**Editor's note: 90 I.D. 352**

IN RE PACIFIC COAST MOLYBDENUM CO.

IBLA 81-1027 Decided August 5, 1983

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dismissing protests to issuance of mineral patent for certain mining claims.

Affirmed.

1. Mining Claims: Determination of Validity--Mining Claims: Patent--Rules of Practice: Appeals: Burden of Proof--Rules of Practice: Protests

   Where protests to a mineral patent application are denied and an appeal is taken, protestants have the burden of affirmatively establishing that patent should not issue and that BLM's decision was in error.

2. Mining Claims: Discovery: Generally--Mining Claims: Discovery: Marketability

   The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or

change, there is a reasonable likelihood of success that a paying mine can be developed.

3. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Patent

The quantum of evidence necessary to prove a discovery does not change because the land on which the claim is located may have other values. Bad faith in locating a claim, however, where proved, requires invalidation of a claim even where it is supported by a discovery.

4. Mining Claims: Generally--Patents of Public Lands: Generally

Where a corporation seeking a mineral patent files a certificate showing incorporation under the laws of a state, such corporation has established its citizenship within the meaning of the Mining Law of 1872, and a conclusive presumption thereby arises that all stockholders of the corporation are citizens of the United States, regardless of whether this is true or not.

APPEARANCES: Durwood J. Zaelke, Esq., Juneau, Alaska, for appellants; F. O. Eastaugh, Esq., Juneau, Alaska, Brian T. Donlan, Esq., and Charles L. Kaiser, Esq., Denver, Colorado, for appellee Pacific Coast Molybdenum Company; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

United Southeast Alaska Gillnetters (USAG) and the Southeast Alaska Conservation Council (SEACC) have appealed from a decision of the Alaska

State Office, Bureau of Land Management (BLM), dated August 3, 1981, denying their protests to an application for mineral patent filed by Pacific Coast Molybdenum Company (PCM). 1/ The application for patent involved a total of 32 lode claims (the JES 34-41, 55-62, 76-83, and 97-104, inclusive) located in unsurveyed secs. 34 and 35, T. 74 S., R. 98 E., and secs. 2 and 3, T. 75 S., R. 98 E., Copper River meridian, Alaska, within the exterior boundaries of the Tongass National Forest.

The claims in issue were located on October 24, 25, 28, and 30, 1974, by United States Borax and Chemical Corporation, and were subsequently conveyed by deed on November 26, 1975, to Pacific Coast Mines, Inc. On December 21, 1977, Pacific Coast Mines, Inc., quitclaimed the claims to PCM. 2/ Pacific Coast Mines, Inc., had filed an application for mineral survey in April 1976, and mineral survey No. 2267 was approved by the Chief, Division of Cadastral Survey, on January 19, 1978. In its application for patent, PCM alleged a discovery of molybdenum had been made within the 647.118 acres claimed.

While the lands embraced by PCM's claims were open to mineral entry when they were located, the lands were subsequently set apart and reserved

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1/ In a decision styled In Re Pacific Coast Molybdenum Co., 68 IBLA 325 (1982), this Board ruled that USAG and SEACC had standing to appeal from a denial of their protests. In that same decision, we held that the Sierra Club (Alaska Chapter) having failed to file a protest, was not a party to the case under 43 CFR 4.410 and thus lacked standing to appeal.

2/ We note that PCM (formerly Quartz Hill Mining Co.) is a wholly owned subsidiary of Quartz Hill Holding Co. which, in turn, is a wholly owned subsidiary of Pacific Coast Mines, Inc., which is wholly owned by Rio Holding Corp., which is wholly owned by RTZ Borax, Ltd., which is wholly owned by Rio Tinto-Zinc Corp., Ltd., a United Kingdom Corporation.

as part of the Misty Fiords National Monument on December 1, 1978, by Presidential Proclamation No. 4623 (93 Stat. 1466), pursuant to section 2 of the Antiquities Act, Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. § 431 (1976). In addition, on December 5, 1978, notice was published in the Federal Register of an application filed by the United States Department of Agriculture, AA-23139, seeking a withdrawal of various lands, including the lands embraced by PCM's claims, from location and entry under the general mining laws. See 43 FR 57134 (Dec. 5, 1978). Under the provisions of section 204(b)(1) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2751, 43 U.S.C. § 1714(b)(1) (1976), the publication of this notice also served to segregate the lands involved for a period of 2 years or until such time as the application was either approved or disapproved, whichever came first.

