



KENJI OTANI

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United States Department of the Interior
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KENJI OTANI

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Appeal from a decision of the Lower Sonoran, Arizona, Field Office Manager, Bureau of Land Management, requiring the payment of estimated processing fees for a mineral examination of an association placer mining claim. AMC-86033.

Affirmed.

1. Fees--Mining Claims: Determination of Validity

When a mining claimant proposes to conduct mining operations on an unpatented mining claim located on land that has been withdrawn for an Indian Reservation, “BLM will not approve a plan of operations or allow notice-level operations to proceed until BLM has prepared a mineral examination report to determine whether the mining claim was valid before the withdrawal, and whether it remains valid.” 43 C.F.R. § 3809.100. In such circumstances, BLM is required to conduct a mineral examination to determine the validity of the claim. An applicant who submits a plan of operations that requires BLM to conduct a mineral examination under 43 C.F.R. § 3809.100 “must pay a processing fee on a case-by-case basis . . . for such examination and report.” 43 C.F.R. § 3809.5(b).

APPEARANCES: Kenji Otani, Sells, Arizona, and Don Haddenham, Riverton, Wyoming, *pro sese*; Sonia D. Overholser, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Kenji Otani has appealed from an April 22, 2010, decision styled “Cost Recovery Fees Determined,” issued by the Field Manager, Lower Sonoran (Arizona) Field Office, Phoenix District, Bureau of Land Management (BLM), requiring him to

pay estimated processing fees for a mineral examination of the Golden Green association placer mining claim, AMC-86033 (Claim).¹ BLM required the payment of such fees, in the total amount of \$85,000, as a precondition to BLM's adjudication of a mining plan of operations (PoP), AZA-35292, filed by Otani for the Claim. For the reasons that follow, we affirm BLM's decision.

BACKGROUND

Otani filed a PoP on December 21, 2009, proposing to mine the mineral deposits on the 160-acre Golden Green association placer mining claim for the recovery of gold.² The PoP concerns approximately five acres of public land situated in secs. 1 and 2, T. 15 S., R. 2 E., Gila and Salt River Meridian, Pima County, Arizona, on the flanks of the Quijotoa Mountains, within the Papago (now Tohono O'odham) Indian Reservation (Reservation).³ Such lands were located as part of the Claim on October 15, 1954.⁴ Lands within the Reservation were thereafter withdrawn from mineral entry pursuant to the Act of May 27, 1955, Pub. L. No. 47, 69 Stat. 67, subject to existing mining claims which had been validly initiated and maintained under the mining laws of the United States. *See United States v. Lee*

¹ Otani also petitioned for a stay of BLM's decision. The Board denied Otani's petition by order dated July 27, 2010.

² Otani proposed to extract alluvial material from excavations on the Claim, after removing the topsoil, and to transport the material to an onsite plant which would process it for the recovery of precious metals and black sand, using water obtained from several local wells. The black sand was to be further processed at an offsite mill, but might in the future be processed onsite, through leaching operations, for which separate approval would be sought.

³ BLM initially notified Steven K. Tanner, identified as an "associate" of the Otanis, by e-mail dated Oct. 31, 2008, that any proposal to engage in mining operations on the Claim "should be directed to the Tohono O'[o]dham Nation," since "BLM has no jurisdiction in this matter." E-Mail to Tanner from Michael Rice, Geologist, Hassayampa (Arizona) Field Office, BLM, dated Oct. 31, 2008. BLM later revisited the question of its jurisdiction over unpatented mining claims within the Reservation.

⁴ A copy of the original location notice was filed for recordation with BLM pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (2006), on Oct. 22, 1979.

Western, Inc., 50 IBLA 95, 97 (1980). The Claim is currently held by the Clear Creek Construction Company, Inc. (Clear Creek), Randy Otani, and Kenji Otani.⁵

In separate letters dated December 3, 2009, the Field Manager informed Clear Creek and the Otanis that, after carefully considering the circumstances of claims located within the boundaries of the Reservation, and the advice of the Office of the Solicitor, BLM had “decided to undertake management of all mining activities associated with existing mining claims.” She notified the claimants that they and their operators would “be required to submit a plan of operations in accordance with 43 CFR Subpart 3809 and obtain BLM’s approval *before beginning or continuing operations greater than casual use on [their] mining claims.*” (Emphasis added.)

