UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAYCO, A LIMITED LIABILITY COMPANY 29461 Green Grass Court Agoura Hills, CA 91301, Plaintiff, v. DAVID BERNHARDT, in his official capacity as Acting Secretary of the United States Department of the Interior 1849 C St., NW Washington, DC 20240, Defendant.	No. _____ **PETITION FOR WRIT OF MANDAMUS**

Plaintiff, Rayco, a Limited Liability Company ("Rayco"), by and through undersigned counsel, complains of Defendant, David Bernhardt, Acting Secretary, United States Department of the Interior ("Secretary"), as follows:

I. INTRODUCTION

1. This is an action to compel the Secretary, and those acting under him, to take all appropriate action immediately and forthwith to complete the review of Rayco's Applications for Mineral Patent, CACA-028826 and CACA-028827, pending since September 23, 1991, without further delay.

2. Rayco's predecessor in interest, the Emerson A. Ray and Fay R. Ray 1990 Trust ("Trust"),[1] first applied for patents on the above-mentioned mining claims ("Cima Cinder Mine")

[1] For the sake of simplicity, the term "Rayco" in this Petition refers to Rayco, LLC, its officers and agents, as well as Rayco's predecessors in interest and their officers and agents.

on September 23, 1991, completed all portions of the applications, received First Half of Mineral Entry Final Certificate ("FHFC"), and paid full purchase price on or before May 7, 1992, more than two years prior to Congress's moratorium on new mineral patents going into effect on September 30, 1994.

3. Rayco has yet to receive a decision on its applications, despite multiple inquiries as to their status. Rayco's applications have been pending without any final resolution for nearly 28 years.

II. JURISDICTION

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1346 (United States as defendant). This action arises under the laws of the United States, including the General Mining Law of 1872, 30 U.S.C. § 21, *et seq*. ("the Mining Law"), as well as regulations promulgated thereunder. Rayco seeks relief under federal law, namely under 28 U.S.C. § 1361 (mandamus against officers of the United States), as well as under 5 U.S.C. §§ 555(b) and 704, provisions of the Administrative Procedure Act ("APA").

5. Under 28 U.S.C. § 1361, "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." While the approval or denial of a mineral patent application is a judgment within the discretion of the Secretary, the Secretary does have an affirmative, nondiscretionary, statutory duty to process applications, and to approve or deny them. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub.L. No. 104-134, 110 Stat. 1321 ("Moratorium Act") (Once the Secretary determines a particular application was filed on or prior to September 30, 1994, and complies with the relevant statutory requirements, Congress's moratorium on processing mineral patent applications "shall not

apply." "The Secretary of the Interior shall" develop and carry out a plan for providing a final determination to at least 90% of such applications within five years).

6. The APA also requires the Secretary and those acting under him to carry out their duties within a reasonable time. 5 U.S.C. § 555(b) (providing that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it"). If the agency fails to "conclude a matter presented to it" within a reasonable time, this Court has authority under 5 U.S.C. § 706(1) to compel the agency to do so. 5 U.S.C. § 706(1) (conferring power on the U.S. district courts to compel agencies to perform "action unlawfully withheld or unreasonably delayed."). As demonstrated below, the delay of nearly 28 years in rendering a decision on Rayco's applications is unreasonable.

III. VENUE

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e), because this is an action against an officer or agent of the United States in his official capacity, brought in the district where his official residence is located.

8. Moreover, venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2), because "a substantial part of the events or omissions giving rise to the claim occurred" within the district. The Secretary bears ultimate responsibility for verifying the validity of a mineral location and approving or disapproving applications for patent. *See* 110 Stat. 1321; U.S. Dep't of the Interior, Order No. 3163 (March 2, 1993) ("Order 3163") (revoking "existing delegations allowing subordinate officials within the Department of the Interior to issue . . . patents under the authority of the Mining Law of 1872," and placing within the office of Secretary of the Interior sole authority to do so). On information and belief, mineral examination and preliminary validity

determination was completed within the Bureau of Land Management ("BLM") California State Office no later than 2006, and subsequent examination of Rayco's applications for patents on the Cima Cinder Mine moved to the BLM's main office in Washington, D.C. The "omission[] giving rise to the claim" therefore took place within this judicial district. 28 U.S.C. § 1391(b)(2).

