

WESTERN MINING ACTION PROJECT

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Via Email

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Re: Mineral Operations at Indian Pass and the California Desert Conservation Area

Dear Mr. Archuleta, Mr. Chatterton, and Department of the Interior and BLM Officials:

This letter is submitted on behalf of the **Ahmut Pipa Foundation, Greenaction for Health and Environmental Justice, Center for Biological Diversity, Sierra Club California/Nevada Desert Committee, Earthworks, and California Communities Against Toxics** to alert the BLM to the serious legal and factual errors contained in the proposal by Imperial USA Corporation (IUC) to conduct extensive mining exploration operations in protected BLM lands in the California Desert Conservation Area (CDCA). As detailed below, because the proposed projects would violate various federal laws, including the Federal Land Policy and Management Act of 1976 (FLPMA), and the 2019 John D. Dingell

Jr. Conservation, Management, and Recreation Act (Dingell Act), BLM cannot approve them and must so inform IUC.

IUC proposes 168 drill pads disturbing 14.3 surface acres across the Picacho Area of Critical Environmental Concern (ACEC) and California Desert National Conservation Lands (CD NCL) designated in 2016 by the Desert Renewable Energy Conservation Plan (DRECP), as well as drilling and operations within the congressionally-withdrawn lands in the Indian Pass Area, including the Running Man/Trail of Dreams/Xam Kwatchan Trail Network Sacred Sites.¹ The lands at and around the sites of all three projects contain invaluable cultural resources considered sacred by the Quechan Tribe and other area Tribes. As the proposed mining including exploratory activities would desecrate and destroy areas acknowledged to be of profound sacred and cultural significance to the Quechan Tribe and other indigenous peoples of the region, permitting the proposed mining activities would violate the federal government's trust responsibility to Native Nations, and other legal protections for this land as detailed herein.

As the Quechan Tribe recently stated: “NO GOLD MINING at INDIAN PASS. This is a sacred area for the Quechan people. Indian Pass is an important part of the traditional homeland of the Quechan Nation, and contains ancient trails, intaglios, rock alignments, sleeping circles, and other evidence of the Quechan's long history in the area. Indian Pass is a place for spiritual and cultural renewal. Our traditional way of life and our culture is at risk.”

<https://www.quechantribe.com/event/quechan-community-spiritual-walk-protest>

These lands are no stranger to controversy, as they have been, since the 1990s, subject to cases in federal courts and international tribunals, differing Solicitor and Secretarial Opinions, extensive environmental and cultural reviews, and widespread public and congressional opposition, especially concerning the invaluable Indian Pass withdrawn area.

At the outset, IUC's assertion that it has “valid existing rights” in the Indian Pass withdrawn lands, based on an outdated BLM mineral validity report from 2002, is both legally and factually wrong. First, any determination of mining and millsite claim validity from 2002 cannot apply to the congressional withdrawal in 2019. The new congressional withdrawal superseded the 2000 administrative withdrawal, and IUC and BLM must base any claim validity finding on the facts in 2019, not 2002. In addition, even if the 2002 validity report was still valid, it recognized that the claims at the site would not be valid if the costs to comply with California state environmental and cultural resource protection requirements were considered, which they must.

Second, regarding the Indian Pass/Running Man/Trail of Dreams/Xam Kwatchan Trail Network Sacred Sites, and any other such sites in the area (to be further determined after BLM conducts detailed and comprehensive consultation with all potentially affected Tribes and indigenous groups), BLM cannot allow any operations that would adversely affect the integrity and Native American uses of the affected lands, under FLPMA, Section 1454 of the Dingell Act, and the controlling Executive Order protecting such Sacred Sites, EO #13007.

¹ The scope and extent of these Sacred Sites should be considered in the broadest possible manner, after full consultation with all potentially affected Indian Tribes and indigenous groups.

Third, regarding all of the lands proposed for mineral exploration and other uses, IUC's proposal would result in "undue impairment" to the critical cultural, environmental, wildlife, and other public resources in the California Desert Conservation Area (CDCA) that are protected under FLPMA. 43 U.S.C. §1781(f).

More detailed analysis of these and other issues follows.

I. IUC Has No "Valid Existing Rights" in the Congressionally-Withdrawn Indian Pass Area

A. Previous Assertions of Claim Validity in 1998, 2000, or 2002 Do Not Apply to the 2019 Congressional Withdrawal

The lands at Indian Pass, including all the lands proposed for exploration and use by IUC in that area, were withdrawn from all mineral entry and occupation by Congress in 2019. Dingell Act Section 1454(e), 16 U.S.C. §410aaa-75. Yet IUC asserts that it has "valid existing rights" to explore for and develop its mining and millsite claims in the Indian Pass Withdrawn lands, based solely on BLM's 2002 Mineral Report conducted in response to Glamis Imperial Mining Co's proposed mining plan at the time.

Moreover, although IUC's unpatented mining claims located within the Indian Pass Segment are located within the "Indian Pass Withdrawal Area," which was subject to a 20-year withdrawal from mineral entry effective October 27, 2000, and was subsequently permanently withdrawn from mineral entry on or around March 12, 2019, both withdrawals were subject to valid existing rights. As set forth in that certain 2002 BLM Mineral Report (Serial No. CACA 35511), IUC's unpatented mining claims located within the Indian Pass Segment were deemed valid as of 1998, prior to any withdrawal from mineral entry, and therefore remain open for mineral entry and exploration by IUC....

The proposed drill pads on the Indian Pass segment of the Project are all located on valid mill site or lode claims as identified in the 2002 Mineral Report cited above.

IUC Plan of Operations (PoO) at 8.

Under current BLM hardrock mining regulations, BLM cannot approve any exploration or mining plan in a withdrawn area without verifying that each and every claim proposed for use was valid at the time of withdrawal, and remains valid.

Sec. 3809.100 What special provisions apply to operations on segregated or withdrawn lands?

(a) Mineral examination report. After the date on which the lands are withdrawn from appropriation under the mining laws, BLM will not approve a plan of operations or allow notice-level operations to proceed until BLM has prepared a mineral examination report to determine whether the mining claim was valid before the withdrawal, and whether it remains valid. BLM may require preparation of a mineral examination report before approving a plan of operations or allowing notice-level operations to proceed on segregated lands. If the report concludes that the

mining claim is invalid, BLM will not approve operations or allow notice-level operations on the mining claim. BLM will also promptly initiate contest proceedings.

43 C.F.R. §3809.100(a).

At the outset, BLM cannot approve any “exploration” within a withdrawn area. The 2019 congressional withdrawal closed off the lands to exploration. When lands are withdrawn from entry under the Mining Law, the Mining Law's authorization for citizens to explore for and develop minerals on those public lands terminates. If the mineral deposit requires additional exploration to determine grade or quality before actual mine development may be confidently started, a discovery has not been achieved. “[I]f one has found only enough mineral to justify further ‘exploration,’ as yet he has not made a ‘discovery.’” Converse v. Udall, 399 F.2d 616 (9th Cir. 1968). *See also* United States v. Snyder, 72 Interior Dec. 223 (1965); United States v. Boucher, 147 IBLA 236, 243 (1999) (“Where the Government subsequently withdraws the land from mineral entry and location, permission to prospect is thereby revoked and only claims then supported by a discovery are protected from the withdrawal.”)(*quoting* United States v. Niece, 77 IBLA 205, 207 (1983)).

