

UNITED STATES FOREST SERVICE  
v.  
WALTER D. MILENDER

IBLA 86-106

Decided September 12, 1988

Appeal from an Administrative Law Judge's decision permitting placer mining operations within a powersite.

Affirmed in part, reversed in part, modified in part.

United States Forest Service v. Walter D. Milender, 86 IBLA 181, 91 I.D. 175 (1985), modified.

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

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), a "general permission" to engage in placer operations is always a possibility. Such a "general permission," however, means all operations are to be carried out under existing laws regulating mining.

2. Act of August 11, 1955 -- Mining Claims: Powersite Lands -- Mining Claims: Special Acts -- Mining Claims Rights Restoration Act -- Powersite Lands

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened powersites to entry under the mining laws. To determine whether placer mining should be allowed pursuant to the Act, there must be a

determination made whether there is a substantial use of the land for other purposes which warrants a prohibition of mining.

3. Act of August 11, 1955 -- Mining Claims: Powersite Lands -- Mining Claims: Special Acts -- Mining Claims Rights Restoration Act -- Powersite Lands

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Secretary of the Interior may, but is not required to, hold a hearing to determine whether placer mining operations should be prohibited, generally permitted, or permitted subject to a requirement that the land be restored to its condition prior to mining. In making this determination, the only limitation placed upon the Secretary's discretion is the requirement that his order must be "appropriate."

4. Act of August 11, 1955 -- Mining Claims: Powersite Lands -- Mining Claims: Special Acts -- Mining Claims Rights Restoration Act -- Powersite Lands

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits to other uses.

5. Act of August 11, 1955 -- Mining Claims: Powersite Lands -- Mining Claims: Special Acts -- Mining Claims Rights Restoration Act -- Powersite Lands

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department possesses authority to condition mining plan approval upon reclamation of the mined land to the same condition as it was found prior to mining.

6. Act of August 11, 1955 -- Mining Claims: Powersite Lands -- Mining Claims: Special Acts -- Mining Claims Rights Restoration Act -- Powersite Lands

Department regulation 43 CFR 3738.1 provides that, in cases where there has been a hearing before an Administrative Law Judge which has resulted in an order that placer mining shall be allowed in a powersite withdrawal provided that the miner shall restore the land to the condition in which it was immediately prior to mining, there shall be a bond to insure reclamation.

## OPINION BY ADMINISTRATIVE JUDGE ARNESS

In June 1982, Walter D. Milender located the Agate One and Red Rock placer mining claims, each consisting of 20 acres. These claims, with the exception of the southeastern portion of the Red Rock, are situated within Powersite Classification No. 179 in the Plumas National Forest. After Milender filed location notices with the Bureau of Land Management (BLM), BLM inquired of the United States Forest Service (FS) if it had objections to the conduct of placer mining operations on the claims pursuant to the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1982). FS objected to the proposed placer mining operations, asserting that the claims would substantially interfere with other uses of the land. Following a hearing on the issues thus raised, Administrative Law Judge L. K. Luoma prohibited placer mining on the Red Rock and Agate One claims, and on three other claims which are no longer an issue in this case, those three having been subsequently relinquished. The testimony at the original hearing is summarized in United States Forest Service v. Milender, 86 IBLA 181, 183-89, 92 I.D. 175, 177-81 (1985).

Milender appealed. In the subsequent Board decision, United States Forest Service v. Milender, supra, the Board examined the standard used to determine whether or not placer mining operations should be prohibited on powersite lands. The Board focused on the term "unrestricted mining" as used in United States v. Bennewitz, 72 I.D. 183, 187-88 (1965). Bennewitz employed this term to describe the Secretary's perceived inability under the Act to limit or condition the claimant's right to mine following commencement

of mining operations; this approach had become the criterion for subsequent decisions which followed the Bennewitz reasoning.

In the Milender decision, we rejected this rationale. Therein, the Board held that it is error to prohibit placer mining on powersite lands pursuant to the Act 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 mining claims, and (2) all land has some other use or value which would be affected by mining, so that prohibiting mining for that reason would foreclose mining on all powersite lands and effectively nullify the Act. The Board stated that 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. The Board held that 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. The Board also expressly overruled United States v. Cohan, 70 I.D. 178 (1963), to the extent that case precluded consideration of the effect other law, regulations, precedent, police powers, and remedies may have upon the Department's ability to regulate mining.

Because the Board had enunciated a new standard, it set aside Judge Luoma's finding that "unrestricted placer mining on the claims will substantially interfere with timber management." The Board found that there must be an objective evaluation of the value of timber management use and the

reasonable and realistic 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. The Board remanded the case to the Hearings Division with instructions to reopen the hearing for the limited purpose of determining, consistent with the opinion, whether the potential interference with the use of the land for timber management is sufficient to warrant issuance of an order prohibiting mining.

The Administrative Law Judge found on remand that Milender's plans for exploring his claims would have little or no effect on timber management, but that a large scale open pit mining operation such as he would conduct "would effectively take the disturbed acreage out of timber production for the foreseeable future, in spite of best efforts to restore the surface to its present conditions" (Decision on Remand, dated Sept. 27, 1985, at 11). He concluded, however, that placer mining operations on the two remaining claims here involved, the Agate One and Red Rock, would not substantially interfere with other uses of the land and that such placer mining should be permitted on the condition that, following operations, the surface of the claims should be restored to the condition in which it was immediately prior to these operations. Id. at 11-12. FS filed a timely appeal.

On January 9, 1986, FS also filed a request for reconsideration of our earlier decision, United States Forest Service v. Milender, supra, and for consideration of this pending appeal en banc. FS argued, correctly, that the Board in the Milender case discarded the "unrestricted placer mining

test" postulated by the decision in United States v. Bennewitz, *supra*. 1/ FS pointed out that the Milender Board was not unanimous in regard to the "balancing test" described by that opinion and asks that the Board set aside this holding or clarify it. Good cause appearing, this appeal is therefore considered by the entire Board. All prior proceedings before the Department concerning the two claims which remain at issue are presently before us for review. We will consider the issues on appeal separately as they apply to each claim, and will not limit our review to the Administrative Law Judge's decision on remand, but will consider the entire dispute insofar as concerns the two remaining claims open to review. 2/

The purpose of the Mining Claims Rights Restoration Act of 1955 was to open the approximately 7 million acres of public lands then withdrawn or reserved for power development or powersites to entry under the Federal mining laws. 3/ Section 2 of the Act, now 30 U.S.C. § 621 (1982), "limit[ed]

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1/ The rationale of the Bennewitz decision was twice rejected by our Milender opinion. It was generally disapproved in a note approving United States v. Mineral Economics Corp., 34 IBLA 258 (1978), as the sole viable precedent remaining from prior Departmental decisionmaking on this subject. Later, use of the Bennewitz rationale was denounced as "unwarranted and conceptually improper." United States Forest Service v. Milender, 86 IBLA at 194, 92 I.D. at 183. Milender rejects the thesis, expressed by Bennewitz, that the Department can "act only once" to control placer mining. The Milender opinion is wholly predicated upon the fact that current regulation of mining has become continuous, whatever may have been the practice when Bennewitz was decided. The dissent mistakenly assumes that any interference with another use is "substantial." If other uses than powersite use are insubstantial, there cannot be a substantial interference with such uses.

2/ References to the 1983 transcript of hearing will be cited: 1983 Tr. References to the remand hearing held in 1985 will be cited: 1985 Tr.

3/ S. Rep. No. 1150, 84th Cong., 1st Sess. (1955), reprinted in 1955 U.S. Code Cong. and Ad. News at 3006. This purpose is realized in 30 U.S.C. § 621(a) (1982), which provides:

"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 effect of entry in four respects." 4/ The fourth of these, now contained in 30 U.S.C. § 621(b) (1982), "gives 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." 5/

Section 621(b) provides, in part:

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.

