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Mining Law - Approval of a Patent - A Command Performance - Barrick Goldstrike Mines, Inc. v. Babbitt

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Casenotes

MINING LAW—Approval of a Patent—A Command Performance. *Barrick Goldstrike Mines, Inc. v. Babbitt*, CV-N-93-550 (DC Nevada, Jan. 18, 1994).

Interior Secretary Bruce Babbitt called it "the biggest gold heist since the days of Butch Cassidy."[1] On May 16, 1994 Secretary Babbitt reluctantly accepted approximately $9,765 from Canadian-based American Barrick Resources Corp. for over 1,800 acres of federal land.[2] This transaction signified the beginning of yet another push to reform the Mining Law of 1872.[3]

American Barrick Resources' wholly-owned U.S. subsidiary, Barrick Goldstrike Mines, Inc. (Barrick), owns several lode[4] mining claims and millsites[5] in northern Nevada.[6] With an estimated gross value of almost

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1. Tom Kenworthy, *A Court-Ordered 'Gold Heist' Babbitt Uses Federal Land Transfer to Urge Reform of 1872 Mining Act*, WASH POST, May 17, 1994, § A, at a05.

2. Secretary Babbitt had several reasons for not wanting to transfer the land to Barrick. The primary reason was concern over the rate of return the federal government was getting in the land transaction. For as little as $2.50 per acre, the mining law allows patenting of land into private ownership. With respect to hard rock mining such as gold, the law does not require the mining claimant to pay any royalties to the government. Secretary Bruce Babbitt, Remarks to the National Press Club, April 27, 1993.

3. Act of May 10, 1872, ch. 152, 17 Stat. 91. The surviving portions of the Act appear at 30 U.S.C. §§ 22-24, 26-30, 33-35, 37, 39-42 & 47 (1988). There have been numerous demands for reform and modification of the mining law since its inception. As early as 1894 a court warned "the sooner amendments are made . . . the better it will be for the mining industry." Consolidated Wyoming Gold Mining Co. v. Champion Mining Co., 63 F. 540, 549 (N.D. Cal. 1894). Since then, numerous attempts have been made to reform the law with little to no avail. JOHN D. LESHY, THE MINING LAW, A STUDY IN PERPETUAL MOTION 287-312 (1987).

4. "Lode" is considered a mining term as opposed to a geological term. A lode is a well-defined occurrence of valuable mineral bearing material. It is synonymous with the term "orebody" and to some extent "reef" and "vein." A. NELSON, DICTIONARY OF MINING 260 (1965).

5. A mill is a "collection of plant and equipment for the concentration of ores and for the recovery of metals such as gold and silver . . . ." *Id.* at 283. A millsite is the land where the plant and equipment are located.

6. Barrick Goldstrike Mines, Inc. owns over 200 lode mining claims and millsite claims, covering approximately 6,500 acres in Eureka and Elko counties, Nevada. Complaint at 4, Barrick

$10 billion, Barrick's discovery represents one of the richest gold mines in the world.[7] Between March 16, 1992 and April 15, 1992, Barrick filed seven mineral patent applications with the Bureau of Land Management (BLM) for land associated with these mining claims and millsites.[8] On September 8, 1992, after approving the form of the applications, the BLM requested that Barrick pay the statutorily required purchase price of $5.00 per acre, which it did.[9] On September 9, 1992, the BLM issued the "First Half—Mineral Entry Final Certificate" for the lode claims and millsites.[10]

The BLM certified mineral examiners later investigated Barrick's claims and millsite and issued a mineral report.[11] The examiner's report

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Goldstrike Mines, Inc. v. Babbitt, CV-N-93-550 (DC Nevada, Jan. 18, 1994); Barrick's Motion for a Writ of Mandamus Or an Order Compelling Agency Action at 2, Barrick Goldstrike Mines, Inc. v. Babbitt, CV-N-93-550-HDM (DC Nevada, Jan. 18, 1994). [hereinafter Barrick's Motion]. Ownership of the mining and millsite claims does *not* include the land itself.

7. The BLM estimates that the claims contain about 30 million ounces of gold. At the then current market price of $320 per ounce, the gold has an in place gross value of $9.6 billion. Prepared Statement of Bruce Babbitt, Secretary of the Interior, Before the Subcommittee on Mineral Resources Development and Production, Committee on Energy and Natural Resources, United States Senate on S. 257 (March 12, 1993) at 5-6.

8. Barrick's Memorandum in Support of Motion For A Writ of Manamus Or An Order Compelling Agency Action, CV-N-93-550 (DC Nevada, Jan. 18, 1994), at 3. [hereinafter Barrick's Memorandum]. Barrick received equitable title to the property in question through discovery and location procedures. Barrick, however, wished to obtain the "patents" or outright ownership to the property. A patent is much more than a deed from the United States. *See infra* notes 67-82 and accompanying text. A patent is evidence of the decision by the United States to relinquish all ownership of a piece of property to a private party. *Id.*

9. Barrick's Memorandum, *supra* note 8, at 3. Both the surface and subsurface of mineral lands may be obtained through patent proceedings upon payment of $5.00 per acre for lode claims or $2.50 per acre for placer claims. 30 U.S.C. §§ 29, 37 (1988).

10. Report and Recommendation of the U.S. Magistrate Judge, Barrick Goldstrike Mines, Inc. v. Babbitt, CV-N-93-550 (DC Nevada, Jan. 18, 1994), at 2. [hereinafter Magistrate's Report]. A "First Half—Mineral Entry Final Certificate" entitles the applicant to apply for a patent if the applicant can prove that the lode claim contains a discovery of valuable minerals. BLM Patent Manual, Handbook for Processing Mineral Patent Applications, H-3860-1 at VI-1 [hereinafter BLM Patent Manual]. The applicant must establish this information by the date of issuance of the final certificate. *Id.* The applicant must also prove that the millsites are nonmineral in character and will be used for mining and milling purposes. *Id.* at III-23.

