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Asserting Mineral Rights Against the United States Government in Federal Court

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INTRODUCTION

It is commonplace to decry the proliferation of federal agencies, and the thousands, perhaps millions of decisions each agency makes annually, each decision affecting one or more individuals in a myriad of aspects of latter twentieth century life. Relief from most of these decisions—when it is available at all—usually comes under the auspices of the judicial review provisions of the Administrative Procedure Act.¹ This is surprisingly terse legislation, considering its potential reach and impact, and, as will be explained more thoroughly below, it is usually the start of the inquiry rather than the end.

This Article will outline in concrete and detailed form² the procedural steps and pitfalls involved in an attempt to seek judicial review of a particular type of agency decision: namely, the invalidation of a mining claim by the Department of the Interior. Other types of agency decisions or orders may, of course, require different steps in seeking redress in the courts. Each aspect of judicial

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1. 5 U.S.C. §§ 701-06 (1976).

2. A "nuts and bolts" treatment of this topic has not been previously undertaken, hence the present effort.

review discussed below—jurisdiction,³ venue,⁴ or the statute of limitations⁵—must be addressed when seeking review of any agency decision, although the conclusion, or “answer,” under each category may differ. To that extent, what follows may serve as a paradigm for the appeal of agency decisions in general.

I. BACKGROUND

Mining claims are property rights to certain types of mineral land within the public domain. The granting and vesting of these rights are governed by the United States Code.⁶ The manner in which mining claims are staked, and the way the rights are perfected or patented has remained essentially unchanged since 1872, although the Federal Land Policy and Management Act imposed recordation requirements in 1976.⁷

When dealing with this topic it is particularly important to understand that unpatented mining claims, even though considered vested and freely alienable property rights, may be invalidated by the Department of the Interior and the Bureau of Land Management on several grounds. The most common ground for invalidation is lack of a “discovery,” a term of art which refers to the sufficiency of mineral values that justify the staking of a claim.⁸ Additionally, invalidation may occur for lack of compliance with other statutory requirements for the continuing validity of a claim.⁹

The invalidation process typically begins as a contest brought by a local office of the Bureau of Land Management, although private parties may also bring such proceedings.¹⁰ An initial determination of invalidity may be made with or without a hearing, depending on the nature of the case.¹¹ An appeal of the Bureau’s decision may be had before the Interior Board of Land Appeals (IBLA), generally without a hearing.¹² The decision of the IBLA

3. See *infra* notes 15-32 and accompanying text.

4. See *infra* notes 33-45 and accompanying text.

5. See *infra* notes 46-49 and accompanying text.

6. 30 U.S.C. (1976).

7. 43 U.S.C. § 1744 (1976). (Provides for filing and recordation of unpatented lode or placer claims; failure to do so will constitute abandonment of a claim).

8. 30 U.S.C. § 23 (1976). See *Shell Oil Co. v. Andrus*, 446 U.S. 657, 661-62 (1980) (whether oil shale would qualify as a valuable discovery under current mining law). See also *Lawson v. United States Mining Co.*, 207 U.S. 1, 13 (1907).

9. 30 U.S.C. § 23 (1976); *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 676 (1888) (a misrepresentation made by an applicant for a patent allows government to set aside patent).

10. 30 U.S.C. §§ 612-13 (1976).

11. 43 C.F.R. § 4.415 (1982) provides that an evidentiary hearing on issues of fact may be granted within the discretion of the Board, upon request by a party.

12. 43 C.F.R. § 4.452-59 (1982).

is defined by regulation as “final agency action,” which is necessary for the invocation of the judicial review process.¹³

What follows is a discussion of the most troublesome areas for the lawyer who wishes to file a complaint for judicial review in federal court. Where applicable, references are made to the sample complaint to be found at the end of this Article.¹⁴

II. AVAILABILITY OF JUDICIAL REVIEW JURISDICTION

When judicial review is desired, the first task is to establish with utmost care which statutes govern the form and substance of the planned review. While the Administrative Procedure Act applies without question to the review of the Department of Interior’s decisions which affect mining claims,¹⁵ other specific agency statutes may either restrict or enlarge its provisions.¹⁶ The Administrative Procedure Act, however, is the only statute governing judicial review of an invalidation of a mining claim.¹⁷ While specific regulations of the Department of the Interior set forth elaborate provisions for Public Land Hearings and Appeals within the agency,¹⁸ neither statutes nor regulations make provision for judicial review of those decisions other than to define “final agency action.”¹⁹