IV. PARTIES

9. Rayco, LLC is a limited liability company, formed under the laws of the State of Nevada, and is the legal entity that owns title to the Cima Cinder Mine. Rayco was formed in 1997 and is a wholly owned asset of the Emerson A. Ray and Fay R. Ray 1990 Trust.

10. The Cima Cinder Mine refers to three placer and 51 millsite claims covering 692.5 acres of formerly BLM-managed land[2] in the Mojave Desert near Baker, California, located between 1948 and 1991 and wholly owned by Rayco. All subject claims and millsites are located in T14N R12E SBBM, San Bernardino County, California, Cima Mining District. The Cima Cinder Mine is located across three extinct volcanic cinder cones, from which Rayco and its predecessors in interest extracted red and black cinders for use in cinder blocks, landscaping, road de-icing, agricultural soil additives, and various other uses. The mine has not been in operation since 1999, when NPS personnel issued a Notice of Trespass to Rayco and shut down the mine for lack of an approved plan of operation.[3] In 1992, the year FHFC was issued,

[2] At the time Rayco filed its patent applications, and at the time equitable title to the patents vested in 1992, the land on which the Cima Cinder Mine is located was managed by the BLM as part of the East Mojave National Scenic Area. In 1994, subsequent to Rayco paying purchase price for the patents and receiving FHFC, Congress passed the California Desert Protection Act, 16 U.S.C.A. §§ 410aaa *et seq.*(1994), creating the Mojave National Preserve and transferring management responsibility to the National Park Service ("NPS").

[3] Rayco filed a plan of operation with the BLM in 1991 that it operated under through most of the 1990s. When NPS assumed jurisdiction over the area under the CDPA, however, it refused to approve Rayco's plan of operation until the claims were determined to be valid by a grant of patent, which the BLM has long failed to do.

production from the Cima Cinder Mine exceeded 400,000 tons of marketable cinder. A full legal description of the relevant claims, originally included with the subject patent applications in 1991, is appended to this Petition as Exhibit 1.

11. On September 23, 1991, Rayco duly submitted the information and documents required by the Mining Law and 43 C.F.R. § 3860 (2019) to apply for patent on the Cima Cinder Mine claims to the BLM California State Office.[4] BLM issued a FHFC, and accepted purchase money for the patents on May 7, 1992.

12. Defendant David Bernhardt is the Acting Secretary of the United States Department of the Interior ("DOI"). This suit is brought against Mr. Bernhardt in his official capacity, as the Moratorium Act and Order 3163 place ultimate responsibility to approve or deny mineral patent applications with the Secretary of the Interior. BLM, the federal entity tasked with processing patent applications, is also organized within DOI, and its officials work under the direction of the Secretary.

V. LEGAL BACKGROUND, FACTS AND PROCEDURAL HISTORY

A. The Mining Laws

13. The General Mining Law of 1872 declares that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, by citizens of the United States . . . ." 30 U.S.C. § 22. Thus, the Mining Law grants all citizens a statutory right to enter upon unappropriated lands for the purpose of exploring for and developing "valuable mineral deposits." *Id.* A person who makes a

[4] Title to the Cima Cinder Mine, and therefore the Trust's interest in the subject patent applications, was transferred from the Trust to Rayco in 2001.

"discovery" of a "valuable mineral deposit" and satisfies the procedures for "locating" a claim becomes the owner of a valid mining claim. 30 U.S.C. §§ 22, 23, 26.

14. A valid mining claim entitles the owner to an exclusive possessory interest in the subject federal land for mining purposes, with fee simple title to the land remaining in the United States. The owner of such a claim owns the mineral resources located within, but the United States retains the right to "manage and dispose of the vegetative surface resources," and the claim is subject to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land" as long as such use does not "endanger or materially interfere" with mining operations. 30 U.S.C. § 612(b).

