



United States Department of the Interior

OFFICE OF THE SOLICITOR

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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The 2001 Opinion was recently withdrawn by an opinion entitled *Rescission of 2001 Ancillary Use Opinion*, M-37011 (Nov. 14, 2005).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

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.