Second, any previous findings as to the validity of mining and millsite claims in 1998, 2000, or 2002 (even if correct, which is not the case as shown herein) are irrelevant as to whether the mining and millsite claims were valid when Congress withdrew the Indian Pass area in 2019. Under the Mining Law, claim validity “cannot be based upon a discovery which existed only at some previous time.” ROCKY MTN. MIN. L. FOUND., AMERICAN LAW OF MINING § 35.08[3] (2d ed. 1993). As stated by the IBLA, even if a discovery existed sometime in the past (which as shown below is not supported by the facts), that does not mean that the discovery exists years (in this case, decades) later:

That a discovery of a valuable mineral deposit does not, by itself, create a vested right to patent is made clear when one considers cases where a discovery is made and then lost. Thus, even though a claimant may have made a discovery and actually mined material from that claim, until a patent application has been perfected and the equitable title has vested, a claimant runs the risk of losing his discovery if the deposit is exhausted or if a material change in market conditions renders it unreasonable to expect that the mineral can be mined at a profit. *See, e.g.,* Best v. Humboldt Placer Mining Co., 371 U.S. [334] at 336; Multiple Use, Inc. v. Morton, 353 F. Supp. 184, 193 (D. Ariz. 1972), *aff'd*, 504 F.2d 448 (9th Cir. 1974); United States v. Mavros, 122 IBLA 297, 302 (1992).

Estate of John M. Lighthill, 147 IBLA 25, 30 (1998). *See also*, U.S. v. Mary Belen Rosenberger, 71 IBLA 195, 200 (1983); United States v. W.S. Wood, et al., 51 IBLA 301, 312 (1980); U.S. v. Mary E. Gray, 50 IBLA 209, 211 (1980); U.S. v. Ubehebe Lead Mines, Inc., 49 IBLA 1, 5 (1980); Mulkern v. Hammitt, 326 F.2d 896, 898 (9th Cir. 1964).

Thus, even if the claims may have been valid in 1998, 2000 or 2002, that is irrelevant as to whether each claim was valid when Congress withdrew the Indian Pass lands in 2019.

Indeed, the fact that IUC and its predecessors never mined the claims, and for roughly 20 years have not proposed any mining, is highly relevant evidence of the lack of discovery.

If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of the discovered minerals was not sufficient to justify the costs of extraction. E.g., *United States v. Humboldt Placer Mining Company*, 8 IBLA 407 (1972); *United States v. Ruddock*, 52 L.D. 313 (1927); *Castle v. Womble*, 19 L.D. 455 (1894).

United States v. Zweifel, 508 F.2d 1150, 1156 n.5 (10th Cir. 1975) cert. denied 423 U.S. 829 (1975). The Interior Department has adopted this reasoning:

[F]ailure to undertake actual operations may be used as evidence that no prudent man would be justified in so doing. For instance, if mining claimants have held claims for several years and have attempted little or no development of actual operations, a presumption may be raised that there has been no discovery of a valuable mineral deposit. This was the case in *Cameron v. United States*, where six years had elapsed from the date of location to the date of hearing. ... [T]he most persuasive evidence as to what a man of ordinary prudence would do with a particular mining claim is what men have, in fact, done or are doing, not what a witness is willing to state that a prudent man would do. A third standard is that money expended on further exploration or further research, but not on initiation of actual operations, is evidence only that further exploration or research may be justified; it is not evidence that the mineral exposed is valuable, or that prudent men would be justified in initiating actual operations.

United States v. Winegar, 16 IBLA 112, 127, 81 I.D. 370 (1974) (citations omitted). See also *U.S. v. Milton Wichner*, 35 IBLA 240 (1978) (citing to *U.S. v. Flurry*, A-30887 (March 5, 1968) “where the Department stated: ‘...the most persuasive evidence as to what a man of ordinary prudence would do with a particular mining claim is what men have, in fact, done or are doing, not what a witness is willing to state that a prudent man would do.’”). See also ROCKY MTN. MIN. L. FOUND., AMERICAN LAW OF MINING § 35.14[2][e] (2d ed. 1993) and cases referenced. The fact that IUC now, and Glamis in the 1990s, hopes/hoped to someday operate a mine on the claims is not dispositive. *Id.*, and cases cited above. Indeed, “[t]he inference [against claim validity] apparently applies even when development is prevented by causes beyond the control of the claimant. Cf *United States v. Osborne*, 77 I.D. 83 (1970), aff’d, Civil No. 1564 (D. Nev. Mar. 1, 1972).” ROCKY MTN. MIN. L. FOUND., AMERICAN LAW OF MINING § 35.14[2][e], n. 91 (2d ed. 1993).

B. The 2002 Mineral Report Admits That the Glamis Project Would Be Uneconomical If California Backfill Requirements Were Applied

Even if the 2002 Mineral Report still governed the determination of claim validity today, as asserted by IUC, the Report itself admitted that the claims were invalid if California state environmental laws were applied. This includes the state requirements to backfill mine pits and recontour lands for metallic mineral operations such as that previously proposed at the Indian Pass site.²

² California mining statutes and regulations, including those that impose substantial costs on mining claimants, are not pre-empted by the 1872 Mining Law. *People v. Rinehart*, 377 P.3d 818 (Cal. 2016)(state bans on suction dredge mining operations not preempted by the Mining Law); *Bohmker v. Oregon*, 903 F.3d 1029 (9th Cir. 2018)(same).

California Regulations § 3704.1, entitled “Performance Standards for Backfilling Excavations and Recontouring Lands Disturbed by Open Pit Surface Mining Operations for Metallic Minerals,” require that:

Notwithstanding the provisions of Section 3700(b) of this Article, no reclamation plan, including any reclamation plan in which the end use is for wildlife habitat, wildland conservation, or open space, or financial assurance for a surface mining operation subject to the provisions of this section, shall be approved by a lead agency unless the reclamation plan meets the provisions of this section. Financial assurances must be maintained in an amount sufficient to provide for the backfilling and contour grading of the mined lands as required in this section.

(a) An open pit excavation created by surface mining activities for the production of metallic minerals shall be backfilled to achieve not less than the original surface elevation, unless the circumstances under subsection (h) are determined by the lead agency to exist.

(b) Backfilling shall be engineered, and backfilled materials shall be treated, if necessary, to meet all of the provisions of Title 27, California Code of Regulations, Division 2, Chapter 7, Subchapter 1, Mining Waste Management, commencing with Section 22470, and the applicable Regional Water Quality Control Board's Water Quality Control Plan.

(c) Excavated materials remaining in overburden piles, waste rock piles, and processed or leached ore piles not used in the backfilling process and remaining on the mine site shall be graded and contoured to create a final surface that is consistent with the original topography of the area. Care shall be taken to avoid the creation of un-natural topographic features, impediments to natural drainage, or conditions hazardous to human life and wildlife.

(d) Backfilling, recontouring, and revegetation activities shall be performed in clearly defined phases to the engineering and geologic standards required for the end use of the site as stipulated in the approved reclamation plan. All fills and fill slopes shall be designed to protect groundwater quality, to prevent surface water ponding, to facilitate revegetation, to convey runoff in a non-erosive manner, and to account for long term settlement.

(e) The requirements of subsections (a), (b), (c), and (d) notwithstanding, no final reclaimed fill slopes shall exceed 2:1 (horizontal:vertical), nor shall the resultant topography exceed in height the pre-mining surface contour elevations by more than 25 feet. Final fill slopes shall have static and dynamic factors of safety, as determined by an engineer licensed in California, that are suitable for the proposed end use of the site and meet or exceed the requirements of applicable building or grading codes, ordinances, statutes, and regulations. Final slopes must be capable of being revegetated, and shall blend visually with the local topography. Surface soil shall be salvaged, stored, and reapplied to facilitate revegetation of recontoured material in accordance with the requirements of Section 3711 of this Article.