In a letter dated December 14, 2009, Don Haddenham, Otani’s agent,⁶ expressed frustration with BLM’s uncertainty regarding whether the Tohono O’odham Nation (the Tribe) or BLM had jurisdiction over the Claim. He noted that a PoP had been provided to the Tribe, which verbally approved the plan, but that a copy could be provided to BLM. He also noted that the claimants intended to resume mining the claim “in the near future,” given “the increase in gold prices.” Letter to BLM, dated Dec. 14, 2009, at unpaginated 2. BLM notified Tanner by e-mail dated December 15, 2009, that a copy of the PoP had to be submitted to the Field Office in order to be considered “properly submitted.” E-Mail from Rice, dated Dec. 15, 2009.

BLM received a copy of the PoP on December 21, 2009, and serialized it as AZA-35292. BLM notified Otani by letter dated January 12, 2010, that since the lands encompassed by the plan were withdrawn from appropriation under the mining laws, BLM could not, in accordance with 43 C.F.R. § 3809.100, approve the plan “without first completing a mineral examination report to determine the validity of

⁵ At page 1 of his statement of reasons (SOR) for appeal, Otani states that the Claim was located in 1954 as eight placer mining claims, and was later consolidated into one claim. The Claim was purchased on Jan. 1, 1990, “by the Otani Family (Family) owner of Clear Creek Construction Company, Inc., a Utah Corporation.”

⁶ In the December 14 letter, Haddenham identified himself as a “delegate” of the “Otani Family,” which held an interest in the Claim, and referred to Tanner as “my associate[.]” BLM informed Haddenham, by letter dated Jan. 13, 2010, that it had no record that he was either a claimant or authorized by Otani to act as an operator or agent concerning the Claim, and that Haddenham must provide a signed and notarized statement from Otani to that effect before BLM would direct matters to his attention concerning the Claim. BLM later received a Jan. 20, 2010, letter signed by Otani, before a notary public, stating that Haddenham and Tanner were both authorized “to act as [his] agents, regarding the Golden Green Placer Mining Claim AMC#86033.”

the mining claim listed in your plan.”⁷ BLM stated that, “[i]f you wish to proceed and have the validity examination completed, *it will be necessary for you to pay a processing fee to the BLM* for the work needed to complete this examination (§ 3800.5(b)),” and that BLM would provide a cost estimate before undertaking any such work. (Emphasis added.) BLM concluded by asking Otani how he wished to proceed, noting that it would answer any questions concerning the validity examination. BLM served a copy of the January 12 letter on Otani, by certified mail, return receipt requested, and included copies of 43 C.F.R. §§ 3800.5 and 3809.100. There is no evidence in the record that Otani responded to that letter.

On March 8, 2010, BLM issued a decision to Otani, styled an “Interlocutory Decision,” in which it reiterated that it could not, under 43 C.F.R. § 3809.100, process the PoP until a validity examination was conducted, and that he must, in accordance with 43 C.F.R. § 3800.5(b), pay the costs of such an examination. BLM stated that it had estimated that the costs of an examination totaled \$85,000, as detailed in a document titled “Golden Green - Validity Exam Cost Recovery Estimate” (Estimate), which it enclosed.⁸

⁷ BLM also stated that, pursuant to 43 C.F.R. § 3809.100(c), in view of the need to determine the validity of the Claim, it was suspending the time limits under 43 C.F.R. § 3809.411 for adjudicating the PoP.

⁸ BLM explained that the estimated costs included all the actual costs, both direct and indirect, expected to be incurred during the mineral examination:

Direct costs include full labor costs (including benefits), equipment rental/equipment operating costs, travel, contractual services and/or services costs. Administrative costs include general costs and are estimated by multiplying the projected direct cost by the indirect cost ratio, which is 19.1 percent for Fiscal Year 2010.