Since a lawyer who practices mining law will turn almost exclusively to the Administrative Procedure Act in order to seek judicial review of the Secretary’s decisions, attention must be paid to the jurisdictional limitations of that act which were recently imposed by the United States Supreme Court in *Califano v. Sanders*.²⁰ Despite an array of circuit decisions generally balanced to the contrary, the court decided in *Sanders* that the Administrative

13. 43 C.F.R. § 4.21(b)(c) (1982); see generally 1 AMERICAN LAW OF MINING §§ 1.45-1.47 (Rocky Mtn. Min. L. Found. ed. 1983).

14. See *infra* Appendix A.

15. 43 C.F.R. § 4.21(b) (1982). *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966), *adhered to on reh.*, 379 F.2d 555 (9th Cir. 1967), *rev’d on other grounds*, 390 U.S. 599 (1968), *reh’g denied*, 391 U.S. 961 (1968), *conformed to in*, 405 F.2d 72 (1968), *cert. denied*, 394 U.S. 907 (1969).

16. See, e.g., Surface Mining Control and Reclamation Act, 30 U.S.C. § 1276 (Supp. V 1981) provides for review in a district court depending on location and circumstance of decision; Mine Health and Safety Act, 30 U.S.C. § 816 (Supp. V 1981) provides review either in the court of appeals where violation occurred or in the court of appeals of the District of Columbia.

17. 5 U.S.C. §§ 701-06 (1976). 43 C.F.R. § 4.21(b) (1982) refers to trial agency action being subject to judicial review.

18. 43 C.F.R. §§ 4.400-4.478 (1982).

19. 43 C.F.R. § 4.21(b) (1982).

20. 430 U.S. 99 (1977). The applicant for social security disability benefits had failed to seek judicial review within the time limit established by the jurisdictional social security statute 42 U.S.C. § 405(g) (1976). He then tried to use the Administrative Procedure Act to obtain jurisdiction to seek later review.

Procedure Act did not provide an independent grant of subject matter jurisdiction for judicial review, but rather served as a blueprint for review procedure once jurisdiction was obtained elsewhere.

The *Sanders* court suggested that the recent 1976 amendment to the Code which removed the \$10,000 minimum for invoking federal question jurisdiction²¹ made that statute a serviceable vehicle for obtaining jurisdiction in a complaint for review of administrative action.²² Subsequently, the court in *Andrus v. Charleston Stone Products Co.*,²³ clearly affirmed that jurisdiction in an action to review the invalidation of a mining claim can indeed be properly predicated on federal question jurisdiction. The *Sanders* decision apparently has not limited the availability of judicial review in the area of mining law, although it is important to be aware of the theoretical basis of that decision.

Despite the presumption in favor of judicial review of administrative action,²⁴ the practitioner should also be aware that some decisions of the Secretary may not be reviewable (through the Administrative Procedure Act) because they are made under permissive type statutes such as the Mining Claims Occupancy Act,²⁵ which commits actions to the Secretary's discretion and authority thereby making review unavailable.²⁶

The basis for invoking jurisdiction of the federal courts must be alleged in the complaint.²⁷ As noted above, the Administrative Procedure Act is no longer considered a viable basis for invoking federal question jurisdiction.²⁸ A shot-gun approach to jurisdictional allegations is advised, so that in addition to federal question jurisdiction, any other conceivable basis for jurisdiction should also be alleged. Occasionally, a statute, otherwise separate from mining law, can affect mining claims and provide an alternative base for jurisdiction. The 1976 Mining in the Parks Act,²⁹ which

21. 28 U.S.C. § 1331(a) (1976).

22. *Sanders*, 430 U.S. at 105.

23. 436 U.S. 604, 607-08, n.6 (1978). See 28 U.S.C. § 1331(a) (1976).

24. *Tooahnippah v. Hickel*, 397 U.S. 598, 605-07 (1970).

25. 30 U.S.C. §§ 701-09 (1976).