First-Half certificates have the effect of vesting equitable title in fee to the claims. The title, however, is subject to verification that the claims do in fact contain a valuable mineral discovery. *Id.* at VI-1. A BLM mineral examiner does the verification. Only after verification and consideration conflicting land use such as land status, conflicting claims, notification and reservations does the BLM issue the "Second Half - Mineral Entry Certificate." *Id.* at VIII-1,

11. Magistrate's Report, *supra* note 10, at 3. The mineral report states a professional opinion of a BLM mineral examiner. BLM Manual, § 3060.4. Of primary importance is the examiner's opinion whether a valuable mineral discovery exists on the lode claims. BLM Patent Manual, H-3860-1 at VII-1. The examiner must also verify that the millsites are nonmineral in character and the claimant is using the millsites for mining and milling purposes. *Id.* at III-23.

recommended that the BLM issue the requested patents.[12] BLM officials acknowledged the report on February 12, 1993.[13] The typical wait for the issuance of patents after acknowledgment was then about eighteen days.[14]

On March 2, 1993, exactly eighteen days later, Interior Secretary Bruce Babbitt issued an order rescinding the authority of subordinate Department of Interior officials to approve the acquisition of mineral claims.[15] Secretary Babbitt personally assumed review of all patent applications, anticipating upcoming changes in the current mining law.[16] After the order, Barrick claimed that Secretary Babbitt refused to review or issue any mineral patents. This refusal halted the BLM's issuance of patents, previously ranging from 28 to 94 patents each year between 1980 and 1992.[17] Secretary Babbitt also publicly denounced Barrick's ability to lawfully obtain its patents at the nominal price.[18]

Barrick sought a Writ of Mandamus from the United States District Court for the District of Nevada to compel the Secretary to issue the patents. United States District Judge Howard D. McKibben referred the matter to U.S. Magistrate Judge Phyllis Halsey Atkins.[19] On July 14, 1994, Magistrate Judge Atkins denied the Writ of Mandamus. The Magistrate, however, rec-

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12. Magistrate's Report, *supra* note 10, at 3.

13. Barrick's Memorandum, *supra* note 8, at 6. Upon approval, the mineral report is presented to BLM management for "acknowledgment." Acknowledgment serves as a final review by management. Once reviewed and approved by a mineral examiner, the conclusions of the report are not subject to revision by management. BLM Manual, § 3060.4.

14. Using a log maintained in the BLM office in Reno, Nevada, Barrick made a comparison of twenty-three different claims filed from September 1985 through November 1990. This information allowed Barrick to find the average amount of time that elapsed from the approval date of the Mineral Report to the patent's issuance date. The longest recorded delay in issuing the patent since September 1985 was 71 days. The average recorded delay, however, was less than 18 days. Barrick's Motion *supra* note 6, at 13.

15. United States Department of the Interior Order No. 3163

16. *Id.* Senate Bill 257 addresses, among other things, the economic return in developing the public's minerals and the patenting provision of the Mining Law that allows the privatization of federal lands and other resources. S. 257, 103rd Cong., 1st Sess. §§ 107, 402 and 410 (1993).

17. Magistrate's Report, *supra* note 10, at 3.

18. An article in the Washington Post outlined the issues involved in the mining law controversy. Under the existing mining law, miners can "patent" or acquire lode claims for $5.00 an acre. The applicant is required to prove the land contains valuable minerals and meets certain validation requirements. With "hard rock" minerals there are no other government fees, such as royalties, involved. The successful applicant receives outright ownership of his mining claim. In Barrick's case, the government is selling almost $10 billion in gold for approximately $10,000. In addition, the government could collect almost $1 billion in revenue from this mine alone if the government imposed a royalty fee of 12.5% on minerals taken from federal lands. Tom Kenworthy, *BLM Stripped of Authority Over Mining Land Sales. Babbitt Assumes Control in Face of Potential "Gold Rush" for Royalty-Free Minerals*, WASH. POST., March 11, 1993, § A, at a13.

19. Magistrate's Report, *supra* note 10, at 1.

ommended that the District Court compel the Secretary to complete his review and either issue the patents or formally contest the validity of Barrick's claims.[20] Secretary Babbitt's due date for compliance was Thursday, April 14, 1994.[21] Judge McKibben adopted the recommendation of the Magistrate Judge but extended the Secretary's date for compliance to June 20, 1994.[22] Secretary Babbitt did not appeal this decision. On May 16, 1994 the Secretary issued the patents to Barrick, transferring the land associated with Barrick's claims. The Secretary's order remains in effect, however, and all future patent applications will require Secretary Babbitt's personal approval.[23]

This casenote briefly examines the Mining Law of 1872 and the general aspects of a mineral patent. It then reviews the legal issues regarding the Secretary's delay in approving the patent application and the arguments advanced on those issues.[24] Finally, this casenote evaluates how the Magistrate Judge applied current mining law to the delay in the patent application and considers alternative arguments. Although Barrick obtained its patents, these issues remain open for other patent applicants who may be forced to similarly compel Secretary Babbitt to issue their patents.

BACKGROUND

The Mining Law of 1872

The United States Constitution gives Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."[25] For over 200 years, Congress has grappled with the issue of mineral disposal. On March 3, 1807 Congress authorized the first legal disposal of federally owned minerals by leasing lead mines.[26] It was not, however, until the Acts of July 11, 1846,[27]

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20. *Id.* at 19.

21. *Id.*

22. Order Adopting Magistrate Judge's Report and Recommendation, Barrick Goldstrike Mines, Inc. v. Babbitt, CV-N-93-550 at 2 (DC Nevada, Jan. 18, 1994).

23. United States Department of the Interior Order No. 3163.

24. Barrick sought a Writ of Mandamus to compel the Secretary to issue the patents at the center of this dispute. An issue presented to the Court was whether the Secretary's remaining obligations were ministerial, justifying the writ. The Magistrate found that the Secretary's obligations were *not* ministerial and denied the writ. Magistrate's Report, *supra* note 10, at 14. The legal issues presented in deciding the appropriateness of a Writ of Mandamus, however, are beyond the scope of this casenote.

25. U.S. CONST. art IV, § 3, cl. 2.

26. 2 Stat. 448. Under this statute, the government could lease lead mines on federal land for limited periods. T.S. MALEY, MINING LAW FROM LOCATION TO PATENT 2 (1985).

27. 9 Stat. 37; *See* MALEY, *supra* note 26, at 2.

and March 1, 1847,[28] that Congress first authorized the *sale* of mineral lands.

Before 1866, local customs, rules of organized mining districts, state laws and local court decisions established the fundamental principles governing mining claims.[29] The Lode Law of 1866[30] and the Placer Act of 1870[31] incorporated these fundamental principles.

The Mining Law of 1872[32] replaced much of the 1866 and 1870 Acts. Although the 1872 law preserved most of the then existing policies, it made several substantive changes. The Act continued to allow mineral deposits on public lands to be free and open to exploration and purchase (known as self-initiation), but restricted the invitation to only "valuable" mineral deposits.[33] The 1872 Mining Law with its accompanying judicial opinions, administrative regulations and decisions, and state law supplements make up the current location-patent system.[34]

A mineral prospector may enter the public domain, search for minerals and establish ownership rights in any deposits of locatable minerals he finds unless federal regulations restrict mineral entry.[35] The location system essentially protects the first mineral claimant against all future rivals. It also entitles the mineral claimant to produce the minerals discovered without purchasing fee simple title from the United States.[36]

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28. 9 Stat. 146; *See* MALEY, *supra* note 26, at 2.

29. L. MALL, PUBLIC LAND AND MINING LAW 235, n. 1 (3d ed. 1981).

30. Act of July 26, 1866, ch. 262, 14 Stat. 251 (portions of the Act survive at 30 U.S.C. § 51 and at 43 U.S.C. § 661 (1988)).

