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THE 1872 MINING LAW AS AN IMPEDIMENT TO MINERAL DEVELOPMENT ON THE PUBLIC LANDS: A 19TH CENTURY LAW MEETS THE REALITIES OF MODERN MINING.

*Roger Flynn**

The 1872 Mining Law was written in the era of small, underground mines that needed little in the way of processing or waste disposal facilities. Today, the proliferation of large, open pit hardrock mining operations on the western public lands has focused attention on the provisions of that Law. The Law places strict limitations on the amount of acreage available for "millsite claims" to accommodate ancillary facilities such as waste rock and tailings dumps and heap leach facilities. In addition, the statute requires that each mining claim contain a valuable mineral deposit in order to establish rights to develop the claim. Most modern open pit mines cannot "fit" these facilities within these limitations. Thus, a different regulatory structure than now exists on the public land is needed. This article traces the development of these limitations in the context of three proposed mines

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on public land in the West. Focusing on recent interpretations of these limits by the Interior and Agriculture Departments, the article details the proper regulatory approach when a mine is proposed on lands that do not contain valid claims.

I. INTRODUCTION

The General Mining Law of 1872, more commonly known as the 1872 Mining Law, or just the Mining Law, is the fundamental statute governing hardrock mineral development on the public lands.¹ Its central tenet, unchanged in 127 years, is that: "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase"

Due to this preference for mineral development on lands where there are "valuable mineral deposits," the Mining Law has rightly been called "the Miner's Magna Carta."² The Mining Law, and its immediate predecessor, the Lode Law of 1866, essentially recognized and codified what was already happening in the goldfields of the western United States.⁴ Upon the discovery of gold in California in 1848, individuals and groups of miners quickly realized that some order had to be brought out of the chaos of the Gold Rush.

Up to that point, Congress had essentially failed to enact a federal mineral policy for the public lands. Miners staked and developed mining claims without interference from federal authorities, mostly the army, in the area. In essence, however, the miners were trespassers on the public lands and usually had no legal right to be removing the public's minerals, let alone constructing dwellings and other improvements. With the passage of the 1866 and 1872 Acts, however, Congress legitimized these existing prac-

1. Act of May 10, 1872, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 22-47 (1994)). The Law, although originally covering most minerals, is now limited to what are commonly known as "locatable" minerals. The most important of these types of minerals are "hardrock" minerals such as gold, silver, copper, molybdenum, and uranium, among others. Non-uranium "fuel" minerals such as oil and gas and coal, were removed from operation of the Mining Law by the Mineral Leasing Act of 1920, 30 U.S.C. §§ 201-210 (1994) and are regulated under entirely separate statutory and regulatory regimes. In addition, the Surface Resources Act of 1947, as amended in 1955, removed "common varieties" of sand, stone, gravel, and clay from operation of the 1872 Law. See 30 U.S.C. §§ 601-615 (1994).

2. 30 U.S.C. § 22 (1994). This is known as the "free access" provision of the Mining Law. For a detailed review of the historical development of free access, see JOHN D. LESHY, *THE MINING LAW, A STUDY IN PERPETUAL MOTION*, 25-48 (1987). Mr. Leshy is the current Solicitor of the United States Department of the Interior, a position he has held since 1993.

3. CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST*, 44 (1992).

4. Lode Law of 1866, 14 Stat. 251 (repealed 1872).

tices.⁵

Along with codifying the existing claims location and filing systems, however, Congress also recognized existing mineral development practices. In 1872, mining did not involve the typical low grade deposit utilized in modern mining operations.⁶ What little ore processing that was needed was often done far from the actual mine tunnels in smelters and other refining facilities. There was little need for lands to conduct on-site processing or to dispose of waste products at the mine sites.⁷ As noted by the legal study prepared for the 1970 Public Land Law Review Commission:

The typical mine then was a high-grade lode or vein deposit from which ore was removed by underground mining. The surface plant was usually relatively small, and the surface of the mining claims together with the incident mill sites adequately served the needs of the mines for plant facilities and waste disposal areas. Today, the situation is frequently different. The high-grade underground mines have, for the most part, been mined out. Open pit rather than underground mining is, with increasing frequency, the most economical way to mine the low-grade deposits which now comprise a major portion of the reserves of many minerals. The mining industry now relies on mechanization, the handling of large tonnages of overburden and ores, and the utilization of large surface plants in order to keep costs down so that these low-grade deposits may be mined and treated at a profit. Such mining operations require not only substantial areas for plant facilities, but much larger areas than formerly for the disposal of overburden and mill tailings. The surface areas of mining claims and mill sites are no longer adequate for such purposes.⁸

This fact, that there was little need for large tracts of land to handle waste, processing and other non-extraction activities, was recognized by Congress

5. For an excellent review of the situation at the time, see LESHY, *supra* note 2, at 11. As noted by then-Professor Leshy, "the Mining Law that emerged represented a snapshot of the social, economic, technological, and political forces then at work." *Id.*; see also WILKINSON, *supra* note 3, at 40.

6. TWITTY ET AL., LEGAL STUDY OF THE NONFUEL MINERAL RESOURCES, 1047-48 (1969) (prepared under contract with the Public Land Law Review Commission).

7. LESHY, *supra* note 2, at 169-81. In fact, the 1872 law was practically out-of-date by the time it was written. Its focus on the "discovery" of a "valuable mineral" prior to claim location was based on the theme of the pick and shovel miner finding such a mineral on the ground, shouting "Eureka" and then staking his claim. While this may have been the case in the early days of the gold rush, mining quickly became a much more capital-intensive industry involving extensive exploration work prior to such a "discovery." *Id.* For an excellent review of the evolution of the Mining Law from the gold rush days, see WILKINSON, *supra* note 3, at 34-40.

8. TWITTY ET AL., *supra* note 6, at 1047-48.

in the Mining Law when it provided limited acreage (and placed strict limitations upon the use of such acreage) for such activities.⁹ This is known as the “millsite provision” of the Law. In that section, Congress allowed non-mineral lands to be claimed, but only under certain conditions: “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 non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode”¹⁰ The statute also contains the requirement that “no [millsite] location made on or after May 10, 1872 of such nonadjacent land shall exceed five acres.”¹¹

Importantly, the millsite provision limited each millsite claim to a maximum of five acres, compared to a maximum of approximately twenty acres for mining claims.¹² In addition, a claimant was limited to only one millsite claim for each mining claim associated with that millsite.¹³ As noted in an early Interior Department decision: “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.”¹⁴ These limitations, and their relationship to restrictions on mining claims in the Mining Law, are a primary focus of this article, particularly as related to the acreage demands of modern mining operations.

Despite these limitations on both mining and millsite claims, the Mining Law served its purpose well based on the needs and priorities of the mining industry during the Law’s first hundred years. As noted in a 1979 study by the Congressional Office of Technology Assessment: “These limitations were probably not too restrictive in 1872 when mining operations were small[er and] involved high-grade deposits.”¹⁵

9. 30 U.S.C. § 42(a) (1994).

10. *Id.*

11. *Id.*

12. Compare 30 U.S.C. § 22 (1994) (mining claims) with 30 U.S.C. § 42(a) (1994) (millsite claims).

13. 30 U.S.C. § 42(a) (1994); see *Mint Lode and Mill Site*, 12 Pub. Lands Dec. 624, 625 (1891) (“[The Mining Law] evidently intends to give to each operator of a lode claim, a tract of land, not exceeding five acres in extent, for the purpose of conducting mining or milling operations thereon, in connection with such lode.”). Other decisions appear to allow more than one millsite per mining claim as long as the total millsite acreage is limited to five acres per associated valid lode claim. See *infra* Section II B.

14. *Alaska Copper Co.*, 32 Pub. Lands Dec. 128, 131 (1903), *overruled on other grounds by* *Yankee Mill Site*, 37 Pub. Lands Dec. 674 (1909); see also, *Pine Valley Builders, Inc.*, 103 IBLA 384, 390 (1988) (“[I]f none of the associated mining claims are being operated, the appellant cannot be using the millsites for mining purposes.”); *United States v. Wedertz*, 71 Interior Dec. 368, 373 (1964) (mill site claimed in connection with previously patented lode claims invalid where exploration was only activity conducted on lode claims).

15. OFFICE OF TECH. ASSESSMENT, *MANAGEMENT OF FUEL AND NONFUEL MINERALS IN FEDERAL LAND*, 127 (April 1979).

However, modern mineral development bears little resemblance to the type of mining and processing existing in 1872.¹⁶ Today, hardrock mining often utilizes vast amounts of land, resources, equipment, and capital. The high-grade deposits have largely been exhausted. Modern gold and copper operations, for example, involve the excavation of open pits hundreds or thousands of feet deep, covering hundreds of acres.¹⁷ Most critically, these operations require many more times that amount of land for the processing or beneficiation of the minerals (usually in large heap-leach facilities) and the disposal of uneconomic waste rock or overburden that is removed from the earth to gain access to the ore deposit. It is not uncommon for a mining project to need vastly more land for these ancillary facilities than for the actual mine pit.¹⁸ As noted by current Interior Solicitor Leshy in his seminal treatise: "Even having one 5-acre mill site for each individual claim (assuming this to be lawful) may still be insufficient for some modern operations. The ore body itself may be many times smaller than the area required for disposal of waste material and for other non-mining uses."¹⁹

In short, today's mining is drastically different, and requires fundamentally different resources, than what Congress authorized in 1872. Despite these critical changes in mineral development practices, the Mining Law has not kept pace with the needs of the modern mining industry. Indeed, the express limitations on the type, extent, acreage, and scope of the rights granted by the Mining Law directly conflict with the necessities of modern mining operations. Almost without exception, a modern hardrock mine on public lands requires vast amounts of acreage in excess of what is

16. TWITTY, ET AL., *supra* note 6, at 1047-48.

17. The following description of a large open pit gold mine in Nevada is on point:

Cranelike electric shovels gouge the rock, fractured and loosened by blasting, out of the pit wall, and front-end loaders fill 3-story-high haul trucks on 12-foot tires (the tires cost \$15,000 apiece: a blowout can explode with the force of a stick and a half of dynamite). These giant haul trucks are latter-day beasts of burden in the fullest sense; at 190 tons per load, the fleet carries out a total of 325,000 tons of ore daily. Meanwhile, sprinkler trucks fight the relentless dust from all the disturbance. Miles upon miles of roads and packed-earth passageways weave through the pounded, gouged, and piled pits, tailings ponds, cyanide-doused "heaps," waste rock, and slashed-in-half hillsides.

WILKINSON, *supra* note 3, at 28. Professor Wilkinson goes on to note that the mine pit at the project he described, the Goldstrike Mine in Nevada, was expected to be nearly two miles long, three-fourths of a mile wide, and 1800 feet deep. *Id.* at 30.

18. "According to one calculation, about 252 acres of surface area are required in order to excavate, by open-pit methods, a 23-acre disseminated copper deposit where the overburden is 400 feet thick. Several thousand additional acres might be needed for tailings disposal and related needs." LESHY, *supra* note 2, at 439 (citing J.B. Knaebel, *Land Acquisition for Mining Development*, in SYMPOSIUM ON AMERICAN MINERAL LAW RELATING TO PUBLIC LAND USE, 61, 70-71 (Tucson, University of Arizona College of Mines, 1966)).

19. LESHY, *supra* note 2, at 180.

allowed under the Mining Law.²⁰

Despite this, federal land management agencies, most notably, the Forest Service, Bureau of Land Management (BLM), and the National Park Service, continue to approve mining operations as if the limited rights granted under the Mining Law extend onto public lands that are not properly claimed. This article focuses on the two primary mine-authorizing agencies, the BLM and the Forest Service.

When these operations occur, or are proposed on federal lands, mining operators usually locate a mixture of mining and millsite claims, or just mining claims, to establish their rights to those properties under the Mining Law. The claimant's interest is secure against competing claims and may be transferred, sold, or mortgaged like any other property right. Such claims, if valid, also establish rights against the federal government. A valid mining claim is a constitutionally protected property right in that the claim cannot be taken away without just compensation or be declared invalid except in accordance with due process.²¹

The central question of this article, and a pressing issue across the West, is whether the mining and millsite claims filed across hundreds or thousands of acres at individual mine sites are indeed valid. If they are, then current regulatory mechanisms will likely remain in force. However, if some of these claims are not valid, then a fundamental re-evaluation of the regulation of public lands hardrock mining must occur.

Recent developments in the field, especially decisions by the Interior and Agriculture Departments, the BLM, the Interior Board of Land Appeals (IBLA), and the Forest Service, call into question the status quo. Most notably, in November of 1997, Interior Secretary Bruce Babbitt issued a concur-

20. For example, for the three mines analyzed in this article, the acreage needed for the ore pit in relation to ancillary facilities is 138 acres out of 787 for the Crown Jewel Mine (January, 1997, Final EIS at S-16) (on file with the author); 38 out of 201 for the Yarnell Project (June, 1998, Draft EIS at S-4) (on file with the author); and 341 out of 1302 for the Imperial Project (November, 1997, Draft EIS, at p. 2-6) (on file with the author).

21. No such rights exist for invalid claims. *Cameron v. United States*, 252 U.S. 450, 460-61 (1920); *United States v. North Am. Transp. & Trading Co.*, 253 U.S. 330, 333-34 (1920); *Forbes v. Gracey*, 94 U.S. 762, 767 (1876). As the Court of Claims has noted, there can be no "taking" of any property under the Fifth Amendment of the Constitution if the claim is invalid:

Until the discovery of a valuable mineral deposit, the locator has only a gratuity from the United States. *Union Oil Co. v. Smith* . . . In determining the validity of contested mineral claims, the following principles apply: A mining claim does not create any rights against the United States and is not valid unless and until all requirements of the mining laws have been satisfied. One of these requirements is the actual physical finding of a valuable mineral deposit within the limits of the claim.

Skaw v. United States, 13 Cl. Ct. 7, 28 (1987) (citations omitted); see also Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 *ECOLOGY L.Q.* 57 (1997).

rence to Interior Solicitor John Leshy's Memorandum Opinion which severely limits the ability of mineral claimants to patent millsites.²² In that decision, Interior Secretary Babbitt and Interior Solicitor Leshy held that "the Bureau [BLM] should not approve plans of operations which rely on a greater number of millsites than the number of associated claims being developed unless the use of additional lands is obtained through other means."²³ BLM headquarters subsequently issued an Instruction Memorandum (IM) in August of 1998, giving guidance on how to implement the Secretary's directive.²⁴ In addition to these actions regarding millsites, the IBLA issued a decision in November of 1998 that calls into question the very nature of the deference given mining operations by the federal land management agencies.²⁵

In March of 1999, the Interior and Agriculture Departments rejected a large open pit mining proposal based on the claim limitations in the Mining Law.²⁶ In the *Crown Jewel Mine Decision*, the agencies denied the proposed Plan of Operations for the Crown Jewel Mine in Washington State "because the Plan does not comply with the requirements of the Mining Law of 1872"²⁷

This article will discuss these developments, as well as examine the rights granted under the Mining Law. It will first focus on the nature of these rights, with particular emphasis on the statutory limitations that conflict with the needs of modern open-pit hardrock mining. Then, it will review how this conflict manifests itself on-the-ground, using three case studies of proposed open pit mines on federal lands. In the context of these case studies, the article will review the appropriate legal framework for managing mining operations in light of the restrictions imposed by the Mining Law and other federal public land and environmental laws. Focusing on recent interpretations of these limits by the federal government, the article then details the proper regulatory approach when a mine is proposed

22. Memorandum entitled "Limitations on Patenting Millsites under the Mining Law of 1872," M-36988, from Interior Solicitor Leshy to the Director of the BLM (November 12, 1997) (with concurrence by Secretary Babbitt) [hereinafter Babbitt/Leshy Memorandum].

23. *Id.* at 2.

24. BLM Instruction Memorandum 98-154 (August 17, 1998) [hereinafter IM 98-154]. The Instruction Memorandum (IM) can be found at the BLM's internet website: www.blm.gov/nhp/efoia/wo/fy98/im98-154.html. The IM expires on September 30, 1999.

25. Great Basin Mine Watch, 146 IBLA 248, 256 (1998).

26. Letter from James R. Lyons, Under Secretary, Natural Resources and Environment, Department of Agriculture, Sylvia Baca, Acting Assistant Secretary, Land and Minerals Management, Department of the Interior, Charles R. Rawls, General Counsel, Department of Agriculture, and John D. Leshy, Solicitor, Department of the Interior, to Greg Etter, Vice President and General Counsel, Battle Mountain Gold Company (March 25, 1999) [hereinafter *Crown Jewel Mine Decision*] (on file with author and with the *Land and Water Law Review*). Battle Mountain Gold Company had proposed the Crown Jewel Mine in Washington State, discussed in more detail *supra* Section III.B.

27. *Id.* at 1.

on lands that do not contain valid claims.

II. LIMITATIONS ON MINING AND MILLSITE CLAIMS

A. *Mining Claims Under the 1872 Mining Law*

Federal mining and mineral entry laws arose together with other land disposal policies of the second half of the nineteenth century. The general land policy of the federal government encouraged westward expansion, resource extraction, and settlement. All of the major land programs of the era—the homestead, statehood, and railroad land grants, along with the General Mining Law of 1872—fostered a policy of land disposal based upon the underlying social goals embodied in each program. Whether it was for the small farmer and irrigator, commerce-expanding railroad companies, public schools for states, or mineral development, each program was representative of the manifest-destiny desires of the country.²⁸

Mining claims on federal land are “valid against the United States if there has been a discovery of [a valuable] mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met.”²⁹ Moreover, “[i]t is a possessory interest in land that is ‘mineral in character’ where discovery within the limits of the claim have been made.”³⁰ The Interior Department is charged with regulatory oversight of mining claims on federal land.

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 [was] confided to the land department, as 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.³¹

Against this backdrop, the Department and courts over the years have been entrusted with the responsibility of resolving disputes between rival claimants and users of the public lands.

In order for an individual to possess a valid mining claim, the claimant must meet the fundamental requirement of the Mining Law—that there is

28. LESHY, *supra* note 2, at 9-16; WILKINSON, *supra* note 3, at 40-41.

29. *Best v. Humboldt Mining Co.*, 371 U.S. 334, 336 (1963).

30. *Hafen v. United States*, 30 Fed. Cl. 470, 473 (1994) (quoting *Cameron v. United States*, 252 U.S. 450, 456 (1920)).

31. *Best*, 371 U.S. at 337 (quoting *Cameron*, 252 U.S. at 459-60).

the discovery of a valuable mineral deposit.³² Discovery means “the actual physical disclosure of a valuable mineral deposit.”³³ The Mining Law further states that any such locators of valuable minerals on the public lands “shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations”³⁴

Even if such rights exist, however, they exist only “so long as they comply with the laws of the United States, and with State, territorial, and local regulations”³⁵ A mining claim location does not give the presumption of a discovery.³⁶ As the Supreme Court has held: “[L]ocation 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.”³⁷ As the IBLA recently noted: “A mining claimant’s rights as against the United States are acquired only under the General Mining Law, and unless and until the claimant meets the requirements under those laws, no rights can be asserted against the United States.”³⁸ The IBLA continued: “*It is axiomatic that operations may not legally proceed on invalid claims.*”³⁹ In another recent case, the IBLA stated:

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. 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

32. *Lara v. Secretary of Interior*, 820 F.2d 1535, 1537 (9th Cir. 1987) (finding that “a mining claimant has the right to possession of a claim only if he has made a mineral discovery on the claim.”).

33. *United States v. Zweifel*, 508 F.2d 1150, 1154 (10th Cir. 1975).

34. 30 U.S.C. § 26 (1994).

35. *Id.*

36. *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F.Supp. 708, 714 (D.Utah 1965).

37. *Cole v. Ralph*, 252 U.S. 286, 296 (1920).

38. *Ronald A. Pene*, 147 IBLA 153, 157 (1999).

39. *Id.* at 158 (emphasis added) (citations omitted). As noted in the *American Law of Mining*:

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

ROCKY MTN. MIN. L. FOUND., *AMERICAN LAW OF MINING* § 110.02[3][d] (2d ed. 1993) (emphasis added). Thus, while some *pedis possessio* rights against rival claimants may attach to exploration activities, they do not extend to full-scale permanent development of invalid claims on the public lands. The Forest Service’s Manual notes that: “A claim unsupported by a discovery of a valuable mineral deposit is invalid from the time of location, and the only rights the claimant has are those belonging to anyone to enter and prospect on National Forest lands.” Forest Service Manual § 2811.5.

by the courts.⁴⁰

In addition to the "discovery of a valuable mineral deposit" requirement, Congress further circumscribed the extent of a valid mining claim. The 1872 Mining Law provides that lode⁴¹ claims located after May 10, 1872, "may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode . . . [that n]o claim shall extend more than three hundred feet on each side of the middle of the vein at the surface . . . [and that t]he end lines of each claim shall be parallel to each other."⁴² "The framers of the statute of 1872 evidently proceeded upon the theory that a claim on a lode . . . would generally take the form of a parallelogram."⁴³ A rectangle or parallelogram with a length of 1500 feet and a width of 600 feet amounts to a total of approximately 20 acres.

The provision on the size of lode claims in the 1872 Mining Law set up a scenario entirely different from the 1866 Mining Law. "[T]he legislation of 1866 provided that claims existing at the time of that legislation might be patented upon proper proof, no matter what their extent, how large or how small."⁴⁴ Prior to the 1872 Mining Law, miners located claims that were of irregular shape and unusual size.⁴⁵ The size provisions in the 1872 Mining Law were apparently included in an effort to make claim size more uniform. On January 23, 1872, Congressman Sargent stated that after the passage of what would become the 1872 Mining Law, mining claims of "a certain size, which the bill does not vary, should be conformed to."⁴⁶

While the 1872 Mining Law sets lode claim size at a maximum of approximately 20 acres, the above-cited language indicates Congress' intent that mining claims should be a "certain" size—a size that the law would not vary. One of the first cases interpreting the Mining Law held that it was customary for miners to locate lode claims that were 1500 feet in length and 600 feet in width. "If a lode or vein three thousand feet in length is discov-

40. Rocky Connor, 139 IBLA 361, 365 (1997) (citations omitted).

41. There are two types of mining claims: lode claims and placer claims. Placer claims are distinguished from lode claims which are more typically characterized as mineral vein or other "rock in place." See 30 U.S.C. § 23 (1994). Although placer mining occurs throughout the West, all large scale open-pit mining is conducted on lode claims. Thus, this article focuses only on lode claims and any mention of a "mining claim" means a lode mining claim.

42. 30 U.S.C. § 23 (1994).

43. *Iron Silver Mining Co. v. Elgin Mining Co.*, 118 U.S. 196, 205 (1886); see also HENRY N. COPP, UNITED STATES MINERAL LANDS 293 (1881), Commissioner Williamson to Surveyor-General Johnson (May 4, 1880) ("The location contemplated by the law above quoted must have been essentially a parallelogram.").

44. CONG. GLOBE, 42d Cong., 2d Sess. 535 (1872).

45. *Carson City Gold & Silver Mining Co. v. North Star Mining Co.*, 73 F. 597, 599 (N.D. Cal. 1896); see also CONG. GLOBE, 42d Cong., 2d Sess. 535 (1872) (statement of Congressman Sargent that miner's claims were "of irregular sizes, and often quite large.").

46. CONG. GLOBE, 42d Cong., 2d Sess. 535 (1872).

ered, two locations may be made, each of 1500 feet, thereon."⁴⁷

Where the size varied from 20 acres, it was usually either because one claim ran out of space by running into another claim, because of some physical condition on the ground such as extreme topography, or because the mineral vein did not extend to the 1500-foot allowable claim length. Soon after passage of the 1872 Mining Law, with an apparent intent to uphold Congress' expectation that mining claims would be maintained at a certain size, the Interior Department stated that a locator of a mining claim could not make the lines of the claim irregular or zigzag for the convenience or purposes of the locator.⁴⁸

B. Millsite Claims Under the 1872 Mining Law

In addition to affirming the right to enter mineralized federal lands for mineral exploitation, the 1872 Mining Law granted holders of lode claims the right to claim non-mineral land that was not contiguous to the vein or lode for use in association with mining claims. The millsite provision of the 1872 Mining Law grants the holder of a lode claim the right to use or occupy non-mineral land for mining or milling purposes.⁴⁹ "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 non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode"⁵⁰ The statute also contains the requirement that "no [millsite] location made on or after May 10, 1872 of such nonadjacent land shall exceed five acres"⁵¹

"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

47. Decision of Acting Commissioner, June 17th, 1873, in HENRY N. COPP, U.S. MINING DECISIONS 207 (1874).

48. See *Belligerent & Other Lode Mining Claims*, 35 Pub. Lands Dec. 22 (1906).

49. 30 U.S.C. § 42(a) (1994). A claim can be a "dependent" or an "associated" millsite, which is used in connection with a specific mining claim, or it can be an "independent" or "custom" millsite, which are quartz or reduction works that are used in support of mining operations. As noted in the Babbitt/Leshy Memorandum: "Dependent millsites are by far the more common type. They can be used not only for mills, but for any number of purposes related to milling or mining." *Supra* note 22, at 1 (citing Charles Lennig, 5 Pub. Lands Dec. 190 (1886)).

