David C. McDonald (*pro hac vice*)
Mountain States Legal Foundation
2596 S. Lewis Way
Lakewood, Colorado 80227
Telephone: (303) 292-2021
Facsimile: (303) 292-1980
dmcdonald@mslegal.org

Anthony T. Caso (CA Bar No. 088561)
c/o Chapman Univ. Fowler Sch. of Law
One University Drive
Orange, CA 92806
Telephone: (916) 601-1916
Facsimile: (916) 307-5164
tom@caso-law.com

Attorneys for Rayco, LLC

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 **RAYCO'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST DEBRA HAALAND** Date: Monday, April 10, 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Administrative Decisions

Statutes

Regulations

Other Authorities

INTRODUCTION

The Government acted arbitrarily and capriciously when it denied nearly the entirety of Rayco's patent applications. At issue are (1) the Government's decision to declare null and void all but 10 acres of the claims making up the Cima Cinder Mine, and (2) to deny patent to those mill site claims associated with the 10 acres of placer claim that were not invalidated. The Court should find in favor of Rayco on both issues, and reject the government's assertion that Rayco filed entirely new patent claims when it merely amended prior descriptions of land that it had claimed for generations.

First, the Government misconstrues permissive language ***allowing*** locators of some placer claims to dispense with the additional labor of physically staking corner monuments if their claims are located via legal land description and based on official public land surveys, as mandatory language requiring locators of placer claims to do so exclusively by legal description, with other evidence of location being not only unnecessary but entirely irrelevant. Courts—and the Bureau of Land Management ("BLM")—regularly look to other sources of evidence when the validity or situs of a location is in dispute. If anything, when physical markings and legal descriptions conflict, courts have long held that it is the physical evidence that controls. Upon examination, the clear themes that emerges from the case law are that a pragmatic, evidence-based approach to adjudicating disputes of this kind is called for, and that it is the clear intent of good-faith locators rather than a strict and formalistic review of their location documents that should guide the analysis.

Second, the Government misconstrues the California Desert Protection Act's ("CDPA") provision limiting patents issued post-enactment to mineral land only. In doing so, the Government ignores important principles of statutory interpretation regarding the retroactive application of statutory provisions to valid rights pending

agency recognition, as well as Congress's commitment to protecting any interests other than environmental protection.

The Government's actions in denying patent and invalidating most of Rayco's claimed acreage were arbitrary, capricious, and otherwise not in accordance with law, in violation of the Administrative Procedure Act ("APA"). For these reasons, and for the additional reasons that follow, Rayco's Motion for Summary Judgment should be granted, and the Government's motion denied.

ARGUMENT

I. THE GOVERNMENT ERRED IN FINDING THAT RAYCO RELOCATED, RATHER THAN AMENDED, ITS MINING CLAIMS.

a. Legal descriptions are merely one source of evidence for determining the true location of a mining claim.

There is more than one way to record the location of a mining claim. For example, lode claims must generally be identified by metes and bounds description, owing to the often-irregular shape of ore veins; placer claims, on the other hand, may be located based on official United States surveys of the land in question. Cal. Pub. Res. Code § 3902(b). And while, under California law, a "description by legal subdivisions shall be deemed the equivalent of marking," such that physically marking the boundaries on the ground is not strictly necessary, they are far from the only evidence that courts examine when determining the validity and location of a disputed mining claim. That is because California law uses permissive, rather than mandatory, language. *See* Cal. Pub. Res. Code § 3902(b) ("Where the United States survey has been extended over the land embraced in the location, the claim ***may*** be taken by legal subdivisions and no other reference than those of the survey ***shall be required***") (emphasis added). And while federal law requires that placer claims "shall conform as near as practicable with the United States system of public-land surveys," 30 U.S.C. § 35, proving location by other means is permitted. *Accord*

McNulty v. Kelly, 346 P.2d 585, 590 (Colo. 1959) ("The only true requirement is that some description be used that will lead a reasonable man to the claim locations.").

