

# H-3870-1 - Adverse Claims, Protests, Contests, and Appeals

1. Explanation of Material Transmitted: This release consolidates, updates, revises, and replaces the existing Manual Sections 3871 - Adverse Claims and 3872 - Protests, Contests, and Conflicts. This new Handbook contains the detailed procedures required by the regulations and case law, updated in these subject areas. These subject areas were last revised in 1976.

2. Reports Required: None.

3. Material Superseded: None.

4. Filing Instructions: File as directed below.

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None H-3870-1

(Total: 61 Sheets)

Assistant Director

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660 RHASKINS:10/19/94:DOC.ID-TRANSMIT1.H37

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## Chapter I - Introduction

A. Purpose. This Handbook gives the procedures and processes to follow in implementing the regulations at 43 CFR 3870. It is to be read and used in conjunction with the Federal regulations at 43 CFR Groups 3700 and 3800, Bureau Manual groups 3860 and 3870, and other issued program guidance.

B. Authority. In the early days of the Federation, the Treasury Department was responsible for the public lands. The Secretary of the Treasury was empowered to hold hearings, settle disputes, and enter judgment over the rights and privileges claimed on the public land. In 1812, when the General Land Office (GLO) was created by the Congress (Acts of April 25, 1812; July 4, 1836; and others: now codified at 43 USCA 2, 1201, and 1457), the Commissioner of the GLO was given the powers over the public lands previously held by the Secretary of the Treasury. The General Land Office was placed into the Interior Department in 1849 when Congress created the Department of the Interior (Act of March 3, 1849). The Secretary of the Interior, by legislation, acquired the adjudicative responsibility and powers of the Commissioner.

When the United States government was reorganized in 1946 by act of Congress, the Bureau of Land Management was created by merger of the GLO and the U S Grazing Service, and the hearings powers of the GLO went to the Director of the BLM, with appeals heard by the First Assistant Secretary of the Interior. In 1970, the Secretary reorganized the hearings and appeals functions into a completely separate agency within the Interior Department, now called the Office of Hearings and Appeals (OHA).

The U.S. Supreme Court in 1920 ruled on the powers of the Secretary to hold hearings and issue judgments concerning rights and privileges on the public lands, after a legal challenge to the Secretary's long standing authority in this area. The Court said:

"By general statutory provisions, the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior as the head of the Department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved.

The power of the Department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed. [The Department's] province is that of determining questions of fact and right under the Public Land Laws, of recognizing or disapproving claims according to their merits, and of granting or refusing patents as the law may give sanction for one or the other."

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

Under the General Mining Law of 1872, and various acts of Congress concerning the public lands, only the Secretary of the Interior may determine the questions of mineral land *vs* agricultural land (mineral-in-character), validity of a mining claim or site, or compliance with the regulations that apply to mining claims and mineral

patents.

C. References. Other sources of information include:

A. Judicial and Departmental case law, especially the decisions of the Interior Board of Land Appeals (IBLA).

B. Maley, T. S. (1992); Mining Law (5th Edition); Mineral Land Publications, P.O. Box 1186, Boise, ID, 83701. pp. 452.

C. Rocky Mountain Mineral Law Foundation (1984, 2nd ed.); American Law of Mining; Matthew Bender & Co., 1275 Broadway, Albany, NY, 12201. 6 Vols.

D. Lindley, C. H.; (1914, 3rd ed.); A Treatise on the American Law Relating to Mines and Mineral Lands within the Public Land States and Territories and Governing the Acquisition and Enjoyment of Mining Rights in Lands of the Public Domain; reprinted 1988, Fred B. Rothman & Co., Littleton, CO, 80127. 3 Vols, pp. 2813. (Commonly referred to as Lindley On Mines).

E. Copp, H. N.; (1881, 1890); United States Mineral Lands; Laws Governing their Occupancy and Disposal; Henry N. Copp, Washington D.C. 2 Vols.

F. Copp, H. N.; (1874); Decisions of the Commissioner of the General Land Office and the Secretary of the Interior under the United States Mining Statutes of July 26, 1866, July 9, 1870, and May 10, 1872; Henry N. Copp, Washington, D.C. pp. 351.

G. Sickles, D. K.; (1881); The U S Mining Laws and the Decisions of the Commissioner of the General Land Office and the Secretary of the Interior Thereunder; Together with the Circular Instructions form the General Land Office, and Forms for Publishing Proof of Claims; also, the Decisions of the Supreme Court of the United States under the Mining Laws. A. L. Bancroft and Company, San Francisco, CA. pp. 677. (Commonly referred to as Sickles Mining Laws and Decisions).

H. Clark, H. F.; Heltman, C. C.; and Consaul, C. F.; (1897); Mineral Law Digest Embracing a Digest of Decisions of the Courts and of the Land Department, under the Public Land Laws; A Brief Manual of Procedure with Forms; and a Manual of Mineral Surveys and Departmental Regulations. Callaghan and Company, Chicago, IL. pp. 538.

I. Pruitt, R. G. Jr.; (1990, 4th Ed.): Digest of Mining Claim Laws. Rocky Mountain Mineral Law Foundation, Denver, Colorado. pp. 224.

## CHAPTER II - ADVERSE CLAIMS

### A. PURPOSE OF FILING AN ADVERSE CLAIM

The purpose of filing an adverse claim is to assert surface rights on the lands in conflict that are involved in a pending patent application. Possessory interest in the conflicted ground is the only issue determined in an adverse suit, **Iron Silver Mining Co. v. Campbell, 135 U.S. 286, 299 (1880)**. In other words, an owner of a lode or placer mining claim cannot adverse against a mill site patent application. The mineral character of the land is determined by the Bureau of Land Management. An adverse claim arises from independent and conflicting surface locations; therefore, a co-owner of the same location cannot adverse.

The 1872 Mining Law provides for adverse claim proceedings only in cases involving mineral patent applications. **See 30 U.S.C. 29 (1988)** and **Powell v. Ferguson, 23 L.D. 173 (1896)**. The right of possession is governed by State Law or by Federal Court rules and procedures where Federal jurisdiction is involved. The Bureau of Land Management cannot determine right of possession; that may only be determined in the proper court. **Batterton v. Douglas Mining Co., 20 Idaho 760, 120 P. 827 (1911)**.



## B. WHO MAY FILE AN ADVERSE CLAIM

An adverse claim may be filed by an adverse party who, in good faith, claims a right of possession to the mining ground, mineral deposits, premises, or any part of the lands included in the mineral patent application.

The adverse claimant's authorized agent or attorney-in-fact may file on behalf of the adverse party provided proof of their authorization is submitted. **See 43 CFR 3871.1(a), Appendix I, and paragraph F. below.**

A detailed listing of the situations for which an adverse claim may or may not be filed to protect a property right which may be in conflict with the mining claims within the mineral patent application is given in Appendix I.

## C. WHO MAY NOT FILE AN ADVERSE CLAIM

Co-owners or other parties claiming an interest in the same mining claim location involved in the pending mineral patent application may not assert those rights by filing an adverse claim. **Turner v. Sawyer, 150 U.S. 578 (1893).**

An adverse claim can not be filed by an owner of a patented mining claim, a mineral lessee, or other permittee because an adverse claim can be filed only by a party whereby a patentable surface title right may be lost if the mining claim(s) is patented.

## D. PLACE AND TIME FOR FILING AN ADVERSE CLAIM

An adverse claim must be filed in the BLM State Office having jurisdiction over the lands involved, during the 60-day publication period of a Notice for a pending mineral patent application. **(See 43 CFR 3871.1(a), 43 CFR 1821.2-1, and 30 U.S.C. 29 and 30).**

The aforementioned 60-day filing period cannot be extended by the Bureau of Land Management. The adverse claim must be received during normal business hours pursuant to 43 CFR 1821. The first day of publication is **excluded** in computing the filing period. If the last day of publication is on a legal holiday, or a day when the BLM proper office is closed, an adverse claim may be filed the next business day. **See 43 C.F.R. 1821.2-2(e).**

## E. FILING FEE

A nonrefundable \$10 filing fee must accompany the statement of an adverse claim. Failure to remit the required fee with an adverse claim before expiration of the required 60-day publication period of a pending mineral patent application will result in dismissal of the adverse claim by a decision of the authorized officer.

## F. CONTENT

### 1. Signed in Land District

The statement of the adverse claim must be signed by the adverse claimant, duly authorized agent or attorney-in-fact cognizant of the facts. The adverse claim must be signed within the land district (State) where the lands involved in the adverse claim are situated if it is signed by the attorney-in-fact or agent and must state under oath that it is signed within the land district. **See 43 CFR 3871.1(c) and 30 U.S.C. 31.** The adverse claimant may sign outside of the land district as long as oath of the adverse claim is made before a clerk of the court or notary in the State where the claimant is at the time of the statement. **See 30 U.S.C. 31.**

### 2. Nature and Extent of Conflict

There is no specific form for filing an adverse claim. The adverse claimant must state his eligibility in filing an adverse claim and describe the nature, boundaries and extent of the conflict.

The adverse claimant must show his right to the conflicted ground covered by his location. The complaint should

show if the conflicted ground is a lode mining claim, placer mining claim, mill site, or tunnel site.

### 3. Proof of Superior Right

The adverse claimant must show that his right is superior to that of the patent applicant of the ground in conflict. It must also be noted whether the adverse claim was located or purchased by the adverse claimant.

#### a. Right by Location

If the adverse claimant located the mining claim, a county certified copy of the location notice must be submitted with the adverse claim.

#### b. Right by Purchase

If the adverse claim was purchased, a county certified copy of the original location notice and a county certified copy of the conveyance document, or an abstract of title from the county recorder's office (some States may require an abstract of title from the county recorder), must accompany the adverse claim. **See 43 CFR 3871.2(a)**. All purchases of mining claims and sites are subject to the State's statutes of frauds (State recording statutes). **See Hugh B. Fate Jr., 86 IBLA 215 (1985)**.

### 4. Description of Claim

The adverse claimant must show the boundaries of the adverse claim and the extent to which it conflicts with the claim which is being adversed.

#### a. Surveyed Lands

(i) Mineral Survey. If the adverse claim and the patent application claim have been surveyed by a government approved mineral surveyor, certified copies of the mineral survey plats for both the adverse claim and the pending application claim must be filed with the adverse claim. **See 30 U.S.C. 30**.

(ii) Legal Subdivision. No survey plat is required if the mining claim or site in a pending patent application is described by legal subdivision, thereby allowing the adverse claimant to describe in the same manner, provided the adverse claim is located by legal subdivision. If the adverse claim is not described by legal subdivisions it will be more satisfactory to submit a plat completed by a mineral surveyor and the correctness of the survey certified by the surveyor. **See 43 CFR 3871.2(b)**.

b. Unsurveyed Lands. Where a completed mineral survey does not exist for the adverse claimant's mining claim or the land involved has not been surveyed, the adverse claim may be sufficiently shown by a statement alleging the boundaries and extent of the adverse claimant's mining claim. This must be supported by affidavits and plats of survey from a licensed surveyor showing that the mining claim in the pending mineral patent application is contained within the adverse claimant's mining claim. The adverse claim cannot be amended to enlarge the area described in the original adverse claim. **Commissioner's Letter of January 14, 1873 to A. J. Ridge; in Copp, U.S. Mineral Lands, 121, (1881)**.

## G. ADJUDICATIVE PROCEDURES

### 1. Review Adverse Claim Filings

The adverse claim is date stamped upon filing with the Bureau of Land Management. The adverse claim must be checked for completeness and timeliness.

a. If the adverse claim is deemed timely, all proceedings are stayed on the patent application in its entirety, until the conflict is settled, **except** the completion of the publication, the submission of the proof of posting and the affidavit

of publication from the newspaper. **See 43 CFR 3871.4; John R. Meadows, 43 IBLA 37 (1979); and Last Chance Min. Co. v. Tyler Min. Co., 157 U.S. 693 (1895).**

Failure to file a statement of an adverse claim within the statutory 60-day publication period is a waiver by the adverse claimant of all asserted rights that were the subject of the adverse claim. The adverse claimant(s) *"are deprived of all remedies in the courts except those which a court of equity might allow to be urged against a judgment at law"*, **30 U.S.C.A. 29, note 233**. The untimely adverse statement will be dismissed by a decision of the authorized officer, without the right of appeal. The only right remaining to a third party is filing a protest with the Bureau of Land Management. **See 30 U.S.C. 29.**

(i) **Adverse Claim Complete/Issuance of Decision**. After it has been determined that the adverse claim is complete and timely filed, a decision shall be issued to the patent applicant and adverse claimant by the authorized officer of the BLM giving notice that the adverse claimant must commence court proceedings against the patent applicant within 30 days from the date of filing the adverse claim. In other words, a suit must be initiated within a court of competent jurisdiction. The decision must also state that the proceedings are for the purpose of establishing the right of possession and that such action must be prosecuted with reasonable diligence to final judgment. **(See Illustration 1)**. If the adverse claimant fails to initiate court action, the aforementioned the adverse claim will be considered waived. If suit has not commenced in a court of law the patent applicant must submit a certificate to this effect signed by the clerk of the State court of jurisdiction. **See 43 CFR 3871.6**. After receiving the aforementioned certificate, a decision shall be issued to both parties stating that the adverse claim is deemed to be waived and the patent proceedings are allowed to continue. **(See Illustration 2)**.

(ii) **Adverse Claim Incomplete/Issuance of Decision**. If an adverse claim is incomplete or untimely, the adverse claimant's rights are considered waived. **See 30 U.S.C. 30**. Also, the patent application proceedings are not suspended. The BLM authorized officer will issue a decision dismissing the adverse claim without the right of appeal. **(See Illustration 3)**.

## **H. CERTIFICATION OF COURT PROCEEDINGS**

The adverse claimant must file proof that the adverse claim has commenced in a court of law. This proof consists of filing a copy of the summons and complaint stamped by the clerk of the court.

## **I. JUDGMENT RENDERED**

BLM cannot proceed with the patent application process until the adverse suit has been terminated, waived or dismissed by the court of jurisdiction. **See 43 CFR 3871.4 and 30 U.S.C. 30.**

A certified copy of the final judgment, affirmed by the clerk of the court under the seal of the court, which determines the right of possession must be filed with the BLM. Also, a statement that the appeal period has expired and no appeal has been filed must also be obtained from the clerk of the court and filed with BLM. A decision is then issued stating the adverse suit is terminated and the patent proceedings are allowed to proceed **(See Illustration 4)**.

## **J. RECORD NOTATION**

The official records, both paper and automated must be updated in accordance Manual Section 1274 and entered into Case Recordation. Data entry, following approved data standards, and other applicable records must be completed and maintained as each step of the case unfolds.

# CHAPTER III - PROTESTS

A. **Purpose**. A protest is an objection raised by any person, organization, or entity to an action proposed to be taken in a proceeding before the Bureau, when the elements of a contest are not present. A protest must show that the applicant has failed to comply with the law in any matter essential to a valid entry under patent proceedings or that

an individual has an ownership interest in the mining claim(s) or site(s) and was not included in the patent application.

B. Who May Protest. A protestant must assert that the applicant or the Bureau has not complied with the law or regulations governing the mineral patent process pursuant to 43 CFR 3860 *et seq.* (See **IN RE Pacific Coast Molybdenum Co. 75 IBLA 16, 90 ID 352 [1983]**). A listing of conditions for which a protest may or may not be filed against a mineral patent application is given in Appendix I.

1. Co-Ownership of a Claim. A co-owner who holds a current interest in the claim but which has been excluded from the patent application would file a protest under 43 CFR 3872.1(a), or if patent should issue, institute a proceeding in the proper court. For a general discussion of this situation, see **2 American Law of Mining (2nd edition, 1984) 52.02(1)**.

2. Adverse Claimant. An adverse claimant cannot initiate a protest to preserve an adverse claim which has been barred because it was not filed within the statutory 60 day publication period. However, an adverse claimant may still file a protest alleging non-compliance by the applicant or the Bureau with the law or regulations.

C. Place and Time of Filing. A protest may be filed with the appropriate Bureau State Office by any person or other agency at any time prior to patent issuance, upon an assertion that the patent applicant or the Bureau has failed to comply with the requirements of the law or regulations for the issuance of a mineral patent.

D. Filing Fee. A protest filed by any party, other than a Federal agency, must be accompanied by a \$10 non-refundable service charge. A Federal agency is not required to furnish the \$10 non-refundable service charge (43 CFR 3872.1(b)).

