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UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

January 20, 1995

IN REPLY REFER TO:
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(320/420)

Instruction Memorandum No. 95-64
Expires: 09/30/96

To: State Directors

From: Director

Subject: Valid Existing Rights (VER) for Mining Claims in Wilderness, Treatment of Plans of Operations and Notices.

ISSUE: Surface management of Notices and Plans of Operations when the land is legislated into Wilderness and determination of valid existing rights for the associated mining claims and sites.

OBJECTIVE: To standardize Bureau policy and procedures to assure uniform treatment and approach. In all cases, unnecessary or undue degradation is to be prevented and impacts to the Wilderness Area are to be minimized to the lowest practicable limit.

BACKGROUND AND POLICY: The California Desert Protection Act of 1994 was enacted on October 31, 1994, creating vast new BLM Wilderness in California. Arizona's Desert Wilderness Act has already been enacted, and several other States are in the works. A National standard policy is deemed necessary and desirable to ensure consistency of approach to valid existing rights to mining claims and to avoid situations which might evolve into a "regulatory taking" suit against the Bureau.

The National policy is transmitted as Attachment 1. The National policy is premised on the Federal 9th Circuit Court's holding on this issue in a similar situation on National Park Service lands in Alaska. (See Northern Alaska Environmental Center et.al vs Lujan, 872 F. 2d 901, 907 [9th Circuit, 1989]). The Court's holding is transmitted as Attachment 2.

IMPLEMENTATION AND SCHEDULE: Immediate.

COORDINATION: Usual channels.

BUDGET IMPLICATIONS: There will be costs associated with performing mineral examinations to determine VER, with processing of plans of operations, and contesting of mining claims.

CONTACT PERSON(S): Roger Haskins (WO 320) at (202)-452-0355 or Keith Corrigall (WO 420) at (202)-452-7798.

W. Hord Tipton
Assistant Director
Resource Use and Protection

2 Attachments
1 - National Policy (2 pp)
2 - The Court's Holding - 872 F. 2d 901 (7 pp)

ATTACHMENT 1

Procedure and Policy for Approval of Plans of Operations and Valid Existing Rights to Mining Claims and Sites in Wilderness

The California Desert Protection Act (PL 103-433, 108 Stat 4471) created large areas of BLM and National Park Service (NPS) Wilderness. The Act also created smaller areas of Wilderness to be administered by the U.S. Forest Service and the U.S. Fish and Wildlife Service. In many cases, Congress extended Wilderness over areas not even studied by BLM for Wilderness under Sections 202 or 603 of FLPMA. These areas contained Notice level operations under 43 CFR 3809 as well as Plans under 3809. In order to effectively discuss our policies and approach, we will subdivide the policy by land status and level of operations currently outstanding. The emphasis is concurrently on protection of rights and minimization of surface disturbance activities in Wilderness Areas.

Based upon the 9th Circuit's holding in Northern Alaska Environmental Center et.al vs Manual Lujan et al, 872 F. 2d 901, 907 (1989), it is permissible to subdivide and process the activities occurring into groups based upon level of activity and existing proof of a valid existing right (VER), and then work the groups based on a standard priority basis until all groups have been examined, and valid existing rights recognized or contested. There is no time frame attached to this process. However, for BLM there are time frames associated within 43 CFR 8560 for plans of operations filings (30 days) under 43 CFR 3809 in Wilderness Areas.

Group One - Claims and Sites with no Existing Plans or Notices. This group is defined as claims and sites with no current activity and no existing plans or notices. Action will only be taken on these claims and sites when the operator or claimant comes forward with a proposal under 43 CFR 3809. At that time, pursuant to 43 CFR 8560.4-6, a validity examination will be performed within 30 days to determine if a VER exists. If it does, then pursuant to 43 CFR 3809, 8560.4-3 and 8560.4-6; a plan of operations shall be approved. If no VER, than pursuant to 43 CFR 8560.4-6, the plan shall be denied and a mineral contest issued against the claims and sites through the State Office.