31. Act of July 9, 1870, ch. 235, 16 Stat. 217 (portions of the Act survive at 30 U.S.C. § 52 and at 43 U.S.C. § 661 (1988)).

32. Act of May 10, 1872, ch. 152, 17 Stat. 91 (portions of the Act appear at 30 U.S.C. §§ 22-24, 26-30, 33-35, 37, 39-42 and 47 (1988)).

33. MALL, *supra* note 29, at 174. This restriction of entry to "valuable mineral deposits" rather than "mineral lands" was to give rise to the discovery test, ultimately articulated by the Supreme Court in United States v. Coleman, 390 U.S. 599 (1968).

34. 1 AM. L. OF MINING § 30.01 (2d ed. 1984). A location-patent system refers to the means of defining a mineral discovery, obtaining the legal rights to the discovery and, if wanted, the title in fee to the land containing the discovery. *See infra* notes 42-54 and accompanying text. The Materials Act of 1947 and the Multiple Use Act of 1955 modified the Mining Law of 1872. The changes, however, do not effect the reform of mining law as it deals with the patent process. Therefore, this analysis does not discuss them.

35. 1 AM. L. OF MINING § 30.01 (2d ed. 1984).

36. The objective of the Mining Law was to promote the development of the mining resources of the United States. By adopting mining laws that reward and encourage mineral discovery, the miners enhanced national wealth and promoted the development of mining lands. Central Eureka Mining Co. v. East Central Eureka Mining Co., 146 Cal. 147, 79 P. 834, *aff'd.* 204 U.S. 266 (1907); United States v. Coleman, 390 U.S. 599 (1968).

The mining laws also accelerated the settlement of unoccupied areas in ways similar to agricultural and other nonmineral entries such as the various homestead acts.

Mineral Claims

The 1872 Mining Act extends an express invitation to qualified persons to explore public lands for valuable mineral deposits.[37] A prospector successfully locating a deposit has rights to claim and mine those deposits.[38] Three events are crucial to the validity of the claims themselves: discovery, location, and, if the locator chooses to obtain title, patent.[39] Of these, discovery is critical because it is the beginning of the effort to develop a valuable mine.[40] Without a discovery, a claim is void *ab initio*. Location and patent are dependent upon discovery and comprise the process devised by Congress for securing to the discoverer the full benefit of the discovery.[41]

Discovery

Section 2 of the Mining Law of 1872 requires the "discovery of the vein or lode."[42] The Act, however, gives no definition of the word "discovery." The Secretary of the Interior has formulated two related rules defining discovery, the *prudent person* rule[43] and the *marketability* rule.[44]

37. 30 U.S.C. § 22 (1988); 2 AM. L. OF MINING § 34.01 (2d ed. 1984).

38. 30 U.S.C. § 29 (1988). "A mining claim is a particular piece of land to which a miner has a recognized, vested and exclusive right of possession for the purpose of extracting minerals therefrom." Northern Pacific Railroad Co. v. Sanders, 49 F. 129, 135 (9th Cir. 1892). There are generally two types of mining claims, namely, vein or lode claims and placer claims. A lode claim is a definite and distinct tract of land designated by stakes and monuments so that its boundaries can be readily traced. Mantle v. Noyes, 5 P. 856, 5 Mont. 274 (1885). An ideal lode claim is a rectangle of 1,500 feet by 600 feet. The claim is laid out along the course of the vein located with the centerline corresponding to the vein located, sidelines parallel to the vein and endlines crossing the vein at right angles. 1 AM. L. OF MINING § 32.03[1][a] (2d ed. 1984).

A placer claim refers to land within defined boundaries which contains minerals in a loose state within the soil. The minerals are not "in place" as with a lode claim but are spread out. United States v. Iron Silver Mining Co., 128 U.S. 673 (1888). Individual placer claims are limited to 20 acres tracts, but may be as large as 160 acres when individuals associate to jointly locate the claim. Because the mineral does not follow a specific vein, the claim must conform to the rectangular subdivisions of the public land survey. 30 U.S.C. § 35 (1976); 1 AM. L. OF MINING § 32.04[1][a] (2d ed. 1984).

39. 2 AM. L. OF MINING § 35.01 (2d ed. 1984).

40. *Id.*

41. *Id.*

42. 30 U.S.C. § 23 (1988).

43. The "prudent [person] rule," as established in *Castle*, states that a discovery exists "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine . . . ." Castle v. Womble, 19 I.D. 455, 457 (1894),

44. The "marketability rule" defines a discovery as a "deposit . . . of such value that it can be mined, removed and disposed of at a profit." Acting Solicitor Op., Taking of Sand and Gravel From Public Lands for Federal Aid Highways, 54 I.D. 294, 296 (1933).

Two requirements exist under the prudent person rule.[45] First, a "valuable mineral" must be found within the limits of the claim.[46] Second, the mineral must exist in such a quantity and quality as to justify a prudent person to expend labor and means, with a reasonable prospect of success, in developing a valuable mine.[47] The prudent person rule accounts for the realties of the cyclical nature of mineral development by considering any reasonable prospect for future economic success.[48] Therefore, a prudent person may use current facts and circumstances to anticipate future changes in economic conditions.[49] In short, the prudent person rule requires some proof that there is a reasonable prospect for future success in developing an economical mine.

The marketability test requires proof that a claimant can extract the mineral and sell it at a profit *now*. Under the marketability rule, a discovery is valid if "the deposit is of such value that it can be mined, removed and disposed of at a profit."[50] The marketability rule is not considered an alternative to the prudent person rule, but is considered a "refinement" of, or a "logical complement" to the prudent person rule.[51]

Reconciliation of the two rules is very difficult if not impossible.[52] At one time, the character of the mineral determined which test to apply.[53] Current court decisions involving discovery issues, however, do not consistently apply either rule.[54]

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45. United States v. Frank W. Winegar et al., 81 I.D. 370, GFS(MIN) 47 (1974).

46. *Id.* at 373.

47. *Id.*

48. United States v. Jenkins, 75 I.D. 312 (1968).

49. *Id.* Prospects included normal market cycles. A normal cycle begins with shortage periods followed by mineral production increases to realize available profit (a result from unmet demand). An inevitable period of overage and lower market prices completes the cycle. *See* MALL, *supra* note 29, at 297 n. 5.

50. Acting Solicitor Op., Taking of Sand and Gravel from Public Lands for Federal Aid Highways, 54 I.D. 294, 296 (1933).

51. United States v. Coleman, 390 U.S. 599, 602 (1968). *See* United States v. Estate of Alvis F. Denison, 76 I.D. 233, 237 (1969) ("Although in earlier decisions the Department [of the Interior] sometimes referred to the marketability test as an "additional test applicable to minerals of widespread occurrence, the test was in actuality only a refinement of the prudent man rule and a logical complement to it.).

