



UNITED STATES v. DONALD E. ENO

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Decided February 13, 2007

UNITED STATES

v.

DONALD E. ENO

IBLA 2004-92

Decided February 13, 2007

Appeal from a decision of Administrative Law Judge William E. Hammett granting a general permission to engage in placer mining operations on a placer claim located within a powersite withdrawal. CAMC-269556.

Reversed in part, affirmed as modified in part, granting of general permission to engage in placer mining affirmed.

1. Act of Aug. 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands--Withdrawals and Reservations: Powersites

The Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. §§ 621-625 (2000), which opened powersite withdrawals for entry under the mining laws, provides that the locator of a placer claim under the Act may not conduct any mining operations for 60 days after filing a notice of location pursuant to 30 U.S.C. § 623 (2000) and that, if the Department decides to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land, the suspension of operations will continue until the hearing has been held and the Department has issued an appropriate order providing for one of the following alternatives: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator restore the surface of the claim to the condition it was in prior to mining; or (3) a general permission to engage in placer mining.

2. Act of Aug. 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands--Withdrawals and Reservations: Powersites

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, as amended, 30 U.S.C. § 621 (2000), 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 placer mining outweigh the detriment that placer mining causes to other uses. Central to the balancing test is the concept that the competing uses must be substantial if they are to be used to prohibit placer mining. Thus, even if the Secretary determines that placer mining would substantially interfere with other uses of the land, he may still appropriately grant a general permission to engage in placer mining operations if the competing surface uses have less significance than the proposed placer mining operation. The importance of the competing uses, which must be compared and judged on whatever grounds are relevant in the individual case, need not be economically quantifiable and may include the preservation of cultural, geological, or scenic resources.

APPEARANCES: Rose Mikovsky, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for appellant Forest Service; Steven J. Lechner, Esq., Lakewood, Colorado, for appellee Donald E. Eno.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Forest Service, U.S. Department of Agriculture, has appealed the December 4, 2003, decision of Administrative Law Judge William E. Hammett, determining that placer mining operations in connection with the Hound Dog placer mining claim, CAMC-269556, would not substantially interfere with other uses of the claimed lands and granting a general permission to engage in such operations. By order dated February 13, 2004, the Board denied the Forest Service's petition for a stay of the effect of Judge Hammett's decision pending appeal.

The Hound Dog placer mining claim is a 40-acre claim situated in the SW¹/₄SW¹/₄ sec. 3, T. 25 N., R. 9 E., Mount Diablo Meridian, Plumas County,

California, within the Plumas National Forest. The claim is basically coextensive with what is commonly known as the “Soda Rock Area.” ^{1/}

The lands included in the Hound Dog claim were originally part of the Delaware 3 placer mining claim, which was located on January 1, 1907, at a time when the lands were open to mineral entry. ^{2/} That claim remained in existence until 1993, when it was declared abandoned for failure to pay required rental fees. See Ex. 23, Mineral Report for Hound Dog Placer Mining Claim Plumas National Forest PL-359 Hearing (P.L. 359 Mineral Report), at 9; Ex. 15, B&R Quarries, IBLA 98-94 (Order dated Feb. 17, 1998). Harry Forcino had acquired the claim in 1965 and quarried the travertine deposit on the claim for building stone until May 24, 1984, when he transferred the claim to B&R Quarries (d.b.a. Feather River Travertine), which continued mining the travertine until the claim was abandoned in 1993.

In 1981, the Forest Service sought a temporary restraining order against Forcino, alleging that he was mining travertine without an approved plan of operations. United States v. Forcino, Civil No. S-81-398-PCW (E.D. Cal. 1981). The parties resolved the action by reaching a compromise settlement that was approved by the Court on November 18, 1985. See Ex. 14, United States v. Forcino, Civil No. S-81-398-PCW (E.D. Cal. Nov. 18, 1985) (Stipulation and Order). Under the agreement, the Forest Service waived any claims for damages at the site and agreed not to seek other relief to prevent removal of the travertine, but did not admit that the claim was valid. Forcino agreed not to conduct mining without an approved plan of operations and not to mine sites identified as Maidu religious, historical, and cultural areas and as scenic areas. The agreement incorporated a plan of operations approved on March 30, 1984, which limited quarry operations to 6.1 acres on the travertine outcrop. Id. and Ex. A attached thereto; see also Ex. 23, P.L. 359 Mineral Report, at 9-10. The terms of the compromise settlement terminated when the Delaware 3 claim was abandoned in 1993. Id. at 10.

^{1/} Soda Rock encompasses a travertine dome structure rising very steeply 70 to 120 feet above Indian Creek. The dome occupies much of the claimed lands at issue here. Indian Creek flows 2,250 feet along the northern and western edges of the dome and is generally confined by a narrow canyon as it passes through the claimed lands.

^{2/} Because the Delaware 3 claim was located in 1907, it was not subject to the Common Varieties Act of July 23, 1955, 30 U.S.C. § 611 (2000), which withdrew common varieties of stone from location under the mining laws unless the deposit had some property giving it a distinct and special value. The abandonment of the claim in 1993 ended the claim’s exemption from that Act.

In January 1982, following a request from the Forest Service, ^{3/} the Keeper of the National Register of Historic Places (Keeper) determined that the Soda Rock Area (also known by the historic Maidu name of Ch'ichu'yam bam) was eligible for inclusion in the National Register of Historic Places under criteria set out at 36 CFR 60.4(a) and (d). ^{4/} See Ex. 4, Executive Order (E.O.) 11593, Determination of Eligibility Notification (Eligibility Determination), at unnumbered pp. 1-3; see also Ex. 5, Mar. 2, 1982, notification of eligibility determination. On September 25, 2003, the Soda Rock Area was officially listed on the National Register of Historic Places. See Statement of Reasons (SOR), Attachment 1.

On August 26, 1988, the Regional Forester, Pacific Southwest Region, issued the record of decision (ROD) and the Plumas National Forest Land and Resources Management Plan (LRMP), which designated an unspecified 30 acres within the Soda

^{3/} The Forest Service request was based on eight iconographic cultural features associated with the Maidu genesis mythology, beliefs, and cultural practices, as described in Exhibit 27, A Brief Examination of Cultural Values and the Potential Effects of Placer Mining at Soda Rock (Elliott Report), at Archaeological Record continuation sheet 1-3: (1) Whippoorwill frozen in the face of the rock, consisting of a figure located on the face of the travertine deposit visible from Highway 89 which resembles a dog's head and is popularly referred to as Dog Rock; (2) the landslide scar formed where, according to Maidu mythology, the Ancient Women would urinate to wash away and drown those trying to travel through the canyon; (3) the travertine pools located just below the wet meadow at the northeast portion of the area adjacent to Indian Creek in which the Maidu historically bathed for their medicinal power; (4) the salt grass meadow where the Maidu historically gathered, collected, and used salt grass; (5) the salt-secreting meadow spring feeding the upper wet meadow at the northeast margin of area; (6) the Ancient Women's sweat lodge encompassing the largest and southernmost in a series of north-south trending sinkholes just west of the quarry where the three evil Ancient Women once lived, a spring once flowed, and salt grass once grew; (7) the Earth Maker's heart or thumping rock represented by a spring located at the southwestern end of the travertine dome enclosed by a concrete spring box, the sound of which is said to be the sound of the Earth Maker's heart; and (8) the spring between the sweat lodge/sinkhole and Indian Creek said to have a bad taste and be curative of urinary problems, the location of which has not been found. See also Ex. 4, Eligibility Determination, National Register Of Historic Places Inventory Nomination Form continuation sheet Description, Item Number 7, at 1-2.

^{4/} A site is eligible under 36 CFR 60.4(a) if it is associated with events that have made a significant contribution to the broad patterns of our history. A site that has yielded or may be likely to yield information important in prehistory or history is eligible under 36 CFR 60.4(d).

Rock Area as a special interest area (geological area) to protect its unique geologic, scenic, and cultural values. See Ex. 16, LRMP, at 4-254, 4-255; see also Ex. 17, ROD, at 3. The LRMP described the Soda Rock Area as a unique and continually developing deposit of multi-colored travertine containing mineral springs, stalactites, sinkholes, and terraced travertine pools of geologic interest that also formed a focal point of Maidu Indian mythology. See Ex. 16, LRMP, at 4-251. Although the LRMP recommended the withdrawal of the Soda Rock Area from mineral entry (id. at 4-48, 4-254), i. e., location of mining claims under the Mining Law of 1872, 30 U.S.C. §§ 28-28e (2000), ^{5/} it plainly contemplated that the travertine on the site would be at least partially mined, presumably as a common variety under the Materials Act of July 31, 1947, as amended, 30 U.S.C. § 601 et seq. (2000). Thus, the LRMP provided management standards and guidelines specifically authorizing travertine extraction within established limits; administering quarrying operations in accordance with the approved plan of operations; ensuring that mined areas were backfilled sufficiently; seeking designation of the area as a National Natural Landmark; and, only upon completion of mining, constructing trails and interpretive signs for public use. Ex. 16, LRMP, at 4-254, 4-255. Despite the recommendation in the LRMP, the area was not closed to mineral entry until September 1997.

On August 15, 1996, prior to the 1997 segregation and the 1999 withdrawal (discussed in more detail immediately below), Gordon K. Burton, Roberta L. Burton, Jimmy A. Brewer, and Steven H. Draper (Burton, et al.) located the Hound Dog placer mining claim pursuant to the Mining Claims Rights Restoration Act of 1955 (MCRRA), as amended, 30 U.S.C. §§ 621-625 (2000) (commonly known as “P.L. 359”). See Ex. 7. Although these lands had been withdrawn from mineral entry under the 1920 Federal Power Act and identified as Power Site No. 179 in 1927 (see 16 U.S.C. § 818 (2000)), in 1955 MCRRA opened lands withdrawn for powersite purposes to location and patent under the United States mining laws. The opening was subject to certain conditions, including the requirements that a locator file a notice of location with the Bureau of Land Management (BLM) within 60 days of location and refrain from conducting any mining operations for a period of 60 days after the filing of the location notice. 30 U.S.C. §§ 621 and 623 (2000). Burton, et al., complied with the filing requirement on August 16, 1996. ^{6/} BLM notified the

^{5/} As noted immediately below, the lands had been opened to mineral entry in 1955 pursuant to the Mining Claims Rights Restoration Act, infra.

