GEORGE KENDALL, *ET AL*.

184 IBLA 71 Decided July 31, 2013

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

GEORGE KENDALL, *ET AL*.

IBLA 2012-199 Decided July 31, 2013

Appeal from four decisions of the Oregon State Office, Bureau of Land Management, declaring four association placer mining claims forfeited. ORMC 163028, *et al*.

Decision Affirmed as Modified; Motion for Hearing Denied; Petition for Stay Denied as Moot

1. Mining Claims: Location--Mining Claims: Placer Claims

   The regulation at 43 C.F.R. § 3832.12 requires all mining claims and sites to be as compact and regular in form as reasonably possible and to conform to the U.S. Public Land Survey System and its rectangular subdivisions as much as possible. Claims also must be described accurately, such that BLM can identify the claims on the ground.

2. Mining Claims: Location--Mining Claims: Placer Claims

   To conform to the public land survey system, a placer mining claim must be described by aliquot part within the quarter section, and then, as necessary, may be subdivided into 10-acre tracts, with few specific exceptions. Claims on unsurveyed lands without a protracted survey of record, gulch or bench placer claims, or claims bounded by other mining claims or nonmineral lands, may be described by metes and bounds.

3. Mining Claims: Location--Mining Claims: Placer Claims

   To meet the compactness requirement, BLM regulations require that the 40-acre square guidance be strictly

> applied to association placer mining claims described by metes and bounds. In addition, BLM may apply the 40-acre square guidance to claims described by aliquot part and complete lots, based upon a case-by-case factual determination.

APPEARANCES: James L. Buchal, Esq., Portland, Oregon, for appellants; Frank S. Wilson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

George Kendall, John James Jones (Rose), Dixie Krimm, Eric Krimm, Charles Montgomery, Marcella Charlan, and Derek Eimer (collectively, "claimants" or "appellants") have appealed from and requested a stay of four decisions of the Oregon State Office, Bureau of Land Management (BLM), declaring four association placer mining claims forfeited.[1] Each claim was declared forfeited for, among other reasons, failing to fit within a single 40-acre parcel.

Factual Background

The location notices for the claims describe them as follows.

Powell Creek: "NE4-NE4-SW4 & NW4-NW4-SE4 & S2-NE4-NW4-SE4 & S2-N2-NE4-SE4" of sec. 17, T. 38 S., R. 5 W., Willamette Meridian (WM), claiming 35 acres. The locators are listed as Mary Koons and Marcella Charlan, below which the location notice reads "Roy J. Johnson as Agent for All."[2]

Deadman Treasure: "SE4-SE4-SW4-SW4 & W2-SE4-SW4-SW4 & SW4-SW4-SW4 & SE4-NW4-SW4-SW4 & W2-NW4-SW4-SW4 & SE4-SW4-NW4-SW4 & W2-SW4-NW4-SW4 & W2-NW4-NW4-SW4 & NE4-NW4-NW4-SW4" of sec. 21, T. 29 S., R. 2 W., WM, claiming 40 acres. The locators are listed as John James Jones and George Kendall, with Roy J. Johnson identified "as Agent for all."

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[1] The Deadman Treasure (ORMC 168836), Golden Days (ORMC 168838), and The Old Days (ORMC 168845), claims were declared forfeited by Apr. 24, 2012, decisions. The Powell Creek (ORMC 163028) claim was declared forfeited in a May 1, 2012, decision.

[2] BLM indicates in its Mar. 23, 2012, decision that Derek Eimer purchased Koons' interest in the claim on Feb. 8, 2011.

Golden Days: "W2-SW4-SW4-NE4 & S2-SE4-SE4-NW4 & NW4-NE4-NE4-SW4 & NE4-NW4-NE4-SW4 & S2-NW4-NE4-SW4 & NW4-SW4-NE4-SW4 & N2-SE4-NW4-SW4 & S2-SE4-NW4-SW4 & SE4-SW4-NW4-SW4 & N2-NW4-SW4-SW4" of sec. 27, T. 29 S., R. 3 W., WM, claiming 35 acres. The locators are listed as Eric R. Krimm and Dixie R. Krimm, with Roy J. Johnson identified "as Agent for all."

The Old Days: "NE4-NE4-NE4 & SE4-NW4-NE4-NE4 & NW4-SE4-NE4-NE4 & NE4-SW4-NE4-NE4 & S2-SW4-NE4-NE4 & SE4-SE4-NW4-NE4 & S2-SE4-NW4-NE4 & E2-NW4-SE4-NE4 & SW4-NE4-SW4-NE4" of sec. 27, T. 29 S., R. 3 W., WM, claiming 37.5 acres. The locators are listed as Charles Montgomery and George Kendall, with Roy J. Johnson identified "as Agent for all."