That a legal description may be sufficient evidence to locate a mining claim does not necessarily mean that it is the only evidence that should be considered when the validity of a location is in dispute. If that were so, there would be no examples of courts comparing legal descriptions to physical monuments, or other indications of location, and no examples of courts weighing one type of evidence against another to settle disputes. And there would be no mechanism available for locators of placer claims to show location via other means, because no evidence of location outside of legal descriptions would be relevant for placer claims.

This is clearly not the case. Courts and the Interior Board of Land Appeals ("IBLA") regularly examine evidence other than legal descriptions when adjudicating disputes over the validity of a mineral location, and have done so for more than a century. *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."); *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 a decision that a mining claim was void *ab initio*, in part, because BLM failed to engage in further examination of facts on the ground, which indicated that 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 (Idaho 1927)).

Even cases cited by the Government agree that some degree of factual analysis outside the text of a claim's legal description is necessary when the valid location of the claim is in dispute. *See Patsy A. Brings*, 119 IBLA 316, 320–23 (1991) (summarizing the substantial amount and variety of evidence examined by the BLM, including witness testimony and evidence introduced in earlier contest proceedings, and also explaining the opportunity the IBLA provided to the plaintiff "to provide additional evidence to substantiate her assertion that the [placer claim] was physically situated, monumented, and posted on the ground [in the place alleged]."); *R. Gail Tibbetts v. BLM*, 43 IBLA 210, 229 (1979) ("Given a disputed issue of fact, hearings were required before the Department could declare Consolidated's claims null and void.") (emphasis in original) (quoting *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 441 (9th Cir. 1971). Sources of evidence such as the permanent monument descriptions in the certificates of location,[1] monuments marked on the site, witness testimony, and physical indications of mining activity,

[1] Detailed maps of the area from prior to the date of location in 1948 are limited. The 1955 USGS quadrangle map from shortly after the claims were located that Rayco requested the Court take judicial notice of does, however, clearly show cinder mining activity on two of the three cinder cones claimed by Rayco, and serves as at least a rough confirmation of the permanent monument descriptions given in the original certificates of location (*e.g.*, all claims are consistently described as south and west of "Valley Wells," which conflicts with the original legal description of the Iwo Jima claim, placed south and slightly east of Valley wells.). Rayco would also point out that the certificates of location refer to a "Valley Wells," and not "Valley Wells Station," located to the south and west of Valley Wells along the highway.

while each not dispositive individually, are all things the Government should have examined.

In fact, "[a]s a general rule, if the recorded description of a mining claim differs from its actual situs on the ground, the physical markings on the ground control, so long as they have been maintained." *Patsy A. Brings*, 119 IBLA at 327 (citing *R. Gail Tibbetts v. BLM*, 62 IBLA 124, 131 (1982)[2]); *United States v. Kincanon*, 13 IBLA 165, 168 (1973); *Kenneth Russell*, 109 IBLA 180, 183 n. 6 (1989). If anything, to the extent there is a conflict between the original legal descriptions and the physical evidence "on the ground," the Government should have defaulted to the physical evidence, rather than ignoring it entirely. At the very least, the Government acted arbitrarily in refusing to examine ***any*** evidence of location outside the original and amended legal descriptions.

b. It is the clear intent of the locator that controls.

The courts have soundly rejected the sort of rote formalism and legal-description-over-all approach that the Government urges in this case. Instead, courts maintain a strong preference for a pragmatic, evidence-based approach that focuses the analysis on determining the true intent of the original locator. For that reason, even the Government's own cases reject its proffered methodology.

A particularly strong example is *Kern Oil Co. v. Crawford*, 76 P. 1111 (Cal. 1903), which the Government cites for the proposition that legal descriptions based on public surveys are "permanent and fixed," and should control over other sources of evidence, *see* Federal Defendant's Memorandum in Support of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment,

[2] The Government cites to the 1982 decision made in the case after the IBLA remanded case to the BLM in its 1979 decision. Hereinafter, *R. Gail Tibbetts v. BLM*, 43 IBLA 210 (1979) will be referred to as *R. Gail Tibbetts I*, and *R. Gail Tibbetts v. BLM*, 62 IBLA 124 (1982) will be referred to as *R. Gail Tibbetts II*.

