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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAYCO, a limited liability company Plaintiff, v. DEBRA HAALAND, in her official capacity as Secretary of the United States Department of the Interior Defendant.	Case No. 2:21-CV-00512-SVW-GJS **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Date: Monday, March 27, 2023 Time: 1:30 p.m. Dept.: First Street U.S. Courthouse 350 West 1st Street Courtroom 10A, 10th Floor Los Angeles, CA 90012 Judge: Hon. Stephen V. Wilson

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INTRODUCTION

The Ray family, represented here through Plaintiff Rayco, LLC ("Plaintiff")[1] had hundreds of acres of property taken from them because of a 74-year old clerical error that never confused a soul and was already corrected more than 30 years ago. Following a 29-year delay in processing the Rays' patent applications, brought to a close only through litigation, the United States Department of the Interior ("DOI")[2] denied patent on all but 10 acres of their claims, and declared the rest void *ab initio*. In doing so, the government ignored or misconstrued relevant statutory and regulatory language, failed to consider the many sources of evidence disagreeing with their ultimate assessment, and misrepresented a family business's attempts to comply with their obligations under the law as a nefarious plot to illegally enlarge the size of their mining claims. This decision was arbitrary, capricious, and not in accordance with law, and should be set aside by this Court as unlawful under the Administrative Procedure Act.

BACKGROUND

Rights Under the Mining Laws

The General Mining Law of 1872 ("the Mining Law")[3] declares that "all valuable mineral deposits in lands belonging to the United States, both surveyed and

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[1] For the sake of simplicity, this memorandum refers to Rayco, LLC and its predecessors in interest (including the Emerson A. Ray and Fay R. Ray 1990 Trust, and Emerson and Fay Ray individually), collectively, as "Rayco," except where more specific identification is necessary.

[2] For the sake of simplicity, this memorandum refers to the Defendant, Defendant's predecessors in interest, and all agents and employees of the same, collectively, as "DOI," except where more specific identification is necessary.

[3] The General Mining Law of 1872 is commonly referred to as "the Mining Law." This brief will also occasionally refer to the body of statutory provisions, including amendments to the General Mining Law of 1872, the Surface Resources Act, and other federal statutes relating to mining, collectively, as "the Mining Laws."

unsurveyed, shall be free and open to exploration and purchase, by citizens of the United States . . . .” 30 U.S.C. § 22. 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 “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. While the days of the lone prospector going out west with a pickaxe and a gold pan and striking it rich may be long behind us, the rights first enshrined in statute in 1872 have not lost their relevance or vitality. *See Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 33 F.4th 1202, 1209 (9th Cir. 2022) (“150 years after its enactment, the Mining Law remains in effect for much federal land and for many minerals . . . . [T]he Mining Law continues to be a source of wealth—sometimes great wealth—for those who discover valuable minerals on federal land.”).

Of course, the Surface Resources Act of 1955 (“SRA”) removed certain minerals—such as the common variety volcanic cinders produced by the Cima Cinder Mine—from the list of minerals subject to location under the Mining Law. 30 U.S.C. § 601. Cinder deposits on federal land that were located after the enactment of the SRA cannot be claimed under the Mining Law and are only available to be leased from the federal government pursuant to the Materials Act of 1947. *Id.* Nevertheless, the SRA explicitly protects valid, pre-existing rights. Existing mining claims for volcanic cinder—located and shown to be marketable prior to the enactment of the SRA on July 23, 1955—were grandfathered in as valid mining claims fully open to patent. 30 U.S.C. § 615 (“Nothing in this Act shall be construed in any manner to limit or restrict or to authorize the limitation or restriction of any existing rights of any claimant under any valid mining claim heretofore located . . . .”).

There are three general types of mining claims: lode claims, placer claims, and mill site claims. Lode claims are used for "veins, lodes, ledges, or other rock in place," 43 C.F.R. § 3832.21(a), with a vein of gold running through solid quartz being the prototypical example. Placer claims cover most other deposits not subject to lode claims, and are used when the mineral being extracted can be found relatively uniformly within a sand or gravel-type substrate. 43 C.F.R. § 3832.21(b). When one mines a placer claim, one is mining what is effectively the gravel on top of the bedrock. Mill site claims, in contrast, are "location[s] of nonmineral land not contiguous to a vein or lode that you can use for activities reasonably incident to mineral development on, or production from, the unpatented or patented lode or placer claim with which it is associated." 43 C.F.R. § 3832.31. Mill sites are essentially claims of nearby, less valuable land, that miners can use to place mills, sheds, and other equipment or structures necessary to their operation without having to sacrifice mineral-producing land.

"Location" is the process by which a mining claimant memorializes his or her discovery of a valuable mineral deposit. Location is governed by both federal and state law, and includes two elements: (1) creating physical monuments, and (2) filing appropriate notice in the county land records office. In physical terms, 30 U.S.C. § 28 states that a "location must be distinctly marked on the ground so that its boundaries can be readily traced," and "shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." Federal regulations expand upon these requirements, adding that a placer claim is physically located by (1) erecting a monument at the point of discovery with a notice including the claim name, the name and address of the locator(s), the date of location (the date on which the notice was posted), the acreage claimed, and a description of the claim (made by reference to one or more physical landmarks); and

(2) then either physically marking the boundaries of the claim or providing a legal description using legal subdivisions (*i.e.*, township and range) when the land has been surveyed. 43 CFR § 3833.11(b). These requirements are mirrored by California law. CA PUB RES § 3902.

Within 90 days of physically locating a claim, the locator must record in the appropriate county recorder's office a notice or certificate of location that includes "a true copy of the notice [posted physically at the location] together with a statement by the locator . . . [which] shall include the section or sections, township, range, and meridian of the United States survey within which all, or any part, of the claim is located." CA PUB RES § 3911. Since the enactment of the Federal Land Policy and Management Act ("FLPMA") in 1976, claimants have also had to record their locations with the relevant BLM state office, again within 90 days of posting.[4] 43 CFR § 3833.11(a).

