, a grant from the United States conveys all minerals not specifically reserved.

**Adverse Possession**

The statute of limitations in the possession of land cannot be used against the United States or a state to acquire title to government land by adverse possession.

## EXCHANGES

The exchange programs described below were generally repealed by the Federal Land Policy and Management Act of 1976; however the lands affected by the repealed exchange statutes will continue to be so affected and are therefore discussed below.

### State and Private Exchanges Under Taylor Grazing Act

Section 8 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1272), as amended; 43 USC 315g), authorized exchanges of lands between the United States and a state or a private land owner. Either party to an exchange "may make reservations of minerals, easements or right of use. The right to enjoy reservations made in lands conveyed to or by the United States shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the lands as the authorized officer deems necessary." 43 CFR 2211.1-1 and 2220.0-3. However, if the offered school sections are unsurveyed, "no mineral reservations to the state may be made in such unsurveyed sections, the identification of which shall be determined by protraction." 43 CFR 2211.0-8(b). Lands conveyed to the United States through a section 8 exchange become public lands, and thus open to entry under the United States mining and mineral leasing laws.

The filing of a formal exchange application under the Taylor Grazing Act, 43 USC 315g(b) (repealed by FLPMA), segregated the selected land (federal land) from appropriation under the mining laws. A mining claim located on such land subsequent to such filing is null and void *ab initio*. *Essex International, Inc*., 15 IBLA 232, 81 ID 187 (1974). Lands segregated from entry by an application for an exchange are again available for mineral leasing after the exchange has been consummated, presuming that a patent has been granted with a reservation of the mineral estate to the United States, and that transfer has been properly noted on the land office records. *Paul S. Coupey*, 14 IBLA 397 (1974).

Land which might be mineral in character may be selected for a private exchange under section 8(b) of the Taylor Grazing Act (43 USC 315g(b), without a mineral reservation, if the public interest is served and the values of the selected lands are not less than the offered lands. *Essex International, Inc*., 35 IBLA 232, 81 ID 187 (1974).

### Mineral Reservation in Section 8 Exchanges

Mineral deposits may be reserved to the United States in a patent conveyed under section 8 of the Taylor Grazing Act. The authority for this reservation under section 8 is as follows:

> Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the

owner of the surface for damages caused to the land and improvements thereon.

In *Renewable Energy, Inc*., 67 IBLA 304 (1982), the Board held that geothermal resources are reserved to the United States in a patent issued under section 8 of the Taylor Grazing Act. The Board said:

> The initial issue raised is whether the reservation of "all minerals" in a patent under section 8 of the Taylor Grazing Act embraces geothermal resources. Inherent in this issue is the question of whether the reservation is insufficiently similar to the reservation of minerals under section 9 of the Stock-Raising Homestead Act, 43 USC '299 (1976), to be governed by the judicial determination in *Union Oil Co. of California*, 549 F2d at 1271, that the reservation under the latter act embraces geothermal resources. We believe that Union Oil, is the judicial determination Congress contemplated and is dispositive of the question of ownership of geothermal resources where land has been patented under section 8 of the Taylor Grazing Act with a reservation of all minerals to the United States.

**Miscellaneous Exchange Programs**

**Miscellaneous State Exchanges**: Acts of May 7, 1932 (47 Stat. 150); Act of June 14, 1934 (48 Stat. 962); and the Act of December 7, 1942; 43 CFR 2212.

**National Forest Exchanges**: Act of March 20, 1922 (42 Stat. 465) 16 USC 485; 43 CFR 2230.

**National Park System Exchanges**: These exchanges are authorized by a number of acts, each applying to a specific national park. For more information see 43 CFR 2240.

**Wildlife Refuge Exchanges**: Act of October 15, 1966; 80 Stat. 926; 43 CFR 2250.

**0 and C Exchanges**: The Acts of July 31, 1939 (53 Stat. 1144), and August 28, 1937 (50 Stat. 874), authorizes the Secretary of the Interior to exchange any nonmineral land granted to the Oregon and California Railroad Co., title to which was revested in the United States under the Act of June 9, 1916 (39 Stat. 218), for lands held in private, state or county ownership. Parties to the exchange "may make reservations of easements, rights-of-way, and other interests and rights." 43 CFR 2260.0-3.

**Indian Reservation Exchanges**: The Act of April 21, 1904 (33 Stat. 211; 43 USC 149) authorizes the Secretary of the Interior to exchange nonmineral, surveyed public lands for any privately owned lands in the states included within the boundaries of an Indian Reservation that was extended by executive order. 43 CFR 2271.

**Reclamation Exchanges**: Act of August 13, 1953; 67 Stat. 566; 43 USC 451; 43 CFR 2272.1.

**National Wild and Scenic Rivers System**: Act of October 2, 1968 (82 Stat. 906); 43 CFR 2273.0-3.

**National Conservation Area Exchanges**: Act of October 21, 1970 (16 USC 460). In this type of exchange, minerals, easements, or rights of use may be reserved by either party. If the minerals are reserved in lands conveyed by the United States, the procedure for mineral entry to such lands is very similar to the procedure under the Stock-Raising Homestead Act of 1916 (30 USC 299). See details in 43 CFR 2274.1.

**Exchanges After FLPMA**

The Federal Land Policy and Management Act of 1976 repealed a major part of the law that gave the Secretary of the Interior exchange authority and replaced it with a more comprehensive authority granted by section 206 of the act. Regulations to implement this act (43 CFR 2200) were made effective February 5, 1981 (46 FR 1634, January 6, 1981).

Lands and interests in lands acquired by exchange become public land upon acceptance of title by the Federal government. These public lands are not available for location under the mining laws or mineral leasing until a notice of their availability is published in the *Federal Register*. The notice will give the date and time and other pertinent facts concerning the availability of these minerals. The availability of the minerals will also be noted on the public land records. 43 CFR 2200.3.

Public lands may be segregated from entry under the mining laws, if they are covered in a notice of realty action offering to exchange certain lands that is published in the *Federal Register*. The segregative effect of the notice of realty action will terminate upon issuance of patent or other document of conveyance to such lands, upon publication in the *Federal Register* of a termination of the segregation or 2 years from the date of its publication, whichever occurs first. The notice of realty action will list all reservations to be included in the conveyance to and from the United States, including, where the Federal lands are encumbered by a mineral lease or permit, a reservation to the United States for the duration of the mineral lease or permit of the mineral or minerals covered by the lease or permit. The notice of realty action is published in the *Federal Register* and shall be published once a week for 3 weeks in a newspaper of general circulation in the area of the lands to be acquired and the lands to be disposed of by a proposed exchange. 43 CFR 2201.1.

**Federal Land Exchange Facilitation Act**

The Federal Land Exchange Facilitation Act of August 20, 1988 (P.L. 100-409; 43 U.S.C. 1716) authorizes the Secretary of the Interior to segregate the Federal lands under consideration for exchange from appropriation under the mining laws for a period not to exceed five years. Before this Act, the segregative effect of a Forest Service exchange application would not exceed 2 years under section 204(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(b) (1994). In *Washington Prospectors Mining Association*, 136 IBLA 28 (1996), the Board held that a claim located on lands under consideration for exchange during this period of segregation was null and void. *Also see Dean Staton et al*, 136 IBLA 161, 164 (1996). The Act also provided that non-Federal lands acquired by the United States through exchange shall be automatically segregated from appropriation under the public land law, including the mining

laws for ninety days after acceptance of title by the United States. The Act, 43 U.S.C. 1716 (I), states:

> (1) Upon receipt of an offer to exchange lands or interests in lands pursuant to this Act or other applicable laws, at the request of the head of the department or agency having jurisdiction over the lands involved, the Secretary of the Interior may temporarily segregate the Federal lands under consideration for exchange from appropriation under the mining laws. Such temporary segregation may only be made for a period of not to exceed five years. Upon a decision not to proceed with the exchange or upon deletion of any particular parcel from the exchange offer, the Federal lands involved or deleted shall be promptly restored to their former status under the mining laws. Any segregation pursuant to this paragraph shall be subject to valid existing rights as of the date of such segregation.
> (2) All non-Federal lands which are acquired by the United States through exchange pursuant to this Act or pursuant to other law applicable to lands managed by the Secretary of Agriculture shall be automatically segregated from appropriation under the public land law, including the mining laws, for ninety days after acceptance of title by the United States. Such segregation shall be subject to valid existing rights as of the date of such acceptance of title. At the end of such ninety day period, such segregation shall end and such lands shall be open to operation of the public land laws and to entry, location, and patent under the mining laws except to the extent otherwise provided by this Act or other applicable law, or appropriate actions pursuant thereto.

**Reserved Minerals Under Section 206 Exchange Are Not Open to Location**

Departmental Regulation (43 CFR 2201.1-2(d)) provides that where mineral interests are reserved in a section 206 exchange of the Federal Land Policy and Management Act of 1976, such minerals are not open to location under the mining law unless the Secretary issues regulations to do so. The regulation states:

> Upon conveyance of public lands under section 206 of the Federal Land Policy and Management Act, mineral interests reserved by the United States, together with the right to prospect for, mine and remove the minerals, shall be removed from the operation of the mining laws pending issuance of such regulations as the Secretary may prescribe.

**National Forest Exchange**

National forest exchanges are authorized under the provisions of the Act of March 20, 1922 (42 Stat. 465), as amended (16 USC 485) and the Federal Land Policy and Management Act of 1976 (43 USC 1701 et seq.) and are filed with U.S. Forest Service as required by 36 CFR part 254. The filing of a notice of an offer for a forest exchange and the notation of the proposed exchange on the public land records serves to segregate the lands from location under the general mining laws but not from the public land laws governing the use of the National Forest System under leases, licenses or permits. The segregative effect of the offer notation on the public land

records terminates upon issuance of patent or other document of conveyance to such lands, upon rejection or denial of the exchange offer or 2 years from the date of the notation, whichever occurs first. 43 CFR 2202.1.

**Claim Is Void If Located Before Acceptance of Title**

In *Robert S. Glenn*, 124 IBLA 104 (1992), the BLM had declared several mining claims null and void ab initio because the lands were not open to entry when the claims were located on February 5, 1987. The lands involved were previously owned by the State of Idaho. However, under a land exchange pursuant to 16 U.S.C. 1716 (1988), the lands were reconveyed from the State of Idaho to the United States on February 5, 1987. The deed was recorded at 3:35 p.m. on that day, shortly before the notices of location were recorded on the same day.

According to 16 U.S.C. 485 (1988) lands become part of the National Forests within whose boundaries they are located upon acceptance of title. According to a letter to the BLM from the Director, Recreation and Lands, Intermountain Region, Forest Service, title was accepted by the General Counsel on April 17, 1987. As noted in *Robert N. Shanahan*, 120 IBLA 187 (1991), where these appeals were first considered, the Board said that authority to accept title had been delegated by the Chief of the Forest Service to the Regional Forester.

**Options for Mineral Interests in FLPMA Exchanges**

If the Federal lands to be exchanged have no known mineral values, there is generally no reservation of mineral deposits to the United States. This procedure is followed even if the nonfederal lands have severed mineral interests and are not available. However, it is required that the value of the federal and nonfederal lands must be equal. If they are not equal, the values have to be equalized by the payment of money so long as the payment does not exceed 25 percent of the total value of the lands or interests transferred out of Federal ownership.

In the event the Federal lands have potential for mineral development, it is not mandatory to reserve the mineral deposits so long as the overall values exchanged are equal, or are made equal by payment of money. Mineral deposits may also be reserved to the United States if it is in the public interest to do so.

**No Restoration Order for Forest Exchange Lands**

Restoration orders issued by BLM are not required under the provisions of FLPMA to open tracts of land acquired by the Secretary of Agriculture under the Forest Exchange Act of March 20, 1922, to mineral leasing and mining claim location. *See* 16 U.S.C. 486 (1982); *Petro Leasco, Inc*., 42 IBLA 345, 350 (1979). Under the Act of March 20, 1922, lands acquired for national forests were regarded as having the status of public lands, and therefore subject to entry for mineral development. *The Atchison Topeka & Santa Fe R'wy v. Cox*, 4 IBLA 279 (1972), *aff=d sub nom.; Rawls v. United States*, 566 F.2d 1373 (9th Cir. 1978). However, the lands do not become part of the National Forest and open to mining claim location until "acceptance of title" by the Regional Forester. 16 U.S.C. 486 (1982). *Robert N. Shanahan*, 120 IBLA 187 (1991).

**Lands Patented under the Taylor Grazing Act Are Open to Mineral Entry**

Lands patented under the exchange provisions of section 8 of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. 315g (1964) (repealed by section 7705(a) of the Federal Land Policy and Management Act of 1976) are subject to appropriation under the mining or mineral leasing laws. *Amax Specialty Metals Corp*., 100 IBLA 60, 61 (1987).

**Restoration Orders Required for BLM Exchange Lands**

Restoration orders are mandatory for reconveyances under section 8 of the Taylor Grazing Act. Restoration orders are also mandatory for lands acquired under authority of FLPMA. 43 U.S.C. 1702(e) and 43 U.S.C. 17158 (1982). As the Board said in *Petro Leasco, Inc., supra* at 352:

> It is the practice of the Department that public lands reacquired by exchange and administered by BLM are not available for entry, sale, location, or leasing until opened to such appropriation, and until such availability is duly noted on the public land records.

Lands Acquired by Exchange under the Taylor Grazing Act

Where lands are acquired in an exchange under the authority of section 8(b) of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. 315g(b) (repealed 1976), they must be opened by BLM order before mining claims can be located. Philip A. Davis, 131 IBLA 14, 15 (1994); Southern California Petroleum Corp., 66 I.D. 61, 62 (1959).

**Reserved Minerals in Exchange Lands Are Open to Entry**

Federal minerals reserved in public lands conveyed by the United States under Section 8 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1272), and the Forest Exchange Act of March 20, 1922 (16 U.S.C. 485) are open to entry.

## ACQUIRED LANDS

**Introduction**

In *Phillips Petroleum Co*., 10 IBLA 275, 276 (1973), the Board defined "acquired lands" as follows:

> Acquired lands, as distinguished from public domain lands have traditionally referred to

those lands "in federal ownership which ... have been obtained by the Government by purchase, condemnation, or gift, or by exchange for such purchased, condemned or donated lands, or for timber on such lands.

The significance of this distinction between "public domain lands" and "acquired lands" is that unappropriated public domain lands are generally available for disposal under the general mining laws of 1872, as amended (30 USC 22) and the Mineral Leasing Act of 1920, as amended (30 USC 181 *et seq*.). However, whether minerals may be disposed on acquired lands depends generally on two considerations: (1) the purpose of the acquisition, and (2) the statutory authority for the acquisition. The following types of acquired lands are described:

**I. Minerals Acquired Before FLPMA (Act of October 21, 1976)**

1. Lands acquired under the General Exchange Act, the Taylor Grazing Act and several other acts have the status of "public lands." Such lands may be subject to appropriation under the mining and mineral leasing laws providing they are formally opened by the Secretary of the Interior.

2. All deposits of coal, phosphate, oil, oil shale, gas, sodium potassium and sulfur in acquired lands may be disposed of under the Acquired Lands Leasing Act of August 7, 1947 (61 Stat. 913; 30 USC 351, 352).

3. All minerals not designated in either paragraph #1 or #2 above are commonly referred to as "hardrock" minerals and are handled as follows:

    a. If hardrock minerals are acquired pursuant to one of the acts listed in section 402 of the Reorganization Plan No. 3 of 1946, they are available for leasing under the regulations in 43 CFR subpart 3500.

    b. If hardrock minerals are acquired pursuant to an act that expressly mentions that acquired minerals are available for leasing, then these minerals may be disposed of under 43 CFR subpart 3560, or by the method mentioned in the act.

    c. If the acquired "hardrock" minerals were not acquired under an authority that provides for disposal as discussed in paragraphs #3.a. or #3.b., then such minerals are not available under any circumstances as either acquired minerals or public minerals. For example in *Joseph E. Worthington*, 54 IBLA 162 (1981), the Board held that the appellant's hardrock mineral prospecting permit application should be rejected by BLM because there was no authority for leasing the hardrock minerals in the TVA Act of 1933 under which the lands were acquired.

**II. Minerals Acquired After the Act of October 21, 1976 (FLPMA)**

Section 205 of FLPMA provides that minerals acquired after October 21, 1976, by purchase, exchange, donation or eminent domain shall become public lands or National Forest System Lands. Such minerals may be locatable, leasable or salable as are public domain minerals. However, before these minerals may be located, the Secretary of the Interior must open the minerals by publication in the *Federal Register*.

**Leasing Under the Reorganization Plan of 1946**

Section 402 of the Reorganization Plan No. 3 of 1946 (60 Stat. 1099) transferred the mineral disposal functions of the Secretary of Agriculture (U.S. Forest Service) to the Secretary of the Interior. Section 402 specified certain types of acquired lands that could be leased by the Secretary of the Interior. For example, lands acquired under the following acts may be disposed of by a Federal mineral lease:

1. Act of March 4, 1917 (39 Stat. 1134, 1150; 16 USA 520)

2. Title II of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 195, 200, 202, 205; 40 USC 401, 403)

3. 1935 Emergency Relief Appropriation Act of August 24, 1935 (49 Stat. 750, 781)

4. Act of July 22,1937 (5O Stat. 522, 525, 530), as amended July 28, 1942 (56 Stat. 725; 7 USC 10118 and 1018).

**Acquisitions After FLPMA**

Section 205(a) of the Federal Land Policy and Management Act of 1976 (FLPMA; 43 USC 1715) authorizes the government to acquire by purchase, exchange, donation or eminent domain lands or interests in lands. Section 2058 specifies that lands (and minerals) acquired by the Secretary of the Interior shall become public lands for the administration of the public land laws in effect. Section 205(d) provides that lands (and minerals) acquired by the Secretary of Agriculture shall "become National Forest System Lands subject to all the laws, rules, and regulations applicable thereto."

Therefore, lands acquired under section 205 of FLPMA, including acquisitions in the national forest system shall become public lands and be subject to the mining and mineral leasing laws. For example, hardrock minerals would be subject to location under the mining law rather than through a leasing system as are some preFLPMA acquired lands. Of course, a notice of availability of such lands must appear in the *Federal Register* before mineral locations may be established.

**Lands Acquired Under FLPMA Must Be Formally Opened**

Lands acquired under sections 205 and 206 of FLPMA and the Taylor Grazing Act of 1934 (repealed by FLPMA), must be formally opened by publication in the *Federal Register*

before they are open to appropriation under the mining and mineral leasing laws. The Department has held that land conveyed to the United States pursuant to an exchange authorized by section 8 of the Taylor Grazing Act does not become subject to oil and gas lease offers immediately upon acceptance of title by the United States, but only pursuant to an order opening the lands to such disposition. *Tom Notestine*, 73 IBLA 320 (1983). As the Board stated in *Petro Leasco*, Inc., 42 IBLA 345, 352-54 (1979):

> [W]e have discerned nothing in the legislative history of FLPMA which arguably suggested congressional intent to abolish the Department's administrative practice of issuing restoration and opening orders. Moreover, we do not choose to assume that the Congress was unaware of this long practice or precedent applicable thereto. In our view, mandates of the Act are best served by adhering to the sound policy of fair and orderly administration of the public lands, until such time as the Secretary may promulgate a different or contrary rule.
>
> ... We further hold that acquired lands administered by BLM are not subject to appropriation unless and until opening orders are duly noted on the land records in the manner prescribed and set forth in the *BLM Manual*, *supra*.

**0 & C Lands**

In *Junior L. Dennis*, 61 IBLA 8 (1981), the appellants contended that revested 0 & C lands, which later passed from Federal ownership as a patented claim, would upon reacquisition by the Federal Government regain their status as revested 0 & C lands subject to mining location. Although the subject lands were acquired pursuant to section 205 of FLPMA, the Board held the such an acquisition, even before FLPMA, "would not, however, regain the status of 0 & C lands" and be subject to location under the mining law. The Board discussed the history of the 0 & C lands as follows:

> By the Act of June 9, 1916 (39 Stat. 218), Congress declared revested in the United States certain lands which had been granted to the Oregon and California Railroad Company. Section 2 of the Act provided that the various lands would be classified as powersite lands, timberlands, or agricultural lands. Section 3 of this Act provided that the lands revested, except for lands classified for powersite purposes, would be open to exploration, entry and disposition under the general mining laws if they were chiefly valuable for the mineral deposits contained therein.
>
> Subsequently, however, Congress adopted the Act of August 28, 1937, 50 Stat. 874, 43 USC "1181a-1181f (1976). Section 1 of this Act provided, *inter alia*:
>
> > [N]othwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and

> power-site, lands valuable for timber, shall be managed, except as provided in section 1181c of this title, for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities: Provided, That nothing in this section shall be construed to interfere with the use and development of power sites as may be authorized by law.

This Act was subsequently interpreted as, in effect, partially repealing section 3 of the Act of June 9,1916, *supra*, so that lands classified as valuable for timber were deemed no longer open to mineral location or leasing. *See Applicability of Mining Laws to Revested Oregon and California and Reconveyed Coos Bay Grant Lands*, 57 I.D. 365 (1941).

The opinion of Assistant Secretary Chapman did note that lands which had been classified as agricultural lands under Class Three of section 2 of the Act of June 9, 1916, if shown to be more valuable for minerals than for agriculture, continued to be subject to disposition under the general mining laws (57 I.D. at 374).

By the Act of April 8, 1948, 62 Stat. 162, Congress provided that:

> [N]otwithstanding any provisions of the Act of August 28, 1937 (50 Stat. 874), or any other Act relating to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands, all of such revested or reconveyed lands, except power sites, shall be open for exploration, location, entry, and disposition under the mineral land laws of the United States, and all mineral claims heretofore located upon said lands, if otherwise valid under the mineral-land laws of the United States, are hereby declared valid to the same extent as if such lands had remained open to exploration, location, entry, and disposition under such laws from August 28, 1937, to the date of enactment of this Act...

This Act, in effect, restored the "revested or reconveyed lands" to the status of lands subject to mineral location, though subject to certain limitations. See 30 CFR 3821.1(a).

**Acquired Lands That Become Public Lands**

Lands acquired by the Federal Government under the following statutory authorities have the status of public domain land rather than acquired land:

1. Revested 0 & C Lands (Act of June 9, 1916, 39 Stat. 218; August 28, 1937, 50 Stat. 874; 43 USC 1181; Act of April 8, 1948, 62 Stat. 162).

2. General Exchange Act of 1922 (16 USC 1181).

3. Section 8 of Taylor Grazing Act (Act of June 28, 1934, 48 Stat. 1272, as amended; 43 USC 315g) -- repealed by section 705(a) of FLPMA.

In *Junior L. Dennis*, 61 IBLA 8,14 (1981), the Board explained how these lands acquired by the Federal Government are public lands and may be disposed of through the Mineral Leasing Act of 1920 (30 USC 181 *et seq*.) and the Mining Law of 1872 (30 USC 22 *et seq*.):

> Not all land, however, which is acquired by the United States is "acquired land." Thus, where public domain land was exchanged by the Government for land in private ownership under the General Exchange Act of 1922, 16 U.S.C. '485 (1976), such land has the status of public domain land and not acquired land. *See The Atchison, Topeka & Santa Fe Railway Co. v. Cox*, 4 IBLA 279 (1972), *aff=d sub nom. Rawls v. United States*, 566 F.2d 13727 1376-77 (9th Cir. 1978); *Solicitor's Opinion*, M-36421 (Feb. 18, 1957). Such lands are thus not available for leasing under the Mineral Leasing Act for Acquired Lands, 61 Stat. 913, 30 U.S.C. "351-359 (1976). *Wyoming Fuel Co*., 52 IBLA 302 (1981). Similarly, revested 0 & C lands are treated as public lands, even though specific laws such as the Act of August 28, 1937, *supra*, control their management, and all mining claims located therein are subject to the specific requirements and limitations of the Act of April 8, 1948, *supra*.

**Weeks Act Status for Certain Lands**

The Act of September 2, 1958 (P.L. 85-862; 72 Stat. 1571; 16 U.S.C. 521a) gives Weeks Act status to certain lands. The statute states:

> In order to facilitate the administration, management, and consolidation of the national forests, all lands of the United States within the exterior boundaries of national forests which were or hereafter are acquired for or in connection with the national forests or transferred to the Forest Service, Department of Agriculture for administration and protection substantially in accordance with national forest regulations, policies, and procedures, excepting (a) lands reserved from the public domain or acquired pursuant to laws authorizing the exchange of land or timber reserved from or part of the public domain, and (b) lands within the official limits of towns or cities, notwithstanding the provisions of any other Act, are hereby made subject to the Weeks Act of March 1, 1911 (36 Stat. 961), as amended, and to all laws, rules, and regulations applicable to national forest lands acquired thereunder: Provided, that nothing in this Act shall be construed as (1) affecting the status of lands administered by the Secretary of Agriculture under the Act of June 24, 1954 (68 Stat. 270), and which are revested Oregon and California Railroad grant lands, administered as national forest lands...

In other words this 1958 Act says that lands which are acquired under a variety of statutes and are situated within the national forests, have the same status for mineral acquisition purposes as Weeks Act lands. For example, hardrock minerals acquired under the Weeks Act of March 1,

1911 (36 Stat. 961) are available for leasing under the regulations in 43 CFR 3500. Authority for leasing of Weeks Act lands comes from the Act of March 4, 1917 (39 Stat. 1150; 16 U.S.C. 520):

The Secretary of Agriculture is authorized, under general regulations to be prescribed by him, to permit the prospecting, development, and utilization of the mineral resources of the lands acquired under the Act of March 1, 1911, known as the Weeks law, upon such terms and for specified periods or otherwise, as he may deem to be for the best interests of the United States.

**Lands Acquired under the Weeks Act**

In *Melvin Franzen*, 92 IBLA 20, 21 (1986), the Board described the status of lands acquired under the Weeks Act of March 1, 1911:

> * * * Development of mineral resources on lands acquired under the Weeks Act is authorized only upon such terms and for such periods as the Secretary may determine to be in the best interests of the United States. 16 U.S.C. 520 (1982). Such "acquired lands" are properly distinguished from Apublic domain" or Apublic lands" which are subject to mineral entry under 16 U.S.C. 475, 578 (1982). *Thompson v. United States*, 308 F.2d 628, 631-33 (9th Cir. 1962).

**Acquired Lands Generally Not Open to Location**

In *Melvin Franzen*, 92 IBLA 20 (1986), the Board again held that acquired lands are not open to location under the mining law unless there is specific statutory authority. The Board stated at 21:

> Lands acquired by the United States are not, by mere force of acquisition, open to disposal under the public land laws. In the absence of specific statutory authority to the contrary, acquired land is not subject to location under the mining law (30 U.S.C. 22 (1982)).

**Acquired Lands May Not Be Public Lands**

In *Robert D. Davis*, 132 IBLA 253, 254 (1995), the Board again stressed that the fact that land patented out of Federal ownership and later returned to Federal ownership is not subject to mining claim location until an order opening the land to location is issued:

> But land patented out of Federal ownership that is again acquired by the United States is properly distinguished from public domain or public land and is not subject to the public land laws. *Bobby Lee Moore*, 72 I.D. 505, 510 (1965), *aff=d sub nom. Lewis v. General Services Administration*, 377 F.2d (9th Cir. 1967). Consequently, the land at issue did not become subject to the operation of the mining laws upon reconveyance. An order opening the land to such location was needed before sec. 27 could become subject to mineral entry.

**Acquired BLM-Administered Lands Require Opening Order**

In *Petro Leasco, Inc*., 42 IBLA 345, 354 (1979), the Board held Athat acquired lands administered by BLM are not subject to appropriation unless and until opening orders are duly noted on the land records in the manner prescribed and set forth in the *BLM Manual*."

In *Roberts and Koch*, 95 IBLA 239 (1987), the Board considered an appeal involving the rejection of an oil and gas lease application for lands reacquired by the United States under authority of the Colorado River Basin Salinity Control Act. 43 U.S.C. 1571 (1982). This authority does not remove the lands "from the classification of those acquired for special uses" and the "Colorado River Basin Salinity Control Act did not 'restore' them to the public domain." *Id*. at 243. "Acquired lands administered by the BLM are not subject to appropriation unless and until opening orders are duly noted on the land records.@ *Id*. at 244.

**Opening Orders Long Required for Restored Lands**

In *Earl Crecelouis*, 58 I.D. 557, 559-60 (1943), the appellant's homestead application was rejected on the basis that the lands had been acquired by the United States from a railroad company under the Transportation Act of September 18, 1940. In holding that the land was acquired and therefore not subject to the public land laws, the Secretary said:

> Through the years, this Office and the Department have had frequent occasion to consider the status of restored lands--lands once segregated by various kinds of adverse claims or appropriations, even those of patent, and restored to the United States by congressional act, by court decision, by individual relinquishment, Executive or departmental. In a long line of decisions in such cases, the Department has held that although restored lands become part of the public domain immediately, it remains for the Department and it alone in the absence of congressional direction to give the indication spoken of by the [Court] and to determine when and how such lands shall be opened for disposal.
>
> Not only this. The Department has also held that orderly administration of the land laws forbids any departure from the salutary rule that lands which have once been segregated from the public domain, whether by entry, patent, reservation, selection or otherwise, shall not be subject to any form of appropriation until the local land officers * * * shall have entered upon the records of the local office proper notation of the restoration.

**Acquired Lands Generally Not Open to the Mining and Mineral Leasing Laws**

Even though the Mining Law of 1872 declares that lands belonging to the United States are free and open to purchase, there are many types of lands acquired by the United States, especially those acquired for a special purpose, that are not available for mining claim location. In *Junior L. Dennis, supra* at 14, the Board stated:

While section 1 of the Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. '22 (1976), is expansive in scope, declaring that "all valuable mineral deposits in lands belonging to the United States... shall be free and open to exploration and purchase," it has long been recognized that the general mining law does not apply to all land "belonging to the United States." Thus, in *Oklahoma v. Texas*, 258 U.S. 574, 599-600 (1922), the Supreme Court noted:

> This section is not as comprehensive as its words separately considered suggest. It is part of a chapter relating to mineral lands which in turn is part of a title dealing with the survey and disposal of "The Public Lands." To be rightly understood it must be read with due regard for the entire statute of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course, it has no application to the grounds about the Capitol in Washington or to the lands in the National Cemetery at Arlington, no matter what their mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, the Yellowstone National Park, and the military reservations throughout the western states. *Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply; and it never applies where the United States directs that the disposal be only under other laws*. [Emphasis supplied.]

As the Supreme Court says in *Oklahoma v. Texas, supra,* there must be an expressed mention in the statute that acquired lands are open to the mining laws or that the disposal is under some specified law. Otherwise no disposal is authorized.

In *Maurice Duval*, 68 IBLA 1 (1982), the Board considered a case where the appellant had applied for a mineral patent for lands that were acquired and not open to mineral location. The Board emphasized that to give such lands the status of public lands, specific statutory authority is necessary. The Board said:

> The acquired lands that are the subject of this appeal are shown on the public records as owned and held by the United States. However, land acquired by the United States does not become public land by the mere process of its acquisition, and, in the absence of specific statutory direction to the contrary, is not open for location of mining claims under 30 U.S.C. '22 (1976). 43 CFR 3811.2-9; *J. C. Babcock*, 25 IBLA 316 (1976). Appellants have demanded issuance of a patent for all the lands applied for notwithstanding that parts thereof are acquired lands and unavailable to mining location. Without authority from Congress, this Department may not issue a patent divesting the United States of its title to Federal lands. Alienation of the public interests in lands administered by this Department can occur only within the limits authorized by law. *See United States v. California*, 332 U.S. 19, 40 (1947); *Union Oil Company of California v. Morton*, 512 F.2d 743, 748 (9th Cir. 1975).

The Board went on to say in *Junior L. Dennis, supra* at 14:

In *Rawson v. United States*, 225 F.2d 855 (9th Cir. 1955), *cert. denied*, 350 U.S. 934 (1956), the Ninth Circuit Court of Appeals examined the question of whether lands acquired pursuant to the Emergency Relief Appropriations Act of 1935, 49 Stat. 115, were open to location under the Mining Act of 1872. In its opinion holding that such land was not available, the Court stated:

> It may be stated as a universal proposition that patented lands reacquired by the United States are not by mere force of the reacquisition restored to the public domain. Absent legislation or authoritative directions to the contrary, they remain in the class of lands acquired for special uses, such as parks, national monuments, and the like areas which it could not rationally be argued remain open to location and exploitation under the mineral laws. *Id*. at 858.

Similarly, in *Thompson v. United States*, 308 F.2d 628 (9th Cir. 1962), the court held that land acquired pursuant to section 7 of the Act of June 7, 1924, 43 Stat. 654, 16 U.S.C. '569 (1976), was also not open to location under the general mining law. The *Thompson* court focused on the distinction between lands held subject to the general land laws and land acquired for a particular purpose which would be incompatible with mineral entries. The court held that inasmuch as the land was acquired "for the specific purpose of preserving the timber ... recognition of a mining location pursuant to 30 U.S.C.A. '22 would be wholly inconsistent with the purpose of the acquisition." *Id*. at 632.

Thus, the analysis utilized in the past in determining whether lands which were acquired became "public lands" has been one focused on the reasons for which the United States acquired a title, as well as the statutory authority by which title was obtained. In this regard, we note that BLM was originally interested in obtaining an easement for a road to enable it to manage its surrounding timber. It is not difficult to determine that, insofar as the area of the right-of-way is concerned, mineral entry would be inconsistent with the purposes for which the land was acquired.

**Lands Acquired Under Sections 205 and 206 of FLPMA Have the Status of Public Lands**

In *Junior L. Dennis, supra*, the Board considered whether lands acquired by donation under section 205 of FLPMA become "public lands," subject to location under the general mining laws. In holding that such lands have "the status of public land," the Board implies that all lands acquired under sections 205 and 206 of FLPMA have the status of public lands. However such lands must be formally opened to entry under the general mining laws. The Board said at 16:

> The essential question before us is whether land acquired by donation under section 205 of FLPMA becomes "public land" upon acceptance of title, subject to appropriation under the general mining laws. We believe that it does.

As noted above, the language of section 205(c), 43 U.S.C. '1715 8 (1976), is explicit. It provides that upon acceptance of title, lands acquired "become public lands and for administration of public land laws not repealed by this Act, shall remain public lands." In *Oklahoma v. Texas, supra*, the Supreme Court noted that the mining laws apply "only where the United States has indicated that the lands are held for disposal under the land laws." 258 U.S. at 600. *See also Thompson v. United States, supra* at 632. It seems unreasonably clear that Congress has determined that lands acquired under the authority of section 205 are to be held for disposal and management under the public land laws.

Section 103(e) defined public lands so as to include, with certain exceptions not relevant here, all land administered by the Bureau of Land Management. The obvious reason for this broad definition was the congressional desire that the management principles and considerations which animate FLPMA should apply to all lands under BLM management, without regard to whether they were public domain or acquired lands. The introductory caveat to the definition section which noted that it was not intended to change or "alter in any way the meaning of the following terms as used in any other statute," was designed to make it clear that to the extent different definitions were relevant in other laws, nothing in FLPMA was intended to alter those definitions. As an example, the Mineral Leasing Act, by its express terms, is not applicable to lands acquired under other Acts "subsequent to February 25, 1920." 30 U.S.C. '181 (1976). Such lands are leasable, again with certain exceptions, under the Mineral Leasing Act for Acquired Lands, Act of August 7, 1947, 30 U.S.C. '351 (1976). While for purposes of FLPMA no distinction is to be made between these two types of land, nothing in FLPMA purported to terminate the distinction as it relates to mineral leasing.

These considerations, however, are irrelevant to the specific question before us. That issue involves the interpretation of an express provision of FLPMA which provides that upon acquisition of title, those lands which are acquired become public lands. Indeed, interpreting this provision to mean that they become "acquired lands" would directly contradict the clear language of the Act. If Congress had intended that such acquired lands should be treated as they had been in the past, there would have been no need for section 205 8 whatsoever.

We are aware that section 205 8 also applies to exchanges completed pursuant to section 206, 43 U.S.C. '1716 (1976). Prior to January 6, 1981, the regulations implementing exchanges, with the exception of the regulations relating to state exchanges (see 43 CFR 2211.2 (1980)), had no express provision relating to the status of land acquired through an exchange. On January 6, 1981, however, the regulations involving exchanges were totally revised. The regulations now provide that "land and interests in lands acquired by exchange shall, upon acceptance of title by the authorized officer, become public lands." 43 CFR 2200.3(a) (46 FR 1640 (Jan. 6, 1981)). It would be impossible to develop a rational theory that would justify the treatment of exchanges in a different manner than gifts and acquisitions, particularly since the same section of FLPMA is applicable to both. We hold, therefore, that land acquired by donation pursuant to section 205 has the status of public land.

**Lands Acquired Under Section 205 of FLPMA Must Be Formally Opened Before Entry**

In *Junior L. Dennis, supra*, the Board held that even though lands acquired under section 205 of FLPMA become public lands, "such land is not available for entry under the mining laws until the land has been formally opened to such entry." The Board said at 16:

> The next question which we must examine is whether land acquired under section 205 must be opened before entry can be made thereon. Here it is helpful to note that section 8 of the Taylor Grazing Act, as amended, 43 U.S.C. '315g (1970), also provided for acceptance of donations of land as well as exchanges. That section expressly stated that "lands conveyed to the United States under this chapter shall, upon acceptance of title, become public lands." 43 U.S.C. '315g(d) (1970). In *Southern California Petroleum Corp*., 66 I.D. 61 (1959), the Department held that land acquired under a section 8 exchange did not become available for oil and gas lease offers until an order opening them to such disposition was issued.
>
> While section 8 of the Taylor Grazing Act was repealed by section 705(a) of FLPMA, the language which section 2058 employs is an almost verbatim replication of the language in section 8(d) of the Taylor Grazing Act. There would seem little reason to alter the constant Departmental approach requiring the publication of an opening order prior to the allowance of entries and applications.
>
> We also note that the recent changes to the exchange regulations also apparently provide that while lands acquired by exchange become public lands, they do not become available for mineral entry or leasing until a notice of availability is published and noted on the public land records. This comports with our own analysis above. Therefore, we hold that while land acquired by donation pursuant to section 205 becomes public land upon acceptance of title, such land is not available for entry under the mining laws until the land has been formally opened to such entry. *See Petro Leasco, Inc*., 42 IBLA 345 (1979).

**Legislative Restoration to Leasing**

In *Texas Oil & Gas Corp. v. Wall*, 683 F.2d 427 (D.C. Cir. 1982), the Court ruled that the Coal Leasing Amendments Act, by removing the exclusion of military lands from oil and gas leasing under the Mineral Leasing Act for Acquired Lands, represented a legislative restoration of those lands to the public domain. Consequently the Secretary had improperly canceled leases issued under the Mineral Leasing Act for Acquired Lands of August 7, 1947, on the basis that the lands had not been restored to operation of the public land laws. Therefore in this case an opening order would be unnecessary to restore the military lands to the public lands. AHowever, in the absence of such a legislative or authoritative directive, all other acquired lands (administered by BLM), whether by exchange or otherwise, are not 'available for entry, sale, location, or leasing until opened to such appropriation, and until such availability is duly noted on the public land records.=" *Petro Leasco, Inc*., 42 IBLA 345, 352 (1979).

**Lands Acquired under Reclamation Act Are Not Public Lands**

In *Ted Thompson*, 98 IBLA 251 (1987), the Board held that lands acquired under the Reclamation Act of June 17, 1902 (43 U.S.C. 416 (1982)), are not subject to location under the Mining Law. Such lands are, instead, segregated from the public domain.

**Department Has Jurisdiction to Construe Ownership of Mineral Reservation**.

The United States has the authority to determine whether title to the mineral estate has passed to the United States under the terms of a reservation contained in a conveyance to the United States. In *Doris A. Slaaten*, 81 IBLA 282 (1984), the Board held that "the Department does have authority to determine what are public lands, including authority to determine the extent of the public ownership of minerals in such public lands." This case involved the question of a mineral reservation in a 1937 warranty deed to the United States. *Also see Brown v. Hitchcock*, 173 U.S. 473 (1899).

# 8. PATENTS AND MINERAL INTERESTS

## PATENTS

### Surveys

If a patent conveying lands incorporates the official plat of survey in the description of the grant, the survey plat becomes a part of the conveyance and controls the limits of the grant. *Greene v. U.S.*, 274 F 145 (CCA La 1921), *affirmed* 260 US 662. However, a patent issued on an unapproved survey is void. *Dalles City v. Missionary Soc. of the M.E. Church*, 6 F 356 (DC Or 1879), *affirmed* 107 US 336.

### Definitions

The following terms are defined in *BLM Manual* 1862 in connection with United States patents:

**Conditions** - a provision that requires, prohibits, or restricts certain uses of land.

**Covenants** - supplemental contractual clauses in the conveyance document that normally run with the lands and are enforceable in court.

**Deed** - a document of conveyance transferring legal title to acquired public lands from the United States or transferring legal title to the United States.

**Exception** - a clause by which the grantor excepts something out of that which is granted by the conveyance; an exclusion.

**Final Certificate** - a document which, prior to patent, evidences eligibility to patent, provided no irregularities are found in connection with the entry.

**Patent** - the instrument by which the United States conveys title to public lands.

**Reservation** - a clause in an instrument of conveyance by which the grantor creates and reserves to himself, some right, interest, or profit, in the estate granted, which had no previous existence as such, but is first called into being by the instrument reserving it, such as rent, or an easement.

**Reverter or Reversionary Clause** - a clause in a conveyance providing that the conveyed interest shall return and revest in the United States upon the occurrence of certain contingencies or events.

**Distinction Between "Entries" and "Patents" in Early Public Land Laws**

The language in a patent taken from section 3 of the Act of June 11, 1906, as amended, ch. 3074, 34 Stat. 234 (1906) stating that "all entries under [the] Act * * * shall be subject to the quartz or lode mining laws of the United States," constitutes a reservation of minerals to the United States. *Homestake Mining Co*., 104 IBLA 357, 359 (1988). The Board pointed out that the "language of section 3 of the Act of June 11, 1906, quoted in patent No. 714017, plainly states that 'entries,' not patents, under the Act shall be subject to the quartz or lode mining laws. * * * From the earliest days of public land law there has been an important distinction between entries and patents. *Chotard v. Pope*, 25 U.S. (12 Wheat.) 376, 377-78 (1827)@ 104 IBLA 359. Under the early laws, "lands which had been entered, but not yet patented, ... would remain subject to the quartz or lode raining laws, including the location of quartz or lode mining claims. This was consistent with the general rule that an 'entry * * * of public lands which is not so far perfected as to confer an equitable title or vested right, does not take the land included in such entry * * * out of the operation of the mining laws * * * .' *Porter v. Landrum*, 31 L.D. 3529 353 (1902)." *Homestake Mining Co*., 104 IBLA 357, 359 (1988).

**Federal Title Conveyed by Three Methods**

The United States may transfer title to lands by three methods: (1) issuance of a patent; (2) by a special act, *Carter v. Ruddy*, 166 US 493 (1897); or (3) by an approved clear list in connection with a grant such as a school or railroad grant. A **patent** is the instrument by which the United States conveys title to the public lands. *BLM Manual* 1862. Whereas, an approved **clear list** is used to convey legal title to public lands identified in a selection list made by a state without necessity of a patent. A **special act**, by contrast, is a special enactment of Congress which conveys by a statute which specifies the parties involved, a description of the tract and the conditions of conveyance.

**Effect of Issuance of Patent**

Title is transferred from the government upon signing of the patent and making all appropriate entries in the BLM office even though the patent is not delivered. *U.S. v. Frank Black Spotted Horse*, 282 F. 349 (1922). And until patent issues, the title to the land is in the United States. *Bagnell v. Broderick*, 38 US 436 (1839).

The effect of the issuance of a patent for public land is to transfer the legal title from the United States and to remove from the jurisdiction the Interior Department the inquiry into and consideration of all disputed questions of fact, including the resolution of conflicting claims to the land. *Hank Patterson*, 71 IBLA 109 (1983); *Harry J. Pike*, 67 IBLA 100 (1982). *Also see Germania Iron Co. v. U.S.*, 165 US 379, 383 (1897). This is true even if the patent has been issued by mistake or inadvertence. *Berthlyn Jane Baker*, 41 IBLA 239 (1979).

**Suits to Vacate and Annul Patents**

Suits to vacate and annul patents shall only be brought within six years after the date of the issue of such patents. 26 Stat. 1093; 43 USC 1166; 43 CFR 1862.5. Government officers may examine an issued patent to see if there is a possible basis for recommendation of initiation of a judicial suit seeking cancellation or modification of such patent. *Lee Williamson*, 48 IBLA 329 (1980). Therefore, absent fraud, the Department may have residual authority to seek cancellation of a patent on the grounds of improper issuance, if such suits are commenced within six years of the date of patent issuance. *Silver Spot Metals, Inc*., 51 IBLA 212 (1980). In cases of fraud, the statute has been construed not to commence to run "until discovery of the fraud." *Exploration Co., Limited, et al. v. United States*, 247 US 435.

A suit to cancel a conveyance will generally be recommended only where (1) the Government has an interest in the remedy by reason of its interest in the land; (2) the interest of some party to whom the Government is under obligation has suffered by issue of the patent; (3) the duty of the Government to the people so requires; (4) significant equitable considerations are involved. *Everett Elvin Tibbets*, 61 ID 397 (1954); *George Autunovich*, 16 IBLA 301,309 (1983).

**Legal Effect of Improperly Issued Patent**

If mineral lands are patented under the nonmineral land laws because of fraudulent filings by the applicant or error on the part of the Government, such a patent is voidable but not void. It is well settled that a patent issued by the United States cannot be successfully attacked by strangers who are not able to show any interest in the land at the time the patent was issued and were not prejudiced by it. *Putnam v. Ickes*, 78 F2d 223, 227 (DC Cir 1935), *cert. denied*, 296 US 612. In *Burke v. Southern Pacific RR Co.*, 234 US 669, 692-693 (1914), the Supreme Court discussed the legal effect of an improperly issued patent:

> Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral-land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it. *Colorado Coal & Iron Co. v. United States*, 123 U.S. 307, 313; *Diamond Coal Co. v. United States*, 233 U.S. 236, 239; *Germania Iron Co. v. United States*, 165 U.S. 379; *Duluth & Iron Range Railroad Co. v. Roy*, 173 U.S. 587, 590; *Hoofnagle v. Anderson*, 7 Wheat. 212, 214-5. In the last case this court said, speaking through Chief Justice Marshall: "It is not doubted that a patent appropriates land. Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation... If the patent has been issued irregularly, the

> Government may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant and to appropriate it to himself." Of the same import are *Cooper v. Roberts*, 18 How. 173, 182; *Spencer v. Lapsley*, 20 How. 264, 273; *Ehrhardt v. Hogaboom*, 115 U.S. 67, 68.

**Legal Effect of Title Conveyed by Approved Clear List**

An approved clear list is used to convey legal title to lands under certain grants made by Congress. For example, an approved clear list conveys a fee-simple title to public lands identified in a selection list made by a state without necessity of a patent. Although 43 USC 1166 (1976) provides that a suit to annul a patent shall be brought with six years, this statute of limitation does not apply to conveyances by an approval by the Department of a list of selections. 30 Op. Att=y. Gen. 572 (1916). In *George Autunouich, supra* at 308, the Board said:

> ... a grant by Congress to a state for the use of schools is also an absolute transfer, vesting title for a specific purpose. *Alabama v. Schmidt*, 232 U.S. 168 (1914); *Utah v. Kleppe* 586 F.2d 756 (l0th Cir. 1978), *rev=d on other grounds sub nom. Andrus v. Utah*, 446 U.S. 500 (1980). If the granting act provides for other action by the Secretary equivalent to a patent, such as final approval of a list of the lands, the approval ends the jurisdiction of the Department. *West v. Standard Oil Co., supra* at 212. The approval of the list ("clearlisting"), like the issuance of a patent, ended the Department's authority to resolve conflicting claims to the transferred lands, including its authority to recognize the validity of mining claims situated on those lands.

**Reservations and Exceptions**

In public land grants, nothing passes except what is passed by clear language and any doubts are resolved in favor of the government (grantor). *Southern Idaho Conference Assn of Seventh Day Adventist v. U.S.*, 418 F2d 411 (1969). However, where a patent does not include an express reservation for an easement which had previously been granted as a right-of-way to a prior party, the right of the easement is not impaired. *Southern Pac. Co. v. City of Reno*, 257 F 450 (DC Nev 1919).

Exceptions included in patents that are not authorized by statute are void. *Francoeur v. Newhouse*, 40 F 618 (CC Cal 1889). And conversely, rights not mentioned in the patent do not pass, even though they might have if included in the patent. *Empire Water Power Co. v. Cascade Town Co*., 205 F. 123 (CCA Colo 1913).

If a patent is issued without a mineral reservation required by law, the United States is at liberty to assert title to such minerals through any appropriate legal or equitable action unless such action is barred by an applicable statute of limitations. Section 8 of the Act of March 3, 1891 provides that suits to vacate patents shall only be brought within 6 years after the date of the issuance of such patents and forbids any suit after the prescribed period which denies the validity of the patent. But it does not forbid a suit to reform the patent to quiet title to mineral rights reserved to the U.S. under acts of Congress. *Patents Inadvertently Issued More Than Six*

*Years Ago Without Mineral Reservation*, M-28, 614 (Oct. 1, 1946).

It has been held that an oil and gas lease must be canceled to land patented more than 6 years previously without an oil and gas reservation, despite the fact that the omission of the reservation from the patent was due to an error. *Davidson Hill*, A-25673 (July 22, 1949).

The Interior Department has no authority to amend a patent to eliminate a reservation to the United States of minerals where the patent has been outstanding over six years and the patentee has acquiesced in the reservation. *Donald K. Miller*, A-28744 (Aug. 7, 1962).

Even if an applicant for a patent to public land consents to the insertion of a reservation in the patent, the Interior Department has no authority to incorporate such a reservation in the patent if there is no statutory authority (50 LD 623).

**Circumstances Where BLM May Interpret Granting Language**

In *Bristlecone Mining Co.*, 134 IBLA 389 (1996), the Board emphasized that it Ahas consistently held that BLM lacks authority to resolve competing land claims between private parties, unless an application for patent is pending.@ The Board said at 391, f.n. 3:

> This case also presents the question whether BLM may properly interpret granting language in a patent, or whether that must be done in court. In *Germania Iron Co. v. United States*, 165 U.S. 379, 383 (1987), the Supreme Court noted that the effect of the issuance of a patent Ais to transfer legal title, and remove from the jurisdiction of the land department the inquiry into and consideration of such disputed questions of fact.@ The Board has consistently held that BLM lacks authority to resolve competing land claims between private parties, unless an application for patent is pending. However, those cases differ from the present case in that appellant posits that the United States never lost title to the lands in question. BLM was obliged to determine its own title to the lands.
>
> It would also appear that, as a matter of due process, BLM could not in any event interpret the language to the detriment of the patent holder without involving it in its decision making process.

**After Patent Issues, Property Rights Are Governed by State Law**

In *James A. and Ruth K. Simpson*, 136 IBLA 77 (1996), the Land Department had issued a Federal patent to the Atlantic and Pacific Railroad Company (A & P) under the Railroad Act of July 27, 1866. The Federal Government retained no interest in the land. The land ultimately because the property of the New Mexico Land Company (the Land Company). The surface and mineral estates were split by a March 28, 1958, conveyance when the Land Co. excepted and reserved Aall oil, gas and minerals underlying and appurtenant to said land, together with the right of ingress and egress and of prospecting, developing and operating said land therefor, and removing the same therefrom.@ The Simpsons acquired the Land Co.=s grantee=s title by deeds dated in 1978, subject to the mineral interests reserved in the 1958 deed. The Federal Government acquired the reserved mineral interests on June 1, 1988, when it completed a land exchange with the Land Co. pursuant to section 206(b) of the Federal Land Policy and

Management Act of 1976. When the Simpsons asked BLM for assurance that it would not claim ownership of the sand and gravel, BLM asserted ownership of the sand and gravel. In response to the Simpson=s appeal, the Board said:

> * * * [U]pon issuance of the patent in 1923, the Federal Government retained no interest in minerals in the conveyed land. The mineral interest was severed from the surface interest when Land Co. sold the surface rights, and its retained mineral interest was later conveyed to the United States. The United States could acquire no more than the interest the Land Co. had retained when the mineral estate was severed. The legal interpretation of the document conveying the surface and retaining the mineral is governed by the laws of the state in which the land is situated. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co*., 429 U.S. 361, 372 (1977). Therefore, Arizona State law must be applied to determine what was conveyed to the Federal Government in 1988.

**Improvements Pass with Patent**

A United States patent passes to the patentee everything connected with the soil, forming any portion of its bed, or fixed to its surface unless specifically reserved in the patent. *Moore v. Smaw*, 17 Cal 199 (1861).

**Failure to Record a Patent**

Failure to record a patent does not defeat the grant. *McGarrahan v. New Idria Min. Co*., 96 US 316 (1878). A record of a United States patent maintained in the proper government office is sufficient to pass title and give notice without being recorded in the county where the land is situated. *Wilcox v. Phillips*, 169 SW 55 (1914); *Sands v. Davis*, 40 Mich. 14 (1879).

**Conflicting Patents**

A junior patent will prevail over a senior one, if the right on which the junior patent is based is prior. *Issacs v. Steel*, 4 Ill. (3 Scam.) 97 (1841). However, normally the junior patent is void. *Gallipot v. Manlove*, 2 Ill. (I Scam) 156 (1839).

Where land has been previously patented, a second patent issued by the land department is invalid. *Francoeur v. Newhouse*, 40 F 618 (CC Cal 1889). Patents for land previously granted, reserved or appropriated are void. *Proctor v. Painter*, 15 F2d 974 (CCA Wash 1926). A patent issued for lands reserved from sale by law is void. *Stoddard v. Chambers*, 43 US 284 (1844).

**Presumption of Validity**

A United States patent, adjudicated and issued by the proper officers in the Interior Department gives a presumption of validity and regularity in all actions preceding the issuance. *United States v. Beaman*, 242 F 876 (CCA Colo 1917).

**Patents Obtained by Fraud and Government Jurisdiction**

After patent issues the Interior Department no longer has any jurisdiction or control. *United States v. State of Wash*., 233 F2d 811 (CA Wash 1956). However, if the patent is erroneously issued, the Department may again gain jurisdiction if the patent is set aside by the courts. Patents obtained from the United States by fraud are not void but voidable and the government may elect to rescind the patent or ratify and sue for damages. *United States v. Koleno*, 226 F 180 (CCA Wyo 1915).

If a patent is issued through fraud to a party not entitled to it, the patentee is a trustee of the true owner. *Meader v. Norton*, 78 US 442 (1871). Individuals who acquire patents through fraud or misrepresentation, are not permitted to derive any benefit, and such patents will inure to the parties entitled to the land. *Cannon v. White*, 16 La Ann 85 (1861), *affirmed* 73 US 443. Even though a patent may have issued through fraud or error, it is not subject to attack by one who at the time of issuance had no interest in the land. *Bateman v. Southern Oregon Co*., 217 F 933 (CCA Or 1914).

Only the government may maintain a suit in the courts to cancel fraudulently issued patents. *United States v. Mior*, 114 US 233 (1885). However, a patent to public land cannot be annulled for fraud unless the evidence is unequivocal, clear and convincing. *United States v. Anderson*, 238 F 648 (DC Mont 1917). This is still true even though the beneficial interest in the land has become vested in a private party. *United States v. Great Northern Ry Co*., 254 F 522 (CCA Wash 1918). However it has been held that the United States will not sue to cancel a patent for the benefit of a third party to whom it owns no responsibility. *Lynch v. United States*, 73 P 1095 (1903).

**Jurisdiction of Courts**

Ruling of the Land Department may not be annulled by the courts unless there was a misconstruction or error of law or fraud involved. *Williams v. Newman*, 257 F 353 (DC Or 1917). For example, where it is asserted that an affidavit containing false allegations of fact in issue is filed, causing the Land Department to reach a decision based on fraud, it must be proved that the alleged false testimony had prevented the Land Department from reaching the proper decision. *Durango Land & Coal Co. v. Evans*, 80 F 425 (CCA Colo 1897), *appeal dismissed* 19 S.Ct. 875. Also where a patent to public land was issued by mistake while an appeal and contest of the right of the patentee was pending, the courts have jurisdiction to settle in an action to quiet

the title. *Duluth & LR.R. Co. v. Roy*, 173 US 587 (1899). But the Land Department's decision should not be disturbed except for cogent reasons. *Lowe v. Dickson*, 274 US 23 (1927).

**Interest in Public Lands by Land Department Employees**

Officers, clerks and employees in the Bureau of Land Management are prohibited from directly or indirectly purchasing any of the public lands, and any person in violation shall be removed from office. 60 Stat. 1100; 30 USC 10. The location of a mining claim by a U.S.

Mineral Surveyor comes within this prohibition.

**Reservations Authorized by FLPMA**

In patents issued under authority of the Federal Land Policy and Management Act (90 Stat. 2757), the Secretary is authorized to "insert in any such patent or other document of conveyance the issues, except in the case of land exchanges, for which the provisions of section 1716(b) of this title shall apply, such terms, covenants, conditions, and reservations as he deems necessary to insure proper land use and protection of the public interest.. ." 43 USC 1718 (1976).

**Amendatory Patents**

Amendatory patents are also known as curative, corrective or lieu patents. Such patents are issued to remedy defects or correct errors in patents issued previously. In a memorandum opinion, H-64-2133.10 of January 14, 1965, the Acting Solicitor said --

> 1. The Secretary has the authority to correct a clerical error in the spelling of the name of the patentee where the patent has not been issued, and he may also correct such an error after issuance of the patent if the patentee voluntarily surrenders the patent for such correction and the rights of third parties are not affected. If the patent has been issued and the patentee does not surrender it voluntarily for correction, or if the rights of third parties are affected, the Department's only resource, if any, is a court suit.
>
> 2. The Secretary has the authority to correct an inadvertent and unintentional omission of a reservation in a patent before the patent is issued, and he may also correct such an error after issuance of the patent if the patentee voluntarily surrenders the patent for correction, and the rights of third parties are not affected. If the patent has been issued and the patentee does not voluntarily surrender it for correction, or if the rights of third parties are affected, the Secretary may bring a suit for reformation of the patent, provided the reservation is required to be in the patent by law.

**Supplemental Patents**

Supplemental patents are issued to cover lands or right to which the patentee is entitled, but which were omitted from a previously issued patent. For example, in mining cases, a supplemental patent may include additional mining claims or millsites included in the original patent application which were not previously clear listed.

**Supplemental Non-Coal Patents**

The Act of April 14, 1914 (30 USC 82), authorizes and directs the Secretary of the Interior to issue new or supplemental patents in cases where patents were issued with a coal reservation to the United States under the Act of March 3, 1909 (30 USC 8 1) or the Act of June 22, 1910 (30 USC 83-85), and the lands so patented were later classified as non-coal. In the new or supplemental patents, the coal reservation is deleted.

**Indian Patents**

Under authority of the General Allotment Act of February 8, 1887, as amended (25 U.S.C. 334), and certain specific laws for named tribes of Indians, allotments of land were made to individual Indians residing on the reservation. After the lands were selected and allotted to each Indian, a schedule or list was prepared showing the name and other identification of the Indian and the description of the land allotted to him. Each schedule was approved by officials of the Bureau of Indian Affairs and the Department. Thereafter, a trust patent was issued for each allotment, with the trust period being 25 years. These trust periods have been extended from time to time by Act of Congress or Executive Orders, including the general extension pursuant to Executive Order No. 10191 dated December 13, 1950 (15 F.R. 8889). This Order extended all trust periods expiring in 1951 for an additional 25 years in all cases except those where the Congress has specifically reserved to itself the authority to extend the trust on tribal or individual Indian lands.

The Bureau of Indian Affairs field office has jurisdiction over the reservation. The concerned office submits a request (title 25 CFR) to the BLM for the issuance of a trust or fee patent to the Indian, his heirs, the purchaser or other party to whom trust or fee title is to be granted. The request may include all the land in the allotment or undivided interests in the allotment or in portions of the surface or minerals or both.

**Mineral Reservations Under the Atomic Energy Act**

By *Executive Order* 9613 issued on September 13, 1945, all public lands which contain deposits of radioactive mineral substances were withdrawn from sale or other disposition under the public land laws. On March 4, 1946, a new *Executive Order* No. 9701 provided that public lands containing fissionable materials were subject to disposal only under appropriate public land laws which authorize or permit a reservation to the United States of all minerals together with the right to prospect for, mine and remove such minerals. The order also provided that any disposal of the public land should be made subject to a reservation to the United States of all minerals.

On August 1, 1946, Congress passed the Atomic Energy Act of 1946 (60 Stat. 755) which provided that all patents shall contain a reservation of all source materials for the production of all fissionable materials, together with the right of the United States or its authorized agents, at any time, to enter upon the land and prospect for, mine and remove the same. The following reservation was generally contained in patents issued under the Atomic Energy Act of 1946:

> Excepting and reserving, however, to the United States, pursuant to the provisions of the Act of August 1, 1946 (60 Stat. 755), all uranium, thorium, or any other material which is or may be determined to be peculiarly essential to the production of fissionable materials, whether or not of commercial value, together with the right of the United States, through its authorized agents or representatives, at any time to enter upon the land and prospect for, mine and remove the same."

On August 30,1954, Congress approved the Atomic Energy Act of 1954 (68 Stat. 919, 934), amending the Atomic Energy Act of 1946. This Act states:

> In cases where any patent, conveyance, lease, permit, or other authorization has been issued, which reserved to the United States source materials and the right to enter upon the land and prospect for, mine, and remove the same, the head of the Government Agency which issued the patent, conveyance, lease, permit or other authorization shall, on application of the holder, thereof, issue a new or supplemental patent, conveyance, lease, permit, or other authorization without such reservation. If any rights have been granted by the United States pursuant to any such reservation then such patent shall be made subject to those rights, but the patentee shall be subrogated to the rights of the United States."

**New Regulations to Correct Patents**

Departmental regulations (43 CFR Subpart 1865) implementing section 316 of FLPMA, 43 U.S. C. 1746 (1976), were made effective September 6, 1984, to give the Secretary discretionary authority to correct errors in patents and other documents of conveyance. An "error@ is defined in 43 CFR 1865.0-5 as "the inclusion of erroneous descriptions, terms, conditions, covenants, reservations, provisions and names or the omission of requisite descriptions, terms, conditions, covenants, reservations, provisions and names either in their entirety or in part..." Detailed procedures for filing applications to correct patents are given in 43 CFR 1865.1.

**Circumstances Requiring Correction of Patent**

Under section 316 of the Federal Land Policy and Management Act of 1976 (43 U.S. C. 1746), a patent may be corrected under certain circumstances. In *George Val Snow (On Judicial Remand*), 79 IBLA 261, 262 (1984), the Board discussed the circumstances under which a patent may be corrected:

> The statute provides that the Secretary may correct patents in order to eliminate error. The first obligation of an applicant for amendment of a land description in a patent, then, is to establish that the description is in fact erroneous. Without a clear showing of error, the Secretary is not empowered to exercise his statutory discretion to favor or disfavor the application. Once the applicant has demonstrated the existence of error in the land description, his next obligation is to show that considerations of equity and justice favor the allowance of his application. Where the applicant is the original patentee, he clearly would be justified in his expectation that the Secretary would amend the error in his patent and allow him the specific land which he had earned entitlement to through his compliance with the particular statute under which the conveyance was made. Others in close privity with the original patentee, such as the immediate heirs of a deceased entryman who were born on and continue to reside on and use the family homestead have a clear equitable interest in what the patentee actually earned by his compliance with requirements of the law.

**Legal Summary of the Secretary=s Authority to Correct Patents**

In *Dallas C. Qualman*, 140 IBLA 247 (1997), the Board summarized the circumstances under which the Secretary may correct a patent:

> Section 316 of FLPMA authorizes the Secretary of the Interior to Acorrect patents * * * where necessary in order to eliminate errors.@ 43 U.S.C. ' 1746 (1994). The statute, thus, invests the Secretary with discretionary authority to correct patents that contain an erroneous description of the patented land. *Shoshone and Arapahoe Tribes*, 102 IBLA 256, 266 (1988); *Arthur Warren Jones*, 97 IBLA 253, 254 (1987); *Rosander Mining Co.*, 84 IBLA 60, 63 (1984); *Elmer L. Lowe*, 80 IBLA 101, 106-106 (1984); *George Val Snow (On Judicial Remand)*, 79 IBLA 261, 262 (1984). By regulation, the term Aerror@ is limited to mistakes of fact and not mistakes of law. 43 CFR 1865.0-5(b); *Lone Star Steel Co.*, 101 IBLA 369 (1988); *Bill G. Minton*, 91 IBLA 108 (1986). The first obligation of an applicant for amendment of a land description in a patent is to establish that the land description questioned is in fact erroneous. *George Val Snow (On Judicial Remand), supra*. Without a clear showing of error, the Secretary is not empowered to exercise his statutory discretion to favor or disfavor the application. *Id.* Once the applicant has demonstrated the existence of error in the land description, his next obligation is to show that considerations of equity and justice favor the allowance of his application. *Id.*

In *Charles E. Crafts*, 135 IBLA 211 (1996), the BLM transferred title for lands occupied by mining claims to the State of Utah while the Board was adjudicating the rights of the mining claimant. Despite the pending right of appeal by the claimant, the Board held that after the patent is issued, the Interior Department has no jurisdiction to continue to adjudicate the mining claimants rights in the lands. The Board said at 213:

> Issuance of a patent, even if done by mistake, operates to transfer title to lands from the United States; the Department of the Interior then loses jurisdiction over the patented land and can no longer adjudicate the asserted rights of other claimants therein. *Henry J. Hudspeth, Sr.*, 78 IBLA 235, 237 (1984); *see Germania Iron Co. v. United States*, 165 U.S. 379 (1897). It was clearly error for BLM to issue a patent while the decision now before us for review might timely be appealed. Goodnews Bay Mining Co., 81 IBLA 1, 6 (1984). Nonetheless, the fact of patent issuance makes this appeal moot. Even if appellants were able to prove a connection between the 1950 locations and earlier claim locations that take precedence over the Astate claim, the existence of a patent to the AState raises a legal impediment that forecloses further inquiry by this Board. Unless and until the patent issued to the State of Utah is overturned by a court of competent jurisdiction, the Department lacks authority to inquire further into this matter. *Merrill G. Memmott*, 100 IBLA 44, 48 (1987). Because the appeal must be dismissed as moot we do not, therefore, decide whether the reasons stated by the BLM decision for declaring the mining claims null and void are correct.

**No Correction of Patent Where Statute Requires It**

In *Walter and Margaret Bales Mineral Trust*, 84 IBLA 29 (1984), the appellants attempted to correct patents to have a reservation for coal removed. The Board held that the Act of March 3, 1909, 30 U.S.C. 81 (1982) required these reservations. Therefore the reservation was not made in error or mistake so no correction is possible.

**Correction of Patent Requires Consent of Affected Parties**

In *Rosander Mining Company*, 84 IBLA 60 (1984), the Board said a state selection patent could not be corrected to exclude mining claims because the state would not give its consent to the correction. On this subject, the Board stated at 64:

> * * * Reformation of a patent under the provision will be allowed where the concerned administrative agencies do not object, the Government's interests are not unduly prejudiced, no third party's rights are affected, and substantial equities of the applicant for relief will thereby be preserved.

## WHAT IS A MINERAL

The term "**mineral**" has been given many definitions, depending on whether the usage or connotation is scientific, practical mining or legal (business transactions such as patents, deeds, and leases).

**Scientific and Technical Definitions**

Scientific definitions are generally concerned with the origin and the chemical and physical properties of a substance rather than with economic considerations. The *Glossary of Geology*, published by the American Geological Institute in 1979, defines "mineral" as follows:

> (a) A naturally formed chemical element or compound having a definite chemical composition and, usually, a characteristic crystal form. A mineral is generally considered to be inorganic, though organic compounds are classified by some as minerals. Those who include the requirement of crystalline form in the definition of a mineral would consider an amorphous compound, such as opal, to be a mineraloid.

Even the scientific definition of "mineral deposit" does not necessarily have much economic significance because most mineral deposits cannot, at the present time, be mined at a profit. "Mineral deposit" is defined in the A.G.I. Glossary of Geology as follows:

> A mass of naturally occurring mineral material, e.g. metal ores or nonmetallic minerals, usually of economic value, without regard to mode of origin. The organic fuels (coal and

petroleum) may or may not be considered as mineral deposits; usage varies and should be defined in context.

In *A Dictionary of Mining, Mineral, and Related Terms*, published in 1968 by the U.S. Bureau of Mines, Department of the Interior, the term "mineral" is defined in a manner similar to the definition quoted above from the Glossary of Geology. However, the Bureau of Mines Dictionary further states:

> In a broad nontechnical sense, the term embraces all inorganic and organic substances that are extracted from the earth for use by man, for example, the mineral fuels.

So, the term "mineral" has a much broader legal meaning than technical or scientific meaning. For example, such minerals as building stone, sand and gravel, coal, guano, limestone, etc. are typically included in legal definitions but not in scientific definitions.

**Statutory or Conveyance Definitions**

For legal purposes of determining what is a mineral, a dictionary definition, no matter how authoritative, is of little significance. The controlling factor is how "minerals" are defined in the statute or the conveyance instrument. There are almost as many different definitions of "mineral" as there are conveyance and statutory definitions.

If the wording of a statutory mineral reservation is ambiguous or unclear, the legislative intent of such a reservation may be ascertained by studying committee reports, floor debates, successive drafts and the purpose of the legislation. Also, it has long been accepted by courts that in cases where the government grants land, the language of the grant, if unclear, is generally interpreted against the grantee and in favor of the public body. However, the normal rule concerning grant construction is generally interpreted against the grantor.

**Court Interpretations of the Term "Mineral"**

The courts have held repeatedly that the term "minerals" in a grant or reservation has no general definition and that to determine what is included in the "minerals" definition, one must determine the intent of the parties involved. If the language of the grant or reservation clearly specifies the minerals that are being conveyed or reserved, there is no problem. However, if the grant or reservation only specified that minerals are being granted or reserved, it will be necessary to determine what specific minerals the parties had in mind.

In *Northern Pacific Ry. Co. v. Soderberg*, 188 US 526, 530 (1903), the Supreme Court gave one of the most frequently cited definitions of the term "mineral":

> The word "mineral" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the

mineral kingdom, and therefore could be excepted from the grant without being destructive of it.

Almost all definitions of "mineral" would include metallic substances and even some nonmetallic substances such as phosphate, gypsum, barite, etc. However, certain nonmetallic substances such as oil and gas, geothermal resources, clay, soil, sand and gravel, building stone, peat, water, etc. have always been a problem where such substances were not specifically mentioned in the grant or reservation.

Courts interpret conveyances and reservations to determine what substances are covered by the term minerals. The courts generally attempt to resolve such issues by determining the intent of the parties involved. In all states except Pennsylvania, the courts have held oil and gas to be minerals. However, the "hard" minerals present a much more difficult problem.

The courts have determined whether substances are minerals reserved in a reservation or conveyance by applying one or more of the following criteria:

1. Surface destruction

2. Intention of the parties

3. General rules of statutory construction

4. Ejusdem Generis

5. NonGovernment cases construed against grantor

6. Mining or commercial usage

7. Mining rights unsuited for certain minerals

8. Separate value from surface

**Surface Destruction**

The general consensus of the courts has been that the parties separating mineral and surface estates would not intend to give one the power to destroy the other. The most litigated minerals are sand and gravel. The courts have generally held that the owner of the surface estate owns the sand and gravel because their removal would cause destruction of the surface.

In *Hartwell v. Camman*, 64 Am. Dec. 448, 451 (1854), the New Jersey Court of Chancery, in construing the terms of a conveyance granting "all mines, minerals, opened or to be opened," stated:

By the use of the terms "mines" and "minerals," it is clear that the grantor did not intend

> to include everything embraced in the mineral kingdom, as distinguished from what belongs to the animal and vegetable kingdom. If he did, he parted with the soil itself...

In *Farrell v. Sayre*, 270 P.2d 190 (Sup. Ct. Colo. 1954), *rehearing denied*, Sayre conveyed the surface of the land involved to another, "...excepting and reserving all mineral and mineral rights and rights to enter upon the surface of the land and extract the same..." In reversing the trial court, the Supreme Court of Colorado, sitting *en banc*, said that to uphold Sayre's contention that he had reserved the sand and gravel would be tantamount to saying that originally Sayre retained all that he granted; that the deed served no useful purpose; and that the grantee received nothing. The Court found that at the time of making the deed Sayre, as grantor, had no intention of reserving to himself that which he had granted, namely the sand and gravel on the surface of the land, and held that the grantor had retained no rights to the sand and gravel through the mineral reservation.

The case of *Smith v. Moore*, 474 P.2d 794 (Sup. Ct. Colo. 1970) involved a conveyance with a reservation of minerals together with "the right to ingress and egress upon said land for the purpose of mining said coal, oil and gas and other minerals together with enough of the surface of the same as may be necessary and reasonable for the proper and convenient working of such minerals..." Coal had been mined from the property continuously by underground methods for many years prior to the conveyance. After the conveyance the grantor determined that underground mining was no longer feasible and that the coal should be extracted by a stripping operation at the surface. The surface owner objected. The owner of the mineral estate contended that the reservation included the right to destroy the surface to the extent necessary and reasonable for the proper mining of the underlying minerals. The court found that the circumstances did not warrant the conclusion that the parties to the conveyance bargained in contemplation that strip mining would be necessary and that extensive destruction of the surface might be authorized without compensation, saying:

> If we were to... find that the plaintiff has the right to destroy any portion of the surface necessary for proper working of the coal without compensation to the defendants, we would in effect be holding that the grantor retained everything he granted by his deed, and that the grantee received nothing.

While *Smith v. Moore, supra*, deals with the surface mining of coal rather than sand and gravel, it involves a theme that is common to all of these decisions; i.e. the concern by the several courts that the grantor, if he prevailed, would have retained dominion over that which he purportedly conveyed and the grantee would be deprived of the very substance of his acquisition without compensation.

In *Cumberland Mineral Co. v. United States*, 513 F.2d 1399 (1975), the Court of Claims ruled that a private reservation of oil and gas and other minerals did not reserve clay and shale because the loss of the surface estate would result and would therefore be unreasonable.

In *Reed v. Wylie*, 554 S.W.2d 169 (Tex 1977), the grantor had reserved a fractional interest in coal. When the grantor wished to strip mine the coal, the issue was litigated and the

Texas Supreme Court held that the surface owner rather than the mineral owner had title to substances at the surface. The Court's decision was based on the concern that the removal of the coal at the surface would result in destruction of the surface. The Court also required that the method of extraction be feasible at the time of the conveyance.

Several years later in *Reed v. Wylie*, 597 S.W.2d 743 (Tex 1980), the Texas Supreme Court modified its 1977 decision. In the 1980 case the Court held that the surface owner's burden was only to demonstrate that "any reasonable method" would destroy the surface rather than show that the only method of mining available would cause destruction of the surface. The Court also held that the mining methods could be available at the date of the Court's decision rather than at the date of the conveyance. Another important concern addressed by the 1980 decision was how far below the surface the coal could exist and still be at the surface.

In *Moser v. U.S. Steel*, 26 Tex S. Ct. 427 (June 8, 1983), the Supreme Court of Texas reversed its approach to surface destruction tests under the *Acker* and *Reed* decisions. In this case, the Court followed the "manner of enjoyment" test of *Kuntz* where the "general intent (of the parties) should be arrived at, not by defining and re-defining the terms used, but by considering the purposes of the grant or reservation in terms of manner of enjoyment intended in

the ensuing interests." *The Law Relating to Oil & Gas in Wyoming*, 3 Wyo L. Rev. 107,112 (1949).

**Acker and Reed Opinions Not Applicable if Mineral Specified**

In *City of San Antonio, Texas*, 65 IBLA 326 (1982), the Board considered a case involving a dispute over ownership of coal. In this case, the United States had acquired the surface in 1942 subject to a 1921 mineral deed which granted "all of the coal, oil, gas and other minerals of whatsoever kind, character or description, lying, being situated under and beneath the surface of all of (tract G-329)."

In a title opinion, the Interior Field Solicitor concluded that the United States as surface owner had title to the coal and could lease it under authority of *Acker v. Guinn*, 464 S.W.2d 348 (Tex 1971) and *Reed v. Wylie*, 554 S.W.2d 169 (Tex 1977). These cases hold that in Texas, a conveyance or reservation of the mineral estate, unless otherwise expressly stated, does not include those minerals lying at or so near the surface if they can be extracted only by surface mining.

However, the Board agreed with the appellant that the Acker and Reed opinions cannot be applied where coal is expressly granted or reserved because it would totally negate the grant or reservation. On this issue the Board said:

> In both the *Acker* and *Reed* opinions, the Texas Supreme Court was fashioning rules for construing whether a specific mineral, *not otherwise addressed in a deed*, was included in a grant or reservation of "all minerals." The court was concerned only with ascertaining the general intent of the parties in absence of any expression of specific intent. Thus, in

*Acker* the court held that "*unless the contrary intention* is affirmatively and fairly *expressed*, ...a grant or reservation of 'minerals' or 'mineral rights' should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate." 464 S.W.2d at 352. (Emphasis added.)

Therefore, if a mineral is specifically mentioned in a deed in Texas, title to such mineral may vest in the mineral owner even if the mineral is exposed at the surface.

**Intention of the Parties**

In order to determine whether a substance is a mineral in a reservation or conveyance, the courts tend to examine the intention of the parties at the time the reservation or conveyance occurred. For example, if the parties were only concerned with gold, nonmetallic minerals such as building stone might not be determined to be a mineral.

In *Bumpus v. United States*, 325 F.2d 262 (10th Cir. 1963), the Court applied the *ejusdem generis* rule in holding that sand and gravel were not included in a reservation of "oil, gas and other minerals." The reservation was in favor of a private party who had conveyed land to the United States for reservoir purposes. Furthermore, the rule was applied only when the Court determined that the result would be consistent with the intent of the parties to the transaction. In *Bumpus v. United States, Id* at 266, the Court said:

> "Mineral" is a word of general language, and not *per se* a term of art. It does not have a definite meaning. It is used in many senses. It is not capable of a definition of universal application, but is susceptible to limitation or expansion according to the intention with which it is used in the particular instrument or statute. Regard must be had to the language of the instrument in which it occurs, the relative position of the parties interested and the substance of the transaction which the instrument embodies. The word, if broadly construed, would include gravel.

**General Rule of Statutory Construction**

The general rules of statutory construction must be considered in examining a mineral reservation to the United States. *Western Nuclear v. Andrus*, 475 F.Supp. 654, 656 (1979), *reversed on other grounds* 664 F.2d 234 (1981), reversed on other grounds *Watt v. Western Nuclear, Inc.*, 103 S.Ct. 2218 (1983). These rules are:

1. Mineral reservations in patents are construed according to the intent of Congress at the time of enactment and under the circumstances then present. *Moor v. Court of Alameda*, 411 U.S. 693, 709; *United States v. Stewart*, 311 U.S. 60, 69 (1940).

2. Legislative intent is sought in the history of the legislation as recorded in the legislative record, the committee reports, statements by sponsors, floor debates, as well as the condition of the country at the time and the purpose of Congress. *Winona & St. Peter R.R. v. Barney*, 113 U.S. 625 (1885); *U.S. v. Union Pac. R.R.*

*Co*., 230 F.2d 690 (10th Cir. 1956), *rev. on other ground* 353 U.S. 112 (1957).

3. Public legislation is construed broadly in favor of the government which made the grant; no rights pass by implication. For example, in *United States v. Union Pacific R.R. Co*., 353 US 112, 116 (1957), the Supreme Court held that "the established rule that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Also see Andrus v. Charleston Stone Productions Co*., 436 US 604 (1978).

**Ejusdem Generis**

Where certain minerals are specified and followed by generic terminology, the unspecified minerals are limited to the same kind or class (*ejusdem generis*) of substances listed. For example, a court may hold that a reservation of "gold and other minerals" does not include oil and gas. Under *ejusdem generis*, oil and gas being a fluid, organic mineral is not the same kind or class of mineral as gold.

In *Bumpus v. United States*, 325 F.2d 264 (10th Cir. 1963), the United States, in the exercise of eminent domain, provided in its declaration of taking that all gas, oil and "other minerals" in and under said land were reserved to the owners of the subsurface estate. The successor in interest to the reserved minerals later asserted a right to remove gravel which was found exposed on the surface of the land. The court held that under the maxim of construction *ejusdem generis*, gravel was not included within the intent of the reservation and that a reservation of the subsurface estate did not include gravel. The Court said (*Id* at 266-267):

> ... The reservation in terms is to the owner of the subsurface estate and the general word "mineral" follows an enumeration of specific kinds of minerals. We are of the opinion that the case is peculiarly one for the application of the maxim *ejusdem generis*. Literally, that phrase means "of the same kind or species." It is a well known maxim of construction, sometimes called Lord Tenterden's Rule, to aid in ascertaining the meaning of a statute or other written instrument, and, under the maxim, where an enumeration of specific things is followed by a more general word or phrase, such general word or phrase is held to refer to things of the same kind, or things that fall within the classification of the specific terms.
>
> Since gravel is not of the same kind or species as oil or gas, the general word "mineral" following that enumeration of specific minerals would not, under the rule of *ejusdem generis*, be construed to include gravel. Moreover, the gravel was found exposed at the surface of the land. It would be more reasonable to conclude that a reservation to the owners of the subsurface estate would be limited to minerals lying below the surface and not those exposed at the surface and lying near the surface of the land.

In *State Land Board v. State Department of Fish and Game*, 17 Utah 2d 237, 408 P2d

707 (1965), the Utah Supreme Court applied the *ejusdem generis* rule in holding that sand and gravel were not included in a statutory reservation of "coal and other minerals." The Court said:

> Under the well known rules of statutory construction known as ejusdem generis (of the same kind), and noscitur a sociis (know from its associates), the "other minerals" should be understood as something of the same general character as coal or minerals.

**NonGovernment Cases Interpreted Against Grantor**

It has long been accepted by the courts that in cases where the governments grant land, the language of the grant, if unclear, is generally interpreted in favor of the grantor (government). *United States v. Union Pacific R.R. Co., supra*. However, the normal rule concerning grant construction is that the courts generally interpret against the nongovernment grantor.

**Mining or Commercial Usage**

Courts have on occasion determined whether a substance was a mineral in a reservation or conveyance depending on whether it was regarded as such by the mining or commercial community at the time the reservation or conveyance was created. This rule requires that the interpretation to be given the term "minerals" is dependent upon popular understanding of what substances were known as minerals at the time of execution of the instrument. *New Mexico & Arizona Land Company v. Elkins*, 137 F.Supp. 767 (DNM 1956). In a Louisiana case, sand and gravel were not contemplated as reserved by a mineral reservation because such a reservation would be inconsistent with trade usage. *Holloway Gravel Co. v. McRowen*, 9 So.2d 228 (1942). In *Whittle v. Wolff*, 437 P.2d 114 (1968), the Supreme Court of Oregon held that a mineral reservation in a deed did not reserve sand and gravel to the grantor because it did not believe "that parties to land transactions in this state normally have this understanding of the effect of a mineral reservation." In *Fleming Foundation v. Texaco*, 337 SW2d 846, 852 (Cir App Tex 1960), the court stated:

> We are of the opinion that in deciding whether or not in a particular case exceptional substances are minerals that the true test is what the word means in the vernacular of the mining and mineral industry, etc., commercial world and the landowners at the time of the grant, and whether the particular substances was so regarded as a mineral.

**Mining Rights Unsuited for Certain Minerals**

The rights specified in a mineral grant which are necessary for mineral extraction or production may be unsuitable for certain types of minerals. For example, provisions in the grant for underground mining may preclude development of a mineral that can only be extracted by surface methods.

**Separate Value from Surface**

One criterion applied by the courts requires that a substance be used in such a way that it has a value separate from the surface. Another aspect of this requirement is that the substance be

marketable. *Texaco, Inc*., 59 IBLA 155 (1981); *Watt v. Western Nuclear, Inc., supra*.

**Sand and Gravel**

The most significant Federal court cases on sand and gravel involve a mineral reservation in a Federal land grant. The longstanding question of whether sand and gravel are reserved minerals in a Stock-Raising Homestead grant is now fully litigated. In *Watt v. Western Nuclear*, 103 S.Ct. 2218 (1983), the United States Supreme Court held that sand and gravel are reserved minerals. However in several earlier cases the Federal courts have held that sand and gravel are not reserved minerals. For example, in *Bumpus v. United States*, 325 F.2d 264 (10th Cir. 1963), the Court held that sand and gravel were not included in a reservation of "oil, gas and other minerals." The reservation, which was in favor of a private party who had conveyed land to the United States, did not involve a Federal land grant.

In numerous cases, state courts have addressed the issue of whether sand and gravel are minerals in a mineral reservation or conveyance. Although the cases tend to go both ways, there is a predominance of cases where the courts have held that sand and gravel go with the surface estate rather than with the mineral estate. For the most part these cases are decided on the fact that sand and gravel are an integral part of the surface, and to remove the sand and gravel would be destructive of the surface.

It has been held that building sand and gravel are not minerals within the terms of a mineral lease. *Praeletorian Diamond Oil Ass'n. v. Garvey*, 15 S.W.2d 698 (Tex. Civ. App. 1929); *Shell Petroleum Corporation v. Liberty Gravel and Sand Co*., 128 S.W.2d 471, 475 (Tex. Civ. App. 1939). In other cases from the same jurisdiction the court held that sand and gravel are not "minerals" within the ordinary and natural meaning unless they are exceptional in character or have a peculiar value. *Watkins v. Certain-Teed Products Corp*., 231 S.W. 2d 981, 985 (Tex. Civ. App. 1950). *Atwood v. Rodman*, 355 S.W.2d 206 (Tex. Civ. App. 1962).

In Mississippi, the court held that the intention of the party controlled the effect of a reservation of "all minerals both liquid and solid" to the grantor, and ruled that in view of the fact that gravel was under all of the land conveyed and that oil had been discovered in the area five years prior to the making of the deed, the reservation did not include sand and gravel. *Witherspoon v. Campbell*, 69 So. 2d 384 (Sup. Ct. Miss. 1954). An Alabama case construing a reservation in a deed, held that the word "minerals" means all substances in the earth's crust, sought for and removed for the substance itself, and is not limited to metallic substances but includes salt, coal, clay, stone, etc. *McCombs v. Stephenson*, 44 So. 867 (Sup. Ct. Ala. 1907). In Washington it was held that the word "minerals" as used in grants and reservations of mineral rights is not a definite term and is susceptible of limitations or extensions according to the language employed, the surrounding circumstances, and the intention of the grantor, if it can be ascertained. *Puget Mill Co. v. Duecy*, 96 P.2d 571 (Sup. Ct. Wash. 1939). A recent Minnesota decision holding that sand and gravel were not reserved to grantors by a deed "also accepting mineral reservations", stated that the rule that ambiguities in deeds must be resolved in favor of the grantee is modified by the rule that in construing reservations and exceptions in deeds, the proper method is to determine the intention of the parties from the entire deed and surrounding

facts and circumstances. *Resler v. Rogers*, 139 N.W.2d 379 (Sup. Ct. Minn. 1965). In Michigan a conveyance of state-owned land which was subject to a reservation of all mineral, coal, oil and gas was held to have reserved the sand and gravel to the state. *Matthews v. Department of Conservation of the State of Mich*., 96 N.W.2d 160 (Sup. Ct. Mich. 1959).

In the Utah case of *State Land Board v. State Dep't. of Fish & Game*, 17 Utah 2d 237, 408 P.2d 707 (1965), the Utah Supreme Court held that gravel was not a reserved mineral. This case involved a conveyance from the State of Utah, which reserved to the state "all coal and other minerals." The Utah Court said:

> It is to be conceded that in its broadest sense the term "minerals" would include sand and gravel. In fact under the common cliche that everything is either "animal, vegetable or mineral" the term would include almost all material substances of the earth, its waters and even the air we breathe. But a reflection upon the semantics of words reveals how unsure and varied are the possibilities of their meanings when considered in the abstract; and that in order to divine the true meaning in any given usage it is necessary to look to the context. Further, with respect to the meaning of statutes, it is appropriate to look to the intended purpose and to the means of accomplishing it by the proper application of the language used.

The rationale of the Utah Supreme Court in this case was very similar to that detailed by the Tenth Circuit Court of Appeals in *Western Nuclear v. Andrus*, 664 F.2d 234 (1981) in its holding that sand and gravel were not reserved minerals under a Stock-Raising Homestead grant. The Utah Supreme Court said:

> Sand and gravel are among the most widely occurring materials in the earth's surface and in fact it is composed almost entirely of them in vast areas. This includes much of the terrain of our Rocky Mountain region in which the land in question is situated. If the statute were so construed as to reserve to the grantor these ordinary materials of the earth's surface, the effect in many instances would be to completely nullify the grant, which does not comport with reason.

As mentioned above, *Western Nuclear v. Andrus, Id*., was later reversed in Watt v. Western *Nuclear, supra*.

Since passage of the Act of January 25, 1927 (44 Stat. 1026), states are not only allowed in place grants that are mineral in character, but they are also required to reserve "all coal and other minerals" in any lands sold or granted to another party. Because this is the same language used in reservations in patents issued under the Stock-Raising Homestead Act (43 USC 299), the states have in many respects assumed the position of the Federal Government as grantor. Using such logic, the United States Supreme Court case of *Watt v. Western Nuclear, supra*, may be a persuasive precedent for sand and gravel being a reserved mineral in state sale of in place school grant lands.

**Water**

Water, like sand and gravel, has been treated inconsistently by the courts; there are cases construing deeds finding water to be a mineral and there are also many to the opposite effect. In *Stephens Hays Estate Inc. v. Togliatti*, 85 Utah 137,38 P.2d 1066 (1934), a solution of copper and water was found not to be a mineral in a deed conveying all minerals in or on the land. And in *Vogel v. Cobb*, 193 Okla. 64, 141 P.2d 276 (1943), "other minerals" in a deed did not include water even though in a technical sense it may be thought of as a mineral.

**Mineral Springs**

The Interior Department long ago held that mineral spring water is not locatable under the general mining law. *Pagosa Springs*, 1 L.D. 562 (1882). In that case the Secretary said:

> Many springs and many waters are impregnated with minerals held in solution; but it does not follow that the lands bearing such waters are mineral lands, and can be patented as such. Lands of a saline character are an exception, and are expressly provided for in the laws relating to the disposition of the public lands. Lands containing mineral springs not of a saline character are subject to sale under the general laws, and not under the acts relating to the sale of mineral lands. ... [Citation omitted.]

Another case involving mineral water is *United States v. Springer*, 8 IBLA 123 (1972), *aff=d*., 491 F.2d 239 (9th Cir. 1974), *cert. denied*, 419 U.S. 834 (1975). In that case there were mineral springs on 6 of the 10 mining claims involved. Some of the water was evaporated, leaving mineral salts which were then packaged and "hawked" through mineral water.

**Charleston Stone Products Case**

The *Charleston Stone Products* case had a checkered history since the Interior decision in 1973. It was appealed, and on appeal the district court reversed the Board in an unreported decision. (Civil No. LV-2039-BRT, D. Nev., November 7, 1974). The Department of the Interior then pursued an appeal to the Ninth Circuit Court of Appeals which affirmed the district court, 553 F.2d 1209 (1977). In the course of its opinion, however, the Ninth Circuit ruled that water was a locatable mineral. The novelty of the ruling caused the Justice Department to petition for a *writ of certiorari*, which was granted by the United States Supreme Court. On this limited issue, the Supreme Court reversed the Ninth Circuit in a decision reported at 98 S.Ct. 2002, 436 U.S. 604 (1978).

The Supreme Court held that although "water is a mineral in the broadest sense of the word" it is not a locatable mineral under the 1872 mining law (30 USC 22). The Court stated:

> We may assume for the purposes of this decision that the Court of Appeals was correct in concluding that water is a 'mineral,' in the broadest sense of that word, and that it is 'valuable.' Both of these facts are necessary to a holding that a claimant has located a 'valuable mineral deposit' under the 1872 law, 30 USC '22, but they are hardly sufficient.

**Geothermal Resources**

Finding an appropriate definition for geothermal resources has been a matter of considerable controversy for state legislatures, the courts and industry. Although most states and the federal government have avoided a statutory definition of geothermal resources, the State of Hawaii claims it as a mineral, the State of Wyoming treats it as water and the States of Idaho, Montana and Washington define geothermal resources as *sui generis* (of its own kind or class or not necessarily a mineral or a water). Apparently the *sui generis* classification gives states flexibility to treat the resource as a water and/or a mineral.

Whether geothermal resources went to the surface owner of a Stock-Raising Homestead patent, or remained with reserved mineral rights was the subject of a ruling by the Ninth Circuit Court of Appeals on January 31, 1977. In that case, *United States v. Union Oil Company of California*, 549 F2d 1271, the court held that potentially valuable subsurface steam, used to power electric generators, is the property of the owner of the mineral rights and not necessarily the owner of the surface rights.

**Reserved Minerals in Stock-Raising Homestead Patents**

The Stock-Raising Homestead Act, 39 Stat. 862; 43 USC 291301 (1976), (SRHA) has passed by Congress on December 29, 1916, to provide 640-acre homesteads of nonirrigable land for livestock grazing. Approximately 40 million acres issued under this Act reserved to the United States "all coal and other minerals in the lands so entered and patented together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916." Since issuance of the first patents under the Act, there have been numerous court cases involving the determination of whether specific mineral commodities are reserved. During the 1970s some of the most significant court rulings on this issue have occurred. In one of the earlier Federal court cases, oil and gas were held to be reserved minerals. *Skeen v. Lynch*, 48 F.2d 1044 (10th Cir. 1931).

**Geothermal Resources: A Reserved Mineral**

Geothermal resources were held to be a reserved mineral in patents issued under the Stock-Raising Homestead Act of 1916. *United States v. Union Oil Co. of California*, 549 F2d 1271 (9th Cir. 1977) *cert. denied*, 434 US 930, *rehearing denied*, 435 US 911. This case was initiated when the United States brought quiet title action under the Geothermal Steam Act of 1970 to determine whether the mineral reservation in patents issued under the SRHA reserved geothermal resources to the United States. The District Court held that geothermal resources were not reserved in such a patent. *United States v. Union Oil Company of California*, 369 F.Supp. 1289 (N.D. Cal 1973). On appeal, the Circuit Court (*United States v. Union Oil Co. of California*, 549 F2d 1271) reversed the District Court and held that geothermal resources were reserved minerals under the Act.

**Scoria Is a Reserved Mineral Under SRHA**

In *Pacific Power & Light Co*., 45 IBLA 127 (1980), the Board determined that scoria

used for surfacing roads is a mineral reserved to the United States under the Stock-Raising Homestead Act. On appeal, Judge Kerr of the Wyoming District Court affirmed *Pacific Power and Light Co., supra. Pacific Power & Light Co. v. Watt*, No. C80-073K (June 17,1983). In light of the recent United States Supreme Court decision in *Watt v. Western Nuclear Inc.*, 103 S. Ct. 2218 (June 6, 1983), Judge Kerr stated:

> Continuing with the contention that gravel and scoria are to be treated the same pursuant to congressional action, scoria must also be termed a mineral under the SRHA patent reservation.

**Reserved Mineral Must Have Separate Value and Be Marketable**

In *Texaco Inc.*, 59 IBLA 155 (1981), the Board discussed the requirement that a material must be used in such a way that it has a value separate from the soil, and furthermore, that the material is marketable.

**The Western Nuclear Case: Sand and Gravel is a Mineral**

The Bureau of Land Management charged Western Nuclear with a trespass for removing gravel from lands patented under the Stock-Raising Homestead Act of 1916. A hearing was held before an Administrative Law Judge who determined that sand and gravel was a reserved mineral in such a patent. On appeal, the Interior Board of Land Appeals affirmed the decision in *Western Nuclear v. Andrus*, 85 ID 129 (1978). Again on appeal, this ruling was affirmed by the United States District Court for Wyoming in *Western Nuclear v. Andrus*, 475 F.Supp. 654 (1979). However, the Court of Appeals for the Tenth Circuit reversed the District Court and held that the gravel extracted did not constitute a mineral reserved to the United States. *See Western Nuclear v. Andrus*, 664 F2d 234 (1981). The United States then filed a petition for a *writ of certiorari*, which was granted by the United States Supreme Court on May 24, 1982. 456 US 988 (1982). On June 6,1983, the Supreme Court rendered its decision, *Watt v. Western Nuclear, Inc*., 103 S.Ct. 2218, in which it reversed the Court of Appeals and held that "gravel is a mineral reserved to the United States in lands patented under the Stock-Raising Homestead Act."

In *Watt v. Western Nuclear, supra*, the Supreme Court determined that a SRHA mineral reservation would include substances that:

1. are mineral in character,

2. are inorganic,

3. can be taken from the soil,

4. can be used for commercial purposes,

5. were not intended to be included in the surface estate,

6. have a separate value,
7. are not necessarily metalliferous, and

8. may not necessarily have a definite chemical composition.

The Supreme Court also concluded that gravel is a mineral reserved under the SRHA because (1) gravel has been consistently treated as a mineral under two Federal land-grant statutes which had similar mineral reservations to the United States; and (2) gravel has been treated as a mineral under the mining laws.

**Limestone Cases**

During 1983 two circuit courts addressed the question of whether limestone is included as a reserved mineral in a deed. As can be expected, one court held that limestone is a reserved mineral, and the other court ruled that limestone is not a reserved mineral. It is of course important to point out that the circumstances in each case were significantly different. The two cases are summarized below:

**1. Millsap Dolomite and Limestone Case**. In *Millsap v. Andrus*, 717 F.2d 1326 (10th Cir. 1983), the Tenth Circuit Court affirmed the Northern District of Oklahoma Court's ruling that dolomite (a magnesium limestone) and limestone fall within a reservation of "oil, coal, gas, or other minerals." This was a reservation in a warranty deed conveyed to the plaintiff rights in property formerly a part of the Osage Indian Reservation. This reservation, authorized by the Osage Allotment Act of June 28, 1906 (34 Stat. 539), provided for reservation of "oil, gas, coal, or other minerals" to the Osage Tribe.

In rejecting the doctrine of *ejusdem generis*, the Court found no significance in the specific enumeration of oil, gas and coal and further said that Congress did not intend "other minerals" "to include only minerals of a similar nature and quality." fn. at 1329. The Court's rationale for holding that limestone and dolomite are reserved minerals is as follows:

> Nothing in the scheme or the legislative history suggests any intent to limit the mineral reservation. In the face of the use of the generic phrase "other minerals" and the absence of any congressional intent to employ a specialized meaning, we must apply the general rule that statutes passed for the benefit of dependent Indian tribes are to be liberally construed with doubtful expression being resolved in favor of the Indians. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918).
>
> If there were any doubt as to the congressional meaning of "other minerals," that rule mandates that it be read as incorporating the broad definitions which the Secretaries of Interior have consistently given it.
>
> * * * *
>
> [Limestone and dolomite] are inorganic substances that can be removed from the

> soil and used for commercial purposes, and there is no reason to suppose they were intended to be included in the surface estate.

2. **Downstate Stone Limestone Case**. In *Downstate Stone Co. v. United States*, 712 F.2d 1215 (7th Cir. 1983), the United States acquired title to two tracts of land for watershed protection and forestry purposes under authority of the Weeks Forestry Act of 1911, as amended by the Clarke McNary Act of 1924 (36 Stat. 962, 16 USC 515 et seq.). Both conveyances contained the following reservation of mineral rights:

> reserving... all minerals in, upon, or under the above described real estate, together with the right to prospect for and remove said minerals...

In the Purcell deed all minerals were reserved for a period of 50 years and in the Wiedemann deed all minerals were reserved for a period of 75 years.

In June and July of 1980, Downstate acquired the right to all minerals except oil and gas from the heirs of the parties that had reserved the mineral rights in 1935. The rock underlying the Purcell and Wiedemann tracts is principally limestone except for surface topsoil, gravel and sand. Therefore, the primary issue in this case is whether the grantors intended to include limestone in the mineral reservation made in the Purcell and Wiedemann deeds.

The Court conceded that "limestone ... may be a mineral in the broad sense of the word, as it is not an animal or vegetable resource." However, it went on to state:

> Classification as a generic mineral resource, however, does not make limestone a mineral in legal contemplation, or necessarily in the contemplation of the parties to the conveyance.

The Court held that limestone is not a mineral included in the mineral reservation because the right to quarry limestone would be inconsistent with the watershed protection and forestry purposes for which the tracts were conveyed. The Court also emphasized that the lack of objection by the grantors and their heirs to the "exercise of dominion and control" by the United States over the limestone within three years after the conveyance indicated the grantors did not consider limestone to be a reserved mineral.

## MINERAL INTERESTS

### Freehold Estates

A **freehold estate** is a right to exclusive possession of land for a period other than a fixed term. The following types of freehold estates are recognized:

1. **Fee Simple Absolute** - A fee simple absolute title is the highest type of private ownership of land. It gives the exclusive perpetual right to the possession of land and is subject only to police power.

2. **Fee Simple Determinable** - A fee simple determinable is similar to a fee simple absolute except that it terminates automatically when a specific event happens. In other words it is a present interest in property that may continue indefinitely but could be terminated by circumstances that may or may not occur. Also called a "defeasible fee followed by a reversion."

3. **Life Estate Followed by a Remainder** - The duration of the present interest is terminated at the death of a certain person. A life estate is a freehold interest held by a person for the duration of his own life or the life of another. The freehold interest which comes into possession after the death of the life tenant is a "remainder."

4. **Conditions Subsequent** - In this case a fee simple interest or other freehold interest may be made subject to divestment at the option of the grantor if a specified event occurs. The difference between this interest and a fee simple determinable is that the termination of the estate is not automatically terminated if the specified event occurs but the termination is optional with the grantor.

**Fee Interest**

A **fee interest** generally refers to ownership of both the surface interest and the mineral interest for an infinite duration.

**Mineral Fee Interest**

A mineral fee interest includes not only the ownership of the minerals, but also includes other implied rights necessary to remove and enjoy the minerals, such as right of access and use of the surface. The owner of the mineral interest can separately convey or reserve some of the incidents of mineral ownership.

A **mineral fee interest** has the following characteristics:

1. Except in Louisiana, separate "hard" mineral estates may be owned in fee simple.

2. Expense bearing.

3. Executive right of possession, leasing, and development.

4. Derived from grants or reservations of minerals in place with right to produce.

5. Includes incidents of fee simple ownership (royalty interests may be carved out).

6. Fee simple estate may have fixed term.

**Surface Fee Interest**

The **surface interest** may simply be defined as all rights to property other than the mineral interest. As a general rule, the rights to use of the surface by the surface interest owner are subject to the right of the mineral interest owner to use the surface for exploration, development and production activities incidental to the enjoyment of the mineral interest. In other words the rights of the surface owner are servient to the rights of the mineral interest owner.

**History of Mineral Severance**

Historically, the severance of the surface from the mineral estate can be traced to English Common Law under which the Crown retained the gold and silver from grants of the land. The Continental Congress followed this practice by reserving a 1/3 interest in all gold, silver, lead and copper mined on the public lands opened to settlement under the Land Ordinance of 1785. These reservations were continued in a number of variations until 1846 when the pre-emption and homestead acts allowed minerals to pass with the patents.

In 1906 and 1907, President Roosevelt noted that some public lands were useful for both agriculture and minerals and determined that it would be in the public interest to separate the title and dispose minerals and agricultural lands by different methods. The President recommended "enactment of such legislation as would provide for title to and development of the surface land as separate and distinct from the right to the underlying mineral fuels in regions where these may occur..." 41 Cong. Rec. 2806 (1907).

In 1909 the Secretary of the Interior maintained that "inducements for much of the crime and fraud ... can be prevented by separating the right to mine from the title to the soil. The surface would thereby be open to entry under other laws according to its character and subject to the right to extract coal..."

The Coal Lands Act of 1909 and 1910 were the first two of the agricultural entry statutes. These were followed by the Agricultural Entry Act of 1914 which allowed agricultural entry to lands withdrawn as valuable for phosphate, nitrate, potash, oil and gas or asphaltic minerals. Then in 1916, the Stock-Raising Homestead Act was passed to provide more acreage to ranchers in the arid lands of the west. This Act provided for reservation of all minerals in patents issued for these agricultural entries.

**Severed Titles**

Mineral rights may be separated into independent mineral estates by grant and reservation. If the mineral rights have not been specifically reserved or granted, any conveyance of the land will include the minerals. If the surface is separated from the minerals, the two estates are independent and either one can be conveyed with no concern for the other. The separation or severance of the mineral estate from the surface (or part of the minerals from the surface and remaining minerals) is accomplished by one of the following approaches:

1. Execution of a **mineral deed** to convey the entire mineral estate of the grantor or to convey a part of the mineral estate owned by the grantor.

2. **Surface deed** - to grant a surface deed would leave the grantor with the mineral estate.

3. **Mineral reservation** - includes a reservation of all or a portion of the mineral interests in conveyance of the fee.

In such cases mineral interests, whether granted or reserved should be carefully defined. For example, in a Stock-Raising Homestead Grant, the mineral interest is severed from the fee interest by a reservation to the United States of the mineral interest. In *Santa Fe Railroad Co.*, 64 IBLA 27, 30 (1982), the Board described how a severance of the mineral estate from the surface estate establishes two separate titles--both of which are freehold estates:

> When the mineral estate is severed from the surface, separate and distinct estates are thereby created which are held by separate and distinct titles, and each is a freehold estate. An exception of minerals in a grant of land with a reservation to enter and remove them is valid and not contrary to public policy. A grantee of minerals underlying the land becomes the owner of them; his interest is not a mere mining privilege. Their ownership is attended with all the attributes and incidents peculiar to ownership of land. A grantee of the land other than the minerals, or with the minerals reserved or excepted from the grant, gets title to all of the surface and that part of the subsoil which contains no minerals, and the grantor has a fee simple in the minerals retained by him.

In Louisiana, the owner of the land does not own fugacious minerals such as oil and gas, so oil and gas rights cannot be severed from the surface rights. Although a mineral servitude creates rights that are similar to those of a severed mineral interest, in common law states, such a mineral servitude is extinguished by a 10-year period of nonuse.

**Division of Mineral Rights**

A **mineral grant** may convey only part of the mineral rights. These mineral rights may be subdivided by (1) types of minerals; (2) depth; (3) time; (4) an undivided fraction of the mineral rights, and (5) a separation of the rights of ownership.

Oil and gas rights are commonly divided on a horizontal basis in both the mineral grant and assignments. This division should be described by separating at the base or top surface of a specified formation. It is poor procedure to divide on a depth basis because a single producing formation could exist above and below the specified depth.

**Surface Protection Provisions in Severed Mineral Interests**

If grantor wishes to protect the surface interest, he may require payment for damage to the surface. The only way to enforce this is to require posting of bond, otherwise the owner of the depleted interest might abandon the property after the minerals are removed, but before reclamation.

**Mineral Grants and Reservations**

A mineral grant or reservation should be carefully written to take into consideration the special technical and legal circumstances in each case. It is important to remember that every mineral property has a unique geologic environment and mineral resource potential. Typically, the mineral grant in a conveyance specifies the substances covered by the conveyance and the types of uses or rights necessary to benefit from removal of the substances.

If it is intended that every possible mineral be included in a mineral grant or reservation, one should include a phrase such as "all minerals of every kind and description including but not limited to..." Because the courts tend to exclude minerals such as sand and gravel that occur at or near the surface and must be extracted by surface mining methods, it is recommended that language be included in the grant that specifically allows extraction by surface mining methods.

Conversely, if the parties wish to limit the grant or reservation to specific minerals, the term "only" should be attached to the specified mineral such as "coal only." Also, if it is intended that certain types of development or mining operations be restricted, this should be specified. For example, heap leaching, solution mining or surface mining could specifically be prohibited.

**Generic Language and Specific Language**

Mineral grants and reservations have three common types of language: (1) generic language such as minerals, mineral rights and other minerals; (2) specific language such as coal, oil and gas, gold and copper; and (3) and a combination of generic and specific language. Generic language is generally used where there is no particular mineral of concern; whereas, when specific minerals are cited, the opposite is generally true.

Grants or reservations with certain specified minerals followed by "and other minerals" tend to be a source of much litigation. The problem is to establish whether or not the phrase "or other minerals" includes a mineral subsequently found that is not included in the list of specified

minerals. For example, Acoal and other minerals" may exclude oil and gas because specification of certain minerals tends to exclude those not on the list. In a case with a reservation of "oil, gas and other minerals," the court expressly excluded metallic minerals. *Fleming Foundation v. Texaco*, 337 SW2d 846 (Tex Civ App 1960).

**Relative Rights of Surface Owner and Mineral Owner**

In *Santa Fe Railroad Co.*, 64 IBLA 27, 30-31 (1982), the Board described the relationship between the owner of the mineral estate and the owner of the surface estate. The Board determined that the mineral owner has the dominant estate and the surface owner has the servient estate. Even though the surface estate is inferior to the mineral estate, the extent of the mineral owner's surface rights is determined on a case-by-case basis and depends on the language in the reservation or conveyance, the intentions of the parties and the mining customs and technology at the date and place of the severance. The Board said (*Id* at 30-31):

> The owner of the mineral estate has, either by the express terms of the conveyance or by necessary implication therefrom, a right of entry or access to the minerals over or through the surface. *See Ross Coal Co. v. Cole*, 249 F.2d 600 (4th Cir. 1957).
>
> In many cases, courts have construed grants or reservations of mineral estates as investing the mineral owner with the right to destroy the surface. *See, e.g., Peabody Coal Co. v. Pasco*, 452 F.2d 1126 (6th Cir. 1971).
>
> As related above, the owner of mineral rights is entitled to take from the land and use that amount of water which is reasonably necessary for the exploitation of the mineral rights. *Russell v. Texas Co.*, 238 F.2d 636 (9th Cir. 1956), *cert. denied*, 354 U.S. 938 (1957).
>
> * * * * * *
>
> The right of the owner of the mineral estate to enter, traverse, occupy, and utilize the surface, even where such right is merely implied, has been held to be in the nature of an easement wherein the mineral estate is dominant and the surface estate is servient. *Cole v. Ross Coal Co.*, 150 F. Supp. 808 (D.S.D. W.Va.), *aff'd*, 249 F.2d 600 (4th Cir. 1957); *Davis v. Mann*, 234 F.2d 553, 559 (10th Cir. 1956). A "dominant estate" has been defined as the property right situated above or higher than that of a lower or servient estate. *Walter v. City of Cape Girardeau*, 149 S.W. 36,38 (C.A. Mo. 1912). The "servient estate" is the one on which the easement is imposed and upon which the obligation rests, while the "dominant estate" is the one to which the right belongs. *See* definitions collected in Words and Phrases, "Dominant," "Servient."
>
> Of course, the owner of the mineral estate owes certain duties to the surface owner as well, such as the duty not to commit waste and to refrain from unreasonable interference with the surface owner's right of enjoyment of his property. However, it is clear from the foregoing discussion that, as a general proposition, the surface estate is relegated to the inferior status, and is subject to the exercise of dominion by the owner of the mineral estate to some extent. The measurement of the extent to which the mineral

owner can utilize the surface must be adjudicated on a case-by-case basis, and is dependent upon such considerations as the language employed in the severance of the estates, the intentions of the parties to such severance, mining customs and technology at that time and place, etc. But such concerns are limited to the determination of whether the claimant to the mineral right is the actual owner and, if so, the extent to which he may utilize the surface. Our research discloses no case in which the acknowledged owner in fee simple of the mineral estate could be controlled by the surface owner in the former's reasonable exercise of the full extent of the rights arising from his mineral ownership.

**Federal Government=s Authority to regulate the use of a Privately Held Mineral Estate**

In *Duncan Energy Company v. U.S. Forest Service*, 50 F.3d 584 (8th Cir. 1995), an owner and developer of outstanding mineral rights on the Little Missouri National Grassland in Custer National Forest in North Dakota wanted access to explore for oil and gas on the Federally owned surface estate administered by the Forest Service. AOutstanding Mineral rights@ are privately owned mineral rights that were originally conveyed out of Federal ownership with the surface. When the Forest Service acquired the surface estate, the mineral rights were severed and reserved to the private party before the title transferred. Therefore, the government acquired the lands subject to the outstanding mineral rights. By distinction, Areserved mineral rights@ are those reserved by the Federal government before the surface estate is conveyed.

Duncan Energy Company brought action against the Forest Service, seeking declaratory judgment that the Forest Service could not prohibit access to or regulate exploration and development of privately owned oil and gas rights. The Forest Service counterclaimed on the basis that the company had improperly used Federal surface without obtaining necessary authorization. The Federal District Court for the district of North Dakota ruled against the Forest Service and the agency appealed. The Ciruit Court reversed the judgment of the District Court and remanded the case to the district court with Ainstructions to enter summary judgment for the United States and an order declaring that Duncan violated Forest Service regulations by

proceeding with mineral development absent Forest Service authorization of the surface use plan.@ *Id*. at 591-92. The Circuit Court stated at 588-590:

> Congress has the power under the property clause to regulate federal land. Citations omitted. U.S. Const. Art. IV, sec. 3, cl. 2; *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 580, 107 S.Ct. 1419, 1424-25, 94 L.Ed.2d 577 (1987). Indeed, Congress may regulate conduct occurring on or off federal land which affects federal land. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 539, 96 S.Ct. 2285, 2291-92, 49 L.Ed.2d 34 (1976); *Minnesota v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981), *cert. Denied*, 455 U.S. 1007, 102 S.Ct. 1645, 71 L.Ed.2d 876 (1982). Under the Bankhead-Jones Farm Tenant Act, Congress directed the Secretary of Agriculture Ato develop a program of land conservation and land utilization.@ 7 U.S.C. 1010 (1988). The Act directs the Secretary to make rules as necessary to Aregulate the use and occupancy@ of acquired lands and Ato conserve and utilize@ such lands. 7 U.S.C. 1011(f) (Supp. V. 1993). The Forest Service, acting under the Secretary=s direction, manages the surface

lands here as part of the National Grasslands, which are part of the National Forest System. See 16 U.S.C. 1609(a) (1988). Congress has given the forest Service broad power to regulate Forest System land. *See, e.g.,* 7 U.S.C. 1011 (1988 & Supp. V. 1993); 16 U.S.C. 551 (Supp. V. 1993).

The Forest Service finds its authority to regulate surface access to outstanding mineral rights in the Aspecial use@ regulations. The special use regulations provide that A[a]ll uses of National Forest System land...are designated >special uses= and must be approve by an authorized officer.@ 36 CFR 251.50(a).

* * * *

Contrary to the district court=s view, the special use regulations do not give the Forest Service Aveto authority@ over mineral development. Slip op. At 5. The Forest Service concedes that it cannot deny access to or prohibit mineral development, and only asks for the authority to determine the reasonable use of the federal surface.

* * * For these reasons, we are convinced that the Forest Service has the limited authority it seeks here; that is, the authority to determine the reasonable use of the federal surface.

If North Dakota law is read to allow developers unrestricted access after twenty days= notice and no injunctive relief for the surface owner, North Dakota law is inconsistent with the special use regulations. State law may be pre-empted in two ways:

> If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishments of the full purposes and objectives of Congress.

*Silkwood v. Kerr-McGee Corp*., 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984) (citations omitted) * * *

**Conveyances**

A **conveyance** is an instrument used to pass ownership in land; it must be a written instrument and include the following elements: (1) grantor and grantee, (2) description of the grant,(3) description of the subject land, and (4) a proper execution. The more common types of conveyances are described as follows:

1. **Deeds** - The various forms of deeds are given below:

   a. General warranty deed transfers the interest stated in it and warrants title against all adverse claims.

   b. Special warranty deed conveys the interest stated in it and warrants title against encumbrances, adverse claims or liens due to the grantor's acts or

omissions.

c. Bargain and sale deed conveys the stated interest but does not warrant title.

d. Quitclaim deed conveys only that interest the grantor presently owns in the described property.

2. **Options** - An option agreement generally gives the transferee a set period of time to either purchase or lease the described property. An option period may be used to determine if the seller has marketable title or has a property valuable for minerals. Some leases also grant the lessee the option to purchase the leased land. Some courts have held that options unlimited in time are void under the rule against perpetuities.

3. **Less than Freehold Interests** - These interests include such conveyances as right-of-way deeds, leases and easements.

**Deed Distinguished from Lease**

In many cases a mineral deed may be similar to a mineral lease.

1. Both have an exclusive right to remove ore.

2. Both may have a specified duration such as the productive life of the mine.

The best evidence of a deed is language in a conveyance showing the grantor's intent to cut all ties and control over the conveyed interest.

Effects of mineral deed versus a mineral lease:

**Leasehold estate**

1. can be abandoned

2. requirements for diligent development

3. payments to grantor are considered ordinary income for tax purposes

**Mineral fee or deed**

1. cannot be abandoned

2. no obligation to develop

3. grantor may take capitol gains on all payments received attributable to the sale

4. may also grant interest subject to a lease

**Term Interests**

**Term interests** are not freeholds because they are intended to last for a specified period of time. The interest of the grantor which comes into possession after the end of the term interest is called a "reversionary interest." Some of the more common types of term interests are (1) leasehold, (2) independent royalty interests and (3) mineral term interests.

There are a number of **incorporeal interests** in land which are generally also termed interests but are not real property. These interests include (1) a profit a Prendre, (2) a license and (3) easements and rights-of-way.

**Leasehold**

A **leasehold** is a term interest that generally provides for a fixed term during which the lessee may get the property under production. Most leases allow for the primary term to be extended indefinitely so long as there is commercial production.

**Independent Royalty Interest**

An **independent royalty interest** is a share of the mineral production, free of the cost of production, and carved out of the mineral interest. The independent royalty owner is entitled to the stated share of production without regard to lease terms. These royalty interests are typically created by mineral owners who sell most of their rights but retain an overriding royalty. Independent royalty interests have the following characteristics:

1. May be separated from the mineral title before or after leasing.

2. May exist in perpetuity.

3. Non-expense-bearing interests in gross production.

4. No participation in bonuses, rentals, etc.

5. No executive power to possession, leasing or development. (fee and profit interests have executive powers and are subject to development expense)

6. Language refers to participation in production rather than ownership of minerals in place.

To create a hard mineral royalty, it is desirable to call the interest "royalty" and specifically deny ownership of minerals in place and also exclude from the interest all executive

powers and participation benefits.

**Term Mineral Interests**

Term mineral interests are generally created by grant or reservation in a deed for a fixed term of years and "so long thereafter as oil or gas is produced from the land." Term mineral interests are very similar to leasehold interests.

A. Characteristics of term mineral interests:

1. No development obligations
2. Generally no royalty
3. Full incidents of fee ownership
4. May execute leases and develop
5. Not subject to abandonment
6. May be construed against grantor

B. Characteristics of Leasehold Interest:

1. Development obligations
2. Subject to royalty reservation
3. Construed against lessee
4. Forfeiture for noncompliance

If a mineral lease is on the property, the term mineral interest should be for a longer period than the lease.

**Profit a Prendre**

A profit is a right to remove and acquire title to severed ore. It is primarily used in states that do not recognize in-place ownership. All states except Louisiana allow possessory estates in hard minerals to be separated in ownership from the surface; however, with oil and gas, a number of states do not allow estates in oil and gas minerals to be separated in ownership from the surface. In states where in-place ownership is not recognized, a profit is indicated by language of use; whereas, a fee interest is indicated by language of possession. Characteristics of profit are:

1. Gives right of enjoyment rather than possessory right.

2. Subject to abandonment.

3. Commercial rather personal.

**License**

A license is a transitory right to enter upon the land; it is personal, nonassignable and revocable. A license has the following characteristics:

1. Creates a privilege, not a right.

2. Grant or retains all rights of ownership.

3. Licensee's interest is tenuous and is maintained at the pleasure of the grantor.

4. Nonassignable without owner's consent.

5. Nonexclusive use.

6. It is personal (personal use), not commercial.

**Easements and Rights-of-Way**

Easements and rights-of-way are rights to enter upon or have access to land for a specific purpose; these rights may also place constraints on the use of land. Easements and rights-of-way may be perpetual, assignable and inheritable, but may be lost by abandonment.

**Fractional Mineral Fee**

The grantee has co-ownership status with executive powers, although the grantor may elect to retain independent executive powers in the deed. It may be desirable to incorporate an operating agreement in the deed, otherwise the grantor will need to satisfy the grantee with any future operating plan. A provision to prevent the grantee from passing (alienating) title in a fractional, fee mineral interest is generally invalid, regardless of the duration.

The conveyance of fractional mineral and royalty interests by owners of fee mineral interests generally have a negative effect on mineral development. As a result titles becomes complex, difficult to abstract and lose their marketability. One solution to this is to limit fractional interests to a fixed term, and so long as minerals are produced in paying quantities.

Sales of undivided interests are commonly used to finance mineral ventures. Grants or reservations of undivided interests create co-owners with common rights to possess and develop the entire mineral estate.

The most important aspect of undivided interests is to make clear in the conveyance how each fraction relates to the total fee interest, and also show how each fraction relates to the other fraction. Also if the grantor owns only a fractional mineral interest and conveys a fractional interest deed, it may be unclear whether he is granting a fraction of his fraction, or a fraction of the entire interest.

In oil and gas, it is common to use the number of undivided mineral acres to the total acres. For example, the sale of 16 mineral acres would give the grantee one-tenth undivided interest of production if the total property includes 160 acres. If both the fraction and the mineral acreage are included in the deed, there could be a problem if the total acreage varies. For example, if the SE 1/4 of section 6 was actually 156 acres rather than 160 acres, there would be a discrepancy between the two interests. Where there is doubt, the courts generally attribute the interest conveyed in the second conveyance to the entire mineral estate rather than the fraction owned by the grantor of the second fraction.

**Mineral Interests Versus Royalty Interests**

In mineral leasing arrangements there is frequently much confusion over what is a mineral interest and what is a royalty interest. Whether you have a mineral interest or a royalty interest has a strong bearing on how the proceeds from a mineral lease are allocated.

A mineral interest is ownership of all incidents of mineral ownership; it is also an interest in the minerals in place and is subject to the cost of extraction. For example, the lessee in a mineral leasing arrangement holds a "working interest" or an Aoperating mineral interest" and is responsible for all production costs.

A royalty interest is the right to receive a cost free share of any mineral actually produced or a right to a share of the production. The royalty interest holder has no right to develop-- only the mineral interest owner can extract the mineral. The royalty interest generally gives no right to bonuses or rentals.

It is better to have a 1/10 royalty interest than a 1/10 mineral interest because the royalty interest is cost free. For example, it may cost 85 percent of the value of a mineral commodity to get it produced. So if the mineral production amounted to $1,000, a 1/10 royalty interest would be (1/10) ($1,000) = $100; whereas, a 1/10 mineral interest would be worth (.15) (1/10) ($1,000) = $15.

**Non-Ownership Theory**

The courts responsible for development of the non-ownership theory held that the owner of the oil and gas rights did not acquire title to the oil and gas until it was produced or captured in a well. In other words, the owner of a severed oil and gas interest has the right to explore,

develop and produce oil and gas from the land. There is no present right to possess the oil and gas in place. This right to explore, develop and produce oil and gas is called a *profit a prendre*. Louisiana, Oklahoma, Wyoming, California and several other states follow the non-ownership theory. In *Gerhard v. Stephens*, 68 Cal.2d 864, 69 Cal. Reptr. 612, 442 P.2d 692 (1968), it was held that oil and gas rights are subject to loss by abandonment. Such abandonment however is a rare event.

**Ownership in Place Theory**

The ownership in place theory allows the owner of the severed oil and gas interest to not only the right to use land for exploration, development and production of oil and gas, but also the right to present possession of the oil and gas in place. Texas, Colorado, Mississippi, Kansas and New Mexico are among the states that follow the ownership theory.

**Corporeal Interests**

A corporeal interest in land includes the right of possession of the land. Thus rights to oil and gas are corporeal in Aownership" states.

**Incorporeal Interests**

An incorporeal interest in land includes only the right to use the land rather than possess the land--therefore, the rights to oil and gas are incorporeal in "nonownership" states. A royalty interest, which is a share of the oil and gas produced free of production, is always considered to be an incorporeal right regardless of the state because there is no present right of possession.

**Rule of Capture**

The law of capture means that the owner of a tract of land has title to all oil and gas produced from wells drilled on his tracts. This is true even if the produced oil had migrated from another tract under a different ownership. An important aspect of this rule is that there is no liability for draining the neighboring tract. Of course the rule of capture is somewhat limited by various state oil and gas conservation statutes as well as the doctrine of correlative rights.

**Correlative Rights Doctrine**

The correlative rights doctrine provides that the rights of an owner to capture oil and gas under his property is subject to the requirement that the oil and gas be removed without waste or negligence. *Ellif v. Texon Drilling Co*., 146 Tex. 575, 210 SW2d 558 (1948). If a producer causes oil and gas to be wasted through negligent practices, there is no shield from liability by the rule of capture. The purpose of this doctrine is to allow separate owners producing from a common reservoir an opportunity to remove an amount of oil in proportion to their ownership.

**Doctrine of Ad Coelum**

The *Ad Coelum* doctrine is based on the common law doctrine that a property owner has title to everything from the heavens to the core of the earth. Although this doctrine has application to "hard" minerals, fugacious minerals such as oil and gas are under the "rule of capture." Because fugacious minerals have the capacity to migrate through permeable reservoirs, it is generally impossible to ascertain their original position in the subsurface.

**Adverse Possession**

Adverse possession occurs where a person is in open and notorious possession of the land which is hostile and adverse to the interests of the true owner for a long period of time. The person in adverse possession was presumed to be in possession under a lost grant. The various states have adopted statutes of limitation which prevent actions to recover possession of land by persons out of possession for more than the period of time specified by the statute. A co-owner is not allowed to acquire title against another co-owner by adverse possession unless it can be shown that his possession is hostile and adverse to the claim of his co-tenant.

**Adverse Possession of Severed Minerals**

Title to severed mineral interests can be perfected only by actual possession. Therefore, the owner of the severed mineral interest cannot show possession of the mineral interest by possession of the surface. The period of adverse possession can start only after the person in possession of the surface initiates possession of the minerals by exploration, development or production of such minerals.

**Right of Access by Owner of Mineral Estate**

In Kuugpik Corp., 85 IBLA 366 (1985), the Board discussed the right of access by the owner of the severed mineral estate:

> It may be taken as a general proposition that where the mineral estate has been severed from the surface estate, the owner of the mineral estate retains, either by the express terms of the conveyance effecting the severance or as a necessary implication therefrom, a right of entry or access to the minerals over or through the surface, absent and expressed intent to the contrary in the document creating the severance. *Citation Omitted*. Such implied rights of entry and development are based on the logical assumption that the mineral estate was reserved for the purpose of retaining the rights to develop the mineral in the grantor. Thus, to the extent that entry on the surface of the land is necessary to effectuate the removal of minerals it is assumed that such right was impliedly reserved in the grantor as a necessary incident of the reserved mineral estate.

**Space Formerly Occupied by Minerals Reverts to Surface Owner**

In *Mallon Oil Co.*, 104 IBLA 145 (1988), the United States as surface owner of a tract of

land appraised a subsurface void under the assumption it belonged to the surface owner. Mallon Oil Company, which used the voids for disposal of waste water, contended the voids are part of the mineral estate. In holding that the United States, as surface owner also owns the subsurface voids, the Board stated at 150:

> The general rule in the United States appears to be that, once the minerals have been removed from the soil, the space occupied by the minerals reverts to the surface owner by operation of law. *See, e.g., Emeny v. United States*, 412 F.2d 1319, 1323 (Ct. Cl. 1969); *United States v. 43.42 Acres of Land*, 520 F. Supp. 1042, 1045-1046 (W.D. La. 1981); * * * This rule stems from the general interpretation of a mineral grant as giving the grantee the right to explore for, produce, and reduce to possession if found, the minerals granted, but not the stratum of rock containing the minerals.

**Reservation Distinguished from Exception**

In *Norman R. Blake*, 119 IBLA 141, 142, note 2 (1991) the Board pointed out the distinction between the terms *reservation* and *exception*:

> Although the terms reservation and exception used interchangeably, technically they are different. A reservation is a creation of a new right issuing out of the thing granted which did not exist as an independent right, while an exception is something in existence at the time of sale, and which is excepted from the operation of the conveyance. *See Elkins v. Townsend*, 182 F. Supp. 861, 871-73 (W.D. La. 1960).

## MINERAL LEASE CLAUSES

### Granting Clause

The granting clause sets forth what rights are given by the lessor to the lessee. The most significant rights include (1) the substances covered by the lease, (2) a description of the lands, and (3) the types of uses permitted by the lease. A lease generally gives an implied right to use the surface of the land for uses incidental to mining. The "accommodation doctrine" is based on the principle that both the surface owner and the mineral owner should be required to accommodate their use of the surface if possible. *See Getty Oil Co. V. Jones*, 470 S.W.2d 618 (Tex. 1971).

The mineral grant should address a number of considerations that are unique for each mineral deposit. In other words, the spatial distribution of the reserves, the geology, mineralogy and geography are all significant in determining the type and extent of surface facilities and transportation systems necessary to establish a commercial mine. The following concerns should be addressed in the mineral grant:

1. Specify minerals or mineral categories.

2. Legal description - verify that it covers the appropriate lands; excess land means

excess liability; attempt to include potential extension of ore body or potential reserves.

3. Right of ingress and egress for power, transportation, water, etc.

4. Right to construct necessary facilities, particularly specialized facilities that may be needed.

5. Include all rights necessary to explore, mine and remove the mineral deposit.

6. In addition to conventional mining rights, it may be important to specifically provide in the grant that unconventional recovery methods such as in situ solution mining or heap leaching may be conducted on the leased premises.

**Mother Hubbards Clause**

The mother Hubbards clause usually follows the land description and provides that the parties intend to pass all other lands of the grantor, contiguous to the tract described and located in a specified section or county. This clause is used to protect against ambiguities in the description and make certain the entire property is conveyed. The land owner should be aware that the mother Hubbards clause could cause the lease to cover portions of his land that were intentionally omitted from the description.

**Rentals**

Rentals are a fixed amount for each acre per year for the right to use the land. They are generally paid in advance on the anniversary date of the lease. Although rental payments are normally not related to production, some leases allow payment of production royalties to satisfy the rental payment requirement. In this respect, rental payments may be similar to advance royalty payments. However, rental payments are not credited towards future production royalties as are advance royalties.

Escalating rentals are required in some leases for the purpose of encouraging development or to discourage speculative holding of leases. An escalating rental clause generally provides for an increasing rental payment in successive years during the primary term to the extent that holding such a lease without production can be a severe financial burden on the lessee.

The delay rental is a payment from the lessee to the lessor to maintain the lease without drilling during the primary term. Delay rental payments are generally required on an annual basis.

**Bonus Payments**

A bonus payment is generally a lump-sum, one-time payment made at the date the lease

agreement is executed. This payment, which is normally not related to any future royalty payment, is based either on (1) an appraisal of the property, or (2)the rental rate for the first year. In the acquisition of government leases, competitive leasing generally involves the selling of a mineral property at public auction to the bidder who offers the highest bonus bid. The bonus bid is generally a lump-sum offer for each acre of the tract and the bid is made at public auction by sealed or oral bid.

**Royalties**

Royalty is a share of the mineral production free of the costs of production to be paid by the lessor to the lessee. A royalty interest is a nonoperating interest and gives no right to lease or share in rental or bonus payments. Royalty rates vary considerably, depending on the commodity involved, the type of mine and the mining method. Each mineral deposit is unique; consequently, mining costs and profits will vary accordingly.

Royalty rates are assessed (1) on the basis of volume (e.g. sand & gravel at 40 cents per cubic yard), (2) on the basis of weight (e.g. coal at $2.50 per long or short ton), and (3) a percentage of the gross or net value of the mineral produced from the leased premises (e.g. 1/8 of the production of oil and gas). It is a good practice to define weight terms such as "wet ton," "dry ton," "short ton" and "long ton." When using volume measurements one should consider the difference between "in place" or "bank" measurements and "loose" measurements. This is significant because some materials swell over 30 percent after extraction. Other terms that should be defined include "gross proceeds,@ Anet proceeds" and "net smelter returns." The royalty clause should also contain a complete list of deductible expenses.

Land management agencies generally assess a higher royalty rate to a commodity mined by surface methods than the same commodity mined by underground methods. The reason for this is twofold -- underground mining is generally more expensive and surface mining may preclude future use of the land.

Royalties have always been difficult to collect from placer gold and gem mining operations. The likely reason is that the miner recovers gold or gems having an exceptionally high market value before processing operations are necessary.

**Technical Aspects of the Ore Body that Should Affect Royalty Rate**

1. overburden
2. shape of orebody
3. reserves and the potential for additional reserves
4. grade of ore

5. metallurgical problems

6. geotechnical problems and mineability

7. environmental problems including reclamation
8. marketability; proximity to market

**Royalty Based on Net Proceeds**

One disadvantage of a royalty based on net proceeds is the possibility that the lessee will inflate the costs of the mining operation with nonessential costs in order to reduce the net profits. For example, the lessee may be tempted to reduce his net profits by utilizing a variety of complex accounting procedures or by commingling activities on the lease with other mining or business activities. However, the lessor can control this practice by carefully defining the allowable cost items so that there will be no opportunity for the lessee to reduce the net profits by claiming mining costs that are not essential and directly related to the mining operation.

Another possible problem in connection with the lessor taking a share of the net proceeds might arise if the lessee's company were inefficiently operated. In such a case the net proceeds would be lower than one would receive from a well managed company because, of course, net proceeds are directly related to the efficiency of the operation. This problem could be minimized by leasing to companies with a proven management record.

**Captive Market**

A common problem related to a royalty based on net smelter returns occurs where an integrated company does not sell its ores to an independent mill or smelter (captive market) and it is necessary to establish a fair-market value for the ores even though no actual sale is made. For example, suppose the mill or buying station is not purchasing ores from independent operators in the district because the ores are shipped to a buying station or mill owned wholly or in part by the lessee. The problem of establishing a market value for the ores in a captive market may be determined by computation of the market value of the ore as based upon the assay value of the ore(s) and applicable market price quotation for the month of production, less any processing and transportation costs incurred after departure of the ore from the mining property. *Engineering and Mining Journal*, *Metals Week*, or some other trade publication, which the lessor and lessee agree upon, may be used as the basis for the price quotation. The royalty due is determined by multiplying the appropriate ore value per ton times the royalty rate in the lease.

**Renegotiation of Royalty**

Renegotiation of lease terms, especially royalty rates, is another method for the lessor to maintain fair-market value in light of the changing technology and economic conditions. However, the possibility of renegotiation of terms is also a problem to the lessee. For purposes of mine design and production planning, the lessee needs to anticipate future costs.

**Excess Reserves**

If a single lessee acquires vast acreages of mineral property, he has in effect a monopoly. A lessee has excessive reserves when the total reserves exceed what can reasonably be produced in the foreseeable future at the present rate of production. The purpose for acquiring such excessive reserves is to control the market by eliminating the competition. From the position of a lessor, it is mismanagement to allow a lessee to hold mineral property for speculative purposes. Consequently, there have been many methods devised to require a lessee to develop a lease in a timely manner and to ensure that the lessee does not hold too much land. These methods include:

1. diligent development requirements,
2. advance royalties,
3. escalating rentals, and
4. maximum acreage and leasehold requirements.

**High-Grading**

High-grading occurs when the high-valued ore is removed early to maximize profits during the early stages of a mining operation and recover costs as rapidly as possible. The lessor, however, is generally left with a large quantity of subeconomic ore that is not feasible to mine. In many cases, it could be feasible to extract a much greater part of the resource by proper planning and mining. High-grading may be avoided by requiring a proposed plan operations before starting mining. An escalating royalty provision may also be beneficial in minimizing high-grading.

**Logical Mining Units**

There is generally a minimum amount of reserves that will justify a company investing in mining equipment and processing facilities. In such a situation one should apply diligent development and maximum leasehold requirements with good judgement. It is more prudent to have minerals leased to a company who has the plant and capability to ultimately develop the resource rather than a speculator who is not capable of developing the property.

**Royalties on Associated By-Products**

Although a lessee acquires a lease to develop and produce certain minerals, associated minerals may also be profitably recovered. A royalty clause should be designed to cover any byproduct mineral that may be recovered in future operations under the lease. Generally it is beneficial to both lessor and lessee to have a lower royalty rate for by-product minerals to encourage the lessee to recover them so that both parties may profit.

**Advance Minimum Royalty**

Advance minimum royalty may be required in the lease while there is no production from the lease in paying quantities. In the event the lease comes under production, the payment of advance royalties may be credited towards the payment of production royalties. If the lease never comes under production, the advance minimum royalties are generally forfeited.

**Sliding Scale or Escalating Royalty**

Sliding scale or escalating royalty provisions are designed so that the higher the grade or value of the ore per ton, the higher will be the production royalty rate. The advantage of this approach is that it encourages maximum extraction of the ore body and minimizes the need for the lessee to high-grade the ore body. The lessee is more likely to produce a low-value ore if the royalty rate is set low as an inducement.

**Royalty in Kind**

A provision in the lease that allows the lessor to take "royalty in kind" rather than a royalty payment derived from sale of the lessor's share of the production gives the lessor added flexibility. This method gives the lessor the opportunity to take actual possession of his share of the mineral production before it is marketed.

**Overriding Royalty**

An overriding royalty is a cost-free share of the production, carved out of the lessee's interest in a lease. Of course, termination of the lease also terminates any overriding royalty interest. The services of landmen and geologists are commonly compensated by overriding royalty interests. In many leases, overriding royalties are limited to a total of 2 to 5 percent of the gross value of the production. The lessor has an interest in limiting overriding royalties because such royalties represent additional costs for the lessee and may cause the property to lose its commercial value.

**Royalty Payments**

The royalty clause should detail the time, place and frequency royalty payments are to be tendered. It should also indicate the consequences of failure to make timely payments.

**Lessor Interest Clause**

If the lessor owns less than the entire undivided interest, a lessor interest clause should be included in the lease. This clause provides that royalties will be decreased in proportion to the interest of the lessor. The lease should show all lessors who have an interest as well as pertinent addresses and depository banks.

**Term Clause**

The term clause establishes a set period of time for the rights given in the granting clause. Most leases allow for a primary term of one to 20 years (most commonly 10 years) to get a property into production. Once production is obtained within the primary term, the lease term is automatically extended so long as commercial production is continued. If a lease should continue beyond the primary term by means of production or other operations, the lease would be in the secondary term. The most important consideration in establishing the length of the primary term is to allow sufficient time to get the lease into production.

Provisions in the lease that allow it to continue beyond the primary term must be properly defined in the lease. The term "in paying quantities" was defined in *Clifton v. Koontz*, 160 Tex. 82, 325 S.W.2d 684 (1959):

> The standard by which paying quantities is determined is whether... a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation continue to operate a well...

Oil and gas leases commonly require that if drilling operations are not started within one year after the effective date of the lease, the lease will terminate unless delay rentals are paid to the lessor. A delay rental is a payment from lessee to lessor due on each anniversary date of the lease to maintain the lease during the primary term. If production is not established by the end of the primary term, the lease will terminate. If production is established, the lease will continue into its secondary term and continue until production ceases. A lease should specify how long it can maintain producing status if there is a cessation of production. For example, the lease could specify that a cessation of production for a period in excess of 180 consecutive days will automatically remove the lease from producing status.

**Assignment Clause**

The assignment clause generally allows the lessee and (or) the lessor to assign their rights under the lease. It is to the advantage of the lessor to prohibit assignment of the lease without written consent of the lessor. Most lessors would like the opportunity to verify that an assignee is capable of performing the terms and conditions of the lease. If written consent is not required, the lessor should most certainly require notification of any assignment within a specified time period.

Many leases, particularly government leases, prohibit assignments of undivided interests. Also, assignments of less than 40-acre subdivisions are commonly prohibited. Such divided tracts would not likely be developed because they would not represent logical mining or drilling units.

**Diligent Development Clause**

Diligent development clauses are included in leases to prevent speculative holding of leases. This may be accomplished by specific mandatory annual work requirements or, by such indefinite language as "lessee shall use reasonable diligence in prospecting and developing minerals." These provisions should be based on the nature of the mineral deposit and the needs of the parties involved. It is generally a good practice to spell out in detail the type of work and the amount of work to be accomplished in a specified time period to avoid later misunderstanding. The lease may provide that minimum royalty payments may substitute for certain work. Conversely, the Federal geothermal resources lease allows for exploration work to substitute for escalating rentals.

**Shut-in Clause**

The shut-in clause allows the lessee to maintain a lease even though there is no production from a well capable of producing. The effect of this provision is to classify a shut-in well as a producing well which would cause the lease to continue indefinitely during the primary or secondary term. Typically, a lease will require that shut-in royalties be paid annually to keep the lease in effect. The shut-in clause may specify a time limit on how long the lease may continue into the secondary term without actual production. Some leases specify the circumstances under which a shut-in clause may be effective, such as lack of market or unavailable transportation.

**Pooling Clause**

The pooling clause allows the lessee to combine a leased tract with adjoining leased tracts for development purposes. The purpose of this provision is to consolidate under one operator all the landowners having an interest in a common reservoir. Therefore, the optimum number of wells are positioned in such a way as to maximize recovery and efficiency.

There are two types of pooling arrangements: (1) voluntary pooling by lease agreement; and (2) compulsory pooling or forced pooling by administrative agency under authority of state law or regulations. Although statutory pooling cannot be avoided, it is to the lessor's advantage to require written consent to pool. This would give the lessor an opportunity to review a specific proposal to pool and ascertain the effect on his retained royalty interest. Once a lease is included in a pool area, many of the lease provisions may be drastically changed to conform with other leases in the pool.

**Pugh Clause**

A pugh clause may be included in an oil and gas lease where less than all of the leased land is pooled. The pugh clause may be included in an oil and gas lease where less than all of the

leased land is pooled. The pugh clause would cause the portion of the lease in the pool to be severed and considered as another lease separate and distinct from the original lease.

**Right of Inspection Clause**

The right of inspection clause authorizes the lessor to inspect the records, books and accounts pertaining to the leased mineral property. It may be important for the lessor to verify such items as production, taxation, assays, reserve calculations and other matters that would affect royalty.

**Reports**

Some leases require that the lessee file monthly, quarterly or annual reports with the lessor on a specified date. These reports generally include the total production during the report period as well as the price received at the first point of sale. Maps may also be required to show all workings, improvements and the distribution of the ore deposit.

**Force Majeure Clause**

If a lessee is prevented from performing the terms of the lease because of *force majeure* (superior force), the lease will continue in good standing. A *force majeure* clause should specifically identify the circumstances under which *force majeure* could be invoked. The types of circumstances normally listed are those problems that occur which are beyond the reasonable control of the lessee. Perhaps the most significant effect on a lease title would occur if *force majeure* allowed a lease to continue beyond its primary term without the necessity of production.

**Warranty Clause**

The warranty clause is a provision in a lease where the lessor guarantees that his title has no defect and agrees to defend the title in case of a dispute. Because the warranty clause benefits only the lessee, a prudent lessor may attempt to have the clause deleted. In some cases the lessor has been held liable for the amount expended by the lessee on the lease.

**Hold Harmless**

Hold harmless clauses are incorporated in leases to require the lessee to indemnify and hold the lessor harmless from any liability claims, losses or damages caused by operations of the lessee or lessee's assignees on the leased premises.

**Surface Protection**

Unless the lease specifies that the lessor is liable for damages to the surface estate, there may be no obligation for the lessee to restore the surface area. Of course, if the lessee causes unnecessary damage through negligence, such a lessee could be liable for damages. An operating and reclamation plan may be agreed upon by the lessor and lessee. Satisfactory performance under such plans could be guaranteed by a bond.

**Sampling and Assaying**

The lease should contain a procedure for weighing, sampling, assaying and moisture determination. Sampling should be done as often as possible. If ores from separate ownerships are commingled in the same concentration operation, the ore should be sampled and assayed prior to commingling.

**Establish the Point Royalty is Payable**

It is important to establish the point that royalties are payable in the royalty clause. The following items should be considered:

1. Provision for ore severed from ground, but not shipped or sold.

2. Cost added by manufacture should be deductible because the greater the refinement, the greater the gross income.

3. Consider sales to subsidiaries or, captive markets.

4. Lease could provide that royalty payments are made when the lessee receives payment for product.

**Options**

The option agreement generally contains an exclusive right to explore and evaluate the lands during the option period. The option period is a set period of time stated in the agreement during which the mining company may cancel the agreement without obligation to lease or purchase the property. The option period generally is based on the length of time necessary for a company to evaluate a property. The length of time will of course be variable, depending on the nature of the project. It is essential that the agreement allow for adequate exploration time and the right to conduct the necessary exploration activities. At the end of the option period the lands may be purchased or leased at the price stated in the option agreement. The terms and conditions of the purchase contract or lease should be incorporated into the option agreement in order to avoid future misunderstandings.

Options are used primarily to keep the front-end investment in a mineral property as low as possible so that scarce exploration money may be spent to evaluate the property rather than to acquire the property. If the property does not prove out, then it may be dropped with no obligation for further payment. One shortcoming of the option agreement for the mining company is that the purchase price or lease rentals and royalties are established with the assumption that the mineral property will prove economic. It is obvious that a property may be acquired by outright purchase at a lower price when the mineral potential is unknown. The owner or the optionor of the property is protected to the extent that the optionee has a specific period during which he must explore the property, therefore lessening the possibility that the property may be held for speculative purposes.

## POST FLPMA CONVEYANCE OF FEDERALLY OWNED MINERAL INTERESTS

### Introduction

Section 209(b) of the Federal Land Policy and Management Act of 1976 (43 USC 1719(b)) authorizes the Secretary of the Interior to convey mineral interests owned by the United States where the surface is or will be in non-Federal ownership if certain conditions are met. Any mineral conveyance under FLPMA must be done under the procedures set forth in section 209(b) and may be accomplished simultaneous with disposal of the surface. This program is also available to surface owners of patents issued under earlier disposal statutes such as the Stock-Raising Homestead Act of 1916 where all minerals were reserved to the United States. The regulations (43 CFR part 2720), to implement the statute were published in the *Federal Register* on January 4, 1979 (44 FR 1320), and were made effective February 5, 1979. Section 209(b)(1) authorizes the Secretary to convey minerals interests "if he finds (1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land and that such development is a more beneficial use of the land than mineral development."

### Definition of "Known Mineral Values"

The term "Known mineral values" is defined in the regulations (43 CFR 2720.0-5(b)) as follows:

> "Known mineral values" means mineral values in lands with underlying geologic formations which are valuable for prospecting for, developing or producing natural mineral deposits. The presence of such mineral deposits in the lands may be known, or geologic conditions may be such as to make the lands prospectively valuable for mineral occurrence.

### Definition of AKnown Mineral Values@

The Interior Department published rules made effective on April 7, 1995, that change the definition of Aknown mineral values.@ 60 F.R. 12710-11 (March 8, 1995). Section 2720.0-5(b) of Title 43 of the *Code of Federal Regulations* is revised to read as follows:

> (b) *Known mineral values* means mineral rights in lands containing geologic formations that are valuable in the monetary sense for exploring, developing or producing natural mineral deposits. The presence of such mineral deposits with potential for mineral development may be known because of previous exploration, or may be inferred based on geologic information.

### Determination That Exploratory Program Is Not Required

Rules made effective on April 7, 1995, supra, also change the standards for determining whether or not an applicant will be required to perform an exploration program. Section 2720.2

of Title 43 of the *Code of Federal Regulations* reads as follows:

> (b) The authorized officer will not require an exploratory program to ascertain the presence of mineral values where the authorized officer determines that a reasonable person would not make exploration expenditures with expectations of deriving economic gain from the mineral production.
>
> (c) The authorized officer will not require an exploratory program if the authorized officer determines that, for the mineral interests covered by the application, sufficient information is available to determine their fair market value.

**Application for Conveyance Rejected Because Lands Withdrawn**

In *Maypole Corporation*, 147 IBLA 304 (1999), three applications for conveyance of a Federally owned mineral interest, under section 209(b) of the Federal Land Policy Act were rejected because the interest is withdrawn from appropriation, and the withdrawal can only be modified or revoked by act of Congress. On appeal, the Board said A @BLM does not have the authority to modify or recind the withdrawal, even were it established that there are no valuable minerals in the subject land suitable for appropriation under the Mining Law of 1872, as amended, 30 U.S.C. 21-54 (1994). Nor may BLM do so becuase the withdrawal is interfering with or precluding appropriate nonmineral development of the land. Congress has retained that authority uder the Act.@ *Id.* At 306.

**Application for Conveyance Rejected Because Known Mineral Values And No Interference**

In *El Rancho Pistachio*, 147 IBLA 205 (1999), the BLM rejected an application for conveyance of Federally owned mineral interest, under section 209(b) of the Federal Land Management and Policy Act because the BLM determined that there were known mineral values for landscape boulders of granite and that the reservation of the mineral interest is not interfering with or precluding appropriate nonmineral development which is a more beneficial use of the land than mineral development. The Board said El Rancho failed to meet its Aburden of rebutting BLM=s determination that the affected lands have known mineral valuaes or of demonstrating that the reservation of the mineral interest is interfering with or precluding appropriate nonmineral development and that such development is a more beneficial use of the land.@ *Id.* At 208-09.

The appellant contended that a 1990 mineral report for a nearby property had different conclusions than the 1997 mineral report for the El Rancho application, and furthermore, the 1990 report should be applied to the El Rancho application. The Board countered that the 1990 report Ahas no relevance to the question of whether the lands sought in El Rancho=s application currently have known mineral values. That report addressed the value of different lands at a different time under different circumstances. The mineral values question, however, must be analyzed in light of current market conditions. *Citation omitted*. BLM would have violated its

statutory and regulatory responsibilities if it had mechanically applied an earlier mineral report prepared for a different conveyance application regardless of current conditions. *Id.* at 209.

The Board also determined that El Rancho has not shown that the mineral reservation will preclude or interfere with its planned uses of the land or that its nonmineral development is a more beneficial use of the land than mineral development. The Board said at 210:

> * * * Although El Rancho no avers that it plans on creating an exclusive subdivision or dude ranches and/or horse ranches on the lands in question and that title to those lands would be clouded if it did not have title to the mineral rights, it has offered no concrete plans for such development, nor has it demonstrated how reservation of the mineral interest is presently interfering with or precluding such development. *Citation omitted*. Allegation, hypothesis, or speculation that nonmineral development might take place sometime in the future is not a sufficient basis for conveyance.

**Mineral Examination Not Required to Determine "Known Mineral Values"**

In *Wayne D. Klump*, 123 IBLA 51, 59-60 (1992) the Board discussed the definition of "known mineral values" and what the BLM must do to verify it:

> ...In considering whether this standard has been met, BLM is not required to do a mineral examination of the lands in question. *Citation Omitted*. A thorough mineral report that is made part of the record is sufficient. *Citation Omitted*.
>
> Although not unequivocal, BLM's thorough mineral report adequately establishes that the lands here possess "known mineral values" for locatable minerals within the meaning of the regulations. The burden of proving that this finding is inaccurate rests with appellants.

**Cases Involving Lands with Known Mineral Values**

The Interior Board of Land Appeals has already considered several appeals where the BLM had found the subject lands to contain "Known Mineral Values." In *Dean A. Clark*, 53 IBLA 362 (1981), the Board held that the existence of two dry holes did not establish the absence of mineral values in lands nearby. The Geological Survey recommended drilling four exploratory wells at $133,990 a piece.

In *David D. Plater*, 55 IBLA 296 (1981), the Geological Survey stated that a tract was valuable for oil and gas and recommended an exploratory drilling program estimated to cost $5,812,500. In the case the Survey reported "that a gas field is located less than a mile from the tract and a gas-condensate well was completed only 4,000 feet from the tract in 1979." The Survey also determined the fair-market value of the minerals to be $1,300 per acre. The Board concluded as follows:

Survey is the Secretary of the Interior's technical expert in matters concerning geologic evaluation of tracts of land and the Secretary is entitled to rely on Survey's reasoned analysis. *Dean A. Clark*, 53 IBLA 362 (1981); *Southern Union Exploration Co*., 51 IBLA 149 (1980). When BLM relies upon Survey's conclusion that land has mineral value it must insure that a reasonable explanation is provided in the record to support the Survey's conclusion. *See Bernard Gencorelli*, 46 IBLA 53 (1980). Survey's conclusion that the land has mineral value is based on the success of a nearby producing well and the close proximity of the gas field. The estimated fair market value of the mineral interest was arrived at by considering leasing data in the area. Neither appellant's characterization of the oil and gas occurrence in the area as "hit or miss," nor his allegation regarding the three abandoned wells show that the BLM decision is erroneous, Those wells were abandoned from 9 to 26 years ago. The Survey report is based on existing producing oil wells and gas fields.

The burden is on appellant to present a convincing and persuasive argument to rebut BLM's determination that the subject land has mineral values. *See Dean A. Clark, supra*. Absent a clear and definite showing of error, we will not disturb the BLM determination. *Donnie R. Clouse*, 51 IBLA 221 (1980).

**Known Mineral Values Include Prospective Value**

In *Kenneth C. Pixley*, 88 IBLA 300 (1985), BLM rejected the appellants application for conveyance of federally owned mineral interests because the lands had known mineral value and because he failed to show that the reserved mineral interests interfered with or precluded nonmineral development of the land. The applicant contended that the land had no known mineral value because there is no production of oil or gas in the area. However, the term Aknown mineral value" as defined in 43 CFR 2720.0-5(b) takes into consideration prospective value. Therefore, production is not necessary for a property to have 'known mineral value."

**Rejection of Application for Known Mineral Values**

In *Denman Investment Corp*., 78 IBLA 311 (1984), the Board said that "BLM may reject an application for conveyance of mineral interests where BLM's determination is supported by the facts of record.@ The Board further stated that "the burden is on appellant to present a convincing and persuasive argument to rebut BLM's determination that the subject land has mineral values. In the absence of a clear and definite showing of error, we will not disturb BLM's determination."

**Land Valuable for Oil and Gas**

In *William Ganus*, 122 IBLA 255 (1992), the BLM had determine the land under application for a section 209 conveyance to be valuable for oil and gas. In this case the land was underlain by a formation found to be productive of oil and gas at a site three miles to the southwest and from a depth of 15,500 feet. As the Board said, "it is unnecessary for BLM to establish that the land is within a KGS in order to find 'known mineral values.' * * * The

record amply demonstrates that the subject land is prospectively valuable for the occurrence of oil and gas based on geologic conditions, viz., the presence of the Smackover Formation, which has elsewhere been shown to be productive."

**Use of Geologic Inference to Determine Known Mineral Values**

The Board has upheld the BLM's use of geologic inference to determine that an area has known mineral values. In *Wayne D. Klump, supra* at 60-61 the Board said:

> ....It is enough to point out that the regulation in question, 43 CFR 2720.0-5, establishes an entirely different, and far less stringent, requirement than the "discovery" rule applicable to the validity of mining claims. Thus the lack of valid claims in the area does not preclude a finding that the lands possess "known mineral values."

**Recommendations on Mineral Potential Must Be Supported by the Facts of Record**

In *Wayne D. Klump*, 104 IBLA 164 (1988), the Board considered an appeal from a decision rejecting an application for conveyance of Federally-owned mineral interests under section 209 (b) of FLPMA. The sole basis for the BLM's determination that the lands are "prospectively valuable for mineral deposit@ is a memorandum which apparently briefly described the regional mineral potential rather than a site-specific factual report. In setting aside the decision and remanding the case because of the inadequate mineral report, the Board stated at 166:

> In sum, this scanty, conclusory memorandum falls short of the evidence required to establish that the four parcels at issue possess 'known mineral values." While BLM is not required in every case to do an on-the-ground evaluation of parcels to determine whether they have "known mineral values," and while the burden of disproving BLM's determination as to the mineral values rests with the applicant, BLM is not absolved from its obligation to make this determination in the first instance on the basis of facts of record. Absent a record supporting the agency's factual determinations, the Board cannot sustain a finding applying the relevant law. *Citations Omitted*. A decision rejecting an application for conveyance of mineral interests because the lands applied for have 'known mineral values' must be supported by facts of record, i.e., a thorough mineral report that is made part of the record.

In *Ken Pixley*, 88 IBLA 300, 301 (1985), a BLM decision was upheld where no "field check" had been done.

**If Known Mineral Values, BLM Gives Applicant Opportunity to Show Interference with Existing Uses**

If the land is shown to possess "known mineral values,@ an applicant might be entitled to the conveyance if it can be established that the reservation of ownership of the mineral estate in the United States would interfere with or preclude appropriate non-mineral development of the

land, or that such development would be a more beneficial use of the land than its mineral development. Under 43 CFR 2720.1-2(d)(4), applicants to purchase Federally owned mineral interests are required to make "as complete a statement as possible" concerning, why the reservation of the mineral interests in the United States would interfere with or preclude appropriate nonmineral development of the land covered by the application, and how and why such development would be a more beneficial use of the land than its mineral development.

In *Wayne D. Klump*, 104 IBLA 164, 168 (1988), the BLM rejected an application where "known mineral values' were identified. The Board held that the BLM should have given Klump an opportunity to amend his application.

BLM is advised that, when an application for conveyance of Federally owned mineral interest fails initially to adequately specify either why the reservation of mineral interests is interfering with or precluding appropriate nonmineral development of the lands applied for, or how and why such nonmineral development would be a more beneficial use of these lands than mineral development, such failure does not subject the application to automatic rejection. Rather, if BLM determines that the lands applied for have "known mineral values,@ it should provide the applicant an opportunity to make a showing as to possible interference with existing uses,

**Section 209 Conflicts with Grazing**

In *Wayne D. Klump, supra* at 62-64, the Board upheld BLM's decision "that grazing is not in the category of nonmineral development that may be interfered with by mining, and refers to 43 CFR 3814.1, providing that a mineral entryman on a stock-raising homestead is properly held liable for any damage caused to the value of the land for grazing by prospecting for or removal of minerals." *Id*. at 62. The Board went on to explain in detail why use of land for grazing is not considered to be qualifying nonmineral development under section 209(b) of FLPMA:

> A review of the Act of December 29, 1916, as amended (the Stock-Raising Homestead Act), 43 U.S.C. 299 (1988), along with the section 5 of the Act of June 21, 1949 (the Open Pit Mining Act), 30 U.S.C. 54 (1988), compels the conclusion that conflicts between grazing and mineral development have been fully considered by Congress, that these Acts were intended to provide relief for grazers whose grazing operations were negatively affected by mining, and that section 209 of FLPMA does not cover conflicts between mining and grazing.
>
> * * * * * * * * *
>
> In 1949, Congress, in the Open Pit Mining Act, 30 U.S.C. 54 (1988), extended the liability of the mineral developer to include "any damage that may be caused to the value of the land for grazing by * * * prospecting for, mining, or removal of minerals." Damage to use for other purposes was not covered, however. The law has not been subsequently amended. Thus, where nonmineral use of the surface estate is no longer restricted to grazing, but entails (for example) development of lands for suburban housing, the owner of the surface estate is vulnerable, as his right to collect damages under the stock-Raising Homestead Act and the Open Pit Mining Act is limited to

damages to the value of the lands for grazing, which may be substantially less than its value for the nonmineral development.

* * * * * * * * *

Passage of section 209(b) of FLPMA is reasonably viewed as providing the surface owner a means to protect himself by allowing him to purchase the mineral estate, where his nonmineral interest has developed beyond grazing. As the Supreme Court observed, "Congress' purpose [in the Stock-Raising Homestead Act] in severing the surface estate from the mineral estate was to encourage the concurrent development of both the surface and the subsurface of the [Stock-Raising Homestead Act] lands." *Watt v. Western Nuclear, Inc.*, *supra* at 50, citing H.R. Rep. No. 35, 64th Cong., 1st Sess., 4, 18 (1916). To allow a homesteader to acquire a mineral interest under section 209 of FLPMA simply because it conflicts with grazing would defeat the demonstrated congressional desire to allow multiple use of the stock-raising homestead lands.

We do not see that section 209(b) of FLPMA changed the balance between grazing and mineral development struck in the Stock-Raising Homestead Act. The critical phrase in FLPMA is "nonmineral *development*," which necessarily connotes a nonmineral use that is different than the use for which the surface of the lands were originally conveyed. Otherwise, the lands could not be rightly said to have been "developed." This interpretation is tacitly recognized in the regulations, which require that there must be some change in conditions for there to be a qualifying nonmineral development.

**Conditions for Conveyance**

In *Mr. and Mrs. E.J. Wright*, 83 IBLA 94 (1985), the Board again held that the Secretary is authorized to convey reserved federal mineral interests to the owner of the surface estate only where either or both of the two specified conditions exist. The Board stated at 93:

> An application for conveyance of mineral interest to the owner of the surface estate pursuant to section 209(b)(1) of FLPMA, *supra*, may be approved where BLM determines (1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land and that such development is a more beneficial use of the land than mineral development. Absent a finding of the existence of one of these conditions, an application is properly rejected.

**Possibility of Qualifying Nonmineral Development Is Insufficient**

In *Wayne D. Klump*, 123 IBLA 51 (1992), the Klumps appealed from a BLM decision rejecting in part their application for conveyance of Federal mineral interests. The Board held that "[a]llegation, hypothesis, of speculation that appropriate nonmineral development might take place at some future time is not a sufficient basis for conveyance. 43 CFR 2720.0-6. Thus, it is insufficient to rely on a mere possibility of qualifying nonmineral development." *Id*. at 65.

**Applicants Must Have Concrete Plans for Development**

In order to qualify for a conveyance under section 209 of FLPMA, under certain circumstances applicants should have plans for development and there should be a conflict with this development and potential future development. In *William Ganus*, 122 IBLA 255, 259 (1992), the Board said:

> However, appellants have simply offered no concrete plans for such development, nor have they demonstrated in what way reservation of the mineral interest is presently interfering with or precluding such development, nor how oil and gas leasing would affect such development. This is clearly an insufficient basis for concluding that the requirements of the statute have been satisfied. *Citations Omitted*. In any case, we can see no inherent conflict between such development and possible oil and gas production, given BLM's ability to restrict the location and scope of such activity so as to create the least impact on the 40-acre parcel of land.

**Conveyance Is Discretionary**

An applicant for conveyance of federally-owned mineral interest may not be entitled to a conveyance even if both conditions of section 209 of FLPMA are satisfied. Conveyance of these interests is discretionary and must be in the public interest. In *Denman Investment Corp*., 78 IBLA 311 (1984), the Board held that public policy considerations militate against the conveyance. The Board also said at 315:

> An applicant for conveyance of a mineral interest may not be entitled to conveyance even when either or both of the conditions in section 209(b)(1) of FLPMA are satisfied. The language of this portion of the statute is discretionary and entitles the Secretary or his designated representative to reject an application upon a determination supported by facts of record that conveyance of the mineral interest would not be in the public interest.

**Mineral Reservation Precludes More Beneficial Use**

In *Mr. and Mrs. E.J. Wright, supra*, a case where the land contains known mineral values, a conveyance is authorized only if the mineral reservation interferes with or precludes appropriate nonmineral development of the land and such development would he a more beneficial use of the land than mineral development. The appellants maintained that oil and gas development might interfere with their planned improvements. The Board held that there was no evidence that oil and gas exploration would interfere with the improvements. *Id*.

In *Temblor Enterprises*, Inc., 86 IBLA 175 (1985), the Board rejected the appellant=s contention that it could not obtain financing for farming operations while the mineral estate is in federal ownership. The Board also determined that the coexistence of oil and gas extraction and ranching in many areas demonstrates that oil and gas wells on ranch land does not unduly interfere with ranching operations.

In *David D. Plater*, 55 IBLA 296 (1981), and *John G. Hafernick*, 69 IBLA 118 (1982), the Board considered cases where the lands were found to have "Known Mineral Values." In both cases, the appellants contended that the reservation of mineral rights was interfering with or precluding nonmineral development of the lands and that such development is a more beneficial use of the land than mineral development. In *David D. Plater, supra*, the appellant speculated that the "Government's retention of the land interferes with the appropriate nonmineral development of the land" for urban use. In *John G. Hafernick, supra*, the appellant intended to develop a pecan orchard on lands that were presently under agricultural use. The Board held in both cases that section 209(b)(2) of FLPMA was not satisfied.

In *Basin Electric Power Cooperative*, 50 IBLA 197 (1980), it was held that an applicant for conveyance of a mineral interest may not be entitled to conveyance even when either or both of the conditions in section 209(b)(1) of FLMPA are satisfied. The language of this portion of the statute is discretionary, and entitles the Secretary or his designated representative to reject an application upon a determination supported by facts of record that conveyance of the mineral interest would not be in the public interest. *See Dean A. Clark*, 53 IBLA 362 (1981).

**Form of Application**

No specific form is required for an application to acquire federally owned mineral interests. However, 43 CFR 2720.1-2 sets forth very detailed information that must be contained in the application. A nonrefundable filing fee of $50 is also required.

**Applicant Pays Administrative and Exploration Costs**

It is specified in 43 CFR 2720.1-3 that an application will not be processed until the applicant has deposited the amount of money requested by the BLM to cover administrative costs of processing the application. If an exploration program is required to determine the fair-market value of the tract, the applicant must submit the requested money to cover the cost. There is also a provision in 43 CFR 2720.1-3(c), for an applicant to obtain consent of the BLM to conduct an exploration program at this own expense to determine the fair-market value of the federal mineral interests. In this program an applicant must conduct the exploration under an approved plan of operation and pay all costs of evaluating the exploration data as well as all administrative costs.

**Mineral Potential Report to Determine if Exploratory Program is Necessary**

An exploratory program is not required if the BLM determines that "there are no known mineral values in the land." This mineral potential report is prepared by one or more mining engineers or geologists employed by the BLM. Locatable, salable and leasable mineral values are all considered in the BLM report. An exploratory program is not required if lands are classified as prospectively valuable for leasable minerals, but such value is found to be only nominal. 43 CFR 2720.2.

**Application May Be Rejected If Not Complete**

In *Kenneth C. Pixley*, 88 IBLA 300 (1985), the Board rejected an application for conveyance of federally owned mineral interests because the appellant failed to provide a complete statement.

**Administrative Costs and Deposit**

An applicant for conveyance of retained mineral interest is required to cover administrative costs of the application and to pay a deposit against which those costs may be charged. However, the burden is on the applicant to show that BLM's charges are excessive. *Wayne D. Klump, supra* at 66.

**Failure to Pay Administrative Costs Timely**

If an applicant for a federally owned mineral interest refuses to deposit the required amount to cover the estimated administrative processing costs in a timely manner, "BLM may properly consider the application to have been withdrawn, as failure to pay timely in either case raises the presumption that the applicant no longer desires to pursue his application. *Richard E. Doscher*, 88 IBLA 264, 266 (1984.

**Improperly Issued Patent**

In *Michael L. Jensen*, 105 IBLA 375 (1988), the BLM conveyed the federally owned mineral interest to the Aexisting or proposed record owner of the surface" as required by 43 U.S.C. 1719(b)(2)(1982) and 43 CFR 2720.0-5(a). When the actual existing record owner of the surface estate applied for the federally owned mineral interest, the application was properly rejected because upon issuing the patent the United States lost jurisdiction over the land. 105 at 378.

Once land passes from United States ownership, it can no longer adjudicate any rights or affect title to the land. However, BLM has authority under section 316 of FLPMA, 43 U.S.C. 1746 (1982), to correct a mistake of fact in a patent, with the consent of the existing owners. In the event that BLM is unable to correct the patent, it should, in consultation with the Solicitor's office, recommend to the Justice Department that a suit be brought to cancel the patent.

**Summary**

1. Application is made for Federal reserved mineral interests.

2. BLM makes a field examination of tract and prepares mineral potential report.

3. If BLM determines that there are "no known mineral values" or only nominal mineral values, then the applicant pays administrative costs.

4. If BLM determines that the tract has mineral potential, then an exploratory program is required.

5. If the exploratory program establishes that there is no mineral value, the applicant pays (1) administrative costs, and (2) costs of the exploratory program.

6. If the exploratory program establishes mineral values, the applicant pays (1) administrative costs, (2) costs of exploratory program, and (3) fair-market value of Federal mineral interests. The applicant must also show that "the reservation of mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land and that such development is a more beneficial use of the land than mineral development."

# 9. MINERAL TITLE EXAMINATION

## MINERAL TITLE EXAMINATION

Title examinations are made to ascertain the ownership of a property and determine who has the power to convey it. In the title examination, all defects must be identified that might affect the marketability of the title. Each transaction of the title is examined to ascertain its validity and effect on the title. For example, a true owner may not be the owner of record. For a title to be marketable, the following requirements must be satisfied:

1. The property is free from encumbrances (some may be acceptable) such as easements, leases, liens, mortgages, etc.

2. It must be possible to establish the chain of title.

3. The seller is the owner of the property.

4. The seller has rightful possession of the property.

**Federal Records Concerning Mineral Title**

1. Mining claims:

   a. FLPMA recordation

      serial register index

      claim index

      claimant index

      geographical index

case files

location certificates

assessment work affidavits

notices of intention to hold

deferment of assessment work

geological, geophysical, geochemical reports

amended locations

maps

transfers of interest

b. Mining claim contest files

c. Mineral patent files

d. Public Law 167 files

e. Public Law 359 files

f. Public Law 585 files

g. Mineral surveys and notes

h. Mining claim indexes

I. Master title plats

j. Historical indexes

k. Control document indexes

l. For active operations, check for operation plans at BLM district offices (43 CFR 3802 and 3809) and forest service ranger districts (36 CFR 228); also check for operating and reclamation plans with state agencies regulating surface mining.

m. County court house for location notices, amendments, transfers of interest,

assessment work affidavits, etc.

2. Mineral leases (Federal)

   a. Serial register pages

   b. Use Plats

   c. Master title plats
   d. Control document index

   e. Case files

   f. For acquired lands check surface management agency and county court house for additional title information.

   g. For operating leases check with BLM state office and state oil and gas conservation commission or agency regulating surface mining.

3. Mineral material contracts:

   check with BLM or forest service field offices for case files.

4. Indian land records:

   a. BLM records

      Some BLM offices contain the original allotment schedule which forms the basis for the allottee's title. The original allotment schedule has the names of all persons entitled to an allotment and the specific tracts of land selected by or for each allottee. Each allottee was given an allotment number in the schedule which is used to help identify both the Indian and his lands.

   b. BIA records

      The BIA maintains title records for Indian lands in a manner analogous to the way the BLM maintains title records for the public lands. The BIA has established title plants in Albuquerque, Billings, Aberdeen and Portland where the following types of title records are maintained:

         original allotment schedules

         secretarial orders

patents, deeds

orders transferring inherited interests

rights-of-way

withdrawals (also see BLM records)

mortgages

liens

mineral leases

orders removing restrictions

contracts for deeds

**State Lands**

1. County records
2. BLM records
3. State land department or commission
4. For navigable waters, check for Acts of Congress, Federal court decisions, etc.

**Fee Lands**

1. County records including tax assessors records
2. Title companies

**State Recording Statutes**

State statutes, often referred to as "recording acts" offer a centralized public depository for title documents. All states have recording statutes which provide a system for the recordation of instruments affecting interests in real property. This public records system serves to give all persons "record" or Aconstructive" notice of instruments that affect title. Although the state recording act establishes the basis for the records system, the individual counties within the state maintain records of all properties within the county at the county court house. The official who administers the recording statutes is referred to by such terms as the "county recorder," "county clerk" or the "register of deeds."

## County Land Records

As required by each state recording statute, instruments affecting real property may be recorded in the county seat of each county. These records are maintained by a county register or recorder. As each instrument is recorded, it is machine copied and (or) microfilmed and designated with a court house reference such as book and page, instrument number or file number. These recorded instruments are normally indexed in a manner required by state law. Some systems maintain records with a grantor-grantee index. Others maintain records in a chronological order.

In many record systems, mining claim records are maintained apart from the other records. They are generally indexed by claim name and (or) claimant. With the recordation system required by section 314 of FLPMA, it is not always necessary to examine county records as it once was. However, it is generally necessary to thoroughly investigate the county records and compare them with the BLM filings.

## Abstracts of Title

An abstract of title is a compilation of all the record data in the county court house affecting or relating to title of the lands subject to examination. The abstract should contain the exact language in the instruments that are abstracted; however, under certain circumstances, an abbreviated abstract is sufficient. A complete abstract of record should contain machine copies of all important instruments.

## Certification of the Abstract

The abstractor generally certifies that the abstract contains a true and correct abstract of all the instruments affecting title to the subject lands as of the date of certification. It is not uncommon for a tract of land to have been subjected to several abstracts of title with a certificate covering each period. An examination of the certificates should reveal whether there is a gap in the record.

## Exceptions in Abstracts of Title

It is always very important to carefully examine the nature and effect of each exception given in the abstract. This is essential because the abstractor will not certify the exceptions. Standard exceptions found in most abstracts of title include (1) instruments including easements, rights-of-way, etc. that are not in the public record, and (2) the boundaries and area of the tract (most abstractors give much attention verifying this item but still tend to make it an exception).

## Certificate of Title

The certificate of title is the most abbreviated type of abstract of title. It is generally a one or two page form on which the abstractor attests that the lands abstracted vests in the present

owner of the lands together with a list of outstanding liens and encumbrances of record, such as leases and rights-of-way. Although this form of abstract of title is generally considered unreliable, it is a fast and inexpensive method to identify any major problem with a title. It is normally used before acquiring fee leases where time is an important consideration. The liability to the abstractor is generally fairly low and typically set at the cost of preparing the certificate of title. For example, the certificate of title on mining claims" (form 4-1246) used in the mineral patent process specifically limits the liability of the abstractor to a maximum of $100.

**Title Opinions**

An attorney states his conclusions of an examination of an abstract of title in a title opinion. The title opinion is generally tailored to the specific requirements of the client. The basic elements of a title opinion include:

1. Identifies the apparent owners of mineral interests.

2. States the extent of their interests including area and type of interest.

3. Identifies title defects.

4. Prescribes curative measures.

**Preliminary Title Opinion**

Preliminary title opinions are conducted to show the company who owns the mineral rights for the purpose of lease acquisition.

**Division Order Title Opinion**

To determine the proper payment by the oil or gas purchaser to the royalty and overriding royalty owners, the company who operates the well requests this opinion for the oil or gas purchasers. On the basis of this opinion, the oil or gas purchaser needs all persons who hold an interest in the production to sign a division order. The division order title opinion gives a complete description of the ownership of (1) the royalty interests, (2) the overriding royalty interests, and (3) the working interests. The opinion identifies the defective aspects of these interests and prescribes curative measures. If curative title work is required, payment of proceeds from the oil or gas production will be suspended; however payments attributable to the working interests may be made on schedule.

**Examining Titles to State or Federally Owned Minerals**

When examining titles to state or Federal leases, permits or materials contracts, it is essential to have a complete understanding of the internal procedures of the agency. Every step of the adjudicatory process should be examined to establish that the lease, permit or contract was properly issued and that there is no existing conflict. The following items should be examined:

1. Were lands available at the time of application?

2. Were there any conflicts, and if so were they properly resolved?

3. Were proper fees and advanced rentals paid when due?

4. Was there compliance with the National Environmental Policy Act with NEPA documents filed and environmental stipulations signed?

5. Check assignments, overriding royalties and bonding.

6. How many years left in the primary term and what is the right of renewal?

7. Does the legal description in the lease, permit or contract cover the lands desired?

8. Are all stipulations or conditions in the lease acceptable?

9. In addition to all documents in the case file, make certain that the serial register page, historical index and use plats are properly notated.

10. Are all instruments properly executed?

11. Check sole party in interest statement and corporate qualifications.

12. Check serial numbers and date stamps on every copy.

13. Check acreage limitations.

14. Required reports from other agencies -

    a. USGS mineral classification report (classification is now done by BLM)

    b. surface management agency or office report

Although the courts have held that BLM records do not provide constructive notice of outstanding interests, evidence of many lease assignments are not filed with the county recorder; so the BLM records must be consulted.

**Problems with Early Records**

The technology to machine copy documents was not available to county recorders until the 1940s. Because of this, early records were copied by hand or typewriters on a variety of standard forms for patents, deeds, leases, mortgages, etc. Undoubtedly, many errors were made during the copying process and were made part of the permanent records. In order to establish

what rights were conveyed in the original documents, one must examine the records in the control document index of the Bureau of Land Management.

## MINING CLAIM TITLE EXAMINATION

This section includes a checklist for evaluating a mining claim title. Although this list is not complete, it at least offers a starting point for title work. Of course this checklist cannot substitute for (1) a detailed, comprehensive knowledge of mining law; (2) technical knowledge of the field aspects of title; and (3) substantial experience in examining mining claim title documents. Commonly, the most important title defects are identifiable from very subtle clues which can only be pieced together by examining all relevant documents as well as making a thorough field investigation of the claim.

### Location Notice

1. BLM serial number
2. Time-date stamp
3. County instrument number or other reference
4. Date recorded with the county
5. Claim name
6. Type of claim or site
7. Mining district
8. County and state
9. Description - legal subdivision or metes and bounds:
    a. agreement with position of monuments on ground
    b. must be sufficient to locate claim on ground
    c. total acreage
    d. metes and bounds survey should be platted to see if the survey closes and covers the intended area
10. Number of locators must be appropriate for claim size
    a. dummy locators - corporations count for only one locator

b. minors - may locate claims

c. aliens - may locate claims but not patent them

d. agents - may locate claim for another

11. Discovery date - generally not given on location notice

12. Location date

**Recordation of Location Notice**

1. Location notice must be recorded with both BLM and county.

2. PreFLPMA claims, located before October 21, 1976, must have been recorded with BLM on or before October 22, 1979.

3. PostFLPMA claims must be recorded with BLM within 90 days.

4. Claims must be recorded with county within period designated by state law.

5. BLM serial number and date of receipt.

6. County instrument number or other reference and date of receipt.

**Map**

1. Determine if position of claim as platted on the map agrees with description in the location notice.

2. Map should show claim boundaries relative to appropriate quarter section, township and range.

**Section 38 Location**

1. Location established by holding and working a claim for a period equal to state statute of limitations.

2. Lands must be open to location during entire period of state statute of limitations while claims are held and worked.

3. These claims must have a notice recorded with both the BLM and county by October 22,1979; however no record notice was required prior to that date.

**Amended Locations**

1. Authorized by state law to correct minor defects in the original location notice.

2. Proper amended location relates back to original location date.

3. Claimant must have present title at date of amendment.

4. Cannot acquire rights acquired by others subsequent to original location date.

5. If amendment covers new ground, the amendment has the effect of a new location for the new ground.

**Relocation**

1. A relocation is a new location and does not relate back to original location.

2. May be an admission that original location had problems.

**Monuments**

1. State law specifies type and dimensions.

2. Federal law requires that boundaries be distinctly marked so that they can be traced.

3. Once boundaries are properly marked, later obliteration of monuments does not affect claims validity.

4. Monuments prevail over description in the notice if there is a discrepancy.

**Posting of Notice**

1. State law may specify which monument the locator must post the notice of location.

**Discovery Work**

1. Generally specific requirements by state law; however many states no longer require discovery work.

2. Performance of discovery work required by state law does not relate to discovery under the mining law.

**Discovery**

1. Each claim must have a discovery physically exposed within the claim boundaries.

2. Title begins with discovery date rather than location date.

3. Placers: each 10-acre subdivision must be mineral in character.

**Floating Claims**

1. Descriptions of claims in the general vicinity (at least the same quarter section) should be examined to determine if prior claim with vague description could be floated over new discovery.

**Conflicting Locations**

1. Relocation over valid existing location is void.

2. Location lines may be placed on the surface of patented land or unpatented claims with prior date to establish parallel end lines.

3. Discovery must be on unappropriated land.

**Lode Claims**

1. Maximum length: 1500 feet along vein.

2. Maximum width: 300 feet on each side of the center line of the vein at the surface.

3. End lines must be parallel (subparallel may be alright).

4. Lines must not be broken or curved.

**Placers**

1. Placers must have a compact form and conform to U.S. surveys.

2. One discovery is required per claim regardless of size.

3. Each 10-acre subdivision must be mineral in character.

4. Association placer claim must not exceed 160 acres with 8 locators; there must be

a locator for each 20 acres.

**Mill Sites**

1. Mill sites must be nonmineral in character.

2. Maximum size is 5 acres.

3. Must be used or occupied for mining or milling purposes.

4. Continuous use requirement for independent mill sites.

5. Dependent mill sites must be associated with valid claim.

**Tunnel Sites**

1. Monument is erected at portal of tunnel.

2. A notice containing the following information is posted:

    a. locators

    b. course of tunnel

    c. height and width of tunnel

    d. notice must describe amount of work done

3. The notice must be recorded.

4. A notice of intent to hold the tunnel site must be filed annually with both the BLM and the county.

5. A tunnel site gives rights to blind lodes intersected by the tunnel.
6. The tunnel must be worked with reasonable diligence; failure to prosecute the work for 6 months results in abandonment of the right.

**Annual Filing Requirements**

1. PreFLPMA claims located prior to October 21, 1976:

    Claimants are required to file (1) notice of intention to hold, (2) affidavit of assessment work, or (3) a detailed report as described in 30 USC 28-1 with both the BLM and the county; the filing must be made after October 21, 1976 and on or before October 22, 1979; annual filings must then be

made on or before December 30, of each year after the initial filing.

2. PostFLPMA claims, located after October 21, 1976:

   Claimants are required to file with the BLM and county one of the documents indicated above on or before December 30, of each year following the calendar year in which the claim was located.

**Affidavit of Assessment Work (Proof of Labor)**

1. BLM date stamp should show filing on or before December 30, for every calendar year since recordation of the claim.

2. Verify courthouse reference and date for timely filing with county under state law.

3. The same instrument filed with the BLM must also be filed with the county.

4. Affidavit should show appropriate amount of work for number of claims covered ($100/claim).

5. One affidavit may cover more than one claim.

6. Determine if work was actually performed.

7. Determine type of work, where it was accomplished and extent of work.

8. Claim name(s) and BLM serial numbers must be shown on the affidavit.

9. Determine if BLM case file contains complete record of annual filings.

**Notice of Intention to Hold (NOIH)**

1. One NOIH may cover more than one claim.

2. NOIH must be filed annually with both the BLM and county.

3. Must contain information required by 43 CFR 3833.

4. NOIH must be filed annually with both the BLM and county for tunnel sites and mill sites; however, failure to file is curable defect.

**Deferment of Assessment Work**

1. Deferment of assessment work may be used for only two consecutive years.

2. Work must be made up at end of deferment.

**Geological, Geophysical or Geochemical Report (30 USC 28-1)**

1. Must be conducted by qualified experts and verified by a detailed report filed with both the BLM and county.

2. The report must contain the following:

    a. location of the work performed in relation to the point of discovery and boundaries of the claim.

    b. type of work, extent and cost.

    c. results of the survey.

    d. name, address and professional background of the person conducting the survey.

**Contests**

1. In many cases, claimants have sold claims that are involved in litigation or being contested by the Government. The following types of BLM records should be inspected:

    a. claims declared null and void by BLM administrative decision

    b. contest proceedings initiated by issuance of a complaint; if claimant answers complaint in 30 days, a hearing is held.

**Patent Applications by Conflicting Claimants**

1. BLM state office records should be examined to determine if a conflicting claimant is attempting to get a patent. It is a good practice to check records because it is easy to miss publication and posting required for patent.

**Transfers of Interest**

1. Should be filed with BLM and county.

2. Transfer of interest is necessary to change claim ownership by amended location notice.

3. A discovery is required before association placer claim can be conveyed to a single owner.

**Status Investigation**

1. Examine master title plats and other public land records to determine if lands are open to entry.

2. Examine microfiche and case files to ascertain if there are other mining claims in conflict.

3. Generally claims filed over valid existing claims are void, even if senior claim is subsequently abandoned.

4. Is the mineral locatable?

**Withdrawals Closed to Mineral Entry**

Mining claims located in lands covered by certain types of withdrawals are null and void *ab initio*. The following types of withdrawals are closed to mineral entry under the mining law:

Classification and Multiple Use Act

Exchange application

State selection application

Indian lands

Military withdrawals

National parks and monuments

Reclamation withdrawals

Recreation and Public Purposes classification

Small Tract Act

Wild and Scenic River System

Wilderness areas

**Withdrawals Open to Mineral Entry**

Material sale contracts -

mineral location is subject to the outstanding contract of sale.

National forests

Power site withdrawals - see below

Special use permits

Taylor Grazing Act

Rights of way -

generally open but subject to the right-of-way

Stock driveways -

claims are subject to the stock driveway

**Power Site Withdrawals**

The Mining Claims Rights Restoration Act of 1955 was enacted so that lands withdrawn for power sites could, under certain conditions, be open to location and patent of mining claims. Check records such as historical indexes and Public Law 359 case files to determine if claims located in power sites complied with the Act.

**Multiple Surface Use Act**

A claim located before July 23,1955 may have certain surface rights. To determine if a claim has surface rights check the master title plat for annotation of the claim name and casefile serial number on the right side of the plat. Further verification can be made by examination of the casefile.

**Multiple Mineral Development Act**

The Acts of August 12, 1953 (P.L. 250), and the Multiple Mineral Development Act of August 13, 1954 (P.L. 585), made it possible to appropriate and develop leasable and locatable minerals at the same time. If at the date of location lands were under application for lease or permit, or classified as valuable for leasing act minerals, claims were invalid if located on the following dates:

1. Prior to July 31, 1939.

2. February 10, 1954 to August 13, 1954.

Check public land records (particularly the historical indexes) to determine if the lands were open. Also check records to determine if claims located prior to August 13, 1954, had complied with the Acts.

**Field Examinations**

A field examination should be conducted on the surface of a mining claim and surrounding area to ascertain whether or not those aspects of title acquisition (location and discovery) and title maintenance (assessment work, development, etc.) have been accomplished according to the applicable state and federal laws.

One of the most important objectives of a field examination is to compare the description on the location notice and map with the position of the claim on the ground. When making a field examination of the ground for title purposes, it is good procedure to construct a map of the surface area at a scale of 1 inch to 200 feet in order to plot the pertinent information. The notations on the map should be supported by a narrative or field notes maintained in a separate manual. This examination should be conducted by a geologist, surveyor, or engineer experienced with mining claims. The following information should be described, plotted and verified with photographs:

1. conflicting claims -- describe all evidence including monuments, location notices, workings, recent activity, etc.
2. Positions of monuments and markings -- size, shape, condition and tie to natural or man-made monument.
3. Mine workings.
4. Evidence of discovery of a "valuable mineral deposit" within the limits of the claim.
5. If the claim is a placer, are any veins exposed?
6. Is claim properly located as a lode, placer, mill site or tunnel site?
7. If vein is exposed, it is properly aligned with respect to the claim boundaries?
8. Does the vein apex within the claim boundaries?
9. Are improvements and equipment within the claim boundaries?
10. Evidence of annual assessment work.
11. Are there defects that require an amended location or a relocation?

**Mining Claim Title Opinions**

In a title opinion covering an unpatented claim, the examiner cannot generally be certain that a discovery exists within the limits of the claim, and should so state. It is important to remember that without a discovery, there is no location. Also, without a mineral survey or legal description, it is generally impossible to ascertain the true position of the claim on the ground.

If a claim is patented, liens and encumbrances pass from the possessory title to the legal title or patent. One need not examine mining patents prior to the date of patent except to make certain that co-owners of the original unpatented claim were either brought through the patent process or their interest was properly maintained.

The title opinion should specifically enumerate those items that weaken the title and qualify the opinion accordingly. The examiner should include in the opinion a detailed account of the examination procedures, i.e. exactly what evidence was examined and what could not be verified, etc.

# 10. ACQUISITION OF FEDERAL MINERALS

Federally owned minerals in the public domain fall into one of the following categories, depending on the kind of mineral, and some cases the manner of use:

**I. Minerals Always Locatable (30 USC 21)**

A. All "valuable mineral deposits" not excluded below.

B. See V.B.

**II. Minerals Never Locatable**

A. Widespread minerals of low unit value and used for ordinary purposes.

B. See V. A. 2.

C. Coal

**III. Leasable Minerals (30 USC 181 et seq.)**

A. Oil, gas, coal, phosphate, potassium, sodium, geothermal resources, etc.

B. Before leasing act, except for coal, most were probably locatable.

C. After leasing act, only available through lease unless valid existing rights.

**IV. Salable Minerals (30 USC 601)**

A. Sand, stone, gravel, common clay

B. Before Materials Act of July 31, 1947, most deposits were unavailable under any system; but after Materials Act, could be purchased.

C. Minerals locatable until July 23, 1955, then salable, unless valid existing rights (see V.B.1.).

**V. Common Varieties Act Minerals (30 USC 611)**

A. Sand, stone, gravel, pumice, pumicite or cinders, (petrified wood)

B. Common Varieties (now salable):

1. Locatable until July 23, 1955 (see IV.C.).

2. Never locatable (see IV. A.).

C. Uncommon Varieties - to qualify, a mineral must satisfy one of the following:

1. Special use (because of intrinsic property giving distinct and special value).

2. Higher price in the market (because of intrinsic property giving distinct and special value).

3. Lower production cost, so higher profit (because of intrinsic property giving special and distinct value).

A more simplified categorization of Federal minerals would include the three major methods of acquisition: (1) locatable minerals; (2) leasable minerals; and salable minerals:

**Locatable Minerals**

1. Uncommon varieties of sand, stone, gravel, cinders, pumice, pumicite or cinders.

2. All "valuable mineral deposits" are locatable under the General Mining Law of 1872, except those specifically excluded below.

**Leasable Minerals**

1. All minerals except salable minerals on acquired lands.

2. All minerals on the Outer Continental Shelf

3. Coal, phosphate; oil, gas, chlorides, sulphates, carbonates, borates, silicates or nitrates of potassium and sodium; sulphur in the states of Louisiana and New Mexico; native asphalt, solid and semi solid bitumen and bituminous rock including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined.

4. Geothermal resources and associated by-products.

**Salable Minerals**

1. Common varieties of sand, stone, gravel, cinders, pumice, pumicite and clay.

2. All minerals not defined as locatable or salable.

## FEDERAL MINERAL LEASING

The General Leasing Act of 1920, as amended (30 USC 181 et seq.) provides that "deposits of coal, phosphate, sodium, potassium, oil, oil shale, native asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only be special treatment after the deposit is mined or quarried) or gas, and lands containing such deposits owned by the United States" may be acquired only through a leasing system. For the most up-to-date and detailed requirements concerning Federal leasable minerals one should consult the most recent volume of Title 43 of the *Code of Federal Regulations*. Because these regulations are under constant revision, it is also a good practice to check the "*Cumulative List of Sections Affected*" which gives a monthly update on new regulations, and the "*Cumulative List of Parts Affected*" which appears in each issue of the *Federal Register*. Federal leasable minerals are covered in the following parts of the *Code of Federal Regulations*:

Part 3100 - Oil and Gas Leasing

Part 3200 - Geothermal Resources Leasing
Part 3300 - Outer Continental Shelf Minerals

Part 3400 - Coal Management

Part 3500 - Leasing of Minerals other than the above

**Locatable-Type Minerals Associated with Leasable-Type Minerals**

For a deposit of minerals to be leasable, the lands must contain valuable deposits of the leasable minerals and be chiefly valuable for the leasable minerals. 30 U.S.C. 262, 282 (1982). Conversely, for a deposit of minerals to be locatable, there must be a discovery of locatable-type minerals. This means the locatable minerals must be present in sufficient quality and quantity to constitute a discovery. A mining claim must be able to stand on its own on the basis of production of locatable-type minerals.

Where leasable minerals without commercial value are associated with locatable minerals that do have commercial value, the deposit should be appropriated under the mining law rather than the mineral leasing law. *Foot Mineral Co. v. United States*, 228 Ct. Cl. 230, 654 F.2d 81 (1981).

If both locatable-type minerals and leasable-type minerals coexist in the same deposit and neither the locatable nor the leasable minerals are worth producing alone, the deposit is not available under a lease or mining claim. This is true even if the locatable and leasable minerals can be profitably mined together. This is based on the principal that one type of mineral (locatable or leasable) cannot be bootstrapped into profitability by both types of minerals. The profits from one type of mineral cannot be aggregated with the profits of another to make a viable operation.

**Leasing When Title Is in Doubt**

In certain limited circumstances, the Department has issued mineral leases where the United States title to minerals was questionable. In such cases the lease is conditioned upon an express stipulation that the United States made no warranty of title to the minerals and assumed no obligation to defend the validity of the lease. *Georgette B. Lee*, 5 IBLA 295 (1972).

**I. Oil and Gas Leasing**

Oil and gas leasing on Federal lands is administered by the Bureau of Land Management through a competitive and noncompetitive leasing system. Oil and gas leases are issued for public domain lands under the authority of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. 181 *et. seq*.) as amended and supplemented, the Act of August 8, 1946 (60 Stat. 950), and the Act of September 2, 1960 (74 Stat. 781). Authority for leasing on acquired lands comes from the Leasing Act for Acquired Lands enacted on August 7, 1947 (61 Stat. 913). Upon passage of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (Pub. L. 100-203) the Bureau of Land Management made a major revision to the Federal Oil and Gas regulations in 43 CFR 3100. Made effective on June 17, 1988, the new regulations cover competitive and noncompetitive onshore oil and gas leasing.

**Competitive Leasing**

All lands available for leasing are to be offered for competitive oral bidding. Each BLM

state office is required to hold sales for such lands at least quarterly. At the day of the auction, the minimum acceptable bid of $2 per acre, the total first years rental and a $75 administrative fee must be paid. The remainder of the bonus bid moneys for each parcel is due within 10 working days. 43 CFR 3120.

**Competitive Lease Size and Duration**

Competitive leases shall have a primary term of 5 years. 43 CFR 3120.2-1. The lands offered in leasing units will be a maximum of 2560 acres per lease. As an exception, in Alaska the leases may be up to 5,760 acres in size. 43 CFR 2120.2-3.

**Notice of Competitive Lease Sale**

At least 45 days before a competitive auction, lands to be offered for competitive lease sale as included in a List of Lands Available for Competitive Nominations or in a Notice of Competitive Lease Sale are to be posted in the BLM state office. 43 CFR 3120.3-6. Lands included in the List of Lands Available for Competitive Nominations which are not nominated are not included in a Notice of Competitive Lease Sale. These lands are available for a 2-year period for noncompetitive leasing. 43 CFR 3120.3-6.

**Noncompetitive Leasing**

Only lands that have been offered competitively and receive no bid are made available for noncompetitive leasing. These lands become available for a period of 2 years beginning on the first business day following the last day of the competitive oral auction, or when formal nominations have been requested, or the first business day following the posting of the Notice of Competitive Lease Sale. 43 CFR 3110.1. Lease applications receive priority as of the date and time of filing. However, all noncompetitive offers are considered simultaneously filed if received in the BLM office during the first business day following the last day of competitive oral auction, or when formal nominations have been requested, or the first business day following the posting of the Notice of Competitive Lease Sale. 43 CFR 3110.2.

**Noncompetitive Lease Size and Duration**

Lease offers are not made for less than 640 acres (2,560 acres in Alaska) and may not include more than 10,240 acres. 43 CFR 3110.3-3. All noncompetitive leases are issued for a primary term of 10 years. 43 CFR 3110.3-1.

**Rental**

Each competitive or noncompetitive lease offer must be accompanied by fall payment of the first years rental based on the total acreage. The amount of rental for all leases issued after December 22, 1987 shall be $1.50 per acre for the first 5 years of the lease term and $2 per acre for any subsequent year. 43 CFR 3103.2-2. A royalty rate of 12 2 percent on all leases is required on the amount or value of the production removed or sold. 43 CFR 3103.3-1.

## II. Geothermal Resources Leasing

### Leasing Authority

Leasing of geothermal resources in Federal lands is authorized by the Geothermal Steam Act of 1970 (84 Stat. 1566; 30 USC 1001-1025). In order to administer this law, regulations contained in 43 CFR 3200 were published December 21, 1973 and made effective January 1, 1974. These regulations are administered by the Bureau of Land Management. Another set of regulations which are also administered by the Bureau of Land Management and contained in 30 CFR 270, regulate exploration, development and production operations under federal leases.

### Geothermal Resources: a Definition

From the standpoint of lease administration, geothermal resources and by-products are defined by 43 CFR 3200.0-5 as follows:

a. "Geothermal resources" means geothermal steam and associated geothermal resources which include: (1) All products of geothermal processes embracing indigenous steam, hot water and hot brines; (2) steam and other gases, hot water and hot brines resulting from water, gas, or other fluids artificially introduced into geothermal formations; (3) heat or other associated energy found in geothermal formations; and (4) any by-products derived from them.

b. "By-product" means (1) any mineral or minerals (exclusive of oil, hydrocarbon gas, and helium) which are found in solution or in association with geothermal steam and which have a value of less than 75 per centum of the value of the geothermal steam or are not, because of quantity, quality, or technical difficulties in extraction and production, of sufficient value to warrant extraction and production by themselves, and (2) commercially demineralized water.

### Known Geothermal Resources Areas

Similar to oil and gas leasing, the issuance of geothermal resources leases is administered by the Bureau of Land Management through a "competitive" and a "noncompetitive" system. All lands within a "known geothermal resource area" (KGRA) are issued only through competitive bidding. The BLM is also responsible for the classification of lands as KGRAS.

A known geothermal resource area is defined in 43 CFR 3200.0-5 (K) as:

> an area in which the geology, nearby discoveries, competitive interests, or other indicia would, in the opinion of the Secretary, engender a belief in men who are experienced in the subject matter that the prospects for extraction of geothermal steam or associated geothermal resources are good enough to warrant expenditures of money for that purpose.

One of the most controversial ways a KGRA may be established is by competitive interest. Competitive interest occurs in the entire area covered by an application if at least one-half of the lands covered by that application are also covered by another application which was filed during the same filing period.

**Geophysical Exploration**

Although geophysical exploration is allowed on a geothermal resources lease, a person must obtain a permit to conduct exploration operations on Federal lands not under lease. A "notice of intent" describing the proposed exploration operations and a $5,000 bond to insure compliance with the terms of the permit is filed with the BLM district manager in the district in which the operations are planned. The district manager has 30 days to either approve or disapprove the permit. When exploration operations are completed, a "notice of completion of exploration operations" is filed with the district manager. The district manager then has 90 days to notify the permittee whether or not the conditions of the permit are satisfied.

**Filing Applications (Noncompetitive)**

Applications filed for lands outside any KGRA must be submitted in sealed envelopes and be accompanied by a nonrefundable $50 filing fee and the first year's rental. Each calendar month is a separate filing period. When the application is filed, the date of filing is stamped on the envelope to document the filing period. The first working day of the following month, all applications are opened. They are platted to determine if overlapping applications cause a KGRA due to competitive interests. All applications that do not fall within a KGRA are assigned priority according to the filing date.

**Lease Size and Acreage Limitation**

A single lease must not exceed 2,560 acres or contain less than 640 acres. The lease must also fit within an area of six miles square or within an area of six surveyed sections in length or width. A single lessee may hold a maximum of 20,480 acres per state.

**Term**

Leases are issued for a primary term of 10 years and so long thereafter as steam is produced in paying quantities, up to 40 additional years. If the lease is producing at the end of this 40-year term, another 40-year term may be allowed.

**Royalty**

A royalty rate of between 10 and 15 percent of the value of the steam is required upon production. By-products from production are subject to a royalty rate of not more than 5 percent; however by-product minerals subject to the Mineral Leasing Act of 1920, as amended, are under a different royalty rate.

### Competitive Leases

Lands within a KGRA may be leased only through competitive bidding. Tracts within a KGRA may be put up for a competitive lease sale either by nominations from the public or by the BLM's own initiative. At the discretion of the Secretary of the Interior, notice of a lease sale is published in a newspaper of general circulation in the area in which the lands are situated. The notice contains such information as the time and place of sale, description of the lands, procedure for submitting bids, terms and conditions of the sale, with required rental and royalty rates. A separate sealed bid is submitted for each lease tract together with one-half of the amount bid and a statement of qualifications. Leases are offered to the highest qualified bidder.

## III. Coal Leasing

### Coal Acquired Under Coal Lands Act of 1873

Coal has never been subject to the Mining Law of 1872. Acquisition of fee title to lands known to be valuable for coal, or the development of coal deposits, was pursuant to the Coal Lands Act of 1873. 17 Stat. 607; 30 USC 71-77. The Mineral Leasing Act of 1920 (41 Stat. 437; 30 USC 181 *et. seq*.), as amended, established coal as a leasing act mineral on February 25, 1920.

With enactment of the Federal Coal Leasing Amendments Act of 1976 (90 Stat. 1083-1092; 43 USC 201), the Federal procedures for leasing coal were substantially changed. For the most part, coal is now available through a competitive leasing system. The major elements of the competitive coal leasing system are land use planning, setting regional leasing targets, coal activity planning and coal lease sale scheduling. The detailed requirements for acquiring coal exploration licenses and leases are found in 43 CFR Part 3400. This portion of the *Code of Federal Regulations* should be examined for more information because there has been a constant stream of regulatory changes in the area of coal management. Noncompetitive leases are available only to preference right lease applications based on prospecting permits issued prior to August 4, 1976.

### Deferred Bonus Payment

A minimum of 50 percent of the total acreage offered for lease during any one year shall be leased under a system of deferred bonus payments. In the event of default or cancellation of a coal lease for which bonus payments are due, the unpaid remainder of the bid is immediately payable to the United States.

### Bids Must Be Fair Market Value

No bid will be accepted if it is less than the fair market value determined by the Secretary. Prior to the determination of fair market value, the Secretary will receive and consider public comment on the fair market value.

**To Obtain New Leases, Old Leases Must Be Producing in Ten Years**

No new coal lease shall be issued to any lessee who holds a lease or leases issued by the United States for coal deposits if the lease or leases have been held for a period of ten years and are not producing coal in commercial quantities. The ten-year period may be extended if

operations under the lease were interrupted by strikes, casualties or the elements at no fault of the lessee.

**Governors to Review Leases in National Forests**

Lease proposals that would permit surface coal mining within the boundaries of a National Forest shall be submitted to the Governor of the state where the lease would be located. No such lease shall issue until a sixty-day period, following the date of submittal, has expired. If the Governor should object to the issuance of a lease, such lease shall not be issued before the expiration of the six-month period beginning on the date the Secretary is notified of the Governor's objection. During this six month period, the Governor may submit to the Secretary a statement of reasons why such lease should not be issued. The Secretary shall reconsider issuance of the lease on the basis of the Governor's statement.

**Land-Use Plan Required Prior to Lease Sale**

No lease sale shall be held unless the lands containing the coal deposits have been included in a comprehensive land-use plan and sale is determined to be compatible with the plan. The Secretary of the Interior shall prepare land-use plans on lands under his administration and will notify the Secretary of Agriculture if plans are required for National Forest lands. If there should be a lack of Federal interest in the surface or insufficient coal resources to justify the costs of a Federal comprehensive land-use plan, the lease sale can still be held if the lands containing the coal deposits have been included in a land-use plan by the state in which the lands are located. If any person should have an interest adversely affected by the adoption of the plan prepared by the state, a public hearing shall be held on the proposed plan prior to adoption.

**Surface Management Agency Other Than Department of the Interior**

Leases covering lands that are under the surface management of any Federal agency other than the Department of the Interior will be issued only upon consent of that agency and subject to such conditions as that agency may request.

**Public Hearing and Notice Prior to Lease Sale**

Before the lease sale, the Secretary of the Interior shall hold public hearings in the area which would be affected by the mining under such a lease. Also no lease sale shall be held until after the notice of the proposed offering for lease has been given once a week for three consecutive weeks in a newspaper of general circulation in the county in which the leases are

located.

**Coal Exploration License**

No person is allowed to conduct coal exploration for commercial purposes without an exploration license. An exploration license has a term not to exceed two years and does not confer rights to a lease. A separate exploration license is required in each state. Each application for an exploration license must identify the general area and the probable methods of exploration. The license will include conditions to protect the environment. The licensee is allowed to remove only such quantities of coal necessary for analysis and study. If the license should cover lands under the administration of a surface management agency other than the Department of the Interior, that agency may prescribe additional conditions to protect the surface resources.

All geological, geophysical and core drilling information obtained by the licensee during exploration must be furnished to the Secretary. All such data shall be considered confidential so as to protect the competitive position of the licensee.

A person who willfully conducts coal exploration for commercial purposes without an exploration license shall be subject to a fine not to exceed $1,000 for each day of violation.

**Logical Mining Unit**

If the maximum economic recovery of a coal deposit may be improved by the consolidation of coal leases into a logical mining unit, the Secretary may approve such a consolidation. However, a public hearing must be held if requested by a person whose interest is or may be adversely affected. A logical mining unit is an area of land in which the coal resources can be developed in an efficient, economical, and orderly manner as a unit, with consideration to the conservation of coal reserves and other resources. Although a logical mining unit may include one or more Federal leases, the lands must be capable of being developed and operated as a single operation. It is also required that the reserves of the entire unit be mined within forty years or a lesser period of time if required by the Secretary. Any lease included within a logical unit shall be amended so as to be consistent with the logical mining unit. The total acreage of a logical mining unit shall not exceed 25,000 acres, including both Federal and nonfederal lands.

**Term of Coal Lease**

A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease; however, any lease not producing in commercial quantities at the end of ten years shall be terminated.

**Minimum Royalty**

Coal leases require a minimum royalty of 12 2 percent of the value of the coal; however, a lesser royalty may be required for coal recovered by underground operations.

**Readjustment of Lease Conditions**

Rentals, royalties and other conditions of the lease will be subject to readjustment at the end of the primary term of twenty years and at the end of each following ten-year period if the lease is extended.

**Maximum Acreage Under Coal Lease or Permit**

No single lessee or permittee shall hold coal leases or permits on an aggregate of more than 46,080 acres in any one state and in no case greater than an aggregate of 100,000 acres in the United States.

**Diligent Development**

Coal leases are subject to requirements of diligent development and continuous operation unless such operations under the lease are interrupted by strikes, the elements or casualties through no fault of the lessee. However, the lessee must pay advanced royalties which shall be no less than the production royalty for the extended period.

**IV. Upland Mineral Leasing**
(excluding oil and gas, coal and geothermal resources)

**Authority - Public Domain**

The basic statute for mineral leasing on public domain lands is the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 USC '181 et seq.), as amended and supplemented.

**Leasable Minerals - Public Domain**

The Mineral Leasing Act of 1920, as amended, authorizes that specific minerals shall be disposed of through a leasing system. Minerals designated as leasable under this law include:

1. Phosphate;

2. Native asphalt, solid and semisolid bitumen and bituminous rock including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined;

3. Sulphur in the states of Louisiana and New Mexico; and

4. Chlorides, sulfates, carbonates, borates, silicates, or nitrates of potassium and sodium.

The statutory authorities for leasing the minerals designated above include the following:

1. *Potassium*. Sections 1 to 7 of the Act of February 7, 1927, as amended (44 Stat. 1057, 30 U.S.C. secs. 281-287).

2. *Sodium*. Sections 23 through 25 of the Act of February 25, 1920 (41 Stat. 447; 30 U.S.C. sec. 189, 261-263).

3. *Phosphate*. Sections 9 to 12, inclusive of the Act of February 25, 1920 (41 Stat. 440, 441, 30 U.S.C. 211-214) as amended.

4. *Sulphur*. Sections 1 to 7 of the Act of April 17, 1926 (44 Stat. 301), as amended July 16, 1932 (47 Stat. 701; 30 U.S.C. 271-276).

5. *Asphalt*. The Act of February 25, 1920 (41 Stat. 437; 30 U.S.C., sec. 181), as amended by the Act of September 2, 1960 (74 Stat. 781; 30 U.S.C. sec. 181, 241).

**Authority -- Acquired Lands**

Minerals in acquired lands may be leased pursuant to the Mineral Leasing Act for Acquired Lands (61 Stat. 913; 30 USC 351-359). This law was enacted on August 7,1947. Section 402 of Reorganization Plan No. 3 of 1946 (60 Stat. 1099) transferred the function of leasing and disposal of minerals in certain acquired lands from the Secretary of Agriculture to the Secretary of the Interior.

**Leasable Minerals -- Acquired Lands**

All minerals that now qualify as locatable minerals in public domain lands may in some cases be obtained through a mineral lease on acquired lands. Leasable Minerals in this category would include gold, silver, copper, gems, uranium, etc. Also, all minerals designated by the Mineral Leasing act of 1920 as leasable in public domain lands are leasable in acquired lands.

**Department of Agriculture Lands**

The issuance of leases and permits on National Forest Lands and other lands under the surface management of the Department of Agriculture is subject to the discretion of the Secretary of Agriculture. Mineral leases will not be issued without the consent of the Secretary of Agriculture. If a lease or permit is authorized, the right to explore, develop, and mine is subject to any stipulations that may be attached to protect surface resources. Lessees and permittees are required also to comply with any additional regulations that the Secretary of Agriculture requires.

**Filing Procedure**

Application for leases or permits are filed with the appropriate fees in the land office of the Bureau of Land Management of the state in which the permits or leases are sought. When an application is received in the land office, it is date-stamped to establish priority and a serial number is assigned. The application is then copied and placed on the public counter for review by interested persons. A serial page is prepared for each application and is placed in the *Serial Register Book* in chronological order. When leases are issued, assigned or terminated, an entry describing the action is made on the serial page. A separate use township plat is prepared for each mineral under lease or permit. For example, all oil and gas leases in a township are delineated on an oil and gas plat, all coal leases in the same township are delineated on a coal plat and all geothermal resources leases are delineated on a geothermal resource plat.

**Prospecting Permit**

A prospecting permit allows the permittee an exclusive right to prospect and explore within a permit area to establish the existence of valuable minerals. The permittee is allowed to remove only such deposits as necessary to conduct experimental studies and must keep a record of all minerals removed. A prospecting permit does not authorize mining in commercial quantities.

**Term - Prospecting Permits**

Prospecting permits are normally issued for a term of two years. A phosphate permit may be extended for a period of four years if certain conditions are met.

**Filing**

In the event of conflicting applications, priority of applications is established by the time and date of filing. Conflicting applications received by mail or filed over the counter at the same time are resolved by a public drawing.

**Preference-Right Lease Applications**

Applications for a preference-right lease must be filed in the land office not later than 30 days after the prospecting permit expires.

**Acreage Limitations - Acquired Lands**

The amount of acquired lands that may be held by a permittee or lessee may not exceed the amount that may be held on public domain lands under the mineral leasing laws. Permit and lease holdings on public domain lands do not count against such holdings on acquired lands.

Minerals that are currently locatable under the General Mining Law of 1872 in public domain lands may be available through a mineral lease in acquired lands. No person is allowed to hold more than 20,480 acres under lease and permit in any one state. A prospecting permit may not exceed 2,560 acres and must fit within an area six miles square or within an area not

exceeding six surveyed sections in length or width.

**Term - Leases**

Leases are issued for a primary term of 20 years and are subject to readjustment of terms if the lease is to be renewed. Asphalt leases are issued for a primary term of 10 years. Hardrock mineral leases for acquired lands have a term which is established by the BLM but cannot exceed 20 years.

## MINERAL LEASING ACT FOR ACQUIRED LANDS

All deposits of coal, phosphate, oil, oil shale, gilsonite (including all vein-type solid hydrocarbons), gas, sodium, potassium and sulfur in acquired lands may be disposed of under the Acquired Lands Leasing Act of August 7, 1947 (61 Stat. 913; 30 USC 351, 352). Deposits in acquired lands used for the following purposes are excluded from leasing (30 USC 352):

1. Incorporated cities, towns and villages;

2. National parks or monuments; and

3. Tidelands or submerged lands.

**Agency Consent Required**

Section 3 of the Act provides that "no mineral deposit covered by this section shall be leased except with the consent of the head of the executive department..." (30 USC 352). The effect of this statute is to preclude mineral leasing on acquired lands without the consent of the administrative agency having jurisdiction over the acquired land. *Capitol Oil Company*, 33 IBLA 392 (1978). In *Jacobs Contracting Corp*., 45 IBLA 40 (1980), the Interior Department rejected a coal lease application because the Corps of Engineers withheld its consent.

In *Esdras K. Hartley*, 57 IBLA 293 (1981), the Board discussed the agency consent issue in the situation where the other agency is in the Department of the Interior:

> However, if the lands embraced by an oil and gas lease offer are under the surface jurisdiction of a service or bureau within the Department of the Interior, such as BuRec, the consent of the Secretary of the Interior is necessary under the Act for leasing of the land. *Mardam Exploration, Inc*., 52 IBLA 296 (1981); *Walter W. Sapp*, 29 IBLA 219 (1977). The opinion of such a bureau or agency would not be controlling, although its views would be considered carefully. In such a case BLM would be responsible for assembling information and determining on the Department's behalf whether a lease should issue. *Esdras K. Hartley*, 35 IBLA 137 (1978).

**Secretarial Discretion to Issue Acquired Lands Lease**

Although it is well established that the Secretary has discretion as to whether a lease should issue pursuant to the Mineral Leasing Act of 1920, in *Esdras K. Hartley, supra*, the Board held that the Secretary has the same discretion over the issuance of acquired lands leases:

> Section 3 of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. '352 (1976), provides that oil and gas deposits "may be leased by the Secretary." Accordingly, the Secretary has discretion whether to issue an oil and gas lease for acquired lands. *General Crude Oil Co.*, 18 IBLA 326 (1975).

**Application Rejected if Uncertainty of Title**

It is well established by Interior decisions that where there is uncertainty of title to acquired minerals, an application to lease such minerals should be rejected. In *J. W. McTiernan*, 11 IBLA 284, 286 (1974), the Board said:

> In the face of the clear reservation in the deeds to the United States, which are of public record, certainty of title to the minerals could not be established without a judicial determination. The refusal of this Department to issue an oil and gas lease prior to any such determination or any refusal to initiate judicial proceedings is not, as appellant suggests, any conferral of the mineral interest in the County contrary to state law. Whether it is in the interest of the United States to initiate litigation is a matter within the discretion of the Department of Justice as advised by the Office of the Solicitor of this Department. ....
>
> This Department has held that oil and gas lease offers may properly be rejected in the exercise of administrative discretion where there is a "mere uncertainty regarding title to oil and gas deposits." *Carolyn C. Stockmeyer*, 1 IBLA 87 (1970); *Duncan Miller*, A-30451 (November 17,1965).

In *Shell Oil Company*, 20 IBLA 292 (1975), the Board considered a case where Shell Oil Company appealed a rejection of an application for an oil and gas lease. The Regional Solicitor examined all the conveyance documents and issued a title opinion concluding that the United States has no interest in the oil and gas deposits. However, Shell asserted that if the Utah Supreme Court were to apply the "Duhig doctrine" to the facts in the case the United States would have a 25 percent interest in the oil and gas. Upon determining that there is substantial uncertainty whether the United States has any interest in the oil and gas deposits, the Board affirmed the BLM rejection of the application.

The "Duhig doctrine" refers to *Duhig v. Peavy-Moore Lumber Company*, 144 S.W.2d 879 (Tex. Sup. Ct. 1940). It held that where A conveys Blackacre to B by deed reserving a 2 mineral interest, and B conveys to C by warranty deed, expressly reserving a 2 mineral interest and purporting to convey all other interest in Blackacre, the mineral interest is then owned 2 by A and 2 by C. It says the doctrine is grounded upon the theory that a grantor will not be allowed

to breach his warranty, and will be estopped from doing so against his grantee. The 2 mineral interest reserved by B, it says, works to satisfy the 2 mineral interest reserved by A, and C takes the other 2 by virtue of B's warranty. In this case, Shell contends that the United States is in the same position as C. *Shell Oil Company, supra*, fn. 1.

**Burden on Applicant to Establish Title**

Where the United States has insufficient information to establish title to acquired lands, the burden is on the applicant for lease to ascertain the title and prove that the land is available for leasing. In *Edward C. Shepardson*, 53 IBLA 79,87 (1981), the Board said:

> Where title to a tract of acquired land which is the subject of an oil and gas lease application is in doubt, the burden is on the applicant to search the land records to ascertain the chain of title and establish the eligibility of the tract for leasing. *Jean Oakason*, 27 IBLA 41, 43 (1976). Where the BLM has insufficient title information with respect to mineral title in acquired lands, it may properly require the lease offeror to furnish evidence from the county recorder's office in the nature of a title abstract sufficient to allow the BLM to determine the status of title to the oil and gas in the lands for which the lease application was filed.

**Fractional Interests May Not Be Leased Separately**

In *Soco 1980 Acreage Program*, 68 IBLA 132, 133-34 (1982), the Board considered a case where the Government owned a 50 percent interest in a tract of acquired lands and has issued an oil and gas lease for that interest. Later the Government obtains the remaining 50 percent and issues a second oil and gas lease to another party for the new fractional interest. Upon realization of the error, the BLM canceled the second lease. The Board affirmed the BLM decision and held that the issuance of the second lease was unauthorized. The Board said at 133-34:

> ... We know of no authority whereby two separate fractional interests in the same public lands may be leased contemporaneously. There is no statute authorizing the United States to issue fractional oil and gas leases when it holds title to the entire mineral estate. In fact, 30 U.S.C. '354 (1976) expressly conditions the leasing of partial or future interests to those situations "[w]here the United States does not own all of the mineral deposits under any lands sought to be leased..." (Emphasis added). In Duncan Miller, A-29425 (July 23, 1963), this Department held that, "An offer for a 50 percent fractional interest [oil and gas] lease cannot be accepted if in fact the United States owns all the mineral interest."
>
> But if the separate leasing of the respective fractional interests were continued, it is unlikely that they would ever be consolidated without an assignment by one of the lessees to the other, and, even then, their terms would not be coincident. Such a separation of the mineral estate is an impediment to the development of the leasehold for the production of oil and gas, and could thwart the very object of the mineral leasing acts

> under which the separate leases purported to issue. Such a result would clearly contravene public policy. As noted in *Sun Oil Co.*, 67 I.D. 298,300 (1960), "It seems apparent that having unified development of the Government's oil and gas rights in the entire block is more in the public interest than permitting divergent ownership of the rights."

The BLM decision also held that the after-acquired fractional interest is included in the first lease. However, because the owner of the first lease did not take advantage of the regulations which provide for leasing of the outstanding future interests which would later vest in the United States, he did not qualify as lessee for the later-acquired 50 percent interest. The Board said at 135:

> Therefore, although the title to the mineral estate has merged in the United States, the oil and gas rights owned by the United States are divided, and it appears that those two interests can only be united by withholding the second-acquired interest from leasing until the lease of the first-acquired interest expires or is otherwise terminated. To create another lease of the second-acquired interest clearly would not be in the public interest, as explained above, and 30 U.S.C. '354 (1976) limits the issuance of any fractional interest lease to those situations where, "in the judgment of the Secretary, the public interest will be best served thereby." Accordingly, the second-acquired interest should be withheld from leasing until both interests can be united in a single lease.

A similar case, *Wilfred Plomis*, 62 IBLA 162 (1982) is distinguished from the *Soco* case. In *Plomis* the Board cautioned that "while we hold that the two separate estates merged upon the vesting of the retained mineral interests, our holding herein is limited to the facts of the present case where the original mineral interest of the United States was unleased at the time that the retained interest vested in the United States." Unlike the situation in *Plomis*, the *Soco* case involves a previously acquired mineral interest that was leased at the time the subsequently acquired interest vested.

**Incomplete Application May Maintain Priority**

It is now well established that where a noncompetitive over-the-counter lease offer fails to include all of the information or materials required by the regulations, the offer is properly rejected. However, when the additional required information is filed with the notice of appeal, the offer may be reinstated and given priority from the time of filing of the information. *Curtis Wheeler*, 55 IBLA 65 (1981); *Bryan D. Blevins*, 63 IBLA 304 (1982).

**Lease Offer May Be Rejected Under Certain Circumstances**

A lease offer may be rejected if it sets forth the reasons for doing so and if the background data and facts of record support the conclusion that the rejection is required in the

public interest. *Esdras K. Hartley*, 54 IBLA 38, 43 (1981). The record should also indicate that the BLM has considered whether leasing subject to clear and reasonable stipulations would be sufficient to protect the public interest concerns raised by the surface management agency. *Id*. at 44.

**The "No Surface Occupancy" Stipulation and Special Stipulations**

Where the Secretary issues a lease, special stipulations to protect environmental and other land use values may be required. *Vern K. Jones*, 26 IBLA 165 (1976); 43 CFR 3109.2-1. Proposed stipulations, though, must be supported by valid reasons weighed with due regard for the public interest. *A. A. McGregor*, 18 IBLA 74. Also, where a stipulation would forbid operations on any of the lands described in the lease, it must be demonstrated that the values to be protected are of sufficient importance to warrant such a prohibition and that "less stringent alternatives would not adequately accomplish the intended purpose by containing the adverse effects of oil and gas operations within acceptable limits." *Bill Maddox*, 17 IBLA 234, 237 (1974).

In cases where other agencies furnish the BLM with unsubstantiated recommendations for a "no surface occupancy" stipulation, the "BLM should make an independent determination as to whether the imposition of protective stipulations are necessary, appropriate, and reasonable to achieve the desired result." *James M. Chudnow*, 43 IBLA 375, 376 (1979).

**Prospecting Permit is Exclusive Right**

The issuance of a permit or lease appropriates the land to the extent of the permitted or leased use and subsequent applications for the same use of the land must be rejected. 43 CFR 2091.1; *Stephen P. Dillon*, 66 ID 148 (1959). Not until the relinquishment of a prior entry or permitted use has been noted on the tract books can the land become subject to further appropriation. 43 CFR 1825.1(b); *State of Alaska*, 79 ID 391 (1972). Therefore, where a hardrock prospecting permit is erroneously issued for lands already subject to such a permit, the second permit must be canceled to the extent of the conflict. *Asarco Inc*., 47 IBLA 14 (1980).

**Permittee's Operating Plan Not Approved**

In *Leroy Pederson*, 56 IBLA 86 (198 1), the Board considered a case where the BLM granted a 2-year permit for hardrock mineral prospecting with the concurrence of the Forest Service and the Geological Survey. However, the permittee's operating plan was not approved either during the permit or during a 2-year extension. The Board held that the permit will be considered to have been suspended during that period and the permittee granted a 2-year term for prospecting with the right to apply for an extension.

**Diligent Work During 2-Year Permit**

In *Fred G. Cansler*, 30 IBLA 273 (1977), the Board considered a case where the appellant had failed to submit a plan for prospecting operations to the Mining Supervisor as required by 30 CFR 231. 10. The appellant also failed to drill an adequate test well or to

excavate a trench for prospecting purposes as required by the regulations, 43 CFR 3511.3-1(b), and the permit terms. The Board said:

> An application for extension of a prospecting permit is properly denied where the permittee has not drilled an adequate test well on the land embraced in the permit during the 2-year term of the permit. *Kansas City Testing Laboratory*, A-26308 (January 30, 1952). The rationale for this requirement is the Departmental policy of promoting diligent exploration and development of minerals.
>
> We are in agreement with the conclusion of Survey that the prospecting work required by the permit terms and the regulations as a condition to an extension of the prospecting permit has not been carried out.

**Discovery Required for Preference Right Lease**

In *John D. Archer*, 47 IBLA 268 (1980), the appellant=s application for a preference-right lease for hardrock minerals was rejected by the BLM for failure to satisfy the discovery requirements of the regulations. 43 CFR 3521.1-1(I). In its discussion of the inadequacy of two exploration holes to satisfy the showing of quantity and quality of ore required for a discovery, the Board said:

> According to GS, the information discovered by drilling these two holes shows an extremely deep deposit of low-value metal ore. This information is inadequate to show that there has been a discovery of a valuable mineral, and appellants have tendered no further information to the contrary regarding discovery on appeal. Thus, appellants have failed to make the essential showing that they have discovered a valuable mineral deposit.
>
> Under 43 CFR 3521.1-1(I), an application may be rejected if it is determined that the evidence does not support the applicant's assertion that a valuable mineral deposit has been found. Moreover, under 43 CFR 3521.1-1(b), an applicant for a preference-right lease is required to show in his application the quantity and quality of the minerals discovered within the area included within the permit in several specific ways. Appellants have failed entirely to show either the quantity or quality of the purported mineral deposit there, either in their application or on appeal.

**Surface or Minerals May Be Acquired Separately**

It is important to mention for the benefit of those doing title work with the Master Title Plats maintained by the BLM that the acquired portion of the title may be (1) part of the minerals, (2) all of the minerals, or (3) only the surface; whereas the remaining interest could be in nonfederal or federal ownership. On most Master Title Plats shaded areas indicate that either surface or minerals or both have been acquired.