^{6/} On Dec. 28, 1994, Donald and Carol Dingel located the Delaware Placer mining claim on the lands previously included within the Delaware 3 claim for the purpose of quarrying the travertine, but failed to file the notice of location with BLM identifying the claim as a P.L. 359 claim as required by 30 U.S.C. § 623 (2000). On Apr. 27, 1995, they transferred the claim to B&R Quarries, and on Mar. 6, 1997, the claim

(continued...)

Forest Service of the location of the claim during the 60-day no-operations period. The Forest Service objected to placer mining of the claim, and on September 12, 1996, BLM sent a letter to each of the claimants informing them that a public hearing would be held in accordance with 30 U.S.C. § 621(b) (2000) to determine whether placer mining operations would substantially interfere with other uses of the land. The Forest Service also advised that, in accordance with 30 U.S.C. § 621(b) (2000), the suspension of operations on the claim would continue pending the outcome of the hearing. See Ex. 6. Burton, et al., transferred the claim to Donald E. Eno on July 28, 1998 (Ex. 9), and BLM was notified of the transfer on August 26, 1998.^{7/}

On August 5, 1997, the Forest Service filed an application with BLM to withdraw the lands within the Soda Rock Area from location and entry under the mining laws, subject to valid existing rights.^{8/} On September 16, 1997, BLM published a notice of the proposed withdrawal in the Federal Register, segregating the land “from mining” for 2 years from the date of publication, but providing that the “land will remain open to mineral leasing and the Materials Act of 1947.” See Ex. 10, 62 FR 48668 (Sept. 16, 1997). On August 31, 1999, BLM issued Public Land Order (PLO) No. 7406, which, subject to valid existing rights, withdrew the 40-acre Soda Rock Area “from location and entry under the United States mining laws for 50

^{6/} (...continued)

was properly filed under P.L. 359. Although the Forest Service challenged this claim as well as the Hound Dog claim, the parties settled the dispute, with B&R Quarries relinquishing and abandoning the claim. See Ex. 23, P.L. 359 Mineral Report, at 10.^{7/} Because Eno is the sole adverse party at the present time, the Board styled the case on appeal as United States v. Eno, instead of United States v. Burton as captioned below. See Stay Order at 2. The Board also noted that a proceeding under P.L. 359 is a public hearing, not a contest, and that the use of the terms contestant and contestee to identify the Forest Service and Eno, respectively, is therefore inappropriate. Id. at 2-3 n.3.

^{8/} Interestingly, in contrast to later mineral reports which concluded that the area had minimal mineral potential, the July 11, 1997, withdrawal application forwarded to BLM on Aug. 1, 1997, and received by BLM on Aug. 5, 1997, concluded that the area had a moderate to high potential for discovery of locatable minerals. See Ex. 11, Excerpts of Final Environmental Assessment (EA) for Soda Rock Special Interest Area Mineral Withdrawal (Withdrawal EA), at unnumbered last page; compare with Ex. 11, Dec. 4, 1998, Mineral Potential Report for Proposed Mineral Withdrawal for the Soda Rock Area (Withdrawal Mineral Report), at 11-12, and Ex. 24, Aug. 6, 1999, Supplemental Withdrawal Mineral Report, at 4-5.

It appears that the record contains two separate documents denominated as Ex. 11, the Withdrawal EA and the Withdrawal Mineral Report, which we have differentiated by their titles.

years to protect the Soda Rock Special Interest Area.” However, the PLO noted that the “land has been and will remain open to mineral leasing,” (see Ex. 12, 64 FR 47515 (Aug. 31, 1999)), thus keeping open the possibility that common variety travertine could be mined and sold under the Materials Act.

Judge Hammett held the public hearing from June 1 through June 5, 2002. At the hearing, the Forest Service offered testimony and documentary evidence supporting its prima facie case that other uses of the land, specifically cultural resources and values, geological values, and scenic values, constituted substantial uses of the land warranting prohibition of placer mining operations; that the mineral value of the land, including its value for placer gold mining and travertine quarrying, was insufficient to outweigh the value of the other uses of the land; and that placer mining operations, including Eno’s planned suction dredging in Indian Creek and possible quarrying of the travertine deposit, would substantially interfere with the other substantial uses of the land. The witnesses testifying on behalf of the Forest Service included Forest Service employees Michael Allen Hall (assistant resource officer and records custodian), Richard Teixeira (mineral examiner), Dan Elliott (district archaeologist and cultural resource manager), Linda Reynolds (heritage resources and tribal relations programs manager), and Allen King (geologist), as well as Maidu Indians Donald Ryberg, Thomas Merino, and Farrell Cunningham.

Eno countered with testimony and documentary evidence indicating that the other uses of the land cited by the Forest Service were not substantial uses; that the land had a high potential value for gold and travertine; and that placer mining operations, which he asserted did not include travertine quarrying, would not substantially interfere with any other uses of the land. In addition to testifying on his own behalf, Eno called as witnesses Vivian Hansen (a Maidu), JoAnn Hedrick (a research genealogist who has interviewed numerous Maidu and is familiar with Maidu family histories and legends), Gordon K. Burton (the claim locator), Gerald Hobbs (a miner with expertise in suction dredging and evaluating stream deposits for gold), Ronald L. Curtis (a mining engineer and mineral property evaluator), and Tom Anderson (an economic geologist). Eno proffered the written testimony of David A. Laskey (a recreational miner) as an exhibit (Ex. V). The parties also submitted extensive post-hearing briefs addressing the relevant issues.

Judge Hammett issued his decision on December 4, 2003. He first set out the applicable legal standards, including that the Forest Service had the burden of establishing, as a prima facie case, the existence of a substantial use of the land for purposes other than mining that warranted a prohibition on placer mining, after which the burden shifted to Eno to show by a preponderance of the evidence that the benefits of mining outweighed the injuries or detriments to the other uses of the land. Applying these standards, he concluded that no showing had been made that there were substantial uses of the land other than mining justifying a prohibition on placer

mining. He therefore granted Eno a general permission to engage in placer mining operations on the Hound Dog claim. (Decision at 3-4.)

Judge Hammett rejected the Forest Service's assertion that placer mining should be prohibited because cultural resources and values, geologic values, and scenic values would be destroyed if placer mining were allowed. He held that the competing uses had to be substantial uses and that the substantiality of those uses had to be proven by objective evidence of the economic value of the uses. According to the Judge, comparing purely subjective values such as the preservation of cultural resources with the objective potential economic value of placer mining was not feasible. He regarded the Forest Service's evidence concerning cultural resources to be primarily subjective in nature and lacking any attempt to attach any economic value to the site's cultural significance. Although noting that the lack of economic factors associated with the site's cultural significance seriously weakened the Forest Service's position, he found it unnecessary to decide whether it was fatal to its position as a matter of law because the evidence in the record failed in any event to establish a substantial cultural use of the land within the Hound Dog claim. (Decision at 6-8.)

Based on his weighing of the evidence and credibility determinations, the Judge found that the lack of current Maidu use of the site and the fact that their stories about Soda Rock varied substantially undermined the Forest Service's assertion that the site possessed cultural values worthy of preservation. He also considered the evidence insufficient to establish that the majority of Maidu considered Soda Rock to be culturally significant and wanted the area to be preserved. He held that the withdrawal of the land from mineral entry, the LRMP's designation of the land as a geologic special interest area, and the Keeper's eligibility determination were not determinative of the issues before him, because (1) the withdrawal was subject to valid existing rights and the claim's validity had not yet been determined; (2) the LRMP designation simply represented the Forest Service's opinion that the land had unique geologic and culturally significant features worth preserving and was not entitled to deference; and (3) the cultural significance of the area had to be determined in this context based on the documentary evidence and testimony adduced at the hearing rather than on Forest Service information advocating the site's inclusion, which information formed the basis of the site's listing. He further observed that the Forest Service had conceded that the land had no archaeological significance. Judge Hammett concluded that the subjective cultural value and significance the Soda Rock Area had to certain individuals of Maidu ancestry did not mandate preservation of the Soda Rock Area as a cultural landmark and therefore did not establish that cultural resources and values were substantial uses of the land warranting the prohibition of placer mining. (Decision at 8-14.)

Judge Hammett also found that the evidence did not establish that the geologic values that made the Soda Rock Area of interest to geologists were substantial uses of the area warranting the prohibition of placer mining operations. He noted that, although Forest Service witnesses Teixeira and King had testified that the area was of geological interest, no evidence had been presented that the area had been used by the scientific community to gather information about the processes leading to the formation of the topography or that it contained valuable information about the geologic history of the region yet to be extracted by the scientific community. He further observed that travertine deposits were not that rare in California, pointing out that the evidence indicated that there were three or four other travertine deposits in California, including a deposit between 1 and 1-½ miles from the Hound Dog claim. (Decision at 14-16.)

Judge Hammett also rejected the Forest Service's contention that the Soda Rock Area had important scenic values that would be destroyed if placer mining were allowed. While acknowledging that Dog Rock was clearly visible from Highway 89, he noted that other features could not easily be seen from the highway and that the poured concrete evident along the bank of the highway and the power line observable from the highway undermined the scenic value of the area. He added that there was no evidence in the record objectively establishing that the site was visited for scenic purposes by significant numbers of the public or that destruction of Dog Rock would have tangible economic effects on the local economy. He considered Forest Service evidence that the public had been observed stopping and taking pictures of Dog Rock insufficient to establish the scenic values of the area, especially since the Forest Service brochure listing Soda Rock as a point of interest (Ex. 21, "An Ancient Trail of the Mountain Maidu Indians, an Automobile Tour") explicitly stated that there was no safe turnout available there and that stopping was not advised. He therefore concluded that the evidence failed to establish that the purported scenic features of the Soda Rock Area constituted a substantial use of the area warranting prohibition of placer mining operations. (Decision at 16-18.)