#### E. Content

1. Form and Sufficiency. There is no specific form for a protest. The document should:

- a. Contain the name and mailing address of the protestant
- b. Identify the patent applicant and serial number of the application
- c. Give the mineral survey number or legal description of the mining claim or site in the mineral patent application
- d. Material facts must be given which show that the patent applicant or the Bureau has failed to comply with the law in any matter essential to a valid entry

#### F. Adjudicative Procedures

##### 1. Protest Disposition

a. Receipt of Protest. Upon receipt of a protest which shows the date and time received and the remittance of a \$10 non-refundable service charge, the adjudicator must determine whether standing has been established by the aforementioned criteria.

b. Review of Protest by Authorized Officer. The Authorized Officer reviews the protest in order to determine that the protestant's allegations substantiate the protest and that the protest is in acceptable form. Specifically, and as reiterated again, the protest must allege a violation of law or regulation, corroborated by acceptable evidentiary material. An uncorroborated protest or one which does not allege failure to comply with the law or regulation is deficient and will be subject to a summary rejection.

2. Appropriate Action. After the disposition of the protest has been made (i.e., whether to accept or reject it), the adjudicator is ready to take the appropriate action. This could include: (a) upholding the protest, (b) dismissing the

protest, (c) suspending the protest, or (d) a fact finding hearing.

a. Protest Upheld. Issue decision to patent applicant rejecting application with right of appeal. Send copy of decision to protestant.

b. Protest Dismissed. Issue decision to protestant dismissing the protest with the right of appeal. Send a copy of the decision to the applicant, who would be the adverse party if the protestant appealed. Continue with processing of the mineral patent application. **See Illustration 5** for an example of a simple decision and **Illustration 6** for an example of a more complex decision for dismissal of a protest to a mineral patent application.

c. Protest Suspended. Issue a notice suspending action on the protest until the mineral examination is completed and the mineral report is approved when the element of protest is based on non-mineral in character or the elements of discovery.

d. Hearings. A hearing is required when there is a material fact at issue, the material fact is not of record with the Bureau, and the presentation of the material fact would affect the outcome of the mineral patent application. A material fact is defined as evidence that, if presented and proven, would result in the Bureau's re-adjudication of the application, and may change the outcome of the Bureau's decision process for the application. A material fact at issue may be either in support of or adverse to the application. **(See Illustration 7 for sample of Notice of Hearing)**. Hearings of this nature are not cost reimbursable, the Bureau and the applicant each bear their own costs related to the hearing.

A hearing can be held: (1) in accordance with the procedures applicable to hearings in contest proceedings under 43 CFR Part 4 or, (2) by a fact finding hearing held under the purview of the Authorized Officer pursuant to 302(c) of FLPMA, such hearing being conducted pursuant to Chapter V of this Handbook.

G. Suspension of Application. Pending the review and determination as to the disposition of the protest, the adjudication of the affected application will be stayed until final action has been taken on the protest. This may include the finalization of a Bureau Decision, preparation for and the holding of an appropriate hearing, (i.e., contest type hearing or fact finding), or an appeal transmitted to the IBLA therefrom.

H. Record Notation. Data entry, following approved data standards, and other applicable records maintenance must be completed as each step of the case unfolds.

## CHAPTER IV - GOVERNMENT CONTESTS

A. Purpose. A contest action is a proceeding brought to determine the validity or use of an unpatented mining claim or site. Contests may be instituted against mining claims or sites included in a pending patent application, to resolve a conflict between a claim or site and other uses of the land, or by any person claiming title to or an interest in land adverse to another party. The term mining claim also includes millsites and tunnel sites.

The procedures for contest of unpatented mining claims included within a pending patent application, and a contest of unpatented mining claims not related to a pending patent application are very similar. The differences are noted herein.

1. Contest of unpatented mining claims included within a pending patent application. A proceeding to determine that a mining claim is invalid for lack of discovery of a valuable mineral, i.e., discovery cannot be verified by a mineral examiner in connection with a patent application.

2. Contest of unpatented mining claim to resolve conflict. A proceeding to establish clear title of the public domain lands for lack of discovery of a valuable mineral for reasons such as: (a) the lands are needed for another federal use such as a withdrawal for recreation purposes; (b) the mining claim is in conflict with a surface disposal such as an exchange of lands; (c) the claim is being used for nonmining purposes such as a vacation homesite; or (d) the mineral claimed is subject to the mineral leasing or material sale laws.

3. Private contest of unpatented mining claims. An action brought by any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land to have the adverse interest invalidated. See **43 CFR 4.450-1**. See Chapter VI of this Handbook for procedures describing Private Contest Actions.

B. Role of Mineral Report. A mineral report serves two functions. One is to give a professionally prepared and technically reviewed report on the merits of the mining claim under the General Mining Law of 1872, as amended. Secondly, the mineral report can be a powerful tool when submitted into evidence at a contest hearing. Mineral reports are prepared and reviewed pursuant to Bureau Manual 3060 - Mineral Reports - Preparation and Review. A well-prepared report will assure quality control over the mineral examination process, and will help to ensure that the Government has a sound prima facie case to stand upon before issuing a contest complaint. See **United States v. Aiken Builders Products (on Reconsideration), 102 IBLA 70 (1988) and Rodgers et al. v. Watt, 776 F. 2d 1376, (9th Circuit, 1984)**.

C. Initiation of Contest Action. Government contests are initiated by the Secretary of the Interior, through the Bureau of Land Management. Any federal agency which has jurisdiction over public domain land encumbered by unpatented mining claims may request the BLM to initiate a contest action. The request must be in writing and include the Bureau approved mineral report.

1. Claims recommended for Contest. If the mining claim or mill site does not meet the requirements of the mining law, the report may recommend contest action for all or a portion of a mining claim.

2. Technical Review. BLM Certified Review Mineral Examiners will perform final technical review of mineral reports generated by the BLM and other government agencies such as the U.S. Forest Service and National Park Service. The charges will also be reviewed to insure that the findings in the mineral report are supported by the facts presented.

3. Charges. The mineral examiner should recommend the specific charges to be made in the complaint. Proper construction of contest charges is the foundation upon which contests are based. Contest charges must be carefully tailored to the evidence available and to the underlying goals sought in the contest. The Administrative Law Judge will only hear evidence and issue a decision based upon the exact language of the charges. The standard charges given in BLM Manual Section 3894 - Mineral Contest Proceedings are:

#### LODE AND PLACER MINING CLAIMS

##### Lack of Discovery.

"Minerals have not been found within the limits of the claim(s) in sufficient quantities and/or qualities to constitute a valid discovery of a valuable mineral deposit." See **Castle v. Womble, 19 L.D. 455 (1894)**.

##### Marketability.

"No discovery of a valuable mineral has been made within the limits of the claim because the mineral present is not actually or prospectively marketable." See **U.S. v. Coleman et al., 390 U.S. 599 (1968)**.

##### Common Varieties.

"The mineral material found within the limits of the claim(s) is not a valuable mineral deposit under Section 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 601)."

"No discovery of a valuable mineral has been made within the limits of the claim because the mineral material is not actually or prospectively marketable now and/or was not actually or prospectively marketable prior to the Act of July 23, 1955."

"The (name) mining claim contains material which is principally valuable for use as fill, sub-base, ballast, riprap or

barrow, for which ordinary earth or rock may be used, is not locatable under the mining laws and was not locatable prior to July 23, 1955."

#### Building Stone Placer Claims.

"The land involved is not chiefly valuable for building stone."

#### Nonmineral Tracts in Placer Claims.

"The (*legal description of a 10-acre tract[s]*) is nonmineral in character and, therefore, should be excluded from the (*name of mining claim*) placer claim."

Failure to do Assessment Work. The claimant(s) has/have failed to substantially comply with the requirements for annual assessment work on each of the claims as required by the statutes (30 U.S.C. 28; R.S. 2324) and the regulations (43 CFR 3851.3).

### MILL SITES

#### Connected with Lode Claims.

"The land involved is not being used or occupied for purposes of mining, milling, processing, beneficiation, or other operations in connection with a lode mining claim."

#### Connected with Placer Claims.

"The land involved is not being used or occupied for purposes of mining, milling, processing, beneficiation, or other operations in connection with a placer mining claim."

"The land embraced by the (*name*) mill site is determined to be mineral land.

#### Custom Mill Sites.

"The land involved does not contain a quartz mill or reduction works, nor is it used or occupied for mining or milling purposes."

"The land embraced by the (*name*) mill site is determined to be mineral land."

Unauthorized Surface Use of a Mining Claim. These are surface use contests to resolve mining claim occupancy situations where the occupancy is not for reasons reasonably incident to exploration, development, or production of a mining claim. These are authorized by **43 CFR 3712.1** and the Departmental holding in **Bruce W. Crawford et ux, 86 IBLA 350 (1985), 92 I.D. 208 (1985).**

"The (*name*) lode/placer claim/mill site is not being occupied for uses that are reasonably incident to, or necessary for, prospecting, mining, or processing operations under the mining laws as provided for by 43 CFR 3712.1 and Section 4(a) of the Act of July 23, 1955."

"The (*name*) lode/placer claim/mill site is not being occupied in good faith for purpose of prospecting, mining, or processing operations under the mining laws."

#### D. Adjudicative Procedures.

##### 1. Establishment of Case Record.

a. The Mineral Patent Application file serial number will be used for claims contested that are included within a

patent application.

b. A case file for a contest action for unpatented mining claims not included in a patent application must be established and assigned a BLM serial number.

## 2. Review of Mineral Report.

a. Claim Name and Description. Are the names and legal descriptions of the claims to be contested correctly reflected in the report?

b. Charges. Are the charges worded correctly? See section C., Charges above.

c. Contestee Name and Address. Are the names and addresses of the locators, claimants, and applicants to be served as contestees correctly identified? See section 3 below.

## 3. Review of the Mining Claim Recordation Case File.

a. Land Status. Check the Master Title Plat to assure that the lands were open to mineral location at the time the claim was located. If the records show that the lands were closed to location, an administrative decision declaring the claim null and void, ab initio (from the beginning), should be issued. See Section 4, Administrative Decision procedures below.

b. Assessment Filings. Insure that the annual filings required by 314 of the Federal Land Policy and Management Act of 1976 and compliance with the Act of October 5, 1992 (PL 102-381, 106 STAT 1374) for payment of annual rental fees or filing of certified statements of exemption from payment of rental fees have been timely made. If the records show an omission of the required filings for any year, an administrative decision declaring the claim abandoned and void should be issued. See Section 4, Administrative Decision procedures below.

c. Amendment to Certificate of Location. Has an amendment to the certificate of location been recorded? If so, be sure to include the amended claim name in the complaint. It is essential that the claim name be shown exactly the same as shown on the certificate of location and/or the latest amended certificate of location. The Bureau serial number assigned to the claim/site and the correct legal description of the claim/site must also be determined and included.

Pursuant to 43 CFR 3833.0-5(p), an amendment may not be used to change ownership.

d. Ownership and Addresses. The BLM mining claim recordation files are the only source of ownership information that the Bureau needs to consult. (See **Topaz Beryllium Co v. United States, 649 F. 2d 775 [10th Circuit, 1981]**).

Has the ownership been changed by a transfer of interest under 43 CFR 3833? If so, the names of the new or additional claimants must be named in the complaint. Check for any changes in the addresses of the claimants or applicants. Additional names as given on current affidavits of assessment work should also be included in the complaint, in order to serve all prospective parties that may have a legal interest in the claim or site.

*(NOTE: If the mining claim contested is within a patent application, the applicant's name must be included as a contestee.)*

e. Payment of Rental or Maintenance Fees. Check to ensure that either the annual \$100 per claim or site fee has been paid pursuant to 43 CFR 3833.1-5, or that a waiver from payment of fees is filed pursuant to 43 CFR 3833.1-6. If neither, the claim or site is forfeited. See section 4 below.

## 4. Administrative Decision.

a. Lands Segregated or Withdrawn. If it is determined that the claim to be contested was located on lands which



were not open to mineral entry on the date of location, a decision should be issued declaring the claim null and void, ab initio (from the beginning). Actions segregating lands from mineral location would include withdrawals such as National Parks, Indian Reservations, and Wilderness areas; exchanges; classifications; Issuance of First Half of Mineral Entry Final Certificate (**See Scott Burnham 100 IBLA 94, 94 ID 429 [1987]**); and lands patented without reservation of minerals to the United States. The decision must contain the following (**See Illustration 8**):

- (1) Name of Claim
- (2) Date of Location/Amendment
- (3) Name of Claimant(s). (A carbon copy of the decision should be sent to lessees and other parties of interest shown in the mining claim recordation file.)
- (4) BLM Mining Claim Serial Number
- (5) Description of Claim
- (6) State the Facts Concerning the Segregation. (A copy of the document which segregated the land should be enclosed with the decision with a copy remaining in the file for the record.)
- (7) The decision should clearly state that the lands were not open to location on the date the claim was located; and therefore, the mining claim is declared null and void, ab initio (from the beginning).
- (8) Appeals paragraph

b. Non-Compliance with Sec. 314 of the Federal Land Policy and Management Act of 1976 or Public Law 102-381 (106 STAT 1374). Upon a determination that the filings required by FLPMA, PL 102-381, or 30 U.S.C. 28 (f)-(k) have not been timely or properly made, a decision declaring the mining claim abandoned and void must be issued. The following dates are critical in making this determination:

- (1) Certificate of location for claim located prior to October 21, 1976, must have been recorded with the proper BLM office on or before October 22, 1979.
- (2) Certificate of location for claim located after October 21, 1976, must be recorded with the proper BLM State Office and local recorder's office within 90 days of location.
- (3) Evidence of assessment work performed/notice of intent to hold for claims located prior to October 21, 1976, and recorded on or after January 1, 1978, must have been recorded with the BLM on or before October 22, 1979, and on or before December 30 of each calendar year after 1979.
- (4) Evidence of assessment work performed/notice of intent to hold for claims located after October 21, 1976, must be recorded with the proper BLM office on or before December 30 of the calendar year following the date of location. Filings, rental, and maintenance fees required by PL 102-381 and PL 103-66 (30 U.S.C. 28 [f]-[k]) must have been made in the proper BLM State office by August 31, 1993 and each August 31 thereafter.

The decision must contain the following:

- (1) Name of Claim(s) or Sites
- (2) Serial Number of Each Claim or Site
- (2) Date of Location/Amendment
- (3) Name of Claimant(s). (A copy of the decision should be sent to the lessees and other interested parties shown in

the mining claim recordation file.)

c. Non-Compliance with the Rental or Maintenance Fee Statutes (30 U.S.C. 28 [f]-[k]). Commencing on August 31, 1993 each mining claim or site must pay either an annual \$100 fee or if qualified, file for a waiver from payment of the fees. Failure to do so renders the claim or site abandoned and void, and therefore forfeited. A decision is issued as in section b. above.

5. Preparation of Complaint. (See Illustrations 9 and 10).

Illustration 9 shows the standard contest complaint form 1850-7 in Word Perfect 5.1 format. Illustration 10 shows a completed contest form for a mining claim contest.

a. Contestants. The name and address of the contestant must be named on the complaint. If the contest is initiated on behalf of another Government agency, that agency must be named, i.e., "The United States of America, acting by and through the State Director, Bureau of Land Management, Department of the Interior; and on behalf of the Regional Forester, U. S. Forest Service, Department of Agriculture."

b. Contestees. Name all applicants, claimants, locators of record as shown in the Bureau State Office mining claim recordation files (43 CFR 3833.5[d]). It is essential that all parties holding or claiming any interest in and to the claim being contested be served with a copy of the complaint. Service should also be made on the agents and/or attorneys-in-fact named in the application.

c. Name of the Claim(s). It is essential that the name of the claim be correctly reflected in the complaint. The complaint should reflect the name of the claim on the date of the location, and/or any changes in the claim name made by subsequent amendments.

d. Addresses. Service should be made upon the most current address available for each named party. If more than one address is available, it is advisable to serve the party at each address.

e. Legal Description. The description of the contested claim must be given as accurately as possible. In situations where the claim is within a mineral survey, the number of the survey must be identified.

f. Dates of Location and Subsequent Amendments to Locations. It is essential that the date of location be given for each claim, together with the dates of any subsequent amendments to such locations.

g. Recordation Data. The county recordation data such as the book, page, and place of recordation should be included in the complaint. Also, include the BLM Mining Claim Recordation serial number and Mineral Patent Application Serial Number, if appropriate. Although not required, it may be beneficial to include the date the Certificate of Location was recorded with BLM, and the recordation dates of the annual filings with BLM.

h. Conveyances. Include the names of the original locator(s) and any subsequent transferee.

i. Pending Actions. Include any title acquisition actions pending such as a patent application, public sale, or exchange.

j. Charges. State the specific charges being instituted against the claim. (See Section C. Initiation of Contest Action.)

k. Prayer for Relief. The complaint must contain the in the prayer for relief, "*Mining claim be declared null and void*". When the First Half Mineral Entry Final Certificate has been issued you must also include in the prayer for relief "*Mineral entry be canceled*." (Note: Where the complaint involves only a portion of a mining claim, this fact must be noted in this area.)

l. Signature. Each of the copies to be served upon the named contestees must be originally signed by the authorized

officer of the BLM. It is IMPORTANT that an originally signed copy of the Complaint be retained as part of the official case file record. This copy of the Complaint must be available for submittal to the Administrative Law Judge with the original copy of the Answer.

