IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Walter B. Freeman, Plaintiff, v. The United States Department of the Interior, the Interior Board of Land Appeals, and the Bureau of Land Management, Defendants.	Case No. 1:12-cv-01094-BAH

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Interior Decisions

Other Authorities

INTRODUCTION

Plaintiff, Walter Freeman (Freeman), claims ownership of mining claims in Southern Oregon.[1] These claims exist on federal land managed by the United States Forest Service (FS) and the Bureau of Land Management (BLM). In 1992, Freeman filed a plan of operations, essentially an application for permission to mine his claims. The FS denied his plan of operations and Freeman filed a complaint in the Court of Federal Claims, alleging a taking of his claims under the Fifth Amendment. Administrative Record (AR) 10700.

The Court of Federal Claims stayed the case pending a determination by the Department of Interior (Department) as to whether Freeman possessed valid mining claims under the General Mining Law.[2] AR 10728. For mining claims to be valid, the claimant must have discovered valuable minerals. *See* 30 U.S.C. §§ 22, 26; *see also Watt v. Western Nuclear, Inc*., 462 U.S. 36, 51 (1983).

During the stay, the Department issued a contest complaint alleging that Freeman had not discovered valuable minerals as of 1994 or 2000. AR 184. That contest was processed within the Department's Office of Hearings and Appeals (OHA) and assigned to Administrative Law Judge, Harvey Sweitzer. After the hearing on this contest was completed, Judge Sweitzer concluded that the OHA did not have jurisdiction to determine whether mining claims were valid as of some historical point in time. AR 1262.[3]

The Department appealed this decision that there was no jurisdiction to the Interior Board of Land Appeals (IBLA), which reversed. *United States v. Freeman*, 174

[1] The minerals contained within these claims are nickel, iron and chromium.
[2] 30 U.S.C. § 22-47.
[3] Instead, Judge Sweitzer concluded the OHA could only determine the validity of claims as of the present, unless there was some reason that historical validity was essential for present validity. AR 1276. Those circumstances do exist here.

IBLA 290 (2008), cited herein as AR 1182-90. The IBLA concluded that the OHA did have jurisdiction to determine the past validity of Freeman's mining claims based on historical circumstances. *Id.* Moreover, it ruled that Freeman's mining claims could be declared currently invalid, even without any regard for current circumstances. AR 1188 n. 8.

Freeman argued that he should have been allowed to prove that his mining claims were valid as of the date of the hearing, but the IBLA ruled that present validity of the mining claims was not at issue. AR 1189. Despite this, the IBLA concluded that the claims could be presently invalid based on conditions in the past. *Id.* at 296 nn. 8, 10 (referencing failure of locations).[4]

Freeman now files this Motion for Partial Summary Judgment and Memorandum of Points and Authorities in Support, seeking reversal of the IBLA's decision finding jurisdiction of the OHA to determine the validity of Freeman's mining claims as of historical dates and authorizing a decision that the claims are presently invalid based solely on those historical circumstances.

MOTION AND RELIEF REQUESTED

Pursuant to FRCP Rule 56, Freeman moves for partial summary judgment on his First Cause of Action, reversing the 2008 decision of the IBLA which erroneously held that the OHA had jurisdiction to determine the validity of Freeman's claims as of

[4] Later, Judge Sweitzer ruled that Freeman's mining claims were "null and void because Mr. Freeman failed to establish that a discovery has been made of a valuable mineral deposit as of the October 1994 marketability date or as of the October 2000 marketability date." AR 2002.

historical dates based on historical circumstances no longer in existence.[5] Freeman requests oral argument on this motion.

EVIDENCE RELIED UPON

This motion relies solely on portions of the Administrative Record in the proceeding before the IBLA. Pursuant to Local Civil Rule 7 (n)(2), upon the conclusion of the briefing in this matter, the parties will assemble the cited portions of the Administrative Record.

ISSUE PRESENTED

Whether the OHA has jurisdiction to determine the validity of mining claims as of a historical point in time and then declare a mining claim currently null and void because the claim was not valid during some chosen historical time period?

SUMMARY OF THE MINING LAW

The General Mining Law[6] represents a controversial facet of American natural resources jurisprudence. While some consider it antiquated, the General Mining Law remains largely unchanged. It implements a policy that assumes the best way of handling certain types of the nation's mineral resources is by rewarding those who discover valuable minerals with the right to develop them. From development of mineral resources, the nation benefits with additional tax revenues and the encouragement of economic development in the local community and less dependence on resources from other countries.[7] With the advent of environmental regulations, mineral development in the United States represents a

[5] A Proposed Order is attached.
[6] 30 U.S.C. § 22, *et seq.*
[7] While a background of the General Mining Law is critical to an understanding of this case, the resolution of this case will in no way authorize any mining. This matter is premised on the expectation that Freeman will never be allowed to mine these claims.

more globally responsible approach as compared to mining in other parts of the world where environmental impacts are not addressed.

However, the United States has determined that some minerals should not be subject to the mining law wherein the mining claimant would otherwise obtain rights to the minerals, such as oil, gas,[8] and what are referred to as common variety minerals,[9] such as sand or gravel. Congress removed these minerals from being subject to the mining law, lest someone claim ownership of the nation's beaches based on a claim that sand, a valuable mineral, has been discovered. Instead of giving miners the right to the minerals, those who seek oil, gas or common variety minerals may acquire them only upon paying royalties to the United States, based on the value of the materials.[10]

Perhaps the most controversial aspect of the General Mining Law is the provision whereby the owner of a valid mining claim may file for a patent. If one has a valid mining claim which is free of, or superior to, any rival claimants, that person may apply for a patent, which entitles the patentee to more than just the minerals, but transfers complete ownership of the land which contains them, upon the payment of a mere $5 per acre. However, Congress has imposed a moratorium on the issuance of patents every year since the early 1990s. This case does not involve the issuance of a patent.

The scope of the General Mining Law is also limited geographically. Mining claims may not be established on land which has been segregated or withdrawn from mineral entry.[11] Such areas include wilderness areas[12] and, by specific Congressional action,

[8] Mineral Leasing Act, 30 U.S.C. § 181, *et seq.*
[9] Common Varieties Act, 30 U.S.C. § 611.
[10] *Id.*
[11] Federal Land Policy and Management Act, 43 U.S.C. § 1716.
[12] Wilderness Act, 16 U.S.C. § 1133.

National Parks. None of the exceptions, whether based on the area or the mineral, apply to this case. Although the Government has the power to prohibit mining claims where Freeman has made his claims, it has chosen not to do so. Freeman's claims are made on land, and for minerals, which the Government has chosen to remain open to discovery and acquisition by individuals.

The method by which a mining claimant makes a mining claim is by discovering valuable minerals and "locating" the claim. The latter involves posting the property with notices and filing with local property recording offices and the Bureau of Land Management (BLM). 43 C.F.R. § 3832.11. However, it is the "discovery" of valuable minerals which establishes the right to the minerals themselves. *United States. v. Shumway*, 199 F.3d 1093, 1098 (9th Cir. 1999). Traditionally, claimants were required to conduct work on their claims each year, previously referred to as "assessment work," in order for the Government to be certain that someone was not just "squatting" on federal land. *See United States v. Locke*, 471 U.S. 84, 86 (1985). That requirement has been replaced with the payment of an annual fee.[13]

While discovery of a valuable mineral deposit comes first in the statutory scheme, early on the courts recognized that the location of a claim could come first and then be followed by a discovery. *See Union Oil Co. of California v. Smith*, 249 U.S. 337, 347 (1919). This recognized that miners could put substantial effort into exploring for minerals and the law should not reward unscrupulous persons who did no work, but merely bested the working miner in a race to filing the notices of location. A mining claimant clearly can

[13] 30 U.S.C. § 28f(a).

locate mining claims and make the discovery of the valuable minerals at a later point in time. *Davis v. Nelson*, 329 F.2d 840, 846 (9th Cir. 1964).