ECF No. 54-1 at 17. While the Government is correct that the specific outcome of that case involved preferring the legal description over the physical monuments, the central theme of *Kern Oil* is that courts should take a pragmatic, evidence-based approach that neither punishes honest mistakes nor rewards opportunistic, bad-faith conduct—the very approach the Government claims is inappropriate here.

Kern Oil concerned a disputed placer claim similar to the one at issue here, where there was a mismatch between the legal description of the claim and the locations of physical corner monuments. *Kern Oil*, 76 P. at 1111. The legal description of the claim at issue encompassed the entire quarter-section of Section 33, while the two eastern corner monuments physically marked the eastern boundary of the claim 24–73 feet west of the surveyed section line (the notices posted to the corner monuments also described the claim as encompassing the entire quarter-section). *Id.* at 1111–12. The defendant in the case subsequently located a claim within this strip of land, and the owner of the original claim sued. The owner of the original claim argued that the physical monuments were placed in error, and that the legal description should control, while the defendant relied on the general rule that physical monuments take precedence over legal descriptions. *Id*. The court held in favor of the plaintiff, reasoning—when looking at the totality of the circumstances—that the later locator had reasonable notice that the plaintiff had intended to claim the entire quarter-section, and that it would be unjust to punish the plaintiff for making an honest mistake while rewarding a bad-faith actor who opportunistically attempted to exploit the ambiguous status of the land to effectively jump the plaintiff's claim. *Id.* at 1112.

Contrary to the Government's implication, the court in *Kern Oil* was *not* attempting to lay out a strong rule of general application that a legal land description controls over other sources of evidence. Rather, it merely explained the reasons why it was diverging from the general rule that "the physical markings on the ground

control," *Patsy A. Brings*, 119 IBLA at 327, in that specific case. In *Kern Oil*, three specific facts contributed to the ruling in favor of the plaintiff: (1) the fact that it was the physical location rather than the legal description that the plaintiff asserted was mistaken; (2) the showing in the record that the defendant knew the plaintiff had attempted to claim the full quarter-section and located a hostile claim on top of land that had already been claimed; and (3) the injustice that would result from privileging the physical evidence over the legal description ***under the specific conditions present in that case.*** *Kern Oil*, 76 P. at 1112. The court summarized the core of its holding thusly:

> The object of the statute as to marking the location, so that its boundaries can be readily traced, is to notify the public that the claim has been located and is claimed under the mining laws of the United States. Whatever is sufficient to give this notice does give it. ***Technical accuracy, either in the location of the stakes or in the wording of the notice, is not required.*** If a third party, intending to locate, can readily ascertain from what has been done by the prior locator the extent and boundaries of the claim so located, then the object of the statute has been accomplished.

Id. (emphasis added). What the statute is concerned about is notice to third parties, and as long as the actual location of the claim is readily ascertainable based on whatever evidence is available, deficiencies in one form of evidence do not defeat the validity of the claim. *See id.* Considering that the Cima Cinder Mine was regularly producing cinders from the same physical locations for about 50 years, that no third parties ever attempted to locate a claim on the land encompassed by the amended legal descriptions, that at least two separate mineral examiners were able to determine the location of the claims and analyze their historical production without substantial difficulty, and that nearly all potential evidence of mining activity is located on the land encompassed within the amended legal descriptions,

the weight of the evidence indicates that the Government and other reasonable third parties were on notice that the land in question had been validly claimed by Rayco.[3]

The other cases cited by the Government in this section all agree that generally, a legal description contained in a certificate or notice of location is sufficient, *prima facie* evidence of location. *See* ECF No. 54-1 at 24–27. Rayco does not dispute this. But *prima facie* evidence is, by definition, "based on what seems to be true on first examination, even though it may later be proved to be untrue." *Prima Facie*, BLACK'S LAW DICTIONARY (11th ed. 2019). It is far from the end of the story.

c. The original legal descriptions at issue here represent exactly the sort of obvious errors that claimants are permitted to amend their certificates of location to correct.

