

Editor's note: 80 I.D. 538.

UNITED STATES
v.
KOSANKE SAND CORPORATION
(On Reconsideration)

IBLA 71-65

Decided August 3, 1973

Reconsideration of Board decision of September 3, 1971, 3 IBLA 189, which reversed in part a decision of Administrative Law Judge Graydon E. Holt, dated September 16, 1970.

Board decision of September 3, 1971, set aside and case remanded.

National Environmental Policy Act -- Mining Claims: Contests -- Mining Claims: Patents

It is not necessary for the Government to prepare an environmental impact statement before issuing a patent to a mining claim, as the patenting of a mining claim is not a "major Federal action" within the ambit of section 102 of the National Environmental Policy Act, 42 U.S.C. §4332 (1970).

12 IBLA 282

Mining Claims: Discovery: Generally -- Mining Claims: Hearings -- Rules of Hearings

Practice:

The Board of Land Appeals will set aside its former decision and remand a contest proceeding for further hearing where on reconsideration of such decision it finds additional evidence is necessary for a final determination.

APPEARANCES: Steven P. Kosanke, for the contestee; Charles P. Eddy, Esq., Office of the Solicitor, United States Department of the Interior, Washington, D. C., and E. Kendall Clarke, Esq., Field Solicitor, United States Department of the Interior, San Francisco, California for the contestant; Donn L. Black, Esq., of Orr, Wendel & Lawlor, Oakland, California, for the East Bay Regional Park District; Victor Westman, Esq., Deputy County Counsel of Contra Costa County for Contra Costa County; Michael W. Palmer, Esq., of Berkeley, California for the Environmental Defense Fund and the California Native Plant Society; Robert B. Morrill, Esq., of Petty, Andrews, Olsen, Tufts, Jackson & Sander, San Francisco, California; Beatrice Challis Laws, Esq., of San Francisco, California, and James W. Moorman, Esq., of San Francisco, California, for the Sierra Club; and Howard A. Twitty,

Esq., of Twitty, Sievewright, & Mills, Phoenix, Arizona, for the American Mining Congress.

OPINION BY MR. FRISHBERG

On September 3, 1971, the Board of Land Appeals, in United States v. Kosanke Sand Corporation, 3 IBLA 189, 78 I.D. 285, reversed a decision of Administrative Law Judge Graydon E. Holt, 1/ dated September 16, 1970, which had held null and void for lack of a discovery the N 1/2 of Earache No. 2, Earache Nos. III and 5, Pete, and the N 1/2 of Jeff placer mining claims embracing the N 1/2 NW 1/4 NE 1/4, N 1/2 NW 1/4, SW 1/4 NW 1/4, N 1/2 SE 1/4 NW 1/4, sec. 8, T. 1 N., R. 1 E., M.D.M., California. The Judge had premised his decision on the failure of the contestee to demonstrate the marketability of the silica sands for which the claims were located. The Board reversed, holding that while the Government had presented a prima facie case as to the invalidity of the claims, the contestee had presented sufficient evidence so as to meet its burden of proof. Subsequently the contestant and other parties petitioned for reconsideration of the Board's decision and submitted briefs in support of their petitions. On May 15, 1972, oral argument was held before the Board sitting en banc. Having

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

carefully considered all aspects of the case, it is the decision of the Board that the opinion of September 3, 1971, be vacated, and that the case be remanded for further hearing.

We take this action with reluctance. Additional proceedings will entail time and money. Yet the Department is required, before issuance of a patent, to examine each claim "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460 (1920). We are thus obliged to determine, with as great a degree of certitude as is possible, whether a discovery of a valuable mineral deposit has been made on these claims. On the record before us, we find that such a determination is impossible. Before a final decision can be made a new hearing must be held to elicit evidence on various factors, which shall be set out below.

Following our initial decision, a number of parties which had not formerly participated in the case petitioned for leave to file briefs in support of the Government's petition for reconsideration. These were the East Bay Regional Park District, Contra Costa County, the Environmental Defense Fund, Inc., the California Native Plant Society, and the Sierra Club. 2/ They were granted permission to

2/ The American Mining Congress filed an amicus brief in opposition to the environmental position espoused by the other amici curiae and appeared at the oral argument.

participate as amici curiae. These parties, in addition to alleging a lack of discovery on the contestee's part, argued that the National Environmental Policy Act [NEPA], 42 U.S.C. §§4321 et seq. (1970), requires the filing of an environmental impact statement. They also contended that NEPA and the General Mining Act of 1872, 30 U.S.C. §§21-54 (1970), require that the land be chiefly valuable for the mineral therein as a prerequisite to discovery.