52. For example, in *Denison*, the court stated that "There is no distinct dichotomy between present value and future value or between present marketability and future profitability." United States v. Alvis F. Denison, 76 I.D. 233, 236 (1969).

In *Coleman*, the court held that "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." *Coleman*, 390 U.S. at 602-603.

53. *See, e.g.*, United States v. Heirs of John D. Stack, A-28157 (Mar. 28, 1960): "The particular test to be applied depends upon the character of the minerals involved. Where the minerals are of limited occurrence, and in and of themselves have intrinsic value, such as gold, the 'prudent man' test . . . is applied." "However, with respect to minerals of widespread occurrence, such as sand and gravel, it is necessary to show additionally that the deposit can be extracted, removed, and marketed at a profit."

54. George E. Reeves, in a presentation to the Rocky Mountain Mineral Law Foundation's

Location

Location is a term of art in the Mining Law that refers to defining the mineral discovery on a map or in the field. The Mining Law of 1872 allows local mining districts and mining customs to establish location procedures and miners' rights on the public domain.[55] Local procedures and rights, however, must not be inconsistent with state or federal law.[56] Locating a claim automatically transfers possessory rights to mineral lands from the United States government to the locator if the applicant meets all the requirements to perfect a location.[57] The mining law, however, conditions the transfer of possessory rights upon the discovery of minerals.[58]

Prior to discovery, the doctrine of *pedis possessio* affords the prospector, to the exclusion of others, the right to possess mineral bearing land to the extent needed to explore and develop it by staking a claim.[59] This possessory right to the claim is superior only to adverse locators and the public.[60] *Pedis possessio* is of no value against the United States government, however, which holds the paramount title.[61]

Twenty-First Annual Institute, stated that the prudent person and the marketability standards of discovery are, by definition, inconsistent, notwithstanding the language in *Coleman*. Reeves, *The Law of Discovery Since Coleman*, 21 ROCKY MT. MIN. L. INST. 415, 417 (1976).

55. Public Domain is land in which the federal government has entire and complete jurisdiction. The assembly of these public lands began with the British treaty of 1783 and concluded with the purchase of Alaska in 1867. MALL, *supra* note 29, at 6.

56. 2 AM. L. OF MINING § 33.01[4] (2d ed. 1984).

57. The Mining Law of 1872 governs the fundamental requirements of obtaining possessory rights to mining claims. The Act, however, leaves state law and local custom to set up the specific procedures. 30 U.S.C. § 28 (1988) requires the claimant to clearly mark the location on the ground so that the claim boundaries are easily traceable. The federal law, however, does not specify the number or nature of the markers. This is left to the state statutes. Federal law also provides that specific information about the mining claim be recorded, but does not expressly direct where these records are to be kept. This too, was left up to the state. Therefore, in examining a specific claim, it is important to consult the statutes of the appropriate state. In 1976, Section 314 of the Federal Land Policy and Management Act required federal filing requirements. 43 U.S.C. § 1744 (1988).

58. 43 C.F.R. § 3862.1-1(a) (1983). The federal mining law requirement that the locator discover a valuable mineral within the boundaries of the claim, although related, is different from the requirement of some state statutes that a locator do discovery work. The requirement of a discovery of a valuable mineral deposit sufficient to meet the requirements of federal law usually requires considerable exploration on the ground. As a result, a discovery of a mineral typically does not occur until after the location of a mining claim. 2 AM. L. OF MINING § 33.05[1] (2d ed. 1984).

59. Union Oil Co. v. Smith, 249 U.S. 337, 346-47 (1919); Cole v. Ralph, 252 U.S. 286, 294-95 (1920).

60. *Union Oil Co.*, 249 U.S. at 347-49.

61. *Id.*

A valid location is dependent on proper recordation. The Federal Land Policy and Management Act of 1976[62] (FLPMA) was the first statute to require federal recording of mining claims. FLPMA requires the owner of a claim to file "a copy of the official record of the notice of location or certificate of location" with the state BLM office and the county real property records.[63] Such a notice or certificate must include a description sufficient to locate the boundaries on the ground.[64] FLPMA requires recording locations within 90 days after location.[65] If the owner of the claim does not make the BLM filing by the deadline, the BLM will declare the location invalid.[66]

Patents

Perfecting a discovery, location and the doctrine of *pedis possessio* confer a valuable right upon a locator by allowing the locator to exploit the deposit.[67] A patent from the United States government, however, conveys a fee title to the claimant.[68] The opportunity to obtain a patent is a fundamental aspect of federal mining law.[69] This privilege is available only to those who follow the mineral patent procedures and can prove they have met the legal requirements of discovery, location and recordation.[70]

A patent is much more than a deed from the United States. It represents the decision by the United States to relinquish *all* ownership of the location to a private party. A patent is the origin of private ownership of the land, passing seisin in fee from the sovereign.[71]

Distinct advantages exist with a patent as with any ownership of real property. The claimant is not required, however, to patent the mining claims or sites.[72] Without a patent, the claimant has only possessory title

62. Act of Oct. 21, 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701-1782 and in scattered sections of Title 7, 10, 16, 22, 25 30, 40, 43, 48 and 49 (1988).

63. 43 U.S.C. § 1744(b) (1988).

64. Mall, *supra* note 29, at 218, n. 9.

65. 43 U.S.C. § 1744 (1988).

66. *Id.*

67. 2 AM. L. MINING § 51.01[1] (2d ed. 1984).

68. *Id.* § 54.01[1].

69. Moran & Ebner, *The Mineral Patent*, 24 ROCKY MT. MIN. L. INST. 269, 274-75 (1978). The patent signifies Congress' continued policy of private mineral ownership found within the public lands.

70. *Id.*

71. *Id.*

72. 2 AM. L. MINING § 51.01[1]. The mining claimant with an unpatented claim still has the right to extract and remove minerals. The primary advantage lies in that a patent satisfies all of the matters concerning location, discovery and mineral character of the land, or any other requirement pertaining to location. Davis v. Shepard, 72 P. 57 (1903).

dependent on maintaining possession and subject to the paramount title of the federal government.[73]

Some risk is associated with applying for a patent. Before the 1969 decision of *United States v. Carlile*,[74] the Department of the Interior would reject patent applications when an applicant failed to prove discovery. The applicant, however, would retain ownership of the unpatented claim until the necessary proof was available.[75] Since *Carlile*, a patent applicant who fails for lack of discovery probably will lose the claim. Such a decision would relegate the claimant's status to an explorer under the doctrine of *pedis possessio*.[76] The applicant who failed to prove discovery runs the risk that the federal government may have withdrawn the location area from mineral exploration and development. Not only is the previous location lost, but the right to locate a new claim in that area may be lost as well.[77]