Group Two - Claims and Sites with Existing Notices under 43 CFR 3809. Notices under 43 CFR 3809 that are in existence will be revoked and a plan of operations will be required of the operator or claimant under 43 CFR 8560.4-6. A VER determination is required prior to plan approval. If no plan is presented for consideration, place them into Group One above and require final reclamation of the operator or claimant. *However, if the notice covered a producing mine, the production establishes a prima facie case of validity, and the plan if otherwise acceptable to the authorized officer, shall be approved and the operation placed into Group Five below, subject to the right of the BLM to conduct a validity examination at a later date for a formal determination of VER.*

Group Three - Claims and Sites with Existing Plans under 43 CFR 3809 for Exploration Activities. Existing plans of operation issued pursuant to 43 CFR 3809 for exploration activities *(not for producing mines, see Group Five below)* are to be suspended until a VER determination can be accomplished by a certified mineral examiner. If a VER is verified, a plan modification can be put into place that conforms to the California Desert Protection and Wilderness Acts. If VER cannot be verified, then a mineral contest against the claims/sites shall be issued by the State Office.

Group Four - Claims and Sites with Existing Plans under 43 CFR 3802. Existing plans of operations issued pursuant to 43 CFR 3802 are more stringent than those required under 43 CFR 3809 and the Wilderness Act. These can remain in place until resources (a certified mineral examiner) are available to determine VER. If a VER is established, then the existing 3802 plan can be modified to a 3809 plan that conforms to the requirements of the California Desert Protection and Wilderness Acts. If a VER cannot be established, than a mineral contest action shall be issued against the affected claims/sites.

Group Five - Claims and Sites with Producing Mines and Existing Plans under 43 CFR 3802 or 3809. This group is restricted to operating mines under existing plans of operations, extracting and marketing ores and related commodities from their mining claims and sites. In these circumstances there is a prima facie case of valid mining claims and sites. Operating plans associated with these are a last priority for a VER determination, as a VER is presumed by the acts of mining and marketing from the claims and sites. However, you may still require a plan modification if needed to meet the requirements of the California Desert Protection and Wilderness Acts, subject to the right of the BLM to make a formal VER determination at a later date.

Priority of Actions. Mineral examinations will be conducted by a certified mineral examiner in the priority order of Groups one, three, two, four, and five. Plan processing, conversions, modifications, and upgrades by District personnel will be in the order of Groups one, five, four, two, and three.

tion of the statute and amendment is that the percentage penalty is to be used unless it would result in a fine of less than $1,000.

A well-reasoned opinion of the district court in *Spriggs*, 660 F.Supp. 789, held the $1,000 assessment to be a minimum penalty. That court, in a case identical to the one presented here, rejected the government's contention, based on the legislative history of the 1984 amendment, that penalties should be assessed for each transaction. The court observed that under the government's interpretation, two promoters with identical incomes would be subject to unequal penalties solely based on how many sales were involved. Under the contrary interpretation, the penalties assessed on the hypothetical promoters would be identical, based on 10% of the identical income. We agree with the logic of the *Spriggs* court that "[t]he proper interpretation of the statute applies the penalties evenly to all promoters." *Id.* at 792.

[2] The government argues for deference to the IRS interpretation because it is a position adopted by the federal agency charged with the administration of tax laws. We should accord deference to an agency "whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent." *Securities Industry Ass'n v. Board of Governors*, 468 U.S. 207, 217, 104 S.Ct. 3003, 3009, 82 L.Ed.2d 158 (1984) (citations and footnote omitted). Judicial deference is afforded to adopted Treasury Regulations. *See Commissioner v. Portland Cement Co. of Utah*, 450 U.S. 156, 169, 101 S.Ct. 1037, 1045, 67 L.Ed.2d 140 (1981). The government concedes that no Treasury Regulation has been adopted regarding this penalty. Since the government's interpretation in this situation strikes us as being neither consistent with legislative intent nor a reasonable construction of the statute, we do not agree that deference is appropriate.

The government argues against calculating penalties on an annual basis. However, 26 U.S.C. § 6671(a) states specifically that "penalties and liabilities provided for by this subchapter ... shall be assessed and collected in the same manner as taxes ..." The subchapter referred to, 68B, includes section 6700 penalties. While this provision is not necessarily conclusive of the issue, it is of substantial significance that taxes are assessed and collected on an annualized basis. Consistency would seem to support the wisdom of holding that section 6700 should be treated the same.

In summary, we hold that the penalties imposed under section 6700 are to be calculated based on the gross income derived from the abusive tax shelter. The flat fee comes into play as a minimum penalty only when the percentage would yield a fine of less than $1,000.

The judgment of the district court is AFFIRMED.

NORTHERN ALASKA ENVIRONMENTAL CENTER; Sierra Club; Denali Citizens Council, Plaintiffs-Appellants,

v.