Judge Hammett noted that the Forest Service's failure to establish the existence of other substantial uses of the land did not require the automatic granting of a general permission to engage in placer mining operations, because the allowance of placer mining in a P.L. 359 proceeding also required that there be a reasonable expectation of gold recovery. He stated that P.L. 359 proceedings were preliminary in nature in that the mining claimant did not need to demonstrate a discovery of a valuable mineral deposit to establish his right to continue to explore the mineral values of the claim, and that, therefore, the amount of evidence needed was not the same as that required to establish the validity of the claim, but simply required the claimant to show the possibility that the claim might contain a profitable gold mining opportunity that merited further exploration of the mineral values of the claim. (Decision at 18-19.)

Judge Hammett reviewed the relevant evidence presented at the hearing, including the sampling conducted by the Forest Service and the Withdrawal Mineral Report (Ex. 11) and the P.L. 359 Mineral Report (Ex. 23) prepared based on that sampling, as well as Eno's evidence, part of which was derived from sampling conducted downstream of the Hound Dog claim and would not be relevant in a contest proceeding. The Judge concluded that there was ample proof to support the existence of sufficient quantities of gold to demonstrate the possibility that Eno's claim might contain a profitable gold mining opportunity. (Decision at 20-23.)

In reaching this conclusion, the Judge cited the table found in both the mineral reports showing the results of the suction dredge samples:

TABLE 1—GOLD RECOVERED FROM SUCTION DREDGE SAMPLE
[Gold weight in milligrams (mg)]

SAMPLE NO.	COARSE GOLD	FINE GOLD	TOTAL GOLD
HD-1	0	15.6	15.6
HD-2	3721	334.2	4055.2
HD-3	1004	74.2	1078.2
TOTAL	4725	424.0	5149.0

See Ex. 11 at 9; Ex. 23 at 14; Decision at 20. He also adopted the reports' common finding that, based on the average recovery rate for the three samples, 25 hours of dredging would produce 20,303 mg of gold. See Ex. 11 at 10; Ex. 23 at 15; Decision at 21. Teixeira set out his calculations of the hourly gold production rate in Table 2 of the P.L. 359 Mineral Report:

TABLE 2—GOLD PRODUCTION RATE AND GRADE OF DEPOSIT

SAMPLE NUMBER	DREDGING HOURS (hrs)	SAMPLE VOLUME (cy)	GOLD RECOVERED (mg)	PRODUCTION RATE (mg/hr)	GRADE (mg/cy)
HD-1	2.00	2.7	15.6	7.8	5.8
HD-2	2.17	3.8	4055.2	1868.8	1067.2
HD-3	2.17	3.8	1078.2	496.9	283.7
TOTAL or AVERAGE	6.34	10.3	5149.0	812.1	499.9

(Ex. 23 at 14; see also Ex. 11 at 10.). ^{2/}

Judge Hammett pointed out that the Forest Service had neither estimated the volume of workable placer material on the claim nor calculated the total value of gold on the claim. He therefore computed the total gold value by adopting Eno's estimated volume of 32,160 cubic yards (cy) of workable placer (Ex. U, see Tr. 1050-1052), multiplying that volume by Teixeira's estimated 499.9 mg/cy average grade of the gold (see Ex. 23, P.L. 359 Mineral Report, at 14, Table 2, reproduced in note 8, supra), and then multiplying the product of those numbers (16,076,784 mg) by the \$321.00 per troy ounce (or \$0.010 per mg) gold price on the date of segregation (see Ex. 23, P.L. 359 Mineral Report, at 14), yielding an estimated total gold value of \$160,768.84. (Decision at 23.) Although that amount was less than the \$650,000 total value estimated by Eno's witnesses (see Tr. 1052; Ex. U), the Judge found it sufficient to establish the possibility that the claim might contain a profitable gold mining venture. (Decision at 23.)

Judge Hammett also found as a matter of law that MCRRA did not apply to the quarrying of travertine because quarrying did not fall within the common definition of "placer mining" as extraction of minerals from a placer deposit by concentration in running water, including ground sluicing, panning, shoveling gravel into a sluice, scraping by power scraper, and excavating by dragline. (Decision at 23, citing U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms (1968).) He concluded not only that the removal of travertine was irrelevant to this proceeding, but also that his granting Eno a general permission to engage in placer mining operations did not extend to any potential quarrying of the travertine deposit at Soda Rock. (Decision at 24.) He added that the issue of whether the travertine was a common or uncommon variety of mineral remained to be determined and that, whatever that determination, the Forest Service would still be required to manage the site in accordance with applicable environmental and historic preservation laws. Id.

Judge Hammett further determined that the evidence established that placer mining operations in Indian Creek would not substantially interfere with any other uses of the land. Having eliminated the impacts of travertine quarrying from the equation, he focused on Eno's proposed suction dredging of Indian Creek in weighing the impacts of placer mining on the uses of the land for cultural, geologic, and scenic

^{2/} The reports and decision used 25 hours of dredging as the basis for their calculations because Teixeira had determined that each hour of dredging required 1.5 hours of actual work time and that, therefore, a 40-hour work week would include 25 hours of actual dredging time, with the rest of the time spent transporting supplies to and from the dredge site, cleaning up the sluice after dredging, panning concentrates, work breaks, and repair and maintenance. See Ex. 11 at 10; Ex. 23 at 15.

purposes. He observed that the only cultural feature potentially affected by the mining operations would be Dog Rock, which was directly adjacent to the creek, and concluded that there was no evidence in the record showing that placer mining operations would necessarily result in the modification, degradation, or destruction of that rock formation. He based this conclusion on Eno's credible testimony that California law prohibiting dredging into the bank of a waterway effectively proscribed suction dredging under Dog Rock; that dredging near Dog Rock would undermine the feature, causing it to collapse on him while he was working the area; and that he would be able to suction dredge the entire length of Indian Creek within the claim without having to walk on the top of Dog Rock. The Judge noted that the Forest Service had conceded that suction dredge mining had only limited potential to physically damage any cultural features any further than they had already been damaged, citing Ex. 27, Elliott Report, at 11. (Decision at 24-25.)

Judge Hammett also found that the dredging operations would, at worst, have a minimal impact on the scenery of Indian Creek because those operations would not require the building of an access trail, would not create a semi-permanent campsite, and would not result in the piling up of gravels and rocks outside the permanent river channel. He observed, parenthetically, that the Forest Service had not always espoused the position that placer mining operations involving travertine quarrying and suction dredging would be inconsistent with maintaining the cultural and geologic significance of Soda Rock, citing the LRMP standards and guidelines recommending the authorization of travertine extraction within established limits and the submission of a plan of operations for mining of gravel deposits, consistent with protecting geologic and cultural features, as indicia of the Forest Service's earlier conclusion that travertine quarrying and placer mining were not entirely incompatible with protection of the area's geologic and cultural features but could be managed in a manner that protected those features. (Decision at 25-26.)

Based on his conclusions and analysis, Judge Hammett issued Eno a general permission to engage in placer mining operations on the Hound Dog claim. (Decision at 26.) The Forest Service appealed this decision.

On appeal the Forest Service asserts that neither MCRRA nor the applicable balancing test requires that the competing uses for the land within MCRRA placer claims be substantial uses, contending instead that the substantiality of a use must be evaluated by a comparison of the importance of the benefits of the competing uses. The Forest Service also maintains that the Judge erred in focusing on an economic evaluation of the alternative uses, pointing out that the case law does not limit the value of competing uses to economics, but also recognizes other benefits, such as recreational, archaeological, scenic, wildlife, wildlife habitat, and preservation qualities. (SOR at 11-15.)

The Forest Service argues that Judge Hammett erred in holding that cultural resources and values are not substantial uses of the lands. According to the Forest Service, the Judge's characterization of those values as subjective ignores the objective evidence of the site's cultural and historic significance documented in the Keeper's eligibility determination and the subsequent listing of the Soda Rock Area on the National Register of Historic Places, which, the Forest Service submits, establish by legal definition that the site's cultural and historic use and value are substantial and significant. The Forest Service avers that the laws and regulations supporting the preservation of historically significant sites and Native American culture discredit the Judge's restriction of his evaluation to economic factors, as does relevant precedent. (SOR at 15-19.) The Forest Service contends that the LRMP's designation of the Soda Rock Area as a special interest area, the application for the withdrawal of the lands to protect the cultural values, and the subsequent withdrawal of the lands all provide objective evidence of the area's cultural use and values and deserve deference. *Id.* at 19-21. The Forest Service also cites the testimony of three Maidu Indians concerning the historical uses and significance of the Soda Rock Area as providing sufficient evidence of the value of the land for cultural uses. The Forest Service maintains that it was error for the Judge to substitute his judgment for that of the Forest Service and the Secretary of the Interior. *Id.* at 21-22.

The Forest Service insists that Judge Hammett erred in construing the term "use" to require actual physical use and in focusing on whether the Maidu currently physically use the Soda Rock Area. The Forest Service asserts that the term "use" also includes passive use such as the Maidu use of the land as a living part of their present culture. The Forest Service also notes that the land has been closed to the public since 1963 because of mining, which necessarily prevented the Maidu from physically using the land, adding that testimony at the hearing indicated that the Maidu would have used the site in the past and would use it again if it were open to the public, citing Tr. 477, 481, 542, 547, and 550. The Forest Service submits that the Judge erred in disregarding the physical impossibility of access to the site from 1963 to the present, the historical and current traditional Native American uses of the Soda Rock Area as the site of their genesis mythology, and the import of passive uses of the land. (SOR at 22-24.)

The Forest Service contends that Judge Hammett erred in holding that the geologic values were not a substantial use of the land. It asserts that the Judge impermissibly refused to accord deference to the Forest Service's determination in the LRMP that the Soda Rock Area contained unique geologic features warranting protection for their scientific geologic values, including the form and beauty of the travertine deposit, the associated karst topography (otherwise known as sinkholes) that is rare in the West, the beautiful travertine pools, the crystals of dogtooth calcite, the stalactites, the pipes, and the curtains, or to accord deference to the Secretary's withdrawal of the lands to protect and preserve those geologic values. (SOR at 23-

26, citing Exs. 23, P.L. 359 Mineral Report, and 32, Geology Report for Soda Rock Geologic Special Area (Geology Report), and Tr. 231-232, 794, 800, 803-805, and 807.) The existence of other travertine deposits in California does not undermine the value of the Soda Rock Area's geologic use, the Forest Service submits, because the other deposits do not exhibit the unique features present in the Soda Rock Area. (SOR at 25.)