15. Prior to 1994, owners of mining claims located on federal land could also apply to "patent" their claims—upon successfully completing the application process, fee simple title to the land covered by the mining claim would be transferred from the United States to the claim owner. That application process included, *inter alia*, the filing of "[a] plat, field notes, notices, and affidavits," and the publication of notice of the application in a local newspaper for sixty days. 30 U.S.C. § 29. "If no adverse claim shall have been filed . . . it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists . . . ." *Id.*

B. Congress's Moratorium on the Issuance of New Mineral Patents

16. In 1994, Congress passed the Omnibus Consolidated Rescissions and Appropriations Act of 1996, placing an indefinite moratorium on the issuance of all new mineral patents.

17. The Moratorium Act, however, also included a "grandfather" provision, which stated that the moratorium "shall not apply if the Secretary of the Interior determines that, for the claim concerned: (1) a patent application was filed with the Secretary on or before September 30, 1994, and (2) all requirements established under [the relevant provisions of the Mining Law], were fully complied with by the applicant by that date." 110 Stat. 1321, § 322(b).

18. The Moratorium Act also directed the Secretary to develop a plan detailing how DOI would make a final determination on "at least 90 percent of such applications within five years of the enactment of this Act" and "[t]ake such actions as may be necessary to carry out such plan." 110 Stat. 1321, § 322(c).

C. The Cima Cinder Mine

19. Emerson Ray and his wife Fay first staked a claim on the Cima Cinder Mine in the Mojave Desert southwest of Las Vegas in 1948. The mine operated consistently from 1948 until 1999, when NPS officials unjustly shut down the Ray family's operation. Several individuals and entities leased and operated the mine from Emerson and Fay for various lengths of time between 1953 and 1990, with ownership remaining with Emerson and Fay throughout the entire period. The Rays resumed direct control of the Cima Cinder Mine in 1990, and their daughter Lorene Caffee and her husband Terrance supervised operations until the mine's closure nine years later. Four generations of the Ray family have lived, worked, and grown up on the mine, and over the decades it became more than a business asset: it became a home, and a valuable part of the Ray family legacy.

D. Rayco's Patent Applications

20. On September 23, 1991, Rayco submitted its patent applications to the BLM. The applications were deemed complete on May 7, 1992, with the BLM California State Office

recognizing that Rayco had complied with all application, posting, and publication requirements necessary for an application for mineral patent. The BLM issued FHFC and accepted payment of the full purchase price for the patents.

21. According to the BLM's own contemporaneous manual, this issuance of FHFC and acceptance of payment marks the point at which equitable title to a mineral patent vests, and Rayco (as successor in interest to the Trust) obtained equitable title to the applied-for patents on May 7, 1992. BLM Manual 3860, Mineral Patent Applications (Release 3-266, Jul. 9, 1991), https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual3860.pdf (last visited Apr. 9, 2019) ("The date of issuance (date of entry) of the first half of the final certificate must be the date of acceptance of the purchase price. This is because the date of acceptance of the purchase price . . . is the legal date of vesting of equitable title (a protected property right) in the applicant, and the final certificate is actually effective on that date."). BLM Solicitor John D. Leshy even felt the need to write a memorandum to the Director of the BLM in 1997 urging BLM officials to stop accepting purchase price for patent applications that have not yet received Second Half Final Certificate ("SHFC"), as he recognized that doing so creates an entitlement to patent. John D. Leshey, Memorandum M-36990, Entitlement to a Mineral Patent Under the Mining Law of 1872, at 7–8 (Nov. 12, 1997).

22. Work began on a mineral examination and report in 1992. Certified Mineral Examiner Robert M. Waiwood performed the examination. A mineral report was completed and signed by Mr. Waiwood, Certified Mineral Examiner and Senior Technical Minerals Specialist James R. Evans, and Superintendent of the Mojave Natural Preserve, Mary Martin, not later than June 18, 1999.

VI. CAUSES OF ACTION

FIRST CLAIM FOR RELIEF
(28 U.S.C. § 1361)
(Mandamus and Venue Act)

23. A plaintiff seeking relief under the Mandamus and Venue Act ("MVA") must demonstrate that: (i) he or she has a clear right to the relief requested; (ii) the defendant has a clear duty to perform the act in question; and (iii) no other adequate remedy is available. *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002).