Manuel LUJAN, Jr.*, et al., Defendant-Appellee,

and

Alaska Miners Association; Resource Development Council for Alaska, Inc., Defendant-Intervenors.

No. 88-3819.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 7, 1989.

Decided April 14, 1989.

Environmental organizations brought action to challenge Secretary of Interior's

* Manuel Lujan, Jr., the current Secretary of the Interior is substituted for former Secretary Hodel. *See* Fed.R.App.P. 43(c)(1).

approval of operation plans for unpatented mining claims within Alaska national parks. The United States District Court for the District of Alaska, James A. von der Heydt, J., entered summary judgment in favor of Secretary. Plaintiffs appealed. The Court of Appeals, Alarcon, Circuit Judge, held that Secretary was not required to conduct on-site inspection and mineral examination to determine existence of valuable discovery before approving plan of operations.

Affirmed.

1. Woods and Forests ⇐8

Alaska National Interest Lands Conservation Act did not require on-site inspection and mineral examination to verify discovery of valuable minerals before Secretary of Interior could determine validity of unpatented claim and approve mining operations within national park. Alaska National Interest Lands Conservation Act, §§ 101 et seq., 206, 16 U.S.C.A. §§ 3101 et seq., 410hh–5.

2. Mines and Minerals ⇐23(1), 29(1)

"Unpatented claim" is possessory interest in particular areas solely for purpose of mining that must continually be developed and not abandoned.

See publication Words and Phrases for other judicial constructions and definitions.

3. Mines and Minerals ⇐39

A claim is patented when claimant gains fee simple from United States.

4. Mines and Minerals ⇐24, 25

Unlike patented claim, unpatented claim can be forfeited, abandoned or exhausted.

5. Mines and Minerals ⇐44

Government or private individuals can contest unpatented claim, but contest cannot be brought against patented claim.

6. Woods and Forests ⇐8

Mining in the Parks Act did not require Secretary of Interior to conduct on-site inspection in mineral examination before approving operation plans for unpatented mining claims within Alaska national parks. 16 U.S.C.A. § 1902.

7. Woods and Forests ⇐8

Secretary of Interior that approved operation plans for unpatented mining claims within Alaska national parks did not act arbitrarily and capriciously by failing to conduct on-site inspection and mineral examination to determine whether valuable discovery was made; Secretary channeled limited resources to on-site mineral examinations of isolated claims or to areas previously not subjected to mining operations. 5 U.S.C.A. §§ 551 et seq., 706(2)(A); 16 U.S.C.A. § 1.

8. Woods and Forests ⇐8

Secretary of Interior's system for validating unpatented mining claims in Alaska did not violate statutory duty to administer Alaska land and waters as new areas of national park system; Secretary explained that substantial increase in number of claims required deviation from procedures in other parks, that geography of parks and claims in Alaska differed dramatically from other areas within national park system, and that limited financial resources required establishment of priority regarding claims requiring field inspection and mineral examination prior to plan approval. Alaska National Interest Lands Conservation Act, § 203, 16 U.S.C.A. § 410hh–2.

Eric P. Jorgensen, Sierra Club Legal Defense Fund, Inc., Juneau, Alaska, for plaintiffs-appellants.

Martin W. Matzen, U.S. Dept. of Justice, Washington, D.C., for defendant-appellee.

James S. Burling, Pacific Legal Foundation, Anchorage, Alaska, for defendant-intervenors-appellee.

Appeal from the United States District Court for the District of Alaska.

Before WRIGHT and ALARCON, Circuit Judges, and RAFEEDIE,** District Judge.

ALARCON, Circuit Judge:

The Northern Alaska Environmental Center, the Sierra Club, Alaska Chapter, and Denali Citizens Council (Appellants) appeal from the order granting summary judgment in favor of the Secretary of the Interior and the National Park Service (NPS) on this claim for declaratory and injunctive relief regarding the practice of the NPS of "approving plans of operations, methods of access, and transportation systems without determining whether the miner has a valid existing right to conduct mining operations." Complaint, Count 3.[1]

We must decide whether Congress has imposed a duty upon the Secretary of the Interior, acting through the NPS (Secretary), to determine whether a discovery of valuable minerals has been made before approving a plan of operations for an unpatented mining claim on land within a national park. Because we conclude that none of the applicable statutes require the Secretary to conduct an on-site-field inspection and mineral examination to determine whether a valuable discovery has been made, we affirm.