The Forest Service maintains that the Judge erred in holding that the Soda Rock Area did not have important scenic values, asserting that the cultural and historic resources and values and the geologic values also give the area its scenic value. According to the Forest Service, the scenic value of the area is bolstered by its inclusion in the Forest Service brochure for automobile tours of Highways 70 and 89 (Ex. 21). (SOR at 26.) ^{10/}

The Forest Service argues that Judge Hammett erred in finding that there was sufficient mineral potential to warrant authorizing placer mining operations. Citing Teixeira's sampling of the claim for gold and economic evaluation of the land, the historical mining production, and the lack of significant commercial gold production either within the claim or in the area (Exs. 11, 23, and 24; Tr. 213, 214, 277), the Forest Service maintains that its evidence demonstrates that the lands within the Hound Dog claim and the Soda Rock Area have a low mineral potential for an economically viable gold deposit ^{11/} and that the travertine deposit is a common

^{10/} Although the Forest Service states that the area is next to Highway 70, which is a scenic byway (SOR at 26), we note that it is Highway 89, not Highway 70, that lies adjacent to the Soda Rock Area.

^{11/} Because he considered suction dredging to be a labor intensive operation with the cost of labor as the major expense, Teixeira focused on the value of gold recovered in relation to the amount of time spent to recover it. He therefore calculated the gold production rate per hour for dredging the active stream gravel. See Ex. 23, P.L. 359 Mineral Report, at 14 and Table 2 at n.8, *supra*. Using the average value of gold for the time period between the Aug. 15, 1996, claim location date and the Mar. 7, 2002, report date, which he computed to be \$297.43/troy ounce or \$0.009/mg, and his production rate per hour calculations, he concluded that, based on the average recovery rate for the three samples, 25 hours of actual dredging would produce 20,303 mg or \$194 per week. *Id.* at 14-15 and Table 3. He then computed the costs of mining, including weekly labor costs of \$800 based on two people each working 40 hours per week at an hourly rate of \$10; weekly operating costs of \$60 covering fuel, repair and maintenance of equipment, and mobilization; and weekly capital costs of \$12 for ownership of the dredge and other equipment, for total weekly mining costs of \$872. *Id.* at 15. He concluded that the \$872 weekly mining costs

(continued...)

variety deposit. It adds that the mineral potential report for the withdrawal (Ex. 11) bolsters its conclusion that the land is more valuable for uses and values other than mining. (SOR at 26-27.) The Forest Service contends that the Judge should not have accepted Eno's evidence and testimony because Eno and Burton, *et al.*, located and conducted suction dredge activities, not as a serious mining venture, but for recreational purposes not allowable under the mining laws, and because Eno did not enter any evidence as to the costs associated with his proposed mining. *Id.* at 27-28.

The Forest Service complains that Judge Hammett restricted his inquiry to the values derived from the gold samples documented in the P.L. 359 Mineral Report, while ignoring the report's assessment of the costs involved in the proposed mining; incorrectly inferred values from sampling conducted downstream of the claim, which were based on an unreliable fire assay; and erroneously relied on Eno's volume of workable placer material, which improperly took into account washed bedrock lacking gravels, parts of the highway embankment containing boulders not amenable to suction dredging, and material above the water line. It also challenges the Judge's finding that the mere possibility that the existing gold values warranted further exploration was sufficient to establish the value of the lands for placer mining. Since Eno's evidence of mineral potential was speculative, in contrast to its affirmative evidence based upon actual gold values from the claim, the Forest Service argues that the Judge's holding that there was sufficient mineral potential to outweigh the detriment to other uses of the land was arbitrary, capricious, and contrary to law and should be reversed. (SOR at 28-29.)

The Forest Service also objects to the Judge's conclusion that the travertine deposit was not relevant for mineral potential purposes because placer mining operations, as that term is used in MCRRA, did not include quarrying the travertine. The Forest Service notes that, although it considers the travertine to be a common variety mineral under the Common Varieties Act, 30 U.S.C. § 611 (2000), and not

^{11/} (...continued)

greatly exceeded the \$194 value of the gold recovered per week, leading to a net loss of \$678 per week of operation. He added that, even if the highest gold recovery rate for HD-2 (1,868.8 mg/hr) and the highest price of gold during the life of the claim (\$386.20/Tr. oz.) were used, the recovery would only be \$580 per week, which was still much less than the \$872 weekly costs of mining. *Id.* He also determined that the sample HBG-1 taken from the bench gravel beneath the travertine cap on the east side of Indian Creek in the vicinity of sample site HD-2 weighed 58 pounds and contained 0.9 mg of gold, which, assuming 3,000 pounds/cy, equated to 46.6 mg/cy or \$0.45/cy, and that, therefore, the costs of mining the bench gravel would far exceed the value of the gold in the gravel. *Id.* He further found that, even adopting the gold values and production information offered by Eno, the generated revenues would not be sufficient to pay mining costs. *Id.* at 17 and Table 4.

subject to location under the mining laws, Eno has submitted a plan of operations to mine the travertine alleging that the travertine is an uncommon variety of building stone. Because an adjudicator might agree with Eno and hold that the travertine is locatable, the Forest Service maintains that the Judge should have considered the benefits and detriments of travertine mining in his weighing of the competing uses of the Hound Dog claim. The Forest Service asserts that uncommon varieties of building stone are locatable as placer claims pursuant to the Building Stone Act, 30 U.S.C. § 161 (2000), and that, therefore, quarrying the travertine falls within the meaning of placer mining because it involves mining a mineral on a placer claim. According to the Forest Service, Judge Hammett's omission of the effects of travertine mining in his balancing of the competing uses of the land creates a loophole, unsupported by MCRRA, which could allow travertine mining to occur without a determination as to whether it would substantially interfere with other uses of the land, since the Secretary may only act once in determining whether the lands should be open to placer mining. (SOR at 29-30.)

The Forest Service further contends that Judge Hammett erred both legally and factually in holding that placer mining operations within the Hound Dog claim would not substantially interfere with other uses. The Forest Service contends that the Judge's limitation of his evaluation to Eno's proposed mining activities was legal error because the applicable test does not focus solely on the specific mining method proposed by the claimant, but requires consideration of all methods that a miner could reasonably use to extract minerals. The Judge erred factually, the Forest Service submits, because its witnesses and documents presented un rebutted evidence demonstrating that normal, regulated placer mining operations, subject to regulatory restraint, would irreversibly and irreparably destroy a unique, historic, and culturally and geologically significant property, the iconographic, geologic, and scenic features of which could not be restored by reclamation. (SOR at 31-32.) The Forest Service concludes that the Judge's decision is arbitrary, capricious, and contrary to law and fact and should be reversed.

In response, Eno contends that Judge Hammett correctly ruled that the Forest Service failed to establish a substantial other use of the land, noting that, contrary to the Forest Service's contention, relevant Board precedent mandates that a competing use be substantial if it is to justify prohibiting placer mining operations. (Response at 15-16.) He further asserts that the Judge properly determined that the party seeking to prohibit placer mining must present objective evidence subject to cardinal measurement of any other purported use, because the balancing test requires an objective evaluation of the potential detriments and benefits accruing from placer mining, which evaluation, by definition, precludes the use of subjective, non-quantifiable evidence to prove the substantiality of the other uses of the land. *Id.* at 17-20.

Eno argues that the Judge correctly found that the purported cultural resources were not a substantial other use of the land. He maintains that the listing of the site on the National Register of Historic Places is not dispositive, because the listed site includes only 15 of the 40 acres embraced by the Hound Dog claim,^{12/} and because the documentation supporting the listing was prepared by Government personnel recommending the preservation of Soda Rock and therefore did not contain objective information.^{13/} (Response at 21-22.) Eno denies that the Judge should have accorded deference to the listing decision and the Forest Service decisions recognizing the cultural significance of the Soda Rock Area; rather, he agrees with Judge Hammett's admonition that the cultural significance of Soda Rock had to be evaluated on the basis of the documentary and testimonial evidence presented at the hearing, because to do otherwise would have made the hearing a meaningless exercise. *Id.* at 22-23.

In any event, Eno submits that the Maidu did not become concerned about quarrying activities at Soda Rock until 1981, citing Ex. D; that the Maidu attached religious, not cultural, significance to the area, citing Ex. 27; and that the designation of the Area as a Special Interest Area did not constitute objective proof of the significance of the Area. (Response at 23-25.) He contends that the withdrawal is irrelevant because it occurred after the Forest Service's 1996 request for a P.L. 359 hearing which, he avers, is the critical time period to avoid his being prejudiced by the delay in holding the hearing caused by the Judge's caseload. He also discounts the probative value of the withdrawal, asserting that it was an afterthought designed to impede him from mining his claim and was based on the purported religious significance of the area. He further alleges that travertine quarrying would not substantially interfere with any purported cultural purposes, pointing out that the withdrawal did not close the land to mineral leasing and that the Forest Service therefore remained free to sell the travertine if it chose to do so. *Id.* at 25-27.

Eno denies that the Forest Service testimony and reports constitute objective evidence of the significance of the area's cultural resources. He avers that Elliott's testimony and report lack credibility because they were based on his interviews with only four Maidu. Eno further asserts that Elliott acknowledged that no artifacts, features, or archaeological sites had been identified at Soda Rock; that neither a

^{12/} The Elliott Report cited by Eno actually indicates that the cultural features embrace 21, not 15, acres. *See* Ex. 27, Elliott Report, Archaeological Record at 1.

