



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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MEMORANDUM

To: Director, Bureau of Land Management

From: Solicitor

Subject: Patenting of Mining Claims and Mill Sites in Wilderness Areas

I. Introduction

My office is reviewing a number of mineral patent applications¹ filed for lands within the National Wilderness Preservation System.² A question has been raised whether the Bureau of Land Management's (BLM) recommendations to patent the lands without a reservation of the surface estate comply with section 4(d)(3) of the Wilderness Act of 1964, 16 U.S.C. § 1133(d)(3) (1994).³

¹ A mineral patent is a deed that conveys title to federal land or interests in land to the patentee.

² The National Wilderness Preservation System includes lands managed by the Forest Service (National Forest System lands), Bureau of Land Management (BLM) (public lands), Fish and Wildlife Service (lands in National Wildlife Refuges), and National Park Service (National Park System lands), that Congress has designated as wilderness areas. BLM is responsible for administering the patenting provisions of the Mining Law of 1872, 30 U.S.C. §§ 22 et seq. even on lands managed by other agencies.

³ BLM conducts a mineral examination and prepares a mineral report on lands for which a patent is sought. The report recommends qualified claims for patenting and recommends initiating a mineral contest against unqualified claims. Lands recommended for patenting are described in a patent document prepared by BLM, which contains any title restrictions or exclusions, such as the reservation to the United States of the surface estate under section 4(d)(3) of the Wilderness Act.

Section 4(d)(3) of the Wilderness Act, which became law on September 3, 1964, allowed the Mining Law of 1872, 30 U.S.C. §§ 22 et seq. (1994), to continue to operate until midnight December 31, 1983, albeit subject to some regulation, on “those national forest lands designated by this chapter as ‘wilderness areas.’”⁴ 16 U.S.C. § 1133(d)(3). Thereafter, except for “valid rights then existing,” the “minerals in lands designated by this chapter as wilderness areas are withdrawn from all forms of appropriation under the mining laws.” Id. Section 4(d)(3) provides:

Mining locations lying within the boundaries of said [national forest] wilderness areas shall be held and used solely for mining or processing operations and uses reasonably incident thereto; and hereafter, subject to valid existing rights, all patents issued under the mining laws of the United States affecting national forest lands designated by this chapter as wilderness areas shall convey title to the mineral deposits within the claim, . . . but each such patent shall reserve to the United States all title in or to the surface of the lands and products thereof, and no use of the surface of the claim or the resources therefrom not reasonably required for carrying on mining or prospecting shall be allowed except as otherwise expressly provided in this chapter: Provided, That, unless hereafter specifically authorized, no patent within wilderness areas designated by this chapter shall issue after December 31, 1983, except for the valid claims existing

⁴ Although section 4(d)(3) references “national forest lands” designated as wilderness, it also applies to BLM-managed wilderness lands under section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1994) (“Once an area [of BLM-managed public lands] has been designated for preservation as wilderness, the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated area[.]”). Furthermore, statutes designating land managed by the National Park Service or the Fish and Wildlife Service as wilderness often incorporate “applicable” provisions of the Wilderness Act, which may include, if relevant, provisions dealing with minerals such as section 4(d)(3). See, e.g., Alaska National Interest Lands Conservation Act § 707, Pub. L. No. 96-487, 94 Stat. 2371, 2421 (1980) (“Except as otherwise expressly provided for in this Act wilderness designated by this Act shall be administered in accordance with applicable provisions of the Wilderness Act governing areas designated by that Act as wilderness, except that any reference in such provisions to the effective date of the Wilderness Act shall be deemed to be a reference to the effective date of this Act, and any reference to the Secretary of Agriculture for areas designated in sections 701 and 702 shall, as applicable, be deemed to be a reference to the Secretary of the Interior.”); Act of Oct. 20, 1976, Pub. L. No. 94-567, 90 Stat. 2692 (1976) (National Park System lands designated by the Act as wilderness “shall be administered by the Secretary of the Interior in accordance with the applicable provisions of the Wilderness Act”); Act of Oct. 19, 1976 § 6, Pub. L. No. 94-557, 90 Stat. 2633, 2638 (1976) (National Wildlife Refuge lands designated by the Act as wilderness “shall be administered in accordance with the applicable provisions of the Wilderness Act”).

on or before December 31, 1983. Mining claims located after September 3, 1964 within the boundaries of wilderness areas designated by this chapter shall create no rights in excess of those rights which may be patented under the provisions of this subsection.

Id. (emphasis added).

Section 4(d)(3) limits patenting in wilderness areas in two ways. First, it restricts all patents in a designated wilderness area to the mineral deposits within the claim, with the United States reserving the surface estate, “subject to valid existing rights.” Second, it cuts off all patenting-of the mineral deposits as well as the surface estate—in designated wilderness areas after December 31, 1983, “except for the valid claims existing on or before [that date].”⁵

This Opinion deals with the first of these limitations, the one restricting patenting in wilderness areas to the mineral deposits, “subject to valid existing rights.” Specifically, it addresses exactly when a claimant has established a valid existing right to patent both the surface estate and mineral deposits or, conversely, when a claimant may patent only the mineral deposits in the claim.

In answering this question, mining claims may be divided into three categories. The first consists of claims where the claimant has properly located a mining claim, made a discovery of a valuable mineral deposit, filed a patent application, and established a right to a patent before the land in question was designated as wilderness. The second consists of claims where the claimant properly located a mining claim and made a discovery of a valuable mineral deposit before the land in question was designated as wilderness, but for which the claimant had not established a right to a patent before the land was designated as wilderness. The third consists of claims upon which no discovery was made or which were not otherwise properly located until after the wilderness designation.⁶

Under section 4(d)(3)’s plain language, claims in the first category may be patented without a reservation of the surface estate because the claimant established a valid existing right to an unrestricted patent under section 4(d)(3) prior to the wilderness designation. The statutory language is likewise clear that only the mineral deposits may be patented for the third group of

⁵ For claims not located or not valid as of midnight December 31, 1983, the plain terms of section 4(d)(3) forbid patenting altogether. 16 U.S.C. § 1133(d)(3) (“[N]o patent within wilderness areas . . . shall issue after December 31, 1983, except for the valid claims existing on or before December 31, 1983.”).

⁶ For lands designated as wilderness before January 1, 1984, claims could still be located until that date. For lands designated as wilderness after January 1, 1984, claims could only be located until the date of wilderness designation.

claims. The issue addressed in this Opinion is whether the second category of claims should be patented without a reservation of the surface estate.