For example, in a case where "all minerals" were reserved in the original land patent and the surface was acquired by the Federal Government, then the minerals would be public domain

minerals rather than acquired minerals. However, unless the disposal statute expressly mentions that such lands are open to the mining law as does the Stock-Raising Homestead Act, such minerals could not be appropriated, either by lease or claim.

## SALABLE MINERALS IN BLM ADMINISTERED LANDS

### Authority

The Materials Act of July 31, 1947 (61 Stat. 681), amended by the Acts of July 23, 1955 (PL- 167; 69 Stat. 367), and September 28, 1962 (PL87-713), authorized that certain mineral materials be disposed either through a contract of sale or a free use permit. This group of mineral materials, commonly known as "salable minerals" includes, but is not limited to petrified wood and common varieties of sand, stone, gravel, pumicite, cinders and clay on public lands of the United States. 30 USC 601 (1976).

### Effect on Mining Claims and Other Surface Uses

Mineral material disposals are not made where there are valid existing claims. Any subsequent mining location or mineral lease covering lands under a contract of sale for mineral materials is subject to the outstanding contract of sale. The United States reserves the right to continue to use the surface of lands under contract of sale for leases, licenses and permits concerning other resources; however, these subsequent leases must not interfere with the extraction or removal of the mineral material. Removal of mineral materials from the public lands without authorization is an act of trespass.

### Disposal of Mineral Materials from Unpatented Mining Claims

The question of whether the Secretary is authorized to make sales of mineral materials from unpatented mining claims under the provisions of section 4(b) of the Surface Resources Act of 1955, 30 USC 612 (b) (1976), has been addressed by two Solicitor's opinions dated March 8, 1979, and November 26, 1980. In both opinions, the Associate Solicitor of Energy and Minerals concluded that there is no authority for the Secretary to dispose of mineral materials from unpatented mining claims. In reaching this conclusion, the Associate Solicitor examined both the legislative history and the statute. Regulations (48 FR 27008, June 10, 1983; 43 CFR 3601.1-1), effective July 11, 1983, preclude mineral disposals from the surface of unpatented mining claims. Section 4(b) of the Surfaces Act of 1955 subjects mining claims located after 1955 (and previously located claims where pre-1955 validity cannot be shown) to the right of the United States "to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States)." The pertinent portion of section 4(b) reads as follows:

> Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United

States *to manage and dispose of the vegetative surface resources* thereof and *to manage other surface resources* thereof (except mineral deposits subject to location under the mining laws of the United States). ...

Although there is authority in section 4(b) to manage and dispose of vegetative resources, there is authority to only manage "other surface resources." The Associate Solicitor determined that common varieties of mineral materials were included within the phrase "other surface resources."

A mining claimant is not precluded by section 48 of the Surface Resources Act of 1955, *supra*, from utilizing vegetative or other surface resources found on his claim in operations conducted off of the claim so long as the use is "reasonably incident to legitimate mining operations in connection with the unpatented claim." *U.S. v. Cruthers*, 523 F.2d 1306,1307 (9th Cir. 1975). Thus, while a claimant cannot himself sell sand and gravel from an unpatented mining claim, he may use it both on and off his claim for legitimate mining purposes.

If the United States should remove timber from a claim and the claimant subsequently does not have sufficient timber for mining purposes, the Federal Government must replace the timber from the nearest available Federal timber. However, if the United States had sold mineral materials such as sand and gravel, there exists no authority for the administering agency to make up those mineral materials from another place. The Associate Solicitor also pointed out that "the fact that a claimant might 'consent' to such a sale would not operate to invest the Secretary with such disposal authority. In the first place, the mining claimant has no alienable interest in the mineral materials (his "title" or interest being limited to use) and in the second, the action of a

third party in concert with the Secretary cannot operate to bestow powers not granted by Congress."

When the BLM receives an application to purchase mineral materials under the Materials Act of 1947, as amended 30 U.S.C. 601 (1982) and the land covered with the application is also embraced by an unpatented mining claim, the application may be rejected under 43 CFR 3601.1-1(a)(1). That regulation prohibits material disposal where A[t]here are any unpatented mining claims which have not been canceled by appropriate legal proceedings.@ In *Roger B. Woody*, 112 IBLA 51, 52 (1989), the Board pointed out that this approach Anecessarily equates the recording of a mining claim with the recording of a valid mining claim. This is so, because rights of a mineral claimant arise, as against the United States, only upon the discovery of a valuable mineral deposit, locatable under the mining laws. Thus, absent a discovery, there are no property rights which inure as against the United States."

The Board went on to say that "the real questions which BLM faces when it receives an application for a mineral material sale which conflicts with an unpatented mining claim are whether proceedings can be brought to nullify the claim and, assuming BLM determines that adequate grounds exist to nullify the claim, whether they should be brought.@ *Id*. at 52. Finally the Board suggested that ABLM must first determine whether there is an adequate basis to conclude that the mining claim is invalid. If this first determination is made in the affirmative,

BLM must then decide whether, considering all of its myriad responsibilities as well as limitations of time and financial resources, the filing of a mining contest can be justified.@ *Id*. at 53.

**No Disposals in National Parks or Monuments**

The regulations preclude disposals under the Materials Act from lands in National Parks or national monuments, or from any Indian Lands. 4 CFR 3600.0-3 (3).

Mineral Material Sales are Discretionary

A decision to sell mineral materials is discretionary to the government. In Glenn Sheldon, 128 IBLA 188 (1994), the BLM rejected an application for sale of boulders from an area classified as Category I desert tortoise habitat because potentially adverse impacts on the tortoise habitat could not be mitigated.

**Community Pits Closed to Mineral Entry**

The regulations (4 CFR 3604. 1) provide for the establishment of community pits to be used by the general public to remove small amounts of material after obtaining a nonexclusive permit from the district manager of the Bureau of Land Management. A fee is charged for each cubic yard or ton of gravel removed plus an amount necessary to reclaim the site upon depletion of the pit. The regulations in 43 CFR 3600.0-5(g) state that the "establishment of a community pit, when noted on the appropriate Bureau of Land Management records or posted on the ground, constitutes a superior right to remove material as against any subsequent claim or entry of the lands."

**Common Use Areas**

Common use areas, like community pits, are established for nonexclusive disposals of mineral materials where the removal of materials would cause only a negligible surface disturbance. 43 CFR 3604.1. However, "the establishment of a common use area does not create a superior right to remove material as against any subsequent claim or entry of the lands." 43 CFR 3600.0-5(h).

**Appraisal of Mineral Materials**

Mineral materials are not sold at less than the appraised value. Also, a reappraisal is necessary every two years. 43 CFR 3610.1-2.

**Noncompetitive Sales**

Noncompetitive sales may be made where it is impracticable to obtain competition and it is in the public interest. Individual sales, not to exceed 100,000 cubic yards, may be made without advertising or calling for bids. The total aggregate of sales to an individual must not exceed 200,000 cubic yards in any one state during a twelve month period. 43 CFR 3610.2-1. The term of contract for noncompetitive sales is not to exceed five years, excluding extension and removal periods. 43 CFR 3610.2-4.

**Provisions for Noncompetitive Sales in Excess of 100,000 Cubic Yards**

The existing mineral materials sales regulations authorize the noncompetitive sale of mineral materials not in excess of 100,000 cubic yards in any individual sale, or 200,000 cubic yards in any one state for the benefit of any entity in any period of twelve consecutive calendar months. Regulations authorize the noncompetitive sale of unlimited amounts of mineral materials where competition is not possible under the circumstances or there exists an emergency situation that threatens public property, health or safety. 51 FR 22079 (June 18, 1986).

**Competitive Sales**

All sales are made through competitive bidding unless excluded for the reasons above. Sales are advertised in a newspaper of general circulation in the area where the material is located. A notice of sale is published once a week for two consecutive weeks giving the location of the lands, the material offered, type of materials, quantities, appraised price and the procedure for bidding. Written sealed bids, oral bids or both may be required, together with a bid deposit of not less than 10 percent of the appraised value of the mineral materials. The contract is awarded to the highest qualified bidder. The term for competitive contracts is not to exceed 10 years, excluding extension or removal periods. 43 CFR 3610.3.

**Free Use Permits**

Free use permits are issued for a period not to exceed one year; however, a maximum term of 10 years is allowed for government agencies and municipalities. Material acquired under a free use permit must be for the permittee's own use and may not be traded or sold. There is no limitation on the number of permits or the amount or value of the material if the permit is issued to a government agency or municipality for use on a public project. A free use permit issued to a non-profit association or corporation must not allow disposal of more than 5,000 cubic yards in any period of twelve consecutive months. 43 CFR 3621.1.

**Mining Claims and Leases are Subject to Contracts**

Lands covered by material sale contracts or free use permits are subject to location and entry under the mining and mineral leasing laws. *U.S. v. McClarty*, 81 ID 472 (1974). However the regulations in 43 CFR 3601.1-28 state that "any person that has a subsequent settlement, location, lease, sale or other appropriation under the general land laws, including the mineral leasing and mining law on lands covered by a material sale contract or free use permit shall be

subject to the existing use authorization."

If a patent is issued covering lands subject to a free use permit, the permittee continues to have the right to remove materials even though there was no reservation incorporated in the patent. The basis for this is that a free use permit is in the nature of a *profit a prendre* and is not a revocable license. *Free Permits under the Materials Act of July 31, 1947,* Opinion dated August 2, 1951.

**Free Use of Petrified Wood**

The Act of September 28, 1962 (76 Stat. 652) removed petrified wood from the locatable mineral category and made it available to the public on a free use basis in limited quantities. The Act defined petrified wood as "agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter." This free use program applies to all public lands administered by the Bureau of Land Management and a portion of the lands administered by the Bureau of Reclamation. No permit for free use is required for specimens over 250 pounds in weight. Specimens over 250 pounds may be used only for museum purposes. Collection of petrified wood on a free use basis is subject to the following rules:

1. One person is allowed to remove a maximum of 25 pounds plus one piece of petrified wood per day. However, that person may not remove more than 250 pounds in a calendar year.

2. No explosives or mechanized equipment may be used for the excavation or removal of petrified wood. Light trucks, up to one-ton capacity, used as a principal means of transportation, may be used for hauling purposes.

3. Free use petrified wood may not be bartered or sold to commercial dealers.

4. Extraction and removal of specimens must be done in a manner that avoids damage to the surface.

**Mineral Material Trespass over Material Used on Government Project**

In *So. Way Co.*, 123 IBLA 122 (1992), a for-profit corporation had a road surfacing contract with BLM. BLM had found that Southway had removed 4,000 tons of aggregate without prior payment and assessed damages at triple the appraised value. Southway contended that BLM employees told it that the company would not have to pay royalty since the material was to be used on a BLM road surfacing project. The Board held that such information from BLM employees could not give it rights not authorized by law; and that the trespass was innocent rather than willful.

**Trespass Regulations**

Mineral material trespass is prohibited by 43 CFR 3603.1 which states:

> Except when authorized by sale or permit under law and the regulations of the Department of the Interior, the extraction, severance or removal of mineral materials from public lands under the jurisdiction of the Department of the Interior is unauthorized use. Unauthorized users shall be liable for damages to the United States, and shall be subject to prosecution for such unlawful acts (see subpart 9239 of this title).

The regulations in 43 CFR 9239 state:

> The extraction, severance, injury, or removal of timber or other vegetative resources or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts.

**Measure of Damages for Trespass**

Departmental regulation 43 CFR 9239.0-8 provides that the measure of damages for an unintentional trespass is determined by the laws of the state in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized. In *Harney Rock and Paving Co*., 91 IBLA 278, 279 (1986), the Board held "that absent a clear expression to the contrary in the law of Oregon, damages for an unintentional trespass involving crushed rock may consist of either (1) the royalty value of the mineral or (2) the market value of the severed and crushed rock less the expenses of severing and crushing it, whichever is greater.@ *Id*. at 289.

**Definition of Wilful Trespass**

In *Western States Contracting, Inc*., 119 IBLA 355 (1991), the IBLA considered a case where the BLM charged the appellant for willful trespass for removing materials from a pit without a permit. The IBLA determined that the record did not support a finding of willful trespass and defined willfulness at 357:

> * * * Wilfulness is demonstrated by conduct which negates the conclusion that a trespasser acted in good faith or innocent mistake. Wilfulness may also be shown by conduct so lacking in reasonableness or responsibility that it became reckless or negligent.

**Willful Trespass**

"Willfulness is demonstrated by conduct which negates the conclusion that a trespasser acted in good faith or innocent mistake, and may also be shown by conduct so lacking in reasonableness or responsibility that it became reckless or negligent." *Bolling Construction Co.*, 125 IBLA 303, 307 (1993).

In *Hess Construction Co.*, 126 IBLA 353 (1993), the Board held that removal of sand and

gravel from the public lands "in excess of the authorized quantity sold by BLM under a prior mineral sales contract and after the expiration date of the contract of sale" is a willful trespass.

**Nonwillful Trespass**

"When the mineral material is removed by a trespasser having a *bona fide*, but mistaken belief that he had a right to remove it, the removal can be said to be a 'nonwillful' trespass." *Pine Grove Builders*, 126 IBLA 269, 275, f.n. 4 (1993).

**Difference Between Innocent and Willful Trespass**

"The difference between innocent and willful trespass is usually understood to concern the trespasser's knowledge and beliefs about his rights. When BLM has indicated to a trespasser that operations may continue, there is no basis for concluding that the continued operations were conducted with knowledge that a violation was occurring or a reckless disregard of whether a violation was occurring." *Richard Connie Nielson*, 125 IBLA 353, 365 (1993).

**Trespass and the Statute of Limitations**

In *Bolling Construction Co.*, 125 IBLA 303 (1993), the Board held that the statute of limitation does not prevent BLM from recovering damages on a trespass. As the Board said "statutes of Limitation may apply to judicial enforcement of administrative actions, but not to the underlying administrative actions."

**Mineral Trespass Damages for Willful Trespass**

The mineral materials trespass case of *Frehner Construction Co., Inc.*, 124 IBLA 310 (1992) involved a mineral materials sales contract for 10,000 cubic yards of sand and gravel from a community pit in Nevada. On September 26, 1990, Frehner paid 75 cents per cubic yard and an additional 75 cents per cubic yard for reclamation and desert tortoise mitigation for a total of $15,000. In a report dated October 22, 1990, Frehner reported removal of 21,340 cubic yards of material and paid $17,010. for the additional material. The area manager consequently initiated a trespass action against Frehner upon determining that the removal of an additional 11,340 cubic yards of sand and gravel from the pit was an act of Trespass.

At the time of the trespass, 43 CFR 9239.08 (1990) provided that the "rule of damages to be applied in cases of * * * [mineral materials] trespass * * * will be the measure of damages prescribed by the laws of the State in which the trespass is committed." The Board noted that though there was no Nevada statute prescribing mineral trespass damages, state court decisions are applicable. *Id*. at 312. "In Nevada, the willful trespasser is charged for the value of the material after it has been extracted and sold, with no deduction for the costs of extraction and marketing. This not only deprives the willful trespasser of the profits but also penalizes him to the extent he cannot recoup the costs of his wrongdoing." *Id.*

Regarding the issue of whether Frehner's trespass was willful the Board said at 316-17:

> Generally speaking, when a person knew or should have known that the trespass was occurring, failure to take reasonable steps to prevent trespass justifies a finding that the trespass was willful. * * * If Frehner did not know, it should have known, that excess sand and gravel was being removed. This is especially true considering the quantity removed.
> * * * * * * * * * *
> Therefore, the facts also support the finding that Frehner's trespass was the result of a reckless disregard of the expiration of the Contract upon removal of 10,000 cubic yards of material, and was therefore willful. *Citation Omitted*. BLM is entitled to measure trespass damages according to the value of the sand and gravel after it was extracted and sold, with no deduction for the costs of extracting and marketing it.

**Damages for Nonwillful Trespass**

"Absent controlling State law, we have held that damages for an unintentional trespass involving removal of rock are either (1) the royalty value of the material or (2) the market value of the severed material less the expenses of severing it, whichever is greater. *See Harney Rock & Paving Co.*, 91 IBLA at 289, 93 I.D. at 186." *Pine Grove Builders*, 126 IBLA 269, 275 (1993).

**Other Liability to Trespassers**

"[A]nyone properly determined by BLM to be in trespass liable to the United States for (1) reimbursement of all costs incurred by the United States in the investigation and termination of a trespass; (2) the rental value of the lands for the time of the trespass; and (3) either rehabilitating the lands harmed by the trespass or for the costs incurred by the United States in so doing. 43 CFR 2801.3(b). * * * It is also established that BLM may properly require the removal of improvements constructed in trespass on public lands, even where placed without knowledge of the trespass." *Double J. Land and Cattle Co.*, 126 IBLA 101, 109 (1993).

In *Pine Grove Farms*, 126 IBLA 269, 274-75 (1993), the Board held that "[a]nyone properly determined by BLM to be in trespass is liable to the United States, among other things, for either rehabilitating the lands harmed by the trespass or for the costs incurred by the United States in so doing. 43 CFR 2801.3(b).

**Damages on Soil Trespass**

In *Pine Grove Farms*, 126 IBLA 269, 276 (1993), the Board described how set the damages on a nonwillful trespass of topsoil:

> * * * Nevertheless, it is comparable to minerals such as rock in that it is both capable of being removed and has value. Further, like rock, the costs of removal of topsoil are identifiable. We deem it appropriate to set damages as the market value of the severed topsoil less the expenses of severing it.

**Fair Market Value**

The classical definition of fair market value as the price at which a willing seller not compelled to sell will accept from a willing buyer not under compulsion to buy, both having reasonable knowledge of the relevant facts. *Richard Connie Nielson v. BLM*, 125 IBLA 353, 358 (1993).

**Appraisal Must Be Adequately Supported by the Record**

In *Pine Grove Builders*, 126 IBLA 269 (1993), the Board said that an "appraisal may be judged inadequate if the accompanying report provides insufficient data on materials compared and insufficient analysis of the differences and similarities between the comparable material and the subject material to support the appraisal."

**Comparable Value Appraisal Method**

"The comparable value method of appraisal is the preferred method where there is sufficient comparable data available and appropriate adjustments are made for differences between the subject material and other material sold. *See Amax Magnesium*, 119 IBLA 284 (1991), and cases cited. BLM correctly held that a use of sand or gravel prices would not be appropriate to set a value for topsoil where, as here, values for comparable sales of topsoil are available." *Pine Grove Builders*, 126 IBLA 269, 277 (1993).

**Relationship of Master Appraisal to Specific Site Appraisal**

In *Richard C. Nielson*, 129 IBLA 316, 325 (1994), the Board discussed the relationship of a master appraisal or area-wide appraisal to a site specific appraisal. If a master appraisal is used to determine the value of materials in a specific site, the appraisal report must describe how the materials from the site compare to those in the master appraisal. The Board said at 325:

> An appraisal of this type, determining the fmv of representative material, rather than material from a specific site, is properly termed a "master appraisal." The preferred method for appraising fair market value is the comparable lease method where there is sufficient comparable data and appropriate adjustments are made for the differences between the subject of the appraisals and other similar materials. *See Oregon Broadcasting Co.*, 119 IBLA 241, 243 (1991), and cases cited. In appraisal cases where BLM attempts to implement the comparable use method of valuation by using a master appraisal, the Board seeks to determine whether the material subject to appraisal actually conforms to the representative material. *See Union Pacific Railroad Co.*, 114 IBLA 399, 403 (1990). It is not proper for BLM to apply a master appraisal without making a thorough comparison of various factors considered in appraising the representative material. A BLM decision using a master appraisal to establish value of materials is insufficient where the record fails to demonstrate any relationship between the materials being appraised and the master appraisal, and where there is no indication that the

specific materials at issue matched the comparable factors identified in BLM's appraisal of the representative material. *See Confidential Communications Co.*, 126 IBLA 349, 351 (1993).

**Appraisal Bias**

In *Richard Connie Nielson*, 125 IBLA 353, 360 (1993), the appellant challenged the BLM's appraiser because her status as an employee may affect her judgment. In rejecting this contention, the Board said a "claim of bias on the part of an appraiser must be based on personal interest rather than employment."

**Mineral Material Sale Must Be in Accordance with Land Use Plan**

In *Jenott Mining Co*., 134 IBLA 191 (1995), mining company appealed the denial of an application for a mineral material sale. The application was denied because the approved land use plan precluded the appellants proposal to use motorized vehicles to conduct its operations at the quarry and to construct a road over one-quarter mile long to gain access to the area. The BLM is required by section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA, 43 U.S.C. 1732(a) (1988), to manage the public lands Ain accordance with the land-use plans developed by him@ pursuant to section 202 of FLPMA, 43 U.S.C. 1712 (1988). And, furthermore, departmental regulations specifically provide that BLM decisions authorizing the sale or other disposal of mineral materials Ashall conform to approved land-use plans.@ 43 CFR 3601.1-3. Approval or denial of an application for a mineral materials sale rests within BLM=s discretionary authority. 43 CFR 3610.1-1; *Glenn B. Sheldon*, 128 IBLA 188, 191 (1994).

**Removal of Mineral Materials Without Agreement or Permit Is a Trespass**

In *Earl Williams*, 140 IBLA 295 (1997), a split estate case where the Federal Government owned the reserved mineral, the Board emphasized that A[m]ineral materials cannot be removed from lands administered by BLM without prior authorization in the form of a mineral material sales agreement or permit issued under the Materials Act of July 31, 1947, 30 U.S.C. " 601, 602 (1994), and Departmental regulations.@ *Id.* at 302. The Board said at 314:

> We previously noted that mineral material cannot be removed from lands administered by BLM without prior authorization in the form of a mineral material sales agreement or permit issued under the Materials Act of July 31, 1947, 30 U.S.C. " 601, 602 (1994) and Departmental regulations. Unauthorized removal of mineral materials from public lands is an act of trespass, and trespassers are liable for damages to the United States. 43 CFR 3603.1 and 9239.0-7; *Richard C. Neilson*, 129 IBLA 316, 324 (1994); *Richard Connie Neilson v. BLM*, 125 IBLA 353, 363 (1993). Having determined that the United States owns the sand and gravel, we find that Williams= removal of the sand and gravel without authorization from BLM constitutes and unintentional trespass, and Williams is liable for damages to the United States. Therefore, BL< must determine

damages under 43 CFR ' 9239.0-8. *See also* 43 CFR ' 9239.1-3 and *CM Concepts of Nevada*, 126 IBLA 134, 139 (1993).

**Timing of Trespass Damages on Split Estates**

In *Earl Williams*, 140 IBLA 295, 315, f.n. 16 (1997), the Board gave guidance on selecting the date when trespass damages are actionable:

> We wish to reiterate that this is a case of first impression. The Bureau may wish to consider the policy it adopted following the Court=s finding in *Watt v. Western Nuclear, Inc., supra*. As noted in *Curtis Sand & Gravel Co., supra* at 147 n. 2, trespass damages were deemed actionable from and after July 21, 1983, 45 days after the June 6, 1983, Supreme Court decision in *Watt v. Western Nuclear, Inc.* that Asand and gravel@ was reserved mineral under an SRHA patent. With limited exceptions, trespass damages prior to July 21, 1983, were waived by BLM as an Aexercise of prosecutorial discretion.@

**Reclamation Costs in Split Estate Trespass Appraisals**

In *H.E. Hunewill Construction Co. Inc.*, 137 IBLA 101 (1996), the Board discussed the procedure for addressing the costs of reclamation to the surface estate when computing royalty value derived from comparable sales in private surface/private mineral trespass cases. The Board said at 108, f.n. 8:

> In *Browne-Tankersley Trust*, we held, in a split estate situation, that the in-place value of the Federal sand and gravel taken in trespass must be determined by first taking the royalty value derived from comparable sales in the case of private surface/private mineral and then subtracting the actual damage to the surface estate (payable to the surface owner) in order to arrive at the lesser in-place value that the United States would have received, since it did not also own the surface estate. *See United States v. Browne-Tankersley Trust*, 98 IBLA 325, 341, 346-48 (1987); *Browne Takersley Trust*, 76 IBLA 48, 51 (1983). In this way, the United States does not receive the surface damage component of the royalty value derived from the comparable private sales, to which it is not entitled as the mineral estate owner. As we said in *Curtis Sand & Gravel Co*., 95 IBLA 144, 156, 94 I.D. 1, 7-8 (1987):
>
> > The United States is simply not entitled to be compensated for the value of [private] rights and privileges which it could not have granted. In determining trespass damages, BLM must factor out such * * * rights and privileges *to the extent they affected the royalty rate set in the private lease BLM relies upon*. [*Emphasis added*.]

We are unsatisfied that the comparable cited by BLM in its appraisals used that approach.

**Problems with BLM Appraisal**

In *H.E. Hunewill Construction Co. Inc*., 137 IBLA 101 (1996), the appellant contended that BLM improperly computed the damages the company owed for a sand and gravel trespass in a private surface/federal minerals case. The Board discussed the burden of proof under such circumstances at 107:

> In challenging a BLM appraisal, an appellant bears the burden of proving by a preponderance of the evidence that the methodology employed by BLM was flawed and/or that the value assigned to the land or commodity exceeded its fair market value. *See London Bridge Broadcasting, Inc*., 130 IBLA 73, 77 (1994); *Universal City Studios, Inc*., 120 IBLA 216, 222 (1991). An appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the charges are excessive. *See KSEI, Inc*., 120 IBLA 266, 267 (1991), and cases cited; *High Country Communications*, 105 IBLA 14, 16 (1988); but *see Lone Pine Television*, Inc., 113 IBLA 264, 266 (1990) (setting aside and remanding a BLM appraisal even though appellant had not done an independent appraisal, because it had made a Acomparison@ that raised Asignificant questions@ concerning the accuracy of the BLM appraisal.

The Board remanded the case to BLM and specified a number of deficiencies in the appraisal and the five comparable transactions used in calculating trespass damages. The appraiser Arelied on a total of five comparable transactions, three of which were sales by BLM reporting a uniform value of $0.35/cubic yard for low quality material >not suitable for mixing concrete,= but >[u]sed as common barrow or fill,= located 3 miles from Winnemucca. The other two were leases by private land owners to T. G. Sheppard Construction Company, reporting a uniform value of $0.45 to $0.50/cubic yard for >high quality sand and gravel= and >high quality undifferentiated sand and gravel or barrow= within 10 miles of Winnemucca (Appraisal at 1-2).@ The Board noted the following deficiencies at 109-110:

1. Comparable lease provisions must be specified

   Size (acreage) or legal description of the site

   Lessor

   Location of lease

   Term of the lease

   Source of the information

   Did purchase price include addition fee for reclamation or surface rights

2. Details are extremely vague for the BLM sites

   No information on type of sale such as community pit, negotiated sale or

competitive sale

Does the $0.35/cubic yard price include any additional fee for reclamation or other costs associated with use of the surface

3. Information lacking from all sites that should be supplied on remand:

Amount of material extracted from each site

Access to the property

Proximity to the site of use

Location of the site and legal description

Size of the site in acres

Other information relevant to the price a willing buyer would pay for the material

AFinally, we agree with appellant that, in valuing the sand and gravel removed from the subject land, BLM improperly applied the value of high quality material to all of the material taken in trespass even though it admittedly found that some of the trespass material was oversized and undersized. BLM did not properly quantify the difference in value between the high-quality material involved in the comparable sales and that involved here. On remand, BLM should consider the cost involved in screening and processing the material in order to render it commercially saleable as high quality material and adjust its valuation accordingly.@ *H. E. Hunewill Construction Co. Inc., supra at* 109-110.

## SALABLE MINERALS IN U.S. FOREST SERVICE ADMINISTERED LANDS

### Authority

Authority for the disposal of mineral materials (petrified wood and common varieties of sand, gravel, stone, pumice, pumicite, cinders, clay and other similar materials) in the National Forests is given by the Materials Act of July 31, 1947 (30 U.S.C. 601), as amended by the Acts of August 31, 1950 (30 U.S.C. 603), July 23, 1955 (30 U.S.C. 601, 603), and September 25, 1962 (30 U.S.C. 602). This material sale program comes under comprehensive regulations made

effective July 24, 1984 (36 CFR 228.40) and apply to both public domain and acquired lands within the National Forest system.

### Disposal of Mineral Materials from Unpatented Claims

In contrast to the Bureau of Land Management regulations, the Forest Service regulations (36 CFR 228.41(b)(3)) authorize disposal of mineral materials from lands embraced by unpatented mining claims. However, no disposal is authorized from claims where the United States does not have the right to manage the surface resources. Also, the claimants must be given prior notice and the removal must not materially interfere with mining operations incidental to the claims.

**Appraisal**

Prior to sale, all mineral materials must be appraised to determine fair-market value. A sale must not be made at less than the appraised value. 36 CFR 228.4.

**Duration of Contract**

In general, a contract or permit may not exceed one year from the effective date of the contract or permit. Extensions are possible under certain circumstances. 36 CFR 228.53.

**Types of Disposal**

The Forest Service disposes of mineral material through competitive sale, sale by negotiated contract, preference right negotiated sale and free use contracts and permits. Prospecting permits are also available but do not allow for disposal.

**Prospecting Permits**

On Acquired National Forest lands, prospecting permits may be issued. These permits grant the permittee the exclusive rights to prospect for mineral material deposits; however, material may only be taken for testing. Commercial quantities may not be removed. A prospecting permit may not cover more than 640 acres and may not be issued for a period exceeding 24 months. 36 CFR 228.60.

**Competitive Sales**

Mineral material sales which exceed 25,000 cubic yards may be sold by competitive bidding. The sale must be advertised on the same day once a week for two consecutive weeks in a newspaper of general circulation. The advertisement of sale must specify the location of the tract, the kind of material, quantity of material, appraised price, time and place of bid and special stipulations. 36 CFR 228.58.

**Negotiated or Noncompetitive Sales**

When it is in the public interest and when it is impracticable to obtain competition, mineral materials not exceeding 100,000 cubic yards may be sold at any one sale. These sales are made at the appraised price without advertising or calling for bids. Furthermore, a single

applicant may not acquire more than 200,000 cubic yards in any one state in any period of 12 consecutive months. 36 CFR 228.59.

**Preference Right Negotiated Sales**

A preference right negotiated sale may be made to a permittee who has discovered suitable mineral materials within an area covered by a prospecting permit. The application must be made before the expiration date of the prospecting permit. Preference right negotiated sales are exempt from volume limitations and the contract time must not exceed five years. 36 CFR 228.61.

**Free-Use Permits**

Free-Use Permits may be issued to any local, state, federal or Territorial agency, unit or subdivision, including municipalities and county road districts for periods up to 10 years. There is no limitation on the number of permits or the value of the material.

Free-use permits may also be made to settlers, miners, residents, prospectors and nonprofit organizations for other than commercial purposes. These permits are limited to 5000 cubic yards during any period of 12 consecutive months. 36 CFR 228.62.

**Petrified Wood**

A free-use permit may be issued to amateur collectors and scientists to take limited quantities of petrified wood for personal use. This material may not be bartered or sold. 36 CFR 228.62(e).

# 11. LOCATION OF CLAIMS

## LANDS AND MINERALS SUBJECT TO LOCATION

### Minerals Locatable Under the Mining Laws

The Federal mining laws (30 USC '22) state that:

> 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...

If valuable mineral deposits are locatable, what then is a Avaluable mineral deposit"? The Federal regulations (43 CFR 3812.1) define a locatable mineral as:

> Whatever is recognized as a mineral by the standard authorities, whether metallic or other substance, when found in public lands in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the mining laws.

The above definition of a locatable mineral is somewhat vague but undoubtedly could be applied to almost any mineral with sufficient value that it could be extracted and marketed at a profit. There is no such thing as a list of locatable minerals because of the requirement for value. For example, some deposits of gold, uranium and gemstones are valuable, whereas other deposits are not. Whether or not a particular mineral deposit is locatable depends on such factors as quality, quantity, mineability, demand, marketability, etc.

### Minerals Not Locatable

Rather than attempting to establish what minerals are locatable, it may be more practical to discuss what minerals are not locatable. The number of locatable minerals authorized by the 1872 Mining Law has been substantially reduced by several subsequent Federal laws. The Mineral Leasing Act of 1920, as amended, authorized that deposits of oil, gas, coal, potassium, sodium, phosphate, oil shale, native asphalt, solid and semisolid bitumen and bituminous rock including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried, the deposits of sulphur in Louisiana and New Mexico may be acquired only through a mineral leasing system. The Materials Act of July 31, 1947 (61 Stat. 681) amended by the Act of July 23, 1955 (69 Stat. 367), excluded common varieties of sand, stone, gravel, pumice, pumicite, cinders and clay. However, uncommon varieties of sand, stone, gravel, pumice, pumicite, cinders and exceptional clay are locatable. The Act of September 28, 1962 (76 Stat. 652), removed petrified wood from the locatable mineral category.

**Minerals Never Locatable**

Even before the Materials Act of 1947, and the Act of July 23, 1955, many mineral materials were never locatable even though they could be marketed at a profit. ln fact the Materials Act of 1947 was enacted to provide a means to dispose of them. Material in this category includes ordinary deposits of clay, limestone, fill material, etc. Non-locatable minerals generally have a normal quality and a value for ordinary uses. In *Holman v. State of Utah*, 41 LD 314 (1912), the question of whether clay was a locatable mineral was considered:

> It is not the understanding of the Department that Congress has intended that lands shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country ...

Other Federal court and Departmental decisions have found that such minerals as decomposed rhyolite, blow sand, peat moss, sand and gravel, if suitable only as fill, soil conditioners or other low-value purposes, were never locatable.

**Reserved Minerals Not Subject to Mining Law Without Specific Authority**

It is well established that where locatable minerals are reserved in a Federal land patent, the reserved minerals are not open to location of mining claims. For example, reserved minerals in patents issued under the Recreation and Public Purposes Act (43 USC 869) are not open to mineral location. The only exception to this rule is where the statute authorizing the disposal specifies that the reserved minerals are subject to the mining laws as does the Stock-Raising Homestead Act of 1916. In *City of Phoenix v. Reeves*, 14 IBLA 315, 327-28 (1974), the Board said:

> When public lands are disposed of with a reservation of minerals to the United States, it has been ruled that without specific statutory authority making the reserved minerals subject to the mining laws, the mining laws do not apply to such deposits. *Solicitor's Opinion*, M-36279 (July 19, 1955). This *Opinion* discussed the applicability of the mining laws to minerals reserved in a patent to the City of Denver. The act authorizing the patent, Act of August 25, 1914, 38 Stat. 706, was similar to that involved in this case as it provided that minerals were to be reserved to the United States, but gave no authorization of the right to mine such minerals under the mining laws. The Opinion concluded that authority to dispose of the minerals under the mining laws could not be read into the statutory provision for reserving the minerals. It distinguished other statutes where the United States has granted the land, reserving the minerals, and specifically authorizing location of the minerals under the mining laws. The rationale of that Opinion is applicable here. The Act authorizing the patent to the City of Phoenix while reserving minerals did not authorize their location under the mining laws. We know of no other

statute making such an authorization. Consequently, the mining laws are not applicable to the reserved minerals in the patent.

When public lands are disposed of with a reservation of the minerals to the United States, the mining laws do not apply to those reserved mineral deposits unless there is specific statutory disposal authorization. *City of Phoenix v. Reeves*, 81 I.D. 65, 70 (1974). In *Richard G. Bradley*, 89 IBLA 281 (1985), the Board held that lands patented under the Act of June 7, 1910, were not subject to mineral location. In this case there was no express provision for disposition of reserved minerals.

When Congress itself has intended to authorize mineral location of reserved minerals, it has expressly done so in the legislation providing for the reservation. *See* section 9 of the Stock-Raising Homestead Act, 43 U.S.C. 315g(d).

**Lands Open to Exploration**

The mining law states that Aexcept 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, by citizens of the United States and those who have declared their intention to become such." Act of May 10, 1872; 17 Stat. 91; 30 USC 22.

Public lands belonging to the United States are open to entry under the General Mining Laws unless some particular lands have been withdrawn by congressional authority, or by an executive authority either expressed or implied. *Lockhart v. Johnson*, 181 US 516 (1901).

Mining claims may be located on unreserved, unappropriated lands administered by the Bureau of Land Management, U.S. Department of the Interior and the unreserved, unappropriated public domain land in the National Forests administered by the Forest Service, U.S. Department of Agriculture. Mining locations may be made in the states of Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Louisiana, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming. 43 CFR 3811.2-1(a).

Lands patented under the Stock-Raising Homestead Law or other land disposal laws that reserved locatable minerals to the United States are subject to mineral location. The effect of the mineral reservation in the patent is to separate the land into a surface estate and a mineral estate. The mineral estate is subject to location under the general mining laws in the same manner as are vacant, unappropriated public lands. However, the surface owner is entitled to compensation for any damages resulting from exploration or mining.

**Lands Closed to Location**

The national parks and national monuments are closed to mining location; however, valid

mining claims existing at the date a national park or monument was established are entitled to certain grandfather rights. Indian reservations, military reservations, most reclamation projects, Federal wildlife refuges, and land segregated under the Classification and Multiple Use Act are generally closed to mining location.

A great variety of withdrawals or land classifications have served to segregate the public lands from mineral location and entry. Before locating a mining claim, the public land records of the Bureau of Hand Management should be examined to determine if the area of interest is available for mineral entry. A mineral location on lands segregated from mineral entry would not only be a waste of time and money but would also be an unauthorized trespass.

**Mining Claims Located Prior to Withdrawal**

In many cases, lands withdrawn from mineral entry embrace mining claims existing at the date of the withdrawal. Such lands are subject to the valid existing rights of the claimants, and in order to have valid existing rights, a claim must contain a discovery as of the date of the withdrawal as well as at the date of determination. *U.S. v. Almgren*, 17 IBLA 295 (1974). In fact, evidence obtained after the date of the withdrawal by drilling, sampling and other exploratory activities cannot be considered for any purpose other than further evidence of a discovery made prior to the date of the withdrawal. If a discovery is not physically exposed within the limits of the claim before the date of withdrawal, the claim is void. *U.S. Gunsight Mining Co*., 5 IBLA 62 (1972).

If a prospector has a prior claim on lands withdrawn from mineral location and there is no discovery, he cannot maintain a possessory right against the government even though he is occupying the land in good faith attempting to make a discovery under the doctrine of *pedis possessio*. *Ernest Smith*, A-29590 (August 2, 1963).

Even though a claimant has valid existing rights predating the withdrawal date, if the original locators fail to perform their annual assessment work, the claim can not be relocated. *Lyman B. Crunk*, A-28738, 68 ID 190 (1961). However a claimant is not precluded from establishing that he has possessory rights, as the successor in interest of an original locator, based on mining claims made and perfected before the withdrawal. *J. Everett Nelson*, A-29174 (February 4, 1963).

The filing of an amended notice of location of a mining claim while the land is withdrawn from mineral location does not render invalid a claim that was located when the land was available for location prior to the withdrawal. *James M. Wells*, A-28549 (February 10, 1961). However, a location that was valid when the land was withdrawn cannot be enlarged by amendment after the date of the withdrawal. *United States Phosphate* Co., 43 LD 232.

**Mining Claims Located After the Date of Withdrawal**

Mining claims located at a time when the land is withdrawn from mineral entry are null and void *ab initio* and may be so declared without a hearing. However if the record indicates that part of the claim was not located on withdrawn land, the entire claim cannot be declared null and

void *ab initio* without contest proceedings. *Brace C. Curtis*, 11 IBLA 30 (1973). Conversely, statements by federal employees that a mining claim is valid cannot make it valid when it was located on land segregated from mining location. *Neil Ferre*, A-30882 (November 29,1967).

Lands which have been withdrawn from entry under the public land laws remain so withdrawn until there is a formal revocation or modification of the order of withdrawal. Merely because the lands are not presently being used for the purpose of the withdrawal does not affect the status of the withdrawal. Mining claims located on lands withdrawn from mineral entry are null and void *ab initio* and will not be validated by the modification or revocation of the order of withdrawal to open the lands to mineral entry. *David W. Harper*, A-30719, 74 ID 141 (1967).

## GENERAL LOCATION REQUIREMENTS

### Location by Agent

The law does not prohibit an agent from locating a mining claim. McCulloch v. Murphy, 125 F 147. Also a resident of one state may locate a claim in another state either in his own name or may employ residents of the state to locate claims in their own names for his benefit. This rule also applies to corporations in other states. *Book v. Justice Mining Co*., 58 F 106 (1893).

### Location by Minors

Minors who are citizens may locate mining claims. *Thompson v. Spray*, 14 P 182 (Cal. 1887); 43 CFR 3832.l. Also, parents of minors may locate claims on behalf of their children. *U.S. v. Haskins*, 59 IBLA 1, 88 (1981); *West v. U.S.*, 30 F2d 739 (DC Cir 1929).

### Location by Aliens

Section 1 of the Mining Law of 1872 states that "[e]xcept as otherwise provided, all valuable mineral deposits in lands belonging to the United States ... 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." Act of May 10, 1872, 17 Stat. 91, 30 USC ' 22 (1976). Section 7 of the 1872 Act further says that "[p]roof of citizenship... may consist ... in the case of a corporation organized under the laws of the United States, or any State or Territory thereof, by

the filing of a certified copy of their charter or certificate of incorporation." Act of May 10, 1872, 17 Stat. 94, 30 USC ' 24 (1976).

An alien may own unpatented mining claims and protect his rights through adverse proceedings, but is not qualified to obtain a patent. *Ginaca v. Peterson*, 262 F 904 (1920). If an alien should locate a claim, his rights to the claim are not void but voidable, as he is subject to losing his rights only by government action. *Manual v. Wulf*, 152 US 505 (1894). For example, a locator who stakes a claim over a prior locator who is not a United States citizen and has not

declared his intention to become such is not entitled to assert priority. *Herrington v. Martinez*, 45 F. Supp. 543 (DD Cal 1945). If a mining claim is located by an alien and the alien subsequently declares his intention to become a citizen and no adverse rights have been initiated, such declaration relates back to the date of location of acquisition of the aliens interest and validates the location. *Shea v. Nilima*, 133 F 209 (1904).

If an alien conveys a claim to a citizen, the citizen has a title good against all persons who had acquired no right before the conveyance. *North Noonday Mining Co. v. Orient Mining Co.*, 1 F 522 (1880). Furthermore, if a citizen and an alien jointly locate a claim not exceeding the area allowed by one locator, the location is valid as to the citizen and a conveyance from the two gives a valid title. *Id*. There is also no restriction upon the location or acquisition of mining claims by a corporation in which some or all of the shares of stock are owned by persons who are not citizens of the United States. *Alien Ownership of Shares by a Corporate Mining Locator*, M-36738 (July 16, 1968).

In *Hugh MacCallum Woodworth*, 72 ID 233 (1965), the Department rejected a verified statement filed by the claimant to establish rights to surface resources under the Act of July 23, 1955, 30 USC 613 (1976). The application was rejected because the claimant, a declared alien, was not qualified to purchase a claim from the United States nor hold a claim under possession or occupancy against the United States. However, no action was apparently taken to declare the claims null and void following the 1965 decision.

**Company May Be Organized Under Any State**

In *Melvin Helit*, 110 IBLA 144, 152 (1989), the Board held that where a company filed a certificate showing that it was organized under the laws of Delaware, it had submitted adequate proof of citizenship under the statute 30 U.S.C. 22 (1982). In other words, if a company is organized under the laws of any one of the 50 states, the company has adequate proof of citizenship to locate mining claims in any state.

**Agent**

An agent who locates in the name of a principal need not be a qualified locator. *Gray v. Milner Corp.*, 64 I.D. 337, 342-43 (1957).

**Mining Claims Held by Aliens**

According to *BLM Manual* 3833.62E, "mining claims or sites held by aliens may be adjudicated by the BLM based upon the official records. The BLM will not summarily challenge mining claimants with a foreign address and will only become involved in the adjudication of citizenship under the following conditions:

a. When a mineral patent application has been filed.

b. When the public interest would be served.

c. When third parties challenge the citizenship requirement of a mining claimant.

**Corporation Has Legal Status of Individual Claimant**

In *U.S. v. Multiple Use, Inc*., 120 IBLA 63 (1991), the Board stated the well-established rule that a corporation has the status of an individual claimant with respect to the size of a placer claim it can locate. Furthermore, a discovery must exist at the date of conveyance to convey more than 20 acres to a corporation.

**Claims Must Be Owned in Part by U.S. Citizens**

In *J. Garth Woodworth*, 78 IBLA 112 (1983), the BLM declared eight lode mining claims null and void because the owner, as recorded under Section 314 of the Federal Land Policy and Management Act, was not a United States citizen. On appeal, however, the appellant furnished documents that established that the claims were owned in part by United States citizens. On this basis, the Board reversed the BLM decision.

**Claimant Has Burden to Show Ownership by U.S. Citizens**

In *J. Garth Woodworth*, *supra* at 113, the Board also pointed out that the "appellant has the burden to demonstrate that these claims are owned, at least in part, by citizens of the United States." In this case, the Board directed the appellant to furnish it with a list of the current owners of the claims and their current mailing addresses, to identify those owners who are United States citizens, and to supply evidence of or proof of citizenship. As required in 30 USC 24 (1976), proof of citizenship may consist, in the case of an individual, of his own affidavit; 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, by the filing of a certified copy of their charter or certificate of incorporation.

**Location by Corporations**

The question of the authority of a corporation to locate mining claims was first examined in *McKinley v. Wheeler*, 130 US 630 (1889). Justice Field, speaking for a unanimous court, stated that the provisions of section 1 of the Mining Law of 1872 "must be held not to preclude a private corporation formed under the laws of a State, whose members are citizens of the United States, from locating a mining claim on the public lands of the United States." *Id*. at 636.

**Location of Claims by Partnership**

In *Owyhee Calcium Products, Inc*., 72 IBLA 235, 238-39 (1983), the Board considered a case where the BLM rejected a patent application partly because the owners of the partnership

located an association placer claim. The BLM decision indicated that a partnership is a single business entity like a corporation and therefore could only locate a 20-acre claim. The Board discussed the location of claims by a partnership as follows:

> BLM likens the partnership unto a corporation in that the partnership is considered a single business entity representative of the partners. However, the concept that a partnership is a separate and single entity is not an established rule and is an often debated issue. 68 C.J.S. Partnership ' 67 (1950). Furthermore, the representative nature of a partnership may change with the circumstances where it is used.
>
> ... In some states, such as Idaho, mining partnerships are recognized. *Idaho Code Ann.* " 53-401 to 53-412 (1979). A mining partnership arises when two or more persons own or acquire a mineral interest or a right to work it, and actually engage in the joint operation of the enterprise. 3 *Lindley on Mines* ' 796 (1914). Mining partnerships have rules peculiar to themselves. *Kimberly v. Arms*, 129 US 512, 530 (1889). When filing the location notices, H. L. Melton acted as an agent for the partnership. Legal title to and possession of the mining property can be held by one, and need not be placed in the names of all partners. 3 *Lindley on Mines* ' 802.

**Citizenship Requirements of Stockholders of a Domestic Corporation**

In *Doe v. Waterloo Mining Co.*, 70 F. 455 (9th Cir. 1895), the Court held that a corporation organized under state laws may locate and patent claims irrespective of the ownership of the stock. It noted that section 7 of the Mining Law of 1872 provided that proof of citizenship could be established for a corporation by filing a certificate of incorporation. The Court stated:

> The question might arise, why would the certificate of incorporation establish the citizenship of the stockholders? In considering the question of jurisdiction in the federal courts, it is an established rule that, when a corporation organized under state laws is a party, it is conclusively presumed that the stockholders thereof are all citizens of that state. *Muller v. Dows*, 94 US 445. Congress was familiar with this rule, and it seems probable intended to establish a similar rule under the mineral land act of 1872.
>
> The practice in the United States land office has been, I think, universal, not to require of a corporation seeking to patent mining ground proof of the citizenship of its stockholders, other than by the production of a certified copy of articles of incorporation.... The practice in the land department of the United States under this statute should have great weight in construing it.

In a recent Interior case, the issuance of a mineral patent was protested because the appellant maintained, in part, that alien ownership of the corporation was involved. *In re Pacific Coast Molybdenum Co.*, 75 IBLA 16 (1983). In its decision, the Board followed the long standing and consistent interpretation of the Department that "proof of incorporation under the laws of a state establishes the citizenship of a corporation for the purposes of the Mining Law of

1872." *Id*. at 38. Therefore, it is not necessary that the stockholders of a corporation be United States citizens because "proof of incorporation in a state is conclusive proof of citizenship by the stockholders." *Id*. at 39.

**Location**

The term "location" is frequently used in a restricted sense to represent the posting of the location notice and marking the boundaries. However, in order to perfect the possessory right of the locator, a discovery of a valuable mineral deposit must be made within the limits of the claim, because a location is not possible without a discovery. *Uinta Tunnel, Mining & Transportation Co. v. Ajax Gold Mining Co*., 141 F 563 (1905). The act of "location" includes the posting of the notice, recording where required and marking the claim boundaries. *Smith v. Union Oil Co*., 135 P 966 (1913), *affirmed* 249 US 337.

**Mining Claim versus Location**

Although the terms "mining claim" and "location" are sometimes used indiscriminately to indicate the same thing, there is a distinction. A "mining claim" refers to the appropriated land; whereas, a "location" refers to the act of appropriating the land. *St. Louis Smelting Company v. Kemp*, 104 US 636 (1881). In *St. Louis Smelting Company v. Kemp*, *supra*, the Supreme Court said:

> A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules. ...The location, which is the act of taking the parcel of mineral land, in time became among the miners synonymous with the mining claim originally appropriated. So, now, if a miner has only the ground covered by one location, "his mining claim" and "location" are identical, and the two designations may be indiscriminately used to denote the same thing. But if by purchase he acquires the ground which his neighbor has taken up, and adds it to his own, then his mining claim covers the ground embraced by both locations, and henceforth he will speak of it as his claim. Indeed, his claim may include as many adjoining locations as he can purchase, and the ground covered by all will constitute what he claims for mining purposes; or, in other words, will constitute his mining claim and be so designated.

**Federal Requirements for Location**

The Act of May 10, 1872 (18 Stat. 315; R.S. 2324) allows the miners of each mining district to "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." However the following Federal requirements for location must be performed (30 USC 28):

1. The "location must be distinctly marked on the ground so its boundaries can be readily traced."

2. The location notice must contain the following information:

   a. "the name or names of the locators"

   b. "the date of the location"

   c. "a description of the claim or claims located by reference to some natural or permanent monument as will identify the claim"

The federal courts have consistently upheld the right of the states to impose additional location requirements so long as such requirements are not inconsistent with Federal law. *Kendall v. San Juan Silver Mining Co*., 144 US 658 (1892).

**Discovery Before Location**

Federal law (30 USC 23) requires that a discovery must precede the location of a mining claim. The law states:

> ... no location of a mining claim shall be made until discovery of the vein or lode within the limits of the claim located.

Federal regulations (43 CFR 3841.3-1) also require discovery before location:

> Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and, upon the discovery of mineral, by locating the lands upon which such discovery has been made.

Thus, it is required that a discovery of a valuable mineral deposit must precede the location of a claim. This requirement has been approved by many court decisions. Of course, as a practical matter, most claims are located before discovery and are held under the doctrine of *pedis possessio*. *See* Chapter on Aprediscovery rights.@

**Location Procedure**

The first step before locating a claim is to verify that the lands of interest are open to mineral location. This is accomplished by examining the land status maps and records at the land office of the Bureau of Land Management. Unpatented claims are recorded in the county recorder's office in the county in which the claim is located. There are five basic steps to location procedure (*see* 1 *American Law of Mining*, 5.49, pp. 833):

1. discovery of a valuable mineral deposit;

2. posting the claim;

3. discovery work, if required;

4. marking the claim boundaries; and

5. recording location notice with county recorder and BLM.

Section 38 Requires Keeping Others Off Claim

In order to satisfy a 30 U.S.C. 38 (1988) location a claimant must keep all other locators out. A peaceable adverse entry on a section 38 location, while the statute is running, will disqualify the section 38 location. Belk v. Meagher, 104 U.S. 279, 281 (1881); In United States v. Webb, 132 IBLA 152, 181 (1995) the Board said:.

> Possessory title must be established by the maintenance of actual, open and exclusive possession of the claim by the claimant combined with development, and requires marking the boundaries of the claim so as to afford actual notice of the extent and limits of the claim, coupled with actual possession and exclusion of all adverse claimants.

**Discovery Work**

Some states require discovery work to be completed on a mining claim within a specific period of time. Discovery work is not to be confused with assessment work. Commonly, prospectors think that by performing the discovery work, they have perfected their discovery of a valuable mineral. The main purpose of discovery work is to show that a claim has been worked.

This may serve a dual purpose by protecting a claim from rival locators and by requiring a minimum amount of work so that a locator may demonstrate good faith.

There is a recent trend for states to abandon the long-established requirement of a discovery pit, generally for environmental reasons. Some states require that the point of discovery of both lode and placer claims be marked by a monument.

**No Limit on Number of Claims Per Locator**

There is no limit to the number of claims that one individual or a single corporation may locate or acquire. *Last Chance Mining Co. v. Bunker Hill Co.*, 131 F 579, 583 (1904), *cert. denied* 200 US 617. Congress has not put a limit on the number of mining claims that may be

included in a single patent and described by a single survey. *Carson City Gold Mining Co. v. North Star Mining Co*., 73 F 597, 600 (1896), *affirmed* 83 F 658.

*St. Louis Smelting and Refining Co*., 104 US 636 (1882) was perhaps the first United States Supreme Court case where it was held that there is no limit to the number of claims that a locator may acquire under the mining law. In this case the Court stated:

> In addition to all this, it is difficult to perceive what object would be gained, what policy subserved, by a prohibition to embrace in one patent contiguous mining ground taken up by different locations and subsequently purchased and held by one individual. He can hold as many locations as he can purchase, and rely upon his possessory title.

In *U.S. v. California Midway Oil Co*., 259 F 343 (SD Cal 1919), *aff'd* 263 US 682, the Court made the following observation regarding the number of claims available for each locator:

> There is so far no law of Congress or regulation made in pursuance thereof limiting the number of placer mining claims an individual or association of individuals may make. On the contrary, the policy of the government seems to be to encourage the development of its mineral resources and to offer every facility for that purpose. *Id* at 351-352.

**Rights of Pedis Possessio May Be Transferred**

The right of *pedis possessio* may be transferred by transfer of possession because it rests on actual possession accompanied by deed, lease, or assignment of color of title represented by state location requirements. *Davis v. Nelson,* 329 F2d 840 (1964).

**Relocation Where No Assessment Work**

Failure to do assessment work does not cause abandonment or forfeiture of mining claims, but merely renders a claim subject to relocation at any time before resumption of the

assessment work by the owner of the senior claim. *Edwards v. Anaconda Co*., 565 P2d 190, 115 Ariz 313 (1977).

**New Discovery Not Required for Relocation**

In order to establish a valid relocation claim on an adopted discovery of a prior locator, the relocator must know at the time of relocation that a discovery exists. And if such original discovery is not exposed, the relocator must uncover it to make a valid relocation. *Bunker Chance Mining Co. v. Bex*, 408 P2d 170, 90 Idaho 47 (1965). In *Dye v. Duncan, Dieckman & Duncan Mining Co*., 164 F. Supp. 747 (1958), the Court said:

> ... in making a relocation, the relocator is not required to make a new discovery of ore; it is sufficient if the relocator finds evidence of the presence of minerals in sufficient quantities to justify the development... 164 F. Supp. at 759.

**Abandonment of Undivided Interest in Mining Claim**

If a co-owner abandons an undivided interest in a mining claim, this abandoned interest does not revert back to the public domain and become available again for relocation; instead, it passes to the original owner or owners of the remaining interest. *Laguna Development Co. v. McAlester Fuel Co*., 572 P2d 1252, 91 NM 244 (1977).

**Compliance with Location Requirements to Establish Validity**

Compliance with the location requirements of state and Federal law confers no right in the absence of a discovery, but it is essential to establish the validity of a claim. *Skaw v. United States*, 13 Cl. Ct. 7, 38 (1987).

**Mining Claim Transferred by Verbal Conveyance**

A mining claim can be transferred by verbal conveyance accompanied by a change of possession of the premises, if there is no statute providing otherwise. *Doe v. Waterloo Mining Co*., 70 F 455 (1895).

**Mining Claim Sold in Part**

If a mining claim has been properly located, the owner may sell any part in any way that seems proper without prejudice to his right to hold the remainder. *Little Pittsburgh Consol. Mining Co. v. Amie Mining Co*., 17 F 57 (1855).

**Mining Claims May Be Sold**

In *St. Louis Smelting and Refining Co. v. Kemp*, 104 US 636 (1882), the Supreme Court in holding that interests in mining locations may be sold, stated:

> A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. Every interest in lands is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary. In the mining statutes numerous provisions assume and recognize the salable character of one's interest in a mining claim.

**Placer Claims and Lode Claims Are Distinct**

APlacer claims and lode claims are two distinct types of claims. *Paul Vaillant*, 90 IBLA 249, 252 (1986); *United States v. Haskins*, 59 IBLA 1, 44, 88 I.D. 925, 947 (1981). The two

types of claims are located for altogether different reasons and are distinct entities.@ *Ronald A. Pene*, 147 IBLA 153 (1999).

## AUTHORITY FOR STATE AND LOCAL REQUIREMENTS

### A Valid Mining Claim Is Intermixture of State and Federal Law

"While the statutory provisions permit states to set requirements for locating mining claims on Federal lands, they do not distinguish between matters governed by Federal law and matters governed by state law. Rather the Federal statutes establish basic requirements governing the location of mining claims and permit them to be supplemented by local laws which are not inconsistent with Federal law. *Citation Omitted*. The difference is important. It means that a valid mining claim is not the result of complying with either Federal or state law, but complying with an intermixture of state and Federal laws." *Scott Burnham*, 100 IBLA 94, 127 (1987).

### Locate According to State and Federal Regulations

A properly located claim must be in compliance with both state and federal requirements. *United States v. Webb*, 132 IBLA 152, 173 (1995); *Patsy A. Brings*, 119 IBLA 319, 327 n. 13 (1991); *United States v. Haskins*, 59 IBLA 1, 49-50, 88 ID 925, 951 (1981), *aff=d Haskins v. Clark*, No. CV-82-2112-CBM (C.D. Cal. Oct. 30, 1984).

### Rules of Mining Districts Replaced by State Laws

"As a practical matter, local customs and the rules of mining districts have now been replaced by state laws. *See American Law of Mining* 33.01[4] (2d ed. 1984)." *Scott Burnham, supra* at 128.

### Mining District Requirements Generally No Longer Followed

Mining district means a section of country usually designated by name, and described or understood as being confined within certain natural boundaries, in which gold or silver, or both are found in paying quantities, and which is worked and the rules and regulations are prescribed by miners operating within the district. *U.S. v. Smith*, 11 F 487 (1882).

The mining districts are also authorized to make rules and regulations concerning location procedures not in conflict with the laws of the United States. *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 US 55 (1898). However, to be valid, such regulations must not only be in force at the time of location, but must also be in general practice. If the regulation is no longer followed, it has no validity. *Jupiter Mining Co. v. Bodie Consol. Mining*

*Co*., 11 F 66 (1881). It was also held in *North Noonday Mining Co. v. Orient Mining Co*., 1 F 522 (1880) that local mining customs or local mining rules only have validity through consistent use and obedience of the miners rather than enactment, and they are void whenever disregarded. Very few mining districts are currently active in a regulatory capacity nor have they been for many years. So now specific location requirements generally originate from the state legislatures.

**Early Mining Rules and Customs The American Common Law of Mining**

Although the rules and customs of the mining districts have, with a few exceptions, been superseded by state laws, these early rules and customs of the various mining districts are now the source of much of present-day mining law. In *St. Louis Smelting & Refining Co. v. Kemp*, 104 US 636, 649, 650, Mr. Justice Field said:

> Soon after the discovery of gold in California, as is well known, there was an immense immigration of gold seekers into that territory. They spread over the mineral regions, and probed the earth in all directions in pursuit of the precious metals. Wherever they went they framed rules prescribing the conditions upon which mining ground might be taken up - in other words, mining claims be located and their continued possession secured. Those rules were so framed as to give to all immigrants absolute equality of right and privilege. The extent of ground which each might locate -- that is, appropriate to himself -- was limited, so that all might, in the homely and expressive language of the day, have an equal chance in the struggle for the wealth there, buried in the earth.
>
> ... The rules and regulations originally established in California have in their general features been adopted throughout all the mining regions of the United States. They were so wisely framed, and were so just and fair in their operation, that they have not to any great extent been interfered with by legislation, either state or national. In the first mining statute, passed July 9, 1866, they received the recognition and sanction of Congress, as they had previously the legislative and judicial approval of the states and territories in which mines of gold and silver were found.
>
> The fundamental thing to bear in mind about these early mining rules and customs, which related to district boundaries, the size and method of location of claims, the keeping of records by a district recorder, the amount of work required to keep a location alive, the way in which claims could be forfeited when they should be deemed abandoned, etc., is that they are the foundation stones upon which our American mining law has been built. They have been called the American common law of mining.

**State Location Requirements**

Although federal law (30 USC 28) gives several basic requirements for location of a claim, detailed procedures for locating mining claims are provided by state law. These state statutes also contain procedures for maintaining the possessory title through annual filing of

assessment work affidavits and provisions for amending defective locations. Although such state requirements vary from state to state, most statutes address the following items:

1. Claim size and shape -
    a. dimensions of placer claims
    b. dimensions of lode claims
    c. mill sites and tunnel sites
2. Posting the notice -
    a. contents of the notice
    b. time for posting notice
    c. posting on discovery monument or claim comer
    d. effect of failure to post
3. Marking claim boundaries -
    a. type and size of monuments
    b. number and position of monuments
    c. information to be noted on monuments
    d. time to complete monumentation
    e. effect of failure to monument
4. Discovery work -
    a. type and extent of discovery work
    b. position of discovery work
    c. maps in place of discovery work
    d. time to complete discovery work
    e. effect of failure to complete discovery work

5. Recording with local office -

   a. contents of recorded notice

   b. description of claim position

   c. recording office

   d. time for recording

   e. effect of failure to record

   f. recording transfers of interest

6. Miscellaneous provisions -

   a. relocation

   b. amended location

   c. water rights
   d. penalties for falsification

The specific provisions of the state location statutes are so important to persons involved in acquiring or maintaining mining claims that it is essential to thoroughly review the pertinent statute and have a copy available for reference.

**State Authority for Specific Location Requirements**

The courts have affirmed the authority of the states to have the following types of location requirements:

1. Detailed description of the claim boundaries, monuments, and discovery shafts. *Butte City Water Co. v. Baker*, 196 US 119 (1905).

2. Discovery shaft. *Northmore v. Simmons*, 97 F 386 (1899).

3. Requirement for location notice. *Upton v. Santa Rita Mining Co*., 89 P 275 (1907).

4. State recording statutes. *Gustin v. Nevada-Pacific Development Corp*., 125 F. Supp. 811, *affirmed* 226 F2d 286, *cert. denied* 351 US 930.

**Authorization for Federal, State and Local Regulations**

The General Mining Law of 1872 (17 Stat. 91; 30 USC 22) authorizes regulations in two sections:

> ....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.

Also, in 30 USC 28 (1976), the law reads:

> 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 states have the power to regulate the location of mining claims, if such regulations are not in conflict with the Constitution and the laws of the United States. *Butte City Water Co. v. Baker*, 196 US 119 (1905); *U.S. v. Zweifel*, 508 F2d 1150 (10th Cir 1975). However, the miners or state legislatures are not authorized to determine how title to the land may be acquired. *Benson Mining & Smelting Co*., 145 US 428 (1892). For example, mining district rules may diminish the size of claims that may be located, *Northmore v. Simmons*, 97 Fed. 386, 388, but such action must be in accord with Federal and State statutes. *Jupiter Mining Co. v. Rodie Consol. Mining Co*., 11 Fed. 666, 673. The basis of the above rule is that the United States mining law fixes the maximum size of a claim but not the minimum.

**Claim May Be Invalidated Under Federal Law If State Law Is Not Followed**

> In *U.S. v. Haskins*, 59 IBLA 1 (1981), the Board stated:
>
> Turning to the acts necessary for location, the only express Federal requirements for location relate to the necessity of making a discovery of a vein or lode within the limits of a lode claim (30 U.S.C. 23 (1976)), and the marking of the boundaries of a lode claim on the ground (30 U.S.C. 28 (1976)). The contents of the actual notices of location and the manner of recordation were left to the local mining districts and the various states. Nevertheless, failure to follow state requirements may result in the invalidation of a claim under the Federal laws. *See Roberts v. Morton*, 549 F2d 158,161-62 (10th Cir 1977), *affg United States v. Zweifel*, 11 IBLA 53, 80 I.D. (1973).
>
> While the Department had originally taken the position that compliance with state law requirements was not a matter of concern in mining claim contests within the Department (see *Reins v. Murray*, 22 LD 409 (1896)), the adoption of a regulation specifically requiring compliance with state laws, see 43 CFR 3831.1, was held by the Court in *Roberts v. Morton, supra*, to result in a Federal requirement that such laws be complied with. *Id.* at footnote 34.
>
> In *Roberts v. Morton, supra* at 161, the Court held 2,910 of Zweifel's claims to be invalid

because they were not properly monumented and located according to state law.

**Degree of Compliance with the Law**

Compliance with the exact letter of the law with respect to proper form and procedure that a locator must file is not indispensable. *Powell v. Atlas Corp*., 615 P2d 1225 (Utah 1980). Minor differences in the description of the claim as recorded from the actual location will not render a claim invalid. *Id*.

**Supremacy of Federal Law Over State Law**

Under the Supremacy Clause of the United States Constitution, Federal law necessarily overrides conflicting State laws with respect to federal public lands. U.S. Const., art. VI, cl. 2; *Kleppe v. New Mexico*, 426 US 529, 543 (1976). "A different rule would place the public domain of the United States completely at the mercy of state legislation." *Camfield v. U.S.*, 167 US 518, 526 (1897). Article VI, clause 2 of the Constitution reads as follows:

> **Clause 2**. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

State or local laws or regulations must always yield in case of conflict with the exercise by the Federal Government of any power it possesses under the Constitution. *Jacobson v. Massachusetts*, 197 US 11, 25 (1905); *Connolly v. Union Sewer Pipe Co*., 184 US 540, 556 (1902).

Article IV, Section 3, Clause 2, of the Constitution clearly provides that the "Congress shall have Power to dispose of and make all needful rules and Regulations respecting the Territory or other Property belonging to the United States..."

## MARKING CLAIM BOUNDARIES

**Introduction**

Federal law requires that "the location must be distinctly marked on the ground so that its boundaries can be readily traced" (30 USC '28). Each state generally has detailed statutory requirements for marking claim boundaries. Most states require that a monument of specific dimensions and material be placed at each corner of the claim. Placer claims located by legal subdivision generally do not require corner monuments unless required by state law. Materials used for monuments include posts, blazed trees and piled rocks; however, by far the most common monument is the 4-inch square post.

It is very important to clearly mark the claim boundaries with durable monuments because the position of the monument on the ground will generally prevail over the recorded description. The more difficult it is to move or destroy a monument, the less likely the claim will be overstaked. It is generally preferable to slightly overlap claims than to inadvertently omit desired land.

**Claim Boundaries Must Be Marked Or Claim Is Invalid**

Numerous cases have upheld the statutory requirement that the location of a mining claim must be distinctly marked on the ground so that the boundaries may be readily traced. Iron Silver *Mining Co. v. Eligen Mining & Smelting Co*., 118 US 196 (1886). Even if the terrain is steep and difficult to work the locator is still required to mark the boundaries. *Gird v. California Oil Co*., 60 F 531, 538 (1894).

If mining claims are not marked on the ground, they are not valid. A mining claim may not be acquired by merely recording a location notice, no matter how accurate the description of the claim. *Vevelstad v. Flynn*, 230 F2d 695 (1956), *cert. denied* 352 US 827. Also, merely posting a location notice without marking the boundaries is not a sufficient location. *Doe v. Waterloo Mining Co*., 70 F 455 (1895).

**Standards and Procedures for Marking Boundaries**

In order to trace the boundaries of a location, one may be expected to have a practical knowledge of surveying and surveying instruments. However, a locator is not expected to understand or follow a metes-and-bounds description. *Oregon King Mining Co. v. Brown*, 119 F 48 (1902).

The boundaries of a location may be marked by blazing trees along boundaries or at the corners, making a trail around the boundary, establishing stakes, posts, piles of stone and blazing stumps. *Id*. However, in *Parker v. Jones*, 572 P2d 1034, 281 Or 3 (1978), it was held that where a claimant marked boundaries by placing red strips on trees, the claim was void. A good general rule for marking a claim on the ground so that its boundaries can be traced is that the markings must be positioned, so that an individual accustomed to tracing the lines of mining claims can readily find all the monuments. *Ledoux v. Forester*, 94 F 600, 602 (1899).

Obviously many more markings (monuments, blazed trees, stakes, etc.) would be required where the claim surface is irregular and covered with dense vegetation than where the surface is flat and barren of vegetation. Under normal circumstances a monument placed at each corner of the location is sufficient. *Hammer v. Garfield Mining Co*., 130 US 291, 299 (1888). Although under certain circumstances, end-center and side-center monuments may be required or recommended. *Golden Fleece Mining Co. v. Cable Consol. Mining Co*., 12 Nev. 312 (1877).

**Relocator May Use Original Monuments**

A relocator of a prior location may use the original boundary markings and monuments regardless if he is relocating his own location or that of another. *Hagan v. Dutton*, 181 P 578 (1919).

**Placer Claims on Surveyed Lands Do Not Require Monuments**

AWhen placer claims are located on land which has been previously surveyed under the public land surveys and claim boundaries are conformed to the legal subdivisions of that survey, it has been held that there is no need to monument the claim corners. *See, e.g., Hagerman v. Thompson*, 235 P.2d 750, 757 (Wyo. 1951).@ *Melvin Helit*, 144 IBLA 230, 233, note 2 (1998). The exception to this rule would be in States such as Idaho where each corner of a claim is required by the state code to be monumented.

**Monument May Be Placed on Valid Location of Another**

If a locator inadvertently places one or two of his monuments on lands under valid location, that portion of the location not in conflict is still valid presuming a discovery exists within the portion of the claim not in conflict. *Perigo v. Erwin*, 85 F 904 (1898), *affirmed* 93 F 608.

**Markings on Ground Control Over Description in Notice**

As a general rule, monuments and markings on the ground control over the description in the location notice so far as the position of the claim is concerned. *Dye v. Duncan, Dieckman & Duncan Mining Co*., 164 F. Supp. 747 (1958).

**Obliteration of Monuments Will Not Affect Validity**

Once the boundaries of a location are marked so that they can be readily traced and all other aspects of a valid location are completed, the obliteration or destruction of the boundary monuments, marks or notices will not affect the validity of the title. *Walton v. Wild Goose Mining* Co., *cert. denied* 194 US 631.

**Obliterated Monuments Established by Witness**

In *United States v. Parker*, 91 I.D. 271 (1984), the Board reviewed the status of monuments. Note the statement that obliterated monuments can be established by testimony of a witness. The Board said at 288-289:

> Once a location is marked on the ground so that its boundaries may readily be traced, the claimant has complied with the law, and unless state law requires that he do so, he need not maintain or restore the monuments if they are removed or obliterated without his fault. *See* 1 *American Law of Mining* 5.68 (1983), and cases cited.
>
> Where the monuments are found on the ground, or their position or location can be

determined with reasonable certainty, the monuments control over the description in the location notice. *Dye v. Duncan, Dieckman Mining Co*., 164 F. Supp. 747 (W.D. Ark. 1958); *Coykendall* 6 P.2d 442 (1931); *Price v. McIntosh*, 1 Alaska 286 (1901). If no monuments are present, their position can be established by testimony of a witness who saw them standing after being placed. *Daggett v. Yreka Mining & Milling Co*., 86 P. 968 (1906).

**Identification of Claim on Ground Based on Recorded Description**

"A locator is not required to submit a precise description of the position of the claim; the description is sufficient if the claim may be found and identified by following the recorded description." *Patsy A. Brings*, 119 IBLA 319, 326 (1991).

**Claimant Has Burden to Show Claim Is Positioned As Asserted**

AAs a general rule, if the recorded description of a mining claim differs from its actual situs on the ground, the physical markings on the ground control, so long as they have been maintained." *Patsy A. Brings, supra* at 327. However, the "claimant has the burden of showing that the claim was positioned as asserted." *Id*.

**Vein May Deviate from the Center Line of Lode Claim**

The "relationship between the actual course of the lode and the position of the mining claim's lateral boundaries and center line does not affect the validity of the claim. Original claim boundaries need not be adjusted, even where the lode materially deviates from the center line, so long as the claim has been located in good faith for mining purposes." *Id*. at 371. Also, "no portion of the claim shall be considered excessive where the statutory dimensions, 1500 feet by 600 feet, are not exceeded." *Id*. It had been held in the overruled *Alaska Empire Gold* case that the Department "has no power to issue a mineral patent to any surface ground exceeding 300 feet in width on each side of the middle of the vein or lode." The only requirement now is that a discovery is physically exposed somewhere within the limits of the claim. *Apex and Extralateral Rights Raised by the Stillwater Mineral Patent*, M-36955, 93 I.D. 369 at 378 (April 18, 1986).

**Junior Locator Has Burden of Proof**

Although a mining claimant bears the responsibility of maintaining markings for mining claims, *U.S. v. Independent Quick Silver Company*, 72 ID 367 (Sept. 21, 1965), it has recently been held that testimony of a junior locator, who located a lode claim over the claim of a senior locator, and who stated that he did not see any monuments, could not prevail over positive testimony of the senior locator who asserted that he had erected the monuments. *Claybaugh v. Gancarz*, 398 P2d 695,81 Nev. 64 (1965).

**Insufficient Location Descriptions and Markings on the Ground**

In *Flynn v. Vevelstad*, 119 F. Supp. 93, 96 (DC Alaska 1954), *affirmed*, *Vevelstad v. Flynn*, 230 F2d 695, 700, 703 (9th Cir 1956), the Alaska District Court considered a case where the location notice and the markings on the ground were both held to be insufficient to constitute

a valid location. The Court said:

> An examination of the defendants' certificates of location discloses that the description of the Doris 1-4 claims is set forth as: "Post # l is located 4.4 miles southerly from Rock Point Light, and 2.8 miles southwest from northerly side entrance of Stag Bay". While Rock Point Light is a well known permanent monument, the "northerly side of the entrance to Stag Bay" embraces so much shoreline as to be of little value as a bearing point. Moreover, if these courses are projected for the distance and in the direction stated, the lines would not intersect anywhere near the claims.
> ... Viewed with the utmost liberality the testimony is insufficient to show that the claims were so distinctly marked as to enable a third person to trace the boundaries by means of cairns or posts erected on the claims above timber line, or by posts, blazes or other marks on claims below timber line and such a deficiency may not be supplied by recourse to the certificates of location ...
>
> ... I have already found that the descriptions in the certificates are insufficient. I further find that "an intelligent person, with a knowledge of the permanent natural objects and permanent monuments in the vicinity", seeking to locate the claims by means of the certificates and marks on the ground, could not "identify them" and, hence, I conclude that the ground embraced by these 26 claims was vacant and unappropriated and open to location ...
>
> On appeal, the Ninth Circuit Court affirmed and further stated the following:
>
> ...Judge Dietrich, speaking for the court and applying an Alaska statute not distinguishable from the present one said (*Vedin v. McConnell*, 22 F2d 753, 756): "For reasons which have often been explained, the courts treat with great indulgence inaccuracies and uncertainties in initial notices and markings prescribed for mining locations. But the same considerations do not apply to the recorded certificate of location, where, as here, a liberal length of time is given in which to make such record; and to uphold defendant's certificate, in the light of all the facts, would be to set at naught the substantial requirements of the law."
>
> Where alleged prior claims of defendants on property claimed by plaintiff were not distinctly marked as to enable the plaintiff to trace boundaries by means of cairns or posts erected on the claims above timber line, or by posts, blazes or other marks on claims below timber line, the ground was vacant and open for location at time plaintiff staked and located subsequent claims.
>
> ... As we stated, the evidence would warrant belief by the trial judge that the asserted markings of the locations on the ground by Paper "were purely imaginary". This finding alone required a judgment that none of appellants' claims were valid for the reason that they were not, any of them, marked on the ground prior to appellee's locations. The mere fact that the descriptions in the recorded location certificates of three of defendants' claims may have been adequate was unimportant, for a locator may not acquire a claim

merely by walking into the recorder's office and filing a location certificate no matter how perfect the description of the location may be.

**Floating Claims**

In *Melvin Helit*, 146 IBLA 362, 370 (1998), the Board held that if it is impossible to ascertain what lands are covered by a mining claim based on either the description in the notice or the markings on the ground, the claim is properly declared null and void. The Board made the following comments on Helit=s claim:

> Even if one could locate the outer boundaries of the description, there would simply be no way for a third party to determine, with any degree of certitutde, which lands were claimed by Helit and which were not. Furthermore, since each location is described as 100 feet on each side from Acenter of river, creek, etc.,@ if the river altered its bed, the claim would presumably move with it.
>
> In reality, Helit and his co-locators have attempted to locate a Afloating claim,@ one which can vary, at any time, by their subjective declarations (as to what is or is not a Avalid prior claim@) or the vagaries of nature. Assuming the claims were ever marked on the ground, the floating of claims after their boundaries have been fixed on the ground has long been held violative of the entire system of mineral location and entry and such indefinite claims are properly declared a nullity. 9/ *Citations omitted*. We declare these claims invalid for this reason as well.
>
> 9/ While the Afloating@ of lode claims prior to marking the boundaries is, under some circumstances, permissible, we note that it has generally been assumed that the problems of Afloating@ claims cannot arise with respect to placer locations since, if the discovery is located on Government land, the claim must conform to the rectangular survey system, if possible. *Citation omitted*. Helit and his co-locators, however, apparently found a way to Afloat@ a placer claim, though not one, we hold, that is in accordance with the law.

## THE LOCATION NOTICE

**Federal Regulations Require Information on Notice**

Federal regulations (43 CFR 3841.4-5) specify that certain information must be contained in the location notice. The course and distance from the discovery shaft on the claim to some permanent, well-known object, such as stone monuments, blazed trees, confluence of streams, intersection of roads and prominent mountains, should be described as accurately as practicable. Survey monuments such as brass cap section corners are excellent, especially since the Federal law (30 USC '23) requires that the location of the claims shall be designated with reference to the lines of the public survey if such claims are situated on surveyed lands. However it is not necessary that the claims conform to the public survey.

It is extremely important for the recorded location notice to have an accurate description

of the location of the claim. Many claims have such a vague description that they could exist anywhere over a large area. A big problem in connection with such a claim is that it could be moved over a subsequent discovery in the vicinity. Such claims are often referred to as "floating claims" and because of an earlier location date could present a serious threat to the locator of a new discovery.

The federal regulations also require that the location notice contain the names of adjoining claims, or if nonadjoining, the relative positions of the nearest claims.

**Federal Regulations Require Discovery Post**

The federal regulations (43 CFR 3841.4-5) state that the claimant should do the following:

> ... drive a post or erect a monument of stones at each corner of his surface ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery.

**Description of Claim's Position in Notice**

The description of the claim's position on the location notice must be sufficient so that the location can be found. *Dennis v. Barnett*, 85 P2d 916 (1938); and if the ground occupied by a location cannot be established with certainty from the description on the location notice, the claim may be void. *U.S. v. Sherman*, 288 F 497 (1923). Furthermore, if the claim description is so vague that the claim may be floated over new ground without changing the description, the notice is not adequate. *Bown v. Levan*, 46 P 661 (1896).

**Location Notice May Only Cover Contiguous Lands**

In *Jesse R. Collins*, 127 IBLA 122, 124 (1993), the Board held that a single notice of location cannot apply to noncontiguous parcels of land.

**Flaws in Claim Description on Location Notice**

Flaws in the description of a mining claim=s geographic position do not necessarily invalidate a mining location. If the recorded description differs from the actual position of the claim on the ground, the monuments of the ground control. In *United States v. Webb*, 132 IBLA 152, 175 (1995) the location notice was inadequate to definitely locate the claim on the ground and there was no evidence the claim was monumented. The Board held that Athe location notice was a legal nullity and afforded the locator no rights.@ *Id* at 184.

**Description of Claim by Reference to Natural Object or Permanent Monument**

A known mining claim may be used as a reference to a natural object or permanent monument. *Glacier Mountain Silver Mining Co. v. Willis*, 127 US 471 (1888). The courts have

held that acceptable permanent monuments include mountains, ridges, hogsbacks, lake inlets, bays, open cuts, drifts, tunnels and stone monuments. *Meydenbauer v. Stevens*, 78 F 787 (1888).

For a placer claim, it is sufficient to either tie the claim to the public land survey system (*McNulty v. Kelly*, 1959, 346 P2d 585) or to refer and conform the boundaries of the claim to the lines of the government survey. *Gird v. California Oil Co.*, 60 F 521 (1894). However, it is essential that the record of location contain a description of the claim by reference to some natural object or permanent monument. *Hammer v.Garfield Mining Co.*, 130 US 291 (1888).

The standard for a description on a location notice is that "an intelligent person, with the knowledge of the permanent natural objects and permanent monuments in the vicinity" can find the claim by reading the description and finding the marked corners. *Flynn v. Vevelstad*, 119 F. Supp. 93 (1954), *affirmed* 230 F2d 695, *cert denied* 352 US 827.

**Description in Notice of Directions and Bearings**

It is not essential that the description on the notice gives the bearings and distances between monuments with absolute accuracy as it is recognized that prospectors may not have access to surveying equipment. Thus a location is not invalidated on the basis of slight errors or inaccuracies in the bearings and distances so long as the claim boundaries are sufficiently marked. *J.E. Riley Inv. Co. v. Sakow*, 98 F2d 8 (1938).

**Monuments Prevail Over Description in Notice**

If there is a discrepancy between the stakes or markers on the ground of a mining claim and the recorded location certificate, the claim as marked on the ground controls over the description in the location certificate. *Sturtevant v. Vogel*, 167 F 448, 452 (1909). However the position of the monuments on the ground prevail only if there is no question as to their position. *Thallman v. Thomas*, 102 F 935 (1900), *affirmed* 111 F 277.

**Conflicting Description in Notice**

In *U.S. v. Johnson*, 39 IBLA 337, 344, 345 (1979), the Board discussed the effect of conflicting descriptive calls in a notice or conveyance. The Board said:

> The primary rule which the courts apply in construing and interpreting a conveyance where the location of the boundary line is uncertain by reason of inconsistent or conflicting descriptive calls in the conveyance is that the intention of the parties controls and is to be followed. *The Coast Indian Community*, 3 IBLA 285 (1971).
>
> Where the calls for the location of boundaries to land are inconsistent, calls to monuments, natural or artificial, are of paramount importance and will prevail over all other calls inconsistent therewith. Calls to boundaries are of secondary importance, and course and distances must be altered if, as given, they will not reach the designated boundary. Calls of courses take precedence over distances, so that where it is necessary

to either change direction to reach a boundary or else reduce or extend the prescribed distance, the distance must yield to the course. The recital of quantity or area of land conveyed or retained will be least influential. *United States v. State Investment Company*, 264 US 206 (1924).

**Errors in Description of Claim in Location Notice**

In *Rasmussen Drilling v. Kerr-McGee Nuclear Corp*., 571 F2d 1144 (10th Cir 1978), the Court considered a case where a junior locator filed over claims described in the wrong township. Kerr-McGee, the senior locator, conducted uranium exploration in the South Powder River Basin, Wyoming for several years before 1967. It contracted surface owners and completed staking by December 1967, and filed with the county recorder by December 1967. A clerical error made in the descriptions of the claims on the location notice placed the claims in section 19 rather than 17. Rasmussen Drilling, the junior locator, located claims over the Kerr-McGee claims after Kerr-McGee completed validation drilling, staking and radiometric surveys. Then, after Rasmussen Drilling located new claims, Kerr-McGee filed amendments correcting the descriptions and placing the claims in section 17. The tenth Circuit Court of Appeals decided the case in favor of Kerr-McGee because the junior locator had actual notice from the activity on the ground and did not need to see a recorded notice. The Court, in making an issue of bad faith on the part of the junior locator, stated:

> The parties agree that the decisions are replete holding that failure to record a location certificate within the period prescribed by statute, i.e., 60 days from the date of discovery as set forth in Wyo. Stat. 1957 sec. 30-1, does not render the certificate invalid or void.
>
> We hold, however, that there is substantial evidence in the record to support the jury verdict on the basis of Rasmussen's actual notice of the Kerr-McGee claims in place on the ground, together with constructive notice of the original filings of the Yike certificates, even though they were recorded in Section 19 rather than Section 17.
>
> In *Globe Mining Co. v. Anderson*, 78 Wyo. 17, 318, P2d 373 (1957), the court specifically held that the function of recording the location notice in the office of the county clerk is that of giving constructive notice and that one who has actual notice will not be heard to complain, even if no recordings have been made in the county records. The *Globe* decision definitively spelled out the *Scoggin v. Miller*, 64 Wyo. 206, 189 P2d 677 (1948) .... rule that one who has actual notice may not rely upon or take advantage of defects in recordation.
>
> The purpose to be thus served (of recording a notice) would seem to be predicated upon the possibility that the boundary markers, just as the posted notice, may very likely be lost or destroyed on the ground. Under such circumstances, constructive notice is provided by the location certificate to be recorded in accordance with Wyo. Stat. 1957 sections 30-1(4), (5) and (6);
>
> The court observed that where a mining locator attempts, in good faith, to comply

> with the law, courts are inclined to be liberal in construing his acts so as not to defeat his claim by technical criticism.
>
> ... the general rule that a miner who proceeds in good faith to comply with the various requirements applicable to perfection of a valid location is to be treated with indulgence, and the notices required are to receive a liberal construction.

*Id*. at 1157 and 1158.

In *Lombard Turquoise Milling & Mining v. Hermanes*, 430 F. Supp. 429 (1977), the Court in considering a similar case to the one above, stated:

> Where plaintiff knew at the time it purchased its claims that its location map, recorded in 1972 did not correctly define boundaries of its claims as located on the ground and that its claims, as located on the ground, did not encroach on unpatented mining claim of defendants, who possessed land since 1972, plaintiff exercised bad faith in February, 1973, when it located additional mining claims which conflicted with defendants' and thus fact that defendants' claim was originally recorded in wrong section and township, until December, 1974, when amended certificates of location and amended map were filed, did not render defendants' claim absolutely void.

**More Than One Claim Described in Notice**

In *Dye v. Duncan, Dieckman & Duncan Mining Co*., 164 F. Supp. 747 (1958), the Court considered a case where three claims were described in a location notice. The Court held that "this is not a fatal defect and, in any event, the notices of location would be subject to amendment to correct the possible error." *Id* at 760.

**Critical Information to be Included in Notice**

The critical information that must be included in the posted notice includes the name of the locators, date of location and a sufficient description. *Preston v. Hunter*, 67 F 996 (1895). If any of these items are missing, the notice is insufficient. *Cheesman v. Shreeve*, 40 F 787 (1889). However strict compliance with location certificate requirements is not required to locate mining claims; a location certificate need only contain sufficient information to enable a reasonably intelligent person to locate the claim on the ground by referring to the location certificate and the marked boundaries. *Dodge v. Amrine*, 596 P2d 71 (1979). The state, of course, may require what additional information it deems necessary.

**Position of Notice on Monument**

The location notice must be visible, but its position on the monument is not critical. *Jose*

*v. Houck*, 171 F2d 211 (1948).

However, the temporary loss or destruction of a posted notice or location monuments does not affect the validity of the claim. *Gird v. California Oil Co.*, 60 F 531, 539 (1894).

**Federal Law Does Not Require Location Notice Be Sworn Affidavit**

The Federal statute does not require that the location notice be a sworn affidavit or a verified certificate. *Hoyt v. Russell*, 117 US 401 (1886).

**More Than One Claim Included in Location Notice**

In *Waldron Enterprises Mining*, 88 IBLA 54 (1985), the Board reviewed a BLM decision declaring 13 placer mining claims abandoned and void for failure to meet the recordation requirements. The claimant in *Waldron* had included all claims in one location notice filed with the State of Colorado. A copy of the notice was then filed with BLM. BLM found all claims abandoned and void because they were not filed with BLM on separate notices. The Board applied Colorado law to save one claim and found that under State law the remaining 12 claims were Aabsolutely void.@

In *Fletcher DeFisher*, 93 IBLA 68, 74 (1986), the Board held that the claims described in a 1969 notice of location were void at the time of a withdrawal because Idaho law says that "no location is made by one or several locators, and if it purports to claim more than one location it is absolutely void.@ Section 47-608, *Idaho Code*.

**Date of Location Under Alaska Law**

Under Alaska law, the date of location is the date when the boundary of the claim is marked on the ground and a notice of location is posted on "one of the posts or monuments marking the boundaries of the claim." AS 27.10.040; *Malone v. Hodel*, A 85-357 CIV, U.S.D.C. Alaska (August 25, 1989).

## STATE RECORDATION REQUIREMENTS

**Introduction**

Most states have laws that give detailed procedures for recording the notice. The individual state requirements should be checked frequently, because state law is amended from time to time. Regardless of whether or not a particular state requires a location notice to be recorded, it is prudent to do so in order to make your interest in the claim a matter of public record.

Because monuments placed in the field are easily lost or destroyed, a copy of the location notice should be recorded in the county recorder's office in the county in which the claim is

located as soon as possible, even though the individual states may allow up to several months. In Alaska, the recording office is under the District Magistrate.

**Federal Regulations Require Recordation Under State Law**

The federal regulations (43 CFR 3841.4-6) require that "the location notice must be filed for record in all respects as required by the State or territorial laws, and local rules and regulations, if there be any."

In *H. B. Webb*, 34 IBLA 362 (1978), the Board affirmed an appeal from the Arizona State Office of the Bureau of Land Management declaring mining claims null and void because appellant failed to record pursuant to the Arizona statute until more than three years after the land in question was withdrawn from mineral entry." This is an unusual case as it is very uncommon for the Bureau of Land Management to void a claim for failure to comply with state recordation law.

**State Recordation and Bad Faith Entry by Junior Locator**

In *Columbia Standard Corp. v. Ranchers Exploration & Development, Inc*., 468 F2d 547 (1972), the Court considered a case where the senior locator failed to file location notices with the county within the 90-day period of location as required by the state statute. Columbia Standard Corporation (Columbia), the junior locator, brought suit to enjoin Ranchers Exploration & Development, Inc., (Ranchers), the senior locator, from interfering with its mining operations. Ranchers had staked mining claims over a five-section area in August 1967 and posted and filed location notices; Ranchers also did discovery drilling. However, the affidavits of discovery work were not filed within the 90-day period required by the statute. From 1967 to 1970, Ranchers drilled about 70 deep drillholes and conducted radiometric testing on some of the claims; Ranchers also graded drill sites and prepared geologic maps.

Columbia entered the disputed land and staked 157 lode claims in January of 1972. Columbia was fully aware of all Ranchers claims and exploratory work but located the claims because of the late filing. The Court decided this case in favor of Ranchers on the basis that "Columbia's entry was not in good faith." *Id* at 551. The following excerpts from the case discuss the issue of good faith:

> Although none of the trial court's findings would constitute bad faith by Columbia standing alone, when they are considered cumulatively they constitute sufficient evidence on which the trial court could find bad faith. The finding of bad faith was not clearly erroneous.
>
> In order to enter on public land, the locator must make a good faith entry. *Union Oil Company of California v. Smith*, 249 US 337 (1919). ...Defects by the senior locator are ignored where the junior locator's entry was in bad faith. 1 *American Law of Mining*, sec. 5.67 (1971). There is an absence of good faith where the junior locator seeks possession solely on the basis of defects in the senior locator's claims. *Ranchers*

*Exploration and Development Co. v. Anaconda Company*, 248 F. Supp. 708 (D Utah 1965). ...While mere knowledge of a relocator that a locator claims superior rights does not constitute bad faith when the relocator enters, knowledge of a prior location places a duty upon the relocator to make inquiry to determine the extent of the adverse party's work performed in relation to exploration and development.

... Carlson, Columbia's geologist, knew about Rancher's claims to the disputed land. Therefore, Columbia was under a duty to make actual and visual inquiry and inspection of Ranchers' lode claims and any work performed on the land.

Columbia relied almost exclusively, then, on its examination of Ranchers' filings in the courthouse to conclude that Ranchers' locations and discoveries were defective and that the land was open to relocation. Bad faith is further evidenced by the fact that Columbia began drilling on its Win Claims 9 and 26 on which Ranchers had deep discovery holes. A thorough visual examination of those claims by Columbia would have disclosed Ranchers' previous drilling. 468 F2d at 549.

... In all actions to recover possession of land one must prevail on the strength of his own title (rights) and not on the weakness of his adversary's title (rights). *Kanab Uranium Corporation v. Consolidated Uranium Mines*, 227 F2d 434 (10th Cir 1955).

The evidence must be viewed in favor of the prior locator. ....

Columbia sought exclusive possession of the disputed land. It failed in its burden of proving that the land was open to location. Columbia also failed to prove that it entered the disputed land in good faith.

**Failure to Record**

In *MacDonald v. Best*, 186 F. Supp. 217 (1960), California District Court Judge Halbert held that the Mining Claims Rights Restoration Act of 1955 (30 US 621 *et seq*.) did not authorize forfeiture of mining claims because of failure of the claimant to file for record in the land office within one year after August 11, 1955, a copy of the location notice of the claim as required by the Act. In determining whether failure to record a claim under a recording statute would cause forfeiture, the Court stated:

There is no necessity of forfeiture of an unrecorded claim to effectuate the purposes of a recording statute.....

Unless the recording statute expressly negatives such construction, actual notice (or constructive notice by possession) is an adequate substitute for recordation.

... In *Last Chance Mining Co. v. Bunker Hill & S. Min. & Con. Co.*, 9 Cir., 150 F 579, a statute required notices of location to be filed within 15 days of location. One claim was located, and the notice recorded more than 15 days later. Another claimant, having actual

knowledge of the first claim, located a second claim and recorded it before the recordation of the first claim, but after the latter's location. It was held that the failure of the first locator to record within the time prescribed by statute did not work a forfeiture of the claim, there being no such penalty expressed in the terms of the statute.

In *Zerres v. Vanina*, 9 Cir., 134 F 6 10, *affirmed* 9 Cir. 150 F 564, a certain claim was made and the location notice posted upon the site of the claim. This first claim was not recorded until after a lapse of more than ninety days. More than ninety days after the posting of the first notice of location, a second claim, adverse to the first, was filed and properly recorded by a party, who had actual notice of the first claim. Only thereafter was the notice of location of the first claim recorded in the office of the county recorder. Notwithstanding the delay in recording the notice of location of the first claim, it was held that the first claim was not forfeited, but that it was in fact valid.

In *Sturtevant v. Vogel*, 9 Cir. 167 F 448, a Federal statute provided that notices of location "shall be filed for record within ninety days from the date of the discovery..." No sufficient notice of the first claim in that case was recorded, and as to a subsequent locator, who had no knowledge of the first location, it was held that "the case as it went to the jury stood precisely as ... if no notice whatever of the location had been recorded." As the Statute did not, in explicit terms, provide for a forfeiture, the Court held that the first claim was not forfeited.

It follows from what has been said above that plaintiff's claims in the instant case may not be forfeited, although any recordation of notice under the Act must now of necessity be tardy.

In *Bradshaw v. Miller*, 377 P2d 781, 14 Utah 2d 82 (1963), the Court held that recording a notice of location can serve only the purpose of notifying others of the facts of location. And if those facts are already known to would-be locators, neither failure to record nor recording of notice containing insufficient description affects rights initiated by a senior claimant.

**Monuments Control Over Notice**

If there is a discrepancy between the stakes or markers on the ground of a mining claim and the recorded location certificate, the claim as marked on the ground controls over the description in the location certificate. *Sturtevant v. Vogel*, 167 F 448, 452 (1909). In *Dye v. Duncan, Dieckman & Duncan Mining Co*., 164 F. Supp. 747 (1958), the Court considered a case where the Aplaintiff's entire block of 8 claims would be 400 feet north of the location notices." The court then held that "a variance of such magnitude would be sufficient to invalidate the notice for failure to properly identify the claim." *Id* at 758.

**United States Has Right to Require Compliance with State Law**

In *Hugh B. Fate*, 86 IBLA 215 (1985), the Board restated the well-established right of the United States to require mining claimants to comply with the law. The Board said at 224:

> The United States has a right to require mining claimants' compliance with State law which is applicable to claims on Federal lands. As held by the Court of Appeals for the Tenth Circuit, Asubstantial or colorable compliance with State location requirements has been enforced even in controversies between the (Federal) Government and private claimants. * * * State requirements have been held by us to apply in such controversies between the Government and mining claimants.@

**Recording Period under State Law**

Each state code specifies the time allowed after location or posting that a notice of location must be recorded:

| | |
|---|---|
| Alaska | 90 days |
| Arizona | 90 days |
| California | 90 days |
| Colorado | 3 months |
| Idaho | 90 days |
| Montana | 60 days |
| Nevada | 90 days |
| Wyoming | 60 days |
| New Mexico | 90 days |
| North Dakota | 60 days |
| Oregon | 60 days |
| South Dakota | 60 days |
| Utah | 30 days |
| Washington | 30 days (placer<br>90 days(lode) |

## CONFLICTING LOCATIONS

**Negative Versus Positive Evidence of Location**

In *Miehlich v. Tintic Standard Mining Co*., 211 P 686 (Utah 1922), the Court gives pertinent instruction on the weight to be given negative versus positive evidence of location:

> In our judgment the overwhelming weight of the evidence was that Greyhound No. 5 lode was staked or marked upon the ground in accordance with law. In fact there is no evidence to the contrary except the statement of witnesses for the plaintiffs that long afterwards they did not see the stakes, and that, owning to their familiarity with the locality, they would have seen them had such been there. Conceding their statements to be true, that is far from contravening the positive statement of the witness Westerdahl that

he staked the ground in the first instance, as required by law. That act, the staking or marking of the claim, having once been properly performed, completed a valid location of' the ground. 211 P at 690.

**Relocation Over Valid Existing Location**

Land under the possession of one who has a valid discovery and location is not subject to location by another until after abandonment or forfeiture. *Belk v. Meagher*, 104 US 279 (1881). However, if a claim is not located and recorded according to state law, the claim may be subject to location. *Zerres v. Vanina*, 150 F 564, 565 (1907).

Once a valid location is made, possessory title vests in the locator. Removal or obliteration of evidence of the location on the ground will not divest the original locator of his title. *Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co*., 125 F 389, 400, 408 (1903).

The courts have ruled consistently in numerous cases that a mining claim located over a valid existing location has no effect and is void. In *Belk v. Meagher*, 104 US 279, 284 (1881), the Supreme Court stated:

> Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he, cannot do until the discoverer has, in law, abandoned his claim and left the property open for another to take up. ...a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done. ...A location, to be effectual, must be good at the time it is made. ... Here Congress has said, in unmistakable language, that what has been once located under the law shall not be relocated until the first location has expired....

In *Gwillim v. Donnellan*, 115 US 45, 49, the Supreme Court also stated:

> A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as bar to the second.

Both of the above U.S. Supreme Court cases were reaffirmed in *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co*., 171 US 78, 79 (1898). In this case the Supreme Court said:

> The question presented in each of those cases was whether a second location is effectual to appropriate territory covered by a prior subsisting and valid location, and it was held it

is not. Of the correctness of those decisions there can be no doubt. A valid location appropriates the surface, and the rights given by such location cannot, so long as it remains in force, be disturbed by any acts of third parties. Whatever rights on or beneath the surface passed to the first locator can in no manner be diminished or affected by a subsequent location.

**Conflicting Location Lines**

If the locators of two claims overlap, the first claimant to make a discovery has the priority of right even though the discovery was made under the junior location. *Hall v. McKinnon*, 193 F 572, 577 (1911).

The location lines of a lode claim may be laid within, upon, or across the surface of patented lode claims (30 LD 120) or patented agricultural land for the purpose of claiming the free and unappropriated ground within such lines, so long as the lines are established openly and peaceably. *Hallatt and Hamburg Lodes*, 27 LD 105 (1898).

It may be necessary for the junior locator to lay out parallel end lines across the surface of the senior location in order to secure underground extralateral rights, not in conflict with the right of the senior locator. *Stenfield v. Espe*, 171 F 825, 827. If the owner of the older claim does not object, the junior location carries the same rights, both surface and extralateral as it would if all its lines were established on unappropriated ground. *Empire State - Idaho Mining & Development Co. v. Bunker Hill & S. Mining & Concentration Co.*, 131 F 591 (1904), *appeal dismissed* 200 US 613. Even though the portion of the mining claim containing the posted location notice lies on a pre-existing claim, the claim is still good on the portion not in conflict. *Upton v. Santa Rita Mining Co.*, 89 P 275 (1907).

**Discovery Must Be on Unappropriated Land**

To have a valid mining location, the place of discovery and discovery monument are located on unappropriated public domain. *Cram v. Church*, 340 P2d 1116 (1959). The fact that the corners of a mining claim are not placed on unappropriated land subject to location, does not render the location entirely void. The part of the claim that is within the marked boundaries and on unappropriated land is valid. *McElligott v. Krogh*, 90 P 823 (1907).

**Junior Locator Goes to Patent Before Senior Locator**

If a junior locator applies for patent and the senior locator does not file an adverse claim, it will be accepted that at the time the junior location was made the land was open to entry. However, a third locator may adverse and show that the junior location was void because the land was not open to entry. *Swanson v. Kettler*, 105 P 1059 (1910), *affirmed* 224 US 180.

If a junior locator goes to patent without protest from a senior claimant and the discovery of the senior claimant is within the surface boundaries of the junior location, the senior locator

loses his discovery. However, if the senior locator makes a new discovery within the boundaries of his senior location but outside the surface boundary of the junior location, the senior location is still valid for the claimed area outside the junior locators patent. *Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co*., 125 F 408, 415 (1903).

**Claims of Excess Size**

A mining claim is not invalidated because it is slightly larger than the law allows; however, the excess is void and must be excluded. *Waskey v. Hammer*, 223 US 85, 90 (1885). If a claim is unreasonably excessive in size, it is void. *Haws v. Victoria Copper Mining Co*., 160 US 303, 315, (1895). It was held in *Velasco v. Mallory*, 427 P2d 540, 5 Ariz App 406, that if a mining claim is excessive in size as a result of an honest mistake, the whole claim including the excess is segregated from the public domain so as to exempt it or any part of it from relocation.

**Prediscovery Rights**

If the locator of a mining claim allows a person to enter the claim and this person makes a discovery followed by a location not protested by the first locator, the second locator has the priority of right. *Crossman v. Pendery*, 8 F 693, 694 (1881). However, if the first locator had perfected his claim by a mineral discovery, the second location would be void. *Ranchers Exploration & Development Co. v. Anaconda Co*., 248 F. Supp. 708 (1965). In such situations, the courts are quite liberal in allowing discoveries made by the first locator. *Rummel v. Bailey*, 320 P2d 653 (1958). Title to a claim dates from the location date rather than the discovery date, where the discovery date preceded the location date.

**Amended Location**

An amended location may be filed only if the original location was valid and had a curable deficiency. *Sullivan v. Sharp*, 80 P 1054 (1905). Although a mining location may be amended without loss of any rights acquired under the original location, the amendment cannot be used to acquire rights already established by other locations made between the dates of the original and amended location. *Bunker Hill Co. v. Empire State Co*., 134 F 268 (1903). For example, a locator cannot amend a claim to cover additional ground that was acquired by an intervening locator.

**Right of Possession Determined By State Courts**

In *Perego v. Dodge*, 163 US 160,168 (1896), the United States Supreme Court held that "the question of the right of possession" must be determined by the state courts, however, these state courts have no jurisdiction in determining the rights of a claimant to the public lands. The Supreme Court stated:

> It must be remembered that it is "the question of the right of possession" which is to be determined by the courts, and that the United States is not a party to the proceedings. The

only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands as against the government may be determined by the courts against the latter.

Although a judgment by a state court is not binding on the Government, the Department of the Interior may properly accept and follow the judgment of a court of competent jurisdiction, determining the respective rights and interests between contending parties and interests.

In *Primus Resources L.C.*, 144 IBLA 364, 365 (1998), the Board concisely state the procedure for resolving the question of right of possession to claims between rival claimants:

> * * * The Department is without authority to determine the question of right of possession to claims as between rival mining claimants. The BLM=s policy is that it Awill not become the forum for the resolution of private party disputes between rival claimants.@ (BLM Manual at 3833.41B.) A suit filed in a court of competent jurisdiction is the proper venue for resolving such disputes. *Sandra Memmott* (*On Reconsideration*), 93 IBLA 113, 115 (1986); *IMCO Services*, 73 IBLA 374, 376 (1983), and cases cited. A U.S. Code section, 30 U.S.C. 30 (1994), provides a method by which a court of competent jurisdiction is to determine the right of possession between two or more mining claimants. This statute gives the court jurisdiction of suits when the parties are all mining claimants and when the land embraced in the claim is unpatented Government land.

**Senior Locator Has Advantage in Court**

The Nevada Supreme Court ruled in favor of the senior locator in a case where the claim was poorly monumented and the claim map was inaccurate and did not agree with the description in the location notice. *Kenney v. Greer*, 656 P2d 857 (Nev. 1983). This is just another typical example of how the courts will uphold the location of a senior locator acting in good faith despite the fact that compliance with state and Federal location requirements is minimal. Those junior locations or "claim jumpers" who wish to have the courts adjudicate the right of possession to a mining claim should be aware that the junior locator seldom prevails even though the claim is not monumented and the description of the claim in the location notice is erroneous.

**Valid Claim Segregates Against Mineral Or Nonmineral Entry**

In *Belk v. Meagher*, 104 U.S. 279 (1881) the Supreme Court held that a valid claim will segregate the land encompassed by the claim "from the acquisition of competing rights." *Scott Burnham*, 94 I.D. 429, 436 (1987); *Nancy M. Swallow*, 112 IBLA 321 (1990). Furthermore, a valid claim segregates even though no final certificate is in effect so the claim is not an entry of record. *Id.*

As stated in the *Swallow* case, "if the locator of a prior mining claim which is not an entry of record can carry the burden of proving the validity of his claim against a nonmineral entry of

record, his claim will be deemed to have segregated the land from entry by the nonmineral entryman." *Id*.

In *Nancy M. Swallow, supra,* the Board summarized the law concerning the segregative effect of a valid mining claim:

> * * * As the Court stated in *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 655 (1898):
>
> Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. Such segregation amounts to an appropriation of public land to private use so far as subsequent competing entries by others.

**Although Valid Mining Claim Segregates, A Junior Claim May Obtain Patent**

Although it is undisputable that a valid mining claim segregates the area it encompasses from the acquisition of competing rights; yet, under the mineral patenting procedures, it remains possible for a junior locator to obtain a patent if the senior does not adverse. *Scott Burnham*, 100 IBLA 94, 108 (1987).

**Claim Located Over Valid Existing Location**

The courts have ruled consistently in numerous cases that a mining claim located over a valid existing location has no effect and is void. *Belk v. Meagher*, 104 U.S. 279, 284 (1881); *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 78, 79 (1898).

**Claim without Discovery May Be Protected Under Pedis Possessio**

In *Union Oil Company of California v. Smith*, 249 U.S. 343, 353 (1919), the United States Supreme Court recognized that if a qualified person peaceably and in good faith enters vacant, unappropriated public domain for the purpose of discovering a valuable mineral under the mining laws -- while he is so searching, he may exclusively hold the place where he is working against those having no better right. However, claims without a discovery must be occupied on a continuous basis to be protected under *pedis possessio*. *Amax Exploration, Inc. v. Ross Mosher*, Civil R-85-162 BRT (March 2, 1987).

**Issuance of Final Certificate Segregates Land**

"With the issuance of a *Final Certificate of Mineral Entry*, the land encompassed by the mining claim is segregated from the location of other claims and may not be located by another.@ *Scott Burnham*, 94 I.D. 429, 437 (1987); *Scott Burnham*, 102 IBLA 363, 369 (1988).

**Mineral Entry Established When Final Certificate Issues**

AWhen BLM has completed its office adjudication of a mineral patent application, proof of posting and publication of notice of the patent application has been filed, the purchase price paid, and a receipt issued, a mineral entry is established, as documented by the *Mineral Entry Certificate.@ Scott Burnham*, 102 IBLA 3639 369 (1988).

**Withdrawal of Final Certificate**

It is well established that a mining claim segregates land from entry by others when a final certificate of mineral entry has been issued, *Scott Burnham*, 94 I.D. 429, 437 (1987); however, when the final certificate is withdrawn, it is possible to initiate adverse interest against those claims where the final certificate is no longer in effect. *Melvin Helit*, 110 IBLA 144, 149-150 (1989).

## LODE CLAIMS

**No Limit to Size of Vein**

There is no limit to the size of a mineral-bearing vein to make it subject to location. A vein may be wider than the maximum width of a lode mining claim (600 feet). *Carson City Gold Mining Co. v. North Star Mining Co.*, 73 F 597, 601 (1896), *affirmed* 83 F 658, *cert. denied* 171 US 687.

**Location Parallel to Course of Vein**

The locator is required to lay out the location parallel with the course of the lode or vein. *Argentine Mining Co. v. Terrible Mountain Mining Co.*, 122 US 478, 485 (1887). Federal regulations (43 CFR 3841.3-2) require that before locating a claim, the vein should be traced on the surface, or sufficient underground workings must be developed to discover the mineral-bearing vein or lode. When the general course of the vein is established, the boundaries of the claim can be marked properly.

**Shape and Dimensions of Lode Claims**

The mining law (R.S. 2320; Act of May 10, 1872; 17 Stat. 91; 30 USC 23), in addition to providing that "no location of a mining claim shall be made until discovery of the vein or lode within the limits of the claim located," gives the following requirements concerning the shape and dimensions of lode claims:

1. The claim "may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode."

2. "No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface."

3. No claim shall "be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface."

4. "The end lines of each claim shall be parallel to each other."

**Width of Lode Claim**

The width of a lode claim cannot exceed 300 feet in width on each side of the middle of the vein or lode, and any patent issued for an oversized claim is void for that portion exceeding 300 feet. *Richmond Mining Co. v. Rose*, 114 US 576 (1885). However, the width may be reduced by local regulations to any width not less than 25 feet on each side of the middle of the vein. *Lakin v. Dolly*, 53 F 333, 337 (1891), *affirmed* 54 F 46, *cert. denied* 154 US 507. Federal regulations (43 CFR 3841.4-1) state:

> ... the lateral extent of locations of veins or lodes made after said date shall in no case exceed 300 feet on each side of the middle of the vein at the surface, and that no such surface rights shall be limited by any mining regulations to less than 25 feet on each side of the middle of the vein at the surface, except where adverse rights existing on May 10, 1872, may render such limitation necessary.

**Vein May Deviate from the Center Line of Lode Claim**

According to 1986 published Secretarial Opinion, the "relationship between the actual course of the lode and the position of the mining claim's lateral boundaries and center line does not affect the validity of the claim. Original claim boundaries need not be adjusted, even where the lode materially deviates from the center line, so long as the claim has been located in good faith for mining purposes." *Id*. at 371. Also, "no portion of the claim shall be considered excessive where the statutory dimensions, 1500 feet by 600 feet, are not exceeded." *Id*. It had been held in the overruled *Alaska Empire Gold* case that the Department "has no power to issue a mineral patent to any surface ground exceeding 300 feet in width on each side of the middle of the vein or lode." The only requirement now is that a discovery is physically exposed somewhere within the limits of the claim. *Apex and Extralateral Rights Raised by the Stillwater Mineral Patent*, M-36955, 93 I.D. 369 at 378 (April 18, 1986).

**Length of Lode Claim**

Federal law (30 USC 23) and regulations (43 CFR 3841.4-1) both say that under no circumstances can a location of a vein or lode made after May 10, 1872, exceed 1500 feet along

the course of the vein.

**Oversized Lode Claims**

AIf a claim marked in good faith exceeds 1500 feet in length or 600 feet in width, the location is not void in its entirety, but is void as to the excess." *Melvin N. Barry*, 97 IBLA 359, 362 (1987).

**Lode Claim May Be Located In Any Shape**

Even when the shape of a claim is not affected by surrounding claims, it may be located in any shape -- even a triangle. *Belligerent and Other Lode Claims*, 35 L.D. 22 (1906), *review denied*, 36 L.D. 7 (1907); *Jack Pat Lode Mining Claim*, 34 L.D. 470 (1890).

**Boundary Lines of Lode Claim May Extend onto Withdrawn or Patented Land**

In *Outline Oil Corp*., 95 IBLA 255, 257 (1987), the Board described the situation under which the boundary lines of a lode claim may be extended onto withdrawn or private land and the rights that may or may not be acquired:

> .... the side and end lines of a lode claim may extend onto withdrawn land for the purpose of defining extralateral rights to veins or lodes which apex within the claim, although the locator does not thereby acquire rights to use the surface of the withdrawn land and may or may not acquire rights to the minerals underneath. *Nancy Lee Mines, Inc*., 89 IBLA 257 (1985); *Donald R. Rowley*, 89 IBLA 248 (1985).

**Lode Claims Must Be Entirely Inside Withdrawn Area to Be Null and Void**

In *United States Borax & Chemical Corp*., 98 IBLA 259 (1987), the BLM issued a decision declaring three lode claims to be null and void *ab initio* because they were described on the location notice as located within section 16, a section acquired by the State of California prior to the location date of the claims. In order for such claims to be null and void *ab initio*, the Board held that the position of the claims as stated in the location notices and portrayed by the map must be sufficiently precise as to be conclusive that the claims lie entirely outside section 16. The Board reversed the BLM decision and said that a field investigation could ascertain the relation of the claims to section 16.

**Lode Claims Partially Located on Nonfederal Minerals**

A[I]t is well established that a lode mining claim partially located on land in which the United States does not own the mineral estate affords the claimant no surface or mineral rights under the general mining laws to the extent that it encompasses such land. *Citations Omitted*. Nonetheless, if valid, such a claim will afford the claimant extralateral rights beyond that land to

veins or lodes that apex within the claim.@ *Kaiser Steel Resources, Inc*., 135 IBLA 340, 345 (1996).

**Lode Claim Separated into Two Noncontiguous Tracts**

An unpatented lode claim separated into two noncontiguous tracts by a patented lode claim may be valid. *Patten Extension Lode,* 15 L.D. 133 (1892); *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co*., 171 U.S. 55 (1898). Furthermore, a lode claim separated into two noncontiguous tracts by a patented placer claim may be patented as a single claim because there is no presumption that the patented claim does not contain a mineral vein. *Mabel Lode,* 26 L.D. 676 (1898); *Raymond E. Johnson*, 57 L.D. 63 (1939).

A lode claim may be separated into two noncontiguous parcels by an intervening patented mill site or other nonmineral patent, "provided the lode or vein upon which the location is based has been discovered on both parts of the lode." *Raymond E. Johnson*, 57 I.D. 63, 65 (1939). Both parcels must have the exposed vein because it can "not be presumed that the vein discovered on part of the lode passed through the mill site." *Id*.

**Boundary Lines Must Not Be Irregular**

The vein or lode lines of a location are not to be established in an irregular and zigzag manner for the purpose of controlling the length of the exterior lines of the location to suit the convenience of the locator. *Belligerent and Other Lode Mining Claims*, 35 LD 22 (1906). For example, one may not locate a mining claim as an octagon or a curved figure. *Iron Silver Mining Co. v. Elgin Mining Co*., 118 US 196 (1886). End lines should not be broken or curved, but must be laid out as straight lines. *Walrath v. Champion Mining Co*., 171 US 293 (1898).

**Subparallel Lines Do Not Invalidate Claim**

Failure to locate a mining claim with parallel lines does not invalidate the location; subparallel lines are considered sufficient. *Grant v. Pilgrim*, 75 F2d 562 (1938). However, a lode claim should be located in the shape of a parallelogram, with end lines approximately parallel crossing the strike at right angles and the side lines approximately parallel to the strike of the vein and equidistant from the center of the lode. *Meydenbauer v. Stevens*, 78 F 787 (1897).

**Parallel End Lines Required for Extralateral Rights**

End lines must be parallel in order to acquire underground extralateral rights. Extensions of the parallel end lines serve to bound the underground portion of the vein owned by the claimant. *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co*., 171 US 55 (1898). The parallel end lines then give the right to follow the downward dip of the vein outside of the side lines of the location. *Id*.

**If Side Lines are Perpendicular to Vein**

If the claim is laid out along the vein so the side lines are perpendicular to the vein for the purpose of determining extralateral rights, the end lines are treated as side lines and the side lines are treated as end lines. *Flagstaff Silver Mining Co. v. Tarbet*, 98 US 463 (1879).

## PLACER CLAIMS

### Placer Claims Defined

The Federal law (30 USC 35; RS 2329; Act of March 3, 1891; 26 Stat. 1097) defines placer claims as "including all forms of deposit, excepting veins of quartz, or other rock in place." In other words every deposit, not located with a lode claim, should be appropriated by a placer location. Because many mineral deposits do not fit well in either category, the courts have defined and distinguished lode and placer deposits in numerous cases.

### Maximum Claim Size

No location of a placer claim shall include more than 20 acres for each individual claimant. However, an association of two locators may locate 40 acres; three may locate 60 acres, and so on. The maximum area that may be embraced by a single placer claim is 160 acres and such a claim must be located by an association of at least eight persons. A corporation counts as an individual claimant and is limited to 20-acre claims.

### Shape of Placer Claims

The mining laws contemplate that, except where impracticable, placer locations must be made in conformity with the system of public-land surveys. They must be rectangular inform and of dimensions corresponding to appropriate legal subdivisions, and with east-and-west and north-and-south boundary lines. *Laughing Water Placer*, 34 LD 56 (1905).

### Placer Claims Must Conform to United States Surveys

All placer mining claims must conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, even if the claims are located on unsurveyed lands. If the claims conform to such legal subdivisions, no further survey or plat is required for patent. However, on unsurveyed land and in certain situations, placer claims may be located by metes and bounds. 30 USC 35; RS 2329; 26 Stat. 1097.

In *U.S. v. Haskins*, 59 IBLA 1, 95, 96 (1981), the Board discussed the early history of conformity as follows:

> As early as the decision in *William Rablin*, 2 LD 764 (1884), the Department recognized that conformity was a question of reasonableness and, therein, expressly recognized that a placer claim along the bed of a river, surrounded by precipitous banks, which stretched 12,000 feet down the riverbed, embracing only a small quantity of surface ground along

the shore, was permissible as a location made in exceptional circumstances. This approach was reaffirmed in *Pearsall and Freeman*, 6 LD 227 (1887).

Subsequently, however, a vast array of differing shapes and forms were entered as placer claims and approved for patent. As a result of this increasing practice, irregular swaths were being carved out of the public domain, thereby making management of such lands as were not patented increasingly difficult. As a result of these practices, the question of conformity was reexamined in a series of cases beginning with the *Miller Placer Claim*, 30 LD 225 (1900), and the *Wood Placer* Mining Co., 32 LD 198 (1903), finally culminating in the *Snow Flake Fraction Placer*, 37 LD 250 (1908).

*Snow Flake Fraction Placer* was shortly thereafter cited with approval by the Ninth Circuit Court of Appeals in *Hanson v. Craig*, 170 F 62 (1909). The court stated at 65:

> Applying the foregoing decisions to the present case, it is impossible to hold upon the record here that the defendants in error had such a possession of the strip of public land 660 feet wide and 2 miles long as precluded any other good-faith prospector from peaceably going within those boundaries and himself making a discovery and location.
>
> It is pertinent to add that the Land Department of the government has recently decided that it would not recognize any such shoestring location as conforming to the provisions of the United States statutes upon the subject. *See Snow Flake Fraction Placer*, 37 Land Dec. Dep. Int. 250 (decided November, 1908), where it was said:
>
> > It is the policy of the government to have entries, whether they be of agricultural or mineral lands, in compact form. Congress has repeatedly announced this principle, and the department has always and does now insist upon it. The public domain must not be cut into long and narrow strips. No shoestring claims should ever receive the sanction of this department. *See* 43 CFR 3842.1-5 (d) wherein the same policy is stated.

**Exceptions to the Rule of Conformity**

Conformity to the public-land surveys and the rectangular subdivisions is not required if such compliance would necessitate running the boundaries of the claim over other prior locations or where the claims are surrounded by prior locations. 43 CFR 3842.1-5(b). The Federal regulations (43 CFR 3842.1-5(c)) also provide that "where a placer location by one or two persons can be entirely included within a square 40-acre tract, by three or four persons within two square 40-acre tracts placed end to end, by five or six persons within three square 40-acre tracts, such locations will be regarded as within the requirements where strict conformity is impracticable." In *U.S. v. Henrikson*, A-28763 (June 4, 1963), 70 ID 212, the Secretary held that a 10-acre placer claim consisting of a string of four contiguous 2 2-acre tracts straddling three regular 10-acre subdivisions is in conformity with the public land surveys.

**Gulch Placers**

A "gulch" placer, which can not, by reason of its environment, practicably be conformed to the system of public-land surveys, may, upon sufficient and satisfactory showing, be patented in a shape approximating the public survey system as nearly as the conditions will reasonably permit. *Wood Placer Mining Co*., 32 LD 363 (1903). Gulch placers may be allowed with a mineral deposit confined within a narrow strip of land in the bed and on the banks of a small stream in a canyon flanked by abrupt walls or rocky slopes on each side, containing no mineral, agricultural, or timber value (53 LD 481). In *U.S. v. Haskins*, 59 IBLA 1, 97 (1981), the Board discussed gulch placers as follows:

> ...Both the Department and the Courts have long recognized that situations occasionally occur wherein a placer claim is located along a ravine, canyon, or gulch, surrounded by precipitous and, in many cases, impassable canyon walls and cliffs, which themselves contain no mineral values, and that in these situations, unusual modes of location may be necessary. Thus, in *William F. Carr*, 53 ID 431 (1931), the Department held proper a placer location over a mile in length which was located in a narrow gulch. ... The critical factor in validating such locations is the inaccessibility of and lack of mineral values in the confining banks, which, as a practical matter, prevent the claimant from embracing these areas within the location.

**Gulch Placer Claims and Conformity with the Rectangular Survey System**

In *Melvin Helit* 146 IBLA 362 (1998), The Board held that two claims Awhich variously run between 49,000 feet and 67,100 feet in length,@ * * * @are so contrary to the statutory mandate of 30 U.S.C. 35 (1994) that no opportunity need be provided to conform the locations to survey. They are properly declared null and void as a matter of law.@ *Id.* at 369. The Board further explained at 368 why Helit=s locations are not gulch placers and therefore not entitled to exemption from conformance with the rectangular system of survey:

> Helit=s assertion that because these claims are Agulch@ placers they are exempted from the location requirements of 30 U.S.C. 35 (1994) is wrong both facually and legally. Factually, these are not gulch placers. The pictures provided in the Voss Report clearly show that the claims do not consist of a narrow strip of land in the bed of a small stream Asurrounded by precipitous and, in many cases, impassable canyon walls and cliffs.@ *Citation omitted*. On the contrary, the areas adjacent to the North Yuba River are clearly heavily forested and are not precipitous cliffs.
>
> As a legal matter, we note that the Department=s decision in *William F. Carr*, 53 I.D. 431 (1931), on which Helit claims to rely, expressly noted that, in that case, the adjacent lands excluded from the mineral location contained Ano mineral, agricultural, or *timber* values in the adjoining walls was a critical factor in allowing the mineral claimant not to conform his location to the public land survey system because the patenting of land in irregular strips would make disposal of the adjacent areas remaining in Federal ownership difficult if not impossible. Thus, the existence of any values in the adjacent areas would have resulted in the requirement that the mineral entry be made in conformity

to the system of public land surveys. Helit has attempted to create precisely the type of Ashoestring@ claim consistently rejected both by the Department and the Federal courts. *See generally Hanson v. Craig*, 170 F. 62, 65 (9th Cir. 1909); *Snow Flake Fraction Placer*, 37 L.D. 250, 257 (1908).

While it is true that, as a general rule, claimants whose locations either fail to conform to the rectangular system of survey or contain excess acreage are afforded an opportunity to cure these defects prior to a declaration of invalidity (*see, e.g., Fred B. Ortman*, 52 L.D. 467, 471 (1928) (nonconformity to survey); *Samuel P. Barr*, Sr., 65 IBLA 167 (1982) (excess acreage)), this rule is not without exceptions. Thus, as we noted in *Melvin Helit, supra*, the right to adjust a claim to delete excess acreage is only available where the inclusion of excess acreage in the first instance was inadvertent. *Citations omitted*. Herein, as in the previous *Helit* case, it is clear that the inclusion of excess acreage was intentional.

Moreover, in both *Wood Placer Mining Co.*, 32 L.D. 198 (1903), and *Miller Placer Claim*, 30 L.D. 225 (1900), the Department canceled mineral entries because of a failure to conform to the system of public land surveys without affording the claimants an opportunity to amend their claims because the very extent of their nonconformity made it effectively impossible to fairly conform the claim. In *Wood Placer Mining Co., supra*, the Acting Secretary rejected two claims which were each 9,000 feet in length and approximately 500 feet in width, generally tracking the bed of Hughes Creek, noting that A[t]he locations here in question (comprising a long and narrow strip, throughout its length following and embracing Hughes creek, in the manner shown on the official plat) do not even approach conformity with the *system* of public-land surveys.@ *Id.* at 200. The same could clearly be said of the instant claims, which variously run between 49,000 feet and 67,100 feet in length.

Again, in *Melvin Helit*, 147 IBLA 45, 49-50 (1998) the Board explains why Helit=s claim is invalid as a matter of law:

* * * The relevant statute, 30 U.S.C. 35 (1994), expressly requires that placer claims Ashall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys.@ As described in the location notice, this claim has a width of 100 feet and extends more than 12 miles in length. The description of the instant claim, on its face, establishes a per se violation of the statutory requirement.

Helit=s attempt to justify the location as some sort of Agulch@ placer may be summarily rejected. While the Department has, on occasion, allowed some variation from complete conformity with the rectangular system of surveys where the claim has been located in narrow and confining Agulches,@ it has never, at least not since the decision of the department in *Miller Placer Claim*, 30 L.D. 225 (1900), countenanced location of claims in the form exemplified by the location of the K-ABLE #5-6-7-8-9-10-11-12. Indeed, in *Snow Flake Fraction Placer*, 37 L.D. 250 (1908), the Department went so far

> as to expressly repudiate a previous decision which had allowed the location of a single placer claim extending 12,000 feet in length. *Id.* at 258. Given the fact that the instant location is more than 67,000 feet long, the location is properly nullified on this basis along, and we so hold that it is null and void on this basis as well. See *Melvin Helit, supra*, at 368-69.

**Lack of Conformity is a Question of Fact**

According to Interior Department regulations (43 CFR 3842.1-5(d)), "whether a placer location conforms reasonably with the legal subdivisions of the public survey is a question of fact to be determined in each case." Therefore in the event of alleged unconformity in connection with a patent application, a hearing would be required before the application could be rejected. However, the most appropriate way to handle such a problem is discussed in *U.S. v. Haskins*, 59 IBLA 1, 99 (1981) wherein the Board said:

> It does not necessarily follow that failure to comply with the conformity requirement works to invalidate the claim. Rather, invocation of the rule has normally resulted in requiring a claimant to amend the claim so that it does conform as nearly as practicable with the rectangular system of survey.

**One Discovery for Each Placer Location**

A single discovery of a valuable mineral deposit is sufficient to validate a placer location, whether it be of 20 acres by an individual, or of 160 acres or less by an association of persons. 43 CFR 3842.1-1. However, each 10-acre subdivision within the claim must be mineral in character. *U.S. v. McCall*, 7 IBLA 21 (1972), 79 ID 437.

**Discovery Required Before Transfer of Association Placer Claim**

Although it is permissible for an individual to acquire an association placer claim over 20 acres in size, it is essential that there were sufficient individuals to make the original location, and furthermore, that a discovery was made within the limits of the claim prior to the date of transfer. In *U.S. v. Harenburg*, 9 IBLA 86 (1973), the Board said:

> ... If a discovery had been effected prior to the conveyance, the entire 160-acre claim would have been valid and would have passed to the contestees. However, if no discovery then existed, the two Harenburgs could hold only a minimum of 40 acres in one association placer claim. A transferee of an association placer who makes a discovery after the transfer has a right to patent only 20 acres. *United States ex rel., United States Borax Company v. Ickes*, 98 F2d 271 (DC Cir 1938), *cert. denied*, 305 US 619 (1938).

**Acquisition of Association Placer Claims by Corporations**

Because a corporation is an individual, any association placer claim, acquired by a corporation must be supported by a discovery prior to the date of acquisition. In *Brittain*

*Contractors, Inc*., 37 IBLA 233, 239 (1978), the Board said:

> Although appellant does not want to recognize the basic deficiency in its application it has not shown that it is entitled to hold claims in excess of 20 acres each. The law clearly provides that no placer location shall include more than 20 acres for each individual claimant and may not exceed 160 acres for an association of up to eight individual claimants. 30 U.S. 35, 36 (1976); 43 CFR 3842.1-2. Within the meaning of 30 U.S.C. 35, it has been determined that a corporation is an "individual claimant," and therefore may not locate placer claims of more than 20 acres each. *United States v. Toole*, 224 F. Supp. 440 (D Mont 1963). It necessarily follows that if appellant wishes to claim ownership of claims in excess of 20 acres each, it must demonstrate that the various groups of associated locators made a qualifying discovery of a valuable deposit of mineral on each claim prior to the conveyance of the claim to a single individual, as the conveyance of an association placer claim which is not supported by a discovery is, in essence, the conveyance of a nullity. Further, the individual grantee of such an association placer claim who thereafter makes a discovery on that claim is entitled to claim and patent only the 20 acres on which the discovery is sited.

**Building Stone Placer Act**

Locatable deposits of building stone may be located with placer-type claims as authorized by the Act of August 4,1892 (27 Stat. 348; 30 USC 161). The law requires that building stone placers may be located only on lands "that are chiefly valuable for building stone." The Act of July 23, 1955 (69 Stat. 367; 30 USC 611), withdrew common varieties of building stone from entry under the mining laws.

**Placer Deposits Defined**

In *United States v. Waters et al.*, 146 IBLA 172, 182 (1998), the Board said A[t]he term >placer desposit= has been defined as: >A mass of gravel, sand, or similar material resulting from the crubling and erosion of solid rocks and containing particles or nuggets of gold, platinum, tin, or other valuable minerals, that have been derived from rocks or veins.@ U.S. Department of the Interior, Bureau of Mines, *A Dictionary of Mining, Mineral, and Related Terms* 829 (1968).=@

**Building Stone Must Have a Placer Location**

In *United States v. Henri (On Judicial Remand*), 104 IBLA 93, 100 (1988), the Board held that a Amining claim for building stone is locatable only under the placer mining laws. 30 U.S.C. 161 (1982); *United States v. Haskins*, 88 I.D. 925, 946 (1981), *aff=d Haskins v. Clark*, No. CV-82-2112-CBM (C.D. Cal. Oct. 30, 1984).

**Saline and Petroleum Placers**

The Saline Placer Act of January 31, 1901 (31 Stat. 745; 30 USC 162), and the Act of February 11, 1897 (29 Stat. 526), authorized saline deposits and lands chiefly valuable for petroleum be subject to location under the mining laws. These two acts were superseded by the Mineral Leasing Act of February 25, 1920 (41 Stat. 437).

**Lands Described by Placer Claims Must Be Contiguous**

The Mining Law, 30 U.S.C. ' 36 (1988), states the following regarding association placer claims:

> Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having *contiguous* claims of any size, although such claims may be less than ten acres each, may make joint entry thereof, but no location of a placer claim, made after the 9th day of July, 1870, shall exceed one hundred and sixty acres for any person or association of persons, which locations shall conform to the United States surveys. [Emphasis added.]

It is well established that lands covered by a single placer claim must be contiguous; two separate tracts that corner are not contiguous and cannot be included in a single location. *W. G. Singleton*, 75 IBLA 168 (1983); *Stenfjeld v. Espe*, 171 F. 825 (9th Cir. 1909); 30 USC 36 (1976). In the event that a claimant has a location consisting of two separate tracts which corner, he can select one of the two tracts to maintain under the original location. The other tract may be covered by a new location providing the land is available for a new location. *Tomera Placer Claim*, 33 LD 560, 561 (1905); *W.G. Singleton, supra*.

In *Robert Collins*, 129 IBLA 341, 344 (1994), the Board held that lands embraced within an association placer claim must be contiguous. Where a claimant has separate tracts that are not contiguous, the claimant has the opportunity to select which tract will be preserved under the original claim.

**Procedure to Correct Noncontiguous Placer Claim**

AThe statute, 30 U.S.C. 36 (1994), provides in relevant part that A[t]wo or more persons, or associations of persons, having *contiguous* claims of any size * * * may make joint entry thereof.@ (Emphasis supplied.) Both the Federal courts and the Department have long held that, pursuant to this provision, a single placer location may not embrace noncontiguous parcels, and any placer location embracing noncontiguous parcels is a nullity with respect to the noncontiguous lands. *See, e.g., Stenfjeld v. Espe*, 171 F. 825 (9th Cir. 1909); *Raymond A. Naylor*, 136 IBLA 153 (1996); *James Aubert*, 130 IBLA 50 (1994); *Tomera Placer Claim*, 33 L.D. 560 (1905).@ Melvin Helit, 147 IBLA 45, 48 (1998).

When a claim improperly contains noncontiguous parcels, Awhen the BLM is apprised of such a situation, the correct procedure is to notify the claimant of the problem and offer the claimant the opportunity to correctly identify that part of the claim which contains the discovery

point and, should the claimant so desire and the land remain open to location, to relocate, as separate claims, the remaining noncontiguous parcels.@ Where the claimant does not appeal the determination or redescribe the claim in conformity with the statute, it is proper to declare the claim null and void in its entirety. *Id.* At 49.

**Contiguity of Claims Required for Both Association and Individual Claimants**

In *Raymond A. Naylor*, 136 IBLA 153, 159 (1996) the Board points out that although the statute (30 U.S.C. 36 (1994)) refers to association claims, the contiguity rule also applies to individual claims:

> While it is true that the language of this statute is directed towards requiring contiguity of claims for the purpose of making joint entry as an association placer, it does not follow that this somehow justifies noncontiguous claims so long as they are only made by an individual entryman. On the contrary, this section clearly presupposes that individual claims must, themselves, consist of contiguous lands and merely seeks to make it clear that only contiguous claims (each of which contain contiguous lands) can be consolidated in a single association placer claim. Were this not the case, 30 U.S.C. 36 (1994) would make no sense since it would permit multiple claims embracing noncontiguous parcels to be joined in a single association placer claim so long as part of each claim was contiguous to some part of each other claim. Such has never been the understanding of this provision.
>
> Thus, in *Tomera Placer Claim*, 33 L.D. 560, 561 (1905), Secretary Hitchcock set forth the rationale for the requirement of contiguity. The Tomera placer was an association claim of 120 acres located in a long, narrow shape whose appearance the Secretary likened to a series of ascending steps, some of which shared only a common corner. Secretary Hitchcock noted that section 2320 of the Revised Statutes, 30 U.S.C. 23 (1994), provides that Ano location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located@ and that this provision was made applicable to placer claims by section 2329, 30 U.S.C. 35 (1994). The Secretary continued:
>
> > The limits of a mining claim are defined by its exterior boundary lines. * * * But one discovery of mineral is required to support a placer location * * * ; and since such discovery is confined by the statute to the Alimits of the claim@--clearly contemplating what may be embraced within one set of boundary lines--*it is evident that a claim may not legally be taken in such form as to make necessary two or more sets of boundary lines, defining separate limits*. [*Emphasis added*.]
>
> Addressing the ascending-step form of the Tomera claim, Secretary Hitchcock continued:
>
> > There is no provision of the mining laws authorizing a locator, by virtue of

> a discovery of mineral within the limits of one parcel of ground, to embrace in his location another and entirely different parcel, lying wholly without such limits and having separate and distinct boundaries, merely because the two parcels corner with each other. Tracts so situated are in fact, and in the administration of the mining laws must be considered and treated as constituting, separate and distinct parcels of ground.

The rationale set forth above for a claim shaped like the Tomera placer applies a fortiori to a claim, like Naylor=s that is bisected by a project right-of-way since the parcels created by the bifurcation do not even corner, much less abut each other.

**Oversized Placer Claims**

As a general rule, an oversized placer mining claim is not completely void; only the excess portion is void. *Zimmerman v. Funchion*, 161 F 859, 860 (CCA Alaska 1908). The owner of the excess claim is given a reasonable period of time to select that portion of the claim he is entitled to retain. Any person who makes a location over any part of the oversized claim is a trespasser and his location is void. *Jones v. Wild Goose Mining Co*., 177 F 95 (CCA Alaska 1910). In *Ventura Coast Oil Company*, 42 LD 453 (1913), the Secretary of the Interior established the Arule of approximation" for placer claim as had been the earlier practice to entries under the homestead laws. The "rule of approximation" concerns the situation where a claimant wishes to patent a slightly oversized placer claim on lands that are surveyed. This case overruled *Chicago Placer Mining Claim*, 34 LD 9.

In *Melvin Helit*, 144 IBLA 230 (1998), the appellant=s mining claims identified lands totalling approximately 16,290 acres for one claim and 27 ,520 acres for another. On two separate occasions the BLM wrote to the appellant requesting a description of the lands prior to rejection of the claims. However, the appellant failed to comply with the request and the claims were rejected. The Board affirmed the BLM decision because the acreage of the claims was Amany times in excess of the statutory limit@ and the appellant failed to describe 160 acres located within the claims. *Id.* at 233. The Board said at 233-34:

> We recognize that the *inadvertent* inclusion in a placer mining location of slightly more than 160 acres when initially located does not, itself, invalidate the claim. Thus, the Aunintentional inclusion of a trifle more than twenty acres in the [placer mining claim] as originally located was an irregularity which did not vitiate the location, but merely made it necessary that the excess be excluded when it became known.@ *Waskey v. Hammer*, 233 U.S. 85, 90 (1912). Similarly, it has been held that excess acreage (1.7 acres) inadvertently and in good faith described in the boundaries of placer claim does not render the entire claim void, but rather the claim was void only as to the excess when the locators were not given notice of the excess acreage and an opportunity to redraw the boundaries so as to comply with the law. *Citation omitted*.

**State Location Requirements for Placer Claims**

In *Roberts v. Morton*, 549 F2d 158, 162 (1977), the court considered a case where numerous placer mining claims, located by legal subdivision, were not monumented or posted as required by State law. In upholding the state location requirements, the court held:

> State requirements have been held by us to apply in such controversies between the Government and mining claimants. Those requirements included the marking of surface boundaries at each angle of the claim. While at one point Zweifel asserted he did this, he later testified that he had not posted the four corners of each claim. We are satisfied that the record as a whole amply sustains the findings that the claims were not properly located.

**Federal Law Does Not Require Monumentation If Located by Legal Subdivision**

If placer locations, are made by legal subdivisions in conformity to the public land surveys according to 30 U.S.C. 35 (1988), Ait has been held that, for Federal purposes, there is no need to monument the claim corners. *See, e.g. Hagerman v. Thompson*, 235 P.2d 750, 757 (Wyo. 1951).@ *United States v. Webb*, 132 IBLA 152, 174 (1995).

If a placer claim is located on surveyed lands according to legal subdivisions, there is no necessity to stake out the location and mark the boundaries unless the state statute requires it. *Kern Oil Co. v. Crawford*, 76 P 1111, 143 Cal 298 (1903).

**Placer Claim That May Extend Over Withdrawn Land**

In *Marvin Allen*, 133 IBLA 94, 95-96 (1995), the Board addressed the situation where an imprecisely described placer claim may extend onto lands withdrawn from mineral entry. The BLM should not declare the claim or a portion of the claim null and void unless it is certain of the boundaries but rather notify the claimant that any portion of the claim on a withdrawal is void. The Board said at 95-96:

> While it does appear that the Coffee Creek corridor may be large enough in the east half of sec. 30 to accommodate the three 20-acre claims located by Allen, the maps provided by BLM and Allen do not establish measurements precise enough to permit a definitive statement one way or another. That being the case, the BLM decision must be limited to a finding that any part of the three claims extending onto land withdrawn from mineral entry is void; as so modified, it is affirmed. If, as Allen contends, there is no part of any of his claims that extends into the area withdrawn from mineral entry, then none of the claims will be affected by the decision as modified. Since the record does not presently provide a sufficient factual foundation to establish the exact boundaries of any of the claims in relation to the withdrawn area, a more precise finding concerning claim validity must await better measurement of the claims, should either BLM or Allen desire it. In the meantime, Allen is on notice that he can obtain no mineral rights in the Trinity Alps Wilderness by his claims.

**Placer Rights Cannot Arise from Holding and Working Lode Claims under Section 38**

All mining claims based on 30 U.S.C. 38 (1988) were required to be recorded with BLM as required by Section 314 of FLPMA, 43 U.S.C. 1744 (1988). *Hiram Webb*, 105 IBLA 290, 305, 95 I.D. 242, 251(1988), *aff=d sub nom. Webb v. Lujan*, 960 F.2d 89 (9th Cir. 1992). In *United States v. Webb*, 132 IBLA 152, 178 (1995) the claimant had timely recorded lode claims but not placer claims with the BLM. Placer rights do not inure to lode locations through 30 U.S.C. 38 (1988), but rather placer rights rising from holding and working under 30 U.S.C. 38 (1988) can only be asserted with a placer claim. *Hiram Webb, supra* at 303-305, 95 I.D. at 250-51.

**No Limit to Number of Contiguous Claims Included in a Patent Application**

A patent is not restricted by the limitation of an association placer claim to 160 acres. A patent may embrace several contiguous locations including more than 160 acres. *Tucker v.* Masser, 113 US 203 (1885). In *St. Louis Smelting and Refining Co*., 104 US 636 (1882), the United States Supreme Court gave the logic for this as follows:

> The last position of the court below, that the owner of contiguous locations who seeks a patent must present a separate application for each and obtain a separate survey and prove that upon each the required work has been performed, is as untenable as the rulings already considered. The object in allowing patents is, to vest the fee in the miner and thus encourage the construction of permanent works for the development of the mineral resources of the country. Requiring a separate application for each location, with a separate survey and notice, where several adjoining each other are held by the same individual, would confer no benefit beyond that accruing to the land officers from an increase of their fees. The public would derive no advantage from it, and the owner would be subjected to onerous and often ruinous burdens.

**Dummy Locators**

Ever since 1870 when the mining law first authorized association placers, locators have used the names of employees or friends to obtain more land than they are entitled to possess. This is particularly attractive because the law provides for eight locators to appropriate up to 160 acres in a single claim. Regardless of whether the claim is 20 acres or 160 acres, one discovery is required, $100 worth of labor is required each year and one set of location and recordation filings are required. For over 100 years the courts have dealt with the issue of dummy locators, generally only hearing the most blatant or obvious cases. Such cases are normally exposed during examination of title documents as required by the mineral patent process. It is quite likely that most of such cases go undetected because of the lack of record information concerning the relationships among the individual parties. In *Cook v. Klonos*, 164 F 529, 538 (9th Cir 1908), the court said:

> The question here is, not whether an individual can purchase mining claims after they have been located and hold them in his own name, but whether an individual can, by the use of the names of his friends, relatives, or employees as dummies, locate for his own

benefit a greater area of mining ground than that allowed by law.

> The mineral land laws of the United States are extremely liberal in the requirements under which possessory rights may be acquired. The few restrictions imposed are only intended to prevent the primary location and accumulation of large tracts of land by a few persons, and to encourage the exploration of the mineral resources of the public land by actual bona fide locators. The scheme of using the names of dummy locators in making the location of a mining claim for the purpose of securing a concealed interest in such claim appears to be contrary to the purpose of the statute; but when this scheme is used to secure an interest in a claim for a single individual, not only concealed but in excess of the limit of 20 acres, it is plainly in violation of the letter of the law, and when, as in this case, all the locators had knowledge of the concealed interest and were parties to the transaction, it renders the location void.

In *Nome & Sinook Co. v. Snyder*, 187 F 385 (9th Cir 1911) like *Cook v. Klonos, supra*, there was an agreement that one of the locators was to receive more than his proportionate share of the association claim. In *Nome & Sinook Co. v. Snyder*, the Court discussed the effect of such a dummy location:

> Any scheme or device entered into whereby one individual is to acquire more than that amount or proportion in area constitutes a fraud upon the law, and consequently a fraud upon the government, from which the title is to be acquired, and any location made in pursuance of such a scheme or device is without legal support and void.

In *U.S. v. Brookshire Oil Co*., 242 F 718 (DCSD Cal 1917), the Court stated at 721:

> It is true there is no limitation as to the number of mining claims an individual or association of individuals may locate, but it is provided that no claim shall exceed 20 acres for each individual or 160 acres for any association. This is a direct and positive limitation of the amount of mining ground any one claimant may appropriate, individually or as a member of an association in any one claim, and he cannot evade the law by the use of the names of his friends, relatives, or employees. Any device whereby one person is to acquire more than 20, or an association more than 160, acres in area, by one discovery, constitutes a fraud upon the government and is without legal support and void.

In *Big Horn Limestone Co*., 46 IBLA 99, 100 (1980) the Board considered a case where the Montana State Office of the BLM learned that four of the original locators of an association placer claims were officers of the Big Horn Limestone Company. In this case the Board said:

> BLM has found a crucial deficiency in appellant's application determining that the eight original locators were "dummy locators" acting on behalf of the corporation. The law clearly provides that no placer location shall include more than 20 acres for each individual claimant and may not exceed 160 acres for an association of up to eight individual claims. Within the meaning of 30 USC 35 it has been determined that a

corporation is an "individual claimant," and therefore may not locate placer claims of more than 20 acres each. *U.S. v. Toole*, 224 F. Supp. 440 (D Mont 1963).

**Case Involving Dummy Locator is Question of Fact**

In *Big Horn Limestone Co., supra*, the Board also held that the determination of whether a claim is located by dummy locators is a question of fact that must be determined at a hearing. The Board stated at 100:

> However, whether appellants' actions in this case amounted to an attempt to circumvent this 20-acre limitation is a question of fact which cannot be decided on the face of the record. Appellants specifically dispute this conclusion and have not had the opportunity to establish the bona fides of their intentions concerning the location and the conveyance of their interests to the corporation.
>
> As we have recently indicated in the same circumstances, this application cannot be rejected on the face of the record without further inquiry by quasi judicial proceedings. BLM should initiate contest Proceedings to determine the validity of the claims. *Big Horn Calcium Co*., 44 IBLA 289 (1979). BLM may not summarily reject the application for reasons related to disputed issues of fact without notice and an opportunity for hearing.

**Lode Versus Placer Claims**

Placer claims are equal both in procedure and rights with lode claims. *Clipper Mining Co.* v. *Eli Mining & Land Co*., 194 US 392 (1904). A placer claim patent grants title to the surface as well as lands beneath the surface. *Deffeback v. Hawk*, 115 US 392 (1885).

**10-Acre Tracts May Include Nonmineral Land**

If a placer location is made to conform as nearly as practicable to the system of public-land surveys and the rectangular subdivisions of such surveys embrace small portions of land not valuable for placer mining, it is still appropriate to conform the location to legal subdivisions. *Hogan and Idaho Placer Mining Claims*, 34 LD 42 (1905).

**Curing Defects in Claim Form**

A placer location which does not qualify for patent in its original form because of nonconformity with the public-land survey system, is not void, but the defect, in the absence of an adverse claim to the added land, is curable either by suitable amendment or relocation, provided the acreage limitation is observed. *Fred B. Ortman*, 52 LD 468 (1928).

**Combining Two 20-Acre Claims**

A placer location for 20 acres cannot, by means of an amended location, be enlarged to cover 40 acres, as such amendment would constitute a new location. *Charles H. Head*, 40 LD 135 (1911).

**Subdivision of Placer Claims into 10-Acre Parcels**

Placer claims must be laid out in square 10-acre parcels to determine whether each 10-acre portion of the claim is mineral in character, regardless of whether the claims conform to the system of public land surveys. In *U.S. v. Lara (On Reconsideration*), 80 IBLA 215, 216 (1984), the Board gave the rules for subdividing a placer claim into square 10-acre parcels in cases where such claims are not in conformity with the public land surveys.

In applying the 10-acre rule, each claim must be subdivided along the axis in which it was laid out on the ground. Inasmuch as it is presumed by the statute that a placer claim shall conform to the public land survey, the 10-acre rule is properly applied by subdividing a claim into parcels as nearly square as possible.

If a claim should consist of two or more 10-acre parcels aligned in a direction that deviates from north-south or east-west, the claim is subdivided in the following manner:

1. Draw an imaginary center line parallel to the long axis of the claim.

2. Subdivide the claim along the center line to create as many 10-acre parcels as possible.

3. Parcels should be as "nearly square as possible."

Although the situation where a claim may be greater than 660-feet wide was not addressed in *Lara*, it may be necessary to establish two or more contiguous rows of claims. This could be accomplished by subdividing the claim along the short axis into sections of equal length approximately 660 feet apart (a 10-acre square parcel is 660 feet on each side). Then construct lines parallel to the long axis of the claim and through the points of subdivision.

The objective is to establish 10-acre parcels that are not more than 10-acres in size, but are as close to that size as possible. Again parcels should be as nearly square as possible. Of course there will be many situations where these rules will not provide a means to completely cover a claim with square, 10-acre parcels. As a result some parcels may be of variable size with side dimensions more or less than 660 feet.

**Mineral in Character and the Ten Acre Rule (Placer Claims Only)**

In *Farrell v. Hoge*, 29 ID 12, 13, 15 (1889), The Secretary discussed the rationale for inquiring into the mineral character of placer mining claims upon establishing that a discovery is made on one portion of the claim:

> It is contended ... that a discovery of placer mineral deposits will support a location of twenty acres by a single individual or one hundred and sixty acres by an association of eight persons whether the mineral deposits extend throughout the entire claim or are confined to the immediate locality of the discovery.
>
> Considering all the statutes relating to mining claims it seems clear that it was not their purpose, to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent. Under the law discovery of mineral deposits is an essential act in the acquisition of mineral land, and while a single discovery is sufficient to authorize the location of a placer claim and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify the patenting thereof, such single discovery does not conclusively establish the mineral character of all the land included in the claim so as to preclude further inquiry in respect thereto.
>
> It would not comport with the spirit of the mining laws to hold that where a placer mineral deposit is discovered in any forty acre subdivision of the public lands, an association of eight persons is authorized to embrace in a mining location founded upon such discovery three other contiguous forty acre subdivisions of non-mineral land and to receive a patent for the same as a part of their mining claim, and yet this would logically follow if the contention of these claimants were sustained.

In *U.S. v. Meyers*, 17 IBLA 313 (1974), the Board held that each 10-acre subdivision of an association placer claim must be mineral in character; if a 10-acre tract is nonmineral in character, it must be excluded from the patent. The Board also applied this 10-acre rule to an association gold placer claim. In this example the Board said:

> A discovery on one 10-acre portion of an association placer mining claim does not establish the mineral character of the entire claim. Even though there is a discovery on one 10-acre portion, if any other 10-acre part is nonmineral in character, that part or parts of the claim must be excluded from the patent.
>
> The gold-bearing gravels on the clear listed area are located on or near the S 2 SE 1/4 NW 1/4 NE 1/4 and appear to extend into that five-acre parcel (Tr. 43, Ex. 1). Certainly the inference that it does is properly drawn. In addition, in the northern-most trench on the 5-acre tract, Meyers testified that one sample taken in that area indicated values of $10 per cubic yard (Tr. 110), and other sampling also indicated gold values (Tr. 67). The presence of all these factors in combination is sufficient to engender the belief that this five-acre section is mineral in character even though there is insufficient *exposure*. of minerals to justify the finding of a discovery. We find that the S 2 SE 1/4 NW 1/4 NE 1/4 is mineral land.
>
> Although there are some differences in the proof available to show that the

remaining 10-acre parcels are mineral lands, the proof for each is essentially similar. Limited sampling has revealed generally low gold values (i.e. from nothing to $.35 per cubic yard) and only small isolated pockets of potential gold-bearing values. These values are in stark contrast to high values found on the clear listed portion or to the recovery of 100 ounces of gold on the parcel the Judge declared mineral in character. The stream below the bend from the center of the clear listed area to the south is almost entirely devoid of gravel (Tr. 25). The finding of traces of gold or low-grade gold-bearing gravels in limited quantities does not demonstrate, without more, that land is mineral in character.

In *McCall v. Andrus*, 628 F2d 1185 (9th Cir 1980), *cert. denied* 450 US 996 (1981), the Ninth Circuit Court upheld the ten-acre rule and also the rule that only one discovery is required for a claim, regardless of size. The Court said at 1188:

> ... 30 U.S.C. " 35 and 36 restrict the *maximum* size of a placer mining claim to twenty acres per individual, up to 160 acres for an association claim. These sections do not provide, however, that land within a placer claim that does not contain valuable minerals can be purchased under ' 22. The Interior Department has held:
>
> > Considering all the statutes relating to mining claims it seems clear that it was not their purpose to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent.
>
> *American Smelting & Refining Co.*, 39 LD 299, 301 (1910). The Department established a rule that, when challenged, the claimant must show that each ten-acre tract on his claim contains a valuable mineral. *Id*.; *U.S. v. Bunkowski*, 79 ID 43, 54-55 (1972). Since federal land is platted in ten-acre tracts, ten acres is a reasonable unit. "A court faced with a problem of statutory construction should give great deference to the interpretation of a statute by the ... agency charged with its administration." *Brubaker v. Morton*, 500 F2d 200, 202 (9th Cir 1974).
>
> The validity of a mining claim is established either by the granting of a patent upon application by the claimant or through contest proceedings initiated by the government. *See Ideal Basic Industries, Inc. v. Morton*, 542 F2d 1364, 1367-68 (9th (ir 1976). If the validity of the claim is contested, the claimant must prove that he has made a "discovery" of a valuable mineral deposit thereon. To do so, the claimant essentially must show that the mineral is "marketable" in that it can be mined, removed and disposed of at a profit. Verrue v. U.S., 457 F2d 1202,1203 (9th Cir 1972). Only one discovery per claim must be shown. 43 CFR '3842.1-1. However, if the character of the land is also challenged in the contest complaint, the claimant must show that each ten-acre tract contains a deposit of the mineral under the ten-acre rule. The rule does not require, as McCall argues, that a discovery be made on each ten-acre tract contrary to regulation.

**Ten-Acre Rule Applies to Individual Placers**

ln *U.S. v. Lara*, 67 IBLA 48, 50(1982) , it was held that "the 10-acre rule is equally applicable to individual and association placer claims." Therefore the Department should examine the mineral character of every 10-acre tract, even if the claim is an individual claim consisting of only 20 acres.

**Dummy Locators**

In *Donald D. Hall*, 95 IBLA 33 (1986), the Board considered a case where two claimants located a 40 acre placer claim. However, there was the possibility that the claim might have been located for the benefit of a corporation which would have the legal status of an individual. If Aa locator has knowledge of a concealed interest and is a party to the use of dummy locators, the location is deemed fraudulent and is invalid in its entirety." *Id*. at 35.

**The Ten Acre Rule**

The Interior Department has "established a rule, that when challenged, the claimant must show that each ten-acre tract on his claim contains a valuable mineral" and that "each ten acre tract must be 'mineral in character.'" *McCall v. Andrus*, 628 F.2d 1185, 1188 (9th Cir. 1980), *cert. denied*, 450 U.S. 996 (1981); *Lara v. Secretary v. Secretary of the Interior*, 820 F. 2d 1535, 1538 (9th Cir. 1987). The Apolicy behind the rule applies equally to individual and association placer claims.@ *Id*. at 1538.

**The Ten-Acre Rule Applies to All Validity Determinations**

The 10-acre rule is applied on all validity examinations of placer mining claims; Ause of the rule is not restricted to patent proceedings." *Lara v. Secretary of the Interior*, 820 F. 2d 1535, 1539 (9th Cir. 1987).

## TUNNEL SITES

**Introduction**

The authority to locate tunnel sites to prospect for veins or lodes is given in the Act of May 10, 1872. 17 Stat. 92; RS 2323; 30 US 27. The law states that "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."

The phrase "not previously known to exist" refers to the date of location the tunnel was started and not to the date of the discovery of veins in the tunnel. *Enterprise Mining Co. v. Rico-Aspen Mining Co*., 66 F 200, 205 (1895), *aff=d* 167 US 108.

Tunnel locations are made by erecting a substantial post or monument at the face or point

where the tunnel is started, and stakes are placed along the line of the tunnel for 3,000 feet. The owner of a mining tunnel shall have the possessory right to 1,500 feet of any blind lodes cut, discovered, or intersected by such tunnel.

**Location by Others Prohibited**

The law (30 US 27) provides that "locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid." This gives the locator of the tunnel exclusive right to prospect 3,000 feet along the line of the tunnel, while work on the tunnel is being prosecuted with reasonable diligence. Claims staked by other parties after commencement of the tunnel for lodes not appearing at the surface, within the area claimed by the tunnel locator, are invalid.

**Procedure for Locating Tunnel Sites**

The federal regulations (43 CFR 3843.2) give the following specific procedures for locating tunnel sites:

1. Erect a substantial post, board, or monument at the face or point of commencement of the tunnel.

2. Post a notice on the monument containing the following information:

    a. names of the parties or company claiming the tunnel right;

    b. the actual or proposed course or direction of the tunnel;

    c. the height and width of the tunnel; and

    d. the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity so as to establish the position of the tunnel site.

3. Establish the boundary lines of the tunnel site by placing stakes or monuments along the lines at proper intervals, to the terminus of the 3,000 feet from the face or point of commencement of the tunnel. These marked lines will serve to delineate the boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

**Recording of Notices**

Federal regulations (43 CFR 3843.3) require that a copy of the notice of location defining the tunnel site be filed with the mining recorder of the district (or county). A sworn statement or

declaration of the owners of the tunnel must be attached to the location setting forth the following facts:

1. The amount expended by themselves and their predecessors in interest in prosecuting the work.

2. The extent of the work performed.

3. State that it is bona fide their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both.

**Tunnel Site Must Be Prosecuted With Reasonable Diligence**

The Federal law provides that "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. RS 2323; 30 USC 27 (1976). In *Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co*., 66 F 200 (8th Cir 1895), the Court described "reasonable diligence" as follows:

> ... Nor can the owner of such a tunnel preserve his rights to undiscovered veins by lazy and perfunctory work. It is true that this section 4 provides that he shall be deemed to have abandoned his rights to undiscovered veins if he fails to prosecute the work on his tunnel for six months; but it also provides that he cannot preserve these rights against subsequent prospectors and locators unless he prosecutes the work upon his tunnel with reasonable diligence.

**Limitation on Rights of Tunnel Owner**

In *Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co.*, 66 F 200, 206 (8th Cir 1895), the Court emphasized that the vein must strike the line of the tunnel and be discovered in the tunnel. The Court said:

> ... It must be borne in mind, however, that it is only the right to veins that strike the line of the tunnel, and only such of those veins as are discovered in the tunnel, that the owner gains any inchoate right to the possession of, if this claim of the appellant is sustained. Others may discover and hold all veins within 1,500 feet of the line of the tunnel that do not strike or cross its line, and all that do strike it that are not discovered in it.

On appeal, the U.S. Supreme Court affirmed the Eighth Circuit Court and further discussed the specific limitations on the rights of tunnel owners. *Id* at 167 US 108, 113. The Supreme Court said:

> ... Surely it is not strange that Congress deemed it wise to offer some inducements for running a tunnel into the side of a mountain. At the same time it placed specific limitations on the rights which the tunnel owner could acquire. He could acquire no veins which had theretofore been discovered from the surface. His right reached only to

blind veins, as they may be called, veins not known to exist, and not discovered from the surface before he commenced his tunnel. It required reasonable diligence in the prosecution of his work. It placed a limit in length, 3,000 feet, beyond which he might not go in his search for veins and acquire any rights under his tunnel location, and the veins to which he might acquire any rights were those which the tunnel itself crossed.

**Width of Line of Tunnel**

The "line" of the tunnel represents the width of the bore of the tunnel. *Corning Tunnel v. Pell*, 4 Colo 507 (1878). It is only on the line of the tunnel or an area defined by the width of the bore and length of 3000 feet that is segregated from the location of subsequent lode mining claims.

**If Discovery in the Tunnel, Is Lode Location Required?**

Upon discovery of a vein in a tunnel, there is no requirement to make a surface location to protect rights to the vein. *Campbell v. Ellet*, 167 U.S. 116, 120 (1897). However, *see Creede and Cripple Creek Mining and Milling Co. v. Uinta Tunnel Mining and Transportation Co.*, 196 U.S. 337 (1905) where the court indicated a lode should be located because a network or set of veins are commonly associated with an intersected vein. Therefore an entire system of veins could be appropriated by a lode claim but not a tunnel site location.

**Vein Exposed at Surface**

If a lode locator acquired a vein exposed at the surface before a tunnel site locator, a tunnel site location would not appropriate such a vein even if it were intersected in the tunnel.

**Tunnel Sites Cannot Be Amended to Lode Claims**

Tunnel sites "cannot be amended into lode claims because tunnel sites are not mining claims; rather they are rights-of-way. *See Creede and Cripple Creek Mining and Milling Co. v. Uinta Tunnel Mining and Transportation Co.*, 196 U.S. 337, 355 (1905).@ *Elsworth and Dolores Loveland*, 89 IBLA 205, 207 (1985).

In the Loveland case, the Board held that the appellant's lode claims are new locations rather than amended locations. Also whether "rights under such locations relate back to the date of the tunnel site location or commenced at the date of location of the amended claims is dependent upon whether appellant discovered blind veins in the course of driving tunnels on each of their claims.@ *Id*. at 208.

**Loss of Rights to a Tunnel Site**

*United States v. Swanson*, 119 IBLA 53 (1991) concerned an appeal from an Administrative Law Judge ruling declaring the Livingston Tunnel Site invalid. Located March 1, 1926, the Livingston Tunnel Site is situated in the Sawtooth National Recreation Area -- an area withdrawn from mining claim entry on August 22, 1972. In this case the Board pointed out an important distinction between two types of rights under the Tunnel Site Act:

1. *The right to undiscovered veins on the line of a tunnel*

   Failure to diligently prosecute the work on a tunnel site for six months results in the conclusive abandonment of the right to any blind veins or lodes which might be discovered on the line of the tunnel. *Id* at 61.

2. *Right to use the tunnel for development of a mine*

   "Failure to diligently prosecute the tunnel for 6 months does not constitute a statutory abandonment of the right to use a tunnel site for development purposes. *Fissure Mining Co. v. Old Susan Mining Co*. 63 P. 587 (Utah 1900); *American Law of Mining*, 32.07[5] 92d ed. 1984); 2 C. Lindley, *Lindley on Mines*, sec. 631. 3rd ed. 1914).@ *U.S. v. Swanson, supra* at 61. However such development rights can be abandoned. Id. at 62. Abandonment of a tunnel site right-of-way can be based on a "showing that the means of enjoyment of the right-of-way have long been in a state of disrepair.@ *Id*. at 62.

The Board found that Swanson abandoned the Livingston Tunnel Site because there was no evidence that a tunnel to be used in the development of the Livingston Mine ever existed and that Athe means of the enjoyment of the right-of-way had long been in a state of disrepair.@ *Id*. at 62.

The Board also indicated that annual filings of proofs of labor or notices of intent to hold and evidence of work on the tunnel site could serve to negate evidence of abandonment. However, the evidence of a lack of annual filing and lack of work supported rather than negated evidence of abandonment. *Id*. at 63.

**Validity of Tunnel-Site Claims**

In *United States v. Parker*, 91 I.D. 271 (1984), the Board held that the Department was authorized to determine Athe validity of tunnel-site claims with respect to undiscovered veins in the same way it determines the validity of lode and placer claims. *Citation Omitted*. It is, therefore, appropriate for the Department to make a finding concerning whether a tunnel-site claim has or has not been properly located, especially in those cases where the land has subsequently been withdrawn from mineral entry. *Id*. at 293. An important aspect of validity is whether a tunnel was commenced at or near the time the tunnel-site claims were located. In *Parker*, the claimants relied on adits that existed at the date of the tunnel-site location rather than driving new adits. The Board pointed out that the importance of commencing a tunnel "is that it

serves to define the starting point of the line of the tunnel, and, thus any possible veins or lodes, intersecting that line which the tunnel-site claimant would in the future have a right to appropriate. Until the tunnel is begun, the claimant has not established conclusively the direction in which the tunnel is to be run. Existing adits simply do not serve that purpose because a claimant can then continue in any of several directions.@The Board held that the tunnel-site claims were void because the owners "did not commence a tunnel on any of their tunnel site claims at or near the time they located the tunnel-site claims."

**Adverse Proceedings by Tunnel Owners**

Until a tunnel owner makes a discovery in his tunnel, he cannot adverse a lode patent application. Even if patent issues, the tunnel owner would have a right to any blind vein discovered in the tunnel for years into the future. Of course once the patent is issued, the Interior Department loses jurisdiction and the tunnel owner would need to go to court to recover title rather than apply through the Interior Department.

Once a discovery is made, the tunnel owner may file an adverse claim regardless of whether he filed a lode location. *Campbell v. Ellet*, 167 U.S. 116 (1897). If the tunnel owner does not file, right to the vein will be lost.

**Owner of Tunnel Site Not Required to Adverse a Lode Patent Applicant**

The owner of a tunnel site who wishes to protect his tunnel, and has not as yet discovered a lode claim, is not required to adverse an application for the patent of the lode claim through which the tunnel runs; and where the lode was discovered on the surface. In *Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation Co., supra*, at 360, the Supreme Court said:

> Without further review of the conflicting authorities, it would seem that whatever may be the propriety or advantage of an adverse suit, one cannot be adjudged necessary when Congress has not specifically required it. Until the discovery of a lode or vein within the tunnel, its owner has only a possibility. He is like an explorer on the surface. Adverse proceedings are called for only when one mineral claimant contests the right of another mineral claimant.

**Right to Vein Discovered in Tunnel Dates Back to Location Date of Tunnel**

In *Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co.*, 167 US 108, the U.S. Supreme Court held that the right of the owner of a tunnel to all veins or lodes not previously known to exist, which are within 3,000 feet from its face on the line of the tunnel, is superior to the right of one who subsequently makes a discovery and location of another claim, providing the two conflict. The Supreme Court stated:

> We hold, therefore, that the right to a vein discovered in the tunnel dates by relation back to the time of the location of the tunnel site, and also that the right of locating the claim to

the vein arises upon its discovery in the tunnel.

**Tunnel Owner May Locate Claim on Either Side of Tunnel**

The tunnel owner is entitled to locate 1,500 feet on either side of the line of the tunnel. In *Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co.*, 167 US 108, 113 (1895), the Supreme Court held as follows:

> ... the right of locating the claim to the vein arises upon its discovery in the tunnel, and may be exercised by locating that claim the full length of 1,500 on either side of the tunnel, or in such proportion thereof on either side as the locator may desire.

**Lode Claim Senior to Tunnel Site**

A prior surface location which contains the apex of a blind lode within its surface boundaries does not go to a tunnel site location, even though the blind lode was not known at the date of the tunnel site location. *Calhoun Gold Mining Co. v. Ajax Gold Mining Co.*, 59 P 607 (1899), *affirmed* 182 US 499.

**"Face" Defined**

The term "face", means the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover. It is from this point that the 3,000 feet are to be counted upon which prospecting by other parties is prohibited. 43 CFR 3843.1.

**Effect of Withdrawal on a Tunnel Site**

In *U.S. v. Livingston Silver, Inc*., 43 IBLA 84 (1979), the Board held that if no vein or lode was discovered in the tunnel of a tunnel site claim at the time of a withdrawal, the tunnel site would be void. The Board also concluded that even if a discovery were made but no lode mining claim was located prior to the withdrawal, the tunnel site would be void.

However in *U.S. v. Parker*, 82 IBLA 344 (1984), the above holding in *Livingston Silver* was overruled. In *Parker*, the Board said that once a discovery is made in the tunnel, even though accomplished after the withdrawal date, such discovery would relate back to the location date of the tunnel site. Therefore, a lode claim located many years after the effective date of a withdrawal would predate the withdrawal because the claim would be based on a right of appropriation which related back to the date of location of the tunnel site. *Id*. at 379.

Tunnel sites cannot be based on preexisting adits or other workings. *Calhoun Gold Mining Co. v. Ajax Gold Mining Co*., 182 US 499, 508 (1901). Instead, a tunnel must be commenced at or near the time a tunnel site is located or the tunnel site must be considered void. *U.S. v. Parker, supra* at 380-81. Consequently, a tunnel site without a tunnel commenced between the location date and the withdrawal date should be considered void.

### Tunnel Rights Are Not Reserved in Lode Patents

In *Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation Co*., *supra*, the Court held that there is "no statutory warrant for placing in a patent to the owner of a lode claim any limitation of his title by a reservation of tunnel rights."

### Tunnel Site is not a Mining Claim

In *Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation Co*., 196 US 337, 359 (1905), the United States Supreme Court held that a tunnel site is not properly deemed a mining claim, but that is only a means of exploration. The Court stated:

> ...A tunnel is not a mining claim, although it hits sometimes been inaccurately called one. As we have seen, it is only a means of exploration. The owner has a right to run it in the hope of finding a mineral vein. When one is found he is called upon to make a location of the ground containing that vein, and thus creates a mining claim.

## MILL SITES

### Authority

The location and patenting of lands for mill site purposes is authorized by RS 2337 as amended by the Act of March 18,1960 (30 USC 42; 43 CFR 3844 and 3864). Consequently, the Federal law provides for three types of mill sites: (1) mill sites in connection with lode claims, (2) independent mill sites, and (3) mill sites in connection with placer claims.

### Mill Sites in Connection with Lode Claims

The Federal law (30 USC 42(a)) provides that "where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes."

### Independent Mill Sites

The Federal law (30 USC 42(b)) states that "the owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site." The owner of such "custom" or "independent" mill need not own a mine in connection with the mill and may also qualify for patent.

**Mill Sites in Connection with Placer Claims**

The Act of March 18, 1960 (74 Stat. 7) authorizes that "where nonmineral land is needed by the proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claims, and is used or occupied by the proprietor for such purposes, such land may be included in an application for a patent for such claim, and may be patented therewith subject to the same requirements as to survey and notice as are applicable to placers."

**Millsite Patents Limited to Five Acres Per Lode Or Placer Claim**

John D. Leshy, Solicitor, Department of the Interior, with the signed concurrence of Secretary Babbitt, wrote a memorandum dated November 7, 1997, to the Director, Bureau of Land Management concerning limitations on millsite patents. *Limitations on Patenting Millsites under the Mining Law of 1872*, M-36988 (November 7, 1997). The Solicitor said that Athe Department should reject patent applications which seek to patent more than five acres per associated mining claim.@ Furthermore, he recommended Athat the Bureau promptly, with the help of my Office, update its Manual to be consistent with this Opinion. These modifications to the Manual and to BLM=s administrative practice should be applied immediately, including with regard to pending patent applications.@ *Id*. At 15. The Solicitor said at 2:

> * * * The Mining Law of 1872 provides that only one millsite of no more than five acres may be patented in association with each mining claim. Hover, Secretarial decisions indicate that multiple millsites may be patented with a lode or placer claim, provided that the total area covered by these millsite claims does not exceed five acres (e.g., one millsite claim for two acres, and another millsite claim for three acres). I believe such decisions can be defended, and therefore confirm that while only a total of five acres per lode or placer claim may be patented as a millsite, that five acres may be broken up into more than one millsite claim.
>
> Because the statute does not support issuing patents for millsite claims totaling more than five acres per placer or lode claim, the Department should reject those portions of millsite patent applications that exceed this acreage limitation. In addition, the Bureau should not approve plans of operation which rely on greater number of millsites than the number of associated claims being developed unless the use of additional lands is obtained through other means.

**Mill Site Claims Partially on Lands Not Open to Entry**

AIt is improper for BLM to declare a lode mining or millsite claim null and void ab initio in its entirety where it is located only partially on land already so patented.@ *Kaiser Steel Resources, Inc*., 135 IBLA 340, 342 (1996). Furthermore, A[t]o the extent that the millsites were located on unpatented public land, they are not null and void ab initio.@ *Id*. at 344.

**Does the Federal Law Limit One Millsite for Each Mining Claim**

In *Collord v. United States*, Civil No. 94-0432-5-BLW (D.C. Idaho, August 27, 1997), the Court suggests that the Board might wish to address on remand the unsettled question on whether the Federal law limits a claimant to one mill site claim for each lode claim. The Court said at f.n. 5:

> The Court would point out that, if the Board deems it prudent, it might also consider on remand another apparently unsettled question raised by this case. That is whether federal mining law limits claimants to one millsite per valid mining claim. Judge Burski, in his concurring opinion, asserts that A30 U.S.C. 42(a)...permits only a single appropriation of additional land, not to exceed 5 acres, per mining claim.@ 128 IBLA at 314 (Burski, J., concurring).

In *Utah International, Inc*., 36 IBLA 219 (1978), 84 of 314 mill sites included in the patent application were approved. This case appears to give implied approval to patent more than one mill site for each associated lode claim.

**Physical Improvements Not Necessary to Validate Mill Site**

In *Collord v. United States*, Civil No. 94-0432-5-BLW (D.C. Idaho, August 27, 1996), the Idaho Federal District Court recently emphasized that, when a patent applicant is not actually using the land, a mill site can be validated by *good faith occupancy*, even where there is *no physical improvement* to the mill site claim. In its remand of *United States v. Collord*, 128 IBLA 266 (1994) back to the Interior Board of Land Appeals, the Federal District Court said at 9:

> First, controlling precedent in this circuit makes clear that occupancy of a millsite within the meaning of 30 U.S.C. 42(a) can be demonstrated by A>improvements *or other indications*...=@ *United States v. Bagwell*, 961 F.2d 1450, 1455 (9th Cir. 1992) (emphasis added) (citing 1 *American Law of Mining* 32.06[6], at 32-67 (rel. Oct. 1987)). *See, e.g., Charles Lenning*, 5 Public Lands Dec. 190, 192 (1886) (A[W]hen an applicant is not actually using the land, he must show such an occupation, by improvements *or otherwise* as evidences an intended use of the tract in good faith for mining or milling purposes.@) (emphasis added). *United States v. Langmade and Mistler*, 52 Pub Lands Dec. 700, 703 (1929) (stating that occupancy of a millsite may be established by Aimprovements or otherwise@); *United States v. Skidmore*, 10 IBLA 322, 326 (1973) (same); Pine Valley Builders, Inc., 103 IBLA 384, 389 (1988) (same). If physical improvements are an absolute prerequisite, as the Board appears to have held, then the language in *Bagwell* and countless Interior Department precedents to the effect that occupancy can be demonstrated by improvements or *otherwise* would be entirely superfluous. Without deviation, judicial and IBLA case law states that millsite occupancy may be evidenced by Aimprovements or other indications...@ *See, e.g., Bagwell*, 961 F.2d at 1455. By paring off the second half of this disjunctive, the Board=s mandatory physical improvements rule would abrogate the opportunity for claimants to establish millsite occupancy by showing that they conducted substantial activities on the millsite claim which did not involve making physical improvements. Such a rule, the Court finds,

is not in accordance with law. See 5 U.S.C. 706(2)(A).

More, the mandatory improvements rule may lead to arbitrary and capricious results. It may cause a millsite=s validity to turn on accidental factors, such as the condition of preexisting structures on the millsite claim. For example, under the mandatory improvements rule, a claimant who builds a cabin, or makes improvements to an existing cabin that he finds in a state of disrepair, for the purpose of storing tools or building materials in it, would satisfy the occupancy prong of the use or occupancy test. Yet a claimant who finds an existing millsite cabin that is not in need of improvements to serve as a satisfactory storage area, and uses the cabin for that purpose, would not satisfy the test. The Court believes a rule that would allow outcomes to be determined by such fortuitous factors is arbitrary and capricious under 5 U.S.C. 706(2)(A).

**Independent Mill Sites: a Summary**

A...the owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site.@ 30 USC 42(b).

In *United States v. Paden*, 33 IBLA 380 (1978), the Board defined the terms Aquartz mill@ and Areduction works@ at 383, n.3:

> **Quartz mill**: a machine or establishment for pulverizing quartz ore, in order that the gold or silver it contains may be separated by chemical means.
>
> **Reduction works**: works for reducing metals from their ores as a smelting works, cyanide plant, etc.
>
> As a general rule, only metallic minerals in veins or lodes may be processed by a quartz mill or reduction works.
>
> In *Pacific Portland Cement Co.*, 51 LD 459 (1926), the Secretary held that a mill to crush gypsum to a smaller size would not qualify.

ACoupled with good faith and the existence of an operable mill or reduction works, we think there must also be evidence of an *ongoing and more or less continuous operation* for custom work.@ *Id*. *Emphasis Added*.

The Board has repeatedly held that for independent mill sites there must be a mill on the claim operating at a **profit**. See Harris and Thompson, *Millsites: Current Law and Unanswered Questions*, Mineral Law Institute, pg 12-12.

**Dependent Mill Sites: a Summary**

Dependent on lode claims:

> Awhere nonmineral land not contiguous to the vein or lode is *used or occupied* by the proprietor of such vein or lode for mining or milling purposes...@ (30 USC 42(a))
>
> In *United States v. Swanson*, 93 ID 288 (1986), the Board acknowledged that Awhile >use= under 30 U.S.C. 42 necessarily implies present mining or milling activities, it has long been noted that land may be >occupied= under the statute even in the absence of present >use= of the land for mining or milling purposes.@ If there is no present use of the land for mining or milling purposes, Athe claimant must show >an occupation by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes.=@ *Id*. at 22.

In *Hudson Mining Company*, 14 LD 544 (1892), the Secretary said that the Aact clearly contemplates that at the time the application for patent is made, and the entry allowed (or at the time of contest proceedings), the land in question is used or occupied for mining or milling purposes.@

Associated lode claims must be valid, even if patented. *United States v. Dean*, 14 IBLA 107, 109 (1973; *United States v. Wedertz*, 71 ID 368, 373 (1964).

Mill Sites under plan for near-term occupancy. In *Collord v. United States*, Civil No. 94-0432-S-BLW (D.C. Idaho, August 2 7, 1996), the Idaho Federal District Court recently held that, when a patent applicant is not actually using the mill site for mining or milling activities, a mill site can be validated by good faith occupancy where there is no physical improvement to the mill site.

**Need Must Be Shown to Entitle Mining Claimant to Millsite**

In *United States v. Robert C. Lefaivre*, 138 IBLA 289 (1997), the Board made the following comments regarding the need a claimant must demonstrate in order to be entitled to a dependant millsite:

> As is obvious, there are a number of separate elements to the grant. Thus, the location must be no more than 5 acres of non-mineral land

which land must be both *needed* by the proprietor of a placer claim for mining, milling, processing, beneficiation, and the like, and must be *used* or *occupied* for such purposes as a precondition for obtaining the grant. Since these are separate ele-

ments, inability to show that the land is needed for the enumerate purposes or that it is actually being used or occupied for those purposes defeats any location made under the grant=s provisions. *Id*. at 293.

Contestee appears to be operating under a misconception that, simply because he had eight placer mining claims, he was entitled to claim eight millsites. Such has never been the law.@ *Id*. at 295-96.

Similarly, in *United States v. Swanson*, [93 IBLA 1, 93 I.D. 288 (1986)], the Board examined in considerable detail multiple millsite locations to determine not only which ones were being utilized to determine which ones were actually needed. The Board

ultimately not only rejected portions of millsites for nonuse but actually rejected claims to some millsites which contained improvements on the ground that more than adequate areas to hold these improvements existed on other millsites which were being allowed. *Id*. at 38-39, 93 *Id*. at 309.@ *Id*. at 296.

**Case Where Use Or Occupancy Does Not Qualify**

In *United States v. Robert C. Lefaivre*, 138 IBLA 289, 295 (1997), the Board described the type of use or occupancy that does not validate a millsite:

> * * * [W]hile there is no question that the millsites are, to a certain extent, being occupied in a generic sense, it is clear from the record that there is simply no present occupancy of the claim for mining or milling purposes. Contestee has, indeed, expressed the hope that, sometime in the future, problems surrounding his mining ventures will be resolved and he will proceed to utilize the millsites for purposes associated with the placer claims. But the objective reality of the matter is that, despite the fact that contestee has held title to eight of the placer mining claims for over 25 years, there has been no production from those claims in that time, nor have any of the millsites been used for mining or milling purposes since their location in 1980. The sole use of the millsite claims has been to serve as a sort of collection site for numerous items of equipment in varying stages of disrepair. This is not the type of use for which Congress has deemed it appropriate to permit the appropriation of public land.

**Procedure of Locating Mill Sites**

The applicable case law and Interior Department policy (covered in detail in other sections) indicate that mill sites may be located by legal subdivision if on surveyed lands and by metes and bounds if on unsurveyed lands, regardless of the type of mill site. Each individual mill site, however, is limited to five acres. Also, there is no limitation to the number of mill sites that may be located as long as each mill site is properly "used or occupied" for "mining or milling purposes." Of course mill sites like lode and placer claims should be located (monumented, posted, recorded, etc.) as required by the applicable state law.

**Location of Mill Site Like Mining Location**

In *U.S. v. Paden*, 33 IBLA 382, 383 (1978), the Board said:

> Although the right to use nonmineral public land for a "mill site" arises from the mining laws of 1872, a mill site is not a mining location, *Smelting Co. v. Kemp*, 104 US 636 (1881). However, the Department has long held that the location of mill sites must be

made substantially in the manner as that employed in the location of mining claims.

**Is Mill Site Claim a Mining Claim?**

In the recent case of *Feldsite Corporation of America*, 56 IBLA 787 79 (1981), the Board discussed whether or not a mill site claim is a mining claim:

> ... the question of whether a mill site is a "mining claim" or "mining location" has received varying answers through the years. Thus mill sites have been denominated "creature(s) of the mining laws," *United States v. Werry*, 14 IBLA 242, 250, 81 ID 44, 48 (1974), or alternatively, "a part of the general mining laws." *U.S. v. Cuneo*, 15 IBLA 304, 322, 81 ID 262, 270 (1974).

**Section 38 Applies to Mill Sites**

In *FeIdsite Corporation of America, supra,* the Board also determined that a mill site comes under the provisions of 3O USC 38. The Board stated:

> ...It has also been established that a mill site is a "claim" within the provisions of 30 USC 38 (1976), which obviates the need to prove a formal location where a claim has been held and worked for a period equal to the statute of limitations of the State in which the land is located. *See Dalton v. Clark*, 18 P2d 752, 754 (Cal App 1933).

**Mill Site Located Over Senior Location**

The location of a mill site over a subsisting location is void and cannot become valid, even if the senior location becomes forfeited or abandoned. *Kershner v. Trinidad Mill & Mining Co*., 201 P 1055, 27 NM 326 (1921).

**Mill Sites Classified As Mineral in Character**

In *U.S. v. Silver Chief Mining Co., Inc*., 40 IBLA (1979), the Board considered an appeal from a mill site applicant whose location was contested because the Forest Service mineral examiner found that mill tailings on the property contained sufficient mineral value to be "mineral in character." In the following excerpt from this case, the Board points out how land can be mineral in character so as to invalidate a mill site; yet there may be insufficient evidence of discovery to validate a mining claim:

> .. It is not necessary, as contestee suggests, that the Government *physically show* minerals to be present on the claims, "in sufficient quantity and quality to permit a profitable mining operation" in order to establish the mineral character of the lands. The difference between the test of "mineral character" and "discovery of a valuable mineral deposit" under the mining laws is largely one of proof. Direct evidence of the existence of minerals is necessary for a discovery. However, to make a *prima facie* case of "mineral in character", it is merely necessary that the Government show, by geological inference if

necessary, that the lands in question presumptively contain mineral of such quality and quantity to render expenditures for its extraction reasonable and prudent. *State of California v. Rodeffer*, 75 ID 176, 181 (1968). Geological inference alone, however, would not suffice to prove discovery, but might constitute sufficient evidence to establish the mineral character of land.

The evidence in the record tending to support the conclusion that the lands in question are mineral in character can be summarized as follows: (1) the testimony of Donald Wood to the effect that he has been mining the properties in question and has made two shipments totaling approximately 8 tons of ore from the claims. Wood stated that he received $806 for the first of these shipments; (2) the testimony of Mr. Mullin, the Forest Services mineral examiner, stating that the lands were, in his opinion, mineral in character and his reasons therefor; and (3) the general history of successful mining in the area of the claims as described in the various supporting documents submitted in connection with this case. Although there is not sufficient evidence of a discovery of a valuable mineral deposit as would be necessary to validate a mining claim, there is enough evidence to support the Government's *prima facie* case that the land is mineral in character.

**Applications for Multiple Mill Sites**

A separate mill site is not necessarily complemental to each lode location, *Alaska Copper Co*., 32 LD 128 (1903); nor does the mining law contemplate that a mill site may be patented for each of a group of contiguous lode claims held and worked in common. *Helena Co. v. Dailey*, 36 ID 147 (1907). It has been held that more than one mill site may be included in an application for a patent, provided each of such tracts keeps within the restriction of 5 acres of nonmineral land and that each is needed and used for mill site purposes. *Alaska Copper Company*, 32 LD 128 (1903). In *Hard Cash and Other Mill Site Claims*, 34 LD 325, 327-328 (1905), the Department said:

> ... It was stated in *Alaska Copper Company, supra*, p. 130, that "whilst no fixed rule can well be established, it seems plain that ordinarily one mill site affords abundant facility for the promotion of mining operations upon a single body of lode claims." It follows that if more than one mill site is applied for in connection with a group of lode claims, a sufficient and satisfactory reason therefor must be shown. The storage of a quantity of ore upon each of the four mill sites in this case, where there is nothing to show but that the area embraced in one of them would be ample for such storage, is but a mere colorable use of the mill sites, which does not satisfy the requirements of the statute.

Commenting on the case, the Board in *U.S. v. Swanson*, IBLA 158 (1974) stated:

> Hard Cash indicates the strictness of scrutiny which will be given to applications for multiple mill sites. The decision signifies that use and occupancy of land in excess of one mill site, even for a group of lode claims, will be allowed only insofar as the applicant is able to show a reasonable need for all the lands claimed.

**Lands Open to Mill Site Location**

In order to be open to mill site location, "the land must be unappropriated, and must be open to location under the mining laws.@ *Robert C. LeFaivre*, 13 IBLA 289, 290 (1973). Lands where the United States owns the surface but not the mineral rights would not be open to entry. *Id*. at 291; *See Eagle Peak Copper Mining Company*, 54 I.D. 251 (1933). However, the Department does not approve of mill sites on lands where the United States owns the minerals but not the surface. "Mill sites cannot be located on lands where only the mineral estate is owned by the United States, such as Stock-Raising Homesteads.@ *BLM Manual* 3864.11C.

In *Golden Arc Mining & Refining, Inc*., 133 IBLA 90 (1995), the Board held that mill site claims may only be located on lands with Federal mineral ownership. The Board said at 92:

> Absent Federal ownership of minerals, the land could not be available for location under the mining laws. *Gold-West Industries, Inc*., 90 IBLA 372 (1986); *August F. Plachta*, 88 IBLA 304 (1985); *Moise & Leon Berger*, 82 IBLA 253 (1984); *Eagle Peak Copper Mining Co*., 54 I.D. 251, 253 (1933). Because a millsite is a location under the mining laws, the land in sec. 5 was not available for the location of appellant=s millsite.

Pickett Act withdrawals which are open to the location of metalliferous minerals are also open to dependent mill site locations in connection to metalliferous mineral locations. *Coeur d'Alene Cresent Mining Co*., 53 I.D. 531, 533 (1931).

Mill sites could not be located on lands known to be valuable for leasing Act minerals or lands under lease or permit before the Multiple Mineral Development Act of 1954. 30 U.S.C. 521-31 (1982). The Act allowed the location of mill sites on such lands. *See Kasey v. Molybdenum Corp. of America*, 336 F.2d 56O, 563 (9th Cir. 1964).

**Mill Site and Subsequent Lode Location**

A mill site location becomes valid at the time it is actually used or occupied for mining and mining purposes rather than the date of location. By comparison a mining claim becomes valid at the time of discovery which likewise might occur at the time of location or sometime later. However where there is no conflict the initiation of claimant's rights or title normally dates back to the location date. Therefore where a mill site is overstaked by a mining claim, the question of mineral character of the mill site should be addressed at the location date or the date the mill site becomes valid rather than at the later date when the mining claim was located. Otherwise the mill site locator would not be protected for his expenditures and improvements.

**No Assessment Work or Expenditures Required for Mill Site**

Mill sites do not require annual assessment work nor do they require $500 worth of work to qualify for patent. *Alta Mill Site*, 8 L.D. 195, 196 (1889). However, work done on a dependent mill site can qualify as assessment work on mining claims.

**Dual Use of Mill Site**

A mill site may be used as both a dependent mill site and a custom or independent mill site. *United States v. Parsons*, 33 IBLA 326, 337 (1978); *United States v. Dean*, 14 IBLA 107, 109 (1973).

**Dependent Mill Site Is Not Patented Before Associated Claim Patented**

A dependent mill site "may only be patented if the mining claim to which it is appurtenant is either already patented or a patent is granted simultaneously with the mill site patent." *Pine Valley Builders, Inc*., 103 IBLA 384, 388 (1988); *Eclipse Mill Site*, 22 L.D. 4969 551 (1896). Therefore a dependent mill site may not be taken to patent at any time before an associated lode or placer mining claim is patented. *Pine Valley Builders, Inc., supra* at 388.

**Dependent Mill Site May Be Located and Patented After Mining Claim Is Patented**

A dependent mill site may be "located after the lode claim is patented.@ *Eclipse Mill Site*, 22 L.D. 496, 499 (1896). Even years after a mining claim is patented, a dependent mill site may be located and taken to patent.

**Requirements to Patent Mill Sites Associated with Lode Claims Similar to Mill Sites Associated with Placer Claims**

The language authorizing the patenting of placer claim mill sites was added in 1960 (P.L. 86-390; Subsection (b) to 30 U.S.C. 42). Although "the language describing the type of activity needed to qualify a placer claim (Amining, milling, processing, beneficiation, or other operations"), the language of subsection (b) should undoubtedly be construed similarly." *Pine Valley Builders, Inc*., 103 IBLA 384, 389 (1988).

**If Associated Mining Claims Not Operated, Mill Site Cannot Be Used for Mining Purposes**

If none of the associated claims are being operated, a claimant cannot be using the mill sites for mining purposes. In *Pine Valley Builders, Inc*., 103 IBLA 384 (1988), a case where the claimant listed on his application such improvements as Aa 40 by 60 foot metal Butler building, trommel with feed and discharge conveyors, holding reservoirs, 7 trailer space hook-ups, underground water, sewer, and electric lines, septic disposal tank, and a well with storage tank." The Board held that "if none of the associated mining claims are being operated, the appellant cannot be using the millsites for mining purposes." *Id*. at 390.

**Independent Mill Site: Acceptable Improvements**

The Mining Law (30 USC 42) allows for the location and patent of an independent mill site by "the owner of a quartz mill or reduction works...@ A quartz mill or reduction works is the only kind of improvement contemplated by the statute because these improvements are distinctly named and there is no mention of any other kind of improvement. *Pacific Portland Cement Company*, 51 L.D. 459, 460-61 (1926). In *Pacific Portland Cement Company, supra*, the Secretary held that a mill to crush gypsum to a smaller size is neither a Aquartz mill" or a Areduction works@ that would qualify an independent mill site for patent. However, he indicated that possible future advances in the mining and milling industry may allow nonmetallic minerals to be processed with a Areduction works."

In *United States v. Paden*, 33 IBLA 380 (1978), the Board defined the terms "quartz mill" and "reduction works" at 383, n. 3:

> **Quartz mill**: "A machine or establishment for pulverizing quartz ore, in order that the gold or silver it contains may be separated by chemical means; a stamp mill. *Standard*, 1964; *Fay*."
>
> **Reduction works**: "Works for reducing metals from their ores, as a smelting works, cyanide plant, etc. Fay, *Dictionary of Mining, Mineral and Related Terms*.

**Type of Mineral Processed by Independent Mill Site**

The mineral processed by a "quartz mill" or "reduction works" must come from a vein or lode. Furthermore, "mill sites of this category may not be used as custom works to beneficiate material from placer claims.@ *United States v. Paden, supra* at 383. As a general rule, only metallic minerals in veins or lodes may be processed by a "quartz mill" or "reduction works."

**Swanson Mill Site Case Reversed**

In *Swanson v. Andrus*, Civil No. 78-4145 (June 3, 1982), the United States District Court for Idaho partially reversed *United States v. Swanson, supra* which had held various mill sites invalid, noting that "no consideration was given to a provision made for living quarters, offices, etc., clearly proper uses for mill site claims.@ *See Bruce W. Crawford*, 86 IBLA 350, 365-66 (1985).

**The Swanson Case**

*United States v. Swanson*, 93 IBLA 1, 93 I.D. 5 (1986), involved a contest action against 23 mill sites in the Sawtooth National Recreation Area, established by the Act of August 22, 1972 [86 Stat. 612; 16 U.S.C. 460aa (1982)]. The Board received this case on remand from, Judge Callister of the U.S. District Court for the District of Idaho. *Swanson v. Andrus, supra*.

**Prima Facie Case Based on No Use or Occupancy**

In *United States v. Swanson*, 93 I.D. 5, 15 (1986), the Board described why a *prima facie* case that a mill site is not used or occupied for a significant period of time is not a weak case. The Board said at 20 and 21:

> The essence of the millsite appropriation is use or occupancy. When the Government presents a *prima facie* case that the millsite has not been used or occupied for a significant period of time, this is not a weak prima facie case. Rather, it is akin to a *prima facie* case in a mining contest wherein the Government has presented substantial probative evidence that no valuable mineral deposit exists within the challenged location. This is a *prima facie* case which goes to the core of the claim's validity.
>
> So, too, in the case of a millsite contest where the evidence presented by the Government is sufficient to establish a *prima facie* case that the land has not been used or occupied for mining or milling purposes, such evidence goes to the very heart of the millsite's validity. It goes without saying that such a *prima facie* case might be overcome by evidence presented by a contestee. But, when such a *prima facie* case has been presented, the contestee has an affirmative obligation to establish by a preponderance of the evidence that the challenged millsite claims are either used or occupied for mining or milling purposes.

**Valuable Tailings on Mill Sites at Time of Withdrawal**

In *United States v. Swanson*, 93 IBLA l, 11 (1986), it was held that Aif the mining claims associated with the mill sites or the tailings ponds found on some of the mill sites contained sufficient mineralization at the time of withdrawal" they could be valid.

**Improvements Added After Withdrawal Cannot Retroactively Validate Mill Site**

Improvements constructed after the date of a withdrawal cannot serve to retroactively validate an otherwise invalid mill site. *United States v. Swanson*, 93 I.D. 21 (1986).

**Use or Occupation of All Land in a Mill Site**

In *U.S. v. Swanson, supra*, the Board also held that a mill site patent applicant may be granted less than a five-acre tract if all the land within the tract is not "proved to be needed for milling and mining purposes." The Board stated at page 174:

> The Secretary's interpretation of how the statute should be administered clearly indicates that a claimant is entitled to receive only that amount of land needed for his mining and milling operations, and this amount can embrace a tract of less than five acres. Furthermore, there is nothing within the statute, which prevents the Government from granting less than five-acre tracts when need for a lesser amount of surface area is indicated.
>
> ... We believe that in granting a gratuity of a mill site the Government is entitled to

require efficient usage, so that only the minimum land needed is taken. All other land can then be retained by the Government to be used for public purposes rather than for possible non-mining use.

The Board concludes that the law requires a claimant, when challenged by the Government, to demonstrate use or occupation of all the area claimed within a mill site location before he will be granted a patent for the full amount requested. The area which is not proved to be needed for milling and mining purposes may not go to patent.

**Public Law 167 Applies to Mill Sites**

The owner of a valid mill site location with surface rights under section 4 of the Act of July 23, 1955 (30 USC 612) may cut and remove the timber on the claim for the purpose of constructing a mill, reduction works, and other accessories required in the development of his mineral interests, but he may not cut the timber for resale. *Effect of Section 4 of the Act of July 23, 1955 on Mill Sites*, 64 ID 301 (1957). In other words surface resources may be used for mining or milling purposes, but may not be used for resale, even if the money from the sale is used for purchase of' mining or milling equipment or supplies.

**Good Faith Use of Mill Site**

The fact that land in a national forest is located in such a manner as to give the most possible frontage on the main highway and to adjoin land owned and used for recreational and camping purposes by the applicant from which he gains his livelihood was held by the Secretary of the Interior to give rise to serious doubt as the good faith of the applicant, especially considering that little mining or milling activity was evident. *U.S. v. Langmade and Mistler*, 52 LD 701 (1929). However the question of relative values with respect to lands within a national forest, whether chiefly valuable as a recreational site or for mining and milling purposes, is not a crucial test of its locatability. The occupation for mining or milling purposes must be more than mere naked possession. *U.S. v. Langmade,* 52 LD 700 (1929). It must be evidenced by outward and visible signs of the good faith of the claimant. *Hecla Co*., 12 LD 75.

**Mill Sites May Be Located in National Forests**

In *James W. Nicol*, 44 LD 197, the Department in holding that the act of June 4, 1887 (30 Stat. 11, 35, 36), confers the right to locate and purchase a mill site under the mining laws of the United States within a national forest, quoted the following provision of the statute:

The purpose and intent of the act of June 4, 1897, was to promote the mineral development of the public lands within national forests. The mineral lands were made subject to entry under the existing mining laws of the United States. As an element of the mineral development of said lands, it is necessary that the lode locator, or entryman, should be permitted to have the ancillary right of locating and purchasing a mill site. The right to locate a mill site is one granted by the existing mining laws, and is an incident under the facts in this case to the right to make mineral entry. By necessary implication,

therefore, the act of June 4, 1897, *supra*, conferred the right to locate or purchase a mill site in connection with a lode claim within a national forest.

**Validity of Mill Sites at Date of Withdrawal**

In *U.S. v. Almgren*, 17 IBLA 295, 299-301, (1974), it was determined that a mill site located prior to a withdrawal must be valid both at the date of the withdrawal and must continue to be valid without interruption from that date forward. The Board said:

> As to the validity of the mill sites, compliance with the mining laws must precede withdrawal, for the United States may at any time withdraw its consent to occupancy of public land under the mining laws, subject to valid existing rights. *Citations Omitted.* Moreover, although a claimant is able to show compliance with the law as of the date of withdrawal, he must also show that he has continued in compliance without substantial interruption from that date to the date that validity is determined.

A mill site may be located on lands withdrawn under authority of the Pickett Act (43 USC 142) which allows entry for metalliferous minerals. *Coeur d'Alene Crescent Mining Co.*, 53 ID 531 (1931). However, a mill site located on land subject to a reclamation withdrawal, or any other withdrawal that closes land to entry under the mining laws, initiates no rights in the locator and is void from its purported inception. *J.P. Hinds*, A-29239 (March 8, 1962).

**Survey Requirements**

If the lands in the patent application are described by legal subdivision and are situated in surveyed lands, no mineral survey is required regardless of whether they are independent mill sites or located in connection with lode or placer claims. However, if the mill site is described as a portion of an irregular lot or is described by metes and bounds, and is not accompanied by the official survey required by 30 USC 29 (1976), the application must be rejected. *U.S. v. Buch*, 11 IBLA 307 (1973).

**Mill Site on End Line or Side Line of a Lode**

The provision of section 2337 where only "nonmineral land, not contiguous to the vein or lode," may be acquired for mining or milling purposes in connection with a lode mining claim, is intended to prevent the appropriation, within the mill site area of a further segment of the actual mineral vein or lode. And a mill site, not contiguous to a vein or lode, embracing only nonmineral land, is not objectionable merely because it is in contact with a side line of the lode. *Yankee Mill Site*, 37 LD 674 (1909).

A mill site may be located adjoining the end of a lode mining claim providing that it can clearly be shown that the lode or vein along which the mining location is laid either terminates before the end line abutting upon the mill site claim, or that the vein departs from the side line of the mining claim. *Montana-Illinois Copper Mining Co.*, 42 LD 434 (1913). If a part of a mill site is contiguous to the end line of a lode claim, the normal proofs of nonmineral character, such

as use of geologic inference, will not suffice to permit patent of that part of the mill site contiguous to the end line. *Coeur d'Alene Crescent Mining Co*., 53 LD 531 (1931). For example, where a mill site is contiguous to the end line of a lode claim, the Government may require core drilling on the mill site near the end line of the lode claim to establish the nonmineral character of the mill site prior to issuance of patent.

In *U.S. v. Skidmore*, 10 IBLA 325 (1973), the Board held that a mill site may border on a supporting lode claim and may be located and patented even though the lode claim with which it is associated has been previously patented. *Also see Eclipse Mill Site*, 22 LD 496 (1896).

**Frequently Quoted Early Secretarial Interpretations of "Used or Occupied"**

In *Charles Lennig*, 5 LD 190, 192 (1886), the Department enlarged upon the statutory language as follows:

> The second clause of this section manifestly makes the right to patent a mill site dependent upon the existence on land of a quartz-mill or reduction works. But the terms of the first clause are more comprehensive. Under them it is not necessary that the land be actually a "mill site". They make the use or occupation of it for mining or milling purposes the only pre-requisite to a patent. The proprietor of a lode undoubtedly "uses" non-contiguous land "for mining or milling purposes" when he has a quartz mill or reduction works upon it, or when in any other manner he employs it in connection with mining or milling operations. For example, if he uses it for depositing "tailings" or storing ores, or for shops or houses for his workmen, or for collecting water to run his quartz mill, I think it clear that he would be using it for mining or milling purposes. I am also of opinion that "occupation" for mining or milling purposes, so far as it may be distinguished from "use," is something more than mere naked possession, and that it must be evidenced by outward and visible signs of the applicant's good faith. The manifest purpose of Congress was to grant an additional tract to person who required or expected to require it for use in connection with his lode; that is, to one who needed more land for working his lode or reducing the ores than custom or law gave him with it. Therefore, when an applicant is not actually using the land, he must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes.

In *Alaska Copper Company*, 32 I.D. 128 (1903) another frequently cited case further defining "used or occupied," the Secretary stated at 131:

> 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 at the time patent thereto is applied for to come with the purview of the

statute.

**Three Types of Mill Sites: Use Must Be Separate**

In *U.S. v. Paden*, 33 IBLA 383 (1978), the Board discussed the three types of mill sites: (1) those occupied by the proprietor of a vein or lode for mining and milling purposes; (2) those that have quartz mills or reduction works or independent mill sites; and (3) those that are used by the proprietor of a placer claim for mining, milling, processing, beneficiation or other operations in connection with such claim. 30 USC 42. The Board, in ruling that the use of each class of mill site must be only that required by statute, said:

> .. For a mill site claim owned by the proprietor of either lode or placer mining claims, it must be shown that the claims are valid by discovery; for a mill site used for a quartz mill or reduction works, it must be shown that there is mineral material from a vein or lode which is being processed through works existing on the mill site. Mill sites of this category may not be used as custom works to beneficiate material from placer claims. 30 USC 42(a). A mill site must be shown to be used or occupied as the statute requires; and if it fails to meet the statutory test it is invalid. *Howard C. Brown*, 73 11) 172 (1966).

**Access Roads Are Not a Qualified Use**

Roads for access to mines have been excluded from the lands needed for mining or milling operations because the mining claimants would, of necessity, have a right of reasonable access to operate and maintain the improvements. *Hales and Symons*, 51 LD 123 (1925), 66 ID 361 (1961).

**Water Conveyance and Ore Transportation Are Not Qualified Uses**

The appropriation of land for the purpose of conveying water to and for a road used in transporting ore from actively operated mining claims cannot be considered uses for mining and milling purposes. *Hales and Symons*, 51 LD 123 (1925).

**Sinking of Wells Used in Mining Operation**

The Department has recognized the sinking of wells and the construction of substantial improvements for the conveyance and utilization of water to be used in mining operations as satisfying the requirements for a mill site. *Howard C. Brown*, 73 ID 172 (1966).

**Springs as Basis for Valid Mill Sites**

Springs used for drinking purposes cannot serve as the basis for a valid mill site if they have not been improved. *United States v. Swanson*, 93 I.D. 5, 21 (1986).

**Improvements Used to Develop Water May Validate Mill Sites**

In *United States v. Swanson*, 93 I.D. 5, 20 (1986), the Board held that works or

improvements to develop water such as pumping stations are proper uses of a mill site. Although the "mere appropriation of water does not validate a millsite...., where water is essential for the working of the mine or an associated millsite, works required in the development of the water therefor are properly embraced in a millsite. *Sierra Grand Mining Co. v. Crawford,* 11 I.D. 338 (1980).@

**Housing Used in Connection with the Mining or Milling**

The Department has also held that the use of land as the site of living quarters for workmen employed in a mill is justification for the allowance of a mill site entry. *Satisfaction Extension Mill Site,* 14 LD 173 (1892). However, the use of a cabin as a base of operations while engaged in prospecting activities, or the intent to use land in the future as the site of a mill or the site of living quarters or other structures to be utilized in connection with the operation of a mine or mill, is not sufficient to validate a mill site location. *See U.S. v. S.M.P. Mining Company*, 67 ID 141 (1960); *U.S. v. Gilbert C. Wedertz*, 71 ID 368 (1964). In *U.S. v. W.E. Polk*, A-30859 (April 17,1968), the Secretary said:

> There remains the use of the cabin by Polk as a place to stay while working on his mining claims. He and others interested in the claims through him have used the No. 1 Mill Site as a base of operations. The use, however, has been sporadic and occasional, and there are other sites which would serve equally well as site for housing workers if a mine were to be developed, While housing workers on a mill site might well constitute use for mining or milling purposes, such use must be more than occasional, particularly where there has been no substantial improvements on the mill site for residential purposes.

**Blacksmith Shop and Tool House**

The use of a mill site as a location for a blacksmith shop and tool house, in which are stored tools and machinery necessary to run a tunnel upon the mining claim in connection with the mill site, constitutes a use and occupation of the land for "mining and milling purposes." *Alaska Mildred Gold Mining Co*., 42 LD 255 (1913). In *U.S. v. Dean*, 14 IBLA 107, 109 (1973), the Board considered a mill site case where it held that the uses were proper. The Board said:

> Here, among other uses, contestees showed that tools used in working the claims and ore are stored at the mill site (related to a lode claim), a stone house is used to board employees, a mill is on the land and has been used, and frequent trips are made between the mill site and the mining claims. The uses and improvements are typical of mining and milling operations. The mill site appears to be used for mining or milling purposes.

**Living Quarters and Offices Are Proper Uses**

In *Swanson v. Andrus*, Civil no. 78-4045 (June 3, 1982), Judge Callister of the U.S. District Court for the District of Idaho held that living quarters and offices are proper uses of mill sites. He stated:

> In accepting the Forest Service's proposal which reduced the mill sites to immediately

around the mill, it appears that no consideration was given to or provision made for living quarters, offices, etc., clearly proper uses for the mill site claims.

In *United States v. Swanson*, 93 I.D. 5, 25 (1986), the Board agreed in saying Awe think the Court was clearly correct in its conclusion that the earlier decision of the Board failed to make adequate provision for housing a work force.@

**Ditches and Pipes for Conveyances of Water**

In *United States v. Swanson*, 93 IBLA 1, 29-30 (1986), the Board upheld a long line of Interior decisions concerning conveyances of water such as pipelines and ditches. The Board stated at 29-30:

> Thus, the mining laws clearly contemplated that use of federal land would be necessary in order to conduct water from its source to a place of beneficiation, and granted a right-of-way for that purpose. This being so, there is no logical basis upon which it could be concluded that Congress also intended that a millsite could be predicated on the same use of the land for which it had expressly granted a right-of-way.
>
> * * *
>
> In light of both the statutory scheme and the Departmental pronouncements, we think it clear that a millsite claim is not properly made for the sole purpose of conducting water from one place to another, even if the water is used in connection with mining or milling operations.

**Fuel Storage, Saw Mill and Equipment Repair**

In *United States v. Donald L. Clark*, 121 IBLA 260 (1991), the Board affirmed a decision by an Administrative Law Judge holding that a mill site was needed by the owner of a placer claim for fuel storage, a saw mill and equipment repair. The Board agreed that a need existed to locate these facilities and uses in an area removed from mining. *Id*. at 267. For example, (1) the fuel storage should be removed from mining operations for safety reasons and the mill site offered clay soil which would help contain any possible spill, (2) the saw mill would be used to provide timbers for buildings on the mill sites and for bulwarks and stabilization of gravel banks, and (3) equipment repair and maintenance should not be conducted near the mineral deposit because oil and grease associated with repair and maintenance would hinder mineral recovery.

**Storage of Ore and Depositing Tailings**

In *United States v. Swanson*, 93 I.D. 5, 22-23 (1986), the Board reaffirmed a long line of cases holding that the storage of ore and depositing of tailings are valid uses of mill sites. In this case, the Board further noted that Awhere millsites are claimed as a repository of tailings, it is necessary for the claimant to show that the tailings possess economic value and that the tailings have a direct relationship with the vein or lode with which the millsites are associated.@

**Storing Ore, Depositing Tailings and Overburden**

In *Utah International, Inc*., 36 IBLA 219, 225-226 (1978), the Board held that storing ore, depositing tailings and depositing overburden are validating uses for mill sites., The Board said:

> In its decision the State Office says that a patent is not warranted in this case because the lands are being used for stockpiling, overburden and tailing ponds and such uses are temporary. In commenting on the word "use" as it appears in the statute, Secretary Lamir, in the case of *Charles Lennig*, 5 L.D. 190, 192 (1886), said that if a claimant used the land for depositing tailings or storing ores, he thought it was clear that the claimant would be using it for mining or milling purposes. Moreover, this Board expressly ruled in *U.S. v. Swanson*, 14 IBLA 158, 81 ID 14 (1974), that storage of ore was a validating use under the mill site provisions of the mining laws.

**Use or Occupancy of a Mill Site That Does Not Validate the Mill Site**

In *U.S. v. Collord*, 128 IBLA 266, 289, 291 (1994), the Board held that the following activities on a mill site did not validate mill site claims:

1. Camping on mill sites while performing assessment work and sampling associated lode claims.

2. Use of a mill site claim as a staging area for prospecting or assessment work activities on a mining claim does not constitute use of the land for mining purposes since such activities are not mining operations.

3. "Even if prospecting or assessment work activities were to constitute mining, occasional use of the millsite claims does not satisfy" *Id.* at 289.

4. Placement of tools and building materials on the claims.

**Reclamation Work Does Not Constitute Use**

In *Utah International, Inc*., 45 IBLA 73, 77 (1980), the Board considered an appeal by Utah International wherein the company argued that reclamation of mill sites, as required by Wyoming law constitutes use and occupancy of the mill site and should be considered the final step in the total mining and milling process. The Board stated at 77:

> ... To hold that reclamation, which generally consists of leveling, contouring, seeding, watering, and possibly fertilizing the land, is a "function or utility intimately associated with the removal, handling, or treatment of ore" is, we feel, to torture the language of *Alaska Copper*. We agree with Judge Rampton below that lands undergoing reclamation are not being used or occupied for mining or milling purposes within the meaning of 30 USC 42.

**Past and Future Use**

A mill site that might once have been valid can lose that validity, and conversely, a mill site located for future use is not valid. In *U.S. v. Skidmore*, 10 IBLA 322 (1973), the Board held that past use of a claim for mining purposes was not sufficient where occupancy was not maintained. Similarly, in *U.S. v. Dietmann*, 26 IBLA 364 (1976), the Board held that past use does not qualify where a portable mill was used on the claim in the past but was removed and only a small amount of ore is stockpiled on the mill site. *U.S. v. Wedertz*, 71 ID 368 (1964), it was held that planned future use for mining purposes was not sufficient where, although improvements were on the site, present use was merely for prospecting activities.

**Intention to Use or Occupy Mill Site in Future Not Sufficient**

In *U.S. v. Osmer, Jr.*, 76 IBLA 59 (1983), the Board determined that three mill sites with such improvements as a house, a corral, a garden plot, a storage shed, a well, a well house, a water tank and a water line do not satisfy the requirements of use or occupancy in the statute, 30 USC 42 (1976). The major reason for the Board's decision in this case was that there has been no mining operation on the associated lode claims since the mill sites were located in 1957. The Interior Department has consistently held that an intention to use a mill site in the future is not sufficient to establish use or occupancy. The Board said at 61:

> In the present case appellants have shown no use on the claims related to any ongoing mining or milling operation. The patented lode claims have been in a state of inactivity, except for various testing and sampling conducted in the 1950's, 1977, and in May 1982. Appellant Osmer also testified that he was involved in mill construction on the mining claims in 1979 and 1980. The mill is portable and was not on the mining claims at the time of the hearing. Although, appellants have expressed the intent to mine in the future, there is no present mining operation on the lode claims. The use of improvements on a millsite as a base for occasional sampling or testing activities on associated patented lode claims and the intent to use the millsite in the future when and if market conditions are favorable, do not satisfy the requirements of use or occupancy set forth in 30 USC ' 42 (1976). *See United States v. Wedertz*, 71 ID 368 (1964).

**Used or Occupied at Date of Patent Application**

In *Hudson Mining Company*, 14 LD 544 (1892), the Interior Department held that the land covered by a mill site location must be used or occupied for mining or milling purposes at the date of patent application. The Department said at 544:

> The act clearly contemplates that at the time the application for patent is made, and the entry allowed (or 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.

It was also held in *U.S. v. Werry*, 14 IBLA 242, 81 ID 44, 49 (1974), a vague intention to use the land at some future time does not satisfy the requirements of the statute."

**Continuous Operation Required for Independent Mill Sites**

In *U.S. v. Paden*, 44 IBLA 257 (1979), the Board considered a case where sporadic use was made of an independent mill site. In holding that such a mill site must show "more or less continuous operation for custom work" the Board said:

> It is apparently undisputed that appellant has installed some equipment on the 7-1/2 acres in issue and that he has processed occasional lots of ore from undisclosed locations. The question to be decided is whether sporadic use of the milling equipment satisfies the intent of the mining law. How much and what kind of use entitles a claimant to the Government's gratuity of a mill site on public land? It appears to be well settled that use in good faith for any mining or milling purpose is necessary. Further, there must be a quartz mill or reduction works on the premises for processing mineral material from a vein or lode. *Paden, supra*. Coupled with good faith and the existence of an operable mill or reduction works, we think there must also be evidence of an ongoing and more or less continuous operation for custom work. We think the record is clear that appellant has not demonstrated more than sporadic or occasional days of operation of his mill. This meager use does not satisfy the requirement of law. Indeed, operations on the mill site are, at best, a "spare time" enterprise, of appellant, apart from his gainful, full-time employment as foreman at the Desert Materials gravel pit and hot plant. It is our opinion that Congress did not intend its grant of public land for mill site purposes to be utilized other than by ongoing operations ancillary to valid mining claims or in connection with a custom mill in continuous operation to satisfy a present demand for milling services.

**Factors to be Considered if Mill Site Not Used**

In *U.S. v. Cuneo*, 15 IBLA 304 (1974), the Board considered the factors that should be taken into account where a mill site is not presently used or occupied. It was held that no specific period of nonuse could be established because the factors vary from case to case. The Board said:

> In considering the issue of occupancy of a mill site which is not being used, we must apply a test of reasonableness to determine whether the period of nonuse demonstrates invalidity. Within this concept of reasonableness, factors in addition to time of nonuse are relevant, namely: the condition of the mill; the potential sources of ore to be run through the mill; the marketing conditions; costs of operations, including labor and transportation; and all factors bearing upon the economic feasibility of a milling operation being conducted on the, site. Because these and other factors vary from case, we cannot establish a definite period of nonuse applicable to all cases which would cause the site of a custom mill to lose its validity. We suggest, however, one example of acceptable

nonuse. If a mill at the time of a withdrawal or contest was not in operation because bad weather, or work stoppage caused by other short-term circumstances briefly interrupted the flow of ore to the mill, and further operation was clearly expected because of available sources of ores and commitments for the milling work, with only nominal startup costs necessary to proceed with the milling, the basic character of the structure as a mill would not be changed, and the land would be occupied for milling purposes.

**How to Determine Validity of Mill Site if Occupancy But No Present Use**

In *United States v. Swanson*, 93 IBLA 1, 21-22 (1986), the Board addressed the question of how to determine the validity of a mill site claim if it is not used but is occupied for mining or milling purposes. The Board acknowledged that Awhile 'use' under 30 U.S.C. 42 (1982) necessarily implies present mining or milling activities, it has long been noted that land may be 'occupied' under the statute even in the absence of present 'use' of the land for mining or milling purposes."

If there is no present use of the land for mining or milling purposes, "the claimant must show 'an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes.'" *Id*. at 22. However, Athe mere intention to use land for mining or milling purposes some time in the future is not sufficient to validate a location.@ *United States v. Herron*, A-27414 (March 18, 1957).

In *United States v. Cuneo*, 81 I.D. 262, 271 (1974), the Board specified the elements that must be considered where an independent mill site is occupied but not used for mining or milling purposes:

> In considering the issue of occupancy of a millsite which is not being used, we must apply a test of reasonableness to determine whether the period of nonuse demonstrates invalidity. Within this concept of reasonableness, factors in addition to time of nonuse are relevant, namely: the condition of the mill; the potential sources of ore to be run through the mill; the marketing conditions; the costs of operations, including labor and transportation; and all factors bearing upon the economic feasibility of a milling operation being conducted on the site.

In *United States v. Swanson, supra* at 22, the Board specified that different elements from those mentioned in Cuneo must be considered where a dependent mill site is occupied but not used for mining or milling purposes:

1. The validity of the claim if unpatented.

2. The extent of mineral reserves on a patented claim.

3. The length of nonuse and amount of time that might reasonably be expected to be consumed in putting the mill site to use. This would be consistent with the scope of foreseeable activities.

**Occupancy But No Present Use**

In the *Swanson* case (supra at 23-25), 21 years had past since Swanson had acquired the mill sites. Other than a single 30-day test run, no production from the mill had occurred during this time. However, the Board held that good faith was indicated by extensive valuable improvements and the expenditure of several million dollars in an effort to get the mill in operation.

**Occupancy But Limited Use**

In *U.S. v. Shiny Rock Mining Corp*., 112 IBLA 3269 363 (1990), the Board considered the validity of *Shiny Rock's* mill sites where there was limited production or use from 1977-78. The Board held that "this fact does not, given the extensive evidence regarding its occupation and other activities during that period, affect the validity of those claims. The Board has held that 'in the absence of actual use of the land for mining or milling purposes, the claimant must show an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes.'"

**Invalidating Portions of Mill Sites for Lack of Use or Occupancy: the 2.5 Acre Rule**

In *United States v. Swanson*, 93 IBLA 1 (1986), the Board held that the mining law grants only the lands in a mill site actually used or occupied for mining and that all excess lands must be excluded. The Board determined that if each 2.5 acre aliquot part does not "show the element of either use or occupancy," it is excess and must be excluded. The Board said at 35:

> Judge Mesch was, of course, on sound legal footing in upholding the authority of the Department to declare acreage within a millsite claim to be excessive, giving due consideration to the use to which the millsite was put. Not only does the statute grant only land actually used or occupied not to "exceed five acres," 30 U.S.C. 42 (1982), but, in addition, the Department's authority to invalidate portions of millsites was expressly upheld by Judge Callister in his decision.
>
> It is our view that, as a general matter, where the United States is examining individual mill sites for the purpose of ascertaining whether all of the land within the millsite is either used or needed for mining and milling purposes, such scrutiny should be limited to each 2.5 acre aliquot part.

**Alternative Method of Omitting Portions of Mill Sites**

The Board also held in *Swanson* that where portions of multiple mill sites are used or occupied for mining or milling purposes, the claimant may be required to omit portions of several mill sites to arrive at the minimum number of mill sites that can embrace all the lands used or occupied. The Board used this approach to exclude lands within two mill sites that were partly used for tailings. *United States v. Swanson, supra* at 35-36.

**2.5 Acre Rule Applicable to Lands Open to Entry**

In *United States v. Donald L. Clark*, 121 IBLA 260 (199 1), the Board discussed the applicability of the 5 acre rule to a mill site associated with a placer claim. One distinction between this case and *Swanson* is *that Swanson* involved mill sites in an area withdrawn to mineral entry, whereas the mill site in the case is situated on lands open to mining claim location. The Board indicated that although the 2.5-acre rule would be applicable, "Clark has demonstrated a need for the entire 5 acres sought in his patent application.@ *Id*. at 267.

**Owner of Valid Claim May Not Be Entitled to Mill Site**

The owner of a patented or patentable mining claim is not entitled to a mill site if the mill site claimant does not show that the mill site is being occupied or used for mining or milling purposes. *U.S. v. National Motor Service Co*., 15 IBLA 23 (1974).

**Mill Site Used in Connection with Invalid Claim is Invalid**

The validity of a mill site that is used in connection with a mining operation on a lode claim is necessarily dependent upon the validity of such lode claim. *U.S. v. Coston*, A-30825 (February 23, 1968). In *U.S. v. Crawford*, A-30820 (January 29, 1968), the Department held:

> Where a mill site is used for mining and milling purposes in connection with a mining claim that is held to be invalid, and the claimant does not show that the mill site is being used for mining and milling purposes in connection with any other mining claim, the mill site is properly declared to be invalid.

**Mining Claim in Connection with Dependent Mill Site Must Also Be Examined**

In *U.S. v. Dean*, 14 IBLA 107, 109 (1973), it was held that in order to determine the validity of a dependent mill site, the validity of the mining claim that it is associated with must also be verified. The Board said:

> The conclusion of whether the activity is actually mining or milling in connection with the lode claims cannot be determined, However, without determining the nature of the activity on the associated claims and their validity.
>
> Where contestees present proof of use and occupancy of a mill site which appears related to mining or milling in connection with lode claims, then the issues raised are whether there are mining activities conducted on the associated claims and whether they are valid claims. This requires evidence in addition to proof of the activities on the mill site.

Therefore, in order to receive a patent for a mill site dependent on an unpatented lode claim, the applicant for patent must show a discovery on the associated lode claim. Even if the mining claim has been patented, it is necessary to show mining operations on the associated patented claim. *U.S. v. Wedertz*, 71 ID 368, 373 (1964); *U.S. v. Dean*, 14 IBLA 107, 109, (1973).

**Ownership of Lode Claim Does Not Disqualify Mill Site Patent Application**

In *U.S. v. Parsons*, 33 IBLA 326 (1978), it was held that a mill site may be patented as an independent location, even though the applicant also owns a lode claim. Of course, the use must be proper for an independent mill site.

**Dependent Mill Site May Be Contested Without Contesting Validity of the Associated Claim**

In *U.S. v. Dean*, 14 IBLA 109 (1973), it was held that a dependent mill site may be contested without contesting the validity of claim with which it is connected. The Board stated that "a mill site can be contested separately and declared invalid when evidence establishes it is not being used for mining and milling purposes independent of the issue of the validity of the mining claims.@ *U.S. v. Polk*, A-30859 (April 17,1968).

**Lode Claim Located Over Existing Mill Site**

If a lode claim is located in such a manner that it overlaps an existing mill site, the owner of the lode claim has no right to remove minerals from the land embraced by the mill site location. *Cleary v. Skiffich*, 28 Colo 362, 65 Pac. 59 (1901); 1 *American Law of Mining* 5.36, p. 795.

**Validity of Patent Application May Be Determined At Any Time**

In *Utah International, Inc.*, 45 IBLA 73 (1980), it was held that the Department of the Interior may inquire into the validity of a mining claim any time prior to the issuance of patent. The Board said:

> The principle, that the Secretary his the power and duty to determine the validity of claim so long as patent has not issued would be rendered nugatory if his inquiry into the applicant's use and occupancy were limited to the patent application period. If inquiry were so restricted in the present case, the Secretary would be asked to close his eyes to the fact that Utah no longer uses the subject mill sites for waste-dumping purposes. The Secretary would be asked to grant a patent for land which Utah is presently reclaiming.
>
> We agree with BLM and Judge Rampton that an inquiry into use and occupancy of the subject claims cannot be restricted to the patent application period.