In addition, state law mandates backfilling and other significant operational controls for an operation that “is located on, or within one mile of, any Native American sacred site and is located in an area of special concern”:

- (a) In addition to other reclamation plan requirements of this chapter and regulations adopted by the board pursuant to this chapter, a lead agency may not approve a reclamation plan for a surface mining operation for gold, silver, copper, or other metallic minerals or financial assurances for the operation, if the operation is located on, or within one mile of, any Native American sacred site and is located in an area of special concern, unless both of the following criteria are met:
- (1) The reclamation plan requires that all excavations be backfilled and graded to do both of the following:
 - (A) Achieve the approximate original contours of the mined lands prior to mining.
 - (B) Grade all mined materials that are in excess of the materials that can be placed back into excavated areas, including, but not limited to, all overburden, spoil piles, and heap leach piles, over the project site to achieve the approximate original contours of the mined lands prior to mining.
 - (2) The financial assurance cost estimates are sufficient in amount to provide for the backfilling and grading required by paragraph (1).
- (b) For purposes of this section, the following terms have the following meanings:
- (1) “Native American sacred site” means a specific area that is identified by a federally recognized Indian Tribe, Rancheria or Mission Band of Indians, or by the Native American Heritage Commission, as sacred by virtue of its established historical or cultural significance to, or ceremonial use by, a Native American group, including, but not limited to, any area containing a prayer circle, shrine, petroglyph, or spirit break, or a path or area linking the circle, shrine, petroglyph, or spirit break with another circle, shrine, petroglyph, or spirit break.
 - (2) “Area of special concern” means any area in the California desert that is designated as Class C or Class L lands or as an Area of Critical Environmental Concern under the California Desert Conservation Area Plan of 1980, as amended, by the United States Department of the Interior, Bureau of Land Management, pursuant to Section 1781 of Title 43 of the United States Code.

PRC Code § 2773.3. (Amended by Stats. 2017, Ch. 521, Sec. 40).

Here, there is no dispute that the Imperial Project proposed by Glamis in the 1990s, and IUC’s new operations, would be within the designated Running Man/Trail of Dreams/Xam Kwatchan Trail Network Sacred Site(s) in the Indian Pass Area (labeled in the BLM’s 2000 FEIS as the Running Man Area of Traditional Cultural Concern, ATCC). Also, the Indian Pass Area is within the CDCA and is within the Picacho ACEC and designated CD NCL lands .

Based on the results of the inventory for cultural resources (see Section 3.6.2.3; see also Appendix L), significant cultural features are either known or inferred to the north and northwest for at least two (2) miles (to at least Indian Pass); to the west for approximately one (1) mile; to the southwest for at least three (3) miles; and to the south for at least one-half (½) mile, of the Project mine and process area. Thus, Project facilities (the heap leach pad and/or the waste rock stockpiles) would have to be relocated outside of these areas to substantially reduce the significant effects to cultural resource sites. All of these same areas, plus an area up to one (1) mile to the east and one (1) additional mile to the south of the Project mine and process area, are included within the Indian Pass-Running Man ATCC, and these same project facilities would

need to be relocated outside of the Indian Pass-Running Man ATCC to be considered to substantially reduce the significant effects to the Indian Pass-Running Man ATCC.

BLM Final EIS for the Imperial Project (2000), at 2-73. Although IUC's exploration plan is not to the scale of the original mining plan of operations, the newly-proposed operations would be located in the same areas. *See* IUC Plan of Operations, Attachment A (operations maps).

As such, any mining at the site must comply with these backfilling and recontouring requirements. Yet all these requirements were not factored into the BLM 2002 Mineral Report. The Report, did, however, acknowledge that the costs to backfill the East Pit (main pit) alone were enough to make the mine uneconomic and thus all the claims would be invalid under the prudent person/marketability tests for claim validity.

We determined the cost of backfilling the proposed East Pit, although doing so was not part of the mine or reclamation plan. [After describing the backfill costs] ... we feel that **the mine would not be profitable if the East Pit backfilling cost were to be applied.**

2002 Mineral Report at 45 (emphasis added).

Thus, even if the 2002 Report could be used by BLM to satisfy the requirements of 43 C.F.R. §3809.100 (requiring claim validity in withdrawn areas), the evidence shows that the mine would have been uneconomic and the claims invalid.

C. None of the Millsite Claims Are Valid

IUC also asserts that all the millsite claims at the Indian Pass site are valid, based on the 2002 Mineral Report. The majority of the site is covered by IUC's millsite claims. IUC PoO Attachment A (maps).

As detailed above, the 2002 Report cannot be used to support current claim validity. In any event, whether in 1998, 2000, or 2002 (the dates under consideration by the 2002 Report), and certainly not in 2019, the millsite claims do not satisfy the strict validity requirements in Section 42 of the Mining Law.

As a matter of law, the millsite claims are invalid because there is no evidence that, as of the date of the 1998 segregation, 2000 withdrawal, 2002 Mineral Report, and certainly not in 2019 and beyond the company was, and is, "using or occupying" each of its millsites for mining or milling purposes in connection with its associated lode claims. The 1872 Mining Law's millsite provision states: "Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode...." 30 U.S.C. § 42. "A mill site is required to be used or occupied distinctly and explicitly for *mining* or *milling* purposes in connection with the lode claim with which it is associated." Alaska Copper Co., 32 I.D. 128, 131 (1903) (emphasis in original) overruled on other grounds (contiguity) Yankee Mill Site, 37 L.D. 674 (1909).

"While a mining claim or millsite claim may be located on public land open to such disposition, the United States may at any time close public land to mineral disposition by withdrawing it from mineral

location.... If the claimant cannot show compliance with the law prior to the withdrawal, ... his claim will be declared invalid.” United States v. W.E. Polk, A-30859, at 4, SO-1968-24, Mining (April 17, 1968) (affirming Office of Hearings and Appeals decision declaring millsite claims invalid when use or occupancy at the time of withdrawal consisted of temporary housing in anticipation of future mining and milling) *accord* United States v. Almgren, 17 IBLA 295, 299 (1974) (finding that “compliance with the mining laws must precede withdrawal”). *See also* United States v. Werry, 81 I.D. 44, 48, 14 IBLA 242 (1974); United States v. Cuneo, 15 IBLA 304, 315 (1974) (“[T]he effect of this withdrawal application was to segregate the public land from mining location, and to require the contestees to show that the millsite claims were valid as of the date of the segregation.”).

In addition to showing compliance with the Mining Law as of the date of withdrawal, a millsite claimant is obligated to show continued compliance and ongoing use and occupancy of the millsite for mining or milling purposes. A millsite claimant “must also show that he has continued in compliance without substantial interruption from that date to the date that validity is determined.” United States v. Almgren, 17 IBLA at 299.³

There is no evidence to suggest that Glamis was using or occupying its millsite claims for mining or milling purposes in 1998, 2000, 2002, or IUC in 2019. “[I]f the claimant cannot show by objective criteria that the millsite claim was valid at the time of the withdrawal application, the millsite may properly be declared invalid.” United States v. Cuneo, 15 IBLA at 324. Therefore, since IUC cannot present any evidence that it was using or occupying each and every millsite claim in 1998, 2000, 2002 and 2019, the BLM cannot approve any activities on these claims and must declare those millsite claims invalid.

“[I]n asserting a claim to a mill site in connection with a lode claim, it must be used and occupied for mining or milling purposes.... The statute does not seem to contemplate the right to locate a mill site without actually using or occupying the ground.” Kerschner v. Trinidad Mill. & Min. Co., 201 P. 1055, 1058 (N.M. 1921). The Interior Department has stated that “[n]o mill site entry should be allowed unless it is shown that the conditions of the law have been complied with.” Hudson Mining Co., 14 L.D. 544 (1892).

