

Editor's note: 92 I.D. 175; modified -- See 104 IBLA 207, 95 I.D. 155 (Sept. 12, 1988).

UNITED STATES FOREST SERVICE

v.

WALTER D. MILENDER

IBLA 84-852

Appeal from the decision of the Administrative Law Judge prohibiting
placer mining on five mining claims insofar as they lie within Power Site Classification No. 179.

Set aside and remanded.

1. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining
Claims: Special Acts--Powersite Lands

It is error to prohibit placer mining on powersite lands pursuant to the Act of August 11, 1955, merely on the basis that unrestricted and unmitigated mining operations will adversely affect other land uses or values, because (1) there no longer can be unrestricted or unmitigated placer mining on such claims, and (2) all land has some other use or value which would be affected by mining, so that prohibition for that reason would foreclose mining on all powersite lands and effectively nullify the Act. Whether to allow or prohibit mining requires an evaluation of potential detriments and benefits in each specific case, bearing in mind that Congress generally intended that powersite lands would be open to placer location and operation.

OVERRULED IN PART: United States v. Cohan, 70 I.D. 178 (1963).

APPEARANCES: Wilbur W. Jennings, Esq., Regional Attorney, San Francisco, California, for the
Forest Service; Walter D. Milender, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

In June 1982 Walter D. Milender located five placer mining claims in Plumas County, California, within the Plumas National Forest. The claims are each 20 acres, and are named the Agate One, Silver Ridge, Red Rock, Owl Tree, and Lightning Tree. All of the claims except the southeastern portion of the Red Rock are sited within Powersite Classification No. 179, dated May 13, 1927.

Milender filed the location notices with the Bureau of Land Management (BLM), which in turn inquired of the United States Forest Service (FS) if it had objections to the conduct of placer mining operations on these claims pursuant to the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1982); P.L. 84-359 (the Act).

Prior to passage of the Act, lands embraced within powersite withdrawals or reservations were not subject to mineral entry by the location of mining claims. The Act provided, with certain conditions and exceptions, that

(a) All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes: * * *.

(b) The locator of a placer claim under this chapter, however, shall conduct no mining operations for a period of sixty days after the filing of a notice of location pursuant to section 623 of this title. If the Secretary of the Interior, within sixty days from the filing of the notice of location, notifies the locator by registered mail or certified mail of the Secretary's intention to hold a public hearing to determine whether placer mining operations would substantially interfere with other

uses of the land included within the placer claim, mining operations on that claim shall be further suspended until the Secretary has held the hearing and has issued an appropriate order. The order issued by the Secretary of the Interior shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining. * * *

In response to BLM's inquiry, FS filed objections, asserting that placer mining operations on the subject claims would substantially interfere with other uses of the land. BLM ordered a public hearing, which was conducted before Administrative Law Judge Luoma on July 26, 1983, at Quincy, California. By his decision dated July 25, 1984, Judge Luoma found that placer mining operations would substantially interfere with other uses of the land within the placer claims, and held that placer mining should be prohibited on the lands embraced by the claims insofar as they lie within Power Site Classification No. 179. Milender has appealed from that decision.

At the hearing the Forest Service presented the testimony of only one witness, Kenneth B. Roby, the resource officer of the Greenville Ranger District, Plumas National Forest. As such, he is responsible for administration of the watershed, wildlife, recreation, mining claims, and special use programs within the district.

Roby testified that the land occupied by the claims is classed by FS as commercial forest land. Trees were selectively harvested from the claim sites in 1975, and another sale of selected trees is scheduled for 1985.

The land within the claims varies in its timber-producing capabilities from 10,000 to 20,000 board feet to the acre.

The claims lie to the east of the North Fork of the Feather River. The powersite classification extends for one-half mile from the river. The claims are from one-quarter mile to one-half mile from the river, except for that portion of the Agate One claim which is beyond a half-mile of the river, and hence not within the powersite classification. No portion of any claim is closer to the river than one-quarter mile, and only the western segment of the Lightning Tree claim is that close.

The topography of the claims varies from virtually flat, to gently sloping, to steeply sloping, with substantial areas in each category. There are several intermittent and ephemeral draws which either begin on the claims or cross them, and drain downslope in a westerly direction. Part of the claims are included in the watershed of an unnamed creek which is tributary to the Feather River. Two old logging roads have been constructed across the Lightning Tree and Owl Tree claims, and one through the Red Rock claim. According to Roby, access to the Agate One and Silver Ridge claims is by a series of skid trails connecting to a FS road. He testified that the soils on all five claims have moderate to high erodability, but that past logging activities have produced little erosion because they were "generally" restricted to the gentler slopes of 30 percent or less.

Roby testified regarding four specific land uses or values which he fears would suffer in the event of unrestricted, unmitigated placer mining of

these claims; namely (1) timber production and forest management, (2) degradation of the water quality of the Feather River through soil erosion on the claims, with consequent damage to the trout fishery, (3) diminished visual or scenic values which would be observable by tourists and the general public, and (4) potential damage to an archeological site which is outside the claim boundaries, but nearby.

Regarding the timber management objectives, Roby's testimony was essentially the same concerning each of the claims. In effect, he said that "unrestricted" or "unmitigated" placer mining would result in the loss of the growth of the immature trees now on the site, as these would be removed. He acknowledged that the mature timber would not be lost, as it is going to be harvested in 1985, so that permitted mining would not conflict with FS administration of that sale. He stated:

[T]he timber is to be harvested except we would lose the understory if the area was to be mined.

