New Federal Mining Law Abandonment Provisions: A Violation of Due Process of Law

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NEW FEDERAL MINING LAW ABANDONMENT PROVISIONS: A VIOLATION OF DUE PROCESS OF LAW?

No person shall be . . . deprived of life, liberty, or property without the due process of law; nor shall private property be taken for public use without just compensation.

—Fifth Amendment to the Constitution of the United States

By failing to comply with the registration requirements of the Federal Land Policy and Management Act of 1976 (FLPMA), owners of unpatented mining claims may have unwittingly forfeited their claims. This is true even if the mine claimants are presently complying with their states’ requirements and have continually done so since first filing their claims: the provisions in FLPMA section 314 (c) provide for a determination of conclusive abandonment if no official record is filed with the Bureau of Land Management (BLM). Application of section 314 (c) requires no hearing or personal notice before the determination of abandonment is made. The implications and potential for loss are grave for the mine claimant who properly registered his claim at the local courthouse prior to FLPMA, but failed to register with the BLM because he had no knowledge of the new FLPMA provisions. There is also another danger of loss due to lack of notice because the BLM records developed from documents filed with the BLM under FLPMA, will be the government’s only source of personal notice in future government initiated contest proceedings.

The new mine claimant who fails to register under FLPMA is not the subject of this present discussion, but rather the claimant who

2. An unpatented mining claim gives the miner possession and ownership of a valuable property right after he has made discovery of valuable mineral. The ownership is not in fee simple absolute, however, it allows him to exploit the minerals on his claim to the exclusion of others as long as he complies with the state and federal requirements for continued possession, i.e. annual assessment work completion.
3. “The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining claim or mill or tunnel site.” 43 U.S.C. § 1744(c) (1976) (emphasis added).
established and has continued to maintain the claim under the law prior to FLPMA. Lack of notice of the changes in the mining law because of FLPMA can deprive the claim owner of a valuable property right without due process of law.

The basis for application of the abandonment provisions of section 314 (c) lies in the critical requirements of its companion section, FLPMA section 310. Under that section, owners of lode or placer mining claims located on public lands prior to October 21, 1976 (FLPMA's implementation date) must file with the BLM within three years following the passage of FLPMA and prior to December 31 of each ensuing year. The type of filing required under the statute for each claim is: a copy of the official record of the location notice or certificate with a description sufficient to locate the claim on the ground and either a notice of intent to hold the claim or an affidavit of assessment work performed on the claim. If the claim is located after October 21, 1976 as a new claim located under FLPMA, the locator has 90 days after location to file with the BLM at the office nearest the claim. In both cases, failure to comply permits the “conclusive determination of abandonment of the claim.”

The abandonment provisions are part of the avowed congressional purpose behind FLPMA: to remove stale mining claims from the public domain and to bring the management of the public lands in the United States under the control of the Department of the Interior through the BLM. The implementation of this legislation raises serious questions as to whether the constitutional rights of the mine claimants already on the public domain are violated by the new FLPMA provisions. The regulations promulgated by the Secretary of the Interior under the FLPMA abandonment provisions also raise questions as to their validity. There is concern that they go beyond the FLPMA requirements themselves, making additional requirements for filing and imposing penalties for non-compliance with the regulations.

PRIOR MINING LAW AND FLPMA

Integral to the present discussion is an understanding of how FLPMA changes prior law. Therefore, a short discussion of the history of mining law is necessary.

4. 43 U.S.C. § 1744(a)-(b) (1976). A lode claim is a vein running beneath the surface. A placer claim is located on the surface.

5. The location notice need only be filed once within the three-year period; the other documents must be filed annually. Id. State laws require performance of a certain amount of annual work on unpatented mining claims in order to hold them. This annual work is known as assessment work.

6. See note 3 supra.

The first recognized rights in mining law were based upon custom as developed among the miners on the vacant public domain. No federal laws governed the acquisition of mining rights and the government’s policy was to encourage transfers of the public land to private citizens if they could put it to appropriate use. The first major codification of the then-established techniques for location and recognition of mining claim possession was the Mining Law of 1872. The 1872 act approved what miners had long recognized through custom: squatters rights.

The 1872 act further established maximum amounts of land for single claims. A single placer claim could be no larger than 20 acres and a single lode claim could not exceed 1,500 feet in length along the vein or lode and could not extend more than 300 feet on each side of the middle of the vein at the surface.

Of equal legal importance was the 1872 law’s failure to eliminate the requirements imposed by the appropriate states. State laws normally include requirements for location, such as marking the corners of the claim, and methods for posting notice of location. The federal government encouraged local administrative control and accepted the states’ location and recording requirements. The states still show individuality in their extant laws: although they are similar, they are not uniform. They do, however, all include requirements for formalities of location, notice and discovery work.

One of the most basic concepts of mining custom and state laws is the judicial doctrine of pedis possessio. Pedis possessio allows a person to peacefully hold possession of the claim after location while searching for valuable mineral. The doctrine gives the miner an opportunity to make discovery which will lead to an unpatented mining claim. In order to maintain pedis possessio, the miner must be ac-

8. Strauss, Mining Claims on Public Lands: A Study of Interior Department Procedures, 1974 UTAH L. REV. 185, 186. Although Strauss wrote the article prior to passage of FLPMA in 1976, he states the position of those favoring federal registration of claims and traces the background of mining law.
9. Id. at 187.
11. Strauss, supra note 8, at 186.
13. Strauss, supra note 8, at 188.
15. 1 AMERICAN LAW OF MINING § 5.46 (Repl. 1975).
16. Pedis possessio allows the prospector to explore peaceably on the unappropriated public domain while he is diligently looking for valuable mineral prior to discovery. See Note, Monopolization of Public Lands or Necessary Liberalization of Exploration Laws?, 20 NAT. RES. J. 387 (1980).
17. See 1 AMERICAN LAW OF MINING § 4.11 (Repl. 1976).
tively searching for valuable mineral and must be present on the
claim. At this point in the work, the miner does not have an un-
patented mining claim. Possession only ripens into an unpatented
mining claim once discovery is made. The miner’s rights against
the federal government commence when this valuable mineral discov-
er is made. The federal government recognizes that the miner has
valuable rights in the mineral but it does not challenge the discovery
of an unpatented mining claim. If the miner seeks to patent the claim
and is, therefore, requesting a fee simple absolute title to the land
and minerals, then the federal government seriously examines the
proof of discovery.