BLM regulations acknowledge the right of owners of unpatented mining claims to amend their notices or certificates of location to, *inter alia*, correct "omissions or other defects in the original notice or certificate of location," or to "correct the legal land description of the claim or site." 43 C.F.R. § 3833.21(a). A claim owner is not allowed to amend a notice or certificate of location to: "(1) [t]ransfer any interest or add owners; (2) [r]elocate or re-establish mining claims or sites [the claim owner] previously forfeited or BLM declared void for any reason; (3) [c]hange the type of claim or site; or (4) [e]nlarge the size of the mining claim or site." 43 C.F.R. § 3833.21(b). This right remains even after the land has been closed to mineral entry if the claim owner is attempting "to correct or clarify defects or omissions in the original notice or certificate of location" or "correct the legal land

[4] Owners of pre-existing mining claims were given until 1979 to comply with the new recordation requirements. *See Or. Portland Cement Co.*, 590 F. Supp. at 54.

description of the claim or site." 43 C.F.R. § 3833.22(c). California similarly allows for the amendment of mining claims where a locator "apprehends that his or her original location notice was defective, erroneous, or that the requirements of the law had not been complied with before filing . . . if the amended location notice does not interfere with the existing rights of others at the time of posting and filing the amended location notice." CA PUB RES § 3908.

An "amended location" differs from a "relocation" in that an amended location merely corrects a defect in the original location and relates back to the date of that original location, while a relocation is the establishment of a new claim over land formerly encompassed by an existing claim that was either forfeited or declared void by the BLM, and legally functions as a new location subject to the laws in place at the time of relocation. *See* 43 C.F.R. § 3833.21(a)–(b) (drawing distinction between relocation and amended location).

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 claim holder owns the mineral resources, but the United States retains the right to manage the surface, as long as such use does not "endanger or materially interfere" with mining operations. 30 U.S.C. § 612(b). Prior to 1994, owners of mining claims located on federal land could apply to "patent" their claims. Upon successfully completing the patent application process, fee simple title to the mineral estate 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 60 days. 30 U.S.C. § 29.

Modern Developments

In 1994, Congress passed the California Desert Protection Act ("CDPA"), which created the Mojave National Preserve (within which is located the Cima

Cinder Mine) and, subject to valid existing rights, withdrew the land from mineral entry. 16 U.S.C. § 410aaa-47. The CDPA included the proviso that "any patent issued after October 31, 1994, shall convey title only to the minerals, together with the right to use the surface of the lands for mining purposes, subject to [applicable] laws and regulations," again, subject to valid existing rights. *Id.* at aaa-48.

On September 30, 1994, Congress enacted the Department of Interior and Related Agencies Appropriations Act, PL 103-302, 108 Stat. 2499, § 112 (1994) ("Moratorium Act"), which placed a moratorium on the expenditure of funds by DOI to process mineral patent applications submitted after that date. The moratorium remains in effect to this day. In response, Interior Secretary Babbitt issued a memorandum directing DOI officials to continue processing those applications for which First Half Final Certificate ("FHFC")[5] was signed before October 1, 1994, and for those for which a FHFC was pending in Washington, D.C., as of September 30, 1994. Instruction Memorandum (IM) No. 95-01. The Moratorium Act, like the SRA, included a grandfather clause, which states 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." 108 Stat. 2499, § 113.

The Cima Cinder Mine

Emerson Ray and his wife Fay (along with Emerson's brother and several other co-locators who transferred their interests to Emerson and Fay prior to 1955)

[5] Approval of a mineral patent application occurs in two stages: the issuance of FHFC indicates that the applicant has successfully completed their application and, pending confirmation of the validity of the mining claim by the BLM, is presumptively entitled to a patent; a Second Half Final Certificate ("SHFC") is issued following completion of the mineral examination and secretarial approval.

first staked a claim on the Cima Cinder Mine in the Mojave Desert southwest of Las Vegas in 1948. AR_02487, AR_02896–97. At the time (even more so than now), the Mojave Desert was remote, inhospitable, and poorly mapped, with new miners having to rely on rough general surveys conducted in 1856–1857, and making measurements as best they could.

The original certificates of location that the Rays filed with the San Bernardino County Recorder's Office on June 29, 1948 (reflecting a June 1–2, 1948 location) provide the following legal descriptions of the claims: "the SE¼ of the NW¼ and the SW¼ of the NE¼ and the NW¼ of the SE¼ and the NE¼ of the SW¼ of Section 15 T14N, R12E SBBM" ("Iwo Jima"), AR_02994, "the SW¼ of Sec. 20 T14N R12E SBBM" ("Cinder 2"), AR_02895, and "E½ of the NW¼ and the W½ of the NE¼ of Sec. 29 T14N R12E SBBM" ("Cinder 3"), AR_02967. The certificates also describe the location of the claims as "[t]en miles south and one mile west of Valley Wells, Calif. (approximately)" for Iwo Jima, "11 miles south and 2 miles west of Valley Wells, Calif. (approximately)" for Cinder 2, and "11½ miles south and 2 miles west of Valley Wells, Calif. (approximately)" for Cinder 3. *Id.* Every certificate of location includes both a legal description based on public land survey and a description based on prominent local landmarks. Save for erroneous legal descriptions, the information contained within the original certificates of location was true and correct. All three placer claims were validly located under the laws of the United States and the State of California.

Production at the Cima Cinder Mine began no later than 1953, with some evidence of marketable production dating back to 1949. AR_02660–70. Mining was "more or less constant" on the claims from 1953 to 1999. AR_02670. Over 56,000 tons of cinder were produced from the Cima Cinder Mine between 1953 and the enactment of the SRA in 1955, AR_02666–67, and by 1998, approximately 650,000

tons of cinder had been produced from the Cima Cinder Mine in total. AR_02671. Minerals were shown to be marketable prior to 1955. AR_02501.

Several individuals and entities leased and operated the mine between 1953 and 1990, with ownership remaining with Emerson and Fay throughout the entire period.[6] AR_02877–81, AR_03015–118 The Rays resumed direct control of the Cima Cinder Mine in 1990. AR_02489, AR_03081, AR_03084–86.

In 1979, the Rays amended the legal description for the Iwo Jima claim to read: S½ NE¼ Sec. 17, T. 14N., R. 12E., S.B.B.M. AR_02996. In 1991, Rayco amended the legal descriptions in the certificates of location for all three placer claims as follows: N½ SE¼; S½ S½ NE¼, Sec. 17, T. 14N., R. 12E., S.B.B.M. (Iwo Jima), AR_02997; S½ SE¼ SE¼, Sec. 19; SW¼ SW¼ SW¼, Sec. 20; W½ NW¼ NW¼, W½ SW¼ NW¼ Sec. 29; NE¼ NE¼, SE¼ NE¼, NE¼ NE¼ SE¼ Sec. 30, T. 14N., R. 12E., S.B.B.M. (Cinder 2), AR_02897; SW¼ Sec. 29, T. 14N., R. 12E., S.B.B.M. (Cinder 3), AR_02969. These amendments were made to correct mistaken legal descriptions erroneously included in the original certificates of location, to align the legal descriptions both with the actual location of the claims on the ground and the landmark-based descriptions.