Subsequent to publication of notice of PCM's patent application, as required by 30 U.S.C. § 29 (1976), various organizations, including appellants, protested issuance of patent with respect to these claims. These protests were denied by the State Office in a number of separate decisions, dated August 3, 1981. Appellants timely pursued an appeal to this Board.

Before commencing an analysis of the issues raised by appellants, however, we wish to make two preliminary points. First, notice must be taken of the relevant provisions of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371, Act of December 2, 1980 (codified variously in titles of the United States Code). Of particular relevance are the provisions found in sections 503 and 504 concerning the establishment of the Misty

Fjords National Monument. 3/ Section 503(f)(1) withdrew the lands within the monument from the operation of the general mining laws. However, section 503(f)(2) provided:

> (A) After the date of enactment of this Act, any person who is the holder of any valid mining claim on public lands located within the boundaries of the Monuments, shall be permitted to carry out activities related to the exercise of rights under such claim in accordance with reasonable regulations promulgated by the Secretary to assure that such activities are compatible, to the maximum extent feasible, with the purposes for which the Monuments were established.
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> (B) For purposes of determining the validity of a mining claim containing a sufficient quantity and quality of mineral as of November 30, 1978, to establish a valuable deposit within the meaning of the mining laws of the United States within the Monuments, the requirements of the mining laws of the United States shall be construed as if access and mill site rights associated with such claim allow the present use of the Monuments' land as such land could have been used on November 30, 1978.

In addition, section 503(i)(1) provided for the leasing of lands for mining and milling purposes to holders "of valid mining claims."

Section 504, 94 Stat. 2403, provided a mechanism whereby any holder of an "unperfected mining claim" might obtain an exploration permit, and, upon a subsequent discovery of a valuable mineral deposit, a patent limited to the discovered mineral estate. An "unperfected mining claim" was differentiated from a "core claim." A "core claim" was defined as either a patented mining

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3/ While section 503(a) of ANILCA, 94 Stat. 2399, established the Misty Fjords National Monument containing approximately 2,285,000 acres, the Misty Fjords National Monument Wilderness, established by section 703(a)(5), 94 Stat. 2419, embraced 2,136,000 acres. The remaining 149,000 acres surrounding the Quartz Hill area were not placed in the Misty Fjords National Monument Wilderness.

claim or an unpatented mining claim which was properly located, recorded, and maintained and which was, as of November 30, 1978, supported by a discovery of a valuable mineral deposit. The question before the Board is whether the 32 lode claims in issue were supported by a discovery as of November 30, 1978, and thereby constitute a "valid mining claim" under section 503(f) and attain the status of core claims under section 504(a).

[1] We also think it appropriate at the outset to clearly delineate the scope of our review and the concomitant burden placed on appellants. Normally, where the Government challenges the validity of a mining claim it bears the initial burden of presenting a prima facie case showing the claim's invalidity; the burden then devolves upon the claimant to overcome that showing by a preponderance of the evidence. See generally Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Strauss, I.D. 129 (1945). This approach results from recognition of the fact that when the Government contests the validity of a mining claim it has, under its plenary authority, determined to examine the status of a claim to land. In the context of a patent application, such a challenge is premised on the implicit finding by BLM that the evidence submitted with the patent application is insufficient to establish entitlement to a patent. United States Steel Corp., 52 IBLA 319 (1981). As a precondition to the issuance of patent, a mineral examination of the claim by Government mineral examiners is necessary. See Brattain Contractors, Inc., 37 IBLA 233 (1978). Where the totality of the evidence indicates that a discovery of a valuable mineral deposit within the meaning of the mining laws has not been made, BLM must issue a contest complaint. In

such a proceeding, therefore, the claimant is the ultimate proponent of the rule, i.e., the validity of the claim. See Foster v. Seaton, supra.