Each claim is described in 2.5-acre, 5-acre, and 10-acre parcels,[3] and generally checkerboards the land survey system to create a "stair step" shape, to follow a stream bed.[4] On February 24, 2012, BLM issued an Interlocutory Decision (February ID) addressing the Deadman Treasure, Golden Days, and The Old Days claims, with other claims, requiring claimants to submit amended location notices and maps correcting errors between acreage claimed and acreage described (Deadman Treasure claim, Golden Days claim), and correcting legal descriptions because the location notices described the claims by aliquot part only, while the section itself was subdivided by lots (Golden Days claim, The Old Days claim).[5] The February ID also stated that all of the claims were longer than allowed by regulation, and that each claim must be as compact and regular in form as reasonably possible, referencing

[3] The Powell Creek claim is described in 5-acre and 10-acre parcels only.

[4] The Powell Creek claim tracks the course of Powell Creek, the Deadman Treasure claim tracks the course of Deadman Creek, and the Golden Days and The Old Days claims track the course of Days Creek.

[5] The regulation at 43 C.F.R. § 3832.12(c)(1) states:

> You must describe placer claims by aliquot part and complete lots using the U.S. Public Land Survey System and its rectangular subdivisions except when placer claims are –
>
> (i) On unsurveyed Federal lands;
> (ii) Gulch or bench placer claims; or
> (iii) Bounded by other mining claims or nonmineral lands.

43 C.F.R. § 3832.12.[6] Finally, claimants also were required to provide a legal document confirming that Roy J. Johnson is an authorized agent or representative of the claimants, and provide a current mailing address for each claimant. BLM stated that the amended location notices and the additional documents must be submitted within 30 days of receipt of the February ID or the claims would be declared forfeited. On March 23, 2012, BLM issued another Interlocutory Decision (March ID), addressing the Powell Creek claim, requiring its claimants to submit an amended location notice and map because the claim is longer than allowed by regulation, and submit an updated mailing address for Derek Eimer. Similarly, BLM required these corrections within 30 days of receipt of the March ID, or the claim would be declared forfeited.

On March 26, 2012, BLM received an initial response from appellants for the Deadman Treasure, Golden Days, and The Old Days claims, addressing Johnson's authority to act as claimants' representative and providing current mailing addresses for the claimants. As a result of this response, on March 29, 2012, BLM issued a decision rescinding in part the February ID with respect to Johnson's status, and accepting the provided mailing addresses. This decision restated, however, that all other requirements of the February ID remained in effect.

BLM received an additional response from appellants dated March 30, 2012, (Additional Response), discussing the compactness issue and arguing that BLM should withdraw its objections to the claims. It was accompanied by an affidavit dated March 30, 2012, submitted by Johnson (Johnson's March 30 Affidavit), explaining why he located the claims the way he did. Johnson's March 30 Affidavit stated that he intended to submit amended location notices to address issues raised in BLM's Interlocutory Decisions, but also stated that he did not intend to change the shape of the claims. BLM later received amended location notices for the Deadman Treasure, Golden Days, and The Old Days claims, but not for the Powell Creek claim.

On April 24, 2012, BLM issued three separate decisions rejecting the amended location notices for the Deadman Treasure, Golden Days, and The Old Days claims, because of uncured defects in the legal descriptions (Deadman Treasure, The Old Days) and because all the claims were not sufficiently compact, and declaring those claims forfeited. On May 1, 2012, BLM issued a decision declaring the Powell Creek claim forfeited because the requested additional information was not submitted and the claim was not sufficiently compact. This appeal followed.

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[6] The Interlocutory Decision explained that 43 C.F.R. § 3832.12(c)(3) defines "compact" for a placer claim located by 1 or 2 persons as fitting within the exterior boundaries of 1 square 40-acre parcel. The regulation references the decision in *Snow Flake Fraction Placer*, 37 L.D. 250 (1908).