We hold that the law does not require the preparation of an environmental impact statement in the case before us. Section 102 of NEPA, 42 U.S.C. §4332, provides in pertinent part that

* * * [T]o the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall:

* * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The Guidelines issued by the Council on Environmental Quality, 3/ a federal agency established under section 202 of the Act, provide:

* * * The phrase "to the fullest extent possible" in section 102(2)(C) is meant to make clear that each agency of the Federal Government shall comply with the requirement unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible (emphasis added). Guideline No. 4, 36 F.R. 7724 (April 23, 1971). (Section 105 of the Act provides that "The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.") 4/

3/ Council on Environmental Quality, Statements on Proposed Federal Actions Affecting the Environment, Guidelines, 36 F.R. 7724 (April 23, 1971). Issuance of the Guidelines to federal agencies for guidance in preparation of environmental impact statements was directed by Exec. Order No. 11514 §3(h), 3 CFR 526, 42 U.S.C. §4321 (1970). Although the Guidelines do not have the effect of a statute or regulation, they are nevertheless to be accorded "great deference [as] the interpretation given the statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16 (1965).

4/ " * * * The purpose of the new language [i.e., "to the fullest extent possible"] is to make it clear that each agency of the Federal Government shall comply with the directives set forth in such subparagraphs (A) through (H) [of clause (2) of section 102] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. If such is found to be the case, then compliance with the particular directive is not immediately required. However, as to other activities of that agency, compliance is required. * * *" H.R. REP. No. 91-765, 91st Cong., 1st Sess. 9 (1969).

It is our conclusion that "existing law applicable to the agency's operations," viz., the General Mining Act of 1872, as amended, supra, under which the claims herein involved were located, and which opens to location and purchase, "[e]xcept as otherwise provided, all valuable mineral deposits in lands belonging to the United States, * * * and the lands in which they are found * * *", 30 U.S.C. §22 (1970), "makes compliance impossible." This comports with the position of the Department when it reported in 1971 to the Council on Environmental Quality that the General Mining Act of 1872 "do[es] not admit of environmental considerations." 5/

fn. 4 (cont.)

In Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), the court stated:

"Thus the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of statutory authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance." Id. at 1115 (footnote omitted).

5/ Section 103 of the NEPA (42 U.S.C. §4333) provides:

"All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter."

In compliance with this mandate, the Deputy Solicitor, Department of the Interior, in a letter to the Chairman, Council on Environmental Quality, dated July 1, 1971, stated:

"On September 1, 1970, we submitted a report under section 103 of the National Environmental Policy Act. This letter is intended to supplement that report insofar as it pertains to the agency jurisdiction of the Bureau of Land Management (BLM).

* * * * *

The discovery of a valuable mineral deposit within its limits validates a mining claim located on public land in conformance with the statute, and its locator acquires an exclusive possessory interest in the claim, a form of property which can be sold, transferred, mortgaged, or inherited, without infringing the paramount title of the United States. 30 U.S.C. §26 (1970); Wilbur v. Krushnic, 280 U.S. 306, 316 (1930); Cole v. Ralph, 252 U.S. 286, 295 (1920); Forbes v. Gracey, 94 U.S. 762, 767 (1877). Such an interest may be asserted against the United States as well as against third parties, Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963); Gwillim v. Donnellan, 115 U.S. 45, 50 (1885), and may not be taken from the claimant by the United States without due compensation. See United States v. North American Transportation & Trading Co., 253 U.S. 330 (1920); cf. Best v. Humboldt Placer Mining Co., supra. The holder of a valid mining claim has the right, from the time of

fn. 5 (cont.)

"The so-called location and settlement laws leave BLM without authority to consider environmental factors in their administration. In Alaska particularly, the homestead settlement laws [43 U.S.C. §270 (1970)], the native allotment law [Acts of May 17, 1906, c. 2469, 34 Stat. 197, and August 2, 1956, c. 891, 70 Stat. 954, repealed by Act of December 18, 1971 (Alaska Native Claims Settlement Act), §18(a), 43 U.S.C.A. §1617(a) (1973)], and the purchases authorized for headquarters, trade and manufacturing or homesites [43 U.S.C. §§687a to 687a-6 (1970)] permit entry without prior approval of the BLM. A similar situation arises throughout the United States under the mining laws (30 U.S.C. §21 et seq.). The Department has no control over entries made pursuant to these laws and the basic statutes under which the entries are made do not admit of environmental considerations. New legislation is required, and the Department has consistently recommended such legislation." (Emphasis added.)

location, to extract, process and market the locatable mineral resources thereon.