This procedure, however, must be contrasted with the one before us in the instant case. Here, based both on the submissions of the patent applicant and the Government's own mineral examination, the appropriate officers of BLM, who are vested with the obligation to safeguard the public domain "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)), have determined that the mineral applicant has shown its entitlement to patent. Appellants have protested this decision. The State Office, having duly considered these protests, has rejected them. Decisions issued by state offices, pursuant to their delegated authority, are presumptively valid. It is appellants who are the proponent of the rule in this case, viz., that the decision appealed from is in error. The mineral claimant is not required in this case to affirmatively show his entitlement to patent. BLM has already determined that matter in favor of the claimant. Appellants must establish that this decision was wrong. 4/

Turning to the substance of the appeal, appellants have alleged, in essence, three separate grounds for appeal: (1) PCM has failed to show a discovery of a valuable mineral deposit existed prior to December 1, 1978;

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4/ This is analogous to private contest proceedings. While, as we have noted above, the Government merely bears the burden of presenting a prima facie case upon which occurrence the ultimate burden of preponderation devolves upon the mineral claimant, where a private contest is initiated, the private contestant, not the claimant, has the ultimate burden of proof. See State of California v. Doria Mining & Engineering Corp., 17 IBLA 380, 389 (1974); Marvel Mining Co. v. Sinclair Oil & Gas Co., 75 I.D. 407, 423 (1968).

(2) an environmental impact statement (EIS) is required prior to issuance of any patent to PCM; and (3) BLM should have investigated whether PCM is a citizen of the United States. 5/

In their challenge relating to discovery, appellants argue at considerable length that PCM's patent application failed to delineate, with sufficient particularity, the costs associated with mining and milling with special emphasis on environmental considerations. In order to place their argument in perspective, we shall briefly review both PCM's application and the mineral examination report prepared by the Forest Service, United States Department of Agriculture.

PCM's mineral patent application, as amended by two separate supplements, dated January 4 and March 18, 1980, alleged discoveries of substantial deposits of molybdenum at an average grade of fifteen-hundredths percent MoS[2]. 6/ PCM stated that each claim contained either an outcrop or one or more drill holes. Open pit operations were envisaged, which would include drilling and blasting on benches, the loading of the broken rock on trucks for haulage to a primary crusher and, after crushing, the lean ore to stockpiles and the waste back to dumps. The milling process, described in the first supplement, would involve secondary and possible tertiary crushing

5/ To the extent appellants are continuing to assert that they possess the requisite standing to initiate a private contest, we note that our prior decision In Re Pacific Coast Molybdenum, supra, decided this issue adversely to them.

6/ PCM provided no specific tonnage of enriched material insofar as the 32 claims at issue were concerned. It merely noted that the claims embraced a portion "of a large cohesive body of molybdenite mineralization, which is estimated to contain, from current drill results, a geologic reserve of 700 million tons" (patent application at 8).

with the fine ore placed in storage bins. Subsequently, the fine ore would be conveyed to rod and ball mills to be ground in a slurry to sufficiently small particles to liberate the molybdenite from the country rock. The ore in the slurry would then be pumped to flotation cells where molybdenite concentrates would be floated. Then, the concentrates would be filtered, dried and placed in containers for shipment to market. While the milling facilities would be located adjacent to the mine, the concentrates would be trucked approximately 10 miles to a dock at tidewater and would be barged from there to a port for shipment to ultimate domestic and foreign consumers.

Total costs (in 1979 dollars) were estimated by PCM to run $5.31 per ton. 7/ At an average grade of sixteen-hundredths percent MoS[2], assuming 83 percent mill recovery and that sales would be equally divided between domestic and foreign markets, gross returns were expected to be $12.82 per ton, thereby leaving a net profit of $7.51 per ton. 8/ According to the first supplement, included in the production costs estimate was $5,563,000

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7/ The cost breakdown was as follows:

| Operating Costs | Dollars per Ton |
|---|---|
| Mining | $1.72 |
| Milling | 2.13 |
| Transportation | 0.07 |
| | $3.92 |
| Depreciation | |
| Environmental | 0.02 |
| Facilities | 1.37 |
| | $1.39 |
| | $5.31 |

8/ For some unexplained reason, PCM, having stated in its original patent application that the average grade of the deposit was 0.15 percent MoS[2] (see Patent Application at 8), used an average grade of 0.16 percent MoS[2] in calculating its return in the Second supplement. If the deposit does have an average grade of 0.15 percent as originally contended (and which is also the figure used by the Forest Service), PCM would receive gross returns of $12.02 per ton, with a net profit of $6.71 per ton, assuming the correctness of its other assumptions.

