

NEVADA PACIFIC MINING CO.

IBLA 96-25

Decided February 10, 2005

Appeal from a decision issued by the Area Manager, Kingman (Arizona) Resource Area, Bureau of Land Management, dismissing a protest of the issuance of Right-of-Way AZA-12037.

Affirmed in part, reversed in part.

1. Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

Section 501(a) of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. § 1761(a) (2000), grants the Secretary of the Interior discretionary authority to issue rights-of-way. However, this authority does not extend to the grant of a right-of-way across a valid mining claim located prior to July 23, 1955, because claimants who located prior to that date gained the exclusive right of possession and enjoyment of the surface of the claim.

APPEARANCES: John C. Lacy, Esq., Tucson, Arizona, and Thomas E. Root, Esq., Denver, Colorado, for Nevada Pacific Mining Company; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management; Ronald J. Klinefelter, Esq., Office of General Counsel, Western Area Power Administration, Golden, Colorado, for Western Area Power Administration.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Nevada Pacific Mining Company (Nevada Pacific) has appealed a September 14, 1995, decision issued by the Area Manager, Kingman Resource Area (Arizona), Bureau of Land Management (BLM or Bureau), dismissing its protest of the grant of right-of-way AZA-12037. The right-of-way was granted to the Western

Area Power Administration (WAPA) for the construction and maintenance of a 500 kV power transmission line, referred to as the Mead-Phoenix Power Transmission Line. Nevada Pacific has limited its appeal to the impact of the grant of the right-of-way upon the rights it possesses by reason of its ownership of the unpatented mining claims described below.^{1/}

Background

Nevada Pacific holds title to four unpatented lode mining claims in the northerly half of sec. 4, T. 27 N., R. 18 W., Gila and Salt River Meridian (G&SRM), Arizona. Its predecessor-in-interest located the P&LM lode mining claim (AMC-31972) on May 21, 1953, and recorded that claim with the Mojave County Recorder on August 7, 1953.^{2/} At the time, 30 U.S.C. § 26 (2000) gave the mining claimant the exclusive right to the surface of the mining claim, but limited use to mining and related activity.

The Mining Law of 1872 was modified on July 23, 1955, by section 4(b) of the Multiple Use Mining Act of 1955 (Multiple Use Act), 30 U.S.C. § 612(b) (2000). The language of the Multiple Use Act important to this case is that which modified the Mining Law of 1872 to authorize multiple use by the United States of the surface of unpatented mining claims located after July 23, 1955. The existence of an unpatented mining claim would not, per se, prevent the grant or use of a right-of-way across the claim. However, the statute also protects the mining claimant's right to use the surface and subsurface resources for mining and related purposes. By its terms, the modification of the 1872 Mining Law to provide for multiple use of the surface estate by the United States is not applicable to unpatented mining claims located prior to July 23, 1955. 30 U.S.C. § 612(b) (2000).

On August 6, 1993, BLM issued right-of-way grant AZA-12037 to WAPA, pursuant to section 507 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1767 (2000), for the purpose of constructing, operating, and maintaining a 500 kV electrical power transmission line within a 200-foot-wide

^{1/} WAPA, an agency of the U.S. Department of Energy, has, by submitting an answer to Nevada Pacific's statement of reasons for appeal (SOR), effectively sought to intervene in this proceeding. Since it would be adversely affected by any Board ruling in favor of Nevada Pacific, its request to intervene is granted.

^{2/} The rights appurtenant to the other three claims, the Lee Nos. 5, 7, and 9 lode claims (AMC-34317 through AMC-34319), are discussed later in this decision.

right-of-way (100 feet on either side of the line).^{3/} The line crosses T. 27 N., R. 18 W., G&SRM, Mojave County, Arizona, including lots 3 and 4, and the S $\frac{1}{2}$ N $\frac{1}{2}$ sec. 4, T. 27 N., R. 18 W., G&SRM. The right-of-way grant afforded WAPA the “full use” of the right-of-way land, “subject to valid existing rights.” See 43 CFR 2801.1-1(c). BLM issued a notice to proceed with construction of the transmission line and related facilities, in connection with right-of-way AZA-12037, on October 21, 1993.

On August 2, 1994, Nevada Pacific submitted a proposed Mining Plan of Operations, pursuant to 43 CFR Subpart 3809. The Plan of Operations contemplated an open pit mining operation on the P&LM, and the Lee Nos. 5, 7, and 9 claims. The pit area would be located entirely on the P&LM claim, with overburden disposal on the Lee Nos. 5, 7, and 9 claims. Nevada Pacific reported that the claims contained a gold-bearing mineral deposit, 600 feet long, 200 feet wide and 40-100 feet thick, which had been extensively sampled and tested. Nevada Pacific estimated that the deposit contained approximately 1.5 million tons of ore, having an average grade of 0.04 troy ounces of gold per ton.

During the course of developing its mining plan of operations, Nevada Pacific discovered that BLM had granted the right-of-way across its claims to WAPA. By letter dated September 21, 1994, Nevada Pacific filed a protest, objecting to BLM’s issuance of the right-of-way grant and any continuing WAPA activity within the boundaries of its P&LM claim. Nevada Pacific noted that, since the P&LM claim was located prior to 1955, Nevada Pacific held exclusive possessory rights under 30 U.S.C. § 26 (2000).

By letter dated December 1, 1994, BLM directed Nevada Pacific to confirm the location of the P&LM claim. BLM perceived a discrepancy between the location of the P&LM claim as shown on the map submitted with the location notice at the time of recordation, and the location depicted in the plan of operations. Nevada Pacific notified BLM that it had retained a surveyor for the purpose of examining the ground and identifying the precise location of the P&LM and other claims, and that it would apply for a mineral survey, so that the boundaries of the claims could be “officially * * * determined and made a part of the public land survey system.” (Letter to BLM, dated Mar. 9, 1995, at 1; see Letter to BLM from Nevada Pacific, dated Aug. 22, 1995, at 2.)

^{3/} This right-of-way is in addition to an existing 150-foot-wide right-of-way, AZAR-035584, which had been granted in 1966 for the Mead-Liberty 345 kV electrical power transmission line. In sec. 4, T. 27 N., R. 18 W., G&SRM, this line parallels the new right-of-way to the southwest.

Nevada Pacific employed Jack M. Kesler, a registered land surveyor and United States mineral surveyor, and Jeffery S. Carlton of CSNA Surveying, a registered land surveyor licensed in the State of Arizona, to determine and describe the location of the P&LM mining claim. (SOR at 7-8.) Carlton conducted his field work under the supervision and direction of Kesler. Kesler accompanied Carlton to the field and viewed the claim on at least one occasion. (SOR at 7-8; Letter to BLM from Nevada Pacific, dated Aug. 22, 1995, at 2 n.1; Affidavit of Carlton, dated Nov. 16, 1995 (Carlton Affidavit), at 1.)

Carlton spent over 28 hours in the initial field examination between April 30 and May 26, 1995, and located what he identified as two of the six original monuments erected by Van C. Lee, who had located the claim in 1953. (Carlton Affidavit at 1-2.) Using these and other findings, Carlton re-established the remaining original corners of the P&LM claim.

Following Carlton's survey, Nevada Pacific amended the P&LM claim on August 29, 1995, to "more definitely describe the locality and boundaries of the claim," but without waiving any of its rights under the original location. (Amended Notice of Location, dated Aug. 29, 1995; see Letter to BLM from Nevada Pacific, dated Aug. 22, 1995, at 2.) A map of the claim was prepared and filed with BLM on August 16, 1995, showing the location of the claim in relation to the N1/4 corner and the NW corner of sec. 4, the Lee Nos. 5, 7, and 9 claims, the center lines of the claim and right-of-way, and the transmission towers for the 1993 and 1966 power lines.