Applicable regulations explicitly allow for the amendment of certificates of location to correct "omissions or other defects in the original notice or certificate of location," or "the legal land description of the claim or site." 43 C.F.R. § 3833.21. This applies even where a third party has intervened on the land in question, if the "object [of the amendment] is to cure obvious defects, and there is no attempt to include new ground." *Gobert v. Butterfield*, 136 P. 516, 517 (Cal. App. 3d 1913). The Government's attempts to place Rayco's amendments outside this category are unconvincing.

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[3] Note that Ray family successfully defended a Quiet Title Action filed by an individual attempting to "jump" some of the Cima Cinder Mine claims in the mid-1950s, when the lawsuit was dismissed in 1956 due to the plaintiff's failure to appear. To the best of Rayco's knowledge, no other person has ever asserted an ownership interest in the land described in either the original or amended legal descriptions. The Government asserts that BLM records "show at least two other groups of mining claimants whose claims covered the same lands involved in these patent applications," but provides no citation to the record or other evidence for this claim.

First, the Government has attempted to create a distinction between "substantive" amendments and amendments that are intended to correct merely "limited," "minor," or "clerical" errors. *See* ECF No. 54-1 at 29–32. Even assuming that Rayco's amendments were examples of the former, rather than the latter—an assertion that the Government fails to support and barely attempts to define—there is no law or regulation that limits the right of the owner of a mining claim based on the substantiveness of the amendment. Rayco amended the legal land descriptions in its certificates of location, as explicitly allowed by the regulations, to merely correct obvious defects with the original certificates, in a way that caused no confusion—let alone injury—to a single third party. To the extent this constituted "substantive" amendments to the claims, the Government can point to no relevant law or regulation that requires amendments to be "non-substantive."

Again, the Government's own cases work against it here. The government cites to *Patsy A. Brings*, 119 IBLA 319, 325 (1991), for the proposition that "substantive changes . . . have been construed as adverse to the original notice and result in the staking of a new mining claim with a new location date." *Id*.; ECF No. 54-1 at 30. But the opinion makes no reference whatsoever to "substantive" amendments, let alone states that "substantive" amendments necessarily constitute adverse relocations, *see* ECF No. 54-1 at 30.

Upon examining the actual reasoning that the IBLA employed, it becomes clear that this case actually supports Rayco's position that a determination of the validity of a disputed mineral location requires a pragmatic, evidence-based approach rather than the dogmatic "all substantive amendments are invalid" approach suggested by the Government. While the IBLA did ultimately rule that the amendment in question was an invalid relocation, it first engaged in exactly the sort of detailed evidentiary analysis that the Government refused to engage in here. First, like the court in *Kern Oil*, the IBLA recognized that the general rule—which the

Government has heretofore refused to acknowledge—is that "the physical markings on the ground control" over the "recorded description of a mining claim" when the two are in disagreement with each other. *Patsy A. Brings*, 119 IBLA at 327. The IBLA then reviewed evidence produced in earlier contest proceedings, consulted witness testimony, and asked the plaintiff to produce any additional evidence within their possession that would assist the IBLA in determining the location of the mining claim at issue—which the plaintiff failed to provide. *Id.* at 327–30. The IBLA ruled that the amendment was an invalid relocation only after reviewing the record (including testimony and other evidence from an earlier contest proceeding), providing an "additional opportunity [for the plaintiff] to substantiate her contentions concerning the location of the Turkey Track #1 placer claim," and failing to receive any additional requested evidence from the plaintiff, *id.* at 330, none of which the Government has done here.