24. First, Rayco has a clear right to the relief requested, as it has fully complied with all statutory and regulatory requirements for applying for a mineral patent. Rayco received FHFC and paid purchase price for the Cima Cinder Mine patents on May 7, 1992, prior to the enactment of Congress's moratorium on the issuance of mineral patents. The Secretary and the BLM have willfully and unreasonably failed to make a decision or provide any substantive information about the status of Rayco's applications.[5]

25. Second, the Secretary has a clear duty to either grant Rayco's application or provide a reasonable explanation for why the applications should not be granted. Federal law establishes that the Secretary and those acting under him have a nondiscretionary duty to process patent applications that comply with statutory requirements, as applicants who have satisfied these requirements "shall thereupon be entitled to a patent for the land," 30 U.S.C. § 29, and

[5] The BLM's case recordation serial register reports for Rayco's applications indicate no action has been taken by BLM officials since 2004. The only additional information Rayco has received since then regarding its applications consists of a refusal by the BLM to turn over relevant documents pursuant to a Freedom of Information Act ("FOIA") request by Rayco and a perfunctory letter written in response to years' worth of requests for information from Rayco simply stating that the mineral report requires additional work and that a new mineral examiner has been assigned to write a new supplemental report, both communications occurring in 2018.

Congress explicitly ordered DOI to continue processing applications that were properly completed prior to the Moratorium Act's effective date. 110 Stat. 1321, § 322. The BLM also has a duty under the APA to resolve the matters properly put before it within a reasonable amount of time. 5 U.S.C. § 555(b) ("With due regard for the convenience and necessity of the parties or their representative *and within a reasonable time*, each agency shall proceed to conclude a matter presented to it.") (emphasis added).

26. While there is no firm statutory deadline for rendering a decision on a mineral patent application, there is a nondiscretionary duty under the APA to do so "within a reasonable time." *Id.* BLM Manual 3860 also provides that a mineral report (which, in this case, the BLM claims is still undergoing review) should be completed within six months of the time the mineral examiner receives the necessary reports and assays. Additionally, the Moratorium Act includes a grandfather provision stating that the Secretary is required to "make a final determination as to whether or not an applicant is entitled to a patent under the general mining laws on at least 90 percent of [applications filed prior to September 30, 1994] within five years of the enactment of this Act . . ." 110 Stat. 1321, § 322. Rayco's applications have never received such a final determination in the more than 24 years that have passed since the Moratorium Act was enacted.

27. Third, this Court should compel the Secretary to issue a decision on Rayco's long-pending applications, because no other adequate remedy is available. The Secretary and the BLM have inexplicably and unreasonably failed to perform their clear duty to act. Despite Rayco's filing of all necessary documentation, payment of all required fees, and submission of inquiries through multiple channels, no decision, nor explanation for the continued delay, has been issued apart from one vague sentence in a March 12, 2018 letter from BLM official James V. Scrivner to Rayco stating that, after having possession of the completed mineral report for

over a decade, DOI sent the report back to the BLM as "requiring additional work." No appealable order has been issued on Rayco's patents and no statute provides an alternative avenue of review. *C.f. TRAC v. FCC*, 750 F.2d 70, 75–79 (D.C. Cir. 1984).

SECOND CLAIM FOR RELIEF
(5 U.S.C. § 706)
(Administrative Procedure Act)

28. Mandamus action is also appropriate because the Secretary has failed to act within a reasonable period of time as required by section 706 of the APA.[6] *Liu v. Novak*, 509 F. Supp. 2d 1, 8–9 (D.D.C. 2007).

29. Generally, in determining what is "unreasonable," courts may look to a variety of factors, including any congressional guidance on what it considers to be reasonable, internal operating procedures established by the agency, processing times in similar cases, the source of the delay, and the facts of the particular case. *See TRAC*, 750 F.2d at 80. A court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed." *Id.* (quoting *Public Citizen Health Research Group v. Commissioner, Food & Drug Admin.*, 740 F.2d 21, 34 (D.C. Cir. 1984). The delay in making a decision on Rayco's applications extends well beyond Congress's guideline of five years on coming to a final determination on pending patent applications under the Moratorium Act.