BLM currently recommends that claims in this category be patented in full fee simple, without a reservation of the surface estate. We also understand that prior to the Secretary's revocation of BLM's authority to issue patents in 1993,⁷ BLM regularly issued patents without a surface estate reservation for such claims. We have found no record of the Solicitor's Office ever addressing whether this practice is consistent with section 4(d)(3); that is, as far as we have been able to determine, the issue being addressed here is one of first impression in the Solicitor's Office, having arisen out of our participation in the Secretarial review of patent applications. See Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167, 1168 (10th Cir. 1997) (discussing the history and implementation of the Secretary's 1993 order on patenting).

For the reasons that follow, I conclude that the Wilderness Act disallows patenting of the surface estate for mining claims located prior to a wilderness designation where the claimant had not established a "valid existing right" to a full fee simple patent as of the date of the wilderness designation. Such a right, I believe, is perfected only when the claimant files a patent application and complies with all the requirements for obtaining a patent under the Mining Law, as determined by the Secretary.⁸ As explained more fully below, this conclusion should serve Congress's purpose in enacting the Wilderness Act, but have little, if any, practical impact on claimants' mining activities in designated wilderness areas.

II. The Text and Purpose of the Wilderness Act

The purpose of the Wilderness Act is expressed in the statutory text:

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the

⁷ See Secretarial Order No. 3163 (Mar. 2, 1993).

⁸ The analysis of whether a claimant has established a right to a patent is distinct from whether, in a mandamus action, the Secretary has a duty to issue a patent. A duty to issue a patent does not arise until the Secretary makes an official determination that all conditions for issuance of a patent have occurred. See Marathon Oil Co. v. Lujan, 937 F.2d 498, 501 (10th Cir. 1991). The Secretarial review process, by which the patent application proceeds through review by the chain of command, generally results in the Secretary's determination occurring later than the date at which a claimant establishes a right to a patent.

American people of present and future generations the benefits of an enduring resource of wilderness.

16 U.S.C. § 1131(a). The same section goes on to define wilderness in terms unusually eloquent for a mere statute:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

Id. § 1131(c).

According to the House Committee on Interior and Insular Affairs, the congressional policy was to maintain “the undeveloped character of their lands and the need to protect and manage them in order to preserve, as far as possible, the natural conditions that now prevail.” National Wilderness Preservation System, H.R. Rep. No. 88-1538, at 7 (1964), reprinted in 1964 U.S.C.C.A.N. 3615, 3615-16. Despite this burst of enthusiasm for the protection of natural, “untrammelled” conditions, political reality required Congress to address, and to some extent allow, continued mineral activity in designated wilderness areas. That compromise was embodied primarily in section 4(d)(3), with which we are here concerned. Nevertheless, the fundamental thrust of the statute, to protect and maintain the natural character of designated wilderness areas, argues for a narrow interpretation of the valid existing rights language in section 4(d)(3).

Turning specifically to that section, its first patenting limitation requires “all patents” in designated wilderness areas issued after September 3, 1964 (the date of enactment), to reserve the surface estate to the United States, “subject to valid existing rights.” Because this limiting language addresses only patenting, the phrase “valid existing rights” must refer only to a claimant’s valid existing rights to a patent without a reservation to the United States of the surface estate.

Valid existing rights to a patent should be contrasted with the broader concept of valid existing rights in an unpatented mining claim. That Congress appreciated the significance of this distinction is demonstrated in section 4(d)(3) itself. In contrast to the earlier reference to a valid existing right to a patent, the second patenting limitation of section 4(d)(3), which prohibits all patenting within designated wilderness areas after December 31, 1983, specifically excepts “valid claims existing on or before” that date, rather than valid rights.⁹ This means that the valid existing rights exception in the first patenting restriction of section 4(d)(3) is not referring to a valid existing right to an unpatented mining claim, but rather a valid existing right to an unrestricted patent if so established by the claimant prior to the wilderness designation. The fact that Congress chose to frame the exemption from the patenting restriction in the first part of section 4(d)(3) as “valid existing rights,” as opposed to “valid claims existing on or before” the date of withdrawal, may be said to reflect a congressional appreciation of the difference between the two phrases and a knowing intention not to allow every valid claim existing prior to a wilderness designation to be patented without a surface reservation to the United States.

It has long been acknowledged that a valid, unpatented mining claim gives the claimant a possessory interest in the land and the right to develop the claim within applicable regulations so long as the claimant continues to satisfy the requirements of the mining laws. See United States v. Locke, 471 U.S. 84 (1985); Chambers v. Harrington, 111 U.S. 350 (1884). This right arises when a claimant properly locates a mining claim and discovers a valuable mineral deposit on lands open to location in compliance with the mining laws. This core right conveyed under the Mining Law—the right to develop the valuable mineral deposits discovered on the claim—is not the same as the right to a patent. See Erhardt v. Boaro, 113 U.S. 527, 535 (1885).

Whether the holder of a valid mining claim may develop minerals found within the claim does not depend upon whether the claimant has a patent, whether to the minerals only, or to the surface estate as well. This is true both within and outside of designated wilderness areas. Nothing in the Mining Law requires claimants to patent their claims. Historically, thousands of producing mines have been brought into production on unpatented claims; today, several hundred producing mines are found at least partially on unpatented claims. See, e.g., Chambers, 11 U.S. at 353 (“[T]he patent adds little to the security of the party in continuous possession of a mine he has discovered or bought.”); Independence Mining Co. v. Babbitt, 105 F.3d 502, 509 (9th Cir. 1997) (stating that the mining company “need not obtain patents to continue its mining operations”). In short, nothing in the language of section 4(d)(3), which requires a reservation of the surface estate to the United States in a patent issued after a wilderness designation, affects a claimant’s ability to continue to develop the valuable minerals on a preexisting unpatented mining claim, so long as a valid claim had been established as of the time the land was withdrawn from further appropriation under the mining laws (January 1, 1984, with respect to

⁹ Thus a claimant with an otherwise valid claim on or before December 31, 1983, could proceed to patent for that claim. That patent should, however, for the reasons explained in this memorandum, be limited to the mineral deposits unless the claimant also had established a “valid existing right” to a patent to the surface as of the time of the wilderness designation.

lands designated as wilderness before that date). Cf. Locke, 471 U.S. at 107 (“Regulation of property rights does not ‘take’ private property when an individual’s reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed.”). By receiving a patent to the mineral deposits only, a claimant does not lose the right to use so much of the surface of the mining claim as is necessary for mining, milling, or processing operations or uses reasonably incident thereto. See Surface Resources Act of 1955 § 4, 30 U.S.C. § 612(b) (1994).