[1] It is at once apparent that there is no statutory requirement that there be a hearing before placer mining operations are allowed. 6/ The

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4/ S. Rep. No. 1150, supra, note 1, at 3006. Significantly first among the limitations was the retention of "all power rights" by the United States. Obviously interference with those rights is not allowed. Powersite use remains the primary use of this land.

5/ Id. at 3007.

6/ It is noted that FS provided evidence at the remand hearing through a member of the staff of the Regional Office, Pacific Southwest Region, to the effect that in FY 1985 in 6 out of 44 placer mining applications made in the Region, it was determined that a hearing should be conducted; in the 38 cases in which no hearing was sought, a finding was made that placer mining would not substantially interfere with other uses of the land affected without conducting a hearing (1985 Tr. 18-19).

Secretary may, in his discretion, allow the 60-day period established by the Act to expire, thus enabling the placer miner to conduct operations despite their effect upon other uses. In the event a hearing is held, however, the Secretary's order must provide for one of three stated alternatives, although nothing in the Act links any available alternative to a particular finding, and any limitations placed upon the proper exercise of Secretarial discretion exist only to the extent legal constraints require reasonableness in actions affecting the public lands. Since the Act does not require any particular result, the third, and most liberal alternative to the miner, a "general permission" to engage in placer operations, is always a possibility. A "general permission" to engage in placer mining means that "mining, development, beneficiation, removal, and utilization of the mineral resources of such lands \* \* \* [are] all to be carried out under existing laws regulating such activities." 7/

Our first Milender opinion was concerned with the definition of the statutory term "substantially interfere," or rather with the re-definition of that term following a series of decisions which the Board found to have been wrongly decided, based upon a misconception originating in United States v. Cohan, supra. So as to give effect to the apparent purpose of the Act, which was to restore mining to powersite areas where it had been prohibited, we proposed, by way of example, an approach to decisionmaking in these cases, which required the use of a balancing test:

The decision in each specific case, then, must reflect a reasoned and objective evaluation of potential detriments and benefits

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7/ S. Rep. No. 1150, supra, note 2, at 3006.

accruing from placer mining operation, 1/ with due regard for the extent to which such operations might be controlled, inhibited and/or mitigated by existing law and regulations.

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1/ Since [United States v.] Cohan, [70 I.D. 178 (1963)] 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.

86 IBLA at 204, 92 I.D. at 188.

[2] The note to our holding in Milender, quoted above, is essential to an understanding of the Milender opinion, first because it disapproves all our prior decisionmaking in this area, including the Bennewitz decision, and, more importantly, because it provides us with an example of a case in which the restoration statute was correctly applied by the Board - Mineral Economics. In Mineral Economics it was presumed, as it now is presumed with Milender's claims, that mining would remove vegetation which was being managed for another purpose. In the Mineral Economics case, the competing use was wild dove production. As in this appeal, the vegetation present on the claims was not of uniform quality, nor was the vegetation of a unique type. Weighing the diminution of the dove population which total removal of the vegetation would cause against the potential benefits of mining, the Board found that the United States had failed to "sufficiently establish such a substantial use of the land for uses other than mining which warrants a

prohibition of mining." Id. at 262. The use of this sort of balancing test is at the center of our Milender decision. And central to the balancing test to be applied is the concept that competing uses must be substantial if they are to be used to prohibit placer mining.

[3] Under the Act the Secretary may hold a hearing to determine whether placer mining operations would substantially interfere with other uses of land included within a placer claim, although he need not do so. Admittedly, all land has other uses which would necessarily be interfered with if extensive, lawful placer mining is conducted. However, the purpose of the Act cannot be effectuated if mining is prohibited in every instance where any impairment of another use is identified at a hearing. Obviously, Congress intended that placer mining should, in general, be permitted, and that some interference with other uses must be tolerated. Congress, however, provided that mining could be prohibited if the Secretary determined that mining would substantially interfere with other uses. But even should the Secretary find there to be substantial interference with other uses, nothing in the Act or in the legislative history of the Act prevents the Secretary from granting "general permission to engage in placer mining," provided that such an order be "appropriate." Such an order would be "appropriate," we find, when the competing surface use has less significance than a proposed placer mining operation. This requires that the importance of the competing interests be compared and judged on whatever grounds are relevant in the individual case.

As we stated in our first Milender decision, 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 other uses. And as we found in Mineral Economics, the showing of a slight diminution of another resource is insufficient to justify a total prohibition of mining. It is also, of course, recognized that the single purpose of FS regulation of mining is to insure that the surface of the national forests is not disrupted: FS does not, under its regulations, attempt to balance mining development against competing uses of the forest, nor is FS charged with responsibility for minerals management in the forest. See generally 36 CFR Part 228. That responsibility must be borne by this Department. 30 U.S.C. § 621(b) (1982).

Our original decision herein, United States Forest Service v. Milender, supra, contained two independent holdings. First, the panel unanimously held that, in determining whether placer mining would result in substantial interference with other uses of the land, the proper focus of analysis was not whether "unrestricted placer mining" would substantially interfere with other uses, but, rather, whether "legal, normal operations, subject to regulatory restraint, might interfere with such uses." Id. at 198, 92 I.D. at 185.

[4] Second, proceeding from the first holding, the majority then held that in determining whether substantial interference had occurred, the decision in each case "must reflect a reasoned and objective evaluation of potential detriments and benefits accruing from placer mining operations, with due regard for the extent to which such operations may be controlled, inhibited and/or mitigated by existing law and regulations." Id. at 204,

92 I.D. at 188. The Board held that, in determining whether or not there was substantial interference, the Department was required to undertake a weighing process in which the benefits of mining were to be set off against the injury to the other uses of the land. It was this second holding from which Judge Irwin dissented in the original decision, a dissent reiterated herein. And it is this holding which the appellant, FS, seeks to have reconsidered in the present appeal.

Judge Irwin dissents on the view that, under the statutory scheme, once it is shown that placer mining will substantially interfere with any existing use of the land, placer mining must be prohibited. Thus, he states, "The Act provides for a determination 'whether placer mining operations would substantially interfere with other uses of the land included within the placer claim,' not whether those uses are substantial or whether they are less significant or valuable than the proposed placer operations." Infra at 250. This argument is flawed for two reasons. First as observed in Milender, by its nature placer mining necessarily interferes to a substantial extent with any other use, at least during the period of active mining. Id. at 200, 92 I.D. at 186. Thus, the position taken by the dissent requires the total prohibition of placer mining activities on lands withdrawn for powersite purposes, a result which is clearly inconsistent with the intent of Congress to open some powersite lands to placer mining.

Second, and more critically, there is a legal error in the dissent's analysis. As pointed out previously, there is simply no provision in the Act which requires the Secretary to prohibit placer mining even if he

affirmatively finds that substantial interference with other uses will occur as a result. If Congress had intended that placer mining be prohibited whenever it was shown that it would substantially interfere with any existing use, Congress clearly could have expressly so provided in the Act. No such language exists.

FS attacks the balancing test enunciated in Milender from a different angle than does the dissent. Thus, FS argues that, regardless whether such a test can be theoretically justified, as a practical matter it would prove impossible to administer. As an illustration of this contention, it points to the decision which Administrative Law Judge Luoma entered in the instant case.

FS argues that Judge Luoma found both that large-scale open pit mining operations "would effectively take the disturbed acreage out of timber production for the foreseeable future," but that "if a mining operation reached the stage of full-scale open pit mining the mineral values would of necessity far outweigh the timber management values" (Decision at 11). FS argues that the reasoning utilized by Judge Luoma is inherently flawed:

It appears that Judge Luoma reasons the mining claimant will not conduct a large-scale mining operation unless he is able to sell his gold for more than it costs to produce, etc. Further he reasons if the miner is making a profit, the value to the public of the gold he produces is greater than the value to the public of all other resources lost as a result of this mining operation.