Rayco's Patent Applications

On September 23, 1991, Rayco duly submitted to the BLM California State Office the information and documents required to apply for patents on the Cima Cinder Mine claims. BLM issued a FHFC to Rayco and accepted purchase money

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[6] Emerson and Fay formed the Emerson A. Ray and Fay R. Ray 1990 Trust ("the Trust") in 1990—the beneficiaries of which were Emerson, Fay, and their heirs—and transferred ownership of the Cima Cinder Mine claims to the Trust. In 2001, ownership of the claims passed to the current Plaintiff, Rayco, LLC, which is an LLC wholly owned by the Trust for the purpose of managing the Cima Cinder Mine. AR_02877–81 (title documents); AR_02018–20 (letter from Rayco's attorney regarding ownership change).

for the patents on May 7, 1992, conveying equitable title and recognizing that Rayco had complied with all application, posting, and publication requirements necessary for application for mineral patents. AR_00335; *United States v. Shumway*, 199 F.3d 1093, 1099 (9th Cir. 1999) (FHFC "confirms equitable title is vested in the applicant, subject to the confirmation of a discovery of a valuable mineral deposit by a mineral examiner, certifies that the applicant has satisfactorily complied with all paperwork requirements, and eliminates the need for performance of assessment work.") (quoting BLM Manual, release 3–270, Millsite Claim Patent Applications § 3864.1(F)) (internal quotation marks omitted).

An internal memorandum dated June 1, 1992 indicated that "[w]ith current patent backlog and other priority work, it is not expected that field examinations and mineral reports for these cases will be completed before September 30, 1993." AR_00339. Rayco was never informed of this backlog or delay. With the exception of a March 30, 1994 decision declaring several mill sites newly located by Rayco in 1991 void *ab initio* for being located after the land in question had been segregated from appropriation under the mining laws, AR_00344–52, and some sporadic field work, *see* AR_02638–39, BLM appears not to have dedicated serious time to work on a mineral examination until March 1998. *See* AR_00362 (letter dated March 3, 1998 informing Rayco that "[y]our mineral patent application is now receiving concentrated attention in our office. We are making every effort to complete all applications by the end of FY 1999," and providing information "about what our mineral examiner will be doing when he/she visits your mineral operation").

A validity examination was conducted by BLM mineral examiner Robert Waiwood, with Mr. Waiwood submitting a "revised" version of a validity exam mineral report on March 4, 1999 ("1999 Mineral Report"). AR_00378–595. The 1999 Mineral Report was approved by the California Desert Department and was transferred to the California State Office on July 7, 1999, AR_01062–65, before

being transferred again to the Washington, D.C. office for BLM Directorate review on August 2. AR_01066. Comments from this review were incorporated by Mr. Waiwood into another mineral report that was completed in September 2003 ("2003 Mineral Report"). AR_01162–1869.

Following an additional three years of BLM Directorate technical review, on December 14, 2007, mineral examiner Charles Horsburgh submitted technical approval of the 2003 Mineral Report, adopting the report's recommendation that 60 acres of the Cima Cinder Mine mining claims be cleared for patent. AR_01875–86. Following this approval, no substantive review of the patent application or 2003 Mineral Report appears to have occurred for nearly seven years.

In 2014, Assistant Deputy Solicitor Karen Hawbecker supposedly identified three "significant issues" with the BLM Directorate's technical approval of the 2003 Mineral Report and instructed the BLM to conduct further review consistent with the issues identified in the memorandum. AR_02478. Review then seems to have stalled again, with no substantive movement until 2018 when increased pressure from Rayco and its attorneys forced their hand.

The government agreed to provide a final decision on Rayco's patent applications in a settlement agreement reached in response to Rayco's mandamus suit. *See* Order Granting Stipulated Dismissal, ECF No. 12, *Rayco v. Bernhardt*, 19-cv-01004 (D.D.C. Sep. 19, 2019). On July 16, 2020, DOI issued its final determination on Rayco's patent applications, holding all but 10 acres of the Cinder 2 claim to be invalid as post-1955 relocations of the claims staked in 1948. AR_03599–601. DOI also declared all but 22.5 acres of the mill sites invalid for not being based on a valid mineral location, and denied patent to the remaining mill site acreage as unpatentable non-mineral land under CDPA. AR_03690–91. (collectively, the "Challenged Decision").

The reasoning provided in the Challenged Decision is that the 1979 and 1991 amendments to Rayco's certificates of location were not routine amendments, but relocations attempting to illegally enlarge the size of Rayco's claims, AR_03600—a concern never before broached to Rayco by any government official in the 29 years between their application and their denial.[7] DOI appears to have based its decision exclusively on the mismatch between the original legal descriptions and the amended legal descriptions included within the certificates of location for the claims.

Importantly, DOI also granted patent on the 10 acres that was included within both original and amended legal descriptions, acknowledging that, but for the amended location vs. relocation question currently under dispute, Rayco's patents would have been awarded in their entirety (or, at the very least, to the extent recommended in the 2003 Mineral Report).

STANDARD OF REVIEW

The Administrative Procedure Act entrusts the federal courts to declare unlawful and set aside federal agency actions that are arbitrary, capricious, or otherwise not in accordance with law. The administrative agencies have been accorded significant discretion by Congress and the courts to carry out the will of the People's representatives as the individuals staffing those agencies see fit, but not without limit. Their decisions must be both reasonable and reasonably supported. The government's decision here to declare void all but 10 acres of Rayco's mining claims was neither, and must be set aside.

The Supreme Court has long held that agency actions may be found arbitrary and capricious in violation of the APA "if the agency has relied on factors which

[7] Indeed, it seems like the DOI may have developed these arguments as early as 2014, only to sit on them for years. ECF No. 45 at 8 ("The 2020 Mineral Report repeats the issues identified in the 2014 Memo in multiple areas and further expounds on them.").

Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"); *Data Mktg. P'ship, LP v. U.S. Dep't of Labor*, 45 F.4th 846, 856 (5th Cir. 2022) ("Our review is not toothless. In fact, it's well-established that after *Regents*, it has serious bite.") (internal citations and quotation marks omitted). Moreover, it is the responsibility of the agency to provide adequate justifications for its decisions at the time those decisions are put into effect, not the responsibility of the reviewing court to find a justification after the fact. *State Farm*, 463 U.S. at 43 (While the "standard is narrow and a court is not to substitute its judgment for that of the agency . . . . the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("We may not supply a reasoned basis for the agency's action that the agency itself has not given.").