Upon satisfaction of the requirements of the statute, the holder of a valid mining claim has an absolute right to a patent from the United States conveying fee title to the land within the claim, and the actions taken by the Secretary of the Interior in processing an application for patent by such claimant are not discretionary; issuance of a patent can be compelled by court order. Wilbur v. Krushnic, *supra*, 280 U.S. at 318-19; Roberts v. United States, 176 U.S. 221, 231 (1900). The patent may contain no conditions not authorized by law. Deffeback v. Hawke, 115 U.S. 392, 406 (1885). ^{6/} The claimant need not, however, apply for patent to preserve his property right in the claim, but may if he chooses continue to extract and freely dispose of the locatable minerals until the claim is exhausted, without ever having acquired full legal title to the land. Union City Oil Co. v. Smith, 249 U.S. 337, 348-49 (1919); United States v. Carlile, 67 I.D. 417, 421 (1960). ^{7/} The patent, if issued, conveys fee simple title to the

^{6/} " * * * The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department, resting for their fitness only upon the judgment of those officers. * * *" Davis' Administrator v. Weibbold, 139 U.S. 507, 528 (1891).

^{7/} " * * * The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. * * *" Wilbur v. Krushnic, 280 U.S. 306, 317 (1930).

land within the claim, but does nothing to enlarge or diminish the claimant's right to its locatable mineral resources.

In order that an environmental impact statement be required under NEPA, there must be contemplated "major Federal action(s) significantly affecting the quality of the human environment." §/

§/ "A `major federal action' is one that requires substantial planning, time, resources or expenditure. Clearly NEPA contemplates some federal actions which are minor, or have so little environmental impact, as to fall outside its scope.

* * * * *

"A federal action `significantly affecting the quality of the human environment is one that has an important or meaningful effect, directly or indirectly, upon any of the many facets of man's environment.' Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 367 (E.D. N.C. 1972). The phrase must be broadly construed to give effect to the purposes of the NEPA. A ripple begun in one small corner of an environment may become a wave threatening the quality of the total environment. Although the thread may appear fragile, if the actual environmental impact is significant, it must be considered. * * *" Citizens Organized to Defend the Environment, Inc. v. Volpe, 353 F. Supp. 520, 540 (D.C.S.D. Ohio 1972).

The following are examples of "major Federal actions" for which environmental impact statements have been required:

Decisions of the Secretary of Transportation involving federal-aid highway projects:

Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2d Cir. 1972); Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972); Brooks v. Volpe, 460 F.2d 1193 (9th Cir. 1972); Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir.), cert. denied, 409 U.S. 1000 (1972); Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1972); Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971); Stop H-3 Ass'n v. Volpe, 353 F. Supp. 14 (D. Hawaii 1972); Keith v. Volpe, 352 F. Supp. 1324 (C.D. Cal. 1972); Daly v. Volpe, 350 F. Supp. 252 (W.D. Wash. 1972); Conservation Soc'y of Southern Vermont v. Volpe, 343 F. Supp. 761 (D. Vt. 1972); Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132 (N.D. Ga. 1971); Nolop v. Volpe, 333 F. Supp. 1364 (S.D.S.D. 1971); Harrisburg Coalition Against Ruining the Environment v. Volpe, 330 F. Supp. 918 (M.D. Pa. 1971).

Construction of the Trinity River Basin Project:

Sierra Club v. Froehlke, No. 71-H-983 (S.D. Tex., filed February 16, 1973) [5 ERC 1033].

The statement is to be provided as part of a recommendation or report on a proposal to implement such action. It has been

fn. 8 (cont.)

Construction of the Tennessee-Tombigbee Waterway:

Environmental Defense Fund v. Corps of Engineers, 331 F. Supp. 925 (D.D.C. 1971).

Construction of the Cross-Florida Barge Canal:

Environmental Defense Fund v. Corps of Engineers, 324 F. Supp. 878 (D.D.C. 1971).

Construction of dam project:

Environmental Defense Fund v. TVA, 468 F.2d 1164 (6th Cir. 1972); Conservation Council of North Carolina v. Froehlke, 340 F. Supp. 222 (M.D.N.C. 1972).

Channelization of river bed:

National Resources Defense Council v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972); Akers v. Resor, 339 F. Supp. 1375 (W.D. Tenn. 1972).

Dredging of New Haven, Conn., harbor and dumping of dredged materials in Long Island

Sound:

Sierra Club v. Mason, 351 F. Supp. 419 (D. Conn. 1972).

Construction of coal-fired electric generating plants:

Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973).

Nuclear test on Amchitka Island, Alaska:

Comm. for Nuclear Responsibility v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971).

Simulated nuclear test on atoll in Pacific Trust Territories:

People of Eniwetok v. Laird, 353 F. Supp. 811 (D. Hawaii 1973).

Federally financed downtown urban renewal project:

Businessmen Affected by the Yearly Action Plans, Inc. (BASYAP) v. D.C. City Council, 339 F. Supp. 793 (D.D.C. 1971).

Federally funded waterfront rehabilitation project involving destruction of buildings of alleged historical value:

Boston Waterfront Residents Ass'n v. Romney, 343 F. Supp. 89 (D. Mass. 1972).

Federally funded state prison reception and medical center:

Ely v. Velde, 451 F. 2d 1130 (4th Cir. 1971).