It has long been held that in order for a millsite to be “used . . . for mining or milling purposes” there must be an active mining operation associated with the millsite. *See e.g.* Pine Valley Builders, Inc., 103 IBLA 384, 390 (1988) (“if none of the associated mining claims are being operated, the appellant cannot be using the millsites for mining purposes”). The Mining Law’s “express requirement [of use for mining or milling purposes] plainly contemplates a function or utility intimately associated with the removal, handling, or treatment of ore from the vein or lode.” Alaska Copper Co., 32 I.D. at 131. A claimant is not using the land for mining and milling purposes where none of its mining claims are being operated. United States v. S.M.P. Mining Co., 67 I.D. 141, 144 (1960).

In addition, IUC’s (or Glamis’ in 1998/2000/2002) intention to use the millsites in the future, assuming for the sake of argument that it receives BLM, local, state and other federal agency approval to go ahead

³ Such use or occupation could only occur pursuant to proper project approvals under 43 CFR Part 3809 in full compliance with NEPA, FLPMA, the Dingell Act, the National Historic Preservation Act, and all other federal, state, and local requirements. Any use or occupancy undertaken without these approvals would be *per se* illegal and thus could not be relied upon to support any claims.

with the project, does not fulfill the Mining law's use or occupancy requirements. "The act does not contemplate the performance of conditions subsequent, or the future compliance with the law." Hudson Mining Co., 14 L.D. 544 (1892). "The use of improvements on a millsite as a base for occasional sampling or testing activities on associated patented lode claims and the intent to use the millsite in the future when and if market conditions are favorable, do not satisfy the requirements of use or occupancy set forth in 30 U.S.C. § 42." United States v. Osmer, 76 IBLA 59, 61 (1983).

The Interior Department has repeatedly stated that an intention to use a millsite in the future does not meet the statute's requirements, and thus does not validate the millsite. United States v. Swanson, 93 IBLA 1, 23 (1986) ("[a] claimant's stated intent or his mere willingness to expend time and effort in developing one or more millsites cannot substitute for objective evidence that the purposes of the millsite law have been accomplished."); United States v. Polk, A-30859 (April 17, 1968) ("[a] prospective use of public land as a millsite is not enough and a claim that is based only on intended use is invalid."); United States v. Wedertz, 71 I.D. 368, 374 (1964) (affirming the Forest Service's determination that a mill site was not valid where the claimant could not contend "that anything more than prospecting or preparations for future mining operations [had] been done"); United States v. S.M.P. Mining Co., 67 I.D. 141, 144 (1960) (finding that a mining company's intention to use the land at some time in the future was not enough to satisfy the statute); Hard Cash and Other Mill Site Claims, 34 L.D. 325, 327 (1905) ("[t]he design to use all of [the mill sites] for the purpose of a reservoir for water, and the building of a reduction works, is not the present active employment of any mining agency upon the land or the direct use of it for milling purposes").

The fact that Glamis in the 1990s, and IUC in 2021, submitted a proposed plan of operations to BLM is not sufficient to demonstrate the use or occupancy required by the Mining Law. In 1872, a claimant could immediately use and occupy federal lands for mining and milling purposes and thus could immediately perfect its millsites. Today, however, statutes such as NEPA, FLPMA, the Dingell Act, and the National Historic Preservation Act, among others, may prevent immediate use or occupancy of federal lands for mining and milling purposes. Since Congress has not revised the use or occupancy requirement contained in the Mining Law, these subsequent statutes may delay perfection of millsites.

Compliance by land management agencies with their responsibilities under environmental, historic preservation and other laws does not allow millsite claimants to bypass the use or occupancy requirement. In United States v. Collord, 128 IBLA 266 (1994), the claimants argued that the Forest Service obstructed their attempts to fulfill the statutory requirements. In that case, the Forest Service's decision as to whether claimants could build a road "was delayed by the need to obtain a more detailed mining plan from the claimants and by environmental review and decisionmaking by the Forest Service." United States v. Collord, 128 IBLA 266, 290 (1994). In an unpublished decision, the United States District Court for the District of Idaho found that "the Board properly rejected Collords' argument that, in spite of their failure to use or occupy the millsites within the meaning of the statute, the millsites should nevertheless be validated because the Forest Service obstructed their attempts to fulfill the statutory requirements." Collord v. U.S. Department of the Interior, Memorandum Decision and Order, Slip. Op. at 7, Case No. 94-0432-S-BLW (D. Idaho, August 27, 1996).

As noted by the IBLA: "It often happens that the claimant can show past use of the claim for mining or milling purposes *or plans to use the claim in the future for such purposes, but these assertions have been held to be insufficient to meet the requirements of the law, and the claim is declared null and*

void.” Utah International, Inc., 36 IBLA 219, 225 (1978)(emphasis added, citations omitted). At Indian Pass, IUC cannot even show **past** mining or milling and use or occupancy, let alone on the date of withdrawal. As such, the millsite claims are invalid and cannot be utilized to support the proposed Project.

In addition to not having “used” the subject millsite claims under the Mining Law, IUC has not “occupied” the claims either. There is no evidence that the strict requirements of the law have been met. The cases interpreting the “use” requirement also dealt with the “occupancy” requirement in the same manner, often using the phrase “use or occupancy” as the focus of the inquiry.

In United States v. Silver Chief Mining Co., 40 IBLA 244 (1979), claimants intended to use their millsites for tailings disposal but they had not yet constructed any improvements or disposed of any tailings on the claims at the time of the challenge. Claimants argued that a reclamation plan they had submitted to the state constituted use or occupancy because it evidenced a good faith intent to use or occupy the claims for tailings disposal and because it was a prerequisite to actual use or occupancy. United States v. Silver Chief Mining Co., 40 IBLA at 145-246. The IBLA rejected this argument and ruled that, absent on-site improvements, a plan for tailings disposal cannot constitute use **or** occupancy of a millsite claim. Id. at 245-246.

Here, in the Indian Pass Withdrawal Area, nothing has been done on the millsite claims that meet the “use or occupancy” requirement.

The 2002 Mineral Report, in (erroneously) determining that Glamis’ millsite claims were valid, relied on United States v. Swanson, 93 IBLA 1 (1986) to argue that Glamis’ “good faith” intention to use and occupy the site in the future satisfies the law. That is legally wrong. In Swanson, as well as other cases supporting millsite occupation, there was no question that there was actual physical milling or related activities occurring prior to the date of withdrawal. For example, in Swanson, there was an existing mill with “a replacement value of \$1,500,000.” 93 IBLA at 25. There is nothing even close to this level of “occupation” at the Imperial site. As the IBLA noted:

With regard to contestees’ general assertion that they “need” all of the land within all of their millsite claims, it is sufficient to note that, absent either present use or occupancy of each claim under 30 U.S.C. § 42, contestees’ perceived needs are irrelevant as they have failed to validly appropriate the land within the claims. Since the land has been withdrawn from further location, the possibility of future use or occupancy is equally ineffective to validate these claims in futuro. What must be shown is present use or occupancy of each of the claimed millsites.

Swanson at 28 (emphasis in original).

Accordingly, since there is no way that any of the millsite claims, let alone each and every millsite claim asserted by IUC, was valid in 1998, 2000, 2002, 2019, or today, BLM cannot authorize any operations on these claims.

D. Most, If Not All, of IUC's Lode Mining Claims Are Invalid

As with the millsite claims reviewed in the 2002 Mineral Report, IUC must show that all of the lode mining claims have been, and remain, valid. Yet even if the 2002 Report can be utilized to establish claim validity in 2019 (which it cannot), the 2002 Report incorrectly found that most of the lode claims were valid, based on an incorrect reading of the Mining Law.