Prior to FLPMA under the 1872 Mining Act, miners were required
to record discovery and claim to an unpatented title in the recorder’s
office for the county where the discovery was made. In order to
maintain the claim, they had to do at least $100 of “assessment
work” annually and file an affidavit to that effect in the same county
courthouse. Failure to perform the annual assessment work opened
a claim to location by other miners. FLPMA did not change these
requirements of the 1872 act. It merely added the requirement of
registration with the BLM.

Both FLPMA and the Mining Act of 1872 distinguish between
patented and unpatented mining claims. The record of discovery,
claim to title, annual assessment work, and now registration with the
BLM, are required for maintaining an unpatented mining claim.

These are also prerequisites to filing for a patent. If a miner wants
to carry the unpatented mining claim to fee simple absolute status,
he or she can apply for such a title, in the form of a patent. The fed-
eral government’s last review of the miner’s claim to the land and
minerals is in the patent process. Therefore, before it gives up abso-
lute title to a portion of the public domain, under prior law and
FLPMA, the Department of Interior will carefully examine the proof
discovery of valuable mineral. It no longer takes the miner’s word
for the discovery, as was done when the unpatented mining claim was
first recorded. Consequently, the patenting process is both costly and
time consuming.

Professor Peter L. Strauss of Columbia University School of Law
has pointed out the unlikelihood that a miner who has an unpatented
mining claim will take it to patent:

18. Id.
20. Strauss, supra note 8, at 189.
21. See id. at 192.
23. Id.
the possibility that the serious miner will seek to patent his claims has become remote. The application process has become increasingly complex, time consuming, and expensive. Miners are almost as well protected by the laws governing possession as they would be by a patent. Under established policy, the Department [Interior] does nothing to challenge the validity of claims unless they are presented for patent or the government immediately needs the lands involved. Since the Department [Interior] does not distinguish between "discovery" for the purpose of possession and the "discovery" required to obtain a patent, it treats denial of a patent application for want of discovery as demonstrating the invalidity of the underlying claim.24

Prior to the passage of FLPMA, the federal government didn't know about claims on the public domain until they were brought to patent. Because the Mining Act of 1872 and the individual state laws did not provide for registration of mining claims with the federal government, only the states kept records of mining titles. The federal government had no effective means to determine which claims were dormant or abandoned except through costly searches of the county records in the courthouses across the country. Prior to FLPMA, the federal government also made no effort to acquire this information from the county records throughout the country.25 The passage of FLPMA was an effort to cure this inability to secure information quickly about the federal lands. Often the lack of such information was an increasing burden upon the federal government during contest proceedings and upon efforts for federal land management.26 The state courthouses also continue to remain the main depositories for title and other ancillary documents.

FLPMA CONSTITUTIONAL ISSUES

Clearly, the federal government has an increasing need to manage its lands during the present period of energy resource exploration. Abuses and improper uses of the lands do occur. The need for federal land management should not, however, overshadow the possible constitutional infringements of the FLPMA abandonment procedures employed to clear the public domain of stale and abandoned claims.27

The FLPMA provisions can extinguish valuable property rights without a quiet title suit, a hearing, or even personal notice to mine claimants who have proceeded in good faith under the prior mining

25. Id. at 196.
26. Id. at 197.
law. Under FLPMA, it is of no consequence that the mine claimant has complied with the 1872 Mining Act and the state laws if he has not complied with FLPMA by filing with the BLM.\textsuperscript{28}

This unwitting forfeiture of valuable property rights raises Fifth Amendment questions of due process of law and the lack of just compensation for private property taken for public use. The concept of notice, inherent in the Fifth Amendment due process protections, requires that a property owner be given an opportunity to be heard before his property right is extinguished.

In considering similar situations where the names of property owners have been known, the standard for notice enunciated by the United States Supreme Court has been notice which is reasonably calculated, under all the circumstances, to apprise interested parties that property rights are in question. In 1950, the Supreme Court established this standard in \textit{Mullane v. Central Hanover Bank & Trust Co.}.\textsuperscript{29} where the names of trust beneficiaries could have been ascertained through trust company records:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.\textsuperscript{30}

In applying FLPMA, the federal government has not used the type of notice that \textit{Mullane} requires. The standard for notice under the FLPMA abandonment provisions, according to the federal government, is publication. Publication of the law or regulations is sufficient.

The unpatented mine claimants who have registered under the pre-FLPMA mining laws and who are in compliance with their appropriate state mining laws have at best received notice through publication of the law in the code and case reports or publication of the regulations in the Federal Register. If the \textit{Mullane} standard for notice is applied, this type of statutory notice by publication is insufficient because the names and addresses of those mine claimants who are in compliance with the pre-FLPMA mining laws could be ascertained through a search of the county courthouse records. The \textit{Mullane} decision specifically recognized that notice by publication, as is being given under the FLPMA abandonment provisions, is inadequate because

\textsuperscript{28} See id.
\textsuperscript{29} 339 U.S. 306 (1950).
\textsuperscript{30} Id. at 314.
"under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." 31

The Mullane standard for notice reasonably calculated to apprise the interested parties has been upheld by later Supreme Court decisions dealing with the taking of property. In Walker v. City of Hutchinson,32 the city commissioners gave no notice of a condemnation hearing except by publication in an official city newspaper. The appellant was a resident whose name was known to the city and was on the official records. The Court held that the publication alone was insufficient to satisfy the due process clause of the Fourteenth Amendment.33