to defray the anticipated costs of meeting Federal, state, and local environmental and reclamation permitting requirements. Included in this $5.5 million figure were the costs necessary to generate baseline environmental data. An additional $400,000 was allocated to environmental monitoring (see Second Supplement at Item 11). Costs of reclamation after mining were estimated to be $4,675,000. Special note must be made of the fact that, while PCM asserted that costs of specialized equipment needed to meet environmental standards were included in the cost per ton figure under the mining or milling costs, where appropriate, no specific figures relating to these costs were included in any of its submissions.

As noted above, prerequisite to the issuance of patent is a physical examination of the claims by a Government mineral examiner. An examination of these claims was conducted by two Government mineral examiners, Wesley G. Moulton and Don E. Williams. 9/ A report of their findings (hereinafter the Moulton-Williams Report) was prepared for the Forest Service which transmitted the report to BLM.

The Moulton-Williams Report estimated total tonnage at 776,830,000 tons of proven reserves at fifteen-hundredths percent MoS[2]. Preproduction costs were estimated to amount to $400,000,000. The production costs were determined to be $3.585 a ton with production and milling costs determined to be $2.13 per ton. At an annual production of 14,600,000 tons per year this amounted to annualized costs of $52,341,000. We note, however, that an

9/ The examination actually encompassed a total of 49 claims, 17 of which are not involved in this patent application.

examination of Exhibit F, which contained the Report's costs computations shows that the authors made two transpositional and one arithmetical error in calculating mining costs. On page 26, they show haulage costs of $1,668,000. The actual figure which they developed was $1,168,000. Additionally, cleanup costs should have been $262,800 rather than $292,000. Finally, an addition error of this column amounting to $500 was also made. Thus, the total given for annual operating expenses overstated the costs by $530,500 assuming the correctness of the Moulton-Williams Report's assumptions. Correcting their final figures to reflect this fact, production costs would be $3.565 per ton and total annual production costs would be $52,049,000.

These corrections are relatively minor compared to the noticeable differences between the figures used by the Moulton-Williams Report as to per ton production costs and selling price per pound of Mo, compared to those used by PCM in its application. Thus, PCM had estimated production costs of $5.31 per ton and a selling price of $8.05 per pound of Mo. The Moulton-Williams Report, on the other hand estimated production costs of $3.565 per ton and a selling price of $5.86 per pound of Mo. We will return to the discrepancy, infra. For our purposes at this time, it is enough to note that, based on the Moulton-Williams Report, the Regional Forester recommended clear-listing of the mineral patent application. Upon receipt of the Forest Service recommendation, BLM requested the Bureau of Mines to run a cash flow analysis. In its report, dated May 4, 1981, the Bureau of Mines noted that the breakeven point over a 20-year life at a zero rate of return was $4.05 per pound of molybdenum, a price which, at the time of the Moulton-Williams Report, was less than half the going price of molybdenum. The Bureau of Mines assumed mining costs of $2.17 per ton and milling costs of $2.71 per ton.

Appellants suggest that PCM's patent application was deficient in that it did not adequately assess development costs, including those of environmental protection and reclamation. To the extent that appellants are contending that PCM's application must be viewed in isolation from the Government's subsequent studies, appellants are in error. Regardless of whether BLM might have rejected the patent application because of informational deficiencies (but see United States Steel Corp., supra), the fact is that BLM did not so act. Rather, it processed the application and caused its own studies to be made. These studies corroborated PCM's discovery. These studies are part of the record before this Board and must be considered in determining whether or not appellants have established error in the denial of their protests. In other words, the studies done by the Government may be used to supply any informational gaps that might exist in the patent application standing alone. See In Re Lick Gulch Timber Sale, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983).