The other impacts would be that while the area was being mined, we would lose timber production because there wouldn't be any trees there and the third impact is that on the poorer site areas such as depicted in the lower photo in this Government No. 16, I think we would have trouble restoring the site to its current productive capability due to soil loss generally and increasing the harshness of the site. (Tr. 94) [To the same effect, see Tr. 43, 49, 73, 78, 85]

On redirect examination Roby expounded on this testimony, saying:

Q Mr. Roby, when you talk about the timber value to the Forest Service, do you take into consideration only the current value of the standing timber on --

A No. That's a good point. The number that I used would reflect the value of the standing timber there. But if the area was taken out of production, we would not be able to manage timber there in the future and further rotations -- rotation is when the trees come of age to be cut, which is, in this area, about -- I

would say -- every 120 to 140 years -- we would miss the opportunity to harvest the timber at that time too.

So at each rotation, we would be losing timber values, yes.

(Tr. 135-36).

Roby expressed concern also for the possibility that after the land had been mined to exhaustion of the mineral resource some portions of the claims could no longer be managed for the production of commercial timber due to removal of the soil. All of the land occupied by the claims is now classed either as "Site 3" or "Site 4" timberland; "Site 1" being the best classification. It is the poorer Site 4 lands which Roby fears will not be susceptible to timber management after completion of mining. However, apparently such site classifications are referable to relatively small areas, as Roby referred to portions of claims which might be so affected in terms of 5 to 10 acres. The total area of the five claims, including that portion which is outside the powersite classification, is 100 acres.

Regarding the potential degradation of the water quality in the North Fork of the Feather River, Roby testified that the present quality of the river is very good because Almanor Dam, about three miles upstream, acts as a sediment trap, so that the water leaving the dam is relatively sediment free (Tr. 72). The river below the dam is a rainbow trout fishery, and the introduction of significant amounts of sediment into the water would produce a deleterious effect on fish mortality and reproduction. Roby opined that "unrestricted" placer mining, particularly on the steeper slopes, would disturb the soil, which would be transported into the drainage system and

eventually would migrate into the river over a normal five-to-seven year period (Tr. 89).

However, as noted by Judge Luoma in his decision, the evidence shows that in this area the river goes through a canyon or gorge with sharply rising walls, about 100 to 200 feet high, and all the claims lie on a ridge high above the gorge, from one-quarter to one-half mile away. "Mining on the claims," he found, "would not directly cause any disturbance of the river bed or the canyon walls." (Dec. at 9). Judge Luoma's decision also summarized the rebuttal testimony, as follows:

Robert Milender [the claimant's brother] said County Road 306 lies between the river and the claims and would effectively stop any erosion from the claims from reaching the river. Another Forest Service road running through the lower section of the claims would serve the same purpose. He conceded that in case of a heavy precipitation a wash out could reach the river. However, the swiftness of the stream in the narrow, deep gorge would rapidly move any such sediment downstream. (Dec. at 11).

Robert Milender also testified that "once you've established your pit in there [on the claims], then you have an absolute minimum of erosion." (Tr. 142).

The claimant's testimony on this subject tended strongly to imply that the FS concern for sediment reaching the river focused exclusively on him while ignoring its own practices and those of other permitted users. He alluded to "50 miles" of FS roads in the vicinity which had simply been bulldozed through the hills with the spoiled earth pushed off the down-slope, loggers' skid-trails on steep grades, and logging debris which still litters the area from previous timber sales.

The testimony concerning the potential loss of visual quality was summarized by Judge Luoma as follows:

3. Visual Quality

The visual resource management classification document (Ex. 11) was prepared by Mr. Andy Sanchez, a forest landscape architect, employed by the Forest Service in Quincy, California. It is the duty of all Forest Service personnel to give consideration to the objectives of the visual classification in the performance of other management activities.

Mr. Roby explained how the visual classification document shows which parts of the claims would be exposed to the public view if the timber were to be totally removed by strip mining operations and thus conflict with visual value objectives. He played no part in the preparation of the document. He did not know the educational background of Mr. Sanchez, whose work it represents. Inexplicably, Mr. Sanchez was not called as a witness.

By the Respondent

Respondent and his brother, Robert Milender, testified at the hearing, disputing some of the testimony presented by Mr. Roby.

1. Visual Quality

Mr. Roby described County Road 306, which borders the Lightning Tree claim, as a "thoroughfare" used by tourists and people mining in the Seneca area, and that mining on the claim would result in visual quality deterioration as observed by those people. Robert Milender said the road was twisty with numerous switchbacks and very steep. It was once black topped but erosion has reduced it to a gravel road. He said it is very lightly traveled, used by local loggers, miners and hunters and a few people who live in the area. It is not a tourist road.

The other two points for viewing mining activities on the claims, according to Mr. Roby, were Highway 89, a heavily traveled major artery, and Lake Almanor, a heavily used recreation area, both approximately three miles to the north. Robert Milender said that from long-standing personal knowledge there is no possible way that either Highway 89 or Lake Almanor can be seen from any part of the claims and, conversely, there is no possible way that a person traveling on the highway or recreating on Lake Almanor can see any part of the claims. He said if all the timber were removed from all the claims, leaving a totally bare spot, it could not be seen from the highway or from Lake

Almanor. Respondent testified similarly, adding that such a bare spot could be seen from some of the local logging roads but no one travels on them. He added that he can spend a week on the claims and never see another person around.

Finally, Roby testified regarding his concern for the preservation of the archeological site located near, but not on, the Agate One claim. The site is described by Roby as a prehistoric chert quarry used by Indians to gather chert for arrowheads. The conceived threat to this site was described by Roby on direct examination, as follows:

Q. Well, how would placer mining on Agate One affect this chert site?

A. Since it doesn't lie within the claim, the mining on the claim wouldn't affect it. The concern would be that the access to the claim might disturb the site.