Similarly, in Schroeder v. City of New York,34 the city instituted proceedings to acquire the right to divert a portion of a river 25 miles upstream from the appellant's summer home. Although appellant's name and address could have easily been ascertained from the deed records and tax rolls, no attempt was made to give notice to appellant except by publication and by posting notice. Again, the Court held that the publication and posting of notice was insufficient to meet the requirements of the due process clause of the Fourteenth Amendment.35

Arguments that the Mullane standard for notice is not constitutionally required for the FLPMA abandonment provisions of course exist. The major policy argument asserts that the BLM must be freed from the burden of finding and then challenging mining claims on government lands for which other mutually exclusive uses are desired.36 Many of these claims are stale and dormant. Therefore, the most practical way to free the BLM from its burden is through allowing it to rely on nonregistration as conclusive evidence that the claim no longer exists.37 Under this argument, the burden for establishing reliable BLM mining claims records lies with the mine claimants themselves, who receive no more notice of the FLPMA registration regulations than the publication of the law or regulations in the Federal Register. In essence, the Mullane standard for notice is not given before conclusive determination of abandonment of a mining claim.

Proponents of the constitutionality of the FLPMA abandonment provisions further contend that the statute itself creates an irrebut-

31. Id. at 319.
32. 352 U.S. 112 (1956).
33. Id.
34. 371 U.S. 208 (1962).
35. Id.
36. Strauss, supra note 8, at 200 n.42.
37. Id.
table and conclusive presumption, which is a congressional judgment that the Congress is entitled to exercise, and that the elements of a taking of property are not present. The act "simply requires that, if the holder of an unpatented mining claim wishes to continue to assert such claim without assuming the burden of demonstrating the validity of the claim [proof of discovery], such claimant must furnish the notice [filing with the BLM] prescribed by the statute." In other words, the mine claimant's property rights are not restricted because the mine claimant can continue to use the property and hold and develop the claim without obtaining a patent to the claimed land. The miner simply must file with the BLM as required by FLPMA. How the miner is to know about FLPMA seems to be a question that is not considered to any great extent. Again, notice by publication of the law or publication of regulations in the Federal Register is sufficient.

Although the constitutionality of the presumption of abandonment is defensible, some writers, such as Peter Strauss, have suggested additional constitutional safeguards to reliance upon notice given through publication of the law in legal reporters or publication of the regulations in the Federal Register: employing a quiet title procedure similar to that used in the Multiple Mineral Development Act. The act provides for a limited search for claims after which notice is given personally or by publication to the claimants so that they can respond or forfeit their interests. Unfortunately, FLPMA fails to require even these types of procedures.

Besides giving personal notice to the mine claimants who annually register at the county courthouses, there are other possible and quite feasible methods of giving notice reasonably calculated, as Mullane requires, to reach those interested persons: visual inspection of the land by local BLM officials and an inquiry by the BLM in the vicinity after reviewing tract indices and the Department of Interior's own records and posting of the land. These methods are not considered in the FLPMA abandonment provisions. The constitutional issues of the due process clause of the Fifth Amendment remain.
JUDICIAL CHALLENGES TO THE ABANDONMENT PROVISIONS: 
THE ACT AND THE REGULATIONS

The constitutionality of the FLPMA abandonment provisions, as regards the type of notice that is required, has been examined only briefly in the courts. Two main challenges have been made. The first challenge has directly attacked the abandonment provisions of the act as being unconstitutional under the Fifth Amendment to the Constitution of the United States. The second challenge has focused on the regulations promulgated by the Secretary of the Interior. The regulations have been challenged on the grounds that they exceed the scope of the secretary's power. The challenge to the regulations does not require actual loss of a mining claim in order to gain standing. On the other hand, actual loss of a mining claim may be required for the direct challenge to the constitutionality of FLPMA in order to establish a case or controversy and to gain standing.

The constitutionality of the notice given to mine claimants is the underlying issue in both of these court contests. The two different approaches to challenging FLPMA's enforceability reflect the interests of the major groups who are directly affected by the FLPMA abandonment provisions. To challenge the constitutionality without having actually lost a mining claim is to risk dismissal before the merits can be reached and must be considered before bringing suit. The challengers who have chosen to use the regulations as the focal point of their suit, apart from their desire to gain standing, seem to have other reasons for not attacking FLPMA's constitutionality. They are mainly large mining interests who knew about the mining law changes in FLPMA and who may not want FLPMA to fail under a constitutional attack.\textsuperscript{45} It appears to be a reasonable assumption that such large mining interests need to clear the public domain of stale or abandoned claims which serve as a nuisance and impediment to their own resource exploration efforts. Because they see the secretary's regulations as going beyond FLPMA itself, they view their rights as locators and mine claimants as being impaired.\textsuperscript{46} The other major group of challengers, those who have questioned the constitutionality of the act itself, are predominantly individual miners who see the potential for loss of their claims or have already lost their claims without just compensation because of lack of knowledge of FLPMA.\textsuperscript{47}

\textsuperscript{45} The plaintiffs in Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (D. Utah 1979), \textit{appeal docketed,} No. 79-2255 (10th Cir. Dec. 3, 1979) are a possible example.
\textsuperscript{46} Reply Brief of Plaintiff-Appellants' Colorado Mining Association and American Mining Congress at 6, Topaz Beryllium Co. v. United States, No. 79-2255 (10th Cir., filed Nov. 21, 1979) [hereinafter cited as Reply Brief].
\textsuperscript{47} The plaintiffs in Lewis v. United States, No. R-78-0219 BRT (D. Nev. Aug. 29, 1980), are a possible example.
Two cases where FLPMA has been challenged are Topaz Beryllium Co. v. United States and Lewis v. United States. Topaz Beryllium is a challenge to the Secretary of the Interior’s (Secretary) regulations and Lewis confronts the constitutionality of the act itself. The approaches of the two cases are different, but the major purpose is the same: to attack the consequences of failure to file with the BLM. If the regulations are invalid, then the secretary will have to re-evaluate his position with regard to the FLPMA abandonment provisions. This would include an examination of the type of records and filing requirements that the BLM would require for the existing mining claims on the public domain and the type of notice required when using these records. The re-examination caused by invalidating the regulations would not be as extensive or disruptive as the redrafting of new abandonment provisions for the Federal Land Policy and Management Act if the act itself were held unconstitutional.