The Department is responsible for managing the nation's real estate assets, not otherwise under the control of another Governmental entity, *e.g.*, the military, the National Park Service or the Forest Service. The Department's OHA hears proceedings involving situations where the Department has chosen to contest the validity of a mining claim. The Department may contest a mining claim for any reason[14] and at any time.

The critical issue in this case is whether the Department may contest a mining claim's validity based on historical circumstances which are no longer true. As addressed below, Freeman contends that it does not.

STATEMENT OF FACTS

A. Facts Leading to Present Dispute

Freeman's predecessors-in-interest located unpatented mining claims from 1940 to the early 1970s on federal land administered by the FS and a smaller portion by the BLM. AR 1183. On December 17, 1992, Freeman filed a plan of operations with the FS, proposing to mine his claims. After several delays by the FS and intervening administrative appeals by Freeman, the FS denied his plan of operations, rejecting his final internal appeal on October 11, 2000. AR 1184.

In early 2001, Freeman filed a complaint in the Court of Federal Claims, alleging that the United States had taken property rights related to his mining claims with payment of compensation. AR 10700. The court issued an order in October of 2001, suspending

[14] *Davis v. Nelson*, 329 F.2d at 846.

proceedings in the case and remanding the case to the Department "for determination of validity of plaintiff's mining claims." AR 10728.

On March 16, 2005, BLM, on behalf of the Forest Service, initiated a contest against the 161 mining claims,[15] alleging that minerals have not been found on any of the mining claims in sufficient qualities or quantities to constitute a discovery, and that any minerals found thereon could not have been marketed at a profit as of either 1994 or 2000. AR 7466-69.

B. The ALJ decision

After discovery and prehearing matters, the OHA scheduled a hearing on this contest proceeding. In the middle of the hearing, the Administrative Law Judge (ALJ) assigned by the OHA to hear this matter, Judge Sweitzer, became aware that the Department had focused its economic analysis of the value of the claims only on circumstances in 1994 and 2000. He raised the question as to whether the OHA had jurisdiction to decide whether mining claims were valid at historical times, unrelated to present circumstances. AR 1366, *et seq.* He directed the party's attention to two prior ALJ decisions within the OHA: *United States v. Story*, IDAHO 15674 (1981)[16] and *United States v. Aloisi*, CACA 41272 (2007).[17] In those two decisions, the respective

[15] During the course of the proceedings, Freeman abandoned 79 mining claims due to the cost of maintaining them, bringing the remaining number at issue down to 82.

[16] The *Story* decision is the same case that was involved in *Skaw v. United States,* 2 Cl.Ct. 795 (1983), *vacated by* 740 F.2d 932 (Fed. Cir. 1982). *See also* subsequent proceedings at 13 Cl.Ct. 7 (1987) and 847 F.2d 842 (Fed. Cir. 1987). Although the initial names in the title of the case differ (*Story* vis-à-vis *Skaw*), the description of the mining claims are identical.

[17] *Aloisi* was resolved by the Court of Federal Claims in *Aloisi v. United States*, 85 Fed.Cl. 84 (2008), by finding that the taking claim was not ripe.

ALJs were confronted with a remand from the Court of Federal Claims and were asked to determine the validity of mining claims at a point in time other than the present.

Judge Mesch in *Story* held the claims were invalid at the present time because the claimant failed to pay maintenance fees. AR 7212. He refused to determine whether the claims were valid as of the point in time the claims may have been taken. Likewise, Judge Holt in *Aloisi* refused to determine validity of mining claims as of any date other than the date of the hearing. AR 1378 . Judge Holt's decision acknowledged, but was not persuaded by, the fact that the parties were looking for validity as of a date that would be useful to the Court of Federal Claims. AR 1377.

In the present case, Judge Sweitzer ruled there was no jurisdiction of the OHA to determine the validity of mining claims as of historical points in time.

> [T]his forum is without jurisdiction to determine the contested claims' validity as of the date of either of the alleged takings in 1994 and 2000.

AR 1262.[18] The Government appealed this decision to the IBLA.

C. The IBLA decision

The question before the IBLA on the interlocutory appeal was whether the OHA had jurisdiction to determine the validity of mining claims as of certain historical points in time. The IBLA framed the issue as follows:

> [T]he present interlocutory appeals involve whether or not the Department can initiate a contest and an ALJ can determine the validity of mining claims as of the date of alleged takings.

[18] Judge Sweitzer recognized a theoretical possibility that the "date coincidentally coincides with the dates of the Contestee's compliance, if any, with the requirements for obtaining a patent," a situation where validity as of an historical point in time is relevant. AR 1262. In Interior Department contest proceedings, the mining claimant is referred to as "Contestee" and the contesting party, in this case the Government, the "Contestant."

AR 1186. The IBLA reversed, concluding that the OHA has jurisdiction. AR 1190.

The IBLA's decision was premised on the conclusion that the historical points in time were the "alleged taking dates," referring to the taking claim pending in the Court of Claims. AR 1183 ("dates of alleged Fifth Amendment takings") ("alleged takings dates"); AR 1184 ("BLM has explained that 1994 and 2000 represent the years when the alleged takings occurred"). As addressed below, Freeman disputes this characterization of the dates upon which the Government chose to assert its contest complaint. However, that issue need not be resolved if, as Freeman contends, the OHA does not have jurisdiction to decide the validity of claims based on historic circumstances regardless of the existence of a takings claim.

Nevertheless, the IBLA concludes that:

> [t]he Department's authority to determine claim validity **as of any point in time** has long been recognized by the courts. Until the lands encumbered by mining claims are conveyed out of Federal ownership, the Secretary may contest the validity of those claims so that "valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." *Cameron v. United States*, 252 U.S. 450, 460 (1920).

AR 1187 (emphasis added). It also concludes that the Department may contest a claim for any reason and such reasons include "assisting the United States in resolving a takings lawsuit." *Id.*[19]

[19] The IBLA includes a footnote indicating that this contest proceeding is similar to those related to condemnation litigation.

> The Secretary's initiating a contest to determine claim validity to assist the Court of Federal Claims in takings litigation against the United States is similar conceptually, even if the relevant dates may be different, to the Secretary's initiating a contest to determine claim validity to assist federal district courts in condemnation litigation on behalf of the United States, which assistance has been freely given.

The IBLA briefly addressed part of Judge Sweitzer's rationale for concluding there was no jurisdiction to base a contest on historical dates because the mining claimant has the right to "make a discovery and validate a mining claim after any such date, even after contest proceedings have begun." AR 1188 (citing AR 1268 (citing *United States v. Foster*, 65 I.D. 1, 5-6 (1958), *aff'd, Foster v. Seaton*, No. 344-58 (D. D.C. Dec. 5, 1958), *aff'd,* 271 F.2d 836 (D.C. Cir. 1959))). The IBLA concluded:

> That fact, however, does not alter our view that there is nothing in the applicable statutes, Departmental regulations, or case law that restricts mining contests in the manner suggested by Judge Sweitzer. A claim that is not support by a discovery as of the alleged takings dates would be invalid *at that time* under the mining laws, and the Government can surely bring a contest on that basis pursuant to 43 C.F.R. § 4.451-1.

AR 1188 (emphasis by IBLA).

After the IBLA reversed Judge Sweitzer's decision on jurisdiction, Judge Sweitzer reviewed the merits of the dispute and concluded that Freeman's mining claims

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> *See, e.g., United States v. Copple*, 81 IBLA 109 (1984); *United States v. Pool*, 74 IBLA 37 (1983); *United States v. Connor*, 72 IBLA 254 (1983).