In its August 22, 1995, letter, Nevada Pacific stated that the claim boundaries depicted on that map represented the valid re-establishment of the original corners of the P&LM claim based on all available evidence, and conformed to the location map filed in 1979. (Letter to BLM, dated Aug. 22, 1995, at 2.) It noted that it had, thus, "verified" the location of the claim as BLM had requested. Id. at 3. Nevada Pacific further noted that Carlton's survey "unquestionably demonstrates [that] WAPA's power lines do cross over Nevada Pacific's [P&LM and Lee Nos. 5, 7, and 9] claims." (Letter to BLM, dated Aug. 22, 1995, at 2 n.2, emphasis added.)

The same letter expressed Nevada Pacific's concern that WAPA's power line interfered with mining operations on the P&LM claim:

Mining operations involve personnel, equipment, explosives, storage, and earth moving activities. Placing power transmission towers and lines on, over, or near mining operations raises questions and concerns of tower stability, health and safety of mining personnel, and the effect

of the electromagnetic field emanating from the power lines on both personnel and mining equipment.

(Letter to BLM, dated Aug. 22, 1995, at 3.)

In his September 14, 1995, decision, the Area Manager dismissed Nevada Pacific's protest of the issuance of the Mead-Phoenix 500 kV transmission line right-of-way grant to WAPA. The reasons for doing so were that there was no foundation for protesting the crossing of the Lee claims, and that the mining plan of operations was not filed until August 2, 1994, which was over a year after the right-of-way was authorized.^{4/}

In an accompanying September 14, 1995, letter to counsel for Nevada Pacific, the Area Manager stated that BLM had completed a survey and re-assessment of the geographic location of the P&LM claim and concluded that BLM's original interpretation of the P&LM claim documents, claim monuments, and physical and topographic features was correct, and that the 1979 claimant's location map was approximately correct regarding the P&LM claim. He noted that "[w]e are preparing a plat and summary report based on our cadastral survey group's observations. It will be forwarded to you upon completion." (Sept. 14, 1995, Letter at 2.) Regarding mining plans of operation, he stated that

[we] can entertain a mining plan for this area, provided that it accurately reflects the conditions on the ground. The mining plan previously submitted for this area does not accurately reflect the claim geometry, and with proposed changes regarding shipment of ore off site cannot be considered sufficient. If a sufficient mining plan is submitted, it will be analyzed with due regard for the claimant's rights, both on any pre-1955 discoveries as well as any other proposed operating areas under the concept of multiple use management.

Id.

In a Memorandum to the Field Supervisor, Cadastral Survey, dated September 17, 1995, three days after the Area Manager's decision, Cadastral Surveyor Gordon R. Bubel stated that he had been asked to investigate the location of

^{4/} The Area Manager also stated that, "based on the information available to BLM, the power line does not cross the pre-1955 P&LM claim, therefore there is no foundation for this protest." (Decision at 1, emphasis added.) However, the decision contains no explanation of the basis for this conclusion.

the P&LM claim. Noting the potential for litigation, he undertook an investigation to ascertain the relationship between the location of the P&LM claim and the power line. He concluded that the preponderance of evidence, as obtained from a search of the records and field measurements, indicated that the SW corner of the P&LM claim was not as described by Nevada Pacific, but that the WAPA right-of-way did, in fact, cross the SW corner of the claim, resulting in an area of conflict equal to 0.023 acres. Nevada Pacific appealed the Area Manager's September 1995 decision and accompanying letter.

In its SOR, Nevada Pacific contends that the Area Manager erred, as a matter of fact, when concluding that the right-of-way did not cross its valid unpatented P&LM mining claim, which predates both the right-of-way grant and section 4(b) of the Multiple Use Act, 30 U.S.C. § 612(b) (2000). It further contends that construction, operation, and maintenance of the right-of-way "does now and will in the future interfere" with its right to develop and mine that claim, in violation of Federal statute. (SOR at 2.) It argues that its surveyors have conclusively determined that the right-of-way crosses its claim, conflicts with its "exclusive right of possession and enjoyment of all the surface" of the claim, and violates 30 U.S.C. § 26 (2000).

Finally, should we not agree that the Area Manager erred, as a matter of fact, in concluding that the right-of-way does not cross the P&LM claim, Nevada Pacific asks us to refer the question to an administrative law judge for a hearing and decision on the merits. (SOR at 15.) We find no material issue of fact regarding whether BLM has properly located the Mead-Phoenix 500 kV transmission line right-of-way in relation to Nevada Pacific's unpatented P&LM lode mining claim that cannot be resolved on the present record. Therefore, we decline to exercise our discretionary authority, pursuant to 43 CFR 4.415, to grant Nevada Pacific's request for a hearing. Felix F. Vigil, 129 IBLA 345, 347 (1994); Woods Petroleum Co., 86 IBLA 46, 55 (1986). That request is hereby denied.

The Issues on Appeal

At the outset, we find that the threshold question in this appeal is whether WAPA's 500 kV transmission line right-of-way crosses Nevada Pacific's unpatented P&LM mining claim. This issue is clearly subject to administrative review within the Department, because Nevada Pacific has properly raised a question regarding BLM's authority to issue the right-of-way across any part of that claim. If BLM does not have that authority to issue a right-of-way across the claim, the right-of-way was

improperly issued, and it is invalid to the extent of the conflict.^{5/} To determine whether the right-of-way does, in fact, cross any part of the mining claim we must weigh the evidence regarding the location of the mining claim on the ground and its relationship to the location of the right-of-way. We will begin by addressing whether the preponderance of the evidence supports BLM's placement of the claim or Nevada Pacific's placement of the claim.

Applicable Law

[1] As enacted, the General Mining Law of 1872 provided that:

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, * * * so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations * * *. [Emphasis added.]

30 U.S.C. § 26 (2000). As noted previously, the Mining Law of 1872 was modified on July 23, 1955, by section 4(b) of the Multiple Use Act, 30 U.S.C. § 612(b) (2000):

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage * * * surface resources thereof * * *. Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes * * *.

See, e.g., United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277, 1280 (9th Cir. 1980); Bruce W. Crawford, 86 IBLA 350, 363-64, 92 I.D. 208, 215-16 (1985). Thus, the existence of an unpatented mining claim would not, per se, prevent the grant or use of a right-of-way across the claim. Willoughby/Leavitt Association, 149 IBLA 250, 255 (1999). However, the statute also protects the mining claimant's right to use the surface and subsurface resources for mining and related purposes: "[A]ny use of the surface of any such mining claim by the United States, its permittees or

^{5/} Thus, we deny BLM's motion to dismiss the appeal. See BLM Answer at 4-6, 27. Administrative finality is inapplicable.

licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto[.]” 30 U.S.C. § 612(b) (2000); *see, e.g., United States v. Curtis–Nevada Mines, Inc.*, 611 F.2d at 1281; *Willoughby/Leavitt Association*, 149 IBLA at 255; *Robert E. Shoemaker*, 110 IBLA 39, 50-54, 96 I.D. 315, 321-23 (1989).