The flaw is there is no linkage between mining profitability and other values, i.e., timber. The profitability of a mining operation, or the price/value of gold produced thereby, has absolutely no relationship to the price/value of timber (or other resources) lost as a result thereof.

Under the foregoing reasoning the mining claimant can operate in total disregard of the timber destroyed, or other uses lost, because the lost timber values, etc., come out of someone else's pocket, e.g., the public treasury. Expressed otherwise, the profits to the miner from his gold in an ongoing operation may be at the expense of the public in the loss of timber or other resources, but this does not constitute substantial interference and grounds for refusal to approve the placer mining claim.

(Statement of Reasons at 11).

While it may be true that no prudent individual will mine where the costs of mining far outstrip the return to the miner, this fact has relevance only to those costs which the mining claimant must absorb. Costs which are incurred by someone other than the mining claimant will not affect his decision to initiate full-scale development. Thus, the mere fact that a mining claimant will not proceed to full-scale mining unless he has a reasonable likelihood of making a profit, while relevant, is not dispositive of the question whether the value of the land for mining exceeds the value of the land for other purposes.

The question in each case must therefore be whether the relative value of the land for full-scale mining can be calculated so as to exceed the value of the land for other purposes. In the instant case, while there was substantial evidence tendered by FS concerning the effect of full-scale mining on the value of the land for timber management purposes, there is little information from which to guess at the ultimate value of the land for mining purposes.

Walter Milender, the mining claimant, testified at the second hearing about his lack of knowledge of the extent of mineralization on his claims:

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There seems to be a gap in the fact that the mining law says you are to stake a claim once you find enough mineral you are to stake - you can stake a claim, and then you can prospect the claim to find a lode or seam, or whatever.

And the Forest Service seems to have the idea that once I stake the claim I'm ready to go mining, and I am not. I should be ready to go mining, and once I find mineral enough on the claim, then I would have time enough to make application for mining through the standard practices of mining. You have to get an application, you have to go through the Forest Service, you have to go through the state laws to do any mining at all, and this is the part I'm confused on.

But either I'm doing it wrong or the Forest Service is doing it wrong, that somehow I wasn't prepared to answer all these questions on all the mining. I know what type of mining it would have to be, yes, pit mining, but if I have time enough, once I have the claim, I have time enough to prospect it or even drill it if the claim is mine.

(1985 Tr. 76). Milender reiterated this point later in the hearing:

If I were granted the mining claims, then I could go ahead and prospect the area and see if there is enough to spend more money in the area to see if the sample I have go all through the area or even get better deeper, because we are on top of the mountain and it's - then after you find this out, why, then you would be - and start mining or thinking about mining, then, of course, you would have to go to the Forest Service and make an application to mine, you would have to go probably to the State, you would have to make an environmental report, you would - it goes on, it's endless, you know.

So there are just plenty of laws that, after you find enough material, but there isn't any reason to spend money looking for material when you don't know if you can have the mining claims or not.

(1985 Tr. 136).

This testimony highlights a shortcoming in the legislative scheme with respect to the opening of powersite lands hinted at by our first Milender

decision. While the mining laws clearly contemplate the making of a discovery prior to the location of a mining claim, it has long been recognized that, as a practical matter, location normally precedes discovery. Indeed, it was awareness of this reality that originally led to the legal recognition of pedis possessio. Thus, the Supreme Court noted in Union Oil Company of California v. Smith, 249 U.S. 337 (1919):

For since, as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the pedis possessio of a bona fide and qualified prospector is universally regarded as a necessity. It is held that upon the public domain a miner may hold the place in which he may be working against all others having no better right, and while he remains in possession, diligently working towards discovery, is entitled - at least for a reasonable time - to be protected against forcible, fraudulent and clandestine intrusions upon his possession.

And it has come to be generally recognized that while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential to the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after location and give validity to the claim as of the time of discovery, provided no rights of third parties have intervened. [Citations omitted; emphasis supplied.]

Id. at 346-47.

Two salient facts must be kept in mind with reference to the instant case. First, the rights appurtenant to the operation of the doctrine of pedis possessio do not apply against the United States. Since the United States holds paramount legal title and has permitted the taking up of mineral lands only upon the making of a discovery, pre-discovery locations gain

the locator no rights vis-a-vis the United States, which may at any time withdraw the lands from location under the mining laws and thereby defeat any inchoate rights flowing from a mere location.

Second, and more critically for Milender, the statute opening up lands within powersite withdrawals to mineral entry expressly requires that the locator of a claim file a copy of his notice of location in the appropriate BLM office within 60 days of the date of location. 30 U.S.C. § 623 (1982). It further provides, in the case of placer locations, that no operations may be conducted in the ensuing 60 days. If, within those 60 days, the Secretary of the Interior notifies the claimant that he intends to hold a hearing to determine whether placer mining operations would substantially interfere with other uses of the land, no operations may be conducted until such time as the Secretary enters one of the three orders set forth above. 30 U.S.C. § 621(b) (1982). Thus, with respect to claims located within a powersite withdrawal, a placer mining claimant is forestalled from performing any discovery work after the filing of his notice of location until after the Secretary has determined either that placer mining would not substantially affect other land uses, or until it has been determined that despite such interference the value of mining in a specific case exceeds the loss suffered by interference with other uses.

The problem is obvious. Since we held in Milender that proper adjudication under 30 U.S.C. § 621(b) (1982) requires a balancing of the benefits and detriments flowing from placer mining operations, any prospective locator who files a notice of location prior to completion of exploration activities

runs the risk that he may be unable to show that the benefits accruing from placer mining will, in fact, outweigh the detriments. Most locators would be somewhat reluctant to proceed with full exploration before locating the claim since it might make them subject to topfiling by another locator. But even if they were protected by *pedis possessio* in pre-location prospecting activities, they would have no assurance that, should they ultimately make a discovery, mining might nevertheless be prohibited under 30 U.S.C. § 621(b) (1982) because the Secretary deemed the damaging effects of mining outweighed the benefits of full-scale development.

Thus, the prospective locator is faced with the Hobson's choice of either locating his claim upon relatively meager showings and running the risk that, should a hearing be held, he will be unable to establish the benefits that might flow from full-scale mining, or of forgoing the location of the claim until exploration is completed, thereby running the risk that, even should he succeed in making a discovery, it will count for nothing should placer mining ultimately be prohibited. This is precisely the dilemma which Milender faced here. And this is the source of FS' contention that, in practice, the balancing test must necessarily prove unworkable.

The fact that we recognize that a locator is faced with a difficult choice cannot justify absolving a locator from the effects of the choice actually made. Milender elected to proceed to locate the claims based on relatively preliminary exploration. He was therefore placed at a distinct disadvantage in his attempts to show that the benefits of placer mining operations outweighed the detriments. The question then is whether for each

of Milender's claims, FS has shown that substantial interference with timber management practices will be caused by full-scale placer mining, conducted in accordance with normal practices, subject to legal and regulatory restraints.

At the remand hearing, several FS employees testified concerning the probable effects of placer mining on the two Milender claims. Two of these witnesses, District Ranger Michael Robert Wickman and Zone Soil Scientist Denny Michael Churchill, described a nearby placer mine, the Cal-Gom operation, using it as an example of placer development in the vicinity. The operating plan for the Cal-Gom mining operation had been approved by FS in November 1984. At the time of the hearing, approximately 5 tons of overburden had been removed for each ton of gold-bearing material recovered. The Cal-Gom operation involved the widening of a road to approximately two to three times the width needed for normal forest management uses and also involved a disposal site for the overburden. After consultations with other Federal and state agencies, the plan of operations was approved in November 1984, and a \$ 280,000 performance bond was posted by Cal-Gom. Certain restrictions were imposed in the operating plan including restrictions for the protection of water and for the safety of the workers and the general public.