Q. How?

A. By -- if the road or access was improperly placed, it would destroy the site by moving material and running over it basically.

(Tr. 64).

Roby testified that the principal concern of the FS in this case was the potential loss of its ability to manage the land for timber; that the fishery was second in importance, and visual impact was third (Tr. 122). The attorney who presented the case on behalf of FS also advised Judge Luoma, "I think the Forest Service protest is based in large part upon the timber stand. The timber resource, I think, is our primary concern here, managing that" (Tr. 122).

The extent of the importance which the FS attaches to its desire to maintain its timber management function in opposition to mining intrusion was revealed in the following colloquy between Roby and Judge Luoma (Tr. 189-92):

JUDGE LUOMA: I'm just going to give you one question. Now, this is a hypothetical question so do not change any facts on me. Don't assume anything. I'm going to give you all the assumptions.

THE WITNESS: Okay.

JUDGE LUOMA: Now, I own the Agate One mining claim. It is located in the power site withdrawal, whatever its number is, 179. It's located right at the top of the ridge, as far away from the river as you can get. It's absolutely flat. If any activities of soil disturbance took place on it, there's no way that erosion could take place that could possibly reach any stream. There's no problem with access roads in that there's no question of disturbing the archeological sites. It's up there where the -- obviously it can be seen from an airplane but no way can anyone of the public see it from anyplace, any observation point on the ground.

Now, it contains a million dollars worth of merchantable timber ready for harvesting. It also contains, it's been determined geologically, that all 20 acres of it is very valuable gold which can be economically mined at a profit of \$5 million.

Now, I go out and I file a mining claim here and then the notices go out and the Forest Service gets its notice in due course. Would the Forest Service file a protest against my filing of that claim?

THE WITNESS: I think if the timber values were such that you described, we would.

JUDGE LUOMA: Okay. That -- I hope you understand the import of that because that convinces me that the Forest Service not only is chiefly interested in the timber management but they are totally interested in it.

THE WITNESS: Well, I don't know --

JUDGE LUOMA: I mean, you've answered my hypothetical question very positively.

THE WITNESS: You eliminated all the other resources.

THE WITNESS [sic; JUDGE LUOMA]: I did. I did.

THE WITNESS: But that doesn't mean that that's always the case. For instance --

JUDGE LUOMA: In my case.

THE WITNESS: In your case, there might always be --

THE WITNESS [sic; JUDGE LUOMA]: You made a very, very strong position for the Forest Service now. By god, we're going to challenge any mining claim, I don't care what it is, if it disturbs our timber management. That's what you're saying, aren't you?

THE WITNESS: Well, it conflicts with other uses, one of them being timber.

JUDGE LUOMA: As I say, that was the only one, just timber.

THE WITNESS: Well, you also mentioned there may be some rare plant there. There may be some --

JUDGE LUOMA: I gave you all the facts.

THE WITNESS: Okay. With the facts given, yeah, timber was the only resource affected.

JUDGE LUOMA: That's right. And you would still challenge that.

THE WITNESS: I think we would.

JUDGE LUOMA: Okay.

Judge Luoma reached the following findings and conclusions in his decision:

In the instant case the position of the Forest Service is that placer mining on the claims would interfere or conflict with (1) the fishery because of erosion carrying sediment off the claims into the nearby river, (2) the visual management objectives, and (3) timber management objectives. The record presented does not support a finding that the first two "other uses" would be substantially interfered with. [No mention was made here of the archeological site.] * * * As to the third "other uses", timber management, the record adequately supports the finding that unrestricted placer mining on the claims will substantially interfere with timber management. In light of the Board's past decisions, recited above, it is questionable that

any placer mining operation in any forested area of a national forest could survive a challenge by the Forest Service based upon interference with timber management.

Based upon the foregoing, it is concluded that:

1. Placer mining operations would substantially interfere with other uses of the land included within the placer claims; and
2. Placer mining should be prohibited on the lands embraced by the Agate One, Silver Ridge, Red Rock, Owl Tree and Lightning Tree claims, insofar as they lie within Power Site Classification No. 179.

When this decision becomes final an appropriate order will be issued providing for the prohibition of placer mining operations.

Judge Luoma quite properly based his holding on prior Departmental decisions in "P.L. 359" hearings cases, and the result he reached was not inconsistent with established precedent. Indeed, the line of decisions handed down by this Board, and by its predecessor, the Branch of Land Appeals, Office of the Solicitor, has been founded on two basic concepts of what the Act requires. The first of these we entitle "Limitations On The Secretary's Authority Under The Act," and the second "Interference With Other Uses Of The Land." Our analysis of these concepts follows.

Limitations On The Secretary's Authority Under The Act

Within this Department there long has been a recognition that the Act allows the Secretary only three alternatives; i.e., (1) to prohibit mining, (2) to allow mining, but to require that the locator thereafter "restore the surface of the claim to the condition in which it was immediately prior to these operations," or (3) grant a general permission to engage in placer

mining. Alternatives (2) and (3) require the Secretary to allow the claimant to proceed with his mining operations in the same manner that he would otherwise be entitled to do if the claim were not on powersite land. The Act does not empower the Secretary to condition or limit the method or extent of the mining operation. Thus, the Secretary could only allow the claimant to mine "normally" or prohibit mining altogether. As explained in United States v. Bennewitz, 72 I.D. 183, 187-88 (1965):

[T]he severity of the damage would vary with the magnitude of the operations; the use of numerous or large dredges could destroy or substantially damage the river bed in the claims as a habitat or spawning area for the brown trout.

This would suggest that carefully controlled placer mining operations restricted to the use of a small dredge or two would not substantially interfere with the use of the claims for recreational, scenic, and sportfishing purposes. The Mining Claims Rights Restoration Act does not, however, permit such a solution. It paints only in broad strokes. * * * The only alternatives left then are complete prohibition or unrestricted permission to mine.