50. 30 U.S.C. § 42(a) (1994).

51. *Id.* "Theoretically one five-acre millsite can be acquired for each valid mining claim. However, only as much ground as is needed for a particular use can be appropriated under a single millsite or a connected group of millsites." Clayton J. Parr & Dale A. Kimball, *Acquisition of Non-Mineral Land for Mine Related Purposes*, 23 ROCKY MTN. MIN. L. INST., 595, 641-42 (1977). As stated in a recent decision by the IBLA: "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." *United States v. Lefavre*, 138 IBLA 289, 295 (1997). The IBLA went on to note that "it seems plain that ordinarily one mill site affords abundant facility for the promotion of mining operations upon a single body of lode claims." *Id.* at 296 (citing *Alaska Copper Co.*, 32 Pub. Land Dec. 128 (1903)).

it is associated.”⁵² Also, “in asserting a claim to a mill site in connection with a lode claim, it must be used and occupied for mining or milling purposes The statute does not seem to contemplate the right to locate a mill site without actually using or occupying the ground.”⁵³ The Interior Department has stated that “[n]o mill site entry should be allowed unless it is shown that the conditions of the law have been complied with.”⁵⁴

In 1960, the last time it squarely reviewed the millsite acreage limitations, Congress amended the Mining Law to extend the ability to utilize and patent millsites in association with placer as well as lode claims.⁵⁵ Importantly, Congress specifically rejected the proposal contained in the original bill to allow a millsite location of “ten acres for each individual claimant” in connection with a placer claim.⁵⁶ The Senate Interior Committee’s Report on the bill stated:

[T]he word “ten” was stricken and the word “five” inserted in lieu thereof. The purpose of this amendment is to restrict the area of a millsite in conjunction with a placer claim to 5 acres of land to make it conform with the allowable millsite acreage for lode claims which has been the statutory requirement since 1872

[T]he words “for each individual claimant” were stricken so as to impose a limit of one 5-acre millsite in any individual case preventing the location of a series of 5-acre millsites in cases where a single claim is jointly owned by several persons

In essence, S. 2033 merely grants to holders of placer claims the same rights to locate a 5-acre millsite as has been the case since 1872 in respect to holders of lode claims, and the committee unanimously urges enactment.⁵⁷

As noted in the Babbitt/Leshy Memorandum:

This legislative history demonstrates that Congress understood both the amendment in 1959 and the existing Mining Law to permit location of only one five-acre millsite per mining claim. The Senate

52. Alaska Copper Co., 32 Pub. Land Dec. 128, 131 (1903) (emphasis added), *overruled on other grounds by* Yankee Mill Site, 37 Pub. Land Dec. 674 (1909). The Babbitt/Leshy Memorandum stated: “[I]t is important to note that the application for a millsite patent must show present use, by proper means, of each 2 ½ acre portion of each millsite.” *Supra* note 22, at 4 (citations omitted).

53. Kerschner v. Trinidad Milling & Mining Co., 201 P. 1055, 1058 (N.M. 1921).

54. Hudson Mining Co., 14 Pub. Lands Dec. 544 (1892).

55. Pub. L. No. 86-390, 74 Stat. 7 (1960) (codified at 30 U.S.C. § 42 (b) (1994)).

56. The original bill was introduced in 1959 as S. 2033. 105 CONG. REC. 8734 (1959).

57. S. REP. NO. 86-904, at 2 (1959), 106 CONG. REC. 6057 (1960). For a more detailed review of the 1960 amendments, see Babbitt/Leshy Memorandum, *supra* note 22, at 7-8.

Interior Committee removed the phrase 'for each individual claimant' from the bill for the express purpose of preventing the aggregation of multiple five-acre millsites by a mining claimant, and made it clear that the Committee understood this to be consistent with the existing law applicable to millsites associated with lode claims.⁵⁸

C. *Lode Claim to Millsite Claim Ratio*

As with lode claims, Congress imposed a maximum claim size for millsites. Millsites are not to exceed five acres.⁵⁹ In addition, a millsite will be limited to less than five acres when a claimant requests more land for millsites than is necessary to support the associated mining operations.⁶⁰ While the Babbitt/Leshy Memorandum notes that the Interior Department could permit, at a maximum, five acres of millsite for each associated mining claim, early Department decisions indicate that, especially where lode claims are grouped together under common ownership, it does not necessarily follow that the claimant is entitled to one five-acre millsite for each individual lode claim. "It is not to be supposed that Congress intended a grant of an equal number of tracts as rightfully incident to all the lode claims of a compact group held and worked under common ownership."⁶¹ Moreover, "it seems plain that ordinarily one mill site affords abundant facility for the promotion of mining operations upon a single body of lode claims."⁶²

Today, due to the size of modern open-pit methods, one millsite generally may not accommodate the needs of the holder of a group of lode claims.⁶³ In fact, the mining industry is likely of the opinion that an allow-

58. Babbitt/Leshy Memorandum, *supra* note 22, at 8.

59. 30 U.S.C. § 42 (1994).

60. *See Swanson v. Babbitt*, 3 F.3d 1348, 1354 (9th Cir. 1993).

61. *Alaska Copper Co.*, 32 Pub. Lands Dec. 128, 130 (1903). A reasonable argument can be made that a proprietor of a lode or vein is entitled to only one millsite location per lode or vein, regardless of the number of lode claims proposed to be developed. The millsite provision links the entitlement of a millsite with the "vein or lode" – not with the claims filed upon that vein or lode. Thus, the one-to-one ratio may be too generous a reading of the law. *See* 30 U.S.C. § 42(a) (1994).

62. *Id.* In a recent IBLA case, the Interior Department noted: "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." *United States v. LeFavre*, 138 IBLA 289, 295 (1997). The IBLA went on to note that "it seems plain that ordinarily one mill site affords abundant facility for the promotion of mining operations upon a single body of lode claims." *Id.* at 296 (quoting *Alaska Copper Co.*, 32 Pub. Lands Dec. at 128).

63. As noted by one respected commentary:

[O]nly as much ground as is needed for a particular use can be appropriated under single millsite or a connected group of millsites. Hence, if a concentrator is to be constructed to treat ores from a group of ten mining claims, for example, only as much ground as is needed for the concentrator may be obtained for that purpose. It

ance of one five-acre mill site per each lode claim is also not enough. However, a 1979 study by the Congressional Office of Technology Assessment stated that "[t]hese limitations were probably not too restrictive in 1872 when mining operations were small[er and] involved high-grade deposits."⁶⁴ The study states that "the Mining Law does not adequately provide for land needed for surface facilities and uses," particularly because of the difficulty of planning in advance caused by the millsite provision's requirement of present occupancy or use.⁶⁵

As noted by the OTA Report—the only detailed analysis that has considered the overall acreage ratio issue—"[t]here could be at most as many millsites as there are mining claims, and each millsite would be at most one-fourth the size of the typical 20-acre claim, so that the millsites, in the aggregate, would be one-fourth the size of the ore body encompassed by the claims."⁶⁶ As shown in the case studies below, these limits on the number of millsite claims, the acreage allowed, and the actual timing of the use of the claims is critical to the management of mining operations in the West. It is to these issues we now turn.

III. CASE STUDIES IN CONFLICTS BETWEEN THE MINING LAW AND MODERN MINING OPERATIONS

A. Mineral Development on Invalid Mining Claims: The Proposed Yarnell Gold Mine in Arizona

The fundamental requirement for a mining claim to be valid is that

is possible that a three acre millsite would be sufficient even though ten five acre millsites could be appropriated if that much ground was actually needed. On the other hand, if some 2,000 to 2,500 acres are needed for tailings ponds, dumps, and other mine-related uses, the five acres permitted for each valid lode mining claim would be insufficient.

Parr & Kimball, *supra* note 51, at 641-42.

64. OFFICE OF TECH. ASSESSMENT, MANAGEMENT OF FUEL AND NONFUEL MINERALS IN FEDERAL LAND, 127 (April 1979). As noted by the American Mining Congress in a 1968 statement submitted to the Public Land Law Review Commission:

When the mining laws were enacted in 1872, provision was made for the acquisition of five-acre millsites to be used for plant facilities on mining claims. The typical mine then was a high-grade lode or vein deposit from which ores were removed by underground mining. The surface plant was usually relatively small, and acquisition of five-acre millsites in addition to the surface of mining claims . . . adequately served the needs of the mines Today, the situation is frequently different A mine having 500 acres of mining claims may, for example, require 5000 acres for surface plant facilities and waste disposal areas. It is obvious that such activities may not be acquired through five-acre millsites.

American Mining Congress, *The Mining Law and Public Lands*, at 29 (January 11, 1968) (quoted in Babbitt/Leshy Memorandum, *supra* note 22, at 12).

65. OFFICE OF TECH. ASSESSMENT, MANAGEMENT OF FUEL AND NONFUEL MINERALS IN FEDERAL LAND, 127 (April 1979).

66. *Id.* (emphasis added).

there is a "discovery of a valuable mineral deposit" on each claim.⁶⁷ Such claims are then used to support the submittal of a mining Plan of Operations to the appropriate federal land agency.⁶⁸ Problems arise, however, when it is clear that many, if not most, of the mining claims at a proposed mine site do not pass this test. Such is the case at the proposed Yarnell Gold Mine outside of the small town of Yarnell, Arizona.

The Mine is proposed by the Yarnell Mining Company (YMC), a subsidiary of Bema Gold, Inc. of Canada, and would result in two waste rock dumps holding 11.3 million tons of waste, a cyanide heap-leach facility, one mine pit, and assorted other ancillary facilities.⁶⁹ Total mine disturbance would be over 200 acres, with much of it just a few hundred feet from the town of Yarnell. An extensive network of ground water pumping wells and pipelines would draw water from local aquifers for use in the Project. The vast majority of Project lands are owned by the BLM.

1. Conflict with the Mining Law

There are essentially two sets of mining claims at issue at the Yarnell site. The first set of claims are those covering the actual ore body to be mined. The second, and more numerous, set of claims are those that are proposed to be utilized for the waste rock dumps, heap leach facility, and other non-extraction activities. Since the vast majority of the proposed pit is on private land, the actual extent of ore on federal land could only be found on one lode claim, the Pennsylvania-1 claim.⁷⁰ Thus, out of the dozens of mining claims covering the site, only one could even be potentially considered valid since only one claim overlies an arguably valuable mineral deposit.

In this case, the applicant blanketed the area with mining claims, instead of filing a mixture of mining and millsite claims as intended by the 1872 Law. Although, under the Surface Resources and Multiple Use Act of 1955, a person may use lands encompassing valid mining claims for non-extractive uses related to the extraction on that claim (i.e., waste disposal, processing, etc.), such an allowance does not override the basic requirement that a discovery of a valuable mineral deposit must be found on each and every claim.⁷¹ As noted in the recent *Crown Jewel Mine Decision*, "[w]hile the Mining Law does permit the use of a valid lode claim for facilities that

67. 30 U.S.C. § 22 (1994).

68. Submittals of plans of operation for lands that contain valid mining or millsite claims are governed by 36 C.F.R. pt. 228 (1998) (Forest Service) and 43 C.F.R. pt. 3809 (1998) (BLM).

69. The information on the Project facilities can be found in the June, 1998, Draft EIS for the Yarnell Mining Project, at S-3 to S-6 (on file with author).

70. *Id.*

71. 30 U.S.C. § 612 (1994).

are ancillary to mining on that claim, it does not permit use of a lode claim for facilities to support mining solely on other lode claims."⁷²

Based on the BLM's statements, the mining claims covering the waste dumps, heap leach facility, and other project facilities do not contain valuable mineral deposits.⁷³ Indeed, they appear to have been filed as mining claims primarily to avoid the limitations on millsite claims. The Draft Environmental Impact Statement (DEIS) prepared in response to the Plan of Operations submitted by YMC admits that the mining claims covering the areas beyond the pit do not contain valuable mineral deposits:

Mineral exploration drilling activities conducted by YMC and previous property holders have been used to determine the limits of the gold orebody within the MSA [Mine Site Study Area]. *The results of the exploration indicate that economic-grade mineral resources do not exist in the areas of the proposed heap pad, waste rock dumps and the process and ancillary facility areas. Therefore, no potentially valuable mineralization would be buried by the placement of these structures and features in their proposed locations.*⁷⁴

Thus, as admitted by the applicant and the BLM, all of the mining claims outside the pit area are invalid.

The key question then becomes: what should the BLM do in the face of such evidence? To date, BLM has yet to formally acknowledge this fatal shortcoming in the project. Based on the DEIS, it appears that the BLM believes that it has no choice but to assume the claims are valid and that the company has valid rights to use and develop all of its claims. "YMC has the legal right to mine and process these gold resources through submittal of an MPO (Mine Plan of Operations)."⁷⁵

Up to now, this has been the standard position of the BLM and Forest Service when presented with a proposed mine. In fact, the Forest Service's Manual appears to assume claim validity outright.⁷⁶ However, such a position is at odds with the Mining Law, federal court decisions, and federal

72. *Crown Jewel Mine Decision*, *supra* note 26, at 2 (emphasis in original) (citing *Teller v. United States*, 113 F. 273 (8th Cir. 1901)).

73. Draft EIS, Yarnell Mining Project, at 4-3 (on file with the author).

74. *Id.* (emphasis added).

75. *Id.* at S-1.

76. Forest Service Manual § 2811.5: "A mining claim may lack the elements of validity and be invalid in fact, but it must be recognized as a claim until it has been finally declared invalid by the Department of the Interior or Federal courts." Although the Forest Service is responsible for regulation of mining's impacts on Forest Service land, the Interior Department has authority over the administration of the mining laws. *Best v. Humboldt Mining Co.*, 371 U.S. 334, 336-37 (1968); 36 C.F.R. § 228.1 (1998) (Forest Service).

policy. "Rights" to develop federal land do not arise without a discovery of a valuable deposit, as noted above in section II. In addition, the *Crown Jewel Mine Decision* specifically noted that mining claims proposed for ancillary uses are of questionable validity: "The validity of . . . lode claims is also questionable because permanent deposit of waste rock indicates [the mine applicant]'s own belief that the lode claims do not contain a valuable mineral deposit, one of the fundamental requirements for a valid mining claim."⁷⁷

The IBLA dealt squarely with this issue in November of 1998, specifically rejecting the BLM's assumption that a mining claimant had a "right to mine."⁷⁸ The importance of the IBLA's ruling regarding federal regulation of hardrock mining bears repeating in full:

Initially, however, we wish to comment on a statement made by BLM in its Answer to appellant's SOR [Statement of Reasons]. In response to a suggestion by GBMW [appellants] that BLM should have either returned the mining plan of operations to Cortez [plan applicant] unapproved or required Cortez to supplement its filings, BLM declared:

Since returning the plan of operations and demanding Cortez provide information on the South Pipeline is not provided for in its regulations, further discussion (returning the plan) by the BLM on this issue is not warranted. In addition, the Mining Law of 1872, as amended and the 43 CFR 3809 regulations provide mining proponents on Public lands the right to mine. As long as the BLM ensures compliance with its 43 CFR 3809 regulations and "undue or unnecessary degradation" is prohibited, the BLM must process and permit a plan of operations filed by a proponent.

(Answer at 10.) In our view, this declaration both overstates the rights of "mining proponents" and understates the authority of the BLM.

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

77. *Crown Jewel Mine Decision*, *supra* note 26, at 3 n.7.

78. Great Basin Mine Watch, 146 IBLA 248, 256 (1998).

appropriate. This, in fact, was the express holding in [citations omitted].

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. 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 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.

Finally, insofar as BLM has determined that it lacks adequate 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 limit its consideration of any aspect of a plan of operations to the information or data which a claimant chooses to provide.⁷⁹

The March, 1999, *Crown Jewel Mine Decision* confirms these points. In that case, the federal agencies denied a proposed mine plan of operations based on conclusions that most of the millsite claims were invalid and many of the mining claims were likely invalid.⁸⁰ This denial occurred despite the fact that the same agencies had previously issued (over two years earlier) a Record of Decision for a Final EIS for the Mine. The agencies noted that: "No rights of any kind attach to invalid mining claims or mill sites."⁸¹

For the Yarnell Project, the BLM is under no obligation to approve the Plan of Operations until BLM is assured that the Project covers valid min-

79. *Id.* (citing Southwest Resource Council, 94 Interior Dec. 56, 67 (1987) (emphasis in original)). See also Robert L. Mendenhall, 127 IBLA 73 (1993); Southern Utah Wilderness Alliance, 100 Interior Dec. 15, 22 (1993); United States v. Pittsburgh Pacific Co., 84 Interior Dec. 282, 290 (1977), *aff'd sub nom.* South Dakota v. Andrus, 614 F.2d 1190 (8th Cir. 1980); United States v. Kosanke Sands Corp., 80 Interior Dec. 538, 546-47 (1973)).

80. *Crown Jewel Mine Decision*, *supra* note 26.

81. *Id.* at 1-2 (quoting Cameron v. United States, 252 U.S. 450, 460 (1920)).

ing claims. Upon investigation, if there are no valid claims covering the ancillary facilities areas (as is the case here), the agency must reject the Plan and begin the formal process of claim invalidation.⁸² The BLM's Manual governing the preparation and review of Mineral Reports, Manual 3060, specifically authorizes mining claim validity examinations and contests "when such action is deemed to be in the public's interest."⁸³

This view was also recently acknowledged by the Forest Service in its Final Rule regarding mining in the Smith River National Recreation Area (SRNRA) in northern California.⁸⁴ In response to comments on the Draft Rule, the Forest Service declared:

To the extent that the reviewer is suggesting that the Forest Service may not examine issues relevant to the question of whether a mining claim constitutes a valid existing right, except in connection with a mineral contest initiated by the Bureau of Land Management, the position of this Department as well as the Department of the Interior is to the contrary.

We recognize that a final determination that a claim is invalid for lack of discovery can be made only after a contest proceeding. We also recognize, however, that the mere location of a claim does not presumptively make it valid and that an agency operating under a mandate to minimize surface disturbance may properly require the mining claimant to affirmatively establish the existence of a valid existing right . . . before allowing operations to proceed. *Richard C. Swainbank*, [citation omitted]. While *Swainbank* involved the National Park Service, its holding applies to the Forest Service, which, like the National Park Service, also operates under a mandate to minimize surface disturbance resulting from locatable mineral operations.⁸⁵

Although the issue in the SRNRA deals with withdrawn lands, the Forest Service's statement regarding the connection between valid mining claims

82. As the IBLA has stated:

When the Government contests a mining claim because it is not supported by the discovery of a valuable mineral deposit, it must make a prima facie case that no discovery exists, whereupon the burden shifts to the claimant to establish by a preponderance of the evidence that a discovery exists as to those matters placed in issue by the Government. The ultimate burden of proof of these matters rests with the claimant Any doubt on the issue of discovery raised by the evidence must be resolved against the mining claimant, who bears the risk of nonpersuasion.

United States v. Collord, 128 IBLA 266, 269 (1994).

83. BLM Manual § 3060.12.

84. 63 Fed. Reg. 15,041 (1998) (to be codified at 36 C.F.R. pt. 2927).

85. *Id.* at 15,048.

and the agency's duty to "minimize" surface disturbance applies on all Forest Service lands since the duty to minimize is not limited to withdrawn lands (i.e., the environmental protection requirements found at 36 CFR Part 228 apply to all proposed plans of operation on Forest Service land).⁸⁶

Under the Forest Service's policy at Smith River, it required the operator to submit information supporting the discovery of a valuable mineral deposit.⁸⁷ If such information did not support such a discovery, the Forest Service stated:

(1) If the authorized officer concludes that there is not sufficient evidence of valid existing rights, the officer shall so notify the operator in writing of the reasons for the determination, inform the operator that the proposed mineral operation cannot be conducted, advise the operator that the Forest Service will promptly notify the Bureau of Land Management of the determination and request the initiation of a mineral contest action against the pertinent mining claim, and advise the operator that further consideration of the proposed plan of operations is suspended pending final action by the Department of the Interior on the operator's claim of valid existing rights and any final judicial review thereof.

(2) If the authorized officer concludes that there is not sufficient evidence of valid existing rights, the authorized officer also shall notify promptly the Bureau of Land Management of the determination and request the initiation of a mineral contest action against the pertinent mining claims.⁸⁸

As indicated earlier, it is the discovery of a valuable mineral deposit that triggers a mining claimant's right to initiate mining operations on public land.⁸⁹ Therefore, the BLM must uphold the legal requirement that a claimant has made a discovery of a valuable mineral deposit in order to satisfy its own obligation to minimize adverse environmental impacts.⁹⁰

The question of whether a claim is valid is an integral part of the

86. 36 C.F.R. pt. 228 (1998).

87. 36 C.F.R. § 292.63 (1998).

88. *Id.*

89. *See supra* Section II.

90. *See, e.g.,* United States v. Rice, 886 F.2d 334 (9th Cir. 1989) (affirming decision of Interior Board of Land Appeals finding claims invalid, where Forest Service initiated contest proceeding at BLM office after determining that mine's operating costs would greatly exceed the value of any extracted gold and silver); United States v. Barrows, 404 F.2d 749, 750 (9th Cir. 1968) (finding that the district court did have jurisdiction to grant the government's motion for a conditional restraining order to prevent irreparable injury to national forest land pending the outcome of administrative proceedings concerning the validity of a mining claim).

BLM's analysis of a proposed mining project's operations, because if the BLM approves a mine before ascertaining whether the mining "rights" have any merit, the agency risks allowing an invalid mining operation to go forward in violation of federal mining law. In addition, because the BLM has the responsibility and the power to maintain and protect public lands, the agency has a duty to ensure that public lands, a resource held by the government in trust for the public, are not used improperly or illegally.⁹¹

"The paramount ownership being in the government, and it also having a reversionary interest in the possessory right of the locator, clearly it has a valuable estate which it is entitled to protect against waste and unlawful use."⁹² Courts have upheld the federal government's authority to suspend approval of a plan of operations until a claim's validity has been determined.⁹³

There can be no "right" to mine until the BLM has satisfactorily concluded its regulatory reviews, that is, determining whether the claimant has "compl[ie]d with the laws of the U.S"⁹⁴ In addition, the BLM cannot approve a proposed mine until a claim's validity has at least been supported by credible evidence.⁹⁵ Indeed, a federal court found that "to the extent that [action by the federal land agency suspending approval of a plan might] have an indirect effect on plaintiff's 'rights' under their mining claims, I find nothing in the statutes to prevent this."⁹⁶ In order to satisfy its statutory and regulatory duties to protect public lands from undue degradation and to minimize adverse environmental impacts, the BLM must independently ascertain the nature of the "rights" at issue in its decisionmaking process.

In fact, this was the federal government's contention in *Clouser v. Espy*, that "[u]nder the relevant statutes and regulations, the [agency] need not permit mining operations until it is satisfied that the operator possesses a valid claim."⁹⁷ The *Crown Jewel Mine Decision* confirms this.⁹⁸ At Yarnell,

91. As required by the Federal Land Policy and Management Act of 1976 (FLPMA): "In managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732 (b)(1994). The Forest Service noted this issue in its recent rules governing claims in the Smith River National Recreation Area. See *supra* notes 84-88 and accompanying text.

92. *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1980) (quoting *United States v. Rizenelli*, 182 F. 675, 681 (D. Idaho 1910)); see also *Teller v. United States*, 113 F. 273, 281 (8th Cir. 1901).

93. See *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994).

94. 30 U.S.C. § 26 (1994).

95. *Great Basin Mine Watch*, 146 IBLA 248, 256 (1998); *Crown Jewel Mine Decision*, *supra* note 26.

96. *Clouser v. Madigan*, 1992 WL 694368, *4 (D. Or. 1992), *aff'd sub nom.* *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994) (finding that the Forest Service regulation limiting plan approval to "valid" mining claims does not violate the general statutes recognizing the mining rights of unpatented claims).

