1974

Mining Claims on Public Lands: A Study of Interior Department Procedures

Peter L. Strauss
Columbia Law School, strauss@law.columbia.edu

Mining Claims on Public Lands: A Study of Interior Department Procedures

*Peter L. Strauss**

TABLE OF CONTENTS

* Professor of Law, Columbia University School of Law.

** This article, in preliminary form, served as the basis for Recommendation 74-3 of the Administrative Conference of the United States. A second article based on the study is presently to appear as Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Some Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. (Nov. 1974). The Recommendation is set out as Appendix. The author expresses his thanks to the Conference, which provided invaluable support for the project, to its Committee on Licenses and Authorizations, to James Potter, J.D., Columbia, '73, and William McKeown, J.D., Columbia, '74, and to his colleagues Walter Gellhorn, Arthur Murphy, and Abraham Sofaer.

I. INTRODUCTION

The Department of the Interior's disposition of mining claims on public lands, largely unknown to lawyers outside the West, is a significant field of federal administrative activity and an important element in planning rational use of the public lands. While energy minerals found under public lands typically pass by lease and common varieties such as sand and gravel are subject to sale, most other mineral deposits on federal property are claimed for possible exploitation by the mining claim, or "location."

The location system arose out of miners' custom, at a time when the federal lands were vacant and no federal law governed acquisition of mining rights. During the turbulent "rushes" of the mid-nineteenth century, each mining district worked out and enforced, however colorfully and informally, its own rules on the important matters of acquiring and holding a mineral claim. These rules tended to embody similar features: physical marking of the land, filing the claim in a local record center, and continuing work on the claim to preserve its validity.

When Congress finally passed the first federal mining law in 1866,[1] almost twenty years after the California gold strike, the tradition of local administration had been firmly established; the public had grown accustomed to treating possession of federal land as establishing a priority right to it; and the principal policy applied in managing the public domain was outright disposal. Although the Constitution gives Congress plenary authority over the disposition of federal land, Congress chose to recognize both "squatters' rights" and the techniques which had evolved for making and maintaining claims. The law of 1866 and its successor, the General Mining Law of 1872,[2] embodied those techniques. The latter statute, with minor changes, is the law in force today.

This study had its origin in amazement, sparked by chance litigation, at the longevity of the General Mining Law of 1872 and at the difficulties which the government apparently faces in learning of claims made under this statute and in eliminating them, when spurious, from its lands. Despite periodic movements for its reform, the General Mining Law remains essentially unaltered; suggestions for change are again afoot, but passage of a revision is anything but certain. It seems relevant to ask what burdens the statute imposes upon the Department; what steps are possible

[1] Act of July 26, 1866, 30 U.S.C. §§ 43, 46 (1970) (14 Stat. 251).

[2] Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified in scattered sections of 30 U.S.C.). A recent historical account may be found in a report for the Public Land Law Review Commission. P. GATES & R. SWENSON, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

without legislation to lighten that burden; and, to the extent legislation may be forthcoming, what procedural measures it should incorporate.

When the General Mining Law was passed, disposal of the public domain was the governing policy; a plenitude of statutes then identified the possible uses of the public domain and provided for its allocation to private citizens who could give some indication that they would put it to appropriate use — in the case of mineral lands, by discovery of a mineral deposit and the performance of limited development work. Since that time, we have rid ourselves of the notion that our public land resources are infinite and adopted instead a policy of retention and development of the remaining lands by the public; sale of them or provision for unimpeded access to their use is now exceptional. Whether or not one believes, as mining industry spokesmen do, that free exploration of public lands and acquisition of possessory rights upon discovery are the most effective stimulants for mineral development, the General Mining Law permits such rights to be acquired in secret, and makes no provision for use regulation, for fair compensation for value, or for demonstration by the claimant at an early point of the merit and good faith of his claim. These latter elements, tolerable enough in an era of freely encouraged land disposal, are inconsistent with the necessary management approach of today.

This inconsistency undoubtedly has led the Department into a grudging and somewhat tightfisted approach toward claims under the mining laws. In an effort to prevent unwarranted dispositions and misuse, standards are applied with increasing rigor and dramatic consequences are visited upon failure to meet them. Understandably, this approach both distresses miners seeking to use the laws in good faith, and teaches them by its consequences to avoid contact with the Department whenever they can. Yet their most frequent complaint, that the Department "makes policy" rather than "applies the law," is somewhat misplaced. What the miners disapprove is that the Department no longer acts as if it were 1872 in applying this 1872 statute. But it *is* no longer 1872, and the Department cannot tenably be required to ignore the striking changes in its general mandate, even if this particular statute has been more durable than most. In the years since congressional action, the Department, like all other administrative bodies, has had to make policy to conform the statute as closely as possible to its other tasks and general charge. The appropriate questions are how, and how well, the Department has done that work. This assessment cannot be made simply from the perspective of efficiency, either in processing claims or in retaining the lands subject to them in government hands; fairness to claimants in procedures and in honoring their reasonable expectations, and to the residual congressional purpose expressed in the statute, must also be considered.

Under the 1872 statute, a prospector who has found a valuable mineral (or, in practice, has found a likely spot for mineral occurrence) may mark off, or locate, a limited area of the ground as a claim. A single claim by a single prospector may never exceed twenty acres, although the statute

does not limit the number of separate claims one person may locate. The locator must mark the corners of the claim and post a notice of his claim prominently on the land, but the details of this ritual are left to state law.[3] Typically, he may put a pile of stones at each of the four corners, and then drive a stake into the land somewhere within the area thus demarked, attaching a piece of paper naming himself and the claim, and stating its geographic location and the date when it was made.

The locator is under no requirement to notify the federal government more directly of the claim he has placed on its land. Rather, the statute instructs him to record his claim at the local county courthouse, where state law again governs the precision with which he must indicate where his claim may be found. State law may or may not require him to file a map showing where the claim is, or to tie it into the public land survey. In the past, if not today, claims might be described as "bearing on the flank of Red Mountain, about five-hundred feet southwest of the low point of the saddle to Henderson Mountain, with the northeast corner marked by a lone scrubby pine tree." Nor is there uniformity in the manner in which these records are filed. In Wyoming, for example, they are indexed by geographical area — section, township and range; elsewhere they may be filed indiscriminately with other real estate documents, or kept chronologically in a separate record book. Other documents affecting claims — conveyances, wills, and the like — may or may not be filed with them. Unless the locator applies to purchase the land, the federal government will be apprised of his claim only if its agents discover a record of it in the county files, or find traces of his workings on the ground.

Nor does the federal statute require the prospector to state as part of his claim what mineral he believes he has found. That matter is also left to state law. A few states require the notice of claim to specify what has been found and where it has been found on the claim. But most do not, and even where state law imposes such a requirement it is very doubtful whether the information thus given binds the claimant in his dealings with the federal government. He certainly is not limited to those assertions; and if he can establish others, he probably does not have to show that the information originally given was even colorable.

Finally, with the possible exception just stated, the law does not require the locator to find anything before he performs the rituals of marking and recording the claim. Again, state law establishes the requirements of timing. Commonly, all that is necessary is an affidavit that a certain amount of "discovery work" — not the discovery itself — has been accomplished; and frequently an accurate map of the claim is accepted in

[3] 30 U.S.C. §§ 26, 28 (1970); *cf., e.g.,* 43 C.F.R. § 3831.1 (1973) (location of placer claims). The state laws are described in 1 ROCKY MOUNTAIN MINERAL LAW FOUNDATION, AMERICAN LAW OF MINING §§ 5.45–5.80 (1974) [hereinafter cited as AM. L. MINING], and in a report prepared for the Public Land Law Review Commission: H. TWITTY, R. SIEVWRIGHT & J. MILLS, NONFUEL MINERAL RESOURCES OF THE PUBLIC LANDS 503–48 (rev. 1970) [hereinafter cited as NONFUEL MINERALS].

lieu even of that work. The following describes a colorful, but not atypical, example of the process:

> On a Friday, the U.S. Geological Survey released its official minerals study of the area as required by the Wilderness Act. The document reported that some copper was found during the field sampling, and further editorialized: "It seems to be a promising target for further work."
>
> By the very next morning, four men from Texas Gulf [Sulphur Co.] had raced to the southwestern Colorado town of Durango. There they chartered a helicopter, loaded it with mining claim stakes, and were making ready for a flight into Navajo Basin, in the very center of the Wilsons. However, both the Forest Service and the Civil Air Patrol warned that avalanche danger and foul mountain weather made prospects of sudden death greater than prospects of a copper strike. So plans were somewhat revised: The chopper dropped down near the comparatively safe summit of 10,022-foot Lizard Head Pass and deposited the men from Texas Gulf, along with toboggans, 40 six-foot 4 x 4 survey stakes and a complement of winter camping gear. From there, the four modern sourdoughs took over, packing and hauling the works up into Navajo Basin on foot. The following Monday, they emerged from the snowy wilds, leaving behind stakes marking precisely 40 unpatented mining claims covering 800 acres at elevations from 12,400 to 13,600 feet above sea level . . . . Texas Gulf cleared its wilderness prospecting permit last spring, and core-drilling started in earnest last summer. More prospecting, this summer and perhaps next, will be necessary before a decision on actual mining is reached.[4]

The claims are "located," but no one asserts that on one wintry weekend four men could or did find valuable minerals beneath the deep snow covering each of their forty claims.

Under the 1872 law, no rights are acquired against the federal government until the actual discovery of a "valuable mineral." At that moment, assuming that all other necessary rituals have been performed, the locator acquires an absolute right of possession against the government to use the land for mining purposes — a right which has been strongly and uniformly described as "property in the fullest sense of that term." [5] It is taxable, inheritable, and indefeasible save by condemnation so long as the claim is maintained. Only state law, however, protects possession during the period of search preceding discovery, and that law protects only against forcible interference by other prospectors — the so-called right of *pedis possessio*.[6] No right against the federal government yet exists; the moment of discovery is thus in theory a crucial event.

In practice, however, once a claim has been recorded any person wishing to interfere with it has the burden of going forward to show his

---

[4] Summer, *Wilderness and the Mining Law*, THE LIVING WILDERNESS 8, 16 (Spring 1973).

[5] *E.g.*, Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 316 (1930); Black v. Elkhorn Mining Co., 163 U.S. 445, 449 (1896).

[6] Duguid v. Best, 291 F.2d 235, 238–39 (9th Cir.), *cert. denied*, 372 U.S. 906 (1961).

superior right. Thus, should there be any private dispute over possession of the land, the fact that a claim has been recorded will require the adverse claimant to show that he has made a discovery, or in some other manner obtained a claim to title, before he can show that the first claimant has made no discovery. In a dispute between the government and the locator, the government currently undertakes to show prima facie reason to believe that the claim is invalid, for example because no discovery has been made, before the locator is called upon to prove his claim. In practice, then, recordation gives the appearance of creating the right which the law indicates matures only upon actual discovery. Miners and prospectors generally believe that once they have recorded a claim they have acquired a property right in the government land thus located. Having marked his corners, pounded in his stake, and filed his forms at the county courthouse, the prospector believes that he has — and in practice is often treated as if he does have — an absolute possessory right to that land and its minerals.

Claims can attach only to land available for location at the time the acts of location, including discovery, are made. Such land includes unreserved public domain managed by the Department's Bureau of Land Management, certain other public lands, such as the national forests, and limited areas of former public domain for which surface rights are now privately owned. Thus, not all federal lands are available; mineral deposits on "acquired lands," [7] for example, may be obtained only by lease, and public domain lands may be closed to location by withdrawal from the operation of the mining laws — an action which may be taken either legislatively, as Congress has done in creating national parks, or administratively, by the Secretary of Interior.[8] Generally speaking, administrative withdrawals take effect as soon as they are noted on the government's land records, and remain in effect, however temporary they may be in name, until affirmatively removed from those records. No new location is possible while lands are withdrawn from the operation of the mining laws.

Land may also be unavailable for location because someone else has claimed it first. The 1872 law makes only a limited provision for supplanting the rights of a prior locator. The locator must perform at least $100 worth of "assessment work" annually for the benefit of each claim, and file an affidavit in the county courthouse that he has done this work.[9] In

[7] 30 U.S.C. § 351 (1970). Acquired lands are those obtained from state or private ownership, distinct from land which has continuously been part of the public domain. Some nonfederal lands *are* available for location, if they were originally public domain and mineral rights were reserved by the United States when they were first disposed of. 1 AM. L. MINING, *supra* note 3, §§ 3.23–3.41.

[8] *See* United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 444–45 (9th Cir. 1971); PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 42–44, 52–56 (1970) [hereinafter cited as P.L.L.R.C. REPORT].

[9] 30 U.S.C. § 28 (1970). This filing, like the filing of the original location, is indexed in accordance with local, not national, rules. The $100 requirement, it may be

some years Congress has permitted substitution of an affidavit in lieu of assessment work. Failure to do the work, however, does not automatically void the claim; absent some intervening event, it lies dormant and may be returned to full vigor if the locator or his successors resume assessment work.[10]

A lapse in assessment work has one clear result: it reopens the land to mineral locations during the period of lapse. A rival prospector may go on the land and make his own location, disregarding the previous claim. Prospectors working the same area, however, may quietly agree not to take advantage of one another's lapses in performing this work.[11] Others are not as clearly entitled to ignore such claims, even during a period of assessment work lapse. For example, persons desiring to lease the land for energy minerals, or to acquire it for farming purposes, must do so through the government; and they can acquire no greater claim to possession than the government has to give them.

Until recently, the "relocation" provision was said to have no bearing at all in disputes between prospectors and the government. That is, once the miner acquired his possessory right, subsequent failure to perform the annual assessment work was thought to give no right of recapture to the government or persons claiming through it; the claim persisted until it was affirmatively abandoned, and the failure to do assessment work did not prove abandonment.[12] A recent Supreme Court decision [13] has stated a less drastic rule, at least for those cases in which relocation of the land by competing miners has been prohibited by withdrawal of the land from the operation of the mining laws: a failure to comply substantially with the assessment work requirement after the withdrawal permits the government to defeat an otherwise valid claim. It remains unclear, however, whether the same reasoning applies to unworked claims on land which remains open to location. More importantly for present purposes, the government has never felt able simply to ignore apparently lapsed claims encumbering its lands, no matter how long the lapse. Following early court pronouncements that the property character of perfected mining claims requires notice and hearing before a claim may be found invalid,[14] the government has consistently felt required to search out all claimants and bring administrative proceedings to declare their claims invalid.

---

noted, means far less than it did in an era when labor was valued at twenty cents per hour.

[10] *Id.*; 2 AM. L. MINING, *supra* note 3, § 7.26.

[11] M. CLAWSON, THE BUREAU OF LAND MANAGEMENT 124 (1971).

[12] Ickes v. Virginia-Colorado Dev. Corp., 295 U.S. 639, 645–46 (1935); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 317–18 (1930); Rocky Mountain Mineral Law Foundation, Annual Assessment Work Manual 1–23 to –25, 6–21 to –24 (D. Sherwood ed. 1972).

[13] Hickel v. Oil Shale Corp., 400 U.S. 48, 57 (1970).

[14] *E.g.*, Cameron v. United States, 252 U.S. 450, 460–61 (1920).

The simple and near-anonymous acts of location, then, create a cloud of some density on the government's title.[15] Even if years have passed and little work has been done, the government's ability to devote the land to other uses may be compromised by the possibility that the locator or his heirs will reappear and reassert a right to the lands. If the claim is valid — if a discovery was made and it cannot be shown that the claim has lapsed — the locators will prevail.

The authors of the General Mining Law can hardly have intended to encumber public lands with such obscure yet tenacious claims .The Act provided that a miner might acquire a patent to his claim, fee simple title, on payment of a few dollars per acre and demonstration to the Department of the Interior that he had made a discovery and had invested at least $500 work in the development of his claim. Evidently, Congress believed that any serious claimant would quickly avail himself of this procedure, and that the claims of the less serious would simply disappear, leaving no trace.[16] But the passage of years without change in the statute has encumbered state land records with several million unpatented claims.[17] Over the same period, the possibility that the serious miner will seek to patent his claims has become remote. The application process has become increasingly complex, time consuming, and expensive. Miners are almost as well protected by the laws governing possession as they would be by a patent. Under well established policy, the Department does nothing to challenge the validity of claims unless they are presented for patent or the government immediately needs the lands involved. Since the Department does not distinguish between "discovery" for the purpose of possession and the "discovery" required to obtain a patent, it treats denial of a patent application for want of discovery as demonstrating the invalidity of the underlying claim.[18] This threat to the underlying claim places a premium on "lying low" if any doubt whatever exists of its validity.[19] Whatever

[15] *E.g.*, N.Y. Times, May 27, 1973, § 1, at 16, col. 4, describing one speculator's activities, suggests the ease with which this cloud may be created. Merle Zweifel asserts that in thirteen years he staked more than thirty million acres of land with claims, at a cost to him and his co-locators of two to ten cents per acre. While his methods were imprecise, to say the least, and he is now the subject of several legal actions seeking to halt his activities and undo the resulting mess, the law's permissiveness toward location methods and the timing of discovery is such that his challengers regard his claims as prima facie valid. It is evident that their expense in removing the claims will be much higher than Mr. Zweifel's cost in making them.

[16] *Cf.* Casey v. Northern Pac. R.R., 15 L.D. 439 (1892); Shreve v. Copper Bell Mining Co., 11 Mont. 309, 28 P. 315 (1891).

[17] The Public Land Law Review Commission adopted the common estimate of six million claims. Estimates of the number of active claims range from 100,000 to 500,000. In Colorado, for example, Bureau of Land Management officials believe there may be as many as one million claims on the county records, but on only ten to thirty thousand has assessment work recently been done.

[18] Kenneth F. & George A. Carlile, 67 Interior Dec. 417, 423–27 (1960); Terry & Stocker, 10 I.B.L.A. 158 (1973); *see* Barton v. Morton, 498 F.2d 288, 292 n.8 (9th Cir. 1974).

[19] Between 1961 and 1970, only 631 mineral patents, covering 81,697 acres were issued; an additional three hundred mill sites, small tracts associated with mineral claims, were also patented. *Hearings on H.R. 7211 Before the Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess., ser. 92–20, at 148 (1971).

Congress's original anticipation regarding the life of claims in unpatented status, their duration today is lengthy.

Aside from the now rare cases in which the claimant applies for a patent to the lands involved, the validity of location is determined through government initiation of "contest" proceedings, typically on the ground that no discovery of a valuable mineral has been made. Although contests can be initiated at any time after location, in general they are brought only if an actual conflict exists over the use of the land, such as would be brought about by a withdrawal, or if it is proposed to deny a patent application. In the former case, the absence of records requires the government to identify the claims possibly at issue. To do this, departmental employees make painstaking searches of the disorganized and ancient county records for each possibly valid claim and evidence of its descent. For each claim thus discovered and put in issue, the government also undertakes to show that no discovery of any valuable mineral has been made. No obligation is placed on the claimant to define his claim, as by stating the nature of the minerals discovered, before the government puts on its case. The practical impact of this practice is that a mineral examiner must be sent to inspect every claim that may be asserted.

Processing patent applications, initiating contests, and effecting proposed withdrawals of federal lands are all primarily the responsibility of the Bureau of Land Management (BLM), a constituent part of the Department of the Interior under the control of the Assistant Secretary for Public Lands. As the manager of over 465 million acres of public domain, the BLM has numerous other responsibilities, many of which are considered more important than these. But the Bureau's Washington office includes a branch within its Resources Department responsible for coordinating minerals policy; and each BLM state office includes a number of mineral examiners and a land law examiner responsible for the technical aspects of these procedures. The Bureau's personnel control the effecting of withdrawals and the granting of patents; once they decide to oppose a patent application, however, or to contest the validity of a location, conduct of the administrative litigation becomes the responsibility of the local representative of the Departmental Solicitor. An administrative law judge of the Department's Office of Hearings and Appeals hears that litigation and the result may be appealed to the same Office's Board of Land Appeals. Judicial review, not presently provided for by statute, is regularly had in United States district courts.

In general, the Bureau's responsibility for procedures involving withdrawals and mining claims includes land for which other government agencies or other parts of the Interior Department have primary administrative responsibility. A withdrawal for the Bureau of Reclamation, or a validity question involving mining claims on lands administered by the Department of Defense, will still be processed within the BLM and litigated, if necessary, as briefly described above. In most instances, the BLM or the Solicitor's Office does this work on a reimbursible basis, with the

referring agency paying the estimated costs of the project. The notable exception to this pattern involves the Forest Service in the Department of Agriculture. Most of the 185 million acres of national forest are open to mineral location, and the scenic and commercial value of the lands often leads to efforts to misuse the mining laws to acquire possession of timber stands or, perhaps more frequently today, a summer cabin site. The problems recur sufficiently to warrant the Service's maintaining its own corps of mineral examiners in each forest region of the public land states. Under a working agreement between the Service and the BLM, these examiners have primary responsibility for investigating mineral questions when issues arise concerning Forest Service lands; the Office of General Counsel of the Department of Agriculture presents the government's side in any administrative contest involving mineral claims. The final decision whether to make a withdrawal, to issue a patent, or to charge invalidity remains with the BLM, however, and the Department of the Interior's hearing procedures and substantive rules concerning claim validity govern any contests. Very recently, the National Park Service has established its own body of mineral examiners and begun to exercise examination functions somewhat independently of the Bureau.

This study examines the expensive and extended processes briefly described above and proposes alternatives. An excellent general study of the administrative procedure of the Department of Interior has already been made.[20] This previous study, however, failed to deal with many of the problems arising under the General Mining Law, or to treat the difficulties arising in connection with stale claims.[21] One aim of this study is to fill those gaps.

In addition to the fairly extensive literature generated by the importance of the matters discussed to the mining industry, by the work of the Public Land Law Review Commission, and by the prospects of reform that Commission's work has generated, this study draws on extensive interviews conducted during the summer of 1972. Four weeks in Denver, and one in Salt Lake City, permitted interviews with most of the personnel responsible for the minerals program in the Colorado and Utah state offices and the Denver (Regional) Service Center of the Bureau of Land Management, the Denver and Salt Lake City Regional Solicitor's offices of the Department of Interior, the Department's Salt Lake City Administrative Law Judges, and the corresponding officials of the Department of Agriculture and its National Forest Service. It was possible

[20] C. McFARLAND, ADMINISTRATIVE PROCEDURES AND THE PUBLIC LANDS (1969). Professor McFarland prepared this study for the Public Land Law Review Commission. Its principal findings and recommendations remain valid today.

[21] Professor McFarland undertook to grasp the whole of the Department's procedures; within its mass, his principal concern appears to have been with departmental statutes offering far greater apparent discretion to the administrator than does the General Mining Law. The major criticism which has been leveled at Professor McFarland's report has been that it fails to connect with substance, and thus to understand procedural quirks as in part a response to the strains of administration. Bloomenthal, *Administrative Procedures,* 6 LAND & WATER L. REV. 241 (1970).

to obtain unrestricted access to the files in all these places. During the same period, it was also possible to talk with a number of lawyers who had had a broad range of experience with the Department in these matters, in both private and public practice.[22] Conversations in Washington with members of the Solicitor's Office, the Bureau of Land Management, and the Office of Hearings and Appeals, both before and after this period, confirmed much of what had been learned.

II. WHO IS ON THE LAND? THE NEED FOR REGISTRATION

A prospector interested in looking for minerals in a given area will wish to satisfy himself of the land's availability: Is it government land, or land for which the government has retained mineral rights? If so, is it open to location under the General Mining Law? Have other locations been made, and are they currently valid? These questions obviously concern the government as well; it must maintain an inventory of its property and, for sensible management, must know its characteristics and availability. How many claims encumber lands which are wanted for a possible withdrawal? To whom should notice be given regarding a proposed withdrawal? What are the bases for those claims which have been made against government land? As will appear, the present information system serves neither the government nor the prospector well.[23]

A. For Efficient Land Management

Responding principally to its own concerns, the government has long kept detailed maps and indexes recording transactions involving its lands. These are freely available for use by the public at the various state offices of the Bureau of Land Management. For any given tract of land once in the public domain,[24] these records show whether the government retains ownership, and whether, if so, the land is subject to restrictions on the operation of the mining laws. If the land has been patented to a private

[22] These included a former Assistant Attorney General of the United States responsible for litigation involving the Department, now in private practice; house counsel for a large mining firm; counsel for a conservation organization; and several counsel in private practice who frequently represent mining interests, both large and small.

[23] The same conclusion applies regarding knowledge of the land in the geophysical sense. Geophysical characteristics have obvious significance for the government's land management planning; the Bureau's resource inventory appears to be, at present, its highest priority task. If the government could acquire the results of prospectors' searches, that would add dramatically to its stock of information. It can do so, and regularly does, with regard to explorations undertaken under lease for oil and other leasible minerals. *See, e.g.*, 5 AM. L. MINING, *supra* note 3, at 1021–22, 1045 (B.L.M. Form Oil and Gas Lease), 1087 (B.L.M. Form Coal Prospecting Permit). It has no authority to require the provision of such information under the General Mining Law. State mining associations and others provide some information voluntarily, but a poorer data base results.

[24] With limited exception, the records do not include lands acquired by the United States from private ownership. Meek, *Federal Land Office Records*, 43 U. COLO. L. REV. 177, 186–87 (1971). The omission, while possibly questionable from the government's point of view, is not troubling to our hypothetical miner, since acquired lands are not available for location in any event. For definition of acquired lands see note 7 *supra*.

citizen, the records will show whether the government has retained mineral rights which permit a subsequent location. The government maintains these records principally for its own purposes, and their use requires some skill.[25] But their availability to the public is assured by regulation,[26] and the government personnel in charge of them — at least in the two offices visited — were both cooperative and helpful in assisting an anonymous visitor to find his way.

In a few respects, however, the prospector may find these records incomplete or misleading. They do not show existing mining claims on locatable land, although they will show claims for which patent applications have been rejected or which have been declared null and void. While they will reveal withdrawals or classifications which have been made or proposed and which would preclude operation of the mining laws, issues regarding the time at which that segregation takes place remain open, and the risk of error in the records appears to be placed wholly on the prospector.

1. Registration of Claims — Land office records show only matters to which the government is a party; the statute makes no provision for notifying the government of mining claims and no effort has been made administratively to secure this information from the county courthouses where it is filed or to record it even when, in the course of other business, the information comes to hand. Consequently, the prospector or other individual interested in the land must also check county records if he wishes to identify rival mining claims. These records are not often indexed, as the federal records are, on the simple and regular basis of the public land survey. The Bureau must also repair to the county courthouse if it needs to know what claims encumber government lands. Not all matters regarding mining claims are noted on county records; no indication is placed there if a claim has been declared null and void, or patented, or, perhaps most important from the viewpoint of a subsequent purchaser, limited because of conflict with prior claims.[27]

The prospector probably suffers less inconvenience from this state of affairs than the government. If he is interested in a particular twenty acres, or even 160, his eye may suffice to tell him whether other prospectors have been on the tract within the past year or so; once a year has gone by without assessment work, the land opens again for location, and he need not be concerned about the possibility of pre-existing claims as long as

---

[25] A detailed description of their contents and use appears in Meek, *supra* note 24, at 192-96; *see also* Edwards, *The Silk Purse and the Sow's Ear: Benefits and Limitations of the Project to Improve the Federal Land Records,* 12 ROCKY MT. MIN. L. INST. 243, 247–52 (1967).

[26] 43 C.F.R. § 1813.2–1 (1973).

[27] Edwards, *supra* note 25, at 259; Meek, *supra* note 24, at 197 describes the tax sale by one Colorado county of a mining claim which appeared on its records as a twenty acre tract. The case file in the Bureau of Land Management shows thirty-nine exclusions at patent, amounting to 19.5 acres — leaving twelve scattered parcels amalgamating one-half acre to the unhappy purchaser.

they have not been taken to patent. Even if assessment work has been excused for past years, a frequent dispensation in the past, it may not take him too long to review two or three years' records in the county courthouse to see whether the required affidavits have been filed. For his purposes, the current records may be enough. County registration of his own claim, moreover, is an economic necessity. The claim, if valid, is property in the fullest sense — taxable, inheritable, deviseable, and assignable. It must be on record in the place where lawyers, bankers, and others accustomed to dealing with property interests will expect to find it, and where recording is required if constructive notice is to be given to other interested parties.

No inconsistency need exist, of course, between federal and local registration systems. Miners argue that a requirement of double registration would substantially impair the economic value of the claim by making it harder to pass secure title. Moreover, any variation between the systems would produce uncertainty, and landsmen would be reluctant to warrant a location simultaneously free of impairment on two sets of records. The very chaos of many county records may also confer a certain advantage on the naturally secretive prospector: the fact that a single prospector has been blanketing a particular area of interest with claims will be much less readily apparent in county records than in federal records tied to the public land survey; inquisitive persons will find it less convenient to go from county to county gathering news of recent activity than to deal in one place with records for the whole state;[28] and if the federal government cannot easily discover a claim, it is that much less likely to be challenged.