* * * The statute permits the Secretary to act only once. He cannot issue an order now allowing unrestricted mining on the basis of a one or two dredge operation and then, if additional dredges are added or larger ones are substituted or a totally different type of operation is adopted, issue an order prohibiting mining. He can act only once, either to permit or prohibit. Because his course of action is so limited, to avoid defeating the purpose of the act, he should be able to base his decision not only on what the claimant proposes to do but also on what the claimant or his successor may be able to do in the way of placer mining.

* * * * *

In the face of this potential danger to the recreational uses of a substantial portion of the Rio Grande river the only order that may properly be issued is to prohibit placer mining operations on all the six claims. The only other alternative, to permit unrestricted mining, could prove to be a disaster to a valuable natural resource.

This rationale in the Bennewitz decision (which we believe reached a correct result) has been reiterated in virtually every subsequent Departmental decision on the subject. See, e.g., United States v. Evans, 82 IBLA 155 (1984); Arthur A. Gotschall, 78 IBLA 81 (1983); United States v. Western Minerals & Petroleum, Inc., 12 IBLA 328 (1973).

The inability of the Secretary under the Act to limit or condition the claimant's right to mine engendered the term "unrestricted placer mining," in the Bennewitz decision and all of its progeny. That term has become the criterion for all decisions heretofore made under the Act. At each hearing pursuant to 30 U.S.C. § 621, a knowledgeable witness is first asked to describe the land's other uses and/or values, and is then asked, "In your opinion, would unrestricted placer mining substantially interfere with such use [or value]?" If an affirmative answer is elicited, as it invariably is, and the administrative law judge finds that it is supported by a preponderance of the evidence, it would appear that he has no choice but to order a complete prohibition of mining. Indeed, in the instant case that question was preponed to the FS witness, Roby, by FS counsel repeatedly (Tr. 49, 56, 57, 70, 78, 84, 95, 101). There were also several references to "unmitigated" mining operations which might occur, as well as "worst case" mining operations.

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We find, however, that reliance on the term "unrestricted placer mining" is unwarranted and conceptually improper. The term does not appear in the statute or its implementing regulations at 43 CFR Subpart 3730.

Moreover, there no longer is any such thing as "unrestricted placer mining" on the public lands of the United States.

Placer mining operations today are restrained or inhibited by an entire body of law comprised of State and Federal statutes and regulations and judicial and administrative precedent. As early as 1893, the State of California had regulated and practically prohibited hydraulic placer mining, or "ground sluicing." See 3 Lindley on Mining, Chap. 3 (3rd Ed.). Claims located after July 23, 1955 (as were the subject claims), are, until patented, subject to the right of the United States to manage and dispose of the surface resources, to utilize the surface for necessary access, to provide timber required for mining purposes from off the claim site, and the claimant is prohibited from severing any vegetative or other surface resource managed by the United States except as needed for actual mining operations or to provide clearance for such operations, except to the extent authorized by the United States. 30 U.S.C. § 612 (1982).

Roads and trails constructed and/or maintained by FS with appropriated funds prior to location of the mining claims are effectively withdrawn from such location, and therefore there is no basis for concern that they might be destroyed or damaged by mining. As stated in United States v. Cohan, 70 I.D. 178, 181 (1963):

It must be emphasized at this point that this Department is not authorized to permit mining under any conditions by the claimants or by anyone else on or within the roads, the roadbeds, the rights-of-way for roads, or on or within any other improvements created by or under the authority of the Forest Service. Forest lands in the actual use and possession of the United States, on which the United States has made valuable and permanent improvements are withdrawn from entry under the mining laws.

United States v. Schaub, 103 F. Supp. 873, 875, 876 (D. Alaska 1952), affirmed United States v. Schaub, 207 F.2d 325 (9th Cir. 1953). In the Schaub case, supra, the courts held that land in a national forest which was in actual use and occupation as an access road is withdrawn from mining and that no right under the mining laws could be initiated on land in the Tongass National Forest which was included in an access road. * * * (See Departmental Instructions, 44 L.D. 513 (1916), excepting improvements such as roads in national forests from public land patents).

Moreover, FS has promulgated regulations, currently codified at 36 CFR Part 228, by which the District Rangers and the Regional Foresters are invested with substantial authority to control and minimize the effect of mining operations on surface resources and environmental values both on and off mining claims located on National Forest Lands. Under these regulations, a mining claimant must file a "notice of intent" with the District Ranger prior to conducting operations "which might cause disturbance of surface resources." If the Ranger determines that such operations will likely cause significant surface disturbances, the operator must then submit a proposed plan of operations for approval. FS may require modification of the plan or the preparation of an environmental impact statement prior to approval. Even after the plan is approved and mining operations are being conducted in accordance therewith, FS can require modification if it is perceived that unforeseen significant disturbance of surface resources is occurring, or that the operations are unnecessarily or unreasonably causing irreparable injury, loss or damage to surface resources. The regulations also impose requirements for environmental protection, specifically including air quality, water quality, solid wastes, scenic values, fisheries, and wildlife habitat. There is a provision for reclamation of areas of surface disturbance following operations for the prevention or control of onsite and offsite damages to the environment and forest surface resources, specifically including, inter alia,

erosion and landslides, control of water runoff, and rehabilitation of fisheries and wildlife habitat; and FS may, prior to approval of the operating plan, require the operator to post a bond conditioned upon compliance with the requirements for reclamation. Also, the regulations require that prior approval be obtained from FS prior to the construction of any road, trail or other access facility, including the location, construction, and use of such access routes.

