August 27, 2024

Jacqueline Buchanan, Regional Forester, Objection Reviewing Officer
Pacific Northwest Region, USDA Forest Service
Attn: 1570 Objections
1220 SW 3rd Ave.
Portland, OR 97204

Re: Objection Powder River Mining FEIS-Jan Alexander

Dear Ms. Buchanan:

My Objections concern the Draft Record of Decision (DROD). The information concerning the Rosemont Decision and this decision's impact on the Forest Supervisor's decision to only include placer exploration and testing in the ROD is new information. Also, the DROD had a decision to drop the Barbara I operation and I could find nothing in the ROD concerning the Bald Mountain Ponds.

I was not able to comment on this information previously. My objections are filed pursuant to 36CFR Part 218. The 45-day objection period began July 17, 2024, so my objections are timely.

Objection #1: On page 4 of the DROD it states "I have decided to authorize the approval of only the placer testing and exploration activities." I object to this decision to only approve placer testing and exploration at sites #3, #4, and #5 on the Return Placer Operation, but not at Site #2.

Details of this objection. The Return is a placer operation, but the DROD, does not authorize approval of testing at Placer Site #2. The Plan of Operation clearly states on page 1, "*A temporary access route up the old trench on the Return claim onto the Lady Dragon claims will be utilized* ***during testing at site #2***". The Rosemont case decided that "discovery of valuable minerals is essential to the right to occupancy-temporary or permanent-beyond the occupancy necessary for exploration".

The Return operation's occupancy at Site #2 is not "beyond the occupancy needed for exploration". Site #2 is in the exploration phase.

Resolution of objection #1: When the Record of Decision is finalized, include Site #2, as the Plan of Operation clearly states this site is in the exploration phase. Change the chart on page A-16 to include Site #2. The Rosemont Decision applied only to production, not exploration

Objection #2: On page 4 of the DROD it states "I have decided to authorize the approval of only the placer testing and exploration activities." On page 5 the DROD states that authorization of approval of only placer testing is based on the Rosemont Decision.

Details of this objection. Rosemont was a proposed lode production operation. The Struggler, and Barbara I operations include lode exploration before production mining can begin. The Rosemont case decided that "*discovery of valuable minerals is essential to the right to occupancy-temporary or permanent-beyond the occupancy necessary for exploration*".

These two lode operations are conducting testing, and further exploration is needed before mining can begin. These mines are not **"beyond the occupancy needed for exploration"**.

The Struggler Plan of Operation clearly states, *"I plan additional exploration"*, the Barbara I Plan states the operator plans to continue *"drifting along the vein to determine the length of the vein , and where ore is encountered"*. These are not production operations. By denying approval of these lode testing operations, you have made it impossible for these miners to demonstrate *"valuable minerals"* to the Forest Service.

Resolution of objection #2: At the same time the ROD is finalized for placer exploration operations, also produce a ROD for lode exploration operations. Authorize the Struggler and Barbara I testing operations for approval when the placer testing operations are authorized for approval. The Struggler and Barbara I mines are in the exploration phase of their operations.

Objection #3: Nowhere in the DROD is there a mention of the Bald Mountain ponds proposal.

Details of this objection: These are existing settling ponds adjacent to the Bald Mountain Mine patented property. NERCO constructed the ponds in the 1980s and they have been used sporadically since that time. Use of these ponds is analyzed in the EIS, but not even mentioned in the DROD.

Resolution of Objection #3: Include the Bald Mountain Ponds in the ROD.

Objection #4: On page 5 the DROD states, "production level activities are not included with the ROD (it's actually a DROD) because of the Rosemont Court Decision. I object to this decision to exclude production operations from the Record of Decision.

Details of this objection: The Rosemont case, where the proposal was to store waste rock on claims where no mining had taken place and there was no valid discovery, has nothing to do with the Struggler, or the Barbara I. Barry Dean of the Struggler, has assays from previous owners, the Forest Service even did a sort of "validity exam" on the Struggler because they didn't like the cabin, and the mineral report clearly shows there are several valid discoveries. However, Barry is still exploring, and he is not ready for production.