Although the litigants in Lewis were dismissed from federal district court for lack of a case or controversy and Topaz Beryllium is on appeal to the Tenth Circuit Court of Appeals with a decision expected sometime in the spring of 1981, these cases are representative of the two types of challenges to FLPMA. The issues that they present will have to be tackled by any litigant who seeks to attack the secretary’s regulations or the constitutionality of the act itself.

A. Topaz Beryllium

The plaintiffs' suit, brought in federal district court in Utah, challenged the Secretary of the Interior’s regulations promulgated under the FLPMA abandonment provisions. The two main issues presented to the court were: first, whether the regulations under FLPMA (providing for filing of information) go beyond the scope of authority delegated to the secretary to promulgate regulations and are therefore, void; and second, whether a regulation which allows the United States, in a government initiated contest, to rely exclusively on its own records in determining to whom notice must personally be given is a deprivation of “due process” and thus constitutionally defective. The regulations challenged in the first issue require the

50. 43 C.F.R. §§ 3833.0-1 to .5 (1979).
51. Id. § 3833.5(d).
filing of information with the BLM by present and future owners of unpatented mining claims on the public domain. The trial court agreed with the government and held that the secretary's regulations do not violate the authority delegated to him under FLPMA. 53 Addressing the second issue, the court also determined that in government initiated proceedings, the government would not violate due process notice requirements by relying exclusively upon its own records when determining to whom notice must be given.54 The case is now on appeal to the Tenth Circuit Court of Appeals. The appeal is the subject of this discussion.

1. Secretary's Authority to Promulgate Regulations

The American Mining Congress and other mining associations in the west intervened in the suit as Plaintiffs-Appellants. They argue that the secretary lacks the power to demand more information in the regulations than that required in FLPMA section 314, which sets out the information gathering requirements of the act. These litigants contend that the secretary should not be permitted to void claims for failure to provide additional information than that which FLPMA itself requires.55

Section 314 of FLPMA, the section requiring the mine claimant to file a copy of the official record of location and either a notice of intent to hold the claim or an affidavit of assessment work performed, operates as the abandonment provision of the statute. The secretary is given specific statutory authority to promulgate regulations under section 314 by its companion statute, section 310. The American Mining Congress and the Colorado Mining Association contend that there is no broad inherent power in the secretary to issue regulations that will be accorded the same effect of law as the FLPMA provisions even though section 310 contains specific statutory authority.56 According to their argument,

Congress has not by any statute delegated its general regulatory and law-making authority to the defendants, and the Government has cited no such authority. Indeed, Congress not only never has done so, it was careful in its 1976 legislation to restrict the extent of the defendants' power to regulate under Section 310 thereof.57

53. Id.
54. Id.
55. Plaintiffs-Appellants' Supplemental Memorandum on Recent Case Law at 6, Topaz Beryllium Co. v. United States, No. 79-2255 (10th Cir., filed Nov. 21, 1979) [hereinafter cited as Supplemental Memorandum].
56. Reply Brief, supra note 46, at 5-10.
57. Id. at 5.
The mining groups further attack the FLPMA regulations under section 314 as having no specific congressional grant of power which accords them the effect of law if they add to the requirements of FLPMA itself. The basis of this argument is that Congress expressly excepted the revision of the 1872 Mining Act from FLPMA application and that the regulatory scheme of the 1872 act is continued under the 1976 act:

In sum, the Government sets up a rule of law derived from statutory regulatory schemes wholly distinct from the scheme set up in the 1872 Act, adhered to uniformly since 1872, and continued in the 1976 Act, and then ignores the fact that, even under its own scheme, the regulations at issue here cannot be sustained. Whether Section 310 of the 1976 Act be considered a general grant of rule-making authority, or not, the purposes of that Act are expressly limited, by Section 302(b) of that Act, and the Government cannot therefore first expand the purposes of Section 314 of the Act beyond those expressed therein, and then argue that any regulations furthering those expanded purposes are within the scope of Section 310.

The secretary’s regulations for the FLPMA abandonment provisions, according to the American Mining Congress and the Colorado Mining Association, exceed the scope and purpose of section 314 as limited by both its own language and the legislative history of the act.

Another vital point in the mining interests’ arguments is that the BLM has prescribed and implemented unauthorized penalties that were not part of FLPMA. The mine claimant who does not make the extra filings and does not provide the additional information required by the regulations, which are not required by FLPMA section 314 itself, will nonetheless suffer the penalties of the conclusive abandonment determination because the secretary’s regulations require it.

In their appellate brief, the American Mining Congress and the Colorado Mining Association find similarities between FLPMA and other legislation that limits the secretary’s power. They compare the secretary’s FLPMA regulations to those of the Surface Mining Control and Reclamation Act of 1977 (the Surface Mining Act). In the

58. Id. at 10-15.
59. Id. at 14-15.
60. Brief of Plaintiff-Appellants American Mining Congress and Colorado Mining Association at 21-30, Topaz Beryllium Co. v. United States, No. 79-2255 (10th Cir., filed Nov. 21, 1979) [hereinafter cited as Brief of Appellants].
61. Id. at 31-36.
62. Id. at 34.
Peabody Coal case (In Re Permanent Surface Mining Regulation Litigation), the District of Columbia Court of Appeals reversed the lower court's opinion on the Surface Mining Act regulations and ordered the secretary's regulations remanded.64 "[T]he Court of Appeals determined that the language, purpose and regulatory structure of the Surface Mining Act warranted the conclusion that the Secretary cannot, by regulation, require more information from permit applicants than the minimum information mandated by Sections 507 and 508 of [the Surface Mining Control and Reclamation Act of 1977]."65 The American Mining Congress and the Colorado Mining Association, therefore, contend that the Secretary's regulations in FLPMA, which are similar to those of the Surface Mining Control and Reclamation Act of 1977, should also not require more information than that required by FLPMA itself.