26. *Lutzenhiser v. Udall*, 432 F.2d 328, 329 n.A (9th Cir. 1970) (the classification of lands was committed to the Secretary's discretion—therefore not reviewable); *Molohan v. Gray*, 413 F.2d 349, 351-52 (9th Cir. 1969) ("with a permissive type statute even where an applicant meets all the statutory requirements, the Secretary still has discretion to refuse to act. Discretionary action under a permissive statute is exempted from judicial review under the Administrative Procedure Act"). See *United States v. Walker*, 409 F.2d 477 (9th Cir. 1969). (The statute uses the word "may," making a decision by the Secretary discretionary).

27. FED. R. CIV. P. 8(a)(1). See Appendix A, Paragraph II.

28. See *supra* notes 20-24 and accompanying text.

29. 16 U.S.C. §§ 1900-1912 (1976) (special statute for mining claims within the National Parks).

directs the Secretary to begin discovery contests against mining claims situated in certain national parks, and which contains a separate jurisdictional section for seeking judicial review, is a good example.³⁰ The Tucker Act³¹ may also provide jurisdiction where the loss of a mining claim can be translated into a dollar equivalent. Furthermore, mandamus jurisdiction may be available, depending on the circumstances.³²

III. VENUE

Unlike jurisdiction, the basis for laying venue in a particular district court need not be alleged in the complaint. An improper choice of venue, however, will probably trigger a motion to dismiss by the government.³³

The basic venue statute applicable to challenges of administrative action dealing with suits against United States agencies and its officers was added in 1962.³⁴ Formerly, actions against the Secretary of the Interior had to be filed in Washington, D.C.³⁵ The 1962 amendment broadened the scope of venue choices to include the district where the defendant resides,³⁶ the district where the cause of action arose,³⁷ the district where any real property involved is situated,³⁸ and the district where plaintiff resides if no real property is involved.³⁹

Since a mining claim is considered real property,⁴⁰ the district of the plaintiff's residence is unfortunately excluded from the scope of venue in most instances.⁴¹ Thus, in most actions which challenge the Secretary's decision in reference to a mining claim,

30. 16 U.S.C. § 1910 (1976) (jurisdiction for review provided in federal district court).

31. 28 U.S.C. § 1346 (1976). The act confers district court jurisdiction for certain non-tortious civil claims arising under the laws of the United States. Only monetary damage may be redressed.

32. 28 U.S.C. § 1361 (1976) (an action in mandamus lies when the circumstances call for an officer or employee of United States "to perform a duty owed to plaintiff"); *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 318-19 (1930) (Action in mandamus was proper when claimant had complied with statutory prerequisites and secretary had no discretion as to claimants rights within the meaning of statute); *see also State of S.D. v. Andrus*, 462 F. Supp. 905 (D. S.D. 1978), *aff'd*, 614 F.2d 1190 (8th Cir. 1980), *cert. denied*, 449 U.S. 822 (1980); *Mollohan*, 413 F.2d at 352 (mandamus is proper only to command an official to perform a ministerial act).

33. 28 U.S.C. § 1406(a) (1976).

34. 28 U.S.C. § 1391(e) (1976).

35. *See* Annot., 9 A.L.R. FED. 719, 723-24 (1971).

36. 28 U.S.C. § 1391(e)(1) (1976).

37. 28 U.S.C. § 1391(e)(2) (1976).

38. 28 U.S.C. § 1391(e)(3) (1976).

39. 28 U.S.C. § 1391(e)(4) (1976).

40. *See supra* note 6.

41. 28 U.S.C. § 1391(e) (venue lies where plaintiff resides "if no real property is involved in the action.")

the choice of venue is between the District of Columbia, where the Secretary resides, and the district where the mining claim is situated.⁴² However, it may be possible to join a subordinate official of the Bureau of Land Management or other applicable agency in order to add the district of that official's residence to the venue choice.