The inability of the federal government to acquire readily information about its lands imposes burdens not only on contest proceedings, but also on federal land management and other uses of federal records, such as preparing land use proposals. These burdens do not seem to be balanced by the advantages to particular miners of nonregistration — "advantages" which from a quite proper government perspective lack substance.[29]

Proposals for federal registration have repeatedly been made, but have never succeeded on a national basis.[30] The report of the Public Land Law Review Commission recommends such a system,[31] as do all three

[28] Edwards, *supra* note 25, at 257. Compare the assertion in Meek, *supra* note 24, at 190, that some dislike the Bureau's transfer of its records to microfilm for essentially the same reason — loss of privacy; *see* Ritchie, *Title Aspects of Mineral Development on Public Lands*, 18 ROCKY MT. MIN. L. INST. 471, 484–85 (1973).

[29] The argument might be made that serious mining claims today are likely to involve large, diffuse ore bodies, requiring many claims and several years of development before a showing could be made that would satisfy the Department's current discovery criteria; secrecy, the argument runs, makes it more likely that the claims will survive the development era without interference. But this argument, in reality, disputes the test for "discovery" and the current rules regarding *pedis possessio*, which require ongoing work on each claim sought to be held during the prediscovery developmental period. Whatever changes are warranted in those rules, the government is entitled to know what use is being made of its lands.

[30] *See, e.g.*, Edwards, *supra* note 25, at 245–46, 267.

[31] P.L.L.R.C. REPORT, *supra* note 8, at 129–30.

of the major bills introduced in Congress during the 1971 session to reform the General Mining Law, and the administration bill introduced during the last session.[32] The BLM has had limited experience with registration under three statutes: Public Law 84–359, concerning mining claims on power site withdrawals;[33] Public Law 84–357, concerning mining claims on lands previously withdrawn as valuable for coal;[34] and the Act of April 8, 1948 reopening to mineral location extensive forest lands in Oregon.[35] These acts all require that a copy of the location notice be filed with the state office of the Bureau within a brief period after filing in the county records.[36] The experience under these statutes reveals no particular hardship on prospectors who register their claims.[37] The Forest Service has also attempted to acquire information about claims made in wilderness areas, with mixed success, by regulation under the Wilderness Act.[38]

One possible reason for the failure of registration proposals has been the varying enthusiasm of Bureau employees for receiving and managing the information thus acquired. Some feel that the volume would tend to clutter the land records, that many claims are evanescent, and that the information acquired would not always be given in a useful form — most notably, where claims are not tied to the public land survey, and hence cannot easily be placed on the Bureau's plats. For these reasons, they suggest, information provided the Bureau under occasional special statutes has been stored rather than used. At a time of increasingly intense land management, however, the argument against knowing what is happening on the government's land becomes increasingly unacceptable.

---

[32] S. 921, 92d Cong., 1st Sess. § 211(b) (1971); S. 2542, 92d Cong., 1st Sess. (1971); S. 2727, 92d Cong., 1st Sess. § 6 (1971). The current bill, S. 1040, 93d Cong., 1st. Sess. (1973) would substitute a leasing system for the location system, § 102, and for existing claims would require registration within one year and ordinarily an application for patent within three, §§ 123(d), (e).

[33] 30 U.S.C. §§ 621–25 (1970). The pertinent regulations appear at 43 C.F.R. § 3730 (1973).

[34] 30 U.S.C. §§ 541–541(i) (1970). The act is restated and to a limited degree explained in 43 C.F.R. §§ 3720–24 (1973).

[35] Act of April 8, 1948, Pub. L. No. 80–477, 62 Stat. 162; the pertinent regulations appear at 43 C.F.R. § 3821 (1973). The lands in question were originally granted to the Oregon and California Railroad and the Coos Bay Wagon Road to aid their development, but subsequently revested in the United States. Because of the fear that the mining laws would be abused to obtain them for their rich timber stands, these lands had been closed to mineral location in 1937.

[36] In other respects, the acts are rather typical of public land statutes in their diversity. As interpreted by the Department, two require, with minor variations, that the notice tie the claim to the public land survey. The third does not. Under the coal lands statute, claims, unless brought to patent, are limited in duration. 30 U.S.C. § 541(i) (1970). Under the other two, annual assessment work statements must be filed. 43 C.F.R. § 3722.1 (1973) (coal lands), § 3821.3 (Oregon and California lands).

[37] *See* M. CLAWSON, *supra* note 11, at 125.

[38] 43 C.F.R. §§ 3823.2(a), (c) (1973); 36 C.F.R. §§ 293.13–.15 (1973); 38 Fed. Reg. 34817 (1973) (notice of proposed rulemaking); Sumner, *supra* note 4, at 13. *But cf.* Ferguson & Haggard, *Regulation of Mining Law Activities in the National Forests*, 8 LAND & WATER L. REV. 391 (1973).

The one reported judicial decision construing the registration requirements of the special statutes has also had a dampening effect. The case involved a miner actively working his several claims and known in fact to Bureau personnel, who had not registered his claim during the statutory period. He succeeded in obtaining a judicial order prohibiting the Bureau from forfeiting his claim on the ground of nonregistration, apparently on the ground that forfeiture would have been a penalty for which Congress had not clearly provided.[39] While defensible on the fact of actual notice, the opinion may mean that the Bureau cannot safely ignore even those unregistered claims of which it has no such notice.[40] That reading clearly deprives the registration requirement of meaning.

The chief impediments to federal registration today appear to be the incompleteness of the public land survey in mountain and desert regions where minerals seem most often to be found, and the inaccuracy of a number of the older surveys still relied upon in BLM state office records. Miners recount tales of claims safely outside withdrawal lines indicated on Bureau plats, which were found to be within lines when the withdrawal was finally marked on the ground. Where the survey is incomplete, an obligation to extend the survey to a claim, or to tie the claim to some other geological marker, could be a significant expense for the smaller miner. Yet these objections go less to the propriety of a registration requirement than to the need for prompt completion of an accurate survey, a matter increasingly within the government's grasp. Mapping of the country has already reached the point where a satisfactory if not ultimately precise statement of a claim's geographical location can be made. Any sensible registration scheme would admit the possibility of adjusting a claim description to suit the physical location of the markers should inaccuracy in the survey be found. The argument regarding possible expense is less one of fairness than the assertion that mineral finds will be discouraged; the expense is one which must be met to obtain a patent, and

[39] MacDonald v. Best, 186 F. Supp. 217 (N.D. Cal. 1960). The Act specified that for pre-existing, valid claims, nothing in it "shall be construed to limit or restrict the rights of the owner," 30 U.S.C. § 624 (1970), and the court concluded that this lent emphasis to its interpretation. This reading largely obliterates the registration requirement for pre-existing claims.

[40] *B.E. Burnaugh*, 67 Interior Dec. 366 (1960) acquiesces in *MacDonald* and gives it force as well for claims located after the Act's passage. That extension is questionable; the savings clause of 30 U.S.C. § 624 (1970) does not extend to such claims, and nonrecognition in this context more properly seems to reflect a failure to meet a condition of initial validity than a penalty assessed against a valid claim for noncompliance. The Department's acceptance was based on the conclusion that the issue was "not . . . of great administrative importance." 67 Interior Dec. at 367. As the discussion within should make apparent, this conclusion is valid only when there is actual notice of the claim notwithstanding the fact of nonregistration. Such notice assures that the informative purpose of the registration requirement is satisfied. If the statute permits the Bureau safely to ignore unregistered claims of which it has no actual notice, then the absence of authority to initiate contests against unregistered claims it does know about is not a great loss. But if *MacDonald* means that a "diligent search" of county records must be carried out whenever it is desired to assure that the land is free for a future use inconsistent with mining, a substantial administrative burden does appear. Unless the statute frees the Bureau of that burden, casting the responsibility for notice on the locator's shoulders, it means nothing at all.

the requirement seems equally warranted whenever a prospector wishes to assert an exclusive possessory right.

The proposal of the Mineral Leasing Bill [41] to require registration of all mining claims as a condition of their continued validity, then, is sound.[42] Indeed, the Department should consider whether it could acquire

---

[41] S. 1040, 93d Cong., 1st Sess. § 123(d) (1973).

[42] Extending the registration requirement to interests acquired before its adoption is constitutionally sound, provided adequate notice and opportunity to protect claims are given. Wichelman v. Messner, 250 Minn. 88, 108–10, 83 N.W.2d 800, 816–20 (1957); Schroeder v. City of New York, 371 U.S. 208, 211–14 (1962); Note, *Constitutionality of Marketable Title Legislation,* 47 IOWA L. REV. 413, 418–23 (1962); *see* text accompanying notes 103–11 *infra.* However, the Supreme Court's recent invalidation of several statutes restricting distribution of governmental benefits for overbreadth of statutory criteria (or irrebuttable presumptions, as the Court called them) suggests the need for caution in articulating the mechanism adopted. *E.g.,* Vlandis v. Kline, 412 U.S. 441 (1973); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973).

Under the present draft, any mining claim not registered within a year would be "conclusively presumed" to have been abandoned. S. 1040, 93d Cong., 1st Sess. § 123(d) (1973). As applied to most circumstances in which no registration occurred despite a well publicized requirement, that presumption would be sound. But, as was the case for the food stamp program at issue in *Murry,* the few cases in which it is likely to be tested will be just those in which it breaks down — bona fide prospectors with plausible and appealing explanations for their failure to register in time, or operating miners, as in MacDonald v. Best, 186 F. Supp. 217 (N.D. Cal. 1960), whose workings, known to the Bureau without need for registration, demonstrate that abandonment has not occurred. To be sure, the doughtiness that might lead a miner to ignore a well publicized registration requirement has the flavor of the eccentric to it. But the prospector's interest is a fully vested property right after discovery, *see* note 5 *supra,* and that well understood fact may make judges hostile to a rule that takes away all power of exception. Language of conclusive presumption is decidedly inadvisable in the current judicial environment.

What is essential for the Bureau is (1) that it be freed of the burden of finding and then challenging mining claims on governmental lands when other, mutually exclusive use is desired; and (2) if the patent system is to be replaced, that claims under the old law are rather quickly adjusted. The first of these purposes seems equally well served by a simple *presumption* of abandonment, which would permit the Bureau to rely on the fact of nonregistration as an adequate basis for ignoring the possibility that other claims, unknown to it, exist; claims which are well known to the Bureau's local officials, as MacDonald's was, or claims, the validity of which could later be established in all particulars despite the presumption of abandonment, are likely to be rare. And the Bureau is less likely to be begrudged a skeptical attitude toward assertions that facts overcoming the presumption have been shown, than to be grounded on the shoal of an irrebuttable presumption.

Alternatively, a quiet title procedure could be employed, on the model of the Multiple Mineral Use Act of 1954, 30 U.S.C. §§ 521–31 (1970), and the Surface Resources Act of 1955, 30 U.S.C., §§ 612–15 (1970). Under these acts, described more fully within (text accompanying notes 97–109 *infra*), a limited search for claims is made, and claimants are then called upon, after notice given personally or by publication, to respond or forfeit their interest — in the case of the statutes cited, a partial interest in their claim. The salient difference from S. 1040 is the provision for individual notice of the obligation to respond, notice which must be *personal* in the case of easily discovered claims. No possibly rebuttable "presumptions" are employed; the statutes rather provide an understandable and fair registration procedure, grounded in the government's undoubted interest in knowing and controlling the uses to which its land is put.

The Bureau's second purpose — quick adjustment of claims under law — is approached through the vehicle of discovery. Failure to apply for a patent within three years of registration is made presumptive of invalidity; "clear evidence" of validity must be presented to overcome that presumption. S. 1040, 93d Cong., 1st Sess. § 123(e) (1973). In establishing a simple rather than an irrebuttable presumption, the draft appears sound. Failure to apply, under pressure, may rationally be taken to signify doubt on the part of the prospector that he had made the discovery required for claim validity by the date the Act was passed; in any event, the burden of demonstrating validity is properly the claimant's. See text accompanying notes 145–48 *infra.* Few are

significant information regarding mining claims and claimants through action that would not require a new statute. The most dramatic step would be to impose a registration requirement by rule, as by making failure to register presumptive of a failure to meet the requirements of good faith mining purpose, discovery, or the like. Although staff members have suggested this step from time to time, the Department has never acted, probably because of fear that authority would be found lacking. The number of failing efforts to require registration by statute makes the concern legitimate, although not conclusive.[43] Moreover, the Department could employ even noncoercive measures to encourage registration. State officials willing to cooperate with the Department might use carbon copy forms for new filings and affidavits of assessment work.[44] This clerical change would permit the Bureau to assess current mineral activity rather quickly. Voluntary registration of claims could also be advantageous to claimants, both by assuring them individual notice of any proposed segregation of the land affecting their claims, and by facilitating the Bureau's consideration of existing mineral activity in connection with proposed withdrawals.[45]

2. Notification of Pending Withdrawals — Unlike mining claims, withdrawals or segregations of land from operation of the mining laws are noted on BLM state land office records. The time at which that segregation occurs can be of crucial importance, since discovery and location must be complete by then if the claim is to be valid. The Department generally notes proposals for withdrawal or other segregation of land both on the land office records and in the *Federal Register;*[46] the latter usually occurs a few days later. The date of noting on the records — indeed, in some instances, the date on which proposals for segregation of lands arrive in the office — is treated as the effective date. Infrequently,

---

likely to be able even to make a showing of facts warranting hearing on this issue, much less prevail, once the presumption has attached.

[43] In particular, the failures to persuade Congress to adopt *general* registration schemes could not foreclose a rule requiring registration of claims located within an area withdrawn from future operation of the mining laws. See text accompanying notes 122–38 *infra.* Such a rule would have the benefit of particularly strong regulatory need, and would also be considerably narrower than the statutes which have been proposed. The Forest Service has recently adopted what amounts to registration of all claims "which might cause a significant disturbance" — most, today — on an environmental protection rationale. 39 Fed. Reg. 31317 (1974).

[44] *Cf.* P.L.L.R.C. REPORT, *supra* note 8, at 126.

[45] See text accompanying note 57 *infra.* Similar benefits were offered for registration under the Multiple Mineral Development Act of 1954, 30 U.S.C. § 527(d) (1970). Such registration has been very infrequent in practice, an outcome which may be due in part to the distrust with which the Bureau and the Department are often viewed, and a corresponding disinclination to put a claim at risk by exposing it to Bureau personnel. *See* Mock, *Human Obstacles to Utilization of the Public Domain,* 12 ROCKY MT. MIN. L. INST. 187 (1967); Sherwood, *Mining Law at the Crossroads,* 6 LAND & WATER L. REV. 161, 170 (1970). No registration scheme is likely to work well unless that distrust can be dispelled.

[46] In limited circumstances, withdrawals are noted *only* on the land office records. Buch v. Morton, 449 F.2d 600, 602 (9th Cir. 1971); C. WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATION OF PUBLIC DOMAIN 412 (1969). No adequate reason for this failure to use the *Federal Register* appears.

the posting of the records, the notice in the *Federal Register,* or both, err in describing the lands withdrawn or segregated. The description in the proposal is treated as controlling.

(a) Effective Date — Variations in the time at which segregations become effective, unless required by inflexible statute, are hard to justify. Under the Department's regulations, however, the date an application is filed controls where private persons or states seek land for airports, for exchange, or for stock driveways,[47] but the date that an application is noted on the land office records controls where federal agencies propose withdrawal or reservation.[48] By statute, classifications under the Classification and Multiple Use Act of 1964, now defunct, did not take effect until publication in the *Federal Register.*[49] Two considerations compete here: the need to prevent any other appropriation of the land once a proposal for its use has been put forward, and fairness to the prospector seeking to use apparently open federal land. (A timely discovery of valuable minerals, it might be added, reflects not only reliance on the prospector's part but also a factor which if known should influence the administrative assessment of the use to which the land would be put.) This conflict makes questionable any segregation of the land without notice — that is, automatically upon the filing of an application for exchange or other disposition. The government doubtless acts lawfully in adopting the earlier time,[50] and in the usual case little time elapses between receipt of the application and its notation. But where substantial time is taken, both fairness and a concern for promoting the wisest use of the land suggest insistence upon actual or constructive notice of the segregation before it may take effect.

(b) Notice in the Federal Register — Whether that notice may be given through the land office records, rather than the *Federal Register,* is more troublesome. The Federal Register Act requires publication of all "Executive orders, except those not having general applicability and legal effect," and provides that such orders do not become effective until filed with the Office of the Federal Register and available for public inspection.[51] The issue whether an order segregating public lands has general applicability and legal effect appears not to have troubled any court, despite the Department's conclusion that the Act does not govern, although in some instances the time lapse between notation and publication may be significant.[52] Some have argued that the order does have

---

[47] 43 C.F.R. §§ 2091.2–2 to –4 (1973); *cf.* Frank Melluzzo, 72 Interior Dec. 21 (1965); C. WHEATLEY, *supra* note 46, at A-6. *But cf.* Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30022 (1973).

[48] 43 C.F.R. § 2091.2–5 (1973). *But cf.* C. WHEATLEY, *supra* note 46, at 411.

[49] 43 U.S.C. § 1414 (1970).

[50] Lutzenhiser v. Udall, 432 F.2d 328, 331 (9th Cir. 1970).

[51] 44 U.S.C. §§ 1505(a), 1507 (1970).

[52] Thus, when the Forest Service seeks a protective withdrawal, there is an interval of at least two weeks between notation and publication, during which the Service is

general applicability [53] on the basis of the wide range of interests the action may affect, the Department's strong recognition of the need for publication,[54] and the general analogy which exists between the Department's procedures for considering withdrawals [55] and ordinary notice-and-comment rulemaking proceedings. The Department's contrary position, however, seems more persuasive. The order affects a particular tract of federal land, thus is both individual in nature and peculiarly within executive discretion, and the possibility of an encumbrance arising makes plain the need for speedy action. Attenuated as the notion of constructive notice may be,[56] most users of the public domain are more likely to receive notice through the land office records than the daily editions of the *Federal Register* (which indexes withdrawal orders only by state); and it seems likely that errors will infect the land office plats less often than the *Federal Register.*

Overall, the Bureau's provisions for notice of orders segregating lands in conjunction with a proposed withdrawal are exemplary in design and execution. It instructs its officers to arrange for publication in nearby newspapers in addition to the *Federal Register,* to post copies in appropriate Bureau offices and on or near the lands in question, to send copies to the county recorder, other possibly interested local officials, and local Congressmen, and to send copies "to individuals and others who have demonstrated an active or potential interest in the lands."[57] These instructions are regularly followed.

(c) Error in the Land Records — The Department's apparent resolution of the problem presented by mistake or omission in notation on the land records is less satisfactory. It holds that in the case of omission, the reservation is still valid [58] and that in the case of error, both the lands erroneously included and those erroneously excluded are withdrawn.[59] The Department's freedom from the need to publish its orders in the

---

to talk with mining interests who might seek to oppose it, in order to determine whether a hearing is desirable. V BUREAU OF LAND MANAGEMENT MANUAL § 4.5.29 (1958) [hereinafter cited as BLM MANUAL]; C. WHEATLEY, *supra* note 46, at 413, 483.

[53] C. WHEATLEY, *supra* note 46, at 399–400, 481–83.

[54] 43 C.F.R. § 2351.4 (1973); V BLM MANUAL, *supra* note 52, § 4.1.9.

[55] 43 C.F.R. §§ 2350.0–1 to 2357.1 (1973).

[56] Departmental regulations treat the notation of segregation on the tract books as affording constructive notice of that action. However, the Department has resisted suggestions that these records be made the subject of constructive notice in proceedings outside the Department. It does not wish to have the land records encumbered with records of wholly private transactions, such as lease sales, or subjected to regular use by title searchers in connection with such transactions. Edwards, *supra* note 25, at 251 n.22.

[57] V BLM MANUAL, *supra* note 52, § 4.1.9.

[58] St. Paul, M.&M. Ry., 36 L.D. 167, 168 (1907).

[59] C. WHEATLEY, *supra* note 46, at A–7 to –8, *citing* Richard L. Oelschlaeger, 67 Interior Dec. 237, 240–41 (1960), and Bert L. Ruark, 40 L.D. 599 (1912); *cf.* Frank Melluzzo, 72 Interior Dec. 21 (1965). The problem is made more serious by survey errors or the placing of a withdrawal on unsurveyed land; mining claims are small enough so that failure to mark the withdrawals in the field — and they may not be marked there for a long time — creates great uncertainty.

Federal Register may imply that it is not bound by omissions or errors there,[60] but that argument is not convincing for erroneous entries in the office records. The citizen expects to find accurate information about the availability of the public lands there, and as a matter of fairness and sound policy, that expectation should be protected by giving such entries an effect like that which required publication in the *Federal Register* would be given.[61]

Recognition of a "vested right" to mining claims maturing during the period afflicted by the error might be an excessive response. Congress has permitted the executive branch enormous discretion in dealing with the public lands. Land office records are essentially a creature of regulation, not statute;[62] and although Congress could make those records or publication in the *Federal Register* conclusive, it has done so only in the now defunct Classification and Multiple Use Act of 1964.[63] The inappropriateness of binding the government to the mistakes of its employees in managing government property has long been recognized.[64] Parties with inside information must also be prevented from frustrating the government's control of its property.

Recoupment of expenditures undertaken in reliance on the error and recognition of the legitimacy of any profits made during the period, however, would be appropriate measures of relief. To say that these records are not kept "for" the public but simply made available to them as a convenience, however accurate as a formal matter, is inappropriate as applied to records of governmental action. Recognizing the fact of reliance upon the records, even to so limited an extent, would emphasize the need for accuracy; it is not that the government must transfer the lands but rather that it must give consideration to the substance of a claim it otherwise could ignore. The principal cases which have held that the government is not estopped by the conduct of its agents in dealings with the public lands have recognized the justice of these reliance claims.[65]

---

[60] *See* Foster v. Jensen, 296 F. Supp. 1348 (S.D. Cal. 1966). *But see* Lutzenhiser v. Udall, 432 F.2d 328 (9th Cir. 1970); United States v. Chatham, 323 F.2d 95, 99 (4th Cir. 1963) (condemnation action; "gross" misdescription was ineffective to confer possessory right on government without personal notice).

[61] 5 U.S.C. § 552(a)(1) (1970). The Bureau provides by rule that "[r]eliance . . . on records maintained by land offices cannot operate to vest any right not authorized by law," 43 C.F.R. § 1810.3(c), but if the government would otherwise be found estopped, reliance on this rule would be no better than a bootstrap operation.

[62] Meek, *supra* note 24, at 177.

[63] 43 U.S.C. § 1414 (1970).

[64] *See* note 61 *supra;* Shotwell v. United States, 163 F. Supp. 907, 915–16 (E.D. Wash. 1958); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 17.01–.04 (1958); Comment, *Never Trust a Bureaucrat: Estoppel Against the Government,* 42 So. CAL. L. REV. 391 (1969).

[65] United States v. California, 332 U.S. 19, 39–40 (1947); United States v. San Francisco, 310 U.S. 16, 31–32 (1940). In each instance, an initial interpretation by the Department's officers erroneously favored the party subsequently opposing the United States in court; California was given to believe it controlled the seabed off its coasts, and San Francisco, that it was permitted to sell electric power generated by a federally supported project to a private utility for resale. No one representing the interests of the United States would have been heard to test the correctness of these interpreta-

Where the situation is readily clarified for the future by correction of the records, and the error involved is a simple factual one, sound policy favors giving the land office record at least partial effect.[66]

The common perception that the Department has failed to recognize just reliance claims is one of the most fertile sources of discontent within the private bar regarding the administration of the mining law. The Department must remain free to change its interpretation of governing law when a previous position appears to have been in error, even though there are adverse consequences for the future expectations of those who acquired benefits under the prior rule. Absent such authority, venal or shallow administrators could too easily commit valuable resources to perpetual waste. No contemporary corrective is available to the government, and Albert Fall's ghost still stalks the Department's corridors. But it does not follow that the interpretation in question may be given no force for the period during which it persisted. Reliance, appropriate in the existing circumstances, may indeed have been placed on the existing state of the law. For example, the Secretary now appears to have erred in concluding that the government had no interest in a locator's failure to perform assessment work on claims located on lands subsequently withdrawn from location by the Mineral Leasing Act of 1920.[67] Freedom to revise his interpretation need not be taken as establishing the proposition that a failure to do the work in 1957, when the erroneous conclusion was in full and notorious effect, may be relied upon by the government in some adverse proceeding. The bar's perception — not yet proved valid in this instance — is that this unnecessary link will be made. Absent an error so clear that it itself serves notice of its absurdity, or some other notice that the interpretation is under question, the justice in a rule permitting the government to ground adverse consequences in another's reliance on existing interpretation is difficult to find.[68] Nothing in the decided cases endorses, much less requires, that result; since the private citizen may acquire no rights by reliance on erroneous government interpretation, neither should he be found to have lost any through that reliance.[69]

---

tions in court at the time; if binding on the government when made, it is unlikely that these constructions could later have been reversed by statute. That the Supreme Court felt unconstrained by these constructions in considering the legal issues posed when departmental officers reconsidered and rejected them is hardly surprising under the circumstances. But neither case sought to recoup such profit as may have been extracted by California or San Francisco under the erroneous interpretation in the past; in the *California* case the suggestion was precisely the opposite — that a just government would surely recognize interests in such values as had been created on the basis of the previous, erroneous view. 332 U.S. at 40.

[66] *Cf.* Seaton v. Texas Co., 256 F.2d 718, 724 (D.C. Cir. 1958) (Secretary of Interior required to give priority over subsequent lessee to a lease application made in the wrong form as a result of error in land office record).

[67] Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), *on remand sub nom.* Oil Shale Corp. v. Morton, 370 F. Supp. 108 (D. Colo. 1973).

[68] *Cf.* Lemon v. Kurtzman, 411 U.S. 192 (1973); James v. United States, 366 U.S. 213, 221–22 (1961).

[69] *Cf.* Carver, *Administrative Law and Public Land Management*, 18 AD. L. REV. 7, 9–10 (1965).

The effect of the Department's approach to error in its records is heightened by its insistence that claims must be perfected before the withdrawal or segregation takes effect. If a discovery of valuable minerals has not been made as of that moment, the locator has no recognized interest in the land, no matter how heavy his investment or diligent his search.[70] Withdrawal documents typically reserve valid existing claims; that reservation extends only to claims perfected by discovery before the withdrawal is put into effect; once it is in effect, a subsequent discovery is to no avail.

This approach is unnecessary.[71] Both the Mineral Leasing Act of 1920,[72] which withdrew from location all lands valuable for fuel minerals, and the Pickett Act of 1910,[73] authorizing temporary withdrawals to protect those lands, provided that prospectors who were already on the land diligently searching for minerals would be permitted to continue diligent pursuit of discovery. These prospectors would have been protected under state law by the doctrine of *pedis possessio,* but would not yet have had a valid federal claim. Recognition was prompted by equitable concerns. The search for petroleum, with which these acts were principally concerned, required substantially greater investment and work to reach the point of discovery than did prospecting generally at that time. For metallic ores, discovery was assumed to occur at or quite near the surface, after primitive tools had been used to find an outcrop or enriched bed of gravel; but to develop a producing oil well, subtle geologic inferences were required, and thousands of feet of well might have to be drilled before discovery occurred. Recognition of this difference, and of the sizable investments made in drill holes which at the moment of withdrawal might not yet have reached producing zones, led Congress to acknowledge a federal right of *pedis possessio* in petroleum claims. The requirement of diligence in pursuit of actual discovery on these claims was, properly, narrowly construed; substantial and continuing work was required to keep claims alive until a discovery was made.[74] But the result was to lighten the consequences faced by the prospector who was acting in good faith, but had not yet been able to verify the inference that valuable minerals would be found on his claim.

The realities of prospecting today resemble the practices of the petroleum industry more than the prayerful scratchings of the sourdough with pickaxe and mule.[75] Diffuse ore bodies, deeply buried and requiring sophisticated geological techniques for location and sophisticated tech-

[70] Cameron v. United States, 242 U.S. 450, 456–60 (1920); Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30018 (1973); cases cited note 18 *supra.*

[71] *See* NONFUEL MINERALS, *supra* note 3, at 348–68.

[72] Mineral Leasing Act, 30 U.S.C. § 193 (1970).

[73] Pickett Act, 43 U.S.C. § 142 (1970).

[74] 1 AM. L. MINING, *supra* note 3, §§ 2.62, 4.32.

[75] *See, e.g.,* Twitty, *Amendments to the Mining Laws,* 8 ARIZ. L. REV. 63, 64 (1966).

nology for extraction, are more likely than an exposed vein or nugget. Consequently, prospectors are likely to be caught by a segregation of the lands in the same state of half development that characterized the search for petroleum when it was removed from the purview of the mining laws at an earlier time. The Secretary's authority to follow the congressional practice is ample, and that measure might significantly increase public acceptance of his administration of the lands.[76] Indeed, he could condition continued recognition of unperfected claims on prompt registration of them with the local land office,[77] and in this manner possibly avoid some of the difficulties now experienced in identifying and dealing with these claims.