6. Distribution of Complaint.

a. Originally-Signed Complaint.

- (1) Each contestee named in complaint.
- (2) Retain one (surnamed) copy for case file record.
- (3) Retain one copy for submittal with Answer to Administrative Law Judge, if required.

b. Conformed Copies of Complaint.

- (1) Contestant - appropriate BLM office and/or government official requesting initiation of contest proceeding.
- (2) Public Room - Post on Bulletin Board for 45 days (to cover 30 days). If an answer is filed prior to the end of the 45 day period, remove the complaint from the Public Room.
- (3) Mining Claim Recordation file.
- (4) Field Solicitor and/or Office of General Counsel.
- (5) Mineral Examiner
- (6) District Manager, District Ranger, as appropriate
- (7) Any additional interested parties.

7. Who Must Be Served. Service must be made on each party named as contestee in the complaint. See paragraph 8, Procedures for Service of Complaint on how this can be accomplished.

a. Individuals. Each named individual must be served with a copy of the complaint. This includes those individuals with the same address. If a transfer of interest takes place after the service of the complaint, the complaint does not have to be amended or re-served upon the transferee.

(1) Husband and Wife. Mining claims may or may not be community property depending upon the Statutes within the specific State. It is a good practice to serve each party regardless of marital status.

(2) Deceased Contestee. The heirs or devisees must be determined prior to service. It is essential that documentation be secured prior to proceeding with service of the complaint. A certified copy of the probate proceedings, final distribution of estate, certified copy of death certificate, affidavit signed by the heirs can serve as sources of evidence. (See **Appendix III United States v. Robert N. Johnson, et al., Solicitor's Decision A-30828 (January 29, 1968)**). If a contestee dies, or his/her interest in the mining claim is transferred, after effective service of the complaint, it is not necessary to amend the complaint to serve the heirs, successors, or assigns.

(a) If probate has not been completed, the complaint shall be served upon the executor or administrator of the estate, at their address of record.

(b) If probate is not required, the complaint shall be served upon the heirs or devisees.

(c) If probate has been completed, the complaint shall be served upon the heirs or devisees.

b. Trust or Guardianship. If the contestee is a minor, or has been legally adjudged as incompetent, the legal trustee or guardian of such person must be served. If no legal trustee or guardian has been appointed, the person having charge of such minor incompetent person must be served. **See Appendix IV Solicitor's Opinion M 36514 "Proof of Service of Complaint Upon Individual Mining Claimant by Post Office Return Receipt (August 1958).**

c. Association or Partnership. Each of the members of the association or partnership must be served with a copy of the complaint. If the partnership has a designated power-of-attorney on file with the Bureau State Office, then only the power-of-attorney need be served.

d. Corporation. Service of the complaint must be made upon an officer of the corporation authorized to act on behalf of the corporation, or upon an attorney-in-fact appointed by the corporation to act on its behalf. **See United States v. Al Sarena Mines, Inc., 61 I.D. 280 (1954).**

e. Agent or Attorney-in-Fact. Service may be made upon an agent or attorney-in-fact provided documentation of such appointment and authority to accept service on behalf of the contestee is available. **See Appendix IV (Solicitor's Opinion M-36514 of August 21, 1958).**

f. Attorney at Law. Service may be made upon an attorney at law whose client is the person to be served if and only if the client has authorized the attorney to represent him in the contest action involving such service. **See United States v. Montezuma Iron and Pigment Co., 14 IBLA 114 (1973).**

8. Procedures for Service of Complaint. Service of the Complaint must be made upon the named contestee in one of the following manners:

a. Certified Mail - Return Receipt Requested. Service upon the contestee may be made through the United States Postal Office. The complaint must be sent to the contestee by Certified Mail, Return Receipt Requested. It is a good practice to have the certified mail card marked Deliver to Addressee Only, to ensure that the contestee actually receives the complaint.

If the claimant is of record with the Bureau, they need only be served by certified mail, return receipt requested, sent to their last address of record. If the certified mail is returned as undeliverable, or moved, no forwarding address; it is still deemed to have been served, and no further service is necessary. **See 43 CFR 4.422(c) and 43 CFR 3833.5 (d).**

If the complaint is delivered, it is essential that the receipt card be returned, and contain the signature of the addressee. If the receipt card has not been returned, proof of the contestee's receipt of the complaint and the date of receipt may be requested from the contestee. A tracer shall also be requested of the U. S. Postal Service to document the routing of and the loss of the certified return card. The "Acknowledgement of Service" statement would meet the "proof of service" requirement. **See Illustration 11.**

b. Personal Service. Service upon the contestee may be made by personal service. The person serving the complaint upon the contestee must provide a written statement attesting that service was made and the date and time thereof (**See Illustration 12**). It is beneficial to have a witness to the delivery of the complaint, or in the alternative, obtain the contestee's signature acknowledging receipt of the complaint.

c. Publication of Contest. If a diligent search has failed to disclose the whereabouts of the contestee(s), service is accomplished through publication.

(1) Diligent Search. A zealous effort must be made to locate the addresses and/or the whereabouts of the contestees in instances where mail service or personal service failed. This search must include the Mining Claim Recordation System records, county records, and personal inquiries. Documentation of the efforts made in this endeavor must be maintained for the case record. **See Appendix II (Field Solicitor Opinion Service by Publication in Mineral Contest Cases; diligent search [January 18, 1967].)**

*(Note: If the address or whereabouts is obtained, the contestees should be served by Certified Mail - Restricted Delivery or by personal service. **Service by publication may only be used when the address or whereabouts of the contestee cannot otherwise be made.**)*

(2) Attempted Service. An attempt must be made to serve the contestee as part of the diligent search prior to publication. This attempt must be made by sending a copy of the complaint to the contestee at the last known address of record by certified mail - return receipt requested - delivery to addressee only.

d. Publication/Posting/Proof of Publication

(1) Contents of Notice

(a) Names of parties to the contest

(b) Legal description of the land involved

(c) Substance of charges in the complaint

(d) Office in which the contest is pending

(e) Statement that failure to file an answer within 30 days after completion date of publication will be taken as confessed, and

(f) Statement of the dates of publication

(2) Publication, Mailing, and Posting of Notice

(a) Publish Notice at least once a week for five consecutive weeks

(b) Publish Notice in a newspaper of general circulation in the county in which the contested land lies

(c) Within 15 days of publication send a copy of the Notice and the Complaint to the contestee at the last known address, by certified mail - return receipt requested - deliver to addressee only. The return receipts shall be filed in the office in which the contest is pending.

(d) Within 15 days of publication send a copy of the Notice and the Complaint to the contestee in care of the post office nearest the land. The return receipts shall be filed in the office in which the contest is pending.

(3) Proof of Posting

(a) Within 15 days after the first publication, a copy of the Notice as published shall be posted in the office where the contest is pending.

(b) Within 15 days after the first publication, a copy of the Notice as published shall be posted in a conspicuous place upon the contested.

(4) Proof of Service

(a) Affidavit of publisher showing the dates of publication

(b) Affidavit of person posting Notice on land showing the dates and location

(c) Certificate of posting in the Public Room

(d) Affidavit of person mailing Notice attached to certified receipt card

9. Answer to Complaint.

a. Timely Filing. An Answer must be filed in the proper BLM office within thirty (30) days from date of service of the complaint upon the contestee (**See Illustration 13**). (*Note: If more than one contestee, the 30-day period would run from the date of the latest receipt of the complaint by one of the contestees.*) If the complaint was published, the answer must be filed within thirty (30) days of the last date of publication.

b. Grace Period for Filing. If the answer is filed not later than 10 days after it was required to be filed, and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed, the filing will be considered as timely. **See 43 CFR 4.422(a)**. This determination will be made by the Administrative Law Judge assigned to the case in the Office of Hearings and Appeals.

c. Untimely Filing of Answer. If an answer to the complaint is received after the 10-day grace period a decision declaring the claim null and void shall be issued. **See Illustration 14**.

10. Transmittal to Administrative Law Judge.

a. Documents to be Submitted. The following items must be submitted to the Hearings Division, Office of Hearings and Appeals as soon as possible after receipt of the Answer:

(1) Original signed copy of Complaint;

(2) Original Certified Mail, Return Receipt Postal Card showing date of receipt on the named contestee(s); or if published, Proof of Publication, and

(3) Original Answer

The above documents should be organized in chronological order and placed in a folder for transmittal to the Administrative Law Judge.

*(NOTE: Neither the BLM Official case file nor the mineral report is sent to the Administrative Law Judge. They are kept for the use of the Solicitor handling the case on behalf of BLM).*

b. "Transmittal of Contest or Other Proceeding for Hearing" - Form 1850-1. The transmittal Form 1850-1 is attached to the documents outlined in "a" above. It is essential that this form be completed in full. It is good practice to check with the Mineral Specialist preparing the report, if possible, to determine what preference should be given as to date of, or location for the hearing. **See Illustration 15**.

c. Notification to Affected Parties. It is essential that the initiating office (BLM, Forest Service, National Park Service, etc) be immediately notified that an Answer was filed. This can be accomplished by sending a copy of the Answer together with a copy of the Form 1850-1.

11. Complaint Unanswered. If an Answer is not received in response to the complaint as served, or publication of the complaint, within the time allowed, the charges are taken as admitted. However, if a co-owner does not answer the complaint, an administrative decision cannot be issued declaring the co-owners interest in the claim null and void until after the hearing has taken place. They may show up at the hearing, or the judge may determine that the claim is valid. If the judge declares the claims null and void, a copy of the judge's decision will be transmitted to the co-owners not attending the hearing or to co-owners who have not answered the complaint.

*(NOTE: An administrative decision is not issued by adjudication when a Complaint is answered because a Decision or Order is issued by the Administrative Law Judge of the Office of Hearings and Appeals).*

The null and void decision must be issued to the Contestees and sent by Certified Mail - Return Receipt Requested. The decision shall state the facts, i.e., that a complaint was issued on (date), served on contestees (date), reiterate the charges of the Complaint, and that an answer was not filed within the time allowed. This decision should clearly state that the allegations of the Complaint are taken as confessed, the claim is declared null and void, and the contest action closed. This decision will require an appeals paragraph. **See Illustration 14.**

A copy of this decision must be placed in the official case file with a copy in the Mining Claim Recordation case file. A carbon copy of the decision should be sent to each of the appropriate parties, such as the District Manager, Regional Forester, Solicitor and Office of General Counsel. If an appeal is filed, the procedures outlined in Chapter VII are to be followed.

E. Hearings. A mining claim contest involves an issue of fact and can only be resolved as a result of an administrative hearing. The Department of the Interior has held that the hearing procedures of the Administrative Procedures Act, 5 U.S.C. 554-559 (1982), apply to contests involving mining claims. **See U.S. v. Keith O'Leary, et al., 63 ID 341 (1956).**

The case is presented by the Solicitor/Office of General Counsel of the federal agency involved. Agency personnel (usually mineral examiners) are the expert witnesses who must establish a "prima facie" case. (A "prima facie" case is one where the Court assumes that the charges and evidence are true; until credible evidence is received that reverses that assumption.) The contestee can be represented by an attorney, or can provide personal representation. The contestee is responsible for rebuttal expert witnesses and any court costs. The contestee's burden is to produce evidence to rebut or overturn the Government's prima facie case.

Upon receipt of a contest action, the case is assigned to an Administrative Law Judge in the Hearings Division who will establish a briefing schedule, assign a hearing date, and a hearings location. The location is usually the county seat where the claim resides, although other arrangements can be made by mutual consent of the parties. These notifications will be made through documents entitled "Order." (**See Illustrations 16 and 17**). When the Orders are received by the adjudication staff, it is essential that copies be sent to the initiating office (mineral examiner and manager) for information.

The hearing is conducted in a quasi-judicial manner by the Administrative Law Judge, and begins with the contestant presenting its case, witnesses, and evidence to support the Complaint. The contestee can then cross-examine the contestant's witnesses. The contestee then presents the rebuttal case, and the contestant can cross-examine the contestee's witnesses. Closing arguments are heard, after which the Administrative Law Judge closes the hearing, and sets a final briefing schedule. The proceedings are recorded verbatim by a court reporter.

A written opinion (decision) is rendered by the Administrative Law Judge approximately 4 to 6 months after the final briefs are filed.

An excellent summary of the hearing process, the roles of the witnesses, and the questions to ask and prepare responses for is given in Chapter VII of the Bureau's Handbook for Mineral Examiners, H-3890-1.

Either party may appeal the decision of the Administrative Law Judge to the Interior Board of Land Appeals (IBLA). The IBLA has the delegated authority of the Secretary of the Interior to review all appealed decisions. The IBLA will either uphold the Administrative Law Judge's decision, reverse the Administrative Law Judge's decision, or order additional action to be taken by the Administrative Law Judge or agency to resolve the issues involved. In the absence of a request for reconsideration to the IBLA, or a petition for Secretarial review, the IBLA decision is final and binding upon the Government. The mining claimant has the right of appeal to the Federal Courts.

If the Decision of the Administrative Law Judge is appealed to IBLA, the case record will be sent to the IBLA by the Office of Hearings and Appeals. The BLM will be informed by the Administrative Law Judge through a Notice of Appeal.

F. Judgment Rendered.

After the hearing and appeal process has been completed, disposition of the complaint must be in accordance with the final decision.

G. Final Action.

1. Complaint Dismissed.

a. Take the action prescribed by the Administrative Law Judge; whether it be issuance of patent, or reinstatement of mining claim.

b. Give proper notification to initiating office with a copy of the judge's decision.

2. Complaint Upheld.

a. Cancellation of Mineral Entry Final Certificate. If the first half of the mineral entry final certificate has been issued, a pen and ink change to the final certificate canceling the entry should be made. A reference to the "Decision" and "Date" thereof should also be shown for later reference.

b. Notification to Cadastral Survey. If the mining claim contested is within a Mineral Survey, a copy of the administrative decision, or decision of the Administrative Law Judge invalidating the mining claim should be distributed to the Cadastral Survey Office for canceling the mineral survey.

c. Notification to Mining Claim Recordation. A copy of the administrative decision, or decision of the Administrative Law Judge must be placed in the Mining Claim Recordation case file; and the case file closed.

d. Close Case Record. The case file is closed and sent to Docket for records disposition.

H. Record Notation. Data entry, following approved data standards, and other applicable records must be completed and maintained as each step of the case unfolds.

## CHAPTER V - FLPMA 302 (c) HEARINGS

A. **Introduction**. Hearings are provided for and required under 302(c) of FLPMA (43 USC 1732(c) [1988] and are defined by the Department in **James C Mackey, 96 IBLA 356, 94 ID 132 (1987)**, as both a FLPMA and a constitutional due process requirement. Mackey supra, 94 ID at 137.

The Department has extended the range of BLM informal hearings to resolve disputed issues of fact in adjudicating a mineral patent application, prior to the issuance of the first half of the Mineral Entry Final Certificate. **See Scott Burnham, 100 IBLA 94, 94 ID 429 (1987); affirmed, Scott Burnham (On Reconsideration), 102 IBLA 363 (1988)**.

This requirement has been further extended to include actions leading to the revocation of a Recreation and Public Purposes Act lease. **See San Juan County, 102 IBLA 155, 95 ID 61 (1988)**, and to Plans of Operations under 43 CFR 3809 and 43 CFR 3802.