By its terms, the modification of the 1872 Mining Law to provide for multiple use of the surface estate by the United States is not applicable to unpatented mining claims located prior to July 23, 1955. 30 U.S.C. § 615 (2000); *Silbrico Corp. v. Ortiz*, 878 F.2d 333, 335 (10th Cir. 1989). The P&LM mining claim was located prior to July 23, 1955, and Nevada Pacific is the current owner of that claim.^{6/} BLM does not have the authority to issue a right-of-way across any portion of the public land which is subject to a valid unpatented mining claim located before July 23, 1955, without the express permission of the claimant. Under 30 U.S.C. § 26 (2000), the claimant possesses the “exclusive right of possession and enjoyment of all the surface” of the land encompassed by the claim. (Emphasis added.) The effect of the grant of exclusive right is that, as against any party other than the United States, the locator has the “exclusive right to use the surface of th[e] land.” *United States v. Etcheverry*, 230 F.2d 193, 195 (10th Cir. 1956); *see 2 American Law of Mining* § 36.03[1] (2d ed. 1999), at 36-7.

Nevada Pacific holds a valid pre-1955 mineral location, and therefore, pursuant to 30 U.S.C. § 26 (2000), the United States is precluded from engaging in a use (or authorizing third-party use) of the surface resources of land encompassed by the unpatented mining claim.^{7/} *See Robert E. Shoemaker*, 110 IBLA at 53, 96 I.D. at 322; *Bruce W. Crawford*, 86 IBLA at 364-66, 92 I.D. at 216-17. In *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55, 79 (1898), the Supreme Court stated: “A valid location appropriates the surface, and the rights given by such location cannot, so long as it remains in force, be disturbed by any acts

^{6/} There is no evidence that the claim was made subject to the notice/determination procedure, provided in section 5 of the Multiple Use Act, as amended, 30 U.S.C. § 613 (2000), or the waiver/relinquishment procedure provided in section 6 of that Act, 30 U.S.C. § 614 (2000).

^{7/} The exclusive possessory right afforded by 30 U.S.C. § 26 (2000) exists if a valuable mineral deposit exists within the limits of the claim. *Bruce W. Crawford*, 86 IBLA at 358-59, 92 I.D. at 213. For the purpose of this decision we presume the existence of a discovery, and that question will not be addressed. *See, e.g., United States v. Woolsey*, 13 IBLA 120, 121-22 (1973).

of third parties.” It went on to state: “A party who is in actual possession of a valid location may maintain that possession and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises.” *Id.* at 83. The land is effectively “‘withdrawn from the public domain,’ and this right of exclusive possession runs against the United States as well as third parties.” 100 IBLA 94, 106, 94 I.D. 429, 435 (1987) (quoting from *Belk v. Meagher*, 104 U.S. 279, 284 (1881)); see *Davis v. Nelson*, 329 F.2d 840, 845 (9th Cir. 1964); *United States v. Rizzinelli*, 182 F. 675, 683 (D. Idaho 1910); *Estate of John M. Lighthill*, 147 IBLA 25, 30 (1998); *United States v. Lutey*, 76 I.D. 37, 40 (1969); *United States v. Coston*, A-30835 (Feb. 23, 1968), at 1, 6-7; *Solicitor’s Opinion*, 65 I.D. 200, 201-02 (1958). As a result, the United States is precluded from issuing a right-of-way across a valid unpatented mining claim located prior to July 23, 1955. The statute precludes the grant itself, regardless of whether the right-of-way or the use that is made of it could be undertaken in a manner that would not endanger or materially interfere with the claimant’s mining and related activity.^{8/} See *Solicitor’s Opinion*, 65 I.D. at 202 (If the claim is a valid mining claim located prior to the date the Multiple Use Act was enacted, the “right[-of-way] will have to be obtained from the locator”).

This exclusive right was not changed by the duty imposed upon the Secretary of the Interior by section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), and 43 CFR 3809.1-5(c), to prevent “unnecessary or undue degradation” of the affected public lands. See WAPA Answer at 13; Letter to BLM from Director, Division of Land, WAPA, dated Oct. 13, 1994, at 2-3. As we said in *Bruce W. Crawford*, 86 IBLA at 398, 92 I.D. at 234-35: “[T]he fact that one use necessarily prevents use of the same land for other purposes [does not] establish that degradation, much less unnecessary or undue degradation, has occurred.”

The P&LM lode mining claim, which was located prior to 1955, precluded issuance of the grant to the extent that the right-of-way crosses the claim. Thus, the

^{8/} We note WAPA apparently offered to resolve any actual interference with Nevada Pacific’s mining and related activity, including compensating Nevada Pacific for any lost mineral revenues or additional operating costs incurred by reason of its power line. See, e.g., WAPA Answer at 12; Letter to Nevada Pacific from Director, Division of Land, WAPA, dated July 11, 1994, at 1. However, that willingness does not address the question of the validity of the right-of-way across Nevada Pacific’s mining claim.

first question for determination is whether right-of-way AZA-12037 contains land which was subject to Nevada Pacific's unpatented P&LM lode mining claim.^{2/}

We start with the well-settled principle that, should there be a discrepancy between the location of a claim as described in documents filed with the County Recorder and/or BLM, and the location of the claim as originally staked and monumented on the ground, or otherwise physically marked, the location of the claim on the ground controls. Silver King Coalition Mines Co. v. Conkling Mining Co., 255 U.S. 151, 162 (1921); Patsy A. Brings, 119 IBLA 319, 327 (1991); United States v. Parker, 82 IBLA 344, 373-74, 91 I.D. 271, 288 (1984); United States v. Kincanon, 13 IBLA 165, 168 (1973); Treadwell v. Marrs, 83 P. 350, 355 (Ariz. 1905). As the court stated in Book v. Justice Mining Co., 58 F. 106, 115 (D. Nev. 1893):

In construing notices of this character, where, under the mining rules and local regulations or state laws, such notices are required to be posted upon the ground, the courts are naturally inclined to be exceedingly liberal in their construction. Such notices are often drawn by practical miners, unaccustomed to legal forms and technical phraseology; hence, the language used in the notices is often subject to more or less criticism by counsel learned in the law, and engaged in preparing documents in legal shape and form. Then, again, locations are often made without any accurate knowledge of the true course and directions which a compass would readily give, and mistakes in the notice as to the direction and course of the ground located often occur. But such mistakes do not invalidate the location. Positive exactness in such matters should never be required. It is the marking of the location by posts and monuments that determines the particular ground located. [Emphasis added.]

^{2/} We are not persuaded that BLM should have known, at the time of issuance of the right-of-way grant in 1993, that it crossed the unpatented P&LM claim. Nevada Pacific relies on the fact that BLM's "Geographic Index" for T. 27 N., R. 18 W., G&SRM, Mojave County, Arizona, which was extant around the time of the grant, reported that the claim was situated in the NW¹/₄ sec. 4 of that township. (SOR at 12 (referring to Ex. 14 to SOR (Geographic Index, dated Nov. 3, 1993)).) However, that fact did not necessarily establish that the claim would have been crossed by the right-of-way grant, since the claim could have been situated in any number of positions in the NW¹/₄ of sec. 4 which would not have been crossed by the proposed right-of-way.

See Walton v. Wild Goose Mining & Trading Co., 123 F. 209, 214-15, 217-18 (9th Cir. 1903). Thus, to the extent that the actual original location of the P&LM claim, as determined from the location of stakes, monuments, or other physical markings on the ground, differs from the description in the location notice filed with the Mojave County Recorder in 1953, or the copy of that notice filed with BLM, or the U.S. Geological Survey (USGS) Map filed for recordation with BLM in 1979, the actual original location of the claim on the ground will control. When such stakes, monuments, or other physical markings have become obliterated or lost, their position, as properly restored in accordance with established surveying principles and with reasonable certainty, will control over a conflicting description. United States v. Parker, 82 IBLA at 373-74, 91 I.D. at 288.