30. The delay also extends well beyond the goals established by the Department of the Interior in the five-year plan to comply with the Moratorium Act it submitted to Congress in July 1996. *See* U.S. Department of the Interior, Five Year Plan for Making Final Determination

[6] The Supreme Court has stated that an MVA claim is "in essence" the same as a claim for relief under section 706 of the APA, *see Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986), so courts generally analyze MVA and APA section 706 claims together, using tests designed under both statutes. *See TRAC*, 750 F.2d at 79–80.

on Ninety percent of Grandfathered Patent Applications Pursuant to Public Law 104-134, at 19 (July 1996) ("BLM plans to complete mineral reports and forward applications for Secretarial Review in the fiscal year following the year in which the examination is commenced.") A mineral examination was requested for Rayco's applications on February 19, 1992.

31. At the time the applications were filed, the stated policy of the BLM was to request a mineral examination, to confirm applicants' use or occupancy of the claims, within 10 working days after issuance of the FHFC. BLM Manual 3860.06.K. The resulting mineral report was then due within six months after the BLM's request for a mineral examination. BLM Manual 3860.06.O. At that time the policy of the BLM required all mineral reports to be prepared on a timely basis and made field examinations mandatory for surface use determinations. BLM Manual 3860.06. Review and correction of the mineral report was supposed to be completed within 60 days after its preparation. BLM Manual 3860.06.P. A patent was required to be issued, or contest action filed, within 30 days after receipt of the mineral report. BLM Manual 3860.06.Q.

32. A delay of nearly 28 years is also significantly longer than any court has ever considered reasonable in a similar mandamus case; indeed, courts regularly find delays only a fraction as long to be egregious enough to warrant mandamus relief. *See, e.g.*, *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013) (granting mandamus relief after a delay of "more than a year" in Nuclear Regulatory Commission complying with court directive to act on application after statutory deadline had already passed); *In re People's Mojahedin Organization of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012) (granting mandamus relief after a delay of twenty months in reviewing organization's petition for revocation of its Foreign Terrorist Organization listing); *In re Core Communications, Inc.*, 531 F.3d 849, 858 (D.C. Cir. 2008) (granting

mandamus relief after a delay of six years for FCC in providing a valid justification for rules promulgated under Telecommunications Act); *Kirwa v. United States Department of Defense*, 285 F.Supp.3d 21, 43 (D.D.C. 2017) (granting mandamus relief after a delay of "two or three years" in processing naturalization application). Congress clearly expected the Secretary to complete his validity determinations of nearly all grandfathered patent applications by 2001, BLM officials established procedures in keeping with that expectation, and those officials are now 18 years late in finalizing Rayco's applications. Considering all of these factors, the delay in this case has been plainly unreasonable.

33. As the Secretary has failed to carry out his mandatory duty to make a decision on Rayco's patent applications, and has unreasonably delayed action for nearly 28 years without justification, and as no alternative means of relief are available, this Court should instruct the Secretary to make a decision on Rayco's applications without further delay. *See* 28 U.S.C. §§ 1331, 1361; 5 U.S.C. §§ 555(b), 706(1).

34. Additionally, "[j]udicial review of an agency's actions under § 706(1) for alleged delay has been deemed an exception to the "final agency decision" requirement." *Independence Min. Co., Inc. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997). Since the Secretary's refusal to provide a final agency decision for more than two decades is the act or omission Rayco is challenging in this matter, no formal appeal procedures are available, and mandamus remains the only avenue available to Rayco.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Compel the Secretary to perform his duty to render a decision on Plaintiff's 1991 patent applications without further delay;

2. Grant reasonable attorney's fees and costs to Plaintiff under the Equal Access to Justice Act, 28 U.S.C. § 2412, *amended by* Pub. L. No. 116-9, 133 Stat 580 (2019); and

3. Grant such other and further relief as this Court deems appropriate and just under the circumstances.

Respectfully submitted this 10th day of April, 2019,

/s/ Zhonette M. Brown
Zhonette M. Brown (D.C. Bar No. 463407)
MOUNTAIN STATES LEGAL FOUNDATION
2596 S. Lewis Way
Lakewood, Colorado 80227
Phone: (303) 292-2021
Facsimile: (303) 292-1980
zhonette@mslegal.org

Attorney for Rayco, LLC