A Plan of Operations is considered a FLPMA authorization. **See Southwest Resources Council, 96 IBLA 105, 94 ID 56 (1987) and Department of the Navy, 108 IBLA 334 (1989)**. Notices under 43 CFR 3809 are not considered as Federal actions or authorizations. They are considered as compliance and enforcement actions. **See Sierra Club et al v. Michael Penfold et al, 857 F. 2d 1307 (9th Cir, 1988)**. They can be considered however, as a use under the language of FLPMA.

B. **Authority**. The basic authority for informal hearings is 302(c) of FLPMA, which states in its entirety:

"(c) The Secretary shall insert in any instrument providing for the use, occupancy, or development of the public



lands a provision authorizing revocation or suspension, *after notice and hearing (emphasis added)*, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable State or Federal air or water quality standard or implementation plan: Provided, That such violation occurred on public lands covered by such instrument and occurred in connection with the exercise of rights and privileges granted by it: Provided further, That the Secretary shall terminate any such suspension no later than the date upon which he determines the cause of said violation has been rectified: Provided further, That the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or public safety or the environment: Provided further, That, where other applicable law contains specific provisions for suspension, revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail."

**C. Secretary Defined.** The Interior Board of Land Appeals has interpreted the term "Secretary" to refer to the BLM Authorized Officer at the State Office level, specifically the Deputy State Director having responsibility for the program area in controversy (*Robert W Mullen, Administrative Law Judge, IBLA; personal communication, February 11, 1992*).

**D. Hearing Process.** The essentials of the informal hearing process are outlined below:

The appropriate Deputy State Director (DSD) determines that a fact finding is necessary to determine compliance with a permit, authorization, or use on the public lands; or that a patent application has unresolved questions of fact that must be resolved before the application can proceed further.

The holder of the permit, authorization, or use permit, or patent application; is served an interlocutory decision. The decision will clearly state the issues or facts in controversy, and requires the holder to appear in person before the DSD (with appropriate staff) on a given day and time, to sit down and attempt to document and resolve the issues or facts in controversy. The usual timeframe for appearance is 30 days. The decision will also state that should the holder not appear, the permit, authorization, or use permit, or patent application; will be held for suspension, rejection, or termination, as appropriate.

At the meeting (this is the "informal hearing"), the holder will address the issues and facts in controversy, submit the necessary information required, and offer into evidence anything else the holder feels will satisfy the DSD and support his position. The holder may choose to be represented by counsel, or have counsel present. The DSD may, if it is felt to be necessary, have an attorney from the Solicitor's Office present also.

The DSD, based upon the facts submitted, will issue a decision disposing of the matter. The decision will include an analysis of the information presented by the holder and the results of the DSD's analysis of that information in the DSD's decisionmaking process.

The DSD's decision will include any necessary administrative order required to contain the situation on the ground. This may include a suspension, rejection, revocation, or termination of a permit, authorization, use, right-of-way, or application.

Emergency orders can be issued by the DSD to temporarily suspend or revoke a permit, use, authorization, or application, prior to the hearing, if there is an immediate threat to the public health, public safety, or the environment.

Orders issued for suspension, revocation, or termination of a use, authorization, or permit must be rescinded when the holder has fully complied with the requirements of the Authorized Officer and is no longer deemed to be in non-compliance.

The DSD's decision will be considered a final action of the Bureau on the issue, and as such, it is appealable under 43 CFR Part 4 to the Interior Board of Land Appeals (IBLA).

The IBLA will decide the case on its merits unless significant facts are still in dispute. In the latter case, the matter will be referred to the Hearings Division and an Administrative Law Judge will hold a formal fact finding hearing and issue an Order, on behalf of the Secretary, disposing of the issues (absent a further appeal back to IBLA). The Order will either dismiss the action; or suspend, revoke, or terminate the holder's application, use, authorization, or permit (**See San Juan County, supra.**).

## CHAPTER VI - PRIVATE CONTESTS

A. Purpose/Definition. A private contest is an administrative proceeding within the Department of the Interior under 43 CFR Subpart E 4.450 which can be brought by any person who claims title to or a legal interest in the land adverse to the title or interest of another for any reason not shown by the records of the Bureau of Land Management. In a private contest, the contestant (the private party bringing the contest) establishes the case, engages their own consultants and attorneys, and issues a contest complaint (using BLM format and legal criteria) against the contestee.

In a government contest, the Government's prima facie case is established with a basic statement of facts and admission of evidence to support the Government's allegations, the contestee's burden is to produce enough evidence to rebut or overturn the Government's position.

In a private contest, the burden of proof is reversed. The contestant must establish by a preponderance of the evidence that the facts upon which his case is based are true and exist. The contestee must simply produce sufficient evidence to rebut the contestant's allegations. **See Jim D Schlosser et al v. Verle Pierce et al, 92 IBLA 109 (1986); 93 ID 211 (1986).**

The contest is heard by an Administrative Law Judge in the Hearings Division of the Department's Office of Hearings and Appeals. His decision is based upon the evidence adduced at the hearing in the disposition of the controversy. Both parties have the right of appeal under 43 CFR Part 4 to the Interior Board of Land Appeals.

B. Who May File. You must have "standing" to bring a private contest action before the Department. To have standing you must have a conflicting legal title interest in the land covered by the mining claims or sites. Some examples of who may file are: (1) a surface owner of land patented under the Stock Raising Homestead Act or other Acts where the minerals are reserved to the United States, (2) a holder of a Forest Service special use permit, (3) lessees under the Taylor Grazing Act, (4) grantees of easements for the construction of public highways, (5) a mill site location claimant versus a mineral location claimant (the issue is not that of rival claimants, but of mineral versus non-mineral), and (6) a proponent of a FLPMA land sale or exchange, after the publication of a Notice of Realty Action. **See 2 American Law of Mining (2nd ed, 1984), 50.04.**

C. Who May Not File. Rival mining claimants may not file a private contest. BLM does not have the authority to consider the relative superiority of the possessory rights of two adverse mineral claimants; jurisdiction lies with the courts. A person who no longer has any title to or legal interest in the land cannot file.

D. How Initiated. The contestant must file a contest complaint in the proper BLM Office having jurisdiction over the land involved (**See 43 CFR 1821.2-1**).

E. Filing Fee and Deposit. The complaint must be accompanied by the required \$10 filing fee and \$20 deposit toward reporting fees. Any complaint which is not accompanied by the required fee and deposit will not be accepted for filing and will be returned. (**See 43 CFR 4.450-4[d]**).

F. Summary Dismissal. The contest complaint must be dismissed by the authorized officer of the BLM upon a determination that the complaint has not been properly filed, involves a dispute of possession between rival mining claimants, does not meet the requirements of 43 CFR 4.450-4, or if the contestee(s) is not properly served by the contestant. (**See Illustration 18**).

1. Exception: Where the contestee(s) responds prior to dismissal of the contest complaint by the authorized officer of the BLM, any defect in service of the contest complaint must be deemed waived by the contestee(s). (**See 43**

## CFR 4.450-5[a]).

G. Contents of a Complaint. A private contest action consists of a complaint together with supporting documents.

1. Complaint. Pursuant to 43 CFR 4.450-4, the complaint must be subscribed and sworn to before a notary and shall contain the following information:

a. The name and address of each party interested,

b. A legal description of the land involved,

c. A reference, so far as known to the contestant, to any proceedings pending for the acquisition of title to, or an interest, in such land,

d. A statement in clear and concise language of the facts constituting the grounds of contest,

e. A statement of the law under which contestant claims or intends to acquire title to, or an interest in, the land and of the facts showing that he is qualified to do so,

f. A statement that the proceeding is not collusive or speculative but is instituted and will be diligently pursued in good faith,

g. A request that the contestant be allowed to prove his allegations and that the adverse interest be invalidated,

h. The office in which the complaint is filed and the address to which papers shall be sent for service on the contestant, and

i. A notice that unless the contestee files an Answer to the complaint in such office within 30 days after service of the notice, the allegations of the complaint will be taken as confessed. If no Answer is filed, proceed to section H.9 below.

2. Supporting Documents. When a statement of fact alleged in the contest complaint do not appear of record, such statement must be corroborated under oath by at least one witness (see **43 CFR 4.450-4[c]**). The witness must have personal knowledge of the alleged fact contained within the complaint. A statement by the witness must attest to such fact and knowledge contained within the complaint. All statements by witness must be made under oath and be attached to the complaint (**Illustration 19**).

## H. Adjudicative Procedures.

1. Review of Complaint. Although there is no specific form or format for the complaint, the complaint must be reviewed to assure that all the required elements are included. The review process is given below in section G. 1. of this Chapter. Defective complaints are rejected by a decision with the right of appeal.

2. Establishment of Case Record. After review and acceptance of the complaint, a case file for the contest action must be established and assigned a BLM serial number.

3. Review of Mining Claim Recordation File. The mining claim recordation file should be reviewed to assure there are no inconsistencies between the information contained in the recordation file and information provided about the mining claim in the Complaint, and to determine if the mining claim can be disposed of by an administrative decision. (see G. 4 of this Chapter)

a. Land Status. Check the land status to determine if the land was open to location when the claim was located (both MTP and Historical Index, or tract book as appropriate). If it was not open to location, a null and void decision will be issued.

b. Assessment Filings. Check to insure the annual filings are current.

c. Amendments. Review amendments filed to make sure there has not been a change in the land description, owners, change of address, or claim name from that shown on the Complaint. If there has been a change, the Contestant should be notified so that he can amend the Complaint to include the changes.

d. Ownership and Addresses. Assure all owners of record with current addresses have been named in the Complaint. If there is a discrepancy, notify the Contestant so that he may amend the Complaint.

4. Administrative Decision. If the mining claim can be disposed of by an administrative decision, a decision must be issued before pursuing the private contest. If the land was not open to location or the assessment work is not current, issue a null and void or abandoned and void decision. See Chapter IV, 4. a. and b. for procedures. Additionally, all of the parties of interest should be notified that action on the private contest is suspended pending the outcome of the administrative decision.

5. Who Must Be Served. Service must be made on each party named as contestee in the complaint. See paragraph 6, Procedures for Service of Complaint and Proof of Service, for instructions on how this can be accomplished. If a contestee dies, or his/her interest in the mining claim is transferred after effective service of the complaint, it is not necessary to amend the complaint to serve the heirs, successors, or assigns.

a. Individuals. Each named individual must be served with a copy of the complaint. This includes those individuals with the same address.

(1) Husband and Wife. Mining claims may or may not be community property depending upon the statutes within the specific State. It is a good practice to serve each party regardless of marital status.

(2) Deceased Contestee.

(a) If probate has not been completed, the complaint shall be served upon the executor or administrator of the estate.

(b) If probate is not required, the complaint shall be served upon the heirs or devisees.

(c) If probate has been completed, the complaint shall be served upon the heirs or devisees.

(3) Trust or Guardianship. If the contestee is a minor, or has been legally adjudged as incompetent, the legal trustee or guardian of such person must be served. If no legal trustee or guardian has been appointed, the person having charge of such minor or incompetent person must be served. **See Appendix IV, Solicitor's Opinion M-36514 (August 21, 1958)**.

(4) Association or Partnership. Each of the members of the association or partnership must be served with a copy of the complaint.

(5) Corporation. Service of the complaint must be made upon an officer of the corporation authorized to act on behalf of the corporation, or upon an attorney-in-fact appointed by the corporation to act on its behalf. **See United States v. Al Sarena Mines, Inc., 61 I.D. 280 (1954)**.

(6) Agency or Attorney-in-Fact. Service may be made upon an agent or attorney-in-fact provided documentation of such appointment and authority to accept service on behalf of the contestee is available. **See Solicitor's Opinion M-36514 (August 1958), supra**.

(7) Attorney at Law. Service may be made upon an attorney at law whose client is the person to be served if and only if the client has authorized the attorney to represent him in the contest action involving such service. **See United States v. Montezuma Iron and Pigment Co., 14 IBLA 114 (1973)**.

6. Procedures for Service of Complaint and Proof of Service. Unlike Government contests, wherein only claimants of record with BLM need be served, in a private contest, the contestant must also search the local records when determining to whom notice must be sent. (See Topaz Beryllium vs.

U. S., 649 F. 2d 775, 779 (10th Cir 1981)).

a. Contestees of Record with BLM

(1) Service may be made by sending the document by registered or certified mail, return receipt requested, to contestee's address of record in the Bureau. Service of this type may be proved by a post office return receipt showing that the document was delivered at the person's record address or showing that the document could not be delivered to such person at his record address because he had moved without leaving a forwarding address or because delivery was refused at that address or because no such address exists (see **43 CFR 4.422[c]**).

(2) Service may also be made by delivering the copy personally to contestee. Proof of service would be by an acknowledgement of service signed by the person served or by a written statement of the person who made such service.

b. Contestees Not of Record with BLM. If the contestees are not of record with the BLM, the contestant must perform a diligent search for the whereabouts of the contestee(s). After such search, the service of the Complaint must be made in one of the following manners:

(1) Certified Mail - Restricted Delivery. Service upon the contestee may be made through the United States Postal Service. The complaint must be sent to the contestee by Certified Mail - Return Receipt Requested, Deliver to Addressee Only.

It is essential that the receipt card be returned, and contain the signature of the addressee. If someone other than the addressee has signed the receipt card, or if the receipt card has not been returned, proof of the contestee's receipt of the complaint and the date of receipt may be requested from the contestee. The "Acknowledgement of Service" statement would meet the "proof of service" requirement. (See **Illustration 20**).

(2) Personal Service. Service upon the contestee may be made by personal service. The person serving the complaint upon the contestee must provide a written statement attesting that service was made and the date and time thereof. (See **Illustration 21**). It is beneficial to have a witness to the delivery of the complaint, or as an alternative obtain the contestee's signature acknowledging receipt of the complaint.

(a) Requirements Prior to Publication. Service can be accomplished through publication by the contestant, but only in those cases where a diligent search by the contestant has failed to locate the whereabouts of the contestee.

(i) Diligent Search. A zealous search must be made to locate the addresses, and or whereabouts of the contestees in instances where mail service or personal service failed. This search should include the Mining Claim Recordation records, county records, and personal inquiries made in the vicinity of the claim. Documentation of the efforts made in this endeavor by the contestant must be maintained for the case record.

(ii) Affidavit Filed with BLM. Before proceeding with publication, the contestant must file with the BLM an affidavit which shall: (1) State that the contestee could not be located after diligent search and inquiry made within 15 days prior to the filing of the affidavit; (2) Be corroborated by the affidavits of two persons who live in the vicinity of the land which state that they have no knowledge of the contestee's whereabouts or which give his last known address; (3) State the last known address of the contestee; and (4) State in detail the efforts and inquiries made to locate the party sought to be served. (See **43 CFR 4.450-5[b]**).

(3) Publication/Posting/Proof of Publication.

(a) Contents of Notice.

- (i) Names of parties to the contest
  - (ii) Legal description of the land involved
  - (iii) Substance of charges in the complaint
  - (iv) Office in which contest is pending
  - (v) Statement that failure to file an answer within 30 days after completion date of publication, the charges will be taken as admitted, and
  - (vi) Statement of the dates of publication
- (b) Publication, Mailing, and Posting of Notice.
- (i) Publish notice at least once a week for 5 consecutive weeks;
  - (ii) Publish notice in a newspaper of general circulation in the county in which the land in contest is situated;
  - (iii) Within 15 days of publication, send copy of Notice and the Complaint to the Contestee: (1) at the last known address, by certified mail, return receipt requested, deliver to addressee only, and (2) in care of the post office nearest the land. (The return receipts shall be filed in the office in which the contest is pending.
- (c) Posting of Notice. Within 15 working days after the first publication, a copy of the Notice as published shall be posted (1) in the office where the contest is pending, and (2) in a conspicuous place upon the land involved.
- (d) Proof of Service.
- (i) Affidavit of publisher showing the dates of publication
  - (ii) Affidavit of person posting notice on land showing date and location of such posting
  - (iii) Certificate of posting in the Public Room
  - (iv) Affidavit of person mailing notice attached to the certified receipt card.

