AN 1872 MINING LAW FOR THE NEW MILLENNIUM

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We are inducing miners to purchase their claims, so that large amounts of money are thereby brought into the Treasury of the United States, causing the miners to settle themselves permanently, to improve and establish homes; to go down deeper in the earth, to dig further into the hills, and in every way to improve their own condition, and to build up the communities and States where they reside.[1]

INTRODUCTION

No one should be surprised that Department of the Interior Secretary Bruce Babbitt has sought to transform the 1872 Mining Law into a program more reflective of the realities of the impending twenty-first century than reminiscent of the days of President Ulysses S. Grant. Since he took office, Secretary Babbitt has not been shy about condemning the law as a "flagrant abuse of the public interest."[2] Not content to let the law continue in its current fashion into the twenty-first century, and no longer willing to wait for legislative action, he has set in motion a number of administrative reforms that could either alter the future administration of the Mining Law or prompt Congress to enact mining law reform legislation.

The 1872 Mining Law stands alone in the field of public land laws as the last vestige of a nineteenth century congres-

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1. CONG. GLOBE, 42d Cong., 2d Sess. 534 (1872) (statement of Sen. Aaron A. Sargent).

2. Tom Kenworthy, *A $1 Billion Return for $275*, WASH. POST, Sept. 7, 1995, at A17.

sional public land policy designed to settle and promote development in a now-populous west.[3] By the early twentieth century, Congress no longer condoned the unrestricted disposal of public lands and resources. Most publicly-owned natural resources became open for sale or lease, but they were not available for outright disposal at below fair market value. And, through the remaining half of this century, Congress has revised many of the public land and resource policies and programs, all the while keeping the 1872 Mining Law virtually intact. In 1976, Congress further made it clear that the national disposal policy was no longer valid, and instead it favored the retention of the public lands unless, as a result of land use planning, the disposal of a particular parcel would serve the national interest.[4] Not surprisingly, therefore, the effort to enact legislative reform has generated a heated debate during the past fifteen years. Commentators have attacked the law as an anachronism,[5] a "lord of yesterday."[6] Mining interests and many Western members of Congress believe the law provides a crucial incentive for developing the region's mineral resources,

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3. *See* CONG. GLOBE, *supra* note 1. Senator Sargent further observed that Congress, when debating the 1866 mining law, considered imposing a royalty on the mining of the public lands and that the government "ought to keep control of the precious metals," but Congress rejected this approach:

> [I]t was argued that these people [the miners] were to a great extent nomadic and unsettled, in one section this year, and next year in some other place, and it was necessary to attach them to the soil, so that they would make more permanent improvements, and acquire for themselves lands which they could improve, upon which they could build their little homes.

CONG. GLOBE, *supra* note 1; *see also* S. REP. NO. 39-105 (1866). *See generally* John C. Lacy, *The Historic Origins of the U.S. Mining Laws and Proposals for Change*, 10 NAT. RESOURCES & ENV'T, at 13, 18–20 (Summer 1995).

4. *See* Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a) (1994) [hereinafter "FLPMA"]. Congress had expressed this policy earlier, when it established the Public Land Law Review Commission to review the need to revise the nation's public land laws. *See* Act of September 19, 1964, Pub. L. No. 88-606, 78 Stat. 982.

5. *See* JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION 89–118 (1987); Lawrence J. MacDonnell, *Mineral Law in the United States: A Study in Legal Change*, *in* NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS 66, 66–93 (Lawrence J. MacDonnell & Sarah F. Bates eds., 1993); John D. Leshy, *Reforming the Mining Law: Problems and Prospects*, 9 PUB. LAND L. REV. 1, 11 (1988); *see also* Cameron Elliot, Clouser v. Espy *and the Environmental Regulation of Mining Claims*, 19 HARV. ENVTL. L. REV. 553 (1995).

6. CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 20 (1992).

and argue that we are at the risk of losing development dollars to projects in other countries. The congressional debate has been equally vitriolic.[7]

Early on, Secretary Babbitt and the Clinton Administration had hoped that the impasse over mining law reform was in its final throes. To prompt congressional action,[8] Secretary Babbitt staged elaborate scenes of giving away $10 billion for $10,000, with props and all; in one public exhibition, a picture of Ulysses S. Grant was prominently displayed as the Secretary signed a patent with a pen that once belonged to President Grant.[9] And, for the first time, reform appeared possible shortly before the 1994 congressional elections.[10] This effort dissolved when some members of Congress became concerned over aspects of a reform package that would have included environmental protection measures and a royalty provision.[11] This failed attempt at legislative reform set the stage for the Secretary to explore the Department of the Interior's administration of the 1872 Mining Law as an alternative to awaiting congressional action.

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7. When he introduced S. 257 to reform the Hardrock Act, Senator Dale Bumpers reaffirmed his long-standing refrain that the law was in desperate need of revision; that it reflected long-since expired policies and allowed serious environmental harms on the public lands, all without any royalties to the government. *See* 139 CONG. REC. S889-02, S899 (daily ed. Jan. 28, 1999). He added that President Grant would "turn over in his grave if he knew what had become of the mining law," and that "the time has come to bring our Nation's mineral policy into the present." *Id.* & S900. For a discussion of reform efforts during the mid-1980s, see Leshy, *Reforming the Mining Law*, *supra* note 5, at 5–10.

8. In giving away resources valued at $16.8 million for a paltry $910, the Secretary commented that, "I am not anti-mining, but I am against this 123 year old law that is severely out of touch with today's realities." UNITED STATES DEPARTMENT OF THE INTERIOR, SECRETARY BABBITT FORCED TO SIGN FOUR MORE MINING PATENTS UNDER ANTIQUATED MINING LAW: AWAITS ACTION BY CONGRESS (June 25, 1997), *available in June 25, 1997 Mining Patents* (visited October 26, 1999) <http://www.doi.gov/news/mine6.html>.

9. *See* Kenworthy, *supra* note 2; Ken Miller, *Law Forces $1 Billion Mineral-Rights Giveaway; Babbitt Blasts Congress*, RENO GAZ., Sept. 7, 1995, at 3A.

10. *See* Lacy, *supra* note 3, at 20; Robert J. Uram, *Prospects for Mining Law Reform*, 12 NAT. RESOURCES & ENV'T 191, 193–95 (Winter 1998).

11. *See* Uram, *supra* note 10, at 194; *see also Mining Law Reform Act of 1995: Hearing Before the Subcomm. on Forests and Public Land Mgmt. of the Comm. on Energy and Natural Resources*, 104th Cong. 19–42 (1995) (statement of John D. Leshy, Solicitor, United States Dep't of the Interior) (noting the final compromise reform act that circulated in the waning days of the 103rd Congress fell "just short").

The result has been dramatic. To begin with, the internal administrative review process for patenting mineral lands has been changed. The Washington, D.C. Office of the Department of the Interior and, in particular, the Solicitor's Office, now take a more active role in ensuring that mining claimants are entitled to a patent before any such patents are issued. This is in marked contrast to the old practice, where little, if any, legal scrutiny was given to the review of patent applications. As a consequence of this heightened review process, the Solicitor's Office identified several unresolved legal issues or possibly incorrect interpretations in the administration of the 1872 Mining Law. At the outset of this process, the Solicitor's Office sought to rectify what it believed had been a misunderstanding surrounding the nature and extent of vested rights that may be acquired during the patent application review process. The Solicitor's Office explained that mining claimants do not have a vested property right in fee simple title to public lands embraced by a mining claim simply because the claimant has submitted a patent application for those lands. Congress, meanwhile, has cooperated to some extent by imposing a moratorium on the processing of any patent applications that were not grandfathered in as of September 30, 1994.[12]

Next, the Department has examined mining claims more closely to ensure that certain claims legitimately fall within the reach of the law. It has informed miners that there are restrictions on the amount of non-mineral lands they can use pursuant to the 1872 Mining Law for activities associated with mining operations. It also informed mining claimants that the law may not be used to patent excess mineral resources that cannot be reasonably developed in the foreseeable future. The Bureau of Land Management (the "BLM") has argued before the agency's own Office of Hearings and Appeals that, when the claimed mineral lands are more valuable for some resource other than minerals, those lands might not be subject to appropriation under the law.

Finally, the Department is pursuing available administrative options designed to address the environmental consequences of hardrock mining. Most notably, the Department

12. *See* Department of Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, § 112, 108 Stat. 2499, 2519 (codified as amended in scattered sections of 25 U.S.C., 43 U.S.C., and 48 U.S.C.).

has sought to protect lands from environmental damage that may result from mining operations by proposing to amend the BLM's regulations governing the surface use and occupancy of non-patented mining claims. These regulations have remained virtually unaltered since they were first developed, and the proposed regulations would put in place what the Department believes is a more modern and environmentally sensitive approach toward mining operations on the public lands. In addition to developing new regulations, the Department has sought to protect against future mining operations in highly sensitive areas by using its authority to withdraw certain lands from the location of any new mining claims.

Mining interests oppose each one of these Departmental initiatives. They believe the Administration has embarked on a campaign against the 1872 Mining Law that is both ill-advised and, in their view, contrary to the old law. Just how all this will play out remains to be seen. This is not the first Administration to develop more restrictive interpretations of the 1872 Mining Law after failing to prompt congressional reform.[13] Even so, absent successful litigation challenging the Department's initiatives, it seems almost certain that there will be a different regulatory regime governing the development of mineral resources on the public lands, whether imposed by Congress or by the Department.

This article reviews the various efforts by the Secretary to develop a new Mining Law through administrative reform that will either carry us into the next century or prompt a congressional response. Part I reviews the Mining Law's history and current rules for its administration. Part II reviews specific strategies for administrative reform, paying particular attention to the rights of mining claimants during the patenting process. This is because an understanding of the nature and extent of a patent claimant's vested rights to public lands, acquired while a patent application is still pending, has the potential to inform future debates about legislation to reform the Mining Law. Moreover, if patent claimants aquire vested rights while their applications are still pending, these rights pose challenges to the Department's various initiatives to advance administrative reforms.

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13. *See* H.R. Hochmuth, *Government Administration and Attitudes in Contest and Patent Proceedings*, 10 ROCKY MTN. MIN. L. INST. 467, 486–90 (1965).

I. OVER ONE HUNDRED YEARS AND STILL GOING: THE 1872 MINING LAW

The 1872 Mining Law (the "Mining Law") provides that citizens may enter, explore, and ultimately appropriate unreserved public lands that contain valuable mineral deposits.[14] Congress passed this law during an era when the nation was encouraging westward expansion and development.[15] Mineral production, once centered around the East and the Appalachians, had shifted to the West, where, by 1857, the value of production from California mines was approximately $50 million.[16] When the Mining Law finally emerged, first in 1866[17] and then later, as amended, in 1870[18] and 1872,[19] it codified the mining industry's general practice for locating and otherwise developing lands that contain valuable mineral deposits.[20] To a large degree, old mining practices could continue, but now miners could, if they so chose, acquire patents to lands embraced by valid mining claims for $2.50 per acre for placer claims[21] and $5.00 per acre for lode claims.[22]

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14. *See* 30 U.S.C. § 22 (1994); *see also* Andrus v. Shell Oil Co., 446 U.S. 657, 658 (1980).

15. Perhaps one of the most noted public land law historians, Samuel P. Hayes, succinctly observed that "[f]ederal policies encouraged rapid exploitation of [public] resources by encouraging land to pass easily from federal ownership into private hands," adding that lax enforcement of these laws and the ability of claimants to file false affidavits allowed for even more ready acquisition of valuable minerals or timber. SAMUEL P. HAYES, THE RESPONSE TO INDUSTRIALISM, 1885–1914 151 (2d ed. 1995); *see also* BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 136–43 (1965); MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 384–94 (1977).

16. *See* GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION, 1815–1860, at 387 (1951); *see also* GEORGE D. LYMAN, THE SAGA OF THE COMSTOCK LODE: BOOM DAYS IN VIRGINIA CITY (1951); DUANE A. SMITH, ROCKY MOUNTAIN MINING CAMPS: THE URBAN FRONTIER (1967).

17. *See* Act of July 25, 1866, ch. 262, § 1, 14 Stat. 251 (1866) (current version at 30 U.S.C. § 22 (1994)).

18. *See* Act of July 9, 1870, ch. 235, § 12, 16 Stat. 217 (1870) (current version at 30 U.S.C. § 22 (1994)).

19. *See* Act of May 10, 1872, ch. 152, § 1, 17 Stat. 91 (1872) (current version at 30 U.S.C. § 22 (1994)).

20. *See generally* PAUL W. GATES, A HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1969); PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST 66 (1987). *See also* LESHY, *supra* note 5.

21. A "placer" claim is a location of all forms of valuable mineral deposits except for veins or quartz or other "rock in place." *See* 30 U.S.C. § 35 (1994).

In order to qualify for a patent under the Mining Law, a miner must satisfy certain requirements, including first establishing the location of a valid mining claim. A location consists of performing the necessary acts through which a right of exclusive possession becomes vested in a locator.[23] In order to perfect a location, "a claimant must comply with the requirements of the General Mining Law, other applicable Federal laws, and applicable state laws."[24] If a miner does show that the claim is valid, the miner "gains certain exclusive possessory rights."[25] These possessory rights are a unique form of property.[26] The *sine qua non* of this protected "possessory" property interest is a "discovery" of a valuable mineral.[27] Once there is a

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Placer claims are associated with loose rock on or near the Earth's surface. *See* United States v. Iron Silver Mining Co., 128 U.S. 673, 679 (1888).

22. A "lode" claim is a location consisting of a vein or lode of quartz or other "rock in place"—gold, silver, lead, copper, and other valuable mineral deposits. *See* 30 U.S.C. § 23 (1994).

23. *See* American Colloid Co., 128 I.B.L.A. 257, 263 (1994) (Mullen, J., concurring) (citing Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transp. Co., 196 U.S. 337, 346 (1905)). The mineral claimant's possessory rights, however, are subject to the Surface Resources Act, 30 U.S.C. § 611 (1994).

24. American Colloid Co., 128 I.B.L.A. at 263 (citations omitted). Since 1976, the FLPMA has required certain filings before the Interior Department. *See* 43 U.S.C. § 1744(a), (b) (1994); *see also* United States v. Locke, 471 U.S. 84 (1985) (holding that a forfeiture of the claim for failing to make the requisite filing is not a "taking"). A substantial number of mining claims have been declared null and void as a result of a mining claimant's failure to pay the required claim rental or maintenance fee. *See* 30 U.S.C. § 28f (1994) (Rental Fee Act); *see, e.g.,* Jones v. United States, 121 F.3d 1327 (9th Cir. 1997); Klein, 147 I.B.L.A. 101 (1999); Yegen, 145 I.B.L.A. 300 (1998); Fredrickson, 144 I.B.L.A. 105 (1998); James, 143 I.B.L.A. 289 (1998); Alamo Ranch Co., 135 I.B.L.A. 61 (1996); *see also* Instruction Memorandum No. 99-017 from Assistant Director, Minerals, Realty and Resource Protection, United States Department of the Interior, Bureau of Land Management to State Directors, *Re-Authorization of Maintenance Fees, Location Fees, and Small Miner Waivers* (Nov. 11, 1998).

25. Hafen v. United States, 30 Fed. Cl. 470, 473 (1994). Even before establishing a valid mining claim, miners have some protected rights in their claim. A doctrine called the right of *pedis possessio* protects mining claimants in actual possession of a mining claim against third party attack as long as the miner is diligently seeking a discovery and occupies the claim. *See* Union Oil Co. of Cal. v. Smith, 249 U.S. 337, 346–50, 353 (1919); Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964); Pene, 147 I.B.L.A. 153, 157 (1999).

26. *See* Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963). A mining claim "is a possessory interest in land that is 'mineral in character' where discovery 'within the limits of the claim' [has] been made." *Hafen*, 30 Fed. Cl. at 473 (quoting Cameron v. United States, 252 U.S. 450, 456 (1920)); *see also* Holden v. United States, 38 Fed. Cl. 732 (1997).

27. *See Union Oil*, 249 U.S. at 347.

"discovery" by a qualified locator who has complied with the requirements of the Mining Law, that locator has a "possessory right" that provides an exclusive right of possession, which is a "property right" that may be transferred by conveyance, inheritance or devise, and the right is lost only by abandonment.[28] Arguably, the government may not deprive a claimant of such a valid mining claim without offering just compensation.[29]

A mining claim is only valid for what are called "locatable" minerals. "That non-mineral land can not be disposed of under the mining laws is a cardinal rule in the administration of the public land laws."[30] Locatable minerals include both metallic minerals, such as gold, silver, and lead, as well as nonmetallic minerals, such as certain kinds of limestone, bentonite, fluorspar, and asbestos. Since 1955, however, "common varieties" of sand, gravel, stone, pumice, pumicite, cinders, and ordinary clay are not locatable—they are instead only capable of being disposed of by sale.[31] But the definition of "common varieties" exludes certain identified nonmetallic materials, such as block pumice, as well as materials that have distinct and special value.[32]

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28. *See id.* at 349. *Accord* Best, 371 U.S. at 336; Cole v. Ralph, 252 U.S. 286, 295 (1920); Noyes v. Mantle, 127 U.S. 348, 351 (1888); Belk v. Meagher, 104 U.S. 279, 283 (1881); Forbes v. Gracey, 94 U.S. 762, 766–67 (1877); *see also* Freese v. United States, 6 Cl. Ct. 1, 10 (1984) (applying the principle that a valid mining claim is an interest in real property), *aff'd*, 770 F.2d 177 (Fed. Cir. 1985).