Federal loan for construction of 16-story, 221-unit apartment building:

Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971).

Approval by National Capital Planning Commission of private redevelopment project in District of Columbia:

McLean Gardens v. National Capital Planning Comm'n, No. 2042-72 (D.D.C., filed October 21, 1972) [4 ERC 1708].

License to construct nuclear power facility:

held that the statement is not to be merely advisory in nature, but that the environmental considerations set forth therein must

fn. 8 (cont.)

Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971).

License to construct pumped storage electric power plant:

Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972).

License to construct high-voltage electric power transmission line:

Greene County Planning Board v. FPC, 455 F. 2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972).

Permit under Rivers and Harbors Act to construct water intake and discharge facility:

Citizens for Clean Air, Inc. v. Corps of Engineers, 349 F. Supp. 696 (S.D.N.Y. 1972).

Permit under Refuse Act to discharge refuse or treated waste water into navigable body of water:

Sierra Club v. Sargent, Civil No. 249-71C2 (W.D. Wash., filed March 16, 1972) [3 ERC 1905]; Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971).

Permission by Interstate Commerce Commission to abandon short-line freight railroad serving New York Harbor traffic:

City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972).

Federally imposed plan for control of emissions of sulphur oxides from copper smelter:

Anaconda Co. v. Ruckelshaus, 352 F. Supp. 697 (D. Col. 1972).

Termination by Secretary of the Interior of contracts for extraction and sale of helium awarded under National Helium Act:

National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

Award by Secretary of the Interior of offshore oil leases to 80 tracts of submerged land, primarily off eastern Louisiana:

Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

Approval by Secretary of the Interior of lease by Indian pueblo of lands on Indian reservation held in trust by the United States:

Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), rev'g 335 F. Supp. 1258 (D.N.M. 1971).

A common element which distinguishes the "major Federal actions" described above from the issuance of a patent to a valid mining claim is that in each instance cited there existed an area in which the federal agency involved was free to exercise discretion. After having accorded full weight to environmental factors the agency was empowered to render the final administrative decision on, e.g., the route, design,

be a factor in the agency's decision whether or in what form to carry out the proposed action. Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, 1117-18 (D.C. Cir. 1971). The statement must discuss, inter alia, "alternatives to the proposed action." ^{9/} The plain meaning of the statutory language connotes an action proposed to be taken by a federal agency which is discretionary in character and to which there may exist a viable alternative. It is difficult to perceive how the possible issuance of patent in the case before us can fall within the designated category. The action taken to perfect a claim and apply for patent, although

fn.8 (cont.)

or method of construction of a highway or a waterways project, or portion thereof, the scope and design of a federally funded rehabilitation project, or whether or not or under what conditions to grant a license, permit, loan, or lease. In no case which we have been able to find has a court characterized the performance of a ministerial duty as a "major Federal action(s)."

^{9/} In Natural Resources Defense Council v. Morton, supra note 8, a case involving the discretionary authority of the Secretary of the Interior to award offshore oil leases, it was held that the agency must consider all alternatives reasonably available, not necessarily limited to those measures which it is empowered to adopt. The court pointed out:

"The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decision-makers in the legislative as well as the executive branch. But the need for an overhaul of basic legislation certainly bears on the requirements of the Act. We do not suppose Congress intended an agency to devote itself to extended discussion of the environmental impact of alternatives so remote from reality as to depend on, say, the repeal of the anti-trust laws." Id. at 837.

To the ministerial act of issuance of a patent to a valid mining claim there exists no alternative. Even a complete overhaul of the General Mining Act of 1872 would have no effect on claims located before the effective date of the new legislation.

authorized and prescribed by law, is in no sense a federal action. The location of the claim, the exploration leading to discovery, the performance of the annual assessment work, and the compliance with the procedural provisions of the statute are all performed by the claimant. Once the statutory requirements have been met, the Secretary has no alternative but to issue patent.

While the decision-making process in determining the existence of a discovery involves an exercise of judgment, it is not discretionary in the ordinary sense. Wilbur v. Krushnic, 280 U.S. 306, 318-19 (1929). Discretionary authority implies the absence of fixed rules. 10/ Such authority is vested in the Secretary in granting oil or mineral leases 11/ and in issuing patents under certain statutes. 12/ In these cases, which do not involve property rights, the Secretary may weigh the effect of leases or patents against the public interest and grant or deny them accordingly, even though the applications meet all other statutory and regulatory requirements.

10/ See cases collected at 12A Words and Phrases, 327-355, App. 52.

11/ E.g., Udall v. Tallman, 380 U.S. 1 (1965); Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), cert. denied 383 U.S. 912 (1966); Haley v. Seaton, 281 F.2d 620 (D.C. Cir. 1960); some statutory grants of secretarial discretion are at 30 U.S.C. §§189, 201, 209, 211, 226.