7. Answer to Complaint. See Chapter IV - Contests

8. Transmittal to Administrative Law Judge. Unlike Government Contests, the entire case record is forwarded to the Administrative Law Judge. The case record documents should be filed in chronological order in the folder. Transmittal Form 1850-1 is used to transmit the case. **(See Illustration 15).**

9. Complaint Unanswered. See Chapter IV - Contests. In Private Contest proceedings, it is not necessary to notify the Solicitor and Office of General Counsel of the decision, however, the remaining procedures in Government Contests apply to unanswered Complaints.

I. Judgment Rendered - Final Action. After the hearing and appeal process has been completed, disposition of the case must be made in accordance with the final decision of the Office of Hearings and Appeals.

J. Record Notation. Records must be noted, and a copy of the administrative decision must be placed in the Mining Claim Recordation Case file. If the claim was declared null and void or invalid, close the MCR file as well as the Contest file.

## A. Purpose

1. Definition. The appeal is the final administrative review to challenge a decision of the BLM or of an Administrative Law Judge.

2. Secretarial Jurisdiction. The Secretary may take jurisdiction of any case at any level of the Department and render the final decision after holding any hearings required by law. **See 43 CFR 4.5(a)**. A Secretarial decision is final for the Department and may not be appealed further within the Department. Also, the Secretary may review any decision made in the Department and order it reconsidered by the deciding party.

3. Jurisdiction of the Director of the Office of Hearings and Appeals. The director of OHA, pursuant to his delegated authority from the Secretary, may assume jurisdiction of any case from IBLA to review it or order reconsideration. **See 43 CFR 4.5(b)**.

## B. Who May Appeal

1. Standing to Appeal. Any party, including the Government, adversely affected by the decision of an officer of the BLM or of an Administrative Law Judge may appeal to IBLA as provided in 43 CFR 4.470, unless the decision has been approved by the Secretary of the Interior.

a. The Right of Appeal. A decision does not grant the right of appeal where it does not exist, nor does it withhold it where it does exist. The IBLA is the sole judge of matters it will entertain or summarily dismiss.

b. Treatment of the Appeal in the Decision. The right of appeal should be stated in decisions where it is obvious or apparent. In multiple-party decisions, the parties who have the right of appeal and any adverse parties to be served should be identified. Decisions from which an appeal may be taken must be accompanied by Form 1842-1 (**See Illustration 22**).

## C. Where to File

1. Filing in the Proper Office. A notice of appeal must be filed in the office of the officer who issued the decision from which the appeal is taken. If an appeal is transmitted within the initial 30 day period for filing an appeal, and the appeal is received within 10 days after the closing of the 30 day appeal period, it will be forwarded to IBLA for consideration (the ten calendar day grace period begins on the day after the 30 day initial filing period has expired). **See 43 CFR 4.411 and 4.401(a)**. If the appeal is received after the end of the ten day period, the Authorized Officer will not give any further consideration to the Notice of Appeal, and the case file will be closed. **See 43 CFR 4.411 (c)**.

2. Ex Parte Communication. This is communication that has a bearing on the issues in the case and is directed to the person hearing the case, without providing the opposing party with the same information. The appellant must be served with any document that: (1) is prepared for inclusion in the case file after the notice of appeal is filed and, (2) states facts or promotes the correctness of BLM's decision. Any such document sent to IBLA after the case file is transmitted must also be sent to the appellant. Failure to comply may subject the Authorized Officer to disciplinary action, as provided in 43 CFR 4.27(b).

3. Effect of the Appeal. Pursuant to 43 CFR 4.21 (revised 1-19-93, 58 FR 4943 - 4943) the proper filing of an appeal concerning a mining claim or mineral patent issue suspends (stays) the effect of BLM's decision for 45 days after the decision is received by the appellant or until IBLA grants a further stay of the decision. The appellant must otherwise request a written stay of the Authorized Officer's decision with the submission of the notice of appeal. If the prospective appellant does not appeal, or if the 45 day period expires and the appellant has not requested a stay, the BLM decision takes full force and effect unless the IBLA issues an order granting a stay.

a. Notice to Transferees. Those to whom mining claims are transferred shall, upon receipt of notice of transfer in the proper office, become entitled to and will receive a copy of any notice of appeal that may be filed by any party.

They will also receive any other notification required to be given to a party in an appeal.

b. Correspondence Received During Appeal. Pursuant to 43 CFR 4.27, during the time the case under appeal is within the jurisdiction of IBLA, all correspondence received on a case under appeal shall be forwarded to IBLA and a copy served upon all adverse parties to the case.

4. Appeals Paragraph. Pursuant to the revised 43 CFR 4.21 (58 FR 4939, January 19, 1993) the new appeals paragraph, which will be placed at the end of all decisions from which an appeal may be taken, **shall read as follows**:

"This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition for a stay (suspension) of the effectiveness of this decision during the time that your appeal is being reviewed by the Board pursuant to Part 4, Subpart B, 4.21 of Title 43, Code of Federal Regulations, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay **must** be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

#### Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied,
- (2) The likelihood of the appellant's success on the merits,
- (3) The likelihood of immediate and irreparable harm if the stay is not granted, and
- (4) Whether the public interest favors granting the stay."

5. Statement of Reasons. If the notice of appeal did not include a statement of reasons, the appellant must file it with the IBLA (address: Board of Land Appeals, Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, VA 22203) within 30 days after the notice of appeal was filed. The IBLA will also permit the appellant to file additional statements of reasons and written arguments within 30 days after the notice of appeal is filed. Failure to File Statement of Reasons. Failure to file the statement of reasons within the required time may subject the appeal to summary dismissal unless the delay in filing is waived as provided in 1a above. The IBLA can excuse a late filing of the statement and extend the filing time.

6. Service. Service of the Notice of Appeal and other documents shall be made according to the following procedures:

a. Service on Adverse Parties. The appellant must serve a copy of the notice of appeal and any statement of reasons or written arguments on each adverse party named in the decision appealed from and on the Office of the Solicitor as identified in the Appendix to 43 CFR 4.413(c)(2).

b. Administrative Law Judge Decisions. If an Administrative Law Judge decision is appealed, the appellant must serve the attorney from the Office of the Solicitor who represented the BLM at the hearing.



c. Mining Claims on Forest Service Land. If the hearing involved a mining claim on Forest Service land, the appellant shall serve the attorney from the Office of General Counsel, U.S. Department of Agriculture, who represented the Forest Service at the hearing.

d. Changes in Service to the Office of the Solicitor. Parties shall serve the Office of the Solicitor as mentioned in 43 CFR 4.413(c)(2) until an attorney in that Office files and serves a Notice of Appearance or Substitution of Counsel. Thereafter, parties must serve the Office as indicated in these documents.

e. Proof of Service. Proof of service as required in 1 above must be filed with IBLA within 15 days after service unless filed with the notice of appeal.

7. Answers to Statement of Reasons. If any party to an appeal wishes to participate in the appeal proceedings, he must file an answer to the statement of reasons within 30 days after service on him of the notice of appeal, or the statement of reasons when such statement was not included in the notice. **See 43 CFR 4.414**. A party not named in BLM's decision may also file an answer in a case when IBLA first grants a petition to intervene in the matter. If additional reasons or arguments are filed by the appellant, the adverse party has 30 days from service of the additional documents on him to answer.

The answer must state the reasons the appeal should not be sustained, and must be filed with IBLA and served on the appellant as described above in C1b above within 15 days. Proof of this service must be filed with IBLA within 15 days after service on the appellant. Failure to answer will not result in a default, but may be disregarded in deciding the appeal, unless the delay in filing is waived as provided in 1a above.

#### D. Adjudicative Procedures.

1. Identification of Case. The notice of appeal must include either the serial number or other identification of the case, and may include a statement of reasons and any arguments the appellant wishes to make.

2. Initial Steps for Filing the Appeal. The appellant must file a notice of appeal in the office of the BLM officer who made the decision. This must be done within 30 days after the date the decision was served. The notice must be date-stamped upon receipt. It does not matter whether the document filed characterizes itself as an appeal. If the submission challenges findings of fact or conclusions made by an adverse decision, it must be treated as a notice of appeal.

3. Computing the 30-Day Period. The 30-day period is counted from the day after service, which is usually made to the claimant's last known address of record, and applies even if the claimant does not receive it. **See 43 CFR 3833.5 (d)**. The thirtieth day after that date is the deadline unless it falls on a Saturday, Sunday, or holiday, in which case the next business day becomes the deadline. **See 43 CFR 1821**. This date is usually evidenced by the date on the return receipt card. If the decision is returned to the BLM as undeliverable, the appellant will be deemed to have been constructively served as of the date the decision is date-stamped upon being returned to BLM.

4. Appeal Filed Later Than 30 Days. The IBLA makes the decision when an appeal is received between 31 and 40 days. If the notice of appeal is filed more than 40 days after the decision is served, send the appellant a letter stating the appeal was untimely and the case has been closed. **See 43 CFR 4.411(c)**. With the letter, send copies of the decision, certified return receipt card, and the date-stamped notice of appeal. If the appellant objects to your letter, send the case to IBLA.

5. Forwarding the Appeal to the IBLA. The office in which the appeal is filed logs it in using standard office procedures and forwards it, along with the original notice of appeal, to IBLA within 10 business days of the receipt of the appeal, using Bureau Form 1842-1 as a cover memo. The file is reviewed for completeness and a dummy file should be made up for retention in the State Office.

The file should begin with the document that started the decision process, such as the location notice in a recordation case. Other documents, including incoming and outgoing correspondence, land reports, and memoranda of telephone conversations or meetings should be placed in the case file chronologically as they are received or

issued. The final documents in the file should be the decision and proof of service of the decision on appropriate parties. The appeal transmittal memorandum, Form 1842-2 (**Illustration 23**) is prepared.

a. Land Status Issues. When land status is at issue, the case file must include historical indices, patents, withdrawal orders, and all other documents affecting the status of the land.

b. Other Agency Files. If the BLM's decision is based on information received from other government agencies, this information must be included in the case file.

6. Mailing the Appeal to the IBLA. All files are sent certified mail, return receipt requested. Notify Mining Claim Recordation that an appeal has been filed and the case has been sent to IBLA so that appropriate action codes can be entered into the Mining Claim Recordation (MCR) data base. Update the Automated Land and Minerals Record System (ALMRS) data base with this information also.

#### E. IBLA Actions.

1. When the IBLA Receives the Case. The IBLA will docket the case and inform the State Office of the docket number. Refer to this number when communicating with the IBLA about the case.

2. IBLA Orders. An appeal may be summarily dismissed by an order signed by an IBLA judge. If BLM feels that an appeal lacks a substantive basis or has disqualifying procedural flaws, it may file for "summary disposition," in which case the IBLA may summarily dismiss the appeal with an order. The IBLA's orders are case specific and are not published. Reasons for summary dismissal:

a. A statement of reasons for the appeal is not included with the notice of appeal or is not filed within the required time

b. The notice of appeal is not served upon adverse parties within the required time

c. The Statement of Reasons does not affirmatively point out errors in the decision

d. Lack of jurisdiction

e. BLM requests remand for further consideration

f. The case is moot and no dispute remains

g. The issues involve are entirely in an area of well-settled law. Although disposition is by summary order, each judge thoroughly reviews the matter (including BLM's case file) before the order is issued

3. IBLA Decisions. Cases suitable for the full decision procedure concern issues that are not governed by well-settled law. The IBLA disposes of these appeals by decisions signed by at least two judges. Decisions are published, indexed, and released to the public in the IBLA decision volumes. Precedent setting decision, or decisions reversing or modifying earlier holdings of significance, are also published in the annual Decisions of the United States Department of the Interior (usually cited as Interior Decisions [I.D.]).

a. Special Concurrence. If one of the judges agrees with result of the decision but disagrees with the reasoning of the other judge(s), this judge will write a concurrence which will further analyze the case. This is attached to the main decision.

b. Dissenting Opinion. If one of the judges disagrees with the result of the decision of the other judge(s), this judge will write a Dissenting Opinion setting out a result and supporting reasons. This is attached to the main decision.

c. Oral Arguments. In cases with extremely complicated legal questions, the IBLA may allow the parties to present

oral arguments. The IBLA rarely grants oral argument because it feels that in almost all cases legal interpretations can be fully set out in writing.

#### F. When the Case Returns From the IBLA.

1. Final Agency Action. The IBLA decision constitutes final agency action and is effective on the date of issuance, unless the decision indicates otherwise.

2. Types of IBLA Decisions and Orders. An IBLA decision or order takes one of three actions: (1) allows BLM's decision to stand, (2) changes BLM decision, or (3) directs BLM to take further action. The IBLA uses these terms to describe the action it takes:

a. Affirmed. The IBLA upheld the decision and accepted BLM's reasons for taking the action.

b. Affirmed as Modified. The IBLA determined that BLM's decision was correct but did not accept one or more of BLM's reasons for taking the action.

c. Vacated. The IBLA finds the decision was incorrect and overturns the BLM decision. The case is then remanded to BLM for further adjudication consistent with the IBLA's decision.

d. Set Aside. The IBLA is unable to conclude whether the decision is correct or incorrect. For example, the decision may be correct, but the record on appeal is insufficient to support the action.

e. Remanded. The IBLA sends the case back to BLM for reasons such as an incomplete record, an inadequate decision, the need to develop more information, or the need to implement IBLA's decision.

f. Reversed. The IBLA determines that the BLM decision is incorrect and orders the BLM to grant the appellant's request and complete the action appealed from.

g. Referred for Hearing. The IBLA determined that material issues of fact existed that could not be resolved on the basis of the record before it, and referred the matter to the Hearings Division for assignment to an Administrative Law Judge to convene a hearing. The order or decision sometimes includes instructions concerning the issues for resolution. The ALJ usually makes an initial decision, which, unless appealed back to IBLA, is filed for the Department.

3. Implementing the IBLA Decision. Implement IBLA's decision based upon its instructions. Where the decision is affirmed, take the action cited in the BLM decision. For example, if a patent application was rejected, close the case file following your State Office procedures. Note the case record and make the appropriate ALMRS entry. If IBLA decides in any other manner such as a reversal, follow their instructions for the next steps.

4. Reconsideration. In extraordinary circumstances, IBLA will reconsider a decision.

a. Petition for Reconsideration. A petition for reconsideration can be filed by the appellant or BLM. It must be filed within 60 days of the date of the decision. It must specify the error in IBLA's decision and include all arguments and supporting documents. The petition may request that IBLA stay the effectiveness of the decision. No answer to the petition is required unless ordered by IBLA. The filing, pendency, or denial of a petition does not stay the effectiveness or affect the finality of the decision unless ordered by IBLA. A petition need not be filed to exhaust administrative remedies.

b. What IBLA Requires for the Reconsideration. The IBLA does not grant reconsideration merely to rehash arguments previously raised by the parties. The petitioner must present either convincing new legal arguments or relevant newly discovered evidence unavailable when the notice of appeal was filed. Petitions must state exactly the error claimed and include all arguments and supporting documents. If you think it is appropriate for BLM to file a petition of reconsideration, discuss the matter with your supervisor and field solicitor.

5. Hearings After Appeal to IBLA. No further hearing will be allowed in connection with the appeal to IBLA, but after considering the evidence they may remand the case for further hearing if they consider this necessary to develop the facts. Additional evidence submitted after the close of a hearing can be used only to determine whether there is a basis for ordering a further hearing.

6. Court Appeals. The appellant may appeal the IBLA decision in the Federal district court where the mining claim is located. The statute of limitations exists for a party to seek review of an IBLA mining law decision in Federal District Court is six years from the date of the IBLA or Secretarial decision (see 28 USC 2401 [1988]). A district court's decision is appealable to the appropriate U.S. circuit court of appeals. The circuit court decision may be reviewed by the U.S. Supreme Court, at its discretion.

If the case is taken to Federal Court by the claimant after the IBLA decision, and the subsequent Court decision calls for further BLM action, the State Office will implement the Court's decision. The MCR data base is updated. If the Court remands the case for further work, the case will go back to IBLA. Pursuant to 43 CFR 4.29, the IBLA will maintain control of the case and direct BLM as to what is required to meet the Court's directives.

G. Record Notation. Data entry, following approved data standards, and other applicable records must be completed and maintained as each step of the case unfolds.