When Nevada Pacific submitted its Mining Plan of Operations, BLM directed Nevada Pacific to confirm the location of the P&LM claim and describe the location of its proposed mining and related activities.^{10/} (BLM Letter dated Dec. 1, 1994.) This request was made because of the apparent discrepancy between the location of the P&LM claim as shown on the map submitted with the location notice and the map submitted with the plan of operations. The burden to establish, through the presentation of credible evidence, that a mining claim is located on the ground in the position asserted by the mining claimant rests with the claimant. Walton v. Wild Goose Mining & Trading Co., 123 F. at 218; Patsy A. Brings, 119 IBLA at 327.

Nevada Pacific satisfied the directive set out in BLM's December 1, 1994, letter on August 16, 1995, when it submitted a map of the claim prepared by a registered land surveyor and United States mineral surveyor.^{11/} In a September 14, 1995, letter to Nevada Pacific, the Area Manager stated that BLM had completed a survey and re-assessment of the geographic location of the P&LM claim and concluded that BLM's original interpretation of the P&LM claim documents, claim monuments, and physical and topographic features was correct, and that the 1979 claimant's location map was approximately correct regarding the P&LM claim.

^{10/} It is clear from the record that, when the Area Manager issued his September 1995 decision, BLM had not undertaken a formal investigation of the location of the P&LM claim on the ground.

^{11/} Surveys of mining claims are in their nature public surveys. In re Standart, 25 L.D. 262, 264 (1896). "[A]ll official surveys of mining claims are made by a deputy mineral surveyor, who is regularly appointed by the surveyor-general of the district. He is, therefore, an officer of the land department, and * * * his reports and acts must be accepted as prima facie true." Gowdy v. Kismet Gold Mining Co., 25 L.D. 191, 193 (1897).

Analysis of the Facts in the Record

The original notice of location for the P&LM claim describes the claim as follows:

The length of this claim is 1500 feet, 750 feet in a[n] Eastern direction and 750 feet in a Western direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim, together with 300 feet in width of the surface grounds on each side of the center of said claim. The general course of the lode deposit and premises is from the East to the West.

The claim is situated and located in the Gold Basin Mining District in Mojave County, in the State of Arizona about 2 miles in a Southeast direction from Cyclopic Mine. This is a relocation of the old abandoned Fry Prospect.

There was no tie to the rectangular system of public-land surveys in the location notice. However, the copy of the USGS topographic map (1979 USGS Map), filed with BLM on January 12, 1979, depicted the location of the P&LM claim as being in the N½ sec. 4, T. 27 N., R. 18 W., G&SRM, Mojave County, Arizona.

The Lee Nos. 5, 7, and 9 lode mining claims were located on January 19, 1975, and filed for recordation with BLM on February 20, 1979. These claims overlap the P&LM claim, are clearly marked on the ground, and are crossed by WAPA's 500 kV transmission line right-of-way. See Carlton Map, filed with BLM Aug. 16, 1995; Map (Detail of SW Corner of the P&LM Claim) attached to Memorandum to Field Supervisor, Branch of Cadastral Survey, Arizona State Office, BLM, from Gordon R. Bubel, dated Sept. 17, 1995 (Bubel Memorandum).

Nevada Pacific Examination and Conclusions

In preparation for re-establishing the location of the corner monuments for the P&LM claim, and thus the location of the claim on the ground, Kesler considered two means for establishing the claim limits. The first was the use of dependent resurvey methods, using the point of discovery and supportive evidence as it relates to old reliable monumentation and maintenance of limits prescribed by law. The second was reliance upon the location of any of the six original monuments that could be found. Using this method, the discovery point would not be on the lode line, as there is no distinctive apex on the claim.

When Kesler and Carlton examined the claim they found what they describe as two of the six original monuments erected by Lee in 1953; the NW corner (a 4"x6" wooden post), and the west end center (a 4"x4" wooden post). (Carlton Affidavit at 1-2.) Their conclusion that the posts were the original monuments was based in part on a conversation with Arden L. Larson, one of Nevada Pacific's predecessors-in-interest, who stated that, based on his work on the claim and conversations with prior owners, he considered the 4"x6" post to be the monument at the NW corner of the claim and the 4"x4" post to be the west end center monument. *Id.* at 1. Carlton also found what he identified as "a discovery or location pit in the proximity of an[] old cairn of rocks containing a rusted tobacco tin can," which he identified as the original discovery point for the claim.^{12/} *Id.* at 1-2. He then determined that the location of the discovery pit "correspond[ed]" with the two monuments. *Id.* at 2. Based on this information Carlton determined that the center (or lode) line of the claim ran N. 70° E. (Carlton Affidavit at 1). Carlton attributed the discrepancy between the bearing of the center line and the bearing of that line, as described in the location notice (East - West) and the bearing based on the monuments as found on the ground to the 15° East of North magnetic declination in Arizona. (Undated Carlton Affidavit (Ex. 9 to SOR), at 2; *see* SOR Errata and Addendum, dated Nov. 30, 1995, at 1.) Using these monuments as a starting point, Carlton re-established the location of the remaining original corners of the P&LM claim.

Based upon Carlton's survey of the claim, Nevada Pacific amended the P&LM claim to conform with the mineral survey. The amended location notice and an accompanying map were filed with BLM on September 14, 1995. The amended location notice described the claim as being 1,498.2 feet long and 591.30 feet wide (295.65 feet on each side of the center line of the claim). The discovery monument was situated on the center line of the claim, 749.1 feet, on a bearing of S. 70° 45' 30" W., from the east end center monument, and 749.1 feet, on the same bearing, from the west end center monument. All of the corners, the end center points, and the discovery point were monumented with 4"x4" wooden posts.

Nevada Pacific submitted a second map on August 30, 1995, which we believe to be a map depicting the claim as they had determined it to be found on the ground before the claim was amended. As can be expected, the claim was not a perfect rectangle and the endlines were not perfectly straight lines because the end center monuments were not located exactly on line. The northerly sideline was shown to be

^{12/} Under State law, a locator was required to erect a "conspicuous monument of stones, not less than three feet in height, or an upright post, securely fixed, projecting at least four feet above the ground, in or on which there shall be posted a location notice" at the point of discovery. Ariz. Rev. Stat. Ann. § 65-102 (1928).

1,537 feet in length, on a bearing of N. 68° 28' 38.8" E., and the southerly sideline was depicted as being 1,606.12 feet in length, on a bearing of N. 68° 44' 48.6" E. The easterly end line from the SE corner to the easterly center monument was depicted as being 325.96 feet long on a bearing of N. 14° 22' 36.7" W. The easterly end line from the easterly center monument to the NE corner was depicted as being 287.59 feet long on a bearing of N. 11° 19' 46" W. The westerly end line from the SW corner to the westerly center monument was depicted as being 312.52 feet long on a bearing of N. 09° 48' 50" W. The westerly end line from the westerly center monument to the NW corner was depicted as being 308.59 feet long on a bearing of N. 03° 10' 53.5" W.