Arguments

In their Notice of Appeal and Statement of Reasons (SOR), Request for Stay, and Reply in Support of Petition for Stay (Reply), appellants provide a wide-ranging discussion of congressional action and the Department's historical interpretation of its authority with respect to the location of placer mining claims.[7] They also submit an additional affidavit, dated May 21, 2012, from Johnson (Johnson May 21 Affidavit), and an affidavit, dated June 29, 2012, from Mark Chestnut (Chestnut June 29 Affidavit), a professional miner who assisted Johnson in locating the Deadman Treasure, Golden Days, and The Old Days claims, and who is familiar with the Powell Creek Claim. Appellants' relevant arguments can be summarized as follows:

(1) The claims at issue generally conform to the legal subdivisions of the public lands, and to the extent they do not, it is because the mineral deposits are long and narrow. As a result, the claims conform to the public land survey as much as possible and are as compact and rectangular in form as reasonably possible. SOR at 2.

(2) BLM has unlawfully created a rule forbidding claims in the form of long narrow strips. *Id.* Appellants also argue that BLM's rule conflicts with substantial judicial and Departmental precedents. Reply at 2-12.

(3) BLM has no standards as to when a claim is too long or too narrow, and so its enforcement of the rule is arbitrary and capricious and contrary to law. SOR at 2-3.

(4) BLM has refused to permit any amendment or revision of "the claim,"[8] and has identified curable defects in appellants' amended location notices for the Deadman Treasure and The Old Days claims, and so BLM should vacate its decision and permit appellants the opportunity to cure the identified defects. SOR at 3.

Johnson acknowledges that he locates claims to conform them to the legal subdivisions of the public land survey, and with respect to placer claims, he will

> sometimes reduce the legal subdivisions down to as little as 2.5 acre plots . . . in order to take ground that is only mineral in character and not take adjoining nonmineral or otherwise inappropriate ground. . . . I

[7] Appellants also submited a Motion for Hearing, which is opposed by BLM.

[8] This claim is not identified.

> use such descriptions [here] in order to follow the natural contours of the mineral-bearing waterway and not claim large sections of nonmineral ground which sometimes includes steep hillsides, road easements, or sometimes private property.

Johnson May 21 Affidavit at 2. Johnson also acknowledges defects in the amended location notices for the Deadman Treasure and The Old Days claims, although he asserts the maps are correct. *Id*. at 3.

Chestnut states that "[t]he intent of the location notices was to claim the mineral-bearing land and not to claim the non-mineral bearing slopes surrounding these locations." Chestnut June 29 Affidavit at 2. He acknowledges there are steep slopes adjacent to the subject claims. After reviewing affidavits submitted by BLM that confirmed slopes of up to 60%, he states that "a 60% slope is so steep that one cannot drive a truck up it, and one could not practically operate placer mining equipment on it," while again confirming the non-mineral character of "such steep ground." *Id*. at 3.

BLM argues that under the standard articulated in *Snow Flake Fraction Placer*, 37 L.D. 250 (1908), the claims involved in this appeal fail the requirements that they be compact and conform, as near as practicable, with the system of public land surveys. Answer at 3, 8-9. In support of this argument, BLM also submits declarations from Sean Gordon and Brennan Garrelts, BLM Foresters, describing the topography of the Powell Creek and Deadman Treasure claims.

Motion for Hearing

Appellants request a hearing to address issues characterized as "issues of material fact," including whether the subject claims are "compact," whether BLM has engaged in unlawful rulemaking, whether BLM has acted outside the scope of its statutory duties, whether BLM has historically "approved" claims no more compact than the subject claims, and whether the Department's implementation of its "'compactness' [sic] policy" is unreasonably vague, arbitrary and capricious, and unconstitutional. Motion for Hearing at 2-3.

The Board may order a hearing if there are issues of material fact which, if proved, would alter the disposition of the appeal, or if there are significant factual or legal issues to be decided and the existing record is insufficient to resolve them. 43 C.F.R. § 4.415(b). As for the issue of the compactness of the claims, appellants fail to identify what evidence beyond that already in the record, including affidavits submitted both by appellants and BLM, must be presented by oral testimony. The remaining issues raised by appellants are principally legal issues that have either been

thoroughly briefed by the parties or are outside our authority to decide, *e.g.*, constitutional questions. *See Henry Deaton*, 182 IBLA 274, 285 n.18 (2012) and cases cited ("This Board has long held that it is not the proper forum for deciding constitutional questions," quoting *Mark Patrick Heath*, 175 IBLA 167, 196 (2008)).

We find that the existing record is sufficient to decide the relevant issues in this appeal, and so a hearing is unnecessary. Appellants' Motion for Hearing is denied.