97. Brief for Forest Service at 18, *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994) (No. 93-35051) [on file with author].

since BLM and the mining claimant admit that the vast majority of Project lands do not contain valuable mineralization, the BLM cannot allow a project to go forward under the assumption that these claims are valid.⁹⁹

2. Regulatory Review of Operations with Invalid Claims: Conflict with the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA)

In the case of the Yarnell Mine, it is possible that the BLM will approve the Mine Plan despite the fatal problems with the Mining Law noted above. However, approval of the Plan would also violate NEPA and the APA.¹⁰⁰ In this case, such an approval would coincide with the rejection of the no-action alternative under NEPA. Rejection of the no-action alternative based on an assumption of mining claim validity would violate NEPA and the APA because such an assumption is not supported in the record.

NEPA is an action-forcing statute. Its sweeping commitment is to "prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action."¹⁰¹ It requires the federal agency to "consider every significant aspect of the environmental impact of a proposed action,"¹⁰² and to ensure "that the agency will inform the public that it has indeed considered environmental concerns in its decision making process."¹⁰³

NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) for "all major federal actions significantly affecting the quality of the human environment."¹⁰⁴ An agency must prepare an EIS if "substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor."¹⁰⁵

98. "No rights of any kind attach to invalid mining claims or mill sites." *Crown Jewel Mine Decision*, *supra* note 26, at 1-2.

99. It is possible that some offices of the Forest Service and BLM would object to conducting validity reviews and initiating mineral contests for claims located on non-withdrawn lands. The argument being that a "losing" claimant could simply refile his claims after they were declared null and void. While such a scenario could conceivably occur, a finding by the Interior Department or the courts that the lands in a certain area cannot support a discovery of a valuable mineral deposit would represent an overwhelming presumption that any future claims would similarly be invalid. Absent a radical change in markets and costs, and indeed in the ore itself, it is extremely unlikely that anyone would ever, or could ever, successfully overcome this presumption.

100. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (1994); Administrative Procedure Act (APA), 5 U.S.C. § 706 (1994).

101. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

102. *Vermont Yankee Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553 (1978).

103. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983).

104. 42 U.S.C. § 4332(2)(c) (1994).

105. *Greenpeace Action v. Franklin*, 982 F.2d 1342, 1351 (9th Cir. 1992) (emphasis in original); *LaFlamme v. FERC*, 852 F.2d 389, 397 (9th Cir. 1988).

The consideration of alternatives is "the heart of the environmental impact statement."¹⁰⁶ It is "absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as 'the linchpin of the entire impact statement.'"¹⁰⁷ Moreover, "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate."¹⁰⁸

The no-action alternative must be fully reviewed in each EIS. "The 'no action' alternative must also be considered in detail. 'Informed and meaningful consideration of alternatives—including the no action alternative—is . . . an integral part of the statutory scheme.'"¹⁰⁹ As noted above, the fact that a company has filed claims under the 1872 Mining Law does not preclude the agencies from adopting the no-action alternative when there is no evidence of valid claims. As stated in *Great Basin Mine Watch* and the *Crown Jewel Mine Decision*, an agency should not approve a mine plan based on an unsupported assumption that the mining claims are valid.¹¹⁰ Because the federal government may review and challenge the validity of any mining claim at any time,¹¹¹ the agencies must inquire into these issues at the outset of their NEPA and Mine Plan review processes.

The NEPA process is the primary means available to the public and to the decisionmaker to ascertain the environmental and social costs of the proposed project. A categorical rejection of the no-action alternative would be arbitrary when the agencies admit that the subject mining claims do not support the discovery of a valuable mineral deposit.

FLPMA outlines the BLM's obligations to protect public lands and to minimize adverse environmental impacts to the resource that the federal government holds in trust for the public.¹¹² The federal mining laws do grant claimants certain rights, but those rights are conveyed only when a claimant has made a discovery of a valuable mineral deposit or locates valid millsite claims associated with development of that deposit.¹¹³ Therefore, the government can only recognize those rights after a valuable mineral deposit has

106. 40 C.F.R. § 1502.14 (1998).

107. *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975).

108. *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993) (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992)).

109. *Alaska Wilderness Recreation & Tourism v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (quoting *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1989)).

110. *Great Basin Mine Watch*, 146 IBLA 248, 256 (1998); *Crown Jewel Mine Decision*, *supra* note 26.

111. *Cameron v. United States*, 252 U.S. 450 (1920).

112. 43 U.S.C. § 1732 (1994); *see supra* note 91.

113. *See supra* Section II.

been discovered.

At Yarnell, the BLM has an obligation to meaningfully consider the no-action alternative because the validity of the claims is seriously in doubt. Even if the one unpatented claim covering the ore pit turns out to be valid, the other claims are not. Thus, for the vast majority of the project lands, the no-action alternative is the appropriate choice. More technically, though, the correct alternative is the "no federal lands for ancillary facilities" alternative since categorical denial of excavation of the mine pit's unpatented claim, if valid, may not be possible due to the rights inherent in valid claims.

The Supreme Court has made crystal clear the obligation of an agency to document its analysis in the record when making a decision otherwise left to the agency's discretion:

There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such . . . practice. . . . Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion."¹¹⁴

In applying the "arbitrary and capricious" standard the APA, a court must consider "whether the agency has articulated a rational connection between the facts found and the choice made."¹¹⁵

Both NEPA and the APA require that an agency's determinations be supported by factual information in the decision. "The agency must explicate fully its course of inquiry, its analysis, and its reasoning."¹¹⁶ An agency decision must always have a rational basis that is both stated in the written decision and demonstrated in the administrative record accompanying the decision.¹¹⁷ The decision must be made in a "careful and systematic manner."¹¹⁸ The record must demonstrate a "reasoned analysis of the factors involved, made in due regard for the public interest."¹¹⁹ Also, "[i]t is incumbent upon to BLM to ensure that its decision it supported by a rational basis and that such

114. *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (citations omitted).

115. *Bowman Transp. Inc. v. Arkansas Best Freight Sys.*, 419 U.S. 281, 285-86 (1974) (cited in *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 32 (1981)).

116. *Dubois v. United States Dept. of Agric.*, 102 F.3d 1273, 1287 (1st Cir. 1996).

117. *Kanawha & Hocking Coal & Coke Co.*, 112 IBLA 365, 368 (1990).

118. *Edward L. Johnson*, 93 IBLA 391, 399 (1986).

119. *Alvin R. Platz*, 114 IBLA 8, 15-16 (1990).

basis is stated in the written decision as well as being demonstrated in the administrative record accompanying the decision.”¹²⁰

In addition to violating the APA, a conclusion that the no-action/plan denial alternative is not viable because a mining claim is presupposed to be valid violates NEPA’s requirement that an agency afford meaningful consideration to all reasonable alternatives. The courts have frowned upon this kind of biased approach to examining alternatives.¹²¹ The “no federal lands for ancillary facilities”/no-action alternative is a viable alternative due to the lack of a discovery. Any BLM Final EIS and Record of Decision would be inadequate because the agency failed to adequately consider this alternative. Indeed, based on the facts of this case, approval of any other alternative would be illegal.

B. Operations Proposed on Invalid Millsite Claims: The Crown Jewel Project in Washington State

A possible outcome of the Yarnell dispute could involve the claimant refiling its lode mining claims as millsites in light of the above-noted admissions regarding the lack of mineralization. In fact, since the lands outside the mine pit are indeed non-mineralized, that is what the company should do at Yarnell to more closely follow the Mining Law. However, there is a problem for claimants such as the Yarnell Mining Company and others similarly situated. Namely, for any mining claim refiled as a millsite claim, or for any millsite claim filed originally, each millsite claim must comply with the strict limitations set out in the Mining Law.

As noted, the millsite provision in the Mining Law is not extensive, but its provisions present important obstacles for modern mineral development. “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 non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode”¹²² The statute also contains the requirement that “no [millsite] location made on or after May 10, 1872 of such nonadjacent land shall exceed five acres.”¹²³

These limitations are directly at issue in the Crown Jewel Mine in Washington State proposed by Battle Mountain Gold Corporation (BMG).

120. Larry Brown & Assoc., 133 IBLA, 202, 205 (1995) (citing Edelman Community Property Trust, 106 IBLA 376, 377 (1989); Roger K. Ogden, 77 IBLA 4, 7 (1983)).

121. *Citizens for Envtl. Quality v. United States*, 731 F. Supp. 970, 990 (D. Colo. 1989) (finding that a “result-biased decisionmaking process prevented the Forest Service from establishing a legitimately broad range of reasonable alternatives as required by the statutory and regulatory scheme.”).

122. 30 U.S.C. § 42(a) (1994).

123. *Id.*

The mine is proposed on a mixture of federal, state, and private land with the vast majority owned by the Forest Service and BLM. As allowed under the Record of Decision (ROD) jointly issued for the Project by the Forest Service and BLM, through continuous 24-hour-a-day, 7-days-a-week operations, including massive blasting and earthmoving, the Crown Jewel Mine will remove over 105 million tons of rock from the open pit to be blasted and excavated from Buckhorn Mountain over approximately 8 years. Of this, approximately 34,000 tons of waste rock per day will be generated, totaling over 97 million tons of waste rock that will be deposited in two massive, unlined dumps at the headwaters of two important watersheds. The mine pit blasted into the side of Buckhorn Mountain will cover 116 acres that will not be reclaimed or backfilled and will form a lake 350 feet deep, which is projected to violate numerous state water quality standards.¹²⁴

The operation would process approximately 3,000 tons of ore per day. Out of this 3,000 tons of ore per day, or 1,095,000 tons of ore per year, gold would be produced over the life of the project through a cyanide leaching process that will use over 13,000 tons of sodium cyanide. The proposed mining operation will directly disturb 787 acres of land—over one whole square mile. Approximately 60% of the disturbance would be on Forest Service lands. The remaining disturbance will be on lands administrated by the federal Bureau of Land Management (BLM) (24%), the Washington Department of Natural Resources (2%), and private land (15%).¹²⁵

BMG proposes to utilize 117 unpatented millsite claims, while developing only approximately 15 mining lode claims for the Crown Jewel Mine.¹²⁶ The strict requirement of the Mining Law limiting the number of millsite claims that can be utilized by operations associated with mining claims is detailed in the November 7, 1997, Babbitt/Leshy Memorandum Opinion.¹²⁷ In addition, the BLM issued guidance to all BLM state offices in August of 1998.¹²⁸

The Babbitt/Leshy Memorandum held that:

Because the statute [the Mining Law] does not support issuing patents for millsite claims totalling more than five acres per placer or lode claim, the Department should reject those portions of millsite

124. Information in this and the following paragraph is found in the Record of Decision, Crown Jewel Mine, January 13, 1997, U.S. BLM and Forest Service, [hereinafter *Crown Jewel ROD*] (on file with author).

125. Final Environmental Impact Statement, Crown Jewel Mine, January, 1997 [hereinafter *Crown Jewel FEIS*] (on file with author).

126. *Id.* Fig. 3.19.4 at 3-250. See also, *Crown Jewel Mine Decision*, *supra* note 26, at 1.

127. Babbitt/Leshy Memorandum, *supra* note 22.

128. IM 98-154, *supra* note 24.

patent applications that exceed this acreage limitation. In addition, the Bureau [BLM] should not approve plans of operations which rely on a greater number of millsites than the number of associated claims being developed unless the use of additional lands is obtained through other means.¹²⁹

The *Crown Jewel Mine Decision* specifically dealt with these issues. In that decision, the agencies denied the proposed mine plan of operations "because the Plan does not comply with the requirements of the Mining Law of 1872" ¹³⁰ The agencies stated:

The Mining Law allows claimants to locate up to five acres of nonmineral land for mill site use in association with each valid mining claim. Any mill site acreage in excess of five acres per valid mining claim is not valid. No rights of any kind attach to invalid mining claims or mill sites. Under the Mining Law, [the applicant] may locate a maximum of 75 mill site acres, depending on whether all of the fifteen lode claims in the Plan are valid. Based on the information in the Plan, the Crown Jewel Mine exceeds the allowable amount of millsites by at least 490 acres.¹³¹

In a letter to the Forest Service and BLM sent prior to the *Crown Jewel Mine Decision*, BMG argued that the millsite limit did not apply to the Plan decision since the Babbitt/Lesly Memorandum was signed after the ROD and Final EIS were issued.¹³² The fact that the Memorandum was written after the ROD, though, is irrelevant. The Memorandum simply made clear the Interior Department's view of the provisions of the Mining Law. It in no

129. Babbitt/Lesly Memorandum, *supra* note 22, at 2. The Department of Justice, representing the Forest Service and the BLM in opposition to a water rights application by a mining company in Colorado, recently affirmed the government's position as detailed in the Lesly/Babbitt Memorandum:

[T]he Mining Law allows mining claimants to locate only one millsite of no more than five acres in association with each mining claim. Because the statute does not support locating millsite claims totaling more than five acres per valid mining claim, millsite claims which exceed that limitation are invalid. As a result, the agencies are not to approve plans of operations which rely on a greater number of millsites than allowed by the Mining Law, unless the use of additional lands is obtained through other means such as a special use right-of-way permit or through land exchange. (Solicitor Lesly's opinion binds the Forest Service as well as the Department of the Interior because the Department of the Interior has authority over the administration of the mining laws.

United States Reply Memorandum In Support of the United States' Motion Pursuant to COLO. R. CIV. PROC. 56(h), at p.9, n.14, District Court, Water Division No. 4, Colorado, (No. 96CW311) (Sept. 10, 1998) (citations omitted) (on file with the author).

130. *Crown Jewel Mine Decision*, *supra* note 26, at 1.

131. *Crown Jewel Mine Decision*, *supra* note 26, at 1-2 (citations omitted).

132. Letter from Danny Robertson, Crown Jewel Project Manager, to Elaine Zielinski, BLM State Director, and Sam Gehr, Supervisor of the Okanogan National Forest (March 9, 1999) (on file with author).

way made law or created new obligations on mining applicants. Secretary Babbitt and Solicitor Leshy specifically noted that

as reflected in treatises and other commentary, including those by industry lawyers, the limitations of the millsite provision appear to have been widely, if not uniformly, appreciated. Therefore, I do not regard immediate application of this Opinion to pending applications to be unreasonable or to thwart any legitimately held expectation to the contrary.¹³³

The agencies rejected the company's contentions, stating that: "BMG also stated that, because BLM and USFS have signed the ROD for the Crown Jewel Mine, the agencies are barred from applying the mill site limitation. We disagree. Nothing in the ROD vests any right in BMG. The ROD did not purport to make any determination as to whether BMG has established valid rights under the Mining Law; it simply selected a preferred alternative."¹³⁴

The agencies also vacated the ROD issued in January, 1997. "Selection of the preferred alternative in the Crown Jewel Mine environmental analysis rested on the premise that BMG had had unpatented mining claims and mill sites that the government could later challenge. The ROD by its very terms addressed only the selection of an alternative for National Environmental Policy Act purposes. The ROD is clear that its selection of an alternative is valid only insofar as the unpatented mining claims and mill sites are valid. To the extent that BMG has not established rights under the Mining Law, the ROD did not create rights or exempt BMG from complying with the law."¹³⁵

The ROD and Final EIS were also based on the perceived "limited discretion" available to federal land managers reviewing operations with valid mining and millsite claims. For example, the ROD acknowledged that due to the agencies' assumption that all the project-related mining and millsite claims were valid, the Mining Law "limits the scope of decision making discretion available to decision makers."¹³⁶ The Final EIS similarly based the "Purpose and Need" of the operation on the "statutory rights" of the applicant under the mining laws. In this case, as noted in the *Crown Jewel Mine Decision*, there are no "statutory rights" to operate on invalid mining or millsite claims.

133. Babbitt/Leshy Memorandum, *supra* note 22, at 15.

134. *Crown Jewel Mine Decision*, *supra* note 26, at 4.

135. *Id.* at 5.

136. *Crown Jewel ROD*, *supra* note 124, at 13.

The question remains, though, as to the proper regulatory framework for operations proposed on invalid claims. The Babbitt/Leshy Memorandum noted that, in the absence of valid millsite claims (i.e., a greater number of millsite claims than associated mining claims being developed), a project applicant could nonetheless attempt to gain the use of federal land. The examples discussed by the Memorandum were land exchanges under FLPMA section 206 and "permits and leases under Title III of FLPMA."¹³⁷ At Crown Jewel, the applicant has not applied for such an exchange or a permit or lease under Title III. Thus, these avenues are not open to the project applicant at this time. It should be noted that any application for such an exchange or permit/lease would be subject to full public review, comment, and appeal under federal law.¹³⁸

The *Crown Jewel Mine Decision* outlined the options available to project applicants:

We emphasize that there are ways for BMG to still proceed with developing the Crown Jewel Mine consistent with the mill site limitation. On both National Forest and BLM-administered lands, BMG could seek a land exchange, provided the federal agencies determine that an exchange would be in the public interest. BLM has also indicated that use of excess mill site acreage on BLM land could be authorized through approval of a plan of operations under 43 C.F.R. § 3809.1-6, if the lands are still open to the location under the Mining Law. Alternatively, BLM is examining the extent to which it may authorize such use through a lease under Section 302(b) of FLPMA and BLM's implementing regulations at 43 C.F.R. § 2920. Because BLM is currently revisiting the surface use authorization issue, if BMG wishes to seek surface use authorization, BMG should consult with BLM for a final determination of the proper authority under which to seek such authorization.

On National Forest System lands, use of lands in excess of what the Mining Law provides may not be authorized by means of a plan of operations issued pursuant to 36 C.F.R. Part 228, Subpart A. Those regulations govern only operations authorized by the United States mining laws, which confer a statutory right to enter upon the public lands to search for minerals. Such use may not be authorized by a special use authorization under 36 C.F.R. Part 251, Subpart B and the authorities cited therein. However, recent amendments to

137. Babbitt/Leshy Memorandum, *supra* note 22, at 2.

138. The scope of the permissible authorities for permits/leases will be discussed in *infra* Section IV. Land exchanges are not discussed in this article.

those regulations prohibit the issuance of a special use authorization for certain uses of National Forest System lands. In particular, issuance of a special use authorization for disposal of solid wastes or hazardous substances is barred.¹³⁹

BLM Instruction Memorandum 98-154 notes that if "the operator's proposed plan would cause unacceptable resource conflicts," the BLM must "inform the operator of the millsite acreage limitation and ask the operator to amend the proposed plan of operations by moving proposed surface uses away from the excess millsite acreage which covers the resource conflict areas."¹⁴⁰ Section IV of this article details why use of the BLM's 43 C.F.R. Part 3809 regulations for mining plans of operations is inappropriate for invalid claims. However, for the purposes of analyzing the *Crown Jewel Mine Decision* and IM 98-154, a brief review of their application to the situation at the Crown Jewel site follows.

IM 98-154 applies this "resource conflict" test to lands open to location under the Mining Law, distinguishing such lands from those withdrawn from mineral entry (which have a flat prohibition against any use of the excess acreage).¹⁴¹ In any case, due to the obvious and significant resources that will be obliterated by the waste rock, tailings, and other facilities proposed for the excess acreage, even under IM 98-154, the currently proposed Plan of Operations (PoO) cannot be approved.

The Crown Jewel Mine, and the project facilities proposed on the excess acres, would clearly result in unacceptable resource conflicts. For example, the State of Washington has expressly acknowledged that ground and surface water standards are predicted to be violated by the pollution released by the waste rock dumps.¹⁴² Clearly, project facilities located on

139. *Crown Jewel Mine Decision*, *supra* note 26, at 3 (citations omitted). For a more detailed review of the land use authorization issue, see *infra* Section IV.

140. IM 98-154, *supra* note 24, at 2-3. In the unlikely event that a mine would not have potential resource conflicts, the Instruction Memorandum and the *Crown Jewel Mine Decision* appear to allow approval of a plan of operations (PoO) under 43 C.F.R. pt 3809 for excess millsite acreage on BLM lands. However, that policy fundamentally ignores the fact that the pt 3809 regulations are based upon the applicant having "statutory rights" under the Mining Law. 43 C.F.R. § 3809.0-6 (1998). As analyzed in this article, there are no such "rights" to excess millsite lands (or mining claims that do not support the discovery of a valuable mineral deposit). Thus, it is questionable whether approval under 3809 would be legally supportable. See *infra* Section IV.

141. Instruction Memorandum 98-154, *supra* note 24.

142. Washington Department of Ecology, Water Quality Certification for Corps Public Notice #92-4-01078R at 12-13 (January 13, 1999) [Crown Jewel Mine] (on file with the Washington Department of Ecology).

The project will result in discharges of leachate from two areas of waste rock to groundwater. *These discharges are predicted to exceed the state's groundwater standards for several contaminants.* The Applicant has provided a report showing that all known, available, and reasonable methods of prevention, control, and treat-

excess millsite acres that will violate water quality standards present an "unacceptable resource conflict."¹⁴³

In addition, a number of other critical resources will be either destroyed or irreparably injured by the location of the waste rock, tailings, and other project facilities on the excess millsite acres. For example, despite the "mitigation" proposed by the Forest Service and BLM in the FEIS and ROD, the agencies admit that there are many "unavoidable adverse effects" from the Crown Jewel Mine. According to a summary list in the FEIS, these unavoidable effects include: loss of vegetation and wildlife habitat (short and long-term); permanent alteration of the topography (long-term); loss of wetlands, springs and seeps and changed functions and values of wetlands (short and long-term); soil productivity (long-term); timber production (short and long-term); and loss of sensitive plants (long-term).¹⁴⁴ This exhaustive list does not even include additional resource destruction caused by the mine pit located on the lode claims (e.g., projected violations of state water quality standards in the pit lake, destruction of cultural resources, shift in hydrologic divide between drainages). The loss of wetland function and

ment (AKART) will not be adequate for these discharges to meet the state's groundwater standards at the toe of the waste rock piles. . . . *Some of the predicted contaminants in the leachate may also exceed surface water quality standards and acute or chronic criteria, as well as exceed the groundwater standards.*

Id. (emphasis added) Incredibly, the state approved the Section 401 certification. This was due, in part, to the state's reliance on future monitoring to detect ground water quality violations. Regardless of whether the certification was legal (the certification has since been appealed by various conservation organizations), the fact that the waste rock piles will violate water quality standards requires the federal agencies to deny the PoO. See 36 C.F.R. pt. 228 (1998); 43 C.F.R. pt. 3809 (1998) (requiring PoO denial when water quality requirements will be violated).

143. In addition to the basic environmental resources that will be destroyed, the Project will also have significant adverse effects upon the treaty rights of the Confederated Tribes of the Colville Reservation. The history of the Colville Tribes' cession of the former North Half of its Reservation, and the Supreme Court's affirmation of the Tribes' reserved property rights in the ceded area, is set forth in *Antoine v. Washington*, 420 U.S. 194 (1975). In a February 1, 1999, letter to the BLM, the Tribes argued that considering the Project's impacts to these rights, the trust responsibility owed to the Tribes, as well as the environmental impacts, the Project represents an "unacceptable resource conflict" that cannot be approved by the federal government. Letter from Stephen H. Suagee, Reservation Attorney, to Elaine Zielinski, BLM State Director (on file with the author).

Long standing federal law holds that Indian Tribes are sovereign nations. *Worcester v. Georgia*, 31 U.S. 515, 544 (1832). It is undisputed that the BLM, as an agency of the federal government, has broad fiduciary obligations to Indian Tribes akin to that of a guardian to a ward. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). Any federal action is subject to this trust responsibility. *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981). The BLM's trust obligation requires it to meet certain standards in deciding whether to approve the plan of operations. The United States, acting through the Secretary of the Interior, "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)). "Moreover, the federal government has a substantive duty to protect 'to the fullest extent possible' the Tribes' treaty rights, and the resources on which those rights depend." *Klamath Tribes v. United States*, Civ. No. 96-381-HA (D. Or. Oct. 2, 1996).

144. Crown Jewel Final EIS, *supra* note 25, at S-129 to 130.

value acknowledged in the FEIS is especially egregious in light of BLM's policy to protect wetland and riparian resources.¹⁴⁵ In addition, the Environmental Protection Agency has objected on numerous occasions to the level of destruction proposed by the Project.¹⁴⁶

Overall, regarding the limits inherent in the Mining Law, the fact that the millsite limitation may not comport with modern open pit mining practices does not excuse the federal government from complying with the law.¹⁴⁷ "The evolution of the mining industry over the years has increased the need, with some mining practices, to secure the use of ancillary acreage to support locateable mining operations. For some kinds of mining, the five-acre limitation precludes obtaining that acreage."¹⁴⁸

As held by the Supreme Court, "[the Secretary 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."¹⁴⁹ In this case, since the Crown Jewel Mine exceeds the strict limitations on millsite claims, as well as likely failing the discovery test for valid lode claims, the agencies correctly informed the project applicant that such a Plan of Operations could not be approved.