On August 19, 1996, Nevada Pacific submitted a July 25, 1996, "preliminary plat" for Mineral Survey (No. 4894), prepared by Kesler. (Petition to Supplement Record, dated Aug. 16, 1996.) This plat, depicting the P&LM and Lee Nos. 5, 7, and 9 claims was submitted to BLM for its approval. This plat ties the NE corner of the P&LM claim to corner No. 1 of the Lee No. 9 M.S. which lies 139.04 feet from the NE corner of the P&LM claim on a bearing of N. 49° 44' 15" E. In turn, corner No. 1 of the Lee No. 9 M.S. is 1.20 feet from the N1/4 corner of sec. 4, T. 27 N., R. 18 W., G&SRM. Nevada Pacific states that the position of the P&LM claim on the preliminary plat is "identical" to that on Carlton's August 16 map. (Declaration of Thompson, dated Sept. 26, 1996 (Ex. B to BLM Response to Petition to Supplement Record), at 1.)

On appeal Nevada Pacific states that, as is typical with most mining claims located in the 1950's, many of the original monuments have been obliterated as a result of the forces of nature. For those corners, the monuments for the P&LM claim were re-established by a licensed professional surveyor under the direction and instruction of a U. S. Mineral Surveyor. It specifically states that when re-monumenting the claim, special attention was given to the fact that not all of the monuments on the ground were of the same age, and that the surveyors were charged with re-establishing where the monuments were placed on the ground in 1953, when the claim was located. It stated that the monuments depicted on the map it submitted to BLM represented the location of the claim on the ground, and that the monuments were placed in accordance with the Manual of Instructions for the Survey of the Public Lands of the United States (BLM Technical Bulletin 6, 1973) (Survey Manual). Citing ¶ 5-7 of the Survey Manual, Nevada Pacific notes that when there is a material difference between the evidence and a record call, the character and dimensions of the monument should not vary widely, the markings in evidence should not be inconsistent with the record, and the nature of the accessories in evidence should not vary widely, but that there should be some allowance for ordinary discrepancies.

Nevada Pacific contends that, based on its physical examination of the ground and testimony given by parties having knowledge of the claim, there were only two monuments in the area examined that were of the correct age. Neither of these monuments matched the most recent place of posting the location notice, which is at the collar of a shaft. The original discovery point was deemed to be at the site of a pit and rock cairn approximately 180 feet from the shaft collar. The pit is described as being approximately 8 feet deep and 750 feet in an easterly direction from the southernmost 4"x4" wooden monument, leading to the conclusion that the 4"x4" post was placed on the west end center of the claim.

Based on these findings, Nevada Pacific re-monumented the other corners. It notes that the location of the claim, as determined by Nevada Pacific, reasonably coincides with the position of the claim as shown on the map filed with BLM in 1979. It states that when the position of the P&LM claim is adjusted to match the road shown on the 1979 plat, the location of the claim on the plat and the location of the claim on the ground are nearly identical.

Nevada Pacific finds fault with the BLM conclusion regarding the location of the claim because no effort was made to judge the age of the monuments, because BLM did not consider how the monuments related to the P&LM claim, and because BLM did not take into consideration the present and prior owners' understanding of the location of the claim. It also is critical of the fact that the BLM investigation of the location of the claim did not take place until after the Area Office decision rejecting the protest.

BLM Examination and Conclusions

The first attempt by any Government agent to find the location of the claim on the ground was in October 1995, when John Thompson, a BLM geologist, made an "initial examination" of the claim on the ground. This was after the decision had been issued and the appeal had been filed.

Based on his two-day reconnaissance, Thompson reported that he had found what he identified as the original discovery monument and four of the original six

boundary monuments. ^{13/} (Thompson Declaration, dated Dec. 1, 1995 (Ex. P to BLM Answer), at 1.)

The first monument Thompson found was a 4"x4" wooden post, which was described as being "somewhat weathered, retaining remnants of a coat of white paint." A tobacco can and an aluminum tag inscribed "Discovery P and LM" was nailed to this post. (Thompson Declaration at 2.) The post was "within a complex of three closely located substantial shafts;" one of unknown depth with a head frame; the second about 10-20 feet deep; and the third 20-30 feet deep. Id. at 3; see id. at 2.

Later, on August 28, 1995, BLM asked the Cadastral Survey to look into the matter. The Cadastral Survey's field work was completed on September 9, 1995. In a Memorandum to the Field Supervisor, dated September 17, 1995 (three days after the Area Manager's decision) Cadastral Surveyor Gordon R. Bubel set out his findings and conclusions:

The focus of this report is to show the relationship between the P & LM location claim and the powerline constructed in 1993.

* * * * *

* * * The claim notice describes the location being 750 ft. in a[n] easterly direction and 750 ft. in a westerly direction from the location monument. It also claims 300 ft[.] on either side of the center of the claim. In addition the claim location notice describes setting post for the discovery monument, the four corners of the claim and the east and west end centers. No mention is made pertaining to the size of the post or any marks applied to identify them. * * *

On March 3, 1956, Van C. Lee filed a location notice for the Lucky Boy lode claim. The notice describes being bounded from the discovery monument 460 ft[.] in a westerly direction, and 1040 ft[.] in a[n] easterly direction, with 300 ft[.] on either side of the center of the

^{13/} While a locator was required by State mining law to monument each of the four corners of his claim and the center of each end line, the 1979 USGS Map, filed for recordation by Nevada Pacific's predecessor-in-interest, did not show a monument at the east end center line of the claim.

claim. * * * [T]he location notice states, “joins the P and LM claim on the east”.

On March 3, 1956, Van C. Lee filed a location notice for Mystery lode claim. The claim notice[] describes being bounded from the discovery monument 340 ft[.] in a[n] easterly direction and 1160 ft[.] in a westerly direction, with 300 ft[.] on either side of the center of the claim. * * * [T]he claim notice states “and the east end of the claim end, lines the P & LM”. The Lucky Boy and Mystery claims were subsequently abandoned.

* * * * *

The discovery monument of the P & LM claim is monumented with a 4 inch by 4 inch wood post, firmly set in concrete, projecting 4 ft. above ground. The amount of weathering observed on the post[] indicate[s] that it was most likely a remonumentation of the original post. An aluminum tag attached is scribed, “Discovery P and LM”. According to Jeffrey Carlton[], Az. R.L.S. # 19319, this tag was attached by Nevada and Pacific Mining Co. From the discovery monument 4 mining shafts were tied in. Three of the shafts were within one chain [66 feet] of the discovery monument, with two of these being in excess of 100 ft. deep. The fourth shaft tied in[] was virtually on line between the discovery monument and the NW cor., as purported by the Nevada and Pacific Mining Co.

The NE and SE claim corners are monumented with post nearly identical with the discovery monument. The EEC [East End Center] is monumented with a 2 inch by 2 inch wood post. The post was found loosely set and located in sandy wash, its position may not be w[h]ere the original monument was set. The purported SW claim corner is monumented with a 2 inch by 2 inch wood post. The tag attached is marked WITNESS CORNER SW COR. P & LM LIES 10' DUE NORTH. The location of the corner as[] indicated by the tag would place the corner in a graded road, within the right-of-way of the powerline constructed in 1967. The weathering and character of the post indicates it has been set within the last 5 years. The purported WEC [West End Center] is monumented with a 4 inch post similar to the NE and SE corners. The purported NW claim corner is monumented with a 4 inch by 6 inch wood post, similar in character to the 4 inch by 4 inch

post. Each post found had an aluminum tag attached similar to that as described on the discovery monument.

(Sept. 17, 1995, Bubel Report at 1-2.)