29. *See* Freese v. United States, 639 F.2d 754, 757 (Ct. Cl. 1981) (stating that "[i]t is a matter beyond dispute that federal mining claims are 'private property' enjoying the protection of the fifth amendment."); *cf.* United States v. North American Transp. & Trading Co., 253 U.S. 330 (1920); United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990) (mining lease); NRG Co. v. United States, 24 Cl. Ct. 51 (1991) (mining lease). *See generally* Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 ECOLOGY L.Q. 57 (1997).

30. Ferrell v. Hoge, 29 Pub. Lands Dec. 12, 13 (1899).

31. *See* 30 U.S.C. § 611 (1994); 43 C.F.R. § 3711.1 (1998). Such materials may be disposed of under the Materials Act of 1947, 30 U.S.C. §§ 601–604 (1994). *See* Memorandum from John D. Leshy, Solicitor, United States Department of the Interior to Director, Bureau of Land Management, M-36998, *Disposal of Mineral Materials from Unpatented Mining Claims* (June 9, 1999) (reviewing history of the Department's interpretation of whether it could dispose of mineral materials on unpatented mining claims, and concluding that it could).

32. *See* 30 U.S.C. § 611 (1994); United States v. Multiple Use, Inc., 120 I.B.L.A. 63 (1991) (discussing under what circumstances non-block pumice is locatable); *see also* McClarty v. Secretary of Interior, 408 F.2d 907 (9th Cir. 1969) (discussing under what circumstances a deposit has distinct and special value); United States v. Foley, 142 I.B.L.A. 176 (1998). BLM is proposing to amend its regulations to include a more useful description of locatable materials. *See* Pro-

The principal requirement of the Mining Law is a discovery of a "valuable mineral deposit" before a claimant has a valid mining claim.[33] Without a discovery, a mineral prospector acquires no rights.[34] This requirement has been interpreted to include what is called the "prudent person" test. The prudent person test requires that, where locatable minerals have been found, "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. . . ."[35] This test evolved out of a 1929 Department of the Interior opinion in which the Solicitor concluded that there must be a distinct showing that the mineral could be developed profitably.[36] In *United States v. Coleman*,[37] the Supreme Court refined the prudent person test with a "marketability test," holding that "[m]inerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable."[38] Further, if the public lands surrounding a claimant's discovery become closed to the operation of the Mining Law, the claimant must show a valid discovery both as of the

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posed Regulation § 3830.12, 64 Fed. Reg. 47,023, 47,033 (1999). For the existing regulations, see 43 C.F.R. §§ 3812.1, 3711.1(b) (1998); *cf.* 36 C.F.R. § 228.41(d) (1998) (Forest Service regulations).

33. *See* 30 U.S.C. § 22 (1994).

34. *See* Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transp. Co., 196 U.S. 337, 345 (1905). "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), *aff'd*, 847 F.2d 842 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 854 (1988) (citations omitted).

35. Chrisman v. Miller, 197 U.S. 313, 322 (1905) (quoting Castle v. Womble, 19 Pub. Lands Dec. 455, 457 (1894)); *see also* Cameron v. United States, 252 U.S. 450, 459 (1920). *See generally* Frank J. Barry, *Discovery Under the Mining Laws*, 8 ARIZ. L. REV. 84 (1966); Hochmuth, *supra* note 13, at 474–80; Don H. Sherwood, *Mineral Discovery: Is the Prudent Man Dead?*, 44 ROCKY MTN. MIN. L. INST. 10-1 (1998); James B. Sult, *Marketability and the Mining Law: The Effect of* United States v. Coleman, 10 ARIZ. L. REV. 391 (1969).

36. *See* Layman v. Ellis, 52 Interior Dec. 714 (1929). Mineralization that only warrants further prospecting in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit. A valuable mineral deposit does not exist simply when the facts might warrant a search for such a deposit. *See Chrisman*, 197 U.S. at 322–23; *Skaw*, 13 Cl. Ct. at 28.

37. 390 U.S. 599 (1968).

38. *Id.* at 602.

time the lands became closed and later, if need be, in order to sustain his property rights against the federal government.[39]

The Mining Law has led to considerable abuse over the years. For example, during the first half of this century, many lands in national forests were being used under the Mining Law for non-mining purposes.[40] Also, placer claims were being located by several family members or other groups and then quickly quitclaimed to a single company or family member—sometimes with an eye toward valuable timber on the land—in order to exceed the limits on acreage available to a single

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39. *See* United States v. Collord, 128 I.B.L.A. 266, 268 (1994) ("In the case of land withdrawn from mineral entry and the subsequent issuance of a final certificate by [the] B[ureau of] L[and] M[anagement], a valuable mineral deposit must be shown to exist on the dates of withdrawal and of issuance of the certificate."); *see also* United States v. Boucher, 147 I.B.L.A. 236, 242 (1999). In *Skaw,* 13 Cl. Ct. at 28, the court noted that the claim must be supported by a valid discovery at the time of the withdrawal. *See also* United States v. Mavros, 122 I.B.L.A. 297, 301 (1992) (stating that discovery must be no later than withdrawal); Lara v. Secretary of Interior, 642 F. Supp. 458, 461 (D. Or. 1986) (requiring discovery at date of withdrawal as well as at date of hearing), *aff'd*, 820 F.2d 1535, 1543 (9th Cir. 1987); United States v. Kosanke Sand Corp., 12 I.B.L.A. 282, 309 (1973) (indicating that discovery must be satisfied at time of withdrawal and at time of hearing); *Cameron*, 252 U.S. at 456 (stating that discovery must predate withdrawal). In *United States v. Whittaker*, 102 I.B.L.A. 162 (1988), *aff'd, Whittaker v. United States*, No. CV-87-140GF (D. Mont. 1989), the Board determined that discovery could be no later than when the claimant is asserted to have fulfilled all the prerequisites to the making of the entry—in that case, it was no later than the date of the issuance of the final certificate. *See Whittaker*, 102 I.B.L.A. at 166. *Cf.* Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964) (noting evidence of present-day market conditions relevant to alleged discovery many years before); Adams v. United States, 318 F.2d 861 (9th Cir. 1963) (indicating that the discovery test for a patent application must be met at time of application, and the test for the validity of a claim when there is a withdrawal must be met before withdrawal). The reasoning in *Whittaker* is questionable, however, in light of the recent focus on when "equitable title" vests, if at all. *See infra* Part II.A.

40. *See* NATIONAL FOREST ADVISORY COUNCIL, REPORT ON THE PROBLEM OF MINING CLAIMS ON THE NATIONAL FORESTS (1953); *see also* UNITED STATES PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 124 (1970) ("Individuals whose primary interest is not in mineral development and production have attempted, under the guise of [the Mining Law], to obtain use of public lands for various other purposes."). One random sampling of 240 mining claims in the 1970s revealed that mining was occurring on only one of those claims, with a similar inquiry into 93 previously patented claims revealing mining on only seven of those claims—twenty were being used for purposes other than mining. *See* Robert C. Anderson, *Federal Mineral Policy: The General Mining Law of 1872*, 16 NAT. RESOURCES J. 601, 602 n.3 (1976) (citing to UNITED STATES GENERAL ACCOUNTING OFFICE, MODERNIZATION OF THE 1872 MINING LAW NEEDED TO ENCOURAGE DOMESTIC MINERAL PRODUCTION, PROTECT THE ENVIRONMENT, AND IMPROVE PUBLIC LAND MANAGEMENT, GA 1.13:M66/6 (1974)).

claimant under the Mining Law.[41] In instances where minerals were extracted, some of the lands that have long since been abandoned are now major sites of contamination.[42] When these factors are coupled with the absence of any royalty payments on mineral development of the public lands, as well as with the ability of a miner to buy the land at prices below fair market value, the crusade by the proponents of mining law reform is, at the very least, understandable.

II. A NEW MINING LAW FOR THE NEXT MILLENNIUM

The Department of the Interior has adopted a variety of administrative strategies to curb these abuses and update the Mining Law to reflect modern policies concerning disposition of the public lands. At the outset, the Department has undertaken a thorough review of historical administrative practices and legal precedents regarding when a patent applicant gains a vested right in mineral lands, so as to cut off the Department's ability to apply reforms to pending applications without effecting a governmental taking. In addition, the Department has implemented specific strategies—for example, limiting patents for millsites, adopting more effective surface-use regulations, and segregating or withdrawing sensitive lands from the patenting process—designed to modernize its administration of the Mining Law. This Part reviews these efforts in detail, and concludes they have the potential either to bring significant

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41. *See* NATIONAL FOREST ADVISORY COUNCIL, *supra* note 40, at 5; *see also* Nome & Sinook Co. v. Snyder, 187 F. 385 (9th Cir. 1911); Durant v. Corbin, 94 F. 382 (E.D. Wash. 1899); Gird v. California Oil Co., 60 F. 531, 544–45 (S.D. Cal. 1894); Mitchell v. Cline, 24 P. 164 (Cal. 1890).

42. *See, e.g.*, Joby Warrick, *Cleanup and Lawsuits Proceed in an Old Idaho Mining Valley*, WASH. POST, May 5, 1997, at A1; United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1263 (E.D. Cal. 1997); *see also* Michael S. Giannotto & David J. Katz, *EPA's Developing Strategy for Increased Regulation and Oversight of the Hardrock Mining Industry*, 43 ROCKY MTN. MIN. L. INST. 14-1 (1997). *See generally* UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL LAND MANAGEMENT: AN ASSESSMENT OF HARDROCK MINING DAMAGE (1988); CHRISTOPHER M. WEST ET AL., MINES, STORM-WATER POLLUTION AND YOU: A CITIZEN'S HANDBOOK TO STOPPING WATER POLLUTION FROM MINES (1995); Susan P. Bass, *Tools for Regulating the Environmental Impact of Mining in the United States*, 26 ENVTL. L. REP. 10159 (1996); Christopher Hayes & William Schafer, *Acid Rock Drainage: The Next Focus of Environmental Regulation?*, 42 ROCKY MTN. MIN. L. INST. 15-1 (1996).

change to the Mining Law's operations, or to prompt legislative reform.

A. The Mining Law Receives a Hard Look

Shortly after he took office, Secretary Babbitt, a proponent of reform, altered the administrative process for handling patent applications. Concerned that neither the Department's field offices nor the Washington office was conducting significant legal or policy review of patent applications, he issued a Secretarial Order rescinding existing rules allowing subordinate departmental officials to issue what are called First Half Final Certificates ("FHFCs") and patents.[43] These FHFCs documented that the patent application had been received and that certain paperwork filing requirements had been satisfied.[44] He issued this order in anticipation of legislative reform during the 103rd Congress.[45] The new procedures for patenting required several levels of review, including a legal review by the Secretary's lawyers in the Solicitor's Office.[46]

Many industry representatives viewed the Secretary's actions as a direct assault on the Mining Law. To them, the Secretary's review process erected unnecessary hurdles designed to bring the patenting process to a grinding halt.[47] In their view, once a mining claimant submits a patent application, pays the purchase price, and receives their FHFC, the claimant has a "vested" property right to the issuance of a patent—a right that the Secretary may not deny or unreasonably withhold.[48] This understanding became significant as the Secre-

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43. *See* Secretarial Order No. 3163 (Mar. 2, 1993); *see also id.*, Amend. No. 1 (Dec. 13, 1993); *id.*, Amend. No. 2 (Dec. 23, 1994); *id.*, Amend. No. 3 (Dec. 12, 1995).

44. *See infra* notes 134–39 and accompanying text.

45. *See* Secretarial Order No. 3163, *supra* note 43, at sec. 1.

46. *See* Memorandum from Michael P. Dombeck, Acting Assistant Secretary, Land and Minerals Management to the Secretary of the Interior, *Secretarial Review Process for Proposed Issuances of First Half Final Certificates and Mineral Patents* (May 4, 1993) (on file with author).

47. *See, e.g.*, Patrick J. Garver, An Address to the 45th Annual Rocky Mountain Mineral Law Institute (July 22, 1999) (on file with the author).

48. *See, e.g.*, R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061, 1067–68 (9th Cir. 1997); Independence Mining Co. v. Babbitt, 105 F.3d 502, 506–07 (9th Cir. 1997); Pl.'s Mem. Resp. to Defs.' Mot. for Summ. J. at 13, Mt. Emmons Mining Co. v. Babbitt, 928 F. Supp. 1046 (D. Colo. 1996) (No. 94-Z-2978) (on file with author) ("[T]he law is clear that upon payment of the purchase price, Mt. Emmons' rights

tary's actions arguably slowed down the patenting process, and remained so when Congress imposed a moratorium on processing new patent applications.[49] The moratorium has been in place since October 1, 1994.[50] Moreover, if mining claimants who have submitted a patent application do not have such a vested right, then Congress might be free to amend the law and

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vested . . . ."); Pl.'s Reply in Supp. of its Mot. for Summ. J. at 8, Santa Fe Pacific Gold Corp. v. Babbitt (No. CV-N-94-477-HDM) (D. Nev. 1996) ("The applicant's right to a patent is complete once the statutory purchase price has been paid, subject to divestment only where Interior concludes that the applicant was not entitled to a patent *at the time* payment was made and equitable title vested.") (on file with author); Pls.' Mem. in Supp. of Mot. for Order of Mandamus or an Order Compelling Agency Action at 10, Canyon Resources Corp. v. Babbitt (No. CV-N-94-00705-ECR) (D. Nev. 1994) ("BLM's issuance of the FHFC vests in an applicant equitable title to the land described in an Application for Mineral Patent, subject only to confirmation of a valuable discovery . . . .") (briefs on file with author). *See generally* R. Timothy McCrum, *The Changing Nature of the Right to a Mineral Patent*, 42 ROCKY MTN. MIN. L. INST. 14-1 (1996).

49. *See* Department of the Interior and Related Agencies Appropriation Act of Sept. 30, 1994, Pub. L. No. 103-332, 108 Stat. 2499, 2519.

50. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act of Oct. 21, 1998, Pub. L. No. 105-277, 112 Stat. 2681, 2681-287; Omnibus Consolidated Rescissions and Appropriations Act of Apr. 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-203; Omnibus Consolidated Appropriations Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-21; *see also* Instruction Memorandum No. 99-113 from Assistant Director, Minerals, Realty, and Resource Protection, United States Department of the Interior, Bureau of Land Management to All State Directors, *Schedule of Mineral Examinations and Mineral Reports for Processing Grandfathered Mineral Patent Cases for the Congressional Five Year Plan* (Apr. 21, 1999); Instruction Memorandum No. 99-016 from Assistant Director, Minerals, Realty, and Resource Protection, United States Department of the Interior, Bureau of Land Management to All State Directors, *Mineral Patent Moratorium and Processing of Grandfathered Mineral Claims* (Nov. 3, 1998).

The Interior Department interpreted the moratorium to apply to all patent applications unless those applications were pending in Washington, D.C. as of September 30, 1994, as well as those for which a FHFC was signed before October 1, 1994. *See* Instruction Memorandum No. 95-01 from Director, United States Department of the Interior, Bureau of Land Management to All State Directors, *Processing of Mineral Patent Applications for FY 1995* (Oct. 4, 1994) (expired Sept. 30, 1995). This interpretation was rejected by the Tenth Circuit, where the court held that the Department had to process Mt. Emmons' patent application. *See* Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167 (10th Cir. 1997). There, at the request of BLM, Mt. Emmons had paid the purchase price and received a receipt for the payment, but before the FHFC could be signed Congress passed the moratorium. The court held that the moratorium did not preclude the Secretary from processing Mt. Emmons' patent application, because the company had done all that it was required to do under the Mining Law. *See id.* at 1171–72. Conversely, the failure to pay the purchase price before the moratorium proved fatal to R.T. Vanderbilt's effort to avoid the moratorium. *See R.T. Vanderbilt*, 113 F.3d at 1067.

strip their ability to obtain fee simple title to those lands covered by a FHFC.[51]

1. The Demise of the Patent

The delay occasioned by the new patent application review process prompted the owner of one of the largest gold mines in the world, Barrick Goldstrike Mines, Inc., to seek a writ of mandamus compelling the Secretary to issue patents to lands covered by the company's seven pending patent applications.[52] The company had paid the purchase price for the lands and the BLM had signed the FHFC. Magistrate Judge Phyllis J. Atkins concluded that the Secretary had intentionally delayed the patent issuance and that Barrick had acquired, through the FHFC, equitable title subject to certain conditions.[53] Nevertheless, she declined to issue a writ of mandamus, holding that a claimant's right to a patent does not vest until the Department of the Interior has only ministerial acts left to complete with respect to a patent application. In the Goldstrike Mines case, the Secretary still had to make a determination of whether Barrick had discovered valuable mineral deposits on

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51. Beginning in the mid-1980s, the number of patent applications increased as mining claimants began to fear the possible consequences of Congress enacting reform legislation. Historically, the government issued more than a thousand patents annually until around the turn of the century, at which point, after 1912, the number of patents issued decreased to several hundred annually—with less than 200 per year issued by 1930. *See* Jan G. Laitos & Thomas A. Carr, *The New Dominant Use Reality on Multiple Use Lands*, 44 ROCKY MTN. MIN. L. INST. 1-1, 1-14, 1-37 (1998). From 1960 to the mid-1980s, the number of patent applications declined considerably, until the threat of mining law reform arguably caused an increase in the 1980s. *See id.*; McCrum, *supra* note 48, at 14-7.