** Honorable Edward Rafeedie, United States District Judge for the Central District of California, sitting by designation.

I

We review an order granting summary judgment independently without deference to the district court's conclusions. *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir.1988). In determining whether any material fact is in dispute, we view the evidence in the light most favorable to the non-moving party. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir.1986). In this matter both sides moved for a summary judgment.

The facts pertinent to this appeal are not in dispute. At the time this action was filed, the Secretary approved operation plans for unpatented mining claims within national park lands in Alaska without conducting on-site-field inspections and mineral examinations to determine whether a valuable discovery had been made.

II

[1] Appellants assert that in enacting the Alaska National Interests Lands Conservation Act (ANILCA), 16 U.S.C. § 410hh-5 (1982), Congress intended to restrict mining on national park land to *valid* patented and unpatented claims existing on the effective date of the statute. We agree.

ANILCA provides in pertinent part:

> *Subject to valid existing rights*, and except as explicitly provided otherwise in the Act, the Federal lands within units of the National Park System established or expanded by or pursuant to this Act are hereby withdrawn from all forms of appropriation or disposal under the public land laws, including location, entry, and patent under the United States mining laws, disposition under the mineral leasing laws and from future selections by

1. The district court granted the relief prayed for in Counts 1 and 2. The Secretary appealed. We affirmed. *Northern Alaska Envtl. Center v. Hodel*, 803 F.2d 466 (9th Cir.1986). This appeal is limited to the claim presented in Count 3.

Attachment 2-3

the State of Alaska and native corporation.

16 U.S.C. § 410hh–5 (emphasis added).

[2–5] Thus, since 1980, no one can enter national park land in Alaska for the purpose of locating minerals and filing a claim in order to engage in mining activities. Furthermore, a person possessing an unpatented claim [2] cannot conduct mining activities without the Secretary's prior approval. 36 C.F.R. § 9.9(a) (1988).

Appellants contend that under ANILCA the Secretary cannot approve a plan to operate on national park land that is subject to an unpatented mining claim without first determining whether it is valid. The parties disagree as to what the Secretary must do to verify the validity of a claim. We have previously described the steps necessary to establish the validity of a mining claim as follows:

> First. The claimant must "locate" the claim. The procedures for locating a claim are prescribed by local custom or state law. *See* 30 U.S.C. § 28. These procedures usually require the claimant to (1) post some form of notice on the land; (2) mark the boundaries of the claim; (3) conduct preliminary excavation or discovery work on the claim; and (4) record a certificate in the local mining district office.
>
> Second. The claimant must make a "discovery." This requires the discovery of a valuable mineral deposit on the claim.

Dredge Corp. v. Conn, 733 F.2d 704, 705–706 (9th Cir.1984) (footnote and citation omitted).

Appellants assert that ANILCA requires that an on-site inspection be made by an expert to verify that a valuable mineral discovery has been made before the validity of an unpatented claim can be determined and mining operations can be approved by the Secretary. Contrary to Appellants' contention, ANILCA does not prescribe to the Secretary the factors he should consider in exercising his discretion in determining the validity of a mining claim prior to approving a plan of operation. Appellants have not directed us to any language in ANILCA or its legislative history that demonstrates that Congress intended that a particular procedure be followed by the Secretary in conducting a validity examination. By its silence, Congress has left selection of the precise procedures employed in claim validity determination to the discretion of the Secretary.

III

[6] Appellants claim that the Mining in the Parks Act (MPA), 16 U.S.C. § 1902 (1982) "contemplates that no mining will be approved unless the claim contains a valid discovery." Appellants' Opening Brief at 17. The quoted language is unsupported by citation to relevant statutory language or any court decision. We have examined the MPA. It does not impose a duty upon the Secretary to conduct a mineral examination to determine whether a valuable mineral discovery has been made by a claim. The MPA leaves it to the Secretary to determine the appropriate manner of determining whether an existing mineral right is valid.[3] We are persuaded that

2. An unpatented claim is a possessory interest in a particular area solely for the purpose of mining that must be continually developed and not abandoned. Rocky Mt.Min.L.Inst., *American Law of Mining*, § 30.05[5] (1988 ed.). A claim is "patented" when the claimant gains fee simple from the United States. *Id.* at § 30.06[2]. Unlike a patented claim, an unpatented claim can be forfeited, abandoned or exhausted. *Id.* at § 30.05[5]. The government or private individuals can contest an unpatented claim, whereas a contest cannot be brought against a patented claim. A contest is an administrative proceeding by the Department of the Interior to invalidate a claim. *Id.* at § 30.06[1].