^{13/} Eno also avers that the only facts relevant to this proceeding are those existing at the time the P.L. 359 hearing was requested and that events and conditions after that time, including the National Register listing, the segregation and withdrawal of the Soda Rock Area, and the fluctuations in gold prices, have no bearing on whether placer mining operations should be allowed. *See* Response at 22 n.20; 25; 53 n.62.

sweat lodge nor a roundhouse ever existed on the land; that he had never witnessed a Maidu ceremony on the lands; that there was no water in the travertine pools and no current use of the salt grass; and that he did not know when the Forest Service first learned about the concrete spring box identified as the Earth Maker's Heart. (Response at 28-30, citing Ex. 27; Tr. 666, 669, 670, 673, 696, 699, and 705.) Eno also enumerates the flaws in the testimony of Linda Reynolds, including her lack of knowledge about the cultural resources in the area, evidenced by her inability to properly locate those features on the map, her lack of personal observation of the area, and her total reliance on the works of other people as the basis for her opinions. (Response at 30-31, citing Ex. 27, Tr. 283, 670-676, 724-725, 751-753, 755, 756, 757-758, and 764.) According to Eno, the Maidu witnesses testifying for the Forest Service, including Tommy Merino and Farrell Cunningham, characterized the Soda Rock Area as having religious importance, rather than cultural significance, and reinforced the subjective nature of the evidence. (Response at 31-32, citing Tr. 472-473, 505-507, 517, 522, 531, 533, 549-550.)

Eno contends that the Forest Service provided no evidence that Maidu actually physically use the purported cultural resources. He maintains that no one currently uses or gathers salt grass, a fact that the Forest Service concedes; that no one utilizes the travertine pools, which are now dry; that the sweat lodge or roundhouse never existed; that the Maidu do not conduct ceremonies at Soda Rock; and that there is no evidence that the Earth Maker's Heart is actually located at Soda Rock. (Response at 33-36, citing Tr. 118-119, 129-131, 132-133, 137, 138, 140, 142, 144, 146, 281, 285, 473-475, 497, 499, 501, 504, 515-516, 521-522, 532, 533, 542, 544-545, 549, 555, 560-562, 635, 705, 725, 790, 836-37, and 1233; Ex. 31.) Eno denies that qualifying substantial uses include passive uses of the land, averring that the common meaning of "use" denotes someone actually physically employing or deriving service from the land, an interpretation consistent with Congress' intent in enacting P.L. 359. The Forest Service's argument that the ongoing mining operations prevented the Maidu from using the land fails, Eno submits, because, although the Delaware 3 claim was abandoned in 1993, no Maidu have visited the site since then, except for meeting the Forest Service there in September 2001. He adds that the mining area now closed to the public for safety reasons consists of the 6-acre footprint of the quarry, which does not encompass the cultural features, and asserts that the possible future use of the area by the Maidu and others does not establish the requisite substantial use. (Response at 36-38.)

Eno denies that the significance some Maidu individuals attach to the land within the Hound Dog claim proves that the alleged cultural resources are a substantial other use of the land. He asserts that his witnesses presented credible evidence demonstrating that the majority of Maidu do not consider the area to be culturally significant, pointing out that Judge Hammett found Joann Hedrick's testimony persuasive because, in contrast to Linda Reynold's testimony, it was based

on her personal contact with the Maidu over several years, not just a review of existing literature and brief discussions with nine Maidu individuals. (Reply at 39-41, citing Tr. 881, 882, 883, 884, 885, 889, 898, 899-900, 901, 903, 904, 906-907, 909, and 922.) Given this lack of consensus, Eno avers that Judge Hammett correctly ruled that the purported cultural resources associated with the area are not a substantial other use of the land. (Response at 41.)

Eno asserts that Judge Hammett correctly found that the geological features were not a substantial other use of the land warranting the prohibition of placer mining operations. According to Eno, the evidence of the unique geologic features presented by King and Teixeira fails to establish that mining should be prohibited, because every piece of land and every mineral deposit is unique. Eno further alleges that the Forest Service failed to prove that the travertine deposit is so unique that its preservation is paramount, observing that, as the Judge noted, there are three or four other travertine deposits in California; that the purported singular geologic features such as sinkholes, travertine pools, stalactites, and pipes are fairly common in the United States; and that no one other than Forest Service employees has expressed any interest in these features and their formation. (Response at 42-43, citing Tr. 300-301, 794, 829, 830-835, 861, 1098, 1099, 1101, 1102, 1142, 1233, and 1235; Exs. P, Q, and Z.) Nor does the designation of the area as a Geologic Special Interest Area mandate the conclusion that the geologic features are substantial uses incompatible with placer mining, Eno submits, especially since the designation acknowledged that mining activities would continue and that the features could be protected through mitigation measures incorporated into plans of operations. *Id.* at 44, citing Ex. 16 at 4-254.

Eno similarly contends that the Judge correctly found that the scenic features were not a substantial use of the land. Given the unsightliness of the quarry and the Forest Service's admission that the only scenic feature associated with the claim is Dog Rock, which is visible from Highway 89, Eno maintains that Teixeira's and King's subjective testimony falls far short of demonstrating a substantial use of the lands for scenic purposes. He asserts that the Forest Service provided no objective evidence that the cultural features associated with the geologic features have scenic values, and that the Forest Service brochure for automobile tours of Highways 70 and 89 (Ex. 21), which describes religious and cultural sites, does not establish the scenic value of those features, given its warning that stopping is not advised because no safe turnout exists. He also points out that, although Highway 70 is a designated scenic byway, it lies over a mile from the Hound Dog claim and therefore does not support the purported scenic values of the area. (Response at 45-48.)

Eno maintains that the evidence supports Judge Hammett's conclusion that the Hound Dog claim might contain a profitable gold mining opportunity. He points out that the Forest Service's own sampling evidence establishes the existence of sufficient

quantities of gold on the claim to warrant issuance of a general permission to engage in placer mining, although he asserts that the values are actually much higher than those derived from the samples because the Forest Service inadequately sampled two of the three sample sites, HD-1 and HD-3. Specifically, he avers that the errors associated with sample HD-1 include Teixeira's failure to reach bedrock, where the best gold is located; his decision to start dredging in the middle of the deposit, which caused him to become "boulder bound"; and his colleague's panning of the black sands directly back into Indian Creek. He states that the key mistake undermining sample HD-3 entails Teixeira's dredging past a major crevice, which is a natural trap for gold, without cleaning it out. Eno contends that, given these flaws, Judge Hammett should have relied solely on the significantly higher recovery rate for HD-2, and that, using only the 1,868.8 mg/hr recovery rate from HD-2 (see Ex. 32, P.L. 359 Mineral Report, at 14, Table 2, supra at n.8), 25 hours of dredging would actually produce 46,720 mg of gold, significantly more than the 20,303 mg of gold underlying the Forest Service's economic evaluation. (Response at 49-52.) Eno further avers that Teixeira's estimate of the width of the active stream channel was based on a visual estimate in the dry month of August (Tr. 310), rather than an actual measurement, and was too low; that, according to a map of the area (Ex. 3), the stream width varies between 45 feet to 125 feet; and that the active stream channel actually contains between 7,700 and 21389 cy of gravel representing gold values between \$78,887 and \$219,133. ^{14/} Id. at 53.

Eno challenges the relevance of Teixeira's profitability calculations, pointing out that, as the Forest Service stipulated, this proceeding does not involve a validity determination. Even if the calculations were relevant, Eno argues that extensive errors underlying the calculations render them meaningless. Specifically, he alleges that Teixeira should not have used the results of non-representative sample HD-1; that Teixeira based his recovery rates on the use of a 5-inch dredge rather than the 6-inch dredge Eno proposed to use, which would move 50 percent more material and increase the gold recovery rate for HD-2 and HD-3 to 2,803.2 mg/hr and 745.4 mg/hr, respectively, for an average of 1,774.3 mg/hr; that Teixeira's math was wrong because, using his theory that each hour of dredging requires 1.5 hours of work, a 40-hour work week would include 26.7 hours of dredging, not the 25 hours

^{14/} Teixeira testified that the stream channel was approximately 2,200 feet long, 30 feet wide, and 3 feet deep, and that 30 percent of the stream channel was washed bedrock with no gravel resources. See Tr. 321-322. Although he estimated that, based on these numbers, there were between 3,500 and 4,000 cy of gravel in the stream, multiplying his estimated dimensions results in 198,000 cubic feet or 7,333 cy of material. Applying the 30 percent reduction for the washed bedrock leaves 5,133 cy of material in the active stream channel. See Response at 52-53. Teixeira conceded, however, that the area of washed bedrock could contain gold if there were joints, fractures, or crevices in the bedrock. See Tr. 322.

upon which Teixeira based his calculations; that, because a serious miner would not transport the dredge to and from the creek each day or include work breaks in an 8-hour work day, each hour of dredging more realistically requires 1.25, not 15, hours of actual work time, or 32 hours of actual dredge time in a 40-hour work week with the commensurate weekly recovery rate of 56,777.6 mg of gold with a value of \$545.10/wk; and that Teixeira should have used the \$4.75/hr minimum wage in 1996 to determine labor costs, for a total of \$380 in weekly labor costs and \$452 in total weekly costs, yielding a net weekly profit of \$93.10. Eno points out that he plans to have two men operate 6-inch dredges side by side, paying each one \$10/hr, which would increase the weekly recovery rate based on HD-2 and HD-3 to 113,555.2 mg (1,774.3 mg/hr x 64 hours) or \$1,090.13/wk and, even with the doubling of operational and capital costs associated with the use of two dredges and total weekly costs of \$944.00, would leave a net weekly profit of \$146.13/wk. Eno therefore submits that the active stream channel can be mined at a profit. (Response at 55-57.)

Eno asserts that neither the 1999 withdrawal of the land nor Teixeira's conclusion in the mineral reports that the claim has low mineral potential establishes that the claim has no mineral potential. He states that Judge Hammett was not required to defer to the Secretary's withdrawal decision because to do so would have denied Eno due process. According to Eno, Teixeira's discovery of gold in all the samples he took from the claim undermines his low mineral potential conclusion, because the BLM Manual at 3031.3 restricts the low mineral potential category to only those situations where there are no reported mineral occurrences. Eno further contends that the admitted unreliability of the sampling conducted by Hank Jones in 1965-1966 referenced in the mineral reports negates the value of those results in disproving the existence of gold on the claim. (Response at 57-58, citing Tr. 312-313, and 315.)