Similarly, the Government misreads *Harvey v. Havener*, 135 Mont. 437, 448 (1959), which it cites for the proposition that "claimants can rely on rights acquired by original location only '[a]s to the portion of ground included both in the original location and the location as amended or relocated.'" ECF No. 54-1 at 31. Notably, this is not a quote from the decision itself, but an excerpt from a provision of Montana state law, which does not apply in this case, *Harvey*, 135 Mont. at 448. Further, the language quoted by the Government is only one part of a sentence in a larger paragraph, and is *dicta* at most. *See id.* at 448. The question of import in *Harvey* was solely one of notice, and the court was primarily concerned not with any issue of overlapping legal descriptions, but with discouraging claim jumpers. In fact, *Harvey* specifically discusses the danger inherent in the Government's theory of the case: Under the Government's theory, "'claim jumping' could become a very profitable occupation. Minor technical defects in the record of certificates of location would make valuable and otherwise valid claims legitimate prey for any person

whose attention might be attracted to the claims by the very work being done thereon." *Id.* at 447.

The opinion in *Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co.*, 95 P. 14 (Idaho 1908), cited by the Government for the same proposition as *Harvey*, fails to support the Government's position for similar reasons. The court in *Bismark* also repeated the general rule that amended certificates of location relate back to the original date of location so long as the amendment does not seek to take in additional land, and reiterates that a certificate of location functions as *prima facie* evidence of location, *id.* at 19. But once again, the Government's case supports Rayco's position. First, while the certificate of location of course "may be admitted in evidence; [] it is not conclusive." *Id.* at 17. Other evidence may also be considered. *See id.* The court also counseled that "location notices and records should receive a liberal construction, to the end of upholding a location made in good faith," and that "if by reasonable construction the language descriptive of the situs of a claim, aided or unaided by testimony, aliunde, will do so, it is sufficient in this respect." *Id.* The court went on to explain that the claims in question were well-known locally, and that the intervening locator "should not be permitted to take advantage of any minor defects in the location notices of said mining claims . . . . where it appears that said claims were located in good faith." *Id.* at 18.

The case law on this question—including much of the case law cited by the Government—consistently returns to the same key themes: that determining the validity of a disputed mineral location is a pragmatic, evidence-based process that gives force to the good-faith intent of the original claimant; that good-faith owners of mining claims should not be punished for inadvertent mistakes; and that bad-faith actors should not be rewarded for opportunistically taking advantage of ambiguities created by inadvertent mistakes. In dogmatically asserting that any amended legal description that does not exactly match the original legal description takes in new

land, and thus functions as a relocation, the Government failed to heed the examples of precedent.

The Government asserts that Rayco's amendments could not have been correcting "obvious defects" because the location, shape, and relative position of the claims as described in the amended legal descriptions did exactly match the location, shape, and relative position of the claims as originally described. It contends that these differences cannot be explained by Rayco attempting to correct obvious mistakes—made in good faith—in the original legal descriptions, and suggests that Rayco is attempting to fraudulently move its mining claims from their original locations. ECF No. 54-1 at 31–32. There are several problems with this argument.

First, the Government exaggerates the extent to which the amendments differed from the original legal descriptions. *See id.* It is clear that, while the positioning is not exactly the same, the basic layout is, with Cinder 2 and Cinder 3 next to each other, and the Iwo Jima claim separated slightly from the other two, a short distance to the north. *See* Map Insert, Plaintiff's Memorandum in Support of Motion for Summary Judgment, ECF No. 49-1 at 27. Both the original and the amended legal descriptions are very obviously drawn from the layout of the three cinder cones on which the mine was based. Similarly, the three claims unmistakably center on those three cinder cone peaks, and Emerson Ray's simple squares reflect that intention. It was only later that Rayco realized that the claims, as physically located, were not necessarily perfect squares, and diligently amended the certificates of location to reflect that understanding. Also, it is important to note that while the described shape was amended, the claimed acreage did not expand; Rayco actually ***reduced*** the described size of the Iwo Jima claim by 40 acres—again, to conform the legal description to the facts on the ground. AR_02994, AR_02997. This is hardly the behavior of an opportunistic bad-faith actor trying to trick the federal government. Yes, Emerson Ray was off in his original assessment of the claims'

location *vis a vis* the official public surveys, but perfection has never been the standard by which the locators of mining claims are judged. *See Kern Oil*, 76 P. at 1112 ("Technical accuracy, either in the location of the stakes or in the wording of the notice, is not required. If a third party, intending to locate, can readily ascertain from what has been done by the prior locator the extent and boundaries of the claim so located, then the object of the statute has been accomplished.").