This Board is aware that the authority of FS to regulate mining activities under these regulations is not absolute, being conditioned in some instances by words such as "where practicable," "reasonably necessary" etc. Nevertheless, there can be no gainsaying the fact that the regulations invest FS with considerable control over mining operations for the protection of the environment and surface resources. (The Bureau of Land Management has promulgated similar, but not identical, regulations at 43 CFR Subpart 3809.)

The courts have likewise demonstrated a willingness to protect other resource values and FS lands from undue degradation or waste by mining activities, even where it was recognized that the mining operator was proceeding in good faith. See, e.g., United States v. Goldfield Deep Mines Co. of Nevada, 644 F.2d 1307 (9th Cir. 1981); United States v. Richardson, 599 F.2d 290 (9th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); Bales v. Ruch, 522 F. Supp. 150 (E.D. Cal. 1981); United States v. Curtis Nevada Mines, Inc., 415 F. Supp. 1373 (E.D. Cal. 1976).

Finally, there is the broad, comprehensive range of Federal and State environmental laws and regulations which every citizen must observe,

including placer miners. These control toxic waste disposal, guard endangered species, and preserve air and water quality, to mention only a few of the protections afforded.

With all of the above-described restraints in place, it is error to premise a "P.L. 359" determination on the potential consequences of a hypothetical "unrestricted," "unmitigated," or "worst case" placer mining operation. The proper standard of evaluating the potential effect of placer mining on other land use is the extent to which legal, normal, operations, subject to regulatory restraint, might interfere with such uses.

In this regard the Board finds that one of the holdings in United States v. Cohan, supra, is in error, and must be overruled.

The Director's decisions hold also that since highways are amply protected by law, the Forest Service's contention that they would be damaged by placer mining operations on these claims is not supported and consequently the assertion was dismissed. The ruling is incorrect. The fact that the United States may have remedies under various statutes other than the act of August 11, 1955, in the event of injury to a Forest Service road from placer mining, such as recovering damages therefor, is not a valid reason for allowing placer mining under the act of August 11, 1955, on lands within a mining claim adjoining a Forest Service road if evidence at a hearing shows that such mining would substantially interfere with, obstruct, or injure the road. The act of August 11, 1955, provides a remedy which is different from and additional to other remedies such as that of trying to recover damages after an injury has been committed, and presumably Congress was aware of such other remedies when the act was passed. Moreover, to refuse to prohibit placer mining under the act solely because of the existence of another remedy in the event of injury to public lands from placer mining might make completely inoperative the provision authorizing the Secretary to prohibit placer mining. Accordingly, the implication in the Director's decisions that the existence of another remedy for injury to or interference with Forest Service roads bars or precludes the prohibition of placer mining under the act of

August 11, 1955, is erroneous, and the Director's decisions are set aside to the extent that they so hold.

For the same reasons, the ruling in the Director's decisions to the effect that stream pollution would be an insufficient cause for restricting operations because the police power of the State can effectively control pollution is not correct, and this ruling in the Director's decisions is also set aside.

70 I.D. at 182 [Emphasis added, Footnote omitted.]

This blinding of the fact finder to the reality that other laws, regulations, case precedent, and police powers exist and operate to constrain and condition placer mining, is probably at fault for raising the wholly illusory specter of "unrestricted" placer mining. We must recognize that the placer miner's operations are constrained by law to some extent, and that they may be further constrained on a case-by-case basis. We must assume that the contemplated operation will proceed lawfully and in accordance with the approved mining plan, and that FS will avail itself of its surface management prerogatives. To regard the mining claimant as one who will conduct his operation in total disregard of all lawful restraints is to prejudice his case beyond any hope of prevailing. To the extent that United States v. Cohan, supra, precludes consideration of other laws, regulations, precedent, police powers, and remedies, it is hereby overruled.

Interference With Other Uses Of The Land

The Act provides that, at the Secretary's discretion, he may notify the locator of the claim of his intention "to hold a public hearing to determine whether placer mining operations would substantially interfere with other

uses of the land included within the placer claim * * *." The nature of such "other uses" is not identified, nor is there any indicium of Congressional concern for land use outside the claim boundaries.

This Department has heretofore construed and administered the Act as requiring that a finding that placer mining would substantially interfere with any other use of the land necessitated an order prohibiting mining.

The fallacy inherent in this construction (which the author and this Board have been slow to perceive), is that all land has some use or value other than for placer mining. It may be only marginal grazing land or wildlife habitat, or that its undeveloped character contributes to the scenic integrity of the area, but the fact is that all land is useful for something other than placer mining. Moreover, we can conceive of no such "other use" of land "included within the placer claim" which would not be subject to substantial interference by extensive, but entirely legitimate, placer mining operations.

It follows, then, that as all land has some use or value with which extensive, lawful placer mining operations would substantially interfere, placer mining must be prohibited in every instance arising under the Act as it has heretofore been construed and administered. Our previous interpretation of the Act has virtually nullified it, reduced the statutory hearing to a sterile exercise which produces a predictable, pre-ordained result in virtually every case, and effectively closed powersite lands to mining.

This is directly contrary to the intent of the Congress. Powersite lands were already closed to mining, and the Congressional purpose was to open them again to placer location so that the minerals thereon might be extracted. The very title of the Act, "The Mining Claim Rights Restoration Act of 1955," is expressive of its purpose, as is the opening text:

(a) All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes: * * *.

The legislative history is reported in U.S. Code Cong. & Ad. News, 84th Cong., 1st Sess., Vol. 2, pp. 3006-3014 (1955). Under the caption "Explanation Of The Bill," Senate Report No. 1150 declared that the bill (H.R. 100) "would open an estimated 7 million acres of public lands in the West for mineral development under the general mining laws, subject to conditions and procedures set out in the bill." It is clear beyond question that that intent has been frustrated.