Since judicial review of mining decisions is generally limited to the administrative record below, and therefore requires no further fact-finding by the court,⁴³ it seems to be a triumph of form over substance that the statute removes the district of plaintiff's residence as a venue choice, simply because a mining claim is characterized as real property. Regardless of which district has venue, the review will be of the administrative record, and defended by the local United States Attorney's Office. The location of the claim is of little or no consequence to the court. Nevertheless, the present statutory scheme is quite clear, and an attempt to lay venue in plaintiff's district of residence, when the mining claim is located in another district, will in all probability be met with a successful motion to dismiss or a motion to change venue.⁴⁴

When improper venue is subject to a successful motion to dismiss by the government, the plaintiff should argue for transfer to another district in order to avoid the danger of a lapsed statute of limitations and the additional expenses of re-filing and re-serving the complaint.⁴⁵

IV. STATUTE OF LIMITATIONS

It is crucial to isolate the particular statute, if any, that provides for judicial review of a particular decision of the Secretary. Often that statute will also set forth a timeline for contesting that decision in the federal courts.⁴⁶

However, for most Board of Land Appeals decisions invalidating mining claims, there are no statutory or regulatory provisions which specify a timeline for seeking an appeal in the courts.⁴⁷ Moreover, the Administrative Procedure Act itself sets no timeline

42. *See, e.g.*, *Pruess v. Udall*, 359 F.2d 615, 617-18 (D.C. Cir. 1966).

43. *See infra* notes 58-60 and accompanying text.

44. 28 U.S.C. § 1406(a) (1976).

45. 28 U.S.C. § 1404(a) and § 1406(a) (1976) (the code provides the district court with power to transfer "in the interest of justice . . .")

46. *See, e.g.*, 30 U.S.C. § 1276 (Supp. V 1981), providing for a sixty-day time limit for seeking review of Secretary's disapproval of state programs under 30 U.S.C. §§ 1201-1328 (Supp. V 1981); *see also* 43 C.F.R. § 3000.5 (1982), which mandates that any action contesting the Secretary's decision as to gas or oil leases must be taken within ninety days.

47. "There is no statute of limitations for judicial review of an administrative decision by the BLA." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981).

for seeking of judicial review.⁴⁸

A surprisingly beneficial effect of the absence of particular provisions for judicial review of departmental decisions is that there need be no concern for a “deadline,” subject to the equitable principles generally associated with estoppel or laches.⁴⁹ Where equitable principles control the timeline, governmental reliance on a decision adverse to the client, such as the remodeling of a park on the site of an invalidated claim, is a factor to be considered in making a timely bid for judicial review.

V. EXHAUSTION OF REMEDIES

Exhaustion of administrative remedies, that is, the pursuit of the appeals process within the agency to a final departmental decision, should also be alleged in the complaint,⁵⁰ and it is an established principle that courts will review agency action only after the prescribed administrative remedy has been exhausted.⁵¹

The Board of Land Appeals, like most agencies which have an administrative appeals process, will not pass on the constitutionality of its enabling legislation.⁵² This agency restraint may raise an issue as to whether the exhaustion of the administrative appeals process is necessary in those cases where the only issue to be litigated is the constitutionality of a statute or regulation.⁵³ Nevertheless, the doctrine of exhaustion is generally departed from only in infrequent cases where immediate and irreparable harm can be shown⁵⁴ or where the administrative remedy would be inadequate or otherwise futile to pursue,⁵⁵ or where the administrative agency has exceeded its jurisdiction.⁵⁶

Since the regulations of the department generally provide for the suspension of operation of a decision during the administra-

48. 5 U.S.C. §§ 701-706 (1976).

49. *Plested v. Abbey*, 228 U.S. 42, 50 (1913); *United States v. Webb*, 655 F.2d at 979 (availability of review is subject to general principles of estoppel); *First National Bank v. Roeland Park State Bank & Trust Co.*, 357 F. Supp. 708, 712 (D. Kan. 1973).

50. See Appendix A, Paragraph IV. 43 C.F.R. §§ 4.21, 4.400-4.415 (1982) for appeal procedures provided by the Office of the Secretary of the Interior.

51. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); *Doria Mining & Engineering Corp. v. Morton*, 608 F.2d 1255, 1257 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980).

52. See, e.g., *Lynn Keith*, 88 I.D. 369 (1981) (constitutionality of recordation provisions of Federal Land Policy Management Act of 1976).

53. See, e.g., *Saint Regis Paper Co. v. Marshall*, 591 F.2d 612 (10th Cir. 1979), *cert. denied*, 444 U.S. 828 (1979), *reh'g denied*, 444 U.S. 974 (1979) (exhaustion required for constitutional challenge).

54. *McKart v. United States*, 395 U.S. 185, 196-201 (1969).

55. *Oil Shale Corp. v. Udall*, 235 F. Supp. 606 (D. Colo. 1964).