In analogizing the District of Columbia decision to the FLPMA regulations, the two mining groups point out the great similarity of the general rulemaking section 201(c)(2) of the Surface Mining Act to the rulemaking section 310 of the Federal Land Policy and Management Act of 1976.66 As stated earlier, section 314 of FLPMA requires that mine claimants file with the BLM and section 314 empowers the Secretary to promulgate these rules and regulations to carry out the purposes of FLPMA.

The secretary, in the Surface Mining Act regulations, asserted the same argument as he now does as the defendant-appellee in Topaz Beryllium: a provision such as section 310 of FLPMA or section 201(c)(2) of the Surface Mining and Reclamation Act grants general rule-making power, which allows the secretary to demand additional information and to impose penalties of non-compliance, even though not specified in the statute.67 The American Mining Congress and the Colorado Mining Association view the government's argument as did the Court of Appeals for the District of Columbia Circuit. The court of appeals' analysis of the secretary's argument brought out two points: (1) section 201(c)(2) (like FLPMA section 310) begs the question of whether prescribing additional information requirements is consistent with the act and (2) the statutory construction argument that an act's provisions should be read so as to render none superfluous is weak and unpersuasive.68 The court could not base its

64. In re Permanent Surface Mining Regulation Litigation, No. 80-1308 (D.C. Cir. July 10, 1980).
66. Id. at 2.
67. Id. at 2-3.
68. Id. at 3.
decision on this type of statutory construction, which it considered hopelessly circular in its application to the Surface Mining Control and Reclamation Act of 1977. The American Mining Congress and the Colorado Mining Association apparently support the District of Columbia court’s arguments with regard to FLPMA section 310 when considering the secretary’s contention that he has a right to demand additional information and to impose penalties for noncompliance not specified in the statute.

In short, the intervenor mining groups believe that construing FLPMA to allow expansion of the scope of the forfeiture penalty and the information reporting requirements of section 314 would permit the secretary to take away by regulation the property rights of mine claimants that allow them to hold and to develop their unpatented mining claims pursuant to the Mining Act of 1872. Congress specifically stated in section 302(b) of FLPMA that these property rights merit protection and are not to be impaired. The American Mining Congress and the Colorado Mining Association further argue that the congressional intent to give specific protection to existing property rights is inherent in the limitations imposed on the secretary’s regulatory authority under section 310 by FLPMA section 701(a), (f) and (h).

The Topaz Beryllium Company brief focuses on much the same arguments as does that of the American Mining Congress and Colorado Mining Association. The crux of Topaz Beryllium’s arguments is that FLPMA section 314 “does not constitute statutory authority for the regulations challenged in this action. Nor are those regulations authorized by any other act of Congress. For in section 314, Congress departed from previously settled federal policy to require, for the first time, that owners of unpatented mining claims notify federal land managers of their claims’ existence.” Topaz Beryllium argues that the section 314 regulations require more than section 314 itself and they “seriously jeopardize the validity of private mining claims in instances where Congress has never seen fit to penalize owners.”

69. Id.
70. Except as provided in section 1744, section 1782 and subsection (f) of section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress.
71. See Supplemental Memorandum, supra note 55, at 5.
72. Brief of Plaintiff-Appellant Topaz Beryllium Company at 7, Topaz Beryllium Co. v. United States, No. 79-2255 (10th Cir., filed Nov. 21, 1979) [hereinafter cited as Topaz Brief].
73. Id.
In its brief, Topaz Beryllium takes issue with the district court’s interpretation of congressional intent. According to Topaz Beryllium, the court seriously mistakes Congress’ method in fashioning the statute by concluding that the challenged regulations merely “fill-in” the purposes of section 314. The true issue, as seen by Topaz Beryllium, is that Congress did not provide the secretary with powers to impose additional requirements and penalties. Section 314 was passed for the purpose of giving the BLM notice of the existence of mining claims and was not intended to supplant the county recorder’s office as the repository for mining claim title documents. Therefore, in Topaz Beryllium’s view, the mine claimant should not be required to file anything other than the copies of instruments that the claimant has already filed in the county courthouse, as is required by FLPMA section 314 itself. In short, the secretary’s required documents and the penalty of “conclusive determination of abandonment” for failure to comply with the regulation requirements exceed the authority conferred on the secretary by section 314 of FLPMA. “The BLM has departed from the simple and relatively inexpensive requirements of section 314, and has created a costly regulatory mechanism bearing no relation to Congress’s purposes.”

2. Notice Requirements of Due Process After Filing With the BLM

In addition to the notice requirements discussed earlier for the initial filing with BLM under FLPMA, is the question of notice which is required when the government engages in a contest with a mine claimant. The problem arises because the federal government now intends to consider the BLM records, developed from the filings of mine claimants under FLPMA with its possible inadequate notice for the initial filings, as the official repository of documents which delineate ownership of mining claims. Topaz Beryllium and the American Mining Congress and the Colorado Mining Association all take exception to this extension of the secretary’s regulations. The government plans to narrow the persons to whom it will give personal notice in contest proceedings to those who are in the BLM records themselves. “With this regulation, the BLM has undertaken to replace

74. Id. at 9.
75. Id. at 15.
76. Id.
77. Id. at 16.
78. Id.
80. See Topaz Brief, supra note 72, at 16; Brief of Appellants, supra note 60, at 43.
the county recorder's office as the acknowledged location of documents establishing ownership-title to unpatented mining claims.\textsuperscript{81}

The plaintiff-appellants point out that, in effect, the regulations for section 314 ignore the Senate's warning that section 314 was not intended to supersede or displace the existing recording requirements under state law.\textsuperscript{82} This would mean that the county records were intended by the Congress to continue to remain the official records for determining ownership of unpatented mining claims. Therefore, the American Mining Congress and the Colorado Mining Association contend that BLM is "precluded by due process of law from relying solely on the BLM records to give notice to those persons whose property rights, in unpatented mining claims, mill sites or tunnel sites will be affected by any contest proceeding."\textsuperscript{83}

The district court, however, examined the quality of personal notice intended by the federal government for contest proceedings and determined that the regulation allowing the United States to rely specifically on its own records (those of the BLM) and not on those of the individual state courthouses did not violate due process.\textsuperscript{84} This interpretation of the personal notice requirements for the regulations under the FLPMA abandonment provisions is directly contradictory of the decisions cited earlier in \textit{Mullane}, \textit{Schroeder} and \textit{Walker}.\textsuperscript{85} Because the BLM record accumulation is solely dependent upon mining claimants registering with the BLM and having notice of the new FLPMA provisions to do so, the mine claimants who continue to follow the 1872 act and the state laws will never be included in the BLM records. Their claims would be contested and no personal notice would be given to them, even though the BLM could ascertain their names and addresses from the state courthouse records.