Legal Background

[1] Placer mining claims located on Federal land generally must meet three requirements: acreage, conformity, and compactness. A placer claim located by an individual claimant may not exceed 20 acres. 30 U.S.C. § 35 (2006); 43 C.F.R. § 3832.22(b)(1). An association placer claim may be located by up to eight persons or business entities, each of which may locate up to 20 acres, for a maximum of 160 acres per association placer claim with eight locators. 30 U.S.C. § 36 (2006); 43 C.F.R. § 3832.22(b)(2). In addition, a claim must be described accurately, by a land description and map, such that BLM can identify the claim on the ground. 43 C.F.R. § 3832.12(a)(2)(ii).

Conformity Requirement

[2] As for conformity, placer claims must conform, "as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys." 30 U.S.C. § 35 (2006). On surveyed or on unsurveyed lands with a protracted survey of record, the lands embraced by such claims must be described by aliquot part[9] to the quarter section, and then may be subdivided, as necessary, into 10-acre tracts or quarter-quarter-quarter sections.[10] 30 U.S.C. § 36 (2006); 43 C.F.R.

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[9] If a placer claim is located within an irregular section that has been divided in whole or in part into lots and the placer claim is located within such lots, then the claim must be described by lots. 43 C.F.R. § 3832.12(c)(1); *see Charles H. Head*, 40 L.D. 135, 137-38 (1911).

[10] With respect to disposals of the public lands, the rule is that the smallest legal subdivision of the public-land surveys is a 40-acre quarter-quarter section. *See* Act of April 6, 1832, 4 Stat. 503 ("[A]ll of the public lands of the United States, when offered at private sale, may be purchased at the option of the purchaser, either in entire sections, half sections, quarter sections, half-quarter sections, or quarter-quarter sections"); *see also, e.g.*, *Warren v. Van Brunt*, 86 U.S. 646, 652 (1873) ("There is no legal subdivision of the public lands less than a quarter of a

(continued...)

§ 3832.12(a)(1); *Roman Placer Mining Claim*, 34 L.D. 260, 263 (1905) (rejecting nonconforming claim described by 5-acre rectangular tracts); *Snow Flake*, 37 L.D. at 255 (discussing with approval *Roman Placer*). Under the statute, "two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof." 30 U.S.C. § 36 (2006) (emphasis added); *see Tai Kim*, 180 IBLA 145, 149 n.5 (2010). If two co-locators make such joint entry, their association claim must at a minimum embrace a 10-acre legal subdivision to conform to the rectangular subdivisions of the public land survey system. The Department has approved an exception to the minimum 10-acre tract requirement "when such requirement would compel a claimant to place his lines on other prior located claims or when his claim is surrounded by prior locations." *Snow Flake*, 37 L.D. at 258; *U.S. v. Henrickson*, 70 I.D. 212, 220 (1963); *U.S. v. Meyers*, 17 IBLA 313, 315 (1974).[11] We note that the Department also has imposed a long-standing requirement that each 10-acre parcel of a placer claim must be mineral in character, which is consistent with the requirement for describing such claims in no less than 10-acre parcels. *American Smelting and Refining Co.*, 39 L.D. 299, 301 (1910); *see McCall v. Andrus*, 628 F.2d 1185, 1187 (1980), *cert. denied*, 450 U.S. 996 (1981) (affirming the 10-acre mineral in character rule).

If a placer claim cannot be described by aliquot parts and lots then it may be described by a metes and bounds description that fixes the position of the claim corners, and conforms to the rectangular subdivisions of the public land survey as much as possible. 30 U.S.C. § 35; 43 C.F.R. § 3832.12(a)(1); *Jim Collins*, 175 IBLA

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[10] (...continued)
quarter-section, or forty acres, except in the case of fractional sections"); Solicitor's Opinion M-36778, 76 I.D. 108, 110-11 (1969), *reaff'd and clarified*, 92 I.D. 121, 125 (1984); *Daddy Del's*, 151 IBLA 229, 232 n.1 (1999) ("It is well-settled that the 'smallest legal subdivision' is a 'quarter-quarter section' comprising 40 acres") and cases cited. Entry into 10-acre tracts for the purpose of locating a placer mining claim is a specific exception to that rule. *See Southern Pac. R. Co. v. Lane*, 263 F. 637, 639 (D.C. Cir. 1920), *aff'd sub nom. Southern Pac. R. Co. v. Fall*, 257 U.S. 460, 463 (1922).

[11] Appellants inaccurately characterize the Board's holding in *Meyers* in their Additional Response to BLM by stating that the claim at issue in that appeal involved the use of small (less than 10 acre) rectangular subdivisions "without objection or comment." Additional Response at 6 n.1. In fact, the Board specifically addressed that issue, confirming the Department's exception to the 10-acre parcels, that "[a] placer mining location may be made for less than 10 acres *where the claim is surrounded by prior locations*." *U.S. v. Meyers*, 17 IBLA at 315 n.1 (emphasis added).