While patenting has little, if any, practical import for mining activity, patenting of the surface as well as the mineral estate does create a fee simple inholding in a wilderness area, and it enlarges the possible range of activities that may properly be conducted on that land. That is, prior to patenting the surface, the only activities authorized on the claim would be mineral activities and uses reasonably incident thereto. This limitation is strongly implied in the Mining Law. See, e.g., Andrus v. Charleston Stone Prods. Co., 436 U.S. 604, 611 (1978) (“[T]he federal mining law surely was not intended to be a general real estate law[.]”). More significantly, it is twice expressly set out in section 4(d)(3) itself: “Mining locations lying within the boundaries of said wilderness areas shall be held and used solely for mining or processing operations and uses reasonably incident thereto”; and again, “no use of the surface of the claim or the resources therefrom not reasonably required for carrying on mining or prospecting shall be allowed except as otherwise expressly provided in this chapter[.]” 16 U.S.C. § 1133(d)(3).

Once the surface of a claim in a wilderness area is patented, this limitation disappears and the claim is converted to a fee simple inholding in the wilderness area. As such, absent other limitations imposed by federal, state or local law, the surface can be used for homesites, ski areas or other recreational developments, or many other uses that could conflict with the purposes of the wilderness designation attaching to the surrounding federal land. This effect strongly suggests that if the patent limitation in section 4(d)(3) were to be read to maximize protection of wilderness, any exemption from it should be read narrowly. The protective thrust of the Wilderness Act, in other words, counsels being cautiously tightfisted about issuing patents to the surface estate in wilderness areas.

III. The Legislative History of the Wilderness Act

The Wilderness Act took an eight-year journey through Congress. See Michael McCloskey, The Wilderness Act of 1964: Its Background and Meaning, 45 Or. L. Rev. 288, 298-301 (1966). Most of the discussion of mining issues in the legislative history of the Wilderness Act focused on mineral leasing and prospecting. See Hearings Before the Comm. on Interior and Insular Affairs on S. 4, 88th Cong. (1963); 110 Cong. Rec. 17,427, 17,429, 17,434, 17,441, 17,446, 17,448 (1964) (debating H.R. 9070); 110 Cong. Rec. 20,601 (1964) (debating S. 4); 109 Cong. Rec. 5922, 5923-28 (1963) (debating S. 4); 109 Cong. Rec. 5885, 5897-98 (1963) (debating

S. 4). As originally introduced in the Congress that finally passed the Wilderness Act, neither the Senate nor the House bills included anything about patenting.¹⁰

The bill reported out of the House Committee included the text of what became section 4(d)(3).¹¹ The House Committee Report explained the purpose of restricting patents in wilderness areas to the mineral deposits only, subject to “valid existing rights,” as being a means “to effect maximum wilderness preservation.” H.R. Rep. No. 88-1538, at 9, reprinted in 1964 U.S.C.C.A.N. 3615, 3618. Regarding the reach of that restriction, the House Committee Report tersely expressed the understanding that it would apply to “locators of claims staked after the effective date of the act.” Id. at 9-10, 1964 U.S.C.C.A.N. 3615, 3618.

This understanding in the House Committee Report is apparently based upon a letter, included in the report, from John A. Carver, Jr., Assistant Secretary of the Interior, to Wayne N. Aspinall, Chairman, Committee on Interior and Insular Affairs, dated December 12, 1963. Id. at 15-17, reprinted in 1964 U.S.C.C.A.N. 3615, 3623-25 [hereinafter Carver letter]. The Carver letter expressed the Department of the Interior’s strong support for the bill, and appended suggestions for nine “technical and perfecting amendments, which we believe are desirable to remove ambiguities.” Id. at 15, reprinted in 1964 U.S.C.C.A.N. 3615, 3623. One of these was to add the words “subject to valid existing rights” to the section 4(d)(3) patenting provision. Id. at 16-17, reprinted in 1964 U.S.C.C.A.N. 3615, 3624-25. The letter explained the purpose this way:

The requirement of the bill that all patents issued after the effective date of this act shall convey title to mineral deposits with a reservation to the United States of all title to the surface of the lands must be subject to “valid existing rights.” The owner of a valid mining claim perfected under

¹⁰ Section 6(c)(2) of the Senate bill simply allowed the President to authorize prospecting and mining “upon his determination that such use or uses” in a specific area “will better serve the interests of the United States and the people thereof than will its denial.” S. 4, 88th Cong. § 6(c)(2) (1963). Section 4(d)(2) of the House bill authorized only prospecting and mineral surveys, while section 5(b) allowed access to valid mining claims wholly within a wilderness area- subject to “reasonable regulations consistent with the preservation of the area as wilderness.” H.R. 9070, 88th Cong. §§ 4(d)(2), 5(b) (1963).

¹¹ The only significant differences between the language of the bill reported out of the House Committee and section 4(d)(3) as enacted were the date of the patenting cutoff in wilderness areas and the date of withdrawal under the mining laws. The House Committee version stated that no patents “shall issue after December 31, 1989, except for the valid claims existing on or before December 31, 1989.” H.R. Rep. No. 88-1538, at 5 (emphasis added). The House Committee version of the bill also withdrew the minerals in wilderness areas from appropriation under the mining laws, “effective January 1, 1990.” Id. (emphasis added). Section 4(d)(3), as enacted, sets the patenting cut-off date at December 31, 1983, and the withdrawal date as January 1, 1984. 16 U.S.C. § 1133(d)(3).

the mining laws prior to the effective date of this act has already acquired a possessory title to the surface of the land and any patent issued on such a claim after the effective date of this act must convey title to both the land and mineral deposits therein, unless provision is made for just compensation. See Solicitor's Opinion, M-36467 (August 28, 1957).

Id. at 17, reprinted in 1964 U.S.C.C.A.N. 3615, 3625. The first quoted sentence reflects a legitimate concern that the proposed Act's restrictions on patenting ought to be carried out in such a way as to avoid extinguishing vested property rights for which just compensation would be required. It also suggests a specific response to that concern—one that was subsequently included in the legislation—to make the restrictions “subject to valid existing rights.”

The second quoted sentence of the Carver letter sets out a view of what kinds of rights would be protected by the addition of that qualifying phrase “subject to valid existing rights”—namely, the right of the holder of a valid mining claim in an area designated as wilderness to obtain a patent to the surface as well as the mineral deposits. Carver describes the claims which establish this right as both “valid” and “perfected.” It is not clear whether Carver understood these terms to be synonymous (and therefore redundant) or whether he thought a “perfected” claim was something more than a “valid” claim. Since mining claims must contain a discovery of a valuable mineral deposit to be considered valid, it is possible that Carver's additional use of the term “perfected” to describe the qualifying claims meant instead that the claims had been “perfected” by complying with all the requirements for filing a complete patent application and establishing a right to a patent, as determined by the Secretary. This reading eliminates the redundancy and makes Carver's position consistent with the case law discussed below and the conclusions in this Opinion.