3. The Government's Defenses

In defense of the FLPMA regulations, the United States, as the defendant-appellee, stresses the importance of the federal government's lack of knowledge of the existence of unpatented mining claims under the 1872 Mining Act and the necessity to have this information.\textsuperscript{86} The brief also discusses the merits of FLPMA, as viewed by

\textsuperscript{81} See Brief of Appellants, \textit{supra} note 60, at 43.
\textsuperscript{82} Id. at 43-44.
\textsuperscript{83} Id. at 45.
\textsuperscript{86} Brief of Appellees the United States at 4, Topaz Beryllium Co. \textit{v}. United States, No. 79-2255 (10th Cir., filed Nov. 21, 1979) [hereinafter cited as Brief of Appellees].
the government: "The Act [FLPMA] repealed several outdated statutes; provided the Bureau of Land Management (BLM) with land-use planning authority; revised the laws governing sales, exchanges, and rights-of-way; and established improved range management procedures." 

Sections 101 and 310 of FLPMA are relied upon for support for the secretary's rulemaking authority. These are the sections which the plaintiff-appellants attack as not giving the secretary broad inherent rulemaking powers. Section 101 empowers the secretary "to establish comprehensive rules and regulations" and section 310 grants authority to "promulgate rules and regulations to carry out the purposes of this Act." Therefore, the government concludes that the secretary is authorized to promulgate regulations requiring mine claimants to submit information not expressly set forth in section 314 under the general rulemaking power granted under section 310. Section 314 as the filing and abandonment provision statute, must have some basis for its regulatory provisions and this comes from sections 101 and 310.

The government ties the secretary's role as the manager of the public lands to his general rulemaking powers. He possesses "broad, inherent powers to prescribe necessary regulations for the administration of the public lands." Therefore, the secretary can "fill-in" any gaps in the FLPMA procedures in order to make the procedures effective as long as the regulations are reasonably related to statutory goals and consistent with statutory directives.

The reasonable relation between the regulations and the statute itself is also central to the government's argument. Its position is that the secretary's regulations for section 314, as a supplement to the notices or certificates of location and the documents filed annually as required by section 314, are reasonable and consistent with congressional intent. The government uses the same argument that its regulations are reasonable and consistent with congressional intent to defend the contest-proceeding notice requirement. In a contest proceeding, the government will notify personally only those persons who have initially recorded their claims with the BLM or have filed

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87. Id. at 5.
89. Id. § 1740.
91. Id. at 12.
92. Id.
93. Id. at 19-30.
94. Id. at 30-37.
notices of transfer. The Congress, according to the government's brief, intended to remedy the necessity of the BLM conducting time-consuming searches of county records to discover basic information concerning a mining claim. Again, the government is going to rely upon its own records (the BLM's) which are developed from the filings by mine claimants who have notice of FLPMA.

The BLM may have inaccurate and unreliable records showing who occupies the public domain because some mine claimants still continue to file with the county recorders' offices, unaware that their claims will be determined conclusively abandoned by the BLM and that no notice of government contests will be given to them because they had no knowledge of the initial registration requirement under FLPMA. The government's purpose for developing the BLM mining title records for better management of the public domain and for clearing the public lands of stale and abandoned claims has merit. Nevertheless, it does not override the importance of adhering to the due process clause of the Fifth Amendment, which under Mullane distinctly requires notice that is reasonably calculated to apprise the parties before their property rights are extinguished. Until Topaz Beryllium is finally decided the issue remains: whether the mine claimant, who is aware of the FLPMA requirements, can be required by regulations to provide more information and to be subject to harsh penalties for noncompliance with the regulations when the act itself doesn't require this.

Coinciding with the issue of the secretary's authority to expand the scope of FLPMA in the regulations is the question whether FLPMA gave mine claimants adequate notice of the BLM filing requirements. An attempt to litigate this question was made in the federal district court for Nevada. Before the merits could be reached, the case, Lewis v. United States, was dismissed for lack of a case or controversy.

B. Lewis v. United States

In Lewis, 100 Nevada miners challenged FLPMA section 314 as being unconstitutional and unenforceable on the grounds that it deprived them of their property without due process of law and that, if enforced, it would result in a taking of their property without just compensation. The district judge ruled on the opposing parties'
cross-motions for summary judgment, holding that the plaintiffs’ complaint failed to show the existence of a case or controversy within the contemplation of Article III of the Constitution of the United States.100

The court’s reason was that none of the plaintiffs had actually lost their claims for failure to file with the BLM as required by FLPMA. These miners were aware of the changed requirements for holding mining claims and they chose to file with the BLM for fear of losing their claims unless FLPMA were found to be unconstitutional.