According to Wickman, FS determined that the Cal-Gom area could not be restored for timber production because the area would be an open pit which could not economically be filled. Therefore, the rehabilitation plan of the Cal-Gom pit operation calls for establishing a covering of grass and brush and will forgo the immediate opportunity to grow timber in the future.

The present Cal-Gom operating plan, which contemplates a 20-year life, is now approved for a 3-year period in which approximately 91 acres of land will be disturbed. In the initial mining pilot set-up, there were disclosed values of gold which appeared to weigh in favor of going ahead with the operating plan. Under the operating plan, topsoil which was moved was to be stored and used later to cover the area that was to be excavated. However, Wickman testified, there was no way that the topsoil would cover completely the restored area. Movement of topsoil from other areas was considered but found to be uneconomic.

After describing the Cal-Gom operation, Wickman went on to testify about the timber production on Milender's claims, the Red Rock and Agate One claims. The existing volume of timber on the Red Rock claim is about 14,000 board feet per acre; this is considered a low volume and the claim is considered a poor timber site. It is capable of growing 20 cubic feet of timber annually on an acre of land. The Agate One claim lies in a better timber growing site, presently containing about 30,000 board feet per acre for harvesting. This site was previously logged. An acre of this land is capable of producing 50-80 cubic feet of wood annually or about 16,000 board feet per acre. Wickman said that timber production of that volume every 120 years into the future is the management purpose planned for both claims by FS. He expressed the opinion that if a moderate to large-scale open pit mining operation, similar to the Cal-Gom operation were to occur, it would be very difficult to manage timber on the land afterward.

Churchill, FS soil scientist, testified at length on the types of soils found on the two claims and concluded, as did Wickman, that it would be very

difficult, if not economically impossible, to restore either site to viable timber production following an open pit mining operation such as the Cal-Gom operation described by Wickman.

The soils on the Red Rock claim were badly eroded: Churchill testified that the soil on this claim had been "highly impacted by some previous logging" (1985 Tr. 88). While the Red Rock soil was generally of similar quality to that found on the Agate One, Churchill said the productivity of the Red Rock site "has been markedly lowered by surface erosion from previous management practices" (1985 Tr. 89). The Red Rock soils were characterized by Churchill as two types: Deadwood and Kinkel, with Kinkel being the better soil. Because of erosion the land was "less than satisfactory" for timber production (1985 Tr. 92-93).

The Agate One claim was of better soil quality. It was comprised also of Kinkel-Deadwood soils, estimated to be potentially productive of 50-80 cubic feet of wood per acre annually (1985 Tr. 92). Deadwood soils are shallow and nonproductive, timber production on such soil falling below 20 cubic feet per acre annually, but the presence of the Kinkel type raises the estimate of productive value on the Agate One claim, which contains about 25 percent Deadwood soil. Kinkel-type soil comprises about 60 percent of the area (Churchill Soil Report at 2). Like the Red Rock, the Agate One claim was logged at one time, a circumstance which lowers the present harvest value of this acreage.

Churchill testified, concerning the mineral potential of the Red Rock and Agate One claims, that the geology is basically the same as it is at the

Cal-Gom operation, which consists of disseminated gold in loose material. The zones of highest concentration at Cal-Gom range anywhere from 60 to about 140 feet below the surface. Potential mining on the Milender claims would cover approximately 30 to 40 acres compared to close to 100 acres on the Cal-Gom operation. Churchill's opinion about the Milender minerals relied on his feeling that the geological type is the same as in the Cal-Gom operation, and being neither a geologist nor a mining engineer he really could not say how actual mining would be done on the claims. Churchill stated that FS, when it entered into the plan of operations with Cal-Gom, knew that it would completely destroy the forest management program at that point. He said FS decided in that case to sacrifice timber production in favor of mining.

While it is clear that FS established that full-scale placer mining would cause interference with timber management on both Milender claims, it is obvious that the adverse effects which could be anticipated vary substantially between the Agate One and the Red Rock. Nor does the value of the standing timber which is presently merchantable have any relevance to this question. Since these claims were located after the adoption of the Surface Resources Act, 30 U.S.C. §§ 601-615 (1982), FS may harvest the timber prior to commencement of mining operations, and, consequently suffer no loss to the merchantable timber presently found on either claim.

The same, however, does not apply to the growing timber which is not presently merchantable. FS presented testimony that a significant part of the Agate One claim had been partially cut in 1975 (Exh. 17 at 3). While

the remaining overstory would be recoverable now, the understory timber would not have reached sufficient maturity to be marketable if a clear cut were undertaken at the present time. Thus, this timber would constitute a total loss. The loss of over ten year's growth of timber on this land could not be deemed insignificant. Moreover, during any period of full-scale mining development, obviously no timber can be grown on the land. This, too, represents a demonstrable loss.

FS has also argued that, since its experience with the Cal-Gom operation had shown that it would be virtually impossible economically to restore the land to its present condition, timber management would also be adversely affected on Milender's claims because the land might never be able to be managed for timber production in the future. The dissent agrees with this position when arguing that FS has established placer mining would substantially interfere with timber management.

This contention misapprehends the nature of the order entered by Judge Luoma. Pursuant to the statute, Judge Luoma allowed placer mining "upon the condition that, following placer mining operations, the surface of the claims shall be restored to the condition in which it was immediately prior to those operations." Thus, under the Judge's order, if the claimant wishes to mine, he is obligated, upon completion of mining, to return the land to the condition which existed prior to mining. With respect to the Agate One, since the testimony was unequivocal that the majority of the land was capable of sustained yield at the rate of 50 to 84 cubic feet per acre per year, Milender would be required to return the land to that condition,

regardless how much it cost. This is true even if these costs, by themselves, made mining prohibitively expensive.

[5] It seems likely that the parties were misled by FS' experience with the Cal-Gom operation. Thus, FS's witnesses recounted the damage which they were unable to prevent and assumed that they were equally fettered with respect to the instant case. In this, they made a fundamental error. There is one crucial difference between the Cal-Gom operation and the two claims here at issue - the Cal-Gom operation is not within a powersite withdrawal, while all of the Agate One and half of the Red Rock are.

With respect to mining operations occurring on otherwise unreserved National Forest lands, FS may well be limited to imposing only those restrictions which do not effectively foreclose otherwise legitimate mining operations, even if to allow mining means that there will be a loss of land from the permanent forest base. But this is so precisely because FS has no general authority to precondition mining plan approval on the return of mined acreage to its pre-mining condition. The Department of the Interior, however, possesses just such authority with respect to lands within powersites under section 2 of the Mining Claims Rights Restoration Act.

While it is true that the Department has no authority to issue an order directing specific operations, it may nevertheless accomplish the same result by requiring that, after completion of operations, the surface be restored to the prior condition. Such a requirement may well compel a mining claimant to forgo certain activities since the cost of ameliorating

them will prove excessive. Issuance of an order requiring restoration of the surface to the status quo ante may prevent the most damaging effects of mining precisely because the costs of conducting the clean-up operation would exceed any profit obtained. By requiring restoration, the Department forces the mining claimant to absorb certain environmental costs. His right to mine the claim is made subordinate to his obligation to restore the surface upon the completion of mining. If this obligation ultimately precludes development of the claim, the claimant has no cause for complaint, since he has no right to mine unless and until he agrees to restore the land.

Pursuing this analysis, therefore, there can be no costs attributable to the ultimate destruction of the surface, since Milender is required to restore the surface to the same condition which existed prior to his mining activities. If he finds this too expensive, he may elect not to proceed. But, to the extent that he disturbs any part of the surface, he is required to return it to its pre-mining condition.

Nor must FS simply rely on his assurances that he will reclaim. Section 2 of the Act provides that the Secretary may make such rules concerning bonds as he deems desirable. See 30 U.S.C. § 621(b) (1982). Under the terms of 43 CFR 3738.1, should a limited order be issued, as was done here, the mining claimant is required to provide a bond, in an amount set by the Administrative Law Judge, for the purpose of assuring surface reclamation after mining is complete. Thus, the costs attributable to the removal of the land from the permanent forest base are not properly computed within the confines of the balancing test mandated by our original Milender decision.