Interlocutory Decision at 1-2. The Estimate reflected the work of two geologists, who would engage in (1) “Office Work - Pre Field Examination,” consisting of title, land status, and mining claim file verification, literature review and compilation, and preparation of maps (costing a total of \$4,090); (2) “Field Work,” consisting of mapping and corner recovery, sample collection, travel, and equipment rental and sample collection supplies (costing a total of \$31,240); and (3) “Office - Post Field Examination,” consisting of drafting, compiling, and reproducing maps and figures, analyzing sample, cost, and market data, creating economic and cost models and applying them to analytical results, preparing the mineral report, and conducting a technical review of the mineral report (costing a total of \$21,700). Total direct costs (\$71,530) were added to indirect costs (\$13,662.23), and the resulting grand total (\$85,192.23) was rounded to \$85,000.

The Interlocutory Decision stated that Otani would have 30 days from receipt of the decision to submit any desired written comments regarding BLM's cost estimate, whereupon, absent a response, "the estimate will be considered acceptable by your organization and will become final after the 30-day review period." Interlocutory Decision at 2. However, BLM noted that, were Otani to submit comments, it would consider them in preparing a written final cost estimate, which would be provided to Otani in a final decision, along with instructions regarding payment, subject to the right of appeal. It concluded by stating: "Please be advised that the BLM will not initiate the mineral examination *until the requested fees have been received.*" *Id.* (emphasis added). BLM served a copy of its Interlocutory Decision on Otani by certified mail, return receipt requested.

On April 2, 2010, BLM received a March 25, 2010, letter from Haddenham and Tanner responding to BLM's March 8 Interlocutory Decision, in which they generally objected to any mineral examination of the Claim.⁹ They argued that the requirement to undertake a mineral examination "does not apply to the Golden Green, a valid claim prior to 1955 [which] . . . has operated intermittently since that time and under the terms and conditions of a plan of operations that the BLM approved before January 20, 2001." At an April 22, 2010, meeting with BLM personnel, Haddenham and Tanner provided documents in support of the March 25 letter.¹⁰

In her April 2010 decision, the Field Manager required Otani to pay estimated processing fees totaling \$85,000 for the mineral examination of the Claim. Attached to the decision was a copy of the original February 22, 2010, Estimate. The Field Manager explained that, in the absence of written comments objecting to the cost estimate, BLM considered Otani to have "accepted" the Estimate. Decision at 1.

⁹ BLM had also served a copy of its March 8 Interlocutory Decision on Haddenham by certified mail, return receipt requested, on Mar. 16, 2010. Despite the fact that Otani had notified BLM in his Jan. 20, 2010, letter that Haddenham and Tanner were his agents, the Field Manager did not acknowledge that Haddenham had responded, by letter dated Mar. 25, 2010, on behalf of Otani to the March 8 Interlocutory Decision. Thus, she did not acknowledge that Haddenham had fundamentally objected to any mineral examination and to having BLM incur any costs associated with an examination. Rather, the Field Manager stated, referring to Otani, "we received no comments from you concerning the cost estimate." Decision at 1.

¹⁰ The record contains the documents provided to BLM on April 22. Those documents appear to reflect assays and sales of mineral materials, by or on behalf of Otani, for the recovery of sizeable quantities of gold during 1991/1992. We assume that the documents were intended to demonstrate the valuable nature of the mineral deposit on the Claim.

She further stated that BLM had determined that the Estimate reflected the “appropriate fee[s],” as determined in accordance with 43 C.F.R. §§ 3000.11 and 3800.5(b). Decision at 1. The Field Manager did not set a deadline for submission of the estimated processing fees, but she did state that upon receipt of payment BLM would initiate the mineral examination. She indicated further that should Otani appeal the decision and pay the fees under protest, BLM would go forward with the examination, but that if he were to appeal and not pay under protest, BLM would not go forward with the examination or otherwise process the PoP until resolution of the appeal, in accordance with 43 C.F.R. § 3000.11.¹¹ Decision at 1.