Appellants suggest that there are unexplained discrepancies in the cost figures used by PCM, Moulton-Williams, and the Bureau of Mines in their respective analyses. We have already indicated above that these variances do exist on both the cost and sale sides. Insofar as the sale price of molybdenum concentrate is concerned, part of the problem has been the extreme volatility of the molybdenum market in recent years. As charted by the Engineering and Mining Journal over the past few years, the price for molybdenum concentrates has been on a virtual roller coaster. Using figures posted at the Climax mine in Colorado, in January 1978, the price of a one lb. cont. Mo, 95 percent MoS[2], was $4.01, in January 1979, the price had risen to $5.86, by January 1980 it had jumped to $8.84, in January 1981 it was $9.20, in January

1982 it was back down to $8.75, and in January 1983, during the height of the recession, pricing was suspended by Climax, though there was no question that prices had fallen precipitously.

PCM used the price of molybdenum concentrates as of December 1, 1979. The Moulton-Williams Report used the December 1978 price. The Bureau of Mines analysis merely noted that $4.05 was the breakeven point and that, at then present prices (May 1981), the price for molybdenum concentrates was nearly double this. Appellants suggest that the market price for molybdenum was artificially high from 1973-1980 (Affidavit of Stephen O. Anderson at 5), and argue that the December 1978 price was elevated because of low inventories due to a strike at one mine and lower production of copper, which often produces molybdenum as a by-product. 10/ They suggest that at the January 1983 price, PCM could not make a profit even using its cost figures.

[2] Appellants' argument crystallizes a problem inherent in the application of the marketability rule. While no prudent man would expend time and money to develop a mine where it is clear that there is no market for the mineral or the price that could be obtained is obviously less than the cost of production, the question of prudence becomes more difficult when the mineral involved is subject to great price volatility. Many minerals, including molybdenum, show marked price elasticity for both the demand and supply fluctuations. Thus, either increased demand or decreased supply in the short term can often result in elevated prices which cannot be sustained over a

10/ In 1981, for example, 34 percent of molybdenum mined constituted a by-product of copper mining. See generally Minerals Yearbook, 1981 at 604.

long period of time. The same, however, is true on the downside. Molybdenum, which is primarily used in steel production, is particularly price sensitive to developments in the steel industry. The sharp 1981-83 recession, with its attendant massive decline in steel production, necessarily depressed molybdenum prices on a world-wide scale.

"Present marketability" has never encompassed the examination of either cost or price factors as of a specific, finite moment of time, without reference to other economic factors. Rather, the question of whether something is "presently marketable at a profit" simply means that a mining claimant must show that, as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihoo of success that a paying mine can be developed. For example, if a claimant has located a deposit of gold which can be mined at a profit, if the price of gold is $500 an ounce, and the evidence is such that there is a reasonable likelihood of sufficient quantity and quality to justify development, that claim can be deemed valid despite the fact that on any specific day gold may be selling at $420 an ounce. This is so because a selling price of $500 an ounce for gold is both within the historic range and expectations of it reaching that level again can be justified as a present matter. On the other hand, if the deposit, because of expenses associated with mining and beneficiation, requires a selling price of $1,500 an ounce, such a claim does not exhibit present marketability. So elevated a price for gold does not represent any relevant historic range and is essentially based on speculation or unsupported hope. It may be an expectation, but it is an unreasonable one given present facts. See United States v. Denison, 76 I.D. 233, 239 (1969).

We recognize that situations can occur in which structural economic changes or technological breakthroughs invalidate historical conditions as a guide to present marketability. Thus, in United States v. Denison, supra, cessation of a Government stockpiling program which had greatly elevated manganese prices, served to render these past prices irrelevant to the question of present marketability. It was, of course, not beyond the realm of possibility that a future stockpiling program might some day be initiated. Such a possibility, however, was essentially speculative and could not serve as a predicate upon which a prudent man would have proceeded to expend time and money with a reasonable hope of success.

The question, then, is whether the presently depressed state of molybdenum prices represent merely a sharp swing in normal market fluctuations or, in fact, is an indication of a major structural alteration in the market which renders irrelevant past economic experience. Appellants have tendered nothing which would justify a conclusion that a permanent structural alteration in the molybdenum market has occurred. Thus, the question of the present marketability is properly determined by reference to the historic range of values. We feel that, on the basis of the record before us, the January 1979 value used by PCM to show marketability as of the date of the withdrawal can be used to show present marketability as of today.