Therefore, with reference to the Agate One claim, we find FS has established that there will be a loss in the mortality to those trees which have not yet reached maturity, as well as a loss in annual growth throughout the period in which full-scale mining is occurring. The mining claimant, on the other hand, has provided virtually no information on which one could make a finding that the benefits from mining would outweigh the losses directly attributable thereto. Applying the balancing test required by our first Milender decision, Judge Luoma's decision allowing mining on the Agate One claim is reversed.

The Red Rock claim, however, located only partially within the power-site withdrawal, is of marginal commercial timber value, having been damaged by prior logging operations which caused substantial soil erosion. <sup>8/</sup> Within the withdrawal, it comprises about 10 acres. Even assuming that the worst case, as exemplified by Cal-Gom, could occur on this claim, therefore, nothing in the record before us shows that interference with timber use on the Red Rock claim is an interference with a substantial interest which would warrant a prohibition of mining operations. The existing volume of timber on that portion of the Red Rock claim which is within the withdrawal is low. This stand is only marginally commercial timberland, owing to erosion and to a low site capacity because of poor soils. FS has classed this land at the lowest commercial timber category. It will not regenerate successfully for silvicultural purposes. Since the order entered by the Administrative Law Judge requires that this tract be restored, following

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<sup>8/</sup> FS has not analyzed the effect of mining on the southeastern part of the Red Rock claim. As to mining this portion of the claim, therefore, there has been no objection.

mining, "to the condition in which it was immediately prior to those operations," it cannot be assumed that FS will allow the Cal-Gom operation to be repeated here. The land will, therefore, only be affected by mining during the life of the mining operation. In any event, even should the principal regulatory mechanisms for controlling mining operations prove to be somehow ineffective in this instance, a bond must be obtained to insure that the reclamation ordered by Judge Luoma will take place.

[6] Judge Luoma, however, made no provision for a bond in his decision, although the regulations governing powersite mining operations require the Administrative Law Judge to set a bond. 43 CFR 3738.1. Moreover, a review of the record fails to disclose a foundation for setting the amount of a bond in this case. It is apparent this requirement was overlooked by all parties to this proceeding. Accordingly, we must direct that FS and Milender attempt to reach an agreed-upon amount for a bond. If this cannot be done, another fact-hearing will be required, limited to the question of the proper amount of bond to be furnished.

Following the approach taken in Mineral Economics, therefore, we find, as did the Administrative Law Judge, that loss of timber production on the Red Rock claim would not substantially interfere with other uses of the land, because the competing use described by FS, cultivation for commercial timber, was not shown at the hearing to be a substantial competing alternative so as to justify a prohibition of mining. Particularly at this early stage in the mineral development of the Red Rock claim, it is clear that the marginal timber located on this claim does not reasonably justify an order

prohibiting placer mining, since, as the Administrative Law Judge found, the possibility that a claim might contain a profitable gold mining opportunity merits exploration of this otherwise marginally productive tract of land. Subject to regulation and reclamation, therefore, Milender should be allowed to explore the mineral value of this claim.

This realistic approach to decisionmaking is the approach outlined by our prior decision in Milender. The first consideration in determining whether mining is to be preferred over some other use in any given case is that Congress generally intended to open powersite lands to mining. FS has not submitted sufficient evidence to establish that an order prohibiting mining is necessary for the Red Rock claim. It has, however, established that mining should be prohibited on Agate One. The relative merits of the known competing uses are therefore found to be weighted in favor of the gold mining operation on the Red Rock and in favor of the timber values which have been shown to be more substantial on the Agate One. We conclude, therefore, that the Administrative Law Judge was correct when he concluded that mining should be allowed, subject to site reclamation, on the Red Rock claim. <sup>9/</sup> We reverse his decision as to the Agate One claim, finding that the comparative values of silviculture on that claim outweigh any evidence of the value of the claim for gold. A bond must be posted before mining can proceed on the Red Rock.

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<sup>9/</sup> Since three members of the Board feel there is an issue in this case concerning the manner of the allocation of the burden of proof which warrants separate emphasis, it should be noted that we agree with the analysis of that question stated in the concurring opinion. The rule as stated by the separate opinion is the rule generally applied by the Board and correctly describes the approach taken by this opinion. Since it is apparent that the dissenter also does not quarrel with this aspect of the decision as written, there is complete unanimity in the Board on this matter.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge at the hearing on remand is affirmed as to the Red Rock claim and reversed as to the Agate One claim; upon reconsideration of our opinion in Milender, supra, that decision is affirmed as explained herein.

Franklin D. Arness  
Administrative Judge

We concur:

Gail M. Frazier  
Administrative Judge

C. Randall Grant, Jr.  
Administrative Judge

John H. Kelly  
Administrative Judge

R. W. Mullen  
Administrative Judge

## ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I am in agreement with the result reached in the majority decision, I wish to write separately to underline a conclusion which I believe is necessarily implicit in that decision, viz., the mining claimant bears the ultimate burden of showing by a preponderance of the evidence that benefits resulting from placer mining outweigh the injuries caused by mining to other uses of the land. This holding is, of course, directly contrary to a subsidiary holding of our original decision in this case. See United States Forest Service v. Milender, 86 IBLA 181, 204, 92 I.D. 175, 188 (1985).

Thus, in our earlier decision in Milender, the Board held that "the party who seeks an order prohibiting mining" is required to prove by a preponderance of the evidence that such an order is necessary. Id. No support was cited for this proposition other than a general reference to the intent of section 2 of the Act of August 11, 1955, 69 Stat. 682, as amended, 30 U.S.C. § 621 (1982), to open up powersite land to mining. I perceive two problems with this analysis. First of all, the Act of August 11, 1955, exhibits two discrete intents. One was to open up some powersite lands to mining. The other, however, as shown by Judge Irwin in his dissent, was to protect other uses presently occurring on powersite lands. Nothing in the Act supports the implicit assertion in our original decision in Milender that congressional desire to open up lands closed to mining was intended to predominate over its desire to protect other uses of the land from substantial interference.

Second, under the structure of the Act, hearings are not held in response to a request from a "party who seeks an order prohibiting mining." On the contrary, the Act clearly vests the authority to initiate a hearing in the Secretary of the Interior whenever he wishes to determine whether placer mining would substantially interfere with other land uses. 30 U.S.C. § 621(b) (1982). While other individuals or entities such as the Forest Service may request that the Secretary issue such a notice, only the Secretary, through his authorized delegate, can initiate the statutory process. In this regard, it would seem to me that there was no justification for departing from the well-recognized procedures with which the Department regularly conducts contest hearings: The Government is required to put on a prima facie case that placer mining will substantially interfere with other uses of the land and then the burden devolves to the claimant to overcome this showing by a preponderance of the evidence. What evidence may be used to overcome this showing is, of course, at the heart of the present appeal. But I think it imperative to keep in mind that, once the Government shows substantial interference with a use, it is the mining claimant's obligation to overcome this showing and, if he or she is unable to do so, for any reason, placer mining operations may properly be prohibited. 1/

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1/ I also agree with the majority rationale for rejecting the dissent's contention that if substantial interference with any existing use is shown, placer mining must be prohibited. Moreover, the interpretation espoused by the dissent is clearly more restrictive than that which has been applied by the Forest Service. Thus, at the second hearing, in order to dispel any misconception as to its operations under the Act of Aug. 11, 1955, supra, testimony was presented showing that, with respect to 44 notices of placer locations in powersite withdrawals, which the Forest Service Region 5 had received during the period from June 1, 1984, through May 31, 1985, the Forest Service had recommended that a hearing be held in only six instances. See 1985 Tr. 17-19; Exh. 19. It seems obvious from these statistics that the Forest Service was not mechanically challenging every filing, but rather was engaged in its own weighing process, a process which the dissent suggests is contrary to congressional intent.