AR 1187 n.7. The dissimilarity, however, is critical. In condemnation litigation, there is no reason for determining the validity of mining claims as of some historical period of time because the taking occurs on the date the government tenders payment for the property. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 3-4 (1984). But the IBLA's reasoning creates a significant problem in condemnation litigation. For instance, the Government could choose to condemn land in 2012 that contains mining claims that were located in 1960. Under the IBLA's reasoning, the Government could contest the validity of the claims as of the lowest point in the minerals value, such as 1962, and have them declared invalid as of that date. Once declared invalid during an economic downturn, the IBLA's rationale is that they remain invalid (because of a lack of value) regardless of the value of the minerals in 2012.

were not valid as of 1994 or 2000 and that they were presently invalid because of that fact. AR 2002.

ARGUMENT

I
THIS CASE MAY BE RESOLVED BY SUMMARY JUDGMENT UNDER FRCP 56

Summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[20] It is particularly appropriate when reviewing administrative action,[21] given that the court's review is generally confined to the administrative record.

A challenge to the issuance of agency action is governed by the Administrative Procedure Act (APA).[22] Under the APA, a court should reverse an administrative agency's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[23] Under this standard, the court "the inquiry into the facts is to be searching and careful, although the ultimate standard of review is a narrow one." *Chritton v. NTSB*, 888 F.2d 854, 856 (D.C. Cir. 1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). However, this motion for partial summary judgment is largely a review of the law, rather than a review of factual conclusions.

> The APA appears to require *de novo* review of all questions of law: "[t]o the extent necessary for decision and when presented, the reviewing court shall decide all relevant questions of law." 5 U.S.C. § 706(1).

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[20] Fed. R. Civ. P. 56(c).
[21] Schwarzer, *et al*., FEDERAL CIVIL PROCEDURE BEFORE TRIAL ¶ 14:293, at p.14-80.6 (Rutter Group 2010) (citing *McCall v. Andrus*, 628 F.2d 1185 (9th Cir. 1980) and *Pliley v. Sullivan*, 892 F.2d 35 (6th Cir. 1989)).
[22] *See Friends of the Earth v. Hintz*, 800 F.2d 822, 830-31 (9th Cir. 1986)
[23] 5 U.S.C. § 706(2)(A).

Office of Communication of United Church of Christ v. F.C.C., 707 F.2d 1413, 1422 n.12 (D.C. Cir. 1983).

The court decides legal issues and otherwise determines whether "the agency has committed a 'clear error of judgment' or has 'failed to consider an important aspect of the problem' before it." *Jicarilla Apache Nation v. U.S. Dept. of Interior*, 613 F.3d 1112, 1118 (D.C. Cir. 2010) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). If it has, the Court will hold the agency action to be arbitrary and capricious. *Id.*

Because the court's searching and careful review is based on a record, rather than live testimony, summary judgment is appropriate.

II
THE IBLA ERRED IN CONCLUDING THAT THE OHA HAS JURISDICTION TO DECLARE CLAIMS INVALID BASED ON HISTORICAL CIRCUMSTANCES THAT NO LONGER EXIST

Regardless of whether the dates selected by the Government for contesting Freeman's mining claims were dates that the Government thought the taking was alleged to have occurred, Judge Sweitzer was correct that the OHA does not have jurisdiction to determine whether mining claims were valid during a historical time frame, unrelated to the present. Judge Sweitzer's treatment of the issue is extensive when compared to the relatively short decision by the IBLA. Sometimes brevity is persuasive; here, it is not.

A. The Jurisdiction of the OHA is Governed by Department Regulations.

The starting point for determining the scope of jurisdiction of the OHA is the review of regulations giving it authority. The Department's regulations, 43 CFR Section 4.1, provide that the OHA is

> an authorized representative of the Secretary for the purpose of hearing, considering and determining **matters within the jurisdiction of the Department involving hearings, and appeals** and other review functions of the Secretary.

43 C.F.R. § 4.1 (emphasis added). While this language indicates that the OHA has the full authority of the Secretary, the OHA does not have authority to exercise the power of the Secretary in all matters. The regulation limits the OHA authority to those matters within the jurisdiction of the Department involving hearings and appeals.

Judge Sweitzer recognized 43 C.F.R. § 4.451-1 provides:

> The Government may initiate contests for **any cause affecting the legality or validity** of any entry or settlement or mining claim.

AR 1268. (emphasis added). As Judge Sweitzer explained,

> Such causes include the failure to discover a valuable mineral deposit within the claim, the failure to properly locate the claim, or the failure to pay any required annual maintenance fee. Under the mining laws, events relevant to the cause of failure to discover a valuable mineral deposit may include the filing of a patent application or the withdrawal of the land but they do not include an alleged taking of the mining claim.

AR 1274.

Judge Sweitzer correctly concludes that 43 C.F.R. § 4.451-1's reference to "any cause" is tied to "any cause affecting the legality or validity of any … mining claim." The regulation's reference to "legality or validity" is in the **present tense**. It does not refer to the "historical validity" of the mining claim. In the absence of any language to suggest to the contrary, the plain meaning clearly is that jurisdiction is limited to determining the legality or validity in the **present.** A contest complaint which does not seek a determination of present legality or validity is not within the scope of this regulation.

In *Aloisi*, Judge Holt, too, references the regulation as providing broad, but not boundless, authority to the Department. AR 7216. After recognizing that selecting the date for an alleged taking is the responsibility of the Court of Federal Claims or a court of general jurisdiction, Judge Holt explains:

> In contrast, the dates for determining a claim's validity, when the contest serves to discharge a governmental responsibility, are well-settled. If the Government seeks to invalidate a claim when a patent application has been filed, the relevant date is when the claimant satisfies all requirements for a patent. If the Government seeks to clear title, the relevant date is the date of a withdrawal and the date of hearing. Because no withdrawal has occurred in this case, the relevant date for determining validity in this proceeding is the date of the hearing.

AR 7219 (footnotes omitted)[24]

In a variety of contexts, the IBLA has recognized that the despite the broad authority of the OHA, its jurisdiction is limited by the Department's regulations regardless of whether the parties, including the Department, desire a decision. *See, e.g., Defenders of Wildlife Wyoming Outdoor Council*, 169 IBLA 117, 127 (2006); *Rock Crawlers Association of America*, 167 IBLA 232, 236 (2006); *Benton C. Cavin*, 166 IBLA 78 (2005). Accordingly, the IBLA has on numerous occasions made clear that it does not render advisory opinions.[25]

The IBLA's decision at issue here is based upon the conclusions that the Department may institute a challenge to the validity of mining claims at any time and for any reason. The problem with the IBLA's decision is significant, but created by a slight

[24] *Id.*(citing *United States v. Whitaker* (on reconsideration), 102 IBLA 162, 166 (1988); Sol. Op. "Patenting of Mining Claims and Mill Sites in Wilderness Areas," M-36994 (May 22, 1998); *United States v. Mavros*, 122 IBLA 297, 301-02 (1992)).
[25] *Bowers Oil and Gas, Inc*., 152 IBLA 12, 18 (2000); *Amax Coal Co*., 131 IBLA 324, 327 (1994); *United States v. Herr*, 130 IBLA 349 (1994); *Edgar v. White*, 85 IBLA 161 (1985).

difference in the words used. The Secretary may institute a challenge to the validity of a mining claim **at** any point in time. Typical reasons include ridding public land of squatters, who have no valid mining claims but are using the land for other purposes. But, the ability to challenge claims **at** any point in time does not mean the Department may contest the validity of mining claims **as of** any point in time. These small differences in word choice make a large difference. If, as the IBLA has ruled, that the Department may challenge the validity of mining claims as of some particular historical point in time, that would mean the Department could invalidate mining claims, even well-established, producing mines, by challenging them **as of** a particular date in the past when they were not so established. Valuable mining claims upon which miners have spent decades working could be wiped out simply because the Department chose to challenge them based on historical time periods when they were not valuable.[26]

Judge Sweitzer concluded that, because the Department may only contest claims "for any cause affecting the legality or validity of any ... mining claim," a determination that the claims were non-valuable at some point in time in history does not affect the legality or validity of the claims at issue. AR 1268.