Consequently, the type of successful plaintiff needed for challenging FLPMA’s constitutionality, as regards the abandonment provisions, is someone who has continued to conform to the state law but who has failed to file with the BLM as prescribed by FLPMA because of lack of notice of the act.101 A wide variety of situations can be imagined in which the mine claimant has no knowledge of FLPMA and fails to file with the BLM. For example, notice by publication would not be effective to protect claims of persons such as: a deceased mine claimant whose estate is unaware of the filing requirements of FLPMA; a mine claimant who sends someone else to the county courthouse to file his annual assessment papers; or the mine claimant who files his annual assessment papers at the county courthouse and never pays any attention to signs or other information alerting miners to the new FLPMA requirements. The author has seen signs posted by the states on bulletin boards or fliers placed on the county recorder’s reception desk in southern Colorado and New Mexico, but these do not constitute notice under the Mullane standard when the federal government itself relies solely on notice given

101. Rogers v. United States, No. CV 80-114-H (D. Mont., filed July 3, 1980) is an apparent case in which the mine claimant lost his claims for failure to file with FLPMA.

On April 23, 1981, the Ninth Circuit Court of Appeals affirmed the district court’s dismissal of the complaint with prejudice in Western Mining Council v. Watt, 643 F.2d 618 (1981). The plaintiffs in this case sought a declaration that FLPMA was unconstitutional. Among their claims was an allegation that the filing requirements of § 1744 are unreasonable and arbitrary and “that the § 1744(c) conclusive presumption of abandonment is a ‘forfeiture statute with Due Process,’ which is unreasonably harsh.” Id. at 628. It is unclear what a forfeiture statute with due process means. The court recognized that the injury to the individual plaintiffs was a sufficiently immediate threat to give them standing. However, the court rejected the plaintiffs’ allegations that the filing requirements of § 1744 are unreasonable and arbitrary as being insufficient to state a claim upon which relief can be granted. Id. The court referred to the Topaz Beryllium district court opinion at 479 F. Supp. 309 (D. Utah 1979). It further rejected the plaintiffs’ argument that the § 1744(c) provisions are unreasonably harsh in requiring the conclusive determination of abandonment upon failure to file. Id. at 629-30. The court did not reach the merits of the claim that the lack of personal notice to mine claimants is a denial of procedural due process because they lacked standing to raise this claim. The plaintiffs did not allege that they have unpatented mining claims located after October 21, 1976 or that they have filed or recorded any of their claims located on or before October 21, 1976. Id. at 630.
through publication of the law and of the regulations in the Federal Register. Even if the individual states provide some additional notice to that of legal reports or that of the Federal Register, there is still no attempt to ascertain the names and addresses of those mine claimants who are complying with both the Mining Act of 1872 and the state laws.

The *Lewis* plaintiffs argued that their mining claims were located pursuant to the Mining Law of 1872.\(^1\) They and their predecessors had also “located, developed, managed, leased, bought and sold unpatented mining claims for over a hundred years prior to the enactment of § 314 [of] FLPMA at issue herein.”\(^2\) Therefore, they asserted that they had valuable property rights recognized by the United States government and entitled to protection under the Constitution of the United States.\(^3\)

The plaintiffs extended the constitutional protections of their claims, with their valuable property rights, to include compensation for the taking of such property. They argued that the United States does not have power to exercise absolute dominion and control over unpatented mining claims so as to extinguish the plaintiffs' property rights.\(^4\)

The *Lewis* mine claimants did not deny that the defendants have a right to pass reasonable regulations regarding mining claims on the public domain, nor did they question the defendants' desire to clear stale claims from the public domain. Their contest concerned the legality of the defendants' taking of active mining claims without notice or compensation.\(^5\)

The government in its defense relied upon case law which allows a congressionally created irrebuttable presumption to exist.\(^6\) The irrebuttable presumption, in this case, is the FLPMA determination that a mining claim is conclusively determined abandoned. Consequently, the defendants depended heavily on the legislative judgment of the Congress in drafting the FLPMA abandonment provisions. They contended that the FLPMA abandonment provisions in question do not violate the claimants' constitutional rights and, therefore, Congress has the discretion to impose such filing requirements as are contained in FLPMA section 314.\(^7\)


\(^2\) Id.

\(^3\) *Id.* at 3-4.

\(^4\) *Id.* at 6.


\(^6\) Defendants' Reply Memorandum, *supra* note 38, at 6-7.

\(^7\) *Id.* at 6-8.
The government's arguments for FLPMA's constitutionality are based upon the contention that the elements of "a taking of property rights" do not exist. According to the defendants, FLPMA does not purport to extinguish any claims, valid or invalid. It does not authorize any acts to be performed by government officials in derogation of the rights enjoyed by mining claimants. It does not impose any restrictions upon a mining claimant's use of property embraced in a mining claim. It does not impose any limitation upon the long-recognized right of a mining claimant to hold and develop a claim without obtaining a patent to the claimed land. 109

The reason for the government's assertions is that the statute (FLPMA) merely requires the mine claimant to assert his or her claim without assuming any burden for demonstrating the validity of such claim (proof of discovery) and that the claimant can prevent the operation of the statute by applying for a patent. 110 As explained earlier, taking a mining claim to patent is extremely expensive and it takes years to accomplish. 111 For purposes of mineral exploration and exploitation, the patent rights to a fee simple absolute are not necessary or even warranted. Therefore, the government's suggestion that the aggrieved mine claimants, who do not wish to come under the FLPMA filing requirements, can seek to patent their claims as a means to avoid the FLPMA provisions is unrealistic. To avoid an injustice which arises from the government's failure to provide adequate personal notice to the mine claimant, the mine claimant should not be forced to take all claims to patent.

Finally, the government bases its arguments for lack of personal notice or a hearing for mine claimants upon the suppositions that the mine claimants are presumed to know the law and that there is no basis "for finding that it is beyond the authority of Congress to require notice to the government as a condition to the continued maintenance of an inchoate claim to property the legal title to which is in the United States." 112 It was further maintained by the government that the plaintiffs failed to show that the statute in question (FLPMA abandonment provisions) is "unreasonable, arbitrary or capricious." 113

CONCLUSION

The conclusive determination of abandonment permitted by the Federal Land Policy and Management Act of 1976 is a major concept

110. Id. at 17-17A, 17A n.10.
111. See note 24 and accompanying text, supra.
113. Id.
in United States land law. Extinguishment of valuable property rights occurs without a hearing, personal notice or other similar contact with the property owner. The government relies upon publication of the law and/or publication of the regulations in the Federal Register to publish the new land law requirements.