The BLM supervises the various proceedings by which a claimant can obtain a patent from the United States.[78] BLM jurisdiction extends over Mining Law issues on *all* federal lands and BLM officials decide whether claimants meet all requirements in the mining patent process.[79]

The patent process is a statutory proceeding. The Mining Law of 1872 establishes the right of qualified claimants to receive a mineral patent under certain conditions.[80] Patent applicants have the burden of

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73. *Id.*

74. United States v. Carlile, 67 I.D. 417 (1960). In *Carlile*, a locator failed in his patent application to prove that his claims contained minerals in sufficient quantities to form a discovery under the mining laws. As a result, he lost his claims, relegating him to the status of "occupant of public lands" under the doctrine of *pedis possessio*. The *Carlile* decision means that a mining claim owner brings his claim to the attention of Secretary at his own peril. A claimant can apply for a patent too soon. The exacting tests of a valuable discovery will not be met even if the mineral deposit is extremely valuable, without sufficient development. United States v. Baranof Exploration & Dev. Co., 72 I.D. 212, GFS (Min) SO-32 (A-29914, May 14, 1965). On the other hand, it is possible to apply for a patent too late. If the claimant produces and sells most of the mineral deposit, there may not be enough to warrant investment by a prudent person? United States v. Lem A. and Elizabeth D. Houston, 66 I.D. 161 (A-27846, April 29, 1959).

75. 2 AM L. MINING § 51.02 (2d ed. 1984). *See also* United States v. Carlile, 67 I.D. 417 (1960).

76. *Carlile*, *supra* note 75.

77. United States v. Locke, 471 U.S. 84 (1985). *Locke* dealt with the annual filing requirements of FLPMA. In *Locke*, the BLM declared claims abandoned and void because the claimants failed to meet the filing requirements. Usually, a loss of a claim has little practical effect; the claimant simply locates the claims again and then rerecords them with the BLM. In Locke's case, however, relocating was impossible because of the enactment of the Common Varieties Act of 1955. 30 U.S.C. § 611. This Act prospectively barred locations with the sort of minerals yielded by Locke's claims. The result was that once the BLM declared the claims void, the mineral deposits escheated to the Government.

78. 2 AM. L. OF MINING § 51.03 (2d ed. 1984).

79. *Id.*

80. *Id.*

proving that applications meet all statutory requirements.[81] The United States, a patent applicant, or any third parties who assert adverse interests in the land may protest the patent application.[82]

PRINCIPAL CASE

In *Barrick v. Babbitt*, Barrick sought a Writ of Mandamus compelling the Secretary to issue patents for 61 claims.[83] In essence, Barrick alleged the Secretary effected a "de facto moratorium" on the legislatively directed issuance of mining patents on federal lands.[84]

Barrick based its suit on the premise that it had met all of the statutory requirements necessary to issue the patents and that the Secretary lacked the authority to withhold the patents. Barrick received its "First Half—Mineral Entry Final Certificate" (First Half Certificate) from the BLM.[85] Barrick also received the appropriate BLM mineral report regarding its claims, which concluded that the Secretary should issue the patents.[86] With this evidence, Barrick argued that the only remaining acts were largely administrative and therefore ministerial.[87] Barrick's claim presented the court with two issues. First, could the Secretary delay issuing the patents under the current mining laws?[88] If the Secretary could not delay issuing the patents, the second issue was whether a Writ of Mandamus was appropriate to compel the Secretary to issue the patents.[89]

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81. *Id.* The statutory requirements include discovery, location and recordation. *Id.*

82. *Id.*

83. Magistrate's Report, *supra* note 10, at 5.

84. *Id.*

85. *Id.* at 2. The mining law (nor the related regulations) does not provide for the issuance of "first half" or "second half" certificates. *See* 30 U.S.C. § 29 (1988); 43 C.F.R. § 3862.4-6 (1983). These certificates appear to be an administrative process for disclosing the current status of a given patent application.

86. Magistrate's Report, *supra* note 10, at 2.

87. *Id.* at 7. In *Marbury v. Madison*, the Supreme Court held that "when the legislature proceeds to impose on that [federal] officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803). The Supreme Court uses the granting of a land patent to illustrate the types of duties that may be subject to a Writ of Mandamus. *Id.* at 165.

88. Magistrate's Report, *supra* note 10, at 5.

89. *Id.* A Writ of Mandamus is appropriate to compel an official of the United States to perform a duty owed to an individual if the individual's claim is clear and certain; the official's duty is ministerial and free from doubt; and no other remedy exists. Azurin v. Von Raab, 803 F.2d 993, 995 (9th Cir. 1986) (quoting Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986)).

The Mining Laws obligate the Secretary to ensure that the miner meets all legal requirements of discovery, location and recordation. Under the Mining Act, the Secretary can only authorize patents for land that is "claimed and located for valuable deposits."[90] Secretary Babbitt argued that Barrick's patent application concerned a "valuable deposit" issue involving the Endangered Species Act[91] (ESA). Because the Secretary's consideration of the ESA was an exercise of the Secretary's discretion, the Secretary argued that issuing the "Second Half—Mineral Entry Final Certificate" (Second Half Certificate) was not a ministerial act.[92] The Magistrate agreed,[93] characterizing the mineral examiner's report as *a* final step before the Secretary reaches a final decision, not *the* final step.[94]

The final step in the patent process is issuing the Second Half Certificate.[95] Until the Second Half Certificate was issued, the Secretary's consideration and review of the value of Barrick's claims were discretionary and, therefore, allowable.[96] The Magistrate recognized this distinction and found that mandamus relief compelling the Secretary to issue the patents was inappropriate.[97]

The Magistrate, however, found that where an abuse of discretion caused unreasonable delays in mandated state actions, mandamus relief would be appropriate.[98] Secretary Babbitt never contested the sufficiency of Barrick's patent requirements. Therefore, the facts suggest the delay resulted from actions internal to the Department of the Interior.[99] Because

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90. 30 U.S.C. § 29 (1988).

91. See *infra* note 106.

92. Magistrate's Report, *supra* note 10, at 14.

93. 16 U.S.C. §§ 1531 - 1543 (1988). See *infra* note 106. The Magistrate agreed that the Secretary can only issue patents for land "claimed and located for valuable deposits." In deciding whether valuable minerals exist, the BLM (and reviewing courts) employs the "prudent person" test. As always, in applying the prudent person test, a primary consideration is profitability. Therefore, before the Secretary could issue a patent, Barrick's location, at the time of the application, must be confirmed as "valuable" for minerals.

The BLM consulted with the U.S. Fish and Wildlife Service ("USFWS") regarding the dewatering activities associated with the mine and mill sites. The purpose of these discussions was to determine whether the dewatering activities would affect a listed threatened species, the Lahontan Cutthroat Trout. Secretary Babbitt's concern was whether potential mitigation measures to protect the fish would affect the prudent person's decision in determining the value of the mineral deposits.