> Thus, while the authority of the Department (and hence the Secretary) to initiate a contest is broad, the Secretary, by regulation, has conditioned that authority. There is no authority to contest validity, and hence no jurisdiction to decide validity, based upon a charge that does not amount to a cause affecting the legality or validity of a mining claim. … [W]hether a discovery existed *as of the alleged takings in 1994 and 2000* has no effect upon the validity of the contested claims under the mining laws and therefore is not an issue which may be adjudicated under section 4.451-1.

[26] Freeman does not in any way concede that his mining claims were not valuable in 1994 or 2000. However, whether the mining claims were valuable then is a closer question than it is today given that the price of nickel over the last five years has been triple the price it was in 1994 and in 2000.

Id. (emphasis in original).

The IBLA addressed the issue in this fashion:

> Judge Sweitzer explains his conclusion by stating that, in the absence of a withdrawal of the land from entry under the mining laws, a claimant may make a discovery and validate a mining claim after any such date, even after contest proceedings have begun. *Id.* (citing *United States v. Foster*, 65 I.D.1, 5-6 (1958), *aff'd, Foster v. Seaton*, No. 344-58 (D.D.C. Dec. 5, 1958), *aff'd*, 271 F.2d 836 (D.C. Cir. 1959)). That fact, however, does not alter our view that there is nothing in the applicable statutes, Departmental regulations, or case law that restricts mining contests in the manner suggested by Judge Sweitzer. A claim that is not supported by a discovery as of the alleged takings dates would be invalid at that time under the mining laws, and the Government can surely bring a contest on that basis pursuant to 43 C.F.R. § 4.451-1. An ALJ, as the delegate of the Secretary for purposes of determining claim validity, may certainly adjudicate validity as of such dates.

AR 1188 (footnotes omitted).

However, the IBLA's decision that the Department can bring a contest based on historical circumstance is a bare conclusion without any explanation of how it arrived to it.[27] The IBLA provides no rationale for ignoring the rule recognized by Judge Sweitzer and the *Foster* line of cases that a mining claimant, like Freeman, has the right to prove that he has a discovery within the contest proceedings even after the contest proceedings have begun. The IBLA simply concludes that this principle "does not alter our view." *Id.* Because a claimant has the right to establish a discovery after the contest proceedings have been initiated, the claimant cannot be limited to defending his claims based on a

[27] Bare conclusions are insufficient. *National Maritime Safety Ass'n v. Occupational Safety & Health Admin*., 649 F.3d 743, 753 (D.C. Cir. 2011); *see also Professional Pilots Federation v. F.A.A*., 118 F.3d 758, 771 (D.C. Cir. 1997) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 41 (1983).

time in the past when the economics may not have been as favorable as they are currently.[28]

This conclusion with no explanation of the contrary authorities presented to the IBLA is an arbitrary and capricious decision.

B. The Issuance of a Contest Complaint is Not the Assertion of Intervening Rights.

A mining claimant may locate claims then later make the discovery that the minerals are valuable. *Davis*, 329 F.2d at 846. However, the miner does so at the risk that a third party, a second miner, makes his own discovery on the same minerals in the interim, creating intervening rights and runs the risk that the Government withdraws the land or makes the minerals no longer subject to the General Mining Law.

This well-established "intervening right" language was addressed in *Cole v. Ralph*, 252 U.S. 286 (1920).

> But in the absence of an intervening right it is no objection that the usual and statutory order is reversed. In such a case the location becomes effective from the date of discovery; but in the presence of an intervening right it must remain of no effect. *Creede & Cripple Creek Mining Co. v. Uinta Tunnel Mining Co*., 196 U.S. 337, 348-351 (1905), . . . and cases cited; *Union Oil Co. v. Smith, supra*, 249 U. S. 347.

Cole, 252 U.S. at 296.[29] The Supreme Court affirmed the Eighth Circuit's clear statement on the question.

> It is true that **subsequent discoveries may validate earlier locations**, and that the latter may then **inure to the benefit of the**

[28] Because the validity of a mining claim hinges on whether valuable minerals have been discovered, the economics of mining and selling the minerals are critical to the determination.

[29] One cannot revive an invalid location because the land was not subject to the mining laws where the intervening right of a third person located a claim after the land became subject to the mining law. *Brown v. Gurney,* 201 U.S. 184 (1906).

> **locators as against the United States** and all parties whose claims were initiated subsequent to the discoveries.

Uinta Tunnel Mining & Transp. Co. v. Creede & Cripple Creek Mining & Milling Co., 119 F. 164, 169 (8th Cir. 1902) (emphasis added). The law is clear that Freeman has the right to make a discovery of valuable minerals, creating his right to the minerals, even in regard to the United States contrary assertion, as long as intervening rights had not been established.

Where a claim is mistakenly located on land which is not subject to the operation of the General Mining Law and then becomes subject to the establishment of mining claims later, the original claimant may relocate his claim as long as someone else has not established a conflicting mineral claim, *i.e.*, an intervening right.[30] Land being subject to the establishment of mining claims is sometimes referred to as being "open to mineral entry."[31] The same basic scenario can occur when a miner failed to do his yearly assessment work or abandoned his claim. That claim could be revived as long as someone else had not intervened by making their own location, discovery and assessment work in the interim.[32]

The IBLA concludes that the Government's own intervening rights, where there is no withdrawal or change in law, prevent Freeman from having a discovery after the contest proceeding was underway. It assumes the "intervening rights" are nothing other than the issuance of a contest complaint.

> By initiating a mining claim contest, the Department is asserting the Unites[sic] States' competing property interest against that of the

[30] *See, e.g., Brown v. Gurney*, 201 U.S. 184 (1906).
[31] *See, e.g., Center for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 655 (9th Cir. 2010).
[32] *See, e.g., United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432 (9th Cir. 1971) ("it is generally held that relocation will not relate back to the detriment of intervening rights").

> claimant. If the claimant does not prove a discovery during the contest hearing, then the claimant's entire location falls before the superior interest of the United States, regardless of the date for which validity has been challenged. *See Gwillim v. Donnellan*, 115 U.S. 45, 50 (1885) ("If the title to the discovery fails, so must the location which rests upon it.").

AR 1188 n. 8.

The IBLA's conclusion that the initiation of a mining contest is the establishment of an intervening right is unprecedented. Intervening rights refers to third parties who make a discovery after the original locator, but before the original locator makes a discovery. The IBLA's conclusion that a contest proceeding is itself the establishment of an intervening right is contrary to the rationale of the cases that set forth that rule. For instance, in *Creede*, the Supreme Court quoted numerous mining law authorities addressing intervening rights.

For instance,

> The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided, only, all the necessary acts are done **before intervening rights of third parties accrue.** All these other steps having been taken before a valid discovery, and a valid discovery then following, **it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate, or file a new one**.

Creede, 196 U.S. at 348 (quoting *Brewster v. Shoemaker*, 28 Colo. 176, 180, 63 Pac. 309, 310 (1900) (emphasis added)); *see also 1 Lindley, Mines*, 2d ed. § 330.

"Intervening rights" typically refers to third parties, not the United States. Moreover, the concept of "intervening rights" refers to the accrual or acquisition of such rights. Here, the initiation of a contest proceeding is not an accrual or acquisition of any

right, but merely a determination of whether a private party has established a valid mining claim.

However, there are limited situations where it might be considered that the United States has acquired an intervening right prior to discovery. For instance, one might consider the Government has an intervening right when it withdraws land from mineral entry. In those situations, not only does the location have to precede the withdrawal, but so does the discovery. In such cases, if the land upon which Freeman's claims were located was withdrawn in 1994, prohibiting the acquisition of mining claims, then a contest proceeding at any subsequent date would have required Freeman to prove his claims valid as of 1994.[33] But that is not the case. The United States has chosen not to withdraw these lands from mineral entry.

For instance, in withdrawal situations, the Department has allowed a mining claimant to amend a claim and allow it to relate back to prior to the withdrawal.