12/ E.g., 43 U.S.C. §1171; Lewis v. Udall, 374 F.2d 180 (9th Cir. 1967); Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964); Willcoxson v. United States, 313 F.2d 884 (D.C. Cir. 1963); Jack H. Stockstill, 1 IBLA 278 (1971).

The Secretary has no such discretionary authority in determining whether a discovery exists and a patent should Issue. It has been the consistent position of the courts and this Department that because a mining claim is an interest in and a claim to property, it may not be declared invalid except in accordance with due process. Cameron v. United States, 252 U.S. 450 (1920); United States v. O'Leary, 63 I.D. 341 (1956). Due process means more than notice and opportunity for hearing. It requires the application of fixed, objective rules to facts. See Wilbur v. Krushnic, supra. In that case the Secretary was ordered by a writ of mandamus to apply the pertinent statute as interpreted by the Court to the application for patent. 13/

It has been argued herein that even assuming a patent must issue, the filing of an environmental impact statement by the Department of the Interior is nevertheless required by NEPA as a condition precedent to such issuance for informational purposes. We cannot accept this contention. NEPA intends that Congress and the general public be kept informed of major federal actions and the effects thereof. As we have already stated, however, the issuance of a

13/ While the Court's interpretation of the statute in Krushnic was modified in Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), the proposition for which Krushnic is cited herein, namely, the limited latitude of the Secretary in applying the mining laws, subject to court order, was not before the Court in Hickel and, hence, not affected by the latter.

patent to one who has fulfilled the requirements of the mining laws is not a major federal action within the meaning of NEPA. Moreover, to condition the full enjoyment of an existing right upon the filing of an informational statement by the executive branch of the federal government, the adequacy of which statement is subject to attack by third parties and ultimate determination by the courts, 14/ would seriously impair that right. Such proceedings might take years, and the mining claimant, whose right to full enjoyment is being enjoined, would be almost helpless to hasten the process.

Nowhere in NEPA or its legislative history does it appear that Congress intended such an effect upon the rights of private individuals. Where Congress has amended the mining laws by excluding certain minerals from location, it has consistently recognized the need to preserve property rights by excepting valid existing claims from the operation thereof. 15/ We do

14/ E.g., Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972); and see other cases cited above at note 8. According to Timothy Atkeson, General Counsel, Council on Environmental Quality, fifty governmental actions are presently enjoined pending compliance with NEPA. See his statement before the Subcommittee on the Environment of the Senate Committee on Commerce on April 5, 1973, at 8.

15/ E.g., §37 of the Mineral Leasing Act of 1920, 41 Stat. 451, 30 U.S.C. §193 (1970); §7 of the Common Varieties Act of 1955, 69 Stat. 372, 30 U.S.C. §615 (1970).

not believe that it intended to do otherwise when enacting the National Environmental Policy Act.

As noted above, a claimant need not obtain full legal title to the land in order to retain the right to extract and dispose of the locatable minerals until they are exhausted. Wilbur v. Krushnic, supra; Union City Oil Co. v. Smith, supra; United States v. Carlile, supra. From this it might be argued that delay in issuance of a patent would cause the owner of a valid claim no real injury. But this argument illustrates the fatal defect in the proposition that NEPA requires the filing of an environmental impact statement before patent can issue. For the real environmental issue is not legal title to the claim, but the impact of the mining operation upon the environment. To the extent that the mining laws give to individuals the right to enter the public domain, to locate claims thereon, to discover minerals therein, and to extract and remove those minerals therefrom, all without prior approval of the United States, the development of a mining claim cannot be tortured into "Federal action," major, minor or otherwise.

That the Secretary is not required to file an environmental impact statement as a condition precedent to issuance of patent does not foreclose consideration of environmental costs in the resolution of the issue before us: whether each of the claims is in fact valid by reason of the discovery of a valuable mineral deposit within its

limits. To the extent federal, state, or local law requires that anti-pollution devices or other environmental safeguards be installed and maintained as part of the processes of extraction and beneficiation of the minerals contained in the claims, the expenditures made necessary by such protective measures may properly be considered in connection with the issue of marketability, as part of the costs in determining whether appellant has a reasonable prospect of success in developing a valuable mine within the claims.