389, 392 (2008). Such claims include those on unsurveyed lands without a protracted survey, gulch or bench placer claims, or claims bounded by other mining claims or nonmineral lands. 43 C.F.R. § 3832.12(c)(1).

Compactness Requirement

The compactness requirement, although related to and often considered jointly with claim conformity, is distinct, and requires that a placer claim "must be as compact and regular in form as reasonably possible." 43 C.F.R. § 3832.12(a). This requirement arises out of, and is clearly stated by, the Department's decision in *Snow Flake Fraction Placer*, 37 L.D. 250 (1908). That decision held that "[c]onformity is required if practicable," but "[i]n the interest of wise administration," the Department has the authority and responsibility to "keep claims in compact form and not split the public domain into narrow, long and irregular strips." *Snow Flake*, 37 L.D. at 258.[12] In carrying out that responsibility, "[e]ach case presented must be considered and decided on its own facts." *Id*. *Snow Flake* also provided guidance as to what constitutes appropriate compactness:

> [A] claim hereafter located by one or two persons which can be entirely included within a square forty-acre tract, and a claim located by three or four persons which can be entirely included in two square forty-acre tracts placed end to end, and a claim located by five or six persons which can be entirely included in three square forty-acre tracts, and a claim located by seven or eight persons which can be entirely included in four square forty-acre tracts, should be approved.

Id. at 258-59. In this way, the Department created a type of "safe harbor" for placer mining claims that satisfied the above 40-acre square guidance.

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[12] Congress has since clearly confirmed that authority in the Federal Land Policy and Management Act, which states "[t]he Secretary shall manage the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a) (2006). Multiple use is defined as including:

> [M]aking the most judicious use of the land for some or all of [the public lands'] resources . . . over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses . . . without permanent impairment of the productivity of the land.

Id. § 1702(c).

The Department's policy,[13] the conformity and compactness requirements, case-by-case factual determination, 40-acre square guidance, exceptions, and application to all placer claims whether on surveyed or unsurveyed lands[14] were promptly incorporated into BLM's regulations, *see Regulations*, 37 L.D. 757, 762 (1909), and they remained unchanged for almost 100 years. *See, e.g.*, 43 C.F.R. § 185.28 (1939); 43 C.F.R. § 185.28 (1949); 43 C.F.R. § 3416.5 (1969); 43 C.F.R. § 3842.1-5 (2003). In 2003, BLM revised the rules for the purpose of rewriting the regulations "in plain language to make them easier for the public to use and understand." 68 Fed. Reg. 61046 (Oct. 24, 2003).

[3] This revision made an important change with respect to the 40-acre square guidance. The regulation now states that to meet the compactness requirement, an association placer claim described by metes and bounds shall fit, depending on the number of claim locators, within the exterior boundaries of one or more square 40-acre parcels, "as described in *Snow Flake Fraction Placer* . . ., in order to keep your claim in compact form and not split Federal lands into narrow, long or irregular shapes." 68 Fed. Reg. at 61070 (emphasis added) (codified at 43 C.F.R. § 3832.12(c)(3)). However, 43 C.F.R. § 3832.12(a)(1) applies to "[a]ll claims and sites," and provides that "[i]n all cases, your description of the land must be as compact and regular in form as reasonably possible and should conform to the U.S. Public Land Survey System and its rectangular subdivisions as much as possible." These requirements, and the *Snow Flake* decision applying them, have been cited with approval by the Department, and this Board, for many years, both before and after this most recent codification. *See, e.g.*, *Jim Collins*, 175 IBLA 389, 393 (2008); *Matthew Helit*, 166 IBLA 69, 73-75 (2005); *Melvin Helit*, 157 IBLA 111, 119-23 (2002) (A.J. Hemmer, concurring specially); *U.S. v. Haskins*, 59 IBLA 1, 96-99, 88 I.D. 925, 973-74 (1981), *aff'd*, No. CV-82-2112 (C.D. Cal. 1984); *U.S. v. Henrikson*, 70 I.D. 212, 218-20 (1963); *Fred B. Ortman*, 52 L.D. 467, 470 (1928). It is clear that the basic requirements and guidance first articulated by the Department in *Snow Flake* retain their vitality today. Thus, the current regulations retain the

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[13] "Claimants should bear in mind that it is the policy of the Government to have all entries whether of agricultural or mineral lands as compact and regular in form as reasonably practicable, and that it will not permit or sanction entries or locations which cut the public domain into long narrow strips or grossly irregular or fantastically shaped tracts." *Regulations*, 37 L.D. 757, 762 (1909) (citing *Snow Flake*, 37 L.D. 250 (1908).