The Mining Law states that “no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.” 30 U.S.C. §23 (emphasis added). This explicit language requires that a discovery be made within the boundaries of each and every lode mining claim. *See Gwillim v. Donnellan*, 115 U.S. 45 (1885). This rule applies even in the case where a claimant holds a number of adjacent mining claims as a group, as is the case at the Imperial site. *See Lombardo Turquoise Milling & Mining Co. v. Hemanes*, 430 F. Supp. 429 (D. Nev. 1977) *aff'd*, 605 F.2d 562 (9th Cir. 1979)(mem.). Instead of determining whether Glamis had made “the discovery of the vein or lode within the limits of the claim located,” 30 U.S.C. §23, the 2002 Report considered all of Glamis's lode claims to act as one claim, and aggregated the revenues and costs determination under the prudent person and marketability tests for discovery. The Report cited no applicable federal court case for this proposition.

Even if Glamis/IUC can aggregate its claims, many of the lode claims at the site are not valid. The IBLA has held that even where “aggregation” could apply, “the recovery expected from each claim must not only exceed the costs of mining, transporting, milling, and marketing the particular deposit on that claim but each claim must also bear a proportionate share of the development and capital costs attributable to the combined operation.” *United States v. Collord*, 128 IBLA 266, 287-88 (1994).

Here, in an attempt to avoid the limitations on the number of millsites associated with lode claims under §42, Glamis refiled its lode claims in 1998, with many of the lode claims covering miniscule amounts of minerals and lands. *See e.g.* Map 3 to 2002 Mineral Report (Amended May 2002). Glamis reworked/refiled its mining claims in September and October of 1998 (one month before the Department's segregation from mineral entry) to multiply its lode claims from 46 to 188. This roughly tracks the number of millsite claims covering the heap leach pad, waste rock dumps, and processing facilities. But such a tactic violated the inherent limitations in the Mining Law, namely, the discovery-on-every-mining-claim rule, the pro-rata share rule, as well as the minimum size required for all lode claims. Such manipulations of the claim limitations in the Mining Law cannot be used to support claim validity.

As background, the 1872 Mining Law provides that lode claims located after May 10, 1872, “may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode . . . [that n]o claim shall extend more than three hundred feet on each side of the middle of the vein at the surface . . . , [and that t]he end lines of each claim shall be parallel to each other.” 30 U.S.C. §23. “The framers of the statute of 1872 evidently proceeded upon the theory that a claim on a lode . . . would generally take the form of a parallelogram.” *Iron Silver Mining Co. v. Elgin Mining Co.*, 118 U.S. 196, 205 (1886); *see also Henry N. Copp*, *United States Mineral Lands*, 1881, Commissioner Williamson to Surveyor-General Johnson (May 4, 1880) (“The location contemplated by the law above quoted must have been essentially a parallelogram”). A rectangle or parallelogram with a length of 1500 feet and a width of 600 feet amounts to a total of approximately 20 acres.

The requirements dealing with the size of lode claims in the 1872 Mining Law were very different from the 1866 Mining Law. “[T]he legislation of 1866 provided that claims existing at the time of that legislation might be patented upon proper proof, no matter what their extent, how large or how small.” House Debate, January 23, 1872, Congressional Globe, 2nd sess. 42nd Cong., p.535. Prior to the 1872 Mining Law, miners located claims that were of irregular shape and unusual size. Carson City Gold & Silver Mining Co. v. North Star Mining Co., 73 F. 597, 599 (Circuit Court, N.D. California 1896); *see also* Congressional Globe, January 23, 1872, 2nd sess. 42nd Cong., p.535 (Statement of Congressman Sargent that miners claims were “of irregular sizes, and often quite large”).

The size provisions in the 1872 Mining Law were included in an effort to make claim size more uniform. On January 23, 1872, Congressman Sargent stated that after the passage of what would become the 1872 Mining Law, mining claims of “a certain size, which the bill does not vary, should be conformed to.” Congressional Globe, 2nd sess. 42nd Cong., p.535.

The 1872 Mining Law’s lode claim size, set at a maximum of approximately 20 acres, and the above-cited language, indicates Congress’ intent that mining claims should be a “certain” size, a size that the law would not vary. One of the first cases interpreting the Mining Law held that it was customary for miners to locate lode claims that were 1500 feet in length and 600 feet in width. “If a lode or vein three thousand feet in length is discovered, two locations may be made, each of 1500 feet, thereon.” Decision of Acting Commissioner, June 17th, 1873, Copp’s U.S. Mining Decisions, 207.

Where the size varied from 20 acres, it was usually either because one claim ran out of space by running into another claim, because of some physical condition on the ground such as extreme topography, or because the mineral vein did not extend to the 1500-foot allowable claim length. Soon after passage of the 1872 Mining Law, with an apparent intent to uphold Congress’ expectation that mining claims would be maintained at a certain size, the Interior Department stated that a locator of a mining claim could not make the lines of the claim irregular or zigzag for the convenience or purposes of the locator. *See Belligerent and Other Lode Mining Claims*, 35 L.D. 22 (1906).

Even if the location of ultra-small claims to avoid the millsite limits was valid, which it is not, such locations cannot apply to low-grade disseminated deposits. In this case, Glamis’ 1998 manipulation of its lode claims occurred on a low grade, indeed very low grade, disseminated deposit. One of the Department’s first rulings on the Mining Law, entitled *Locations when a Vein exceeds Fifteen Hundred Feet in Length*, stated that: “If a lode or vein three thousand feet in length is discovered, two locations may be made, each of 1500 feet, thereon.” Decision of Acting Commissioner, June 17th, 1873, Copp’s U.S. Mining Decisions, 207. Thus, in the case of a large disseminated deposit, one longer than 1,500 feet in length (as IUC/Glamis maintains is the case at Imperial), one location should be made – two locations if the length is longer than 1,500 feet but less than or equal to 3,000 feet.

Neither the Department nor the courts have ever recognized the right to divide a 1,500 foot (or 3,000 foot) deposit into miniscule claims. The 1873 Department ruling clearly contemplates that large deposits would be divided into claims **maximizing**, not minimizing, the 1,500/600 foot rule up to the full coverage of the deposit.

In essence, by minimizing its location boundaries, IUC/Glamis argues that it had discovered separate, individual deposits. Obviously, that contradicts its assertions to the California BLM that it had

discovered one large disseminated deposit (or three large deposits to be excavated in three proposed mine pits). IUC/Glamis cannot have it both ways. Either it has discovered disseminated deposits and the “maximizing” rule applies, or it has discovered 188 individual deposits. In the latter case, it would be extremely difficult to prove that each of those claims individually passed the marketability and prudent person tests under the Mining Law. In any event, since IUC/Glamis stridently maintains that it has discovered a large disseminated deposit, the former situation applies. Thus, the Department’s rule requiring maximization of claim boundaries to cover large deposits is determinative.

Congress never intended to allow miners to locate extremely small claims. The 1872 Mining Law also contains a provision stating that in no case shall any mining claim “be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface.” 30 U.S.C. §23. This provision illustrates Congress’ intent that a miner could only locate a claim with an end line of at least fifty feet in width. “The end lines, required in all cases to be parallel to each other, are important features of a vein or lode location, and the statute clearly contemplates that such lines shall have substantial existence in fact.” Jack Pot Lode Mining Claim, 34 L.D. 470, 471 (1906).

The size constraints in the 1872 Law replaced the 1866 Act’s allowance for location of any size claim. “[T]he legislation of 1866 provided that claims existing at the time of that legislation might be patented upon proper proof, no matter what their extent, how large or how small.” House Debate, January 23, 1872, Congressional Globe, 2nd sess. 42nd Cong., p.535 (emphasis added). As noted previously, the 1872 Law eliminated this ability to file claims of any size and of any shape.