In a letter to the Chairman, Committee on Interior and Insular Affairs, dated July 18, 1955, Assistant Secretary of the Interior Orme Lewis wrote:

[G]enerally, we fully agree with the need for encouraging mineral development in public-land areas not now subject to mining location, since the discovery of new sources of mineral wealth on the public domain is urgent to the national economy.

The various provisions in the bill which are designed to protect these lands for other uses appear well justified. Power-site lands are often quite valuable for other surface uses. For example, many of the lands withdrawn for power-site purposes are timbered lands situated in national forests. The timber on these

lands usually constitutes an integral part of large timber tracts which should be managed on a sustained-yield basis. The bill would reserve the timber within the revested Oregon & California Railroad and reconveyed Coos Bay Wagon Road grant lands by making mineral locations under this act in that area also subject to the act of April 8, 1948 (62 Stat. 162).

Normally, the filing of unpatented mining claims in the United States district land office of the land district in which the claim is situated would seem unnecessary, if S. 1713, a bill "to amend the act of July 31, 1947 (61 Stat. 681) and the mining laws to provide for the multiple use of the surface of the same tracts of the public lands and for other purposes," now under consideration by the Congress, should be enacted. However, it is particularly important that the Secretary of the Interior be advised immediately when placer claims are initiated since the most serious conflict between mining activities and other land uses occurs when placer mining and dredging operations are involved. The mining of monazite sands by dredging in flat meadow areas has recently caused serious problems in the West because such operations interfere with recreational, grazing, and scenic values of these lands. The Secretary should have the authority in the case of placer-mining claims to hold public hearings to determine whether placer-mining operations in the areas would be detrimental to other uses of the land. When necessary, he should be able to require the locators of placer-mining claims to execute bonds or undertakings to the United States or to make deposits of money to assure restoration of the lands in their former condition. If the locators or their sureties fail to restore the lands, the deposits or bonds should be forfeited and the receipts obtained made immediately available for restoration of the lands by the Secretary. Any excess funds, of course should be returned. If these provisions along these lines were added to H.R. 100, we believe that most of the alleged abuses of the existing mining laws, as they may affect lands withdrawn for power-site purposes, would be met. * * * [Emphasis added.]

This Board interprets the foregoing as expressive of the Department's full agreement with the declared purpose of the bill to open these lands to mineral development, coupled with a perceived need to protect other land use values from the effects of abusive mining practices.

The question which confronts the Board at this juncture is whether the Act was so ineptly conceived and expressed as to be self-defeating of its

own purpose, or whether this Department's efforts to administer the Act have focused so intently on its provisions for protecting other land uses as to preclude the very benefit which the bill was enacted to provide.

We can find no praise for the drafters of the bill. As legislation, it is truly a poor piece of work. Nevertheless, we cannot hold that the Congress did a vain and useless thing. As administrators of the law, we must try to give it a reasonable interpretation which will comport favorably with what the Congress intended.

It was the expressed intent of both the Congress and this Department to open to mining those lands which long had been closed. It was declared that to do so would be in the public interest. That was the Act's primary purpose. The protection of other land uses was a secondary purpose, because had that concern been paramount, the bill need not have been enacted at all, as other land uses were already protected. Obviously, it was not the intent of Congress to preserve the status quo.

Our discussion has already established that all land has other uses which will be substantially interfered with if extensive lawful placer mining is conducted, and that the purpose of the Act cannot be effectuated if mining is prohibited in every instance where such an impairment of another use is identified at a hearing.

If every "other use" cannot be protected by a prohibition of mining without doing violence to the Act, then, certainly, some uses must be so protected, because the Act expressly so provides. It follows, therefore,

that some uses are deserving of protection under the Act while others are not.

The first consideration in determining whether mining is to be preferred over some other use is that Congress generally intended to open powersite lands to mining. Thus, it devolves on the party who seeks an order prohibiting mining to prove by a preponderance of evidence that such an order is necessary, as that party is the proponent of the order.

The second consideration is that it is not enough for such proponent merely to show that the protection of the other use(s) identified would serve the public interest, as the Congress conceived that allowing placer mining on powersite lands is also in the public interest.

The decision in each specific case, then, must reflect a reasoned and objective evaluation of potential detriments and benefits accruing from placer mining operations, 1/ with due regard for the extent to which such operations might be controlled, inhibited and/or mitigated by existing law and regulations.

1/ Since Cohan, supra, only one Departmental decision has authorized placer mining on powersite land, and that was the only decision which correctly evaluated the value of the "other use" of the land against placer mining and concluded that even though the other use might be substantially impaired, mining could proceed anyway. In United States v. Mineral Economics Corp., 34 IBLA 258 (1978), the Board affirmed the finding of the administrative law judge that the "likely destruction" of a dove nesting and breeding site was insufficient cause to prohibit mining where the number of doves which would be lost was negligible when compared to the annual number harvested annually by hunting.

Applying these standards to the instant appeal, the Board finds as follows:

1. The concern of FS that the archeological site located outside the boundaries of the Agate One claim might be damaged or destroyed if the claimant improperly placed an access road to the claim which moved the material and ran over the site is both specious and irrelevant. The claimant is prohibited by regulation from constructing any access facility on national forest land without prior FS approval, which approval "shall specify the location of the access route * * * and other conditions reasonably necessary to protect the environment and forest surface resources * * *." 36 CFR 228.12. Thus, the location of any such road, and the protection of the site from the conceived threat of destruction, is entirely within FS control. Moreover, the site is not, in the language of the statute, on "the land included within the placer claim." 30 U.S.C. § 621.