The Barbara I is a similar case. There are two adits on the Barbara I and Josh Haynes has assays, and ore was mined underground when Flexible Mining leased the claim. But today, Josh is conducting additional exploration. He is not ready for production.

Under 36CFR228.1 Purpose, the regulations state that operations *"shall be conducted so as to minimize adverse environmental impacts on Forest Service System resources"* and also states, *"It is not the purpose of these regulations to provide for the management of mineral resources"*.

Both these operations were analyzed in the EIS and adverse effects to surface resources were minimized. The Office of the Solicitor wrote an opinion November 14, 2005. In that white paper the solicitor wrote on page 2 , *"No Law Requires a Claim Validity Determination Before Mine Plan Approval on Lands Open to the Operation of the Mining Law"*.

"The Mining Law nowhere requires that the Secretary determine mining claim or mill site validity before allowing exploration or mineral development. See U.S.C. 22 et seq. In addition, none of the laws that have amended the Mining Law require validity determinations before approving mining operations".

On page 3, the solicitor wrote: "Decisions of the Department ***and the U.S. Forest Service*** *recognize that no law requires that the Secretary determine mining claim or mill site validity before approving a plan of operation on lands open to entry under Mining Law (hereunder "open lands".) W. Shoshone Def. Project, 160 IBLA 32,57 (2003) See also Cottonwood Res. Council, App No 02-01-00-0004 (Forest Service Dec 21, 2001.*

Resolution of objection: #4: Comply with the law, and follow the Forest Service regulations. Authorize the approval of placer and lode Plans of Operation for production as well as exploration.

Objection #5: The DROD states on page 5, *"A separate ROD will be issued for each production plan contingent on an evaluation by the Forest Service of placer/lode mining claims to determine if valuable minerals, within the meaning of the General Mining Law, have been found on the land in question".*

I object to this decision whereby the Forest Service determines "valuable minerals (validity) before approving a Plan of Operation.

Details of the Objection: First, the Forest Service is well aware that the Struggler, with its various adits, trenches and shafts, the Barbara I, with its two audits, and the Pardners Lode with its adit and shaft have discoveries under the Mining Law of 1872. The owners are *"prudent men"*. The Prudent Person Rule is based on the idea that if someone would invest time and money to develop the deposit, then it is considered valuable (see Castle v. Womble, and the U.S. Supreme Court approved it in 1905). These miners are conducting exploration and investing time and money to prove that the mines can go into production in the future.

The Office of the Solicitor wrote an opinion November 14, 2005 concerning validity. In that white paper the solicitor wrote on page 2: *"No Law Requires a Claim Validity Determination Before Mine Plan Approval on Lands Open to the Operation of the Mining Law.*

The Mining Law nowhere requires that the Secretary determine mining claim or mill site validity before allowing exploration ***or mineral development****. See U.S.C. 22 et seq. In addition, none of the laws that have amended the Mining Law require validity determinations before approving mining operations.*

On page 3, the solicitor wrote: "Decisions of the Department ***and the U.S. Forest Service*** *recognize that no law requires that the Secretary determine mining claim or mill site validity before approving a plan of operation on lands open to entry under Mining Law (hereunder "open lands".) W. Shoshone Def. Project, 160 IBLA 32,57 (2003) See also Cottonwood Res. Council, App No 02-01-00-0004 (Forest Service Dec 21, 2001."*

Resolution of Objection #5: In addition to the RODs for authorization of placer and lode exploration operations, produce a ROD to include the future expansion into production on the Return, Struggler, Barbara I and Pardner. That way, the miners will not be held up while new analysis takes place and can move from exploration to production without delay. **Comply with the Solicitor's opinion that** *"Decisions of the Department* ***and the U.S. Forest Service*** *recognize that no law requires that the Secretary determine mining claim or mill site validity before approving a plan of operation on lands open to entry under Mining Law".*

Objection #6: On page 5 of the DROD, it states *"Barbara I Lode has been removed from the decision due to closure of the claim associated with the submitted plan"*. I object to removing a proposed Plan of Operation from the EIS after analysis has been completed.