C. When All Else Fails, Manipulate Your Claims: The Proposed Imperial Project in California

Although the mine applicants for the Yarnell and Crown Jewel Projects face considerable, even fatal, problems with their mining and millsite claims, another proposed open pit mine faces an even more complex situation. At the Imperial Project proposed by the Glamis Imperial Corporation (GIC) in southern California, not only were the original lode claims subject to the problems discussed above with Yarnell, but the vast majority of the subsequently-filed millsite claims exceeded the millsite limits as is the case

145. *Riparian-Wetland Initiative for the 1990s*, September 1991, Document No. BLM/WO/GI-91/001+4340.

146. Despite all of the "mitigation" proposed by the applicant, in a recent letter to the Corps of Engineers, the EPA stated:

EPA remains concerned about the cumulative impacts this project will have upon the waters of the United States. Although the applicant has developed a mitigation plan that addresses both direct and indirect impacts, we still have concerns about the risks associated with the project. The project will affect five headwater systems. As these systems cannot be recreated, complete replacement of lost ecological functions is likely not possible.

Letter from Tim Erkle, to Colonel James M. Rigsby (COE), at 2 (July 30, 1998) (on file with author).

147. As stated in the *Crown Jewel Mine Decision*, *supra* note 26, "As the Solicitor's Opinion [Babbitt/Leshy Memorandum] notes, the limitations on mill sites in the Mining Law have been widely appreciated by mining industry lawyers for decades."

148. Babbitt/Leshy Memorandum, *supra* note 22, at 14.

149. *Cameron v. United States*, 252 U.S. 450, 460 (1920).

with Crown Jewel. Faced with this situation, the company resorted to a novel approach—abandoning all of its lode claims and refiling them as mostly miniscule claims. In doing so, the company multiplied the number of lode claims to approximately match the number of millsite claims. The following discussion details the problems with this tactic and other related concerns.

The proposed Imperial Project would cover approximately 1,500 acres of near-pristine lands within the California Desert Conservation Area (CDCA) with three open pits, two waste rock dumps, a heap leach pad, and a network of roads and other facilities.¹⁵⁰ In April 1994, GIC submitted a proposed Plan of Operations. The BLM released a Draft EIS in November 1996. Based largely on the Project's devastating impacts to the religion, culture, and history of the Quechan people, a revised Draft EIS was issued in November 1997.¹⁵¹ A Final EIS is possible in 1999.¹⁵²

Similar to the statement in the Draft EIS for the Yarnell Project, in the revised Draft EIS for the Imperial Project, the BLM acknowledged that the mining claims that covered the areas beyond the pit do not contain valuable mineral deposits.¹⁵³ Faced with this fact, in early 1998, GIC changed all or

150. The CDCA was established by Congress in the Federal Land Policy Management Act of 1976 (FLPMA), and represents a unique public land classification. FLPMA section 1732(b) specifically notes that FLPMA's provisions regarding the CDCA represent an amendment of the 1872 Mining Law. 43 U.S.C. § 1732(b) (1994). FLPMA section 1781(f) specifically limits the rights of mining claimants on CDCA lands:

Subject to valid existing rights, nothing in this Act shall affect the applicability of the United States mining laws on the public lands within the [CDCA], *except* that all mining claims located on public lands within the [CDCA] shall be subject to such reasonable regulations as the Secretary may prescribe to effectuate the purposes of this section. . . . Such regulations shall provide for such measures as may be reasonable to protect the scenic, scientific, and environmental values of the public lands of the [CDCA] against undue impairment, and to assure against pollution of the streams and waters within the [CDCA].

43 U.S.C. § 1781(f) (1994) (emphasis added). Thus, the BLM can only approve development of mining claims within the CDCA that do not represent "undue impairment" to these values. See Eric L. Price, 116 IBLA 210, 219 (1990) (IBLA affirms BLM decision to deny plan of operations due to impacts to CDCA).

151. Imperial Project (November, 1997 Draft EIS) [hereinafter Imperial Project DEIS] (on file with author). The Quechan Tribe is associated with the Fort Yuma Reservation on the California side of the Colorado River near Yuma, Arizona. The Project's impact on the Tribe is also discussed in William Claiborne, *Protecting Sacred Ground*, WASHINGTON POST, May 12, 1998, at A3, col. 1-6.

152. As with the Yarnell and Crown Jewel proposals, the Imperial Project has received massive public opposition. Numerous conservation organizations, along with the Quechan Tribe at the nearby Fort Yuma Reservation, and hundreds of other groups and individuals, including United States Senator Barbara Boxer, have submitted thousands of pages of evidence against the Project to the BLM. The vast majority of comments focused on the extreme environmental damage and destruction of Tribal religious and other use of the area, as well as questions regarding the Mining Law discussed in this article.

153. The BLM stated:

Condemnation drilling by Glamis Imperial geologists has been used to determine the

most of the non-pit lode claims to millsite claims.

However, this filing of nearly two hundred millsite claims greatly exceeds the Mining Law's strict limitation on millsite numbers and acreage as noted above in the discussion of the Crown Jewel Project. Again faced with the realities of the Mining Law, in September and October of 1998, GIC attempted to bypass the millsite acreage and ratio limits by changing its approximately 46 lode claims covering the pit areas into approximately 187 lode claims. Some of these "new" claims are as small as 20 feet by 130 feet. At least 15 claims are under one-quarter of an acre, 33 claims are between one-quarter and one-half of an acre, and a total of 103 claims are less than one acre.¹⁵⁴ After this relocation, the number of mining and millsite claims covering the site were approximately equal, although there still are about twenty-five more millsite claims than mining claims.

This change was to avoid the one-to-one mining/millsite ratio contained in the Mining Law. GIC undertook this claim manipulation after it was verbally informed by BLM (in or around June, 1998) that the Interior Department was considering a mineral withdrawal for the subject lands.¹⁵⁵ The Department segregated from entry under the mining laws approximately 9,360 acres of BLM land on November 2, 1998, including the entire proposed Project site.¹⁵⁶ Although the following analysis will detail why GIC's multiplication of lode claims from 46 to 187 violated the Mining Law, the November 2 segregation/withdrawal fundamentally alters the claims situation for the Project and is thus considered first.

1. Effect of Mineral Withdrawal on Millsite Claims

When millsites lie within lands that the government has segregated or withdrawn from mineral entry, their validity is dependant upon adherence to the statutory conditions as of the date of the segregation or withdrawal and at all times subsequent to the segregation or withdrawal.

While a mining claim or millsite claim may be located on public

limits of the gold ore bodies within the Project mine and process area. The results of this drilling, to date, indicate that valuable mineral resources common to the Project mine and process area do not exist in the areas of the proposed heap pad, waste rock stockpiles, and the process and ancillary facilities. Therefore, no potentially valuable mineralization would be buried by the placement of these facilities in these areas.

Imperial Project DEIS at 4-4.

154. Information regarding claim filings was obtained from personal communications with Edie Harmon, San Diego Chapter of the Sierra Club, who investigated the claims filings at the offices of the California BLM and the land records of Imperial County, California.

155. See *supra* note 154.

156. 63 Fed. Reg. 58,752 (1998).

land open to such disposition, the United States may at any time close public land to mineral disposition by withdrawing it from mineral location. . . . If the claimant cannot show compliance with the law prior to the withdrawal . . . his claim will be declared invalid.¹⁵⁷

On November 2, 1998, the BLM segregated 9,360 acres of land in southern California from mineral entry. The area now segregated encompasses all of the mining and millsite claims that GIC proposes to use in connection with the Imperial Project. As a matter of law, GIC's millsite claims are invalid because there is no evidence that, as of the date of segregation, the company was, and is, using or occupying each of its millsites for mining or milling purposes in connection with its associated lode claim. "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."¹⁵⁸

In *United States v. Cuneo*, in a situation similar to the one involving the proposed Imperial Project, the National Park Service (NPS) filed an application to withdraw an area of land from mining location. "[T]he effect of this withdrawal application was to segregate the public land from mining location, and to require the contestees to show that the millsite claims were valid as of the date of the segregation."¹⁵⁹

Where a claimant holds millsites on land that has been withdrawn from mineral entry, "[i]f the claimant cannot show compliance with the law prior to the withdrawal . . . his claim will be declared invalid."¹⁶⁰ In addition to showing compliance with the Mining Law as of the date of withdrawal, a millsite claimant is obligated to show continued compliance or ongoing use and occupancy of the millsite for mining or milling purposes. A millsite claimant "must also show that he has continued in compliance without substantial interruption from that date to the date that validity is determined."¹⁶¹ Furthermore, "if the claimant cannot show by objective criteria that the millsite claim was valid at the time of the withdrawal application, the millsite

157. *United States v. W.E. Polk*, A-30859, at 4, SO-1968-24, Mining (April 17, 1968) (affirming Office of Hearings and Appeals decision declaring millsite claims invalid when use or occupancy at the time of withdrawal consisted of temporary housing in anticipation of future mining and milling); see also *United States v. Werry*, 81 Interior Dec. 44, 48 (1974).

158. *Alaska Copper Co.*, 32 Pub. Lands Dec. 128, 131 (1903) *overruled on other grounds* by *Yankee Mill Site*, 37 Pub. Lands Dec. 674 (1909) (emphasis in original).

159. *United States v. Cuneo*, 15 IBLA 304, 315 (1974).

160. *W.E. Polk*, A-30859, at 4; accord *United States v. Almgren*, 17 IBLA 295, 299 (1974) (finding that "compliance with the mining laws must precede withdrawal.").

161. *Almgren*, 17 IBLA at 299.

may properly be declared invalid.”¹⁶²

The 1872 Mining Law’s millsite provision states: “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 non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode”¹⁶³ Also, “[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.”¹⁶⁴

“[I]n asserting a claim to a mill site in connection with a lode claim, it must be used and occupied for mining or milling purposes. . . . The statute does not seem to contemplate the right to locate a mill site without actually using or occupying the ground.”¹⁶⁵ The Interior Department has stated that “[n]o mill site entry should be allowed unless it is shown that the conditions of the law have been complied with.”¹⁶⁶ GIC cannot show that it has ever used or occupied its millsites for mining or milling purposes, let alone that such activity was taking place on November 2. Since GIC was not using or occupying its millsite claims as of the date of segregation, its millsite claims are invalid. The BLM therefore cannot approve GIC’s Plan of Operations.¹⁶⁷

a. GIC Has Not “Used” Its Millsite Claims for Mining or Milling Purposes

It has long been held that in order for a millsite to be “used . . . for mining or milling purposes” there must be an active mining operation associated with the millsite.¹⁶⁸ The Mining Law’s “express requirement [of use for mining or milling purposes] plainly contemplates a function or utility intimately associated with the removal, handling, or treatment of ore from

162. *Cuneo*, 15 IBLA at 324.

163. 30 U.S.C. § 42 (1994).

164. *Alaska Copper Co.*, 32 Pub. Lands Dec. 128, 131 (1903) *overruled on other grounds by* *Yankee Mill Site*, 37 Pub. Lands Dec. 674 (1909). The Babbitt/Leshy Memorandum stated: “[I]t is important to note that the application for a millsite patent must show present use, by proper means, of each 2 1/2 acre portion of each millsite.” *Supra* note 22, at 4 (citations omitted). Although the Solicitor noted that “the body of law governing the ‘use and occupancy’ of millsites is beyond the scope of this Opinion,” the fundamental requirement for “present use” on the each portion of the millsite claims is clear.

165. *Kershner v. Trinidad Milling & Mining Co.*, 201 P. 1055, 1058 (N.M. 1921).

166. *Hudson Mining Co.*, 14 Pub. Lands Dec. 544 (1892).

167. *Great Basin Mine Watch*, 146 IBLA 248, 256 (1998). Although the IBLA’s discussion in that case focused on mining, and not millsite claims, the bar against Plan approval in the face of invalid claims is clear. Additionally, the Board instructed the BLM in the proper course of action in such a case. “BLM must, indeed, reject the plan of operations and take affirmative steps to invalidate the claim by filing a mining contest.” *Id.* Accordingly, in this case, the BLM should reject GIC’s Plan of Operations and begin the formal process of claim invalidation.

168. *See, e.g., Pine Valley Builders, Inc.*, 103 IBLA 384, 390 (1988) (“[I]f none of the associated mining claims are being operated, the appellant cannot be using the millsites for mining purposes.”).

the vein or lode.”¹⁶⁹ A claimant is not using the land for mining and milling purposes where none of its mining claims are being operated.¹⁷⁰ “The act does not contemplate the performance of conditions subsequent, or the future compliance with the law.”¹⁷¹

Even if a claimant submits a mining plan to one of the federal land management agencies, such an exhibition of intent to mine is not sufficient to demonstrate the use or occupancy contemplated by the statute. In 1872, a claimant could immediately use and occupy federal lands for mining and milling purposes and thus could immediately perfect its millsites. Today, however, statutes such as NEPA, FLPMA, and the National Historic Preservation Act, among others, may prevent immediate use or occupancy of federal lands for mining and milling purposes.¹⁷² Since Congress has not revised the use or occupancy requirement contained in the Mining Law, these subsequent statutes may delay perfection of millsites. There may also be delays caused by other mechanisms that have been put in place to aid the government in regulating the use of federal lands.

Compliance by land management agencies with their responsibilities

169. *Alaska Copper Co.*, 32 Pub. Lands Dec. at 131.

170. *United States v. S.M.P. Mining Co.*, 67 Interior Dec. 141, 144 (1960).

171. *Hudson Mining Co.*, 14 Pub. Lands Dec. 544 (1892). The Interior Department has repeatedly stated that an intention to use a millsite in the future does not meet the statute's requirements and thus does not validate the millsite. *United States v. Swanson*, 93 IBLA 1, 23 (1986) (finding that “[a] claimant’s stated intent or his mere willingness to expend time and effort in developing one or more millsites cannot substitute for objective evidence that the purposes of the millsite law have been accomplished.”); *United States v. W.E. Polk*, A-30859, at 4, SO-1968-24, Mining (April 17, 1968) (holding that “[a] prospective use of public land as a millsite is not enough and a claim that is based only on intended use is invalid.”); *United States v. Wedertz*, 71 Interior Dec. 368, 374 (1964) (affirming the Forest Service’s determination that a mill site was not valid where the claimant could not contend “that anything more than prospecting or preparations for future mining operations [had] been done.”); *United States v. S.M.P. Mining Co.*, 67 Interior Dec. 141, 144 (1960) (finding that mining company’s intention to use the land at some time in the future was not enough to satisfy the statute); *Hard Cash & Other Mill Site Claims*, 34 Pub. Lands Dec. 325, 327 (1905) (finding that “[t]he design to use all of [the mill sites] for the purpose of a reservoir for water, and the building of a reduction works, is not the present active employment of any mining agency upon the land or the direct use of it for milling purposes” (emphasis added)). As noted by the IBLA:

It often happens that the claimant can show past use of the claim for mining or milling purposes or plans to use the claim in the future for such purposes, but these assertions have been held to be insufficient to meet the requirements of the law, and the claim is declared null and void.

Utah Int’l. Inc., 36 IBLA 219, 225 (1978).

172. Indeed, all claims under the mining laws are held subject to the environmental review and protection requirements of federal law. In FLPMA, Congress specifically stated that both the generalized “unnecessary or undue degradation” standard and the specific requirements to protect California Desert Conservation Area lands from “undue impairment” amended the Mining Law of 1872 so as to “impair the rights of any locators or claims under the Act, including, but not limited to, rights of ingress and egress.” 43 U.S.C. § 1732(b) (1994). See also, *Baker v. United States*, 928 F. Supp. 1513 (D. Idaho 1996) (upholding delay in reviewing mining Plan of Operations based on need to undertake environmental review under NEPA and the Endangered Species Act).

under environmental, historic preservation and other laws does not allow millsite claimants to bypass the use or occupancy requirement.¹⁷³ In *United States v. Collord*,¹⁷⁴ the claimants argued that the Forest Service obstructed their attempts to fulfill the statutory requirements. In that case, the Forest Service's decision as to whether claimants could build a road "was delayed by the need to obtain a more detailed mining plan from the claimants and by environmental review and decisionmaking by the Forest Service."¹⁷⁵ In an unpublished decision, the United States District Court for the District of Idaho found that "the Board properly rejected Collords' argument that, in spite of their failure to use or occupy the millsites within the meaning of the statute, the millsites should nevertheless be validated because the Forest Service obstructed their attempts to fulfill the statutory requirements."¹⁷⁶

Thus, a claimant's failure to meet the use or occupancy test is not excused by the fact that the BLM's NEPA and 43 CFR Part 3809 review process has delayed the commencement of activities at the site. In the vast majority of cases, agency decisionmaking and other procedures may cause such a delay. Where statutory or regulatory procedures and requirements do cause delay, it is because the federal government must take the time to discharge its duty to oversee the disposition of the federal lands which it holds in trust for the public. "The paramount ownership being in the government, and it also having a reversionary interest in the possessory right of the locator, clearly it has a valuable estate which it is entitled to protect against . . . unlawful use."¹⁷⁷

Once a millsite claim is staked, before it is used or occupied for mining or milling purposes, a claimant may exclude others from filing competing claims. "[W]hen land is claimed for nonmineral use by a competing claimant, the doctrine of *pedis possessio* has been applied to mill site locations for which the locator's rights have not yet vested by reason of the commencement of improvements."¹⁷⁸ It is only when environmental and other statutory requirements delay use or occupancy and when the United States' government withdraws the claimed lands prior to use or occupancy, that a millsite claim is prevented from becoming valid.

173. An overview of environmental requirements on mining operations located on public lands can be found in LESHY, *supra* note 2, at 183-228.

174. 128 IBLA 266 (1994).

175. *Id.* at 290.

176. *Collord v. United States Dep't of the Interior*, Memorandum Decision and Order, Slip. Op. at 7, Case No. 94-0432-S-BLW (D. Idaho, August 27, 1996) (on file with author).

177. *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1980) (quoting *United States v. Rizenelli*, 182 F. 675, 681 (D. Idaho 1910)).

178. ROCKY MTN. MIN. L. FOUND., AMERICAN LAW OF MINING § 32.06[5] at 32-65 (2d ed. 1993).

b. GIC Has Not "Occupied" Its Millsite Claims for Mining or Milling Purposes

If a claimant cannot show that it is "using" the subject millsite claims under the Mining Law, it can only hope to show that it has "occupied" the claims. The cases strictly interpreting the "use" requirement also dealt with the "occupancy" requirement in the same manner, often using the phrase "use or occupancy" as the focus of the inquiry. However, some cases discuss the occupancy requirement in more detail.

In *United States v. Silver Chief Mining Company*, the claimants intended to use and occupy their millsites for tailings disposal but they had not yet constructed any improvements or disposed of any tailings on the claims at the time of the challenge. The claimants argued that a reclamation plan they had submitted to the state constituted use or occupancy because it evidenced a good faith intent to use or occupy the claims for tailings disposal and because it was a prerequisite to actual use or occupancy.¹⁷⁹ The IBLA rejected this argument and ruled that, absent on-site improvements, a plan for tailings disposal cannot constitute use or occupancy of a millsite claim.¹⁸⁰

In *United States v. Collord*,¹⁸¹ the claimants' activities on the millsites consisted of storing tools and building materials on the site for future construction of a mill and repair of existing cabins, and occasional use of the site for camping when performing sampling and assessment work on the associated mining claims. The United States District Court for the District of Idaho affirmed the IBLA's finding that the claimants had not used the millsites for mining or milling purposes.¹⁸²

However, the court questioned the IBLA's analysis of whether the claimants had occupied the millsites for mining or milling purposes. The IBLA had determined that the claimants had not occupied the millsites for mining or milling purposes, because the claimants had not constructed any new physical improvements on the millsites. The district court noted that the inquiry into whether a claimant is actually occupying a millsite for mining or milling purposes requires the reviewer to ask whether the claimant has shown such occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes.¹⁸³

179. *United States v. Silver Chief Mining Co.*, 40 IBLA 244, 245-46 (1979).

180. *Id.*

181. 128 IBLA 266 (1994).

182. *Collord v. United States Department of the Interior*, Memorandum Decision and Order, Slip. Op. Case No. 94-0432-S-BLW (D. Idaho, August 27, 1996) (on file with author).

183. *Id.* at 9.

The court remanded the case to the IBLA so that the IBLA could make a factual examination as to whether the claimant had exhibited occupancy by improvements or otherwise. However, the court held that the presence or absence of new physical improvements is an "important factor" in determining occupancy.¹⁸⁴ The court also noted that "[w]hile the Board erred in gauging the Collords' activities by the mandatory improvements rule, it does not follow that Collords' millsite claims should have been validated."¹⁸⁵ Thus, the IBLA could have reached the same result, finding no occupancy, even if it had not applied the mandatory improvements rule.¹⁸⁶

For the Imperial Project, unlike the situation in *Collard*, there has not been any physical occupation on any of the millsite claims even remotely associated with mining or milling. Thus, even under that case, GIC's claims fail.

Nothing that has been done, or could have been done, on the claims meets the use or occupancy requirement. For example, the Interior Department has determined that use of a millsite during performance of sampling work for purposes of exploration does not constitute use or occupancy under the Mining Law, and that storage of tools on a millsite might not constitute use or occupancy. In *United States v. Wedertz*, the claimant argued that it was using or occupying the millsite because there were two buildings on the site and because the claimant used the millsite for storage of shingles to repair the buildings and for storage of tools. The Assistant Solicitor noted that "[o]nly the larger building on the mill site has been used in any way and that has been insubstantial—as very infrequent overnight accommodations [for exploration] and as a storage place for some hand tools and supplies."¹⁸⁷

In that case, there had been "no mining of any ore" from the mining claims since the claimant had acquired them, and all of the work done on the claims had been in the nature of exploration or prospecting.¹⁸⁸ It was also important that "[t]he use of the tools was not specified; they may have been used to cut the drainage trench and rebuild the tunnel framework but may have been used as much or more to repair the two buildings."¹⁸⁹ The Assistant Solicitor determined that this occupancy of the millsite was not for

184. *Id.* at 11.

185. *Id.* at 10.

186. *Id.* The court's discomfort with the Board's "new physical improvements" rule was based on a unique factual situation. In that case, the claimants had occupied the existing cabin on the millsite claim, yet had apparently not constructed any new improvements to the cabins. Although the court did not say that such occupancy validated the millsite claim, the court was adverse to requiring new improvements to existing structures as an absolute prerequisite for claim validity.

187. *United States v. Wedertz*, 71 Interior Dec. 368, 372 (1964).

188. *Id.* at 372-73.

189. *Id.* at 372.

mining or milling purposes and affirmed the BLM's decision declaring the millsite null and void.

Therefore, while the storage of tools in an existing structure on a millsite may conceivably constitute occupancy for "use or occupancy," such occupancy of a millsite for prospecting or exploration purposes does not satisfy the statutory requirement that such occupancy be for active mining or milling purposes. "The prospector too has need of a place to live and to keep supplies and equipment. But clearly a prospector is not entitled to claim a mill site."¹⁹⁰ During prospecting or exploration activities, a claimant may perform some work on an associated lode claim, however that work cannot be characterized as mining, or mineral producing, activity. Gathering of samples on lode claims is not "mining activity" as envisioned by the drafters of the statute."¹⁹¹

One possible use or occupancy on the millsite claims at the Imperial Project site would have been for exploration drilling to confirm the lack of valuable mineralization. As such, it would have only been for a few claims as they existed at the time (remember that as late as the start of 1998, all of the current millsite claims were filed as large lode mining claims). In addition, such activity ceased many years ago. In any event, as noted above, such use or occupancy could not have been for mining or milling purposes as required by the Mining Law.¹⁹²

In determining whether a millsite is valid under the Mining Law, the pivotal inquiry is whether the millsite is being used or occupied for mining or milling purposes in connection with some mineral production on the associated lode or placer claim. If an individual is not actually mining the lode claim, then the claimant cannot possibly meet the requirement that: "[s]ome step in or directly connected with the process of *mining* or some feature of *milling* must be performed."¹⁹³ In order to validate a millsite, a claimant's occupancy of that millsite must be directly related to the process of mining the associated lode claim.

190. *Id.* at 373.

191. *United States v. Werry*, 81 Interior Dec. 44, 48-49 (1974).