94. Magistrate's Report, *supra* note 10, at 13.

95. *Id.*

96. Magistrate's Report, *supra* note 10, at 11.

97. *Id.* at 14.

98. *Id.*

99. *Id.* Before the time Secretary Babbitt took office, the BLM was using a pilot program to contract-out the preparation of some final mineral reports. The purpose of this program was to speed up the application process. In May 1993, Secretary Babbitt approved a revision of the application

this was an inconclusive assumption, the Magistrate ordered the Secretary to affirm or deny the existence of a valuable mineral deposit on the Barrick claims by April 14, 1994.[100]

ANALYSIS

The Magistrate found that Secretary Babbitt effected a *de facto* moratorium on issuing mining patents.[101] The Secretary, although denying a moratorium, had several reasons for delaying Barrick's patent request. To a large degree, Secretary Babbitt believes that the patent system itself, as currently authorized by the Mining Act of 1872, is unfair and should be abolished.[102] The Secretary also considers it unfair for the federal government to "lose" billions of dollars worth of minerals and real property to private parties for what he believes are token payments.[103] Finally, the Secretary withheld the patents in anticipation of mining reform legislation.[104]

Analyzing the validity of the Secretary's actions required the court to consider the Secretary's obligations and the extent to which these obligations conflict. The Secretary's most significant obligations in this case are those directed by the Mining Law of 1872,[105] the Endangered Species Act (ESA)[106] and the Federal Land Policy and Management Act (FLPMA).[107]

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process requiring at least five additional levels of review. The Magistrate held that considering the Secretary's stand on the current mining law, the additional levels of review were evidence of the Secretary's intent to delay patent issuance. *Id.* at 15.

In addition, the Secretary's delay between the effected moratorium in March, 1993, and the initiation of the USFWS consultation in December, 1993 was further evidence of an intent to effect a moratorium. *Id.* at 15-19.

100. *Id.* at 19. The Court, though not explicitly, followed *Marathon*, by compelling the defendants to exercise their discretion, but did not dictate how that discretion was to be exercised.

101. Magistrate's Report, *supra* note 10, at 5, 15-19.

102. Secretary Babbitt outlined the Administration's mining law reform agenda in remarks to the National Press Club on April 27, 1993. During that presentation, Secretary Babbitt said that the first point on the agenda for mining law reform was to abolish the patent system. Babbitt claimed that the patenting of land for $2.50 to $5.00 an acre is plainly a giveaway. This transaction has little to do with current mining needs and a lot to do with land speculation. Secretary Bruce Babbitt, Remarks to the National Press Club, April 27, 1993.

103. *Id.* Secretary Babbitt's remarks to the National Press Club also included his intent to reform the mining law by requiring miners to pay mineral royalties to the federal government. *Id.*

104. United States Department of the Interior Order No. 3163.

105. Act of May 10, 1872, ch. 152, 17 Stat. 19 (codified as amended at 30 U.S.C. §§ 22-47 (1976). The primary purpose of this law was to encourage development of the mineral resources of the United States. United States v. California Midway Oil Co., 259 F. 343, 351-52 (S.D. Cal. 1919), *aff'd.*, 279 F. 516 (9th Cir. 1922), *aff'd per curiam*, 263 U.S. 682 (1923).

106. 16 U.S.C. §§ 1531-1543 (1988). The Endangered Species Act places on federal agencies the substantive obligation to ensure that actions that they authorize are "not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of [critical] habitat of such species." *Id.* § 1536(a)(2) (1988).

107. Pub. L. No. 94-579, 90 Stat. 2743 (codifed at 43 U.S.C. §§ 1701-1782 and in scattered

The Mining Law of 1872 provides that "[a]ll 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."[108] The Secretary, therefore, is obligated to keep public lands free and open to exploration, occupation and purchase. He is also obligated, however, to ensure that located claims contain "valuable" minerals.[109]

A mineral deposit is considered "valuable" if it passes the prudent person/marketability test.[110] When determining the validity of a mining claim and issuing a mining patent, the Secretary must consider all influences affecting a mine's profitability. Examples of such influences include the need for surface resources such as water and additional land, financing, labor, costs of complying with environmental protection laws and costs of reclamation.[111]

The Secretary must also consider the impact environmental protection laws have on the mineral claim. Of particular concern in this case is the ESA. The ESA requires any federal agency that engages in an action that is authorized, funded, or carried out by that agency to consult with the Secretary if that action may affect any listed species.[112] Under the ESA, the Secre-

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sections of titles 7, 10, 16, 22, 25, 30, 40 43, 48 and 49 (1988)). Section 1701(a) contains a statement of policy expressing the beliefs that public lands should be retained in public ownership; that public lands and their resources should be periodically inventoried and that their present and future use should be projected through land use planning coordinated with other federal and state planning efforts; that land use classifications should be reviewed; that Congress should reassert its withdrawal authority and delineate the extent of executive withdrawal authority; that comprehensive rules and regulations for land management should be established after considering the views of the public; that multiple use and sustained yield concepts should be used unless the law specifies otherwise; that the "quality of scientific, scenic, historical, ecological environmental, air and atmospheric, water resources, and archeological values" should be protected; that, as a general rule, fair market value should be received for the use of public lands and their resources; that public lands should be managed in a manner which recognizes the country's need for domestic minerals, food, timber and fiber; and that state and local governments should be compensated for the burden resulting from the immunity of federal land to state and local taxation. 43 U.S.C. § 1701(a) (1988). These laudable statements of policy are not self-executing, however, but must be implemented by the Act itself or other law. *Id.* § 1701(b).

108. 30 U.S.C. § 22 (1988).

109. As previously mentioned, the two rules of discovery formulated by the Secretary are the prudent person rule and the marketability rule. *See supra* notes 42-54 and accompanying text.

110. *See supra*, notes 42-54 and accompanying text. The prudent person rule defines a "valuable" mineral as a mineral which exists in such a quantity and quality to justify a prudent person expending labor and means to develop. Under the marketability rule a mineral deposit is valid if it can be mined, removed and disposed of at a profit.

111. United States v. Pittsburgh Pacific Co., 84 I.D. 282 (1977); *Cf.* Natural Resources Defense Council, Inc. v. Berkland, 458 F. Supp. 925 (D. D.C. 1978), *aff'd*, 609 F. 2d 553 (D.C. Cir. 1979).