3. The Secretary has discretion under the MPA to promulgate regulations deemed necessary or desirable for the management and preservation of the National Parks System. 16 U.S.C. § 1902. The MPA provides:

> In order to preserve for the benefit of present and future generations the pristine beauty of areas of the National Park System, and to further the purposes of section 1, and 2 to 4 of the title, ..., all activities resulting from the exercise of valid existing mineral rights on patented or unpatented mining claims within any area of the National Park System shall be subject to such regulations prescribed by the Secretary of the Interior as he deems neces-

Congress has placed the question of the appropriate method of determining claim validity within the discretion of the Secretary.

IV

[7] Appellants also insist that the failure of the Secretary to conduct a field inspection and a mineral examination to determine the value of a discovery prior to the approval of a plan of operation violates the Administrative Procedure Act because it is arbitrary, capricious and an abuse of discretion under 5 U.S.C. § 706(2)(A) (1982).

We review agency action to determine if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). To make this finding we "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971) (citations omitted).

Congress has directed that the Secretary "shall promote and regulate the use of the Federal areas known as national parks ... to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1 (1982).

The record when viewed in the light most favorable to the Appellants amply demonstrates that the Secretary considers factors relevant to the preservation and management of this nation's parks in Alaska prior to determining the validity of a claim. In assessing the Secretary's procedures in approving plans of operation, it is essential to note at the outset that some mining claims are in remote areas of Alaska, and that lengthy periods of bad weather and frozen ground make on-site inspection and mineral examination to determine the value of a discovery costly, complex, and time consuming. Because of extreme climatic conditions the time available for an on-site inspection is limited to three or four months.

The type of inspection and examination apparently demanded by Appellants takes years to complete. In addition, a mineral examination may require the use of heavy equipment that could inflict more serious damage to the environment than the activity proposed by the miners. Furthermore, in selecting the appropriate method to determine the validity of claims, the Secretary must consider the most efficient allocation of the agencies' resources and personnel. *See Heckler v. Chaney*, 470 U.S. 821, 831, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985) (in considering whether to enforce a statutory requirement, an agency may determine whether it has the resources to do so).

The Secretary has established a priority system to determine which procedure should be used to determine whether a mining claim is valid. As to certain claims, the Secretary has conducted lengthy field inspections and mineral examinations. As to other claims, the Secretary has selected different validation methods. Under the Secretary's priority system, mineral examinations are conducted on isolated claims as well as on those in previously undisturbed areas of the national park lands. Priority in the use of available resources is given to lode claims because they are more likely to be invalid than placer claims.[4] The Secretary checks the past history of mining activity in the area of the unpatented claim.

To ascertain claim validity, the Secretary examines Bureau of Land Management records to determine compliance with recordation requirements at the time the mineral deposit was located. Prior to deciding

sary or desirable for the preservation and management of those areas.
16 U.S.C. § 1902.

4. A "lode" claim involves "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits...." 30 U.S.C. § 23 (1982). A "placer" claim involves all other forms of mineral deposits, including sand and gravel. 30 U.S.C. § 35 (1982).

whether a valuable discovery has been made, the Secretary also reviews Geological Survey and Bureau of Mines reports and any other available information about the mine site. A claimant must file supplemental claim information relating to the value of the discovery which includes sampling assay results, geological testing and studies, and business records regarding exploration expenditures. In addition, after accumulating the foregoing information about the value of the discovery, the Secretary interrogates the claimant.

The process described above permits the Secretary to select which unpatented claims can be contested successfully and those which appear to contain valuable mineral deposits. Where approval is granted prior to any on-site mineral examination to verify the value of the discovery, the Secretary plans to make the type of complete validity examination requested by the Appellants as soon as manpower and resources permit.

Prior to the addition of land to the national parks in Alaska under ANILCA, there were approximately 286 mining claims. After the expansion in 1980, the number of mining claims within the boundaries of the national parks rose to approximately 4,580. A review of the status and mining records, as well as validity contests, reduced the number of mining claims by more than 50% to 2,170 by June of 1985.