When Glamis multiplied its lode claims in September and October of 1998, it took 20-acre lode claims and parsed them down to create 188 lode claims. Some end lines on IUC/Glamis’ lode claims are just 20 feet across. At least 15 claims have end lines less than 50 feet across. Where miners locate claims with miniscule end lines, the Interior Department has said that such lines “are severally obnoxious to the principle that end lines are required to be of a substantial nature . . . [and, as such,] are not end lines within the intendment of the law.” Belligerent and Other Lode Mining Claims, 35 L.D. 22, 25 (1906). The end lines of IUC/Glamis’ ultra-small lode claims do not have a substantial existence in fact, as contemplated by the statute.

Indeed, claims that are 50 feet or less across are also too small since that width violates the absolute minimum of “twenty-five feet on each side of the middle of the vein at the surface.” 30 U.S.C. § 23. A total of 50 feet would essentially mean that the width of the vein was practically non-existent. Additionally, in the case of a large disseminated deposit, the 25/50 foot rule supports the claim size “maximizing” rule discussed above. In other words, the law contemplates that end lines approaching 50 feet could only be located on a deposit with an extremely narrow and independent vein – certainly not the case for a disseminated deposit such as at Indian Pass.

Thus, at a minimum, the Department should inform IUC that any claim with less than a 50-foot endline is *per se* invalid. Also, the legality of any claim less than 20 acres (except on the edge of the disseminated deposit assuming it meets the discovery requirement) is seriously in doubt. Since the project site is now withdrawn from mineral entry, the invalidity of any claim covering the ore body would likely result in serious consequences for the company. This would be especially true if the claim was located in such a position that would make it impractical for open pit mining to occur (i.e., the pit could not be developed if the claim area was not disturbed).

II. BLM Cannot Authorize Operations That May Adversely Affect the Running Man/Trail of Dreams/Xam Kwatchan Trail Network Sacred Site(s)

Regardless of whether the mining and millsite claims at the Indian Pass site are valid (which as shown above they are not), BLM cannot authorize any operations that may adversely affect the Running Man/Trail of Dreams/Xam Kwatchan Trail Network Sacred Site(s) in the Indian Pass area. Under FLPMA, BLM cannot authorize operations that may adversely affect important Native American religious, cultural, and historical resources under Executive Order 13007, the NHPA and related laws. *See* Exec. Order 13007, “Indian Sacred Sites” (May 24, 1996), 61 Fed. Reg. 26771 (agencies are to “(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.”) (EO 13007).

In addition, in the 2019 Dingell Act required to protect the invaluable cultural resources “associated with the Xam Kwatchan Trail network”:

“(d) TRIBAL CULTURAL RESOURCES MANAGEMENT PLAN.—

“(1) IN GENERAL.—Not later than 2 years after the date of enactment of the John D. Dingell, Jr. Conservation, Management, and Recreation Act, the Secretary shall develop and implement a Tribal cultural resources management plan to identify, protect, and conserve cultural resources of Indian Tribes associated with the Xam Kwatchan Trail network extending from Avikwaame (Spirit Mountain, Nevada) to Avikwial (Pilot Knob, California).

“(2) CONSULTATION.—The Secretary shall consult on the development and implementation of the Tribal cultural resources management plan under paragraph (1) with—

“(A) each of—

“(i) the Chemehuevi Indian Tribe; “(ii) the Hualapai Tribal Nation; “(iii) the Fort Mojave Indian Tribe;

“(iv) the Colorado River Indian Tribes; “(v) the Quechan Indian Tribe; and “(vi) the Cocopah Indian Tribe;

“(B) the Advisory Council on Historic Preservation;

and

“(C) the State Historic Preservation Offices of Nevada, Arizona, and California.

“(3) RESOURCE PROTECTION.—The Tribal cultural resources management plan developed under paragraph (1) shall—

“(A) be based on a completed Tribal cultural resources survey; and

“(B) include procedures for identifying, protecting, and preserving petroglyphs, ancient trails, intaglios, sleeping circles, artifacts, and other resources of cultural, archaeological, or historical significance in accordance with all applicable laws and policies, including—

“(i) chapter 2003 of title 54, United States Code; “(ii) Public Law 95–341 (commonly known as the ‘American Indian Religious Freedom Act’) (42 U.S.C. 1996);

“(iii) the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa et seq.);

“(iv) the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.); and

“(v) Public Law 103–141 (commonly known as the ‘Religious Freedom Restoration Act of 1993’) (42 U.S.C. 2000bb et seq.).

Section 1454 of the Dingell Act. *See also* §1454(a) (“The Secretary shall ensure access to areas designated under this Act by members of Indian Tribes for traditional cultural and religious purposes.”) *amending* the California Desert Protection Act of 1994.

First, until BLM completes the required tribal cultural resources management plan, subject to full consultation with the listed Tribes, BLM does not have a picture of the cultural resources that must be protected under Section 1454. As such, BLM cannot authorize any activities in the lands associated with the Xam Kwatchan Trail network. Second, due to the strict protection requirements in Section 1454, it is almost certain that IUC’s proposed operations would violate those requirements – precluding BLM’s approval.

In 1978, Congress passed the American Indian Religious Freedom Act (“AIRFA”), extending religious freedom, including the use of sacred sites, to all American Indians. Reflecting the aims of the self-determination era, AIRFA provides:

[I]t shall be the federal policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996 (1994). In the sacred sites context, AIRFA has been implemented through laws such as Section 1454 of the Dingell Act and amendments to the National Historic Preservation Act, and Executive Order 13007.

Under the National Historic Preservation Act Amendments of 1992, “properties of traditional religious and cultural importance to an Indian tribe ... may be determined to be eligible for inclusion on the National Register.” The protections of the NHPA are generally procedural. The 1992 amendments direct federal agencies, including the BLM, “to consult ... with any tribe ... that attaches religious and cultural significance” to a site regarding federal “undertakings” that may affect it. 16 U.S.C. § 470a(d)(6)(A)-(B) (2012).

Executive Order 13007 is a substantive requirement on federal agencies; the agencies are directed to take action, not merely to consult. EO 13007 directs federal agencies to: “(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.” EO 13007, Sec. 1(a).

Executive Order 13007 defines a “sacred site” as “any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.” *Id.* at Sec. 1(b). There is no question that EO 13007 applies to the Running Man/Trail of Dreams/Xam Kwatchan Trail network Site(s).

The Ninth Circuit has held that EO 13007 is implemented via, and is a part of, BLM’s responsibilities

to protect such resources under federal public land law and FLPMA's UUD requirement.

Executive Order No. 13007 ... imposes an obligation on the Executive Branch to accommodate Tribal access and ceremonial use of sacred sites and to avoid physical damage to them. See 61 Fed. Reg. 26771 (May 24, 1996). The district court expressly recognized that BLM was required to comply with the Executive Order. *South Fork Band*, 2009 WL 24911, at *16 n. 9.

South Fork Band Council v. U.S. Dept. of the Interior, 588 F.3d 718, 724 (9th Cir. 2009) (emphasis added). As noted herein, this would also apply to BLM's duties to prevent "undue impairment" of lands within the CDCA, as well as the protective requirements in Section 1454 of the Dingell Act.

In *South Fork Band*, the Ninth Circuit held that compliance with EO 13007 was required in order for the agency to meet its duties to protect public land under FLPMA, as the case concerned BLM's approval of a large mine in Nevada. Yet, in that first round of the case, while holding that EO 13007 applied to BLM's review of the mine, the court determined that the mine would not actually adversely affect a nearby sacred site and thus BLM did not violate EO 13007.