Illustration 1

Decision - Adverse Claim Received

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CERTIFIED MAIL

RETURN RECEIPT REQUESTED

### DECISION

Gold Fields Mining Corporation : Mineral Patent

Patent Applicant : Application

:

:

Melvin Helit :

Adverse Claimant :

Court Proceedings Required

Patent Proceedings Stayed

On March 28, 1989, a mineral patent application was filed by Gold Fields Mining Corporation to the GOLD HILL 1 lode mining claim. The claim is described by Mineral Survey Number 6933, Sec. 8, partially surveyed T. 13 S., R. 19 E., San Bernardino Meridian.

During the 60-day publication of the aforementioned application, Melvin Helit timely filed an adverse mineral claim

against a portion of the Gold Hill 1 lode mining claim.

The adverse claimant is required within 30 days from September 11, 1989, the date of filing the adverse claim, to commence proceedings in a court of competent jurisdiction to determine the question of right of possession to the overlapping portion of the claim, and to prosecute the same with reasonable diligence to final judgment. Should the adverse claimant fail to take the required actions, the adverse claim will be considered waived and the application for patent will be allowed to proceed upon its merits.

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Evidence of the institution of court proceedings must be filed in this office.

With the exception of filing the proofs of publication and posting, all proceedings on the application of patent CACA 28304 are stayed until the controversy is finally adjudicated in court.

Chief, Locatable Minerals Section

Branch of Adjudication and Records

By certified mail to:

Gold Fields Mining Corporation

(address)

Melvin Helit

(address)

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Decision - Adverse Claim Waived

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

DECISION

Gold Fields Mining Corporation : Mineral Patent

Patent Applicant : Application

:

Melvin Helit :

Adverse Claimant :

Adverse Claim Deemed Waived

Patent Proceedings Allowed to Continue

Additional Evidence Required

On March 28, 1989 a mineral patent application was filed by Gold Fields Mining Corporation to the GOLD HILL 1 lode mining claim. The claim is described by Mineral Survey Number 6933, Sec. 8, partially surveyed T. 13 S., R. 19 E., San Bernardino Meridian.

During the 60-day publication of the aforementioned application, Melvin Helit timely filed an adverse mineral claim against a portion of the GOLD HILL 1 lode mining claim.

By decision dated September 13, 1989, the adverse claimant was advised of the requirement to commence proceedings in a court of competent jurisdiction within 30 days from September 11, 1989, or the adverse claim would be considered waived.

On December 7, 1989, Certificates of Search from the Superior Court of the State of California, County of Imperial, and the United States District Court for the Southern District of California attesting that there are no suits pending were filed by Gold Fields Mining Corporation. Accordingly, the adverse claim is deemed waived and the application for patent will be allowed to proceed on its own merits.

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The patent applicants are required to submit a Statement of Fees and Charges; and may also submit the purchase monies in the amount of \$105.00 for 20.67 acres at \$5.00 per acre.

Chief, Locatable Minerals Section

Branch of Adjudication and Records

By Certified Mail to:

Gold Fields Mining Corporation

(address)

Melvin Helit

(address)

Decision - Adverse Claim Dismissed

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CERTIFIED MAIL

RETURN RECEIPT REQUESTED

DECISION

Gold Fields Mining Corporation : Mineral Patent

Patent Applicant : Application

:

Melvin Helit :

Adverse Claimant :

ADVERSE CLAIM DISMISSED

On March 18, 1992, a mineral patent application was filed by Gold Fields Mining Corporation to the GOLD HILL 1 lode mining claim. The claim is described by Mineral Survey Number 6933, Sec. 8, partially surveyed T. 13 S., R. 19 E., San Bernardino Meridian.

An adverse claim was filed by Melvin Helit on June 20, 1992 against a portion of the GOLD HILL 1 lode mining claim. An adverse claim must be filed within the 60-day publication period of a mineral patent application. Failure to do so operates as a waiver of all rights that were the subject of the adverse claim, and deprives the adverse claimant of filing any adverse claim thereafter.

The 60th day of publication for the subject mineral patent application was June 15, 1992. Therefore, the adverse claim is considered untimely filed and hereby dismissed.

Chief, Locatable Minerals Section

Branch of Adjudication and Records

By certified mail to:

Gold Fields Mining Corporation

(address)

Melvin Helit

(address)

Decision - Adverse Suit Terminated

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CERTIFIED MAIL

RETURN RECEIPT REQUESTED

DECISION

United Bee Keepers Association : Mineral Patent

Mineral Patent Applicant : Application

:

Arthur B. Ferl :

Adverse Claimant :

Adverse Suit Terminated

Patent Proceedings Allowed to Proceed

Additional Evidence Required

On October 24, 1985, United Bee Keepers Association, through their Attorney in Fact, DeVere R. Parkinson, filed application CACA 18090 for mineral patent to the Blue Jay #1 placer mining claim. The claim is situated in Sec. 34, T. 40 N., R. 9 W., Mount Diablo Meridian.

During the 60-day publication of the aforementioned application, Arthur B. Ferl, through his attorney, Harry A. Hammond, filed an adverse claim against the Blue Jay #1 placer mining claim.

An action to quiet title to the subject mining claim was adjudicated in the Superior Court of California for the County of Siskiyou in Action No. 35386. The action was reduced to judgment rendered May 20, 1985, in favor of the patent applicants which was subsequently appealed by the Adverse Claimants to the Court of Appeal for the Third Appellate District of California.

The patent applicant filed a certified copy of the decision rendered together with a statement from the Clerk of the Court of Appeals for the Third Appellate District that the decision has now become final. The judgment quieted title to the patent applicant.

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Patent proceedings which were stayed during the pendency of the suit are now allowed to continue.

The claimant is hereby allowed 30 days from receipt of this decision to submit a Statement of Fees and Charges together with the purchase monies in the amount of \$50.00 for 20 acres at \$2.50 per acre. Failure to comply within the time allowed will result in rejection of the application.

Chief, Locatable Minerals Section

Branch of Adjudication and Records

By certified mail to:

United Bee Keepers Association

(address)

Arthur B. Ferl

(address)

Decision - Protest Dismissed

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OR \_\_\_\_\_

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

DECISION

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Protest Dismissed

On the \_\_\_\_\_ day of \_\_\_\_\_, this office issued a letter informing you that it is the intention of the Government to reserve the timber now and hereafter growing on the mining claim pursuant to the Act of April 8, 1948, (62 Stat. 162) unless you can show by acceptable evidentiary material that your claim location predated the 1956 exchange of public domain lands embraced therein from the U.S. Forest Service to the U.S. Bureau of Land Management subject to land status as Oregon and California Revested lands under management authority of the Act of April 8, 1948.

Your response titled "Letter of Protest" to our referenced letter was received on . The evidentiary material submitted with your protest fails to show that the mining claim pre-dated the 1956 land exchange.

Therefore, the protest is dismissed without prejudice to your filing an appeal.

This protest dismissal will become final 30 days from receipt hereof, in the absence of an appeal.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Within 30 days of receipt of this decision, you have the right of appeal to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations at 43 CFR 4.400. If an appeal is taken, you must follow the procedures outlined in the enclosed Form 1842-1, Information on Taking Appeals to the Board of Land Appeals. The appellant has the burden of showing that the decision appealed from is in error.

Chief, Branch of Lands

and Minerals Operations

Enclosure

Form 1842-1

cc:

USFS, Portland

\_\_\_\_\_ (claimant's attorney)

OR \_\_\_\_\_

3860 (943)

CERTIFIED MAIL--RETURN RECEIPT REQUESTED

DECISION

John Q. Public : \* Bluebird #1

2211 Taggart : Bluebird #2

Anywhere, USA 90000 : Bluebird #4

: Bluebird #5

: Bluebird #6

: Bluebird #7

:

: All placer mining claims located in

: Sec. \_\_\_\_, T. \_\_\_\_ S., R. \_\_\_\_ E.,

: W.M., Multnomah County, Oregon

: within the North Fork John Day

: Wilderness, Umatilla National

: Forest.

PROTEST DISMISSED

You asked by letter of protest received August 12, 1990, that the Bureau of Land Management (BLM) intervene to stay the U.S. Forest Service (FS) from conducting the mineral examination of the Thunderbolt #2 placer mining claim (and others, captioned above\*) until 1991. The basis of your protest includes the allegations that the examination is premature and irregular, is calculated to cause the applicants hardship and deprive applicant(s) of the opportunity to participate with the Government in the evaluation; that in pursuing their patent applications, the applicants rights, and performing of ground work to prepare the site for mineral examination have temporarily exhausted their resources; that time is otherwise insufficient to arrange for professional assistance to accompany the proposed FS evaluation; that the FS proposed action is hurried and is in excess of FS jurisdiction.

Outlined as follows are certain points, authorities, objectives, and policy standards by which the Bureau of Land Management adjudicates interests in land appropriated under the general mining law.

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The Act of April 25, 1812 (R.S. 453; 43 U.S.C. 2) assigns to the Secretary of the Interior the responsibility to inquire into the extent and validity of rights claimed against the United States.

The authority of the Secretary of the Interior with respect to administration of the public lands or interests in lands was stated by the U.S. Supreme Court in Cameron v. United States, 252 U.S. 450 (1920):

"By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the Department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved."

Accordingly, the Bureau of Land Management through its Director is delegated the authority from the Secretary of the Interior to administer the public lands or interests therein, including the examination of mining claims. This authority is delegated to the Director, Bureau of Land Management by Reorganization Plan No. 3 of 1946 (60 Stat. 1099), Reorganization Plan No. 3 of 1950 (64 Stat. 1262), and Departmental directive at 235 DM 1.1a and 135 DM 1.3B.

It is the policy of the Bureau of Land Management and in this instance through the USFS as the surface management agency to conduct validity examinations under priority order where 1) a mineral patent application has been filed and a field examination is required to verify the validity of the mining claim and 2) where a locatable minerals operation has been proposed within a designated wilderness area (43 CFR 8560.4-6j).

Both, having filed two mineral patent applications and with the claims included thereunder being in the North Fork John Day Wilderness area, it is consistent with Bureau policy to have the BLM State Office adjudicate the patent application to assure compliance with applicable regulations and assign the cases for mineral examination and report as soon as the application has been reviewed. Since the USFS is the managing agency, it is their mineral specialist who has the responsibility to both schedule and conduct mineral examinations. The test for discovery is the same for all public domain land whether the surface is managed by the Bureau of Land Management, Forest Service, National Park Service, or other Government agency (see In re. Pacific Coast Molybdenum Co., 75 IBLA 16, 90 ID 352 (1983)). When a plan of operations is received for lands within a designated wilderness area the case is immediately assigned to the mineral examiner for the completion of a validity examination prior to the approval of the plan.

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It is policy that mining claimants who have tendered mineral patent applications be notified 30 days in advance of the proposed field examination except when the examination is in response to a plan of operations in a designated wilderness area or WSA. In the case of the exceptions, the mining claimant is still notified, but a 30-day notice does not apply due to the constraints of the surface management regulations. This case involves claims under patent application, and which are also in the designated North Fork John Day Wilderness area. The USFS notice dated July 15, 1990, and which you received on July 20, 1990, indicated that you have apparently utilized motorized equipment on the claims contrary to applicable regulations and that no plan of operations was filed as required for claims located in designated wilderness areas.

You were invited to participate in the mineral examination and to identify the discovery point(s) and provide any information that would assist in the verification of the validity of the mining claim(s), and that if the proposed date of the mineral examination was inconvenient, to negotiate a reasonable alternative date to schedule the examination.

Subsequent to notification, the record indicates that you amended your operating plan and your attorney issued a letter to the Forest Service asking to delay an examination of the Bluebird #2 until 1991. By letter dated August 5, 1990, the Forest Service informed you that the examination date would remain the same, i.e. August 20-22, 1990, unless another date could be negotiated as stated in their earlier July 15, 1990 letter. From the record it appears that no new date was negotiated and that your August 12, 1990 protest from your attorney requesting a 1991 examination for the reasons stated therein was your final position taken as a more reasonable time to schedule the examination.

Your August 12, 1990 protest to the BLM also states that the USFS was requested to cooperatively arrange for an examination during 1991 at a time when funds become available and conditions are suited for testing.

It is well established that the Government has no obligation to do the discovery work for the mining claimant or to do more than simply examine the claim to verify whether there is a discovery of a valuable mineral deposit located within its limits. To establish the existence and extent of a mining deposit sufficient to meet the prudent man test of discovery is the obligation of the mining claimant. U.S. v. Alex Bechthold 25 IBLA 84 (1976).

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In conclusion, it is the function of the Bureau of Land Management through the USFS to prosecute the adjudication of mineral patent applications with diligence and for the USFS mineral examiner to apply the Department's legal and technical standards, as recognized by law, and to give an opinion as to whether the mining claim(s) have met those requirements. If the requirements have been met, then the mining claim(s) will be deemed valid and, if appropriate, the mining claim(s) will be clearlisted for patent. If the requirements have not been met, then a mineral contest action may be initiated.

Further, it is the obligation of the USFS to manage the designated wilderness in accordance with all the duly promulgated rules, statutes, and regulations applicable thereto.

Therefore, for the reasons as heretofore expressed the protest is dismissed without prejudice to your filing an appeal.

This protest dismissal will become final 30 days from receipt hereof, in the absence of an appeal.

Within 30 days of receipt of this decision, you have the right of appeal to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations at 43 CFR 4.400. If an appeal is taken, you must follow the procedures outlined in the enclosed Form 1842-1, Information on Taking Appeals to the Board of Land Appeals. The appellant has the burden of showing that the decision appealed from is in error.

If you appeal this decision, the adverse party on whom you must also serve copies of your notice of appeal, statement of reason(s), etc.:

U.S. Department of Agriculture

Forest Service

Pacific Northwest Region

P.O. Box 3623

Portland, Oregon 97208

Chief, Branch of Lands

and Minerals Operations

Enclosure

Form 1842-1

cc: USFS, Portland

\_\_\_\_\_ (claimants attorney)

Decision - Request for Informal FLPMA 302(c) Hearing Granted

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

OR \_\_\_\_\_

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

NOTICE

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Opportunity For Hearing

On \_\_\_\_\_ day of \_\_\_\_\_, this office issued a Decision dismissing your letter of protest dated \_\_\_\_\_.

Within the time allowed, you protested the Governments intent to reserve timber. Therefore, in order to hear your protest, we are giving you an opportunity to be heard, and to allow you the opportunity to cross-examine the Government's experts. Please appear before, and be ready to present your views to the Authorized Officer at

\_\_\_\_\_  
\_\_\_\_\_.

If you fail to appear, the Government's Intent to Reserve Timber decision of the \_\_\_\_\_ day of \_\_\_\_\_, will stand, and any patent issued will contain the subject timber reservation.

Deputy State Director

Decision - Mining Claims Declared Null and Void ab initio

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Complaint for Contest of Mining Claim - Word Processor Format

\_\_\_\_\_  
\_\_\_\_\_

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UNITED STATES

DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

Form 1850-7

(June 1979) Contest Number:

CERTIFIED - RETURN RECEIPT REQUESTED

Deliver to Addressee Only

UNITED STATES OF AMERICA : Involving:

:

:

Contestant :

:

:

vs. :

:

:

:

:

:

Contestee

:

COMPLAINT

(Contest of Mining Claim)

In accordance with Title 43, Code of Federal Regulations, Part 4, the United States of America, acting by and through the State Director, Bureau of Land Management, Department of the Interior, and on behalf of the Regional Forester, Forest Service, Department of Agriculture, bring this contest against the contestee named above, and alleges:

1. The lands hereinafter described are public lands of the United States.

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2. The contestant is informed and believes that the above-named contestee is the owner, or asserts the ownership, of the above-named unpatented mining claims. The contestant is also informed and believes that the contestee is the only party of interest and that the contestee address :

The contestant is also informed and believes that the contestee is over the age of 21 years except:

3. Said mining claims are situated in County, State of and further identified as follows:

4. So far as known to the contestant, there are no proceedings pending for the acquisition of title to, or an interest in, the above-described lands, except:

5. Contestant charges separately and collectively that:

WHEREFORE, Contestant requests that it be allowed to prove its allegations and that one, or both, of the following actions be taken, as indicated:

1. The mineral entry be canceled.

2. Said mining claim be declared null and void.

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## NOTICE

This complaint is filed in the State Office, Bureau of Land Management, Address and any papers pertaining thereto shall be sent to such office for service on the contestant.

Unless contestee file an answer to the complaint in such office within 30 days after service of this notice and complaint, the allegations of the complaint will be taken as admitted and the case will be decided without a hearing. Any answer should be filed in accordance with Title 43, Code of Federal Regulations, Part 4, a copy of which is enclosed.