56. *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639, 647 (1935) (the action by the Secretary was beyond the authority of the statute).

tive appeals process,⁵⁷ lessening the chance of harm, only an unlikely case would provide a clear basis for seeking judicial review without exhausting the departmental procedure.

VI. SCOPE OF REVIEW

A. *Exclusiveness of Administrative Record*

Except in limited circumstances, the reviewing court looks only at the administrative record, and will not consider evidence extrinsic to the administrative proceedings. One well established exception to this rule exists where fraud has been alleged in the actual administrative adjudicatory process in which case the reviewing court will accept evidence relevant to the fraud issue.⁵⁸

In addition to fraud, any irregularity in the administrative process might justify the introduction of new evidence to the reviewing court. In a recent case,⁵⁹ the reviewing court decided a factual issue on affidavits submitted in support of a summary judgment where the factual issue was raised in briefs before the agency, but the agency had failed to conduct an evidentiary hearing.⁶⁰ In *Mendenhall v. United States*,⁶¹ the reviewing court looked at the new evidence which had been offered to the Board in a request to reopen in order to determine whether the IBLA had abused its discretion in refusing to reconsider the case.⁶²

B. *Limited Review of Question of Fact*

Although it appears that the scope of review of agency findings of fact has broadened since the passage of the Administrative Procedure Act,⁶³ cases in which administrative factual findings have been overturned are quite scarce, and the practitioner still faces a decidedly uphill battle when seeking judicial review of factual issues.

The Administrative Procedure Act authorizes findings to be set aside if unsupported by "substantial evidence."⁶⁴ Courts have given various interpretations to this phrase, perhaps the most pre-

57. 43 C.F.R. § 4.21(a) (1982) (Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal).

58. *Doria Mining*, 608 F.2d 1255, 1258 (1979). See also *Linn and Lane Timber Co. v. United States*, 236 U.S. 574 (1915).

59. *Foote Mineral Co. v. United States*, 654 F.2d 81 (Ct. Cl. 1981).

60. *Id.* at 87. (The court did not remand for more procedure since the agency had made its decision based on facts which it did not dispute.)

61. 556 F. Supp. 444 (D. Nev. 1982), *aff'd*, 735 F.2d 1371 (9th Cir. 1984).

62. *Id.* at 450.

63. Annot., 5 A.L.R. FED. 566, 593-96 (1970).

64. 5 U.S.C. § 706(2)(E) (1976).

cise being “enough evidence supporting the Secretary’s decision to justify, if it were a jury trial, a refusal to direct a verdict against him.”⁶⁵ In regard to factual issues, the “arbitrary and capricious” standard of the Administrative Procedure Act is used interchangeably with the “substantial evidence” test.⁶⁶ When applying the substantial evidence test to the administrative record, courts will not “weigh” the evidence.⁶⁷ In practical terms, this approach means that even when a particular agency finding is contrary to the weight of the evidence as perceived by the reviewing court, that finding will not be set aside so long as there is substantial evidence to support it.⁶⁸

Given the limited judicial review accorded questions of fact, the practitioner should exert maximum effort during the administrative hearings in support of factual issues favorable to the claimant. Once a factual issue has been adversely decided, attention should be paid to those procedural factors which permit the introduction of new evidence.⁶⁹ Finally, the practitioner should be alert to decisions where the agency’s application of law to the facts may be attacked, rather than the factual finding itself, thus bypassing the “substantial evidence” standard in favor of the more ample review accorded legal issues.⁷⁰

VII. FEDERAL COURT PROCEDURE

It goes perhaps without saying, that both the Federal Rules of Civil Procedure and the local rules of the chosen filing district are applicable to a complaint for judicial review when it is filed in a federal court. This section will highlight a few practical points of this procedure.

- A) Before filing, check local rules as to the number of copies which must be filed. Also check the Federal Rules for the filing fee.
- B) Service must be accomplished in the following *three* ways.⁷¹

65. *Consolo v. Fed. Maritime Comm’n*, 383 U.S. 607, 618-21 (1966).

66. 5 U.S.C. 706(2)(A). See *Mendenhall*, 556 F. Supp. at 449. See, e.g., *Multiple Use, Inc. v. Morton*, 353 F. Supp. 184 (D. Ariz. 1972), *aff’d*, 504 F.2d 448 (9th Cir. 1974).