The Ninth Circuit remanded the BLM decision on other grounds, and in its decision on the second appeal, again affirmed that the federal agency had to comply with EO 13007 as part of its duties to prevent UUD: "Although E.O. 13007 has no force and effect on its own, *see id.* [quoting EO 13007], **its requirements are incorporated into FLPMA by virtue of FLPMA's prohibition on unnecessary or undue degradation of the lands.**" *Te-Moak Tribe of Western Shoshone Indians of Nevada v. U.S. Dept. of the Interior*, 565 Fed. Appx. 665, 667 (9th Cir. 2014) (emphasis added).

However, as in the previous appeal in that case, the court eventually found that the mine would not adversely affect the sacred site because Tribal members "could not identify particular locations that were of greater cultural significance than others." *Id.* The court also based its decision on its finding that there was a "lack of specificity as to location" of the sacred site. *Id.* at 668. (Dissenting Judge Berzon agreed with the majority that EO 13007 applied to BLM's FLPMA public land management duties, *id.* at 668, but thought the evidence demonstrated that the lands qualified as a sacred site under EO 13007 and thus BLM's approval of the mine violated FLPMA.)

That is not the case here, as it is undisputed that IUC's drilling, ground clearance, road construction/reconstruction, and other operations would either be directly within the Running Man Sacred Site, including the Trail of Dreams and Xam Kwatchan Trail network, or would adversely affect Native American uses of the Sacred Sites.

Thus, the law is clear – the commands of EO 13007 apply to BLM under FLPMA, the Dingell Act, and its governing public land statutes, and the agencies must "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites."

IUC's plan of operations essentially ignores this issue and the impacts its extensive drilling, road construction/reconstruction, and other operations, will have on uses of these Sacred Sites and the lands themselves.

The facts which required BLM to deny Glamis' mining plan of operations to protect these Sacred Site(s) have not changed. Secretary of the Interior Bruce Babbitt issued the Record of Decision in January 2001, finding that the mine would violate various federal requirements, including the fact that "the proposed project is located in an area determined to have nationally significant Native American values and historic properties and would cause unavoidable adverse impacts to these resources." Imperial Project ROD at 3.

The ROD relied in part on the October 19, 1999 letter from the Advisory Council on Historic Preservation (ACHP), which found that due to critical importance of the Running Man ATCC, including the Trail of Dreams, BLM should reject mineral operations on these lands. (reprinted as Appendix U to Final EIS for the Imperial Project).

The fact IUC is proposing extensive exploration in and near the Running Man site, rather than full-scale mining, does not mean that the exploration drilling, road work, and other operations will not have "unavoidable adverse impacts to these resources."

As such, without full government-to-government consultation with all potentially affected Tribes, and assurance that there will be no adverse effects to these Sacred Sites, or any impacts to use of the Sites (such as from noise, visual, and other impacts), BLM cannot complete its review of the proposed operations, or approve any proposed plan.

III. Other Operations in the CDCA Will Cause "Undue Impairment" to Public Resources

In addition to the prohibitions and restrictions on IUC's operations in the Indian Pass Area, BLM cannot approve operations that may conflict with the protective requirements in the FLPMA-designated California Desert Conservation Area (CDCA). All three IUC proposed drilling areas, Indian Pass, East Mesquite, and Ogilby, are all within the Picacho ACEC and CD NCL lands in the CDCA.

FLPMA places significant restrictions on the ability of mining claimants to disturb public lands in the CDCA – and requires the BLM to reject proposed mining operations that cannot meet the strict environmental, cultural, and other resource protection standards associated with the CDCA.

FLPMA section 601(f), specifically limits the rights of mining claimants on CDCA lands. It states (emphasis added):

Subject to valid existing rights, nothing in this Act shall affect the applicability of the United States mining laws on the public lands within the [CDCA], **except** that all mining claims located on public lands within the [CDCA] shall be subject to such reasonable regulations as the Secretary may prescribe to effectuate the purposes of this section. . . . Such regulations shall provide for such measures as may be reasonable **to protect the scenic, scientific, and environmental values of the public lands of the [CDCA] against undue impairment**, and to assure against pollution of the streams and waters within the [CDCA].

43 U.S.C. § 1781(f). Thus, the BLM can only approve use of mining claims within the CDCA that does not threaten "undue impairment" of these critical "scenic, scientific, and environmental values of the

public lands.” The BLM has yet to specifically promulgate the regulations noted in section 1781(f). Instead, BLM appears to rely on its generalized mining regulations adopted at 43 CFR Part 3809. The guiding principle of the “3809 regulations” is to meet FLPMA’s standard of preventing “unnecessary or undue degradation” for BLM land across the West.

However, and critical for this case, the generalized “unnecessary or undue degradation” standard in the 3809 regulations (as defined at 43 CFR §3809.5) is different from FLPMA/CDCA’s standard of “undue impairment.” CDCA standards create a higher burden of protection on BLM decisionmaking. This distinction is specifically noted in the 3809 definition of “unnecessary or undue degradation,” requiring that operations must also “attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area.” 43 CFR §3809.5.

The IBLA has affirmed that the 3809 definition, coupled with the fundamental FLPMA requirement to protect CDCA lands against “undue impairment,” mandates a higher level of protection when deciding whether to approve or reject a proposed plan of operations. In Eric L Price, James C. Thomas, 116 IBLA 210, 218 (1990), the Board discussed the different standards of review:

Section 601(f) of FLPMA required BLM to promulgate regulations which would provide for measures to protect the scenic, scientific, and environmental values of public lands of the CDCA against “undue impairment.” The regulations actually promulgated by BLM do not define “undue impairment” as that term is used in section 601(f) of FLPMA, but simply provide, at 43 CFR 3809.0-5(k), that “that level of protection shall be met.”

The Board went on to note that in adopting the 3809 regulations, the BLM specifically stated that:

The final rulemaking includes provisions that will afford the area adequate protection The final rulemaking requires the filing of a plan of operations for any activity in the [CDCA] beyond that covered by casual use. **The plan would be evaluated to ensure protection against “undue impairment” and against pollution of the streams and waters of the area.**

Price, 116 IBLA at 218 (quoting 45 Fed. Reg. 78902, 78909 (Nov. 26, 1980))(emphasis added). The Board further highlighted how this statutory and regulatory structure creates a higher duty of protection on CDCA lands:

Under 43 CFR 3809.0-5(k), a plan of operations must take “into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations” (emphasis added). **Furthermore, a plan of operations affecting lands in the CDCA must take into consideration the specific objectives of section 601(f) of FLPMA, i.e., protecting the scenic, scientific, and environmental values of the affected lands against undue impairment, and to assure against pollution of affected streams and waters. As promulgated by BLM, the general standard contained in the definition of “unnecessary or undue degradation” is to be applied to CDCA lands in accordance with the imperatives of section 601(f) of FLPMA.**

Price, at 218-219 (underline emphasis in original, bold and italics emphasis added). Thus, only those plans of operation that “protect scenic, scientific, and environmental values of the affected lands against undue impairment” can be approved by the BLM. For the development of IUC’s claims, the proposed operations clearly fail to meet this standard.

It is important to note that in the Price case, an important mining-specific IBLA case detailing the protective standards for CDCA lands, the IBLA affirmed the decision of the same El Centro Resource Area to reject a proposed mining plan of operations based primarily on undue visual impacts. Here, the proposed operations will threaten and impact irreplaceable archeological and Native American resources.

The California Desert Plan requires that the BLM reject a plan of operations that cannot ensure protection of scenic, scientific, and environmental values. The Plan was mandated by FLPMA section 1781(d), which set up a system by which environmental values were to be protected areas. The Plan itself states that: “multiple use, sustained yield, and the overall maintenance of environmental quality are the context for CDCA management, and all other public-land management laws must be viewed within this context, including the following: -- U.S. Mining Laws” (CDCA Plan at p. 5). Thus, “rights” afforded mining claimants elsewhere in the West are not paramount in the CDCA.