The question, then, is whether, for each of the two claims, the Forest Service has shown that substantial interference with timber management practices will be caused by full-scale placer mining, conducted in accordance with normal practices, subject to legal and regulatory restraints. <sup>2/</sup> If the answer to this question is in the affirmative, the issue then becomes whether appellant has established that the benefits from placer mining outweigh the detriments engendered thereby. Inasmuch as I agree with the majority that the quality of the evidence from the point of view of the initial showing by the Forest Service differs substantially between the Agate One and the Red Rock, I will review the two claims separately.

With respect to the Agate One placer claim, the Forest Service presented testimony showing that the Agate One presently contains approximately 24 to 30 mbf per acre and that the site is capable of growing 50 to 80 cubic feet per acre per year (1985 Tr. 61, 88). Thus, District Ranger Mike Wickman estimated that, based on past timber harvests and the present amount of merchantable timber on the site, the land within the Agate One was capable of producing 31 mbf per acre every 120 years into the indefinite future (1985 Tr. 68).

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<sup>2/</sup> Inasmuch as the Board's prior decision in this case expressly limited the hearing on remand to the effect of full-scale placer mining operations on use of the land for timber management (See United States Forest Service v. Milender, supra at 208, 92 I.D. at 190), no further testimony was presented as to the impact of placer mining on either visual resource values or potential degradation of the North Fork of the Feather River. Indeed, a review of the hearing clearly indicates that both Judge Luoma and counsel for the Forest Service were of the opinion that the Forest Service was absolutely precluded from introducing further testimony on either of these two questions. See 1985 Tr. 6-7. Since the Forest Service neither petitioned for reconsideration of that holding nor reargued its original contentions in the context of this appeal, I must agree with the majority opinion that, in this case, only the impact of placer mining on timber management is properly before the Board.

Zone Soil Scientist Denny Churchill testified as to a soil survey he had conducted on the Agate One. See 1985 Tr. 86-93; Exh. 21, Attachment 4. Churchill noted that there were two dominant soil types on the claim, the Kinkel and the Deadwood. He stated that the Kinkel soil, which he described as "fairly well-developed deep soils, fairly productive soils" was the dominant soil on the Agate One (1985 Tr. 88). The Kinkel soils had the potential of sustaining an annual growth of 50-84 cubic feet per acre and carried a Forest Service Site Class 5 rating, meaning it was to be managed for commercial forest production. His report, however, did note that Deadwood soils, which he described in his testimony as "shallow, rather rocky soils \* \* \* essentially nonproductive (1985 Tr. 88)," made up approximately 25 percent of the soils within the claim. Churchill noted that the areas where the Deadwood soils predominated, which were capable of maintaining a growth rate less than 20 cubic feet per acre per year and were therefore rated as Site Class 7, would be considered noncommercial forest land under the National Forest Management Act (1985 Tr. 92). But, overall, Churchill concluded that the land within the Agate One had good to excellent potential for regeneration after a timber harvesting, at least insofar as the Kinkel soils were concerned (1985 Tr. 93). Churchill subsequently noted that Site 5 land constituted 40 percent of the 900,000 acres in the entire Plumas National Forest and over 60 percent of the total land base in the Greenville Ranger District, and encompassed the majority of the land actually managed for commercial forest production in the Plumas National Forest (1985 Tr. 118).

In discussing the effects that full-scale placer mining would have on use of the land within the Agate One claim for commercial timber purposes,

both Wickman and Churchill referred to the nearby Cal-Gom operation, also known as the Goldstripe mine, a large open-pit mine located approximately two miles from the claim, but totally outside the powersite withdrawal. The plan of operations for this mine had been approved by the Forest Service pursuant to its surface management regulations (See generally 36 CFR Part 228). Nevertheless, even though mining activity was proceeding in a prudent, responsible manner, and appropriate reclamation activities were being pursued, it was clear that the disturbed area, which was already scheduled to aggregate approximately 91 acres, would not be returned to commercial forest production. Indeed, Wickman testified that there would be insufficient topsoil to fill the 21 acres of open pits, and that, while Cal-Gom was going to replace the stored topsoil on the 51 acres being used for overburden dumps and residue disposal, the Forest Service had determined that timber production in the area would not be possible for "some time," without significant expenditures by the Forest Service (1985 Tr. 48-49). 3/

Wickman explained that the Forest Service had approved the plan of operations, even though it realized the timber resource loss which would occur, because of its view that it could not impose conditions on mining, beyond those necessary for compliance with statutory environmental or water quality requirements, if those conditions, because of the expenses necessitated thereby, would make the mining economically infeasible. See 1985 Tr. 50-52. Thus, the Forest Service expected to absorb a significant loss in

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3/ Thus, Churchill testified that insofar as the areas disturbed by Cal-Gom were concerned "[o]ur main point is to simply stabilize disturbed areas so that they create no other impacts, no off-site adverse impacts, and that is usually only in terms of regenerating, let's say, annual or perennial grasses. That is as best as we can do" (1985 Tr. 94).

timber production capability within the area of the Cal-Gom operations, even though the operations were being conducted in a responsible manner.

Assuming that similar development would be undertaken on the Agate One claim, 4/ Wickman asserted that significant interference with existing timber production use would occur (1985 Tr. 72). In this conclusion, he was supported by the testimony of Churchill, who was the Forest Service's liaison with Cal-Gom and, therefore, had first-hand knowledge of the adverse impacts associated with its open-pit mining activities (1985 Tr. 110).

In their testimony related to that part of the Red Rock placer claim which was located within the powersite withdrawal, 5/ both Wickman and Churchill noted that the timber-growing potential of the lands within that claim were significantly below that of the lands within the Agate One. This difference was primarily occasioned by the fact that all of the soils within the Red Rock exhibited severe erosion, much of which was directly attributable to past logging practices under Forest Service contracts (1985 Tr. 88-89, 118-19). As a result, the Kinkel soils within the claim carried a Class 6 rating, meaning they were capable of producing only from between 20 to 49 cubic feet per acre per year, the lowest commercial rating. Churchill

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4/ In this regard, it is important to note that the Forest Services' witnesses were not testifying that the mineral deposit located within the two claims was comparable with that being developed by Cal-Gom. On the contrary, Churchill expressly testified that he had seen no specific data related to the mineral potential of either the Agate One or the Red Rock claims (1985 Tr. 97, 108-110).

5/ Approximately half of the Red Rock claim was located outside the powersite withdrawal and, accordingly, was not covered by the proceedings (1983 Tr. 32, Exh. 3).

noted that "the productivity of this site has been markedly lowered by surface erosion from previous management practices" (1985 Tr. 89). Indeed, in discussing clear-cut harvesting of the timber on the claims, he stated that while the likelihood of successful regeneration on the Agate One would be good to excellent, "it would be less than satisfactory on the Red Rock claim because of previous damage that has occurred on that site" (1985 Tr. 93).

While I think that it is clear that the Forest Service established that full scale placer mining would cause interference with timber management on both claims, I also think it is obvious that the adverse effects which could be anticipated vary substantially between the Agate One and the Red Rock.

Thus, with respect to the Agate One, while I agree with the majority that, under the restriction which Judge Luoma imposed, namely that the surface of the land be restored to its pre-mining condition, the Forest Service will not suffer any loss attributable to the removal of the land from the permanent forest base, I also agree with the majority that the Forest Service has established that it will suffer an increase in the mortality to those trees which have not yet reached maturity as well as the loss of a substantial amount of annual growth throughout the period of full-scale mining. The mining claimant, on the other hand, has provided virtually no information on which one could predicate a finding that the benefits from mining would outweigh the losses directly attributable thereto.