Bubel's conclusions were based in large part upon the evidence he found regarding the Lucky Boy and Mystery mining claims.^{14/} Both claims were located by the same person, but were subsequently abandoned. The location notice for the Lucky Boy claim describes that claim as adjoining the P&LM on the east. Bubel took this statement to imply that the easterly boundary of the Lucky Boy claim is identical with the westerly boundary of the P&LM claim, and considered the lode line of the Lucky Boy to be an extension of the lode line of the P&LM claim. The discovery point for the Lucky Boy claim was found 464 feet from the easterly boundary. The location notice describes the distance from the boundary to the discovery point as 460 feet. The discovery monument for the Lucky Boy claim was recovered.

The abandoned Mystery claim adjoins the P&LM on the west. The SW, NW, and west end center monuments for this claim were recovered. All were monumented wood posts, and Bubel concluded that the decay and weathering observed indicated that the posts he found were the original monuments set in 1956. Bubel considered the Mystery claim to be an extension of the P&LM claim. He states in his Declaration that his field measurements verified this conclusion. (BLM Exhibit M at 2.)

The September 17, 1995, Bubel report states that, based on the recovered Mystery corners, he concludes that the two monuments on the westerly end of the P&LM claim did not mark the NW and west end center corners, but rather the west end center and SW corners of the claim. The stated basis for his conclusion is as follows:

The Nevada [] Pacific Mining Company's assertion that WAPA has trespassed across its P & LM claim is contingent upon the location

^{14/} The record contains copies of the location notices for the Lucky Boy and Mystery claims, which confirm the language quoted by Bubel. These notices place the claim in sec. 4, T. 27 N., R. 18 W., G&SRM, Mojave County, Arizona, and state the location of the claims in relation to the Cyclopic Mine (southeasterly either about 2 ½ (Lucky Boy) or about 2 (Mystery) miles from the Mine). The notices state that posts were erected at each corner, and at the east and west end of the center line, and that the notice of location was posted at the discovery point on the center line of the claim.

of the SW corner of the claim. Based upon the evidence uncovered during our investigation, it is my belief that the SW corner as now monumented does not represent the position of the original claim corner. I contend that the original SW corner of the claim is the 4 inch by 4 inch wood post, purported to be the west end center by the Nevada [] Pacific * * * . The basis of this contention is as follows: The claim notice of the Lucky Boy claim implies that its east boundary is identical with the west boundary of the P & LM claim. This being the case, the lode line of the Mystery claim is an extension of the P & LM claim. Our measurements verify this. The bearing and distance from the discovery monument of the P & LM claim, to the west end center as I contend, (Nevada [] Pacific[']s NW cor.), is S. 82° 04' W., for 759.1 ft. The prolongation of this bearing at the record distance of 1500 ft., results in a positional error of the west end center of the Mystery claim of N. 37 ft. and W 4 ft. This error is well within the limits expected from a claim locator in 1956. Likewise the prolongation of the bearing from the SE corner of the P & LM claim through the SW corner of the claim, (Nevada [] Pacific[']s WEC), results in a positional error of the SW corner of the Mystery claim of N 69 ft., and W of 42 ft. The NW cor. of the P & LM claim has been lost. Three methods for reestablishing this corner were tested. * * * Each method put the reestablished corner in nearly the same location. In the vicinity of the reestablished NW corner of the P & LM claim, earth moving equipment has leveled a drilling s[i]t[e] approximately 150 ft. by 150 ft. It is possible that this corner was destroyed during the leveling of the drilling site.

The Lucky Boy claim notice states, “joins the P & LM claim on the east”. My interpretation of this statement is that the Lucky Boy[']s west boundary is identical to the P & LM’s east boundary. The claim notice also implies that the endlines of the claim are parallel. This being the case, then the lode line of the Lucky Boy claim is an extension of the P & LM claim. Our measurements confirm that the Lucky Boy lode line is an extension of the P & LM lode line. The record distance from the discovery monument of the Lucky Boy claim, to the east boundary of the P & LM claim is 460 ft. Our measurements intersect the P & LM claim at 464 ft. This calculation ignores the loosely set, and probably disturbed west end enter post of the P & LM claim.

A claim location diagram submitted to the BLM Az. State Office, on Jan. 12, 1979, offers more evidence of the position of the original

P & LM claim. The diagram has the P & LM claim overlaid on a 7.5 minute U.S.G.S. topographic map. The scaled bearings of the sidelines are N 80° E / S 80° W. The bearings as measured in the field are N 81° E / S 81° W. The bearings as purported by the Nevada [] Pacific * * * are for the N. bdy. N 69° E and for the S. bdy. N 70° E. The difference between the scaled bearings and the bearings purported by the Nevada [] Pacific * * * equate to a positional error of 274 ft. on the N. bdy. and 259 ft. on the S. bdy. The relationship between the claim location diagram and the powerline constructed in 1967, also correlates with our field measurements. From the true SW claim corner the 1967 powerline lies s[outher]ly approximately 234 ft. The scaled distance from the claim location diagram is 233 ft. The Nevada and Pacific * * * purported SW corner is located within the R.O.W. of the 1967 powerline. The bearing and distance as scaled from the location diagram between the NE corner of the claim and the 1/4 sec. cor. of secs. 33 and 4, also matches our field measurements.

(Sept. 17, 1995, Bubel Report at 2-3.)

In his declaration, BLM Geologist John Thompson states that he had examined the site, identified existing monuments on the ground, and taken Brunton compass bearings on the monuments and known features. He states that he found four monuments in a similar condition, which he described as very weathered unpainted 4"x4" to 4"x6" posts. He considered these monuments to be the NE corner, the SE corner, and two posts approximately 300 feet apart on the west end line. The post he deemed to be the discovery post was described as being somewhat weathered, retaining remnants of a coat of white paint. This post was next to a head frame and shaft of unknown depth, a shaft approximately 20-30 feet deep, and an exploration trench. Thompson examined the photos of the discovery pit submitted by Nevada Pacific (Exhibit 10 to SOR). He stated that he found a shallow, bowl-shaped pit about 4 feet deep at that point. He stated that the pit shown in Exhibit 10 is actually located about 200 feet northwest of the point identified by Nevada Pacific as the discovery point. (BLM Exhibit P at 2-3.)

Findings and Conclusions

All of the parties accept two monuments as being original monuments erected by the claimant in 1953. The issue before us is what those monuments represent. Are they the NW corner and the west end center, as Nevada Pacific contends, or are they the SW corner and west end center, as BLM contends? After carefully reviewing all of the evidence in the record regarding the situs of the P&LM mining claim as it

was originally located on the ground in 1953, we conclude that BLM has established by a preponderance of the evidence that the 4"x4" post on the westerly end of the P&LM claim is the monument representing the SW corner of that claim and that the 4"x6" post is at a position which represents the west end center of the P&LM claim.

Thompson and Bubel found what they believed were the NE and SE corner monuments set by Lee in 1953. While none of the wooden posts is marked in a way which would conclusively demonstrate that it is, in fact, one of Lee's original claim monuments, the two additional monuments were found by Thompson to be "identical regarding weathering." (Thompson Declaration at 2.) Bubel stated that they appear to be of sufficient age to date from 1953. Accepting these monuments to be the corners of the claim results in a claim which is 1,469.7 feet long on the north side line and 1,574.2 feet long on the south side line. The claim is also 613.4 feet wide on the east end line and 617.1 feet wide on the west end line, which is reasonably close to being 1,500 feet long and 600 feet wide.