[14] Until the 2003 revision of the regulations, none of the previous versions of the regulations distinguished between surveyed and unsurveyed lands, consistent with the policy articulated in *Snow Flake*. *See* 37 L.D. at 258 ("no distinction should be made whether the claim be on surveyed or unsurveyed lands").

long-standing conformity and compactness requirements applicable to all placer claims.

We therefore find that BLM may properly apply the *Snow Flake* 40-acre square guidance to claims described by aliquot part and complete lots to determine whether such a claim is as compact and regular in form as reasonably possible, based upon a case-by-case factual determination.

Analysis

We first address the issues raised by the original claim location notices and BLM's interlocutory decisions, and then appellants' amended location notices, submitted to BLM in response.

Conformity to the U.S. Public Land Survey System

One aspect of the conformity requirement is that placer claims must be properly described, "by aliquot part and complete lots using the Public Land Survey System and its rectangular subdivisions," subject to limited exceptions. 43 C.F.R. § 3832.12(c)(1). Descriptions may include parcels as small as 10 acres, described as quarter-quarter-quarter sections. 30 U.S.C. § 36 (2006); *see Roman Placer Mining Claim*, 34 L.D. at 263.

In this case, BLM informed appellants that the descriptions in the original location notices for the Golden Days and The Old Days claims did not accurately describe the claims because the claims were located in sections that are described by lots and the location notices did not describe the claims by lots.[15] February ID at 1. In addition, the descriptions of all four claims included 2.5 and/or 5-acre parcels, in addition to 10-acre parcels, violating the 10-acre parcel conformity requirement. There is no evidence in the record, and no assertion by the appellants, that the claims are described by smaller parcels in order to avoid placing the claim boundaries on other prior located claims, *see, e.g.*, *U.S. v. Meyers*, 17 IBLA at 315, or that that the claims are the result of joint entry by claimants of contiguous claims of less than 10 acres, *see* 30 U.S.C. § 36 (2006).

To the extent appellants argue that they are entitled to locate and describe placer claims in parcels smaller than the 10-acre parcels authorized by statute, that

[15] This defect was not cured in the amended location notices submitted to BLM for the Golden Days and The Old Days claims. *See* Amended Placer Mining Location Notice, Golden Days claim, received by BLM Apr. 13, 2012; Amended Placer Mining Location Notice, The Old Days claim, received by BLM Apr. 16, 2012.

argument is rejected. The state court cases cited by appellants as authority are distinguishable from the circumstances here, because they addressed claims described by metes and bounds (*not* the case here), *see Mitchell v. Hutchinson*, 142 Cal. 404, 407 (1904); *Young v. Papst*, 148 Or. 678, 680 (1934), or addressed gulch placer claims, *see Wiesenthal v. Goff*, 63 Idaho 342, 351 (1941), an issue we discuss below. Similarly, the Departmental cases cited by appellants also refer to claims described by metes and bounds.[16] Appellants also refer to the decision in *U.S. v. Henriksen*, 70 I.D. 212 (1963), as justification for nonconformity because of the shape of mineral deposits and topography. Reply at 12. However, in that case the claim encompassed a total of 10 acres, was bounded by patented lands on one side, and "it is to be noted, the . . . claim can be encompassed within a square 40-acre tract" which is consistent with the *Snow Flake* decision. *See Henriksen*, 70 I.D. at 220.

As further justification for locating their claims in parcels smaller than 10 acres, appellants assert that such locations were necessary to avoid including non-mineral ground in their claims. SOR at 2; Reply at 6; Johnson March 30 Affidavit at 1; Johnson May 21 Affidavit at 2-3; Chestnut Affidavit at 2. That assertion is not persuasive. The Department has long held that some non-mineral lands may be included in placer claims, particularly when necessary for those claims to conform to the public land survey. *See Hogan and Idaho Placer Mining Claims*, 34 L.D. 42, 43 (1905); *U.S. v. Swanson*, 93 IBLA 1, 36 (1986), *aff'd*, 3 F.3d 1348 (1993) ("[T]he Department does not require that a mining claimant show that each acre of land is mineral in character. Rather, it merely requires a mineral claimant to show that each 10-acre subdivision is mineral in character").