The Government points to the decision in *R. Gail Tibbets et al. v. BLM*, 62 IBLA 124 (1982), in which the IBLA determined that the appellants' amended notices of location did not relate back to the date of original location, in part, because the strange and unexplained ways in which the configuration of the claims in question had shifted over time indicated that the "amended" location notices were not, in fact, contemporaneously intended to amend existing claims. 62 IBLA at 131–32. The facts in that case, however, were extreme, and easily distinguished. It is not the mere fact that the original and amended legal descriptions differed that motivated the IBLA's decision in *Tibbets*, but that the appellants failed to explain how "the physical relationship of the various claims can constantly change. Thus, claims which are 2 miles apart become adjacent, claims located to the west of other claims migrate to the east of those claims, and the configuration of the claim groups alter with each successive map." *Id.* In *Tibbets*, unlike here, the supposed configuration of the claims changed drastically, multiple times, in a context where it was not even entirely clear the appellants held lawful title to the claims in the first place. *Id.* Yet even in *Tibbets*, where the location notices were held to be void *ab initio*, *id.* at 132, the IBLA went to pains to reiterate that:

> [t]here are often problems in ascertaining the exact situs of land in the absence of a mineral survey. This is particularly true in mountainous terrain. Accordingly, it has long been recognized that to the extent that a description of a mining claim, as recorded, differs from its actual situs

> on the ground, the physical markings on the ground control, so long as they have been maintained.

Id. at 131.

Unlike in the *Tibbets* case, the differences here between the original legal descriptions and the amended legal descriptions are easily explicable when viewed in context. In contrast, the theory that the Government darkly hints at without directly stating—that Rayco is engaged in a cynical, decades-long plot to move its mining claims onto more productive land to which it has no claim, having somehow failed to recognize, when staking its original claims, that cinder mines should be located on top of actual cinders—does not offer a compelling explanation for the events that have transpired.

Using the Iwo Jima claim as an example, why would Emerson Ray choose to locate a claim for volcanic cinder more than a mile away from the nearest cinder cone? The area encompassed by Iwo Jima's original legal description includes no significant quantities of cinder (let alone a cinder cone); no corner monuments; and no broken earth, waste rock piles, mining equipment, or other physical evidence of mining activity. There were no pre-existing, competing claims located on the Iwo Jima cinder cone (also known as Button Mountain) providing Emerson an incentive to pretend to be mining somewhere other than where he was mining. The simplest explanation is the correct one: that the original legal descriptions were mistaken for some reason, that Cima Cinder Mine has always been located where it is currently located, and that Rayco's amendments to the legal descriptions were good-faith attempts to conform them to this reality.

The combination of legal description, description by permanent monument, physical monumentation, physical evidence of mining activity, and the simple facts of geography and geology served to clearly mark out the location and boundaries of the Cima Cinder Mine claims for third parties for decades. No reasonable person,

even if initially misled by the original legal descriptions, could travel to the site and fail to "readily ascertain" that Rayco had claimed and was actively mining the three cinder cones described in the amended legal descriptions. As with the mining claims at issue in *Bismark*, Rayco's claims "were located very prominently," involved the expenditure of large sums of money in development, and included "dwelling houses, bunkhouses, and other buildings in connection [with mining activity]." *Bismark*, 95 P. at 17. And considering their prominent placement and obvious signs of mining activity, "[i]t does not seem possible" that someone with any familiarity with the area in question would lack effective notice of their location. *Id.* at 18.