Whether the government should be anxious to retain ownership to lands containing existing mine sites is not a simple matter. Many existing or past mine sites contain hazardous substances, thereby potentially exposing the government to liability or, at the very least, a cleanup responsibility. *Cf.* FMC Corp. v. United States, 29 F.3d 833 (3d Cir. 1994). *See generally* Steven G. Davison, *Governmental Liability under CERCLA*, 25 B.C. ENVTL. AFF. L. REV. 47 (1997).

52. *See* Barrick Goldstrike Mines, Inc. v. Babbitt, No. CV-N-93-550-HDM(PHA), 1995 WL 408667 (D. Nev. Mar. 21, 1994). *See generally* Scott W. Meier, Casenote, *MINING LAW—Approval of a Patent—A Command Performance*. Barrick Goldstrike Mines, Inc. v. Babbitt, *No. CV-N-93-550-HDM, (D. Nev. Jan. 18, 1994)*, 30 LAND & WATER L. REV. 109 (1995). *Barrick* has not been alone in attempting to have a court force the Secretary's hand. *See generally* McCrum, *supra* note 48.

53. *See* Barrick Goldstrike Mines, Inc. v. Babbitt, No. CV-N-93-550-HDM (PHA), 1994 WL 836324 (D. Nev. Jan. 14, 1994) (Dec. of Mag. J. Phyllis J. Atkins).

the mining claim, and, therefore, more than a ministerial act was left to be completed. Rather than directly ordering Secretary Babbit to issue the patent, Judge Atkins ordered him to finish processing Barrick's patent application within three months—as requested by the Secretary himself.[54] Under protest, the Secretary ultimately signed Barrick's patents and conveyed over $10 billion in resources in return for a payment of approximately $10,000.

Aside from prompting lawsuits such as Barrick's, the Secretary's new review procedures led to several important reforms in processing patent applications. For example, a review of patent applications for lands designated as federal wilderness areas under the Wilderness Act of 1964[55] prompted Department of the Interior Solicitor John D. Leshy to issue a May 1998 opinion concluding that only the surface estate, and not the entire fee simple estate, could be patented. However, Leshy recognized an exception for situations in which, prior to the wilderness designation, the mining claimant had a valid discovery *and* had fully complied with all the requirements for obtaining a patent.[56]

Perhaps more significantly, the Solicitor issued an opinion in 1997 explaining that considerable confusion had arisen among the courts, patent applicants, and Congress concerning the point at which applicants obtain vested rights to the issuance of a patent.[57] Precisely when, if at all, a mining claimant acquires some sort of vested property right in the issuance of a patent conveying fee simple title to the land is a matter of con-

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54. *See Barrick*, 1995 WL 408667, at *1. The court actually extended the time period by about one month. *See id.* A year later the Department's Office of Inspector General began an audit on patent application activities that occurred from 1993 through 1995. *See* OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF THE INTERIOR, AUDIT REPORT OF ISSUANCE OF MINERAL PATENTS, BUREAU OF LAND MANAGEMENT, AND OFFICE OF THE SOLICITOR, REP. NO. 97-I-1300 (1997).

55. 16 U.S.C. §§ 1131–1136 (1994).

56. *See* Memorandum from John D. Leshy, Solicitor, United States Department of the Interior to Director, Bureau of Land Management, Patenting of Mining Claims and Mill Sites in Wilderness Areas, M-36994, at 21 (May 22, 1998); *cf.* Estate of Lighthill, 147 I.B.L.A. 25 (1998) (indicating that a surface estate to Wild and Scenic River Act lands is not patentable unless purchase money is paid and patent application filed prior to inclusion of the lands into the system) (currently on appeal).

57. *See* Memorandum from John D. Leshy, Solicitor, United States Department of the Interior to Director, Bureau of Land Management, M-36990, *Entitlement to a Mineral Patent Under the Mining Law of 1872* (Nov. 12, 1997).

siderable significance to the mining industry. For years, the hardrock mining industry has sought to dissuade Congress from enacting significant reform by arguing that any reforms made applicable to existing mining claimants, such as taking away vested statutory rights to a patent, would constitute a taking of their property.[58] The answer, according to the Solicitor, is that "[u]nder established federal case law, the right to a mineral patent does not vest in the applicant until the Secretary of the Interior determines that the applicant has met all the terms and conditions of the patent, including verification that the applicant has discovered a valuable mineral claim."[59] In reaching this conclusion, the Solicitor observed that one recent decision in particular, *Cook v. United States,*[60] may have attached too much significance to the signing of FHFCs, which the Solicitor views simply as an indication that the applicant has complied with the initial paperwork requirements of the Mining Law.[61] As a consequence, he recommended that the BLM abolish FHFCs and refuse any purchase money until there has been a verification of the amount of mineral lands, if any, that are available for patenting.[62]

Whether the Solicitor's conclusion will prove convincing remains to be seen.[63] The litigation in *Cook*, which preceded the Solicitor's opinion, is perhaps the most significant test, to date, of the conclusions advanced by the Solicitor's opinion. Although the court was not persuaded by the Solicitor's argu-

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58. *See Mineral Exploration and Development Act of 1993: Hearing Before the Subcomm. on Mineral Resources Development and Production of the Comm. on Energy and Natural Resources*, 103d Cong. 443, 449 (1993) (statement of Lawrence G. McBride).

59. Memorandum, *supra* note 57, at 9.

60. 37 Fed. Cl. 435 (1997).

61. *See* Memorandum, *supra* note 57, at 3, 7–9.

62. *See id.* at 9. The Solicitor further recommended that the BLM Manual, described *infra* note 73, the regulations, and other policy statements be amended to reflect the conclusions in the opinion. *See* Memorandum, *supra* note 57, at 10.

63. This issue, coupled with the Solicitor's opinion on patenting in Wilderness areas, apparently has generated considerable interest before the Interior Board of Land Appeals (the "IBLA"). *See Lighthill*, 147 I.B.L.A. at 31–32 & n.7; *id.* at 34–35 (Burski, J., concurring). The IBLA is one of the appellate boards in the Office of Hearings and Appeals within the Department of the Interior, and it has jurisdiction over BLM decisions, including mining law matters. *See generally* William Philip Horton, *IBLA Practice and Procedure,* 2 NAT. RESOURCES & ENV'T 36 (Spring 1986).

ment, this Part of the article attempts to show that the court's decision is, at the very least, questionable.

a. Congress Halts the Cooks' Patent Application

On September 29, 1989, Richard Cook, along with his wife and two daughters, filed a patent application for twenty-three placer claims containing pumice, totalling approximately 1,692 acres located within the Santa Fe National Forest in Sandoval County, New Mexico. The Cooks submitted their patent application at a time of high public concern for protecting part of the Santa Fe National Forest.[64] On January 16, 1991, the Cooks paid the purchase price of $4,232.50 and the BLM signed a Mineral Entry Final Certificate—the effective equivalent of an FHFC.[65]

On October 12, 1993, Congress established the Jemez National Recreation Area (the "JNRA").[66] Section 3(a) of the JNRA Act provides that "[n]otwithstanding any other provision of law, no patents shall be issued after May 30, 1991, for any location or claim made in the recreation area under the mining laws . . . ."[67] This section further provides that any party claiming to have been deprived of a property right by such a prohibition may file an action for compensation in the United States Court of Federal Claims within one year after the date of enactment of the Act.[68] Other provisions of the Act preserve valid existing rights, require reclamation after mining operations are completed, and direct the Agriculture and Interior

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64. A Forest Land Management Plan for the Santa Fe National Forest was approved on September 4, 1987, recommending that part of the Jemez River be designated as a Wild & Scenic River. Congressman William B. Richardson introduced this legislation on January 24, 1989. *See* H.R. 644, 101st Cong. (1989); East Fork of the Jemez River and the Pecos River Wild and Scenic Rivers Addition Act of 1989, Pub. L. No. 101-306, 104 Stat. 260 (codified at 16 U.S.C.A. §§ 1271, 1274 (1994 and Supp. III 1997).

65. *See* Cook v. United States, 37 Fed. Cl. 435, 438 (1997).

66. *See* Jemez National Recreation Area, New Mexico, Pub. L. No. 103-104, 107 Stat. 1025 (1993) (current version at 16 U.S.C. §§ 460jjj–460jjj-5 (1994)).

67. 16 U.S.C. § 460jjj-2(a)(1) (1994 and Supp. IV 1998).

68. For another example of such congressional treatment of existing mining claims, see Mining in the Parks Act, 16 U.S.C. §§ 1901–12 (1994), wherein Congress directed a study of the validity of unpatented mining claims and authorized district court jurisdiction for claimants who believed they had suffered a compensable loss under the Constitution.

Departments to take certain actions to determine the validity of any mining claims within the JNRA.[69]

The Cooks brought a legislative takings case, alleging that the provision in the JNRA prohibiting patenting deprived them of a vested property right to a patent. They argued that each of the claims was supported by a valid discovery and, as such, they were entitled to the issuance of a patent. Their argument was premised upon the assumption that equitable title had vested because they had paid the purchase price and received a Mineral Entry Final Certificate for the mining claims. According to the Cooks, "[t]he Final Certificate and valid discoveries entitle[d] [them] to the issuance of a patent . . . ."[70] Since Congress denied them this right to a patent upon enactment of the JNRA, Congress effectively deprived them of fee simple title to the land.[71]

Thus, this case squarely presented the question of what happens when Congress amends the law to remove a preexisting opportunity to patent mining claims after the claimant files paperwork to perfect a discovery. The answer to this question also indirectly affects whether or when during the patenting process Congress or the Department can change the rules governing hardrock mining and the disposal of the mineral lands. For a short while, the BLM and the Interior Board of Land Appeals (the "IBLA") believed that a mineral claimant obtains a vested right—a Fifth Amendment compensable property interest—once equitable title has passed. This passing of equitable title to the fee simple estate underlying the boundaries of the mining claim occurs, according to the BLM and the IBLA, upon the issuance of the FHFC.[72] The BLM's manual at-

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69. *See* 16 U.S.C. § 460jjj (1994 & Supp. IV 1998).

70. *Cook*, 37 Fed. Cl. at 438.

71. Paragraph 15 of Cook's complaint asserted that:

> Through enactment of Section 3(a) of the Recreation Act, the United States has taken the vested private property rights conferred upon Plaintiffs' by the Final Certificate, including the right to obtain a patent to the lands comprising the Brown Placer Claims, the right to hold such lands in fee simple absolute, the right to subdivide, lease or sell such lands, and the right to use and profit from the minerals, including common varieties, water, timber, wildlife and other natural resources located on or therein.

Pls.' Compl. at para. 15, Cook v. United States, 37 Fed. Cl. 435 (1997), 42 Fed. Cl. 788 (1999) (No. 94-344L).

72. *See* United States v. Whittaker, 102 I.B.L.A. 162 (1988).

taches special significance to this FHFC and to a mining claimant's payment of the purchase price. According to the manual, the signing of the FHFC, which occurs when the BLM receives the payment of the purchase price, is when equitable title is deemed to have vested in the applicant. The applicant is then relieved of annual requirements to assess prospects of profitably mining the land, and the land is segregated from further entry, if entry is allowed, subject to confirmation of the discovery.[73] However, the manual relies on selected excerpts from a small number of IBLA decisions that, almost in passing, simply assume that precedent requires the passing of equitable title upon the issuance of the FHFC.[74]

But that precedent is not so clear. Two cases analyzing the effect of the Sawtooth National Recreation Area Act (the "SNRA") on patent applications suggest that no such vested

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73. *See* DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT, MINERAL PATENT APPLICATIONS H-3860 at Glossary, p. 4 (Rel. 3-266, July 9, 1991). The BLM manual provides non-binding but persuasive guidance on agency procedure. When referring to equitable title, this manual often appears to mix various terms. For example, the manual asserts that the owner of an unpatented mining claim with a discovery has an "equitable title to the land within the mining claim which the courts would recognize as a vested property right." *Id.* MINERAL PATENT APPLICATION PROCESSING H-3860-1 at III-10 (Rel. 3-265, Apr. 7, 1991) [hereinafter BLM MANUAL]. Of course, this confuses "equitable title" to the land with a property right in a valid mining claim. The BLM Manual also indicates that the acceptance of the purchase money is the date when equitable title passes, but elsewhere it suggests that the acceptance only can occur upon the date of the mineral entry, which is the date of issuance of the final certificate. And the purchase money can only be accepted "when publication has been completed, any adverse claims have been properly settled, and final proofs have been filed." *Id.* at III-4.

74. In *United States v. Whittaker*, 102 I.B.L.A. 162 (1988) (on reconsideration), the issue was whether the present marketability test for a valid discovery had to be satisfied at the time of the issuance of the first half final certificate or at the time of a hearing in a contest proceeding. Relying on the old judicial decisions, the IBLA held that the test only had to be met at the time of the issuance of the final certificate, because then the claimant obtained equitable title to the property and the government only retained bare legal title—and the issuance of a patent could be compelled by mandamus. *See id.* at 166. At least until the IBLA was made aware of the recent Solicitor's opinions, *Whittaker* was still followed. *See* United States v. Waters, 146 I.B.L.A. 172, 181–82 (1998). Yet, in one of IBLA's decisions, a claimant argued that, having paid the purchase money, it was no longer required to perform annual assessment work. The IBLA held that, pursuant to the regulations, the obligation only ceases upon issuance of the final certificate and that the money was prematurely paid. There were issues requiring resolution before the final certificate could be issued. *See Small*, 108 I.B.L.A. 102, 106 (1989).

rights are acquired. In *Swanson v. Babbitt*,[75] the court addressed the effect of provisions in the SNRA that precluded the issuance of patents for applications that were pending when the SNRA was enacted. Swanson filed his patent application several years prior to the SNRA's passage. Shortly after he filed his application, the BLM brought a contest proceeding on the validity of the claims. Congress passed the SNRA during this contest proceeding. After holding that the SNRA precluded the issuance of any further patents in the recreation area, the court addressed whether Swanson had a vested patent right as of the date of the application, and therefore whether "the SNRA's extinguishment of patent rights affected a taking of his property without compensation, in derogation of his rights under the Fifth Amendment."[76]

The court agreed that Swanson would have had a claim for compensation if he had a vested patent right. In determining whether Swanson had such a right, the court first noted that "[t]he right to a patent accrues when the claimant has filed a proper patent application and has paid his fee . . . ."[77]

Swanson had in fact paid the purchase price.[78] But the court then quoted from various decisions emphasizing that the right accrues when *all* the requirements of the law have been met.[79] Although the court's analysis is somewhat cursory, it suggests that the right accrues only after all the requirements of the law have been satisfied, and all that is left is the ministerial task of issuing the patent. Applying this analysis to Swanson's claim, the court held that:

> [b]ecause the delay in the issuance of Swanson's patent application was not attributable to the Department's purely ministerial and administrative functions but resulted from the Department's challenge of the size of Swanson's mill site

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75. 3 F.3d 1348 (9th Cir. 1993).

76. *Id.* at 1353.

77. *Id.*

78. *See* Def.'s Reply to Pls.' Resp. to the Def.'s Mem. Br. in Supp. of the Def.'s Mot. for Summ. J. at 8, Cook v. United States, 37 Fed. Cl. 435 (1997) (No. 94-344L) (citing Ex. C, Decl. of B. Wilson ¶ 3) (on file with author).

79. *See Swanson*, 3 F.3d at 1353–54. The court relied on *Cameron v. United States*, 252 U.S. 450 (1920), *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428 (1892), *Freese v. United States*, 639 F.2d 754 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 827 (1981), *South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980), *cert. denied*, 449 U.S. 822 (1980), and *Oil Shale Corp. v. Morton*, 370 F. Supp. 108 (D. Colo. 1973).