**Mill Site Patent Application Must Not Be Held Up for Possible Adverse Environmental Effects**

In *Utah International, Inc*., 36 IBLA 219, 226 (1978), the Board considered whether the Government had the discretion to hold up a mill site patent application on the basis of possible adverse environmental effects. In holding that no such authority existed, the Board said at 226:

> In conclusion, we find that appellant has met all the applicable requirements of 30 USC 42, *supra*, and a patent must therefore issue. The concerns expressed by EPA regarding radioactive waste on the sites seem to be addressed more than adequately by Wyoming's environmental statute and the EPA recommendation should thus constitute no bar to appellant's application. In light of these determinations it is unnecessary for us to reach the question of the authority of the Department to refuse to issue a patent for a mill site where all of the conditions of the mill site law have been met.

**Contest Procedures are Same for Mill Site Locations as Lode and Placer Claims**

A mill site, since it falls within the ambit of the United States mining laws, is a claim to property which may not be declared invalid without proper notice and opportunity for adequate hearing in accordance with due process. *See U.S. v. O=Leary*, 63 ID 341 (1956). Consequently, contest procedures are the same for mill site locations as lode and placer claims. In *U.S .v. Paden*, 33 IBLA 383 1978 (1978), the Board said:

> As the Department has considered it necessary that the location of a mill site be, made substantially in the manner of locating mining claims, so it has also construed the mineral contest procedures as being wholly applicable to contests against mill site locations.

**Adverse Claims**

A mill site locator may not file an adverse claim against a mineral patent applicant but should instead file a protest. The reason for this is only the interior Department has the authority to determine whether a discovery exists or the land is nonmineral. *Snyder v. Wallar*, 25 L.D. 7, 8 (1907); *Helena Etc. Co. v. Dailey*, 36 L. D. 144, 148 (1907). An adverse claim should only be filed where a priority of right is involved such as with two conflicting mill sites. *Ebner Gold Mining Co. v. Hallum*., 47 L.D. 32, 35 (1919).

## PROPER TYPE OF LOCATION: LODE OR PLACER

**Introduction**

One of the most poorly defined areas of the mining law concerns the question of whether a deposit should be located as a placer or lode. The statute (30 USC 23 and 35), which is not helpful in many cases, has in turn been interpreted by numerous confusing and conflicting Interior and Federal court decisions. Most case law, concerning the proper type of location, results from litigation between conflicting claimants over the right of possession rather than through initiation of contest action by the Interior Department. Unfortunately such cases offer little consistent direction that can be used by the prospector in the field. In *Bowen v. Sil-Flo Corporation*, 451 P2d 626 (1969), the Arizona appeals court stated:

> Because of the apparently relentless dichotomy established by judicial interpretation of pertinent mining statutes, there has been a plethora of litigation to determine whether particular ore bodies are locatable as lode or placer. The many judicial decisions have left the distinction as beclouded as when the conundrum was first posed by the 1870 enactment of the second of the two controlling statutes.

Although in many cases a particular mineral deposit will fit readily in either the lode or placer category, there is a trend for the opposite situation to be the case. Part of the problem relates to the type of mineral deposits worked during the passage of the mining law and the subsequent early case law. These deposits typically consisted of classic veins and recent stream placers that could be easily categorized under the statutory definition by even the most unsophisticated early miner. However, in recent years, discoveries are more and more commonly for deposits such as industrial minerals and disseminated ore bodies with no predictable form or character. For example, in *Titanium Actynite Industries v. McLennan*, 272 F2d 667, 673 (10th Cir 1960), the Court considered such a deposit as follows:

> ... The record discloses that we are dealing with a large, shapeless, coarsely grained mass of ore which, with the possible exception of the disintegrated top portion, is "in place" in the sense that it is in a fixed position. However, the mass extends over several miles of country and has no known dimensions or boundaries and none of the ordinary lode characteristics, not even as to the method of recovering the minerals. The theory that the entire mass is a lode in place with undetermined boundaries would create a single lode covering somewhere between 8 to 12 square miles.

**No Rule of Thumb Definition**

Another problem with precedents established by earlier court cases involving the question of whether a specific deposit should be located by lode or placer is that each ore deposit is unique. It has not worked well to apply a precedent established in one case to another case where the deposit in question may differ greatly from any other. As Lindley the well-known early authority on mining law said, "there can be no unyielding rule of thumb definition of a vein or lode; each case must be decided with reference to its own peculiar facts." *Lindley on Mines*, Vol. 1, 3rd Ed., *see* 289; also quoted with approval in *Titanium Actynite Industries v. McLennan*, 272 F2d 667 (10th Cir 1960). Lindley went on to discuss judicial definitions of lode and placer deposits as follows:

> The danger lies in accepting the definitions of either as broadly comprehensive or rigidly restrictive, and attempting to apply them to conditions not within the reasonable contemplation of the law, or in attempting to deprive a locator of the benefit of his discovery, if the thing discovered cannot be forced into the mold of arbitrary definition, either popular or scientific.

**Statutory Definitions of Placers**

The statute (30 USC 23) defines placers as "including all forms of deposit, excepting veins of quartz, or other rock in place..." Thus, the statutory definition of a placer includes essentially every type of deposit that is not a lode.

**Statutory Definition of Lodes**

The mining law (30 USC 23) states that lode locations may be made "upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits..." Upon comparing the statutory definition of a lode with that of a placer given above, it appears that the critical distinction between the two is that a lode should be rock in place, whereas, a placer should be a deposit that is not rock in place. However, the confusion began when the courts held certain hardrock deposits consisting of rock in place to be placers. *See Titanium Actynite Industries v. McLennan, supra.*

**Statutory Dichotomy**

In *U.S. v. Haskins*, 51 IBLA 1, 42 (1981), the Board made the distinction between a lode and placer as follows:

> Thus developed the essential statutory dichotomy which exists to this day. A lode claim is one located "upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits." 30 USC 23 (1976). A placer claim is essentially everything else. 30 USC 35 (1976).

**Importance of Making Proper Location**

The importance of making the proper location over a mineral discovery has been clearly stated by the United States Supreme Court. In *Cole v. Ralph*, 252 US 286, 295, 296 (1920), the Court held that "a placer discovery will not sustain a lode location, nor a lode discovery a placer location." Therefore, a placer location will not appropriate a lode deposit and a lode location will not appropriate a placer deposit.

**Location Certificate Cannot Describe Claim as Both Placer and Lode**

A mining claim may not be designated as both a placer and a lode location. AA certificate of location which attempts to classify mining claims as both placer and lode will fail, as these

terms are mutually exclusive.@ *Jack J. Swain*, 137 IBLA 235, 241 (1996). AThe proper way for Swain to have protected his interest in both placer and lode claims on the same land would have been to >double stake;= that is, to stake placer claims first, then stake any lode claims found within the placer locations. *See* Earl M. Hill, >Placer Mining claims -- Selected Problems and Suggested Solutions,= 23 *Rocky Mountain Mineral Law Institute* 385, 395-96 (1977); John W. Shireman, >Mining Location Procedures,= 1 *Rocky Mountain Mineral Law Institute* 307, 312-13 (1955).@ *Jack J. Swain, supra* at 241, f.n. 5.

**Float or Detached Materials**

The discovery of float or detached mineralized rock does not qualify for discovery of a lode mining claim. *Jupiter Mining Co. v. Bodie Consol. Mining Co*., 11 F 666, 675 (1881).

**Vein Covered by Alluvial Material**

A vein lying on fixed immovable rock, but covered by alluvial material is not a lode. *Leadville Mining Co. v. Fitzgerald*, Fed. Cas. No. 8, 158 (1879).

**Placers Consist of Softer Materials**

Decisions of the United States Supreme Court indicate that placer claims should be limited to "softer" material. In *Reynolds v. Iron Silver Mining Co*., 116 US 687 (1886), the Court said:

> Placer mines, though said by statute to include all of the deposits of mineral matter, are those in which this mineral is generally found in the softer material which covers the earth's surface, and not among the rocks beneath.

Somewhat later in *Cole v. Ralph*, 252 US 286, 295, 296 (1920), the Supreme Court further said:

> ... and to sustain a placer location it must be of some other form of valuable mineral deposit (citations omitted), one such being scattered particles of gold found in the softer covering of the earth.

**Method of Processing**

A bed of gravel from which particles of gold may be washed is not a lode even though the gravel may be enclosed within defined boundaries. *Gregory v. Pershbake*r, 14 P 401 (1887). In *United States v. Iron Silver Mining Company*, 128 US 673, 679 (1888), the Court defined the term placer claim as follows:

> ... ground within defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation

without milling.

**Placers Are Superficial Deposits**

In *North Pacific Railroad Co. v. Soderberg*, 188 US 526 (1903), the United States Supreme Court held that "placers are merely superficial deposits, occupying the beds of ancient rivers or valleys, washed down from some vein or lode..."

**Lode is Variation of the Word Lead**

A practical test of what constitutes a lode would be what a miner might follow to find ore (a lead). *King Solomon Tunnel & Development Co. v. Mary Verna Mining Company*, 127 P 129 (1912). The term "lode" simply means the formation by which a miner can be led or guided and is an alteration of the verb "lead." *Eureka Consol. Mining Co. v. Richmond Mining Co.*, Fed. Case No. 4,548 (1877) *affirmed* 103 US 839. It has also been held that a lode may contain more than one vein. *United States v. Iron Silver Mining Co.*, 128 US 673 (1888). In *Rummell v. Bailey*, 7 Utah 137, 320 P2d 653 (1958), the Court in determining that the word "lode" is a variation of the word "lead," stated that the term includes "mineralization in place... as distinguished from float or imported material.... of such significance that a practical, experienced miner of prudence and judgment would deem it advisable to pursue the vein or "lead"...

**Lode May Consist of Sedimentary Rock**

A deposit of mineralized quartzite of purely sedimentary origin enclosed between nonmineralized sedimentary strata, is a lode. *Duggan v. Davey*, 26 NW 887 (1886). In the *Mike & Starr Gold & Silver Mining* case, the United States Supreme Court said:

> ...a body of mineral underlying a large area of country in the Leadville mining district, whose general horizontal direction together with the sedimentary character of the superior rock, indicated something more of the nature of a deposit like a coal bed than of the vertical and descending fissure vein in which silver and gold are ordinarily found... 12 S.Ct. at 544. (1892).

**Lode May Have Broken Ore and Broken Country Rock**

Although the ore may be loose and friable, the enclosing walls must be country rock if the deposit is to be located as a lode. The deposit may also be considered to be a lode even though the enclosing country rocks are highly faulted and broken. *Tabor v. Dexler*, 23 Fed. Cas. No. 13,723 (CC Colo 1878).

**Form and Character of a Lode**

In *Meydenbauer v. Stevens*, 78 F 787, 790, 791 (DCD Alaska 1897), the district court described many aspects of lode deposits, including a definition of "in place" as well as variability of shape, structure and mineralization. The Court said:

> In addition to these definitions, I will direct your attention to two characteristics mentioned in the statute, which are essential to and inherent in the formation of a lode. You will observe that the statute uses the language "quartz or other rock in place." By the phrase "in place" congress evidently intended to make a distinction between rock or quartz held in place by the adjoining country rock and bunches or blotches of quartz or rock simply lying or resting upon the earth's surface without any walls, and also pieces or boulders detached from the earth's crust, commonly called "float," and usually found in the mountain gulches and along the beds of streams in a mineral country. The quartz or rock designated as "in place" must be suspended between, or lie within, or be enclosed by walls of rock constituting the general mass of the earth's crust in the immediate vicinity of the zone or belt. "The zone may be very thin, and it may be many feet in thickness, or thin in places, - almost or quite 'pinching out,' as miners term it, - and in other places widening out into extensive bodies of ore." Uniformity of structure in the formation of the zone is not required, as it may narrow down until very thin, and then suddenly expand or swell out, and as suddenly contract, forming what miners sometimes call "Kidneys"; but if it be held in place as I have described, and continuous in its formation between the country rock, it possesses one of the characteristics necessary to constitute a lode. The other necessary characteristic is that the belt or zone must bear some of the minerals or valuable deposits mentioned in this statute. A body of quartz or other rock in place might have the most clearly-defined walls, be of very great width, continue in its strike for a long distance, and go down to very great depth through the earth's crust, but, if totally barren of minerals, it would not be a lode. It is not necessary, however, that the minerals or valuable deposits shall be evenly distributed throughout the zone or belt. It may carry pay streaks near either side or in the center of the lode. In places the zone may be nearly barren of mineral, and in others disclose pockets immensely rich in the precious metals. Areas of the lode may carry ore of a very low grade, while others contain bands or shoots heavily impregnated with mineral.

In *Book v. Mining Co*., 58 Fed 106, 120, the Court further elaborated on the variable character of lode deposits as follows:

> ...This statute was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock bearing mineral, in whatever kind, character, or formation the mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock in place, bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts the veins, lodes, and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the core and existence of the rock in place, bearing mineral, is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein or lode is liable to have barren spots and narrow places, as well as

rich chimneys and pay chutes, or large deposits of valuable ore.

**Boundaries of Lodes or Veins**

In *Iron Silver Mining Company v. Cheesman*, 116 US 529, 536 (1886), the Supreme Court described the boundaries of lodes or veins as follows:

> To determine whether a lode or vein exists, it is necessary to define those terms; and as to that it is enough to say that a lode or vein is a body of mineral or mineral bearing rock, within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral bearing rock and the boundaries; with either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a lode or vein.

**Continuity of Lodes**

In *Iron Silver Mining Company v. Cheesman, supra*, the Court also described the necessity for continuity of lodes in the following manner:

> ... Excluding the wash, slide or debris on the surface of the mountain, all things in the mass of the mountain are in place. A continuous body of mineral or mineral bearing rock, extending through loose and disjointed rocks, is a lode as fully and certainly as that which is found in more regular formation; but if it is not continuous, it cannot be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein.....
>
> Certainly the lode or vein must be continuous in the sense that it can be traced through the surrounding rocks, although slight interruptions of the mineral bearing rock would not be alone sufficient to destroy the identify of the vein. Nor would a short partial closure of the fissure have that effect if a little farther on it recurred again with mineral bearing rock within it. . .
>
> .... Such boundaries constitute a fissure; and if in such fissure ore is found, *although at considerable intervals and in small quantities,* it is called a lode or vein.

**Boundaries of Lodes Determined by Assay Value**

If the vein is not visibly distinguished from the rock enclosing it by well-defined boundaries, such boundaries which must exist, may be established by assay value. *Golden v.*

*Murphy*, 103 P 394 (1909). In *Hyman v. Wheeler*, 29 F 347 (1886), the Court determined that the boundaries of a lode may be established by assay and analysis:

> ... and that it was a matter of importance to ascertain whether the ore was separated from the country rock by planes or strata of that rock visible to the eye. I see no reason for such distinctions. It is true that a lode must have boundaries, but there seems to be no reason for saying that they must be such is can be seen. There may be other means of determining their existence, and continuance, as by assay and analysis; and certainly the form and mode of occurrence of valuable ore, however controlling and influential in determining its geological character, is not a matter upon which it can be excluded from the terms of the act of congress.

Also, in *Titanium Actynite Industries v. McLennan*, 272 F2d 667, 671 (10th Cir 1960), the Court gave approval to establishing boundaries of lodes by assay analysis and further allowed some mineral in the country rock so long as the mineral content of the lode is significantly greater than the surrounding rock. The Court said:

> However, the boundaries or walls do not have to be visually discernible, but instead can be established by assay analysis. ... The country rock need not be totally barren of minerals, but the mineral content of a lode must be appreciably greater than that of the surrounding rock. *Grand Central Min. Co. v. Mammoth Mining Co.*, 29 Utah 490, 83 P. 648. A lode usually is said to exist where the body of mineral-bearing rock has such continuity and apartness that it can be traced in the general enclosing mass.

**Dimensions of Vein**

In *Bowen v. Chemi-Cote Perlite Corporation*, 432 P2d 104 (1967), the Court determined that the mining law makes no limitations as to the width, depth, or length of a lode. The Court said the following:

> The width of this particular vein, which the court might have found under the evidence to be not substantially more than fifty feet, is no obstacle to this deposit being regarded as a lode. It is to be noted that the applicable statute makes no limitation as to the width of the lode. In *McMullin v. Magnuson*, 102 Colo. 230, 78 P2d 964 (1938), pegmatite, a rock containing feldspar, a valuable nonmetallic substance which occurred in a formation 300 to 600 feet in width was held to be properly located as a lode.
>
> Nor does the statute (30 U.S.C.A. ' 23) provide that the length and depth of the vein must have ascertained limits. The typical situation in the case of the more vertical veins is that the length and depth thereof is unknown. That the exact boundaries of the subject horizontal lode in relation to the earth's surface are not established can certainly not be a defeating factor to the validity of these claims.

**Scientific Definitions Do Not Apply to Veins or Lodes**

The courts have, with a few exceptions, determined that the meaning of the terms Avein@ and Alode@ is established by the manner in which they are used by the practical miner rather than scientific definitions by geologists. One of the early cases relating to lode deposits where this issue was discussed is found in *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, 8 F. Cas. 819, 823 (CCI) Nev 1881), *aff=d* 103 US 839. In this case Justice Field said:

> Those acts were not drawn by geologists or for geologists. They were not framed in the interests of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose. The use of the terms Avein@ and Alode@ in connection with each other in the act of 1866, and their use in the act of 1872, would seem to indicate that it was the object of the legislator to avoid any limitation in the application of the acts, which a scientific definition of any one of these terms might impose. It is difficult to give any definition of the term, as understood and used in the acts of Congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes.

In *Duffield v. San Francisco Chemical Co.*, 205 F 480,485 (9th Cir 1913), the Court also determined that it is not important for a locator to have knowledge of the origin of a mineral deposit. The Court stated:

> ... It is not important to inquire how the mineral deposit had its origin, whether mineralized waters have ascended from below through fissures in the rock, and have deposited their solutions therein, or the deposit has been washed into the fissures by the elements, or brought from a distance as alluvium. The mining locator is not required to know the manner in which a mineral deposit had its origin. It is enough for him to know that a mineral deposit in place between walls of rock is a lode, and may be located as a lode claim, and that land containing mineral scattered or diffused through a superficial deposit of sand or gravel not in place may be entered as a placer claim.
>
> In *Titanium Actynite Industries v. McLennan*, 272 F2d 667, 669-670 (10th Cir 1960), the

Court determined that the form and character of the deposit controls the type of location. The Court said:

> ... But the experts did disagree in their opinions as to whether the mineral deposit was subject to lode or placer locations. The question must be resolved from the form and character of the mineral deposit as disclosed by the facts. ...it clearly appears that the plan of this legislation was to provide two general methods of purchasing mineral deposits from the United States -- one by lode mining claims where the valuable deposits sought were in lodes or veins in rock in place, and the other by placer mining claims where the deposits were not in veins or lodes in rock in place, but were loose, scattered, or disseminated upon or under the surface of the land. The test which Congress provided by this legislation to be applied to determine how these deposits should be secured was the form and character of the deposits.

In *U.S. v. Haskins*, 59 IBLA 1, 80 (1981), the Board determined that a deposit of limestone, not used for building stone, should be located according to the nature of deposition. The Board held:

> As we noted above, lands chiefly valuable for building stone must be entered as placers under the Building Stone Act. Where, however, a limestone deposit is valuable for its chemical or metallurgical properties, it is the nature of the deposition which determines the proper form of the location.
>
> There is no rule, despite, Davis' belief, that limestone valuable for chemical purposes must be located as a lode. Rather, the rule is that such a deposit is properly located according to the form of its deposition. *Citations omitted*. As an example, if the detrital deposit herein was valuable for chemical purposes it would be locatable as a placer, not a lode, because it is a placer deposit.

One of the exceptions to the rule that the origin of a deposit need not be considered may be found in *Moulton Mining Co. v. Anaconda Copper Mining Co*., 23 F2d 811, 814 (9th Cir 1928). In this case the Court said:

> .. Thus, while what are spoken of as structural boundaries are not always necessary to constitute a vein or lode, there must be ore bodies coming from the same source, impressed with the same form, and appearing to have been created by the same processes.

Compare the above quotation from *Moulton Mining Co*. with the last sentence of the quotation from *Eureka Consolidated Mining Co., supra*. There is a good reason for the scientific definition to not control the type of location because the origin of a deposit is in many cases not clear even to experienced geologists. Therefore, a practical miner could, in few situations, correctly determine the origin of a deposit as would be necessary if scientific definitions were required.

**Lode Versus Placer is a Question of Fact**

In the *Estate of Arthur C. W. Bowen*, 18 IBLA 383 (1975), the Board held that the determination of whether a deposit should be located by a lode or placer is a question of fact that must be established at a hearing. The Board said:

> Appellant is also entitled to a hearing on the nature of the deposit as placer or lode. When there is a disputed question of fact on a controlling issue, the claimants are entitled to a hearing on that issue. *U.S. v. O=Leary*, 63 I.D. 341 (1956); *The Dredge Corporation*, 65 I.D. 336 (1958). While it is true that most mineral deposits are almost as a matter of definition lode or placer, yet some embody enough characteristics of each to require a thorough determination of the factual nature of the deposit before the legal determination may be made. In this case it appears that expert geologists disagree on the nature of the deposit.

**A Lode May Lie on Surface**

In *Bowen v. Sil-Flo Corporation*, 451 P2d 626 (Ct App Ariz 1969), the Court in determining that a lode may lie on the surface, explained that cases thought to hold otherwise were concerned with extralateral rights and not whether a lode claim was valid. The Court said at 634:

> There is reputable authority holding that, in order for a mineral deposit to be a vein or lode, it cannot lie "merely on the surface." Quote from Ricketts, *American Mining Law* ' 158, at 131 (4th ed.) Among the cases cited by Ricketts, to support his position and principally relied upon by the appellant here, are: *Stevens v. Gill*, Case No. l3,398, 23 Fed.Cas. 12 (D.C.Colo. 1879); *Tabor v. Dexler*, Case No. 13,723, 23 Fed.Cas. 615 (D.C.Colo. 1878); and *Leadville Co. v. Fitzgerald*, Case No. 8,158, 15 Fed.Cas. No. 98 (D.C.Colo. 1879). Each of these federal decisions was authored by Judge Hallett, a trial judge of early renown in mining jurisprudence. ln each of this trilogy, the concern was with whether there were extralateral rights, not whether the lode claim was valid. That Judge Hallett considered that surface ore might be validly located as a lode is indicated by the following:
>
> > For the decision of this motion it is enough to say, that where the mass overlying the ore is a mere drift, or a loose deposit, the ore is not 'in place,' within the meaning of the act. *Upon principles recently explained, a location on such a deposit of ore may be sufficient to hold all that lies within the lines*; but it can not give a right to ore in other territory, although the ore body may extend beyond the lines. (Emphasis added.) *Tabor v. Dexler*, 23 Fed.Cas. at 615.

**Lode Without Hanging Wall Exposed by Erosion**

The Court in *Bowen v. Sil-Flo Corporation, supra*, also determined that a lode without a hanging wall, because of removal by erosion, may still be located as a lode. The Court said:

No authority has been called to our attention which would hold that, because a substantial portion of a vein or lode has been exposed by erosion, that it no longer has the characteristic of a lode. We see no purpose in creating new law which would thus metamorphose a lode into a placer and thus defeat bona fide efforts to satisfy these ambiguous statutes. This ore body is certainly fixed "in place" from a layman's view. If a lode cannot exist without a "hanging wall," and we do not find the law to be clear on this, we find a sufficient one here.

**Large, Shapeless, Mineralized Area Is Placer Even Though In Place**

In *Titanium Actynite Industries v. McLennan*, 272 F2d 667 (1969), the Tenth Circuit Court of Appeals determined that a mineral deposit consisting of pyroxenite, an igneous rock, should be located by placer location. This deposit covers approximately 8 to 10 square miles and is shapeless with no known dimensions or boundaries. Although the deposit is in place, it has historically been considered a placer deposit and been mined by placer methods. This case is particularly significant because the Court held that the deposit is a placer, even though the mineral is "in place." The Court said at 669, 671 and 673:

The trial court found that the exterior boundaries of the contested area lie within the 8 to 10 square mile surface dimensions of a mass of pyroxenite, and igneous rock containing several different minerals ... that the minerals are distributed unevenly throughout the pyroxenite so that there are a great number of relatively high mineral segregations arranged in a generally haphazard fashion; that in the discovery pits highly mineralized zones are visible, but they are irregular in shape and have little continuity; that there are no contacts between mineral-bearing ,and country rock free of mineralization; rather, any particular zone composed of relatively large amounts of mineral is bounded by rock containing lesser quantities of that same mineral; and that the whole surface of the pyroxenite mass has been weathered and some alluvium has been transported in from surrounding areas. On these facts, the trial judge, a distinguished jurist in the field of mining law, concluded that there were no individual veins or lodes of mineral-bearing rock in place within the area, so as to make lode locations appropriate. ...

It is quite evident here that plaintiffs' claim covered no well-defined veins or lodes as those terms are ordinarily used, unless it can be said that the entire area was a single lode. The record discloses that we are dealing with a large, shapeless, coarsely grained mass of ore which, with the possible exception of the disintegrated top portion, is "in place" in the sense that it is in a fixed position. However, the mass extends over several miles of country and has no known dimensions or boundaries and none of the ordinary lode characteristics, not even as to the method of recovering the minerals. The theory that the entire mass is a lode in place with undetermined boundaries would create a single lode covering somewhere between 8 to 12 square miles.

...While it is true that the higher mineral segregations were fixed in place in the pyroxenite, the evidence discloses that even assay tests could indicate no ascertainable

boundaries setting them apart from the general mass. The bodies of higher mineral content were irregular in shape and lacked continuity so that extreme difficulty would be encountered in attempting to trace them, even if selective mining methods were advisable. The evidence is without conflict that the minerals can best be mined by traditional placer methods. The area was generally considered to be placer territory, in spite of three very old lode claims which had gone to patent without contest. In an adverse proceeding, a Colorado court had upheld a placer claim within the same deposit. *Black Mica Mines, Inc. v. Vernon and Swank*, Civil Action No. 3076, Dist. Ct. of Gunnison County, Colo. Under these circumstances, the trial court's findings that there were no veins or lodes in the area in question were not clearly erroneous and "the theory that the whole mass can be called a lode or a vein and be located as a lode mining claim on that basis" is not tenable under the facts of this case.

**Nonmetallic Minerals May Be Located As Lodes**

Both metallic and nonmetallic minerals may be located as lodes providing they are in the right form. This was first established in *Webb v. American Asphaltum Mining Co*., 157 F 203 (1907) and later quoted with approval in *Titanium Actynite Industries v. McLennan, supra*. In *Webb v. American Asphaltum Mining Co., supra*, the court said:

> The 'mineral deposits' treated in this legislation include nonmetalliferous deposits, alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, and building stone, as well as deposits bearing gold, silver, and other metals, and the term 'lands valuable for minerals' in the law means all lands chiefly valuable for any of these mineral deposits rather than for agricultural purposes.

**Lodes May Consist Entirely of Valuable, Nonmetallic Minerals**

In *Bowen v. Sil-Flo Corporation*, 451 P2d 626 (Ct app Ariz 1969), the Court held that perlite which is a valuable rock in itself, is a lode even though it does not contain or bear valuable minerals. The Court discussed this issue as follows:

> Of the three attacks made, the principal one is that perlite does not satisfy the requirements of 30 U.S.C.A. ' 23, because, though it is admittedly mineral in nature, it is not in lode form because it is not "* * * rock in place *bearing* gold, silver * * * or other valuable deposits * * *." (Emphasis added.) The argument is made that the perlite found in these beds is a valuable rock in itself but that it does not contain or bear valuable minerals. Bowen relies upon two authorities to support this view: *Henderson v. Fulton*, 35 I.D. 652 (1907); and 2 Lindley, *Mines* ' 421 (3d ed. 1914). While the authority cited is pertinent, it is our view that there are more authoritative declarations that it is not disqualifying that a lode consists of nonmetallic minerals of such a nature that the entire body of ore has commercial value.
>
> Decisions which are persuasive to this court are: *San Francisco Chemical Co. v. Duffield*, 201 F. 830 (8th Cir. 1912); *Webb v. American Asphaltum Mining Co*., 157 F.

203 (8th Cir. 1907); *Duffield v. San Francisco Chemical Co*., 205 F. 480 (9th Cir. 1913), reversing District Court decision at 198 F. 942 (1912). The impact of these decisions is summarized in the following statement:

> AThe idea that nonmetallic minerals were excluded from lode locations because only metallic minerals were mentioned by name in the statute was laid to rest in *Webb v. American Asphaltum Mining Co*. [157 F. 203 (8th Cir. 1907)], where gilsonite, a petroleum type of mineral, was held to be locatable as a lode, if the lode characteristics were present. Thereafter, deposits of calcium phosphate in Wyoming and Idaho were held to be lodes were [sic] circumscribed within the general mass of the mountain." 1 *American Law of Mining* ' 5.10, at 741.

**Placer Building Stone Act**

The Placer Building Stone Act of August 4, 1892 (27 Stat. 348; 30 USC 161) was adopted by Congress in order to clear up confusion which had been generated by various decisions of the Interior Department concerning the proper method of location for building stone deposits. The Act, in requiring that lands chiefly valuable for building stone must be entered as placer claims, provides that:

> Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims. Lands reserved for the benefit of the public schools or donated to any States shall not be subject to entry under this section.

**Coexistence of Lode Claims, Placer Claims and Mill Sites**

In *U.S. v. Haskins*, 51 IBLA 1, 90 (1981), the Board determined that lode claims can coexist with placer claims, even though in different ownership; however, both types of mining claims are not compatible with mill site locations. The Board said at 90:

> We also wish to focus on the Question of the propriety of having this placer claim embrace land formerly within two millsites. In its decision of May 18, 1972, the District Court, in ruling in favor of contestee's right to allege a placer location under 30 U.S.C. ' 38 (1976), noted: "There is after all a difference between a lode claim and a placer claim. ... Both types of claims can, of course, be made upon the same property and can co-exist, even though in different ownership." *United States v. Haskins*, No. 72-246-J WC (C.D. Cal. 1972) at 3-4. This statement is correct, so far as it goes. But what neither the District Court nor the Circuit Court examined was the more particular question whether a millsite claim is compatible with a mining claim for the same land. The answer is clearly in the negative.

**Good Faith Location Should Be Protected**

In cases involving right of possession to mining claims, whether the issue be marking claim boundaries, posting notice, recording notice or assessment work, the courts generally rule in favor of the senior locator, if such locator attempted to perfect the location and maintain it in good faith. This is also true for the original locator who acts in good faith and improperly locates a claim as a lode or a placer. In *Bowen v. Chemi-Cote Perlite Corporation*, 423 P2d 104 (1967), the Court said:

> Lindley's solution to the ambiguity presented in the *American Asphaltum Mining Co.*, and *San Francisco Chemical Co. v. Duffield* cases, *supra*, is to recognize the rights of the original discoverer who has acted in good faith, regardless of whether he locates as a lode or as a placer:
>
> > "The first locator locating as a lode would, of course, hold his claim as against a later locator seeking to challenge the first locator's classification by locating as a placer. There are no equities in favor of the second comer." 2 *Lindley on Mines* ' 425 (B), p. 1005 (3d ed.).

In *Bowen v. Sil-Flo Corporation*, 451 P2d 626 (Ct App Ariz 1969), the Court determined the good faith locations based on local customs should be protected. The Court said:

> If our decision needs reenforcement, we find it in the fact that at the time this lode claim was initiated it was a custom in this mining district to locate similar ore under the lode statute. We agree with the following:
>
> > A locator who makes a good faith location in reliance upon past practice should be protected regardless of the court's view as to what might have been the most appropriate form of location." 1 *American Law of Mining* ' 5.20, at 764.

**Lode Versus Placer Under Section 38**

In the *Estate of Arthur C. W. Bowen, Deceased*, 18 IBLA 379 (1975), the Board held that a locator may qualify for rights under 30 USC 38 even though the claim may have been improperly located as a lode or placer. The Board said:

> That a mining claimant who has met certain fundamental requirements of the mining law, such as discovery, citizenship, and expenditure, and who has exclusively held and worked his claim for the period of adverse possession prescribed by the law of the state, is entitled to a patent (under 30 USC 38) regardless of the fact that the claim may have been improperly located as a lode or placer.

**Locator's Section 38 Placer Claim Covering His Improperly Located Lode Claims**

It has been held that a locator who improperly covers a building stone deposit with lode claims has established placer claims over the same deposit pursuant to 30 USC 38, where a

junior locator who is not acting in good faith makes locations over the senior locator's lode claims. In *U.S. v. Haskins*, 51 IBLA 1 (1981), the Board discussed this case as follows:

> Much of this concern was, we feel, generated by the essential difference between the factual milieu of the instant case and that which attended the decision in *Springer v. Southern Pacific Co.*, 248 P. 819 (Utah 1926), the only major precedent for the argument that a claimant could locate a 30 U.S.C. ' 38 (1976) placer claim adverse to his own lodes. In that case, the supreme Court of Utah found that Southern Pacific (the defendant) and its predecessors in interest had been in possession of lode claims adjacent to its track for over 20 years, and had expended upwards, if not in excess of $500,000 for their development. These claims, however, while located as lodes, were located for building stone which could only properly have been taken up by placer location. Plaintiffs, as the Court noted, "early in the morning of said day, long before working hours and either before or about daylight, clandestinely and surreptitiously entered upon and invaded the actual possession of said claims" of the defendant. *Id*. at 821. The Court found, in fact, that this subsequent location was not made in good faith but was rather made "for the sole purpose of dispossessing the respondent and to compel it to pay tribute to appellants." *Id*. at 825. Thus, considering the manifest equities, it was not surprising that in a suit between the two locators the Court held that the railroad should prevail, on a theory that it was possessed of a subsisting placer claim under 30 U.S.C. ' 38, embracing the area covered by its lodes.

**Res Adjudicata**

It is well established that once a claim has been determined to be invalid on the basis of a lack of discovery rather than an improper location as lode or placer, the claimant cannot change the type of location and depend on the same mineral deposit for his discovery. In *U.S. v. Haskins*, 505 F2d 246 (9th Cir 1974), the Court discussed this issue as follows:

> In any event, it is clear that the Haskins lode claims were not declared invalid by the Department because they should have been located as placers. If they had been, this case would be different. On the contrary, the Department accepted the lode locations and proceeded to investigate the quality of the deposit, ultimately holding the claim invalid for lack of discovery of a valuable mineral. Haskins now attempts to claim at least some of the same mineral on the same ground as a placer deposit. It may be that some of the dolomite is not in lode formation. To the extent that it is deposited as a zone or belt of mineralized rock lying within boundaries separating it from neighboring rock, Haskins cannot twice litigate the issue of the existence of this valuable mineral in the ground. He is precluded by the doctrine of *res judicata*. Consequently, whatever the merits of Haskins' claimed placer locations, their validity cannot be supported by proof of the presence of dolomite or dolomite limestone in lode formation. Haskins cannot use the same material that he relied on as discovery of valuable mineral under his lode locations to support his present placer applications. Our Court has affirmed that for a mining location to be valid, the entry must have been made in good faith for the purposes of mining valuable minerals. *United States v. Nogueira*, 403 F.2d 816 (9th Cir. 1968). The

thorough opinion in the *Nogueira* case establishes this requirement beyond dispute. *Nogueira*, like the instant case, was an action for ejectment brought by the United States in which the locator relied on a subsequent placer location after his lode claim had been held invalid. While not couched explicitly in terms of "good faith," the Government here has consistently argued that Haskins cannot "circumvent" the final decision disqualifying the lode claims by now asserting valid placer claims. This amounts to the same thing.

**Phosphate Beds Located As Lodes**

The Ninth Circuit Court of Appeals has determined that a dipping bed of phosphate, confined between clearly defined walls, is properly located as a lode. *Duffield v. San Francisco Chemical Co*., 205 F 480, 481-482 (9th Cir 1913). The Court said:

> May the mineral deposit which is in dispute between the parties be secured by placer mining locations, or must it be secured by lode mining locations, and preliminary to that question is the inquiry whether the trial court had jurisdiction to determine it. The mineral deposit in dispute is a zone of calcium phosphate. It lies between clearly defined walls. The overhanging wall is a cherty siliceous limestone of a bluish color, and the foot wall is a similar limestone of a grayish color. Between the two lies the belt of calcium phosphate about 60 feet in width, of a dark color, with a strike northerly and southerly and a dip westerly, varying from 15 to 45 degrees. The calcium phosphate lies between veins of shale and limestone, which also contain phosphorous. The individual beds of phosphate vary in thickness from five feet to a few inches. The outcropping of the deposit is visible at points along the surface, and it is the only mineral deposit known to be in the ground in controversy.... Within these definitions there is no room to doubt that the mineral deposit in controversy in this case was a lode, and was not subject to location as placer.

**Perlite Located As a Lode Even Though Horizontal Blanket Deposit**

In *U.S. v. Estate of Arthur C. W. Bowen, Deceased*, 38 IBLA 390, 400 (1979), the Board held that a horizontal blanket of perlite is properly located as a lode, if sandwiched between two other rock layers, even if the upper layer is partially eroded away leaving the perlite exposed. The Board said at 400:

> The perlite in the area of the claims lies in a "blanket" or "pancake" in an almost horizontal plane. In the past, there were a series of volcanic flows that laid down igneous material of different compositions. The perlite resulted from one of the flows. In its original state, the perlite was encased between two different types of rock. In places the upper rock or layer has been eroded away leaving the perlite exposed at the surface. In other places on the claims, the upper layer is still present. A qualified mining engineer called by the contestant characterized the perlite as a blanket lode sandwiched between a lower layer of rock, or foot wall, and an upper layer of rock, or hinging wall. The perlite

is a rock and the mining thereof is essentially a hard rock operation. After the perlite is extracted from the ground, it is processed or in effect milled to produce a marketable product. The perlite in the area of the claims is used principally for filtering aids.

**Proper Type of Location for Limestone**

Although the type of location for limestone is no different than any other mineral, except of course when used as a building stone, the proper method of location depends on the form or character of the deposit even though the entire limestone may be the valuable mineral rather than the limestone bearing one or more valuable minerals. In *U.S. v. Haskins*, 59 IBLA 1, 46-49 (1981), the Board discussed the interesting history concerning the proper form of location of limestone as follows:

> Early cases involving limestone deposits, such as *Eureka Consolidated Mining Co. v. Richmond Mining Co., supra,* actually concerned limestone deposits which themselves were mineral bearing, i.e., the claims were not located for the limestone, but rather were located for precious metals which were carried within the limestone structure. *See also Jupiter Mining Co. v. Bodie Consolidated Mining* Co., 11 F. 666, 675 (C.C.D. Cal. 1881). Thus, while these claims were lode locations, this fact was not dispositive of the question of the proper form of location for limestone claims.
>
> Limestone, itself, was held to be a mineral within the, meaning of the mining laws as early as Secretary Teller's decision in *Maxwell v. Brierly*, 10 C.L.O. 50 (1883). Ten years later, in *Shepherd v. Bird*, 17 L.D. 82, 84-85 (1893), the Department expressly held that limestone suitable for making lime was subject to mineral entry under the placer form and not as a lode location. Later, in *Henderson v. Fulton*, 35 L.D. 652 (1907), the Acting Secretary held that marble could not be located as a lode claim because it did not "possess the elements of rock in place *bearing* one or more of the minerals specified in the statute, or some other mineral that would be embraced within the added words 'other valuable deposits.' *Id*. at 663 (emphasis supplied). While this case expressly applied only to deposits of marble, its logic, of course, would apply to limestone. Under such analysis, no deposit of limestone, regardless of the nature of its deposition, which was valuable for the limestone, could be located as a lode.
>
> Approximately 5 months after the Department's decision in *Henderson v. Fulton*, *supra*, however, the Eighth Circuit Court of Appeals held that asphaltum was locatable as a lode claim in *Webb v. American Asphaltum Mining Co*., 157 F. 203 (1907). ... Inasmuch as asphaltum (also known as gilsonite) is the vein itself, this decision cast serious doubt on the correctness of the *Henderson* analysis.
>
> Eventually in *Dunbar Lime Co. v. Utah-Idaho Sugar Co*., 17 F.2d 351 (8th Cir. 1926), it was held that a limestone deposit which was useful in flux and in the making of

cement was locatable as a lode. This decision rejected an argument that the deposit should have been located as a placer in conformity with the Building Stone Act, inferentially holding that such qualities as the deposit possessed did not make the land chiefly valuable for building stone.

The import of such judicial pronouncements was not lost upon the Department. In *Big Pine Mining Corp*., 53 I.D. 410, 412 (1931), the Department invalidated various placer locations of limestone on the grounds that there was no showing of marketability. The decision further noted that "it is undisputed that the deposit is in lode formation" and cited *Cole v. Ralph, supra*, for the proposition that a lode discovery would not sustain a placer location. A year later, in *Vivia Hemphill*, 54 I.D. 80 (1932), the Department expressly abandoned the rule enunciated in Sh*epherd v. Bird, supra*, and *Henderson* v. *Fulton, supra*, and held that a deposit of limestone which existed in lode form with well defined walls and which was valuable for the burning of lime and the manufacture of Portland cement was subject to location as a lode or vein.

While the Department has followed the ruling of *Vivia Hemphill* ever since its rendition, we must recognize that a certain anomaly exists with respect to the proper mode of location for limestone. If the lands embraced by a claim for limestone are chiefly valuable for building stone purposes that claim must, under the Building Stone Act, be located as a placer claim, regardless of the actual form of deposition. *United States v. Gardner*, 14 IBLA 276, 280, 81 I.D. 58, 60 (1974). On the other hand, if the limestone is chiefly valuable because of chemical or metallurgical properties, the proper mode of location is dependent upon the nature of the deposition.

**Perlite a Building Material Rather Than Building Stone**

In *Bowen v. Sil-Flo Corporation*, 9 Ariz App 268, 451 P2d 626 (1969), the Court held that perlite is a building material rather than a building stone and therefore does not come under the Building Stone Placer Act. The Court said:

> Moreover, the only authority coming to our attention would indicate that perlite, being a building material, rather than building stone, does not come within the above-quoted "Stone Act."

**Limestone Used for Portland Cement or Plaster Is Not a Building Stone**

By logic used for perlite in the case above, the Eighth Circuit Court of Appeals ruled that calcite (or limestone) used as a mineral valuable in making Portland cement and white plaster does not make it a building stone. *Dunbar Lime Co. v. Utah-Idaho Sugar Co*., 17 F2d 351 (8th Cir 1926). The Court said at 356:

> The fact that the calcite might be used in making artificial stone for building purposes or as an ingredient in making Portland cement and white plaster, as found by the court, does not make the same building stone within the meaning of the act of 1892.

**Definition of Rock in Place**

In *U.S. v. White*, 118 IBLA 266 (1991), the Board discussed the question of what constitutes rock "in place" at 316:

> The question of what constitutes rock Ain place@ has received a not inconsiderable amount of judicial attention. Thus in *Stevens v. Williams*, Fed. Cas. No. 13,414, cited in *Lindley on Mines* sec. 301 (3d ed. 1914), Judge Hallett stated that "[a]s to the meaning of these words 'in place,' they seem to indicate the body of the country which has not been affected by the action of the elements; which may remain in its original state and condition as distinguished from the superficial mass which may lie above it."

**Altered Rock in Place Containing Crystals**

In *Weightman v. Gray*, Civ. No. 83-1235 (D. Or. 1986), the Oregon Federal District Court decided a case involving the proper type of location for a feldspar gemstone deposit. The claims were originally located as placer claims and then later overstaked by rival locator with lode claims.

The crystals were disseminated throughout a hydrothermally altered igneous rock that was apparently in place. There were also placer deposits of crystals on the claim which the original claimant had successfully recovered using placer mining methods. The Court was further convinced that the crystals could not be removed from the unaltered portion of the dike without shattering them. The Court held that the deposit was properly located with placer claims by the senior locator.

**Section 38 Remedy for Wrong Type of Claim**

One possible remedy for those who have located the wrong type of claim for a particular deposit is to establish that "they held and worked the claims prior to the segregation or withdrawal or the land for a period of time equal to the state's statute of limitations." *United States v. Henri (On Judicial Remand)*, 104 IBLA 93, 100 (1988). Under the appropriate circumstances, holding and working may be the legal equivalent of proof of location, recording, and transfer of mining claims.

## LODES OVER PLACERS AND PLACERS OVER MILL SITES AND LODES

**Lodes and Placers Have Equal Rights**

In *Clipper Mining Company v. Eli Mining & Land Company*, 194 US 220 (1904), the Supreme Court pointed out that placer claims are equal in rights and procedures to lode claims:

By section 2329, placer claims are subject to entry and patent Aunder like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." The purpose of this section is apparently to place the location of placer claims on an equality both in procedure and rights with lode claims.

**Reason Known Lodes Are Identified in Patent Application**

The reason the Federal law (30 USC 37) requires that known lodes must be identified when making application for a placer claim is merely because Congress believed that since a lode deposit goes to a greater depth than a placer, the surface area of a lode claim should be charged at a higher rate ($5) than a placer ($2.50). It is a common misconception that a lode claim ranks higher in rights and procedures than placer claims because the law requires that known lodes be surveyed out or reserved from the placer patent. In *Clipper Mining Company v. Eli Mining & Land Company, supra* at 227 and 228, the Supreme Court said:

> ... Parties obtaining a patent for a lode claim must pay $5 an acre for the surface ground, while for a placer claim the government only charges $2.50 an acre. By ' 2333 it is provided that one who is in possession of a placer claim and also of a lode claim included within the boundaries of the placer claim shall, on making application for a patent, disclose the fact of the lode claim within the boundaries of the placer, and upon the issue of the patent payment shall be made accordingly; that if the application for the placer claim does not include an application for a vein or lode claim known to exist within the boundaries of the placer, it shall be construed as a conclusive declaration that the placer claimant has no right of possession of that vein or lode; and further, that where the existence of a vein or lode within the boundaries of a placer claim is not known, the patent for the placer claim shall convey all valuable mineral and other deposits within its boundaries.
>
> A mineral lode or vein may have its apex within the area of a tract whose surface is valuable for placer mining, and this last section is the provision which Congress has made for such a case. That a lode or vein, descending as it often does to great depths, may contain more mineral than can be obtained from the loose deposits which are secured by placer mining within the same limits of surface area, naturally gives to the surface area a higher value in the one case than the other, and that Congress appreciated this difference is shown by the different prices charged for the surface under the two conditions.

**Lode Claims May Not Be Located on Prior Valid Placer Location**

In *Clipper Mining Co. v. Eli Mining & Land Co*., 194 US 220, 229-230 (1904). the Supreme Court discussed the reasons that a lode prospector has no right, without permission, to go on a placer owner's surface to search for lodes. For example, the whole surface could be occupied by lode prospectors looking for veins so as to prevent the placer claimant from mining and maintaining possession. The Supreme Court said the following on this issue:

It is contended that because a vein or lode may have its apex within the limits of a placer claim a stranger has a right to go upon the claim, and by sinking shafts or otherwise, explore for any such lode or vein, and on finding one obtain a title thereto. That, with the consent of the owner of the placer claim, he may enter and make such exploration, and if successful, obtain title to the vein or lode, cannot be questioned. But can he do so against the will of the placer locator? If one may do it, others may, and so the whole surface of the placer be occupied by strangers seeking to discover veins beneath the surface. Of what value then would the placer be to the locator? Placer workings are surface workings, and if the placer locator cannot maintain possession of the surface he cannot continue his workings. And if the surface is open to the entry of whoever seeks to explore for veins, his possession can be entirely destroyed. In this connection it may be well to notice the last sentence in ' 2322. That section, from which we have just quoted, is the one which gives a locator the right to pursue a vein on its dip outside the vertical side lines of his location. The sentence, which is a limitation on such right, reads: "And 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.

It would seem strange that one owning a vein, and having a right in pursuing it to enter beneath the surface of another's location, should be expressly forbidden to enter upon that surface, if, at the same time, one owning no vein, and having no rights beneath the surface, is at liberty to enter upon that surface, and prospect for veins as yet undiscovered. We agree with the supreme court of Colorado as to the law when it says that "one may not go upon a prior valid placer location to prospect for unknown lodes, and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or, by his conduct, is estopped to complain of it." Perhaps if the placer owner, with knowledge of what the prospectors are doing, takes no steps to restrain their work, and certainly if he acquiesces in their action, he cannot, after they have discovered a vein or lode, assert right to it, for, generally, a vein belongs to him who has discovered it, and a locator permitting others to search within the limits of his placer ought not thereafter to appropriate that which they have discovered by such search.

In *Duffield v. San Francisco Chemical Co.*, 205 F 485 (9th Cir. 1913), the Court considered a case where a prospector went on an unoccupied placer claim owned by another and made a lode location. Since the junior locator, entered the placer claim without permission, the Court ruled in favor of the owner of the prior placer claim owner. The Court stated the following:

... But the important facts shown by the record are that the appellants went upon the land when it was vacant and unoccupied, made a discovery, and performed all the necessary acts to perfect lode locations thereon. This they had no right to do if there were valid placer claims covering the same ground.

**Rights Cannot Be Acquired Through Trespass**

It has been held in many cases that no mining claim title can be initiated by the commission of a trespass. In *Clipper Mining Co. v. Eli Mining and Land Co*., 194 US 220 (1904), the Supreme Court said at 230:

> ... the entries of the locators of these several lode claims upon the placer grounds were trespasses, and as a general rule no one can initiate a right by means of a trespass. ...
>
> If a placer locator is, as we have shown, entitled to the exclusive possession of the surface, an entry thereon against his will, for the purpose of prospecting by sinking shafts or otherwise, is undoubtedly a trespass, and such a trespass cannot be relied upon to sustain a claim of a right to veins and lodes.

In *Campbell v. McIntyre*, 295 F 45 (9th Cir 1924), the Court ruled in a manner similar to *Clipper Mining Co*. above:

> No person other than the owner of the placer claim has the right to enter upon the same for the purpose of discovering veins or lodes and locating the same, and one who attempts to do so without the owner's consent or without his knowledge is a trespasser and can acquire no rights to such lode claim.

**Pedis Possessio and Trespass**

Until a discovery is made within the boundaries of either a lode or placer claim, the protection against the trespass provided by the cases above does not apply. However, the prospector has some possessory rights against forcible, fraudulent, or clandestine intrusions while maintaining possession of the claim and diligently seeking a discovery. *Duguid v. Best*, 291 F2d 235 (1961), *cert. denied*, 372 US 906. But a placer or lode claim that contains no discovery and is not protected under the doctrine of *pedis possessio* by actual physical occupancy, is open to entry and relocation by the first to make a discovery. *Geomet Exploration v. Lucky Mc Uranium Corp*., Ariz, 601 P2d 1339 (1979). It has long been held by the courts that until a discovery is made, there is no location. *Uinta Tunnel, Mining & Transportation Co. v. Ajax Gold Mining Co*., 141 F 563 (1905).

**Effect of Placer Patent Different Than Lode Patent**

In *Clipper Mining Co. v. Eli Mining & Land Co., supra*, the Supreme Court pointed out the difference in mineral rights between a lode patent and a placer patent. The Court stated at 229:

> While by the statute the right of exclusive possession and enjoyment is given to a locator, whether his location be of a lode claim or a placer claim, yet the effect of a patent is different. The patent of a lode claim confirms the original location, with the right of exclusive possession, and conveys title to the tract covered by the location, together with all veins, lodes, and ledges which have their apexes therein, whereas the patent to the

> placer claim, while confirming the original location and conveying title to the placer ground, does not necessarily convey the title to all veins, lodes, and ledges within its area. It makes no difference whether a vein or lode within the boundaries of a lode claim is known or unknown, for the locator is entitled to the exclusive possession and enjoyment of all the veins and lodes, and the patent confirms his title to them. But a patent of a placer claim will not convey the title to a known vein or lode within its area unless that vein or lode is specifically applied and paid for.

**Discovery Made Subsequent to Placer Patent Enures to Patentee**

It is important to point out in reference to the last sentence in the quote above that if veins or lodes within the placer claim are not known at the date of application, they will go with the placer patent; only veins or lodes that are known but not applied for are reserved in the placer patent. Any subsequent discovery of a vein or lode not known at the date of application goes to the benefit of the patentee. In *Clipper Mining Co. v. Eli Mining & Land Co., supra,* the Supreme Court said at 231:

> .. Further, if there be no prospecting, no vein or lode discovered until after patent, then the title to all veins and lodes within the area of the placer passes to the placer patentee, and any subsequent discovery would enure to his benefit.

**Location of Placer Claim Over Tailings on Mill Site Claim**

In *U.S., George B. Conway, Intervenor v. Grosso*, 53 LD 115, 125, 126 (1930), the Secretary of the Interior considered a case involving the status of mill tailings on a mill site location. The Secretary determined that mill tailings are not available for appropriation until abandonment of such tailings is established by showing both intention to abandon and actual relinquishment. Once severed from the land, the tailings become personalty and they remain in that status while being held for later processing and are not available for appropriation by another. However, if such tailings are moved to lands owned by another through processes of erosion, they become property of that owner; or, if the tailings are deposited on unappropriated public lands, they may be acquired by placer locations. The Secretary discussed this issue as follows:

> ... It is clear from the foregoing that the tailings were deposited on the claims with the intention of retaining the possession of them, and rights under the millsite law were invoked no matter whether successful or not, to be secure in that possession. No rule of law has been called to the department's attention where mere failure to check deterioration in value that follows from lapse of time of unproductive property is of itself conclusive of abandonment, and that is practically all that has been proven. The tailings were deposited to wait for better days, and from the evidence in the record as to the improvement in processes of treating complex ores, and the strenuous struggle for possession, those days have but recently come.
>
> To establish abandonment both the intention to abandon and actual

relinquishment must be shown. In the opinion of the department neither was shown in this case. No abandonment being shown, but on the contrary a clear intention to preserve and protect the property right in the tailings, there is no room for the conclusion under the authorities cited by appellant that the tailings became a part of the realty so as to mineralize the public land upon which they were placed and make it subject to mining location. It is clear that by severance of the ore from the land in which it existed for milling and sale it became personalty (2 R.C.L. Secs. 50 and 52), and that it did not lose that character by its retention for further utilization.

In *Steinfield v. Omega Copper Co*. (141 Pac. 847), the court said -

> ... The intention with which the owner of the property extracted the ore from the ground and the purpose and intention of the owner with which it was placed on the dump is controlling in arriving at the solution of the question of whether the ore after having been extracted and placed in the dump was personalty or realty.

While it may be true that --

> To suffer tailings to flow where they may without obstruction to confine them is equivalent to their abandonment. If they lodge on lands of another, they are considered as an accretion and belong to him. If they accumulate on vacant unappropriated public land, it has been the custom in the mining regions of the west to recognize the right of the first comer to appropriate them by proceedings analogous to the location of placer claims. (*Lindley on Mines*, Sec. 426, and cases cited.)

Yet, it is manifest that this doctrine is not applicable to the facts in the instant case. In *Ritter v. Lynch* (123 Fed. 930), in holding that no rights could be acquired under the placer mining law to public land nonmineral in its natural state that was covered by valuable tailings where the owner thereof had kept and preserved them from waste and destruction until such time as they could profitably be worked and sold, it was said -

> It must be admitted that, if the tailings had been suffered by Mr. Lynch to flow where they listed, his claim of ownership therein would have to be considered as abandoned; or if the tailings were, by their own uninterrupted flow, lodged upon the land of another, they would be considered as an accretion, and belong to the owner of the land. If they were allowed to flow in their natural course, and accumulate on vacant and unappropriated public land, they would become subject to appropriation by any one who took them up and pursued the steps and proceedings analogous to the location of placer mining claims. 1 *Lindley on Mines* (2d. Ed.), Sec. 426, and authorities there cited. But no such conditions appear in this case.

The grounds of invalidity are all the stronger in the instant case where not only were the tailings deposited under conditions practically the same as the Lynch case, but

the lands were embraced in an asserted millsite location by the claimants of the tailings, the invalidity of which had not been declared by the rejection of the application for patent thereto. (*See Alaska Copper Co. et al.*, 43 L.D. 257.) As the evidence shows convincingly that the land in its natural condition is nonmineral in character, and that under the conditions shown no mineral character is imparted to it by the deposit of the tailings. ...

**Can You Stake a Lode Claim Over a Placer Claim Or a Placer Claim Over a Lode Claim**

This is probably the most frequently asked question in the area of mining law during the last few years. One reason people find this subject confusing is because the answer depends on whether they are interested in (1) locating a lode claim over their own placer claim, or locating a placer claim over their own lode claim (no conflicting locator), or (2) locating a lode or placer claim over another persons lode or placer claim (two or more conflicting locators). Therefore when you read this chapter keep in mind the distinction between these the two categories. Another part of the confusion stems from the fact that this is a somewhat unsettled area of the mining law.

**Proper Sequence for Locating Lode and Placer Claims on Same Lands by One Individual**

Several recent court cases have upheld the right of an individual claimant to locate both lode and placer claims over the same lands. In 1987, the Federal District Court in Nevada indicated that location of both types of claims would not constitute abandonment of either type of claim. In other words, both types of claims could exist on the same lands under the same ownership. *Amax Exploration, Inc. v. Ross Mosher*, Civil R-85-162 BRT (March 2, 1987). The Court indicated this would be an approach to follow before discovery; however, once a discovery was made a choice might be required. In *United States v. Haskins*, No. 72-246-JWC (C.D. Cal. 1972), the Court said that Aboth types of claims can, of course, coexist, even though in different ownership."

Some writers have suggested that there is a preferred sequence of location. They say that the proper sequence is to locate the placer claim first because to locate a placer claim over your prior lode claim might be deemed an abandonment of the lode claim. The rationale for this sequence appears to be based in part on the patent section of the Mining Law (30 U.S.C. 37) which requires that known lodes must be identified and surveyed when making application for a placer claim. This requirement exists merely because Congress believed that since a lode deposit goes to a greater depth than a placer, the surface area of a lode claim should be charged at a higher rate ($5) than a placer ($2.50). *Reynolds v. Morrissey*, 116 U.S. 687 (1886).

Section 37 is frequently cited as authority for locating lode claims over placer claims. The law provides that if a known lode exists within the boundaries of a placer claim, 25 feet of surface on each side of the vein or lode must surveyed out of the placer claim. However, there is no requirement in the statute to locate a lode claim over the placer claim for the purpose of including a known vein or lode in the patent application. *Sullivan v. The Iron Silver Mining Co.*, 143 U.S. 431 (1892); *Railroad Lode v. Noyes Placer*, 9 L.D. 26 (1889). The United States Supreme Court has said that a Aknown vein" is not synonymous with a Alocated vein.@ *The*

*Iron Silver Mining Company v. The Mike & Starr Gold and Silver Mining Company*, 143 U.S. 374 (1888). Again, the main purpose of the requirement to identify known lodes in placer claims under application for patent is to have the applicant pay for the vein or lode at the rate of $5.00 rather than the placer rate of $2.50 because the vein is deeper and presumably more valuable. Consequently, section 37 is not authority to locate lode claims over placer claims, or authority for any sequence of location; it establishes a procedure to delineate the lode deposit within a placer claim so that the Government can be compensated for the lode deposit at the lode rate of $5.00.

It is a common misconception that a lode claim ranks differently than a placer claim because the law requires that known lodes be surveyed out or reserved from the placer patent. However, the mining law states that placer claims are subject to entry and patent Aunder like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims.@ The United States Supreme Court has interpreted this statement "to place the location of placer claims on an equality both in procedure and rights with lode claims.@ *Clipper Mining Company v. Eli Mining & Land Company*, 194 U.S. 220 (1904). Therefore it appears that, if anything, the statute supports the position that no preferred sequence is necessary because both lode claims and placer claims are equal in rights in procedures.

It is a logical rule that to locate a second lode claim over your prior lode claim is an implied admission that the prior lode claim has problems. Furthermore, because both lode claims would be appropriating the same lode deposit, the location of the second lode claim could be deemed an abandonment of the prior lode claim. However, the location of a lode claim over a placer claim or the location of a placer claim over a lode claim may represent an attempt to appropriate two different types of mineral deposits. For example, if you discovered a vein and appropriated it with a lode claim and then some time later discovered a placer deposit within the boundaries of the lode claim, the subsequent location of a placer location over your prior lode claim could hardly be deemed abandonment.

The law of abandonment as it relates to mining law includes relinquishment of possession together with the subjective intent to abandon. To show abandonment, the intent of the claimant to abandon must be demonstrated. For example, if a claimant maintained title on a claim performing annual assessment work and making timely annual filings with both the BLM and the local recorder, such actions could hardly indicate abandonment. As the Court said in *Fuller v. Harris*, 29 F. 814, 818-19 (D. Alaska 1887), "a claimant who relocates the same ground does not evidence an intent to abandon the prior claim.@ Furthermore, a relocation negates the intent to abandon the ground. *Hartman Gold Mining Co. v. Warning*, 11 P.2d 854, 856 (1932). The advantage of this rule is that if an attempted relocation fails, the claimant may still maintain the rights he had under the first location. *Peach v. Frisco Gold Mines Co*., 204 F. 659 (D. Ariz. 1913). As a general rule, abandonment must be established by clear and convincing evidence. *United States v. Eaton Shale Co*., 433 F.Supp. 1256, 1274 (D. Colo. 1977). The location of a placer claim over a lode claim would hardly be clear and convincing evidence of abandonment of the former lode claim particularly where annual assessment work and the requisite annual filings were timely accomplished.

Because it seems to be the prevailing opinion of many writers in mining law that placer

claims should be located before lode claims, it is probably a good procedure to do so, regardless of reasons. Another option is to locate both the lode and placer claims on the same day, implying discovery was made at the same time. However, if you have an existing lode claim and decide to cover the same property with a placer claim, it is probably inadvisable to relinquish or abandon the lode claim just to establish the lode-over-placer sequence. In general, the arguments for a preferred sequence are unconvincing.

**Model Situations for Sequence of Location**

To illustrate your available options when locating both lode and placer claims, four situations are given below. As you can see, the recommended sequence of location depends upon the special circumstances in each situation:

1. You have located a placer claim over a deposit that is properly located with a placer claim such as gold-bearing gravel. Then you discover a vein of gold or suspect one exists within the boundaries of your placer claim.

   *In this situation most authorities would recommend that you locate a lode claim over your placer claim to appropriate the lode deposit.*

2. You have located a lode claim over a deposit that is properly located with a lode claim such as a gold-bearing quartz vein. Then you discover a deposit of gold-bearing gravel and wish to protect your new find with a placer location.

   *In this situation I would advise that you violate the "lode-over-placer sequence and locate a placer claim over your prior lode. Here, you have two different types of deposits -- a lode deposit and a placer deposit. Location of a placer claim over your prior lode cannot be deemed abandonment of the lode claim because the lode claim was intended to appropriate the lode deposit; whereas, the placer claim was intended to appropriate a completely different deposit.*

3. You have not made a discovery of either lode or placer minerals , but based on geological inference or some other basis you would like to appropriate an area with lode and placer claims while you conduct exploratory drilling. Of course, without a discovery you will be holding the claims under prediscovery rights or *pedis possessio*.

   *In this situation, follow the conventional practice by first locating a placer claim followed by a lode claim.*

4. You have just discovered a mineral deposit such as limestone or perlite and are uncertain as to whether a lode location or placer location would be most appropriate because the deposit does not clearly fit into either category. You are also aware that Aa placer discovery will not sustain a lode location, nor a lode discovery a placer location.@ *Cole v. Ralph*, 252 U.S. 286 (1920). In this

situation you are at the core of the "sequence of location@ controversy, because here it is advisable to locate both lode and placer claims to make certain that you appropriate the deposit. There is an important distinction between this case and the three cases described above. Here we are only concerned with one type of deposit; whereas, in the other three situations we were describing the existence of both lode and placer deposits within a claim.

*As in situation #3, first locate a placer claim and then a lode claim. Even if there is no basis for locating lode over placer rather than placer over lode, it is advisable to do so if only because so many people believe it is important.*

**Lode Claims May Not Be Located on Prior Valid Placer Location and Vice Versa**

No person, other than the owner, has the right to enter upon an unoccupied valid placer claim for the purpose of discovering and locating lodes. To do so without the placer claim owner's consent or acquiescence is a trespass. This rule is supported by many Federal court cases, including the United States Supreme Court. *Clipper Mining Co. v. Eli Mining & Land Co*., 194 U.S. 220, 229-30 (1904). Although there are few supporting cases, the rule should also apply to the situation where the prior location is a lode claim. As the Supreme Court said in the *Clipper Mining Co.* case, "by the statute the right of exclusive possession and enjoyment is given to a locator, whether his location be of a lode claim or a placer claim."

**Without Discovery a Claim Must Be Protected by Pedis Possessio**

Until a discovery is made within the boundaries of either a lode or placer claim, the protection against trespass does not apply. However, the prospector has some possessory rights against forcible, fraudulent, or clandestine intrusions by actual and continuous occupancy while diligently seeking a discovery. *Duguid v. Best*, 291 F.2d 235 (1961), *cert. denied*, 372 U.S. 906. But a placer or lode claim that contains no discovery and is not protected under the doctrine of *pedis possessio* is open to entry and relocation by the first claimant to make a discovery. *Geomet Exploration v. Lucky McUranium Corp*., 601 P.2d 1339 (1979). The courts have long held that until a discovery is made there is no location. *Uinta Tunnel, Mining & Transportation Co. v. Ajax Gold Mining Co*., 141 F. 563 (1905). Under *pedis possessio* the courts require actual physical occupancy of each claim on a continuous basis. *Amax Exploration, Inc. v. Ross Mosher*, Civil R-85-162 BRT (March 2, 1987). In conclusion, whether the claim be lode or placer, without a discovery or protection under *pedis possession* the land is open to location as though it had never been appropriated. *Amax v. Mosher, supra*.

**Coexistence of Mill Sites with Mining Claims**

Lode claims can coexist on the same property with placer claims even though in different ownership because both placer and lode deposits may be found in the same land. *United States v. Haskins*, 51 IBLA 1, 90 (1981); *United States v. Haskins*, No. 72-246-JWC (C.D. Cal 1972). However, mill sites are not compatible with mining claims because the statute requires that mill sites must be "nonmineral land," whereas, mining claims require the discovery of "valuable

mineral deposits.@ Therefore, the subsequent location of a mill site over your prior placer or lode claim could be deemed an abandonment of the mining claim. Conversely, the subsequent location of a mining claim over your prior mill site could be deemed an abandonment of the mill site. As the Secretary stated in *United States v. Morehead*, 59 I.D. 192 (1946):

> The mill site must be located on nonmineral land. By changing the location to a lode claim because it was ascertained that the land therein was mineralized, it was thereby admitted that the mill site was void from its inception, and no mining title can be held to relate back to the inception of a void location.

**Location of Placer Claim over Tailings on Mill Site Claim**

Tailings and ore become personal property once severed from the ground. Mill tailings are not available for appropriation until abandonment of such tailings is established by showing both intention to abandon and actual relinquishment. *U.S., George B. Conway, Intervenor v. Grosso,* 53 L.D. 115, 125-26 (1930). However, if such tailings are moved to lands owned by another through natural processes such as erosion, they become the property of that owner; or, if the tailings are deposited on unappropriated public lands, they may be acquired by placer locations. *Id*.

Although it may be appropriate to locate abandoned mine tailings with placer claims, it is very unlikely that such placer claims could be patented. Aside from the fact that mill tailings are not naturally deposited, to allow a claimant to patent a tract of land by merely placing valuable tailings on it would create an enormous loophole in the mining law. Furthermore, the acquisition of mill tailings may be accompanied by unwanted liability for toxic substances.

**Discovery Made After Placer Patent Issues Goes to Patentee**

If veins or lodes within a placer claim are not known at the date of application, they will go with the placer patent; only veins or lodes that are known but not applied and paid for are reserved in the placer patent. Any subsequent discovery of a vein or lode not known at the date of application goes to the benefit of the patentee. *Clipper Mining Co. v. Eli Mining & Land Co., supra* at 231.

**Lode and Placer Claims Owned by One Individual Covering Same Ground**

In *Amax Exploration, Inc. v. Ross Mosher*, Civil R-85-162 BRT (March 2, 1987), the Federal District Court of Nevada held that the staking of both lode and placer claims over the same lands did not constitute abandonment. The Court reasoned that "until discovery, there appears to be no reason to limit the prospecting in this uncertain geologic area to one particular type of claim. The nature of the discovery, when made, might require a choice."

## AMENDED LOCATION VERSUS RELOCATION

**History**

In *R. Gail Tibbetts*, 43 IBLA 210, 86 ID 538, 540 (1979), the Board gave an excellent review of the history of the practice of amending location certificates, particularly as it relates to the act of relocation. The Board described this history as follows:

> While a number of departmental, federal, and state court decisions have attempted to draw a distinction between relocation of a former claim and an amended location of such a claim, it is clear that nothing approaching uniformity has resulted. This confusion is understandable since it finds its germination in the 1872 Mining Act, itself. Sec. 5 of the Mining Act, as amended, 30 U.S.C. ' 28 (1976) contains the only reference to relocation:
>
> > On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. ... [A]nd 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.
>
> There was no reference in the original mining law of the United States to an "amended" location. The term "amended notice of location" was used in sec. 1 of the Act of Aug. 12, 1953, 30 U.S.C. ' 501 (a) (1976) and in sec. 1 of the Act of Aug. 13, 1954, 30 U.S.C. ' 521 (a) (1976) relating to mining claims originally located on lands which were embraced by either a mineral lease or a mineral lease application. The term, however, was not defined. It is in no small part due to this omission that the subsequent history of mining law adjudication has been mired in a seemingly endless sea of contradictory statements.
>
> The difficulty arose virtually immediately as a number of states passed laws which permitted amended and additional certificates of location. *See Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co*., 125 F. 389 (C.C.D. Nev. 1903). This was necessitated by the fact that it was not unusual for the original notice of location to contain various minor defects, particularly as regards the actual physical location of the claim. Thus as early as 1885 the Federal courts recognized the right of the mineral locator to amend his location. *See McCoy v. Hyman*, 25 F. 596 (C.C.D. Colo. 1885). It is interesting to note that at this early date, the court recognized, in interpreting the Colorado statute authorizing amended locations, that "[i]t is perhaps unfortunate that the question of amending a certificate and of changing the boundaries of claim, which amounts to a relocation, should be expressed in general terms relating to both subjects, and in one section of the law." *Id*. at 599-600. The court continued noting that the right of correction of the certificate of location had been recognized independently of statutes expressly authorizing amendments to certificates. See also Fred B. Ortman, 52 L.D. 467, 471 (1928). Moreover, the court opined that the proviso of the statute limiting its relation back to those situations in which no intervening rights had been initiated referred to the situation where the boundaries of the claim were changed, i.e., a relocation, and not to the

amendment of a certificate of location.

**Introduction**

As mentioned in *R. Gail Tibbetts, supra* at 540, there is no specific direction in the Federal statute concerning procedures and rights to amend or relocate claims. The state statutes, although brief and inadequate in many respects, should be consulted for specific direction on how to relocate or amend a claim as required by state law. Decisions of the state and Federal courts and the Interior Department currently furnish most of the specific direction necessary to properly relocate or amend a location. Consequently, this chapter is based on a compilation of the important, precedent-setting decisions.

**Definitions of Amended Location and Relocation**

*R.. Gail Tibbetts, supra*, contains frequently quoted definitions of "amended location" and "relocation." The Board said at 542:

> For the purposes of this decision, we will define an "amended" location as a location which is made in furtherance of an earlier valid location and which may or may not take in different or additional ground. The term "relocation" will be limited to those situations in which the subsequent location is adverse to the original location.

Shortly thereafter, the Board expanded the definitions above in *American Resources Ltd.*, 44 IBLA 220, 223 (1979) as follows:

> An "amended location" of a claim is a subsequent location intended to further the rights acquired by the earlier locator while making some change in the location, such as changing the name of the claim or its owners of record (as where the original claim has been sold) or excluding excess acreage. In contrast to a "relocation," an "amended location" *does* relate back to the date of the filing of [the] original notice of location, so that the filer does receive the rights associated with the earlier location, including its superiority to subsequent withdrawals, to the extent that the amended location merely furthers rights acquired by a prior subsisting location, and does not include any new land.

**Amended Location: Definition by Regulation**

"'Amended location' means a location that is in furtherance of an earlier valid location and that may or may not take in different or additional unappropriated ground. An amendment may: (1) Correct or clarify defects or omissions in the original notice or certificate of location; or (2) Change the legal description, mining claim name, position of discovery or boundary monuments, or similar items. An amended location notice relates back to the original location notice date. No amendment is possible if the original location is void." 43 CFR 3833.0-5.

This definition was established by regulations made effective January 3, 1989. 53 FR 48876 (December 2, 1974.

**Relocation: Definition by Regulation**

"'Relocation' means the establishment of a new mining claim, mill site, or tunnel site. A relocation may not be established by the use of an 'amended location notice,' but requires a new original location notice or certificate as prescribed by state law." 43 CFR 3833.0-5.

This definition, established by regulations made effective January 3, 1989 (53 FR 48876), appears to preclude the use of a mining claim location certificate filed to fill the dual role of both an amendment and a relocation certificate.

**Original and Amended Certificates Must Be Construed Together**

"In determining the sufficiency of an amendment, the original and amended certificate of location must be construed together, and if sufficient when so construed, the location record will be valid, even though neither standing alone would be sufficient." *Estate of Van Doolah*, 95 IBLA 132, 134 (1987).

**Burden of Proof for Amended Locations**

In *Steven A. Beld*, 136 IBLA 142 (1996), the Board defines an amended location and points out that the burden is on the claimant to establish that the mining claim is an amendment to a prior location and specifies what the claimant must show to meet this burden:

> * * * An amended mining claim location is a location made in furtherance of an earlier *valid* location and relates back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land withdrawn from mineral entry, made after the withdrawal, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended location embraces lands included in the original location, that the original claim had not been invalidated, and the claimant has an unbroken chain of title from the original location.

**Claimant Stakes New Claims Over Claims Nullified in Contest Action**

*Jon Zimmers*, 90 IBLA 106 (1985) involves a claimant whose claims were declared null and void in a Government contest action. After the claims were declared null and void, the claimant filed amended locations covering the same ground described in the original claim so as to allow him to maintain occupancy of the area located within the claims. The Board then was presented with the question whether this "amended location" should be considered an amended location or a relocation. The Board held that these locations were "an attempt to amend void claims, an action which has no legal effect." The Board then stated at 110:

Under the circumstances of this case, where original locations of these claims were found to be void, it is not factually possible to find that appellant's intent was to file new location notices. Such an interpretation of appellant's actions would be inconsistent with appellant's prior conduct, and would ignore this Board's holding in Zimmers which found Zimmers did not hold his claims in good faith. Appellant cannot now be allowed to assert he has amended his prior locations while at the same time contending he has filed new locations. This approach may in principle be compared to the application of judicial estoppel made in *United States v. Haskins*, 59 IBLA 1, 92, 88 I.D. 925, 971 (1981), where the Board quoting from the Tenth Circuit Court of Appeals opinion in *Re: Johnson*, 518 F.2d 246 (1975), observed:

> Under the doctrine of Judicial estoppel a party and his privies who have knowingly and deliberately assumed a particular position are estopped from assuming an inconsistent position to the prejudice of the adverse party.

The requirement for a written instrument to convey an unpatented claim was stated by Professor Lindley in 1914. "At the present time, in every state and territory subject to federal mining laws, a perfected location is treated as real estate, and the same formalities are required to transmit title as in the case of other real property." *Lindley on Mines*, 3rd ed., sec. 642 (1914). *Also see Hugh B. Fate*, 86 IBLA 215, 222 (1985).

*Hugh B. Fate, supra* involved an oral conveyance of an unpatented mining claim in Alaska. The Alaska statute of frauds applicable at the time of the 1960 conveyance required that "an agreement, promise or undertaking shall not be enforceable unless it or some note or memorandum thereof be in writing and subscribed by the party to be charged." 1955 Alaska Sess. Laws, 206. Therefore the oral conveyance violated the state statute of frauds because the alleged conveyance was an oral gift without consideration. The Board stated at 227:

> The United States, as the owner of the land which is the subject of an alleged conveyance. Therefore, it is equally entitled to the protection of the statute.
>
> We conclude that the United States has the right to invoke the statute of frauds to invalidate a purported parol conveyance of a mining claim when the validity of the conveyance obviously affects the title to the United States' public lands.

**Claimant Relocates Claim over Prior Contested Claim**

In *Jack J. Swain*, 137 IBLA 235 (1996), the Board considered a case where the appellant had a claim declared nonmineral in character under contest proceedings and later relocated another claim over the same lands. The Board discussed the status of the new claim at 239:

> Swain has attempted to locate claims on lands that were declared nonmineral in character as the result of a 1967 contest to which Swain was a party. This raises the question whether doctrines of res judicata and administrative finality preclude Swain from locating the claims. The Board has addressed this question most recently in *Untied*

*States v. Richard N. Stone*, 136 IBLA 22 (1996). That case was decided under the Mining Claims Rights Restoration Act, 30 U.S.C. 621(b) (1994), but also relied upon the Board=s decision in *Helit v. Gold Fields Mining Corp*., 133 IBLA 299, 97 I.D. 109 (1990), in reaching its results. In Stone, we stated:

> In *Helit v. Gold Fields Mining Corp*., * * * We examined the applicability of the doctrine of res judicata in the context of mining locations made subsequent to a contest determination that the land involved was nonmineral in character. Therein, relying on prior Departmental precedents (*see, e.g., Shire v. Page*, 57 I.D. 252 (1941); *Gorda Gold Mining Co. v. Bauman*, 52 L.D. 519 (1928)), the Board held that a final determination rendered after a hearing as to the mineral character of the land in one proceeding Ais binding as res judicata between the parties to the contest as to the status of the lands at the date of the hearing.@ *Id*. at 311, 97 I.D. at 115. While such a determination would not be completely preclusive of subsequent locations by the mineral claimant, the claimant would be required to show that exploration and development since the time of the last hearing had disclosed mineral values sufficient to support a finding that the land was mineral in character.

*United States v. Richard N. Stone*, 136 IBLA at 27. Thus, under *Helit* and *Stone*, and absent other defects or conditions rendering the locations invalid, BLM must give Swain an opportunity to show that his exploration and development since 1967 had yielded a valuable mineral deposit, and cannot invalidate them solely upon the Hearing Examiner=s 1967 findings.

The Board Brought up the issue of good faith in f.n. 4 at 239"

In *Stone* we also noted that *Helit* contained the following cautionary statement for mining claimants who adopt this course of action:

> In the absence of a showing of a substantial evidence of mineral discovery not previously disclosed, the filing of new locations for the same ground which was the subject of a prior contest hearing which resulted in a finding that the land was nonmineral in character would leave the locator vulnerable to a charge that the claims were not located or held in good faith.

**Location Date for Added Lands in Amended Location**

An amended location that describes lands not included in the original location where there was an intervening right such as a withdrawal, is a relocation or new location for the added lands. Therefore, the date of location for the added lands is the date of the amended location. *Patsy A. Brings*, 119 IBLA 319 (1991).

**Burden of Proof on Amended Location**

The claimant has the burden of proof to establish that a mining claim location on land segregated from mineral entry is actually an amendment of a prior location made while the land was open. *Patsy A. Brings,* 119 IBLA 319 (1991). This burden includes the requirement to show that the original location was properly made, that the amendment embraces only land covered by the original location, and that the claimant making the amendment has an unbroken chain of title back to the original locator. *Id*.

**Oral Transfers of Interest**

In *Hugh B. Fate*, 86 IBLA 215, 224 (1985), the Board held "that the United States may invoke the statute of frauds to challenge the validity of an oral conveyance of a mining claim." This was contrary to the Board's ruling in *R. Gail Tibbetts*, 43 IBLA 210, 86 I.D. 538, 546-47 (1979); therefore *Tibbetts* is overruled on this point.

Many courts have held that a written instrument is necessary for conveyance of an unpatented mining claim. *Moore v. Hammerslag*, 41 P. 805 (1895); *Garth v. Hart*, 15 P. 93 (1887). For example in *Waskey v. Chambers*, 224 U.S. 564, 565-66 (1912), the U.S. Supreme Court described the consequences of an unrecorded deed:

> But it is obvious that in principle the right of a lessee is the same as that of a purchaser in fee, and it would be a great misfortune, especially to mining interests, if a man taking a lease from those whom the record showed and he believed to be the owners, were liable, after spending large sums of money on the faith of it, to be turned out by an undisclosed claimant on the strength of an unrecorded deed. We find no words in the statute that require such a result. On the contrary, the word "conveyance" is defined, although for other purposes, as embracing every written instrument except a will by which any interest in lands is created.

**Hearings Involving Oral Transfers of Interest**

In *Russell Hoffman (On Reconsideration)*,89 IBLA 146. 148 (1985), the Board discussed the effect of the Fate decision where claim owner is attempting to establish a chain of title to an amended location by means of an oral conveyance. The Board said at 148:

> The effect of the Fate decision is therefore to create, in cases such as this, additional legal and factually issues arising under state law where a mining claimant seeks to show he is entitled to amend a prior location based upon an oral transfer by a prior owner of the claim. A hearing into these matters is also required, as a result.
>
> At the hearing, the burden (is upon the appellant who must)..show his claim is not barred by the Alaska statute of frauds by producing evidence to show that he has taken his claim of ownership outside the statute's operation.

**Placer Rights Cannot Inure to a Lode Location Through Section 38**

In *Patsy A. Brings*, 119 IBLA 319 (1991), the Board considered a case where the

claimants were trying to show that an amended location of a placer claim related back to an original location. In this case there was a withdrawal between the original location and the amended location, so no new land could be acquired. Apparently, the claimants were attempting to appropriate ground not covered by the original placer claim by contending that the monuments of an old lode location were the monuments of original placer claim. The Board held that "placer rights cannot inure to a lode location through the operation of 30 U.S.C. 38 (1988)." *Id*. at 330.

**A Placer Location Cannot Be Amended to a Lode Location**

In *Paul Vaillant*, 90 IBLA 249 (1986) the Board held that a "miner cannot amend a placer location by filing a lode location" because the "two claims are located for altogether different reasons." *Id*. at 253; *Hiram Webb*, 105 IBLA 290, 300 (1988).

**Mill Sites May Not Be Amended or Replaced by Lode Claims After a Withdrawal**

In *Georgia-Pacific Corp*., 137 IBLA 248 (1996), the company owned placer claims on lands that were later withdrawn from mineral entry by publication of a notice of withdrawal published in the *Federal Register*. After the withdrawal, the company amended/relocated the lands as mill sites. The Board said that A[a]ssuming that the Glenn placer claims were perfected and contained a discovery, and therefore constituted valid existing rights, the land was segregated from all forms of location, including mill site locations, by notice of withdrawal published in the *Federal Register*.@ *Id*. at 251. In pointing out that the lands occupied at the date of segregation with valid placer claims could not possibly be held now under valid mill site claims, the Board said at 251 and 252:

> As noted above, a placer claim must contain sufficient valuable mineral to support a discovery. On the other hand, a mill site can only be located on nonmineral land. 30 U.S.C. 42(b) (1994). If Georgia Pacific is correct that the Glenn placer claims were valid, the mill sites are not valid because they are located on mineral land. Conversely, if Georgia-Pacific is correct that the mill sites occupy nonmineral land, the Glenn placer claims were invalid for lack of a discovery when the mill sites were located, Georgia-Pacific held no valid existing rights, and the GPMS mill sites were located on land which had been segregated from entry. Applying the same analysis, Georgia-Pacific=s argument that the GPMS mill sites amend the Glenn placer claims is of no avail. If Georgia-Pacific had a valid existing right by reason of owning valid placer mining claims at the time of withdrawal, either that right expired when the claim could no longer support a discovery or the mill sites were invalid because they had been located on land which was mineral in character.

**No Amendments to Original Locations Not Recorded Under FLPMA**

If an original location notice is not recorded under section 3l4 of the Federal Land Policy and Management Act of 1976, the claim is presumptively abandoned and cannot be later brought back to life by amendment. In *American Resources*, 52 IBLA 290, 295 (1981), the Board discussed this issue as follows:

> Finally, we note that any interests in the claims dating back to Huff s original location in 1931 (now perhaps held by his heirs and the heirs of Gordon and Purkey) have been presumptively abandoned and are void, owing to their owners' failure to record copies of the notices of location and proof of labor as required by section 314 of the Federal Land Policy and Management Act of 1976, and 43 CFR 3833.2 and 3833.4. Accordingly, any effort to gain title to these claims by purchase or otherwise would now be fruitless.

**Amended Location Is Relocation If Not Timely Filed**

If the original location notice is not timely filed with the BLM during the 90-day period, the timely filing of an amended location will be considered a relocation of the claim at the date of the amendment, provided of course that "no rights of the United States or of third parties have intervened, and the requirements of law pertaining to relocations by the same claimant have otherwise been met." *Walter T. Paul*, 43 IBLA 119, 120 (1979). It is important to point out that a copy of such amended location held to be a relocation must also be recorded with the county recorder, otherwise the amended location will be deemed to have been abandoned.

**No Requirement That Amended Location or Relocation Be Designated on Certificate**

In *R. Gail Tibbetts*, 86 ID 538 (1979), the Board discussed the situation where a claimant does not designate on the certificate itself whether it is an amended location or a relocation. It was determined that although there is no requirement to make such designation, failure to do so gives "rise to an inference that such was not the intent." The Board said:

> ... There is no absolute requirement, however, that an amended location or a relocation state that this is its purpose on its face. ... We have been unable, however, to discover any court case dealing with an alleged amended certificate or location in which the documents do not, on their face, indicate that they are amended or additional location notices. We feel that while this omission does not inevitably lead to the conclusion that no amended location was intended, it does properly give rise to an inference that such was not the intent.

*Fairfield Mining Co., Inc*., 66 IBLA 115 (1982) also involved a case where the claimant did not designate the certificate as an amendment or relocation. The Board said at 118:

> The essential question in this appeal is whether the documents filed in 1974 were amended notices of location or whether they were new locations or relocations made after the land had been withdrawn. Nothing on the face of the notices indicates that they were amended notices or relocations. However, there is no requirement that an amended location or a relocation state that this is its purpose on its face.

**Purpose of Amended Location Need Not Be Specified**

In *Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co*., 125 F 389 (1903), it was held that the filing of an amended location does not require that the purpose of such amendment be mentioned in the certificate. The Court stated at 397:

> The law does not require that the object or purpose of making the amended certificate shall be specified therein. A general statement that it is made to cure errors or defects will be sufficient, the general rule upon this subject being that the filing of such certificate is effectual for all the purposes enumerated in the statute, whether such purposes are mentioned in the certificate or not.

Recently, in *R. Gail Tibbets, supra* at 547, the Board concurred that "the general rule is that an >amended= certificate need not state the specific purpose of the amendment."

**Right to Amend Location**

In *Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co., supra*, it was held that a locator has the right to adjust boundary lines by amendment so long as intervening rights of others are not impaired. The Court said at 396:

> ... It has always been the policy of the government to encourage its citizens in searching for, discovering, and developing the mineral resources of the country; and this policy can always be best subserved by permitting the discoverer to rectify and readjust his lines, whenever from any cause he desires to do so, provided he does not interfere with or impair "the intervening rights of others." There is no statute, law, rule, or regulation, state or national, which denies this right. The amended certificate of location, when made, becomes the completed location of the discoverer, and is just as valid as if it had been made in the first instance. It necessarily follows that parties coming upon the mining claim and ground described in the amended certificate of location, subsequent to the perfection of such amended location in compliance with the mining laws, can acquire no rights, because they have not been injured, and have no right to complain.

**Present Title Prerequisite to Amend Claim**

In order to have the right to amend a claim, one must have present title to the claim. In *Tibbetts v. BLM*, 62 IBLA 124 (1982), the Board said at 132:

> Intrinsic to the right to amend a claim is the prerequisite that the amender have present title to the claim, for if such title is lacking, an individual is not claiming through a prior location, but rather is initiating a claim of right adverse to the original location. In *United States v. Consolidated Mines & Smelting Co*., 455 F.2d 432 (9th Cir. 1971), the court dealt with a number of allegations that various claims, located after the Ickes withdrawal, were actually amendments of claims located prior thereto. The court noted:

> The Bureau found no evidence, and Consolidated produced none, of prior locations by Consolidated on these claims. *Nor was there any evidence before the Bureau of a chain of title leading to Consolidated from holders of prior identifiable locations*. A relocation cannot relate back unless the original location notice is proved.

*Id*. at 449. (Emphasis supplied.)

In *American Resources*, 52 IBLA 290 (1981), the Board considered a similar case and determined that unless the locator is the grantee in a conveyance of legal title to the earlier claims, the new location is adverse to the earlier location and is a relocation. The Board said at 294-295:

> Where a person files notices of location for lands covered by earlier mining claims which have been abandoned, this action is properly regarded as adverse to those earlier claims unless the person is the grantee in a conveyance of legal title to the earlier claims. *See Janelle R. Deeter*, 34 IBLA 81, 83-84 (1978). In other words, McGuire "relocated" these claims in 1958, that is, he established his own claim to these lands which were adverse to whatever interests Mission Mining Corporation or anyone else had in these lands. Accordingly, he cannot relate the date of recording of his claims back to the date of recording of the earlier claims.

**Oral Transfers of Interest**

Where the claimant can only demonstrate that present title is based on oral transfers of a mining claim, such oral transfers do not alone cause an amended location to be invalid. The validity of such an amendment is a question of fact that may be resolved at an administrative hearing. In *R. Gail Tibbetts*, 86 ID 538 (1979), the Board stated at 546-547:

> ... we hold that the fact that transfers of mining claims are oral and not committed to writing does not, *ipso facto*, invalidate a subsequent amended location notice. Since the United States is essentially a stranger to the agreement, the fact that the agreement may be subject to the statute of frauds should not be used to invalidate the claim. This rule is in conformity with another well-established rule in the mining laws that the omission of a co-locator's name in an amended notice is only subject to the objection of the co-locator whose name has been omitted. *Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co., supra; Thompson v. Spray, supra*. We also hold, however, that the failure to commit a transfer of a mining claim to writing does give rise to a question of fact into which the Department may improperly inquire.

**Claims Cannot Be Moved Long Distances by Amendment**

In *R. Gail Tibbetts v. BLM*, 62 IBLA 124 (1982), it was held that where claims are moved substantial distances and the claim positions are constantly changed, notices making such

changes in position cannot be considered amendments. The Board said at 131:

> ... What appellants have not explained, however, is how the physical relationship of the various claims can constantly change. Thus, claims which are 2 miles apart become adjacent, claims located to the west of other claims migrate to the east of those claims, and the configuration of the claim groups alter with each successive map. Appellants have not even attempted to explain how these movements have occurred. There is no possible way to treat the 1974 and 1975 notices as amendments where it is impossible to ascertain what they, in fact, amended.

**Lodes Are Amended Like Placers**

For the purpose of curing imperfections or defects in the original location, the same latitude of amendment should be allowed in the case of placers as in lodes. *Fred B. Ortman*, 52 LD 467 (1928).

**New Names in Amended Notices**

In *Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co*., 125 F 389 (1903), the court discussed the inclusion of new names in amended locations that did not appear in the original notice. The Court said at 397:

> The rule is that, where the second or amended notice or certificate of location contains names other than those set forth in the original, it cannot be taken advantage of by other parties. It may be treated is an original notice as to the persons whose names do not appear on the first, and as a supplemental or amended notice as to those whose names appear on both.

**Discovery Required Prior to Dropping Locator**

If the name of one of eight locators of a 160-acre association placer is deleted in an amended location, the Interior Department may properly inquire into the existence of a discovery at the time of the amendment. *R. Gail Tibbetts, supra*.

**Court Approved Reasons for Amendments**

The courts have supported the validity of amendments for a variety of purposes. Among these are the following:

1. A change in the record owners of a claim where such change is reflective of an existing fact. *U.S. v. Consolidated Mines & Smelting Co*., 455 F2d 432, 441 (9th Cir 1971).

2. Successor in interest to original locator made amendment to location notice which

contained indefinite description of discovery shaft. *Hagerman v. Thompson*, 235 P2d 750, 757-58 (Wyo 1951).

3. Defects in the location notice. *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp*., 571 F2d 1144, 1156-57 (10th Cir 1978), *cert. denied*, 439 US 862 (1978).

4. Amendment to location notice which contained no reference to a natural object or monument. *Nyland v. Ward*, 67 Colo 108, 187 P 514, 515-16 (1920).

5. A change in the name of the claim. *Butte Consolidated Mining Co. v. Barker*, 35 Mont. 327, 89 P 302, *aff=d on rehearing*, 90 P 177 (1907).

6. Amendment to location notice which described claim in wrong section. *McEvoy v. Hyman*, 25 F 596, 599-600 (CCD Colo 1885).

**Amended Location Generally Relates Back to the Original**

An amended location notice, made to cure defects, will generally relate back to the original notice provided no new land was included in the amendment. In *R. Gail Tibbetts, supra* at 546-47, the Board said the following:

> It will be seen that generally an amended location relates back, *where no adverse rights have intervened*, to the date of the original location. *See* Morrison, *Mining Rights*, 16 th ed. (1936), at 159-163. Thus, in *Bunker Hill & Sullivan Mining & Concentration Co*. v. *Empire State Idaho Mining & Development Co*., 134 F. 268 (1903), the Circuit Court for the District of Idaho noted: "It has long been held that a mining location may be amended without the forfeiture of any rights acquired by the original location, *except such as are inconsistent with the amendment, but new rights cannot be added which are inconsistent with those acquired by other locations made between the dates of the original and the amended location*. " *Id*. at 270. Additionally, there are certain circumstances in which an amended location notice will relate back to the date of the original notice even in the face of intervening adverse claims. Thus, it has been held that if the amended notice is made to cure obvious defects in the original notice without including any new grounds, it will relate back to the original notwithstanding intervening locations.
>
> ... thus an amendment would of necessity relate back, provided no new land was included in the amendment.

**Hearing to Determine if Amended Location a Relocation**

Under certain circumstances, the determination of whether a notice represents a relocation or an amendment is a disputed issue of fact and a hearing must be held before the claims are declared null and void. In *U.S. v. Consolidated Mines & Smelting Co*., 455 F2d 432 (1971), the Ninth Circuit Court of Appeals said the following at 441:

> [C]laimed that some of its location notices were actually relocation notices. This

> contention was dismissed by the Department with the observation that relocation is necessarily adverse to the interests of prior locators. Thus, the Department concluded, Consolidated's rights in its mining claims must date from the "relocation" notices filed after the withdrawal. This generalization is correct only if the relocator claims against, rather than through, the prior locator. *If a relocator claims through the prior locator, ordinarily the relocation notice relates back.* ...The evidence before the Department did not indicate whether Consolidated claimed through or against its predecessors. Thus, the Department's generalization is supported only by an unjustifiable assumption of fact. Accepting arguendo Consolidated's status as a relocator, hearings would have been desirable to ascertain the relationship between Consolidated's relocations and prior location made by persons through whom Consolidated claimed.
>
> Given a disputed issue of fact, hearings were required before the Department could declare Consolidated's claims null and void. [Italics supplied.]

In *Fairfield Mining Co., Inc.* 66 IBLA 119 (1982), the Board determined that a hearing could be held to allow a claimant to establish an unbroken chain of title back to the original location so as to predate a withdrawal. The Board said:

> In *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432 (9th Cir. 1971), the Court of Appeals for the Ninth Circuit held that a hearing is required where there is a disputed issue of fact whether the interests of the present mining claimant are adverse to the interests of prior locators (i.e., whether the filing is a "relocation") or whether instead the present owner was the successor to these earlier interests (i.e., whether the filing is an "amended location"). As appellant may be able to establish an unbroken chain of title through previous claimants back to the 1952 location, which would predate the withdrawal, it is appropriate to refer the matter for a hearing to allow the opportunity to do so.

**Gaps in Chain of Title and Documentation**

In order to amend an original location, a present owner who is not the claim owner designated in the original location notice must be able to document each transfer of interest so as to show present title to the claim. In *Fairfield Mining Co., Inc., supra*, the Board said the following:

> While the 1974 location could be construed as an amended location, there is presently no showing in the record that appellant is the successor to an unbroken chain of legal title to the claims extending back before the withdrawal of the land in 1964, as suggested in the statement of reasons. There is no documentation verifying the 1954 transfer of interest in the claims from the original locators to appellant nor is there documentation of the December 1, 1971, sale which resulted from the October 20, 1971, judgment rendered against the corporation. Appellant has only provided evidence of the original 1952 location together with the 1974 filing and a copy of the 1974 quitclaim deeds, thus leaving a gap in the chain.

**Right to Amend After Withdrawal**

A claim embraced by a withdrawn area may only be amended under certain circumstances: (1) the claim must have been valid and existing at the date of the withdrawal; (2) there must be no break in the validity of the claim; (3) the amender must be able to demonstrate present title; and (4) the location may not be enlarged by adding new land. In *R. Gail Tibbetts, supra* at 543, the Board discussed this as follows:

> There is no doubt that withdrawal of land from mineral entry constitutes such an appropriation of the land as to prevent the initiation of new rights. *Citations omitted*. But to the extent that the amended location merely furthers rights acquired by a valid subsisting location, withdrawal of land subject to existing rights, will not prevent the amended location. It should be emphasized, however, that the original claim must have been valid, and not voidable, in this situation. While it is true that a legal presumption arises in favor of a mineral claimant in possession and working the claim against the attempts of another claimant to enter upon the land and make a discovery, such presumption does not arise against the United States. *Citations omitted*. By withdrawing the land, the United States has prohibited the initiation of new claims and also prevented the curing of substantive defects in other claims.

In *James C. Haight*, 44 IBLA 240 (1979), the board again emphasized that an amended location may not enlarge rights by adding new land where intervening rights exist. In this case, a withdrawal represented the intervening rights of the government. After the effective date of a withdrawal which covers a valid existing claim, no new land can be added to such claim by amendment.

# 12. CLAIM RECORDATION UNDER FLPMA

## RECORDATION OF CLAIMS

### Introduction

Although the Federal Land Policy and Management Act (FLPMA), 90 Stat. 2769; 43 USC 1744 (1976), significantly affected activities under the mining law in many ways, perhaps section 314 is by far the most important. Before the passage of FLPMA, the recordation of mining claims and the maintenance of possessory title through filing annual assessment work was mandated by state law. As a consequence, all records related to mining claims such as location notices, amended location notices, transfers of interest and assessment work affidavits could be found in the county recorder's office in the county in which the claim was located.

The purpose of section 314 was to furnish the Bureau of Land Management (BLM) with information on the location and number of unpatented mining claims, mill sites and tunnel sites. Other objectives were to remove the cloud on title to lands where claims were recorded but abandoned and to determine the name and address of the current owner of record. 43 CFR 3833.0-2.

For unpatented lode or placer mining claims or mill or tunnel sites located prior to the date of the Act, Section 314(b) requires a copy of the official record of the notice of location or certificate of location to be filed on or before October 22, 1979, in the state office of the Bureau of Land Management. For claims or sites located after the date of the Act, the notice of location must be filed within ninety days after the date of location of the claim. The notice of location must include a description of the claim sufficient to locate the claimed lands on the ground. 43 CFR 3833.1-2.

The owner of an unpatented lode or placer mining claim located before the date of the Act was required to file an affidavit of assessment work or a notice of intention to hold the mining claim on or before October 22, 1979, and prior to December 31 of each year thereafter. For lode and placer claims located after the date of the Act, the owner is required to file the affidavit of assessment work or notice of intention to hold the claim before December 31 of each year following the calendar year in which the claim was located. 43 CFR 3833.2.

Failure to file a location notice, assessment work affidavit, or notice of intent to hold as required by Section 314 shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner. Hundreds of appeals have resulted from claims declared abandoned by administrative decisions for failure of the owner to file the proper instrument. As a result there have been decisions rendered by the Interior Board of Land Appeals addressing almost every aspect of the recordation process. To this date the courts have held that

Section 314 is constitutional, and also, that the regulations promulgated under the Act were not made in excess of statutory jurisdiction. *Topaz Beryllium Co. v. United States*, 649 F.2d 775 (10th Cir. 1981); *Western Mining Council v. Watt*, 643 F.2d 618 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 567 (1981).

**Recordation of Claims Located on Or Before October 21, 1976**

Section 314(a) and (b) of FLPMA, 43 USC 1744(a) and (b) (1976), require that the owner of an unpatented claim located on or before October 21, 1976, shall, within the 3-year period following the date of approval of the Act, file a copy of the notice of location for the claim in the proper office of BLM, and also file (1) evidence of the performance of assessment work, (2) a notice of intention to hold the claim, or (3) a detailed report as provided by the Act of September 2, 1958, 30 USC 28-1 (1976). Section 314 8 of FLPMA, 43 USC 17448 (1976), provides that the failure to file the instruments required by subsections (a) and (b) shall be deemed conclusively to constitute an abandonment of the mining claim, mill site or tunnel site by the owner.

As stated in *Sidney 0. Smith*, 62 IBLA 378,380 (1982), if the documents "were not tendered to BLM timely for recordation under FLPMA, there was no authority for BLM to accept and record the affidavits of assessment work and notices of intention to hold the claims in December 1981."

In *County of Imperial*, 51 IBLA 250 (1980), a claim owned by the County of Imperial was deemed to be conclusively abandoned and void even though the late filing was caused by an Act of God. The Board said:

> On appeal the County of Imperial has indicated the filing was late because an earthquake collapsed the County Office Building on October 15, 1979. Although they indicate they had every intention to meet the October 21, 1979, deadline, they could not do so because of circumstances beyond their control.
>
> It is indeed unfortunate that the County Office Building was damaged as indicated on October 15,1979. However, there is no latitude in the law or the regulation to excuse the late filing for an act of God. These requirements are mandatory and failure to comply with them must result in a finding that the claims are void.

In some cases, extremely valuable mineral properties were lost on account of failure to record, even though actively producing over many years. Unfortunately many of such deposits can no longer be relocated because of intervening rights. In *Petro-Lewis Corp*., 57 IBLA 300 (1981), it was held that failure to comply with FLPMA recordation results in voiding an oil placer claim even though in producing status. The Board said:

> It is irrelevant that these are oil placer claims, since FLPMA and the regulations provide no dispensation for such claims. Nor does the fact that appellants may be producing from

these claims alter the result. The holding of a mining claim and the diligent pursuit of mining activities on it do not relieve an owner of the obligation imposed by statute to file required material.

**Recordation of Claims Located After October 21, 1976**

The owner of an unpatented mining claim, mill site, or tunnel site located after October 21, 1976, on Federal land is required to file within 90 days after the date of location of that claim in the proper BLM office a copy of the official record of the notice or certificate of location of the claim or site filed under state law. 43 USC 1744(b); 43 CFR 3833.1-2(b).

**Failure to Record Claim as Required by State Law**

Before the passage of FLPMA, failure to record a mining claim as required by state law does not, in and of itself, render the claim invalid. This may be true even if the state statute indicates failure to record within the specified period constitutes an abandonment of the claim. *Sakow v. J.E. Riley Investment Co.*, 9 Alaska 427 (D. Alaska 1939), *aff'd*, 110 F.2d 345 (9th Cir. 1940). Other events, such as a withdrawal or classification of the land, prior to recordation by the claimant, may operate as an adverse right rendering the claim invalid. Under section 314 of FLPMA, a claim not filed with both BLM and the local recording office within 90 days of the date of location is conclusively deemed to be abandoned. *Dutch Creek Mining Co.*, 98 IBLA 241, 249 (1987).

**Curable Defects**

The policy of the BLM to allow "curable defects" was established by Organic Act Directive No. 80-5. This directive was the first formal statement that items required by the regulations, but not the statute, will be treated as curable defects if not submitted. Filing or service fees are an exception to this rule. The Interior Board of Land Appeals has also applied the concept of "curable defects" to a number of important cases discussed in the remainder of this chapter. The Board's approach to this problem was described in a concurring opinion by Judge Burski in *Harvey A. Clifton*, 60 IBLA 29 (1981):

> Of course, adoption of a bifurcated curable/noncurable approach requires an initial determination of what is a curable defect. In order to ascertain what requirements are mandatory this Board has been forced to examine closely the regulations in light of the statute. Where we could find no statutory replication of a regulatory requirement we have treated a failure to comply with the regulatory requirement as a curable defect.

In *Topaz Beryllium Co. v. United States*, 649 F2d 775, 778 (10th Cir 1981), the Tenth Circuit Court upheld the Secretary's view that "once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings required only by 3833 - and not by the statute - are not made." The Court then said at 778:

> ... failure to file the supplemental information is treated by the Secretary as a curable defect. A claimant who fails to file the supplemental information is notified and given

thirty days in which to cure the defect. If the defect is not cured, "the filing will be rejected by an appealable decision."

The regulations in 43 CFR 3833.4(b) provide for curable defects:

> The failure to file the information required in.....when the document is otherwise filed on time, shall not be deemed conclusively to constitute an abandonment of the claim or site, but such information shall be filed within 30 days of receipt of a decision from the authorized officer calling for such information. Failure to file the information requested by the decision of the authorized officer shall result in the mining claim, mill site, or tunnel site being deemed abandoned by the owner.

**Date of Location**

The "date of location" represents the initiation of the mining claim title and it is also the date to which a timely filing must relate. Although the statute does not define "date of location," the phrase is defined by regulation in 43 CFR 3833.0-5 as follows:

> ... the date determined by state law in the local jurisdiction in which the unpatented mining claim, mill, or tunnel site is situated.

Many of the filings which have been rejected due to failure of the claimants to file within the period authorized by statute involved problems with the date of location. In *Byron L. Philpott*, 137 IBLA 137, 139-140 (1996), the Board summarized its holdings on this subject:

> By Departmental regulation, as well as decisions of this Board, the Adate of location@ of a mining claim is Athe date determined by State law in the local jurisdiction in which the unpatented mining claim, mill or tunnel site is situated.@ 43 CFR 3833.0-5(h); *John & Maureen Watson*, 113 IBLA 235 (1990); *Dutch Creek Mining Co.*, 98 IBLA 241, 247 (1987). Under California law, the date of posting a location notice on a permanent monument situated on the claim is the date of location. Cal. Pub. Res. Code 3900(d), 3902(d), 3915 (West 1984, Supp. 1996); *John & Maureen Watson, supra*; *C.B. Shannon*, 55 IBLA 312 (1981); *Lee Resources Management Corp*., 50 IBLA 131, 132 (1980).
>
> As a practical matter, however, decisions by this Board have generally treated the date of location as the date of posting stated in a recorded location certificate. *Dutch Creek Mining Co., supra* at 248, n.6; *see American Law of Mining* 33.10[5] (2d ed. 1985). In large measure, this because most of the Board=s cases on this point arise under section 314(b) of FLPMA which requires that Aa copy of the official record of the notice of location or certification of location,@ be filed Awithin ninety days after the date of location of such claim.@
>
> Athough 43 CFR 3833.0-5(h) provides that the date of location of a mining claim shall be determined by state law in the jurisdiction where the claim is located, where the

> location certificate, as recorded with the county recorder=s office as required by state law, recites a specific date of location of the claim, that date will be used as the inception of the 90-day period allowed for recordation by 43 US 1744 (1994), as that is the date upon which the claimant asserts he located the claim and entered upon the public land. See *Mrs. George Wagner*, 63 IBLA 146, 149-51 (1982. The Board had held that allegations that the true date of location is other than that *recorded* on the notice of location cannot dictate a different result. *John C. Buchanan*, 52 IBLA 387 (1981); *Lee Resources Management Corp., supra*; *P & S Mining Co*., 45 IBLA 115 (1980).

In *Park City Chief Mining Co*., 57 IBLA 342 (1981), the date of location was not furnished with the documents filed during recordation, but was a curable defect. Normally, if the claimant does not furnish the date of location within the requisite 30-day period, the claim would be deemed abandoned. However, in this case, the incompacitated condition of the claimant convinced the Board to allow a greater length of time. The Board said:

> There is no evidence that appellant responded within 30 days of receipt of the notice of deficiency. Nevertheless, we believe that this failure to respond timely should not result in the rejection of the filing where the person entrusted with handling such matters was and was not reasonably able to attend to normal business matters. While allegations of the disability of Richard S. Johnson would not excuse a late filing, *E. M. Koppen*, 36 IBLA 379 (1978), this case does not present a question of a late filing but, rather, a question of a curable deficiency. In the latter regard, we believe that Johnson's disability was sufficient to excuse the failure to respond timely, especially, when appellant promptly cured the defect upon learning that Johnson had not.

In *Lee Resources Management*, 50 IBLA 131 (1980), the Board determined that "under the law of the State of California, the date of location is fixed as the date of the posting of the location notice on the claims, and the time for recordation in the county is measured from that date."

In *John C. Buchanan*, 52 IBLA 387 (1981), the Board considered the "date of location" under state law of the State of Arizona:

> Under the law of the State of Arizona, where these claims are situated, the date of location is that specified by the locator on the notice of location filed with the record office. Ariz. Rev. Stat. Ann. ' 27-202 (1976). In this context we note that the location notice prepared by appellant and recorded in this official record of Pinal County shows that appellant entered as the date of location the "10th day of January 1979." Thus, this is the date of location which determines whether appellant timely filed copies of the notices with BLM.

If claimants fail to include a location date with their filing, but do so later upon request by the BLM, such claimants must remember that the location date filed with the BLM must be the same as that filed with the county. For example, you could not possibly have a location date on your BLM filing later than the date of filing with the county. This situation is discussed by the

Board in *Gerald B. Bannon*, 63 IBLA 115 (1982), State of Washington example:

> In this case, the copy of the notice of location did not contain a date of location. Appellant's insertion of the date "Feb. 3, 1982" at the time of appeal does not cure this defect, as February 3 obviously is not the real date of location of the claim filed with the county on November 10, 1981. Moreover, the new documents bearing the new location date, is no longer a "copy" of the filing made with the county. Nor could November 11, 1981, have been the date of location. Washington State law, which here governs determination of the location date (43 CFR 3833.0-5(h)), contemplates recordation with the proper county only after certain prerequisites have been accomplished on the claim to locate it. *See* Wash. Rev. Code Ann. ' 78.08.050. Therefore, appellant's filing with BLM and his submissions on appeal could effect no location or relocation.

In *Mrs. George G. Wagner*, 63 IBLA 146 (1982), the Board gives a good discussion of "location" as it relates to the inception of title. It also interprets "date of location" in terms of State of Colorado law:

> "Location" is the inception of the miner's title to the public land claimed in the location notice or certificate, and it is the date of such "location" from which the miner's title runs. If all the statutory requirements for "location," including discovery of a valuable mineral deposit, are not met before the named date of location, then, in the absence of intervening rights, the title of the miner will relate back to the named date of location once all of the statutory requirements have been accomplished. It is immaterial as to the order in which the requirements are completed in the absence of any third party intervention. The date on which the miner states that he went onto the public land and asserted a claim thereto, and which he thereafter acknowledges on his certificate of location, is the date of "location" which FLPMA contemplates. However, we conclude that we must adhere to our holding in *C. B. Shannon, supra* it 314:
>
> > The date of location of the claims disclosed on the notice of location filed for record in the county recorder's office under state law is controlling in determining whether the notice of location has been timely recorded with BLM under section 314 of FLPMA, 43 U.S.C. ' 1744 (1976), and allegations that the true date of location is other than that recorded on the notice of location cannot dictate a different result.
>
> That is a correct statement of the law. It clearly applies where, as in the previously cited cases, the governing state location law establishes some procedure that explicitly or implicitly presumes the date of location to be the one entered on the location notice or certificate itself.

By Departmental regulation, as well as decisions of the Board of Land Appeals, the "date of location" of a mining claim is "the date determined by State law in the local jurisdiction in which the unpatented mining claim, mill or tunnel site is situated." 43 CFR 3833.0-5(h). *Dutch Creek Mining Co*., 98 IBLA 241 (1987).

In *Dutch Creek Mining Co., supra* at 248, the Board held Athat, absent clear evidence to the contrary in a specific case, under Alaska State law, the date of location of a mining claim is the date (the) notice is posted on the claim as recited in the recorded certificate of location.@

As a practical matter, decisions by the Board have generally treated the date of location as the date of posting stated in a recorded location certificate. *Dutch Creek Mining Co., supra* at 248.

**Computing the 90-Day Period**

FLPMA requires the owner of an unpatented mining claim located after October 21, 1976, to file a copy of the official record of the notice of location with the BLM within 90 days after the date of location. In *Warren J. Fytem*, 58 IBLA 381 (1981), the Board determined that in computing the 90-day period, the date of the location is not included but the last day of the period is included.

The 90-day period begins the day after the date of location. If the 90th day falls on a day when the office is closed to the public, consider the 90th day as the next day the office is open to the public. *BLM Manual* 3833.12A.

**Office Closed on Day Filing Period Ends**

In *Birco Development*, 97 IBLA 259 (1987), the Board considered a case where the period for recording mining claims ended Sunday, September 8, 1985, and the claimant recorded the claim on Monday, September 9, 1985. The Board held that if the BLM office was officially closed on Sunday and the claims were recorded on the following Monday, Departmental regulation, 43 CFR 1821.2-2(e) would apply:

> Any document required by law, regulation, or decision to be filed within a stated period, the last day of which falls on a day the office is officially closed, shall be deemed to be timely filed if it is received in the proper office on the next day the office is open to the public.

Therefore the claims were properly recorded and FLPMA requirements are satisfied.

**Filing in the Proper Office**

In *C. F. Linn*, 45 IBLA 1563 157-58 (1980), it was held that the Riverside District Office is not the proper office for filing; the proper office is the California State Office. Also, "file" means received and date-stamped in the proper BLM office. The Board said:

> The "proper BLM office" is defined in the regulations at 43 CFR 3833.0-5(g) as the BLM office which has jurisdiction over the area in which the claim is located, as specified in 43 CFR 1821.2-1(d). The latter section states in turn that the office having jurisdiction over lands located in California is BLM's *California State Office in Sacramento*. Thus, under

43 CFR 3833.1-2(b), appellant was required to "file" this information in BLM's California State Office, i.e., to cause it to be received and date stamped there, on or before September 7, 1979.

Appellant submitted this information prior to this date, but with the Riverside District Office, rather than the State Office in Sacramento as expressly provided in the regulations. Accordingly, this information may not be regarded as having been "filed" with the State Office until it was actually received and date stamped there on September 17, 1979. As this was more than 90 days after the date of location, BLM properly declared the claim abandoned and void, as required by 43 CFR 3833.4(a).

It is irrelevant that the District Office might have waited some few days before forwarding the information to the State Office, as the State Office could not have received the information timely even if the District Office had acted immediately, in that it was submitted in Riverside only 1 day in advance of the date it was due in Sacramento. The District Office is without authority to accept such filings.

If the office having jurisdiction is the Colorado State Office, the New Mexico State Office is not the proper office. In *Santa Fe Nuclear, Inc.*, 47 IBLA 222 (1980), the Board said:

Appellant's act of having the envelope date stamped by the New Mexico State Office prior to transmittal does not constitute timely filing of the documents in the Colorado State Office. Regulation 43 CFR 3833.1-2(a), quoted above, requires documents to be received and date stamped by the *proper* BLM office.

The "proper BLM office" is defined in the regulations at 43 CFR 3833.0-5(g) as the BLM office which has jurisdiction over the area in which the claim is located, as specified in 43 CFR 1821.2-1(d). The latter section states in turn that the office having jurisdiction over lands located in Colorado is BLM's *Colorado State Office in Denver*.

The documents had to be received and date stamped by the Colorado State Office by October 22, 1979, in order to be filed timely.

If the claim is near the dividing line of two filing districts (Anchorage and Fairbanks) in Alaska, timely filing in either district is acceptable. *Also see* 43 CFR 3833.0-5(g). In *Janie S. Nelson*, 55 IBLA 291, 292 (1981), the Board said:

We recently had occasion to deal with a similar situation in *Inspiration Development Co.*, 54 IBLA 390, 88 I.D. (1981). We pointed out therein that Alaska is unique in that it is the only state with two BLM offices having jurisdiction to receive recordation filings. However, we concluded that the regulation upon which a mining claimant must rely in determining in which office to file was "inherently ambiguous" where a mining claim is located near the dividing line between "Northern" and "Southern" Alaska such that it is virtually impossible from the map depicted in 43 CFR 1821.2-1 to determine with substantial accuracy in which district the mining claim lies. Accordingly, we held that

where such a mining claimant files timely in one of the Alaskan BLM offices, such filing will be considered as satisfying the requirement of 43 CFR 3833.1-2(a) of filing in the proper BLM office.

**Copy of the Official Record of the Notice of Location**

In 43 CFR 3833.0-5(I), the "copy of the official record" is defined as follows:

> A legible reproduction or duplicate, except microfilm, of the instrument which was or will be filed under state law in the local jurisdiction where the claim or site is located. It also includes an exact reproduction, duplicate, except microfilm, of an amended instrument which may change or alter the description of the claim or site.

It was held in *W. C. Miles*, 48 IBLA 214, 215-216 (1980) that a handwritten copy of the instrument of recordation is acceptable; and a machine reproduction is not required:

> Nowhere in the definition does it include a requirement that either the reproduction be a machine reproduction or that only photostatic copies are acceptable. The words "reproduction" and "duplicate" are not terms of art. *Webster's New Collegiate Dictionary* defines "reproduction" as "something reproduced: COPY." Similarly, "duplicate" is defined as "1: either of two things that exactly resemble or correspond to each other; specif : a legal instrument that is essentially identical with another and has equal validity as an original 2: COPY, COUNTERPART." Neither word necessarily implies a machine copy.
>
> We hold, therefore, that under the present regulation, a handwritten copy of a notice or certificate of location which was or will be recorded in the local jurisdiction meets the regulatory requirements. *See Wilma Hartley*, 48 IBLA 83 (1980).
>
> Claimants, of course, run the risk that should the handwritten copy not accurately reflect the original notice of location, the original will not be deemed to be recorded and the claim will be deemed conclusively to have been abandoned. But we cannot say that filing a handwritten copy is forbidden by the regulations.

In *John J. Vikarcik*, 58 IBLA 377 (1981), it was held that quitclaim deeds may not be substituted for the location notice unless it can be shown that the location notices are unavailable:

> The quitclaim deeds submitted by appellants do not constitute "other evidence" of the certificate of location under the above regulation as the deed in no way refers to the location of the claim or its recordation in the county recorder's office. *Cleo May Fresh*, 50 IBLA 363 (1980). The provision in the regulation concerning the submission of "other evidence" applies only when the notice of location is no longer obtainable or when a claimant purports to hold a claim under 30 U.S.C. '38 (1976).

**Recording Claims Existing in National Park System Lands**

A mining claim in existence in national park system lands on September 28, 1976, must have been recorded on or before September 28, 1977, or it is conclusively presumed to be abandoned and void as provided by section 8 of the Act of September 28, 1976 (16 USC 1907; 36 CFR 9.5(a).

**Relocation Versus Amended Location**

An amended location notice that is timely filed may be considered a relocation if the original location notice filed with it is untimely. In *Walter T. Paul*, 43 IBLA 119 (1979), the Board said:

> With regard to the original location notice, BLM properly held the mining claim abandoned, as it was clearly filed for record beyond the 90-day period. However, the timely filing on March 16, 1979, of the "amended" location notice may be considered a relocation of the claim as of March 1, 1979, provided no rights of the United States or of third parties have intervened, and the requirements of the law pertaining to relocations by the same claimant have otherwise been met. Therefore, although the original claim is deemed to have been abandoned, the relocated claim of March 1, 1979, is not.

In *Gary S. Posenjak*, 63 IBLA 326 (1982), it was held that an amended location notice need not be denoted as such on the location notice in order to qualify as an amended location notice. The Board said:

> We begin by pointing out that BLM seems to have relied on a faulty premise in invalidating the Poseys Pickin's II claim in its most recent decision. In *R. Gail Tibbetts*, 43 IBLA 210 (1979), the Board held that there is no absolute requirement that an amended location be denoted as such on the face of the location notice. While the failure to designate the Poseys Pickin's 11 location notice as an "amended location" gives rise to the inference that appellant did not intend this claim to be an amended location, the omission of these words does not inevitably lead to this conclusion. *R. Gail Tibbetts, supra* at 228; *American Resources, Ltd*., 44 IBLA 220 (1979).
>
> The import of a determination that the Poseys Pickin's II claim is an amended location of a pre-FLPMA claim is set forth in *American Resources, Ltd., supra* at 223:
>
> > An "amended location" of a claim is a subsequent location intended to further the rights acquired by the earlier locator while making some change in the location, such as changing the name of the claim or its owners of record (as where the original claim has been sold) or excluding excess acreage. In contrast to a "relocation," an "amended location" does relate back to the date of the filing of [the] original notice of location, so that the filer does receive the rights associated with the earlier location, including its superiority to subsequent withdrawals, to

the extent that the amended location merely furthers rights acquired by a prior subsisting location, and does not include any new land.

Furthermore, in *Sunshine Mining Co*., 64 IBLA 399 (1982), the Board held that the recordation in 1981 of an amended location notice for a pre-FLPMA mining claim, where the original claim had never been recorded with BLM, cannot confer any earlier right to the claim than the date of the amended location.

**Information to Be Included With the Location Notice**

In 43 CFR 3833.1-2(b), seven items are specified that must either be in the location notice or included as supplemental information:

1. Name or number of claim or site.

2. Name and address of current owner.

3. Type of claim or site.

4. Date of location.

5. Position of claim must be described to within a quarter section (160-acre quadrant); township, range, meridian and state must be included.

6. Claim(s) must be described by narrative or shown on map with sufficient accuracy for the Government to identify and locate the claim on the ground. More than one claim may be shown on a map.

7. An approved mineral survey in lieu of items (5) and (6) may be filed.

**Map and Legal Description**

Section 314(b) of FLPMA, 43 USC 1744(b) (1976) requires the owner of an unpatented claim located after October 21, 1976, to file in the office of the Bureau designated by the Secretary of the Interior a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

**Precise Description of Claim Not Required**

In *United States Borax & Chemical Corp.*, 98 IBLA 259, 260 (1987) the Board concluded that "neither the statute nor the regulations require a locator to submit a precise description of the position of his claims; rather the test as to whether a recorded description is sufficient is 'whether the claim may in fact be found and identified by following the recorded description.'" *Also See Arley Taylor*, 90 IBLA 313, 316-17 (1986).

**Description of Claim within Quarter Section**

Where the lands are surveyed, "BLM may require a claimant to furnish a description of the location of his claim to within a quarter section, if this information was not provided with his original filing." *Walter Everly*, 52 IBLA 58, 59 (1981).

In *Joe Ostrenger*, 94 IBLA 229 (1986), the Board considered a case where the claims, situated on unsurveyed lands, were described by metes and bounds. The location notices did "not provide descriptions which refer to a natural object or a permanent monument so as to give a starting point from which, by following the description, markings on the ground may be found." *Id.* at 233.

The Board affirmed the BLM decision that the claims were abandoned and void because the claimants failed upon notice to provide a description reciting the location of each claim which complies with 43 CFR 3833.1-2(b)(5). The Board then expanded on the requirement for a description at 232 and 233 as follows:

> The requirement that a mining claimant provide a description reciting the location of the claim or claims to within a quarter section, according to an official survey plat or other U.S. Government grid, is a qualified requirement. The claimant is required to describe "to the extent possible," the "approximate location of all or any part of the claim." 43 CFR 3833.1-2(b)(5)(I). This qualified requirement takes into account the problems associated with conforming the situs of the claim on the ground with the description of the claim in the notice of location.

However, "the fact that the township involved is unsurveyed does not relieve the claimant from describing the approximate location of the claim, to the extent possible, based upon the protracted U.S. Government grid, and from providing a map, narrative, or sketch describing the claim with reference by appropriate tie to some topographic, hydrographic, or man-made feature." *Id.* at 234.

In *Walter Everly*, 52 IBLA 58, it was held that "BLM properly required appellant to supplement his certificate of location to reflect the quarter section where it is situated... As the land has been surveyed, this information was readily ascertainable." *Also see Lowell L. Patten*, 55 IBLA 127 (1981).

In *Arley Taylor*, 90 IBLA 313 (1986), it was held that "neither the statute nor the regulations requires a precise map or description of the position of the claims." *Id.* at 316. *See Floyd and Elsie Patrin*, 87 IBLA 152 (1985); *Robert H. Lawson*, 48 IBLA 93 (1980). Instead, the Board emphasized the requirement that the recorded description refers to a natural or permanent monument.

In *Joe Ostrenger, supra* at 234, the Board advised BLM on a procedure where additional information is required concerning the description of mining claims located in areas covered by

protracted surveys (unsurveyed areas). The better approach "would be not only to request that the description provide, to the extent possible, the information required by 43 CFR 3833.1-2(b-)(5)(I), but also to indicate that if such a description is not feasible, the description should be tied to some natural object or permanent monument."

**Standards for Describing a Claim**

In *The Carrow Co.*, 115 IBLA 102, 103 (1990), the Board summarized the standards the description in the notice and the claim map must satisfy for showing the position of a claim:

> The Board has previously held that where no adequate map is filed, a location notice providing only a vague description of the claim does not comply with 43 U.S.C. 1744 (1982). *Joe Ostrenger*, 94 IBLA 229 (1986).
>
> * * * *
>
> If a location notice description is inaccurate, the situs of the claim on the ground as disclosed by its monuments controls over any conflicting descriptions or maps. *See United States v. Kincanon*, 13 IBLA 165, 168 (1973).
>
> * * * *
>
> "...the test established by statute for the sufficiency of a recorded description is whether the claim may in fact be found and identified by the following the recorded description."

**Claimant may Be Required to Describe Claim within Quarter Section**

"BLM may properly require a mineral locator to supply a description of the location of his claim to within a quarter section if this information has not been provided with the filing of a location notice.@ *Outline Oil Corp.*, 95 IBLA 255, 259 (1987).

**Adequate Map or Description of the Claim**

The Board of Land Appeals has considered several important cases involving what constitutes an adequate map or description of the claims. *See Floyd and Elsie Patrin*, 87 IBLA 152 (1985); *Robert H. Lawson*, 48 IBLA 93 (1980); and *Arley Taylor*, 90 IBLA 313 (1986). As the Board stated in *Arley Taylor, Id.* at 316 "neither the statute nor the regulations requires a precise map or description of the position of the claims." The Board further noted that "the test established by statute for the sufficiency of a recorded description is whether the claim may in fact be found and identified by following the recorded description." *Id.* at 317.

Consequently the "recorded description and map filed with BLM are not required to be precise, the uses which may be made of information submitted necessarily depend upon its relative accuracy." *Id.* at 317. The Board stated at 317:

> As discussed above, the distances from a natural object or permanent monument

given in a location notice or certificate are not intended to be exact. As a practical matter, most frequently they are not measured but are paced off or otherwise estimated by the locator. In the present case, the distances are given from the confluence of Eureka Creek with Moose Creek, a point roughly a mile and a half from the nearest of the claims. Even if the distances from the confluence stated in the location certificates are fairly accurate, they may have been measured following sinuosities of the river which could alter claim placement considerably. In this regard, the map submitted with the location notice cannot independently serve as a basis for placing the claims on the protracted survey plat as it is not designed to be an exact depiction of the situs of the claims but merely an aid in finding them on the ground.

**Claim Description and Map Requirement**

In *Outline Oil Corp.*, 95 IBLA 255, 259 (1987), the Board reviewed a case on appeal where the map prepared by the BLM did not agree with the map prepared by the claimants. The Board then said that the "question of which appellants claims are located on withdrawn land does not depend on which map is correct but rather will be decided by a finding concerning where on the ground the claims were located." The Board discussed the claim description and map requirement at 259:

> A mining claimant, however, is not required to submit to BLM information sufficiently precise for his claim or claims to be projected onto a township plat. *Arley Taylor*, 90 IBLA 313, 316 (1986). Neither the statute nor the regulations requires a precise map or description of the position of the claims. *Id.*; *Robert H. Lawson*, 48 IBLA 93 (1980). The regulation requires a locator to supply information as to the quarter section in which his claims are located only "to the extent possible." 43 CFR 3833.1-2-(b)(5)(I). A locator is not required to employ a professional surveyor to produce a map. 43 CFR 3833.1-2(b)(7). Alternatively, he may submit "a narrative or a sketch describing the claim or site with reference by appropriate tie to some topographic, hydrographic, or man-made feature." 43 CFR 3833.1-2(b)(5)(ii). In either case, the test established by statute for the sufficiency of a recorded description is whether the claim may in fact be found and identified by following the information provided. Arley Taylor, supra at 317; 43 CFR 3833.1-2(b)(ii). This is a factual question and, unless the description or map is on its face so deficient as to be inadequate as a matter of law, the issue of its sufficiency can be determined only by testing the information in the field.

**Map Showing Claim in Wrong Area**
**Is Curable Defect**

In *The Carrow Co.*, 115 IBLA 102 (1990), the claimant appealed from a BLM decision declaring a claim null and void ab initio because a legal description on a map showed the claim to be on state land. The description in the notice was by metes and bounds and the claim was tied to a ranch house. The Board held that where a map required by departmental regulation has not accurately depicted the situs of the claim, the defect is curable. *Id*. at 103; *Also see Outline Oil Corp*., 95 IBLA 255, 259 (1987).

The Board also noted that "allowing correction of a map is consistent with the well-established rule that a claimant may amend a location notice to correct an error in the description of a claim and that such an amended location will relate back to the original location so long as the claim as marked on the ground does not take in new or additional land and no adverse rights have intervened." *The Carrow Co.*, *supra* at 104, n. 1.

**More Than One Claim Included in Location Notice**

In *Waldron Enterprises Mining*, 88 IBLA 54 (1985), The Board reviewed a BLM decision declaring 13 placer mining claims abandoned and void for failure to meet the recordation requirements. The claimant in Waldron had included all claims in one location notice filed with the State of Colorado. A copy of the notice was then filed with BLM. BLM found all claims abandoned and void because they were not filed with the BLM on separate

notices. The Board applied Colorado law to save one claim and found that under State law the remaining 12 claims were "absolutely void."

In *Fletcher DeFisher*, 93 IBLA 68, 74 (1986), the Board held that the claims described in a 1969 notice of location were void at the time of a withdrawal because Idaho law provides that "no location notice shall claim more than one location, whether the location is made by one or several locators, and if it purports to claim more than one location it is absolutely void." Section 47-608, *Idaho Code*.

**Mill Site Is Abandoned Unless Recorded within 90 Days**

Section 314(b) of FLPMA requires the owner of an unpatented mill site located after October 21, 1976, to file with BLM "within ninety days after the date of location of such a claim" a copy of the notice of location for the site. Failure to file timely in accordance with section 314(b) of FLPMA "shall be deemed conclusively to constitute an abandonment of the * * * mill * * * site by the owner," under section 314(c) of FLPMA. *See Tom Frederick*, 93 IBLA 289 (1986).

**Single Claim with Two or More Recordation Numbers**

In *Ralph C. Memmott*, 88 IBLA 377 (1985), the claimant filed notices of location for the same claim on more than one occasion. As a result, more than one recordation number has been assigned to the same claim. "When this happens, the proper procedure would be to merge the respective files and make a determination whether, on a combined basis, all of the requisite documents have been filed in a timely manner. *Id.* at 378. A claim represented by a specific recordation number should not be declared null and void. *Also see Michael R. Flynn*, 92 IBLA 327, 329 (1986). BLM should also cancel the later recordation serial numbers. *Leslie Corriea*, 93 IBLA 346, 350 (1986).

**Single Mining Claim with Two Serial Numbers**

The Board has held that "when a single mining claim has been recorded with BLM on two occasions and assigned two serial numbers, the proper procedure is to merge the respective files and cancel one serial number. If, on a combined basis, all requisite filings have been made, the claim should not be deemed to be abandoned pursuant to 43 U.S.C. sec. 1744 8 (1982)." *International Metals & Energy*, 114 IBLA 221, 222 (1990).

**Relocation of Claim by Same Owner Resulting in Two Serial Numbers**

In *Edward Ellis*, 101 IBLA 272 (1988), the Board considered an appeal where a claim was relocated and recorded by the same owners. Both locations embraced the same lands. The subsequent proofs of labor filed by the claimant referenced the serial number of the original location rather than the relocated claim. The Board held that if the relocation is not adverse to the prior location (which is generally the case where the locators are the same), a single proof of labor filed under the name of the claim can be applied to both locations, even if the sole reference to a serial number applies only to the prior location. "To the extent the 'relocation' notice .... is properly treated as an amended notice of location which relates back to the original, it would be improper to treat the latter location as abandoned and void where a proof of labor was timely filed for the original location." *Id.* at 274. The Board further stated at 274:

> Where it appears that a single mining claim has been recorded with BLM on more than one occasion and more than one mining recordation serial number has been assigned to the claim, the proper corrective procedure is to merge the respective files and consider whether, on a combined basis, all of the requisite filings have been made rather than declaring a claim represented by a specific recordation number to be abandoned and void for failure of a proof of labor to reference that serial number.

**BLM Acceptance of Notices Does Not Validate Otherwise Invalid Claims**

In *Boyard Tanner*, 113 IBLA 387, 391 (1990), the Board said that "the fact that BLM accepted copies of the certificates of the location of the subject mining claims for recordation does not establish that the land was open to mineral entry on the date of location or, more importantly, preclude BLM from later declaring these claims null and void ab initio because the land was not then open. Acceptance did not validate claims which were otherwise invalid at the time of their inception or preclude a subsequent finding that the land claimed was not open to entry.

**Service Fee**

The service fee requirement has been upheld by several Interior Department decisions and was expressly upheld as reasonable in *Topaz Beryllium Co. v. United States*, 479 F. Supp. 309, 316 (D Utah 1979) *aff=d*, 649 F2d 775 (10th Cir 1981):

> Regarding objections to the $5.00 filing fee, 43 U.S.C. ' 1734 authorizes such fees if they

> are "reasonable". The filing fee, rather than being onerous and unlawful, is in reality modest and moderate. The method of computation was rational, reasonable and extremely conservative. In short, there is nothing wrong with the fee.

In Mrs. George G. Wagner, 63 IBLA 146, 151, 153 (1982), the Board discussed service fees as follows:

> The Department of the Interior has long adhered to the policy that an application or other instrument requiring a filing fee under an applicable regulation must be rejected if the required fee is not paid when the application is first filed. See Christian G. Wieger, 65 I.D. 402 (1958). In considering notices of location for unpatented mining claims submitted to BLM for recordation pursuant to FLPMA, this Board has merely perpetuated the hoary practice of the Department; a location notice submitted without the required service fee must be returned unrecorded or, said another way, a location notice cannot be considered as filed with BLM until the service fee is paid, and if the fee is not received within the period prescribed by FLPMA, there can be no recordation of that claim and it must be deemed abandoned.

The Board went on in *Wagner* to point out that the Tenth Circuit Court in *Topaz Beryllium Co., supra,* held that regulatory requirements for filing "instruments" not required by the statute, 43 USC 1744 (1976) were curable if such instruments were not timely filed in connection with unpatented mining claims of which the Secretary had prior notice. However, the Board has consistently ruled that all claims filed for recordation must be accompanied by a filing fee even though the statute has no such requirement.

If the claimant submits insufficient payment for claims recorded under FLPMA, he may select from all the claims those that can be covered by the tendered payment. The remaining claims are declared abandoned and void. *Robert L. Steele,* 46 IBLA 80 (1980).

In *Erwin Tonne*, 57 IBLA 303, 304 (1981), the filing fee was returned to claimant. The Board held that "it was error for BLM to have retained the $25 service fee for recordation of these claims, without the required instruments, proof of labor and notices of location, being filed on or before October 22, 1979. BLM is directed to repay that service fee of $25..."

**Possessory Title Based on 30 USC 38**

Claims based on Section 38 where no original location notice exists must record under FLPMA or the claims are a nullity; and since all new claims must be recorded within 90 days, it appears unlikely that any new claims will arise under section 38. In *United States v. Haskins*, 59 IBLA 1, 105, 106 (1981), the Board said:

> The recordation provisions of FLPMA required the recording of all claims located prior to October 21, 1976, no matter how located, on or before October 22, 1979, or the claims would deemed conclusively to be abandoned and void. See 43 U.S.C. ' 1744 8 (1976). Specific provision was made for recording claims premised or dependent upon 30 U.S.C.

' 38 (1976).

Since FLPMA also required the recording of new claims within 90 days of their location, it is difficult to see how any new claims can arise, for which recourse to 30 U.S.C. ' 38 (1976) to establish the existence of the claim is necessary or possible. Rights of individual ownership of the claim may still be determined by 30 U.S.C. ' 38 (1976), but if that claim has not been duly recorded under FLPMA, it can only be treated as a nullity.

In *Philip Sayer*, 42 IBLA 296, 300-302 (1979), the Board gave the minimum evidence to be filed with the FLPMA recordation where proof of recording is not possible and section 38 is relied upon for holding the claim. The Board said:

> The provision at 30 U.S.C. ' 38 (1976) is not usually invoked or becomes relevant unless a patent application is filed since it permits patent upon evidence of possession and working of a mining claim for a period of time equal to the time prescribed by the statute of limitations in the state where the claim is situated. In some nonpatent cases, however, we have noted the possibility that the provision could be used to show the validity of a claim located before some segregative action affecting the land status. *See, e.g., Gardner v. McFarland*, 8 IBLA 56 (October 13, 1972). Proof of a discovery of a valuable mineral deposit is also required for the claim to be valid. Because there is a gap in the recording statute and the regulations currently concerning proof that a claim is being held under this provision of the mining laws, BLM should liberally consider attempts by claimants to record evidence of such claims.
>
> In the absence of specific regulations governing the type of evidence sufficient to show the holding of the claim for the purposes of the recordation statute, it is proper for BLM to look to the analogous regulations requiring proof for a patent as a guide to the type of evidence which should be acceptable. However, unless required by other regulation or policy directive, it does not appear essential to require all the proof necessary to meet the requirements of the patent regulations. It is also proper to look by analogy to the information required by amended regulation 43 CFR 3833.1-2(c), 44 FR 9720 (February 14, 1979), applicable where state law does not require recordation. That regulation is not otherwise applicable here as Alaska requires recordation. Alaska Stat. ' 27.10.050.
>
> As indicated, *supra*, the purpose of the recording provisions in FLPMA is essentially to give notice to BLM of the existence of mining claims on Federal lands so that this information may be considered in the land use planning and management of those lands. To serve this purpose then, there is some essential information that would be necessary where a claimant cannot show proof that a notice of location was recorded. This would include the following: (1) the name under which the claim is presently identified and all other names by which it may have been known to the extent possible; (2) the name and address of the present claimants; (3) an adequate description of the claim; (4) type of claim; (5) information concerning the time of the state's statute of

limitations and a statement by the claimant as to how long the claim has been held and worked, giving, if possible, the date (or at least the year) of the origin of the claimant's title and facts as to continuation of possession of the claim; and (6) any other information the claimant would have showing the chain of title to him and bearing upon the possession and occupancy of the claim for mining purposes. Other information which

BLM deems essential to meet its purposes may also be required. The above information would set the minimal requirements to be satisfied until regulations are issued specifically addressing the problems of a holding of a claim under 30 U.S.C. ' 38 (1976).

**Section 38 under FLPMA**

In *Robert L. Mendenhall*, 127 IBLA 73, 83 (1993), the Board explained in detail why it has not been possible to establish rights under section 38 since the passage of FLPMA:

> * * * [S]ince the adoption of section 314 of FLPMA, 43 U.S.C. 1744 (1988), it is not possible, as a matter of law, to resort to the provisions of 30 U.S.C. 38 (1988) to establish rights in a location which was not timely recorded under the provisions of section 314 of FLPMA.
>
> * * * * * * * *
>
> That the recordation provisions applied to claims initiated under 30 U.S.C. 38 (1988) is clear. Thus, in *Webb v. Lujan*, 960 F.2d 89 (1992), the Court of claims assertedly initiated prior to FLPMA through the aegis of 30 U.S.C. 38 (1988) must be recorded under section 314, or they would be conclusively presumed abandoned and void. *Id*. at 92-93. And, an analysis of the language of section 314 makes the conclusion ineluctable that 30 U.S.C. 38 (1988) is no longer available to establish rights under the mining laws of the United States subsequent to FLPMA's adoption for claims which have not been duly recorded with BLM.
>
> As noted above, section 314(b) of FLPMA requires that all locations be recorded with BLM within 90 days of the date of location. The "holding and working" provisions of 30 U.S.C. 38 (1988), on the other hand, operated, consistent with the general rules relating to adverse possession, so that, upon completion of the holding and working period applicable under state law, the location was presumed to have been made at the date of the *initiation* of the holding and working period. Thus, as a matter of chronology, it would be impossible to timely record any such location assertedly initiated subsequent to FLPMA, because any recordation could occur after more than 90 days had elapsed following the date of location, unless the statute of limitation prescribed by the State was less than 90 days. No such statute exists.

**Filing Location Notice with Both County and BLM**

Section 314 of FLPMA requires filing a location notice with both BLM and the local recording office. Undoubtedly, numerous filings are defective because the claimant either (1)

filed different documents in both places, or (2) the claimant filed with BLM but not with the local recording office. Furthermore, the claimant may never know of this defect until another claimant locates over the same ground. The BLM generally does not check local or county filings and would not be in a position to advise the claimant of the problem. In *Sidney 0. Smith*, 62 IBLA 382 (1982), the Board said:

> Whatever rights a mining claimant had before the enactment of FLPMA, he retains, if he has done the mandatory recording called for by section 314 of FLPMA. That section requires recording in two places, the office having local jurisdiction, ie., the county recorder, and the proper office of BLM. The dual recordations are separate and distinct requirements. Compliance with the one does not constitute compliance with the other. Accomplishment of a proper recording of notice of location or evidence of annual assessment work in the county of record does not relieve the claimant from recording a copy of the recorded instrument in the proper office of BLM under FLPMA and the implementing regulations.

## ANNUAL FILING REQUIREMENTS

### Annual Filing Requirements for Claims Located Prior to October 21, 1976

The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three year period following October 21, 1976, and on or before December 30, of each year thereafter, file one of the following: (1) a notice of intention to hold the mining claim, mill site or tunnel site, (2) an affidavit of assessment work, or (3) a detailed report as described in 30 USC 28-1 in two places:

a. File for record in the office where the location notice or certificate is recorded (generally the county recorder's office).

b. File in the proper office of the BLM a copy of the official record of the instrument filed with the county or local recording office.

The above requirements for lode and placer claims are required by 43 USC 1744(a). *Also see* 43 CFR 3833.2.2. FLPMA does not require filing of notices or affidavits for tunnel sites or mill sites, but the regulations do. 43 CFR 3833.2.2.

### Annual Filing Requirements for Claims Located After October 21, 1976

The owner of an unpatented lode or placer mining claim located after October 21, 1976, shall on or before December 30 of each year following the calendar year in which the claim was located, file one of the following documents: (1) a notice of intention to hold the mining claim, mill site or tunnel site, (2) an affidavit of assessment work, or (3) a detailed report as described in 30 USC 28-1 in two places:

a. File for record in the office where the location notice or certificate is recorded (generally the county recorder's office).
b. File in the proper office of the BLM a copy of the official record of the instrument filed with the county or local recording district.

**Annual Filing Required During Calendar Year Following Calendar Year of Claim Location**

If a claimant is not required to do assessment work, he must file a notice of intention to hold a claim instead of an affidavit of assessment work. For example, if a claim is located after September 1, 1982, no assessment work is required by 30 USC 28 (1988) during calendar year 1983; however a notice of intention to hold or affidavit of assessment work must be filed with both the BLM and county or local Government during calendar year 1983. In *Silvertip Exploration & Mining*, 43 IBLA 250 (1979), the Board said:

> The statute concerning performance of assessment work still applies: the period within which to do the required annual work "shall commence at 12 p.m. meridian on September 1 succeeding the date of location of such claim." 30 U.S.C. ' 28 (1988); *Donald H. Little*, *supra* at n.l. Appellant's claims were located in September and October 1977, so that its assessment year began on September 1, 1978. Thus, appellant had until August 31, 1979, the end of this assessment year, to do its first assessment work, so that no assessment work was required in calendar year 1978.
>
> Nevertheless, appellant was required to comply with the recordation requirements of FLPMA. That is, on or before December 30, 1978, it was required to file with BLM evidence of any assessment work which it actually did in the previous year, if any. Alternatively, if appellant chose to wait until 1979 to do any assessment work (which it could legally do, as discussed above), it was required in the alternative to file a notice of its intention to hold the claim.

**"Assessment Year" Distinguished from "Filing Year"**

Because of the long-standing confusion on the part of mining claimants over the assessment year under 30 USC 28 and the "filing year" in 43 USC 1744, the following new definitions were established in 43 CFR 3833.0-5(n) and (o):

> "Assessment year" is defined in 30 USC 28 and commences at 12 o'clock noon on September 1st of each year. For the purpose of complying with the requirements of section 314(a) of the Act, the calendar year in which the assessment year ends is the year for which the evidence of annual assessment work shall be filed.
>
> "Filing year" for the purposes of complying with the Act begins on January lst of each

year and continues through December 30th of the following year.

**Filing Period**

In *James V. Joyce (On Reconsideration)*, 56 IBLA 327 (1981), the Board held that where the requirement of filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after January 1 and on or before December 30. In *Robert C. LeFaivre*, 95 IBLA 26 (1986), the claimant had filed his affidavit for the 1982-83 assessment year on December 17, 1982. Because he made no filing in calendar year 1983, his claims were abandoned by statute.

**"Assessment Year" Distinguished from "Filing Year"**

As the Board stated recently in *Buck Wilson*, 89 IBLA 143, 146 (1985), "the annual requirements of section 314 have absolutely nothing to do with the assessment year, which presently runs from September 1 to September 1. In fact, section 314 does not even mention the assessment year, a point to which we have expressly alluded."

In *Ronald Willden*, 97 IBLA 40, 44 (1987), the Board again restated the fact that the assessment year (30 U.S.C. 28) has no relation to the calendar year of section 314 of FLPMA. "Assessment year@ and Acalendar year" are defined at 44:

> * * * An assessment year is defined at 30 U.S.C. 28 (1982), which provides that "[t]he period within which the work required to be done on all unpatented mineral claims * * * shall commence at 12:00 meridian on the lst day of September * * *." Therefore, the assessment year runs from September 1 to September 1 of the following year. However, the "year@ contemplated by 43 U.S.C. 1744 (1982), commences on January 1 and ends on December 30.

**Filing Under FLPMA Only Applies to Public Lands**

The Board observed in *Bilderback* that the appellant's claims are now located upon land conveyed to the State of Alaska; and these lands are no longer part of the public lands as defined in FLPMA. *See* 43 U.S.C. 1701 (1982). Therefore the filing requirements of section 314 of FLPMA do not apply to mining claims located on public lands which have subsequently passed out of Federal control.

**Annual Filing Rejected if Land No Longer Public Land**

If the land on which a claim is located is conveyed, the Department no longer has jurisdiction over the land and can make no determination as to the claims validity. Also, the annual filing required by section 314 of the Federal Land Policy and Management Act must be rejected when the land is no longer public land under the jurisdiction of the Department. *Charles Renfro*, 96 IBLA 311, 314 (1987).

**Claim Owners Cannot Avoid the Benefit of Their Filing to Other Interest Holders**

In *Jackson v. Robertson*, 763 F. 2d 1176 (10th Cir. 1985), the claim owners recorded a group of claims under section 3148 of FLPMA. In doing so the owners indicated in their notice to BLM that there are Asome minor interest assignments" but did not name the owners of the minor interest assignments. The claim owners who filed the notice contended that those minor interests should be considered abandoned under FLPMA because there was no filing by the owners of the minor interests. The court held that the original filing "constituted a filing on behalf of all of the interest holders for purposes of compliance with the statute and avoided conclusive abandonment of these interests.@ *Id*. at 1180.

The owners were unsuccessful in their attempt to void the effect of their filing to benefit the other interest holders. They had urged that the failure of the minor interest holders to file information such as the name and current mailing address, if known of the owner or owners of the claim." 43 CFR 3833.1-2(b)(2). The court, however, pointed out that filing information required by regulation and not by the statute cannot cause the abandonment of the claim. *Id*.

**Claimant May Elect Type of Annual Filing**

Several decisions have addressed the problem of determining which of the three documents (notice of intention to hold, assessment work affidavit, or geological, geophysical or geochemical survey report) that a claimant may elect to file. *Silvertip Mining and Exploration*, 43 IBLA 250 (1979); *Alaskamin Co*., 49 IBLA 43 (1980); *Joseph V. Dodge*, 50 IBLA 394 (1980). It was held in *Alaskamin Co., supra*, that filing a notice of intention to hold a claim may substitute for filing evidence of assessment work "only where the obligation to perform the annual assessment work has been suspended or deferred, or has not yet accrued." However, the order by the IBLA (49 IBLA 49A (1981)) striking the *obiter dicta* from the *Alaskamin* decision is the latest word on the subject. As a result the BLM will accept any one of the three documents as satisfactory compliance regardless of what was actually required (*see Organic Act Directive* No. 80-22 and *Information Memorandum* No. 81-224).

It is important to point out, however, that because a claimant elects to file a notice of intention to hold rather than an affidavit of assessment work, assessment work is still required under 30 USC 28 and filing of an affidavit of assessment work is still required under state law. Also, suppose a claimant files a notice of intention to hold with the BLM, he must also file the same document with the county or local recording office, even if he has already filed an affidavit of assessment work with the same local recording office.

Regulations made effective January 3, 1988 (53 FR 48876), also provide that "a notice of intention to hold a mining claim, mill site, or tunnel site may be filed at the election of the owner, regardless of whether the assessment work has been suspended, deferred, or not yet accrued." 43 CFR 3833.2-3(c).

**Circumstances Under Which a Notice of Intention to Hold May Be Filed**

The regulations (43 CFR 3833.2-3(c)) specify the circumstances under which a "notice of intention to hold@ may be filed:

> Notice of intention to hold a mining claim, mill site, or tunnel site may be filed at the election of the owner, regardless of whether the assessment work has been suspended, deferred, or not yet accrued. However, the owner shall have filed with the Bureau of Land Management the same documents which have been or will be recorded with the local recordation office. There is no requirement to file a notice of intent to hold for a mill site or a tunnel site with the local recordation office. A notice of intention to hold a mining claim, mill site, or tunnel site shall be effective only to satisfy the filing requirement for the calendar year in which the notice is filed.

Even though a claimant may elect the type of annual filing, the filing of a notice of intention to hold with the BLM will not relieve the owner of complying with Federal and State laws pertaining to the performance of assessment work. Furthermore, whatever document that is filed with the BLM must also be filed with the local recorder. However there is no requirement to file a notice of intent to hold for a mill site or a tunnel site with the local recordation office (county recorder). 43 CFR 3833.2-3(c).

**Affidavit of Assessment Work**

An "affidavit of assessment work' "means the instrument required under state law that certifies that assessment work required by 30 U.S.C. 28 has been performed on, or for the benefit of, a mining claim or, if state law does not require the filing of such an instrument, an affidavit evidencing the performance of such assessment work." 43 CFR 3833.0-50).

**Annual Filing Required the Calendar Year Following Location**

For mining claims, tunnel sites, or mill sites located between September 1 and December 31 of a given calendar year following the calendar year of location, the claimant is required to submit an annual filing on or before December 30, of the following calendar year. 43 CFR 3833.2-3(a). This provision of the regulations makes it clear that even though assessment work is not required the following calendar year for claims located between September 1 and December 31 of a given year, an annual filing is still required to satisfy FLPMA filing requirements.

**Evidence of Assessment Work Filed During Calendar Year Qualifies Regardless of Assessment Year Work Fulfilled Under State Law**

Evidence of assessment work filed between January 1 and the following December 30 of the same calendar year shall be deemed to have been filed during that calendar year, regardless of what assessment year that work fulfilled under state law. 43 CFR 3833.2-3(b). This regulation, made effective January 3, 1989, allows any affidavit of assessment work to satisfy the requirements of FLPMA for the calendar year it is filed, regardless of the assessment year covered.

**Filing Required Each Calendar Year Regardless When Assessment Work Is Due**

In *Ronald Willden*, 97 IBLA 40 (1987), the Board again dealt with an appeal from a claimant who had done his assessment work over a period straddling the 1983 and 1984 assessment years. On October 18, 1983, he filed an affidavit of assessment work for the 1983 assessment year ending at 12:00 meridian on September 1, 1983. Then on December 16, 1983, he filed an affidavit of assessment work for the 1984 assessment year ending at 12:00 meridian on September 1, 1984. He filed affidavits of assessment work for both the 1983 and 1984 assessment years during calendar year 1983, and made no filing for calendar year 1984.

The Board said that the principles in *James v. Joyce (On Reconsideration*), 56 IBLA 327 (1981) were applicable to this case. In the Joyce case, the appellant had filed proof of assessment work for both the 1977 and 1978 assessment years when he recorded the claims on October 7, 1977. The BLM had declared Joyce's mining claims abandoned and void for failure to file either proof of assessment work or a notice of intent to hold within calendar year 1978. The Board then held (*Ronald Willden, supra* at 44):

> * * * Therefore, even though a claimant might do assessment work in the calendar year 1986 for the assessment year beginning on September 1, 1986, and ending September 1, 1987, and thus have FLPMA documents available for filing prior to December 31, 1986, any such documents filed prior to December 31, 1986, will apply only to the 1986 FLPMA filing period, and will not satisfy the filing requirements for 1987. The periods contemplated by the two statutes, unfortunately, are unrelated.

**Filing Copy of Assessment Work for Wrong Year Is Curable**

Where a claimant timely files with BLM a copy of assessment work, but for the wrong year, he satisfies the statutory requirement; however, this is a violation of the regulation in 43 CFR 3833.2-3(b) which requires "evidence of annual assessment work performed during the previous assessment year....@ In *Thomas A. Alexander*, 108 IBLA 347 (1989), the Board held that it is a curable defect when the mining claimant files an affidavit of assessment work with BLM within the prescribed time period, even though it not the affidavit of assessment work for the preceding assessment year. In such a case the BLM should send a decision to the claimant which gives him 30 days to submit and affidavit of assessment work which shows the proper date of the previous assessment year (normally the date of the calendar year in which the filing was required).

When a claimant submits a modified affidavit in response to a BLM decision, he must also file a copy of the modified document with the local recorder. *See* 43 CFR 3833.2-4(a) and 3833.2-5(b)(1).

**Annual Filing Timely Made But for Wrong Year**

In *James L. Gleave*, 112 IBLA 281 (1990), the Board noted that there is no statutory requirement that a mining claimant file proof of labor with respect to any specific assessment year. In fact, section 314 does not even mention the Aassessment year.@ "The failure to file a proof of labor for any specific assessment year is merely a curable defect of which a party must be given notice and an opportunity to correct before a claim can be declared abandoned and void." *Id*. at 284.

In *James T. Briggs*, 112 IBLA 130 (1989), the Board also held that when a claimant complies with section 314 by filing with BLM an affidavit of assessment work on time but for the wrong year, BLM should give the claimant an opportunity to file the proof of labor for the correct year.

**No Filing in a Calendar Year: An Incurable Defect**

In *James V. Joyce (On Reconsideration*), 56 IBLA 327(1981), the Board overruled *General Electric Co*., 55 IBLA 185 (1981) and discussed the "nonsyncronized nature of the assessment year and the calendar year." The Board also explained why the early filing of documents would thwart the intent of Congress and further held that a proof of assessment work or notice of intention to hold must be filed within each calendar year. In *James V Joyce*, *supra*, the Board said:

> In summation, we hold that where the requirement of filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after January 1, and on or before December 30.

In *Rupert Thorne*, 58 IBLA 319 (1981), the claimant filed 1980 assessment work in 1979 and made no filings in calendar year 1980. Therefore, the claim was deemed abandoned and void. The Board said at 321:

> The Board has held that the statutory requirement of filing proof of labor or notice of intention to hold means that one or the other instrument must be filed for record in the appropriate county where the location notice is of record and a copy must also be filed in the proper BLM office within each calendar year, i.e., on or after January 1, and on or before December 30.

**Affidavit of Assessment Must Be Filed for Work During Preceding Assessment Year: A Curable Defect**

In *Plet Avery*, 60 IBLA 159 (1981), the Board reversed a case where the BLM declared claims void for failure of claimant to file proof of labor for the 1979 assessment year. The claims were located in 1957. On September 25, 1979, the claimant recorded with BLM notices of location as well as the affidavit of assessment work for these claims for the period from August 31, 1977, to August 31, 1978. The Board discussed the case as follows:

> Section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43

U.S.C. ' 1744(a) (1976), provides:

> The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three year period following October 21, 1976, and prior to December 31 of each year thereafter, file ... :
>
> ... File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim..., an affidavit of assessment work performed thereon, or a detailed report provided by section 28-1 of Title 30, relating thereto.

By submitting affidavits of assessment work in 1979 and 1980, appellant did meet the statutory deadline. The implementing regulation, however, is more specific:

> The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever date is sooner, evidence of annual assessment work *performed during the preceding assessment year* or a notice of intention to hold the mining claim. [Emphasis added.]

Appellant herein complied with the statute but did not comply with the underlined portion of regulation 43 CFR 3833.2-1. When, on September 25, 1979 (*i.e.*, in the calendar year 1979), appellant filed the affidavit for the 1978 assessment year, the preceding assessment year was the 1979 assessment year. The regulation would have required a filing for the 1979 assessment year.

This failure to comply does not necessarily require a finding that appellant's claims are abandoned and void. The Court of Appeals in *Topaz Beryllium Co. v. United States*, 649 F.2d 775 (10th Cir. 1981), noted that failure to comply with a purely regulatory requirement should be treated as a curable defect and an individual should be afforded notice and an opportunity to submit the required supplemental information. Compliance with express statutory provisions constitutes compliance with "the minimum requirements of the law and regulations. Therefore, appellant should be allowed to file proof of labor for the preceding assessment year in order to cure the defective filing.

Thus, if a claimant files an affidavit of assessment work during the calendar year, but the affidavit represents some assessment year other than the preceding one as required by the regulations, it is a curable defect which the claimant may remedy within 30 days of notice. *Harry J. Pike*, 57 IBLA 15 (1981).

**Filing Requirements Satisfied But No Affidavit for 1979 Assessment Year**

The intermingled use of the assessment year and the calendar year is discussed in *Perry L. Johnson*, 57 IBLA 20, 21-22 (1981). In this case, the Board also shows how filing requirements may be satisfied even though no proof of assessment work was filed for the 1979 assessment year:

> It is crucial to remember that the assessment year, unlike the calendar year, runs from September 1 to September 1. Thus, an assessment year which runs from September 1, 1978 to September 1, 1979, is normally referred to as the 1979 assessment year. The difficulty with this regulation can be seen where an individual files his claim for recordation in June of 1979. If he seeks to file his assessment work at this time, the preceding assessment year is the 1978 assessment year, since he is presently in the 1979 assessment year. Then, if, pursuant to the statute and regulations, he files his assessment work in November of 1980, the preceding assessment year is the 1980 assessment year. Thus, this individual, who has literally followed the filing requirements, has never filed proof of assessment work for the 1979 assessment year.

In *Nellie McLaughlin*, 61 IBLA 347 (1982), the Board held that a proof of labor filed in calendar year 1979 satisfied the requirement of FLPMA for that year, even though the proof of labor recited it was for the assessment year ending September 1, 1980. However, because no proof of labor or notice of intention to hold was filed for calendar year 1980, the claims were properly deemed to be abandoned and void.

**PreFLPMA Claims With No 1978 Filing: Curable Defect**

The cases of *Harvey A. Clifton*, 60 IBLA 29 (1980) and *Henry Seibel*, 63 IBLA 77 (1982) both involved claims located prior to October 22, 1979 (FLPMA). The claimants recorded the claims in calendar year 1977 and filed evidence of assessment work in calendar year 1979 (prior to October 22, 1979), but they had not satisfied the regulatory requirement of filing evidence of assessment work or notice of intention to hold during calendar year 1978. The Board held that failure to make the annual filing in calendar year 1978, the year following recordation to be a curable defect as such filing is not required by statute.

In *Harvey A. Clifton*, 60 IBLA 29 (1981), the Board considered the validity of mining claims located before October 21, 1976, recorded with BLM in 1977, where no evidence of assessment work or intention to hold was filed on or before December 30, 1978. But evidence of assessment work or a notice of intention to hold was filed by October 22, 1979. It was determined that the lack of filing by December 30, 1978, of either evidence of assessment or intention to hold the claims as required by the regulation in 43 CFR 3833.2-1(a) is a deficiency that is subject to curative action. In *Harvey A. Clifton, supra*, the Board said:

> After extensive consideration, this Board is now convinced that the requirement of filing evidence of assessment work or notice of intention to hold with BLM for claims located on or before October 21, 1976, must be met at some point during the 3-year period following enactment, of the recordation statute, 43 U.S.C. ' 1744 (1976), i.e., by October

> 22, 1979, and by December 30 of each year following such initial filing of evidence of assessment work or notice of intention to hold. We do not challenge the authority of BLM, asserted in the decision below to adopt regulations pursuant to the provisions of the Mining Law of 1872, as amended, 30 U.S.C. ' 22-24, 26-28, 29, 30, 33-35, 37, 39-42 (1976), requiring the owners of unpatented mining claims to file notice of intention to hold or evidence of assessment work with BLM by December 30 of the year following recordation with BLM of the certificate of location. However, we cannot affirm a decision conclusively presuming a claim to be abandoned and thus void in the face of evidence to the contrary where the statutory filing requirements imposed by section 314 of FLPMA have been complied with.

In a similar case, *Henry Seibel, supra*, the Board again held that failure to file an affidavit of assessment work during calendar 1978 is a curable defect. The Board said:

> As indicated, appellants in this case had satisfied the statutory requirements for the initial recordation of the claim and the initial filing of annual assessment work by October 22, 1979. They had not satisfied the regulatory requirement by filing his evidence of assessment work or notice of intent to hold by December 30, 1978. Where a claimant fails to comply only with the regulations he is to be given notice of the defect and 30 days to comply. If compliance is not then achieved within the allowed time the claim may be declared abandoned and void, in an appealable decision.

**PreFLPMA Claims With No 1978 Filing: An Incurable Defect**

In *H. L. Baroid Petroleum Services*, 60 IBLA 90, 93-94 (1981), the Board reviewed the circumstances in *Harvey A. Clifton, supra*, and then pointed out that the claimants in *Baroid Petroleum Services* have filed a proof of assessment work in calendar year 1977; whereas in *Clifton*, the initial proof of assessment work was not filed until calendar year 1979. Therefore, in *Baroid Petroleum Services*, the statute itself would require that proof of labor be filed in calendar year 1978, rendering the defect incurable. The Board said:

> In our recent decision in *Harvey A. Clifton*, 60 IBLA 29 (1981), we examined the relationship between the language of 43 U.S.C. '1744(a) (1976) and 43 CFR 3833.2-1(a). In that decision we noted that, while the statute only required the subsequent annual filing of assessment work, or a notice of intention to hold, after the initial filing of the assessment work or notice of intention to hold (provided the initial filing was no later than October 22, 1979), the regulation required annual filings commencing in the calendar year following recordation of the claim. Thus, in many cases, the regulation would require a filing of assessment work or a notice of intention to hold prior to the time for filing mandated by the statute. We therefore held in *Harvey A. Clifton, supra*, as we have held in a number of cases (*see, e.g., Perry L. Johnson, supra; Feldsite Corporation of America, supra*), that the failure to follow a regulatory requirement which was a requirement not found in the statute itself, did not automatically result in a conclusive presumption of abandonment.

In the instant case, however, having filed an initial proof of assessment work in calendar year 1977, the statute itself would require a subsequent filing of either proof of assessment work or a notice of intention to hold the claim on or before December 30, 1978. Since appellant failed to make such a filing, the statutory presumption of abandonment must apply.

**PreFLPMA Claims with 1977 Filing but No 1978 Filing**

*Oregon Portland Cement Co.*, 66 IBLA 204 (1982) was substantially reversed by a decision of the Alaska District Court reported as *Oregon Portland Cement Co. v. United States* Department of the Interior, 590 F. Supp. 52 (1984). *See also Oregon Portland Cement Co. (On* Judicial Remand), 84 IBLA 186 (1984). While no appeal was taken from the decision of the District Court of Alaska, the subsequent decision of the Ninth Circuit Court of Appeals in *NL Industries, Inc. v. Secretary of the Interior*, 777 F.2d 433 (10th Cir. 1985), which as itself, premised on the Supreme Court decision in *United States v. Locke*, 471 U.S. 84 (1985) effectively overruled the Alaska District Court case.

In *NL Industries, Inc. v. Secretary* of the Interior, supra, the Ninth Circuit Court of Appeals interpreted the meaning of the word "thereafter" as it appears in section 314(a) of FLPMA, 43 U.S.C. 1744(a):

> The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three year period following October 21, 1976, and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection.

*NL Industries* owned a pre-FLPMA claim and made its first annual filing of assessment work on December 7, 1977, however it did not file with the BLM during the 1978 calendar year. The company filed assessment work in 1979. The Court held that "the annual filing requirement is 'triggered' by the initial filing of a claim, and that the grace period related solely to the initial filing." The statute did not require pre-FLPMA claims to be filed until October 21, 1979. However, if such a filing were made in 1976, 1977 or 1978, the subsequent filings must be made in the year following the initial filing and, of course, each year thereafter. Since the claimant made an initial filing in 1977 and missed the 1978 filing, the circuit court upheld the invalidation of the claims.

**Assessment Work Straddles Two Assessment Years**

In *Red Top Mercury Mines, Inc*., 96 IBLA 391 (1987). the claimant filed an affidavit of assessment work on December 10, 1980. The affidavit was intended to cover work accomplished in August and September, 1980, and would be sufficient to cover the mining assessment year ending at noon on September 1, 1981, (the 1981 assessment year). The Board ruled "that filing a proof of labor on December 10, 1980, did not excuse Red Top from filing a proof of labor or notice of intention to hold the subject claims in the 1981 calendar year.@ *Id*. at 395. The Ninth Circuit Court of Appeals upheld the Board decision and stated that "the

combined affidavit of annual labor filed by the plaintiff in 1980 for the 1980 and 1981 assessment years does not satisfy the 1981 filing requirement. A filing each year is required." *Red Top Mercury Mines, Inc. v. United States*, __ F.2d__ (9th Circuit 1989).

**Annual Filing Sent to Wrong BLM Office**

In *Gold Leaf Enterprises*, 105 IBLA 282 (1988), the claimant sent his annual filing document to the Kingman Resource Area office rather than the Arizona State Office. The Board held, as expected, that where Athe annual filing is submitted to a BLM office not authorized to receive it, the filing requirements have not been complied with.@ *Id*. at 283. However, in *Joe H. Vozza*, 121 IBLA 370 (1991), the Board considered an appeal where the appellant originally mailed his 1988 affidavit of labor to a former address of BLM State Office in an envelope postmarked December 30, 1988. The envelope was returned to the sender because the forwarding order had expired. Then the 1988 affidavit of labor was again mailed to the new address of the BLM and arrive on January 6, 1989, with a postmark of January 5, 1989. The Board concluded that there has been good faith compliance with the requirements of Departmental regulation 43 CFR 3833.0-5(m) and that the BLM should properly rely on the December 30 postmark to record the 1988 affidavit as timely received. *Id*. at 371-73. To support its position, the Board discussed a similar case:

> ... *Accord Patrick J. McClain*, 109 IBLA 320 (1989), wherein the Board concluded that evidence of annual assessment work was timely filed within the meaning of 43 CFR 3833.0-5(m) where it was received by BLM before January 19 in an envelope postmarked prior to December 31. Pertinent to this case, the McClain envelope was initially received by an incorrect BLM office (the Las Vegas District Office, Nevada) and forwarded to the correct office (the Nevada State Office), where it was received before January 19. In that case, the requirements of 43 CFR 3833.0-5(m) were deemed to have been satisfied.

**Annual Filing Must Be Postmarked by December 30 and Received by January 19**

Although the required date of filing the evidence of annual assessment work has not been changed, the regulations 43 CFR 3833.0-5(m) allow the Bureau of Land Management to accept for a period of twenty days from the due date of December 30, any document postmarked by the U.S. Postal Service on or before the due date. So, the claimant must have completed all annual assessment work and mailed the document evidencing that work to the proper BLM office on or before December 30th. Presumably, if the annual filing is received after the due date and by January 19th, but the date on the postmark is not legible, the document will not be "timely filed." The Pertinent regulation states:

> "Filed or file" means being received and date stamped by the proper BLM office. For the purpose of complying with section 3833.1-2 of this title, "timely filed" means being filed within the time period prescribed by law, or received by January 19th after the period

prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law. This 20 day period does not apply to a notice of location filed pursuant to 3833.1-2 of this title.

**Regulation 43 CFR 3833.0-5(m) May Not Be Applied Retroactively**

In *Lindsay Lee Lemons*, 98 IBLA 75 (1987), the appellants annual filing was datestamped showing it was received by BLM December 31, 1981, at 7:30 a.m. Consequently his four claims were declared abandoned and void for failure to file with BLM on or before the December 30, 1981 deadline.

In his dissenting opinion, Judge Arness suggested that this could be a case where the regulation 43 CFR 3833.0-5(m), made effective December 30, 1982, might be applied retroactively. This regulation treats as "timely filed" a mining claim recordation document received by BLM within 20 days of the statutory deadline for annual filings if transmitted in an envelope bearing a clearly-dated postmark affixed by the United States Postal Service denoting that the document was mailed on or before December 30 of the filing year. However, there was no envelope in the case file which was not unusual because there was no necessity for BLM to retain envelopes in its files before the regulations were changed. As Judge Arness indicated, the receipt time of 7:30 a.m. indicated the document arrived in the mail unless the BLM office was open to the public at or before 7:30 a.m. on December 31, 1981.

The majority took the position that regulation 43 CFR 3833.0-5(m) Awas considered by the Supreme Court in its disposition of the *Locke* case and the Court expressly held that the regulation could not be applied retroactively to benefit the mining claimant. The Board quoted footnote 14 in *United States v. Locke*, 471 U.S. 84, 102 (1985) where the filing in question was hand delivered on December 31, 1981. The Court stated at 102, n. 14:

> Since 1982, BLM regulations have provided that filings due on or before December 30 will be considered timely if postmarked on or before December 30 and received by BLM by the close of business on the following January 19th. 43 CFR 3833.0-5(m) (1983). Appellees and the dissenters attempt to transform this regulation into a blank check generally authorizing Asubstantial compliance" with the filing requirements. We disagree for two reasons. First, the regulation was not in effect when appellees filed in 1980; it therefore cannot now be relied on to validate a purported "substantial compliance@ in 1980. Second, that an agency has decided to take account of holiday mail delays by treating as timely filed a document postmarked on the statutory filing date does not require the agency to accept all documents hand-delivered any time before January 19th. [Emphasis added.]

On this basis the Board determined Awhere the Supreme Court has said that a specific agency regulation may not be applied retroactively, it behooves the Board to follow that pronouncement in similar cases." *Lindsay Lee Lemons, supra* at 77.

**Application of Grace Period Where No Envelope in Case File**

Where the BLM receives an envelope from the U.S. Postal Service containing an annual filing after the end of the filing year, the envelope must be retained in the case file. The grace period allowed by the regulations requires that the postmark show that the envelope was mailed before the filing period ends. If the BLM does not save the envelope and the filing is received within the grace period, then the claimant gets credit for a timely filing. *Howard G. Willison*, 114 IBLA 323, 324-25 (1990); Also *see Gary Hennis*, 108 IBLA 121, 123-24 (1989).

**Grace Period Applies Only to Postal Delivery**

In *Victor Shepherd*, 102 IBLA 334 (1988), the claimant after personally delivering the annual filing after the deadline, contended that his claims were still valid because he filed within the grace period. However, the Board held that the "grace period provided by regulation applies only when that choice is the U.S. Postal Service." *Id*. at 336.

**Private Postage Meter Labels**

Under 43 CFR 3833.0-5(m), a document which is mailed will be considered timely filed if it bears a clearly-dated postmark affixed by the U.S. Postal Service on or before the filing deadline. In *Chemical Products Corp*., 109 IBLA 357 (1989), the claimant's private postage meter label had a date of December 31, 1988. However the claimant contended that he set the postage meter date one day ahead at the request of the U.S. Postal Service. The Board responded that Aeven if we were to assume that the filing was mailed on December 30, the fact that it does not bear an official postmark date within the filing period ending December 30, 1988, is fatal to the filing.@ *Id*. at 359.

**Affidavit Received Before January 19 Deadline**

In *Gary Hennis*, 108 IBLA 121 (1989), the BLM issued an abandonment decision on a claim where there was an affidavit received through the mail and datestamped on January 6, 1986. Therefore BLM at one point had an envelope, which may or may not have displayed a Aclearly dated postmark affixed by the United States Postal Service within the period prescribed by law, but that envelope is no longer part of the record.@ The Board reversed the BLM decision and concluded that A[t]he lack of the envelope requires that we find that appellant mailed his proof of labor to BLM in an envelope bearing a United States Postal Service postmark of December 30, 1985, or earlier, and that, under the circumstances, his proof was timely filed. *Id*. at 124.

**Summary of Recording and Filing Dates**

In *Buck Wilson*, 89 IBLA 143, 146 (1985), the Board gave the recording and filing requirements for both pre-FLPMA and post-FLPMA claims:

> For pre-FLPMA claims the statute required that each claim be recorded with BLM

no later than October 22, 1979. *See* 43 U.S.C. 1744(b) (1982). In addition to mandating the recordation of each claim, however, section 314 of FLPMA further required the filing of an affidavit of assessment work or a notice of intention to hold the claim by October 22, 1979, deadline, and each year thereafter commencing with the initial filing under section 314(a), 43 U.S.C. 1744(c). *See NL Industries v. Secretary of the Interior*, 766 F. 2d 1380 (9th Cir. 1985).

With respect to claims located subsequent to the adoption of FLPMA, the statute required that a mineral locator provide BLM with a copy of the official record of the notice or certificate of location within 90 days after the date of location. Section 314 further required a claimant to file annual proofs of labor or notices of intention to hold commencing prior to December 31 following the calendar year in which said claim was located. *See* 43 U.S.C. 1744(a) (1982).

**No Specific Form for Notice of Intention to Hold**

There is no specific form required for a notice of intention to hold. It must be signed by the owner or his agent. A copy of a notice of intention to hold which has been or will be filed in the local recording office is acceptable.

**Annual Filing for Tunnel and Mill Sites Required in Calendar Year Following Calendar Year of Location**

Regulations made effective January 3, 1988 (53 FR 48,876, 82) provide that tunnel sites and mill sites are treated the same as mining claims. The first annual filing must be accomplished in the calendar year following the calendar year of location. Prior to these regulations, owners of mill sites and tunnel sites were required to file a notice of intention to hold (NOIH) in the proper BLM office on or before December 30 of the calendar year following the calendar year of recording. Of course failure to file an NOIH for a tunnel site or mill site is a curable defect.

**Failure to File Annual Notice for Mill Sites and Tunnel Sites is Curable Defect**

In *Feldsite Corporation of America*, 56 IBLA 78 (1981), it was held that failure to file an annual notice of intention to hold a mill site is a curable defect. The requirement is in the regulations; the statute has no requirement for annual filing of such notices. The Board said:

> Analysis of section 314(a) and (b) of FLPMA, 43 U.S.C. ' 1744(a) and (b) (1976), clearly discloses an intent not to include millsite within the term "mining claim" as used in that section. In the first place, section 314(a), relating to proof of assessment work and notices of intention to hold, is directed to "the owner of an unpatented lode or placer mining claim." Millsites, while they may in certain contexts be considered mining claims or mining locations, are neither lode nor placer in form, being limited by statute to no more than 5 acres. Then, too, in section 314(b), which relates to notices of location, Congress has clearly evinced a desire to differentiate among mining claims, millsites, and

tunnel sites. Thus, the opening line of the provision makes specific reference to "an unpatented lode or placer mining claim or mill or tunnel site."

With reference to millsites and tunnel sites, therefore, we feel that the statute must be read as only requiring the filing of notices of location. But it is also clear that Departmental regulations require the filing of notices of intention to hold, *see* 43 CFR 3833.2-1(d), and it is undisputed that no such filing was made in the instant case in calendar year 1978. The question before us concerns the effect of such a failure to file, where the necessity for filing is determined by the regulations and not the statute.

We have noted in the past that there is a difference between the consequences which attend a failure to comply with a statutory recordation requirement and one which is purely regulatory. Thus, we have recognized that a failure to comply timely and scrupulously with the express statutory requirements cannot be waived by the Department. *Lynn Keith*, 53 IBLA 192, 88 I.D. 369 (1981). On the other hand, failure to comply promptly with those requirements based on purely regulatory language is subject to curative action.

This approach has received judicial approbation in a recent decision by the Tenth Circuit Court of Appeals in *Topaz Beryllium Co. v. United States*, No. 79-2255 (filed May 21, 1981).

Admittedly, the language of the court was primarily directed toward filings of notices of location, but we think the logic has equal applicability to the instant question. Accordingly, we hold that upon the failure of a millsite claimant to file an annual notice of intention to hold, BLM should notify the claimant of this deficiency and afford the claimant a period of time in which to comply with the regulatory requirement. Should compliance not then occur, the millsite will properly be declared abandoned and void.

In *Heidelberg Silver Mining Co., Inc.*, 58 IBLA 10 (1981), the Board again held that failure to file an annual notice of intention to hold a tunnel site is a curable defect:

There is no statutory requirement for filing evidence of assessment work or notice of intent to hold for tunnel site claims. As was pointed out in *Feldslite Corporation of America*, 56 IBLA 78, 88 I.D. 643 (1981), FLPMA must be read as requiring only the filing of a notice of location for millsite and tunnel site claims. It is clear that the Department's regulations require a notice of intent to hold millsite and tunnel site claims, filing a notice of intent to hold the claim is required not by statute but only by regulation. Where there is a failure to comply with a requirement imposed only by regulation (as opposed to statute), the deficiency is subject to curative action.

A person who fails to comply only with the regulations is to be given notice of the defect and 30 days to comply. If compliance is not achieved within the allowed time, the tunnel site claim may he declared abandoned and void, in an appealable decision.

Unlike lode and placer claims where failure to make a timely annual filing results in

statutory abandonment of the claim, failure to make the annual filing with a tunnel site or a mill site is a curable defect. The owners of tunnel sites and mill sites must be given a notice of a deficiency and an opportunity to correct it before their mill sites or tunnel sites may be deemed void for failure to comply with FLPMA's filing requirements. *Red Top Mercury Mines*, 96 IBLA 391, *Aff=d, Red Top Mercury Mines v. United States*, A 87-326 Civ. (D. Alaska, filed September 19, 1988). The BLM normally allows claimants a 30 day period from the date of the notice to make the required filing. *Jean Hatton*, 107 IBLA 47, 54 (1989).

**Contents of the Notice of Intention to Hold a Mining Claim**

A notice of intention to hold a mining claim or group of mining claims shall be an exact legible reproduction or duplicate, except microfilm, of an instrument, signed by the owner of the claim or his/her agent, which was or will be filed for record pursuant to section 314(a)(1) of the Act in the local jurisdiction of the State where the claim is located. 43 CFR 3833.2-5(b). The instrument must include the BLM serial number assigned to each claim upon filing in the proper BLM office of a copy of the notice or certificate of location. Include also any change in the mailing address, if known, of the owner or owners of the claim.

**Notice of Intention to Hold a Mill or Tunnel Site**

The notice of intention to hold a mill or tunnel site must be in the form of a letter signed by owner or owners and must include the following information (43 CFR 3833.2-5(c)):

1. Serial number assigned to each site.

2. Any change in the mailing address.

**Notice of Intention to Hold if Deferment of Assessment Work**

If a deferment of annual assessment work has been granted by the BLM, a reference to the decision on file in the proper BLM office by date and serial number which granted the deferment should be specified on the notice of intention to hold. If a petition for a deferment of annual assessment work is pending, the date of filing and serial number should be specified on the notice of intention to hold. 43 CFR 3833.2-5(b).

**Contents of Evidence of Assessment Work**

Evidence of assessment work is required to be in one of two forms (43 CFR 3833.2-4):

1. An exact legible reproduction or duplicate except microfilm of the evidence of assessment work which was performed under state law and was or will be filed for record in the local jurisdiction of the state where the claim or group of claims

is located. Also required is the BLM serial number assigned to each claim. Any change in the mailing address of the owner of the claim must also be included.

2. An exact legible reproduction or duplicate, except microfilm, of the detailed report concerning geological, geochemical and geophysical surveys provided for by the Act of September 2, 1958 (30 USC 28-1) which has been or will be filed for record pursuant to section 314(a)(1) of the Act in the local jurisdiction of the State where the claim or group of claims is located. Also required is the BLM serial number assigned to each claim. Any change in the mailing address of the owner of the claim is also required.

**Inadequate Notices of Intention to Hold**

The filing of a location notice does not satisfy the requirements for a notice of intention to hold. In *Albert L. Fillerup*, 58 IBLA 194 (1981) the Board said:

> We find no merit in appellant's argument that the notice of location documents filed on October 19, 1979, constitute a notice of intention to hold. The requirements of a notice of intention to hold are set forth in 43 CFR 3833.2-3. That particular instrument follows a specific form and may be filed under certain circumstances. The notice of location documents filed pursuant to 43 CFR 3833.1-2 may not substitute for a notice of intention to hold.

In *M.D.C., Inc*., 57 IBLA 35 (1981), the Board held that delivery of evidence of annual assessment work after BLM's closing hours on December 30, 1980, to an employee's home does not satisfy the recordation requirement.

In *John Murphy*, 58 IBLA 75 (1981), it was held that a map does not qualify as a notice of intention to hold. The Board said:

> The recordation of this map, which arguably shows the appellants' subjective intent to continue to hold and work the claims, does not meet the requirement, noted above, that all instruments required to be filed with BLM under section 314 must also be timely filed with the local recorder's office where the notice of location is recorded. Appellants have not intimated that the map prepared by their geologist has ever been filed with the local recording office where the notice of location is recorded, and thus their good-faith subjective intent to hold does not overcome their failure to comply with the recording statute.

**Deferment of Assessment Work Serves as Notice**

A granted deferment of assessment work which is still in effect, or a petition for deferment which has been recorded in the local office, serves as a notice of intention to hold. Where a petition for deferment of assessment work has been recorded in the local recording office, as required by 30 USC 28(e), and has not yet been acted on by BLM, a timely filed copy

of the petition serves as the notice of intention to hold.

**Notice of Intention to Hold a Mill or Tunnel Site Need Not Be Filed with the Local Recorder**

There is no requirement under FLPMA or the regulations for filing a notice of intent to hold a mill site or tunnel site with the local recorder's office. *Richard Holland*, 74 IBLA 167 (1983); 43 CFR 3833.2-3(c).

**Notice of Intention to Hold Must Be Filed as NOIH and Meet Specific Requirements**

In *Add-Ventures, Ltd*., 95 IBLA 44 (1986), a claimant had failed to file an assessment work affidavit or a notice of intention to hold during the calendar year. But he had sent in three letters to the BLM during the year and contended that these letters support an inference that he intended to hold the claims. Even though these letters identified the claims by their serial numbers, they were not filed with the local recording district nor did the letters indicate they were to be filed as notices of intention to hold. As the Board said "the question is not whether appellant supplied a document which, indicated that it intended to hold its claims, but whether it filed a notice of intent." *Id*. at 49.

The Board concluded that the letters did not qualify as a notice of intention to hold and said "whatever the form of the instrument, it must be filed with BLM as a notice of intent.@ A notice of intention to hold must satisfy the following requirements (*Id*. at 49):

1. It must indicate that the claim owner continues to have an interest in the claim. 43 CFR 3833.0-5(k)..

2. It must also be copy of the document which was or will be recorded in the local office where the claim's location notice has been recorded. 43 U.S.C. 1744(a) (1); 43 CFR 3833.2-5; *Ronald Willden*, 60 IBLA 173; *Ted Dilday*, 88 I.D. 682 (1981).

3. The instrument must also include Aa description of the location of the mining claim sufficient to locate the claimed lands on the ground,@ 43 U.S.C. 1744(a)(2) (1982). Citing the serial number (see #4 below) satisfies this requirement. 43 CFR 3833.2-5.

4. The instrument must include the BLM assigned claim number, 43 CFR 3833.2-5, or the name of the claim, *Arley Taylor*, 90 IBLA 313, 314 (1986); *Philip Brandl*, 54 IBLA 343, 344 (1981).

**Different Notices Filed with State and BLM**

*Bernice Sheldon*, 87 IBLA 161 (1985), involved an appeal from a claimant who filed with the recording district a different notice of intention to hold the claims from that originally filed

with BLM in 1979. The claimant contended that because of the intervening death of her husband between the two filings, she was unable to file the same document with both the recording district and the BLM.

The Board held that "the document filed with the BLM was substantially the same as that previously filed with the BLM. Indeed, the document filed with BLM was fully consonant with the purpose of the statutory requirement for annual filings, i.e., to notify BLM of the continuing vitality of mining claims located on the public lands." *Id*. at 163 and 164.

**Letter Qualifies As Notice of Intent**

In *R.H. Gunn*, 98 IBLA 104 (1987), the Board accepted a letter as a notice of intent to hold. The letter received by the BLM on July 25, 1979, contained the following statement:

> As owner of two unpatented Mining Lode Claims located in the Mount Dale Mining District in Park County, Colorado, I am submitting copies of the amended location certificate, Quit Claim Deed and a location map together with additional information that I understand is required to be filed in your office prior to October 22, 1979.

This letter also contained the following information: the name of the claims, dates of location, county recordation information, type of claim, the name and address of owner, and the location of claims. At the close of the letter, appellant stated that a copy of the letter and attachments, including a map, were being sent to the Clerk and Recorder of Park County at Fairplay, Colorado. In approving the letter as a notice of intent to hold, the Board said at 106:

> As stated in the Board's holding in *Add-Ventures, Ltd., supra*, the mining claimant need not state in a document that it is a notice of intention to hold, but must only intend for it to be a notice of intent to hold. Appellant's letter of July 23, 1979, satisfies the requirements for a notice of intent under FLPMA and the regulations. *See Add-Ventures, Ltd., supra*. It meets all the requirements for notice and indicates on its face that it was being submitted to the County recorder's office. It is clear it was filed with BLM as a notice of intent to hold, even though those words do not appear in the letter.

In *L & S Mines*, 98 IBLA 123 (1987), the Board approved two letters as qualifying as notices of intent to hold. One letter was sent to the BLM and the other was addressed to the District Court in Sitka, Alaska. Both letters contained statements indicating an intention to hold the claims and provided the book and page numbers where recorded with the Sitka Recording District. The letter to the BLM also described the position of claims on the ground and included a map. In approving the letter to the BLM as a notice of intent, the Board said at 126 and 127:

> We find that the language in appellant's letter of July 25, 1979, quoted above, is sufficient to show that it was filed with BLM as a notice of intent, satisfying the first requirement set forth in *Add-Ventures, Ltd., supra*. Similarly, the description of the position of the

claims would seem sufficient to satisfy the statutory requirement to provide a description sufficient to locate the claimed lands on the ground. Additionally, while the letter did not expressly state the names of the claims, but rather that AL & S Mines, Inc., has 24 mining lode claims," the names of the claims are not materially different from this description.

It is more difficult to determine whether the letter appellants sent to BLM qualifies as a "copy" of that recorded with the Alaska court. The relevant language of the statute and regulations was reviewed in *Bernice Sheldon*, 87 IBLA 161 (1985). In that case the Board concluded:

> [T]he document that was filed with the county was substantially the same as that previously filed with BLM. We are not prepared to hold, in such circumstances, that the notice of intention to hold the claims involved herein originally filed with BLM was not a "copy" of the instrument filed with the Kotzebue Recording District, within the meaning of section 314(a)(2) of FLPMA.

In *Bernice Sheldon, supra* at 164, footnote 4, the Board indicated that certain deficiencies in the document could be considered a curable defect:

> To the extent that the document filed with BLM does not constitute an Aexact legible reproduction or duplicate" in accordance with 43 CFR 3833.2-3(b), the failure to comply with the regulatory requirement may be treated as a curable defect of which the claimant should be given notice and an opportunity to rectify prior to any decision voiding the claims.

In comparing the letter the appellants sent to the Alaska court with that sent to BLM, the Board noted that the only significant difference is that the letter sent to the court omits the description of the claims, but rather identifies them as L & S Mines, Inc. lode claims and by book and page references. *L & S Mines*, *supra* at 126.

In *International Metals & Energy*, 114 IBLA 221 (1990), a case involving a missing affidavit, the Board determined that the record contains sufficient corroborative evidence to rebut the presumption that the missing affidavit of assessment was not filed with BLM. In this case BLM returned the date-stamped cover letter to the appellant which appeared to be intended to serve as the receipt as required by the BLM Manual. The Board accepted the letter as evidence that the affidavit was filed because Athere is no notation on the copy of the letter submitted by the appellant, or on the copy of the letter contained in the case file to contradict the obvious implication that all of the documents listed were received.@ *Id*. at 223.

**Letter Does Not Qualify As NOIH**

In *Red Top Mercury Mines, Inc. v. United States*, __ F.2d __ (9th Cir. 1989), the Court of Appeals held that two letters sent to BLM by a surveyor in behalf of the claimant do not qualify as a notices of intention to hold. The Court said:

> ... None of the plaintiff s actions could be reasonably construed as affirmative efforts to comply with the pertinent provisions of 43 U.S.C. 1744(a). There is no evidence that plaintiff actually attempted to submit a proof of completed annual assessment work or a notice of intent to hold, nor is it arguable that the letters may have constituted a "nominally defective" notice of intent, possibly involving the provisions of 43 U.S. C. 1744(c). In this case, the court finds that there was simply a failure to file.

**Quitclaim Deed Is Not Notice of Intention to Hold**

A quitclaim deed filed with the BLM cannot be considered a notice of intention to hold under the provisions of 43 CFR 3833.2-3. "[A] quitclaim deed, standing alone, merely evidences 'present ownership,' not an intention to hold in the future.@ *George McGowan*, 109 IBLA 1, 2 (1989).

**Curable Deficiencies in Annual Filing Instruments**

Deficiencies under the regulations, but not under FLPMA are curable. In *Ted Dilday*, 56 IBLA 337 (1981), the claimant did not include information in the notice of intention to hold required by the regulations. The Board said:

> Thus, claimant is required by statute to file with the local recording office where the notice of location is recorded either a notice of intention to hold the claim or an affidavit of assessment work and, further, to file in the proper BLM office a copy of the instrument filed in the local recording office prior to December 31 of the year following the calendar year in which the claim was located. The notice of intention to hold filed with BLM must be an exact legible reproduction or duplicate of the instrument filed for record in the local jurisdiction of the state where the claim is located and recorded. 43 CFR 3833.2-3; *Pacific Coast Mines, Inc*., 53 IBLA 200 (1981). Although the notice which appellant filed with BLM is defective for failure to include a statement that the claim is held and claimed for the valuable mineral contained therein, a statement that the owners intend to continue development of the claim, and the reason that the annual assessment work has not been performed, as called for by the regulation at 43 CFR 3833.2-3(a)(1)(iii) through (v), these requirements go beyond the requirements of the statute and the deficiency is in the nature of a curable defect which would not support a conclusive presumption of abandonment under section 314 of FLPMA.

The Board also pointed out in *Ed Dilday, supra*, that even though the mining law does not require assessment work until the assessment year beginning on the first day of September succeeding the date of location of the claim, a notice of intention to hold filed with the BLM must also be filed with the local recording office. The Board said:

> However, in cases such as this one where it is clear the notice submitted was not a copy of a notice of intention to hold the claim filed in the local recording office as required by the terms of the statute, the statutory filing requirements have not been complied with and the claim is conclusively presumed abandoned under section 314 of FLPMA.

> It is true, as appellant alleges, that the mining law does not require performance of assessment work until the assessment year commencing on the first day of September succeeding the date of location of the claim. 30 U.S.C. ' 28 (1976). Thus, appellant was not required to perform assessment work until sometime during the year running from September 1, 1980, to September 1, 1981. However, this does not obviate the necessity for compliance with section 314 of FLPMA requiring filing of either an affidavit of assessment work or notice of intention to hold with both the local recording office and BLM by December 30 of the year following the calendar year in which the claim was located.

**Serial Number Must Be Included With the Annual Filing**

The serial number assigned by the BLM to each claim at the time of initial recordation must be included with each annual filing of the notice of intention to hold or proof of labor. 43 CFR 3833.2-4 and 3833.2-5. In *David V. Udy*, 45 IBLA 389 (1980), the Board held that failure to include the serial number with a filing is a curable defect. The Board said:

> Without the serial numbers, a tremendous burden is placed on State Office personnel to locate the record in which the affidavit of assessment work is to be filed. When a mining claim notice of location is first filed, a copy of the collection voucher is given or sent to the mining claimant. This voucher contains the serial number assigned the claim. It is not unreasonable to require the claimant to refer to these numbers in future correspondence concerning the claims. Appellant failed to do so, even after BLM informed him of the requirement. This failure rendered the filing unacceptable.

**Annual Filing Must Include Claim Name**

In *Francis J. Darger*, 63 IBLA 67, 68 (1982), it was held that failure to include the name of a claim with the proof of assessment work or a notice of intention to hold causes abandonment of the claim. It is quite common for owners of large blocks of claims to send the annual filing to the BLM on a single document listing all of the claim names in the claim group. If the names of certain claims are inadvertently omitted, such claims become abandoned. The Board said:

> The statute expressly requires that a mining claimant file the instrument recorded in the county office, whether proof of labor or notice of intention to hold the claim, in the proper BLM office. Where, as in this case, the proof of labor did not include the December claim, there was no discretion under the statute for BLM to determine that claim had not been abandoned. Also *see William J. Booth*, 73 IBLA 274 (1983).

**Identification of a Claim on an Assessment Affidavit**

In *Havilah Gold Co., Inc*., 112 IBLA 160, 163-64, The Board restated the well-established rule that "the affidavit of assessment Work must contain the BLM serial number, claim name, or some other description of the claim sufficient to identify it." The Board

then gave an example of a statement that is not sufficient to identify a claim:

> * * Writing the words Aall contiguous@ after a list of claim names is not sufficiently specific to delineate exactly which claim or claims are intended to be included in a list on an affidavit of assessment work. The term Acontiguous@ could be merely descriptive of listed claims. If BLM was to attempt to construe the term to extend a list to unmentioned claims, BLM would have to guess which claims were intended, and whose. Although a single affidavit of assessment work can suffice for a group of claims, this does not obviate the need to identify the claims involved.

**Claims Named With Incorrect Serial Numbers**

In *Harris A. Hansen*, 137 IBLA 64 (1996), the claimants notice of intention to hold has correctly identified four of his claims by name, but has incorrectly listed their serial numbers. Because the claims were identified by name the Board would normally reverse the BLM decision; however, Aan ambiguity has been created by the fact that he has also identified them by serial numbers which cannot be accounted for.@ *Id.* at 67. Therefore, the Board remanded the case back to BLM to investigate the problems with the ambiguous serial numbers and give the appellant time to supply the accurate serial numbers in his notices of intention to hold.

**Claim Name and Serial Number Omitted from Annual Filing**

In *Ethel Bilotte*, 99 IBLA 159, 162 (1987), the appellant had inadvertently omitted the name and serial number of some claims from a group of claims filed in a notice of intention to hold. Having learned of the omission the claimant asserted that 43 CFR 3833.4(b) gives authority to permit amending a group filing to include omitted claims.

The Board responded by stating that "the Department has no authority to permit amendment of the required filing to include omitted claims after the deadline for filing has passed.@ The Board also gave the standards for claim identification in an annual filing at 162:

> * * * First, Molycorp's contention fails to take into consideration that in each annual filing, the claimant must "fulfill the statutorily imposed requirement that he include 'a description of the claim sufficient to locate the claimed lands on ground,' * * *. 43 U.S.C. 1744(a)(2) (1982). *Arley R. Taylor*, 86 IBLA 283, 284 (1985). As pointed out in Taylor, without some identification of the claim in the group filing, either by name or by BLM serial number, it is impossible for BLM to apply the filing to the omitted claim. This is consistent with *Philip Brandl*, 54 IBLA 343 (1981), where claimants listed the wrong name for one of their mining claims on their affidavit of annual assessment work and there was no other means of identifying the claim on the document. In that context, the Board affirmed a BLM decision declaring the claim abandoned and void for failure to comply with 43 CFR 3833.2.

**Claim Name Acceptable on Annual Filing**

In *Philip Brandl*, 54 IBLA 343 (1981), the Board expanded the types of filings that would be acceptable by including "the proper identification of the claim by name@ as an alternative to the submission of the correct recordation number given by BLM.

**No Claim Name, Recordation Number or Description of Annual Filing**

If there is no designation of the claim name, the assigned BLM number or a description in an assessment work affidavit by which a claim may be identified, the claim must be deemed abandoned. In *Arley Taylor*, 90 IBLA 313 (1986), the Board discussed such a case at 314:

> The portions of the assessment affidavits underlined by appellant each state, with slight stylistic differences: AEureka Creek Placer Claims 20 acre Claims F 52407 & F 52398 thru F 52404 -- 10 claims.@ It is clear that this description contains neither the proper names of the claims in question nor their assigned BLM numbers. Nor do the affidavits contain any further description of the claims by which they might be identified. Finally, as we have previously noted in another case involving claims listed in the same 1980 affidavit, the indication that 10 claims are included cannot be given any weight because of the consistent pattern of inaccuracies in the totals given for the claims listed.

**Claim Name Shown on Map But Not on Affidavit**

In *Philip Brandl*, 54 IBLA 343 (1981), the Board expanded the types of filings that would be acceptable by including "the proper identification of the claim by name" as an alternative to the submission of the correct recordation number given by BLM. In other words the claim is required to identify the claim by name or serial number.

In *Douglas C. Liechty*, 108 IBLA 247 (1989), the claimant depicted on a map the Scotia #3 Lode Mining Claim among other contiguous mining claims that were expressly identified in the affidavit of assessment work. However, the Scotia #3 Lode Mining Claim was omitted from the express listing of the claims for which the annual assessment work was performed. Furthermore, the map was not referred to in the affidavit. Consequently, the Board held that because the appellant failed to unambiguously identify the Scotia #3 claim in his affidavit of assessment work by name or serial number, the claim was properly deemed to be abandoned and void.

**Annual Filing Left at BLM Office 5 Minutes Late**

On December 30, 1981, an assessment work affidavit was left in the Arizona State Office of the BLM at 4:20 p.m. The document was date stamped the next business, December 31, 1981, because it was received after the close of business which was 4:15 p.m. Therefore the BLM declared the claim abandoned and void. In *United States v. Ballas*, 87 IBLA 88 (1985), the Board upheld the BLM decision and stated:

> Accordingly, appellant was required to file either evidence of annual assessment

> work or notices of intention to hold his claims prior to close of business on December 30, 1981. *See* 43 CFR 3833.21(a) (1981). Appellant's affidavit of assessment work was left in the BLM State Office on that day. However, it was left after regular business hours. The regulations expressly note that "[a]pplications and other documents cannot be received for filing by the authorized officer out of the office hours, nor elsewhere than at his office." *See* 43 CFR 1821.21b. Indeed, 43 CFR 1821.2-2(d) clearly provides that a document delivered after regular business hours must be deemed to have been filed on the next business day. *See M.D.C., Inc*., 57 IBLA 35 (1981).

The appellant also attempted to apply the 20-day grace period where a document postmarked by December 30 is received by January 19. The Board responded by saying the "amended regulation simply has no bearing, even if it were to be applied retroactively, where the relevant document was hand delivered to a BLM office."

**BLM Accepts Affidavits that Filings Were Made**

By decision, BLM accepted affidavits as sufficient evidence that 1983 proofs of labor were mailed and received by BLM in a timely manner. In other words BLM concluded the claimant has rebutted the evidence that the documents were never received arising from the absence of the documents from the record and the presumption that BLM had not lost or misplaced legally significant documents filed with it.

In *Wells J. Horvereid*, 88 IBLA 345 (1985), a claimant who had located claims over the senior claimant, protested the BLM decision to accept the lost documents. In affirming the BLM decision, the Board stated at 348:

> It is undoubted that the Department has authority to decide whether a particular mining claimant has complied with the statute in determining whether or not that claimant has abandoned his claim by virtue or the statutory presumption, such that the paramount Government title is no longer encumbered. We find the decision appealed from is supported by the record. The burden of proof is on appellant to show error in the decision appealed from and, in the absence of such a showing, the decision under appeal will be affirmed.

**Filing Plan of Operations Does Not Satisfy FLPMA Filing**

Filing a plan of operations under 43 CFR 3809 does not satisfy the filing requirements of 43 U.S.C. 1744 (1982). *Robert C. LeFaivre,* 95 IBLA 26, 32 (1986).

**Annual Filing with Inadequate Postage**

In *Oro Fino Dredging Co*., 94 IBLA 11 (1986), a mining claimant mailed his annual filing to the BLM in an envelope with proper postage by weight, but was returned for additional postage because the envelope was oversized. The Board held that the document was timely filed even though the additional postage was affixed after December 30. Of course the envelope was

originally postmarked prior to December 30 and was received by the BLM with the additional postage before January 19th of the following year.

**No Affidavit But Notation on Computer Records**

In *Robert Aumiller*, 94 IBLA 315 (1986), the files for the claims in question contained no copy of the affidavit of assessment work. However, a case file abstract, which is a computer printout of the documents filed for the claim contained a notation of receipt of the affidavit of assessment work. Consequently, the Board held that Aa notation of receipt of the document on the computer printout is sufficient to overcome the presumption that the document was not subsequently lost.@ *Id*. at 316.

**Typographical Error in Serial Number**

In *Homer F. Wilson*, 101 IBLA 70 (1988), the identification of the serial number of a series of claims in an affidavit of assessment work contained a typographical error. The last digit of the lead claim in the series was omitted. However, the affidavit also identified the claims for which it was filed by BLM serial number and by identification of the book and page assigned to the location notice by the county. The Board held that Ain view of the identification on the affidavit of assessment work of the book and page number of the county records at which the certificates of location were recorded, which book and page number is also clearly reflected on the certificates of location recorded with BLM and on the BLM computer printout for these claims, it is clear there was no confusion as to the claims identified in the affidavit."

**Evidence of Annual Filing Accepted**

In *Milton E. Kutil*, 104 IBLA 396 (1988), the Board reversed a BLM decision declaring mining claims abandoned and void for failure to make the annual filing as required by section 314 of FLPMA. The mining claimant produced evidence that he delivered the proof of labor to BLM, and that BLM received the document. The copy of the 1981 proof of labor he asserted he hand carried to BLM has a handwritten notation of the BLM serial number on the document which he asserted was written by a BLM employee at the time he filed the original proof of labor. This assertion was corroborated by a statement of a BLM employee, who identified the handwriting as her own and who concluded the documents were timely received. *Id*. at 397.

Examples of acceptable evidence demonstrating that a filing was received would also Ainclude a copy of the affidavit of labor with a datestamp showing receipt by BLM within the proper filing period or a BLM-prepared acknowledgment receipt." *Donald G. Stern*, 109 IBLA 76 (1989).

In *Luella S. Collins (On Reconsideration*), 101 IBLA 399 (1988), another claimant submitted evidence sufficient to overcome the presumption that the BLM officials did not lose or misplace her annual filing documents. Although the claimant was not able to show that affidavits submitted with her appeal were filed with the BLM, she Asubmitted a copy of a certified mail return receipt card showing delivery of a document to BLM on December 30,

1982, and an acknowledgment receipt prepared by BLM showing that evidence of assessment work performed filed by appellant was received on December 30, 1982. The copy of the certified mail return receipt card does not show what was delivered, but it is evidence that something was received by BLM within the filing period."

In *Richard Al Willers*, 101 IBLA 106 (1988), a claimants evidence of making an annual filing was a return receipt card or certified mail receipt. The Board held that this evidence overcame the presumption which ordinarily arises from the absence of documents in BLM's official files because there was no evidence that the claimant had filed any other document on that date. Also *see Sydney Green*, 109 IBLA 19, 20 (1989); *Paul Harvey*, 119 IBLA 25, 27 (1991).

**Claimant Has No Right of Notice from BLM**

In response to a claimant's contention that he had a right to be notified of a filing deficiency from BLM, the Ninth Circuit Court of Appeals state the following in *Red Top Mercury Mines, Inc. v. United States*, __ F.2d __ (9th Cir. 1989):

> Thus, plaintiff has no right to any notice from the BLM stating that there has been a violation of the filing requirement. In effect, a miner could do everything right but--due to misfiling, a filing lost in the mail, or various other problems--could be in violation of the filing requirement, and years later be told that his claim is deemed abandoned. A logical outcome is that a miner may very well have put additional money into his claim during the intervening years without knowing his claim is abandoned. While this strikes the court as unfair, to remedy the situation would rewrite the Secretary's regulation and be contrary to the Supreme Court's holding in *Locke*. The court assumes, without deciding, that a claimant could protect himself by mailing notices or affidavits of assessment work by certified or registered mail and with a return receipt requested.

**Supplemental Information Required by the Regulations Cannot Be Used to Settle Priority of Right Disputes**

In *Jackson v. Robertson, supra* at 1180, the court observed that if Afailure to file the supplemental requirements contained in the regulations cannot be used by Secretary to deem a claim abandoned, then it is clear that this failure may not be used by private parties to settle disputes over ownership of mining claims.@

**BLM Fails to Notify Mill Site Owner of Defective Filing Before Later Annual Filing**

In *James J. Kohring*, 89 IBLA 345 (1985), the BLM declared a mill site claim abandoned and void because the claimant failed to file a notice of intention to hold the mill site locations for 1979. The claimant failed to respond to a decision issued July 5, 1983, requesting that the 1979 notice be filed. *See Ruth Irene Hackathorn*, 94 IBLA 194 (1986).

By the time the BLM notified the claimant of the defective 1979 filing, the records show

he had filed annual notices of intention to hold the mill sites in 1980, 1981, 1982 and 1983. In *Feldsite Corporation of America*, 88 I.D. 644, 648 (1981), the Board recognized that BLM could properly extinguish a mill site if the owner did not cure a defective filing after notice to do so. However, in *Feldsite*, when the BLM decision was issued, no interim annual filing had been made.

Because the interim annual filings had been made in *Kohring* between the year during which no filing was made and the date of the BLM decision, the Board ruled in favor of the claimant. The Board stated at 348:

> We conclude therefore that where BLM fails to notify a millsite claimant to cure a defective filing prior to the time a subsequent annual filing is made, BLM has effectively waived the defective filing and may not declare a millsite claim abandoned and void based on absence of that document from the file.

**Notice of Intent Must Be Filed in Local Office**

In *Joseph L. Frankmore*, 101 IBLA 202 (1988), the Board held that a letter filed by a claimant was not a notice of intent because it was not recorded with the local office where the notice of location was recorded.

**Filing Required Despite Pending Contest Proceedings**

The pendency of contest or condemnation proceedings does not excuse a claim owner from the annual filing requirements of FLPMA. *Gordon B. Copple*, 105 IBLA 90, 94 (1988), *appeal filed, Copple v. United States*, No. Civ. 88-1886 PHX (D. Ariz. Nov. 16, 1988); *Jean Hatton*, 107 IBLA 47, 51 (1989).

**Contest Action Is Not Basis for Rejecting Annual Filing**

A contest action on a mining claim cannot be used as a basis for rejecting the filing of an assessment work affidavit. *Hiram Webb*, 105 IBLA 290, 312 (1988).

**Pre-FLPMA Claims: Annual Filings with Both BLM and County**

Evidence of assessment work or notice of intention to hold must be filed both with the county and the BLM. In *Elsie L Stewart*, 63 IBLA 153, 154-155 (1982), the Board said:

> Section 314 of FLPMA, *supra*. requires that the owner of a pre-FLPMA unpatented mining claim must file in the proper office of BLM a copy of the recorded notice of location and evidence of assessment work or a notice of intention to hold the claim on or before October 22, 1979, and evidence of annual assessment work or notice of intention to hold prior to December 31 of every calendar year thereafter. Such filing must be made in both the office where the notice of location is recorded, i.e., the county recorder's office, and in the proper office of BLM. These are separate and distinct requirements.

Compliance with the one does not constitute compliance with the other.

**Post-FLPMA Claims: Annual Filings with BLM and County**

In *Lynn Day*, 63 IBLA 70, 72-73 (1982), the claimant located a claim after September 1, in calendar year 1980. So, assessment work was not required until the 1982 assessment year because the claim was located during the 1981 assessment year. But, even though assessment work was not required during calendar year 1981, section 314 of FLPMA required that a notice of intention to hold be filed with both the BLM and the local recording office during calendar year 1981. Although most claimants are aware that a notice of intention to hold must be filed with the BLM in the calendar year following the date of location of the claim. Section 314 of FLPMA also makes it mandatory that the notice of intention to hold be filed with the county even if assessment work is not required that calendar year. The Board discussed this problem as follows in *Lynn Day*, *supra*:

> Section 314 of FLPMA specifies that the owner of a mining claim located after October 21, 1976, must file evidence of assessment work or a notice of intention to hold the claim prior to December 31 of every calendar year after the year of location of the claim. Such filing must be made both in the office where the notice of location is recorded, i.e., the county recorder's office, and in the proper office of BLM. These are separate and distinct requirements. Compliance with one does not constitute compliance with the other. In this case no filing was made in either place.
>
> It is true, as appellant suggests, that the mining law does not require performance of assessment work until the assessment year commencing on the first day of September succeeding the date of the claims. 30 U.S.C. '28 (1976). Thus, appellant was not required to perform assessment work until the assessment year commencing on September 1, 1981, and running to September 1, 1982. However, this does not eliminate the necessity for compliance with section 314 of FLPMA, requiring the filing of either an affidavit of assessment work or a notice of intention to hold the mining claims, in both the local county recording office and the proper office of BLM, by December 30 of the year following the location of the claims. *Ted Dilday*, 56 IBLA 337, 88 I.D. 682 (1981). The deadline for filing the required notices for appellant's claims was December 30,1981, following the calendar year in which the claims were located. In the absence of such filing of either a notice of intention to hold the claims or an affidavit of assessment work in both the county and with BLM, BLM properly declared the claims abandoned and void.

In *Eugene Fox*, 62 IBLA 232, 234 (1982), the Board held that even if a notice of intention to hold is filed with the BLM but is not filed with the local recording office, the claim is deemed abandoned. The Board said:

> None of the instruments purporting to be a notice of intention to hold the claims at issue reflects that it was recorded in Uintah County, Utah, as required by the statute and regulations. BLM should have declined to accept any of the notices as satisfactory

compliance with the requirements, and should have declared the claims to be abandoned and void. *Robert W. Hansen*, 46 IBLA 93 (1980). When a claimant fails to file a notice of intention to hold in the local jurisdiction where the claims were recorded, the BLM State Office properly should hold the claims to have been abandoned and to be void.

**Claims in National Park System Must File Annually with BLM**

Even though unpatented mining claims in the National Park System were recorded as required by 16 USC 1907 (1988), if a notice of intention to hold was not properly filed with the BLM and the local recording office on or before December 30 of each year, the claim is deemed abandoned and void. *Riter Ekker*, 58 IBLA 251 (1981).

**Failure to Make Annual Filings for Claims or Sites in Park System May Be Curable Defect**

The case of *Morrill A. Nielson*, 62 IBLA 249 (1982) gives a good review of the annual filing requirements of mining claims, mill and tunnel sites situated in the National Park System. Although the Parks Act of September 28, 1976, did require recordation of location notices, it did not require annual filings. However, claims in the park system come under the filing requirements of FLPMA and the applicable regulations in 43 CFR 3833.2-1 and 36 CFR 9.5. The Board said:

> The Mining in the Parks Act did not require the owner of an unpatented mining claim within a unit of the national park system to file other than a copy of the notice of location within 1 year after passage of the Act, on September 28, 1976. The requirement to file a notice of intention to hold the claim or evidence of assessment work after such recordation of the location notice with NPS is regulatory only.
>
> FLPMA required the owners of mining claims located prior to October 21, 1976, to file a notice of intention to hold the claim or evidence of assessment work in the proper office of BLM within 3 years after the date of the Act, or before October 22, 1979.
>
> In *Topaz Beryllium Co. v. United States*, 649 F.2d 775 (10th Cir. 1981), the court held that where the Secretary of the Interior is on notice of an unpatented mining claim, he cannot deem the claim abandoned merely because supplemental filings required only by regulation, and not by statute, were not made. The court stated that the failure to file the supplemental information required only by regulation is a curable defect and the claimant is entitled to notice of the deficiency and 30 days within which to cure the defect. Failure to respond to such notice will result in rejection of the claim by an appealable decision.
>
> In this case, owners of the Terry No. 1 mining claim recorded a copy of the notice of location with the superintendent of the Capitol Reef National Park, as required by MIPA, and thereafter timely filed proofs of assessment work with the proper office of BLM, as required by FLPMA. If the failure to file a notice of intention to hold the claim or proof of the assessment work in 1978 was construed as a defect by NPS, the claimants

should have been notified and given 30 days to comply.

As there has been no violation of any requirement of FLPMA or MIPA relative to the Terry No. 1 mining claim, the decision of BLM deeming the claim abandoned and void must be reversed.

The notices of location for these claims were properly filed with the National Park Service (NPS), pursuant to section 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. ' 1907 (1976). No further filings were required under the Mining in the Parks Act, and, in addition, that Act waived the annual assessment work requirement of 30 U.S.C. ' 28 (1976) for a 4-year period while the Department evaluated the claims which had been recorded.

Almost contemporaneous with the adoption of the Mining in the Parks Act, however, Congress also enacted section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA) (October 21), 43 U.S.C. ' 1744 (1976). While the Mining in the Parks Act, by its terms, applied only to claims located within the national park system, FLPMA's provision applied to every outstanding unpatented mining claim wherever located. Moreover, in addition to the timely filing of copies of the location notice of the claims, FLPMA also required an annual filing both in the local office in the state and with BLM, of either evidence of assessment work performed or notices of intention to hold. Thus, holders of mining claims recorded under the provisions of the Mining in the Parks Act were also required to record such claims under section 314 of FLPMA and to make annual filings (presumptively of notices of intent to hold the claims as the assessment requirements had been suspended). Since all claims recorded under the Mining in the Parks Act would, of necessity, predate the effective date of FLPMA, the required documents could be filed no later than October 22, 1979.

In order to obviate the need for double filings by claimants whose claims had been recorded under the Mining in the Parks Act, the NPS regulations, adopted in January 1977, provided that timely recordation under the Mining in the Parks Act would constitute compliance with the claim recordation requirements of section 314(b) of FLPMA, 43 U.S.C. ' 1744(b) (1976). However, the regulation noted:

> [S]ubsequent annual filings of notice must be made under section 314 and implementing regulations with the Superintendent who will provide copies to the Bureau of Land Management. These subsequent filings with the Superintendent will satisfy the requirements of section 314 of mining claims in the National Park System.

36 CFR 9.5(d) (1978):

Appellant claims to have mailed the required notice to NPS in October 1979. However, the filing provisions of 43 CFR 3833.2-l(b)(1) and 36 CFR 9.5(b), on which appellant relied, were changed on April 5, 1979. 44 FR 20430 (Apr. 5, 1979). Owners of

unpatented mining claims were henceforth required to file notices of intent to hold the claims with BLM, which would then undertake to notify the NPS. Thus, 43 CFR 3833.2-1(b)(1) states:

> Except as provided in paragraph (b)(2) of this section, [where claimants have received permits to do assessment work] the owner of an unpatented mining claim, mill site or tunnel site located within any unit of the National Park System shall file before October 22, 1979, and on or before December 30 of each calendar year after the year of recording (*see* 36 CFR 9.5), a notice of intention to hold the mining claim, mill site or tunnel site. Such notice shall be in the form prescribed by ' 3833.2-3 of this title and shall be filed with the proper BLM office. A copy of each such filing shall be provided to the Superintendent of the appropriate unit by the Bureau of Land Management.

A similar change in 36 CFR 9.5(b) reflected the new requirement of annual filing with BLM. *See* 44 FR 20426-27 (Apr. 5, 1979). Thus, appellant should have transmitted any filing made after April 5, 1979, to the BLM State Office and not to the relevant NPS superintendent.

**Evidence or Notice Not Required If Final Certificate Issued**

It is not necessary to file a proof of labor or a notice of intention to hold an unpatented mining claim or mill site if a patent application has been filed and final certificate has been issued. 43 CFR 3833.2-6.

**The Locke Case**

In *Locke v. U.S.*, 573 F.Supp. 472 (D. Nev. 1983), the Federal District Court of Nevada held that "43 USC 1744 is an unconstitutional violation of procedural due process insofar as it creates an irrebuttable presumption of abandonment for failure to timely file the annual assessment work notice." *Id*. at 478. The Court further concluded that "the plaintiffs here have substantially complied with the statute regardless of its constitutionality." *Id*. at 478. On November 23,1983, the United States appealed this ruling directly to the U.S. Supreme Court. In a similar case, *Rodgers v. U.S.*, 575 F.Supp. 4 (D. Mont. 1982), the Federal District Court of Montana also held the same section unconstitutional. However, the Montana case involved a claim that was never recorded; whereas, in the Nevada case initial recording had been accomplished but the subsequent annual filing was not timely. The *Rodgers* case was not appealed by the United States.

The Locke case represents an excellent example of a claimant that obviously did not intend to abandon his claims. The case involves 10 sand and gravel claims owned by the Lockes. Since 1960, the claims have produced approximately $4,000,000 in materials, with over $1,000,000 of that being produced during the 1979-80 assessment year. Unfortunately the claims could not be relocated because "common variety" sand and gravel has not been locatable since

July 23, 1955. 30 USC 611 (1976).

The Lockes apparently made a strong effort to make the annual filing. They sent their daughter to the Ely District BLM office to inquire on the filing procedure. There she was allegedly told that the documents must be filed at the BLM office "on or before December 31, 1980." The Lockes chose to hand deliver the documents and made the filing at the Reno BLM office on December 31, 1980. Since the statute, 43 USC 1744, requires filing the assessment notices on or before December 30 of each calendar year, they filed one day after the filing deadline.

On April 1, 1985, the United States Supreme Court reversed the Nevada District Court's holding that section 314(a) of the Federal Land Policy and Management Act is unconstitutional. United States v. Locke, 471 U.S. 84 (1985). In holding that section 314 of FLPMA is constitutional, the Supreme Court pointed out that a claimant's intent to abandon is irrelevant, and that failure to comply with the statutory filing dates automatically voids the claim. The following excerpts from the case distinguish between abandonment and forfeiture as they relate to section 314 of FLPMA:

> Although section 3148 is couched in terms of a conclusive presumption of Aabandonment," there can be little doubt that Congress intended section 3148 to cause a forfeiture of all claims for which the filing requirements of sections 314(a) and 314(b) had not been met.
>
> Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. "Any less rigid standard would risk encouraging a lax attitude toward filing dates." *Citation omitted*. A filing deadline cannot be complied with, substantially or otherwise, by filing late--even by one day.
>
> In this case, the statute explicitly provides that failure to comply with the applicable filing requirements leads automatically to loss of the claim. *Citation omitted*. Thus, Congress has made it unnecessary to ascertain whether the individual in fact intends to abandon the claim, and there is no room to inquire whether substantial compliance is indicative of the claimant's intent--intent is simply irrelevant if the required filings are not made.

**Department Cannot Affect Title After Lands Conveyed**

*Ed Bilderback*, 89 IBLA 263 (1985), involved an appeal where the claimants 16 mining claims were declared null and void by the BLM. The claims, located between 1954 and 1960 along the White River in Alaska, were selected for conveyance by the State of Alaska under section 906(c) of ANILCA. When the claimant attempted to record filings under section 314 of FLPMA, the BLM rejected the filings on the basis that there is no Federal jurisdiction over the lands involved.

The Board held that although BLM lacked jurisdiction to declare the claims void, the agency may reject the annual assessment documents. The Board stated at 265:

> BLM need not continue to accept annual assessment documents from appellants since appellants are no longer required to comply with provisions of section 314 of FLPMA, 43 U.S.C. 1744 (1982). The Department no longer has authority to affect title to the land at issue in this appeal, which was legislatively conveyed to Alaska by the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. 1635(c) (1982). See, *Terry L. Wilson*, 85 IBLA 206, 92 I.D. 109 (1985); *State of Alaska v. Thorson (On Reconsideration*), 83 IBLA 237, 91 I.D. 331 (1984).

**BLM Not Required to Determine Legal Status of Claims**

"BLM does not have an affirmative duty to immediately determine the legal status of every claim filed with the Department and to notify claimants of its conclusions in time to permit them to correct their filings, where, as here, there are deadlines to be met." *Joseph L. Frankmore*, 101 IBLA 202 (1988).

**BLM May Delay Abandonment Decision**

BLM may declare an unpatented mining claim abandoned and void for failure to make an annual filing even though BLM has delayed issuing such a declaration for a number of years. *Donald E. Stewart*, 104 IBLA 48, 50 (1988).

**Failure to File While Case Under Judicial Review**

In *J.L. Block*, 98 IBLA 2099 211-12 (1987) the Board considered the question of whether a claimant is required to file for a period where he was seeking reinstatement of his claim in District Court. On March 24, 1980, the Board affirmed the BLM's decision declaring the claim abandoned and void so the claim ceased to exist. The claimant's filing of a suit for judicial review did not change this fact. Because no claim was in existence from March 24, 1980, through June 30, 1983, when the claim was restored, BLM could not require the claimant to make an annual filing for 1980, 1981 or 1982.

**Until Issuance of Final Certificate, Patent Applicant Must File Annually**

Unless a final certificate has been issued, an applicant for a patent to a mining claim is not excused, under 43 CFR 3833.2-6, from the requirement to file annually an affidavit of assessment work or notice of intention to hold the claim with BLM under 43 U.S.C. 1744 (1982). This is because "the patent application is not cognizable as a recordation filing under FLPMA, as it was not an Aexact legible reproduction or duplicate * * * which has been * * * filed for record

* in the local jurisdiction of the State" 43 CFR 3833.2- 6; *U.A. Small*, 108 IBLA 102 (1989).

**When Annual Filing Required After Recision of Final Certificate**

Departmental regulation 43 CFR 33833.2-6 provides that evidence of annual assessment work performed or a notice of intention to hold a mining claim need not be filed for an unpatented claim Afor which an application for a mineral patent which complies with 43 CFR Part 3860 has been filed and the final certificate has been issued." In *B.J. Londo*, 109 IBLA 353 (1989), the Board considered a case where the BLM issued a final certificate on August 15, 1980, to a claimant who withdrew five mining claims from his patent application during September of 1983. The Board held that the claimant was excused from complying with section 314 of FLPMA for 1980 through 1983. *Id*. at 355. As restated by the Board, "the filing requirements were satisfied for any filing period ending or arising within that time frame.@ *Id*. at 355, fn. 2.

**Annual Filing Must Be Made While Case Under Appeal**

Unless a claimant has been granted a deferment from assessment work, annual filings must be timely made even though a case is under appeal before the Interior Board of Land Appeals. In *C.A. Braun*, 119 IBLA 252 (1991), the Board said at 256, n. 4:

> Nor does the pendency of administrative review before the Board relieve a claimant of statutorily imposed filing requirements during such period, in the absence of the grant of deferment from assessment work in accordance with 30 U.S.C. 28b-e (1988) and 43 CFR 3852.0-3.

**Timeliness of Appeals**

Departmental regulation 43 CFR 4.411(a) provides: "A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service.@ Therefore, the 30-day period for filing a notice of appeal does not begin to run until the day after a decision has been served upon the appellant in the manner required by 43 CFR 1810.2 and 4.401(c). Also, an appeal will not be dismissed as untimely if the record transmitted with appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.4018 more than 30 days prior to the filing of the notice of the appeal. *Luella S. Collins (On Reconsideration*), 101 IBLA 399, 400 (1988); *Jean Hatton*, 107 IBLA 47 (1989).

In *Jean Hatton, supra*, the BLM sent a decision dated April 3, 1986, to the address that appeared on the copy of the notice of location filed with the BLM in 1979. However, the claimants had informed BLM in 1980 and subsequently by annual filings that their address was at another location. A party dealing with the BLM is entitled to specify, through proper advance notice, an address of record where BLM may contact him by mail. *Coastal Oil & Gas Corp*. 106 IBLA 90 (1988). Under 43 CFR 1810.2, where BLM uses the mails to send a notice to the party, that party will be deemed to have received the communication if it was received at his last

address of record, regardless of whether it was in fact received by him. *Rick Lee McMullen, Jr.*, 105 IBLA 80, 81 (1988); *J-O'B Operating Co.*, 97 IBLA 89, 92 (1987). AHowever, this rule known as 'constructive service,' does not apply where BLM does not honor a parties designation of a last address of record." *Jean Hatton, supra*. The Board held that because BLM's April 3, 1986, decisions were not delivered to appellants' last address of record at the time they were issued, and because appellants were not otherwise provided notice of the decisions, there was no service at that time. Furthermore, the 30-day appeal period did not begin to run for these decisions until appellants received notice of them for the first time.