Not only does the Forest Service's evidence confirm the sufficiency of the quantities of gold on the claim to indicate that the claim might contain a profitable gold mining opportunity, but, Eno submits, the evidence he produced renders that conclusion inescapable. He cites the approximately ½ oz (15,552 mg) of chunky or big gold he recovered in June 1996; the over 6 oz (186,621 mg) of chunky gold retrieved by recreational miners Steve Gardner, Rich Malone, and Dave Meyers; and the 4-4½ oz uncovered by David and Edna Laskey after moving 20 yards of gravel (6,221 mg/cy) over a 20-day period. (Response at 59, citing Tr. 934-936, 1167-1168, 1169, 1171, 1174, and 1177-1178; Exs. V and EE; see also Decision at 21-22). Eno adverts to the "primitive" sampling conducted by Jerry Hobbs and Ron Curtis on April 2, 2002, 50 feet downstream from the Hound Dog claim, which, based on a fire assay, recovered 210.8 mg of gold from a 0.1 cy sample, or 2,180 mg/cy of gold. He also notes Curtis's calculation that, based on his measurements of the active stream channel (290,000 square feet) and the Forest Service's estimated gravel depth of

three feet, the claim contained 32,160 cy of workable placer. Eno accordingly estimates that the active stream channel on the Hound Dog claim contains \$650,000 worth of gold. (Response at 59, citing Tr. 975-977, 980, 981, 983, 984-985, 1046, 1049, 1050, and 1051-1052; Exs. S and U; Decision at 22.)

Eno counters the Forest Service's attempts to minimize the probative value of his evidence. He denies that he wants to use the claim solely for recreational purposes, alleging that he acquired the claim because of its commercial value and would not be paying taxes and maintenance fees for the claim if he did not want to commercially produce the claim. He asserts that Judge Hammett's acceptance of the evidence from downstream of the claim was proper given that he was precluded from sampling the claim by P.L. 359, pointing out that Board precedent allows the use of geologic inference as evidence of the extent of a deposit once the actual existence of the ore on the claim has been established. He adds that even if a fire assay is not the best assay method, the flaws in that method were offset by the loss of 20 percent of the gold because of the primitive sampling methods Hobbs and Curtis were reduced to employing. He further contends that, using Teixeira's estimate of 5,133 cy in the active stream channel, instead of Curtis's calculation, along with the grade of gold recovered by Hobbs and Curtis leads to a value of \$107,423 for the gold in the active stream channel, which still supports the conclusion that the claim might contain a profitable gold mining opportunity. (Response at 60-63.) Eno maintains that the only issue here is whether the possible benefits from placer mining might outweigh the detriments caused thereby to other substantial uses of the land and that, therefore, possible impediments to additional exploration activities, such as a future validity contest, do not detract from the Judge's conclusion that the claim might contain a profitable gold mining opportunity. *Id.* at 64.

Eno avers that the travertine is not relevant to this proceeding because quarrying the travertine deposit does not fall within the definition of placer mining operations. Even if the travertine were relevant, Eno contends that consideration of that deposit would confirm that the benefits of mining outweigh the benefits from any other uses, because mining within the footprint of the existing quarry would produce 255,000 net tons with a gross value \$19,125,000, assuming a price of \$75/ton and an annual production rate of 10,000 tons, while expanding mining to include all the deposit except for a 100-foot wide strip to accommodate the pre-existing power line would yield 472,500 net tons with a gross value of \$35,437,500, citing Tr. 1134, 1136, 1138-1139, and 1146, and Ex. Y at 9. See also Tr. 861 (travertine deposit is 900 feet long by 700 feet wide or 630,000 square feet); and Ex. Q at 4 (total volume of the travertine on the Hound Dog claim is approximately 600,000 cy). The Forest Service's claim that the travertine is a common variety and not locatable under the mining laws is disingenuous, Eno asserts, because a specific determination that the travertine is a common variety has not yet been made, citing Tr. 356 and Ex. 23, P.L. 359 Mineral Report, at 11. (Response at 64-68.)

Eno further argues that Judge Hammett correctly ruled that legal, normal placer mining operations, subject to statutory and regulatory restraints, would not substantially interfere with any other uses of the land. Eno points out that the Forest Service's own witnesses undermined its contention that suction dredging would interfere with cultural resources, citing Elliott's concession that mining with suction dredges within the active stream channel had only limited potential to physically damage cultural features any more than they had already been damaged (see Ex. 27, Elliott Report, at 10-11), and Ryberg's and Cunningham's admissions that placer mining in Indian Creek would not affect them (see Tr. 148, 559). Eno adds that suction dredging poses no risk to Dog Rock because California law prohibits dredging into a bank of a waterway and because suction dredging near Dog Rock could undermine the feature causing it to collapse on him while he was working the site (Tr. 1238-1239). He also avers that he will be able to dredge the entire length of Indian Creek within the claim without walking on top of Dog Rock, that suction dredging will cause an insignificant amount of additional noise when compared with the noise from traffic on Highway 89 (Tr. 411-413; Ex. Z), and that visual effects will be minimal because suction dredging is allowed only between the fourth Saturday in May and October 15 (see Ex. 23, P.L. 359 Mineral Report, at 11) and leaves no permanent or semi-permanent evidence of its occurrence (Tr. 1256, 1260). (Response at 68-69.)

The Forest Service's assertion that the Judge erred in considering only Eno's proposed activities fails, Eno submits, because the Forest Service did not present any evidence of what other legal, normal placer mining operations subject to regulatory restraints could occur on the Hound Dog claim. Eno avers that the Forest Service bases its contention that placer mining operations will irreversibly and irreparably destroy Soda Rock on a purely speculative unrestricted and unmitigated worst case scenario that unrealistically ignores the highly regulated nature of mining activities. Eno cites the regulations at 36 CFR Part 228, which vest the Forest Service with substantial authority to control and minimize the effects of mining operations on national forest lands, including 36 CFR 228.8, which requires mining operators to comply with all applicable Federal and State air and water quality and solid waste disposal standards and, to the extent practicable, to harmonize operations with scenic values, take measures to maintain fisheries and wildlife habitat, and reclaim disturbed surface areas by taking steps to prevent or control onsite and off-site damage to the environment and forest surface resources. He adds that the regulations also require him to file a notice of intent and probably a plan of operations addressing, among other things, these environmental protection measures. (Response at 69-72.)

Eno points out that the submission of a plan of operations triggers compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (2000), including the preparation of an EA or possibly an environmental impact statement

(EIS) analyzing the environmental impacts of the proposed mining operations, alternatives to the proposed actions, and mitigation measures to reduce any identified impacts, which could lead to modification of the proposed mining activities. Eno contends that section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (2000), and its implementing regulations provide the Forest Service with additional authority to regulate the extent and effect of Eno's mining operations by directing it to determine whether the proposed plan of operations would have an adverse effect on Soda Rock and, if so, to develop and evaluate alternatives or modifications that could avoid, minimize, or mitigate the adverse effects. Eno avers that, should the Board decide that the removal of the travertine constitutes placer mining operations, these statutory and regulatory mandates enable the Forest Service to impose mitigation measures limiting Eno's activities to the footprint of the quarry or precluding mining of travertine in the areas of the sinkholes and springboxes, adding that the Forest Service's duty to protect the pre-existing 40-foot wide power line from interference also protects the travertine terraces and purported stalactites, curtains, and pipes. Given these restrictions and the opportunity for adversely affected parties to appeal any approval of a plan of operations for removing the travertine, Eno submits that there is no evidence that a general permission to engage in placer mining operations will actually result in any mining activities that would substantially interfere with any other uses of the land. (Response at 72-75.)

[1] As noted above, MCRRA opened powersite withdrawals for entry under the mining laws, but prohibited the locator of a placer mining claim from conducting any mining operations for a period of 60 days after the filing of the location notice. 30 U.S.C. § 621(b) (2000). If, during that time period, the Secretary of the Interior

notifies the locator by registered 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 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.

30 U.S.C. § 621(b) (2000).

[2] To determine whether placer mining would substantially interfere with other uses of powersite lands within the meaning of MCRRA, 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. United States v. Stone, 136 IBLA 22, 32 (1996); United States v. Brown, 124 IBLA 247, 252 (1992); United States v. Milender, 104 IBLA 207, 218, 95 I.D. 155, 161 (1988) (Milender II); United States v. Milender, 86 IBLA 181, 204, 92 I.D. 175, 188 (1985) (Milender I). Mining may be allowed where the benefits of placer mining outweigh the detriment which placer mining causes to other uses. United States v. Brown, 124 IBLA at 252.

Central to the balancing test is the concept that the competing uses must be substantial if they are to be used to prohibit placer mining. United States v. Brown, 124 IBLA at 253; Milender II, 104 IBLA at 215-16, 95 I.D. at 160; United States v. Mineral Economics Corp., 34 IBLA 258, 262 (1978). Thus, even if the Secretary determines that placer mining would substantially interfere with other uses of the land, he may still appropriately grant a general permission to engage in placer mining operations if the competing surface uses have less significance than the proposed placer mining operation. Milender II, 104 IBLA at 216, 95 I.D. at 160. The importance of the competing uses must be compared and judged on whatever grounds are relevant in the individual case. ^{15/} Id.

We begin our analysis under these guiding principles with the question of whether the Forest Service, as the party who seeks to restrict placer mining operations, has demonstrated that there are substantial other uses of the land warranting a prohibition of placer mining operations. ^{16/} The Forest Service alleges

^{15/} Since the other uses of the land must be substantial uses to justify prohibiting placer mining, we reject the Forest Service's contention that it need not prove the substantiality of the other uses as part of its prima facie case. See United States v. Brown, 124 IBLA at 253, citing Milender II, 104 IBLA at 215, and United States v. Mineral Economics Corp., 34 IBLA at 262 (to justify the prohibition of mining, the United States must establish a substantial use of the land for uses other than mining, which use warrants a prohibition on mining).