Courts in APA cases review questions of law *de novo*. *United States v. Dahan*, 369 F. Supp. 2d 1187, 1191 (C.D. Cal. 2005) ("However, this 'arbitrary and capricious' standard of review only applies to limit judicial review of questions of fact found by the agency, and questions of law are freely reviewable by the courts."). The interpretations of law contained in the Challenged Decision are entitled to no deference under *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984), just as the interpretations of DOI regulations are entitled to no deference under the Supreme Court's recent decision in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019). As neither the statutory nor regulatory provisions at issue in this case are ambiguous in their meaning (nor has DOI thus far asserted that the provisions are ambiguous),

deference to DOI is prohibited. *See Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997) ("If a statute is clear and unambiguous, the court must interpret the statute to effect the unambiguous intent of Congress, regardless of the interpretation given to the statute by an administrative agency with responsibility for enforcement."); *Kisor*, 139 S. Ct. at 2414 ("the possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation. Still more, not all reasonable agency constructions of those truly ambiguous rules are entitled to deference.").

SUMMARY OF ARGUMENT

In largely denying Rayco's patent applications and declaring all but 10 acres of the Cima Cinder Mine claims void *ab initio*, the DOI failed to consider a number of important factors central to the question of claim validity. As just one example, under the mining laws, the miners of each mining district are permitted to make their own regulations "governing the location, manner of recording, [and] amount of work necessary to hold possession of a mining claim," provided such regulations do not conflict with federal or state law. 30 U.S.C. § 28. DOI apparently failed to make any inquiry whatsoever regarding local regulations, customs, and practices regarding the evidence necessary to prove valid location of a mining claim. DOI failed to consider any evidence apart from the legal descriptions in the original and amended certificates of location, such as the permanent monument descriptions including on those same certificates of location, publicly available satellite and aerial photographs of the area in question, physical evidence such as corner posts and disturbed earth, or the testimony of individuals with personal knowledge of the history of mining operations on the Cima Cinder Mine.

The Challenged Decision also indicates that DOI failed to consider the plain language of its own regulations, reviewal of which should have informed DOI that

that the agency's analysis was inadequate. At least three separate regulatory provisions contradict the reasoning used to justify the Challenged Decision. 43 C.F.R. § 3833.21 explicitly lists "correct[ing] the legal land description of the claim or site, the mining claim name, or accurately describe[ing] the position of discovery or boundary monuments or similar items" as a permissible reason for amending a notice or certificate of location, confirms that amendment can occur after the underlying land has been withdrawn from mineral entry, and specifically prohibits using an amendment "to . . . enlarge the size of the mining claim or site," implying that it is the *intent* of the claimant that matters to this inquiry. Meanwhile,

Further, the Challenged Decision's invalidation of mill sites associated with the 10 acres granted patent is also contrary to law in violation of the APA. DOI impermissibly and retroactively applied provisions from the California Desert Protection Act enacted in 1994 to its analysis of Rayco's 1991 patent applications. As Congress did not clearly express a desire for the CDPA to apply retroactively—indeed, Congress did the opposite and explicitly included a protection of valid existing rights—and because applying the CDPA to Rayco's patent applications as DOI did changed the legal effect of actions Rayco took prior the CDPA's enactment, retroactive application in this context would be inappropriate. This is especially true in this case, considering the fact that the application of the CDPA is only a question at all because DOI failed to reach a decision on Rayco's patent applications within a reasonable period of time. The government should not be allowed to "run out the clock" on decisions by refusing to take action until a more favorable legal regime is put into place.

ARGUMENT

I. DOI FAILED TO CONSIDER LOCAL CUSTOMS AND REGULATIONS IN THE CIMA MINING DISTRICT AS REQUIRED BY THE MINING LAWS

Section 28 of the Mining Laws declares that "[t]he miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to [various base-line requirements laid out in the statute]." 30 U.S.C. § 28. Such regulations "may be evidenced by a written rule, or by an observed custom in the district, not in writing." *Doe v. Waterloo Mining Co.*, 70 F. 455, 459 (9th Cir. 1895). Moreover, failure to consider both written rules and unwritten local custom constitutes a violation of the APA's command that agency decisions be adequately supported in law. *See Or. Portland Cement Co. v. U.S. Dep't. of Interior*, 590 F. Supp. 52, 61 (D. Alaska, 1984) (Failure to consider "an existing statutory scheme . . . and industry practices in promulgating regulations is both arbitrary and capricious."), *overturned on unrelated grounds by Red Top Mercury Mines, Inc. v. U.S.*, 887 F.2d 198 (9th Cir. 1989).

The legal description of a mining claim in a certificate of location has never been considered adequate evidence, in and of itself, to definitively determine the location of a disputed claim. *See Cal. Dolomite Co. v. Standridge*, 275 P.2d 823, 825 (Cal. Dist. Ct. App. 1954) ("The mere recording and filing of [a certificate of location and proofs of labor] without regard to what was done on the ground could not be conclusive . . . . Assuming that such recording and filing would be sufficient to make out a prima facie case, this may well be overcome by evidence of the factual situation and what was actually done."). Precedents are clear that *multiple* sources of evidence should be considered when attempting to determine a mining claim's

actual location. *See Skaw v. United States*, 13 Cl. Ct. 7, 39 (1987) ("The intent of the locators, when apparent from the notices and the markings on the ground, controls the description of the claims.") (citing *Sturtevant v. Vogel,* 167 F. 448, 452 (9th Cir. 1909)); *Jim Collins,* 175 IBLA 389, 392 (2008) (setting aside decision that mining claim was void *ab initio*, in part, because BLM failed to engage in further examination of facts on the ground, which indicated the claim was potentially valid under a different regulatory provision). *C.f. Houck v. Jose*, 72 F. Supp. 6, 8 (Dist. Ct. S.D. Cal. 1947) (refusing to accept a later-filed document as evidence of valid location over other, more probative evidence, in dispute with competing claimant). Legal descriptions need not be perfect, as long as they provide reasonable notice to the public of where a claim is located. *Skaw*, 13 Cl. Ct. at 39 ("If a description gives reasonable notice, it is legally sufficient as a description.") (citing *Law v. Fowler*, 261 P. 667, 669 (1927)).