Thompson also found what he believed was the original discovery monument for the P&LM claim. In this instance, there was an identifiable marking. Attached to the wooden post was an aluminum tag inscribed "Discovery P and LM." (Thompson Declaration at 2.) In contrast, Carlton initially reported that he found the original discovery point for the claim, which he described as an "old cairn of rocks," and a nearby "pit." (Carlton Affidavit at 2.) He did not report the pit's depth, or suggest that it comported with State mining law. See Letter to Nevada Pacific from Kesler, dated May 28, 1995 (Ex. 8 to SOR), at 1 ("The discovery pit is of good size"). In his original location notice, Lee had stated that he had posted his notice at the mid-point on the center line of the claim. Nevada Pacific states on appeal that the discovery pit or shaft is eight feet deep, and provides photographs (Ex. 10 to SOR) depicting that pit (SOR at 10), which it describes as being situated along the center line of its claim, 750 feet easterly of the 4"x4" post, deemed by it to be the west end center monument. Id. at 10-11. This is reflected on Carlton's map, which was provided to BLM on August 16, 1995. We presume that this is what Carlton meant by his assertion that the "correspond[ence]" between the pit and two monuments he found supported his location of the claim. (Carlton Affidavit at 2.)

However, Thompson found the pit at the mid-point on the center line to be a "shallow pit * * *, about 4 feet deep, partially filled and bowl shaped." (Thompson Declaration at 2.) This observation is supported by the field notes prepared by Kesler in connection with his mineral survey for the P&LM and Lee Nos. 5, 7, and 9 claims, which describe a shaft 5 deep at the discovery point, located at the mid-point on the center line of the claim. (Field Notes, M.S. No. 4894 (Ex. A to BLM Response to Petition to Supplement Record), at 13; see Plat, dated July 25, 1996 (Preliminary

Mineral Survey Plat) (attached to Nevada Pacific's Petition to Supplement Record.) Kesler reported a number of other shafts in the general vicinity of the mid-point of the center line of the claim, but none is closer than 125 feet. (Field Notes, M.S. No. 4894, at 13; see Mineral Survey Plat.) Further, Thompson states that the shaft shown in Nevada Pacific's Exhibit 10 is actually situated 200 feet northwest of Carlton's discovery point. (Thompson Declaration at 2-3; see Map ("Plat of P & LM Claim As Contended by [Nevada Pacific]") attached to Thompson Declaration.) A subsequent Carlton map, filed with BLM on August 30, 1995, shows a discovery monument ("DM") situated "AT SHAFT," located about 150 feet north of the mid-point on the center line of the claim. This map also shows an "Adit of Shaft," about 225 feet northwest of that mid-point, which BLM states is eight feet deep. (Letter to Nevada Pacific, dated Sept. 14, 1995, at 1.) The location of the eight-foot-deep shaft northwest of the mid-point on the center line of the claim is also confirmed by Kesler's report of a shaft nine feet deep 150 feet north-northeast of the mid-point on the center line of the claim. (Field Notes at 13; see Mineral Survey Plat.) The later map, prepared by Carlton and submitted to BLM on August 30, 1995, shows no discovery point or monument at the mid-point on the center line of the claim as depicted by Nevada Pacific.

In his original location notice, Lee stated that the P&LM claim was a relocation of the "old abandoned Fry Prospect." J.B. Fry located lode mining claims in the Gold Basin Mining District in November 1939 and January 1940.^{15/} However, there is no evidence of where the "Fry Prospect" was located on the ground, and we find nothing to suggest that the two monuments, which Nevada Pacific's and BLM's experts all now associate with the P&LM claim, were actually surviving monuments for that claim. BLM based its determination regarding the location of the P&LM on all of the monuments it found on the ground, including the monuments it found which were identified as monuments for adjacent claims located by Lee, but subsequently abandoned. The weight of the evidence supports BLM's conclusion that the Lucky Boy and Mystery claims were located on the ends of the P&LM claim, with adjoining end lines to trace what appeared to be the apex of a mineral structure. The location of the found monuments for the Lucky Boy and Mystery claims supports a conclusion that the center line of the P&LM claim runs through the most northerly found monument for that claim.

We also note that BLM's placement of the boundaries of the P&LM claim on the ground is close to the location of the claim on the 1979 USGS Map, filed for recordation with BLM in accordance with section 314(b) of FLPMA, 43 U.S.C.

^{15/} Copies of Fry's Queen Anne Nos. 1 through 5 location notices are found in the record.

§ 1744(b) (2000). This map was not prepared by Lee, but by a successor claim owner, and the location of the claim on the ground controls, even when the description in the location notice or the map filed with BLM shows that the claim is in a different place. Nonetheless, the 1979 USGS Map does support BLM's conclusion. Nevada Pacific correctly notes that it was not intended that the map filed pursuant to FLPMA requirements was to represent the exact location of the claim. However, it admits that "the maps that have been heretofore filed represent a reasonable approximation of the location of the[] claims from which the actual boundaries can be ascertained." (Letter to BLM, dated Sept. 21, 1994, at 2, emphasis added.) Both Thompson and Bubel state that the BLM placement of the claim on the ground agrees with the placement of the claim on the 1979 USGS Map.

We also note that Carlton's August 16 map shows the SE corner of the claim west of the N1/4 corner of sec. 4, and his August 30 map depicts the SE corner east of the N1/4 corner of the section (as shown on the 1979 USGS Map). Carlton's August 16 map places the SW corner of the claim approximately 66 feet from the center line of the 1966 power line right-of-way, and the SW corner of the claim is located southwest of the center line. However, the 1979 USGS Map places the SW corner of the claim northeast, about 220 feet from the center line. Bubel places the SW corner of the claim approximately 234 feet northeast of the center line. (Memorandum to Field Supervisor from Bubel, dated Sept. 17, 1995, at 3.) BLM's placement of the NW corner of the claim locates it north of the road, as it appears on the 1979 USGS Map, while Carlton places the NW corner south of the road. See Thompson Declaration at 4. We agree with Thompson's observation that "[i]t seems unlikely that the original author of the 1979 map [a member of the Lee family] would have missed such obvious geographic cues as an existing power line and his own access road." Id.

We find that, with the exception of a small portion of the P&LM claim, BLM properly concluded that the right-of-way for the Mead-Phoenix 500 kV electrical power transmission line, AZA-12037, does not cross Nevada Pacific's unpatented pre-1955 P&LM lode mining claim, AMC-31972. With respect to the area of conflict, the right-of-way was improperly issued and is void because Nevada Pacific has the exclusive right of possession and enjoyment of that area. See 30 U.S.C. § 26 (2000).

All of the claims in question were located prior to the right-of-way grant, but the Lee Nos. 5, 7, and 9 claims were located after 1955. My colleague, Judge Irwin, is concerned that BLM will not, and WAPA does not, recognize that the dominant and primary use of the lands subject to the P&LM and Lee claims is vested in the mining claimant. He correctly notes that BLM's authorization to manage, use, and dispose of surface resources is limited by section 4(b) of the Multiple Use Act, 30 U.S.C.

§ 612(b) (2000), to activities that do not “endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.” See Robert E. Shoemaker, 110 IBLA 39, 96 I.D. 315 (1989).