112. 16 U.S.C. § 1536(a)(2) (1988). The Endangered Species Act directly affects mining and milling operations, especially new or expanding mining operations. These laws have the potential to

tary has an obligation to consult with the United States Fish & Wildlife Service regarding any action taken to perfect a location.[113]

If dewatering activities at Barrick's mine have an adverse impact on a threatened species, the effect of modifying those activities must be considered when determining the marketability of the discovery. Similarly, it may become questionable whether a prudent person, faced with this modification and/or mitigation expense, would expend the time and money necessary to develop the deposit. The Secretary, therefore, retains jurisdiction until he has resolved this matter. Furthermore, the Secretary is not "estopped by the principles of *res judicata* . . . from correcting or reversing an erroneous decision by his subordinates or predecessors."[114]

This argument may have some merit in Barrick's case. It is difficult, however, to see how the ESA would play a part in a moratorium. Unless general mining activities are imposing new threats on endangered species or there is a sudden increase in the number of species becoming endangered, support for a moratorium on mineral patents based on the ESA is lacking.

Furthermore, although a review must be thorough, "[m]ere authority to reconsider does not entitle the Secretary to act in an arbitrary or capricious manner."[115] The Secretary began the ESA investigations on December 1993,[116] approximately 10 months after Barrick received its acknowledgment report from the BLM.[117] Secretary Babbitt's public contempt for Barrick's patent application and for the Mining Law's patent process provide a basis for the Magistrate to find the Secretary's delay intentional.[118]

Like the ESA, FLPMA places additional responsibilities on the Secretary. It does not, in its words, "amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including . . . rights of ingress or egress."[119] FLPMA does, however, obligate the Secretary to manage the land.[120] In managing the public lands "the Secretary shall by regulation or otherwise, take any action necessary to prevent unnecessary or

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prohibit exploration and mining in some areas. Despite this potential conflict, there are no known instances where the laws have permanently prohibited any mineral development project. 5 AM. L. OF MINING § 175.02 (2d ed. 1984).

113. 5 AM. L. OF MINING § 185.02 [8], (2d ed. 1984).
114. Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976).
115. *Ideal Basic Industries*, 542 F.2d at 1368.
116. Magistrate's Report, *supra* note 10, at 18.
117. *Id.* at 3.
118. *Id.* at 18.
119. 43 U.S.C. § 1732(b) (1988).
120. *Id.*

undue degradation of the lands."[121] This obligation applies to operations involving public lands pursuant to the Mining Law of 1872.[122]

Secretary Babbitt cites FLPMA in his brief.[123] Although mining activities may be inherently degrading to the lands upon which the activity occurs, it is doubtful that Congress intended mining to be considered an *undue* degradation of the public lands.[124] Because the Secretary does not correlate this statute with the facts in Barrick's case, it is difficult to see how this opaque argument relates to the issuing of patents.

An alternate view to the Secretary's action is that the moratorium on issuing mining patents serves as a withdrawal pending legislative reform. In a case cited by neither party, *U.S. v. Midwest Oil* Co.,[125] the President of the United States effected a withdrawal of public lands containing oil reserves.[126] The President's actions were temporary solutions to the Navy's increasing need for fuel and an apparent immediate necessity to protect the government's supply.[127] The President defended his actions by claiming the withdrawal was necessary pending the enactment of adequate legislation, primarily the Picket Act.[128]

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121. *Id.*

122. The legislative history for this section of FLPMA, the House Report on H.R. 13777, which was eventually enacted into law, states that the "Secretary is granted general authority to prevent such degradation." H.R. Rep. No. 94-1163, 94th Cong., 2d Sess., 6 (1976).

123. Defendant's Response to Barrick's Motion for a Writ of Mandamus or an Order Compelling Agency Action at 4, Barrick Goldstrike Mines, Inc. v. Babbitt, CV-N-93-550 (DC Nevada, Jan. 18, 1994).

124. The Court views the mining law's purpose as one to encourage the development of mining operations. The Court held to this view several years after Congress passed the 1872 Mining Act. "It is the policy of the government to favor the development of mines of gold and silver and other metals, and every facility is afforded for that purpose." United States v. Iron Silver Mining Co., 128 U.S. 673, 675 (1888). Eighty years later the Court reiterated this position again. "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." *Coleman*, 390 U.S. at 602.

125. United States v. Midwest Oil Co., 236 U.S. 459 (1915).

126. *Id.* On September 27, 1909, President Taft issued Temporary Petroleum Withdrawal No. 5, withdrawing all forms of entry or disposal from three million acres of land in California and Wyoming. This withdrawal was without express congressional sanction. *Id.*

127. *Midwest*, 236 U.S. at 467. The Director of the Geological Survey reported that limited coal supplies on the Pacific coast and the value of oil as a fuel had accelerated the rate of patenting oil lands. The Director concluded that the current rate of issuing patents would make it impossible for the United States to continue owning oil lands for more than a few months. Because of the increased need for fuel by the U.S. Navy, the government would be obligated to repurchase the very oil that it had practically given away. *Id.* at 466.

128. *Id.* The Picket Act authorized the President to temporarily withdraw lands for water power sites, irrigation, classification of lands or other public purposes to be specified in the withdrawal order. Withdrawn lands, however, were kept open to exploration and purchase of metalliferous minerals. Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847, 43 U.S.C. § 141 (1964) (Repealed 1976).

The appellees (Midwest Oil Company) in *Midwest* acquired an interest in some oil wells from William T. Henshaw.[129] Mr. Henshaw had explored, drilled and discovered oil on the withdrawn land approximately six months *after* the President issued the withdrawal proclamation.[130] The issue in *Midwest* concerned the validity of rights asserted under the mining laws between the time of the original withdrawal order and the later congressional approval.[131] The court upheld the Pre-Picket Act withdrawal based on longstanding congressional acquiescence of executive withdrawals.[132]

The facts in *Barrick* are very similar to those in *Midwest*. In *Midwest*, President Taft withdrew property in contemplation of legislation affecting the use and disposition of petroleum deposits within the public domain. In *Barrick*, Secretary Babbitt, in contemplation of mining reform that would eliminate mineral patents within the public domain, imposed a moratorium on issuing patents.

The power of executive withdrawals of public land based on congressional acquiescence is no longer available.[133] The Secretary, however, is not powerless to withdraw mineral deposits pending legislation. Currently, the Secretary has the power to make a general withdrawal of the public lands from mineral development under FLPMA.[134]

Under section 204(e), the Secretary can withdraw lands when "an emergency situation exists . . . [requiring] extraordinary measures . . . to preserve values that would otherwise be lost."[135] Secretary Babbitt asserts

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129. *Midwest*, 236 U.S. at 467.

130. *Id.*

131. *Id.* at 468.

132. *Id.* at 483. *Midwest* did not settle the President's authority to withdraw public lands. New legislation, in which Congress clearly defines the scope of its delegated power to the President, could directly affect Congressional acquiescence in prior actions. The Picket Act, for example, coming after the President's withdrawal, could set a different standard of action for all Presidential withdrawals following the Acts passage. The Court, therefore, limited its decision to the validity of the 1909 withdrawal, avoiding the scope of the Executive's power after the Picket Act passed in 1910.

In 1976 Congress expressly revoked the "acquiescence" authority relied upon by the court in *Midwest*. Federal Land Policy and Management Act of 1976, Pub L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976).