Otani filed a timely notice of appeal of the Field Manager’s April 2010 decision on May 7, 2010. There is no indication in the record that Otani paid the processing fees under protest, and, so far as we are aware, BLM has not gone forward with the mineral examination.

DISCUSSION

We, therefore, turn to Otani’s appeal from BLM’s April 2010 decision.¹² Under 43 C.F.R. § 3809.100, BLM is required to undertake a mineral examination for the purpose of determining the validity of an unpatented mining claim in certain circumstances, as follows:

¹¹ The Field Manager also noted that, if the appeal resulted in a change in the fees, BLM would “adjust the fee[s] in accordance with 43 CFR [§] 3000.11.” Decision at 1.

¹² BLM argues that the appeal is limited to the question of whether BLM properly computed the required processing fees for the mineral examination. According to BLM, Otani’s challenge to the regulatory requirement that BLM conduct a mineral examination before processing the PoP, and to BLM’s authority for recovering processing fees, in accordance with 43 C.F.R. §§ 3800.5(b) and 3809.100, is untimely. Response to Petition for a Stay at 5. We disagree.

As previously noted, BLM did not inform Otani, until issuance of the April 2010 decision, of the amount of the processing fees or explain to him that payment of the fees was a prerequisite to any mineral examination and any further processing of the PoP. A challenge to BLM’s mere statement that Otani was required to pay processing fees as a precondition to a mineral examination, in the absence of a determination of amount, would have been premature and subject to dismissal by the Board. *See, e.g., Southern Utah Wilderness Alliance*, 140 IBLA 341, 346 (1997); *Sierra Club, Grand Canyon Chapter*, 136 IBLA 358, 363-64 (1996).

After the date on which the lands are withdrawn from appropriation under the mining laws, *BLM will not approve a plan of operations or allow notice-level operations to proceed until BLM has prepared a mineral examination report to determine whether the mining claim was valid before the withdrawal, and whether it remains valid.* [Emphasis added.]

See *United States v. Carlwood Development, Inc.*, 177 IBLA 119, 124 (2009); *United States v. Kribs*, 174 IBLA 375, 378 (2008). In such circumstances, the regulation provides that BLM may approve, pending completion of the mineral examination report, a PoP where the claimant intends only to take samples to confirm or corroborate mineral exposures physically disclosed and pre-dating the withdrawal, and to perform the minimum amount of assessment work necessary to maintain the claim.¹³ See 43 C.F.R. § 3809.100(b). Where BLM ultimately determines as a result of the mineral examination that the claim is invalid, because of the absence of a discovery of a valuable mineral deposit, the regulation directs BLM not to approve the PoP or allow notice-level operations, and to “promptly initiate contest proceedings,” with the aim of declaring the claim null and void. 43 C.F.R. § 3809.100(a).

Further, 43 C.F.R. § 3809.5(b) provides that “[a]n applicant for any action for which a mineral examination, including a validity examination or a common variety determination, and their associated reports, is performed under § 3809.100 or § 3809.101 of this part [43 C.F.R. Part 3800] *must pay a processing fee on a case-by-case basis . . . for such examination and report.*”¹⁴ (Emphasis added.)

The record leaves no question that the lands encompassed by the subject mining claim are withdrawn from appropriation under the mining laws as part of the Tohono O’odham Reservation. Initially, the lands at issue and other lands were withdrawn and set apart on January 14, 1916, by President Wilson for the benefit of the Papago Indians pursuant to Executive Order (EO) No. 2300. The EO stated, however, that the withdrawal “shall not interfere with prospecting for minerals, under such rules and regulations as the Secretary of the Interior may prescribe, or

¹³ We find no indication that Otani intends to engage in limited sampling or assessment work, and he has not sought approval for such work.