If, however, Carver thought that owners of valid mining claims have, without more, vested rights to a patent including the surface as well as the mineral deposits, his viewpoint is less persuasive. The only authority cited for that proposition in his letter does not support such a conclusion. The referenced Solicitor's Opinion, entitled Disposal of Sand and Gravel from Unpatented Mining Claims, M-36467, at 2 (Aug. 28, 1957), analyzes the respective rights of mining claimants and BLM to dispose of sand and gravel from unpatented mining claims. It does not address or cast doubt on the authority of Congress to impose statutory restrictions on patenting, such as the surface estate reservation, or to cut off patenting entirely, for valid existing unpatented mining claims.

As explained more fully below, court decisions over the past two decades have demonstrated that valid mining claims, without more, do not include a valid existing right to a patent under the Mining Law. Until a right to a patent is established, there is, contrary to what the Assistant Secretary's letter might indicate, no “valid existing right” to a mineral patent to the surface estate—nor, indeed, to the mineral estate.

The question is what, if any, weight should be given to the Carver letter and the terse statement in the House Committee Report. Plainly, the House Committee embraced Carver’s concern about the need to protect “valid existing rights,” and accordingly added that language to section 4(d)(3). But the drafters of the House Committee Report also implied in the report language quoted above, that the phrase protected all claims “staked” prior to enactment, whether or not the claims were “valid” or “perfected” prior to enactment, as one interpretation of the Carver letter might indicate.

The suggestions offered in both the Carver letter and the House Committee Report describing what the phrase “valid existing rights” might mean in this context should not, in my view, be regarded as enacting into law a particular view of valid existing rights. Instead, by using such a general, common phrase,¹² Congress was leaving it ultimately up to the courts to determine what “valid existing rights” meant in the patenting context. Moreover, the House Committee Report in effect counseled the courts to construe the pertinent language to “effect maximum wilderness preservation,” because that was the thrust of the patent limitation to “mineral deposits alone, with only such use of the surface as may reasonably be required in connection with the mining operation.” See H.R. Rep. No. 88-1538, at 9, reprinted in 1964 U.S.C.C.A.N. 3615, 3618. In short, in light of the subsequent case law described below, Congress’s inclusion of the valid existing rights provision in section 4(d)(3) is best viewed as responsive to the general constitutional concern the Assistant Secretary raised, rather than as legislating any precise understanding of the scope of those rights.

IV. Modern Judicial Treatment of Valid Existing Rights with Respect to Legislation Affecting Mining Claims and Patents

Any doubt that may have lingered as to the power of Congress to restrict the opportunity to obtain a patent or limit its scope, as Congress has done in section 4(d)(3), was erased by the Supreme Court’s decision in United States v. Locke, 471 U.S. 84 (1985). There the Court rejected a challenge to Congress’s authority to condition the holding of a mining claim on the claimant’s filing, “prior to December 31” every year, a notice of intent to hold the claim or proof of assessment work performed as required by section 314 of the Federal Land Policy and Management Act (FLPMA). Id. at 88-90 (discussing the requirements under FLPMA § 314, 43 U.S.C. § 1744 (1994)). The challenge was mounted by a hapless claimant who had filed one day late, on December 31. Id. at 90. The Court’s discussion of Congress’s power to limit the scope of even vested property rights in mining claims is fully applicable here:

Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a

¹² For examples of other statutes using the phrase “subject to valid existing rights” see note 13 infra.

reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties. . . .

This power to qualify existing property rights is particularly broad with respect to the “character” of the property rights at issue here. Although owners of unpatented mining claims hold fully recognized possessory interests in their claims, we have recognized that these interests are a “unique form of property.” . . . The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. See, e.g., Kleppe v. New Mexico, 426 U.S. 529, 539 (1976). . . . Claimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests.

Id. at 104-05 (citations omitted). Reflecting such teachings, federal appellate courts in the past two decades have issued a number of decisions rejecting “vested rights” challenges by holders of mining claims to subsequently-imposed legislative restrictions on mineral patenting. None of these decisions has construed section 4(d)(3) of the Wilderness Act, apparently because BLM’s practice has been not to reserve the surface of patents in wilderness areas if the claim was valid at the time of the wilderness designation. Rather, these court decisions arise out of other laws enacted by Congress that have cut off or restricted patenting on designated lands in a manner similar to (or more restrictively than) the Wilderness Act provisions.¹³

The first of these cases addressed that part of a statute establishing the Sawtooth National Recreation Area which flatly abolished patenting in the area in question. The statute was unequivocal: “Patents shall not hereafter be issued for locations and claims heretofore made in the recreation area under the mining laws of the United States.” Sawtooth National Recreation

¹³ Many statutes withdrawing lands for, among other things, parks, recreation or conservation areas, monuments, and wild and scenic rivers areas, curtail or restrict patenting, but make a provision for valid existing rights. See, e.g., Wild and Scenic Rivers Act § 6, 16 U.S.C. § 1280 (restricting patenting in designated areas to the mineral deposits, subject to valid existing rights); California Desert Protection Act of 1994, § 508, 16 U.S.C.A. § 410aaa-48 (West Supp. 1997) (requiring patents in the Mojave National Preserve to “convey title only to the minerals” subject to valid existing rights). A few statutes withdrawing lands and restricting patenting do not make provision for valid existing rights. See, e.g., Sawtooth National Recreation Area Act § 12, 16 U.S.C. § 460aa-11 (1994) (disallowing patenting for existing and future claims); Jemez National Recreation Area Act § 3, 16 U.S.C. § 460jjj-2 (a)(1) (1994) (cutting off all patenting for any claims made in the recreation, area); Los Padres Condor Range and River Protection Act, Pub. L. No. 102-301, § 8, 106 Stat. 242 (1992) (restricting patents issued after the withdrawal to the mineral deposits only).