133. *See supra* note 132.

134. 43 U.S.C. § 1714 (1988). FLPMA sets out the procedures for the creation, modification, extension and revocation of withdrawals. *Id.*

135. 43 U.S.C. § 1714(e) (1988). Under this section, the Secretary can make emergency withdrawals either on his own or upon notification from the Interior Committee of either the House or the Senate. Public hearings are not necessary for emergency withdrawals, as they are for other withdrawals, but emergency withdrawals may not exceed three years.

Although the withdrawal procedures do not expressly affect the status of mining claims in a manner different than under withdrawals made under prior statutes, the ability of the BLM to make emergency withdrawals has had a significant practical effect on mining locations. *Id.* § 1714(e).

that it is fiscally irresponsible to allow the removal of minerals and the patenting of mining claims without adequate compensation. Given today's budget constraints, this may be considered an emergency. Although an "emergency withdrawal" may not exceed three years,[136] it may still allow the Secretary to withhold lands in contemplation of Congressional changes in the mining law as was done in *Midwest*.

If the law allows a total withdrawal of lands in the situations previously mentioned, could the Secretary effect a partial withdrawal? A partial withdrawal could entail withdrawing the right to patent a mining claim as opposed to withdrawing the land itself. A withdrawal of patent opportunities presents issues concerning the validity of the right to apply for a patent and whether the right to apply for a patent is a vested interest.[137] In *Freese v. United States*, the court held that a claimant did not suffer an "unconstitutional divestment solely by virtue of the fact that he no longer has the option to apply for patents upon his claims."[138] As such, the loss of an option to apply for patents on mining claims would not be considered a vested interest.

If a claimant, however, had elected to exercise that option before the withdrawal, the issue of whether there is a vested interest is much more difficult to resolve. The Court in *Midwest* addressed this issue by discussing whether President Taft's action and Congress' subsequent ratification abridges any rights acquired in the land.[139] The Court held that if a locator had initiated a right that had not been perfected before the withdrawal, later Congressional acquiescence did not intend to remove those rights.[140]

Where there is a "partial withdrawal," determining whether a *right* to exercise the patent application option exists would therefore depend on when the partial withdrawal was initiated. Under *Midwest*, a miner submitting a patent application before the Secretary initiated the withdrawal

136. 43 U.S.C § 1714(e) (1988).

137. The law is well settled that a vested right does not arise until there has been full compliance with the extensive procedures set forth in the federal mining law for obtaining a patent. *See* Wyoming v. United States, 255 U.S. 489, 497 (1921); Benson Mining and Smelting Co. v. Alta Mining and Smelting Co., 145 U.S. 428, 433 (1892); Willcoxson v. United States, 313 F. 2d 884, 888 (*cert. denied*), 373 U.S. 932; *cf.* Andrus v. Utah, 446 U.S. 500 (1980).

The Ninth Circuit held in *Swanson* that "[t]he 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 administrative function* of issuing the patent." Swanson v. Babbitt, 3 F.3d 1348 (9th Cir. 1993) (emphasis added).

138. Freese v. United States, 639 F.2d 754 (1981).

139. *Midwest*, 236 U.S. at 482.

140. *Id.* at 483.

probably would have a vested interest. That interest, however, would extend only to the right to have that patent application continue in the Secretary's review process. *Midwest* would not extend the right to the patent itself. The applicant must still prove that the claim meets the requirements of discovery, location and recordation.

If the current moratorium were to be considered a "partial withdrawal," Barrick's rights would depend on when the moratorium was initiated. The facts indicate the moratorium was not in place at the time Barrick applied for the patents because the BLM had already issued the First Half Certificates.[141] This would entitle Barrick the right to continue its patent application despite the moratorium.[142] Elimination of Barrick's right to continue with the patent process might very well be considered a "taking" under the Fifth Amendment of the United States Constitution.[143]

The Secretary's administrative obligations, such as addressing discovery and endangered species issues, frame the debate in Barrick's case. Barrick, in its patent application must still demonstrate that its claims are "valuable" and pass the prudent person/marketability test. The current issue, however, involves determining whether Barrick has the right to apply for a patent and, if so, determining under what circumstances that right can be lost. Secretary Babbitt has attempted to move through these issues interstitially without really addressing them. The Secretary might have been more successful had he framed the debate more directly.

CONCLUSION

The mineral patent is a controversial method of obtaining legal title to federal property. Longstanding calls for reform of the mining laws and elimination of the right to patent suggest that mineral patents may soon be obsolete. Until there is reform, however, the patent process is still the law.

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141. BLM officials issued the First Half Certificates on September 9, 1992. Magistrates Report, *supra* note 10, at 2. The BLM management acknowledged the report on February 12, 1993. *Id.* at 3. The Magistrate found that the Secretary effected the moratorium in March 1993. *Id.*

142. That is not to say, however, that Barrick would be entitled to the patent. A patent right may vest upon application if the patent application was valid under existing law and the delay in issuing the patent was attributable to administrative delay in processing the otherwise valid application. Until the Second Half Certificate is issued, the Secretary still has discretion.

143. U.S. CONST. amend., V. The Fifth Amendment commands that "private property [not] be taken for public use, without just compensation." If the right to continue in the patent process is a vested right, then it is not subject to future modification or definition. Nor can it be taken away by the Government as the proprietor of the public domain. It can only be extinguished by the miner failing to have his patent approved due to lack of discovery, location or recordation.

Secretary Babbitt's actions are very similar to those taken by President Taft in 1909. Both attempted to withdraw public lands from mineral exploration in contemplation of legislation affecting the use and disposition of mineral deposits within public lands. Although Congress specifically removed the executive branch's power to withdraw public lands based on congressional acquiescence, the power to withdraw lands in emergency situations still exists. Problems arise, however, when an initiated right is withdrawn as well.

The Barrick decision provides some guidance for other miners currently in the patent process. The court did not clearly determine that the patent application process is itself a protected right. Miners, therefore, should proceed with some caution in attempting to obtain a patent. The court did make it clear, however, that the Secretary could not hold applications indefinitely, despite his obligations to areas other than the Mining Law. The patent applicant should have the right to expect normal processing of applications submitted according to the laws then in effect.

Few people defend the Mining Law and the patent process in its current form. Issues of discovery, environmental impact and national economics continue as potentially insurmountable obstacles. Yet, the Mining Law of 1872 continues to endure and evolve through executive implementation, legislative amendment and judicial interpretation. This evolutionary process allows the Mining Law to evolve to fit the demands of today's society.

Various advocates of reform have had and will continue to have different and irreconcilable objectives. These competing pressures for mining reform, however, have tended to negate each other in the only true arena that can provide a definitive change: the Congress. Any attempts by the executive branch to administratively modify the mining law would probably live only as long as the current administration and be generally ineffective.

SCOTT W. MEIER[144]

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