192. In addition, any roads or other activity that may have existed on the subject claims similarly cannot meet the law's strict requirements. In *Hecla Consol. Mining Co.*, 14 Pub. Lands Dec. 11 (1892), the Interior Department found that neither the building of a tram road, nor the grading of the road bed in preparation for laying the road, were a sufficient use or occupancy to validate a millsite. "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." TERRY S. MALEY, *MINERAL LAW* 399 (6th ed. 1996) (citing *Hales & Symons*, 51 Pub. Lands Dec. 123 (1925); *Rights of Mining Claimants to Access Over Public Lands to Their Claims*, 66 Interior Dec. 361 (1961)). Therefore, GIC cannot argue that road building on any of the millsites would validate them.

193. *Alaska Copper Co.*, 32 Interior Dec. 128, 131 (1903).

In response to these issues raised by mine opponents, GIC submitted a letter to the Interior Solicitor's Office in February, 1999 (the Glamis Letter).¹⁹⁴ GIC argues that its past activities at the site, primarily maintenance of claim stakes, ground water monitoring, and wildlife and other resource reviews, constitute "occupancy" under the millsite provision.¹⁹⁵ Such "uses," however, do not amount to "use or occupation" under the law. At best, these activities are in preparation for future mining. The Interior Department has affirmed the denial of millsite validity when the claimant could not contend "that anything more than prospecting or *preparations for future mining operations* [had] been done."¹⁹⁶ "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 U.S.C. § 42."¹⁹⁷

GIC relied heavily on *United States v. LeFavre* and *United States v. Swanson* to argue that GIC's "good faith" intention to use and occupy the site in the future satisfies the law. This is an incorrect reading of the law. GIC fails to pass the test laid out in these and other cases. Namely, that there be "*present* occupancy of the claim for mining and milling purposes."¹⁹⁸

GIC confuses *present* occupancy and a good faith intent to use the claim for future mining or milling (i.e., the test for occupancy) with *future* occupancy and a similar good faith intent for future mining/milling (the case here). A claimant must show present occupancy on each and every claim, regardless of their intentions for future use. The IBLA, in *United States v. LeFavre*, correctly ruled that the "contestee is required to establish the validity of each one [of the millsite claims] on an individual basis and may not simply assert that they should be treated as a single millsite claim."¹⁹⁹

Thus, even if GIC's field work and studies are viewed as present occupancy, which is not the case, there is nothing in the record which supports a finding of present occupancy on each and every claim. At best, the company may have a smattering of valid claims. In any event, even if the Department

194. Letter from James E. Good, attorney for GIC, to Katherine L. Henry, Associate Solicitor (February 9, 1999) (on file with the author).

195. 30 U.S.C. § 42(a) (1994).

196. *United States v. Wedertz*, 71 Interior Dec. 368, 374 (1964) (emphasis added).

197. *United States v. Osmer*, 76 IBLA 59, 61 (1983). The fact that this case dealt with millsite occupancy in support of patented, rather than unpatented claims, is largely irrelevant since the Mining Law makes no applicable distinction between the two types of claims when determining the validity of millsites.

198. *United States v. LeFavre*, 138 IBLA 289, 295 (1997).

199. *Id.* at 293.

agrees with GIC on occupancy based on the activities noted in the GIC Letter, it should determine exactly on which of the over 200 millsite claims such activities were occurring on November 2, 1998 (the segregation date). Vague reference to unspecified activities at unspecified locations cannot be relied upon to support validity on any claim.

The "activities" relied upon by Glamis fail to meet the present occupancy test. In *Swanson*, as well as other cases supporting millsite occupation, there was no question that there was actual physical milling or related activities occurring prior to the date of withdrawal. For example, in *Swanson*, there was an existing mill with "a replacement value of \$1,500,000."²⁰⁰ There is nothing close to this level of "occupation" at the Imperial site. As the IBLA noted:

With regard to contestees' general assertion that they "need" all of the land within all of their millsite claims, it is sufficient to note that, absent either present use or occupancy of each claim under 30 U.S.C. § 42 (1982), contestees' perceived needs are irrelevant as they have failed to validly appropriate the land within the claims. Since the land has been withdrawn from further location, the possibility of future use or occupancy is equally ineffective to validate these claims *in futuro*. What must be shown is present use or occupancy of each of the claimed millsites.²⁰¹

A "good faith" intent of future use or occupancy is not enough. Thus, the fact that Glamis has submitted a plan of operations to the BLM cannot establish validity, regardless of the earnestness of the company's intentions. As correctly noted in IBLA Judge Burski's concurrence in *United States v. Collord*: "*The question is not whether appellants have an understandable reason for not complying with the law; the question is whether they have complied with the law.*"²⁰²

These requirements have been acknowledged by mining industry commentators. "The government appears willing to allow millsites based on a showing of prospective use coupled with all necessary operating permits and some 'substantial' improvements on the ground."²⁰³ This article goes on to note:

The BLM district office in Nevada takes the following position: (1)

200. *United States v. Swanson*, 93 IBLA 1, 25 (1986).

201. *Id.* at 28.

202. *United States v. Collord*, 128 IBLA 266, 314 (1994) (emphasis added).

203. Richard W. Harris & Richard K. Thompson, *Millsites: Current Law and Unanswered Questions*, 38 ROCKY MTN. MIN. L. FOUND., 12-1, 12-35 (1992).

the company must demonstrate the nonmineral nature of the ground through a suitable program of condemnation drilling; (2) the company must have an approved operating and reclamation plan for its mining and processing activities; and (3) the company must have begun substantial improvements on the ground, such as construction of the tailings dam.²⁰⁴

In this case, GIC has certainly not “begun substantial improvements on the ground,” and does not “have an approved operating and reclamation plan.” Accordingly, all of the millsite claims are invalid as of November 2, 1998. Even if a small number of millsite claims are judged to have present occupancy, the vast majority of the remaining claims are invalid. As noted above, the BLM cannot approve any part of a plan of operations that is associated with invalid claims.²⁰⁵

2. The Mining Law Does Not Allow the Filing of Miniscule Lode Claims To Avoid the Millsite Limits

Even if the millsite claims somehow pass the use or occupancy requirement, GIC’s manipulation of its lode claims just prior to the segregation/withdrawal violates the Mining Law. Faced with the one-to-one mining-to-millsite claim limitation, GIC manipulated its mining claims in September and October of 1998 to multiply its lode claims from 46 to 187.²⁰⁶ This roughly tracks the number of millsite claims needed to cover the heap leach pad, waste rock dumps, processing facilities, etc. While such a tactic may have satisfied the bare number-of-claims ratio, it violated the other inherent limitations in the Mining Law—namely, the total acreage ratio between mining and millsite claims, the discovery-on-every-mining-claim rule, the minimum size required for all lode claims, as well as the location

204. *Id.* at 12-36. The requirement that each and every millsite claim embrace “nonmineral land” raises an interesting issue in this case. It must be remembered that up until early 1998, all of the current millsite claims were located and maintained by GIC as lode claims—clearly not “nonmineral land” according to GIC at the time. GIC abruptly changed its position from arguing that the lands contained “valuable mineral deposits” to a position that the lands were now “nonmineral.” In *United States v. Moorhead*, 59 Interior Dec. 192 (1946), the Department held that a mining claim filed on a millsite claim was an admission that the land was mineralized and declared the millsite claim void. “[T]he reasoning in *Moorhead* would also appear to apply if the mining claim was the senior location.” ROCKY MTN. MIN. L. FOUND., *AMERICAN LAW OF MINING* § 110.03[2][b] (2d ed. 1993). This latter scenario is exactly the case here. Thus, there is a serious doubt as to whether the new millsite claims can overcome the previous admittance by GIC that the land was not “nonmineral.” See also, Harris & Thompson, *supra* note 203, at 12-29 (“the ore body itself gives rise to an ‘inference’ of mineralization under the *Silver Chief* rationale. Outside the ore body, the ground can be sufficiently mineralized to defeat a millsite but not mineralized enough to sustain a lode or placer claim.”). A number of millsites, especially those almost completely surrounded by lode claims, are especially questionable in this regard.

205. See Great Basin Mine Watch, 146 IBLA 248, 256 (1998); Ronald A. Pene, 147 IBLA 153, 158 (1999); *Crown Jewel Mine Decision*, *supra* note 26.

206. See *supra* note 154.

in good faith rule. Further, if GIC's manipulation of its mining claims is allowable under the Mining Law, such a method of location forecloses the option of aggregating a group of claims for purposes of proving the marketability of mining the ore body in question. Even if GIC may aggregate its claims for purposes of proving that mining the ore body will turn a profit, GIC's particular method of locating its claims will likely render several of its claims, whether the very small ones or the large ones, unmarketable and thus invalid for lack of discovery.

As noted earlier, the Mining Law provides that lode claims located after May 10, 1872,

may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode . . . [that n]o claim shall extend more than three hundred feet on each side of the middle of the vein at the surface . . . [and that t]he end lines of each claim shall be parallel to each other."²⁰⁷

Also, "[t]he framers of the statute of 1872 evidently proceeded upon the theory that a claim on a lode . . . would generally take the form of a parallelogram."²⁰⁸ A rectangle or parallelogram with a length of 1500 feet and a width of 600 feet amounts to a total of approximately 20 acres.

In this case, Glamis has attempted to capitalize on one provision of the Mining Law, the ability to file claims less than 1500 feet by 600 feet, to totally nullify another equally valid provision of the same law, the limitation on millsite claim numbers and acreage. Glamis' manipulation of its lode claims to create several lode claims within the same location where there was previously only one contradicts the Mining Law's overall statutory scheme and Congress' intent in creating the lode claim and millsite claim provisions.²⁰⁹ Read as a whole, the lode provision's twenty-acre maximum

207. 30 U.S.C. § 23 (1994).

208. See *supra* note 43.

209. In the *Crown Jewel Decision*, the Interior and Agriculture Departments specifically addressed the potential for manipulation of claims. See *supra* note 26. The decision states that

[o]ne mining claimant has sought to avoid the five mill site acres per mining claim limitation by relocating numerous small lode claims over its existing 20-acre claims, arguing that the Mining Law requires no minimum size for lode claims." However, the Department of the Interior currently is reviewing whether any attempted relocation for the purpose of avoiding the mill site limit might be invalid. *United States v. City and County of San Francisco*, 310 U.S. 16, 28 (1940) ("ingenuity of contractual expression" will not be permitted to thwart Congress's intent to restrict federal land grant); *Leavenworth, Lawrence & Galveston R.R. v. United States*, 92 U.S. 733, 740 (1876) (federal land grants should not be "enlarged by ingenious reasoning"); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (statutes should be interpreted in a manner that avoids rendering any provision of the statute meaningless).

and the millsite provision's five-acre maximum evidence Congress' intent to establish a ratio of roughly one acre of mill site claim for every four acres of lode claim.

a. The Filing of Miniscule Claims Violates the Discovery-On-Every-Claim Rule

The Mining Law states 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."²¹⁰ This explicit language requires that a discovery be made within the boundaries of each and every lode mining claim.²¹¹ This rule applies even in the case where a claimant holds a number of adjacent mining claims as a group.²¹² The Department of the Interior and the federal courts will find a valid discovery:

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.²¹³

This definition of discovery does not allow claimants to speculate as to future market conditions; a valid mining claim must possess a mineral deposit capable of being extracted, processed, and marketed at a profit both at present and at the time of any withdrawal.²¹⁴ Given this clear statutory mandate that a discovery be found within the boundaries of each claim, the IBLA has found that a claimant "must show *as to each claim* that they have found a valuable mineral deposit and that a prudent man would have been justified in the further expenditure of his labor and means with a reasonable prospect

Crown Jewel Mine Decision, *supra* note 26, at 2 n.4.

210. 30 U.S.C. § 23 (1994).

211. See *Gwillim v. Donnellan*, 115 U.S. 45 (1885).

212. See *Lombardo Turquoise Milling & Mining Co. v. Hemanes*, 430 F. Supp. 429 (D. Nev. 1977) *aff'd*, 605 F.2d 562 (9th Cir. 1979) (mem.); *United States ex rel. United States Borax v. Ickes*, 98 F.2d 271, 278 (D.C. Cir. 1938); *United States v. Williamson*, 45 IBLA 264 (1980); *United States v. Stevens*, 14 IBLA 30 (1974); *United States v. Heard*, 18 IBLA 43 (1974); *United States v. Zweifel*, 16 IBLA 74 (1974); *United States v. Forsyth*, 15 IBLA 43, 58 (1974); *United States v. Bunkowski*, 5 IBLA 102 (1972); *United States v. Melluzzo*, 76 Interior Dec. 181 (1969).

213. *United States v. Williams*, 64 IBLA 346, 348 (1982). See also *United States v. Coleman*, 390 U.S. 599 (1968); *Roberts v. Morton*, 549 F.2d 158 (10th Cir. 1977); *Foster v. Seaton*, 271 F.2d 836 (D.D.C. 1959).

214. See *United States v. Alaska Limestone Corp.*, 66 IBLA 316 (1982); *United States v. Bartlett*, 2 IBLA 274 (1971).

of success in developing a valuable mine *on that claim*.²¹⁵

Although the support for requiring a separate marketable discovery on each claim finds ample expression in the Mining Law itself, the IBLA reversed established precedent and all but dropped this requirement beginning in the 1980s. Instead, the Interior Department now allows claimants to aggregate adjacent claims for purposes of proving the marketability of each claim.²¹⁶ None of the cases in which the IBLA has directly applied this 'aggregation' rule have been subject to judicial scrutiny beyond the administrative stages and so the legality of the rule has never been squarely tested in the federal courts.

Given the clear statutory language requiring a discovery "within the limits of the claim located," the aggregation rule does not appear to rest on the firmest of legal foundations.²¹⁷ In fact, several federal courts, including the United States Supreme Court, and the Interior Department itself, had previously held that mining claims may not be grouped together in order to prove a discovery.²¹⁸ In *Baker v. United States*, the Ninth Circuit Court of Appeals stated that "the validity of a claim has always been determined by an inquiry into that particular claim, not by an examination of the individual's other claims."²¹⁹ In reversing an IBLA decision, the *Baker* court disallowed the Interior Department from deciding on the validity of a claim with reference to deposits contained on any other claims. Further, in *Lombardo*

215. *United States v. Melluzzo*, 76 Interior Dec. 181, 189 (1969) (emphasis in original). See also *United States v. Cactus Mines Ltd.*, 79 IBLA 20 (1984); *United States v. Williamson*, 45 IBLA 264 (1980); *United States v. Melluzzo*, 32 IBLA 46 (1977); *United States v. Clifton*, 14 IBLA 146 (1974); *United States v. Gardner*, 14 IBLA 276 (1974); *United States v. Block*, 12 IBLA 393 (1973); *United States v. Stevens*, 14 IBLA 380 (1973); *United States v. Bunkowski*, 5 IBLA 102 (1972); *U.S. v. Chas. Pfizer & Co.*, 76 Interior Dec. 331 (1969).

216. See *In Re Pacific Coast Molybdenum Co.*, 75 IBLA 16 (1983); *Schlosser v. Pierce*, 92 IBLA 109 (1986); *United States v. Foresyth*, 100 IBLA 185 (1987); *United States v. New York Mines, Inc.*, 105 IBLA 171 (1988); *United States v. Collord*, 128 IBLA 266 (1994).

217. See 30 U.S.C. § 23 (1994). In his book, Interior Solicitor John Lesly described this issue as the one that "holds the potential for sinking the ship" of the Mining Law. LESLY, *supra* note 2, at 175:

The ritually invoked need to show discovery on each claim is fraught with peril for those who need to aggregate claims in order to assemble a viable deposit. There is no easy way out of this conundrum; no readily available way to reconcile the unbroken line of precedent with the imperatives of modern mining. . . . A department or court sensitive to the Mining Law's fundamental defects might conclude that enough is enough, and simply apply the often-repeated admonition that a discovery must be shown on each claim.

Id. at 177.

218. See *Gwillim v. Donnellan*, 115 U.S. 45, 50 (1884); *Cole v. Ralph*, 252 U.S. 286, 295 (1920); *Lombardo Turquoise Milling & Mining Co. v. Hemanes*, 430 F. Supp. 429 (D. Nev. 1977) *aff'd*, 605 F.2d 562 (9th Cir. 1979); *United States v. Williamson*, 45 IBLA 264 (1980).

219. *Baker v. United States*, 613 F.2d 224, 229 (9th Cir. 1980). In *Baker*, the Court struck down what it called the "too much" rule. This rule would have allowed the Interior Department to invalidate claims upon proof that the size of the locatable mineral deposit exceeded both the needs of the claimant or the foreseeable needs of the market. See *id.* at 227 n.4.

Turquoise Milling & Mining Co. v. Hemanes, the court stated that:

Each lode claim must be independently supported by a discovery of a valuable mineral within the limits of the location as it is marked on the ground. [citations omitted] In the latter text, the authors stated:

A claimant who holds a number of mining claims as a group must have a discovery on each claim. He cannot establish the validity of one claim merely by showing a valid discovery on a contiguous claim, whether owned by another or by himself, nor is it sufficient to show that all of the claims taken as a group satisfy the requirements of a discovery. Under the prudent man rule, the claimant must show a reasonable prospect of success in developing a valuable mine on each claim. This means that each claim, to be valid, must be capable of being operated at a profit independently of any other claim.²²⁰

Given this established federal court precedent, the aggregation of adjacent claims for purposes of proving a discovery on each claim is not in accord with the Mining Law.²²¹ Applying these holdings to GIC's newly located mining claims, the miniscule size of many of the claims will inevitably result in a deposit which would not be profitable to extract on its own. Thus, GIC would not likely be able to show that each claim is "marketable" as is required and would fail the discovery-on-every-claim requirement, rendering those claims invalid.

b. The Mining Law Does Not Authorize Miniscule Mining Claims

Even if the Interior Department and the courts were to abide by the

220. *Lombardo Turquoise Mining & Milling* 430 F. Supp at 443 (quoting 1 AMERICAN LAW OF MINING § 4.15 at 612-14).

221. This is not to say that miners or mining companies cannot work more than one claim in combination, but that the miner cannot combine claims for the purpose of showing a valid, marketable discovery on each of those claims. See *Jackson v. Roby*, 109 U.S. 440 (1883); *St. Louis Smelting Co. v. Kemp*, 104 U.S. 636 (1882). To the extent these cases intimate that the Mining Law does not require an independently marketable discovery on every claim, the relevant discussion in each is dicta and, as demonstrated, not representative of federal law. At most, these cases may only loosely indicate the historic custom of the mining camps. Although such mining camp custom was intended to be incorporated into the Mining Law, this was so only to the extent consistent with federal law. See *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 714 (D. Utah 1965); *Jupiter Mining Co. v. Bodie Consol. Mining Co.*, 11 F. 666, 672 (C.C.D. Cal. 1881). For brief discussion of this requirement, sometimes termed the "independent mine" requirement, see Rodney D. Knudson & Harold G. Morris, *Locating, Maintaining, and Patenting Groups or Large Blocks of Mining Claims*, 26 ROCKY MTN. MIN. L. INST. 517, 620 (1980); Jerry L. Haggard & J. Stanton Curry, *Recent Developments in the Law of Discovery*, 30 ROCKY MTN. MIN. L. INST. § 8.02[1][d][vii] (1984).

dubious claim aggregation policy, many of GIC's claims are likely invalid due to their miniscule size. The Mining Law's language, the meaning given this language by the Interior Department and legal commentators, as well as Congress' intent when passing the Law, all weigh strongly against allowing locators to stake mining claims as small as has been done by GIC in this case.

The Mining Law states that, as to the size of lode mining claims located after the passage of the Act:

[A] mining claim may equal but shall not exceed, one thousand five hundred feet in length along the vein or lode No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, *nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May 1872 render such limitation necessary.*²²²

Thus, based on the Law's language disallowing any state or local regulation from limiting a mining claim to less than fifty feet wide, Congress rejected the idea that claims of a smaller size could be located under the Mining Law. Further, as demonstrated by the emphasized portion quoted above, Congress intended to allow such small mining claims only where absolutely necessary to protect mining claims in existence as of 1872. This narrow exception should not allow for mining claims less than fifty feet wide when merely convenient to manipulate a set of claims to gain access to lands outside the lode claim and millsite acreage limitations contained in the Law.

In locating its claims in artificially small sizes, GIC is taking advantage of the language in the Mining Law providing that lode claims "may equal, but shall not exceed, one thousand five hundred feet in length . . . [nor] extend more than three hundred feet on each side of the middle of the vein" ²²³ The support for such a strategy no doubt rests on an interpretation of the plain meaning of the statute to set a maximum size for lode claims, but not a minimum size. In precisely the same manner, however, Congress also required "the discovery of a vein or lode *within the limits of the claim located.*" ²²⁴ Thus, if the plain language of the statute is to be abided by, ultra-small claims may be allowed, but only if the claimant can show an independently valid discovery within the limits of that claim. The statute cannot be interpreted so as to allow *both* the location of miniscule claims and claim aggregation. Such an interpretation is not allowed, as it would completely

222. 30 U.S.C. § 23 (1994) (emphasis added).

223. *Id.*

224. *Id.* (emphasis added).

eviscerate the basic legal strictures inherent in the Law, namely, the discovery-on-every-claim requirement and the millsite number and acreage limitations.

That the Mining Law does not allow claimants to locate miniscule claims over large deposits is further demonstrated by the meaning given to the Mining Law's language by the Interior Department and legal commentators. One of the Department's first rulings on the Mining Law, specifically entitled *Locations When a Vein Exceeds Fifteen Hundred Feet in Length*, stated that: "If a lode or vein three thousand feet in length is discovered, two locations may be made, each of 1500 feet, thereon."²²⁵ Thus, in the case of a large disseminated deposit, one location should be made—two locations if the length is longer than 1,500 feet but less than 3,000 feet.

The 1873 Department decision clearly shows that mining claimants must maximize, not minimize, the 1500/600 foot rule when covering large, disseminated ore deposits.²²⁶ Neither the Department nor the courts have ever recognized the right to divide a continuous 1,500 foot (or 3,000 foot) deposit into miniscule claims.²²⁷ This interpretation of the 1872 Law by those charged with its immediate implementation deserves great weight.

Such are some of the rulings and decisions of the Land Department, made shortly after the mineral land laws became part of the public land system, and by the officers of the government charged with their administration; and as contemporaneous and uniform interpretation, they are entitled to great weight.²²⁸

225. Decision of Acting Commissioner, June 17th, 1873, *in*, COPP'S U.S. MINING DECISIONS, 207 [hereinafter *Locations*].

226. A claimant could credibly argue that for deposits less than 1,500 feet long, it would still be entitled to a five acre millsite if it needed all five acres. However, there is no support for an argument that the claimant is entitled to millsite claims *ad infinitum* if that deposit is artificially divided into a multitude of miniscule lode claims.

227. When Congress enacted the 1872 Mining Law, one design of the statute was to codify the customs and practices of location as then existed within the mining camps throughout the west, to the extent not inconsistent with federal law. *See Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 714 (D. Utah 1965); *Jupiter Mining Co. v. Bodie Consol. Mining Co.*, 11 F. 666, 672 (C.C.Cal. 1881); *See also* COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 422 (3d ed. 1993); WILKINSON, *supra* note 3, at 43. The fact that GIC's novel tactic of splitting up a claim into several tiny claims has never been encountered shows that such a method of location has not been common, nor even existent, in the American mining industry since its beginnings in the mid-1800s. The applicable custom for locating claims over a large deposit was set forth in the 1873 Interior decision entitled *Locations*, *supra* note 225. This decision clearly shows that the custom was to maximize claim size when covering large deposits. Thus, because the location of artificially small claims was not only never part of the mining camp custom or practice but also entirely contrary to those customs, it is neither contemplated nor acceptable under the Mining Law. *See Dent v. Alaska*, 177 F.2d 8 at 11 (9th Cir. 1949) (stating that "miners are without authority . . . to expand or enlarge a right or privilege granted by Congress, or to create rights not granted.").

228. *Pacific Coast Marble*, 25 Pub. Lands Dec. 233, 239 (1897). The Supreme Court has further noted

In essence, by minimizing its location boundaries, GIC is arguing that it has discovered separate, individual deposits. Obviously, that contradicts its assertions to the California BLM that it has discovered one large disseminated deposit (or three large deposits to be excavated in three proposed mine pits). A claimant cannot have it both ways. Either it has discovered a disseminated deposit and the "maximizing" rule applies, or it has discovered 187 individual deposits. In the latter case, it would be extremely difficult to prove that each of those claims individually contained valuable mineral deposits.²²⁹

The latter situation is nonsensical. In any event, since GIC stridently maintains that it has discovered a large disseminated deposit, the former situation applies. Thus, the Department's rule requiring maximization of claim boundaries to cover large deposits is determinative. Overall, the filing of a multitude of claims not only eviscerates Congress' intent to limit the total number of millsite claims and acres, it nullifies the basic discovery requirement for each claim.