Area Act (Sawtooth Act) § 12, 16 U.S.C. § 46Oaa-11 (1994).¹⁴ In Freese v. United States, 639 F.2d 754 (Ct. Cl.), cert. denied, 454 U.S. 827 (1981), the U.S. Court of Claims held that a mining claimant with valid but unpatented mining claims had no right to receive a patent for lands withdrawn from location and patenting under the Sawtooth Act. The court held that the Sawtooth Act did not disturb the plaintiffs “valid existing rights” in his mining claims because his “rights of use, enjoyment and disposition in his unpatented mining claims remain undiminished.” Id. at 758 (emphasis added). The court noted that the plaintiff “had not yet taken the first step towards obtaining patents upon any of his mining claims when the Sawtooth Act intervened[,]” and concluded that he had no right to be given the “opportunity to obtain greater property than that which he owned” at the time of the withdrawal. Id.

In describing the impact of the Sawtooth Act’s patenting prohibition on the House floor, the Chair of the House Committee, Rep. Wayne Aspinall, had expressed the view that

any person holding a valid claim is entitled to proceed to patent and thereby acquire fee title to the lands involved. Section [46Oaa-11]. in effect, extinguishes that right with respect to lands located within the recreation area, While this probably creates a right to some compensation, its value may not be too significant since the right to prospect, develop, and mine the claim is protected by the terms of the bill. In short, Mr. Chairman, the committee has attempted to protect this area without unjustly or unlawfully depriving any person of an established property right.

118 Cong. Rec. 1255, 1256 (1972) (statement of Rep. Wayne N. Aspinall) (emphasis added). In Freese, the Court of Claims in effect rejected Chairman Aspinall’s suggestion that extinguishing a patent opportunity for holders of valid claims “probably creates a right to some compensation.” In answering Freese’s argument that “his right to the issuance of a patent upon each of his mining claims vested as soon as he completed the discovery [of a valuable mineral deposit] and location of each claim,” the court explained 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.” Freese, 639 F.2d at 758. The court concluded that a

¹⁴ Section 10 of the Sawtooth Act contained a “valid existing rights” provision for mining claims, as follows: “Subject to valid existing rights, all Federal lands located in the recreation area are hereby withdrawn from all forms of location, entry, and patent under the mining laws of the United States.” 16 U.S.C. § 46Oaa-9 (1994). The Conference Report on the bill clearly reflected the understanding that the flat abolition of patenting in section 12, without provision for valid existing rights, left no room for suggesting that the section 10 valid existing rights provision applied to the patent abolition. That is, without mentioning valid existing rights, the report expressed “approval of the provision prohibiting the issuance of patents on existing claims.” Sawtooth National Recreation Area, H.R. Rep. No. 92-1276, at 9 (1972), reprinted in 1972 U.S.C.C.A.N. 3013, 3047.

claimant suffers no unconstitutional divestment of a property right solely because it no longer has the option to apply for patents to its claims. Id.

The court recognized the differing impacts of the section 12 patenting prohibition and the section 10 withdrawal from location subject to “valid existing rights.” See supra note 14. It stated that, “while the right of possession and enjoyment attaching to valid claims existing upon the effective date of the Act is expressly recognized and preserved, the ability to obtain patents upon these claims is expressly denied.” Freese, 639 F.2d at 756-57.

The next court decision came in a lawsuit brought by holders of valid mining claims in Alaska on federal land that was conveyed to Native corporations under the terms of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 et seq. (1994). Under section 22(c) of ANCSA, mining claimants had five years to “proceed to patent” on such lands,¹⁵ but the plaintiffs missed the deadline. They argued that they had ‘a valid existing right to a patent that could not be cut off by legislation. In Alaska Miners v. Andrus, 662 F.2d 577 (9th Cir. 1981), the court soundly rejected the argument, concluding that the claimants had no valid existing right to a patent immune from subsequent congressional restriction. Id. at 579. A mining claimant’s interest prior to proceeding to patent was merely the right to possess the land, according to the court, and even “a valid mining location does not limit the rights of the United States as the paramount title holder.” Id. The land in question “remains subject to the disposing power of the Congress until [the mining claimant] satisfies the conditions imposed by law for the issuance of a patent.” Id. at 580.

The restrictions on patenting upheld in Freese and Alaska Miners were more severe than the restrictions in the Wilderness Act because they abolished patenting entirely. Other court decisions in this area have reached similar results on even more extreme facts. In creating the Jemez National Recreation Area on October 12, 1993, for example, Congress cut off patenting, effective more than two years prior to enactment: “Notwithstanding any other provision of law, no patents shall be issued after May 30, 1991, for any location or claim made in the recreation

¹⁵ The statute specifically provided:

On any lands conveyed to Village and Regional Corporations, any person who prior to August 31, 1971, initiated a valid mining claim or location under the general mining laws and recorded notice of said location with the appropriate State or local office shall be protected in his possessory rights, if all requirements of the general mining laws are complied with, for a period of five years and may, if all requirements of the general mining laws are complied with, proceed to patent.

ANCSA § 22(c), 43 U.S.C. § 1621(c)(1) (1994).

area under the mining laws of the United States.” Jemez National Recreation Area Act (Jemez Act) § 3(a)(1), 16 U.S.C. § 460jjj-2(a)(1) (1994).

In Cook v. United States, 37 Fed. Cl. 435 (1997) the Jemez Act restriction was challenged by claimants who had filed a patent application for 23 mining claims in 1989, paid the purchase price, and received a first half-mineral entry final certificate (FHFC)¹⁶ on January 16, 1991, four months before the date set in the statute for the ban on patenting to take effect. Id. at 437. The plaintiffs argued that the statute effected a taking of their alleged right to a patent. Id. at 436. The Department argued that a vested property interest did not arise until there had been a final determination that the claimants had satisfied all of the requirements for the issuance of a patent. Id. at 440. Because BLM had not completed a mineral examination and there had not been a final determination that the claimants were entitled to a patent, as of May 30, 1991, the Department argued that the claimants’ right to patent had not yet vested, and thus no taking occurred. Id. at 438.

In denying the Department’s motion for summary judgment, the court held that a claimant’s valid existing right to a patent vests only once the claimant has completed all steps required to receive a patent under the Mining Law, including, among other things, filing a patent application. The “existence of a property interest is based,” the court stated, “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.” Id. at 445-46.¹⁷

¹⁶ The “First Half-Mineral Entry Final Certificate” (FHFC) is the Department’s internal administrative recordation of an applicant’s compliance with the initial paperwork requirements of the Mining Law. By its own terms, the FHFC informs the applicant 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.” After the Secretary signs the FHFC, the patent application is returned to BLM for verification that the applicant has made a valuable mineral discovery, or, in the case of a mill site, that the applicant is using and occupying five acres-or less of nonmineral lands for mining or milling purposes. BLM then conducts a mineral examination and makes a recommendation on whether patent should issue. See supra note 3. I have previously recommended that BLM stop issuing FHFCs for new and nongrandfathered patent applications should the moratorium ever be lifted. For further background on the FHFC, see Entitlement to a Mineral Patent Under the Mining Law of 1872, M-36990 (Nov. 12, 1997).