There may, of course, be policy reasons for refusing to recognize claims in the course of development, even under conditions which assure both cooperation and diligence. The disrepute into which the General Mining Law has fallen undoubtedly contributes to that refusal. But force of habit and a failure to consider the effects of nonrecognition on other departmental procedures may also play a part. Indeed, one aspect of the unperfected claim which seems clear is that it gives its holder a particular interest in actions affecting the availability of the land for mineral location. In the past that interest has been reflected in the Department's painstaking searches for possible claimholders and case by case hearing procedures for determining validity in each instance. That procedure, discussed below, is overelaborate and inefficient for the interests involved. But the obverse of that proposition is some greater recognition of the claimant's interest in connection with withdrawal — a recognition not only of the opportunity to participate but also of the chance to demonstrate, as by further diligent development, the validity of his claim and the mineral potential of the lands in question. The information provided over a relatively short time by persons diligently pursuing the development of their claims might also prove significant in evaluating the desirability of the proposed action.

B. For Clearing Title to Needed Land

Wholly apart from the desirability of knowing about mining claims as an incident of sound public land management, knowledge of the existence of claims is important to particular transactions affecting discrete tracts of public land. A miner may wish to obtain a patent for his land. Others might wish to assert competing claims. Alternatively, the land may be required for a competing use inconsistent with the encumbrance of an existing claim; a withdrawal or segregation will protect the land against future claims but not past valid ones. Finally, legislation limiting the incidents of future mining claims requires ascertainment of already valid

[76] Negotiations between a state mining association and the Bureau over a proposed withdrawal were reported to the author as having led to such an accommodation in at least one case.

[77] See text accompanying notes 41–45 *supra*.

claims, for which the limitation will not be effective. Fair and efficient procedures must be adopted in each instance for identifying possible claims and claimants affected by departmental action.

The central focus of this study is on the procedures the Department follows when withdrawn or segregated land is to be cleared of existing claims for some competing use. The General Mining Law refers only to an application for patent, and even in that context does not explicitly provide for a hearing on the application should the government seek to controvert any of the matters alleged in it.[78] But the Law has long been interpreted to permit the Department to challenge claim validity whether or not an application for patent has been made.[79] If a dam is to be built, claims must be discovered and tested before its waters drown the land; afterwards, resolution of the discovery issue would be virtually foreclosed.[80] While national parks, picnic grounds, and buildings present less dramatic prospects should a miner asserting his prior right arrive several years after their creation, the tendency has been to view the inconvenience as the same. Chains of title are shorter than they would be years hence, and failure to discover claimants or their heirs, in the Department's view, makes any action ineffective as to them. The time to act, then, is at the outset — while the land can still be inspected, claimants are easier to track, and their heirs are less numerous.

To prosecute every mining claim that might come to the government's notice would be senseless. So long as the land remains open to mineral location, vacating a particular claim is meaningless for management purposes; absent injunctive relief, it may be instantly resurrected, even

---

[78] 30 U.S.C. § 29 (1970). Notice of the application is published and posted on the land for a sixty-day period to permit adverse claims to be made by other locators. *Id.* But such claims, if made, are not passed upon by the Department. Its proceedings are stayed while a "court of competent jurisdiction" entertains the adverse claim. *Id.* § 30. The statute on its face, then, envisions no adjudicative function for the Department; the grant or denial of the applications it processes is not characterized as a quasi-judicial act.

[79] Cameron v. United States, 252 U.S. 450, 459–64 (1920). The Department has no *obligation* to decide the validity of claims respecting which a patent application is not outstanding. It could proceed to make whatever use it wished of land possibly subject to claims, or sue to enjoin alleged trespass, without first convening a formal or adversary inquiry into the existence and validity of mining claims extant on the land. If the use of any valid claims was thus prevented, the claimants would have an action for just compensation (or, should the sovereign immunity barrier be waived, an action to clear title) or a defense to an action in trespass. That is, the Department could leave the question of validity for assertion and hearing in court. The choice of the administrative over the judicial tribunal for hearing can be attacked or defended on all the bases commonly referred to in arguing such matters, and commonly is. Mining interests complain of institutional bias, delay, and the overrating of expertise, and others assert the values of uniformity, relative informality, and experience. But the choice of tribunal is a free one. The Department need not provide hearings; rather, it *may* do so, as it has done, as a means of obtaining greater control over the outcome of cases by preempting the fact-finding process. *But cf.* C. McFARLAND, *supra* note 20, at 204–05 nn. 113 & 116.

[80] For the small earth dams used for flood control or watering livestock, the useful life of the dam is short enough and the acreage affected slight enough that the Bureau is willing to take the chance of relying solely on the absence of any apparent mining activity at the site. The elaborate procedures described in the text are not followed.

by the parties to the contest proceeding. Recognizing this and the need to assure miners of its good intentions, the Bureau adopted (and widely disseminated) a firm policy of not bringing contests unless a patent was being sought or the land was required for some other, inconsistent use, and hence had been withdrawn from the possibility of further location.[81] The need for a determination of validity in the patent setting is clear; when government land has been segregated from further mining claims, that fact at the same time justifies the inquiry into the validity of existing claims and assures the finality of the decision — a claim once cancelled cannot be located again.[82]

In order to place these clearance procedures in context, the pages which follow provide a general description of all the contexts in which the issue of claim validity can arise, and a step by step analysis of clearance processes with suggestions for reduction of their present complexity and expense without impairment of their fairness to claimants.

1. Contexts — (a) Patent Application. The patent process is initiated by the mineral claimant's application to purchase the land on which his claim is located for the statutory price of $5.00 or $2.50 per acre.[83] No particular form is provided for application, but the information and acts

[81] Directive from Harrison Loesch, Assistant Secretary of the Interior, to Boyd L. Rasmussen, Director, Bureau of Land Management, Oct. 31, 1969.

[82] The Forest Service has never accepted the Bureau's self-imposed limitation on the initiation of contests. Under its 1957 agreement with the Bureau allocating responsibility for handling mineral matters, it reserved the authority to decide whether or not a contest would be brought; the Bureau is responsible only for drawing the complaint to the Forest Service's specifications, assuring that the charges preferred are ones which might be recognized under the General Mining Law, and so forth. As administrator of land often spectacularly scenic and heavily timbered, the Forest Service has been particularly sensitive to the possibility of abuse of the mining laws and quick to contest claims which it believes to have been made for other than mining purposes, even though the land remains formally open for location. FOREST SERVICE MANUAL § 2811.5.3 (1972). Some regional supplemental instructions describe this responsibility in great detail. FOREST SERVICE MANUAL, tit. 2800 (Supp. I, 1966) (Region 6); FOREST SERVICE MANUAL, tit. 2800 (Supp. VII, 1971) (Region 1); *see* Ferguson & Haggard, *supra* note 38, at 391. In such circumstances, the Forest Service is sometimes also able to secure injunctive relief against the alleged abuser. United States v. Denarius Mining Co., Civil No. C-2441 (D. Colo., filed Feb. 11, 1972). Often what it seeks is the removal of facilities, such as a summer cabin, the claimant may have installed. But estimations of what constitutes abuse may vary and the decision to take litigative action rarely receives intense supervision. Undoubtedly, persons mining in good faith, whether or not with much hope of ultimate success, are caught in the net.

The Bureau has recently expanded its policy to include aggravated cases of abuse of the mining laws, but evidently with the risks of futility and of overreaction in mind. Bureau of Land Management Instruction Memorandum No. 72-404 (October 12, 1972). Such contests are to be limited to actions in aid of other remedies — such as prosecutions for trespass or efforts to obtain injunctive relief against the continuance of objectionable behavior — against which a valid mining claim might be a defense. By associating actions in this way, the Bureau avoids the problem of futility; the particular malefactor, against whom the remedies are sought, is effectively prevented from reasserting his claim. A court action requires the cooperation of the Regional Solicitor's office and the Justice Department, and that affords further practical assurance against overuse. On the whole, the Bureau has adequate and efficient safeguards against the possibility of abusive or harassing filing of contests. The occasional suggestions of commentators to the contrary may accurately reflect folk myth; but nothing encountered supports them.

[83] The $5.00 price is for lode claims (minerals in place), 30 U.S.C. §§ 29, 37 (1970); $2.50 for placer claims (alluvial beds), 30 U.S.C. § 37 (1970).

required are set forth in the departmental regulations in considerable detail.[84] Among the requirements are the following: a precise survey of the physical location of the claim, showing any conflicts with other claims and the amount of work done on the claim;[85] a certificate or abstract of title; a precise description of the minerals found, specifying their location on the claim, the dimensions and richness of the find, and the amount and value of ore already extracted; and a showing that the land is available for location. The claim must be posted, and notice of the application published weekly over a sixty-day period in the newspaper nearest to the claim.

The applications are processed in the state offices of the Bureau by land law examiners (until recently called "adjudication officers"). Where applications are deficient in some remediable respect, the examiners so inform the applicant; their responses, although sometimes slow, appear genuinely helpful, and generally occasion no complaint. The land law examiners are also responsible for checking the availability of the lands in question; if the lands were withdrawn at the time of location, they are to issue a decision "declaring" the claim void and rejecting the application on that basis.[86] No hearing is afforded, since the decision is made wholly on the basis of departmental records; but an examiner's adverse decision is appealable as if made after hearing before an administrative law judge,[87] and a hearing may then be ordered if a factual controversy appears.[88] Although it might be described as adjudication, the land law examiner's function is the essentially administrative one of determining whether and to what extent the Department's lands are available for the use proposed.

---

[84] 43 C.F.R. §§ 3861.1 to 3864.1–4 (1973). In a few respects — for example, the documents required to support the application of a corporation — the requirements are set out only in VI BLM MANUAL, *supra* note 52, § 3.1.8F(1). These omissions from the regulations could be easily remedied, and should be. See Strauss, note ** *supra.*

[85] The survey is performed by a private mineral surveyor who has been certified by the Bureau for this purpose, 43 C.F.R. § 3861.5 (1973), under the supervision of the cadastral engineer in the local Bureau office. For placer claims located on surveyed lands and conforming to the legal subdivisions, the official survey is not required. 43 C.F.R. § 3863.1(a) (1973).

[86] VI BLM MANUAL, *supra* note 52, §§ 3.1.10–11, 5.2.18.

[87] The Dredge Corp., 65 Interior Dec. 336 (1958), *aff'd sub nom.* Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966); 43 C.F.R. § 4.410 (1973); *cf.* Ferris F. Boothe, 66 Interior Dec. 395 (1959). It might be thought that this appeal should be taken to the administrative law judge, who would hear any factual disputes, rather than to the Board of Land Appeals.

[88] United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 440–42 (9th Cir. 1971); *cf. id.* at 452–54 (supplemental opinion). Informal contact is occasionally made with claimants regarding locations made on restricted land, to ascertain whether they assert any claims predating the segregation, and these inquiries have sometimes uncovered earlier claims whose history was otherwise unclear or hidden in the county records. The making of the inquiry reflects conscientious practice, but suggests no need for notice or hearing concerning the validity of the post-segregation claims. Indeed the inquiry assumes their invalidity. Adoption of a verified statement procedure, as is suggested in the text, would serve equally well to reveal all bases for asserted claims.

Once the application is formally complete and the necessary fees have been paid, the Bureau issues the applicant a "final certificate" which conveys equitable but not legal title to the land, and suspends the ordinary application of the mining laws.[89] At this point — or, in practice, as soon as it appears likely that a final certificate will be issued — a copy of the application is referred to a mineral examiner in the Bureau or, if national forest lands are involved, to the Forest Service for inspection of the claim. If the result is favorable to the claim, a patent is then issued; no one outside the Bureau (or the Forest Service) and few within it will review the correctness of this action. If the report is unfavorable, formal charges will be drawn up and a contest initiated. If the government prevails, the application will be rejected and the claim declared invalid, whether or not the land is still available for location;[90] but an application may be withdrawn at any point prior to hearing without prejudice to the claim, and Bureau employees often encourage that step, given the consequences of a rejection.

Although 167 patents covering 28,000 acres were issued as recently as 1960,[91] both application for and grants of patents have slowed to a trickle. In 1971, fifty-one applications were made and eighteen patents issued, covering 1,666 acres. Of the fifty cases acted on, twenty-seven, involving 131 of the 186 claims for which application was made,[92] ended in recommendations against patent; in addition, fifteen contests, involving sixty-four claims, were heard by departmental hearing examiners during the year.[93] Considering the development which precedes any well inten-

[89] That is, assessment work will no longer be required to prevent relocation; the lands could not be affected by a subsequent withdrawal, and so forth. The effect of thus conferring equitable title is to make clear the claimant's due process right to hearing in any future adverse proceedings concerning his claim. Orchard v. Alexander, 157 U.S. 372, 385–86 (1895).

[90] Kenneth F. & George A. Carlile, 67 Interior Dec. 417, 422–26 (1960). The result is hardly a necessary one. Although the opinion is written as if invalidation of the claim underlying the rejected application was absolutely required by the statutory language (rather than the product of a conscious choice among policy alternatives), the necessity seems never to have been noticed in the ninety-odd years of prior administration of the statute. It is unlikely that anyone believed the matter not open to choice. The demanding discovery standard was formulated in cases in which the lands involved were needed for a competing, inconsistent use or were being abused. In contests between rival prospectors, where mineral use is not at issue, a less rigorous test has traditionally been applied. Chrisman v. Miller, 197 U.S. 313, 323 (1905). A patent application, if granted, would foreclose any other use of the lands involved, and such a demanding discovery standard to judge its sufficiency is entirely appropriate; but if the land will remain available to mineral entry once a patent application has been denied, the less rigorous test could be chosen to assess the continuing validity of the underlying claim as against rival miners.

[91] BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS table 35 (1960).

[92] Patent applications may and often do comprehend more than one claim.

[93] BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS tables 83, 84, 110 (1971). The figures represent a composite, since the fifty-one applications made in 1971 could not have been finally processed by the end of the year, and many applications were pending when the year began. The substantial number of recommendations against patent — that is, against validity — is typical of recent years. Over the past eight years, such recommendations were made in fifty percent of all cases. Also apparently typical is a greater tendency for recommendations against patents on application for Forest Service lands — eleven of eighteen cases in 1971, or sixty-

tioned claim, the attrition rate is staggering. Since rejection means loss of the claim as well as failure of the application, and an unpatented claim provides lower tax visibility and almost the same degree of security as is experienced under a patent,[94] the active miner has little incentive to apply for a patent. The chief present advantages of a patent — control over the surface resources and elimination of the necessity of appearing to be performing mining work in order to protect the claim — are attractive principally to persons with other than mining purposes for the land once acquired.

(b) Adverse Claims — During the sixty-day publication period preceding issuance of a final certificate to a patent applicant, rivals for the land may intervene in a variety of ways. A rival prospector, depending on a separate claim in conflict with that for which patent is sought, may make an "adverse claim"; this has the effect of suspending the patent application while he initiates suit in state court (or, in the event of diversity jurisdiction, federal court) to resolve the issue of priority. The final judgment in the action is determinative of the asserted conflict in the patenting process. A co-locator with the applicant, believing that he has been unfairly excluded from the application or that the claim is in fact his, may file a "protest" which permits him party status in the proceedings; so may any person who asserts a nonmineral right to the land, for example, one holding a right of entry under the homestead laws. Any other person may also protest the application, but absent some claim of right to the land he will not be afforded any measure of control over the proceedings, merely the chance to make his views known. "Private contests," like government contests, may be brought against claims for which no patent application is pending by any person with a claim of title or interest in the

---

one percent, as against sixteen of thirty-two cases, or fifty percent, for the remainder. Over the past eight years, the Forest Service has recommended rejection in almost two-thirds of its cases (sixty-four percent), as against forty-two percent of the total received, but its cases typically involve less land than other applications (2.5 claims per case, as against six claims per case elsewhere in 1971; over the past eight years, 4.5 claims per case as against 6.3). The Forest Service's record is not necessarily the product of greater hostility to mining claims as such. Rejected applications generally are characterized by fewer claims per application than those recommended for grant — an average of 4.9 claims per rejected application as against 6.3 claims per application recommended for grant over the past eight years, and this characteristic could be explained in a number of ways: a need for relatively large acreage (many associated claims) for efficient development of most mineral deposits found today, so that small areas are less likely to support a finding of discovery; the relative disability of the small miner (who is not, to be sure, necessarily the claimant of a smaller area) to command the legal and other resources necessary to deal effectively with the bureaucracy; or the greater frequency of applications made to acquire land for other than mining purposes (for example, as a summer cabin site) among smaller claims. Forest Service land, generally more valuable both for recreational and commercial (timber) purposes than Bureau or other government land, seems particularly subject to the last abuse. *Cf.* text following note 180 *infra*.

[94] Security of title is somewhat greater under a patent, but the unequivocal characterization of perfected claims as property, taken together with the Bureau's policy against testing validity unless the land is required for other purposes, makes the difference slight. To the extent a patent invites state taxation which would not otherwise apply, it is actually disadvantageous.

land adverse to a mining claimant. Although the Department's rules provide fully for these contests,[95] they are very rare, and are not further considered here.[96]

(c) Statutory Validity Hearings — A variety of statutes passed during the mid-1950's also provide occasionally for hearings in which validity is at issue, not for the purpose of cancelling the claim outright, but to determine some perquisite of claims located prior to the effective date of the statute, a perquisite which had been eliminated by the statute in question. For example, the Multiple Mineral Use Act of 1954,[97] Public Law 585, permitted the coexistence of mineral leases and mineral locations on the same land; previously, leased lands had been unavailable for location, and locators of lands subsequently found valuable for leasible minerals had been able to control those minerals both before and after patent. The Act opened leased lands to location and, for the future, reserved leasible minerals on located lands to the United States. Finally, for locations made before the effective date of the Act, procedures were specified for determining the claims' validity as of that date on motion of any applicant, offeror, permittee, or lessee. This determination was to be made for the limited purpose of imposing the same restriction on the preexisting claim. That is, a finding that the claims were invalid at the Act's passage resulted in a reservation of leasible minerals and the right to develop them on the claim to the United States; if the claims were valid then, the right of control remained with the locator. Similarly, the Surface Resources Act of 1955,[98] Public Law 167, reserved the management of surface resources, such as forage and timber, to the United States for all subsequently located claims, and stated a procedure by which the United States could determine the validity of pre-existing claims as of the Act's effective date. The reservation of surface resources would be imposed on all previously located claims found invalid as of that date, but not on those claims found to have been valid then. The striking reverence in which mining claims have often been held is reflected in the limited change thus accomplished. In fact, miners had never been entitled, prior to patent, to use surface resources unnecessary for mining — as, for example, by renting their claims for grazing. But they had been able to exclude the government from their claims; thus the Act made clear the government's right to manage the surface despite the "exclusive possessory right" ordinarily ascribed to mining claims.

Nearly twenty years after their passage, these statutes are rarely

---

[95] Duguid v. Best, 291 F.2d 235 (9th Cir.), *cert. denied*, 372 U.S. 906 (1961); 43 C.F.R. §§ 4.450–1 to –8 (1973).

[96] One such proceeding was heard in 1971, one in 1970, and none in 1969. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS table 110 A (1971); *id.* (1970); *id.* (1969).

[97] 30 U.S.C. §§ 521–31 (1970).

[98] 30 U.S.C. §§ 611–15 (1970).

invoked.[99] Each, however, may be remarked for its procedures, since each involves the same problem that confronts the government in bringing validity contests: the need to identify existing, largely inactive mining claims and to determine the effect of those claims by efficient means which are fair to the claimants.

The prescribed procedure under each statute begins with a physical examination of the lands and a "reasonable" inquiry to find the names and addresses of others having mining claims on the land involved. The whole body of county records need not be searched, however. The statutes require inspection only of tract indexes [100] — that is, indexes compiled on a geographical basis — and the formal Requests for Notice which each Act permits mining claimants to file for record in the county record office.[101] Notice of the proceeding is mailed to each claimant thus discovered at the address given in the records, and published weekly for nine consecutive weeks in the nearest local newspaper of general circulation.[102] If these procedures have been correctly observed,[103] the rights in question are extinguished for all claims whose owners do not respond within a stated time by filing a verified statement of claim. The verified statement must identify with precision [104] the claim, its location, and the persons known to the respondent/claimant to have an interest in it. The discovery claimed need not, however, be specified.

If a verified statement is filed and the rights in question are not waived, a contest proceeding may then be brought to determine the validity of the claim for the limited purposes of the statute, following "the then established general procedures and rules of practice of the Department of Interior in respect to contests or protests affecting public lands of the United States." [105] The determination of validity made under these statutes rests on precisely the same inquiry as a patent application or a

---

[99] In 1971, there were five hearings and sixteen cases initiated under Public Law 167; one hearing and an indeterminate number of cases were initiated under Public Law 585. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS tables 109, 110A, 110B (1971). The Forest Service initially made extensive use of Public Law 167, but has now essentially completed its program; the Bureau has abandoned the statute in all but unusual situations.

[100] Public Law 167 is explicit as to this limitation. 30 U.S.C. § 613(a) (1970). Public Law 585 refers to "indices" generally. 30 U.S.C. § 527(a) (1970). Among mining states, only Wyoming has such an index.

[101] 30 U.S.C. §§ 527(d), 613(d) (1970). The notice filed must give precise information regarding the physical location of each claim.

[102] *Id.* §§ 527(a), 613(a).

[103] *Id.* §§ 527(e), 613(e) reserve the rights of any person for whom the challenger failed to comply with the requirements of personal notice. Presumably, this is no more than a restatement of the constitutional doctrine that notice of publication will not suffice to bind persons whose interest is readily ascertainable. *E.g.*, Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306, 309–18 (1950); *cf.* Schroeder v. City of New York, 371 U.S. 208, 212–13 (1962). As the statutes elsewhere recognize, the interests of claimants not revealed by current activity on the land, by tract indexes, or by current statements of interest adequately identifying both claim and claimant, are not readily ascertainable.

[104] 30 U.S.C. §§ 527(a), (b), 613(a), (b) (1970).

[105] *Id.* §§ 527(c), 613(c).

government contest. The sole difference lies in an artificially limited date of inquiry — the effective date of the act in question[106] — and the artificially limited impact of a finding of invalidity.

The limited impact of an adverse finding under these statutes encourages waivers or acquiescence in the proceedings. But the same limits make these proceedings seem inefficient to the Bureau, and some claimants fear their use as a possible occasion for harassment. Claimants fear multiple proceedings, or the potential for change from the comparatively innocent proceedings under the Surface Resources Act to validity proceedings intended to eliminate a questioned claim. Indeed, the Forest Service may on occasion have brought full scale contest proceedings when the refusal of a claimant to waive his surface rights under the Act required a hearing.[107] The Bureau, for reasons both of efficiency and fairness, has essentially ceased bringing cases under the Act and it has undertaken not to switch to full scale contest in midstream when it does bring such proceedings.[108]

Proceedings under the Surface Resources Act have proved relatively efficient. Perhaps 400,000 claims existed on the 53,000,000 acres of land cleared by the Forest Service by January 1, 1962. Less than five thousand were asserted by verified statement; after negotiation, 4,100 statements were withdrawn and 642 claims stipulated to be valid. Apparently, few hearings were held.[109] Cost figures are unavailable, but the Bureau estimates its processing costs to have been less than one dollar per claim.

(d) Withdrawal or Segregation — No such efficiency characterizes the procedures followed when public lands are to be cleared of claims in connection with a proposed withdrawal or segregation. Although some claims may be easy to identify, because they are being worked at the time and their locators are readily found, the bulk (eighty-five percent by common estimate) are inactive. No application papers speed the examiner's task. For the claim located in 1890, 1914, or 1932, and long since untouched, physical markers on the land will have disappeared and evidence of development will be overgrown. The managers of the land and persons living in the vicinity will have no reliable knowledge. County records are the only possible source of information; but these are not usually arranged or indexed on a tract-by-tract basis,[110] and the claims in them — particularly the older ones — are not usually tied to the

---

[106] The Department has asserted the right to contend against claims valid on the Act's effective date that discovery was subsequently lost. A. Speckert, 75 Interior Dec. 367, 371–72 (1968). *But see* 30 U.S.C. §§ 527(c), 613(c), (1970).

[107] Ed Bergdal, 74 Interior Dec. 245, 246, 249 (1967).

[108] *See id.* at 247–48.

[109] *Compare* 1 AM. L. MINING, *supra* note 3, § 1.44 (Supp. 1974) (no hearings held), *with* Letter from J. Phil Campbell, Acting Secretary of the Dep't of Agriculture, to George P. Smith III, representing the official views of the Dep't of Agriculture on the Report, at 5, May 28, 1974, on file with the Administrative Conference of the United States [hereinafter cited as Letter] (limited hearings, no claims found valid).

[110] Name indexes are common, but useless unless the claimant's name is known; claim indexes, where they exist, still do not place the claim on the land.

public land survey. Uncovering all the claims made on a particular tract of land, then, is an arduous process.

Nevertheless, it is a process regularly undertaken when a withdrawal or other segregation of government land appears to make determination of the validity of outstanding claims essential. The Bureau insists that it cannot compromise these matters, or permit other agencies on whose behalf it acts to do so, for fear of encouraging nuisance claims. In the ordinary case, a Bureau mineral examiner will spend the winter months, when field work is difficult, seated in the county courthouse searching the chronological records for mining claims and — since the claimants must also be found — evidence of transfers of interest.[111] Trained to this work by the Bureau, the examiner will often find many more claims affecting the land in question than the professional abstracters who are occasionally hired on a contractual basis for such examinations.

The problem of identifying claimants is handled in a similar, perhaps even more tortuous, manner. For patent applications, the problem does not exist; the applicant is directed to identify all persons with an interest in his claim by providing a certificate or certified abstract of title,[112] which must show full title in the applicant. Notice of the application must be conspicuously posted on the claim and published weekly for a sixty-day period in the newspaper published nearest to the claim.[113] This suffices to establish the claim's priority over any competing claim — to deprive the competing claimant, to that extent, of his "property right" — if an adverse claim is not timely made in response.[114] Thus, *no* search for competing claimants need be made.[115]

Old and inactive claims, however, involve the Bureau in quicksand. Oil shale claims, for example, were located before 1920, usually by more

---

[111] Examiners commonly estimate that one-half to three-fourths of their time in working on contests is spent in these searches or the associated hunt for claimants.

[112] 43 C.F.R. § 3862.1–3 (1973).

[113] *Id.* § 3862.4–1.

[114] *E.g.*, Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transp. Co., 196 U.S. 337, 354 (1905); Black v. Elkhorn Mining Co., 49 F. 549, 552–54 (C.C.D. Mont. 1892), *aff'd*, 163 U.S. 445 (1896).