II. THE GOVERNMENT WRONGLY DENIED PATENTs TO RAYCO'S MILL SITES BASED ON AN IMPERMISSIBLE RETROACTIVE APPLICATION OF THE CDPA.

Turning to the Government's denial of Rayco's mill site patents, the Government's response to Rayco's Motion for Summary Judgment contains three major errors. The Government mistakenly conflates "valid existing rights" with "vested rights," overstates Congress's intentions regarding the proper balance of environmental protection and defense of private property rights, and entirely fails to reckon with the retroactivity issues at play.

a. The Government mistakenly conflates "valid existing rights" with "vested rights."

The Government's first mistake is conflating "valid existing rights," as that term is used in the CDPA, with the concept of "vested rights," which is not relevant to the present dispute. *See* ECF No. 54-1 at 37–38. As Rayco explained in its Memorandum in Support of Motion for Summary Judgment, ECF No. 49-1 at 35–36, no part of the CDPA states or even implies that "unvested" rights currently pending agency recognition are *invalid*. *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").

While completing and submitting an application to patent a mining claim may not confer a vested right to that patent, *see Independence Min. Co., Inc. v. Babbitt*, 105 F.3d 502, 508 (9th Cir. 1997), an unvested right is still valid for purposes of the CDPA's grandfather clause. *See* David L. Deisley & Susan A. Ross, VALID EXISTING RIGHTS: LEGAL AND PRACTICAL REALITIES, 44 RMMLF-INST 24 (1998) ("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***.") (emphasis added).

b. The purpose of the CDPA was not environmental protection, to the exclusion of all other interests.

The Government also drastically overstates the environmental protection purposes of the CDPA, framing the intentions behind the statute as elevating environmental protection over all other values, when Congress has repeatedly reiterated its respect for existing rights-holders and support for responsible development of the Nation's mineral resources.

It is true that Congress's stated intent in passing the CDPA was to protect the "particular ecosystems and transitional desert type found in the Mojave Desert area," 16 U.S.C. § 410aaa-41(1), and it may even be true that retroactive application of the CDPA's prohibition of the patenting of non-mineral land to pending applicants like

Rayco would "vindicate its purpose more fully," but that is insufficient to rebut the general presumption against retroactivity. *Landgraf*, 511 U.S. at 285–86 ("It will frequently be true . . . that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity. Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal. A legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute.").

Further, the limited purpose of any specific statute should not be pursued to the exclusion of other important interests that Congress has sought to protect. The CDPA itself protects "valid existing rights," 16 U.S.C. § 410aaa-48, and Congress has repeatedly expressed a desire to protect the rights of mining claimants like Rayco whose patent applications were pending at the time that the national moratorium on patents was enacted, and who suffered when BLM has refused to process those applications in a timely manner. *See*, *e.g.*, 110 Stat. 1321 § 322(c) (directing the Secretary of the Interior 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."). More generally, as succinctly expressed by the court in *Bismark*:

> [B]oth Congress and the courts have endeavored to protect the rights of locators and their assigns where locations have been made and held in good faith, and courts have given a liberal construction to the mining laws and locations made under them with a view of doing justice to the prospector and miner who have acted in good faith.

Bismark, 95 P. at 20. Ultimately, however, vague and aspirational statements of purpose, whether in support of environmental protection or the rights of locators, are little more than set dressing. The CDPA's lack of a clear statement of intent to apply

the provision in question retroactively to pending patent applications like Rayco's dooms the Government's argument. Only a clear statement of intent by Congress may defeat the general rule against retroactivity.

c. The Government fails to reckon with the retroactivity questions created by its preferred interpretation of the CDPA.

Finally, the Government has refused to engage with well-established judicial rules governing the retroactive application of law to applications submitted prior to the enactment of the change, failing to so much as mention the words "retroactive" or "retroactivity" in its brief. In denying patents to the six mill site claims at issue, the Government retroactively applied the terms of a statute to acts occurring ***years*** prior to the statute's enactment. To deny Rayco a property right on this basis is impermissible under standard retroactivity principles.