The "maximization" rule is also supported by Department decisions holding that "[t]he endlines, required in all cases to be parallel to each other, are important features of a vein or lode location, and the statute clearly

that: "Particularly in this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

229. The Supreme Court has endorsed at least two tests for determining whether a claim qualifies as a "valuable mineral deposit." Under the "marketability" test, it must be shown that the mineral can be "extracted, removed and marketed at a profit." *United States v. Coleman*, 390 U.S. 599, 600 (1968). According to the "prudent-person" test, "the discovered deposits must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labors and means, with a reasonable prospect of success, in developing a valuable mine." *Id.* at 602. The Court has held that profitability is "an important consideration in applying the prudent-man test and the marketability test," and noted that "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." *Id.* at 602-03.

The Department of the Interior is the agency charged with formally determining whether an applicant has discovered a valuable mineral deposit. *Clouser v. Espy*, 42 F.3d 1522, 1529 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 2577 (1995), *and reh'g. denied*, 116 S.Ct. 18 (1995). That agency has indicated that the costs of compliance with environmental requirements are factored into the balance when the agency makes a validity determination. *See Great Basin Mine Watch*, 146 IBLA 248, 256 (1998).

To the extent federal, state, or local law requires that anti-pollution devices or other environmental safeguards be installed and maintained as part of the processes of extraction and beneficiation of the minerals contained in the claims, the expenditures made necessary by such protective measures may properly be considered in connection with the issue of marketability, as part of the costs in determining whether appellant has a reasonable prospect of success in developing a valuable mine within the claims.

United States v. Kosanke Sand Corp., 80 IBLA 538, 546-47 (1973).

contemplates that such lines shall have substantial existence in fact.”²³⁰ When GIC multiplied its lode claims in September and October of 1998, it took approximately 46 twenty-acre lode claims and parsed them down to create 187 lode claims.²³¹ Some end lines on GIC’s newly located claims are just twenty feet across.²³² At least 15 claims have endlines less than fifty feet across.²³³ Where miners locate claims with miniscule end lines, the Interior Department has said that such lines “are severally obnoxious to the principle that end lines are required to be of a substantial nature . . . [and, as such,] are not end lines within the intendment of the law.”²³⁴ The end lines of GIC’s ultra-small lode claims do not have a substantial existence in fact, as contemplated by the statute.²³⁵

In addition to the meaning given to the language of the Mining Law by the Department, several legal commentators have also recognized the restriction on artificially miniscule claims. As far back as 1880, legal commentators had declared that “[t]he [Mining Law] shows that [a lode claim] is a surface parallelogram, *not less than fifty feet in width*, which must be located.”²³⁶ Further, it has been said that “[t]he [Mining Law] contemplates an ideal lode claim which is a rectangle of 1500 by 600 feet laid out along the course of the vein located with the centerline corresponding to the vein”²³⁷ In discussing the practice of “blanketing” an area with claims,²³⁸ mining industry commentators state that

[w]hen a group of lode mining claims is located as a block, the goal

230. Jack Pot Lode Mining Claim, 34 Pub. Lands Dec. 470, 471 (1906); *See also* Belligerent and Other Lode Mining Claims, 35 Pub. Lands Dec. 22, 25 (1906).

231. *Supra* note 154.

232. *Id.*

233. *Id.*

234. *Belligerent*, 35 Pub. Lands Dec. at 25.

235. Indeed, any claims that are less than 50 feet across are too small since that width represents “twenty-five feet on each side of the middle of the vein at the surface.” 30 U.S.C. § 23. This provision demonstrates the Mining Law’s intent that a lode claim follow along the length of a mineral vein. A fifty foot end line would essentially mean that the width of the vein is practically non-existent. Given the maximization rule, the law contemplates that end lines approaching 50 feet could only be located only on a deposit with an extremely narrow vein—certainly not the case for a disseminated, and low grade, deposit such as Imperial.

236. EDWARD P. WEEKS, A COMMENTARY OF THE MINING LEGISLATION OF CONGRESS § 74a, at 434 (2d ed. 1880) (emphasis added).

237. 2 ROCKY MTN. MIN. L. FOUND., AMERICAN LAW OF MINING § 32.03[1][a], p.32-16, (2d ed. 1998).

238. “Blanketing” an area with claims is when a claimant, suspecting that an entire area may contain valuable deposits, and afraid that another claimant may invade the area, locates multiple claims covering the entire area. This process became widespread after World War II with the advent of regional exploration. Mining companies would conduct such exploration by aerial surveys and other reconnaissance studies, followed by deep drilling on a systematic basis over an entire geologic basin which may extend for miles in each direction. Although the claimant would have to make proof of discovery in order to go to patent, this tactic effectively preserves the claimant’s right to any deposits in the covered area. *See* 2 ROCKY MTN. MIN. L. FOUND., AMERICAN LAW OF MINING § 32.03[3][b] (2d. ed. 1998).

is to establish claims with the maximum allowable dimensions of 1500 feet in length and 600 feet in width, and to locate them in a grid pattern end to end and side by side so as to appropriate every part of a large target area."²³⁹

Thus, it is apparent that the accepted interpretation of the 1872 Mining Law, both then and now, includes a requirement that claimants maximize claims, especially when covering a large, disseminated deposit as GIC has done.

Apart from the meaning given to the language of the Mining Law by the Department and legal commentators, the congressional intent behind the 1872 Mining Law also shows the invalidity of miniscule claims. The size constraints in the 1872 Law replaced the 1866 Act's allowance for location of *any* size claim. "[T]he legislation of 1866 provides that claims existing at the time of that legislation might be patented upon proper proof, no matter what their extent, how large *or how small*."²⁴⁰ The 1872 Act eliminated the ability to file claims of any size and of any shape. Thus, given this important change made in the 1872 Law, the intent of Congress was to require extensive regularity in the size of mining claims located after its passage. This intended regularity included a requirement that all claims have endlines in excess of fifty feet.²⁴¹

In addition to requiring a minimum claim size, Congress also intended to limit the overall number of acres a claimant could acquire under the Mining Law. These limitations came in the form of the lode claim provision and the millsite provision.²⁴² If a claimant is able to locate mining claims encompassing infinitely small amounts of land and aggregate those claims, such manipulation renders the express limitations on millsite claim numbers and acreage meaningless. This would open up vast amounts of nonmineral millsite land for acquisition—certainly not what Congress intended when it placed strict limitations on nonmineral land use and acquisition in 1872.²⁴³

239. *Id.* (emphasis added). See also, Knudson & Morris, *supra* note 221, at 534-50 (demonstrating mining industry custom to maximize size of claim when covering large deposit areas).

240. CONG. GLOBE, 42d Cong., 2d sess. 535 (1872) (emphasis added).

241. See 30 U.S.C. § 23 (1994). See also *supra* notes 235-236 and accompanying text.

242. 30 U.S.C. §§ 23, 42 (1994).

243. It is true that one of the stated purposes of the Mining Law was to open up the public lands for mineral exploration and encourage mining. See *Maher v. United States*, 56 F.3d 1039, 1042 (9th Cir. 1995) (citing ROCKY MTN. MIN. L. FOUND., *AMERICAN LAW OF MINING* § 4.10 (2d ed. 1994)). This policy was given effect by the statute in its codification of the then-existing local customs in the mining camps. See *supra* note 227. Thus, this stated purpose does not grant free reign to interpret the Mining Law to accord with any newly recognized desire of modern day miners. To do so would fail to give effect to the discovery-on-every-claim rule and the millsite limits. As the Supreme Court has stated, "[s]tatutes must be interpreted, if possible, to give each word some operative effect." *Walters v. Metropolitan Educ. Enter.*, 117 S. Ct. 660, 664 (1997). *Accord*, *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Further, although the purpose of the statute may have been to encourage mining on the public lands, "a court is not free to disregard require-

Clearly, that cannot be what Congress wanted when it explicitly recognized the difference between mining and millsite claims—and the effect of such difference on the appropriation of the public's land.²⁴⁴

Given the express language of the Mining Law itself, the Department of the Interior's and legal commentators' interpretation of this language, as well as the evidenced congressional intent, the location of miniscule claims is not consistent with the Law. Even if the location of miniscule claims is allowed in special circumstances where a mineral vein is less than fifty feet wide, where the claimant (such as GIC) locates claims covering a large disseminated deposit, the "maximization" rule applies. Thus, at a minimum, the Interior Department should inform Glamis that any claim with less than a fifty foot end line is *per se* invalid.

Also, the legality of any claim less than twenty acres (except on the edge of a disseminated deposit) is seriously in doubt. Since the project site is now withdrawn from mineral entry, the invalidity of any claim covering the ore body would likely result in serious consequences for the company. This would be especially true if an invalid claim was centrally located in such a position that would make it impractical for open pit mining to occur. In such a case, the Project would have to undergo substantial revision to avoid disturbing these areas. As confirmed by the *Great Basin Mine Watch* line of cases and the *Crown Jewel Mine Decision*, invalid claims cannot form the basis for approval of a plan of operations.²⁴⁵ Based on the claim situation in this case, the Plan must therefore be denied.²⁴⁶

ments [of a statute] simply because it considers them redundant or unsuited to achieving the general purpose [of that statute] in a particular case." *IRS v. Gordon*, 391 U.S. 83, 93 (1968). Admittedly, such an interpretation may work a hardship on modern day mining of large, low-grade, disseminated deposits, but this problem is neither for the administrative agencies nor the judiciary to remedy. *United States v. Smith*, 740 F.2d 734, 738 (9th Cir. 1984) (holding that the federal courts do not possess "a license to rewrite [a] statute, for 'our problem is to construe what Congress has written. After all, Congress expresses its intent in words. It is for [the federal courts] to ascertain—neither to add nor subtract, neither to delete nor to distort.'"). Any such change in the meaning of the Law must come from Congress alone.

244. Interpreting the lode claim provision of the Mining Law to eviscerate the millsite provision violates accepted canons of statutory construction and cannot be upheld. *Mackey v. Lanier Collection Agency and Serv.*, 486 U.S. 825, 837 (1988) (a statute should not be interpreted in a manner that renders a portion of the statute superfluous); *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (statutes must be interpreted so as not to render any part inoperative).

245. See *supra* Sections II A, II B.

246. The fact that some of GIC's errors are just now being realized instead of when the operation was first proposed is largely irrelevant and cannot be used to override BLM's duty to deny the Plan. As the IBLA recently reiterated

it is ultimately the responsibility of those seeking to assert rights to land to correctly ascertain the true status of the land on which they desire to locate mining claims. This is a responsibility which they may not shift to BLM. Moreover, while it is unfortunate that BLM did not advise the [claimants] of the location problem with these two claims sooner, we must point out that the applicable regulation [for mining and

c. The Realities of Low-Grade Deposits Preclude Claim Aggregation

When manipulating its mining claims as it did, GIC apparently expected that all of the claims could be aggregated for purposes of proving a marketable discovery on every claim. Although the IBLA has allowed aggregation of claims in the past, as discussed above, this agency practice has never been squarely tested in the federal courts.²⁴⁷ Even if this practice is legal in some contexts, however, it cannot apply to the situation currently facing Glamis or other claimants similarly situated.

The IBLA cases in which the "aggregation" rule has been employed demonstrate the principle that a claimant may aggregate claims only where the location has been made both in good faith and maximizing the size of the claims. A principal IBLA decision allowing aggregation of mining claims for the purposes of proving a discovery on every claim is *Schlosser v. Pierce*.²⁴⁸ In *Schlosser*, the Board was presented, inter alia, with a question as to the validity of two groups of eight contiguous 20-acre claims containing bentonite, a valuable mineral under the Mining Law.²⁴⁹ The Board ultimately held that the claimant could aggregate both sets of claims, and based on such aggregation, held both sets to contain marketable discoveries.²⁵⁰ In so deciding, the Board relied in part on affidavits submitted by two BLM employees with responsibility for administering the 1872 Mining Law, both asserting that claim aggregation was common practice.²⁵¹ These affidavits,

millsite claims] expressly advises claimants that[.]

[f]ailure of the government to notify an owner upon his filing or recordation of a claim or site . . . that such claim or site is . . . otherwise void for failure to comply with Federal or State law or regulation shall not prevent the government from later challenging the validity of or declaring void such claim or site in accordance with due process of law.

Jesse R. Collins, 139 IBLA 392, 393 (1997) (citations omitted). See also, *Crown Jewel Mine Decision*, *supra* note 26, at 5 ("We understand your concern that these issues are being raised relatively late in the process of considering your plan of operations. Nevertheless, the limitations the Mining Law places on mining claims and mill sites have long been understood. In these circumstances, we have no choice but to enforce the law.").

247. See *supra* notes 217-224 and accompanying text.

248. 92 IBLA 109 (1986).

249. See *id.* at 111. Although the claims at issue in *Schlosser* were placer claims, the same discovery requirement applies to lode claims. See *id.* at 122.

250. See *id.* at 134.

251. See *id.* at 133-34. In allowing aggregation for these claims containing bentonite, the Board also distinguished between cases dealing with mining claims containing building stone as opposed to other valuable minerals. See *id.* at 221. In this way, the Board escaped the precedential control of those cases disallowing aggregation with building stone claims. See *United States v. Gardner*, 81 Interior Dec. 58 (1974); *United States v. Bunkowski*, 79 Interior Dec. 43 (1972); *United States v. Chas. Pfizer & Co.*, 76 Interior Dec. 331 (1969); *United States v. Melluzzo*, 76 Interior Dec. 181 (1969) *modified*, 77 Interior Dec. 172 (1970), *aff'd sub nom. WJM Mining & Dev. Co. v. Morton*, Civil No. 70-679 (D. Ariz. 1971). Without discussion, the Board based this distinction on the statutory requirement that each location for building stone be chiefly valuable for building stone. See 30 U.S.C. § 161 (1994). The Board's holding would thus allow aggregation with respect to all locatable deposits except building stone. This distinc-

however, dealt explicitly with groups of lode claims possessing an average of between 14.12 and 20.21 acres per claim.²⁵² Further, the Board expressed concern over the fact that “[f]ew, if any, mining claimants can demonstrate an economically viable mine within the confines of a 20-acre claim where large low-grade deposits are involved.”²⁵³ Thus, the Board in *Schlosser* embraced aggregation in the context of low-grade deposits only because the claimant had done everything in its power (that is, staked the largest claim possible) to create a profitable mine on each claim, and this was still insufficient.²⁵⁴

In GIC’s case, the company has not done everything in its power to create a profitable mine on each claim. In fact, the company has practically gone through pains to ensure that few of its individual claims could possibly support a marketable mine. These efforts were not made in the face of some legitimate condition or event necessitating the location of small claims, but rather in a deliberate attempt to sidestep the acreage limitations inherent in the Mining Law. As such, the *Schlosser* rationale for allowing aggregation does not apply in GIC’s case or any other case where a locator artificially splits its claims up into smaller sizes than the law or legitimate conditions allow. Thus, for any locations which do not maximize the size of the claim, the claimant should have to prove the viability of an independently marketable deposit on each claim.²⁵⁵

Even if the aggregation rule does apply to GIC’s claims, which, as demonstrated above is of questionable legality, several of the claims may still not be marketable under IBLA’s stated test. The IBLA has held that even when the “aggregation” rule applies, “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

tion does not comport with holdings of both the Interior Department and several federal courts. The Interior Department has often held that a discovery must be shown on every claim for valuable minerals, even if part of a group of claims. See *United States v. Cactus Mines Ltd.*, 79 IBLA 20, 29 (1984) (gold and silver); *United States v. Williamson*, 87 Interior Dec. 34, 42 (1980) (lump pumice); *United States v. Heard*, 18 IBLA 43, 46 (1974) (gold); *United States v. Zweifel*, 80 Interior Dec. 323 (1973) (alumina); *United States v. Clifton*, 14 IBLA 146, 150 (1974) (copper); *United States v. Independent Quick Silver Co.*, 72 Interior Dec. 367, 384-85 (1965) (cinnabar); *Ainsworth v. Bex*, 53 Interior Dec. 382, 385 (1931) (copper/lead). Further, in *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966), *overruled on other grounds*, 390 U.S. 599 (1969), the Ninth Circuit Court of Appeals specifically stated that “[w]e perceive no reason for a distinction between a placer claim allegedly for gold bearing sand and a placer claim for building stone with respect to the requirements for proof of a valuable mineral.”

252. See *Schlosser*, 92 IBLA at 133-34.

253. *Id.*

254. This is also the case with other IBLA decisions allowing aggregation. For example, in *In Re Pacific Coast Molybdenum Co.*, 75 IBLA 16 (1983), cited by *Schlosser* as authority for the ‘aggregation’ rule, there were 32 lode claims encompassing 647,118 acres, averaging 20.22 acres per claim. This is approximately the acreage contained in a lode claim measuring 1500 by 600 feet (20.66 acres).

255. The burden of proof in a claim validity contest ultimately falls on the claimant. See *supra* note 82.

a proportionate share of the development and capital costs attributable to the combined operation.”²⁵⁶ According to the analysis in *Collord*, the “aggregation” rule applies so as to require that each claim be profitable on a pro-rata basis.²⁵⁷ This test requires that the dollar return gained on each ton of min-

256. *United States v. Collord*, 128 IBLA 266, 287-88 (1994). This test applies, however, only after the claimant has established both that valuable mineral deposits actually exist on the claims (i.e. mineral concentration above the cut-off grade) and after the claimant has established that the overall operation, including all of the claims in a group, will be profitable. See *United States v. Feezor*, 130 IBLA 146 (1994) (invalidating seven claims; five for lack of evidence supporting the existence of a valuable mineral deposit and two because the claimant failed to carry its burden of showing that the combined operation had a ‘reasonable likelihood’ of producing a paying mine). See also *United States v. New Jersey Zinc Co.*, 74 Interior Dec. 191 (1967) (finding that entire operation would not be marketable as a whole obviated need to examine marketability on claim by claim basis); *United States v. Denison*, 76 Interior Dec. 223, 243 (1969).

257. *Collord*, 128 IBLA at 287-88. In his concurrence, Administrative Judge Burski detailed the meaning of the test for discovery employed by the majority. In so doing, Judge Burski explained that:

Under [the “pro-rata” approach], one first determines the unit value of each deposit within each mining claim and then subtracts from this figure the unit cost of production. Thus, by way of example, if there are three claims (A, B, and C) containing mineralization with a unit value of \$350, \$250, and \$100 per ton, respectively, a determination that the unit cost of production was \$175 per ton would result in a finding that claim C is invalid. In effect, costs are apportioned to all claims based on the mineralized tonnage presumed to exist thereon and those for which the apportioned cost of production exceeds the value of the mineralization will be deemed invalid.

Id. at 302. The dissent in *Collord* endorsed a different approach. Judge Burski called this test the ‘carrier’ method of cost allocation and described it in his concurrence as well:

Under this approach, once it is shown that either a single claim or a subgroup of the claims in the claim group can absorb or “carry” all the infrastructure costs (roads, tunnels, millsites, etc.) of claim development, other claims must merely show that they can recover their direct mining costs in order to be deemed valid. This analysis proceeds on the assumption that since the general infrastructure costs would be incurred in the development of the carrier claim or group of claims, regardless of whether or not other claims were developed, the profitability of those latter claims may be determined without reference to any of the infrastructure costs expended in developing the initial claim or claims. In effect, the one claim or subgroup of claims “carries” the others.

Id. at 302-03. Judge Burski further stated that the only IBLA precedent which could even arguably support the “carrier” approach was *United States v. Mannix*:

In that case, the Forest Service argued, *inter alia*, that, as a precondition to establishing the validity to two claims, the claimants were required to show that the successful mining of the mineral deposit therein disclosed would cover the costs of the construction of an extensive underground tunnel system already in existence on the claims. In rejecting this argument, the Board declared that “[a]bsent a withdrawal, if the mineral material may now be 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.”

Id. at 303 (quoting *United States v. Mannix*, 50 IBLA 110, 119 (1980)). Judge Burski explained that this test would only work absent a withdrawal because “nothing would prevent the appellants from relocating new claims . . . [which] would not be burdened with the necessity of recouping past expenditures made under prior locations.” *Id.* at 304. On the facts of *Collord*, Judge Burski determined that even if applicable, the claimant there would fail the “carrier” test because “in the instant case, none of the expenditures have been made whereas in *Mannix* they had occurred prior to the hearing. Moreover, in *Mannix* there was no withdrawal of the land whereas in the instant case, the land has been withdrawn from mineral

eral ore extracted from each individual claim must exceed the cost per ton (including its portion of any and all capital costs and day to day operational costs) associated with extracting that ore from each individual claim.²⁵⁸

As demonstrated by the *Collord* majority's "pro-rata" test, there are two distinct types of costs involved when mining a large block of claims—both capital and development costs and those costs associated with mining a particular deposit. Only the development and capital costs should be apportioned to each claim based on the proportionate number of tons of mineral ore extracted from that claim. These costs include those expenses associated with the construction of a mill for all the ore, environmental compliance costs, or other costs not associated with the actual mining, transporting, milling, or marketing of the mineral ore. These apportioned costs are then added to the claim-specific costs associated with the actual mining, transporting, milling, and marketing of each particular claim's deposit.

The total cost per claim is then compared with the revenue from that particular claim. If the total cost is higher than the revenue, the claim is invalid. Each of GIC's 187 lode claims must pass this test to be valid.

In GIC's case, the company must extract large amounts of overburden, or waste rock, from each claim in order to reach the mineral ore.²⁵⁹ The costs of mining one particular claim includes the costs of removing the waste rock from that particular claim because that ore is not accessible without first removing that waste rock. Thus, for instance, if one claim has the same amount of ore with the same concentration of minerals as another claim, but four times the waste rock overlying it, the costs to mine that particular claim will be approximately four times more expensive. The extraction of waste

entry." *Id.* at 304. The situation facing the claimant in *Collord* is, in this respect, identical to that facing GIC. GIC has not yet developed any infrastructure and the land has been withdrawn from mineral entry. Thus, even if allowable, the "carrier" test could not apply to GIC either.

Judge Burski summarized his discussion on the forgoing matters as follows:

I would conclude that, in those situations in which a mining claimant has already constructed the infrastructure necessary to mine multiple claims and can show that these costs will be recovered from either a single claim or a subgroup of claims, the claimant need not establish that the pro rata costs of these workings can be borne by the production from other claims. So long as these latter claims can show a profit over their operating costs, they exhibit the *present* value required for a valid mining claim. *Where, however, as in the instant case, the infrastructure expenditures have not yet been made, a claimant can show, as a present fact, the value of each claim only by establishing that each claim can cover both the direct costs of mining it and its pro rata share of anticipated development and infrastructure costs. Barring such a showing, the claim cannot be said to contain a valuable mineral deposit within the meaning of the mining laws.*

Id. at 305 (emphasis added).

258. *Id.*

259. See *Imperial Mine DEIS*, *supra* note 151. GIC's internet web site, www.glamis.com, also discusses the amount of waste rock to be produced at the site.

rock is not considered an apportioned capital cost because those costs are due to actual mining activities and occur only on that claim.

Thus, for each one of GIC's 187 claims, the company must prove that enough valuable mineral exists under each and every claim to generate enough profits to exceed the costs of extracting the overburden on each individual claim, extracting the mineral ore on that claim, and all processing, transporting, and marketing costs associated with developing that ore. In addition to these claim specific costs, the returns from each claim must also exceed the per ton proportionate share of all the general capital and development costs associated with the entire project. Given the nature of GIC's proposed open pit mine operation, if one claim happens to have more waste rock associated with it and less valuable mineral ore, or even a less concentrated ore, that claim may run a high risk of being found unable to support both the costs associated with mining that claim and its pro-rata share of the capital and development costs.²⁶⁰ Any of GIC's claims which fail to cover these combined costs must be invalidated as lacking a valid discovery.²⁶¹

d. Overt Claim Manipulation Violates the "Good Faith" Requirement in the Mining Law

260. Many of GIC's larger claims are on the edge of their proposed pit and extend outward, likely only touching the periphery of the ore body. Thus, it is safe to assume that much of the material extracted from these claims will be waste rock having no returns associated with it. If so, this probably leaves these claims, which are extremely important to the whole operation by virtue of their locale, without enough mineral ore to cover costs, rendering them invalid. On the other hand, the smallest of GIC's claims may not possess enough mineral ore to make any substantial return at all and may not be able to cover their share of the costs either. GIC has located these smallest claims in the middle of the proposed open pits. See Map entitled "Imperial Project, Lode Mining Claims and Mill Sites, December 9, 1988," available from the BLM EL Centro, California, Resource Area. Thus, these claims are equally important to the combined operation and should even one be found invalid, the entire operation would require substantial revision of the project to avoid disturbing these areas.