As regards the second point relating to whether a comparison of values prior to the issuance of a patent is required, the applicable laws recognize no such test. In early cases involving the application of the mining laws, the Department was faced with numerous private contests between agricultural entrymen and mineral claimants as to whether the land in issue was mineral or non-mineral in character. See, e.g., Castle v. Womble, 19 L.D. 455 (1894); Magruder v. Oregon and California R.R. Co., 28 L.D. 174 (1899). These cases focused on the comparative value of the lands involved for mining as opposed to agricultural purposes. They seemed to apply precisely the balancing approach advocated by amici curiae. In Cataract Gold Mining Co., 43 L.D. 248 (1914), however, the Department was confronted by a case within which it was alleged that regardless of whether minerals existed in such quantity and of such quality as would meet the prudent man rule of Castle v. Womble, supra, the land was still more valuable for the development of

electrical power. The Department examined the law and noted that while many earlier decisions had apparently utilized a balancing of values approach, those decisions had actually been premised on the belief "that the land involved possessed a positive or greater value for the purposes for which the award was made and no practical or commercial value for the purposes for which patent was denied." Id. at 252. The Department then expressly held that:

* * * if a mineral claimant is able to show that the land contains mineral of such quantity and value as to warrant a prudent man in the expenditure of his time and money thereupon, in the reasonable expectation of success in developing a paying mine, such lands are disposable only under the mineral laws, notwithstanding the fact that they may possess a possible or probable greater value for agriculture or other purposes.

Id. at 254. Cited with approval in United States v. Langmade, 52 I.D. 700, 705 (1929).

A useful comparison can be made between the Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. §22 (1970), under which the claims were located in the instant case, and the Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. §161 (1970), relating to building stone. Section 1 of the Act of 1872, as amended, provides:

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free

and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States * * * [Emphasis added]

30 U.S.C. §22.

Section 1 of the Act of 1892 provides:

Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims. * * * [Emphasis added]

30 U.S.C. §161.

The Act of 1872 contains no language that admits of limitation on the location of claims, save that they must be for valuable mineral deposits. The Act of 1892, relating to building stone, however, requires as an additional prerequisite for a valid claim for building stone that the lands embraced within such claims must be chiefly valuable for the located mineral. Therein, Congress has expressly mandated a comparison of values approach. But it is equally clear that Congress has chosen not to amend the Act of 1872 to the effect that all claims must embrace lands chiefly valuable for located minerals. We do not believe that anything in NEPA would hint that

Congress intended so drastic a revision. Nor have the amici curiae pointed to anything in the legislative history of the Act that would justify such a reading of the statutory language. Accordingly, we hold that under the Act of May 10, 1872, supra, if the discovery of a valuable mineral deposit be shown, a valid claim exists, regardless of a more beneficial use to which the land might be put. See United States v. Iron Silver Mining Co., 128 U.S. 673, 684 (1888).

While the existence of other values does not qualify the locator's rights under the mining law if he has a valid claim, it may be a factor in determining whether a valid claim exists. It may be considered in assessing the weight and credibility to be accorded the locator's testimony in determining whether a discovery has been made. Helen V. Wells, 54 I.D. 306, 309 (1933); E. M. Palmer, 38 L.D. 294 (1909). And it may be an issue in evaluating his bona fide intention to develop a mining operation. As the Court stated in United States v. Coleman, 390 U.S. 599, 602 (1968):

Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes.

We note that the East Bay Regional Park District has applied for the land under the Recreation and Public Purposes Act, 43 U.S.C.

§§869 et seq. (1970), and that Contra Costa County, within which the land is situated, supports this action. We believe they have the requisite interest to participate in further proceedings, and they will be recognized as parties in the hearing below. The other amici curiae have only a general concern for the environment of the area and the application of the mining law. Accordingly, they will not be granted status in the hearing as parties but may remain as amici for the limited purpose of filing briefs to the Judge or this Board.

Contestant requests that the Board reverse its decision of September 3, 1971. In support of its request contestant asserts that the decision of the Board is unclear as to exactly what standard was applied in connection with the marketability test. The test to be applied in determining whether the locator of a mining claim has demonstrated a discovery of a valuable mineral deposit is set forth by the Department in Castle v. Womble, 19 L.D. 455, 457 (1894):

[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

This test has met the approval of the Supreme Court on several occasions. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963);

Cameron v. United States, 252 U.S. 450 (1920); Chrisman v. Miller, 197 U.S. 313, 322 (1905). In United States v. Coleman, 390 U.S. 599 (1968), the Supreme Court again approved the prudent man test and specifically recognized the marketability test as a logical complement to and refinement of the prudent man rule. In Coleman the court stated:

Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact.

390 U.S. at 602, 603.

In our view, this Board applied the proper legal standard in our original decision. While we recognize that a mining claimant's burden of proof may be more difficult to meet in a situation where, as here, developmental work on a claim has not reached the stage of full-scale mining operations, the standard to be applied is the same regardless of the extent to which a locator has developed his claim. Obviously, contestee's burden of proof is much more difficult to meet where development of his claim has not reached the point of actual sales and significant profits. See, e.g., United States v. Pierce, 75 I.D. 255 (1968); United States v. New Jersey Zinc Company, 74 I.D. 191 (1967); cf. United States v. Anderson, 74 I.D. 292 (1967).

However, the mining laws do not require a mining claimant to demonstrate a paying mine as an accomplished fact. See United States v. McKenzie, 4 IBLA 97, 100 (1971).