¹⁷ The Cook opinion is not a final judgment in the case. At the court’s direction, the parties have filed supplemental briefs regarding whether the claimants failed to comply with the requirements for patenting before the change in law and a further decision on the merits is pending. Cook v. United States, No. 94-344L (Fed. Cl.).

In Swanson v. Babbitt, 3 F.3d 1348 (9th Cir. 1993), the Ninth Circuit returned to the patenting restrictions in the Sawtooth Act, and addressed a question left open by the earlier decision in Freese. In Swanson, the claimant had filed a patent application for mill sites in 1967, five years before the statute with its restrictions on patenting was enacted; (While not mentioned in the opinion, the claimant had also paid the purchase price for his mill sites and received an FHFC in December 1967.) BLM began contest proceedings against the mill sites in 1968. Eventually, the Interior Board of Land Appeals (IBLA) rejected the claimant's patent application because of the statutory patent prohibition after deciding that portions of some of the mill sites were valid. United States v. Swanson, 14 IBLA 158, 183 (1974). The rejection of the patent, the IBLA noted, "should not be construed as preventing or interfering with the full exercise of the claimant's right to further work and develop his valid millsite claims" subject to the applicable laws and regulations. Id.

After the district court upheld the IBLA, the Ninth Circuit affirmed. It held that the "plain language of the statute precludes the issuance of a patent to Swanson after 1972, regardless of when the application was filed." Swanson, 3 F.3d at 1352. Until the patent "actually issued," according to the court, "the government retained broad authority to remove those public lands from mining claims and patents, as it did in 1972" with the passage of the Sawtooth Act. Id. Moreover, Congress could act to abolish patenting without infringing upon any property rights of the claimant. Id. at 1353-54; see also Independence Mining, 105 F.3d at 508 (citing to Swanson and holding that "if rights to a patent do not vest pending challenge to its validity, no rights can vest before the Secretary has decided whether to contest the patent claim").

A recent Solicitor's Opinion dealt with the confusion and ensuing litigation surrounding when precisely a patent application was considered "complete" for purposes of establishing an entitlement to a patent. Specifically, it concluded that such an entitlement does not arise until the patent applicant has complied with all the terms and conditions entitling it to a patent under the Mining Law, as determined by the Secretary. Entitlement to a Mineral Patent Under the Mining Law of 1872, M-36990, at 6 (Nov. 12, 1997). Although the Opinion focused on patent applications which are subject to a Congressionally imposed moratorium, see infra note 25, its reasoning supports the conclusion reached here, that a claimant must, prior to a wilderness designation, file a patent application and comply with all the requirements for a patent under the Mining Law in order to establish a valid existing right to a patent of the surface as well as the mineral. See Independence Mining, 105 F.3d at 508 (stating that "the right to a patent arises only after the party seeking the patent has complied with all the terms and conditions entitling it to that patent").

The IBLA has addressed the issue of when a patent applicant has complied with the applicable requirements, for the purpose of fixing the time for determining whether a discovery exists. Specifically, IBLA has said that the "present marketability" of a claim for purposes of deciding whether a discovery exists should be determined "by reference to the date on which the claimant fulfilled all of the prerequisites to the making of the entry, i.e., no later than the date of the

issuance of the [first half] final certificate.” United States v. Norman A. Whittaker (on recon.), 102 IBLA 162, 166 (1988).

For both legal and practical reasons, the IBLA’s rigid cut off date (the FHFC) for determining whether a claimant has complied with all the requirements for obtaining a patent is not an appropriate standard. While the Mining Law specifically requires patent applicants to show such compliance in the patent application, 30 U.S.C. § 29, it has long been the Department’s experience that many patent applicants do not, in their initial patent applications, furnish enough information to enable the Department to verify whether the applicant has discovered a valuable mineral deposit (or is properly using and occupying mill sites). Full compliance is not achieved until the applicant has submitted sufficient information to allow the Department to verify a discovery, usually some time after an FHFC has been signed.

Where the applicant has obtained an FHFC, but has not submitted enough information to allow the Department to verify a discovery, the Department’s mineral examiner requests additional information from the applicant. In this common situation, the Department should not follow the Whittaker rule and measure “present marketability” as of the date the FHFC is issued. Rather, present marketability should be determined as of the date the applicant submitted adequate information to allow the Department to verify the discovery. Where the applicant has submitted sufficient information at the time the FHFC is issued, however, the Whittaker standard may still be followed.¹⁸

Commentators are in accord with the general conclusion reached here regarding mining claimants’ rights. George C. Coggins & Robert L. Glicksman, 2 Public Natural Resources Law 14B-26 (1997) (footnote omitted) (“The mineral deposit limitation on patents is subject to ‘valid existing rights,’ but closely analogous authority holds that a mineral locator has no vested right to a patent, unless perhaps the locator has filed a patent application and met all other requirements prior to designation of the area.”) (citing Swanson, 3 F.3d at 1352-54, and Freese, 639 F.2d 754); Charles F. Wilkinson & H. Michael Anderson, Land and Resource Planning in the National Forests, 64 Or. L. Rev. 1, 364 & n.1982 (1985) (citing Freese and stating that the “opportunity to apply for a patent . . . apparently falls short of being a compensable property right”).

V. The California Desert and the IBLA

Section 601 of FLPMA created the California Desert Conservation Area (CDCA), and addressed, in a curiously awkward way, the treatment of mining claims within its borders-not by restricting patenting, but by adding regulatory conditions to the patent:

Subject to valid existing rights, nothing in this Act [FLPMA] shall affect the applicability of the United States mining laws on the public lands

¹⁸ This question should not arise for new and nongrandfathered patent applications. See supra note 16

within the California Desert Conservation Area, except that all mining claims located on public lands within the California Desert Conservation Area shall be subject to such reasonable regulations as the Secretary may prescribe to effectuate the purposes of this section. Any patent issued on any such mining claim shall recite this limitation and continue to be subject to such regulations. Such regulations shall provide for such measures as may be reasonable to protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment, and to assure against pollution of the streams and waters within the California Desert Conservation Area.

FLPMA § 601(f), 43 U.S.C. § 1781(f) (1994) (emphasis added). Section 302(b). of FLPMA expressly provides that section 601(f) amends the Mining Law and may impair the rights of any locators or claims under the Mining Law. 43 U.S.C. § 1732(b).