> requests, whatever patent rights Swanson might have possessed did not vest until resolution of those claims in 1986.[80]

For the most part, *Swanson* followed an earlier decision, *Freese v. United States*.[81] There, the court considered whether the SNRA prohibition on patenting constituted a taking of a property right. In rejecting a takings argument, the court reasoned that the mining claimant was only denied the opportunity to obtain a greater property right than that which was owned when Congress passed the SNRA. The court's—albeit rather cryptic—review of the law prompted the conclusion that "[t]he law is well-settled that this vested right does not arise until there has been full compliance with the extensive procedures set forth in the federal mining laws for the obtaining of a patent."[82] The court nevertheless emphasized that the SNRA preserved "valid existing rights" and did not diminish the claimant's property interest in the mining claim itself.

b. The Decision in Cook v. United States

With this background, the court in *Cook* held that, if the Cooks could establish that they had located valuable deposits of pumice, then they were entitled to just compensation for their loss of the right to patent the lands embraced within those claims.[83] The court began its analysis by asserting that it is "well established that the right to a patent" can precede the actual patent issuance and that a divestiture of that right deprives the holder of a property right compensable under the

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80. *Swanson*, 3 F.3d at 1354. Implicit in *Swanson* is the premise that no vested right accrues until the Department has *determined* the validity of the claims, with only "purely ministerial and administrative functions" left to be done. Arguably any other result would mean that parties might acquire vested rights in land before the Department has determined precisely what land is open for disposition under the general mining laws. *Cf.* Irwin v. Wright, 258 U.S. 219, 233 (1922) (stating that "[c]ertainly until the area which the entryman could receive was ascertained, no equitable title could pass"); Wisconsin R.R. Co. v. Price County, 133 U.S. 496, 509 (1890) (indicating the need for the property to be definitely fixed before any beneficial title could pass).

81. 639 F.2d 754 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 827 (1981).

82. *Freese*, 639 F.2d at 758. In *Freese*, as the court noted, the plaintiff had not even taken the "first step towards obtaining patents." *Id.* at 758.

83. *See Cook*, 37 Fed. Cl. at 435.

Fifth Amendment.[84] The court distinguished *Swanson* because there, the Department of the Interior had contested the claimant's right to a patent before Congress passed the SNRA.[85] Instead, the court held that the issue had been resolved by the Supreme Court's 1892 decision in *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*,[86] which held that equitable title passes when the applicant has complied with "all of the terms and conditions required for entitlement to a patent, including the payment of statutory fees."[87] The *Cook* court explained:

> The existence of a property interest in *Payne*, *Benson*, and the instant case is . . . based on the applicant, prior to any change in the law, having done all that is required of it under existing law to receive title to public land, including the filing of all papers and, where applicable, the payment to the United States of the purchase price for a patent. Once the applicant has complied with all requirements, the DOI is obligated under the law to complete the administration of its internal affairs and grant a patent. In other words, plaintiffs had an entitlement to a patent. Interpreting this entitlement to constitute a vested property interest constitutes a reasonable and appropriate application of the doctrine of equitable title and is demanded by the logic that underlies the Supreme Court [decisions in *Benson* and *Payne*].[88]

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84. *Id.* at 438. One could speculate that our "rights"-based jurisprudence is inherently ill-equipped to address congressional entitlement programs, such as under the Mining Law. After all, the "right" to a patent only exists because Congress created the "right" in the first place. When it "takes away" that "right" in subsequent legislation, the "right" no longer exists. So it cannot be a "right" to a patent that creates a property interest—it must be something else. The more appropriate question, therefore, is not when a "right" to a patent vests, but rather when and on what basis does the mining claimant possess enough strands in the fee simple estate to the lands encompassed by the mining claims such that Congress may not deprive that claimant of that property interest without affording just compensation.

85. *See Cook*, 37 Fed. Cl. at 442–43. Of course, the irony of this rationale is that Cook's patent application was *earlier* in the process than Swanson's and, as such, the Department had not yet had time to decide whether to contest the application.

86. 145 U.S. 428 (1892).

87. *Cook*, 37 Fed. Cl. at 442. For a discussion of *Benson*, *see infra* notes 102–04 and accompanying text.

88. *Cook*, 37 Fed. Cl at 445–46.

The *Cook* court rejected the United State's effort to distinguish *Benson*. The United States argued that the patent application process during the period when *Benson* was decided differed significantly from modern-day practices.[89] Unconvinced, the court noted that the United State's position was contrary to the BLM Manual, relying too heavily on wording differences between the Cooks' FHFC and the certificate applicable at the time of *Benson*.[90] Consequently, the court held that the Cooks would be entitled to just compensation for those mining claims ultimately determined to be valid by the Secretary.[91]

c. *The Foundations of Equitable Title Doctrine*

This section of the article traces the foundations of the equitable title doctrine and illustrates how several practical considerations underlie the need to examine the rights of patent applicants and develop the "equitable title" concept. The section explains that the equitable title doctrine was developed to facilitate taxation of mineral discoveries and to protect claimants against interlopers, but it was not intended to create freehold property rights before a patent was issued.

The decision in *Cook*, as well as the arguments advanced by mining interests in cases such as *Cook* and *Barrick*, overlook the history of public land administration. It became axiomatic during the nineteenth century that an applicant for a patent to public lands obtained a protected but defeasible property interest in the patent only after *all* the conditions for the issuance of the patent were satisfied, there was an entry and payment of the purchase price, and, most importantly, the claimant received a patent certificate or certificate of purchase. The ten-

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89. *See id. at* 440.

90. *See id.* at 440–42.

91. *See id.* at 446–47. The court also required further briefing on whether the Cooks had, prior to the establishment of the Jemez National Recreation Area, done all that was required in order to obtain a patent. *See id.* at 447. The case was subsequently transferred to another judge, who has since held that the Cooks were entitled to a judgment in their favor on liability, because they had valid mining claims and had complied with all the requirements of the Mining Law for issuance of a patent. *See* Cook v. United States, 42 Fed. Cl. 788, 795 (1999). In May 1999, the United States requested and was denied reconsideration of this decision, although the Department has since challenged successfully the underlying validity of 19 of the mining claims. *See infra* notes 172–175 and accompanying text.

der of the purchase price reflected an "offer" to purchase the land,[92] with a "purchase" occurring upon the issuance of a certificate. The certificate reflected a determination by the local land office that the applicant was entitled to a patent. All that was left to be done was for the General Land Office to review that determination for any errors and issue the patent.[93] Once the Department issued the certificate, the applicant was deemed to hold "equitable title" to the land and as such possessed a vested right to the patent.[94] Thus, it was the Department's review and *determination* that the applicant was entitled to a patent, as evidenced by the certificate, that justified the passage of some form of a vested—albeit defeasible—right.

State and local governments, unable to tax federal property, eagerly awaited the change in ownership and sought to exercise their authority when, for all practical purposes, the federal government's ownership and control over the property had ceased.[95] The "equitable title" doctrine provided the legal fiction allowing states to tax what would otherwise have been federal property beyond the reach of state jurisdiction. In *Carroll v. Safford*,[96] the Court upheld the application of a state tax even though no patent had yet issued because the purchaser had acquired an equitable interest in the land, as reflected by the certificate of purchase. The land was no longer public property, and as such the certificate was equivalent to a patent. The court reasoned that, "[s]o far as the rights of the purchaser are considered, they are protected under the patent-certificate as fully as under the patent."[97]

More importantly, the "equitable title" concept served as a useful legal device for resolving disputes over property by rival

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92. *See infra* notes 133–36.

93. *See infra* notes 133–36.

94. *See infra* notes 133–36.

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> [L]ands which had constituted a part of the public domain might be taxed by the States before the government had parted with the legal title by issuing a patent, but that this could only be done when the right to the patent was complete, and the equitable title fully vested in the party, without anything more to be paid, or any act to be done going to the foundation of his right.

Railway Co. v. McShane, 89 U.S. 444, 461 (1875); *see also* Northern Pac. R.R. Co. v. Rockne, 115 U.S. 600, 609–10 (1885).

96. 44 U.S. (3 How.) 441 (1845).

97. *Id.* at 461; *see also* Witherspoon v. Duncan, 71 U.S. (4 Wall.) 210, 217–18 (1866).

claimants. Parties often attempted, in one fashion or another, to enter and claim land covered by a pending patent application, but for which no patent had issued because of the delay typically surrounding the General Land Office's issuance of patents.[98] Claimants, for instance, sometimes attempted to step into (or "relocate") mining claims after entry but before the issuance of a patent "in the event that the persons making the entry fail to perform the labor or to make the improvements required"[99] under the law. This practice was thwarted by the legal fiction that, once there was an entry and certificate of purchase, "so far as the acquisition of title by any other party was concerned,"[100] it was the equivalent of a patent and the government held only legal title in trust for the certificate holder.

Cook relied on the oft-cited case *Benson Mining Co. v. Alta Mining Co.*[101] In *Benson*, the plaintiffs' predecessor applied for a patent, paid the purchase price and obtained a certificate of purchase. The property was then sold to the plaintiffs, who neglected to perform required annual assessment work. The defendant then attempted to relocate the claim on its own behalf before the patent was ever issued. After the government issued the patent to the plaintiffs, they brought suit against the defendant's attempted relocation. The Court held that the plaintiffs' claim survived despite their failure to do assessment work, because equitable title already had passed at the time of

98. In *Houghton v. McDermott*, 15 Pub. Lands Dec. 509 (1892), for example, the Secretary observed that a protestor not residing on the claimed mineral lands until twelve years after the filing of a patent application could not seek to upset the application by claiming that the lands were at the time of the protest agricultural and not mineral. The Secretary emphasized that the mineral survey notes and the patent application provide sufficient evidence of the character of the land at the time of the application. *Cf.* Barney v. Dolph, 97 U.S. 652, 657 (1878) (explaining donation system and stating, "[t]he delay which necessarily attended the delivery of the patents, after settlers had become entitled to them under the law, oftentimes operated with great hardship upon those whom Congress intended to assist").

99. D.K. SICKELS, THE U.S. MINING LAWS, AND THE DECISIONS OF THE COMMISSIONER OF THE GENERAL LAND OFFICE AND THE SECRETARY OF THE INTERIOR THEREUNDER 379 (1881).

100. Deffeback v. Hawke, 115 U.S. 392, 405 (1885). In *Deffeback*, the plaintiff received his certificate on Jan. 31, 1882. *See id.* at 393. In July of 1878, the defendant nevertheless entered the land and attempted to claim a right under the laws relating to town sites. *See id.*

101. 145 U.S. 428 (1892).

the purchase.[102] The court observed that "equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued."[103]

The Supreme Court's decision in *Benson* reflected the views of the Commissioner of the General Land Office and of the Secretary of the Interior. In their opinion, once there was an "entry," an acceptance of the purchase money, and issuance of an entry or patent certificate, the land could not be relocated by a rival claimant.[104] The Secretary indicated that "equitable title . . . accrues upon purchase and entry," with "certain acts,

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102. *See id.* at 433–34. The Court reached its conclusion by relying primarily on SICKELS, *supra* note 99, *Aurora Hill Consol. Mining Co. v. 85 Mining Co.*, 34 F. 515 (D. Nev. 1888); *Carroll v. Safford*, 44 U.S. (3 How.) 441 (1845); *Lessee of French v. Spencer*, 62 U.S. (21 How.) 228 (1858); *Witherspoon*, 71 U.S. at 210; *Stark v. Starrs*, 73 U.S. (6 Wall.) 402 (1867); *Wirth v. Branson*, 98 U.S. 118 (1878); and *Deffeback*, 115 U.S. at 392. The Court followed the Secretary of the Interior's summary where the Secretary identified three classes of title: (1) title in fee simple; (2) title by possession; and (3) complete equitable title. *See Benson*, 145 U.S. at 430. The first describes an absolute grant by purchase and issuance of a patent is not defeasible; the second simply describes a possessory right that may be defeated if the party in possession fails "to perform labor or make the annual improvements required by the statute." *Id.* at 430–31. The third class describes the passage of equitable title:

> [T]he ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership.

Id. at 432; *see also id.* at 434.

103. *Benson*, 145 U.S. at 431.

> In other words, when the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the Land Department causes delay. But such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or place any additional burdens on the purchaser, or expose him to the assaults of third parties.

Id. at 431–32; *see also Aurora Hill*, 34 F. at 518 (holding that claim did not lapse for failure to comply with annual expenditure requirement after entry and payment of purchase price).

In *Aurora Hill*, the court observed that when a patent applicant:

> has complied with the requirements of this section, made his entry, and obtained his certificate of purchase, his obligations cease, and nothing more by way of consideration is required of him. He may be required to make further proof upon any matter not satisfactorily established, but these things are matters of detail, not consideration.

Id. at 519.

104. *See* SICKELS, *supra* note 99, at 387.

in the nature of conditions precedent, to be performed before an entry is made."[105] The certificate of entry or patent certificate was a legal instrument that reflected an adjudication and determination by the local land office issuing the instrument that the applicant had tendered all the requisite proofs and therefore was entitled to a patent.[106]

This understanding reflected the practical consequences surrounding the disposal of the public lands during the nineteenth century. Under pre-emption and other laws for disposal of public lands, parties routinely sought to supplant a prior en-

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105. *Id.* at 380. *See also* 382. The Secretary concluded:

> The true rule of law governing entries of the public land, to which mineral lands form no exception, is that, when the *contract of purchase is completed by the payment of the purchase money and the issuance of the patent certificate* by the authorized agents of the government, the purchaser at once acquires a vested interest in the land, of which he can not be subsequently deprived if he has complied with the requirements of the law prior to entry, and the land thereupon ceases to be a part of the public domain, and is no longer subject to the operation of the laws governing the disposition of the public lands. In such cases there is part performance of a contract of sale, which entitles the purchaser to a specific performance of the whole contract without further action on his part. *When the proofs are made, and the purchase money paid, the equitable title of the purchaser is complete, and the patent when issued is evidence of the regularity of the previous acts, and relates to the date of the entry*, to the exclusion of all intervening claims. *In short, an entry made is in all respects equivalent to a patent issued, in so far as third parties are concerned.*

Id. at 383 (emphasis added).

106. *See id.* at 386. Quoting from *Witherspoon,* 71 U.S. at 218, the Commissioner noted that "if the party is entitled by law to enter the land, the Receiver gives him a certificate of entry, reciting the facts, by means of which, in due time, he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered . . ." SICKELS, *supra* note 99, at 386; *see also id.* at 387.

> In the execution of all prior laws relating to land patents, the date when a party who, having fulfilled the requirements of law, submitted his final proof thereof, paid the purchase money, and received his patent certificate, has with great uniformity been held by the Supreme Court of the United States to be when he acquired a vested right in the land of which he could not be divested except by the exercise of the right of eminent domain.

Id. at 389. *See also Witherspoon,* 71 U.S. at 219 (indicating that equitable title exists upon the certificate of entry from the local land office); United States v. Mulligan, 177 F. Supp. 384, 385 (D. Or. 1959) (stating that: "Until the Government issues the final certificate, it retains both the legal and equitable title"); McGuire v. Brown, 39 P. 1060, 1062 (1895) (stating that inceptive right accrues upon "entry" and issuance of certificate of entry).

try. To prevent such abuses, the payment of the purchase price and the issuance of a final certificate was treated as a contract that had been accepted by the federal government. It was this contract that created equitable rights in the claimant—albeit rights that were defeasible for fraud or other irregularities.[107] As a consequence, public lands could be sold until the time that a pre-emption applicant complied with all the prerequisites for an entry, including the payment of any purchase price.[108] Any other result would have left the original entrant with little or no recourse against unscrupulous efforts by third parties attempting to have the original entry voided prior to the issuance of a patent.

Even so, parties claiming an interest in property based on a final certificate rather than on a patent often had to contend with subsequent determinations by the General Land Office that the entry was invalid. In *Hawley v. Diller*,[109] for example, *bona fide* purchasers of entries under the Timber and Stone Act argued that the Land Office was without jurisdiction or authority to cancel the entries once the purchase money had been paid and a final receipt issued. The Court rejected this argument. It emphasized that any property rights accruing at this stage—which "[a]t the most, [were] but an equitable ti-

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107. *See* Parsons v. Venzke, 164 U.S. 89, 92 (1896). Under the pre-emption laws:

> [a]n entry is a contract. Whenever the local land officers approve the evidences of settlement and improvement and receive the cash price they issue a receiver's receipt. Thereby a contract is entered into between the United States and the [pre-emptor], and that contract is known as an entry. . . . The effect of the entry is to segregate the land entered from the public domain . . . .

Id.; *see also* Cornelius v. Kessel, 128 U.S. 456 (1888); *Witherspoon*, 71 U.S. at 210. Once the entryperson had complied with all the requirements for obtaining the property, including paying the purchase price and receiving in return the final certificate, the land was said to be beyond the authority of Congress or the Department to make any other disposition: "it was not in equity their property." Pelham, 39 Pub. Lands Dec. 201, 202 (1910). This same reasoning led a court to conclude that sales under the Isolated Tracts Act could be altered at any time prior to the issuance of the cash certificate, which constituted an acceptance of the buyer's bid. *See* Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964).

108. *See* Moore v. Robbins, 96 U.S. 530 (1877).

109. 178 U.S. 476 (1900).

tle"—were "subject to the risk of the consequences" of the Interior Department's inquiry.[110]

Finally, the equitable title doctrine evolved to manage situations in which rival claimants asserted rights to lands that were covered by a patent application, but were withdrawn from entry or disposal prior to the issuance of the patent. In *The Yosemite Valley Case,*[111] the Court had to decide whether a

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110. *Id.* at 486–87. The Court added that the Department would be guided by principles of equity and justice, including providing the original entrant with notice of any cancellation proceeding. *See id.* at 489–94.