Dated this day of , 19\_.

UNITED STATES OF AMERICA

BY

Division of Mineral Resources

Bureau of Land Management

Department of the Interior

1 Enclosure

1-Title 43, CFR, Part 4 (4 pp)

cc:

Field Solicitor, Address

United States Department of Agriculture,

bc:

Administrative Law Judge (Hold in file until answer filed)

DM,

Bulletin Board

File

Chief, Mineral Regulation and Development Section 921.

Example of Completed Mineral Contest Complaint

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UNITED STATES

DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

Form 1850-7

(June 1979) Contest Number

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Deliver to Addressee Only

UNITED STATES OF AMERICA : Involving: The mineral locations : of the Bees 1 and Bees 2 lode mining : claims situated in Mineral Survey : No. 1 in portions of Sections 27, Contestant : 34, and 35, Township 3 North,

: Range 5 East, Black Hills Meridian, : South Dakota and the mineral : locations of the Wax No. 1,

: Wax No. 2, Wax No. 3, Wax No. 4, and : Wax No. 5 lode mining claims : situated in Mineral Survey No. 2 in : portions of Sections 35 and 36 : Township 3 North, Range 5 East, : Black Hills Meridian, South Dakota : and in a portion of Section 1, : Township 2 North, Range 5 East, : Black Hills Meridian, South Dakota.

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:

Contestee :

COMPLAINT



(Contest of Mining Claims)

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In accordance with Title 43, Code of Federal Regulations, Part 4, the United States of America, acting by and through the State Director, Bureau of Land Management (BLM), Department of the Interior, and on behalf of the Regional Forester, Forest Service, Department of Agriculture, brings this contest against the contestee named above, and alleges:

1. The lands hereinafter described are public lands of the

United States.

2. The contestant is informed and believes that the above-named contestee is the owner, or asserts the ownership, of the above-named unpatented mining claims. The contestant is also informed and believes

that the contestee is the only party of interest and that the contestee's address is :

3. Said mining claim situated in County, State of and further identified as follows: The Bees 1 was located by R. Debt and

B. Debt on November 28, 1956 and recorded on January 1, 1957, Book No. , on page , Register of Deeds, County, South Dakota; the Bees 2 was located by R. Debt and B. Debt on December 1, 1956, and recorded on January 15, 1957, in Book No. , on page , Register of Deeds, County, South Dakota; The Wax No. 1, Wax No. 2, Wax No. 3, Wax No. 4, and Wax No. 5 were located by Corp. on July 11, 1957, and recorded on September 3, 1957, in Book , Pages , , , , , and respectively, Register of Deeds, County, South Dakota.

On January 31, 1958, R. Debt and B. Debt conveyed their interest in the Bees 1 and Bees 2 lode mining claims to .

The Bees 1 and Bees 2 lode mining claims were recorded with BLM on September 30, 1977, and the Wax No. 1, Wax No. 2, Wax No. 3, Wax No. 4, and Wax No. 5 were recorded with BLM on October 21, 1976, in compliance with the Federal Land Policy and Management Act of 1976 (FLPMA). The filings were given serial numbers M MC , M MC , M MC , M MC , M MC ,

M MC , and M MC . Annual filings required by FLPMA were timely filed for assessment year 1978.

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Mineral Entry Final Certificate was issued .

4. So far as known to the contestant, there are no proceedings pending for the acquisition of title to, or an interest in, the above-described lands, except Mineral Patent Application .

5. Contestant charges that the lands are not mineral-in-character with respect to locatable minerals.

WHEREFORE, Contestant requests that it be allowed to prove its allegations and that one, or both, of the following actions be taken, as indicated:

A. The said portion of mineral entry be cancelled.

B. Said portion of mining claims be declared null and void.

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NOTICE

This complaint is filed in the State Office, Bureau of Land Management, (Address), (City), (State), (Zip Code) and any papers pertaining thereto shall be sent to such office for service on the contestant.

Unless contestee file an answer to the complaint in such office within 30 days after service of this notice and complaint, the allegations of the complaint will be taken as admitted and the case will be decided without a hearing. Any answer should be filed in accordance with Title 43, Code of Federal Regulations, Part 4, a copy of which is enclosed.

Dated this day of , 19\_.

UNITED STATES OF AMERICA

BY

Deputy State Director

Division of Mineral Resources

Bureau of Land Management

Department of the Interior

1 Enclosure

1-Title 43, CFR, Part 4 (4 pp)

cc:

Unite States Department of Agriculture

Office of General Counsel

Denver Regional Office

1405 Curtis Street, Suite 1950

Denver, CO 80282

bc:

Administrative Law Judge (Hold in file until answer filed)

DM,

Bulletin Board

File

Chief, Mineral Regulation and Development Section 921.

Example of Acknowledgement of Service

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United States of America Involving:

vs.

**ACKNOWLEDGEMENT OF SERVICE**

I hereby acknowledge the delivery to me of a true copy of the COMPLAINT

dated of

Date Title

in the above-referenced contest action.

Signed this day of , 1992.

Signature

Address

Example of Certificant of Service

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**CERTIFICATE OF SERVICE**

I, , certify that on Name date

I personally delivered a COMPLAINT (Contest of Mining Claims), Form 1850-7,

dated , involving the mining location of the

Mining Claim, CONTEST (number),

to \_name and address

Name

Contestee's Answer to Mining Claim Contest Complaint

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UNITED STATES

DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

Contest Number:

CERTIFIED - RETURN RECEIPT REQUESTED

Deliver to Addressees Only

UNITED STATES OF AMERICA : Involving: The mineral locations of : the Bees 1 and Bees 2 lode mining : claims situated in Mineral Survey : No. 1 in portions of Sections 27, Contestant : 34, and 35, Township 3 North, Range : 5 East, Black Hills Meridian,

: South Dakota and the mineral : locations of the Wax No. 1,

: Wax No. 2, Wax No. 3, Wax No. 4 lode : mining claims situated in Mineral : Survey No. 2 in portions of

: Sections 35 and 36,

: Township 3 North, Range 5 East, : Black Hills Meridian, South Dakota : and in a portion of Section 1, Contestees : Township 2 North, Range 5 East, : Black Hills Meridian, South Dakota.

:

ANSWER BY CO.

TO COMPLAINT

(Contest of Mining Claim)

Comes now the undersigned as Attorney for Co., and in answer to the Amended Complaint of the United States of America states as follows:

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1. Denies each and every fact, matter or thing as stated in Plaintiff's Complaint unless specifically admitted herein.

2. Co., admits the allegations of

paragraph one (1).

3. Co., admits those allegations of

paragraph two (2) of the Complaint relating to the transference of interest from Corp. to Co., but denies that

Co., is a South Dakota Corporation. Co., is a South Dakota Partnership also known as Co. The transfer from Corporation to Company by Quit Claim Deed was recorded in County, South Dakota as Document No. filed February 19, 1986.

4. Co. admits those allegations contained in paragraph three (3) of Plaintiff's Complaint.

5. Co., lacks sufficient information to either admit or deny the allegations contained in paragraph four (4) of Plaintiff's Complaint. Notwithstanding the foregoing, however, Co., states upon information and belief that Corporation has filed Chapter 11 Bankruptcy Laws of the United States of America Case No. . Co., does not believe the bankruptcy affects this proceeding in that the undersigned does not believe Corporation has any further interest in the above named unpatented mining claims.

6. Co., specifically denies the allegations contained in paragraph five (5) of Plaintiff's Amended Complaint. Co., specifically states that the land referred to in the above name unpatented mining claims is mineral-in-character with respect to locatable minerals.

Dated this day of January 1991.

/s/

Attorney for Co.,

a/k/a Company

P. O. Box 999

Boomtown, U. S. A.

605-222-1234

Decision - Contest Closed

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(Serial Number)

CERTIFIED - RETURN RECEIPT REQUESTED November 16, 1992

DECISION

: Involving: The mineral location

: of the George 1, George 2, : George 3 placer mining claims : situated in Lots 3, 6, 39, 40, and : 42 of Section 1, SESWNE, and : the SWNW of Section 2 in : Township 9 South, Range 58 East, : and the mineral location of the

: Foreman placer mining claim : situated in SENESE and the : NWSWSE of Section 35 in : Township 8 South, Range 58 East, : Principal Meridian,

: Carter County, Montana.

Mining Claims Declared Null and Void, In Part

Contest Closed

On October 20, 1989, the United States of America, acting by and through the State Director, Bureau of Land Management, Department of the Interior, filed a Complaint against a portion of the George 1, George 2, and George 3 placer mining claims situated in Lots 3, 6, 39, 40, and 42 of Section 1, the SESWNE, and SWNW of Section 2 in T. 9 S., R. 58 E., and a portion of the Foreman placer mining claim situated in the SENESE and NWSWSE of Section 35 in T. 8 S., R. 58 E., Principal Meridian, Montana.

The Complaint charged that the lands are not mineral-in-character with respect to locatable minerals.

The Complaint was served on the contestees, , ,

and , as evidenced by the return receipts.

No answer to the Complaint was filed in this office within the time allowed by or on behalf of the above-named parties.

Pursuant to 43 CFR. 4.450.7, the charges contained in the Complaint are taken as confessed and that portions of each of the mining claims identified above are declared null and void and the contest action is closed.

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This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition pursuant to regulation 43 CFR 4.21 for a stay (suspension) of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay **must** be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied,
- (2) The likelihood of the appellant's success on the merits,
- (3) The likelihood of immediate and irreparable harm if the stay is not granted, and
- (4) Whether the public interest favors granting the stay.

/s/

, Chief

Branch of Solid Minerals

1 Enclosure

1-Appeal Information Sheet (1p)

cc:

District Manager

Form 1850-1 - Transmittal of Contest or Other Proceeding for Hearing - Example of Actual Form

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Notice of Hearing - Issued by Administrative Law Judge

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Notice of Rescheduled Hearing - Issued by Administrative Law Judge

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Decision - Dismissal of Private Contest Complaint

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(Serial No.)

(File Code)

CERTIFIED--RETURN RECEIPT REQUESTED

DECISION

:

Name, : Private Contest

Contestant, :

vs. :

:

Name, :

Contestees :

Contest Dismissed

Complaint Contest XXXXXXXXX filed by \_\_\_\_\_ as Contestant, is hereby dismissed because it does not meet the requirements of 43 CFR 4.450. The elements for a private contest do not appear in the complaint.

Regulations under 43 CFR 4.450-1 state in part:

"Any person...may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management...." (emphasis added)

The factors upon which the claim to this contest is based are shown by the records of the Bureau of Land Management.

Further, the Department of the Interior does not have any jurisdiction under the mining laws, in the absence of an application for patent, to adjudicate questions of the right of possession between rival mining claimants. Superiority of title and the consequent right of possession is a matter for the courts.

Appeal paragraph

Affidavit of Material Witness

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STATE OF XXXXXXXXXX )

) ss,

COUNTY OF XXXXXXXXXX )

(Witness name), first being duly sworn, on oath, desposes and says that he is the witness named in the foregoing statement; that he has read the foregoing statement and knows the contents thereof; and that the matters and things stated therein are true of his own knowledge, except those matters stated on information and belief, and he also believes those matters to be true.

SUBSCRIBED AND SWORN TO BEFORE ME THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 19\_\_\_\_.

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Notary Public in and for said

County and State

(seal)

Sample - Acknowledgement of Service in Private Contest

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Name

Address

Dear

On (date), a complaint involving the (claim name) mining claim was sent to you certified mail -- restricted delivery, but was signed by (name).

If, in fact, you did receive the complaint, it would be appreciated if you will sign the statement below and return it to the above address in the envelope which is enclosed.

Sincerely,

In duplicate

Enclosure

1. Envelope

I, (claimants name), did on \_\_\_\_\_, 19\_\_, receive a copy of the complaint.

Sample - Personal Service Statement for Private Contest

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CERTIFICATE OF SERVICE

I, (name), certify that on (date), I personally delivered a COMPLAINT (Contest of Mining Claims), dated (date), involving the mining location of the Mining Claim, to (name and address).

(name)

Form 1842-1 - Information for Filing of an Appeal to IBLA

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APPENDIX I - CASE LAW ON MINERAL PATENT PROTESTS AND ADVERSE CLAIMS

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**MINERAL PATENT APPLICATIONS**

*Legal Grounds for Protesting an Application or Filing an Adverse Claim*

**ADVERSE CLAIMS**

General

Surface rights of the adverse claimant must conflict with the surface rights of the patent applicant. New York Hill Co. v. Rocky Bar Co., 6 LD 318 (1886). Lawson v. United States Mining Co., 207 US 1 (1907).

Conflict with a Mineral Lands Leasing Act permittee is not an adverse claim. H. Leslie Parker et al, 54 ID 165 (1933).

Conflict with a Mineral Lands Leasing Act leasee is not an adverse claim. Union Oil Company of California, Ramon P. Colvert; 65 ID 245 (1958). Aff'd Union Oil Company of California v. Udall, 289 F. 2d 790 (1961).

Conflict with a patented claim owner is not an adverse claim. North Star Lode, 28 ID 41 (1899).

To adverse, you must claim a legal interest in the ground under application. Alger Lode; Only Those Showing Interest in the Premises Can Assert an Adverse Claim; Commissioner's Decision of March 4, 1872; Copp, U.S. Mineral Land Decisions, 80 (1874) and U.S. Mineral Land Decisions, 90 (1881).

A co-owner may file an adverse claim on behalf of another co-owner. Only Those Showing Interest in the Premises Can Assert an Adverse Claim; Commissioner's Decision of March 4, 1872; Copp, U S Mineral Land Decisions, 80 (1874).

An alien may adverse to protect his interest in unpatented mining claim. Ginach et al v. Peterson, 262 F. 904 (9th Cir, 1920).

One having a contractual interest in a claim may adverse. Wolverton v. Nichols, 119 US 485 (1886).

**Legal Grounds:**

Placer claimant must adverse conflicting lode claimant. Ethelyndal McMullin et al, International Mineral and Chemical Corp; 62 ID 395 (1955).

Lode claimant must adverse conflicting lode claimant. Calhoun Gold Mining Co. v. Ajax Gold Mining Co, 59 P. 607 (Sup Ct CO, 1899).

Millsite claimant must adverse conflicting millsite claim. Ebner Gold Mining Company v. T. C. Hallum et al, 47 LD 32 (1919).

Tunnelsite claimant who has discovered a vein or lode must adverse a lode claimant. Enterprise Mining Co v. Rico-Aspen Consolidated Mining Co, 167 US 108 (1897).

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Rival claimant asserts that annual assessment requirements have not been met. Jackson v. Roby, 109 US 440 (1883).

### **Not Legal Grounds**

Mineral character of the land. Low et al v. Katalla Company, 40 LD 534 (1912).

Millsite claimant cannot adverse lode or placer claimant where the mineral character of the ground is the question. Low et al v. Katalla Company, 40 LD 534 (1912).

One claiming ground as a squatter cannot adverse. Le Fevre et al v. Amonson et al, 81 P. 71 (Sup Ct ID, 1905).

One claiming ground under an agricultural grant/patent cannot adverse. Powell v. Ferguson, 23 LD 173 (1896).

One claiming ground under a townsite patent/grant. Ryan v. Granite Hill Mining and Development Co., 29 LD 522 (1900).

One claiming ground under a railroad grant/patent. Grand Canyon Railway v. Cameron, 35 LD 495 (1907).

Mining claimant cannot adverse a non-mineral patent application. III Lindley on Mines 717 (3rd ed, 1914) *citing* Iron Smelting and Mining Co v. Campbell, 135 US 286 (1892).

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Rights protected by statute and reservations in a patent cannot be the grounds for an adverse claim. Rockwell v. Grahm, 10 P. 284 (Sup Ct CO, 1886).

Highway rights-of-way cannot be the grounds for an adverse claim. A Public Highway is not an Adverse Claim; Commissioner's Decision of December 29, 1871; Copp, U.S. Mineral Decisions, 76 (1874).

Railroad rights-of-way cannot be the grounds for an adverse claim. Grand Canyon Railway v. Cameron, 35 LD 495 (1907).

Excluded co-owner cannot file an adverse claim. Turner v. Sawyer, 150 US 578 (1893).