In addition to their "non-mineral ground" justification, appellants argue that the nature of the claims' locations was dictated by topography, asserting that topography and the related lack of mineral value in the banks confining the claims was a *critical factor* that was present in the location of the instant claims. Reply at 12-13 (citing to *Henriksen*, 70 I.D. at 220; *Haskins*, 59 IBLA at 97, 88 L.D. at 973; *Seth M. Reilly*, 112 IBLA 273, 275 n.2 (1990)). The argument clearly indicates that the claims were confined by precipitous, or at least very steep slopes, suggesting that they may be "gulch placers." *Id*. at 12. In support of this argument, appellants reference the Johnson and Chestnut declarations. *Id*. at 13. Johnson asserts that the shapes of all four of the claims are "driven by the location of the gold-

[16] For example, appellants cite to *William F. Carr*, 53 I.D. 431 (1931), which involved the Hy-Grade placer claim. That claim was a gulch placer claim located on unsurveyed lands in Montana and described by metes and bounds. *Id*. at 431. The Department determined, after a factual evaluation, that the claim could be approved under the then-existing regulations even though it did not strictly comport to the *Snow Flake* guidance. *Id*. at 434.

bearing placer ground," and that two of them, Deadman Treasure and Powell Creek, are surrounded "by steep mountain walls, which are also non-mineral in character."[17] Johnson March 30 Affidavit at 2.

If the Deadman Treasure and Powell Creek claims were indeed gulch placers,[18] then appellants should have provided metes and bounds descriptions of the claims, which they did not. *See* 43 C.F.R. § 3832.12(c)(1)(ii), (2)(ii); *see id.* § 3830.5 *Gulch placer claim* ("a metes and bounds description is necessary").[19] There is no evidence that the Golden Days and The Old Days claims are gulch placers, and so there was no topographic justification for their failure to conform to the public land survey.

All of the claims fail to meet the conformity standard because they are described in parcels smaller than 10 acres but do not meet any of the exceptions to that requirement.

Compactness

Both the February ID and the March ID stated that appellants' claims were too long and did not satisfy the compactness requirement. In response, appellants stated that they had no intent to amend the shape of the claims. Johnson March 30 Affidavit at 2.

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[17] Johnson does not provide any more specific information about the locale of these claims other than his description of them being surrounded "by steep mountain walls." Johnson March 30 Affidavit at 2. Chestnut also provides no specific information, other than mentioning BLM's reference to a 60% slope. Chestnut June 29 Affidavit at 3. In contrast, BLM proffers that the north side slopes around Powell Creek have gradients that range from 12% to 40% and the south side slopes range from 14% to 60%. Declaration of Sean Gordon, dated June 1, 2012 (Gordon Declaration). BLM also states that slopes in the vicinity of Deadman Treasure have an average gradient of 40%, with the steepest being approximately 66%.

[18] It is unlikely that the Deadman Treasure and Powell Creek claims would qualify as gulch placers, in light of the Department's long-standing determination that "lands ascending at slopes of twenty to thirty degrees only [approximately 35% to 60% slopes], are not thereby rendered impracticable of location . . . therefore, the claims cannot be regarded as in any sense within the category of 'gulch placers.'" *Hogan and Idaho Placer Mining Claims*, 34 L.D. 42, 44 (1905).

[19] We note that if the claims had been described by metes and bounds, then the claims *must* be sufficiently compact as to fit within a square 40-acre parcel. 43 C.F.R. § 3832.12(c)(3)(i). These two claims fail that requirement.

BLM asserts that the claims failed the requirement of compactness because they did not fit into one square 40-acre parcel (for claims located by one or two claimants) or two contiguous square 40-acre parcels (for claims located by three or four claimants). February ID at 1; March ID at 1. Although the regulation cited by both interlocutory decisions, 43 C.F.R. § 3832.12(c)(3), states the proper standard, that portion of the regulation itself is not applicable, because the claims are not described by metes and bounds, as discussed above. However, BLM still must enforce the compactness requirement found elsewhere in the regulation, *see* 43 C.F.R. § 3832.12(a)(1), and BLM may apply the *Snow Flake* 40-acre square guidance to claims described by aliquot part and complete lots, based upon a case-by-case factual determination. That is what BLM did in this instance, and BLM's decision is modified accordingly.