The Plan recognizes the inherent conflict between mining and maintenance of environmental quality. However, it specifically notes that, in attempting to resolve this conflict: “This means, in the face of unknowns, erring on the side of conservation in order not to risk today what we cannot replace tomorrow.” (CDCA Plan at p. 6). This is in line with the stated “Goal of the Plan”:

The goal of the Plan is to provide for the use of the public lands and resources of the [CDCA], including economic, educational, scientific, and recreational uses, in a manner which enhances wherever possible - **and which does not diminish, on balance** – the environmental, cultural, and aesthetic values of the Desert and its future productivity.

(CDCA Plan at pp. 5-6)(emphasis added). Thus, this Goal can only be met when uses such as mining “do not diminish, on balance” critical resources.

IUC’s operations are proposed for public lands within the Picacho ACEC and on CD NCL lands in the CDCA. See <https://eplanning.blm.gov/eplanning-ui/project/66459/570>). The nationally significant resources and the goals for this area include the following:

Nationally Significant Values:

Cultural: These conservation lands and this unit contain nationally significant prehistoric cultural resources including habitation sites, geoglyphs, trails, and areas of sacred value to the local Native American tribes. Other historic properties (properties eligible for or listed in the National Register of Historic Places [NRHP]), within these lands include the Tumco/Hedges historic gold mining districts and the Quechan Area of Traditional Cultural Concern. The conservation lands link and protect a vast and significant cultural landscape important to many tribes, from the Cargo Muchacho Mountains and Colorado River up through related landscapes in the Colorado Desert subarea through Joshua Tree National Park and into the Mojave Desert.

Ecological: The unit's lands contain critical habitat for desert tortoise populations in the southern portion of their range and is essential for maintaining connectivity. The unit also contains areas with a combination of meteorological, geological, hydrological, topographical features that have been identified as important climate refugia (slow/minimized climate changes) for wildlife species. These conservation lands provide an unbroken linkage between eight wilderness areas in three subareas, and connect these lands from the Colorado River to Joshua Tree National Park and into the Mojave Desert.

Scientific: Numerous prehistoric and historic archaeological sites located within this area contain significant information values that would inform our understanding and knowledge of the past.

...

Relevance and Importance Criteria: The ACEC serves as an outstanding representative of the Sonoran Desert with a full complement of the characteristic wildlife and plant species. The unit also contains areas with a combination of meteorological, geological, hydrological, topographical features that have been identified as important climate refugia (slow/minimized climate changes) for wildlife species. The ACEC provides unique opportunity for multiple use management- aside from its rich wildlife and botanical resources; it has been utilized extensively for outdoor recreation. The area is also essential for other important wildlife species including Bighorn Sheep and Mule Deer and includes important movement corridors for these species. These corridors provide wildlife the ability to disperse across long distances in order to connect different habitat and populations. Additionally, the area supports several species of bats and birds.

...

Overarching Goals: To enhance, protect and preserve the cultural and biological resources while providing compatible recreational opportunities. To maintain desert tortoise habitat connectivity between the Chuckwalla Desert Wildlife Management/Area of Critical Environmental Concern/ Critical Habitat Units and high value climate refugia for wildlife. Where the CMAs in this Special Management Plan conflict with the CMAs included the LUPA, the more restrictive CMA would be applied (i.e. management that best supports resource conservation and limits impacts to the values for which the conservation unit was designated), unless otherwise specified.

This area is included in the California Desert National Conservation Lands. The BLM will manage this area to protect the Nationally Significant Values above. Appropriate multiple uses will be allowed, consistent with this Special Unit Management Plan and the CMAs in the LUPA. If an activity is not specifically covered by the CMAs, it will be allowed if it is consistent with the Nationally Significant Values, but prohibited if the uses conflict with those values.

DRECP, Appendix B, Colorado Desert Ecoregion at 226-227. The ACEC also has disturbance cap limits of 0.5% and 1% (*Id.* at 227, 231(map)), and objectives to minimize soil disturbance to protect air quality, biodiversity, and carbon sequestration in soils. *Id.* at 227, 228, 229. For cultural resources in the ACEC the BLM's objective is to "[p]rovide for the protection of highly sensitive cultural resources." *Id.* at 229.

For proposed any mining activities the Objectives for the ACEC require BLM to "ensure that they provide adequate protection of public lands and their resources." *Id.* at 230. And "proposals for active mining operations beyond casual use will need to be analyzed on a case-by-case basis, to assess whether they can be accommodated within the Picacho ACEC and its management goals." *Id.* (emphasis added).

Overall, IUC's extensive drilling and other operations would not minimize soil disturbance, protect highly sensitive cultural resources, or meet the other objectives of the Plan.

In this case, on January 3, 2000, Secretary Babbitt approved the Solicitor's Opinion of December 27, 1999, which discussed in detail BLM's duty to reject mineral plans of operations undue the CDCA's "undue impairment" standard if those operations would adversely affect these critical cultural and environmental values within "Class L" or "limited use" lands of these same lands within the CDCA.⁴ That opinion was included as part of Appendix T to the 2000 Final EIS for the Imperial Project.

On October 23, 2001, former Solicitor Myers and Secretary Gale Norton issued Solicitor Opinion M-37007, which revised the Department's interpretation of the UUD standard (but did not go into detail on the "undue impairment" standard). On November 23, 2001, Secretary Norton rescinded Secretary Babbitt's ROD, based solely on the legal analysis contained in M-37007. Yet, M-37007's "legal analysis" of the UUD standard was rejected by the federal court in Mineral Policy Center v. Norton, 292 F.Supp.2d 30 (D.D.C. 2003).

Thus, the Department's 1999/2000 interpretation of the "undue impairment" standard in the CDCA is legally valid and guides BLM's decisionmaking in this case. For example, the 1999/2000 Opinion stated that, in order to meet the CDCA protective requirements in Class L areas (now designated ACEC and CD

⁴ In 2016, the Desert Renewable Energy Conservation Plan (DRECP) Land Use Plan Amendments to the CDCA Plan made new "land use allocations to replace the CDCA plan multiple-use classes." DRECP ROD at 63. The earlier Multiple Use Classes (MUC) in the CDCA Plan were replaced by more site-specific designations: "The DRECP LUPA eliminates the multiple-use classes (MUCs) in the CDCA. Because the LUPA identifies California Desert National Conservation Lands, ACECs, Wildlife Allocations, SRMAs, ERMAs, DFAs, VPLs, and GPLs, and specific CMAs for those allocations and areas, retaining the MUCs created duplicative and potentially contradictory management. Many of the concepts of the MUCs were maintained, but with different names. . . . Where the DRECP LUPA is silent on a resource, activity, or use, this table provides guidance on which decisions in the CDCA Plan would apply. For example, if an area is an ACEC, the BLM would apply the decisions for Class Limited (L) if the DRECP LUPA did not provide direction." DRECP Land Use Plan Amendments at 206. In this case, the lands at issues were redesignated from Class-L to be part of the Picacho ACEC and CD NCL lands. DRECP, Appendix B, Colorado Desert Ecoregion, at 226- , 231-32 (maps).

NCL) “protection may at times be paramount and a proposed project can be rejected because it unduly impairs resources.” Opinion at 17.

That certainly is the case at the Indian Pass withdrawal area, as determined by the Advisory Council and BLM in 1999 and 2000. It is also true throughout the Picacho ACEC, where IUC proposes its other exploration operations.

Conclusion

Thank you for the opportunity to bring these important concerns to your attention. We look forward to your response.

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On behalf of Ahmut Pipa Foundation, Greenaction for Health and Environmental Justice, Center for Biological Diversity, Sierra Club California/Nevada Desert Committee, Earthworks, and California Communities Against Toxics

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