## MISCELLANEOUS RECORDATION PROBLEMS

### Problems with Mail

Documents placed in the mail and postmarked prior to the due date, but not received in the proper office until after the due date, are not considered timely filed. In *Henry D. Friedman*, 49 IBLA 97, 98-99 (1980), the claimant mailed his location notice to BLM on January 5, 1980. To be filed within the 90-day period, the location notice had to be received by the BLM on or before January 10, 1980; however, the notice was not received until January 15. Even though his letter was postmarked on January 6, 1980 and took 9 days to reach BLM, the Board upheld the BLM's abandonment decision. The Board said:

> Appellant also asserts that the fact that they were mailed 9 days before they were date stamped suggests that BLM received these papers timely but delayed date stamping them until after the deadline. Absent any evidence to support this speculation, it is pure conjecture. There is nothing in the record to support such a conjecture. Where a mining claimant merely raises the possibility that BLM officials mishandled notices of location submitted in attempted compliance with the requirements of 43 CFR 3833.1-2(b), causing them to be date stamped as untimely, he has not met the burden of rebutting the presumption that BLM officials have properly discharged their duties in receiving and promptly date stamping all such notices tendered to them.

The case of *Roy B. Smalley*, 59 IBLA 238, 240 (1981), involved a letter postmarked on December 29, 1980, before the due date but received December 31, 1980, after the due date. The Board again held that the "controlling date is the date on which the BLM received the document and date stamped it."

In numerous ceases claimants have alleged that they mailed documents to the BLM of which the BLM has no record. Undoubtedly in some cases the Postal Service or BLM may have lost or misplaced the documents; however there have been so many cases of this type that it is also likely that some of such instruments were never mailed. In any event, the Board has responded to this type of allegation many times. In *Faun Rupp*, 65 IBLA 277, 279 (1982), the Board said:

> Various presumptions come into play when an appellant alleges transmittal of an

instrument, but BLM has no record of its receipt. On one hand, there is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. *Citations omitted*. On the other hand, there is a presumption that mail properly addressed and with adequate postage affixed, and deposited in an appropriate receptacle, is duly delivered. When these two presumptions have come into conflict, the Board generally has accorded greater weight to the former. We believe that public policy considerations dictate that greater weight be given to the presumption of regularity over that accorded the presumption that mail, duly addressed, stamped, and deposited, is delivered.

Thus, where after diligent and thorough search BLM states it did not receive the instrument, the burden is on the appellant to show that the instrument was, in fact, received timely by BLM.

Appellant's statement that he thought he transmitted the 1980 proof of labor to BLM does not overcome the presumption of regularity by the BLM employees. It is the receipt of the instrument which is critical.

The regulations define "file" to mean "being received and date stamped by the proper BLM office." 43 CFR 1821.2-2(f); 43 CFR 3833.1-2(a). Thus, even if loss of the envelope, containing evidence of assessment work and addressed to BLM, was caused by the Postal Service, that fact would not excuse appellant's failure to comply with the cited regulations. The Board has held repeatedly that a mining claimant, having chosen the Postal Service as his means of delivery, must accept the responsibility and bear the consequence of loss or untimely delivery of his filings. Filing is accomplished only when a document is delivered to and received by the proper BLM office. Depositing a document in the mail does not constitute filing. 43 CFR 1821.22(f).

**Evidence of Filing**

Even though the proof of labor is missing from the file, there have been a few cases where the appellant managed to furnish sufficient evidence for the Board to hold that a preponderance of the evidence supports a finding that the required document was filed. In *H. S. Rademacher*, 58 IBLA 152, 155-156 (1981), the Board gave a detailed discussion of the kinds of evidence sufficient to establish the filing of a document where the BLM has no record that such document exists. The Board said:

> Although appellant asserts that the required evidence of assessment work was mailed to BLM with the notices of location, the record does not show that BLM received the documents. There is a legal presumption of regularity which attends the official acts of public officers in the proper discharge of their official duties. *Legille v. Dann*, 544 F.2d 1 (D.C. Cir. 1976). It is presumed that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents submitted for filing. This Board has recognized that this presumption may be rebutted by probative evidence to the contrary. *Citations omitted*.

The effect of a rebuttable presumption of law is to invoke a rule of law compelling the trier of fact to reach a conclusion in the absence of evidence to the contrary, but the presumption disappears if evidence to the contrary is submitted and the case is then in the fact-finders hands free from any rule. *Legille v. Dann, supra* at 5-6 (citing 9 J. Wigmore, Evidence ' 2491, at 289 (3d ed. 1940)). The evidence submitted by appellant in the form of an affidavit that the proofs of labor for the claims were transmitted in the same envelope with the notices of location precludes resolution of the case solely on the basis of the presumption that the documents would have been placed in the file if actually tendered. However, this does not preclude consideration of evidence that the documents were not found in the files and that BLM follows regular procedures to insure that submitted materials are not mishandled.

The issue of what kind of evidence is sufficient to establish the filing of a document despite the absence from the appropriate file of such a document is one which has troubled this Board previously. *See David F. Owen*, 31 IBLA 24 (1977) (with dissenting opinion). This Board has found the inference of nonfiling drawn from the absence of the document from the case file to be effectively rebutted by a preponderance of the evidence in those cases where appellant's assertion that the document was timely filed is supported by substantial corroborating evidence. In *Bruce L. Baker*, 55 IBLA 55 (1981), the assertion that the document in issue was actually filed was supported by an affidavit setting forth in detailed chronological sequence the events surrounding the filing which affidavit in turn was corroborated by the dates of notarial seals and filing with the county recorder's office. In the *L. E. Garrison* case, 52 IBLA 131 (1981) claimant's assertion that the document in issue had been filed with BLM was corroborated by an affidavit of a subsequent telephone conversation with a BLM employee who opened the mailing and acknowledged timely receipt of the required document. The phone conversation was in turn documented by a long-distance telephone bill reflecting the call. On the other hand, the Board has held that uncorroborated statements, even where placed in affidavit form, to the effect that a document was filed are not sufficient to overcome the inference of nonfiling drawn from the absence of the document from the file and the practice of BLM officials to handle properly filings of legally operative documents.

The two cases quoted below review the types of evidence necessary to rebut the presumption of regularity that administrative officers properly discharged their duties and did not lose the missing documents:

1. *Bruce L. Baker*, 55 IBLA 57 (1981):

> In this case, we find that appellants have reasonably established the course of the missing document by the date it was notarized, the date of the Seward filing and Irene Baker's affidavit. The only evidence that appellants lack which would conclusively establish that the affidavit was timely filed is the BLM date stamp. Appellants' description of what occurred in the BLM office when Bruce Baker went into submit their filings comports with BLM procedure, though again the

> date stamp is missing. We note that the copy of appellants' notice of location contained in the case file has the BLM date stamp but the copy submitted with appellants' statement of reasons, like the affidavit, does not reflect the date stamp. While there still may be room for doubt as to whether the affidavit of annual labor for the Red Head # 1 claim was filed, we hold that a preponderance of the evidence before us supports a finding that all required documents were filed timely.

2. *Robert T. Reynolds*, 61 IBLA 52 (1981):

> Where, however, as in this case, the BLM computer printout indicates that evidence of assessment work was received for one claim of the appellant's four claims, and where appellant has submitted a copy of the proof of labor for all four claims, which was recorded in the proper county office, and which he asserts was also filed with BLM, and where BLM had no record of having issued an adverse decision for the fourth claim but appellant submitted a copy of the decision, we find the cumulative evidence rebuts the presumption of regularity. Thus, we find that the evidence of assessment work was timely filed.

In *George Fauver*, 62 IBLA 399, 400-401 (1982), the Board considered a case similar to *H. S. Rademacher, supra*, in that the claimant swears by affidavit that the proof of labor was mailed in the same package with the notice of location and check for recordation fee. The BLM acknowledged receiving the notice of location and the check, but not the proof of labor. The Board said:

> An affidavit that proof of labor was mailed together with the notice of location and check for recordation fee, which letter documents were received by BLM, is not sufficient to overcome the inference of nonfiling drawn from the absence of the document from the file and the practice of BLM officials to handle properly filings of legally significant documents, in the absence of substantial corroborating evidence that the document was filed.

**Uncorroborated Statement Generally Insufficient to Overcome Presumption**

In *John C. Schandelmeier*, 136 IBLA 36, 39 (1997), the Board restated its long-standing position that Aan uncorroborated statement that an additional document was included with a filing is generally insufficient to overcome the presumption that BLM would have taken proper notice of the document in issue, had it been received. *Wilson v. Hodel*, 758 F.2d 1369 (10th Cir. 1985); *Diane M. Berndt*, 62 IBLA 288 (1982), *appeal dismissed*, Civ. No. 82-0167 (D. Wyo. Feb. 9, 1983); *Metro Energy, Inc.*, 52 IBLA 369 (1981); *See Red Top Mercury Mines, Inc. v. United States*, 887 F.2d 198 (9th Cir. 1989); *cf. Silver King Mining Co.*, 122 IBLA 357 (1992) (presumption of regularity rebutted by sufficient corroboration).@ *Id.* at 39.

**Receipt and Accounting Advice Accepted as Evidence of Filing**

In *Silver King Mining Co.*, 122 IBLA 357 (1992), the BLM had issued a decision

declaring certain claims abandoned for failure to make the annual filing. The IBLA held that Silver King rebutted the presumption that there was no filing with probative evidence, even though the datestamped affidavits could not be found. The appellant furnished a copy of the "Receipt and Accounting Advice," which showed that the rejected claims were receipted and filing fees paid.

**Document Mailed But Not Received**

In *James L. Gleave*, 112 IBLA 281, 284-85 (1990) the Board discussed the situation where a claimant contends a document was mailed but the BLM has no record of its receipt. The Board also addressed the type of evidence necessary to show the document was timely filed:

> We have noted, however, that various presumptions of differing import may come into play when an appellant alleges timely transmittal of a document but BLM has no record of its receipt. On the one hand, there is the presumption of regularity. On the other hand, there is the presumption that mail properly addressed, with adequate postage affixed and deposited in an appropriate receptacle, is duly delivered. In *Bernard S. Storper*, 60 IBLA 67 (1981), *aff'd*, Civ. No. 82-0449 (D.D.C. Jan, 1983), we adverted to these potentially conflicting presumptions and noted that the presumption of regularity must, for reasons both of public policy and burden of proof analysis, be accorded priority over the presumption that mail correctly addressed and deposited is timely received.
>
> The presumption of regularity, of course, is rebuttable. Thus, the Board has, in a number of cases, held that an appellant has overcome the presumption of regularity and established that it was "more probable than not" that the missing document was timely filed. *See, e.g., Richard A. Willers*, 101 IBLA 106 (1988); *Elizabeth D. Anne, supra*; *Pennzoil Co*., 64 IBLA 392 (1982); *L. E. Garrison*, 52 IBLA 131 (1991). But critical to overcoming the presumption of regularity is the submission of evidence which can fairly be said to make the conclusion "more probable than not@ that the missing document was, in fact, timely filed.

**Erroneous Information**

There have been many cases where the claimant has alleged that BLM employees had provided erroneous or incomplete information which resulted in the loss of claims. However, the Board has consistently held that reliance upon erroneous advice provided by BLM does not relieve claimants, from compliance with the statute or regulations. In *John Murphy*, 58 IBLA 75 (1981), the Board discussed one of these cases:

> We sympathize with appellants to the extent they were misled by BLM's misstatement of what is required under section 314 of FLPMA. However, we cannot indulge appellants' claim of estoppel against the Government. One of the essential elements of an estoppel situation is that the party asserting estoppel must be ignorant of the material facts. In this case, the facts about which appellants claim they were misled were the applicable statutory and regulatory rules of recordation. But it is an established rule of law that "[a]ll

persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *Edward W. Kramer*, 51 IBLA 294 (1980)." *John Plutt, Jr., supra* at 316. Thus, this presumption precludes appellants' argument that estoppel lies, because they cannot claim ignorance of the true facts. A careful reading of the statute and the governing regulation, 43 CFR 3833.2-1 (a), would have clearly indicated that evidence of assessment work or notice of intention to hold must have been filed by appellants with BLM on or before October 22, 1979. Moreover, as we recently stated:

[R]eliance upon erroneous or incomplete information provided by BLM employees cannot relieve the owner of a mining claim of an obligation imposed by statute, or create rights not authorized by law, or relieve the claimant of the consequences imposed by the statute for failure to comply with its requirements. *Parker v. United States*, 461 F.2d 806 (Ct. Cl. 1972);... *Atlantic Richfield Co. v. Hickel*, 432 F.2d 587 (10th Cir. 1970).
*Lynn Keith*, 53 IBLA 192, 198, 88 I.D. 369, 373 (1981).

**Notice of Transfer of Interest**

The regulations (43 CFR 3833.3) require that "whenever the owner of an unpatented mining claim, mill site or tunnel site ... sells, assigns, or otherwise conveys all or any part of his interest in the claim, his transferee shall file in the proper BLM office within 60 days after the completion of transfer..." Also, new owners acquiring their interest through inheritance must file the notice in 60 days. The "notice of transfer of interest" must include the assigned serial number and the name and address of the new owner.

The BLM has not considered that failure to file a notice of transfer of interest within the 60-day period to constitute a conclusive presumption of abandonment of the claim or site. Rather it insures that the present claim owner will receive a notice of contest action or some other action affecting the claim. *Topaz Beryllium, supra* at 779 discussed below.

*See* 36 CFR 9.6 for specific details concerning transfers of interest of claims within the national park system.

**Last Address of Record**

Where the BLM sends a decision to a claimant's last address of record it is deemed to have been constructively delivered in accordance with 43 CFR 1810.2(b). Furthermore, the date of receipt of the decision will be the date the first envelope containing the February 1990 decision was returned to BLM. *Gerhard W. Befeld*, 123 IBLA 118, 120-21 (1992).

**Owner of Record Will Be Sent Notices of Contest Action**

In *Topaz Beryllium, supra* at 779 (10th Cir. 1981), the appellants expressed concern that 43 CFR 3833.5, which requires that notice of an action or contest affecting an unpatented mining claim, will be given only to those owners who have recorded as required by 3833.1-2 or filed a

notice of transfer of interest pursuant to 3833.3. The appellants contended that such a procedure would allow parties other than the Government to initiate contests and win default judgments. The Tenth Circuit Court upheld the notice of transfer provisions in the regulations and affirmed the right of BLM to use the recordation files when initiating a Government contest action, rather than resorting to a diligent search procedure involving county records. The Court said at 779:

> First, we agree with the district court that ' 3833.5(d) speaks only to government-initiated contests. In a contest initiated by a third party, that party cannot rely on ' ;3833.5(d) and ignore local records -- the official repositories -- when determining to whom he must send notice. Appellants' fear that ' 3833.5(d) will be read more broadly should be assuaged by this opinion. Any such broad reading will be appealable and this interpretation given ' 3833.5(d) will be controlling at least in this circuit.
>
> The notice of transfer provisions merely provide a procedure by which the Secretary can more efficiently satisfy his due process obligation to give notice to affected parties when he initiates a contest. It does not by itself work a forfeiture; it merely facilitates the giving of notice of a government challenge under ' 4.451-L. As the district court stated, "It is easier and more efficient to require millions of claim holders to say to the government early on, 'tell me' if you intend to challenge my interest, than to require the government to ferret out millions of interested persons from local records scattered in thousands of locations." 479 F.Supp. at 316.
>
> As we interpret the notice-of-transfer regulations, a transferee who fails to file a notice of transfer is in danger of going without notice in a government-initiated contest only until he files his first annual filing required by 43 U.S.C. ' 1744.
>
> We hold that this notice procedure is reasonably related to the broad concerns for the management of public lands set forth in FLPMA, as well as to the Secretary's unchallenged authority to initiate contests concerning public lands, and that the procedure wholly comports with due process of law.

**Failure to File Constitutes Abandonment**

Section 3148 of the FLPMA, 43 USC 1744c (1976), provides that failure to file the instruments specified in section 314 "Shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof."

**Claim Must Be Adjudicated Before Conclusive Presumption of Abandonment**

In *Mesa Sand and Rock, Inc.*, 128 IBLA 243, 246 (1994), the Board held the conclusive presumption mentioned in *Rice, supra* "does not arise until BLM has concluded by adjudication that proof of the basic fact exists." "At that time, the presumption becomes effective and it relates back to the date payment was due."

**Conclusive Presumption of Abandonment**

*Lynn Keith*, 88 ID 369, 371-372 (1981) is the most frequently quoted case on how failure to comply with the recording requirements results in a conclusive presumption of abandonment. In this case, the Board said:

> [T]he conclusive presumption of abandonment which attends the failure to file an instrument required by 4,3 U.S.C. ' 1744 (1976) is imposed by the statute itself, and would operate even without the regulations. *See Northwest Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management*, Civ. No. 78-46 M (D. Mont. June 19, 1979). A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences.
>
> At common law, evidence of the abandonment of a mining claim would have to establish that it was the claimant's intention to abandon and that he in fact did so. *Farrell v. Lockhart*, 210 U.S. 142 (1908); 1 Am. Jr. 2d, *Abandoned Property* " 13,16 (1962). Almost any evidence tending to show to the contrary would be admissible. Here, however, in enacted legislation, the Congress has specifically placed the burden on the claimant to show that the claim has *not* been abandoned by complying with the requirements of the Act, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon may not be considered.

Although there have been attacks on the recordation requirements of FLPMA as being unconstitutional, the courts have validated section 314, including subsection 3148 specifically. For example, when presented with the argument that the conclusive presumption of abandonment acts as a forfeiture statute violative of due process, the Ninth Circuit, in *Western Mining Council v. Watt*, 643 F2d 618 (9th Cir. 1981), *cert denied*, 102 S.Ct. 567 (1981), stated: "[W]e reject plaintiffs' conclusion that the provisions of section 17448 are unreasonably harsh in requiring that mining claims be conclusively presumed to be abandoned upon failure to file." In this opinion, the Ninth Circuit relied extensively on the reasoning and language in *Topaz Beryllium Co. v. United States*, 479 F.Supp. 309, 315 (D Utah 1979), *aff 'd*, 649 F2d 775 (10th Cir. 1981). The Court said at 315:

> The statutory consequence of "deemed" abandonment, as interpreted by the regulations, renders a claim "void", and rightly so, in light of the legislative history which equates "deemed" abandonment with "extinguishment". *House Conf. Rep. No. 984-1724*, 94th Cong., 2d Sess. at 62, 1976 *U.S. Code Cong. & Admin. News* at 6175, 6223. The beneficiary of "deemed" abandonment is not a stranger who happens upon the claim in the records or on the ground. The beneficiary is the owner of the land, the United States. The claim no longer exists. It is no longer subject to acquisition, succession, resuscitation

or resurrection by anyone. He who is interested must start anew.

ln *Oregon Portland Cement Co*., 66 IBLA 204, 207-209 (1982), the Board gave a good review of forfeiture and abandonment as both relate to a claim owner's failure to (1) perform assessment work, (2) file proof of labor under state law, and (3) make annual filings pursuant to FLPMA. The following four situations may result:

1. Failure to perform assessment work might be evidence of abandonment, but it is not abandonment; however, such failure may subject a claim to forfeiture under certain circumstances.

2. Failure to record proof of labor as required by state law does not necessarily subject a claim to forfeiture; the important issue is generally to determine if the work was performed (see 1 above).

3. Failure to make annual filings as required by section 314 of FLPMA produces a conclusive presumption of abandonment. The specific statutory provision for abandonment in a state recordation statute could also produce abandonment. *See Texaco, Inc. v. Short*, 102 S.Ct. 781 (1982).

4. Traditional abandonment, which is relinquishment of possession together with the subjective intent to abandon, should be clearly distinguished from the conclusive presumption of abandonment expressly provided in a statute such as FLPMA.

The Board distinguished abandonment and forfeiture as both relate to assessment work and the recording of proof of such assessment work (*Oregon Portland Cement Co., supra* at 207-209):

> The purpose behind the statutory requirement that a mining claimant perform assessment work (30 U.S.C. ' 28 (1976)) has been a desire to insure that claims are diligently developed and to prevent the locking up of land by claimants who have no present intent to develop the minerals located therein. *See Powell v. Atlas Corp*., 615 P.2d 1225 (Utah 1980). Until FLPMA, there was no general Federal requirement that assessment work be recorded; requirements of recordation were a matter of state law. The Federal law merely required that work be performed. Failure to perform the assessment work, however, did not result in an "abandonment" of the claim. On the contrary, failure to perform the required annual work simply subjected the claim to "forfeiture" upon the subsequent occurrence of certain events. Thus, the failure of a mining claimant to perform annual assessment work would permit a rival claimant to enter upon the land and "relocate" the original claim for his benefit., See 30 U.S.C. ' 28 (1976). So, too, where the land was withdrawn from subsequent mineral location and the original locator failed to "substantially satisfy" the assessment work requirements, this failure might work a forfeiture of the claim to the Government. *See Hickel v. The Shale Oil Corp*. (TOSCo),

400 U.S. 48, 56-57 (1970), *United States v. Bohme*, 48 IBLA 267, 300-22, 87 I.D. 248, 264-76 (1980). But where neither the land nor the mineral had been withdrawn, and where no other claimant had appropriated the ground embraced by the claim, the original claimant could, even after the lapse of many years, reenter upon his claim and perform assessment work. Such action would cure any deficiency occasioned by his prior failure to perform and, from that point on, his claim would be as valid as it would have been had the claimant dutifully performed assessment work in each year during the intervening period.

"Abandonment," of course, is a concept well known to mining law, but its basis is the traditional law of abandonment -- relinquishment of possession together with the subjective intent to abandon. Failure to perform assessment work might be *evidence* of an abandonment but it is not the abandonment. *United States v. Bohme, supra; Del Giorgio v. Powers*, 81 P.2d 1006, 1013 (Cal. App. 1938). Moreover, courts have long recognized that an abandonment may occur even where the assessment work has been performed or has not yet accrued. *Farrell v. Lockhart*, 210 U.S. 142, 147 (1908). *Citations omitted*.

As we noted above, prior to FLPMA, all that was required under 30 U.S.C. ' 28 (1976) was that the assessment work be performed. Save for specified circumstances, such as claims located on Oregon and California Railroad and Reconveyed Coos Bay Grant Lands (O&C) lands under the Act of April 8, 1948, 62 Stat. 1162, there was no requirement that the mining claimant file an affidavit of assessment work with the Federal Government. Such requirements as did exist were based originally in local mining custom and subsequently in positive State law. Failure to record an affidavit of labor under State law, however, did not *ipso facto*, subject the claim to forfeiture. On the contrary, while the recording of assessment work was normally treated as *prima facie* evidence that the work had been performed and, in Oregon at least, the failure to record was treated as *prima facie* evidence that it had not, the question which determined the right of possession between rival claimants was whether or not the work had been performed.

Thus, in those situations in which the assessment work had been performed, failure to record the assessment work, even in the local county office, would not give rise to rights in either the Federal Government or other third parties. Even where the assessment work was neither performed nor recorded, no rights would inure to the Government absent a withdrawal of the land or the mineral concerned from location. The penalty for nonperformance of assessment work under 30 U.S.C. ' 28 (1976) is not invalidation of the claim. Such nonperformance merely subjects the land embraced by such claim to the possible initiation of adverse third party rights. This was clearly the status of the law prior to the enactment of FLPMA. We find nothing in either the language of the Act or the legislative history of section 314 which might evidence an intent to alter these substantive rules.

It is clear from the language of section 314(a) relating to notices of intention to

hold that the recordation provisions of FLPMA were not intended to effect a change in the assessment work provisions. "Notices of intention to hold" had been a term of art prior to FLPMA. These documents had historically been required to be filed at various times when Congress had suspended the assessment statutes during the war or the Depression. In the absence of actual performance of assessment work, a "notice of intention to hold" served to inform the public of the intention of the claimant to maintain his claim and the proper filing thereof *excused* performance of the assessment work for that year. Thus, the filing of a notice of intent was only efficacious to prevent the initiation of third party rights where the requirement to perform assessment work had been waived. Had Congress, therefore, merely required the filing either of an affidavit of assessment work or a "notice of intent to hold" where authorized under a different statute, there might well be a basis on which to contend that Congress was seeking to use the recordation provision as a tool to enforce the assessment requirement, since the only time the traditional "notice of intent" could be used would be where a waiver of assessment work had occurred. Congress however, expressly authorized notice of intent "including *but not limited to* such notices as are provided by law to be filed where there has been a suspension or deferment of annual assessment work." 43 U.S.C. '1744(a) is to enforce the assessment statute since the scope of the authorization to file a notice of intent to hold obviates any necessity to annually file evidence of assessment work.

As pointed out above, it is performance of the work and not recordation thereof which determines compliance with 30 U.S.C. ' 28 (1976). Compliance with 43 U.S.C. ' 1744(a) (1976) is only accomplished by annual filing. In addition, failure to perform assessment work may subject the claim to "forfeiture," but it does not render the claim abandoned. *United States v. Bohme, supra*, at 301-02. Failure to record under section 314(a), however, conclusively establishes the "abandonment" of the claim.

Thus, the simple purpose of section 314(a) was to keep the Department informed of the continued interest by the mining claimant in his claim. In order for the claimant to do this, he or she was required to make an annual filing in both the local offices of the State and with BLM. Not once, in either the language of the statute or the legislative history is there mention of the assessment year. Not once is there any indication that the filing with BLM was somehow to be synchronized with the assessment year. Congress intended to permit the use of assessment work affidavits as a means of showing the "continued interest" but it clearly did not intend to utilize recordation to "enforce" the assessment statute.

**No Hearing Required**

In *Sidney 0. Smith*, 62 IBLA 378, 382 (1982), the claimant challenged the constitutionality of FLPMA and the regulations because there was no provision for a hearing prior to a declaration of abandonment. The Board said:

Appellant's challenge of the constitutionality of the statute and regulations cannot be sustained. To the extent that due process of law requires that claimant be afforded some

form of hearing prior to declaring the unpatented mining claims abandoned and void for failure to file timely the instruments required by section 3l4 of FLPMA, that requirement is satisfied by claimant's right of appeal to this Board. No evidentiary hearing is required where the validity of a claim depends upon the legal effect to be given uncontested facts of record.

**Statutory Authority for Regulations**

In *Topaz Beryllium Co. v. United States, supra*, the court held that the regulations promulgated under FLPMA which provide that an unpatented mining claim be deemed abandoned and void if the filings required by FLPMA are not made was not in excess of statutory jurisdiction, authority, or limitation, or short of the statutory right under the Act. The Court said at 316:

> Placed in their proper perspective, the challenged supplemental filings represent the Secretary's effort to "fill in" the broad outlines of FLPMA. Names, addresses, and the other information that the challenged regulations require of those making filings pursuant to ' 1744 do not constitute the regulatory horrible that appellants attempt to vivify. Rather, the supplementary information enables the Secretary to integrate ' 1744's information with other data pertaining to land use planning. As the district court noted,
>
> > Congress could not foresee and did not attempt to foresee all of the information that might be needed to efficiently administer 43 U.S.C. ' 1744 and to coordinate its operation with the rest of the FLPMA and with other public land laws. These reasons were among those Congress had for delegating broad authority to the Secretary in 43 U.S.C. ' 1740.
>
> *Topaz Beryllium Co. v. United States*, 479 F.Supp. 309, 314-15 (D. Utah 1979).
>
> All of the other regulations found at 43 C.F.R. Subpart 3833 have been scrutinized, whether or not they have been discussed in detail herein, and I find that they are reasonable and that plaintiffs' objections to these regulations are without merit.

**Thirty-Day Appeal Period**

In *R. W. Dodds*, 62 IBLA 241 (1982), the Board held that failure to file an appeal within the 30-day period after the person taking the appeal is served with a decision requires dismissal of the appeal. The Board said:

> The regulations require that a notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. 43 CFR 4.411(a). This Board has held that the timely filing of a notice of appeal is required to establish the jurisdiction of the Board to review the decision below and that the failure to file the appeal within the time allowed mandates dismissal of the appeal.

Although this Board is generally reluctant to take any action which would preclude review of appeals on the merits, the purpose of the 30-day rule is to establish a definite time when administrative proceedings regarding a claim are at can end, in order to protect other parties to the proceedings and the public interest. Thus, strict adherence to the rule is required.

**Mining Claim Records Maintained Under Section 314 of FLPMA**

Prior to FLPMA, title records concerning unpatented mining claims were generally available only through the county or local recorder as required by state statute. The disadvantages of a local recording system include: (1) necessity to travel to each county seat for mining claim title examinations; (2) diverse record systems maintained by local officials; and (3) difficult and time consuming title examinations. With the advent of a Federal computerized system for the maintenance of mining claim records it is now possible to examine up-to-date microfiche containing the basic elements of a mining claim title. The microfiche as well as copies of the actual case files may be examined either in the public room of the BLM state office or ordered for home or office review. For example, one may wish to monitor mining claims in certain geographic areas to determine if they are properly maintained under the annual filing requirements. With updated microfiche copies available periodically, it is now possible to ascertain that an area is open to mineral entry with a fair degree of confidence before expending exploration money or staking a claim. Of course, it is still necessary to examine the country or local records in most cases because of the dual filing requirements of section 314 of FLPMA and the *local* records are the official records..

**Documents on File with BLM and Available for Inspection or Purchase**

1. Case File Documents (organized by serial number):

Location notices

Amended location notices

Transfers of interest

Receipts for fees (service, rental, holding. etc.)

Notices of intention to hold

Geological, geochemical or geophysical reports

Assessment work affidavits

Deferment of assessment work
Claim map or narrative description

Correspondence

Administrative decisions and other actions

Notice of patent application

2. Microfiche Indexes:

Claimant index - alphabetical order

Claim index - alphabetical order by claim name

Geographic index - legal description by quarter section

Serial number - reference number for each case file

3. Information on Indexes:

Claim name

Claimant's name and address

Legal description of each claim

Serial number of each claim

Case type

County book and page or instrument number

Claim location date

Date of latest assessment year filing

Date case closed

**Rival Claimants**

BLM must accept all proper recordings, including those from rival claimants. Disputes over property rights should be resolved by private litigation. In *W.W. Allstead*, 58 IBLA 46, 48

(1981), the Board said:

> Nevertheless, we have held that under the statute, *supra*, the Department is without authority to determine the question of right of possession to claims as between rival claimants, and that a suit filed in a court of competent jurisdiction is the proper method of resolving such disputes. *John R. Meadows*, 43 IBLA 35 (1979). Therefore, BLM may not refuse to accept and record a notice of location in proper form, with the correct fee paid, merely because a rival claimant to the same ground protests the filing.

In several cases, the BLM has received requests from the owner of one group of claims to issue cancellation letters to owners of conflicting claims. It was alleged that the owners of one set of claims had failed to file timely the affidavits of assessment work required by section 314 of the Federal Land Policy and Management Act of 1976, 43 USC 1744 (1976). *Gold Depository and Loan Co. v. Mary Brock*, 69 IBLA 194 (1982); *IMCO Services*, 73 IBLA 374 (1983). The Board concluded that "this Department has no authority to decide whether one claimant has a better right to possession of a claim by virtue of his relocation of the claims following his rival claimant's failure to file the documents required by section 314." *Gold Depository and Loan Co., supra* at 197. And furthermore, the claimants "right of possession can be determined from the record, and a cancellation letter by BLM will not serve to 'quiet title' to appellant's claims." *IMCO Services, supra* at 376.

*Sandra Memmott*, 88 IBLA 379 (1985) involved a case where the appellant requested a ruling from the BLM that a rival claimant's claims are abandoned and void. The Board upheld the BLM's rejection of this request and stated that the ADepartment is without authority to determine the question of right of possession to claims between rival claimants. A suit filed in a court of competent jurisdiction is the proper method of resolving such disputes." The Board also cautioned that Aa decision by BLM that a rival claimant's claim is abandoned and void will not quiet title to appellant's claims." *Id*. at 380. Finally the Board stated at 380 and 381:

> There is, however, an important distinction between periodic review of records to ascertain, for BLM's own purposes, the standing of missing claim recordation documents and acting as arbiter in private disputes.
>
> If in the course of maintaining comprehensive and up-to-date information on the status of recorded but unpatented mining claims BLM determines, for its own purpose, that a claimant has failed to comply with the statute, BLM may notify the claimant of its determination that the claim is conclusively abandoned and void, and the claimant has the right to appeal from that determination. We do not, however, deem it appropriate to require BLM to make a determination as to the standing of a mining claimant at the insistence of a rival claimant.

The Bureau of Land Management must not make determinations regarding the sufficiency of mining claim recordation documents in response to third party requests. The basis for this is that the Interior Department has no authority to determine the right of possession as to mining claims between rival claimants. *Sandra Memmott (On Reconsideration*), 93 IBLA 113, 115 (1986).

**If Court Determines Claim Abandoned, BLM Can Close Case File**

The BLM must abide by the judgment of the Court in the settlement of a dispute between rival claimants and must "not become the forum for the resolution of private party disputes between rival mining claimants. If the Court declares the mining claim(s) or sites abandoned, a decision should be issued to that effect and the case file closed. *Alvin L. Kile*, 97 IBLA 6, 7 (1987).

**Lode Claims Partially on Withdrawn Land**

In order to be valid, a lode mining claim located partially on withdrawn land must have a discovery on land open to location. *Timberline Mining Co*., 87 IBLA 264 (1985). The end lines and side lines of such a claim may be extended onto withdrawn land in order to define the extralateral rights to lodes or veins which apex within the claim. However, a claimant will not have any rights to the surface of the previously appropriated or withdrawn lands, and, except for previously located mining claims, will not acquire mineral rights in the subsurface of such land by reason of the location. *Santa Fe Mining, Inc*., 79 IBLA 48, 52 (1984).

It does not matter if the discovery point described in the location notice is on withdrawn land so long as there is an actual discovery somewhere on that portion of the claim open to mineral entry. "The location of a discovery is a matter of fact that cannot be determined by reference to a 'discovery point' described on a notice of location" filed with the BLM as required by FLPMA. *Donald R. Rowley*, 89 IBLA 248 (1985).

The validity of mining claims located partially on withdrawn or patented lands depends on whether the discovery point is on land open to mineral location. "BLM may adjudicate the validity of such mining claims only by initiating a mining claim contest because the position of discovery is a matter of fact that cannot be determined by reference to a notice of location filed under 43 U.S.C. 1744 (1982).@ *James W. Phillips*, 92 IBLA 58 (1986).

**3000 Feet by 3000 Feet Lode Claim Accepted as Tunnel Site**

In *Elsworth and Dolores Loveland*, 89 IBLA 205 (1985), the claimant recorded a location notice with BLM for a 3,000 by 3,000 feet lode claim. After the BLM rejected the recordings, the claimant appealed on the basis that the claims were in fact tunnel site claims and that lode mining claim notices were used because there was no notice available for tunnel sites. Since the requirements for tunnel sites were satisfied, the Board accepted the two claims as tunnel sites for the purposes of FLPMA recordation.

**Federal Records of Mining Claims Are Not Official Depositories**

Federal records of mining claims are not official depositories of records of mining claims. Rather local records control the record title to mining claims. 43 CFR 3833.0-1(d); *United States Borax & Chemical Company*, 98 IBLA 358, 359 (1987).

**Amended Location Notices Must Be Filed with Local Recording Office and BLM**

The filing of amended location certificates cannot change the official description of mining claims unless the certificates are also recorded in the county recording office where the originals were recorded. *United States Borax & Chemical Corp*., 98 IBLA 358, 359 (1987).

**Mill Site Owner Must Be Notified of Deficiency**

A mill site cannot be deemed void for failure to comply with FLPMA's filing requirements without first notifying the claimant of record of the deficiency. *Red Top Mercury Mines, Inc*., 96 IBLA 391, 396 (1987), *affirmed, Red Top Mercury Mines, Inc. v. United States*, _ F.2d _ (9th Cir. 1989). 'The owners of mill sites must be given notice of a deficiency and an opportunity to correct it before their mill sites may be deemed void for failure to comply with FLPMA's filing requirement." *Ptarmigan Co*., 91 IBLA 113, 118 (1986) *aff=d, Bolt v. U.S.*, 994 F.2d 603 (9th Cir. 1991).

**Statutory Abandonment for Failure to File Is Self-Operative**

The conclusive presumption of abandonment which attends the failure of a claimant to file an instrument required by 43 U.S. C. 1744 (1988) is imposed by the statute itself. As a matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with the authority to waive the requirements of the Act, or to afford a claimant any relief from the statutory consequences. *Estate of Steve Pederson*, 118 IBLA 210, 212-13 (1991).

**BLM Cannot Void Claim for Failure of Claimant to Submit Information Not Required by Regulations**

In *Add-Ventures, Ltd*., 95 IBLA 44 (1986), the BLM had required a claimant to submit a proof of chain of title and when the claimant failed to do so the claims were declared void. The Board held that because "neither the statute nor regulations require a mineral locator to submit evidence of title other than a location notice, BLM did not have authority to require appellant to submit documentation establishing a chain of title. Consequently, BLM could not have declared appellant's claims void either on the basis of the documents of title supplied or for failure to supply them.@ *Id*. at 48.

The BLM had mistakenly presumed that the regulation 43 CFR 3833.4(b) could be used as a basis to declare the claims null and void. This regulation provides that the BLM may determine a claim to be void if a claimant fails to file information requested to cure a deficiency. However, the Aregulatory procedure for dealing with curable defects which allows a claim to be declared invalid for failure to file requested information applies only when the information sought by BLM is required by regulation. It does not apply to other information BLM believes might be useful to its administration of mining claim records. When BLM wishes to obtain such additional information, it should simply request that the mining claim owner provide it." *Id*. at 48.

**Fraudulent Documents**

A person who knowingly files false, fictitious, or fraudulent documents is subject to criminal action by the United States under 18 U.S.C. 1001

**Deficiency Notice Required Service Fees Since July 15, 1993**

Regulation 43 CFR 3833.1-4(c) requires that annual filings submitted for affidavits of assessment work, shall accompanied by a nonrefundable service charge of $5 for each mining claim, millsite or tunnel site. However, 43 CFR 3833.1-3(c) allows that such documents and filings will be noted as being recorded on the date initially received, provided that the claimant submits the proper service charge within 30 days of receipt of a deficiency notice from the authorized officer.

Since January 1, 1991, annual filings received but not accompanied by the proper service charges shall not be accepted and will be returned to the owner. Where a bank returns a company's check as uncollectible after the filing deadline, the claim will be declared abandoned and void. *N.T.M., Inc.*, 128 IBLA 77 (1993); *Glen Taylor*, 67 IBLA 393 (1982); *Elinor D. O'Rourke*, 130 IBLA 87, 89 (1994). However, this regulation was changed on July 15, 1993, when the Department promulgated regulations implementing the Rental Fee Legislation.

In *Steve Hicks*, 136 IBLA 190 (1996), the appellant mailed to BLM in an envelope postmarked December 29, 1995, and it was received by BLM on January 8, 1996. Thus, Hicks= affidavit of labor would have been considered timely filed had it been accompanied by the appropriate service charge. BLM did not apply 43 CFR 3833.1-3(c) in Hicks= case, but simply returned the affidavit of labor for the 1995 filing period to him. It was improper for BLM to reject Hicks= affidavit of labor without first providing him with a deficiency notice informing him that he had 30 days from receipt of the notice in which to submit the required service fee.

In *R. Keith Barrett*, 123 IBLA 240 (1992), a similar case, BLM had declared his unpatented mining claims abandoned and void because the check which accompanied his affidavits of labor was not honored by his bank. The affidavits of labor arrived at the BLM office on January 3, 1991. The Board ruled that Barrett=s affidavits of labor were filed in compliance with the grace period provisions of 43 CFR 3833.0-5(m) (1992) and that they would have been considered timely filed had the check for the service charge not been dishonored by the bank on which it was drawn. The Board concluded that BLM should have provided Barrett with a deficiency notice pursuant to 43 CFR 3833.1-4(a) (1988) informing him that he had 30 days from receipt of the notice in which to submit the required service fee.

**Annual Filing without Proper Fee**

"[W]hen an annual filing required to be filed prior to January 1, 1991, is not accompanied by the proper service fee, the appropriate course of action is for BLM to notify the claimant/owner that there is a deficiency, and that the claims will be rejected and returned if the amount of the deficiency is not submitted within 30 days of receipt of the notice. *Id*.

**Dishonored Checks**

The Board=s general position regarding dishonored checks is given in *Gary L. Carter (On Reconsideration)*, 132 IBLA 46, 47 (1995):

> ...submission of a check which is not honored by the bank does not constitute payment. *Twin Arrow, Inc.*, 118 IBLA 55, 58 (1991). An exception to the rule for checks dishonored as a result of bank error has been recognized. *See*, e.g., *Duncan Miller*, 70 I.D. 113 (1963). However, this exception has been limited to situations where bank officials have acknowledged that the bank erred in failing to honor the check.

In the *Carter* case the check was tendered by the due date but erroneously dishonored by the bank on which it was drawn. However, the Board said Athe fee will be considered to have been timely tendered where bank officials acknowledge that the bank erred in not honoring the check when presented. *Gary L. Carter*, *supra* at 47. The Board was not persuaded until it received an affidavit of a bank vice president who acknowledged that it was an error of the bank. *Id* at 48.

In *R. Keith Barrett*, 123 IBLA 240, 242 (1992), the Board held that "submission of a check, which upon presentment is dishonored by the bank on which it is drawn, does not constitute timely payment of the service fees for annual mining claim filings." In *Great American Gold Co.*, 141 IBLA 170 (1997), the Board said Ain the absence of an acknowledgment of error by a bank official, the rule is that a check that is dishonored by the bank on which it is drawn does not constitute payment of the underlying obligation for which it is tendered.@ *Id.* at 172.

**Insufficient Annual Filing Fees to Cover All Claims**

After January 1, 1991, there can be no timely annual filing without the accompanying fee. Where a claimant has insufficient fees to cover all the claims in his annual filing, he should be given an opportunity to choose the claims for which the timely service charge was submitted. *Norman Filip*, 124 IBLA 122 (1992). In *Floyd Moody*, 52 IBLA 153 (1981), the Board applied this same rule to a claimant who had insufficient recordation fees to cover new location notices.

## RENTAL AND MAINTENANCE FEE PROVISIONS

**New Rental Fees Required for Mining Claims**

On October 5, 1992, the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Public Law 102-381; 106 Stat. 1374) was passed. This Act requires the holders of unpatented mining claims to pay the federal government a new rental fee of $100 per claim per year for a two year period. The two rental years are September 1, 1992, through August 31, 1993, and September 1, 1993, through August 31, 1994. This new rental fee suspends the requirement in the Mining Law for $100 of assessment work per claim per year. It should be noted that in the past the assessment work requirement has not been applied to mill sites and tunnel sites; however, under Public Law 102-381, the rental fee must be paid on mill sites and tunnel sites as well as lode claims and placer claims. Failure to pay rental fees by the required date, constituted statutory abandonment of the claim. The final regulations were

effective upon publication 58 FR 38186 (July 15, 1993), correction 58 FR 41184 (Aug. 3, 1993).

**Maintenance Fee Statute Extends Fee Requirements Until September 30, 1998**

The Omnibus Budget Reconciliation Act of August 10, 1993 (P.L. 103-66, 107 Stat. 312) continues, with certain modifications, the mining claim fee requirements of the Act of October 5, 1992, until September 30, 1998. This Act requires the payment of an annual maintenance fee of $100 per claim or site, unless the owner qualifies for an exemption from the fee. The Act also establishes a new location fee of $25 for each new mining claim or site located on public lands on or after August 11, 1993, and before September 30, 1998. This $25 location fee will be in addition to the existing $10 recordation fee. Final regulations to implement Public Law 103-66 were effective August 30, 1994 (59 FR 44846, 44860-61)

**Claims Located on or Before October 5, 1992**

To maintain claims for the two rental years, the BLM must have been paid $100 per claim rental on or before August 31, 1993, for the year ending September 1, 1993, and an advance rental of $100 per claim on or before August 31, 1993, for the year beginning September 1, 1993.

**Individual Notice of Fee Payment Not Required**

In *Carol E. Shaw*, 136 IBLA 84 (1996), the appellants argued that they were entitled to adequate and individual notice before the rental fee could be imposed upon them. The Board responded that Aenactment of the statute gave sufficient notice of the new requirement@ * * * and the Anotice of the requirement to pay rental fees was published in the *Federal Register*, as were subsequently promulgated rule implementing the 1992 Act.@ Therefore, A[i]ndividual notice of enactment of the statutory fee payment requirement was not needed in order to afford appellants due process of law * * * .A *Id* at 88.

**Claims Located After October 5, 1992**

Mining claims, mill sites and tunnel sites located after October 5, 1992, must submit a $10 service fee and a $100 rental fee for each claim at the time of recording. This $100 fee covers the rental year in which the location was made. An advance rental fee for the following year will also be due on or before August 31, 1992. Public Law 103-66 also

requires an additional location fee of $25 for each new mining claim or site located on public lands on or after August 11, 1993, and before September 30, 1998.

**Location Fee**

The Act of August 10, 1993 (Public Law 103-66, 107 Stat. 312) requires a one time $25 payment for all new mining claims and mill and tunnel sites located after August 11, 1993, and before September 30, 1998. This location fee of $25 is in addition to the prior existing $10 service fee. Therefore, the total cost for a new location is $35. 43 CFR 3833.1-4.

**Maintenance Fee**

A nonrefundable maintenance fee of $100 is required for each mining claim, mill site, or tunnel site for each assessment year a claimant intends to hold the claim or site. The assessment years covered by the Act of August 10, 1993, begin at 12 o'clock noon on September 1, 1994, and end at 12 o'clock noon on September 1, 1994. For a new location made before August 31, 1994, but recorded timely after August 31, 1994, a $100 fee is required at the time of filing for both the 1994 and the 1995 assessment year, for a total of $200 plus $35 for location and service fees. 43 CFR 3833.1-5. The $100 maintenance fee shall be paid annually on or before August 31, for the subsequent assessment year beginning at 12 o'clock noon on September 1 of that year. 43 CFR 3833.1-5 (b).

**Assessment Work Not Required if Maintenance Fee Paid**

The Act of August 10, 1993, provides that if the maintenance fee is paid, the requirement to perform assessment work is suspended. However, if a waiver certificate is filed for the small miner exemption, then assessment work must be performed and recorded with the BLM along with the $5 filing fee on or before December 30 of each year.

**After Allowance of Mineral Entry Assessment Work Not Required**

Performance of annual assessment work and payment of maintenance fees is not required after the date the mineral entry has been allowed. The assessment year in which the mineral entry is allowed is the first assessment year for which the assessment work and payment of maintenance fees is no longer required. If a mineral entry is canceled in whole or in part, the mining claims and mill sites that are no longer covered by the mineral entry shall be subject to the assessment work requirement, or the payment of maintenance fees, beginning in the next assessment year following the assessment year that the mineral entry was canceled. 43 CFR 3851.5

**Transfer of Waived or Exempted Claims**

If a claim has received a waiver from the exemption fee under the small miners exemption is transferred in whole or in part to an unqualified party, the waiver is forfeited. The maintenance fee for the previously waived claim or site must be paid for the assessment year in which the transfer occurred. 43 CFR 3833.1-5 (g).

**Maintenance Fee Waiver or Small Miner Waiver**

In order to qualify for a waiver of the maintenance fee requirements, the claimant and all related parties shall hold no more than 10 mining claims, mill sites, and tunnel sites in the United States on the date payment is due. Mill and tunnel sites are counted towards the limit and may be waived from payment of the maintenance fee. 43 CFR 3833.1-6.

**Deferment of Assessment Work**

If a petition for deferment of assessment work is granted, the maintenance fees for the claims are deferred for the upcoming assessment year. At the expiration of the deferment, all deferred fees shall be paid within 30 days of the end of the deferment, unless the claimant qualifies as a small miner. If the claimant qualifies as a small mineral, all deferred assessment work shall be performed upon the expiration of the deferment. 43 CFR 3833.1-6 (e).

**Another Exception to Filing Waiver Due on August 31, 1994**

If no change in status has occurred, a small miner exemption certification previously filed for the assessment year ending at noon on September 1, 1994, under the Act of October 5, 1992 and the regulations in effect on August 31, 1993, will be considered a proper certification filing for a waiver of payment of the maintenance fee due on August 31, 1994. 43 CFR 3833.1-7 (a).

**Waiver Certification May Be Treated as Notice of Intention to Hold**

A waiver certification form to cover mining claims and sites may be treated as a notice of intention to hold, providing the $5 service charge per claim or site is paid at the time the waiver certification is filed. 43 CFR 3833.1-7 (c).

**Soldiers' and Sailors' Relief Act**

A military person entering active service may file a notice with the BLM of his or her entry into active military service. This filing excuses the person from performing assessment work or paying the maintenance fees until 6 months have passed from the person's release from active duty status, or until 6 months have passed after release from a military hospital, whichever is later. Such claims cannot be co-owned with any person who does not qualify under the Soldiers' and Sailors' Relief Act. 50 U.S.C. Appendix 565. 43 CFR 3833.1-7 (e).

**Small Miner Exemption**

Public Law 102-381 makes an exception to the rental requirement for "small miners" who have a total of 10 or fewer mining claims, mill sites and tunnel sites in the United States and who meet certain criteria with respect to levels of production on exploration activity and unreclaimed surface disturbance. Although mill sites and tunnel sites count towards the ten claim/site limit, the rental fee must be paid on all mill sites and tunnel sites. Those who qualify for the small miner exemption must also perform assessment work and file the affidavit with both the BLM and the County or local office on or before December 30 of each year together with the annual filing fee of $5 per claim. Any claimant interested in qualifying for an exemption should carefully review the detailed requirements in the current regulations (43 CFR Subpart 3833).

**Performed Assessment Work Does Not Satisfy Holding Fee Requirements**

In *Idaho Mining and Development Co.*, 132 IBLA 29 (1995), the appellant made application to BLM to have performed and paid for assessment work satisfy the holding fee

requirement under the Interior Department and Related Agencies Appropriations Act of 1993, enacted on October 5, 1992 (106 Stat. 1378-79). The Board upheld the BLM decision and said the ADepartment is without authority to excuse lack of compliance with the rental fee requirement to extend the time for compliance, or to afford relief from the statutory consequences, and the Board may not consider special facts or provide relief in view of the mitigating circumstances.@ *Id* at 35.

In *Daniel D. Koby*, 139 IBLA 131 (1997), the Board again stressed that Aclaimants who were ineligible for the small miner exemption and who had performed $100 worth of assessment work between September 1 and October 4,[1992], nevertheless were required to pay the $100 per claim rental for that year.@ The Board said at 135:

> In *Keith Lindsey*, 130 IBLA 346, 348 (1994), we noted that in proposing its regulations, BLM considered the possiblity that some mining claimants had performed assessment work prior to passage of the legislation and asked for commentson an alternative proposal that would allow such claimants to certify that they had completed assessment work between September 1, 1992, and October 5, 1992. 58 Fed. Reg. 12878, 12878, 128879 (Mar. 5, 1993). That option was not adopted. 58 Fed.Reg. 38190, 38191 (July 15, 1993). Thus, apart from the small miner exemption, no other exemptions were specified or implied. *Id*.

**Small Miners Exemption with More Than 10 Claims**

In *Edna Jarvis*, 128 IBLA 143 (1994), a claimant's Certificate of Exemption from payment of Rental Fee was rejected by BLM because the records indicated the claimant owned 34 mining claims. The claimant appealed on the basis that the other claims (unlisted claims) were not properly filed on and recorded in the County. The Board remanded the case back to BLM to determine if the other claims were properly recorded with the County as required by 43 CFR 3833.1-2. Regarding ownership records, the Board made the following observation:

> We note that BLM has recognized that the actual ownership, not the ownership as shown on BLM records, is controlling when determining whether a claimant qualifies for an exemption, and that BLM's records may not accurately reflect the actual ownership on the date the claimant files for exemption. Instruction Memorandum No. 94-20 (Oct. 15, 1993).

In *Lee H. and Goldie E. Rice*, 128 IBLA 137 (1994), the Rices filed an exemption form for the 1992-93 assessment year and another form for the 1993-94 assessment year. BLM rejected the 1992-93 form because at the time the certification was filed, the claimants were co-owners of 16 mining claims. The Board stated at 141:

> * * Since the record evidence, unrebutted by appellants, shows that they are co-owners of more than 10 unpatented mining claims in the State of Arizona, we conclude that BLM properly denied an exemption for assessment year 1992-93 and determined that without

an approved exemption for 1992-93, the request for 19934-94 was moot.

Consequently the Board held that the claims were properly deemed abandoned and void because they failed to qualify for the small miner exemption. The significance of this decision is that claimants who owned more than 10 claims at the time of filing the exemption would loose all claims even though the unlisted claims would automatically become abandoned if they were not covered by rental fee at the end of the filing period.

**Claimant Abandons Excess Claims By Filing Assessment Work Affidavit and Notice**

Washburn Mining Company (Washburn) appealed from a decision of the Nevada State BLM office declaring its 12 claims abandoned and void. *Washburn Mining Co*., 33 IBLA 294 (1995). The claimant had filed a certificate of exemption from payment for both the 1993 and 1994 assessment years on *August 26, 1993*, to cover 10 claims. However, BLM denied the exemption because its records showed Washburn owned 12 claims rather than 10 as shown on the waiver form.

The Board vacated the BLM decision because Washburn had recorded its statement of annual assessment work with the Humboldt County recorder for only 10 claims (the same claims listed on the exemption form) on *August 24, 1993*. Washburn also filed a notice with the Forest Service for the same 10 claims. The Board was Asatisfied@ that the appellant only Aowned ten claims *as of the date* it filed its certification seeking the small miners exemption.@ Id at 296. *Emphasis added*.

With respect to the *Edna Jarvis* and *Goldie Rice* cases reviewed above, it appears that the Board considered the 2 excess claims abandoned because they were not listed among the 10 claims on the assessment work affidavit filed with the county. It is also important to note that the assessment work was filed with the county 2 days before filing the exemption forms were filed with the BLM so that the claimants only Aowned ten claims *as of the date* it filed its certification.@

In *Calvin W. Barrett*, 134 IBLA 356 (1996), the BLM had rejected a small miner=s exemption on the grounds the claimant owned more than 10 claims. On August 25, 1993, the claimants filed certification of exemption from payment of rental fee forms for both the 1992-93 and the 1993-94 assessment years listing nine claims. On October 1, 1993, the claimants filed a copy of their affidavit of annual assessment work for the 1993 assessment year which had been recorded with the County Recorder on August 6, 1993. The affidavit identified only the nine original 1987 claims as the claims upon which the assessment work had been performed. The Board vacated the BLM decision because A[a]ppellants=intent to drop the 32 Blacktail claims finds corroboration in their affidavit of annual assessment work for the 1993 assessment year which they recorded with the County Recorder on August 6, 1993, and filed with BLM on October 1, 1993, in which they list only their nine original 1987 claims as the claims upon which the assessment work had been performed.@ Id at 359.

In *The Big Blue Sapphire Company*, 138 IBLA (1997), the company appealed from a

BLM decision declaring claims abandoned and avoid because the company held 13 claims when the exemption application was filed. The Big Blue Sapphire Company recorded it affidavit of labor for the 1993 assessment year with the County Recorder on August 19, 1993, and included it with its certification of exemption which it filed with BLM on August 25, 1993. Both the assessment affidavit and the certification of exemption listed only the same 10 claims. In reversing the BLM decision, the Board said that if a claimant can establish that the excess claims were abandoned before August 31, 1993, it does not matter when the BLM becomes aware of the abandonment. For example, if The Big Blue Sapphire Company had filed it assessment work affidavit for the 1993 assessment year after August 25, 1993, the certifications of exemption should still be accepted. The Board said at 4-5:

> We note that, similar to the claimants in *Barrett* and *Washburn*, Big Blue had recorded locally proofs of labor omitting certain claims prior to August 31, 1993, and had, in fact submitted copies of these proofs of labor to BLM before that date. Clearly, under our precedents, Big Blue has established that BLM=s decision was in error. We wish to emphasize, however, that receipt by BLM of such corroboration prior to August 31, 1993, is not an essential prerequisite to establishing that previously existing claims which were not recorded in a certification of exemption were timely abandoned.
>
> Abandonment, as we have noted in the past, Ais a concept well known to mining law, but its basis is the traditional law of abandonment--relinquishment of possession together with the subjective intent to abandon.@ *Department of the Navy*, 108 IBLA 334, 338 (1989) *quoting Oregon Portland Cement Co*., 66 IBLA 204, 207 (1982). The relevance of the local filings in *Barrett* and *Washburn* was not that they effected an abandonment of the claims but rather that they provided evidence of the subjective intent of the claimants to abandon the claims. So long as a claimant who sought a small miner exemption can establish that, with respect to any claims in excess of 10, the elements of abandonment predated August 31, 1993, he or she has met the statutory and regulatory requirements with respect to the limitation on claim ownership, regardless of the point in time at which these facts are communicated to BLM.

The case of *Burbank Gold, Ltd*., 138 IBLA 7 (1997) involved a claimant who listed 10 claims on an application for exemption filed on August 30, 1993, and filed an affidavit of assessment work listing the same claims on December 30, 1993. The Board said at 20:

> * * * [w]e do not consider it essential that affidavit of assessment work be filed before August 31, 1993, however, so long as it is not contradicted later, e.g., by filing an affidavit of assessment work for claims previously dropped by not listing them on an application for exemption. In this case, the evidence of appellant=s intent to abandon is that its December 30, 1993 affidavit of assessment work listed the same 10 claims it had listed on its August 30, 1993, application for exemption, and there is nothing in the record that appears to contradict appellant=s intent to abandon the claims it did not list on its exemption application. Under these circumstances, we believe appellant qualified for a small miner exemption.

Similarly, in *William J. Montgomery*, 138 IBLA 31 (1997), the claimant filed

certifications of exemption on August 23, 1993, for each of the assessment years ending September 1, 1993, and September 1, 1994. Like the *Burbank Gold* case, the claimants filed their affidavit of labor for the 1993 assessment year with BLM on November 16, 1993, which reflected the same 10 claims shown in their certifications of exemption filed earlier. Again, the Board found the BLM decision declaring the 10 claims abandoned and void to be in error. *Also see Anson L. Renshaw*, 140 IBLA (1997) and *Ernest B. Williams*, 140 IBLA 351 (1997).

**More Than 10 Mining Claims Based on Effective Date of Transfer of Interest**

On August 26, 1996, BLM received a maintenance fee payment waiver certification from Frances Pedersen listing eight mining claims, and another waiver certification from Phyllis Southam listing eight other claims. Their filings also included two quitclaim deeds executed on August 22, 1996, by which Pedersen and Southam conveyed their claims to Richard Cahoon, the appellant. Upon determining that Cahoon aquired ownership of the 16 claims on August 22, 1996, the BLM found that the appellant did not qualify for the small miner exemption. *Richard W. Cahoon Family Limited Partnership*, 139 IBLA 323 (1997). The appellant contended that the quitclaim deeds were not recorded until after the exemption certificates were file and that the deeds were not effective until they were recorded. The Board held that Aa delay in recording the deeds would not have posponed the effective date of the transfer.@ Id at 325. It said that Athe transfer itself >will be deemed to have taken place on its effective date under state law.= Nevada=s recording statute requires recordation of conveyances in the appropriate county recorder=s office >to operate as notice to third persons,= but states that a conveyance >shall be valid and binding between the parties thereto without such record.= Nev. Rev. Stat. 111.315 (1995).@

The case of *George Marchuk*, 140 IBLA 64 (1997) involved two original locators who conveyed 13 claims to Nikolaj Marchuk and Paul Marchuk by quitclaim deed executed on August 30, 1997. On the same date George Marchuk and Paul Marchuk filed separate certifications for 1993 and 1994. The certifications filed by George Marchuk stated that he was the owner of 10 Federal mining claims and the certifications file by Paul Marchuk stated that he was the owner of the other three Federal claims. Then on February 18, 1994, BLM received two quitclaim deeds, which were both executed on February 18, 1994, convey Nikolaj=s interests to Paul and George. The concluded that the appellant was not entitled to the small miner exemption:

> * * * The joint owners of all 13 of these claims at that time were Nikolaj and Paul Marchuk, in the absence of a deed conveying the interest to Paul and George. Nothing shows that the ownership pattern asserted in the August 30, 1993, affidavits was correct. The February 18, 1994, quitclaims in the record were untimely to effectuate any change of ownership relevant to the small miner exemption, as they occurred long after the August 31, 1993, deadline. Further, the fact that no quitclaim deed establishing that pattern was executed until February 1994 confirms that Nikolaj and Paul Marchuk held more than 10 claims on August 31, 1993, the cut-off date established by the Act, and were therefore not entitled to a small miner exemption.

**Partnership Exceeds 10 Claims**

In *Richard W. Calhoon Family Limited Partnership*, 139 IBLA 323 (1997), the appellant contended that the family limited partnership Aincludes 4 parners, including 2 general partners, with 10% interest each and two Limited partners who own 40% interest each . These are individual, distinct interests. With a total of 16 claims, it is clear no participant has over ten claims.@ In rejecting this position because the partnership is a separate entity, the Board said at 325-26:

> Appellant=s argument concerning eligibility for the small miner waiver is unavailing for several reasons. The first reason why this argument will not prevail is that the partnership is not eligible for the waiver. The quitclaim deeds conveyed the claims not to the individual members of the partnership, but to the partnership as an entity, which as a result holds more than 10 claims. There is no evidence that the interest of each partner is limited to a certain number of specific claims, and accordingly, we conclude that the individual interest of each partner extends to all of the claims held by the partnership. Where a partnership as an entity is qualified to own claims, a partnership that owns more than 10 claims cannot qualify for the small miner exemption.
>
> More, the applicable statutory provision authorizes waiver of the claim maintenance fee for a claimant who certifies that Athe claimant *and all related parties* * * * held not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands.@ 30 U.S.C. 28(d)(1) (1994); *accord*, 43 CFR 3833.1-6(a)(1) (emphasis added). A Arelated party@ is defined as A(A) the spouse and dependent children (as defined in section 152 of Title 26), of the claimant; and (B) *a person who controls, is controlled by, or under common control with the claimant*.@ 30 U.S.C. 28(d)(2) (1994); *accord*, 43 CFR 3833.0-5(x) (emphasis added). A[T]he term control includes actual control, legal control, and the power to exercise control, through or by common directors, officers, stockholders, voting trust, or a holding company or investment company, or any other means.@ *Id*.; *accord*, 43 CFR 3833.0-5(y). Thus, the term Arelated parties may include a general partner who can exercise Acontrol@ or limited partners who are Aunder common control with@ a person who holds the right to transfer the claim.

**Plan Must Be Approved as of August 31, 1993**

In *Ronald E. Milar*, 133 IBLA 214 (1995), the Board considered a case where the appellant had a claim within a Wild and Scenic River Study Area. The BLM surface-management regulations (43 CFR 3809.1-4(b)(2) require a plan of operations rather than a notice be on file for the claimant to qualify for a small miner exemption. The Board stressed that is was not sufficient for the appellant to have a proposed plan on file, but instead, must be an approved plan as of August 31, 1993. The Board said at 217-218:

> To qualify for a small miner exemption, appellant needed to have his claim

Aunder [an] approved [plan] of operations@ on August 31, 1993. (Emphasis supplied.) 43 CFR 3833.1-6(a)(4) (1993). There is no doubt, as BLM held, that appellant did not have his claim under an approved plan of operations on August 31, 1993. Although he filed a plan for approval on that date, appellant could not reasonably have expected that BLM would approve the plan (and that his claim would therefore be Aunder an approved plan@) on the date it was filed, as the regulations grant BLM 30 days from date of receipt to analyze the proposal and to notify the operator of approval or changes and additions necessary to meet the requirements of the regulations.

In *Robert Limbert*, 135 IBLA 364 (1996), the appellant had filed his small miner exemption forms for the 1993 and 1994 assessment years, but did get his notice of intent to operate approved by the the U.S. Forest Service until January 10, 1994, and filed with BLM on the same day. The Board upheld the BLM decision rejecting the appellants 1993 and 1994 certificates of exemption because the appellant did not have his claim under an approved notice or plan on August 31, 1993. *Id* at 367. In *Lookout Mountain Mining & Milling Co*., 140 IBLA 17 (1997), the claimant filed notices of intent with the U.S. Forest Service on August 31, 1993. As the Board said 23-24:

> * * * Appellants could not reasonably have expected that USFS would review them and decide on that date whether or not plans of operations need by submitted, as the regulations grant USFS 15 days from date of receipt to analyze the notice. *See Ronald E. Milar*, 133 IBLA at 217-18. We do not accept Appellants= argument that USFS ruled on the acceptability of Appellants= submission orally before the deadline date. As a result, it cannot be said that the claims were under either a Notice or a Plan of Operations issued under 36 CFR Part 228 on the deadline date.

In *Diamond B. Industries, Inc*., 138 IBLA 50 (1997), the Board upheld a BLM decision finding a plan approved by the U.S. Forest Service on November 22, 1993, was not approved in time to qualify for the exemption. As the Board said at 52:

> A claimant such as appellant who seeks a small miner exemption for mining claims located on National Forest lands must have secured approval of a notice or a plan of operations issued under 36 CFR Part 228 on or before August 31, 1993. If the claimant does not meet this requirement for an exemption, mining claims are properly declared abandoned and void where no rental has been paid before the deadline date.

In *John E. Baxter*, 138 IBLA 129 (1997), the Board said that Aeven assuming that appellant could establish that he timely filed the 1994 exemption certificate, he has not alleged and the record fails to show that the claim was under a notice or plan of operations on August 31, 1993. In order to qualify for a small miner exemption, a mining claimant must be producing or exploring >under a valid notice or plan of operation.= 106 Stat. 1378-79. Appellant needed to have this claim under a notice or approved plan of operations on August 31, 1993.@ *Id*. at 131; *Also see David F. Matuszak*, 138 IBLA 206 (1997).

In *David B. Sinnott*, 141 IBLA 174 (1997), the Board remanded a case because BLM

determined the appellant=s operation was not in compliance with BLM regulations. However, documents in the case record indicated the issue was whether the appellant had a valid notice or plan of operation with the Forest Service. The Board said that ABLM must adjudicate the question whether, on the facts presented by Sinnott, he complied with applicable regulations governing mining plans of operations for claims such as his on lands administered by the Forest Service in 1993 and 1994.@ *Id.* at 176. The Board said at 176:

> If Sinnott=s operation was not in compliance with some Forest Service regulation governing the filing of mining plans of operation, *see* 36 CFR Part 228, BLM must cite the regulation violated and describe the nature of the violation, *see Leber Mining Co.*, [131 IBLA 275, 276-77 (1994)]. * * * [W]e therefore return this case file to BLM for determination whether, considering the information he has furnished, Sinnott had provided a valid notice or plan of his operations in 1993 and 1994 in compliance with the Act and Forest Service regulations requiring plans of operations for mining claims.

**If Fewer Than 10 Claims, Some Claims May Be Under Waiver And Some Under Rental**

In *Richard W. Taylor*, 136 IBLA 299, 302-303 (1996), the Board reviewed the regulatory provisions implementing the 1993 Appropriations Act to establish if a claimant who holds 10 or fewer claims was required to have all of the claims under a notice or plan of operations to qualify for a small miner exemption. The question was whether the claimant could qualify for a small miner exemption for those claims under a valid notice or plan of operations and pay rental fees for those which were not. The Board concluded that the regulations allowed a claimant holding 10 or fewer claims to qualify for a small miner exemption for claims subject to an approved plan of operations and to pay rental fees for claims not named in an approved plan of operation. The Board pointed out that there was Anothing in the 1993 Appropriations Act preventing a claimant holding 10 or fewer claims from paying rental on a portion of them and seeking an exemption on the balance. This act does not mandate that a claimant hold all of the claims as a group. some of the claims may be miles apart, or even in another state. So long as the aggregate number of claims is 10 or fewer, each claim should be considered separately.@ *Id*. at 302. *Also see Edgar C. Dunlap*, 139 IBLA 224 (1997); *Richard W. Taylor*, 139 IBLA 231 (1977); *James R. Ragsdale*, 137 IBLA 243 (1996).

In *Arthur H. Farthing*, 141 IBLA 163 (1997), the appellant had filed a plan of operation that only covered three of his six claims. The Board held that only the three claims under the plan of operation qualified for the small miner exemption.

**Claims Under Rental Fee One Year and Waiver the Following Year**

In *Fred Holbrook*, 137 IBLA 335 (1997), the claimant filed a small miner exemption on August 31, 1993 for two claims for the 1994 assessment year, and paid the rental fees for the 1993 assessment year. In reversing the BLM decision voiding the claims, the Board held that a miner holding 10 or fewer claims could also elect to pay rental fees for some of the claims in one assessment year and seek and exemption for the same claims in the ensuing assessment year. *Id*. at 338.

**Requirements for Exemption Filed for 1992-93 and 1998-94 Assessment Years**

In *Edwin Evans* 132 IBLA 105 (1995), the Board set forth the 4 basic requirements for a claimant to qualify for a small miner exemption in a filing to be made on or before August 31, 1993:

1. A...the applicant must hold 10 or fewer mining and millsite claims on Federal Lands.@

2. A...the applicant, operating >under a valid notice or plan of operation,= must either conduct exploration for possible valuable mineralization on or produce not less than $1,500 and not more than $800,000 gross revenues per year from his claims.@

3. A...the applicant must have less than 10 acres of unreclaimed surface disturbance in connection with these operations.@

4. A...the applicant....is required to file a separate certificate by August 31, 1993, for each of the two assessment years (ending September 1, 1993, and ending September 1, 1994) for which he is seeking an exemption.@

In the *Evans* case, the appellant had filed with BLM on August 18, 1993, for an exemption from payment of rental fee for the assessment year beginning September 1, 1992, and ending September 1, 1993. The Board identified two fatal problems with the filing: (1) the certificate did not indicate that the claims were under a notice or plan of operations; and (2) no certificate of exemption was filed for the assessment year beginning September 1, 1993, and ending September 1, 1994. The Board said at 106:

> In the absence of payment of the annual rental fee, the statute and the implementing regulations clearly required a timely filing (by August 31, 1993, of a certificate of exemption for both assessment years (ending September 1, 1993, and September 1, 1994), as well as a reference to the notice or plan of operations under which exploration was conducted.

Failure of a claimant to satisfy any one of the four requirements mentioned above to support exemptions filed for the 1992-93 and 1993-94 assessment years will constitute abandonment of the claim. *See Richard Shreeves*, 132 IBLA 138 (1995). In *Lookout Mountain Mining & Milling Co.*, 140 IBLA (1977), the Board said at 20:

> It is established that an applicant for a small miner exemption from payment of rental fees under the Act was required to file separate complete certified statements for each of the assessment years (ending September 1, 1993, and September 1, 1994) for which the exemption was claimed, by August 31, 1993. *Richard L. Shreves*, 132 IBLA 138, 139 (1995); *Edwin L. Evans*, 132 IBLA at 106. This requirement is explained by the

fact that a claimant may elect to file for exemption for 1 year and pay the rental fee for the other. 43 CFR 3833.1-5(e) (1993).

The facts of the various appeals vary. We hold that, in the cases where complete certificates of exemption were not filed for both assessment years, there was no claim of exemption made, and the small miner exemption was lost. The Bureau correctly determined in those cases that, as a matter of law, the mining claims then became abandoned and void for failure to pay annual rental fees owned for the 1993 and 1994 assessment years by August 31, 1993.

In *Janet Cochran*, 140 IBLA 391 (1997), the claimants timely filed a certification of exemption for the assessment year beginning September 1, 1993, and ending September 1, 1994. However, no certification of exemption was filed for the assessment year ending September 1, 1993. The Board held that A[i}n the absence of payment of the annual rental fee, the statute and the implementing regulations clearly require a timely filing {by August 31, 1993) of a certificate of exemption for each of the assessment years (ending September 1, 1993, and September 1, 1994).@ *Id.* at 392.

**Claim Located at End of Assessment Year and Recorded the Following Year**

If a claimant locates a claim near the end of an assessment year and timely records it with the BLM during the following assessment year, rental for both assessment years must be paid at the time of recordation. In order to qualify for a small miner exemption for the following year, the claimant must both record the claim and file the exemption for on or before August 31 of the calender year the claim was located.

In *Bonnie M. Brown*, 132 IBLA 393 (1995), the claimant located the claim on August 27, 1993 (near the end of the 1992-93 assessment year), and filed a notice of location for the claim with BLM on October 6, 1993 (after the beginning of the 1993-94 assessment year). The Board assessed her situation at 346-47:

> ....appellant was required to pay both a $100 rental fee for the 1992-93 assessment year in which the claim was located and a $100 rental fee for the 1993-94 assessment year on the date of filing the notice of location, i.e., October 6, 1993 (not on August 31, 1993).
>
> * * *
>
> Thus, in order to pursue an exemption for the 1993-94 assessment year, a claimant who located a claim on August 27, 1993, had to do three things on or before August 31, 1993: (1) record the claim with BLM, (2) pay the rental fee required by 43 CFR 3833.1-5(a), and (3) file the certificate of exemption for the 1993-94 assessment year.
>
> By waiting until October 6, 1993, to file her claim for recordation with BLM, appellant bypassed any opportunity to file for an exemption for the 1993-94 assessment year. Accordingly, she was required to file the necessary rental fees for both assessment years on the date of filing for recordation.

**Deferment of Assessment Work under the Rental Fee Statutes**

A deferment of assessment work can only be filed by a claimant who owns 10 claims or fewer. In *Clay Worst*, 128 IBLA 165 (1994), the Board said:

> The regulations promulgated to implement the Act provide (at 43 CFR 3833.1-7) for filing petitions for deferment of assessment work. Worst was therefore entitled to file, as he did, a petition for deferment of assessment work in order to avoid the rental, provided he was a small miner. *See* 58 FR 38200 (July 15, 1993). Nonetheless, because he held more than 10 claims, he was not a small miner as that term is defined by regulations implementing the Act. Not being entitled to claim that status because of the number of claims held by him, his petition was properly denied.

**Deficiency in Exemption Form**

In *William C. Harrison*, 130 IBLA 225 (1994), the claimant filed both exemption forms but entered no information concerning his operating plan. The Board said:

> Where a timely certified statement is filed, but there is an unintentional failure to file all of the information required by that regulation, BLM is required to notify the claimant of the deficiency and provide 30 days from receipt of the notice within which to file the requested information. Failure to file the information within the time allowed results in a conclusive presumption of abandonment of the mining claims, millsites, or tunnel sites.

In *John C. Schandelmeier*, 138 IBLA 36 (1997), the appellant had only made timely submission of one small miner exemption form despite the requirement that forms be submitted for both the 1993 and 1994 assessment years. A single form that indicated that it included both years would represent a curable defect. Where a single form did not indicate that it was for both years, the failure to submit a separate form for the second year was not a curable defect. *Id*. at 39. However, in *Thelma C. Satrom*, 138 IBLA 180 (1997), the appellant timely filed a Certification of Exemption, but failed to include the assessment year in which the exemption from payment was being sought. The Board said at 181:

> Although claimants filed the exemption document on time, they unintentionally failed to file the complete information required in 43 CFR 3833.1-7(d). Specifically, they failed to specify the assessment year or years that the exemption request intended to cover. Under 43 CFR 3833.4(b), BLM should have provided claimants notice calling for such information and allowed 30 days for compliance. Only after the expiration of that period without compliance could BLM properly issue a decision declaring the claims abandoned and void.

The Board=s holding in *Schandelmeier* appears to be inconsistent with that in *Satrom*. In *Schandelmeier*, the Board said a single form with no information indicating it was for both years was not a curable defect; whereas, in *Satrom* a single form with no information indicating it was

for both years was curable. Apparently sometime after the August 31, 1993 filing date, Satrom filed an affidvit stating she wanted the exemption for two years.

In *W.H. Snavely*, 141 IBLA 64 (1997), the BLM found the appellant=s claim void because he did not respond to BLM=s inquiry within the 30-day timeframe. However, the Board found that Snavely=s waiver application Awas an accurate and complete statement of the ownership of the claims at issue, although responses provided by Snavely on the waiver form seemed inconsistent with earlier statements on the forms used to record his location notices. Because Snavely has shown on appeal that his waiver request conformed to requirements of the Act and was not inconsistent with prior statements furnished on earlier forms submitted to BLM, we must set aside the finding that the claims at issue became abandoned because he was late in explaining his situation and remand the case files to BLM to permit adjudication of the information provided by Snavely on appeal.@ *Id*. at 66.

**Abandonment Under Rental Regulations and Forfeiture Under Maintenance Fee Regulations**

In *Great American Gold Co.*, 141 IBLA 170 (1997), the BLM erroneously declared claims abandoned and void for failure to pay the maintenance fee. Under the rental fee regulations, claims are declared abandoned for failure to pay the fee or file the small miners waiver; however, Aunder 43 CFR 3833.4(a)(2), the failure to pay the maintenance fee or file the waiver certification within the time prescribed does not constitute an abandonment of the claims; instead, such a failure >shall be deemed conclusively to constitute a forfeiture= of the claims.@ *Id.* at 172.

**Grace Period for Maintenance Fee Filings Is Not Retroactive to Rental Fee Filings**

In Kathleen K. Rawlings, 137 IBLA 368, 372 (1997), the Board explained the history of the 15-day grace period, and held that the grace period available under maintenance fee filings was not available under the rental fee filings and could not be applied retroactively to the rental fee regulations:

> BLM declared the rental fees untimely filed because, under 43 CFR 3833.0-5(m) (1993), the regulation in effect at the time of the BLM decision, the fees had to have been received and date stamped by the proper BLM office on or before August 31, 1993. Because the fees were untimely, BLM held the claims were conclusively deemed to be abandoned and void by operation of law.
>
> Following careful review of the parties= submissions, we conclude that we may not apply the grace period provided for in 43 CFR 3833.0-5(m) (1994) to appellants= rental fees filed on September 3, 1993.
>
> In this case, there can be no retroactive application of 43 CFR 3833.0-5(m) (1994) to rental fee filings. In 1993, the Department made a policy choice not to extend the grace period found in 43 CFR 3833.0-5(m) to rental fee filings made under the 1992 Act. It did

so by expressly providing that rental fee filings would not have the benefit of the 15-day grace period established in the 1993 rulemaking. 58 FR 38197 (July 15, 1993). When the Department again amended 43 CFR 3833.0-5(m) in 1994, it removed the rental fee regulations from the Code of Federal Regulations and agin made a policy choiceBto apply the grace period to maintenance fee filings under the 1993 Act.

Regardless of the similarities between the 1992 and 1993 Acts, they are separate acts of Congress and the Department promulgated separate sets of regulations to implement each act. In such circumstances, we may not legally apply, retroactively, a regulatory provision promulgated to provide a benefit for maintenance fee filings under the 1992 Act. No previous decision of the Department provides precedent for doing so.

* * * * * * *

It is important to recognize that, prior to 1993, the grace period contained in 43 CFR 3833.0-5(m), defining Afile@ or Afiled,@ was specifically limited only to FLPMA annual filings under 43 CFR 3833.2 (i.e., affidavits of assessment work/notices of intent). For all other filings, file or filed was defined as Abeing received and date stamped by the proper BLM office.@ See 43 CFR 3833.0-5(m) (1982). The 1993 amendment of 43 CFR 3833.0-5(m) merely shortened the grace period for FLPMA annual filings.

A number of cases have been appeal to the IBLA where the claimants mailed certificates of exemption for rental fees or the rental fees in letters postmarked on or before August 31, 1993, but were not received and date stamped by the BLM until September 1, 1993 or later. In all cases the Board upheld the BLM decision that the claims were abandoned and void, and that the 15-day grace period available for maintenance fees would not be retroactive to rental fee filings. *Walter Eager*, 138 IBLA 45 (1997); *Bart Cannon*, 138 IBLA 194 (1997; *Michael Nemeth*, 138 IBLA 238 (1997); *Bart Cannon*, 138 IBLA 242 (1997).

**Maintenance Fee Filing Received After End of Grace Period**

In *Bellmetal Enterprises*, 140 IBLA 76 (1997), the appellant sent his 1995 maintenance fees to BLM by Express Mail on August 27, 1994. On September 29, 1994, BLM received the Express Mail envelope containing the maintenance fees and noted that the postmark was clearly dated August 27, 1994. The Board upheld the BLM decision that the filing was not timely because it was not received within 15 calendar days subsequent to the deadline filing date.

**Post Mark Date Later Than Actual Date of Mailing**

In *Barodynamics, Inc*., 135 IBLA 352 (1996), the appellant submitted evidence sufficient to persuade the Board that it did transmit to BLM assessment work notices in an envelope postmarked December 23, 1992. Due to a post office error, the envelope was returned. When the envelope was returned, it was not postmarked until January 6, 1993. AGiven the admission on the part of the post office that its error was the direct cause of the return of appellant=s timely postmarked envelope and that the filing was received within the grace period specified in the regulation, we believe that the proper course is to direct BLM to accept the filings as timely and

to reinstate the above-referenced mining claims.@

**Certificates for Exemption Filed Before Due Date in BLM Post Office Box**

In *John & Marlene Chrissinger*, 139 IBLA 32 (1997), the claimants mailed their exemption certificates to BLM=s post office box in Billings, Montana on August 27, 1993,Bfour days before the August 31, 1993, deadline. The Board presumed, Ain the absence of any evidence to the contrary, that, in the ordinary course of the mails, the certificates travelled from Reno to Billings, and were placed in BLM=s post office box at least before the State Office closed for filing at 4:30 p.m. on August 31, 1993, a Tuesday. Further, this was clearly the case since the certificates were picked up and date-stamped as received by BLM at 9 a.m. on September 1, 1993, before any additional mail would have been delivered to the post office and placed in BLM=s box on that day. Moreover, because the certificates were available for pick-up by BLM during the hours that its office was open for filing on August 31, 1993, we conclude that they are deemed to have been filed with BLM on that date, and thus the Chrissingers satisfied the Appropriations Act and its implementing regulations.@ *Id.* at 36.

The Board pointed out that the *Chrissinger* case is controlled by the decision in *Washington Chromium Co.*, 60 IBLA 378 (1981). In *Washington Chromium*, the evidence of assessment work was not received and date-stamped by the BLM and thus Afiled@ with BLM until December 31, 1980, 1 day late. However, the Board reversed BLM because Athe record demonstrated that the evidence of annual assessment work was mailed, properly addressed and with postage properly prepaid, from Auburn, Washington, to BLM=s regular post office box in Portland, Oregon, on December 27, 1980, a Saturday, and was presumed in the ordinary course of the mails, absent any evidence to the contrary, to have been placed in that box before 4:15 p.m. on December 30, 1980, a Tuesday, *i.e.*, during the time that the BLM office to which the mail was addressed was open for filing. Washington Chromium Co., 60 IBLA at 380. In these circumstances, we further held that the evidence was deemed to have been timely filed with BLM on December 30, 1980, regardless of the fact that BLM did not actually take delivery until the next day, beause it was available for pick-up by BLM during the hours that its office was open for filing on that date. *Id.* at 381.

**Assessment Work Affidavit Must Be Filed for Exemption**

In *Arlin D. Walkup*, 137 IBLA 259 (1996), the claimant timely filed a certification of exemption from the payment of rental fees for the 1993 assessment year covering nine mining claims. However, because he failed to file an affidavit of assessment work for the 1993 assessment year with BLM on or before December 30, 1993, as required by section 314 of the Federal Land Management and Policy Act of 1976, his claims were declared abandoned and void. *Also see Melvin J. Young*, 135 IBLA 336 (1996); *Walter J. Yahn*, 134 IBLA 387 (1996). In *Lee Jesse Peterson*, 133 IBLA 381, 384 the Board held:

> The Act and implementing regulations make clear that in lieu of paying the rental fee, a miner claiming the exemption must file the affidavit of assessment work performed with the proper state office of BLM on or before December 30. Having properly filed the certification of exemption from payment of the rental fees otherwise required by the Act,

> [claimant] was responsible for performing the assessment work required by the Mining Law of 1872, 30 U.S.C. 28-28e (1988), and for meeting the filing requirements of section 314 of FLPMA, 43 U.S.C. 1744(a) and (c) (1988). 106 Stat. 1378; 43 CFR 3833.1-7(a), (b), and (d). Section 314(c) of FLPMA provides, inter alia, that failure to file evidence of annual assessment work or a notice of intention to hold Ashall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner.@

In *Dale J. LaCrone*, 135 IBLA 203 (1996), the claimant filed a waiver certification for the assessment year beginning September 1, 1993; however, he failed to file an affidavit of assessment work by December 30, 1994. The claimant contended that he was excused from filing the affidavit because the Certificate of Exemption constituted a notice of intent to hold the claims. The Board said at 207-208:

> LaCrone=s argument fails because the regulations expressly require a small miner who claims a waiver from paying the maintenance fee to perform assessment work and file the affidavit of assessment work in accordance with section 314 of FLPMA and 43 CFR 3833.2.
>
> A notice of intent to hold a mill or a tunnel site would otherwise be required, *i.e.*, if a certification waiver is not filed, because there is no requirement that the owner of a mill or tunnel site or a mining claim located the previous assesssment year perform annual assessment on such sites. *See* 30 U.S.C. 27, 28, and 42 (1994). The regulation relieves the claimant of the requirement to file a notice of intention to hold a mill site or tunnel site if it is covered by a certification waiver.
>
> * * * However, the implementing regulations make clear that they contemplate allowing a small miner only to file an affidavit of assessment work. The regulations, therefore, purport to eliminate the option of filing a Anotice of intention to hold@ for mining claims if annual labor is required during the assessment year ending in the calendar year in question and a waiver of the maintenance fee has been granted,

**Failure to File: Claims under Patent Application**

A claimant is only excused from compliance with the rental fee requirement if he or she has been issued a final certificate by the BLM. *Cyrus L. Colburn, Jr.* 130 IBLA 314, 318 (1994). A $450 service charge for filing a mineral patent application under 43 CFR 3862.1-2 cannot be refunded after claims are declared abandoned and void under section 314 of the Federal Land Policy and Management Act of 1976. *William R. Smith*, 129 IBLA 384 (1994).

**Statutory Abandonment under P.L. 102-381 Compared to Sec. 314 of FLPMA**

In *Lee H. and Goldie E Rice*, 128 IBLA 137 (1994), the Board discussed the consequence

of failure to satisfy the rental fee requirement of Public Law 102-381 and compared it to section 314(c) of the Federal Land Policy and Management Act. 43 U.S.C. 17448 (1988). The Board stated at 141:

> Responsibility for satisfying the rental fee requirement of the Act resides with the owner of the unpatented mining claim, as Congress has mandated "that failure to make the annual payment of the claim rental fee as required by this Act shall conclusively constitute an abandonment of the unpatented mining claim, mill or tunnel site by the claimant" (106 Stat. 1379). This language used by Congress is nearly identical to that found in section 314(c) of FLPMA, 43 U.S.C. 1744(c) (1988), which provides that the failure to record the notice of location of a mining claim, millsite or tunnel site with BLM or file evidence of annual assessment work or a notice of intention to hold "shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner."
>
> The Board has consistently held that responsibility for complying with the recordation and filing requirements of FLPMA rests with the owner of the unpatented mining claim or millsite or tunnel site, as Congress mandated that failure to file the proper documents in the proper offices within the time periods prescribed in section 314 of FLPMA would, in and of itself, cause the claim or site to be lost. The Supreme Court upheld the constitutionality of section 314 of FLPMA, concluding that a mining claim for which timely filings are not made is extinguished by operation of law notwithstanding the claimant's intent to hold the claim. *United States v. Locke*, 471 U.S. 84, 97 (1985). Thus, section 314 of FLPMA is self-operative, and a claim must be deemed abandoned when an annual filing is not timely received. *Ptarmigan Co.*, 91 IBLA 113, 118 (1986), *Aff'd Bolt v. United States*, 994 F.2d 603 (9th Cir. 1991). Congress did not provide for waiver of the section 314 requirements, and the Board has held that the Department is without authority to excuse lack of compliance, to extend the time for compliance, or to afford any relief from the statutory consequences. *Lynn Keith*, 53 IBLA 192, 196, 88 I.D. 369, 372 (1981).
>
> We must assume that Congress was aware of the interpretation that this Department and the courts had given to section 314 of FLPMA and that it intended the present language under consideration to be given the same construction. Thus, there is no reason to deviate from this interpretation in this case. Accordingly, where a mining claimant fails to qualify for a small miner exemption from the rental fee requirement, failure to pay that fee in accordance with the Act and regulations results in a conclusive presumption of abandonment. In addition, the Department is without authority to excuse lack of compliance with the rental fee requirement, to extend the time for compliance, or to afford any relief from the statutory consequences, and the Board may not consider special facts or provide relief in view of mitigating circumstances.

**1992 and 1993 Acts Are Construed Separately**

In *Kathleen K. Rawlings*, 137 IBLA 368, 372 (1997), the Board held that the 1993 and 1992 Acts, despite their similarities, are separate statutes implemented by separate regulations which must be separately construed. In *Jim F. Rusher*, 141 IBLA 265, 267 (1997), the Board also

emphasized that compliance with the 1992 Act does not imply compliance with the 1993 Act, nor do the two statutes conflict, because they cover different assessment years.

**Insufficient Annual Filing Fees to Cover All Claims**

After January 1, 1991, there can be no timely annual filing without the accompanying fee. Where a claimant has insufficient fees to cover all the claims in his annual filing, he should be given an opportunity to choose the claims for which the timely service charge was submitted. *Norman Filip*, 124 IBLA 122 (1992). In *Floyd Moody*, 52 IBLA 153 (1981), the Board applied this same rule to a claimant who had insufficient recordation fees to cover new location notices.

**Fee Is Reasonable Condition for Claim Retention**

A[An] assertion that the statute does not apply to his vested rights was rejected by the court in *Kunkes v. United States*, 78 F.3d 1549 (Fed. Cir. 1996), *aff=g* 32 Fed. Cl. 249 (Fed. Cl. 1994). The appeals court upheld the lower court=s application of *United States v. Locke*, 471 U.S. 84 (1985), and *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), to find that the fee was a reasonable condition on the retention of unpatented mining claims and application of the statute to find mining claims abandoned and void did not constitute a taking of the claims.@ *Arthur H. Farthing*, 141 IBLA 163, 165 (1997.

**No Initial Refiling Under Maintenance Fee Act If Filed for Rental Fee Exemption**

Under 43 CFR 3833.1-7(a), claimants who had timely filed for a rental fee exemption before August 31, 1993, were not required to make an initial refiling under the Maintenance Fee Act if the claim ownership situation had not changed in the interim. In *Alamo Ranch Co., Inc*., 135 IBLA 61, 76 (1997), the appellant did not qualify because he had paid the rental fees for fiscal years 1993 and 1994, rather than submit an exemption certification under the Rental Fee legislation. Therefore, 43 CFR 3833.1-7(a) will not benefit a claimant unless he or she had filed for a rental fee exemption before August 31, 1993.

**Rental Fee Challenged in Nevada Court**

In the Federal District Court of Nevada, two mining claimants challenged the annual rental fee of $100 per claim for the 1992 and 1993 assessment years required by the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1993 (Public Law No. 102-381; 106 Stat. 1374). On September 28, 1994, Judge Lloyd D. George granted the Federal Government=s motion for Summary Judgment in *Presley v. United States*, Civ. No. CV-S-93-837 LDG (LRL) (D. Nev.). The claimants (plaintiffs) alleged that ABLM=s final rule implementing the rental fee requirement violates the National Environmental Protection Act (NEPA) because the BLM did not prepare either an environmental impact statement (EIS) or an environmental assessment (EA).@ The claimants also contended that Athe annual rental fee rules are procedurally defective, that they cause a taking of private property without just compensation, that they violate the due process of women and children, and they cause a tax on

private property. A Furthermore, they asserted that the BLM did not prepare a takings implication assessment as required by Executive Order #12630. The Court ruled that the A[d]efendants have set forth meritorious arguments showing that each of these claims fails as a matter of law.@

The Court found that the Plaintiffs lack standing to challenge the rental fee rules under NEPA because they have not alleged losses within the zone of interests protected by NEPA. Furthermore, the Court said that ACongress is not precluded from requiring the payment of a rental fee in lieu of assessment work as a condition of demonstrating continued serious intent to mine an unpatented mining claim. Likewise, the abandonment provision does not constitute a taking. Rather, as purpose of the rental fee is to determine serious intent to mine a claim, the failure to pay the rental fee shows a lack of that intent.@

**Consequences of Failure to Comply with BLM Request for Information**

In *Melvin Helit*, 146 IBLA 362 (1998), the Board admonished the BLM for retroactively changing the consequences to the claimant for failing to comply with an information request. In this case the changes increased the severity of the penalty for noncompliance. The Board pointed out that the BLM should reissue its demand, and advise the claimant of the increased consequences should there be a failure to comply. The Board said at 366-67:

> This Board has, on numerous occasions, affirmed the authority of BLM officials, acting within the scope of their delegated responsibilities, to require the filing of information or the taking of other actions within a specified time-frame and to provide penalties for the failure to do so. *Citation Omitted*. But a critical element in enforcing the penalties is that the party was informed of exactly what the consequences might be expected if he or she failed to comply with the BLM request. One would, after all, expect that the likelihood of a favorable response would increase as the severity of penalties for a failure to respond rose. In view of this expectation, what cannot be permitted is the imposition of penalties upon a failure of compliance which are harsher than those threatened in the compliance notice. While the initiation of a mining contest could clearly be seen as an adverse action, it differs considerably in impact from a decision rejecting recordation of the claim and declaring the claim null and void. When BLM realized that it had erred in its May 22 notice in delineating the consequences of a failure to comply, it was required to reissue another notice if it intended to increase those consequences. It could not, in effect, retroactively increase the penalties attendant upon a failure of compliance.

**Proper Use of Recordation Information**

n *Melvin Helit*, 147 IBLA 45 (1998), the BLM had improperly rejected a claim for recordation. In setting aside the decision, the Board reminded the BLM that Athe thrust of the recordation statute was informational; it was not intended to serve as a mechanism for enforcing substantive provisions of the mining laws.@ The Board further said at 49:

> This, of course, does not mean that BLM cannot use information acquired through the recordation process as a predicate for its management actions and decisions. It simply

means that substantive problems relating to thos locations which have been properly recorded with BLM do not bring compliance with the recordation provisions into play. * * * The fact that, as indicated below, the claim possesses fatal flaws should not be metamorphosed into a finding that the claim was not properly recorded. Accordingly, we set aside the rejection of the claim=s recordation

**Regulation Amended While Appeal Pending**

A mining claim recordation regulation which is amended while the matter is pending may be applied in its amended form provided that it benefits the affected party and there are no intervening rights which will be adversely affected. In *Robert D. Thompson*, 140 IBLA 70, 75 (1997), the Board said:

> These regulations were not, of course, in effect, either when the annual filing was initially made or when the matter was adjudicated by BLM. Nevertheless, the Board has frequently noted that amended regulations may be applied retroactively Awhen to do so would benefit an affected party and not prejudice the rights of third parties or the interests of the United States.@ *Kathleen K. Rawlings*, 137 IBLA 368, 372 (1997)

**BLM Should Request Board to Set Aside Decision if Original Basis Cannot Be Sustained**

In *Robert D. Thompson*, 140 IBLA 70, 74 (1997), the Board admonished the BLM for not requesting that it set aside a decision where the original basis of the BLM decision can no longer be sustained. The Board said at 74:

> In the future, we would hope that, when BLM discovers, after a notice of appeal has been filed, that the original basis of its decision cannot be sustained, it would request the Board to set aside that decision and return jurisdiction over the matter to the State Office, even in those situations in which the State Office believes that sufficient, independent grounds exist to reiterate the conclusions reached in its original decision.

**Estoppel Based on Concealment of Material Fact**

In *Rudy Sutlovich*, 139 IBLA 79 (1997), the claimant filed a small miner exemption certificate for the assessment year beginning at noon September 1, 1993, but did not file a separate small miner exemption certificate for the assessment year beginning at noon September 1, 1992. Sutlovich filed the certificate on August 12, 1993, and on August 17, 1993, the State Office sent Sutlovich a form letter, the first sentence of which stated: AIn reviewing your certification of exemption received on August 12, 1993, the following information IS NEEDED to complete your filing.@ The form letter then enumerated 12 items. Before each item appeared a blank space, in which the State Office could place an AX,@ if it needed that information. The State Office checked only one item on the notice sent to Sutlovich, No. 4. That item stated:

AIDENTIFY THE APPROVED Notice or Plan of Operations (approval must be dated on or before August 31, 1993) by its assigned serial number issued by the Forest Service Ranger District or BLM District Office.@ No check mark appeared on the form for item No. 1: AA separate certification MUST BE FILED FOR EACH ASSESSMENT YEAR.@ A return receipt in the file show that Sutlovich received the State Office=s August 17 letter on August 21, 1993. The Board said at 82:

> * * * [I]n this case, we find that BLM=s for letter constitutes an Aoffical decision@ which misled or concealed material facts from Sutlovich. Having taken the action of advising Sutlovich how to perfect his filing, it was incumbent upon BLM to disclose all items required to be corrected. By failing to do so, BLM concealed a material fact from Sutlovich and induced him not to file a certification of exemption for the 1993 assessment year.
>
> This is not a situation where estoppel will result in Sutlovich being granted a right not authorized by law. Rather, this is a case in which Sutlovich could clearly have timely filed the required document, but for BLM=s concealment of a material fact. In such circumstances, estoppel is properly invoked to prevent BLM from declaring the claim abandoned and void for failure to file a certification of exemption for the 1993 assessment year.

*Leitmotif Mining Co.*, 124 IBLA 344, 346 (1992) is a case similar to the *Sutlovich* case. The Nevada State Office had issued a decision rejecting for recordation notices of location because they were not filed in the proper BLM office as required by FLPMA and the regulations. Leitmotif located the claims on December 3, 1990, and, on January 24, 1991, in accordance with oral instructions from BLM, filed the notices of location with the Nevada State Office. In a letter to Leitmotif, dated January 28, 1991, the Nevada State Office explained that it was returning the certificates without taking any action on them because they had been accompanied by a post-dated check to cover the recordation fees. The State Office also told Leitmotif it still had Auntil March 4 to resubmit its certificates along with a properly dated check in order for them to be timely filed.@ Leitmotif refiled its notices with the Nevada State Office with the proper payment. However, nine months later, the Nevada State Office issued the decision rejecting the notices of location for recordation. The Board held that Leitmotif was ignorant of the true facts, since the regulations governing the recording of mining claims with BLM were ambiguous regarding where recordation filings were to be made. The Board also ruled that BLM=s January 28, 1991, letter constituted an Aofficial decision@ and Leitmotif had relied on it to its detriment.

**Stay May Be Dissolved If No Likelihood of Success**

A stay of a BLM decision may be dissolved upon a showing that the claimants have no likelihood of success on the merits of their pending appeal and there is no likelihood of injury to them if the stay is dissolved. *Carol E. Shaw*, 136 IBLA 84 (1996). In *Carol E. Shaw, supra* at 87-88, the Board dicusses its autority to issue, modify, or dissolve stays of BLM decisions and the standards followed by the Board in deciding whether to grant a stay:

In *David L. Burton*, 11 OHA 117 (1995), the Director, Office of Hearings and Appeals, found that the Interior Board of Land Appeals posesses authority under the general grant of authority from the Secretary at 43 CFR 4.1 to issue, modify, or dissolve stays of BLM decisions during the pendency of an appeal before the Board without regard to the time limitation imposed by 43 CFR 4.21(b) (4). 11 OHA at 120. This authority to administer stays of decisions pending appeal, the Director found, must be flexible enough to permit the Board to adjust to changed circumstances that become known during an appeal: AWhen circumstances change, there must be a corresponding ability [by IBLA] to respond.@ 11 OHA at 128. Such a response is required here. Nonetheless, the 45-day limitation on Board action set by the general stay regulation at 43 CFR has now passed, and direct application of the rule is therefore problematic, as the *Burton* decision points out. The test for stay issuance established by 43 CFR 4.21(b) restates standards generally followed by this Board in deciding whether to grant a stay in such cases. *See Jan Wroncy*, 124 IBLA 150, 152 (1992); *Marathon Oil Co.*, 90 IBLA 236, 245, 246 (1986). This test, borrowed from Federal court cases dealing with preliminary temporary injunctions, requires consideration of likelihood of success on the merits, relative harm to the parties, possibility of irreparable harm, and the public interest, as factors relevant to stay issuance. *Compare Marathon Oil Co.*, and *Jan Wroncy, supra,* with 43 CFR 4.21(b), where the same four standards are invoked. This four-part test requires that Aa party must demonstrate either (1) likelihood of success on the merits and a possibility of irreparable injury, or (2) the existence of serious questions on the merits and a balance of hardships tipping in its favor.@ *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992). We apply this test in deciding whether to continue the stay previously issued in this case; in doing so, we first consider whether the record before us shows appellants have a probability of success on the merits of their appeal.

# 13. MINERAL DISCOVERY

## MINERALS NEVER LOCATABLE

### Introduction

Even before the Materials Act of 1947 and the Act of July 23, 1955, were enacted, many minerals were never locatable even though they could be marketed at a profit. In fact the Materials Act of 1947 was passed to provide a means to dispose of them. Material in this category includes ordinary deposits of clay, limestone, fill material, etc. Nonlocatable minerals generally have a normal quality and a value for ordinary uses. In *Holman v. State of Utah*, 41 LD 314 (1912), the question of whether clay was a locatable mineral was considered by the Department:

> It is not the understanding of the Department that Congress has intended that lands shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country...

**Salable Minerals**

The Materials Act of July 31, 1947 (61 Stat. 681), amended by the Acts of July 23, 1955, (PL-167; 69 Stat. 367) and September 28, 1962, authorized that certain mineral materials be disposed either through a contract of sale or a free-use permit. This group of mineral materials, commonly known as "salable minerals" includes, but is not limited to petrified wood, sand, stone, gravel, pumice, pumicite, cinders and clay in public lands of the United States. The Materials Act of 1947 was passed to provide authority to the United States to dispose of those minerals that have value for some purpose but were never locatable under the Mining Law of 1872.

**List of Minerals Never Locatable**

In *U.S. v. Bienick*, 14 IBLA 290, 297-298 (1974), Judge Stuebing gave a good summary of cases in which minerals used for specific purposes were held to be not locatable:

> The majority opinion quite correctly states that "not all materials which can be removed from the earth and sold at a profit are locatable under the mining law." Within the context of the mining law, the term "mineral" has never been construed to mean all substances which are not "animal" or "vegetable" in character. Such a division "would be absurd as applied to a grant of land, since all lands belong to the mineral kingdom." *Northern Pacific Ry. Co. v. Soderberg*, 188 US 526, 530 (1903). There are numerous cases involving specific examples of materials which have been held to be not locatable under the general mining law. Among these are common brick clay, *Dunluce Placer Mine*, 6 LD 761 (1888); *King v. Bradford*, 31 LD 108 (1901); *U.S. v. Mattey*, 67 ID 63 (1960); *U.S. v. Gunn*, 7 IBLA 237, 79 ID 588 (1972); peat, peat moss or sedge peat, *U.S. v. Lawrence*, Civil No. 648-B (D. Calif, March 13, 1941); *U.S. v. Toole*, 224 F. Supp. 440 (1963); common or inferior limestone "for building of levees or railroad embankments or filling up low places," *Holman v. Utah*, 41 LD 314 (1912); *Gray Trust Co. (on rehearing)* 47 LD 18 (1919); stalactites, stalagmites, geodes, crystalline deposits and formations valuable as natural curiosities, *South Dakota Mining Co. v. McDonald*, 30 LD 357 (1900); minerals held in solution in springs and other waters (other than saline), *Pagosa Springs*, 1 LD 562 (1882); soil containing "trace elements" of minerals for use as agricultural additive; *U.S. v. Toole, supra*; "blow-sand" used for agricultural and horticultural purposes, *Solicitor's Opinion* M-36295 (August 1, 1955); *U.S. v. Jaramillo*, A-28533 (February 6, 1961); common rock for "filling purposes" *Solicitor's Opinion* M-36295, *supra*; *Holman v. Utah, supra*; clay used as mud for facial cosmetics, *U.S. v. Springer*, 8 IBLA 123 (1972); fine, flour-like earth having some of the properties of

pumicite, but characterized as only "a type of dirt," *U.S. v. Pulliam*, 1 IBLA 143 (1970), *aff'd., Pulliam v. U.S.*, Civil No. 71-649 (D. Ariz. filed April 13, 1973); clay sold for use as an additive to cattle feed but not distinguishable from common clay, *U.S. v. O'Callaghan*, 8 IBLA 324, 79 ID 689(1972); a Amine" deriving revenue only through paid admission of persons desiring to breathe radon gas released by decaying uranium and said to have therapeutic value, *U.S. v. Elkhorn Mining Co*., 2 IBLA 383 (1971), *aff=d., Elkhorn Mining Co. v. Morton*, Civil No. 2111 (D. Mont., filed January 19, 1973); sandstone used as fill for roads, *U.S. v. Black*, 64 ID 93, 96 (1957).

It is the purpose of the mining laws to reserve from disposition and to devote to mineral sale and exploitation only such lands as possess mineral deposits of special or peculiar value in trade, commerce, manufacture, science, or the arts. *Stanislaus Electric Power Co*., 41 LD 655 (1913).

Having established that certain products of the earth have never been regarded as subject to location under the mining law, despite their marketability at a profit, we reiterate that among these non-locatables are materials used for fill, grade, ballast and base. *U.S. v. Harenberg*, 11 IBLA 153 (1973); *U.S. v. Barrows* 76 ID 299 (1969), *aff=d., Barrows v. Hickel*, 447 F2d 80 (9th Cir. 1971). We must note, however, that there was an exception to this broad, general rule. Certain types of ballast and base for road beds, railroads, airport runways, foundations for large buildings, bridges and other structures were often treated as mineral subject to location prior to July 23, 1955. The criterion for distinguishing between two types of base material, for example, was whether the material demanded had to meet established engineering specifications for the particular use. "Specification material" was treated as locatable, on the theory that inferior grades would not serve. *See U.S. v. Mattey, supra; Stephen E. Day, Jr.*, 50 LD 489 (1924). Nevertheless, even where the material was previously regarded as a mineral subject to location because it met engineering requirements for compaction, hardness, soundness, stability, favorable gradation, non-reactivity and non-hydrophilic qualities in road building and similar work, after July 23, 1955, these materials were treated as common varieties, and therefore not locatable, because materials which meet these standards are common, abundant and of widespread occurrence. *U.S. v. Cardwell*, A-29819 (March 11, 1964).

**Minerals Never Locatable**

AMaterial which principally valuable for fill purposes, for road base, or for ballast, uses to which ordinary earth and rock may be put, is not and has never been locatable under the mining laws.@ *United States v. Webb*, 132 IBLA 152, 183 (1995)

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**Caliche Is Not Locatable**

In *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676 (10th Cir. 1986), the Court held that caliche is not a locatable mineral for the following reasons:

> The record demonstrates that mining locations were not made on caliche; it is of the most common occurrence generally and extensively in very large areas in Southeastern New Mexico, Texas and Arizona and there in towns and cities. It is present on many square miles of the land in issue on the surface or under a few inches of other dirt or range grass. It has value as fill dirt and surfacing by reason of its geographical location to the road work where it is used, and a market for this use exists. Nothing can be extracted from it nor derived from it. It is used by reason of its physical characteristics only.

**Invalid Uses**

As pointed out in the *Bienick* decision above, certain mineral materials have never been subject to the mining law even though they may be produced and marketed at a profit. These types of mineral materials have been held by the Interior Department and Federal Courts to be nonlocatable on the bases of type of use. If the earth material is used in a manner that practically any material could satisfy, then it is not locatable. In *U.S. v. Verdugo & Miller, Inc*., 37 IBLA 279, 280-281 (1978), the Board said:

> Certain products of the earth have never been regarded as subject to location under the mining law, despite the fact that they might be marketable at a profit. Among these nonlocatable materials are those used for fill, grade, ballast, and sub-base. *U.S. v. Bienick*, 14 IBLA 290; see also concurring opinion, 14 IBLA 297 (1974). From the evidence it is apparent that the chief value of the granitic rock from these claims was only for fill and related purposes, at least prior to July 23,1955, when the mining law was amended to preclude the location of all common varieties of rock, even those which were valuable because they met specifications for building material. In sum, material which is principally valuable for use as fill, sub-base, ballast, riprap, or barrow was never locatable.
>
> As previously noted, common varieties of rock such as this were locatable prior to July 23, 1955, if they were then valuable for building purposes other than fill, ballast, sub-base, etc. However, claims located for common varieties before that date could not be validated by the discovery of special properties or the development of a qualifying market after that date, unless such properties were unique or so rare as to remove the material from its common variety classification. In short, a claim located for a common variety material had to be valid on July 23,1955, in order to subsist beyond that date.
>
> In this case, although the rock was tested as early as 1955 and as recently as 1971, and found to meet certain specifications, the major market into which the material was

actually sold did not require much more by way of specifications than that there "be no sticks or vegetative matter in or with it."

Since much of the specification testing was not even performed until after the critical date, it is clear that the results were not known and cannot be credited to a "discovery" prior thereto. Where material claimed prior to July 23, 1955, is chiefly valuable as fill, a subsequent finding that it meets specifications for certain construction requirements does not validate the claim retroactively.

Thus, even if a mineral meets the proper specifications to have been locatable prior to July 23, 1955, but is marketed for only nonlocatable uses, such marketability does not satisfy the discovery requirement.

The decision in Earl Douglas, 44 LD 325 (1915) ruled that fossil remains of prehistoric animals are not materials recognized as mineral by standard authorities.

## DISCOVERY UNDER THE MINING LAW OF 1872

### Statutory Definition of Discovery

The Act of May 10, 1872 (30 USC 22) provides that:

... all valuable mineral deposits in lands belonging to the United States ... shall be free and open to exploration and purchase ...

Although the statutes do not prescribe a test for determining what constitutes a discovery of a valuable mineral deposit, the Department and the courts have established a test through almost a century of decisions. These decisions generally support a Congressional intent that "valuable mineral deposits" be valuable in an economic sense or could be worked as a paying mine. A profitable mining operation has always been considered as the best evidence of the discovery of a valuable mineral deposit.

### Necessity for Administrative and Judicial Decisions

In *U.S. v. Gunn*, 7 IBLA 237, 79 ID 588 (1972), the Board discussed the long-recognized lack of a statutory definition of discovery as an explanation for "the necessity for administrative and judicial declarations" of what constitutes a discovery. The Board said at 591:

> The necessity for administrative and judicial declarations of what constitutes a valid discovery because of the lack of explanatory statutory language has long been recognized ... Congress in its many deliberations concerning the mining laws has never seen fit to prescribe a different standard.

**Prudent Person Test of Discovery**

The most durable and famous test of discovery was first laid down in *Castle v. Womble*, 19 LD 455 (1894), in which the Secretary of the Interior stated:

> ... 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 requirements of the statutes have been met.

This test, known as the "prudent-person test," has been approved by the Supreme Court of the United States in many cases. *Chrisman v. Miller*, 197 US 313 (1905); *Best v. Humboldt Placer Mining Company*, 371 US 334 (1963); *U.S. v. Coleman*, 390 US 599 (1968).

**Prudent Man Test**

In *United States v. Feezor*, 130 IBLA 146, 189 (1994), the Board restated the "prudent man" test:

> Traditionally, a discovery has been said to exist where the evidence is such that a prudent individual would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. *Crisman v. Miller*, 197 U.S. 313 (1905); *Castle v. Womble*, 19 L.D. 455, 457 (1894). This "prudent man" test has been refined to require a showing that the mineral disclosed is "presently marketable at a profit," which simply means that the mining claimant "must show that as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed." *In re Pacific Coast Molybdenum*, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983).

**Insufficient Evidence for Discovery**

Not long after enactment of the General Mining Law of 1872, the courts began to develop a definition of what constitutes a discovery of a "valuable mineral deposit." In *Davis v. Weibbold*, 139 US 507 (1891), the Supreme Court in approving the rulings of the Department of the Interior with respect to applications for mineral patents under the mining laws stated:

> ... such applications should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present

fact.

In *Iron Silver Mining Company v. Mike & Starr Gold and Silver Mining Company*, 143 US 394 (1892), the Supreme Court stated:

> ... so, here, the amount of the ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one which justified exploitation and working ...

In this early Supreme Court decision, such factors as quantity of ore, its minability and value per ton are mentioned as criteria for discovery.

In *Chrisman v. Miller*, 197 US 313 (1905), the Supreme Court specifically considered what was necessary to constitute a discovery of mineral sufficient to validate a mining claim. In that case some oil had been found seeping at the surface within the limits of an oil placer mining claim. The Court considered this finding of mineralization and stated at 322-323:

> It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as "known" veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation,
>
> "...The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral.... It is not every vein or lode which may show traces of gold or silver that is exempted from sale or patent or the ground embracing it, but those only which possess these metals in such quantities as to enhance the value of the land and invite the expenditure of time and money for their development. No purpose or policy would be subserved by excepting from sale and patent veins and lodes yielding no remunerative return for labor expended upon them.

In order for a mining claim to be valid, there must be a discovery of a valuable mineral deposit within the limits of the claim. Although many prospects show mineralization and are worthy of further exploration, a discovery has not been made. In *East Tintic Consolidated Mining Company*, 40 I.D 271 (1911), the Department of the Interior stated:

> The exposure, however, of substantially worthless deposits on the surface of a claim; the finding of mere surface indications of mineral within its limits; the discovery of valuable mineral deposits outside the claim; or deductions from established geological facts relating to it; one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim, will neither suffice as a discovery thereon, nor be entitled to be accepted as the equivalent thereof.

In *Converse v. Udall*, 399 F2D 616 (1968), it was held that the extent and value of an orebody must be considered to establish the validity of a claim. The Court said at 619:

> Thus it was made clear as long ago as 1888 that the finding of .some mineral, or even of a vein or lode, is not enough to constitute discovery -- their extent and value are also to be considered.

In *Barton v. Morton*, 498 F2d 288 (1974), it was held that isolated values occurring either in or outside of a vein only suggest the existence of a valuable mineral deposit. The Court said:

> But a mineralized vein is not the equivalent of a deposit of minable ore. Such a vein may not contain material of substantial value.
>
> Although appellants have found ore samples with indicated values exceeding $70 per ton, the record does not support a finding that they have found a deposit yielding ore of that quality, or of any other quality, the exploitation of which maybe contemplated. The evidence of record indicates that the values thus far found are spotty, and appellants do not argue otherwise" (emphasis in original).
>
> The Department held, and we agree, that there is "no difference between the showing of isolated mineral values, not occurring in a vein, which only suggests the existence of a valuable mineral deposit within the limits of the claim and the showing of isolated values occurring in a vein which only suggests the possible existence of a valuable mineral deposit in the course of the vein. That which is called for in either case is further exploration to find the deposit supposed to exist."

In *U.S. v. Fitzgerald*, A-30973 (July 25, 1969), the Board discussed a specific example of how the existence of a minimum quantity of ore may be applied to the prudent person test. The
Board said:

> Claimants= need to establish the existence of a sufficient quantity of valuable ore was rendered all the more acute and their failure to do so rendered all the more complete by the fact that Climax Co. would not consider buying claimants' ore unless and until it was assured that claimants "properties could provide [it] ... with a minimum quantity of ore." This assurance was apparently never given.
>
> Furthermore the high per ton cost of transporting ore from the claims to Climax, Colorado, would in all likelihood require claimants to install a mill and tables for concentrating the 1 % ore prior to shipment. A prudent man would want greater proof of a larger body of valuable mineral where he was obliged to go to the expense of installing a mill than where he could simply ship crude 1% ore to market. For he would want some assurance that the ore body was large enough not only to cover operating costs and yield a profit, but also large enough to return this capital expenditure before he would risk his time and money trying to develop a paying mine. Here, of course, claimants completely

failed to prove the existence of any minimum quantity of ore remaining on the Molly No. 2 Claim.

It was held in *U.S. v. Murdoch*, 65 IBLA 239 (1982) that the mere presence of slight amounts of gold such as a few colors does not satisfy the requirement for discovery. The Board said at 243:

> No one disputes that "colors" of gold have been found in examining the claim. However, appellants mistaken in his belief that this is sufficient to satisfy the requirement of a discovery in a Government mining claim contest. As authority for this proposition, appellant cites 1 Rocky Mountain Mineral Law Foundation, *American Law of Mining*, ' 460 (1981), and *Lange, v. Robinson*, 148 F. 799 (9th Cir 1906). Although those authorities state, that there may be a valid discovery on a gold placer claim based on the finding of colors, the authorities cited are clearly referring to the standard of discovery applicable in a proceeding between rival mining claimants, not a Government contest. Those authorities make clear that the standard in a Government contest is far stricter. Thus, the mere presence of slight amounts of gold on a placer mining claim does not satisfy the requirement of a discovery of a valuable mineral deposit under the mining laws even if the showings would justify further exploration.

In *U.S. v. McKenzie*, 29 IBLA 270 (1977) the Board determined that 1985 tons of exposed ore does not establish a discovery where an expenditure of $600,000 is necessary to initiate mining. The Board said at 293:

> According to the Contestee's own evidence, an expenditure exceeding $600,000.00 is required to commence mining and milling operations. He proposes to mine 75 tons of raw material per day. At this rate of production, the Contestant's most recent tonnage estimate of exposed minable barite bearing ore, 1,985 tons, would be exhausted within 27 working days. The net price which could be received for the final mill product would be only a fraction of the fixed costs. The remainder of the fixed costs could be recovered only by further exploration leading to the exposure of thousands of tons of more minable ore than has been exposed heretofore. Since this is a shallow deposit, conducive to relatively inexpensive exploration, prudence would appear to dictate that further exploration be conducted before the fixed costs of mining and milling operations are incurred.

` As stated in *Thomas v. Morton*, 408 F. Supp. 1361 (D Ariz 1976), *affirmed*, 552 F2d 871 (9th Cir 1977): "There must be physically exposed within the limits of the claim the vein or lode bearing mineral of such quality and quantity as to justify the expenditure of money for the development of a mine and the extraction of the mineral."

**Deposit Must Be Physically Exposed Before Date of Mineral Entry or Segregation from Mineral Entry**

In *United States v. Waters, et al.*, 146 IBLA 172 (1998), the Board pointed out that

discovery of a valuable mineral deposit which includes physical exposure must predate any segregation from mineral entry or predate a mineral entry in connection with a mineral patent application. The Board said at 182:

> * * * A critical requirement is that the deposit be physically exposed at the time of discovery, which must predate any segregation from mineral entry. No further exploration to obtain such an exposure may be permitted after closure of the land to mineral entry. *United States v. Mavros, supra*, at 302. As a general rule, the Board has held that, when Aa patent application is involved and final certificate has issued, the question of present marketability must be determined by reference to the date on which the claimant fulfilled all of the prerequisites to the making of the entry, i.e., no later than the date of the issuance of the final certificate.@

**"Valuable Mineral" versus "Valuable Mineral Deposit"**

In *U.S. v. Feezor*, 74 IBLA 56, 90 I.D. 262 (1983), the Board distinguished between a "valuable mineral" and a "valuable mineral deposit." The Board said at 75:

> We believe that the key distinction to keep in mind is the difference between "a mineral deposit," and "a valuable mineral deposit." As modern adjudications have developed, the latter phrase has come to mean a mineral deposit of sufficient quantity and quality so as to justify a prudent man in expending both labor and money in developing a paying mine. Where the term "mineral deposit" is used, it merely means, in the context of a lode claim, that a mineralized area in a vein or lode has been disclosed. It does not necessarily mean that a valuable mineral deposit has been exposed.

**Valuable Mineral Deposit is Valuable in Economic Sense**

The courts have recently made it clear that the test of what is a "valuable mineral deposit" does involve a consideration of economic value. In *U.S. v. Coleman*, 390 US 599 (1968), the Supreme Court in discussing the "prudent man test" and the phrase "valuable mineral deposits" as it appears in the mining statutes said at 602:

> Under the mining laws Congress had made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. [Footnote omitted.] The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test.

In *Converse v. Udall*, 399 F2d 616, 623 (9th Cir 1968), *cert denied*, 393 US 1025 (1969), the Court said that "a valuable mine need not be a profitable one... Nevertheless, the nucleus of value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result."

In *U.S. v. Fitzgerald*, A-30973 (July 25, 1969), the Secretary indicated that a "proved ability to mine the claim at a profit" is not required:

> As indicated in the *Converse* decision, "the prudent man test" does not require value in the sense of proved ability to mine a claim at a profit to be shown but only a showing that would induce a person of ordinary prudence to expend substantial sums "in the expectation that a profitable mine might be developed." *Adams v. U.S.*, 318 F2d 861, 870 (9th Cir 1963) (emphasis added).

**No Discovery If Deposit Warrants Additional Exploitation**

In *U.S. v. Arbo*, 70 IBLA 244 (1983), a geologist (White) employed by the claimant had sampled at the same points tested by the government and also sampled using a section dredge. The assay values of White's report indicated lower values for gold than assays taken by the government. Because the appellant indicated at the hearing that he accepted the findings of the report, the Board focused on the conclusions of the report where White said "there is sufficient gold present in those Denny placers examined by me, to justify the continued expenditure of time, effort and money in the search for the fabled golden fleece." Concerning the effect of White's report on this case, the Board said at 248:

> The Government's case is buttressed, moreover, by the White report which appellant endorsed in his testimony. Appellant himself stated that White sampled using the dredge. The report, however, does not extol any values which may have been so obtained. As previously indicated, the gold values of the White report are lower than those obtained by the Government. White's conclusion (quoted above) expresses an often-cited principle of mining law. That principle is that mineralization which may warrant further exploration or prospecting in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit. That is, a valuable mineral deposit has not been discovered because a search for such a deposit might be indicated. *Converse v. Udall*, 399 F2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969); *Henault Mining Co. v. Tysk*, 419 F2d 766 (9th Cir. 1969), *cert. denied*, 398 U.S. 950 (1970).

It is a common pitfall for a claimant or his expert witness to reveal at the hearing that the deposit is mineralized to the extent that it justifies additional exploration or prospecting to find a commercial deposit. The hearing officer considers this to be an admission by the claimant that there is no discovery, and simply evidence that one may exist. This does not meet the present court interpretation of discovery which requires that the valuable mineral deposit has been found and is ready for development and mining. With a discovery, no more prospecting or exploration work to find the deposit would be necessary.

**Exploration Versus Development**

Numerous recent Departmental and court decisions have held that in order to qualify as a discovery it must be established that the mineral deposit can be mined and sold at a profit and that development and mining operations may proceed with reasonable confidence. If the deposit requires additional exploration to delineate the ore reserves and determine grade or quality before development may be confidently started, a discovery has not been made. In *Converse v. Udall*, *supra*, the Court affirmed the action of the Department of the Interior in drawing a sharp distinction between "exploration" for and "discovery" of a valuable mineral deposit. The court stated at 620 and 621:

> Converse attacks the Secretary for drawing a distinction between Aexploration.@ Adiscovery," and "development." But the authorities we have cited show that there is a difference between "exploration" and "discovery." (*See, e.g., Cole v. Ralph, supra*, 252 US at 294, 296, 307, 40 S.Ct. 321.) If the latter word were taken literally, then the finding of any mineral would be a "discovery." Webster, 2d Ed., defines "discover" as "to make known the identity of,...by laying open to view, as a thing hidden or covered, to expose; to disclose; to bring to light." But, as we have seen, that alone is not enough. On the other hand, Webster defines Aexplore" as "to seek for or after, to strive to attain by search." This is exactly what a prospector does, both before he finds the first "indications ... of the existence of lodes or veins" (*U.S. v. Iron Silver Mining Co., supra*, 128 US at 683) and thereafter until he finds enough mineralization to meet the legal test of a discovery. It is true that some of the cited cases say that "development" and Aexploration" mean the same thing (*Charlton v. Kelly, supra*, 156 F. at 436), or speak of "exploration" after discovery (*Lange v. Robinson, supra*, 148 F. at 804). But in each of these cases, the court was talking about further work to be done after a sufficient discovery had been made, work which could be called "exploration" or "further exploration," or could also be called "development." They do not support the attack here made upon the distinction between the exploration work which must necessarily be done before a discovery, and the discovery itself, which is what the Secretary talks about when he distinguishes between "exploration" and "discovery." The real question here is not whether there is such a distinction, but whether Converse's exploration had resulted in a legal discovery.

In *U.S. v. New Mexico Mines, Inc*., 3 IBLA 101 (1971), the Board offered the following definitions for "exploration," "discovery" and "development":

> "Exploration," within this context, is the process of searching for a valuable mineral deposit. The finding of mineralization of sufficient value to encourage further exploration does not successfully conclude the exploratory process or constitute a discovery.
>
> "Discovery," to paraphrase the definition in *Castle v. Womble*, occurs upon the finding of a mineral deposit revealed to be of sufficient qualitative and quantitative value to warrant the expenditure of effort to develop a mine in the reasonable anticipation that a profitable mining operation will result.

"Development" refers to the physical work incident to the excavation of a mine for the extraction of the mineral values discovered. After discovery, certain exploratory activities incident to the actual production of the minerals are regarded as "development" rather than as "exploration." These would include the blocking out of the orebody, testing for engineering feasibility, determining the strike and dip of the vein beyond the extent of the qualifying knowledge, and related activities.

In *U.S. v. Lundy*, A-30724 (June 30, 1967), specific examples of exploration work are discussed by the Secretary:

> There is a clear distinction between "exploration@ and "development" as they relate to discovery under the mining laws. The separate stages of mining activity serve as a basis for determining what further mining activity a prudent man would be justified in undertaking. Exploration work includes such activities as geophysical or geochemical prospecting, diamond drilling, sinking an exploratory shaft or driving an exploratory adit. It is that work which is done prior to a discovery in an effort to determine whether the land is valuable for minerals. When inherently valuable minerals are found, it is often necessary to do further exploratory work to determine whether a valuable mineral deposit exists, i.e., whether the minerals exist in such quality and quantity that there is a reasonable prospect of success in developing a paying mine.

**Loss of Discovery**

Worked-out claims do not qualify as valid mining claims. Although a mining claim may have been valid in the past because of a discovery on the claim of a valuable deposit of mineral, the mining claim will lose its validity if the mineral deposit ceases to be valuable because of a change in economic conditions, or the mineral deposit is depleted.

**Discovery in Each Claim**

The discovery of mineral on one claim will not support rights to another claim or group of claims even though the claims are contiguous. *Ranchers Exploration & Development Co. v. Anaconda Co*., 248 F. Supp. 708 (DC Utah 1965).

In contest proceedings involving more than one claim, the test of discovery is applied to each claim individually, since "(a) discovery without the limits of the claim, no matter what its proximity, does not suffice." *Waskey v. Hammer*, 223 US 85, 91 (1912). In order to be valid each claim in a claim group must have a discovery within its boundaries. However, under certain circumstances the government has taken a broad look at the requirement. For example, in the case of large, low-grade, prophyry-copper deposits which by necessity require hundreds of claims to cover the mineralized area, it is obvious that any one claim could not stand by itself as a paying mine. The entire deposit must be available in order to be economically feasible. In acknowledging this fact, the government has issued mining patents on numerous such claims.

**Willingness and the Prudent Person**

In *Chrisman v. Miller*, 197 US 313 (1905), the Supreme Court discussed willingness as it relates to ordinary prudence:

> Some cases have held that a mere willingness on the part of the locator to further expend his labor and means was a fair criterion. In respect to this *Lindley on Mines* (lst ed.) sec. 336, says:
>
> > But it would seem that the question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property.

In U.S. v. Nevitt, A-30030 (July 28, 1964), the Secretary gave another discussion of willingness as it applies to prudence:

> It is thus evident that the willingness of a mining claimant, grounded only in hope of success, to expend time and money in further efforts to develop a mine will not suffice. He must act upon compulsions which would move a man of ordinary prudence, not necessarily a miner, and he must be justified in undertaking an endeavor which promises a reasonable prospect of success in developing a valuable mine. Admittedly, a valuable mine need not be a profitable mine, but the nucleus of value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result.

**Prudence: a Definition**

> In *U.S. v. Mortensen*, 7 IBLA 123 (1972), the Board defined "prudence" at 126:
>
> Finally, the "Prudence" to which reference is made in the "prudent man test" first articulated in *Castle v. Womble, supra*, is measured by the probability of developing a valuable mine as determined by an ordinary man with knowledge and understanding of all of the facts involved; not by the degree of prudence which a particular claimant exercises in the conservation of his individual economic means.

**Prudent Man Test Is Objective Standard that Assumes Proper Management**

In determining what a prudent miner would do to obtain a maximum return for satisfying the prudent man/marketability test, the Board has stated that because "the standard is objective, it does not depend on what the claimants actually planned to do. *Citation Omitted*. In applying the prudent man/marketability test, we will assume 'proper management' of the mining venture." *United States v. Collord*, 128 IBLA 266, 274 (1994).

**Fair Market Value in Excess of Costs**

In *U.S. v. Downs and Goldfield Deep Mines Company of Nevada*, 61 IBLA 251, 254 (1982), it was held that a discovery requires, among other things, that the deposit yield a fair market value in excess of costs:

> The "prudent man test" is met generally where it appears that mineralization on the claim has been physically exposed and the evidence shows that the mineral deposit is probably valuable enough to yield a fair market value in excess of the costs of extraction, removal, and sale.

**What Has Been Done Successfully**

In *U.S. v. Flurry*, A-30887 (March 5, 1968) it was held that "the most persuasive evidence as to what a man of ordinary prudence would do with a particular mining claim is what men have, in fact, done or are doing, not what a witness is willing to state that a prudent man would do." In another case (16 IBLA 126), the Board determined the following:

> A second standard is that actions of others in the same or very nearly the same circumstances may be used as evidence of what would constitute prudent investment activity. For example, a mining claimant would be justified in initiating actual mining operations on mineral showings that are the same or very nearly the same as those where actual mining operations have been successfully brought to fruition by others.

**Paying Mine Need Not Be Demonstrated**

Although a mining claimant may be required to demonstrate he has what could be developed into a profitable mine under present economic conditions, it is not required that he demonstrate a paying mine as an accomplished fact. In *Adams v. U.S.*, 318 F2d 861 (9th Cir. 1963) the Court stated:

> Discovery of a valuable mineral deposit within the limits of each claim is essential but value, in the sense of proved ability to mine the deposit at a profit, need not be shown.

Undoubtedly though, the most convincing demonstration of a valid discovery would be a mine presently operating at a profit.

**Up-To-Date Version of Prudent Man Test**

In *United States v. Jerry E. Franklin*, 99 IBLA 120, 124 (1987), the Board gave an up-to-date version of the "prudent-man test" as applied to the validity of a mining claim:

> There is no question that the validity of any mining claim is dependent upon the disclosure of a valuable mineral deposit within the limits of the claim. 30 U.S.C. 22 (1982). A valuable mineral deposit exists if the mineral found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. *United States v. Coleman*, 390 U.S. 599, 602 (1968); *Chrisman v. Miller*, 197 U.S. 313 (1905); *Castle v. Womble*, 19 L.D. 455, 457 (1984). This "prudent man test has been refined to require a showing that "as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed." *In re Pacific Coast Molybdenum*, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983). However, actual successful exploitation need not be shown--only the reasonable potential for it. *Barrows v. Hickel*, 447 F.2d 80, 82 (9th Cir. 1971). The question is not whether a profitable mining operation can be demonstrated, but whether, under the circumstances and based upon the mineralization exposed, a person of ordinary prudence would expend substantial sums with the reasonable expectation that a profitable mine might be developed. *Barton v. Morton*, 498 F.2d 288 (9th Cir. 1974).

**Claimant Has Burden of Proof That Discovery Exists**

It is important for the claimant to understand that the role of the government mineral examiner is merely to verify the existence of an established, physically-exposed discovery. The claimant has the ultimate burden of proof that a discovery exists. In *Lara v. Secretary of the Interior*, 820 F.2d 1535, 1542 (9th Cir. 1987) the Court stated:

> The government mineral examiner has no duty to search for a discovery.....The claimant in *Humboldt Placer Mining Co. v. Secretary of the Interior*, 549 F.2d 622, 624 (9th Cir.), *cert. denied*, 434 U.S. 836 (1977), similarly criticized the government's exploratory work. his court pointed out that the mining claimant, not the government, bears the ultimate burden of proof. *Id*. Rather than criticize the government's testing methods, the claimant must produce evidence to rebut the government's case. *Russell v. Peterson*, 498 F.Supp. 8, 10 (D. Ore. 1980).

In *United States v. Foresyth*, 100 IBLA 185 (1987), the Board said that "the prudent man rule requires the claimant to submit proof that a prudent man would develop a mine. It is not enough that a claimant himself desires to do so if the evidence leads to the conclusion that a prudent man would not." *Id.* at 209-10. *Citation Omitted*. "One of the most common means of demonstrating what a 'prudent man' would do is through the testimony of expert witnesses who have examined the property and express their opinions, as experts, that the evidence supports a determination that further development is warranted. To have an expert in the field examine the property and render a decision is, itself, an exercise of prudence." *Id.*

**Conflicting Claimants Held to Prudent-Man Discovery**

In *Amax Exploration, Inc. v. Ross Mosher*, Civil R-85-162 BRT (March 2, 1987), involving a priority of right between rival mining claimants, The Federal District Court of Nevada held both the senior and junior claimants to the prudent man discovery standard commonly required of mining claimants by the Department of the Interior. In this case, Amax staked both lode and placer claims over placer claims owned by Ross Mosher on the basis that Mosher had not discovered a valuable placer mineral. Although the Court acknowledged that courts typically view the evidence of discovery more in favor of the senior locator in a dispute between rival claimants, it held that the "advantage of being the senior locator cannot displace the need to prove the elements of a discovery." As the Court said, the senior locators "have failed to prove credibly, with respect to each particular claim, placer mineralization which would lead a reasonable and prudent miner to conclude that there is a reasonable prospect of developing a profitable mine." After holding that none of the parties in the case, had made a discovery, the Court declared "that the land remains in the public domain open to peaceable exploration by the parties or by any other citizen. The Court took this position even though it agreed that the claims of both parties are procedurally proper.

The Court partly based its opinion that the Mosher claims lacked a discovery on the following reasons:

1. The samplers could not connect the samples to individual claims. They apparently collected samples on a haphazard basis and had taken no field notes to document the source of the samples.

2. The five assay results of the placer samples were held to be suspect. The Court agreed with the Amax geologist's opinion that the assay results are beyond the realm of geologic possibility. It was pointed out that the assayer had little experience and an education assaying that consisted of attendance at a two-day rudimentary seminar. The Court was not convinced the shallow pit samples could yield such high assay values.

The Court also found that Amax had not proven a discovery of gold within any of its claims even though gold was found in many samples taken by surface sampling. Amax geologists also used biogeochemical and geomicrobial sampling, resistivity/inverse-polarization geophysical testing, ground magnetic testing and gravimetric testing methods. On this basis Amax geologists extrapolated "a geologic inference that there is excellent potential for discovery of minable deposits." The Court concluded that "at best, this means the area has promising potential for exploration. That falls short of a legal discovery on each Amax claim."

**Quantity of Mineral Reserves Necessary for Discovery**

As pointed out in the case of *United States v. Willie White*, 118 IBLA 266, 308-14 (1991)

it has long been a requirement for discovery under the mining laws that minerals exist in sufficient quantity. As the Board said, "a discovery *within the meaning of the mining laws* cannot be said to exist absent some evidence of the extent of mineralization." *Id.* at 314.

Of course it would be inappropriate to specify a minimum amount of reserves necessary for a discovery. The reason for this is that every mineral deposit is unique in terms of all the factors that affect costs and profit such as size, shape, overburden, grade, mining costs, milling costs, or processing costs and efficiency. Similarly, you can not give a grade of ore or value per ton of ore sufficient to validate a claim. As with reserves, the grade or quality of ore is dependent on many factors. For example, it is a well known principal that the larger the ore body, the lower the cut-off grade because of the opportunity to leverage with large equipment. Conversely, the higher the grade, the smaller can be the minimum reserves necessary to establish a profitable mine.

**Each Claim Need Not Support Independent Mine**

In *Schlosser v. Pierce*, 92 IBLA 109, 93 I.D. 211 (1986), the Board held that a mining claimant is not required to show "the profitability of each claim in a group as a potentially viable independent mine." This case was a private contest brought by the owners of lands patented with mineral reservation against the locators of 18 mining claims. Although the mineral in this case was bentonite, this ruling would apply to any high-tonnage, low-grade mineral deposit appropriated with a group of mining claims. This is true even though an individual claim of the group might not contain ore of sufficient quantity and quality to support a discovery.

For many years the Interior Department has validated groups of claims for low-grade, large-tonnage disseminated deposits of copper, gold and molybdenum as well as a variety of construction and industrial minerals. Under the following circumstances, there is no requirement that each claim be independently capable of being mined and marketed at a profit:

1. A group of mining claims must be located over a high-tonnage, low-grade deposit.

2. Ore can be extracted profitably from each claim under a single large mining operation; or

3. To be valid, each claim must contain sufficient quality and quantity of mineral to be extracted profitably under an overall mining plan.

This claim group approach to validity is necessary in light of the predominance of large-tonnage, low-grade deposits being mined during the last several decades. In many cases, the large equipment and scale of operations needed to keep unit costs low in such deposits would normally be far too costly for the amount of reserves that could exist within the boundaries of a single claim.

The economic analysis may be based on the claim block as a whole rather than on each individual claim. In *Pacific Coast Moly*, 90 I.D. 352 (1983), the costs for developing a single

mine were estimated and apportioned to each claim.

In *United States v. Cactus Mines Limited*, 79 IBLA 20, the Board clearly stated the requirements for validating a group of mining claims:

While the proof of quantity of and quality are often interrelated, a claimant must prove that a valuable mineral is actually present on each of the claims. Once mineral is demonstrated to be present, the proof of sufficient quality and quantity of mineral to warrant development can take into consideration the overall mining operation. There is little question that circumstances exist in which a group of mining claims containing low grade ore can support a mining operation, and thus demonstrate a discovery on each claim, even though taken individually the claims might not contain sufficient quantity to support discovery. However, that fact does not relieve the claimant from the responsibility for presenting the proof of mineralization and the suitability of the project to low-grade, high-tonnage extraction.

**Group Development: Each Claim Must Bear a Proportionate Share of the Development and Capital Costs Attributable to Combined Operations**

In *United States v. Collord*, 128 IBLA 266, 285, 287 and 288 (1994), the Board emphasized that in determining whether "a group of claimants may be considered together for purposes of determining whether there exists on each of the claims a valuable mineral deposit ....., the recovery expected from each claim must not only exceed the costs of mining, transporting, milling, and marketing the particular deposit on that claim but each claim must also bear a proportionate share of the development and capital costs attributable to the combined operations."

**Contiguous or Nearby Claims Required to Satisfy Group Development**

"Contiguous or nearby claims lend themselves to group development" because of economic reasons. *United States v. Melluzzo*, 105 IBLA 252, 258 (1988). The Board stated at 258:

> Generally, in cases in which grouping of claims has been considered for the purposes of determining the validity of individual claims, the claims have been contiguous or nearby claims located for a particularly mineral deposit. The reason for that is simple; the law of discovery contemplates the development of a "valuable mine." Economics dictate in such a situation that the "mine" be developed so as to maximize the profitable exploitation of the minerals. Contiguous claims or nearby claims lend themselves to group development.

**Group Development: Relevance of Reserves on Adjacent Properties**

Under the concept of "Mine" development where operations may be established on a group of contiguous claims, "the existence of reserves on adjacent mining properties controlled by claimant is relevant to the question of whether there is a reasonable prospect of developing a

paying mine." *United States v. New York Mines*, 105 IBLA 171, 191 (1988).

**Group Development of Placer Claims**

In *United States v. Joseph Laczkowski*, IBLA 165, 179 (1989), Judge Mullen in a concurring opinion indicated that the concept of "mine" development as enunciated in *United States v. New York Mines*, 95 I.D. 223, 234 (1988) could be applied to a group of placer claims. In such a case, a claim need not stand on its own, but assuming exposure of a valuable locatable mineral on each claim of a contiguous group, the claims may be considered as a group when determining discovery. In other words the economic analysis may be based on the claim block as a whole rather than on each individual claim.

**Group Development of Building Stone Claims**

The location of a group of building stone claims "to have under claim the greatest possible range of colors and gradations of stone ... in order to afford his customers the widest possible range of choices" does not constitute group development as defined in *Schlosser*, 93 I.D. at 222; *United States v. Melluzzo*, 105 IBLA 252, 258 (1988).

In the *Melluzzo* case, the appellant attempted to apply the benefits of "group development" to "numerous claims, widely scattered throughout the Phoenix area." The Board pointed out that the claimants did not specify which claims were susceptible to group development nor did he provide cost or production figures for group development. *Id.* at 258.

**Successful Exploitation of Claim Not Required**

In *Barrows v. Hickel*, 447 F2d 80, 82 (9th Cir 1971) the Court said that "actual successful exploitation of a mining claim is not required to satisfy the 'prudent-man test'."

**Present or Prospective Value**

In *U.S. v. Jones*, 67 IBLA 225, 231 (1982), the Board held that "discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values. To constitute a discovery on a lode claim there must be exposed within the limits of the claim a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes."

If a "prospective value for mining purposes" may constitute a discovery as indicated in *Jones, supra*, this is indeed a departure from the recent federal court cases which require Apresent@ value." *See Foster v. Seaton*, 271 F2d 836, 838 (DC Cir 1959); *U.S. v. Coleman*, 390 US 599, 602 (1968); *Hallenbeck v. Kleppe*, 590 F2d 852 (1979).

**Validity Versus Discovery**

In *U.S. v. Bartels*, 6 IBLA 126 (1972), the Board discussed the discovery of a valuable

mineral deposit as it relates to the validity of a claim. The Board said at 127:

> The essential conclusion that a mining claim cannot be valid without a discovery has been restated by the courts as well as the Department. "Discovery is the *sine quo non* of an entry to initiate vested rights against the United States." *Davis v. Nelson*, 329 F2d 840, 845 (9th Cir 1964); "... that discovery is the prerequisite to the validity of a mining claim cannot be disputed." *Fresh v.Udall*, 228 F. Supp. 738, 740 (DC Colo. 1964).
>
> "A mineral discovery upon a claim is the *sine qua non* for its validity; and although location of boundaries and monuments upon the ground may precede discovery or discovery may precede such location so long as intervening rights are not affected, it is essential to validate it that mineral discovery be within the limits of the claim located." *Ranchers Exploration and Development Co. v. Anaconda Co.*, 248 F. Supp. 708, 714 (DC Wash. 1965).
>
> How then can a claim that is not valid or has no validity be other than invalid? To say that claims whose validity has not been determined are neither valid nor invalid is to transmute a question of fact into one of law. A claim is either valid or invalid upon its facts. The only unresolved question is not the status of the claim, but of the facts that determine into which category it falls. As *Carlile* explained, when the requirement essential to the validity of claim is found to be lacking, the claim is invalid,

**Test of Discovery: Patent Versus Contest**

In *U.S. v. Higbee*, A-31063 (April 1, 1970), it was held that the test of discovery is the same whether a patent is being applied for by the mining claimant or the claim is being contested by the United States. *U.S. v. Carlile*, 67 ID 417 (1960); *Mulkern v. Hammill*, 326 F2d 896, 898 (9th Cir 1964).

**Severed Claims and Discovery**

In *U.S. v. Higbee*, *supra*, the Board discussed the longstanding requirement that to be valid, a discovery must exist within the boundary of a mining claim; and if a claim is severed, only those portions that contain a discovery are valid. The Board said:

> For a mining claim to be valid, the required discovery must be made within the limits of the claim as located (30 USC " 23, 35 (1964)), and a discovery outside the limits of the claim cannot serve to validate a claim no matter what its proximity to the claim. *Waskey v. Hammer*, 223 US 85 (1912). Ordinarily a discovery anywhere within the boundaries of the originally located undivided claim will serve to validate the entire claim. *Ferrell et al. v. Hoge et al.*, 27 LD 129, 131 (1898). However, if a claim which contains a discovery is, prior to being patented, severed in its ownership, the cases have held that the part which contains the discovery is valid and a patent may issue on it without regard to the remainder of the claim (*Pittsburg-Nevada Mining Co.*, 39 LD 523 (1911); *J. Arthur Connell*, 29 ID 574 (1900); *Carrie S. Gold Mining Co.*, 29 LD 287 (1899)), but that the

part which no longer contains discovery is invalid and no patent can issue on it (*Gwillim v. Donnellan*, 115 US 45 (1885); cf. *The Gilson Asphaltum Co*., 33 LD 612 (1905)) unless a "second discovery" can be found within its limits (*Silver City Mining Co. v. Lowry*, 57 Pac. 11 (Utah 1899); *Star Gold Mining Co*., 47 LD 38 (1919)). These decisions reflect the general principle that each part of a severed mining claim is "independently subject to all the requirements of the mining law." *Pittsburg-Nevada Mining Co., supra,* at 254. According to this principle, a patent may be obtained on any severed portion of a mining claim provided it "is a complete claim in itself in the manner of delimitation, discovery, and improvements." *Id*.

**Examples of Severed Claims**

A mining claim intersected and separated by land patented as nonmineral (including mill site claims) requires two discoveries -- one on each tract. *Paul Jones Lode*, 31 LD 359. However, if such intersected mining claim is separated by patented mineral land, one discovery is sufficient. *Hydee Lode*, 30 LD 420. If a lode claim is intersected by a prior placer, the lode claim cannot include ground not contiguous to that containing the discovery.

**Discovery Must Not Be Split to Validate Two Claims**

A discovery must be treated as an entirety and the basis of but one location. For example, a single discovery may not be split at the common end lines of two claims to validate the two claims. 16 LD 1.

**Comparison of Values**

In *Cataract Gold Mining Co*., 43 LD 248 (1914), The Secretary considered a patent case where it was alleged that the lands were more valuable for the development of electrical power than for mineral value. The Secretary held at 254:

> If a mineral claimant is able to show that the land contains mineral of such quantity and value as to warrant a prudent man in the expenditure of his time and money thereupon, in the, reasonable expectation of success in developing a paying mine, such lands are disposable only under the mineral laws, notwithstanding the fact that they may possess a possible or probably greater value for agriculture or other purposes.

However, under the Act of August 4, 1892 (27 Stat 348; 30 USC 161) relating to building stone, section 1 of the Act provides as follows:

> Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims ....

The Act of 1872 contains no language that limits mining claim locations, except that they

must be for valuable mineral deposits. The Act of 1892, relating to building stone, however,

requires as an additional prerequisite for a valid claim for building stone that the lands embraced within such claims must be chiefly valuable for the located mineral. Thus for building stone, Congress has expressly mandated a comparison of values approach.

*In re Pacific Coast Molybdenum Co*., 75 IBLA 16 (1983) involved a protest to the issuance of a mineral patent embracing lands in the Misty Fjords National Monument. It was suggested that "a stronger showing of marketability is required for important recreation areas, such as Misty Fjords, than for other public lands." On appeal, the Board said at 32:

> It is true that a number of cases in the past have indicated that a higher standard of proof is required for claims located in national forests than for other public lands. In actual practice, the Board has long since abandoned this position. We take this opportunity to expressly repudiate it.
>
> As a conceptual matter, the theory that the situs of the land alters the nature of the test applied is untenable. Where the mining laws apply, they necessarily apply with equal force and effect, regardless of the characteristics of the land involved. The test of discovery is the same whether the land be unreserved public domain, land in a national forest, or even land in a national park.

Of course, in this type of case, questions of good faith may become an issue. Even if a discovery exists in lands embraced by a claim, proof of bad faith can invalidate a claim. For example if the evidence "demonstrates that the intended use for the claims was other than for *bona fide* mining of minerals from the claims," the claims are invalid. *U.S. v. Jon Zimmers*, 81 IBLA 41 at 48 (1984).

**Other Values Require Clear and Convincing Evidence**

In *U.S. v. Wells*, A-30805, the Secretary held that where the discovery of a valuable mineral deposit is claimed on land known to be valuable for purposes other than mining, the Department requires clear and convincing evidence that the land is valuable for mineral. In this case the Secretary said:

> In *Hellen v. Wells et al*., 54 ID 306, 309 (1933), where the Government offered evidence of the value of timber on a mining claim in a national forest, the Department stated:
>
> > "... While the existence of valuable timber on a mining claim, though in a national forest, in no way qualifies the locator's rights under the mining law if he has a valid claim (*see United States v. Deasy*, 24 F2d, 108), it is a proper element for consideration in determining the weight and credibility to be attached to the testimony in determining the character of the land. *E.M. Palmer* (38 LD 295).

> No bad faith is charged or proven in this case, nevertheless, the fact that the tracts in controversy contain more or less valuable timber and timber that will grow into value, supplies an additional reason for clear and convincing evidence that the land is valuable for mineral before title should pass from the United States ...@

> In other words, the discovery of a valuable mineral deposit that is required to validate a claim is the same whether it occurs inside or outside of a national forest, provided of course, that the land is subject to mining location, but, where the discovery of a valuable mineral deposit is claimed on land which is known to be valuable for purposes other than mining, the Department will subject the evidence that the land is *also* valuable on account of its mineral resources to more careful scrutiny than might be the case if the discovery were alleged on land valuable *only* for the mineral deposits found therein.

In *U.S. v. Kosanke Sand Corporation (On Reconsideration)*, 80 ID 538, 547 (1973), the Board said:

> Accordingly, we hold that under the Act of May 10, 1872, *supra*, if the discovery of a valuable mineral deposit be shown, a valid claim exists, regardless of a more beneficial use to which the land might be put.

> While the existence of other values does not qualify the locator's rights under the mining law if he has a valid claim, it may be a factor in determining whether a valid claim exists. It may be considered in assessing the weight and credibility to be accorded the locator's testimony in determining whether a discovery has been made. *Citations omitted*. And it may be an issue in evaluating his *bona fide* intention to develop a mining operation.

In *U.S. v. Osborne (Supp on Judicial Remand*), 28 IBLA 13, 43 (1976), a similar case to *Kosanke Sand*, it was held that "the law does not provide that mining claims which are otherwise valid may be held to be null and void by weighing the prospective value of their mineral yield against the present or prospective value of the land for other purposes."

**Contests Between Claimant and U.S. Require Stricter Application of Discovery Than Contests Between Locators**

In *Converse v. Udall*, 399 F2d 616, 619-620 (9th Cir 1969), *cert denied*, 393 US 1025 (1969), it was held that "the prudent man test, complemented by the marketability test is to be applied with varying degrees of strictness, depending on the relative positions of the parties to the case." For example, the test is applied with greater strictness in contests between the claimant and the United States Government than in contests between two claimants. The Court said at 619-620:

> The decisions also make it clear that the standard is more liberally construed in favor of a first locator when the contest is between him and a second locator than in contests between a mineral locator and another party who challenges the mineral nature of the

lands. *Chrisman v. Miller, supra*, 197 US at 323:

> It is true that, when the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority.

*Miller, supra*. Therefore, we think that in this contest between Converse and the Forest Service the test should be strictly applied against Converse. Here, the decision does not deprive Converse of his possession or of the right further to explore his claim and make a valid discovery. It protects an important public interest, the right of the government, which still has paramount title, to manage valuable timber on the claims, thus confining Converse to the sole purpose for which he can acquire a valid claim under the mining laws.

To us, the cases indicate that the prudent man test, complemented by the marketability test, is to be applied with varying degrees of strictness, depending upon the relative positions of the parties to the case, i.e., against whom and for what purpose the claim of discovery is asserted, e.g., *Chrisman v. Miller, supra*, and the type of minerals involved, i.e., precious metals, base metals, or minerals of widespread occurrence, e.g., *Coleman v. U.S., supra*, 390 US at 603. Here we deal with a contest between a locator and the government, which is asserting its interest in managing timber in a national forest, rather than a contest between locators. This factor, we think, calls for a somewhat strict application of the test.

**Lower Standard of Discovery in Contests between Rival Claimants**

In two cases, the Montana Supreme Court addressed the question of discovery as it applies towards rival claimants seeking possessory title to the same lands. *Boscarino v. Gibson*, 672 P2d 1119 (Mont. 1983); *Silver Jet Mines, Inc. v. Schwark*, 41 St. Rptr. 933 (Mont. 1984). In *Boscarino v. Gibson, supra* at 1123, the Supreme Court relied on the Montana version of the "prudent man rule." This rule, which was originally set forth in *Murray v. White*, 113 P. 754, 756 (Mont. 1910), is as follows:

> It has long been the settled rule that to constitute a discovery, within the meaning of that term as used in mining law, it is sufficient that precious metals be found in the ground in quantity which justifies the locator in spending his time and money in prosecuting development work with the reasonable hope or expectation of finding minerals in payment quantities.

The trial court held in favor of Boscarino, the senior claimant, because the junior claimant had actual notice of the Boscarino claims. On appeal, the Supreme Court agreed that Boscarino

had a valid location under the "prudent man" rule.

In *Silver Jet Mines, Inc., supra*, the Montana Supreme Court again applied the "prudent man" rule and held in favor of the senior locator on one of the four claims. For this claim the Supreme Court indicated that the burden of proof in demonstrating a discovery under the "prudent man" rule is not stringent.

**Discovery Required at Date of Patent Application**

In order to patent a mining claim, there must be a discovery at the date of application, regardless of the original date of discovery. *Pruess v. Udall*, 286 F. Supp. 138 (1968), *affirmed*, 410 F2d 750, *cert denied*, 396 US 967. As the Supreme Court said in *Best v. Humboldt Placer Mining Co*., 371 US 334, 336:

> A locator who does not carry his claim to patent does not lose his mineral claim, though he does take the risk that his claim will no longer support the issuance of a patent. *U.S. v. Houston*, 66 ID 161, 165. It must be shown before a patent issues that at the time of the application for patent Athe claim is valuable for minerals,@ worked out claims not qualifying. U.S. v. Logomarcini, 60 ID 371, 373.

**Validity of Mill Site at Date of Patent Application**

Mill site claims must valid at the date of application for patent as are lode and placer claims. In *U.S. v. Rand*, A-30036 (October 19, 1964), the Secretary discussed the types of operations on mill site claims that establish validity:

> This statute clearly contemplates that at the time an application for a patent is made the land included in the mill site claim be used or occupied for mining or milling purposes. 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 at the time the application for patent is filed. *Alaska Copper Company*, 32 LD 128, 131 (1903). Where the land is not actually being used, an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining and milling purposes must be shown. *Charles Lennig*, 5 LD 190,192 (1886). It is not enough merely to show a prospective use of a mill site tract. *U.S. v. S.M.P. Mining Company*, 67 ID 141,143 (1960).

**Validity at Date of Withdrawal and Date of Hearing**

When land is closed to location under the mining laws subsequent to the location of a mining claim, the claim cannot be recognized as valid unless all requirements of the mining laws, including discovery of a valuable mineral deposit, were met at the time of the withdrawal and the

claim presently, i.e., at the time of the hearing, meets the requirements of the law. *U.S. v. Netherlin*, 33 IBLA 86 (1977). Where land occupied by a mining claim has been withdrawn from 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. *U.S. v. Chappell*, 42 IBLA 74 (1979). Even though there may have been a discovery at the time of a withdrawal or some other time in the past, a mining claim cannot be considered valid unless the claim is at present supported by a discovery. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, results in the loss of the location. *U.S. v. Wichner*, 35 IBLA 240 (1978). In *U.S. v. Clemans*, 45 IBLA 64, 71-72 (1980), the Board said:

> When land is withdrawn subsequent to location of a mining claim, the validity of such claim can not be recognized unless (1) it was perfected by a discovery at the time of withdrawal, and (2) it has been continuously supported by the same discovery to the present; that is, at the time of the hearing. *Citations omitted*. In other words, there are two events with which a claimant in such circumstances must be concerned: the first being the effect, if any, of withdrawal of the land; the other being any subsequent inquiry into the validity of unpatented claims as required by the general mining laws.

**Mineral Examination After Withdrawal**

In *U.S. v. Lara*, 67 IBLA 48 (1982), it was held that a mineral examination conducted years after the date of a withdrawal may be used to establish a lack of discovery at the date of withdrawal. The Board said at 56:

> Finally, appellant argues that mineral examinations conducted in 1977 and 1979 cannot establish the lack of a discovery at the time of the withdrawal (1972). We disagree. due to the absence of historical records, it is appropriate to extrapolate the current presence of mineral values to a prior point in time, where the nature of the deposit is such that no substantial change could be reasonably anticipated to occur over that time period. In the present case, the top layers of river gravel on the Madeline Nos. 1 and 2 claims are subject to annual erosion and replenishment. The lower layers of river gravel and the bench gravel are apparently stable. Indeed, it is precisely this relative stability that permits the long term accumulation of placer gold. In any case, there is no evidence that gold values significantly changed between 1972 and 1977 or 1979. In this sense, the gold-bearing gravels sampled by the Government mineral examiner constituted "pre-existing exposures" of the mineral deposit and the results of such sampling are clearly admissible.

**Exposure of New Reserves or Increase in Mineral Price after Withdrawal**

If a discovery did not exist on a claim at the date of withdrawal, a later discovery established by subsequent mineral exposures or rise in mineral commodity prices would not give

a claim validity at the date of a hearing. In *U.S. v. Lara, supra* at 57, the Board said:

> In light of the fact that we agree with Judge Clarke that appellant did not preponderate on the question relating to the existence of a discovery as of the date of the withdrawal, it is unnecessary to determine whether a discovery existed as of the date of the hearing. It is axiomatic that a mining claim, not supported by a discovery of a valuable mineral deposit at the time the land was withdrawn from the operation of the mining laws, is not excepted from the effect of the withdrawal. *Citation omitted*. Neither the subsequent exposure of previously undiscovered deposits nor a subsequent substantial increase in value of a mineral previously exposed can breathe life into such an invalid claim. Thus, even if appellant could show that the Madeline claims were supported by a discovery of a valuable mineral deposit as of the date of the instant hearing it would avail him nothing.

**Lode Claims Partly on Withdrawn or Patented Lands Must Be Contested**

The validity of mining claims located partially on withdrawn or patented lands depends on whether the discovery point is on land open to mineral location. "BLM may adjudicate the validity of such mining claims only by initiating a mining claim contest because the position of a discovery is a matter of fact that cannot be determined by reference to a notice of location filed under 43 U.S.C. 1744 (1982)." *James W. Phillips*, 92 IBLA 58 (1986).

**Access to Prove Discovery After Withdrawal**

In *United States v. Parker*, 91 I.D. 271, 294 (1984), the claimants contended that they were denied access to their claims after a withdrawal and did not have an opportunity to develop their case. The Board explained the rights of mining claimants to prove a discovery exists after a withdrawal:

> We have held that mining claims are not properly declared null and void for lack of discovery where the mineral claimants are effectively foreclosed from proving that a discovery exists. *United States v. Foresyth*, 15 IBLA 43 (1974). We have further recognized that while, in cases of withdrawal of the land, such withdrawal entitles the Government to restrict the development of a claim, restrictions must be reasonable "in order to permit a claimant a fair opportunity to make [its] case." *United States v. Niece*, 77 IBLA 205, 207-08, n.3 (1983).

However, the Board also cautioned that a "discovery must be judged by what has been exposed on a mining claim at the time of a withdrawal, and a claimant is not entitled to go onto a claim thereafter for the purpose of exposing new veins or lodes.

**If Disclosure of Mineral Before Withdrawal, Sampling and Assaying After Withdrawal May Prove Discovery**

In *United States v. Foresyth*, 100 IBLA 185, 207 (1987), the Forest Service argued that a discovery is not established until the minerals on the claim had been sampled and assayed and

the assay results had been returned. The Board addressed the argument by stating that "the acts of sampling and assaying are acts which either confirm or disprove the existence of a discovery. Thus, if there was a disclosure of mineral at the date of withdrawal from mineral entry, that disclosure is a discovery of valuable mineral if subsequent sampling, assaying, and testing confirm the fact that the disclosed mineral is valuable." The Board further noted that "assay results from diamond-drill intercepts of the mineralized zone will support a conclusion that there was an exposure of valuable mineral if reasonable geologic projection leads to a conclusion that the intercept and the exposure are from the same mineralized structure." *Id.* at 207.

**Circumstances Where Drilling Is Permissible on Claim after Withdrawal Date**

A mining claim cannot be declared void for lack of a discovery if the Government prevented the claimants from entering the claim to gather information to prove the existence of a discovery. *United States v. Mavros*, 122 IBLA 297, 310 (1992). In *Mavros* the Board described several circumstances where a claimant could enter claims after the date of withdrawal to gather evidence that a discovery existed on the date of withdrawal or the date of hearing:

> * * * For example, if the claimant had driven an adit which exposed valuable mineral prior to withdrawal, the claimant should be allowed to reopen a caved portion of the adit to take samples of the mineral he had previously exposed (*see United States v. Parker, supra* at 384, 91 I.D. at 294-95). He could also drill in order to sample a previously disclosed valuable mineral deposit (*cf. Hiko Bell Mining & Oil Co.*, 55 IBLA 324, 328-31 (1981) (drilling permitted to prove existence of commercial quantities of coal already discovered during term of prospecting permit, consistent with *Foresyth*)). On the other hand, the claimant may not drive an adit on what appears to be a promising structure in hopes of finding valuable mineral, and that activity would be considered further exploration to disclose a deposit not exposed prior to withdrawal.

In *United States v. Foresyth*, 94 I.D. 453 (1987), the Board held that where a claim had a prewithdrawal exposure of mineral, postwithdrawal drilling could be used to establish that the quantity and continuous quality continues for a reasonable projectable distance to confirm a discovery. The Board stated at 458:

> * * * By Order dated October 30, 1975, the Board held, *inter alia*, that inasmuch as the contestant had conceded that post-segregation removal of limestone from the quarry would help to establish whether the Avenger limestone was commercial grade and marketable, there was no theoretical or practical justification for the position that additional samples taken by drilling to establish quantity and quality must be excluded. The Board held that to the extent core samples may aid in establishing the quantity and continuous quality of an exposed outcropping, they are clearly within the scope of the remand. The Board agreed, however, that a number of proposed drill sites were located on claims for which the evidence showed no prewithdrawal exposures of mineral to exist.

Again, in *United States v. Mavros, supra*, at 313 the Board explained the right of the claimant to obtain postwithdrawal core samples to establish the quantity and continuous quality of a

prewithdrawal exposure of minerals:

> * * * There is no evidence that Mavros wanted to obtain core samples to establish "the quantity and continuous quality of an exposed outcropping," which was permitted after segregation of the land in *United States v. Foresyth*, 100 IBLA at 194, 94 I.D. at 458. The existence of an exposure of valuable minerals that would support a discovery if quantity and continuous quality of these minerals continues for a reasonably projectable distance is critical to the right to enter withdrawn land for the purpose of drilling to confirm a discovery.

The important significance of *Foresyth* and *Mavros* is that the prewithdrawal exposure of mineral is apparently something short of the mineral reserves (quantity of ore) necessary to support a discovery. The language "continuous quality" implies that the assay value or grade should be sufficient at the prewithdrawal exposure to support a discovery if additional reserves of the same quality can be confirmed.

**Physical Exposure of Valuable Minerals before Drilling Withdrawal**

In *United States v. Crowley*, 124 IBLA 374, 378 (1992), the Board reiterated its holding in *United States v. Mavros, supra* at 310-11, that core drilling may not be allowed on withdrawn land unless it is "to confirm the pre-existing discovery of a valuable mineral deposit." Furthermore, "[a]t the very least, there must be a showing that there has been an exposure of valuable minerals before permission may be granted to determine the extent thereof." *United States v. Crowley, supra* at 378.

**Cost Analysis Is Required in Prudent Man Determination**

In *United States v. Foresyth, supra*, the Board gave an example to explain how a mineral deposit may not be an ore deposit if the cost of extracting the minerals exceeds the value of the minerals. This example explains why a cost analysis plays a crucial role in the "prudent man" determination. The Board said the "determination that a valuable mineral exists on a property is only the first step in the 'prudent man' determination. One analysis of the earth's crust noted that the gold contained in seawater represents the largest known 'reserve' of gold in the world. However, the cost of extracting gold from seawater is far greater than the value of the gold that would be recovered. A prudent man, therefore, would not expend his time and means to evaporate sea water and process the solids to recover the gold. A mineral deposit becomes an ore deposit only if the cost of removal and rendering the minerals contained in the deposit suitable for sale is less than the sales price. Cost of extraction must, therefore, be examined." *Id.* at 211.

**Validity May Be Challenged for Any Reason**

"Federal employees charged with the management of Federal lands have the right and authority to challenge the validity of mining claims for any reason. *Estate of Melvin E. Viles*, 126 IBLA 162, 164 (1993).

**Until Patent Issues, Government May Inquire into Claim Validity**

In *United States v. Knoblock*, 131 IBLA 48, 78 (1994), the Board pointed out that even though a claim was formally determined to be supported by a discovery in a contest proceeding, the Government can later make an inquiry into validity on some other deficiency. The Board said at 1994:

> * * * In this regard, we note that, until patent issues, paramount title to the land embraced within mining claims remains in the United States, and it may inquire into the extent and validity of rights claimed against it. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963; *Cameron v. United States*, 252 U.S. 450 (1920); *Ideal Basic Industries, Inc. v. Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976); *United States v. White*, 118 IBLA 266, 308-10, 98 I.D. 129, 151-52 (1991). Thus, even had the United States formally determined in the course of an earlier contest proceeding that a specific claim was supported by the existence of a discovery of a valuable mineral deposit, this determination would not bar a subsequent inquiry as to whether the claim continued to be supported by a discovery or whether some other deficiency existed which would justify a declaration of invalidity.

**Validity of Claim May Be Challenged Even If Previously Determined**

In *United States v. Fisher*, 115 IBLA 277, 284 (1990), the Board stated the well-established rule that "*so long as legal title to the mining claim which is subject to review has not passed out of the United States*, the Government may still determine its validity, regardless of whether it has previously been determined to be valid or whether a comparable claim has been so determined and title to that claim has passed." *United States v. Webb*, 1 IBLA 67 (1970), *aff'd* 723 F.2d 917 (9th Cir. 1983), *cert. denied* 466 U.S. 972 (1984).

**Department May Not Adjudicate Validity Of Claims After Conveyance**

ANCSA and ANILCA allow the conveyance of lands out of Federal ownership with whatever "valid existing rights" may have attached before the conveyance. The Department is not required to adjudicate the validity of unpatented mining claims located upon a native selection. Furthermore, it cannot adjudicate the validity of Native Allotment applications located upon lands legislatively conveyed to Alaska under ANILCA. *Ed Bilderback, supra*, at 267.

**Recitals of Discovery in Location Notice**

It is not uncommon for locators to indicate on the location certificate that a discovery exists within the claim boundaries and that such discovery was made on a specified date. In *Cole v. Ralph*, 252 US 286, 303 (1920), the United States Supreme Court held that such assertions on the location affidavit does not constitute evidence of discovery. The Court said at 303:

> The further objection is made that no probative force was given to recitals of discovery in the recorded notices of location of the lode claims. The notices were admitted in evidence and no instruction was asked or given respecting the recitals. In one nothing is

said about discovery, and what is said in the other two is meager. But, passing this, the objection is not tenable. The general rule is that such recitals are mere *ex parte*, self-serving declarations on the part of the locators, and not evidence of discovery.

**Federal Versus State Discovery Requirements**

In a contest between the U.S. Government and a claimant, a state law which provides for a presumption of discovery in favor of the locator would not apply. In *U. S. v. Ramsey*, 14 IBLA 154 (1974), the Board said:

> The appellants argue that Oregon law provides for a presumption of discovery in favor of the locators of a claim, *Steele v. Preble*, 158 Ore. 641, 77 P2d 418, 428-29 (1938). This may be true when the dispute is in a state court and the issue is determination of possession or title between private parties. Here, however, the issue is whether a discovery has been made and presumptions afforded claimants by state courts simply do not obtain, especially since the Government was not a party to the proceedings, *Perego v. Dodge*, 163 US 160, 168 (1896). It is the interior Department, and not state courts, which has been given plenary power over disposition of the public lands, *Cameron v. U.S.*, 252 US 450, 460 (1920).

State mining laws relating to discovery may only add to the federal mining law; such laws cannot diminish the Federal requirements for the discovery of a valuable mineral deposit on a mining claim located on Federal lands. *U.S. v. Tappan*, 25 IBLA 1 (1976).

**Federal Law Versus Local Customs**

In *U.S. v. Knecht*, 39 IBLA 8 (1979), it was held that local customs concerning the validity of a claim may only add to the Federal requirements and cannot replace the Federal requirements. The Board said at 12-13:

> Local customs relating to validity of a claim may only add to the Federal mining law; such customs cannot replace the Federal requirements for adjudication of the claim's validity. Cf. *U.S. v. Denham*, 29 IBLA 185 (1977) (holding that State mining law may only add to Federal mining law). Under the statute, the lands are open only "under regulations prescribed by law." While the custom in appellant's area may be to have a district examining committee review the validity of a claim, its determination does not bind the Federal Government, which is required instead to adjudicate the validity of a contested claim in accordance with the terms of its regulations, which implement the Administrative Procedure Act. 5 USC ' 554 *et seq*. (1976).

**Location of Claim Confers No Right if No Discovery**

A mining claim location does not give the presumption of a discovery. *Ranchers Exploration and Development Co. v. Anaconda Co*., 248 F. Supp. 708 (1965). In *Cole v. Ralph*,

252 US 286, 294-296 (1920), the Supreme Court held that "location is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim."

**Discovery Does Not Precede Location**

Although the statute requires that discovery precede location, the order may be reversed provided there is no intervening right established. In *Cole v. Ralph, supra*, the Supreme Court said:

> In practice, discovery usually precedes location, and the statute treats it as the initial act. But, in the absence of an intervening right, it is no objection that the usual and statutory order is reversed. In such a case the location becomes effective from the date of discovery; but in the presence of an intervening right it must remain of no effect.

**Assessment Work May Not Substitute for Discovery**

The performance of assessment work has no relationship to discovery. In *Cole v. Ralph, supra*, the Supreme Court said:

> ... Nor does assessment work take the place of discovery, for the requirement relating to such work is in the nature of a condition subsequent to a perfected and valid claim and has "nothing to do with locating or holding a claim before discovery." *Union Oil Co. v. Smith, supra*, p. 350.

**Changing the Discovered Mineral After Discovery**

In *U.S. v. Copple*, 81 IBLA 109, 123-25 (1984), the Board considered an appeal where a mining claim was declared null and void for lack of a discovery. The claims were originally located for gold and other precious minerals before 1962 when the lands were withdrawn from mineral entry. A geologist hired by the claimant examined the claims and at the hearing testified that he made a discovery of gem quality chrysocolla. Chrysocolla is a secondary mineral of copper with generally a blue-green color and a low hardness. It can be a semiprecious gemstone when it has the proper combination of color and hardness. The problem for the claimant in this case is that even if the chrysocolla was of gem quality and locatable, any "discovery" of chrysocolla occurred long after the land had been removed from mineral entry. *Id* at 125. *See U.S. v. Haskins*, 88 I.D. 9257 967 (1981).

**Bad Faith Can Invalidate a Claim -- Even with Discovery**

*U.S. v. Zimmers*, 81 IBLA 41 (1984) involved an appeal from a decision of an Administrative Law Judge declaring four mining claims invalid for lack of discovery. It was alleged in the complaint that the claims were not located in good faith. The basis for the bad faith allegation was the information and belief that the claimants had not located the claims for the purpose of developing a mine but had intended to use the claim ownership as a basis for activities not related to mining.

During the five years the claimants occupied the lands embraced by the claims, they built two cabins, a water system and cut 50 trees. From the time of location until the hearing, the claimants had done no work on the claims other than take a few samples. Although the owners indicated the claims were valuable for gold, assays indicated a value of only $0.025 per cubic yard using a gold price of $700 per ounce. The claimants also maintained that a discovery existed on the claims for fire clay; however they provided no information on purity, costs of production and marketability. On the basis of the above-mentioned activities, the Board said at 48:

> ... the evidence clearly demonstrates that the intended use for the claims was other than for *bona fide* mining of minerals from the claim. The evidence presented did not demonstrate that there was sufficient mineral on the claim to justify a prudent man's expenditure of his time and means in the further development of a mine. The claims were neither located nor held for legitimate mining purposes. We therefore hold that the contestant sustained the burden of proof that there was no discovery on the claims and that the claims had not been located in good faith.

The Board then reviewed several other cases involving the location of claims for purposes other than mining and pointed out that mining for minerals is the only valid use of a claim under the mining laws. The Board said at 43:

> When expressing the absolute necessity for good faith on the part of the claimant in *In re Pacific Coast Molybdenum Co*., 75 IBLA 16, 90 I.D. 352 (1983), this Board said that "even if a discovery can be shown to exist, proof of bad faith can invalidate a claim, since in such a situation the mineral values are incidental to the purpose for which the land is claimed." Thus, it is readily apparent that if claims are not located in a good faith effort to develop a mine, the claims are void *ab initio*.
>
> The concept that an entry can be canceled if it is found that title to the ground is not being sought for the intended purpose is neither new nor novel. In *United States v. Elkhorn Mining Co*., 2 IBLA 383 (1971), *aff=d, Elkhorn Mining Co. v. Morton*, Civ. No. 2111 (D. Mont. Jan. 19, 1973), the Board found that charging admission for breathing the atmosphere of a mine tunnel did not constitute the use of property for mining purposes. It was never contemplated or intended that public lands might be possessed and held and title thereto acquired under the mining laws for purposes or uses nonessential to mining or mining operations. *Grand Canyon Railway Co. v. Cameron*, 36 L.D. 66 (1907). *See* also *South Dakota Mining Co. v. McDonald*, 30 L.D. 357 (1900) (bad faith entry by homestead claimant). In each of these cases the claimant had used the lands for purposes other than that for which entry was made. The mining of minerals from the claim must be the primary purpose for the location of a claim. If it is the secondary purpose or used as a means of justification for the occupancy of the land, it is not a *bona fide* claim.
>
> It is important to note however, that "where the issue of bad faith is raised, the

government bears the ultimate burden of proof..." *In re Pacific Coast Molybdenum Co., supra, U.S. v. Prowell*, 52 IBLA 256 (1981).

**Comparison of Deposits to Determine Prospect of Success**

In *U.S. v. Walper*, 77 IBLA 90 (1983), 35 lode claims covering a large disseminated molybdenum deposit (Nunatak Deposit) were declared null and void for lack of discovery of a valuable mineral deposit. The Board concluded that the testimony of the government mineral examiners was sufficient to establish a *prima facie* case of invalidity. The mineral examiners relied on a 1978 U.S. Geological Survey report on the Nunatak deposit. The report indicated that the deposit "as presently known" is "between the 50th and the 90th percentile in size and just below the 10th percentile in grade," when compared with known porphyry-molybdenum deposits of the world. The report also stated that "in evaluating the mineral resource potential of this favorable area, we assume that the minimum size and grade deposit that would attract serious interest would have at least ... 100 million tons ... of resources containing between 0.15 and 0.20 percent molybdenum...."

The mineral examiners sampled core segments left behind by the drilling and had four assays taken. The four assays indicated an average grade of molybdenum sulfide (MOS2) of 0.1 percent. This grade is lower than the minimum exploitable grade at the Urad-Henderson mine in Colorado which was 0.2 percent MOS2.

The significance of the government's *prima facie* case is that the mineral examiners made no estimate of the quantity of ore available on the claims and had not developed "the costs of extracting, removing and marketing the ore." *Id* at 55. Instead, the examiners partly determined the Nunatak deposit could not be operated at a profit by comparing its reserves and grade with the minimum ore grade at the Urad-Henderson Mine. In approving this approach, the Board said at 55:

> ... in this case, it was not necessary that the opinion of the Government mineral examiners be based upon a personal estimate of the tonnage of the deposit coupled with specific knowledge as to costs of extraction in order to establish a *prima facie* case. It was not improper for the Government mineral examiners to use the Urad-Henderson mine as a standard by which to judge the quality of the ore in terms of the prospect of success in developing a valuable mine. The standard is certainly relevant even if it is not conclusive on the issue. The Urad-Henderson mine, operated by AMAX, Inc., is one of the predominant domestic mines, which, along with the Climax mine and the Questa mine, account for two-thirds of domestic molybdenum production.

## THE MARKETABILITY TEST

### Introduction

The marketability test has long been followed by the Department of the Interior since *Layman v. Ellis*, 52 LD 714 (1929). The application of the test was expressly upheld in *Foster v. Seaton*, 271 F2d 836 (f)C Cir 1959). It was further approved by the Supreme Court as a complement to the prudent person test in *U.S. v. Coleman*, 390 US 602 (1968), pointing out that "profitability is an important consideration in applying the prudent-man test." *See* also, *Converse v. Udall*, 399 F2d 616, 621 (9th Cir 1968), *cert denied*, 393 US 1025 (1969), indicating that the marketability test is applicable to all mining claims, including those containing precious metals.

### The Foster v. Seaton Case

In *Foster v. Seaton*, *supra* at 838, the Court upheld the requirement for present marketability followed by the Interior Department since *Layman v. Ellis*, 52 I.D 714 (1929):

> With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these minerals by persons seeking to acquire such lands for purposes other than mining. Thus, such a "mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." *Layman v. Ellis*, 54 ID 294, 296 (1933).

### The Coleman Case

In *U.S. v. Coleman*, *supra*, Mr. Justice Black speaking for a unanimous Supreme Court approved the requirement of the Secretary that "the mineral can be 'extracted, removed and marketed at a profit' -- the so-called 'marketability test' " (390 US at 600, 602-603).

> Indeed, the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is Avaluable.@ It is a logical complement to the Aprudent man test@ which the Secretary has been using to interpret the mining laws since 1894.
>
> Finally, we think that the Court of Appeals' objection to the marketability test on the ground that it involves the imposition of a different and more onerous standard on claims for minerals of widespread occurrence than for rarer minerals which have generally been dealt with under the prudent man test is unwarranted. As we have pointed out above, the prudent man test and the marketability test are not distinct standards, but

are complementary in that the latter is a refinement of the former. While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is a great demand, sell at a price so high as to leave little room for doubt that they can be extracted and marketed at a profit.

**Marketability and the Claimant's Intention**

In *U.S. v. Coleman, supra* at 603, the Supreme Court pointed out that the marketability test is useful in revealing the claimant's intention or good faith:

> The marketability test also has the advantage of throwing light on a claimant's intention, a matter which is inextricably bound together with valuableness. For evidence that a mineral deposit is not of economic value and cannot in all likelihood be operated at a profit may well suggest that a claimant seeks the land for other purposes. Indeed, as the Government points out, 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.

**Marketability Test Is Not "Supplemental" or "Complementary" Test**

In *United States v. Multiple Use, Inc*. 120 IBLA 63, 80 (1991), Judge Mullin clarified the relationship and significance of the "marketability test" to the Aprudent-man test:@

> At various times since *United States v. Coleman, supra*, decisions have alluded to a "supplemental" or "complementary" test, usually referred to as the Amarketability test." *See, e.g., United States v. Crawford*, 109 IBLA 264 (1989); *United States v. Holder*, 100 IBLA 146 (1987). However, the Amarketability test" is merely a means of ascertaining whether there will be a "valuable mine" and not a supplemental or complementary standard. The requirement of showing that the evidence is of such a character that there is a reasonable prospect that the commercial value of the deposit exceeds the cost of extracting, processing, transporting, and marketing the contained mineral remains valid -- no matter how it may be couched.
>
> It is therefore evident that, to have a reasonable prospect of success in developing a valuable mine, the mine owner must be able to demonstrate, as a present fact, that there is a reasonable probability that the mineral can be extracted and marketed at a profit. A discovery cannot be based on speculation that at some time in the future an economic change or untested technological advance will render the mine valuable.

**Marketability Applies to All Minerals**

The question of whether the marketability test is applicable to intrinsically valuable minerals such as base and precious metals has been considered in a number of cases. In *U.S. v. Denison,* A-29884 (April 24, 1964), the Secretary applied the marketability test to a gold claim:

> That the ruling (of marketability) is not confined to instances involving minerals of common occurrence, such as pumice, is plain from the court's statement that the *Adams* case decided the same question. That case (*Adams v. U.S.*, 318 F2d 861 (9th Cir 1963)), of course, dealt with gold.
>
> Thus, the economic conditions which may be considered in determining whether a valuable mineral deposit has been discovered include such factors as the cost of mining, transporting, and processing the mineral and the existence of a market for the mineral, whether it be deemed one of intrinsic value, such as gold, or one of common occurrence, such as pumice ... Thus, it is entirely proper to require the holder of a claim containing a low grade of an intrinsically valuable mineral to show that there is a market or demand for the mineral in the claim.

In *U.S. v. Pekovich,* A-30868 (September 27, 1968), the Department again applied the marketability test to a deposit of gold. The Department said:

> ... Appellants have attempted to divorce the term Avaluable mineral deposits@ from the concept of Aeconomic value@.
>
> This principle is applicable to all minerals. A deposit of gold which cannot be mined for a cost less than the market value of the gold which it will yield is not a Avaluable deposit.@ The same may be said of a deposit of iron ore or of building stone or of any other mineral. (Citation omitted.) This is the essence of the Aprudent man@ test of *Castle v. Womble, supra,* uniformly accepted since its pronouncement as the criteria for determining whether or not a discovery of a valuable mineral deposit has been shown. In this sense, a test of Amarketability@ is applied to all minerals.

In *Converse v. Udall,* 399 F2d 616 (1968), perhaps the most frequently-cited case on this subject, the court held that the marketability test, including the profit factor, was applicable to all mining claims including those containing precious metals. The Court said at 621-622:

> We think it clear that the marketability test is applicable to all mining claims. We do not agree with Converse's argument that the last sentence that we have quoted means that marketability has no relevance in a case where the discovery is of precious metals. Such a holding would be contrary to Mr. Justice Field's rationale in *U.S. v. Iron Silver Mining Co., supra,* and to the rationale of the prudent man test itself. It, too, concerns itself with whether minerals are "valuable in an economic sense.@

In *Roberts v. Morton,* 549 F2d 158 (1977), the Tenth Circuit Court again approved the application of marketability at a profit to precious metals. The Court said at 163:

> We agree, however, with the district court's view that marketability at a profit remains an essential consideration in this case. We are persuaded that the Court's statement in *Coleman*, cited above, does not mean that marketability has no relevance where a discovery even of a precious metal is involved.

**Less Strict Application of Marketability on Metallic Minerals Than Widespread Minerals**

In *Converse v. Udall, supra* at 622, it was held that a contest involving metallic minerals require a less strict application of the marketability test than contests involving widespread minerals and that "there need not be a full showing of marketability." The Court said:

> Here, we also deal with a lode claim containing small values in precious metals, but principally base metals, copper, lead, and zinc. This second combination of factors, we think, calls for a somewhat less strict application of the test. We think that in such a case it is still the law that there need not be a full showing of marketability, such as the Secretary required in *Coleman, supra*. But the marketability test does permit the fact finder, even in the case of a showing of gold, to consider, somewhat more extensively than heretofore, the economics of the situation. Perhaps we could phrase the test this way: When the claimed discovery is of a lode or vein bearing one or more of the metals listed in 30 USC ' 23, the fact finder, in applying the prudent man test, may consider evidence as to the cost of extraction and transportation as bearing on whether a person of ordinary prudence would be justified in the further expenditure of his labor and means. But this does not mean that the locator must prove that he will in fact develop a profitable mine.

**Marketability Test Does Not Require Proof of Profitability for Precious Metals**

In a case involving gold deposits, the Ninth Circuit Court of Appeals held that Ait need not be proved that the claim can in fact be operated at a profit, but the evidence as to costs of mining may be considered in determining whether a person of ordinary prudence would be justified in the further investment of labor and capital.@ *Multiple Use, Inc. v. Morton*, 504 F.2d 448 (9th Cir. 1974). In *Lara v. Secretary of the Interior*, 820 F.2d 1535 (9th Cir. 1987), a case also involving gold, the Court cited the *Multiple Use* case with approval and further held that a claimant "need not have shown profitability at the date of withdrawal or at the date of the hearing. Rather, evidence of the costs and profits of mining the claims should have been considered in determining 'whether a person of ordinary prudence would be justified in the further investment of labor and capital.=" *Id*. at 1541. Furthermore, the Court stated that the ALJ and the IBLA (67 IBLA 57) Aerred in stating that the marketability test requires 'a showing that the mineral in question can be presently extracted, removed, and marketed at a profit.=" *Lara v. Secretary of the Interior, supra* at 1541.

**Higher Standard of Marketability for Common Material**

In *Lara v. Secretary of the Interior, supra* at 154 1, the Court indicates that the marketability test is more stringent for common materials such as limestone than precious minerals. The Marketability test for common materials requires that they "presently@ can be

extracted and marketed at a profit. The Court stated at 1541:

> In apparent contradiction to this statement from Multiple Use is our holding in *Ideal Basic Industries, Inc. v Morton*, 542 F.2d 1364, 1369 (9th Cir. 1976), that "[t]o meet this [marketability] test it must be established that the limestone presently could be extracted and marketed at a profit." (Emphasis in original). These cases can be reconciled by the distinction *Lara* makes between precious minerals and common materials. *Multiple Use* involved gold; *Ideal* involved limestone.

**Marketability at a Profit**

Many recent Interior and federal court decisions have required marketability at a profit. In *U.S. v. Coleman*, 390 US 599 (1968), the Supreme Court held that "profitability is an important consideration in applying the prudent man test..." The Court said at 602:

> Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent man test, and the marketability test which the Secretary has used here merely recognizes this fact.

In *Roberts v. Morton*, 549 F2d 158 (10th Cir 1977), the Court indicated that marketability at a profit is relevant to a claim for precious metals. The Court said at 163:

> We agree, however, with the district court's view that marketability at a profit remains an essential consideration in this case. We are persuaded that the Court's statement in *Coleman*, cited above, does not mean that marketability has no relevance where a discovery even of a precious metal is involved. *See Converse v. Udall*, 399 F2d 616, 621 (9th Cir). It is still proper here that the Secretary "take into account the economics of the situation." *Id* at 622. The required showing by a claimant, however, is that at the time of discovery there is a market sufficiently profitable to attract the efforts of a person of ordinary prudence.

**Present Profitability**

Since *Coleman*, the test of discovery has, in certain cases, required that a mine could be operated at a profit under present economic conditions. In *U.S. v. Estate of Alvis F. Denison*, 76 ID 233 (1969), the Department construed the prudent-man rule as follows:

> ... the expectation of future remunerative market prices must be based upon rational

considerations, including normal market ups and downs, and not upon conjectures and speculation as to possible sharp increases in market prices due to unpredictable changes, world political economic conditions, or to a Government subsidy, or to the unforeseen lowering of costs because of dramatic technological breakthrougb. Thus, the expectation of future profitability under the prudent man test must be based upon present economic circumstances known then and not upon mere speculation as to possible substantial changes in the market place.

In *Hollenbeck v. Kleppe*, 590 F2d 852 (1979), the Court expressly held that in order for a claim to be valid it must be shown that the mineral "can be extracted, removed and marketed at a profit." The Court said:

> Plaintiffs say that it need not be shown that the mineral has been sold, but rather that it can presently be extracted, removed and marketed at a profit.
>
> We would agree with the rule as stated but cannot say that the district court misapplied the law. We feel the court correctly followed the test of present marketability. *Citations omitted*. The court's findings in the instant case stated that: "A private litigant cannot locate claims upon public lands and then simply wait until the minerals are in sufficient demand to be marketed at a profit," and also that: "...plaintiffs cannot hoard common sand and gravel on public lands until it becomes profitable to market such deposits."

In *U.S. v. Smith*, 66 IBLA 182, 190 (1982), in holding that a claim is invalid, the Board said that "while the record reveals that appellants could have a competitive advantage because of the location and accessibility of their claim, they have failed to establish that there is a present market for the material from their claim.

**Presently Marketable at a Profit: New Definition**

The Interior Board of Land Appeals has significantly refined the prudent-person test by defining "presently marketable at a profit" to mean that the claimant "must show that as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed." *In re Pacific Coast Molybdenum*, 78 IBLA 16, 29, 90 I.D. 352, 360 (1983). This new definition was made in response to large fluctuations in mineral commodity prices that occurred during the preceding five years. Now a claimant is not stuck with the latest market price of a commodity, but instead may average prices over an appropriate period of time. However the Board did caution that Asituations can occur in which structural economic changes or technological breakthroughs invalidate historical conditions as a guide to present marketability." For example, mineral prices elevated artificially by Government price supports would not be relevant to the question of present marketability. Also the possibility that a future stockpiling program might someday be initiated would be "essentially speculative and could not serve as a predicate upon which a prudent man would have proceeded to expend time and money with a reasonable hope of success." *Id* at 30. *Also See U.S. v. Denison*, 76 I.D. 233, 239 (1969). Because of its bearing on

the validity of a claim, the relevant portion of the Boards decision on marketability is given below (*Id* at 28-30):

> While no prudent man would expend time and money to develop a mine where it is clear that there is no market for the mineral or the price that could be obtained is obviously less than the cost of production, the question of prudence becomes more difficult when the mineral involved is subject to great price volatility. Many minerals, including molybdenum, show marked price elasticity for both the demand and supply fluctuations. Thus, either increased demand or decreased supply in the short term can often result in elevated prices which cannot be sustained over a long period of time. The same, however, is true on the downside. Molybdenum, which is primarily used in steel production, is particularly price sensitive to developments in the steel industry. The sharp 1981-83 recession, with its attendant massive decline in steel production, necessarily depressed molybdenum prices on a world-wide scale.
>
> "Present marketability" has never encompassed the examination of either cost or price factors as of a specific, finite moment of time, without reference to other economic factors. Rather, the question of whether something is "presently marketable at a profit" simply means that a mining claimant must show that, as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed. For example, if a claimant has located a deposit of gold which can be mined at a profit, if the price of gold is $500 an ounce, and the evidence is such that there is a reasonable likelihood of sufficient quantity and quality to justify development, that claim can be deemed valid despite the fact that on any specific day gold may be selling at $420 an ounce. This is so because a selling price of $500 an ounce for gold is both within the historic range and expectations of it reaching that level again can be justified as a present matter. On the other hand, if the deposit, because of expenses associated with mining and beneficiation, requires a selling price of $1,500 an ounce, such a claim does not exhibit present marketability. So elevated a price for gold does not represent any relevant historic range and is essentially based on speculation or unsupported hope. It may be an expectation, but it is an unreasonable one given present facts.

In *United States v. Joseph Laczkowski*, 111 IBLA 165, 172 (1989), the Board expanded on the definition of "presently marketable at a profit by holding that "[a]n elevated or depressed price for gold does not represent any relevant historic range and is essentially based on speculation or unsupported hope." In the *Laczkowski* case, the Board applied a price of $403 per troy ounce for gold and $10.50 per troy ounce for silver to placer gold operations. To get these values, the Board averaged the price of silver and gold for the time period starting when the Government first sampled the claims and ending at the date of issuance of the *Laczkowski* decision.

**What Evidence of a Present Market Is Required?**

In *United States v. Foresyth*, 100 IBLA 185, 239 (1987), the Board held that the evidence furnished by the owners of limestone claims was sufficient to establish that a market for limestone presently exists. The claimants demonstrated that there "is a ready and willing buyer, and that they can mine and sell the material from the claims in the market place at a competitive or lower price than the present suppliers of that market." *Id*. at 239. The Board also noted that "the negotiations are preliminary, for until a final determination of the validity of the claims is made, no contracts or final commitments can be executed" *Id*.

The Board pointed out that Ato a degree,@ evidence of a market is speculative "with respect to all mining operations whether they be for precious metals, or, as in this case high grade limestone. It is rare that in the early stages of development of any mine a miner has an assured buyer for his product, unless the mine is captive. Even in the case of a captive mine, there is no assurance that when the mine has been brought on stream the market price for the end product will be the same.@ *Id*. at 251.

**Evidence of Marketability**

In *United States v. Melluzzo*, 105 IBLA 252, 258 (1988), the Board held that a group of claims lacked credible positive evidence of marketability on the basis of the following:

1. Aerial photographic evidence established a lack of surface disturbance on the claims between 1954 and 1956.

2. Claimants failed to prove there was a demand for stone as of July 23, 1955.

3. Very little stone marketed from claims before July 23, 1955.

4. No evidence of costs of production or profits from sales.

**Proof of Profitable Market**

In *U.S. v. Gould*, A-30990 (May 7, 1969), the Department held that it "does not require a mining claimant to prove a discovery by showing that he is actually engaged in profitable mining operations or even that profitable operations are assured, but it does require a showing of a prospect of profit which is sufficient to invite reasonable men to expend their means in attempting to reap that profit by extracting and marketing the mineral, as distinguished from evidence of value which will entice men to invest their money only in gaining control over land and holding it in the hope or expectation that at a future date the land may be found to be valuable for the minerals which it contains."

In *Barrows v. Hickel*, 447 F2d 80,82 (9th Cir 1971), the Court held that "actual successful exploitation of a mining claim is not required to satisfy the prudent man test." The Court in

*Barton v. Morton*, 498 F2d 288 (1974) explained below the rationale for not requiring proof that a mine can operate at a profit. The Court said:

> "Proved ability to mine the deposit at a profit need not be shown." *Adams v. U.S.*, 318 F2d 861, 870 (9th Cir 1963). The question is not "whether assured profits were presently demonstrated, but whether, under the circumstances, a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed ... Room remains after discovery of the mineral deposit for application of the principle that the claimant need only show a reasonable prospect that a profitable mine will be developed. The margin between a valuable mineral deposit and a profitable mine may be substantial.
>
> The reason for accepting less than demonstrated profitability as a condition to patentability is to encourage the investment of capital in the development of mineral resources. No doubt it would further that purpose to offer the incentive of patentability to "prudent" prospectors as well as "prudent" mine developers. But there are other considerations. A patent passes ownership of public lands into private hands. So irrevocable a diminution of the public domain should be attended by substantial assurance that there will be a compensating public gain in the form of an increased supply of available mineral resources.

**Amount of Profit**

One of the most common questions by claimants concerning the profitability requirement is how much profit is necessary to validate a claim. In several interesting cases the Interior Department addressed the profitability requirement in terms of the amount of profit necessary to establish a discovery. In *U.S. v. Barrows*, A-31023 (November 28, 1969), the Board held that a profit as low as $245 per year would not satisfy the prudent man test of discovery. The Board said:

> We do not believe a profit of as low as $245 per year would satisfy the prudent man test of discovery. It might be argued that Barrows' claim satisfied the marketability rule in a narrow sense in that material was sold from it at a profit. But this would be true if Barrows had sold only one truckload (3 yards) of sand and gravel per year at a profit of $10.50. It would be ridiculous to say this would have met the test of discovery. We have pointed out recently that the prudent man rule is the ultimate test of discovery, that the marketability test is but a refinement of it, and that although a claim may literally or technically satisfy the marketability test if it returns a minimal profit this will not satisfy the prudent man test if a prudent man would not invest his labor and means for such small profit.

In *U.S. v. Penrose*, 10 IBLA 334 (1973) the Board indicated that although a sale of $1.00 could represent a profit to a claimant, it would not meet the prudent-person test. The Board said:

> It is not enough that a claimant demonstrate that merely a profit or prospect of a profit be

present to validate a "common variety" claim. As here, for example, where there is every indication that appellant spent little or even nothing, other than the time required for location, to improve the claim, a sale, of $1.00 would in fact be a "profit" for a claimant. It is unconscionable to think that the intent of the mining laws was to authorize the issuance of patent for fee title to land to anyone who derived or foresaw any profit no matter how small from minerals on the claim, particularly where no effort was expended to explore for and extract the minerals. The Department has long held that the sale of minor quantities of material at a profit, or the disposal of substantial quantities at no profit, does not demonstrate the existence of a market for the material found on a particular mining claim which would induce a man of ordinary prudence to expend his labor and means in an attempt to develop a valuable mine on that claim.

In *U.S. v. Gold Placers, Inc*., 25 IBLA 374, 376 (1976), the Board held that "if it were shown as a matter of certitude that a deposit contained X amount of mineral for which the costs of removal would be one cent more than the value obtained no prudent man would expend further labor or means with a reasonable prospect of success."

**Supply Verses Demand**

Minerals that are not intrinsically valuable such as many of the construction or building minerals are extremely vulnerable to the "law of supply and demand." Most of the cases in which the Interior Department or the Federal courts considered the problem of supply and demand as it applies to the marketability test involved sand and gravel, building stone and cinders or pumice. Quotations from three pertinent Interior Department cases are given below:

1. *U.S. v. Benson*, A-31061 (September 4, 1969)

Furthermore where the supply of a material greatly exceeds the demand, as here, the marketability of, or present demand for, a *particular* deposit is not demonstrated as is required, by evidence that sand and gravel of like quality has been removed and perhaps even marketed from other deposits in the same vicinity. *Citations omitted*. In fact, such operations tend to show the opposite. For they tend to show that whatever limited market or demand exists is being saturated by supply from those other operations.

The failure of the claimants to enter the competition to supply sand and gravel contradicts the supposed speculative, hypothetical, and theoretical position of the claimants that because others developed pits and perhaps profitably sold material, they could have done as well.

2. *U.S. v. Gibbs*, 13 IBLA 382, 393 (1973)

We conclude that a showing which merely establishes that a given market is receiving an adequate supply is an insufficient basis upon which to rest a conclusion that supplies from another source are not marketable at a profit.

It is where the market is saturated by a super-abundance of top quality goods from competitive sources at prices near the irreducible minimum that the advent of yet another would-be supplier must be viewed with the proverbial "jaundiced eye." *Citation omitted*. Similarly, where demand is limited to a very few consumers who supply their needs from their own sources, so that the market is "closed" or "captive," we have held, quite properly, that a mining claimant must prove that the consumers will buy the produce of his claim at a profit, failing which it will be assumed that his mineral deposit has no economic value and does not quality as a discovery. *Citations omitted*. In *Barrows v. Hickel*, 447 F2d 80 (9th Cir 1971), a divided opinion, the majority simply rejected the claimant's speculative contention that marketability could be shown where one *might anticipate an increased market* and a depletion of better quality reserves; i.e., Barrows' gravel was inferior to what the market was accepting in 1955, and no amount of speculation concerning the possible alteration of circumstances could improve it.

The super-abundant *presence* of sand and gravel does not establish the fact of a super-abundant *available* supply.

3. *U.S. v. Melluzzo (Supp on Judicial Remand*), 32 IBLA 51

In determining marketability, both the demand and the supply sides of the actual market must be considered. With respect to demand, the claimant must be allowed to demonstrate the existence of demand that would absorb his material, even if, as noted, the market is already adequately supplied. With respect to supply, a hypothetical market must be created which includes all potential sources of supply. If the amount of material would be such a superabundance that the price would be lowered below a profitable level, then the claim cannot compete in any realistic economic sense.

**Demand for Material on Each Claim Need Not Be Shown**

It is not required that a mining claimant show the existence of a demand for material on his specific claims; but it must be shown that there is a general demand for such material. In *U.S. v. Gibbs*, 13 IBLA 382, 393-394 (1973), the Board discussed the common misconception on this issue:

Another oft-stated misconception, encountered again in this case, is the proposition that "To satisfy the marketability test, a mining claimant must show the existence of *a demand for the material on his specific claims*, and not simply a general demand for the type of material in question." To require this of the claimant is to impose, in most instances, an impossible burden on him. The buyers of common sand, gravel, rock, cinders, etc., ordinarily could not care less which claim their supplier (or his supplier) took it from so long as it was legally obtained and the price is competitive. Those whose demands create

the market are unlikely even to be aware of a particular claim as an undeveloped potential source of supply, and, if they were, it is unlikely that they would generate a demand for the produce of that specific claim in the absence of a critical shortage. This is in no way indicative that the material from that claim was, or is, precluded from the existing profitable market.

The origin of this misconception seems to lie in the inversion by restatement of the perfectly valid proposition to the effect that a mining claimant must show that material from his specific claim can supply an existing market demand for such material at a profit.

**Market Lost Through Changed Economics**

If a mining claim no longer has a discovery because of changed economic conditions, it is invalid. In *Mulkern v. Hammitt*, 326 F2d 896 (1964), the Court stated at 898:

> The appellant's contention is erroneous. This court, in the recent case of *Adams v. U.S.*, 318 F2d 861, dealt with this very question, and held that even though the mining claim there in litigation would, at one time, have satisfied the test, nevertheless the Government rightfully denied a patent to the claimant since, *because of changed economic conditions*, the claim did not *presently* satisfy the test ... The problem is whether the public lands of the United States should be perpetually encumbered and occupied by a private occupant just because, at one time, he had there a valuable mine which has now been completely worked out; or because he had on his location a mineral which, in the then practice of the building industry, had a market, but which, on account of a change in building practice, *no longer has a market or a reasonable prospect of a future market*, or because, at the time of his discovery, transportation facilities were available which made exploitation feasible, which facilities are no longer available.

**Market Value of Claim Does Not Relate to Validity**

In *U.S. v. Winegar*, 16 IBLA 112, 81 ID 370 at 388 (1974), the Board held that the "market value of a mining claim is not the test for discovery of a 'valuable mineral deposit'."

**Present Marketability Does Not Apply to Oil Shale Claims**

In *Andrus v. Shell Oil Co*., 446 US 657 (1980), the United States Supreme Court ruled that pre-1920 oil shale mining claims are an exception to the general principles for establishing a discovery a valuable mineral deposit under the mining laws. The Court held that the Department could not impose the present marketability test, approved by the Court in *U.S. v. Coleman*, *supra*, as a complement to the prudent person test, on oil shale placer claims as of 1920. The Court was making an exception to the application of the General Mining Law based on both the history of the Mineral Leasing Act and the post-1920 treatment of oil shale claims by the Department of the Interior, rather than finding that section 37 required the application of pre-1920 standards. *Andrus v. Shell Oil Co.*, *supra* at 673. The Court focused particularly on the Department's

decision of *Freeman v. Summers*, 52 LD 201 (1927), in which the Department had ruled that present marketability was not a prerequisite to patenting oil shale claims. The Court noted that Congress had recognized oil shale as valuable by preserving oil shale claims in section 37 even though oil shale was not a marketable commodity in 1920 and that the imposition of a marketability test as of 1920 by the Board was inappropriate. The situation of oil shale claims was unique, and the Court expressly stated that this exception applies only to oil shale claims. *Andrus v. Shell Oil Co., supra* at n. II.

**Injunctions and Marketability**

If a claimant is restrained from operating a claim by a court order, such an injunction may not be used by the government to establish that a claimant has not made a showing of marketability. In *U.S. v. Foresyth*, 15 IBLA 43, 61 (1974), the Board said:

> Contrariwise, the very fact that the Department of Agriculture felt obliged to seek a court order enjoining contestees from entering upon the claims and removing minerals for the purpose of testing the marketability of the deposit is probative of contestees' bona fides in development. And by the same token, we note that the court order which was obtained by the Forest Service certainly made it more difficult, if not impossible, for contestees to prove whether or not they had perfected a discovery. We have special reference to the decision of the Ninth Circuit Court of Appeals in *U.S. v. Barrows*, 404 F2d 749 (1968) wherein the court discussed a question closely parallel to that before us:
>
> > Defendants argued orally to this court, but not in their briefs nor, apparently, in the trial court, that if they are restrained by court process from continuing the sand and gravel operation, they will lose what they now contend to be a valid claim. They predicate this contention on the asserted fact that continued validity of the mining claim depends upon continued marketability of the sand and gravel. In response, counsel for the Government told this court, at oral argument, that if defendants had a valid claim when the injunction order was entered, it would be "completely unreasonable" for the Government to urge that loss of a market for the sand and gravel resulting from such injunction would prejudice the validity of the claim. We agree, and hold that *the Government-sought temporary injunction may not be permitted to prejudice defendants' asserted rights in this way*. (Emphasis added).
>
> We have held that notation of the application for withdrawal did not foreclose the right of the claimants to take samples or other evidence to prove the existence of a discovery on each claim prior to the date of the notation of the application for withdrawal. This right of the claimants was effectively negated by the Government's attorneys when they obtained a restraining order. We find, therefore, that contestees have not made a showing of marketability, but we find as well that sufficient justification exists for this failure so that we are not disposed to rule finally on the case in its present posture. Accordingly, we vacate the judgment of the Judge as to discovery or lack thereof on all of the claims, and remand for further hearing by the Judge.

**Hypothetical Market at a Critical Date**

The Act of July 23, 1955, as well as many withdrawal actions have caused certain minerals to be no longer open to location under the mining law. However, valid existing claims for such minerals at the date of the withdrawal, remain valid so long as a discovery existed at the critical date and continues to the present. When the United States investigates the validity of such claims, it is necessary to apply the marketability test at both the critical date and the present. For example, in *U.S. v. Penrose*, 10 IBLA 332, 334 (1973), the Board made the following statement concerning common varieties of sand and gravel located before July 23, 1955:

> Furthermore, since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23,1955 (30 USC ' 611 (1970)), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date, *citations omitted*, and at the present time as well; where such a showing is not made, the claim is properly declared null and void.

In cases where minerals from a claim were never mined and marketed at the critical date, it must be determined that if minerals were produced, could they fill a theoretical void in a hypothetical market. Quotations from several pertinent cases are included in this section to give the reader an understanding of how the Interior Board of Land Appeals and the Federal courts have responded to diverse types of evidence.

**Preponderance of Credible Evidence**

*Osborne v. Hammit*, 377 F.Supp. 977 (D Nev 1964) was one of the first Federal court cases in which opinion evidence alleging marketability at a critical date was considered by the court. The Court said that the burden is on the claimants to produce a preponderance of credible evidence:

> But the record discloses a situation where, if the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied upon by the plaintiffs, each of the claims in the valley comprising over 100,000 acres might be separately validated on the same sort of theoretical evidence. The end result would be that 100,000 acres of public lands would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably foreseeable future.
>
> Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of *credible* evidence, and the trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June 1952, owners of other claims near Las Vegas had commenced to produce

and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the Las Vegas market, rendering the Bradford Claims valueless.

**The Profit Factors**

In *Melluzzo v. Morton*, 534 F2d 860, 864 (1976), the Court discussed the profit element or increment in terms of two factors: the cost factor and the demand factor. Both profit factors must be considered in determining whether material from a claim, although it had not been marketed, could have been marketed at a profit. The Court said at 864:

1. The cost factor. It must appear that the cost of extraction, preparation for market and transportation to market will, in the claimant's case, provide a value increment or profit comparable to that which attaches to the material being successfully marketed by others.

2. The demand factor. It must appear that the local demand was able to absorb additional material such as the claimant's and still permit an attractive profit to be realized. It is for that profit that the newcomer, under Barrows, must be permitted to compete.

**Hypothetical Market Described**

In *Melluzzo v. Morton, supra* at 864, the Court describes how a hypothetical market is created and how it relates to the material from a particular claim. The Court said:

> In order to ascertain whether a demand existed for hitherto unmarketed material a *hypothetical market* must be created in which the new material plays its part. If the profitability of the market for such material is realistically to be ascertained by setting the factor of demand opposite that of supply, the new material must be included with that from all other known potentially competitive sources in calculating the factor of supply. If supply so calculated amounts to a superabundance and so overwhelms the existing demand as to reduce the value or profit increment to a level below that which would prove attractive to a prudent man, the material cannot he said to be marketable at a profit.

**Experience and Equipment of Claimant in Establishing Marketability at a Critical Date**

In *U.S. v. Segna*, 49 IBLA 73 (1980), the Board indicated that the lack of experience and equipment as both relate to the production of marble, detracted from the credibility of the evidence from the claimant. The Board said:

> Appellants' presentation at the hearing was speculative, at best, and did nothing more than to show that they had yet to attempt to remove any slabs of decorative marble from the

> claims and sell them at a profit. They had no direct experience in removing and transporting these slabs of marble to the market place. Nor did they possess any equipment for conducting such a large scale and difficult operation. Establishing the marketability of this deposit of limestone requires much more than a mere showing that the deposit is theoretically marketable, or intrinsically valuable. Appellants were able only to establish that attempts were being made to explore possible markets or to promote, the use of these hypothetical slabs of ornamental marble.

**Failure to Study Operating Costs to Establish Marketability**

In *Calhoun and Howell of Oregon, LTD. v. Temple*, A-31004 (August 29, 1969), the Department indicated that failure of the claimant to address matters as critical to the validity of a claim as operating costs leads to a presumption of invalidity. The Board said:

> Appellants' witness, Howell, frankly acknowledged that the appellants had made no study of operating costs, capital investment required, or amortization, and that he had no idea what those costs would be today. These costs, however, are as critical to a determination of the practical value of a mining claim as the intrinsic value of the mineral present on the claim. Moreover, although appellants had engaged in past mining in the area, at the time of the hearing, they did not own or possess any of the major equipment which would be required to conduct mining operations on the claims.

**Approach to Establish Marketability of Mineral Deposit**

In *Dredge Corp. v. Conn*, 733 F2d 704, 707 (9th Cir. 1884), the Court described the approach for determining the marketability of a mineral deposit it set forth in *Melluzzo v. Morton*, 534 F2d 860 (9th Cir. 1976). It should be pointed out that both *Melluzzo* and *Dredge Corp*. involved sand and gravel claims that required a demonstration of marketability as of July 23, 1955, -- the date when common variety minerals were no longer locatable. The Court said at 707:

> In Melluzzo, we stated that the existence of a local market for sand and gravel alone is not sufficient to establish marketability. *Id*. at 863. In other words, the claimant cannot rely solely on the fact that comparable material is being marketed. Rather, "[t]he claimant must establish that his material was of a quality that would have met the existing demand and that it was marketable at a profit." *Id*. (emphasis added). The profitability of a particular deposit is determined not only by its cost of extraction, preparation for market, and transportation to market, but also by the overall market demand and supply. *Id*. at 864. Proof that neighboring claims are being marketed is relevant to determining a claim's marketability, but such proof alone does not overcome evidence that the market was already well-supplied. The claimant must also show that given existing market conditions his particular claim could have returned a profit.
>
> ... In Melluzzo, we noted that the supply conditions in the industry, particularly the number of potentially competitive sources of supply, have a direct bearing on whether

new material will be marketable. "If supply ... so overwhelms the existing demand as to reduce the value or profit increment to a level below that which would prove attractive to a prudent man, the material cannot be said to be marketable at a profit." *Id*. at 864. Thus, even though comparable claims are being mined, a new claim may be deemed unprofitable because the market has reached such a point of saturation that a new entrant cannot make a profit. The focus therefore is on the profit margin for the new entrant and not on the profit margin for existing suppliers.

**Effect of Lack of Development on a Claim's Validity**

The Interior Department and the courts have long held that where, over a sustained period of several years, the claimant has failed to engage in productive extraction of mineral from a claim, a presumption is raised that there has been no discovery of a valuable mineral deposit or that the market value of discovered minerals was not sufficient to justify the costs of extraction. *U.S. v. Barrows*, 76 I.D. 299, 306 (1969). This rule reflects the principle that, in varying economic conditions present during a period of years, the claims will be developed if there is mineralization on them and if it is commercially feasible to do so at a profit. Evidence of absence of production or sale from mining claims over a period of years is sufficient, without more, to establish a *prima facie* case of invalidity. *U.S. v. Rosenberger*, 71 IBLA 195, 200 (1983). However, in *U.S. v. Rodgers*, 726 F2d 1326 (9th Cir. 1984), the Court held that "lack of actual marketing of the mineral by the claimant may be relevant to the question of marketability, it is not conclusive proof of invalidity of the claim." To distinguish *Rodgers* from the "absence of production" case above, it should be noted that the issue was not lack of production over a long period of years but rather whether a market existed for the gem mineral sunstone. In *Rodgers*, the claimant had apparently attempted marketing with some success.

**Market too Small for Profitable Operation**

In *U.S. v. Husman*, 81 IBLA 271, 278 (1984), the Board determined that there was a market for chemical-grade (locatable) limestone; however, this market could not support an operation of the size necessary to establish a profitable operation.

**Tenth Circuit Approves Presumption of Invalidity Where Lack of Development**

In *U.S. v. Zweifel*, 508 F2d 1150 (10th Cir 1975), the Tenth Circuit Court approved the Interior Department's requirement concerning the presumption of invalidity where claims were held several years with no development. The Court said:

> If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of discovered minerals was not sufficient to justify the costs of extraction. 508 F2d at 1156, n. 5.

**Circumstances Justifying Lack of Development**

In *U.S. v. Harenberg*, 9 IBLA 77 (1973), the Board held that under certain circumstances it is prudent and reasonable to locate and hold minerals in reserve without development on a particular claim. The Board said at 80:

> On the basis of this history of problems with material sources, the expansion of the business, 25 years of continuance operation, and the amount of the invested capital, it would appear eminently prudent and reasonable for Harenberg to locate and hold a source of supply in reserve. It also serves to rebut any inference of invalidity raised by the lack of development prior to July 23,1955. A favorable showing of bona fides in development is recognized as one of the factors which can serve to demonstrate the marketability of a mineral.

**Lack of Sale**

Although "lack of sales" is directly related to "lack of development," generally the Interior and Federal Decisions address either one or the other, therefore indicating a slight difference in the effect of each on the validity of a claim. For example, you can have development with a lack of sales, but you cannot have sales with a lack of development.

In *Verrue v. U.S.*, 457 F2d 1202, 1204 (9th Cir 1972), the Court discussed "lack of sales" as it relates to evidence of marketability. The Court said at 1204:

> In determining marketability, evidence of sales is only one factor to be considered in the application of the prudent man and marketability tests. *See Coleman, supra*. In our opinion this lack of evidence as to sales and the fact that there was other material available does not constitute the substantial evidence required to support the conclusion of the Secretary, when, as here, there is positive evidence in the record of marketability.

In *Melluzzo v. Morton*, 534 F2d 860, 863 (9th Cir 1976), the Court held that lack of sales of material from a claim is relevant to the question of marketability, but is not conclusive proof of the lack of value. The Court said at 863:

> Verrue did not hold that the facts of lack of sales and abundance of material from other sources were irrelevant to the question of marketability. It held that under the circumstances of that case these facts could be, and were, overcome by "positive evidence in the record of marketability." 457 F2d at 1204. *Clear Gravel* presented the opposite evidentiary situation. There government evidence was to the effect that the material from the claims in question could not have been marketed at a profit. We construe the two cases together as holding that lack or insubstantiality of sales of material from the claims in question is relevant to the question of marketability. It is not, however, conclusive proof of lack of value. The inference to that effect, when all evidence is considered, it can be found to have been overcome by evidence of marketability.

**Lack of Sales Due to Reluctance to Invest in Unpatented Claim**

In *U.S. v. Williamson*, 45 IBLA 264, 284-285 (1980), the claimant overcame evidence indicating a total lack of sales and production by a preponderance of the evidence showing that a prudent individual had a reasonable expectation of his or her ability to extract and market the mineral profitably. In this case the Board said at 285:

> There may be a number of reasons why any individual claimant might decide to limit production from a claim. Herein, appellants testified that production had purposefully been held to minimum levels in order to avoid heavy investment in an unpatented mining claim. This is, of course, a common problem with mining claims, since both individuals and lending institutions are often reluctant to invest great funds in a mining venture if the property is not patented.

**Continuous Operation is not Required During Critical Period**

In *Charlestone Stone Products Co., Inc. v. Andrus* 553 F2d 1209 (9th Cir l977), *reversed in part on other grounds*, 436 US 604 (1978), the Court held that failure of a claimant to maintain continuous operations during a critical period is not required for proving validity of a claim. A critical period refers to that period of time between the date of withdrawal and the present time during which a showing of marketability must be maintained. The Court said at 1214-1215:

> The seemingly sporadic operations by Southern and Brawner were a mirror of the building and construction industry in the Las Vegas area during and shortly after World War II. Continuous operation of a placer mining claim is not a per se requisite to proving the validity of that claim. Cessation of operation of any economic enterprise may be caused by innumerable factors totally beyond the *bona fide* intentions of the operator. Reason dictates that periodic cessation of operation of a placer mining claim, short of an intentional abandonment of the claim, need not defeat ultimate proof of validity.
>
> Since a total absence of operation does not preclude a finding of validity (*Verrue, supra*), it follows that sporadic operation does not preclude a finding for validity.

In *Rawls v. U.S.*, 566 F2d 1373 (1978), the Court held that absence of sales in the critical period, though relevant, will not alone support a finding of unmarketability and nondiscovery. When there is little or no evidence of pre-1955 sales, a court should consider costs of extraction, preparation and transport as well as the level of then-existent market demand."

**Reasonably Continuous Market Required**

"In order for a mining claim for a common variety of mineral, located prior to the Act of July 23, 1955, to be sustained as a claim validated by a discovery, the prudent man/marketability test of discovery must have been met at the time of the Act and reasonably continuously thereafter up to and including the time of a contest hearing." *United States v. LeRoy S. Johnson*, 100 IBLA 322, 338 (1987).

**Business Records to Show Marketability**

As stated in *United States v. Penrose*, 10 IBLA 332, 335 1973), A[i]t is the obligation of a mineral claimant to maintain adequate business records or other means of proof to support his contentions as to sales and marketability at a profit * * *.@ *United States v. Fisher*, 115 IBLA 277, 291 (1990).

**Lack of Marketing (Sales) Is Not Proof of Invalidity**

In *Rodgers v. U.S.*, 726 F2d 1376, 1379 (9th Cir. 1984), it was held that "although lack of actual marketing of the mineral by the claimant may be relevant to the question of marketability, it is not conclusive proof of invalidity of claim. And on the same point, the Court in *Barrows v. Hickel*, 447 F2d 80, 82 (9th Cir. 1971) said that "actual successful exploitation of a mining claim is not required to satisfy the "prudent man test." In *Rodgers v. U.S., supra*, the Court apparently accepted a lack of sales because the claimants "needed to accumulate an inventory before breaking into the foreign market."

**Proof or Evidence of Sales Records**

In a number of Interior Department and Federal Court cases, it has been held that it is the responsibility of the claimant to maintain adequate business records relating to both sales of the mineral product and costs of production. Quotations from several pertinent cases are given below:

1. *U.S. v. Barrows*, A-31023 (November 28, 1969):

> It may be argued that our conclusions are based on an unfair downgrading of Barrows' testimony, that we are imposing on a small operator an obligation of maintaining records and proof which is far beyond that to be expected from a small businessman.
>
> A mining claimant cannot meet this burden by failing to keep adequate records or other means of proof. Or, if he has kept such records, he cannot be relieved of his burden if his records are lost or destroyed and he has only infirm or inconsistent recollection to substitute. As the court indicated in *Foster v. Seaton*, he cannot expect the validity of his claim to be established by his default.

2. *U.S. v. Penrose*, 10 IBLA 335 (1973):

> The other market apparently consists of sporadic sales to individuals who buy a yard or two. The appellant offered no evidence or records to support the size of this limited market. It is the obligation of a mineral claimant to maintain adequate business records or other means of proof to support his contentions as to sales and marketability at a profit of the mineral material in his claim.

3. *U.S. v. Mansfield*, 35 IBLA 95 (1978):

> Contestee's net profit from the sale of obsidian is in doubt since there are no records which show the true cost. There is nothing in the record which establishes the cost of maintaining contestee's rock shop and other associated costs of obtaining the obsidian. In the absence of proof that a reasonable profit was made from the sale of obsidian from contestee's claim we must conclude from the record that the obsidian sold in rough form does not support the contention of marketability.

4. *U.S. v. Lambeth*, 37 IBLA 107, 112-113 (1978):

> Lambeth, however, did not point out this location to the Government mineral examiner, but stated that he took the gold to Baker to a jewelry store where the jeweler paid him for only 71/2 ounces. Although he stated, "I think it would still be on the records," Lambeth was unable to produce any documentation of this sale, and failed to note the name of the store or jeweler to whom the gold was delivered.
>
> Similarly, Lambeth testified that, in November 1976, in the course of two weekends, he and his son-in-law had recovered some 6 ounces of gold on the First Chance Placer. When questioned as to the whereabouts and disposition of the gold, he responded that "My son-in-law has part of it and another party here in John Day has some of it. They weren't home this morning so we didn't get to pick it up." Thus, the gold alleged to have been recovered from the First Chance was not produced at the hearing, a development which was repeated when Gaylord Lambeth, who testified to having recovered "at least a couple of ounces" of gold from 15 or 20 yards of gravel, stated that he had the gold in his possession but was unable to produce it in evidence. Considering the obvious relevance and importance which would attach to such recoveries, we are of the opinion that claimants' failure to produce the gold seriously detracts from the weight which may be accorded to their claimed recoveries.

5. *Hallenbeck v. Kleppe*, 590 F2d 852 (1979):

> The question of marketability is one of fact. The absence of proof of actual sales of material from the claims is relevant but not conclusive and may be overcome by other evidence of marketability. The evidence of lack of sales from the claims was relevant and we find no error in the ruling by the district court that the record supports the Board's findings.

*U.S. v. Arbo*, 70 IBLA 244 (1983) is an excellent example of where a claimant had no record of sales. Although the appellant supplied a number of receipts indicating sales of gold to several different companies, he was not able to show the costs of producing the gold or even to

document that the gold came from the contested claim. It is not uncommon for the owner of a placer gold claim to have a poor record of receipts in some cases because the gold is recovered in a highly marketable condition and there may be a temptation to market the gold in such a manner so as to avoid income taxes. However as the Board points out below, you cannot have it both ways, i.e., get credit for sales in a contest action for which there is no income tax record of sales. The Board said at 247, 249-50:

> Appellant stated that he had about six other claims within a 10 mile vicinity of the Masson claim and that in several years he had produced probably about "$65,000 or $70,000" worth of gold from these claims (Tr. 176). He estimated that $45,000 to $50,000 of this was recovered from the Masson claim (Tr. 181, 194). He could not, however, give definitive information concerning the amount of gold recovered from the claim, his expenses incurred in recovering the gold, or the income realized therefrom. The witness also declined to answer questions relating to his income tax returns for the years 1977-78, and was reluctant to produce his books and records for the purpose of providing more specific information of his mining operations. Appellant's counsel stated:"But I think that we would be going far afield if we drag in records relating to Mr. Arbo's entire operation and I don't think that it's necessary to resolve the issues in this case, which is the legitimacy of this claim."
>
> The statements that he sold "many pounds" of gold, that he produced tens of thousands of dollars worth of gold, and his Anaheim invoices were never linked to the costs of extraction and labor costs. Appellant's vague, speculative, and unsupported statements on these points do not allow the reviewer to formulate even a basic financial picture of his mining operations. Additional doubt is cast by appellant's reluctance to bring pertinent records to the hearing, and his hesitancy to avail himself of the opportunity to supplement the record and clarify crucial elements of his case.

The above situation can be avoided if a claimant maintains detailed records of all sales and costs and how they are applied to each claim.

**Lack of Sales or Development and the Hypothetical Market**

There is a presumption of non-marketability raised by the lack of development and sales; however, such a presumption may be overcome by credible evidence that the claimant could have extracted and sold material at the critical date. In *U.S. v. Gibbs*, 13 IBLA (1973), the Board took notice of the holding in *Verrue v. U.S.*, 457 F2d 1202 (9th Cir 1972). The Board said at 391-392:

> It has repeatedly been held that proof of actual sales of minerals from the claims is not an indispensable element in establishing their marketability, and that while lack of development and sales may raise a presumption that the market value of the minerals found thereon was not sufficient to justify the cost of their extraction, this presumption may be overcome by evidence showing that the materials *could have been extracted,* removed and marketed at a profit before July 23, 1955. This rule rests on a strong

foundation.

If proof of development and profitable sales is *not* the *sine qua non*, of a valid mining claim, then we must hold that the presumption raised by the absence of development and sales *can* be overcome by proof that the claimants' showing that they *could have* extracted and sold material from the claim at a profit prior to July 23, 1955. This entails a showing of the market which *then existed*, the cost of extraction and processing which *would have been* incurred, the transportation charges which *would have been* involved, the unit price which *then* prevailed and the profit which claimants *might have* realized *if they had elected to proceed at that time*. This evidence of what the claimants could have done is, presumably, the "speculative, hypothetical and theoretical testimony" which the court said could not contradict their failure to actually do it in *Osborne v. Hammitt, supra*, and which the court held was sufficient in *Verrue v. U.S.*, *supra*.

In our opinion, such evidence of what the claimant could have done at the time, had he so elected, if credible, must be allowed to rebut the presumption of non-marketability raised by the lack of development and sales. It may not be excluded or held to be "insufficient" by characterizing it as "speculative, hypothetical or theoretical." This, essentially, was the holding in *Verrue v. U.S., supra*. Otherwise, the presumption would be converted to an irrefutable conclusion because the true test (of what the claimant could have done) would not be susceptible of proof.