The circumstances surrounding these type of pre-emption claims should not be confused with those surrounding cases such as *Payne v. New Mexico*, 255 U.S. 367 (1921), relied upon by the *Cook* court. *Payne* involved a State's in-lieu selection, under which a State was allowed to relinquish its title to certain property and in return select an alternative tract from the unappropriated non-mineral public lands. *See id.* at 370. Once the State accepted the Government's offer by relinquishing the State's title to certain land, and when a list of the in-lieu selected lands was approved by the Land Office, the in-lieu selection (essentially an exchange) had been consummated. *Payne* and other such cases reflected the general understanding that any other interpretation would have chilled a State's relinquishment of title to its lands. *See* Wyoming v. United States, 255 U.S. 489, 502 (1921). In *Wyoming*, for instance, the State had received an in-lieu selection. The local land office allowed and approved the selection and forwarded it to the General Land Office, where it sat for three years. The Court held that an Executive Order issued prior to the issuance of a patent to the selected lands did not divest the State's equitable title to those lands. *See* Payne v. Central Railway Co., 255 U.S. 228, 234 (1921) (describing how local land officers had approved an indemnity list and forwarded the list and usual certificates to the General Land Office; argued along with *Wyoming*); *see also* Shaw v. Kellogg, 170 U.S. 312, 316–17, 334–35 (1898) (describing similar process); McDonald, 30 Pub. Lands Dec. 124 (1900) (superceded by statute).

These in-lieu selections did not involve a typical adjudication by the local land officers. Many of the statutes operated as a grant of lands *in praesenti*, with the in-lieu lands selected by the State "hereby appropriated and granted." Act of Feb. 28, 1891, ch. 384, 26 Stat. 796. Other grants also operated *in praesenti*. *See* United States v. Wyoming, 331 U.S. 440, *reh'g denied*, 332 U.S. 787 (1947) (discussing unsurveyed school land grants); Barden v. Northern Pac. Ry. Co., 154 U.S. 288, 313 (1894) (discussing railroad grants). *See generally* William E. Colby, *Mining Law in Recent Years*, 33 CAL. L. REV. 368 (1945), 36 CAL. L. REV. 355 (1948), *reprinted in* 5 ROCKY MTN MIN. L. REV. 186, 209 (1968) (noting that school land grants became effective immediately upon the grant if the land was surveyed, otherwise upon an approval of an official survey by the Land Office). Thus, a discovery of minerals that occurred after a selection would not defeat a prior non-mineral application for land. *E.g.*, Daniels v. Wagner, 237 U.S. 547 (1915); Leonard v. Lennox, 181 F. 760 (8th Cir. 1910) (cited and written by the author of the *Wyoming* opinion); Homestake Mining Co. of California, 136 I.B.L.A. 307, 313–14 (1996); Bakersfield Fuel & Oil Co. v. Saalburg, 31 Pub. Lands Dec. 312, 314 (1902); Rea v. Stephenson, 15 Pub. Lands Dec. 37 (1892).

111. Hutchings v. Low (The Yosemite Valley Case), 82 U.S. (15 Wall.) 77 (1872).

settler with the declared intention of obtaining title to public lands under the pre-emption laws, "does thereby acquire such a vested interest in the premises [so] as to deprive Congress of the power to divest it by a grant to another party."[112] The Court concluded that Congress's power over the property ceases only when the settler has complied with *all* the preliminary acts prescribed by the law and she is entitled to a certificate of entry from the local land officer, and, consequentially, to the issuance of a patent.[113] The Court distinguished the situation in *The Yosemite Valley Case* from instances in which a settler obtained a vested equitable right after paying the purchase price and acceptance by the local land officers.[114] The Court further admonished counsel for neglecting to distinguish between those instances where the settler claims a legal right to the land against the United States and those instances when the settler claims a right against third parties, noting:

> It seems to us little less than absurd to say that a settler or any other person by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition.[115]

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112. *Id.* at 86.

113. *See id.* at 87.

114. *See id.* at 88–89. The Court distinguished *Lytle v. Arkansas*, 50 U.S. (9 How.) 314 (1850), involving a settler who had paid the purchase price and received a certificate. *See* The Yosemite Valley Case, 82 U.S. at 89–90. There, the local land officer determined what land the settler could enter and accepted the payment only for the land on which it was determined that an entry would be allowed. *See Lytle,* 50 U.S. at 328–30, 332. The local land officer was given the authority to determine the rights of those asserting a pre-emption claim. *See id.* at 333. The *Lytle* Court had observed that the settler had done all that he could do to perfect his right under the law, including, "*proved his right*, under the law, *to the satisfaction of the register and receiver* of the land office." *Id.* at 334 (emphasis added).

115. The Yosemite Valley Case, 82 U.S. at 94; *see also* Campbell v. Wade, 132 U.S. 34, 37 (1889) ("The adjudications are numerous where the withdrawal from sale by the government of lands previously opened to sale has been adjudged to put an end to proceedings instituted for their acquisition."); Shepley v. Cowan, 91 U.S. 330, 338 (1875) (finding that Congress's power only ceases when all preliminary acts prescribed by law are performed, including payment of purchase price and entry); Pike, 32 Pub. Lands Dec. 395, 399 (1904) ("It has been uniformly held that land embraced within a preemption filing may be set apart by executive order, or reserved by act of Congress, at any time prior to proof and payment.");

Frisbie v. Whitney,[116] for example, reviewed a statute that prevented Whitney from pursuing a pre-emption claim. Whitney's claim arose after a court in a prior, unrelated action declared a land grant void, thereby abrogating existing claims and opening the land to new claims such as Whitney's.[117] Congress responded by re-enacting the land grant for the benefit of the earlier settlers, and effectively curtailing the rights of intervening pre-emption claimants such as Whitney. As a consequence, the Court held Whitney had no vested rights even though he had occupied the land, built a house and barn, applied to the land office, and offered to make a declaration that he had undertaken these activities with the intention of making a permanent settlement.[118]

In concluding that Whitney did not have a "vested right in the land," the Court focused on the fact that he "never has paid any money, has never received any certificate of pre-emption, and the [General Land Office has] never, in any manner, acknowledged or admitted his right to make pre-emption of that land."[119] The mere occupation of the land, with a view toward acquisition, only gives one the privilege of pre-emption against others, which provides a preference in the acquisition as well

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Rees v. Churchill, 1 Pub. Lands Dec. 450 (1882) (noting the right of a pre-emptor is extinguished by executive order withdrawal); Attorney General Opinion, 1 Pub. Lands Dec. 30 (1881) (indicating public land subject to homestead settlement may be withdrawn for military purposes at any time prior to the payment of the purchase price and entry by the settler, but not thereafter because it ceases to be public lands). *But cf.* Corcoran, 1 Pub. Lands Dec. 307 (1882) (stating claimant who had made settlement, constructed a residence and cultivated the land, and otherwise complied with the requirements for a donation certificate was, as a matter of common justice, paid damages when title was not perfected because of government's taking possession for military and Indian purposes).

> It is, unquestionably, the rule of law that a pre-emptor has no vested right in the land claimed by him until he has complied in good faith with the requirements of the pre-emption law, paid the purchase money and received his certificate, and that until this is done, it is within the legal and constitutional power of Congress to withdraw the land from entry and sale, though this may defeat the imperfect right of the settler.

Thomas v. Knight, Vol. II Copp's Pub. Land Laws 1890 at 800, 801 (Secretary Vilas to Commissioner Stockslager, Mar. 1, 1889).

116. 76 U.S. (9 Wall.) 187 (1869).

117. *See id.* at 193.

118. *See id.*

119. *Id.* at 192–93. The court emphasized that a vested right does not accrue until the register and receiver ensure that all acts necessary have been performed, that there has been a payment of the purchase price, and finally that a certificate of entry has been issued. *See id.* at 194.

as protection against intrusion by others.[120] Congress, according to the Court, retains absolute power over the disposal of public lands until the settler has made the required proof of compliance with the laws and has paid the purchase money.[121] The Court added that, in situations in which equitable title has been protected, "it will be found that the party whose equitable title was thus protected had, by the action of the officers of the Land Department, and the payment and acceptance of the price, acquired a vested right, which these officers afterwards disregarded, in violation of law."[122]

This array of judicial and administrative decisions illustrated that a vested property right accrued upon purchase when (a) all the requirements under the law were satisfied, including receipt of the purchase money and (b) the local land officers either allowed the entry or issued a certificate of purchase or patent-certificate. As one court explained:

> The purchaser became the equitable owner of the land the moment he entered and paid for it, and received his certificate of purchase. From that time the United States had no real interest in the land. It only held the dry legal title in trust for the purchaser, pending the usual necessary delay in issuing patents, and the patent only perfected the title, the right to which had already vested.[123]

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120. *See id.* at 195.

121. *See id.*

122. *Id.* at 196; *see also* Atherton v. Fowler, 96 U.S. 513, 518 (1877).

123. Pacific Coast Mining & Milling Co. v. Spargo, 16 F. 348, 349–50 (C.C.D. Cal. 1883); *see also* Silver King Co. v. Conkling Co., 255 U.S. 151, 162 (1921) ("The final receipt from the local land officer fixed the claimant's rights."); Cornelius v. Kessel, 128 U.S. 456, 461 (1881) ("By such entry and payment the purchaser secures a vested interest . . . and a right to a patent . . . ."); Amador Medean Gold Mining Co. v. South Spring Hill Gold Mining Co., 36 F. 668, 670 (C.C.N.D. Cal. 1888) ("From the moment of the entry, payment, and issue of the certificate of purchase, these lands cease to be public, and became private property."), *rev'd on procedural grounds*, 145 U.S. 300 (1892); *see, e.g.*, Doe v. Waterloo Mining Co., 54 F. 935 (C.C.S.D. Cal. 1893) (treating certificate of purchase like a patent).

Since the final certificate, for all practical purposes, constituted the significant act in conveying rights to the applicant, courts developed the fiction that once the patent was issued the rights of the patentee related back to the date of that final certificate. *See* United States v. Etcheverry, 230 F.2d 193, 196 (10th Cir. 1956); *cf.* James Barlow Family Ltd. v. Munson, Inc., 132 F.3d 1316 (10th Cir. 1997). A relation-back doctrine served an important purpose. It avoided interloping mining or other claimants from gaining rights to the land during the intervening period between the asserted discovery of a mining claim and the final proof

The issuance of the certificate reflected an adjudication by the local land office that the applicant was entitled to the issuance of a patent.[124]

> The entry by the local land officers issuing the final receipt was in the nature of a judgment *in rem*, and determined that the . . . locations were valid, and that everything necessary to keep them in force, including the annual assessment work, had been done. It also adjudicated that no adverse

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and acceptance of that mining claim. *See generally* EMILLIO D. DESOTO & ARTHUR R. MORRISON, MINING RIGHTS ON THE PUBLIC DOMAIN at 24, 97, 111, & 167–68 (16th ed. 1936).

124. *See, e.g.*, El Paso Brick Co. v. McKnight, 233 U.S. 240, 260 (1914). In *Aurora Hill Consol. Mining Co. v. 85 Mining Co.*, 34 F. 515 (D. Nev. 1888), the "usual and necessary proceedings" occurred at the local land office, which is where the patent applicant tendered final proof of entry to the satisfaction of the local land officers, paid the purchase price, and received a certificate of purchase. *Id.* at 516. Another case stated:

> So, also, the register and receiver, to whom the law primarily confides these duties, often hear the application of a party to enter land as a pre-emptor or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent. Undoubtedly, this constitutes a vested right . . . .

Johnson v. Towsley, 80 U.S. (13 Wall.) 72, 85 (1871); *see also* Johns v. Marsh, 15 Pub. Lands Dec. 196, 200 (1892) (holding that allowance of entry is an adjudication by local land officers that the lands are mineral in character).

The practice, as reflected in the procedures governing the local land office, was that no entry would be allowed until the local land officer was satisfied that proper proofs had been filed and "that they show a sufficient bona-fide compliance with the laws and such regulations. A strict observance of this regulation will be required." Circular, 2 Pub. Lands Dec. 725, 726 (1883). The procedures, for instance, required that, for placer applications:

> [T]he placer application should contain, in detail, such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits not in vein or lode formation and that title is sought not to control water courses or to obtain valuable timber but in good faith because of the mineral therein. This statement . . . must depend upon the character of the deposit and the natural features of the ground . . . .

37 Pub. Lands Dec. 757, 769–70 (1909) (reproducing paragraph 60 of the regulations). The procedures further make clear that such proof of the character of the land was required prior to issuance of a certificate of entry. *See id.*; *see also id.* at 771 (explaining in paragraph 65 proof for millsites); *id.* at 772 (stating in paragraph 71 that "[n]o entry will be allowed until the register has satisfied himself, by careful examination, that proper proofs have been filed upon the points indicated in the law and official regulations"); *id.* at 786 (explaining in paragraph 167 the mineral surveyors' examination, such as the use or adaptability of the site for placer mining).

> claim existed and that the [claimant] was entitled to a patent.[125]

As explained in Curtis Lindley's treatise on mining law, "[i]f . . . these officers are satisfied that the applicant for a patent has fully and fairly fulfilled the requirements of the law, and that the land is mineral in character, an indorsement is made upon the application to purchase, allowing the entry."[126] The form of the certificate in 1897, for example, provided that "upon the presentation of this certificate to the Commissioner of the General Land Office . . . a patent shall issue thereupon to the said —[Name]—if all be found regular."[127]

When presented with the certificate, the General Land Office simply reviewed the local land officer's decision to ensure against errors.[128] In *Orchard v. Alexander*,[129] the Court upheld

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125. *El Paso Brick Co.*, 233 U.S. at 257. The "receiver's receipt" pre-dated the similar earlier form referred to as the "final certificate of entry," with the receiver signing the former document and the register signing the latter document. *See generally* DE SOTO & MORRISON, *supra* note 123, at 585.

126. 2 CURTIS H. LINDLEY, A TREATISE ON THE AMERICAN LAW RELATING TO MINES AND MINERAL LANDS § 770 (2d ed. 1903) [hereinafter LINDLEY ON MINES]; *E.g.*, Simmons, 7 Pub. Lands. Dec. 283, 285 (1888) ("The mineral claimant's rights to a patent rested upon the judgment of the land office approving his entry for patent upon the record showing that said claim was located . . . and was in all respects regular and valid.") (explaining Deffenbacke v. Hawke, 115 U.S. 392 (1885)).

One mining law treatise listed four reasons supporting the passage of equitable title after "entry" in the land office:

> *First*-The receiver's receipt for the purchase money is evidence of title in the purchaser, with our without statute to such effect . . . The land ceases to be public land after the receipt issues.
>
> *Second*-The subsequent issue of the patent follows as a mere ministerial act, except where some irregularity has occurred in the application, or a protest delays or prevents issue. When issued legally it is conclusive; if issued without jurisdiction, it does not pass title . . . .
>
> *Third*-Before entry is allowed the time for assertion of any adverse title must have elapsed.
>
> *Fourth*-Upon issuance of patent, the fee passes to the purchaser, and the title relates back to the original location or to the relocation, if there be one . . . .

DE SOTO & MORRISON, *supra* note 123, at 164–65 (citations omitted).

127. HORACE F. CLARK ET AL., MINERAL LAW DIGEST 517–18 (Chicago, Callaghan & Co. 1897).

128. For example, when discussing the land patenting process, the Court in *Cornelius* observed that the supervisory power of the Commissioner of the general land office:

> authorizes him to correct and annul entries of land allowed . . . where the lands are not subject to entry, or the parties do not possess the quali-

the General Land Office's authority to review the local land officer's determinations, but in so holding, the Court observed that the power to review those decisions was limited. The Court reasoned that the local land officer's determination gave the applicant a vested right that could not be divested without due process of law.[130] Conversely, in situations where the local land officers were prevented from making a determination on an entry, for whatever reason, the Court held that equitable title did not pass until such a determination was made by the General Land Office: "[t]here must be a decision somewhere regarding the rights asserted by the selector of land under the act, before a complete equitable title to the land can exist. The mere filing of papers cannot create such title."[131]

d. Old Law Catches Up to Modern Practice

Assuming, therefore, that a vested right accrues only when an appropriate departmental officer determines that an applicant is entitled to a patent and memorializes this judgment by issuing a certificate of mineral entry,[132] such a judgment under the modern-day patent application process does not occur until the Department issues the Second Half of the Final Certificate. The Second Half of the Final Certificate reflects an actual determination that the claimant has complied with the Mining Law in every respect. Modern administrative practices are markedly different from those of the period in which the equitable title doctrine arose. When *Benson* and other such cases were decided, the "certificate" that was discussed in those opinions reflected the final administrative act prior to the issu-

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fications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department.

128 U.S. at 461; *see also* Nichols & Smith, 46 Pub. Lands Dec. 20 (1917) (on rehearing).

129. 157 U.S. 372 (1895).

130. *See id.* at 381–83; *see also El Paso Brick Co.*, 233 U.S. at 257.