First, the original certificates of location themselves provide evidence that the original legal descriptions were made in error and that the claims have always actually been located exactly where the amended legal descriptions describe. Each certificate of location includes, in addition to a legal description, a description of the claim's location based on prominent local landmarks. The certificate for Iwo Jima describes the claim's location as "[t]en miles south and one mile west of Valley Wells, Calif. (approximately)," the certificate for Cinder 2 describes the claim's location as "11 miles south and 2 miles west of Valley Wells, Calif. (approximately)," and the certificate for Cinder 3 describes the claim's location as "11½ miles south and 2 miles west of Valley Wells, Calif. (approximately)". If one examines a contemporaneous map of the area that includes a reference to the Valley Wells location (the site typically does not appear on more modern maps), *see* Exhibit

1,[8] it is clear that these descriptions refer to the area described in the amended legal descriptions, not the original legal descriptions. Considering the context in which the Cima Cinder Mine claims were originally located—a single man hiking through the inhospitable Mojave Desert, taking and noting measurements by hand using pre-Civil War land surveys, without the aid of modern GPS or other surveying equipment—the intuitive descriptions based on visible landmarks are far more likely to be reliable than section and township descriptions.

Prior to the development of modern surveying equipment and the availability of high-quality, detailed maps—none of which Emerson had at his disposal in 1948—it was almost expected that certificates of location would contain errors that would need to be corrected. *McEvoy v. Hyman*, 25 F. 596, 600 (Cir. Ct. D. Colo. 1885) ("Every one who is at all familiar with mining locations knows that, in practice, the first record must usually, if not always, be imperfect. Recognizing these

[8] This 1955 USGS map was apparently not considered by the DOI and therefore not included in the administrative record. The Court may, nevertheless, review extra-record evidence "if admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (internal quotation omitted). The Court may also take judicial notice of "facts not subject to reasonable dispute that 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'" *Friends of Clearwater v. Higgins*, 523 F. Supp. 3d 1213, 1222 (D. Idaho, 2021) (quoting Fed. R. Evid. 201(b)). As an official record of the United States Geological Survey, created in the ordinary course of business and obtained from an official government website, the accuracy of which cannot be disputed, this map is a matter of public record that can be judicially noticed. *See Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 727 (9th Cir. 2015) ("We may take judicial notice of official information posted on a governmental website, the accuracy of which is undisputed." (citations and alterations omitted). A Request for Judicial Notice has been filed concurrently with this memorandum. The location of Valley Wells relative to the Cima Cinder Mine can also be seen (albeit barely) in a map included with the 2003 Mineral Report. AR_02783.

difficulties, it has never been the policy of the law to avoid a location for defects in the record, but rather to give the locator an opportunity to correct his record whenever defects may be found in it."). And as the IBLA has recognized, this need for miners to amend their certificates of location has never been limited to defects like spelling errors, but has always extended to defects relating to the memorialization of the physical location of claims. *See R. Gail Tibbetts et al.*, 43 IBLA 210, 214–15 (1979) (A right to amend "was necessitated by the fact that it was not unusual for the original notice of location to contain various minor defects, particularly as regards the actual physical location of the claim."). As demonstrated in the 2020 Addendum Mineral Report and by the 2019 dependent resurvey of Section 20 conducted in preparation of that report, even the federal government has struggled to determine the true location of section lines in this part of the country, well into the 21st Century, and with the assistance of GPS, aerial drones, and high-quality modern maps. *See* AR_02524–27; AR_03320–40.

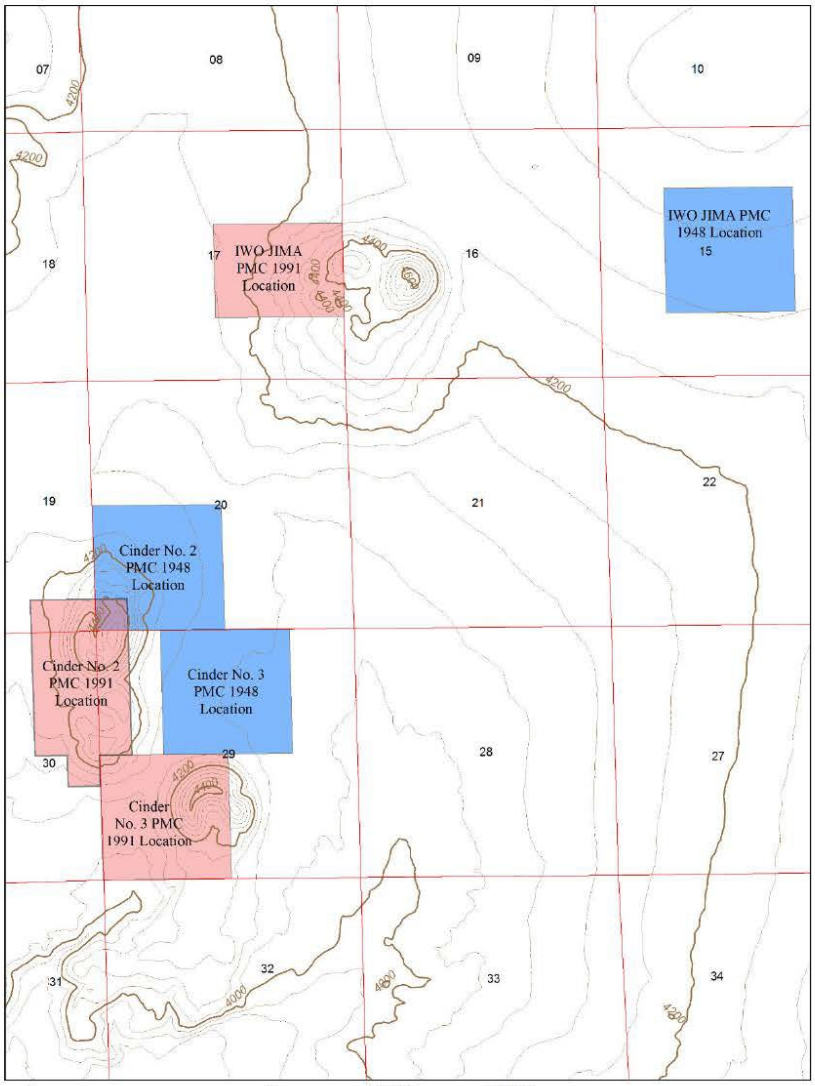
Beyond the certificates themselves, an examination of the administrative record in this case demonstrates that DOI was aware of the voluminous amount of evidence available indicating that Rayco's amendments to its certificates of location were mere corrections, not impermissible attempts to relocate claims Rayco had already been productively mining for decades. This is made immediately and abundantly clear simply by reviewing any of various maps included in the 2020 Addendum Mineral Report showing overlays of both the original and amended legal descriptions. *See* AR_02491–92, AR_02500, AR_02510–11 (a copy of Map 3 from the 2020 Mineral Report located at AR_02492 is inserted on the following page for ease of reference).