One of the most comprehensive decisions on the subject of absence of production or development as it relates to entering a hypothetical market at a critical date may be found in the case of *U.S. v. Alaska Limestone Corp*., 66 IBLA 316 (1982). This case involved limestone claims in Alaska that existed in an area withdrawn on September 28, 1976. The claimant, who intended to use the limestone to manufacture cement had the burden of showing marketability at the date of withdrawal as well as at the date of the hearing. The government contended that because there was no cement manufacturing plant in Alaska either on September 28, 1976 or at the date of the hearing, the claims did not satisfy the marketability test. Thus, the Government established a *prima facie* case of invalidity because of the commercial advantage other sources of limestone would have in being closer to the Manufacturing plants. The Board said at 320-322:

In Addition, independent of the Government's presentation, the record shows that claimants held these claims from November 25, 1958, to September 28, 1976, without developing the minerals on them. The record reveals that serious efforts were made, both by appellant and Kaiser Permanente, to arrange to develop limestone deposits in the railbelt area, but those efforts did not result in any actual development. Uncontradicted evidence of absence of production from a mining claim over a period of years is sufficient, without more, to establish a prima facie case of invalidity of the claim. This rule reflects the principle that, in the varying economic conditions present during a period of many years, a mining claim will usually be developed unless it is not commercially feasible to do so profitably; that is, unless the material is not marketable. Appellant's failure to market any limestone from the claims over 18 years raises the presumption that

it was not marketable it a profit during this time, and this presumption is aided by the fact that plans to develop the claims were abandoned.

Claimants who have not developed their claims may nevertheless prevail if they can overcome the presumption of unmarketability by showing that they *could have* extracted and sold the minerals at a profit prior to the statutory cutoff date. This type of showing is necessarily hypothetical, involving reconstruction of' market conditions as of this date, including unit prices, transportation and production costs, etc. However, the success of the showing depends on how thoroughly the evidence establishes these market conditions and how convincingly the hypothesis is proven by these facts. The hypothesis must be proven with factual evidence of conditions actually prevailing at that time. Speculative evidence showing that if certain conditions had prevailed in 1976, those would have allowed appellant to dispose of its material at a profit, is not adequate.

Where a claimant actually could have sold minerals on the cutoff date in an ongoing market, it is possible to demonstrate convincingly that the mineral was marketable at a profit on that date, by showing pertinent facts about the condition of the market, such as the prevailing sales price, market demand, and costs of production. In contrast, where, as here, there was no market on the cutoff date, in which the material could have been directly sold at a profit, and the claimant hypothesizes that he could have profitably established its own market for direct sales of the material, the difficulty of proving the hypothesis with convincing factual evidence is compounded. By presuming the existence of its own cement processing plant, appellant places us in a strictly theoretical arena, where estimates and conjecture replace evidence of the circumstances that actually prevailed. The conclusions from this exercise are too uncertain and conjectural to overcome the plain implications of appellant's failure over 18 years to actually accomplish the profitable development of these claims.

As noted above, in order to establish a valid mining claim, there must be a qualifying discovery of a "valuable mineral deposit." 30 USC ' 22 (1976). The deposit must be "valuable" in an economic sense; that is, it must be capable of being extracted, processed and marketed it a profit both at present and at the time of any withdrawal. If there has been no production prior to the cutoff date, the claimant must demonstrate by factual evidence that it could have been extracted and marketed at a profit prior to the critical date. In the instant case, the limestone on these claims could only have been utilized in the manufacture of cement, and could only have been extracted and disposed at a profit to a cement manufacturing plant in relatively close proximity to the claims. But, there were no cement manufacturing plants anywhere in Alaska then, there are none now, and there never have been. Thus, there is not now, nor his there ever been, a market into which this limestone could have been sold at a profit.

Appellant seeks to overcome the implications of this undisputed fact by showing that it *might have* built a manufacturing plant and captured a significant portion of the cement market in Alaska, and *if* it had done so, it *could have* utilized the limestone from these profitably. A great deal of conflicting evidence has been adduced concerning the

> economic feasibility of such an undertaking, and we are left unconvinced that had appellant actually constructed the manufacturing plant, it would have been an economically viable operation. However, we are not persuaded that we are required to make a finding concerning whether a hypothetical prudent man would have been justified in constructing a hypothetical cement manufacturing plant in order to resolve the issue of whether the limestone on these claims constituted the discovery of an economically "valuable mineral deposit," as the term has been defined by this Department and by the Supreme Court. The fact is that there was no market into which this material could have been sold at a profit for the manufacture of cement during the critical period. Absent such a market, a prudent man would *not* have expended his labor and means with a reasonable prospect of success in developing a valuable mine on these claims. To speculate that if appellant had built a manufacturing plant the material would have been valuable is little different than speculating that if *anybody* had built such a plant in the vicinity the material would have been valuable. Nobody did. For us to consider whether appellant *could have* marketed material from the claims at a profit, we are obliged to consider the circumstances and conditions that *actually* prevailed, not those which *might* have prevailed had things been different.

**Prospective Market or Reserves With No Market**

In many parts of the west, minerals subject to the mining law are covered by large claim groups. Where such minerals are widespread with vast reserves, it is not uncommon for the claims or claim groups to cover substantially more reserves than the market could ever absorb. These minerals tend to be nonmetallic minerals without intrinsic value such as building stone, sand and gravel, bentonite, silica sand, pumice, perlite and many other construction materials. In *Barrow v. Hickel*, 447 F2d 80 (9th Cir 1971), the Court said at 83:

> The "marketability test" requires claimed materials to possess value as of the time of their discovery. Locations based oil speculation that there may at some future date be a market for the discovered material cannot be sustained. 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.

In *Oneida Perlite*, 57 IBLA 167 (1981), the Board gave a thorough review and analysis of the case law on the subject of reserves for which there is no market; and in doing so, it covered all aspects of the problem including: (1) validity on the basis of individual claims, regardless of claims or ownership; (2) situations where claims may be held as reasonable reserves; (3) multiple claims over deposits too vast for the market to absorb over 100s of years; (4) the *Baker* case; (5) the *McCall v. Andrus* decision; (6) a "reasonable reserves" definition; and (7) the present status of the phrase "excess reserves."

Extensive portions of the lengthy *Oneida Perlite* case are organized and quoted under eight subjects to provide the reader with the latest Interior Board of Land Appeals statement on the subject of reserves for which there is no market:

1. *Introduction*

Oneida Perlite Corporation (Oneida) applied to the Bureau of Land Management (BLM), Department of the Interior, for patent of 15 association placer mining claims. The claims, which are located for the mineral substance perlite, are situated in Oneida and Bannock Counties, Idaho, and embrace an area of 2,000 acres within Caribou National Forest, which is administered by the Forest Service (FS), Department of Agriculture

The FS mineral examiner testified that on the 10-acre area he recommended for patent there is in excess of 5,300,000 tons of commercial perlite which, based on the contestee's annual production, would provide a reserve for 1,000 to 1,200 years. Contestee had arranged to have the claims examined by an expert in perlite who enjoys a worldwide reputation as such, Herbert A. Stein, whose report is appended to the patent application. Stein estimated the total reserves on the subject claims at 200,000,000 to 300,000,000 tons. The FS mineral examiner estimated that this is enough to supply the entire needs of the United States at current levels of consumption for "more than two or three hundred years." The national rate of production was given as 602,000 tons per annum.

2. *Each Claim Must Be Validated Individually*

Moreover, this test of whether claims are supported by a qualifying discovery of an economically valuable deposit of mineral must be applied to *each claim individually*. Where *multiple* claimants have located multiple claims for an infinite amount of mineral which is widespread and abundant for which there is only a limited market demand, the Court of Appeals for the Ninth Circuit has held that claims which are not already developed and producing profitably to supply that market must be held invalid where it cannot be proven that they are presently capable of such profitable participation. *Melluzzo v. Morton*, 534 F2d 860 (9th Cir 1976). Of course, where, for example, 50 different claimants locate 50 separate claims for a superabundance of the same mineral with a limited market, the question of "excess reserves" does not arise. Each claim is regarded individually and a determination made that the mineral deposit is or is not "valuable" according to the test applied by the Supreme Court in *U.S. v. Coleman, supra*, and interpreted by the Ninth Circuit in *Melluzzo v. Morton, supra*. Those claims determined to be not qualified according to these criteria are properly held to be invalid for want of discovery of a valuable deposit of mineral.

Where a *single* claimant or association of claimants locates multiple claims for far more mineral than the market can absorb the test of the validity of each claim *is precisely the same*. No "legislative enactment by an executive tribunal," violative of "our system of separation of powers" is required in order for the Department to discharge its historic responsibility in this regard. The only distinction between the situation involving *multiple* parties locating multiple

claims involving a superabundant mineral with a limited market, and the situation where a single locator or association does so, is in the terminology employed to describe what has happened. Assuming that the single locator does have, at present, a profitable market for a limited amount of material which can easily be supplied from one claim, the question of the value of the deposits of the same mineral on the rest of the claims necessarily arises. Usually, the claimant asserts that the additional claims are needed as a *reserve* supply in order to continue his operation when the supply on the first claim is exhausted or severely depleted.

3. *Multiple Claims May Be on Deposits and Held as "Reasonable Reserves"*

This Board has recognized repeatedly the right of a mining claimant to locate claims containing valuable deposits of mineral and to hold them, without development, as "reasonable reserves. "*See*, e.g., *U.S. v. Bunkowski*, 5 IBLA 102, 79 ID 43 (1972); *U.S. v. Harenberg*, 9 IBLA 77, 80 (1973). In *U.S. v. Gibbs*, 13 IBLA 382, 396 (1973), we discussed the concept of "reasonable reserves" and application of a test of the validity of a claim allegedly located for that purpose, as follows:

> The Judge further found that the absence of sales was attributable to the fact that the operator chose to put his plant on the adjacent claim and hold the material from the contested claim in reserve. He concluded that the holding of a claim without development as a reasonable reserve supply is a permissible procedure under the rules announced in the case of *U.S. v. Anderson*, 74 I.D. 292, 303 (1967), noting that the reserves afforded by the Sorefoot No. 10 were clearly not in excess of the 30-year supply held to be a reasonable amount in the *Anderson* case. Again, we agree.
>
> The question of the propriety of holding mining claims as reserve sources of supply has been considered in other cases. It is well established that the holding of a mining claim as a reserve of sand and gravel for future development *without present marketability* does not impart validity to the claim. But where the marketability of the deposit has been established for the critical dates by a demonstration that the claimant could then have mined and sold the material at a profit, his election to retain that deposit intact as a reasonable reserve for future use will not operate to invalidate an otherwise valid claim. *U.S. v. Harenberg, supra*. The location of claims for the purpose of securing reasonable reserve supplies is not prohibited by the United States mining laws, but claims so located must meet the same standards and pass the same tests of validity as other claims, including (where the mineral is a "common variety") a showing of marketability on or before July 23, 1955.

4. *Multiple Claims Over Deposits too Vast for the Market to Absorb*

But where a claimant has located multiple claims embracing deposits of mineral so vast that the limited market for that mineral, reasonably projected for growth, could not be expected to absorb it over the course of hundreds or even thousands of years, we have held that such an appropriation of public land cannot be justified under the mining laws as necessary "reasonable reserves." Instead we have characterized such locations as "excess reserves," a term which the Ninth Circuit has disdained in favor of its own descriptive phrase "*the too much test*" (always italicized by the Court). The reserves are in excess of the ability of the market to absorb them and, correspondingly, in excess of the claimant's need of them for any legitimate purpose under the mining law. The claims located for such additional amounts are invalid for lack of a discovery of a valuable mineral deposit on each of them, since no prudent man would spend his labor and means in an effort to produce mineral in such quantity that the market could not accept even a small percentage of it.

Theoretically, mineral from all the claims blanketing an homogenous, massive, and extensive deposit could be marketed profitably to supply a limited demand by the simple expedient of taking a little material from each claim as the opportunities for sales presented themselves. But this would be deliberately inefficient mining, not *bona fide* development but a clear subterfuge to control the land, either to preclude its acquisition by competitors, or for other purposes. *U.S. v. Osborne (Supp on Judicial Remand*), 28 IBLA 13, 29 (1976). "Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes." *U.S. v. Coleman*, *supra* at 602. Moreover, the Court of Appeals for the Ninth Circuit, prior to its decision in *Baker*, had considered and rejected the notion that simply because a limited market exists for a mineral which is the subject of a great many claims, we must consider that each claim, viewed in isolation from all the rest, is capable of being developed as a profitable source of supply for that market. In *Melluzzo v. Morton, supra*, 864, n. 4 the Court said:

> A hypothetical market in which the claimant's material is the only unmarketed material taken into account is hardly a useful supposition. If claimant's material can be marketed, then so can that from all potentially competitive sources. To exclude all unmarketed material save that of the claimant *could result in the unrealistic conclusion that all such material, considered claim by claim, is marketable at a profit notwithstanding the fact that if the claims had all been actively operated none could have done so profitably*. (Emphasis added.)

The same theory (that since a limited market existed locally in an area of superabundant supply, material could be taken from any claim and sold at a profit into that market) was addressed in *Osborne v. Hammitt*, 377 F. Supp. 977, 985 (D. Nev. 1964), where the Court said:

> We think the Secretary has right in holding the proofs insufficient here to establish present marketability under the quoted standards. If we were to judge the case solely on the basis of the conflicting evidence bearing upon the theoretical marketability of the sand and gravel from the Bradford Claims, we would be inclined to agree with the Hearings Officer rather than the Secretary .... But the record discloses a situation where, if the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied upon by the plaintiffs, each of the claims in the valley comprising over 100,000 acres ... of public lands would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably foreseeable future.

In *Melluzzo v. Morton, supra* (as in *Osborne v. Hammitt, supra*), the Court was dealing with a superabundant supply from many sources held by diverse owners and claimants, and the Court was in full agreement with the Department that claims for surplus mineral which simply overwhelm the available market are invalid for want of discovery.

The Court of Appeals for the Ninth Circuit has previously considered a classic case wherein a claimant acquired multiple claims for common, abundant mineral, some of which could be then profitably disposed in the market while the balance could not be, because the claimant's own production from one of its claims was sufficient to satisfy the existing market. In that case, *Clear Gravel Enterprises, Inc. v. Keil*, 505 F2d 180 (9th Cir 1974), *cert. denied*, 421 US 930 (1975) the Court noted that appellant had held 16 association placer claims of 160 acres each located for common sand and gravel in the Las Vegas Valley, and had leased all 16 claims to the second largest producer of sand and gravel in the area. The lessee company had opened a mine on only one of these claims. The validity of 14 of the claims had previously been litigated as the result of which 7 were ordered to patent and 7 claims were declared invalid. Before the Court was the question of the validity of the remaining two claims, neither of which was the claim being mined by the lessee. The Court noted and held as follows:

> Other evidence produced at the time of the hearing before the Hearings Examiner further *demonstrated that the one mine being operated provided sufficient sand and gravel to meet the needs of the market and that it could yield a sufficient quantity of sand and gravel to provide for any increased share of the market to its producer.... Of particular significance is the obvious fact appearing from the record that the quantity of Appellant's other sand and gravel holdings in the area, when combined with the state of the market, were such as to deter the Appellant from expending money and effort to extract and market the sand and gravel from the claims in question* from the time of location in 1946 until approximately 1963. (Emphasis added.)

*Id* at 505 F2d 181. Although the Court did not use the terms "*too much* " or "excess reserves," either phrase would have served to characterize its findings. The Court had, from the outset, identified the issue in the case as being whether there had been a discovery of valuable mineral deposits on the claims within the definition of "the prudent man rule" as tested by an ability to market the material at a profit during the critical period.

In *Hollenbeck v. Kleppe*, 590 F2d 852, 859 (10th Cir 1979), the Court of Appeals quoted with approval from the decision of the district court in that case saying:

> We feel the court correctly followed the test of present marketability. *Citations omitted.* The court's findings in the instant case stated that: "A private litigant cannot locate claims upon public lands and then simply wait until the minerals are in sufficient demand to be marketed at a profit," and also that: "... plaintiffs cannot hoard common sand and gravel on public lands until it becomes profitable to market such deposits." The court also quoted the following statement from the opinion in Foster v. Seaton, 106 US App DC 253, 255, 271 F2d 836, 838:
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> > To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development.

5. *The Baker Case*

In *Baker v. U.S.*, 613 F2d 224 (9th Cir 1980), the Court held that this Board's application of the excess reserves rule, except the "*too much* test," exceeded the Board's discretionary and statutory powers, and amounted to a legislative enactment by an executive tribunal, was arbitrary, capricious, and an abuse of discretion. The Court held, in effect, that there can be no such thing as an "excess reserves test" or a "*too much* test." (Emphasis by the Court.) In so doing the Court of Appeals declared that *U.S. v. Anderson, supra*, and other Departmental decisions which referred to "excess reserves" or "reasonable reserves" were based upon a faulty premise. The Board's decision in that case, *U.S. v. Baker*, 23 IBLA 319 (1976), noted that the claimant had, prior to July 23, 1955, located the Wildcat Hill Nos. 1 through 5 placer claims for common cinders, and had made application for patent. At the request of FS, contest proceedings had been initiated to determine their validity and that of a sixth claim, known as the "Cinder." Subsequently, the contest proceedings against the Wildcat Hill No. 5 and the Cinder claims were dismissed, leaving only the Wildcat Hill Nos. 1 through 4 at issue. The hearing established that marketable cinders were exposed in vast quantities on all four claims, and that a profitable market for such cinders had existed since prior to July 23, 1955. Accordingly, the Administrative Law

Judge held that all four claims were valid. FS then appealed to this Board. Upon review of the record, we noted that Baker had located claims covering 15,000,000 tons of cinders by his own estimate; that his sales over the preceding 18 years amounted to from 700,000 to 1 million tons; that a substantial volume of these sales were for fill or other nonmineral purposes which could not be recognized under the holding in *U.S. v. Barrows*, 76 ID 299 (1969), *aff'd, Barrows v. Hickel*, 447 F2d 80 (9th Cir 1971); that at 10 cents per ton for the material, the maximum gross income from his operation was $100,000 over the preceding 18 years, or an average of $5,555 per annum; that the supply of cinders in the area significantly exceeded the demand; and that there were numerous competitive producers in the vicinity. Depending on the figures used for the projection, Baker's location of four claims containing 15,000,000 tons of cinders gave him a reserve supply which could. not be consumed in less than 270 years and most probably would last more than 400 years. Accordingly, we held that Baker had located extra claims for Aexcess reserves," i.e., reserves which could not be marketed, which had no value, which no prudent man would produce, and which were therefore invalid for lack of a discovery of a valuable deposit of mineral. We held that two of his claims were valid instead of one because his main pit and principal improvements extended into both claims and we did not wish to disrupt his operation.

The Department of the Interior recommended to the Department of Justice that application be made to the Supreme Court for a *writ of certiorari* in the *Baker* case. The Solicitor General concurring, this was done, but the Supreme Court denied the petition on October 20, 1980. *Andrus v. Baker*, 101 S. Ct. 332 (1980). Mr. Justice Blackmun authored a dissenting opinion, in which he was joined by Mr. Justice Marshall and Mr. Justice Powell. The dissent noted that the Board had nullified two of Baker's four contested Wildcat Hill claims, "reasoning that development of all four claims would be imprudent." The opinion also noted that proceedings against a fifth Wildcat Hill claim had been dismissed. Mr. Justice Blackmun related the Board's action to the "prudent person" test and its correlative marketability standard, and opined at 333:

> I believe that, as in *Coleman*, the Court of Appeals may have unduly restrained the Secretary's authority to evaluate claims of mineral discoveries on public lands; its ruling appears to be based on the perception, possibly a misperception, that the Secretary's "excess reserves" analysis does violence to the statute. In light of that ruling, one now may expect the assertion of additional claims involving "valuable" mineral deposits not marketable in the foreseeable future.

6. *The McCall v. Andrus Decision*

The decision in *Baker v. U.S., supra*, was handed down by the Court of Appeals for the Ninth Circuit on February 11, 1980. On July 10, 1980, that Court issued

its decision in *McCall v. Andrus*, 628 F2d 1185, *cert. denied*, 49 USLW 3710 (March 23, 1981); as related in the syllabus, in part:

> The Court of Appeals, Farris, Circuit Judge, held that: (1) (Board of Land Appeals) *in concluding that claimant would have a reserved supply of sand and gravel for 100 year and that, without expanded market, it was not economically feasible to produce material on contested tracts was proper application of test for determining whether land was mineral in character*; (2) testimony of government expert that he had examined claims and that contested areas were not mineral in character because materials from them could not have been mined and marketed for profit at time of his examination or it any time earlier constituted substantial evidence of prima facie case by government that lands were not mineral in character, and testimony of one of claimant's experts that sand and gravel on contested area could have been marketed at profit but that he had not made market study was not enough to undermine substantiality of government's case; ... (Emphasis added.)

William A. McCall, Sr., and another had acquired 26 association placer mining claims of 80 acres each, located for deposits of sand and gravel in the Las Vegas Valley. The 2,080 acres comprising the claims adjoined the boundaries of the city of Las Vegas and lay approximately 6 miles westerly from the Clark County Courthouse in the center of the city. Some of the claims and/or portions of claims had been developed and material therefrom was being extracted and sold at a profit. The claimants had applied for patent to all the claims. Two patents had been granted in response, one for 40 acres and one for 190 acres, covering parts of five claims. Contest proceedings were initiated, the complaint charging that the remaining portions of these five claims, amounting to 170 acres, were not mineral in character.

At the hearing the evidence, including that presented by the Government, established that on each 10-acre subdivision of the contested portions of the several claims there existed sand and gravel which was inferentially of the same character as the material under the patented portions of these same claims and under other patented claims adjacent. However, most of the contested areas were overlain by a dense, cemented caliche-type conglomerate which would make extraction of the commercial sand and gravel beneath more difficult and expensive than on the patented claims adjacent. Moreover, the evidence showed that this mineral material in easily recoverable form exists over many square miles of the Las Vegas Valley, and that there were numerous sand and gravel operators in the area at the time of the hearing and that there had been many active operators there for the preceding 30 years, with operations being conducted on widely dispersed tracts, including the patented portions of the five claims involved in the contest proceeding. In addition the hearing examiner noted that the contestees had already received patents for 230 acres containing over 3,500,000 yards of

sand and gravel which, "If they had a market for this amount they would have a reserve supply for one hundred years." On the basis of these facts the examiner held that the contested portions of the claims were "nonmineral in character" and void, notwithstanding that there existed on each of the contested portions mineral of the same type and quality as on the patented portions which had been found by the Department to be valid claims. Underlying this holding was a finding that given the limitations of the market to absorb the material, the vast local abundance of it, and numerous competitive suppliers, coupled with the fact that the Department had already awarded the claimants patents to Federal lands containing 100 years' reserve supply, it would not have been prudent or reasonable to attempt development of the contested deposits at any time prior to July 23, 1955, when common sand and gravel ceased to be locatable, because these deposits were more costly to develop than what was already available in superabundance. In affirming the Board's decision the Court observed:

> McCall's contention that the Board based its decision on the absence of actual mining is incorrect. The Board adopted the conclusions of the hearing examiner who stated:
>
> > It is only those tracts with a deposit which can be extracted, processed, and marketed at a profit in competition with other deposits that are valuable and mineral in character. The contestees believe that the caliche material can be blasted and processed at a competitive price at the present time. (The contestees) have received a patent for 230 acres which has over three and one-half million yards of sand and gravel in every ten feet of depth. If they had a market for this amount they would have a reserve supply for one hundred years.
> >
> > The contestees offered no evidence to suggest that they had a market for any more than this amount of material either in 1948, 1953, or 1955. Without an expanded market it was not economically feasible to produce the material on the contested tracts. Consequently it had no value as a mineral prior to July 23, 1955.
>
> *This is a proper application of the test for determining whether land is mineral in character*. (Emphasis added.) *McCall v. Andrus, supra* at 1188.

Again, in this case the Court did not employ the phrases "too much" or "excess reserves," although it did stress the fact that if appellants had a market for all the material on other lands which they claimed and had been granted title to "They would have a reserve supply for one hundred years." (Emphasis added.) The Court then said, "*McCall presented no contrary evidence to show that a*

*market existed in Las Vegas in 1955 in which he could have sold at a profit more sand and gravel than the amount contained in the already patented areas*." *Id*. at 1189 (emphasis added). Clearly, the Court was of the opinion that the claimants had a market for *some* of the material, but they were asserting claims to *more land and mineral than could be profitably exploited* and which, therefore, constituted an *additional* "reserve supply" on which a prudent man would not be justified in expending his labor and means to develop in the reasonable anticipation of creating a valuable mine. This precisely parallels the rationale of this Board in the Baker case.

7. *Definition of Phrase "Reasonable Reserves"*

As explained above, claims "which are by all present day statutes and relevant decisions legally exploitable" would never be considered excess reserves by this Department. And, as also related above, reasonable reserves, liberally projected for many years into the future, have been consistently approved by this Department as legitimately within the scope and purpose of the general mining law. *Citations omitted*. What amount of reserves is "reasonable" is a determination to be decided on the basis of the evidence in each case. The nature of the mineral, its unit value, the extent of the market, and whether it is expanding or diminishing, the amount of similar mineral which can supply that market from other sources, might all bear on the question of whether the location of additional claims for the same mineral was justified as the act of a prudent man in the reasonable belief that by the expenditure of his labor and means a valuable mine might be developed on each such claim.

8. *Present Status of Phrase "Excess Reserves"*

As hereinbefore indicated, a reference to Aexcess reserves" does not describe a new rule of law invented by this Department, or a super imposition of a new test of a claim's validity on the existing law. It is nothing more or less than a descriptive phrase applicable to a particular set of circumstances. It describes the location of claims for far more land and mineral than reason and prudence would allow because there is such a superabundance of the material that the market simply cannot accept all of it at a profit. Therefore, some of the deposits must be regarded as not valuable in an economic sense. This concern for excess reserves is rooted in the basic statute, 30 USC ' 22 (1976), and controlled by the "prudent man" test of discovery as complemented by the requirement that the economic value of the deposit be measured by a determination of whether it is presently marketable at a profit. In the making of this determination, it is appropriate to consider the quantity of the claimant's other holdings of this same mineral, and the limitations of the market, and the claimant's share of that market. It is also appropriate to consider the magnitude and sources of other supplies of that mineral to the same market.

**Marketability Must Not Depend on Value Added by Manufacture**

It is well established that the marketability of a mineral must be based on the mineral in its raw state rather than depend on value added by manufacture. In *U.S. v. Mansfield*, 35 IBLA 95 (1978), it was held that "any determination of the value of the contestee's claims, must rest on the marketability of the obsidian in its rough form and not upon any enhanced value from subsequent processing or craft work.

**Profitability Must Be Based on Locatable Minerals**

Sales of minerals from a mining claim for unqualified or nonlocatable uses such as fill material cannot be considered in determining the marketability of the material, even if the material could meet the specifications for locatable-type uses. In *U.S. v. Osborn*, 10 IBLA 23, 25 (1972), the Board said:

> The sale of sand and gravel, rock or other material from a mining claim for use as fill material, or for such comparable purposes as sub-base, ballast or grade material, for which ordinary earth or rock could be used, cannot be considered in determining the marketability of the material on the claim. Such sales cannot be considered even if the material is suitable for other purposes which are cognizable under the mining law .... The value of nonlocatable minerals may not be added to that of associated minerals which are locatable in determining whether discovery of a valuable mineral deposit has been made.

**Aggregation of Profits**

You cannot aggregate the profits from the sale of a nonlocatable mineral such as sand and gravel with the profits from the sale of a locatable mineral such as gold. The validity of a claim must rest entirely on the marketability and profitability of the locatable mineral. In *U.S. v. Prowel*, 52 IBLA 256 (1981), the Board said:

> Appellants contend that high quality sand and gravel found on the claims is marketable and that gravel tailings yielded as a result of gold placer operations are saleable notwithstanding that such deposits of common variety mineral materials could not be located after July 23, 1955. 30 USC ' 611 (1976). Appellants aver that the value of the sand, gravel, and magnetite crystals, when added to the value of the gold, represents a combined deposit which is susceptible to commercial exploitation. However, it has long been the rule that the value of a nonlocatable mineral deposit may not be added to the value of a locatable mineral deposit for the purpose of establishing that a qualifying discovery has been made. The validity of a mining claim located after July 23, 1955, depends upon whether a discovery has been made only with respect to the locatable mineral, and this determination must be made without any consideration of any value that a common variety mineral deposit on the same claim may have.

**Marketing of Comparable Material from Other Claims**

In *Melluzzo v. Morton*, 534 F2d 860, 863 (9th Cir. 1976), the Court held that a "claimant need not rely on his own successful marketing efforts to prove marketability of his material. If the successful marketing by others has sufficiently established that the claimant's comparable material is itself marketable, that can suffice." It should be pointed out that in this case the Court was making reference as to how sales of material by one claimant may establish marketability for another claimant who has comparable material but no record of marketability.

In *Rodgers v. U.S., supra*, the Court held that the successful marketing by a claimant of a gem mineral from one claim in a claim group could satisfy marketability for the other claims that had comparable material. The Court also indicated that this concept of comparable material would apply even though the market was already preempted by the producing claims and that there is an abundance of comparable material from other sources in the area. The Court said at 1379:

> Invalidation of the claims on such grounds, however, gives insufficient weight to Rodgers' other evidence of marketability, and is inconsistent with this court's rulings that positive evidence of marketability overcomes a contention that other mines already produce an abundance of comparable material. ...Competition with existing sources may not be foreclosed because of their preemption of the market. In *Verrue,* this court expressly held that lack of sales of material from the disputed claims, together with evidence of an abundance of comparable material from other sources in the area, did not overcome the claimants' showing of marketability.

In *Dredge Corp. v. Conn*, 733 F2d 704, 707 (9th Cir. 1984), it was held that "the claimant cannot rely solely on the fact that comparable material is being marketed. Rather, 'the claimant must establish that his material was of a quality that would have met the existing demand, and that it was marketable at a profit.' *Melluzzo v. Morton, supra* at 863." *Dredge Corp. v. Conn, supra* at 707. "Proof that neighboring claims are being marketed is relevant to determining a claim's marketability, but such proof alone does not overcome evidence that the market was well supplied. ...Thus, even though comparable claims are being mined, a new claim may be unprofitable because the market has reached such a point of saturation that a new entrant cannot make a profit." *Id* at 707.

**Marketability and Comparison with Other Deposits**

It is necessary to establish that the material on a mining claim satisfies the marketability test rather than showing that material of similar quality and quantity many miles away has met the test. As the Board said in *U.S. v. Kaycee Bentonite Corp*., 64 IBLA 223 (1982), "the validity... must be established by a showing that the material on those claims, not some other claims, can be mined, removed and marketed at a profit."

**Definition of "Discovery" Includes Marketability**

In almost every administrative decision issued by the Interior Board of Land Appeals, on cases concerning the validity of mining claims, the Board has defined "discovery" of a "valuable

mineral deposit." Typical of these definitions is the following from *U.S. v. Williams*, 64 IBLA 346, 348 (1982):

> A mining claimant must make a discovery of a valuable mineral deposit within the limits of a mining claim as a prerequisite to a valid location. A discovery exists where minerals have been found on the claim which are of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This prudent person test has been refined to require a claimant to show that the mineral is "marketable," that is, that it can be extracted, removed, and marketed at a profit.

**Definition Includes Present Marketability at a Profit**

In *U.S. v. Alaska Limestone Corp*., 66 IBLA 316 (1982), the Board included a definition that requires that a valid mining claim must have a "valuable mineral deposit" capable of being extracted, processed and marketed at a profit both at present and at the time of any withdrawal."

**Claimant Has Burden to Show Existence of Potential Buyers of Product and Price They Would Pay**

In *United States v. Foresyth, supra* at 228-29, the Board said that the "primary impact of the Coleman case upon.... similar cases is to place a burden upon a claimant to submit additional proof regarding the ability to mine at a profit. To illustrate that burden, we set forth the following example:

> If a claimant were to possess a mining claim containing an uncommon variety of building stone, and the claimant submits proof that the particular stone sold at a price greater than the cost he would incur when quarrying the stone, he must demonstrate that there is a reasonable prospect that if quarried, someone would buy his stone. If he was only able to show that in the past 10 years one ton of the stone had been sold as ornamental building stone at the price he would propose to sell his product and was unable to demonstrate that an additional market for his product could be developed, it could reasonably be stated that the claimant had not demonstrated that there was a demand for his product at a price higher than the cost of extraction.

With this in mind, we will examine the evidence regarding the existence of potential buyers of the product and the price they would be willing to pay." *Id*. at 229.

**Pre-1955 Cinder Claim Failed to Satisfy Marketability Test**

In *United States v. Aiken Builders Products*, 95 IBLA 55 (1986), mining claims for volcanic cinders were located in 1954 and 1955 (before July 23, 1955) for volcanic cinders. The primary issue for a common variety mineral located before July 23, 1955, is marketability of the mineral at the time. And Awhere there is little or no evidence of pre-1955 sales, the costs of extraction, preparation, and transportation, as well as the level of the then-existent market, should

be considered.@ Although "some isolated sales of cinders were made prior to July 23, 1955, no income was realized by the claim holders and no commercially viable marketing of cinders from the claims had been accomplished.@ *Id* at 58.

**Foreseeability of Market Change**

To determine whether there is a possibility of marketing a mineral, "the foreseeability of changes in the market conditions is significant." *Skaw v. United States*, 13 Cl. Ct. 7, 37 (1987). A new use developed two years after an area was withdrawn from mineral location is not a foreseeable change. *Id*.

**Cinders Removed from Claims without Compensation**

In *United States v. Johnson*, 100 IBLA 322 (1987), the claimant was able to show a few thousand tons of cinders had been removed from his claims since 1943; however, he received no compensation as they were used by the community. In rejecting his contention that he met the test of marketability, the Board described an earlier case with similar facts at 346:

> * * * The case of *United States v. Chapman*, A-30381 (July 16, 1968), involved an appeal from a contest of a mining claim located prior to 1955 for a common variety of cinders which bore certain significant similarities to appellants' case. In that appeal cinders taken from the claim were used extensively in highway, street, and driveway construction. Further, claimants received no compensation for cinders, although they were removed from the claim with their consent. The Department held that the lack of evidence of a profitable market for the cinders coupled with evidence that thousands of tons cinders had been removed from the claim with claimants' permission at no expense other than the operating costs of the parties removing the cinders and without payment of compensation to claimants sustained a finding of lack of discovery of a valuable mineral deposit within the meaning of the mining law of 1872.

**Problems With the Law of Discovery**

George E. Reeves (1975) in his paper "Discovery Since Coleman" made an astute observation concerning the types of contests from which the test of discovery is being developed:

> The law of discovery is being made on the fringes of the mining industry. The rules of discovery are being developed, for the most part, in contests involving sand and gravel and other common varieties of minerals, in contests involving individual claimants who work their claims sporadically, if at all, and in contests involving oil shale claims, which present their own special problems because of the length of time which has elapsed since oil shale was withdrawn from location. Sometimes the Secretary does not seem to realize that the rules he is developing will be of general application in the mining industry.

Unfortunately, this is true. The legitimate mining industry depends heavily on a test of discovery that is reasonable and compatible with its needs. The *Coleman* decision has been cited in almost

every subsequent decision concerning discovery; yet the mineral involved in *Coleman* was building stone and the claimant had little in common with the mining industry. See Reeves, G. E., 1975, *The Law of Discovery Since Coleman*: Rocky Mtn. Min. L. Inst., v. 21, p. 415-474.

**Mineral Examiner Must Be Expert on Marketability of Specific Mineral**

In *Rodgers v. U.S.*, 726 F2d 1376 (9th Cir. 1984), a case involving the gem mineral "sunstones," it was held that the Government failed to present evidence on marketability sufficient to make out a *prima facie* case of invalidity. The Court focused on the qualifications and testimony of the Government's expert witnesses.

One of the most significant aspects of this case is the Court's holding "that the testifying mineral examiner must be an expert as to the marketability of the particular mineral." As the Court pointed out, the two government mineral examiners "stated that they had no expertise regarding gemstones or the market for those stones. Conversely, testimony by the claimant's witnesses included a geologist for the State of Oregon, an amateur faceter, the original locator of the claims, a mineral commodities marketing specialist and an eminent mineralogist.

The following excerpt from *Rodgers* (*Id* at 1380-81) details the Court's concern about the lack of expertise of the government's witnesses on the marketability of sunstones and the inadequacies of the market survey:

> ... Yet, this court has made clear that the testifying mineral examiner must be an expert as to the marketability or value of the particular mineral. *Charlestone Stone Products Co., Inc. v. Andrus*, 553 F2d at 1213-14; *Verrue v. United States*, 457 F2d at 1204. We are troubled by the lack of expertise of the government's witnesses regarding the marketability of sunstones and gemstones.
>
> Notwithstanding the judge's articulation of the limited nature of the witnesses expertise, and the witnesses' own admissions that they lacked qualifications to testify about the marketability of the sunstones, the ALJ permitted the witnesses to testify on the marketability of sunstones. Further, the ALJ relied upon that testimony in concluding that the claims were not valuable discoveries. Their testimony, however, establishes nothing as to the crucial issue of the stones' marketability. *See Verrue v. United States*, 457 F2d at 1204.
>
> Broili admitted that he had no expertise in marketing and had never before conducted a market survey. The survey he conducted here was no more than a few telephone calls to local rock shops. He did not show the rock proprietors samples of the stones from the disputed claims, nor did he discuss with them the difference between facet quality stones and tumbling material. The testimony of Rudys, the other government "expert", was similarly deficient. The only additional government testimony was by one rock store proprietor, who testified about his lack of sunstone sales. We can only conclude that the government presented no substantial evidence on which to base a *prima facie* case of nonmarketability.

**Marketability of Sunstones**

*Rodgers v. U.S.*, 726 F2d 1376 (9th Cir. 1984) involved the marketability of Asunstones," a gem mineral. In *Rodgers* the Court concluded that the "ALJ and IBLA improperly applied the marketability and prudent person test." In this case the BLM contested four mining claims for lack of discovery of a valuable mineral deposit. The mineral in question is a colored gem mineral sold under the name of "sunstone." These gem minerals occur as phenocrysts (crystals) of labradorite enclosed in a finer groundmass of basalt. Some of the crystals are of sufficient size and quality for faceting.

The sunstones are extracted from the claims by handpicking, screening with a quarter-inch screen, and by prying from the host rocks. The stones are sold in rough form to rock shops, collectors and faceters with the highest-grade material sold to jewelers and museums.

In the contest action that followed, the Administrative Law Judge (ALJ) held that all but one of the four claims were invalid for lack of discovery. The Bytownite #1 mining claim was considered valid because marketability was established by sufficient sales of sunstones prior to October 8, 1970 -- the date the lands were closed to mineral entry. On appeal the IBLA and the U.S. District Court for the District of Oregon agreed.

The claimants grossed approximately $20,000 in sunstone sales from the claims between 1970 and 1975. During this same period, the claimants accumulated an inventory of faceting-grade stones valued at $200,000 while incurring costs of less than $2,000 per year.

**Marketability of a Sand and Gravel Claim**

In *Dredge Corp. v. Conn*, 733 F2d 704 (9th Cir. 1984) the Court upheld an Interior Board of Land Appeals decision that the market conditions would not have permitted *Dredge Corp*. to mine a sand and gravel claim at a profit in 1955. This case involved a common variety of sand and gravel where marketability of the deposit must have been established on July 23, 1955.

Based on the evidence that no mining activity had occurred on the claim, the Court noted that the "lack of mining activity lends support to the government's contention that the local market was weak in 1955. *Id* at 707.

The government's expert witness testified that the mineral deposit on the contested claim was of poorer quality than other deposits in the area. Furthermore the examiner testified that a greater quantity of caliche in the sand and gravel of the contested claims would also raise costs. The Board's conclusion that *Dredge Corp*. could not have mined and marketed the deposit in 1955 was also buttressed by the claimant=s concession at the hearing that a prudent person would not have mined the deposit in 1955, but would have waited until 1960 when the local demand increased.

At first glance the conclusions reached by the Court in *Rodgers v. Watt, supra* and

*Dredge Corp. V. Conn, supra*, appear to be at odds. However in *Dredge Corp v. Conn, supra* at fn. 7 the Court asserted that there is no conflict and the two cases are distinguishable in the following ways:

1. The IBLA did not rely on lack of sales as evidence of nonmarketability in *Dredge Corp*.

2. The Government's witness was far more qualified and his testimony was sufficient for a *prima facie* case in *Dredge Corp*.
3. In *Rodgers*, the sunstones on the disputed claim were identical to those on the undisputed claim in which profitable marketing was established.

4. *Rodgers* established a local market and a potential international market for the sunstones.

5. *Rodger's* evidence of potential markets was sufficient to overcome the government's contention that the sunstone market was well supplied.

6. *Dredge Corp*. could not overcome the government's contention that the supply of sand and gravel in 1955 vastly exceeded the demand.

## COMMON AND UNCOMMON VARIETIES

### IBLA Approves Placing Sales Proceeds in Escrow Until Locatability of Minerals Adjudicated

In *Jesse R. Collins*, 145 IBLA 145, 204 (1998), the Board approved a BLM determination which Aprotected the claimants rights to mine the clay as a locatable mineral by directing that the sales proceeds be placed in escrow, allowing for their return to Collins if the clay were found to be salable, it conformed with reasonable agency-wide BLM procedures (set out in Instruction Memorandum WO IM No. 92-290) that are reasonable and consistent with the law, and it is properly affirmed. *See Lone Mountain Production Co.*, 139 IBLA 244, 249 (1997); *Atlantic Richfield Co.*, 121 IBLA 373, 380, 98 I.D. 429, 432-33 (1991); *Beard Oil Co.*, 105 IBLA 285, 288 (1988). This procedure amply protects the rights of both the Government to receive proceeds of sales of mineral material and the due-process rights of claimants to have the legal staus of minerals on their claims fully and fairly adjudicated.@ *Id.* at 204.

The Board further pointed out that BLM must conduct a mineral examination of the clay deposit to determine if the clay is a common variety, and if so, contest the claim. AThat must be done in order to resolve the status of the money placed in escrow, since, as discussed above, the common- (or uncommon-) variety status of the clay removed will determine whether those moneys are deposited in the U.S. Treasury or returned to Collins. If no such examination and contest have been initiated, BLM should undertake them as soon as possible.@ *Id* at 204.

### Statutory Authority for Disposing Common Variety Minerals

Section 601 of Title 30 of the United States Code authorizes the Secretary of the Interior to sell "common varieties" of "sand, stone, gravel, pumice, pumicite, cinders and clay." On July 23, 1955, Public Law 167 (69 Stat. 368; 30 USC 611) was passed to, among other things, prohibit further location of common variety minerals. The Act stated in part:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws.

However, the Act went on to provide for an exception for Auncommon variety" minerals at 30 USC 611:

> "Common varieties" as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more.

Therefore, the statute clearly implies that "uncommon varieties" of such materials exist and are still locatable under the mining law. Uncommon varieties are "valuable because the deposit has some property giving it distinct and special value...."

The remainder of this chapter is primarily devoted to what the Federal Courts and Interior Department have interpreted the phrase "property giving it distinct and special value" to mean so as to provide a basis for determining under what circumstances a deposit of "sand, stone, gravel, pumice, pumicite or cinders" may be located.

The Interior Department has attempted, with little success to define "common varieties" by regulation (43 CFR 3711.1(b)):

> "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common

varieties." This subsection does not relieve a claimant from any requirements of the mining laws.

**Stone Versus Mineral or Element**

Because common varieties of sand, stone, gravel, pumice, pumicite or cinders generally consist of an aggregate of two or more elements and (or) minerals, the properties of each are not particularly significant. It is important to note that in this context we are talking about minerals in the "scientific" sense rather than the "legal" or "economic" sense. In fact, it is quite uncommon for minerals to be used in the scientific sense in any Interior or court decision. However, in *U.S. v. Pierce*, 75 ID 270 (1968); *U.S. v. Bunkowski*, 79 ID 47 (1972); and *U.S. v. Beal*, 23 IBLA 378 (1976), the Board did use the term "mineral" as a geologist would.

Scientific definitions are generally concerned with the origin and the chemical and physical properties of a substance rather than with economic and legal considerations. The *Glossary of Geology*, published by the American Geological Institute, defines "mineral" as follows:

> A naturally formed chemical element or compound having a definite chemical composition and, usually, a characteristic crystal form. A mineral is generally considered to be inorganic, though organic compounds are classified by some as minerals.

As an example of how the Board made a distinction between "stone" and "mineral" in *Pierce*, *Bunkowski*, and *Beal*, suppose that a mineral such as feldspar is extracted and used for a particular purpose that requires the physical and (or) chemical properties of the mineral feldspar. In such a case we do not have a common variety situation regardless of whether the feldspar is mined as an individual mineral or as granite (a stone or rock which is composed of several minerals such as mica and quartz in addition to the mineral feldspar).

In general, if the rock is valuable for only an individual mineral or element such as gold, silver, feldspar, mica, etc. it is not a common variety question and 30 USC 611 does not apply; however, if the entire rock is used and the constituent elements or minerals are relatively unimportant, then 30 USC 611 may apply.

The following cases, (*Pierce*, *Bunkowski* and *Beal*) should be reviewed carefully in order to acquire an understanding of how to distinguish a common or uncommon variety deposit from a "valuable mineral deposit" not specified in 30 USC 611:

1. *U.S. v. Pierce*, 75 ID 270, 279-281 (1968):

> At the outset it is to be noted that the statute does not apply to common varieties of all minerals but only to common varieties of those enumerated, namely, "sand, stone, gravel, pumice, pumicite, or cinders." Some of these terms, e.g., sand

gravel, and stone, are broad in meaning and can encompass a wide range of materials. The term "stone," in particular, is extremely broad in meaning, including material of igneous, sedimentary, or metamorphic origin and material of variegated mineral composition, ranging, for example, from white limestone to dark basalt. This being the case, it is important not to confuse the material with the constituent elements that make it up. That is, in determining whether a particular material falls within the purview of the common varieties provision, it is necessary to determine whether the material as a totality has value or whether only a constituent element of the material has value.

An example will illustrate. Suppose we have a granitic rock which is composed of quartz and the other minerals usually found in a granitic rock. The rock as such is suitable for use in constructing buildings. There is no doubt that the rock would constitute a "stone" within the meaning of the common varieties provision and the question would be whether the particular rock was a common variety of stone. If, however, the same rock carried gold and was located only for the supposed value of the gold, the question would not be whether the rock was a "stone" and whether it was an uncommon variety of stone because of its gold content. The question would simply be whether there was a valuable deposit of gold on the claim. In other words, the matrix in which the gold is embedded would be of no significance and no Acommon variety" question would be present.

With this in mind we turn to the question whether the mineral deposits on appellant's claims present a common varieties question. The materials claimed to be valuable on the lode claims are limestone, aplite, mica schist (or biotite gneiss), and feldspar. The materials of asserted value on the placer claim are mica and feldspar silica sand. The examiner held all these minerals to be common varieties.

There is little problem with the limestone and aplite. They occur in rock formation and are used in crushed or ground form.

The mica schist presents a different problem. Pierce contends strongly that it is an uncommon variety of stone. However, whether it is or not raises the question that we have just discussed. On the one hand, great value is claimed for use of the mica schist as backing on composition roofing. For that use the whole rock is simply ground and the pulverized rock applied. The mica content is of little significance -- it averages 10 or 12 percent but can be as low as 1 or 2 percent -- and other material can be used for the same purpose, such as beach sand. The mica schist then is properly considered to be a "stone" within the meaning of the common varieties provision and it seems clear that, used as a stone, it is a common variety having no unique or special value. If the validity of the lode claims depended upon value of the mica schist as a whole rock, a showing of the profitable marketability of the schists as of July 23,1955, would be necessary.

However, Pierce also claims value for the mica alone. This is the biotite mica which would be extracted or separated from the matrix in which it occurs. In this situation the value asserted for the claims would not be for the mica schist as a stone, but for the mica alone, which could not be characterized as a "stone." Therefore, no question could exist is to whether the mica is or is not a common variety; the validity of the claims would depend simply upon whether the mica can be marketed at a profit at the present time. This is a distinction which the hearing examiner did not draw.

The feldspar appears to be akin to the mica so far as the common varieties issue is concerned. While it is a common constituent of rocks, its value here is claimed to be for its chemical qualities. For such use the crystals of feldspar would be extracted from the matrix in which they occur. The feldspar therefore cannot properly be considered to be a "stone" within the purview of the common varieties provision.

2. *U.S. v. Bunkowski*, 79 ID 47, 48 (1972):

If the material is located only for the value of a constituent element of the sand, gravel, or stone, the question is not whether the deposit is a "common variety" but whether there is a valuable deposit of the constituent element on the claim. *Id*. at 280, 281. Since the material here is valued and used only for its constituent gypsum, it is not necessary to determine whether the deposit is an uncommon variety of sand, gravel or stone. The validity of' the claim may be based upon the discovery of gypsum.

3. *U.S. v. Beal*, 23 IBLA 378, 395-396 (1976):

For its use as landscaping and building stone, the feldspar on the subject claim (as well as the quartz) is simply ground into rock form and the feldspar element in the final product is of no significance. As the Judge pointed out, when used for this market the material is no different from "ordinary crushed stone or quartzite." Under these circumstances, the feldspar was properly considered to be a "stone" within the meaning of the common varieties provision.

**Unique Property Gives Special Use or Higher Price in Market Place**

In *U.S. Minerals Development Corp*., 75 ID 127 (1968), one of the early and important common variety cases, the Board held that for a deposit to be an uncommon variety, it must satisfy the following criteria:

1. The deposit must have a unique property.

2. The unique property must give the deposit a distinct and special value.

3. The value may be for some use to which ordinary varieties of the mineral cannot be put, or

4. The material must sell at a higher price than material in other deposits without such property is sold.

In *U.S. Minerals Development Corp., supra* at 134 and 135 the Board said:

> In short, the Department interprets the 1955 Act as requiring an uncommon variety of sand, stone, etc. to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. It must give the deposit a distinct and special value. The value may be for some use to which ordinary varieties of the mineral cannot be put, or it may be for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use....
>
> The question is presented as to what is meant by special and distinct value. If a deposit of gravel is claimed to be an uncommon variety but it is used only for the same purposes as ordinary gravel, how is it to be determined whether the deposit in question has a distinct and special value? The only reasonably practical criterion would appear to be whether the material from the deposit commands a higher price in the market place. If the gravel has a unique characteristic but is used only in making concrete and no one is willing to pay more for it than for ordinary gravel, it would be difficult to say that the material has a special and distinct value.
>
> When the same classes of minerals used for the same purposes are being compared, about the only practical factor for determining whether one deposit of material has a special and distinct value because of some property is to ascertain the price at which it is sold in comparison with the price for which the material in other deposits without such property is sold (*U.S. Mineral Development Corp., supra*, at 134 and 135).

**Guidelines to Distinguish between Common And Uncommon Varieties**

In *McClarty v. Secretary of the Interior*, 408 F2d 907, 908 (9th Cir 1969), the Court set forth standards to distinguish between common varieties and uncommon varieties of material, thus approving *U.S. Mineral Development Corp., supra*. The Court said at 908:

> In the *U.S. Minerals Development Corporation* case, the Secretary, impelled by the *Coleman* decision to breathe some life, into the building stone statute, has defined guidelines for distinguishing between common varieties and uncommon varieties of building stone. These guidelines, as we discern them, are (1) there must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must

give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher piece which the material commands in the market place.

**Every Mineral Deposit Is Unique**

Every mineral deposit is unique, in that they are formed under a variety of physical and chemical conditions. However, does the unique property give a distinct and special value over most other deposits of the mineral. In *United States v. Multiple Use, Inc.*, 120 IBLA 63 at 78, fn 13, Judge Mullen clearly described this situation:

> All mineral deposits are formed in a complex geologic and chemical environment, and the conditions during the deposition will never be the same for any two deposits. Therefore, if one were to compare a sufficiently large set of physical variables (properties), one could conclude that no mineral deposit is a common variety deposit -- each deposit can be found to be unique and distinguishable from all others. Thus, to give meaning to the Common Varieties Act, one must consider the property or combination of properties making the deposit unique to see if those properties impart a distinct and special value over run of the mill deposits of that material. By doing so one can determine if a particular mineral deposit is locatable under the Mining Law of 1872 or excluded from location.

**Common Varieties Act: Distinction Between Locatability and Discovery**

If a mineral is not locatable, such as a common variety mineral, there can be no discovery even though the mineral can be marketed at a large profit. Conversely, if a mineral is locatable, such as gold, a discovery may or may not exist in a particularly deposit, depending on whether or not the gold bearing rock exists in sufficient quality and quantity. In *United States v. Multiple Use, Inc.*, 120 IBLA 63, 83-84 (1991), Judge Mullen clarified the distinction between "locatability" and "discovery" as it relates to common variety minerals:

> The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a major distinction between the evidence and case law applicable to "locatability" and that applicable to "discovery." For example, if the mineral material on a claim located after 1955 is being sold at a common variety price for a common variety use, it matters not that the claimant has developed a valuable mine which is operating at a sizable profit. An overwhelming showing that the mineral material is marketable will not support a claim if the mineral material is not locatable. On the other hand, the inability to mine the mineral material at a profit does not render it common variety when the deposit has some unique property giving it a distinct and special value. The prudent man test is not applicable when considering whether the mineral deposit has a distinct and special value. Conversely, comparing the value of mineral material on the claim to what may be called a "run of the mill" deposit has a direct bearing on an uncommon variety determination, but would have

little bearing on the issue of marketability.

The ease of confusing the locatability and discovery issues and the facts and case law relevant to each is a valid basis for arguing that the hearing on these two aspects of a contest involving a common Varieties Act mineral should be bifurcated.

**Marketability for Common Variety Minerals Located Prior to July 23, 1955**

The prudent man/marketability test of discovery for a common variety mineral located prior to the Act of July 23, 1955 has been addressed by the Board of Land Appeals in many cases. The test "must have been met at the time of the Act and reasonably continuously thereafter up to and including the time of a contest hearing. *United States v. Wirz*, 89 IBLA 350 (1985). However, "it is clear that sales are not absolutely necessary to establish the marketability of material from a claim." *Id.* at 356.

**Photos used to Document Mining**

*United States v. Webb*, 132 IBLA 152 (1995), involved a claim located for granite before July 23, 1955. In order to establish that the claimant had not mined or marketed stone from the claim prior to that date, the BLM offered photographs of the claims and testimony that documented no surface mining had taken place on the claims before the critical date. The BLM was able to show no development in a 1958 photograph with the first surface mining activity showing up in a 1964 photograph.

**Sales During Critical Period**

In order to get credit for sales made from common variety minerals on claims located before July 23, 1955, such sales during the critical period (before July 23, 1955, to present) must be documented with receipts showing the specific claim used as a source as well as the exact dates of purchase. Evidence that minerals have been sold from claims within the general area is not sufficient to validate a claim. *United States v. Webb*, 132 IBLA 152, 183 (1995).

**Period for Holding and Working Must Be Completed by July 23, 1955**

To establish a section 38 location for a common variety mineral you must, among other things, show that the claim was held and worked for a period equal to the statute of limitations. This statutory period must be completed before July 23, 1955, the effective date of the Common Varieties Act, 30 U.S.C. 611 (1988) which withdrew such minerals from location under the mining laws. *United States v. Webb*, 132 IBLA 152, 180 (1995).

**Prior to July 23, 1955 "Specification Material" Was Locatable**

Certain mineral products have never been regarded as subject to location under the

mining laws even though they might be marketable at a profit. Among these nonlocatable materials are those used for fill, grade, ballast, and subbase. *United States v. Wirz*, 89 IBLA 350, 358 (1985). However, prior to the Act of July 23, 1955, an exception to the general rule was applied for certain types of ballast and base for roadbeds which conformed to engineering specifications for such use. Prior to the passage of the Act of July 23, 1955, "specification material" was regarded as locatable on the ground that inferior grades would not suffice. *United States v. Bienick*, 14 IBLA 290, 298 (Steubing, A.J. concurring). However, even where material was previously regarded as locatable because it met engineering standards for "compaction, hardness, soundness, stability, favorable gradation," etc., in road building and similar work, such materials have been treated as common varieties and were not locatable after passage of the Act of July 23, 1955, because materials which meet the standard are of widespread occurrence. *Id.* at 298.

**Meeting ASTM Standards Does Not Make Mineral Uncommon Variety**

In *United States v. Multiple Use, Inc.*, 120 IBLA 91 (1991), Judge Mullen pointed out that just because a mineral meets ASTM standards does not make it an uncommon variety. The fact that a mineral can meet ASTM standards may only help establish its marketability:

> On the other hand, the fact that a pumice meets certain ASTM standards does not make it an uncommon variety of pumice. It is clear that when Congress passed the Common Varieties Act, it specifically named common varieties of sand, stone, gravel, *pumice*, pumicite, and cinders as being no longer subject to the Mining Law of 1872. One common thread runs through each of these mineral products. That thread is the use of those products as aggregates in making concrete products. If pumice meets the ASTM standard for use as a lightweight aggregate, that fact does no more than establish the ability to market and use it as an aggregate. It therefore only supports its value as a common variety mineral. To use ASTM standards as a basis for a determination that an aggregate is an uncommon variety, it would be necessary to show that the qualities of the particular aggregate so exceed an ASTM standard that the particular aggregate commands a higher price in the marketplace than similar aggregates.

**Lower Overhead and Greater Profits**

In *McClarty v. Secretary of the Interior, supra* at 909, the Court suggested that the distinct and special value of a stone may not be measurable by a comparison with the price of other building stones; and that the unique property of the deposit might allow lower costs of mining and thus greater profits. The Court said:

> ... in the *McClarty* case, where the unique properties of the stone are the natural fracturing into regular shapes and forms suitable for laying without further fabrication, the distinct

> and special economic value of the stone may or may not be measurable by the retail market price in comparison with the price of other building stones. It is quite possible that the special economic value of the stone would be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price would remain competitive with other building stone.

**The Reduced Overhead Approach**

In *U.S. v. McClarty*, 17 IBLA 20, 45 (1974), the Board gave an example of how unique qualities of a deposit give special value which is reflected by reduced costs. The Board said at 45:

> From the facts presented we find that while the price per ton of Heatherstone is not significantly higher than other stone used for the same purposes, its unique qualities do impart definite economic advantages over other competitive types of stone. Heatherstone is cheaper by half to quarry and prepare for market, resulting in significantly higher profits to the quarry operator. It yields a greater volume of usable stone per ton and the same volume of usable Heatherstone covers a broader area, which means that fewer tons of Heatherstone are required for a given job, thereby effecting a significant saving to the builder. A mason can lay a substantially broader area of Heatherstone in a day's work, which affords a definite economic advantage to the masonry contractor. Where the wall exceeds five feet in height this advantage is further enhanced.
>
> The finding that Heatherstone's unique properties impart special economic advantages does not hinge on the advantages in quarrying alone, but also on the economic advantages in installation that may be appreciated by the contractor, stonemason and customer.
>
> The dissenting opinion questions whether a special and distinct value which accrues to the user of the stone is within the ambit of the Court's guidelines. Regardless of whether it is or is not, our finding of special value to the builder, contractor or subcontractor is not essential to the conclusion, There is an established special value to the producer, reflected by reduced costs of overhead so that the producer's profit is substantially increased, and this is attributable to the uncommon physical properties of the stone. This, of itself, is sufficient to meet the Court's criterion for determining whether the stone has a special economic value.

The "reduced overhead" approach, which now appears to be well established, was concisely restated in *U.S. v. Pope (On Reconsideration*), 27 IBLA 134 (1976). The Board said:

> To support a finding of distinct and special value, the evidence generally must show that the unique property would command a market price higher than that for common materials used for the same purpose or that the unique property would reduce overhead production costs and provide for greater profits.

Judge Thompson's dissenting opinion in *U.S. v. McClarty*, 17 IBLA 20, 58-59 (1974) pointed out the evidentiary problems involved in using the reduced cost approach:

> Under the Court's suggested test the reduced overhead costs may give a producer a substantial profit over other producers, very difficult evidentiary problems are created. If a truly valid comparison of the profitability of producers is to be made, there should be evidence comparing the cost operations of many quarry operators with evaluations and adjustments made to reflect cost and overhead differentials due to the unique property, such as differences in labor costs resulting from other economic and geographical factors and transportation costs from the quarry to the market.

**Immense Quantities Indicate Common Variety**

In *U.S. v. Coleman, supra* at 603-604, the United States Supreme Court said "we believe that the Secretary of the Interior was... correct in ruling that "in view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a common variety."

**Comparison With Deposits of Common Occurrence**

In order to determine whether a deposit of stone has a property which gives it a distinct and special value there must be a comparison with other deposits of common occurrence. As the Board stated in *U.S. v. Thomas*, 1 IBLA 209, 217, 78 ID 5,11-12 (1971):

> It must then be shown that the material under consideration has some property which gives it value for purposes for which other materials are not suited, or, if the material is to be used for the same purposes as other materials of *common occurrence*, that it possesses some property which gives it a special value for such uses, which value is reflected by the fact that it commands a higher price in the market place. (Emphasis added.)

**Stone in Question Must Be Compared With Common Varieties**

In *U.S. v. Vaughn*, 56 IBLA 247 (1981), the Board held that "it is a prerequisite for an adequate comparison that the stone in question be compared with deposits of common varieties in order to determine if it has a distinct and special value reflected by a higher market value, The Board said at 252:

> The market research offered by BLM provided the prices for other materials used for the same purposes as marble from the Basins quarry. These materials included granite, feldspar, scoria, and quartzite. There is no indication whether these materials were themselves common or uncommon varieties of stone. It is a prerequisite for an adequate comparison that the stone in question be compared with deposits of common varieties in order to determine if it has a distinct and special value reflected by a higher market value.

*See U.S. v. Pope*, 25 IBLA 199 (1976). The mere fact that the materials are used for the same purposes is not sufficient. The test must be applied to the stone in question versus known common varieties. If the stones for comparison are, uncommon varieties, each exhibiting a distinct and special value, it would be virtually impossible for a stone to meet the test unless its characteristics were such as to command the highest market value. The Government failed to establish that the stones used for comparison purposes were, in fact, common varieties. Appellees' evidence supports a finding that the white marble on its claims is an uncommon variety of stone subject to location under the mining laws.

**Comparison Must Be With All Deposits Rather Than Uncommon Varieties**

In *U.S. v. Kaycee Bentonite Corp.*, 64 IBLA 186, 207-209 (1982), the Board reviewed a number of cases where it was held that the comparison of the deposit of stone in question may be with all deposits, or limited to similar deposits. The Board held that the comparison should be with all deposits generally if (1) the deposit is marketable for purposes which are not typical of common variety minerals, and (2) the material is not widespread. The Board said at 207-209:

... *U.S. v. U.S. Minerals Development Corp*., 75 ID 127, 132 (1968). In that case, the Department held a deposit of colored quartzite ("Rosado) stone") to be a common variety, after comparing it with other deposits of colored quartzite rather than deposits of quartzite generally. Similarly, in *Brubaker v. Morton*, 500 F2d 200 (9th Cir 1974), the court sustained the Department's comparison of the deposits of colored stone with other deposits of colored stone rather than with deposits of gray stone. In *Boyle v. Morton*, 519 F2d 551 (9th Cir), *cert. denied*, 423 US 1033 (1975), it was held that the Department properly compared the deposit at issue with "similar" decorative decomposed granite rather than with decomposed granite generally.

For example, in *U.S. v. Dunbar Stone Co.*, 56 IBLA 61 (1981), the claimant asserted that a deposit of Yavapi schist, a stone which was used for facing on buildings and other building purposes, was an uncommon variety because it was an uncommonly good deposit of schist. We ruled, however, that simply because it might be an uncommonly good schist did not necessarily make it uncommonly good stone. Other types of common stone were suitable for wall facing. We held further:

> We are not obliged to consider how a particular deposit of a common stone type ranks when compared only with other deposits of the same generic type (i.e. limestone, sandstone, shale, granite, basalt, slate, etc.), and hold that a superior or unusual occurrence of that particular type is an uncommon variety, when it,,; special characteristics only make it suitable to be used in the same manner as common varieties of other types.

Id at 65-66.

Thus, contestant maintains, we are required to compare deposits of bentonite with other deposits of bentonite, since that admittedly is the only clay which can be used for

certain purposes. One example demonstrates the obvious fallacy of extending this argument too far: gemstones would become common varieties of stone if comparison were limited only to other gemstones. Even jewelers distinguish between investment grade diamonds and those which are of lower quality but still suitable for jewelry, and these can be distinguished from industrial diamonds.

A mineral does not have to be so scarce as diamonds before we stop comparing one deposit with a similar deposit in order to determine its common or uncommon character. This issue was squarely presented in *U.S. v. Bolinder*, 28 IBLA 187, 83 ID 609 (1976), which involved a deposit of geodes. The Government had contended that the contested deposit of geodes was a common variety because it did not differ from other deposits of geodes. We agreed that the contested deposit did not differ from other geodes; we disagreed that it was a common variety. We held that the proper basis of comparison was with deposits of stone generally, not other deposits of geodes. The decision states no general rule when a deposit of stone will be compared with common stone generally rather than with stone just like itself. The decision, however, affords ample basis for such generalization. The Board noted that geodes possessed an economic value in trade and the ornamental arts, apart from whatever commercial value may be attributed to their uniqueness as a so-called "natural curiosity," a use which would not have made them valuable within the meaning of the mining laws. The uses making them locatable can be distinguished from use as a building material which has typified common variety minerals in the cases relied on by contestant. The Board also noted that geodes are not widespread. The *Bolinder* case then governs the comparison of deposits when (1) the contested deposit is marketable for purposes which are not typical of common variety minerals; and (2) the material is not widespread. Only bentonite can be used to pelletize taconite, which is not a typical common variety use.

**Comparable Deposits Marketed by Others**

*Melluzzo v. Morton*, 534 F2d 860 (9th Cir 1976) gives authority to prove marketability where successful marketing by others has established that the claimant's undeveloped but comparable material is marketable. The Court said at 863-864:

In this respect *Verrue*, at 1203, quotes *Barrows v. Hickel*, 447 F2d 80, 82 (9th Cir 1971), to the effect that "actual successful exploitation of a mining claim is not required to satisfy the 'prudent man test.'" *Verrue* makes it plain that the claimant need not rely on his own successful marketing efforts to prove marketability of his material. If the successful marketing by others has sufficiently established that the claimant's *comparable material* is itself marketable, that can suffice.

**Unique Property Based on Comparison with Deposits Nationwide**

One important point noted in *United States v. Henri (On Judicial Remand)*, 104 IBLA 93 (1988) was that the Board apparently established that the "unique property" giving stone a

distinct and special value is based on a national comparison rather than unique to the vicinity or the State of Alaska. The testimony in Henri indicated that although the stone may be unique in Anchorage and Juneau, it is "very mediocre" if compared to other deposits in the western United States.

**Compare Deposit with Common Varieties Rather than Uncommon Varieties**

When making the determination of whether a mineral is an uncommon variety, it is only necessary to compare with run of the mill deposits rather than with other uncommon varieties. "Both direct and indirect evidence supporting the conclusion that other deposits of such mineral generally are unsuitable for that use can be used to establish that it is an uncommon variety. Further, it need only show that the mineral material is an uncommon variety by a preponderance of the evidence." *United States v. Multiple Use, Inc.*, 120 IBLA 63, 101 (1991).

**Common Variety Sales Price Is Important for Uncommon Variety Determination**

In *United States v. Multiple Use, Inc.*, 12 IBLA 63, 78, 79 and 102 (1991) Judge Mullen emphasized the importance of price received from the sale of common varieties as an indicator that a deposit is an uncommon variety. The willingness of a knowledgeable buyer to pay more than the common variety price for a mineral is strong evidence that it has a unique property that gives it a distinct and special value:

> The sales price of the material sold for a "common variety use" is one of the most important facts to be considered in a contest involving the common variety question. When a mineral is of a common variety, a buyer can obtain his mineral product from many sources. Thus, the market is almost always controlled by the location of the deposit (transportation costs) and control of the deposit (ownership), rather than some intrinsic property of the mineral material.
>
> In fact, the common variety sales price is more important to a determination that the mineral is an uncommon variety than it is for a common variety determination.
>
> * * * * * * * * *
>
> * * * As can be seen, the willingness of a user to buy a mineral material at a higher price is a clear indication that the mineral material has a special intrinsic property that renders it an uncommon variety. If the sales price of the mineral material sold for common variety uses is established, the value of "other deposits of such mineral generally" has been determined.
>
> Once a common variety sales price is established, evidence of an arm's length purchaser's willingness to pay much more than the "common variety price" for a particular mineral material strongly supports a finding that the deposit of that material is intrinsically unique.
>
> * * * * * * * * * *
>
> * * * On the other hand, when comparing the sales price for the materials sold to the denim-washing industry, the price far exceeds the average sales price. This factor

indicates that, if it is usable in the denim-washing industry, the white Vulcan pumice has properties giving it distinct and special value.

**Where Very Few Deposits Are Suitable for a Particular Use, The Deposit May Be Uncommon**

Most of the common variety minerals are abundant and widespread throughout the western states. However, in reference to finding a deposit that meets certain industry specifications, the Board indicated that the more difficulty such a deposit is to find, the more unusual it must be. In *United States v. Multiple Use, Inc.*, 120 IBLA 63 at 71-78, fn 12, Judge Mullen Stated:

> * * * It should be obvious, therefore, that the further afield one must go to find a comparable deposit, the more unusual the particular deposit must be. For example, marble is a relatively common rock type. Italian marble suitable for carving the Pieta is not. A Colorado marble deposit containing marble comparable to high quality Italian marble would most likely be considered uncommon. It may well be helpful to compare such a deposit with a deposit in Italy, but if they are similar, the comparison does little to support a conclusion that the Colorado marble is run of the mill. The opposite is probably true. The more comparable, the more likely that the Colorado deposit is uncommon.

**Transportation Costs Must Be Subtracted Out When Comparing the Price of Stone**

In determining whether a deposit has a distinct and special value for use as a building stone, you cannot give a stone a competitive advantage because shipping costs are less. *United States v. Henri, supra* at 98. In other words when comparing the sales price of stone in the market place, you must subtract out transportation costs.

**Comparison With other Minerals on Per Unit Basis**

The Board in *U.S. v. McClarty*, 17 IBLA 20, 46 (1974) said that materials must be compared on a "per unit" basis rather than on volume or quantity of material sold. The Board said:

> We do not agree with the Administrative Law Judge's statement that volume of material sold rather than the selling price determines the real difference in value between the stones. The rule for determining whether a material used for the same purposes as common varieties of similar materials as set forth in *U.S. v. U.S. Minerals Development Corporation, supra,* was to determine whether it commanded a higher price than other such materials in the area. Comparison of materials on a "per unit" basis is inherent in this rule. If a comparison of the value of materials were not based on a "per unit" basis, then it might be said that coal could be considered more valuable than gold based upon

the respective volumes produced and sold.

**Unique Properties Distinguished from High Quality Material**

Even though the material on a claim is of a better quality than other material found generally in the area, the Department has held in several cases that the fact that deposits may have
characteristics superior to those of other deposits does not make them an uncommon variety so long as they are used only for the same purposes as other deposits which are widely and readily available. Of course it is assumed that the superior characteristics do not give the deposit a special and distinct value. *U.S. v. Guzman*, 81 ID 685 (1974); *U.S. v. Harenberg*, 9 IBLA 77 (1973). In *U.S. v. Verdugo and Miller, Inc*., 37 IBLA 280 (1978), the Board said:

> Appellant contends that the Administrative Law Judge erred in holding that the granite rock is a common variety within the meaning of the Act of July 23, 1955, 30 USC ' 611 (1976).
>
> It is said that the hard granite at issue has greater density than that of competitors and thus has a higher specific gravity and is more durable. Also, it is asserted that the subject rock is Angular in shape, rather than rounded. These attributes make its use more desirable for harbor projects, such as breakwaters and jetties.
>
> However, even had appellant succeeded in demonstrating that rock from these claims was better suited to this purpose, this would still not serve to elevate this otherwise common rock of the country to the status of an uncommon variety.

**Intrinsic Factors Distinguished from Extrinsic Factors**

The Interior Board of Land Appeals has held in a number of cases that unique properties which give a deposit a distinct and special value must be inherent in the deposit. Extrinsic factors such as scarcity, proximity to market, value added by manufacture or marketing techniques and other external factors unrelated to the deposit itself are not counted towards giving a deposit a distinct and special value. The following cases have distinguished intrinsic factors from extrinsic factors:

1. **Value Added by Marketing or Manufacture**

*McClarty v. Secretary of the Interior, supra* at 909:

> It should be noted that the common varieties statute (30 USC ' 611) refers to a "deposit" which has "some property giving it distinct and special value" and not to the fabricated or marketed product of the deposit.

*U.S. v. California Soylaid Products, Inc*., 5 IBLA 192:

The price at which the stone was sold to the retailer or builder, that is the second sale price, is only indirectly related to the quarry price because, as Lotridge testified, a great deal of the difference in price between the quarry and the stone yard was due to added processing. In fact he stated that the $23 a ton difference in price for Palos Verdes stone as rubble or cut stone was due to cutting. *Id*. It is also noteworthy that Lotridge testified that at least 50 % of the sales were as rubble.

The evidence as to "second sale" price does not establish that Lotridge was able to obtain a premium price for the mint stone. Transportation costs are also a factor influencing price at second and subsequent sales.

2. **Quantity or Scarcity of Material**

*U.S. v. Melluzzo*, 76 ID 320 (1968):

Simply because a sand and gravel deposit is located in an area where supplies are scarce does not make it an "uncommon variety." *Scarcity* is not a unique property inherent in the deposit but only an extrinsic factor.

*U.S. v. Stewart*, 5 IBLA 39, 48, 79 ID 27 (1972):

The Department has rejected the situs of a mineral deposit as a factor in determining whether or not a deposit of sand and gravel is in uncommon variety.

We think that the same reasoning is applicable to a contention that a sand and gravel deposit is "unique" by virtue of the scarcity of sand and gravel in the area. We therefore find that the material on the appellant's claims is a "common variety" of sand and gravel within the meaning of 30 USC ' 611 (1970).

3. **Availability of Water and Proximity to Construction**

*U.S. v. Mt. Pinos Development Corp*., A-30823 (1968):

The proximity of the appellant's claim to the construction project, together with the availability of a water supply which appellant has shown, should give an economic advantage in selling and processing the materials from the claim over sites which are further away and do not have water. However, no physical property of the material itself has been shown which demonstrates that it has a special and distinct value.

4. **Proximity to Market**

*U.S. v. Verdugo and Miller*, 37 IBLA 281 (1978):

> Appellant makes the argument that, in addition to its other asserted attributes, this deposit of rock is "close to the marketplace," which contributes to its value and tends to remove it from the status of a common variety. We have repeatedly held that a deposit of otherwise common sand, stone, clay, etc., cannot be regarded as an uncommon variety on the basis that the deposit enjoys an economic, advantage due to its closer proximity to the market than other such deposits. Proximity is only an extrinsic factor which may influence the marketability of the material, but it does not distinguish the material from other such deposits in any of its inherent physical properties which lend it distinct or special value.

*U.S. v. Smith*, 66 IBLA 182,188 (1982):

> As noted by the Administrative Law Judge, appellants have raised a number of extrinsic factors which they assert contribute, to the uniqueness of their deposit. These factors include a central location on the Kenai Peninsula and direct access to a highway. Such factors, however, are not determinative of a "unique" property of the mineral deposit itself. While such factors may give appellants a competitive advantage with respect to marketing their material, the Board has concluded that unique properties which give a deposit a distinct and special value must be inherent in the deposit and not extrinsic factors. *U.S. v. Heden*, 19 IBLA 326 (1975). Therein, the Board stated:
>
> > Factors *extrinsic* to a deposit, however, are not determinative. Advantageous location which results in reduced transportation costs is such an extrinsic factor. A deposit of rhyolite cannot be determined to be an uncommon variety of mineral solely on the basis of its location, even it if were proven that the location gives the deposit a competitive advantage due to its proximity to market. *Citations omitted.*

**Amount of Profit for Uncommon Variety**

In *McClarty v. Secretary of the Interior*, 408 F.2d 907, 909 (9th Cir. 1969), the Court held that for the material to be uncommon, the "profit to the claimant would be substantially more." (Emphasis added).

**Superior Deposits Used for Same Purpose As Those Widely Available Are Common Varieties**

The Department has held that a sand and gravel deposit with many superior properties is a common variety if it is used for only the same purposes as other widely available, but less

desirable deposits. In *United States v. Guzman*, 81 I.D. 685, 692 (1974), the Board stated:

> Likewise, the Department has consistently held that deposits of sand and gravel suitable for all construction purposes, which may be superior because it is free of deleterious substances, and because of hardness, soundness, stability, favorable gradation, nonreactivity and nonhydrophilic qualities, but which is used only for the same purposes as other widely available, but less desirable deposits of sand and gravel are, nonetheless, a common variety of sand and gravel.

**Unique Property: A Sand and Gravel Case**

In *United States v. Thomas*, 90 IBLA 225 (1986), the Board reversed a decision of the Administrative Law Judge and held that a sand and gravel deposit was a common variety. This deposit consisted of soft and uniformly smaller-sized material requiring little or no crushing for use as a subbase. The material would require little crushing; however for other uses, sizing, crushing and washing would be necessary. Also, comparable material was available, but at greater distances from the place of use.

The Board determined that although the sand and gravel had an economic advantage, this advantage was not based on a unique property. Furthermore the only use of the material was for subbase -- a type of use that has never been locatable. The Board said at 261:

> In effect, the decision appealed from ignored the requirement that the purported property, which gives the mineral its distinct and special value, must be unique. Although the gravel deposit now in issue has certain advantages for subbase and possibly certain other road building applications (i.e., if produced for subbase, it could be produced at a lower cost), there is no evidence that other widely available materials, although less desirable, including the other gravel in the same area, would not be equally satisfactory for the same purpose.

**Mineral Is Not Unique If There Is A Readily Available Substitute**

In *United States v. Thomas, supra*, it was held that a mineral is not unique if there is a readily available substitute. The Board said:

> As BLM states, the question is whether there is a readily available substitute for a particular purpose. Where there is such a substitute, the particular property which makes the mineral under review more desirable for that purpose cannot be considered unique.

**Coloration Is Not a Unique Property**

In *United States v. Thomas*, 90 IBLA 255 (1986), the Board held a red sandstone to be a common variety stone. Testimony given at the hearing before the Administrative Law Judge indicated that the stone was prevalent throughout the area. Also the appellants had not developed a market sufficient to establish that the red coloration of the stone would allow it to

command a higher price in the market.

**Uncommon Varieties Bootstrapped into Profitable Operation**

Deposits of uncommon variety minerals must be profitable entirely on the basis of sales of the locatable minerals. It is common for deposits of uncommon variety material to coexist with lower quality common variety material. An example of this might be a limestone deposit with more than 95 percent total carbonate used for Portland cement which is interbedded with a less pure limestone that could be sold as fill or road material (common variety uses). In *United States v. Foresyth*, 100 IBLA 185, 241 (1987), the Board discussed the problem of bootstrapping:

> .....mining claimants will bootstrap themselves into a profitable operation by considering the value of sales of nonlocatable substances in the proposed operation thereby rendering the overall operation profitable, even though the price paid for the "uncommon variety" alone would not be profitable. The three cases cited by the Government, *United States v. Chas. Pfizer & Co., supra* at 331; *United States v. Lease*, 6 IBLA 11, 79 I.D. 379 (1972); and *United States v. Husman*, 81 IBLA 271 (1984), *aff'd*, 616 F. Supp. 344 (D. Wyo. 1985), all stand for the proposition that bootstrapping is impermissible. That is, the uncommon (locatable) variety cannot "ride piggyback, as it were, on the shoulders of a common variety," but must support a mining operation on its own merits. *Pfizer, supra*, at 348. Another common problem is for uncommon varieties (locatable minerals) to be sold at common variety prices (*United States v. Foresyth, supra* at 247); or "the uncommon variety stone is sold for a 'common variety' use and as a result does not command a premium price." *Id.* at 245. Income from such sales should be disregarded when projecting profitability. If mining costs are reduced as a result of sales or disposal of common variety materials or uncommon varieties used for common variety purposes, the reduced costs should also be disregarded when projecting profitability. In *United States v. Foresyth, supra* at 245, n. 21, the Board gave an example of such cost reduction:
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> > An example of cost reduction would be if, rather than moving and reclaiming sand and gravel, a placer gold operator were to deliver the product with no charge to a party who transports it from the property and uses it for land fill. The operation would properly be examined in a value determination by calculating the transportation and reclamation costs of the common variety product as a proper cost of operation.

The sale or disposal of common variety minerals (or uncommon variety minerals sold for common variety uses or at common variety prices) is an act of trespass. Common variety materials may only be removed under the authority of a material sale contract.

**Mining Operation Must Be Profitable from Uncommon Variety Minerals**

Where uncommon variety minerals are marketed along with common variety minerals from the same deposit, the mining operation must be profitable on the basis of sales from the uncommon variety and cannot be subsidized from sales of the common variety minerals or

uncommon variety minerals sold for common variety uses. In *United States v. Multiple Use, Inc.*, 120 IBLA 63, 111 (1991) the Board said:

> * * * The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability. Thus, if the "undersized" pumice produced from the White Vulcan claims is sold for a common variety use such as lightweight aggregate, the income or reduction of cost resulting from such sales should be disregarded when projecting profitability.

**Gold or Other Locatable Minerals with Common Variety Minerals**

The question of whether gold can be claimed if it is contained in common variety material such as sand and gravel was addressed by section 3 of the Act of July 23, 1955, which provides as follows:

> That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit (of a common variety of sand, stone, etc.).

This provision refers to the discovery of some locatable mineral such as gold occurring in a deposit of a common variety sand and gravel. Congress did not intend that the presence of any gold within such a deposit would validate the claim, but that there must be a discovery of the gold within the meaning of the mining laws. The fact that a mineral such as gold occurred in a nonlocatable deposit of sand and gravel would not invalidate the claim if it were otherwise valid. However, the value of the sand and gravel would not be considered in evaluating the value of the gold to determine if there was a valuable deposit of the gold. In *U.S. v. Basich*, A-30017 (September 23, 1964) the Board said:

> The legislative history of the act of July 23, 1955, affords no comfort for the appellant to sustain him in the contention that the finding of meager values of gold and silver which are insufficient to constitute an independent discovery of these minerals is sufficient to take the sand and gravel on the claims out of the category of common varieties which are withdrawn from location.
>
> And in *U.S. v. Thomas R. Shuck et al*., A-27965 (February 2, 1960), the Department held null and void mining claims located for sand and gravel when the evidence showed no discovery before withdrawal of the land for reclamation purposes. The decision noted that the claimants had shown some gold values and had indicated a hope of increasing their return from the sand and gravel by recovery of gold from concentrates extracted from the gravel in the course of the processing necessary to prepare, it for sale and concluded that this did not meet the test required for a discovery of gold which would validate the mining claims independently of the sand and gravel. The departmental decision was affirmed in *Shuck et al. v. Helmandollar et al.* in the United States District Court for the District of Arizona (Civil No. 682-Prescott) on December 7,

1961.

**Aggregation of Profits from Sales of Common and Uncommon Varieties**

In many cases a claim may contain deposits of both common and uncommon variety minerals. For example, a claim may embrace layers of very pure metallurgical-grade limestone which are interbedded with layers that are not as pure and do not qualify as metallurgical grade. If the claimant should by necessity mine both grades and sell the lower-grade limestone for some common variety use, he cannot include profits from the sale with profits derived from sale of the metallurgical-grade limestone to show marketability for the claim. The common variety limestone must be purchased by contract as required by 30 USC 601. In *U.S. v. Pfizer*, 76 ID 331, 348-349, a similar distinction was made between limestone materials of varying qualities. In that case the Board said:

> In determining whether a discovery has been made..., the critical consideration is whether a discovery has been made only of the *uncommon* variety of limestone on the claim. No consideration can be given to the value of the common variety of limestone that may exist on the claim even though that limestone may be marketable at a profit today. This is self-evident for since July 23, 1955, only an uncommon variety of limestone has been subject to mining location and it must stand on its own feet so far as discovery is concerned, unaided by its association with a common variety. It cannot ride piggyback, as it were, on the shoulders of a common variety. *Citation omitted*. Thus the common limestone on the claims must be treated like the other worthless rock on the claims in evaluating whether a discovery has been made of the uncommon limestone.

In *U.S. v. Lease*, 6 IBLA 19, 25-26 (1972), the Board considered a case involving aggregation of profits from sales of a metallurgical-grade dolomite and common variety dolomite:

> The crucial question raised in this case is whether in applying the test here we must consider those profits which have been or may be attained from selling the material for the purposes for which common varieties of materials concededly may be used in order to determine the value of the deposit as a locatable uncommon variety material. In other words, did the hearing examiner in applying the marketability and prudent man test correctly differentiate between sales of the dolomite for metallurgical uses and sales of the material for the common variety uses?
>
> The purposes of the Act are served by holding that we will not look to sales for common variety purposes in order to determine the profitability of a mining operation for an uncommon variety of stone. This holding is in accord with other determinations as to what factors may be used in determining whether or not a mineral deposit is valuable. For instance, it is obvious that in determining whether a profitable mining operation can be anticipated to satisfy the prudent man test, we cannot look to other values upon a claim, such as the value of the sale of timber therefrom. We have indicated that under the rule in *U.S. v. Mt. Pinos Development Corp., supra*, the value of a gold deposit may not

be determined by considering the sale of common varieties of ambient sand and gravel.

> Therefore, if a deposit of an uncommon variety of material may not be profitably sold for the uses for which it allegedly has a special value, we conclude that it may not be deemed to be a valuable mineral deposit under the mining laws although it may be sold for common variety uses.

In *U.S. v. Forsesyth*, 15 IBLA 43, 59-60 (1974), the Board again said that with different grades of limestone, you cannot aggregate the profits of the common and uncommon variety minerals; but instead, you must treat the common variety limestone as waste with no value, even if it must be mined in order to extract the uncommon variety deposit. The Board said at 59-60:

> Under the *Pfizer* doctrine a mineral claimant whose claim embraces deposits of both common and uncommon varieties of minerals cannot aggregate the profits returned from mining the common Variety and the profits netted from mining the uncommon variety to show marketability, but must treat the common variety as waste material of no value, even though it is essential that he mine it in order to reach the deposit of locatable minerals.

In *U.S. v. Mansfield*, 35 IBLA 95 (1978), the Board considered a case involving the aggregation of profits from several grades of obsidian:

> The record of this case contains no evidentiary figures showing marketability at a profit of pink obsidian. The contestee must come forward with an accounting that not only shows a profit, but that the profits were not aggregated with profits derived from her rock shop and related operations. We have held on other occasions that where "a claim embraces deposits of both common and uncommon varieties of minerals we cannot aggregate the profits returned from mining the common variety and the profit netted from mining the uncommon variety to show marketability."

**Stone with Market Value but No Unique Property**

In *United States v. Henri (On Judicial Remand)*, 104 IBLA 93 (1988), the claimant contended that a micaceous quartzite on his claims was an uncommon variety. The stone easily split along cleavage surfaces so as to make flat-surfaced plates suitable for building stone. The BLM mineral examiner gave testimony asserting that the building stone on the contested claims compared unfavorably with stone in other areas that the examiner had determined to be uncommon varieties. The claimants offered testimony that with respect to cleavability and coloration, it was unique in the anchorage area and Juneau.

In conclusion the Board held that while "the deposit of phyllite and quartzite located on the claims clearly has market value as a building stone, we are unable to conclude the stone has a unique property giving it a distinct and special value for use as a building stone which is reflected in either a higher price for the stone or a reduced cost to develop the deposit." *Id.* at 98. The

Board gave the following reasons for holding that the stone lacked a unique property (*Id.* at 98):

1. Although the stone has good cleavage giving it flat surfaces desirable for masonry work, it was not unique among building stone deposits.
2. When compared with uncommon varieties of veneer building stone, the size diameter of the plates is too small and the spacing of the cleavage caused the plates to be too thick.

3. The coloration of the stone did not continue to depth.

**Standards to Distinguish Between Common Varieties and Uncommon Varieties**

In *Massirio v. Western Hills Mining Association*, 78 IBLA 155 (1983), the Board stated that the following standards to Adistinguish between common varieties and uncommon varieties of material@ were set forth in *McClarty v. Secretary of the Interior*, 408 F2d 907, 908-09 (9th Cir. 1969):

1. There must be a comparison of the mineral deposit in question with other such minerals generally;

2. The mineral deposit in question must have a unique property;

3. The unique property must give the deposit a distinct and special value;

4. If the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use;

5. The distinct and special value must be reflected by the higher price which the material commands in the market place, or by reduced cost or overhead so that the profit to the claimant would be substantially more.

**Failure of BLM to Forward Appeal to IBLA**

On February 20, 1992, Jesse Collins filed a Notice to Mine 5 to 10 thousand tons of clay in San Bernardino County, California. On March 9, 1992, the Barstow Area Manager rejected the notice on the grounds the material proposed to be mined is a common clay and not locatable under the mining laws. Collins appealed to the Californa State Director on March 23, 1992, arguing that the clay is an uncommon variety of clay. The State Director responded by a decision dated August 17, 1992, of which Collins filed an appeal within the 30-day appeal period.

In *Jesse R. Collins*, 145 IBLA 199 (1998), the Board Aadmonished@ the BLM for failing to forward the Acomplete, original case file to the Board within the 10-day period@ required by the BLM Manual. The Board said at 203-204:

> Transmittal of the case file to this Board by BLM was unaccountably delayed for

over 3 years. The Bureau is admonished that it failed to follow the correct procedure in handling this appeal. The correct procedure is for BLM to forward the complete, original case file to the Board within the 10-day period provided by the BLM Manual 1841.15A. *E.g.*, *Patrick G. Blumm*, 116 IBLA 321 (1990). The Board reviewed a similar situation in *Thana Conk*, 114 IBLA 263 (1990):

> The filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, and BLM=s authority is not restored until the Board takes action disposing of the appeal. *AA Minerals Corp*., 27 IBLA 1 (1976). In keeping with this principle, BLM must forward the case (as represented by BLM=s casefile) to the Board so that it may exercise its autority to resolve the dispute.
>
> Under governing procedures, an appellant is not required to serve a copy of his notice of appeal on the Board, which normally becomes aware that a notice of appeal has been filed only when BLM forwards the notice of appeal and its complete, original casefile in the matter to the Board. BLM must forward the record to the Board within no more than 10 business days after receipt of the notice of appeal. *Utah Chapter Sierra Club*, 114 IBLA 172, 175 (190) (citing with approval BLM Manual 1841.15 A). Until the file is received, the Board is unable to intelligently review the details of the dispute, and may not even be aware (as in this case) that a notice of appeal has been filed.
>
> The Board is very sensitive to delays in forwarding the case when a notice of appeal is filed, as BLM=s failure to promptly transmit a file might be seen as recalcitrance, resulting in delaying an appellant=s right to have BLM=s decision reviewed by the Board. *See Harriet B. Ravenscroft*, 105 IBLA 324, 331 (Hughes, A.J., concurring). We are surprised by BLM=s failure to initially realize (or to become aware during the more than 13 months that it held the case following the filing of the notice of appeal) that it was required to forward the case to the Board, so that the administrative appeals process could begin to run its course. It is hoped that BLM will take steps to conform their procedures to these realities to avoid similar mishandling of appeals in the future.

**Marketability of a**

*United States v. Lederer and Barr*, 144 IBLA 1 (1998), involved a case where appellants had claims located for clay where they only sold 11 pounds of clay in more than 50 years. In holding that the clay from the claim cannot be Amined, removed, and marketed at a profit,@ the Board noted that if Athis deposit were as valuable as Appellants assert, one would assume a greater effort would have been made to market it.@. *Id.* at 1.

**Limestone is a Common Variety of Stone**

In *United States v. Pfizer & Co.*, 76 I.D. 331, 338 (1969), the Board reaffirmed the Departments long standing determination that limestone is an uncommon variety of stone. The Board said at 338:

> The Department has held that limestone is included within the meaning of the term Astone,@ as it is used in the 1955 act, and that a deposit of limestone is a common variety of stone within the meaning of the act if the material found therein does not satisfy the criteria of the statute and the regulation for exclusion form the category of Acommon varieties.@

**Legal Standards for Locatable Limestone**

In *United States v. Foresyth*, 94 I.D. 453, 484 and 485 (1987) the Board gave the legal standard for locatable limestone:

> The relevant legal standards applicable to this case are relatively easy to state. This particular type of limestone (95 percent or greater in calcium and magnesium carbonates) is an uncommon variety of limestone and is therefore locatable. *Citation Omitted*. However, as any mining claim must, in order to be declared valid, contain a valuable mineral deposit, the contained limestone must meet the requirement of the Aprudent man@ and marketability tests. These tests require testimony which demonstrates that the deposit can be extracted, removed, and marketed at a profit, which implies that a prudent person would invest his or her money and time with the reasonable expectation of developing a profitable mine. Such estimates of profitability must be based upon anticipated sales of the locatable mineral. Sales of Acommon variety@ minerals and/or other materials found on the claims may not be considered. The questions are, what type of sales may be considered and to whom may the claimants sell?
>
> * * *
>
> Combining the above concepts, sales of an allegedly uncommon variety of limestone must reflect the limestone=s special value in order that the limestone may be considered in a determination regarding the existence of a valuable mineral deposit of locatable mineral. This special value can be demonstrated either by sales for uses which require particular characteristics [uncommon variety use] or by an increase in marketplace price if sold for Acommon variety@ uses. If the stone is sold for a Acommon variety@ use and as a result does not command a premium price, the income and/or reduced cost resulting from such sales should be disregarded when projecting profitability.

**Comparison with Common Variety to Establish Premier Price**

In *United States v. Foresyth*, 94 I.D. 453, 487 (1987), the Board noted that a plus 95-

percent total carbonate limestone will be sold at a premium price of $7.50 per ton; whereas, the Aaverage value of crushed limestone sold or used in Colorado, taken from the Bureau of Mines yearbooks, for all purposes, including aggregate, rip-rap, and other common variety uses was $3.38 per ton in 1981 and $3.41 per ton in 1982.@ *Id.* At 487.

**Intrinsic Quality or Unique Property Must Give Competitive Edge**

In *United States v. Foley*, 142 IBLA 176 (1998), the Interior Board Land Appeals held that the claims located for sandstone and chemical-grade limestone were invalid. The La Madra building stone placer claims were located 10 miles northwest of Las Vegas, Nevada on July 4, 1989. On November 16, 1990, the land within the boundaries of the claims was withdrawn from mineral entry by the Red Rock Canyon National Conservation Area Establishment Act, Pub. L. No. 101-621.

The Board said that A[a] limestone or sandstone deposit which has some property or *aggregate of properties* giving it distinct and special value is locatable under the Mining Law of 1872.@ *Id*. at 183. In *United States v. Multiple Use, Inc*., 120 IBLA 63 at 78, n. 13 (1991), Judge Mullen said A...one must consider the property or *combination of properties* making the deposit unique to see if those properties impart a distinct and special value over run of the mill deposits of that material.@ For example, in the *McCormick* case [27 IBLA 65 (1976)], the Board determined that an *aggregate* of high quality but not unique properties represents a unique quality that in combination constitute a unique property because it is so exceptional for a single deposit to possess so many high-quality properties contributing to a distinct and special value. In this case the Board appears to use the terms Aunique property,@ Aintrinsically unique,@ and Aintrinsic quality= more or less interchangeably. The Board said at 183 (Emphasis added):

> The test is always whether the mineral has some intrinsic quality that differentiates it from other ordinary deposits. Importantly, however, a showing that the deposit is of commercial value does not necessarily give the mineral material within the deposit the character of Auncommon variety.@ *Citations Omitted*. For this reason, the limestone and sandstone deposits at issue in this case must hold those unique properties giving it distinct and special value, and thus a competitive edge over general run limestone and sandstone. *Citations Omitted.*

**Coloration of Stone Is Not a Unique Property**

In *United States v. Foley*, 142 IBLA 176 (1998), the Board said Athat this Department has repeatedly held that variation in color is a common attribute of building stones which does not qualify as a unique property upon which to base a determination of distinct and special value.@ *Id*. at 189.

**Accessibility and Lack of Overburden Are Not Intrinsic Qualities**

In *United States v. Foley, supra* at 189-190, the appellants contended that the accessibility and the lack of overburden would allow for low-cost mining and support a determination for an uncommon variety deposit. In rejecting this contention, the Board said Athe amount of

overburden is not an intrinsic quality of the stone being mined, and thus is of >no consequence= in determining whether a deposit is common or uncommon. Similarly, the fact that the La Madra claims are easily accessible to existing roads is an extrinsic factor which bears on economic viability of the deposit, but is not a unique property which gives the deposit a distinct and special value.@ *Id* at 189-190.

**When Mineral Is Put to Common Variety Use, It Must Have Special Economic Value**

If an uncommon variety deposit is put to a common variety use, it must have a distinct special economic value over and above the general run of such deposits when applied to that use. In *United States v. Foley*, 142 IBLA 176 (1998), the Board said at 186:

> When the preponderance of the evidence supports the conclusion that the use to which the mineral material is being put is a common variety use, the mineral material must carry some distinct, special economic value over and above the general run of such deposits when applied to that use. If, on the other hand, the mineral material commands a premium over that sold for common variety uses, that fact is, in and of itself, evidence that the mineral material is an uncommon variety. If the sales price for the material sold for a particular use far exceeds the average sales price for such use, the price differential advances the argument that the mineral material has some property giving it distinct and special value. *Citation Omitted*.
>
> The Court of Appeals for the Ninth Circuit established standards for distinguishing between common and uncommon varieties in *McClarty v. Secretary* of the Interior, 408 F.2d 907 (9th Cir. 1969). In *McClarty*, an arm=s-length purchaser=s willingness to pay more than the Acommon variety price@ for a particular mineral strongly supported a finding that the deposit was intrinsically unique. *Id*. At 908-09.

**Establishing a Potential Sales Price and Potential Market**

In *United States v. Foley*, 142 IBLA 176 (1998), the Board pointed out that the claimant is only required to demonstrate evidence of potential market sales and potential prices rather than actual sales. The Board said at 185:

> When establishing the potential sales price of the sandstone and limestone, Appellants here needed only to demonstrate a potential market for the product at a price marking it as special and distinct. Actual sales were not required. *See United States v. Foresyth*, 100 IBLA 185, 239, 94 Interior Dec. 453, 483 (1987). Evidence of market potential is customarily given through the testimony of a person having specific or general knowledge of the existing market. *Citation Omitted*. That person may have knowledge of market conditions as a seller or a buyer of that product or as an independent observer.

**Chemical-Grade Limestone in Lode Form Must Not Be Located as a Building Stone Placer**

In *United State v. Foley*, 142 IBLA 176 (1998), the claimants located a chemical-grade limestone as a building stone placer claim. However, if a chemical-grade limestone is in lode form, but located as a building stone placer, it would be invalid. Because the BLM had not raised this issue it its prima facie case during the contest, the Board could not dispose of the claims on such a basis. The Board said at 188, n. 4:

> In *U.S. v. Haskins*, 59 IBLA 1, 49 (1981), the Board stated that if the limestone is chiefly valuable because of chemical or metallurgical properties, the proper mode of location is dependent upon the nature of the deposition. In *Haskins*, supra, at 44, we noted that A[a] placer discovery will not sustain a lode location nor a lode discovery a placer location@ (quoting *Cole v. Ralph*, 252 U.S. 286, 295 (1920)). Thus assuming the limestone on the claims is in lode form, the claims, in so far as they purport to be located for chemical-grade limestone, were not properly located as building stone placers. Because this issue was not raised in the contest, however, it may not be relied on by the Board to dispose of the claims.

**A Great Natural Wonder in the Big Wood River**

In *United States v. United Mining Corp*., 142 IBLA 339 (1998), a decision authored by Judge Mullen, the majority of six judges concluded that Administrative Law Judge Child erred in holding that the lands embraced by the KB-1 through KB-14 placer mining claims Ais more valuable for aesthetic and geological purposes than for building stone or for any other mining purpose.@ Four judges dissented in this rather divisive case.

The KB-1 through KB-14 building stone placer claims were located February 4 and 5, 1992, along a four-mile stretch of the Big Wood River in south-central Idaho which contains one of the best examples of bedrock erosional features found anywhere on earth, both in terms of variety and quality of features. Several months before the BLM could establish a protective withdrawal, the area was located by United Mining Corporation for the purpose of extracting the beautifully water-sculpted boulders to supply the local and international markets. The boulders, which are sold under the trade name of AHolystone,@ are used for a variety of decorative and artistic purposes including waterfalls, fountains and as natural stone sculptures. Small boulders readily sell for more than $2,000. each. The potential market is enormous and the supply is small; the company could extract and market every commercial-grade boulder with the claim group in a 2- to 3- year period.

This stretch Big Wood River is situated on the lava-covered almost featureless Snake River Plain. Most of the erosion in the Big Wood River channel occurred during the large runoff of melt water from the end of the alpine glaciation in the northern mountains about 7,000 to 10,000 years ago. For many years water has been entirely diverted out of the River during the summer months to provide irrigation water to the nearby farms. When the channel is dry, one is able to descend into the canyon and view one of the best examples, if not the best example, of bedrock erosion features to exist anywhere on earth.

For years, the public has enjoyed the geological wonders in the canyon through such

activities as hiking, exploring and photography. The unique scientific aspects and geological heritage values of the canyon have been described in the scientific literature for almost 100 years and presented at a number of national scientific meetings. This stretch of the Big Wood River Channel offers a complete outdoor museum of outstanding examples of every type of pothole, relict potholes, coalesced potholes, exotic pebble types, deep inner channels, dry falls, collapsed cave segments, overprinting of asymmetry and sculpted boulders. In recognizing the unique heritage values of the canyon, the local BLM, with the encouragement of many public organizations, began the lengthy process the of establishing a withdrawal to protect the most geologically significant segments of the river several years before the claims were located. On July 8, 1992, BLM published a Notice in the Federal Register proposing to withdraw the lands embraced by the claims from mineral entry to protect the unique geological sites, 57 Fed. Reg. 30228-29 (July 8, 1992). Upon inspection of the claims, the BLM determined the claims occupied the best examples of water sculpted basalt that exists anywhere along the Big Wood River.

On March 8, 1993, United Mining submitted a Notice of Intent under 43 CFR 3809.1-3, advising BLM of its intent to extract the large water-sculpted boulders from the Big Wood River channel. In an effort to preserve the geological heritage values of the Big Wood River, the BLM initiated contest proceedings against the claims on essentially two charges: (1) the land involved embraces a great natural wonder that should be preserved for public benefit, and is not the type of resource Congress intended to dispose of the Mining Law, and (2) the land involved is not chiefly valuable for building stone.

During the hearing, counsel for BLM stipulated that the water-sculpted boulders represent an uncommon variety building stone with a very significant value and market. Testimony from the BLM geologists during the hearing also supported this stipulation.

**Natural Wonder Not Exempt from Location Under the Mining Law**

In *United States v. United Mining Corp*., 142 IBLA 339 (1998), Judge Mullen determined that nothing in either *South Dakota Mining Co. v. McDonald*, 30 Pub. Lands Dec. 357 (1900), or *United States v. Bolinder*, 28 IBLA 187 (1976), Asupports either BLM=s assertion or Judge Child=s conclusion that, as a matter of law, land which might be described as embracing a natural wonder is thereby removed from location under the mining law, without requiring any affirmative Departmental or Congressional action to effectuate such a result.@ *Id* at 363.

**What Mineral Materials Are Locatable Under the Building Stone Act**

In *United States v. United Mining Corp*., 142 IBLA 339 (1998), the appellant asserted that its mineral deposit of water-sculpted boulders (Holystone boulders) was not a building stone and therefore was not subject to the chiefly valuable test of the Building Stone Act. The Board upheld Judge Child=s finding that Holystone boulders are a Building Stone and gave an excellent discussion of legal history concerning the types mineral materials locatable under the Building Stone Act (*Id*. at 364-367):

The pertinent part of the Building Stone Act provides that A[a]ny person authorized to enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims.@ 30 U.S.C. 161 (1994). After the Building Stone Act was enacted, various mineral materials used in construction, including sand and gravel, were deemed locatable under the Building Stone Act.

The scope of materials locatable under the Building Stone Act was substantially altered in 1955 when Congress passed the Common Varieties Act, 30 U.S.C. 611 (1994). The Common Varieties Act made common varieties of mineral materials no longer locatable under the Building Stone Act. However, as noted by the Supreme Court, the Building Stone Act remained Aentirely effective as to building stone that has >some property giving it a distinct and special value= (expressly excluded under 611).@ *United States v. Coleman*, 390 U.S. 599, 605 (1968); *McClarty v. Secretary of the Interior*, 408 F.2d 907, 908 (th Cir. 1969); *United States v. Haskins*, 59 IBLA 1, 42-43 n. 26 (1981).

* * * * * *

By definition, the term Abuilding stone@ includes Aall stones for ordinary masonry construction, *ornamentation*, roofing, and flagging.@ *A Dictionary of Mining, Mineral, and Related Terms*, U.S. Bureau of Mines (1968), page 149 (emphasis added). There is clear precedent for a finding that stone used in the construction of walls, fireplaces, patios, and for general landscaping purposes falls within the category of building stone. *United States v. Melluzzo*, A031042 (July 31, 1969). Similarly, mineral material used for nonstructural facings on buildings, decorative stone around fireplaces, or for landscaping has been deemed to be building stone. *United States v. Shannon*, A-29166 (Apr. 12, 1963); *see also United States v. Gardner*, 14 IBLA 276, 282 (1974) (stone used for construction of fireplaces is used as building stone but when used for artifacts is not used as building stone); *United States v. Chartrand*, 11 IBLA 194, 239 (1973) (Thompson, dissenting in part) (traditional construction purposes for building stone include landscaping, fireplace, and patio construction); *United States v. U.S. Minerals Development Corp.*, A-30407 (Apr. 30, 1968) (stone used as veneer in walls, in fireplaces and hearths, and in patio floors); *United States v. Melluzzo*, A-29074 (May 20, 1963) (stone used as decorative stone in fireplaces, patio walls, fountains, and for entryway floors).

* * * * * *

It is the projected use of Holystone boulders, not the value of the Holystone boulders, that determines whether the stone is building stone or mineral material locatable under the General Mining Law. 8/ To the extent that Judge Child found the Holystone boulders to be building stone, subject to the Building Stone Act, we affirm his Decision.

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8/ We recognize that, if the weight of the evidence was that the primary use of Holystone boulders removed from the Hisel property was for artwork, the use may properly be considered as other than for building stone. However, it was not demonstrated that a sustainable market would exist if the stone was sold exclusively as artwork.

**Chiefly Valuable for Building Stone Does Not Include Comparison of the AAesthetic@ and AGeological@ Values**

The key issue in the case concerned the interpretation and definition of the term Achiefly valuable.@ The Board described the history of the Building Stone Act of August 4, 1892 (30 U.S.C. 161 (1994) in terms of analogous statutes and regulations at the time as well the relevant case law. He concluded that if building stone is found on the public lands in sufficient quantity and quality as to render the land more valuable for the minerals than for agricultural use, the land must be considered to be chiefly valuable for building stone. Therefore geological heritage values, no matter how significant, may not be considered as a comparable use under the chiefly valuable test. Judge Mullen said at 371-372:

> The provision in the Building Stone Act, 30 U.S.C. 161 (1994), declared that lands Achiefly valuable for building stone@ should be enterable Aunder the provisions of the law in relation to placer mineral claims.@ As noted above, when this law was enacted the Department restated its adherence to the pronouncement made 24 years previously that, whenever a mineral is found on the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, that deposit should be treated as coming within the purview of the mining laws. This interpretation does not include a comparison of the Aaesthetic@ and Ageological@ value. An evaluation strictly on the basis of the land=s Aaesthetic@ or Ageological@ worth with no regard to its worth for agricultural purposes does not comport with the intent of Congress when it enacted the Building Stone Act, 30 U.S.C. (1994), or with the Department=s clearly stated interpretation of that Act since that time.

The four dissenting judges in this case disagreed with the majority primarily on the basis of its limited construction of the chiefly valuable test. For example, Judge Arness stated in dissent at 383-84:

> The lead and concurring opinions assume this inquiry is qualified by an historic understanding that the Department, when determining whether lands are Achiefly valuable for building stone,@ must make a market analysis comparison between competing agricultural and mining uses. There is, however, no language in the statute to limit the Department in this way, nor has the Department promulgated regulations to this effect. Neither opinion cites any legislative history indicating that Congress intended the language to be so limited.@
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> * * * * * *
>
> In the course of offering evidence to make a prima facie case that Appellant=s mining claims were invalid, the Bureau of Land Management (BLM) established that the contested lands are geologically unique and that their disturbance by mining will constitute the destruction of a *natural wonder unlike any other in the world*. This sweeping statement of fact is based upon the expert opinion of two of BLM=s staff geologists; it has not been challenged by Appellant, who characterizes the Holystone material as A*geological diamonds*,@ (Tr. At 267), and agrees the material is unique. While appellant presented some evidence concerning commercial value, no attempt was made to deprecate the showing made by BLM concerning the value of conserving the resource. *Emphasis added*.

Similarly, Judge Irwin stated in dissent at 380:

> Nothing in this language [the Building Stone Act] precludes taking aesthetic and geological values into account when determining whether the lands are chiefly valuable for building stone. The Achiefly valuable@ language of the Building Stone Act derived from the Avaluable chiefly for timber [or stone] but unfit for cultivation@ language of the much-abused Timber and Stone Act of 1878. But the historical origin of this language likewise does not preclude present-day consideration of whether lands unfit for cultivation are more valuable for building stone or for other purposes.

**In Determining AChiefly Valuable@ Measurement of Value Must Be Quantifiable**

In *United Mining Corp., supra* at 373, the Board held, that in applying in Achiefly valuable test,@ Athe measurement of those value must be quantifiable, using units of measurements applicable to both sides of the equation.@ Judge Mullen said:

> The term Achiefly valuable@ contemplates a rational comparison of values, and the measurement of those values must be quantifiable, using units of measurement applicable to both sides of the equation. 12/ Accepting an unquantifiable statement of value, such as a conclusion that the land is Aunique,@ or Apriceless,@ or Airreplaceable,@ for one use and demanding a value of the same land quantified in a dollar amount for the other use would render any decision arbitrary. The *evidence presented by BLM established that the land is geologically unique*. It did not establish a quantifiable value for that land. *Emphasis added.*
>
> _____
>
> 12/ The fact that one or more persons express an opinion that the land is Aunique,@ or Apriceless,@ and Airreplaceable@ does not establish value. The same has been said about the London Bridge, the Elgin Marbles, and Van Gogh=s AIrises.@ A value has been found for each of these objects.

It should be noted that BLM went well beyond establishing that the land was Ageologically unique.@ As Judge Mullen said in *United States v. Multiple Use, Inc., supra* at 78, n. 13, Aeach deposit can be found to be unique and distinguishable from all others .@ Without question the bed of the Big Wood River is unique, but most significantly it may represent the best example of water-sculptured rock in the entire world. In his dissenting opinion, Judge Irwin stated the following at 379:

> The majority holds that the Aterm >chiefly valuable= contemplates a rational comparison of values, and the measurement of those values must be quantifiable, using units of measurement applicable to both sides of the equation.@ (Majority opinion at 372-73.) In my view, this approach does not comprehend the difference between the value of natural formations left in place as they were created and the value of things bought and sold in the marketplace. There is not a marketplace for buying and selling unique formations in their natural settings on public lands. Under the majority=s rationale, presumably the formations in what became Arches National Park could have

been sold for building stone unless enough people had paid to go and see them where they are.

**To Be Locatable Building Stone Must Be Geologically Unique**

In *United Mining Corp*., 142 IBLA 339 (1998), the Board said that A[t]o possess distinct and special value, the building stone must be geologically unique. Its uniqueness gives it value and makes it readily distinguishable from the common variety of the same stone.@ *Id.* at 372.

## COMMON AND UNCOMMON VARIETIES: SPECIFIC COMMODITIES

**Limestone Used as Concrete Aggregate or Soil Additives**

In *U.S. v. Alaska Limestone Corp*., 66 IBLA 316, 324 (1982), the Board held that limestone deposits cannot be located after July 23, 1955, for use as concrete aggregate or soil additives. The Board said:

> Moreover, it is extremely doubtful that we could recognize validity of mining claim locations for limestone which postdated July 23, 1955, as these do, where the value of the deposit lay in its use for concrete aggregate or as a soil additive. Section 3 of the Multiple Surface Resources Act of that date (popularly known as the "Common Varieties Act"), 30 USC ' 611 (1976), provided, *inter alia*, that no deposit of common varieties of stone would thereafter be deemed a valuable mineral deposit within the meaning of the mining laws of the United States. A regulatory definition of "common varieties" provides, with respect to limestone, that, "limestone suitable for use in the manufacture of cement, metallurgical or chemical grade limestone, gypsum, and the like are not 'common varieties'." 43 CFR 3711.1(b). While the subject limestone does have the physical properties to make it "suitable for use in the manufacture of cement," if it has no value for that purpose because of its location, a "value" attributable only to its use as concrete aggregate or as a soil additive would not be cognizable.

**Locatable Grades of Limestone**

In *U.S. v Foresyth*, 15 IBLA 43, 59 (1974), the Board upheld *U.S. v. Chas. Pfizer & Co., Inc*., 76 ID 331 (1969) in which limestone containing 95 percent or more calcium and magnesium carbonates was determined to be an uncommon variety. The Board said:

> Thus, in order for a claim located for limestone after July 23, 1955, to be valid, the limestone must be either chemical grade, metallurgical grade or of a grade suitable for the production of cement. The obvious question is what qualities are necessary within a limestone deposit to make it of a grade sufficiently high to remove it from the proscriptions of the Act.
>
> As regards chemical grade, this Department wrestled with this problem on a

number of occasions and in *U.S. v. Chas. Pfizer & Co., Inc., supra*, at 342-43, held that "limestone containing 95 percent or more calcium and magnesium carbonates is an uncommon variety of limestone which remains subject to location under the mining laws."

**Limestone Used in Manufacture of Cement is Uncommon Variety**

Although limestone used in the manufacture of cement is an uncommon variety, it must still meet the requirements of discovery including marketability at a profit. In *U.S. v. Alaska Limestone Corp., supra* at 318, the Board said:

> Limestone that is suitable for use in the production of cement is not a "common variety" of mineral. 43 CFR 3711.1(b). Thus, the Act of July 23, 1955, which excluded common varieties of mineral from location after July 23, 1955, did not bar the subsequent location of these claims in November 1958. However, in order for cement-grade limestone claims to be valid, it is still necessary to show a reasonable prospect that the limestone can be mined, removed, and marketed at a profit in order to satisfy the requirements for discovery under the general mining laws.

**Limestone with More Than 95 Percent Ca and Mg Carbonates May Be Locatable**

In *United States v. Foresyth*, 100 IBLA 185, 242 (1987), the Board held that limestone with "95 percent or greater in calcium and magnesium carbonates is an uncommon variety of limestone and is therefore locatable. *Pfizer, supra* at 342-43. However, as any mining claim must, in order to be declared valid, contain a valuable mineral deposit, the contained limestone must meet the requirement of the 'prudent man' and 'marketability' tests." Id. at 242.

**Limestone Used for Rock Dust May Be Locatable**

"It has been established that rock dust may not contain more than 4-percent silica and 1-percent combustibles. By definition then, limestone used for rock dust must contain plus 95-percent carbonate or greater. Although rock dust can be made from materials other than limestone, that fact alone does not convert an otherwise locatable mineral into a nonlocatable waste product." *United States v. Foresyth*, 100 IBLA 185, 247 (1987).

**Travertine -- An Uncommon Variety**

In *United States v. Smith*, 115 IBLA 398 (1990) the Board held that a deposit of travertine was not an uncommon variety of building stone. This is not to say that all deposits of travertine are not locatable, but the *Smith* case discussed the attributes of a nonlocatable deposit.

**Pfizer Rule Restricted to Limestone Used to Manufacture Cement**

Because limestone is generally recognized to be a common variety of stone under the Common Varieties Act, a claimant "must show that it has unusual properties that take it out of

the operation of the 1955 Act. That the stone can be located under the mining laws is not established by the fact that some high-grade stone is known to exist on the claim." *United States v. Smith, supra* at 406. The above quotation is apparently in reference to the fact that simply because a limestone is more than 95 percent pure calcium carbonate does not make it locatable. In *United States v. Smith, supra* at 402, f.n. 2, the Board pointed out that the reference in *United States v. Chas. Pfizer & Co.*, 76 I.D. 331 (1969), an Assistant Solicitor's opinion, found that limestone used for *manufacturing cement* to be subject to location under the mining laws if it is "95 percent or more calcium and magnesium carbonates." The Board implied that the purity of limestone would have little effect on the locatability of limestone used for other purposes.

**Sand and Gravel Deposits That Have Never Been Locatable**

Sand and gravel used as fill, subbase or ballast has never been locatable. *U.S. v. Osborn* (*Supp on Judicial Remand*), 28 IBLA 13 (1976). In *U.S. v. Harenberg*, 11 IBLA 158,156 (1973), the Board said:

> However, all this material was disposed of as common fill to bring low ground up to grade or to serve as base material for roads, airport runways, building foundations, and the like. The Judge correctly held that because the mining law has never countenanced the location of claims for fill material, the profitable sales of materials from the claim for that purpose could not validate the claim in this instance."

**Sand and Gravel Deposits Not Locatable After July 23, 1955**

In *U.S. v. Henderson*, 68 ID 26, 29-30 (1961), the Department considered a sand and gravel deposit that was free of caliche and other impurities and the material existed in such size ranges that it was possible to use or sell pit run material meeting construction specifications of concrete aggregate. In *Henderson, supra*, the Board said:

> The fact that these sand and gravel deposits may have characteristics superior to those of other sand and gravel deposits does not make them an uncommon variety of sand and gravel so long as they are used only for the same purposes as other deposits which are widely and readily available.

Of course, if such a claim were valid and existing on July 23, 1955, and met the marketability test at that date and continued to meet it to the present, the claim would be valid.

In *U.S. v. Guzman*, 18 IBIA 109, 81 ID 685, 692 (1974), it was alleged that the sand and gravel had unusual angularity and was less rounded than that of its competitors because it had not been stream washed as much. This, it was said, gave the material the capability for use in "high test" concrete. In holding that the use of material for construction purposes is only a common use, the Board said in *Guzman, supra* at 692:

> Common varieties of a particular mineral material do not have to be physically alike or

equally desirable for a given purpose. For example, many kinds of common rock may be used to build a wall and, because their physical properties differ, certain kinds of common rock may be preferred for this purpose and, in fact, make a better wall and command a better price. Nevertheless, they remain common varieties of rock because their physical properties are not unique or rare.

The Department has consistently held that sand and gravel deposits suitable for road base, asphalt-mix and concrete aggregate without expensive processing but which are used only for the same purposes as other widely available, but less desirable deposits of sand and gravel are common varieties. *U.S. v. Ramstad,* A-30351 (September 24, 1965).

**The McCormick Case: An Uncommon Variety Sand and Gravel**

In *U.S. v. McCormick*, 27 IBLA 65, 68-69, 83-84 (1976), the Board held that the sand and gravel deposit in question was an uncommon variety. This is one of the very few sand and gravel deposits to ever qualify as an uncommon variety, and for this reason, it should be read carefully to develop an understanding of the type of properties and/or uses that make such a mineral locatable even after July 23, 1955. It should be noted in reading this case that the Board applied many of the principles previously established for building stone to sand and gravel. The Board said:

> The material is rhyolite and dacite stone deposited near the mouth of a volcanic crater (Robinson Crater). The stone has been crushed by the forces of nature in such a way that 80 to 95 percent is of the proper size for various uses in road construction and paving projects. The natural crushing gave the stone the added attributes of angular edges and flat plane surfaces and a natural cleanliness, all of which are necessary to insure good adhesion in asphalt. The witnesses for both sides agree that the fragments of rock were loosened from the rock in place and moved, probably by a combination of gravity and by the sheet action of water flowing off the peaks. As a consequence, the broken material on the O=Leary claims is roughly stratified and naturally sorted to an extent that does not exist on any other material sources in the area.
>
> Wilson described these qualities as "distinguishing physical properties" by which the subject deposit is different from other such deposits in the San Francisco area. Thus the contestant acknowledged that, although used for the same purposes as common variety mineral materials from other deposits, this deposit "has distinct and special properties," one of the two criteria which must be met in order to classify the deposit as other than a "common variety."
>
> It being established that the subject deposit is possessed of the requisite "distinct and special properties," we need only ascertain whether those properties afford the deposit "a distinct, special economic value."
>
> The natural crushing, stratification and sorting of the material has indeed lent the deposit a special, distinct value over any other known source of material for this purpose

with a radius of at least 5 miles from Flagstaff, Arizona, which is considered to be center of the market area served by these several deposits.

The principle products of the Oleary claims are: (1) aggregate basic course material (ABC); (2) mineral aggregate for asphalt cement (MA); and (3) sealcoating chips, included in a special surface topping which is applied to finish asphalt paving. Each of these products is utilized separately in different stages of road building and must meet different specifications. Each has been naturally sorted and segregated on the Oleary claims.

We conclude the merits of the case demand a holding that the material is locatable. The evidence establishes the following special characteristics of the deposit which translate directly into special and substantial economic values:

1. No drilling, blasting or ripping is required.

2. No "primary" crushing (to reduce the rock to minus 15 inches) is required.

3. Three of the four purchasers testified that no "secondary" crushing was required.
4. There is little or no overburden.

5. The material is naturally sorted by type, no sorting or classification is required beyond screening to eliminate oversize.

6. The waste factor is very much lower than at other area pits.

7. The material is naturally clean, requiring no washing.

8. No blending of fine or coarse aggregates is necessary to meet specifications.

9. Because the material is significantly lighter in weight than competing aggregates, a ton of the subject material will cover a 20 percent greater area.

10. The material can be used without the addition of expensive lime or commercial anti-stripping agents.

No other deposit described in the testimony had all of these attributes. All of the witnesses who were actually engaged in the asphalt paving business testified that they were willing to pay more for this material because of these special economic advantages except for Latham, who was barred from paying more than 10 cents a ton by highway department regulations. Even so, Latham inferred, hypothetically, that he might purchase the material at 36 cents if the economic advantages warranted.

In *U.S. v. U.S. Minerals Development Corporation*, 75 ID 127 (1968), the test imposed by this Department was whether the material which is used for the same

purposes as common varieties of materials are used could, by reason of its special and distinct properties, command a higher price in the market place.

Moreover, the deposit meets the alternative test laid down by the Court of Appeals for the Ninth Circuit in *McClarty v. Secretary of the Interior*, 408 F2d 907, 908 (1969), which held that the special economic advantage of a deposit may be reflected by reduced costs or overhead so that the profit to the producer would be substantially more even where the price remained competitive with other materials used for the same purpose.

Clearly, the special and distinct physical properties of the subject deposits are such that there is a substantial economic advantage to the producer resulting from reduced costs of production. Regardless of whether McCormick reaps this economic advantage as the "producer" or is paid a higher unit purchase price by the producer in consequence thereof, it all comes down to the same thing: the claimants derive substantially more money per unit from this deposit.

This Board has held in *U.S. v. McClarty*, 17 IBLA 20, 81 ID 472 (1974), and in *U.S. v. Pope*, 25 IBLA 199 (1976), that where the material in question was naturally fractured so as to preclude the necessity for drilling, blasting and other quarry work, requiring only a minimum of effort to produce and prepare if for use, the economic advantage thereby gained over other deposits was sufficient to classify the deposit as locatable. That is precisely the operative criterion in this instance as well.

The dissenting opinion finds that "the higher royalty of 5 to 16 cents per ton, while yielding a higher profit, does not constitute so substantial a higher profit as to remove this deposit from the category of a common variety of sand and gravel." We disagree.

First, the premium spread is 5 to 26 cents. Material from both the Grand Falls pit and the Salt River Valley sells for only 10 cents per ton. Likewise, Shearer testified that the average statewide price for aggregate is 10 cents. The Highway Department is limited to a maximum payment of 10 cents.

As noted in the dissenting opinion, in the *McClarty* case, *supra*, the stone could be produced at one-half to one-fourth the cost of his competitors. In this case we find that McCormick receives more than 3 2 times as much as materials selling for 10 cents; 80 percent more than materials selling for 20 cents; 44 percent more, than materials selling for 25 cents; and 20 percent more than material selling for 30 cents. Although in this case we are dealing with a premium price calculated in cents per ton rather than in dollars per ton as in Pope and McClarty, we should also consider that McCormick sells a vast volume and has ample supply to continue to do so for many years hence. It will be recalled that Shearer was taking 70 tons per hour, Bell was taking 300 tons per day, and McCormick's projected sales over the next 20 years are 800,000 tons. There is no basis on which to conclude that the locators' profit would not be "substantially" greater....

Accordingly, we conclude that the material is not a common variety and that it is locatable under the mining law under the tests described in *U.S. v. U.S. Minerals Development Corp., supra*, *U.S. v. McClarty, supra*; and *U.S. v. Pope, supra*.

**Building Stone Properties**

In *U.S. v. Heden*, 19 IBLA 338 (1975), the Board reviewed a number of cases in which it held that specific properties of building stone do not give the stone a distinct and special value and would not qualify the stone as an uncommon variety:

> (1) unique and attractive coloring -- *U.S. v. California Soylaid Products, Inc.*, 5 I BLA 179, 183 (1972); *U. S. v. Melluzzo*, 76 ID 181, 185 (1969), *set aside and remanded on other grounds*, 77 ID 172 (1970) ("...variety in coloration appears to be the common attribute of the vast amounts of decorative building stone..."); *U.S. v. U.S. Minerals Development Corp.*, 75 ID 127, 128 (1968); (2) deposit large in size and uniform in quality -- *U.S. v. Heldman, supra* at 5; (3) thickness, easier to process -- *U.S. v. California Soylaid Products, Inc., supra*; (4) hardness and resistance to weathering -- *U.S. v. Kincanon*, 13 IBLA 165, 171 (1973); (5) particular geologic stone with trade name -- *U.S. v. Melluzzo supra*; *U.S. v. U.S. Minerals Development Corp., supra* ("Rosado@ stone); (6) location -- *U.S. v. Stewart*, 5 IBLA 39, 79 ID 27, 31 (1972); *U.S. v. Bedrock Mining Co., Inc.*, 1 IBLA 21, 24 (1970).

In *U.S. v. Dunbar Stone Co.*, 56 IBLA 61, 64-67 (1981), the Board considered several different properties of building stone to determine if such properties are unique and give the deposit a distinct and special value:

> 1. *Coloration is not a property that makes a stone an uncommon variety:*
>
> Attractive coloration, even if unusual, does not distinguish a deposit of stone from other deposits of the same stone so as to justify the conclusion that the deposit has a distinct and special property, where comparable stone is abundant and is found with varied coloration. *U.S. v. Mansfield*, 35 IBLA 95 (1978); *U.S. v. Brubaker*, 9 IBLA 281, 80 ID 261 (1973), *aff=d Brubaker v. Morton*, 500 F2d 200 (9th Cir 1974). *Citation omitted*. This is because beauty of coloration is inherently subjective. One type of coloration from among the infinite variety of nature may appeal to some persons, and this coloration may in fact be unusual. However, the fact that one deposit of a material may bear this coloration does not make it unique, as there are often deposits which will do the same job to the full satisfaction of the other persons. Appellant makes no price distinction based on the various colors.
>
> The record shows that there is a vast amount of Yavapai schist of varying coloration throughout the area where appellant's claims are situated, and that Apache is selling comparable material, even though its coloration may be different from that found on appellant's claims. Accordingly, we find that the

color of appellant's schist is not a distinct and special property having special economic value.

2. *Comparisons must be made with all stone rather than one type of stone:*

But simply because this may be uncommonly good schist does not necessarily make it uncommonly good stone. There are many other types of common stone which are suitable for wall facing. Were we to hold that a deposit of a particular kind of country rock is uncommon merely because, unlike much rock of the same kind, it rises to a standard of acceptance for masonry work, we would be obliged to hold that vast quantities of other common stones suitable for such purpose are locatable under the mining law, notwithstanding the prohibitions of the Act of July 23, 1955, in that regard. We are not obliged to consider how a particular deposit of a common stone type ranks when compared only with other deposits of the same generic type (i.e., limestone, sandstone, shale, granite, basalt, slate, etc.), and hold that a superior or unusual occurrence of that particular type is an uncommon variety, when its special characteristics only make it suitable to be used in the same manner as common varieties of other types. Appellant's argument and evidence centers on the desirability of this deposit of schist, "compared to other schist that you get," (contestee's appeal brief, p. 6), but in considering common building stone we are not limited to comparing schist only with other schist, limestone only with other limestone, granite only with other granite.

3. *Each deposit of stone may have unique properties, but is not necessarily locatable:*

It is a widely-accepted truism that nature does not duplicate exactly, i.e., that there are no two identical snowflakes, fingerprints, trees, mountains, etc. Each product of nature may be expected to have some distinct feature or unique characteristic which will distinguish it from others of its kind, and perhaps either enhance its value or render it worthless. But where these qualities only serve to make a common stone suitable or desirable for a common purpose, such as construction, without imparting any marked, special, economic advantage over the broad range of other common building stones, that stone cannot be considered an exception to the statutory bar against the location of Acommon varieties" of stone imposed by 30 USC ' 611 (1976).

4. *Vast deposits of stone indicate a common variety:*

So it is here; the angularity of this schist, even if naturally occurring, is inadequate to make it uniquely valuable in an economic sense. As Judge Morehouse found, the commonness of the schist found on appellant's claims is also reflected by the abundance of similar stone found near these claims, on lands outside their boundaries.

5. *No economic advantage in mining may indicate a common variety:*

> This schist is readily distinguishable from "cliffstone" and "heatherstone," other types of building stone which we have recognized as unique in, respectively, *U.S. v. Pope*, 25 IBLA 199 (1976), and *U.S. v. McClarty*, 17 IBLA 20, 81 ID 472 (1974). These stones were unique in that they could be removed for sale and use with practically no expense, simply by prying them out of formation with a bar, a distinct and special economic advantage. Appellant admits that the schist on his claim must be drilled and blasted out of the formation, and then split with a maul, or with a hammer and chisel, a time-consuming and expensive process associated with removal of common stone.

**Gem Stones and Gem Minerals**

Gem stones and gem minerals are discussed together in this section even though many gem minerals are elements or minerals as described in *Pierce, supra*; and therefore does not come under 30 USC 611:

> Gem stones and minerals held to be locatable in early cases include: (1) onyx -- *Utah Onyx Development Co*., 38 LD 504 (1910); (2) marble -- *Pacific Coast Marble Co. v. Northern Pacific R.R. Co*., 25 LD 233 (1897); and diamonds - 14 *Op. Atty Gen.* 115, 1872.

**Mineral Specimens Must Be Marketable at a Profit**

In *U.S. v. Rodgers*, 32 IBLA 84 (1977), the Board considered a case involving claims located for specimens of labradorite crystals. Although labradorite is a mineral such as gold rather than a stone and thus does not come under 30 USC 611, it must still show marketability at a profit. Even though a mining claim for a mineral specimen was held to be invalid in this case, if the same claimant could have shown the deposit was capable of being marketed at a profit, the claims would have been valid. The Board said:

> Recovery of the labradorite stones from the claims is by picking the stones from the surface, by processing the decomposed host rock over a screen and handpicking the phenocrysts which do not pass through, or by carefully prying stones from the unweathered host rock in small excavations. Stones from these claims have been sold mostly to "rock hounds" (collectors) without further processing after recovery from the host rock. Although contestees exhibited a number of faceted and cabochoned specimens in their personal collection, they do not ordinarily process their stones to such a condition before selling.
>
> The mere presence of phenocrysts of labradorite on a mining claim does not satisfy the requirements of a discovery of a valuable mineral deposit under the mining laws where it has not been shown that a continuing market exists for such stones and that

a prudent person would expend further time and money in a reasonable anticipation of developing a valuable mine.

The requirement that deposits of labradorite be marketable at a profit prior to the withdrawal of the lands embracing the claims has not been satisfied where it is clear that no open market for the stones existed, no mining operations had been conducted on the claims, no sales of stones had been made, and no effort to establish a market for these specific labradorite deposits had been made by the claimants prior to the date of the withdrawal.

**Geodes Are Uncommon Variety Minerals**

In *U.S. v. Bolinder*, 28 IBLA 192 (1976), the Board held that geodes are an uncommon variety mineral and should not be compared with other geode deposits but instead should be compared with "other stone formations." The Board said at 199-203:

There is no doubt that a geode is composed of recognized mineral substances which would be individually locatable under the mining laws unless found to be a common variety subject to 30 USC ' 611 (1970). The testimony at the hearing indicated that geodes possess an economic value in trade and the ornamental arts, apart from whatever commercial value may be attributed to their uniqueness as a so-called "natural curiosity."

It is evident from the testimony at the hearing that geodes have a value in their raw state in addition to any enhanced value from subsequent processing or craftwork.

We find no justification for ruling that geodes per se are not subject to location under the mining laws. Where a mining claimant has located his claim on a sufficient quantity of geodes and is conducting actual mining operations to extract the geodes, we hold that such a mineral deposit is subject to location under the mining laws.

The Government's prima facie case that the geodes are a common variety rests only upon a comparison of this deposit with geodes from other areas. The evidence of the Government witnesses comparing the geodes with other stone formations, however, tends to show that the geodes do not occur in abundance in nature and are not widespread in their occurrence generally. This is unlike sand and gravel deposits and many building stone deposits which are widely spread and in large abundance generally. It was such deposits that the Act of July 23, 1955, was intended to make nonlocatable. The contestees' evidence emphasized the peculiar physical properties of these geodes and the special economic values attributable to those properties and to the deposits on these claims in such quantities that they assert mining operations are feasible. From the state of the record, we must conclude that the deposits of geodes, and the geodes themselves, have unique properties which give them a special and distinct value. The fact that the geodes may be similar to geodes from other areas which have similar properties and values is not sufficient alone to establish that the deposit of geodes is a common variety of stone within the meaning of the Act of July 23, 1955.

**Gemstone Permits Do Not Apply Towards Validity**

The mining laws do not authorize the sale of permits to take or enjoy gemstones; and any such sales would not be considered in determining the validity of a claim. In *U.S. v. Stevens*, 14 IBLA 380 (1973), the Board said:

> The income from the sale of Gemstone Enjoyment permits is not properly to be considered as income from a mining operation. *See South Dakota Mining Co. v. McDonald*, 30 LD 357, 360 (1900). As was stated in *U.S. v. Elkhorn Mining Co*., 2 IBLA 383, 389 (1971), *aff'd, Elkhorn Mining Co. v. Morton*, Civ. No. 2111 (d. Mont., filed January 19, 1973):
>
> > However, not every profitable enterprise conducted upon the public lands entitles the entrepreneur to a patent under the mining laws .... The expenditure of means and labor must be for the benefit of a mining operation from which minerals can be extracted and marketed. The marketed commodity must be the product of this mining operation.
>
> Here, the claimant is marketing permits, not mineral material. In fact, the claimant is charging the public to do what it has the right to do freely on public land. 43 CFR Part 6010. *See also* 43 CFR 3621.1 (providing for the free use of minerals not for sale or barter); 43 CFR 3712.1 (restricting the use of unpatented mining claims). Gemstone Enjoyment is not a mining operation as contemplated by the general mining laws, and the income from its operation could not properly be considered in determining if a discovery had been shown on the Agate claims.

**Obsidian Is a Common Variety Mineral**

In *U.S. v. Mansfield*, 1978, the Board determined that the ability of obsidian to take a polish does not make it an uncommon variety. In this case, it was held that obsidian was held to be a common variety because it exists "in almost limitless quantities." The Board said:

> The evidence clearly demonstrates that nearly all obsidian selected at random from a deposit or even from a rockbed, can take a polish. The ability of obsidian to take a polish does not in itself make it uncommon. If there is insufficient evidence that a stone is an uncommon variety within the meaning of 30 USC '611, it is not locatable under the mining laws.
>
> Contestee cites *U.S. v. Bolinder*, 28 IBLA 187 (1976), in support of her contention that obsidian is not a common variety stone. But *Bolinder* is easily distinguished from the instant case. Obsidian, as noted above, is located in almost limitless quantities through many areas of the west. But the finder of fact in *Bolinder* indicated that deposits of geodes which possess an economic value "do not occur in abundance in nature and are not widespread in their occurrence generally." *Bolinder, supra* at 202.

**Value of Gemstones as Found on Claims Rather Than Enhanced Value**

In *U.S. v. Stevens*, 14 IBLA 380 (1974), the Board determined that even though many stones will take a polish and have an enhanced value because of it, "it is the value of the stone deposit as it is found on the claims that is the important fact." In other words if a gemstone such as "chert" or "jasper" is to be an uncommon variety, it is the value of the stone in its uncut or unpolished state that must be compared with other "stone formations." The Board said:

> Appellant asserts that this material and agate found on the claims is gemstone in quality. It is evident that the stone is of such a hardness that it can be tumbled and polished, but such material is found in great abundance not only on the claims, but also on nearby public lands, and in many other locations throughout the West. (Tr. 60, 64, 80.) The Government witness testified that any stone of Apossibly a four or five and on up to a ten hardness on a Mohs' scale of hardness would provide a polish." (Tr. 22.) The market for the stone is for rock hound purposes, gathering and collecting, for curios, and for polishing and cutting to make into "gemstones" for jewelry or ornamental objects. The evidence did not disclose that the stones on the claims have any property giving them special or distinct value which takes them out of the category of a common variety within the meaning of 30 USC ' 611 (1970).
>
> The mere fact the stones may be polished is not sufficient to meet the uncommon variety test, as hardness, the prime requisite for polishing, is a property common to many types of stone found in great abundance. It is the value of the stone deposit as it is found on the claims that is the important factor, not any enhanced value which might be obtained for a fabricated or marketed product of the deposit. *McClarty v. Secretary of the Interior*, 408 F2d 907, 909 (9th Cir 1969).

**Cinders and Other Volcanic Products**

In *U.S. v. Harenberg*, 9 IBLA 77 (1973), the Board held that volcanic cinders used in the manufacture of cement blocks is a common variety mineral. The Board said:

> A deposit of volcanic cinders which are suitable for use in the manufacture of cement blocks must be regarded as a common variety mineral material within the context of the Act of July 23, 1955, when the evidence shows that other such deposits occur commonly in the area and are similarly used, and the fact that the subject deposit has qualities which are particularly well-suited to this purpose does not alter its essential character as common cement block material.

Volcanic rock useful as a filter rock in sewage treatment plants may be an uncommon variety mineral. In *U.S. v. Clark County Gravel, Rock and Concrete Company*, A-31025 (March

27, 1970), the Board said:

> The mere showing that volcanic rock on mining claims may be useful for filter rock in sewage treatment plants does not adequately establish that the rock is not a common variety of stone within the meaning of the act of July 23, 1955, where it appears that volcanic rock widely found in abundance may have desirable characteristics for filter rock and there is no detailed showing of any unique property in the rock within the claims giving it a special and distinct value for such purposes.

**Aggregate for Use in Terrazzo**

In *U.S. v. Henderson*, 68 ID 26 (1961), the Department determined that the use of aggregate as a terrazzo was not a demonstration of special and distinct value because it was limited in amount and restricted to local use.

**Pumice Used as Lightweight Aggregate is Common Variety**

Pumice used as a lightweight aggregate in making concrete products is a common variety use. This is true even though the pumice meets ASTM standards as a lightweight aggregate. *United States v. Multiple Use, Inc.*, 120 IBLA 63, 91, 111 (1991).

**An Uncommon Variety of Pumice**

In *United States v. Multiple Use, Inc.*, 120 IBLA 63 (1991) the Board held that an air-fall pumice used as an abrasive for stone-washing denim is an uncommon variety. The Board determined that three properties of the pumice give it a distinct and special value: (1) size (greater than one inch; (2) shape (rounded); and (3) the absence of staining material. The Board noted that the pumice sold for use in stone-washing denim commands a premium over and above the value of pumice sold for common variety uses. The Board determined that 17 percent of the deposit (the oversize fraction) brings approximately ten times the price per pound that the rest of the pumice does in the market for construction-related uses. The uncommon variety portion of the pumice, which sold for approximately $160 per ton, yielded a net profit of more than $55 per ton after subtracting mining and transportation costs of approximately $105 per ton.

**Glass Sand an Uncommon Variety**

In *United States v. Multiple Use, Inc.*, 120 IBLA 63, 103 (1991), the Board indicated that the sand used for making glass would be an uncommon variety if the claimant can satisfy the three requirements set forth below:

> * * * The claimant must show that he has an uncommon variety of sand -- one that can readily be used in making glass, for example. The unique intrinsic property in such a case could be the high silica content or low iron content of the sand. Once this has been established, and the claimant demonstrates that: (a) glass sand is unique and thus sells at a marked premium over sand used for common variety purposes, such as in concrete; (b)

there is a market for this type of sand in the glass industry; and (c) there is glass sand on the claim, the claimant has met the burden of showing that the sand is an uncommon variety. A claimant need not take the next step urged by the Forest Service, *i.e.*, he need not show that the mineral material has some unique quality in the glass industry unless and until evidence is presented that common variety sand could serve the same use as glass sand.

**Soil Amendments**

It was held in *U.S. v. Bunkowski*, 79 ID 43 (1972) that when a mineral is used as a soil amendment, it must cause a chemical change to the soil rather than a physical change. However, keep in mind that *Bunkowski* was not a common variety case. The substance involved in *Bunkowski* was gypsum, a mineral rather than stone--so it was not subject to a common variety determination under Section 611 of Public Law 167. *See United States v. Pierce, supra*. In *U.S. v. Robinson*, 21 IBLA 363 (1975), the Board said:

> In *Bunkowski*, the Board adopted the Bureau of Land Management's ruling that the gypsite was locatable as an agricultural soil amendment because it was not only a physical amendment, altering friability, but a chemical amendment, combining with and removing sodium to improve alkaline soils. The gypsite was thus distinguished from other "minerals" such as rhyolite and blow sand, which only served as physical amendments to soil and have been held nonlocatable.
>
> Bog Iron ore, used as a soil conditioner or soil amendment, is not a locatable mineral deposit in the absence of a showing that it meets the test of *U.S. v. Bunkowski*, i.e., it is found to be not just a physical amendment to the soil but a chemical amendment which alters and improves soil or plant chemistry.

**The Tanner Humate Case**

In *Maurice Tanner*, 141 IBLA 373 (1997), the appellant appealed from a decision of the Farmington, New Mexico, District Office of the Bureau of Land Management (BLM) in which he was found to have committed an innocent trespass by the unauthorized removal of Ahumate@ from lands patented with a mineral reservation to the United States. Maurice Tanner was the surface owner of the lands which were patented under Stock-Raising Homestead Act (SRHA), 43 U.S.C. 291-301 (1970). The lands were subject to a reservation to the United States for Aall the coal and other minerals. Tanner contended that the humate, which is organic in origin, is not a mineral because it is like peat; whereas, the BLM considered the humate to be a low grade of coal and subject to the reservation. The Board quoted several definitions of humate including one from the U.S. Department of the Interior, Bureau of Mines, *1990 Minerals Yearbook*, Vol. 2, at 353:

> Humate, derived from weathered coal and associated carbonaceous shales and claystones, has become an important nonfuel mineral commodity in the State [of New

> Mexico]. Enormous reserves of the humic-acid rich material have been identified, and 1990 there were two producing mines. * * * Humate is used chiefly as an additive in drilling muds and soil conditioners.

Another description of humate was quoted from B. Lloyd, *Humates in Northwestern New Mexico (Snake Oil or Wonder Product*), Energy and Minerals Newsline, October/November 1991, at 9-10:

> The New Mexican variety of humate can best be described as a carbonaceous mudstone or shale-like material made up of totally decomposed humus and salts of humic acids such as humic, ulmic, and fluvic acids. In northwestern New Mexico, humate is most often associated with coal in the Upper Cretaceous Menefee Formation, where humate was formed in meandering channels and floodplains in a fluvial-deltaic setting.
>
> Humate has several other uses such as in drilling muds, water soluble brown stains, and as a binder in briquets made from lignite char. Other areas of potential use of humates include oil field reclamation and capture of heavy metals in hazardous waste. However, the majority of humate produced in New Mexico is for agricultural effects, humate seems to aid plant uptake of nutrients via the acids. Humate also aids soil by increasing the water holding capacity, and acts as a buffer for alkaline soils. Microorganism growth also seems to be positively affected by the introduction of humate material.

According to the BLM mineral report, the trespass site is situated in the Fruitland Formation, an Upper Cretaceous coal-bearing formation formed at the margins of the sea which lay within the San Juan Basin. AIn short, humate in this case is a lithified material that originated from vegetation more than 65 million years ago.

The Board pointed out that through a number of opinions, the Department has explored the legal status of humate deposits, in some cases designating it as a mineral and in others calling it vegetative material. The Board described the more recent legal history as follows:

> In less than a year, this view was under renewed challenge within the Department. Thus, by letter dated October 19, 1977, the Director, USGS, advised the Associate Solicitor that, in his view, humate was properly classified as a mineral rather than a vegetative material. In reliance on this conclusion, the Associate BLM Director issued Instruction Memorandum No. 78-97 (February 24, 1978) advising all BLM State Directors that humate was to be disposed of as a type of stone under the Materials Act that humate was not subject to location under the mining laws.
>
> Subsequently, in a memorandum to the New Mexico State Director, dated May 1, 1979, the Field Solicitor, after recounting the history of prior consideration of the status of humate, concluded that humate was a reserved salable mineral under the SRHA, relying both on the USGS finding that the material is stone and this Board=s decision in

*Western Nuclear, Inc*., 35 IBLA 146 (1978), *aff=d* 462 U.S. 36 (1983), holding that gravel is a reserved mineral. This remains the official statement of position of the Bureau and the Solicitor=s Office on the status of humate.

**Is Humate a Amineral within the meaning of the mining and mineral leasing and disposal laws of the United States?**

To answer this question, the Board first reviewed the legal history of peat to ascertain whether it was vegetable or mineral and on what basis. In *United States v. Toole*, 224 R. Supp. 440 (D. Mont. 1963), the Court held that sedge peat was not a mineral within the meaning of the mining laws of the United States. Significantly, the Supreme Court in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 at 43 (1983) discussed *Toole* with approval. The Board arrived at its conclusion that humate is a mineral by comparing it with peat (a vegetative material) and coal (a mineral) at 381-82:

> Since peat moss has been determined not to be a mineral while it is clear that coal is a mineral, it is helpful to briefly compare the similarities and differences between these two substances. While both are derived from organic matter, peat moss is Aorganic@ in a way that coal is not since it has clearly not lost its Avegetable characteristics.@ Indeed, as noted above, economic peat deposits are no older than 14,000 years old, while many coal deposits date from the Carboniferous period, i.e., from 270 to 350 million years ago. *See* note 4, *supra*. The forces of nature which have acted on coal to produce a different substance have not altered the essential vegetable nature of peat. Indeed, it is the interruption of the normal processes of decay that results in peat formation. Finally, while peat is still clearly used as an agricultural commodity as a soil additive for purposes of conserving water and improving the physical character of the soil (rather than the chemical), coal is used primarily as a fuel.
>
> Where, then, does humate figure in this equation? Humate is not a vegetative material that has undergone only slight modification. On the contrary, unlike peat moss which still retains its vegetative character, humate is a Acarbonaceous mudstone or shale-like material.@ Unlike peat moss which dates from the present epoch (the Holocene), humate dates from the Upper Cretaceous period, i.e., at least 65 million years ago, such that the forces of nature have, indeed, had ample opportunity to act upon it and alter its original nature. And, unlike peat moss which is primarily used as an additive for improving the physical character of the soil, it seems clear that the major incentive for humate use is an alteration in the chemical character of soil by improving plant uptake of nutrients via humic and other acids present in the humate. *See*, e.g., United States v. Bunkowski, 5 IBLA 102 (1972) (gypsite locatable as a soil conditioner because of its chemical effects.) It seems clear from the foregoing that humate is far more akin to coal in being an Aorganic rock@ than it is to peat moss which has retained its essential vegetable character. *We conclude, therefore, that humate is a mineral within the meaning of the mining and mineral leasing laws of the United States* (emphasis added).

**Humate Is a Reserved Mineral in Patents issued under the SRHA**

In *Maurice Tanner*, 141 IBLA 373 (1997), the Board concluded that humate is a mineral reserved to the United States under the SRHA. The Board discussed the basis for its decision at 383:

> There is no dispute that the humate involved herein is mined for commercial sale. It is deposited like a mineral and is taken from the soil and has a separate value like the gravel in *Western Nuclear*, the scoria in *Pacific Power & Light*, [45 IBLA 127 (1980)] and the sand and gravel in Browne-Tankersley Trust, 76 IBLA 48 (1983). It is not being used only on-site or as common earth. *Cf. Texaco, Inc*., 59 IBLA 155 (1981) (no trespass on reserved mineral estate where scoria is used no differently than common earth and the record fails to demonstrate that the deposit of scoria has commercial value independent of such use). The Amanner in which it is extracted and used@ does not differ from other substances classified as mineral. The fact that one of humate=s commercial uses is agricultural provides no greater basis for excluding it from the scope of the reservation than for excluding other minerals used for agriculture such as phosphate, potash, gypsum, or perlite. It is both recognized as a mineral by standard authorities, *see, e.g.*, U.S. Department of the Interior, Bureau of Mines, *1990 Minerals Yearbook*, Vol. 2 at 353, and referred to as such in private commercial transactions, *see Cal-Am Corp. v. Spence*, [659 F.2d 1034 (10th Cir. 1981]. For all the foregoing reasons, we must conclude that humate is a mineral reserved to the United States under the SRHA.

**Humates Are a Reserved Mineral**

The Board concluded Athat humates are a mineral reserved under patents issued pursuant to the SRHA and that disposition of such mineral constitutes a trespass for which the United States is properly compensated.@ *Id* at 385.

**Whether or Not Humate a Reserved Mineral Is Question of Law**

In *Maurice Tanner*, 141 IBLA 373 (1997), the appellant requested an evidentiary hearing on the organic nature of humic materials. The Board responded at 385:

> Although an evidentiary hearing may be appropriate when an appeal presents a controverted issue of material fact, no hearing is required where the issue is purely one of law. *See United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971). As the authorities quoted above illustrate, the organic nature of these deposits was not disputed. What was in dispute was whether or not humate is a mineral reserved under the SRHA. This, however, is a question of Law. We note that, in holding geothermal resources were reserved under the SRHA, the court similarly found that the facts about the nature of geothermal resources necessary for a decision were not disputed and concluded that the case presented Aonly a question of law.@

**Forest Service Regulations Establish Nonlocatable Uses for Certain Minerals**

The U.S. Forest Service amended its Mineral Material Disposal regulations (36 CFR 228.41(c) to establish five categories of minerals, based on use, as disposable under the Mineral Material Sale Act of 1947, rather than available for location under the mining law. The following mineral categories are designated by the regulations as salable on Federal lands administered by the Forest Service:

1. *Agricultural Supply and Animal Husbandry Materials*. This category includes, but is not limited to, minerals and vegetative materials used as or for: Soil conditioners or amendments applied to physically alter soil properties such as direct applications to the soil of carbonate rocks, soil containing "trace elements" and peat; animal feed supplements; and other animal care products.

2. *Building Materials*. Except for minerals identified as *Uncommon Varieties*, this category includes, but is not limited to minerals used as or for: paint fillers or extenders; flagstone, ashlar, rubble, mortar, brick, tile, pipe, pottery, earthenware, stoneware, terrazzo, and other nonstructural components in floors, walls, roofs, fireplaces, and the like; and similar building uses.

3. *Abrasive Materials*. This category includes, but is not limited to, minerals used for: filing; scouring; polishing; sanding; and sandblasting.

4. *Construction Materials*. This category includes, but is not limited to, minerals such as sand, gravel, clay, crushed rock and cinders used as or for fill; borrow; rip-rap; ballast (including all ballast for railroad use); road base; road surfacing; concrete aggregate; clay sealants; and similar construction uses.

5. *Landscaping Materials*. This category includes, but is not limited to minerals and peat used as or for: chips, granules, sand, pebbles, scoria, cinders, cobbles, boulders, slabs, and other components in retaining walls, walkways, patios, yards, gardens, and the like; and similar landscaping uses.

**Common Variety Based on Forest Service Regulations**

On July 9, 1992, Brainard and Jackson filed a mineral patent application for a deposit of building stone in the in the LoLo National Forest of western Montana. By letter dated November 19, 1993, the U.S. forest Service notified BLM that its regulations (36 CFR 228.41(c)) defined the building stone of the APritchard formation Argillite@ underlying the mining claims as a mineral material subject only to sale under the Materials Act of 1947, as amended, 30 U.S.C. 601-604 (1994), and its implementing regulations (36 CFR Part 228, Subpart C). In this letter the Forest Service requested the BLM to reject the mineral patent application. BLM complied with this request and issued a decision in March 1994 pointing out that the administration of the

Materials Act of 1947 and its implementing regulations on national forest lands is vested Asolely@ in the Forest Service. Consequently, Brainard and Jackson appealed the rejection to the Interior Board of Land Appeals.

In *Matthew J. Brainard*, 138 IBLA 232 (1997), the Board found two errors in the BLM decision: (1) the BLM should make its own determination that the stone was a common variety, and (2) in cases such as this, involving issues of law and fact, the BLM should initiate contest proceedings to satisfy procedural due process requirements for notice and hearing. The Board said at 236-37:

> FS=s determination that the Pritchard formation argillite underlying the subject claims was a mineral material subject to disposal under the Materials Act of 1947 and 36 CFR Part 228, Subpart C, was, however, not binding on BLM for the purpose of resolving the question of whether the stone was locatable under the General Mining Laws and thus could support the patent application. The decision of BLM in this case errs in two critical respects. First, it abdicates the responsibility of BLM to determine the validity of mining claims which are the subject of a patent application. Further, it purports to defer to an FS validity determination involving issues of law and fact made without the benefit of notice and an opportunity for a hearing. It is well established that the final administrative determination of the validity of unpatented mining claims, including those located on national forest lands, will be made by the Department of the Interior after notice and opportunity for hearing. *Citations omitted*. The authorized officials of BLM plainly did not exercise that authority in the present instance. When FS has determined that the mineral claimed to have been discovered under a mining claim on national forest land is a common variety not subject to location under the General Mining Laws, but rather subject to disposal only under the Materials Act of 1947, thus requiring rejection of a mineral patent application, the proper recourse is to initiate a Government contest. *Citations omitted*.

**Common Variety Status of Mineral Determined Through Contest Action**

In *Jesse R. Collins*, 145 IBLA 199, 204 (1998), the owner of a clay deposit appealed a decision of the BLM State Director that his clay was a common variety. The Board set aside the Decision of the State Director because he lacked authority to rule on the common-variety status of the clay and described the appropriate course of action at 204:

> The proper manner to make a common-variety determination is to initiate a mineral examination and (if that examination determines that the clay is a common variety) to initiate a contest against the clay. *See, e.g., United States v. United Mining Corp.*, 142 IBLA 339 (1998). As we held in *Matthew J. Brainard*, 138 IBLA 232, 235-37, BLM may not make a common-variety determination without providing notice and an opportunity for a hearing. *Citations Omitted*. When the governing agency (in this case BLM) had determined that the mineral claimed to have been discovered under a mining claim on Federal lands is a common variety not subject to location under the General Mining Laws, but rather subject to disposal only under the Materials Sales Act of 1947

(thus requiring payment of the purchase price for the mineral), the proper recourse is to initiate a Government contest. *Citations Omitted.*

## CLAYS AND MISCELLANEOUS MINERALS

### Introduction to Clay

The most comprehensive decision concerning the locatability of clay is undoubtedly *U.S. v. Peck*, 29 IBLA 357, 84 ID 137 (1977). Of particular significance in *Peck* is the Board's distinction between "common" or "ordinary" clay, which has not been considered a "valuable mineral deposit," and deposits of clays having exceptional qualities useful for purposes for which common clays cannot be used. Extensive quotes are taken from this rather lengthy case and categorized under the following subheadings: (1) clays held to be not locatable under early decisions; (2) clays generally held to be locatable under early decisions; (3) the Mattey case; (4) Congressional policy on clays; (5) no advantage for clays that can meet new specifications; (6) common clays; and (7) exceptional clays:

1. *Clays not locatable under early decisions:*

> The question of the locatability of deposits of fire clay is not completely clear from the cases and may depend upon the quality of the deposit and its uses. The Secretary of the Interior had ruled in *The Dobbs Placer Mine*, 1 LD 565 (1883), that a deposit of fire-clay or kaolin should be located as a placer location and not a vein or lode. In *Alldritt v. Northern Pacific R.R. Co*., 25 LD 349 (1897), the Acting Secretary ruled that land chiefly valuable for deposits of fire clay is subject to entry under the mining laws and excepted as "mineral lands from a railroad grant." He noted that the evidence showed the land was not valuable for other purposes, but was underlaid with fire clay "of a superior quality, which crops out in various places." 25 LD at 351. Nevertheless, in *Jordan v. The Idaho Aluminum Mining and Mf=g Co*., 20 LD 500 (1895), a deposit was alleged to be valuable for fire clay, kaolin and aluminum. The evidence indicated an immense deposit of clay which was valuable for the manufacture of pressed brick. No other use was indicated except testimony that the deposit contained aluminum, but there was not a sufficient quantity of aluminum to be in paying quantities. The decision decided the deposit did not make the land mineral in character. It is apparent that the fire clay or kaolin and its commercial use for pressed brick was not considered as sufficient to make the land mineral in character. Similarly, in *Holman v. State of Utah*, 41 LD 314 (1912), there was an allegedly valuable deposit of fire clay within an area selected by the State. This was not considered sufficient to warrant the land classified as mineral in character. The decision did not discuss the material except to point out the fact there are vast deposits of clay which, because of a temporary local demand for brick, could be used profitably. It concluded, however, that except for deposits of clay of such exceptional nature as to warrant

entry of the lands under the mining laws, the lands should not be considered mineral. It appears, therefore, that even if a deposit contains fire clay, if it is only usable for brick, including pressed brick, the deposit is not locatable under the mining laws.

Clay which was suitable for use in the manufacture of Portland cement was not locatable under the mining laws. *Bettancourt v. Fitzgerald*, 40 LD 620 (1912). In reaching this conclusion, the decision emphasized the following: the widespread distribution of the clay, the small element of cost of the manufactured product in relation to the value of the clay in its natural state in place, the fact the practicable availability of the clay as a cement ingredient was "so largely dependent upon the existence of certain extremely favorable artificial as well as natural conditions, it cannot properly be regarded in and of itself as a valuable mineral deposit within the meaning of the mining laws" (at 621). Where clay had been sold to a plaster contractor but evidence showed it was not naturally absorbent and probably could not be used as a catalytic agent, it was deemed common clay not locatable under the mining laws. *U.S. v. Shannon*, 70 ID 136 (1963). Likewise, in *U.S. v. O'Callaghan*, 8 IBLA 324, 79 ID 689 (1972), clay sold as an additive in cattle feed, but which did not possess characteristics distinguishing it from common clays, was not locatable. The case was affirmed in *O'Callaghan v. Morton*, Civil No. 73-129-S (S.D. Cal., May 13, 1974), but remanded in part to determine the validity of one claim based on sand and gravel deposits.

2. *Clays held to be locatable:*

On the other hand, the exceptional clay deposits which have been recognized as locatable under the mining laws are: *Fred B. Ortman*, 52 LD 467, 469 (1928), a "colloidal clay, which has value for different purposes, principally the filtering of oils in the process of refining" (however, the nature of the deposit was not in issue in that case); *U.S. v. Barngrover (On Rehearing*), 57 ID 533, 534 (1942), "one of the better, if not the best, grade of rotary mud used in the oil fields of Southern California." In *U.S. v. Gunn*, 7 IBLA 237, 79 ID 588 (1972), a deposit of bentonite clay did not meet commercial standards for certain uses for which some other bentonite clays are suitable; namely, for a bleaching clay for decolorization of crude oils, or as a rotary drilling mud. The latter is the use recognized in *Barngrover* and the former is similar to that in *Ortman*. Because the bentonite in *Gunn* was not of a quality and quantity which could be marketed profitably for commercial purposes for which common clay cannot be sold, the clay was not locatable.

3. *The Mattey Case:*

One of the leading cases concerning the locatability of clay, *U.S. v. Mattey*, 67 ID 63 (1960), recognized that deposits of clay of an exceptional nature may be

locatable. However, the Department pointed out that the only unusual qualities attributed to the deposit in that case were certain "impurities" or flux materials useful in the manufacture of vitrified sewer pipe. The decision noted that sewer pipe, brick and drain tile are usually classified as heavy clay products and clay deposits usable only for such purposes are generally not locatable. However, it noted (at 68):

> ... if the deposit is in itself of the type of clay not subject to location under mining laws, the fact that it is used in combination with purer clays cannot remove it from the proscribed category. In other words, the use to which a common clay is put cannot make the lands in which it is found subject to location under the mining laws, if the use is not dependent upon any unusual characteristics of the clay itself. It would be different if a clay with unusual characteristics which could be used in the manufacture of ordinary brick were used to ma[k]e a product for which its unusual characteristics were essential....

4. *Congressional Policy on Clay:*

We turn now to the manifested Congressional policy. By section 1 of the Materials Act of July 3, 1947, as amended 30 USC ' 601 (1970), Congress has authorized the disposal of mineral materials "including but not limited to common varieties of sand, gravel,... clay" unless disposal is not otherwise expressly authorized by law, including the mining laws of the United States. In *U.S. v. Mattey, supra* at 65-66, the legislative history of this bill was quoted in part where the Under Secretary of this Department reported on the bill, indicating it would apply to:

> 2. Sand, stone, and gravel not of such quality and quantity as to be subject to the mining laws but which are desired by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements....
>
> 4. Common earth to be used for road fills, earth dams, stock-watering reservoirs and similar uses.
>
> 5. Clay to be used for the manufacture of bricks, tile, pottery, and similar products. (S. Rept. No. 204, 80th Cong., 1st Sess.)

This understanding of Congress concerning the nonlocatability of common earth and of clay used for the enumerated purposes was undoubtedly the reason Congress saw no need to list either clay or common earth as one of the "common varieties" of materials excluded from the mining laws by section 3 of the Surface Resources Act of July 23, 1955, 30 USC ' 611 (1970), because common earth and

common clay were never considered locatable under the mining laws.

5. *No Advantage for Clay that Meets New Specifications:*

The crucial issues this appeal raises are whether the changes in the brick and other clay-product manufacturing industry warrant a change in the interpretation of the mining laws for clay deposits. In other words, does the fact a given clay deposit may meet the particular specifications of a large brick and tile manufacturer, whereas many other available deposits would not meet those specifications, impel a determination that the desired clay deposit should be considered a valuable mineral deposit under the mining laws? Or does the fact a particular deposit may be of a better quality for the manufacture of certain other clay products, as possibly pottery, earthenware, or stoneware, than other widespread clay deposits, impel such a conclusion? We must answer no to these questions.

6. *Common Clay:*

In referring to "common clay" which is not locatable under the mining laws, the precedents demonstrate that clay used only for structural brick, tile, and other heavy clay products, and pressed or face brick, falls within that classification. They also demonstrate that clay deposits useful only for pottery, earthenware, or stoneware which cannot meet the refractory and other quality standards for high-grade ceramic products, such as china, come within that classification.

7. *Exceptional Clay:*

The exceptional qualities that have been recognized as taking a deposit outside the classification of a common or ordinary clay within the meaning of the mining laws are, as mentioned, clays having a sufficiently high refractoriness to meet the standards for products requiring such special qualities. In addition, certain clays with special characteristics making them useful for particular uses, such as in the oil and oil well drilling industries, outside the manufacture of general clay-products, have been considered locatable.

**The Kaycee Bentonite Case**

In *U.S. v. Kaycee Bentonite Corp.*, 64 IBLA 186 (1982), the Board upheld a decision of Administrative Law Judge Mesch declaring five mining claims null and void and 125 mining claims valid because the claims contain deposits of exceptional clay. Judge Mesch held that if a claimant can establish that a deposit of bentonite is marketable for purposes for which common clay cannot be used, the deposit is locatable. Bentonite, the "exceptional clay" in this case is used as a binder in pelletizing taconite. Approximately eighty percent of the steel produced in the United States is made from pellets of taconite.

Between 1946 and 1969, the Bureau of Land Management issued mineral patents for 76,237 acres containing bentonite. In many cases, the only test of locatability was the "taste test" (64 IBLA at 198). However, as early as 1961 many managers in the BLM began to question the locatability of bentonite.

Because bentonite contains sodium cations exchangeable with calcium cations, it was also suggested that the sodium bentonites be leased under the provisions of the Mineral Leasing Act of 1920 (30 USC 261-262) which authorizes that silicates of sodium may be leased. In 1972, the Office of the Solicitor issued a memorandum to the Director, BLM, which advised that at some future time certain bentonites may be classified as silicates of sodium. However, any claim located for bentonite during the interim could still be valid. Applicability of the Mineral Leasing Act to Deposits of Bentonite, 79 ID 642 (1972). In *U.S. v. Union Carbide Corp*., 84 ID 309 (1977), the Board held that the presence of the sodium cation in a deposit of zeolite did not make that material leasable because the sodium ion was an exchangeable cation and was not essential to the nature of the mineral. According to the Director of the U.S. Geological Survey, this is also true of bentonite.

Several pertinent quotations from Kaycee Bentonite are organized under descriptive subheadings below:

1. *Common clay versus common varieties* (64 IBLA at 205-206):

> Accordingly, in *Peck* the Board recognized a distinction between the test used to determine common clay and the test used to determine common varieties of sand and gravel. This distinction arises from the fact that a century of precedent holds that common clay is not subject to location and constitutes a body of law historically distinct from law relating to other common minerals, the status of which has varied from time to time. This fact prompted the Board to observe that "although many of the criteria in determining what constitutes a common variety of material under section 3 of the Surface Resources Act may be applicable in determining whether a deposit of clay is locatable generally, the basis for determination should not be confused." 29 IBLA at 375, 84 ID at 146. It is quite plain that the author of *Peck* consciously confined her authority to the body of law regarding clay and disregarded the body of law involving other common minerals, although it is not clear how this distinction affected the outcome of the case. However, the distinction is not so great as the parties and the Judge would have us believe, and as we shall demonstrate, it has no effect here.

2. *Even if blending is required, bentonite is still an exceptional clay* (64 IBLA at 217):

> The evidence establishes that the amenability of bentonite to blending or treatment with additives distinguishes it from common clay.

3. *Bentonite must meet the marketability test* (64 IBLA at 217):

Judge Mesch held these claims invalid because he found that the claimants had failed to show that the material can be mined, removed, and marketed at a profit. *See U.S. v. Coleman*, 390 US 599 (1968). To be found valid a mining claim for any mineral must meet this test.

4. *Comparison of undeveloped bentonite deposits with other bentonite deposits which are profitably mined* (64 IBLA at 223):

As for appellants' contention that Judge Mesch failed to take into account the fact that bentonite of similar quality and quantity was being mined and marketed at a profit by Kaycee Bentonite at a distance of 80 miles from the bentonite plant when the bentonite on the claims of these contestees is only 45 miles away, there is no reason that the Judge should have done so. Appellants did not establish that their bentonite was of similar quality as that being mined by Kaycee Bentonite. Moreover, the validity of their claims must be established by a showing that the material on those claims, not some other claim, can be mined, removed, and marketed at a profit. Deposits which no prudent man would develop because they cannot be mined, removed, or marketed at a profit are not subject to location under the mining laws. Even if they could establish that the bentonite was of the same quality as other deposits sold for pelletizing taconite, they would have to show that their deposit could be marketed for this purpose rather than for a purpose for which common clay could also be used.

5. *Widespread minerals may be locatable:*

Judge Mesch held that the fact that bentonite may be of widespread occurrence has no bearing on the issue of its locatability.

To support its contention that bentonite is widespread, BLM conducted a resource study which concluded that in Wyoming there are 963 million tons of bentonite resources. Another exhibit asserts that there are 1.82 billion metric tones (1 tonne equals 2,204 pounds) of identified bentonite resources in the United States, although it does not distinguish between swelling and nonswelling bentonites.

Some locatable minerals may be more abundant than bentonite. In *U.S. v. Oneida Perlite Corp*., 57 IBLA 167, 88 ID 772 (1981), 15 claims covering almost 2,000 acres had been located for the mineral perlite which is not a common variety mineral. The estimated total reserves on the claims were at 200-300 million tons. The Board estimated that the reserves on those claims alone could have satisfied United States production for some 332 to 498 years, including total domestic consumption and total exports. Nevertheless, the total *reserves* of perlite in one contest proceeding involving a single patent applicant bear a greater

relationship to the national demand for that mineral than the estimated resources of bentonite in the State of Wyoming. Other minerals which are universally recognized as locatable are also widespread and abundant, such as silica sand and gypsum.

**Two-Fold Test to Determine if Zeolites and Other Minerals are Locatable or Leasable**

In *U. S. V. Union Carbide Corp*., 31 IBLA 72, 84 ID 310, 311-312 (1977), the Board considered the question of whether a deposit of zeolites is locatable under the general mining laws (30 USC 22 *et seq*.) or is subject to leasing under the provisions of the Mineral Leasing Act of 1920 (30 USC 181 *et seq*.). The Board held in this case that the particular zeolite deposit in question is locatable; however, another deposit of zeolites with a different composition might conceivably be leasable. The Board gave a two-fold test to determine whether or not a deposit is locatable or leasable. A mineral is leasable if (1) "the sodium must be present in sufficient quantity so as to be commercially valuable;" and (2) "if the presence of sodium or any other material listed in the Mineral Leasing Acts is essential to the existence of the mineral." The significance of this two-fold test is that it can be applied to any mineral that contains "chlorides, sulphates, carbonates, borates, silicates or nitrates of sodium..." (30 USC 261) to determine if it is locatable or leasable. Pertinent portions of *U.S. v. Union Carbide Corp., supra* at 310-312 are set forth below:

> We think this case points very clearly to the peril of using terminological categorization as a facet of adjudication. The appellant seems to be directing its effort to naming the mineral substances as sodium zeolite; the appellee seems to be devoted to calling the substance a calcium sodium alumino-silicate. The mineral deposit, however, remains structurally the same no matter how it is designated. The ultimate question is whether this mineral on the claims in issue is a type of deposit containing sodium that Congress intended should be removed from the workings of the general mining laws, and made subject to disposition only under the mineral leasing statutes.
>
> It should first be noted that all substances that contain traces of sodium or other leasable minerals are not necessarily subject to the Mineral Leasing Act of 1920.
>
> The relevant statute speaks of "chlorides, sulphates, carbonates, borates, silicates or nitrates of sodium...," 30 USC ' 261 (1970). For the purposes of this appeal we are concerned with the meaning of the term "silicates ... of sodium" as used in the Act.
>
> Zeolites are a class of hydrated silicates of aluminum and either calcium or sodium or both. *Id*. at 1252. Zeolites are clearly silicates. But the question is whether the casual or fortuitous presence of sodium within the molecular structure causes the zeolites in the instant case to be classified as "silicates of sodium." We think it does not.
>
> We believe that a zeolite could properly be classified as silicate of sodium, as contemplated by the Mineral Leasing Act, *supra*, if either of two contingencies occur. First, the sodium must be present in sufficient quantity so as to be commercially valuable. An analogy can be drawn with the situation that may occur with granite deposits.

Secondly, the molecular structure of the mineral must be ascertained in order to determine whether the mineral is locatable under the general mining laws, or is disposable only by lease under the Mineral Leasing Acts. If the presence of sodium or any other material listed in the Mineral Leasing Acts is essential to the existence of the mineral, that mineral is leasable and not locatable. Thus, as the decision in *Wolf Joint Ventures, supra*, found dawsonite, while admittedly a double salt with aluminum present, requires sodium carbonate for its molecular structure. Regardless of whether the sodium was commercially recoverable, dawsonite would be subject to the provisions of the Mineral Leasing Act. The structure of zeolite on the other hand has no molecular requirement for sodium, but merely for a cation. The molecular structure of zeolite does not vary essentially, dependent upon which cation is present. It is structurally immaterial whether the cation be calcium, sodium, potassium, or magnesium. Therefore, it cannot be said that the presence of sodium is essential to the existence of a zeolite deposit.

## MINERAL EXAMINATIONS

### Objectives of the Examination

The mineral examiner's field examination represents the first step in the validity determination. The validity determination, as far as the mineral examiner is concerned, is a mineral property evaluation or feasibility study to determine if a mineral deposit is capable of sustaining a profitable mining operation. The mineral examiner conducts the study somewhat similar to the way a mining company might make an evaluation of the property, utilizing modern geologic and engineering principles and procedures. Of course, the mineral examiner is not allowed to drill or excavate so as to uncover the deposit as this is considered exploration.

Although the test of discovery will obviously vary slightly among mineral examiners most of them probably consider that a discovery has occurred if the mining claim has a reasonable prospect of sustaining a commercial mining operation. This may partially explain why most contest proceedings involve prospectors or laymen and not successful mining companies with operating mines.

In the case of a validity determination, if the mineral examiner verifies that a discovery exists within the boundary lines of the mining claim, the claimant retains full possessory title; and, in the case of a patent examination, if all other aspects of the case are in order, a patent will issue. However, if the mineral examiner should determine that a discovery does not exist within the limits of the mining claim, contest proceedings are initiated with subsequent Departmental hearings.

### Scope of the Examination

It is important that the claimant understands that the Government is not required to make an exhaustive study of the mineral deposit; the law merely requires that the examiner verify and sample the discovery. In *U.S. v. Swain*, A-30926 (December 30, 1968), the Department said:

> It is not the duty of a Government mineral examiner to prove affirmatively that the land embraced in a mining claim is nonmineral in character or that a discovery of a valuable mineral deposit has not been made, and the examiner is under no obligation to make such an exhaustive search of the land and test of the minerals as would normally be done by a prospector. Rather, the Government examiner's function is one of verifying, if possible, the claimed discovery.

In *U.S. v. Frisco & Young*, 32 IBLA 248, 252 (1977), the Board said:

> The mining laws do not require a government mineral examiner to make a complete evaluation of a mining claim, but merely to take samples from the claim and to have those samples evaluated. Mr. Lancaster's proposed testimony concerning the proper method to evaluate a mining claim would have been irrelevant to the issues at hand.

In a recent District Court case, *Russell v. Peterson*, 498 F.Supp. 8 (DC Idaho 1980), the Court stated:

> The government's examiners were not obligated to do more in attempting to verify plaintiff's claimed discovery. Furthermore, when a mining claimant charges the government with failure to examine a particular working, it is incumbent upon the claimant to produce evidence that mineralization of significant value his been exposed at that location. The record supports the conclusion that plaintiff failed to make such a showing.

**Notification of Claimant**

Although it has long been the policy of the Forest Service and the BLM to notify a claimant of a pending field examination, failure to make such notification does not disqualify the Government's evidence. The purpose of the notification is to provide the claimant with an opportunity to show the mineral examiner certain aspects of the deposit that might benefit the claimant, particularly the discovery points that should be sampled. At the same time the claimant has an opportunity to observe the examination procedure in order to verify that the examination is properly conducted. In *U.S. v. Grigg*, 8 IBLA 331 (1972), the Board said:

> Failure of a mineral examiner to notify a claimant of a field examination is not a sufficient reason in a subsequent contest against mining claims to disqualify the Government's evidence of the examination and sampling, especially where the field examination was of sites previously identified in joint examinations conducted with the claimant.

**Mineral Examiner Must Examine Exposures of Significance**

In *United States v. Waters et al.*, 146 IBLA 172, 177, n. 7 (1998), the Board said that A[w]e have noted that the credibility of the contestant=s mineral examiner may be impaired by the failure to look for and examine reported exposures of significance. *United States v. Highsmith*, 137 IBLA 262 (1996), *appealed sub nom., Hjelvik et al. v. Babbit*, Civ. No. 97-024-BLG (D. Mont. Feb. 28, 1997).@

**Refusal to Allow Examination**

A mineral claimant has no right to prevent the Government mineral examiner from inspecting a claim. lt is the obligation of the claimant to keep his discovery points open at all times so that, if required, the discovery can be verified. For example, it was held in *U.S. v. Gayanich*, 36 IBLA 111, 117 (1978) that Federal employees may examine a claim without a search warrant. In *U.S. v. Knecht*, 39 IBLA 8, 11-12 (1979) the Board said:

> It is incumbent upon the mining claimant to keep his discovery points available for inspection by Government mineral examiners. If there were any deficiency in the sampling used by FS to show the absence of mineral values, which we do not find, it resulted from appellant's repeated unjustified refusal to allow inspectors to remove samples from the claim. Where a claimant fails to keep his discovery points open and available for sampling, he assumes the risk that the mineral examiner will be unable to verify the discovery of the alleged mineral deposit.
>
> Appellant challenges the right of FS to enter the claim and remove samples. The lands within a mining claim are Federal lands unless and until they are patented, and the Government retains the legal title and the right to enter these lands at any time without search warrants pursuant to its power and obligation to administer the lands according to the terms of the mining laws. This right includes the right to remove mineral samples from the claim.

Furthermore, if 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 alleged discovery of a valuable mineral deposit. *U.S. v. Russell*, 40 IBLA 309 (1979), *aff=d sub nom Russell v. Peterson*, 498 F.Supp. 8 (1980.

**Placer Claims Open to Bedrock**

Although many placer claim owners recognize that the highest values are generally found near bedrock, they are not aware that if the examiner is to sample the best values at bedrock, the placer deposit must be open by trenching or some other method to allow access to the examiner and physically expose the discovery. In *U.S. v. Horn*, 16 IBLA 214 (1974), the Board said:

> Appellants also argue that the examiner did not dig the necessary four or five feet to reach bedrock, where, they say, he would have encountered much higher values. In seeking to determine the validity of a mining claim government mineral examiners need only to

examine the claim to verify whether the claimant has made a discovery; they are not required to perform discovery work, to explore or sample beyond the claimant's working, or to rehabilitate alleged discovery cuts in order to establish the Government's prima facie case.

This principle also applies to an alleged discovery in an inaccessible river bottom. In *U.S. v. McClurg*, 31 IBLA 12 (1977), the Board held:

> Appellant Sebring's argument that the Government's witness failed to take her samples from the River is thus without merit. Geologist Hankins correctly described her duty as selecting a representative sample, not performing discovery work. She stated that she felt the samples she took were sufficient to determine what values were on the claims. This included a sample on the east side of the river which would include any material deposited by the river. Sebring has introduced no evidence showing the quantity and quality of any gold or other mineral deposits in the riverbed.

In *U.S. v. Lambeth*, 37 IBLA 107, 114 (1978), the claimant maintained that the Government examiner sampled false bedrock and that the discovery exists below on the real bedrock. In that case the Board said:

> Similarly, appellants' claims of high-grade gravels lying just below a "*false bedrock*" are of no probative value, absent affirmative proof of such deposits. As the decision below properly held, the Government's mineral examiner is under no obligation to perform discovery work for mining claimants or to explore beyond the current workings of a claim.

**Charge of Lack of Good Faith**

Although it is common for the Government to include a charge indicating the claim is not held in good faith, the applicable Interior and Federal court decisions generally require that the evidence for such a charge must be clear and convincing. In *U.S. v. Dillman*, 36 IBLA 358, 360 (1978), the Board said:

> We disagree, however, with Judge Clarke's finding that the Government has sustained the charge that "the land embraced within the claim is not held in good faith for mining purposes." With due deference to the Judge's opportunity to weigh the demeanor of the various witnesses who appeared at the hearing, the record, itself, does not satisfactorily support his conclusion that the mining claims were held by appellant in bad faith.
>
> It is clear that appellant misapprehended the requirements of the mining law as they relate to discovery. It is similarly manifest that appellant, at least initially, attempted to obstruct the mineral examiner in his attempts to simple the claims. Nevertheless, at the trial appellant consistently maintained that he intended to develop the minerals which he thought were embraced within the claims. Moreover, his uncontradicted testimony that he has opened two tunnels, begun work on a third, purchased various equipment, and had

expended approximately 6 months of labor on the claims provide independent corroboration of his intent.

In order to support a finding that a mining claim is not held in good faith for mining purposes the evidence should be clear.

In *U.S. v. Prowell*, 52 IBLA 256 (1981), the Board discussed good faith in a situation where the claimant relocates a claim previously invalidated for one type of mineral in favor of another mineral. The Board stated:

> We are aware that these new claims are merely relocations of the claims which the Board held were invalid in *U.S. v. Bienick*, 14 IBLA 290 (1974). These former claims, however, were primarily based on deposits of gravel and magnetite, whereas the present ones were mainly based on gold deposits allegedly located in the stream bed. While we do not find present support for a finding of bad faith, we wish to caution appellants that future locations covering the same ground, absent a showing of values substantially superior to those heretofore presented, might well support a finding that the claims were not located or held in good faith for mining purposes.

In *U.S. v. Osborne (Supp on Judicial Remand*), 28 IBLA 43 (1976), the Board suggested that while the existence of other land values does not qualify a locator's rights under the mining law, if he has a valid claim, evidence of such other values may be considered in assessing the weight and credibility to be accorded the locator's testimony in determining whether a discovery has been made. Evidence of other land values may also be a factor in evaluating his *bona fide* intention to develop a mining operation.

Other evidence of bad faith might be when a claimant makes improvements on a claim unrelated to mining. In *U.S. v. Knecht*, 39 1BLA 8 (1979), the Board said:

> We also affirm Judge Ratzman's findings that the claim was not being held by appellant in good faith for mining purposes, and that it is excessive in area in that it is not limited to 20 acres. There is evidence in the record showing that appellant had set up a saw mill and cut pine and oak lumber. He used the pine to build a cabin on the claim and stacked the oak planks. There was very little evidence of any actual mining work on the claim.

**Validity Examinations in the Park System**

Section 6 of the Parks Act, 16 USC 1905 (1976), requires the Secretary of the Interior to determine the validity of all claims in the National Park System within a certain specified time period. However, in *U.S. v. Alaska Limestone Corp*., 66 IBLA 316, 326 (1982), the Board held that failure of the Government to complete such validity examinations within the statutory period did not preclude the validity examination at a later date. ln this case the Board said:

> Appellant argues that section 6 of the Mining in the Parks Act, 16 USC ' 1905 (1976), effectively removed the Department's jurisdiction to consider the validity of these claims.

In this section, Congress directed the Secretary to determine within 2 years after September 28, 1976, the validity of unpatented mining claims in Mount McKinley National Park, among others, and to submit to Congress recommendations as to whether any valid claims should be acquired by the United States. Since the present contest complaint was not filed until after this date, appellant maintains, the Department no longer has authority to determine the validity of its claims.

The purpose of this section was to require the Secretary to advise Congress of any valid claims in the park in order to allow it to arrange to provide just compensation to the holders for the loss of their interests. H. R. Rep. No. 94-1428, 94th Cong., 2d Sess., *reprinted in* (1976) U.S. Code Cong. & Ad. News 2490. Although the Secretary did not report to Congress that appellant's claims were valid, this action could not be regarded as a determination that the claims were invalid, since mining claims may only properly be invalidated following an administrative hearing. *Cameron v. U.S.*, 252 US 450, 459-60 (1920). Moreover, "so long as the legal title remains in the Government (the Department) does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it is found invalid to declare it null and void." *Id*. at 460.

**Examiners Mistakes**

Even though a Government mineral examiner errors in the examination procedure or evaluation, the claimant cannot take advantage of such error. And under certain circumstances the claim may be reexamined. In *U.S. v. Bunkowski*, 79 ID 43, 52 (1972), the Board said:

The Government's examiner, laboring under a misapprehension that gypsite used for agricultural purposes was not a locatable mineral, made a limited examination of the claims. After satisfying himself that there was some gypsite on all the claims, he did not take any samples from five of them. Before the Secretary disposes of land under the mining law he must be satisfied that the requirements of the law have been met. *U.S. v. New Jersey Zinc Company*, 74 ID 191, 206 (1967). One of the essential elements of the process by which the Secretary reaches his decision is an examination of the claim by Government mineral examiner. For this examination to be useful, the examiner must be apprised of the legal basis on which the examination is made. Now that the issue as to locatability of gypsite has been resolved, the claims should be examined as they would have been if the examiner had been investigating a claim located for a deposit whose locatability was not in question.

**Qualification of Examiner**

In mining claim contests, the qualifications and competence of a Government examiner to investigate a specific type of mineral deposit are commonly challenged. Because there are hundreds if not thousands of different types of deposits and (or) mineral commodities that any one examiner may be responsible for, it is quite likely that even the most experienced examiner will have experience with only a small percent of the total types. However, even though possessing a lack of specific experience, general education and experience coupled with diligent

preparation on the deposit in question are sufficient to qualify an examiner to establish a *prima facie* case of invalidity. In *U.S. v. Rouse*, 56 IBLA 36, 39 (1981), the Board said:

> Appellant's first argument is a challenge to the competence of the Government's mineral examiner. The Government examiner graduated from the University of South Dakota with a major in geology. In that field he worked for the Corps of Engineers and the Atomic Energy Commission. His experience in examining mining claims for both BLM and the Department of Agriculture dates from 1957. Appellant asserts that the examiner's lack of experience with asbestos prevented the establishment of a *prima facie* case. The Government examiner's testimony is detailed on pages 2-4 of the decision. His answers to technical queries on cross-examination reveal a considerable knowledge, as well as a diligent preparedness, on the subject of asbestos mining and marketing. Appellant's claim that no *prima facie* case was established because of the examiner's inexperience is clearly unfounded.

In *U.S. v. Harling*, 32 IBLA 31 (1977), the Board responded to the contestees' assertion that the examiner lacked work experience as a gold placer miner:

> We disagree with contestees' assertion that the Mineral Examiner is not qualified as an expert to testify about gold placer mining. The Mineral Examiner had a sufficient educational background and work experience to testify about gold placer mining. He had examined mining claims for 14 years, his lack of work experience as a gold placer miner does not detract from his expertness.
>
> The law does not require an expert witness to be the best witness available, nor does the law prohibit a generalist in a field from testifying where an expert is available. That a witness is not an expert in a particular area goes to the weight of the testimony, not its admissibility. *Wigmore on Evidence* (3rd ed.), ' 569.

In *U.S. v. Zweifel*, 11 IBLA 89 (1973), the claimant asserted that Government witnesses who examined the claims failed to follow established guidelines for field examination of unpatented mining claims. On this issue the Board said:

> Appellants overlook the fact that such standards are merely general guidelines and do not have the force and effect of statutes or regulations. There is no requirement that such guidelines be followed. Whether or not they were followed is not the essential issue. It is, rather, whether or not the Government established a prima facie case that the claims are invalid.

**Poor Examination Procedure**

In *United States v. Anderson*, 83 IBLA 170 (1984), the Forest Service examiner investigated a gold placer claim in midwinter without giving advance notice to the claimant. Although BLM Manual 3920.14 requires the mineral claimant to be contacted in advance of the examinations, "procedural guidelines of the BLM Manual do not regulate the conduct of the

Forest Service." *Id.* at 181. Also, the claimant contended that the examiner should have sampled by dredging rather than take two pan samples. The Board was concerned because "the mineral examination was made without appellant's knowledge and participation, and at a time of the year when a suction dredge could not have been operated on the claim...."

**Handbook for Mineral Examiners**

The *Handbook for Mineral Examiners* used by mineral examiners in the Forest Service and the Bureau of Land Management for guidance in conducting validity examinations on unpatented mining claims has been extensively revised. This new edition was written by Roger A. Haskins and Eugene Carlat of the Bureau of Land Management and Frederic B. Mullin of the U.S. Forest Service. The Bureau of Land Management published the Handbook in December of 1984, and revised it on March 17, 1989.

**Interagency Agreement Between the BLM and Park Service**

On May 1, 1985, an Interagency Agreement between the Bureau of Land Management and the National Park Service was signed. This agreement formalized the current BLM/NPS working relationship where the validity of mining claims in the National Park System must be determined. All BLM regulations, instructions, manuals and handbooks shall be followed in mining claim examination and preparation of mineral reports. Mineral examiners employed by the Park Service may conduct mineral examinations and prepare mineral reports. However, all such reports must be reviewed and approved by the BLM to see that they are technically correct. In the special case of patent applications, BLM conducts the validity examination and prepares the mineral report with the participation of the Park Service. *Information Bulletin No.* 85-251 (June 10, 1985).

On October 10, 1990, the Bureau of Land Management and the National Park Service revised the Interagency Agreement for processing mineral patent applications and validity examinations on mining claims.

**Validity Examinations in the Park System**

In *Alaska Limestone Corp. v. Hodel*, 614 F.Supp. 642 (D. Alaska 1985), the Court affirmed the IBLA decision and held that Congress did not intend the National Parks Act to impliedly repeal the Secretary's authority to contest mining claims in national parks.

**Role and Relevancy of Government Mineral Reports**

In a concurring opinion in *United States v. Aiken Products (On Reconsideration)*, 102 IBLA 70 (1988), Judge Burski described the role and relevancy of government mineral reports (*Id.* at 83):

> But, regardless of the impetus for its preparation, a mineral report, just like any other internal BLM report, has no independent evidentiary weight nor is it probative as to any issue of law or fact "until such time as the pertinent facts are admitted by the

> applicant or the report is admitted as evidence at a hearing initiated by a contest complaint." *Citations Omitted*. The sole impact of the report is to inform the authorized officer as to mineral values so that he might decide, in the exercise of his delegated authority, whether or not a contest complaint should issue. Once that decision has been made, unless the report is subsequently admitted into evidence, it has no relevancy whatsoever to the contest proceedings, and, indeed, is not even part of the record upon which the determination of the claim's validity will be made.

A mineral report is generally the factual basis for a management decision. Presumably, the better the report, the better the decision.

**Mineral Reports May Be Confidential**

Reports of examinations of mining claims by Government examiners are generally considered as confidential, intradepartmental communications and will not be made available to mining claimants; however, in exceptional cases where there appears to be no obvious detriment to the public interest, the reports will be made available to the mining claimants. *Herbert H. Blakemore*, 72 ID 248 (1965). In *Frank Winegar*, 74 ID 161, A:30804 (June 12, 1967), the Department said that although mineral reports are generally considered confidential intradepartmental communications which are not to be made available to mining claimants, disclosure of the factual information in such reports will be permitted.

**Reports as Evidence**

In order for a mineral report to be given much weight as evidence, the author must be available for cross examination by the other side. In *U.S. v. Williams*, 65 IBLA 346, 350 (1982), the Board said:

> On June 6, 1980, after the hearing, contestees filed with Judge Clarke a brief containing additional evidence, to-wit, a report prepared by one David Bero, assertedly a geologist. The report included Bero's description of a 3-hour test sampling allegedly performed at the claim by Bero, Williams, his wife, and one Kenneth O'Byrne, on the morning of May 31, 1980. Since this report was not subject to cross-examination by the contestant, it has little evidentiary value.

**Prima Facie Case of No discovery Where Claims Are Inaccessible**

In *United States v. Rukke*, 32 IBLA 155 (1977), *aff'd, Rukke v. United States*, Civ. No. 77-206T (W.D. Wash. June 23, 1981). In the Rukke case, the mineral examiner testified that he was unable to examine 7 of the 40 claims because they were inaccessible due to snow and glacial thawing causing rock slides. The mineral examiner also testified that he had observed these claims from a helicopter and when doing so observed no evidence of mining activity. *Id.* at 163. The Board found that there was sufficient basis for forming an opinion that no discovery had been made on the inaccessible mining claims. *Id.* at 164.

In *United States v. Parker*, 91 I.D. 271, 276 (1984), the mineral examiner was unable to examine several claims because of the presence of snow and ice. The Board held that the Government established a *prima facie* case that these snow-covered claims were not supported by a discovery. However, the Board also cautioned "that this case is weak and can be overcome with minimal evidence of the existence of mineral on the claims. *Id.* at 276.

**Mineral Examiner May Rely on Statements of Claimant**

In *U.S. v. Copple*, 81 IBLA 109 (1984), the Board held that where the "Government mineral examiner testifies that a mineral claimant or his representative has stated that certain claims are not supported by a discovery, such testimony, unless impeached in cross-examination, is sufficient to constitute a prima facie case that claims are invalid." *Id* at 120. The Board also held at 120:

> ... if a Government mineral examiner is unjustified in relying on the statements of mineral claimants and their representatives, it will be necessary not only to sample every claim, but to present evidence relating to every claim at the hearing. This would needlessly extend contest hearings, result in increased costs to both the claimant and the Government, and, in most cases, be without benefit for either party.

## RESERVES AND GEOLOGICAL INFERENCE

**Deposit of Sufficient Size and Value Need Not Be Blocked Out**

In *United States v. Clouser*, 144 IBLA 110, 113 (1998), the Board restated the long-established principle that a Adeposit of sufficient size and value need not be actually >blocked out.= *Citations omitted*. Nor must the deposit be actually mined and milled at a profit or the profitability of mining and milling that deposit be guaranteed. *Citations omitted*.@

**Proof of Quantity Is Crucial**

In *United States v. Bagwell*, 143 IBLA 375 (1998), the Board discussed the quantity of reserves necessary to establish validity in a slightly different context than that discussed in *Clouser, supra* at 113. The quantity of ore discussed in *Bagwell* relates to the principle that to infer the existence of ore beyond the exposed sample sites, you cannot base such inference on a few isolated high values; but instead, the high values must persist a sufficient distance along a vein of continuous mineralization. The Board said at 391:

> Proof of quantity is crucial to establish the existence of a valuable mineral deposit. *Citation omitted*. Isolated showings of high values of gold will not alone suffice to demonstrate the existence of a valuable mineral deposit. * * * Rather, there must be evidence that the high values persist for a sufficient distance along the vein that there may be said to be a continuous mineralization, the quantity of which can be reasonably determined by standard geologic means. *Citations omitted*.

**Minimum Reserves or Value**

In *Sedgwick v. Parker*, 27 IBLA 256, 258 (1976), the Board adopted a decision of Administrative Law Judge Robert W. Mesch, which held that a 10-ton deposit containing gold and other valuable minerals was not sufficient to validate a mining claim where the expected total recovery from mining the deposit was on the order of $440 to $540. Judge Mesch said that there must be a Asubstantial assurance that there will be a compensating public gain in the form of an increased supply of available mineral resources. *Id.* at 266. *Also see United States v. Clouser*, 144 IBLA 110 (1998), f.n. 33.

**Doctrine of Geological Inference**

In *United States v. Clouser*, 140 IBLA 110, 115 (1998), the Board describes the Adoctrine of geologic inference@ at 115:

> Claimants rely heavily on the doctrine of geologic inference in support of their assertion of a discovery. That doctrine permits the dimensions of a mineral deposit to be defined by extrapolating, in accordance with sound geologic principles, from surface and underground *exposures* of the deposit. *Citations omitted*. Thus, the various dimensions of an ore body may be reasonably inferred based on factors such as the similarity of geologic formations on a particular claim and in the surrounding area, as evidenced in nearby workings. *Citation omitted*.

**Excess Reserves or Unmarketable Resources**

In response to a BLM request for guidance on whether a quantity of mineral that is not presently marketable should be allowed to support a mineral patent, the Solicitor issued an opinion (*Excess Reserves Under the Mining Law*, M-36984 (March 22, 1996)) in which he held:

> ...I hold that whether excess reserves exist is a fundamental element in the marketability test and must be considered in a mineral report. Excess reserves, by definition, are not presently marketable and, therefore, cannot support a valid mining claim.

The Solicitor also specified the circumstances where it is appropriate for BLM to address excess reserves:

> For either of the following two reasons, the *Baker* decision does not preclude the BLM from continuing to examine whether the presence of Aexcess reserves@ affects the validity of mining claims. First, by its own terms *Baker*=s reach is confined to situations where BLM has conceded that a claim is valid, but refuses to patent the claim on the ground that excess reserves are present. This does not describe the usual case. So long as BLM limits its inquiry into excess reserves to situations where it has not found a discovery, therefore, it can apply the excess reserves principle and still meet the requirements of *Baker*.

In response to the solicitors suggestion that BLM develop Aguidance for mineral examinations where an analysis of present marketability could be affected by the presence of excess reserves,@ the BLM issued AUnmarketable Resources (AExcess Reserves@) Policy@ under *Instruction Memorandum* No. 98-167 (September 14, 1998). The policy recommends that mineral examiners refer to the concept of Aexcess reserves@ by the more appropriate and descriptive term Aunmarketable resources;@ and it is limited to industrial minerals such as Alimestone, pumice, gypsum, perlite, cinders, sand and gravel.@ Important aspects of the Instruction Memorandum are quoted below:

> In order to determine whether a mining claimant has unmarketable resources, you should first determine the extent of the industrial mineral deposit, the available market for the particular mineral, and the number of years the deposit might supply that market. Because every mineral deposit and mining operation differs, it is impossible to designate a standard method for making these determinations. Instead, the mineral examiner must make them on a case-by-case basis.
>
> Unmarketable resources may be viewed as a facet of the Amineral in character@ concept. If the claimant has located mining claims containing industrial minerals which cannot be marketed and sold in the reasonably foreseeable future, the unmarketable portion of the deposit is not a valuable mineral deposit within the context of the mining law and the land on which that unmarketable deposit is found is not mineral in character. BLM must apply this concept to each ten (10) acres of placer claims and to lode claims in their entirety, and in doing so must consider the total resource base of the mine. *United States v. Oneida Perlite Corp*., 88 I.D. at 788.
>
> Therefore in conducting validity examinations of mining claims which have unmarketable quantities of a given industrial mineral, you should treat as nonmineral in character those portions of mining claims that contain mineral deposits which cannot be marketed within 40 years of: 1) the time a patent applicant has complied with all patenting requirements for claims not in a withdrawn area, 2) the date of withdrawal for claims on lands withdrawn from the operation of the Mining Law, or 3) for all others, the time of the mineral examination.
>
> BLM is defining the Areasonably foreseeable future@ as 40 years for purposes of marketability determinations for validity examinations of mining claims for industrial minerals. When examining such unpatented mining claim(s) for validity, if the supply of claimed minerals appears to exceed the present demand, the mineral examiner should first determine the amount of resource material in that particular mineral deposit which is available for marketing. If the mineral examiner identifies a supply of resource material which exceeds 40 years, the examiner should apply a 40-year projection of market demand to determine the portion of those resources which can be considered a valuable deposit (reserves) under the mining law. In making this determination, the examiner must use a reasonable method which considers the particular mineral involved and the market demand and marketing and financing arrangements for that mineral, other resources in the

mining area held by the claimant on both public and private lands, changing market conditions, availability of substitute materials, advancements in technolgy, and any other relevant factors.

**Mineral Classification and the Definition of Reserves**

In *Vanderbilt Gold*, 126 IBLA 72, 78-83 (1993), Judge Mullin discussed in detail the significance and meanings of the terms Aresources@ and Areserves@ under the classification schemes used by the U.S. Geological Survey (Survey) and the Society of Mining Engineers (SME); and, he also points out why the SME classification is more appropriate and gives several key legal interpretations to the terminology. This lengthy quote is given below because of the clarity it provides to this important but previously murky area:

> There is no firmly established or codified set of definitions of terms (standards) applied by the industry when classifying a mineral deposit. The term Areserves@ is found to have differing meanings in different contexts. Terms with separate and distinct meaning are often used interchangeably and in inappropriate contexts. This often results in confusion regarding what was intended when the viability of a mineral property is discussed.
>
> We find no decision setting out the relationship between statutory and regulatory standards such as Aworkability@ and the concept of a Areserve@ with the degree of precision Vanderbilt would apply. The SME committee report reflects an ongoing professional effort to develop more accurate and acceptable definitions. Before attempting to determine whether Areserve@ and a Aworkable deposit@ can be considered synonymous, we must define the term Areserve.@
>
> The Department has used similar definitions found in *Principles of the Mineral Resources Classification System*, Geological Survey Bulletin 1450-A (*Bulletin*) when classifying mineral deposits under other statutes. 3/ *See, e.g., United States v. Feezor*, 74 IBLA 56, 83-85, 90 I.D. 262, 277-78 (discussing relationship of reserve classification to issue of whether there was a discovery of a valuable mineral deposit under the mining laws). The Geological Survey (Survey) definitions define a Aresource@ as Aa concentration of naturally occurring solid, liquid, or gaseous materials in or on the earth=s crust in such form that economic extraction of a commodity is currently or potentially feasible.@ *Bulletin* at A2-A-3. Two resource categories are given:
>
> > **Identified resources**.--Specific bodies of mineral-bearing material whose location, quality and quantity are known from geologic evidence supported by engineering measurements with respect to the demonstrated category.
> >
> > **Undiscovered resources**.--Unspecified bodies of mineral-bearing material surmised to exist on the basis of broad geologic knowledge and theory. [Bold in original.]

*Id.* At A3. 4/ The Survey description of a resource gives no suggestion that any given deposit will have economic value. The concept of economic value becomes applicable when the term Areserve@ is employed. A Areserve@ is A[t]hat portion of the identified resource from which a usable mineral and energy commodity can be economically and legally extracted at the time of determination.@ 5/ Vanderbilt contends that the value of the known copper deposit is too low to permit economic extraction, the deposit cannot be called a reserve, and it is therefore not workable.

Using the approach adopted by both Survey and SME, deposits are classified on the basis of an increasing degree of geologic assurance and on the basis of an increasing degree of certainty regarding economic feasibility. Survey developed the following definitions, applicable to both identified subeconomic resources and 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 the specific limits within which the inferred material may lie. [Bold in original.]

*Bulletin* at A3-A4.

It is not surprising that the SME terminology is similar to that previously developed by Survey. A major difference results from SME=s having adopted Aa sequential relationship between exploration information, resources and reserves.@ 43 *Mining Engineering* 379 (April 1991). Thus, SME begins its classification by examining the available physical information about a mineral deposit. The Society describes exploration information as: A[A]ctivities designed to locate economic deposits and to establish the size, composition, shape and grade of these deposits. Exploration methods include geological, geochemical, and geophysical surveys, drill holes, trial pits and surface and underground openings.@ Id. At 379-80. SME then offers the following definition of Aresource:@

> A concentration of naturally occurring solid, liquid or gaseous material in or on the Earth=s crust in such form and amount that economic extraction of a commodity from the concentration is currently or potentially feasible. Location, grade, quality, and quantity are known or estimated from specific geological evidence. To reflect varying degrees of geological certainty, resources can be subdivided into measured, indicated, and inferred.

*Id.* The first sentence of the SME definition is the same as that developed by Survey. Survey included undiscovered Aresources.@ SME excludes Aundiscovered resources@ in the last two sentences of its definition, characterizing that classification as Aused by public planning agencies [but] not appropriate for use in commercial ventures.@ *Id.* At 379. Thus, the SME term Aresource@ is analogous to the Survey term Aidentified resource.@

Survey and Society both divide resources into three classes: measured, indicated, and inferred. The SME defines these terms as:

> **Measured**. Quantity is computed from dimensions revealed in outcrops, trenches, workings or drill holes; grade and (or) quality are computed from the result of detailed sampling. The sites for inspection, sampling and measurement are spaced so closely and the geological character is so well defined that size, shape, depth and mineral content of the resource are well established.
>
> **Indicated**. Quantity and grade and (or) quality are computed from information similar to that used for measured resources, but the sites for inspection, sampling, and measurements are farther apart or are otherwise less adequately spaced. The degree of assurance, although lower than that for measured resources, is high enough to assume geological continuity between points of observation.
>
> Inferred. Estimates are based on geological evidence and assumed continuity in which there is less confidence than for measured and (or) indicated resources. Inferred resources may or may not be supported by samples or measurements but the inference must be supported by reasonable geo-scientific

(geological, geochemical, geophysical, or other) data. [Bold in original.]

*Id.* The SME definition of Ameasured@ closely follows that of Survey, but Survey adds: A[T]he 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.@

The definitions of the term Aindicated@ differ in one respect worth noting. The Survey definition would allow a resource to be categorized as indicated when Athe 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.@ SME allows that the points for inspection, sampling, and measurements are less adequately spaced than is required for a measured resource, but states that: A[T]he degree of assurance although lower than that for measured resources, is high enough to assume geological continuity between points of observation.@

SME=s definition of Ainferred@ is similar to, but may be considered more restrictive than Surveys=s definition: A[B]odies that are completely concealed may be included if there is specific geologic evidence of their presence.@ However, the language in the Survey=s definition requiring Aspecific geologic evidence@ of completely concealed bodies renders that definition very close to the SME definition.

SME=s definition of Areserve@ is more detailed than Survey=s:

> Reserve. A reserve is that part of the resource that meets minimum physical and chemical criteria related to the specified mining and production practices, including those for grade, quality, thickness and depth; and can be reasonably assumed to be economically and legally extracted or produced at the time of determination. The feasibility of the specified mining and production practices must have been demonstrated or can be reasonably assumed on the basis of tests and measurements. The term reserves need not signify that extraction facilities are in place and operative.
>
> The term *economics* implies that profitable extraction or production under defined investment assumptions has been established or analytically demonstrated. The assumptions made must be reasonable including assumptions concerning the prices and costs that will prevail during the life of the project.
>
> The term *legally* does not imply that all permits needed for mining and processing have been obtained or that other legal issues have been completely resolved. However, for a reserve to exist, there should not be any significant uncertainty concerning issuance of these permits or resolution of legal issues. [emphasis in original.]

*Id.* at 380. The two most significant differences between the SME and Survey definitions are: (1) SME limits the use of the terms Ameasured,@ Aindicated,@ and Ainferred@ to

resource determinations by eliminating the phrase Aor reserve,@ making those terms applicable only to discussions of geologic assurance, and not applicable to economic viability; and (2) SME bases its categorization of Areserves@ upon the category of the resource being considered during the course of economic viability examination. The second difference is apparent from the SME reserve classification:

> **Proven reserve**. That part of a measured resource that satisfies the conditions to be classified as a reserve.
>
> **Probable reserve**. That part of an indicated resource that satisfies the conditions to be classified as a reserve.
>
> It should be stated whether the reserve estimate is of in-place material or of recoverable material. Any in-place estimate should be qualified to show the anticipated losses resulting from mining methods and beneficiation or preparation. [Bold in original.]

*Id.* At 380. Under the Survey=s definitions a mineral resource could be classified as an Ainferred reserve.@ SME intentionally omitted the term Areserve@ from its definitions of Ameasured,@ Aindicated@ and Ainferred,@ and thus the Athe terms Ameasured reserve, A @indicated reserve,@ and Apossible reserve@ are not part of its classification scheme. The basis for this conclusion was that the use of these terms does not convey sufficient economic assurance to be reported as a reserve. *See id.* at 379.

Various statutes mandate the Department=s classification of mineral deposits found in public lands and impose consideration of the economic value of a mineral resource. A mining claim must contain Aa valuable mineral deposit@ under 30 U.S.C. 22 (1988), and the claimant desiring to exercise a property right must show evidence of mineral of such a character that 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), approved in *Chrisman v. Miller*, 197 U.S. 313, 322 (1905). Under United States v. Coleman, 390 U.S. 599 (1968), the prudent man test includes evidence that the mineral in question can be presently extracted, removed, and marketed at a profit.

The term Areserve@ is most often employed in mining claim contests. In *United States v. Feezor, supra*, the Board examined how that term related to the requirement for a discovery, and the extent geologic inference could be used when determining whether a mineral resource constituted a discovery supporting the validity of a mining claim. The definitions and classification described by Survey were used.

> In *United States v. Hooker*, [48 IBLA 22 (1980)], the Board directly held that Aindicated@ reserves could be used to establish quantity and quality. *Id.* at 35-36; accord, *United States v. Larsen*, [9 IBLA 247, 261-63 (1973), *aff=d, Larsen v. Morton*, Civ. No. 73-19-TVC-JAW (D. Ariz. Oct. 24, 1974)]. The

> Board noted, however, that the question of whether Ainferred@ reserves could be utilized had yet to be determined. *But see United States v. Wells*, 11 IBLA 253, 258 (1973).
>
> As noted above, demonstrated reserves (*i.e.*, measured and indicated) can clearly be used to show the quantity necessary to establish a discovery. We do not however, believe that any such broad ruling can be made insofar as inferred reserves are concerned. To the extent that such an estimate is based on assumed continuity or repetition *for which there is geologic evidence*, we feel such a reserve base can properly be considered. Where, however, a body is completely concealed, so that its actual existence must be predicated on geologic inference, use of geologic inference would, in effect, substitute for the exposure of the mineral. Such an exposure, however, is a necessary precondition to a discovery. Therefore, an Ainferred@ reserve whose existence is dependent solely on geologic inference cannot serve as a predicate for finding quantity and quality sufficient to support a discovery. [Emphasis in original.]

*United States v. Feezor*, *supra* at 84-85, 90 I.D. at 278. Although SME considers an Ainferred reserve@ lacking Athe requisite degree of assurance to be reported as a reserve,@ *Feezor* recognized that there may be circumstances in which an@inferred reserve@ could be considered in support of a discovery finding.

**Geological Inference to Determine Mineral in Character But Not Discovery**

It is well established that geological inference may be used to support a classification of land as "mineral in character" but may not be used to support the existence of a discovery. The reason for this is that a discovery requires actual physical exposure of a mineral deposit within the claim boundaries; whereas, mineral in character may be established by geological inference. *U.S. v. Hines Gilbert Gold Mines Company*, 1 IBLA 296 (1971); *U.S. v. Carbon County Land Co.*, 46 F 980 (1931), *aff=d* 284 US 534 (1932).

**Definition of "Geological Inference"**

"Geological inference" of a "valuable mineral deposit" involves making certain assumptions about a mineral deposit on the basis of geological evidence which may be any level of evidence short of actual physical exposure. Such evidence may include surface indications of minerals, favorable geological environment such as rock types and structures conducive to mineralization, geochemical or geophysical evidence and discoveries in nearby lands. In *U.S. v. Lundy*, A-30724 (June 30, 1967), the Department described geological inference as follows:

> First, we fail to recognize the distinction the appellant places upon "geological inference" and upon "opinions of experts" who are geologists. To infer suggests the arriving at an opinion by reasoning from known facts or evidence. Thus, it would seem that geological inference is no more than opinion of a geologist inferred or deduced from known and observed geological evidence.

**Credible Foundation for Geological Inference**

In *U.S. v. Marion*, 37 IBLA 75 (1978), the Board held that geologic inference must be based on a credible foundation of observed data. It also held in *Marion* that 23 drill holes over a 795-acre tract were inadequate to establish reliable geological inference. The Board said:

> But the extrapolation procedure -- which is a matter of geologic inference -- is meaningless if the *observed data* do not lay a *credible foundation* for the geologic inferences drawn. In the instant case we do not find the foundation credible. Contestee's witness on quantity of ore heavily qualified his estimate of 1 2 million tons of iron oxide within the claims, as we have noted in detail above. There is very little evidence on the vertical extent of the deposits, and we do not find the 23 drill holes on this 796-acre tract to be adequate to establish a reliable geologic inference on quantity of ore present.

**Discovery Requires More Than Mineralization In Exposed Vein**

In *U.S. v. Watkins and Barton*, A-30659 (1967), the Department held that there is no "difference between the use of inference to establish the existence of a mineral-bearing vein where the vein itself has not been found and the use of inference to establish the existence of a valuable mineral deposit within a vein where the vein itself has been found but the mineral deposit which it is supposed to contain has not." In other words, the finding of evidence of mineralization (but not a discovery) in an exposed vein, is not sufficient to establish the existence of a valuable mineral deposit by geological inference.

**After Discovery, Geological Inference May Establish Extent and Value of Deposit**

Once a discovery is established by continuous mineralization along a vein, geological inference may be relied upon as an aid to calculate the extent and potential value of a mineral deposit. In *U.S. v. Chambers*, 47 IBLA 107 (1980), the Board said:

> While geologic inference based upon knowledge of the degree of mineralization prevalent within the surrounding area cannot substitute for the actual exposure of a vein or lode within a claim, it may be relied upon as an aid to calculate the extent and potential value, of the mineral deposit, once a continuous vein or lode bearing minable material has been exposed.
>
> To establish the existence of a valuable mineral deposit on a lode claim there must be evidence of continuous mineralization along the course of a vein or lode; the mere showing of disconnected pods of mineral concentration, even of high values, does not satisfy the test.

**Unnecessary to Block Out Deposit**

In *U.S. v. Hooker*, 48 IBLA 30 (1980) the Board held that "there has, of course, never been a requirement that a mining claimant block out a deposit to show its extent."

**Geophysical, Geochemical Testing and Geological Mapping**

An assumption of mineralization inferred from the results of geological mapping and geophysical and geochemical testing, invites further exploration, but is not sufficient to show a discovery of a valuable mineral deposit which will meet the requirement of the mining laws. Geophysical and geochemical evidence will allow a geological inference that unexposed mineralization exists below the surface and such geological inferences may at best indicate that further exploration is necessary and a discovery has not been established. *U.S. v. New Park Mining Co*., A-28530 (January 25, 1961).

**Radiometric Measurements Versus Chemical Assays**

Radiometric measurements may be used as supporting geological inferences in evaluating a deposit but, alone, they cannot be accepted to prove the existence of a uranium deposit. A sample taken from an exposure of mineralization and chemical assays of the sample may be given greater weight to prove the existence or nonexistence of a valuable uranium ore deposit that radiometric probe measurements of gamma ray emissions. *U.S. v. Rigg*, 16 IBLA 385 (1974).

**Evidence of Geological Inference Will Not Validate a Claim**

In *U.S. v. Milisich*, A-30720 (April 13,1967), it was held that Aeven though the claims may be within a favorable geological environment and are adjacent to claims once successfully mined, such evidence will not establish the validity of the claims." And in *U.S. v. Watkins and Barton*, A-30659 (1967), the Department described several types of evidence of a valuable mineral deposit that may allow the inference of such a deposit,but this evidence is not sufficient to validate a claim where the ore body has not been exposed. The Department said:

> The Department has also refused to accept as the equivalent of discovery deductions or opinions with respect to the existence of valuable mineral deposits which are based upon *findings of substantially worthless surface indications of minerals within the limits* of a claim or upon the discovery of *valuable mineral deposits outside the claim*, or which are based upon known geological facts, regardless of the strength of inferences that may arise from the established facts, where the actual body of ore supposed to exist has not been exposed.

**Two Requirements to Use Geologic Inference**

In *U.S. v. Dresselhaus*, 81 IBLA 252, 265 (1984), the Board stated the two physical facts

that must be demonstrated in order to utilize geologic inference. The Board said at 265:

> While the use of geologic inference cannot be used to establish the existence of a mineral deposit, it can be used to show the extent of the deposit. The claimant must be able to demonstrate two important physical facts in order to utilize 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.

**Use of Geologic Inference to Show Discovery**

Although geologic inference cannot be relied upon to establish the existence of a mineral deposit, it may be used as evidence to the extent of a deposit. *U.S. v. Dresselhaus*, 81 IBLA 252, 265 (1984). In *U.S. v. Feezor*, 74 IBLA 56, 90 ID 262 (1983), the Board significantly expanded the use of geologic inference in determining the necessary reserves or quantity of ore necessary to establish the existence of a discovery. The Board held that "to the extent exposures and samples exist which show high values of relative consistency, geologic inference is properly used to determine the reasonable likelihood of the persistence of similar mineralization beyond the areas actually sampled or exposed." *Id* at 81.

After a detailed review of Interior cases on the subject of geologic inference, the Board concluded that geologic inference may not be relied upon to establish the existence of a mineral deposit. *See Henault Mining Co. v. Tysk*, 419 F2d 766 (9th Cir. 1969); *U.S. v. Watkins*, A-30659 (Oct. 19, 1967), *aff=d sub nom. Barton v. Morton*, 498 F2d 288 (9th Cir. 1974). It has also been the consistent view of the Department that "while geologic inference may not be relied upon to establish the existence of a mineral deposit, it may be accepted as evidence of the extent of a deposit." *U.S. v. Hooker*, 48 IBLA 22, 30 (1980) quoting *U.S. v. Larsen*, 9 IBLA 247, 262 (1973), *aff=d*, *Larsen v. Morton*, Civ. No. 73-119 TUC-JAW (D. Ariz. Oct. 24,1974).

The Board in *Feezor* noted that *U.S. v. Edeline*, 39 IBLA 236 (1979) was a case where it was held that "while geologic inference may be used to estimate the extent of a continuous deposit, it may not be used to establish the validity of a claim where valuable mineralization is alleged to exist in separate deposits, hot spots or ore chutes along a vein." *Id* at 241. *Edeline* dealt with a case where "mineralization was discontinuously distributed along veins in ore chutes and enriched zones." *Id*. However, the claimant contended he was able to profitably mine the separate exposed bodies of ore.

In *Feezor*, the Board said that the holding in *Edeline, supra* at 241 implies "that a discovery of a valuable mineral deposit must be shown to exist before recourse may be made to geologic inference. This, of course, begs the question of why one would be concerned with geologic inference when a discovery had already been established." *U.S. v. Feezor, supra* at 72. The Board in *Feezor* then said that the holding in *Edeline, supra* at 241 that geologic inference

"cannot be used as a substitute for evidence sufficiently showing the existence of an ore body or bodies necessary to warrant a prudent man to develop a valuable mine" was expressly overruled. The Board said in *U.S. v. Feezor, supra* at 80:

> Thus, that decision noted that "[w]hile appellants contend that an immediate profit can be realized by mining bodies of exposed ore, the exposed deposits are of such limited extent and their removal such a short-term matter that it would not constitute the development of a mine." 39 IBLA at 241, 247-48. It is precisely on this point we believe the *Edeline* majority erred by refusing to even consider what might be geologically inferred.
>
> ...appellants in *Edeline* were seeking to show continuity of high values in a specific vein based on high values, though of limited extent, on exposed portions of that vein. Quite apart from the question of whether geologic factors would support an inference of continuing high values, the refusal to even consider what might be geologically inferred was in error. To the extent that anything in *United States v. Edeline, supra*, is inconsistent with our above analysis, it is hereby expressly overruled.

In perhaps the most important part of *U.S.v.Feezor, supra* at 78, it was pointed out that "geologic inference is primarily applicable as a basis upon which to show continuity of values" and that isolated and erratic high values cannot be used to infer the existence of better values someplace else on the claim. The Board then held that "where values have been high and relatively consistent, geologic inference can be used to infer sufficient quantity of similar quality mineralization beyond the actual exposed areas, such that a prudent man would be justified in expending labor and means with a reasonable prospect of success in developing a paying mine." *Id* at 78.

In two cases the Board has addressed the question of whether other than proven reserves should be utilized to show necessary quantity and quality of ore to show discovery. *U.S. v. Feezor, supra* at 83-85; *U.S. v. Hooker, supra* at 35. In both cases, the Board examined the type of reserves necessary to support a discovery using definitions jointly used by the Geological Survey and the U.S. Bureau of Mines for classifying reserves. The definitions given in *Principles of Mineral Resources Classification*, Geological Survey Bulletin 1450-A at A3-A4 are as follows:

> **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.

Although it was held in *U.S. v. Hooker, supra* at 35-36 that "indicated" reserves could be used to establish quantity and quality, the Board went one step further in *U.S. v. Feezor, supra* at 85. In *Feezor* the Board held that not only can demonstrated reserves be used to show the quantity of ore necessary to show a discovery, but under certain circumstances "inferred" reserves may also be used to show a discovery. These conditions are given below:

> As noted above, demonstrated reserves (i.e., measured and indicated) can clearly be used to show the quantity necessary to establish a discovery. We do not, however, believe that any such broad ruling can be made insofar as inferred reserves are concerned. To the extent that such an estimate is based on assumed continuity or repetition for which there is geologic evidence, we feel such a reserve base can properly be considered. Where, however, a body is completely concealed, so that its actual existence must be predicated on geologic inference, use of geologic inference would, in effect, substitute for the exposure of the mineral. Such an exposure, however, is a necessary precondition to a discovery. Therefore, 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.

**Case Where Geological Inference Cannot Be Applied**

While geologic inference cannot be used to show the existence of a mineral deposit, where an exposure has been developed which shows high and relatively consistent values, geologic inference can be used to infer sufficient quantity of similar quality mineralization beyond the actual exposed areas. *United States v. Feezor*, 90 I.D. 262, 274-75 (1983); *United States v. New York Mines*, 105 IBLA 171, 185 (1988). A "reasonable estimate of inferred reserves may be considered when there is strong geologic evidence to support the inference.@ *Id*. The *New York Mines* case involved a mined out supergene mineral deposit. This type of deposit occurs below an oxide zone where the minerals are leached by ground water and redeposited at the water table in the zone of supergene enrichment. Below the zone of supergene enrichment is a much lower grade deposit of primary mineralization. This is the lower portion of

the deposit.

In *New York Mines, supra,* the Board held that Ain the face of such strong evidence that past production came from a zone of supergene enrichment, it would not be prudent to project the size or grade of the ore previously mined to the underlying mineral deposit, where exposures in that deposit show it to be composed of primary mineralization.@ *Id*. at 189. In other words, the facts in this case do not support the downward projection of ore-grade deposits below the water table using geological inference.

**When Geological Inference Can Be Applied**

In *United States v. Feezor*, 130 IBLA 146 (1994), the Board restated the circumstances under which geological inference can be used to show continuity of values beyond physical exposure. The Board stated at 190:

> * * * Once an exposure of a mineral deposit within the limits of a mining claim has been shown to exist, and demonstrated values have been high and relatively consistent, geologic inference may be used to show continuity of values beyond the area of the physical exposure and establish that the exposed mineral deposit is "valuable" within the meaning of the mining laws.

**Exploration versus Development**

In *United States v. Feezor*, 130 IBLA 146, 208 (1994), the Board pointed out that "evidence which is sufficient to justify further exploration expenditures does not necessarily constitute evidence which would justify embarking upon the vastly more expensive venture of attempting to develop the prospect."

**Evidence of Reserves**

A claimant that presents evidence of a sale of minerals must give "additional evidence that material of a similar grade remains on the claims." Without this showing that additional mineral material of a similar quality remains on the claims, the logical conclusion is that the sale represented "an isolated showing." *Estate of Melvin E. Viles*, 126 IBLA 162, 165 (1993)

**Determining Ore Reserves of Vein by Geologic Inference**

In *United States v. Collord*, 128 IBLA 266 (1994), the Board approved of the application of a "rule-of-thumb" that the depth of a vein is at least one-half the length of the vein. *Id.* at 270. However, in Judge Mullen's concurring-dissenting opinion he said "there must be a factual foundation for applying this 'rule of thumb,' and it must be shown that a projection of one-half of the strike length is reasonable." *Id.* at 336. For example, the Board said that "[w]hile these ore bodies may in fact extend the length of the vein, in the absence of any subsurface sampling, we will project them to depth only to the extent that they can be observed on the surface. *Id.* at 275. Testimony by the Collord's geologist indicated the relative "consistent nature of the vein and the

surrounding wall rock along the veins entire length as indications that the vein likely goes to great depth." *Id.* at 271.

## SAMPLING AND ASSAYING

### Introduction

The sampling and assaying program represents the most important part of the mineral examination. In many cases the claimant selectively samples the highly mineralized portion of the ore body rather than attempting to take a representative sample which reflects the total amount of rock that must be extracted, including both ore and waste. This variance in sampling procedures among claimants often leads to inconsistent assay values for the same ore body. Such problems may be avoided by (1) conducting the sampling program according to recognized engineering standards, (2) adequately describing the sampling procedure, and (3) having the samples processed by competent assayers.

### Representative Samples

"It is only the 'representative' sample which can be said to have any predictive value." *United States v. Feezor*, 130 IBLA 146, 206 (1994).

### Nonrepresentative Samples May Be Used for Geological Inference

Although nonrepresentative samples do not prove the existence of a "valuable mineral deposit," once a discovery is established such samples may be used to estimate the extent and value of a mineral deposit. In *U.S. v. Kinsley*, 20 IBLA 17 (1975), the Board said:

> It is true, as appellant contends, that nonrepresentative samples do not prove in-place mineral value, or demonstrate that the veins bear valuable minerals. By themselves nonrepresentative samples cannot prove the existence of valuable mineralization exposed within a vein. *Citation omitted*. However, if other evidence establishes such mineralization, selected and cobbed samples may be given some weight to support geological inferences of value. Thus, although evidence of working mines in the area, similarity of geological formations on the claim which established valuable mineral deposits in the area, and other facts, may not be used to establish the fact of valuable minerals within a given claim, if minerals are proved to exist within that claim, the facts to support geological inferences may be used in estimating the extent and value of the exposed deposit. The evaluation and use of nonrepresentative samples, however, must be made with care as the potential for drawing misleading inferences is greatly enhanced compared with evaluations made from mineral exposures within the veins themselves.