131. Cosmos Exploration Co. v. Gray Eagle Co., 190 U.S. 301, 312 (1903).

132. When Congress amended the mining laws to remove common variety materials from location, it noted in the House Report that "[a]s members will understand, acquisition of patent requires compliance with the mining laws as to location, performance of assessment work, payment to the United States of the purchase price, and a *determination* by the Department of the Interior as to claim validity and full compliance with the law." H.R. REP. NO. 84-730 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2474, 2483 (emphasis added).

ance of the patent.[133] Until 1958, the final certificate (Form 4-201) issued to applicants provided that "upon the presentation of this Certificate to the COMMISSIONER OF THE GENERAL LAND OFFICE, together with the plat and field notes of survey of said claim and the proofs required by law, a PATENT shall issue thereupon . . . if all then be found regular."[134] This meant that those charged with administering the Mining Law had, through the issuance of this certificate, indicated that they were satisfied that the applicant had complied with all the requirements of the Mining Law, including that they had discovered a valuable mineral deposit.[135]

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133. *See supra* Part II.A.1.b.

134. United States Department of the Interior, Form 4-201, Register's Final Certificate of Mineral Entry (Apr. 26, 1915); *id.* (Oct. 1949); *id.* (Dec. 1950) (on file with the author).

135. Former Department of the Interior Solicitor Frank Barry observed that, "[u]ntil 1910, it was uncommon for any Government representative to inspect the claim to see if there had actually been a 'discovery.' The oath of the patent applicant was regarded as sufficient in most cases." Barry, *supra* note 35, at 85. Barry further noted that, although professional geologists and engineers began to be hired in the late 1910s, patent applications continued to be processed without any investigation as late as the 1940s. *See id.* Prior to the mid-twentieth century, therefore, most inquiries into the character of land generally focused on adverse proceedings or contest actions. *See, e.g.*, United States v. King, 83 F. 188 (9th Cir. 1897); Johns v. Marsh, 15 Pub. Lands Dec. 196 (1892). However, the land office regulations required an investigation of mining claims within forest reservations that were presented for patent. *See* United States v. Lavenson, 206 F. 755, 759 (C.C.W.D. Wash. 1913).

One author speculates that the inquiry into the mineral character of the land became more important in the early twentieth century, when the Department could no longer invalidate mining claims for the failure to perform the required assessment work. *See* Sult, *supra* note 35, at 404. Yet it would appear that not until after Congress prohibited the location of common variety materials did the discovery test become an important independent administrative inquiry. *See* 30 U.S.C. § 611 (1994). Several other events also coalesced around this period. First, applicants were accorded a hearing when there was a challenge to a discovery. *See* United States v. O'Leary, 63 Interior Dec. 341 (1956). Interior and court decisions also began to emphasize the "present marketability" requirement and that the applicant bears the burden of proof once the government has made a *prima facie* case of a lack of discovery. *See* Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). Lastly, the Department reversed its practice of not invalidating mining claims when it rejected a patent application for lack of a valuable mineral deposit. *See* United States v. Carlile, 67 Interior Dec. 417 (1960). For a discussion of the Interior Department's historical process for contesting mining claims, see PETER L. STRAUSS, PROCEDURES OF THE DEPARTMENT OF THE INTERIOR WITH RESPECT TO MINING CLAIMS ON PUBLIC LANDS (1973) (report prepared for the Administrative Law Conference of the United States) (on file with the author); Clayton J. Parr, *Government Initiated Contests Against Mining Claims—A Continuing Conflict*, 1968 UTAH L. REV. 102.

Today, this determination does not occur until after the Department issues the Second Half of the Final Certificate. Sometime after 1958, the Department split the "final certificate" into two components, although the issuance of a First Half Final Certificate first appeared in its modern form in October 1990.[136] This form, as it is currently drafted, provides that the "[p]atent may issue if all is found regular and upon demonstration and verification of a valid discovery of a valuable mineral deposit and subject to the reservations, exceptions, and restrictions noted herein."[137] Moreover, the receipt for the purchase monies, which is issued at about the same time as the FHFC, expressly states that it is "not an authorization to utilize the land applied for and it does not convey any right, title, or interest in the land for which the application is made."[138] Today, the issuance of a Mineral Entry Final Certificate or FHFC does not reflect any administrative determination that the applicant has satisfied all the requirements for the issuance of a patent; it merely signifies that the applicant has submitted the appropriate filing fee, apparently complied with the location and assessment/maintenance requirements, submitted the appropriate and necessary affidavits and documents, and paid the correct purchase price for the mining claims.[139] It is not a recordable interest. Until the department has prepared a favorable mineral report and issued the Second Half of the Final Certificate, no one in the Department has "adjudicated" the validity of the claim or claims.[140]

Consequently, the differences between today's process and the process that existed when the Court decided *Benson* go far beyond mere words. Yet, it is not clear whether this ultimately will make a difference in influencing any subsequent court

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136. *See* BLM MANUAL, *supra* note 73, at illus. 13.

137. *Id.*

138. United States Department of the Interior, Bureau of Land Management, Form 1370-41, Receipt and Accounting Advice, (Mar. 1984).

139. *See, e.g.*, BLM MANUAL, *supra* note 73, at VI-1 to VI-4.

140.

> The issuance of a final certificate on a mineral entry does not impart that discovery of a valuable mineral has been made, a *sine qua non* for the issuance of patent, but rather only that the proper papers and fees have been submitted. In contradistinction, a final certificate in a lands case imports that all requirements of the governing law have been satisfied.

United States v. Harper, 8 I.B.L.A. 357, 362 (1972) (citation omitted).

trying to determine whether to follow *Cook*—finding that a vested property right accrues on issuance of an FHFC—or the Solicitor's opinion—requiring issuance of a Second Half of the Final Certificate. The next court that confronts this issue hopefully will address the matter head-on, rather than invoking venerable precedents potentially out of context.

2. The Future of Millsites

In addition to revisiting the historical underpinnings of the equitable title doctrine, the Department undertook a careful review of the law and its history to examine and clarify the amount of acreage that can be used under the Mining Law to support mining operations. Indeed, it is the need for mineral claimants to use or occupy such lands—called millsites—that is poised to become the new reform tail that wags the old 1872 Mining Law dog. Congress recognized that many mining claims would be difficult—if not impossible—to develop without access to millsites and, therefore, it generally allowed mining claimants the right to locate, enter, and appropriate public land for use as a millsite in connection with the location and discovery of a valuable mineral deposit.[141]

Mining claimants may appropriate millsites only when those millsites are non-mineral in character and are being "used" or "occupied" by the claimant for "mining or milling purposes."[142] But the question becomes: Just how much land can

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141. There are three types of millsite claims: first, those that are "dependent" upon or "associated" with a specific lode claim; second, those that are "dependent" upon or "associated" with a specific placer claim; and third, those that are "independent" or include "custom" works for quartz mills or reduction works that service mining operations. This last type is almost never available and warrants little attention. Congress added the second type of millsite in 1960, in order to grant placer claimants the same rights as lode claimants. *See* Act of Mar. 18, 1960, Pub. L. No. 86-390, 74 Stat. 7 (1960).

142. *See* 30 U.S.C. § 42 (1994). The standard for appropriating millsites requires actual use or occupancy of the site. *See* Valcalda v. Silver Peak Mines, 86 F. 90 (9th Cir. 1898); United States v. Collord, 128 I.B.L.A. 266, 289–292 (1994), *aff'd*, 154 F.3d 933 (9th Cir. 1998); United States v. Shiny Rock Mining Corp., 112 I.B.L.A. 326, 357–59 (1990); Pine Valley Builders, Inc., 103 I.B.L.A. 384, 390 (1988); United States v. Swanson, 93 I.B.L.A. 1, 28 (1986); United States v. Dean, 14 I.B.L.A. 107, 109 (1973); United States v. Skidmore, 10 I.B.L.A. 322, 323 (1973); United States v. Polk, A-30859 (Apr. 17, 1968); United States v. Wedertz, 71 Interior Dec. 368, 373 (1964); Alaska Copper Co., 32 Pub. Lands Dec. 128, 131 (1903); Lening, 5 Pub. Lands Dec. 190, 191 (1886). The mere intention to use a site is not sufficient. *See* 2 LINDLEY ON MINES, *supra* note 126, at § 521; *see, e.g.*,

be appropriated for use as a millsite? Modern mining techniques that have increased production rates and allowed for the mining of lower-grade ore have also increased the need for much larger areas to accommodate mining operations.[143] Thus, the answer to this question could affect the economics of many large-scale mining operations. It would appear that, over the past several decades, the BLM simply assumed mining claimants could appropriate any number of millsites that legitimately could be used or occupied.[144]

As a result of increased Solicitor's Office involvement in the patenting process, this practice of patenting any number of millsites came under scrutiny. The Solicitor concluded that the language of the Mining Law only allows the patenting of one millsite of no more than five acres in association with each mining claim; multiple millsites for each mining claim may be patented as long as the total acreage covered by the millsite claims does not exceed five acres.[145] This conclusion relied upon the plain language of the statute, as well as a review of the legislative history and historical development.[146] In lieu of

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United States v. S.M.P. Mining Co., 67 Interior Dec. 141, 143–44 (1960). *See generally* Gary L. Greer, *Millsites: Non-Mineral Mining Claims*, 13 ROCKY MTN. MIN. L. INST. 143 (1967); Richard W. Harris, *The Law of Millsites: History and Application*, 9 NAT. RESOURCES LAW. 103 (1976), *reprinted in* 14 PUB. LAND & RESOURCES L. DIG. 133 (1977); Richard W. Harris & Richard K. Thompson, *Millsites: Current Law and Unanswered Questions*, 38 ROCKY MTN. MIN. L. INST. 12-1 (1992).

143. *See Fact Sheet: Questions and Answers About BLM's Part 3809 Rulemaking*, at 2 (last modified Feb. 9, 1999) <http://www.blm.gov/nhp/news/press/qa990209.html> [hereinafter *Q&A Fact Sheet*].

144. Any meaningful inquiry into the nature and extent of millsites did not become an issue until the abuses of the Mining Law began to surface. "The early practice of the Land Office was to patent a mill site when applied for in connection with a lode, without proof of either use or improvements. This practice was taken advantage of to patent building lots, and all sorts of claims as mill sites . . . ." DE SOTO & MORRISON, *supra* note 123, at 296.

145. *See* Memorandum from John D. Leshy, Solicitor, United States Department of the Interior to Director, Bureau of Land Management, M-36988, *Limitations on Patenting Millsites Under the Mining Law of 1872* 2 (Nov. 7, 1997) (on file with author).

146. For both lode and placer claims, the language of the Mining Law of 1872 limits the patenting of millsites to five acres. *See* 30 U.S.C. § 42(a) (1994) ("no location made on and after May 10, 1872 of such nonadjacent land shall exceed five acres"); 30 U.S.C. § 42(b) (1994) (stating that "[n]o location made of such nonmineral land shall exceed five acres"). The opinion observes that, since the 1870s, the agency's regulation arguably prohibits the patenting of more than five acres for each associated mining claim. Nevertheless, the opinion notes that the BLM Manual expresses a contrary view, although adding that the manual offers

using the Mining Law to obtain access to millsites, the Solicitor offered three other possible ways that mining operators could use public lands for millsite purposes. They could enter into a land exchange under section 206 of the Federal Land Policy and Management Act ("FLPMA");[147] obtain a permit or lease under Title III of FLPMA;[148] or, in limited circumstances, obtain a right-of-way grant under Title V of FLPMA.[149] Of course, the opinion notes that none of these scenarios would provide the mining operator with a "right" to the land, particularly at the statutory payment price of either $2.50 or $5.00 per acre.

This opinion garnered considerable interest. On August 17, 1998, the BLM issued an Instruction Memorandum that outlined the agency's new policy for reviewing plans of operation.[150] For lands that have been withdrawn from the operation of the Mining Law—thereby precluding any future locations under the law—only one millsite per mining claim will be allowed.[151] Conversely, the number of millsites will not be questioned for lands that remain open to the location of mining claims, unless the mining operations would cause unacceptable

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no support for its view. The opinion next reviews the legislative history of the 1960 millsite amendment to the Mining Law, where Congress expressed its intent to limit the patenting of millsites. The last sections of the opinion briefly review some early millsite cases and mining law treatises and scholarship, all of which are used to support the Solicitor's conclusion. *See* Memorandum, *supra* note 146. *See, e.g.,* Hoggin, 2 Pub. Lands Dec. 755 (1884). *But cf.* Hard Cash & Other Mill Site Claims, 34 Pub. Lands Dec. 325 (1905); *see also* THEODORE MARTIN, MARTIN'S MINING LAW AND LAND-OFFICE PROCEDURE, WITH STATUTES AND FORMS 64 (1908).

> But the statute does not contemplate the location of a separate mill site for each one of a group of contiguous lode claims, held and worked under a common ownership. Whilst no fixed rule can be established, it seems plain that, ordinarily, one mill site affords abundant facility for the promotion of mining operations upon a single body of lode claims.

Id.

147. 43 U.S.C. § 1716(a) (1994 & Supp. IV 1998) (authorizing equal value intrastate land exchanges, when in the public interest).

148. 43 U.S.C. § 1732(b) (1994 & Supp. IV 1998) (discussing issuance of use and occupancy permits).

149. 43 U.S.C. § 1761(a)(7) (1994 & Supp. IV 1998) (authorizing issuance of certain types of right-of-way grants).

150. *See* Instruction Memorandum No. 98-154 from Carson W. Culp, Assistant Director, Minerals, Realty and Resource Protection, United States Department of the Interior, Bureau of Land Management to All State Directors, *Solicitors Opinion Regarding Legal Limitation on Millsite Acreage in Plans of Operations* (Aug. 17, 1998) (expired Sept. 30, 1999) (on file with author).

151. *See id.* at 2.

resource conflicts.[152] Absent such resource conflicts, the approval of a mining plan would constitute a concomitant surface use approval under FLPMA instead of under the Mining Law.[153] Yet resource conflicts could abound, particularly because millsites are used for tailings and leaching operations, all of which arguably present important environmental issues. The approach of using an Instruction Memorandum apparently has proven somewhat problematic for the Department, possibly because of such issues as defining the scope of "unacceptable resource conflicts," and the Department has since issued a notice of proposed rulemaking that would implement the Solicitor's opinion.[154]

The first significant test of this interpretation is now underway in a case involving the Battle Mountain Gold Company's Crown Jewel Mine in Washington State.[155] On March 25, 1999, the Interior Department and the U.S. Forest Service wrote Battle Mountain notifying the company that its proposed use of 117 unpatented millsites, covering approximately 565

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152. *See id.*

153. FLPMA's surface use regulations, 43 C.F.R. pt. 2920, only apply if the lands are not valid mining claims, and the distinction can be important in several respects, such as whether the purported mineral claimant can be charged with trespass. *See* Alanco Envtl. Resources Corp., 145 I.B.L.A. 289 (1998). Of course, although FLPMA suggests the payment of fair market value for the use of public property, the BLM has not, thus far, proposed to charge the companies for the use of these "extra" millsites. This seems inconsistent with BLM's approach elsewhere, such as its recent inspection and enforcement program for ensuring that the Government is properly being compensated for the extraction of mineral materials from the public lands. *See* Instruction Memorandum No. 99-021 from Director, United States Department of the Interior, Bureau of Land Management to All Field Officials, *Mineral Materials Inspection and Enforcement, Production Verification, and Appraisal Policy* (Nov. 9, 1998) (on file with author).

154. *See* 64 Fed. Reg. 47,023, 47,028 (1999).

155. The Crown Jewel project had received from the U.S. Forest Service a Record of Decision ("ROD") and final environmental impact statement for the company's proposed cyanide-leach gold mine on Buckhorn Mountain, in Okanogan Highlands, Washington. Several environmental organizations and the Confederated Tribes of the Colville Reservation brought an unsuccessful challenge to this ROD. *See* Okanogan Highlands Alliance v. Williams, 1999 U.S. Dist. LEXIS 4068 (D. Or. Jan. 12, 1999). The case is currently on appeal to the Ninth Circuit. The plaintiff also is preparing to file a new lawsuit challenging the Departments of Interior and Agriculture's approvals of a plan of operations for the Crown Jewel project. Despite the Solicitor's Opinon regarding limitations on patenting millsites, *see* Memorandum, *supra* note 145, the Departments were required to issue these approvals under a rider to the Emergency Supplemental Appropriations Act for military operations in Kosovo. *See* Emergency Supplemental Appropriations Act § 3006(a)–(b), Pub. L. No. 106-32, 113 Stat. 57 (1998).

acres, could not be approved.[156] The letter recited the interpretation of the 1872 Mining Law that would only allow a mining claimant to locate a maximum of five acres for each mining claim, in this case approximately 75 millsite acres.[157]

The letter gave Battle Mountain two options. First, the company could seek a land exchange, if it were found to be in the public interest. Second, if the lands were still open to location under the Mining Law, the approval of a plan of operations could be authorized under the Mining Law's surface use regulations.[158] The letter concluded by rejecting the company's entreaties to permit a deviation from the millsite limitation, noting that the millsite limitation has been "widely appreciated by mining industry lawyers for decades" and that the United States is not free to enlarge the rights to public lands granted by Congress under the Mining Law.[159]

Reaction to this letter was fierce and quick. The trade press announced that the Clinton Administration had dropped "a bomb" on the mining industry.[160] At least one observer believes the decision could block the "majority of open pit mining plan applications."[161] Others expect the decision to spur the Mining Law reform effort before Congress.[162] How all this will

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156. *See* Letter from James R. Lyons, Under Secretary, Natural Resources and Environment, Department of Agriculture, et al., to Greg Etter, Vice President and General Counsel, Battle Mountain Gold Company 1 (Mar. 25, 1999) (on file with author) [hereinafter Lyons Letter].