^{16/} In Milender II, the Board clarified that the party seeking to restrict or prohibit placer mining had the burden of presenting a prima facie case, after which the burden switched to the mining claimant to overcome the prima facie case and show by a preponderance of the evidence that the benefits of placer mining outweighed the injury caused by mining to the other uses of the land. Id. at 234 n.9, 95 I.D. 171 n.9 (adopting the allocation of the burden of proof stated in the separate concurrence of Administrative Judge Burski, 104 IBLA at 236-37, 95 I.D. at 171-72); see United States v. Stone, 136 IBLA at 23; United States v. Brown, 124 IBLA at 252. Although

(continued...)

that the cultural, geologic, and scenic resources and values of the lands, and their preservation, constitute substantial competing uses of the land warranting the prohibition of placer mining. In his analysis, Judge Hammett discounted those values, in part because the Forest Service had failed to provide any objective evidence demonstrating the economic value of those uses.

Nothing in MCRRA, however, limits the other uses to only those which are economically quantifiable. Nor does Departmental precedent require that competing uses be economically measurable. To the contrary, in an analogous context, the Secretary of the Interior, in a May 15, 2000, decision reviewing the Board's decision in United States v. United Mining Corp., 142 IBLA 339 (1998), reversed the Board's holding that only economic values were relevant in determining whether lands within a claim located pursuant to the Building Stone Act, 30 U.S.C. § 161 (2000), were chiefly valuable for building stone. He concluded that the lack of quantifiable valuation would not preclude a valid comparison under the Building Stone Act and that the lack of specific statutory limitations on the uses to be considered under that comparative values test indicated Congress's intent to develop a flexible test permitting the consideration of contemporary values such as conservation and preservation. See May 15, 2000, Secretarial Decision at 4-5. He therefore remanded the matter to the Board for application of the comparative values test of the Building Stone Act in a manner allowing for a comparison of the value of all potential land uses, including those that were quantifiable and non-quantifiable. Id. at 5.

The Secretary's analysis in United Mining Corp. is equally relevant here. Accordingly, we hold that the competing uses need not be economically quantifiable and may include the preservation of cultural, geological, or scenic resources. See also United States v. Stone, 136 IBLA at 30 (recognizing use and habitation of land by the endangered Stephen's kangaroo rat as a competing use); United States v. Mineral Economics Corp., 34 IBLA at 261 (recognizing preservation of important and critical habitats for wildlife as a competing use). We therefore reverse Judge Hammett's decision to the extent it rested on the lack of quantifiable evidence of the economic value of the competing uses.

The Judge discounted the Forest Service's evidence of other uses, including the withdrawal, the LRMP designation, and the listing of part of the area on the National Register of Historic Places, as well as the testimony of the Maidu Indians about the

^{16/} (...continued)

Eno objects to the allocation of the ultimate burden of persuasion to the mining claimant, we see no need to reconsider that question here.

We also note that, as the party appealing Judge Hammett's decision, the Forest Service has the burden of proving error in the appealed decision. See, e.g., Pass Minerals, Inc., 168 IBLA 183, 189 (2006).

value that the Soda Rock Area had to them. We find that the Judge failed to accord proper weight to the listing of the area which, while not dispositive of the outcome of this proceeding, clearly constituted objective evidence that the land included in the listed area contained substantial cultural resources warranting protection under the NHPA. Cf. United States v. Brown, 124 IBLA at 255 (error for Judge to fail to consider designation of river as potential addition to the wild and scenic river system which implicitly recognizes that recreational uses are substantial). We find no error in the Judge's conclusion, based in part on his credibility determinations, that the evidence establishes that the Maidu do not currently physically use the Soda Rock Area, that variations exist in the stories about Soda Rock, and that not all Maidu attach cultural significance to the Soda Rock Area. See Decision at 8-12; see also, Tr. 454, 500, 530, 718, 906, 922; Ex. 29, A Century of Testimony: The Ethnographic Record of Soda Rock (CA Plu 426): A Maidu Traditional Cultural Property. While these factors tend to diminish the substantiality of the cultural uses, they do not totally outweigh the import of the site's listing on the National Register; nor do they completely undermine the importance of the 1999 withdrawal of the Soda Rock Special Interest Area from entry under the mining laws to protect the area's cultural and geologic values. Accordingly, we find that the weight of the evidence demonstrates that preservation of the cultural resources and values constitutes a substantial use of the land within the meaning of MCRRA. Judge Hammett's decision is reversed to the extent it found otherwise.

Judge Hammett also concluded that the evidence failed to establish that the geologic values represented substantial uses of the area warranting the prohibition of placer mining. We disagree. Forest Service geologist King testified that the Soda Rock Area contains karst topography (sinkholes) that is unique in the West, as well as travertine pools, stalactites, and curtains. We acknowledge the lack of any evidence that the scientific community uses the area to gather information about the processes leading to the formation of those topographical features or that the area contains valuable information about the geologic history of the region. The admitted rarity of the rock formations in the western United States, however, supports the conclusion that preservation of those formations is a substantial use of the lands. The designation of the area as a geologic special interest area, while not dispositive, further evinces the substantiality of the geologic resources of the area as does the 1999 withdrawal of the area to protect those values. Accordingly, we reverse Judge Hammett's finding to the contrary.

We agree with the Judge that the evidence does not establish that the area has important scenic uses warranting the prohibition of mining. The only notable scenic resource is Dog Rock which is observable from Highway 89; none of the other cultural and geologic features identified by the Forest Service are readily visible to the general public. The scenic value of Dog Rock, however, is diminished by the noticeable poured concrete and power lines. The videotapes of the Soda Rock Area

admitted into evidence, Exs. 26 (Forest Service videotape) and Z (Eno videotape), show nothing so distinctive or attractive that it would lead to the area's becoming a destination point for visitors. Neither Elliott's testimony that visitors have stopped and taken pictures of Dog Rock, nor the site's listing in the Forest Service automobile tour brochure (Ex. 21), which advises against stopping to view the area because no safe turn-out exists, suffices to establish that the area's scenic features are substantial uses of the land.

The existence of one or more substantial competing uses of the land does not mandate the prohibition of placer mining; rather the focus now shifts to the value of the lands for placer mining. If the area has minimal mineral value, then, regardless of the substantiality of the competing uses, a general permission to engage in placer mining operations would not be appropriate. See United States v. Stone, 136 IBLA at 32-33. Although the Forest Service equates the evidence needed to establish the mineral value of the land with that needed to prove a discovery of a valuable mineral deposit, the true standard of proof is less than that. The evidence need only show the possibility that the claim might contain a profitable mineral mining opportunity meriting further exploration of the claim. See Milender II, 104 IBLA at 233-34, 95 I.D. at 170; see also United States v. Stone, 136 IBLA at 32 (appellant failed to demonstrate that there were any values that might reasonably be expected to accrue from mining) and 34 (claimants should be prepared to show the benefits they believe placer mining could bring). We agree with Judge Hammett that the evidence presented by the Forest Service, as well as that proffered by Eno, establishes that the Hound Dog claim might contain a profitable gold mining opportunity meriting further exploration of the claim.

The sampling done by Teixeira clearly demonstrates that gold exists in the gravel of the active stream channel that can be recovered through suction dredging. See Ex. 23, P.L. 359, Mineral Report at 13-14 and Table 1.^{17/} The Forest Service does not deny that gold exists on the claim; rather it maintains that the costs of mining the gold would far exceed the value of the gold and thus that mining would be unprofitable. The Forest Service relies on Teixeira's economic analysis, which included his calculations of the hourly gold production rate found in Table 2 of the P.L. 359 Mineral Report (see Ex. 23 at 14 and n.8, supra). It also relies on his assumptions both that each hour of dredging required 1.5 hours of actual work time (so that a 40-hour work week would include 25 hours of actual dredging time, with

^{17/} We need not address Eno's challenges to the significance of the results of samples HD-1 and HD-3 because, as Judge Hammett found, even using those values, the evidence supports the conclusion that sufficient gold quantities exist to indicate that the claim might contain a profitable gold mining opportunity. See Decision at 21. Our resolution of this appeal also obviates any need for us to discuss most of the other issues raised by Eno in his appeal submissions.

the rest of the time spent transporting supplies to and from the dredge site, cleaning up the sluice after dredging, panning concentrates, work breaks, and repair and maintenance) and that the labor costs associated with suction dredging would be \$10.00 per hour per person. See Ex. 23 at 15.

We find that Teixeira's economic analysis contained several flaws that undermine the persuasiveness of his calculations, including his mathematical error in determining the number of hours of actual dredging in a typical 40-hour work week (1 hour of dredging for every 1.5 hours of work equals 26.7 hours of dredging, not the 25 hours he used in his calculations) and his unsupported assumptions that break time should be included within an 8-hour work day and that labor costs should be \$10 per hour. In any event, since this proceeding is not a validity determination and the evidence needed to establish the mineral value of the land is much less than that needed to prove a discovery of a valuable mineral deposit (see Milender II, 104 IBLA at 233-34, 95 I.D. at 170), the record at this point need not demonstrate that mining the claim would be profitable, just that the possibility exists that the claim might contain a profitable mineral mining opportunity meriting further exploration of the claim. Id. Thus, the Forest Service's evidence concerning the claim's profitability, or lack thereof, while crucial to a validity determination, is not critical in this proceeding.

Judge Hammett did not address the costs of mining at all in his analysis, but focused on estimates of the amount of gold present in the workable stream and the potential value of that gold. Although the Forest Service challenges the correctness of those calculations, the Judge adopted the Forest Service's own sampling results and estimates in his computations and determined that the Forest Service's evidence in and of itself demonstrated that the claim contained sufficient gold values to indicate the possibility that the claim might contain a profitable gold mining opportunity warranting further exploration. See Decision at 21, 23. The Forest Service's objection to the Judge's reliance on Eno's computation of the volume of workable placer is unpersuasive, however, because Teixeira's estimates of the dimensions of the deposit were based on visual approximations made in the dry month of August (see Tr. 321-322), rather than on actual measurements representative of average conditions, and differ from the dimensions found on the map of the area (Ex. 3). Accordingly, we find that the Forest Service has not shown error in the Judge's analysis and determination.