### Where and How Mineral Examiner Takes Samples

In *United States v. Bagwell*, 143 IBLA 375 (1998), the Board reiterated its long-held position that the mineral examiner=s objective is to merely verify, by representative sampling,

the discovery exposed by the claimant, rather than conduct a comprehensive sampling program to determine if valuable minerals exist within the claim. The Board said at389:

> A Government mineral examiner is not required to sample beyond the areas of exposed mineralization, either on the surface or in underground workings, within the limits of a mining claim. As the court stated in *Hallenbeck v. Kleppe*, 590 F.2d at 859: A[T]he examiner is not required to perform discovery work for the claimant, or to explore or sample beyond those areas which have been exposed by the claimant, as the examiner simply verifies whether a discovery has been made.@ Citations omitted. Nor is an examiner required to engage in a comprehensive sampling program in order to establish definitively whether a valuable mineral deposit exists somewhere within a claim. *United States v. Mavros*, 122 IBLA at 307. Rather, an examiner is only required to traverse a claim, identifying any exposure of mineralization and sampling any site or sites deemed representative of any and all such exposures.

**Sample Size and a Representative Sample**

In United States v. Clouser, 144 IBLA 110 (1998), the appellant contended that the placer samples taken by the government were unrepresentative because they were too small. Although the Board acknowledged Athat relatively larger samples have advantages when gold in the deposit is not uniformly distributed, ... the overriding concern is with obtaining a >representative=sample.@ Id. At 115. The Board noted that there was no evidence that the samples taken by the government were not representative.

**Government Takes Samples without Claimant**

In *United States v. Clouser*, 144 IBLA 110, 126 (1998), the appellants attempted to exclude samples that were not taken in their presence. The Board said A[t]here is no requirement that they be taken in the claimants= presence in order to be considered valid samples. * * * Further, there is a presumption that the samples were correctly taken and assayed by the Government employee.@ Id. 126.

**Specific Problems with Unreliable Samples**

In *United States v. Clouser*, 144 IBLA 110, 122 (1998), the Administrative Law Judge noted key shortcomings in the reliability of the quantity and quality reserves projected by the claimants. AThis finding of the unreliability was based on the selective use of higher sample values while omitting lower sample values, inaccurate sample dimensions affecting claimants= weighting of particular samples, failure to weight samples by mining width and area of influence, and use of unrepresentative samples taken along the vein.@ Id. At 122.

**Area of Sample Influence**

In *United States v. Clouser*, 144 IBLA 110 (1998), the Administrative Law Judge disregarded the claimant=s analysis of the quality of mineralization because he did not take into account the area along each vein influenced by each sample. The Board said at 124:

It is well-accepted that any given sample does not just reflect the mineral values at the sample point, but rather will reflect the values for some distance along the vein on either side of the sample point towards the next sample point, i.e., the area or zone of influence. *Citation omitted*. The accepted rule is that the influence of a particular sample will be deemed to extend one-half the distance to the next sample point along the strike of the vein in either direction. *Id.* at 124.

* * *

In averaging the grade within a particular vein, the accepted procedure is to first multiply the length of the area of influence of a particular sample by the average width of the vein in the zone of influence and then by the grade at that point. The results of all of the samples along the vein are then totaled and divided by the sum of the multiples of the lengths of the area of influence and the widths of the vein. *Id.* at 124.

* * *

This principle [zone of influence] is less helpful when the distribution of mineral values *is* highly erratic. *Id.* at 122.

**Bulk Sampling**

In *United States v. Bagwell*, 143 IBLA 375 (1998), the appellants contended that the Government had failed to establish a prima facie case because it had not bulk sampled, in accordance with industry standard, but instead used channel or chip channel sampling. The Board responded at 389-90:

To require the Government, in support of its prima facie case, to do more than analyze what it regards as representative samples, taken by the channel or chip channel method, from areas of exposed mineralization would be to improperly require it to effectively engage in mining or at least to undertake discovery work on behalf of the claimants. Citation omitted. It is up to the claimants to rebut that case, which they may do by demonstrating that the sampling is not representative of what is found on their claims, and to show what is actually found there. This they failed to do. Indeed, while Appellants object to the Government=s failure to engage in bulk sampling, neither they nor their expert did so.

**Old Samples Versus Recent Samples**

In *U.S. v. Kiggins*, A-30827 (July 12,1968), the Board made the following distinction between samples taken on old workings as opposed to samples taken on new discoveries:

Assay values of mineral samples, however, are essentially meaningless unless considered with other criteria which afford some basis for estimating the quantity and the quality of the mineral found in a particular deposit. *Citation omitted.*

Mineral samples of a certain assay value, for example, taken from a newly

discovered vein may have substantially different significance from samples of the same value taken from the workings of an abandoned mine. The assay values shown here must be considered in light of the fact that the samples were taken from the workings of a mine which had been inactive for almost a quarter of a century prior to the hearing, as well as in light of the testimony of the witness who took the samples that the mineralization in the exposed portions of the veins was erratic and that the points selected for sampling were the only places where he detected mineralization.

**Adequate Sample Descriptions**

The primary purpose of a sampling program is to determine the average quality (grade or assay value) and quantity (reserves) of a mineral deposit. In order for such a program to yield effective results and have a high probative value in an administrative hearing, the samples must be adequately described. Among the items that must be addressed in a sampling program include: (1) description of the mineral deposit and the surrounding host rocks; (2) size and shape of the mineral deposit; (3) mineralogic and structural description of the mineral deposit; (4) weight or volume of the sample; (5) dimensions of sample; (6) mineralogic and structural description along line of sample; and detailed sampling procedure.

In the following three cases, the Department gave a good discussion of the problems associated with inadequate sample descriptions:

1. *U.S. v. Taylor*, A-30776 (October 6, 1967):

> Admittedly, the meaning of the statement in question is not clear. As implied by the Bureau, obviously a sample without an adequate description of the manner in which it was taken is meaningless insofar as establishing the average quality and estimating the quantity of a mineral deposit are concerned. The statement also indicated that two additional factors are important in relating the assay value of a sample to the overall quantity and quality of a mineral deposit: a description of the host rock (size of the vein or mineralized material sampled) and, to the extent possible, an *estimate* of the quantity of "ore" of the same quality as the sample (quantity of such material remaining at the place from which the samples were taken). In other words, the more that is known about the character of a mineral deposit the more meaningful assay values of adequately described samples become. This we feel is the intended construction of the statement.
>
> However, this leaves unanswered the question, "What is an adequately described sample? A sample, by definition, is a representative unit of material for analysis. A sample systematically cut from a portion of a mineral deposit should truly represent the average value of that portion. Therefore, unless the manner in which a sample is taken is described, there is no way of ascertaining whether it is representative, i.e., whether the sample was properly taken in the prescribed

manner, or what it represents, i.e., whether the sample was cut across the entire face representing tens of tons or cut across an isolated bit of mineralization representing a few pounds. In other words, an adequately described sample is one that is shown to be representative of the unit it purports to represent.

As it applies to the mining laws, we believe the foregoing can be summarized as follows: the assays of samples shown to be representative of the average value of a mineral deposit as a whole have greater probative value and are entitled to more evidentiary weight than assays of samples shown to be representative of isolated bits of mineralization contained within the mineral deposit in ascertaining the quality and quantity of a mineral deposit, i.e., whether the mineral deposit is valuable and a discovery has been made.

A channel sample is one taken at a given spot but covers a relatively long distance and narrow width. As such it yields an average value and masks details. Most usually a trench-like cut approximately 4 inches wide and 2 inches deep is cut into a clean face of the "ore" and across its course (strike).

2. *U.S. v. Fitzgerald*, A-30973 (July 25, 1969):

These two samples have little or no probative value because no description was given of the manner in which the samples were taken. Obviously a sample without an adequate description of the manner in which it was taken is meaningless insofar as establishing the average quality and estimating the quantity of a mineral deposit are concerned.

The six samples, of course, have a high probative value because they are channel samples, because the method of taking each sample was adequately described, because the lightest or smallest sample weighed at least three pounds, and because an adequate description of the host rock was given by Alexander.

3. *U.S. v. Nicholson*, 31 IBLA 233 (1977):

The present and prospective value of any mine consists in what is in the earth, not in what has been taken from it. Assay results have no probative value without further evidence establishing how each sample was taken and where the sample was taken from so that the fact-finder can determine how accurately the sample represents what remains in the ground. By themselves, the assay reports do not tell us whether the samples were taken from areas of isolated mineral occurrences or from areas of continuous mineralization. They tell us nothing about the size or extent of the deposit from which they were taken. Without such information, it is impossible to form a basis for a reasonable belief that the mineral in the ground can be mined, removed, and marketed at a profit. The mill runs (smelter returns) may establish that large quantities of valuable material had been removed in the past, but by themselves, they do not tell us whether more minerals remain.

**Government Not Required to Take Extensive Samples**

In response to a claimant's contention that the Government should take bulk samples, or that more and larger samples should have been taken, the Board said in *United States v. Crowley, supra* at 377:

> * * * A Government mineral examiner is not required to sample all areas of a mining claim in order to determine the full extent of mineralization so that it might be decided whether mining operations would actually be profitable. Nor is the Government responsible for generating the same level of information that would be required by a mining company when deciding whether to go ahead with mining. The duty of a Government mineral examiner is to sample existing exposures of mineralization disclosed on a claim in order to determine whether mining operations are likely to be profitable.

**More Detailed Field Examination, Sampling and Testing Gives More Credibility**

In *United States v. American Independence Mines and Minerals*, 122 IBLA 177, 187 (1992), the Board found that testimony on reserves by the claimant's experts to be more credible than the Forest Service experts because the claimant's experts performed more detailed sampling, testing and field examinations.

**Number of Samples**

In *United States v. Feezor*, 130 IBLA 146 (1994), the Board stressed that as the number of samples relative to the area samples decreases, the reliability of such samples decreases. The Board said at 206:

> * * * But, equally important in such an analysis is the nature and number of the samples which go into making the "average." Thus, as the number of samples relative to the area being sampled decreases, the reliability of any average derived therefrom decreases as well, since the possibility that anomalous samples will contaminate the average operates inversely to the number of samples taken. In other words, as the number of samples goes down, the likelihood of distortion goes up.

**Sampling a Minable Width**

The Interior Department has, in several cases, required that samples be cut across a "minable width." This requirement is justified and is a standard practice among experienced geologists, engineers and miners. Even though a vein is one foot wide, it would be impossible in most cases to remove only the vein and leave all of the host or waste rock undisturbed. The "minable width" merely recognizes that in developing underground workings one must provide sufficient space to allow people and equipment to enter the mine and follow the vein. Although the minimum "minable width" is generally four feet wide, it of course may be more or less depending on the circumstances in an individual case. Quotations from the following three cases discuss this problem:

1. *U.S. v. Crawford*, A-30820 (January 29, 1968):

The principle upon which the calculation of $2.49 is based is sound. An assay value adjusted to a minable width does not purport to represent the value of the "ore" to be shipped, but demonstrates the diluent effect a vein of less than a minable width has upon the assayed value of the vein material itself As such, it is one way of illustrating the effect a narrow vein has upon the value of a mineral deposit.

An assay value not related to a minable width is meaningless in itself. Thus Still took 6 samples of quartz vein material ranging from 3/4 inch to 5 inches in width. To get 5-pound samples, which he apparently did in 5 cases, he said that it would probably require digging out rock probably a foot long by 3 or 4 inches deep by 2 1/2 inches thick. His highest value sample was $229.95 per ton for material 2 to 3 inches wide. To actually get a ton of ore worth $229.95 would require mining a vein which is 2 to 3 inches wide and 3 or 4 inches deep over a length of 400 feet. Obviously this would be, practically speaking, a wholly impossible mining operation, assuming a veinlet of that value and length existed. Of course, there was no evidence whatsoever that a veinlet of that length existed.

2. *U.S. v. Taylor*, A-30780 (October 24, 1967):

Clearly, the principle upon which Alexander based his calculations is sound. When a narrow vein is mined, as in the small mining operation described in the record, the barren country rock is stoped, handled, and shipped to the mill. Nevertheless, the width of a vein is an important factor in determining cost per ton of ore mined and in estimating the value of the ore to be shipped. A vein of less than a minable width affects the value of the mineral deposit in a combination of ways -- by increasing mining costs through additional handling of barren country rock, both in sorting of barren rock from the ore and in removing the barren rock to get to the vein; and by diluting the ore with the barren country rock, the degree of dilution depending upon the extent of sorting. Regardless of what factor predominates, the net result is a less valuable mineral deposit.

3. *U.S. v. Fitzgerald*, A-30973 (July 25, 1969):

On this appeal claimants do not dispute the wisdom and necessity of spreading the assay value of a narrow band of mineral of less than a minable width over a minable width of 4 feet, as was done in the case of the Government's samples Nos. 5921 and 5922 (Ex. 3) and the claimants' exhibit S. Claimants agree this must be done in order to get a "realistic average of value."

**Mining Width Must Be Taken into Account**

In United States v. Clouser, 144 IBLA 110 (1998), the upheld the Administrative Law Judge=s determination that mining width must be taken into account. The Board gave the reasons for requiring that mining width be taken into account at 123-124:

> The reason is that, in mining a vein, it is not just the vein that is extracted and removed from the mine. Rather, mining will extract material across a certain Amining width,@ given the type of equipment being used. To the extent that the vein is contained (as it often is) in only a portion of that width at any given point, the mineral value disclosed by a sample at that point will in the course of mining, be diluted by the additional material on either or both sides of the vein (often containing no mineral values) that must also be extracted. Citation omitted. Thus, in order to determine the true value of the material extracted at a given point so that it can be justly compared to the cost of extraction of that material, the value of the sample must be spread across the full mining width. The appropriate method is to multiply the sample value by the sample width and then divide by the mining width.

**Samples Must Be Cut Across the Vein**

In United States v. Clouser, 144 IBLA 110, 119 (1998), the Board upheld the Administrative Law Judge=s exclusion of samples that were taken parallel to, rather than across the strike of the vein because such samples did not represent the mineralization to be found in the vein. The Board said at 119:

> He based his determination that samples should be taken across the strike of the vein on a treatise (Mining Geology (1948)) by Hugh Exton McKinstry, a noted geology professor, whose work is relied upon by both parties. Citation omitted. Indeed, we find that McKinstry recommends taking samples across, rather than along, the vein. Citation omitted. The purpose is to obtain an indication of the value of all of the vein material that would be mined at a certain point within a particular mining width. Citation omitted. It is not sufficient to sample only a portion of the vein width, especially along the edges or in the center of the vein. Citation omitted. We can find no endorsement of sampling along the strike of a vein in McKinstry=s treatise or in the testimony of any expert. The record supports the conclusion that sample[s] ... were taken along the strike of the vein. Citation omitted. There is no evidence that the samples were cut across the vein, either perpendicular to the vein walls or at an angle.

**Overburden Included**

It is a standard procedure in the testing of a placer mining claim to take channel samples from top to bottom of a cut, trench or pit, including overburden; also when taking samples by churn or auger drill it is also a standard procedure to include the overburden. The mineral values

are then determined on the basis of the cost of removing all material that must be moved during the mining operation.

**Sampling and Mining with a Suction Dredge**

There have been two appeals to the IBLA involving validity examination by the Forest Service where the claimants method of mining was by suction dredge in the bed of active streams. *U.S. v. Williams*, 65 IBLA 346 (1982); *U.S. v. Arbo*, 70 IBLA 244 (1983). In *U.S. v. Williams*, 65 IBLA 346, 351 (1982), the Forest Service investigated the validity of a gold placer claim. The claim was contested and a *prima facie* case was established on the basis of the Government examiner using standard sampling techniques. The claimant submitted evidence showing a recovery of 26 or 27 ounces of gold using a suction dredge. Because the government did not submit evidence showing that suction dredging on the claim has not resulted in a discovery, the board held that the claimants evidence was sufficient to overcome the Government's *prima facie* case. The Board stated at 351:

> The Government's case was based on evidence concerning only the insufficiency of techniques other than suction dredge mining to establish a marketable claim. Therefore, contestees' evidence of recovery by suction dredging, although certainly flawed by vagueness is adequate in the absence of evidence showing to the contrary.

The Board stated, commenting on the vague nature of contestees' evidence: "However, the Government's evidence is even more deficient, since it made no attempt to take samples from the claim by means of a suction dredge." *Id*. at 351.

The Forest Service sought reconsideration of the *Williams* case arguing that there can be no valid mining claim in a stream bed because any gold in a stream is not found in a "deposit." It also argued that suction dredging is not legitimate mining.

In an order dated December 3, 1982, the Board denied the petition, rejecting the contentions of the Forest Service. The Board stated:

> The record showed that contestees were removing mineral material laid down in the stream bed, concentrating it, and apparently removing enough gold to meet their expenses. The "deposit" consisted of the material laid down in the stream bed by the water. The contestees were removing the material, not the water itself, as Ball testified. The fact that they were mining in an active stream bed did not make the process any less placer mining. Further, the fact that they used a suction dredge (or any other instrumentality) did not make the process any less legitimate, as long as it was economical for them to do so, as measured by the traditional marketability tests.
>
> FS' position that it need not address the economics of suction dredging was evident at the hearing and is now urged upon us as a rule of law. We reject it, and we emphasize that if FS expects to successfully contest the validity of claims such as this one, it must meet its burden of showing, on a case by case basis, that such operations are

not economical. It may be necessary for FS to use a suction dredge to take sample tests at the claim in order to so demonstrate.

In any event, FS did not establish that contestees were removing "flood gold." The record contained no evidence that the geological situation described by Wells in his discussion of "flood gold" existed, or that other conditions existed that favored the conclusion that flood gold was being collected. In the absence of evidence of such a showing, we cannot presume that contestees were not actually mining a "river deposit" that had been overlooked because it was within an active stream bed. The record contained evidence showing that no concentrations were present on the banks of the stream, but it did not deal adequately with the stream bed itself. We do not comment on the extent to which such concentrations may exist; we simply hold that it is part of contestant's obligation to address this issue.

However, *Williamson, supra* does not necessarily mean the Govemment must use the same sampling method as the claimant. If the claimant furnishes evidence that profitable recovery may be made by a method not addressed in the Government's *prima facie* case, the Government must also provide evidence showing that the new method has not resulted in a discovery.

In *U.S. v. Arbo*, 70 IBLA 244 (1983), the Forest Service mineral examiner was assigned to conduct a validity examination of a placer property. The examiner noted that the only evidence of recent mining activity appeared to be a small suction dredge in the river. Although the claimant apparently maintained that his discovery was in the bed of the river and requested the examiners to take samples using the dredge, the examiners refused to sample with the dredge. Instead, the examiners selected their own sites for sampling above the river.

Asked during the hearing why he did not take samples using the dredge, he replied that he took none because "there was no definable deposit in the river" and based on geologic analysis and inference the examiner gave his opinion that recovery of gold from the river would not be profitable.

The Board concluded that the Government's testimony and exhibits were sufficient to establish a *prima facie* case of invalidity. The invalidity of the claims was based on the negative results of the sampling rather than the opinion of the Government's witness that the river contained no definable deposit. *Id* at 253.

Although the Board did not really address the failure of the mineral examiner to sample the river bottom with the dredge, Judge Harris stated in his concurring opinion (*Id* at 253):

I am in agreement that appellant's claim was properly declared null and void by the Administrative Law Judge, and I am in agreement with much of the discussion in the main opinion. However, I believe that if appellant had made a timely motion to dismiss the case following the Government's presentation of evidence on the basis that the Government failed to present a *prima facie* case and had rested, the motion should have

been granted and the contest dismissed. *See United States v. Taylor*, 19 IBLA 9, 23, 82 ID 68, 73 (1975). The basis for this belief is the failure of the Government mineral examiner to take samples using appellant's dredge, as requested by appellant.

It was clear error in the present case for the Government mineral examiner to refuse to sample from appellant's dredge. Appellant's dredge was available. Samples easily could have been taken; however, they were not. I would find that where a mining claimant directs the Government mineral examiner to what the claimant considers as his discovery area, and the examiner refuses to sample, and there is no legitimate basis for that refusal, the Government has not established a *prima facie* case of lack of discovery of a valuable mineral deposit.

From the standpoint of the mineral examiner, it is very difficult to establish accurate reserve and grade information on a deposit using a suction dredge, particularly if the water is deep, turbulent or murky. However, a suction dredge may be the most appropriate mining method for certain types of river placers, especially if it is possible to reach bedrock. In any event, testing with a suction dredge would require operating the dredge for specific periods of time in such a manner so that an excavation of constant diameter could be extracted to bedrock. Then, if possible, calculate the quantity of material removed. The assay value could be estimated by relating the weight of gold recovered during the specific period of operation to the quantity of material removed. Similar sample pits could be distributed in a geometric pattern to determine the extent of the deposit. Costs of operating the dredge for a specific period of time could be calculated and related to the production during the same period.

**Streambed Dredge Samples**

In *United States v. Waters et al.*, 146 IBLA 172, 191 (1998), the Board said that Ato measure the productivity of dredging on the basis of ounces of gold recovered per hour..was clearly a more reasonable approach given the difficulty of accurately measuring the volume of material dredged from the underwater streambed.@ In other words, it is appropriate to determine the yield in gold from operating a suction dredge on an underwater streambed on an hourly basis rather than measuring the precise amount of material processed by the dredge, which would be very difficult. Of course one would still need to determine the amount of total reserves of gold-bearing material in the streambed.

**Sample Points Must Be Accessible to Mineral Examiner**

Mineral examiners are not required to blast or do any extensive discovery work beyond the workings exposed by the claimants in order to satisfy the Government's *prima facie* burden. It is incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. Where he does not, he assumes the risk that the mineral examiner will not be able to verify the discovery of the alleged mineral deposit, and his argument that the samples taken by the examiner are not representative will be rejected. *U.S. v. Anderson*, 57 IBLA 256 (1981); *U.S. v. Polashek*, 57 IBLA 104 (1981).

In *U. S. v. Copple*, 81 IBLA 109, 125 (1984), the Board held that "it is normally the claimant's responsibility to keep his workings available for inspection. Accordingly, if the workings are inaccessible because a shaft has caved or is otherwise unsafe, a mineral examiner has no obligation to either imperil himself or retimber the shaft." *U.S. v. Cook*, 71 IBLA 268 (1983) involved a case where the claimants indicated that the discovery was covered by large boulders and deep water to the extent it was inaccessible. The Board held that since "there was no means of gaining access to the alleged discovery point, this indication was tantamount to an admission that no valuable placer material had been discovered on the claim at the time of these inspections. In these circumstances the mineral examiners were justified in not taking any placer samples, since none could be representative. The examiners' testimony about the admission was enough to establish a *prima facie* case of invalidity of the placer." *Id* at 270-71.

**Examiners Should Independently Select Sample Sites**

Although it is appropriate for a mineral examiner to take a sample at sites recommended by the claimant or the representative of the claimant, examiners should also independently select sample sites in the same manner as they would if unaccompanied by the claimant. In *U.S. v. Rosenberger*, 71 IBLA 195, 200 (1983), the Board said:

> The Board acknowledges that it was appropriate for the examiners to sample the more attractive sites indicated by Charles Rosenberger, since he was the only representative of the claimant on hand. But it was also known to the examiners that he had no knowledge of what his grandfather had been pursuing on the claims, and no personal qualifications in mining or geology. The Board would have preferred that the examiners also have used their own expert qualifications to independently select appropriate sample sites, as they would have been expected to do had they been unaccompanied.

**Mineral Examiners Not Required to Sample Areas with No Apparent Mineralization**

In *United States v. Mavros*, 122 IBLA 297, 306-07 (1992), the Board described the circumstances under which a mineral examiner is not required to sample a claim or an area with no apparent mineralization:

> It is clear that the sample points were not arbitrarily selected by the mineral examiners, but were selected to determine to the fullest extent possible the nature and concentration of the mineralization they observed, whether exposed by old workings or by claimants. The mineral examiners were not required to go beyond that, *i.e.*, they were not required to sample areas with no apparent mineral content to prove their observations accurate. If their observations were incorrect it would be easy for claimants to prove them wrong by presenting contrary evidence.
>
> * * * * * * * * *
>
> Claimants argue that Government's prima facie case is undermined because the mineral examiners took samples from 6 of the 30 claims and did not sample every claim. It is true that only six (and possibly seven) of the claims were sampled....., but this hardly undermines the Government's prima facie case. Samples were taken at various points

> across the entire claim group. * * * The selection of sample sites reflects an effort to sample any exposed signs of mineralization not sampled by the mineral examiners or any area which should have been sampled because of the likelihood that minerals might be disclosed by the sampling.
>
> When a mineral examiner, who is not accompanied by the claimant, undertakes a systematic reconnaissance of a group of claims, and makes a conscientious effort to sample those sites deemed most likely to contain mineralization, the combination of observation and sample results is sufficient to form a proper basis for a professional opinion. The mineral examiner is not required to engage in a comprehensive sampling program of a group of claims to establish definitively that there is no mineralization within any of them. *Citation Omitted.* When all of the assays of the samples taken from the sites deemed most likely to contain mineralization indicate mineral values far too low to justify further investigation, the evidence will establish a prima facie case that no discovery exists within all of the claims examined even though no samples were taken from some of those claims.

**Claimant's Evidence May Include Placers Not Examined or Sampled by Mineral Examiner**

At a hearing, claimants may present "evidence of the actual location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners. *Estate of Melvin E. Viles*, 126 IBLA 162, 167 (1993).

**Date of Exposure Versus Date of Sample**

In order to establish discovery by a certain date such as a withdrawal, it is essential that the discovery be exposed prior to that date. Then once the discovery is validated by exposure prior to the withdrawal, the sample may be taken at any later time. In *U.S. v. Page*, 43 IBLA 396 (1979), the Board said:

> *Converse v. Udall, supra*, states the rule to be applied in a dispute over the existence of discovery as of a certain date. There, the date of exposure of the sample, rather than the date the sample was taken, determined whether or not the sample was proper evidence.

**Claimant Objects to Government's Sampling Procedure**

If a claimant contends that the Government samples his claim improperly, he must be able to offer probative evidence tending to show that the samples taken by the Government failed to adequately represent the mineral value of the land. *U.S. v. Murdock*, 65 IBLA 242, 243, (1982).

**Government Not Obligated to Share Samples**

In *U.S. v. California Alluvial Mining Corporation*, A-30928 (January 30, 1969), the

Department said that "it is enough to point out that the United States is under no obligation to share its samples with a claimant."

**Claimant=s Samples Are Flawed**

In *Rocky Conner*, 139 IBLA 361, 373 (1997), the Board said the claimant=s sampling procedure is flawed because the Acontestees failed to identify the size or nature of most of the post-withdrawal samplings or the details of how they were taken. These samplings are entitled to little weight for the additional reason that contestees failed to show their chain of custody, creating further doubt as to whether these samplings were uncontaminated.@

**Sampling Oil Shale Claims**

Because the discovery requirements are less stringent for oil shale claims than other minerals, the sampling procedures are also different. In *U.S. v. Energy Resources Technology Land, Inc*., 74 IBLA 117 (1983), the Board approved grab samples taken from the richest oil shale exposed in the outcrop. The Government examiners contended that such a sample must be taken over a minable face several feet thick to be representative of the deposit. After cautioning that "an isolated bit of mineral, not connected with or leading to substantial prospective values" will not suffice as a discovery, the Board proceeded to make the distinction between oil shale claims and claims for other minerals:

> Were we concerned here with any mineral other than oil shale, we would agree. There are uncounted administrative and judicial decisions which hold that isolated or high-grade samples which are not representative of the deposit will not serve to prove a discovery. But the rules of law governing oil shale claims, the product of decades of confusion and error, have provided so many unique applications of the 1872 mining law to oil shale claims as to deny comparison with the application of that law to claims for any other mineral. As matters now stand any finding of even "lean" oil shale will serve to effect a "discovery" by geologic inference if the exposure exists "in such situation and such formation that he can follow the vein or the deposit to depth with reasonable assurance that paying minerals will be found." *Freeman v. Summers, supra*. All that is necessary, then, is that the claimants, prior to February 25, 1920, found exposures of "oil shale" in such geologic circumstances. The quality or quantity is, apparently, unimportant, so long as the rock can properly be termed "oil shale," and is found situated in the requisite geologic circumstances.

**Grab Samples**

Assay reports have limited probative value where there is no evidence as to how and where the samples were taken. *United States v. Jones*, 72 IBLA 52, 57 (1983). In *United States v. Parker*, 91 I.D. 271, 282 (1984), the Board discussed the problems connected with a grab sample of Afloat" taken by the claimant:

> While the report describes the samples, it does not give any information regarding the size of the samples or the material represented. It appears from the report that these samples are merely grab samples taken of material found during a reconnaissance of the claims and do not represent any attempt to delineate a mineralized zone or ore body.
>
> The crucial flaw in appellants' reliance on these assay reports is the fact there is no clear evidence of either the location from which the samples were taken or the nature of the structure sampled. Without this evidence there is no way to determine if the samples were, in fact, taken from a point within the boundaries of the claims, the claim from which the samples were taken, or what the assays are to represent in the way of ore in place.

**Samples Taken During Mining and from Dumps Have Little Significance**

Samples taken during mining operations lead to the presumption that the material was removed after sampling. At least "it is not possible to know if like material remains.." *United States v. Crowley*, 124 IBLA 374, 380 (1992). Samples taken from dumps are also of little value because they would only represent ore which has already been mined. *Id*. at 377.

**Samples from Mine Dump**

In *United States v. Mavros*, 122 IBLA 297, 306 (1992) the Board explained why samples from a mine dump cannot be used to support a discovery:

> A showing of high mineral values in a sample taken from a pile of loose material on a mine dump, with no evidence of the origin of that material, is not probative of the existence of a valuable mineral deposit. *Citation Omitted.* It is simply impossible to know where the sample came from, the dimensions or continuity of the vein from which the material was taken, or the manner in which the sample was taken. The rock Lawson picked from the dump may have come from a small pod or even from outside the claims. Lawson correctly concluded that sample DCL 84-4 is probative only of the possible existence of valuable mineral which might warrant further exploration.

**Joint Sampling When Discrepancy in Assay Values**

In situations where there is a significant discrepancy between the assay values of the Government and the claimant, a joint sampling of the claim may be ordered by the judge to reconcile the conflicting testimony. *U.S. v. Signa Lauch*, 9 IBLA 66 (1973).

However, if the claimant fails to submit the requested report in accordance with the hearing examiner's instructions, the claimant's charge, made after issuance of the decision that the Government's mineral examiner failed to sample properly is entitled to no consideration. *U.S. v. King*, A-30867 (March 1, 1968).

**Sample Must Come from Contested Claim**

It is well established that if a sample is to be probative of mineralization on a contested claim, it must be ascertained that the sample came from that claim. In *U.S. v. Williams*, 65 IBLA 3469 350 (1982), the Board said:

> Contestees also presented the testimony of Henry L. King, owner of a claim situated across the Trinity River from theirs. He brought with him a concentrated sample of ore that he had mined in 1978 in one 90-minute "swipe across the river" with a 6-inch dredge. By his own admission, this sample came in part from his own claim, as well as contestees'. Accordingly, the sample is not probative of the mineralization on contestees= claim, since there is no way of ascertaining whether any gold in the sample came from it or from King's claim.

**Assayer or Sampler Not at Hearing**

Assay reports are generally admitted into evidence even if the reports have major deficiencies; however, the reports will be accorded appropriate weight by the judge or fact finder depending on the circumstances in each case. Normally the assayer is not present at the hearing but the sampler is available to testify. If neither the assayer or sampler are present, the evidentiary value of the report is very low. In *U.S. v. Rukke*, 32 IBLA 155 (1977), the Board said:

> In this regard, Judge Steiner erred in refusing to admit the assay reports described above into evidence. It is well settled that the hearsay rule of evidence under which Judge Steiner excluded these reports is not strictly adhered to in administrative proceedings, particularly where the evidence is competent and relevant, such as assay reports with a proper foundation concerning the sampling, the submission of the samples to the assayer and the assayer's reputation. 5 USC ' 556(c), (d) (1970); *Citations omitted*. After the assay reports are admitted into evidence, the fact finder may accord them appropriate weight in his deliberations according to the circumstances surrounding the particular report.

In a more recent case the Board considered a similar issue. In *U.S. v. Burt*, 43 IBLA 367, 368 (1979), the Board said:

> Notice, however, that although it was held in that case that assay reports should not have been excluded from evidence as hearsay merely because the assayer was not present to testify, the Board was concerned with the need to lay a proper foundation for their introduction. In that case, although the assayer was not present, the person who took the samples was, and he testified concerning the sample sites and the method of their collection. Therefore, we said, the reports should have been admitted.
>
> In the instant case it is apparent that Judge Ratzman was adhering to our holding in the *Rukke* case. Although the assayers were not present, he admitted the assay reports of both sides where the person who took the samples which were the subject of the report

was present and testified to that effect. However, with reference to the assay report excluded from evidence by Judge Ratzman, neither the assayer nor the sampler-taker was presented for testimony so that there was virtually nothing which could be established about the report beyond the fact that it existed. Thus, the evidentiary value of the report was virtually nil, and it was not improper for the Judge to exclude it.

In *U.S. v. Arbo*, 70 IBLA 244 (1983), the appellant objected to the assay results on the ground that the assayer was not present at the hearing and subject to cross-examination. It was held that "there was sufficient evidence of the reliability of the assay certificates which justified the chief expert witness' acceptance and consideration of the documents in forming his opinion according to the recognized custom among geologists and mining engineers. *Brown v. United States*, 375 F2d 310 (D.C. Cir. 1967); *see also Federal Rules of Evidence*, R. 703. Material, relevant hearsay evidence is admissible in administrative proceedings. 5 U.S.C. ' 556(d) (1976)." *Id* at 250.

**Delivery of Samples to Assayer**

The procedure for handling samples, from the time they are collected at the outcrop until they are delivered to the assayer is important. In order to maintain the integrity of samples, the sampler is responsible to see that (1) the assay results of one sample will not be confused with the results of another sample, (2) the samples are not damaged, diluted or salted, and (3) the samples are secure at all times and the sampler can fully account for every aspect of the process from sampling to assay.

In *U.S. v. Clemans*, 45 IBLA. 64, 70-71 (1980), the Board discussed this problem as follows:

> Appellants also objected to the assay results of five of those eight samples on the ground that the person who actually delivered the samples to the assayer on behalf of the geologists was not present for cross-examination. The objections were overruled and the certificates admitted in evidence. No error was committed in so ruling.
>
> The objection pertaining to actual delivery of the samples, raised by appellants for the first time in their posthearing brief, lacks significance. Based upon all the evidence, Judge Mesch concluded that no serious question exists as to whether the samples assayed were in fact those obtained from the mining claims in controversy. While the mineral examiners did not personally deliver the samples, one Mr. Robb prepared the receipt for the samples to be assayed at their direction and pursuant to established office procedure. He was actually seen leaving the office with the samples by at least one of the Government's witnesses. The assayer's offices are located across the alley from the geologists' offices, approximately 100 feet away.
>
> Judge Mesch also found that there was sufficient evidence of the reliability of the assay certificates which justified the chief expert witness' acceptance and consideration of the documents in forming his opinion according to the recognized custom among

geologists and mining engineers. *Brown v. U.S.*, 375 F2d 310 (DC Cir 1967); *see also Federal Rules of Evidence*, R. 703. Material, relevant hearsay evidence is admissible in administrative proceedings. 5 USC ' 556(d) (1976); *Casey Ranches*, 14 IBLA 48, 80 ID 777 (1973).

**Custodial Security of Samples**

"It is important that the 'custodial security' of samples taken from mining claims be maintained and, in the absence of assurances thereof in the record, the reliability of assay results is weakened." *United States v. Crowley, supra* at 381.

**Nonstandard Assay Method**

There are numerous methods of assaying minerals; however, in most cases there is only one method that is considered most appropriate for a given situation. In *U.S. v. Ramsey*, 14 IBIA 156, the Board held that a nonstandard method of assay is not entitled to probative weight without a scientific basis. The Board said:

> Finally, we agree with Judge Ratzman's determination that the appellants' expert witness "utilizes unreliable processes, and provides inaccurate information." Appellants' own samples, when tested by the fire assay method failed to show the presence of gold in significant quantities. In apparent explanation of the disparity of results between their fire assays and their nonstandard assays, appellants' expert witness stated that the gold was "clear down in the atoms" of the associated material. While we do not categorically assert that such pre-Agricolian notions of metallurgy are totally invalid, neither do we believe that such evidence is entitled to probative weight without a showing of its scientific basis.

**Fire Assays on Placer Samples**

The Department has never accepted fire assays for placer gold samples. The reason for this is that the fire assay will recover more gold than a placer miner would ever recover by using the most efficient placer mining equipment. It is generally financially prohibitive to smelt the heavy minerals or black sands recovered from a placer gold mining operation. Therefore, a fire assay of a placer sample may result in a higher value than would normally be recovered and could result in the validation of an uneconomic property. *U.S. v. San Juan Exploration Co*., A30965 (March 27, 1969); *U.S. v. Bass*, 6 IBLA 113 (1972). The preferred method for assaying gold samples is recovery of the free gold by amalgamation; but it is also standard practice to fire assay the tails to determine if, under any circumstances, it would be worthwhile to recover gold by smelting.

Judge Burski, in a concurring opinion in *United States v. Ramsey*, 84 IBLA 66, 71-73 (1984), gave a lengthy discussion on the problems involved in using fire assays rather than free gold by amalgamation to determine the gold content of placer deposits. In citing BLM Technical Bulletin 4, *Placer Examination: Principles and Practice* by John Wells, Judge Burski said "I

think that Government mineral examiners should be put on notice that fire assaying of placer deposits might not, in some future cases, be a sufficient basis upon which to prevail before this Board.....In such future cases, it may well be that the assay results obtained through a fire assay will not be accorded the same weight as assay results which are derived from procedures more likely to fairly value placer ground. Against this eventuality, mineral examiners should clearly be on guard."

In several cases, the Board has admonished against the practice of using fire assays to determine the value of placer gravels. *United States v. Parker*, 91 I.D. 271 (1984); *United States v. Ramsey*, 84 IBLA 66 (1984); *United States v. Chapman*, 87 IBLA 216, 222 (1985). For example, in *United States v. Parker, supra*, at 282, the Board said:

> The Henkins' assay was a fire assay of the gravels and can be given little weight, as a fire assay is not representative of the values that could be recovered from a placer operation.

**Nugget Effect in Assaying**

In *United States v. Clouser*, 144 IBLA 110 (1998), the Board defined Anugget effect@ at 112, f.n. 4:

> Coarse gold or the nugget effect refers to small particles of gold having a high value that are found in the deposit. *Citation omitted*. The difficulty posed by coarse gold particles is the lack of uniform distribution of the gold in the sample which may cause an unrepresentative assay. *Citation omitted*. When assaying samples believed to contain coarse gold, the sample is screened or sieved to separate any visible particles of gold which are then weighed and included in the calculation of the gold value.

**Calculations of Average Grade Must Be Weighted Average**

In *United States v. Jerry E. Franklin*, 99 IBLA 120, 123 (1987), the Board held that a report can be given little weight where the average grade of a deposit is based on a numeric average. The proper method is to calculate average grade by a weighted average.

**Samples Must Be Compensated for Fineness**

In *United States v. Laczkowski*, 111 IBLA 165, 171 (1989) the Board indicated that placer gold samples (assayed by fire assay methods) must be compensated for the fineness of the gold.

**Selection of Assayers**

Assayers should be selected on basis of established reputation and registration under state law if required. *United States v. Gillette*, 104 IBLA 269, 275 (1988).

**Vein Samples and Registered Assayers**

In *United States v. Ware*, 113 IBLA 1,5 (1990), the Board indicated that vein samples alone may be insufficient to test a mineral deposit. The Board also implied that the use of registered assayers that certify results gives more reliable assay evidence:

> Claimants' assay evidence is clearly inadequate to refute the Government's assay results. Assays of vein samples do not reflect the probable value that could be achieved in actual mining operations, *United States v. Denison*, 76 I.D. 233, 246 (1969), *aff'd sub nom., Smith v. Morton*, 489 F.2d 1275 (9th Cir. 1974), *cert. denied*, 419 U.S. 835 (1974), and the sample which revealed mineralization was taken from the vein only. Moreover, an isolated showing of a high mineral value is insufficient as there must be evidence of continuous mineralization.
>
> In addition, claimants' assay results are clearly less reliable than those submitted by the Government. There is no evidence that claimants' assay was conducted by a registered assayer or that the result is certified.

**High Assay Values Are Not Sufficient Evidence**

The Department has consistently held that high assay reports alone are not evidence of a discovery. The nature of the samples yielding the high values must be considered and the evidence, taken as a whole, must suggest that the assay results are representative of mineralization on the claims. *U.S. v. Lambeth*, 37 IBLA 107, 114 (1978). In *U.S. v. Bechthold*, 25 IBLA at 88 (1976), the Board said:

> Occasional high samples are not conclusive evidence of a valid discovery. Other factors must be considered, such as the extent of the mineral deposits, the number of samples assayed which show only a trace of mineral value, and the nature of the samples which yielded the high values. To be meaningful, the samples must be representative of the mineral deposit, not simply selective showings of the best mineralization.

As recently stated in *U.S. v. Judd*, 68 IBLA 137, 139 (1982), "in order to be meaningful, samples must be representative of the mineral deposit rather than selective showings of the best mineralizations.@

**Chemical Assays Given Greater Weight Than Radiometric Measurements of Uranium Ore**

Chemical assays of a sample of uranium mineralization may be given greater weight to demonstrate the value of uranium ore than radiometric probe measurements of gamma ray emissions. Radiometric measurements may be used as supporting geological inferences in evaluating a deposit; however, alone, they cannot be accepted to prove the existence of a uranium deposit. *U.S. v. Rigg*, 16 IBIA 385 (1974).

**Atomic Absorption Assays Are Recognized Test**

Atomic absorption assays have been approved by the Interior Board of Land Appeals as a recognized test for hardrock gold deposits. In *U.S. v. Pool*, 78 IBLA 215, 221-22 (1984), the Board held that "while the atomic absorption method is not as universally accepted in the mining industry as is the standard fire assay, it is, nevertheless, a recognized test of gold content."

**Expert Witness Must Have Personal Knowledge of Sampling and Assaying**

In *Cactus Mines Limited*, 79 IBLA 20, 30 (1984), the testimony of a mining engineer attempting to show mineral values in certain ore samples was held to have no value. His testimony was rejected because it "appeared he was unfamiliar with the actual testing for the purported samples, had not performed it himself, and had no personal knowledge of the tests or the ore sampling upon which the tests were presumably based." *Id.* at 30.

**Assay Values in Old Reports**

It is not uncommon for mining claimants to submit assay values mentioned in old reports as evidence that a discovery exists. However, there is seldom sufficient description of such samples to make them useful; furthermore, since publication of the report, the mineral deposit may have been mined out. In *U.S. v. Vaux*, 24 IBLA 289, 299 (1976), the Board said:

> Bulletin 37 also showed apparently high assay samples taken on appellant's two relocations, the Isoletta claim and the Homestake and Star claim. These samples alone are not evidence of a valid discovery. The nature of the samples yielding the high values must be considered. *U.S. v. Pruess*, A-28641 (August 22, 1961), *aff='d, Pruess v. Udall*, 410 F2d 750 (9th Cir), *cert. denied*, 396 US 967 (1969). The Bulletin neither reveals when the samples were taken nor the nature of the samples submitted. Therefore, they cannot be considered as representative of a present valuable mineral deposit within the limits of those two relocations.

In *U.S. v. Meyers*, 17 IBLA 321, a similar case, the Board said:

> We also agree with the Judge's conclusions for another reason. The mining reports indicate that this tunnel, at one time, contained substantial mineral deposits. As we said before, however, the reports are not reliable evidence of whether the claims now contain valuable minerals. There is evidence in the record that mining operations were conducted on the Liberty Placer claim after the reports were prepared. It is possible that any values that were once in the buried channel have been mined out.

## ECONOMIC ASPECTS OF VALIDITY

**Mining Methods**

In *U.S. v. Gold Placers, Inc.*, 25 IBLA 374, 375 (1976), the Board recognized that mining methods, equipment and procedures vary depending on the special circumstances of each mineral deposit. The Board also explained that if a claimant proposed a mining method that would lower

mining costs, he should present evidence at the hearing to document the fact. The Board said at 375:

> ... statistical, well-established data readily available through published documentation. Mining methods may vary depending upon many variables including the geological conditions of the mine, sources of water, transportation and equipment costs, etc. Thus, evidence would have to be presented to show that any new method could be utilized at costs lower than those estimated using appellant's present mining methods.

**Mining Costs**

The costs of extraction processing and transportation must be considered in determining the validity of a claim. Furthermore, labor and equipment costs must be calculated at a price one would have to pay to hire the work done by others. The purpose of this requirement is to prevent a claimant from appropriating the public land by subsidizing mining operations with his own labor and equipment. In *U.S. v. Garner*, 30 IBLA 42, 67 (1977) the Board said:

> It is clear that in applying the prudent man test, the cost of extraction, processing and transportation of the recovered mineral must be considered because these costs bear on whether a person of ordinary prudence would be justified in the further expenditure of his time and means to develop the mining claim. *Citation omitted.* Such costs necessarily must include the amortization cost of the equipment used in the mining operations, even though the claimant by fortuitous circumstance has access to machinery at a cost less than the average prudent person would have to pay. *Citation omitted.* Labor and equipment costs must clearly be considered in determining whether a mining operation has a reasonable prospect of success. There is no reason to consider the value of the labor of a locator or the use of his mining equipment any differently from that which he might hire. Either one must be taken into consideration in determining the likelihood of a profitable venture being established.

In *U.S. v. Alaska Limestone Corp.*, 66 IBLA 316, 324 (1982), the Board again specified certain costs that were not considered by the claimant:

> No evidence was adduced to establish the cost of such an installation, the cost of extraction and delivery to the proposed plant, the cost of operation, the anticipated sales volume, the unit price, the identity and location of prospective purchasers or the cost of delivery to them.

**Environmental Costs**

Costs to satisfy environmental requirements of Federal, state, and local laws and regulations are properly considered in determining the feasibility of a mining operation. *U.S. v. Pittsburgh Pacific Co.*, 30 IBLA 388, 84 ID 282 (1977), *affirmed* 462 F.Supp. 905, 614 F2d 1190 (1980). Also, it was held in *Pittsburgh Pacific Co., supra* at 285, that such costs as water supply, additional land, financing and labor costs must be considered in determining whether a mining

operation will be profitable. The Board said:

> While Pittsburgh has submitted considerable evidence which indicates that a discovery has been obtained, there remain factors -- some of which may be beyond the control of *Pittsburgh* which could stand in the way of a profitable mining operation. After evaluating the evidence, we conclude that substantial questions exist with respect to adequacy and cost of water supply, additional land, financing, labor costs, and expense of compliance with environmental protection laws.

In *Great Basin Mine Watch*, 146 IBLA 248 (1998), the Board again reiterated the requirement that Aif the costs of compliance render the mineral development of a claim uneconomic, the claim, itself, is invalid and any plan of operations therefor is properly rejected.@ The Board said at 256:

> Moreover, in determining whether a discovery exists, the costs of compliance with all applicable Federal and State laws (including environmental laws are properly considered in determining whether or not the mineral deposit is presently marketable at a profit, i.e., whether the mineral deposit can be deemed to be a valuable mineral deposit within the meaning of the mining laws. *See, e.g., United States v. Pittsburgh Pacific Co.*, 30 IBLA 388, 405, 84 I.D. 282, 290 (1977), *aff=d sub nom. South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir.), *cert. denied* 449 U.S. 822 (1980); *United States v. Kosanke Sand Corp. (On Reconsideration)*, 12 IBLA 282, 298-99, 80 I.D. 538, 546-47 (1973). If the costs of compliance render the mineral development of a claim uneconomic, the claim, itself, is invalid and any plan of operations therefor is properly rejected. Under no circumstances can compliance be waived merely because failing to do so would make mining of the claim unprofitable. Claim validity is determined by the ability of the claimant to show that a profit can be made after accounting for the costs of compliance with all applicable laws and, where a claimant is unable to do so BLM must, indeed, reject the plan of operations and take affirmative steps to invalidate the claim by filing a mining contest.

**Labor Costs**

In numerous cases the Interior Department has held that labor costs must be considered in determining whether a mining operation could be profitable; and furthermore, the value of such labor must be applied in amount that would be sufficient to hire another person. In *U.S. v. Gardner*, 18 IBLA 175, 179 (1974), the Board said:

> Labor costs must clearly be considered in determining whether a mining operation has a reasonable prospect of success, and there is no reason to treat the value of the labor of a claimant any differently from that of one he might hire. Either one must be taken into consideration in determining the likelihood of a profitable venture being established. *U.S. v. Harper*, 8 IBLA 357, 365 (1972); *U.S. v. White*, 72 ID 522 (1965), *aff=d, White v. Udall*, 404 F2d 334 (9th Cir 1968). In the *Harper* case, *supra*, the Board rejected the

argument that a meager yield of income from the claims would constitute a substantial increment to the income of a person living on retirement benefits and would be sufficient to satisfy the amount required to establish a profitable operation.

Even in a one-man operation, "the value of the claimant's labor must be considered in determining whether there has been a discovery of a valuable mineral deposit." *United States v. Wirz*, 89 IBLA 350, 357 (1985). In other words, there must be profit left over after the value of the claimant's labor is subtracted from the gross income.

**Minimum Wage Is Not Proper Standard for Mom and Pop Mines**

In *United States v. Miller*, 138 IBLA 246 (1997), the appellants contended that wage rates for a Amom and pop@ operation such as they envisaged should be based solely on the minimum wage. In rejecting this contention, the Board said at 275-277:

> * * * And it was because of the objective nature of the test for discovery that we expressly held, in *United States v. Wirz*, 85 IBLA 350 (1985), that Alabor costs must be considered in determining whether a particular operation has a reasonable prospect of success, and *the value of the labor of an individual mining claimant is not to be treated any different that of one he might hire.@ Id*. at 358 (*emphasis supplied*).
>
> We recognize that a number of Board decisions have, through a negative inference, seemingly embraced the minimum wage as a proper standard for determining labor costs with respect to small Amom and pop@ mines. However, none of these decisions directly held that the minimum wage was the correct value of a claimant=s labor. Rather, what these decisions have in common is that, in examining admittedly small projected returns from placer gold operations, they noted that either Government experts had testified or the evidence showed the anticipated revenues Awould be far below what a person would receive at the minimum wage.@ *United States v. Rouse*, 56 IBLA 36 (1981). See also United States v. Corns, 53 IBLA 5, 14 (1981); *United States v. Page*, 43 IBLA 390, 392-93 (1979); *United States v. Lambeth*, 37 IBLA 107, 110 (1978). Not only did none of these decisions expressly mandate use of the minimum wage for imputing labor costs in such operations, but, more importantly and unlike the instant appeal, in none of these appeals was there any evidence that the value of the labor involved (primarily panning and sluicing) was greater than the minimum wage.
>
> Correctly viewed, the minimum wage merely establishes the floor for determination of the value of the claimant=s labor. Where, however, there is independent evidence establishing the value of the labor necessary to mine a deposit, it is that value which is properly used to determine whether or not a prudent man would expend his effort and means to develop a paying mine. The willingness of a claimant to accept less than the market value of his labor represents a subjective value judgment on the part of that claimant. In effect, for reasons unrelated to the economics of development, the mining claimant is subsidizing the operation of the claim by undervaluing his labor. The validity of the claim, however, must be premised on the objective economics surrounding

the proposed mining venture.

**Industry-Scale Wages Required for Hired Workers**

In *Collord v. United States*, Civil No. 94-0432-5-BLW (D.C. Idaho; August 27, 1996), the Collords contended that the Board=s analyses of profitability are flawed because the Board assumed Athat the Collord=s project, through a family operation, would pay industry scale wages to hired workers.@ Plaintiffs= Brief at p. 36, n. 8. The Collords had inappropriately relied on *United States v. Wells*, 11 IBLA 253 (1973) for the proposition that wages need not be accounted against the project=s profitability if an owner works on the mine

himself. On this issue the Court upheld the accounting of labor costs against the profitability of Collord=s operation:

> However, the Board has spoken more recently--and more directly--to this question. In *United States v. Anna Wirz*, the Board held that Alabor costs must be considered in determining whether a particular operation has a reasonable prospect of success, and the value of the labor of an individual mining claimant is not to be treated any different than that of one he might hire. Either must be considered when determining the likelihood of establishing a profitable mine.@ 89 IBLA 350, 358 (1985) (emphasis added). In light of this authority (and others cited by the Board in the *Anna Wirz* opinion), the Court finds that the Board did not err by accounting labor costs against the profitability of the Collords= proposed operation.

**Value of Claimant=s Labor**

In *United States v. Waters et al.*, 146 IBLA 172 (1998), the Board described how the claimant=s labor must be accounted for in the cost analysis:

> The assertion that labor costs need not be considered because claimants plan to do the work themselves is contrary to long-established precedent. AThere is no reason to consider the value of the labor of a locator or the use of his mining equipment any differently from that which he might hire. Either one must be taken into consideration in determining the likelihood of a profitable venture being established.@ *United States v. Garner*, 30 IBLA 42, 67 (1977).
>
> * * * When wages are paid overhead expenses are incurred. These expenses include costs such as unemployment taxes, workers=compensation contributions, and social security contributions.

**Labor Costs Based on Local Market**

In *United States v. Clouser*, 144 IBLA 110 (1998), the Board approved the Administrative Law Judge=s determination that it is appropriate to establish the costs of labor as the Aordinary labor costs that would be experienced by a typical mining operation on the claim

were it to go hire its own work force from the local labor market.@ *Id.* at 128. In other words, the prevailing rate is used where the nature of the work is unskilled mining. *Id* at 129. However,

**Minimum Wage May Be Used If No Better Evidence**

In *United States v. Clouser*, 144 IBLA 110, 130 (1998), the Board said that the Aminimum wage figure provides a floor to be used if no better evidence is introduced. If there is better evidence, that evidence should be used.@ *Id.* At 130.

**Earlier Development Costs Not Considered in Determining Validity**

In *United States v. Mannix*, 50 IBLA 110, 119 (1980), the Board held that costs associated with developing a deposit should not be considered in determining if an ongoing operation is profitable. The Board stated at 119:

> 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 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.

**Costs Are Sunk If Claimants Already Own Equipment**

In *United States v. Clouser*, 144 IBLA 110 (1998), the Board indicated the *United States v. Garner*, 30 IBLA 42, 67 (1977) was Aimpliedly overruled@ to the extent it conflicted with the Board=s ruling in *United States v. Mannix*, 50 IBLA 110, 119 (1980) that Aequipment costs need not be considered where the claimant already owns the equipment. The Board said at 132:

> * * * Judge Sweitzer properly recognized that the claimants own most of the equipment that they will need and are capable of maintaining it. *Citations omitted*. Nevertheless, he held that the costs of obtaining the equipment must still be taken into account. *Citation omitted*. We disagree. Judge Sweitzer relied on *United States v. Garner, supra*, at 67, in holding that equipment costs must be considered in determining whether mineral could be extracted, removed, and marketed at a profit even where a claimant already owns the necessary equipment. While *Garner* is to that effect, it was impliedly overruled in *United States v. Mannix, supra*, at 119, wherein we held that equipment costs need not be considered where the claimant already owns the equipment.

**Costs Factors in Determining Validity**

In *United States v. Mannix, supra* at 118, the Board restated the many types of cost factors currently considered in determining the validity of a mining claim under the prudent man rule:

1. 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.
2. Quantity of minable mineral on the claims.
3. Average grade or quality of mineral on the claims.
4. Price at which the mineral will be sold and expected returns.

The above evidence should focus on current estimates of costs and prices.

**Basis for Estimating Mining Costs**

"Although final proof of actual mining costs can only be ascertained after the conduct of an actual mining operation," to satisfy the prudent man test, mining costs may be established by comparison of the estimated costs based on "a reliable cost analysis system, .... and by use of a comparison to an operating mine." *United States v. Foresyth et al*, 100 IBLA 185, 224-25 (1987).

**What a Prudent Man Might Expect as Mining Costs and Selling Price**

"....it is not necessary for a prudent man to know exactly the cost of producing the product or the exact price he might receive. Rather, based upon a reasonable and rational estimate of the cost of production and a reasonable and rational estimate of the market price for the product, there is a reasonable probability of success in the development of a valuable mine." *United States v. Foresyth et al, supra* at 227.

**Mining Costs Must Be Supported by Specifics**

In *United States v. Gillette*, 104 IBLA 269 (1988), the Board found that a claimant's profit analysis was of little probative worth because "mining, hauling, and milling costs are unsupported by specifics or realistic cost data. For example, a contract mining cost of $55.25 per ton is posited, but neither the necessary machinery nor man-hours is itemized. Nor is there any mention of other operations which might serve as comparisons." *Id*. at 275.

**Mine Costs and Commodity Prices in Profit Analysis Taken Date Final Certificate Issues**

Mining costs and commodity prices to be applied in the profitability analysis must be those in effect at the date of final certificate rather than some later date such as the date of a hearing. Where the United States contests the validity of a mining claim after issuance of final certificate, the government is determining whether or not equitable title has already passed. Of

course the date of hearing would still be the critical date for validity examinations where no patent application was involved. *United States v. Whitaker (On Reconsideration)*, 102 IBLA 162, 166 (1988).

**Dates Discovery Must Be Demonstrated/Dates to Use Commodity Prices and Mining Costs**

In *Collord v. United States*, Civil No. 94-0432-5-BLW (D.C. Idaho; August 27, 1996), the Court reviewed the case law precedents regarding the date a discovery must be demonstrated on a claim:

> * * * First, Board precedents hold that demonstration of a valuable mineral deposit must be accomplished as of certain dates. Where the land on which the claim is situated has been withdrawn from mineral entry, the claimant must demonstrate that the mineral deposit in question is valuable as of the date of withdrawal. *See United States v. Hooker*, 48 IBLA 22, 29 (1980), (*citing Palmer v. Dredge Corp*., 398 F.2d 791 (9th Cir. 1968), cert denied, 393 U.S. 1066 (1969)). Further, when a patent application has been applied for and a final certificate has issued, the claimant must demonstrate the validity of the claim as of Athe date on which the claimant fulfilled all of the prerequisites to the making of the entry, i.e., no later than the date of the issuance of the final certificate.@ *United States v. Whittaker*, 102 IBLA 162, 166-67 (1988), *aff=d, Whittaker v. United States*, No. CV-87-140-GF (D. Mont. Feb. 8, 1989).

AIf the Board=s precedents require a claimant to demonstrate profitability as of the date of final certificate issuance, as they do, then it makes perfect sense to limit consideration of mineral prices to time periods preceding that date; mineral price data relating to periods of time subsequent to the date on which profitability must be demonstrated should be irrelevant. *See Whittaker*, 102 IBLA at 166-67" *Collord v. United States, supra* at 23. Furthermore, A[t]he Court found that the Board in *Collord* erred by considering average gold prices during a six month period subsequent to the final certificate date.@ *United States v. Collord, supra* at 23.

**Cost Estimation Unnecessary for Prima Facie Case**

In *United States v. Parker*, 91 I.D. 271, 284 (1984), the appellant contended that a prima facie case cannot be established where the Government mineral examiner did not make an estimation of the cost of mining and recovering the gold from the claims. In holding that a cost estimation was not required to establish a *prima facie* case, the Board said at 284:

> We conclude that a *prima facie* case is established where a Government mineral examiner testifies, based on his observations and expertise, that gold is not present on a mining claim in such quality and quantity to warrant the expenditure of time and means in the development of a mine.

Of course a *prima facie* case with no cost estimation would be a very weak case and much easier to overcome by the claimant at the hearing .

**Selective Mining**

The use of selective mining methods may be considered in determining the profitability of a mineral deposit. *United States v. Mannix*, 50 IBLA 110, 117 (1980).

**Cut-Off Grade Defined**

In *United States v. Clouser*, 144 IBLA 110 (1998), the Board defined Acut-off grade@ at 118, f.n. 9:

> The Acut-off grade@ for a viable mining operation is the lowest grade of the mineral resource that would have to be recovered in order for the revenues derived from mining and milling to cover the costs thereof, and leave a profit. *See United States v. Dresselhaus, supra*, at 264 n.11, *citing* U.S. Department of the Interior, Bureau of Mines, *A Dictionary of Mining, Mineral, and Related Terms* 294 (1968).

**Costs of Selective Mining**

Costs of mining a part of a vein (selective mining) may be greater than removing the entire vein if the vein consists of a shear zone with incompetent material. The requirement for additional support would raise mine costs. *United States v. New York Mines*, 105 IBLA 171, 185 (1988).

**Estimates taken from Model Have Less Credibility**

In *United State v. American Independence Mines and Minerals*, 122 IBLA 177, 187 (1992), the board gave greater credibility to the cost estimates of the claimants than it did the government mineral examiner. The claimants based their estimates on the proposed operation whereas the mineral examiners estimate was based "on a 'general generic model' of a mine that assumed a larger and deeper pit." Furthermore, the mineral examiner "had no knowledge of the actual foundation for the cost-analysis estimate she offered in rebuttal to the Mashburn estimate. Her estimate was in fact, taken from a model appearing in a mining publication journal that was not clearly comparable to that proposed in the american Independence analysis." *Id.* Similarly, the mineral examiner estimated a 75-percent recovery rate for the mill derived from technical reference works; whereas, the higher estimates of 90-percent recovery by the claimant's experts was based on actual tests of samples taken from the claims. *Id.* at 188.

**Five Year Average Price for Mineral Commodity**

The Board has held that minerals should be valued for validity determination purposes according to their historic prices to allow for market determination. *In re Pacific Coast Molybdenum Co.*, 90 I.D. 352, 359-60 (1983). In *United States v. Crowley*, 124 IBLA 374 at 376

(1992) the Board approved the application of a five-year average price for gold and silver preceding a withdrawal. The Board also noted that the "profitability of mining the claims at time of the hearing is also a relevant consideration." *Id*. at 376.

**Nothing Significant About Using Five Year Period**

In *Collord v. United States, supra*, the Court addressed the significance of the five-year average used in Crowley. The Court said at page 24:

> The Court does not believe there is anything talismanic about a five-year period. Rather, it seems plain that the Board used a five-year average in *Crowley* simply because that was the data at hand--the data in the record--that best reflected the historical range of mineral values.

**Extended Nonproduction Rule**

In *United States v. Miller*, 138 IBLA 246 (1997), the Board discussed the extended nonproduction rule=s applicablility to a case where the claimant was not notified that the rule would be the basis for the government=s case. The Board said at 277, f.n. 18:

> We recognize that there could be some question as to the applicability of out holding in *United States v. Hess*, 46 IBLA 1 (1980), to the instant case. In *Hess*, we held that uncontradicted evidence of the absence of production over an extended period of time may, in and of itself, establish a prima facie case of invalidity. *Id*. at 7-9. As we explained in *United States v. Knoblock*, supra at 88, 101 I.D. at 144:
>
> > This rule reflects the principle that, given the varying economic conditions present over a period of many years, a mining claim will usually be developed unless it is not commercially feasible to do so profitably. In other words, the best evidence of what a prudent man would do is what a prudent man has done.
>
> In this case, while the specific claim was located in 1980, appellants have held the land for mining purposes since the early 1950's. This is more than a sufficient amount of time in which to bring the Aextended nonproduction@ rule into play.
>
> The problem, however, is that, if the Forest Service desired to utilize the extended nonproduction of the claim as a basis for its case, it was necessary that it alert contestees of this fact, either in the complaint or at the hearing. *See United States v. McElwaine*, 26 IBLA 20 (1976). Not only did the Forest Service fail to put contestees on fair notice, it is affirmatively clear from its post-hearing brief that the Forest Service, itself, did not consider this to be an issue.

**Price of Gold**

In *United States v. Collard*, 128 IBLA 266 (1994), the Board made a determination of how the value of an ounce of gold should be set where you first have a withdrawal on January 1, 1984, and then issuance of the first half final certificate on June 1985. The Board said at 277, f.n. 14:

> The record demonstrates that gold was selling for $381.50/oz. when the subject land was withdrawn from mineral entry (Jan. 1, 1984). Gold prices subsequently declined to $316.49/oz. in June 1985, when the final certificate issued. (July 1985 gold price - $320/oz.). At that time, the average gold price since May 1984 was $332.41/oz. But after June 1985 the price of gold climbed slowly to $345.49/oz. in January 1986 and eventually to $439.10/oz. in July 1988. It is proper to consider the historic range of prices in order to account for market fluctuations. *United States v. Crowley*, 124 IBLA 374, 375 (1992). Therefore, in the course of this opinion, we will rely on the Jan. 1, 1984, price and the average price for the period from May 1984 to January 1986 (330.66/oz.) as representing the immediate historic period surrounding issuance of the final certificate in June 1985.

So, the total value of the deposit "can be determined by multiplying the total number of ounces .... by the value of an ounce of gold in January 1984 and June 1985." *Id*. at 277.

**Gold Price That is likely in the Future**

In *United States v. Clouser*, 144 IBLA 110, 128 (1998), the Board indicated that the selection of a gold price Amust not be focused exclusively on the price extant at that time [marketability date, hearing, etc.], but rather on the price that is likely in the future given past experience with prices. The Board went on to say at 128:

> Gold prices more than 5 years prior to the time of the hearing cannot be considered to reflect the likely price in the future where they include abnormally high prices and there is no evidence that there is a reasonable expectation that the high prices will return, given the downward trend in prices in the years preceding the hearing. * * * By looking at the historically highest prices, Appellants failed to take into account the downward trend at the time of the hearing. Moreover, where there is no evidence that prices will return to those high levels, they cannot be utilized in arriving at a price which can be justified Aas a present matter.@

**Gold Values: Threshold Requirement of the Mining Law**

In *United States v. Collord, supra*, the Board indicated that the assay values of gold in a quartz vein met the "threshold requirement" of the mining law. The Board said at 272:

> In the case of the GS-1 claim, the samples exhibited gold values in the vein of from a trace to 4.185 oz./ton, or an average of 0.85 oz./ton. For the GB-2 claim, the samples showed gold values in the vein of from a trace to 0.675 oz./ton, or an average of 0.14

oz./ton. We therefore find that there has been exposed on the claims a vein or lode carrying mineral values so as to meet the threshold requirement of the mining law.

**Commodity Prices Based on Government Stockpiling Program**

In *United States v. Knoblock*, 131 IBLA 48, 104 (1994), the Board quoted with approval from its decision in *United States v. Denison*, 76 I.D. 233 (1969). The Board said "cessation of a Government stockpiling program, which had greatly elevated manganese prices, served to render these past prices irrelevant to the question of present marketability." While "[i]t was, of course, not beyond the realm of possibility that a future stockpiling program might some day be initiated," * * * it "was essentially speculative and could not serve as a predicate upon which a *prudent* man would have proceeded to expend time and money with a reasonable hope of success." 131 IBLA at 104. (emphasis in original).

**Claims in Withdrawal Should Be Charged for Development Costs Even if Already in Place**

In his concurring opinion in *United States v. Collord*, 128 IBLA 266 at 303-04 (1994), Judge Burski pointed out that the fact *United States v. Mannix*, 50 IBLA 110, 119 (1980) did not involve a withdrawal, "was critical to the Board's ruling." Judge Burski said at 304:

> While not clearly explained, the non-existence of a withdrawal was critical to the Board's ruling in the *Mannix* case. The claimants in *Mannix* had, in fact, made substantial expenditures in developing the underground workings, expenditures which, quite frankly, would never be recouped even if they successfully mined the deposit disclosed in the evidentiary record. Obviously, with the benefit of 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 the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. It could, therefore, have been argued with some force that these claims were not valid since there was virtually no chance that a paying mine (one which would recoup all of the claimants' expenditures) would result.
>
> The Board declined to invalidate the claims, however, *because* the land was not withdrawn. In essence, the Board reasoned that while it might be argued that the specific claims at issue were invalid, nothing would prevent the appellants from relocating new claims upon the receipt of the Board's decision. Such new claims, however, would not be burdened with the necessity of recouping past expenditures made under prior locations. Rather, they would merely be required to show, in the words of the Board, that "the mineral may be now mined, removed, and marketed at a present profit over and above the costs of such operations." In effect bowing to practicality, the Board determined that, so long as the land remained 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.

**Claimant's Own Equipment Must Be Counted at Rental Value and Cash Must Be Counted**

**at Interest Value**

In *United States v. Feezor*, 130 IBLA 146 (1994), the mineral examiner had failed to "provide outlays for various items of mobile equipment" because the claimant told him that they "had a surplus of equipment from another job, project or plant or operation that had gone out of commission * * * [a]nd that it was his intent that we utilize the equipment." Consequently, no costs were allocated to "a 580 backhoe, a three-cubic-yard loader, three-ton forklift, 10-ton truck, two pickups, some water tanks and welders and miscellaneous tools." *Id.* at 222. The Board found this approach to proceed on a "fundamentally flawed" basis and stated at 222:

> To suggest that, because an individual happens to already have on hand various equipment which will be used in mining, such equipment is essentially "free" is no different than arguing that, because an individual happens to have large amounts of cash which are not being invested, use of the cash in an enterprise is also without cost. *Regardless of whether or not either the equipment or the cash is being presently put to beneficial use, both are possessed of a present opportunity value which might be expressed with respect to equipment as its rental value and with respect to cash as its interest value.* Utilization of either presently unused equipment or presently uninvested capital represents consumption of the opportunity value attributable to both, and this lost opportunity value is properly assessed against any income in determining the net profitability of an enterprise. The failure of the PAH Report to factor in these costs in its analysis necessarily resulted in an overstatement of any possible return. (emphasis added).

**Costs Associated with Suction Dredging**

In *United States v. Lackowski*, 111 IBLA 165, 174 (1989), the Board specified that items as setup time, cleanup time, depreciation, wetsuits, face masks, maintenance costs, labor, fuel and costs of the dredge should included in the operating costs of the suction dredge. In this case, mining costs were estimated on an hourly basis. For example, the costs for operating an 8 inch dredge was $16.50 per hour and the costs for operating a 4 inch dredge was $11.50 per hour. These costs would then be subtracted from the value of gold recovered in an hours operation. Of course, the costs of operating a dredge may depend on many factors in addition to those mentioned here. Dredge costs are affected by type and size of dredge, operating condition, type of material dredged, thickness of material, physical conditions in the river, etc. Therefore, even the same dredge may have widely different operating costs in two different sites in the same river.

**Value Added by Manufacture**

It is well established that the value of a mineral as it relates to the validity of a claim is the value of the mineral after extraction from the mine, but before any additional manufacturing that would significantly raise the value. In other words the value should be based on the mineral in its raw state rather than on the value of subsequent workmanship. For example, the value of gold may be $400 per ounce, whereas, the same ounce of gold, once manufactured into jewelry,

might have a value of $2,000. In *U.S. v. Alexander*, 17 IBLA 429, 433 (1974), the Board said:

> It is only the intrinsic value of the raw mineral exposed or removed from a claim that is considered in a validity determination; value added to the mineral by reason of manufacture or design must be disregarded, because it essentially reflects the skill and ingenuity of the artisan rather than the value of the mineral.

**Government Support**

During certain periods, particularly during World War II, the Federal Government has created an artificial market for low grade ores by paying an incentive price under a stockpiling program. In *U.S. v. Kinder*, A-30916 (November 26, 1968), the Department held that there is no justification to issue a mineral patent for mining claims containing low-grade manganese ore simply because patents were issued for similar-type claims during the war. In a related case, the Court held in *Northern Pacific Railroad Co. v. U.S.*, 355 F2d 601 (Ct Cl 1966) that the incentive price should not be considered as establishing the value of manganese for the purpose of commodity tariff rates.

**Commodity Prices**

In determining the validity of a mining claim at an administrative hearing, the Department has consistently held that one must use the commodity prices at the date of the hearing as well as the mining costs at the same date. Of course in the case of determining validity of a claim located prior to a withdrawal, one would use the commodity prices and mining costs at both the date of the withdrawal and the date of hearing. In *U.S. v. Gold Placers, Inc*., 25 IBLA 374, 375 (1976), the Board gave a detailed discussion of this requirement:

> The only conceivable justification for continuation of mining activities would be in the hope that the market value of the mineral might rise. But until a rise of sufficient magnitude is an actual fact so that a prudent man then could expect a profitable mining venture, no discovery has been made, and a contested claim is properly declared invalid. Indeed, subsequent declines in the price of gold show that blind reliance in an indiscriminate future rise of gold prices is not justified....
>
> We believe it was reasonable for the Judge to recompute the value of the auriferous gravel subsequent to the date of hearing in light of the tremendous upsurge in the price of gold then rampant. Indeed, there is precedent for such action in a number of our own decisions. *See, e.g., U.S. v. Kinsley Ranch Resort, Inc*., 20 IBLA 14 (1975); *U.S. v. King*, 15 IBLA 210 (1974). the implicit premise of this approach has been that the prices of certain minerals in universal demand where there is an established and definite general market price are matters of which official notice may be taken pursuant to 43 CFR 4.24(b) and 43 CFR 4.450-4(c). We adhere to that position. Quoted mineral and metal prices in standard financial and mining journals, as well as in weekly reports submitted by the Bureau of Mines are subject to official notice, but we hasten to point out that the applicable regulations are clearly permissive, not mandatory. The weight to be

> given unilaterally to an increase in the value of a mineral or metal must he carefully considered in the entire context of a case, especially where no new data concerning possible increases in the costs of mining is available. We must also insist that where a falling price cycle is apparent, similar notice be taken of the current lower values.
>
> ... While it is not improper to take notice of the increase in the price of a mineral after the time of hearing, we think it is improper not to recognize the great increase in the prices of petroleum products and other service costs necessary to placer mining operations. We cannot reconcile the present higher price of gold, weighed against the operational costs of 1973, as indicative of a profitable mining venture on this claim. We are convinced that a marginal operation in 1973 would continue to be a marginal operation now because, although gold prices are 10 percent higher, costs of operation fuel have increased more than 25 percent.

As pointed out in *Gold Placer, Inc., supra*, the validity of a mining claim depends on present prices; the anticipation of future increases in the value of a mineral commodity is not permitted. As was stated in *U.S. v. Garner*, 30 IBLA 42, 67-68 (1977), the "application of the prudent man and the present marketability tests does not afford latitude to include mere speculation that substantial changes in the market place might occur."

**Claim Bootstrapped into Validity by Associated Business**

A claim must be validated on the basis of the mineral commodity itself rather than riding on the "coattails" of an associated business. A good example of this problem may be found in *U.S. v. Beckley*, 66 IBLA 357, 364-365 (1982) where the Board said:

> In arguing that they have met the marketability test for the discovery of a valuable mineral deposit, the claimants argue that we should take into account the fact that they wish to use the silver from the claim to make jewelry which they will market locally. They contend that the marketability test should have been applied to the entire venture rather than just to the mining operation. Although the entire business operation of a claimant may be viewed as creating a market where none would otherwise exist, there would be a market for appellants' silver if it could be economically mined regardless of their jewelry casting business. The issue is whether it is economically worthwhile to produce silver from these claims, and the claimants did not meet their burden in proving this.
>
> ... An otherwise invalid mine cannot be bootstrapped into validity because of the profitability of some other business in which a claimant may be engaged.

**Closed or Captive Market**

In *U.S. v. Taggart*, 53 IBLA 357 (1981), the Board explained that the marketability test is not met by a claimant selling minerals in a closed market and that a mining claimant must Aprove willing customers exist to whom the claimant could have reasonably expected to sell at a

profit." The Board said:

> With respect to the marketability test, a showing which merely establishes that a given market is receiving an adequate supply of the mineral in question to meet the demand is not a sufficient basis for concluding that supplies from another source are not marketable at a profit. *Citations omitted*. However, where demand is limited to a very few customers who supply their needs from their own sources so that the market is "closed" or "captive," a mining claimant must prove that willing consumers exist to whom the claimant could have reasonably expected to sell at a profit. Failure to make that showing will result in a finding that the mineral deposit has no economic value and does not qualify as a discovery. *U.S. v. Duval*, 1 IBLA 103 (1970), *Aff=d, Duval v. Morton*, 347 F.Supp. 501 (D. Ore. 1972), *aff'd*, Civ. No. 72-2839 (9th Cir Dec. 19, 1973).

**Using Market Data from Several Claims to Give One a Discovery**

The Department has held in many cases that "mineral values obtained from several claims cannot be joined or consolidated to establish a discovery on one of them." In *U.S. v. Melluzzo* (*Supp on Judicial Remand*), 32 IBLA 59, 60 (1977), the Board considered a case where the claimant had no record of cost or production by individual claims. For a claimant to meet the evidentiary burden of showing a discovery of a valuable mineral deposit on each claim, cost and production records should be maintained on each individual claim to avoid the problem of "floating production." The Board said at 60:

> There is yet another, equally compelling reason for concluding that contestees failed to carry their evidentiary burden. They failed utterly to show a discovery of a valuable mineral deposit on each of the 6 separate 40-acre Rena claims or on any single one of them. Where a contestee is attempting to establish the validity of a group of claims he must prove that a valuable mineral deposit exists on each individual claim. An attempt to show that all the claims in several groups, or all the claims in a particular group, taken as a whole, satisfy the requirements of discovery, is not sufficient. An assumption that a discovery on one claim can inure to the benefit of another is a mistake of law.
>
> In short, if it takes the mineral from six or more claims together to warrant a prudent man to attempt to develop a valuable mine, then none of the claims may be regarded as valid, as each claim must be supported by discovery of a valuable mineral deposit within its own boundaries.
>
> Virtually all of the evidence adduced by the contestees was referable to the six Rena claims as a group, and to the use and value of stone from that group of claims when used in combination with stone from other groups of claims. Melluzzo had no records and no idea as to what volume or percentage of the stone allegedly taken and sold at a profit came from any particular claim. Nor did he supply any estimate of what percentage or volume of his stone sales as a whole came from the Rena group as opposed to his numerous other claims or groups of claims.

**Discovery Lost**

The Department has held in many cases that a once valid claim may lose its discovery and become invalid. In *U.S. v. Johnson*, 16 IBLA 237, 238 (1974), the Board specified some of the reasons why a claim may lose its discovery as well as showing that this principle applies both to validity determinations in connection with patent applications and multiple use conflicts:

> The principle thrust of the appeal appears to be that the locator, having once made a discovery, secures a valid and subsisting right to his claims, and that such discovery may not thereafter be "lost" or the locator's right divested. This statement is simply wrong. A discovery, once made, may be lost through the occurrence of any one of a number of events, including the physical loss of the discovery, the loss of essential transportation facilities, exhaustion of the deposit or a loss of the market of substantial duration (as distinguished from temporary market fluctuations).
>
> In *Adams v. U.S.*, 318 F2d 861, 871 (9th Cir 1963), the Court held that even though the mining claim once would have satisfied the test of validity, nevertheless the Government rightfully denied a patent to the claimant since, because of changed economic conditions, the claim did not presently satisfy the test. In comparing the circumstances of the *Adams* case with those before it in *Mulkern v. Hammitt*, 326 F2d 896, 898 (9th Cir 1964), the Court noted:
>
> > ... The fact that in *Adams* the attack was upon the Government's refusal to issue a patent, while in the instant case the Government was seeking to nullify the appellant's claim as to which he had never requested or received a patent, does not distinguish the *Adams* case from the instant one. The problem in both cases is whether the public lands of the United States should be perpetually encumbered and occupied by a private occupant just because, at one time, he had there a valuable mine which has now been completely worked out; or because he had on his location a mineral which, in the then practice of the building industry, had a market, but which, on account of a change in building practice, no longer has a market or a reasonable prospect of a future market; or because, at the time of his discovery, transportation facilities were available which made exploitation feasible, which facilities are no longer available.

**Substitutes for Discovery**

Over the years, mining claimants have come up with a number of reasons their claims should be considered valid even though they have not discovered a "valuable mineral deposit" within the boundary lines of their claims. The pertinent parts of several of these cases are quoted below under the appropriate subheading:

1. Consolidate ownership to keep out other locators and put land on the tax rolls. *U.S. v. Grigg*, 8 IBLA 331, 343, 79 ID 682 (1972):

Appellant asserts that the land should be patented as its highest and best use is "to consolidate the patented land and protect the patented land against encroachment of outside location" and also to put the land on the tax rolls. He also asserts he has not been able to afford the expense of hiring mining engineers and of having tests performed. These assertions do not establish a basis for issuing a patent. The mining law is not simply a vehicle for transferring federal lands to private owners so that they may consolidate their ownership in an area.... Even though expensive capital investment may be necessary for a claimant to establish the fact of discovery, this is no excuse or substitute for failure to prove the existence of the valuable mineral deposit to entitle the claimant to a mineral patent.

2. Lack of investment money to establish the discovery. *U.S. v. Grigg*, *supra*:

   Inability of a mining claimant to make the necessary capital investment to establish the existence of a discovery of a valuable mineral deposit is not an excuse or substitute for failure of the claimant to prove the existence of the deposit in order to be entitled to a patent for a mining claim.

3. Claim may not be located to provide access to other claims. *U.S. v. Connett,* 36 IBLA 87 (1978):

   The location of a mining claim simply to insure access to other claims is not a legitimate purpose within the scope or intention of the general mining law.

4. The Government is not required to establish a *prima facie* case for every possible mineral that might exist on a claim. *U.S. v. Johnson*, 16 IBLA 242 (1974):

   In order to make a prima facie case of the invalidity of a mining claim, it is not required that the contestant go through a "*shopping list*" of all possible minerals and prove that each one, or each possible combination, is insufficient to qualify the claim, where even the claimant has not seriously asserted that he has made a discovery of a valuable deposit of those minerals.

**Unproven Methods of Mineral Recovery**

There have been a number of cases where the claim owners contended that they have a new process to recover gold or other minerals. These cases fall into two general categories: (1) The gold can be detected in standard assays but cannot be recovered by conventional mining or processing methods. In such a case, the claimant asserts that he has a new recovery process that will enable profitable recovery of the gold. *U.S. v. Page*, 43 IBLA 395 (1979); *U.S. v. Segna*, 49 IBLA 75 (1980). (2) The Government determines that only small amounts of gold can be detected by standard assays; however, the claimant contends that additional gold does exist and can be profitably recovered by a secret or unconventional process. *U.S. v. Swain*, A-30926 (1968); *U.S. v. California Alluvial Mining Corporation*, A-30928 (January 30, 1969).

In general, if a claimant asserts that he has a novel and unproven method for recovery of very fine gold which cannot be recovered profitably by conventional methods, it is the claimant's affirmative duty to present evidence that such gold can be recovered at a profit.

The following three cases involved claimants who contended that they have a new process to recover minerals:

1. *U.S. v. Swain*, A-30926 (1968):

> Appellant's principal thesis was that, under a new process developed by Green, more gold can be recovered than is possible with the use of conventional methods of recovery and that, with such recovery, the claim can be profitably mined. Green testified that in the "Jicarillo placer" the panning of free gold will yield only 25 percent or less of the gold present. Most of the gold present, he stated, is found in colloidal form in specularite and will wash away and be lost in conventional wet processes of gold recovery, whereas, under his own process, 90 to 95 percent gold recovery could be expected, and profitable operation would be possible with material having a value of $1.50 per yard.... Moreover, she argues, Ashby's testing by the fire assay method is not a true test of mineral content where colloidal gold is involved.... However, appellant has introduced no tangible evidence in support of this assertion, and, in the absence of demonstrable evidence that the material found on appellant's claim does contain substantially greater values in gold than have been revealed in tests of that material, we cannot find that there is a reasonable possibility of developing a valuable mine by the use of an extraction process which permits greater gold recovery if the value of the gold present did not exceed the cost of its extraction and processing, and, as we have already pointed out, appellant has not submitted any evidence that the gold on her claim is of such value.

2. *U.S. v. California Alluvial Mining Corporation*, A-30928 (January 30, 1969):

> He stated that the material on the claims contained clays carrying extremely fine gold, "as fine as talcum powder," and that this fine gold, if recovered, would permit the claims to be operated successfully. The fine gold, he continued, could be extracted by processing the material through some special scrubbing and roasting machinery... New procedures and methods are, of course, relevant and important. The contestee does not say that the method of operation employed in Nevada is suitable or adaptable to its claims. It was, moreover, not able to demonstrate that it could recover gold economically by the method it had developed. Its assertions that by building larger equipment of the same type it could operate profitably from the material on the surface of the claims was unsupported by anything more substantial than its witness' enthusiasm... We are then left with a novel and unproven method of separating fine gold from a material which has not as yet been shown to contain substantial amounts of even fine gold. Either deficiency would raise difficulties for the claims; together they

are overwhelming.

3. *U.S. v. Segna*, 49 IBLA 75 (1980):

> Moreover, while a Government mineral examiner must have cognizance of the normal uses and methods of beneficiation of any mineral in formulating an opinion as to whether a discovery of a valuable mineral deposit has occurred (*cf. U.S. v. Hooker*, 48 IBLA. 22 (1980)), there is absolutely no requirement that a mineral examiner consider all theoretical uses for the claimed mineral or unproven methods of beneficiation as a predicate of his or her expert opinion. When a Government mineral examiner testifies that, based upon an examination of the claim and considering both the normal uses and modes of extraction of any mineral located thereon, there is disclosed no evidence of a valuable mineral deposit such as would justify a reasonably prudent individual in the further expenditure of his or her labor and means with a reasonable prospect of success in developing a paying mine, a prima facie case has been presented. If a mining claimant wishes to show that a mineral deposit embraced within the claim is valuable either because of unusual uses to which the mineral may be put, or because a new method of extraction reduces the cost of beneficiation, it is the claimant's affirmative duty to raise such a claim and present evidence thereon. A claimant might well ultimately preponderate on such a showing, but the failure of the Government to expressly negate the existence of such a possibility does not invalidate its prima facie case.

**Patent Application May Be Rejected If Technical Information Is Insufficient to Support A Patent**

In *United States v. Waters et al.*, 146 IBLA 172, 183 (1998), the Board said Athe mineral examiner is not obligated to develop the information required to support a patent application,@ and if such information is not submitted upon request, the patent application may be rejected. However if the decision is made to contest the validity of the claim for lack of discovery, the examiner may use evidence beyond what is submitted by the claimant. Also, not that in footnote 11 (below) the Board indicates that the primary responsibility of the mineral examiner Ais to assure the accuracy and truthfulness of the information submitted by the claimant.@ The Board said at 183:

> The mineral examiner is not obligated to develop the information required to support a patent application. 11/ If the information presented by the claimant is insufficient to support a patent, the proper procedure is to direct the claimant to submit additional evidence in support of the application. If such evidence is not forthcoming, the patent application may be rejected subject to the right of appeal. If, however, the decision is made to contest the validity of the claim on the ground of lack of discovery of a valuable mineral deposit, the claimant is not limited by the evidence submitted with the patent application.

11/ The field examination conducted by a mineral examiner as a result of a mineral patent application is undertaken to verify the quantity and quality of the mineralization and the accuracy of the statements regarding the costs and returns from the sale of the minerals submitted in support of the mineral application. The examiner=s primary responsibility is to assure the accuracy and truthfulness of the information submitted by the claimant. *Id*. at 183.

# 14. MINING CLAIM RIGHTS

## POSSESSORY TITLE

### A Claim Is Property

The discovery of a valuable mineral deposit within the limits of a mining claim located on the public lands in conformance with state and Federal statutes validates the claim; and the locator acquires an exclusive possessory interest in the claim. The classic statement on a mining claim as property is found in the United States Supreme Court case of *Wilbur v. U.S. ex rel. Krushnic*, 280 US 306 (1930). The Supreme Court said:

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

parties, *Best v. Humboldt Placer Mining Co*., 371 US 334, 336 (1963), and may not be taken from the claimant by the United States without due compensation, *United States v. North American Transportation & Trading Co*., 253 US 330 (1920), or be declared invalid except in accordance with due process. *Cameron v. United States*, 252 US 450 (1920).

Fee title remains with the Federal Government until patent issues. The owner of an unpatented claim is entitled to mine, remove and sell all valuable mineral deposits within his claim boundaries that are not subject to extralateral rights of adjacent claim owners. The claimant is also entitled to such surface rights necessary for mining operations.

**Possessory Right Versus Possessory Title**

In *Geomet Exploration v. Lucky Mc Uranium Corp*., Ariz., 601 P2d 1339, 1341 (1979), the Arizona Supreme Court stated that "it is perhaps more proper to speak of a possessory right than a title because, until discovery of mineral and issuance of a patent, absolute title in fee simple remains in the United States."

**Locator's Right of Possession**

The ownership rights of a locator are described in Act of May 10, 1872 (R.S. 2322; 30 USC 26; 17 Stat. 91). However, keep in mind that the "exclusive right of possession" mentioned in the section below has been amended by the Multiple Surface Act of July 23, 1955, which allows the government to manage the surface resources of claims. Also, the Ninth Circuit Court of Appeals held in *United States v. Curtis-Nevada Mines, Inc*., 611 F2d 1277 (1980) that the general public has the right to enter the surface of unpatented mining claims. 30 USC 26 reads as follows:

> The locators of a mining location situated on the public domain, including their heirs and assigns, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside 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 sidelines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions therof as lie between vertical planes drawn downward as above described, through the endlines of their locations, so continued in their own direction that such planes will intersect such parts of such veins or ledges. However the locator is not given authority to enter upon the surface of claims owned by other locators even though his vein dips beneath the surface of those claims.

**Rights of Co-owners**

When two or more persons locate a mining claim, a tenancy in common arises and each locator has the same rights in respect to his share as a tenant in severalty. But any one of the locators holds his interest independently of the other(s) and may transfer, devise or encumber it separately without the consent of the other co-tenants. *Union Oil Company of California*, A-29560 (Supp.) (July 30, 1965), 72 ID 313.

Where a mining claim is owned by two or more persons the possession of one is the possession of all, and there can be no abandonment by one owner so long as his co-owner continues in possession. *Alaska Dome Mines*, 52 LD 550.

A stockholder in a corporation which is the owner, in whole or part, of a mining claim has in himself no title in or to the claim separate and distinct from that of the corporation. Moreover, such a stockholder is not a co-owner with the corporation or the other shareholders. 35 ID 54.

**Community Property**

The possessory right to a mining claim is not community property. *Phoenix Mining Co. v. Scott*, 54 P 777 (1898).

**Quiet Title and Trespass Actions**

Quiet title actions and trespass actions apply to mining claims as they do to real estate. *Black v. Elkhorn Mining Co*., 49 F 549, 552 (1892), *affirmed*, 163 US 445. Furthermore, a mining claim comes under the statute of limitations. *Lavagnino v. Uhlig*, 71 P 1046 (1903), *affirmed*., 198 US 443.

**Transfer of Mining Claims**

Mining claims may be transferred by deed. *Roseville Alta Mining Co. v. Iowa Gulch Mining Co.*, 24 P 920 (1890). And a locator may convey any portion of a mining claim. *St. Louis Mining Co. v. Montana Mining Co.*, 171 US 650 (1898).

**Surface Rights**

The Multiple Surface Act of July 23, 1955, was enacted to provide a means for the Federal Government to obtain management rights of surface resources on mining claims located both before and after the Act. As a result any use of the surface of an unpatented claim for purposes unrelated to mining is unauthorized and subject to trespass action by the surface management agency.

**Grazing Rights**

Grazing rights are not included in the possessory rights of a mining claim. *United States v. Etcheverry*, 230 F2d 193 (1956).

**Mining Claims are Subject to Liens**

Unpatented mining claims are real property, and as such, are subject to liens. *Bradford v. Morrison*, 212 US 389 (1909).

**Termination of Rights**

The possessory rights of a mining claim may be terminated by abandonment or loss of discovery. See other sections of this book for detailed discussions of abandonment and discovery.

**Holder of Valid Mining Claim Has Right to Patent**

Upon satisfaction of the requirements of the statute, the owner of a valid mining claim has an absolute right to a patent from the United States conveying fee title to the land within the claim. The actions taken by the Secretary of the Interior in processing an application for patent by such claimant are not discretionary and the issuance of a patent can be compelled by court order. *Wilbur v. Krushnic, supra*, 280 US 306 at 318-19; *Roberts v. United States*, 176 US 221, 231 (1900). Also, the patent may contain no conditions not authorized by law. *Deffenback v.* Hawke, 115 US 392, 406 (1885).

It is not necessary for the claimant to apply for a patent to preserve his property right in the claim, but he may continue to extract and remove the locatable minerals until the claim is exhausted, without ever having acquired full legal title to the land. *Union City Oil Co. v. Smith*, 249 US 337, 348-49 (1919). The patent, if issued, conveys fee simple title to the land within the claim, but does nothing to enlarge or diminish the claimant's rights to the locatable mineral reserves.

**Until Patent Issues, Government Has Right to Enter Lands**

Unless and until the lands within a mining claim are patented to the claimant, they are Federal lands, and the Government retains the right to enter the lands at any time without search warrants, including the right to remove samples from the claim in order to determine whether the land is mineral in character. *United States v. Knecht*, 39 IBLA 8 (1979).

**Invalid Claims Have No Rights**

In *Cameron v. United States*, 252 US 450, 459, the United States Supreme Court discussed the rights of invalid claims as follows:

> ... But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.
>
> Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void.

**Inheritance of Mining Claims**

Upon the death of the owner of a mining claim, the identical rights and interests of the claimant passes to his heirs by descent. These interests may be sold as other property by an executor or administrator. *O'Connell v. Pinnacle Gold Mines Co*., 140 F 854 (1905).

**Due Process**

It has been the consistent position of the courts and the Department of the Interior that because a mining claim is an interest in and a claim to property, it may not be declared invalid except in accordance with due process. *Cameron v. United States*, 252 US 450 (1920); *United States v. O=Leary*, 63 ID 341 (1956). Due process means more than notice and opportunity for hearing. It requires the application of fixed, objective rules to facts. It requires that the claimant have a hearing before being deprived of that right. The Bureau of Land Management must apply the Administrative Procedure Act, sections 551 *et seq.* and 701 *et seq*. of Title 5 which also governs the right to judicial review. *Adams v. Witmer*, 271 F2d 29 (CA Cal 1959).

**Taxes on Ores**

When ore becomes detached from the earth, it becomes the personal property of the mine owners and is free from any title of the United States. However, the extracted ore may be subject to taxation by the state and the collection of taxes may be enforced by sale as is any other property. *Forbes v. Gracey*, 94 US 762 (1877).

A state does not have the power to make a lien for taxes levied on ore to be a lien on a mining claim, if such lien in any way affects the title of the United States. A state tax levied on a property right of the United States is void. However, if the tax is levied on the possessory right of the locator and can be collected without affecting title of the United States, it is proper for the state to collect the tax. *Forbes v. Gracey, supra*.

**Right of Possession Versus Right of Title**

State courts may only determine the right of possession between claimants and have no jurisdiction on any matter that affects the title of the United States. In *Perego v. Dodge*, 163 US 160 at 168 (1896), the United States Supreme Court discussed this as follows:

> It must be remembered that it is the question of the right of possession which is to be

determined by the courts, and that the United States is not a party to the proceedings. The only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands as against the government may be determined by the courts in a suit against the latter.

It was held by Mr. Justice Lamar, when Secretary of the Interior, that, notwithstanding the judgment of a court on the question as to the right of possession between two litigants, it still remained for the land department to pass on the sufficiency of the proofs, and to ascertain the character of the land and whether the conditions of the law had been complied with in good faith before the government parted with the title.

## PREDISCOVERY RIGHTS OR PEDIS POSSESSIO

### Introduction

The mining laws require that a discovery precede a mineral location. This is an impractical requirement because most mineral deposits which may be discovered today are hidden well below the surface. Thus, before a discovery may be made, large amounts of exploration money must be expended through geochemical, geophysical and geological surveys in addition to sampling, and core-drilling programs. If the claim were not staked prior to the exploration program, rival claimants alerted by the exploration activity might locate claims over the area.

In the mining camps of California a custom developed which spread throughout the west and was subsequently recognized by the courts. A claimant in actual occupancy of a mining claim, even if he did not have a discovery, could hold against anyone who had no better title, so long as he was diligently engaged in seeking a discovery. The doctrine of *pedis possessio* was founded to provide such protection. However, these possessory rights are limited to protection against adverse locators or the general public. They are of no value against the United States who holds the superior title.

There are now more than 500,000 recorded mining claims in the western United States and most do not have a discovery under the mining laws. Thus, the majority of all mining claimants must operate under the doctrine of *pedis possessio* to protect their claim.

### Law of Possession

The doctrine of *pedis possession* which evolved from the customs of miners, has achieved statutory recognition in the Federal law as the "law of possession," 30 USC 53 (1976):

> No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be judged by the law of possession.

**Actual Possession Versus Constructive Possession**

The literal meaning of *pedis possessio* is a foothold, actual possession. *Black's Law Dictionary*, 1289 (rev. 4th ed. 1968). This actual occupancy must be distinguished from constructive possession, which is based on color of title and has the effect of enlarging the area actually occupied. *Geomet Exploration v. Lucky Mc Uranium Corp.*, Ariz, 601 P2d 1339 (1979).

**Discovery Required for Valid Claim or Rights Against Government**

Regardless of compliance with statutory requirements such as monumenting and recordation, one cannot perfect a location, under either Federal or state law, without actual discovery of minerals in place. As was stated in *Union Oil Co. of California v. Smith*, 249 US 337 (1919), "it is clear that in order to create valid rights or initiate a title as against the United States a discovery of mineral is essential." *Best v. Humboldt Placer Mining Co*., 371 US 334 (1963). So until discovery, the law of possession determines the right of possession.

**The Law and Regulations Require Discovery Before Location**

In 30 USC 23 (1976), it is stated that "no location of a mining claim shall be made until discovery of the vein or lode within the limits of the claim located." Federal regulations (43 CFR 3831.1) also require discovery before location:

> Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and, upon the discovery of mineral, by locating the lands upon which such discovery has been made.

**Rights of Claimant Who Locates Before Discovery**

Although the courts consistently uphold the requirement that discovery must precede location, they also provide prospecting and location under the doctrine of *pedis possessio*. In *Davis v. Nelson*, 329 F2d 840 (9th Cir 1964), the court summarized the rights of prospectors who have not made a discovery as follows:

> Whatever may be the rights acquired by a prospector, who locates a mining claim prematurely, and before actual discovery of valuable mineral, in the defense of his actual possession against third persons, it is clear under both the mining law and the regulations that a discovery of valuable mineral is the *sine qua non* of an entry to initiate vested rights against the United States. ...Nor do we imply that it is an actionable wrong for a good faith prospector to locate a claim in furtherance and in protection of the right of *pedis possessio* while pursuing his more thorough exploration. But the validity of his title, claimed and asserted by the location of the claim and the recordation of notices, depends upon the resolution of a question of fact, that is, has there been a discovery of valuable mineral within the limits of the claim?

**Pedis Possessio and the Supreme Court**

The classic discourse on *pedis possessio* is found in *Union Oil Company of California v. Smith*, 249 US (1919) in which the theory was recognized that if a qualified person peaceably and in good faith enters vacant, unappropriated public domain for the purpose of discovering a valuable mineral under the mining laws -- while he is so searching, he may exclusively hold the place where he is working against those having no better right. In other words, to qualify for rights of *pedis possessio* the claimant must physically occupy the claim while excluding rival claimants and diligently in good faith attempting to make a discovery. In *Union Oil Co. of California v. Smith, supra*, at 346-347, the United States Supreme Court stated:

> ... For since, as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the *pedis possessio* of a *bona fide* and qualified prospector is universally regarded as a necessity. It is held that upon the public domain a miner may hold the place in which he may be working against all others having no better right, and while he remains in possession, diligently working towards discovery, is entitled -- at least for a reasonable time to be protected against forcible, fraudulent and clandestine intrusions upon his possession.
>
> And it has come to be generally recognized that while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential to the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after location and give validity to the claim as of the time of discovery, provided no rights of third parties have intervened.
>
> ...Whatever the nature and extent of a possessory right before discovery, all authorities agree that such possession may be maintained only by continued actual occupancy by a qualified locator or his representatives engaged in persistent and diligent prosecution of work looking to the discovery of mineral.

**What May Happen If Occupancy Relaxed**

Because prediscovery rights "may be maintained only by continued actual occupancy," failure to maintain such occupancy may open your claim to location by others. In *Cole v. Ralph*, 252 US 286, 294 (1920), the United States Supreme Court stated:

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

respected accordingly.

**Discovery Makes Continuous Occupation Unnecessary**

It has been well established for over one hundred years that continuous occupation is not necessary to maintain a mining claim, if such claim is protected by discovery. In *Belk v. Meagher*, 104 US 279 (1881), the United States Supreme Court stated:

> Actual and continuous occupation of a valid mining location based upon discovery is not essential to the preservation of the possessory right. The right is lost only by abandonment, as by nonperformance of the annual labor ...

**Geomet Exploration v. Lucky Mc Uranium Corp: A Case on Actual Occupancy**

In 1979 the Arizona Supreme Court decided a case where the senior locator, Lucky McUranium Corporation (lucky), detected radiometric anomalies (areas of higher than background for natural radioactivity of rock as measured by a radiation detector of the Geiger-Muller or scintillation type) in the Artillery Peak Mining District in Yuma County. In November, 1976 Lucky monumented and posted 200 claims, embracing 4,000 acres. The company then drilled a 10-foot hole on each claim and recorded notices as required by Arizona State law.

Sometime later while Lucky was not occupying the claims, Geomet Exploration (Geomet) peaceably enter the area claimed by Lucky and started drilling operations. Although employees of Geomet were aware of Lucky's claims, they considered them invalid because there had been no discovery of minerals in place and Lucky was not in actual occupancy of the areas Geomet entered and located.

In *Geomet Exploration v. Lucky McUranium*, Ariz., 601 P2d 1339 (1979), the Court stated at 1342-1343:

> ... there are always inherent risks in prospecting. The development of *pedis possessio* from the customs of miners argues forcefully against the proposition that exclusive right to possession should encompass claims neither actually occupied nor being explored. We note that the doctrine does not protect on the basis of occupancy alone; the additional requirement of diligent search for minerals must also be satisfied.
>
> ...but wish to emphasize that mere knowledge of a previous claim, in and of itself, does not constitute bad faith. *Citations Omitted*. ... Since Geomet's entry concededly was open and peaceable, we hold that the entry was in good faith.
>
> ... In conclusion, Lucky was not in actual occupancy of those areas Geomet entered and *pedis possessio* affords Lucky no protection as to those particular claims. Geomet is entitled to the exclusive possession of the disputed claims.

The Supreme Court granted review of the *Geomet Exploration* case (*see* 48 LW 3820), but dismissed September 12, 1980, pursuant to Rule 53 of the Supreme Court Rules. Even though continuous or actual occupancy has been upheld by the courts through the years as essential in order to maintain prediscovery rights, it is well known that many companies are holding claims, without protection of a discovery, under circumstances no different than the claims held by Lucky Mc Uranium Corporation. As was stated in *Davis v. Nelson*, 329 F2d 840 (9th Cir 1964), "the premature location of such a claim and the recordation of certificates or notices of location cast a cloud upon the title of the United States to the lands, as the law contemplates that discovery must coincide with the physical location of the claims."

**Pedis Possessio on a Group or Area Basis**

Several cases have come before the courts concerning the issue of whether a claimant could, by occupying a small part of a claim group, maintain *pedis possessio* over the entire claim group. In *United States v. Union Oil*, 249 US at 343, 353, the Supreme Court rejected *pedis possessio* on group basis:

> It was and is defendant's contention that... one who has acquired the possessory rights ... in five contiguous claims... may preserve and maintain an inchoate right to all of them by means of a continuous actual occupation of one, coupled with diligent prosecution in good faith of a sufficient amount of discovery work thereon, provided such work tends also to determine the oil-bearing character of the other claims.
>
> ... In our opinion the act shows no purpose to dispense with discovery as an essential of a valid oil location or to break down in any wise the recognized distinction between the *pedis possessio* of a prospector doing work for the purpose of discovering oil and the more substantial right of possession of one who has made a discovery.

However, in *MacGuire v. Sturgis*, 347 F. Supp. 580, 584, 585 (1971), the Court provided for *pedis possessio* on a group or area basis under the specific circumstances given below:

> ... Plaintiff is presently entitled to the exclusive possession thereof on a group or area basis where, as here, the following exists or was done for his benefit: (a) the geology of the area claimed is similar and the size of the area claimed is reasonable; (b) the discovery (validation) work referred to in Wyo. Stat. sec. :30-6 (1957) is completed; 8 an overall work program is in effect for the area claimed; (d) such work program is being diligently pursued, i.e., a significant number of exploratory holes have been systematically drilled; and (e) the nature of the mineral claimed and the cost of development would make it economically impracticable to develop the mineral if the locator is awarded only those claims on which he is actually present and currently working.

Finally, in *Geomet Exploration v. Lucky Mc Uranium Corp*., Ariz., 601 P2d 1339 at 1342 (1979), the Arizona Supreme Court rejected *MacGuire v. Sturgis, supra*, holding for *pedis possessio* on a group or area basis and held that "*pedis possessio* protects only those claims

actually occupied." As an explanation for this position, the Arizona Supreme Court stated at page 1342:

> ... If one may, by complying with preliminary formalities of posting and recording notices, secure for himself the exclusive possession of a large area upon only a small portion of which he is actually working, then he may, at his leisure, explore the entire area and exclude all others who stand ready to peaceably and openly enter unoccupied sections for the purpose of discovering minerals. Such a premise is laden with extreme difficulties of determining over how large an area and for how long one might be permitted to exclude others.
>
> We hold that *pedis possessio* protects only those claims actually occupied (provided also that work toward discovery is in progress) and does not extend to contiguous, unoccupied claims on a group or area basis.

**Pedis Possessio May Be Transferred**

The right of *pedis possessio* may be transferred by transfer of possession. In *Davis v. Nelson*, 329 F2d 840 (9th Cir 1964), the Court said the following:

> Such occupation and working of the claim, even before discovery, gives the locator a limited defendable right of possession and a right which is, in some respects, alienable. The right of *pedis possessio* is one which may be transferred by transfer of possession because it rests on actual possession, accompanied by deed, lease or assignment of the color of title represented by the local location and recording of the claim.

**Pedis Possessio Requires Physical and Continuous Occupancy of Each Claim**

In *Amax Exploration, Inc. v. Ross Mosher*, (Civil R-85-162 BRT, March 2, 1987), The Federal District Court of Nevada indicated that pedis possessio requires that each claim be physically occupied on a continuous basis:

> No party has occupied the claims in dispute actually, physically and continually. Amax has an operation of exclusion over the entire area under the guise of its Sleeper Project, but that alone does not equate to claim-by-claim occupancy. * * * Assessment work and sampling on the claims in dispute have not brought the parties to the claims with the frequency of an occupation. In the past, there has been occupancy of the GR claims around the Austin Well and some sluice box testing in 1983 near the windmill on the A & R claims, and perhaps some on-site equipment testing by defendants, but not of the duration or permanency of an occupation of those, let alone the contiguous claims in dispute.

**Pedis Possessio Cannot Be Applied to Large Blocks of Unoccupied Claims**

In *Amax Exploration, Inc. v. Ross Mosher, supra*, the Court held that neither party could rely on the doctrine of *pedis possessio* for title. In this case Amax had located a large block of

claims over Mosher and sought to have *pedis possessio* be extended to recognize the realities of modern day practices in Nevada's gold mining industry. The Court stated as follows:

> The court recognizes these realities, but does not think that the doctrine should in this case afford Amax relief. * * * The development of the doctrine of pedis possessio came about out of a desire to encourage the prospector whose concentrated and diligent work epitomizes the objectives of Congress in enacting the general mining law. The doctrine favors the prospector in actual possession, protecting him against forcible, clandestine or fraudulent intrusions by others, so that he may continue to prospect the area of possession diligently. There is a great difference between this and recognizing some right short of discovery to support contiguous, unoccupied claims located solely upon geologic inferences and an area-wide program of exclusion.

**Diligent and Bona Fide Work to Make a Discovery**

Work towards making a discovery in claims held under *pedis possessio* must be *bona fide* and diligent. In *Amax Exploration, Inc. v. Ross Mosher, supra*, the court pointed out that neither the work of Amax or Mosher satisfied the work requirement of *pedis possessio*. The court said:

> Diligent, *bona fide* work directed toward making a discovery on each claim is not the case either. The Amax sampling in the subject area was admittedly geared toward initial claim validation. Amax is focussing its current efforts on Section 21. Other than a general enthusiasm to explore the subject area further, no plan was put before the court to permit it to find reasonable likelihood of near future development of each subject claim. * * * Much of the defendants' discovery work, as discussed, has not been pinpointed to each separate claim. Much if not the majority of the work has been directed primarily toward development of milling equipment only, with incidental sampling resulting. Considering the defendants' general method of sampling in this geologic framework, the court has problems calling it *bona fide*.

**Good Faith Effort to Comply with Law**

*Continental Oil Co. v. Natrona Services, Inc*., 588 F2d 792 (10th Cir. 1978), an important case involving the doctrine of *pedis possession*, requires a good faith effort to comply with the law. Continental Oil Company (Conoco) filed a declaratory judgement against Natrona Services, Inc. and John MacGuire to establish Conoco's right to exclusive possession to certain unpatented claims. Conoco alleged that it hired contractors to locate, record and perform the validation work on the claims. Conoco also contended that it had spent $500,000 in service contracts for the purpose of airborne reconnaissance, geophysical work, surface sampling and deep exploratory drilling. The deep exploratory drilling on a portion of the claims allegedly included 40,000 total feet involving 48 deep holes. Conoco maintained that the claimed area was reasonable in size and that the exploratory work was systematic, diligent and performed in good faith. Although Conoco admitted that it had not actually been present and currently working on a large number of the claims, it was in possession to the extent that it was practical and had asserted its rights to the claims.

Natrona and MacGuire admitted overstaking some of Conoco's claims in 1975 on the basis of their determination that the recorded location certificates were falsely made and that the location and discovery work did not comply with the law.

Natrona and MacGuire counterclaimed to establish that they had superior rights to some 1,200 claims and further sought to establish that Conoco's remaining 840 claims that they had not overstaked were invalid. The U.S. District Court for the District of Wyoming granted a verdict in favor of Conoco for the claims that had not been overstaked by Natrona and MacGuire. On the remaining claims, a jury verdict, which went in favor of Natrona determined the following:

1. Conoco had not completed discovery;

2. There was no overall work program by Conoco in the claimed area.

3. No such work program was diligently pursued; and

4. There was no evidence of a significant number of exploration holes systematically drilled.

Judge Davis of the Tenth Circuit Court of Appeals affirmed the trial court decision. He held that Conoco was able to maintain its rights to the claims that were not overstaked by Natrona because it had demonstrated sufficient good faith effort to comply with the law. The Court said at 800:

> The deep drilling, coupled with Conoco's efforts to validate these claims, furnished evidence of its good faith effort to comply with the law at least in these areas. In fact, deep drilling can be sufficient in compliance with the law if other filing requirements are met.

Conoco had requested the appeals court to write definitions and guidelines that could be applied to protect locators of large areas under the doctrine of *Pedis possessio*. In other words, to what extent must actual physical occupancy of the ground be accomplished as well as the necessary extent of location and discovery work. In its holding that "prospectors must substantially and in good faith comply with the statutes," the Court replied at 798:

> The request is that the doctrine of *pedis possessio* be extended so as to protect the locators and discoverers of a large area and a large group of claims. We can only say in response to this request that the trial judge did not rule out the application of the mining laws to this type of an operation and we do not do so either. At the same time we are powerless to change the fundamental requirements of the law and the response has to be that the prospectors must substantially and in good faith comply with the statutes, and this was the approach of the trial court. On the other hand, there was considerable evidence to support a conclusion of insubstantial compliance by Conoco in this case. As a result, the jury could conclude that Conoco's possession of the embattled area was not a good faith

possession.

The Court pointed out that for the claims overstaked by Natrona, Conoco "had attempted a wholesale location program which could be said to have been designed to tie up large areas of public lands without making any substantial effort to comply with the law." *Id* at 799. Judge Doyle agreed that there is sufficient evidence to support the jury verdict that Conoco did not (1) have an overall work program, (2) act in good faith, (3) diligently pursue work on the overstaked claims, and (4) substantially comply with the law. *Id* at 799. However, it is important to note that Judge Doyle qualified his decision by saying "the senior locator who has diligently pursued a claim, but by ignorance or error has failed to fulfill a technical requirement is protected." This principal has been consistently upheld by the courts.

In reference to *MacGuire v. Sturgis, supra*, the Court said that "a reading of the MacGuire opinion shows that its standards do not differ from those which were applied here in deciding whether the appellant was entitled to exclusive possession."

## EXTRALATERAL RIGHTS

### Extralateral Rights Outside Vertical Side Lines

The statute (30 USC 26) provides that extralateral rights to veins, lodes and ledges that apex within the boundary lines and dip downward so as to extend outside the vertical planes through the side lines belong to the owner of such lode location. So, the extralateral portion of the vein is that part which extends on its downward dip through the vertical planes along the side lines. The statute states:

> ....although such veins, lodes or ledges may so depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.

To qualify for extralateral rights, the following criteria must be satisfied (see Figure 1):

1. The location must be a lode claim.

2. The vein must be discrete and continuous along its downward course.

3. The vein must be inclined and the top or apex of the vein must lie inside the vertical extension of the boundary lines; however, the terminal edge of the vein need not crop out at the surface.
4. The end lines must be parallel.

5. Extralateral rights are confined to that part of the vein that exists between two vertical planes drawn through the parallel end lines.

### Definition of "Apex"

The statute (30 USC 26) indicates that the "apex" of a vein is the "top" or highest part of all veins, lodes and ledges within the boundary lines:

> ... 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.

The "apex" or "top" refers to the parts of a vein or lode which come nearest to the surface even though such apex may be well below the surface. *Stevens v. Williams,* Fed. Cas. Nos. 13,413, 13,414 (1879). At its apex the vein must have both a strike and dip component and not be just an upward projecting spur. *Stewart Mining Co. v. Ontario Mining Co*., 132 P 787 (1913), *affirmed* 237 US 350. *See* Figure 2.

An apex does not refer to the highest point in a succession of rolls or folds of a vein; however, the crest of a single anticlinal fold is an apex. *Jim Butler Tonopah Mining Co. V. West End Consol. Mining Co*., 158 P 876 (1916), *affirmed* 247 US 450. *See* Figure 3.

**Definition of "Strike" of Vein**

Regardless if' the surface is level or inclined, the actual surface outcrop of a vein is taken as the course or strike, rather than the true strike which may be in a different direction. *Brugger v. Lee Yim*, 55 P2d 564 (1936).

In *Flagstaff Silver Mining Co. v. Tarbet*, 98 US 463(1878), the Supreme Court determined that the strike is synonymous with the onward course of the vein. It is the longitudinal direction across country of the vein. If the vein crops out on the surface, the strike is shown by the course the vein takes on the surface. But the true strike of the vein is its horizontal line -- the line of a level run in the vein and lengthwise as to the vein. 1 American Law of Mining 6.20, note 7. p. 50.

**Vein at Surface Controls Extralateral Rights**

The strike of a vein at the surface determines the location lines and extralateral rights rather than the strike of the vein in the subsurface which may be quite different. *Flagstaff Silver Mining Company v. Tarbet*, 98 US 463 (1978).

**Definition of "Dip"**

The term "dip" is synonymous with "downward course" and they both refer to the direction the vein or lode descends into the earth at right angles to the strike or course of the vein. *Brugger v. Lee Yim*, 55 P2d 564 (1936). *See* Figure 4.

**Legal Apex**

In *Woods v. Holden*, 26 LD 198 (1898), the Secretary established that where a vein apexes on lands patented as placer claims or patented under the nonmineral laws, and the same vein also extends downward on dip into public lands, the highest part of the vein in the public land shall be considered the "legal apex." The Secretary defined the "legal apex" as "that portion of the vein within the public lands which would constitute its actual apex if the vein has no actual existence in the ground so disposed of." *See* Figure 5.

**Required Characteristics of Vein for Extralateral Rights**

In order for a mineral deposit to constitute a vein and thus qualify for extralateral rights, it is not necessary that it be a clean fissure filled with mineral. But the fissure must have form, and be well-defined, with a hanging wall and foot wall. *Consolidated Wyoming Gold Mining Co. v. Champion Mining Co*., 63 F 540 (1894). *See* Figure 6.

**Vein Must Be Continuous**

To maintain extralateral rights, the vein must be more or less continuous; however, some interruption is acceptable. *Utah Consol. Mining Co. v. Utah Apex Mining Co.*, 28 F 249 (1922), *cert. denied*, 261 US 617. If the vein is faulted, the extralateral rights terminate. *Wall v. U.S.*, 232 F 613 (1905). However, a vein offset 15 feet by faulting was held to be continuous. *Original Sixteen to One Mine v. Twenty-One Mining Co*., 254 F 630 (1918). *See* Figure 7.

If a fault that offsets a vein is mineralized, both may be considered as the same fissure. *National Mine Syndicate*, 205 F 787, 791 (1912). *See* Figure 8.

A claimant is not entitled to follow his vein under another location if the vein is not a single discrete one, but a network of interconnected veins which forms one large lode and unitizes at depth below the surface of both claims. *Colorado Central Consol. Mining Co. v. Turck*, 50 F 588, 592 (1892), *on rehearing* 54 F 262, 265, *error dismissed* 150 US 138. *See* Figure 9.

Perhaps the most practical rule for continuity of a vein is that it can be traced by the miner along its downward course. *Cooper v. Saratoga*, 40 F 509 (1889).

**Parallel Endlines Required for Extralateral Rights**

The end lines of a lode mining claim must be parallel for the locator to have the right to follow a vein outside the vertical planes drawn through the side lines. This lateral right is confined by statute to such portion of the vein that exists between planes drawn through the end lines and extended along the vein on its downward dip. *Iron Silver Mining Co. v. Elgin Mining & Smelting Co*., 118 US 196 (1896). The statute (30 USC 26) states the following:

> 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 direction that such planes will intersect such exterior parts of such veins or ledges.

The location as made on the surface determines the extent of rights below the surface. In *Del Monte Mining & Milling Co. v. Last Chance Mining Milling Co*., 171 US 55, 85 (1898), the Supreme Court explained the reason why parallel end lines are necessary for extralateral rights and how such lines control the extent of such rights. The Court stated:

> There is no command that the side lines shall be parallel, and the requisition that the end lines shall be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. He may pursue the vein downwards outside the side lines of his location, but the limits of his right are not to extend on the course of the vein beyond the end lines projected downward through the earth. His rights on the surface are bounded by the several lines of his location, and the end lines must be parallel in order that going downwards he shall acquire no further length of the vein than the planes of those lines extended downward inclose. If the end lines are not parallel, then following their planes downward his rights will be either converging and diminishing or diverging and increasing the farther he descends into the earth.

It has also been held that extralateral rights are determined by the location on the ground rather than how shown on the survey plat of a patent. *Consolidated Wyoming Gold Mining Co. v. Champion Mining Co*., 63 F 540 (1894).

**Secondary Veins**

The location lines are generally established relative to the primary" or "discovery" vein. However, lode locations may also contain a number of "incidental" or "secondary" veins that may have a "strike" and "dip" that is different than the discovery vein. *Cosmopolitan Mining Co. v. Foote*, 101 Fed 518 (CCD Nev 1900). *See* Figure 10. If such secondary veins apex within the location lines, the owner has extralateral rights, providing the secondary veins relate properly to the lines of the location which control extralateral rights. *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co*., 171 US 55,88 (1898). For example a locator may not, under any circumstances have extralateral rights outside vertical planes run through the end lines, even for secondary veins. *Walrath v. Champion Mining Co*., 171 US 293 (1898).

**Rights to All Ore Except Veins Apexing on Another's Claim**

The owner of a mining claim has the right to all ore beneath the surface of his claim, including a vein that does not have its apex within the claims. However, if the apex of such a vein should fall within the limits of a claim owned by another, that claimant has the right to follow the vein downward on its dip. *Mammoth Mining Co. v. Grand Central Mining Co*., 213 US 72 (1909).

**Junior Claimant May Have Extralateral Rights Under Senior Location**

A junior claimant has the right to follow the extralateral portion of a vein dipping under a senior location if such vein apexes within the claim of the junior locator. *Colorado Central Consolidated Mining Co. v. Turch*, 54 F 262 (1893).

**Junior Claimant Has Burden of Proof**

In a suit involving extralateral rights between two adjacent claimants, the junior locator has the burden of proving that a vein apexes within his claim and extends in a downward course beneath the surface of the senior locator. *Butte & Superior Copper Co. v. Clark-Montana Realty Co*., 248 F 609 (1918) *cert. denied* 247 US 516.

A claimant who asserts extralateral rights to a vein penetrating another's claim has the burden of proving that the vein has its apex within the boundaries of his claim. Also the continuity and identity between the vein and surface apex will not be presumed over substantial unexposed distances. *Silver Surprise, Inc. v. Sunshine Mining Co*., 547 P2d 1240, 15 Wash. App. 1 (1976), *affirmed* 558 P2d 186.

**Flat-Lying Veins Have No Extralateral Rights**

Even though a flat-lying or horizontal vein is located as a lode, such a location has no extralateral rights and operations must be confined within the boundary lines. The rationale for this is that the right is restricted to following the vein in its "course downward so as to extend outside the vertical side lines of such surface location." 30 USC 26; 1 *American Law of Mining*, 5.13, p. 752. *See* Figure 11.

**No Extralateral Rights Where Vein Becomes Horizontal**

Extralateral rights do not go to a lode or vein beyond the point outside the side lines where it flattens to a horizontal plane or takes an upward trend for a considerable distance. *Tom Reed Gold Mines Co. v. United Eastern Milling Co*., 209 P 283 (1922), *cert. denied*, 260 US 744. *See* Figure 12.

**Converging End Lines**

If the end lines on a mining claim converge in the direction of the dip, extralateral rights will apply to the extralateral portion of the vein taken within the converging lines. *Grant v. Pilgrim*, 95 F2d 562 (1938). *See* Figure 13.

If two claims overlap along the apex of a vein and their end lines converge and meet, the extralateral rights of the junior location is bounded by the extension of the plane passing through the end line of the senior claim. Thus the extralateral rights of the junior claim converge in the direction of the dip of the claim. *Bunker Hill & S. Mining & Concentrating Co. v. Empire State Idaho Mining & Developing Co*., 108 F 189 (1900), *affirmed* 109 F 538. *See* Figure 14.

**Longitudinally Divided Vein Goes To Senior Locator**

If two or more mining claims longitudinally bisect or divide a vein, the right to the entire width of the vein along its downward course goes to the senior locator (A). This is based on the custom of miners to treat a vein as an indivisible unit because it is not practical to separate the vein as it is extracted along the downward course. *Argentine Mining Co. v. Terrible Mining Co.*, 122 US 478, 484 (1887). *See* Figure 15.

**Apex Partly Within Two Claims**

In the case where a thick vein crosses a common side line between two claims, the apex is partly within both claims for a distance. The entire vein is considered to be apexing upon the senior location to the point on the sideline (a) where it is entirely within the junior location B. *St. Louis Mining Co. v. Montana Mining Co*., 104 F 664 (1900), *error dismissed* 186 US 24, *reversed on other grounds* 204 US 204. *See* Figure 16.

**Extralateral Rights May Apply to Both Side Lines**

Extralateral rights for a vein apexing within a claim may apply to one or both side lines. *Jim Butler Tonopah Mining Co. v. West End Consol. Mining Co*., 247 US 450 (1918). *See* Figure 17.

**Vein Passing Through Side Lines**

The owner of a location cannot follow the extralateral portion of the vein within the side lines of a prior location, if the prior location has the vein pass through both side lines so as to make them end lines *Tyler Mining Co. v. Sweeney*, 79 F 277 (1897). In *King v. Amy & Silversmith Copper Mining Co*., 152 US 222, 228 (1894), the Supreme Court considered a case where the vein passed through both side lines rather than the end lines. The Court held that for the purpose of determining extralateral rights it "will treat such side lines as end lines and such end lines as side lines." *See* Figure 18. Therefore, under a location where the vein runs through the side lines, the locator may not follow the vein along its strike outside of his end lines. Situations where the side lines become end lines and end lines become side lines only apply to discovery veins and not secondary or minor veins apexing within the location. *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 US 55 (1898).

In *Flagstaff Silver Mining Company v. Tarbet*, 98 US 463 also affirmed in *Argentine Mining Co. v. The Terrible Mining Co., supra*, the Supreme Court explains that it is not the intent of the law to allow a person to make his location cross-wise of the vein. Under such circumstances, one would not have the right to follow the strike of the vein outside the side lines. The Court said:

> When, therefore, a mining claim crosses the course of the lode or vein instead of being >along the vein or lode,' the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface.

**Length of Apex Limits Length of Vein Along Strike**

When following the extralateral portion of a vein, you are entitled to no greater dimension along the strike than its dimension along the apex that is terminated by the two end lines. *Tyler Mining Co. v. Last Chance Mining Co*., 71 F 848, 851 (1894).

**Vein Crosses One End Line**

If the apex of the vein crosses one end line and one side line of the claim, the owner may still follow the vein on its dip beyond the vertical side line, but of course must stay within vertical planes run through extensions of the end lines. *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co*., 171 US 55 (1898). *See* Figure 19.

**Vein Need Not Extend Full Length of Claim**

In order to have extralateral rights, it is not essential that the vein extend the full length of the claim, from end line to end line. *Tyler Mining Co. v. Sweeney*, 54 F 284 (1893). However, a claimant is not entitled to any part of an apex outside the claim boundary lines. The extralateral portion of the vein is determined by placing the end line at the point of intersection of the vein with the side line as shown below. In other words, the end lines may be placed where the lode terminates within the surface lines or where the apex of the lode crosses the sideline. *Tyler Mining Co. v. Sweeney*, *supra* at 292. See Figure 20.

**Intersecting or Crossing Veins**

In 30 USC '41 the law specifically establishes priority of ownership to the mineral within the zone of intersection:

> Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right-of-way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

If two veins from two claims belonging to a single owner unite in a single vein and continue, down until it intersects with a third vein belonging to another, priority for the zone of intersection belongs to the earlier of the two former claims and that of the third claim. *Little Josephine Mining Co. v. Fullerton*, Colorado, 58 F 521 (1893). *See* Figure 21.

Ore within the space of intersection refers to the body of ore bounded by the foot and

hanging walls of one lode as they extend across the foot and hanging walls of the other lode. *Watervale Mining Co. v. Leach*, 33 P 418, 4 Ariz 34 (1893), *appeal dismissed* 159 US 258. *See* Figure 22.

**Blind Veins Belong to Prior Lode**

Blind veins that apex underneath a prior lode claim belong to such lode claim even though veins are discovered by a tunnel under a subsequent tunnel site location. If the tunnel site location is later than the lode location, the blind vein belongs to the lode claimant. *Calhoun Gold Mining Company v. Ajax Gold Mining Co*., 182 US 497 (1901). *See* Figure 23.

**Apex Law Not Used to Show Discovery**

In *U.S. v. Jackson*, 53 IBLA 298, 299 (1981), it was held that the apex law cannot be used to establish a discovery because an independent discovery must be physically shown on each claim. The Board said:

> Under 30 U.S.C. '26 (1976), the locator of a mining claim has the exclusive right of possession and enjoyment "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." 30 U.S.C. '23 (1976) mandates 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." The regulations implementing these requirements, 43 CFR 3831.1 and 3841.3-1, require a discovery on each claim prior to its location. Therefore, each claim is challenged individually and it follows that appellant cannot utilize the apex law to establish the existence of a discovery for another claim absent an independent showing of a discovery.

**No Right to Tunnel in Country Rock**

A locator has no authority under the mining law to run tunnels through country rock in another claimant's adjoining location for any reason including to cut a vein apexing in his own patented claim. *St. Louis Mining & Milling Co. v. Montana Mining Co*., 194 US 235 (1904). *See* Figure 24. However, under certain circumstances, "easements and rights of way necessary for the practical and economical operation of a mine, such as sublateral tunnels, drainage ways and railways, may be acquired by condemnation or otherwise only where permitted by statute (30 USC 43). 1 *American Law of Mining*, 6.19, p. 48.

**Country Rock May Be Removed With Vein**

Extralateral rights include the right to excavate country rock if the vein is too crooked or narrow to follow within its confines so that the surface owner cannot accomplish the necessary excavations. *Twenty-One Mining Co. v. Original Sixteen to One Mine*, 265 F 543 (1920). *See* Figure 25.

**Lines of Junior Location Across Senior Location**

The lines of a junior lode location maybe laid within, upon or across the surface of a valid senior location for the purpose of securing extralateral rights for the junior location. However, the extralateral rights of the junior location must not conflict with the senior location. *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co*., 171 US 55 (1898).

**No Right to Enter Surface of Another Claim**

The statute clearly states that no surface rights on adjoining claims accompany extralateral rights (30 USC 26):

> 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.

In removing ore from the extralateral portion of a vein under a patented claim, there is no right to enter upon and appropriate any portion of the patented claim to more conveniently work the extralateral vein. *St. Louis Mining Co. v. Montana Mining Co*., 104 F 664 (1900), *error dismissed* 186 US 24, *reversed on other grounds* 204 US 204.

One is prohibited from entering on the surface of a placer to work an extralateral portion of a vein within the vertical lines of a placer location. Under the same theory one is also precluded from entering upon the surface of a placer claim to explore for veins or lodes. *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co*., 171 US 55 (1898). However, the subsurface of a placer claim may be entered by a lode claimant to extract ore from the extralateral portion of the lode claimants vein. *Iron Silver Mining Co. v. Reynolds*, 124 US 374 (1888).

**Extralateral Rights Under Patented Lands**

The owner of a patented lode claim containing the apex of a vein has the right to follow the downward course along the vein outside the vertical side lines whether or not the right is specified in the patent document. *Doe v. Waterloo Mining Co*., 54 F 935 (1893). This of course would not be the case if the United States did not own any vein or lode existing beneath the surface of the adjoining claims and having its apex within the patented claim, regardless of whether provided for in the patent. *Empire Star Mines Co. v. Grass Valley Bulletin Mines*, 99 F2d 228 (1938).

A valid unpatented mining claim has extralateral rights superior to the subsurface rights later granted by a nonmineral patent. In other words, if a mining claim has valid existing rights at the date of a nonmineral patent for adjacent lands, the claimant will have extralateral rights in the subsurface of the junior nonmineral patent. *Hecla Mining Co. v. Atlas Mining Co*., 445 P2d 225, 92 Idaho 476 (1968). *See* Figure 26.

Extralateral rights to lands embraced by nonmineral patents such as homestead entries,

school lands and railroad grants are only available if a valid mining location was established before the date the agricultural land was patented. On the other hand, "the right of a junior lode claimant, whether his claim be patented or unpatented, to follow the dip of his vein into an adjoining patented or unpatented lode claim, is one which arises under the mining laws." *Reeves v. Oregon Exploration Co.*, 127 Or 686, 273 Pac 389, 391 (1929).

For mining claims perfected after issuance of a nonmineral patent, extralateral rights in the subsurface only apply if minerals were known to be valuable at the time of patent issuance. If minerals were known to be valuable at the time of patent issuance, the owner of a subsequent claim will have extralateral rights. For example, in *Davis v. Weibbold*, 139 US 507, 519 (1891), the Supreme Court said:

> The exceptions of mineral lands from pre-emption and settlement and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant.

In *Ames v. Empire Star Mines Co.*, 17 Cal 2d 213, 110 P2d 13, 18 (1941), the court considered a case involving extralateral rights in the subsurface of a railroad grant which was established prior to the date of the railroad patent. The Court said:

> The patent secured by the railroad in 1880 was issued under the authority of the Railroad Grant Act of July 25, 1866, and could in no way apply to mineral land title to which had been previously vested in others. Any authority it might acquire in the passage of time as to the nature of the land, despite the limitations of the act, could operate only against subsequently located claims. ... Whatever claims plaintiffs advance to the subsurface mineral land of the Ames tract would have to date from the issuance of the patent and not from the date of the Railroad Grant Act, and by the time of the issuance of the patent the extralateral rights of the Pennsylvania and Jefferson mines in the Ames tract had already fully vested by virtue of the Mining Act of July 26, 1866.

If lands covered by nonmineral patents were not known to be valuable for minerals at the date of patent issuance, all minerals subsequently discovered will go to the nonmineral patentee or his successor in interest. In *Deffeback v. Hawke*, 115 US 392, 404 (1885), the Supreme Court said the following:

> It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term Aknown to be valuable at the time of sale,@ to prevent any doubt being cast upon titles to lands afterwards found to be

different in their mineral character from what was supposed when the entry of them was made and the patent issued.

In order to determine the availability of mineral rights in the subsurface of lands covered by nonmineral patents, one must examine the following:

1. The date of the nonmineral patent and whether such date predated or postdated the claim.

2. The specific language in the patent and the statutory authority for the patent.

3. If the location was perfected after the date of patent issuance, were the lands known to be valuable for minerals at the date of issuance?

**Side Line Agreements**

It is well established that two companies having claims adjacent to each other may establish an agreement for subsurface rights beneath the common side lines. Typically such companies execute vertical side line agreements where the division of rights is made by a vertical plane running through the common side lines. *Richmond Mining Company of Nevada v. Eureka Consolidated Mining Co*., 103 US 839 (1881). Vertical side line agreements are most commonly made where mineral deposits are irregular or consist of a complex network of veins and where the legal-technical problems of ascertaining extralateral rights are insurmountable.

**Law of the Apex: Present Status**

Since the early 1900s, there have been very few significant court cases concerning conflicts over extralateral rights. Several reasons for this lack of legal activity include the following:

1. The early cases have provided direction for most of the possible situations.

2. Many companies solve potential extralateral rights problems by establishing vertical side line agreements.

3. Development costs are so high that companies consolidate mineral properties to avoid such conflicts prior to starting mining operations.

4. Newly discovered lode deposits are less likely to be of the classic vein type where extralateral rights would attach. Most new deposits tend to be large, of irregular form and have poorly defined boundaries.

**Claims Partially Covering Patented or Withdrawn Lands**

In *Zula C. Brinkerhoff*, 75 IBLA 179 (1983), the Board overruled a number of earlier

Interior decisions which held that a lode claim partially within prior patented or withdrawn lands are null and void *ab initio* for that portion within the withdrawn or patented lands. In *Brinkerhoff* the Board said:

> ... a locator whose discovery is located on lands open to location may extend the end lines and side lines of a lode mining claim across patented or withdrawn lands to define extralateral rights to lodes or veins apexing within the portion of the claim subject to location. *Amoco Minerals Co*., 81 IBLA 23 (1984); *Marilyn Dutton Hansen*, 79 IBLA 214 (1984); *Santa Fe Mining, Inc*., 79 IBLA 48 (1984). This principle permits development of unappropriated minerals in irregular parcels of land in compliance with the statutory requirement for parallel end lines, 30 U.S.C. ' 23 (1982). *The Hidee Gold Mining Co*., 30 L.D. 420 (1901); *see Del Monte Mining Co. v. Last Chance Mining Co*., 171 U.S. 55 (1898).

The placement of exterior boundary lines over the surface of withdrawn or patented lands may be done only for the purpose of claiming unappropriated veins through extralateral rights. Of course the extension of boundary lines over withdrawn or patented lands should not be done without permission of the land owner. In *Santa Fe Mining Inc., supra* at 50, fn. 3, the Board suggested that if such permission is not possible, the claimant may make extension by projection and use of witness comers.

Although a locator may place the exterior boundary lines of his claim over patented or withdrawn lands, the rights that may be acquired by this practice depend on the particular circumstances in each case. For example, it may be possible for a claimant to obtain extralateral rights to veins dipping below or outside patented surface or withdrawn lands. *See Santa Fe Mining Inc., supra* at 51.

In *Moise and Leon Berger*, 82 IBLA 253, 255 (1984), the Board again summarized the status of lode claims with boundary lines projected over patented, withdrawn or acquired lands:

> It has long been held that where a lode location is based upon a discovery of a mineral deposit on land which is open to mineral entry, the mining claimant may extend or project the claim boundaries onto adjacent patented, withdrawn or acquired land in order to configure the claim boundaries so as to obtain, in appropriate circumstances, the extralateral rights to the deposit. Therefore, this Board has held in a number of recent opinions that BLM should not declare null and void those portions of lode claims which extend or are projected onto lands not subject to mineral entry without a factual determination that the apex of the lode purportedly discovered is not situated within the available portion of the claim. Such a determination may only be made within the context of a contest proceeding conducted in accordance with the rules governing due process. *Marvin F. Johnston*, 81 IBLA 295 (1984); *Marilyn Dutton Hansen*, 79 IBLA 214 (1984); *Santa Fe Mining, Inc*., 79 IBLA 48 (1984); *Zula C Brinkerhoff*, 75 IBLA 179 (1983); and cases cited therein.
>
> With the exception of Stock-Raising Homestead patents which reserved minerals to the

United States, most patents including placer, mill site, homestead, school grants and railroad grants convey locatable minerals to the grantee. Therefore, in most cases, a claim located after the issuance of a patent will not have extralateral rights within the boundary lines of an adjacent patent. Only where the locatable minerals are available for appropriation are such extralateral rights available. *Sante Fe Mining Inc., supra* at 50-51.

The exterior boundary lines of mill sites and placer claims may not be placed over patented or withdrawn lands. This is because such locations do not give extralateral rights. Therefore, placer claims and mill sites partly located on prior patented or withdrawn lands are null and void to the extent of their encroachment. *Sante Fe Mining Inc., supra* at 51.

**Stillwater Mineral Patent Case**

On July 14, 1982, Manville Products Corp. filed a mineral patent application with the Montana State Office of the Bureau of Land Management. The claims, located for platinum-group metals, cover a part of an ore-grade layer of the igneous Stillwater Complex. Manville had located mining claims over both the apex and along the apparent down-dip extension of the lode. Manville contended that the claims on the down-dip extension of the vein were validated by drilling which exposed ore-grade mineralization in place within the limits of each claim. The drill data suggests but does not confirm that the mineral deposits on the down-dip claims are an extension of the vein that crops out on the up-dip claim.

Following a validity examination of the claims, the Forest Service advised Manville that the claims may be improperly located because the course of the lode deviates from the center lines of the claims. The Forest Service also advised Manville that only those claims located on the exposed outcrop or apex of the lode may be valid; and any claims located over the apparent down-dip extension of the lode are invalid. According to the Forest Service, the down-dip claims are invalid because the extralateral rights attached to the apex claim appropriate the down-dip extension of the lode.

To resolve these two issues, an opinion was requested from the Solicitor of the Department of the Interior. Solicitor Tarr's opinion was subsequently approved by Secretary Hodel. *Apex and Extralateral Rights Issues Raised by the Stillwater Mineral Patent*, M-36955, 93 I.D. 369 (April 18, 1986). Secretary Hodel also overruled *United States v. Alaska Empire Gold Mining Co.*, 71 I.D. 73 (1964) and dicta in *United States v. Curlee*, A-22301 (December 22, 1939).

**Claims on Down-Dip Extension of a Vein with Physical Exposure May Be Patented**

In *Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent, supra*, Solicitor Tarr described the rights of a lode locator to place locations along the down-dip extension of a lode. A locator is not required to show that the apex of a vein is within the claim boundaries to have a valid location. Solicitor Tarr stated at 383:

> We therefore construe the Mining Law as not limiting a locator to appropriate a

discovered mineral vein only by locating claims along the apparent apex. The Mining Law requires an apex as a prerequisite to the exercise of extralateral rights, but not to the validity of a lode mining claim. If there is in fact a true apex with an identifiable descending vein, the claimant may at his option rely solely on locations on the apex and the corresponding extralateral right to appropriate the vein, as well as upon the apex, so long as each claim is supported by an exposure of the valuable mineral deposit.

Where a claimant chooses to locate claims along the apex and the dip of the vein, the location and maintenance of the claims on the dip is properly viewed as evidencing the claimant's right flowing from the apex locations with regard to the mineral within the boundaries of the down-dip claims.

The "existence of an apex within a given lode claim is not essential to the validity of the claim,....but only the claimant's ability to assert an extralateral right derived from that location." *Id.* at 382.

**Patent Applicant Not Required to Demonstrate Apex**

The Interior Department is not under any duty to require that a mineral patent applicant show that the apex of a mineral deposit exists with the claim boundaries before the claim can be held valid and patent issued. *Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent, supra*. The Supreme Court has approved the Department's practice of not determining questions of extralateral rights or resolving extralateral rights disputes in patent proceedings. *Lawson v. U.S. Mining Co.*, 202 U.S. 1 (1907).

**Protest to Issuance of Patent on Lack of Apex**

Where the issuance of a patent is protested by a third party contending that the apex of the vein is within his claim and that the patent applicant has appropriated a down-dip extension of the same vein, the burden of proof is upon the party questioning the applicants right to a patent. *U.S. Borax Co.*, 51 L.D. 464 (1926). The existence of an apex within a claim "is a matter in to which the Government will simply not inquire in the absence of a formal protest by a third party who asserts a property interest in the vein, and even then, under Lawson, the Department may decline to adjudicate the controversy." *Apex & Extralateral Rights Issued Raised by the Stillwater Mineral Patent, supra,* at 381. Some lode-type mineral deposits such as disseminated gold, copper and molybdenum simply do not have a well-defined vein within an apex.

**Extralateral Rights Establish Date of Location Rather than Date Patented**

In *Swoboda v. Pala Mining, Inc.*, 844 F.2d 654 (9th Cir. 1988), the Court reviewed an extralateral rights case. The case involved a mining claim embracing the apex of a pegmatite dike which dips beneath a contiguous boundary of the Pala Indian Reservation. The Indian reservation was established in 1920 by patent that was subject to valid existing rights. The claim was located in 1898 and patented in 1949.

The Court held that the dike was a vein and that the owner of the mining claim owned the extralateral rights under the reservation because the claim was located before the date of the Indian reservation. The Court also held that Indian tribal lands are not exempt from extralateral rights.

## SURFACE RIGHTS ON MINING CLAIMS

### Introduction

This chapter covers the rights of owners of unpatented mining claims to use the surface and vegetative resources of mining claims. Although any such use must be necessary to conduct development or mining operations on the claim, there is a slight distinction between the rights of owners to claims (1) located before the Act of July 23, 1955 (Public Law 167; 69 Stat. 367; 30 USC 612), and verified as valid under sections 5 and 6 of the Act; and (2) claims not verified as valid if located before the Act, or claims located after the Act (July 23, 1955).

### Surface Resources Act (PL-167)

On July 23,1955, Congress adopted an Act commonly called The Surface Resources Act. PL-167; 69 Stat. 367; 30 USC 612. Section 4 (30 USC 612) provides a means for the United States to manage and dispose of the vegetative surface resources and to manage other resources, except locatable mineral deposits. Claims located before July 23, 1955, may retain surface rights, if such claims are verified as being valid under Sections 5 and 6 of the Act. However, claims located after July 23, 1955, are subject to all provisions of the Act, including the Government's right to manage surface resources. This Act was passed in response to abuses of the mining laws where claims were located for purposes other than mining, such as recreational cabins, fishing and hunting sites, cafes, or for timber, grazing and water rights. H.R. Rep. 730, 84th Cong., 1st Sess., 2 U.S. Code Cong. & Ad. News, pp. 2474, 2478 (1955).

Section 4 of Public Law 167 specifies the surface rights acquired with mining claims located after July 23, 1955. The pertinent portions of this section are reproduced below as they represent the most important statutory authority concerning surface use of mining claims:

> Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.
>
> Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the

United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, that any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: Provided, further, that if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim.

Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States.

As stated in section 4 of Public Law 167, the claimant of an unpatented mining claim located after July 23, 1955, has the following surface rights:

1. Unpatented mining claims may not be used for purposes other than prospecting, mining or processing operations and related uses.

2. All surface rights of unpatented claims are subject to the right of the United States, its permittees, and licensees to use so much of the surface as necessary or for access to other lands; however, uses by the United States, its permittees or licensees, shall be such as not to materially interfere with mineral-related operations.

3. If the United States should sell timber from the surface of the mining claim which is subsequently needed for mineral-related operations, the claimant is entitled to be supplied free of charge with timber that is equivalent in kind and quantity to the timber taken from the claim.

4. Timber or vegetative resources may not be removed from a claim for other than mineral-related purposes.

**Determination of Surface Rights**

Mining claims located before the date of Public Law 167 may be made subject to the provisions of section 4 of the act if a determination of surface rights is made according to a procedure given in sections 5 and 6 of the act. The head of a Federal department or agency which has surface management responsibilities of Federal lands may file with the Secretary of the Interior a request for publication of notice to mining claimants for determination of surface rights. A notice to mining claimants is published in a newspaper having general circulation in the county in which the lands involved are situated. In addition to a field examination, a title search is made in the county recorder's office to determine the existence and ownership of all mining claims in the involved lands. All owners of record are sent a notice by personal service or registered mail.

The notice, which describes the involved lands notifies the owners of unpatented claims that they must file within 150 days from the date of the first publication of the notice a verified statement which includes: (1) the date of the location; (2) the book and page of the recorded location notice or the certificate of location; (3) the legal description of where the claim is situated; and (4) the names and addresses of the owners and others claiming an interest. If any claimant fails to file a verified statement within 150 days as specified above, failure to do so constitutes a waiver and relinquishment of surface rights so that the claimant would have the same rights under section 4 of the Public Law 167 as though the claim were located after July 23, 1955.

If a verified statement is filed, all claims indicated in the statement are examined by a government mineral examiner for a discovery. Proceedings are initiated on those claims that do not appear to have a discovery and a hearing is held to determine whether the claimant or the Government has the right to manage the surface resources. Although, at the hearing, the claim is contested on the grounds of a lack of discovery, the only effect of a determination adverse to the claimant is a restriction of surface rights as stated in section 4 of the Act. The claim is not invalidated and the claimant does not lose any possessory rights to the mineral or his rights to mine and use as much of the surface as necessary to his mining operation. If the determination is made that the claim has a discovery, the claimant retains the same surface rights he had before enactment of Public Law 167.

The claimant may file a waiver of surface rights and thus avoid a possible hearing. The effect of this action would give him the same surface rights as though he had located the claim after July 23, 1955.

**Claims with Surface Rights Under Public Law 167**

What surface rights does a claimant have who acquired such rights pursuant to the verification process provided by Public Law 167 that a claimant without such rights have? Regardless of the status of surface rights, it has long been held that the surface of an unpatented mining claim cannot be used for some purpose other than mining. It was held in *United States v. Rissinelli*, 182 Fed 675 (Idaho 1910) that "the phrase 'exclusive enjoyment,'... means enjoyment

of the surface for mining purposes alone..." More recently in *United States v. Curtis-Nevada Mines, Inc.*, 611 F2d 1277 (9th Cir 1980), the Court said that "the claimant thus had the present and exclusive possession for the purpose of mining, but the federal government retained fee title and could protect the land and the surface resources from trespass, waste or from uses other than those associated with mining."

**Claims Without Surface Rights Under Public Law 167**

*United States v. Bartell*, 31 IBLA 47 (1977), involved claims located before July 23, 1955 (Public Law 167), where the Government did not verify a discovery in connection with a section 5 proceeding. As the Board states at page 51 below, the claimant loses certain surface rights, but still retains the mining claim and all the surface rights necessary to develop and mine the mineral resource:

> We also wish to emphasize the nature and the effect of this proceeding. Section 5 of the Surface Resources Act, *supra*, establishes the procedure whereby the United States Government obtains a determination as to the respective rights of the United States and the claimants as to surface resources of the claims located prior to the Act. The principal effect of a section 5 proceeding is the limitation prior to patent as to the management and disposition of vegetative surface resources and management of other surface resources. Where a determination has been made to subject appellant's claims to the restrictions of section 4 of the Act, appellant may still proceed to develop his mining claims. He remains entitled to all the subsurface rights he had prior to such a proceeding. He is also entitled to those surface resources reasonably necessary for conducting his mining operations. *United States v. Trussel*, 7 IBLA 225 (1972); *Arthur L. Rankin*, 73 I.D. 305, 311 (1966). Thus, Bartell remains in possession of the claim for mining purposes, subject to the restrictions of section 5, *supra*.

Claims located before the Act of July 23, 1955, in which the Government could not verify a discovery at the time of the section 5 proceeding (most of the section 5 proceedings were conducted during the late 1950s and to early 1960s), have the same surface rights as claims located after July 23, 1955. The reason for this is that since the mining law requires a discovery before location, such claims were not considered to be validated at the date of the Act and therefore should have no greater rights than any other claim located after July 23, 1955.

**Claim with Surface Rights Is Subject to Contest Proceedings**

A[A] decision not to challenge the claimant=s right to use the surface resources on the claim does not preclude a subsequent decision to contest the mining claim for lack of discovery. *See United States v. Harper*, 8 IBLA 357, 361-62 (1972).@ *United States v. Waters et al.*, 146 IBLA 172, 174 (1998).

**How to Determine if a Claim Has Surface Rights**

The best way to determine if a claim located before July 23, 1955, has surface rights is to examine the Master Title Plats maintained in the public room of the Bureau of Land Management. If the claim has surface rights, the right side of the plat will be annotated with a

listing of all claims in the township carrying surface rights. If you have reason to believe the plat is improperly annotated, you may request the original case file from the BLM for the appropriate Public Law 167 determination area. The plat should give the number for the case file. Such surface rights can be maintained through a succession of owners so long as the claim is properly maintained and the transfers of interest are proper. If there is a break in the chain of title, surface rights are lost and cannot be reacquired through relocation. For example, many claimants lost surface rights because the owner failed to make the proper recordation or filing as required by section 314 of the Federal Land Policy Management Act of 1976. Even though the claimant is able to relocate, the surface rights are lost forever.

**Timber May Not Be Taken Unless Necessary for Mining**

Even as early as 1901, the federal courts required that timber may not be removed from a claim unless the use is reasonably necessary to conduct mining operations. In *Teller v. United States*, 113 Fed 273 (8th Cir 1901), the Court said:

> Possession of a mining claim, in accordance with the provisions of the statute, by well-settled authority, confers the right, subject to certain limitations and conditions, upon a locator, to work the claim for precious metals for all time, if he desires to do so; but confers no right to take timber, or otherwise make use of the surface of the claim, except so far as it may be reasonably necessary in the legitimate operation of mining.

In *United States v. Deasy*, 24 F2d 108 (Idaho 1928), the Court agrees with Teller and specifically names some of the types of uses of timber in developing a mine:

> It is then declared that the locators shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,...This right has been extended to the use of sufficient timber upon the claim for development purposes, and includes the use of timber for fuel and what is necessary for shafts, tunnels, and the construction of buildings as may be necessary as an adjunct to such development.

**BLM Authority for Emergency Salvage Operations**

The Bureau of Land Management has the authority in emergency situations to cut and dispose of by sale, diseased or insect-infested timber growing on an unpatented mining claim located before July 23, 1955, if the timber represents a threat to the health of nearby timber growing on government lands either within or without the exterior boundaries of a claim. *Emergency Salvage Operations On Unpatented Mining Claims*, M-36636 (April 5, 1962).

**Timber May Not Be Cut for Sale**

The possessory title of a mining claimant is such that he can cut timber on the claim for mining purposes but not for other purposes nor for sale. *Authority of the Bureau of Land Management to Sell Timber on an Unpatented Mining Claim*, M-36265 (March 11, 1955).

**Cabin May Be Built from Timber on Claim**

Timber may be cut from the surface of an unpatented mining claim to construct a cabin on adjacent private property, only if the cabin is used for the purpose of operating the claim. *United States v. Cruthers*, 523 F2d 1306 (CA Cal 1975).

**Mining Claimant Has No Grazing Rights**

In *United States v. Etcheverry*, 230 F2d 193 (10th Cir 1956), the Court held "that under the statute general grazing rights of the public domain are not included in the possessory rights of a mining claim." It was also held in *James G. Brown*, 65 ID 394 (1958) that possession of the surface of the land included in an unpatented mining claim does not permit the locator to use the mining claim for grazing purposes or to grant this privilege to others.

**High Value of Surface Resources Does Not Change Discovery Requirement**

The fact that a mining claim is located in a national forest does not qualify the rights of the locator in any way or increase the mineral values required to be shown in a mining contest. However, because the land on which the claim is situated is known to be valuable for purposes other than mining, the Department requires clear and convincing evidence of the values that are claimed in order to establish the validity of the claim. *United States v. Wells*, A-30805 (January 8, 1968).

**Good Faith Removal of Minerals from Valid Claim**

If a mining claimant is removing materials in good faith from an invalid claim, the measure of damages for such removal is the value of the materials in place. *United States v. Toole*, 224 F. Supp. 440 (DC Mont 1963).

**Sale of Surface Resources is Trespass**

The sale of surface resources for use unrelated to mining operations constitutes a trespassory taking, even where the funds raised by such sale are used to finance the legitimate mining operations conducted on the site. *Teller v. United States*, 113 F 273 (8th Cir 1901).

**Definition of Trespass**

In *United States v. Osterlund*, 505 F. Supp. 165 (DCD Colo 1981), the Court defined trespass "as an entry upon the real estate of another without the permission or invitation of the person lawfully entitled to possession. *Restatement 2d of Torts*, sections 158-159. One who without right enters public lands of the United States is a trespasser."

**Right of United States to Prevent Trespass**

In *United States v. Osterlund, supra,* the Court discussed the right of the United States to protect Government lands by prosecuting trespassers. The Court said:

> The government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his property. *Camfield v. United States*, 167 U.S. 518, 524 (1896) ... In *Utah Power and Light Co. v . United States*, 243 U.S. 389 (1916), the United States sought to enjoin the continued occupancy and use, without its permission, of certain of its lands in forest reservations in Utah as sites for works employed in generating and distributing electric power. In deciding whether state or federal law governed disposition of the claim the court started:
>
> > "... We are of the opinion that the inclusion within a state of lands of the United States does not take from Congress the power to *control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them* even though this may involve the exercise in some measure of what commonly is known as the police power." (Emphasis added) 243 U.S. at 404.

Thus the United States can protect its lands against trespassers.

**Right of Access to Mining Claim**

The right of reasonable access for purposes of prospecting, locating, and mining is provided by the mining law. Such access must be in accordance with the rules and regulations of the Forest Service (36 CFR 252) or the Bureau of Land Management (43 CFR 3809). Although the claimant has the right of access, under these regulations the Government has authority to approve the route and method of access so as to minimize the surface disturbance. However, it is important to emphasize that access to a mining claim is a nondiscretionary right of the miner and is not subject to a right-of-way permit.

In *Mepelt & Almasy Mining Co*., 99 IBLA 25, 27 (1987), the Board restated the well-established implied right of access across public lands to mining claims:

> Assuming that there is a valid claim supported by discovery, a right of access impliedly granted by Congress under the general mining laws for mining purposes across public land is well recognized by both the Department and the courts. *Herbert L Stewart*, 82 IBLA 329 (1984), *see also United States v. 9,947. 71 Acres of Land*, 220 F. Supp. 328 (D. Nev. 1963).

**Right of Access to Claim is Nonexclusive**

The United States mining laws give to the owners of mining claims a nonexclusive right

of access across the public lands to their claims for the purposes of maintaining the claims and as a means of removing the minerals. In *Alfred E. Koenig*, 78 ID 305 (1971), the Secretary considered an appeal from a claimant whose application for a special land use permit for an access road right-of-way across public land was rejected. The claimant contended that the road was built and is necessary for access to his mine workings. The Secretary held that "no authorization is needed for such a nonexclusive road" because the "appellant's continued use of the access road is authorized by law."

**Exclusive Access if in Public Interest**

In *Mosch Mining Co*., 75 IBLA 153 (1983), the Board indicated that where it is in the public interest, multiple locks may be placed on gates to allow entry to only the government and the claimant. The Board said at 161, fn. 4:

> ... We note that the procedure for barring public access while affording access to a claimant by installing a gate with multiple locks is proper in those cases where BLM determines that the public interest is best served by road closure. This practice is often invoked in cases where surface management is best served by limiting vehicular access.

**Permit Not Required for Access to Mining Claim**

In *Mosch Mining Co*., 75 IBLA 153 (1983), the Board considered a case where the BLM filed a trespass action against a claimant who constructed an access road to a claim. In response, Mosch, the claimant, filed an application for an exclusive right-of-way. Mosch appealed from a decision offering the right-of-way grant and requiring payment of fair-market value.

The Board pointed out that section 302(b) of the Federal Land Policy and Management Act of 1976 (43 USC 1732(b) (1976)) specifies that "no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress or egress." The Board further noted that the surface management regulations in 43 CFR 3809 make numerous references to access. In addition to stating a claimant's right of access to claims, the regulations also specify that such access is considered part of the operation and is addressed under notice (43 CFR 3809.1-3) or a plan (43 CFR 3809.1-4).

The comments on the regulations promulgated in 43 CFR Part 3800 include the following: "Another comment was concerned whether rights-of-way for access to mining claims would require approval under Title V of the Federal Land Policy and Management Act. Access for all purposes of ingress and egress to unpatented mining claims will not be regulated under the provisions of Title V." 45 FR 78908 (Nov. 26, 1980).

In conclusion, the Board made the following statements on the appellant's right of access:

1. The "appellant is not entitled to exclusivity of access."

2. The "grant of right-of-way was not the appropriate means of resolving the

question of appellant's access over and to his mining claims."

3. "BLM has no discretion to abridge such access and the matter should have been resolved under the surface management regulations of 43 CFR 3809.

Although the *Mosch* case involved BLM-administered lands, it seems likely that the same approach would hold true for Forest Service-administered lands, i.e., access roads to mining claims would be regulated under 36 CFR 228 rather than a right-of-way grant or permit.

**Special Use Permits Do Not Apply to Exploration or Mining Operations**

In *U.S. v. Craig*, CR-82-8-H (April 16, 1984), the U.S. District Court for the District of Montana considered a case where a mining claimant appealed from a U.S. Magistrate's judgement finding him guilty of violating the regulations 36 CFR 261.10(a) and 261.12(d). The Forest Service contended that the claimant had damaged a national forest system road and had locked a gate on a forest system road without a special use permit as required by 36 CFR 261.

The Montana District Court dismissed the complaints and held that the "appellant was not required to have a special use permit for activities done in connection with mining operations as defined in 36 CFR Part 252 (now part 228)." *Id*. The Court also held that 36 CFR 261 does not apply to a claimant acting under the United States mining laws of 1872 who submitted a proposed plan of operations as required by 36 CFR 228. And any violation of Forest Service regulations should be charged under 36 CFR 228.

**Public Access on Unpatented Mining Claims**

In *United States v. Curtis-Nevada Mines, Inc*., 611 F2d 1277 (9th Cir 1980), the Ninth Circuit Court of Appeals reversed judgment which required members of the general public to have specific written licenses or permits from a state or federal agency in order to gain access to unpatented mining claims for recreational purposes or for entrance to adjacent national forest lands. Since 1970, Curtis-Nevada Mines, Inc. had located 203 mining claims covering approximately 13 square miles on public lands administered by the Bureau of Land Management and on lands within the Toiyabe National Forest administered by the Forest Service. The United States initiated the action to enjoin Curtis-Nevada Mines, Inc., from prohibiting public access through their unpatented mining claims and public recreational use of the surface of their claims. The district court ruled that under Section 4(b) of the Multiple Use Act, 30 USC 612(b), the United States and its permittees and licensees have a right to use and access, but the district court limited such use and access to those who hold specific written recreational licenses or permits. The United States appealed from the part of the decision restricting public use and access to permit holders. The court of appeals discussed cases of implied licenses and the historic use of public lands for recreation without requirement of written formal permits. In light of this historical background, the court did not find in the legislative history of the Multiple Use Act of 1955 an intent to limit the meaning of "permittees and licensees" and, therefore, held that while the BLM or Forest Service may require permits for public use of federal lands, they need not do so as a prerequisite to public use of surface resources on unpatented mining claims. In *United*

*States v. Curtis-Nevada Mines, Inc., supra* at 1286, the Court said:

> Consequently, in light of the historical background of the use of the public domain for many purposes without express written permits or licenses we do not find in the legislative history of the 1955 act an intent to so limit the meaning of "permittees and licensees." Most assuredly, the B.L.M. or the Forest Service can require permits for public use of federal lands in their management of federal lands; however, they need not do so as a prerequisite to public use of surface resources of unpatented mining claims.
>
> It should be noted that mining claimants have at least two remedies in the event that public use interferes with prospecting or mining activities. Section 612(b) provides that "any use of the surface... shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." The mining claimant can protest to the managing federal agency about public use which results in material interference and, if unsatisfied, can bring suit to enjoin the activity. Secondly, a claimant with a valid claim can apply for a patent which, when granted, would convey fee title to the property.
>
> In the present case, appellees have not presented any evidence that the public use of land included within their unpatented mining claim has "materially interfered" with any mining activity. Absent such evidence, section 612(b) applies in this case to afford the general public a right of free access to the land on which the mining claims have been located for recreational use of the surface resources and for access to adjoining property. Therefore, we reverse the portion of the judgment that requires specific written permits or licenses for entry onto the mining claims.

**Public Access on Claims Located Before July 23, 1955**

In *U.S. v. Curtis-Nevada Mines, Inc*., 611 F2d 1277,1283 (9th Cir. 1980), the court discussed the "exclusive right of possession" to claims located before July 23, 1955. However, if the government had made a determination of surface rights as authorized by the Surface Resources Act, 30 U.S.C. 612 (1976), and the claimant did not retain surface rights, then his surface rights would be the same as though the claims were located after July 23, 1955. But if no determination were ever made or, if the claimant retained surface rights as a result of a determination of surface rights, then the claimant would have the "exclusive right of possession" and would have the "right to exclude the general public" from the claim. *Id*. The Court also indicated that the Surface Resources Act was passed largely to limit this exclusive possession in order to permit multiple use by the public. It stated that "before the 1955 Act this exclusive possession and use was recognized so long as the use was incident to prospecting and mining."

**Governments Authority to Manage Surface of Mining Claims**

*Cliff Gallauger*, 140 IBLA 328 (1997) is a case where the claimant (Gallauger) appealed from a determination of the BLM, dated June 1, 1992, accepting a finding of no significant impact (FONSI) and authorizing implementation of the proposed alternative described in the

Buffalo Gulch Mine Wetland Mitigation Plan and environmental assessment. Gallauger owns three placer and three lode claims along the American River in central Idaho. In August 1990, the BLM had approved Idaho Gold=s plan of operations for the Buffalo Gulch Mine Project near Elk City. But in order to comply with section 404 of the Clean Water Act, 33 U.S.C. ' 1334 (1994), Idaho Gold included in its plan of operations a wetland mitigation plan which proposed the creation of an on-site wetland during reclamation activities. The U.S. Army Corps of Engineers, reviewed the mitigation plan and determined that compliance with the Clean Water Act and the Federal wetland policy of Ano net loss@ required additional wetland mitigation acreage affecting a 1-mile corridor along the American River as compensation for existing wetland functions and values lost or diminished by the mining project.

The proposed wetland mitigation area had been disturbed by earlier placer mining activity up until 1982, and no activity has occurred on the claimants three placer claims since that date. Furthermore, no active notices or plans of mining activities had been submitted to BLM.. The land surface consisted primarily of unreclaimed dredge piles and soil stockpiles with scattered areas of wetland and impounded and the river flowed through a channel created by the early mining activity. Most of the riverbed had been mined and there were only isolated pockets of unworked ground and the BLM found the mineral potential to be low. Consequently, the BLM determined that implementation of the plan would result in no immediate conflicts or impacts to claimants of record to the sites.

The planned actions include (1) installing rock/log check dams; (2) placing woody debris in the stream channel; (3) positioning approximately 1,000 rock wing deflectors; (5) stabilizing the streambanks; (6) enhancing riparian areas and flood plains; (7) constructing and relocating approximately 700 feet of river channel to develop a natural meander channel and filling in the existing channel with excavated material from the new channel; and (8) building a rearing pond for anadromous fish. Gallauger alleged that the proposed activities would endanger or materially interfere with prospecting, mining, or processing operations and uses reasonably incident thereto on his six claims in violation of section 4(b) of the Surface Resources Act (the Act), 30 U.S.C. ' 612(b) (1994).

The Board found that ABLM@ has the authority to manage both wetlands and fish habitat and that, based on the record before us, neither the wetland mitigation plan nor the fish habitat enhancement project imperils or substantially impedes mining activities on the claims.@ *Id.* 337. The Board said at 338-340:

> While the phrase Aother surface resources@ admittedly is ambiguous, *see, e.g., United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1280 (9th Cir. 1980); *Robert E. Shoemaker*, [110 IBLA 39 at 48 (1989)]. * * *
>
> * * * Thus, the approved plan does not import totally alien resources into the area, but simply develops, improves and expands upon resources which, while not now extant on the sites, once flourished there and augment the resources presently on the sites. In any event, BLM=s right to manage the surface resources on unpatented mining claims is not confined to simply preserving those resources as they exist, but also embraces enhancing

those resources. *See Robert E. Shoemaker, supra,* at 50. Accordingly, we hold that wetland improvement activities and fish habitat enhancement techniques fall within BLM=s authority to manage Aother surface resources@ on unpatented

The Act, however, further limits authorized surface uses to those which do not Aendanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.@ 30 U.S.C. ' 612(b) (1994). This provision reflects the balance struck by Congress to resolve conflicts between Federal management of surface resources found on a mining claim and the claimant=s legitimate use of the surface and surface resources by confirming that Federal surface management activities must yield to mining as the dominant and primary use. * * *

* * * We find that the record supports BLM=s conclusion that the wetland mitigation plan and fish habitat enhancement project will not endanger or materially interfere with active mining operations. Although Gallauger did file a notice of proposed mining activities after issuance of the challenged approvals, BLM=s examination of the areas involved in the mining actions described in the notice revealed no conflict between those undertakings and the wetland and fish habitat projects, a finding which Gallauger has not challenged on appeal and which we sustain. Claimants argue, however, that the possibility that the approved projects might imperil or materially impede potential future mining uses of the claims suffices to invalidate BLM=s approval actions as violative of the Act. We disagree.

**Claims to Remain Open for Public Use Except Where Actual Mining or Prospecting Operations**

Upon reviewing the legislative history and case law on the Act, the Board in *Cliff Gallauger, supra,* determined that Aestablished@ or Aactual@ mining operations rather than the Amere possibility of future mining operations@ are to be afforded the restriction of surface uses. The Board said at 339:

While the language of the Act is silent on this issue, the legislative history reciting the purpose of the Act clarifies that the Act was designed to Alimit surface use to those activities which do not endanger or materially interfere with *established* mining operations or related uses.@ H.R. Rep. No. 730, 84th Cong., 1st Sess. 3, *reprinted* in 1955 U.S.C.C.A.N. 2474, 2475 (emphasis added). As the court in *United States v. Curtis-Nevada Mines, Inc., supra,* explained:

> One of the clear purposes of the 1955 legislation was to prevent the withdrawal of surface resources from other public use merely by locating a mining claim. The inertia of the situation was previously with the mining claimant who retained exclusive possession of the surface of the claim until the location was invalidated by affirmative action. As to claims located after the 1955 legislation, however, the inertia works the other way. Essentially, the surface resources remain in the public domain for use as before with the exception that the mining

> claimant is entitled to use the surface resources for prospecting and mining purposes and that the other uses by the general public cannot materially interfere with the prospecting and mining operation. Thus, the vast acreage upon which mining claims have been located since 1955 * * * remain open for public use except for restrictions imposed where *actual* mining or prospecting operations are taking place.
>
> 611 F.2d at 1285 (footnote omitted; emphasis added). To accept claimants= suggestion that the mere possibility of future mining precludes BLM management of the surface resources on the claim would negate the authority granted by the Act and lead to the return of the situation the Act was devised to remedy. Accordingly, we find that only surface uses which endanger or materially interfere with actual, established prospecting, mining, processing, or related uses are restricted by the Act.

**Easiest Access Is Not a Matter of Right**

A[T]he Board has observed in rights-of-way cases, the easiest or highest degree of access is not a matter of right. *See J.E. Lepetich*, 129 IBLA 255, 260 (1994); *Dwane Thompson*, 88 IBLA 31 (1985).@ *Joseph Smith*, 135 IBLA 347, 350 (1996).

AUnder 43 CFR 3712.1(b), no locator may >block access to or egress from adjacent public land,= including recreational areas.@ Joseph Smith, 135 IBBLA 347, 350 (1996). An exception to this rule occurs where such access or other surface uses Aendanger or materially interfere with actual, established prospecting, mining, processing, or related uses...@ *Cliff Gallauger, supra* at 339.

**Locator's Right to Occupy Unpatented Mining Claims**

The right of a locator to place buildings and (or) cabins for residential purposes on a claim is based on the requirement that such buildings must be directly related and incidental to the mining operation. *United States v. Springer*, 321 F. Supp. 625 (CD Cal 1970), *aff=d* 478 F2d 43; *United States v. Rizzinelli*, 182 F 675 (ND Ida 1910). Such property may be legitimately placed on an unpatented mining claim and maintained by the original locator and all subsequent owners of the claim, providing, of course, that such buildings are essential to the mining operations. In *United States v. Nogueira*, 403 F2d 816 (9th Cir 1968), the Court said:

> The government's third contention involves the good faith of the possessor who is currently using the land. Even if the 1961 mining claim were found to be valid, such a determination would not justify the occupancy and use of the land for other than mining purposes.

> ... While the right of a mining claimant under a valid discovery has been said to be that of exclusive possession, such possession can be maintained against the United States only for mining purposes ...
>
> ... Thus the government can prohibit occupation of a mining claim and collect damages for past trespass where the land is not being used for mining purposes, regardless of whether or not the claim was valid.

So, according to *Nogueira*, even a valid claim cannot be occupied unless it is being used for mining purposes.

In *United States v. Osterlund*, 505 F. Supp. 165 (DCD Colo 1981), the Court affirmed *Nogueira* and further held that even if the claims were valid at one time and the structures were used in connection with past mining activities, it would be a trespass to occupy such claims without ongoing mining operations. The Court said at 168:

> Even if the mining claims near or around the subject land were valid at one time, such a determination would not justify the continued occupancy and use of the land for other than mining purposes. While the right of a mining claimant under a valid discovery has been said to be that of exclusive possession, such possession can be maintained against the United States for mining purposes only. *United States v. Nogueira*, 403 F.2d 816, 824 (9th Cir. 1968). So even if the structures in question were built and occupied pursuant to past mining claims, in the absence of any mining operation, defendant has no right contrary to those of the general public. *United States v. Allen*, 578 F2d at 238.

There is little question that actual continuous prospecting (under *pedis possessio*) or mining operations are required to validate occupancy. Mining operations are required even if the claimant holds surface rights pursuant to Public Law 167.

**Government Remedies for Occupancy Trespass**

Even though a claim is valid, the owner has no right to occupy it in the absence of actual mining operations. *See United States v. Nogueira, supra*, and *United States v. Osterlund, supra*. Therefore, it is unnecessary for the government to conduct a validity examination and initiate contest proceedings in order to remove an occupancy trespass. As stated in *United States u. Nogueira, supra* at 825, the "court may not deny the United States injunctive relief or damages if trespass upon the public lands is shown." More recently in *United States v. Brown*, 672 F2d 808, 810 (10th Cir 1982), the Court said that "people who occupy unpatented mining claims as residences are thus subject to trespass claims and ejectment actions by the United States if the land cannot be patented."

**Unauthorized Occupancy Is Subject to Consultation Provisions of Subpart 3715**

*David J. Flacker*, 147 IBLA 161 (1999) involved a situation where the appellant was occupying a a cabin on his mining claim causing a disturbance that constituted Acasual use@ under 43 CFR 3809.1-2. The BLM Area Manager issued a Notice of Noncompliance with 30

days within which to file a mining plan of operations or a removal and reclamation plan and to furnish a reclamation bond in the amount of $2,000. However, the Board said a Amining plan of operations is required only if the activities on the claim rise above the level of Acasual use,A * * * and if Aoccupancy is Acasual use@ the regulations provide that no mining plan of operations is required.@ *Id.* at 165. Upon determining that BLM should be addressing the case as an unauthorized occupancy, The Board said at 166:

> Pursuant to 43 CFR Subpart 3715, governing use and occupancy under the mining laws, one proposing a use that would involve occupancy, but is Acasual use@ under 43 CFR 3809.1-2, or does not require a plan of operations under 43 CFR 3809.1-4, is subject to the consultation provisions of Subpart 3715 and the occupant must submit the materials required by 43 CFR 3715.3-2 to BLM. Where consultation has not been effected by BLM under this provision, and the occupant has not been given the opportunity to provide a submission in accordance with 43 CFR 3715.3-2, the decision will be vacated and the case remanded to allow adjudication under 43 CFR Subpart 3715.

**Circumstances for Residential Occupancy**

In *David J. Flacker*, 147 IBLA 161, 165 (1999), The Board described two situations where residential occupancy of a mining claim may be appropriate:

> * * * Residential occupancy may be reasonably incident to mining during the conduct of operations where required to provide feasible access to remote claims and/or to provide security for equipment and material at times when operations are ongoing; however, a claimant may not occupy a claim for purposes other than mining activity. *See United States v. Lee Jesse Peterson*, 125 IBLA 72, 77-93.

**The Bagwell Case: Bad Faith Use of Mill Site**

On April 21, 1992 the Ninth Circuit Court rendered its decision on the Bagwell case. *United States v. Bagwell*, 961 F.2d 1450 (9th Cir. 1992). For more than eight years the Forest Service had attempted to evict the Bagwells from a mill site claim on the basis of bad faith occupation of the public lands under the guise of the Mining Law.

Since 1972 Bagwell has occupied a 4.25 acre mill site in the Angeles National Forest. After a number of disputes with Bagwell over questionable use of the mill site, the Forest Service approved an operating plan in July 1984 to cover Bagwell's mining and milling operations. In October 1985 the Forest Service revoked that plan because Bagwell refused to remove livestock and livestock facilities and he also failed to engage in mining activities. In 1987 the Forest Service ordered Bagwell to vacate the mill site. Then in August 1989, The United States filed an action in Trespass to recover possession of the mill site. At the trial the Forest Service showed that (1) Bagwell's mining operation could not be operated at a profit; (2) Bagwell had engaged in very little actual mining or milling activities in his many years at the mill site; (3) Bagwell never processed a significant amount of ore; and (4) Bagwell used the mill site primarily for residence and livestock purposes.

In April 1990, the district Court held that Bagwell occupied the mill site in bad faith and

ordered Bagwell to vacate the mill site, restore the land to its natural state, and pay $5,355 in rent for the use of the land since he was ordered off in 1987. The Ninth Circuit Court, in affirming the District Court's order, stated that the "district court correctly applied the good faith doctrine to Bagwell's claim and determined that Bagwell's claim was invalid, and we can find no error. The district court's finding of bad faith is well supported by the evidence." *Id.* at 1457. As the Circuit said, the "rights of possession of public lands for mining purposes under the Mining Law of 1872.....is subject to a good faith requirement." However, "the United States has the burden of proving bad faith by clear and convincing evidence." *Id.* at 1453.

**If Occupied, Claim May Be Invalidated on Bad Faith**

In *United States v. Bagwell, supra*, the Court explained that the "federal courts have jurisdiction to determine whether possession of a mining claim is in good faith when the United States brings an action to recover possession of public lands." *Id.* at 1453. Therefore, a federal court has authority to invalidate a claim "to end the bad faith possession of public lands." *Id.* However, "where the claimant has not taken possession of the land, the Department of the Interior has primary jurisdiction to determine the validity of the mining claims on public lands." *Id.* at 1453-54. As stated in *Adams v. United States*, 318 F.2d 861, 866 (9th Cir. 1963):

> The Department of the Interior has been granted plenary authority over the administration of public lands, including mineral lands. It is that agency which has been entrusted with the function of making the initial determination as to the validity of claims against such lands, such determination being subject to judicial review.

But if the Claim is occupied "[p]ossession of public lands in bad faith for purposes not reasonably related to mining need not be tolerated until all of the claims at issue have been declared invalid in administrative proceedings. *Citations Omitted.* Instead, the United States may bring an action to recover possession of the public land in district court." *Id.* at 1454.

The Court then restated its holding that where there is bad faith occupancy, a claim may be invalidated without resorting to determining the validity of a claim in administrative proceedings (*Id.* at 1454):

> In sum, if the United States determines that the possession of a mining claim is in bad faith, it may choose to bring an action in federal court to recover possession of the public land without first adjudicating the validity of the claim in administrative proceedings. We are well aware that the court's finding on good faith usually determines the validity of a claim as well because good faith is a necessary element of a valid claim.

**Criteria for Invalidating a Claim under Bad Faith Occupancy**

If there is clear and convincing evidence of bad Faith under either of the two following inquiries, a claimant may be evicted and the claim declared invalid (*Id.* at 1455-56):

A. Extent to which the mill site is being used for purposes other than mining-

1. whether the mill site is being used for residence, recreational, or other non-mining purposes,

2. the extent to which the land is valuable to the claimant for uses other than mining,

3. the amount of ore that has been processed or is currently being processed by the mill,

4. significant periods of nonuse for milling purposes, and

5. activity or improvements indicating a good faith intent to undertake milling in the immediate future.

B. Whether a reasonably prudent person would be justified in continuing to expend money or labor developing the mill site-

1. the length of time the mill site has not been used,

2. the condition of the mill,

3. the potential sources of ore to run through the mill,
4. the market for the processed ore, and

5. the operating costs.

**No Taking on Invalid Mining Claim**

In *United States v. Bagwell, supra* the court held that the Fifth Amendment of the Constitution "does not require compensation to be paid for divestment of an invalid mining claim." The Court said that "[b]ecause Bagwell's mill site claim is invalid under the doctrine of bad faith, he is not entitled to compensation under the Fifth Amendment."

**Occupancy Not Reasonably Incident to Mining**

The phrase "reasonably incident" to mining is found at section 4(a) of the Surface Resources Act, 30 U.S.C. 612(a) (1988), which states: "Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." In *United States v. Peterson*, 125 IBLA 72 (1993) the Board considered a variety of uses on the surface of a mining claim in light of whether or not they were "reasonably incident" to mining.

The raising of Buffalo for meat to feed mine workers was held to not be "reasonably incident" to mining. *Id.* The storage of inoperable automobiles and pickup trucks on the claim

was held to not be reasonably incident to the mining operation. *Id* at 84. A wood-chip plant on the claim is not reasonably incident to mining activities where the plant was useless for the recovery of valuable minerals. *Id.* at 88. Even though almost any item of equipment or materials salvaged from discard may eventually have a use in a low budget operation, "this does not make everything in the salvage yard reasonably incidental to mining." *Id* at 83. "[R]esidency to prevent theft and vandalism might support a conclusion that occupancy of a mining claim is reasonably incident to mining..." *Id*. at 79. However, if the claimant owns land nearby and could reside on it, then occupancy of a mining claim would not be reasonably incident to mining. *Id*. at 81. The Board also held that there was no necessity to live on the claim because it borders a state highway only 1.5 miles from town. *Id*. at 79.

The Board conceded that "while Peterson's residential occupancy of his claim is incident to his mining operation, under the circumstances in this case is not *reasonably* incident." *Emphasis Added*.

**Occupancy Not Incidental to Mining**

In *United States v. William Doherty*, 125 IBLA 296 (1993), BLM had sought removal of a log cabin and a well from a claim because they were not used or occupied for purposes reasonably incident to mining activity on the claim. The Board held that the claimant's "occupancy and use of structures on the claim, particularly the cabin in question, are shown by the record before us to relate entirely to mining activity. Although his mining efforts may be sporadic or minimal, they are all mining-directed nonetheless." *Id.* at 300.

In *United States v. McMullin*, 102 IBLA 276, 282-84 (1988), a claim was contested for lack of discovery and failure to hold a claim in good faith for mining purposes. The Board held that the claimants' occupancy of the cabin was not reasonably incident to mining activities because there was no evidence of mining, the cabin was apparently constructed before the claim was located and had not been used for anything related to mining activities during its entire 50-year existence. Furthermore, there was no evidence of any mineralization within the mining claim.

**Occupancy Is Challenged by Contest**

If BLM desires to challenge a claimant's occupancy on the basis that such occupancy is not reasonably related to the mining activities, or that the specific occupancy is causing unnecessary or undue degradation, a contest alleging such grounds should be initiated. *Bruce W. Crawford*, 86 IBLA 350, 402 (1985).

**Residency on a Mining Claim**

Uses, such as residency, that are not reasonably incident to mining are not permitted on a mining claim, including those claims located before the Surface Resources Act of July 23, 1955. Conversely, "a permanent residence which is reasonably related to mining is permissible." *United States v. Langley, supra* at 1263.

**Occupancy of Claim Where Necessary for Development**

If a claimant's activity, such as placement of structures or occupancy, is not reasonably incident to mining, BLM's remedy is to issue a notice of noncompliance. *Richard W. Taylor*, 119 IBLA 310, 314 (1991). "[I]f occupancy of the claims is necessary for development of the mineral deposit, the effect of an order requiring a claimant to cease occupancy is tantamount to a taking of the right to mine. *Id.* at 315.

**Occupancy of a Mill Site for Purposes Unrelated to Mining Is a Trespass**

In *Jim D. Wills*, 113 IBLA 396, 398 (1990), the Board held that "because occupancy of a mining claim for purposes not related to mining operations constitutes a trespass, *United States v. Nogueira*, 403 F.2d 816 (9th Cir. 1968); *United States v. Rizzinelli*, 182 F. 675 (D. Idaho 1910); *Teller v. United States*, 113 F. 273 (8th Cir. 1901), it also follows that occupancy of a millsite claim for purposes not related to mining operations constitutes a trespass."

**Claimant Not Occupying Land in Good Faith**

In order to succeed in an action for ejectment, the Govemment must establish that a claim is invalid, either because the claimant has failed to make a mineral discovery, or because he is not occupying the land in good faith for mining purposes. In *United States v. Langley, supra* 126 1, the Court held that where the claimant is not occupying the land in good faith for mining purposes, "there is no need for the court to withhold judgement pending an administrative determination of whether the claim is otherwise valid. *United States v. Russell*, 578 F.2d 806, 807-08 (9th Cir. 1978); *United States v. Noguira*, 403 F.2d 816, 824 (9th Cir. 1968).

**No Rights by Prescription**

In *United States v. Osterlund, supra*, the Court held that a claimant who has continuously occupied a mining claim cannot acquire any rights against the government by prescription or adverse possession. The Court said:

> Defendant also contends that it is equitable to allow him to remain on the land and pay damages to the plaintiff. In support of this contention it is alleged that defendant and his predecessors in title have been living on the land for years and they believed in good faith that they had acquired title by the purchase of government lot No. 43. In addition, the trespass has been longstanding and innocent. Since its discovery in the early sixties, the Forest Service has taken no action against defendant or his predecessors in title. In essence defendant argues that he has obtained rights to the land by his and his predecessor in title's continuous possession and occupancy of the subject lands and the failure of the Forest Service to take action to the contrary. Defendant cites numerous cases applying equitable principles in such circumstances between private owners. However, no right by prescription may be obtained against the government.

In *United States v. California*, 332 U.S. 19, 39, 40, 67 (1946), the State of California argued that the federal government's paramount rights to ocean areas were lost by reason of the conduct of its agents. The defendants argued that by this conduct the government is barred from enforcing its rights by reason of principles similar to laches, estoppel, or adverse possession. The Court held:

> ... Even assuming that government agencies have been negligent in failing to recognize or assert the claims of the government at an earlier date, the great interests of the government in this ocean area are not to be forfeited as a result. The government which holds its interests in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of the government's property cannot by their conduct cause the government to lose valuable rights by their acquiescence, laches, or failure to act.

**Abandoned Property on Mining Claim**

A memorandum dated August 7,1979, from the Office of the Regional Solicitor to the Anchorage District Office of the BLM, contains an excellent discussion of abandoned property on mining claims. According to this memorandum, abandoned property may be categorized as follows:

1. *Items attached to realty* -- This type of property includes permanent, nonmovable fixtures attached to the land such as cabins or other buildings. If the mining claim is abandoned, these fixtures become the property of the United States. *Brothers v. United States*, 594 F2d 740 (9th Cir 1979). If the lands embracing the cabin are subsequently located, the new locator has the same rights of exclusive possession to the cabin as he does to the other surface resources on the mining claim. *McKenzie v. Moore*, 176 P 568 (Ariz 1918). Therefore, rights to use a cabin, or a surface resource on an unpatented claim must be directly related and incident to actual mining operations on the claim.

   In *Brothers v. United States*, 594 F2d 740 (9th Cir 1979), the Forest Service had notified the holder of an invalidated mining claim that, unless she removed two cabins from her former claim on national forest land by a specified deadline, the cabins would become property of the United States. Two days before the deadline, new locators (plaintiffs), who were friends of the former mining claimant, filed a new mining claim coinciding with the boundaries of the earlier claim. On the deadline date, Forest Service employees posted "no trespassing" signs on the cabins, stating that they were federal property. The plaintiffs claimed that the United States took the cabins and they sought $10,000 as just compensation. The court of appeals held that the posting of signs, without more, was insufficient to establish seizure of the mining claim by the United States, noting that the Forest Service has conceded that the plaintiffs may continue

to prospect their claim and seek to patent it. Also the new locators were not entitled to compensation for any loss of the cabins because they lacked a possessory interest in the buildings. The ownership of the buildings had reverted to the United States when abandoned by the previous mining claimant.

2. *Items of personalty embedded in the soil* -- This type of property, which is not attached to realty, includes such items as mining equipment embedded in the soil but does exclude "treasure troves." A treasure trove is defined as "... any gold or silver in coin, plate, or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown, or the treasure having been hidden so long as to indicate a probability that the owner is dead." 36 CJS, *Finding Lost Goods* 1, pp. 418-419. Upon abandonment of the claim, this type of property becomes the property of the land owner, the United States. *Alfred v. Biegel*, 219 SW 2d 665 (Mo Ct Cl 1949). The new locator of this type of abandoned property would have rights to use such property if the use is directly related and incidental to actual mining operations.

3. *Items of personalty not embedded in the soil* -- This type of property, which is found at the surface of realty, includes such items as tools and vehicles. Upon abandonment, such items become the property of the finder rather than the landowner or the United States. 170 ALR 707, 708. However, ownership of such abandoned property can be claimed by the United States under 40 USC 484 (m). This section requires that the government assert dominion and control over the abandoned property by taking possession of such property. Until the government takes this affirmative action, the abandoned property remains subject to the claims of whoever first finds the objects and claims title. If the new locator of an abandoned claim containing such property asserts possession over these movable items before the United States does so, ownership of the property would vest in the claimant. Furthermore, there is no requirement that such property be used in connection with mining operations because the claimant would hold a legal rather than possessory title.

**Liability for Unlawful Use, Removal or Damage to Abandoned Property**

If a relocator should remove, damage or use property left on an abandoned claim, he may be subject to civil and criminal liability. For example, if the property belongs to the United States, such liability would apply if the relocators use or disposal of the property is done without right, regardless of whether the relocator actually believed he had a right to the property.

Removal and (or) sale of appurtenances abandoned by a prior locator on an unpatented mining claim by a relocator without right can, under certain circumstances, constitute a criminal act under 18 USC 641. Maximum penalties for theft of government property may be a fine of up to $10,000 and (or) imprisonment for up to 10 years. Unlike the civil remedies, however, not only must government ownership and a trespassory taking be shown, but it must also be shown that the defendant acted with an intent to appropriate property he knew to belong to another.

*Morrisette v. United States*, 342 US 246 (1952); *Ailsworth v. United States*, 448 F2d 439 (9th Cir 1971).

Intentional damage to property left on an unpatented mining claim by a relocator without right can, under certain circumstances, also constitute a criminal act under 18 USC 1361. Like the criminal theft statute, and unlike the civil remedies, not only must government ownership and a trespassory act be shown, but it must also be shown that the defendant acted intentionally (rather than merely negligently) and with knowledge that the property belonged to the United States. *United States v. Simpson*, 460 F2d 515 (9th Cir 1972).

**Fish and Fish Habitats Are "Other Surface Resources"**

In *Robert E. Shoemaker*, 110 IBLA 39 (1989), the Board held that fish and fish habitats are "other surface resources" which the Interior Department has authority to manage on the surface of mining claims under section 4(b) of the Surface Resources Act, 30 U.S.C. 612(b)(1982). However, section 4(b) further provides that "any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting mining or processing operations or uses reasonably incident thereto * * *. *Emphasis added.*

**If Federal Surface Management Activities Endanger or Materially Interfer with Mining Operations**

In *Shoemaker, supra*, the BLM had installed weirs to enhance the wildlife habitat on a stream embraced by an existing placer claim. The Board had to make a determination as to whether the weirs endanger or materially interfere with the operations conducted by the claim owners. If the weirs do endanger or materially interfere, the "[f]ederal surface management activities must yield to mining as the 'dominant and primary use,' the mineral locator having a first and full right to use the surface and surface resources." *Id.* at 53. Based on dictionary definitions, the Board determined that "materially interfere" is equivalent to "substantially hinder, impede or clash." The Board then held that the 10 weirs "substantially impede" or "materially interfere" with the appellant's mining operation. *Id.* at 55.

**Claimant with Surface Rights May Exclude Public**

In *United States v. Langley*, 587 F. Supp. 1258, 1264 (E.D. Cal. 1984), the Court upheld the right of a claimant to exclude members of the public from the surface of a claim where the claim was located prior to the Surface Resources Act of July 23, 1955, and the claimant has "surface rights."

**Good Faith Requirement for Independent Mill Sites**

In order to establish bad faith on the use or occupancy of a mill site, the government bears

the burden of demonstrating the claimant's bad faith. Furthermore, the government can only meet this burden with clear and convincing evidence. *United States v. Bagwell*, Civil No. 88-6944 (DC Idaho, April 27, 1990); *Also see United States v. Prowell*, 52 IBLA 256, 259 (1981). In *Bagwell* the Court found that "good faith is required for independent mill sites." In order to determine whether a mill site is being used in good faith or bad faith, the Court considered the following factors:

1. the length of time of nonuse

2. the condition of the mill
3. the potential source of ore to run the mill

4. the marketing conditions

In *Bagwell* the mill site was in working condition but was used only sporadically. Also, the mill was of poor quality, had never been used by miners, and there was no evidence that the miners intending to use the mill had significant amounts of ore. However, most significant was the uncontroverted evidence of prolonged inactivity. Consequently, the Court held that the mill is not a *bona fide* mill and concluded that the mill site is not being operated in good faith.

**Good Faith Required for Dependent Mill Site**

A mill site can be declared invalid it is not being used in good faith for mining or milling purposes. In *United States v. Bagwell, supra*, the Idaho Federal District Court held that a group of mill site claims did not meet the marketability or prudent-man test and was not operated in good faith for the following reasons:

1. The volume and quality of ore on the associated claims are such that the ore cannot be mined at a profit.

2. The mill is inefficient and there is a relatively high cost of mining and milling the ore.

3. The miner has been in prolonged occupancy of the mill site and the mill is in poor condition.

The Court concluded that "Bagwell's occupation of the mill site has been in bad faith and thus constitutes trespass."

**Operating Plan Required for Inactive and Existing Mill Site Structures**

In *United States v. Burnett*, 750 F.Supp. 1029 (D. Idaho 1990) the First District Court of Idaho held that maintenance of structures and personal property on a mill site require an approved plan of operations. A plan must be filed even though there is no activity on the mill site. In *United States v. Brunskill*, 792 F.2d 938, 940-41 (9th Cir. 1986), the Court also held that

the *maintenance* of structures, including a cabin, mill, and other structures is a significant surface disturbance which requires an approved plan of operations.

**Structure and Property on Abandoned Claims**

*United States v. Burnett, supra*, involved a case in the Nez Perce National Forest involving structures placed on a claim that was subsequently lost for failure to make the annual filing required under the Federal Land Policy and Management Act. The claims were relocated, but the Forest Service sent a letter to the claimant advising him to remove the structures. Burnett, who purchased the structures from the original claimant wrote the Forest Service to inform it that he had no intention of tearing down the buildings or filing a plan of operations.

On the basis the Forest Service had told Burnett from the outset that the structures and personal property should be removed, the Court held that he was on notice and that he had "only the right to remove the structures and the personal property, and not the right to possess them on the claims." In other words, when the claims were relocated, the claimants "did not get a possessory interest in the structures and personal property. What they received was an interest in the mining claims, less structures and personal property." *See Brothers v. United States*, 594 F.2d 740 (9th Cir. 1979). In *Brothers* the Ninth Circuit Court held that once claims are abandoned, the prior owner only has the right with permission to remove cabins from an abandoned claim. Another relevant case is *Anderson v. United States Forest Service*, 645 F.Supp. 3 (E.D. Cal. 1985). In *Anderson*, the Court held that the claimants mining claim was null and void and that all property must be removed from the claim. The Court also held that the claimant could not maintain property on the claim without having a special use authorization, contract or approved operating plans. "Without approval, the government is allowed to take the necessary steps to prevent the trespass, including ejectment and removal." *United states v. Burnett, supra*.

**Property on Abandoned Mining Claim Owned by Government**

Where a mining claimant relocates an abandoned claim with existing buildings and personal property, he acquires only a possessory interest in the mining claim. He does not get a possessory interest in the buildings and personal property. *United States v. Burnett*, 750 F.Supp. 1029, 1032 (D. Idaho 1990). In *Brothers v. United States*, 594 F.2d 740 (9th Cir. 1979), the Court ruled that where a claimant relocates an abandoned mining claim, the cabin is abandoned to the government.

**Claimant Not Occupying Land in Good Faith**

In order to succeed in an action for ejectment, the Government must establish that a claim is invalid, either because the claimant has failed to make a mineral discovery, or because he is not occupying the land in good faith for mining purposes. In *United States v. Langley, supra* 1261, the Court held that where the claimant is not occupying the land in good faith for mining purposes, "there is no need for the court to withhold judgement pending an administrative determination of whether the claim is otherwise valid. *United States v. Russell*, 578 F.2d 806,

807-08 (9th Cir. 1978); *United States v. Noguira*, 403 F.2d 816, 824 (9th Cir. 1968).

**Patented Mining Claim Has No Surface Rights Outside Patent**

Once patent issues to a mining claim, the rights of the owner are the same as any other private land owner and would no longer include any additional surface rights that would be available to an unpatented claim under the General Mining Law. For example, operations outside the patented land would no longer be governed by the Forest Service regulations (36 CFR 228 or the Bureau of Land Management regulations (43 CFR 3809). Instead such operations would come under other land use regulations, special use permits and rights-of-way which in some cases the approval is discretionary to the government.

In *Virgil Horn*, 117 IBLA 10 (1990) the Interior Board of Land Appeals upheld a decision of the California State Director, dated May 15, 1989, in a case where the owner of a mineral patent issued in 1988, was advised by the District Ranger that a mining plan of operations was no longer effective because the lands are now private. In its approval of the BLM decision, the Board explained that there is no benefit under the mining law because the appellants no longer possess a mining claim on Federal land. Upon issuance of patent fee title ownership transferred to the appellants and the Interior Department looses jurisdiction. Therefore, "the use of additional National Forest lands by appellants outside the exterior boundaries of the patent land is subject to regulation by the Forest Service." *Id.* at 11.

**Hearing Necessary to Determine if Occupancy Is Incidental to Mining**

If there is no mining activity on a claim, a determination can be made that occupancy of such a claim is not reasonable incidental to mining. This determination can be made without the benefit of a fact-finding hearing. *Bruce W. Crawford*, 86 IBLA 350, 373 (1985). However, if some mining activity is taking place and the claimant contends that occupancy of the claims is necessary in order to develop the mineral deposits, the effect of an order requiring such a claimant to cease occupancy is tantamount to a taking of the right to mine. *Id.* at 376. In *Bruce W. Crawford, supra*, the Board held that "a decision ordering the cessation or limitation of occupancy ...be entered after notice and an opportunity for hearing. In summary, where mining is occurring and the Government seeks to challenge occupancy as not reasonably incident to such mining activities, the Government must provide notice and an opportunity for hearing prior to ordering the cessation of occupancy. *Id.* at 401.

**Civil Remedies by Government to Protect Surface Resources**

The United States has available a number of civil remedies to prevent damage, misuse, or theft of to its surface resources on mining claims. Use and (or) occupancy of the public lands without right subjects the trespasser to liability to the United States for damages. *Utah Power & Light Co. v. United States*, 243 US 389 (1917); *United States v. Langendorf*, 322 F2d 25 (9th Cir 1963). Specifically, use of the surface resources of an unpatented mining claim for purposes unrelated to mining operations will entitle the United States to bring suit for trespass damages. *United States v. Nogueira, supra*. The United States may be granted an injunction enjoining

future unauthorized use of the surface estate and its appurtenances. *United States v. Nogueira, supra*. The United States may enjoin a relocator from prohibiting public access such as for recreational activities across unpatented mining claims so long as such public access does not interfere with legitimate ongoing mining operations. *United States v. Curtis-Nevada Mines, Inc., supra*. The United States can bring an ejectment action prohibiting occupancy of an unpatented mining claim or its appurtenances, for purposes unrelated to mining operations. *United States v. Allen*, 578 F2d 236 (9th Cir 1978). Finally, should such appurtenances be removed by or sold to another without right by the relocator, the United States could recover the objects from either the relocator or his purchaser in an action for replevin. *Morrisette v. United States*, 342 US 246 (1952).

# 15. ASSESSMENT WORK

## ASSESSMENT WORK

### Purpose of Assessment Work

The purpose of the assessment work requirement is to discourage the speculative holding of mining claims to the exclusion of others and to require a demonstration of good faith in developing a claim. *Jupiter Mining Co. v. Bodie Consolidated Mining Co*., 11 F 666 (1881). Assessment work is done to assure diligent development of mining claims and prevent speculation by location of many claims and letting them go idle. *Powell v. Atlas,* 615 P2d 1225 (Utah 1980).

There is some precedent for requiring that assessment work cause visible change to the surface so as to notify other potential locators that the ground is being held in good faith. In *Hickel v. Oil Shale Corp*., 406 F2d 759 (10th Cir 1969), *reversed on other grounds*, 400 US 48 (1979), the Court held "that the basic federal requirements, the staking, and the assessment work were all acts relating to the ground itself and to create some condition which could be observed by persons seeking to locate claims in the same area..." However, in a somewhat contrary opinion, the Court in *Eveleigh v. Darneille*, 276 Cal App 2d 638, 81 Cal Rpts 301, 303 (1969) held that the work "must be of such a character as directly tends to develop and protect the claim and facilitate the extraction of minerals even though such work does not create visible signs." See 2 *American Law of Mining*, 7.2. p. 102 (Supp). In *Great Eastern Mines, Inc. v. Metals Corp. of America*, 527 P2d 112 (1974), the Supreme Court of New Mexico stated at 114:

> The general rule in regard to the character of ground work is that the work must be of such a character as directly tends to develop and protect the claim and to facilitate the extraction of minerals.

### The Assessment Year

The assessment year or the period during which the work must 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 o'clock meridian on the 1st day of September succeeding the date of location of such claim." 30 USC 28 (1976). The Act of August 23, 1958 (72 Stat. 829) changed the period for doing assessment work so that each assessment year begins at noon September 1 instead of noon July 1. Assessment work is not required during the assessment year the claim is located. For example, if a claim were located November 10, 1972, the first assessment work would be required for the assessment year beginning September 1, 1973 and ending September 1, 1974. Assessment work is not required subsequent to issuance of the patent certificate.

**Amount of Work Required Per Claim**

The federal law requires that "on each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year." 30 USC 28.

**Value of the Labor Rather than Price Paid**

To determine the amount of work done on a claim, the critical factor is the reasonable value of the work rather than the contract price paid. *McKay v. Neussler*, 148 F 86 (CCA Alaska 1906). Other factors that may be taken into consideration in the value of labor is remoteness of the claim from sources of labor, the cost and availability of supplies and the lack of facilities. 132 Cal 56, 64 P 98 (1901).

**Assessment Work Unnecessary if No Discovery**

If there is no discovery within the boundaries of a mining claim, the location is not perfected and assessment work is not required. *Borgwardt v. McKittrick Oil Co*., 130 P 417 (1913). In *Great Eastern Mines, Inc. v. Metals Corp. of America*, 527 P2d 112 (1974), the Supreme Court of New Mexico discussed the necessity for assessment work to follow the discovery. The Court stated at 114 and 115:

> This would indicate that the work was done after discovery of the mineral in place and for the purpose of development of the claim in question. ...
>
> The work done by plaintiffs was not accomplished for the discovery of mineral deposits nor for the purpose of measuring physical differences between rock types or discontinuities in geological formation. It was done to determine the milling characteristics of the mineral deposit already known to exist. Because of these facts, these samples were outside the definitions contained in '28-2, supra, and outside the labor requirements of '28-1, supra. However, this was labor for the purpose of developing rather than discovering, and complied with assessment work requirements on mining claims regardless of '28-1 and 28-2, supra.

**Apportionment of Work Among Contiguous Claims**

In the situation where a claimant performs an insufficient amount of work (less than $100 per claim) to cover all the claims in a contiguous group, the courts may follow three rules (2 *Anterican Law of Mining* 7.721, p. 128):

1. If the assessment work is apportioned equally to each claim, all claims will have insufficient work. *Duncan v. Eagle Rock Gold Mining & Reduction Co*., 48 Colo 569, 111 Pac 588; *Platt v. Bogg*, 77 Ariz 214, 269 P2d 715 (1954).
2. The assessment work may be allocated entirely to the claim(s) where the work was performed. *Swanson v. Kettler*, 17 Id 321, 105 P 1059 (1910), *on rehearing*

105 P 1065, *affirmed* 224 US 180.

3. The claim owner may select those claims upon which sufficient work was performed. In *Utah Standard Mining Co. v. Tintic Indian Chief Mining & Milling Co.*, 73 Utah 456, 274 P 950 (1929), the Court said at 951:

> There is no principle of law that we are aware of which asserts that, if the owner of a group of 22 claims undertakes to do the annual work for that group, as a consolidated group, and performs only the labor necessary for 9 claims, he loses the benefit of that work on 9 claims, provided it is in fact performed on one of the 9 claims in such a way as to benefit the remaining 8, as well as the one upon which performed.

**Type of Work**

The federal law does not specify the type of work that should qualify for assessment work. However, because the law does require that discovery precede location, any work done must directly relate to the development or extraction of the mineral. Any work expended towards finding a mineral discovery would be exploratory in nature and would not qualify. The following situation represents a hypothetical example. If a geochemical, geophysical anomaly, or a mineralized area is drilled to determine if there is a commercial deposit in the subsurface, such work would be exploratory in nature and thus, would not qualify as assessment work. Even if ore were intersected by the first drill hole and several other holes were necessary to establish that the deposit contained sufficient reserves of ore to justify development, this additional drilling would also be exploratory in nature and may not qualify.

However, once it is established that the deposit is sufficient in quality and quantity to justify commercial development, a discovery is made. *Chisman v. Miller*, 197 US 313, 321, 322 (1905); *Barton v. Morton*, 498 F2d 288 (1974). Any future drilling to further define the limits or shape of the ore body would, of course, qualify as assessment work. *See Schlegal v. Hough*, 182 Ore 441, 188 P2d, 158 (1947). Again, the above is an extreme theoretical situation. The courts have accepted many types of exploratory work and would normally accept most types of drilling.

In a conflict between claimants over right of possession of a mining claim, involving the question of proper assessment work, the question of whether a discovery is made is generally not an issue and probably should not be. The judge is in a poor position to determine a question of fact such as discovery; but the judge is generally quite comfortable with ruling on good faith. Therefore, in most cases, judges have ruled in favor of a senior locator who performed assessment work in good faith, regardless of whether such work consists of exploration-type work.

**Examples of Work or Improvements that Qualify as Assessment Work**

1. A building that benefits and improves the claim. *Bryan v. McCraig*, 10 Colo 309, 15 P 413 (1887).

2. Reasonable value of meals to miners who receive board in addition to salary. *Fredricks v. Klauser*, 52 Or 110; 96 P 679 (1908).

3. Value of blasting supplies. *Id*.

4. Construction of road to mining claim. *U.S. v. 9,947.71 Acres of Land, More or Less, in Clark County, State of Nev.*, 220 F. Supp. 328 (DC Nev 1963); *Silliman v. Powell*, Utah, 642 P2d 388, 393 (1982).

5. Maintenance of access roads to mining claim. *Pinkerton v. Moore*, 66 NM 11, 340 P2d 844 (1959).

6. Sinking shafts and running tunnels or drifts. *James v. Krook*, 42 Ariz 322 (1933).

7. Installation of mining machinery or fixtures. *Id*.

8. Employment of a watchman when necessary to protect structures or property used in developing a claim. *Ingersolt v. Scott*, 13 Ariz 165, 108 P 460 (1910).

9. Drilling and removal of samples from a mining claim. *Eveleigh v. Darneille*, 81 Cal Reptr 301 (Cal App 1969).

**Examples of Work or Improvements That Do Not Qualify As Annual Labor on a Mining Claim**

1. Removal of water from a mine for inspection of prospective buyer. *Evalina Gold Mining Co. v. Yosemite Gold Mine Co.*, 15 Cal App 714,115 P 946 (1911).

2. Erection of a house outside the boundaries of a claim for the shelter of miners. *Remington v. Baudit*, 6 Mont 138, 9 P 819 (1886).

3. Eating utensils, groceries, and bedding. *Fredricks v. Klauser*, 52 Or 110, 96 P 679 (1908).

4. Amount paid for horses used in development work; however value of their use will qualify. *Id*.

5. Payment for iron rails or tools, but their value in developing the mine may qualify. *Id*.

6. Material taken to a claim but not used. *Id*.

7. Sampling and assaying. *Bishop v. Baisley*, 28 Or 119, 41 P 936 (1895).

8. Reconnaissance surveys of mining claims. *Pinkerton v. Moore*, 66 NM 11, 340 P2d 844 (1959).

9. Use of a claim to deposit wastes from other claims and building a flume to carry tailings to claim. *Jackson v. Roby*, 109 US 440 (1883).

10. Employment of a watchman to prevent relocation. *Justice Mining Co. v. Barclay*, 82 F 554 (CC Nev 1897); or where there is no valuable improvement or machinery to protect. *James v. Krook*, 42 Ariz 322, 25 P2d 1026 (1933).

**Access Roads and Qualifies**

The construction of access roads as well as improvement of existing access roads qualifies as assessment work, even though the road is not on the claims. For example, the cost of installation of water bars on an existing road to prevent erosion and reduce the need to rehabilitate or maintain the road is sufficient improvement to qualify as assessment work. *United States v. Herr*, 130 IBLA 349, 365-65 (1994).

**Geological, Geochemical and Geophysical Surveys**

Until Public Law 85-876 (Act of September 2, 1958; 72 Stat. 1701) authorized that geological, geochemical and geophysical surveys may be used to fulfill the annual labor assessment requirements, the Federal laws did not describe the type of assessment work that would satisfy the statutory requirement of $100 per claim per year.

If geological, geochemical and geophysical surveys are to be utilized to fulfill the requirement for assessment work as authorized by the Act of September 2, 1958, such survey must be conducted by qualified experts and verified by a detailed report filed in the county in which the claim is located. The report must include: (1) the location of work performed in relation to the point of discovery and boundaries of the claim; (2) type of work, extent and cost; (3) the results of the survey; and (4) the name, address and professional background of the person or persons conducting the work. 30 USC 28-1.

In PL 85-876 (30 USC 28-2 and 43 CFR 3851.2[b]-1) the following definitions are given:

(1) The term "geological surveys" means surveys on the ground for mineral deposits by the proper application of the principles and techniques of the science of geology as they relate to the search for and discovery of mineral deposits; (2) The term "geochemical surveys" means surveys on the ground for mineral deposits by the proper application of the principles and techniques of the science of chemistry as they relate to the search for and discovery of mineral deposits; (3) The term "geophysical surveys" means surveys on the ground for mineral deposits through the employment of generally recognized equipment and methods for measuring physical differences between rock types or

discontinuities in geological formations; (4) The term "qualified expert" means an individual qualified by education or experience to conduct geological, geochemical, or geophysical surveys, as the case may be.

Surveys may not be used to satisfy the assessment work requirement for more than two consecutive years or for more than a total of five years on any one claim. No two surveys on the same claim may involve the same type of work. Such surveys may not be applied towards the statutory requirement that $500 must be expended for each claim in order to obtain patent.

**Good Faith and Evidence of Work**

Good faith may be taken into consideration in determining whether a senior locator has performed the required assessment work. *Haws v. Victoria Copper Mining Co*., 160 US 303 (1895). Visibility is not a trustworthy test of whether or not the assessment work was accomplished. *Eveleigh v. Darneille*, 81 Cal Reptr 301 (Cal App 1969). Although annual assessment work on mining claims does not need to be performed openly and notoriously, *Great Eastern Mines, Inc. v. Metals Corp. of America, supra,* no visible assessment work after years of occupancy of a claim indicates no such work was done. *U.S. v. Mobley*, 45 F. Supp. 407 (DC Cal 1942), supplemented on other grounds, 46 F. Supp. 676. One should also keep in mind that assessment work may be done below the surface of a claim as well as at the surface. *Justice Mining Co. v. Barclay*, 82 F 554 (CC Nev 1897).

In *Schlegel v. Hough*, 182 Or 441, 186 P2d 516, *reh. denied,* 182 Or 449, 188 P2d 158 (1947), the Court discussed good faith as follows:

> ... The question to be considered is whether or not the work was done in good faith for the purpose of working, prospecting or developing the mining ground embraced in the location, or for the purpose of facilitating the extraction or removal of the ore therefrom.

In *Great Eastern Mines, Inc. v. Metals Corp. of America, supra* at 114, the Court said that "the work is performed in good faith, the court will not substitute its own judgment for that of the miner."

**Group Assessment Work**

Assessment work done on one or more of a group of adjoining claims, or even outside all of them, held in common ownership must be of a character that it would benefit the development of the group as a whole and the value of the labor must be at least $100 for each claim. *St. Louis Smelting and Ry Co. v. Kemp,* 104 US 636 (1881). Group assessment work is authorized in 30 USC 28 and 43 CFR 3851.1. The law provides that "where such claims are held in common, such expenditure may be made upon any one claim." 30 USC 28.

If the assessment work is not done within the claim boundaries, the locator has the burden

to show that the work would benefit the development of the claim. *Justice Mining Co. v. Barclay*, 82 F 554 (CC Nev 1897). Claims must be contiguous or at least in such a position in relation to the ore body that it is reasonable to conclude that assessment work done on one claim would benefit the others. *Powell v. Atlas Corp*., 615 P2d 1225 (Utah 1980). In *Jackson v. Roby*, 109 US 440 (1883), the United States Supreme Court stated at 444:

> ... where work or expenditure in one of several claims held in common is allowed, in place of the required expenditure on the claims separately...
>
> ... the work or expenditure must be for the purpose of developing all the claims. It does not mean that all the expenditure upon one claim -- which has no reference to the development of the others -- will answer.

**Definition of "Contiguous"**

If claims of such a group touch only at a common corner, they are not considered contiguous. *Anvil Hydraulic & Drainage Co. v. Code*, 182 F 205 (CCA Alaska 1910). The regulations (43 CFR 3851.1) also state that "cornering locations are held not to be contiguous."

**Purpose of Group Assessment Work**

In *Union Oil Co. of Cal. v. Smith*, 249 US 350, 351, 352, the United States Supreme Court discussed the purpose of "group assessment work" in a case involving an oil placer mining claim. Although very few oil placers exist at present, the rationale certainly is still appropriate, particularly as it would apply to core drilling to satisfy the assessment work requirement. The Court said at 351 and 352:

> "Group assessment work" did not originate with the Act of 1903. From an early period the economy of operating contiguous mines or claims by a single system was recognized. In '5 of the Act of May 10, 1872, it was provided with respect to the annual labor that "where such claims are held in common such expenditure may be made upon any one claim." Questions as to the precise meaning of this naturally arose, and it was determined that it applied only to contiguous claims, and that the work must be done for the common benefit or for the purpose of developing all the claims. ...The courts have held with reference to lode mining claims that this annual labor may be done upon any one of a group of mining claims, provided the said work tends to benefit the entire group, but the Land Department of the government seems to be of opinion that the annual labor upon placer-mining claims must be done upon each of said claims. There is good reason for this holding when applied to the ordinary placer claim containing deposits of gold, because in such case the gold lies upon the surface or near the surface, and general development work being upon and near the surface does not tend to benefit other claims than the one upon which the work is actually done; but in the case of oil-mining claims the situation is different. It is necessary to bore wells for great depths in order to determine whether or not oil exists in paying quantities. These wells are expensive, and it is the opinion of the committee that the industry itself will be more benefitted by

permitting the owner to spend his means in sinking a single well in order to demonstrate the possibilities of the property than it would to require him to Distribute his means among several claims. In other words, it is better that $500 should be spent in one place until the character of the oil deposit has been demonstrated than it is to require the same amount of money to be spent in five different places."

**Gold Placer Claims May Not Qualify for Group Assessment Work**

The Supreme Court's mention of group assessment work as applied to ordinary placer claims containing surface deposits of gold should be noted above. *Union Oil Co. of Cal. v. Smith, supra* at 351. The Court indicates that with such claims, the annual labor should be done on each claim because the "general development work being upon and near the surface does not tend to benefit other claims than the one upon which the work is actually done..." Of course ordinary placer claims should qualify for group assessment work if the work benefits each claim.

**Group Assessment Work Must Be Done According to General System**

Work done on one claim to benefit adjoining claims must be done according to a "general system." In *Silliman v. Powell*, 642 P2d 388 (1982), the Utah Supreme Court developed this concept by quoting several earlier cases. The Court said at 393:

> To determine whether adjoining claims are benefitted by work done on another, courts have required that the work be done pursuant to a general system "well adapted and intended to work several contiguous claims or lodes, and where such is the case work in furtherance of the system is work on the claims intended to be developed by it." *Chambers v. Harrington*, 111 U.S. 350, 353, 4 S.Ct. 428, 430, 29 L.Ed. 452, 454 (1884), affirming an appeal from this Court and quoting from *Mount Diabolo M. & M. Co. v. Callison*, 5 Sawyer 439.
>
> The meaning of the term "general system" was stated in *Nevada Exploration & Mining Co. v. Spriggs*, 41 Utah 171, 180, 124 P. 770, 773 (1912), as follows:
>
> > That the work as it is commenced on the ground, is such that, if continued, will lead to a discovery and development of the veins or ore bodies that are supposed to be in the claims, or, if these are known, that the work will facilitate the extraction of the ores and mineral.
>
> While a general Plan must have a reasonable tendency to benefit the claim for which the work is asserted, a court will not substitute its judgment for that of the owner as to the wisdom of the method employed. *Miehlich v. Tintic Standard Mining Co*., 60 Utah 569, 211 P. 686 (1922).

**Compliance with Federal Assessment Work Requirement Liberally Construed**

The owner of a group of mining claims, when in good faith, performs work on one claim to benefit the entire group, is generally given broad latitude by the courts as to how and where

such work is done. *Copper Mtn. Mining & Smelting Co. v. Butte & Corbin, Consolidated Copper & Silver Mining Co.*, 39 Mont 487, 104 P 540 (1909). In *Silliman v. Powell, supra* at 394, the Utah Supreme Court said that "when there is an attempt at compliance, however, the law should be construed liberally to prevent a forfeiture."

**Compliance with Recordation Is Not Compliance with Assessment Work**

Compliance with the annual filing requirement of Section 314 of FLPMA, 43 U.S.C. 1744(a) (1988) does not establish compliance with the assessment work requirements of 30 U.S.C. 28 (1988). As the Board said in *United States v. Hiram B. Webb*, 132 IBLA 152, 170 Acompliance with the annual filing provisions of section 314 of FLPMA does not, either in theory or in fact constitute compliance with the requirements relating to the annual performance of assessment work. The purpose of 43 U.S.C. 1744 (1988) is A*to inform* the Department of those claims existing on public lands and of continued interest of the claimant in such claims.@ Emphasis in original. *James V. Joyce (On Reconsideration)* 56 IBLA 327, 328 (1981).

The purpose behind the assessment work requirement is Ato insure that claims are diligently developed and to prevent the locking up of land by claimants who have no present intent to develop the minerals located therein.@ Before FLPMA, there was no Federal requirement that assessment work be *recorded*; the various state=s statutes mandated the recordation of assessment work while the Federal law only required the work be performed. *See Powell v. Atlas Corp.*, 615 P.2d 1225 (Utah 1980); *Oregon Portland Cement Co.*, 66 IBLA 204, 207-208 (1982). *rev. on other grounds, Oregon Portland Cement Co. v. U.S. Department of the Interior*, 590 F.Supp 52 (1984).

If an affidavit of labor is not recorded under state law, a claim is not necessarily subject to forfeiture. As a general rule, the recording of assessment work is treated as prima facie evidence that work had been performed. However, the primary question in cases involving the right of possession between rival claimants was whether or not the work had been performed. *Oregon Portland Cement, supra* at 208.

**Resumption Doctrine**

The "resumption doctrine," described in *Wilbur v. Krushnic*, 280 U.S. 306, 318 (1930), establishes that the failure to perform annual labor makes a claim vulnerable to loss through relocation by another claimant. If a claimant resumes the required annual labor before the rights of another party attach, the original claimant's rights are as good as though there was no failure to perform assessment work. "However, during the period that the claim has been abandoned and the land is subject to appropriation, and if another party's rights attach, the intervention of those rights deprives the ability to reactivate the claim by resumption of work." *United States v. Herr*, 130 IBLA 349, 366-67 (1994).

When the 1872 Mining Law was amended by the 1920 Leasing Act, certain locatable minerals such as oil, phosphate, and oil shale were converted to leasable minerals. So, when oil shale claimants, which located before the 1920 leasing Act, failed to perform assessment work,

intervening rights were established by the 1920 Act. According to the ruling in *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970), the resumption doctrine no longer protected oil shale claims.

**Clear and Convincing Proof Assessment Work Not Performed**

Where claimants demonstrate a "total lack of knowledge regarding the nature or amount of work that was supposed to have been performed," the Government has established by clear and convincing proof that they have failed to have work performed or improvements made. For example, "[s]ome of the work allegedly undertaken was surveying and mapping, yet the claimants produced no maps or other evidence of a survey. *United States v. Herr*, 130 IBLA 349, 365-66 (1994).

**Department Has Jurisdiction to Challenge Validity of Claim for Failure to Perform Assessment Work**

The Department has jurisdiction to challenge the validity of a mining claim for failure to substantially comply with the assessment work requirement. However, forfeiture of a mining claim for failure to perform the work must be established by clear and convincing proof that the claimant has failed to make the improvements or perform the work. *United States v. Herr*, 130 IBLA 349, 358 (1994; *Hammer v. Garfield Mining & Milling Co.*, 130 U.S. 291 (1889).

**Assessment Work Off Claim**

Assessment work may be performed outside the boundary lines of a claim, or outside the entire contiguous claim group so long as the work benefits the claim. The courts have held that such work may be done on unappropriated public domain or patented lands. *Anvil Hydraulic Drainage Co. v. Code*, 182 Fed 205 (9th Cir 1910). However, such work may not qualify if done within the boundaries of a claim owned by another. *Weigle v. Salmino*, 49 Idaho 522, 290 Pac 552 (1930). In *Smelting Co. v. Kemp*, 104 US 636 (1881), the Supreme Court said at 655:

> Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development; that is, to facilitate the extraction of the metals it may contain; though, in fact, such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material.

It is not essential the labor improvements be made on the claim itself so long as work such as labor to develop water, or to remove waste rock or tailings from a placer facilitates the extraction of ore. *Smelting Co. v. Kemp, supra*. However, labor expended to obtain water to operate a mill does not qualify. *DuPrat v. James*, 65 Cal 555,4 P 562 (1884). Not only has work in connection with bringing water to a benefitting claim been held to qualify, but also construction of access roads to claims has been held to qualify as assessment work. *Lind v.*

*Baker*, 31 Cal App 2d 631, 88 P2d 777 (1939); *See* 2 *American Law of Mining*, 7.18, pp. 123, 124.

**Work for Contiguous Claims Included in Same Affidavit**

It is generally accepted that assessment work covering a contiguous group of claims may be included in a single affidavit. *Id*.

**State Requirements for Assessment Work**

Each state has a statute requiring that an affidavit of assessment work be filed. Although all state statutes give specific information that must be included in the affidavit, the states of Arkansas, Arizona, Colorado and Idaho include in the statute the exact language to be included in the affidavit. In all states except Wyoming, the statutes provide that the filing of an affidavit of assessment work constitutes *Prima facie* evidence that the work was performed. Each state statute also provides that the affidavit must be filed by the end of a specified period of time, following the assessment year. 2 *American Law of Mining* 723, pp. 142, 143.

**Recordation of Assessment Work Affidavit under State Law**

| **State** | **Period Allowed or Date after Sept. 1** |
|---|---|
| Alaska | 90 days |
| Arizona | before December 31 |
| California | 30 days |
| Colorado | on or before December 30 |
| Idaho | 60 days |
| Montana | 90 days |
| Nevada | on or before Nov. 1 |
| New Mexico | on or before December 30 |
| North Dakota | not required |
| Oregon | 30 days |
| South Dakota | no form required |
| Utah | 30 days after completing work |
| Washington | 30 days |
| Wyoming | 30 days after completing work |

**Burden of Proof on Junior Locator that Assessment Work Not Performed**

The junior locator has the burden of providing clear and convincing proof that the senior locator failed to do the required work. *Pascoe v. Richards*, 20 Cal Reptr 416 (1962); *McDermott v. O'Brien*, 409 P2d 588, 2 Ariz App 429 (1966); *Velasco v. Mallory*, 427 P2d 540, 5 Ariz App 406 (1967). A Colorado appeals court also held that the junior locator had the burden to prove by a preponderance of evidence that the senior claimant had not done the required assessment work, but it was not necessary to prove such fact by clear and convincing evidence. *Silver Core Mining Co. v. DeBell*, 595 P2d 269 (1979).

In *Silliman v. Powell, supra* at 393, the Utah Supreme Court held that the junior locator also has the "ultimate burden of persuasion ... to prove a failure to meet the statutory assessment requirement..." The Court said:

> This Court stated in *New Mercur Mining Co. v. South Mercur Mining Co*., 102 Utah 131, 137, 128 P.2d 269, 272 (1942), "[O]rdinarily the party claiming the forfeiture of a title must plead it and establish it by clear and convincing proof." *See also Utah Standard Mining Co. v. Tintic Indian Chief Mining & Milling Co*., 73 Utah 456, 274 P. 950 (1929). The ultimate burden of persuasion is upon a junior locator to show that insufficient assessment work was done on the claims in question and that they were therefore open to relocation.
>
> On the other hand, plaintiffs concede that they have the burden to prove by competent evidence that work performed outside the boundaries of any claim forming part of a group being commonly developed fulfilled the requirements of the law and was both intended to develop the claim and did actually tend toward its development. *New Mercur, supra.*
>
> The Court further stated that if claimants "indisputedly performed the work on this claim, they cannot lose the benefit of it." In other words, where assessment work is actually performed on a particular claim of a senior locator, the burden is upon the one asserting a forfeiture to prove a failure to meet the statutory assessment requirement as to that claim.

**Burden of Proof on Claimant if No Recorded Affidavit**

In *U.S. v. Haskins*, 59 IBLA 1, 102, 103 (1981), the Board addressed the situation where no assessment work was recorded for a claim and determined that such failure established a *prima facie* case that the work was not performed, therefore placing the burden of proof on the claimant. Apparently this situation applies only to contests between the Government and a claimant. The Board said at 102 and 103:

> ... While the question is not free of all doubt, we believe that Exhibit G-7, which showed that no assessment work had been recorded for the placer claim, established a *prima facie* case that the work had not been performed. The burden then devolved to the claimant to show that despite the absence of recorded statements, the requisite work for the benefit of the placer claim had been accomplished.

In *Golden Condor, Inc. v. Bell*, 678 P.2d 72 (Idaho App. 1984), Aff=d, 739 P.2d (Idaho 1987), Golden Condor, Inc. filed assessment work affidavits for the 1977-78 assessment year; however, Bell contended that the work was not actually accomplished and filed new claims over the Golden Condor locations. The Idaho Court of Appeals observed that the filed affidavit is *prima facie* evidence that the work was accomplished. However, if conflicting evidence is presented that the work was not done, the court weighs the conflicting evidence to determine if

such work was actually performed. As the Junior locator, Bell had the burden of proving by clear and convincing evidence that the work was not performed.