2. The Board concurs in Judge Luoma's finding that a preponderance of evidence adduced at the hearing indicates that County Road 306 is not a well-traveled "thoroughfare" as it was described by FS, but that it carries little traffic other than local residents, loggers, hunters, and miners. The preponderance of evidence also indicates that the total removal of all vegetation from the claims could not be observed from Highway 89 or Lake Almanor, both approximately three miles from the claims. This is disputed by FS, which insists that small areas of three claims (areas of one, four, five, and twenty acres) would be visible from those points if denuded of vegetation. Even if the FS assertion were proven, the Board would not find that the effect of a motorist driving along Highway 89 and catching a fleeting glimpse of a

small "bare spot" in the hills three miles away, or a boater on some portion of the lake experiencing the same view, is sufficiently significant to justify the issuance of an order prohibiting mining. Also, it should be borne in mind that no prudent, responsible miner is going to completely strip all the vegetation off 100 acres unless there are sufficient mineral values to warrant such an effort. Irresponsible or abusive mineral operations which create waste can be punished, enjoined, and the miner made to rehabilitate, as in United States v. Goldfield Deep Mines Co. of Nevada, *supra*, United States v. Richardson, *supra*, and the other cases cited above. Thus, the prospect of total or expansive removal of trees from the claim is remote, but if that should be necessary, it would likely be worth the loss in terms of its minimal effect on the FS visual resource management objectives.

3. The Board agrees with Judge Luoma's finding that the potential for degradation of the water quality of the river and the consequent impairment of the fishery to the degree hypothesized by FS was not proven. Previous cases in which these concerns have produced orders prohibiting mining operations have all involved placer claims where the mining would be done in the banks or the actual beds of the streams involved by dredging and sluicing, with the residue introduced directly into the stream. By contrast, the subject claims are one-quarter to one-half mile removed from the river, and to the extent that erosion could not be controlled, it would take several years to migrate to the river, given normal precipitation events. Given the barrier effect of the roads between the claims and the river, and the other topographical circumstances, it appears unlikely that there would be any sudden infusion of eroded earth from the claims into the river except in the event of what Roby described as "a major precipitation event" which would be

more likely to produce a flushing and cleansing effect on the river, carrying the sediment all the way to the river's mouth and beyond. Also, although not addressed at the hearing, the Board has taken into account the authority of FS to withhold approval of a mining plan which provides no measures for the mitigation of excessive erosion and surface runoff. Finally, we note that FS does not prohibit other earth-disturbing uses of this land, such as road building and maintenance, and logging activities; yet it apparently has a standing objection to the allowance of any mining. This engenders at least an appearance of use prejudice.

4. The Board concludes that it must set aside Judge Luoma's finding that "unrestricted placer mining on the claims will substantially interfere with timber management." First, the concept of "unrestricted placer mining" is an improper standard. Second, under 30 U.S.C. § 612, FS retains management of the surface of the claims and the timber not actually required to be removed for the purpose of mining. The right to use the surface for access is reserved. FS roads across the claims are protected and reserved from the locations. Therefore, the degree of potential interference with the use of the land for timber management purposes may be substantially less when these factors are considered than was envisioned by Judge Luoma on his application of the standard applied by the Department in previous decisions. "Any placer mining operation in any forested area of a national forest" (within a powersite reserve) cannot be treated as automatically requiring the issuance of an order prohibiting mining. There must be an objective evaluation of the timber management use and the reasonable and realistic potential extent to which such use might be impaired by lawful placer mining operations which are

subject to such constraints as may be imposed for the protection of other resource values.

Therefore, 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 set aside and the case remanded to the Hearings Division with instructions to reopen the hearing for the limited purpose of determining, by a manner consistent with this opinion, whether the potential interference with the use of the land for timber management is sufficient to warrant issuance of an order prohibiting mining.

Edward W. Stuebing

Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge.

ADMINISTRATIVE JUDGE IRWIN DISSENTING IN PART AND CONCURRING IN PART:

When construing a statute, one starts, obviously enough, with the language of the statute.

What section 2(b) of the Mining Claims Rights Restoration Act of 1955 (69 Stat. 682, 30 U.S.C. § 621(b) (1982)), provides, in words suggested to the Senate by the Department of the Interior itself, is:

If the Secretary of the Interior, within sixty days from the filing of the notice of location, notifies the locator by registered mail of the Secretary's intention to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land included within the placer claim, mining operations on that claim shall be further suspended until the Secretary has held the hearing and issued an appropriate order. The order issued by the Secretary of the Interior shall provide for one of the following:

- (1) a complete prohibition of placer mining;
- (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or
- (3) a general permission to engage in placer mining. [Emphasis added.]

The report of the Senate Committee on Interior and Insular Affairs on the bill makes clear that the opening of all public lands withdrawn or reserved for power development to entry for location and patent of mining claims and for "mining, development, beneficiation, removal, and utilization of the mineral resources of such lands" 1/ was "subject to conditions and procedures." 2/ Concerning section 2(b), the report stated:

1/ 30 U.S.C. § 621(a) (1982).

2/ S. Rep. No. 1150, 84th Cong., 1st Sess., (1955), reprinted in 1955 U.S. Code Congressional and Administrative News 3006.

This section limits the effect of entry in four respects: . . . Fourth, gives to the Secretary of the Interior authority to hold public hearings to determine whether placer mining operations would be detrimental to other uses of the lands involved, and to require at his option, locators and operators of placer-mine operations to restore such lands to their former condition when the mining operation has been completed. 3/ [Emphasis added.]