[115] The certificate of title relates only to the applicant's own location, and instruments or actions of record purporting to affect it. 43 C.F.R. § 3862.1–3(d) (1973). The field survey of the claim is intended to include any conflicts with prior surveys and with unsurveyed claims which may be encountered on the ground. *Id.* § 3861.2–1 (a)(2)(4). Land already patented, of course, will be excluded from the patent applied for. But regarding unpatented land — notably, unsurveyed claims which are encountered — exclusion is not ordered in the absence of a successful adverse claim, *and there is no apparent requirement of personal notice to the owner of the conflicting claim*, even when it has been discovered during the survey. *See* 30 U.S.C. §§ 29–30 (1970). It may be noted that only active claims are likely to be encountered on the ground; and at the time the General Mining Law was passed, if not today, it could be supposed that a posted and locally published notice of application for a patent would usually reach any competing, active miner. *Cf.* Black v. Elkhorn Mining Co., 49 F. 549 (C.C.D. Mont. 1892), *aff'd*, 163 U.S. 445 (1896) (unsuspecting widow). The proposition that the valid claim of a *known* adverse claimant could be eliminated without personal notice to him seems highly suspect today. Eisen v. Carlisle & Jacquelin, 42 U.S.L.W. 4804 (U.S. May 28, 1974); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

than one man, often by as many as eight. Assessment work filings typically ceased in the early 1920's; while there have been some subsequent sales of partial interests, nothing appears of record for most locators since that date.[116] Since then, most of the locators have moved from the vicinity, often long years ago; most have died; the property of some has passed intestate or through probate in distant places; the claim may or may not have been mentioned in any will; the inheritors of each locator's interest by this time may be numerous. Tracking down the locators, ascertaining how and to whom their estates passed, finding these persons (and perhaps *their* heirs), requires painstaking inquiry. Probate records, cemetery headstones, old folk in the vicinity, postal records, and regional telephone directories are among the sources checked; while the mineral examiners who do this work will not ordinarily be able to leave the state to pursue it, they can and do call upon the corresponding officers of other state offices to assist them, and by mail and telephone have at times extended their search even beyond the nation's borders.[117] Perhaps the most striking example, although one made somewhat special by its history, is the Bureau's special Oil Shale Project, centered in Denver. A sizable task force has been working since the late 1960's to identify all mineral claims affecting almost eight million acres of land in Colorado, Utah, and Wyoming thought to be valuable for oil shale. The effort is to extinguish those claims, where possible, so that a leasing program for

[116] Purchases of partial interests often have led to transactions which, like the patent application procedures, *see* note 115 *supra*, suggest the overscrupulousness of the Bureau's efforts. Under the General Mining Law, one of a group of co-locators may perform the assessment work obligation of a claim and then call on the other members of the group for contributions; a noncontributor's share may then be forfeited to him. The statute provides that notice of the obligation to contribute may be either "personal notice in writing or [weekly] notice by publication in the newspaper published nearest the claim . . . for ninety days." 30 U.S.C. § 28 (1970). This option to use notice by publication has been said to exist "regardless of knowledge, express or implied, as to location or proximity of the defaulting co-owner." 2 AM. L. MINING, *supra* note 3, § 8.14, *citing* Evalina Gold Mining Co. v. Yosemite Gold Mining & Milling Co., 15 Cal. App. 714, 115 P. 946 (1911); *see also* Rocky Mountain Mineral Law Foundation, Annual Assessment Work Manual 7–40 (D. Sherwood ed. 1972). However suspect this conclusion may be in cases of actual knowledge or of knowledge which is "very easily ascertainable," active search for a locator or his heirs is not required. Schroeder v. City of New York, 371 U.S. 208, 212–13 (1962); see note 127 *infra*. The purchasers of partial interests have used this procedure to acquire full ownership of the claims: they perform assessment work for a year or two; "advertise out" the other owners through notice in the local weekly newspapers; and, upon the predictable failure of response from the original locators' distant grandchildren, nieces, and nephews, have full rights to the claim. While the Bureau may wisely conclude that a reasonable search is nonetheless appropriate when it proceeds against a claim, that search can be kept within dimensions corresponding to the possibility that the persons found would in fact resist and might prevail — that is, owners of currently active claims.

[117] On one set of claims located late in the nineteenth century in what is now Dinosaur National Monument, a recent search identified 135 persons presently holding an interest in the claims. Nancy M. Ayers, Colo. Contest No. 469 (Bureau of Land Management 1974). The search documents reflect conversations with twenty-eight residents of six different localities and the clerks of four local courts, and inspection of probate and county land records, and several phone directories; the addresses of all but thirteen of the claimants were discovered. Cases involving sixty to eighty heirs are a fairly frequent occurrence in the Utah office.

which the land has been withdrawn can be put into effect. Although the use of a task force has permitted specialization and use of sophisticated data retrieval techniques, the group must follow the usual Bureau procedures in its mineral investigations and contacts with claimants. By mid-1972, it had barely touched the surface of the work to be done. Its full-time process, and the use of computer memory capabilities, undoubtedly produce greater efficiencies — but these are efficiencies in a fundamentally inefficient process. Even though, with good will and hard effort, information can be obtained from county records, the extent of effort required when that is the *only* indication of the claims' existence is so great as to be unreasonable. The question which ought to be asked is whether the effort is really necessary, from either the theoretical or the practical viewpoint, to assure clear title to the government and fairness to mining claimants.

In virtually all cases the conclusion is that the claim is probably invalid;[118] hence a contest is prepared, a complaint is served, and if answered, the case goes to hearing. The issues and procedures are identical with those of a patent contest, but the attrition rate is much higher. Thus, in 1971 the Bureau noted 6,149 new mineral entries and investigations among its adjudication operations, of which substantially more than half appear to have involved validity investigations.[119] A similar order of magnitude characterizes prior years. Yet only forty-eight adverse proceedings were referred for hearing in 1971, affecting 425 claims; the previous two years each saw eighty-three cases referred for hearing, affecting 3,234 and 341 claims, respectively.[120] The disparity is explained by the failure of claimants or their heirs to respond. Cases set for hearing include only those in which a timely response has been received to the Bureau's contest charges.

The expense of these proceedings is considerable. Individual proceedings would be the most costly mode, and the amount of detective work required of the Bureau in these contests adds to the costs. Thus, one

[118] The Bureau's Utah office, after investigating over 4,900 of the 12,258 claims in the new Canyonlands National Park, found none it thought valid; the experience of the Bureau's special Oil Shale Project has been the same.

[119] BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS table 108 (1971). The figures include 2,691 reimbursable investigations (that is, investigations of mining claim validity undertaken for other agencies); 1,797 "other mineral cases," probably relating to mining claims; 841 land disposal conflicts and 314 multiple use (non-disposal) conflicts, which probably concerned mining claim validity; and 506 other matters relating either to mineral entries (patent applications), surface use, multiple mineral development, or mineral classification. Only the last group clearly falls outside the present subject; the manner in which the statistics are reported permits no greater precision.

[120] BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS table 110B (1971); *id.* (1970); *id.* (1969). A similar rate of attrition is reflected in the experience of a single reimbursable project, the Canyonlands National Park project. *See* note 118 *supra.* Of 3,843 complaints issued, only twenty-four claimants asserting interests in 345 claims responded to the Bureau's statement of charges; 128 of these claims were nullified on bases requiring no hearing and the rest were set for hearing. The Bureau's mineral examiners believe there is no more than one disputable group of claims in the lot.

project undertaken for the Bureau of Reclamation in Colorado bears an estimated cost of $115,000, about three-fourths of which was said to have been incurred in searching county records for claims and claimants. About 450 claims were found ($256/claim); no more than twenty are expected to be put in issue. Another reclamation project, in California, cost $256,802.39, about $400 for each of the 667 claims examined. Answers were received only as to fourteen, and only three were found valid. The Canyonlands National Park Project,[121] yet to develop a valid claim from 4,900 examined, had cost $185,000 by mid-1972.

2. *A Suggested Procedure for Mining Claim Clearance* — The government's purpose in seeking to identify existing claims is to assure effective notice to all mining claimants of the need to establish the validity of their claims. Its extraordinary diligence is the product of the Department's view that contests are essentially in personam proceedings, in which any person who could possibly be found must be personally served from the outset if his interest is to be affected. Thus, the Department's rules provide that service of a contest complaint must ordinarily be made personally upon every contestee,[122] including each heir should the original locator have died. While the government, unlike a private contestant, is not disabled from proceeding by a failure to join all interested parties,[123] any judgment in its favor may be ineffective as to persons not named or served.[124] Only a limited provision for service by publication is made: the private contestant must show by affidavit, or the government by statement, the last known address of the contestee and the detail of the efforts and inquiries made in a "diligent search" to locate him; notice is then published for five weeks in a county newspaper of general circulation, sent to the contestee at his last known address and the post office nearest the land, and posted on the land and in the office where the contest is pending.[125] The "diligent search" is the extraordinary process described above. The BLM Manual appears to endorse that concept, describing it generally as involving "all 'reasonable' means of locating a contestee" and then adding such examples as interviews with residents and other miners, checking with local postmasters, and other steps similar to those commonly taken.[126]

If personal notice to each claimant were required to determine his possible interest in the land, the present exercise would be required; indeed, any claim not discovered as a result of the search through the records, however diligent, could not be affected. But this assumes that the principal orientation of these actions involves the individual claimant's

---

[121] See note 118 *supra*.

[122] 43 C.F.R. § 4.450–5 (1973).

[123] *Id.* § 4.451–2(b). *But see* Johnson v. Udall, 292 F. Supp. 738, 749 (C.D. Cal. 1968).

[124] Pinkett v. United States, 105 F. Supp. 67, 71 (D. Md. 1952); *see* Union Oil Co., 72 Interior Dec. 313, 315–16 (1965).

[125] 43 C.F.R. §§ 4.450–5(b), 4.451–2(f)–(h) (1973).

[126] VI BLM MANUAL, *supra* note 52, App. 1, § 5.2 (August 1, 1958).

personal rights and not, at least to the point where claimants come forward to assert those rights, ascertaining generally the existing interests in the lands involved. If the government's efforts are viewed as a whole, the latter characterization is more accurate. Needing a particular tract of land for its own purposes, the government seeks to determine all claims that others might have in that tract. The proceedings are then essentially actions to quiet title. Consequently, personal notice is not constitutionally required to determine each claimant's interests, so long as reasonable efforts have been made overall to discover and personally notify all those who might have an interest.[127] Those who are not found after such efforts can be bound, nonetheless, by alternative forms of notice, such as publication.

The operative question here is what constitutes a "reasonable" effort to discover and notify persons claiming an interest in the land. That question is not without difficulty. The fact that a person's name appears in the county records, together with Congress' designation of those records as the place where claims are to be recorded, might be thought to make him and his claim "known," and hence necessarily the subject of personal notice. But that is rather too simple an argument. County records were specified at a time when Congress anticipated that claims would have only a short life before patent. The provision for relocation of claims by others upon one year's default in assessment work both makes the significance of any particular claim recorded in the county books uncertain and suggests a judgment that only claims reflected in contemporary records need be seriously considered. As a practical matter, it is clear that the records are obscure, and "knowledge" of claims recorded there could only be imputed. So, too, distant relatives of the locators of an aged, unworked claim rarely know of its existence, much less have the knowledge and interest to prevail in a contest over its validity. If the locator himself has moved away, he has thus delivered his own verdict on the economic viability of the claim; even if he lacked the resources to develop it himself, he would not readily leave untended a valuable right subject to peremptory seizure by others, relocation, once it is left unmaintained.

Perhaps most important, Congress has since expressed the judgment that a complete search need *not* be undertaken to support a proceeding intended to determine government rights in land possibly subject to

---

[127] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950). As the Court there recognized, the question whether personal notice is required is no longer meaningfully dealt with on the basis of the traditional common law classification of actions as in personam or in rem, although those categories may be instructive. Rather, the issue is determined by balancing the state interest in final resolution of the issue (here considerable), the private right to notice and an opportunity to be heard, and the practicalities of identifying and notifying the parties at interest. What is reasonably possible must be done; but the notice required need not be so extensive that it forecloses final resolution. *Id.* at 314, 317. *See also* Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974); Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956).

previous mining claims. That is, both the Surface Resources Act of 1955 and the Multiple Mineral Use Act of 1954 provide only for a partial search of the county records (unless organized on a tract-by-tract basis), to supplement information on claims discovered through physical reconnaissance of the land, or otherwise known. Since title to the land remains in the government until patent, personal service plainly is not required for the Department to acquire jurisdiction over the subject matter of the dispute; only the fairness of the method to notify possible claimants of the opportunity to litigate could be questioned. Moreover, the judgment that the more recently adopted procedures of these acts are sufficient for fairness is not open to serious challenge.[128] "A state may indulge the assumption that one who has left tangible property [there] either has abandoned it, in which case proceedings against it deprive him of nothing . . . or that he has left some caretaker under a duty to let him know that it is being jeopardized." [129] In the condemnation context — where, as here, the action undertaken may appear from the state's perspective to affect a host of indeterminate private interests in a broad expanse of land — the state is forbidden to indulge this assumption only with respect to one "whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." [130] Even in such cases it has been suggested that the personal notice to be provided can be informal.[131] The procedures of the above statutes, which provide for mailed notice in such cases, plainly meet these tests, and thus define a "reasonable" effort to discover and notify mining claimants.

This conclusion would be equally valid if the same procedures were adopted for validity contests generally. The procedures authorized by the more recent statutes determine only a part of the miner's interest in his claim — the right to possession of leasing act minerals after patent, or to exclusive possession of the surface during the life of the claim. But these rights were considered by Congress to have been part of the "property" interest which attaches to a valid claim. Had Congress believed otherwise, it would simply have imposed the restrictions without providing any procedure for determining validity. It did not impose them, lest it be found to have impaired property interests, at the cost either of invalidity or an obligation to pay compensation. The conclusion that the specified procedures were constitutionally apt is unaffected by whether the result governs the validity of all or only some of the incidents of those claims. "Property" is equally at stake in either case; the value of the rights need not be dramatically different.[132] The congressional judgment, then, is fully

---

[128] *See, e.g.*, 1 AM. L. MINING, *supra* note 3, § 1.42.

[129] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 316 (1950).

[130] Schroeder v. City of New York, 371 U.S. 208, 212–13 (1962).

[131] "Even a letter would have apprised him . . . ." Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956).

[132] Consider a marginal location for uranium astride an oil field, or one for gold in the midst of commercial forest. The entire value of the claim may lie in the rights affected by Public Laws 167 or 585.

applicable to the contest situation. All that is lacking is a procedure through which to give it effect.

From the practical viewpoint, too, the current practice appears unwarranted. It is by far the most expensive means for ascertaining claimants and their interests. Bureau staff members quickly concede the futility of the procedure for identifying valid claims. Except perhaps in the special case of oil shale, where unfortunate Supreme Court decisions combined with a lengthy period of withdrawal to produce the expectation that claims unworked for decades might yet be taken to patent,[133] those claims which the Bureau has had to search county records to find uniformly prove invalid. In reality, they have been abandoned; but the effort taken to find the locators or their heirs and inquire regarding their interest in the claim is enough to convince a few that some value might exist and therefore lead them to make statements that preclude cancellation on that ground.[134]

The practice may already be disappearing under the influence of a recently adopted rule stating that the Bureau will regard substantial noncompliance with assessment work requirements as a ground of invalidity.[135] Claims unworked for five or more years, in all probability,

---

[133] The decisions in *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935), and *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930), seemed to state that oil shale claims remained valid encumbrances on government lands whether or not they were maintained, and despite the withdrawal of the lands from further location in 1920. That reading was accepted by the Department for almost a quarter century. Since 1960, when the Department issued the last oil shale patent, it has been engaged in a prodigious and as yet inconclusive effort to determine the validity of the outstanding claims and begin a leasing program. The teeth of *Krushnic* and *Virginia-Colorado* have been withdrawn. Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), *on remand sub nom.* Oil Shale Corp. v. Morton, 370 F. Supp. 108 (D. Colo. 1973). Discovery of a valid claim will now require that a present value for oil shale be demonstrated by evidence that a prudent man could profitably market the mineral; it appears unlikely that a present value of oil shale could be established as long as liquid petroleum can be marketed more profitably. Frank W. Winegar, 16 I.B.L.A. 112, 4 ENV. L. RPTR. 30005 (1974). The Oil Shale Project, described in the text, is seeking to identify all claims and claimants affecting the lands in question, so that their availability for leasing can be finally determined. *See* United States Smelting & Ref. Co., 6 I.B.L.A. 253, 255 (1972). The twenty-five years which elapsed between the earlier decisions and the Department's about face in 1960, however, undoubtedly produced expectations regarding validity and patentability which may influence the outcome of the Department's effort. Hickel v. Oil Shale Corp., *supra; see* text accompanying notes 58–70 *supra.* See Widman, Brightwell & Haggard, *Legal Study of Oil Shale on Public Lands,* V Energy Fuel Mineral Resources of the Public Lands (December 1970), for a lengthy and excellent analysis of the subject. C. WELLES, THE ELUSIVE BONANZA (1970) gives a popular account.

[134] Abandonment, as the Department interprets it, requires both acts of abandonment and intention to abandon. Proving that intention against a locator's statement that he always had some hope for the claim, although he was unable to work it, has been difficult enough to dissuade the Bureau from using that charge in contests. It is effective only when proved by the claimant's failure to answer the complaint. The Bureau has provided for accepting "relinquishments" of claims, formal waivers of right from persons willing to agree not to put it to the trouble of bringing a contest. But although form relinquishments appear in VI BLM MANUAL, *supra* note 52, § 5.2.25, efforts to obtain them in the past led to charges of coercion and over-reaching against Bureau personnel. The consequence was a set of cautionary instructions under which a claimant must virtually force a relinquishment upon the Bureau, substantially ending the usefulness of the device. *Id.* App. 2, § 5.2 (November 19, 1958).

[135] 43 C.F.R. § 3851.3(a) (1973).

could always have been safely ignored; it is now clear that that step could be taken. But even the new rule requires application if a claim is to be determined invalid; and, consistent with its present practice, the Bureau apparently plans to continue searching earlier records for all claims, whether or not assessment work has recently been done, in order to give individual notice of this possible ground for finding of invalidity and permit a hearing on it.[136]

The Department should adopt a form of verified statement procedure for identifying those claims burdening withdrawn or classified lands for which individual proceedings challenging validity may be necessary. Short of what the Constitution forbids, the Department has full authority to structure the procedures it follows. "The United States, which holds legal title to the lands, plainly can prescribe the procedure which any claimant must follow to acquire rights in the public sector. . . . [It] is not foreclosed from insisting on resort to the administrative proceedings for a determination of the validity of those claims." [137] No statute requires the contrary, and since the effort is to establish the encumbrances on title for a possibly extensive tract of land — and the task of identifying individual claimants is correspondingly difficult — use of the model provided by the 1954 and 1955 Acts is fully appropriate.

The proceedings in question, like the proceedings under the Surface Resources Act, would begin as a single inquiry into all claims affecting the land withdrawn or classified. Notice of the proceeding would be personally served on all claimants known to the Bureau or readily found by it through tract indexes, reconnaissance of the land, the knowledge of local land managers, or indications of activity in county records sufficiently recent to meet the requirements of the new assessment work rule. It has already been suggested that provision be made for voluntary registration of claims with the Bureau, corresponding to the special registers provided for by Public Laws 167 and 585;[138] claimants so registered would also be personally served. But all other notice would be effected by publication, according to the Department's usual practice, in local papers of general circulation.

Persons wishing to assert claims affecting the segregated lands would then be required to provide at least the information demanded in the two "model" acts — a verified statement regarding the date, location, and recording of the claim and the identity of co-locators.[139] Unless the

[136] The phrasing of the rule fits well the established pattern of presuming the validity of untested claims. Failure to comply substantially with the assessment work requirement "will render the claim subject to cancellation." *Id.* That is, all claims are treated as effective, requiring affirmative cancellation whether or not a discovery has been made or other prerequisites of validity — including substantial compliance — performed. This failure to distinguish between conditions of validity and misfeasances which might be grounds for cancellation is the key to the Bureau's procedural bind.

[137] Best v. Humboldt Placer Mining Co., 371 U.S. 334, 339–40 (1963).

[138] See text accompanying notes 41–46 *supra.*

[139] 30 U.S.C. §§ 527(a), 613(a)(1970). It is suggested below that claimants in these proceedings *and* in proceedings under Public Laws 167 and 585 may also be

claimant were able to show that proper notice had not been effected, a failure to respond in timely fashion would result in extinction of any claim. The responses received would identify the claims whose validity must be determined, without either unfairness to the claimants or the grinding and largely futile exercise of traversing county records to discover inactive claims.

III. The Validity Determination

Once the claims and claimants have been identified, the validity question can be squarely faced: Was the land on which the claim was located open to mineral entry at the time? Has all necessary work on the claim been performed? Has a discovery of a valuable mineral deposit been made? What, if any, charges are appropriate in a validity contest? The process of passing upon patent applications (and thus, validity) was early characterized as a "judicial function" [140] and long treated within the Department as calling for hearings in the event of factual controversy. Since 1956, the Department has regarded these hearings as adjudication required to be determined on the record under section 5 of the Administrative Procedure Act.[141] Despite its express reference to hearings required "by statute," the Supreme Court had earlier interpreted section 5 as also applying to quasi-judicial hearings required by constitutional due process.[142] Valid mining claims had long been characterized as "property in the fullest sense," [143] so that a hearing in some form was required by due process before matters affecting such a claim could be decided.[144] Thus, the Department reasoned, validity contests must be treated as section 5 proceedings.

That conclusion is overdrawn. Recognition of claimants' property interests in their claims grew out of cases in which local officials had

---

required to indicate the date, place, and quality of the discovery on which he bases his claim once an individual contest is begun. See text accompanying notes 164–68 *infra*.

[140] Smelting Co. v. Kemp, 104 U.S. 636, 640 (1881); *see* Knight v. United States Land Ass'n, 142 U.S. 161, 211–12 (1891) (Field, J., concurring). The question in these cases was the effect to be given the Department's findings in subsequent judicial proceedings, not what fairness might require within the Department. The conclusion reached was that departmental findings of fact, if within the Department's jurisdiction, were conclusive against collateral attack. *See* text accompanying notes 292–305 *infra*.

[141] Keith V. O'Leary, 63 Interior Dec. 341 (1956); 5 U.S.C. § 554 (1970).

[142] Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). The holding with which this interpretation was announced, that the Administrative Procedure Act governed certain proceedings involving aliens, was promptly reversed by Congress. Act of Sept. 27, 1950, ch. 1052, 64 Stat. 1048; *see* Marcello v. Bonds, 349 U.S. 302 (1955); 8 U.S.C. § 1252(b) (1970). That might have been taken as impugning the interpretation as well. Congress was unlikely to express displeasure with the whole in any other way. The reversal has not been so viewed, however, and the interpretation has survived intact. In effect, the APA has been understood to embody Congress's assessment of what the due process clause of the Constitution requires to achieve fairness in administrative hearings.

[143] *E.g.*, Manuel v. Wulff, 152 U.S. 505, 510–11 (1894).

[144] Cameron v. United States, 252 U.S. 450, 460 (1920).

signified the probable validity of the claims by preliminary acts on application for grant, and the Secretary then sought to reverse this decision.[145] While patent applications may have reached a similar stage before a contest is brought, other challenges to claim validity can occur when the claim has barely been located on the ground. The Department's view of the hearing question has been somewhat confused by a tendency to assume that the presumptive validity of a mining claim is established by the formal rituals of location — staking, posting, and filing. But the possessor of an unperfected (invalid) claim has no rights against the government. Before the question of hearing arises, a claimant could appropriately be required to demonstrate some reason to believe that the conditions of validity have been fulfilled — that he is in a position to make showings which, if believed, will demonstrate the existence of a valid claim.[146] The fact that a claim has been filed on county records may give a basis for presuming that the necessary physical identification of the claim on the ground has occurred. The simple facts of staking, posting, and filing, however, afford no rational basis for presuming that other requirements for perfection of mining claims have been met — in particular, the requirement that a valuable mineral deposit be discovered.

Yet the Department's present rules in effect make that presumption. No hearing is afforded if a claim is unregistered, or if the records of registration show that it was located after the land in question had been withdrawn from location. But the Department treats a hearing as required for claims registered during a period when the land in question was open to mineral claims, without regard to whether a showing of probable discovery has been made. In that proceeding, the claimant has the ultimate burden of persuasion regarding the perfection of his claim. The Department, however, first assumes the burden of making a prima facie showing that no valuable mineral deposit has been found.[147] Its acceptance of this obligation presumes that perfection will ordinarily have occurred — that because the claim is located on land open to mining claims, a discovery has probably been made and the probability of the contrary pro-

[145] Orchard v. Alexander, 157 U.S. 372, 383 (1895) (once equitable title vests, on acceptance of proofs and payment, government may not divest homestead claimant of right without due process).

[146] A possible analogy is suggested by the Supreme Court's recent decision in two cases involving termination of teaching contracts. Perry v. Sinderman, 408 U.S. 593 (1972); Regents v. Roth, 408 U.S. 564 (1972). The decision to terminate (the decision to treat as invalid an asserted mining claim) was held to come within the scope of the due process clause protection against impairment of property interests only in those cases in which a property relationship, tenure (perfection of claim), could be shown. Absent tenure, no hearing on termination need be afforded. Obviously, someone must decide whether tenure exists; subject to the unlikely application of the "constitutional fact" doctrine, 4 K. DAVIS, *supra* note 64, §§ 29.08–.09 & (Supp. 1970), that may be either agency or court. But as to this issue, the clear implication is that the burden of persuasion lies with the teacher, and, consequently, that he may be required to demonstrate a factual basis for the claim as a preliminary to any inquiry into it. *Cf.* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973). Any other conclusion would require a hearing in every case in which "tenure" was alleged, regardless of the ultimate conclusion.

[147] *E.g.*, T.C. Middleswart, 67 Interior Dec. 232, 235 (1960).

position must be shown before the claimant can be required to make his case.[148] The consequence of this approach is that the government cannot afford to ignore mining claims on its lands, however tenuous their validity, if it wishes to devote the lands to any use that will make it difficult to investigate claim validity in the future.

A. Investigating the Claim

On an application for patent, most necessary information is provided in the application, and the administrative investigation and work-up of the claim amount to little more than checking its accuracy. The required survey reveals conflicts with prior withdrawals and patents, and whether the $500 development work required for a patent has been performed. Discovery and, to a degree, the good faith of the applicant in seeking the land for a mining purpose,[149] are checked through an inspection of the premises by a Bureau or Forest Service mineral examiner. In contrast to the "diligent search" for claims and claimants, the examinations involve work which the examiners, who are mining engineers, are professionally trained to perform.[150] So far as could be determined, the examinations are performed in exemplary fashion. Both the Bureau and the Forest Service Manuals explain in detail the procedure to be followed.[151] The application must fully and adequately describe the discovery made. The

[148] One is hard put to explain the Department's acceptance of this obligation — or, indeed, the fact that until shortly before *Foster v. Seaton,* 271 F.2d 836 (D.C. Cir. 1959), the government usually seems to have accepted the burden of proof as well as the burden of proceeding. Had it chosen to rely on judicial rather than administrative proceedings, note 79 *supra,* the claimant — whether as trespass defendant or condemnation plaintiff — would have had to show the validity of his claim. Perhaps the explanation for the Department's formal tenderness toward claimants, this willingness to assume the likely sufficiency of a claim once it has been recorded, lies in the statute's history as a disposal device, adopted at a time when the anticipated disposition of federal lands and their best use was sale into private hands. At least in the past, it has been easy to forget that discovery as well as physical identification of a claim on the ground is required for validity, and thus to attach to every recorded claim the presumption of validity that, once established, requires a hearing before governmental action impairing the claim can be taken. *See* 1 AM. L. MINING, *supra* note 3, § 4.60, at 694. In gold rush days, when the presence of one miner invited a multitude and prospecting was based chiefly on surface manifestations, failure quickly to develop a claim to the point that made a presumption of validity reasonable invited top filing by another. While the standard of discovery was never as demanding in contests between miners as in other settings, note 90 *supra,* it was still necessary to show "reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or . . . that [the claim] is valuable for [placer] mining." Chrisman v. Miller, 197 U.S. 313, 323 (1905). One would think the same showing could be required of a claimant asserting a right to hearing on the validity of his claim to government land.

[149] Good faith must be averred to by applicants for placer claims but not by applicants for lode claims. *Compare* 43 C.F.R. § 3862.1 (1973) *with id.* § 3863.1–3(a). Want of good faith is rarely used as a contest charge because of the inconvenience of proving it; when used, it is equally available against lode claims. VI BLM MANUAL, *supra* note 52, § 5.3.13; *see* Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30021 (1973).

[150] A fuller description of the technical side of examinations may be found in Payne, *Examination of Mining Claims and Compliance with Law: Clear-Listing or Adversary Proceedings,* 5 ROCKY MT. MIN. L. INST. 163, 173–89 (1960).

[151] V BLM MANUAL, *supra* note 52, § 5.3.8; FOREST SERVICE MANUAL, *supra* note 82, § 2811.42.

examiner is to sample the points of discovery, mineralization, or ore extraction so described, and have them assayed. If at all possible, this sampling, and the inspection generally are to be done in the presence of the applicant, and his agreement is to be secured to the assaying laboratory used and other matters.[152] A wide variety of information regarding ore extraction, market expectations, and development plans is to be obtained. These responsibilities appear to be smoothly and fairly carried out. Applicants are in fact given ample notice of inspections and encouraged to be present; mineral examiners appear willing to go out of their way to assure that the inspection is a cooperative one. Although there was much complaint regarding the "unrealistic" discovery standard, none was heard about the procedure by which the matter is inquired into. The result is a detailed report with recommendations for action — a report which is generally available to the applicant under the Freedom of Information Act.[153]

The same ethos, carried into a situation in which the claimant is neither applying nor pliant, again produces an excessively heavy burden on the administrator. Until he applies for patent, the mineral claimant may never have to announce what he has found, where, in what quantities, or what he intends to do with it. From the deceased locator's nephews and heirs in Philadelphia, who have no idea what their uncle may have found but hope the government will treat them "fairly" by looking to

---

[152] *Cf.* Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30021 (1973).