Appellants focus on the admitted failure of PCM to expressly delineate the individual costs attendant to compliance with specific environmental standards, e.g., the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1976). Appellants do not suggest that PCM will be technologically unable to

comply with applicable environmental constraints. Nor have they even provided estimates of what they believe the costs will be. Rather, they have contented themselves with postulations that "it cannot be substantiated that economic viability in fact either existed in 1978 or exists today" and that "environmental costs may be as much as five to ten times larger than those estimated by the company (approximately $1 million per year) on the basis of comparable deposits" (Affidavit of Arnold J. Silverman at 3, 4). These statements, however, miss the point that appellants bear the burden of showing that the cost figures used by PCM and BLM are so understated that a reasonable likelihood of success in developing a paying mine does not exist. It is not enough to merely suggest that such might be the case. Appellants are required to show that such is the case.

Admittedly, PCM's application did not attempt to isolate individual cost factors beyond those associated with licensing and ultimate reclamation. The Moulton-Williams Report, which also showed the claims' profitability, noted that "due to the environmental problems unique to the Quartz Hill area, $0.045 per ton was allowed to cover additional protection, mitigation, and rehabilitation measures." Moulton-Williams Report, Exhibit F, at 28. We have noted above that there are great areas of disparity among the three studies of profitability. They all, however, agreed that a discovery existed.

Appellants have not submitted cost analyses which would show that the claims could not be mined profitably. Indeed, they do not even argue that these claims could not, as a fact, be profitably developed. Rather, they merely argue that they might not be capable of profitable development. They proffer no figures to support this conclusion beyond bare assertions that

environmental protection might cost on the order of five to ten times more than estimated. However, even if this is the case, the three studies indicate that the instant claims could still be mined at a profit. Appellants bore the burden of showing that these claims could not be economically developed. This burden they did not discharge.

[3] Appellants also suggest that because of ANILCA the prudent man marketability test must be "strictly" applied. Thus, they suggest "a stronger showing of marketability is required for important recreation areas, such as Misty Fjords, than for other public lands" (Reply Brief at 19). It is true that a number of cases in the past have indicated that a higher standard of proof is required for claims located in national forests than for other public lands. In actual practice, the Board has long since abandoned this position. We take this opportunity to expressly repudiate it.

The genesis of this rule in the Department lies in cases such as United States v. Dawson, 58 I.D. 670 (1944), and United States v. Langmade, 52 L.D. 700 (1929). All of these early cases, as well as the Federal court decisions on which they were based (United States v. Lillibridge, 4 F. Supp. 204 (S.D. Cal. 1932); United States v. Lavenson, 206 F. 755 (W.D. Wash. 1913)), involved fact situations which called into question the bona fides of the mineral claimant. In Dawson and Langmade millsites and mining claims had been located on lands valuable for recreation sites and there were specific indications that the claims were a mere subterfuge to acquire title to these sites for purposes not associated with mining. Lillibridge involved the same problem, whereas Lavenson involved allegations that land valuable for water power was being acquired under the general mining laws. Particularly instructive

is the following language from the Lavenson opinion, which involved a Government suit to cancel a patent:

> The land must not only be located for valuable deposits, but claimed for such deposits, when patent is asked. If the sole purpose of location, or making claim to the land, when patent is sought, is to secure valuable water power or timber, a claimant is not entitled to it under the mineral land law. [Emphasis supplied]. The decision of the Supreme Court by Justice Field, in the last-mentioned cause, does not justify any other assumption, for therein it is said:
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> "If the land contains gold * * * which can be secured with profit, that fact will satisfy the demand of the government as to the character of the land as placer ground, whatever the incidental advantages it may offer to the applicant for a patent." [Emphasis in original.]
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> If the claimant represents that he claims the land for its valuable deposits, when in fact he does not, and if, but for such representation, he would not receive a patent, but, relying on it, he is granted one, this is fraud.

206 F. at 763.

Subsequent decisions, however, ignored the clear basis of this rule and blindly applied the standard to all lands in national forests. Indeed, in United States v. Gray, A-28710 (Supp.) (May 7, 1964), the Deputy Solicitor attempted to premise the rule on a totally different basis. Thus, he stated that "[w]hile it is also clear that valid mining claims may be perfected within the limits of forest reservations, it is also clear that the validity of such mining claims is to be determined by a comparison of the relative value of the lands in question for forest or mineral purposes." No citation accompanied this statement, as the law did not support it. Indeed, in Cataract Gold Mining Co., 43 L.D. 248 (1914), the Department expressly held:

> [I]f 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. This holding was reaffirmed in United States v. Langmade, supra at 705 (a case actually cited subsequently in United States v. Gray, supra, for a different proposition), and more recently in this Board's decision in United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 299-302, 80 I.D. 538, 547-48 (1973).