67. *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *Mendenhall*, 556 F. Supp. at 449.

68. *Roberts v. Morton*, 389 F. Supp. 87 (D. Colo. 1975), *aff’d*, 549 F.2d 158 (10th Cir. 1977).

69. See *supra* notes 58-61 and accompanying text.

70. See, e.g., *Baker v. United States*, 613 F.2d 224 (9th Cir. 1980), *cert. denied*, 449 U.S. 932 (1980) (the court invalidated a “too much” test the Secretary had used in making his decision); see generally Annot., 5 A.L.R. FED. 566, 576-92 (1970).

71. FED. R. CIV. P. 4(D)(4), 4(D)(5).

- 1) By personal service on the U.S. Attorney in the district of chosen venue, *and*,
 - 2) On the Attorney General of the United States, at the Department of Justice, Washington, D.C., 20503, by certified or registered mail, *and*,
 - 3) On the offending officer(s) or agencies themselves, also by certified or registered mail.
- C) As to naming parties: Prior to 1976, to name and serve "The Department of the Interior" or the "United States," rather than the Secretary of the Interior in his official capacity, rendered a complaint vulnerable to the defense of sovereign immunity.⁷²

As amended in 1976, the Administrative Procedure Act abolishes the defense of sovereign immunity in cases within its purview.⁷³ However, it is still better practice to name the Secretary in his official capacity, since it avoids the additional risk that a complaint may fail to plead itself within the scope of the Administrative Procedure Act and thereby fall vulnerable to the immunity defense under another jurisdictional statute.⁷⁴

D) The administrative record, consisting of all pleadings and decisions in the administrative appeals process, should be filed with the complaint as Exhibits.

E) *Motion Practice*. Once the complaint has been filed, it is likely to be the subject of a number of motions and the familiarity with the rules of motion practice for the local district is very important.

1) *Motion to Dismiss*. Government motions to dismiss may be based on improper venue, lack of jurisdiction, failure to comply with a statute of limitations, failure to exhaust administrative remedies, and sovereign immunity, all of which have been substantively discussed above.⁷⁵

2) *Motion to Dismiss for Improper Party or Service*. The statute under which suit is brought sets forth who one must or may sue.⁷⁶ However, as long as no applicable statute of limitations has run after the Secretary receives improper service, the parties will be allowed to amend their pleadings.⁷⁷

3) *Motion to Dismiss for Failure to Exhaust Administrative Remedies*. The regulations describe the appeals procedure within the Department of Interior.⁷⁸ They mandate spe-

72. See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.07 (1958 & Supp. 1970); see also *Chournos v. United States*, 335 F.2d 918 (10th Cir. 1964).

73. 5 U.S.C. § 703 (1976).

74. See, e.g., *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981) (sovereign immunity defense still valid under 28 U.S.C. 1331 "federal question" jurisdiction).

75. See *supra* notes 26, 44, 48, 50, 51 and accompanying text.

76. See *supra* notes 72-74 and accompanying text. See also FED.R.CIV.P. 25(d) for substitution of parties upon succession to the office of Secretary.

77. FED. R. CIV. P. 15.

78. 43 C.F.R. § 4.21 (1982).

cifically that parties must exhaust Departmental appeals before qualifying for judicial review.⁷⁹

4) *Motion to Prevent Further Discovery.* In confining a litigant to the record below, the government, in addition to arguing nonexhaustion of remedies, will likely be able to prevent further discovery. Plaintiff's counsel may, for example, move for leave to depose the "deciding official," possibly an Assistant Secretary of the Interior. The government can and most likely will object to such a request because testimony not contained in the record below is not relevant.⁸⁰

5) *Motion for Summary Judgment.* Except in the rare case of a *de novo* trial, a motion for summary judgment will result in a final disposition of a complaint for judicial review. Where with no further factual input, there exists no triable issue of fact, the entire determination will be based on the administrative record.⁸¹ The court recognizes that the question of whether an agency's factual finding is "unsupported by substantial evidence" within the meaning of the Administrative Procedure Act is itself a question of law and not one of fact.⁸²

79. 43 C.F.R. § 4.21(b) (1982); 5 U.S.C. § 704 (1976).