[153] The only possible controversy regarding its availability concerns whether the report is an "intra-agency memorandum . . . which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1970). That brings the Department's deficient discovery powers, see note 166 *infra*, to the fore: under the discovery rules of federal district courts and most agencies, the documents would be so available in litigation with the agency, subject to possible excision of recommendations for action; but under the Department's limited subpoena powers, they are not. The Department's initial response was to continue to deny the report, resting the availability question on its own discovery powers. Under pressure in a case in which broad discovery had been stipulated by the parties, the Solicitor directed that the factual portions of reports be made available. Frank W. Winegar, 74 Interior Dec. 161 (1967), *rev'd on other grounds*, 16 I.B.L.A. 112 (1974). But this compromise was found insufficient on review, *id. sub nom.* Shell Oil Co. v. Udall, Civ. No. 67-C-321 (D. Colo., filed September 15, 1967), on the basis, reflected in the legislative history (S. REP. No. 813, 89th Cong., 2d Sess. 9 (1966)) and in other judicial opinions (Consumers Union of United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 804 (S.D.N.Y. 1969); Benson v. General Services Administration, 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878, 880 (9th Cir. 1969)) that "availability" was to be determined in light of the broad discovery powers of the district courts. That holding appears to have been accepted, and the reports are regularly made available to claimants who ask for them. There remain standing instructions that recommendations as distinct from factual matter not be disclosed; and this restriction seems fully justified by the statute and the prevailing understanding of it. EPA v. Mink, 410 U.S. 73, 85–94 (1973); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); S. REP. No., 813, 98th Cong., 2d Sess. 9 (1966). Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047 (1973). The opinion mentioned, however, recognized no such limitation, and the disposition of those who know about it is that the possibility of excising a portion of these reports is not sufficiently important to insist upon. Full reports, therefore, are often provided. In *Mink*, government counsel conceded in the Supreme Court that "low-level, routine factual reports" were fully disclosable. 410 U.S. at 91. The reports here fit that description.

see before proceeding against the claim, to the active but pugnacious locator who says to the examiner, "You're the expert — you tell me!", to the claimant who is simply unreachable but whose claim must nonetheless be proceeded against, the potential respondents in contests are frequently uncooperative. The mineral examiners often must examine the claim — ranging from twenty to 160 acres — without any information what to expect or where to expect it. Drawing on their knowledge and skills as geologists, they prospect the claim. Nor is this burden undertaken simply as a defensive precaution; the government's obligation to make a prima facie case of invalidity invites the claimant's defensive contention that the survey made was inadequate to support the government's case. To be sure, an indication that the claimant refused to cooperate will influence an administrative law judge's assessment of the matter; and when claimants assert additional points of discovery or minerals discovered at hearing after the examiner's evidence has been given, continuance for reinspection may be ordered. But the risk and delay involved are often unacceptable, and so the examiner must be able to give a respectable account of himself.[154]

As in the case of patent applications, the mineral examinations associated with validity contests are performed by Bureau examiners unless Forest Service lands are involved, in which case the Forest Service performs the examination.[155] In both cases, manuals and practice combine to stress thoroughness. Thus, the BLM Manual calls for the examiner to begin by reviewing the mineral characteristics of the neighborhood: geological literature, known mines, patents, and claims in the vicinity. For the field examination, he is encouraged, as on patent examinations, to contact the claimant and give him a chance to go along. During the examination, he is to find the claim on the ground (the claim corners and any discovery post or notice), survey the general geology, and "locate and inspect *all* mineralized exposures and excavations on the claim," giving special attention to the discovery point and taking necessary samples.[156] The examiners are told they need not make the discovery for the claimant — that is, dig beneath the surface or enter any dangerous

[154] While other approaches to the problem are preferable, giving failure or refusal to point out discovery points presumptive force on the discovery issue might serve to encourage greater cooperation. No self-incrimination principle exists to inhibit the drawing of this rational inference. As for the distant and unknowledgeable uncles or nieces who occasionally inherit claims, it is hard to require the government to respect as theirs an "asset" in which they have insufficient interest to prospect or develop—even in cases in which the original locator, had he survived, could have made the requisite showing.

[155] Where the report comes from the Forest Service, the Bureau sits in a reviewing posture. While the BLM has been held to have no authority to refuse a technically sound contest recommended by the Forest Service, *Ed Bergdal,* 74 Interior Dec. 245 (1967), it asserts but rarely exercises the right to review recommendations for patent and, if necessary, perform its own examination. BLM Directive, August 7, 1963. This oversight function has been the source of occasional friction. Letter, *supra* note 109, at 2.

[156] VI BLM MANUAL, *supra* note 52, § 5.2.9. If the claimant is not yet known, the inspector is also to try to identify him, and then provide him an opportunity to take part in a re-examination. *Id.* § 5.2.8.

or flooded workings — but the emphatic obligation to visit all exposures on the claim is more demanding than the duty owed to the patent applicant. The latter's application must precisely describe the discovery made, and the inspection of his claim is limited to the matters thus described.

In practice these rigorous instructions may be mediated somewhat by the examiner's sense of the occasion. Claimants may not be invited to accompany the examiner on his first survey when large projects involving a substantial number of claims are involved, either because identification of the claimants has not yet been completed, or because the inspector wants to appraise the claim before talking with the claimant or taking him to inspect the claim. A claimant's refusal to provide information may be met by a polite, but emphatic, explanation of the likely impact of that behavior when reported in the course of the contest hearing. Where the claimant is vague about what he has found and where, samples may be taken, but not with the care that would attend sampling at an identified discovery point. Statements can be found in departmental opinions to the effect that no more than reconnaissance is required for unworked claims.[157] The degree of casualness in such circumstances, however, should not be overestimated. Particularly as the inspection seeks to develop the geological character of the land and its suitability for mining, it calls upon the examiners in their professional capacity. A number of examiners voiced strong feelings about their professional responsibility here. Acknowledging their employment by the government and its interest in freeing the land of spurious claims, they nonetheless believed themselves professionally obliged to give each claimant the benefit of a thorough and professional examination, whether or not he was willing to cooperate.

The thoroughness and concomitant expense of the government's inspection is also influenced by its present obligation to negate discovery, prima facie, at any subsequent hearing. Uncertain what the claimant's assertions will be, the Department must be thorough enough in its search to exclude all reasonable possibilities of claim. Several of the officials interviewed believed, although without precise figures to back their belief, that the resulting expense was the largest single item of government cost in validity proceedings.

Although not all claims unearthed by the Bureau's "diligent search" are examined, the screening which does occur is limited. In the past, the screened out group has consisted principally of claims located during periods when the land in question was segregated from application of the mining laws, and thus subject to *ex parte* administrative nullification by the land law examiner.[158] The remainder are then referred to the mineral examiner for inspection before it is known whether any interest in the

[157] Frank Coston, No. A–30835 (Dep't of Interior, February 23, 1968).

[158] See text accompanying notes 86–88 *supra.*

claim will be asserted, and all are inspected unless relinquishments are volunteered.[159]

Under the Department's new regulation making a failure substantially to comply with the assessment work requirement a ground for cancellation,[160] further preinspection screening may be possible. Whether the work has been performed will be reliably shown by the county records; if no entry appears for the preceding few years — however many make credible the charge of failure of substantial compliance — that failure could also be asserted as a preliminary ground of invalidity, further reducing the need for mineral examination. Only if the assessment work charge is controverted would it be necessary to make an examination, in order to join in one hearing all charges affecting the claims.[161] The result should be a significant limitation of inspections. The Bureau appears ready to take this step.

If the assessment work rule is valid, it adds to the force of the congressional judgment reflected in Public Laws 167 and 585 that painful searches for claims and claimants in disorganized county records are not required for fairness in establishing the government's clear title to withdrawn or segregated land. Inactive claims, defined by the failure of substantial compliance, may now safely be presumed invalid;[162] the burden can be placed on their owners, after notice suitable to the character of proceedings to quiet title, to assert the claims and establish their validity. The government need search no further than to find all claims that might be deemed active, on which assessment work has been substantially and contemporaneously performed, and the claimants who have contributed to that activity.[163]

A verified statement or show cause procedure would nonetheless be preferable. The projected use of the assessment work rule continues to presume the validity of any claim once noted in the county records, requiring a "diligent search" to find all claims and their owners, however old and remote. Although the rule may reduce the number of mineral inspections which must be performed, it is ineffective in enlisting the claimant's cooperation in those inspections which do occur.

---

[159] See note 134 *supra*. Thus, in the Auburn (Cal.) Project for the Bureau of Reclamation, 667 claims were examined, but only fourteen answers received; the Canyonlands National Park project examined 4,900 claims, but only 345 were defended by answer.

[160] 43 C.F.R. § 3851.3(a) (1973); *see* note 136 *supra*.

[161] A hearing will often be necessary if the assessment work allegations are denied. The question of "substantiality" presents factual issues, and others are possible; more important, the Department has no established summary judgment procedure. Since the assessment work ground leads to "cancellation" rather than a finding of nullity, note 136 *supra*, the Department would treat it as a ground for contest rather than "administrative adjudication."

[162] The historical record of the past decade, in which fewer than ten percent of claims challenged have been supported against the government's challenge and a tiny proportion sustained, would equally support such a presumption.

[163] *See* text accompanying notes 128–36 *supra*.

Neither Public Law 167 nor Public Law 585 provides a model for requiring that cooperation. While each requires identifying information to be provided in a verified statement, in neither case does the information include notice regarding the claimant's asserted discovery. Rather, the Acts provide that once possible claims and claimants have been identified, each asserted claim is to become the subject of notice and hearing under "the then established general procedures and rules of practice of the Department of the Interior in respect to contests . . . affecting public lands of the United States." [164] Those rules and procedures, then and today, impose no obligation on the claimant to reveal the character of his claim until the government has completed its prima facie case. And while pending proposals for change in the Department's procedural rules create a prehearing deposition and interrogatory practice which could readily incorporate inquiry into discovery,[165] the Department's authority to engage in mandatory discovery is open to question.[166]

If claimants were required to identify their discovery as part of their answer in contest proceedings filed against their individual claims, neither obstacle would be disabling.[167] Public Laws 167 and 585, and the model

---

[164] 30 U.S.C. §§ 527(c), 613(c) (1970).

[165] Proposed Interior Dep't Reg. §§ 4.469–72, 37 Fed. Reg. 12543–44 (1972).

[166] The Department's direct statutory subpoena power in mining contests is limited to subpoenas directing the attendance of witnesses, and even these are limited in effect to the county in which the hearing in question is to be held; depositions could be taken of witnesses more distantly located. 43 U.S.C. §§ 102, 105 (1970). In 1968, the Department attempted to assert authority to compel prehearing production of documents by rule. 33 Fed. Reg. 10394 (1968). Apparently catalyzed by miner complaints, the House Committee on Government Operations began an inquiry into this effort, not because "[t]he issuance of the invalid regulation was . . . a notorious act of tyranny. . . . But [because] it would result in subjecting citizens to inconveniences which Congress has not seen fit to require of them." HOUSE COMM. ON GOV'T OPERATIONS, UNAUTHORIZED BUREAU OF LAND MANAGEMENT SUBPOENA REGULATIONS, H.R. REP. No. 916, 91st Cong., 2d Sess. 1 (1970). The Department backed down. *See* 43 C.F.R. § 4.425 (1973). It has since sought legislative authority for investigative powers comparable to other agencies, most recently in connection with the pending Organic Act for the Bureau of Land Management (H.R. 5541, 93d Cong., 1st Sess. (1973)). The handicap under which it presently operates is hard to understand except as a relic of earlier times, when agency investigative powers were not so well accepted as they are today. The authority should be granted.

The Department's hearing procedures do provide for an optional prehearing conference, at which an exchange of information might be agreed upon. 43 C.F.R. § 4.430 (1973). In conformity with the Department's understanding that it lacks discovery power, however, these rules make no provision for mandatory production of information at these conferences, or sanctions, such as a presumption that the withheld facts would be unfavorable to the withholder, for failure to produce it. In private conferences, departmental hearing examiners remarked that they did what they could to encourage the production of information, including the issuing of discovery orders they knew to be unenforceable; that practice is as questionable as it is understandable. The handicap should be removed. *See* Administrative Conference of the United States, Recommendation 70–4, 1 ACUS 37, 571 (1971); Tomlinson, *Discovery in Agency Adjudication,* 1971 DUKE L.J. 89.

[167] It would be more efficient from the Department's perspective to require that the verified statement include the discovery information. That would put the Department in possession of all the information it typically possesses regarding patent applications, at the very outset. The failure of Public Laws 167 and 585 to make a similar provision does not *demonstrate* that the Department could not so provide in its rules. The Department might consider, however, whether the cost to the small miner of generating such information (*see* text accompanying notes 175, 229–30 *infra*)

proceeding discussed here each begin as collective actions, involving a wide expanse of governmental land clouded with possible numerous unidentified claims. The stages thus far discussed, analogous to quiet title proceedings, lead to identification of the active or defended claims; the statutes then provide for the validity of those claims to be individually determined, for limited purposes, through the Department's usual contest procedures. No effort is made to influence or define what those procedures shall be. Like the General Mining Law, the two statutes leave definition of sensible contest procedures to the Department.[168] If the Department would free itself of its present irrational presumption that filing a notice of claim in a county courthouse (or a verified statement in the proceedings here discussed) demonstrates the discovery of a valuable mineral, a fair procedure putting the burden of showing probable validity on the claimant could be readily constructed. Where a verified statement has been filed, the Department must afford an opportunity to establish validity but fairness does not require a full, quasi-judicial hearing where a plausible showing of validity cannot first be made.[169] Such a showing could be insisted upon in the detail now required for patent applications, as part of the answer to the individual contest complaint.[170] The mineral examination, performed subsequent to its receipt, would then serve the confirmatory function characteristic of patent proceedings to which it is best adapted.

Requiring specificity of answer in response to a general complaint, in this case a recitation that "no discovery has been made," would mark no striking procedural departure. The Bureau would have obtained sufficient geological information to ground the complaint through its reconnaissance surveys in connection with the withdrawal and with initiation of the verified statement procedures. In a variety of contexts, civil action defendants are required to plead with specificity matters likely to be within their personal knowledge.[171] Respondents in administrative actions, as

---

makes it more fair to wait for an individual determination that his claim must be cleared before requiring him to incur that cost. These two considerations, in any event, explain the more limited recommendation made here at the acknowledged cost of somewhat more cluttered procedural lines.

[168] Best v. Humboldt Placer Mining Co., 371 U.S. 334, 339–40 (1963); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[169] *See, e.g.,* Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964); *see* notes 145–46 *supra.*

[170] The Denver Regional Solicitor has made similar proposals. In support of the proposal, the Solicitor remarked:

> As the situation exists in a mineral contest, a Government mineral examiner can accompany a claimant on an examination of the lands and be advised of one discovery point and certain minerals claimed. However, the mining claimant, as has been done on many occasions, can appear at the hearing and claim other points of discovery and additional minerals. This creates undue confusion of time so that additional examinations of the claim may be made. We feel the proposed regulation will eliminate these delaying tactics.

Denver Regional Solicitor, Internal Memorandum of April 28, 1971, § 1852.1–3(a)(5).

[171] *E.g.,* FED. R. CIV. P. 9 (capacity, fraud, performance, or occurrence of conditions precedent); N.Y. CIV. PRAC. § 3015(a) (McKinney 1974) (condition prece-

well, have been similarly burdened as a condition of obtaining a hearing on matters sharply affecting their interests.[172] The Department has the power to define the contents of a well pleaded answer, and the particular obligation here discussed is strongly supported by the historical record of contestants' failure to establish the validity of their claims.

Another possible objection to the procedure lies in the constant concern of miners that the Bureau or Forest Service would harass them by bringing contests without warrant if free to force their hand in this manner. The requirement would impose a measure of cost on the locator, should he be forced to seek a mining engineer's professional help in drawing up his response; the obligation to make an elaborate response, particularly during months when weather may make his claim inaccessible, may require additional time for answer. The concerns are legitimate but should be met directly. The initiating government agency could be required to show good cause for bringing contests; reasonable extensions of time for answering the contest complaint could be given; and an outcome favorable to the claimant could be given conclusive effect (absent dramatically changed circumstances) for the future.[173] "Good cause" for bringing a contest is *not* a prima facie basis for belief that no discovery has been made; rather, it is established by any of the reasons to which the Bureau now administratively limits itself in bringing contests: withdrawal or classification of the land for uses inconsistent with mining, or substantial reason to believe that a claim is being abused.[174] Once sound reason to insist on assessment of the claim is shown, it is not unfair to require the miner to make a showing of his claim's probable validity. Indeed, the pending proposals for change in the mining laws assume the propriety of requiring even the possessors of valid rights under the present law to apply for patent within a brief period after passage of the reform legislation or forfeit those rights.[175] Within that assumption lies the proposition that the burden of demonstrating discovery may properly be placed on the claimant, that nothing about a claim implies a license to be secretive about discovery or puts on the government the burden of proving the negative when a proper occasion for determining its validity arises.[176]

---

dent); *see* Sweeney v. Buffalo Courier Express, Inc., 35 F. Supp. 446, 447 (W.D.N.Y. 1940) (defenses to libel); Winslow v. National Elec. Prods. Corp., 5 F.R.D. 126, 129 (W.D. Pa. 1946) (Fair Labor Standards Act — defendant may be required to respond with particularity regarding matters within its knowledge).

[172] *See* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973).

[173] *Cf.* 30 U.S.C. §§ 527(c), 613(c) (1970) (prohibiting successive challenges under those acts).

[174] See note 82 *supra.*

[175] S. 1040, 93d Cong., 1st Sess. § 123(d) (1973).

[176] The proposals go further, requiring claimants to undertake the expense of cadastral survey and to undergo the other tests, procedures, and costs of a patent application. Whether or not these additional burdens can be imposed on a claimant able to demonstrate the validity of his claim, the judgment that demonstration can be required, and the claimant forced to take the initiative in making it, is the feature to which attention is drawn here.

Once the government is notified of the precise nature of the claims, its mineral examiners will have a basis they now lack for conducting their inquiries. Thus, except for reconnaissance missions intended to uncover obvious, active workings as part of the government's effort to discover active claims, no mineral inspections need be made before this point; when made, they should follow the pattern set in inspecting claims for which patent application has been made, restricting themselves to the exact locations and minerals specified. The point is to save and focus work, for the benefit of the claimant in good faith as well as for the government. The examination should continue to be made in accordance with the present practice of proceeding with the claimant's cooperation, taking samples where he directs, and using laboratories mutually agreed upon to assay them.

B. Formulation of Charges

The mineral examiner's report of his inspection contains both a thorough description of his investigation and its results and a recommendation for action. In the Bureau, it will be transmitted to the minerals specialist, the senior mineral examiner of the state office, for a technical review limited to assuring "a professional job," [177] and to the land law examiner, who makes the final decision whether to contest and draws up the charges made in the complaint. The Regional Solicitor is not necessarily involved.[178] In the Forest Service, the mineral examiner himself will decide what if any charges are to be brought, after consultation within his local office; actual preparation of the request for contest is done by attorneys of the Department of Agriculture's Office of General Counsel. The recommendation is then sent to the Bureau's land law examiner. Under the Bureau/Forest Service operating memorandum, initiative in this matter substantially belongs to the Forest Service;[179] its requests are honored unless formally deficient or insupportable on the report, or unless a report requires further study or re-examination by a Bureau examiner (a rare occurrence). In Forest Service cases, then, the land law examiner primarily performs drafting services.

The land law examiner's decisions, including decisions to "clearlist" (forego challenges to) particular claims, rarely receive close review. The poor repute in which the General Mining Law is now held by some land law examiners and the lingering impact in the Department of the Teapot Dome scandal may make it unlikely that examiners will resolve doubts about clearlisting in a claimant's favor. This reluctance may also be

---

[177] Technical proficiency is also assured by initial and brushup training at the Bureau's Phoenix, Arizona training center. Since there are fewer than ten examiners in any state, supervision tends to be quite informal.

[178] In Colorado, where the land law examiner is a lawyer and the State Office is miles from the Regional Solicitor's Office, the Solicitor is consulted only occasionally, on an informal basis. In Utah, a single state Region with joint offices, the Solicitor's Office shares the drafting function with the land law examiner, who is not a lawyer.

[179] Ed Bergdal, 74 Interior Dec. 245 (1967); see note 155 *supra*.

encouraged by the realization that a decision to clearlist is largely personal; initiation of a contest is one way to pass responsibility on to others. This skepticism is fully appropriate in the withdrawal/classification context, given the procedural burdens under which the government labors and the usual absence of any reason to suppose that the claims will be valid. But in the patent context, it seems less apt. Together with miners' general perception that the process is inefficient and slow and their fear of risking the invalidation which now accompanies rejection of patent applications,[180] the examiners' uncharitability is one of the factors discouraging patent applications.

Some differences exist between the Forest Service and the Bureau in the processes by which charges are drawn up. The former entertains justifiably higher suspicions that mining claims on its lands have been located for purposes other than mining: patents, once granted, pass title to all timber on the claims; and the sudden appearance of a cabin may suggest the wish to have a pleasant place to spend the summer. As a result, the Service is more likely than the Bureau to allege matters bearing on the good faith of the claimants. In the past, the Bureau has usually limited itself to the assertion that no discovery of valuable mineral has been made.[181] With adoption of the new assessment work rule, a failure to comply with the work obligation may also be regularly alleged.

On the whole, however, the practice is strikingly uniform in its emphasis upon the "discovery" question. The principal determinant is neither the mineral examiner's report nor discretionary preference for one rather than another form of charge. Emerging clearly and uniformly from discussions at every level is a strong sense of futility about developing any issue but discovery, because that is the only issue on which the administrative law judges will base a holding adverse to the claim. However apt charges of abandonment, want of good faith, lack of mining purpose, or the like might be,[182] want of discovery will be seized upon as sufficient basis for declaring the claims invalid, leaving the other issues unresolved.

The reasons for this preference lie in the apparent objectivity of the criterion. "Discovery" is quantifiable, determinable, or at least apparently so, on the basis of examination, chemical assay, and economic calculation,

---

[180] See note 90 *supra.*

[181] Complaints may also assert on occasion that the land in question is not "mineral in character." The claim is one which adds nothing to the assertion that no discovery has been made; the land might be mineral in character and yet discovery wanting, were the claimant lazy or unlucky; but a discovery could not be made were it not "mineral in character." Nor does the General Mining Law make validity turn on the question. The characterization is important, however, to classification of lands for certain dispositions to nonfederal applicants. Where contests are brought to establish the land's availability for those dispositions, making the assertion may be thought significant for the subsequent disposal process. Absent mining contests, however, no formal proceedings are brought to establish whether the land is "mineral" or not; the charge may be used chiefly by force of habit. Confusing and irrelevant to the contest outcome, it should be dropped.

[182] *See, e.g.,* Coleman v. United States, 363 F.2d 190, 202 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 599 (1968); Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017 (1973).

without any need to refer to the shadow world of purpose, intention, or personal conduct.[183] Application of a universal, quasi-scientific rule to the well reported and often uncontradicted [184] characteristics of a particular claim is far simpler than divining from conflicting testimony and impressions an individual's prior intent to abandon or maintain his claim, or his present purpose to use it for mining or other purposes.[185]

C. Default

The Department's ability to deal with mining claims encumbering its lands is further restricted by its practice concerning failure to respond to notice of the resulting contests. The patent applicant is fully identified by his application papers, which include an address of record. He will ordinarily defend his claim if contested; but should he not respond to a notice of contest, the Department is unimpeded in resolving the dispute by default. In other contest situations, however, no address of record is provided. Claimants are hard to find and, when found, rarely respond to notice of contests.[186] With virtually all cases thus resolved by default, the question under what circumstances these judgments may be reopened or treated as ineffective is central. The Department has long been criticized for excessively rigid enforcement of the time limits it sets for response to notices of contest when received.[187] That problem is counterbalanced by another; when response to a complaint is never received, the Department is remarkably ready to conclude that proper service was never effected and hence that the resulting default judgment was ineffective.

An example of the first of these characteristics is given by a recent Board of Land Appeals decision in a contest brought by the Forest

---

[183] Some readers may object that the test for discovery involves assessments regarding the likely behavior of the "reasonably prudent miner"; when discovery is present, he would develop a mine; when not, in the usual formulation, he would be justified only in continuing to explore the prospects for development. *Cf.* note 90 *supra.* Deciding how a reasonably prudent miner would behave, like assessing the actions of the reasonable man of negligence actions, obviously involves judgment of a delicacy surpassing mere recital and manipulation of numerical data. Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017 (1973). That judgment, nonetheless, need not penetrate the subjective realm.

[184] See text accompanying note 214 *infra.*

[185] The readiness with which the "discovery" ground is seized upon in lieu of perhaps more accurate judgments regarding purpose has its impact on the content of the standard. See text accompanying notes 271–76 *infra.* In order to avoid the necessity of discriminating between those acting in and out of good faith, the test becomes stringent enough to invalidate all of the subjectively questionable claims. But, made to do this work, the discovery standard then imperils the bona fide, but marginal claim, with the result already seen: fewer applications for patent, and a desire to avoid contact with the Department at virtually any cost. The Board's recent decision in Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017 (1973), might be understood as an effort to reverse this trend.

[186] Since each claimant may hold whole or partial interests in an unlimited number of claims, and contests are initiated against claims, not claimants, the proportion of claimants who respond to complaints cannot be precisely stated. Well under ten percent of claims are defended. *See* note 120 *supra.*

[187] *E.g.,* McCarty, *A View of the Decision-Making Process Within the Department of the Interior,* 19 AD. L. REV. 147, 164–68 (1967).

Service.[188] Reflecting the working memorandum, the complaint in the contest was signed by Forest Service officials and drawn up on Forest Service stationery. In the body of the complaint, however, the contestees were directed to file their answer within thirty days with the local Bureau office. It is in the Department of the Interior that any adjudication, whether after default or hearing, takes place.[189] An answer was filed with the Department of Agriculture within the regulatory period; by the time the claimants could be apprised of their error and a new answer submitted, the period for answer had barely expired. The Department's regulations provide a grace period of ten days for its receipt of papers timely mailed.[190] The answer was received well within that period. The fact that it was not transmitted until after the thirty days had ended, however, was held conclusive. A default judgment was entered. The regulations state, and the Hearing Examiners and Board of Land Appeals assume, no basis on which a failure to direct an answer in time to the proper office can be excused.

At one level this result can be attributed to carelessness on the claimant's part. Even if the heading and signature on the complaint might be somewhat misleading, its body clearly stated to what office response was to be made, and sufficient time was provided for the response. Still, the potential for misreading was there, and in bringing these contests the Department often encounters claimants who can afford no more than cursory legal services, if any at all.[191] No statute requires such sternness. If discretion were thought available, it would certainly have been exercised in the claimant's favor here. The Bureau could afford to recognize the frequent unsophistication of the citizens involved in contest proceedings rather than give the appearance of relying on technicalities to avoid the merits. Mistakes of the kind made could be indulged without prejudice to the Bureau or any threat to the integrity of its processes.

While the Department is unbending in its refusal to reopen default adjudications, it is also — perhaps in unconscious compensation for this rigidity — extraordinarily ready to declare those actions ineffective. Service is ordinarily achieved by registered or certified mail, return receipt requested. Because claimants have no address of record, this service is frequently ineffective; or the receipt may be signed by a spouse, child, or employee rather than the person to whom it is addressed. In the former case, the resulting default adjudication may be treated as final, if a "diligent search" had been made and the last known address was used.[192] In the latter situation, however, the apparent default will be treated as ineffective

---

[188] James D. Lindsay, 10 I.B.L.A. 238 (1973).

[189] 43 C.F.R. § 4.506 (1973).

[190] *Id.* § 4.422(a).

[191] *See* text accompanying notes 229–31 *infra.*

[192] Roy Jones, 10 I.B.L.A. 112 (1973). The conclusion is entirely justified, particularly given the character of the proceedings as a whole. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 25, 57, 59 (1971).

to end that person's interest in the claim should it later be challenged [193] unless written authorization for the signature appears on record. Since claims may have as many as eight locators, and by the time a contest is brought, each of these may have passed on his interest to several heirs, the trap the Department has set for itself is apparent. Almost inescapably, some of the partial interests in any claim under contest will escape valid service by this test.[194] Even if other owners should respond and defend, so that a determination on the merits is made, the resulting judgment is treated as ineffective for those not "properly" served.

No principle of fairness requires such a narrow view of effective service. All that is required is a method reasonably calculated to give persons interested in the land, known or unknown, knowledge of the proceedings in which their claims may be determined.[195] Notice delivered and received at the claimant's address suffices at least to raise a presumption of effectiveness which he may be called upon to defeat.[196] Contests associated with withdrawals or classifications may and should be begun on a verified statement basis, so that through a combination of notice and publication constitutionally effective notice of the proceedings is assured. Provision in the verified statement for incorporation of an address of record will eliminate the problem for further proceedings.[197]

Whether or not a verified statement procedure is adopted, the requirement of *personal* delivery of the contest complaint should be eliminated from the Department's rules.[198] Nothing in the nature of service by registered or certified mail, as distinct from personal service, requires that delivery be made only to the contestee. The questions whether service was made at the proper place, to a responsible person in the claimant's household or employ, are the same as they would be with regard to personal service. The manner of proof may differ from what it is when a process server is employed, but the identity and signature of a spouse or employee are no less subject to demonstration than the purported signature of the claimant himself, on which the Department agrees it is proper

---

[193] United States Smelting & Ref. Co., 6 I.B.L.A. 253 (1972); Union Oil Co., 72 Interior Dec. 313 (1965).