157. *See id.* The letter further indicates that an attempt to segment a mining claim into several separate claims in order to increase the amount of millsite acreage might be viewed as an improper effort to circumvent the law. *See id.* at 2 n.4. It also noted that the claimed millsites must be ancillary to valid lode mining claims. In this case that presented a problem because some of the lands the company proposed to use for "mining" purposes were alleged lode claims being used to support mining solely on other lode claims. *See id.*

158. *See* 43 C.F.R. § 3809.1–6 (1998). Because the mining claims are on both BLM administered lands and United States Forest Service lands, the letter noted that an approval of a plan of operations could not authorize activity on Forest System lands. For those lands, the company would need a special use authorization under 36 C.F.R. pt. 251, subpt. B, which might not be available for certain uses of National Forest System lands. *See* Lyons Letter, *supra* note 155, at 3 (citing to 63 Fed. Reg. 65,950–69 (1998); 36 C.F.R. §§ 251.54(e)(1)(ix), 251.54(e)(2) (1998)).

159. Lyons Letter, *supra* note 156, at 4.

160. *See Fed Opinion Leaves Miners with Few Places to Dump Waste*, PUB. LAND NEWS, Apr. 30, 1999, at 1.

161. *Id.*

162. *See id.* at 2. On June 15, 1999, the Subcommittee on Forests and Public Land Management of the Committee on Energy and Natural Resources held a

play out generally remains to be seen. However, for the Crown Jewel mine, at least, Congress has provided the company with an exemption, allowing the patent application to go forward.[163]

3. No Valuable Mineral Deposit?

The Department's focus on ensuring that public lands are not improperly appropriated under the Mining Law similarly prompted a review of several other legal issues. In particular, the Solicitor's Office has addressed two outstanding questions involving the discovery test.[164] Since at least the 1930s, there has been a lurking question as to whether miners asserting claims to large tracts of various minerals, such as limestone,

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hearing on the Crown Jewel mine and the Solicitor's millsite opinion. The Mineral Policy Center, for example, testified that the millsite opinion should be enforced, and that the law was in dire need of congressional reform. *See Statement of Mineral Policy Center, Regarding Recent Decision by the Departments of Interior and Agriculture to Enforce Legal Limits on Mine Waste Dumping on Public Lands: Before the Subcomm. on Forests and Public Land Management of the Comm. on Energy and Natural Resources*, 106th Cong. (June 15, 1999) (statement of Stephen D'Esposito, Pres., CEO, Mineral Policy Center) (on file with author). Solicitor John D. Leshy testified that the millsite limitation is not a recent invention, it reflects an interpretation of the law endorsed by Congress as recently as 1960, and that the decision resulted from the review of the patenting process occasioned by the Secretary's 1993 Order. *See Testimony Before the Subcomm. on Forests and Public Land Management Senate Comm. on Energy and Natural Resources,* 106th Cong. (June 15, 1999) (testimony of John D. Leshy, Solicitor General, Department of the Interior) (on file with author). Others testified, however, that the they believed the Solicitor's opinion was contrary to the Mining Law. *See Statement of Patrick Garver: Before the Subcomm. on Forests and Public Land Management of the Senate Comm. on Energy and Natural Resources,* 106th Cong. (June 15, 1999) (statement of Patrick Garver, Pres., Barrick Resources) (on file with author); *With Respect to Issues Surrounding the Interior Department Letter of March 25, 1999, Concerning the Crown Jewel Mine: Hearings Before the Subcomm. on Forests and Public Land Management of the Senate Energy and Natural Resources Comm.*, 106th Cong. (June 15, 1999) (statement of Stephen D. Alfers) (on file with author); *Issues Related to the March 25, 1999 Letter from the Department of the Interior Which Vacated the Record of Decision and Disapproved the Plan of Operations for the Crown Jewel Mine in Okanogan County, Washington, Before the Subcomm. on Forests and Public Land Management of the Senate Energy and Natural Resources Comm.*, 106th Cong. (June 15, 1999) (statement of Roger W. Jeppson) (on file with author). For a good discussion of the issue by one of the participants in the Crown Jewel controversy, advocating the millsite limitation, see Roger Flynn, *The 1872 Mining Law as an Impediment to Mineral Development on the Public Lands: A 19th Century Law Meets the Realities of Modern Mining*, 34 LAND & WATER L. REV. 301 (1999).

163. *See* Emergency Supplemental Appropriations Act § 3006(a)–(b), Pub. L. No. 106-32, 113 Stat. 57 (1998).

164. *See* United States v. Harper, 8 I.B.L.A. 357, 362 (1972).

pumice, gypsum, and perlite, could satisfy the discovery test for all their claims. After all, how could they satisfy the present marketability aspect of the discovery test if the mineral reserves are so vast that they could support mining operations for over one hundred years—well after the normal life span of any mine?[165]

Even today, miners might try to "lock-up" the resource by claiming a "discovery" of a "valuable mineral deposit" on all such lands, in order to thwart any competition and drive up the value of the resource. However, Solicitor Leshy has opined that they could not.[166] In so doing, he followed an earlier Solicitor's Opinion[167] and the views of the IBLA.[168] He reasoned that reserves in excess of what presently can be mined, including amounts available for reasonable reserves, could not satisfy the requirement that a mineral deposit be presently marketable.[169]

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165. *See generally* Frank Erisman & Marla J. Williams, *Watt's Up for Patenting?: Excess Reserves and Other Mysteries*, 29 ROCKY MTN. MIN. L. INST. 321 (1983); Hochmuth, *supra* note 13, at 481–82; Rodney Knutson & Harold Morris, Jr., *Locating, Maintaining, and Patenting Groups or Large Blocks of Mining Claims*, 26 ROCKY MTN. MIN. L. INST. 517 (1980); Donald W. Large, *Defining "Valuable" Mineral Deposits—A Continuing Legal Quagmire*, 1986 ARIZ. ST. L.J. 453, 473–83 (1986); Bartholemew Lee, *Hardrock Mining and the Antitrust Laws: Too Much is Really Too Much, Even in the Ninth Circuit*, 15 GOLDEN GATE L. REV. 49 (1985). For one early discussion of the present marketability test, see John C. Lacy, *Present Marketability: A Proper Test of Mineral Value Under the Mining Law*, 9 ARIZ. L. REV. 70 (1967).

166. *See* Memorandum from John D. Leshy, Solicitor, Department of the Interior to Director, Bureau of Land Management, *Excess Reserves Under the Mining Law* 1 (Mar. 22, 1996) (on file with author).

167. *See* Marketability Rule, M-36642, 69 Interior Dec. 145, 146 (1962).

168. *See* United States v. Oneida Perlite Corp., 88 Interior Dec. 772, 786–87 (1981).

169. *See* Memorandum, *supra* note 166, at 2. The opinion also addresses an apparent conflict between two Ninth Circuit decisions, *McCall v. Andrus*, 628 F.2d 1185 (9th Cir. 1980), *cert. denied*, 450 U.S. 996 (1980), and *Baker v. United States*, 613 F.2d 224 (9th Cir. 1980), *cert. denied*, 449 U.S. 932 (1980). In *Baker*, the Ninth Circuit held that the Department could not impose a "too much" rule on mining claimants. *See Baker*, 613 F.2d at 225. Five months later, however, the *McCall* court upheld the Department's rejection of certain claims based upon the abundance of the mineral. *McCall*, 628 F.2d at 1189. The opinion suggests that the court in *Baker* misinterpreted the decision of the IBLA and is not necessarily reconcilable with other Ninth Circuit precedent. *See* Memorandum, *supra* note 161, at 5–8. The Bureau of Land Management has determined that a forty-year reserve is about as much as can be mined during the reasonably foreseeable future. *See* Instruction Memorandum No. 98-167 from Pat Shea, Director, United States Department of the Interior, Bureau of Land Management to All State Directors, *Unmarketable Resources ("Excess Reserves") Policy* 3–4 (Sept. 14, 1998) (on file with author).

This largely impacts only industrial grade minerals, where the profits are smaller and market limitations as well as transportation costs limit just how much can be mined. Nevertheless, one commentator warns that "[t]his, together with related issues arising as the patenting moratorium drags on, . . . is an area in which litigation seems certain."[170]

Indeed, just how much pumice legitimately can be mined over the reasonably foreseeable future is now at the heart of the litigation surrounding the Cooks' mining claims in the JNRA. In the United States Court of Federal Claims, the Cooks are seeking damages for a deprivation of their alleged right to patent twenty-three mining claims containing pumice. That lawsuit was filed on the basis that all twenty-three of those mining claims are valid, yet the government contested nineteen of those claims on the basis that the Cooks could not possibly mine the pumice on those claims over a forseeable market life of thirty-five years.[171] Pumice has a variety of uses, but the pumice on these claims allegedly was valuable for its use in stonewashing jeans—making our jeans soft and comfortable.[172] In a proceeding before the Interior Department's Office of Hearings and Appeals, Administrative Law Judge James Heffernan agreed, reasoning that the the government's mineral "examiners correctly determined that profitable operations would not be possible on any of the 19 contested claims, because production from those claims would overwhelm the laundry grade pumice market."[173] The Cooks have appealed this decision to the IBLA, and, as of this date, the parties are engaged in settlement talks.[174]

While the debate over excess reserves may become animated as a result of Judge Heffernan's decision, the Interior Department is considering yet another issue that could be more

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170. Sherwood, *supra* note 35, at 10–19; *see also* McCrum, *supra* note 48, at 14–35.

171. *See* United States v. Armstrong, NMNM 97937, at 2 (Aug. 18, 1999) (Dec. of Admin. L. Judge James H. Hefferman) (on file with author).

172. As Judge Hefferman explained, the use of pumice to create stonewashed jeans has dramatically decreased over the past 10 years, with other products replacing it. *See id.*

173. *Id.* at 16.

174. The ALJ's decision appears consistent with old cases that address the loss of discovery as a result of the claimant having exhausted the resource, changed market conditions, or the loss of a transportation delivery system. *See, e.g.*, Mulkern v. Hammett, 326 F.2d 896, 898 (9th Cir. 1964).

troubling to mining companies: Whether to adopt a comparative value test for determining whether a mining claim contains a valuable mineral deposit. What happens if land embraced within a mining claim is more valuable for aesthetic, scientific, or recreational values than it is for mining purposes?

This is the issue in *United States v. United Mining Corp.*[175] There, the United States has challenged the company's mining claims on several grounds, including that the lands are not "chiefly valuable" for building stone as required by the The Building Stone Act of 1892, which specially recognizes building stone as a locatable mineral.[176] The claims unquestionably satisfied the discovery test, although they were located in an area that one BLM examiner noted was unlike any other place on Earth, unique in its scenic beauty and geological features.[177] The question was whether the value of the land was greater for purposes other than mining and, if so, whether such a "comparison of values is relevant to the determination of whether the mining claims are valid."[178] In a somewhat surprising opinion, Administrative Law Judge Ramon A. Child concluded that, regardless of the Building Stone Act, a mining claim is invalid if the "claimed land is more valuable for purposes other than mining."[179]

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175. 142 I.B.L.A. 339 (Feb. 10, 1998).

176. *See* 30 U.S.C. § 161 (1994). The Common Varieties Act, 30 U.S.C. § 611 (1994), removed common varieties of building stone from the operation of the Mining Law, but preserved the ability to locate building stone in those instances where the claimant can show that the stone is of an uncommon variety (that it has a distinct and special value), that the discovery test can be satisfied, and that the claimed land is "chiefly valuable" for building stone. *See* United States v. Melluzo, 76 Interior Dec. 181, 189 (1969); *see also* Kosanke Sand Corp., 80 Interior Dec. 538, 548 (1973) (on reconsideration). Other laws include a "chiefly valuable" test as well. *See* Oil Placer Act, ch. 216, 29 Stat. 526 (1897) (petroleum and other mineral oils); Saline Placer Act, ch. 186, 31 Stat. 745 (1901) (salt and salt springs); *see also* Locating, Recording and Maintaining Mining Claims or Sites, 64 Fed. Reg. 47,023, 47,037 (1999) (to be codified at 43 C.F.R pt. 3832) (indicating that BLM's proposed regulation notes that building stone and oil or saline placer claims must be "chiefly valuable" for such development).

177. *See United Mining Corp.*, IDI-29807, at 3 (Nov. 1, 1994) (Dec. of Admin. Law J. Ramon M. Child), *aff'd,* 142 I.B.L.A. 339 (Feb. 10, 1998).

178. *Id.* at 5.

179. *Id.* at 13. Arguably, this aspect of his decision was not necessary, because he concluded that the Building Stone Act applied to the claimed lands and that the claimed "land is more valuable for geological and aesthetic purposes" than for building stone. *Id.* at 12.

This holding was soon reversed by the Interior Board of Land Appeals.[180] The Board vacated Judge Child's comparative value determination, reasoning that the issue was unnecessary to a resolution of the case because the claims were located as building stone placer claims.[181] The Board then proceeded to examine whether the claims satisfied the Building Stone Act's "chiefly valuable" requirement, with a majority of the Board concluding that this language did not sanction an inquiry into the relative economic, aesthetic, and other values. In short, values must be measurable and quantifiable.[182] This led one dissenting judge to end his opinion by warning that "[p]etty economies" would lead to the loss of "an unusual example of the forces that created our tiny place in the universe."[183] The issue is now before Secretary Babbitt, who has the authority to trump the IBLA; several prominent natural resources professors have asked that the Secretary review the decision and adopt a comparative value test for all mining claims.[184] Should Secretary Babbitt heed their request, another firestorm of litigation and possibly a congressional response is likely to ensue.

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180. *See United Mining Corp.*, 142 I.B.L.A. 339 (Feb. 10, 1998). The case garnered considerable interest and several parties participated in the appeal. The Western Mining Action Project participated as an intervenor, reviewing an array of authority that purported to establish that the "comparative value test is one of three recognized validity tests, along with the prudent person and marketability tests, that are available for use by the Department." Br. of Intervenors/Resp.'s at 2, United Mining Corp., 142 I.B.L.A. 339 (Feb. 10, 1998) (No. 95-133) (on file with author). Several mining companies participated as *amici curiae*, attempting to show that the "ALJ's analysis [is] flawed in numerous respects and is inconsistent with more than a century of Interior and judicial precedent." Br. of *Amici Curiae* ASARCO, Battle Mountain Gold Co., Hecla Mining Co., Phelps Dodge Corp., and Santa Fe Pacific Gold Corp. at 5, *United Mining Corp.*, 142 I.B.L.A. at 339. The Department ostensibly recognized the comparative value test in its monograph published in the 1950s, where it suggested that a comparative value analysis was an element for consideration. UNITED STATES DEPARTMENT OF THE INTERIOR, MONOGRAPH: MINING LOCATIONS, ENTRIES AND PATENTS 22 (1954) (on file with author).

181. *See United Mining Corp.*, 142 I.B.L.A. at 367–68.

182. *See id.* at 372–73.

183. *Id.* at 382 (Irwin, J., dissenting).

184. *See* Letter from Charles F. Wilkinson, Professor of Law, University of Colorado Law School, et al., to Bruce Babbitt, Secretary, United States Department of the Interior (Feb. 4, 1999). A recent opinion of the Solicitor, affirmed by the Secretary, observed that the "chiefly valuable" test was used during the early twentieth century to distinguish between widely occurring locatable and non-locatable mineral substances, such as sand and gravel. *See* Memorandum, *supra* note 31, at 2.

B. Hardrock Mining Meets FLPMA

1. New Surface Use Regulations Under FLPMA

The Department's scrutiny of the Mining Law, on such issues as the right to a patent, how many millsites are allowed, and when or whether there is a discovery of a valuable mineral deposit, does not address the outstanding environmental concerns of *how* mining operations are conducted on the public lands and *whether* such operations should be conducted in sensitive areas. Secretary Babbitt, therefore, embarked on a campaign in 1997 to revise the Department's surface management (section 3809) regulations.[185] These regulations are intended to ensure that hardrock mining activities on the public lands are conducted in an environmentally responsible manner, one of the critical elements sought during the legislative reform effort. In 1991, the Bush Administration proposed revising these regulations,[186] but the process lay dormant in the wake of increased congressional interest in reforming the Mining Law.[187] The Secretary resurrected this process, with three overarching goals: (a) ensuring adequate financial guarantees from mining claimants that money will be available for reclamation activities;[188] (b) developing a program that will ensure that modern environmental controls are put in place for mining operations; and (c) providing a process for greater public involvement. To

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185. *See* 43 C.F.R. § 3809 (1998). These regulations were first promulgated in 1980. *See* Surface Management of Public Lands Under U.S. Mining Laws, 45 Fed. Reg. 78,902, 78,909 (1980) (codified at 43 C.F.R. pt. 3800). They represented the Department's first effort to establish a regime for protecting the environment under FLPMA, which was enacted in 1976, and there was an expectation that they would be reviewed within three years for possible revisions. No such review ever took place; instead, the Department in 1989 established a task force to examine hardrock mining issues. *See* BLM MANUAL, *supra* note 73, at 1; *see also* Joby Warrick, *Taking Another Approach to 'Antiquated' Mine Law*, WASH. POST, Feb. 28, 1997, at A19.