**Assessment Work Performed but No Filing with County**

In *O'Connor v. Wilke*, 705 P.2d 572 (Mont. 1985) was a case where the original locators of four mining claims had neglected to file affidavits of assessment work in 1977. Upon discovering the failure to file, Wilkes relocated the claims. Both parties were in agreement that the senior claimant had actually performed the 1977 assessment work. The Montana Code (Ann. sec. 82-2-103), which requires the claimant to file the assessment work affidavit with the County Clerk, states that the affidavit Ais *prima facie* evidence of the facts therein stated. The failure to file such affidavit .... shall be *prima facie* evidence that such labor has not been performed and that the owner of the claim.... has abandoned and surrendered the same.@

The court then held that even though filing the affidavit is mandatory, the failure to file is only *prima facie* evidence that the assessment was not performed. Therefore, because the required work has been performed, failure to make the 1977 filing did not cause abandonment of the claim and the senior claimant prevailed.

**Failure to Perform Assessment Work**

In the event a claim owner fails to perform the annual labor, "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." 30 USC 28.

If annual work in the amount of $100 per claim is not accomplished, the claim is subject to relocation but is not necessarily forfeited. *Wilbur v. U.S. ex rel. Krushnic*, 280 US 306 (1930); *Edwards v. Anaconda Co*., 565 P2d 190, 115 Ariz 313 (1977).

Failure of a mining claimant to make the expenditure or perform the labor required upon a location will subject a claim to relocation unless the original locator, his heirs, assigns, or legal representatives have resumed work after such failure and before relocation. 43 CFR 3851.3(b).

**Performance of Assessment Work Not a Matter of Concern to United States**

Assessment work is required only to preserve the exclusive right to the possession of a valid mineral location on which discovery has been made. Such work is not a matter of concern to the United States. *James W. Hansen*, 1 IBLA 134 (1970). Although most mining law administrators in the Interior Department are still in agreement with the Board in *Hansen*, see the following paragraph for a qualification to the above statement.

**Cancellation of Claim for Failure to do Assessment Work**

Historically, assessment work was done to prevent relocation by rival claimants, and whether or not such work was done was of little concern to the Federal Government. However, in *Hickel v. Oil Shale Corporation*, 400 U.S. 48 (1970), the Supreme Court held that the Secretary of the Interior has authority to declare unpatented mining claims invalid for lack of assessment work. Although the claims in this case were for oil shale, the Secretary, in an effort to extend the requirement to all types of mining claims, adopted the following regulations (43 CFR 3851.3 [a]) on September 9, 1972:

> Failure of a mining claimant to comply substantially with the requirement of an annual expenditure of $100 in labor or improvements on a claim ... will render the claim subject to cancellation.

However, the Interior Department has been reluctant to apply this regulation to mining claims.

**Delinquent Assessment Work**

The delinquent assessment work covering a period of several years may be grouped in a single notice. *Elder v. Horseshoe Mining & Milling Co*., 194 US 248 (1904).

**Agricultural Entryman Cannot Take Advantage of Failure to Do Assessment Work**

A claimant under the agricultural land laws cannot take advantage of a mineral claimant's failure to perform assessment work. Only another mineral claimant may take advantage of such failure by locating after the failure and before the resumption of work. 29 LD 359.

**Association Placer Claims**

Although placer claims may range in size from 20 acres with one locator and up to 160 acres in an association placer located by at least eight persons, only $100 worth of labor is required by the statute.

**Relocation After Expiration of Assessment Year**

A relocation on lands covered by a valid location is void; a relocation should not be made until the existing location expires at the end of the assessment year. *Belk v. Meagher*, 104 US 270 (1881). This is true even if the owner of the valid existing location ultimately fails to perform the required work. *Rooney v. Barnette*, 200 F 700 (1912); *Velasco v. Mallory*, 427 P2d 540, 5 Ariz App 406 (1967). In *Dye v. Duncan, Diekman & Duncan Mining Co*., 164 F. Supp. 747 (1958), the Court stated at 759:

> ... There was no evidence whatsoever that Ratliff, Hillard, or Walker did any assessment work for the year ending July 1, 1956, and thus the area embraced by their claims was open to relocation as of July 1, 1956, at 12 o'clock meridian.

Even a junior claim over a valid senior claim must be relocated again after the work on the senior claim is delinquent.

**Performance of Assessment Work Confers No Rights If Invalid Location**

Performance of assessment work confers no rights where there is no valid location. The Board has held that substantial compliance with the assessment work regulations as described in *Hickel v. Shale Oil Corp*., 400 U.S. 48 (1970) does not bring to life an otherwise invalid location. *See E. J. Belding*, 96 I.D. 272 (1989) and *Steven Heady*, 110 IBLA 245, 249 (1989).

**Distinction Between Forfeiture and Abandonment**

In *United States v. Bohme*, 48 IBLA 267, 87 ID 248, 265-268 (1980), the Board clearly distinguished between the question of forfeiture and the question of abandonment as both relate to nonperformance of assessment work. In this case, the Board synthesized the important U.S. Supreme Court cases in such a way as to provide a clear picture of the present status of this subject. *Wilbur v. Krushnic*, 280 US 306 (1930); *Ickes v. Virginia-Colorado Development Corp*., 295 US 639 (1935); *Hickel v. Oil Shale Corp. (TOSCO)*, 400 US 48 (1970). *Krushnic*, *Virginia-Colorado* and *TOSCO* are cases involving nonperformance of assessment work on oil shale claims located before the Mineral Leasing Act of February 25, 1920. Although oil shale is now a leasable mineral, a savings clause in the Mineral Leasing Act (section 37) covered valid claims existing on February 25, 1920 "and thereafter maintained in compliance with the laws under which initiated." In a related issue, the Board also determined that if there is no evidence of assessment work on the ground and if there is no record of any work having been performed, then such evidence would be sufficient to establish a *prima facie* case. The burden of proof would then be on the claimant to show by a preponderance of evidence that the required work was done. The Board stated at 265-268:

> We think the error of Judge Sweitzer's ruling on this matter may be rooted in the unfortunate proclivity of the various authorities to suggest that substantial nonperformance of assessment work may equate with abandonment of the claim. As but one example, in *Hickel v. TOSCO, supra* at 57, the Court stated that defaults in performance of assessment work "might be the equivalent of abandonment." We see only a contingent, inconclusive connection.
>
> In the absence of a statutory presumption that a default constitutes abandonment (*see* 43 U.S.C. '1744 (1976)), the fact of abandonment is determined on the basis of the intention of the party. Thus, a hypothetical mining claimant might have manifested a

clear intention not to abandon his claims by each year posting thereon notices of intention to hold them, recording such notices, publishing them in a newspaper, forming a company for the development of his claims, etc., but performing no assessment work whatever. The weight of evidence in such a case would clearly militate against a finding on the basis of common law principles that the mining claimant had "abandoned" the claims. But would that absolve him of the consequences of his failure to meet his statutory obligation to perform assessment work each year for the benefit of each claim? Obviously not.

It is the mining claimant's duty under 30 U.S.C. '28 (1976) to perform work in the amount of $100 for the benefit of each claim annually, and that is an objective standard which he must meet regardless of other manifestations of his intent to retain the claims. A default, then, if it is to have any consequential effect, must result in forfeiture, not abandonment. Of course, where abandonment is charged, the nonperformance of assessment work would have evidentiary value in proving the charge.

Abandonment, being essentially a question of intent, is difficult of proof, and perhaps should impose a heavy evidentiary burden on the one who asserts it. But the assertion that annual assessment work has not been performed is the assertion of a negative fact. If an examination of the claims and the nearby lands does not reveal the accomplishment of the required work, and there is no record of any such work having been performed, then evidence to this effect would be sufficient to establish a *prima facie* case. It would then devolve on the claimant to show by a preponderance of countervailing evidence that he has substantially complied with the statute.

... nonperformance of assessment work bears very little similarity to abandonment. One might just as easily say that a lessee who fails to perform a continuing obligation under a lease had "abandoned" the leasehold. Second, where the Government contests the validity of a claim for nonperformance of annual work, there is nothing inherent or implied in that action which requires a conclusion that the claim is valid in all other respects, nor may the bringing of such an action be treated as tantamount to an admission by the Government that "property rights in the claim have been established by the making of a valid location."

*TOSCO* clearly addressed the issue of whether *Krushnic and Virginia-Colorado* correctly held that failure to do assessment work furnishes no ground for forfeiture, but inures only to the benefit of relocators. The Supreme Court ruled that the United States is "the beneficiary of all claims invalid for lack of assessment work or otherwise. It follows that the Department of the Interior had, and has, subject matter jurisdiction over contests involving the performance of assessment work." 400 U.S. at 57.

... In *TOSCO*, the Court noted that in *Virginia-Colorado* the lapse in assessment work had been held to provide no basis for a charge of abandonment. The decision in *TOSCO* continued:

We construe that statement to mean that *on the facts of that case failure to do the*

> *assessment work was not sufficient to establish abandonment*. But it was well established that the failure to do assessment work was evidence of abandonment. *Union Oil Co. v. Smith*, 249 U.S. 337, 349; *Donnelly v. United States*, 228 U.S. 243, 267. If, in fact, a claim had been abandoned, then...[t]he United States had an interest in retrieving the lands. [*Citations omitted*.] The policy of leasing oil shale lands under the 1920 Act gave the United States a keen interest in recapturing those which had not been "maintained" within the meaning of '37 of that Act. We agree with the Court in *Krushnic* and *Virginia-Colorado* that every default in assessment work does not cause the claim to be lost. *Defaults, however, might be the equivalent of abandonment, and we now hold that token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. '28, is not adequate to "maintain" the claims*. [Italics supplied.]

400 U.S. at 56-7.

We find the import of the language emphasized unambiguous: (1) failure to maintain a claim by doing assessment work each year may constitute evidence of abandonment; and (2) independently, a failure to substantially comply with the requirement that annual assessment work be performed (30 U.S.C. '28 (1976)) requires a finding that the claim has not been "maintained" within the meaning of sec. 37 of the Leasing Act and results in a forfeiture of the claim.

**Relocation of Oversized Claims**

When a junior locator places a location on an oversized placer claim, only the excess portion of the oversize claim is void. However the entire oversized claim is valid for a reasonable time during which the senior locator selects that part of the claim he is entitled to keep. *Jones v. Wild Goose Mining Co*., 177 F 95, 98 (1910).

**Relocation by Original Locator**

A mining claimant may relocate his claim for any purpose except to avoid performing annual assessment work. *Lehman v. Sutter*, 198 P 1100 (1921). However if a location has lapsed and is subject to relocation because the annual labor was not performed, the owner of the lapsed claim may relocate. *Warnock v. DeWitt*, 40 P 205 (1895), *appeal dismissed* 18 S.Ct. 949. Also, relocation may not be essential. If no intervening rights are established, the original locator may revive his rights by doing the necessary work. *Belk v. Meagher*, 104 US 279 (1881). Some claim owners have been known to relocate their claims every year shortly after expiration of the assessment year so as to avoid the $100 expenditure for assessment work. There are several pitfalls involved with such a practice: (1) the claim loses its seniority; (2) the claim is open to relocation for a short period of time; and (3) if the claim is properly relocated, the costs involved could exceed the costs of the assessment work.

**Work by Agent or Person Who Holds No Interest**

Labor or improvement on a claim may be performed by the owner's authorized agent. *Richard v. Thompson*, 72 F2d 807 (CCA Alaska 1934). And the work is still attributable to the required assessment work even if done by a person who holds no interest in the claim. *Smelting Co. v. Kemp*, 104 US 636 (1881).

**Assessment Work May Be Performed by Party Other than Claimant**

In *United States v. Herr*, 130 IBLA 349 (1994) the Board said "assessment work may be performed by a party other than the claimant. It may be done by a lessor or a lessee. *See New Mercer Mining Co. v. South Mercury Mining Co,*, 128 P.2d 269 (Utah 1942). It may be done by a shareholder. *See Wailes v. Davies*, 158 F. 667 (CC Nev. 1907), *aff'd*, 164 F 397 (9th Cir. 1908). It can even be performed by the Federal Government. *See Simmons v. Muir*, 291 P.2d 810 (Wyo. 1955)." *Id.* at 364.

**Patent Expenditure of $500 does not Terminate Assessment Work Requirement**

The expenditure of $500 worth of improvements required by 30 U.S.C. ' 29 (1988) does not terminate the ongoing requirement of $100 each assessment year specified in 30 U.S.C. ' 28 (1988). *United States v. Herr*, 130 IBLA 349, 357 (1994); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 658 n.1 (1980). In *United States v. Energy Resources Technology Land, Inc.*, 74 IBLA 117 (1983), the Board stated at 122:

> [W]hile it is true that the requirement of section 29 can be satisfied by the performance of annual labor pursuant to section 28, the reverse is not possible. If it were, a claimant could do $500 worth of improvement on his claim during the first year of location--before the obligation to perform assessment work had even accrued--and then hold the unpatented claim for the next 50 years without ever performing any of the annual assessment work required by section 28. Clearly the 1872 Act did not contemplate that once a claimant had accomplished $500 worth of work he would thereafter be excused from any further work.

**Threats by Junior Locator**

A junior locator cannot acquire any right by forcibly preventing a senior locator from doing assessment work. *Ames v. Sullivan*, 235 F 880, 149 CCA 192 (1916). However threats made seven miles from the claim do not constitute a sufficient excuse for nonperformance. *Slavonian Mining Co. v. Perasich*, CC Nev 188, 7 F 331.

**Fraudulent Acquisition of Title**

Title to a mining claim cannot be fraudulently acquired by an agent, trustee, co-owner or any person having confidential relations with the owner of a claim by violation of agreement or trust. Any locator who fraudulently obtains such title by relocating in his own name is considered as a trustee of the rightful owner and acquires no interest in the property by such action. *Turner v. Sawyer*, 150 US 578 (1893). Many cases have occurred where individuals

under contract to perform the assessment work have failed to do the work for the purpose of making the ground open to relocation either to themselves or to a third party. *Soule v. Johnson*, 201 P 834 (1921).

**Abandonment and Co-owner**

If one co-owner abandons his interest, the entire claim is not abandoned, but the abandoned interest passes to the other co-tenants. *Crane v. French*, 39 Cal App2d 642, 104 P2d 53 (1940); *Laguna Development Co. v. McAlester Fuel Co*., 572 P2d 1252, 91 NM 244. Abandonment of a mining claim is a question of intent and may be demonstrated only by clear and convincing proof. *Loeser v. Gardiner*, 1 Alaska 641 (1902). It has been held that a voluntary absence from a claim for a period of nine years is sufficient to sustain a finding of abandonment. *Harkrader v. Carroll*, 76 F 474 (DC Alaska 1896).

There is a general rule that co-owners or co-tenants have a relationship of mutual trust and that one is not allowed to demonstrate hostility to other co-owners by acquiring a separate title from the joint ownership. Any such separate or distinct title goes to the benefit of all joint owners. *Stevens v. Grand Central Mining Co*., 13:3 F 28 (1904). For example, one co-owner may not relocate a claim, owned jointly, on the basis that the annual work was not done. *Speed v. McCarthy*, 181 US 269 (1901). Such co-owner who relocates or patents the claim in his own name, will hold the title in trust for all. *Turner v. Sawyer*, 150 US 578.

**Failure of Co-owners to Contribute to Assessment Work**

Co-owners who do not contribute their share of the annual assessment work may lose their interest in the claim through a procedure given in 30 USC 28 (1976). The law provides that "upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners 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 regulations (43 CFR 3851.4) give final directions to the claimant receiving the forfeited interest as follows:

> Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the statement of the publisher is to the facts of publication, giving dates, and a printed copy of the notice published, should be furnished, and the claimant must state that the delinquent co-owner failed to contribute his proper proportion within the period fixed by the statute.

Even though a co-owner is prevented from making the assessment work contribution by occurrence of death during the assessment year, his rights are subject to forfeiture by proper notice to his heirs. *Elder v. Horshoe Mining Co*., 194 US 248 (1904). Even the disabilities of

infancy do not relieve a minor from the obligation to contribute to assessment work on a claim. *Pomeroy v. Sam Thorpe Mining Co*., 296 P 255 (1931).

The required assessment work contribution of a delinquent co-owner, if made by friends or a third party is valid and prevents forfeiture if agreeable to such delinquent co-owner. *Forderer v. Schmidt*, 154 F 475 (1907). Contribution of assessment work from a co-owner cannot be made if such work is not required. *Kline v. Wright*, 51 F2d 564 (DC Id 1931). Also if a co-owner takes exclusive possession of the claim and prevents the other co-owner from contributing to the assessment work, the co-owner in possession may not forfeit the interests of the excluded co-owner. *Becker-Franz Co. v. Shannon Copper co*., 256 F 522 (CCA Ariz 1919).

Only the co-owner who has performed the required work has the right to give notice to the delinquent co-owner. In order to forfeit a co-owner for failure to contribute to assessment work, the $100 worth of labor or improvements must be expended for each claim. *Pack v. Thompson*, 223 F 635 (CCA Cal 1915). Many cases have occurred where the evidence suggested the required work was not done and the intent was to extract money or the claims from one or more co-owners. *Delnoe v. Long*, 88 P 778 (1907).

In order to acquire patent, a co-owner who obtained a forfeiture of the interest of a delinquent co-owner must be able to furnish evidence concerning the delinquent co-owners failure to contribute his part of the required work. *Turner v. Sawyer*, 150 US 578 (1893).

**Definition of "Actual Written Notice"**

"Actual written notice for the purposes of the statute means that the delinquent co-owner has full and actual knowledge of every fact required by the statute to be given in the notice." *Jackson v. Robertson, supra* at 1181.

In *Jackson v. Robertson, Id.*, the court held that a written notice under 30 U.S.C. 28 requesting payment for assessment work satisfied the required "form and content" necessary to give the delinquent co-owner the opportunity to contribute his proportionate share. The Court stated at 1181:

> Courts look to the form and content of the notice provided to determine whether the delinquent co-owner "was given the opportunity to contribute his proportionate share of the assessment work for the many preceding years."

**Qualifications of Person Giving Notice**

In *Jackson v. Robertson, supra*, the Court held that a person sending a notice requesting payment for a share of annual assessment work had the right to do so even though she did not sign her letters on behalf of all the entities holding legal title. The Court stated at 1181:

> The statute does require indicia of ownership before a person has the right to invoke its forfeiture provisions. In order to give notice under the statute a person must

have the "duty and right" to protect his title.

The Court further discussed the requirements of a person qualified to give notice at 1182:

> If a notice is signed by both an owner entitled to demand contribution and another person or entity without capacity to issue a forfeiture notice, the "co-owner" requirements of the statute have been met.

**Statutory Period Before Forfeiture**

The statutory period before forfeiture is 90 days. In *Jackson v. Robertson, supra,* one of the delinquent co-owners stated he did not receive his letter within 90 days of mailing. However he admitted he had read the notice. Therefore "he had 90 days thereafter in which to pay but he did not do so. His interests were forfeited under the statute 90 days after he received the notice." *Id.* at 1182.

**Interest Forfeited If Failure to Pay Full Share**

In *Jackson v. Robertson, supra*, one of the co-owners who received a notice to contribute his share of the assessment work under 30 U.S.C. 28 paid approximately one-half of the amount due within the 90-day statutory time limit. This co-owner contended that because his one-half payment was accepted without a request for further payment constitutes a waiver for further contribution. The Court disagreed and said at 1182:

> A delinquent co-owner complies with the statute only by paying his "proper portion within the period fixed by statute." 43 CFR 3851.4. Mr. Stevenson failed to pay his full share of annual assessment costs within the statutory period. By operation of 30 U.S.C. 28 his interests become "the property of his co-owners who have made the required expenditures."

**Advertising Out of Co-owner Does Not Require Judicial Intervention**

The "advertising out" procedure whereby a delinquent co-owner forfeits his interest to the co-owner who did the work
causes forfeiture without the requirement of judicial intervention. In *Jackson v. Robertson, supra* at 1182, the Court said:

> It is a remedy which does not require judicial intervention. It is the exclusive remedy to divest the delinquent co-owner of his interest. 2 *Rocky Mtn. Min. L. Inst.*, sec. 8.8. The forfeiture is automatic and title vests in the co-owner giving proper notice and the statute provides the effective date.

**In Alaska Burden of Proof Is on Claimant If Affidavit Not Filed Timely**

In Alaska, the Federal Mining Law provides, respecting annual affidavits of labor on mining claims, that "if such affidavits be not filed within the time fixed [not later than 90 days after the end of the assessment year] the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements." 30 U.S.C. 49e (1982). However, there is no forfeiture until an adverse claim is located by another. *Sakow v. J.E. Riley Inv. Co.*, 9 Alaska 427, 443 (D. Alaska 1939), *aff'd* 9 Alaska 663, 110 F.2d 345 (9th Cir. 1940), *cert. denied*, 311 U.S. 659 (1940); *Russel Hoffman v. BLM*, 105 IBLA 238, 240 (1988).

**Work on Patented Claim Applies to Adjacent Unpatented Claim**

In *Silver Jet Mines v. Schwark*, 41 St. Rptr. 933 (Mont. 1984), the Montana Supreme Court considered a case involving the question of adequate assessment work. Silver Jet, the senior claimant, had cleared vegetation from 6,000 square yards of land in an area leading to a tunnel on an adjacent patented claim, and had also secured the entrance to a tunnel. The Court held that the cleared area could be used as an operations area to support the unpatented claims. It also indicated that the unpatented claim could possibly be mined from the tunnel. The Court concluded that this assessment work done on the patented claims would benefit the unpatented claim.

**Federal Requirements for Recordation of Assessment Work**

Section 314 of the Federal Land Policy Management Act of 1976 (*also see* 43 CFR Subpart 3833) requires that on or before December 30 of each succeeding calendar year, one of three documents must be filed with the state office of the Bureau of Land Management: (1) evidence of annual assessment work; (2) a detailed report of geological, geochemical or geophysical surveys; or (3) a notice of intent to hold the claim.

**Trends in the Law Concerning Assessment Work**

Just as the law of discovery is evolving, so is the law concerning improvement work on mining claims. Sherwood (1973) has stated two important trends in the law pertaining to assessment work:

> First, the old concept that possessory rights to mining claims depend upon physical improvements upon or for the benefit of the claims has been quietly dropped across the West in favor of a new concept, the concept that maintenance of possessory rights depends upon the performance of work which tends to define the extent of claims and to develop or exploit an orebody. Work which does not tend to outline, develop, or exploit an orebody, even if actually done on a mining claim, will not suffice. Second, a new and fundamental concept of good faith is evident in recent decisions involving disputes between competing locators and between locators and their Government. *See* Sherwood, D. H., 1973, Improvement of Mining Claims: *Rocky Mt. Min. L. Inst*., v. 18, pp. 149-188.

## DEFERMENT OF ASSESSMENT WORK

### Introduction

The Act of June 21, 1949 (63 Stat. 214; 30 USC 28) authorizes the temporary deferment of annual assessment work under the following circumstances:

> ... upon the submission by the claimant of evidence satisfactory to the Secretary that such mining claim or group of claims is surrounded by lands over which a right-of-way for the performance of such assessment work has been denied or is in litigation or is in the process of acquisition under State law or that other legal impediments exist which affect the right of the claimant to enter upon the surface of such claim or group of claims or to gain access to the boundaries thereof. 30 USC 28b. *Also see* 43 CFR Subpart 3852.

### Petition Must Be Filed for Deferment

The regulations in 43 CFR 3852.2 give the specific requirements for filing a petition. The petition, which has no particular form, is filed with the state office of the Bureau of Land Management and must have a copy of the "notice to the public" attached to show that the notice was filed with the county recorder or other local office of recordation. In 43 CFR 3852.2(b) the regulations require that the applicant give full details concerning the "legal impediments" preventing access to the claim. In *A.J. Maurer, Jr.*, 61 IBLA 39, 41 (1978), the Board considered a case where the appellant's application did not contain the full details of the "legal impediment." The BLM rejected the application even though the applicant had asked the BLM if any additional information was required. The Board determined that under "these circumstances the State Office should have informed appellant of the deficiency in the application and given him the opportunity to provide the necessary information to cure the deficiency" and remanded the case back to BLM for further consideration.

### Definition of Legal Impediment: Legislative History

The meaning of the term "legal impediments" was specifically considered in the legislative history of 30 USC 28(b) and was discussed in Senate Report No. 405 (May 19, 1949) as follows:

> It frequently happens that the surface of a claim is owned by other than the mineral claimant, or that the claim is surrounded by privately owned lands. Either of these situations may prevent the claimant from performing his assessment work within the specified period if he is unable to make satisfactory arrangements with the surface owners covering possible surface damage, or with the owners of the surrounding lands for a right-of-way. In either of these situations the obstructing party, being on the land without hindrance, will be in a preferred position to "jump" or relocate the claim himself. (U.S. Cong. Ser. 1403, 1404 (1949).

The Report lists the following obstructions within the scope of denial of access:

1. Delays in making arrangements with surrounding surface owners due to contested titles, family squabbles, changes of ownership during negotiations, etc.

2. Delays in official approval of bonds to protect the owners of the surface of the claims. Such bonds are posted with the Bureau of Land Management, but the claimant may not enter until official approval has been received. The surface owner is entitled to protest the bond in several successive appeal actions, and by delaying tactics he may prevent the claimant from performing assessment or patenting work for many months.

3. Delays in causing legal condemnation of rights-of-way, which can be contested for a long time in the courts.

4. Delays in overcoming by court action the posting of "No trespassing" signs on roads which have been used by the public for many years but have never been declared public roads.

The above quotation from Senate Report No. 405 was also quoted with approval in *Oliver Reese*, 34 IBLA 103 (1978) and *A.J. Maurer*, 36 IBLA 4, 8-9 (1978).

**Applicant Must Comply with Regulations**

In order to qualify for a deferment from the requirement to perform annual assessment work on a mining claim, a claimant must comply with all the regulatory requirements of 43 CFR Subpart 3852. *Sunrise Mining & Exploration Co.*, 117 IBLA 377 (1991). These requirements include payment of fee, filing with the local recorder, providing date of location and stating the time for which the deferment is sought. The BLM must have sufficient information to allow it to make an informed decision of the merits of the petition. *Id.* at 378-79.

**Petition Must Be Signed by Claim Owners**

A petition for the deferment of annual assessment work must be signed by at least one of the owners of each location involved. *Beryl J. Strong*, 121 IBLA 309 (1991).

**Forest Service Approval of Assessment Work Is Not Legal Impediment**

A court injunction which precludes a claimant from any mining activities in a wilderness area without the approval of the Forest Service does not constitute a legal impediment. Such an order is not a legal impediment to entry upon the claims; rather, it imposes a condition precedent to undertaking mining activities. In other words, the claimant can still perform the work, but must do so under certain constraints. *David Doremus*, 115 IBLA 336 (1990).

**No Deferment for Diligent Prosecution of a Tunnel Site**

In *David Doremus*, 115 IBLA 336 (1990) the owner of tunnel sites requested a deferment from the requirement of diligent prosecution on a tunnel site. In rejecting the request, the Board responded as follows:

> The deferment statute provides that the annual assessment work requirement of 30 U.S.C. 28 (1982) "may be deferred by the Secretary of the Interior" for "*any mining claim or group of claims*." (Emphasis added.) Tunnel sites are not mining claims. *Creede & Cripple Creek Mining & Milling Co. v. Unita Tunnel Mining & Transportation Co.*, 196 U.S. 337, 357 (1905). Therefore, 30 U.S.C. 28b (1982) is inapplicable to tunnel sites. Also, the deferment statute specifically refers to the annual assessment requirement imposed by 30 U.S.C. 28 (1982). The requirement to prosecute work on a tunnel site is dictated by 30 U.S.C. 27 (1982), not 30 U.S.C. 28 (1982).

**Despite Locked Gate, Claimant Must Show Access Denied**

"Before a claimant can complain that access has been denied, he must make an attempt to gain access." *Michael Greninger*, 119 IBLA 383, 386 (1991). Even though there is a locked gate, the claimant must show actual denial of needed access to perform the assessment work. *Id.*

**Deferment of Assessment Work with No Notice of Intention to Hold**

A deferment of assessment work authorized by 30 U.S.C 28 without a timely filed notice of intention to hold a mining claim will not save a mining claim from abandonment under 43 U.S.C. 1744(a). However a notice of intention to hold filed with both the BLM and local recording office before December 31 satisfies 43 U.S.C. 1744(a) (1982). The Board addressed this problem in *Marcus D. Schneider*, 94 IBLA 239, 241 (1986) as follows:

> There is no comparable statutory provision which permits the deferral, suspension, or waiver of compliance with the mining claim recordation requirements set forth in 43 U.S.C. 1744(a) (1982). *Citation Omitted*. On the other hand, by submitting a properly completed notice of intention to hold a mining claim with both the local recording office and BLM prior to the statutory deadline, a claimant satisfies the requirements of 43 U.S.C. 1744(a) (1982), even though he may have been unable to comply with the annual labor requirements of 43 U.S.C. 1744(a) (1982).

BLM Manual 3833.23A allows a deferment of assessment work which is still in effect, or a petition for deferment which has been recorded in the local recording office to serve as a notice of intention to hold. However, in *Marcus D. Schneider, Id.*, the claimant had not actually filed a petition for deferment.

**Unapproved Plan of Operations Is Not Condition for Granting Deferment**

A mining claimant's assertion that delay in the approval of a plan of operation has denied him access to perform such work, cannot be used as a condition for granting a deferment of

assessment work. *Instruction Memorandum No.* 86-191 (January 8, 1986). "Both BLM and Forest Service surface management regulations contain provisions requiring the limited approval of operations which are necessary for meeting the assessment work obligations, pending approval of a plan." *Id.*

**Deferment Not Approved for Fire Closure**

In *Horace S. Wilson*, 120 IBLA 395 (1991), a claimant petitioned for a deferment of assessment work because of the high fire danger in the area of his claims. Although the forest service had issued a closure order which prohibited high fire risk activities, the closure did not apply to people with approved operating plans. The Board held that the order "does not constitute a proper basis for the deferment of assessment work" because the closure order excepted permitted activities.

**Bankruptcy Does Not Constitute Legal Impediment**

In *Oliver Reese, supra* at 105 (1978), it was held that even though the restrictions imposed by bankruptcy may restrict a claimant's ability to perform assessment work, physical access to the claim is not restricted. The Board said:

> We disagree with BLM's and Trigg's position that the pending approval of an arrangement under Chapter XI of the Bankruptcy Act constitutes a legal impediment within the meaning of 43 CFR 3852.1. We therefore hold that Appellant's protest should have been sustained. An examination of the pertinent language of the regulation leads us to conclude that the "legal impediments" referred to include only those which interdict physical access of the claimant to the claim. Restrictions imposed by bankruptcy, while possibly disabling a claimant from performing assessment work, do not do so by restricting his access to the claim.

**Requirement to Use Steep Road Is Not Legal Impediment**

In *Richard K. Hatch*, 145 IBLA 267 (1998), the Board said the requirement for the appellant to use an access road, which is more difficult to use than the one he would prefer, does not represent a legal or other impediment to his performance of annual assessment work.

**Access from Surface Owner Must Be Attempted**

In *A.J. Maurer, Jr.*, 36 IBLA 4, 9 (1978), it was held that a claimant must attempt to obtain access to mining claims from a surface owner before he can complain that access was obstructed. The Board said at 9:

> It is clear, however, that before a claimant can complain that access has been foreclosed, he must make an attempt to gain access. The instant record contains no indication that appellant attempted to make arrangements with the surface owners. Appellant concedes as much in its statement of reasons. It cannot be said, therefore, that appellant was

obstructed or hindered from entering its claims by the surface land owners. The letters filed by these owners are not denials of access. They show, on the contrary, that the question of access was negotiable, and that appellant had made no effort to communicate or negotiate with the owners in regard thereto. We conclude that there was no basis for granting the desired relief.

**Government Contest Proceedings Are Not Basis for Deferment**

A pending government contest in which the government charges that claims are null and void for lack of discovery is not sufficient basis to grant a deferment of annual assessment work. *J. R. Eck*, 6 IBLA 263 (1972).

**Trespass Action by Government Is Not Legal Impediment**

In *Charlestone Stone Products, Inc*., 32 IBLA 23 (1977), it was held that a possible or threatened trespass action by BLM did not constitute a legal impediment to perform assessment work. The Board said:

> In *Portland General Electric Company*, 29 IBLA 165 (1977), we held that a possible or threatened trespass action by BLM did not constitute a legal impediment which affected appellant's right to enter upon the surface of the claims. As we stated in that case: "the deferment statute is designed to grant relief where access to the claims is interdicted ... In the case before us, there has been no preclusion of access and, indeed, none is alleged. Reduced to its essentials, appellant's argument is merely that the pendency of litigation concerning its claims creates a risk that any assessment work invested in the claims may be lost by virtue of an unfavorable court decision. This argument is clearly insufficient to support a petition for deferment of assessment work and therefore the decision of the Nevada State Office is affirmed.

**Pending Litigation Is Not Basis for Deferment**

In *Continental Oil Co*., 36 IBLA 65, 68 (1978), it was held that "the mere pendency of litigation involving mining claims, which gives rise to a risk that any assessment work invested in the claims may be lost as a consequence of an unfavorable court decision, is an insufficient basis to support a petition for deferment of assessment work." *Also see John W. MacGuire*, 35 IBLA 117 (1978).

**Court Injunction Constitutes a "Legal Impediment"**

In *Continental Oil Co., supra* at 68, the Board held that an injunction issued by a court is a legal impediment to entry which will justify a deferment.

**Government Agency Barring Entry Constitutes "Legal Impediment"**

In *American Resources*, 44 IBLA 227 (1979), it was held that barricading entry to a

mining claim by the Government constitutes a "legal impediment." The Board said:

> While the appeal from BLM's decision declaring its claims null and void was pending, another issue concerning the New Dawn claims arose. Appellant alleges that, following BLM's decision of December 13, 1978, it was barred from entering these claims by no-trespassing notices, barricades, and threats of criminal action by National Park Service (NPS) officials at the Joshua Tree National Park, so that it could not complete assessment work on the claims for the assessment year ending on August 31, 1979.
>
> It is difficult to imagine a case presenting a greater "legal impediment" affecting a claimant's right to enter upon the surface of a group of claims than is demonstrated here by the action of NPS in barricading appellant's access and threatening criminal action to bar its entry. Accordingly, we reverse BLM's decision denying appellant's application for deferment.

In the same case the Board also determined that it was improper for the Park Service to prevent the claimant from entering his claims while the case is under appeal. On this issue the Board said:

> While it does not bear directly on the question of whether BLM properly denied appellant's petition for deferment, we note that it was improper for NPS to bar appellant's access to its claims on the strength of BLM's decision declaring them null and void, Under 43 CFR 4.21(a), the effect of this decision was suspended upon the timely filing of a notice of appeal. The effect remains suspended until final action on the appeal. Thus, appellant's claims are still extant, and appellant was (and is) entitled to enter the claims to do annual assessment work on them as required by the mining laws pending final action on the appeal. NPS is advised that it may not bar appellant's access to these claims until this appeal is finally resolved.

**Period of Deferment**

The statute states that "the initial period shall not exceed one year but may be renewed for a further period of one year if justifiable conditions exist." 63 Stat. 215; 30 USC 28(c). The period begins on the date requested in the petition unless the BLM specifies a different date in the approval. If the circumstances justifying the deferment are removed before the specified termination date, the deferment ends automatically at the end of the earlier date. 43 CFR 3852.4.

**Maximum Deferment of Two Years**

The law allows a deferment of assessment work for a maximum period of two years even though the "legal impediment" that prevents access to the claim may exist for a longer period of time. For this reason, claimants commonly attempt to obtain a deferment for a third year. Several Interior Department cases as well as the Legislative history of the statute are in agreement that a maximum deferment of two years is intended by the statute. Senate Report No. 405 (May 19, 1949), quoted in *U.S. Congressional Service* 1405 (1949) states:

> [W]hen a mineral claimant could not obtain access to the boundaries of the claim or was

hindered from entering upon the surface of the claim by the adjoining landowners or holders of the nonmineral title, under the proposed legislation a deferment for not to exceed 2 years could be granted. [Emphasis added.]

In the *Dredge Corp*., 38 IBLA 178 (1978), the Board held that "the initial period (of a deferment) shall not exceed one year but may be renewed for a further period of one year if justifiable conditions exist." *Also see John S. Herr*, 40 IBLA 159 (1979). In *Charlestone Stone Products, Inc., supra* at 24, the Board considered an appeal from a claimant who had already received a deferment for a two-year period. the Board said that "in light of the period of deferment heretofore granted and extended to Charlestone, there appears to be no statutory authority to extend the deferment period even if it were otherwise justifiable.@

**When Deferred Work Must Be Done**

According to the statute "all deferred assessment work shall be performed not later than the end of the assessment year next subsequent to the removal or cessation of the causes for deferment or the expiration of any deferments granted under sections 28(b) to 28(e) of this title and shall be in addition to the annual assessment work required by law in such year." 63 Stat. 215; 30 USC 28(d).

**Recordation of Deferment**

The statute requires that the "claimant shall file or record or cause to be filed or recorded in the office where the notice or certificate of location of such claim or group of claims is filed or recorded, a notice to the public of claimant's petition to the Secretary of the Interior for deferment ... and of the order or decision disposing of such petition." 63 Stat. 215; 30 USC 28(d). In other words, the claimant must file in the office where he recorded his notice of petition a copy of the decision from the BLM granting the deferment of assessment work.

**No Assessment Work Required for Mill Site**

In *Andrew L. Freeze*, 50 IBLA 26, 87 ID 396 (1980), it was held that no deferment of assessment work could be granted for a mill site because the law does not require assessment work for mill sites.

**Claims Protected from Forfeiture While Owner in Military Service**

Section 505 of the Soldiers' and Sailors' Civil Relief Act of 1940 (43 CFR 2096.2-7) protects claims from forfeiture for nonperformance of assessment work while the owner serves in the military. Assessment work is not required during the period of the claimant=s military service or until six months after termination of the service. This period of protection also includes the

time spent in a hospital as a result of wounds or disability incurred in the line of duty.

The owner of a mining location who wishes to obtain this deferment must before the end of the assessment during which military service is entered, file or have filed in the county recording office, a notice that he or she has entered such service and that the mining claim is to be held under section 505 of the Soldiers= and Sailors= Relief Act of 1940.

**Additional Deferment under Judicial Declaration**

In *J.M. Glenn*, 73 IBLA 323 (1983), The Board concluded that the Department has no authority under 30 USC 28c (1976) to grant annual assessment deferments for more than two years. Although the two-year deferment is authorized by statute and may not be extended by the Department, the Board did indicate that it might be possible to obtain another deferment outside the Department. It was pointed out Athat if circumstances exist which would warrant a deferment under judicial declarations, then such circumstances may be availed of in appropriate judical litigation.@

# 16. SURFACE MANAGEMENT PROGRAMS

## SURFACE PROTECTION

**Right of the United States to Protect Public Lands**

Several early federal court cases dealt with the right of the United States to protect the public lands from trespass and waste. This right has always existed even before the Government established regulatory programs (36 CFR Part 252 and 43 CFR Subpart 3809). In *United States v. Rizzinelli*, 182 F 675 (D Ida 1910), the Court said:

> The paramount ownership being in the government, and it also leaving a reversionary interest in the possessory right of the locator, clearly has a valuable estate which it is entitled to protect against waste and unlawful use.

Also, in *Teller v. United States*, 113 F 273 (8th Cir 1901), the defendant was convicted of unlawfully cutting and exporting timber from the public lands of the United States, including from an unpatented mining claim. The Court of Appeals said:

> While his location so far segregated and withdrew the land from the public domain that no rival claimant could successfully initiate any right to it until his location was voided and his entry was canceled ... It gave him nothing but "the right of present and exclusive possession" for the purpose of mining. It did not divest the legal title of the United States, or impair its right to protect the land and its product, by either civil or criminal proceedings, from trespass or waste.

The statement above was quoted with approval in *United States v. Nogueira*, 403 F2d 816 (9th Cir 1968).

**The Richardson Case and Unnecessary Degradation**

In *United States v. Richardson*, 599 F2d 290 (9th Cir 1979), *cert. denied* 44 US 1014, the Ninth Circuit Court of Appeals held that blasting and bulldozing by locators of six unpatented mining claims within the Gifford Pinchot National Forest, Washington was destructive to the surface resources and not a reasonable method of exposing subsurface deposits.

The government's expert geologist testified that the bulldozing and blasting is not an appropriate method to explore this type of low-grade copper deposit because "small area excavations are virtually meaningless for this type of problem." The recommended approach is to perform applicable surface geotechnical surveys, and then if the data warranted, the deposit should be core drilled. On the basis of this evidence, the Court affirmed a permanent injunction against further blasting and bulldozing and required the locators to restore the surface damage.

In affirming the injunction, the Ninth Circuit relied on the Surface Resources Act of 1955 (30 USC 612 *et seq*.), which limits the use by mining claimants of the surface resources of federal land "to the extent required for ... prospecting, mining ... and uses reasonably incident thereto." The Court also concluded that the legitimacy of any particular prospecting technique is governed by the facts in each case.

The facts in this case leading up to the injunction occurred before the Forest Service or the Bureau of Land Management established regulations which closely control all mining and prospecting operations on mining claims. So it is somewhat significant that Section 302(b) of the Federal Land Policy and Management Act of 1976 (43 USC 1701 *et. seq*.) directed the Secretary of the Interior to take any action necessary by regulation or otherwise to prevent unnecessary and undue degradation of the lands. Although *Richardson* was initiated prior to FLPMA, it is apparent that even before FLPMA the United States had the authority to prevent unnecessary and undue degradation to the surface of unpatented mining claims. In *United States v. Richardson, supra* at 295, the Court said:

> Here the locators did not have a mine, they had a prospect, they were still exploring. Their methods of exploration were unnecessary and were unreasonably destructive of surface resources and damaging to the environment. They were warned and persisted. The judgment of the District Court is affirmed.

*Richardson* is the only case where the United States has argued the position that a claimants method of exploration is too destructive to the surface resources and that a more appropriate method should be used. Now, with statutory authority to prevent unnecessary and undue degradation under FLPMA, this type of case may become more common.

**Right to Protect Government Lands Is Distinct from Right to Challenge Validity**

In *United States v. Goldfield Deep Mines Co. of Nevada*, 544 F2d 1307 (9th Cir 1981), the Court determined that the right of the United States to protect its lands from waste through the federal courts is separate and in addition to its right to challenge the validity of a mining claim by the initiation of contest actions through administrative hearings. The Court said at 1309:

> Goldfield claims that the Government should have exhausted its administrative remedy by challenging Goldfield's mining claim before the Department of Interior. This is an alternative remedy which the Government successfully pursued. However, the right to protect Forest Service lands from waste is separate from and in addition to the right to challenge mining claims. The jurisdiction of the Department of the Interior is not to the exclusion of the district court's. *See United States v. Nogueira*, 403 F.2d 816, 825 (9th Cir. 1968). There was no need to exhaust the mining claim proceedings before enjoining destruction of forest lands.

**Environmental Assessment**

Although both the BLM regulations (43 CFR 3809.2-1) and the Forest Service regulations (36 CFR 252.8) provide for an environmental assessment and a possible environmental impact statement (EIS), the approval of a plan of operations is not a discretionary action. The Government certainly has the authority to require that the prospector and miner conduct their operations in a manner so as not to cause unnecessary and undue degradation, but so long as operations are conducted in compliance with the regulations, the Government has little authority to disapprove the plan of operations. The authority for an environmental impact statement comes from section 102(2)(c) of the National Environmental Policy Act of 1969 (83 Stat. 852; codified at 42 USC 4321-4347) which requires an EIS for "major Federal actions significantly affecting the quality of the human environment.". An environmental assessment provides a sound basis for determining mitigating measures as well as for determining proper operating and reclamation procedures.

## REGULATIONS ON NATIONAL FOREST LANDS

## Introduction

On September 1, 1974 (39 FR 31317), the U.S. Department of Agriculture made effective regulations (36 CFR Part 228) designed to cover prospecting, exploration and mining activities on National Forest Lands by persons operating under the United States Mining Laws of 1872, as amended. Although these regulations do not constitute a permit to explore or mine as that is already a statutory right under the 1872 mining law, they do mandate that such exploration and mining activities be conducted so as to minimize adverse environmental impacts on the National Forest System.

## Scope

These regulations apply to all operations concerned with prospecting, exploration, development, mining or processing mineral resources, including access roads and other operations whether on or off a mining claim conducted under the U.S. Mining Laws of May 10, 1872, as amended (30 USC 22 *et. seq*.) on National Forest Lands. 36 CFR 228.2.

## Notice of Intent to Operate

Before starting any operations which might cause disturbance to the surface resources, a notice of intent to operate must be submitted to the district ranger having jurisdiction over the area to be affected. If the district ranger determines that the proposed operation may cause significant disturbance to the surface resources, a proposed plan of operation must be submitted. A notice of intent to operate and a plan of operation are not required in the following situations: (1) operations that do not involve the use of mechanized earth moving equipment and do not involve cutting of trees; (2) operations confined to use of vehicles on existing roads; (3) mineral collecting and sampling of a mineral deposit that does not cause a significant disturbance of the surface resources; and (4) location of a mining claim. 36 CFR 228.4 (1).

The notice of intent to operate must include sufficient information to identify the nature of the proposed activities, the route of access and the method of transport. The district ranger must notify the operator within 15 days whether or not a plan of operations is required. 36 CFR 228.4 (2).

## Plan of Operations

Among other things, the plan of operations must include the name and address of the operators, a map of the proposed site of operation delineating all roads and other areas to be affected, a description of type of operation, including how and where it will take place and environmental and reclamation procedure. If it is not feasible to prepare a complete plan for the entire operation, an initial plan may be submitted and augmented later by supplemental plans as the project develops. 36 CFR 228.4 (2).

Upon receipt of the proposed plan of operation, the district ranger has thirty days to review the plan and notify the operator that: (1) he has approved the plan; (2) the proposed

operations do not require an operating plan; (3) modification of the plan is necessary; (4) more time, not to exceed an additional sixty days, is required to review the plan; or (5) the plan will not be approved until a final environmental statement has been prepared and filed with the Council on Environmental Quality, if an EIS is needed. While reviewing the plan of operation, the district ranger makes an environmental analysis to determine whether an environmental statement is required. Certain information in the plan of operation may be designated as confidential and will not be available for public inspection. 36 CFR 228.5.

**Reclamation Requirements**

The operator is required to reclaim all lands affected by the mining operation, during the mining operation, if feasible, or within one year after termination of mining operations. Reclamation procedures specifically include: (1) control of erosion and landslides; (2) control of water runoff; (3) removal and control of toxic substances; (4) rehabilitation of fisheries and wildlife habitat; and (5) reshaping and revegetation of disturbed areas, where reasonably practicable. Also, within a reasonable time following a cessation of mining activities, the operator is required to remove all structures and equipment and clean up the site of operation. 36 CFR 228.8.

**Bonding**

In certain cases, operators required to file a plan of operations will also be required to furnish a bond conditioned upon reclamation of the site of operations. The basis for determining the amount of bond will be the estimated cost of reclamation of the area of operations. As each portion of the site is reclaimed, the bond may be reduced proportionately. 36 CFR 228.13.

**Appeals Procedure**

In response to an adverse action or decision by the district ranger, an appeal may be made in written form setting forth the manner in which the decision is contrary to the facts, law, regulations or is otherwise in error. This written statement must be filed with the district ranger within thirty days of the date of notification of the contested decision. Upon receipt of the statement, the district ranger will forward it, together with his own statement to the forest supervisor. The final administrative appeal may be taken to the regional forester. Upon receiving an adverse decision by the regional forester, the claimant may go directly to the courts for judicial review. 36 CFR 228.14.

**Court Approval of Forest Service Regulations**

Although the regulations (36 CFR Part 228) have been challenged on the basis of insufficient statutory authority, the courts have consistently upheld their validity. Under sections 478 and 551 of Title 16, the Secretary of Agriculture has authority to develop regulations concerning the methods of prospecting and mining in national forest.

In *United States v. Curtis-Nevada Mines, Inc*., 415 F. Supp. 1373 (DC Cal 1976),

*affirmed in part, reversed in part on other grounds* 611 F2d 1277 (1980), the Court held that owners of unpatented mining claims located in the national forest are required to file operating plans as required by the regulations in 36 CFR 252, before starting mining operations.

In *United States v. Goldfield Deep Mines Co. of Nev*., 644 F2d 1307 (9th Cir 1981), *cert. denied* 455 U.S. 907 (1982), the United States sued for trespass, seeking injunctive relief and damages. The Ninth Circuit Court of Appeals affirmed the District Court's award of the requested relief. Goldfield cut trees, dug roads and used heavy equipment and machinery in the national forest in San Bernardino, California and refused to file an operating plan as required by the regulations (36 CFR Part 228). The United States Marshall seized the equipment and prevented Goldfield from further operations. The Government was also awarded damages totaling $17,560.

The Ninth Circuit Court of Appeals in affirming the District Court's decision, upheld the Forest Service Regulations and determined that Goldfield's right to due process was not violated. The Court said at 1309:

> The Forest Service may properly regulate the surface use of forest lands. While the regulations of mining *per se* is not within Forest Service jurisdiction, where mining activity disturbs national forest lands, Forest Service regulation is proper. *See United States v. Weiss*, 642 F.2d 296, at 298 (9th Cir., 1981). (Secretary of Agriculture has "power to adopt reasonable rules and regulations regarding mining operations within the national forests"); *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), *cert. denied*, 444 U.S. 1014, (1980) (recognizing the conflict between mining and forest land policies and holding that the district court may properly enjoin unreasonable destruction of surface resources). In this case, defendants cut trees, dug roads, erected structures, moved earth and otherwise damaged forest surface land. The Forest Service may properly regulate such activity.
>
> ... Goldfield claims that the proceedings below violated its right to due process and that the United States Forest Service ("Forest Service") has no authority to interfere with mining claims. We find that the defendants violated properly-promulgated Forest Service regulations and that this violation was finally determined in the partial summary judgment proceeding. The district court was correct in limiting the trial to damages. The defendants had proper notice of all proceedings below and no due process violation occurred.

**Regulations Apply to Wildernesses**

The regulations (36 CFR Part 228 and 293) also apply to mineral-related activities in wilderness and primitive areas. The Act that created the National Wilderness Preservation system in 1964 (Act of September 3, 1964; Public Law 88-577) specified that prospecting for minerals and location of mining claims would be permitted in wilderness areas through December 31, 1983. Although prospecting and mining are authorized, they must be conducted in a manner as compatible as possible with preservation of the wilderness. Therefore, the standards

under which the regulations are applied in a wilderness are somewhat stricter than on other lands. Special limitations and restrictions have been placed on the use of mechanized equipment. For example, no operator shall construct roads across a National Forest Wilderness unless authorized in writing by the Forest Supervisor. 36 CFR 228.15 (c).

**Special Use Permits Do Not Apply to Exploration or Mining Operations**

In *U.S. v. Craig*, CR-82-8-H (April 16,1984), the U.S. District Court for the District of Montana considered a case where a mining claimant appealed from a U.S. Magistrate's judgement finding him guilty of violating the regulations 36 CFR 261. 10(a) and 261.12(d). The Forest Service contended that the claimant had damaged a national forest system road and had locked a gate on a forest system road without a special use permit as required by 36 CFR 261.

The Montana District Court dismissed the complaints and held that the "appellant was not required to have a special use permit for activities done in connection with mining operations as defined in 36 CFR Part 252 (now part 228)." *Id*. The Court also held that 36 CFR 261 does not apply to a claimant acting under the United States mining laws of 1872 who submitted a proposed plan of operations as required by 36 CFR 228. And any violation of Forest Service regulations should be charged under 36 CFR 228.

**Violators of Regulations Subject to Criminal Sanctions**

In *U.S. v. Langley*, Civil No. s-75-664. TJM, U.S. Dist. Ct. E. Dist. Cal. (May 10, 1984), the district court enjoined claimants from conducting mining operations using a D-4 caterpillar and maintaining a residence on a claim without obtaining an approved plan of operations as required by 36 CFR 228. The Court noted that "violations of the regulations may subject the violator to criminal sanctions under 16 USC 551." This section provides that "any violation of the ... rules and regulations (enacted for the protection of national forests) shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both." Also *See U.S. v. Smith-Christian Mining Enterprises, Inc*., 537 F.Supp. 57, 64 (D. Ore. 1981).

**Residence Covered by Forest Service Regulations**

In *United States v. Langley*, 587 F. Supp. 1258, 1266 (E.D.Cal. 1984), the Court held that the claimant's residence is covered by the Forest Service regulations and must not exist unless approved under an operating plan.

**Operating Plan Approval May Require an EIS**

In some cases, the approval of an operating plan may require the preparation of an Environmental Impact Statement (EIS). Any major federal action which is likely to have a significant effect on the environment requires such a statement. The need for an EIS is normally identified in the environmental assessment. *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

**Operating Plan Required for Structures on Mining Claim**

In *United States v. Burnett*, 750 F.Supp. 1029, 1035 (D. Idaho 1990), the Court held that the maintenance of structures "under the Forest Service's current policies and the law of this circuit, is a significant surface disturbance which requires an operating plan." The Court ordered the claimant to remove the structures and personal property from the claim because "without the requisite approval by the Forest Service, the structures and personal property constitute a trespass upon government property." *Id.* at 1036.

**Operating Plan Required for Structures on Mill Site**

In *United States v. Brunskill*, 792 F.2d 938 (9th Cir. 1986), the Court required mining claimants "to remove at their expense a cabin, a mill, and other structures from their mill site on Forest Service land and to pay the United States $1,000 to restore the land to its natural state." *Id.* at 939. If the claimants do not remove the structures within one year, the government was given permission by the Court to remove the structures and assess the claimants costs. *Id.* at 940.

The Court also found that the claimants "are required to have an approved operating plan for their cabin, mill and other structures because each of those structures constitute a surface disturbance within the meaning of 36 CFR 228.

**Terms of Approved Plan Exceeded**

In *United States v. Doremus*, 658 F. Supp. 752 (D. Idaho 1987), a miner appealed a conviction in a Court trial before a United States Magistrate for exceeding the terms of an approved operating plan and damaging natural resources on national forest land. United States District Court Judge Ryan affirmed the decision of the magistrate and conviction of the appellants.

The operating plan required by 36 CFR 228.1-228.63 was signed by the appellant in 1985. The plan provided that no more than five trenches be opened at one time and that exploration be confined to the clearout area. The claimants were also prohibited from using live timber and that all amendments be in writing. Apparently more than thirty trenches were opened, with some larger than approved in the plan, and live trees were pushed over. Other regulations such as 36 CFR 261.9(a) and 261.10(k) prohibit certain other conduct such as damaging natural features or property of the United States. Criminal Charges for violation of these regulations is authorized by 16 U.S.C. 551. The Court held that 36 CFR 261.9(a) and 261.10(k) are clear and not constitutionally vague.

In affirming the District Court case, the Ninth Circuit Court of Appeals held that "the regulations at issue are consistent with the statutory scheme and are not unconstitutionally vague." Furthermore, "36 CFR 261.9(a) does not conflict with the mining laws. *United States v. Doremus*,888 F.2d 630 (9th Cir. 1989). The Court also held that the "requirement of prior approval does not 'endanger or materially interfere with' appellants' mining operations, ...." The purpose of requiring prior approval of an operating plan is to resolve disputes concerning the

statutory balance before operations are begun, not after. If the claimants are not satisfied with the plan, the regulations give them the right of appeal. *Id.*

**Removal of Surface Resources Requires Approved Plan**

Disposal of any vegetative resources from a claim must be authorized under an approved plan as specified in 36 CFR Part 228. This includes the removal of trees to provide access to mining operations. *United States v. Doremus*, 888 F.2d 630 (9th Cir. 1989).

**Unreasonable Mining Operations May Be Enjoined**

The forest service has authority to enjoin unreasonable mining operations even in the absence of specific regulations. *United States v. Doremus*, 888 F.2d 630 (9th Cir. 1989); *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), *cert denied*, 444 U.S. 1014 (1980).

**Loss of Mineral Rights from Unapproved Plan**

In *David Doremus v. United States*, Civil No. 88-3103 (October 28, 1988) and *United States v. David Doremus*, Civil No. 88-3105 (October 28, 1988), a claimant was enjoined from conducting mining operations in the Gospel Hump Wilderness area until his plan of operations was approved. In this case Doremus had located 23 placer claims and 103 tunnel site claims in a Wilderness area that would be closed to mining on December 31, 1988.

Doremus submitted a plan for Forest Service approval which would allow him an opportunity to make discoveries on his placer claims and to initiate tunnels on his tunnel site claims. In order to establish valid existing rights to the claims and sites, the work must be done by December 31, 1988. Without approval of the operating plan Doremus would be unable to establish rights that could relate back to before December 31, 1988.

In noting that Doremus is well aware of the requirements to get approval of an operating plan, the Court cited a case where a miner faced the loss of mineral rights if certain actions were not completed by a given date and held that a miner could not claim injury when he had not allowed sufficient time for obtaining permits. *Downstate State Stone Co. v. United States*, 651 F.2d 1234, 1241 (7th Cir. 1981).

**Paperwork Reduction Act Loophole**

In *United States v. Hatch*, 919 F.2d 1394 (9th Cir. 1990), a miner operating in the Humboldt National Forest was convicted on criminal charges in a lower court for constructing a road on public land without an approved plan of operations. The Ninth Circuit Court reversed the conviction because none of the forms or Forest Service regulations had an Office of Management and Budget Control number as required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3507(f)(1988).

**The Granite Rock Case**

On March 24, 1987, the Supreme Court in *California Coastal Commission v. Granite Rock Company* (55 LW 43666), holding that Federal law does not preempt reasonable state environmental permitting requirements for mining activity on unpatented mining claims. In 1980, Granite Rock Company submitted to the Forest Service a 5-year plan of operations under the regulations in 36 CFR 228 for a mining operation on unpatented mining claims on National Forest lands near the California coast. The Forest Service sent the plan to the California Coastal Commission for consistency review under the California Coastal Act. The Commission did not respond so the Forest Service approved the plan.

In 1983, the Coastal Commission instructed Granite Rock to apply for a coastal development permit. Granite Rock refused and filed suit in Federal District Court. The District Court denied Granite Rock's motion for summary judgment and dismissed the action. 590 F. Supp. 1361 (1984). The Ninth Circuit Court of Appeals reversed the District Court and held that an "independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and is preempted." Therefore, Granite Rock Company is not subject to the permit authority of the California Coastal Commission. 768 F. 2d 1077 (1985). The Supreme Court granted certiorari and reversed the Ninth Circuit.

The Supreme Court held that the surface management regulations 36 CFR 228 (Forest Service) and 43 CFR 3809 (BLM) do not preempt state laws and regulations relating to the conduct of operations or reclamation on Federal lands under the mining laws. Furthermore the Court noted the federal regulations contemplate compliance with state environmental permit requirements. However the Court did not clarify the extent to which the states may place limits and conditions on exploration or mining activities on federal lands. The decision appears to support the existing cooperative agreements that the BLM and Forest Service have with the various states concerning mined land reclamation. The state's involvement appears to be limited to those areas where the federal law does not regulate. The decision distinguished environmental regulation from land use planning with the assumption that federal land use planning laws preempt state land use planning requirements from applying to federal lands. The decision also indicates that the states may not control use of federal land by land use planning or by denying environmental permits.

In another recent case the U.S. Supreme Court has held that a temporary prohibition on all use and occupancy by states and local governments constitutes a taking of private property which must be compensated. *First English Evangelical Luthuran Church of Glendale v. County of Los Angeles*, No. 85-1199 (S.Ct. June 9, 1987).

The Granite Rock decision may ultimately affect the issues decided by the Ninth Circuit Court of Appeals in the case of *Ventura County v. Gulf Oil Corp*., 601 F. 2d 1080 (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980). The *Ventura County* case involved a federal oil and gas lease issued under the Mineral Leasing Act of 1920 (30 U.S.C. 181 et seq.). In *Ventura County* the Court held that the state permit requirement was impermissible because it delayed the federally-approved activity, and if the permit were denied, could prevent it.

## BLM'S SURFACE MANAGEMENT REGULATIONS

### Introduction

The Federal Land Policy and Management Act of October 21, 1976 (FLPMA) directed the Secretary of the Interior to take any action necessary by regulation or otherwise to prevent unnecessary or undue degradation of the lands. Sections 302, 303, 601 and 603 of the Federal Land Policy and Management Act of 1976; 43 USC 1701-1782 *et. seq*. To implement this part of FLPMA, the Secretary issued proposed "3809 regulations" on December 6, 1976 (41 FR 53428) which were then reproposed March 3, 1980 (45 FR 13959). The final "3809 regulations," which were made effective January 1, 1981 (45 FR 78902; 43 CFR Subpart 3809), apply to surface disturbances made in connection with mining operations conducted under the Mining Law of 1872, as amended. 30 USC 21-54 (1976).

The compliance process is similar to that authorized by the Forest Service regulations (36 CFR Part 252). The final regulations address three levels of exploration and mining activity: (1) for *casual use* where mechanized earth-moving equipment and explosives are not used, there is no requirement to contact the BLM; (2) if proposed exploration or mining activities would cause a surface disturbance of *five acres or less per year*, the operator is required to submit a *notice* to BLM 15 days before starting work; and (3) a *plan of operations* must be submitted to the BLM if surface disturbance is *more than five acres per year*, or if the operations are proposed in certain specified environmentally sensitive areas. The plan of operations must contain a detailed description of the proposed mining and reclamation activities. Once submitted to the BLM, the plan is reviewed and processed in much the same manner as plans filed under the Forest Service regulations. All operations, whether casual, under a notice, or under a plan of operation must be reclaimed. 43 CFR 3809.1-1.

### Jurisdiction of Regulations

The regulations (43 CFR-Subpart 3809) generally apply to all BLM-administered lands subject to the mining law. The regulations do not cover lands included in the National Park System, the National Forest System, the National Wildlife Refuge System and Stockraising Homestead lands or lands where only the mineral interest is reserved to the United States. Lands under Wilderness Review and administered by the BLM are subject to regulations in 43 CFR 3802 and not to the 3809 regulations.

### Application of 3809 Rules to Pre-existing Disturbances

The preamble of the regulations (45 FR at 78906, November 26, 1980) indicates that the surface management rules would not apply to areas disturbed before January 1, 1981. However, if such areas were redisturbed, then the rules would apply. *United States v. Peterson*, 125 IBLA 72, 92 (1993).

### Unnecessary or Undue Degradation

"Unnecesssary or Undue Degradation" is defined in 43 CFR 3809.0-5(k) as surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses. Failure to reclaim disturbed areas may also constitute unnecessary and undue degradation.

**Burden of Proof for Unnecessary or Undue Degradation**

Where BLM determines that surface disturbance had caused unnecessary or undue degradation and the determination is challenged, the burden is on the claimant to show that the situation does not exist. *B.K. Lowdes*, 113 IBLA 321, 325 (1990).

**Validity of the Use and "Unnecessary and Undue Degradation"**

In *Bruce W. Crawford*, 86 IBLA 350, (1985), the Board examined the interrelationship between the determination whether a use was "reasonably incident" to mining and the determination that a use resulted in "unnecessary or undue degradation." The Board stated at 396:

> The key distinction to keep in mind is that the "reasonably incident" standard resolves questions as to the permissibility of a use by determining whether or not the use is reasonably incident to the mining activities actually occurring. The "unnecessary or undue degradation" standard comes into play only upon a determination that degradation is occurring. Upon such an initial determination, the inquiry then becomes one of determining whether the degradation occurring is unnecessary or undue *assuming the validity of the use* which is causing the impact. For, if the use is, itself, not allowable, it is irrelevant whether or not any adverse impact is occurring since that use may be independently prohibited as not reasonably incident to mining. [Emphasis in the original].

**Relationship of "Unnecessary and Undue Degradation" to Validity**

In *Southwest Resource Council*, 96 IBLA 105 (1987), the appellant asserted that BLM cannot determine whether "unnecessary or undue degradation" is occurring without a determination that a valuable mineral deposit has been discovered; or in effect, arguing that any degradation of the federal lands caused by the development is necessarily undue and unnecessary if there exists no right to enter such lands. The Board stated "that the determination of the question whether unnecessary or undue degradation will occur necessarily assumes the validity of the use which is causing the impact," and therefore a validity examination should not necessarily be prerequisite to approval of a plan of operations. *Id.* at 122.

However the Board noted that BLM is not precluded from determining the validity of a

claim. If "BLM determined that the claims were not supported by a discovery, the proper course of action would be to initiate a contest as to the claims' validity and suspend consideration of the plan of operations pending the outcome of the proceedings." *Id.* at 124.

**Filing Plan of Operation Invests No Rights**

In *Great Basin Mine Watch*, 146 IBLA 248 (1998), the Board spoke to this issue as follows:

> First of all, the 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, 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).
>
> Moreover, in determining whether a discovery exists, the costs of compliance with all applicable Federal and State laws (including environmental laws are properly considered in determining whether or not the mineral deposit is presently marketable at a profit, i.e., whether the mineral deposit can be deemed to be a valuable mineral deposit within the meaning of the mining laws. *See, e.g., United States v. Pittsburgh Pacific Co.*, 30 IBLA 388, 405, 84 I.D. 282, 290 (1977), *aff=d sub nom. South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir.), *cert. denied* 449 U.S. 822 (1980); *United States v. Kosanke Sand Corp. (On Reconsideration)*, 12 IBLA 282, 298-99, 80 I.D. 538, 546-47 (1973). If the costs of compliance render the mineral development of a claim uneconomic, the claim, itself, is invalid and any plan of operations therefor is properly rejected. Under no circumstances can compliance be waived merely because failing to do so would make mining of the claim unprofitable. Claim validity is determined by the ability of the claimant to show that a profit can be made after accounting for the costs of compliance with all applicable laws and, where a claimant is unable to do so BLM must, indeed, reject the plan of operations and take affirmative steps to invalidate the claim by filing a mining contest.

**BLM=s Authority to Require Supplemental Information**

In *Great Basin Mine Watch*, 146 IBLA 248, 256 (1998), the Board made it clear that where ABLM has determined that it lacks adeequate information on *any* relevant aspect of a plan of operations, BLM not only has the authority to require the filing of supplemental information, it has the obligation to do so. We emphatically reject any suggestion that BLM must limt its consideration of any aspect of a plan of operations to the information or data which a claimant chooses to provide.@

**3809 Regulations to Prevent Unnecessary or Undue Degradation**

In *Differential Energy, Inc.*, 99 IBLA 225, 229 (1987), the Board pointed out that the surface management regulations of 43 CFR 3809 were issued to implement the Secretary's statutory requirement to "take any action necessary to prevent unnecessary or undue degradation of the lands." The Board said at 229:

> In managing the public lands the Secretary of the Interior is mandated by law to "take any action necessary to prevent unnecessary or undue degradation of the lands." Federal Land Policy and Management Act of 1976 (FLPMA), 302(b), 43 U.S.C. 1732(b) (1976). This provision was expressly recognized in sec. 302(b) of FLPMA as affecting the rights of claimants under the mining law of 1872. The surface management regulations of 43 CFR Subpart 3809 were promulgated pursuant to this authority.

**Inoperable Vehicles Constitute Unnecessary or Undue Degradation**

The regulation, 43 CFR 3809.0-5(k) states that "creation of a nuisance may constitute unnecessary or undue degradation." In *United States v. Peterson, supra* at 85 the Board held that "[e]ven if the inoperable automobiles and pickup trucks and the excessive number of dump trucks on the claim were found to be reasonable incidental to mining, the storage of these vehicles on contestee's claim would constitute unnecessary and undue degradation."

**Excess Parts and Scrap Create Unnecessary or undue degradation**

In *United States v. Peterson, supra* at 86, the Board held that "excess parts and scrap create unnecessary or undue degradation."

**Comparison with Similar Operations in Determining Unnecessary or Undue Degradation**

In the regulatory definition of unnecessary or undue degradation (43 CFR 3809.0-5(k)), the reference to operations of similar character Arequire that a plan of operations be reviewed in relation to other specific mining operations. A plan also could be examined in relation to industry standards for the type of operation, regulatory standards governing the type of operation, or other standards which allow a meaningful determination whether the effects of the proposed plan are unnecessary or undue.@ *Kendall=s Concerned Area Residents*, 129 IBLA 130, 140, f.n. 4 (1994).

**Proposed Plan Requires BLM to Document Assessment of Unnecessary and Undue Degradation**

The record must show that BLM Ahas conducted the required review and came to reasoned conclusions regarding whether a proposed plan or amended plan would cause unnecessary or undue degradation. In *Kendall=s Concerned Area Residents*, 129 IBLA 130 (1994), the State had prepared an environmental assessment but had not addressed whether the proposed operation would cause unnecessary or undue degradation. Because BLM had not

considered whether the amended plan would cause unnecessary or undue degradation in a separate document, the record does not support BLM=s decision that the amended plan of operations was sufficient to prevent unnecessary and undue degradation.

**Unnecessary or Undue Degradation must Be Considered Independent of NEPA Review**

A finding that there will be no significant impact under a NEPA review does not mean a project has been reviewed for unnecessary or undue degradation or that unnecessary or undue degradation will not occur. The definition of Aunnecessary or undue degradation@ in the regulations (43 CFR 3809.0-5(k)) Arequires BLM to consider, in relation to operations of similar character, the extent of surface disturbance and the effects on resources and land uses both within and outside the area of operations.@ *Kendall=s Concerned Area Residents,* 129 IBLA 130, 140 (1994).

The surface management regulations also require that an EA be prepared for a plan of operations in order Ato identify the impacts of the proposed operations on the lands and to determine whether an environmental impact statement is required.@ 43 CFR 3809.2-1(a). They further require that the EA be used Ato determine the adequacy of mitigating measures and reclamation procedures included in the plan to insure the prevention of unnecessary or undue degradation of the land.@ 43 CFR 3809.2-1(b). The relation between BLM=s duty to determine whether significant impacts are likely to occur and its responsibility to prevent unnecessary and undue degradation was addressed in *Nez Perce Tribal Executive Committee,* 120 IBLA 34, 36 (19991) and quoted with approval in *Kendall=s Concerned Area Residents, supra:*

> BLM employs the National Environmental Policy Act (NEPA) process to evaluate both whether a proposed mine plan of operations entails significant effects on the environment and whether mitigation measures are required to prevent unnecessary or undue degradation of the public lands. 43 CFR 3809.2-1. Of course, the consequences of the two determinations differ. The fact that a proposed mine plan of operations would not cause unnecessary or undue degradation of public lands does not preclude the possiblity that it would cause significant environmental effects that would require preparation of an environmental impact statement. *Citation omitted*. If there are significant environmental effects that cannot be mitigated, an EIS must be prepared even if there is no unnecessary or undue degradation of the public lands, *Citation omitted*. If there is unnecessary or undue degradation, it must be mitigated. *See* 43 CFR 3809.2-1(b). If unnecessary or undue degradation cannot be prevented by mitigating measures, BLM is required to deny approval of the plan. *Citation omitted*.

**Unnecessary or Undue Degradation Outside Permit Boundary**

Although BLM is not required by 43 CFR 3809.0-28 to prevent unnecessary or undue degradation to all lands, BLM=s review must consider potential effects to all public land and not just the land within the permit boundary. *Kendall=s Concerned Area Residents*, 129 IBLA 130, 141 (1994).

**Issuance of Notice of Noncompliance to Operator Who Is Not Owner**

An operator, who is not the owner of a claim, may be properly issued a notice of noncompliance for failure to complete the reclamation required under an approved plan of operations. *Del M. Ackels*, 128 IBLA 72, 75 (1993). Under 43 CFR 3809.0-5(g), an operator is defined as "a person conducting or proposing to conduct operations," and under 43 CFR 3809.0-5(f), "operations" is defined as including the performance of assessment work.

**Unnecessary or Undue Degradation Must Be Abated**

In *Red Thunder, Inc.*, 129 IBLA 219, 236 (1994), the Board said that the "Secretary's authority 'to provide that prospecting and mining under the Mining Law will not result in unnecessary or undue degradation of the public lands' entails not only acting to avert unnecessary or undue degradation before it occurs (i.e., at the plan approval stage, 43 CFR 3809.1-6(a)) but also acting to abate degradation if it develops after a plan has been approved, e.g., from unforeseen circumstances."

If an operation is causing undue or unnecessary degradation, the BLM has the authority to either order a cessation of operations, or allow the operations to continue in accordance with the approved plan until a modified plan is approved, depending on the circumstances. *Id.* at 237. However, if "the nature or degree of the degradation were such that the only effective way to prevent it were a complete cessation of mining operations, then under section 302(b) the State Director would be authorized and obligated to order a complete cessation." *Id.* at 238.

**Casual Use: No Notice or Plan Required**

No notification to the BLM is required for casual use, however casual use operations may be monitored to ensure that unnecessary and undue degradation does not occur. 43 CFR 3809.1-2. The regulations (43 CFR 3809.0-5(b)) define "casual use" as activities ordinarily resulting in only negligible disturbance of the federal lands and resources. For example the use of mechanized earth moving equipment and explosives is not allowed under casual use.

**Notice Required for Disturbance of 5 Acres or Less**

Operators on project areas whose operations, including access across federal lands, cause a cumulative surface disturbance of 5 acres or less during any calendar year must file a notice with the Bureau of Land Management. 43 CFR 3809.1-3. A "project area" is defined in 43 CFR 3809.0-5(I) as a single tract of land upon which an operator is, or will be, conducting operations. It may include more than one mining claim under one ownership as well as federal lands on which an operator is exploring or prospecting before locating a mining claim. Before an operator may conduct additional operations under another notice, all lands disturbed under a previous notice must be reclaimed. "Reclamation" is defined in 43 CFR 3809.0-5(j) as taking such reasonable measures as will prevent unnecessary or undue degradation of the federal lands,

including reshaping land disturbed by operations to an appropriate contour. Revegetation of disturbed areas may be necessary so as to provide a diverse vegetative cover.

A written notice of planned activities must be submitted to the BLM at least 15 calendar days before starting operations. The Notice must describe the operations and their location and must contain a statement that the lands will be reclaimed to standards provided in the regulations. *See* 43 CFR 3809.1-3 for the specific contents of a notice. No approval or bonding is required but the BLM may request a meeting with the operator when road construction exceeds certain specifications.

**Plan of Operations: Disturbance of More Than 5 Acres or Mining in Special Areas**

A plan of operations must be submitted to the BLM if a surface disturbance exceeds 5 acres for a single calendar year, or if the operations are proposed in the following areas: (1) California Desert Conservation Area; (2) areas designated for potential addition to, or an actual component of the National Wild and Scenic Rivers System; (3) designated areas of critical environmental concern; (4) areas designated as part of the National Wilderness Preservation System which are administered by the BLM; (5) areas withdrawn from operation of the mining laws in which valid existing rights are being exercised; and (6) areas designated as "closed" or "limited" to off-road vehicle use. 43 CFR 3809.1-4.

A plan of operations must be filed in the District Office of the Bureau of Land Management having jurisdiction over the lands to be affected. The regulations (43 CFR 3809.1-5) specify the contents of the plan which need not be prepared in any special form. Generally, the plan will describe operators, the property location, access routes, types of equipment, nature of the operations and a map will be required. The plan must also describe measures to be taken to prevent unnecessary or undue degradation and measures to reclaim disturbed areas.

**Plan Approval**

Upon submission of a proposed plan of operations, the BLM acknowledges receipt of the plan and has 30 days to approve or require changes in the plan. If changes in the plan are necessary, or additional time is needed to review the plan, an extension of time, not to exceed 60 days, may be required; however, days during which the area of operations is inaccessible for inspection are not counted when computing the 60-day period. The plan cannot be approved until the BLM has complied with section 106 of the National Historic Preservation Act or section 7 of the Endangered Species Act. 43 CFR 3809.1-6.

**BLM=s Responsibility Under the Endangered Species Act**

Once BLM determines Athat an endangered or threatened species was known to be present in an area, it was required by the ESA to determine whether its action of approving the proposed mining operation Amay affect@ the species or its habitat and, if so, consult with the U.S. Fish and Wildlife Service.@ *Richard Rudnick*, 143 IBLA 257, 266 (1998).

**Modification of Plan**

The regulations (43 CFR 3809.1-7) provide for modifications of an approved plan. Significant modifications require approval in the same manner as an initial plan. Plan modification may either be required by the BLM or requested by the operator.

**BLM Does Not Approve Notice**

The regulations, 43 CFR 3809.1-3(b), clearly show BLM does not approve or disapprove a notice. *Bruce W. Crawford*, 86 IBLA 350, 391 (1985). If an individual is required by the regulations to file a notice and receives a notice of noncompliance for failure to file, he may remedy the deficiency by filing the required notice. *Id.*

**Noncompliance for Lack of State Permits**

A notice of noncompliance may be based on the failure of an operator to obtain state permits. However, a decision alleging a lack of compliance with state permitting requirements should clearly delineate the permits needed and clearly describe the reasons why each permit is needed. *Bruce W. Crawford*, 86 IBLA 350, 401 (1985).

**Specificity in Notice of Noncompliance**

When the BLM notifies claimants by notice to bring operations into compliance, the notice must be specific in detailing violations. For example, laws and codes that are violated must be cited; also the remedial action that is required must be specified. *Jim D. Wills*, 113 IBLA 396, 399 (1990).

**No Prior Notice of Road Construction Work**

In *Wayne D. Klump*, 130 IBLA 98, 103 (1994), the Board held that a claimant that failed to give prior notice of road construction work was properly given a notice of noncompliance pursuant to 43 CFR 3809.3-2(a). The Board also concluded that the claimant was properly required to reimburse administrative costs incurred by BLM in the investigation and termination of the trespass which consisted of unauthorized construction of a road, water pipeline, and dam.

**Notice of Noncompliance Required Removal of Property and Reclamation**

In *Douglas Ditto*, 132 IBLA 359 (1995), a mining claimant was issued a notice of noncompliance for causing unnecessary and undue degradation on his mining claim including

removal of vegetation, occupation of the site, constructing a road and trailer pads and placement of residential structures and private property. None of the surface-disturbing activities were mentioned in a notice or approved in a plan of operations prior to their installation. The Board upheld the BLM=s notice of noncompliance and requirement that the claimant Aremove all personal property from the claim and reclaim all surface disturbing activities...@ *Id* at 364.

**Right-of-Way Required for Pipeline to Claim**

In *Wayne D. Klump*, 130 IBLA 98, 101 (1994), the Board said that "pipelines for conveyance of water as well as associated development across public lands must generally be authorized under the regulations governing rights-of-way." *See* 43 CFR 2800.0-7 and *Desert Survivors*, 96 IBLA 193, 196 (1987). The Board further pointed out that FLPMA requires that water pipeline construction must be authorized by the regulations at 43 CFR Part 2800; and it quoted with approval the following statement from *Roger G. Gervais*, 128 IBLA 43, 47 (1994):

> FLPMA was designed to replace prior acts, providing as it does that "[e]ffective on and after October 21, 1976, no right-of-way for the purposes [listed, including water pipelines] shall be granted, issued, or renewed over, upon, under, or through [public] lands except under and subject to the provisions, limitations, and conditions of this subchapter [V]."

**Access to Claims Covered by 3809 Regulations Rather than Right-of-Way Permit**

*Mosch Mining Co.*, 75 IBLA 153 (1983) was a case where the BLM required a claimant to file an application for a right-of-way permit to construct an access road to a mining claim. On appeal the Board held that "the grant of right-of-way was not the appropriate means of resolving the question" and "the matter should have been resolved under the surface management regulations of 43 CFR 3809.@ *Id* at 161. Although this case dealt with BLM administered lands, it seems certain that the Forest Service surface management regulations (36 CFR 228) would cover access to claims in the same manner.

**Mill Sites Must Not Be Located for Access Roads, Water Lines or Power Lines**

Mill sites must not be located to cover access roads, water lines or power lines, except within the general mining operation. For example a slurry line from a crusher to a concentrator several hundred yards apart may be covered by mill sites; however, if the crusher and concentrator are separated by several miles, mill site locations would not be appropriate. In *Hales and Symons*, 51 LD 123 (1925), the Secretary held that the appropriation of land for the purpose of conveying water to and for a road used in transporting ore from actively operated mining claims cannot be considered uses for mining and milling purposes. Also *See* 66 ID 361 (1961).

**Noncompliance**

Failure of an operator to file a notice or a plan of operations may result in being served a

notice of noncompliance or being enjoined from continuing such operations by a court order. Also, failure to reclaim disturbed areas or follow an approved plan of operation will subject the operator to a notice of noncompliance. Actions specified in a notice of noncompliance must be corrected in 30 days; failure to take necessary actions may be justification for requiring a plan of operations and mandatory bonding. 43 CFR 3809.3-2.

**Prior Approval for Occupancy Not Required**

Under the regulations in 43 CFR 3809, there is no requirement that a claimant obtain prior approval to establish occupancy. In fact a claimant could proceed to erect a cabin in the face of BLM's objections and not violate any element of the regulations. *Bruce W. Crawford, supra* at 389, 391. In the Crawford case, the Board pointed out that under the present regulations the BLM must react to rather than anticipate the occupancy activities of a claimant. For example, if BLM determined that the placement of a cabin on a claim constituted "unnecessary or undue degradation," it could issue a notice of noncompliance on such grounds. However, the regulations require that such occupancy be duly "noticed" (described in a notice). Occupancy that is duly "noticed" can be prohibited, only by a showing that such occupancy results in unnecessary or undue degradation. *Id.* at 389, 391.

**Lands Disturbed under Prior Notice Must Be Included in Determining if Plan of Operations Is Required**

Deferral of reclamation for certain legitimate mining purposes is allowed by the regulations, 43 CFR 3809.0-5(j) and 3809.1-3(d)(5). However before conducting additional operations under a subsequent notice, the operator shall have completed reclamation of operations which were conducted under any previous notice. 43 CFR 3809.1-3(a). *Differential Energy, Inc.*, 99 IBLA 225, 231 (1987). Therefore any lands disturbed by mining may be legitimately deferred, but all disturbed land "must be included in the computation of surface disturbance for purposes of determining whether a plan of operations is required." *Id.* at 231.

**Plans of Operation Must Not Include Greater Number of Millsites Than Number of Associated Claims**

The Solicitor, Department of the Interior, wrote a memorandum dated November, 7, 1997, to the Director of the BLM stating Athe Department should reject patent applications which seek to patent more than five acres per associated mining claim. @*Limitation on Patenting Millsites under the Mining Law of 1872*, M-36988 (November 7, 1997). Solicitor Leshy also said Athe Bureau should not approve plans of operation which rely on a greater number of millsites than the number of associated claims being developed unless the use of additional lands is obtained through other means.@ *Id.* At 2.

**Suction Dredges Are Mechanized Earth Moving Equipment**

In *Pierre J. Ott*, 125 IBLA 250, 253 (1993), the Board noted that A[s]uction dredges capable of removing by mechanized means large quantities of earth from the surface of the

Federal Lands (albeit from the bed of a river) are >mechanized earth moving equipment.=@ *See Richard W. And Lula Taylor*, 139 IBLA 236, 243 (1997).

**Notice of Noncompliance May Be Issued to All Parties**

As a rule, all parties holding a direct interest in a mining claim as well as those conducting an active mining operation are jointly and severally liable for the reclamation. *Dale Daugherty*, 139 IBLA 56 (1997). ABLM has the authority to issue an NNC [notice of noncompliance] to all parties involved in the mining operation. *See Charles S. Stoll*, 137 IBLA 116, 129 n.6, 130 (1996); *B.K. Lowndes*, 113 IBLA 321, 323 (1990). *Dale Daugherty*, *supra* at 62 n. 3.

**Failure to Obtain State Permits Is Basis for Notice of Noncompliance**

In *Dale Daughtery*, 139 IBLA 56 (1997), the BLM concluded that Daugherty needed a CEQ permit, a DOGAMI permit and a water rights permit and issued a notice of noncompliance (NNC). The Board upheld the decision and said at 65:

> Under 43 CFR 3809.2-2, all operations on mining claims must not only be conducted to prevent unnecessary or undue degradation but also Ashall comply with all pertinent Federal and State Laws.@ The regulations also expressly recognize the continuing applicability of AState laws and regulations relating to the conduct of operations or reclamation on Federal lands under the mining laws.@ 43 CFR 3809.3-1. Thus, the failure of an operator to obtain any necessary State permits serves as an adequate justification for issuance of an NNC. *Bruce W. Crawford*, 86 IBLA 350, 399-400, 92 Interior Dec. 208, 235 (1985). Such a notice properly issues where the authorized officer finds, as a fact, that specific permits are required and have not been obtained. *Bruce W. Crawford*, 86 IBLA at 400, 92 Interior Dec. At 236.

In *William J. Schweiss*, 139 IBLA 10 (1997), the upheld the issuance of a notice of noncompliance where the use and occupancy of the claimant violates a state code and constitutes undue or unnecessary degradation.

**State Director=s Decision Must Not Cover Noncompliances Not Covered in NNC**

In *Dale Daugherty*, 139 IBLA 56 (1997), the State Director cited Daugherty for additional noncompliances not covered in the notice of noncompliance. The Board Aset aside the State Director=s decision to the extent it found Daugherty liable for noncompliances not noticed in the NNC. The BLM, of course, has the authority to issue future NNC=s to the appropriate parties for any activities on the claims found to conflict with applicable laws and regulations.@ *Id*. At 66

**Claimant=s Burden of Proof on Appeals to NNC**

In *Fred Wilkinson*, 135 IBLA 24, 25-26 (1996), the Board explains how the Aburden of proof is on an appellant to show error in the decision appealed from.@ *Id*. at 25.

> The burden of proof is on an appellant to show error in the decision appealed from; in the absence of such a showing, the decision will be affirmed. *B.K. Lowndes*, 113 IBLA 321 (1990); *Wells J. Horvereid*, 88 IBLA 345 (1985). Where, as in the present case, a party appeals from a BLM determination affirming a notice of noncompliance under 43 CFR 3809.3-2, it is the obligation of the appellant to show that the determination is incorrect. Unless a statement of reasons shows adequate basis for appeal and appellant=s allegations are supported with evidence showing error, the appeal cannot be afforded favorable consideration. *Howard J. Hunt*, 80 IBLA 396 (1984). When BLM determines that the surface disturbance caused by appellant=s mining operation had caused unnecessary or undue degradation of the lands, and appellant challenges that determination, the burden is on appellant to show that the situation does not exist.

**BLM Lacks Authority to Issue Cease and Desist Order**

In *United States v. Rothbard*, 137 IBLA 159, 163 (1996), the BLM issued a combined Notice of Noncompliance and Notice to Cease and Desist to a claimant for failure to modify an approved plan of operation, did not notify BLM of the change in operators, and failed to reclaim the area in accordance with the approved plan. The Board said that BLM had no authority under the regulations to order a claimant to cease and desist operations:

> With respect to the part of the notice ordering appellants to cease and desist operations, however, we find no such authority in the regulations. Departmental regulation 43 CFR 3809.3-2 requires that, in order to enjoin operations on a mining claim, BLM must first obtain an appropriate court order. We must vacate this latter provision of the notice, no such order having been obtained.

**Bonding Requirements**

Mining operations conducted under an approved plan may require a bond. The amount of bond is normally based on the estimated cost of reclamation; however, no bond may be required if the operations would cause only minimal disturbance to the land. 43 CFR 3809.1-9. In lieu of a bond, the operator may deposit and maintain in a Federal depository account of the United States Treasury, a cash bond or negotiable securities of the United States. The regulations also provide for blanket bonds covering statewide or nationwide operations. 43 CFR 3809.1-9(d).

**Two or More Plans of Operation on One Mining Claim**

If more than one plan of operation should be filed for a single claim, each plan of

operation will be reviewed on its own merits and approved if it complies with the regulations. *Instruction Memorandum* No. 81-590 (July 23, 1981). The reason for this is that the Department of the Interior has no authority to become involved in determining right of possession of a mining claim.

**Operating Plans Subject to Stipulations**

In *Draco Mines*, 75 IBLA 278 (1983), it was held to be proper for the BLM to condition the approval of a plan of operation on the acceptance of stipulations designed to prevent unnecessary and undue degradation of the public lands. It is also required that such stipulations are reasonable and properly reflect considerations of the public interest.

**Plan of Operations Did Not Continue in Effect**

In *Pierre J. Ott*, 122 IBLA 371 (1992), the Board determined that a plan of operations approved in the 1988 and 1989 seasons did not continue in effect through the 1990 season. The claim, situated within the Merced River wild and scenic study area, was conveyed to the appellants in December 1989.

No plan of operations was filed for 1990 and no notification of a new owner/operator was received by BLM. Also, the claimants were mining on the opposite side of the river from the original operation.

**Court Approval of BLM Surface Management Regulations**

United States District Court Judge Raul A. Ramirez issued an order to the locators of a mining claim enjoining and restraining them from conducting any mining operations on the claim unless they submit a plan of operations pursuant to 43 CFR 3809 and obtain approval. This is the first federal court case involving compliance with the BLM surface management regulations. *United States v. Bales*, 522 F. Supp. 150 (E. D. Cal. 1981).

**Environmental Assessment**

Upon receiving a plan of operations, the BLM is required to make an environmental assessment to identify the impacts of the proposed operations on the lands and determine whether an environmental impact statement is required. 43 CFR 3809.2-1.

**Notice Does Not Require Environmental Assessment**

In *Sierra Club, et al. v. Michael Penfold*, Civil No. A86-083 (January 29, 1987), the Federal District Court of Alaska held that the filing of a notice under 43 CFR 3809.1-3 is not a Federal "action" under the CEQ regulations (40 CFR 1501.4(b) and 1508.18) because no approval is required before beginning operations. NEPA documents are not required where there is no Federal "action." The Sierra Club had contended that no mining can proceed until an environmental assessment is completed.

**Legal Guidelines for Determining if Regional EIS Is Necessary**

The controlling legal guidelines for determining when a regional EIS is required were established by the Supreme Court in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). In *Peshlakai v. Duncan*, 476 F. Supp. 1247 (D.D.C. 1979), the District Court summarized the Supreme Court's holding at 1258:

> [S]uch environmental impact statements are required in two and only two instances: (1) when there is a comprehensive federal plan for the development of a region, and (2) when various federal actions in a region have cumulative or synergistic environmental impacts on a region.

**Environmental Analysis**

In *William E. Tucker*, 82 IBLA 324 (1984), the Board concisely stated under what circumstances it would uphold a "finding of no significant impact" as developed in an environmental assessment by the BLM:

> The question of whether a proposed action will have a significant environmental impact based on facts developed in an environmental assessment, is one of the principal bases for determining whether an agency is required to prepare an environmental impact statement (EIS). Section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332 (1982), requires preparation of an EIS in the case of "major Federal actions significantly affecting the quality of the human environment."
>
> The reasonableness of a finding of no significant impact has been upheld where the agency has identified and considered the environmental problems; identified relevant areas of environmental concern; and made a convincing case that the impact is insignificant, or if there is significant impact, that changes in the project have sufficiently minimized such impact.

If the modifications completely compensate for any adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects will not be crossed, and an environmental impact statement (EIS) will not be required. *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F. 2d 678 (D.C. Cir. 1982). In two cases the Board has reviewed a finding of no significant impact for a proposed mining plan of operations, i.e. an EIS was not required. *William E. Tucker*, 82 IBLA 324 (1984). In *Tulkisarmute Native Community Council*, 88 IBLA 210 (1985), the Board held "that a BLM management decision will be upheld on appeal where the decision is based on an EA which reflects an evaluation of the environmental impacts sufficient to support an informed judgement." *Id.* at 220.

**EA Must Also Address Potential Impacts of Mining**

In *Concerned Citizens for Responsible Mining*, 124 IBLA 191 (1992), the Board considered an appeal from an environmental organization who contended that BLM should address the potential environmental effects of not just the exploration stage but the mining process as well. The Board remanded the case to BLM to supplement its environmental assessment with an analysis of the environmental effects of the mining process.

**BLM Must Independently Evaluate EA Prepared By State**

In *Kendall=s Concerned Area Residents*, 129 IBLA 130 (1994), the Board said that an environmental assessment prepared by the State in response to a proposed amendment to a plan of operations can be relied on by the BLM. However, the BLM must make an independent review and expressly adopt its findings by written record. The Board said at 139 and 140:

> An EA prepared by a State agency, as was done by DSL in this case, can certainly be relied upon by BLM in meeting the requirements of NEPA, but BLM must independently evaluate the EA prior to approval and adoption.
>
> One consequence of the lack of documentation of BLM=s review of the final EA is that the arguments raised on appeal about its sufficiency are addressed to a document prepared and issued by DSL, a State agency over which we have no review authority. Were we to agree with KCAR that the EA is deficient, we could not instruct the State to undertake further work to revise the document or require that mitigation measures be developed and stipulations added to assure compliance. *Citations omitted*. Our concern is whether BLM complied with NEPA. Absent joint authorship of the EA, express adoption of its facts, reasoning and conclusions, or a record documenting BLM=s independent review and FONSI, we must conclude it has not.

**Mitigation Plan Must Be Developed Before FONSI**

If a FONSI is based on mitigating measures that are designed to minimize impacts, an analysis of the proposed mitigation measures, including an explanation of how they would reduce the impact is required. A FONSI made before the development of such a mitigation is premature because there is no basis for such a finding. *Idaho Natural Resources Legal Foundation, Inc*., 15 IBLA 88 (1990); *Nez Perce Tribal Executive Committee*, 120 IBLA 34 (1991). In *Idaho Natural Resources Legal Foundation, supra* at 91 the Board said:

> A FONSI may be predicated on a finding that changes to or restrictions on a project will sufficiently minimize the environmental impact. * * * However, in such circumstances, NEPA requires analysis of any proposed mitigation measures and how effective they would be in reducing the impact to insignificance. *Northwest Indian Cemetery Protective Ass=n v. Peterson*, 795 F.2d 688, 696-97 (9th Cir. 1968) [*rev=d on other grounds, Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988)]; see 40 CFR 1502.16(h). In the present case, we find this analysis to be lacking. * * * [N]o details are provided about the management plan to be developed between BLM and the Idaho Department of Fish and Game. * * * In the absence of any details regarding mitigation,

there is no analysis upon which a FONSI may be predicated.

In *Nez Perce Tribal Executive Committee, supra*, there were no details about the plan to be developed between the land management agency and Idaho Gold to reduce sediment and enhance fish habitat by off-site mitigation measures. The Board said at 45:

> Therefore, a FONSI made before a mitigation plan is developed to this extent is premature because there is no basis for the finding. *Citation omitted*. Until an off-site sediment load reduction and fisheries habitat enhancement plan is adequately developed, the measures it includes cannot be analyzed and their effectiveness cannot be appraised. Without such an appraisal it is not possible to know whether the plan will reduce the potentially significant impacts of the Buffalo Gulch Mine on fish habitats so they are not significant. A determination that the mitigation plan will adequately reduce the impacts on fish habitat is a prerequisite to a finding that these impacts are not significant.

**Complete Mitigation Plan Not Required**

In *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 369 (1989) the Supreme Court held that a Acomplete mitigation plan@ is not required. The Court said at 351-52:

> * * * Aone important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences.@ 490 U.S. at 351. AThere is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other.@ *Id* at 352.

The Supreme Court concluded that NEPA does not require the agency to take action to mitigate the adverse effects of major Federal actions; and furthermore, there is no necessity to include in every EIS a detailed explanation of specific measures which will be used to mitigate the adverse impacts of a proposed action. *Id* at 353.

**Bond Must Be Sufficient to Ensure Mitigating Measures Are Successful**

In National Wildlife Federation, 126 IBLA 48, 65 (1993), the Board said it will affirm a mining plan of operations if the record documents that BLM carefully considered the plan, analyzed potential environmental impacts and conditioned approval of the plan on the companies agreement to apply mitigating measures designed to ensure successful reclamation. However, the Board remanded the case to BLM because the bond was insufficient to reclaim the 2:1 test slopes in the event mitigating measures are unsuccessful and the slopes fail.

**Challenge to a Finding of No Significant Impact**

In *Southwest Resource Council*, 96 IBLA 105 94 I.D. 64 (1987), the Board considered an appeal by southwest Resource Council (SRC) on the approval of a major modification of a plan

of operations submitted by Energy Fuels Nuclear, Inc. (EFN). SRC challenged the BLM's finding of no significant impact (FONSI) for the proposed operation on the basis that it did not include an analysis of cumulative impacts resulting from existing and reasonably foreseeable future developments. A finding of no significant impact allows approval of a proposal without preparation of an environmental impact statement. Upon review of the BLM's environmental assessment the Board determined the BLM's FONSI is supported by the small size of the mine-site and the lack of likelihood that a minesite will be located sufficiently close to the EFN proposed project to cause synergistic effects.

**Circumstances Where IBLA Will Approve a FONSI**

*Red Thunder, Inc.*, 124 IBLA 267 (1992) was on appeal from BLM's approval of Zortman Mining, Inc.'s (Zortman) amendment to a plan of operation to allow cyanide leaching operations at a gold mine to proceed and to allow leach pads to be abandoned. The Board held at 282:

> * * * ...it is well established that the Board will affirm a FONSI with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination that the impact is insignificant is reasonable in light of the environmental analysis. *Citation Omitted.* When mitigating measures are imposed to reduce impacts of the environmental effects of the proposed action that might otherwise be significant, a FONSI is properly affirmed. *Citation Omitted.*
>
> Thus, one challenging such a finding must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal. *Citation Omitted.*

In *Red Thunder, Inc., supra* at 283, the Board said that under 40 CFR 1508.7 "a 'cumulative impact' is the impact on the environment that results from the incremental impact of the action when added to other past, present, and *reasonably foreseeable* future actions." As the Board indicated, "reasonably foreseeable future actions" does not include an exploration proposal that was withdrawn by the claimant. If the proposal were later reinstated, any decision to allow it would be subject to environmental review and appeal.

**Sierra Club Says Project Requires EIS under NEPA**

In *Sierra Club, Toiyabe Chapter*, 131 IBLA 342 (1994), the Sierra Club appealed from a decision of the BLM approving a plan of operations by Atlas Gold Mining, Inc. The plan for the Gold Canyon Project proposes to develop an open-pit gold mine to furnish mill-grade ore for processing at an existing Atlas plant. This project consists of a 26.6 acre open pit gold mine, three waste dumps covering 53.1 acres and 29.2 acres in haul roads and other surface effects that would disturb approximately 119 acres in Eureka County Nevada.

The Sierra Club contended that BLM violated section 102(2)(c) of the National

Environmental Policy Act (NEPA), 42 U.S.C. 433(2)(c) (1988), when it failed to prepare an environmental impact statement (EIS). Section 102(2)(c) requires an agency to include a detailed statement on the environmental impact of a proposed action in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. The Sierra Club said that Aexpansion of the Gold Bar mine, coupled with previous impacts, is sufficient to trigger the need for an EIS, because it is enough that a proposed action *may* significantly degrade some human environmental factor.@ BLM prepared an environmental assessment (EA) of the Gold Canyon project and concluded that the project would not significantly affect the quality of the human environment. In rejecting the *Sierra Club* appeal, the Board stated:

> We find that Sierra Club=s first argument, that BLM should have prepared an EIS, to be supported by little more than a bare expression of opinion. No citation to case law is offered to show that a contemplated operation of similar scope requires an EIS, and Sierra Club makes no express reference to error in BLM=s action. A mere disagreement with BLM=s FONSI, without more, does not establish a basis for reversal of agency action. *Id*. at 345.
>
> * * * If one is to be successful on appeal to this Board, it is not enough to point out environmental impacts and seek to have BLM adopt a different course of action from that BLM has selected. Sierra Club must show error in BLM=s decision, and give support of such showing both in fact and in law. *Id*. at 348.

**Activities Not Involving a "Federal Action"**

In *Southwest Resource Council, supra* at 119, the Board described the types of activities that would represent a "federal action" within the meaning of NEPA, therefore requiring the agency to prepare an environmental assessment (EA):

> It is clear that no Federal action is involved in the act of prospecting for minerals or locating claims. These activities occur through the volition of private entities acting under statutory authority. Nor do we perceive that any "federal action" within the meaning of section 102 of NEPA occurs when BLM receives a "notice of intent" filed pursuant to 43 CFR 3809.1-3, where less than 5 acres of land are being disturbed in any calendar year. As we noted in *Bruce W. Crawford*, 92 I.D. 208, 230-31 (1985), BLM neither approves nor disapproves a notice. *Accord, Sierra Club v. Penfold*, A-86-083 Civil (D. Alaska, Jan. 9, 1987). It may consult with a mining claimant over aspects of his activities but, under the present regulatory scheme, it may not bar his planned activities absent a showing that unnecessary or undue degradation will occur.

**EIS Required on Cumulative Impact of Numerous Plans of Operations**

In *Sierra Club v. Penfold*, A-86-083 Civil (D. Alaska, Jan. 9, 1987), the Federal District of Court of Alaska ruled that under NEPA, BLM is required to study the cumulative impact of some 60 placer mining operations that contribute incrementally to siltation and other

environmental degradation of Birch Creek -- a National Wild River. It was held that 60 or more placer mines are related in such a way as to require unified analysis under NEPA. The Court ordered BLM to conduct an environmental impact statement on the cumulative impacts on the watershed caused by individual operations disturbing five acres or more. Approximately 23 of the 60 placer mines in the watershed operated under plans of operation as required under 43 CFR 3809.1-6.

In footnote 7, page 7, the Court said the "twenty-three mining operations in the watershed approved pursuant to 43 CFR 3809.1-6 are, of course, "federal actions" for the purpose of NEPA. Although the Court did not go so far as to enjoin operations approved under plans from working during the 1987 season, it enjoined BLM from approving any placer mining Plan of Operation on the watershed of Birch Creek National Wild River until an EIS assessing cumulative impacts has been prepared. Prior approvals were declared void as of that date.

**Burden on Claimant to Show Plan of Operation Is Not Necessary**

"Where.....a party appeals from a BLM determination that a plan of operations is necessary under 43 CFR 3809.1-4, it is the obligation of the appellant to show that the determination is incorrect. Unless a statement of reasons shows adequate basis for appeal and appellant's allegations are supported with evidence showing error, the appeal cannot be afforded favorable consideration. *Howard J. Hunt,* 80 IBLA 396 (1984). Where BLM determines that unreclaimed surface disturbance and proposed operations will cause a cumulative surface disturbance of more than 5 acres, and the claimant challenges that determination, the burden is on the claimant to show that 5 acres or less will be affected." *Differential Energy, Inc., supra* at 235.

**Approval of Plan of Operations Is "Federal Action"**

In *Southwest Resource Council, supra* at 120, the Board held that approval of a mining plan of operations is a "Federal action" within the meaning of 42 U.S.C. 4332 (1982). It also described the limits of authority to the BLM in approving a plan of operation:

> When a mining claimant is required to file a plan of operations, however, BLM has considerably more leeway. It may make its approval contingent upon acceptance of various modifications designed to prevent or mitigate undesired impacts. Such modifications may make it more difficult or more expensive for the claimant to develop the property. BLM may require design changes in plant operation or in the route of access. BLM may not, however, absolutely forbid mining or totally bar access to a valid mining claim. *Citation Omitted*. The reason, of course, is that such action would totally frustrate the congressional policy, as expressed in the mining laws, which accord a mining claimant rights, even against the Government, upon the discovery of a valuable mineral deposit. Thus, while BLM clearly has some discretion in the approval of mining plans of operations, there are parameters which establish the limits of its exercise. Nevertheless, because of BLM's ability to modify plans submitted, we agree that approval of a mining plan of operations is Federal action within the scope of 42 U.S.C. 4332 (1982).

**Plan Approval May Constitute "Major Federal Action"**

The approval of a plan of operations not only is a "Federal action," requiring an environmental assessment, but may also be a "major Federal action" requiring an environmental impact statement. In *Southwest Resources Council, supra* at 121, the Board discussed this possibility as follows:

> Whether or not such approval constitutes "major federal action significantly affecting the quality of the human environment," however, is a question of fact determinable only within the confines of a specific case. It is to be expected that some plans of operations might have impacts of such a nature so as to compel the preparation of an EIS, even given the fact that BLM lacks authority to totally prevent mining in the context of approving a plan of operations. Indeed, the regulations clearly contemplate such an eventuality. See 43 CFR 3809.1-6(a)(4). We agree with appellant that there may be situations in which Federal approval of discrete mining plans of operations ultimately necessitate the preparation of a regional EIS because the mining activities result in synergistic or cumulative impacts which are best considered in a unified document.

**Contest Action Is Not Basis for Rejecting Plan of Operations**

A contest action on a mining claim cannot be used as a basis for rejecting a plan of operations. *Patsy A. Brings*, 98 IBLA 385 (1987); *Hiram Webb*, 105 IBLA 290, 312 (1988).

**Materials Stored Contrary to Plan**

In *Jim D. Wills*, 123 IBLA 74 (1992), the BLM had issued a notice of noncompliance with a claimant's plan of operations. The Board affirmed the BLM decision because the record established that construction materials were stored contrary to the plan of operation.

**Fact-Finding Hearing**

In *Jim D. Wills*, 123 IBLA 74, 76 (1992), the Board discussed the circumstances under which a fact-finding hearing can be held on a 3809 dispute:

> The Board may order a fact-finding hearing in cases where there is an issue of material fact relevant to an issue in dispute that cannot otherwise be resolved. *Ben Cohen (On Judicial Remand)*, 103 IBLA 316 (1988). A hearing is not required, however, if, even assuming that the allegations made on appeal are shown to be correct, there is no remedy that can be afforded on the record so established. *Id.* This is such a case, inasmuch as appellants have not denied that their actions were inconsistent with their plan of operations, but instead contend that they were otherwise not contrary to law. Accordingly, the request for hearing is denied.

**National Historic Preservation Act Compliance**

In *Red Thunder, Inc.*, 124 IBLA 267, 284 (1992), the Board said that if no property eligible for inclusion on the National Register of Historic Places is identified in an area, then BLM is not required to comply with section 106 of the National Historic Preservation Act, as amended, 16 U.S.C. 47F (1988).

**Upon Issuance, 3809 Decisions Have Immediate Effect**

Decisions issued by the Interior Department are "not effective during the time in which a person adversely affected may file a notice of appeal." 43 CFR 4.21(a). Furthermore, "the timely filing of a notice of appeal will suspend the affect of the decision appealed from pending the decision on appeal." *Id.*

"The important exception to this general rule is found in 43 CFR 3809.4(b). This regulation specifically provides that decisions concerning mining plans of operation under the 3809 regulations have immediate effect. "Such decisions are not stayed pending appeal, although a stay can be granted by the authorized officer. If it is not, the decision is a final decision of the Department and a party aggrieved can either appeal within the Department or take his grievance to the judicial branch, since his administrative remedy has, at that point, been exhausted sufficiently to permit judicial review. *Citation Omitted*. While further administrative review within the Department is possible, it is no longer necessary, and any party may pursue whatever remedy is deemed best." *The Wilderness Society*, 110 IBLA 67, 71-72 (1989).

**Public Availability of Information**

The information submitted and specifically identified by the operator as containing trade secrets or confidential or privileged commercial or financial information shall not be available for public examination. Other information and data submitted by the operator shall be available for examination by the public.

**Appeals**

Any operator adversely affected by a decision of the authorized officer has the right of appeal to the State Director of the Bureau of Land Management. The decision of the State Director, when adverse to the appellant, may be appealed to the Board of Land Appeals, Office of Hearing and Appeals. The adversed party in a decision of the Board of Land Appeals may then appeal that decision to the federal courts. 43 CFR 3809.4.

## BLM WILDERNESS STUDY AREAS

**Nonimpairment Mandate**

Section 6038 of the Federal Land Policy and Management Act of 1976 says to manage wilderness study areas (WSA) so as "not to impair the suitability of such areas for preservation as

wilderness..." Section 603 also allows for exception from the nonimpairment mandate with "grandfather uses." Grandfather uses are referred to in section 603 as follows:

> ...subject however, to the continuation of existing mining and grazing uses and mineral leasing in the same manner and degree in which the same was being conducted on the date of approval of this Act...

Therefore mining uses which existed on October 21, 1976, are restricted to the same "manner and degree." All activities except those exempt must be regulated to prevent impairment. If an activity cannot meet the nonimpairment standard, it will not be permitted. Some temporary uses are permitted even though they cause physical or aesthetic impacts, providing impacts are temporary and can be reclaimed. *See Implement Management Plan* issued December 12, 1979, as amended July 12, 1983, published by the Bureau of Land Management.

Lands in wilderness study areas must be managed to prevent unnecessary and undue degradation. This applies to both grandfather uses and valid existing rights. "Unnecessary and undue degradation" is defined to mean impacts greater than those that would normally be expected from an activity being accomplished in compliance with current standards and regulations and based on sound practices, including use of best reasonably available technology. 43 CFR 3802.

**Appropriation under the Mining Laws**

Lands under wilderness study are still open to entry; however new locations fall under the nonimpairment standard. A post-FLPMA claim with a discovery has a right to patent, and on receipt of patent, the claimant is no longer subject to the nonimpairment standard.

**Grandfather Uses**

Existing mining and mineral leasing uses on October 21, 1976, may be continued in the same manner and degree. This means actual physical impacts on the land before October 21, 1976. In *Havlah Group*, 60 IBLA 349, 88 I.D. 115 (1981), the Board determined the following:

> Development of the claim detailed in the plan of operations exceeded the manner and degree of any mining use of the claim on October 21, 1976. Only assessment work had been carried out prior to October 21, 1976; there was no indication of development work as detailed in the rejected plan of operations. Therefore, the claimant did not qualify for grandfather rights. *Id.* at 358.

With grandfather rights you can continue operations in the "same manner and degree." This means to expand the scale of the operation at a logical pace and progression (i.e., exploration through development and through mining, with geographic extension until deposit is exhausted. Grandfather uses go with the land and cannot be transferred to other properties. It is the use rather than the claim that is grandfathered. A grandfathered mineral use may continue in the same manner and degree onto adjacent claims owned by the same person. A grandfathered mineral use outside the boundary of a WSA may extend into the area as long as the activity

follows the logical pace and progression of development.

**No Rights to Same Manner and Degree on Post FLPMA Claims Even if Same Lands**

In *Eugene Mueller*, 103 IBLA 308, 310 (1988), the claimant contended that he should be able to continue uses on the land in the same manner and degree in which they were conducted on October 21, 1976, even if such activities impair wilderness characteristics. However, the Board determined that the preFLPMA uses occurred on pre-FLPMA claims that were subsequently declared invalid. Although he intends to continue working the same lands that were worked under pre-FLPMA claims, the work would now be done exclusively on post-FLP-MA claims. Therefore the Board approved the BLM's rejection of the claimants operating plan. *Id.* at 310.

**Valid Existing Rights**

The Department cannot regulate valid existing rights to the nonimpairment standard. The situation is given below for both mining claims and leases:

**I. Mining Claims**

Mining claims have valid existing rights if a discovery was made on the claim before October 21, 1976, and the claim continues to be supported by a discovery. A claim would also have grandfather rights if it were actively worked as of October 21, 1976. However a claim has a more liberal development standard under valid existing rights. Grandfather uses are unimportant if the claim also has valid existing rights because claimants may proceed even if the activities exceeded the manner and degree that existed on October 21, 1976.

Activities to use and develop a claim must satisfy the nonimpairment criteria unless it would unreasonably interfere with the claimant's rights to use and enjoyment of the claim. If so, the claimant may proceed while regulated to prevent unnecessary or undue degradation.

In *Havlah Group*, 88 I.D. 115 (1981), *appeal dismissed without prejudice, Havlah Group v. Watt*, Civ. No. 82-1018 (D. Idaho, Nov. 16, 1982), the Board held that because the appellant's claims were located before FLPMA, he would be able to continue to mine to full development even if such operations would cause impairment -- providing he could demonstrate "valid existing rights." However the IMP requires the operator to show evidence of discovery through field examination. The Board upheld the BLM decision because although the appellant was invited by letter to make a showing of discovery, he did not respond.

**II. Mineral Leases**

Mineral leases have valid existing rights if they were issued before October 21, 1976. Grandfather uses are not applicable to pre-FLPMA mineral leases because such leases enjoy more liberal development standards under valid existing rights.

Activities must satisfy the nonimpairment criteria unless this would unreasonably interfere with the rights provided by the lease. If rights can only be exercised through activities that permanently impair wilderness suitability, such activities will be allowed to proceed, but they will be regulated to prevent unnecessary and undue regulation.

In *Colorado Open Space Council*, 73 IBLA 226 (1983), the Board considered a case where the lease predated FLPMA but no drilling was underway on October 21, 1976. So the grandfather provision for existing use was not applicable. However, the Board agreed with the *Solicitor Opinion*, M-36910 (Supp.), 88 I.D. 909 (October 5, 1981), that the application of the nonimpairment standard to a pre-FLPMA lease might be impossible because of the protection which section 701(h) of FLPMA gives to valid existing rights.

**Transfers of Interest**

If a claimant or lessee transfers a claim or lease, the same valid existing right is recognized in the new owner. Valid existing rights are tied to a particular claim or lease and cannot be transferred to a different claim or lease, even for the same land.

**Nonimpairment Standard May Be Exceeded if Valid Existing Rights**

Development of mining claims with valid existing rights prior to FLPMA may, under certain circumstances, exceed the nonimpairment standard; however, such activities will be regulated to prevent unnecessary or undue degradation. In *The Bureau of Land Management Wilderness Review and Valid Existing Rights*, M-36910, 86 I.D. 89 (1979), M-36910 (Supp), 88 I.D. 909, 914-915 (1981), Solicitor Coldiron stated:

> * * * Although the nonimpairment standard remains the norm, valid existing rights that include the right to develop may not be regulated to the point where the regulation unreasonably interferes with enjoyment of the benefit of the right. * * When it is determined that the rights conveyed can be enjoyed only through activities that will permanently impair an area's suitability for preservation as wilderness, the activities are to be regulated to prevent unnecessary and undue degradation or to afford environmental protection. Nevertheless, even if such activities impair the area's suitability, they must be allowed to proceed.

**Unnecessary and Undue Degradation Standard**

The unnecessary and undue degradation criterion authorized by Section 603 c of FLPMA must not be applied to post-FLPMA claims. *Ralph E. Pray*, 105 IBLA 44, 46 (1988).

**State Lands Surrounded by Federal Lands**

In *Utah v. Andrus*, 486 F. Supp. 995 (D. Utah 1979), the Court held that where state land is encircled by Federal land within a WSA, the activity of the state's lessee may be regulated so as to prevent wilderness impairment. However, such regulation cannot be so restrictive as to

constitute a taking. In *California State Lands Commission*, 58 IBLA 213, 219 (1981), the Board held that the BLM can regulate the route and method of access to state-owned lands to prevent impairment. However such limitations must not impair full economic development of the state-owned lands.

**Areas Less than 5000 Acres**

In December of 1982, Secretary Watt published an order which required that areas of less than 5000 acres could not be properly considered for wilderness status as a matter of law and should be deleted from WSA status. In *Sierra Club v. Watt*, 608 F. Supp. 305 (E.D. Cal. 1985), the Court noted that former Secretary Andrus had properly exercised his discretion under FLPMA to manage certain areas less than 5000 acres under a modified nonimpairment standard. Later in 1980, Secretary Andrus designated some these areas as WSAs under section 603 of FLPMA. The Court agreed with Secretary Watt that areas less than 5000 acres should not be managed as WSAs.

**Split Estate Lands**

In December of 1982, Secretary Watt published an order which required that split estate lands (U.S. does not own mineral rights) be deleted from the wilderness inventory and no longer managed under Interior's Interim Management Policy. In *Sierra Club v. Watt, supra*, the Court found that the "statute, section 603(a) of FLPMA, in plain and unadorned language requires the Secretary to review 'those roadless areas of five thousand acres or more...of the public lands, identified during the inventory as having wilderness characteristics.'" The Court also determined that the definition of "public lands" in FLPMA included split estate lands. Therefore the Court ordered the Secretary to restore WSA status to all split estate lands that had been deleted by the order.

**Management of Lands Deleted from WSA Status**

All lands deleted from WSA status are to be managed according to the IMP issued December 12, 1979, as amended July 12, 1983, and *Instruction Memorandum No.* 83-237. These lands are also subject to the regulations in 43 CFR Subpart 3802. Areas deleted because they have less than 5000 acres are managed according to the IMP but not 43 CFR 3802. Instead, they are subject to the surface management regulations in 43 CFR Subpart 3809. *Instruction Memorandum No.* 84-11 (October 6, 1983).

**Reclamation Deadline Under the Interim Management Policy**

Impacts within wilderness study areas (WSA), except for grandfathered uses and those having valid existing rights, must be reclaimed to a condition of being substantially unnoticeable in the WSA as a whole by the time the Secretary of the Interior is scheduled to send his recommendation on that area to the president. Chapter I.B.2, page 10, *Interim Management*

*Plan*.

The latest possible date for attaining complete reclamation for all nonimpairing impacts within WSAs scheduled for statewide reporting is the date the Secretary is scheduled to sign the record of decision. To ensure the reclamation timeframe is met, each state establishes a final deadline for having all projects reclaimed within WSA's, regardless of the suitability recommendation on any specific WSA. The reclamation deadline can be no later than October 21, 1991, which is the statutory date by which the Secretary must report all recommendations to the President. From that date until Congress acts, the only activities permissible (other than grandfather uses and valid existing rights) under the Nonimpairment Criteria are temporary uses that create no new surface disturbance. Such uses may continue until Congress acts, so long as they can easily and immediately be terminated at that time, if necessary to manage the area as wilderness. *Instruction Memorandum No.* 86-491 (May 22, 1986).

**Off-road Vehicles in WSAs**

The regulations in 43 CFR 8340.0-5(a), which are the authority for closing areas to off-road vehicle use, make an exception for off-road vehicles used in connection with lawful mining activities. Off-road vehicles may be used for mining purposes if expressly authorized by the appropriate BLM official. 44 FR 34834 (June 15, 1979); *Manville Sales Corp.*, 102 IBLA 385, 388 (1988).

**Right of Access to PreFLPMA Claim in WSA**

In *Murray Perkins*, 116 IBLA 288, 294 (1990), the Board discussed the valid existing rights, particularly access rights, of a claim located before October 21, 1976:

> Under section 701(h) of FLPMA, all mining claimants who located claims on or before October 21, 1976, and are able to demonstrate a discovery as of that date, as required under the 1872 Mining Law, will be allowed to continue their mining operations to full development. The right of access to a mining claim is a valid existing right. *See* 48 FR 31854 (July 12, 1963); *Mespelt & Almasy Mining Co.*, 99 IBLA 25, 27 (1987). However, contrary to appellant's contentions, FLPMA amended the 1872 Mining Law with respect to access by making the right of access subject to Federal regulation when access crosses Federal Property. *See State of Utah v. Andrus*, 486 F.Supp. 995f, 1007 (D. Utah 1979). BLM is authorized to regulate the method and route of access over Federal lands so as to prevent permanent impairment of wilderness characteristics. *Id.* at 1009; *Eugene Miller*, 103 IBLA 308 (1988). Such regulation cannot, however, prohibit access or be so restrictive as to preclude economic development. *State of Utah v. Andrus, supra* at 1011. If, therefore, it is determined that access rights for a valid mining claim existing on October 21, 1976, can be exercised only through activities that will impair wilderness suitability, the activities will be regulated to prevent unnecessary or undue degradation. 48 FR at 31858.

**Contest Initiated If Claim in WSA Has No Discovery**

In *Edmund Key*, 117 IBLA 274 (1991) a claimant had a pre-FLPMA claim in a Wilderness Study Area (WSA). He had also established Grandfather rights by working the claims prior to the enactment of FLPMA. However, the Board said that if "BLM's position is that the claims are not valid mining claims because there has been no discovery,.....or for some other reason, opportunity should be provided to Key to establish that he has a valid discovery on the claims. If investigation reveals there is no discovery, a contest should be initiated." *Id.* at 279.

## DESIGNATED WILDERNESS AREAS ADMINISTERED BY BLM

### Validity Examinations on BLM-Administered Wilderness Areas

Regulations made effective on March 27, 1985 (43 CFR 8560.4-6(j), give procedures for reviewing plans of operations on unpatented mining claims within wilderness areas administered by the Bureau of Land Management. Before approving plans of operation or allowing previously approved operations to continue on unpatented mining claims (on newly-designated wilderness areas), a mineral examiner will conduct a validity examination to determine whether or not the claim was valid prior to the withdrawal and remains valid. If the mineral report indicates the claim lacks a discovery or is invalid for any reason, the plan of operations will be denied. Existing approved operations will be issued a notice ordering the cessation of operations. In both cases the BLM will initiate contest proceedings to determine the status of the claims conclusively. However, the regulations allow for proposed operations that will cause only insignificant surface disturbance for purposes such as sampling and performing assessment work.

## 3802 SURFACE MANAGEMENT REGULATIONS

**Final Regulations**: April 2, 1980 (45 FR 13968)

**Authority**: Sections 302 and 603 of FLPMA

**Purpose**: Procedures established to prevent impairment of the suitability of lands under wilderness review for the inclusion in the wilderness system and to prevent unnecessary and undue degradation.

### Operations Existing on October 21, 1976

A plan of operations is not required for operations that were conducted on October 21, 1976, unless the manner and degree of operation on October 21, 1976 is being exceeded.

An approved plan may be requested if operations in the same manner and degree are causing unnecessary and undue degradation. Operations may cover previously undisturbed ground and may take place even if impairment of wilderness suitability should occur.

**Plan Approval**

The plan approval process is used to determine if the plan will result in wilderness suitability or if parts or all of the plan is based on mining claims with valid existing rights. In *Golden Triangle Exploration Co.*, 76 IBLA 245 (1983), the Board upheld the rejection of a plan of operation because the proposed operation would impair the naturalness of the WSA.

**When Plan Is Required**

An approved plan of operations is required when one or more of the following actions are involved (43 CFR 3802.1-1):

1. Construction of access including bridges, aircraft landing areas or improving or maintaining access facilities in such a way that changes the alignment, width, gradient, size or character of such facilities. In *William E. Godwin*, 82 IBLA 105 (1984), the Board held that significant alteration and enlargement of an existing access road in a WSA requires approval of a plan of operations;

2. Destruction of trees two or more inches in diameter at the base;

3. Mining operations using tracked vehicles or mechanized earthmoving equipment, such as bulldozers or backhoes;

4. Using motorized vehicles over other than "open use areas and trails;"

5. The construction or placement of any mobile, portable or fixed structure on public land for more than 30 days;

6. Use of explosives; and

7. Changes in a water course.

**When a Plan Is Not Required**

A plan of operations is not required for the following actions (43 CFR 3802.1-2):

1. Searching for and removing mineral samples or specimens;

2. Operating motorized vehicles over "open use areas and trails;"

3. Maintaining or making minor improvements of existing access routes, bridges, landing areas for aircraft or other facilities for access; however, the alignment, width, gradient, size or character of such facilities shall not be altered; and

4. Making geological, radiometric, geochemical, geophysical measurements using instruments or drilling equipment which are transported without using mechanized earthmoving equipment or tracked vehicles.

**Proposed Plan of Operations Requires Validity Examination**

When a plan of operations is reviewed for a pre-FLPMA claim, a determination must be made by an experienced mineral examiner as to whether a discovery existed on the date of the act and continues to the present. The test of discovery should be commensurate with the proposed action.

**Pre-FLPMA Operations But Post-FLPMA Claims**

In *Ralph E. Pray*, 105 IBLA (1988), the Board reviewed an appeal concerning a proposed plan of operations in a WSA. The proposed operation covered an area that was originally located in 1974, before FLPMA, but was abandoned by failure to comply with the recordation provisions of FLPMA. The claimant then located the claims again on October 28, 1979 (post-FLPMA). Even though the claimant established operations prior to FLPMA, he could not qualify for "valid existing rights" or "grandfather rights" because his claim was located after FLPMA. Therefore he was subject to the nonimpairement standard.

**Claim Partly within WSA**

If a portion of a claim is included in a WSA, the regulations in 43 CFR 3809 do not apply. The regulations in 43 CFR 3802 do apply and may require a plan of operations. *Paul M. Shuck*, 126 IBLA 232, 235 (1993).

A postFLPMA claim that includes both WSA lands and lands containing preFLPMA mining operations situated outside the WSA does not qualify as a mining operation on WSA

lands that could continue under operations occurring in the same manner and degree as on October 21, 1976. *Ceminex, Ltd.*, 129 IBLA 64 (1994).

**Removal of Impairments from WSA**

The case of *Virgil Schuette*, 131 IBLA 332 (1994) involved a claimant who had an approved plan of operations within a wilderness study area (WSA). Because the claimant=s operations were post-FLPMA and he had not established a grandfather right under FLPMA, the BLM issued a decision to have him remove all impairments including a mobile home, generators and other personal property as well as reclaim the site by June 30, 1989, the date the Secretary was scheduled to send his recommendation on that WSA to the President.

**Claims with Final Certificate Are Regulated under 3802**

In *International Silica Corp.*, 124 IBLA 155, 160 (1992), the claimant contended that issuance of final certificate bestowed the right to enter and use the placer claim. However, the Board said that "the United States may regulate mining activities on Federal lands to protect the surface resources. Therefore, BLM must manage lands in a WSA in accordance with section 6038 of FLPMA, even after final certificates are issued."

**Nonimpairing Operations Can Be Approved**

In *Committee for Idaho's High Desert*, 130 IBLA 327, 239 (1994), the Board said "FLPMA did not prohibit mining activity within a WSA" and the guidelines "do not bar actions which do not cause an impairment."

**Substantially Unnoticeable Defined**

The IMP allows a temporary activity that is capable of being reclaimed to a *substantially unnoticeable condition*. In *International Silica Corp.*, 124 IBLA 155, 158 (1992), the Board defined substantially unnoticeable as "something that either is so insignificant as to be only a very minor feature of the overall area or is not distinctly recognizable to the average visitor as being manmade or man-caused, because of age, weathering, or biological change.

**Operations that Impair Suitability**

If operations such as road construction and other mechanized surface disturbing activity would impair an areas suitability for inclusion in the wilderness system, a proposed plan of operations may not be approved. *Dave Paquin*, 129 IBLA 76 (1994); *International Silica Corp.*, 124 IBLA 155, 158 (1992).

**Road Construction or Land Clearing before Plan Approval Is Trespass**

In *Karry K. Klump*, 123 IBLA 377, 380 (1992), the Board held that clearing land prior to getting an approved plan in a WSA is a trespass. The Board also held that building a road without filing a notice outside a WSA is also a trespass. In this case the road construction was outside the WSA and if the claimants total mining operation caused a cumulative surface disturbance of 5 acres or less, "he was required by 43 CFR 3809.1-3(a) to notify BLM before commencing road construction. Appellant's failure to file a notice with BLM subjected him, at the discretion of the authorized officer 'to being served a notice of noncompliance or enjoined from the continuation of such operations by a court order until such time as a notice or plan is filed.' 43 CFR 3809.3-2(a). Road construction prior to filing this notice was not authorized by the regulations. This was also a trespass. 43 CFR 2801.3." *Id.* at 381.

Regulation 43 CFR 2801.3(a) provides that any use, occupancy, or development of the public lands that requires a right-of-way, temporary use permit, or other authorization, which authorization has not been obtained, is prohibited and shall constitute a trespass. *See also* 43 CFR 9239.7-1. The Board said at 382:

The remedy sought by the United States in the present case, restoration and rehabilitation of the lands in sec. 15 and 16, is plainly authorized by 43 CFR 2801.3. That section states at (b)(3):

> Anyone determined by the authorized officer to be in violation of paragraph (a) of this section [prohibiting trespass] shall be notified in writing of such trespass and shall be liable to the United States for:
> * * * * * * * * *
> (3) Rehabilitating and stabilizing any lands that were harmed by such trespass.

BLM's decision of August 13, 1990, gives appellant the option to restore and rehabilitate the subject lands or have the agency contract for such work. As noted above, these costs total $5,800.

Regulation 43 CFR 2801.3 also indicates at (b) (1) that a person determined to be in trespass is liable for "[r]eimbursement of all costs incurred by the United States in the investigation and termination of such trespass." These costs total $3,866.

**Road in WSA Without Approval Requires Reclamation**

In *Lloyd L. Jones*, 127 IBLA 270, 274-75 (1993), the appellant had constructed a motor vehicle route for access to his claim in a WSA without an approved plan of operations. The Board stated at 274-75:

> * * * Their failure to make such an application before beginning construction of a motor vehicle road within a 40-foot trail easement held by BLM over privately-owned land resulted in a situation that required reclamation of the right-of-way to its prior condition to conform actual usage to the terms of the trail easement under which maintenance of the trail by BLM on private property was allowed.

**Work without Approved Plan of Operations Is a Trespass**

Work performed on a mining claim without an approved plan of operations is a trespass. *Richard C. Behnke*, 122 IBLA 131, 139 (1992).

**Valid Existing Rights Require Approved Plan of Operations**

In *Richard C. Behnke, supra* at 140, the Board described the requirement of an owner of a claim with valid existing rights to obtain approval of a plan of operations before starting operations:

> * * * In the case of mining operations within a WSA, such rights are defined by the

Department to mean that a "discovery had been made on a mining claim on October 21, 1976, and continues to be valid at the time of exercise." 43 CFR 3802.0-5(k). However, even assuming that the subject mining claims are supported by a discovery of a valuable mineral deposit and thus might be deemed to be valid existing rights, there is nothing in the regulations which indicates that the valid existing rights status of mining claims thereby dispenses with the need to obtain approval of a plan of operations before the commencement of mining operations. The contrary is true. Indeed, 43 CFR 3802.1-5(b)(2) clearly presupposes that prior approval of a plan of operations is required even for a plan "covering operations on a claim with a valid existing right." *See also* IMP, 44 FR 72031 (Dec. 12, 1979), *as amended*, 48 FR 31856 (July 12, 1983). Thus, even if appellant had made the requisite showing to establish the existence of a discovery as of October 21, 1976, which he has not, he would still have been required to obtain approval of a plan of operations *before* commencing the actions undertaken on the claims.

**Grandfather Uses Do Not Include Those That Change Impact on Wilderness Potential**

Although grandfather uses can impair suitability, the change in impact on wilderness potential from uses existing on October 21, 1976, can disqualify such uses to grandfather rights. In *Richard C. Behnke, supra* at 138, the Board said:

> * * * Indeed, it is clear that such grandfathered uses can be those which impair suitability. Rather, it is the *change* in the impact on wilderness potential occasioned by appellant's 1988 activities, as compared to that occasioned by the uses existing on Oct. 21, 1976, that causes such activities not to constitute grandfathered uses.

**Plan Not Required for Claims with Grandfather Rights**

"While it is somewhat paradoxical that claims which might be judged supported by valid existing rights are required to obtain approval of a plan of operations while the mere continuation of grandfathered uses does not require approval of a plan, it must be remembered that grandfathered uses were *only* those uses *actually* occurring on October 21, 1976, or which were temporarily suspended on that date but which had occurred in the preceding 12 months. *Richard C. Behnke, supra* at 140.

**Case on Logical Pace and Progression of Development**

In *Southern Utah Wilderness Alliance*, 125 IBLA 175 (1993), the claimant proposed to construct new road into areas not previously disturbed by road building where there had been "a hiatus of all road-building activities over the last 12 years." The Board held that this road construction "could not be justified under the 'grandfathered uses' exception because such activities do not represent the 'logical pace and progression of development,' as required by the IMP."

**Does PostFLPMA Work Differ in Manner and Degree**

In *Richard C. Behnke, supra* at 137, the Board determined whether a claimant's work in a WSA after October 21, 1976, qualified for grandfather rights by comparing the postFLPMA work with the type of work mentioned on PreFLPMA assessment work affidavits:

> * * * ...in determining whether, in the absence of an approved plan of operations, mining operations are permitted within a WSA, we are concerned only with whether the impact of such operations differs in manner and degree from that of operations taking place on October 21, 1976, or which might have been temporarily suspended on that date but which was occurring within the 12 months preceding October 21, 1976. Thus, we will not consider the manner and degree of mining operations prior to October 21, 1976, except to the extent activities occurring within the preceding year may have been temporarily suspended. We, thus, look to the affidavit of labor performed during the period between September 1, 1976, and August 30, 1977. * *
>
> We conclude that the impact of the road work which resulted in issuance of the November 1988 trespass notice exceeded in manner and degree the impact of the operations existing on October 21, 1976. While we recognize that the access road was cleared of deadfall in sec. 33 in 1988, much as it may have been on October 21, 1976, the noticeable difference in 1988 was that the perimeter of the road in secs. 28 and 29 was bladed, with the resulting destruction of live trees, and live trees were also cut in sec. 33. There is simply no evidence in the affidavit or elsewhere that the road was bladed, thus destroying live trees, or that trees were cut on October 21, 1976. Further, it appears that a 600-foot section of the trail within the WSA was bladed in 1988. This increased impact was clearly of a physical and aesthetic nature.

**Denial of Plan and Request for a Stay**

"Where BLM denies a proposed plan for operations in a wilderness study area, a request for a stay, even if granted, would not authorize the action which BLM has denied. The granting of a stay would merely mean that the decision denying the plan of operations would not be effective during this Board's review of the decision. It would not constitute approval of the pending plan of operations, nor would it authorize any activities under the plan. *Robert E. Oriskovich*, 128 IBLA 69, 70 (1993).

**Proposed Plan Rejected Because Road Cannot Be Reclaimed before Deadline**

In *Manvill Sales Corp.*, 102 IBLA 385 (1988), the Board upheld the rejection by BLM of a proposed plan of operation in a WSA. The BLM determined that the road the claimant wanted to use could not be reclaimed to meet the criteria of being substantially unnoticeable in the area as a whole by the time the Secretary was scheduled to make his recommendation to the President. *Id.* at 389-90.

**Approval of Plan of Operation Rescinded Because of Inadequate Water**

In *Far West Exploration, Inc.*, 100 IBLA 306 (1987), plans of operation for a cyanide

leaching operation were approved in error. Apparently, the BLM had assumed that an adequate supply of water was available to carry out the plans. Because a sufficient water supply was not available, the Board held that the plans could properly be rescinded. The Board went on to say that the company "must reveal how much water the chemical recovery process eventually proposed to be used will take, and describe in detail how the water will be obtained and where it will come from, and what effect this usage will have on the environment." *Id.* at 310.

**Plan Rejected Even Though WSA Not Suitable for Wilderness**

In *Robert L. Baldwin*, 116 IBLA 84, 87-88 (1990), the Board considered an appeal involving a Wilderness Study Area that the BLM recommended as not suitable for inclusion in the wilderness system. BLM did not approve a proposed plan of operations because it determined such activities would impair the area's suitability for inclusion in the wilderness system. The Board upheld the rejection because the lands must be managed under the nonimpairment standard until Congress has acted.

**Plan Rejected on Basis of Access Roads**

If a claimant's mine plan could not meet the nonimpairment standard because road building and blasting impacts cannot be eliminated before the wilderness designation is made, the disapproval of such plan will be upheld on appeal. *Eugene Mueller*, 103 IBLA 308 (1988). The "impacts of proposed road construction are clearly proper considerations for review of mining plan operations in a WSA." *Id.* at 311.

**Proposed Plans of Operations That Would Impair Suitability: Post-FLPMA Claims**

In *Keith R. Kummerfeld*, 72 IBLA 1, 4 (1983), a 40-acre open pit mine and a road was proposed in a plan of operations. The plan was denied by the BLM because it determined the proposed plan would impair suitability. However, the BLM did permit drilling and other related actions. The IBLA affirmed the BLM's rejection.

In *Golden Triangle Exploration Co.*, 76 IBLA 245, 249 (1983), the IBLA upheld a BLM rejection of a proposed plan of operations because the proposed operation would impair the naturalness of the WSA. The BLM determined that the proposed drilling operations conducted in such climatic conditions would preclude revegetation for many years. Therefore the area could not be reclaimed to the state of being substantially unnoticeable by the time the Secretary would transmit his recommendations to the President.

In *Doyle Cape*, 79 IBLA 204, 208 (1984), the Board affirmed the BLM rejection of a proposed plan of operations because the proposed earth-moving operations would impair suitability by creating a new road system in a WSA.

**Rejection of Proposed Modification to Approved Plan of Operation**

In *L.D.C. Artman*, 98 IBLA 164 (1987), BLM rejected a modified plan of operation under the nonimpairment standard. BLM is required to either approve the plan subject to measures designed to prevent impairment of the areas suitability for preservation as wilderness or reject the plan where anticipated impacts of mining operations would result in impairment of the areas suitability for preservation as wilderness. The Board concluded "that BLM properly rejected appellants proposed modification of their approved mining plan of operations." *Id.* at 168. To resolve the matter, the Board held at 169:

> * * * Accordingly, we conclude that BLM properly required appellants to cease those mining operations proposed in appellants' September 1984 proposal and to either submit proposed reclamation measures and complete such measures as approved or remove equipment, recontour and reestablish natural vegetation to BLM's satisfaction with respect to the area affected by such operations. Either course of action was calculated to preclude any impairment of the affected area's suitability for preservation as wilderness. Following appellants' receipt of this decision, they will comply with the reclamation requirements set forth in the October 1985 BLM decision within six months of the date of this decision.

The Board allowed mining operations to continue that were approved under the original plan of operations and to submit another proposed plan of operations for BLM approval that will satisfy the nonimpairment standard.

**BLM Cannot Completely Forbid Mining**

When considering a proposed plan of operations, BLM cannot completely forbid mining either under the 3802 regulations, *L.C. Artman*, 98 IBLA 164 (1987), or under the 3809 regulations, *Southwest Resource Council*, 96 IBLA 105, 120, 94 I.D. 56 (1987).

**Hearing Authorized on Denial of Mining Plan**

In *Norman G. Lavery*, 96 IBLA 294 (1987), Mr. Lavery appealed a BLM district decision disallowing his plan of operations because the activities proposed would impair the suitability of the area for preservation as wilderness. The appellant requested that his case be assigned to an administrative law judge for a hearing. The Board exercised its discretionary authority and referred the case to an administrative law judge for a hearing on an issue of fact.

**Appellants Burden on Denial of Mining Plan Approval**

In *Norman G. Lavery, supra* at 298, the Board described the burden of persuasion by a preponderance of the evidence required of an appellant seeking the reversal of a decision involving lands in a WSA:

> * * * An appellant seeking reversal of a decision involving lands in a wilderness study

area must show that it was premised either on a clear error of law or a demonstrable error of fact. *Southwest Resource Council, Inc., supra* at 42. The burden of persuasion by a preponderance of the evidence rests on appellant.

**Right-of-Way Permit Required to Transport Water to Mining Claim**

In *Desert Survivors*, 96 IBLA 193, 196-97 (1987), the Board held that a right-of-way permit issued under Title V of FLPMA before transporting water across public land for any mining purpose. Approval of a right-of-way application is discretionary and the application process is subject to an environmental assessment as required by NEPA. The Board said at 196:

> Clearly, FLPMA repealed or amended previous acts and Title V now requires that BLM approve a right-of-way application prior to the transportation of water across public land for mining purposes.
>
> * * * * * * *
>
> BLM apparently contends that a mining claimant does not need a right-of-way to convey water from land outside the claim for use on the claim. It asserts that such use is encompassed in the implied rights of access which a mining claimant possess under the mining laws. Such an assertion cannot be credited.
>
> The implied right of access to mining claims never embraced the right to convey water from outside the claim for use on the claim. This latter right emanated from an express statutory grant in the 1866 mining act. See 30 U.S.C. 51 (1970) and 43 U.S.C. 661 (1970). In enacting FLPMA, Congress repealed the 1866 grant of a right-of-way for the construction of ditches and canals (see 706(a) of FLPMA, 90 Stat. 2793) and provided, in section 501(a)(1), 43 U.S.C. 1761(a)(1), for the grant of a right-of-way for the conveyance of water under new procedures. In effect, Congress substituted one statutory procedure for another. There is simply no authority for the assertion that mining claimants need not obtain a right-of-way under Title V for conveyance of water from lands outside the claim onto the claim.

The BLM has taken the position that this ruling does not apply to other forms of access under 43 CFR 3809, because the 3809 regulations specifically cover these types of facilities for plans of operations and notices.

**Failure to Notify Owner**

If the operator is not notified within the 30-day period or the 60-day extension, operations under the plan may begin. However, this does not constitute approval of a plan of operations. If operations later impair wilderness suitability, the operator is notified of the compliance and a modified plan of operations is requested.

**Modification of Plan**

In many cases it is not possible to file a plan for the entire life of the operation because certain aspects of the deposit are unknown. The operator files an initial plan and at the appropriate time files a supplemental plan. A supplemental plan is approved in the same manner as the initial plan. The operator either voluntarily submits a significant modification of the plan or is asked to submit a modification.

**Bonding**

Bonds are not required except in connection with an approved plan of operation. If a plan is not required, a bond is not required. The requirement for a bond is discretionary and depends on -

1. the potential for surface disturbance

2. operator's past record of reclamation

The amount of bond should be based on the estimated cost of reclamation. When a claim is patented or disturbed land is satisfactorily reclaimed, the bond may be reduced proportionately.

**Noncompliance**

Noncompliance results where the operator --

1. operates without having filed a plan or bond.

2. failed to comply with requirements of an approved plan of operations.
3. failed to comply with the 3802 regulations.

4. and the noncompliance is causing (a) impairment of wilderness suitability, or (b) unnecessary or undue degradation.

If the above occurs, the authorized officer shall serve a notice of noncompliance upon the operator. An operator who fails to file a plan of operations and ignores the notice of noncompliance should be enjoined from operating by a court order.

**Criminal Penalties**

There are no criminal penalties expressly contained in the 3802 regulations. However *Instruction Memorandum No.* 85-389 (April 18, 1985) points out that operators, who fail to obtain proper authorization with an approved plan and continue operations or fail to respond to a notice of noncompliance, may be cited for violation of 43 CFR part 8340 or part 8360 or both. The conduct is criminal under these provisions.

**Environmental Assessment**

Once a plan of operations is filed, an environmental assessment must be prepared within the 30-day period.

**Public Interest**

If it is determined that there is substantial public interest in the proposed operation on the basis of the EA, an additional period, not to exceed 60 days may be required to consider public comments.

**Mitigating Measures**

If the proposed plan indicates that the proposed operations will impair wilderness values or cause unnecessary or undue degradation, the EA is used to develop mitigating measures. If mitigating measures are sufficient to compensate for adverse environmental impacts, the statutory threshold of significant environmental effects will not be crossed. *Cabinet Mountains Wilderness/Scotchman's Grizzley Bears v. R. Max Peterson*, 510 F. Supp. 1186 (D.D.C. 1981) *affirmed*, 685 F.2d 678 (D.C.C. 1982).

**Cultural and Paleontological Resources**

A cultural resource inventory shall be completed before approval of a plan. Although the operator is not required to do the inventory, he may hire a qualified professional to expedite the process. If the operator discovers cultural resources, he must notify the BLM and leave it intact. Operations can proceed within 10 days after notification.

**Notice of Suspension of Operation**

Except for seasonal suspension, the operator must notify the BLM within 30 days of a suspension. During periods of suspended operations, the name and mailing address of the operator should be posted on the site.

**Cessation of Operations**

Within one year following cessation of operations, the operator must remove all structures and equipment and reclaim the site of operation.

**Appeals**

If adversely affected by a decision of the authorized officer or the State Director, the operator has the right of appeal to the Interior Board of Land Appeals. The adversed party from the IBLA has the right of appeal to the federal courts.

## MINING AND MINING CLAIMS IN THE NATIONAL PARK SYSTEM

**Introduction**

The regulations in 36 CFR Part 9 were authorized by the Act of September 28, 1976 (90 Stat 1342; 16 USC 1901 *et. seq*.), to govern all mining activities in the National Park System. These regulations cover such things as access permits, claim recordation, assessment work, use of water, surface protection and reclamation requirements.

**Surface Disturbance Moratorium**

Until September 28, 1980, no operator of a claim located in the Death Valley National Monument, Mount McKinley National Park or Organ Pipe Cactus National Monument was allowed to disturb by mineral exploration or development operations the surface of any lands which had not been significantly disturbed by mineral extraction activities before February 29, 1976. If an operator wished to enlarge an existing excavation or development, he was required to file an application explaining his need to maintain his annual rate of production. He was not allowed to exceed an average annual production level achieved by the operations for the three calendar years 1973-1975.

**Recordation**

Owners of any unpatented mining claims were required to record the claim in the office of the Superintendent of the applicable National Park by September 28, 1977. Information that must have been included in the recordation is specified in 36 CFR 9.5(b). If the claim was not recorded as required by 36 CFR 9.5 by September 28, 1977, the claim will be presumed abandoned and will be void. Recordation as required by the National Park regulations (36 CFR 9.5) satisfies the recordation requirements of the Federal Land Policy and Management Act of 1976 (90 Stat. 2743; 43 USC 1701); so the claimant did not have to record the claim with the BLM.

**Transfers of Interest**

If a claimant conveys any part of his interest in his claim(s), he must notify the Superintendent within 60 days after completing the transfer.

**Assessment Work**

Before performing any assessment work, the claimant must obtain an access permit and an approved plan of operations. No access permits will be issued for claims on those lands subject to the surface disturbance moratorium. The secretary will not challenge the validity of any claim for failure to do assessment work during or after the assessment year beginning September 1, 1976.

**Plan of Operation**

Before conducting any activities, a plan of operations (36 CFR 9.9) must be submitted and approved by the applicable Regional Director. The plan must take into consideration the

Park's Management Plan. A plan of operations will not be approved for unpatented claims or patented claims subject to surface use restrictions if the operation would constitute a nuisance in the vicinity of the operation or would significantly or adversely affect federally-owned land. Within 60 days of receipt of a proposed plan, the Regional Director will make an environmental analysis and notify the operator of rejection or approval of the plan. The operator may also be notified that the plan must be modified or that another 30 days is needed to complete the review. If the Regional Director determines that an Environmental Impact Statement is necessary, the operator will have to wait for a decision until 45 days after a final EIS has been prepared and filed with the Council on Environmental Quality.

**Reclamation Requirements**

Minimum reclamation requirements are specified in 36 CFR 9.11 for both patented and unpatented claims. Reclamation must be accomplished as contemporaneously as possible with the operations, but in no case, later than 6 months after completion of operations. For a claim that was patented with surface use restrictions or is unpatented, the reclamation must provide for safe movement of native wildlife, reestablishment of native vegetation, normal flow of surface water and the return of the area to a condition equivalent to its original pristine beauty.

**Performance Bond**

The operator is required to file an acceptable performance bond with satisfactory surety, payable to the Secretary of the Interior upon approval of his plan. The bond will be conditioned upon the faithful compliance with the regulations, permit and plan of operations. The amount of bond will be based on an amount equal to the estimated cost of reclamation.

**11.** MINERAL PATENTS

## MINERAL PATENTS

### Introduction

An unpatented mining claim allows the claimant the right to extract and remove minerals but does not represent a full title. A patented mining claim is one in which the Federal Government has passed its title to the claimant, giving him exclusive title to the locatable minerals and, in most cases, the surface and all resources. At any time before the issuance of a patent, the Government may challenge the validity of a claim and, if successful, the claim will be canceled with all rights forfeited.

Although the procedure for acquiring a mineral patent is lengthy and cumbersome, it generally is advantageous for the claimant to do so. The requirements for patenting a mining claim are given in detail in 43 CFR Part 3860.

### Legal Authorities for Mineral Patents

1. General Statute: Mining Law of May 10, 1872, as amended and supplemented; 17 Stat. 92 *et seq*.; RS 2325, 2333, and 2337; 30 USC 29, 37, and 42(a) and (b).

2. Regulations: 43 CFR 3862, 3863, and 3864.

3. Delegations: Bureau Order 701, as amended.

4. Bureau of Land Management Manual 3862, 3863, and 3864.

5. Instruction Memorandum No. 81-421.

**Office Responsible for Processing Mineral Patents**

The various state directors of the Bureau of Land Management are authorized (Bureau Order No. 701, as amended, Section 1.6(k)) to take all actions on mining claims under the general mining laws. The Chief of the Division of Technical Services, subordinate to each state director, is further authorized to take all actions on mining claims. However, the actual processing of all mineral patent applications is handled by mining law adjudicators. These adjudicators are responsible for processing all mineral patents, regardless of which agency manages the surface of the lands.

**Revocation of Delegations to BLM for Signing First Half Final Certificates and Patents**

On March 3, 1993, the Secretary of the Interior issued *Secretarial Order* 3163 for the purpose of revoking Adelegations allowing subordinate officials within the Department of the Interior to issue first half final certificates and patents under the authority of the Mining Law of 1872, as amended. This action is being taken to enable the Secretary to assume the review and issuance of such documents and instruments...@

## MINERAL SURVEY

Mineral surveys are used to delineate the legal boundaries of mineral lands on the public domain where the boundaries are established by lines that deviate from standard subdivisions and lots. All lode mining claims must receive a mineral survey before application for patent. Placer mining claims and mill sites must also receive a mineral survey if their boundaries are described by metes and bounds instead of by legal subdivision. A mineral survey should accomplish the following:

1. Monument the claim corners.

2. Witness the location in the field.

3. Show all conflicts with earlier surveys and other prior locations that should be excluded.

4. Show all workings on the claim.

**Claims Requiring a Survey**

A mining claim must be surveyed if (1) the claim is a lode location, (2) the claim covers land which is not surveyed in accordance with the rectangular survey system, and (3) the boundaries of the claim do not conform to the legal subdivisions of the rectangular survey system (43 CFR 3861.1-1).

If a placer claim is located on surveyed land and conforms to legal subdivisions, a mineral survey is not required. Even though the lands are surveyed, if the description of the claims does not conform to legal subdivisions, a survey and plat must be prepared. Conversely, even if the lands conform to legal subdivisions, if the area was not surveyed by the government, a mineral survey and plat are required. 43 CFR 3863.1(a).

**Sequence of Survey**

The mineral survey and plat must be made after recordation of the notice of location as required by state law. 43 CFR 3861.12; however, the survey must be completed and approved before filing the patent application (43 CFR 3861.1-3). And two copies of the plat and field notes must be filed with the patent application.

**Claim Must Be Surveyed or Conform to Legal Subdivision**

AIt is well settled that, when a mining or millsite claim cannot be described by legal subdivision (either because the land is unsurveyed or the claim will not conform to a legal subdivision), BLM properly rejects a patent application when the applicant fails to survey the claim and submit the mineral survey along with his application.@ *Jack K. Carter*, 142 IBLA 1, 5 (1997).

**If Break in Chain of Title After Mineral Survey, a New Survey is Required**

In *Walter Bartol*, 19 IBLA 82 (1975), the Board considered a case where mining claims were originally located July 26,1926 and a mineral survey was approved May 29,1957. However, the claim was subsequently declared null and void by decision dated May 1, 1967. The claimant then relocated December 17, 1969 and filed a patent application attempting to use the mineral survey approved May 29, 1957. Upon determining that a new survey and plat must be made subsequent to recording the relocation, the Board stated at 84:

> ... A survey and plat of mineral claims must be made subsequent to the recording of the, location of the claim. Moreover, when the original location is made by survey of a mineral surveyor, such earlier survey cannot be substituted for the mineral survey required by the regulation. The official survey of a mining claim must be in accordance with the recorded notice of location as of record at the time of the order authorizing the survey. *Rose No. 1 and Rose No. 2 Lode Claims*, 22 LD 83 (1896).

**Manual of Survey Instructions**

The method and procedures used for surveying mining claims are given in the *Manual of Surveying Instructions*, published in 1973 by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

**Mineral Surveyor**

The first step in the patent process is to secure a mineral surveyor. This is done by acquiring a list of approved and active mineral surveyors from the State Office of the BLM. Any surveyor on the list is qualified to conduct mineral surveys in all states. Fees, which may be negotiable, depend on many factors such as accessibility to the claim, existing survey monuments, vegetative cover, conflicts with other claims, workings, etc. Other than conducting the mineral survey, the mineral surveyor is not allowed to participate in the patent process.

Mineral surveyors are appointed under 30 USC 39 by the Chief, Division of Cadastral Surveys of the BLM at Washington, D.C. The mineral surveyor is exempt from registration by a state as long as he is working under a mineral survey order as an employee or official of the Federal government. Before appointment as a mineral surveyor, a 16-hour examination must be passed covering land survey methods, mining and mineral law. As of March 1, 1982 (*Instruction Memorandum* No. 82-288), there were 128 surveyors on the official "Roster of Mineral Surveyors" currently holding an appointment to conduct mineral surveys for mineral patent applicants. Mineral survey orders are issued only to persons listed on this roster and persons on the roster are authorized to conduct mineral surveys in all of the Public Land States. 43 CFR 3861.5-1.

Mineral surveys must be conducted by or under the direct field supervision of the mineral surveyor. Supervision of field surveyors may not be delegated to employees who are not mineral surveyors. A mineral surveyor is considered to be an employee of the BLM and thus cannot be an employee of the claimant, or locate mining claims. *Waskey v. Hammer*, 233 US 85 (1912).

The claimant is responsible for making satisfactory arrangements for the mineral surveyor to conduct the survey and the United States is not involved in the contract arrangement. 43 CFR 3861.4-1. Although the BLM has the authority to set the maximum charge for a mineral survey, it generally does not become involved in this private arrangement.

Mineral surveyors are restricted by regulation (43 CFR 3861.3-1) as to what duties they may perform for the claimant. The surveyor is not allowed to prepare any papers in support of the patent application for the mineral claimant. The surveyor must have nothing to do with the case outside of his or her official capacity as surveyor.

**Application Procedure**

Before applying for a mineral survey it is important to thoroughly search the Bureau of Land Management and county records for evidence of existing mining claims. At the state office

of the BLM one should examine both the Master Title Plats and the geographic index of recorded mining claims.

If a contiguous group of claims lies in two states, an application for survey should be made in both states. The state in which most of the claims are situated processes the application; however, a survey number is assigned by each state to the claims that exist in the state.

Two or more claims in contiguous block may be included in a single application. Such claims do not qualify as contiguous if they only make contact at their corners; it is required that the boundary lines overlap. If two groups of claims are separated by one or more claims (all contiguous) already surveyed, the two groups may be included in the same survey provided all have the same owner.

Applications for survey are made by the claimants or his agent on current form 3860-5. When the application is completed, it is filed with two copies of the location notice, one of which must be certified by the county recorder or other appropriate county official.

**Charges for BLM Preparation of Plats and Field Notes**

With the application for mineral survey, the claimant is required to furnish a deposit to cover the BLM survey office costs in connection with processing the survey and final preparation of the plat and field notes to be furnished to the claimant. 43 CFR 3861.6-1.

**Order for Mineral Survey**

An order for a mineral survey must be issued from the state office of the BLM in the state where the claim is situated. The mineral surveyor designated in the survey order must personally conduct the survey. After receiving an order for a mineral survey, if the applicant should find that the description of the claim's boundaries on the location notice does not conform to the boundaries as staked on the ground, the surveyor should file a certified copy of an amended location certificate describing the claim's boundaries as they actually exist on the ground. The applicant must then obtain an amended order for survey.

**Procedure for Mineral Survey**

1. Acquire application for mineral survey and roster of authorized mineral surveyors from appropriate BLM state office.

2. File application, filing fee and two copies of location certificate -- one of which must be certified by the custodian of the records where the mining claims are filed.

3. Application contains the following information:

    a. applicant's name and address

b. claim name(s), location dates, amended locations, recordation references

c. location of claims -- section, township, county, state

d. name of mineral surveyor

4. Chief of cadastral surveys examines for completeness the application for survey request:

a. examines land status records to determine if land is open to location

b. issues survey order

5. Mineral surveyor conducts survey and submits plat and field notes to the chief cadastral surveyor for approval.

**Ties to the Public Survey System**

Ties are made to the public land survey, U.S. location monuments (formerly called mineral monuments), adjacent mineral surveys and conflicting claims. A solar or Polaris observation is made to establish the true bearings of the claim lines. The corner of a location which is used to make a tie to a public survey corner is generally designated corner number 1, with the remaining corners numbered in consecutive order.

In areas where there is no corner of the public survey system within two miles of the mineral survey, a location monument is established. The site for such a monument should be a prominent point, easily visible from all directions and reasonably free from destruction by natural causes. The monument may consist of an iron post or a stone with the letters "USLM" followed by the number of the survey marked on the brass cap of the pipe or chiseled on the stone.

**Conflicting Claims**

All conflicting surveyed claims must be reported in the survey plat and notes as well as all discrepancies found in such surveys. However, if there is a conflicting claim and the applicant believes it is an invalid location, the surveyor does not show it on the final plat.

**Mining Claims Bounded by Navigable Water**

Lands below the mean high water mark of a meandered stream should not be included in a mineral survey. *Argillite Ornamental Stone Co*., 29 LD 585 (1900). In a mineral survey where a mining claim is bounded by a navigable water body, it is proper to run such a boundary as a meander line and the field notes of the mineral survey should state that it is a meander line of the mean high water line and that the corners of such line are meander corners. *Victor A. Johnson*,

33 LD 593 (1905). In *Alaska United Gold Mining Co. v. Cincinnati-Alaska Mining Co*., 45 LD 330 (1916), the Secretary discussed the matter as follows:

> The rule as to meander lines is applicable to mining claims, and where in the course of an official patent survey of a mining claim abutting upon a navigable body of water a meander line has been run, which follows as nearly as practicable the shore line of the water, such shore line and not the meander line, must be taken as the boundary of the claim when patented according to the plat and field notes of the survey.
>
> Where one of the boundaries of a patented mining claim is a navigable body of water, all accretions formed after survey and prior to entry and patent of the tract passed under the patent, and all accretions that may thereafter form become the property of the Riparian proprietor.
>
> If one entire end of a lode claim is delineated by a meander line, the end line is protracted parallel to the inland end line at the farthest seaward point so as to determine and qualify for extralateral rights.

**Survey Monuments**

Monuments are established by sinking a 24 to 30-inch large iron post, ranging from 3/4 inch to one inch in diameter, in concrete. A brass cap, 2 inches in diameter, is placed on top of the pipe which is left approximately 12 to 16 inches above the ground. All monuments, whether claim corners or angle points, are numbered consecutively, beginning with number one. The mineral survey number and the claim number are given on each brass cap.

**Conflicts Between Monuments and Descriptions of Patent Claims**

Where a discrepancy exists, it is a well established general rule that the position of the monuments on the ground prevail over description of the claim on the location notice. This same rule applies in a mineral patent where the position of the mineral monuments controls over the patent description. *Cardoner v. Stanley Consol. Mining & Milling Co*., 193 F 517 (CC Idaho 1911). Federal law (30 USC 34) provides as follows:

> ... The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patent claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto.

**Irregular Claim Boundaries**

> The Interior Department held in Belligerent and Other Claims, 35 LD 22 (1906) that:
>
> There is no warrant in the mining laws for extending, arbitrarily and without any basis of

fact therefor, the vein or lode line of a location in an irregular and zigzag manner for the purpose of controlling the length or situation of the exterior lines of the location to suit the convenience, real or imagined, of the locator. The end lines of a lode location must be straight and parallel to each other and when at right angles with the side lines may not exceed 600 feet in length.

**Certificate of Expenditures and Improvements**

The mining law (30 USC 29) requires that at least $500 shall be expended upon a mining claim as a prerequisite to patent. The mineral surveyor prepares a certificate of the value of the improvements and files it with his field notes. On this form the surveyor estimates the amount of actual expenditures made on the claim that directly relate to the development of the claim. Even labor performed on or improvements made outside the boundaries of the claim are within the meaning of the statute when they facilitate the extraction of metals in the claim. *Emily Lode*, 6 LD (1887). The certificate must be filed within 60 days of publication.

**Mineral Surveyor's Report of Expenditures and Improvements**

The mineral surveyor must describe and report the value of all improvements having a direct relation to the development of the claim and the extraction of minerals. Qualifying expenditures may include mine workings and drill holes. Improvements such as buildings, machinery or roadways are excluded from the estimate unless they are used towards development of the claim. Again, improvements made on abandoned claims may not be included, *Aldebaran Mining Co*., 36 LD 551 (1908); however, such improvements are described in the notes and plat. 43 CFR 3861.2-3. Expenditures made by any prior owner of the same location in the patent application do qualify. 43 CFR 3861.2-2. If mill site and lode claims are included in the same patent application, $500 in expenditures are required for only the lode claims.

**Survey Notes**

The final copy of the survey notes is typed on current form 9180-21, which is bound on the left; two carbon copies are made on current form 9180-22, which is bound at the top.

Current form 3860-7, "Certificate of Surveyor," contains the certificate of approval to be signed by an authorized officer of the Bureau of Land Management. This officer may be the State Director or the Chief of the Division or Branch of Cadastral Surveys in the state office. One of these two officers will also approve the expenditure of $500 per claim on current form 3860-8, which is attached to a copy of the field notes. Both the field notes and the form certifying $500 in expenditures are filed with the application for patent. Certified copies of the location notices are also submitted with the plat and field notes.

The original plat and field notes are maintained in the public room of the Bureau of Land Management and are available for public inspection. Copies of these records are also available at a price.

The claimant is furnished with two copies of the field notes and two cloth-backed copies of the plat. One copy of the plat is waterproofed with shellac for posting on the claim before submitting the patent application. One set of field notes and one copy of the plat are submitted with the patent application.

**Cancellation of Surveys**

Once a mining claim is patented, the survey can never be canceled. However, if an unpatented mining claim is declared null and void through contest proceedings or is void for failure to comply with the recordation requirements of the Federal Lands Policy and Management Act, it may be canceled by the same officer of the BLM who approved the survey. The plat of survey is then annotated to show the cancellation.

**Rejection and Cancellation of Mineral Surveys**

Once a mineral survey is approved, the application for survey cannot be rejected. However, before approval an application for survey may be rejected. AUpon approval, a mineral survey becomes part of the public land survey. Thus, if any action were appropriate, it would be cancellation of the mineral survey itself." *Add-Ventures, Ltd*., 95 IBLA 44, 50 (1986).

**Amendment to Location**

Upon completing the preliminary plat, minor adjustments may be made so as to make the end lines parallel and modify the size of the claim if it exceeds the statutory limit. However, such modification must result in the claim boundaries being within the original corners. When claim boundaries require adjustment, it is generally allowable to amend the location notice after the survey order has been issued. Subsequently, this will require an "Amended Application for Survey" and an "Amended Order for Survey" to conform with the amended location notice. If the claim is not properly monumented, the surveyor should not make the survey.

**Amended Surveys**

Under special circumstances amended surveys may be required and all work, including that done by the BLM will be paid for by the claimant. The amended survey must be made in strict conformity with, or be embraced within the boundary of the original survey. 43 CFR 3861.2-5.

**Conditions for Resurvey**

The claim must be resurveyed if its boundaries are changed by amendment after the original survey is approved. A new survey is also required if the claim originally surveyed is later abandoned and then relocated.

**Survey Plat Becomes Official Record of BLM**

A mineral survey, once recorded on a plat of survey and approved by the proper official, becomes an official record of the BLM. At any time after approval, the survey plat may be submitted with the patent application, so long as the lands described in the patent application are the exact lands covered by the mineral survey.

**Posting of Plat and Notice to Apply for a Patent**

In a conspicuous place upon the claim, the claimant is required to post a copy of the plat of survey, a notice of intention to apply for a patent. The notice must include (1) the date of posting, (2) the name of the claimant, (3) the name of the claim, (4) the number of the survey, (5) the mining district and county, and (6) the names of adjoining and conflicting claims as shown by the plat of survey. 43 CFR 3861.7-1.

**Proof of Posting**

After posting the plat and notice, the claimant files two copies of the plat and field notes accompanied by two copies of the statement of at least two credible witnesses that such plat and notice are posted conspicuously upon the claim. Two copies of the notice as posted on the claim are attached to the statement and become a part of the statement. The statement must also give the date and place of posting. 43 CFR 3861.7-2. The plat and field notes filed with the patent application must also be approved and certified by the cadastral engineer.

## PATENT APPLICATION

**Form of the Application**

There is no specific form required for the patent application. The application must contain the requisite information in narrative form and be filed in duplicate.

**Contents of the Application**

The following items concerning the claimant's possessory right to the claim(s) must be narrated:

1. Claimant's possessory right to the claims; compliance by claimant and his grantors with the mining rules, regulations and customs of the mining district or state in which the claim lies and the Federal mining laws.

2. Origin of claimant's possession.

3. Basis of claim to patent.

The patent application should contain the following geologic and technical information (lode claims only, see requirements for placer claims and mill sites in a following section):

1. Give a complete description of the kind and character of the vein or lode.

2. State the amount and value of ore that has been removed from the claim.

3. Show the precise place within the limits of each claim in the application where the vein or lode is exposed and the width of the exposure.

4. Sufficient information should be included in the application to allow the government mineral examiner to confirm the discovery on each claim during the field examination. 43 CFR 3861.1-1(a).

**Purchase Price for Placer Claims**

Placer claims may be purchased at the rate of $2.50 per acre or fractional part of an acre. 43 CFR 3863.1-1. For a claim group the purchase price is computed on a total acreage basis rather than for each individual claim.

**Proof of Improvements for Placer Claims**

If claims are located by legal subdivision and no mineral survey is required, a "proof of improvements" must be filed showing that at least $500 worth of improvements were made on the claim by the applicant or his grantor. Improvements made under a prior location of the same lands do not qualify if the chain of title was broken by a relocation. The "proof of improvements" should consist of the statement of two or more disinterested witnesses. 43 CFR 3863.1-2.

**Description of Improvements (Placers)**

For claims located by legal subdivision with no mineral survey, the applicant must describe in detail all workings on the claims included as improvements. Workings such as shafts, cuts, and tunnels should be described in terms of size, value and distance to the nearest corner of the public surveys. 43 CFR 3863.1-3(d). The statement regarding the description and value of the improvements must be corroborated by the statements of two disinterested witnesses. This proof must be filed in duplicate. 43 CFR 3863.1-3(e).

**Technical Information Required for Placers**

The application for patent in connection with a placer claim should contain certain information in addition to that specified for lode claims (43 CFR 3863.1-3):

1. Furnish data documenting that the lands covered by the application contain valuable placer mineral deposits.

2. Include a statement that the title is sought in good faith for mining purposes and not for the purpose of controlling water courses, or for obtaining valuable timber.

3. If the claim is for placer gold, the following information is required:

    a. the quantity of gold per cubic yard,

        (1) describe how and where the samples were taken

        (2) describe processing of samples and how assay value was determined.

    b. describe the extent of the minable deposit -

        (1) give distance to bedrock and thickness of overlying material

        (2) describe relationship of values to bedrock

        (3) give the total minable reserves

4. If the claim is for building stone or deposits other than gold, describe completely the nature and extent of the deposit and why the deposit is considered valuable.

5. Describe all natural features of the claim, including

        (1) streams and the amount of water carried, (2) amount of timber and other vegetation, and (3) adaptability of the claimed lands to mining or other uses.

**Citizenship**

The proof necessary to establish the citizenship of applicants for mining patents must be made in one of the following ways (30 USC 24):

1. **Incorporated company:** A certified copy of its charter or certificate of incorporation must be filed. A copy of the resolution of the Board of Directors authorizing its agents to file the application, certified to by the secretary of the corporation under seal, is required. The president or vice president of the corporation may execute an application for patent without resolution of the board of directors, provided the president or vice president has orders to do so. It has

been held that a citizen of the United States, acting in the interest or as a trustee of a foreign corporation, cannot make a mineral entry for the benefit of such corporation. *Capricorn Placer*, 10 LD 641 (1890). A corporation organized under the laws of a state, that has members who are citizens of the United States, is deemed to be a citizen of the United States. *U.S. v. North Western Express Stage & Transportation Co*., 164 F 686 (1896). However, the citizenship of the stockholders in a corporation need not be proved to establish its right to patent a claim. *Doe v. Waterloo Mining Co*., 70 F 455 (1895).

2. **Association of persons unincorporated:** The statement of their duly authorized agent, made upon his own knowledge or upon information and belief, setting forth the residence of each person forming such association must be submitted. *O'Reilly v. Campbell*, 116 US 418 (1886). This statement must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the citizenship showing to act for them in the matter of their application of patent. 43 CFR 3862.2-1. If an application is filed by an association of persons, one of whom has no interest in any one or more of the claims included in the application, the application is void. *Golden Crown Lode*, 32 LD 217 (1903).

3. **Individual or an association of individuals who do not appear by their duly authorized agent:** Each applicant must submit a signed statement showing (1) whether he is a native or naturalized citizen, (2) date of birth, (3) place of birth, and (4) present address. 43 CFR 3862.2-1(a).

4. **Applicant who has declared intention to become a citizen or has been naturalized:** The statement must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued with present address. 43 CFR 3862.2-1(b).

5. **Trustee:** The trustee must disclose fully the nature of the trust and the name of the *cestui que* trust; and such trustee as well as beneficiaries must furnish satisfactory proof of citizenship. The names of beneficiaries as well as that of the trustee must be inserted in the final certificate of entry.

If the applicant for a mineral patent resides outside of the land district in which the claim is situated, such applicant may make the affidavit required for proof of citizenship before any notary public of any state or territory (Act of April 26, 1882; 22 Stat. 49; 30 USC 25). The United States Supreme Court has held that an affidavit of citizenship is *prima facie* evidence of the fact. *Hammer v. Garfield Mining & Milling Co*., 130 US 291 (1889).

**Atomic Bomb Project**

For mining claims located after August 1, 1946, the application must state whether the claimant has or has not had any direct or indirect part in the development of the atomic bomb

project. The application must describe in detail the exact nature of the claimant's participation in the project, including whether (as a result of participation) any confidential or official information on the existence of deposits of uranium, thorium, or other fissionable source materials in lands covered in the application. 43 CFR 3862.1-1(b).

**Patent Application Covering Two Land Districts**

If a patent application should include lands covered in two land districts, a complete set of papers must be filed in each office, with the exception that one abstract of title and one proof of patent expenditures will be sufficient. Only one newspaper publication and one posting on the claim is required; however, the proof of posting and publications must be filed in both offices. 43 CFR 3862.1-1(c). *North Clyde Quartz Mining Claim and Mill Site*, 35 LD 455. Land districts for the purpose of patent adjudication are generally states and the boundaries would coincide with the state line.

**Signing in the Land District**

The application must be executed by the claim owner in the land district. However, a claimant who does not live within the land district may have a duly authorized agent within the land district execute the application. 30 USC 29.

The verification of an application for patent to a mining claim by an attorney in fact or agent for the claimant, at a time when the claimant is both resident and physically within the land district is invalid. *Rico Lode*, 8 LD 223 (1889); *C.C. Drescher*, 41 LD 614 (1913). Also, an application verified outside the land district where the claim is situated, although before an officer authorized to administer oaths, is not properly verified. *Home Mining Co.*, 42 LD 526 (1913).

**Application Must Be Signed in Land District**

Section 6 of the Mining Act of May 10, 1872, 30 U.S.C. ' 29 (1994), as amended reads in relevant part: AAny person, association, or corporation authorized to locate a claim * * * may file in the proper land office an application for patent, under oath, showing such compliance * * * .@ The Act of January 22, 1880, 21 Stat. 61, added the following sentence:

> Where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits.

In *Lyle W. Talbot*, 136 IBLA 177 (1996) the Board discussed the case of *Floyd R. Bleak*, 26 IBLA 378 (1976), where a jurisdictional defect, which is not subject to cure, occurred because the claimant failed Ato comply with the statutory filing requirement that he, not his agent, execute the patent application the patent application when the claimant was present within the

land district where his claims were located.@

> In *Bleak*, an agent filed an application for patent of mining claims on behalf of the claimant who was, at the time of filing, a resident of the land district encompassing his claims. The claimant subsequently filed an amended application signed by himself with his appeal and asked the Board for leave to amend his application. The Board denied his request, holding that under 30 U.S.C. ' 29 (1944) and Departmental case law Aa mineral patent application executed by an agent at a time when the claimant is a resident of and physically present within the land district is invalid and cannot be cured by filing a new application, *nunc pro tunc*, and such and application must be rejected.@ 26 IBLA at 380.

In *Lyle W. Talbot, supra*, the appellants= Aapplications for patent were properly executed, but were merely executed outside the land district where the claims were located. This error does not rise to the level of violating a substantial requirement of the law that existed in *Bleak* where the wrong person executed the application.@ 136 at 181. The Board concluded at 181:

> We therefore conclude that the failure of appellants to have the applications for patent executed in the proper land district did not constitute a jurisdictional defect, but was merely an irregularity that was subject to correction. When appellants promptly filed supplements rectifying the noted defect, their supplemental applications should have been accepted for processing by BLM.

**Loss of Option to Patent Claims Is Not Unconstitutional Divestiture**

The case of *Freese v. U.S.*, 639 F2d 754 (Ct. Cl. 1981) involved a claimant who owned five unpatented lode mining claims within lands withdrawn as the Sawtooth National Recreation Area under the authority of the Act of August 22, 1972 (86 Stat. 612; 16 USC 460), also known as the Sawtooth Act. The Sawtooth Act expressly provides that, "Subject to valid existing rights, all Federal lands located in the recreation area are hereby withdrawn from all forms of location, entry, and patent under the mining laws of the United States." 16 USC 460aa-9 (1976). The Act further provides that, "Patents shall not hereafter be issued for locations and claims heretofore made in the recreation area under the mining laws of the United States." 16 USC 460aa-11 (1976). Thus, while the right of possession and enjoyment attaching to valid claims existing upon the effective date of the Act is expressly recognized and preserved, the ability to obtain patents upon unpatented claims is expressly denied.

The plaintiff contended that he suffered an unconstitutional taking by virtue of the denial of his ability to obtain patents upon the five unpatented claims which he held on the effective date of the Act, even though he had not initiated an application for patent by the date of the Sawtooth Act. The Court of Claims concluded as follows (*Freeze v. U.S.*, Id at 756):

> The case before us thus ultimately reduces to the question whether plaintiff has suffered an unconstitutional divestment solely by virtue of the fact that he no longer has the option

to apply for patents upon his claims. Common sense dictates a negative response. At best, plaintiff has suffered a denial of the opportunity to obtain greater property than that which he owned upon the effective date of the Sawtooth Act. This cannot fairly be deemed the divestment of a property interest, save by the most overt bootstrapping.

**Power of Attorney**

A duly authorized agent is a person designated by an individual, or by a group of individuals such as an association or corporation, to act for them on the patent application. Proof of the appointment of a duly authorized agent must be by a power of attorney. Such appointment may be made where the claimant is a nonresident or is out of state and the agent is conversant with the facts to be established by affidavit. *BLM Manual* 3862.11CI.

**Service Charge for Patent Application**

Each mineral patent application must be accompanied by a nonrefundable service charge of $250 per application for the initial mining claim or site. An additional $50 must be submitted for each additional mining claim or site included within the same application. 43 CFR 3862.1-2.

**Payment of Purchase Price for Lode Claims**

If there is no adverse claim after the proof of publication and posting are filed by the applicant, the BLM officer will allow the claimant to pay for the land embraced by a lode claim at the rate of $5 for each fractional part of an acre. 43 CFR 3862.4-6.

**Statement of Charges**

The claimant is required to furnish the BLM with a statement of all charges and fees paid by him for publication and surveys. 43 CFR 3862.4-6.

**Transfer of Claim After Application**

Transfer of a claim made after the patent application is filed will result in issuance of the final certificate and patent in the name of the applicant for patent. In other words, once the application is filed, subsequent transferees cannot amend the application to have the patent issue in their name as such transfers are not recognized. 43 CFR 3862.5-1. If an applicant or new transferee insists on changing the name to the new owner, the application must be withdrawn and a new application must be filed.

**Patents Must Be Pursued With Diligence**

The regulations (43 CFR 3862.6-1) require the applicant to file necessary proofs and make payment for the land within a reasonable time after the expiration period of publication, or

after adverse proceedings are terminated by the courts. Failure to prosecute the application shall constitute a waiver by the applicant of all rights granted under earlier proceedings and the application will be rejected.

If the application is completed within a reasonable time, a final certificate may be issued. If the applicant has not been diligent in compliance with timely filing of the required evidence, the applicant may be required to furnish an updated certificate of title and to republish and repost the notice, since there may have been intervening adverse claims.

**Issuance of Patents to Aliens and Foreign Corporations**

In *Melvin Helit v. Gold Fields Mining Corp.*, 113 IBLA 299, 317-18 (1990), the Board described the status of aliens and foreign corporations as mineral patent applicants:

> * * * [S]ince at least 1899 the practice of the Department of the Interior has been to issue patents to a corporation organized under the laws of the United States or any state or territory irrespective of the ownership of stock of the corporations by persons, corporations, or associations who are not citizens of the United States. *See Clark's Pocket Quartz Mine*, 27 L.D. 351 (1898). The regulations provide that the citizenship of a corporation is established by filing a certified copy of its charter or certificate of incorporation. 43 CFR 3862.2-1. * * * *In re Pacific Coast Molybdenum Co.*, 75 IBLA 16 at 37-39, 90 I.D. 352 at 364-65 1983); *Solicitor's Opinion*, M-36738 (July 16, 1968); *Instructions*, 51 L.D. 62 (1925).
>
> It is indisputable that the Department's construction of the provision allows aliens, as well as foreign corporations, to locate and hold mining claims by forming a corporation under the laws of a state or territory.

**Department Determines if Claim in Patent Application Valid under Both Federal and State Law**

The "issue of the validity of a mining claim is also the ultimate concern of the Department when a patent application has been made, and it necessarily has the power to inquire into and determine whether the location is valid under both Federal and state law." *Scott Burnham*, 100 IBLA 94, 129 (1987).

**Two Patent Applications for the Same Lands**

In *Scott Burnham, supra* at 116, n. 7, the Board discussed the problem where two patent applications are filed on the same land:

> A number of early Departmental decisions held that acceptance of a patent application precludes acceptance of a second application for the same land, although when the matter

was raised by a third party it was frequently determined that the irregularity of accepting a second application could be waived by the Department. *See International Asbestos Mills & Power Co.*, 45 L.D. 158, 161 (1916), and cases cited therein; *Stemmons v. Hess*, 32 L.D. 220 (1903); *Rocky Lode*, 15 L.D. 571 (1892); *Hall v. Street*, 3 L.D. 40 (1884); *Rebellion Mining Co.*, 1 L.D. (1881). Although not recently applied, the rule appears to have continued in effect.

**Patent Application Does Not Segregate Land from New Locations**

The filing of a mineral patent application does not segregate lands from entry under the mining law. However "with the issuance of a Final Certificate of mineral entry, the land encompassed by the mining claim is segregated from the location of other claims and may not be located by another. *Union Oil Company of California*, 65 I.D. 245, 253 (1958); *McCormack v. Night Hawk & Nightingale Gold Mining Co.*, 29 L.D. 373, 377 (1899); *Leary v. Manuel*, 12 L.D. 345 (1891); *F.P. Harrison*, 2 L.D. 767 (1882)." *Scott Burnham*, *supra* at 109. Of course "it is indisputably the law that a valid mining claim segregates the area it encompasses from the acquisition of competing rights." *Id.* at 108. But keep in mind that "any segregative effect attributed to a patent application could not be absolute. The mining laws permit the relocation of a mining claim by a rival locator when a claim has been abandoned by failure to perform annual assessment work. *Id.* at 109.

**No Sworn Statement Unless Regulations Require It**

Proof of improvements and proof of posting of notices on claims need not be sworn affidavits. In *Dennis J. Kitts*, 84 IBLA 338, 340 (1985), the Board held that "written statements in public land matters under jurisdiction of the Department of the Interior need not be made under oath unless the Secretary in his discretion shall so require." In this case the applicable regulations do not require sworn statements. 43 CFR 3861.7-2 and 3863.1-2. By contrast, 43 CFR 3862.4-5 requires a "sworn statement" with regard to an applicant's proof of publication and posting.

**Final Certificate**

When all the above-mentioned requirements are satisfied, the "mineral entry final certificate" (form 1860-1) is issued. This is accomplished when the BLM adjudicator completes page 1 of the two-page form and notifies the applicant by letter that the "final certificate is issued." Only the original of the final certificate is prepared and it remains with the case file. A copy of the letter is forwarded to (1) the county recorder, (2) the affected surface management agency and (3) current licensees, permittee, lessees or contractees are notified that their rights may be terminated.

Completion of page one of the form indicates that the applicant has complied with all of the statutory provisions of posting, payment, etc. under 30 USC 29. Upon issuance of the final certificate, the requirements for annual assessment work ceases. The second page of the form is completed after all requirements are completed and just before preparation of the patent

document.

**Request for Mineral Examination**

After the final certificate is completed, a copy of the case file is forwarded to either the BLM district manager or regional forester together with a request for examination and report. The field examination of the claim(s) and preparation of the mineral report containing recommendations on the validity of the claim are performed by a geologist or mining engineer employed by the Bureau of Land Management, U.S. Forest Service, or the U.S. Park Service.

**Mineral Patent Does Not Require EIS**

The issue on appeal in *State of South Dakota v. Andrus*, 614 F2d 1190 (8th Cir. 1980), *cert. denied* 449 US 822 (1980) was whether the Department of the Interior is required by section 102(2)(c) of the National Environmental Policy Act (NEPA), 42 USC 4332(c), to file an environmental impact statement (EIS) before issuing a mineral patent. Specifically, and EIS is required for "major Federal actions significantly affecting the quality of the human environment."

The Pittsburgh Pacific Company (Pittsburgh) filed an application for a mineral patent for 12 contiguous 20-acre placer claims situated in the Black hills National Forest in South Dakota. Pittsburgh, which had discovered 160 million tons of low-grade iron ore, planned to extract the orebody from an open pit at the rate of seven million long tons a year. The State of South Dakota asserted that the Secretary must prepare an EIS before issuance of a mineral patent because the proposed project would take 240 to 1,140 acres from the National Forest and discard approximately 2.3 million tons of waste annually.

The Court reasoned that because the issuance of a mineral patent is a nondiscretionary action on the part of the Interior Department, such patent issuance should be exempt from NEPA's EIS procedure. In acknowledging that the primary purpose of the impact statement is to aid agency decision making, the court's have ruled that nondiscretionary acts should be exempt from NEPA. *Id*. at 1193.

The Court also noted that Pittsburgh had a statutory right to mine the mineral deposit regardless of whether a mineral patent is granted. In other words "the issuance of a mineral patent is not a precondition which enables a party to begin mining operations." *Id*. at 1194. Finally, in ruling that an EIS is not required in connection with a mineral application, Circuit Judge Henley stated at 1194:

> In light of the fact that a mineral patent in actuality is not a federal determination which enables the party to mine, we conclude in present context that the granting of such a patent is not a "major" federal action within the meaning of ' 102(2)(C).

*Also see U.S. v. Kosanke Sand Corp*., 12 IBLA 282 (1973); *In re Pacific Coast Molybdenum Co*., 75 IBLA 16, 35 (1983).

**EIS Not Required Prior to Issuance of Mineral Patent**

AWe have held that an EIS is not required prior to a nondiscretionary Federal action such as the issuance of a mineral patent. *United States v. Pittsburgh Pacific Co.*, 30 IBLA 388, 84 Interior Dec. 282, *aff=d sub nom. State of South Dakota v. Andrus*, 462 F. Supp. 905 (D.S.D. 1978), *aff=d*, 614 F.2d 1190 (8th Cir.), *cert denied*, 449 U.S. 822 (1980). As implementation of the requirements of the Appropriations Act is nondiscretionary, it is not subject to the requirement to prepare and EIS.@ *Daniel D. Koby, American Resources USA, Inc.*, 39 IBLA 131 (1997).

**BLM May Not Reject Patent Application without Notice and Hearing**

On July 9, 1992, Brainard and Jackson filed a mineral patent application for a deposit of building stone in the in the LoLo National Forest of western Montana. By letter dated November 19, 1993, the U.S. forest Service notified BLM that its regulations (36 CFR 228.41(c)) defined the building stone of the APritchard formation Argillite@ underlying the mining claims as a mineral material subject only to sale under the Materials Act of 1947, as amended, 30 U.S.C. 601-604 (1994), and its implementing regulations (36 CFR Part 228, Subpart C). In this letter the Forest Service requested the BLM to reject the mineral patent application. BLM complied with this request and issued a decision in March 1994 pointing out that the administration of the Materials Act of 1947 and its implementing regulations on national forest lands is vested Asolely@ in the Forest Service. Consequently, Brainard and Jackson appealed the rejection to the Interior Board of Land Appeals.

In *Matthew J. Brainard*, 138 IBLA 232 (1997), the Board found two errors in the BLM decision: (1) the BLM should make its own determination that the stone was a common variety, and (2) in cases such as this, involving issues of law and fact, the BLM should initiate contest proceedings to satisfy procedural due process requirements for notice and hearing. The Board said at 236-37:

> FS=s determination that the Pritchard formation argillite underlying the subject claims was a mineral material subject to disposal under the Materials Act of 1947 and 36 CFR Part 228, Subpart C, was, however, not binding on BLM for the purpose of resolving the question of whether the stone was locatable under the General Mining Laws and thus could support the patent application. The decision of BLM in this case errs in two critical respects. First, it abdicates the responsibility of BLM to determine the validity of mining claims which are the subject of a patent application. Further, it purports to defer to an FS validity determination involving issues of law and fact made without the benefit of notice and an opportunity for a hearing. It is well established that the final administrative determination of the validity of unpatented mining claims, including those located on national forest lands, will be made by the Department of the Interior after notice and opportunity for hearing. *Citations omitted*. The authorized officials of BLM plainly did not exercise that authority in the present instance. When FS has determined that the mineral claimed to have been discovered under a mining claim on national forest land is a common variety not subject to location under the General Mining Laws, but rather subject to disposal only under the Materials Act of 1947, thus requiring rejection of

a mineral patent application, the proper recourse is to initiate a Government contest. *Citations omitted*.

**Technical Information Deficiencies in Patent Application**

Informational deficiencies in a patent application such as developmental and environmental costs may be supplied by the Government. A recent Interior decision held that "studies done by the Government may be used to supply any informational gaps that might exist in the patent application standing alone. *United States Steel Corp*., 52 IBLA 319 (1981). In that case the Board held that a patent application will not be rejected as a result of failing to submit additional technical information because the existence of a discovery is a question of fact, and disputed issues of fact must be resolved at a hearing. *Id*. at 32324. *Also See Brittain Contractors, Inc*., 37 IBLA 233, 240-41 (1978).

In *Dennis J. Kitts, supra*, the BLM rejected a patent application for a placer claim partly because the appellant failed to furnish adequate geologic and economic information to prove he has discovered a valuable mineral deposit. In this important case, the Board upheld the BLM and said that a patent applicant "bears the burden of showing in his application that he has made valuable mineral discoveries." *Id.* at 342. The Board also indicated that the geologic and economic information must be sufficient for the mineral examiner to conclude in the office that each claim is valid. The Board stated at 343:

> An applicant has an obligation to support his application for mineral patent with sufficient descriptive information and data to permit the BLM mineral, examiner, on review in his office, to conclude that each claim was valid and that all prerequisites for patent had been met, subject only to confirmation upon field examination. In short, the patent applicant must make a prima facie showing that he is entitled to the patent he seeks. This is a reasonable requirement because, otherwise, BLM would be obliged to waste the valuable time of its mineral examiners to conduct costly field examinations based upon information which did not even show the patent application to be meritorious on its face.

The Board described in detail the inadequacies of geologic, sampling and economic information in the appellant's patent application at 342 and 343:

> Specifically, appellant has provided no meaningful description of the geology on the claims or in the general area; no substantiated description of the quantity and quality of the ore alleged discovered; no description of the discovery points; no description of the samples taken in terms of their location, size, the sampling technique employed, or the means of their evaluation; no description of the $500 in improvements which allegedly have been installed or constructed for the benefit of each of the claims.
>
> Moreover, appellant's economic analysis is wanting in a number of particulars. Among these are his failure to ascribe any cost to labor, his use of $500 per troy ounce as the average price for gold when gold has not averaged that much over a sustained period for several years (as this is written it is $296 p/tr/oz.). His production estimates are based

> upon a nontypical sluice box containing a special matting of his own design, which he says will increase his recovery by up to two and a half times over conventional riffle or matting material. He has failed to submit any evidence which would substantiate his claim that he can, in fact, recover gold in the manner or to the extent described.

The implication of *Kitts* is that a patent application for placer claims should contain the information specified as lacking in the Dennis Kitts application; otherwise an application may be rejected.

In *G. Donald Massey*, 114 IBLA 209 (1990), the Board considered an appeal on a placer mining claim patent application where the claimant objected to BLM's request for the submission of "sufficient details for the mineral specialist of the United States Forest Service to determine whether a valuable mineral deposit has been found." The claimant objected to the BLM's specific requirements that he "describe, among other things, the general geology, the quality and quantity of the mineral deposit, all discovery points, the results of drilling and sampling the claim and of analysis of the samples, the method of mining, processing, and transporting the raw material and the estimated profitability of the mining operation."

The Board held that the "information that BLM required to be submitted is intended to aid in such a determination and, thus, may justifiably be required of a mineral patent applicant. The Board has made it clear that BLM has the authority, and responsibility, to ensure that it receives sufficient information from a mineral patent applicant to determine whether a mineral examination is required:" *Id.* at 214. The Board then quoted from the *Dennis J. Kitts* case and the regulation 43 CFR 3863.1-3(a) which states that a placer application "should contain, *in detail*, such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits not in vein or lode formation." In conclusion, the Board said that "BLM's requirements are consistent with the regulations" and that "it could require that the information be submitted to supplement the application. *Id.* at 214.

**Patent Rejected Because Applicant Did Not Furnish Supporting Information**

In *Karen Lynne Smith Harper*, 126 IBLA 301, 303 (1993), the Board reaffirmed its previous holdings in *Dennis J. Kitts*, 84 IBLA 338, 343 (1985) and *G. Donald Massey*, 114 IBLA 209, 214 (1990) concerning the authority and responsibility of BLM to secure adequate information for mineral patent applications. In the *Harper* case the Board upheld BLM's decision rejecting a patent application because the applicant failed to submit the supporting information requested by BLM. The Board quoted the following from *Dennis J. Kitts*, at 343:

> An applicant has an obligation to support his application for mineral patent with sufficient descriptive information and data to permit the BLM mineral examiner, on review in his office, to conclude that each claim was valid and that all prerequisites for patent had been met, subject only to *confirmation* upon field examination. In short, the patent applicant must make a *prima facie* showing that he is entitled to the patent he seeks. This is a reasonable requirement because, otherwise, BLM would be obliged to

waste the valuable time of its mineral examiners to conduct costly field examinations based upon information which did not even show the patent application to be meritorious on its face. [Emphasis in original.]

**Request for Additional Information Must Be Specific**

It is important that the BLM must be very specific when requesting additional information so that it is clear to the applicant exactly what is needed. *Thermal Energy Co.*, 135 IBLA 291, 321-22 (1996). Although *Thermal Energy* involved a coal prospecting permit, the principle is much the same for establishing the validity of a mining claim. As the Board said in *Thermal Energy, supra* at 322:

> * * * It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. *Citations omitted*. The recipient of a BLM decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. *Citation omitted*.

**Patent Application May Be Rejected If Technical Information Is Insufficient to Support A Patent**

In *United States v. Waters et al.*, 146 IBLA 172, 183 (1998), the Board said Athe mineral examiner is not obligated to develop the information required to support a patent application,@ and if such information is not submitted upon request, the patent application may be rejected. However if the decision is made to contest the validity of the claim for lack of discovery, the examiner may use evidence beyond what is submitted by the claimant. Also, not that in footnote 11 (below) the Board indicates that the primary responsibility of the mineral examiner Ais to assure the accuracy and truthfulness of the information submitted by the claimant.@ The Board said at 183:

> The mineral examiner is not obligated to develop the information required to support a patent application. 11/ If the information presented by the claimant is insufficient to support a patent, the proper procedure is to direct the claimant to submit additional evidence in support of the application. If such evidence is not forthcoming, the patent application may be rejected subject to the right of appeal. If, however, the decision is made to contest the validity of the claim on the ground of lack of discovery of a valuable mineral deposit, the claimant is not limited by the evidence submitted with the patent application.
>
> 11/ The field examination conducted by a mineral examiner as a result of a mineral patent application is undertaken to verify the quantity and quality of the mineralization and the accuracy of the statements regarding the costs and returns from the sale of the minerals submitted in support of the mineral application. The examiner=s primary responsibility is to assure the accuracy and truthfulness of the information submitted by the claimant. *Id*.

at 183.

### Patent Applicant Not Required to Demonstrate Apex

The Interior Department is not under any duty to require that a mineral patent applicant show that the apex of a mineral deposit exists within the claim boundaries before the claim can be held valid and patent issued. *Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent*, 93 I.D. 369 (1986). The Supreme Court has approved the Department's practice of not determining questions of extralateral rights or resolving extralateral rights disputes in patent proceedings. *Lawson v. U.S. Mining Co.*, 202 U.S. 1 (1907).

## SPECIAL REQUIREMENTS FOR MILL SITES

The procedure to be followed in obtaining a patent for a mill site is similar to the proceedings for obtaining a patent to a lode mining claim.

### Survey May Not Be Required

If the public land survey covers the land and the mill site is described by legal subdivision (in conformance with the survey), the mill site does not require a survey regardless of whether it is located independently or in connection with a lode or placer claim. However, under all other circumstances a survey is required. *BLM Manual* 3864.1.

### Improvements

No expenditures or improvements are required for mill site patents.

### Area of Mill Site

The maximum size of a mill site is 5 acres. However, a group of two or more contiguous mill sites may be included in a single application. *Alaska Copper Co.*, 32 LD 128 (1903). There is no limit on the number of mill sites that may be located so long as they are used or occupied for mill site purposes. In *U.S. v. Swanson*, 14 IBLA 158 (1974), the Board held that the government may grant less than a 5-acre tract if a lessor amount of surface area is used or occupied for mining or milling purposes.

### Private Surface

A mill site cannot be located on lands when the surface is privately owned and the United States owns only the mineral title. *U.S. v. LaFaivre*, 13 IBLA 289 (1973).

**Contiguous Versus Noncontiguous Mill Sites**

Where a mill site is used or occupied in connection with a lode or placer claim, the owner may include the mill site and the lode or placer claim in one application, even though they are not contiguous. The mill site lands under application must not be contiguous to the lode since contiguous land is presumed to be mineral in character. However, a mill site may touch the side lines or the end lines of a lode claim if the lands can be shown to be non-mineral in character. *See Coeur d'Alene Cresent Mining Company*, 53 ID 531 (1931).

**Independent Mill Site Application**

The owner of a patented claim may make an independent application for a mill site if the mill site is used in connection with the patented lode claim. *Eclipse Mill Site*, 22 LD 496 (1894); 43 CFR 3864.1 -1 (b).

**Mill Sites for Placer Claims**

The Act of March 18, 1960 (74 Stat. 7; 43 USC 42(b)) allows owners of placer claims to hold nonmineral land for mining, milling, and processing operations in connection with the placer claims. Such mill sites may be patented under the same requirements for survey and notice as are placer claims. 43 CFR 3864.1-1(c).

**Mill Sites for Lodes**

An application for patent to a lode claim may also include a noncontiguous mill site. If the original survey includes both a lode claim and mill site, the lode claim is designated in the plat and field notes as "Survey No. 302A", whereas the mill site is designated as "Survey No. 302B". Also the course and distance from the corner of the mill site to a corner of the lode claim is given in the plat and field notes.

A copy of the plat and notice of application for patent must be conspicuously posted on the mill site just as it is on the lode claim for the 60-day statutory time period. The mill site and lode claim may be covered under the same entry with a single patent issued for the two. The price of $5 per acre and fractional part of an acre is required for mill sites in connection with lode claims. 43 CFR 3864.1-2.

**Custom Mill Sites**

If the owner of a mill site has no lode mining claim, patented or unpatented, and uses such mill site for processing or milling ore, the law allows the owner to receive patent at the same rate as charged for lode claims. 43 CFR 3864.1-3.

**Proof of Nonmineral Character**

Only lands that are nonmineral in character can be located and used or occupied as a mill

site. If the nonmineral character of the land claimed for a mill site is unquestioned, the claimant must submit a statement of two or more persons acquainted with the lands that such lands are nonmineral in character. 43 CFR 3864.1-4.

The application should include a complete description of the geology and the reason the land is considered nonmineral. It should also be documented that the lands are used and occupied for mill site purposes.

### Mill Site Cannot Be Patented Before Associated Lode Claim Is Patented

In *United States v. Shiny Rock Mining Corp*., 112 IBLA 326 (1990) the Board stated at 360:

> ` The Department has long held the position that an appurtenant mill site "shall be patented, if at all, only simultaneously with the lode claim or claims to which it is appurtenant unless * * * the lode claim should have been previously patented." *Pine Valley Builders, Inc*., 103 IBLA 384, 388 (1988), quoting *Union Phosphate Co*., 43 L.D. 548, 551 (1915), which in turn cites *Eclipse Mill Site*, 22 L.D. 496 (1896).

## EXPENDITURES FOR PATENT

### Acceptable Expenditures

Labor or improvements must promote the extraction of mineral from the land or aid the development of claim or be necessary to protect the mining operation. *St. Louise Smelting and Refining Co. v. Kemp*, 104 US 636 (1881).

### Unacceptable Expenditures

If expenditures are used to find or prospect for the mineral rather than develop a mine, they are not credited. *Pruess v. Udall*, 410 F2d 750, *cert denied* 396 US 967. Work done either on or off the claim which has no direct benefit or does not tend to develop the claim for mining purposes cannot be counted.

Milling or ore processing expenditures do not qualify towards the $500 expenditure. The Secretary has specifically held that quartz or stamp mills (*Monster Lode Mining Claim*, 35 LD 493) and lime kilns to reduce limestone to lime (*Schirm-Carey and other Placers*, 37 LD 371) cannot be applied towards the patent expenditure requirement.

Roadways and buildings must be excluded from the estimated value of the patent improvements unless it is clearly shown that they are associated with actual excavations, are

essential to the practical development of the claim, and facilitate the extraction of minerals from the claim. *U.S. v. Smith*, 66 ID 169 (1959).

**Work Done Outside Claim**

Work done outside the boundaries of a claim for the purpose of facilitating the extraction of mineral from such claim, is available for meeting the expenditure requirement; however, the burden is on the applicant to show that work done off a claim is intended for and does benefit the claim. *Cooper Glance Lode*, 29 LD 542. The Secretary has held that the following types of expenditures qualify: (1) tunnel -- *U.S. v. BunkerHill Co*., 48 LD 598; (2) boarding house, bunk house, office, and blacksmith shop -- *Douglass and Other Lodes*, 34 LD 556; (3) diamond drill holes -- *East Tintic Consol. Mining Co*., 43 LD 79; (4) mining dredge to be used on several placers -- *Garden Gulch Bar Placer*, 38 LD 28; (5) roads -- *Tacoma and Roach Harbor Lime Co*., 43 LD 128. However, the cost of construction of a road for the development of several claims cannot be apportioned to a claim which does not benefit. *White Cloud Copper Mining Co*., 22 LD 252 (1896).

**Group of Contiguous Claims**

Although it is permissible to allocate among a group of contiguous claims the value of improvements placed on one of the claims in the group, this can only be done where it is shown that the improvements made on that claim were intended to aid in the development of all of the claims. *U.S. v. Smith*, 66 LD 169 (1959). In *Garden Gulch Bar Placer*, 38 LD 28, the Secretary has held that a mining dredge purchased and placed in working order on a claim group, may apply the cost of purchase toward the patent expenditure so long as the cost was not applied towards any other patented area. However, where surface excavations are made on one claim in contiguous group, the expenditures would not apply because the other claims did not benefit. *Elmer F. Cassel*, 32 LD 85 (1903).

The Secretary established a rule in *William Dawson*, 40 LD 17, that where a group of contiguous lode claims are included in a single application for patent, and the patent is rejected because one of the claims did not have sufficient improvements, the remaining claims, even though no longer contiguous, may be embraced in a single patent. This rule has been held to be equally applicable to placer claims. *U.S. v. The Millfork Oil and Shale Co*., 52 LD 610 (1929).

**Allocation of Group Expenditures**

In *Brittain Contractors, Inc*., 37 IBLA 233 (1978), the Board gave the most recent Interior statement on the allocation of group expenditures. The Board stated at 242 and 243:

> A road or building is not necessarily a mining improvement. 43 CFR 3861.2-3(a); *White Cloud Copper Mining Co*., 22 LD 252 (1896). However, even where such an improvement, common to a group of claims, is shown to be directly associated with actual excavations and essential to actually facilitate the extraction of mineral, there still must be a demonstration that a portion of the value of such improvement can properly be

attributed to each claim in the group for which benefit is alleged. This is not accomplished simply by taking the value of the improvement and dividing by the number of claims. It must first be established that each of the claims derives the direct benefit of the common improvement in that it is essential to facilitate the extraction of ore from that claim. Any claim located after the improvement was constructed cannot be credited with any portion of the value of the improvement regardless of how beneficial it may be to that claim. Where the work or improvement is qualifying and the attendant benefits inure to a number of claims in a group, then each such claim may be credited with an equal, undivided, aliquot share of the value of the common improvement. *Aldebaran Mining Co*., 36 LD 551 (1908); *James Carretto and Other Lode Claims*, 35 I.D. 361 (1907).

Further, the BLM decision correctly held that an improvement common to a group of claims cannot be credited where there is a scheme of successive development of such claims unless there is an expenditure for the direct benefit of each, citing *U.S. v. Wood Placer Mining Co.*, 32 LD 401, 402 (1904).

**Relocation or Break in Chain of Title**

If a claim is relocated and an application for patent is made under the new location, any improvements or labor by the original locator before the relocation, cannot be applied to the $500 expenditures for patent. *U.S. v. Smith*, 66 ID 169 (1959). It has also been held that improvements made on the ground by one not in privity with the claimant may not be credited. *C. A. Sheldon*, 43 LD 152.

**Mineral Survey Cannot Be Credited**

An official survey of a mining claim cannot be credited as annual assessment work or expenditure required as a prerequisite to patent either under the act of March 2, 1907, which pertains to mining claims in Alaska, or under R.S. 2324 concerning mining claims in general. 52 LD 561.

**Certificate of Surveyor**

An applicant for patent must file a certificate showing an expenditure of $500, and if the filed certificate does not show such expenditure, additional time to make further improvements cannot be granted, but the entry allowed on such proof must be canceled. *White Cloud Copper*, 22 LD 252 (1896). Also, the certificate is not conclusive upon the Land Department. If evidence shows the certificate to be incorrect, the Department may disregard it and require further showing of improvements. *C. A. Sheldon*, 43 LD 152.

**Reasonable Value of Work**

In determining whether the requisite expenditure of $500 in labor or improvements has been made upon a mining claim, the proper test is whether the reasonable value of the work performed or improvements relied upon amounts to that sum. *Samuel R Beatty*, 40 LD 486

(1912).

### Affidavits and Good Faith

Affidavits and other statements concerning the value of improvements given by witnesses for an applicant for a mineral patent are not conclusive on the Government. *U.S. v. Smith*, 66 ID 169 (1959). Furthermore, good faith must appear in the matter of expenditures. *Good Return Mining Co*., 4 LD 221 (1885).

### Expenditures Insufficient: A Question of Fact

In *Brittain Contractors, Inc*., 37 IBLA 233 (1978), the Board held that the BLM cannot reject patent application for failure to make sufficient expenditures. The sufficiency of expenditures is a question of fact that must be determined at a hearing. In that case the Board said:

> We conclude, therefore, that it was proper and appropriate for the BLM to ask for additional details which would indicate whether these several legal requirements had been met by the patent applicant. However, to the extent that issues of fact are raised by the applicant's showings, the patent application should not be rejected unless and until the findings of fact and conclusions of law adduced through a contest proceeding finally determine that rejection is required.

## CONTIGUOUS CLAIMS IN PATENT APPLICATION

### Contiguous Claims

Claims included in a single application must be contiguous, with several exceptions. The survey must conform to the lines of the claim's location or be contained by the claim's boundaries. If two or more tracts in a single location are contiguous by cornering with each other, such location is not considered to be valid. *Gomeira Placer Claim*, 33 1,D 560 (1905); *Hidden Treasure Mine*, 35 LD 485 (1907). An owner of several claims who has received patent for certain contiguous claims in the group may apply for patent to the remainder in one application, even though they are not contiguous to each other, if each is contiguous to the body of land embraced in the patented claims. *Wagner Assets Realization Corp*., 53 LD 614 (1932).

Concerning patent applications for contiguous groups of claims held in common ownership, the Interior Department held in *James Carreto*, 35 1,D 361 (1907):

> Each of a group of contiguous mining claims held in common and developed by a common improvement has an equal, undivided interest in such improvement, which is to

be determined by a calculation based upon the number of claims in the group and the value of the common improvement.

**Claims Must Be Contiguous**

An application for patent may embrace two or more lode claims held in common only where such claims are contiguous within the meaning of the public land laws, and claims which merely corner on one another are not contiguous. *Hidden Treasure Mine, Supra*. The word "contiguous" as used in the public land laws means "adjoining" or "abutting," and lands which do not actually come in physical contact with one another are not "contiguous." *Mrs. M. H. Wildermuth*, A-27409 (Jan. 30, 1957).

A single application may include placer and lode claims where the land lies in one body and the claims have a common ownership. It does not matter that one or more of the intervening claims are patented so long as all are in the common ownership of the applicant. *Wagner Assets Realization Corp*., 53 LD 614.

**Intervening Claim Rejected**

The rule in *William Dawson*, 40 LD 17, that on rejection of one of the claims in a patent application for lack of sufficient patent expenditures, the remainder may be retained and embraced in a single patent even though noncontiguous. This rule applies to both placer and lode claims. *U.S. v. Millfork Oil and Shale Co*., 52 LD 610.

**Mill Sites Will Not Satisfy Necessary Contiguity**

The existence of a mill site between two claims will not satisfy contiguity, *Hales and Symons*, 51 LD 123 (1925); also if there has been no discovery on the intervening claims, which are necessary for contiguity, entry may only be permitted and patent issued for the particular claim upon which the notice and plat were actually posted, provided a discovery and sufficient expenditures were made on such claim. *Bunker Hill Mining & Conc. Co*., 45 LD 501 (1916).

**Reason Claims in Application Must Be Contiguous**

In *Charles House*, 33 IBLA 308, 309-10 (1978), the Board discussed the basis for the requirement that all claims in a patent application must be contiguous:

> Where more than one noncontiguous mining claim is included in one mineral patent application, it is likely that the mineral characteristics and productivity of each constituent claim will be different. The mineral deposits in the claims are unlikely to be associated with the same geological occurrence, due to the geographical separation between the claims. Similarly, the prospects of successful production from each claim may vary. Thus, owing to their geographical separation, the claims are apt to be of disparate natures in aspects critical to the validity of the mineral patent application.

It does not suit convenient administration to consider disparate claims under one application. The casework concept, involving assembly of all information concerning one specific claim, or group of claims, is not suited to the consolidated consideration of two or more tracts of land remote from each other which are likely to be of disparate natures.

Moreover, an application for a mineral patent application must be accompanied by payment of a $25 service charge. 43 CFR 3862.1-2, 3863.1(a). Administration of a mineral patent application is necessarily complicated and made more expensive by the inclusion of multiple noncontiguous claims. Field inspections must be made in at least two different geographical locations. Reports on mineral conditions, which are likely to be different at the different locations, must be made at each location. An applicant may not increase the costs of administration of a mineral patent application by including in it multiple noncontiguous mining claims without correspondingly increasing his contribution of service charges toward meeting these costs.

Originally it was the position of the Department that a separate application had to be filed for each claim, regardless of how situated. However, in *Smelting Company v. Kemp*, 104 U.S. 636 (1881), the Supreme Court construed the statute as permitting *contiguous* claims to be included in a single patent application. This is the rule followed by the Department ever since. *Citations omitted*.

...Accordingly, we adhere to the long-standing rule that a single application for patent under the mining laws may not include noncontiguous mining claims.

## LODE IN PLACER

### Known Lodes within Placer Claims

The applicant for a placer claim is required to describe in the application all known lodes or veins, which are in possession of the claimant. *Iron Silver Mining Co. v. Sullivan*, 16 F 829 (CC Colo. 1883). This statement regarding known lodes must also be included in the published and posted notices. If the lodes or veins are owned by other claimants, this fact must also be clearly stated in the application and notices. *Sullivan v. Iron Silver Mining Co*., 143 US 431 (1893).

If a claim includes a lode, even if located after the placer claim, the lode must be surveyed regardless of whether it is claimed or excluded. The lode must be marked on the plat and field notes giving the areas of both the placers and lode claims. A subsequently located vein or lode is limited to 25 feet on either side of the vein unless the lode is less than 25 feet from the nearest boundary of the placer. The 25-foot rule applies whether the claim is owned by the applicant or others. Of course a prior located lode mining claim on a known lode or vein need not be limited to 25 feet on either side of the vein, but the claim must be surveyed and delineated

on the plat whether owned by the applicant or others. lf the application does not contain a statement that a known vein or lode exists, it is considered a conclusive declaration that the applicant has no right to the known vein or lode.

If the lode and placer mining claims are included in one application, the rate of $5 per acre is charged for the surveyed lode claims and the remainder of the placer mining claim is at the rate of $2.50 per acre. *Sullivan v. Iron Silver Mining Co*., 109 US 550, 552 (1883).

If there are no known lodes and the claim is all placer, the fact must be stated in the application and corroborated by accompanying proofs. All known lodes within the claim boundaries must be described in the application. This specific declaration is required by 30 USC 37 and must be furnished for each lode intended to be claimed. All lodes not so declared are excluded by law from all claim by the applicant. 43 CFR 3863.13(b).

**The Statute**

In R.S. 2333 (30 USC 37) we find the law as it provides for lodes within the boundaries of placer claim under application for patent:

> Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter and sections 71 to 76 of this title, including such vein or lode, upon the payment of $5 per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of $2.50 per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section 23 of this title, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

**Historical Background: Lodes More Valuable Than Placers**

In *Reynolds v. Morrissey*, 116 US 687 (1886), the Supreme Court gave the following rationale as to why Congress made a special provision for lodes in placers:

> It is very clear that Congress considered that the vein of mineral-bearing quartz was more valuable than the surface or placer deposit; and it accordingly, when a patent was asked, fixed the price of the former at $5 and of the latter at $2.50 per acre, as represented by the superficial area of the survey. It also for the same reason limited the quantity of the former, which any single claimant could obtain from the government in some cases, to

less than half of what he could obtain of the latter.

This was not done, as suggested by counsel, in special regard to the revenue of the government from this source, but to prevent too much of this rich public mineral falling into the hands of one successful explorer, to the exclusion of others.

But experience had shown that both of these classes of mineral deposits might be found within the same survey of superficial area; and section 2333 makes specific provision for such a case. There was no difficulty in the case of a patent for a lode or vein, for this necessarily must include both the surface by which it was measured and the vein beneath it, But in the case of a placer mine whose deposits were superficial, there might be under it a vein of far more value than the twenty acres of surface mineral.

A man cognizant of the existence of such a vein who could, if he established his right to it as a lode, secure only a limited part of it, if he could cover it with a placer claim, would thereby increase the quantity of this vein over what he could get by making a lode claim, in double the amount; and in some cases, regulated by the state or local mining laws, he might quadruple it. Congress also had to deal with the possibility that a vein might be discovered under the surface of a placer claim after the claimant had received his patent.

**Lode Claims Located Before Placer Claims**

R.S. 2333 does not apply to lodes or veins within the boundaries of a placer claim, if the lodes or veins are located under lode claims that predate the location date of the placer claims. *Sullivan v. The Iron Silver Mining Company*, 143 US 431 (1892).

**Known Vein Versus Located Vein**

The term "known vein" is not to be taken as synonymous with the term "located vein." The term "known vein" refers to "a vein or lode whose existence is known, as contradistinguished from one which has been appropriated by location." *The Iron Silver Mining Company v. The Mike & Starr Gold and Silver Mining Company*, 143 US 374 (1888).

**Lode Location Unnecessary for Known Lode**

A lode location is not necessary before a vein or lode in a placer claim can be a known vein or lode. *Sullivan v. The Iron Silver Mining Company*, 143 US 431 (1892). Furthermore, the formal location of a lode claim is not necessary to exclude the lode from a placer patent. *Railroad Lode v. Noyes Placer*, 9 LD 26 (1889).

**Veins or Lodes Known to Exist Are Available for Location**

AA vein or lode containing valuable mineral deposits >known to exist= as of the date of the filing of the application for [a placer mining claim] patent would be deemed >excepted and excluded= from the patent, and thus now available for location pursuant to a proper lode mining

claim. *See Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co.*, 143 U.S. 394, 402 (1892); *Clark Montana Realty Co. v. Ferguson*, 218 F. 959, 963 (D. Mont. 1914); *Republic Oil & Mining Co.*, 46 IBLA 120, 121 (1980).@ *Bristlecone Mining Co.*, 134 IBLA 389, 392 (1996).

**Patent Excludes Veins or Lodes AClaimed to Exist@ Rather Than AKnown to Exist@**

*Bristlecone Mining Co.*, 134 IBLA 389 (1996), involved a case where A[t]he patent appears also to exclude veins or lodes that were >claimed * * * to exist at the date of the patent. As noted above, the statutory language does not refer to veins or lodes that were >claimed to exist,@ and it has been decided that, in issuing that patent, the United States exceeded its authority in excluding veins or lodes containing valuable mineral deposits merely >claimed * * * to exist at the date@ of the patent, and that all such language is properly treated as a nullity. *See Burke v. Southern Pacific Railroad Co.*, 128 U.S. 669, 704-05 (1914); *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 680 (1880); *Iron Silver Mining Co v. Reynolds*, 124 U.S. 374, 382 (1888).@ *Bristlecone Mining Co., supra* at 391.

**Burden of Proof on Lode Claimant**

The burden of proof is upon the lode claimant to establish that as of the date the application for a placer claim patent was filed, that a vein or lode containing valuable minerals deposits was Aknown to exist@ on the land sought by the placer claimant. *Cripple Creek Gold Mining Co. v. Mt. Rosa Mining, Milling & land Co.*, 26 L.D. 622, 628 (1898); *Bristlecone Mining Co.*, 134 IBLA 389, 392 (1996).

**Vein Not AKnown to Exist@ Simply Because Appropriated by Locations**

It is well established that a vein or lode was not Aknown to exist@ at a particular date simply because the vein or lode was Aappropriated by location@ at that time. *Iron Silver Mining Co. v. Mike & Starr gold & Silver Mining Co.*, 143 U.S. 394, 400 (1892); *Bristlecone Mining Co.*, 134 IBLA 389, 392 (1996).

**Veins or Lodes Not Known to Exist Are Not Available for Location**

Those veins or lodes which may subsequently be discovered within the patented placer claim, and which were not known to exist at the date of application, were expressly included in the patent and are not now available for location. *Bristlecone Mining Co.*, 134 IBLA 389, 392-94 (1996). In Bristlecone Mining Co., supra, the appellant tried to make the case that a known lode existed withing a patented placer claim. In response, the Board described the level of evidence necessary for the appellant to establish a preponderance of evidence:

> Although appellant shows that the area containing the Zeibright Lode was apparently actively mined, its own evidence indicates that this did not occur until the 20th century, when the Zeibright mine was developed. Even the name of the Zeibright mine and lode appears to have long postdated the patenting of the lands now sought. Evidence of discovery and development after the date of application for placer patent may not be

considered. *United States v. Iron Silver Mining Co.*, 128 U.S. at 683; *Cripple Creek Gold Mining Co. v. Mt. Rosa Mining, Milling and Land Co.*, 26 L.D. at 624.

While there is evidence that some vein outcroppings along the strike of the AZeibright Lode@ in sec. 34 might have been visible prior to April 1878, there is no evidence that any prospecting efforts prior to the 1858 location or any subsequent work on the Chamberlain claims had disclosed the existence of the lode before that date, let alone demonstrated that it was valuable. This is required for the lode to be considered Aknown.@ *Aurora Lode v. Bulger Hill & Nugget Gulch Placer*, 23 L.D. 95, 96-97 (1896). As the Supreme Court has held,

> [i]t is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as Aknown@ veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation.

*United States v. Iron Silver Mining Co.*, 128 U.S. at 683; *accord Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co.*, 143 U.S. at 404; *see also Mason v. Washington-Butte Mining Co.*, 214 F. 32, 37 (9th Cir. 1914); *Clark Montana Realty Co. v. Ferguson*, 218 F. at 963-64; 2 Am. L. of Mining ' 54.03 (2d ed. 1984) at 54-8 to 54-9. The evidence shows that the lode was exposed in the vicinity of the claimed lands well after the date patent was applied for or granted.

Evidence of other historical mining activity in the area is inadequate to show that the lode was known to exist on the lands now claimed. Appellant quotes from various written reports that never specifically refer to that land, so far as can reasonably be determined. Although its efforts to identify the sites of 19th-century mining and ore processing activity are very interesting, they fall short of establishing either that there was lode mining activity on the lands now claimed or that it was such as to put the placer claimant on notice of the existence of the lodes later exploited in the vicinity. As the Supreme Court held,

> [a] placer patent conveys to the patentee full title to all lodes or veins within the territorial limits, not then known to exist; and mere speculation and belief, based, not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts, sunk elsewhere in the district, had disclosed horizontal deposits of a particular kind of ore, which, it was argued, might be merely parts of a single vein of continuous extension through all that territory, is not the knowledge required by law.

*Sullivan v. Iron Silver Mining Co.*, 143 U.S. 431 (1892) (syllabus).

In sum, we are not persuaded that, on or before April 12, 1878, the land included

in ME Patent No. 2816 and now sought by appellant was known to encompass a vein or lode containing gold or other valuable mineral deposits.

**Patent Excludes Veins or Lodes AClaimed to Exist@ Rather Than AKnown to Exist@**

*Bristlecone Mining Co.*, 134 IBLA 389 (1996), involved a case where A[t]he patent appears also to exclude veins or lodes that were >claimed * * * to exist at the date of the patent. As noted above, the statutory language does not refer to veins or lodes that were >claimed to exist,@ and it has been decided that, in issuing that patent, the United States exceeded its authority in excluding veins or lodes containing valuable mineral deposits merely >claimed * * * to exist at the date@ of the patent, and that all such language is properly treated as a nullity. *See Burke v. Southern Pacific Railroad Co.*, 128 U.S. 669, 704-05 (1914); *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 680 (1880); *Iron Silver Mining Co v. Reynolds*, 124 U.S. 374, 382 (1888).@ *Bristlecone Mining Co.*, *supra* at 391.

**Placer Patent Conveys All Lodes or Veins Not Known to Exist**

A placer patent conveys to the patentee full title to all lodes or veins within the boundaries of the claim, not then known to exist. So it does not matter what development or discoveries were made by a party after the patent was issued. Nothing disclosed after patent issues that could limit the effect of the patent or except from its scope any vein or lode within the claim limits. *Sullivan v. The Iron Silver Mining Company*, 143 US 431 (1892). Patent for a placer passes title to all lodes or veins contained within the claim boundaries if such veins or lodes are not known to exist at the date application is made. *Maggie Lode*, 14 LD 654 (1892).

**Placer Claim Must Include in Application All Lodes Known to Exist**

R.S. 2333 applies only to lodes or veins not taken up and located so as to become the property of others. If any are not owned, and are known to exist, the applicant for patent for the placer claim must include them in his application, or he will be deemed to have declared that he had no right to them. *Sullivan v. The Iron Silver Mining Company*, 143 US 431 (1892).

**No Title to Lodes Known to Exist (if Undeclared)**

In *Reynolds v. Morrissey*, 116 US 687 (1886), the Supreme Court discusses the effect on a placer patent where a lode is known to exist, but is undeclared:

> We are of opinion that Congress meant that lodes and veins known to exist when the patent was asked for should be excluded from the grant as much as if they were described in clear terms. It was not intended to remit the question their title to be raised by some one who had or might get a better title, but to assert that no title passed by the patent in such case from the United States. It remains in the United States at the time of the issuing of the patent, and in such case it does not pass to the patentee. He takes his

> surface land and his placer mine, and such lodes or veins of mineral matter within it as were unknown, but to such as were known to exist he gets by that patent no right whatever. The title remaining in his grantor, the United States, to this vein, the existence of which was known, he has no such interest in it as authorizes him to disturb any one else in the peaceable possession and mining of that vein. When it is once shown that the vein was known to exist at the time he acquired title to the placer, it is shown that he acquired no title or interest in that vein by his patent.

**Time Vein Must Be Known**

The time at which the vein or lode within the placer must be known in order to be excepted from the grant of the patent is, by section 2333, the time at which the application is made. *The Iron Silver Mining Company v. The Mike & Starr Gold and Silver Mining Company*, 143 US 394 (1892).

**Known to Whom**

In *The Iron Silver Mining Company v. The Mike & Starr Gold and Silver Mining Company, supra*, the Supreme Court discussed the extent that a lode must be known in order to make it a known lode:

> It is enough that it be known, and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government.

A[T]he vein or lode must have been >known to the applicant for the placer patent or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government.= [*Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co.*, 143 U.S. 394, 402-03 (1892)]; (citation omitted). The vein or lode must be known to exist within the boundaries of the placer tract. *See Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co.*, 143 U.S. at 401.@ *Bristlecone Mining Co.*, 134 IBLA 389, 392 (1996).

**Belief Versus Knowledge of a Lode or Vein**

In *Iron Silver Mining Company v. Reynolds*, 124 US 374 (1888), the Supreme Court distinguished between belief and knowledge of a vein, as follows:

> The statute speaks of acquiring a patent with a knowledge of the existence of a vein or lode within the boundaries of the claim for which a patent is sought, not the effect of the intent of the party to acquire a lode which may or may not exist, of which he has no knowledge. Nor does it render belief, after examination, in the existence of a lode, knowledge of the fact.

There may be difficulty in determining whether such knowledge in a given case was had; but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge and thus in effect incorporate new terms into the statute.

Knowledge of the existence of a lode or vein within the boundaries of a placer claim may be obtained from its outcrop within such boundaries; or from the developments of the placer claim previous to the application for a patent; or by the tracing of the vein from another lode; or perhaps from the general condition and developments of mining ground adjoining the placer claim. It may also be obtained from the information of others who have made the necessary explorations to ascertain the fact, and perhaps in other ways. We do not speak of the sufficiency of any of these modes, but mention them merely to show that such knowledge may be had without making hopes and beliefs on the subject its equivalent.

**Known Lodes Must Have Sufficient Mineralization**

In order to establish that a lode was known to exist when a placer patent including it was applied for, it must be established that the (1) lode is clearly defined, (2) would justify development, and (3) is more valuable than the surrounding ground for placer mining. *Clark Montana Realty Co. v. Ferguson*, 218 F 959 (DC Mont 1914). In *Iron Silver Mining Company v. The Mike & Starr Gold and Silver Mining Company*, 143 US 394 (1892), the Supreme Court stated:

It is undoubtedly true, that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute. As said by this court in the case of *United States v. Iron Silver Min. Co.*, 128 US 673, 683: "It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation."

.. It cannot be said, as a matter of law in advance, how much of gold or silver must be found in a vein before it will justify exploitation and properly be called a "known" vein.

... We are told by counsel for defendant that the Father de Smet mine at Deadwood produces ore that runs less than five dollars to the ton, yet is of immense value and constantly worked, because of the large quantity of this low grade ore. So here, the amount of the ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one which justified exploitation and working.

**Burden of Proof on Lode Claimant**

The burden of proof is on the lode claimant located within the prior placer claim to establish by clear and convincing testimony that a valuable lode deposit was known to exist at the date of patent. *McConaghy v. Doyl*, 75 P 419, 32 Colo 92, 97 (1903). Furthermore, all presumptions favor the validity of a placer patent and that at the time of application there was no known vein embraced by the claim. *Montana R. Co. v. Migeon*, 68 F 811, 813 (CC Mont 1895). After the issuance of a placer patent, the Interior Department cannot assume that a known lode existed within the limits of said placer at the date of the application, merely because a conflicting lode location predates the location of the placer. *Valley Lode*, 22 LD 317 (1896).

**Patent Application for Lode Claim**

If a known lode exists within the limits of a placer claim under application for patent, in order to acquire title to the lode, the applicant must also apply for patent to the lode mining claim. *Mantle v. Noyes,* 1885, 5 P 856, *affirmed* 127 US 348.

**Lode in Placer Even Though Detrimental to Placer**

Where a known lode is excepted from a placer patent, the subsequent location and development of the lode is proper even though such location and development would be detrimental to the placer. *McKay v. Mesch*, 274 F 867 (DC Mont 1921).

**Summary: 3 Classes of Cases**

In *Iron Silver Mining Company v. Reynolds*, 124 US 374 (1888), the Supreme Court held that three distinct classes of cases exist under Section 2333:

1. When one applies for a placer patent, who is at the time in the possession of a vein or lode included within its boundaries, he must state the fact, and then, on payment of the sum required for a vein claim and twenty-five feet on each side of it at $5.00 an acre, and $2.50 an acre for the placer claim, a patent will issue to him covering both claim and lode.

2. Where a vein or lode, such as is described in a previous section, is known to exist at the time, within the boundaries of the placer claim, the application for a patent therefor, which does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode.