In two mid-1980s decisions construing section 601(f), the IBLA departed rather sharply from the modern trend of case law on valid existing rights in mining claims. In California Portland Cement Corn., 83 IBLA 11 (1984) the claimant had filed a patent application before FLPMA was enacted, but the application was incomplete (or, in the words of the IBLA, “not perfected”) because the claimant had not tendered the purchase price. Id. at 12. Focusing on the “subject to valid existing rights” language in the opening phrase of section 601(f) along with the fact that the claimant had apparently made a discovery of a valuable mineral deposit prior to FLPMA,¹⁹ the IBLA held, over a dissent, that the addition of the stipulation in the appellant’s patent was improper. Id. at 16. The IBLA stated that Congress intended to have the section 601(f) stipulation “placed only in patents to claims which are perfected after-the passage of FLPMA,” because “to give effect to the phrase ‘subject to valid existing rights’ the statute must be applied only to mineral locations which had not been perfected prior to the passage of FLPMA.” Id.

The majority opinion lays out an unconvincing reading of the legislative history of section 601 to reach this result. The House-passed version of the bill would have applied the regulatory authority of the Secretary contained in the first sentence of section 601 only to mining claims located “after the date of approval of this Act.” The quoted language was deleted in the conference without explanation. The IBLA majority said it must have been deleted because it was redundant. Id. at 15. The more logical explanation is that, as stated by the dissent,

¹⁹ The IBLA opinion never expressly states that the claimant had a valid discovery, but does say that the claimant had “performed” all other things required of it as part of its patent application,” California Portland Cement, 83 IBLA at 12, and later contrasted the claims at issue with ones “which are perfected after the passage of FLPMA,” or “had not been perfected prior to the passage of FLPMA.” Id. at 16.

The deletion of this limitation by the conference committee and the subsequent passage of section 601(f), as written, supports an interpretation that Congress sought to impose the provisions of section 601(f) on all mining claims in the California Desert Conservation Area, *i.e.*, on those claims located prior to FLPMA's enactment and on those claims located subsequent thereto.

Id. at 19 (Harris, A.J., dissenting).²⁰ Nevertheless, the majority held that the inclusion of the stipulation was improper because the claimant was protected by the "subject to valid existing rights" language of section 601(f).

The IBLA came to a similar conclusion, using somewhat more clear reasoning, in Lee Chemicals, 86 IBLA 164 (1985). Although the claimant in Lee Chemicals had, like the claimant in Swanson, submitted a patent application before the restriction became effective, the IBLA did not base its determination on the point in the patenting process at which the claimant established a right to a patent. Rather, the IBLA ended its analysis of whether the claimant had established a valid existing right after it determined that there was a discovery as of the date FLPMA was enacted. In Lee Chemicals, IBLA reexamined the deletion, in the Conference Report, of the language limiting the Secretary's regulatory authority to new claims. Because Congress retained the "subject to valid existing rights" language, IBLA found that "Congress effectively differentiated between existing locations supported by a discovery and those not." *Id.* at 167. In essence, then, the IBLA read "valid existing rights" to encompass claims supported by a discovery, rather than claims that already had a vested right to a patent.

There appears to be no discernible difference, in legal effect, between the prohibitions or restrictions on patenting upheld as against valid mining claims in Freese, Alaska Miners, and Swanson, and FLPMA section 601(f)'s acknowledgment of a continuing federal regulatory responsibility in patents for claims located in the CDCA. Any difference would cut against rather than in favor of the IBLA's restrictive application of the California Desert stipulation.²¹ In

²⁰ The dissent reasoned that because section 601(f) expressly amended the Mining Law to require inclusion of the CDCA stipulation, unless a right to a patent vested prior to the enactment of FLPMA, all that could have been acquired under the Mining Law was a patent that included the CDCA stipulation. California Portland Cement, 83 IBLA at 19 (Harris, A.J., dissenting).

²¹ Several cases have upheld the authority of federal land managers to directly regulate activities on nonfederal lands or interests therein in order to protect federal land. *See, e.g.*, United States v. Vogler, 859 F.2d 638 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); Free Enter. Canoe Renters Ass'n v. Watt, 711 F.2d 852 (8th Cir. 1983); United States v. Brown, 552 F.2d 817 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977). Congress did not need, in other words, to include a condition in the mining patent authorizing "reasonable regulation" of activities on the patented claim in order to protect the resources of the CDCA. An exercise of federal regulatory power such as this is, if anything, easier to justify than a restriction on the patent itself.

short, the IBLA's reasoning in California Portland Cement and Lee Chemicals is directly contrary to the rationale of these federal court decisions, two of which (Freese and Alaska Miners) predate, but were not addressed in, the IBLA decisions. Instead, the valid existing rights provision in section 601(f), if indeed it applies to the patenting restriction as the IBLA interprets it,²² should be given effect in the same way the valid existing rights provision will be given effect in section 4(d)(3) of the Wilderness Act-by construing it narrowly to apply only to the clear establishment of a right to a patent prior to the protective designation of the area.

Because the federal court decisions are both more authoritative and more persuasive in their reasoning, the Department should no longer rely on California Portland Cement or Lee Chemicals when determining whether to include the CDCA stipulation in a patent for lands within the CDCA. Nor should the Department rely on these two cases when determining whether to reserve the surface estate in a patent for lands within a wilderness area or to restrict patenting as required by other similar statutes.

VI. BLM Regulations and Manual

Departmental regulations and the BLM Manual do not distinguish between claims for which a right to a patent had been established before a wilderness designation and those for which no right to a patent had been established. The pertinent departmental regulation deals only with patenting in National Forest System wilderness areas and has remained unchanged since originally promulgated in 1966. Prospecting, Mineral Locations, and Mineral Patents Within National Forest Wilderness, 31 Fed. Reg. 3013, 3014 (1966). It simply says that any patents issued for mining claims either located or validated by a discovery after enactment of the Wilderness Act should be for minerals only, with the United States reserving the surface estate.. 43 C.F.R. § 3823.3 (1997). Although the regulation does not address whether a surface estate

²² The words "subject to valid existing rights" do not appear in the specific sentence requiring the CDCA patent stipulation. It is possible to interpret section 601(f) as protecting valid existing rights, "if any." Moreover, even assuming that there are valid existing rights to protect, the IBLA was mistaken in determining that the claimant in both California Portland Cement and Lee Chemicals had established valid existing rights. As discussed earlier, the point at which a claimant's right to a patent vests is not at the time of discovery, but at the time the claimant satisfies all the requirements for obtaining a patent, as determined by the Secretary. If a claimant's rights have not vested at the time Congress acts to restrict patenting, that claimant has no valid existing right to protect against a subsequent assertion of regulatory authority, as explained by court decisions in this evolving area of law. The IBLA's error, then, was not just in ascribing significance to the "subject to valid existing rights" language in section 601(f), but also in erroneously applying that protection, if any, to a broader range of claimants than the case law interpreting comparable statutes would require.

reservation is required under any other circumstances, one could infer from it that no surface reservation is required otherwise.