¹⁴ The recoverable costs on which the processing fee is based are determined pursuant to section 304(b) of FLPMA, 43 U.S.C. § 1734(b) (2006), 43 C.F.R. § 3000.11, and applicable Departmental policy. See 43 C.F.R. § 3809.5(b); *Natural Minerals Processing Co.*, 173 IBLA 304, 308-10 (2008). While the claimant initially pays estimated costs, ultimately, he is only charged for the costs actually incurred by BLM to conduct the mineral examination. See 43 C.F.R. § 3000.11(b)(4)(iii); *Natural Minerals Processing Co.*, 173 IBLA at 310.

the filing of entries in accordance with the mineral land laws of the United States[.]” The Order, thus, did not bar the location of mining claims under the mining laws. The President subsequently issued EO No. 2524, on February 1, 1917, revoking EO No. 2300, but continuing to withdraw the lands at issue and other lands within the Reservation from entry under the public land laws, but mineral lands therein remain subject to exploration, location, and entry under the mining laws. By the Act of May 27, 1955, Congress specifically repealed the contrary language in EO No. 2524 and withdrew, subject to valid existing rights, the lands at issue “from all forms of exploration, location, and entry under [the mining] . . . laws [of the United States.]” 69 Stat. at 67. The minerals underlying Reservation lands were made part of the Reservation, “to be held in trust by the United States for the Papago Indian Tribe[.]” *Id.* The Act stated, however, that its provisions “shall not be applicable to lands within the Papago Indian Reservation for which a mineral patent has heretofore been issued or to a claim that has been validly initiated before the date of this Act and thereafter maintained under the mining laws of the United States.” *Id.* at 67-68.

Otani does not dispute the fact that the lands at issue were withdrawn from appropriation under the mining laws following the location of the Claim, which is borne out by the copy of the Master Title Plat (MTP) and Historical Index (HI) for the township in the record. *See* SOR at 1 (“This is an unpatented claim which lies within the exterior boundary of the Tohono O’[o]dham Nation”). Nor does he question BLM’s interpretation of 43 C.F.R. § 3809.100, as requiring it to conduct a mineral examination of a mining claim located on withdrawn lands, or of 43 C.F.R. § 3800.5(b), as requiring it to charge the claimant in such a situation with the costs of the mineral examination. Instead, Otani fundamentally objects to BLM’s underlying decision to require a mineral examination as a precondition to adjudication of the PoP in this case, and thus to BLM’s requirement that Otani pay the processing fees for such examination, since *a mineral examination has already occurred*.¹⁵ Otani argues that BLM should not require a “re-validation” of the Claim.

¹⁵ Otani suggests that BLM is undertaking the mineral examination as a matter of discretion, for which it must pay the costs, given that a plan has been previously approved or a notice previously allowed, apparently alluding to BLM’s prior allowance of a notice filed by the current claimants and serialized as AZA-25772. *See* SOR at 4 (citing Instruction Memorandum No. 2010-88 at 2). The present record contains documentation that this notice, which permitted limited mining operations to occur under prior Subpart 3809 regulations, was deemed to have expired on Jan. 22, 2003, absent extension under the new Subpart 3809 regulations adopted effective Jan. 20, 2001 (65 Fed. Reg. 69998 (Nov. 21, 2000)). *See* 43 C.F.R. § 3809.300. Otani and the other claimants were so notified by BLM decision dated

(continued...)

SOR at 1, 5. He refers to a mineral examination undertaken on behalf of the Bureau of Indian Affairs (BIA) by Charles L. Fair, a Registered Geologist in Arizona, as described in a report entitled “Validity Examination Golden Green Placer Claim” (Validity Report). That Validity Report is dated September 26, 1977, and was filed with BLM on October 11, 1977. He also refers to a report prepared by Arthur Rex Rogers, a Professional Geologist in Wyoming, dated January 5, 2009, and entitled “A Report to Terrell Lambert With the Purpose to Update the Validity Examination Golden Green Placer Claim Report of Charles L. Fair” (Updated Validity Report).¹⁶