186. *See* Notice of Intent to Propose Rulemaking, 56 Fed. Reg. 54,815 (1991).

187. *See* Memorandum, Bruce Babbitt, Secretary, United States Department of the Interior to Assistant Secretary, Land & Minerals, and Acting Director, Bureau of Land Management, *Upgrading Hardrock Mining Environmental Regulation* (Jan. 6, 1997).

188. In 1997, BLM changed its bonding regulations, but these regulations were invalidated on procedural grounds in *Northwest Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998).

this end, the BLM promulgated proposed regulations on February 9, 1999.[189]

A principal aspect of these regulations is that they would amend the Department's existing definition of "unnecessary or undue degradation." FLPMA section 302(b) requires that the Secretary shall, in managing the public lands, take any action "necessary to prevent unnecessary or undue degradation of the lands."[190] The existing regulations simply require compliance with applicable environmental laws and regulations, and they are dependent on an assumption that prudent and customary mining operations satisfy FLPMA.[191] This may no longer be the case if the proposed regulations are finalized. To the extent

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189. 64 Fed. Reg. 6422 (1999) (to be codified at 43 C.F.R. pt. 3800) (proposed Feb. 9, 1999). The proposed rule would amend the existing 3809 regulations in numerous ways, but specifically it would—

> [1] use plain language to help readers find key information and make that information easier to understand;
>
> [2] expand the number of situations where a plan of operation is required (a plan-level mining operation is one that, in general, disturbs five or more surface acres);
>
> [3] allow the BLM to defer to a state government in administering a mining regulatory program;
>
> [4] establish a plan for terminating inactive notice- and plan-level operations (a notice level mining operation is one that disturbs less than five acres);
>
> [5] require all notice- and plan-level operators to provide a financial guarantee that covers the estimated cost of reclamation (rather than a guarantee based on a minimum per-acre amount);
>
> [6] provide an opportunity for public comment on these financial guarantee amounts;
>
> [7] clarify certain issues that have arisen since 1981, including whether parent entities of operators can be liable for an operation (the answer being yes, in some circumstances);
>
> [8] require mining operators to meet certain outcome-based performance standards relating to all aspects of operations, including exploration, mining, processing, and reclamation;
>
> [9] incorporate the BLM's existing cyanide leaching and acid mine drainage policies into its surface mining regulations;
>
> [10] authorize the agency to allow, at its discretion, members of the public to accompany BLM inspectors at mine sites; and
>
> [11] strengthen the BLM's administrative mechanisms and penalties for enforcing its surface mining regulations.

Bureau of Land Management, *News Release, BLM's Proposed Mining Rule Would Update "3809" Regulations, Enhance Protection of Public Lands* (last modified Feb. 24, 1999) <http://www.blm.gov/nhp/news/press/pr990209.html>.

190. 43 U.S.C. § 1732(b) (1994).

191. *See* 50 C.F.R. § 3809.0–5(k) (1998).

that mining operations cannot satisfy the new standards articulated in the revised section 3809 regulations, the BLM has indicated that it would disapprove those operations, reasoning that operators do "not have an unfettered right under the mining laws to develop locatable minerals regardless of the level of surface disturbance."[192] For the first time, therefore, the BLM has made it clear that post-FLPMA mining claims are subject to the "unnecessary or undue degradation" standard.[193] In doing so, the agency also is attempting to develop an administrative penalty, suspension, and revocation program for non-compliance with the revised section 3809 regulations.[194]

The effort to reform the section 3809 regulations sparked a heated debate in Congress. When the idea was first proposed, the Western Governors objected strenuously, and secured from Congress a moratorium on any final regulations until after November 1998 and a certification by the Secretary that the Department had consulted with the coalition of Western Governors.[195] Congress also has directed the National Academy of Sciences' Committee on Hardrock Mining on Federal Lands to prepare a report.[196] The report concluded that, "[a]lthough the overall regulatory structure for hardrock mining on federal lands is effective," some changes in the program are necessary.[197]

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192. Mining Claims Under the General Mining Laws, 64 Fed. Reg. 6422, 6428–29 (1999). The proposed rule would clarify that an approval of a plan of operations would constitute an authorization under § 302(c) of FLPMA, which could then be suspended or revoked for noncompliance. *See id.* at 6446–47.

193. Existing regulations incorporate FLPMA's "unnecessary or undue degradation" standard. *See* 43 C.F.R. § 3809.2-1 (1998). However, the definition of the standard is premised upon an implicit assumption that mining activities, if conducted appropriately, will never result in a violation of the standard. *See* 43 C.F.R. § 3809.0–5(k) (1998).

194. *See* Mining Claims Under the General Mining Laws, 64 Fed. Reg. 6422, 6446–48 (1999). BLM's authority to establish administrative penalties, pursuant to the broad mandate in FLPMA of protecting against unnecessary and undue degradation, is questionable. Agencies typically have to go to Congress to obtain express authorization for imposition of administrative penalties. *See* 42 U.S.C. § 7612 (1994); 33 U.S.C. § 1251 (1994).

195. *See* Pub. L. No. 105-83 § 339, 111 Stat. 1543, 1602 (1997).

196. *See* Pub. L. No. 105-277 § 120, 112 Stat. 2681 (1998).

197. COMMITTEE ON HARDROCK MINING ON FEDERAL LANDS, NATIONAL RESEARCH COUNCIL, HARDROCK MINING ON FEDERAL LANDS 5 (prepublication copy) (on file with the author). At the time of this article's printing, the House of Representatives was considering an appropriations bill containing a rider authorizing the Bureau of Land Management to finalize its surface use regulations, so long as they are consistent with recommendations contained in a report

2. Statutory Segregations and FLPMA Withdrawals

In areas where mining operations conflict with other resource values, the existing or even the proposed section 3809 regulations might not be sufficient to protect such resource values. The Administration, therefore, has been adept at using old tools to prevent new mining operations in sensitive areas.[198] One such tool is simply to acquire mining claims in sensitive areas. For instance, the Interior Department, with congressional appropriations, has sought to acquire the New World Mine near Yellowstone National Park.[199] The conservation organization American Rivers and others have waged a campaign against the mine, including a protest against the issuance of a patent to Crown Butte Mines, Inc. for the land encompassing the mine.[200] The mine site became so controversial that the United Nations World Heritage Committee has declared Yellowstone to be endangered by the New World Mine development.[201]

The Interior Department also can close the public lands to the location of new mining law claims in one of several ways. To begin with, FLPMA authorizes the Interior Department to withdraw public lands from mineral location.[202] A withdrawal

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prepared by the National Research Council. *See* H.R. 3194, 106th Cong. § 357 (1999).

198. In the first quarter of this century, for example, the Executive Branch issued controversial and blanket orders removing oil, gas, coal and other such substances from location on the public lands under the Mining Law. *See generally* William E. Colby, *Mining Law in Recent Years*, 33 CALIF. L. REV. 368 (1945).

199. *See generally* Bob Ekey, *The New World Agreement: A Call for Reform of the 1872 Mining Law*, 18 PUB. LAND & RESOURCES L. REV. 151 (1997); Murray D. Feldman, *The New Public Land Exchanges: Trading Development Rights in One Area for Public Resources in Another*, 43 ROCKY MTN. MIN. L. INST. 2-1, 2-11 to 2-24 (1997). The effort to buy out the Crown Butte mine was part of a settlement of a Clean Water Act lawsuit, where a court held that the mine was illegally allowing acid mine drainage to flow into nearby creeks. *See* Beartooth Alliance v. Crown Butte Mines, Inc., 904 F. Supp. 1168 (D. Mont. 1995).

200. *See* Complaint, American Rivers v. Crown Butte Mines, Inc., Mineral Patent Application No. MTM-080972, Interior Board of Land Appeals (filed Jan. 1995) (on file with author). In this complaint, the contestants advanced, among other grounds, a comparative value argument. *See id.* at 12–14.

201. *See* Feldman, *supra* note 199, at 2–13.

202. *See* 43 U.S.C. § 1714 (1994). Under 5000 acres can be withdrawn without congressional involvement, but the withdrawal from mineral entry of larger tracts is limited to withdrawals of up to twenty years and only after a congressional layover period has not resulted in a concurrent resolution disapproving the withdrawal. *See* 43 U.S.C. §§ 1714(a), (c), (d) (1994). *See generally* David H.

withholds identified public lands from settlement, sale, location, or entry under some or all of the general land laws, including the Mining Law, "for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program."[203] Lands remain closed to the operation of the Mining Law until the withdrawal is revoked, modified, or terminated by an appropriate official action, and a notation is made on the public land records that the land is once again open to location.[204]

Prior to a formal withdrawal, which may take a year or longer to process, the Department can "segregate" the lands during the pendency of a withdrawal application or proposal.[205] A "segregation" temporarily removes the public lands from the operation of the public land laws, including the Mining Law, for a specified time period.[206] For example, lands might be segregated while the Interior Department considers selling the property,[207] or they might be segregated for up to five years for the purpose of considering a land exchange involving the property.[208]

Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RES. J. 279 (1982); James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483 (1999); John F. Shepherd, *Up the Grand Staircase: Executive Withdrawals and the Future of the Antiquities Act*, 43 ROCKY MTN. MIN. L. INST. 4-1 (1997).

203. 43 C.F.R. § 2300.0–5(h) (1998); *see also* 43 U.S.C. § 1702(j) (1994).

204. *See* Pene, 147 I.B.L.A. 153 (1999); Goergen, 144 I.B.L.A. 293 (1998). When public lands are closed to mineral location pursuant to a withdrawal, they only become open to mineral location after revocation or termination of the withdrawal and the publication of an opening order by the Secretary in the Federal Register. *See* 43 C.F.R. § 2091.6 (1998); *see also* Kosanke v. United States Dep't of the Interior, 144 F.3d 873 (D.C. Cir. 1998) (upholding what has been called the "notation" rule, *see* 43 C.F.R. § 2201.1–2(a), which effectively operates to keep lands closed to the operation of the 1872 Mining Law until the public land records are duly noted as being once again open to mineral location—regardless of whether the segregation was illegally or erroneously entered); Shiny Rock Mining Corp. v. United States, 825 F.2d 216 (9th Cir. 1987).

205. *See* 43 U.S.C. § 1714 (1994); *see also* 43 C.F.R. §§ 2901.0–5(b), 2091.5, 2300.0–5(m), 2310.2 (1998).

206. *See* 43 C.F.R. § 2300.0–5(m) (1998).

207. *See* 43 U.S.C. § 1713 (1994); 43 C.F.R. § 2091.2–1(b) (1998).

208. *See* 43 U.S.C. § 1716 (1994); 43 C.F.R. §§ 2200.5(w), 2201.1–2 (1998). *E.g.*, Thomas Daubert, 143 I.B.L.A. 186 (1998) (finding mining claims null and void where lands are within an exchange proposal); Daugherty, 143 I.B.L.A. 41 (1998) (same). If the segregation is not done quickly or if existing questionable mining claims are on the property considered for an exchange, an exchange proponent might otherwise seek to have the claims declared null and void. *See* Del

The Secretary has used this withdrawal authority, and the segregative effect that accompanies a proposed withdrawal, to temporarily prohibit new mining locations in sensitive areas.[209] In early 1999, the Clinton Administration proposed a two-year moratorium on mining along Montana's Rocky Mountain Front, a 100-mile-long region between Helena, Montana and Glacier National Park.[210] This area is considered one of the richest wilderness zones in the United States. The Administration also has closed lands to new mining claims in areas where there are endangered species.[211] Further, it has closed lands valuable for their archeological, educational, interpretative, or recreational value.[212]

Webb Conservation Holding Co. v. Tolman, 44 F. Supp. 2d 1105 (D. Nev. 1999). If a proposed exchange fails to materialize, the segregated lands will only become open to new mineral location following the publication of an opening order. *See, e.g.*, Notice of Realty Action: Termination of Segregation of Public Lands Under the Federal Land Exchange Facilitation Act of 1988 and Opening Order; Nevada, 63 Fed. Reg. 45,090 (1998).

209. The use of withdrawal authority for this purpose is not new; it generated interest when the first section 3809 regulations were published. *See* DEPARTMENT OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT, AUGUST 1980, SURFACE MANAGEMENT OF PUBLIC LANDS UNDER THE U.S. MINING LAWS, 43 C.F.R. 3809 1–6 (1980) ("The power to contest, coupled with the Secretary's authority to make withdrawals of land from operations conducted under the Mining Law, has been used in the past to protect environmentally sensitive areas from the impacts associated with mining operations.").

210. *See* Tom Kenworthy, *U.S. Would Halt Mining in Montana Widlife Area*, WASH. POST, Feb. 4, 1999, at A2; *see also* Notice of Proposed Withdrawal and Opportunity for Public Meeting; Montana, 64 Fed. Reg. 5311 (1999) (giving notice of proposed withdrawal of 429,000 acres in the Lewis and Clark National Forest, Montana).

211. *See, e.g.*, Notice of Proposed Withdrawal and Opportunity for Public Meeting; New Mexico, 64 Fed. Reg. 26,438 (1999) (giving notice of proposed withdrawal in the Sawtooth Area of Critical Environmental Concern, Catron County, New Mexico); Public Land Order No. 7382; Withdrawal of Public Lands for the Devil's Backbone Desert Bighorn Sheep Habitat Area; New Mexico, 64 Fed. Reg. 14,463 (1999) (listing public land order withdrawing 5,607.52 acres to protect and preserve endangered desert bighorn sheep habitat); Notice of Scoping and Public Meetings on Proposed Withdrawal of Public Lands; Ash Meadows National Wildlife Refuge, Nevada, 64 Fed. Reg. 2229 (1999) (describing application by the U.S. Fish and Wildlife Service to withdraw 5,360 acres as part of the Ash Meadows National Wildlife Refuge, Nevada).

212. *See, e.g.*, Notice of Proposed Withdrawal and Opportunity for Public Meeting; Montana; 64 Fed. Reg. 25,363 (1999) (protecting Four Dances Natural Area); Notice of Proposed Withdrawal and Opportunity for Public Meeting; New Mexico, 64 Fed. Reg. 25,063 (1999) (protecting the Lechuguilla Cave in New Mexico); Public Land Order No. 7387; Withdrawal of National Forest System Land for Oak Creek Canyon Recreation Area, 64 Fed. Reg. 23,664 (1999) (listing public land order withdrawing 10,500 acres in the U.S. Forest Service's Oak Creek Can-

CONCLUSION

Collectively, these initiatives reflect a critical examination of what were previously assumed to be fundamental tenets of the Mining Law. These assumptions, preached for so long, went untested prior to Secretary Babbitt's tenure. Regardless of whether one believes that those assumptions should continue, the 1872 Mining Law, at least for the moment, appears to be catching up to the twentieth century. It is too early to judge whether the Department's various administrative tools will withstand the test of time or be sufficient for the new millennium. They do not, for example, allay the Secretary's concern over transferring public resources for little value in return; yet, with the patenting moratorium in place the number of such transfers ultimately will decrease. Over thirty-five years ago, the then-Solicitor of the Department commented, prophetically, that "since it comes from a long-lived family, an up-to-date Mining Law should have an eye on the needs of the next century as well as its own."[213] This means that it will be up to Congress or the courts to retard—or possibly even facilitate—the 1872 Mining Law's march to the new millennium.

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yon Recreation Area); Public Land Order No. 7384; Withdrawal of Public Lands for Expansion of Lake Pleasant; Arizona, 64 Fed. Reg. 19,386 (1999) (listing public land order withdrawing 1,988.27 acres to protect the Bureau of Reclamation's Lake Pleasant expansion area); Notice of Proposed Withdrawal and Opportunity for Public Meeting; Montana, 64 Fed. Reg. 18,932 (1999) (proposing withdrawal to protect campsite in Montana); Public Land Order No. 7381; Withdrawal of Public Land for Protection of the Crystal Cave Area; Montana, 64 Fed. Reg. 14,462 (1999) (protecting geologic resources of the Crystal Cave area, Montana); Public Land Order No. 7383; Withdrawal of Public Lands for the Rio Grande Corridor; New Mexico, 64 Fed. Reg. 14,463 (1999) (listing public land order withdrawing 2,151.80 acres to protect the Rio Grande Corridor, in New Mexico); Notice of Proposed Withdrawal; Arizona, 63 Fed. Reg. 68,788 (1998) (listing notice of proposed withdrawal of 605,350 acres to protect the native biodiversity and ecological richness of the Shivwits Plateau, pending an inquiry into a possible national monument designation).

213. Barry, *supra* note 35, at 101.