Contestant next argues that the evidence adduced at the original hearing does not support a finding of discovery on each claim. Upon re-examination of the record, we conclude that the evidence is insufficient to make a final determination as to the validity of the claims. Therefore, all parties are afforded a further opportunity to produce evidence on those issues which were insufficiently covered at the first hearing.

Upon rehearing, in order to establish a discovery on each claim in issue, evidence should be further developed on the following points:

1. Significant variations in value occurred between the samples taken by contestant and contestee. Therefore, further sampling is necessary to demonstrate clearly the quality and quantity of silica sand on each claim. In the analysis of the samples care should be taken to avoid combining samples from different claims. As this Board stated in United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43, 51-52 (1972):

[T]here must be a discovery on each claim. The appellants must show as to each claim that they

have found a mineral deposit which satisfies the prudent man rule as complemented by the marketability test. (Emphasis in original)

In order to avoid further problems in connection with sampling, we recommend that joint sampling be conducted on each claim.

2. The quantity of sand on the claims should be considered in connection with the existing and foreseeable market; i.e., evidence should be presented on the presence of sufficient reserves within the limits of each claim. The record contains no such evidence. Should the validity of one or more of the claims be established, the issue of possible excess reserves must be considered. See United States v. Anderson, supra.

3. Different grades of silica sand produce different types of glass. Thus, the critical issue in establishing marketability is the nature and extent of the market for each grade of glass sand and the approximate amount of each grade on each claim.

4. The milling and flotation process described by contestee in the original hearing needs further clarification in order to determine whether the costs of beneficiation permit the silica sand to be marketed at a profit. In developing this evidence, to the extent it is reasonably possible, similar costs of other producers should also be presented.

Contestant contended, and the Judge so held, that absent an actual pilot testing of the proposed process, it cannot be determined whether the process can be worked at a profit. We reject such a position. Certainly, the existence of a successful pilot plant would greatly increase contestee's ability to demonstrate the costs of producing its silica sand and the feasibility of its process. When the contestee's case rests on a proposed flotation process which has yet to be tested, expert corroborative evidence would be helpful and might be essential in determining the potentiality of success. The Government, of course, may rebut such evidence.

5. Evidence relating to the costs of transportation should be further developed on rehearing. The subject claims are closer to the existing markets than the deposits of present suppliers. It does not necessarily follow, however, that contestee's costs of transportation will be lower. While distance is an important factor in determining transportation costs, it is not necessarily the only factor. Transportation costs may vary depending upon whether sand is shipped by road, rail, or water. Costs may also vary depending upon the difficulty presented by the geographic conditions of the route, as well as other factors.

Contestee argues that silica sand is shipped "f.o.b. plant at \$4.25 per ton" and that transportation costs under these terms are

incurred by the glass producers rather than the sand suppliers. We recognize that where a glass producer quotes a price for sand and incurs the transportation costs, the producer, in all likelihood, reflects this cost in the price per ton he is willing to pay a particular supplier for silica sand. However, we cannot determine from the present record whether glass producers would quote the same terms to contestee as they apparently have quoted to existing sand suppliers.

It may be that, because of geographic conditions or the mode of transportation, glass producers will offer better terms to contestee than they apparently have made to existing suppliers. On the other hand, because of geographic conditions or the mode of transportation, glass producers may not want to incur the expense of transportation, and therefore may offer contestee a price for its sand which does not reflect transportation as a cost. In the latter instance contestee would have to produce evidence to establish its cost of transporting sand from its claims to the glass producers. Whatever the situation might be, evidence should be developed on transportation costs so that an informed determination can be made with regard to this issue in applying the marketability test.

6. Since water is relatively scarce in the area of the claims, its availability, the contestee's right to use it and the cost

related to such use are all items which must be considered on remand.

7. As discussed above, evidence, if any, as to additional costs necessary to meet pollution control standards, under such applicable federal, state, and local laws as may apply, is relevant to determine whether production may be reasonably foreseen as returning a profit to contestees.

8. In applying the legal standards to the facts of the case, all factors must be considered as of the time of the hearing and as of the time the land in issue was officially classified for disposition under the Recreation and Public Purposes Act, 43 U.S.C. §§869 et seq. (1970).

9. In addition to determining whether a discovery has been made and still exists on each of the claims, the date on which each discovery was made must be considered. The date is important for two reasons.

First, the claims were located by Steve Kosanke and others in 1963 and 1964 as association placer claims of 40 acres each. Three of the claims remaining at issue, Earache No. III, Earache No. V and Pete, still contain 40 acres. Although the exact date

of transfer does not appear in the record, Kosanke's patent application, filed July 30, 1964, states that the claim had been conveyed to Kosanke Sand and Gravel Company. Unless a discovery is made prior to the transfer of an association placer claim to a single claimant, the transferee is only entitled to perfect each claim as to 20 acres. United States v. Harenberg, 9 IBLA 77, 86 (1973); United States v. Lease, 6 IBLA 11, 27; 79 I.D. 379, 386, n.5 (1972). Therefore, unless there was a discovery on each of these three claims prior to the date of the transfer to contestee, each claim can be valid for 20 acres at most.