The statement of the managers of the bill on the part of the House of Representatives in the Conference Report about the amendment that added section 2(b) was similar:

In addition, language has been adopted in the form of a new subsection added to section 2 affecting placer-mining claims which may be located on lands opened to mining entry by H.R. 100. The House managers agree that the Secretary of the Interior should be advised immediately when placer claims are initiated since serious conflict frequently arises between mining activity and other land uses when placer mining and dredging operations are involved, as this amendment provides. The language adopted would give to the Secretary authority in the case of placer-mining claims to hold public hearings to determine whether placer-mining operations in the areas would be detrimental to other uses of the lands. 4/

It requires no long essay to demonstrate that any entry or mining, development, etc., of the mineral resources on land withdrawn or reserved for power development or powersites must conform to the governing law. Congress specifically provided that it should, in four words in the first sentence of section 2(a): "under applicable Federal statutes." 5/ This fact, however, does not call for overruling United States v. Cohan, 70 I.D. 178 (1963), in part. That case does not, as the majority claims,

3/ Id. at 3006-07.

4/ Id. at 3013.

5/ 30 U.S.C. § 621(a) (1982).

ante at 199, "blind the fact-finder to the reality that other laws . . . operate to constrain and condition placer mining" or "preclude consideration of other laws." All it states is the self-evident proposition that the Mining Claims Rights Restoration Act of 1955 provides additional legal authority for the Department to prohibit or condition such mining and that the existence of other laws with similar authority does not preclude invoking that Act to prohibit it. 70 I.D. at 182. ^{6/}

So far as the construction of section 2(b) is concerned, the first observation to make is that whether or not a hearing is held is within BLM's discretion. Secondly, if it does, the issue is "whether placer mining operations would substantially interfere with other uses of the land included within the placer claims." Although where "other uses" must be is clear, what they may be is not limited. Whether the placer mining operations will "substantially interfere" with another use is a question of the circumstances of the situation. Although the statutory test can hardly be regarded as oracular, the Congressional reports add that the determination to be made is whether placer mining operations "would be detrimental to other uses of the lands," that is, whether they would cause them damage, harm or loss.

The Department's regulations implementing section 2(b) state simply:

Upon receipt of a notice of location of a placer claim filed in accordance with § 3734.1 for land subject to location under the

^{6/} In discussing *United States v. Mrs. Reho Wolfe*, a case relied on by the Director of BLM, it is stated in *Cohan* that the statement in *Wolfe* that the Forest Service might protect a trail threatened by mining by legal remedies available to any landowner against destruction of his property by adjoining uses "is not to be read as a ruling that the existence of other legal remedies, in and by itself, precludes the prohibition of placer mining under the act." 70 I.D. 182, note 3.

act, a determination will be made by the authorized officer of the Bureau of Land Management as to whether placer mining operations on the land may substantially interfere with other uses thereof. If it is determined that placer operations may substantially interfere with other uses, a notice of intention to hold a hearing will be sent to each of the locators by registered or certified mail within 60 days from date of filing of the location notice.

43 CFR 3736.1(b). This provision has not changed since the Department first proposed the rule. See 43 CFR 185.176, 23 FR 5437 (July 17, 1958); 43 CFR 185.106, 21 FR 8947 (Nov. 16, 1956). As a matter of practice BLM sends notice of the location of the claim to the District Manager or the Regional Forester, if it is located in a national forest, asking that a box be checked indicating whether placer mining operations would or would not substantially interfere. Even if the box for "would" is checked, of course, BLM is free to inquire what the other uses are and what the nature of the anticipated interference with them is before deciding whether to hold a hearing. If interference with other uses would not be substantial, then no hearing is required. If this is uncertain, then a hearing is appropriate.

In United States v. Bennewitz, 72 I.D. 183 (1965), the Department concluded that, since section 2(b) provides that the order resulting from a hearing shall either prohibit mining or allow it on the condition of subsequent reclamation or grant a "general permission", the Secretary should "be able to base his decision not only on what the claimant proposes to do but also on what the claimant or his successor may be able to do in the way of placer mining." 72 I.D. at 188. Since the Secretary may act only once, reasoned Bennewitz, "[i]n the face of this potential danger to the recreational uses * * * the only order that may properly be issued is to prohibit

placer mining operations. * * * The only other alternative, to permit unrestricted mining, could prove to be a disaster to a valuable natural resource." Id.

As indicated above, however, and elaborated by the majority, there is in fact no such thing as "unrestricted" placer mining. The "general permission" that may be granted for placer mining under section 2(b) would not exempt it from regulation under other provisions of law. The issue at the hearing, therefore, is whether regulated, not unrestricted, placer mining, on the scale proposed or potentially possible, would substantially interfere with other uses.

I agree that the hearing and the Administrative Law Judge's conclusion in this case were based on the incorrect assumption that the issue was whether "unrestricted" placer mining would substantially interfere with other uses of the land included within the claims and that the case must be remanded for a determination whether placer mining as regulated "under applicable Federal statutes" would do so. I do not, however, agree that the determination includes a weighing of the relative merits or value or public interest of placer mining and other uses of the land. ^{7/} Nothing in the Act or its

^{7/} United States v. Mineral Economics Corp., 34 IBLA 258 (1978), cited by the majority, ante at 204, note 1, is not persuasive to the contrary. What that case holds is that the Administrative Law Judge's decision that placer mining operations would not substantially interfere with other uses of the land should be affirmed. The dicta in the Administrative Law Judge's decision that placer mining should not be prohibited simply because a small percentage of the doves killed by hunters annually in the state would be lost, and in the Board's decision that no value was ascribed to the land except for dove production, are irrelevant. The issue is whether other uses of the land will be substantially interfered with, not whether they are substantial uses in the opinion of the Administrative Law Judge or the Board.

history imparts this consideration to the hearing. It is appropriate, if at all, in deciding whether to hold the hearing.

Will A. Irwin
Administrative Judge

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