> When a valid mining claim is amended, **the amended claim relates back to the original date of location, so long as no adverse rights have intervened**. …Therefore, when the original date of location is prior to an intervening withdrawal, the rights acquired by location are valid existing rights, and an amendment of that claim is excepted from the effect of the withdrawal.

Southern Appalachian Mining Co. v. Office of Surface Mining Reclamation and Enforcement, 53 IBLA 312, 218 (2000) (Kelly, concurring) (footnotes and numerous citations omitted). If the withdrawal itself were truly an intervening right, a mining claimant could not amend his location. *See Tibbetts,* 43 IBLA 210, 214-19 (1979).

[33] Judge Sweitzer specifically recognized that there was an exception to the right of a mining claimant to prove his discovery when there was a withdrawal. AR 1264.

The other analogous situation is where the United States has withdrawn certain *minerals* from the operation of the General Mining Law. Such as the law making oil shale a leasable, instead of locatable, mineral. *See United States v. Cliffs Synfuel Corp.*, 146 IBLA 353 (1998). A mining claimant asserting a valid mining claim for withdrawn minerals must have a valid discovery prior to the enactment of the statute. *Id.* at 360. Again, such is not the case in regard to Freeman.

The IBLA assumes that the mere initiation of the contest proceeding is tantamount to the establishment of intervening rights which could cut off Freeman's right to make a discovery. AR 1188 n.8. This assumption is erroneous.

C. The IBLA's Conclusion that the Contest Proceeding Itself is the Establishment of Intervening Rights Conflicts with Well-established Precedent.

Judge Sweitzer relied upon the oft-cited ruling in *Foster* that a mining claimant may possess the land and not be considered a trespasser because he is on the land with the consent of the Government.

> However, when the Government withdraws that consent, either by withdrawing the land from the operation of the mining laws or by the institution of adverse proceedings against the claims, the locator must show that the has made a discovery of valuable mineral deposits within the limits of the claim in order to retain his possession.

Foster, 65 I.D. at 5, *quoted in* AR 1269. However, the *Foster* decision recognizes a difference between a withdrawal and a contest.

> [W]hen adverse proceedings are instituted against a claim involving land which remains open to the operation of the mining laws, discovery may be proved, even though that discovery may have been made after adverse proceedings have been started and such a discovery will permit the locator to retain possession of the land, all else being regular, and in the absence of a withdrawal of the land in the interim.

Foster, 65 I.D. at 6, *quoted in* AR 1269 (emphasis added).

Foster explicitly recognizes that a discovery may be proven **after adverse proceedings**[34] have been started. This requires the conclusion that the contest complaint cannot be the establishment of an intervening right which cuts off the ability of the mining contestee to prove his discovery later. When adverse proceedings are instituted (as they were here), a discovery may be made later. This does not merely allow the mining claimant to locate new claims, but rather the discovery "will permit the locator to **retain possession** of the land." *Id.* (emphasis added). The IBLA's conclusion that the mere institution of adverse proceedings constitutes the establishment of an intervening right, which blocks the ability to prove the discovery of valuable minerals, is completely contrary to the well-established and long-relied upon ruling in *Foster.*[35]

By initiating a mining claim contest, the Department is not asserting an intervening right. While the contest proceeding seeks a ruling that Freeman has not yet established mining rights, or more accurately, did not establish mineral rights in 1994 or 2000, it is not asserting an intervening right that would prohibit Freeman from making his discovery on previously located claims. Additionally, this conclusion is reinforced by the fact that *Foster* was a case where the Department had instituted a contest proceeding and yet that was not considered to be the establishment of an intervening right.

Moreover, *Foster* is far from alone. The mining law as expressed in 30 U.S.C. § 22 requires that a valid mining claim contain a valuable mineral deposit **at present**. In *Davis v. Weibbold*, 139 U.S. 507 (1891), this was affirmed in regard to a mineral patent.

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[34] Contests initiated by the Government are a type of adversarial proceeding. *See, e.g.*, *United States v. Cuneo*, 15 IBLA 304, 314 (1974).

[35] There are hundreds of decisions of both the IBLA and courts that rely on the *Foster* decisions.

> [S]uch applications should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a **present fact**.

Id. at 523 (emphasis added).

> This "prudent man" test has been refined to require a showing that the mineral disclosed is "**presently** marketable at a profit," which simply means that the mining claimant "must show that as a **present fact**, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed.

United States v. Feezor, 130 IBLA 146, 189 (1994) (emphasis added) (*quoting In re Pacific Coast Molybdenum*, 75 IBLA 16, 29 (1983)).

The IBLA's conclusion that the institution of a contest proceeding is the institution of an intervening right is contrary to prior precedent, both judicial and its own.

> To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.

F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)). The IBLA cannot change its precedent in *Foster* and other cases without addressing them. The Government's institution of a contest proceeding is not the establishment of an intervening right that would prevent Freeman from making a discovery. The IBLA's contrary conclusion should be reversed.

D. The IBLA's Conclusion Conflicts with Departmental Policy

The BLM's Handbook on Preparation and Review of Mineral Reports addresses the relevant dates for determining mining claim validity.

> 1. Withdrawn Land requires that a validity or mineral-in-character examination must reach a conclusion as to discovery or mineral

> in character on the date of the withdrawal, as well as of the date of the field examination or the hearing.
>
> 2. Mineral Patent Applications located on land open to entry, the date for determination of discovery is the date of payment of the purchase price … .
>
> **3. For Non-Patent Validity Examinations on land open to entry, the discovery date is the date of the field examination by the Mineral Examiner or the hearing.**

BLM, *Manual on Mineral Reports – Preparation and Review*, at page .081C1 (underline in original; bold added).[36] The validity examination in Freeman's case was in the third category. Departmental policy contemplates a discovery date at the hearing, rather than some earlier point in time. *See, e.g., United States v. Marion,* 37 IBLA 68 (1978) ("claims must be presently valid" and valid on the date of withdrawal).

Similarly, the BLM has a Mineral Pricing Policy, 65 Fed. Reg. 41,724, which follows the same rubric for dates of claim validity. AR 7246.

> For any mining claim validity determination where there is no patent application and no withdrawal, BLM will determine the validity of the claim **as of the date of the mineral examination.**

AR 7197 (quoting AR 7247 (emphasis added)).[37]

The IBLA's conclusion is contrary to well-established Departmental policy.

E. The IBLA's Conclusion Does Not Further the Statutory Purposes.

As Judge Sweitzer recognized, the OHA's lack of jurisdiction is supported by (1) the present tense and plain language of the regulation, (2) the history of evaluating

[36] The BLM Manual may be found at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.18421.File.dat/3060.pdf.

[37] While this policy was not adopted by formal rule-making procedures and is not binding on third parties, it does demonstrate the longstanding policy of the Department to determine the validity of mining claims using current, as opposed to historical, information, except where there is a withdrawal or a patent.

mining claims and (3) departmental policy. It is further supported by the purpose of the mining law.

> [T]he Secretary has continuing jurisdiction to determine validity in accordance with the mining law, including its dictates regarding the critical date(s) for determining whether a discovery exists and its purpose, which is to reward and encourage the discovery and development of valuable mineral deposits.

AR 1270 (citing *United States v. Coleman*, 390 U.S. 599, 602 (1968) (identifying the purposes of the mining law)).

Judge Sweitzer continues:

> The purpose of the mining laws is not served by making the discovery determination for land still open to mineral entry based upon facts existing as of the dates of the alleged taking or some other non-critical date in the past.

AR 1270.