Thus, as the majority notes, the claimant repeatedly admitted that further prospecting was necessary in order to determine whether any

development was warranted. While he had submitted assay results at the first hearing (Exh. A), he was unable to say which ones came from the five claims at issue, much less which specific claims were related to which assays (1983 Tr. 153-55). Moreover, his subsequent tender at the second hearing of Master Title plats for Ts. 26, 27 N., R. 8 E., Mount Diablo Meridian (Exhs. B and C), which depict a number of mineral surveys and patented mineral entries in the two townships can scarcely be said to establish that the specific land within his claim is mineral in character, to say nothing of showing the specific values which would outstrip the losses absorbed by timber management should full-scale mining occur. In short, I cannot agree with the decision below that application of the balancing test mandated by our previous Milender decision supports permission to mine the Agate One. Accordingly, I agree with the majority that Judge Luoma's decision permitting placer mining on the Agate One claim must be reversed.

I find the situation with respect to the Red Rock claim much more problematic. While the paucity of evidence on behalf of the benefits derived from mining which characterized the Agate One is also manifested with respect to this claim, I found the Forest Service's evidence of damage much less convincing. In fact, my reading of the record supports the view that, while the land within the Red Rock claim is presently managed as commercial forest land, it would be unlikely to retain such a rating after the timber now standing thereon was harvested. Such being the case, it is difficult to perceive exactly how timber management would be adversely affected by full-scale mining, which, itself, would not occur unless there were adequate indications that mining would be sufficiently remunerative not

only to support a mining operation but to recover the cost of returning the surface to the condition it was in prior to mining. Moreover, while I would not necessarily consider damage to ten acres to be a matter of insignificance, I do believe the small acreage involved in this claim, coupled with the Forest Service's evidence, is a factor which weighs on allowing appellant's mining activities to proceed, subject to the requirement of ultimate surface restoration. As a result, I find myself in agreement with the majority that, subject to surface restoration, placer mining may be allowed on the Red Rock claim.

Since I believe that the majority decision has correctly allocated the burden of proof, and in view of my agreement with the majority's conclusions concerning the legal and factual issues presented by this appeal, I concur with its disposition of the instant case.

James L. Burski  
Administrative Judge

We concur:

Bruce R. Harris  
Administrative Judge

Wm. Philip Horton  
Chief Administrative Judge

## ADMINISTRATIVE JUDGE IRWIN DISSENTING:

With this decision the Board disfigures the Mining Claims Rights Restoration Act of 1955.

Although that Act was designed to open public lands that were withdrawn or reserved for power development or powersites to mineral development under the general mining laws, 1/ it did so "subject to conditions and procedures." 2/ One of the conditions is applicable to the owner of any unpatented mining claim located on land described in the Act, i.e., the requirement for filing a copy of the notice of location within 60 days of location. 3/ One of the conditions, however, applies only to a person who has located a placer mining claim. 4/ This condition is the subject of this appeal. It "limits the effect of entry \* \* \* under Federal mining laws" by giving "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." 5/

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1/ S. Rep. No. 1150, 84th Cong., 1st Sess. (1955), reprinted in 1955 U.S. Code Cong. and Ad. News 3006. One reason for the interest in the legislation is indicated in the explanation provided for H.R. 3915, the similar bill considered by the 83rd Congress: "Included in the minerals the location and patenting of claims for which would be authorized by this measure on lands now withdrawn is uranium. Large deposits of uranium are believed to exist in several areas set aside for a power site." S. Rep. No. 1532, 83rd Cong., 2d Sess. (1954) at 1.

2/ S. Rep. No. 1150, supra, note 1, at 3006.

3/ See 30 U.S.C. § 623 (1982).

4/ "The locator of a placer claim under this chapter, however, shall conduct no mining operations for a period of sixty days after filing of a notice of location pursuant to section 623 of this title." 30 U.S.C. § 621(b) (1982).

5/ S. Rep. No. 1150, supra, note 1, at 3006-07.

The Congress implemented its concern about the effects of placer mining with a special procedure. It prohibited the locator of a placer claim under the Act from conducting mining operations within 60 days of filing a copy of the notice of location with the district land office of the land district in which the claim is situated. 6/ If, within this time, the Secretary notifies the locator 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," then mining operations on the claim are further suspended until the hearing has been held and the Secretary has issued "an appropriate order." 7/ Such an order

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. [8/]

This language of this provision of the Act originated with the Department of the Interior. Assistant Secretary Orme Lewis, in a July 18, 1955, letter to Senator Murray, chairman of the Committee on Interior and Insular Affairs, while agreeing fully "with the need for encouraging mineral development in public-land areas not now subject to mining location," observed:

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

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6/ 30 U.S.C. § 621(b) (1982).

7/ Id.

8/ Id.

lands usually constitutes an integral part of large timber tracts which should be managed on a sustained yield basis. \* \* \* [I]t 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. [9/]

The language of the Assistant Secretary's proposed amendment was adopted verbatim by the Congress. 10/ The Board has previously said:

Inasmuch as such reports represent views of senior officials of this Department which served as the basis for legislative action, this Board is not generally disposed to apply enacted legislation in a manner inconsistent with such statements. \* \* \* Such a conclusion is especially compelling where, as here, Congress enacted verbatim the statutory language proposed by the agency. [Emphasis in original.]

Celsius Energy Co., Southland Royalty Co., 99 IBLA 53, 77, 94 I.D. 394, 408 (1987). 11/

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9/ S. Rep. No. 1150, supra, note 1, at 3010-11.

10/ See Conference Report 1610, July 30, 1955, Statement of the Managers on the Part of the House, id. at 3013. In explanation, the Managers stated:

"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 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." Id.

The language of this provision has only been amended to allow for the use of certified mail in providing notice to the locator of the Secretary's intention to hold a public hearing. Section 1(27), P.L. 86-507, June 11, 1960, 74 Stat. 202.

11/ "[C]ourts have generally accepted such appended reports and letters from officials of this Department as evidence of legislative intent. See

The Board's decision, however, applies section 621(b) of the Act in a manner that is inconsistent with the views of the Department when it was proposed and with the intent of the Congress when it was enacted.

If a hearing is held under that section, the majority says:

[N]othing in the Act links any available alternative [order] to a particular finding, and any limitations placed upon the proper exercise of Secretarial discretion exist only to the extent legal constraints require reasonableness in actions affecting the public lands. Since the Act does not require any particular result, the third, and most liberal alternative to the miner, a general permission to engage in placer operations, is always a possibility.

(Majority Opinion at 214). 12/

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fn. 11 (continued)

e.g., Watt v. Western Nuclear, Inc., 462 U.S. 36, 50, 55-56 (1983); Utah Power & Light Co. v. United States, 243 U.S. 389, 407 n. 1 (1917); United States v. Union Oil Co., 549 F. 2d 1271, 1277 (9th Cir.), cert. denied sub nom. Ottoboni v. United states, 434 U.S. 930 (1977). So has this Board. e.g., Western Nuclear, Inc., 35 IBLA 146, 157, 85 I.D. 129, 135 (1978), aff'd, Watt v. Western Nuclear, Inc., supra; Cecil A. Walker, 26 IBLA 71, 76 (1976)." Id.

12/ The language of H.R. 3915 in the 83rd Congress did not contain this alternative, but provided:

"[M]ining operations on such claim shall be further suspended until the Secretary holds the hearing and issues an appropriate order prohibiting or permitting such operations or permitting such operations upon the condition that, following such operations, the surface of the claim shall be restored by the locator substantially to its condition immediately prior to such operations."

S. Rep. No. 1532, supra, note 1, at 5.

The report of the Senate Committee on Interior and Insular Affairs explained:

"The Secretary can then prohibit mining operations altogether, or may permit them only on condition that the locator file a bond or undertaking to restore the surface of the land substantially to its condition prior to such mining operations, if the Secretary deems the public interest to require such action."

Id. at 2.