As a general matter, retroactive application of a substantive law is strongly disfavored barring clear statutory instructions to the contrary. *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."). The default rule is that the law as it stood at the time Rayco submitted its patent application applies, not the law as it currently stands now.

The CDPA itself contains no clear statement that Congress intended the provision limiting locators' ability to patent mill site claims to apply retroactively to pending applications such as Rayco's. As already discussed, vague statements of intent to protect the environment do not suffice, especially when paired with other indications of contrary intent, such as the statute's protection of valid existing rights. Nor do references to legislative history that merely amount to a restatement of the statutory text itself. *See* ECF No. 54-1 at 40 (quoting Senate Report paraphrasing, almost exactly, the wording of the second clause of Section 508 of the CDPA). The fact that the Senate Report separates its discussion of Section 508's clauses by a period rather than a comma is a reflection of the fact that commentary on a statute tends to be longer than the statute itself, and that the Government is resorting to pointing out subtle differences in punctuation found in legislative history to bolster its argument regarding the supposedly clear intent of Congress is telling.

III. THIS COURT'S ABILITY TO FASHION AN APPROPRIATE REMEDY IS FLEXIBLE

Section 702 of the APA provides that any person who has been legally wronged by a federal agency shall have a right of review in the federal district courts for "relief other than money damages." 5 U.S.C. § 702. Courts have discretion to provide declaratory, injunctive, and equitable relief under the APA, as the needs of each particular case require, as the APA holds itself out as "a comprehensive remedial scheme." *Western Radio Services Co. v. U.S. Forest Service*, 578 F.3d 1116, 1122 (9th Cir. 2009); *see id*. at 1123 ("The APA does not provide for monetary damages, through it does allow 'specific relief,' including the payment of money to which a plaintiff is entitled.") (citing *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988). And while courts adjudicating APA claims generally limit themselves to remanding to the agencies for further consideration of decisions lacking adequate explanation, they are not necessarily required to do so, especially in contexts where

the agency involved has engaged in unreasonable delay or bad faith, thereby rendering the chance of obtaining an adequate explanation within a reasonable time unlikely. *See Radio-Television News Directors Ass'n v. F.C.C.*, 229 F.3d 269, 272 (D.C. Cir. 2000) (ordering specific relief to repeal offending rules rather than remand, noting that "[t]he petition to vacate the rules has been pending since 1980, and less stalwart petitioners might have abandoned their effort to obtain relief long ago."). Like the petitioners in *Radio-Television*, Rayco has been attempting to obtain relief for decades now. This Court need not return this matter for yet further review to an agency that has already spent three decades purportedly engaged in such a review, and only agreed to provide Rayco with a final decision on its applications under threat of court order.

Should this Court find that additional review by the Government is necessary, it should carefully limit the scope of any remand order so that the Government is forced to both proceed in an expeditious manner, and prohibited from attempting to raise new issues to further delay final resolution of this case.

CONCLUSION

For the reasons stated above and in Rayco's Motion for Summary Judgment, the Court should grant summary judgment in Rayco's favor and deny the Government's Motion for Summary Judgment.

Dated: February 24, 2023

Respectfully submitted,

s/ David C. McDonald

David C. McDonald (*pro hac vice*)
Mountain States Legal Foundation
2596 S. Lewis Way
Lakewood, Colorado 80227
Telephone: (303) 292-2021
Facsimile: (303) 292-1980
dmcdonald@mslegal.org

Anthony T. Caso (CA Bar No. 088561)
c/o Chapman Univ. Fowler Sch. of Law
One University Drive
Orange, CA 92806
Telephone: (916) 601-1916
Facsimile: (916) 307-5164
tom@caso-law.com

Attorneys for Rayco, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, I caused a true and correct copy of the foregoing **RAYCO'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST DEBRA HAALAND** 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:

Shannon Boylan
United States Department of Justice
Environment & Natural Resources Division
Shannon.Boylan@usdoj.gov

/s/ David C. McDonald
David C. McDonald