3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries.

**Security of Placer Patent Titles**

Although a placer patent is *prima facie* evidence that known lodes did not exist on the date of patent application, *Montana Cent. Ry. v. Migeon*, 68 F 811 (CCD Mont 1895), in *McKay v. Mesh*, 274 F 867, 869 (D Mont 1921) the Court pointed out how placer patent titles are never fully quieted. The Court stated at 869:

> If lodes were conspicuous upon the land, like a stone wall or growing trees, and so indubitably "known," general and undefined exceptions of them would be valid, and their existence easily demonstrated in any suit. But they are not. Too often it is that their existence, first discovered long after patent, is seized upon by the covetous and speculative to attack the patent, 10, 20, 40 years subsequent to its issuance, in the hope that the lode may before court or jury be given the character of a "known lode" by the recollections, real or imaginary, of ancient witnesses. And one defeated, another takes his place, *ad infinitum*. In consequence, placer patent titles to lands of great value are never finally quieted and are always doubtful, in theory at least. Instances have occurred where, upon such recollections, years subsequent to patent, lode after lode were so carved out until the entire premises had been held to have been excluded *ab initio* by the patent itself, rendering the latter a mere scrap of paper, conveying nothing. Such might be its fate in this and in any case.

## TITLE REQUIREMENTS

### Title Evidence

Each patent application must be accompanied by either a certificate of title or an abstract of title. The selected documents must be certified by the legal custodian of records of locations and transfers of mining claims (generally the county recorder) or by an abstractor of title. The certificate of title or certificate to an abstract of title must be by a person, association, or corporation authorized by the state laws to execute such a certificate and acceptable to the Bureau of Land Management. 43 CFR 3862.1-3(a). Most claimants find the most suitable method is to use the BLM (Certificate of title form and have it certified by a local abstractor of title. One important reason that abstractors of title find this form 4-1246 acceptable is that the form specifically limits their liability to $100. This is important because most abstractors of title are inexperienced in researching mining titles and are uncomfortable about certifying them. If an abstract of title is not submitted, the regulations (43 CFR 3862.1-3(b)) specifically require that the "certificate of title on mining claims, form 4-1246" be used.

### Documents to Accompany the Abstract of Title or Certificate of Title

The certificate of title or abstract of title must be accompanied by single copies of the original location notice of each claim as well as all amended location notices. All copies must be certified by the legal custodian of the records of mining locations. 43 CFR 3862.1-3(c).

**Certificate to Abstract of Title**

A certificate to an abstract of title must state that the abstract is a full, true and complete abstract of the location notices, all amendments, and all deeds, instruments, or actions of record purporting to convey or to affect the title to each claim. 43 CFR 3862.1-3(d).

**Date of Abstract of Title or Certificate of Title**

When the application for patent is filed, a certificate of title or an abstract of title, which shows full title in the applicant, must be brought down to a date reasonably close to the date of filing the application. Then as soon as practicable, the applicant must file a supplemental certificate of title or an abstract brought down so as to include the date of filing of the application. 43 CFR 3862.1-3(e); *Daniel Cameron*, 4 LD 515.

**Co-applicant Must Have Portion of Title**

If an abstract of title filed by an applicant does not show that a coapplicant has a portion of legal title of record, its application is properly rejected. *Golden Crown Lode*, 32 LD 217, 219 (1903); *John C. Teller*, 26 LD 484, 488 (1898); *John R. Meadows*, 43 IBLA 35, 39 (1979).

**Title Opinion**

When acceptable evidence of title has been filed, the case will be referred to the appropriate office of the solicitor, Department of the Interior for an opinion on whether full possessory title is vested with the applicant.

**Destroyed or Lost Records**

If records have been lost or destroyed, a statement of the fact should be made and secondary evidence of possessory title may be submitted. Secondary evidence may include a statement of the claimant, supported by those of other parties knowledgeable of the facts concerning the claimants location, occupancy, possession, improvements, etc. Also, any deeds, certificates of location or purchase, and any other evidence that would tend to establish the claim should be filed. 43 CFR 3862.1-4.

**Applicant Need Not Show Every Link in Chain of Title**

In *Clark v. Watt*, Civil No. 83-1125 (December 17, 1987), the Idaho Federal District Court considered a case where a mineral patent applicant appealed a decision of the Interior Board of Land Appeals (IBLA). The IBLA decision upheld the BLM rejection of five patent applications, primarily on the basis of title problems. The Federal District Court reversed the

IBLA's decision.

Most significantly, the Court cited and interpreted language in the Interior decision of *John R. Meadows*, 43 IBLA 35 (1979). The *Meadows* decision held that an applicant must demonstrate "that he is the successor to possessory title dating back to the original location of the claim which he seeks to patent, and that he presently has full legal possessory title of record." *Id.* at 38. In interpreting the language in Meadows as it relates to the requirement for a chain of title, the Court stated:

> * * * Should this language be interpreted to require an applicant to show every link in the chain of title back to the original location? If the language is so interpreted, it essentially goes directly against the holding of the case which is that the applicant need not resolve conflicting claims or explain other instruments affecting title. Such an interpretation would also essentially add a new requirement to patent applications. 43 C.F.R. 3862.1-3 sets forth in detail the patent application procedure and says nothing about showing the chain of title. That regulation simply requires a certificate, or abstract, of title. There is no dispute that a certificate of title was filed in this action. * * * Although the certificate of title does not explain what happened to the interest of Thelma Clark, there is no requirement in the regulations that such an explanation be given.

The Court indicates that so long as a Certificate or Abstract of Title is filed by the applicant as required by the regulations, the BLM need not inquire into the chain of title. Apparently in one of the applications, some of the original locators were deleted through the filing of amended location notices with no transfer of interest or other documents to support the removal of the names on the amended location notice. This ignores a long-standing rule in mining law that in order to have the right to amend a claim, one must have present title to the claim. *See United States v. Consolidated Mines and Smelting Co.*, 455 F.2d 432 (9th Cir. 1971); *Tibbetts v. BLM*, 62 IBLA 124 (1982).

**Occupancy Statement (Alaska Only)**

All patent applications in the State of Alaska must include a duly corroborated statement showing (1) that no portion of the lands covered by the application are occupied or reserved by the United States so that such lands are not open to mineral entry, (2) that the land is not occupied or claimed by natives of Alaska, and (3) that the land is unoccupied, unimproved and unappropriated by any person claiming the same other than the applicant. 43 CFR 3862.1-5.

**Interior Decisions Concerning Evidence of Title**

The Applicant must hold full possessory title at the time of application (*Lackawana Placer Claim*, 36 LD 36); but, if he or she is diligent in prosecuting the application, it may be permissible to show title was acquired after the application was filed (*L.L. Squires*, 40 ID 542).

The evidence of title, required by 43 CFR 3862.1-3 to be submitted in support of a mineral patent application need reflect only documents of record purporting to convey or to

affect the title to each location. It is not necessary that the title data also show instruments or actions to the land in the mining claim. ln *Kerr-McGee Nuclear Corp. (on Reconsideration*), 43 IBLA 348, 350-352 (1979), the Board discussed the type of evidence necessary to establish full possessory title. The Board said:

> The essential holding of our earlier decision was that an abstract of title, submitted in connection with a mineral patent application, must reflect, with few exceptions, all transactions affecting the land in the mining claims in issue rather than merely the possessory title to the particular mining claims for which patent is being sought. Upon careful reflection, we are persuaded of the correctness of the view enunciated by Judge Henriques in his earlier dissent.
>
> Our earlier holding that an abstract must reflect virtually all documents affecting the lands in issue is discordant with the adjudication of applications under any of the other public land laws. Under no other public land law, other than the Color of Title Act, 43 USC 1068 (1976), and the implementing regulations, 43 CFR Part 2540, is an applicant under an obligation to demonstrate to the Bureau of Land Management that the land is free from claims of record. There is no cogent reason to impose a greater burden upon a mineral patent applicant than upon any other category of applicants seeking title to public land.
>
> *Lindley on Mines*, Vol. 11 (1897), section 687, supports this conclusion and shows that even before the turn of the century, the abstract of title needed to be directed solely to the mining claim, and not to the land therein.
>
> ... In *Henrietta C. Steele*, 53 LD 26, 30 (1930), Assistant Secretary Edwards essentially concurred in this conclusion stating: "The question for determination in this case is not, who are heirs of the person who is seeking the title from the United States under the application, but whether the applicant has shown sufficiently that she has a mining title to the location for which the patent is sought."
>
> Recently, the Board considered whether an "abstract of title is inadequate under 43 CFR 3862.1-2 in that it did not address all deeds, instruments or actions of record affecting title to the claims..." *John R. Meadows*, 43 IBLA 35 (1979). We held at 43 IBLA 38 as follows:
>
> > By suggesting that Mobil has failed to meet the requirements of 43 CFR 3862.1-3 by not addressing the existence of his conflicting claims in the abstract of title filed with its application, appellant misperceives what is required by this section. It does not require that an applicant demonstrate that his title is legally superior to all other existing claims, but merely that he is the successor to possessory title dating back to the original location of the claim which he seeks to patent, and that he presently has full legal possessory title of record. Mobil's submissions appear to satisfy the requirements of 43 CFR 3862.1-3 concerning the nature of the evidence of its title to the claims which must be presented in support of a patent application. Our finding in this regard relates only to the kind of title evidence

submitted, and does not constitute a finding that it establishes that Mobil has good title or suggest that Mobil's title has been finally approved.

**BLM Must Give Notice to Owners of Conflicting Claims**

The BLM is required under 43 CFR 3833.5(d) to give notice to the owners of any conflicting claims that were recorded pursuant to section 314 of the Federal Land Policy and Management Act of 1976. This is a requirement even though the claims are not identified in the patent application. The regulations speak of any "action" affecting an unpatented mining claim.

## CLAIM LOCATION UNDER SECTION 38

**Possessory Title by Occupancy Under Statute of Limitations**

It is possible to establish title to mining claims and mill site claims (*Dalton v. Clark*, 18 P2d 752 (1933)) when the title records have been lost or destroyed by a provision in R.S. 2332 (30 USC 38). Under this section the applicant for patent will not be required to produce evidence of location, copies of conveyances or abstracts of title. Instead the applicant is required to furnish a duly certified copy of the statute of limitation of mining claims for the state, together with a statement giving the facts concerning (1) the origin of title, (2) the continuation of possession, (3) the area of possession, (4) the nature and extent of mining, (5) any opposition to possession, or litigation concerning the claim, and if so, when it ceased and whether the cessation was caused by compromise or by judicial decree and (6) any other facts having a direct bearing upon the claimants possession of the claim. 43 CFR 3862.3-1.

The primary effect of section 38 (30 USC 38) is to provide that possession of a claim for the statutory period is equivalent to making a location by posting and recording a notice of location. *Humphreys v. Idaho Gold Mine Development Co.*, 120 P 823, 21 Idaho 126 (1912). One must also show the required assessment work was done for the statutory period. *Id*.

Congress made provision in the 1870 Placer Act for situations in which, due to the passage of time, it would be difficult to prove that the initial acts of location, recordation and later transfers occurred as required by law. Section 38 of Title 30 provides:

> Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such

possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter and sections 71 to 76 of this title, in the absence of any adverse claim. 30 USC 38 (1976).

**Certificate of Court Required**

A certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim must state that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before the court affecting the title to any part of the claim for a period equal to the time fixed by the statute of limitations for mining claims in the state other than litigation which has been decided in favor of the claimant. 43 CFR 3862.3-2.

**Corroborative Proof Required**

The claimant should support his narrative of facts concerning possession, occupancy and improvements by corroborative testimony of any disinterested person or persons of credibility who may be aware of the facts in the case and are capable of testifying understandably. 43 CFR 3862.3-3.

**Unbroken Chain of Title**

One must maintain actual unbroken possession of a specifically defined locality in order to constitute actual, exclusive and continuous adverse possession to acquire title under section 38. *Pacific Coal & Transportation Co. v. Pioneer Mining Co*., 205 F 577, 591 (1913). An assignee or successor in interest may also qualify for patent where the original locator acquired a claim through provisions of section 38. *St. Louis Smelting & Ref. Co. v. Kemp*, 104 US 636 (1882). It has recently been held that the patent applicant may tack the predecessor's period of possession to its own if there was a privity of interest between them which was demonstrated by any agreement, conveyance or understanding, where the purpose was to transfer the right and possession of the previous adverse claimant to the successor, and this is accompanied by actual delivery of possession. *Alaska Placer Co*., 33 IBLA 187 (1977).

**Land Must Be Open to Entry**

In order to establish a right to patent by holding and working a claim prescribed by the state statute of limitations, the land must be open to entry at the time the claimant initiated his possessory title. *U.S. v. Midway Northern Oil Co*., 232 F 619 (DC Cal 1916). Furthermore, the period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the claim is situated must run while the lands are open to mineral entry. *U.S. v. Consolidated Mines & Smelting Co*., 455 F2d 432 (CA Wash 1971).

**Discovery Is Required**

Even though a claimant and his grantee have held and worked a claim for a period equal to the time prescribed by the statute of limitation for mining claims of the state or territory in which the claim is located, the requirements for discovery must still be satisfied. *Multiple Use Inc. v. Morton*, 504 F2d 448 (CA Ariz 1974). Section 38 does not establish an independent means of acquiring title to a mining claim, nor does it dispense with the requirement that there be a discovery on each claim. In *Cole v. Ralph*, 252 US 286 (1920), the reason for the discovery requirement is discussed at 305-07:

> The effect which must be given to section 2332, Rev. St., in circumstances such as are here disclosed -- whether it substitutes something else in the place of discovery or cures its absence -- is the matter we have to consider. That the section is a remedial provision and designed to make proof of holding and working for the prescribed period the legal equivalent of proof of acts of location, recording and transfer, and thereby to relieve against possible loss or destruction of the usual means of establishing such acts, is attested by repeated rulings in the land department and the courts. But those rulings give no warrant for thinking that it disturbs or qualifies important provisions of the mineral land laws, such as deal with the character of the land that may be taken, the discovery upon which a claim must be founded, the area that may be included in a single claim, the citizenship of claimants, the amount that must be expended in labor or improvements to entitle the claimant to a patent, and the purchase price to be paid before the patent can be issued. Indeed the rulings have been to the contrary.
> ... As respects discovery, the section itself indicates that no change was intended. Its words, "have held and worked their claims," presuppose a discovery; for to "work" a mining claim is to do something toward making it productive, such as developing or extracting an ore body after it has been discovered. Certainly it was not intended that a right to a patent could be founded upon nothing more than holding and prospecting, for that would subject nonmineral land to acquisition as a mining claim.

In *U.S. v. Haskins*, 505 F2d at 251, the Ninth Circuit Court also held that a discovery must exist within the claim during the period in which the state statute of limitations is running. The Court said:

> Haskins having occupied and worked the ground for more than five years may assert placer locations without proof of recording and posting. He must, nevertheless, prove discovery of a valuable mineral because the statute has no application to a trespasser on public lands, title to which cannot be acquired by entry under the mining laws of the United States.

**Requirement That Claim Be "Held and Worked"**

In *U.S. v. Haskins*, 59 IBLA 1, 90 (1981), the Board held that "weekend visits and simply living on the claim are not "holding and working" within the meaning of 30 USC 38 (1976)." The Board also discussed "held and worked" as follows:

It is important to note that the operative statutory phrase in 30 USC 38 (1976), is "held and worked." Since the entire purpose of section 38 was to obviate the necessity of proving formal location and recording, which acts, of course, to serve to notify the world of the claimant's appropriation of the land, it was obvious that there must be some method by which other parties would be put on notice that the land was under the claim of another. Thus, a claimant was required to prove that he had held or worked his claim in addition to other showings as were required by law.

The early cases which examined the applicability of this provision... clearly recognized that it embraced two separate concepts. Thus, it was generally conceded that performance of annual assessment work would fulfill the requirement that the claims be "worked." *See, e.g., Law v. Fowler*, 261 P. 667, 670 (Idaho 1927). *U.S. v. Haskins, supra* at 52.

The Courts did recognize, however, that "actual possession" of the claim was required and that this encompassed something more than simply performing assessment work. Thus, the Court in *Law v. Fowler, supra*, stated:

> Actual possession therefore means something more than mere compliance with the requirement to do the annual assessment work as a basis of title under claim of adverse possession.

In *United States v. Haskins*, 88 I.D. 925, 949-53 (1981), *aff'd, Haskins v. Clark*, No CV-82-2112-CBM (C.D. Cal. Oct. 30, 1984), the Board made clear that "held" and "worked" are two discrete conditions of 30 U.S.C. 38 (1982). Furthermore, the claimants are required to comply with both requirements for the entire period set by the state by the Statute of Limitations. *Steven Heady*, 110 IBLA 245, 247 (1989).

**Section 38 Claim Must Be Recorded under FLPMA As a New Location**

Where the original location is null and void *ab initio* because the land was closed to entry when the original location occurred, a new location is effectively established if the claimants meet the hold and work requirements of 30 U.S.C. 38 (1982) during a subsequent period when the land is open to entry. *Steven Heady*, 110 IBLA 245, 247 (1989).

In *Steven Heady, supra*, the claimant located his claim in 1940 in an area that was closed to mining by a powersite withdrawal. The claim notice was subsequently recorded with the BLM under FLPMA in 1978. The claimant contended that he had established his location under 30 U.S.C. 38 (1982) by holding and working the claim for the five year period of the state statute of limitations while the land was open to entry. In this case the Board pointed out the special requirements for a section 38 claim. The claimants had recorded under FLPMA in 1978 a copy of the original location notice which was properly declared null and void *ab initio* by the BLM. The Board agreed that a section 38 claim could have been established if the claim was held and worked for a five year period follow the Mining Claim Rights Restoration Act of August 11,

1955, and 1984 when the lands were subsequently withdrawn. However such a section 38 claim must be recorded with the BLM or county as a new location certificate while the land is open to entry. Recordation of the original 1940 location notice would not suffice. *Steven Heady, supra* at 248 (1989). As the Board stated in *Hiram Webb*, 105 IBLA 290, 305, 90 I.D. 242, 251 (1989), "[w]hile the provisions of 30 U.S.C. 38 (1982) do permit the assertion of a location without proof of posting or recording, appellant is still required to comply with all other substantive provisions of the mining laws, including recordation of the claim under FLPMA."

**"Held and Worked" Requires Development**

The "requirement that a claim be held and worked under 30 U.S.C. 38 (1982) has been held to require possession by the claimant that goes beyond the mere performance of assessment work to include the actual, open, and exclusive possession of the claim by the claimant, coupled with development." *United States v. Henri ( On Judicial Remand)*, 104 IBLA 93, 102 (1988); *United States v. Johnson*, 100 IBLA 322, 334 (1987).

**Failure to File Recorded Proof of Labor Indicates Claim Not "Held or Worked"**

Although the failure to record proof of assessment work (as opposed to failure to perform assessment work) is not fatal to a possessory claim under 30 U.S.C. 38 (1982), 88 I.D. 952, the Board has previously recognized that an absence of recorded proof of labor for a substantial period of time prior to a relocation of the claims followed by a resumption of filings is probative of whether the land was held and worked as a claim at the time. *United States v. Henri (On Judicial Remand), supra* at 101.

**Possession Must Be Actual, Open and Exclusive**

The holding and working of a claim for a period of time equal to the state's statute of limitations may be the legal equivalent of proofs of acts of location, recording and transfer provided there was actual, open, and exclusive possession. In *United States v. Johnson*, 100 IBLA 322, 335 (1987), the Board said:

> * * * Maintenance of actual, open, and exclusive possession the claim by the claimant coupled with development has been recognized as required to establish possessory title. *Oliver v. Burg*, 58 P.2d 245, 249 (Ore. 1936); *Springer v. Southern Pacific Co.*, 248 P. 819 (Utah 1926). In *Humphrey v. Idaho Gold Mines Development Co.*, 120 P. 823, 827 (Idaho 1912), the court held 30 U.S.C. 38 (1982) had the effect of eliminating the necessity for proof of posting and recording a notice of location where the claimant of mineral ground has been actual, open, and exclusive possession of the ground for the period required by the statute of limitations for adverse possession of real estate. The court held, however, that marking the boundaries of the claim so as to afford actual notice of the extent and boundaries of the claim, coupled with actual possession and exclusion of all adverse claimants is required. *Id.*

**Minerals Removed without Permission Disqualifies Section 38 Location**

The "holding and working" of a mining claim as required to establish possessory title to a mining claim is not satisfied where minerals are taken by others without permission and without compensation during the period of the statute of limitations. *United States v. Johnson*, 100 IBLA 322, 335 (1987).

**Association Placers: Co-locators Must Have Held and Worked Claim**

In association placer claims, all co-locators must have "held and worked" their claims for a period prescribed by the statute of limitations in order that the 20 acres for each locator to be valid. *U.S. v. Haskins*, 59 IBLA 1, 90 (1981).

**Amended Locations**

If there has been no original location notice, there can be no amended location notice. *U.S. v. 237,500 Acres of Land, More or Less, in Counties of Inyo and Kern, State of Cal.*, 236 F. Supp. 44 (DC Cal 1964), *affirmed* 404 F2d 336.

**Co-existence of Mill Sites and Other Claims**

Although it is well established that a lode claim and a placer claim may co-exist on the same land, lode or placer claims may not co-exist on the same land as mill sites. In *U.S. v. Haskins*, No. 72-246-JWC (C.D. Cal. 1972) at 3-4, the Court discussed the co-existence of lode and placer claims on the same lands and said that "both types of claims can, of course, be made upon the same property and can co-exist, even though in different ownership."

In *U.S. v. Haskins*, 59 IBLA 11 91-93 (1981), the Board held that mill site claims are not compatible with lode or placer claims located on the same lands. The Board first cited *U.S. v. Morehead*, 59 ID 192 (1946), in which the Department determined that a mill site location is adverse to a subsequent placer location. In *Morehead*, the Department said:

> Rights to a mill site are initiated by its use for mining and milling purposes, whereas rights to a mining claim are initiated by discovery of mineral. The change of location from one to the other necessarily involves a change not merely of form but of purpose. The mill site must be located on nonmineral land. By changing the location to a lode claim because it was ascertained that the land therein was mineralized, it was thereby admitted that the mill site was void from its inception, and no mining title can be held to relate back to the inception of a void location. Furthermore, the common improvement work on the mill site could only be applied to the group of mining claims that it tended to benefit. Mill sites are not subject to the annual labor laws and there can be no such thing as the development of a mill site.

**Assessment Work Required to Show Claim Was "Worked"**

Performance of assessment work is a necessary prerequisite to demonstrate that a claim was "worked" within the meaning of 30 USC 38 (1976). It is the claimants burden to establish that the required work had been accomplished during the period of years the state statute of limitations was "worked." In *Ernest Higbee (On Reconsideration*), 79 IBLA 380, 387 (1984), the Board held that the claimant was unable to show that the claim was Aworked." *See U.S. v. Haskins*, 59 IBLA 1, 52-53, 88 ID 925, 951-52 (1981).

**Lode Rights Cannot Be Converted to Placer Rights through Section 38**

Any claim asserted under the provisions of 30 U.S.C. 38 (1982), must have been recorded as required by section 314(b) of FLPMA or it will be deemed conclusively to be abandoned and void. *Hiram Webb*, 105 IBLA 290, 302 (1988). However the recordation of location notices with the County Recorders office is inadequate to record any placer claim asserted under section 38. *Id*. at 305. In other words placer rights cannot inure to a lode location through the auspices of 30 U.S.C. 38. *Id*. at 303.

**Recordation Under FLPMA**

Two recent Interior decisions have addressed the issue of whether claims that were or will be established under section 38 must record under Section 314 of the Federal Land Policy and Management Act (43 USC 1744). *U.S. v. Haskins*, 59 IBLA 1, 106 (1981); Philip Sayer, 42 IBLA 296 (1979). In *U.S. v. Haskins, supra* at 106, the Board stated:

> The recordation provisions of FLPMA required the recording of all claims located prior to October 21, 1976, no matter how located, on or before October 22, 1979, or the claims would be deemed conclusively to be abandoned and void. See 43 USC 17448 (1976). Specific provision was made for recording claims premised or dependent upon 30 USC 38 (1976). *See* 43 CFR 3833.05(I); *Marvin E. Brown*, 52 IBLA 44 (1981).
>
> Since FLPMA also required the recording of new claims within 90 days of their location, it is difficult to see how any new claims can arise, for which recourse to 30 USC 38 (1976) to establish the existence of the claim is necessary possible. Rights of individual ownership of the claim may still be determined by 30 USC 38 (1976), but if that claim has not been duly recorded under FLPMA, it can be treated as a nullity.

In *Philip Sayer*, 42 IBLA 296, 301-03 (1979), the Board discussed the kind of evidence of a claim that could be recorded with the BLM to satisfy section 314 of FLPMA. In this case the Board said:

> Because there is a gap in the recording statute and the regulations currently concerning proof that a claim is being held under this provision of the mining laws, BLM should liberally consider attempts by claimants to record evidence of such claims.

## PUBLICATION

### Publication Period

Prior to publication of the "notice of application for patent" the applicant must furnish the agreement of the publisher to hold the applicant for patent alone responsible for charges of publication. The notice of the application is published for a period of 60 days in a newspaper situated nearest to the claim. If a daily newspaper, the notice is published in the Wednesday issue for nine consecutive issues; if semiweekly or triweekly newspaper, the notice is published in the issue of the same day of each week for nine consecutive weeks. The first day of issue is always excluded in determining the period of 60 days. 43 CFR 3862.4-1. An officer of the BLM will have the notice published in a paper of established quality and general circulation. This paper is designated by the officer as being the newspaper published nearest the claims. 43 CFR 3862.4-3.

The three types of notices, i.e., publication, posting on the claims and posting in the land office, must run concurrently for the full period of 60 days. *Great Western Lode Claim*, 5 LD 510. And no entry can be made until these notices have been given. *Southern Cross Gold Mining Co., et al v. Sexton, et al*, 31 LD 415. If any one of these three notices is insufficient, they are all rendered valueless. *Gross v. Hughes*, 29 LD 467 (1900).

### Post Notice in a Conspicuous Place

The requirement that an applicant for patent shall post a copy of the plat, together with a notice of the application, "in a conspicuous place on the land," contemplates that both shall be prominently and openly displayed, in such position that they can, without being removed be conveniently inspected and read by the public. *Tom Moore Consolidate Mining Co. v. Nesmith*, 36 LD 199. If the applicant should fail to post the plat and notice in a "conspicuous" place on the claim, a new notice is required. *Ferguson v. Hanson*, 21 LD 336 (1895). The notice of an application for a mineral patent must be posted within the exterior limits of the area under application. *Equity Mining and Investment Co*., 43 LD 396 (19l4). However, where the plat and notice were posted in the limits of the claim as located, although on ground excluded from the application, such posting is acceptable. *Hughes v. Gilbert*, 2 LD 756 (1882).

### Published Notice

The published notice should substantially conform to the notice as posted on the claim, and contain sufficient correct data to put persons of ordinary intelligence and prudence interested in the land applied for upon inquiry, and "to enable any one interested to ascertain with accuracy the position of the claim." *Reed v. Bowron*, 32 LD 383 (1904). However it has been held that a misstatement in the published notice of an application for a placer patent concerning the mining

district in which the land is situated, is not fatal to the notice, if the land is accurately described by legal subdivisions and otherwise identified. *Nancy Whitefeather*, 26 LD 25 (1898).

**Contents of the Published Notice**

The published notice must contain the following information:

1. All data included in the notice posted upon the claim.

2. The position of the claim is shown by giving the connecting line between one of the claim corners and either a United States mineral monument or a corner of the public survey.

3. From the corner of the claim, the boundaries of the claim or claim group are described by courses and distances. 43 CFR 3862.4-4.

The three notices must contain all essential aspects of the description, including the connection of the claim with a mineral monument or corner of the public survey, if a mineral survey is required. *Henry Wax*, 29 LD 592; *Broad Ax Lode*, 22 LD 244. The notice of an application for patent on surveyed lands must give a connecting line between the claim and a corner of the public survey; if this is not done, a new notice is required. *The Alice Lode Mining Claim*, 30 LD 481 (1901).

The description in the notice must be in accordance with the official field notes of the survey, *Hoffman v. Venard*, 14 LD 45. This description will be considered sufficient if it designates with reasonable accuracy the position of the claim, *Nielson v. Champagne Mining & Milling* Co., 29 LD 491. For example, an error in the description where the course and distance was made to run east instead of west, but did not mislead the adverse claimant or defeat any right, will not invalidate the publication. *Downey v. Rogers*, 2 LD 707 (1883). However, it has been held that a notice is fatal, if the description is shown in the wrong township. *Frank G. Peck*, 34 LD 682. The notice posted on the claim is also fatal if the book and page of the courthouse reference of the location notice is not included in the notice. *Parsons v. Ellis*, 23 LD 504 (1896). And finally, the exact area of the land applied for must be included in the notices. *Canuck Lode*, 22 LD 711.

**Posting of Notice by BLM**

A copy of the publication notice is posted in the proper BLM office public room for the full period coinciding with the 60-day period of approved publication.

**Adjoining and Conflicting Claims**

The notices must contain the conflicting and adjoining claims and the book and page where the notices of location are recorded. *Gowdy v. Kismet Gold Mining Co.*, 22 LD 624. Where the boundaries of placer claims are adjusted to conform to legal subdivisions of the Government survey and the adjusted claims include land not described in the posted and

published notice of application, republication is necessary. *Instructions*, June 20, 1931, 53 ID 398.

Any land in conflict with a surveyed claim that is excluded in the posting and publication may not be included in the patent. *Woods v. Holden*, 28 LD 24 (1899). As was held in *Silver King Coalition Mines Co. v. Conkling Mining Co*., 255 US 151, a patent can convey only claims as to which notice was properly given.

**Proof of Publication and Posting**

After the 60-day period of publication is completed, the claimant must have the office of publication (the newspaper) furnish the BLM with a sworn statement that the notice was published for the 60-day period, giving the first and last day of such publication. The claimant must also furnish the BLM with his own statement asserting that the plat and notice remained conspicuously posted upon the claim during the same 60-day publication period giving inclusive dates. 43 CFR 3862.4-5.

Affidavit of posting may be made by a claimant whose knowledge is derived from personal observation at various times and from reliable information. *Bright v. Elkhorn Mining Co*., 9 LD 503 (1889). The Secretary has held that an occasional absence of the witness from the mine does not impair the value of the testimony concerning the posting. *Tangerman v. Aurora Hill Mining Co*., 9 LD 538 (1889). However, a defect in the patent proceedings due to the execution of such affidavit outside of the land district cannot be cured by the subsequent filing of a properly verified affidavit. *El Paso Brick Co*., 37 LD 155 (1908).

**Errors in the Notice**

An error in the published notice will not require a new notice if it does not mislead; and the different forms of notice, as published and posted, when taken together, show with accuracy the location and boundaries of the land. *Suburban Gold Mining & Land Co. v. Gibberd*, 29 1,D 558. Clerical errors in posted and published notices will not be held invalid where not designed to mislead or deceive, and no prejudice is shown or alleged, and it appears that such notice, taken as a whole meets the requirement of the law. *Opie v. Auburn Gold Mining and Milling Co*., 29 LD 230 (1899). However, a mineral entry based on an essentially defective notice must be canceled and may not be validated by a republication and reposting of notice of the patent application. *Juno and Other Lode Claims*, 37 LD 365 (1908).

## ADVERSE CLAIMS

**Purpose of Adverse Claims**

The purpose of adverse proceedings is for the courts to determine which party is entitled to own the land in conflict. *Coates v. Union Oil Co. of Cal*., 176 F. Supp. 713 (DC Cal 1959). An adverse claim is the assertion of an alleged better right under the mining laws to the mining ground than the right claimed by the applicant.

Revised Statute 2326, as amended, 30 USC 30 (1976) and the implementing Departmental regulations, require that BLM notify a party who files an adverse claim that he or she is required within 30 days of such filing to begin proceedings in a court of competent jurisdiction to determine the right of possession between rival claimants.

**State Courts Determine Right of Possession**

State courts have been held to be the courts of "competent jurisdiction" to determine the right of possession. *Blackburn v. Portland Gold Mining Co*., 175 US 571 (1900).

**Patented Claims Need Not File**

Those who have already received a patent have no need to file an adverse claim as any subsequent claim would be subject to the patented claim. *Iron Silver Mining Co. v. Campbell*, 135 US 286, 298 (1890).

**Who May File Adverse Claim**

An adverse claim may be filed by any adverse party who in good faith claims a right of possession to the mining ground, mineral deposits, premises, or any part of lands included in a mineral patent application.

**A Co-owner Dispute Does Not Constitute an Adverse Claim**

In *David J. Bartoli*, 123 IBLA 27, 40-41 (1992), the Board discussed the situation where a claim is under patent application and a party, other than the patent applicant, claims ownership of the claim (as a co-owner). The Board indicated that the BLM has the authority to determine whether the patent applicant, one of the parties, is entitled to patent. However, such a dispute does not constitute "adverse claim[s]" under 30 U.S.C. 30 (1988). *Id.* at 40; *Thomas v. Elling,* 25 L.D. 495, 498 (1897); *Coleman v. Homestake Mining Co.* 30 L.D. 364, 367 (1900); *Thomas v. Elling (On Review),* 26 L.D. 220, 221-22 (1898). But, as the Board pointed out in *Bartoli*, "[t]his determination does not bar a subsequent action in the courts seeking title under the doctrine of constructive trust..." *David J. Bartoli, supra* at 40.

**Burden of Proof on Adverse Claimant**

The adverse claimant has the burden of showing ownership of a valid location in conflict and that his right is superior to that of the defendant. *Gwillim v. Donnellan,* 115 US 45, 50

(1885).

**Defendant Cannot Rely on Weakness of Plaintiff's Title**

In an adverse suit on a mineral patent application, the defendant cannot rely upon the weakness of the plaintiff's title. *Murray Hill Mining & Milling Co. v. Havenor*, 66 P 762, 24 Utah 73 (1901).

**Authorized Agent**

The adverse claim may be filed by the claimant's duly authorized agent or attorney-in-fact who is fully aware of the facts stated in the claim. Proof must be furnished that he or she is an authorized agent or attorney-in-fact. 43 CFR 3871.1(b).

**Signing in the Land District**

The statement must be signed within the land district where the claim is situated and, if the claim is signed by an authorized agent, a statement must accompany the filing, stating that it was signed within the proper land district. 43 CFR 3871.1(c).

**Time and Place to File Adverse Claim**

An adverse claim must be filed in the proper BLM office within the 60-day period of publication of the patent application. The published notice should state where the adverse claim is to be filed. *Gross v. Hughes*, 29 LD 467.

**Late Filing**

Upon failure to file a statement of an adverse claim within the 60-day period of publication, it is assumed that no claim exists and there is no later remedy. *Gwillim v. Donnellan*, 115 US 45 (1885).

**Description of the Conflict**

The adverse claim must describe the nature and extent of the conflict, including whether the claim is made as a purchaser or locator. If the adverse claim is made as a purchaser, you must furnish (1) a certified copy of the original location, (2) a certified copy of the original conveyance, or (3) an abstract of title from the proper recorder. If the transaction was verbal, one must describe the date and nature of the transaction, and the amount paid together with a statement of one or more witnesses.

If the adverse claim is made as a locator, you must file a certified copy of the location notice from the appropriate recorder. 43 CFR 3871.2(a).

**Proof of Superior Right**

The adverse claimant has the burden of showing that he or she is the owner of a valid location of the claim in conflict and has the superior right. This may be shown by purchase or location.

**Rights by Purchase**

If an adverse claimant asserts a right by a purchase, a certified copy of the original location notice and a certified copy of the original conveyance or an abstract of title from the county recorder must accompany the filing. If the transaction was made orally, the nature of the purchase, the date and the amount paid, and the supporting statement of at least one witness must be filed.

**Right by Location**

If the adverse claimant asserts a right as a locator, a copy of the location notice, certified by the proper county recorder, must accompany the filing of the adverse claim.

**Description of the Claim**

In order to show the boundaries and extent of the claim, the adverse claimant must file a plat showing the entire claim, its relative position with the one against which the claim is made, and the extent of the conflict. If the mining claim under application and the adverse claim have been surveyed by a mineral surveyor, a certified copy of the mineral survey of each claim must be filed. However, if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, is allowed to describe the adverse claim in the same manner without a survey on plat. 43 CFR 3871.2(b). If it is not possible to obtain a survey, the adverse claim may be sufficiently shown by an allegation giving the boundaries and extent, supported by affidavits and plats showing that the claim under application for patent is contained within the mining claim of the adverse claimant.

**Content of Statement of Adverse Claim**

Although it may not be required that the adverse claimant include specifics of the claim to title, it is necessary to allege ownership and possession of the property and that the patent application is unlawfully asserting a claim adverse to the adverse claimant.

**Adverse Claimant to Commence Proceedings**

If the adverse claim is filed within the 60-day publication period, the adverse claimant is notified by administrative decision to commence proceedings within thirty days from the date of filing the adverse claim. Such proceedings must be commenced in a court of competent jurisdiction to determine the question of right of possession. The claimant must prosecute with reasonable diligence to final judgment and that failure to do so must be considered a waiver of the adverse claim. 43 CFR 3871.3; *Mason v. Washington-Butte Mining Co*., 214 F 32, 35 (CCA

Mont 1914).

**Failure to Answer Complaint Is Admission of Charges in Complaint**

Failure to answer a complaint issued by an adverse claimant is taken as an admission of the truth of the facts stated in the complaint. Such failure results in a judgment by default which is just as conclusive as an adjudication between the parties. *Last Chance Mining Co. v. Tyler Mining Co*., 157 US 683 (1905).

**Patent Proceedings Stayed**

When an adverse claim is filed, all proceedings on the application for patent will be stayed with the exception of the completion of the publication and posting of notices and plat and the filing of the necessary proof. The patent proceedings are stayed until the controversy is adjudicated in court or the adverse claim is waived or withdrawn. 43 CFR 3871.5; *Richmond Mining Co. v. Rose*, 114 US 576, 585.

Proceedings cannot be resumed until the adverse claim is waived or decided by a competent court. *Henry C. Bolyard*, 53 ID 556; *John R. Meadows*, 43 IBLA 35, 37 (1979). In either case and whether suit is commenced or not, a certificate of the proper state court is necessary to restore jurisdiction. If the suit is dismissed by fraud or mistake, the land office cannot resume jurisdiction. *McEvoy v. Hyman*, 25 F 539. If the applicant amends his application to exclude the land in dispute, patent may not be issued without awaiting outcome of the suit. *Last Chance Mining Co. v. Tyler Mining Co., supra*.

A patent is void if issued for a lode claim at a time when the claimants are litigating the claim in a state court. *Richmond Mining Co. v. Rose*, 114 US 576 (1885).

**Annual Assessment Work Not Required During Adverse Proceedings**

After commencement and during adverse proceedings against a mining claim, the applicant for patent is not obligated to maintain annual Assessment work. *Chicagoff Extension Mining Co*., 53 ID 669 (1932).

**Adverse Claims Only by Rival Claimants**

The mining laws do not provide for adverse proceedings against an applicant for mineral land by a party claiming same lands under laws providing for the disposal of nonmineral lands. *Ryan v. Granite Hill Mining and Development Co*., 29 LD 522 (1900).

In *Union Oil Co*., 65 ID 245, 248-49 (1958), the Department discussed adverse claims as follows:

The Department has for many years held that an adverse claim must be filed only by rival

> mining claimants and that an oil and gas lessee does not fall into that category. In *Joseph E. McClory et al*., 50 LD 623 (1924), an oil and gas permittee filed a protest against a mineral patent application during the period of publication. The local officers treated the protest as an adverse claim. The Commissioner of the General Land Office (now Director of the Bureau of Land Management) held that the Protestant was not asserting his claim under the United States mining laws and that therefore his protest could not be treated as an adverse claim under sections 2325 and 2326 of the *Revised Statutes*.

However in *Chemi-Cote Perlite Corporation v. Bowen*, A-30404 (Sept. 30, 1965) 72 1 D 404, the Board held that a conflict between a lode claimant and a placer claimant is properly resolved by the filing of an adverse claim and the institution of judicial proceedings.

**Mill Site Versus Mining Claim**

In *U.S., George B. Conway, Intervenor v. Grosso*, 53 ID 115 (1930), the Secretary held that a conflict between a prior mill site and placer claim is not the subject of an adverse claim, but of protest. The Secretary said:

> The rule is supported by the weight of authority in the courts, and in its application the department has held that as between a prior mill site claimant and a placer claimant the only question involved would be the character of the land which is not the subject of an adverse claim, but of protest. *Helena etc. Co. v. Dailey* (36 L. D. 144); *Lindley on Mines*, Sec. 724. Any finding of the court therefore in such a suit as to the mineral or nonmineral character of the land or of any fact relevant to that issue would be considered as advisory and not binding upon the department.

**Tunnel Location Versus Other Claim**

The owner of a tunnel site location should protect his or her location by the filing of an adverse claim and the institution of judicial proceedings. 1 LD 584.

**Patent Application by Adverse Claimant**

An adverse claimant should not, after suit is commenced in court of competent jurisdiction, and while pending, file a patent application for the ground adversely claimed. *Great Eastern Mining Co. v. Esmeralda Mining Co*., 2 LD 704 (1883).

**Conflicting Patent Applications**

The junior application should be treated as an adverse claim when the record shows the existence of the senior application. *Hall v. Street*, 3 LD 40 (1884). By filing an adverse claim against a conflicting junior application and in institution of a suit, a senior applicant for patent does not abandon or forfeit any rights under his or her senior application. Also the pendency of

such an adverse suit does not cause a stay of proceedings on the junior application pending determination of the suit. *International Asbestos Mills and Power Co*., 45 LD 158 (1916).

**Co-owners**

Filing of adverse claims only applies to independent and conflicting locations, and not to co-owners or others who claim an interest in the same location. *Turner v. Sawyer*, 150 US 578 (1893). Those who claim an interest in the same location may assert their rights after patent issues in a court of competent jurisdiction. *Id* at 586.

**Underground Versus Surface Conflicts**

Adverse claims are not filed on prospective underground conflicts. *Lawson v. United States Mining Co*., 207 US 1, 16 (1907), but only on surface conflicts. *Butte & Superior Copper Co*., 249 US 12 (1919).

**Land Under Adverse Claim Excluded From Patent**

Where two or more claims are included in a single patent application and there is a pending contest, protest or adverse proceeding against one of the claims, the applicant may take patent for the land not in conflict without waiving possessory right to the remainder. *Black Queen Lode v. Elcelsion No. 1 Lode*, 22 LD 343 (1896); *Kohnyo and Fortuna Lodes*, 28 LD 451, 562 (1899).

**A Valid Location Segregates Land from Mining Location**

In *Belk v. Meagher*, 104 U.S. 279 (1881), the Supreme Court said "a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing be done." *Id.* at 284. Furthermore a claim located over a valid subsisting claim does not become valid if the original location is abandoned. The Supreme Court stated at 284-85:

> A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. As in this case, all these things were done when the law did not allow it; they are as if they had never been done. On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or pre-emption entry.

However it is possible under the mineral patenting procedures "for a junior locator to obtain a patent if the senior does not adverse." *Scott Burnham*, 100 IBLA 94, 107, n. 3 (1987).

**Character of Deposit Is Conclusively Established by Failure of Rival Claimant to Assert Adverse Claim**

The Supreme Court has expressly held that the character of the deposit as lode or placer is conclusively established by the fact that no adverse claim is asserted to the application for a patent of such lands. *Dahl v. Rauheim*, 132 U.S. 260, 263 (1889). In other words, the Court held that the party who failed to file an adverse suit was estopped from challenging the character of the deposit in a collateral proceeding.

In *Melvin Helit*, 110 IBLA 144 (1989), the Board held that the failure of a rival claimant to file suit as required by 30 U.S.C. 30 (1982) leads to the conclusive establishment of the patent applicants claims as lode claims against the rival claimant who contended that the applicant improperly located the claims as lodes, rather than placers.

**Effect of Judicial Proceedings on Departmental Review**

Unlike litigation over title to real property, Athe judgment in a judicial proceeding between locators determines superiority of possessory title." *Scott Burnham, supra* at 132. The Department is only bound by the judgment of the court as it determines which claimant has the highest right. The Department then determines if the claimant with the highest right has a valid claim and is entitled to a patent. As the Supreme Court stated in *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220 at 232-34 (1904):

> We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of inquiry by the government, or that the judgment necessarily gives them the lodes in controversy. * * * * *
>
> * * * The land office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against the placer location and set it aside, and in that event all rights resting upon such location will fall with it.

**Location of Claims after Publication**

The statement in 30 U.S.C. 29 (1982) "that no adverse claim exists" (if no adverse claim is filed during the publication period) only applies to claims that exist at the time of publication. A claim initiated after the publication period could not have been the basis for an adverse claim. *Scott Burnham, supra* at 113-14. In *P. Wolenberg*, 29 L.D. 302 (1899), *On Review*, 29 L.D. 488 (1900), the rule was established that implied valid claims could be located subsequent to the end of the publication period. The Secretary said at 305:

> The assumption, declared in section 2325 of the Revised Statutes, that no adverse claim exists in those instances where no adverse claim is filed in the local office during the period of publication, relates to the time of the expiration of the period of publication and to adverse claims which might have been made known at the local office before that time. It has nothing to do with adverse claims which are initiated subsequent to that time and which could not therefore have been made known at the local office during the period of publication.

In *Enterprise Mining Co v. Rico-Aspen Co. Consolidated Mining Co.*, 167 U.S. 108 (1897), the Jumbo No. 2 lode mining claim was located by the owner of a tunnel site after a vein was discovered in the tunnel. Another claimant had located the vestal lode claim on the same ground several months prior to the location of the Jumbo No. 2 claim. The Supreme Court held that the right to the vein in the Jumbo No. 2 claim related back to the location date of the tunnel site which predated the location of the senior vestal claim.

In this case the owner of the senior vestal claim had applied for patent and completed the publication period before discovery of the vein in the tunnel. Consequently, the Supreme Court concluded that the tunnel site/Jumbo Claim owner could establish an adverse right because "litigation in the courts is based upon facts and not upon possibilities, it seems to us that nothing was to be gained by instituting adverse proceedings, and, therefore, nothing lost by a failure so to do." *Id.* at 116.

**Claims Located after Publication Period May Not File Adverse Claims**

In *Scott Burnham, supra* at 117-18, the Board held that lode mining claims are not invalid just because they were located subsequent to the period of publication of notice of American Colloid's patent application. Of course, for such claims to be properly located, the land must be available to location. In most cases the claims under patent application would be valid existing claims at the date of application. *See Belk v. Meagher, supra*. After location of a claim which was located after the end of the publication period, a claimant is not entitled to file an adverse claim with the Department. "The statute provides for adverse claims to be filed only 'during the period of publication' and makes no provision for their submission at any other time." *Scott Burnham, supra* at 118.

**Status of Rival Claimants Who Fail to File Adverse Claims**

In *Scott Burnham*, 100 IBLA 94, 116-17 (1987), the Board described how the "statute requires an assumption by the Department that no adverse claim exists. This assumption operates to effect a presumption that the patent applicant holds superior possessory title so that the Department may proceed to determine the question of whether his mining claim is valid under the mining laws." *Id.* at 116. This is true even though other claims superior in title held by rival claimants exist on the same lands. The Board then described the status of such rival claimants at 116-17:

> Rival locators may still have competing claims, and one may be superior in title, but their claims are of no concern to the Department. If rival locators wish to pursue their claims, they must find a forum elsewhere. If the Department determines that the applicant's claim is valid and issues a patent, a rival claim becomes a nullity because there is no longer any Federal land to which it can attach as a location under the mining laws. However, if for any reason the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for the land or apply for patent himself. Thus, while the result of a locator's failure to adverse is that

his claim becomes nullified when patent is issued, this effect is a result of the issuance of the patent, not the assumption that no adverse claim exists as required by 30 U.S.C. 29 (1982).

**Failure to File Does Not Invalidate Claim**

"The controlling statute does not explicitly require the holder of an adverse mining claim to file an adverse proceeding with BLM." *Scott Burnham (On Reconsideration)*, 102 IBLA 363, 366 (1988). If no adverse claim is filed during the 60-day period, it is assumed that no adverse claim exists. *Id.* The assumption required by the statue "operates to effect a presumption that the patent applicant holds superior possessory title so that [the] Department may proceed to determine the question of whether his mining claims is valid under the mining laws." The "assumption concerns Departmental review of patent applications, not the validity of mining locations whether made prior to or after the date of the patent application, publication of notice, or any adverse proceeding resulting from it." 94 I.D. at 441.

The inability to file an adverse proceeding does not render mining claims invalid. "They would remain adverse claims, but the locator would lack a procedure within the Department to assert the superiority of his title as a reason to deny patent to the applicant." *Id.* at 367. And, "if for any reason the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for the land or apply for patent himself." 94 I.D. at 441.

**Judgment Rendered**

After judgment of the court has been rendered in adverse proceedings, a certified copy of the final judgment determining the right of possession must be filed with the BLM. *Cole v. Ralph*, 252 US 286, 297 (1920). Such judgment must be affirmed by the clerk of the court under the seal of the court as a final judgment. A statement must also be obtained from the court that the appeal period has expired and that no appeal has been filed. 43 CFR 3871.5.

**Suit Dismissed**

If the adversed proceedings are dismissed by the court, evidence of dismissal must be furnished either by a certificate of the clerk of the court or a certified copy of the order of dismissal. 43 CFR 3871.5(b).

**Determination of Party to Have Possession**

The judgment of the court must prevail as to determination of the party to have the right of possession. Where the judgment has been rendered in favor of the applicant for patent, processing of the application may be resumed. Where the judgment has been rendered in favor of the adverse party, the judgment rendered by the Court is not sufficient to entitle the prevailing

party to issuance of a patent automatically. The requirements of the laws and regulations relative to filing of an application for mineral patent must be complied with before issuance of patent. *Woods v. Holden*, 27 ID 375 (1898).

**Judgment Against Both Parties**

The issue to be decided in a conflict concerning an adverse claim is not to establish which claimant has the highest right, but whether either claimant has sufficient right to a patent. If the adjudication of ownership by the state court should determine that neither party was entitled to the property, then neither party may receive a patent. *Perego v. Dodge*, 163 US 160 (1896).

If as a result of such judgment, outlying segments of different locations embraced in the application do not form one contiguous body of land, the applicant will be required to elect which of such noncontiguous tracts he will retain in his application. *Chichagoff Extension Mining Co*., 53 ID 669 (1932).

**Certificate Required When No Suit Commenced**

If BLM is advised that the adverse claimant has not complied with the requirement for commencing court proceedings within thirty days after the filing of the adverse statement with BLM, a statement from the clerk of the state court having jurisdiction of such cases and a statement from the U.S. District Court in which the claim is located must be furnished certifying that no adverse claim has been filed. 43 CFR 3871.6.4.

**Jurisdiction Restored to BLM**

After the commencement of adverse proceedings, the jurisdiction of the BLM over a mining claim is restored only upon a final judgment, or a waiver by the adverse claimant of the ground in conflict, or a proper certificate showing that the adverse suit has been dismissed or was not timely instituted. *Seth Corbett*, 53 ID 712 (1932).

**Lands Excluded by the Judgment**

If a portion of a conflict area is excluded in favor of the adverse claimant as a result of adverse proceedings, the official plat and field notes should be amended and certified by the BLM Cadastral Survey officer as specified by the judgment. This is done so that the boundaries and areas of both that portion of the claim entered and that excluded are definitely shown and described. *Lawrence Donlan*, 39 LD 353 (1910).

**State Courts and Interior Jurisdiction**

Even though a court holds that a lode claim is invalid because it was located by a trespasser on a prior placer claim, the Land Department is not precluded from deciding that the placer claim was not valid. *Clipper Mining Co. v. Eli Mining & Land Co*., 194 US 220 (1904).

In an action on an adverse claim, the government is only bound by the judgment of the

state court only as it determines which party is the owner of the claim. The government is not bound by the state court adjudication and the judgment is not sufficient to entitle the prevailing party to a patent and divest the government of its title. *Mason v. Washington-Butte Mining Co*., 214 F 32, 36 (1914).

**Protest Against Mineral Applications**

At any time before the issuance of patent, a protest may be filed against the patenting of a claim. This protest may be made upon any ground tending to show that the applicant has failed to comply with the law in any matter necessary to a valid entry, or that an individual has a joint interest in the mineral location and is excluded from the patent application. However a protest cannot be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit.

An individual holding a present joint interest in a mineral location included in an application for patent who is excluded from the application, may protest against the issuance of a patent. The Protestant should furnish the nature and extent of his interest in such location and he or she shall be deemed a party in interest entitled to appeal. 43 CFR 3872.1. This results from the holding that a co-owner excluded from an application for patent does not have an adverse claim within the meaning of R.S. 2325 and 2326. *Turner v. Sawyer*, 150 US 578-586.

In case of a protest against an application, the BLM is authorized to order a hearing to determine the character of the land and determine whether there has been due compliance with the law, *Devereaux v. Hunter*, 11 LD 214 (1890); however, in such case, the Protestant cannot set up his own claim to the land. *Nevada Lode*, 16 ID 532 (1893).

A protest goes to the sufficiency of the claim as a basis for patent or to the sufficiency of the showing made by the applicant. It puts the office on notice of alleged defects which the office should consider before approving an entry. The Protestant has no standing before the Department but is held to appear merely as a friend of the court. *Parsons v. Ellis*, 23 LD 504; *Woodman v. McGilvary*, 39 LD 574.

**Adverse Claim Must Be Filed during Publication Period**

The Mining Law of 1872 requires an applicant for a mineral patent to publish notice of the application for a period of 60 days. The holder of a conflicting claim must (1) file his intention to assert an adverse claim with the proper BLM office within the publication period; (2) within 30 days initiate proceedings in a court of competent jurisdiction to determine the right of possession; and (3) prosecute the proceedings with reasonable diligence to final judgement. Failure of the holder of a mining claim to file an adverse claim within the 60-day publication period amounts to a waiver of any rights to a claim against the mineral patent applicant for a conflicting claim. *See Essex International, Inc*., 81 ID 187, 191-92 (1974).

**Where State Court Determines Right of Title, Losing Claimant Cannot Protest Winning Claimant=s Patent Application**

LaRue Burch appealed from a decision of the BLM dismissing her protest of mineral patent application filed by Lionel Rodriguez. *LaRue Burch*, 134 IBLA 329 (1996). Burch=s protest and subsequent appeal collaterally attack the Idaho State court decision quieting title to the Rock Garden Quarry claims in Rodriguez, by requesting that BLM rule on issues it has no authority to decide. The Board held that ABurch is bound by the final Idaho court decision validating Rodriguez= chain of title and possessory right to the Rock Garden Quarry claims as against Burch and the Whittles. (Citation omitted.) The State court determination in favor of Rodriguez prohibits Burch from asserting her (or Whittle=s) adverse claims as objections to the issuance of Rodriguez= mineral patent.@ *Id* at 332.

**Judgment that Patent Shall Issue Does Not Preclude Validity Examination**

In *Scott Burnham*, 100 IBLA 94, 113 (1987), the Board held that Athe provision that upon presentation of a judgement to the Department >a patent shall issue@ does not preclude Departmental review of the validity of a claim. *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220, 224 (1904)."

**Interior Department Has Authority to Determine Whether Document Is Adverse Claim**

In *Melvin Helit v. Gold Fields Mining Corp.*, 113 IBLA 299 (1990), The Board described the Department's authority in reviewing an adverse claim:

> Although the statutes providing for adverse claims do not authorize the Department to rule on their merits, *John R. Meadows*, 43 IBLA 35, 37 (1979), it is within the Department's authority to determine whether a document presents an adverse claim within the meaning of the statutes. *Thomas v. Elling*, 25 L.D. 495, 497 (1897). If the document does not present an adverse claim such as is contemplated by the statutes, BLM may take other appropriate action or, if a judicial suit has been filed, the Department may choose to await the result.

**Adverse Claim Between Placer and Mill Site Claims**

In a conflict between a placer claim and a mill site claim, the filing of an adverse claim should be treated as a protest. The reason for this is the issue in such a case is the mineral character of the land. The issue whether land is mineral or nonmineral in character is within the exclusive jurisdiction of the Department of the Interior and for this reason a conflict between mineral and nonmineral claimants does not raise an "adverse claim@ as the term is used in 30 U.S.C. 29, 30 (1982) *Melvin Helit v. Gold Fields Mining Corp.*, 113 IBLA 299, 316 (1990).

**Mill Site Versus Mill Site**

In *Ebner Gold Mining Co. v. Hallum*, 47 L.D. 32 (1919), it was held that where a mill site claimant has a claim conflicting with a patent application for another mill site claim, the adverse

procedures of 30 USC 29 and 30 (1976) are mandatory, since in such a case it is the right of possession rather than the character of the land that is at issue. *Also see In Re Pacific Coast Molybdenum* Co., 68 IBLA 325 (1982).

## PROTEST AGAINST PATENT ISSUANCE

### Prerequisites to Appeal from Denial of a Protest

It is not necessary to show an adversely affected interest to file a protest. However to prosecute an appeal before the Interior Board of Land Appeals, there are two separate prerequisites: (1) that the appellant be a "party to the case," and (2) that the appellant be "adversely affected" by the decision from which the appeal is taken. 43 CFR 4.410. Denial of a protest makes an individual a party to the case. Such a denial, however, does not establish that an individual is adversely affected. *Lee Brothers Dredging Co*., 79 IBLA 330, 334 (1984). Where a party cannot assert a cognizable interest which has been adversely affected, it does not have standing to appeal under 43 CFR 4.410, and its appeal will be dismissed. *Oregon Natural Resources Council*, 78 IBLA 124 (1983).

The failure to adverse a mineral patent application estops an adverse claimant from asserting his conflicting claim against the issuance of a patent under the mining laws. *Turner v. Sawyer*, 150 US 578 (1893). A claimant who failed to file an adverse claim during the 60-day publication period may file a protest to issuance of a mineral patent. However, the claimant will not be able to appeal the denial of a protest because he is "adversely affected by the decision." 43 CFR 4.410; *Lee Brothers Dredging Co., supra* at 333.

### Pacific Coast Molybdenum Company Case

In the Interior case of *In re Pacific Coast Molybdenum Co*., 68 IBLA 325 (1982), the Board considered the question of standing of the Sierra Club, the United Southeast Alaska Gillnetters (USAG), and the Southeast Alaska Conservation Council (SEACC), to appeal from a denial of protests objecting to Pacific Coast Molybdenum Company's mineral patent application. The Board also considered the standing of the three environmental organizations to initiate a private contest under 43 CFR 4.450-1 to determine the validity of the claims.

Pacific Coast Molybdenum Company (PMC) filed a mineral application on April 19, 1979 covering 32 claims located in the Tongass National Forest in Alaska. Following the location of the claims in 1974, the lands were set apart and reserved as part of the Misty Fjords National Monument on December 1, 1978. Subsequent to the filing of the application in 1979, various groups filed protests alleging an adverse interest in the lands embraced by the claims. The environmental groups further argued that the patent application was deficient and that the claims were invalid.

### Qualification as "Party to the Case"

In the case USAG and SEACC were qualified as "parties to the case" because both organizations had filed a protest to the mineral patent, and when the protest was denied, they made timely appeals from that denial. On the other hand the Sierra Club filed no protest, and in the absence of a protest, it could not become a party to the case by appealing from the denial of a protest filed by someone else. *Id*. at 331.

The leading Board decision on what constitutes a "party to the case" is *California Association of Four Wheel Drive Clubs*, 30 IBLA 383, 386 (1977). In that case the Board quoted from an order of Judge Conti rendered in *Citizens' Committee to Save Our Public Lands v. Kleppe*, C 76-32 SC (January 23, 1976):

> [W]here an individual or group such as the Citizens' Committee uses the Federal land in question and is recognized by the Federal Land Management as a *bona fide* representative of the community and is provided with notice of all proceedings and actions by the Bureau of Land Management regarding the land in question, and actively and extensively participates in formulating land use plans for the land in question, and takes the position in a dispute concerning the use of the land in question contrary to another individual or group, that individual or group is a party within the meaning of 43 CFR 4.410.

**Parties Must Show Adversely Affected Interest**

In order to maintain the appeal, the party to the case "must show a legally recognizable interest which has been adversely affected by denial of the protest." *Id*. at 331. Therefore, anyone can protest, but only one who has an interest adversely affected by denial of a protest has standing to appeal. The Board then held that "SEACC and USAG have established that they are parties to the case and have alleged interests which were adversely affected by the denial of their protests within the meaning of 43 CFR 4.410, and, thus, can maintain the instant appeal. *Id*. at 333-334." The Board then gave the following basis for determining that SEACC and USAG have established an asserted interest:

> In its initial protest, USAG stated that its members fish for salmon stock bound for Keta and Wilson-Blossom rivers and that important tributaries of those rivers are located in the patent area. They contended that mining the deposit as proposed "could have significant adverse environmental impact to the fishery resource and habitat." For its part, SEACC, in its protest complaint, alleged that it was an organization designed to promote the conservation and appreciation of the scenic, wilderness, fish, wildlife, recreation, and other natural resources of southeast Alaska. It specifically alleged that individual members of SEACC have used the areas within the Misty Fjords Monument for a variety of purposes and further claimed that "many members make a substantial portion of their livelihood from the commercial fishery and wilderness values which maybe impaired by the proposed mining activities of [PCM]."

**Protestants to Mining Claim Validity Have Burden of Proof**

In the case of *In Pacific Coast Molybdenum Co*., 75 IBLA 16 (1983), the Board affirmed

the decision of the BLM which dismissed the protests of USAG and SEACC to the issuance of Pacific Coast Molybdenum Company's patent application. The Board pointed out that the "mineral claimant is not required ... to affirmatively show his entitlement to patent. BLM has already determined that matter in favor of the claimant. Appellants must establish that this decision was wrong." *Id*. at 22.

**Protests to Issuance of Patents Have Burden of Proof**

The case of *In re Pacific Coast Molybdenum Co*., 75 IBLA 16, 90 ID 352 (1983) involved an appeal from denial of a protest to issuance of a mineral patent. Although the protest covered a variety of issues, one of particular interest was that PCM had failed to specify and address costs attendant to compliance with specific environmental requirements. The appellants indicated the costs of compliance may be as much as ten times larger than those costs estimated by the company, and as a result, the property could not be mined at a profit. The Board concluded that the "appellants have not submitted cost analyses which would show that the claims could not be mined profitably. "Indeed, they do not even argue that these claims could not, as a fact be profitably developed. Rather, they merely argue that they might not be capable of profitable development.... Appellants bore the burden of showing that these claims could not be economically developed. This burden they did not discharge." *Id*. at 31.

**The Scott Burnham Cases: Scott Burnham, 100 IBLA 94, 94 I.D. 429 (1987); Scott Burnham (On Reconsideration), 102 IBLA 363 (1988)**

Scott Burnham filed a protest against a mineral patent application made by American Colloid Company. The case came as a result of the partial revocation of a withdrawal of land which had been in effect since 1903 under authority of the Reclamation Act of 1902. By notice published in the *Federal Register*, the lands were open to location under the mining laws at 10:00 a.m. on October 10, 1981. American Colloid blanketed the area with 92 mining claims on the date of opening. On June 22, 1982, the Company filed a patent application with the BLM. During the period of publication of notice of the patent application, some of the parties who located claims on the morning of October 10, filed adverse claims to preserve their rights. Scott Burnham did not file an adverse claim during the publication period because his claim which covered lands embraced by the claims of American Colloid's patent application. Instead he filed a protest against American Colloid's patent application. In his protest he asserted that Colloids claims were improperly located partly because the company had gone out on the ground and posted survey markers that were later adopted as corner posts on the morning of October 10. Burnham also alleged that American Colloid drilled a number of exploratory test holes before the revocation. BLM dismissed the protest for several reasons covered in the chapter on AAdverse Claims.@

**Claimant Who Fails to File Adverse Claim May File a Protest**

If a rival mineral claimant, for one reason or another, fails to file an adverse claim during the publication, his only remedy before the Department of the Interior is to file a protest under the regulations (43 CFR 4.450-2) on the grounds that the patent applicant failed to comply with

the terms of the mining laws. *Scott Burnham, supra* at 118-19.

**Owner of Claim Located After Publication Period Has Standing to Appeal Dismissal of Protest**

In *Scott Burnham, supra* at 120-21, the Board held that a claimant who located claim on lands embraced by a patent application after the publication period ended had standing to appeal the dismissal of a protest.

**To Appeal, a Protestant Must Have an Interest in the land**

Although it is not necessary to show an "adversely affected" interest to file a protest, under 43 CFR 4.410, the right of appeal is extended only to those parties to a case who can show that they are "adversely affected."

In order to be adversely affected, a Protestant must have an Ainterest@ in the land which is the subject of the protested action. The Ainterest@ necessary for standing to appeal is not the same as the Ainterest@ necessary to bring a contest. A contest requires Atitle to or an interest in the land," which generally must be grounded on a statutory grant. In contrast, the interest necessary to appeal denial of a protest is neither limited to legal interests in the specific land at issue, nor to economic or property rights. It must be a legally recognizable interest, but ownership of adjoining land or past usage of the land in dispute have been recognized as giving sufficient interest. *Melvin Helit*, 110 IBLA 144, 149 (1989); *Scott Burnham*, 94 I.D. 429, 443 (1987).

**Protest to Issuance of Patent on Lack of Apex**

Where the issuance of a patent is protested by a third party contending that the apex of the vein is within his claim and that the patent applicant has appropriated a down-dip extension of the same vein, the burden of proof is upon the party questioning the applicants right to a patent. *U.S. Borax Co.*, 51 L.D. 464 (1926). The existence of an apex within a claim Ais a matter into which the Government will simply not inquire in the absence of a formal protest by a third party who asserts a property interest in the vein, and even then, under Lawton, the Department may decline to adjudicate the controversy.@ *Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent*, 93 I.D. 369, 381 (1986). Some lode-type mineral deposits such as disseminated gold, copper and molybdenum simply do not have a well-defined vein with an apex. *Id*.

## VALIDITY INVESTIGATIONS

**Validity Examination**

A validity examination is defined as a field examination of an unpatented mining claim by a minerals examiner to verify or refute the discovery alleged by the mineral claimant. The

mineral examiner, in an evaluation report of the claim, makes a recommendation as to whether a claim is valid or invalid. *BLM Manual* 3920.04. If a discovery cannot be verified within the limits of the claim, the examiner will normally recommend that the government contest the claim.

**Validity Determination**

A validity determination of the claim is made when either (1) a minerals examiner's recommendation of validity is approved by the state BLM director or an authorized subordinate; or (2) a final administrative finding that the claim is null and void through contest proceedings as a consequence of the mineral examiner's recommendation to initiate a contest. *BLM Manual* 3920.05. Of course the administrative decision may be appealed by the adversed party (See chapter on mining claim contests).

**Validity Investigations**

The general procedure for conducting a validity investigation of a mining claim is given in *BLM Manual* 3920 (1976). This manual section represents minimum direction and requirements that should be adhered to as closely as possible; however the geologist or mining engineer (mineral examiner) conducting the investigation is allowed to exercise much personal discretion and judgment as to what is necessary to make a proper validity determination on a specific claim. Because every mineral deposit is geologically unique, it is important that the mineral examiner not be required to operate under highly structured and detailed procedures.

**Objective of Validity Investigations**

The objective of a validity investigation is to assume that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." *Cameron v. United States*, 252 US 450 (1920); BLM Manual 3920.02.

**Authority for Investigation**

The Secretary of the Interior is authorized to inquire into the validity of mining claims by the Act of April 25, 1812 (R.S. 453; 43 USC 2). Validity examinations are also authorized by the Act of July 23, 1955 (69 Stat. 367; 30 USC 601), for the purpose of asserting management over surface resources of claims located prior to the Act. *Adams v. United States*, 318 F2d 861 (9th Cir 1963).

**Purpose of Validity Investigations**

Validity examinations are normally made in response to one of two circumstances: (1) to process a mineral patent application; or (2) to resolve a conflict between the claim and some other use of the land. According to *BLM Manual* 3920.11, validity examinations may be made to resolve the following types of conflicts:

1. Multiple use conflicts

    a. Public Law 167

    b. withdrawals

    c. other

2. Mining claim conflicts with surface disposal entries

    a. homestead entries

    b. desert land entries

    c. private exchanges

    d. public sale applications

    e. other

3. Suspected trespass

    a. occupancy

    b. mineral material removal

4. Condemnation

    a. easement acquisition

    b. wild and scenic river acquisition

5. Reimbursable projects

    a. Bureau of Reclamation projects

    b. Army Corps of Engineers projects

**Information to Be Included in the Patent Application**

It is important that the application for patent include sufficient information to allow the minerals examiner to determine whether a "valuable mineral deposit" has been found. The field examination is made to confirm the facts in the application and verify the discovery. It is generally to the claimant's advantage to include all available technical information supporting the discovery. This includes detailed geologic maps and cross sections together with sampling and assay data. In *BLM Manual* 3862 and 3863, the following list of technical items is given that should be included in the patent application:

1. Complete description of general geology;

2. Complete description of economic geology and mineralization;

3. Complete description of mineral deposit as to quantity and quality (ore reserves by grade);

4. Complete description of all discovery points;

5. Maps and results of drilling, sampling and analysis of samples (if other than routine methods of analysis are used, describe the methods of testing or analysis);

6. Complete description of all workings, improvements, etc., on the claim;

7. Description of mining or extraction method;

8. Description of beneficiation or metallurgical or other processing of the raw mineral;

9. Description of transportation method from mine to mill or processing plant and, if appropriate, to market;

10. Economic analysis including actual or estimated mining, processing and other costs, value or price of product, and estimated profitability; and

11. An analysis of anticipated environmental and reclamation costs under state and local laws.

In addition, application for such widespread construction type or industrial minerals as limestone, gypsum, bentonite, etc. (when locatable), must contain information to satisfy the marketability rule. This includes such things as:

1. Why the deposit in question should be considered a locatable mineral;

2. A complete description of the market for the mineral from the deposit, including:

    a. Market specifications.

    b. Market demand and future trends.

    c. Market prices.

3. An economic analysis showing the actual or estimated profitability of the sale of the mineral from the deposit into the market.

**Failure of Applicant to Submit Additional Information on Discovery**

In several Interior decisions, the IBLA considered similar cases where the BLM adjudicator rejected mineral patent applications because the applicants failed to submit additional technical information in support of a discovery. *Brittain Contractors, Inc*., 37 IBI,A 233 (1978); *United States Steel Corp*., 52 IBLA 319 (1981). In *Brittain Contractors*, at 240 and 241 the Board stated the following (also cited in *United States Steel Corp*., at 323 and 324):

> First, we must observe that if the BLM adjudicator is not satisfied with the evidence of discovery submitted with the patent application he has a right to so advise the applicant and request further evidence. He certainly is precluded from granting the application. Moreover, it would seem to be incumbent on the applicant to cooperate in providing such evidence in support of its own application so as to resolve any deficiencies and to facilitate the process.
>
> However, appellant is correct in arguing that it is premature to reject the patent application on the adjudicator's finding of insufficient evidence of discovery. Before there can be any final disposition of a mineral patent application which is otherwise acceptable, there must be a mineral examination of the subject claims for the purpose, *inter alia*, of obtaining evidence tending either to confirm or refute the allegation that qualifying discoveries have been made. *If the discoveries are confirmed by the BLM minerals personnel, and if all else be regular, the application may be processed and a patent issued without quasi-judicial proceedings*. If, however the evidence yielded by the mineral examination impels a finding of "no discovery," or other impediment to issuance of patent, and the applicant does not voluntarily withdraw his application, BLM is left with no choice but to initiate contest proceedings to determine the validity of the claims. *United States v. O=Leary*, 63 ID 341 (1956). *Prior to a final holding that the claims are null and void, BLM may not summarily reject the application on any finding of disputed fact*. This is because the validity or invalidity of the claims is the ultimate issue in the contest proceeding, as well as the basis for rejection of the application. But if a charge of "no discovery" is finally proven in a proper proceeding, then not only must the patent application be rejected, the claims must be held to be null and void. *United States v. Carlile*, 67 ID 417 (1960).
>
> There may be situations in which the failure of mineral patent applicant to comply with a clear requirement of the regulations relating to the form of the application would result in the simple rejection of the application by the adjudicator. Such a situation might occur in an application for a patent of a lode mining claim, where the application was not accompanied by a mineral survey as required by 43 CFR 3861.1-1. The failure of an applicant to tender such a survey would necessitate the rejection of his patent application, but it would not necessarily imply that the mining claim was null and void. It is basically a distinction between the form of the patent application and its substance. The issue

involved herein, i.e., the existence of a discovery at a specified date, is manifestly one of substance going to the validity of the claims or parts thereof, and is thus resolvable against the claimant only after affording the applicant notice and an opportunity for hearing on disputed issues of fact.

As the decisions above indicate, a patent application will not be rejected as a consequence of failing to submit additional technical information supporting a discovery because the existence of a discovery is a question of fact and disputed issues of fact must be resolved at a hearing. However, a hearing should be avoided if possible, especially since if a discovery is to be demonstrated at a hearing, the additional technical information would have to be presented at that time and under difficult circumstances.

**Notification to the Mining Claimant**

The owner of a mining claim must be contacted prior to the examination and invited to accompany the examiner during the field investigation. *BLM Manual* 3920.14. The purpose of this notification is to give the claimant an opportunity to point out the discovery, and suggest areas to be sampled. The claimant should also be given the opportunity to explain and describe all aspects of his claim pertinent to the examination such as location monuments, workings, past, current and planned activity and estimated reserves and grade.

**Examination Must Be Unbiased**

It is extremely important that the mineral examiner conduct the examination in an unbiased manner, with no preconceived notion of the validity of the claim. Although the examiner should carefully record and include any use of claims for nonmining purposes, a validity recommendation should be based purely on whether or not a discovery is verified.

**Background Information for the Field Investigation**

Prior to making the field investigation, the minerals examiner should obtain the following maps and reports in order to prepare for the examination and make the best use of field time:

1. Geologic maps and reports from all sources including state and Federal geological surveys, Bureau of Mines, professional journals, unpublished theses, etc. These reports and maps should provide information on the regional geology, mineralization of the area and production history.

2. Geological survey topographic maps and other maps showing land status and physical geography.

3. Location certificates and maps prepared by the claimant.

4. Cadastral survey connecting sheets and mineral survey plats.
5. Appropriate master title plats.

6. Mineral information from the planning system and prior mineral reports of the area.

7. Aerial photographs.

**Field Examination**

Depending on the number of claims involved and the complexity of the project, anywhere from one day to several months may be required to complete the field examination. Prior to the examination, all existing geologic reports and maps relevant to the validity of the claims should be studied and digested. However, information in such reports and maps should be considered as background information because all field aspects bearing on the validity of the claim must be personally verified and documented by the examiner in the field.

**Verification and Documentation**

As stated above, every aspect of the field examination must be documented to support the findings in the report. This documentation takes three standard forms -- all of which must be meticulously cross referenced:

1. Field notes should include detailed descriptions of the geology, mineralization, sampling, workings, interviews with claimants, geographic information and any other pertinent data. Also prepare sketches, label and date each page.

2. Prepare a claim map showing location monuments, workings, geology, mineralization, drill holes, location and identification of samples, delineation of reserves. Map should be prepared on a base with a scale of 1 inch to 200 feet. A pace-and-compass survey is generally adequate.

3. Photographs should be taken of all significant features of the claim including perspective views, improvements, workings, sample sites, mineralization, geology, equipment, and discovery. Photographs should have an approximate scale and a card displaying the site number, date, claim name, sample number and the investigator. The notes should also include the names and positions of all participants in the examination, including both government and claimant representatives.

It is good practice to compile the field data in such a manner that it would be understandable and useful to some person other than the examiner. At a minimum, the data and conclusions of any mineral report should be verifiable at a later date by another examiner.

**Field Verification of Validity**

During the field examination of lode, placer and mill site claims the mineral examiner

must verify the following:

1. **Lode Claim** - The examiner determines whether a discovery of a valuable mineral has been made within the limits of each claim.

2. **Placer Claim** - In addition to determining that a discovery of a valuable mineral exists within the limits of each claim, the mineral examiner must determine whether each 10 acres is mineral in character.

3. **Mill Site Claim** - If a mill site claim, the examiner must determine (1) whether the lands involved are nonmineral in character; (2) whether the claim is being occupied and used for mining or milling purposes; and (3) whether there is a quartz mill or reduction works on the claim if a custom mill site.

**Field Verification of Mineral Survey**

The first step in the field examination requires the mineral examiner to identify the claim on the ground by locating the claim corners established by the mineral surveyor by determining that there is conformance between the mineral survey plat and the claim as monumented on the ground. This is the only field inspection by the government to verify that the mineral survey was proper and that the ground was monumented.

**Field Verification of Improvements**

During the field investigation, the mineral examiner must verify that improvements amounting to $500 or more have been made on each mining claim, or in the case of group expenditures, all claims benefit. Until about 30 or 40 years ago many patent applications were rejected by the Land Department for failure to satisfy the $500 expenditure requirement; now however, because of substantial inflation, this is no longer considered to be the costly requirement it once was. *BLM Manual* 3930.15B requires the examiner to evaluate each of the following:

1. All surface and underground excavations, access roads, buildings, or other improvements shown on the plat of mineral survey and listed in the mineral surveyor's report of expenditures.

2. All improvements made after completion of the mineral survey and not shown on the plat of mineral survey or listed on the mineral surveyor's report of expenditures.

3. The tying of these improvements to a corner of the mineral survey or public land survey.

4. Dimensions and values for all improvements made for the benefit of the claims not shown or listed by the mineral surveyor.

5. Completeness and adequacy of recordings of drill logs claimed as improvements.

6. Whether the improvements were made at the instigation of the applicant, or the applicant's grantors. Expenditures made prior to a break in the chain of title do not qualify.

**Field Verification of the Posting**

During the field examination, the mineral examiner must determine whether a copy of the plat of mineral survey and a notice of intent to apply for a patent was posted in a conspicuous place on the claim.

**Technical Information Included in the Mineral Report**

The primary purpose of the mineral report is to set forth in detail the findings and results of the mineral examination and give recommendations regarding the validity of the claim(s). Therefore, a mineral report should contain a complete description of the following: (1) regional and site-specific geology; (2) quantity and quality of the ore and (or) mineralization; (3) sampling and assaying procedures; (4) workings and improvements on the claims; (5) mining methods and equipment; (6) processing and beneficiation of ore; (7) marketability of the mineral(s), including supply, demand, future trends, specifications and commodity prices; and (8) economic analysis, including actual or estimated mining, processing and transportation costs together with estimated profitability. The report will normally include geologic maps with cross sections, mine maps, assay certificates and photographs.

**Review of Mineral Reports**

The mineral report is prepared by the Forest Service, Park Service or the BLM mineral examiner who investigates the claim. Mining claims on lands within the national forest system are examined by mineral examiners employed by the Forest Service under a Memorandum of Understanding between the BLM and Forest Service, dated April 1, 1957. The State Directors of the BLM are delegated responsibility for all actions involving mining claims in their respective states, including actions within the national forest system. Consequently all mineral reports prepared by Park Service, Forest Service, or BLM mineral examiners within a state are given technical review and approval by the chief mineral examiner employed in the BLM state office.

Before mineral reports are forwarded to the BLM state office, reports prepared by the Forest Service are generally submitted for technical review by a senior mineral examiner in the appropriate Regional office of the Forest Service. ln cases where claims are recommended for contest action, the Forest Service Office of General Counsel in the Regional Office reviews the case and helps prepare the recommended charges to appear in the complaint. Reports prepared by BLM mineral examiners are submitted for technical review to the state office mineral examiner and then returned for management review by the BLM district manager responsible for managing

the lands where the claims are situated.

The purpose of the technical review is to ascertain whether standard professional procedures and established BLM policy were followed during the examination. The conclusions and recommendations in the mineral reports must be fully supported by facts developed by sound scientific and engineering procedures. All factual information such as geologic maps, structural information, reserve calculations, sample descriptions and assay results must be fully documented and be verifiable by another qualified mineral examiner. It is essential that the factual information bearing on the reserves and assay values of the deposit are personally observed by the examiner and not taken from any other source written or oral, no matter how authoritative.

If technical review should identify portions of the report that do not support the findings of the examiner or the report is inadequate for some reason, the original mineral examiner will be requested to correct the deficiency. In exceptional cases it may even be necessary for the state office specialist to request that a new report be prepared and (or) that another mineral examiner be assigned.

Upon completion of the technical and management reviews, the mineral report is forwarded to the mining law adjudicator. If the recommendation of the report is for contest action against the claim(s), the adjudicator will prepare a complaint with the appropriate charges. If the recommendation is for patent to issue, the adjudicator will complete the final certificate and prepare the patent document.

**Completion of the First Half of Final Certificate**

The last step before preparation of the patent is to complete the reverse side of the "mineral entry final certificate" (form 1860-1). Finally the mineral patent document is prepared from information contained on the final certificate.

**Mineral Report on Leasable Minerals**

If the claims are subject to Public Law 250 (Act of August 12, 1953) or Public Law 585 (Act of August 13,1954), as amended, the BLM adjudicator will request a report from the Minerals Management Service for a determination as to whether the lands are valuable for leasing act minerals and geothermal resources.

A report is not required (1) if a waiver exists under the Act, (2) if the subject lands contain existing leases or permits, or(3) if there are applications or offers for leases or permits. If one of the above three applies, a mineral reservation of leasable minerals is required by law.

If the provisions of Public Laws 250 or 585, as amended, do not apply, conflicts among outstanding permits or leases under the Mineral Leasing Act or Geothermal Steam Act must be resolved before issuance of the mineral patent. *BLM Manual* 3862.81AI.

**Part of Claims Not Recommended for Patent**

If the mineral report recommends that part of the claims in the application may proceed to patent and that adverse charges be made against the remaining claims, a patent may be issued for those approved claims without waiting for the final determination on the contested claims. However, before issuance of patent to such claims, the applicant is generally requested to give consent to this procedure. If any of the contested claims are ultimately determined to be valid, a supplemental patent is issued. *BLM Manual* 3862.8lA2.

**Claims Not Recommended for Patent**

If the mineral report recommends that adverse proceedings or contest action be initiated against the claim(s), the case is processed as provided under 43 CFR Parts 1840,1850 and 3870. In all contest cases challenging the validity of a mining claim, the prayer for relief must request that the claims be declared null and void (*see United States v. Carlile*, 67 ID 417 (1960)). Applicants may apply in writing for repayment of the purchase money if the claim(s) do not qualify for patent.

**Claims on Down-Dip Extension of a Vein with Physical Exposure May Be Patented**

In *Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent*, 93 I.D. 369 (1986), Solicitor Tarr described the rights of a lode locator to placer locations along the down-dip extension of a lode. A locator is not required to show that the apex of a vein is within the claim boundaries in order to have a valid location. Solicitor Tarr stated at 383:

> We therefore construe the Mining Law as not limiting a locator to appropriate a discovered mineral vein only by locating claims along the apparent apex. The Mining Law requires an apex as a prerequisite to the exercise of extralateral rights, but not to the validity of a lode mining claim. If there is in fact a true apex with an identifiable descending vein, the claimant may at his option rely solely on locations on the apex and the corresponding extralateral right to appropriate the vein, as well as upon the apex, so long as each claim is supported by an exposure of the valuable mineral deposit discovered.

> Where a claimant chooses to locate claims along the apex and the dip of the vein, the location and maintenance of the claims on the dip is properly viewed as evidencing the claimant's intent to abandon any extralateral right flowing from the apex locations with regard to the mineral within the boundaries of the down-dip claims.

The Aexistence of an apex within a given lode claim is not essential to the validity of the claim.... but only to the claimant's ability to assert an extralateral right derived from that location.@ *Id*. at 382.

## ISSUANCE OF PATENT

**Definition of "Patent"**

In *St. Louis Smelting and Refining Co. v. Kemp*, 104 US 636 (1882), the United States Supreme Court defined "patent" as "the conveyance by which the Nation passes its title to portions of the public domain."

**Legal Effect of a Patent and Jurisdiction of Land Department**

The Supreme Court in *St. Louis Smelting and Refining Co., supra*, discussed the role of the Land Department officials and the legal effect of their actions in the adjudication of mineral patent applications. The Supreme Court stated:

> ...That the provisions may be properly carried out, a Land Department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty, the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation.
>
> ... a patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court, the patent is unassailable for mere errors of judgment.

**Sawtooth National Recreation Area Act Precludes Patents**

Section 12 of the Sawtooth National Recreation Act (SNRA) 16 U.S.C. 460aa et seq.

expressly terminated the right of existing claim holders to proceed to patent on any claim already established with the SNRA. This section states that "Patents shall not hereafter be issued for locations ..... in the recreation area under the mining laws of the United States."

On September 3, 1993, the Ninth Circuit Court issued its decision on the Swanson Case (*Swanson v. Babbitt*, 3 F.3d 1348 (9th Cir. 1993)). In this case the Court held that "the plain language of the SNRA prohibits the issuance of any patent on mining claims or mill sites after August 22, 1972" and "no patents can be issued after August 22, 1972, regardless of when the mining claims were actually made."

Although Swanson had made application for patent before August 22, 1972, his patent right did not vest on application because the Department determined that he was seeking more land for his mill sites than was necessary for the mining operation rather than "mere administerial delay in processing the otherwise valid application." Consequently, "Swanson's patent rights did not vest upon the filing of his patent application in 1967, but instead would have vested in 1986 when his application was perfected..." Finally the Board held that "a patent right does not vest upon the submission of a patent application if the Secretary of the Interior contests the validity of the patent application and thus delays its issuance."

In *Swanson v. Babbitt, supra*, the Circuit Court discussed in significant detail when a patent right vests to the patent applicant:

> .....The right to a patent accrues when the claimant has filed a proper patent application and has paid his fee, regardless of when the Department of the Interior fulfills its purely administerial function of issuing the patent. Other courts have recognized the Department's approval of a valid patent application is non-discretionary and is purely a "ministerial act." *See South Dakota v. Andrus*, 614 F.2d 1190, 1193-1194 (8th Cir.), *cert. denied*, 449 U.S. 822 (1980). Once a valid application has been made, "'the holder of a valid mining claim has an absolute right to a patent...and the actions taken by the Secretary of the Interior in processing an application for patent by such claimant are not discretionary; issuance of a patent can be compelled by court order.'" *Id.* at 1193 n. 3 (quoting *United States v. Kosanke Sand Corp.* 12 IBLA 282, 290-91 (1973)).
>
> In *Benson Mining and Smelting Co. v. Alta Mining and Smelting Co.*, 145 U.S. 428 (1892), the Supreme Court decided that as long as the claimant had complied with applicable claims laws up to the point where the patent application was filed, his failure to adhere to those regulations applying to unpatented claims after the application was filed but before the actual patent was issued did not invalidate his claim. The Court determined his patent rights had vested upon his submitting a valid patent application and proper payment:
>
> > In other words, when the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the Land Department causes delay. But such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties.

*Id.* at 431-32 (*emphasis added*). The Court went on to state: "[A] party who has complied with all the terms and conditions which entitle him to a patent for a particular tract of public land, acquires a vested interest therein, and is to be regarded as the equitable owner thereof." *Id.* at 433 (*citing Wirth v. Branson,* 98 U.S. 118 (1878) (*quotations omitted*)).

**Claim Required for Patent**

A patent cannot issue without the surface location of a mining claim. *Campbell v. Ellet*, 167 US 116,119 (1897). And a person qualified to locate a claim is also qualified to make application for a patent. *Doe v. Waterloo Mining Co*., 70 F 455, 463 (1895).

**Supplemental Proofs**

Whenever there has been compliance with substantial requirements of the law, irregularities are waived or permission is given, even on appeal, to cure them by supplemental proofs. *U.S. v. Marshall Silver Mining Co.*, 129 US 579, 587 (1889).

**Land Descriptions in Patents**

Land descriptions in patents for a lode mining claim, for a placer mining claim, or for a mill site is given by reference to the names and survey numbers of the claims, if such claims were not described by legal subdivision. The land description shall make reference to the survey field notes and plats in such a manner so as to make them an official part of the description. 43 CFR 3862.8-1.

**Patent Reservations**

The BLM has no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions it prescribes. *Deffeback v. Hawke*, 115 US 392, 406 (1885). In other words, all exceptions and reservations must be authorized by law, and if not authorized by law, are void.

**Common Exceptions and Reservations in Mineral Patents**

Common Exceptions and Reservations inserted in mineral patents are listed below (*see BLM Manual* 1860 and 3862):

1. *Ditches and Canals*: Excepting and reserving to the United States from the land so granted a right-of-way thereon for ditches or canals constructed by the authority of the United States (Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. Sec. 945).

2. *P.L. 585, All Leasing Act Minerals (43 CFR 3540)*: All deposits of coal,

phosphate, sodium, potassium, oil, oil shale, native asphalt, solid and semi-solid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried) or gas, and to it, or persons authorized by it, the right to enter upon such land whenever reasonably necessary for the purpose of prospecting for, mining, treating, storing, and removing such minerals on and from other lands of the United States, sec. 4, Act of August 13, 1954, 68 Stat. 710 (30 U.S.C. 524).

3. *P.L. 359, 43 CFR 3520, All Power Rights*: All power rights in the afore-described lands. The United States, its permittees and licensees shall not be responsible or held liable or incur any liability for the damage, destruction, or loss of any such lands or of any facility installed or erected, income, or other property or investments resulting from the actual use of such lands or portions thereof for power development at any time where such power development is made by or under the authority of the United States, sec. 3, Act of August 11, 1955, 69 Stat. 682 (30 U.S.C. 622).

4. *O&C Timber Reservation (43 CFR 3631)*: The timber now or hereafter growing on said land, together with the right to manage and dispose of the timber, in accordance with and subject to the provisions of the Act of April 8, 1948 (62 Stat. 162).

5. *Stockraising Homesteads* (limitation to be expressed -- not a reservation): All or a portion of the lands above described have been patented under the provisions of the stockraising homestead Act of December 29, 1916, 39 Stat. 862. The grantee hereunder shall have the right to enter upon and occupy only so much of the surface as may be required for all purposes reasonably incident to the prospecting for, mining, and removal of the minerals granted by this patent in accordance with the provisions of such act as amended and supplemented, 43 U.S.C. 299.

6. *Reclamation Lands (43 U.S.C. 154; 43 CFR 3400.4)*: The exceptions and reservations should be listed under a paragraph reading substantially as follows:

   This patent is issued subject to the provisions of the Act of April 23, 1932, 47 Stat. 136; 43 U.S.C. 154, and to such terms, conditions and reservations as are set forth in certain stipulations executed by the locator(s) of the (those) claim(s) and recorded in Vol.__, p.__ of the records of _____ County, State of those stipulations being and providing that...

   1.
   2.

**Samples of Reservations in Patents for Rights-of-Way Issued Under the Act of October 21, 1976 (P. L. 94-579) and 44 LD 513 Notations That Have Not Been Converted to Grants Under This Act**

1. *Rights-of- way issued to Federal Agencies*:

... Reserving to the United States a right-of-way for road purposes as granted under Right-of-Way No. (serial number) pursuant to Title V of the Act of October 21, 1976 (43 U.S.C. 1761-1771) (as to (land description) when right-of-way does not cover all the land in the patent), and the right to enforce all or any of the terms and conditions of the right-of-way, including the right to renew it or extend it upon its termination.

2. *Rights-of-way issued to private parties*:

... Those rights for (purpose) granted to , (its, his or hers) successors or assigns, by Right-of-Way No. (serial number) , pursuant to Title V of the Act of October 21, 1976 (43 U.S.C. 1761-1771) (as to (land description) when the right-of-way does not cover all the land in the patent), and the right to enforce all or any of the terms and conditions of the right-of-way, including the right to renew it or extend it upon its termination and to collect rents.

3. *44 LD 513 notations not converted to grants under P.L. 94-579:*

... Reserving to the United States a right-of-way ____ feet in width for an existing road (located in the (land description) (when the right-of-way does not cover all the land in the patent), and more particularly described in case file No. (serial number).

**Conditions and Stipulations for Placer Patents**

1. "That the grant hereby made is restricted in its exterior limits to the boundaries of the said mining premises, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, which may have been discovered within said limits subsequent to and which were not known to exist on (date of filing patent application)."

2. "That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above described premises on (date of filing patent application), the same is expressly excepted and excluded from this patent." (30 U.S.C. 37.)

**Valid Existing Rights and Patent Stipulations**

On June 1, 1972, California Portland Cement Corporation (California Portland) filed a mineral patent application for claims located in 1968. The application for patent was perfected July 28, 1978, approximately two years after the Federal Land Policy and Management Act of October 21, 1976, was passed. On February 27, 1981, the BLM issued patent to the claims.

California Portland filed a protest to a stipulation in the patent because it claimed its rights to a patent had vested before the passage of FLPMA. BLM maintained that the stipulation was required by section 601(f) of FLPMA, 43 U.S.C. 1781(f). (1982).

The Board noted that section 701(h) of FLPMA provides that "all actions by the Secretary concerned under this Act shall be subject to valid existing rights." In *California Portland Cement Corporation*, 83 IBLA 11 (1984), the Board held that the stipulation was improper because the claims had "valid existing rights" when FLPMA was passed.

In a similar case, *Lee Chemicals*, 86 IBLA 164, 167 (1985), the Board determined that an application for patent is perfected if the claim is supported by a discovery rather than the date all patent requirements are completed. The Board said at 167:

> Thus, the applicability of section 601(f) to appellant's claims is dependent upon a determination whether these claims were supported by a discovery on or before October 21, 1976, the date of enactment of FLPMA. The record in this case clearly establishes that a discovery then existed. Therefore, appellant is correct in its assertion that the reservation was not properly included in its patent.

**Reservation of Rights-of-Way in Mineral Patents**

When a mining claim is patented the title relates back to the initiation of the mining claim. *Heydenfeldt v. Daney etc. Mining Co.*, 93 U.S. 634, 641 (1876). The authority to reserve rights-of-way in mineral patents depends upon the date of the right-of-way relative to the location date of a claim. *Access Road Construction -- Effect of Waivers and Determinations Given under Public Law 167*, M-36493, 65 I.D. 200 (1958); *Instruction Memorandum No.* 87-736 (Sept. 24 1987). The following circumstances exist:

> 1. Roads and other rights-of-way constructed with Federal funds may be reserved in mineral patents if the construction preceded the location of the claim. *Instructions of August 31, 1915* (44 L.D. 359), and *Instructions of January 13, 1916* (44 L.D. 513).
>
> 2. Where a mining claim was located before the Act of July 23, 1955 (P.L. 167), and has surface rights under the Act, a right-of-way cannot be established after the location date of the claim. A right-of-way may be established after the location date and reserved in the patent only if the owner of the mining claim grants a right-of-way by deed or legal instrument before the date of patent to the Federal government.
>
> 3. Where a mining claim was located after July 23, 1955, or a claim located before July 23, 1955, without surface rights, a right-of-way may be established across the surface of a claim after the location date of the claim. However, the right-of-way terminates at the date patent is issued and cannot be reserved in the patent. The reason for this is that when

a mining claim is patented, the title relates back to the date of location. Of course if the claim owner conveys a right-of-way to the Federal government before patent issues, such right-of-way may be reserved in the patent.

**Date Purchase Price Paid**

In *Mt Emmons Mining Co. v. Babbitt*, Civ. No 96-1230 (10th Cir. 1997), the issue was whether or not Mt. Emmons was grandfathered under the mineral patent moratorium. Mt. Emmons (a Colorado case) had paid its purchase monies timely (prior to 9/30/94) but its file had not arrived in Washington, D.C. Solicitor=s office for the First Half of Final Certificate review by 9/30/94 so it was deemed not grandfathered.

The Court held that if purchase monies were timely paid before the moratorium, it was grandfathered. Nine patent applications were to be processed for patent where purchase money was paid before 9/30/94 but the Secretary had not issued the First Half of Final Certificate. Also *see Vanderbilt v. Babbitt*, 113 F3d 1061 (9th Cir 1997).

**No Rights Vest Until Secretary Concludes Formal Review**

In *Independence Mining Company v. Babbitt*, Civil No. 95-16112 (9th Cir 1993), the Court made the following points:

1. Until patent is issued, the government retained the authority to remove those lands from mining claims and patents.

2. The right to a mineral patent vests where the purchase price is paid and the application is valid in all respects, including the results of the mineral exam and the Secretarial review process.

3. If patent issues, rights vest as of the date the purchase price was accepted by BLM. Also *see Swanson v. Babbitt*, F3d. 1348, 1355 (9th Cir 1993).

**Date of Mineral Entry**

The date of a "mineral entry" is not the date on which a claim is located. In the case of a mineral patent application, it is the date the Final Certificate of Mineral Entry is issued. This date is always subsequent to the date of application. *State of Idaho*, 101 IBLA 340, 356-57 (1988); *Also see Elda Mining & Milling Co.*, 29 L.D. 279 (1899).

**Issuance of Final Certificate Requires More than Submission of Purchase Money**

The submission of purchase money and acceptance by the BLM can create no rights to a

final certificate not authorized by the regulations. 43 CFR 1810.3(c); *U.A. Small*, 108 IBLA 102, 106 (1989). For example all the requirements specified in the statute and regulations such as establishing that no adverse claim or other objections appears must be satisfied prior to issuance of final certificate. *Id.*

**How Issuance of Final Certificate Affects Mineral Title**

During the patent application process, equitable title passes to a claimant upon payment of the purchase price for the claim and issuance of final certificate. And presuming a discovery exists, the Government holds only the bare legal title. *United States v. Whitaker (On Reconsideration)*, 102 IBLA 162 (1988). "When such an entry is made, the land is not only withdrawn from the public domain, but the entryman has acquired an equitable title, and thereafter, and not till then, the United States holds the legal title in trust for him." *Teller v. United States*, 113 F. 273, 281-82 (8th Cir. 1901).

Of course, even after issuance of the final certificate, the Department may inquire into the validity of a claim and initiate contest proceedings if a discovery cannot be verified. *Cameron v. United States*, 252 U.S. 450, 460 (1920). This does not mean that "when an equitable title has passed the Land Department has power to destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed." *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589, 593 (1897). In other words where the United States contests the validity of a mining claim after issuance of the final certificate, it is determining whether or not equitable title has passed. Therefore, the determination of whether or not minerals on a claim are marketable at a profit "must focus on that date and not on some subsequent date, e.g., the date of the hearing." *Id.* Consequently, mining costs and commodity prices to be applied in the profitability analysis must be those in effect at the date the Final Certificate is issued.

**Mineral Patent Cannot Issue If Prior Existing Entry**

There is a longstanding rule that a mineral entry cannot be allowed for land within an existing entry so long as the existing entry remains of record. The prior entry must be removed before a mineral patent application can be processed. *See Roos v. Altman (On Petition)*, 54 I.D. 47, 56-57 (1932); *Walter G. Bryant*, 53 I.D. 379 (1931). However, a BLM record of a mining location filed pursuant to 43 U.S.C. 1744(b) (1982) is not an entry in the same sense of the term. *Melvin Helit v. Gold Field Mining Corp.*, 113 IBLA 299, 320 (1990).

**Authority of Interior to Correct Patents**

Section 316 of FLPMA, 43 U.S.C. 1746 (1982), gives the Secretary of the Interior discretionary authority to correct patents or other documents of conveyance at any time where necessary in order to eliminate errors. 43 CFR 1865.0-1; 43 CFR 1865.0-3. The regulations (43 CFR 1865.0-5(b)) define "error" as follows:

...the inclusion of erroneous descriptions, terms, conditions, covenants, reservations,

provisions and names or the omission of requisite descriptions, terms, conditions, covenants, reservations, provisions and names either in their entirety or in part, in a patent or document of conveyance as a result of factual error. This term is limited to mistakes of fact and not of law.

The regulations also allow the authorized officer to initiate and make corrections in patents on his or her own motion, if all existing owners agree. However, absent such consent, a patent may not be administratively corrected. *Lone Star Steel Co.*, 101 IBLA 369 (1988); *Rosander Mining Co.*, 84 IBLA 60, 64 (1984). Furthermore, the reformation may be allowed where "the concerned administrative agencies do not object." *Loyd Schade*, 116 IBLA 203 (1990).

**Correction of Mineral Patent**

In *Frank L. Lewis*, 107 IBLA 307, 311 (1993), the Board rejected an application for correction of a mineral patent from the purchaser of a tax deed to a mineral patent. The Board found that the applicant failed to make a sufficient showing because his evidence offered to show error in the patent was inconclusive.

**Patent May Be Vacated If Claimant Makes False Statements**

The only written statement required to support a patent application that must be made under oath is the applicant's proof of publication and posting. 43 CFR 3862.4-5. However, if "it is found that a claimant has made false statements in the patent application a patent can be vacated, even after patent has issued. *Multnomah Mining Milling & Dev. Co. v. United States*, 211 F. 100, 102 (9th Cir. 1914). Thus, in this context there is no difference between corroborated and uncorroborated statements. It must only be shown that material statements are untrue." *United States v. Multiple Use, Inc.*, 120 IBLA 63, 127, f.n. 67.

**Priority of Right Between Patented Locations**

Priority of right between two conflicting patented locations is determined by priority of patent and not by priority of location. *Hall v. Equator Mining & Smelting Co*., Fed. Cas. No. 5931 (CC Colo 1879). But, the title of the patentee of a mining claim dates back to the date of the entry rather than the date of patent. *Pacific Coast Mining Co., v. Spargo*, 16 F 348, 349 (CC Cal 1883).

**Patent Acquired by Fraud**

If a patent is acquired by fraud, although it is not void, it may be nullified in a suit by the U.S. Government against the patentee or his successors in interest. *Diamond Coal Co. v. U.S.*, 233 US 236, 239 (1914). However, before a court will nullify a patent on the ground of fraud, it must be clearly shown that the patent was acquired through false and fraudulent representation; and not merely that the applicant was mistaken on the mineral character of the ground. *Multnomah Mining, Milling & Development Co. v. U.S.*, 211 F 100, 128 (1914).

It is fraud on the Government to obtain a patent on representation that land is valuable for its mineral deposits, if the land is not valuable for such deposits but is desired by the patentee for some purpose other than mineral development. *U.S. v. Desert Gold Mining Co.*, 282 F. Supp. 614 (DC Ariz 1968). However a patent cannot be vacated or limited by the Interior Department because its power over the land is ended when the patent is issued. *Steel v. Smelting Co.*, 106 US 447 (1882).

**Extralateral Rights**

A patent conveys the right to everything found within the vertical planes drawn through the claim boundaries, with the exception of lodes that apex within the boundaries of other claims. *St. Louis Mining Co. v. Montana Mining Co.*, 194 US 235, 238 (1904).

A patent cannot grant extralateral rights to a patentee of a lode claim if the United States did not own such rights at the time of the grant. *Empire Star Mines v. Grass Valley Bullion Mines,* 99 F2d 228 (CCA 1938).

**Patents are Void**

Mining claim patents are void if the government officers acted without legal authority or if the lands were not available for patenting. *Northern Pac. R. Co. v. Cannon*, 54 F 252, 258 (1893), *appeal dismissed* 17 S.Ct. 997.

**Patent Covering Excess Area**

A patent that is issued for a surface area greater than permitted by law is void only for the excess. *Peabody Gold Mining Co. v. Gold Hill Mining Co.*, 106 F 241 (CC Cal 1900), *affirmed* 111 F 817, 821.

**No Suit to Annul Patent After Six Years**

Regardless of any error by the officers of the Land Department or by fraud by the patentee, "suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." 43 USC 1166. If the United States is attempting to annul a patent on the basis of concealed fraud, the statute does not run until the fraud is discovered. *United States v. Exploration Co.*, 203 F 387 (8th Cir 1913). However, if a title fraudulently obtained from the government is acquired by a *bona fide* purchaser, it is protected against action by the government to recover the patent. *United States v. Winona & St. Paul RR*, 165 US 463, 479 (1897).

**Failure to Record Patent in Local Records**

Failure to record a mineral patent in the local records does not effect the validity of the patent or cause a break in the chain of title. Even if the government should inadvertently issue

two patents for the same land, the second patent would not be valid even if it were first to be recorded. 2 *American Law of Mining* ' 9.8 G, pp. 328.1.

# 18. MINING CLAIM CONTESTS

## INTRODUCTION TO CONTEST PROCEEDINGS

### Purpose of Contest Proceedings

The authority of the Secretary of the Interior to initiate proceedings to contest the validity of unpatented mining claims on the public domain does not depend upon an assertion by the United States of some other use for the public lands; establishment of clear title to the lands is sufficient justification. *Davis v. Nelson,* 329 F2d 840 (9th Cir 1964). Claims may also be contested if request is made by a surface management agency other than the Bureau of Land Management such as the U.S. Forest Service or the Park Service.

The validity of a claim may be contested for one of the following reasons; (1) the lands are needed for another use such as a withdrawal for recreational purposes; (2) the claim is being used for nonmining purposes such as a vacation homesite; (3) the mineral claimed is subject to disposal under the mineral leasing or material sale laws; and (4) the government mining engineer or geologist cannot verify a discovery in connection with a patent application.

### Field Examination

The first step, before contest proceedings, takes place when a government mining engineer or geologist, commonly called a mineral examiner, makes a field inspection to verify the discovery. The Bureau of Land Management, the U.S. Forest Service and the U.S. Park Service all employ mineral examiners. The mineral examiner prepares a report on his or her findings with recommendations that the claim be considered valid or that the claim is invalid for lack of discovery of a valuable mineral.

### Contest Proceedings

The state director of the Bureau of Land Management makes the decision to initiate contest proceedings. A contest is an inquiry into the validity of a mining claim. The mining claimant is advised of the inquiry by the service of a complaint. If the claimant denies the

allegations of the complaint within the required time, an administrative hearing is held. At the hearing, the claimant will be allowed to cross-examine the Government's witness (mineral examiner) and will be given an opportunity to present his case, with or without legal counsel and expert witnesses to substantiate his assertion of the validity of the claim.

When the Government initiates a mining contest, it has only the burden of going forward with evidence to make a *prima facie* showing that the claim is invalid. A *prima facie* case has been made where the Government's mineral examiner testifies that he or she has examined the claim and found the evidence of mineralization insufficient to support a finding of discovery. *U.S. v. Kelty*, 11 IBLA 38 (1973). The burden of going forward then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made. *Foster v. Seaton*, 271 F2d 836 (DC Cir 1959).

The hearing is presided over by an Administrative Law Judge who renders a decision upon consideration of the law and all evidence submitted by the parties. If the Judge rules that there has been no discovery, the claim is declared null and void. The general authority of the Secretary of the Interior to investigate the validity of mining claims is set forth in *Cameron v. U.S.*, 252 US 450 (1920) where the Court said:

> By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the Department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved ... the power of the Department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed.

Although a mining claim on public land cannot be struck down arbitrarily, the Government has the power, so long as it holds legal title to the land and after proper notice and upon adequate hearing, to determine where the land is mineral in character and the claim valid, and if the land is found to be nonmineral in character, or the claim invalid, to declare it null and void. *Best v. Humboldt Placer Mining Company*, 371 US 334 (1963).

## GOVERNMENT JURISDICTION

### Authority of the Interior Department over Public Lands

The Department of the Interior has full responsibility to manage the public lands, including mineral lands, and it has broad authority to issue regulations concerning them. *Best v. Humboldt Placer Mining Co.*, 371 US 334 (1963). And the Department's rules and regulations, if reasonable and not inconsistent with valid law, have the force and effect of law, *U.S. v. Nelson*, 199 F 474, and are noticed judicially. *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 US 301 (1903). In fact it is provided by law (44 USC 1507) that the contents of the *Federal Register* be judicially noticed and that the *Code of Federal Regulations* is *prima facie* evidence

of the text of the original documents (44 USC 1510).

The legal basis for the Department's authority include the Acts of September 28, 1850 (9 Stat. 520); March 12, 1860 (12 Stat. 3); February 19, 1874 (18 Stat. 16); R.S. 2478; the Reorganization Plan No. 3 of July 16, 1946 (60 Stat. 1100); and 43 USC 1201. The law in its current form reads as follows (43 USC 1731, 1733 and 1740; Public Law 94-579; Act of October 21, 1976; 90 Stat. 2763):

> The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specifically provided for...

**Authority of Interior to Contest Claims**

In *Rocky Conner*, 139 IBLA 361, 365 (1997), the Board restated the Department= authority to contest mining claims:

> Although the Conners charge that this Department lacks authority to contest their claim, it is well settled that the Department is vested with such authority.
>
> > The determination of the validity of claims against the public lands was entrusted to the General Land Office in 1812 (2 Stat. 716) and transferred to the Department of the Interior on its creation in 1849. 9 Stat. 395. Since that time, the Department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them.
>
> *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963) (footnotes omitted).
>
> > Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void.
>
> *Cameron v. United States, supra*, at 460.
>
> This Board has held that, as against the United States, a mining claimant acquires no vested rights by location of a mining claim. Even though a claim may be perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of valuable locatable mineral within the boundaries of the claim, no rights are acquired. *United States v. Knoblock*, 131 IBLA 48, 78 (1994); *United States v. Mineco*, 127 IBLA 181, 191 (193). In addition, the continuing authority of the Department to inquire into the validity of claims so long as legal title remains in the Department has been repeatedly reaffirmed by the courts. *See, e.g., Schade v. Andrus*, 638 F.2d 122, 124-25 (9th Cir. 1981); *Ideal Basic Industries, Inc. v. Morton*, 542 F.2d 1364,

1367 (9th Cir. 1976).

**Right of Government to Clear Title**

In *Mulkern v. Hammitt*, 326 F2d 896, 897 (1964), the Ninth Circuit Court said:

> The location of a mineral claim upon the public lands of the United States is, in effect a unilateral act by the locator. It indicates that, in his opinion, there are minerals upon the land which are susceptible of profitable exploitation. That opinion may, of course, be, upon examination by less optimistic persons, regarded as ill-founded. If it is, the Government must have the right to clear the title and the right to the possession of its land from a useless and annoying encumbrance. The proceeding here under review was instituted by the Government because, it contended, the land in question did not contain minerals susceptible to profitable exploitation.

**Right to Prospect versus Right of Occupancy**

In *Davis v. Nelson*, 329 F2d 840,846 (1964), the Ninth Circuit Court stated:

> It is also clear that the contest proceedings which plaintiffs seek to enjoin do not attack plaintiffs' asserted right of possession to prospect and explore for minerals. By virtue of having located claims, plaintiff's here, like those in *Diguid v. Best*, 291 F2d 235 (9th Cir. 1961), claim a greater right than that of a mere prospector. The scope of plaintiffs' statutory right to prospect and explore, and of their right to occupancy for such purposes, will not be determined in contest proceedings.

**Government Authority to Contest Claims and Due Process**

The Bureau of Land Management may, at any time on its own initiative, question the character of the land in a mining location or question the uses to which such land is being put. In *Best v. Humboldt Placer Mining Company*, 371 US 334, at 336 (1963), the United States Supreme Court said:

> The determination of the validity of claims against the public lands was entrusted to the General Land Office in 1812 (2 Stat. 716) and transferred to the Department of the Interior on its creation in 1849 (9 Stat. 395). Since that time, the Department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them. *Cameron v. U.S.* 252 US 450 at 459, 460 -- an opinion written by Mr. Justice Van Devanter, who, as Assistant Attorney General for the Interior Department from 1897 to 1903, did more than any other person to give character and distinction to the administration of the public lands

-- illustrates the special role of the Department of the Interior in that field. Cameron, however, would not vacate the land and the United States sued to oust him. The Court said:

> By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved...
>
> 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. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.
>
> Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. 252 U.S. 450, 459-460.

Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department. *Orchard v. Alexander*, 157 US 372, 383. If a patent has not issued, controversies over the claims "should be solved by appeal to the land department and not to the courts." *Brown v. Hitchcock*, 173 US 473, 477.

**Judicial Role of the Secretary**

The Supreme Court of the United States has repeatedly acknowledged and defined the judicial role of the Secretary. In *Plested v. Abbey*, 228 US 42, 52 (1913), the Court said:

> Congress has placed the Land Department under the supervision and control of the Secretary of the Interior, a special tribunal with large administrative and quasi-judicial functions, to be exerted for the purpose of the execution of the laws regulating the disposal of the public lands.

And in *Knight v. United States Land Association*, 142 US 161, 178 (1891), the Court said:

> The Secretary of the Interior is the supervising agent of the government to do justice to all

claimants and preserve the rights of the people of the United States... The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department... by direct orders or by review on appeals.

In the *Estate of Arthur C. W. Bowen, Deceased*, 18 IBLA 379, 381, 382 (1975). the Board summarized the division of responsibility between the Department of the Interior and the Department of Agriculture. The Board stated:

> The statutory division of jurisdiction between the Department of the Interior and the Forest Service occurred when the Forest Service was placed under the jurisdiction of the Department of Agriculture. The Act of February 1, 1905, 16 USC 472 (1970), provided that the Secretary of Agriculture should execute all laws pertaining to lands within national forest, "excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands." The execution of the laws excepted in that act remained the responsibility of the Secretary of the Interior. The policy the Department of the Interior has followed since the enactment of that law was stated by Secretary of the Interior in a letter to the Secretary of Agriculture dated June 5, 1908:
>
> > The respective jurisdictions of the two departments over applications for rights and privileges within forest reserves may be safely defined as follows, namely, that your Department (Agriculture) is invested with jurisdiction to pass upon all applications under any law of the United States providing for the granting of a permission to occupy and use lands in forest reserve which occupation or use is temporary in character, and which, if granted, will in nowise affect the fee or cloud the title of the United States should the reserver be discontinued, but that this Department (Interior) retains jurisdiction over all applications affecting lands within a forest reserve the granting of which amounts to an easement running with the land ...
>
> 33 LD 609, 610 (1905).

Since that time the Department of the Interior has consistently exercised the exclusive authority, either on its motion or on the motion of others, to challenge the validity of mining claims in a national forest. *H.H. Yard*, 38 LD 59 (1909). Indeed, the Department of the Interior cannot delegate its authority to determine the validity of mining claims to another agency when the ultimate responsibility for that determination is placed by statute upon the Department of the Interior. What the Memorandum of Understanding purports to accomplish is to give the Forest Service an opportunity to challenge the validity of mining claims for any reason related to the management of the national forest. *U.S. v. Bass*, 6 IBLA 113 (1972). Such proceedings are nevertheless initiated and conducted by the Interior Department, with both the initial and final determinations as to validity of the claims resting with this Department. This has been the consistent practice of this Department, and was not changed by the Memorandum of

Understanding. *U.S. v. Dummar*, 9 IBLA 308 (1973).

In *U.S. v. Diven*, 361, 365, 366, the Board considered the authority of the Forest Service (1) to initiate contests, (2) to use Forest Service examiners as witnesses, and (3) to use Department of Agriculture attorneys in the prosecution of the case. The Board said:

> Although BLM will initiate a contest against a mining claim by issuing a complaint, the request for such may come from any Federal agency which has Federal public lands under its jurisdiction encumbered by unpatented mining claims.
>
> It is proper for the Government to be represented by counsel employed by the Department of Agriculture acting on behalf of the Forest Service... However, the final determination of the validity of such unpatented mining claims will be made by the Department of the Interior, after notice and opportunity for a hearing. *Best v. Humboldt Placer Mining Co.*, 371 US 334 (1963).

If an unauthorized use of a mining claim is believed to exist, the District Ranger submits a request for a mineral examination to the USFS Regional Office. A Forest Service mineral examiner, after proper authorization, may go on an unpatented claim to make a mineral investigation. The mineral examiner's findings, conclusions, recommendations, together with pictures and maps, will be compiled in a Report of Mineral Examination, which will be sent to the Regional Office for technical review and approval by the Regional Mineral Examiner. This report will be the basis for a decision on whether or not to contest the claim. *FS Manual* 2819.1.

**Mineral Examinations by the Park Service**

A Memorandum of Understanding, dated March 1977 (WO88) between the Bureau of Land Management and the National Park Service was established to authorize the National Park Service to conduct mineral examinations. The agreement was specifically made to allow the NPS to complete validity examinations in Glacier Bay, Death Valley or Organ Pipe Cactus National Monuments, Crater Lake or Mount McKinley National Parks and Coronado National memorial within the Statutory period provided by Public Law 94-429.

**Forest Service Role in Contest Actions**

The Forest Service, Department of Agriculture has no adjudicative authority over locatable minerals under the 1872 Mining Law. However the Forest Service does have an important role in the management of these minerals. A Memorandum of Understanding, executed by the Forest Service and Bureau of Land Management, effective May 3, 1957 (VI *BLM Manual* 3.1, Illustration 4, June 21, 1962) provides that the Department of the Interior will give the forum for any proper contest proceedings against unpatented mining claims which the Forest Service may wish to initiate. On the basis of this agreement, the Interior Department has

no authority to refuse to initiate a contest challenging the validity of a mining claim located in a national forest, if the elements of a contest are present. *U.S. v. Bergdal*, 74 ID 245 (1967).

## CONTESTS

### Validity Versus Condemnation

The authority of the Department of the Interior to determine the validity of mining claims is not affected by the institution of proceedings by the United States to condemn the interests of the mineral claimants. *U.S. v. Baker,* A-25434 (Oct. 14, 1948).

### Motivation for Contest

The motivation of any government agency in initiating a contest against mining claims is irrelevant. The fact that such contest challenges the validity of certain mining claims, and not of others in the same general area, does not constitute a denial of due process. *U.S. v. Howard,* 15 IBLA 139 (1974).

### Contests May Be Used to Resolve Conflicts Between Surface Management Programs and Claimants

In *Cliff Gallauger,* 140 IBLA 328 (1997), the Board pointed out that a mining claim contest is a legitimate mechanism to resolve conflicts between surface management programs and mineral claimants. The Board said at 340:

> Moreover, BLM=s willingness to consider the initiation of mineral contests where conflicts between its surface management programs and the desires of mineral claimants cannot be amicably resolved, far from constituting an improper threat, represents the utilization of a legitimate mechanism for the resolution of such conflicts. Mining claims are, after all, an assertion by the locator that he or she has made a discovery of a valuable mineral deposit which vests in him or her rights to the mineral estate as against the United States. If the Department has a legitimate reason to believe that the requirements of the mining law have not been fulfilled in any individual case, commencement of a mining contest to afford claimants an opportunity to establish that a discovery has, in fact, been made fully accords with the Department=s responsibility to exercise its delegated authority Ato the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved.@ *Cameron v. United States,* 252 U.S. 450, 459-60 (1920). Appellants have no legitimate cause for complaint on this point.

### Community Property

Although a woman, as a citizen of the United States, may in *propria persona,* locate mining claims pursuant to R.S. 2319, 30 USC 22 (1976), unless she is specifically named in the

notice of location or in a subsequent deed transferring title to an unpatented mining claim, the wife of the locator or claimant to an unpatented mining claim need not be recognized by the United States as having any rights in or to an unpatented mining claim owned in whole or in part by her husband. *Melvin McCormick*, 5 IBLA 382 (1972).

The courts in states recognizing community property, have consistently held, with respect to such community property, that the husband represents the community interests of himself and also his wife, and as to such interest the wife is considered to be in privity with her husband and is represented in actions affecting such community property as though she had been expressly made a party thereto. *Lichty et ux. v. Lewis et ux*., 77 F 111 (9th Cir 1896).

**Initiating a Contest Action**

Before initiating contest action on a mining claim, a government geologist or mining engineer conducts a validity investigation of the claim. The results of the investigation are described in a written report which contains factual data and supports the conclusions concerning the validity of the claim. The conclusions, which are the basis of the charges in the complaint, normally address such items as discovery, marketability, common varieties, assessment work and mineral character of the claim(s).

**Review of Request for Contest and Charges**

Requests for initiation of Government contests are reviewed by the BLM state office minerals specialist for adequacy of the mineral report. The charges to be inserted in the complaint will be examined to determine if they are supported by the findings in the mineral report.

**Contests Proceedings**

If the report on the validity of a claim should contain a recommendation for contest proceedings, the claimant is served with a complaint setting forth the charges. If the claimant answers the complaint within the 30-day time period, an administrative hearing is held, presided over by an administrative law judge. On the basis of the testimony presented at the hearing, the judge determines if the charges are true. The judge then renders a decision on the findings developed at the hearing. If the charges in the complaint are not answered by the claimants within the 30-day period, the charges are taken as admitted, and a decision declaring the claims null and void is issued by the proper BLM office. All decisions by the BLM and the administrative law judges are appealable to the Interior Board of Land Appeals.

**Conflicts of Record Versus Ouestions of Fact**

Contest actions involving administrative hearings are held only where questions of fact must be resolved. In such cases it is essential that an administrative law judge has an opportunity to hear both sides present their case, including cross examination of witnesses in order to best establish the facts of the case.

However where conflicts of record exist, contest action is not necessary. For example, where claims are located on lands that were withdrawn or segregated from mineral entry at the date of location, such claims are null and void *ab initio* (from the beginning). An investigative report on such a case would recommend that a decision be issued declaring the claims null and void *ab initio*.

The Department of the Interior has long recognized a distinction between two categories of cases involving the determination of validity of mining claims. The first category includes cases where the validity of a claim turns on the legal effect to be given to facts of record (a question of law) and the second category consists of cases where the validity of a claim depends upon the resolution of a factual issue (a question of fact). The Department has always held hearings in the second category of cases but not in the first category. *The Dredge Corporation*, 65 ID 336 (1958), *affirmed* in *Dredge Corporation v. Penny*, 362 F2d 889 (9th Cir 1966).

**Types of Proceedings: Administrative Decisions versus Complaints**

Whether or not the land is open to mineral entry on the date of mining claim location, dictates the type of proceedings that will be instituted against a claim. The status of the land may either allow an administrative decision to be issued declaring the claims to be null and void *ab initio*, or require a complaint to be issued, bringing charges and giving the contestee a right to a hearing.

**Administrative Decision on Matters of Record**

If a mining claim was located on lands which were withdrawn or segregated from mineral entry at the date of location and the withdrawals or segregations is a matter of record with the Bureau of Land Management, the mining claimant has not acquired a right to property and a hearing is not required. This type of case is resolved by issuance of an administrative decision prepared by the BLM mining law adjudicator with a declaration that the claim is null and void *ab initio* (from the beginning).

**Contents of the Administrative Decision**

The administrative decision should contain the following items in narrative form:

1. name of claim;
2. date of location;
3. name of claimant;
4. geographical position of the claim;
5. court house and BLM document reference;

6. facts identifying the withdrawal or other segregation (including legal authority);

7. a statement that the land was not open to location on the date the claim was located and a declaration that the claim is null and void ab initio.

These decisions are normally served by certified mail to the record owner as recorded under FLPMA. The claimant is allowed 30 days to appeal to the IBLA.

**Service of Decisions and Complaints**

Service of administrative decisions and complaints may be accomplished by delivering the copy personally or by sending the document by registered or certified mail with return receipt requested. Proof of service and date of service is documented by a post-office return receipt showing that the decision or complaint was delivered at the person's record address or showing that the document could not be delivered to the record address (1) because the person has moved without leaving a forwarding address, (2) because delivery was refused at that address, or (3) because no such address exists. 43 CFR 4.401(c).

## ESTOPPEL AND LACHES

Under certain circumstances, the defense of equitable estoppel may be applied to the Government. Davis, *Administrative Law of the Seventies*, 17.01 at pp. 399409 (1976). Davis, at page 400, says that "estoppel should be applied against governmental bodies where justice and right require it." At least in one case the United States Supreme Court has noted that some Federal courts have permitted estoppel against the Government based on the conduct of its officials. *Montana v. Kennedy*, 366 US 308, 314-315 (1961).

In *U.S. v. Georgia-Pacific Company*, 421 F2d 92 (9th Cir 1970), the Ninth Circuit set forth the elements of an estoppel:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; (4) he must rely on the former's conduct to his injury.

The Court further stated "that the dictates of both morals and justice indicate that the Government is not entitled to immunity from equitable estoppel." *U.S. v. Georgia-Pacific Company, supra* at 103.

In *Atlantic Richfield Co. v. Hickel*, 432 F2d 587, 591 (10th Cir 1970), the Tenth Circuit Court required for application of estoppel, that the actions and statements relied on be authorized and correct. On this the Court stated:

> The United States may not be estopped from asserting a lawful claim by the erroneous or unauthorized actions or statements of its agents or employees, nor may the rights of the

United States be waived by unauthorized agents' acts. As harsh as the tenet is under practical application, an administrative determination running contrary to law will not constitute an estoppel against the federal government.

**Interior Department Regulations**

The Interior Department Regulation is consistent with the *Atlantic Richfield* decision. At 43 CFR 1810.3, the regulation provides:

> (a) The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or agents, or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.
>
> (b) The United States is not bound or estopped by the acts of its officers or agents when they enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.
>
> 8 Reliance upon information or opinion of any officer, agent or employee or on records maintained by land offices cannot operate to vest any right not authorized by law.

In *Brandt v. Hickel*, 427 F2d 53 (9th Cir 1970), the government was estopped to deny misleading advice to an oil and gas offeror. In this case, the offeror was misled to believe that she would not lose her first priority in an oil and gas lease drawing while she corrected certain information in her offer. After Brandt received the misinformation, a second offer was submitted by Hansen for the same parcel of land; however Hansen's offer was rejected. On Hansen's appeal to the Secretary, the Secretary reversed and held that BLM had no authority to give the Brandt offer priority over the Hansen offer. On appeal, the Ninth Circuit Court held that BLM was estopped to disavow its misleading advise to Mrs. Brandt.

In *U.S. v. Lazy FC Ranch*, 481 F2d 985, 989 (9th Cir 1973) the Court described a test that was also approved by Wharton:

> The *Moser-Brandt-Schuster* line of cases establish the proposition that estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel.

In *U.S. v. Wharton*, 514 F2d 406 (9th Cir 1975), the requirement that a party to be estopped must know the facts was interpreted to include those situations where the party to be estopped should have known the facts giving rise to the estoppel. In concluding that estoppel would lie against the Government, the Court said:

> The interest of the public would not be unduly threatened or damaged by invoking estoppel against the government and granting the occupants an opportunity to obtain this small tract of desert land. The public will be damaged to no greater extent now than it

would have been had the original entry been completed. To the contrary, the public interest will be served by the addition of the land to the tax rolls once the Whartons have gained title. And, perhaps more importantly, the public has an interest in seeing its government deal carefully, honestly and fairly with its citizens. *Supra* at 412413.

In a more recent case involving a resurvey which questioned a long-established boundary, the Court denied estoppel because "affirmative misconduct" did not exist. *U.S. v. Ruby Co*., 588 F2d 697, 703 (9th Cir 1978). "Affirmative misconduct" would require an affirmative misrepresentation or affirmative concealment of some material fact.

**Rules of Estoppel**

The Interior Board of Land Appeals has well-established rules governing consideration of estoppel issues. First, it has adopted the four elements of estoppel described by the Ninth Circuit Court of Appeals in *United States v. Georgia Pacific Co*. , 421 F.2d 92, 96 (9th Cir. 1970). These elements are: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his\her conduct shall be acted on or must so act that the party asserting estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped. Second, we have adopted the rule of numerous courts that estoppel is an extraordinary remedy, especially as it relates to the public lands. *Harold E. Woods*, 61 IBLA 359, 361 (1982). Third, estoppel against the Government in matters concerning the public lands must be based upon affirmative misconduct, such as misrepresentation or concealment of material facts. *United States v. Ruby Co*., 588 F.2d 697, 703-04 (9th Cir. 1978); D.F. Colson, 63 IBLA 121 (1982); Arpee Jones, 61 IBLA 149 (1982). Finally we have noted that while estoppel may lie where reliance on Government statements deprived an individual of a right which he would have acquired, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law. 43 CFR 1810.3(c); *Raymond T. Duncan*, 96 IBLA 352 (1987); *Shama Minerals*, 119 IBLA 152, 156 (1991).

The IBLA has expressly ruled that, "as a precondition for invoking estoppel, the erroneous advice upon which reliance is predicated must be, inter alia, 'in the form of a crucial misstatement in an official decision.' *United States v. Morris*, 19 IBLA 350, 377, 82 I.D. 146, 157 (1975), quoting form *Marathon Oil Co*., 81 I.D. 447, 455 (1974)." *In Infield Resources* 101 IBLA 124, 126 (1989), the Board held that file abstracts are not official decisions and therefore not a basis for estoppel.

**Estoppel Applied to Claims in Withdrawals**

In *Edward Ellis*, 42 IBLA 69, 72 (1979), the Board discussed the application of estoppel where mining claims were located on lands withdrawn from mineral entry. In this case the Board said:

As in the *Wharton* case, the effect of the estoppel against the Government was to permit

the exercise of a right which was available to the general public, i.e., the right to lease public land open for oil and gas exploration. Appellants here, however, assert a right to locate a claim on withdrawn land, a right which is wholly unavailable to the general public.

In *Arthur W. Boone*, 32 IBLA 305, 308 (1977), we held:

> The fact that a mining claimant has held a claim for many years and performed work on the claim does not, by itself, create any rights against the Government which will estop the Government from determining the validity of the claim ... It is incumbent upon the locator of a mining claim to exercise considerable care in ascertaining the status of the land embraced in the claim and the limitations upon his rights as the holder of an unpatented mining claim ... (Reliance on open status of land is unreasonable and, hence, estoppel will not lie where details of effect of withdrawal were available upon inquiry at the local land office). Failure of a Government employee to advise appellant that the land embraced in the mining claims was closed to mining location cannot give life to invalid claims.

In *U.S. v. Verdugo & Miller*, 37 IBLA 281, 282 (1978), the appellant contended that the contest proceeding was barred by estoppel and laches because the Forest Service had made no objection to the location and development of the claims for approximately 10 years prior to initiation of the contest. In this case the Board said:

> These circumstances do not describe a case in which the equitable defenses of either laches or estoppel can be properly invoked against the United States ... In *Brittain Contractors, Inc*., 37 IBLA 233 (1978), we noted that it has been estimated that more than 6,000,000 unpatented mining claims have been located on the public lands of the United States, exclusive of those in national forests. It would be an absurdity to place the onus on the United States to "promptly" determine the validity of all these claims or else be forever barred from defending its interests in those claims believed to be invalid.

**State Statutes of Limitations and Defense of Laches**

In *Roberts v. Morton*, 549 F2d 158, 163 (9th Cir 1977), the Court of Appeals considered the application of state statutes of limitation and the defense of laches to rights of the United States. In this case the Court said:

> We start with the general rule that "...the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." *U.S. v. Summerlin*, 310 US 414, 416; *Board of Commissioners v. U.S.*, 308 US 343, 351. But even assuming some relaxation of these strict rules might be developing, there are no circumstances shown here to support the defense of laches. It is an affirmative defense requiring a showing of lack of diligence by a plaintiff and prejudice to the defendant. *Costello v. U.S.*, 365 US 256, 282.

**Collateral Estoppel**

Collateral estoppel operates to prevent relitigation of issues actually litigated between the same parties in a suit on a different cause of action. *V & S Machine Co. v. Eastex Poultry Co.*, 437 F2d 422, 425 (6th Cir 1970). If the second suit between the same parties is on a different cause of action, only those matters actually litigated and determined in the first action are conclusive in the second suit under the doctrine of collateral estoppel. *U. S. v. General Electric Co*., 358 F Supp. 731,738 (D NY 1973).

## COMPLAINTS

The Bureau of Land Management issues complaints on Form 1850-7. The issuance of the complaint starts the contest action and service of the complaint notifies the claimant of the charges to be defended in an administrative hearing.

**Elements of a Complaint in Government Contest**

The essential elements contained in a complaint used in a Government contest are given below:

1. *Contestees*: parties named as contestees are the locators, or any subsequent transferees having an interest as shown by the official records, or any other known parties claiming an interest.

2. *Name of claim*.

3. *Addresses of contestees.*

4. *Legal description of the land involved*: the claims may be identified by incorporating the complete descriptions by reference, *U.S. v. Montezuma Iron and Pigment Co*., 14 IBLA 115, 116 (1973); it has been held that a claim described "in the wrong range does not vitiate a decision holding the claim null and void where there was no confusion as to the land involved, the contestee and the mineral examiner had been on the claim together, and there is no showing of prejudice to the contestee," *U.S. v. McGuire*, 4 IBLA 307, 309 (1972); in another case it was held that it is not proper to hold an amended location invalid containing land which was not described or referred to in the contest complaint, *U.S. v. Gifford Allen*, A-28718 (July 26, 1962).

5. *Recordation information*: date of location of claim, book page, instrument number, place of recordation, including recordation data on amended locations and transfers of interest; BLM recordation data should also be included.

6. *Conveyances*: name of original locator and any subsequent transferees.

7. Proceedings pending for acquisition of title to or an interest in the land, such as public sale, oil and gas lease, etc.

8. *Charges being instituted against the claim.*

9. *Prayer for relief*. all complaints must contain as a prayer for relief that "mining claims be declared null and void." Where the *Mineral Entry Final Certificate* is issued in an application for mineral patent, the complaint must contain an additional prayer for relief that "mineral entry be canceled." It must also contain the prayer that the application for patent be rejected where the Mineral Entry Final Certificate has not been issued.

10. *Address of contestant and name and address of any adverse party*: if initiated on behalf of another Government agency, that agency must be named as an adverse party. *U.S. v. Roy Jones*, 10 IBLA 112 (1973).

11. *Signature*: all copies of the complaint to be served upon contestees must be signed by an authorized officer.

**Service of Complaints**

Service of the complaint must be made on each and every party named in the complaint. Mining claims may or may not be community property. In states where the state statutes specifically provide that mining claims are not community property, and if husband and wife are named as contestees, each must be served separately.

If a corporation, partnership, or association is named as contestee, service of the complaint must be made upon any officer authorized to conduct the affairs of such organization. Such service would legally bind the corporation. Service may be made through an agent, provided the corporation has made special appointment of a statutory agent to receive service in contest proceedings. *U.S. v. Al Sarena Mines, Inc*., 61 ID 280 (1954).

Exceptions to service on actual party are given below:

1. If the contestee is deceased, the heirs or devisees are determined by obtaining a certified copy of appropriate proceedings in the probate known to be of the deceased person's estate. All heirs must be served. *U.S. v. Johnson*, A-30828, (January 29, 1968).

2. If the contestee has not reached the age of majority or a person who has been legally adjudged of incompetency, the legal guardian or the committee of such person must be served, or if there is no legal guardian or committee, service must be made on the person having charge of the minor or incompetent person. *Solicitor's Opinion* M-36514, (August 1958).

3. Service may be made upon an attorney at law whose client is the person to be served -- if, and only if, such client has authorized the attorney to represent him in the matter involving the service. *U.S. v. Montezuma Iron and Pigment Co*., 14 IBLA 114 (1973). Furthermore, if there is more than one locator, the attorney must represent all of them. *U.S. v. Brunkalla*, A-30231 (Dec. 29,1964).

4. Service may be made upon an attorney in fact if such designation is actually shown authorized under the power of attorney to accept service on behalf of the contestee to be served. *Solicitor's Opinion* M-36514, (August 1958).

**Service by Publication**

If personal service is not possible, constructive service (informing claimant or party of a complaint or contest by some legal means other than personal service) is authorized by the regulations (43 CFR 4.450-5). Constructive service is accomplished by publication. Before publication is authorized, a diligent search for all claimants must be made so that personal service can be made, if possible.

Now that recordation of every claim with the BLM is required by the Federal Land Policy and Management Act (43 USC 1744), the government has an address for every claim owner of record. The regulations in 43 CFR 3833.5(d) provide as follows:

> In the case of any action or contest affecting an unpatented mining claim, mill or tunnel site, only those owners who have recorded their claim or site pursuant to 3833.1-2 or filed a notice of transfer of interest pursuant to 3833.3, shall be considered by the United States as parties whose rights are affected by such action or contest and shall be personally notified.

This regulation was recently upheld in *Topaz Beryllium v. U.S.*, 649 F2d 775, 779 (10th Cir 1981). In this case the court ruled that in government-initiated contests, the government may serve the claimants of record under the FLPMA recordation system; however, in private contests, the third party who initiates the contest cannot ignore the local records when determining to whom notice must be sent. As stated by the District Court (*Topaz Beryllium v. U.S.*, 479 F. Supp at 316) and affirmed by the Tenth Circuit (*Supra*, at 779):

> It is easier and more efficient to require millions of claim holders to say to the government early on, "tell me" if you intend to challenge my interest, than to require the government to ferret out millions of interested persons from local records scattered in thousands of locations.

**Amendment to Complaint**

The complaint which initiates the contest action may be amended only after the parties have been given due notice and allowed an opportunity to object. No issue unrelated to the

complaint may be interjected at the hearing without the implied or expressed acquiescence of the contestee. A decision holding mining claims to be null and void will be vacated if the contest did not proceed upon any grounds stated in the complaint or upon any issue to which the contestee had expressly or impliedly consented. *Harold Ladd Pierce*, 3 IBLA. 29 (1971).

In a mining contest a matter not charged in the complaint can be used as a ground to find a claim invalid where it is raised at the hearing and the contestee does not object to it at the hearing. *U.S. v. Alexander*, 17 IBLA 430,431 (1974). Thus, even if the Government has failed to make a *prima facie* case, evidence presented by the contestee which supports the Government's contest charges may be used against the contestee, regardless of the defects in the Government's case. *U.S. v. Arizona Mining and Refining Co., Inc*., 27 IBLA 99 (1976). Where the name of a new claimant surfaces after issuance of a complaint, the complaint may be amended to show the name of the new claimant. *U.S. v. Gibson*, 16 IBLA 246 (1974).

**Failure to Answer Complaint**

The failure of a claimant to answer a complaint and assert his Ainterest@ in the claim, where there was a determination that Athe claim was null and void, was as effective upon him as if he had been personally served and failed to answer.@ *Robert Mendenhall*, 127 IBLA 73, 80 (1993).

**Defect in Service Waived if Claimant Files Answer to Complaint**

In *U.S. v. Montgomery*, 75 IBLA. 358 (1983), the Board considered a case where the BLM issued a complaint to a party other than one of the co-owners of a claim. Even though he was not served, one of the co-owners (Montgomery) was aware of the complaint and filed an answer to the BLM. Because 43 CFR 4.450-5(a) provides that if, prior to summary dismissal of a complaint a contestee answers without questioning the service, any defect in service will be deemed waived as to such answering contestee. Therefore it was concluded "that since Montgomery had actual knowledge of the complaint and filed an answer, he waived any defect in service."

It was also concluded that the waiver only applied to Montgomery and not the other co-owners. Even though he purported to answer on behalf of the other co-owners, such answer could not bind those co-owners in the face of the failure of BLM to serve them properly. There is no evidence of service on the other co-owners or of waiver of defective service by any of those three. Therefore, the interests of the co-owners other than Montgomery were not affected by the outcome of the contest in this case.

**Claim Owner Must Be Served or Contest Is Fatally Defective**

Failure to serve a claim owner with a copy of a contest complaint is fatally defective to a contest. In *Patsy A. Brings*, 98 IBLA 385 (1987), a claimant had conveyed her interest to another party before the BLM's complaint on June 23, 1956. Although the quitclaim deed was not recorded, on June 23, 1956, the new claim owner recorded an affidavit of labor which reflected

him as the new owner. The Board held that because the new owner was not served a copy of the complaint, the failure to do so was fatally defective to the contest.

**Upon Request, 30-Day Period May Be Extended**

In *Estate of Ralph James Steward*, 36 IBLA 275 (1996), the claimant=s attorney had filed a letter with BLM within the 30-day period for answering a contest complaint, requesting additional time to answer the complaint. BLM declared the claims null and void for failure to file a timely answer to the complaint without ever answering the request. The Board remanded the case back to BLM because under 43 CFR 4.422(d) it is expressly provided that BLM Amay extend the time for filing * * * any document in a contest.@

**Service Accomplished If Sent to Last Address of Record**

Under 43 CFR 4.450-5, a contest complaint is properly served on a claimant by delivering it to his last address of record. This is true regardless of the fact that it may not actually have been received by him. *See Terry L. Wilson*, 85 IBLA 206, 209, 92 I.D. 109, 111 (1985); *Estate of Ralph Jones Steward*, 136 IBLA 275 (1996).

**Date of Complaint Issuance Is Date for Determining Parties of Interest**

The date of issuance of the complaint is the critical date for determining real parties in interest. Prior to that date, it is the BLM's obligation to search the appropriate records to obtain ownership information. *Patsy A. Brings, supra* at 389. In *United States v. Prowell*, 52 IBLA 256, 258 (1981), the Board stated:

> We hold that where the contest complaint, when filed and received by the mineral claimants, correctly identifies all claimants as of that time, the addition or substitution of subsequent transferees is the obligation of those who have acquired such an interest and their failure to so move will not vitiate the effectiveness of an adjudication of the validity of a mining claim.

**Private Contest Complaints Require Statements of Witnesses**

In a private contest proceedings, the regulations 43 CFR 4.450-48 require statements of witnesses corroborating the allegations of the complaints. As stated in *Melvin Helit v. Gold Fields Mining Corp*., 113 IBLA 299, 315 (1990):

> * * * The purpose of the requirement is to assure there is evidence of the truth of the facts alleged, thereby preventing Athe allowance of unjustifiable attacks against entries, thus relieving the Land Department of the consideration of speculative and unwarranted contests and entryman from the trouble and expense attendant on the defense thereof.@ *Nemnich v. Colyar*, 47 L.D. 5, 7 (1919). The complaint is not a corroborating witness and his affidavits cannot confirm the facts alleged in the complaint. *Winegeart v. Price*, 90 I.D. 338, 342 (1983).

**Complaints Issued on Questions of Fact**

If the records show that at the date of location of the claim, that the lands were open to mineral location, the claimant may not be divested of his possessory title without proper notice of hearing to determine the validity of the claim. The existence of a "valuable mineral deposit" within the limits of a claim is a question of fact that must be determined by a hearing. A notice of adverse proceedings must be given by issuance and service of a complaint.

**Contest Charges**

The mineral examiner is responsible for recommending the specific charges to be used in the contest complaint. These charges are the basis for the contest proceedings. Contest charges may take many forms, particularly if the agency should wish to establish a particular point of law through case law.

**Obliteration of Monuments Does Not Invalidate Claim**

In *U.S. v. Pool*, 78 IBLA 215, 217-218 (1984), the Board reviewed a charge in a complaint that a claim should be declared invalid because "the claims are not marked or monumented on the ground so that the boundaries can be readily traced." In response to this charge, it was held that "an inability to locate claim boundaries which results from failure to maintain monuments may make it more difficult for a claimant to establish that discoveries exist on specific claims, but it does not, by itself, necessarily invalidate the claim." The Board also stated at 217-18:

> In the first place, as Written the allegation fails to state an adequate ground for the invalidation of a mining claim. While it is true that a lode claimant must monument claim comers in locating a claim (30 USC ' 28 (1976)), the subsequent obliteration of these monuments does not invalidate the claim where the destruction is not caused by the claimants. *See, e.g., Larned v. Dawson*, 90 F. Supp. 14 (D. Alaska 1950). Absent an allegation that claimants were responsible for the present lack of monumentation or that the claims had never been monumented, the charge in the complaint was premised on a misperception of law.
>
> We recognize that there could be situations where it is possible to establish the exact situs of the claims from the location notices and thus the failure to maintain monuments might make it impossible to delineate the claims.

**Charge of Lack of Good Faith**

In *United States v. Jerry E. Franklin, supra* at 126, the Board held that if "claims were not located in good faith because they were located for purposes other than for mining development, BLM could have so charged in the complaint."

**Charge of Bad Faith**

In *United States v. Miller*, 138 IBLA 246 (1997), the Forest Service included a Abad faith@ charge in a contest complaint because it was a standard charge to be included even though the examiner testified that he believed the claimants were making a good faith effort to make a discovery. To repudiate this approach, the Board said at fn. 3, page 250:

> In this regard, we wish to emphasize that there is no such thing as a Astandard@ charge in a contest complaint. While there have been a number of cases in which the allegation of Abad faith@ does, indeed, appear to have been just Aadded@ without regard to whether or not there is any evidence to support this allegation, we wish to make it clear that the Board looks upon this practice with extreme disfavor. The charge that a claim has been located in Abad faith@ is a serious charge, one which, if proven, can invalidate a claim even if the claim is supported by a discovery. *See, e.g., United States v. Zimmers*, 8 IBLA 41 (1984); *In re Pacific Coast Molybdenum*, 75 IBLA 6, 90 I.D. 352 (1983). Such a charge is not to be included in a contest complaint unless the Forest Service has reason to believe that the claim is not being held, in good faith, for mining purposes. Where, as here, the Forest Service readily admits the good faith of the mining claimants and merely asserts that the claim under contest is not supported by a discovery, inclusion of such a charge is clearly improper.

**Answer to Complaint**

An answer to a complaint must be filed in the proper BLM Office within thirty days from date of service of the complaint or the last date of publication. If an answer is timely filed, the case record is forwarded to the appropriate Administrative Law Judge. This case record must include the signed original of the complaint, proof of proper service on contestee, and the answer. The mineral report of the validity investigation is not sent to the Judge.

**Unanswered Complaint**

In *U.S. v. Weiss*, 15 IBLA 198 (1974), the Board discussed due process of law where the claimant fails to answer a complaint. The Board said:

> A mining claim is a claim to property which may not be declared invalid without proper notice and an adequate opportunity for an agency hearing in accordance with due process of law. Administrative Procedure Act, 5 USC 554 (1970); *U.S. v. OLeary*, 63 ID 341 (1956). Due process consists of notice and opportunity for Hearing, and it suffices if the claimant is afforded the opportunity to be present and heard. *U.S. v. McCall*, 1 IBLA 115 (1970). But there is no requirement that a hearing be held where the contestee has been given due notice in the form of an adequate contest complaint, properly served, and fails thereafter to avail himself of the opportunity for a hearing within the time provided. *U.S. v. Garnett*, A-28545 (Jan. 31, 1961). The requirement for the timely filing of an answer to a contest complaint is mandatory in nature and jurisdictional in character. 15 IBLA at

207.

It is a long-standing rule that the Secretary of the Interior is without authority to waive his own regulations to permit late filing of answers to contest complaints. If the answer is not timely filed, the allegations of the complaint must be taken as admitted and the claims declared null and void. *U.S. v. Sainberg*, 5 IBLA 270 (1972), *aff'd sub nom., Sainberg v. Morton*, 363 F. Supp. 1259 (D Ariz 1973). As the District Court stated in affirming the Department's position:

> The Secretary's rules are reasonable in giving a period of thirty days in which to file an answer. In order to carry out an orderly system of justice the Secretary has not established a grace period or retained discretion in the application of the regulation. Plaintiffs ask this Court to require the Secretary to waive his own mandatory regulation because the answer was filed one day late as a "result of mistake, inadvertence and excusable neglect." Nowhere in the regulations is the authority given the Secretary to waive his regulations because of excusable neglect or mistake. The defendant is required to abide by his own regulations, so are plaintiffs. If the time requirement was waived this would disturb the Secretary's long-standing procedure of administering the mining laws and other land laws fairly. The regulations would be a farce if they could be applied only if and when the parties felt like complying therewith. 363 F. Supp. at 1263.

If a complaint or publication remains unanswered after the time allowed for response, a decision declaring the claim null and void must be issued to contestees, or in situations involving publications, the decision must be a part of the official record. ABoth the contest complaint and the applicable regulations, 43 CFR 4.450-7(a),expressly advised appellants that if an answer were not filed within 30 days the allegations of the complaint would be taken as admitted and the case would be decided without a hearing. The failure to timely file an answer is not waivable, even where the answer is filed 1 day late. *See, e.g., Sainberg v. Morton*, 363 F.Supp. 1259 (D. Ariz. 1973).@ *Robert D. McGoldrick*, 115 IBLA 242, 248 (1990).

**Failure to Answer Complaint Is Admission of Charges**

In *Union Oil Company of California*, 98 IBLA 37, 43 (1987), the Board described the consequence of failure to answer a complaint in a mining claim contest:

> It is undisputed that where a party to a mining claim contest does not answer the contest complaint denying the charges therein, which would result in a declaration of invalidity, the Government may properly treat this failure as an admission and declare the claim null and void.

**Failure to Name a Party in Contest Complaint**

"The law is well settled that, even if a Government contest complaint fails to name all of the parties in interest, it is not subject to dismissal for that reason and determination made pursuant thereto is sufficient to bind the parties properly served. *See United States v. Prowell*, 52 IBLA 256 (1981); 43 CFR 4.450-2(b). If a party is not served, it would have standing to raise an

argument that such a failure compels reversal of a BLM determination.@ *Robert D. McGoldrick*, 115 IBLA 242, 248 (1990).

**Error in the Name of Contestee on Complaint**

The owner of a mining claim will be regarded as having been properly served and due process satisfied when that person actually received a copy of the complaint challenging the validity of the claim. This is true even though there was a minor error in the name of the contestee. *Union Oil Company of California, supra*.

**Motivation for Government Contest Is Irrelevant**

AThe motivation of a Government agency when initiating a contest against a mining claim is irrelevant to a determination of the existence of a discovery, as a discovery is necessary to the continuing validity of an unpatented mining claim. The fact that such contest challenges the validity of certain mining claims and not of others in the same general area does not constitute a denial of due process." *United States v. Jerry E. Franklin*, 99 IBLA 120, 126 (1987).

## HEARINGS

**Right to Hearing**

A mining claim is a claim to property which may not be declared invalid without proper notice and an adequate opportunity for an agency hearing in accordance with due process of law. Administrative Procedure Act, 5 USC 554 (1976); *U.S. v. O'Leary*, 63 ID 341 (1956). Due process consists of notice and opportunity for hearing, and it suffices if the claimant is afforded the opportunity to be present and heard. *U.S. v. McCall*, 1 IBLA 115 (1970).

**Testimony at Administrative Hearings**

Oral testimony at administrative hearings is taken under oath and is subject to cross examination. Documentary evidence may also be received and admitted in the record. The judge also has the authority to exclude testimony which is irrelevant and rule upon objections to evidence.

**Trial by Jury**

Regarding the right of trial by jury, in *U.S. v. Fisher*, 37 IBLA 80, 85 (1978), the Board stated:

> Appellants' contention that they were denied their seventh amendment right to a jury trial is also without merit. Statutory rights adjudicated in administrative proceedings, such as mining claim contests, were unknown at common law, and the amendment does not

extend to such quasi-judicial administrative proceedings.

**Circumstances Where Hearing Required**

In *Pine Grove Builders*, 126 IBLA 269, 275 (1993), the appellant requested a fact-finding hearing. The Board responded that "under 43 CFR 4.415, a hearing is required only when the record before the Board presents conflicting issues of fact that cannot be resolved on the bases of that record.

**Issue of Fact Resolved at Hearing**

"A hearing is necessary only where there is a material issue of fact requiring resolution through the introduction of testimony and other evidence. *United States v. Consolidated Mines & Smelting, Ltd.*, 455 F.2d 432, 453 (9th Cir. 1971); *KernCo Drilling Co.*71 IBLA 53, 56 (1983)." *Joe Trow*, 123 IBLA 96, 103 (1992).

**Hearing Officers and Witnesses Employed by the Government**

The Secretary of the Interior is charged with seeing that valid mineral claims are recognized, invalid ones eliminated, and the rights of the public preserved. *Palmer v. Dredge Corp*., 398 F2d 791 (9th Cir 1968), *cert. denied*, 393 US 1066 (1969). It is well established that the Interior Department may determine the validity of mining claims by administrative contest proceedings which provide the claimant the right to a hearing before a qualified hearing officer (Administrative Law Judge). *Best v. Humboldt Placer Mining Co*., 371 US 334 (1963).

The fact that a hearing in a mineral contest is conducted by an Administrative Law Judge employed by the Department of the Interior, that the Government's case is presented by a witness and by an attorney employed by the Department of Agriculture, and that appellate review is conducted by employees of the Department of the Interior does not establish unfairness in the proceeding. *U.S. v. Stevens*, 1 IBLA 380, 81 ID 83 (1974). A Forest Service mineral examiner is not to be disqualified as a witness against a mining claim within a national forest nor his testimony discredited merely because he is an employee of that agency. *U.S. v. Zerwekh*, 9 IBLA 172 (1973). In *U.S. v. Stevens, supra*, the Board said that "the mere fact the witnesses, the Administrative Law Judge, and Members of this Board are employees of the Department of the Interior does not establish unfairness in the contest proceeding" (at page 387).

In order to sustain a charge that an administrative law judge should be disqualified or his decision set aside for bias, a substantial showing of personal bias must be made. An assumption that he might be predisposed in favor of the Government is not sufficient. *Converse v. Udall*, 262 F. Supp. 583 (D. Ore 1966), *aff'd on other grounds*, 399 F2d 616 (9th Cir 1968), *cert. denied*, 393 US 1025 (1969).

The procedures followed by the Department of the Interior in the initiation, prosecution and deciding of mining contest cases are in full compliance with the Administration Procedure Act, 5 USC 556 (1976). *U.S. v. Fisher*, 37 IBLA 80, 83, 84 (1978).

**Rehearings or Additional Hearings**

The Interior Department will hold additional hearings where it is deemed necessary to make a more informed determination concerning the validity of a mining claim. *U.S. v. Edeline*, 24 IBLA 34 (1976). However, a request for further hearing must not be for the purpose of making a discovery during the interim. *U.S. v. Johnson*, 33 IBLA 121 (1977).

A rehearing is normally ordered in cases where the hearing and record have failed to obtain sufficient evidence upon which to decide the case or, the testimony of the parties is vague and unconvincing. *U.S. v. Larsen*, A-30328 (Sept. 13,1965); *U.S. v. Anderson*, A-28260 (Feb. 20,1963). Generally new hearings are granted only when there is some indication that a different result is likely. *U.S. v. Long*, 43 IBLA 150 (1979).

While a case is still within the jurisdiction of an administrative law judge, it is within his or her authority to reopen a hearing for the production of further evidence before a decision is made in the matter. *U.S. v. King*, A-30867 (February 28,1968). This discretionary authority, however, should be exercised carefully so that a case is not drawn on beyond reasonable lengths of time, and so that the parties are not required to go to unreasonable efforts in presenting their cases. There should also be a reasonable basis for concluding that a further hearing will be productive of the desired additional information before reopening the proceedings. *U.S. v. Taylor*, 19 IBLA 21 (1975).

Generally, the basis for a decision made after a hearing is the evidentiary record made at the hearing. 43 CFR 4.24. New evidence offered on appeal after an initial decision as tendered by an administrative law judge may not be considered or relied upon in making a final decision, but may only be considered to determine if there should be a further hearing. *U.S. v. Edeline*, 24 IBLA 38, 44 (1975). A request to reopen a hearing in a contest against a mining claim to produce further evidence would be denied if there is no showing that further evidence of a discovery will be produced. *U.S. v. Snyder*, A-30292, 72 ID 223 (1965).

**Failure to Appear at a Hearing**

Where a party fails to appear or participate in a hearing as scheduled even though no order postponing the hearing has been issued, the merits of the case may be reached and decided on the basis of the record as completed at the hearing, despite the absence of evidence in support of the party's case. *U.S. v. Franklin*, 45 IBLA 54 (1980). "...where a party to a mining claim contest fails to appear at or participate in a hearing regarding the validity of that party's mining claim, the merits of the case may be reached and decided on the basis of the record as completed at the hearing, despite the absence of evidence in support of the party's case." *United States v. Koenig*, 99 IBLA 397, 400 (1987).

**When a Second Hearing Will Be Granted**

In *United States v. Kendrick Holder*, 100 IBLA 146, 148 (1987), the Board addressed the issue of when a second hearing will be granted, quoting from *United States v. Syndbad*, 42 IBLA

313, 322 (1979):

> A second hearing will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he actually was present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. *Citation Omitted*. A petition to reopen a hearing for submission of further evidence will be denied when the contestee offers no valid justification for the neglect to offer evidence which was or could have been available at the original hearing. *United States v. Hanson*, 26 IBLA 300 (1976). A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery of a valuable mineral deposit.

**Dismissal of Contest and Claim Validity**

The dismissal of a mining claim contest does not constitute a finding that a claim is valid unless the contest proceeding results from a patent application. *Gordon B. Copple*, 105 IBLA 90, 92, n. 2 (1988).

**Failure to Obtain Counsel for a Hearing**

Failure to obtain counsel for a hearing gives a claimant no greater rights on appeal than if he or she were represented by counsel. *Eldon Brinkerhoff*, 24 IBLA 324, 83 ID 185 (1976). It is the responsibility of the claimant to obtain counsel, if desired. The Department is not obligated by the Constitution or statute to furnish counsel for a party to an administrative hearing. *U.S. v. Gayanich*, 36 IBLA 111 (1978). In *U.S. v. Fenton*, A-30621 (Jan. 9, 1967) the Board stated:

> The Department's regulations permit a party to be represented at a hearing by proper legal counsel, but there is nothing to require such representation, nor is there any provision which would suggest that legal counsel must be provided for a person who claims he is an indigent ... The only express Constitutional provision pertaining to the right of counsel is the 6th amendment which by its own terms is limited to criminal prosecutions and does not apply to civil cases. *Hullom v. Burrows*, 266 F2d 547 (6th Cir 1959), *cert. denied* 361 US 919. This administrative proceeding to determine whether the requirements of the mining laws have been met is far removed from the realm of a "criminal prosecution." There is no right to have appointed counsel in such an administrative proceeding under the 6th amendment of the Constitution, under the Administrative Procedure Act, 60 Stat. 23, as amended, 5 USC 1001 *et seq*. (1976).

**Transfer of Claim After Initiation of Contest**

It is not uncommon for claimants to sell a mining claim after contest proceedings are initiated and a complaint is served. In *U.S. v. Prowell*, 52 IBLA 256 (1981), where the original claimant, Virgil Prowell transferred three mining claims by quit claim deed to the Bienicks over six months after initiation of the contest. The Board determined that Prowell's interest in the three claims was already subject to the contest proceedings and held as follows:

> We hold that where the contest complaint, when filed and received by the mineral claimants, correctly identifies all claimants as of that time, the substitution or addition of subsequent transferees is the obligation of those who have acquired such an interest and their failure to so move will not vitiate the effectiveness of an adjudication of the validity of a mining claim. *Id* at 258.

Furthermore, the present regulations of the Department expressly provide that a Government contest complaint is not subject to dismissal for failure to name all parties interested. *See* 43 CFR 4.451-2(b); *U.S. v. Frisco & Young*, 32 IBLA 248, 250 (1977). Thus, even had the transfer to the Bienicks preceded the initiation of the contest complaint, it would not have been subject to a motion to dismiss on the grounds of failure to serve all interested parties.

## PRIMA FACIE CASE

### Definition of Prima Facie

In *Foster v. Seaton*, 271 F2d 838 (DC Cir 1959), *cert. denied*, 393 US 1025 (1969), the court gave the well-established rule that in a mining claim contest. The government has only the burden of going forward with a prima *facie* case of lack of discovery. It is well established that when the Government contests the validity of a mining claim on the basis of lack of discovery, it bears only the burden of going forward with sufficient evidence to establish a *prima facie* case. Once a *prima facie* case is presented, the claimant must present evidence which preponderates sufficiently to overcome the Government's case on those issues raised. *U.S. v. Springer*, 491 F2d 239, 242 (9th Cir.), *cert. denied*, 419 US 834 (1974); *Foster v. Seaton*, 271 F2d 836 (D.C. Cir. 1959).

The amount of proof necessary to establish a *prima facie* case has been examined numerous times in decisions of the Board. A *prima facie* case means, in this context, that "the case is completely adequate to support the Government's contest of the claim and that no further proof is needed to nullify the claim." *U.S. v. Bunkowski*, 5 IBLA 102, 119, 79 ID 43; *U.S. v. Pool*, 78 IBLA 215 (1984).

In *U.S. v. Copple*, 81 IBLA 109, 118 (1984), the Board held that Anormally, a *prima facie* case has been made where the Government mineral examiner testifies that he has examined the claim and found any evidence of mineralization insufficient to support a finding of discovery." *U.S. v. Hess*, 46 IBLA 1, 5 (1980); *U.S. v. Winters*, 2 IBLA 329, 335-36, 78 ID 193, 195 (1971).

### Burden of Proof

In *Foster v. Seaton, supra*, the Court discussed the burden of proof in a mining claim contest as follows:

The Administrative Procedure Act, which states that "the proponent of a rule or order shall have the burden of proof." 60 Stat. 241 (1946), 5 USCA 1006. The Secretary ruled that, when the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a *prima facie* case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. The short answer to appellants' objection is that they, and not the Government, are the true proponents of a rule or order; namely, a ruling that they have complied with the applicable mining laws. One who has located a claim upon the public domain has, prior to the discovery of valuable minerals, only "taken the initial steps in seeking a gratuity from the Government." *Ickes v. Underwood*, 78 US App. D.C. 396, 399, 141 F2d 546, 649, *cert. denied*, 1944, 323 US 713. Until he has fully met the statutory requirements, title to the land remains in the United States. *Teller v. U.S.*, 8 Cir., 1901, 113 F 273, 281. Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the Government undertook the affirmative burden of proving that no valuable deposit existed. We do not think that Congress intended to place this burden on the Secretary. *See U.S. v. Smith*, 508 F2d 1157 (1975).

**The Taylor Case**

In *U. S. v. Taylor*, 19 IBLA 9, 22-25, 82 ID 68, 73-74 (1975), the Board gave an excellent review of the legal principles involved in establishing a *prima facie* case:

By locating a mining claim and alleging a discovery of a valuable mineral deposit therein, a mining claimant is asserting a superior right and title to the land over the United States. He is the true proponent of a rule or order that he has complied with the mining laws entitling him to possession of the claim. Consequently, the ultimate burden of proving discovery is always upon the mining claimant. *U.S. v. Springer*, 491 F2d 239, 242 (9th Cir 1974), *cert. denied*, 419 US 834 (1974); *Foster v. Seaton, supra*. When the Government contests the claim it has only the burden of going forward with sufficient evidence to make a *prima facie* case of lack of discovery and then the affirmative burden of disproving the Government's case by a preponderance of the evidence devolves upon the claimant. *Id*.

If the Government fails to present a *prima facie* case, a contestee by timely motion may move to have the case dismissed then rest. The contest complaint would then properly be dismissed because there was no *prima facie* case making an evidentiary basis for an order of invalidity by lack of discovery, and no other evidence in the record to support the charges in the complaint. *U.S. v. Winters*, 2 IBLA 329, 339-40, 78 ID 193, 197 (1971).

If, however, the contestees go forward, even after filing a motion to dismiss, and present their evidence, that evidence must be considered as part of the entire evidentiary record and weighed in accordance with its probative values. Therefore, even if the Government has failed to make a satisfactory *prima facie* case, or if its case is weak,

evidence presented by contestees which supports the Govemment's charge may be used against the contestees, regardless of the defects in the Government's case. *U.S. v. Melluzzo*, 76 ID 181, 188 (1969).

Where evidence has been presented on an issue and the Judge does not order a further hearing to resolve factual uncertainties on that issue, those uncertainties, or doubts, must be resolved against the party having the ultimate burden of proof on the issue, the party bearing the risk of nonpersuasion. Thus, if the party having the risk of nonpersuasion does not present sufficient evidence to sustain his burden, he must suffer the consequences of his failure; namely, a ruling against him on the issue upon which there is doubt. *See Marcum v. U.S.*, 452 F2d 36 (5th Cir 1971); *Johnson v. Barton*, 251 F. Supp. 474 (WD Va 1966). The application of the burden of proof is to forestall unresolved decisions where evidence has been presented but there are doubts or uncertainties remaining. Therefore, where the Government has made a *prima facie* case of lack of discovery, any doubt on the issue of discovery raised by the evidence must be resolved against the mining claimant, who bears the risk of nonpersuasion. The Administrative Law Judge has a duty to make findings of fact and conclusions of law on the factual and legal issues raised in a contest. *See* 5 USC 556(c)(8), 557 (1970). Where the claimant has failed to meet his burden of proof on discovery, the Judge must find that there has not been a discovery. *Foster v. Seaton, supra*. Such a finding impels the conclusion that the claim is invalid, as discovery is a *sine qua non* of a claim's validity.

**Claimant's Burden is to Preponderate on Issues Raised by Evidence**

In several cases, the Board has pointed out that the Administrative Law Judge has raised an erroneous theory concerning the nature of the burden of proof which shifts to the claimant following a *prima facie* case of invalidity. *U.S. v. Hooker*, 48 IBLA 22 (1980); *U.S. v. Cannon*, 70 IBLA 328 (1938); *U.S. v. Cactus Mines Limited*, 79 IBLA 20 (1984). For example in *U.S. v. Cannon, supra*, the Board noted that the Administrative Law Judge stated: "When the Government contests the validity of a mining claim, the ultimate burden of proof as to the validity of the claim is upon the mining claimant." To this statement the Board responded as follows:

This is an incorrect statement of the law. Absent a patent application, in a mining claim contest hearing, there is no requirement that a mining claimant show that a contested claim is valid; rather, the claimant's burden is to preponderate on the issues raised by the evidence.

In *U.S. v. Cactus Mines Limited, supra* at 27 the Board considered the same issue and again stated:

In the context of this appeal, these cases simply stand for the proposition that matters not placed in issue by the Government case need not be disproved by the miner. The conclusion by the Administrative Law Judge, therefore, that appellant has an affirmative

> duty to establish the validity of his claim, is not necessarily true. In the context of this contest, however, the erroneous assumption contained in that conclusion does not lead to error.

Therefore, "in a hearing on a Government contest complaint, there is no requirement that a mining claimant show that the claim is valid; rather, the mineral claimant's burden is to preponderate on the issues raised by the evidence." *U.S. v. Hooker*, 48 IBLA 22, 26 (1980).

In *U.S. v. Dresselhaus*, 81 IBLA 252 (1984), the Board held that even "if the Government merely shows that one essential criterion of the discovery test was not met, it has established a *prima facie* case as to that criterion." *Id*. at 258. However, in such a case, "the contestee need only preponderate on that one issue, and matters not placed in issue by the Government case need not be disproved by the claimant. *Id*.

As an example of how this might work, in *Dresselhaus* the Government had based its case on an assessment that no discovery was made because the deposit could not be mined at a profit using conventional methods. In response the Board said that in "presenting its case in this manner, the Government runs the risk that its *prima facie* case will be easily overcome by probative evidence that an alternative method of mining will satisfy the test for a discovery." Id.

**Contestees' Evidence Preponderates**

Where the contestees' evidence preponderates sufficiently to overcome the Government's *prima facie* case on an issue raised by the evidence, the contest should be dismissed and a ruling on the issue made by the Judge.

**Government Falls to Establish Prima Facie Case**

If the Government fails to establish a *prima facie* case of no discovery, or some other ground for invalidity, the claimant need not present any evidence, but may simply move to have the contest complaint dismissed following the completion of the Government's presentation. *U.S. v. Chappell*, 42 IBLA 74 (1979). However, if the claimant does not move for dismissal and proceeds to attempt to show that there was discovery (or that the claim was not abandoned nor improperly located, etc.), and actually presents evidence which shows *prima facie* that there in fact was no discovery, this evidence is properly used against him, regardless of the Government's failure to establish a *prima facie* case to this effect. *U.S. v. Hess*, 46 IBLA 1, 4 (1980).

In *U.S. v. Pool*, 78 IBLA 215 (1984), the Board said:

> If the Government fails to present sufficient evidence to establish a *prima facie* case, the claimant not need present any evidence in order to prevail. But, should the claimant proceed to present evidence, the evidence which he tenders must be considered and the deficiencies in the Govemment's presentation may, in effect, be remedied where the contestees' evidence supports the allegations made in the contest complaint. *United*

*States v. Rice, supra*; *United States v. Beckley*, 66 IBLA 357 (1982); *United States v.* Taylor, 19 IBLA 9, 82 ID 68 (1975). We wish to make it clear, however, that the mere fact that the contestee elects to proceed with the presentation of his case does not mean that he therefore must preponderate on the issues raised in the contest. The requirement of preponderation only arises as to issues for which the Government has presented a *prima facie* case. Where there is no *prima facie* case, there can be no issue on which a claimant must preponderate. The only risk that the claimant runs is the risk that the evidence as a whole will prove that an element of discovery is not present.

**Prima Facie Established on Nonproduction**

In *U.S. v. Hess*, 46 IBLA 1 (1980), the Board ruled that absence of development of a mining claim for a period of time, is sufficient to establish a *prima facie* case of invalidity. The Board stated:

> Finally, we turn to the question whether the absence of development, over a considerable period of time, may serve to establish a *prima facie* case of invalidity. We are fully cognizant of the thesis that production is not a precondition of establishing a discovery of a valuable mineral deposit, but it is too late to gainsay the proposition that the failure to produce gives rise to a presumption of invalidity. *See U.S. v. Zweifel*, 508 F2d at 1156 (10th Cir 1975). The question which is presented is whether this presumption rises to the level of a *prima facie* case. We believe that this question must be answered in the affirmative.
>
> Thus, while failure to develop a mining claim does not conclusively establish the invalidity of the claim, such failure may nevertheless, when unrebutted by evidence of marketability, give rise to a presumption upon which the claim may be declared invalid. Proof of nondevelopment over a period of time may serve as an independent basis for determining a claim's invalidity where it stands uncontradicted by any relevant evidence. Thus, proof of the fact of nondevelopment may also serve to establish the Government's *prima facie* case.
>
> We agree that such a *prima facie* case is the weakest that the Government can establish. The assertation by a mining claimant of a reasonable justification for nondevelopment would defeat the presumption that arises therefrom, and thus effectively rebut the Government's case, resting solely on such a presumption, and require the dismissal of the contest.

Judge Stuebing disagreed with the majority that a *prima facie* case of invalidity may be established on nonproduction, and in his rather convincing dissent he states:

> But there are many reasons which the imagination can supply which would justify such nonexploitation of a valuable mineral deposit. It is entirely possible that production has been delayed in anticipation of higher market prices in the future, or that the claim(s) is held as a reasonable reserve supply, or because the claimant lacks the financial resources

> to proceed, or because he has been otherwise occupied. It may even be that the claimant lacks initiative, being bone lazy and indifferent to potential wealth. None of these have anything at all to do with whether a valuable deposit of mineral has been discovered on the claim.

**Mineral Examiner Uses Wrong Test of Validity**

If the mineral examiner should, in his or her testimony, use a faulty test of validity, a *prima facie* case cannot be established on such testimony. In *U.S. v. Hooker*, 48 IBLA 31 (1980), the Board said:

> Thus, while the mineral examiner did purport to apply the traditional prudent man test, he also appeared to posit requirements that a mineral claimant block out a deposit and develop an actual mine as preconditions to validity. In view of this, we find it impossible to place sufficient weight on the mineral examiner's conclusion of invalidity to permit it to establish a *prima facie* case.

**"Shopping List" of All Possible Minerals**

"In order to make a *prima facie* case of the invalidity of a mining claim, it is not required that the contestant go through a "shopping list" of all possible minerals and prove that each one, or each possible combination, is insufficient to qualify the claim, where even the claimant has not seriously asserted that he has made a discovery of a valuable deposit of those minerals." *U.S. v. Johnson*, 16 IBLA 242 (1974).

**Forest Service Fails to Establish Prima Facie Case**

In *United States v. Miller*, 138 IBLA 246 (1997) the Board held that the Forest Service failed to establish a prima facie case of invalidity. The mineral examiner testifying in the contest hearing erroneously thought the mining costs exceeded the returns from the minerals mined so he did not present an estimate of transportation and milling costs during the government=s prima facie case nor did he include them in the mineral report. However, because of errors identified in the examiners calculations during the hearing, the Board determined that Aignoring transportation or milling costs, the costs of mining would not be greater than the returns which might be expected to inure to the contestees.@ *Id*. at 273.

The Board did make it clear that simply because the Forest Service failed to establish a prima facie case is not to say that the appellants have affirmatively established the validity of their claim. Dismissal of a contest complaint does not determine the validity of the claim, but merely establishes that, as to the issues raised in the hearing, the mineral claimant has preponderated. *Id* at 281. Because transportation and milling costs are a critical part of the overall cost, the Forest Service retains the option to request the BLM to initiate a new contest based on a new mineral examination and report. *Id*. at 281.

**The Establishment of a Prima Facie Case**

In *United States v. Miller*, 138 IBLA 246 (1997), the Board discussed how and under what circumstances the Government may establish a prima facie case. The Board said at 269-271:

> * * * [t]he Board has expressly held that the determination of whether or not the Government has presented a prima facie case is to be made solely on the evidence adduced during the Government=s case-in-chief. Thus in United States v. Knoblock, 131 IBLA 48, 101 I.D. 123 (1994), we noted that the:
>
> > [d]etermination of the existence of a prima facie case is necessarily limited to the confines of the Government=s case-in-chief. This includes, of course, testimony elicited in cross-examination. Where a contestee, as in the instant case, cross-examines a Government witness as to contrary conclusions reached in prior Government examinations of a claim, both the witness= response and the substance of the prior report, *if admitted into evidence*, are properly weighed in adjudicating whether or not a prima facie case has been established. To the extent that the fact-finder determines that the effect of cross-examination has been to effectively undermine any weight which might have been accorded the witness= direct testimony, the fact-finder could properly conclude that the Government has failed in its obligation to establish a prima facie case. [Emphasis in original.]
>
> *Id*. at 84, 101 I.D. at 142-43. *Accord*, *United States v. White*, 118 IBLA 266, 276 n.10, 98 I.D. 129, 134 n.10 (1991); *United States v. Copple*, 81 IBLA 109, 120 (1984). Evidence presented by the contestees in their own case or later by the Government in any rebuttal to contestees in their own case or later by the Government in any rebuttal to contestees= submissions is *not* properly considered in determining whether a prima facie case has been presented.

This is not to say that, in those situations in which the Government has failed to present a prima facie case, evidence submitted after the Government=s case-in-chief is irrelevant. On the contrary, the Board has noted on numerous occasions that, even if the Government has failed to present a prima facie case, evidence tendered by a contestee may be considered, not for the purpose of curing any of the deficiencies in the Government=s prima facie case but rather for the purpose of determining whether or not this evidence, when considered in the context of all of the other evidence of record, affirmatively established that the claim is invalid. *See, e.g.*, *United States v. Pool, supra*. This is a critical distinction. Thus, we noted in *Pool* that:

> [T]he mere fact that the contestee elects to proceed with the presentation of his case does not mean that he therefore must preponderate on the issues raised in the contest. The requirement of preponderation only arises as to issues for which the Government has presented a prima facie case. Where there is no prima facie case, there can be no issue on which a claimant must preponderate. The only risk that the claimant runs is the risk that the evidence as a who will prove that an element

of discovery is *not* present. [Emphasis in original.]

*Id*. at 220. See also *United States v. Opperman*, 111 IBLA 152, 153 (1989), (A[I]f the contestee goes forward after the Government rests its case, any testimony presented by the contestee which is adverse to its interests may be utilized by the Administrative Law Judge for purposes of making a decision. However, such testimony can never be the basis for a finding that the Government did not establish a prima facie case.@)

**Government Need Not Negate all Aspects of Marketability**

In establishing a *prima facie* case of nonvalidity of a mining claim, "it would place an impossible burden upon the Government to present evidence to negate all possible aspects of the marketability-discovery test. If the Government showed that one essential criterion of the test was not met, this was sufficient to establish a prima facie case." *U.S. v. Taylor*, 19 IBLA 9,27,28 (1975).

**Each Claim Must be Examined for Prima Facie Case**

In *U.S. v. Hess*, 46 IBLA 1, 6, 7 (1980), the Board considered whether the Government could establish a *prima facie* case of invalidity on claims which were not physically examined by the mineral examiner. The Board said:

We have been unable, however to discover any case in which the Department has ruled that a *prima facie* case was established by the testimony of a mineral examiner who had failed to actually traverse the claim, where the issue involved was the existence of mineralization within the claim's limits. The general rule, and one which is of salutary effect, is that set forth in *U.S. v. Winters*, 2 IBLA 329, 335-36, 78 ID 193, 195 (1971):

> Where a Government mineral examiner offers his expert opinion that a discovery of a valuable mineral deposit has not been made within the boundaries of a contested claim, a *prima facie* case of invalidity has been made, *provided that such opinion is formed on the basis of probative evidence of the character, quality and extent of the mineralization allegedly discovered by the claimant. Mere unfounded surmise or conjecture will not suffice, regardless of the expert qualifications of the witness*. But an expert's opinion which is premised on his belief or hypothetical assumption of the existence of certain relevant conditions, *if evidence is presented that those conditions do exist*, is sufficient to establish a *prima facie* case and to shift the burden of evidence to the contestee. The admissibility of expert testimony in a mining contest is determined by the hearing examiner, who exercises a wide latitude of discretion in making these determinations.

In *U.S. v. Hess, supra* at 7, the Board further stated:

We affirm Judge Luoma's holding that O'Brien's testimony had no probative value

> concerning the claims which he admittedly never visited or was unsure about having visited. A mineral examiner is obligated to make a careful and competent inspection of a mining claim in order to be able to testify meaningfully on the presence or absence of mineral discovery there. Testimony made in admitted ignorance of the physical status of the land, or based on uncertain recollection about the nature of the land, is entitled to no weight.

**Prima Facie Case of Invalidity Cannot Be Established by Geologic Inference**

In *U.S. v. Hess, supra* at 7, the Board also pointed out that a *prima facie* case of no discovery on a mining claim cannot be established by geologic inference:

> We reject O'Brien's assertion that the fact that these claims are located in the same kind of area with the same topography as the other claims where there was no discovery supports the conclusion that there was also no discovery on these former claims. Geologic inference alone cannot support a determination that a discovery has been made. *U.S. v. Walls*, 30 IBLA 333, 338 (1977). Likewise, alleged geological similarities of other claims are insufficient by themselves to show that no discovery has been made on the claims at issue.

**Prima Facie Case Established Where Claims not Examined**

Those cases in which the Interior Department has ruled that a *prima facie* case of invalidity exists without a physical examination of the claim by the mineral examiner generally involve situations where the existence of the mineral is admitted, but its marketability is dubious. *U.S. v. Hess*, 46 IBLA 1 (1980). In *U.S. v. Zweifel*, 11 IBLA 53, 80 ID 323 (1973), 2,910 association placer claims located for alumina-bearing compounds were contested by the Government. Although each claim was not examined, the issue was not whether the mineral existed, but whether technology existed that would allow extraction at a profit. In *U.S. v. Fisher Contracting Co*., A-28779 (August 21, 1962), the Department also established a *prima facie* case even though two of the ten claims were not physically examined. Here again, the existence of sand and gravel on the two claims was not questioned. The question was whether a market for the sand and gravel existed.

In other situations the Government has established a *prima facie* case of invalidity where the mining claims are either inaccessible or have unsafe workings. *U.S. v. Rukke*, 32 IBLA 155 (1977); *U.S. v. Long Beach Salt Co*., 23 IBLA 41 (1975).

In *U.S. v. Copple*, 81 IBLA 109 (1984), the Board held that where "the Government mineral examiner testifies that a mineral claimant or his representative has stated that certain claims are not supported by a discovery, such testimony, unless impeached in cross-examination, is sufficient to constitute a *prima facie* case that those claims are invalid." *Id*. at 120. The Board elaborated on this approach at 119-120:

> A statement that there were no values on some of the claims, made by an expert in the

employ of the claimants, is in the nature of an admission against interest. While such a statement may not be preclusive against a subsequent attempt to contradict the substance of the admission, it clearly provides an adequate reason for a Government mineral examiner not to physically examine these claims. And, when testimony relating to this admission is introduced in the Government's case-in-chief, it may serve to establish a *prima facie* case since, if it is uncontroverted by the claimants, an Administrative Law Judge would be justified in concluding that the referenced claims were, indeed, without mineral values.

**Each Claim Need Not Be Sampled**

In order to establish a *prima facie* case of invalidity, it is well established that each claim should be physically examined, except in the special situations cited above. However, so long as each claim is examined on the ground, it does not necessarily follow that each claim must also be sampled to establish a *prima facie* case, especially where there is no evidence of mineralization. *U.S. v. Flurry*, A-30887 (Mar. 5, 1968); *U.S. v. Coston*, A30835 (Feb. 23, 1968).

## EXPERT TESTIMONY

**Evaluation of Expert Testimony**

The purpose of a hearing under the Administrative Procedure Act, 5 USC 551 (1976), is a search for the truth. As was pointed out in *McCarthy v. Sawyer-Goodman Co*., 194 Wisc. 198, 215 NW 824, 826 (1927), expert testimony is not infallible:

> The convincing power of expert testimony depends somewhat upon the knowledge and experience of the one who is called upon to weigh such testimony. The untutored are likely to accept the opinion of an expert at its face value, while those possessing knowledge upon the subject concerning which he testifies may discount it or entirely disregard it as unsound.

**Opinion Evidence**

In *U.S. v. Wells*, 11 IBLA 259 (1973), the Board described opinion evidence:

> However, opinion evidence is entitled to weight only when consistent with probability and reason, and a conclusion contrary to reason, or to common knowledge and experience, or to the physical facts, has no probative force or value, and is insufficient to support a finding. An opinion buttressed only by assumed facts has no evidential efficacy. So, an opinion based on speculation, surmise or conjecture, is of no probative force or value and will not support a verdict or finding. 32 C.J.S. *Evidence*, Section 567 (citations omitted). As noted by this Board in *U.S. v. Winters*, 2 IBLA 329, 78 ID 193 (1971), "mere unfounded surmise or conjecture will not suffice, regardless of the expert qualifications of the witnesses."

**Hearsay Evidence**

The rule has been long settled that the technical rules for the exclusion of evidence are not applicable to Federal administrative proceedings in the absence of a statutory requirement that such rules are to be observed. *Cotton Mills v. Administrator of Wage and Hour Division, Dept. of Labor*, 312 US 126 (1941). This principle has not been changed by the Administrative Procedure Act, 5 USC 551 *et seq*. Thus, the mere receipt of hearsay evidence is no cause for a reversal of an administrative decision. *Willapoint Oysters v. Ewing*, 174 F2d 676 (9th Cir 1949), *cert. denied*, 333 US 860 (1949). Instead, whether such evidence is considered and what weight is given to it may depend upon whether there is other corroborative evidence and whether it is in the interest of fair play and justice to allow the evidence. *U.S.* v. *Little*, A-308842 (February 21, 1968).

**Weighting or Credibility of Evidence**

In order for the testimony of a witness at an administrative hearing to be accorded weight, the testimony must be credible. Although the IBLA has the authority to reverse the fact findings of the hearing examiner, even when not clearly erroneous, if the resolution of the case is influenced by the hearing examiners findings of credibility, which in turn are based upon his reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they will not be disturbed by the Board. *U.S. v. Melluzzo (Supp. on Judicial Remand*), 32 IBLA 75 (1977). This is because the trier of fact who presides over a hearing has an opportunity to observe the witnesses, and is in the best position to judge the weight to be accorded testimony. *U.S. v. Chartrand*, 11 IBLA 194, 212, 80 ID 408, 417 (1973). As stated in *Osborne v. Hammitt*, 377 F. Supp. 977, 985 (1964):

> The burden of the proponent, plaintiff here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of credible evidence, and the trier of fact is not required to believe or give weight to testimony which is inherently incredible.

**Validity of Claim Decided on Evidence as a Whole**

In *U.S. v. Taylor and Hicks*, A-30780 (Oct. 24, 1967), the Board discussed the role of opinion evidence in determining the validity of a claim. The Board stated:

> At this point it is well to observe that in their appeal the appellants rely solely upon the opinion testimony of their expert witnesses to establish the validity of their claim. They refer to no evidence bearing upon the actual mineral character of the claim itself. From the nature of their contentions the appellants seem to infer that the question by the hearing examiner of whose witness is the best qualified and, accordingly, which opinion is entitled to the greatest weight. Obviously the scope of review of the trier of fact is not limited to the weighing of opinion evidence. Nor does the fact that five qualified geologists or mining engineers reiterate a certain phaseology promulgated by this Department as a standard for determining the validity of a mining claim in and of itself conclusively establish its validity. To the contrary, the validity of a mining claim is the

> ultimate question to be decided by the hearing examiner from the evidence as a whole. It is for the trier of fact to consider not only the opinion testimony of the expert witnesses, but to evaluate in its proper context, together with all evidence in the record bearing upon the mineral character of the claim itself. The record as a whole is the basis for the decision of the trier of fact, and to support the finding that a valuable mineral deposit exists within the limits of a claim, the evidence must be of such a character as to satisfy the "prudent man" test, quoted above.

The necessity to consider the evidence as a whole was discussed in *Charlestone Stone Products Co., Inc. v. Andrus*, 553 F2d 1209, 1213 (9th Cir 1977), *rev'd on other grounds*, 436 US 604 (1978):

> We cannot affirm the examiner's conclusion simply by isolating a specific quantum of supporting evidence... Davis, 4 *Administrative Law Treatise* 29.03 (1958)... Evidence which may be logically substantial in isolation may be deprived of much of its character or its claim to credibility when considered with other evidence... and *Universal Camera Corp. v. N.L.R.B.*, (1951) 340 US 474, 484-488.

**Professional Witness versus Lay Witness**

In *U.S. v. Mansfield*, 35 IBLA 99 (1978), the Board made a distinction between professional witnesses with substantial education and experience and lay witnesses without such education and experience:

> But as noted herein, two witnesses for the Government are experts in their field, each having 25 years experience in examining mining claims. The only witnesses who testified on behalf of the contestee were Ned F. Smith and Laurence Beebe. Smith is a machinist whose hobby is rock collecting, and Beebe is a school teacher by profession and a rock hound with a few courses on the college level in lapidary techniques. So long as the contestee has been unable to produce a professional geologist or a witness whose trade is in the lapidary arts, the testimony of the Government expert witnesses that obsidian is only a common variety of the mineral remains uncontroverted.

**No License Required for Expert Witness**

In *Sedgwick v. Parker*, 27 IBLA 256, 262 (1976), the Board held that although the expert witness was not registered or licensed in the state, he was still qualified to testify at the hearing. The Board said:

> ...the witness was not a registered geologist and might have performed work in violation of the Arizona statutes did not make him an incompetent witness or require that his testimony be stricken.

The Board also cited with approval the following language from *Paradise Prairie Land Co. v. U.S.*, 212 F2d 170 (5th Cir 1954):

The trial judge is vested with a broad judicial discretion in admitting or rejecting expert testimony, but lack of a statutory license to practice surveying is not of itself sufficient to justify the rejection of the testimony of one who is otherwise qualified as an expert.

An expert is one who qualifies as such by reason of special knowledge and experience, whether or not he is authorized to practice in his special field under a licencing (sic) requirement imposed by statute. The inquiry by the trial judge as to the qualifications of such a witness should be whether or not the witness possesses the special knowledge and experience to qualify him as an expert, not whether or not he has complied with the state's licencing (sic) requirements to practice that profession.

**State License Not Required for Federal Officials**

The case of *Thom Seal*, 132 IBLA 244 (1995) offers a good review of the case law concerning the conflict between a state license law and a Federal employee performing official duties. In *Thom Seal* the Board of Engineering Examiners for the State of Oregon contended that surveys done by BLM were invalid because the State law requires that all surveys that establish lines, corners and monuments in Oregon affecting private land must be performed by a registered Oregon Surveyor. The Board said that the Cadastral surveyors were exercising authority given by Congress under the Act of March 3, 1909, as amended (43 U.S.C. 772 (1988), and reviewed the law at 246-47:

Notwithstanding the foregoing, the law is clear that, insofar as the Federal Government employs surveyors to fulfill statutory functions, the State licensing authority may not impose its requirements on such employees when engaged within the scope of their official duties. Indeed, in *Johnson v. Maryland*, 254 U.S. 51 (1920), the Supreme Court determined that the State of Maryland had no authority to require that employees of the Post Office obtain motor vehicle licenses as a precondition for operation of vehicles within the State. Justice Holmes, speaking for the Supreme Court, noted:

> [T]he immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed.

*Id*. At 57. More recently, in a decision prohibiting the State of Florida from enjoining unlicensed individuals from practicing before the United States Patent Office, a unanimous Court, per Chief Justice Warren, noted that:

A State may not enforce licensing requirements which, though valid in the

> absence of federal regulation, give Athe State=s licensing board a virtual power of review over the federal determination@ that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress.

*Sperry v. Florida*, 373 U.S. 379, 385 (1963), *citing Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1851).

**Written Uncorroborated Testimony**

Although exclusionary rules of evidence applicable in court proceedings need not be followed in administrative hearings, a hearing examiner may either exclude or, at least, give little weight to a written uncorroborated statement by a mining claimant who submits the statement in lieu of making an appearance at the hearing. *U.S. v. Little*, A-30842 (Feb. 21,1968).

**Government Mineral Examiners Are Not Clients of Government Attorneys**

Mineral examiners, employed by the Government to investigate mining claims to determine whether or not adverse proceedings should be initiated against the claims, are not clients of the attorneys who may subsequently represent the Government in such proceedings. These government attorneys and mineral examiners are not governed by the rules normally applied to attorney-client relationships.

**Credibility of witness May Be Based on Experience**

Where two witnesses are both experienced, but one Ahas considerably more experience... in the practicalities and economics of mining," his testimony will be more credible. In *United States v. Mannix*, 50 IBLA 110, 117 (1980), the Board considered the testimony of the contestees witness to be more credible because of his greater experience in the practicalities and economics of mining.

## PRIVATE CONTESTS

**Initiation of Private Contests**

Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land may initiate private contest proceedings to have the adverse interest invalidated. 43 CFR 4.450-1.

The contestant must file in the proper BLM office a complaint made under oath and containing the information specified in 43 CFR 4.450-4. Within 30 days a copy of the complaint must be served on the contestee and within 30 days after service upon contestee, proof of service

must be filed in the proper BLM office (normally the state office).

If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the case will not require a hearing. If an answer is filed, the BLM will transmit the case to an Administrative Law Judge who will set a time and place for the hearing. 43 CFR 4.50-7.

**State Court Determinations Have No Effect on Federal Title**

In *Duguid v. Best*, 291 F2d 235, 239 (9th Cir 1961), the court discussed the circumstances under which the state courts may need to make determinations on the mineral character or validity of mining claims. Although the court allowed that such determinations may be necessary in order to determine the possessory right between two litigants, such determination of mineral character affects only the possessory interests of the litigants and has no effect upon the paramount title of the government. The government will not be bound by the results of a private contest concerning the validity of a mining claim where it is not a party to the proceedings. *Everett E. Wilder, et al*, 14 IBLA 406 (1974).

**Conflicts Involving Possessory Rights Must Not Be Resolved by Private Contests**

Conflicts between two claimants involving the right of possession over a mining claim must be adjudicated by a state court and not through private contest proceedings at an Interior Department administrative hearing. In *Duguid v. Best, supra* at 242, the Court said:

> We do not construe the provisions of Section 4.450-1 to authorize an adjudication on the superiority of possessory interests as between claimants. In our view, controversies between claimants of possessory interests on public lands must be determined by the courts.

**Standing to Initiate a Private Contest By a Holder of a Special Use Permit**

In *Duguid v. Best*, 291 F2d 235 (9th Cir 1961), *cert. denied*, 372 US 906 (1963), the Court of Appeals held that the holder of a special use permit granted by the Forest Service, Department of Agriculture, which permitted construction of a dam and spillway on national forest land, could initiate a private contest to determine the validity of a mining claim in conflict with the special use permit. In *Duguid*, the Paradise Irrigation District was granted a permit "subject to all valid claims." Subsequent to the grant of the permit, the District, without the consent of the mining claimants, took possession of a portion of the mining claim and proceeded to construct a dam and spillway on the mining claim. The claimants then instituted an action against the District in the Superior Court of the State of California alleging unlawful taking of private property. Thereafter the District filed in the California Land Office, Bureau of Land Management, a complaint against the mining claimants as a private contest seeking an adjudication by the Bureau of the validity of the mining claim. The District's complaint alleged that its special use permit entitled it to use the lands specified in its permit, that the mining

claimants were asserting an adverse claim, and that the lands within the mining claim were nonmineral in character and contained minerals insufficient to constitute a discovery. The Court of Appeals held that under such circumstance the initiation of a private contest by the District was proper.

In a case similar to *Duguid v. Best, supra*, the Board has held that the holders of special use permits and easements granting rights-of-way across mining claims have a sufficient adverse interest under 43 CFR 4.450-1 to initiate a private contest against mining claimants challenging the validity of the claims. *State of California v. Doria Mining and Engineering Corporation, U.S., Intervenor*, 17 IBLA 380 (1974). This case involved a conflict of interest between a multi-lane, major freeway and high pressure pipeline project and mining claim located for sand and gravel and other minerals. The Board ruled that the two interests are clearly "adverse" within the meaning of 43 CFR 4.450-1 and that the appellees "are entitled to bring an action in the Department to determine whether discoveries have been perfected on appellants' unpatented mining claims so that appellees may know the proper course to follow in protecting their interests in the land. Accordingly, we conclude that the appellees have standing to bring this private contest."

**Right of the Forest Service to Intervene In a Private Contest**

In *State of California v. Doria Mining and Engineering Corporation, U.S. as Intervenor, supra*, the Board also considered the right of the Forest Service to intervene in a private contest. The Board said:

> Intervention was clearly proper as the Department of Agriculture was a party whose interests were affected by the proceeding. *See U.S. v. McCall*, 2 IBLA 64, 75, 78 ID 71 (1971). When lands within national forests are not valuable for their mineral deposits, the Forest Service is entitled to the free and unrestricted possession and control of the lands in order to properly administer them as the law directs. Accordingly, if the Department of Agriculture determines that it has an administrative need to ascertain its right to certain lands upon which mining claims are located, then it is entitled to have that right adjudicated, and that duty devolves upon this Department. *U.S. v. Bergdal*, 74 ID 245, 252 (1967); *H.H. Yard*, 38 LD 59, 66-67 (1909). The purpose of this private contest was to ascertain the validity of mining claims lying in a national forest. The initiation of such a proceeding could have been recommended by the Forest Service pursuant to the Memorandum of Understanding executed by the Bureau of Land Management and the Forest Service, effective May 3, 1957. VI *BLM Manual* 3.1 (June 21,1962). Had such a separate proceeding been brought, it could have been consolidated with the private contest. *Marvel Mining Co. v. Sinclair Oil and Gas Co., U.S. v. Marvel Mining Co.*, 75 ID 407, 410 (1968). Whether done by consolidated proceedings or by intervention, the substance of the action is the same. Furthermore, the Government intervenor may attack the validity of the mining claims on the grounds disclosed by the private contestants' complaint. *Jebson v. Spencer*, 61 ID 157, 169 (1953).

**Party Bringing Action Has Burden of Preponderating in a Private Contest**

In *State of California v. Doria Mining and Engineering Corporation, U.S. as Intervenor, supra*, the Board distinguished between the requirements of a private party bringing action and the Government bringing the action:

> We note that while in a private contest the party bringing the action generally has the burden of preponderating on the disputed issue, *Marvel Mining Co., v. Sinclair Oil and Gas Co*., 75 ID 407, 423 (1968), when the Government intervenes as a contestant the proceeding then becomes analogous to any other government contest where we have held that the contestant need only show a *prima facie* case of invalidity. The burden then shifts to the mining claimant to show by a preponderance of the evidence that the claims are valid. *U.S. v. Clear Gravel Enterprises, Inc*., 2 IBLA 285, 301 (1971).

**Right to Intervene**

In *U.S. v. United States Pumice Co*., 37 IBLA 153 (1978), the Wilderness Society and several other environmental organizations attempted to intervene in a government mining claim contest. The contestee, United States Pumice Co., alleged that the appellants do not have standing to file a private contest as defined in the regulations 43 CFR 3871.2 and 43 CFR 4.4504(a)(5). Concerning the right of the appellants to intervene, the Board stated at 157 and 158:

> To the extent to which appellants are proceeding on an assumption that intervention in the instant appeal is a matter of right, we must reject that contention. In our view, intervention, as a matter of right, exists only in those cases where the individual seeking to intervene could independently maintain the action in which he seeks to participate. While the regulations, as we have noted, *supra*, are silent on the question of intervention, they provide explicit requirements relating to who may file a private contest. The regulations limit such actions to those who claim "title to or an interest in land adverse to any other person claiming title to or an interest in such land."

**Standing to Bring Private Contests**

Standing to bring private contests under 43 CFR 4.450-1 has been recognized where a party holds an easement for highway and a special use permit issued by the United States. *State of California v. Doria Mining and Engineering Corporation, supra*. Standing has been recognized where a party holds a special use permit issued by the Forest Service for construction of a dam and spillway on national forest land. *Duguid v. Best*, 291 F2d 235 (9th Cir 1961), *cert. denied*, 372 US 906 (1963). A party has also been held to have standing to bring a private contest where he is the holder of a grazing lease issued under section 15 of the Taylor Grazing Act of 1934, as amended, 43 USC 315m (1976). *Thomas v. DeVilbiss*, 10 IBLA 56,57 (1973), aff'd, Thomas v. Morton, 408 F. Supp. 1361 (D Ariz 1976), *aff=d, Thomas v. Andrus*, 552 F2d 871 (9th Cir 1977). Finally, the Board has consistently ruled that those with an interest in the

surface estate have standing to bring a private contest against a mineral entryman. *See City of Phoenix v. Reeves*, 14 IBLA 315, 81 ID 65 (1974), *aff=d, Reeves v. Morton*, Civil No. 74-117 PHXWPC (D Ariz 1974).

**Protests**

In *U.S. v. United States Pumice Co.*, 37 IBLA 153 (1978), the Board considered the rights of individuals who have standing but cannot show a claim of title to the land. In that case the Board said:

> The regulations do not, even as they are written, foreclose participation of individuals who are vested with the requisite standing, but who cannot show a claim of title to or interest in the land. On the contrary, 43 CFR 4.450-2 provides a mechanism for those who cannot meet the requirements necessary to support the filing of a private contest to protest actions proposed to be taken in any proceeding before the Bureau. The thrust of this regulatory admixture is clear. An individual may be either a private contestant or a Protestant, his status depending upon the nature of the interest which he seeks to vindicate. In either case, however, the individual must have the requisite standing. *See Crooks Creek Commune*, 10 IBLA 243 (1973).

**Only Matters Relating to Discovery are Determined**

In a mining claim contest, the only matters to be determined at the administrative hearing are those relating to a discovery under the Mining Law of 1872, as amended. "Such acts as the National Environmental Policy Act, 83 Stat. 852, 42 USC 4321 *et seq*. (1976), and the Wilderness Act, 78 Stat. 890,16 USC 1131 *et seq.* (1976), did not purport to amend the Mining Act." *U.S. v. United States Pumice Co., supra* at 160.

**Extent of Intervention**

Finally in considering the extent of participation to be allowed an intervenor, there are many factors that might determine the allowable degree of participation. "Among such proper concerns are the desires of the original parties, the likelihood that the parties seeking intervention will provide information which would not be forthcoming without their participation, and the cost which must be borne by both the contestant and the contestee by the nature and scope of the intervention granted." *U.S. v. United States Pumice Co., supra* at 161.

## APPEALS

**Appeals to the Secretary**

The Director of the Office of Hearings and Appeals in the Department of the Interior is authorized to represent the Secretary in matters involving hearings and appeals (*see* 43 CFR Part 4). Administrative law judges in the Hearings Division are responsible for conducting hearings.

Also, in the Office of Hearings and Appeals, are six Appeals Boards: (1) Board of Contract Appeals; (2) Board of Indian Appeals; (3) Board of Land Appeals; (4) Board of Mine Operations; (5) Alaska Native Claims Appeals Board; and (6) Ad Hoc Board of Appeals. Each appeals Board consists of regular members called Administrative Judges, including a Chief Administrative Judge and the Director who is an *ex officio* member.

The Interior Board of Land Appeals (IBLA) handles appeals to the Secretary from decisions rendered by Departmental Officials concerning use and disposition of public lands and their resources, including acquired lands and the submerged lands of the Outer Continental Shelf. Title 43 CFR Subpart E gives the special rules applicable to public land hearings and appeals. Decisions of the IBLA must be in writing and signed by a majority of Judges who considered the appeal.

The IBLA review is based entirely on the record and the decision appealed from will be "affirmed," "reversed," or the case may be remanded for further consideration under stipulations set out by the appeals board. After all administrative remedies are exhausted, the adversed party may then appeal to the Federal courts.

**Representation Before Appeals Boards**

Attorneys employed by the Department of the Interior and designated by the Solicitor of the Department represent the various agencies of Interior in proceedings before the Office of Hearings and Appeals. Also, counsel for other Federal agencies may represent their agencies in proceedings before the Office of Hearings and Appeals. 43 CFR 4.3. These government attorneys have the same relationship to the agency they represent as would a private advocate representing a client.

**Power of the Secretary**

The Secretary of the Department of the Interior has the authority to review any decision of any employee or employees of the Department, including any administrative law judge or appeals board. The Secretary also has the authority to assume jurisdiction at any stage of any case before the Department, including any administrative law judge or board of the office and render the final decision in the matter. 43 CFR 4.5.

**Right of Appeal**

Except where a decision has been approved by the Secretary of the Interior, any party to a case who is adversely affected by a decision of an officer of the BLM or of an administrative law judge, shall have a right to appeal to the IBLA 43 CFR 4.410. The decision served to the adversely affected party always contains the instructions for filing an appeal.

**Standing to Appeal**

In *Mark S. Altman*, 93 IBLA 265 (1986), the Board discussed how a person must be a

party to a case and have an adversely affected recognizable interest in order to have the right of appeal to the Board:

> .....43 CFR 4.410(a) provides that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right to appeal to the Board." To be a "party to a case" a person must have "actively participated in the decisionmaking process regarding the subject matter of [the] appeal." To be "adversely affected" by a decision "the record must show that appellants have a legally recognizable interest." The interest need not be an economic or a property interest; use of the land involved or ownership of adjoining land suffices. "Mere 'interest in a problem'" or "deep concern with the issues" involved, however, does not. The Board will not speculate why an appellant is concerned about a decision, i.e., what interest is adversely affected. Appellant must allege or the record must show an interest that is injured. A person must be both a party to a case and have an adversely affected recognizable interest in order to have a right to appeal to the Board. If either element is lacking, an appeal must be dismissed.

In *Colorado Open Space Council*, 109 IBLA 274 (1989), the Board summarized the elements necessary to show standing to appeal under 43 CFR 4.410:

> ....That regulation, with limited exceptions not applicable herein, confers standing to appeal on "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management." 43 CFR 4.410(a). The decisional law of the Department has clearly established that the question of standing must be resolved by a two-step analysis. First, are the appellants parties to the case within the meaning of the regulation? Second, assuming that the answer to this first question is in the affirmative, have the appellants been adversely affected by the decision being appealed? *Citations Omitted*.
>
> With respect to the "party to a case" criterion, the Board has consistently held that this test is met where the party seeking to appeal has filed a timely protest to the action being taken under 43 CFR 4.450-1.
>
> * * * * * * * *
>
> But, as the Board has reiterated on numerous occasions, the mere fact that an individual is a party to a case does not necessarily establish that he or she has been adversely affected by the decision under appeal. *See, e.g., George Schultz*, 94 IBLA 173, 177-78 (1986); *Mark Altman*, 93 IBLA 265 (1986). On the contrary, the Board has expressly held that in order to maintain an appeal, "the record must show that appellants have a legally recognizable interest." *Sharon Long*, 83 IBLA 304, 308 (1984).
>
> * * * * * * * *
>
> ...It is the responsibility of the appellant to allege facts establishing the nature of the injury for which redress is sought. *Donald Pay*, 85 IBLA 283 (1985). Moreover, the injury must be an injury in fact; mere speculation that an injury might occur in the future will not suffice. There must, in short, be a causal relationship between the action undertaken and the injury alleged.

Where a party has actively participated in the consideration of an inventory unit for eligibility as a WSA, before both BLM and the Board; has requested in writing the opportunity to comment on APD's filed for lands within the unit; and has been recognized by the BLM as a party wishing to have input in the process of adjudicating APD's for lands in the unit, the Board concluded that the test of standing was met. *Utah Wilderness Association*, 91 IBLA 124 (1986). The Board also held that such a party has established itself as a class of persons entitled to notice of further agency proceedings. *Id.* In *Edwin H. Marston*, 103 IBLA (1988), the Society did not participate in the proceedings in the case prior to the announcement of a decision by the BLM, and therefore not a party to a case as it relates to standing in 43 CFR 4.410(a).

In *The Wilderness Society*, 110 IBLA 67, 72 (1989) The Board said that "[p]rior decisions of this Board make clear that participation as a party in Departmental proceedings prior to issuance of a decision from which review is sought is required for standing before this Board. For persons such as Society who are not immediately affected as either an applicant or person against whom the Department has asserted some claim of right, it is clear that the customary way to become a party is by making a protest against a proposed action before it is implemented. *Citations Omitted*. Clearly some prior participation is required. *Mark S. Altman, supra*. The reason for this requirement is practical: it fosters the dispatch of the Department's business and, in the interest of administrative economy limits review to cases where the parties have an interest which has been considered in the course of decisionmaking."

**Appeals from Persons Not Personally Served**

Departmental regulation 43 CFR 4.411 provides that a person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service. If a decision is published in the *Federal Register*, a person not served with the decision must transmit a notice of appeal in time for it to be filed within 30 days after the date of publication. If a decision is not published in the *Federal Register* an appeal is brought by a person who is not served with the decision, the appellant must establish that he was entitled to personal service of the decision or that his appeal was filed within 30 days after service of the decision upon parties of record. *Lew Landers*, 109 IBLA 391 (1989).

**Failure to File a Timely Appeal**

Under 43 CFR 4.410 the timely filing of a notice of appeal is necessary to establish the Board's jurisdiction over a matter. Failure to file a timely appeal has the result that a decision becomes final action for the Department. The Board will not consider the validity of such decisions in a later appeal. *U.A. Small*, 108 IBLA 102 (1989); *City of Klawock*, 94 IBLA 107 (1989).

**Untimely Filed Appeals**

In *Golden Arc Mining & Refining, Inc*., 133 IBLA 90, 91 (1995), the Board summarized

the rights of a claimant as they relate to an untimely appeal:

> The regulation governing the filing of appeals to the Board of Land Appeals, 43 CFR 4.411(a), provides:
>
> > A person who wishes to appeal to the Board [of Land Appeals] must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where is required to be filed within 30 days after the date of service.
>
> Under 43 CFR 4.411(c), no extension of time can be granted for filing. In the absence of a timely notice of appeal, the Board lacks jurisdiction over an appeal. *Gary T. Suhrie,* 75 IBLA 9 (1983); James M. Chudnow, 72 IBLA 60 (1983); and cases cited.
>
> The case record shows that BLM=s decision was received by H.E. Harris at appellant=s address of record on October 29, 1990. Accordingly, under 43 CFR 4.411(a), the time for filing its notice of appeal with BLM expired on November 28, 1990. 43 CFR 4.22(e). Appellant=s notice of appeal was not filed with BLM until November 29, 1990, 1 day after the mandatory deadline for filing an appeal. It was therefore untimely filed.
>
> The provisions of 43 CFR 4.401(a), establishing a grace period for filing in some circumstances, are of no comfort to appellant here. Under that provision, a delay in filing a document may be waived if the document is filed not later than 10 days after it was required to be filed *and* it is determined that the document was transmitted or probably transmitted to the office in which filing is required before the end of the period in which it was required to be filed.

**Petition for Stay Under New Regulations**

In *Robert E. Oriskovich,* 128 IBLA 69,70 (1993) the Board discussed the effect of a petition for stay that was untimely under the new appeal regulations:

> Under 43 CFR 4.21(a), 58 FR 4942-43 (Jan. 19, 1993), a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for stay pending appeal is filed together with a timely notice of appeal. In this case, the petition for stay was not filed at the same time as the notice of appeal. Nor was it received during the appeal period. Thus, the petition for stay was not filed together with the notice of appeal within the meaning of 43 CFR 4.21(a) (2). Since, the petition was untimely under 43 CFR 4.21(a) (2), the decision became effective on the day following the expiration of the appeal period. However, although the regulations establish a particular time period for filing a petition for stay in order to delay a decision becoming effective, the failure to file a petition within that time period means only that the decision becomes effective. Nothing in the regulations precludes the filing of a subsequent petition for stay, and the Board, in

its discretion, may entertain such a petition.

**Requirements for Appeals**

In *American Colloid Co.*, 128 IBLA 257, 262 (1994), the Board described the types of information an appellant must cover to prevail:

> * * * Where an appellant does not state with some particularity the reason for appeal, and, as appropriate, support the allegation with argument or evidence showing error, the appeal will not be favorably considered. *Add-Ventures, Ltd.*, 95 IBLA 44, 50 (1986). Any party appealing from a decision of an officer of BLM has the burden of establishing error in the decision under appeal, by a preponderance of the evidence. Conclusory allegations of error, standing alone, do not discharge this burden. *Shama Minerals*, 119 IBLA 152, 155 (1991).

**BLM Has No Jurisdiction over Cases under Appeal**

When a Bureau of Land Management decision is appealed to the Interior Board of Land Appeals by an adversely affected party, the BLM no longer has authority to take further dispositive action in a case. *James T. Brown*, 46 IBLA 265 (1980); *Melvin N. Barry*, 97 IBLA 359, 361 (1987). If the BLM should wish to take action on a case, it should move the Board to take the action or request that the Board remand the case to allow it to take such action. *Id*. at 361.

**Notice of Appeal and Statement of Reasons**

The notice of appeal which must give the serial number or other identification of the case and must be sent in time to be received in the proper office within 30 days after service. The notice of appeal may include a statement of reasons for the appeal. A statement of reasons must point out why the decision appealed from is in error; if this is not done the statement of reasons will have no affect and the appeal will be dismissed. *U.S. v. Maus*, 6 IBLA 164 (1972).

If the notice of appeal did not include a statement of reasons for the appeal, such statement must be filed with the IBLA within 30 days after the notice of appeal was filed. Or if the statement of reasons was filed with the notice of appeal, the appellant may file additional statements of reason within the 30-day period following filing of the notice of appeal. 43 CFR 4.412.

The appellant must also serve a copy of the notice of appeal and statement of reasons on the field solicitor having jurisdiction over the state in which the appeal originated, or upon the associate solicitor, Division of Energy and Resources and each adverse party named in the decision appealed from not later than 15 days after filing the document.

**Effect of a Decision Pending Appeal**

In general, a timely filing of a notice of appeal by a person adversely affected will suspend the effect of the decision appealed from until the decision on appeal is rendered. 43 CFR 4.21(a). However, an appeals board may authorize a decision to be in full force and effect immediately, if such action is in the public interest.

**Exhaustion of Administrative Remedies**

An adversed party of an administrative decision does not qualify for judicial review under 5 USC 74 until all administrative appeals are exhausted and the case has been decided by the IBLA. 43 CFR 4.21(b). In other words if your patent application is rejected by the BLM adjudicator, or you receive an adverse decision by an administrative law judge in a mining claim contest, you cannot take your case to the Federal courts. You must first appeal the decision to the IBLA.

No further administrative appeal is available in the Department of the Interior beyond the Board of Land Appeals. However in extraordinary circumstances, a reconsideration of the case may be made if the request is made in sufficient time. Also the filing of a request for reconsideration will not delay the effect of the decision unless authorized by the Board. 43 CFR 4.21(c).

**Grace Period to File Appeals**

If a document was transmitted or probably transmitted before the end of the period allowed to file an appeal (normally 30 days from receipt of the decision), the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed. 43 CFR 4.401(a).

In computing the period of time required for filing and serving a document, the day on which the decision or document to be appealed from or answered was served is not included. The last day of the period is to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day. When the time prescribed or allowed is seven days or less, intermediate Saturdays, Sundays, Federal legal holidays and other nonbusiness days shall be excluded in the computation. 43 CFR 4.22(e).

**Dismissal of Appeals**

An appeal to the IBLA will be subject to summary dismissal because (1) a statement of reasons for the appeal is not included in the notice of appeal; and (2) the notice of appeal is not served upon the adverse parties within the required periods. 43 CFR 4.402.

**Requirements of the Appealing Party**

In *United States v. Multiple Use, Inc.*, 120 IBLA 63, 76 (1991), the Board discussed the requirements the appealing party must satisfy in order to receive favorable consideration:

> * * * In such cases, the appealing party has the burden of showing error in the Administrative Law Judge's decision. *Yankee Gulch Joint Venture v. BLM*, 113 IBLA 106, 129 (1990); *United States v. Peterson*, 47 IBLA 92 (1980). In such cases, this Board has had a long-standing reluctance to overturn the administrative Law Judge's determinations, as he presided at the hearing, witnessed the deportment and demeanor of the witnesses. * * * * This is especially true when the record contains testimony that could be construed as conflicting or contradictory when taken out of the context of the hearing or when the resolution of disputed facts is influenced by the Judge's findings of credibility of a witness or the relative weight assigned by him to testimony that might otherwise be construed as conflicting. *See Yankee Gulch Joint Venture v. BLM, supra* at 136. On appeal an appellant must show adequate reason for appeal with some particularity, and support the allegations with arguments or appropriate evidence showing error. An appellant who fails to do so cannot be afforded favorable consideration. Conclusory allegations of error, standing alone, do not suffice.

**The 30 Day Appeal Period and the 30 Day Compliance Period**

In *Robert C. LeFaivre*, 95 IBLA 26, 28 (1986), the Board reviewed the difference between the 30 day compliance period and the 30 day appeal period. As the Board points out, appeals filed during the compliance period are premature and must be filed during the appeal period. The Board stated at 28:

> [The] 30-day period during which an appeal may be initiated does not commence until the expiration of the 30-day compliance period. *Randall J. Gerlach*, 90 IBLA 338, 339 (1986); *Carl Gerard*, 70 IBLA 343, 346 (1983). In *Gerard*, we stated as follows:
>
> > We note that BLM has long followed the practice of issuing decisions "holding for rejection" an offer or application for some perceived deficiency, but allowing a stated period of time within which such deficiency might be corrected, failing in which the offer or application will be rejected without further notice. It is our view that, where such a decision clearly contemplates that rejection will occur upon the running of the prescribed period, such a decision is interlocutory. * * * In such a case, the 30-day appeal period commences upon the expiration of the 30-day compliance period.
>
> Thus, in this case, the time for filing the notice of appeal did not commence until July 7, 1985, 30 days after LeFaivre received the June 4 notice. However, LeFaivre filed his notice of appeal on June 24, 1985, prior to the start of the appeal period. At the time the appeal was filed, BLM's notice was interlocutory in nature and was not subject to appeal. Accordingly, BLM should have treated LeFaivre's appeal as a protest and issued a decision on his objections that provided a right of appeal. *Citations Omitted*.

In the past, the Board has dismissed as premature appeals such as this one that are filed during the compliance period, and remanded them to BLM to consider the matters raised in the appeal as a protest.

At footnote 1, page 28, the Board suggests that the solution to the confusion would be to issue two decisions:

> * * * The first decision would require compliance with a request for further information (or a request for signing oil and gas stipulations) and state expressly that it was interlocutory and not subject to immediate appeal. The second decision would be issued if there were no compliance, and it would notify the person that his claim had been voided (or his oil and gas lease offer finally rejected) and advise him of his right to appeal. However, BLM has adopted an official policy of issuing just one decision, stating its view that the "two decision process is confusing to the applicant and is wasteful and inefficient." *BLM Instruction Memorandum No.* 85-194, Change 1, May 16, 1986.

**Decisionmaking: Holding for Rejection**

In several cases the BLM has issued decisions which describe an improper appeal procedure. For example, in *Jean Hatton*, 107 IBLA 47, 54-55 (1989), the BLM decision provided claimants with 30 days in which to file additional information, failing in which their mill site would be abandoned without further notice. The decision also stated that "no appeal, protest or petition for reconsideration will be entertained from this decision after the 30-day period. Upon calling this an example of the decision-making practice of "holding for rejection," the Board said at 55, n. 2:

> It was not correct for BLM to state in its decision that, if no compliance was made, its decision would be final for the Department and that no appeal would be entertained if filed after the expiration of the 30-day compliance period. It is established that, where (as in this case) BLM issues a decision holding an application or claim for rejection because of some deficiency, but allowing a stated period of time within which such deficiency might be corrected, there is, nevertheless, a right of appeal to this Board. *Citations Omitted.* In such cases, the 30-day period under 43 CFR 4.411(a) for filing a notice of appeal commences at the expiration of the compliance period. Thus, directly contrary to the statement in BLM's decision, any appeal was required to be filed after the 30-day period.
>
> This is because, where a BLM decision contemplates that invalidation of a claim will not occur until the compliance period expires, the decision is merely an interim determination affording a party an opportunity to correct a problem prior to cancellation of his interest. The decision is interlocutory, that is, the party is not adversely affected (and therefore may not file an appeal) until the interest is actually canceled. The interest is not canceled until the compliance period expires, at which time the cancellation is then subject to review by this Board. Contrary to BLM's decision, it is not final for the Department at that point.

**Failure of Claimant to Serve Copy of Notice of Appeal**

In *United States v. Koenig*, 99 IBLA 397, 398-99 (1987), the counsel for the Government moved to dismiss the appeal because appellants failed to comply with 43 CFR 4.413 by serving a copy of their notice of appeal and statement of reasons on the Regional Solicitor. However the Forest Service counselor was served. The Board denied the motion to dismiss and held that the "proceeding, although initiated under the authority of the Secretary of the Interior, was prosecuted by counsel employed by the Department of Agriculture, acting on behalf of the Forest Service, in accordance with a Memorandum of Understanding between the agencies. It was proper, therefore, that counsel for the Forest Service be served, rather than counsel for BLM."

**Evidence Submitted for the First Time on Appeal**

"[E]vidence submitted for the first time on appeal following a hearing and a decision by an Administrative Law Judge may not be relied upon in making a final decision, but may only be considered for the purpose of determining 'if there should be a further hearing.' *United States v. Edeline*, 24 IBLA 34, 37 (1976). This is equally true where the claimant failed to appear at or participate in the original hearing." *United States v. Koenig, supra* at 401.

**BLM May Not Declare a Claim Abandoned until the State Appellate Court Review Process Is Complete**

In *Alvin L. Kile*, 97 IBLA 6 (1987), the Board reviewed a case where the BLM declared several mining claims abandoned and closed the mining claim recordation files on the basis of an Alaska State Appeals Court decision. However because the claimants had filed a timely appeal with the Supreme Court of Alaska, the Board held that the BLM may not declare a claim abandoned until the state appellate court review process is complete. *Id.* at 7.

**Res Judicata**

Under the doctrine of administrative finality, the counterpart to the judicial doctrine of *res judicata*, a claimant is precluded from raising issues that were resolved in a contest proceeding. Once a decision has become final action for the Department, this Board will not consider the validity of such a decision in a later appeal. *George A. Haddad, Jr.*, 109 IBLA 394, 397 (1989); *City of Klawock*, 94 IBLA 107 (1986). A claimants failure to file a timely appeal from the decision in the contest proceeding precludes the Board from consideration of the issues covered by that proceeding. *Melvin Helit*, 110 IBLA 144, 150 (1989).

In *Melvin Helit v. Gold Field Mining Corp*., 113 IBLA 299, 308 (1990), the Board discussed the doctrine of administrative finality as follows:

> * * * Under the doctrine of administrative finality--the administrative counterparts of the doctrine of res judicata--when a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was

affirmed, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice.

## DECISION

### Decision by Administrative Law Judge

After the hearing, the administrative law judge gives the parties an opportunity to submit proposed findings of fact and conclusions of law, which may be adopted by the judge if correct. The judge will render a written decision which will include the findings of fact and conclusions of law. A copy of the decision will be served on all parties. 43 CFR 4.452-8.

Any party adversely affected by the decision may appeal to the Interior Board of Land Appeals. There will be no further opportunity on the matter unless the IBLA should remand the case for further hearing, if additional facts must be developed.

Administrative hearings are conducted by administrative law judges in the Office of Hearings and Appeals. This judge establishes the time and place of hearing, has authority to subpoena witnesses, take depositions, to call and question witnesses and to make proposed findings of fact.

### Declaration of Invalidity

The Interior Department has ruled numerous times that if there is no discovery as defined by the mining laws within the limits of a contested claim, the claim is null and void. *Sedgwick v. Callahan*, 9 IBLA 216, 224, 229 (1973). Furthermore, if the Judge finds there is no discovery, the claim must be declared null and void. In *Sedgwick v. Callahan*, *supra*, the Board stated:

> Having found that a discovery of a valuable mineral deposit does not exist within the limits of any of the claims, the Judge stated that he would not extend his authority beyond such finding, that is, he would not declare them null and void. We do not agree with the position expressed by the Judge that the subject mining claims should not be declared null and void. The following comment from *U.S. v. Carlile*, 67 ID 417 (1960) is illuminating:
>
> > What is the effect of a declaration of invalidity. It is that the mining claimant has acquired no rights against the United States; he has no exclusive right of possession to the land in his claim which is property in the fullest sense of word. If the United States wishes to withdraw the land in the invalidated claim or otherwise dispose of it under the public land laws, it can do so. If the land has already been included in a withdrawal or some other form of disposition, the withdrawal will attach to the land or the prior disposal will remain unimpaired. No further notice to the claimant or further proceedings against the claim are

necessary to achieve these results.

> If, however, at the time of invalidation of the claim for lack of discovery the land has not been withdrawn or otherwise disposed of, the claimant may resume occupation of the land, or remain in occupation, and so long as he is engaged in persistent and diligent prosecution of work looking to a discovery have *pedis possessio*. But until he makes a discovery, he had no rights against the United States and the United States can withdraw or otherwise dispose of the land without giving him further notice. In other words, he has the same status as anyone seeking to make a mining location on land open to mining.

**Constructive Service**

The rules governing constructive service are provided by both regulation and Board decisions. The applicable regulation, 43 CFR 1810.2(b), provides as follows:

> Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the requirements of the section where the attempt to deliver is substantiated by post office authorities.

**Situation Where Constructive Service Does Not Apply**

In *David Robertson*, 107 IBLA 114 (1989), the claimant had arranged for his mail to be picked up by a designated person. However, the Postal Service delivered at least one notice to pick up the claimant's mail to the wrong house and also did not deliver the mail to the designated person. In this case, the Board held that constructive service did not apply because the claimant established error in Postal Service procedure amounting to negligence. *Id.* at 117.

**Two Methods to Defeat Application of the Constructive Service Rule**

In *J-O-B Operating Co*, 97 IBLA 89 (1987), the Board described the methods by which a party may defeat the general rule of constructive service (Quoted with approval in *David Robertson, supra* at 116-17):

> [t]he Department has long followed the general rule that transmission of a decision to a part's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. *Victor M. Onet, Jr.*, 81 IBLA 144, 146, n. 2 (1984), and cased cited; *Michele M. Dawursk*, 71 IBLA 343 (1983); *John Oakason*, 13 IBLA 99, 102 (1973). In such a case the date of service is the

date the item is received back by BLM. *Citations Omitted*.

> Application of the constructive service rule is based on two assumptions: first, that BLM's decision was sent to appellant's last address of record, and second, that the Postal Service properly performed its duties. *John H. Blackwood*, 898 IBLA 379, 381 n.1 (1985). Due to the first assumption, upon return of an item as undeliverable, BLM is required to check its files to verify that the address to which the item was sent was correct and to determine whether a new address has been provided since the date the notice or decision was sent. *Stephen C. Ritchie*, 81 IBLA 162, 165 (1985); *Estate of Glen R. Coy*, 52 IBLA 182, 194, 88 I.D. 236, 242 (1981). If a change of address is found, notice must be sent to the new address to perfect service., Because of the second assumption a party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision. *Terry L. Wilson*, 92 I.D. 109. 112 (1985).

In *David Robertson, supra*, the Board held that because error was established in postal service procedure amounting to negligence, BLM failed to accomplished constructive service.

## PROTEST

### Timing of Protest

In *Jan Wroney*, 136 IBLA 187 (1996), the Board pointed out that a protest Aby definition relates to actions proposed to be taken.@ The Board said:

> To the extent appellant is protesting the prior purchase of the BGR itself, the protest would have to be dismissed as untimely since a protest by definition relates to actions proposed to be taken. 43 CFR 4.450-2. A protest of any action that is not proposed to be taken, but which has already occurred, is properly dismissed as untimely. *Lazaro Mendieta*, 126 IBLA 394, 397 (1993); *Sierra Club Legal Defense Fund, Inc.*, 84 IBLA 311, 318, 92 I.D. 37, 41 (1985).

### Proposed Action Must Adversely Affect Interest

In an appeal from the denial of a protest, an appellant must explain how the proposed action adversely affects any legally cognizable interest. If this is not satisfied, the appeal would be subject to dismissal on that basis. *See Jan Wroney*, 136 IBLA 187 (1996); *Mark S. Altman*, 93 IBLA 265 (1986); *Save Our Ecosystems, Inc.*, 85 IBLA 300 (1985).