In September 1995, BLM stated that it could entertain a mining plan, provided that it accurately reflects the claim geometry. I believe that this decision answers the question of the claim geometry and that Nevada Pacific can now submit a proposed mining plan of operations which will be considered by BLM. The record also indicates that BLM recognizes that other use of the surface must be carried out or permitted in a manner that does not endanger or materially interfere with the approved mining and related operations or activities. BLM has yet to reject a mining plan of operations or insist upon restrictions that would endanger or materially interfere with mining, or related operations and activities on the mining claim. It is my opinion that, if the mining plan of operations submitted by Nevada Pacific represents a reasonable and practical means for mining the ore body, BLM will work with Nevada Pacific to develop a plan of operations that complies with current standards and regulations, and will not allow the right-of-way to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.^{16/} Judge Irwin’s concerns address issues that are not before us at this time.

Finally, except to the extent that they have been expressly or impliedly addressed in this decision, all other errors of fact or law raised by the parties hereto are rejected on the ground that they are contrary to the facts and law, or are immaterial.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM’s motion to dismiss is denied, the Area Manager’s September 1995 decision is reversed to the extent of the conflict between the P&LM lode mining claim (AMC-31972) and right-of-way grant AZA-12037, and affirmed in all other respects.

R.W. Mullen
Administrative Judge

^{16/} This determination might be made by comparing the proposed plan of operations with approved plans for similar mining operations on lands not encumbered with a right-of-way.

ADMINISTRATIVE JUDGE IRWIN CONCURRING:

I agree with Judge Mullen's conclusion, based on his careful examination of the record, that the right-of-way BLM granted to WAPA conflicts with a small portion of the surface of Nevada Pacific's P & LM mining claim, located before 1955, and that, to the extent of the conflict, the right-of-way is void. Nevada Pacific has an exclusive right under 30 U.S.C. § 26 (2000) to possess the area of conflict, and if WAPA wants that area then WAPA must pay Nevada Pacific to acquire it.

In my view, however, that is not the end of the matter. Nevada Pacific's protest directly raised the issue whether WAPA's right-of-way or the uses it authorizes will "endanger or materially interfere with [Nevada Pacific's] prospecting, mining or processing operations or uses reasonably incident thereto," 30 U.S.C. § 612(b) (2000), on the three Lee claims located after 1955 when that statute was enacted. Nevada Pacific's protest stated that WAPA's "proposed activit[y] includes both land within the P. and L.M. claim and otherwise endangers or materially interferes with operations and planned projected operations within the Lee claims."

BLM's September 14, 1995, response said there was no basis for Nevada Pacific's protest of the "crossing of the Lee claims" because there was no active mining taking place and Nevada Pacific had not filed a plan of operations until a year after the right-of-way was granted. That does not address Nevada Pacific's concern that WAPA's activities would endanger or materially interfere with prospecting, mining, or processing operations or uses related to such operations.

If BLM had any doubt about that concern it need only have re-read WAPA's September 28, 1994, letter to BLM, which it received the same day as Nevada Pacific's protest, outlining WAPA's reaction to Nevada Pacific's proposed plan of operations. WAPA's letter stated, among other things, that "[t]o ensure safe working conditions, it must be stipulated that no objects below or adjacent to the conductors [for the Mead-Phoenix 500-kV line] may extend to within 25 feet of the conductors." In Nevada Pacific's plan the southwest boundary of the proposed open pit was located directly below these conductors. WAPA was also "strongly concerned about blasting near the transmission lines and structures," and about "the potential impacts to [its] tower sites and access road" from the development of diversion ditches and drainage associated with the proposed open pit and overburden.

Nevada Pacific's statement of reasons for appeal says that "the construction and maintenance of the Power Transmission Line does now and will in the future interfere with the rights of Appellant to develop and mine its unpatented mining claims located within the path of the Right-of-Way and the Power Transmission Line."

Statement of Reasons at 2. Nevada Pacific's response to the answers filed by BLM and WAPA stated its position that "with regard to the Lee claims, WAPA's activities and its operation of its power line must be in such manner as to recognize the superiority of rights under these mining claims." Response at 2.

In Robert E. Shoemaker, 110 IBLA 39, 96 I.D. 315 (1989), we examined the legislative history of the language in 30 U.S.C. § 612(b) (2000) that limits use of the surface of mining claims, located after that language was enacted in 1955, by the United States or its permittees or licensees so that any use will not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto."

This language, carefully developed, emphasizes the committee's insistence that this legislation not have the effect of modifying longstanding essential rights springing from location of a mining claim. Dominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator; the United States would be authorized to manage and dispose of surface resources, or to use the surface for access to adjacent lands, so long as and to the extent that these activities do not endanger or materially interfere with mining, or related operations or activities on the mining claim.

110 IBLA at 50-51, 96 I.D. at 321, quoting H.R. Rep. No. 730, 84th Cong., 1st Sess., 10, reprinted in 1955 U.S. Code Cong. and Admin. News 2474, 2483. The Committee on Interior and Insular Affairs emphasized the mining claimant's dominant right in discussing the language in § 612(c) that limits claimants' use of surface resources subject to management by the United States: "This language, read together with the entire section, emphasizes recognition of the dominant right to use in the locator, but strikes a balance, in the view of the committee, between competing surface uses, and surface versus subsurface competing uses." 110 IBLA at 51, 96 I.D. at 321-322.

In Shoemaker we held that whether "a specific surface management action must yield to a conflicting legitimate use by a [mining] claim owner" depends on whether the action will cause "danger or peril" to the mining operations or will "substantially hinder, impede, or clash" with them. 110 IBLA at 54, 96 I.D. at 323. In that case, we found no evidence that BLM's action would endanger the claimant's operation. We did, however, find that its action would materially interfere with it and directed BLM to remove the offending structures. Id. at 56, 96 I.D. at 324.

In this case, there are clear statements of both danger and material interference in WAPA's letter, quoted above, and in Nevada Pacific's August 22, 1995, letter to BLM Area Manager Ken Drew: "[T]ransmission lines conflict and interfere with mining operations. Mining operations involve personnel, equipment, explosives, storage, and earth moving activities. Placing power transmission towers and lines on, over, or near mining operations raises questions and concerns of tower stability, health and safety of mining personnel, and the effect of the electromagnetic field emanating from the power lines on both personnel and mining equipment."

In United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277 (9th Cir., 1980), the U.S. Court of Appeals for the Ninth Circuit observed that a mining claimant has at least two remedies if a use interferes with its prospecting or mining activities. It "can protest to the managing federal agency about public use which results in material interference and, if unsatisfied, can bring suit to enjoin the activity. Secondly, a claimant with a valid claim can apply for a patent which, when granted, would convey fee title to the property." Id. at 1286.

On September 14, 1995, BLM wrote that it could "entertain a mining plan for this area, provided that it accurately reflects the conditions on the ground. The mining plan previously submitted for this area does not accurately reflect the claim geometry, and with proposed changes regarding shipment of ore off site cannot be considered sufficient. If a sufficient mining plan is submitted, it will be analyzed with due regard for the claimant's rights, both on any pre-1955 discoveries as well as any other proposed operating areas under the concept of multiple use management." Letter from BLM Area Manager Ken Drew to Samantha Masters-Brown.

Apparently, Nevada Pacific has awaited our decision in this case before proceeding with a revised plan of operations. In my view, now that we have resolved the extent of the conflict between the P & LM claim and WAPA's right-of-way, Nevada Pacific may submit such a plan with the expectation that BLM will take into account its exclusive right to possession of that portion of the P & LM claim and its right to be free from danger or material interference with its prospecting, mining, or processing operations, or uses reasonably incident thereto, on the Lee claims, as amended. Alternatively, if Nevada Pacific is not satisfied with the outcome of its protest, it may proceed as the Court of Appeals suggested.

Will A. Irwin
Administrative Judge