We are persuaded that the procedure followed by the Secretary in determining which mining claims require a field inspection and a mineral examination by an expert to determine the value of a discovery prior to approving a plan of operations is not arbitrary or capricious and demonstrates an appropriate concern for the relevant factors. We find no abuse of discretion in the Secretary's decision to channel his limited resources to on-site mineral examinations of isolated claims or to areas previously not subjected to mining operations.

V

[8] Appellants also argue that the failure of the Secretary to require a field inspection and a mineral examination prior to claim approval violates the requirement that the Alaska land and waters added under this statute be administered "as new areas of the National Park System." 16 U.S.C. § 410hh-2 (1982). Appellants contend that since the Secretary requires a mineral examination prior to approval in the national parks in the lower 48 states, the failure to do so in Alaska violates ANILCA.

Section 410hh-2 merely requires that the Alaskan areas added to the National Park System be governed by the same laws as the other national parks. As explained above, Congress has not imposed a requirement that the Secretary conduct a mineral examination before approving a plan of operation. The methodology employed in validity determination is left to the Secretary's discretion. The climate and geography of Alaska pose unique administrative problems.

The Secretary's explanation for using different methods of claim validation in Alaska can be summarized as follows: (1) The substantial increase in the number of claims within the jurisdiction of the NPS after the passage of ANILCA requires a deviation from the procedures in other parks; (2) The geography of the parks and claims in Alaska differ dramatically from the other areas within the NPS' jurisdiction; and (3) Limited financial resources require the establishment of a priority regarding the claims that require field inspection and a mineral examination *prior* to plan approval. The Secretary's priority system of claim validation in Alaska does not violate section 410hh-2.

CONCLUSION

Congress has charged the Secretary with the responsibility of protecting the natural beauty of our national parks for coming generations of visitors. At the same time, Congress has authorized the Secretary to approve mining operations within these parks if valuable mineral deposits are discovered. This task is complicated by the fact that some of the park lands in Alaska

are in remote areas amenable to field examinations during brief periods of time each year.

The record shows that the Secretary has been quite mindful of these competing goals in selecting those mine sites that require field inspection and an expert's examination of the value of mineral deposits prior to approval of mining operations, and those claims whose discovery can be verified by a review of pertinent geological studies, the success of other mines in the area, and an examination of the past history of the assay results of prior exploration at the site.

The allocation of his limited resources to isolated claims and to those areas not previously mined is illustrative of the Secretary's concern for the protection of Alaska's national parks. Appellants have failed to demonstrate that the Secretary has abused his discretion or acted arbitrarily and capriciously in the procedures adopted for the validation of mining claims and the approval of operating plans. Accordingly, the district court did not err in ordering summary judgment in favor of the Secretary.

AFFIRMED.

Irena NARELL, Plaintiff-Appellant,

v.

Cynthia FREEMAN, aka Bea Fineberg, G.P. Putnam's Sons, Berkeley Publishing Corp., Defendants-Appellees.

No. 88-2491.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 9, 1989.

Decided April 17, 1989.

Copyright infringement action was brought. Summary judgment for defendants was granted by the United States District Court for the Northern District of California, Alfonso J. Zirpoli, J., and plaintiff appealed. The Court of Appeals, Farris, Circuit Judge, held that: (1) novelist had not copied protected expression from author of historical work by duplicating a few ordinary phrases and paraphrasing largely factual statements in creating an entirely different kind of story; (2) there was no substantial similarity between the two works; and (3) novelist made fair use of the historical work.

Affirmed.

Cynthia Holcomb Hall, Circuit Judge, filed opinion specially concurring.

1. Copyrights and Intellectual Property ⇐89(2)

Although summary judgment is not highly favored on questions of substantial similarity in copyright cases, summary judgment is appropriate if the court can conclude, after viewing the evidence and drawing inferences in a manner most favorable to the nonmoving party, that no reasonable juror could find substantial similarity of ideas and expression.

2. Copyrights and Intellectual Property ⇐89(2)

Fair use is a mixed question of law and fact in a copyright infringement case, and may be resolved on summary judgment if a reasonable trier of fact could reach only one conclusion.

3. Copyrights and Intellectual Property ⇐83(3)

To establish a successful copyright infringement claim, plaintiff must show that she owns the copyright and that defendant copied protected elements of the work, and plaintiff may establish copying by showing that alleged infringer had access to the work and that the two works are substantially similar. 17 U.S.C.A. §§ 101-810.

4. Copyrights and Intellectual Property ⇐4.5, 12.1

Copyright law protects only an author's expression, and facts and ideas with-