The date of discovery is also crucial for another reason. On September 30, 1970, the California State Director, BLM, classified the lands covered by these mining claims for lease or sale for recreational use under the Recreation and Public Purposes Act, 43 U.S.C. §§869 et seq. (1970). The classification withdrew the land it covered from disposition under the public land laws, including the mining laws, but did not adversely affect valid existing rights. Buch v. Morton, 449 F.2d 600 (9th Cir. 1971). Therefore, all the requirements essential to a valid mining location must have been completed by that date at the latest.

The classification was made pursuant to an application filed on October 24, 1964, by the East Bay Regional Park District. East Bay Regional Park contends that equity and the doctrine of de facto

withdrawal require a relation back of the classification decision to the date of its application. While the Department has held that in some circumstances the classification or other disposition of public land relates back to the date of filing of the application leading to such action, Frank Melluzzo, 72 I.D. 21 (1965); Harry E. Nichols, 68 I.D. 39 (1960), it has not ruled upon whether an application under the Recreation and Public Purposes Act falls within this principle. See R. C. Buch, 75 I.D. 140, 144 (1968), aff'd, Buch v. Morton, supra. 16/ Since the issue may not arise in this case, depending on resolution of other factual questions, we do not decide it now. However, to resolve all possibly pertinent matters, we request the Judge to consider in his findings whether a discovery existed as of October 24, 1964.

At the hearing, the parties may develop such other evidence as is pertinent.

This case has engendered considerable public and legislative comment within the San Francisco and Sacramento areas. Nevertheless, we are confident that each Administrative Law Judge situated in Sacramento would conduct the hearing with judicial detachment and fairness. We are concerned, however, not only with the substance

16/ For a discussion of the resolution of a conflict between an oil and gas lessee and a mineral locator, see Union Oil Company of California, 65 I.D. 245 (1958), aff'd, Union Oil Company of California v. Udall, 289 F.2d 790 (1961).

of justice, but also with its appearance. Consequently, to remove any basis for doubt as to the impartiality of further proceedings, we direct that a Judge be assigned from the Salt Lake City Office, Hearings Division, Office of Hearings and Appeals, to hear this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of this Board dated September 3, 1971, is set aside and the case is remanded for further hearing and decision.

Newton Frishberg, Chairman

We concur:

James M. Day, Director ex officio member

Frederick Fishman, Member

Douglas E. Henriques, Member

MR. STUEBING CONCURRING IN PART, DISSENTING IN PART.

I am in full agreement with those portions of the majority opinion which hold (1) that the accomplishment of an environmental analysis and statement as contemplated by Section 102(C) of the National Environmental Policy Act of 1969 is not a prerequisite to the issuance of a patent to a valid mining claim located in compliance with the Act of May 10, 1872, as amended, and (2) that the law does not provide that claims so located may be found to be invalid by weighing the prospective value of their anticipated mineral yield against the present or prospective value of the land for other purposes.

However, I do not agree with the majority that the state of the record is so deficient that it will not support the conclusion reached in the decision of September 3, 1971 (3 IBLA 189). Accordingly, I adhere to that decision.

Edward W. Stuebing, Member

I concur:

Anne Poindexter Lewis, Member

MRS. THOMPSON CONCURRING IN PART, DISSENTING IN PART

I agree that this case must be remanded for a further hearing to resolve adequately the question of the validity of the claim and entitlement to patent.

I disagree with Mr. Frishberg's opinion with regard to the question relating to a comparison of mineral and other land values. I believe his opinion sweeps unnecessarily and too broadly in ruling on the materiality of comparative values. He recognizes that evidence of nonmineral values may be admitted for the purpose of evaluating the claimant's good faith and in assessing the weight and credibility of his testimony. With this I agree. However, I disagree with the attempt to resolve the broader question as to the application of the comparative value test on the validity of mining claims in other respects. There are conflicting precedents and viewpoints in applying such a balancing test. A ruling of such importance is best made after all of the facts are known. It may be that this case will be resolved on further hearing without the necessity of deciding this question. Therefore, a ruling now is premature. Evidence on comparative values may be admitted, in any event, although cast in a different complexion.

Accordingly, I would defer a final ruling on the scope of the applicability of comparative values in evaluating the validity of a

mining claim, and the mineral character of the land embraced thereby, until resolution of the question is required after the complete factual record has been made. This obviates any reason for discussing the principles involved and my viewpoints on this question at this time.

Joan B. Thompson, Member

We concur:

Martin Ritvo, Member

Joseph W. Goss, Member