Judge Sweitzer is correct that the best way to encourage the development of mineral deposits which are presently valuable is to use the date of the hearing as the critical date. *Id*. Otherwise, there may be a determination that a mining claim is valid as of some earlier date when it no longer valid. AR 1270-71 ("It would be nonsensical to encourage and reward through a determination of validity the development and discovery of a deposit not presently valuable"). That result does not encourage the development of mineral deposits, but rather encourages the validity of mining claims which currently have no value. Or, there may be a determination of invalidity as of a date in the past when the claim is presently valuable. AR 1271. This too, does not encourage the

development of mineral resources. All it does is put mining claimants through the useless act of having to relocate claims. *Id.*[38]

Hence, Judge Sweitzer concludes:

> [T]he purpose of the mining law appears better served by applying the well-established principle that a discovery generally may be made on land open to mineral entry at any point in time up to the present, meaning the date of hearing in a contest proceeding.

AR 1266.

The IBLA's decision also creates a significant uncertainty in mining law. The IBLA's decision allows the Government to institute a contest proceeding and select an earlier and most inopportune market conditions to determine that a claim is presently invalid based on those earlier market conditions, especially when the present conditions render the mining claims clearly valuable. The Government should not be able to find a date in the past, obtain a ruling on the invalidity as of that past date, and then leave the mining claimant with no choice but to relocate his claims. Indeed, preventing such manipulations is why the public policy is to determine validity of mining claims as of the date of the hearing.

In summary, Judge Sweitzer was correct in concluding that the regulation giving the OHA jurisdiction to decide mining contest cases is limited to cases where the present legality or validity of the claim is at issue. In stark contrast is the IBLA's decision which is completely silent on the consistency, or lack thereof, between the purposes of the mining law and either its decision or that of Judge Sweitzer. Unlike Judge Sweitzer's decision, the IBLA's result is inconsistent with the history, the case law, the tense of the

[38] After the ruling that Freeman's mining claims were invalid, he filed new relocation notices of new claims that cover largely the same area and minerals.

regulation's provisions, and the mining law's policy of promoting development of valuable mineral resources.

The IBLA's decision that the OHA has jurisdiction to declare claims invalid at present because they were not proven to be valid at some point in time in the past should be reversed.

F. The Precedent Relied Upon by the IBLA does not apply and the IBLA is Silent as to the Distinguishing Features

The cases the IBLA relied upon to support its conclusion simply do not provide the needed support. The IBLA stated:

> If the claimant does not prove a discovery during the contest hearing, then the claimant's entire location falls before the superior interest of the United States, regardless of the date for which validity has been challenged. *See Gwillim v. Donnellan*, 115 U.S. 45, 50 (1885) ("If the title to the discovery fails, so must the location which rests upon it.").

AR 1188 n. 8. *Gwillim* was dealing with a conflict between parties who claimed a right to the same minerals at different times. Naturally, the first in time prevails. *Id.* Here, the Government is not asserting that it is entitled to the minerals exclusive to everyone else as it is when minerals are excluded from the General Mining Law. It merely argued that Freeman had not acquired exclusive rights in 1994 and 2000, or either one of those dates.[39] This is not the establishment of an intervening right that precludes Freeman from establishing a discovery.

Additionally, the IBLA claims that it "upheld numerous contest decisions in which the contestant's complaint alleged invalidity only as of a date years prior to the

[39] The IBLA's reasoning creates severe issues contrary to the history decisions under the General Mining Law. If Freeman had not made a discovery in 1994, but had made a discovery in 2000, under the IBLA's reasoning, Freeman's mining claims would nevertheless be invalid because the Government challenged them as of the 1994 date.

date of the hearing." AR 1188 n. 9 (citing *United States v. Clear Gravel Enterprises, Inc.*, 2 IBLA 287 (1971); *United States v. Stewart*, 1 IBLA 161 (1970); *United States v. Bartlett*, 2 IBLA 274 (1971). Each of these cases are inapplicable to the case at hand.

Both *Clear Gravel Enterprises* and *Stewart* involved a common variety mineral (*e.g.,* sand and gravel), which in 1955 Congress declared could no longer be subject to mining claims. Common Varieties Act, 30 U.S.C. § 611. These are but two of many cases recognizing that, for a mining claim to be valid in a common variety mineral, the mining claimant had to establish the validity of the mining claim prior to the legislative change. The IBLA is silent as the obvious difference between these cases and the present one.

The third cited case, *Bartlett,* involved an area which had been withdrawn from mineral entry. When Congress withdraws land and essentially declares mining claims may no longer be established in an area, a person with a pre-existing mining claim must show that his claim is valid as of the date of the withdrawal. Again, one would not be able to discern this from reading the IBLA decision, but Freeman expressly addressed this situation (AR 6950-51), as did Judge Sweitzer. AR 1272 . Despite every opportunity, the Department has not chosen not to withdraw from mineral entry the land on which Freeman's claims are located.[40]

[40] The IBLA also noted that Freeman could simply relocate his claims, which he has done. But this opportunity to relocate claims does not work in cases where there has been a withdrawal. For example, if the Government were to file a contest proceeding in 2005 alleging that mining claims were not valid in 1994, there was a withdrawal in 2006, and a decision that the claims are not presently valid solely because of circumstance in 1995, the result would be that currently valuable claims would be lost because a decision was made after a withdrawal occurred.

Apart from the withdrawal of land or "withdrawal" of specified minerals, there is only one other circumstance in which validity must be shown as of a historical date—when the miner has filed to receive a patent to the land. AR 1266 n. 2. Validity as of the date of either a patent application or later submission of material sufficient to grant a patent is necessary to determine whether the Department should give present relief (*i.e.*, a patent) to the claimant. Consistent with Judge Sweitzer's ruling, determining the validity of mining claims when a patent application has been filed, when a withdrawal occurs, or when minerals are no longer available under the General Mining Law, the consideration of validity in the past is critical to determining present validity or present relief. None of those considerations exist in the present case.

Even more telling is the situation where a person seeking a patent fails to show validity of the mining claim as of the date of applying for the patent. In such a situation, the patent does not issue, but **the claims cannot be declared null and void unless the claims are also proven to be invalid at the time of the hearing.**

> Denial of the patent application, it should be emphasized again, does not constitute a ruling that the claims are null and void. The appellants' rights in the claims remain as they were before the application for patent was filed and as they would be if no application for patent had ever been filed.

United States v. Houston, 66 I.D. 161, 168 (1959).[41] While numerous patent cases result in a finding that the claims are null and void, to reach that result there must have been

[41] The Department has previously rejected attempts to have presently valid claims declared null based on an earlier patent application.

> The spirit and intent of the mining laws has been fulfilled and it would be overtechnical to require the applicant to go through the form of a new proceeding to accomplish a result which may be attained by allowing the entry to remain intact as to said locations.

proof that the claims were not presently valid. The IBLA never addresses this argument based on its own decision despite the fact it was specifically argued to it. AR 6954-55. Instead, the IBLA arbitrarily ignores its own precedent creates a new rule applicable only to Freeman.

G. The IBLA Erred In Changing the Rules Applied in *Aloisi* and *Story* without even Referring to Them.

Although the OHA rulings in *Aloisi* and *Story* were briefed to the IBLA, the IBLA's decision makes no mention of them. This violates well-established precedent regarding the changing of agency policy. As addressed above, the Court in *Fox Television Stations,* 556 U.S. at 515, noted that an agency cannot change policy *sub silentio*, which is exactly what the IBLA has done in this case.[42]

H. The Lack of OHA Jurisdiction to Determine Claim Validity as of Historical Dates does not leave Those Issues Incapable of Resolution.

While the Department has the power to determine the validity of mining claims, that power is far from exclusive.[43] In takings cases where the determination is necessary as part of the Court's resolution of disputes, the Court can make, and has made, the determination. *See Skaw v. United States,* 740 F.2d 932. Judicial resolution of the

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United States v. Bunker Hill and Sullivan Mining and Concentrating Co., 48 Pub. Lands Dec. 598 (1922).

[42] *See also, Jicarilla Apache Nation v. U.S. Dept. of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010).