Fair reported that the Claim, for which he conducted a field examination in July 1976, consists generally of alluvial gravels, mostly boulders and cobbles of volcanic rock, overlying bedrock, which outcrops in places on the Claim. He took four samples (BCQ-011 through BCQ-014) by vertical channel cuts (from 18 to 24 inches long) from active mining operations on the Claim, three from near bedrock in a 60- to 150-foot wide and 200-foot long “pit” or “open cut,” and one from the bottom of a “trench” 400 feet east-northeast from the pit. Validity Report at 16. He noted that the “best values” for gold were known to “usually” occur “at the bottom of the gravel on the old bedrock surface.”¹⁷ *Id.* These samples were fire-assayed, yielding from 204.08 to 358.27 milligrams of gold and from 54.44 to

¹⁵ (...continued)

Feb. 6, 2003, which informed them that they were not authorized to engage in further operations, and that, should they desire to resume operations, they must file a new notice or PoP in accordance with the new regulations. There is no indication that any of the claimants appealed the decision. By virtue of expiration of the notice, were Otani to undertake any mining operations at the present time, he is required to obtain BLM’s approval of a PoP. *See* 43 C.F.R. § 3809.11; *LKA International, Inc.*, 175 IBLA 225, 230-31 (2008). Further, since BLM is required by 43 C.F.R. § 3809.100 to conduct the mineral examination as a precondition to approval of a PoP, Otani is clearly required to pay the costs thereof. *See* 43 C.F.R. § 3800.5(b).

¹⁶ Otani provided copies of the Validity Report and Updated Validity Report to BLM along with the PoP on Dec. 21, 2009, and other copies are now attached to his SOR.

¹⁷ A Sketch Map (Figure 2), at page 6 of the Validity Report, denotes the location of a “Pit” and “Trench” in the northeastern corner of the Claim, which would appear to be the site of active operations in 1977. The pit and trench are located near a distinctive intersection of two roads. A map attached to the PoP reveals that mining is proposed to take place in an area (“Current Planned Mining Area”) adjacent to two smaller areas denoted as “Mined & Reclaimed” and “Reclaimed Area From Previous Operation.” Current Information Map, dated Feb. 4, 2009. The map appears to show the same distinctive intersection. Presuming it is the same, neither the proposed nor the previous areas encompasses the pit or the trench.

93.16 milligrams of silver. *See id.* at unpaginated 20 (Table I). Fair determined that the samples disclosed the presence of from 9.275 to 15.23 grams of gold and from 2.412 to 4.779 grams of silver per ton of material. *See id.* He translated this gold and silver content into a value per cubic yard of material of from \$37.24 to \$61.23 for gold and from \$0.29 to \$0.57 for silver, given gold and silver prices, respectively of \$150 and \$4.50 per ounce. *See id.* The four samples were, thus, deemed to disclose a total value of from \$37.53 to \$61.65, or an average of \$51.15, per cubic yard of material. *See id.*

Fair noted that the alluvial gravel disclosed in the pit ranged from 6 to 25 feet thick. He projected the extent of the gravel over an area approximately 1,000 feet wide and 2,500 feet long, averaging about 18 feet in depth, and calculated that the Claim likely contained close to 16.7 million cubic yards of alluvial gravel. *See* Validity Report at 17-18. He determined that this gravel deposit likely contained a mineralized zone near bedrock such that the extraction of every 6 cubic yards of material down to bedrock would yield one-half cubic yard of mineralized material, having an average value of \$25.57. *See id.* at 18. Based on this rate of return, Fair estimated that the entire deposit was valued at \$4.26 per cubic yard of material, which, given the costs of mining and stripping the deposit (\$0.40 per cubic yard), trucking and handling wastes and gravel (\$0.15 per cubic yard), and assembling an onsite cleaning and concentration plant (\$1.25 per cubic yard), or total costs of \$1.80 per cubic yard, resulted in a net profit of \$2.46 per cubic yard. *See id.* Fair stated that, “[i]f the estimates on total yardage and average mineralization are correct, this is a possible total gross value of \$40,000,000 for the gold contained on the claim.” *Id.* (emphasis added). Fair concluded, based on his professional opinion, that “the mineralization on the Golden Green Placer Claim meets the requirements for validity under the U.S. mining laws.” *Id.* at 19.