[194] Thus, in *Union Oil Co.*, not one of the more than two hundred claims involved had been fully cancelled; the usual defect was that a spouse or co-locator signed the receipt. 72 Interior Dec. at 313.

[195] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 25, 57, 59 (1971); RESTATEMENT OF JUDGMENTS § 6 (1942).

[196] See note 131 *supra;* Shushureba v. Ames, 255 N.Y. 490, 175 N.E. 187 (1931). The Department recognized this in *Union Oil Co.* as the usual rule in judicial proceedings, but felt obliged by the early departmental precedents interpreting its regulations to take the narrower view. 72 Interior Dec. at 320–21.

[197] 43 C.F.R. § 4.401(c)(2) (1973), dealing with service of documents generally, states that once a record address has been furnished, 43 C.F.R. § 4.22(d) (1973), service by registered or certified mail may be proved by a post office return receipt showing that the document was delivered at the person's record address.

[198] *Id.* §§ 4.450–5, 4.451–2(h) (receipt must be shown by "personal delivery").

to rely. In other settings where service by mail is permitted, personal delivery is not thought essential.[199]

D. Hearing Procedures [200]

Contests concerning the validity of mineral locations are heard by Departmental administrative law judges headquartered in Sacramento, California and Salt Lake City, Utah. The hearings themselves are held in cities close to mining areas, to which the administrative law judges travel whenever a sufficient number of cases to make up a docket — five or so — have accumulated, or if the oldest case has been pending for an unusual length of time. In general, the hearings are conducted as formal section 5 adjudication; all testimony is transcribed by a reporter, and that transcript becomes part of the record of the proceedings.

The number of hearings is not large, averaging 120 per year [201] during 1967–1971; nor are the hearings themselves usually complex. For reasons already stated, "discovery" is usually the only seriously contested issue, and testimony ordinarily takes less than a day. The cases represent a substantial part of the docket, nonetheless; in Salt Lake City, where four administrative law judges are centered, mineral contests occupy about half of the Office's time.

From the point of complaint forward, hearing procedures are closely controlled by Departmental regulation.[202] Under the present rules, contests are not referred to the Office of Hearings and Appeals for hearing, or to the Solicitor's Office for prosecution, unless a timely answer to the Bureau's complaint has been received. Default adjudications and determinations regarding the timeliness of response are made within the Bureau subject to appeal to the Board of Land Appeals; together with the cases the Bureau decides on the ground that invalidity is shown by record of a prior withdrawal, they represent at least ninety percent of the adjudications made. Once the complaint and answer have been referred to the administrative law judges, an administrative assistant screens the papers, referring to the senior hearing officer those which seem likely to involve substantial controversy; in these cases, the latter will suggest

---

[199] Combs v. Chambers, 302 F. Supp. 194, 197–98 (N.D. Okla. 1969); Shushureba v. Ames, 255 N.Y. 490, 175 N.E. 187 (1931); *cf.* Bucholz v. Hutton, 153 F. Supp. 62, 67–68 (D. Mont. 1957) (statutory wording required narrower interpretation).

[200] The issues dealt with in the next two sections of this article are the subject of Chapter X of Professor McFarland's Report (C. MCFARLAND, *supra* note 20, at 154–231). His chief focus, however, is upon discretionary decision, the Department's usual process, rather than the few occasions, such as mining contests, for which formal hearing procedures are routine. Particularly is this so with respect to the hearing stage. The criticisms generated by his focus are generally inapplicable in the present context. He finds the details of the formal hearing process largely unexceptionable, *id.* at 169; little change, other than consolidation of the regulations governing those hearings in Part 4 of the Department's Rules, 43 C.F.R. §§ 4.1 *et seq.* (1973), and movement of the Bureau's hearing examiners to the newly created Office of Hearings and Appeals, has occurred since his report was written.

[201] BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS table 110 (1971); *id.* (1970); *id.* (1969); *id.* table 71 (1968); *id.* (1967).

[202] 43 C.F.R. §§ 4.1 to .30, 4.400 to 4.452–9 (1973).

to the parties the possibility of a prehearing conference to define issues and otherwise prepare for hearing. Cases that appear routine are filed according to the probable location of the hearing, to await accumulation of a sufficient number. If the parties themselves do not suggest prehearing, they will next hear from the Office sixty days before a suggested hearing date, when they will be notified of its place and occurrence. The length of the warning thus afforded reflects the sedate pace of action of these matters.[203] The slow pace perhaps has, however, both reduced the incidence of requests for continuance and encouraged the administrative law judges to careful scrutiny and frequent denial of those requests they do receive.

As previously noted, the Department's statutory authority to discover the basis on which a locator asserts his claim in prehearing inquiry is sharply limited — or at least considered by the Department to be limited — by its deficient subpoena power.[204] The administrative law judges consider themselves powerless to order prehearing disclosures upon which the parties cannot agree. In cases tried by lawyers familiar with the federal rules a substantial measure of agreement may be achieved;[205] and some hearing officers may enter a discovery order for whatever good it will do, knowing it to be unenforceable. Nonetheless, because no more is now required in answer to the government's complaint than a general denial of its necessarily general assertion that no discovery of a valuable mineral has been made, most cases now reach hearing without any prior opportunity for screening or for making particular the issues for trial.

The genesis of the hearing requirement has already been explained. Under the statute, a claim once perfected by discovery of a valuable mineral is considered property in every sense, entitling its owner to exclusive possession of the minerals discovered, such use of the land as may be necessary for their extraction, and, if he wishes, purchase of the associated lands at statutorily fixed prices. Some mechanism had to be provided for determining in individual cases whether perfection had occurred, and the Department has consistently provided such procedures, including a form of hearing for entertaining and resolving disputed factual issues.[206] While remarking that such procedures were required,[207] courts which early faced the issue did not suggest that more than a chance to state the basis of one's claim was essential; and, indeed, they gave near conclusive force to the Secretary's factual determinations.[208] It was not

---

[203] The NLRB, for example, requires only ten days notice, with continuances available only through an administrative official. 29 C.F.R. § 102.90 (1973).

[204] See notes 153, 166 *supra.*

[205] *Id.*

[206] *See, e.g.,* Franklin Bush, 2 L.D. 788 (1884).

[207] *E.g.,* Cameron v. United States, 252 U.S. 450, 460–61 (1920).

[208] *Id.* at 464; Standard Oil Co. v. United States, 107 F.2d 402, 409, 410 (9th Cir. 1939); Peck, *Judicial Review of Administrative Actions of Bureau of Land Management and Secretary of the Interior,* 9 ROCKY MT. MIN. L. INST. 225, 232–42 (1964); see note 140 *supra; cf.* C. MCFARLAND, *supra* note 20, at 168, 205–06 n.116.

until 1956 that the Department concluded that validity determinations require quasi-judicial hearings in which the Administrative Procedure Act's provisions for formal adjudication must be observed.[209] This conclusion was quickly endorsed.[210]

Formal adjudication is appropriate in the unusual case in which the locator's claim is given substance by prior proceedings. A patent application, for example, will almost invariably show that the claimant's dominion over the land and mineral findings have reached a level giving strong color to his claim.[211] Until such color appears, however, the argument for a fact-finding hearing is not persuasive. The assertion of an interest in purchasing or acquiring possessory control over government property would not usually be considered an occasion requiring a formal hearing, even though decision is necessarily made case-by-case. Moreover, the notion that, in the absence of a colorable claim, the government must first undertake to show that there is no right to the lands involved is indefensible. Neither statute nor any principle of fairness requires anything of the kind. Taken together with the absence of any procedure for requiring the claimant to reveal the nature of his claim, the Department's acceptance of an unqualified right to a hearing in which it bears the burden of going forward results in a notable degree of wasted motion and needless delay.[212]

During 1971, the Department's Salt Lake City hearing examiners held sixty-seven hearings, of which twenty-seven were contests involving mining claims — four patent applications and twenty-three validity contests. Of these, only three involved more than one day of hearing. Only fourteen involved any conflicting evidence or substantial legal issue warranting adversary presentation; in nine of the remaining thirteen, the claimant put on no evidence after the government had completed its prima facie case, and in four the claimant gave evidence that confirmed

---

[209] *See* text accompanying notes 141–44 *supra.*

[210] Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958).

[211] Cameron v. United States, 252 U.S. 450 (1920), the case most cited for the proposition that notice and hearing must be afforded before the Department may declare a claim invalid, itself relied on cases in which denial of the claim had been preceded by initial acceptance of the application in the local land offices. This preliminary clearance of the claim, when it occurs, results in the passage of "equitable title" to the land to the claimant. The proposition that one has a right to notice and hearing before "equitable title" may be affected, Orchard v. Alexander, 157 U.S. 372, 383 (1895), is stronger than and distinguishable from the assertion that anyone privately asserting the validity of a mining claim has the same right. *Cameron* provided no occasion to address the question what showing of probable right was required to generate a right to hearing, since a hearing had in fact been afforded in the case; the Court glided over the problem. *See* note 146 *supra.*

[212] The Department *has* consistently distinguished, as not requiring a hearing, the case in which invalidity of a claim appears on the face of its records, as where a location is not filed until after the effective date of a withdrawal. The Dredge Corp., 64 Interior Dec. 368, 374–75 (1957), *aff'd,* 65 Interior Dec. 336 (1958); Clear Gravel Enterprises, Inc., 64 Interior Dec. 210, 213 (1957); see notes 87–88 *supra* and accompanying text. The problem in the cases under discussion arises from the Department's willingness to assume, rather than require demonstration of, the proposition that facts are in issue there. *See* text accompanying notes 140–48 *supra.*

the absence of discovery.[213] Had there been a prehearing requirement to show a plausible basis for belief that qualifying mineral values existed, most of these hearings would have been avoided. A partial survey of cases heard in the Salt Lake City Office in 1972 reaches similar results: of sixteen hearings, two on patent applications and the remainder validity contests, only two occupied more than a single day of hearing, and only seven involved conflicting evidence or legal controversy; no evidence of discovery was presented by the claimants in any of the remaining nine cases.

These inefficiencies are aggravated, as might be expected, if only the thirty-seven validity contests are considered. Of the six patent applications, only one was "no contest"; the applicant, apparently a party to other claims in which an element of fraud had been found, made no appearance. The remainder were strongly contested and two of the five resolved, at least partially, in the applicant's favor. Twenty-one, fifty-seven percent, of the validity contests were issueless; of the sixteen that were disputed only four were resolved, even partially, in the applicant's favor.[214]

These fruitless hearings have an impact beyond their immediate waste of several government officials' energy and time. They contribute to a diminishing, but still substantial, backlog of cases; on the average, a case takes more than sixteen months to progress from receipt by the Salt Lake City Office, after the complaint has been answered, to hearing. The hearings also contribute to delay in the decisional process; unable, as they see it, to decide such cases from the bench, the administrative law judges must call for proposed findings and for briefing, adding to a burden of opinion writing which requires an average of six months from hearing to decision.[215] Inevitably, issueless hearings must distract attention from real controversy and contribute to attitudes which disserve miners asserting claims in good faith. Finally, pending decision, the government is deprived of its use of the land, and the claimant able to extend his enjoyment of what is, by hypothesis, a baseless claim.[216] Indeed, loca-

[213] For example, testimony that on the basis of what he had found, the claimant wanted to keep looking; or that a profitable mine could not be operated on the basis of the findings so far made. *E.g.*, Robert Kelty, 11 I.B.L.A. 38 (1973).

[214] Industry critics of the Department frequently assert the impossibility of obtaining favorable consideration from the Department. If "no contest" cases are discounted as they should be, the sample here, while small, suggests that claimants enjoy a fair rate of success.

[215] While comparisons are hazardous, it may be noted that as of December 31, 1972, two-thirds of United States district court judges had no cases held under advisement for more than sixty days. Of the 203 cases that were in that status, 171 — over eighty percent — had been held less than six months. In the following six months, 3,604 civil cases were terminated during or after trial. The median time elapsed from filing to disposition in tried cases was sixteen months. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1973 SEMI-ANNUAL REPORT OF THE DIRECTOR 64–65, A–22 (1973). The median time from filing to disposition in the Salt Lake City office was twenty-two months.

[216] Where the land has been affirmatively misused, the government has several times been able to secure preliminary injunctive relief in district court. United States v. Noqueira, 403 F.2d 816, 824–25 (9th Cir. 1968); United States v. Zweifel, Civil No. 5784 (D. Wyo., Dec. 26, 1973) (quiet title action); United States v. Foresyth, 321

tors who are the subject of validity contests are served by delay and, unlike patent applicants, have no incentive to avoid it.

At least four possibilities suggest themselves for dealing with the substantial inefficiencies and overprotectiveness thus revealed. Claimants could be required to specify as part of their answers what discovery they claim, where they claim to have made it, and how rich a find they have — all in detail equivalent to that set forth in a patent application, and similarly subject to initial verification by a mineral examiner's inspection; failure to include such information in an answer could be treated as an admission of invalidity for want of discovery. Second, if government allegations denying discovery were supported by a mineral examiner's report, that report submitted in verified form could be treated as sufficient to warrant summary judgment unless the claimant could document its contrary assertions by competing, professional surveys. Third, the order of proof at the hearing might be reversed, to reflect the burden of persuasion and the claimant's position as true proponent of the claim. Finally, provision might be made for summary action if, after hearing, no substantial dispute of evidence or relevant law emerges. The first of these possibilities has already been examined.[217] Each of the remainder is discussed, in turn, below.

A mineral examiner's report finding facts indicating a discovery or its absence (or some other requisite of validity), submitted in verified form, should be sufficient to authorize summary judgment on the issue unless conflicting or discrediting evidence, also verified, can be presented. The model is drawn from the Food and Drug Administration's procedures, recently upheld by the Supreme Court,[218] for determining the effectiveness of prescription drugs regarding which only a finding of safety had previously been made. Faced with a statutory grant of hearing, yet the necessity of passing upon the effectiveness of thousands of drugs within a limited time span, the FDA adapted a mode of preliminary screening through a professionally qualified body. A finding by this body that the drug in question was probably "ineffective" triggered a complaint mechanism in which the committee finding would be considered sufficient

F. Supp. 761 (D. Colo. 1971); United States v. Springer, 321 F. Supp. 625 (C.D. Cal. 1970), *aff'd*, 478 F.2d 43 (9th Cir. 1973). Such actions burden the government's finite litigating resources, and cannot readily be extended to ostensible mining uses, at least absent some major environmental affront. *Cf.* United States v. Denarius Mining Co., Civ. No. C-2441 (D. Colo., filed Feb. 11, 1972).

Immediate possession could also be secured through condemnation proceedings, and it might be suggested that Rule 71(A) proceedings in district court would be more efficient than the present departmental proceedings to clear lands required for a particular withdrawal. So to act would not require the district court to decide the validity of any mining claims asserted in the proceedings; it could refer that issue to the Department for decision. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963). Ordinarily, however, the Department's preference is to leave valid claims undisturbed, rather than to condemn the miner's interest; and the risk that a district court might not refer the validity issue to it is also a source of concern. A change to such an approach, then, is not to be expected.

[217] See text accompanying notes 162–76 *supra.*

[218] Weinberger v. Hynson, Westcott & Dunning Co., 412 U.S. 609 (1973).

to support summary judgment on the effectiveness issue — judgment without a hearing — unless the manufacturer was able to submit "adequate and well controlled" scientific studies supporting the claim of effectiveness. Only when it was clear issue would be joined would a hearing be afforded. The Court found this procedure fully satisfied the FDA's statutory (and constitutional) hearing obligation.

The Department of the Interior does not operate under the FDA's emergent circumstances, but the constraints of resources and manpower it experiences are real enough to support an otherwise sensible and fair procedure. On the matters concerning which the Department's mineral examiners are professionally most adept — the geological character and mineral potential of the lands they inspect — the questions in issue before the Department seem as susceptible to scientific judgment as those on which the FDA bases its effectiveness proceedings. Mineral examiners' reports, traditionally, have been professional and thorough. The basic facts typically reported are objective in nature and capable of replication by a trained observer; and inferences from those facts are drawn according to established professional methods in ample detail to permit a reader to assess the reasoning used. Such reports would be fully appropriate to frame the findings which the claimant must be prepared to contradict. If the Department adopts its pending proposal to grant summary decision power to its administrative law judges,[219] as it should, a mineral examiner's report should be furnished to the claimant at an early stage and considered sufficient to establish all facts and projections reported unless opposed by affidavits establishing either a basis for impeachment of the report or well supported showings of contradictory findings. If the only dispute will be whether the government examiner's findings demonstrate discovery or its absence, as proved to be the case in over half the hearings inspected, summary decision will usually prove sufficient.

Alternatively, the Department could consider giving its examiners a decisional rather than an investigative role, by providing for initial determination of discovery and like issues through an inspection procedure. The Administrative Procedure Act recognizes the possibility of using "inspection, tests, or elections" as an alternative to formal adjudication.[220] While theoretical and judicial discussions have been scarce, inspections seem appropriate for any matters that turn "either upon physical facts as to which there is little room for difference of opinion, or else upon technical facts like the quality of tea or the condition of airplanes, as to which administrative hearings have long been thought unnecessary." [221] The

---

[219] 37 Fed. Reg. 12544, § 4.473 (1972).

[220] 5 U.S.C. § 554(a)(3) (1970).

[221] Door v. Donaldson, 195 F.2d 764 (D.C. Cir. 1952); ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT: ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. 8, 77th Cong., 1st Sess. 36–38 (1941) [hereinafter cited as ATTORNEY GENERAL'S COMMITTEE]; see, in particular, the Committee's

facts central to determination of discovery seem to fit this description: technical findings subject to replication in the field by trained professionals are generally more clearly apparent there or in the assay laboratory than in testimony at a formal hearing.[222] Administrative law judges are less well placed to determine the prospects for mineral development of a given piece of land than a trained mineral examiner, traversing the claim in the company of the claimants, familiarizing himself with past and present activity in the area, and sampling for chemical assay.

The Department uses inspection procedures in lieu of hearing in other contexts, notably in connection with mine safety laws.[223] These procedures, and the limited writings in the field, suggest the requisites of fairness: prior articulation, by rule, of the standards to be applied,[224] the definition of discovery so strikingly absent from the Department's regulation;[225] a provision for reinspection on demand and/or hearing in the event of demonstrable controversy regarding the initial inspector's findings;[226] an opportunity to be present at the inspection and to have a voice in any choice of the procedures to be followed during it;[227] and reasonable assurance of impartiality on the part of the government inspector. The last goal could be achieved by dissociating some mineral examiners from the Bureau and placing them in the Office of Hearings and Appeals, as referees.[228] Except where an application for patent has been made, requiring a bureaucratic decision to clear it or not, a careful inspection is not required as part of the complaint procedure; the government's "good cause" for placing discovery in issue, as has already been suggested, is not the want of mineral findings but either the competing need for land encumbered with a claim or the appearance of palpable abuse. An inspection would then be made on an impartial basis, like a judge's or

---

full description of the procedures for grading under the Grain Standards Act in *id.*, Part 7, S. Doc. 186, 76th Cong., 3d Sess. 15–17 (1940); 1 K. DAVIS, *supra* note 64, § 7.09.

[222] *See* Payne, *Examination of Mining Claims and Compliance with Land: Clear-Listing or Adversary Proceedings*, 5 ROCKY MT. MIN. L. INST. 163 (1960).

[223] *E.g.*, Federal Metal and Non-Metallic Mine Safety Act of 1966, 30 U.S.C. § 727 *et seq.* (1970) (mine inspections); 43 C.F.R. §§ 4.650–4.666 (1973); *cf.* Day, *Administrative Procedures in the Department of the Interior: The Role of the Office of Hearings and Appeals*, 17 ROCKY MT. MIN. L. INST. 1, 11–12 (1972).

[224] 30 U.S.C. § 725 (1970) (mandatory safety standards to be enforced by inspection procedures).

[225] *See* text accompanying notes 266–78 *infra*.

[226] 30 U.S.C. §§ 728(a), 730 (1970); 43 C.F.R. § 4.663 (1973); ATTORNEY GENERAL'S COMMITTEE, *supra* note 221, FINAL REPORT at 36 (remarking, *inter alia*, how infrequently review provisions are invoked); COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, LEGAL SERVICES AND PROCEDURE 65 (1955) (Rec. 39: absent emergency conditions, review of inspection procedures must be provided for, but costs may be imposed if unsuccessfully invoked).

[227] *Cf.* Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30021 (1973) (joint sampling and selection of assay laboratory). Such cooperative approaches are already well established.

[228] In other contexts, private parties have been allowed to choose from a list of certified inspectors. 43 C.F.R. § 3861.5 (1973) (cadastral surveyors for patent applications); ATTORNEY GENERAL'S COMMITTEE, *supra* note 221, Part 7, at 15–17. Here, that choice would too closely resemble the choice of one's judge to be acceptable.

jury's "view," with representatives of both the Bureau (or the Forest Service) and the locator entitled to be present; the report would ordinarily be conclusive on *both* sides, with each having the opportunity to seek reinspection, to impeach, or to introduce conflicting findings.

The hardship faced by smaller miners in contest proceedings is apparent, and arguably prejudicial. The cost of resisting a contest under the present procedures is staggering. Attorneys in well-established firms, familiar with mining laws and their administration, estimate fees in the tens of thousands of dollars for defending a contest, as against one or two thousand for preparing a straightforward patent application for bureaucratic processing. The smaller prospector could not afford legal representation at this level; at best, he may be able to hire, but not educate, a general practitioner lacking substantial experience in mining matters. The administrative law judges uniformly report both a sense of dissatisfaction with the level of practice before them and recognition that the handicap of being unrepresented is not readily overcome, even when government counsel and the hearing officer take pains, as they do, to explain the proceedings as they progress and otherwise adjust for the handicap. The Salt Lake City files, too small in number and too strongly influenced by a variety of factors to be conclusive,[229] are nonetheless suggestive. Only one of the seventeen claimants who appeared *pro se* succeeded in protecting his claim in any respect; six of the twenty-six claimants represented by attorneys achieved some measure of success. But on even a hasty scanning of the files, it appears that four more of these twenty-six were positively disserved by their counsel's representation.[230]

The experience bespeaks the need for simplified rules, which untutored lawyers can more quickly and efficiently learn, and for some means which will permit the smaller miner either to avoid the necessity for hearing altogether, or to garner some assistance in meeting the often substantial cost of expert help. One such measure would be to provide independent

---

[229] For example, it was not possible to tell whether underlying claims in cases where representation was present were comparable to those in which it was lacking; the locator of a rich claim might be more likely than one more doubtful of his find to make the sacrifices and to secure the financing required to hire an attorney.

[230] This disservice typically occurred through counsel's concession, or solicitation of testimony conceding, that the mineral resources to support a paying mine had not yet been found, but that there were "good indications" — that is, a reason to look further. The concession is an admission that no discovery has been made; hence, that there was no real issue for hearing. *Cf.* Robert Kelty, 11 I.B.L.A. 38 (1973); Multiple Use, Inc. v. Morton, 353 F. Supp. 184, 193 (D. Ariz. 1972). This fatal concession was most poignant when made in the case of an elderly, blind miner who had applied for patent on his claim — the one thing that kept him going. The land was not under withdrawal, so that the Department would have permitted him to withdraw his application and continue to work his claim; firm departmental policy, however, required that if the application were finally denied, the claim would also have to be cancelled. *See* note 90 *supra*. Counsel evidently neither understood the discovery concept nor was aware of this policy. When the administrative law judge found discovery absent, on the miner's own testimony, he neglected to order that the claim be cancelled, perhaps in recognition of the pathetic circumstances. Counsel, however, filed an appeal and that "error" was promptly corrected by the Board of Land Appeals. Terry & Stocker, 10 I.B.L.A. 158 (1973).

mining consultants, or subsidized legal assistance, to locators able to make a threshold showing of need and of diligence in seeking to develop their claims.[231] The first of these possibilities has in fact been considered within the Department, but never carried to the funding stage. Obviously, significant expense might be involved; and the government would be put in the position of subsidizing claimants whom, from its perspective, had not yet established a color of right to their locations. Assuring adequate guidelines and the impartiality of inspections already professionally performed seem the preferable measures.

The third suggestion for change made above is that the locator, as true proponent, be made to bear the obligation of going forward as well as the burden of proof. The basis for this proposal has already been lengthily stated, and need not be repeated here.[232] It is a change long sought by Department and Bureau officials in the Denver area, but apparently rejected in Washington. That rejection should be reexamined. Requiring that the government prove, as an initial matter, the negative of a proposition which the locator is uniquely situated to establish is self-evidently ill-conceived. The present, highly unusual structure is not imposed upon the Department by statute, and the Department has ample power to eliminate it by regulatory redefinition of the procedures to which claims must be submitted when their validity is called into question.[233] Again, the only possible unfairness lies in the remote risk that locators will be called upon to justify their claims without real need, but the Bureau has adequate policies to avoid that danger. Assuming sound reason to investigate the validity question, justice does not require that the government bear the burden of going forward at any resulting hearing.

The final suggestion — a practice of ruling from the bench where real dispute proves absent after hearing — leaps out of the files of the Salt Lake City Office. Thirty-eight of the forty-three contest hearings examined there took no longer than one day. Twenty-two of these would not have reached the hearing stage had the techniques already suggested been used. These twenty-two, and perhaps half of the remaining sixteen, could in any event have been decided at the conclusion of the hearing, as presenting no difficult question either of fact or of law. Instead, as the Department's rules and, apparently, section 8 of the Administrative Procedure Act require,[234] the cases were continued until a transcript of the hearing could be prepared and distributed; then, any briefs filed; and, finally, a decision written and served. The median time between hearing and decision in the no-issue cases was two and one-half months with the longest taking eleven months; for the single day, but contested, hearings,

[231] *Cf.* 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 38–39 (1973) (Rec. 71–6 (D)) [hereinafter cited as RECOMMENDATIONS].

[232] *See* text accompanying notes 140–48 *supra.*

[233] Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); *see* text accompanying notes 164–68 *supra.*

[234] 5 U.S.C. § 557(c) (1970); 43 C.F.R. § 4.452–8 (1973).

the median was seven months and the longest time, twenty. Only in the latter cases were briefs ordinarily filed, and the time elapsed there was undoubtedly increased, not only by the need to write opinions in other cases but also by permissiveness regarding the dates when briefs must be filed and extensions of those dates upon counsel's request.[235] Nonetheless, more than half the time taken falls after all briefs have been filed.[236] In the interim, all memory of the events at the hearing — particularly a brief one — fades; when the administrative law judge comes to write his decision,he must rely on the transcript to re-create the event. Credibility is not a usual problem, but judging the relative soundness of competing expert opinions may be; and under present practice, that must be done principally on the basis of the transcript.

The remoteness of the administrative law judge from the inquiries on which "discovery" turns has already been remarked.[237] His inability, or at least disinclination, to rule on the matter while his perceptions of the witnesses are fresh compounds that difficulty. Not only has he not viewed the claim as an expert himself, his judgment when finally made is only remotely based on having seen and heard the witnesses who did. For a complex hearing, the model to which administrative law theorists are perhaps accustomed, this distance is perhaps the better course. After days or weeks of hearing, better judgment may be achieved by insisting that a transcript be awaited and the parties given an opportunity to argue from it before a decision is made; otherwise, memory of the most recent events in the hearing may tend to distort overall judgment.[238] But where hearings consume less than a day, as over eighty-five percent of the hearings examined here did, and issues are frequently simple and well defined, it is hard to imagine that judgment is improved by putting the case aside for a number of months. In such cases, it should be possible to state at the conclusion of the hearing a tentative opinion regarding the outcome; hear brief argument, which may persuade, *inter alia,* to the need for further thought; and then, unless there is reason to postpone, make a ruling. Formal findings of fact and of law may subsequently be provided, and service of them upon the parties made the starting point for administrative review. But the decision will have been made, as the administrative law judges agree it readily can be in such cases, at the point when memory and impression are still fresh.

---

[235] The practice reported by the administrative law judges was to permit counsel to agree upon the date for filing of briefs and then routinely to permit extensions for as long as six months. The limited data suggest that more time was indeed likely to be taken where the claimant was represented by counsel. Such representation was present in ten of the sixteen one-day, but contested, hearings and in these ten cases the median time between hearing and decision was eleven months as compared to seven overall. In the eight no-issue cases in which counsel appeared at the hearing, no similar effect appears; there would have been no reason to file briefs in those cases.

[236] *See* note 215 *supra.*

[237] *See* text accompanying notes 220–28 *supra.*

[238] *See* Walker, Thibaut & Andreoli, *Order of Presentation at Trial,* 82 YALE L.J. 216, 222–25 (1972).