As is clearly visible from these maps, most of the areas enclosed by the original legal descriptions—particularly for Iwo Jima—contain few if any cinders to mine. Cinders are mined directly out of the cinder cones of extinct volcanoes,

AR_02617, and as both casual observation and the mineral reports show, most of the areas enclosed by the original legal descriptions are non-mineral in character. *Compare* AR_02309 (satellite imagery clearly showing the location of the actual cinder cones being mined matching up with amended legal descriptions, with area enclosed within the original legal description for Iwo Jima off the map to the east, clearly outside the area of volcanic scoria indicating the presence of cinders) *with* AR_02491–92 (map showing areas enclosed by original and amended legal descriptions).

EMERSON RAY AND FAY R RAY 1990 TRUST MINERAL PATENT EXAM

Map 3 - Location of Subject PMCs as Described in the original Location Notices and the 1991 amended location notices that are included in the subject patent applications.



15

Production records collected by mineral examiner Robert Waiwood show that the Cima Cinder Mine was continuously operational and productive from *at least* 1953 until being shut down in 1999. AR_02666–70. Even only examining the period prior to the first amendment in 1979, more than 472,000 tons of cinder had been produced from the Cima Cinder Mine. AR_02666–68. This simply would not have been possible had Rayco's claims originally been located where DOI seems to think they were originally located.

If examining maps, satellite photos, and historical financial records were not enough to demonstrate to DOI that Rayco's amended legal descriptions did not constitute impermissible attempts to relocate Rayco's claims, the extensive field work conducted both in preparation of the 2003 Mineral Report and in preparation of the 2020 Addendum Report (and for which DOI felt the need to delay its release of the 2020 Addendum Report and Challenged Decision), certainly should have. DOI employees visited the Cima Cinder Mine and surrounding area to conduct field work on at least two occasions between 1993 and 1998, AR_02638–39, and on no fewer than six occasions between 2003 and 2020. AR_02517. Every placer claim discovery monument found was located in an area corresponding to the amended legal descriptions. AR_02521. Mill site claim monuments that were found also appear to line up with the amended legal descriptions, rather than the originals. AR_02522–23. To the extent DOI looked for evidence that the claims had actually been relocated at all,[9] DOI has failed to identify a single piece of evidence of past

[9] Post-2003 field work appears to have been conducted mostly in and around Section 20, apparently under instructions to focus on the 10 acres of Cinder 2 ultimately approved for patent, with attempts to locate mill site corner monuments around the actual/amended locations of the Iwo Jima and Cinder 3 claims. *See* AR_02517–24 (describing field work). DOI employees do not appear to have examined Section 15 (the supposed original location of the Iwo Jima claim) for evidence of past mining activity (or at all) at any point during their field work.

mining activity on the area enclosed within the original legal description of the Iwo Jima claim.

All evidence outside the mistaken legal descriptions themselves indicates that Rayco's mining claims have existed in their current location since the late 1940s, and that Rayco has neither attempted to move nor enlarge its claims at any time since. This evidence was available to DOI at the time it made its decision, and yet the agency failed to consider it, despite ample custom and precedent stating that agencies must consider evidence other than legal descriptions when determining the location and validity of a mining claim. This failure constitutes unlawful agency action that must be set aside under Section 706 of the APA.

II. DOI FAILED TO CONSIDER THE PLAIN TEXT OF ITS OWN REGULATIONS REGARDING AMENDMENT OF CERTIFICATES OF LOCATION

In determining that all but 10 acres of Rayco's mining claims were not only undeserving of patent, but void *ab initio* due to impermissible relocations, DOI not only failed to consider the lion's share of the evidence before it, but also failed to consider the plain language of its own regulations concerning locating, amending, and relocating mining claims. The Challenged Decision is plainly not in accordance with the relevant laws and regulations.

BLM regulations acknowledge the right of owners of unpatented mining claims to amend their notices or certificates of location to, inter alia, correct "omissions or other defects in the original notice or certificate of location," or to "correct the legal land description of the claim or site." 43 C.F.R. § 3833.21(a). This provision recognizes that claim owners may need to amend their certificates of location from time to time, both to update information as it changes and to correct existing errors in the certificates as they become apparent. A claim owner is not

permitted, however, amend a notice or certificate of location to: "(1) [t]ransfer any interest or add owners; (2) [r]elocate or re-establish mining claims or sites [the claim owner] previously forfeited or BLM declared void for any reason; (3) [c]hange the type of claim or site; or (4) [e]nlarge the size of the mining claim or site." 43 C.F.R. § 3833.21(b). The federal courts have recognized the right to amend certificates of location for well over a century. *See McEvoy*, 25 F. at 599–600.

An amended location differs from a relocation in that an amended location merely corrects a defect in the original location and relates back to the date of that original location, while a relocation is the establishment of a new claim over land formerly encompassed by an existing claim that was either forfeited or declared void by the BLM, and legally functions as a new location subject to the laws in place at the time of relocation. *See* 43 C.F.R. § 3833.21(a)–(b) (drawing distinction between relocation and amended location). In contrast to an amended location, a "relocation" changes the effective date of the claim, subjecting the claim to whatever factual or legal changes may have occurred since the original location. 43 C.F.R. § 3833.0-5(q). The central question of this litigation, therefore, is whether Rayco's amendments to its certificates of location in 1979 and 1991 are amendments that related back to the original locations in 1948 or relocations that impermissibly attempt to "[e]nlarge the size of the mining claim[s]." 43 C.F.R. § 3833.21(b)(4).

The first clue that DOI was mistaken to label Rayco's amendments relocations is that 43 C.F.R. § 3833.21(a) explicitly provides for "correct[ing] the legal land description of the claim or site" as a legitimate reason for amending a certificate of location. Under DOI's theory, Rayco "relocated" its claims rather than merely amending them solely because the amended legal descriptions do not match up exactly with the original legal descriptions. Despite acknowledging the right of claim owners to "amend a location notice to correct or clarify defects or omissions in the original notice or certificate of location," DOI asserts that any difference between

Rayco's original and amended legal descriptions constitutes an attempt to "take in additional ground" foreclosed by the withdrawal of cinders from location under the Surface Resources Act of 1955. AR_03600.