Details of the Objection: Keith Lyons submitted a new Plan of Operation to replace the previously approved Plan that was expiring in 2009. Keith's wife inherited the claims when Keith died. Through an error in her BLM paperwork, the claim was closed by BLM, and Josh Haynes, who had been working with Keith, located both the Barbara I and the Barbara II in 2018. The Barbara I is an active claim in good standing with BLM.

Removing the Barbara I Plan of Operation from the decision is arbitrary and capricious. There is no prevision under the regulations for the Forest Service to remove a Plan of Operation from a NEPA document after analysis is completed, except when the miner requests removal.

Thousands of claims are lost annually with BLM due to paperwork errors, and thousands of clams have to be immediately refiled. But even more important, the Forest Service has no authority to determine if a claim even exists. A miner could conduct exploration on open ground and the Forest Service would have no right to require that the miner have a claim. Claim ownership is the responsibility of the Bureau of Land Management, not the Forest Service.

Resolution of Objection #6: Do not remove the Barbara I, or any other claim from the analysis, unless the miner requests removal.

I appreciate the opportunity to provide these Objections to the Powder River Mining Draft Record of Decision.

Sincerely,

Jan Alexander

Jan Alexander
[redacted]

Enclosure: Office of the Solicitor Memorandum of November 14, 2005

Enclosure
Objection Powder River Mining

United States Department of the Interior

OFFICE OF THE SOLICITOR

M-37012

NOV 14 2005

Memorandum

To: Secretary
Director, Bureau of Land Management

From: Solicitor

Subject: Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations

I. Introduction

The Mining Law of 1872 (hereinafter "Mining Law") opens "all valuable mineral deposits in lands belonging to the United States" and "the lands in which they are found" to exploration, occupation and purchase. 30 U.S.C. § 22. The Mining Law thereby authorizes citizens and those who have declared their intention to become citizens to enter federal lands that are open to the operation of the Mining Law to explore for valuable mineral deposits and develop those minerals. *Id.* §§ 22, 23, 28, 35. The Mining Law also establishes requirements for self-initiating property rights in the form of unpatented mining claims. *Id.* Before beginning mining operations, however, operators must obtain government approval of a proposed plan for mining operations. 43 C.F.R. Subpart 3809 (2004).

In 2001, former Solicitor John Leshy issued an opinion, concurred in by former Secretary Bruce Babbitt, that addressed use of the surface of unpatented mining claims for purposes ancillary to mining. *Use of Mining Claims for Purposes Ancillary to Mineral Extraction*, M-37004 (Jan. 18, 2001) (hereinafter "2001 Opinion"). By ancillary, we mean that the surface uses are: (1) related to or accompany the mining activities or (2) are viewed as supplementary to or as an auxiliary activity relative to the removal of the mineral from the ground. That opinion concluded that the Department of the Interior should not approve a proposed plan for mining operations if the claimant is proposing to use mining claims solely for purposes ancillary to mining without also developing minerals from those claims. 2001 Opin., at 15. The opinion suggested that the Department could approve this sort of proposed mining operation only if:

(1) the Department determined that the mining claims were valid despite being used for ancillary purposes,

(2) the claimant relocated the mining claims being used for ancillary purposes as mill sites, or

(3) the Department determined that the plan could be authorized as a matter of discretion under other applicable public land laws.

Id.