The Forest Service has, however, shown that the Judge erred in concluding that the travertine deposit was not relevant to this proceeding. Mining claims are located either as lode claims or as placer claims. See 30 U.S.C. §§ 23, 35 (2000). The Building Stone Act explicitly states that building stone claims may be located under the laws related to placer mineral claims. 30 U.S.C. § 161 (2000). Mining the mineral on a placer claim by whatever method necessarily constitutes placer mining

operations. Although quarrying building stone may not fall within the technical definition of placer mining found in A Dictionary of Mining, Mineral, and Related Terms (1968), it nevertheless is mining on a placer claim and, given the absence of any indication in MCRRA to the contrary, the phrase “placer mining operations” as used in that statute includes the mining of building stone on a placer claim.

Our conclusion is bolstered by MCRRA’s provisions requiring notice of the location of any placer claim on a powersite withdrawal and affording the Secretary the opportunity to hold a hearing to determine whether placer mining operations would be detrimental to other uses of the land. Those statutory provisions reflect the Congressionally recognized need to protect other land uses and values from potential serious conflicts between mining activities and other land uses that can arise when placer mining and dredging operations are involved. See Milender I, 86 IBLA at 201-02, 92 I.D. at 187, quoting a July 18, 1955, letter to the Chairman, Committee on Interior and Insular Affairs, from Assistant Secretary of the Interior Orme Lewis. These concerns focus on the effects of mining on other uses of the surface of the claim. Placer mining operations, unlike lode mining activities, directly affect the surface of the land; mining building stone similarly unequivocally impacts the surface of the claimed land. Thus, the concerns animating the notice and hearing provisions of MCRRA apply to travertine mining, as well as to other types of placer mining. Accordingly, we reverse Judge Hammett’s conclusion that the travertine was not relevant to this proceeding.^{18/}

The final issue before us centers on whether placer mining operations, including suction dredging for gold in Indian Creek and quarrying the travertine, will substantially interfere with the cultural and geologic uses of the land. The proper standard of evaluating the potential effect of placer mining on other land uses is the extent to which legal, normal operations, subject to regulatory restraint, might interfere with other uses. Milender II, 104 IBLA at 216-17, 95 I.D. at 161; see Milender I, 86 IBLA at 198, 92 I.D. at 185. The placer mining operations subject to this test are not limited only to those activities proposed by the claimant but include all methods which a miner could reasonably use to extract minerals. United States v. Stone, 136 IBLA at 32 n.7; United States v. Bennewitz, 72 I.D. 183, 188 (1965). As we explained in United States v. Stone:

^{18/} The issue of whether the travertine is an uncommon variety mineral locatable under the Common Varieties Act, 30 U.S.C. § 621 (2000), is not before us, and we venture no opinion on that issue. Assuming for the purposes of this decision only that the travertine is an uncommon variety and therefore locatable, we find that the record, including the fact that the travertine had previously been profitably extracted and sold, supports the conclusion that the claim might contain a profitable travertine mining opportunity. See Ex. 23, P.L. 359 Mineral Report, at 17. As noted below, that increases the “benefits of placer mining” in this particular case.

The reason for this is that, under section 2(b)[, 30 U.S.C. § 621(b) (2000),] the Secretary has only a single opportunity to grant or deny a general permission to placer mine. See, e.g., United States v. Bennewitz, 72 I.D. 183, 188 (1965). Once he exercises the discretion invested in him by the statute to permit placer operations, his options under the [MCRRA,] supra, have been exhausted. Should operations thereafter proceed differently and more destructively than those proposed by the claimant at the hearing, so long as those operations were, themselves, legal, the Secretary would be powerless to intervene. It is because of this reality that the standard for evaluating the potential effect of placer mining on other land use values is “the extent to which legal, normal operations, subject to regulatory restraint, might interfere with such uses” and cannot be limited to an evaluation of the impact of the mining method proposed by the [claimant]. See Milender I, [86 IBLA] at 198, 92 I.D. at 185.

136 IBLA at 32-33 n.7.

The record in this case, including Elliott’s concession that mining with suction dredges within the active stream channel had only limited potential to physically damage cultural features any more than they had already been damaged (see Ex. 27, Elliott Report, at 10-11), Ryberg’s and Cunningham’s admissions that placer mining in Indian Creek would not affect them (see Tr. 148-149, 559-560), and Eno’s unchallenged representation that California law prohibits suction dredging near Dog Rock, supports Judge Hammett’s determination that placer mining operations for gold in Indian Creek will not substantially interfere with the uses of the land for its cultural and geological values. ^{19/} The Forest Service does not seriously challenge that conclusion, other than to contend that the Judge erred in limiting his analysis to the suction dredging operations proposed by Eno. The flaw in this argument stems from the Forest Service’s failure to identify any other legal, normal operations, subject to regulatory restraint, that could be used to mine the placer gold that would substantially interfere with those uses. ^{20/}

^{19/} The California prohibition against suction dredging the creek bank also minimizes the possibility that suction dredging the creek would substantially interfere with any other cultural features or with the geologic features associated with the travertine deposit.

^{20/} Any proposed suction dredging or other placer mining of the gravel deposits in the stream would be subject to the same notice, plan of operations, and environmental protection requirements addressed infra in our discussion of the

(continued...)

Judge Hammett did not address the question of whether mining the travertine would substantially interfere with the uses of the land for its cultural and geologic values. The Forest Service insists that, since the travertine itself constitutes the very features underlying those values, any removal of the travertine will necessarily irreparably destroy those values. This disregards that, for the purposes of the MCRRA analysis, any locatable travertine on the claim increases the “benefits of placer mining” side of the scale, to be weighed against the detriment that placer mining (which includes both removal of gold and of locatable building stone) has on other uses (that is, uses other than removal of locatable travertine or gold).

In any event, the Forest Service’s dire predictions ignore the fact that, while the regulations and statutes governing mining operations do not grant it the authority to preclude all mining, they do authorize it to limit the effects of that mining by imposing conditions, stipulations, and mitigating measures to protect the other uses of the land. The regulations at 36 CFR Part 228 invest the Forest Service with substantial authority to control and minimize the effects of mining operations on surface resources and environmental values. See Milender I, 86 IBLA at 196-97, 92 I.D. at 183-84. Under these regulations, the Forest Service has the authority to require a plan of operations if the notice of intent filed by a mining claimant prior to conducting operations reveals that such operations are likely to cause significant surface disturbance ^{21/} and to seek modification of a plan to minimize unforeseen significant disturbance of surface resources. See 36 CFR 228.4. The regulations also impose requirements for overall environmental protection and for reclamation of the surface to prevent or control onsite and off-site damage to the environment and forest surface resources. See 36 CFR 228.8. They further authorize the Forest Service to require the payment of a bond to ensure compliance with the plan of operations.

Consideration of proposed plans of operations is also subject to the procedural requirements of NEPA, 42 U.S.C. § 4332(2)(C) (2000), including the preparation of an EA or possibly an EIS analyzing the environmental impacts of the proposed mining

^{20/} (...continued)

impacts of travertine quarrying. See also Ex. 16, LRMP at 4-254 (requiring plan of operations for any mining of gravel deposits, consistent with the intent of protecting geologic and cultural features). These regulatory requirements counterbalance Elliott’s speculation that mining the gravel bar with mechanical equipment would further damage or even completely destroy the wet meadow and travertine pools. See Ex. 27, Elliott Report at 11.

^{21/} We note that the compromise agreement between the Forest Service and Forcino, which limited travertine mining to 6.1 acres on the travertine outcrop, arose from the requirement that the claimant file a plan of operations.

operations, alternatives to the proposed actions, and mitigation measures to reduce any identified impacts, which could lead to modification of the proposed mining activities. Section 106 of the NHPA, 16 U.S.C. § 470f (2000), and its implementing regulations provide the Forest Service with additional authority to regulate the extent and effect of Eno's mining operations by directing it to determine whether the proposed plan of operations would have an adverse effect on the listed site within the Soda Rock Area and, if so, to develop and evaluate alternatives or modifications that could avoid, minimize, or mitigate the adverse effects. Eno concedes both that these statutory and regulatory mandates enable the Forest Service to impose mitigation measures limiting Eno's activities to the footprint of the existing quarry or precluding mining of travertine in the areas of the sinkholes and springboxes, and that the Forest Service's duty to protect the pre-existing 40-foot wide power line from interference also protects the travertine terraces and stalactites, curtains, and pipes. The Forest Service has not shown that, given these regulatory and statutory constraints, any mining of locatable travertine would substantially interfere with the uses of the land for cultural and geologic purposes. ^{22/}

Balancing the benefits of placer mining against the potential harm to the other substantial uses of the land, we find no error in Judge Hammett's decision to grant Eno a general permission to engage in placer mining on the Hound Dog claim, although we modify his decision to reflect the additional analysis contained herein.

To the extent not specifically addressed herein, the other arguments raised in this appeal have been considered and rejected. Our decision is without prejudice to any contest against the placer claim for lack of discovery, whether of gold or of building stone.

^{22/} The Forest Service claims that the testimony of the Maidu witnesses that they have observed adverse effects to the hydrology of the area since mining began in the 1960s establishes that mining the travertine will substantially interfere with the other uses of the land. The Maidus' observations do not differentiate between the impacts created by early unregulated mining activities and the effects arising from mining conducted pursuant to the compromise agreement. The record also contains evidence indicating that the causes of the changes to the hydrology and to the travertine deposit itself are not definitely known and could simply be the result of natural processes. See Ex. 32, Geology Report at 4, 5-6; see also Ex. 27, Elliott Report, at Archaeological Record continuation sheet at 2-3. Although the Forest Service speculates that continued mining would worsen the already existing deteriorated conditions, it has not shown that, given that the environmental analyses conducted before approval of any plan of operations will address these issues and prescribe necessary mitigation measures to minimize any such impacts from mining, travertine mining will adversely affect the hydrology of the area or the extant cultural and geologic features.

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 reversed in part and affirmed as modified in part.

David L. Hughes
Administrative Judge

I concur:

James K. Jackson
Administrative Judge