261. It is settled law that each claim must have an individual discovery point and that claims cannot "share" discovery points. See *Belk v. Meagher*, 104 U.S. 279, 284 (1881); see also, 2 ROCKY MTN. MIN. L. FOUND., AMERICAN LAW OF MINING § 35.09[2][a], at 35-23 (2d. ed. 1998). A discovery on one claim cannot support a discovery on another. As the Supreme Court has stated: "[a] discovery without the limits of the claim, no matter what its proximity [to a valuable mineral deposit], does not suffice." *Waskey v. Hammer*, 223 U.S. 85, 91 (1912). The discovery of a valuable mineral deposit on one claim will not support the rights to another claim or group of claims even though the claims may be contiguous. See *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 714 (D. Utah 1965). Due to the extremely small size of many of the claims, BLM may attempt to use statistical methods to assume a discovery on a claim that does not have a physical exposure of a valuable mineral deposit within the limits of that claim. BLM may argue that it is not the physical exposure of the mineral on the claim that counts but rather the "block of ore" that is found on one claim that extends to the other. This practice is not supported by the Mining Law. In this case, due to the miniscule claims, as well as the many overlapping claims, GIC or BLM may argue that mineralogical extrapolation from one claim to another is allowed by the Law. It is not. See *United States v. Feezor*, 90 Interior Dec. 262 (1983) (affirming the fact that "geologic inference may not be relied upon to establish the existence of a mineral deposit."). Such data manipulation should especially not be allowed when the claim boundaries are artificially arranged, not to follow the lode under the Law, but to avoid the millsite limit.

Even if GIC can somehow prove a valid discovery on each of its 187 mining claims, its manipulation in its location of these claims violates the good faith requirement inherent in the Mining Law and may render these claims invalid. Although the language of the Mining Law nowhere specifically includes a requirement of good faith in the location of claims, courts have consistently and regularly read one in.²⁶² In enforcing this requirement, courts will invalidate claims which have been located absent good faith.²⁶³ Further, "even if a discovery can be shown to exist, proof of bad faith can invalidate a claim"²⁶⁴

"Good faith" has been defined as "honesty of purpose and absence of intent to defraud."²⁶⁵ Further, courts have found that "[g]ood faith also necessarily involves an honest intention to abstain from taking any unconscionable advantage of another even through the forms or technicalities of law."²⁶⁶ The good faith requirement also embodies a "public policy against breaches of the peace, monopolization and speculation with respect to mineral rights on the public domain"²⁶⁷ In adhering to this policy, the IBLA has invalidated mining claims which were located in a deliberate effort to obtain excess acreage on the public domain.²⁶⁸

In GIC's case, there is little doubt that its relocation of claims was intended for the sole purpose of avoiding the acreage limitations contained in the lode claim and millsite provisions of the Mining Law. This intention is made apparent by the miniscule sizes of so many of the claims. Given this situation, it becomes clear that GIC (and any other claimant who artificially divides and multiplies its mining claims) has violated the good faith standard by taking unconscionable advantage of the technicalities of the Mining Law to the detriment of the owners of the public land, the American public.²⁶⁹ Further, by scheming to acquire lands beyond the Mining Law's millsite number and acreage limitations, GIC has engaged in monopoliza-

262. See *Union Oil Co. v. Smith*, 249 U.S. 337 (1919); *Geomet Exploration v. Lucky McUranium Corp.*, 601 P.2d 1339 (1979); *Columbia Standard Corp. v. Ranchers Exploration & Dev., Inc.*, 468 F.2d 547 (10th Cir. 1972); *Ranchers*, 248 F.Supp. at 708; see also, 1 ROCKY MTN. MIN. L. FOUND., AMERICAN LAW OF MINING § 31.08 (2d. ed. 1998); Don H. Sherwood, *Improvement of Mining Claims*, 18 ROCKY MTN. MIN. L. INST. 149, 177 (1973).

263. See *supra* note 262; *United States v. Noguiera*, 403 F.2d 816 (9th Cir. 1968); *Cook v. Klonos*, 164 F. 529 (9th Cir. 1908); *Bagg v. New Jersey Loan Co.*, 354 P.2d 40 (1960).

264. *In Re Pacific Coast Molybdenum*, 75 IBLA 16, 35 (1983). See also, *Haggard & Curry*, *supra* note 221, at § 8.02[3][e].

265. *Geomet Exploration*, 601 P.2d at 1343.

266. *Ranchers*, 248 F.Supp. at 731.

267. *Id.*

268. See *Robert Cornett*, 36 IBLA 84 (1978). In that case, the IBLA invalidated a claim that was filed in order to obtain excess acreage for access to other claims. Thus, even if legitimate mining-related purposes are intended, filing of claims solely for the purpose of obtaining excess acreage is not "within the scope or intention of the general mining law." *Id.* at 87.

269. See *Ranchers*, 248 F.Supp. at 731.

tion and speculation with respect to mineral rights on public lands. Thus, because most, if not all, of GIC's mining claims on the Imperial deposit were located in a manner deliberately and specifically designed to thwart the provisions of the Mining Law, they are invalid under that Law.

In order for GIC's claims to be valid, it would have to refile its claims as if it were locating them anew. Of course, since the area is currently precluded from such entry, the number of lode claims for the project drops considerably, if not eliminated altogether. Due to the application of the mill-site limits, any drop in lode claims must be accompanied by a corresponding drop in the number of valid millsite claims. As admitted by GIC: "[b]oth the Law and the Memorandum require that there not be a greater number of millsites than the number of associated claims being developed."²⁷⁰

The mining and millsite claims issues in this case are certainly complex. Indeed, in light of GIC's novel attempts to nullify key provisions of the Mining Law, many of these issues have not been squarely dealt with by the Interior Department or the courts. It should be noted, however, that any ambiguity in the law must be resolved in favor of protecting the public's paramount property interest in the land.²⁷¹ Grants against the government (such as rights under the Mining Law) should be strictly construed against the grant.²⁷² In a Mining Law case, the Supreme Court held that:

In construing this grant we must not overlook the general principle announced in many cases in this court, that grants for the sovereign should receive a strict construction—a construction which shall support the claim of the government rather than the individual. Nothing passes by implication, and *unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee.*²⁷³

In fact, this overarching rule was specifically highlighted as applicable to the Mining Law in the seminal treatise by Curtis Lindley:

Where a statute operates as a grant of public property to an individ-

270. Letter from James E. Good, attorney for Glamis, to Katherine L. Henry, Associate Solicitor, Department of the Interior 3 (February 9, 1999) (on file with author). This statement by GIC acknowledging the legal correctness of the November 7, 1997, Solicitor's Memorandum on the millsite limits (with Secretarial concurrence) represents the mining industry's first formal statement on this issue.

271. *Northern Pac. R.R. v. Soderburg*, 188 U.S. 526, 534 (1903). *See also*, *Andrus v. Charleston Stone Prod. Co.*, 436 U.S. 604, 617 (1978) (Mining Law construed in favor of government in determining what constitutes a "valuable mineral.")

272. *Id.*

273. *Soderburg*, 188 U.S. at 534 (emphasis added).

ual, or the relinquishment of a public interest, that construction should be adopted which will support the claim of the government rather than that of the individual.²⁷⁴

In this case, “the language of the grant” claimed by Glamis is not “clear and explicit.” Thus, the vast majority of the mining and millsite claims in the project area are invalid. A plan of operations based on such invalid claims cannot therefore be approved.

IV. THE FUTURE OF FEDERAL MINE PERMITTING: HARDROCK MINING MEETS MULTIPLE USE

In light of the invalidity of mining and millsite claims at many hardrock mining operations in the West, the question remains: What should the federal land management agencies do when faced with a mine proposed in whole or in part on invalid claims? The answer to this question will determine the future of mine permitting on federal public lands.

The answer, in short, is to treat mining operations that lack valid claims like any other “multiple use” on the federal lands. This is because mining operations proposed on invalid claims do not have statutory “rights” different from any other users of public lands. The issue was summarized in the *American Law of Mining*:

In addition to the land on which mining will occur, other areas are usually needed by a mining operation for such ancillary purposes as adit construction, plant sites, pit slopes, ore, waste and equipment storage, tailings ponds, water reservoirs, and town sites. The acquisition of federal lands or interests therein by means other than the location of mining claims or mill sites is sometimes necessary to provide the additional ground needed for a planned mining operation. The restraints on the number and size of mill site claims can limit their usefulness as a land acquisition method. The use of mining claims for ancillary purposes is often limited by their use for actual mining and the requirement that there be a mineral discovery within each claim.²⁷⁵

The task of the federal land agencies is to determine whether, and to what extent, it may permit these ancillary facilities. The following discussion focuses on the statutory and regulatory framework applicable to the BLM and Forest Service.

274. CURTIS LINDLEY, LINDLEY ON MINES 168 (3d ed. 1914).

275. ROCKY MTN. MIN. L. FOUND., AMERICAN LAW OF MINING, § 111.01 (2d ed. 1993).

A. *BLM Authority Over Mining Operations That Lack Valid Claims*

Use of BLM lands is governed by the Federal Land Policy and Management Act of 1976 (FLPMA). That law requires that "the Secretary *shall* manage the public lands under the principles of multiple use and sustained yield" ²⁷⁶ As noted in previous submittals to the BLM and Forest Service, this mandate is different when the lands involved are covered by valid mining and millsite claims. In this latter case, the BLM is limited to "prevent[ing] unnecessary or undue degradation" on the claimed lands. ²⁷⁷ Much of the Yarnell, Crown Jewel, and Imperial Project lands invoke the first scenario—federal authority over public lands that are not validly claimed under the mining laws.

The FLPMA defines multiple use as "management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people." ²⁷⁸ The multiple use mandate also requires "management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources" ²⁷⁹

In addition, the FLPMA lists a broad range of resource values to be taken into consideration, "including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values." ²⁸⁰ In *Sierra Club v. Butz*, the Ninth Circuit Court of Appeals held that FLPMA's multiple use statutory mandate "require[s] that the values in question be informedly and rationally taken into balance." ²⁸¹ With respect to public lands management by the BLM, the IBLA has expressly adopted *Butz*, specifically applying that holding to the FLPMA multiple use mandate. ²⁸²

In order to prove that the resource values have been informedly and rationally balanced, "the process must show that BLM has balanced competing resource values to ensure that the public lands . . . are managed in the manner that will best meet the present and future needs of the American

276. 43 U.S.C. § 1732(a) (1994) (emphasis added). In the context of the FLPMA, when the imperative language "shall" is used, "Congress [leaves] the Secretary no discretion" in how to administer the Act. *Natural Resources Defense Council, Inc. v. Jamison*, 815 F. Supp. 454, 468 (D.D.C. 1992).

277. 43 U.S.C. § 1732(b) (1994).

278. *Id.* § 1702(c).

279. *Id.*

280. *Id.*

281. *Sierra Club v. Butz*, 3 Env't'l L. Rep. 20,292, 20 293 (9th Cir. 1973).

282. *National Wildlife Fed'n v. BLM*, 140 IBLA 85, 99 (1997).

people.”²⁸³ Further, the legislative history of the FLPMA shows that the long list of resources to be considered by the BLM in the management of the public lands was inserted into the Act “to insure that the . . . values . . . which are difficult to quantify and thus to consider, are given *equal weight* with more quantifiable resource values in the . . . management of the national resource lands.”²⁸⁴ Thus, the BLM must balance the relative values of the various resources on the public land giving equal consideration to all such resource values.²⁸⁵

Federal courts have granted the BLM discretion in its final decision resulting from a multiple use analysis, *but only* after such analysis was properly conducted.²⁸⁶ Although the BLM has flexibility as to how and when it conducts its multiple use analysis, this discretion in no way mitigates the BLM’s legal obligation to conduct such analyses prior to permitting the use of the public lands for mining purposes under section 302 of the FLPMA.

Therefore, before approving any mining use on the public lands outside the Mining Law acreage and discovery limitations, the BLM is required to give equal consideration to the relative values of the various resources on the public lands in question and make an informed and rational determination as to whether to allow such mining development.

Even after such review, the FLPMA multiple use mandate prohibits the BLM from approving a mining plan of operations, or any other use of federal land that is subject to the multiple use mandate, which will cause “permanent impairment” to the public lands.²⁸⁷ At Yarnell, Crown Jewel and Imperial, the disposal of heap leach spent ore, waste rock, and/or tailings on public land outside of valid mining and millsite claims violates the “permanent impairment” standard. The FLPMA legislative history demonstrates the intended meaning of the “permanent impairment” standard. In the bills leading up to the ultimate version of the FLPMA, the House of Representatives Committee on Interior and Insular Affairs inserted the word “perma-

283. *Id.* at 101. *National Wildlife Federation* was a grazing case in which the IBLA found that “the BLM violated FLPMA, because it failed to engage in any reasoned or informed decisionmaking process concerning grazing in the canyons in the allotment.” *Id.*

284. S. REP. NO. 94-583, at 38 (1975) *reprinted in* COMM. ON ENERGY AND NATURAL RESOURCES, U.S. SENATE, LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 (Public Law 94-579), S. DOC. NO. 95-99, at 103 (1978) (emphasis added).

285. The FLPMA also provides that “where a tract of . . . public land has been dedicated to specific uses according to any other provision of law it shall be managed in accordance with such law.” 43 U.S.C. § 1732(a) (1994). This provision is inapplicable to the management of unclaimed or invalidly-claimed public lands because the Mining Law itself expressly limits its own applicability to those lands included within the lines of a valid mineral location, 30 U.S.C. § 26 (1994), as well as valid millsite claims, 30 U.S.C. § 42 (1994). Thus, this provision of FLPMA does not affect BLM’s duty to manage public lands outside the Mining Law acreage limitation under the principle of multiple use.

286. *Headwaters, Inc. v. BLM*, 914 F.2d 1174 (9th Cir. 1990).

287. 43 U.S.C. § 1702(c) (1994).

ment” before “impairment” in order to show that “[t]he objectives of such a provision should be to prevent permanent impairment rather than *minor alterations of a temporary nature*.”²⁸⁸

Thus, Congress intended the BLM to manage the public lands so as to allow minor alterations of a temporary nature, but not greater, more lasting impacts. Permanent waste rock piles and tailings dumps cannot be characterized as minor alterations of a temporary nature. In fact, once the waste materials are excavated and placed on the land, they will remain in that same location forever and will completely alter the surface of that public land. Therefore, allowing such a use of public land outside the Mining Law acreage limitation will permanently impair the land and violate the FLPMA multiple use mandate.

The FLPMA multiple use mandate requires the BLM to manage the public lands to “best meet the present and future needs of the American people.”²⁸⁹ Where the BLM has discretion to approve or disapprove an activity on the public lands, it should disapprove that activity if there is an irreparable adverse impact to the public’s land.²⁹⁰

In addition, the IBLA has held that even where the BLM must provide access across public land to a valid mining claim, the owner of such claim is not entitled to exclusive use of that land.²⁹¹ When an applicant proposes uses on lands that do not contain valid claims, the BLM may not approve a use of the public land where such use is adverse to the public interest or where such use would effectively result in the exclusive use of that land by the holder of the permit.²⁹²

288. H.R. REP. NO. 94-1163, at 44 (1976) *reprinted in* COMM. ON ENERGY AND NATURAL RESOURCES, U.S. SENATE, LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 (Public Law 94-579), S. DOC. NO. 95-99, at 474 (1978) (*emphasis added*).

289. 43 U.S.C. § 1702(c) (1994); *see also* National Wildlife Fed’n v. BLM, 140 IBLA 85, 101 (1997).

290. *See* King’s Meadow Ranches, 126 IBLA 339 (1993). In *King’s Meadow*, the IBLA affirmed a BLM decision to deny a right-of-way application for construction of a water conveyance pipeline. The IBLA held that because of the irreparable damage to the land, impacts on wildlife, and resulting erosion, the permit for the right-of-way was properly denied. *Id.* at 341-42; *see also* Stewart Hayduk, 133 IBLA 346 (1995) (similarly rejecting a right-of-way application based on public interest in preventing both irreparable damage to surface resources and negative impacts to local mule deer and sage grouse populations). Although these cases dealt with the denial of right-of-ways instead of permanent mining facilities, the basic prohibition against permanent and irreparable damage is applicable in both situations.

291. In a case outlining the nature of access rights on and to valid mining claims, the IBLA stated:

Although the necessity for the road appears to be clear and appellant’s right to construct an access road is also clear, the exclusive access requested is difficult to reconcile with the policies expressed in the various statutes and regulations which vest surface management, including multiple use, as well as the responsibility to prevent undue degradation and to assure reclamation of disturbed areas in the BLM.

Mosch Mining Co., 75 IBLA 153, 157 (1983).

292. Access to valid mining claims is statutorily recognized in FLPMA. 43 U.S.C. § 1732(b) (1994)

B. BLM Regulatory Mechanisms for Authorizing Uses on Lands Without Valid Claims

The Babbitt/Leshy Memorandum Opinion detailed the authorities available to BLM when considering proposed mining-related operations on lands that do not contain valid claims:

Our confirmation of the limits on millsite patenting may to some extent limit the acquisition of federal land for milling and mining purposes under the Mining Law. There are, however, at least two other ways that mining operators can gain the use of federal land for millsite purposes. These are by exchange under § 206 of the Federal Land Policy and Management Act (FLPMA), and by permits and leases under Title III of FLPMA. We understand that both exchanges and permits have been issued in the past by mining companies for ancillary facilities in lieu of millsites. Several exchanges have recently been completed or are in negotiation. Nothing in the Mining Law or in this Opinion limits the use of those other authorities to obtain land for use in locateable mining operations.

Nevertheless, there are a number of major differences between the use of these other authorities and the millsite provision of the Mining Law. First, the payment to the federal treasury from a millsite patent application is fixed by statute (\$5.00 per acre for a millsite associated with a lode claim; \$2.50 per acre for a millsite associated with a placer claim), while payments under FLPMA are based on fair market value. Second, issuance of millsite patents is not discretionary once all the statutory requirements for patenting have been met, while FLPMA-authorized exchanges and permits are discretionary. Third, fee title may be acquired by the operator through either exchange or millsite patents, but a Title III lease creates only a possessory interest in the land and a Title III permit conveys no possessory interest.²⁹³

Thus, absent a land exchange, the review of mining plans that do not cover valid mining or millsite claims should be conducted pursuant to Title III of FLPMA. The BLM may attempt to argue that its review is under its mining regulations found at 43 CFR part 3809.²⁹⁴ However, those regula-

(noting rights for "ingress or egress" to claims). This right of access is very different, however, from the use of federal lands for non-access uses such as waste rock and tailings dumps and other ancillary facilities.

293. Babbitt/Leshy Memorandum, *supra* note 22, at 2-3.

294. The *Crown Jewel Mine Decision* noted this possibility. See *supra* note 26, at 3.

tions are replete with assumptions of statutory rights for mining claimants.²⁹⁵ Use of these regulations is not appropriate for operations proposed on invalid mining or millsite claims to which no rights attach. As the IBLA recently noted: "A mining claimant's rights as against the United States are acquired only under the General Mining Law, and unless and until the claimant meets the requirements under those laws, no rights can be asserted against the United States."²⁹⁶ The IBLA specifically stated that: "It is axiomatic that operations may not legally proceed on invalid claims."²⁹⁷

As noted in the *American Law of Mining*:

Several early cases recognized the right of an operator to occupy and use unoccupied public domain in connection with mining operations. However, it is doubtful that such rights continue to exist in light of the comprehensive land use procedures adopted in the Federal Land Policy and Management Act of 1976. *When ground is held by a mining claim that is not valid, an operator's rights are limited to those conferred under the doctrine of pedis possessio.*²⁹⁸

This tracks the basic tenets of the Mining Law. There are two basic provisions in the Law which grant rights to lode claimants—the lode claim provision found in section 22 and the millsite provision in section 42.²⁹⁹ The lode provision applies only to "valuable mineral deposits" and to "the lands in which they are found."³⁰⁰ Absent such a finding, or discovery, on these lands, this provision is inapplicable. The millsite provision establishes only those rights on lands that meet the strict limitations noted in this article (i.e., one-to-one ratio, 5-acre limit). Thus, unless a claimant meets one of these two sets of conditions, there really are no claims at all—millsite or mining.³⁰¹

295. For example, the BLM regulations are based on the assumption that: "Under the mining laws a person has a statutory right, consistent with Departmental regulations, to go upon the open (unappropriated and unreserved) Federal lands for the purpose of mineral prospecting, exploration, development, extraction and other uses reasonably incident thereto." 43 C.F.R. § 3809.0-6 (1998). As noted herein, except for prospecting and exploration, these "statutory rights" only apply to valid mining claims.

296. Ronald A. Pene, 147 IBLA 153, 157 (1999).

297. *Id.* at 158.

298. ROCKY MTN. MIN. L. FOUND., *AMERICAN LAW OF MINING*, § 110.02[3][d] (2d ed. 1993) (emphasis added). Thus, while some *pedis possessio* rights against rival claimants may attach to exploration activities, they do not extend to full-scale permanent development of invalid claims on the public lands.

299. 30 U.S.C. §§ 22, 42 (1994).

300. 30 U.S.C. § 22 (1994).

301. In another recent case, the IBLA stated:

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

In such a case, the appropriate FLPMA review is pursuant to 43 CFR part 2920, the vehicle for reviewing special use permits under FLPMA Title III.³⁰² The part 2920 regulations are applicable for “[u]se[s] not specifically authorized under other laws or regulations and not specifically forbidden by law.”³⁰³ In the case of mining operations on invalid claims, since such uses are not authorized by the mining laws, part 2920, not part 3809, applies.

The 3809 regulations specifically recognize that: “The purpose of this subpart is to establish procedures to prevent unnecessary or undue degradation of Federal lands which may result from operations *authorized by the mining laws*.”³⁰⁴ Only operations on valid mining or millsite claims, and limited rights of ingress and egress to those claims, are “authorized by the mining laws.”

This was recently confirmed by the IBLA:

According to 43 CFR 2920.1-1, “[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law may be authorized under this part.” Here, *appellant’s use and occupancy in connection with milling and related operations was not authorized under the general mining laws because at the time BLM issued its 1994 Final Notice, there were . . . no mill sites or mining claims on the lands at issue*. The continued presence of any equipment, material, supplies, or slag on that land, without authorization under 43 CFR 2920.1-1, constituted a trespass, and subjected appellant to trespass liability, under section 303(g) of FLPMA, 43 U.S.C. § 1733(g), and 43 CFR 2920.1-2.³⁰⁵

Thus, mining or milling operations are “not authorized under the general

claim, no rights are acquired. 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

Rocky Connor, 139 IBLA 361, 365 (1997) (citations omitted).

302. The part 2920 regulations were promulgated pursuant to Title III of FLPMA. See 43 U.S.C. §§ 1731-1750 (1994). The regulations have not changed since they were promulgated on the last full day of the Carter Administration, January 19, 1981. 46 Fed. Reg. 5777 (1981). For a review of BLM and Forest Service special use authorizations, land exchanges, and permit regulations, see Stanley Dempsey et al., *Obtaining Surface Rights to Non-Mineral Federal Land by Purchase, Exchange, Permit, and Location*, ROCKY MTN. MIN. L. INST., ch. 8 (1985).

303. 43 C.F.R. § 2920.1-1 (1998). A locator’s property rights in a lode or vein mining claim arise only in those lands which are “included within the lines of their location.” 30 U.S.C. § 26 (1994). Although these rights may also encompass one five-acre millsite claim per lode claim, they do not extend to any surrounding public land.

304. 43 C.F.R. § 3809.0-1 (1998) (emphasis added).

305. William H. Snavey, 136 IBLA 350, 357 (1996) (emphasis added); see also Rocky Connor, 139 IBLA 361 (1997) (applying the part 2920 regulations on lands that are not covered by valid mining claims); Douglas Noland, 139 IBLA 337 (1997) (applying BLM right-of-way regulations, 43 C.F.R. pt. 2800, on lands that are not covered by valid mining claims).

mining laws” when such activities are proposed on lands without valid claims. The 2920, not the 3809, regulations therefore apply in such a situation.

This rule was also noted in another IBLA case that approached the issue from a different angle. In *Alanco Environmental Resources Corporation*, the IBLA ruled that the 3809 regulations applied to mining operations if the claims were valid.³⁰⁶ In that case, the IBLA ruled that the BLM may not charge a mining claimant with trespass, pursuant to part 2920, when the claimant failed to obtain BLM’s prior approval of a plan of operations under part 3809.