The 2001 Opinion was recently withdrawn by an opinion entitled *Rescission of 2001 Ancillary Use Opinion*, M-37011 (Nov. 14, 2005). However, while the opinion was in effect, it was cited by some outside parties for the proposition that the Department must conduct a validity examination of all mining claims and mill sites included in a proposed mining plan of operations before it may approve the plan. Although the 2001 Opinion did not conclude that the Department was under such an obligation, it suggested that validity examinations might be required under certain circumstances where the claimant is proposing to use mining claims solely for purposes ancillary to mining without also developing minerals from those claims. 2001 Opin., at 15. Because this conclusion conflicts with current Departmental regulations, I have analyzed whether the Department is legally obligated to determine the validity of mining claims and mill sites before it may approve a plan of operations. Based on the analysis set out below, I conclude that, although the Department may determine claim validity at any time until a patent is issued, the Department is under no legal obligation to determine mining claim or mill site validity before approving a proposed plan of operations to explore for or develop minerals on lands open to the Mining Law's operation.

II. No Law Requires a Claim Validity Determination Before Mine Plan Approval on Lands Open to the Operation of the Mining Law

The Mining Law nowhere requires that the Secretary determine mining claim or mill site validity before allowing exploration or mineral development. *See* 30 U.S.C. §§ 22 *et seq.* In addition, none of the laws that have amended the Mining Law require validity determinations before approving mining operations. For example, nothing in the Surface Resources Act of 1955 requires such a validity determination. *Id.* §§ 611-614. The determination that is provided for in the Surface Resources Act decides whether mining claims located before 1955 can be found to be free from the surface rights restrictions imposed by the Act. *Id.* § 613(a). This *surface rights* determination does not require that the Department determine *claim validity*. Rather, it merely requires that the Department investigate whether a pre-1955 claimant was "in actual possession of or engaged in the working of such lands" at the time of the law's enactment to be free of its effects.

Likewise, nothing in the Federal Land Policy and Management Act ("FLPMA") requires a validity determination before a mine plan approval. Only four provisions of FLPMA amend the Mining Law. 43 U.S.C. § 1732(b). None of the four provisions require that the Secretary determine mining claim or mill site validity before approving a plan of operations. Congress

expressly provided that no other provision of FLPMA "shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress." 43 U.S.C. § 1732(b). As a result, no Departmental regulations require validity determinations before approving a mine plan on open lands.[1] Rather, the Department's current surface management regulations require validity determinations before approving a plan of operations *only* if the lands are *withdrawn* from appropriation under the Mining Law. *See* 43 CFR § 3809.100 (2004).[2]

Decisions of the Department and the U.S. Forest Service recognize that no law requires that the Secretary determine mining claim or mill site validity before approving a plan of operations on lands open to entry under the Mining Law (hereinafter "open lands"). *W. Shoshone Def. Project*, 160 IBLA 32, 57 (2003) ("while [the Bureau of Land Management ("BLM")] always possesses the authority to investigate the validity of unpatented mining claims, it is not required to do so, nor should it suspend consideration of a plan of operations even when it decides to conduct a validity examination of the affected claims to determine whether to initiate a contest."); *see also Cottonwood Res. Council*, App. No. 02-01-00-0004 (Forest Serv. Dec. 21, 2001) ("Except in special circumstances where the Forest Service may need to establish clear

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[1] Nevertheless, the BLM has unconstrained discretion to initiate a mining claim validity examination at any time before a patent is issued. *Cameron v. United States*, 252 U.S. 450, 460 (1920) ("so long as the legal title remains in the government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void"); *Freese v. United States*, 639 F.2d 754, 757 n.1 (Ct. Cl. 1981) ("The United States has the power under the mining laws to initiate a contest of the validity of unpatented mining locations."). Because the government has discretionary power but no legal obligation to determine claim validity on open lands, neither the claimant nor any third party can compel BLM to determine claim validity as a condition of mine plan approval. *See Southwest Res. Council*, 94 Interior Dec. 56, 67 (1987) (concluding that application of FLPMA's "unnecessary or undue degradation" standard presumes the validity of the use).