## **PROTESTS**

### **General**

May be filed at anytime prior to issuance of patent. Tam et al v. Storey, 16 LD 282 (1893).

Must alledge that the applicant has failed to fully comply with the law. Parsons et al v. Ellis, 23 LD 69 (1896).

A protest cannot be filed to protect a surface conflict lost by not filing an adverse claim. Hughes et al v. Ochsner et al, 27 LD 396 (1898).

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A protest cannot be filed to protect a surface conflict lost by court judgement in an adverse suit. Hughes et al v. Ochsner et al, 27 LD 396 (1898).

May be summarily dismissed if uncorroborated or based only upon a belief. Gillis v. Downey, 29 LD 83 (1899).  
Melvin Helit v. Gold Fields Mining Corp, 97 ID 109 (1990).

A protest may result in a hearing. Parsons et al v. Ellis, 23 LD 69 (1896).

If a protest is successful, the mineral entry is cancelled, and one who failed to previously file an adverse claim may do so during the new period of publication. Nevada Lode, 16 LD 532 (1893).

### **Legal Grounds**

Land is non-mineral. Harry Livingston Lode, 7 LD 319 (1888).

Land is mineral (Millsites). Low et al v. Katalla Company, 40 LD 534 (1912).

No discovery on claim. Hughes et al v. Ochsner et al, 27 LD 396 (1898).

Land entered as placer is not placer. Devereux et al v. Hunter et al, 11 LD 214 (1890).

The required \$500 expenditure has not been made. United States v. C. F. Smith, 66 LD 169 (1959).

Notice of application to patent is not correct. Nevada Lode, 16 LD 532 (1893).

Title to the ground is in a third party. Bradstreet et al v. Rehm (On Review), 21 LD 544 (1898).

Defective abstract of title. Bradstreet et al v. Rehm (On Review), 21 LD 544 (1898).

### **Not Legal Grounds:**

Dispute over extralateral rights. Beik et al v. Nickerson, 29 LD 662 (1900).

Lode departs through the sideline of the claim. Beik et al v. Nickerson, 29 LD 662 (1900).

Where "no discovery" was an issue in an adverse suit, the same charge cannot be the basis of a protest by the losing litigant. Hallett and Hamburg Lodes, 27 LD 104 (1898).

Claim not located in compliance with the local laws and rules. Bridges v. The Canyon Siding Mining Co., 47 LD 74 (1919).

Applicant's discovery is within protestant's conflicting claim. Mutual Mining and Milling Co. v. Currency Co., 27 LD 191 (1898).

Improvements in area of conflict between applicant and protestant are not owned by the applicant. American

Consolidated Mining and Milling Company v. De Witt, 26 LD 580 (1898).

Mineral entry obtained in fraud of the rights of protestant who failed to adverse. Bridges v. The Canyon Siding Mining Co., 47 LD 74 (1919).

Lode claimant cannot protest against a placer entry on the grounds that the lode was known to exist on the date of the placer patent application. Elda Mining and Milling Co. v. Mayflower Gold Mining Co., 26 LD 573 (1898).

APPENDIX II - SOLICITOR'S OPINION ON DILIGENT SEARCH

APPENDIX III - SOLICITOR'S DECISION A-30828

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UNITED STATES

v.

ROBERT N. JOHNSON ET AL.

A-30828 Decided January 29, 1968

Mining Claims: Contests--Rules of Practice: Government Contests

The requirement of the Departmental Regulation that service of a contest complaint be made on every contestee is satisfied by service at an address which the mineral locator, whose claim is being contested, has named in his mineral patent application as his post office mailing address for the mineral patent application proceedings.

Mining Claims: Contests--Rules of Practice: Government Contests

Upon the death of a mineral patent applicant prior to the service upon him of a contest complaint, service must be made upon his heirs or the legal representative of his estate and service at the deceased applicant's address of record is not binding upon his successors.

(Editor's note: This is a conformed copy of the original decision)

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UNITED STATES

DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20240

A-30828

: Contest No. Riverside 06706

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United States : Placer mining claim held

v. : null and void and mineral

Robert N. Johnson et al. : patent application rejected

:

: Affirmed in part; reversed

: and remanded in part

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Robert N. Johnson, Gary Johnson, Thelma A. Johnson, Walter Johnson, Emma Johnson, Ronald R. Johnson, Janet R. Johnson, and Thelma A. Johnson, as executrix for Nolan F. Fultz, deceased, have appealed to the Secretary of the Interior from a decision of the Riverside district and land office rejecting mineral patent application R-060706 filed by them for The Royal Black Mining Claim and holding the claim null and void.

The appellants, Nolan F. Fultz being then alive and filing as an applicant, filed their patent application on May 7, 1965, seeking a patent for The Royal Black Mining Claim, a placer claim covering approximately 160 acres of public land in sec. 32, T. 4 S., R. 4 W., S.B.M., California. The application stated:

"The post office and mailing address of the applicants for the purposes of these proceedings is and will be in the care of Lonergan and Lordan [sic], Attorneys at Law, 506 Anderson Building, San Bernardino, California." 1The "Notice of Application for United States Patent" substituted "John B. Lonergan" for "Lonergan and Lordan" in an otherwise identical statement.

On February 4, 1966, the manager of the land office issued a contest complaint against the mineral claimants charging that no valuable mineral discovery had been made within the limits of the claim and asking that the mineral entry be cancelled and the claim declared null and void. The complaint was served by registered mail addressed to the contestees

c/o JOHN B. LONERGAN, Attorney at Law

506 Anderson Building

San Bernardino, California 92401

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Service was made on February 8, 1966, the receipt being signed by John B. Lonergan. On March 18, 1966, the land office issued its decision stating that the contestees had not filed an answer to the complaint, that the complaint had contained a notice that, unless the contestee filed an answer within 30 days, the allegations of the complaint would be taken as admitted and the case decided without a hearing, and that, no answer having been filed, the allegations of the complaint were taken as admitted. The decision held, as a result, that the mineral patent application was rejected and the mining claim declared null and void. The decision was served on contestees on March 23, 1966.

On March 25, 1966, the contestees through their attorney, John B. Longergan, filed a document entitled "Answer to Contest Complaint" which was signed by each of the Johnsons and "Estate of Nolan F. Fultz, Deceased."

In a letter dated April 1, 1966, the manager returned the answer, saying that it was late and would not be accepted.

In their appeal to the Director, the claimants pointed out that Fultz had died prior to the filing of the contest complaint, that their attorney did not learn of this until the answer to the complaint he prepared and sent to the claimants was returned to him on March 14, 1966, and that he signed the answer "Estate of Nolan F. Fultz, deceased, to avoid further delay. They then contend that the regulation requires each contestee to be served, that the contestees themselves were never served, that the contest complaint was delivered to their attorney, and that the designation "in Lonergan's care" did not constitute an appearance by him as an attorney for the contestees. As to Fultz, the appeal pointed out that he was dead when the complaint was filed, and that his death terminated whatever agency Lonergan had as his attorney or agent, and that as a result service would not have been made on Fultz by service on Lonergan. Finally, they say the complaint failed to give the name and age of Fultz's heirs as required by pertinent regulations, 43 CFR 1852.1-4(a) and 1852.1-1. 2 Editor's note: These regulations are now found in 43 CFR Part 4, Subpart E.

The Bureau held that the regulations permit service by registered mail on a person whose address is of record in the Bureau and that service can be made on an attorney representing a party and will be deemed served on the party. It also held that the heirs or representatives of the estate of the claimant were obligated to notify the land office of the death of the claimant and to furnish a different address of record, if the one given by Fultz was not to continue, and it concluded that, they not having done so, had received constructive service through the service on the attorney of record for all the mineral patent applicants.

On appeal, the contestees assert again that none of them was served with a copy of the contest complaint, that service on the agent and attorney, Fultz being then dead, was only on 7 of the 8 owners, and that there was no service on the heirs or representatives of Fultz.

The regulations provide:

"The complaint must be served upon every contestee. If the contestee is of record in the land office, service may be made and proved as provided in 1850.0-6(e)." 43 CFR 1852.1-5.

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The address to which the complaint was mailed had been furnished to the land office as part of the appellants' application for a mineral patent and it was the one to which they requested that all mail relating to their application be sent. The contest complaint having been mailed there in accordance with the regulation, service was properly made and the appellants were at their peril to respond within the time allowed by the regulations. When they failed to do so, the complaint was properly taken as admitted against them. United States v. J. Hubert Smith, 67 I.D. 311 (1960); Union Oil Company of California et al., 72 I.D. 313 (1965). 3 See 73 I.D. XXIII (1966) for a list of cases seeking judicial review of this decision. (Editor's note: the main case, Union Oil Co v Stewart L. Udall, (CV No. 2595-64, DC of CO) was decided in favor of the Government 12/27/65. No appeal was taken. & 4Editor's note: Union Oil Company of California (Supp.) 72 I.D. 313; was overruled & rescinded in part *in U.S. v. Energy Resources Technology Land, Inc., et al.*, 74 IBLA 117 (1983) on the grounds that all co-locators of the mining claims contested had not been properly served prior to the contest hearing - the contest was deemed a nullity and the claims re-instated.

Our conclusion, however, does not apply to the interest in the claim of the heirs of Nolan F. Fultz. Upon Fultz' death prior to the service of the contest complaint, his heirs became the ones on whom service had to be made. 43 CFR 1852.1-5. Since neither they nor the legal representative of Fultz' estate had given the address at which service was made as his address of record, service there was not effective as to the Fultz interest. It was therefore improper to declare null and void that interest in the mining claim and proper proceedings must be pursued against it. A mining claim can be declared null and void as to the interests of some of the locators while a contest is carried on against others. Union Oil Company of California et al., *supra*.

Therefore pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision of the Bureau of Land Management is reversed and the case remanded as to Thelma R. Johnson, executrix of the estate of Nolan F. Fultz, and affirmed as to the other applicants.

(Sgd) Ernest F. Holm

Assistant Solicitor

Land Appeals



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42055

M-36514 August 21, 1958

PROOF OF SERVICE OF COMPLAINT UPON INDIVIDUAL  
MINING CLAIMANT BY POST-OFFICE RETURN RECEIPT

Rules of Practice: Government Contests

In order to prove service of a complaint upon an individual mining claimant by post-office return receipt, the return receipt should, with certain exceptions, contain the signature of the very person to be served, and in the usual case the return receipt which accompanies the complaint should be checked in the item "Deliver only to addressee".

(Editor's note: This is a conformed copy of the original opinion)

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UNITED STATES

DEPARTMENT OF THE INTERIOR

Office of the Solicitor

410 Newhouse Building

10 Exchange Place

Salt Lake City 11, Utah

M-36514 August 21, 1958

Memorandum

To: Area Administrator, Area 2, Bureau of Land Management, Salt Lake City, Utah

From: Field Solicitor

Subject: Proof of service of complaint upon individual mining claimant by post-office return receipt

Your office has requested our opinion on two questions which relate to the above subject and which may be phrased as follows:

1. The pertinent notice of mining claim location as found recorded in the county recorder's office list an address for the locator (who is the individual wished to be served). The complaint is mailed by registered or certified mail, return receipt requested, to such address and the return receipt is returned signed by the ostensible wife of the locator. Is this sufficient to prove service on the said locator?

2. The pertinent notice of mining location as found recorded in the county recorder's office lists one address as the common address of all the several locators shown thereon. It is wished to serve all of these locators. A complaint is mailed to each of them at the one address by registered or certified mail, return receipt requested, and the return cards are returned all signed by one of the locators. Is this sufficient to prove service on the locators who did not themselves sign?

For the reasons following, in our opinion, both of these questions should be answered, in a general way, in the negative. These negative answers are, however, subject to certain exceptions and qualifications as will be hereinafter mentioned.

The present rules of practice for the Department of the Interior, 43 CFR Part 221 5 Editor's note: These rules are now found at 43 CFR Part 4, Subpart E, 4.450-5 (1992), were promulgated to comply with the Administrative Procedures Act (5 U.S.C. sec. 1001 et seq.), when it was determined that a mining claim is a claim to property which may not be declared invalid without proper notice (etc.) in accordance with the Administrative Procedure Act. See United States v. Keith V. O'Leary et al., 63 I.D. 341 (1956). While the notice requirements of the Act are rather broadly stated, the pertinent portions of the rules of practice appear in complete compliance therewith and are controlling.

43 CFR 221.58(a) provides as follows (with emphasis supplied):

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"The complaint must be served upon every contestee. If the contestee is of record in the land office, service may be made and proved as provided in sec. 221.95. If the person to be served is not of record in the land office, proof of service may be shown by a written statement of the person who made personal service, by post-office return receipt showing personal delivery, or by an acknowledgement of service. In certain circumstances, service may be made by publication as provided in sec. 221.60."

43 CFR 221.95 provides in pertinent part (with emphasis supplied):

"(a) Wherever the regulations in this part [221] require that a copy of a document be served upon a person, service may be made by delivering the copy personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau.

"(b) \*\*\*Service by registered or certified mail may be proved by a post-office return receipt showing that the document was delivered at the person's record address or showing that the document could not be delivered to such person at his record address because he had moved therefrom without leaving a forwarding address or because delivery was refused at that address or because no such address exists. \*\*\*

"(c) A document will be considered to have been served at the time of personal service, of delivery of a registered or certified letter, or of the return by the post-office of an undelivered registered or certified letter." 6 Editor's note: See also 43 CFR 1821.2-4 (1992) and 43 CFR 3833.5(d) (1992).

From the above regulations we reach the conclusion that subject to the exceptions and qualifications hereinafter set forth, proof of service may be shown by post-office return receipt only if such return receipt is signed by the very person to be served.

It will be seen from a reading of the above regulations that a primary exception to this conclusion exists in the situation where the person to be served is "of record in the land office." Fundamentally a person is "of record in the land office" in the sense used in the above cited regulations only if he is a moving party in some proceeding pending before such land office and then only as to that proceeding. An applicant or entryman under the public land laws is obviously "of record" as to any proceeding involving his application or entry. So also is one who had filed a protest

or application to contest (complaint) as to matters involving that protest or complaint. Likewise is any party interested in a proceeding who be filing a pertinent paper or otherwise appearing has duly submitted himself to the jurisdiction of the land office as to that case.

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The owner of a mining claim, prior to the filing of an application for patent, is not "of record in the land office" as an owner unless he has appeared as a protestant or contestant alleging ownership of the mining claim and asserting his rights thereunder as a basis of his protest or contest. Thus one who merely files a notice of location for record purposes pursuant to a law so providing is not "of record" within the contemplation of the regulations. 7 Editors note: This has changed since 1958. Now all mining claims must be recorded with BLM pursuant to 314 of FLPMA and 43 CFR 3833. Mining claimants are "of record in the land office" if they have recorded under 43 CFR 3833.1-2 or filed a transfer of interest pursuant to 43 CFR 3833.3.

Additional exceptions and qualifications to the above-stated conclusion that the return receipt must be signed by the very person to be served, exist in the following three situations wherein proof of service would be shown if the post-office return receipt were signed by the proper attorney, guardian, etc., as is mentioned in these three situations. (See also 43 CFR 221.58(b) and 221.95 (d).)

1. Service may be made upon an attorney at law whose client is the person to be served, if, and only if, such client has authorized the attorney to represent him in the contest or matter involving the service. Such authorization may be presumed if the attorney has entered his appearance on behalf of his client. Moreover, if he has entered his appearance his client would appear to be "of record" through the attorney so as to invoke the exception concerning a person "of record in the land office" noted above.
2. Service may be made upon an attorney in fact if such attorney in fact is actually shown authorized under the power of attorney to accept such service on behalf of the person to be served.
3. Where the person to be served is an infant or a person who has been legally adjudged of unsound mind, the service would be on the legal guardian or committee, of such person, or if there where no legal guardian or committee, on the person having the infant or person of unsound mind in charge.

Thus it is our opinion that unless the person to be served is "of record in the land office" proof of service by post-office return receipt may be shown only by the signature of the person to be served (or of his attorney, guardian, etc., in the situations outlined above) and for this reason, in the usual case it appears desirable to check the item marked "Deliver only to addressee" on the return receipt. Whenever the question arises as to whether a particular mining claimant is "of record in the land office" or whether service on a claimant's attorney, guardian, etc., will be sufficient, we suggest the question be referred to the appropriate Regional or Field Solicitor.

(Sgd) J. Stuart McMaster

Field Solicitor