Rogers does not report taking any samples, or otherwise examining the Claim in field. Rather, he appears simply to have reviewed the Validity Report, initially finding Fair’s description of the mineralization on the Claim to be “straight forward and what would be expected from that area of Arizona.” Updated Validity Report at 2. He deemed the method of sampling and assaying the samples to be in accord with generally accepted methods, and Fair’s estimate of a mineral deposit totaling close to 16.7 million cubic yards of alluvial gravel to be “reasonable.” *Id.* Rogers’ sole focus was in updating the profitability analysis in Fair’s report, looking at the value likely to be derived from mining the gravels, based on current prices for the gold and silver likely to be extracted from the Claim, and the expected current costs of mining and milling the mineral material. Using the same methodology employed by Fair to assess the value of the mineralized zone near bedrock, at current gold and silver prices of \$853.10 and \$11.12 per ounce, respectively, Rogers valued the entire deposit at \$24.13 per cubic yard of material, which, given the total costs of \$12.67

per cubic yard for mining, hauling, stripping and waste, and refurbishing the existing mill, would result in a net profit of \$11.46 per cubic yard.¹⁸ See Updated Validity Report at 4 (Table I (Updated Golden Green Sample Values After C.L. Fair Report, 1977)). Rogers concluded that he concurred with Fair's assessment that "this is a valuable property and should be developed." Updated Validity Report at 2.

Otani asserts that, since the Claim was valid in 1977, when gold was \$150 per ounce, it is still valid, now that the price of gold has risen to \$1,200 per ounce: "Reasonableness tells you mining is still viable as nothing has changed geologically on the property to invalidate the discoveries made since 1954[.]" SOR at 4. He argues that the only purpose of BLM's requirement to pay processing fees for a mineral examination is not to validate the Claim, but rather "to discourage or prevent this Family from resuming operations," which can be suitably undertaken with disturbances limited to 10 acres, at any one time, subject to continuous reclamation under an appropriate bond, and otherwise fully in accord with the mining laws.¹⁹ *Id.*; see *id.* at 1, 5.

We start with the fact that Otani errs in stating that BLM "singled out" the Claim for a mineral examination from among the "hundreds of thousands" of active unpatented placer claims. SOR at 2. We find no evidence to support Otani's charge. Further, BLM is plainly required by 43 C.F.R. § 3809.100 to undertake a mineral examination whenever a claimant seeks approval of a PoP for a claim located on withdrawn lands.²⁰

¹⁸ Rogers noted that he was "sure" that there were other cost items "that Fair did not consider that will reduce the value some." Updated Validity Report at 2. He did not specify these items, or how much they would affect the net return, but he clearly did not expect them to undermine the profitability of mining the Claim.

¹⁹ Otani argues that to continue to preclude mining "approaches a *taking*" of private property by the United States without the payment of just compensation, contrary to the Fifth Amendment to the U.S. Constitution. SOR at 5. We will not address the constitutional implications of BLM's actions, since that is for the judicial, not the executive, branch of the Federal government. See *Laguna Gatuna, Inc.*, 131 IBLA 169, 173 (1994); *Slone v. Office of Surface Mining Reclamation & Enforcement*, 114 IBLA 353, 357-58 (1990).

²⁰ Otani points out that the Solicitor, in a Nov. 14, 2005, Memorandum to the Secretary, in which the Secretary concurred on Nov. 17, 2005, noted that the Department has determined the validity of only a very small percentage of "the hundreds of thousands of *unpatented mining claims* and mill sites on the public lands," and that "the Department . . . *need not know*[]" whether these mining claims
(continued...)