[2] The Department's regulations also disallow mining claimants from beginning mining operations for minerals that may be "common variety" minerals until after BLM has determined that the minerals are an uncommon variety. 43 C.F.R. § 3809.101 (2004). The inquiry involved in a common variety determination, like the surface rights determination under the Surface Resources Act, is not a validity determination. Common variety determinations consider only the nature of the mineral deposit, including whether the mineral has some property giving it distinct and special value, to determine whether the mineral at issue is locatable. *United States v. McClarty*, 17 IBLA 20 (1974). By contrast, a validity determination considers primarily whether there is a reasonable expectation of success in developing a paying mine. *In re Pac. Coast Molybdenum Co.*, 75 IBLA 16, 28-30 (1983). If a mining claimant has discovered a deposit of an uncommon variety mineral, or any locatable mineral for that matter, the claim may still be found to be invalid if the deposit is not economically viable.

title to the lands involved (e.g., in wilderness areas and other withdrawn areas, in land adjustment cases where the lands are segregated, or in mineral patent applications), there is no legal requirement or land management need for the Forest Service to conduct validity determinations on unpatented mining claims.").

In practice, the Department has determined the validity of only a very small percentage of the hundreds of thousands of unpatented mining claims and mill sites on the public lands.[3] This is because the Mining Law allows citizens to enter the public lands and locate mining claims and mill sites without pre-approval from the government. The Department is not involved in a mining claimant's decision to locate a mining claim or mill site. As a result, the Department simply does not know and, as shown above, *need not know*, whether these mining claims and mill sites are valid before approving a proposed plan for exploration or mining operations on open lands.

In summary, because no law requires that the Secretary determine mining claim or mill site validity before approving a mine plan on open lands, the Department is under no legal obligation to do so.[4]

III. A Claim Validity Determination is Required Before Mine Plan Approval on Withdrawn Lands

When lands are withdrawn from entry under the Mining Law, the Mining Law's authorization for citizens to explore for and develop minerals on those public lands terminates. *Id.* § 1714; *United States v. Snyder*, 72 Interior Dec. 223 (1965); *see also United States v. Boucher*, 147 IBLA 236, 243 (1999) ("'Where the Government subsequently withdraws the land from mineral entry and location, permission to prospect is thereby revoked and only claims then supported by a discovery are protected from the withdrawal.'") (quoting *United States v. Niece*, 77 IBLA 205, 207 (1983)). As a result, it is not lawful for the Department to approve a plan of operations for mining activities on withdrawn lands unless and until it determines the validity of the pre-existing claims and mill sites proposed to be used for those operations. In the case of mining claims, the Department must verify whether the claimant has located a valid mining claim, including whether the claimant has discovered a valuable mineral deposit as of the withdrawal date, before approving a plan of operations because only claims perfected before the withdrawal establish a valid existing property interest. *Freese v. United States*, 639 F.2d 754,

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[3] *See* Mark Squillace, *The Enduring Vitality of the General Mining Law of 1872*, 18 Envtl. L. Rep. 10,261, 10,266 (1988) (stating that the government rarely considers the validity of an unpatented mining claim).

[4] To the extent the 2001 Opinion implied anything other than this conclusion, the implication can only be characterized as policy advice that has been withdrawn, as previously mentioned.

757 (Ct. Cl. 1981).

The Department's current regulations reflect this understanding. The BLM will not authorize mining operations on withdrawn lands until BLM has determined claim validity. 43 C.F.R. § 3809.100 (2004).

VI. Summary and Conclusion

Based on the foregoing analysis, I conclude that, although the Department is authorized to determine claim validity at any time until a patent is issued, the Department is under no legal obligation to determine mining claim or mill site validity before approving a proposed plan of operations to explore for or develop minerals on lands open to the Mining Law's operation. However, when lands are withdrawn from entry under the Mining Law, the Department must verify whether the mining claims and mill sites included in a proposed mine plan are valid before approving the plan.

Sue Ellen Wooldridge
Solicitor

I concur in this opinion:

Secretary of the Interior

Nov 17, 2005
Date