DOI attempts to obfuscate, repeatedly referring to the lands described in Rayco's amended legal descriptions as "new" and using scare quotes around the word "amended," ignoring the fact that these "new" lands are covered in decades-old mining equipment owned by Rayco and have obviously been actively mined for many years. Judging solely by the reasoning included in the Challenged Decision, one would think that, between 1979 and 1991, Rayco picked up and moved its entire cinder mining operation (which had been productively producing cinders for the Las Vegas and Los Angeles construction markets since at least 1953, as DOI acknowledges) to mysteriously already heavily mined cinder cones from the barren, cinderless, valley floor half a mile to two miles away. According to DOI, Rayco was apparently producing cinders for years from a location where there are no cinders, then without alerting anyone in the surrounding area or disrupting production in any way, moved hundreds of tons worth of heavy equipment to the Cima Cinder Mine's current location, and erased all evidence of their original mining operation a short distance away.

DOI is left telling this absurd story because to acknowledge what actually happened—Emerson Ray made an error at some point in the process of putting together his legal land descriptions in 1948 that no one noticed for decades because the actual location of his claims was immediately obvious to all observers based on every other piece of evidence available—would demonstrate how out of step the Challenged Decision is with DOI regulations. DOI cannot acknowledge that Rayco's amendments were merely efforts to correct errors in the legal descriptions of its claims because doing so would acknowledge that Rayco lacked the intent "to enlarge the size of" its claims impliedly required by 43 C.F.R. § 3833.21(b)(4).

Notably, the regulation does not prohibit any amendment of a certificate of location that "took in new ground," as stated in the Challenged Decision, AR_03600, but states that "[y]ou may not amend a notice or certificate of location to . . . [e]nlarge the size of the mining claim or site. 43 C.F.R. § 3833.21(b)(4). Leaving aside the fact that the land taken in by Rayco's amended certificates of location was not "new," but the same land Rayco had been mining for decades, DOI's paraphrase of the regulatory language misrepresents exactly what Section 3833.21(b)(4) was attempting to prevent.

Almost by definition, an error in the legal description of a claim means that the legal description either encloses land the mining claimant did not intend to be included within their claim, or fails to include land that they did intend to be included within their claim. That is, practically all amendments to correct errors in the legal descriptions of mining claims would be "taking in new ground," and therefore actually relocations under DOI's theory. In order to prevent Section 3833.21(a)(2)'s express allowance of amendments to correct errors in legal descriptions from being rendered meaningless,[10] provision (b)(4) must prohibit something other than all amendments of erroneous legal descriptions. Since Rayco was not attempting to "enlarge" it's claims—in fact, the amended legal description of the Iwo Jima claim describes an area 25% *smaller* than the original legal description—43 C.F.R. § 3833.21(b)(4) simply does not apply to Rayco's claims.

It is true that several opinions have used the phrase "take in new ground" to describe the prohibition of amending to enlarge the size of a claim, but even those cases tend to involve claimants not merely adjusting the legal description to more accurately describe the claim on the ground, but actively seeking to enlarge the size

[10] *see Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).

of their claims, in contrast to Rayco. *See, e.g.*, *James F. Burke, et al.*, 148 IBLA 95, 98 (1999) (rejecting amended location notices because the amendment doubled the size of the original claim).

Courts have recognized for more than a century that it is the intent of the claim owner to enlarge their claim and the reasonable notice of location provided to the public that are most important—the question of whether an amendment relates back to the original location should not be determined formalistically. *See Gobert v. Butterfield*, 136 P. 516, 4 (Cal. App. 3d. 1913) ("That where the object is to cure obvious defects, and there is no attempt to include new ground, the amended certificate will relate back to the original, notwithstanding intervening locations."). In *Karen N. Owen*, the IBLA overturned a BLM decision declaring nine unpatented mining claims null and void *ab initio* because of "an obvious defect" in the notices of location. 176 IBLA 168 (2009). Crediting the claimant's explanation that the error was an "honest mistake made by an elderly woman just trying to comply with the rules and regulations required of her," and her suggestion that there must be "a simple solution . . . to correct such a simple mistake," the board ruled that the error was obvious, non-prejudicial, and eminently curable. *Id.* at 171–72.

Two more regulations drive home the point. 43 C.F.R. § 3830.91 lists the conditions under which a failure to comply with these regulations may result in a forfeiture of a person's claim. Making an error in the legal description of one's certificate of location is conspicuously absent from the list of failures that can trigger forfeiture. And even errors that ***do*** result in forfeiture can be cured as long as the claim owner does so within a reasonable time of receiving notice from BLM. Rayco cured the defects identified by DOI more than 30 years ago, without any prompting from the government whatsoever. Similarly, 43 C.F.R. § 3833.91 explains precisely which types of errors ***are not*** curable, and again, making an error in the legal description on a certificate of location is notably absent from the list. These two

provisions, taken together and in the context of the other provisions already discussed, inform us that correcting an error in a legal description is simply not considered a particularly consequential act by DOI's own regulations. The regulations are concerned with preventing harm resulting from fraud and competing claims to land, not with small errors that are easily corrected and failed to actually mislead any individual or entity (materially or otherwise) during the multiple decades they went unnoticed.

DOI's decisions are not in accordance with either the Mining Law or its own regulations, ignoring or misrepresenting important provisions providing for the rights of claim owners, and therefore must be set aside as violations of the APA.

III. THE DOI'S RETROACTIVE APPLICATION OF THE CDPA TO RAYCO'S MILL SITES IS NOT IN ACCORDANCE WITH LAW

In Count 3, Rayco has alleged that the denial of six mill sites pursuant to the California Desert Protection Act was an invalid agency decision, not in accordance with law. Rayco is entitled to judgment as a matter of law on this Count. Specifically, the Department of Interior based its denial on an erroneous interpretation of the CDPA, and the decision is therefore not in accordance with law. The federal statute at issue is 16 U.S.C. § 410aaa-48, which provides:

> *Subject to valid existing rights*, all mining claims located within the preserve shall be subject to all applicable laws and regulations applicable to mining within units of the National Park System, including section 1865(b) of Title 18 and subchapter III of chapter 1007 of Title 54, and any patent issued after October 31, 1994, shall convey title only to the minerals together with the right to use the

> surface of lands for mining purposes, subject to such laws and regulations.