[43] Federal courts have often "routed" the question of claim validity to the Department. *See, e.g., Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336-40 (1963); *Center for Biological Diversity v. United States Department of the Interior*, 255 F. Supp. 2d 1030, 1037 (D. Ariz. 2003). However, federal courts have determined mining claim validity on their own when ancillary to the federal court's jurisdiction. *See, e.g., Skaw v. United States,* 740 F.2d 932 (Fed. Cir. 1984); *United States v. Zweifel,* 508 F.2d 1150 (10th Cir. 1975); *United States v. 237,500 Acres of Land, More or Less, Counties of Inyo and Kern,* 278 F.2d 584 (9th Cir. 1960) (condemnation case); *United States v. Mulligan,* 177 F. Supp. 384, 385 (D. Or. 1959) (validity determined by court).

validity of mining claims where a taking is alleged makes sense because the determination of validity is tied to the date of taking, which typically, as in this case, has not yet been determined.

The IBLA has clearly erred in ruling that the OHA has jurisdiction to determine the validity of mining claims based on historical circumstances, unrelated to the present. The IBLA's decision should be reversed and Freeman's motion for partial summary judgment granted on this question.

The IBLA's decision allows the Department to institute a contest proceeding and select an earlier and most inopportune market condition to determine that a mining claim is invalid. While the Department may contest a claim at any time and for any reason, the Department should not be able to select a date in the past, obtain a ruling on invalidity as of that past date, and then force the mining claimant to relocate the claims. Indeed, preventing such manipulations is why the public policy is always to determine validity as of the date of the hearing.

III
DIFFERING PROCEDURES FOR DETERMINING THE VALIDITY OF FREEMAN'S MINING CLAIMS VIOLATES COLLATERAL ESTOPPEL PRINCIPLES, IS ARBITARY AND CAPRICIOUS AND/OR VIOLATES EQUAL PROTECTION OF THE LAW

In addition to the IBLA's misreading of precedent, the Department's regulations and the statutory purposes, the IBLA's decision creates several violations of law in employing differing procedures to Freeman than to others similarly situated. Basically, at the same time as Freeman's case before Judge Sweitzer, an ALJ in the *Aloisi* case ruled that the OHA did not have jurisdiction to determine the validity of mining claims as of historical points in time for purposes of assisting the Court of Federal Claims. Decades

earlier, there had been a previous unappealed decision in *Story* that was consistent with the *Aloisi* decision. Courts have evaluated different analyses for differing administrative procedures, including collateral estoppel, the arbitrary and capricious standard and equal protection principles. The different treatment afforded to Freeman violates all of them.

A. Collateral Estoppel Bars the Government from Claiming that the OHA had Jurisdiction to Decide the Validity of Freeman's Mining Claims Based on Historical Circumstances.

A starting point for evaluating differing procedures in largely identical cases is consideration of collateral estoppel. There is an unappealed final decision in *Aloisi* that the OHA has no jurisdiction to determine the validity of mining claims in the past when such a ruling has no effect on the present validity of the claims.[44]

When collateral estoppel is sought to be applied *offensively*, it does not apply automatically against the Government. *United States v. Mendoza*, 464 U.S. 154, 159 (1984). However, in this case collateral estoppel should be applied *defensively*. That is, in light of the Department's loss of its argument that OHA had jurisdiction in both *Aloisi* and *Story*, and those were final rulings that were not appealed, collateral estoppel should prevent the Department from asserting a contrary position. *See Montana v. United States*, 440 U.S. 147, 154–155 (1979) (issue preclusion found when United States involved in both earlier and later cases).

Here, the alignment in subject matter in *Aloisi, Story* and *Freeman* is as close as possible—determining the same jurisdictional question as to whether the OHA can

[44] The IBLA applies collateral estoppel to parties which had an opportunity to appeal an earlier decision but failed to prosecute an appeal. *State of Alaska Department of Transportation and Public Facilities*,154 IBLA 57, 61 (2000) (collateral estoppel applies "when a party had an opportunity to obtain review within the Department and no appeal was taken").

determine mining claim validity at historical time periods upon a referral from the Court of Federal Claims, or its predecessor, the Claims Court. The fact that the *Freeman, Aloisi* and *Story* involve different miners, mining claims for different minerals and claims in different locations have absolutely no legal significance in resolving the question as to whether the OHA jurisdiction. The Department should be collaterally estopped from changing the jurisdictional conclusion it decided to accept in the prior cases.

The Court of Appeals for the District of Columbia Circuit has recently applied the doctrine of collateral estoppel in regard to an administrative decision.

> Before the doctrine of collateral estoppel can be applied, it must be demonstrated that: (1) the same issue was involved in both cases; (2) that issue was litigated in the first case; (3) resolving it was necessary to the decision in the first case; (4) the decision in the first case, on the issue to be precluded, was final; and (5) the party attempting to raise the issue in the second case was fully represented in the first case.

U.S. Dept. of Commerce, Patent and Trademark Office v. Federal Labor Relations Authority, 672 F.3d 1095, 1100 (D.C. Cir. 2012) (citations omitted). In that case, the Court held that the federal agency was collaterally estopped from asserting a position contrary to earlier rulings in similar cases. *Id.* at 1096-97.

Here, the issue of whether the OHA has jurisdiction to decide the validity of mining claims as of dates in the past in *Aloisi* and *Story* were the same as that in Freeman's case. The issue was litigated in both *Aloisi* and *Story*. Resolving the issue was not merely necessary to the first decisions; it was the primary issue in those cases.

The decisions in *Aloisi* and *Story* were final. An unappealed decision is the final decision of the Department.[45]

The same result should apply to the Department. It is clear that the Government was fully represented in both *Aloisi* and *Story*. The Government should be estopped from arguing that the OHA did have jurisdiction and the IBLA's decision in Freeman's case should be reversed on that basis alone.

B. Under the APA, Employing Differing Procedures for Similarly Situated Individuals is Arbitrary and Capricious and Violates Equal Protection.

A "fundamental norm of administrative procedure requires an agency to treat like cases alike." *Westar Energy, Inc. v. Federal Energy Regulatory Com'n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007). More directly, this Court has previously explained that agencies must treat similarly situated persons the same without running afoul of the Equal Protection Clause or the arbitrary and capricious grounds for reversal in the APA.

> Both the Equal Protection Clause and the APA prohibit agencies from **treating similarly situated petitioners differently** without providing a sufficiently reasoned justification for the disparate treatment. *See, e.g., Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1102–03 (D.C. Cir. 2005) ("To prevail on [an] equal protection claim, [a plaintiff must] demonstrate that [it] was **treated differently than similarly situated individuals** [or entities] and that the [agency's] explanation does not satisfy the relevant level of scrutiny.") (citing *Plyler v. Doe*, 457 U.S. 202, 216 . . . (1982)); *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) (holding that "an agency action is arbitrary when the agency offers insufficient reasons for **treating similar situations differently**" (internal quotation marks and citations omitted)); *Freeman Eng'g Assocs. v. FCC*, 103 F.3d 169, 178 (D.C. Cir.1997) (observing that

[45] The IBLA even applies a similar doctrine to those who appear before it. *See Helit*, 110 IBLA 144, 150 (1989) (applying "the doctrine of administrative finality, the counterpart to the judicial doctrine of res judicata" to preclude revisiting issues from unappealed decisions).

> "an agency may not **treat like cases differently**" (internal quotation marks and citation omitted)).

Muwekma Ohlone Tribe v. Salazar, 813 F.Supp.2d 170, 196-97 (D. D.C. 2011) (emphasis added); *see also Etelson v. Office of Pers. Mgmt.*, 684 F.2d 918, 926 (D.C. Cir.1982) ("Government is at its most arbitrary when it treats similarly situated people differently.")