The Department's administrative law judges and some others treat section 8(b) of the Administrative Procedure Act as the chief barrier to any such practice. It provides that "before a recommended, initial, or tentative decision . . . the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions — (1) proposed findings and conclusions. The record shall show the ruling on each finding [or] conclusion . . . presented."[239] Although it was initially suggested that the proposed findings could be oral in form where that mode of presentation would be adequate,[240] the Senate Committee to which this view was addressed and the House Committee which subsequently reviewed the draft act understood the section to mean that "briefs on the law and facts must be received and fully considered by every recommending [or] deciding . . . officer." [241] Subsequent commentators also appear to take the view that there is a right to present written findings and briefs after hearing, and *before* decision is reached.[242] That view is reified in the Department by a regulation requiring a written decision in each case, after the parties have had "a reasonable time . . . considering the number and complexity of the issues and the amount of testimony," unless findings and conclusions are waived by stipulation.[243]

Whether the ordinarily broad commands of the Administrative Procedure Act in fact do prohibit prompt resolution of simple disputes of fact or law application seems doubtful despite the legislative history. The language will allow the broader construction. No such wooden rule is imposed upon federal district courts, although they too are under an obligation to state findings of fact and conclusions of law in support of each judgment;[244] and, unlike the findings of administrative law judges, such fact finding is controlling on review unless "clearly erroneous." In appropriate circumstances, an administrative law judge's oral statement of findings would fully suffice "to preserve objections in the record and to inform the parties and any reviewing body of the disposition of the case and the grounds upon which . . . 'decision' is based." [245] Written findings may indeed provoke care by the trier of facts in the face of complexity;[246]

---

[239] 5 U.S.C. § 557(c) (1970).

[240] Letter from Francis Biddle, Attorney General of the United States, to the Senate Comm. on the Judiciary, S. REP. No. 2752, 79th Cong., 1st Sess. 43 (App. B) (1945).

[241] *Id.* at 24; H.R. REP. No. 1980, 79th Cong., 2d Sess. 46 (1946).

[242] UNITED STATES DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 85–87 (1973); 1 K. DAVIS, *supra* note 64, § 8.17; Netterville, *The Administrative Procedure Act: A Study in Interpretation,* 20 GEO. WASH. L. REV. 1, 79–80 (1951).

[243] 43 C.F.R. § 4.452–8 (1973). The same rule, somewhat more elaborately stated, appears in the Interior Department's proposals for rulemaking. 37 Fed. Reg. 12,546 § 4.493 (1972). *Cf.* Geissinger, *Rules of Procedure Governing Department of the Interior Contests,* 7 ROCKY MT. MIN. L. INST. 477, 507–08 (1962).

[244] FED. R. CIV. P. 52(a); *see* Hodgson v. Humphries, 454 F.2d 1279, 1282 (10th Cir. 1972); Makah Indian Tribe v. Moore, 93 F. Supp. 105 (W.D. Wash. 1950).

[245] Borek Motor Sales, Inc. v. NLRB, 425 F.2d 677, 681 (7th Cir. 1970).

[246] United States v. Forness, 125 F.2d 928, 942–43 (2d Cir.), *cert. denied sub nom.* City of Salamanca v. United States, 316 U.S. 694 (1942).

but if neither counsel nor brief proceedings persuade the administrative law judge that the issues are more complex than they seem, delay for briefs followed by written findings is a wasteful enterprise.[247]

Whether or not the statute compels such delays in all cases in which a hearing on the record is required "by statute," [248] the Department need not accept them. Application of the Administrative Procedure Act to departmental hearings on mining contests arises, not out of a specific legislative judgment, but from the Supreme Court's holding in *Wong Yang Sung v. McGrath* [249] that the Act's requirement of an impartial hearing examiner also applies to proceedings in which hearings are required as a matter of constitutional due process. That holding, despite its prompt overruling in the particular circumstances of the case,[250] has been taken to impose all the Act's strictures on all federal adjudicatory hearings required by due process.[251] Brief consideration, however, should suggest that the holding has force only for those elements of the Act which respond to issues of constitutional fairness. A claim of right to an impartial decision maker, for example, presents constitutional issues which the *Wong Yang Sung* Court would have been required to resolve had not the Act been available as a model;[252] it would be reasonable to ascribe to Congress a definition of the due process interest, and to avoid the constitutional issue by adopting it. No similar force warrants disregarding the specific limitation of sections 5, 7, and 8 to hearings required "by statute," where the procedural issue concerns a technical requirement unlinked to considerations of fundamental fairness — such as whether an opportunity for *written* submission must be afforded all parties between the close of a hearing and the rendering of decision. Here the natural judg-

[247] The Postal Service permits its presiding officers in hearings on denials of second class mailing privileges to determine whether the parties' proposed findings of fact and conclusions of law "shall be oral or written." 39 C.F.R. § 954.18(a) (1973). "Upon request of either party the presiding officer may render an oral initial decision at the close of the hearing when the nature of the case and the public interest warrant." *Id.* § 954.19(a). The hearings in question are required by statute (39 U.S.C.A. § 4352(b) (1962)) and so unquestionably fall within the purview of section 8. Similar rules govern mail fraud issues. 39 C.F.R. §§ 952.23–.24 (1973). These rules have been upheld by the Service's Judicial Officer against objections based on section 8. *In re* Soberin Aids Co., Postal Service Doc. No. 2136 (Oct. 1, 1973). *See* 14 C.F.R. § 421.32 (1974) (permitting National Transportation Safety Board to render decisions by a similar procedure).

[248] 5 U.S.C. § 554(a) (1970).

[249] 339 U.S. 33 (1950).

[250] *See* note 142 *supra.*

[251] Whether this reading will withstand the recent proliferation of "due process" decisions involving relatively simple individual claims is open to doubt. The Court has shown some tendency to propitiate fears of excessive formality in such cases. *E.g.,* Goldberg v. Kelly, 397 U.S. 254, 267 (1970). While these have generally been state cases, the Court may now find that, having there resolved the due process issues, it has no substantial reason to deny the same realities in the federal sphere. The legislative reversal of *Wong Yang Sung* would surely permit such flexibility. Lower federal courts encountering due process claims, for example from a discharged federal employee, often seem oblivious to *Wong Yang Sung* and the possibility that more than the due process clause might apply. *E.g.,* McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973).

[252] *E.g.,* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

ment is that "by statute" expressed a deliberate limitation, more or less congruent with the complex regulatory decision-making processes with which Congress was most familiar and concerned. There is reason neither to suppose it intended a broader sweep nor, unlike *Wong Yang Sung,* to disregard its intention.[253]

There remains the possibility that some feature of the Department's overall decisional process warrants the delays and inefficiencies introduced by permitting briefing after hearing and before decision in every case. The papers submitted become part of the record on appeal to the Board of Land Appeals, and so might complete the record on which the Board will decide. Yet in the kind of case in which it is here asserted that immediate decision should be available, it is questionable whether completion is either possible or required. Once oral *or* written rulings are made at the hearing level, objections can still be forcefully stated in exception form, and annotated to the transcript. Postponing decision costs the Board just that function that a hearing officer can most usefully perform — prompt and measured assessment of credibility and demeanor.

Although the Department's four Salt Lake City administrative law judges find themselves burdened with a considerable backlog and, indeed, recently found it necessary to shift part of their caseload to the Sacramento Office, the amount of actual controversy coming before them in mining cases is considerably less than the commitment of resources to them implies. Rules which permitted adequate prehearing screening and on the spot decision when the circumstances warrant, and procedures which made clear the nature and placement of the claimant's burden of proof, should permit the same load to be carried by far fewer judges, freeing resources for the apparent demands of mine safety enforcement.

E. Appeal Procedures

The Department's Board of Land Appeals (of which the Director of the Office of Hearings and Appeals, is an *ex officio* member) hears all appeals in public lands cases, including those arising under the mining laws in Washington, D.C. Except for a still theoretical possibility of secretarial intervention, its decision is final and binding on the government; judicial review is available at the behest only of a disappointed private litigant. The Board's participation may be invoked by any party adversely affected by a decision of a departmental administrative law judge, by filing a notice of appeal within thirty days after the person taking the appeal has been served with the challenged decision. A state-

[253] Similarly, the application of the Administrative Procedure Act to mineral contests for some purposes does not require application of its rule that "[e]xcept as otherwise provided by statute, the proponent of a[n] . . . order [declaring a claim invalid] has the burden of proof." 5 U.S.C. § 556(d) (1970). The Department's contrary rule, placing the burden on the locator is not statutory in nature. *See* text accompanying notes 140–48 *supra.* But the question of allocating the burden of proof in these cases is one not significantly influenced by considerations of due process; therefore no reason exists to disregard the limitation of the quoted language to hearings required "by statute." Compare C. MCFARLAND, *supra* note 20, at 205–06.

ment of reasons for the appeal must be filed with the notice or within thirty days thereafter, and written arguments must also be filed during this period. The respondent has a like period to reply, but need not, and usually does not, avail himself of this opportunity. Rather, the arguments supporting the judgment below are left to the record. The high incidence of hearings involving no significant dispute of law or fact provides ample explanation for this willingness of respondents, usually the government, to trust the outcome to the record.

The Board's operations were not a focal point of this study.[254] Nonetheless, two matters warrant comment. First, the Board, like the administrative law judges, appears to lack tools for distinguishing the routine, essentially uncontested case from more important appeals. Second, no mechanism exists for discretionary departmental review or rejection of Board decisions in the unusual case in which important policy is made and the Secretary, acting for the Department, might reach a different conclusion.

1. Distinguishing Routine From Important Appeals — This problem may be brought into focus by a brief description of the ordinary handling of an appeal. When the appeal documents are complete an administrative officer chooses a panel of three of the seven members of the Board. The documents are sent to one of the designated panel members, and he and a staff assistant write an opinion in the case. No formal consultation with the other two members of the panel is provided for and none usually occurs. A predecision conference will be held only if the opinion writer wishes it. The opinion, when complete, is sent to the other panel members with the supporting documents; they may propose changes, note their agreement, or prepare opposing opinions. Oral argument is a matter for discretion and is limited to the rare case in which a request is made. Each opinion is circulated to all members of the Board for possible comment, dissent, or invocation of en banc consideration before release — without a requirement of oral argument or notice to the parties that the appeal is being considered by the Board as a whole.

The problem here is that the Board's cloistered approach may lead, in the routine case, to unnecessary and even misleading opinions; in more important cases, to a failure sharply to focus on the matters in issue. Of course, appellate bodies, notably the federal courts of appeal, increasingly dispose of appeals to them without oral argument, but there are salient differences. No appellate court contemplates decision before argument where there is significant controversy or where the outcome will have any shaping impact upon the law. The panel member who initially receives an appeal to the Board, however, must write fully even if the case appears a simple one, since his colleagues' views are not yet known. The Board neither identifies its uncontroversial holdings with brief opinions and in-

[254] A brief description of its operations by the first director of the Office of Hearings and Appeals appears in Day, *supra* note 223, 1–11; see also Strauss, note ** *supra*.

structions not to publish or cite them, nor limits its individualistic, record-only review procedures to such cases; the opinions seem equally elaborate and the processes equally remote in all cases. The dryness and remoteness of the procedure contrast sharply with the Board's authority to act as administrative *alter ego,* reformulating significant policy without any institutionalized check beyond the possibilities of reconsideration or, remotely, secretarial review. If a case *is* cut-and-dry under departmental precedent and rules, oral argument is indeed a waste; but so is *seriatim* consideration, the writing of lengthy opinions, or any indication that those opinions may be significant for the Department's future business. It would be equally suitable, and fully sufficient against the possibility of judicial review, for the panel to agree after review of the record that no real controversy exists and to issue a judgment to that effect, adopting the findings and conclusions made below. The Board should consider formal adoption of screening mechanisms that would permit such summary action in appropriate cases.

Where significant controversy exists, on the other hand, the Board should not refuse oral argument,[255] but consider instead possible measures to encourage it.[256] Without oral argument and the initial collegiate consideration that it implies, the individual members of the panel never face the discipline of preparing for argument at a particular time, do not experience the sharpening focus of adversary presentation of central issues, and have little sense of post-consideration agreement regarding the simplicity or complexity of the issues presented. The infrequency of oral argument may encourage respondents not to respond to appeals, and the non-writing Board members to give somewhat unfocused attention to the case. Collegiate consideration might well produce both an accelerated pace of decision from filing to judgment, and deeper, more sharply focused consideration where controversy is genuine.

2. *Policy Decisions* — For those cases in which significant policy questions are presented, explicit provision should also be made for some form of secretarial control over the policy conclusions reached, in order to assure uniformity and intelligibility in the Department's interpretive application of the mining laws. The Office of Hearings and Appeals was created in response to the pressure of criticism from the private bar that policy and adjudication functions in the Department were too closely linked; with it, division of function became complete.[257] The Director of

[255] *Compare* 43 C.F.R. § 4.25 (1973) *with* 8 C.F.R. §§ 3.1(d)(1–a), (e) (1974) (Board of Immigration Appeals; oral argument mandatory on request unless appeal is frivolous or technically deficient).

[256] Oral argument is doubtless discouraged by the fact that the Board sits fifteen hundred miles from the nearest mining district or significant concentration of public lands, requiring at least one of the parties to hire local counsel or fly half the continent or more to attend. Relocation of the Board to one or more of the western law centers, a step apparently under consideration in the Department, would markedly alleviate that problem.

[257] *See, e.g.,* 35 Fed. Reg. 12,081 (1970); P.L.L.R.C. REPORT, *supra* note 8, at 253; McCarty, *A View of the Decision Making Process Within the Department of the*

the Office is placed immediately under the Secretary in the Department's table of organization. Members of the Board, although typically drawn from within the Department, are almost completely isolated from contact with the rest of the Department. The point is strongly made in the Department's regulations that government counsel appearing before the Board of Land Appeals "shall represent the Government agency in the same manner as a private advocate represents a client" [258] and that there shall be no oral or written *ex parte* communication between "any" party and a member of the Office of Hearings and Appeals concerning the merits of a proceeding.[259]

The result is that although departmental officials can argue policy matters — the desirability of overruling outdated or erroneous departmental precedent, for example — through their briefs, the operating divisions have no control over the outcome; they cannot impose their policy choices or preferences, except by previous adoption of a rule.[260] The isolation of the Bureau, ostensibly the principal source of policy concerning mining matters, is particularly dramatic. Before creation of the Office of Hearings and Appeals, the Bureau had a deciding role in litigation as well as in legislative approaches. An intermediate appeal ran to the Director from the hearing examiner's decision, and that permitted the Bureau a measure of policy control. This appeal was eliminated, however, as a source of oppressive delay and an example of the combined functions which the proponents of the Office believed must be separated. The result was isolation of the Bureau from any contact with a case once a complaint had been made and answered (and, perhaps, evidence had been given by Bureau experts) — all distinctly local functions. To the extent policy in mining matters is made by decision rather than rule, the higher levels of the Bureau no longer contribute significantly to its formulation.

To be sure, the independence of the Office is not without formal limit; the Secretary retains his power of personal decision.[261] The regulations, however, make no formal provision for secretarial review; rather, they state that no departmental appeal will lie from a decision of an appeals board.[262] Even if that provision, important to assure finality of administrative decision before judicial review is sought, were not seen to preclude a corrective, personal intervention, such intervention would be extraordinarily difficult as a political matter; flaunting the very pressures that

---

Interior, 19 AD. L. REV. 147, 172–74 (1966). The history and criticisms are briefly recounted in Day, *supra* note 223, at 1–8.

[258] 43 C.F.R. § 4.3(b) (1973).

[259] *Id.* § 4.27(b).

[260] Although the issue has not been squarely tested, members of the Office of Hearings and Appeals feel able to disregard lesser policy statements, such as Manual directions and Solicitor's Opinions, if convinced of another interpretation.

[261] 43 C.F.R. § 4.5 (1973).

[262] *Id.* § 4.21(c). Reconsideration or hearing en banc is provided for, and the filing of a motion to that end would permit the Secretary to intervene were he so minded.

led to creation of the Office, it could be afforded only in the most urgent cases if at all. In fact, the Secretary has not yet intervened, although departmental demands for rehearing have been frequent enough and the Solicitor's policy arguments have often been rejected.

Certain informal lines of communication do exist — incursions, perhaps necessary ones, on the spirit if not the letter of the "as a private advocate" rule. Private communications between the Department and the Director of the Office, who does not ordinarily sit on appeals, have been quite free. While there is some disagreement whether he is ever approached on the merits of policy matters, he will be told if a particular matter is regarded as "important," and is occasionally asked either to have matters considered en banc or to place himself on the panel. The effect is to underscore the policy implications of the particular case. Communication exists as well in the opposite direction: departmental regulations or forms which by their obscurity have proved particularly productive of litigation are called to attention, sometimes with suggestions for changes that might produce greater clarity or otherwise reduce the litigative load. The opinions themselves, concrete examples of the Office's independence, may produce a somewhat greater incentive at higher levels in the Department to act by rule.[263]

The total picture, however, remains quite different from one's ordinary expectations about the rulemaking/adjudication choice. Instead of a single decider, rationally or irrationally allocating choices between the two procedures and itself making the fundamental policy choices whichever mode is chosen, one finds a frequently unconscious process of allocation and, more important, a process which leads ultimately to different authorities. Whatever its deficiencies as a maker of rules, the National Labor Relations Board which makes a rule is the same body as that which, encountering a troublesome point in litigation, announces a new departure in that format. For the Department of the Interior, the procedural choice — rule, Manual, Solicitor's Opinion,[264] decision — determines the body which makes the decision as well as the format in which policy appears. The effect is "to isolate the Secretary and others within the Department most concerned over policy from any feel for the impact of the flow of

[263] *Cf.* Day, *supra* note 223, at 3–5, 23–24. It must be emphasized that the only suggestions of contact made related to matters of policy and interpretation; on questions of fact and of rule application, no basis whatever exists to suspect that the independence of the Office has been compromised. It would be surprising were there even an effort in that direction. But the point about policymaking by adjudication, which warrants the present *excursus*, is that it permits "judges" to announce decisions which could equally be made in a legislative format.

[264] The Solicitor's Office once exercised what amounted to direct interpretative rulemaking authority through publication of Solicitor's Opinions, stating a departmental interpretation of governing statutes independent of particular litigation. *E.g.*, Rights of Mining Claimants to Access over Public Lands to Their Claims, 66 Interior Dec. 361 (1959). While the practice of giving opinions on matters within the Department remains, public notice of them has become quite rare; even when the opinions are published, they may no longer be considered binding in departmental adjudication.

decisions on policy," [265] and to bifurcate the policy function. Although impartiality in the application of established rules is essential, adjudication has been and remains an important mode of policy formulation within the Department. While that remains so, it seems an arid concept of fairness that purchases independence of function at the cost of coherent policy.

(a) Example: "Discovery" and "Valuable Mineral Deposit" Policy — The preceding generalizations may be illustrated by a consideration of the principal criterion by which the Department tests the validity of mining claims under the General Mining Law: whether "discovery" of a "valuable mineral deposit" has been made. The requirement of discovery of a valuable mineral is imposed, but left undefined, by sections 1 and 2 of the General Mining Law;[266] subsequent statutes, notably the Mineral Leasing Act of 1920 and the Common Varieties Act of 1955, have limited somewhat the types of minerals which may be considered "valuable" (coal, oil, and common sand and gravel, for example, no longer may be so considered) but have left unanswered such questions as how much ore, of what richness, must be found in the case of minerals which remain locatable.

The view sometimes articulated, that these undefined terms present questions of law to be resolved through a *judicial* search for some fixed meaning,[267] is untenable. To the extent the Secretary or his delegate decides that discovery of a valuable mineral *has* been demonstrated, the issue can rarely arise in a judicial setting; in effect, final definitional power for the grant of patents and confirmation of claims has been placed with the administrator. Thus unable to fix the inner limit of meaning, a court can say only when the administrator has been too grudging. Realizing that it will never be called upon to say whether the Secretary has treated "discovery" as meaning too little, a court should be reticent to conclude that he has construed it to require too much. The Secretary has in fact been permitted substantial leeway in his definition of the terms.[268]

The definition, changing over the years, has clearly been the instrument of policy.[269] In early years, when the government's lands were still

---

[265] Bloomenthal, *supra* note 21, at 257. The problem here is not significantly different from that often predicted in response to recommendations for radical separation of adjudicatory and legislative functions in the major federal agencies. *E.g.*, Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 485–86 (1970). Loevinger, Book Review, 68 COLUM. L. REV. 371 (1968).

[266] 30 U.S.C. §§ 22, 23 (1970).

[267] *See, e.g.*, Reeves, *The Origin and Development of the Rules of Discovery*, 8 LAND & WATER L. REV. 1 (1973).

[268] United States v. Coleman, 390 U.S. 599 (1968).

[269] *See* Hochmuth, *Government Administration and Attitudes in Contest and Patent Proceedings*, 10 ROCKY MT. MIN. L. INST. 467 (1965) (an unusually forthright and sound statement of the policy); NONFUEL MINERALS, *supra* note 3, at 390–410, 419–20; Note, *Government Initiated Contests Against Mining Claims — A Continuing Conflict*, 1968 UTAH L. REV. 102, 129–35. In one of its most recent pronouncements, however, the Board took a rather limited view. Kosanke Sand Corp., 12

viewed as goods held for disposal, securing a patent was easy and quick. More attention was paid to the accuracy of the cadastral survey that fixed its location on the public land records, than to any mineral survey to determine whether or not minerals had in fact been found. Even then, a higher showing of discovery was asked of a miner competing with another proposed use of the land than of one seeking to establish his priority over another prospector, where no competition existed regarding use.[270] With increasing awareness that remaining public lands were a trust to be managed for the benefit of all — and with increasing sophistication, as well, in the available technology for processing mineral ores — mineral surveys became more careful, and the standards applied more rigorous. The discovery that lands ostensibly claimed for their mineral values were being used for residential development, timber production, summer homes, or long-term speculation after patent, rather than developed as mineral properties, contributed as well. There were also practical choices: a rigorous, objective standard of discovery might appear more workable, less productive of expensive litigation and difficult questions of credibility or purpose, than a standard which sought to assess the element of good faith or mining purpose. The very age of the statute produced substantial strain; the statute lacks any express provision for ongoing regulation of claims, and so its definitional provisions have been made to serve functions for which supervisory measures might ordinarily be used. The consequence, however, is that the Department can only determine the validity of claims; it is powerless to take any less severe step.[271]

Throughout this development, the Department has never attempted to state its construction of the "discovery" or "valuable mineral deposit" requirements in rule form. Although lengthy descriptions of these concepts are included in the BLM Manual, which ostensibly controls mineral examinations and the formulation of complaints, the standards lack force as an instrument of departmental or Bureau policy. Strikingly, they are not presented simply as statutory interpretations grounded in policy considerations; rather, each is supported by reference to numerous prior adjudications. The decisions referred to were made at a time when insouciance about separation of functions permitted them to be made by persons in the main stream of administration; the Manual standards themselves were adopted after an intricate bureaucratic procedure.[272] Yet the effect of the citation format is to suggest that the standards are no more than a digest of the Department's case law. Consequently they may be disregarded if a rereading of the cases or analysis of subsequent cases

---

I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30019–21 (1973). This may in part have resulted from the needs of the immediate moment — rebutting a claimed entitlement to an Environmental Impact Statement before a patent could be issued. See also Frank W. Winegar, 16 I.B.L.A. 112, 4 ENV. L. RPTR. 30005 (1974).

[270] Chrisman v. Miller, 197 U.S. 313 (1905); *see* AM. L. MINING, *supra* note 3, §§ 2.4, 4.19, 4.53 (1973).

[271] Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017, 30019–20 (1973).

[272] *See* Strauss, note ** *supra.*

suggests a different synthesis. That has in fact been their fate. Unrevised in seventeen years, they are presently ignored.

This period, however, has not been lacking in efforts to reshape the "discovery" standard into an instrument that would permit the Department to administer the mining laws sensibly pending the passage of reform legislation. Patent applications have been slowed to a trickle both by a tightening of standards, approved by the Supreme Court's acceptance of the role of secretarial discretion in interpreting the statute,[273] and by the Department's policy of declaring invalid any claim for which a patent application is denied.[274] The discovery standard applicable to oil shale claims, once differentiated in the hope of encouraging shale development, has now been conformed to that generally applicable to mining claims.[275]

Individual Department employees who must apply the discovery standard in their work are well aware of its flexibility and policy implications, and use that flexibility within the limits imposed on them by staff review or current case law to achieve what appears to them to be useful change. Thus, a mineral valuation expert bases his recommendations for contesting a claim on his belief about what the discovery standard ought to become as well as upon his understanding of what it is. His recommendations are supervised for conformity to Bureau policy, but he has a fair amount of initiative. The expert would not think of provoking a legislative type of process; that is too impersonal and clogged with obstacles. Case work, on the other hand, involves dealing with a few well known individuals, and involves relations with peers or near peers, not a belittling chain of command. The case is a matter of individual responsibility; hence, the individual employee has a ready medium for policy expression. A prototype rule cannot easily be so regarded.[276]

(b) Suggestions for Unifying Policy Formulation — At the same time, the consequences of fractionating the policy-making function within the

---

[273] United States v. Coleman, 390 U.S. 599 (1968).

[274] Kenneth F. & George A. Carlile, 67 Interior Dec. 417 (1960); *see* note 90 *supra.*

[275] Frank W. Winegar, 16 I.B.L.A. 112, 4 ENV. L. RPTR. 30005 (1974). In the first quarter of the century, both the potential value and the current uselessness of oil shale seemed clear; the differential standard of discovery, foregoing the necessity to show current value with respect to oil shale, was adopted with the clearly expressed policy purpose of fostering in this manner the development of this enormous energy resource. The policy did not work. Its adoption is, however, a striking example of the flexibility with which the statute was interpreted, even then, to achieve desirable objectives. *See* text accompanying notes 267–68 *supra.*

[276] This possibility of individual initiative contributes to the prospector's fear of arbitrariness, as eloquently remarked by a Denver attorney:

> The antiquity of the General Mining Law makes it less acceptable to staff in the field than it might once have been; today's mineral examiner or field attorney is offended by the notion of J. Jones getting 160 valuable acres virtually for free, and the ghost of Albert Fall, still stalking the Department's corridors, reinforces his disposition to resist. A tradition of decision by adjudication, in these circumstances, may permit efforts to develop new policy; my fear is that in a setting of marginal supervision, no one will get a claim if it can be helped.

Carver, *Administrative Law and Public Land Management,* 18 AD. L. REV. 7, 14–15 (1965); *see* Hochmuth, *supra* note 269.

Department have begun to appear. Whether in expressing skepticism that they can be bound by Solicitor's Opinions or in making subtle changes in the discovery concept which seem to point away from the direction taken in *United States v. Coleman,*[277] the members of the Board of Land Appeals assert an independence of other departmental policy makers which is both intended and productive of possibly destructive antagonisms.[278] Should the Board recant the existing policies on discovery, and order issuance of a patent where none would have been granted before, no appeal to the courts is possible to check the validity of that position. Internal check, after the fact of an unacceptable decision, is possible, but at the cost of destroying both the finality of the Board's decision and the appearance of impartiality which has been so emphatically sought after. Permitting policy making to continue as predominantly adjudicatory under the present institutional arrangements assures a loss of control; the issue is not simply which is the more suitable procedure to formulate policy, but who is to decide the ultimate policy question. The operating divisions of the Department have a necessary and, indeed, proper interest in having some assurance that the outcome will conform to the policies of the Department generally. The Secretary's position vis á vis that office is not that of a coordinate and coequal branch. To the extent that it is not merely applying existing rules to disputed facts, the Board of Land Appeals cannot be insulated and impartial in its function without raising some risk of prejudice to the government's proper interests in its lands. The interest in uniform policy cannot be wholly disregarded. If, for the sake of fairness to private litigants, the Board of Land Appeals is to be insulated from secretarial policy control, the concomitant of that remoteness must be an interest on the Secretary's part to assert that some legal or factual conclusion is in error.

Whether an independent board to decide administrative appeals is a sensible institution is, itself, an interesting question.[279] One possible response would be adoption for use by the Board of a hybrid procedure under which policy issues would be certified for secretarial decision after public notice and an opportunity for comment, with the question of applying the procedure adopted to the particular case reserved for decision by the Board. Any such procedure would magnify the need for screening mechanisms in the Board's processes, to identify in advance the possibly

---

[277] 390 U.S. 599 (1968); *cf.* Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017 (1973).

[278] Letter, *supra* note 109, at 1, 4.