(emphasis added). The plain text and standard rules of statutory construction indicate that the protection of "valid existing rights" extends to the entire Section—including that portion prohibiting the patenting of lands that are non-mineral in character. *See Paroline v. United States*, 572 U.S. 434, 447 (2014) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.").

Moreover, no part of the statute implies that it rules out rights that are valid, existing, and yet pending agency recognition with DOI. *Aleknagik Natives Ltd. v. United States.*, 806 F.2d 924, 926 (9th Cir. 1986) ("We conclude that 'valid existing rights' does not necessarily mean vested rights.") (opinion by then-Judge Anthony Kennedy); *Cook v. United States*, 37 Fed. Cl. 435, 445–46 (Fed. Ct. Cl. 1997) ("[T]he existence of a property interest is based on the applicant, prior to any change in the law, having done all that is required of it under existing law to receive title to public land, including the filing of all papers and, where applicable, the payment to the United States of the purchase price for a patent"); *cf. Forest Guardians v. Dombeck*, 131 F.3d 1309, 1313 (9th Cir. 1997) ("The language of § 1604(i) does not explicitly mandate the retroactive application of all amendments. In fact, it expressly precludes the retroactive application of amendments where such retroactive application would impair existing rights. § 1604(i) states in pertinent part: 'Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be *subject to valid existing rights*.'") (emphasis added); *see also* David L. Deisley & Susan A. Ross, VALID EXISTING RIGHTS: LEGAL AND PRACTICAL REALITIES, 44 RMMLF-INST 24 (1998) ("[I]n the case of existing mining claims, provided a valid discovery and compliance with the provisions of the General

Mining Law prior to issuance of the proclamation can be established, the claimant has a right to develop the claim which carries with it an implied right of access over public lands."); *see id.* at nn. 115–17.

"Where lands covered by mining claims are withdrawn subject to *valid existing rights*, the withdrawal attaches to all land described in the withdrawal, including the lands covered by the mining claims. [But] [w]hile the claims are valid, *the withdrawal is ineffective as against the lands embraced by the claims*." *Id.* (emphasis added); *see also Forest Guardians*, 131 F.3d at 1313 ("[T]he retroactive application of the 1996 Plan Amendments would impair the valid existing rights of parties who held authorizations, permits, or contracts for the use of Forest resources in the Southwestern regional forests prior to the Amendments' adoption."); *Aleknagik Natives Ltd.*, 806 F.2d at 927 ("Legitimate expectations may be recognized as valid existing rights, especially where the expectancy is created by the government in the first instance."); *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1343 (9th Cir. 1990) ("[T]he holders of conditional purchase options granted under the Alaska Statehood Act have legitimate expectations in obtaining title to land that should be protected as 'valid existing rights.'").

To the extent that DOI would contend that a statute enacted in 1994 ought to retroactively undermine a filing made in 1992, such an argument should be rejected. *See Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994) ("It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution."); *id.* at 270 ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent."); *see also Forest Guardians v. Thomas*, 967 F. Supp. 1536, 1560 (D. Ariz. 1997) ("The Ninth Circuit Court of Appeals has adopted the *Landgraf* reasoning and further explained that if a statute is substantive, a presumption against retroactive application applies, while a procedural statute

receives a presumption in favor of retroactive application. … The above rationale applies equally to administrative decisions, such as the ROD involved in this matter. There is no doubt that the ROD would *operate retroactively to impair existing rights or impose new liabilities upon the parties to the permits, contracts, etc.*") (emphasis added).

This is particularly so because it was DOI's own delays that caused the resolution of Plaintiffs' rights to extend beyond the passage of the CDPA in 1994. *See, e.g.*, AR_00339 (June 1, 1992 letter from California Desert District Manager to BLM California State Director) ("With current patent backlog and other priority work, it is not expected that field examinations and mineral reports for these cases will be completed before September 1993); *see also* AR_00362 (Mar 3, 1998 letter informing Rayco that "[y]our mineral patent application is now receiving concentrated attention in our office."); *see also* ECF No. 45, at 2 ("After more than 20 years, the government did not complete its analysis, and Rayco filed a lawsuit seeking writ of mandamus to compel action on the patents."); *id.* ("In 1992, the Department of the Interior, acknowledged that the application process had been properly followed, accepted payment of the patents, and granted the Rays a certificate that conferred them with equitable title to the land while the government finished the geological and other technical analysis of whether patents should be issued."); *id.* at 6 (noting that even in 2014, there was "give-and-take of the consultive process" occurring within the DOI, and that agency officials were still recommending further actions before approving or rejecting Rayco's mining patents).

In the same vein, the language in the statute, when interpreted appropriately, effectively functions as a bar to agencies effecting a taking of property, with or without just compensation. *Stupak-Thrall v. United States*, 89 F.3d 1269 (6th Cir. 1996) (Mem) (en banc, affirming by equally divided court) (Moore, J., concurring)

("Congress, of course, can always take property, provided it pays just compensation (and provided it does not violate due process), but Congress here has instructed the Forest Service not to do so. As a result, the remedy for an overreaching Forest Service regulation, rather than compensation, is an injunction. In other words, the 'subject to valid existing rights' language appears to be Congress's 'promise' to private property owners that, at a minimum, it will not take their property, even with just compensation."). Of course, if the CDPA genuinely worked to defeat a property interest, as the government contends, it would effect a taking against the Rays. So the statute must be interpreted to avoid such a result. *Cf. Jackson v. U.S.*, 103 F. Supp. 1019, 1020 (Fed. Ct. Cl. 1952) (fishing license constituted property right for which a taking occurred because the license had the quality of alienability); *see also Todd v. U.S.*, 155 Ct. Cl. 111, 120–21 (Fed. Ct. Cl. 1961) (Secretary of War's regulations imposed a taking on fishing licenses that could be used for subsequent fishing).

DOI should not be permitted to use its own unreasonable delay in processing Rayco's patent applications to justify retroactive application of the CDPA.

CONCLUSION

For the reasons provided above, Rayco respectfully request that the Court grant its Motion for Summary Judgment and enter judgment setting aside the Challenged Decision.

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Respectfully submitted,

s/ David C. McDonald

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th Day of December, I caused a true and correct copy of the foregoing **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be electronically filed with the Clerk of the Court using the Court's CM/ECF system which sent notification of such filing to the following counsel of record in this matter:

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/s/ David C. McDonald
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