What Otani overlooks is that the validity of a mining claim must be determined as a present fact. Where location of the claim predates withdrawal of the underlying lands, it must be shown that the claim was supported by a discovery not only at the time of the withdrawal, but also at the present time. *See, e.g., United States v. Dwyer*, 175 IBLA 100, 111 (2008); *In Re Pacific Coast Molybdenum Co.*, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983). While the January 2009 evaluation by Rogers may have served to update the 1977 mineral examination, it assessed the profitability of mining the Claim based only on the results of sampling the Claim in July 1976. Otani asserts that nothing about the Claim has changed “geologically” and that since the Claim was valid in 1977, it remains valid. SOR at 4. We question whether the true extent and current value of the deposit is adequately shown by four samples taken from the old pit and trench, and by what appears to be an unsupported geologic inference from which Fair projected the deposit to extend over an area approximately 1,000 feet wide and 2,500 feet long. *See* Validity Report at 15, 18; *see also, e.g., Clark County v. Nevada Pacific Co., Inc.*, 172 IBLA 316, 328 (2007); *United States v. Marion*, 37 IBLA 68, 75-76 (1978). The 1976 pit and trench, on which both the 1977 Validity Report and the 2009 Updated Validity Report depend, may no longer exist, based on mining that occurred intermittently from 1954

²⁰ (...continued)

and mill sites are valid before approving a proposed plan for exploration or mining operations on open lands.” SOR at 3-4 (*quoting* Sol. Memorandum, “Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations,” M-37012 (Nov. 14, 2005) (Sol. Memo), at 4); *see Center for Biological Diversity*, 162 IBLA 268, 281-83 (2004), *aff’d*, *Center for Biological Diversity v. U.S. Department of the Interior*, No. CV-01-01758-ROS (D. Ariz. June 6, 2007), *rev’d on other grounds*, 581 F.3d 1063 (9th Cir. 2009). He urges similar treatment for the Claim, since it was located in 1954 “when this land was opened up for mining[.]” SOR at 4.

While the land may have been open at the time of location, it is no longer open, having been withdrawn from entry under the mining laws. In such a situation, the Solicitor counsels: “[W]hen lands are withdrawn from entry under the Mining Law, the Department must verify whether the mining claims and mill sites included in a proposed mine plan are valid before approving the plan.” Sol. Memo at 5. Indeed, with respect to such lands, BLM is, as acknowledged by the Solicitor, required by a duly promulgated regulation to conduct a mineral examination. *See* Sol. Memo at 3, 5; *United States v. Nixon*, 418 U.S. 683, 696 (1974); *Conoco, Inc. (On Reconsideration)*, 113 IBLA 243, 249 (1990); *State of Alaska*, 97 IBLA 229, 231 (1987). The Solicitor explains that BLM is required to determine whether a claim in existence at the time the lands were withdrawn was supported by the discovery of a valuable mineral deposit before authorizing mining activities on the claim. *See* Sol. Memo at 4.

to 1997. Thus, the possibility that a valuable mineral deposit, if there was one, has been exhausted or depleted to the point that it no longer contains minerals in sufficient quality or quantity to be considered a valuable deposit, and thus does not validate the Claim, cannot be discounted. *See, e.g., United States v. Bechthold*, 25 IBLA 77, 90 (1976).²¹

Regardless of whether the 1977 submission to BLM of BIA's mineral examination satisfied the requirement that the Claim be determined to be "valid before the withdrawal" in 1955, it remains for BLM to determine that this claim "remains valid" before it can approve appellant's PoP. *See* 43 C.F.R. § 3809.100. The 1977 Validity Report and 2009 Updated Validity Report are no doubt relevant but do not obviate the need for BLM to make that determination.

We conclude that the Field Manager properly decided that BLM must conduct a mineral examination as a precondition to approving the PoP, as required by 43 C.F.R. § 3809.100, and that BLM is entitled, pursuant to 43 C.F.R. § 3800.5(b), to require Otani to pay the costs of that mineral examination. There is nothing in the record to suggest that BLM's cost estimate is excessive.

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

_____/s/
James F. Roberts
Administrative Judge

I concur:

_____/s/
James K. Jackson
Administrative Judge

²¹ We have an additional concern as whether the 1977 Validity Report and 2009 Updated Validity Report fully assessed all of the costs of mining and recovering the reported gold values disclosed by Fair's 1976 field examination. Indeed, Rogers acknowledged that not all of the costs were taken into account by Fair. *See* Updated Validity Report at 2. Neither report addressed the costs at the time of the 1955 withdrawal or at the time of submission of the PoP in December 2009, or at the time of BLM's April 2010 decision.