The general permission alternative was added to the bill enacted by the 84th Congress to authorize mining in accordance with existing laws, without posting a bond, where the hearing revealed that placer mining operations would not substantially interfere with other uses of the land. See note 13, infra.

I disagree. The three alternative orders the Congress provided in section 621(b) authorize either a prohibition of or a permission to conduct placer operations on the condition the lands are restored to their previous condition afterwards if it is shown at the hearing that there are other land uses that placer mining would substantially interfere with, and a general permission if it is not. <sup>13/</sup> Although the Congress opened powersite lands to mining generally, it was concerned about the "serious conflict [that] frequently arises between mining activity and other land uses when placer mining and dredging operations are involved," and therefore provided that such operations be subject to special procedures and conditions. If the evidence presented at a hearing demonstrates no serious conflict, then a general permission to engage in placer mining operations may be granted. If, however, the evidence presented at the hearing demonstrates that placer mining operations would cause such a conflict, i.e., would substantially interfere with other land uses, the conflict must be resolved by requiring the restoration of the lands or by prohibiting the operations. To do otherwise ignores the conditions under which the Congress authorized placer mining operations. If there is evidence of substantial interference, it would be outside the range of choices available to the Secretary to grant a general permission anyway, and it would be arbitrary and capricious, an abuse of discretion, and not in accordance with law to do so. 5 U.S.C. § 706(2)(A) (1982); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971). See Hurley v. United states, 575 F.2d 792 (10th Cir. 1978). That

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<sup>13/</sup> A general permission to engage in placer mining operations means they would be "carried out under existing laws regulating such activities." S. Rep. No. 1150, supra, note 1, at 3006; U.S. Forest Service v. Walter D. Milender, 86 IBLA 181, 92 I.D. 175 (1985).

is, it would violate "legal constraints [that] require reasonableness in actions affecting the public lands."

The Board adopts an approach to decisionmaking under section 621(b) that requires the use of a balancing test. Central to this approach "is the concept that competing uses must be substantial if they are to be used to prohibit placer mining" (Majority Opinion at 216). The majority says "Congress intended that placer mining should, in general, be permitted," and finds that an order granting general permission to engage in placer mining would be appropriate "when the competing surface use has less significance than a proposed placer mining operation." Id. at 216. Elsewhere the majority says "[i]f other uses than powersite use are insubstantial, there cannot be a substantial interference with such uses." Id. note 1 at 212. "The question in each case must therefore be whether the relative value of the land for full-scale mining can be calculated so as to exceed the value of the land for other purposes," according to the majority. Id. at 220.

The Congress intended that mining, in general, be permitted on powersite lands, but limited the circumstances under which placer mining could be. The Act provides for a determination "whether placer mining operations would substantially interfere with other uses of the land included within the placer claim," not whether those uses are substantial or whether they are less significant or valuable than the proposed placer operations. Granting a general permission to engage in placer operations in the face of evidence demonstrating other land uses would be substantially interfered with would be outside the scope of the Secretary's authority and would

therefore be arbitrary and capricious. Citizens to Preserve Overton Park v. Volpe, *supra*.

The majority observes that, because 43 CFR 3738.1 requires that a bond be posted if an order conditioning permission to conduct operations on restoration of the lands involved is issued, "there can be no costs attributable to the ultimate destruction of the surface" (Majority Opinion at 231). Its "calculation" of relative values results in an application of the balancing test that disallows placer mining on the Agate One claim because the locator did not provide sufficient information to overcome the Forest Service's showing of the loss of immature trees that could not be marketed before mining, and of annual growth during the mining operation. Id. at 232. Because the land within the Red Rock claim "is of marginal commercial timber value," however, the majority concludes that "nothing in the record before us shows that interference with timber use \* \* \* is a substantial interest which would warrant a prohibition of mining operations," and allows placer mining subject to restoration of the surface and the accompanying bond. Id. 14/

The majority's decision concerning the Red Rock claim contradicts the conclusion of the Administrative Law Judge, based on the evidence at the hearing on remand, that the kind of placer operation that would be conducted "would effectively take the disturbed acreage out of timber production for

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14/ The majority's calculation with respect to this claim says nothing about the values of the proposed placer mining. The concurring opinion observes: "[T]he paucity of evidence on behalf of the benefits derived from mining which characterized the Agate One is also manifested with respect to this claim." Supra at 243.

the foreseeable future, in spite of best efforts to restore the surface to its present conditions." <sup>15/</sup> Just as it would be arbitrary and capricious to grant a general permission where the evidence shows placer mining operations would substantially interfere with other land uses, it is arbitrary and capricious to authorize such operations where the evidence shows that restoring the surface of the claim to the condition in which it was immediately prior to those operations is not possible. Where, as here, the evidence shows that this alternative will not avoid substantial interference with other land uses, the only order the Secretary is authorized to issue is one prohibiting placer mining operations.

The majority does not define what other land uses it regards as substantial or significant. In this case the lands are precisely the kind cited by the Department in its letter to the Congress as an example of those "quite valuable for other surface uses," i.e., "timbered lands situated in [a] national forest \* \* \* which should be managed on a sustained yield basis," and they are so managed by the Forest Service. Even so, and even

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<sup>15/</sup> Decision on Remand dated Sept. 27, 1985, at 11; see Exhibit G 21, report of Mike Wickman, District Ranger, Greenville Ranger District, Plumas National Forest, dated June 25, at 2-3:

"Impacts of Mining on the Timber Resource

"We believe that wherever topsoil is stripped on these claims in conjunction with mining, the productivity of the site will be reduced to the extent that it will no longer be commercial timberland (productivity will drop below 20 ft.<3> /acre/year).

"Productivity would be impacted due to changes in the physical and chemical characteristics of the site. This would hold true even if soil were stripped and stockpiled for eventual use in reclaiming the site (as would be a provision of the Plan of Operations). Soil handled in this way has reduced nutrient levels. Bulk density is also impacted. The main obstacle to restoring commercial timber site is rooting depth. Following reclamation, the site would be characterized by a thin soil mantle sitting on top of bedrock. Such a situation does not provide sufficient rooting area to maintain productive timberland."

See also Tr. 47-49, 51-52, 70-72, 94-97, 100, 110.

where the worth of the use could be measured in relatively objective terms, the majority finds this use is not substantial enough on one claim involved in this case, and implies that it might well have found the same for the other claim if the locator had provided a little more information about the benefits from the proposed placer mining. Nor does the majority consider the "recreational, grazing and scenic values of these lands," or their other values, under the balancing approach. It does not because the scope of the hearing on remand did not allow for evidence on those values. How will such less tangible values be weighed in the balance where they are involved?

I agree that the Congress intended to restore rights to locate mining claims, as the name of the Act indicates. However, the Congress also recognized that certain land uses and land-use values cannot be restored after placer mining and sought to protect them. In its apparent concern to prevent the frustration of one purpose of the Act in some future case by the assertion of some fabricated use or imaginary value, the Board ignores the other purpose of the Act and sacrifices silviculture on national forest lands involved in this case. <sup>16/</sup> The discretion that the majority says is afforded under section 621(b) exceeds the scope of the authority the Congress delegated. The result in this case is an abuse of the discretion that is delegated and is arbitrary and capricious. The balancing approach the majority adopts offers neither objectivity nor methodology and makes it impossible to predict how land-use values will be weighed against proposed placer mining values in future cases.

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<sup>16/</sup> When the Act was enacted there were approximately 3 1/2 million acres of national forests located within power withdrawals. H. Rep. No. 86, 84th Cong., 1st Sess. (1955) at 6.

The Congress charted a straightforward course: Are there other land uses? If there are not, no hearing is necessary. If there are, will placer mining substantially interfere with them? If not, it may be granted a general permission. If so, can the use be restored? If it can, placer mining may be permitted on the condition the land is restored. If it cannot, it must be prohibited. The Board discards both the chart and the compass.

I dissent.

Will A. Irwin  
Administrative Judge

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