Having invoked the comparative value test in Gray, however, the Deputy Solicitor then proceeded to state that "I think it is reasonable, and entirely in accordance with prior Departmental and judicial decisions, to apply a higher standard and more rigid compliance with the requirements of the mining law where the claim is located within a National Forest." Thus was the standard separated from its moorings in considerations of bona fides.

As a conceptual matter, the theory that the situs of the land alters the nature of the test applied is untenable. Where the mining laws apply, they necessarily apply with equal force and effect, regardless of the characteristics of the land involved. The test of discovery is the same whether the land be unreserved public domain, land in a national forest, or even land in a national park. 11/

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11/ This discussion assumes the validity of the location. Thus, where land is closed to mineral entry, a subsequent discovery is irrelevant as the mining laws no longer apply so as to permit a discovery.

This does not mean that questions of good faith are irrelevant. On the contrary, even if a discovery can be shown to exist, proof of bad faith can invalidate a claim, since in such a situation the mineral values are incidental to the purpose for which the land is claimed. See United States v. Lavenson, supra. But this is, essentially, an independent question from that involved in determining the existence of a discovery. The Board has noted that where the issue of bad faith is raised, the Government bears the ultimate burden of proof. See United States v. Prowell, 52 IBLA 256 (1981); United States v. Dillman, 36 IBLA 358 (1978). Imposing a higher standard of discovery by relying on the situs of the land embraced by the claim is, in effect, an attempt to shift the burden of proof sub rosa. In any event, appellants have failed to submit any credible evidence that these claims are not held in good faith. Thus, even were a different test for discovery applicable where bona fides is in question, which we expressly hold is not the case, it would not be applicable herein. 12/

Appellants also suggest that an EIS is required to be prepared prior to issuance of the mineral patent. In United States v. Kosanke Sand Corp. (On Reconsideration), supra, we considered this contention at some length. We

12/ Appellants also suggest a more rigid standard is applicable because of the language of section 503(f)(2)(A) which requires that activities on the claims should be regulated "to assure that such activities are compatible to the maximum extent feasible, with the purposes for which the monuments were established." We disagree. First of all, nothing in this section arguably relates to the test for validity, since the section presupposes valid claims. But secondly, and more importantly, this section actually provides that if there is an irrevocable conflict between mining any valid claims and the purposes for which the monument was established, the latter must give way, where regulations to ensure compatibility are not "feasible." As we read the Ninth Circuit's decision in SEACC v. Watson, 697 F.2d 1305 (1983), the Court merely found that preparation of an EIS for either bulk sampling or a road was not infeasible and indeed had been expressly provided for by section 503(h)(3).

will not repeat that analysis here. We will simply note that the Board, en banc, unanimously held issuance of a mineral patent was not a "major Federal action" within the ambit of section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332 (1976), as such action was not discretionary nor did the act of issuing the patent result in significant effects on the quality of the human environment. This holding was reaffirmed in United States v. Pittsburgh Pacific Co., 30 IBLA 388, 84 I.D. 282 (1977). This latter decision was, itself, affirmed by the Eighth Circuit Court of Appeals sub nom. South Dakota v. Andrus, 614 F.2d 1190, cert. denied, 449 U.S. 822 (1980). We adhere to our position.

[4] The last issue pressed in the appeal is whether PCM is qualified to receive patent for these claims. Section 1 of the Mining Law of 1872 states that "[e]xcept as otherwise provided, all valuable mineral deposits in lands belonging to the United States * * * 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." Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22 (1976). Section 7 of the 1872 Act further provides that "[p]roof of citizenship * * * may consist * * * in the case of a corporation organized under the laws of the United States, or any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation." Act of May 10, 1872, 17 Stat. 94, 30 U.S.C. § 24 (1976).