The Department promulgated additional wilderness area mining regulations in 1985 to implement section 603 of FLPMA (see supra note 4), but these regulations are even more murky. 43 C.F.R. § 8560.4-6 (1997). They do not mention patenting with a surface reservation at all, but again one could infer that they contemplate the Wilderness Act restrictions apply only to claims located, or validated by a discovery, after Congress designates an area as wilderness.

BLM's Manual is somewhat more explicit, stating:

(1) For claims located before enactment of the Wilderness Act of September 3, 1964 (16 U.S.C. 1131 et seq.), the claims must have a discovery as of the date of enactment [of the Wilderness Act] to acquire the surface and mineral estates.

(2) Claims located after date of enactment [of the Wilderness Act], or preexisting claims not validated by discovery as of the date of enactment [of the Wilderness Act], are subject to a reservation of the surface estate to the United States.

(3) For newly created wilderness areas, claims located after date of enactment [of the wilderness area], or preexisting claims not validated by discovery as of the date of enactment [of the wilderness area], are subject to a reservation of the surface estate to the United States.

BLM Manual H-3860-1, Mineral Patent Application Processing VIII-7 (Apr. 17, 1991) (emphasis added). This rather strongly implies that mining claims which were located and validated by a discovery prior to a wilderness designation, but for which no patent application was filed, may be patented without a reservation of the surface estate. This is, for reasons discussed above, an incorrect view of the applicable legal requirements. BLM should explicitly incorporate the guidance in this Opinion in both its regulations and its Manual.

VII. Mill Sites

The last issue is how to handle patent applications for mill sites located in designated wilderness areas. Mill sites are a peculiar species of mining claim because they are defined to be "nonmineral" in character. See 30 U.S.C. § 42 (1994). To the extent the Wilderness Act limits patenting to the mineral deposit only, mill sites cannot be patented, because by definition they contain no mineral deposits. Therefore, if a mill site claimant in a wilderness area has not established a valid existing right to an unrestricted patent prior to the wilderness designation, it

cannot obtain a patent.²³ The claimant may, of course, still hold a valid mill site which it may continue to operate in connection with a valid mining claim.²⁴

VIII. Conclusion

After careful consideration of the plain language of the Wilderness Act, its legislative history, subsequent case law, and previous Solicitor's Opinions, I conclude that mineral patents issued under the Mining Law for lands within wilderness areas, no matter when designated, should convey only the mineral deposits within the claim, unless the mining claim for which the patent is sought was located and validated by a discovery prior to designation of the wilderness area and the claimant complied with all the requirements for obtaining a patent under the Mining Law prior to the wilderness designation, as determined by the Secretary. I further conclude that no patents for mill sites may be issued for lands within wilderness areas, no matter when designated, unless the mill site for which the patent is sought was properly located prior to designation of the wilderness area and the claimant complied with all the requirements for obtaining a patent under the Mining Law prior to the wilderness designation, as determined by the Secretary.

BLM should follow the guidance of this Opinion in making its recommendations for patenting mining claims located in wilderness areas as well as in other areas where Congress has enacted limitations on patenting, subject to valid existing rights. This Opinion will be applied to all new and currently pending patent applications.²⁵ Applying it to existing applications is appropriate

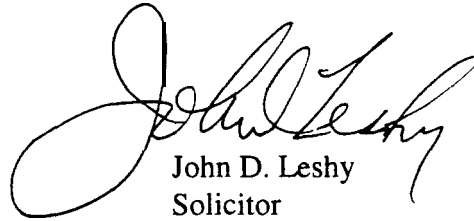
²³ In general, in determining whether a claimant has established a right to patent a dependent mill site, the mill site must be associated with a previously patented mining claim or with a valid unpatented mining claim which will be patented concurrently. See Limitations on Patenting Millsites under the Mining Law of 1872, M-36988 (Nov. 7, 1997). In addition, a patent applicant may not patent more than five mill site acres per associated mining claim. Id.

²⁴ The continued use of unpatented mill sites in wilderness areas is expressly recognized in section 4(d)(3) of the Wilderness Act, with its reference to the use of mining locations in wilderness areas “solely for mining or processing operations and uses reasonably incident thereto.” 16 U.S.C. § 1133(d)(3) (emphasis added).


²⁵ For the past four fiscal years, Congress has included a moratorium on the acceptance of new patent applications or processing of certain previously-filed patent applications in the Department's annual appropriation. See, e.g., Pub. L. No. 105-83 § 314(a), 111 Stat. 1543, 1591 (1997) (“None of the funds appropriated or otherwise made available pursuant to this Act shall be obligated or expended to accept or process applications for a patent for any mining or mill site claim located under the general mining laws.”); Pub. L. No. 104-208 § 314(a), 110 Stat. 3009, 3009-221 (1996) (identical language in the Department's 1997 appropriation); Pub. L. No. 104-134 § 322(a), 110 Stat. 1321, 1321-203 (1996) (identical language in the Department's 1996 appropriation). Excepted from the moratorium are certain pending patent applications that had reached a specific stage of processing when the moratorium was first imposed. Some of these

because it will carry out the thrust of the Wilderness Act to effect maximum wilderness preservation, while at the same time, for reasons given earlier, have little, if any, impact on development of any valuable mineral deposits found on these claims. This Opinion does not, however, affect any patents already issued for lands in designated wilderness areas or other withdrawn areas. Finally, BLM should amend its regulations (43 C.F.R. § 3823.3 and 43 C.F.R. § 8560.4-6) and its Manual (H-3860-1) to comport with this Opinion.

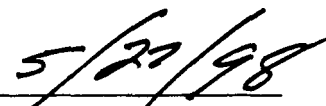
This Opinion was prepared with the substantial assistance of Kendra Nitta and Karen Hawbecker, attorneys in the Division of Mineral Resources, and Sam Kalen, when he was an attorney in the Office of the Solicitor.


John D. Leshy
Solicitor

Approved:



Secretary of the Interior



Date

include land within designated wilderness. This Opinion will be applied to those applications exempted from the moratorium, as well as to any new and nongrandfathered applications filed if and when Congress lifts the moratorium.