[279] C. MCFARLAND, *supra* note 20, at 302–04; P.L.L.R.C. REPORT, *supra* note 8, at 254. Both the Public Land Law Review Commission and its reporter on procedural matters, Professor McFarland, recognized the divided administrative responsibilities which would attend any independent review board; but both also stressed the public apprehension that disinterested justice could not be obtained, as possibly warranting steps in that direction. As has also been apparent in more general studies of the problem, the two considerations are not readily reconciled. Freedman, *Review Boards in the Administrative Process,* 117 U. PA. L. REV. 546 (1969); Loevinger, *supra* note 265; Robinson, *supra* note 265; Robinson, *On Reorganizing the Independent Regulatory Agencies,* 57 VA. L. REV. 947, 970 (1971).

significant cases.[280] Alternatively, provision could be made for discretionary secretarial review, the reactive approach which seems to have been anticipated by the Administrative Conference and the A.B.A. in prior recommendations for formulation of intermediate appellate bodies.[281] Or the Secretary might take the lesser measure (since it involves neither the formulation of policy nor reversal of its application in the particular case) of voicing disapproval of particular Board decisions, with the effect of leaving the question unsettled for the future. Finally, the Board's holdings would be given maximum effect consistent with any secretarial control were he authorized to seek judicial review of adverse holdings — as, for example, the Commissioner of Internal Revenue may from decisions of the Tax Court — and otherwise were considered bound by them.[282]

A provision for discretionary secretarial review would be the most orthodox response. Models can be found in the executive departments as well as in the multimember independent agencies that were the apparent focus of the A.B.A. and Administrative Conference recommendations.[283] But a three-level tier of administrative decision involves elements of possible unfairness to private litigants, particularly if, as in the Department's public land matters, their capacity to support the expense of litigation is often marginal. The Department's elimination of the appeal to the Director of the Bureau, previously an intermediate step to final departmental decision, was itself made in recognition of possible unfairness worked by the costs of a multistage procedure. Where the issue is unifying the policy-making function, the fairness of imposing the risks and expense of additional proceedings entirely on particular litigants is doubtful.[284]

The Solicitor's Opinion offers a less costly means to individual litigants for blunting the force of unacceptable appellate board decisions. Just as the Internal Revenue Service announces its acquiescence or occasional nonacquiescence in decisions of the Tax Court, the Solicitor's Office might be authorized to announce reasoned disagreement with decisions of the Office of Hearings and Appeals. That opinion, obviously, would not affect the outcome of the particular case. But it could be given the effect of removing precedential force from the decision disapproved, leaving the issue involved subject to redetermination either in ensuing litigation or by rule. The fact that its prior decision had been rejected, together with the reasons stated for rejecting it, might have forceful effect should the Board again be called upon to resolve the issue. As a published docu-

---

[280] *See* text accompanying notes 254–56 *supra.*

[281] RECOMMENDATIONS, *supra* note 231, at 20, 125 (Rec. 68–6) (1971); *see* statements of the Administrative Conference of the United States on the ABA Proposals to Amend the Administrative Procedure Act, 1972–73 ANN. REP. 51 (1973).

[282] *Cf.* S&E Contractors, Inc. v. United States, 406 U.S. 1, 60–68 (1972) (Brennan, J., dissenting); INT. REV. CODE OF 1954, § 7483.

[283] *E.g.*, 8 C.F.R. § 3.1(h) (1974) (Attorney General may review decisions of the Board of Immigration Appeals sua sponte or at the behest of the Board or the Commission of the Immigration and Naturalization Service).

[284] *Cf.* Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ENV. L. RPTR. 30017 (1973).

ment, the Solicitor's Opinion would be available to both sides for citation in the case and doubtless would be cited. The appellate board, however, would again remain formally free to make its own reading of the issue presented.

The judicial model has its flaws when adapted to the administrative context. But if the Department feels compelled to grant court-like independence to the Board of Land Appeals, giving up centralized policy control, it might also assert that the judicial model of appeal by either side should apply. The Department's Solicitor might wish equal redress for his "grievances" as any private party.[285] In some cases, notably those involving Forest Service lands, neither litigator before the Board has any formal connection with the Department of the Interior. The Forest Service, in pursuit of its own statutory and regulatory mandates to manage its lands efficiently, may come to believe that the Board (or, through it, the Department of the Interior) has failed to recognize some special factor, misread the governing statutes, or encumbered Forest Service lands without substantial evidence in support. Judicial review at its behest would be one means, and perhaps the fairest to all parties concerned, for resolving the dispute.[286] This last possibility is perhaps unlikely. It would

[285] It is not inconceivable that private claimants would be benefitted thereby. Their prevailing complaint is that the Department remains too conservative regarding recognition of claims — that the ghost of Albert Fall still stalks the corridors, rendering departmental bureaucrats unwilling to recognize private claims of right. The unreviewability of decisions to recognize claims must (and on the evidence of informal discussions does) influence decisions; an erroneous denial can always be reviewed, but not an erroneous grant, and hence it is safer to deny in cases of doubt. The Board of Land Appeals might be led to greater evenhandedness in managing its doubts if assured that both parties appearing before it had an opportunity to correct its errors.

Yet more speculative is the possibility that reviewing courts, faced with contentions that the Board had been too solicitous of private claims as well as claims that it was not solicitous enough, would acquire a more balanced view of the Board's decisional processes. When court decisions speak of the limited nature of judicial review, they perhaps already recognize and adjust for its present negative character. As cases asserting insufficient agency aggressiveness have slowly begun to appear, the courts entertaining them have voiced perceptions of a "new era" in judicial-administrative relations. *E.g.*, Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971). What seems to be involved is just this recognition — that the consistently negative character of traditional provisions for review, responding only to private assertions that the agency had gone "too far" in encroaching on private right, tended to foster caution within the agency; it had to fear judicial assault only on one front. So far as the Department is concerned, however, there is no indication that in recent years judicial control has been a significant factor; final reversals of its actions have been quite rare.

[286] The obvious difficulties regarding the existence of a constitutional case or controversy, less severe for the Forest Service, would be avoided were the Board given independent status by statute, *cf.* INT. REV. CODE OF 1954, §§ 7441, 7483, or were the Department merely to repudiate the unacceptable internal holding and await private suit. In a suit brought by a patent applicant to compel the issuance of a patent, or by a locator for the value of land "taken" by government action, or in a locator's defense to a government action seeking an injunction against continuing trespass, the claimant would prove the Board's decision, and the Department would seek to resist on the ground of error. The necessity of demonstrating error, it may be observed, would tend to limit invocation of review to a quite narrow class of cases; discretionary review within the Department, if provided for, would permit review, as well, of all matters within the Secretary's leeway.

require statutory authorization, and the more broadly sweeping substantive reforms now proposed would moot the problem.

Agencies are not courts, and for a variety of reasons may be left to resolve such disputes through the internal mechanisms of the executive branch. Lapses by the Board may offer encouragement to rulemaking, and the government's interest in the particular land affected by arguable error is not usually so great as to render the other possibilities suggested inadequate, nor is the incidence of internal or interdepartmental disputes regarding the correctness of the Board's decisions now substantial.[287] Yet the absence of a judicial remedy when disputed issues of law are resolved against the position of the government's attorneys appearing before the Board should stand as a caution against excessive insulation of the Board from the rest of the Department's policy setting apparatus.

The better course might be in the form of hybrid procedures, introducing elements of rulemaking into those cases in which large issues of interpretation, unresolved or imperfectly dealt with on the Department's rules, appear. Hybrid procedures seem to be most frequently viewed as a mode for increasing the discipline of rulemaking proceedings, but as some have suggested,[288] they are equally apt for expanding the scope of adjudication when an issue of general importance is found to be involved in pending litigation. Published notice of the problem posed and a proposed ruling would avoid the problems of participation and representation which critics have noted in the past, while possibly easing the financial burden for the individual respondent. Incorporation of the result in the Department's rules as well as its reported decisions would tend to simplify the presently overcomplex task of finding its governing law. The Department, not formally subject to the Administrative Procedure Act's rule-

---

The posture in such a case would be essentially that which the government stated existed in S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972), where the litigation took the form of a claim asserted by a contractor against the government. The Justice Department properly viewed the action as government-initiated review of findings of fact and conclusions of law reached by an AEC hearing examiner, specially designated by the agency to act much like an independent contract review board — that is, much like the Board of Land Appeals within the Interior Department. There the majority, over a strong dissent, protested sharply what it deemed the unfairness of requiring a litigant, successful before the AEC, to run the further "gauntlet" of "review" by other agencies (the General Accounting Office and the Justice Department) as a prelude to those agencies precipitating judicial review on behalf of the United States. *Id.* at 15. The majority found both the administrative "review" by the other agencies and judicial review at the request of the United States to be unauthorized by statute. Had the statute been explicit, however, nothing suggests the Court would have found a constitutional barrier to the procedure. And the assessment that forcing the litigant to run the further gauntlet is "unfair" ignores the deliberate effort to make the board whose decision is thus appealed "independent" of agency influence, itself in the interests of fairness. One cannot have it both ways.

[287] *But see* Letter, *supra* note 109, at 2.

[288] *E.g.*, Clagett, *Informal Action — Adjudication — Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51, 83; *cf.* RECOMMENDATIONS, *supra* note 231, at 24, 175 (Rec. 71-3).

making or adjudicatory procedures,[289] is in a particularly favorable position to undertake procedural experimentation of this sort.

Such procedures would be more appropriate at the Board level than before the Department's administrative law judges. Awaiting appeal permits a more accurate assessment of the importance of the issues, and the record compiled at the initial hearing should both illustrate the ambiguity or insufficiency of existing policy guides and afford a basis for resolution of the immediate controversy. The suggestion is that the Board be empowered, either on motion of a party or sua sponte, to publish in the *Federal Register* notice of policy issues thus framed and of their suggested resolution. The suggested resolution might be the Board's but reliance on the departmental Solicitor's position would reflect the Secretary's proper authority over policy issues. Notice-and-comment rulemaking would ensue. Once all comments had been received, final decision of the policy issue should be possible, at least formally, at the secretarial level. In any event, the less confining strictures of rulemaking processes would apply. Application of the policy in the particular case, however, or decision of the case should legislative statement prove infeasible or unnecessary, should be left to the Board's present adjudicatory processes.

Adoption of such a procedure undoubtedly would stir arguments regarding the "prospective" application of rules and permissible "retroactivity" of adjudication. The claim would be that, having infected the adjudicatory process with general public participation and open consideration of concededly unresolved policy issues, the Department could no longer fairly apply the result of its proceedings to the case at hand. The prospectivity-retroactivity distinction, however, like other formal differences between rulemaking and adjudication, has been considerably overdrawn.[290] If properly subject to the possibility that his rights would be determined by adjudication, a claimant suffers no discernible injury from the choice of a slightly different, fair, and yet more catholic procedure to investigate the policy questions involved. At most, he is entitled to an opportunity — such as he would have in a strictly adjudicatory context as well — to show equitable bases for a claim not to have the new standards applied to his detriment: for example, that prior law, upon which he properly relied, was clearly in his favor; that past events, in particular, should not be judged by a standard clearly different from that which seemed to govern at the time; or the like.[291] Where prior law has been uncertain, or the question is what future showing must be made

---

[289] 5 U.S.C. § 553(a)(2) (1970) ("public property"); *see* text accompanying notes 206–10 *supra*.

[290] Robinson, *supra* note 265, at 517–19; *see* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 933, 925–58 (1965); NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 94 S. Ct. 1757, 1770–72 (1974).

[291] *See* text accompanying notes 62–70 *supra; cf.* Massey Motors, Inc. v. United States, 364 U.S. 92 (1960); K. DAVIS, *supra* note 64, § 5.09 (Supp. 1970); Robinson *supra* note 265, at 525–26; Shapiro, *supra* note 290, at 952.

or conduct performed with respect to existing claims, such bases could not be established, and full application of the determination made in the hybrid proceedings to all claims would be entirely justified. The common practice under regulatory statutes such as the Mineral Leasing Act is to include in the lease agreement an undertaking to be bound by future changes in governing regulations; that practice should apply here. In the context of a claim to government property gratuitously made available, not private property subjected to outside control, the citizen's claim to "nonretroactivity" is fairly limited to the avoidance of adverse consequences from behavior apparently lawful when undertaken — without regard to the character of the proceedings in which the rules governing his obligation are eventually defined. While existing claims obviously could not be abrogated by fiat, neither Congress nor the Department lacks authority to clarify governing law or to alter for the future the circumstances under which the claims are held.

F. Judicial Review

No statute provides for review of the Department's decisions in mining contests. At least since the Mandamus and Venue Act of 1962 [292] authorized nonstatutory actions for review to be brought in the district where land in question is located, however, applicants for patent or locators whose claims are held invalid in government contests have had no difficulty in securing district court review of those decisions. Once the administrative hearing process has been traversed,[293] their standing to complain of an adverse impact on arguable statutory rights is clear. Although the doctrine of sovereign immunity might theoretically be invoked to bar actions seeking a mandate that a patent issue,[294] no claim for review of a decision denying a patent or declaring a claim invalid under the General Mining Law has ever been refused on that basis.[295]

The most perplexing issue on review of government contests has been the judicial standard to be applied. The initial decisions, perhaps mindful of Congress' particularly broad power of regulation over public lands and its sweeping delegation of that authority to the Secretary of the Interior, made the Secretary's factual findings conclusive and gave substantial

---

[292] 28 U.S.C. §§ 1361, 1391(e) (1970).

[293] An interesting recent decision suggesting that under section 10(c) of the Administrative Procedure Act, exhaustion of administrative appellate remedies is not required for judicial review absent a specific requirement imposed by statute or rule, United States v. Consolidated Mines & Smelting Co., 455 F.2d 432 (9th Cir. 1971), has been mooted for the Department by adoption of such a rule. 43 C.F.R. § 4.21(b) (1973).

[294] *E.g.*, Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306 (1930).

[295] The theoretical confusion is elegantly set out in Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions From the Public Lands Cases,* 68 MICH. L. REV. 867 (1970), which finds in the irreconcilable lines of cases confirmation of the common law judge's historically oriented approach. *See* C. MCFARLAND, *supra* note 20, at 187–88, 224–27 & nn.271–79.

weight to his interpretations of statutes governing discretionary matters.[296] Recently, the tendency on factual issues has been further to incorporate the Administrative Procedure Act, resulting in application of the usual test of "substantial evidence on the record as a whole." [297] The Department seems not to have conceded the propriety of this standard, however,[298] and some courts still appear uncertain whether its findings are not entitled to a higher measure of respect.[299] Professor McFarland, while acknowledging that the question has never been litigated, appears to suggest precisely the opposite view: that since these hearings are not required by *statute* to be decided on the basis of a formal record, courts are free to disregard the Department's factual conclusions and to try factual issues de novo.[300] On questions of statutory interpretation, the Department's views continue to be given substantial weight.[301]

Obtaining review may be considerably more difficult where one private party is disappointed by a decision favoring another. The problems may arise either after a private contest or following a decision against the government in a proceeding in which the Department's litigating position had been supported by an intervenor. In a rare private contest, the disappointed litigant may be required to await issuance of a patent to the victor and then relitigate the preferential right question in local courts, without presence of government officials.[302] Should a government contest

---

[296] Cameron v. United States, 252 U.S. 450, 464 (1920) ("conclusive in the absence of fraud or imposition"); United States v. Schurz, 102 U.S. 378, 396 (1880); Standard Oil v. United States, 107 F.2d 402, 409–10 (9th Cir. 1940); Peck, *Judicial Review of Administrative Actions of Bureau of Land Management and Secretary of the Interior,* 9 ROCKY MT. MIN. L. INST. 225, 232–42 (1964); *see* note 140 *supra.*

[297] Coleman v. United States, 363 F.2d 190 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 599 (1968); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958).

[298] *See* Udall v. Garula, 405 F.2d 1181 (10th Cir. 1968); Udall v. Snyder, 405 F.2d 1179 (10th Cir. 1968).

[299] Pruess v. Udall, 359 F.2d 615 (D.C. Cir. 1965); Multiple Use, Inc. v. Morton, 353 F. Supp. 184, 188 (D. Ariz. 1972) ("judicial relief is not available unless the administrative action was arbitrary and capricious and unsupported by substantial evidence," meaning, apparently, some evidence rather than substantial evidence on the record as a whole); *cf.* Camp v. Pitts, 411 U.S. 138 (1973); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971).

[300] C. MCFARLAND, *supra* note 20, at 168, 204–06 nn.113 & 116. The interpretation, questionable even if only the Administrative Procedure Act were considered to bear on this problem (*see* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)) is impossible to reconcile with the pre-APA decisions regarding scope of review (*see* authorities cited note 296 *supra*); nor could it be convincingly argued that passage of the Act was supposed to work such a reversal. The Supreme Court may be said to have settled the point in Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963), which recognized the appropriateness of a district court's reference of a claim validity question to the Department; that reference need hardly have been made if, the Secretary having decided, the district court would have been empowered to try the factual issues afresh.

[301] United States v. Coleman, 390 U.S. 599 (1968); Udall v. Tallman, 380 U.S. 1, 16–17 (1965).

[302] C. MCFARLAND, *supra* note 20, at 186–87, 223–24 nn.267–70 points up the complexities and possible frustrations. In some circumstances, *see* text accompanying notes 95–96 *supra,* the dispute over possessory right must be resolved in state court *before* the patent application will be acted upon; the loser, having lost his claim to possessory interest in such cases, could neither participate in the departmental proceed-

fail in a proceeding in which an intervenor supported the government's contention, it might be supposed that the intervenor could seek the review the Department (or the Department of Agriculture) ordinarily could not obtain. In the latter case, however, acquiring jurisdiction over all necessary parties may be extremely problematic;[303] as a practical matter, review may be infeasible. With regard to mining contests, neither of these difficulties will frequently arise; competing applications are unlikely and are usually resolved judicially before any administrative decision. Intervention on other bases is extremely rare.

Any modification of the present review practice would require a statutory change, a change that may not be necessary when the location system seems to be teetering to an end. If the system is maintained, however, statutory provision for review would be advisable. Given a formal hearing process within the agency, the results of that process should have the consequences normally accorded agency hearings on the record: a review proceeding brought directly to the United States Court of Appeals [304] in which the standard applied for review of factual issues is substantial evidence upon the record as a whole. District courts have no special expertise or function to warrant continuation of the present two-tiered structure for review; rather, they have seemed somewhat confused, and far from uniform in their approach to review of the Department's decisions. Nor does continuing reason appear for giving greater than usual deference to the Secretary's findings of fact. They emerge from a hearing procedure indistinguishable from that of other agencies and, while somewhat technical in nature, are hardly shielded by the demands of expertise from the possibility of review for support on the record. The problems of distinguishing findings of fact from conclusions of law for analytic purposes are not materially different for the Department than for

---

ings nor demonstrate the requisite standing for any form of review. Where the dispute is administratively resolved, judicial review is appropriate in the sense that res judicata could not be asserted, but the Department's availability as a party to review of a decision in which it did not participate as a litigant — and hence, the availability of effective relief —is conceptually troublesome. Perhaps for this reason, the Department has recently indicated that in the most common modern form of private contest, under the Multiple Mineral Development Act, 30 U.S.C. § 527 (1970), a government contest may often be substituted with the private proceeding to abide the event. The problem, in any event, is not significant in practical terms.

[303] As Professor McFarland points out, the Mandamus and Venue Act may be invoked only if *each* defendant is a government officer or employee. C. McFARLAND, *supra* note 20, at 189, 229 n.288; 28 U.S.C. § 1391(e) (1970). Omission of the successful private party as a defendant is hard to justify, since a successful appeal will deprive him of the fruits of victory before the agency; it is hard to imagine that the occasional case permitting review in his absence will survive hard questioning. C. McFARLAND, *supra* note 20, at 189, 229 n.288. The Secretary (or the United States) could be omitted only at peril — unless the government had entirely disposed of its interest in the land, as by issuing the patent, its indispensability would defeat the action. *Id.* at 189, 229 n.287.

[304] No reason exists for limiting such review to the District of Columbia; the western circuits, where the land and the claimants are located, have acquired substantial familiarity with the questions since passage of the Mandamus and Venue Act of 1962, and are more likely to draw for their membership upon lawyers familiar with the problems of mining practice.

other agencies. In short, it is hard to justify the proposition that the Secretary's findings, unless tainted by fraud or arbitrariness, are "conclusive" upon the reviewing court.

At root is the perennial difficulty of assessing the weight to be given the Secretary's determination of the legal effects to be given the facts once found — whether they do or do not constitute a "discovery," for example. Both the authority of Congress over the public lands, and Congress's delegation of that authority to the Secretary, are remarkably broad. The consequence is, at the same time, a broad range of uncertainty regarding the meaning of governing statutes and an initial commitment to the Secretary of the authority to order matters within that range by his decision. The Secretary's law-applying decision may therefore indeed be entitled to special respect.[305] That proposition, already recognized, would be unaffected by explicit statutory adoption of court of appeals review under the "substantial evidence" test. Any statutory provision for review would, and should, eliminate the jurisdictional difficulties that some private participants in departmental hearings now experience in obtaining review.

APPENDIX

RECOMMENDATION 74–3: PROCEDURES OF THE DEPARTMENT OF THE INTERIOR WITH RESPECT TO MINING CLAIMS ON PUBLIC LANDS (Adopted May 30–31, 1974)

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Although largely unknown to lawyers outside the West, the Department of the Interior's disposition of mining claims on public lands is a significant field of Federal administrative activity and an important element in planning rational use of the public lands.

The procedures for establishing or "locating" mining claims are set out by the General Mining Law of 1872, which has not been significantly amended since its passage. A claim is located by marking the corners of the acreage claimed, posting a notice on the land, and, if state law requires, performing specified work. Notice is then filed in the county courthouse. No valuable mineral need have been found, nor is the prospector under any obligation to reveal what mineral he believes to be present in order to exclude possible rivals from the land. A valid possessory interest is acquired against the United States, however, only if a "valuable" mineral deposit has been "discovered." If certain formalities are then complied with, the prospector may convert this possessory interest into full title, or "patent," for a modest sum; the possessory interest in

[305] United States v. Coleman, 390 U.S. 599 (1968); Udall v. Tallman, 380 U.S. 1 (1965); Work v. United States *ex rel.* Rives, 267 U.S. 175, 183 (1925) ("as the statute intended to vest in the Secretary [of the Interior] the discretion to construe the land laws . . . no court could reverse or control them by mandamus in the absence of anything to show that they were capricious or arbitrary").

a demonstrably valid claim is so secure, however, that such purchases are rarely sought. Claims are neither registered with the Federal Government nor paid for unless a patent is sought; nor need any discovery of valuable mineral be formally recorded anywhere in advance of a possible application for patent.

In the view of the Department of the Interior, a claim may be valid even if inactive; all claims are regarded as potential clouds on the Government's title. Thus, when a dam is to be built or a National Park secured, obtaining clear title to the land requires the Government to identify claims for which patent applications have not been made. This currently requires Bureau of Land Management employees to make a painstaking search of disorganized and ancient county records for each possibly valid claim and for evidence for its descent. Part A of the present recommendation urges the elimination of this wasteful and uncertain system by establishment of a registration process, and suggests interim measures which the Department may take until that legislation is enacted.

Once the identity of existing claimants is known, the present system provides for testing the validity of their claims by formal administrative adjudications in which, although the burden of persuasion is upon the claimant, the Government must first establish prima facie that no "discovery" of any "valuable" mineral has been made. It must do this without the benefit of subpoena power, or even of any requirement that the claimant define his claim (*e.g.,* by stating the nature of the minerals discovered) before the Government puts on its case. The practical effect of these hearing procedures is that a mineral examiner must be sent to inspect every claim that may be asserted. Adjudication is performed by administrative law judges in the Department's Office of Hearings and Appeals, subject to de novo review by the Board of Land Appeals in the same Office. Although the Department has full rule-making authority, it has typically used case adjudication to develop positions on such central issues as what constitutes the "discovery" necessary to render a claim valid against the Government. To the extent cases are decided on the basis of interpretations or policy that a court would find within the Secretary's discretion, the Department's Office of Hearings and Appeals exercises important policy-making functions; yet at present no provision is made for Secretarial review of its conclusions. Judicial review of these adjudicatory determinations can be obtained only in United States District Court, in accordance with the so-called "nonstatutory review" provisions of 5 U.S.C. § 703. The "substantial evidence" standard of 5 U.S.C. § 706(2)(E) is of course applicable, but some confusion remains as a result of early cases treating the Department's findings of fact as near-conclusive. Part B of the present Recommendation seeks to rationalize the Department's adjudicatory system by providing fairer and more efficient hearing procedures, bringing the Department's case law more closely within a unified policy-making structure, and establishing

judicial review provisions in appellate rather than trial-level federal courts, with explicit affirmation of the APA standard of review.

Although not required to do so by statute, the Department of the Interior commendably makes use of notice-and-comment rulemaking procedure, both for adoption of regulations to be codified in the Code of Federal Regulations and for actions withdrawing public lands from use under the various public land laws, including the mining laws. Public participation in such rulemaking, however, is substantially impaired by the lack of ready access to geologic data and other Government-developed data and views relating to rulemaking proposals. Moreover, other information important to the public, pertaining to matters of law, policy, procedure and Departmental organization, is not available as readily, or in as comprehensible a form, as it should be. Part C of the present Recommendation suggests requirements to render the Department's rulemaking process more effective and to facilitate citizen receipt of needed information.

Recommendation

A. Identification of Claims

1. Whether it is achieved separately or in conjunction with more general mining law reform, mandatory Federal registration of claims and records of required assessment work is important for sound management of the public domain. The Congress should enact legislation to impose that requirement; and the Department should consider whether it may impose such a requirement under its existing rulemaking powers and management authority over the public lands.

2. Pending the implementation of mandatory registration procedures, the Department should afford facilities for voluntary federal registration of claims by persons who wish to be assured personal notice of governmental actions possibly affecting their interests. Moreover, when clear title must be established for particular tracts of public domain during this period, fairness permits and efficiency demands that the Department adopt procedures which require the unknown owners of the claims, or the holders of unknown claims, to identify themselves and their claims before any more formal government action can be called for. Procedures for identifying claims, modeled on those specified in the Multiple Mineral Use Act of 1954 and the Surface Resources Act of 1955, should include the following:

(a) The search for claims and claimants should be limited to what can be readily discovered by visual inspection of the land, by limited inquiry in the vicinity, by listing in tract indexes, and by reference to the Department's own records and knowledge.

(b) Personal notice should be given only to those claimants thus discovered; otherwise, notice may be effected by posting the land and by appropriate publication.

(c) All persons wishing to assert the validity of claims affecting the lands in question should be required to file verified statements with the Department precisely identifying themselves, their claims, and other parties in interest.

(d) Claims not asserted within a reasonable period of time should be deemed abandoned.

B. Hearing and Review Procedures

1. The Department should by rule require that once the Government initiates proceedings to determine the validity of mining claims located on particular tracts of public land, claimants must specify all matters necessary to establish this validity — in particular, what discovery of valuable mineral is claimed, with supporting geological and economic information. Until such matters are specified, the claimant has not established a basis for a fact-finding hearing; failure to make adequate specification should subject the claim to summary judgment declaring its invalidity. In the administration of this rule, the Department should take measures to protect the interests of smaller prospectors, acting in good faith, who may not be financially able to provide full technical data regarding their claims. Such measures might include joint inspection and assay using government experts (once the nature and points of discovery asserted are identified and adequately defined), and reliance upon the resulting reports as adequate to support summary judgment in accordance with their conclusions of fact.

2. Because the nature and quality of his claim is a matter uniquely within his knowledge, the claimant should be made to bear the burden of going forward as well as the burden of proof in any fact-finding hearings. Moreover, the Department should make clear by rule that where such hearings prove brief and the issues of fact or law involved prove simple, the presiding administrative law judge has the authority to decide the case immediately from the bench upon conclusion of the hearing and receipt of argument, without need to await the transcript or written briefs.

3. Effectively conferring final decision-making authority upon the Board of Land Appeals risks a bifurcation of the Department's policy-making function. The Department should adopt measures that will reconcile the appropriate adjudicative role of the Board with the Secretary's policy-making responsibility.

4. The Congress should enact legislation which would help to bring the adjudicative procedures of the Department into line with usual administrative practice:

(a) by conferring on the Bureau of Land Management discovery authority commensurate with that enjoyed by most federal agencies; and

(b) by explicitly providing for review of the final agency decision in adjudicated cases in the appropriate Court of Appeals under the

Administrative Procedure Act, with "substantial evidence" review of findings of fact.

C. Rulemaking Procedures — Public Information

1. The Department's rulemaking procedures should be improved and the availability of its information to the public increased by various means, including:

(a) Adoption of procedures providing interested parties adequate opportunity to inspect and to comment upon geologic data and other Government-developed data or views relating to a pending rulemaking proposal and otherwise available under the Freedom of Information Act, 5 U.S.C. §552. This may require extension of the ordinary comment period.

(b) Reduction of the number and complexity of law-sources which must be consulted to determine governing law and authority within the Department. Matters substantially affecting the public, but now incorporated in staff manuals or other internal documents, should be included in the published regulations, and policies generated through the adjudicatory process should be codified in regulations periodically. In addition, the Bureau of Land Management should publish regularly, in the Code of Federal Regulations and in pamphlet form, a full and current description of its central and field organization, showing lines of authority, and a full and current description of its operating procedures for dealing with mining matters, including the full requirements for patent applications.