BLM carefully reviewed appellants' location notices [20] and applied the *Snow Flake* 40-acre square guidance to each of the four claims, determining that each claim was inconsistent with that guidance and not sufficiently compact. BLM informed appellants that the claims were too long and not compact enough, and then provided appellants with a 30-day opportunity to amend their location notices to shorten the claims. February ID at 2; March ID at 1. Appellants refused that opportunity. Accordingly, the claims are not sufficiently compact and do not comply with 43 C.F.R. § 3832.(a)(1).

Accuracy of Claim Information

Upon its examination of the original location notices for the claims at issue, BLM identified a number of defects in the descriptions of the Deadman Treasure (claimed acreage does not match claim map or description), and The Old Days claims (description does not match claim map). BLM informed appellants of these defects and provided a 30-day period in which to submit amended location notices correcting the defects and correctly describing the claims. February ID at 1-2. BLM later requested that additional information be provided about one of the appellants with respect to the Powell Creek claim, and provided a 30-day period in which to submit the information. March ID at 1. Although amended location notices were submitted they still failed to properly describe the claims, and appellants did not submit the requested information with respect to the Powell Creek claim.

BLM must, and is entitled to, collect information about mining claims to, among other things, "[k]eep records of mining claims or sites," "maintain ownership

[20] The care with which BLM reviewed the location notices and the claim shape and position on the ground is apparent, considering the numerous errors in the legal descriptions identified by BLM. *See, e.g.,* February ID at 1.

records to those mining claims or sites," and "[d]etermine the geographic location of the mining claims or sites recorded for proper land management purposes." 43 C.F.R. § 3830.8(b)(1)-(3). In addition, the information submitted by a mining claimant must allow BLM "to identify the mining claims or sites on the ground." *Id.* § 3832.12(a)(2)(ii). The accuracy of the information, and particularly the description of mining claims, is crucial to those purposes. In this case, BLM notified appellants of defects in the information they provided with respect to the mining claims and provided them with an opportunity to cure those defects pursuant to BLM's regulatory authorities. *See* 43 C.F.R. §§ 3830.91(a)(8), 3830.94(b). Appellants failed to cure those defects, and BLM properly declared the claims forfeited. *See* 43 C.F.R. §§ 3830.91(a), 3830.94(d).

Conclusion

Appellants failed to describe the Golden Days and The Old Days claims by complete lots despite BLM providing them notice and an opportunity to cure that defect. As a result, those claims are properly considered forfeited. In addition, the descriptions of all of the four claims include parcels smaller than the 10-acre minimum parcel and yet do not satisfy any of the exceptions allowing a departure from that minimum, and so the claims do not satisfy the conformity requirement. A failure to conform usually results in an opportunity to cure the defect before a claim can be declared invalid. *James F. Burke*, 148 IBLA 95, 98 (1999). Because BLM in its February ID and March ID did not identify parcel size in appellants' descriptions of the claims as a defect in the location notices, the appellants would normally be entitled to an opportunity to cure the defect by redescribing the claims by 10-acre or larger parcels in conformity with the public land survey. In this case, however, such an opportunity would serve no purpose because of our holdings with respect to the other matters at issue.

BLM conducted a factual evaluation of all of the instant claims and determined that they failed to meet the compactness requirement, based upon regulatory requirements. Appellants were notified of this defect and given an opportunity to cure. Appellants' response was to declare that they did not intend to amend the locations. Johnson March 30 Affidavit. As a result, BLM properly declared all four of the claims forfeited for failing to meet the compactness requirement.

BLM provided appellants notice and an opportunity to cure defects in the descriptions of the Deadman Treasure and The Old Days claims, and to provide additional information about one of the appellants for the Powell Creek claim. Appellants failed to cure the defects or timely provide the requested information, and BLM properly declared the claims forfeited.

To the extent appellants argue that the Board should remand BLM's decision and require that appellants be given an opportunity to cure various defects in the claims, such argument is unavailing. Appellants were provided such opportunities and failed to cure the defects.[21] BLM is not required to offer appellants multiple opportunities to cure defects. Here, after notice and an opportunity, appellants failed to cure some defects and refused to cure others. BLM need do no more.

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 is affirmed as modified herein, the motion for hearing is denied, and the petition for stay is denied as moot.

/s/
H. Barry Holt
Chief Administrative Judge

I concur:

/s/
James F. Roberts
Administrative Judge

[21] In addition, the Board has held that where the "shoestring" shape of a claim is intentional on the part of a claimant, BLM need not provide a claimant with an opportunity to conform the claim to survey, but may declare the claim null and void as a matter of law. *Matthew (Mattew) Helit*, 166 IBLA at 75-76. In this case, the manner in which these claims were located clearly was intentional.