However, the IBLA based its application of the 3809 regulations on the fact that the millsite claims were thought to be valid.

Our holding here, of course, assumes that ALANCO was, in all respects, properly occupying the land under valid millsite claims, as required by the general mining laws, and for the purposes of prospecting, mining, or processing and uses reasonably incident thereto, as required by section 4(a) of the [Surface Resources Act].”³⁰⁷

An earlier IBLA case noted that the 3809 regulations were “promulgated under the authority of FLPMA with respect to surface management of claims located under the 1872 Mining Law.”³⁰⁸ In other words, the 3809 regulations do not apply outside “claims located under the 1872 Mining Law.” The only exception to this is for access across and to valid mining claims which is regulated pursuant to 3809.³⁰⁹ As noted above, under the

306. 145 IBLA 289 (1998)

307. *Id.* at 298. The Surface Resources Act allows activities “reasonably incident” to mining on valid mining claims. Such authorization does not extend beyond the valid mining claim. “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.” 30 U.S.C. § 612(a) (1994). Further, although reserving in the United States the right to use the surface resources overlying a valid claim, the Surface Resources Act states “[t]hat 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” 30 U.S.C. § 612(b) (1994). Thus, by its express terms, the Surface Resources Act both allows Mining Law locators to engage in any activities reasonably incident to mining and prevents any use by others which would materially interfere with those mining activities. As with the rights granted under the Mining Law, however, these statutory protections for the use of public land for mining purposes are specifically limited to lands overlying a valid “mining claim.” See 30 U.S.C. § 612 (1994). A millsite claim is considered a “mining claim” for the purposes of the Act. See *Manning v. United States*, 146 F.3d 808 (10th Cir. 1998). Therefore, just as with the Mining Law itself, apart from lands included within a valid mining or millsite claim, the Surface Resources Act does not grant a locator of valuable minerals any statutory right to use the public land for mining purposes.

308. *Mosch Mining Co.*, 75 IBLA 153, 159 (1983) (emphasis added). The IBLA also noted that the 3809 regulations “also restate an operator’s right of access to his operations consistent with provisions of the mining laws and reasonable reclamation.” *Id.*

309. *Id.* at 161 (noting that the 3809 regulations, rather than the right-of-way provisions of FLPMA,

Department's rule stated in *Snavely*, the 3809 regulations do not apply for full-scale mining and development located on invalid claims.

The current BLM Instruction Memorandum dealing with the millsite limits, however, fails to note the distinction between valid and invalid millsite claims. In that document, the BLM stated that:

When you approve a plan of operations under 43 CFR § 3809.1-6, the approval, in effect, serves as a surface use permit under section 302(b) of the FLPMA, as well as authorization under the Mining Law. To the extent the plan does not unacceptably conflict with other resources within the plan area, your plan approval under 3809 serves as a permit to use even those lands on which millsites are located in excess of the acreage limitation in the Mining Law.³¹⁰

This policy does not track the Babbitt/Leshy Memorandum, IBLA caselaw, FLPMA, or the mining laws.³¹¹ The BLM cannot treat plan approval under 3809 "as a surface use permit." As noted above, such a permit can only be issued under FLPMA Title III, as implemented by the part 2920 regulations. The BLM's position also contradicts the IBLA's rule that 3809 applies if the claims are valid—not when the claims are invalid as in the case of excess millsite acreage.³¹² More fundamentally, such a position that attaches statutory rights to "regular" public land (i.e., lands without valid claims) violates the multiple use mandate of FLPMA noted above.

Also, by stating that plan approval under 3809 is a "special use permit," the BLM appears to argue that such approval is completely discretionary, as is the case with proper BLM special use authorizations under 2920. That has never been the position of the federal government, which consistently differentiates between plan approval under 3809 and other special use permits at mine sites (e.g., rights-of-way).³¹³

apply to the regulation of the access route to the claims). Importantly, the access route discussed in *Mosch Mining* crossed unpatented mining claims, not unclaimed public lands.

310. IM 98-154, *supra* note 24, at 2.

311. Indeed, the National Mining Association, in comments on proposed revisions to the BLM's part 3809 regulations, stated: "A plan of operations under the 3809 regulations is *not* 'an instrument providing for the use, occupancy, or development of the public lands' because the Mining Laws already authorize the 'use, occupancy, or development of the public lands.'" *Comments of the National Mining Association on the Bureau of Land Management's Predicisional Draft 3809 Regulations*, (August 11, 1998), in *Conference Proceedings, 13th Annual Developments and Trends in Public Land, Forestry, and Mineral Law* (March 26-27, 1999), American Bar Association, Section on Natural Resources, Energy, and Environmental Law (emphasis in original) (on file with author).

312. William H. Snavely, 136 IBLA 350, 357 (1996); *Alanco*, 145 IBLA at 298.

313. Indeed, the Crown Jewel Final EIS specifically distinguishes between the "approval" of the plan of operations and the "approval" of special use authorizations. Crown Jewel FEIS, *supra* note 126, at S-5, Table S-1 (on file with author).

The proper avenue for a mining company seeking approval of ancillary activities is via the part 2920 special use regulations. For almost all of these uses, an applicant will need a long-term lease to cover the life of the activity.³¹⁴ Prior to authorizing such a use, the BLM must assure that it receives fair market value determined through an appraisal conducted in conformance with the Uniform Appraisal Standards for Federal Land Acquisitions.³¹⁵ As the preamble to the part 2920 regulations states: "*There is no statutory authority for issuing land use authorizations under section 302 of the Federal Land Policy and Management Act at less than fair market value.*"³¹⁶

This latter rule is critical. As noted in the Babbitt/Leshy Memorandum, authorizations for activities on excess millsite lands occur pursuant to Title III of FLPMA. The primary section of that Title is section 302. However, the BLM's Instruction Memorandum implementing the Memorandum allows such use authorizations to occur under part 3809—regulations that do not require any consideration of fair market value. Thus, the BLM is violating its own interpretation of FLPMA.

In the past, Congress considered amending the Mining Law to accommodate the need for ancillary facilities, including establishing a right to use ancillary lands. In 1977, a number of bills were introduced to this effect. For example, Senator Metcalf's bill would have established "the right to use so much of the surface of the lease or permit area as may be reasonably required for the actual extraction and removal of minerals," and "the right to use nearby federal lands upon payment of fair market rentals."³¹⁷ H.R. 5806 would have established a similar leasing system to cover ancillary lands.³¹⁸ H.R. 5831 would also have established a leasing system and would have authorized the Interior Secretary to sell lands, whether mineral or nonmineral, to a mining applicant that needed the extra acreage for any mining related activity.³¹⁹ As one commentary noted, "it is apparent that the acquisitions of nonmineral land for mine related purposes would be facilitated un-

314. "Leases shall be used to authorize uses of public lands involving substantial construction, development or land improvement and the investment of large amounts of capital which are amortized over time." 43 C.F.R. § 2920.1-1(a) (1998). Large facilities for waste rock and tailings disposal clearly fall under this definition. In contrast, the two other types of land use authorizations under part 2920, permits and easements, are for shorter-term activities (permits apply to uses that do not exceed three years) or non-exclusive uses (for easements). *Id.* at § 2920.1-1(b) & (c).

315. Preamble to part 2920 regulations. 46 Fed. Reg. 5772 (1981).

316. *Id.* (emphasis added).

317. S. 1248, 95th Cong. § 304(c)(2) (1977). For a discussion of these bills, see generally Parr & Kimball, *supra* note 51.

318. H.R. 5806, 95th Cong. § 18(a) (1977).

319. H.R. 5831, 95th Cong. Title III, § 2(a) (1977).

der the provisions [of these bills].”³²⁰

These congressional efforts to relax the millsite restrictions failed. The fact that members of Congress saw fit to attempt to relax these limitations is further evidence of the existence of the restrictions. As noted in this article, absent amendment of the Mining Law, there is no “right to use” excess lands.³²¹

The requirements for use authorizations under part 2920 can present significant obstacles to a mining operation hoping to obtain a lease for spent ore, waste rock, and tailings dumps. The BLM cannot approve such a use unless it “minimize[s] damage to scenic, cultural and aesthetic values, fish and wildlife habitat and otherwise protect[s] the environment.”³²² Also, the BLM can deny the use if the use cannot “protect the public interest,” among other requirements.³²³

This discretionary authority is very different from the part 3809 plan of operations approval. The obvious distinction is that approval under 2920 is totally discretionary with the BLM. In contrast, the BLM must approve a mine plan of operation on valid claims unless the operation will cause “unnecessary or undue degradation.” A key component of the 3809 regulations is the consideration of the economic impact on the operator of measures imposed by BLM in approving a plan of operations.³²⁴ There is no such restraint under part 2920. The BLM must reject land use requests under part 2920 if environmental resources are adversely impacted, regardless of the financial impact on the mining company.

Overall, the approval of mining-related activities on lands without valid mining or millsite claims is drastically different from approval of those operations on valid claims. Based on the size and impact of waste rock and tailings dumps, it will be very hard for these activities to pass muster under FLPMA’s multiple use mandate. At a minimum, the bar against creating an exclusive or permanent preference for one use over others will likely rule out approval of many of these facilities.

C. Forest Service Authority

Similar to the BLM, the Forest Service is struggling with the question of mining-related activities on invalid claims. Like the BLM, the Forest

320. See Parr & Kimball, *supra* note 51.

321. See *supra* Section II.

322. 43 C.F.R. § 2920.7(b)(2) (1998).

323. *Id.* § 2920.7(c)(6).

324. One of the “objectives” of the 3809 regulations is that BLM “will not unduly hinder” mining operations. 43 C.F.R. § 3809.0-2(a) (1998).

Service regulations covering operations on valid claims, 36 CFR part 228, are very different from its special use authorization regulations.

Forest Service authority over lands under its administration, including mining operations, is governed by its Organic Administration Act of 1897.³²⁵ This statute authorized the agency to promulgate rules and regulations for the national forests in order "to regulate their occupancy and use and to *preserve the forests thereon from destruction*."³²⁶ As noted in *Clouser v. Espy*, the leading Ninth Circuit case on the Forest Service's authority over mining: "Further, [the Organic Act] specifies that persons entering the national forests for the purpose of exploiting mineral resources 'must comply with the rules and regulations covering such national forests.'"³²⁷ In 1974 and 1981, the agency adopted regulations under this authority "in connection with operations authorized by the United States mining laws . . ."³²⁸

The Forest Service has a judicially enforceable duty to prevent destruction of National Forest System lands and to minimize adverse environmental impacts to National Forest surface resources. In the district court case in *Clouser*, the court noted that the Forest Service's Organic Act, 16 U.S.C. § 551, requires that the agency "must . . . ensure that its approval of a plan or project does not result in the 'destruction' and 'degradation' of the public forests."³²⁹

The National Forest Management Act (NFMA) also requires that all Forest Service projects and activities "shall be consistent with the land management plans."³³⁰ The Ninth Circuit has held that "[p]ursuant to the NFMA, the Forest Service must demonstrate that a site-specific project would be consistent with the land resource management plan of the entire forest."³³¹

The Forest Service must also abide by the multiple use mandates as defined in federal public land law.³³² As noted by one leading treatise, "[t]he definition of multiple use in FLPMA for the BLM public lands is almost identical [to that for the Forest Service]."³³³ Thus, the multiple use analysis

325. Organic Administration Act of 1897 (Organic Act), 30 Stat. 35 (codified at 16 U.S.C. §§ 478, 551 (1994)).

326. 16 U.S.C. § 551 (1994) (emphasis added) (quoted in *Clouser v. Espy*, 42 F.3d 1522, 1529 n.7 (9th Cir. 1994)).

327. *Clouser*, 42 F.3d at 1529 (quoting 16 U.S.C. § 478 (1994)).

328. 36 C.F.R. § 228.1 (1998).

329. *Clouser v. Madigan*, 1992 WL 694368, *4 (D. Or. 1992), *affd. sub nom. Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994).

330. 16 U.S.C. § 1604(i) (1994).

331. *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1377 (9th Cir. 1998). See also *Friends of the Southeast's Future v. Morrison*, 153 F.3d 1059 (9th Cir. 1998).

332. 16 U.S.C. § 531(a) (1994).

333. GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW, § 16.01[2][b] (1998).

discussed above is generally applicable to both the Forest Service and BLM.³³⁴

Similar to the BLM's 3809 regulations, the Forest Service's mining regulations cover "operations authorized by the United States mining laws."³³⁵ Thus, similar to the above discussion dealing with BLM authority over activities that are *not* so authorized,³³⁶ the Forest Service, like the BLM, must look to its special use regulations for the authority to approve activities on non-claimed, or invalidly-claimed lands.

D. Forest Service Regulatory Mechanisms for Authorizing Uses on Lands Without Valid Claims

Similar to operations proposed on non-claimed, or invalidly-claimed BLM lands, activities proposed on such lands under Forest Service administration have the same two basic choices: request and obtain a land exchange with the agency or seek authorization under the agency's special use authorization regulations. Although the issue of land exchanges is certainly an important one, this article focuses on the more common scenario of land retained in federal ownership. If a mining applicant applies for a land exchange to facilitate its operation in light of the limits under federal mining and public land law, that process will certainly involve substantial new NEPA and other legal responsibilities by the agencies.³³⁷

In 1998, the Forest Service revised its special use authorization rules.³³⁸ In many instances, these revised regulations track the BLM's part 2920 regulations discussed above.³³⁹ The revised regulations set up a two-stage screening process to review land use authorization applications. "The purpose of the screening is to eliminate those proposed uses which are obviously unsuitable on National Forest System (NFS) lands."³⁴⁰ In the first step of the screening process, the Forest Service ensures that a proposed use meets certain minimum criteria. For those that pass this hurdle, the agency conducts a full-scale review.³⁴¹

The first hurdle, what the agency loosely refers to as the "suitability" test, is a critical one for proposed mining-related uses. In that test, similar to

334. See *supra* notes 276-290 and accompanying text.

335. 36 C.F.R. § 228.1 (1998).

336. See William H. Snavely, 136 IBLA 350 (1996).

337. 36 C.F.R. pt. 254 (1999) (Forest Service); 43 C.F.R. pt. 2200 (1999) (BLM).

338. 36 C.F.R. pt. 251 (1999).

339. In the Preamble to the revised regulations, the Forest Service noted that: "The Forest Service concurs with the DOI [Department of the Interior] suggestion that regulations governing administration of land uses on Federal lands should be more consistent." 63 Fed. Reg. 65,952 (1998).

340. 63 Fed. Reg. 65,954 (1998).

341. 36 C.F.R. § 251.54 (1999).

the BLM part 2920 rules, the agency cannot authorize any use that represents a permanent or exclusive use of the federal lands. In the Preamble to the revised regulations, the Forest Service stated that: "Longstanding Congressional and Executive Branch policy dictates that authorizations to use NFS lands cannot grant a permit holder an exclusive or perpetual right of occupancy in lands owned by the public."³⁴² A mining applicant would be hard-pressed to show that a proposed waste rock or tailings dump would not represent a permanent or exclusive use of the federal lands.

These revised rules further require that a proposed use will fail the first hurdle if it "involve[s] disposal of solid waste or disposal of radioactive or other hazardous substances."³⁴³ For mining operations, waste rock and tailings are considered, at a minimum, to be solid waste, and may even be hazardous waste depending on the specific contamination risk.³⁴⁴ A number of more generalized requirements also apply that could limit the ability of a mining-related use to receive part 251 approval, including a requirement that the project be in the public interest.³⁴⁵

There is no direct caselaw on the issue of Forest Service approvals for non-claimed or invalidly-claimed lands. However, due to the similarity of the BLM and Forest Service regulations (e.g., the prohibition of exclusive use), the legal analysis noted in the IBLA decisions should be essentially the same.

Importantly, the *Crown Jewel Mine Decision* approached the authority of the Interior and Agriculture Departments differently. It noted the applicability of the BLM's part 3809 regulations via implementation of BLM IM 98-154, although acknowledging the conflict with the part 2920 regulations.³⁴⁶ In contrast, the decision ruled that for National Forest lands, the part 251 regulations, not the 228 regulations, were applicable.³⁴⁷

Thus, a mining applicant faces an even more daunting task before the Forest Service than it does before the BLM. However, in light of the problems in using the 3809 regulations as noted in this article, the eventual result should be the same regardless of which agency's lands are involved. It is hard to envision a scenario that would grant a special use authorization for

342. 63 Fed. Reg. 65,955 (1998); 36 C.F.R. § 251.54(e)(1)(iv) (1999).

343. 36 C.F.R. § 251.54(e)(1)(ix) (1999).

344. See Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1994). Under what is known as the Bevill Amendment, for now, mining waste is regulated under Subtitle D (nonhazardous wastes). Certain mine wastes are considered hazardous waste, and are regulated under Subtitle C. See COGGINS & GLICKSMAN, *supra* note 333, at § 11B.05[1][d].

345. 36 C.F.R. § 251.54(e)(5)(ii) (1999).

346. *Crown Jewel Mine Decision*, *supra* note 26, at 3.

347. *Id.*

mine facilities such as spent ore, waste rock, and tailings dumps. Thus, such approvals will be limited to small-scale, short-term, temporary uses—quite different in scale, intensity of impact, exclusivity of use, and duration from these large facilities.

CONCLUSION

The 1872 Mining Law is a two-edged sword for the hardrock mining industry. On one hand, the “free access” provision grants a benefit unequalled on the public lands. However, the Law’s limitations on mining and millsite claim validity present real challenges to open pit mining proposals. Some in the industry may argue that the Mining Law should be construed to fit the times. However, that is not the role of the executive branch or the courts.³⁴⁸

Just as the “free access” provision cannot be ignored by the courts or the agencies, neither can the claim limitation provisions. Faced with the reality of the Mining Law, the industry may demand that the “rights” granted by the Mining Law on valid claims somehow extend onto the public’s lands—lands not authorized by the Mining Law. The Babbitt/Leshy Memorandum anticipated, and flatly rejected, this argument. Quoting a decision by the federal courts, the opinion noted: “These companies have now come into court . . . and have said, ‘This is not enough land; give us more.’ We have no more power to grant their request, of course, than we have the power to increase congressional appropriations to needy recipients.”³⁴⁹

Certainly, adherence to the claim limitations will result in substantial on-the-ground changes in mining practices.³⁵⁰ It is very possible that low-

348. “[W]e have no authority to enlarge the rights granted under the Mining Law; that power is reserved to Congress.” *Crown Jewel Mine Decision*, *supra* note 26, at 4.

349. Babbitt/Leshy Memorandum, *supra* note 22, at 14, (quoting *Wilderness Soc’y v. Morton*, 479 F.2d 842, 891 (D.C. Cir.) (en banc)). The Memorandum also noted that:

From [one] perspective, the five-acre limit may be seen as a hopeless anachronism, even though it was affirmed by Congress as recently as 1960. But many aspects of the Mining Law have that appearance, simply because of the vintage of the statute. The \$2.50 and \$5.00 per acre patent fees, fixed in 1872 by Congress and never changed since, have fallen totally out of step with the times, but the Department is not free to fix higher fees for patenting without the consent of Congress.

Id.

350. There is an interesting precedent for changing the prevailing methods of an industry based on adherence to the governing statute. In the early 1970s, the famous Monongahela National Forest decision prohibited clearcutting of forests under the Forest Service’s Organic Act. *West Virginia Div. of Izaak Walton League of Am., Inc. v. Butz*, 367 F. Supp. 422 (N.D. W. Va. 1973), *aff’d*, 522 F.2d 945 (4th Cir. 1975). The appeals court noted the issues involved when the interpretation of a long-standing statute goes against the prevailing practice:

The appellants argue that . . . the courts should not permit a literal reading of the

grade, marginally economic mines cannot absorb the additional costs necessitated by the need to move some ancillary facilities off federal land. Due to the environmental and social costs of these operations, this should be welcomed.³⁵¹

It is very possible that the proper interpretation and implementation of the claim limitations will spur congressional reform of the Mining Law.[†]

1897 Act to frustrate the modern science of silviculture and forest management presently practiced by the Forest Service Economic exigencies, however, do not grant the courts a license to rewrite a statute no matter how desirable the purpose or result might be. . . . We are not insensitive to the fact that our reading of the Organic Act will have serious and far-reaching consequences, and it may well be that this legislation enacted over seventy-five years ago is an anachronism which no longer serves the public interest. However, the appropriate forum to resolve this complex and controversial issue is not the courts but the Congress.

Butz, 522 F.2d at 955 (citing *United States v. City and County of San Francisco*, 310 U.S. 16, 29-30 (1940)). Although this caused considerable consternation within the agency and the timber industry, Congress quickly stepped in and enacted the National Forest Management Act of 1976, 16 U.S.C. §§ 1600-1614, which permitted clearcutting, although under much stricter guidelines than existed prior to the Act or the court decision. See Charles Wilkinson & Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1 (1985). For a discussion of the relationship between the Monongahela decision and the Mining Law, see Laura Ziemer, *The 1872 Mining Law and the 20th Century Collide: A Rediscovery of Limits on Mining Rights in Wilderness Areas and National Forests*, 28 ENVTL. L. 145, 167 (1998).

351. For an overview of the environmental impacts associated with hardrock mining, see generally DA ROSA & LYON, *GOLDEN DREAMS, POISONED STREAMS* (1997).

† *Author's Note*: Congressional action on the millsite limits is already occurring as this article goes to print. During the week of May 10, 1999, Washington Senator Slade Gorton (R-WA), along with Rep. Ralph Regula (R-OH), inserted during the House-Senate conference, an appropriations rider into the Emergency Supplemental Appropriations Act (S. 544, H.R. 1141) that attempts to waive the millsite ratio limits discussed in this article for the Crown Jewel Mine. The Act's primary purpose is to provide funding for the Kosovo military situation and for victims of Hurricane Mitch, which ravaged Central America in 1998. See Sam Howe Verhovek & Tim Weiner, *Spending Bill Boggled Down by a Plethora of Pet Projects*, N.Y. TIMES, May 14, 1999, at A1. The Emergency Supplemental, including the Crown Jewel Mine rider, passed both Houses of Congress and was signed into law by President Clinton on May 21, 1999. Pub. L. No. 106-31, 113 Stat. __ (1999). The language of the rider, as of May 19, 1999, stated as follows:

Section 3006. Millsites Opinion

(a) Prohibition on Millsite Limitations—Notwithstanding the opinion dated November 7, 1997, by the Solicitor of the Department of the Interior concerning millsites under the general mining law (referred to in this section as the "opinion"), in accordance with the millsite provision of the Bureau of Land Management Handbook for Mineral Examiners H3890-1, page III-8 (dated 1989), and section 2811.33 of the Forest Service Manual (dated 1990), the Department of the Interior and the Department of Agriculture shall not limit the number or acreage of millsites based on the ratio between the number or acreage of millsites and the number or acreage of associated lode or placer claims with respect to the Crown Jewel project, Okanogan County, Washington for any fiscal year.

(b) Effect on Prior Approvals and Records of Decision—As soon as practicable after the date of enactment of this Act, the Departments of the Interior and Agriculture shall approve the plan of operations and reinstate the record of decision for the Crown Jewel project.

(c) Patent Application or Plan of Operation—No patent application or plan of operations submitted prior to the date of enactment of this Act shall be denied pursuant to the opinion of the Solicitor of the Department of the Interior dated November 7,

However, real reform of the claim provisions must be accompanied by real reform of the "free access" provision. The end result will hopefully be a better balancing of the needs of the mining industry with the needs of the public and the environment across the West.

1997.

Sections (a) and (b) of the rider appear to potentially apply only to the Crown Jewel Mine. Section (c) may apply to other hardrock mining projects on public lands. However, since the rider is attached to an appropriations bill applicable to the current fiscal year, sections (b) and (c) likely expire at the end of this fiscal year, on or about September 30, 1999. Section (a)'s statement regarding "for any fiscal year" may extend that provision's applicability beyond the current year.

Thus, the discussions in this article regarding the millsite provision in the Mining Law are not substantially affected by the rider in the long-term. Neither does the rider amend in any way the limitations on mining claims, most notably the requirement that each claim contain a valuable mineral deposit. Also, the rule that the federal government cannot approve a mining plan of operations proposed on lands with invalid claims similarly remains untouched by the rider. The rider has had its initial desired effect: On May 28, 1999 the Interior and Agriculture Departments reinstated the Crown Jewel Mine Record of Decision, and during the first week of June the Forest Service and BLM, by individual decision, approved the Plan of Operations. However, it is clear that the true effect of the rider upon the Crown Jewel Mine, as well as other mining projects, will be dependent upon the outcome of the expected federal court challenge.