80. See *supra* notes 58-60 and accompanying text.

81. See *supra* notes 59-61 and accompanying text.

82. But see *Nickel v. Morton*, 501 F.2d 1389 (10th Cir. 1974), which requires, where there are conflicting facts, that the reviewing court indicate which operative facts in the record constitute substantial evidence.

APPENDIX A
SAMPLE COMPLAINT

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEBORAH J. GARTNER) Civil No. 10-888
and LEE D. GARTNER,)
Plaintiffs,) COMPLAINT FOR REVIEW
OF ADMINISTRATIVE
DECISION
v.) (5 U.S.C. § 702)
WILLIAM CLARKE,)
SECRETARY OF)
THE INTERIOR,)
in his official capacity,)
Defendant.)

I

This is an action for judicial review of a decision by certain officers and agencies of the United States Department of the Interior (herein referred to as "the Department") declaring plaintiff's asbestos mining claims null and void for lack of a valuable discovery.

II

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1331, 28 U.S.C. Section 1361, and 16 U.S.C. 1910.

III

Plaintiffs are owners of asbestos mining claims known as Tar Asbestos Claims, One through Ten, located pursuant to 30 U.S.C. 22 in 1955 in the northwest portion of Death Valley National Monument, in Inyo County, California. In 1976, the park was

closed to entry and location under the mining laws by 16 U.S.C. 1901 through 1911.

IV

Pursuant to 16 U.S.C. 1905 of the same 1976 legislation, the Department was directed to begin proceedings to determine the validity of mining claims already established within the park's boundaries. Accordingly, a contest against Plaintiffs' claims was initiated by the Department on June 2, 1979 before Administrative Law Judge E. Kendall Clarke (Transcript: Exhibit A of original complaint.) Plaintiff and Department submitted briefs (Exhibits B and C of original complaint.) A decision as to that contest was rendered on May 6, 1980 (Exhibit D of original complaint), declaring Plaintiffs' claims null and void for lack of a valuable discovery. Plaintiffs duly appealed from that decision to the Interior Board of Land Appeals (Exhibit F of original complaint.) On July 8, 1981, the Board affirmed the decision (Exhibit G of original complaint). Having thus exhausted all administrative remedies, plaintiffs now seek judicial review of the Board's decision as to *Tar Asbestos Claims Number One and Two*.

The departmental decisions invalidating Plaintiffs' mining claims for lack of a valuable mineral discovery are arbitrary and capricious and are not supported by substantial evidence on the administrative record pursuant to 5 U.S.C. § 706, and especially in the following particulars:

A. (Exhibit D, page 9) Judge Clarke based his determination as to the value of the asbestos found on Plaintiffs' claims on a seven-hundred and twenty (720) ton figure. As more thoroughly explained in Exhibit E, pages 7 and 8, that figure is less than one-fifteenth of the figure that a fair reading of the hearing transcript would justify.

B. The *prima facie* burden of showing lack of discovery was not met by the government in this contest since government examiner John Jones based his opinion as to the marketability of plaintiffs' claims on the totally arbitrary assumption that a minimum fifteen (15) million tons of asbestos are needed for a profitable operation. (Exhibit E, pages 4-5)

C. The decision of the Board (Exhibit G) arbitrarily and incorrectly declared the decision of Judge Clarke final as to plaintiff DEBORAH J. GARTNER's former husband and son, named in all stages of the administrative proceedings below. (Exhibit G, page 3)

D. Plaintiffs herein incorporate by reference all arguments in Exhibit E, Statement of Reasons for Appeal, pages four

through nine, showing that s to the issues of marketability, demand, and economic viability of Plaintiffs' discovery, the administrative decisions are arbitrary, capricious, and not supported by substantial evidence in the record.

VI

Plaintiffs request a *trial de novo* on the issues of lack of discovery and marketability of Plaintiffs' claims, pursuant to statutory authority in 16 U.S.C. § 1910.

WHEREFORE, Plaintiffs request that this court:

1. Review and reverse the decision of the Board invalidating Plaintiffs' mining claims.
2. In the alternative, pursuant to 16 U.S.C. 1910, award Plaintiffs reasonable and just compensation for the taking of said mining claims.

DATED: 4/8/84

Respectfully submitted,

WHITNEY C. LINDLEY
Attorney for Plaintiffs