The property rights in question are too valuable and too important to leave to such uncertain notice as publication in the Federal Register or legal reporters. The *Mullane* standard for notice reasonably calculated under all the circumstances to apprise interested parties and to afford them an opportunity to present their objections should be the rule. The underlying premise of the Constitution of the United States found in the Fifth Amendment due process clause is that each person shall be given an opportunity to be heard before his property rights are extinguished.

Not only do the requirements of FLPMA itself provide inadequate notice, but so do the Secretary of the Interior's regulations promulgated under the abandonment and filing provisions of section 314. If the mine claimant fails to know about FLPMA and doesn't file with the BLM, the government is satisfied that in any ensuing government initiated contest the only source of personal notice will be those same BLM records which obviously don't include the mine claimant who had inadequate notice for the first filing.

There can be hundreds of mine claimants on the public domain who still are unaware that FLPMA has extinguished their mining claims. These are persons who haven't abandoned their claims and who have complied and continue to comply in good faith with the prior mining law.

In order to rectify the injustice to these good faith mine claimants, the inadequacies of the notice provisions in FLPMA must be recognized. If the act is not required to be redrafted and reenacted or the regulations amended, then why not grant *pedis possessio* to the mine claimant while he/she restakes his/her claim and files with the BLM?

The most practical and fairest solution for the loss of a mining claim because of lack of knowledge of FLPMA seems to be at a minimum, to take the mine claimant back to his/her status before discovery when he/she was merely in possession of the land. At this point, while looking for valuable mineral or reestablishing the claim through location, a miner can be given *pedis possessio*. Therefore, another miner cannot overstake and take advantage of claimants' lack of knowledge of FLPMA. They should rightfully have *pedis possessio* because they have continued to work the land to substantiate the annual assessment affidavits, and they have shown good faith in complying with the state laws and the Mining Act of 1872. This remedy
should not be available to those who have truly abandoned their claims and now want to take advantage of an opportunity to claim that they, too, had no notice of the new FLPMA filing requirements. The miner must at least have been complying with the annual filing requirements established by the Mining Act of 1872 and filing in the county courthouse under state law.

All segments of the mining industry are affected by the application of FLPMA. If the BLM records are inaccurate, then all run the risk of not getting adequate notice before extinguishment of their claims. Likewise, if the FLPMA regulations are invalid, then the rights of the persons filing with the BLM under FLPMA are also impaired.

**TENTH CIRCUIT COURT OF APPEALS DECISION:**

The Tenth Circuit Court of Appeals decided *Topaz Beryllium* after this article was written and before it went to press. The opinion, issued on May 21, 1981, upheld the Secretary of the Interior's authority to promulgate rules and regulations for FLPMA. The court clarified certain sections of the Secretary's regulations. As to the American Mining Congress and the Colorado Mining Association argument that the Secretary's regulations in 43 C.F.R. § 3833 requiring supplemental filings not required by FLPMA itself go beyond the scope of the Secretary's authority, the court concluded that they do not.\(^{114}\) The court found “that the Secretary has not ignored § 1744(c) [of FLPMA] which assumes that even defective filings put the Secretary on notice of a claim, and we hold that once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings required only by § 3833—and not by the statute—are not made. ... Placed in their proper perspective, the challenged supplemental filings represent the Secretary’s effort to ‘fill in’ the broad outlines of FLPMA.”\(^ {115}\) The court went on to say that the “Supreme Court consistently held that similar grants of general rule-making authority [such as that to the Secretary of the Interior] sustain the validity of detailed regulations which are designed to achieve with reasonable effectiveness the purposes for which Congress has acted. ...”\(^ {116}\)

As to the challenge by all appellants to 43 C.F.R. § 3833.5(d), which requires that notice be personally given in government initiated contests only to those persons who have filed with the BLM or have

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115. *Id.* at 6-7.
116. *Id.* at 8.
filed a notice of transfer of interest, the court clarified that the regulation only speaks to government initiated contests.\textsuperscript{117} In contests initiated by third parties, however, the court concluded that the local county courthouse records will remain the official repositories for giving notice. Any broader reading of § 3833.5(d) will be appealable in the tenth circuit and this interpretation will be the rule in the circuit.\textsuperscript{118} The court, therefore, upheld the government’s right to rely upon its own records \textit{at the BLM} in government initiated contests. These records do not include the mine claimants who failed to file with the BLM because of lack of notice of FLPMA and who are still filing at local courthouses. In conjunction with its conclusion that the government can rely upon its own records in government initiated contests, the court stated that: “... FLPMA contains numerous provisions evidencing Congress’ intent to grant the Secretary broad regulatory authority over public lands. Part of that authority is expressed in the Secretary’s ability to initiate a proceeding contesting or clarifying a party’s interest in a particular parcel of public land.”\textsuperscript{119}

The notice to the government of a transfer of title from one mine claimant to another, as required by the Secretary’s regulations, was not discussed in this article. However, the court’s opinion dealing with this section of the regulations gives some insight into how the tenth circuit will approach future questions of the notice requirements of due process. The court stated that “[t]he notice of transfer provisions merely provide a procedure by which the Secretary can more efficiently satisfy his due process obligation to give notice to affected parties when he initiates a contest. It does not by itself work a forfeiture...”\textsuperscript{120} The court gave its opinion that “this notice procedure is reasonably related to the broad concerns for the management of public lands set forth in FLPMA, as well as the Secretary’s unchallenged authority to initiate contests concerning public lands and that the procedure wholly comports with due process of law.”\textsuperscript{121}

After the tenth circuit’s decision in \textit{Topaz Beryllium}, litigation of the major due process question with which this comment deals, the improper notice of the FLPMA abandonment provisions to mine claimants who are still complying in good faith with the pre-FLPMA mining law, seem to lie in the constitutional attacks upon FLPMA itself.

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\textsuperscript{117} Id. at 9.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 9-10.
\textsuperscript{121} Id. at 10.