Clearly, the *Freeman* and *Aloisi* (and *Story*) cases are identical in all material respects. They all involve mining claims that were the subject of a suit for a taking of property pending in the Court of Federal Claims, or, in the case of *Story*, that court's predecessor, the Court of Claims. All involve a stay of the proceedings to give the Department of the Interior an opportunity to review the validity of the mining claims. All involve a request for a determination of the validity of the claims at a time prior to the hearing in the OHA, a time more relevant to resolving the taking claim. All involved an argument that the OHA could and should assist the other tribunal with a ruling on the validity of mining claims as of a prior time.

Additionally, there are differences between a decision by the IBLA as the fact-finder and a judge as the fact-finder. The ultimate decision-maker for Freeman was the IBLA, which is the ultimate decision-maker and finder of fact, even though it heard none of the evidence. For *Aloisi* and *Story*, the decision-maker was a judge with the normal judicial procedures applicable, including discovery, nationwide subpoena power, the rules of evidence and a hearing before the disinterested decision-maker.

Only for Freeman is the case resolved with the OHA with an ALJ decision and then one of the IBLA. There is no sufficient or adequate explanation for Freeman to go through a different appeal process, with a different decision-making body and different procedures.

The result is no different than allowing the Government to decide that one group of people denied government benefits may appeal to court, but the Government can arbitrarily subject certain applicants to an appeal to an internal appeal body with different procedures. The different treatment of similarly situated parties is not justified and is arbitrary and capricious.

As addressed above, most of the cases resolve agency action which treats people to different procedures as an arbitrary and capricious violation, the Equal Protection Clause also provides a similar restraint.[46] Having two different appeal procedures at the whim of the Government must still pass the rational basis test. Because there is no legitimate reason for treating Freeman differently, the rational basis test is not met.

IV
TO THE EXTENT THE IBLA CONCLUDED THAT THE HISTORICAL DATES CHOSEN BY THE GOVERNMENT WERE DATES OF ALLEGED TAKINGS, THE IBLA'S CONCLUSION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The primary issue in the interlocutory appeal to the IBLA was whether the OHA had jurisdiction to decide whether Freeman's claims were valid as of historical points in time. The IBLA's decision suggests that the historical dates chosen by the Department were the dates alleged as the dates of taking in Freeman's complaint filed in Court of Federal Claims. AR 1183. The Department argued that 1994 and 2000 represent the "years when the alleged takings occurred" and that "the parties conferred and stipulated that the validity determination would cover the dates of the two events Mr. Freeman

[46] *See also, Baxstrom v. Herold*, 383 U.S. 107 (1966) (equal protection denied by applying different procedures for civil commitment).

alleges in his complaint before the Court of Federal Claims resulted in a taking of his property." AR 1184.

While there were discussions about the dates the Department would evaluate Freeman's claims, there was no stipulation that the 1994 or 2000 date were dates alleged in Freeman's complaint before the Court of Federal Claims. The IBLA recognized there was no such stipulation.

> Freeman views this agreement less strictly. At most, Freeman agreed that the 1994 and 2000 date [sic] would be appropriate for consideration in the mineral examination process because those dates would likely be useful to the Court of Federal Claims.

AR 1185 n. 3.

Nevertheless, the IBLA's decision includes references that suggest it believed the 1994 and 2000 dates were dates alleged in the complaint pending in the Court of Federal Claims. *See* AR 1182 ("alleged takings dates"); AR 1183 ("alleged takings dates"); AR 1184 ("BLM has explained that 1994 and 2000 represent the years when the alleged takings occurred").

For the reasons addressed above, Freeman contends that the OHA did not have jurisdiction to determine mining claims presently invalid based on historical circumstances. In the alternative, if the OHA does have jurisdiction to determine the validity of mining claims as of the dates of alleged takings, the IBLA's decision that 1994 and 2000 were the alleged takings dates is reversible under 5 U.S.C. § 706(2)(E). Such a conclusion would not be supported by substantial evidence.[47]

[47] In considering whether there is substantial evidence, the Court should consider evidence that detracts from the administrative agency's conclusion. The Court

While the Department was evaluating Freeman's claims, the parties did confer, evidenced by letters between the parties, about the scope of the Department's investigation. While Freeman had no objection to the BLM examining his claims as of the 1994 or 2000 dates, Freeman explained his reasoning:

> In regard to the date of taking, we agree that October 6, 2000 is one possible appropriate date. We may, however, argue to the court that 1993 is another potential date of taking since it was the day of an unqualified statement by the person who everyone knew would make the ultimate decision. We believe the decision was made in 1993 and only formalized in 2000. I understand why you would not want to agree with this point. Nevertheless, we believe this dispute in the date of taking may not turn out to be significant because … [the Department's team] will also be using the October 6, 1994, date which is relatively close in time to our alternative taking date. We agree that October 4, 1994 is the appropriate date for the temporary taking of Mr. Freeman's right to a patent.

AR 10891.[48] Freeman explained on numerous occasions his position about the 1994 and 2000 dates:

> Freeman agreed that 1994 was relevant because it was close to the time in which he was told by Forest Service officials that he would never be allowed to mine. It is also close to the time he filed his plan of operations to mine. As Judge Sweitzer noted below, there was no agreement that the two dates the Government chose were the only relevant dates. … Nor was there agreement that those years were relevant for the reasons asserted by the Government.

AR 7190 n.1 (citing AR 1264 n.1); *see also* AR 1288.

> "may not find substantial evidence merely on the basis of evidence which in and of itself justified [the agency's decision], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.' "

Morall v. DEA, 412 F.3d 165, 177 (D.C. Cir. 2005) (quoting *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 962 (D.C. Cir.2003) (internal quotations omitted)).

[48] Although Freeman agreed that October 4, 1994 was the appropriate starting date for the taking of his right to a patent due to the Congressional moratorium, the Department never evaluated whether Freeman was entitled to a patent.

However, the evidence of what is alleged in a court proceeding by a plaintiff is the complaint in that case. There are no dates alleged as to when the taking is believed to have occurred. AR 10700-12. Hence, there is simply no evidence, let alone substantial evidence, that any date is the **alleged** taking date.

There are reasons no particular date is, or dates are, alleged in the complaint. As the decision of the Supreme Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002) makes clear, a taking may not fit into any *per se* or categorical type of takings. One extremely generalized "standard" for finding a taking is when regulation goes "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Knowing whether regulation has gone too far is difficult enough. Knowing when it reaches that point is even more difficult and is the proper subject for the Court of Federal Claims.

Additionally, another well-accepted method of analyzing whether a taking has occurred is by the consideration of multiple factors addressed in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-25 (1978). If and when those factors coalesce is far from clear. Given the fluid nature of takings jurisprudence, the bottom line is that, while Freeman believes a taking occurred, no court has so ruled and there is no certainty as to when any taking occurred.[49]

[49] The 2000 date was presumably selected because that was the date of the final levels of appeal within the Forest Service on the denial of Freeman's proposal to mine his claims. While that final decision might have been necessary to make Freeman's takings claim ripe, the Court of Federal Claims may conclude that the taking occurred when the Forest Service made its initial written decision in 1999, or even earlier. *See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S 304, 320 n.10 (1987) (taking might occur before claim becomes ripe).

In sum, any conclusion by the IBLA that the 1994 and 2000 dates upon which the Department focused its contest complaint are alleged dates of the taking of the mining claim in the complaint pending in the Court of Federal Claims is not supported by substantial evidence. No dates were alleged for the taking of the claims; that was left for the Court of Federal Claims to decide. The IBLA's decision should be reversed under 5 U.S.C. § 706(2)(E) for lack of substantial evidence.

CONCLUSION

For the foregoing reasons, Freeman moves this Court for reversal of the IBLA decision that the OHA had jurisdiction to determine the validity of Freeman's mining claims as of 1994 and 2000, that the OHA had no jurisdiction to conclude that claims are presently invalid simply because they were invalid in 1994 or 2000. Furthermore, imposing on Freeman a process not imposed on others similarly situated was subject to collateral estoppel, was arbitrary and capricious and violates Equal Protection.

RESPECTFULLY SUBMITTED this 5th day of December, 2012.

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