Appellants argue that, while PCM is a corporation organized under the laws of the State of Nevada, it is, in point of fact, a wholly owned subsidiary, through a web of corporate holdings, of Rio Tinto-Zinc Corporation,

Limited, a United Kingdom corporation. See note 2, infra. Both PCM and the Solicitor's Office contend that proof of incorporation under the laws of a state gives rise to a conclusive presumption of citizenship in that state.

The question of the authority of a corporation to locate mining claims was first examined in McKinley v. Wheeler, 130 U.S. 630 (1889). Justice Field, speaking for a unanimous court, stated that the provisions of section 1 of the Mining Law of 1872 "must be held not to preclude a private corporation formed under the laws of a State, whose members are citizens of the United States, from locating a mining claim on the public lands of the United States." (Emphasis supplied.) Id. at 636. While the underlined language in this decision might be read as an implicit holding that all of the members of a corporation must, themselves, be citizens of the United States, it actually was merely a restatement of the averments of the appellant therein, that all of the stockholders of the corporation were, in fact, citizens of the United States.

The first case to directly examine the question of the subsidiary citizenship requirements of stockholders of a domestic corporation was Doe v. Waterloo Mining Co., 70 F. 455 (9th Cir. 1895). That case involved the question whether, having alleged domestic incorporation, it was also necessary to allege that the stockholders were citizens of the United States. The Court's response was guided by two factors. First, it noted that section 7 of the Mining Law of 1872 provided that proof of citizenship could be established for a corporation by the filing of a certificate of incorporation. As the Court noted:

> The question might arise, why would the certificate of incorporation establish the citizenship of the stockholders? In considering the question of jurisdiction in the federal courts, it is an established rule that, when a corporation organized under state laws is a party, it is conclusively presumed that the stockholders thereof are all citizens of that state. Muller v. Dows, 94 U.S. 445. Congress was familiar with this rule, and it seems probable intended to establish a similar rule under the mineral land act of 1872.

70 F. at 463.

The Court's second line of analysis proceeded from the actual practice of the Department of the Interior. Thus, the decision stated:

> The practice in the United States land office has been, I think, universal, not to require of a corporation seeking to patent mining ground proof of the citizenship of its stockholders, other than by the production of a certified copy of articles of incorporation. * * * The practice in the land department of the United States under this statute should have great weight in construing it. Hahn v. U.S., 107 U.S. 402, 2 Sup. Ct. 494; U.S. v. Moore, 95 U.S. 760; Brown v. U.S., 113 U.S. 568, 5 Sup. Ct. 648. Considering the statute and the practice thereunder, I think the citizenship of the stockholders of the Waterloo Mining Company was sufficiently established. It was not necessary to allege in the answer what was conclusively presumed from the facts alleged.

Id.

Practice in the Department was, indeed, as indicated by the Court. Thus, Secretary Hitchcock stated "a corporation organized under the laws of the United States or of any State or Territory thereof may * * * occupy and purchase mining claims from the government, irrespective of the ownership of stock therein by persons, corporations or associations not citizens of the United States." Opinion, 28 L.D. 178, 180 (1899). This was reiterated in

the Instructions published at 51 L.D. 62 (1925) relating to the right of United States Borax Company, having been acquired by Borax Consolidated, Ltd., to hold and patent mining claims. This interpretation has continued to the present day. See 43 CFR 3862.2-1; Alien Ownership of Shares in a Corporate Mining Location, M-36738 (July 16, 1968). Appellants have failed to show why this consistent interpretation, stretching over nearly a century of adjudication, should be abandoned at this late date. See State of Wyoming, 27 IBLA 137, 83 I.D. 364 (1976), aff'd sub nom. Wyoming v. Andrus, 602 F.2d 1379 (10th Cir. 1979). We decline to alter the rule that proof of incorporation in a state is conclusive proof of citizenship by the stockholders.

In summation, we hold that appellants have failed to show error in the denial of their protests, that issuance of a mineral patent is not a major Federal action requiring the preparation of an EIS, and that proof of incorporation under the laws of a state establishes the citizenship of a corporation for the purposes of the Mining Law of 1872.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

_____
James L. Burski
Administrative Judge

We concur:

_____
Bruce R. Harris
Administrative Judge

_____
Douglas E. Henriques
Administrative Judge