In the United States Court of Federal Claims

NOT FOR PUBLICATION
No. 06-112C
(Filed June 10, 2009)

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JACK STRUBEL, *
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Plaintiff, *
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v. *
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THE UNITED STATES, *
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Defendant. *
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MEMORANDUM OPINION AND ORDER

WOLSKI, Judge.

The plaintiff, Jack Strubel, appearing *pro se*, formerly possessed an interest in six unpatented mining claims in Josephine County, Oregon, which straddle the North Fork of Galice Creek and are collectively known as the Leopold Mine. Mister Strubel contends that his property interest was taken by the United States when the Bureau of Land Management required a Mining Plan of Operations for the work he wished to continue to conduct at the site. Alternatively, Mr. Strubel claimed that a compensable Fifth Amendment taking occurred when the federal agency sought to enforce its regulations, thus resulting in an injunction, and his and his family's subsequent eviction from the Leopold Mine. Pending before the Court is the defendant's motion to dismiss the case for lack of subject-matter jurisdiction, and for failure to state a claim upon which relief can be granted. The Court concludes that the case should be dismissed, for the reasons that follow.

I. BACKGROUND

A. Immediate Procedural History

Plaintiff Jack Strubel filed a complaint with this Court on February 10, 2006, naming as defendants the State of Oregon's Water Resources Department ("OWRD") and the United States. *See* Compl. at 1. While it was clear that Mr. Strubel labored with great effort to assemble his complaint, which is filled with a large number of legal citations and quotations, this is the only thing that was clear about the filing. Interspersed among the various and sometimes seemingly random excerpts from case notes relating to legal procedure, jurisdiction, and the law

of contracts and takings, were few discernible factual allegations. Plaintiff seemed to be complaining that the Department of the Interior's Bureau of Land Management ("BLM") without compensation "invalidated vested rights and property rights" associated with "a historical mining claim of 1851." *See* Compl. at 1. The complaint contained references to the Leopold Mine, *id*. at 2, and in an impressionistic manner suggested that a possessory interest in property was taken from the plaintiff without due process or the payment of just compensation, in an Oregon federal district court proceeding. *See id*. at 2-3, 5-7. Plaintiff appeared to be asserting that BLM and Oregon officials misled the district court into finding that he did not have the vested surface rights and water rights that he believed he had. *See id.* at 5-8. The complaint concluded with a prayer for damages in the amount of $550,000,000,000 "for historical property and rights, destruction of private property and constitutional rights." *Id.* at 8.[1] Attached to the complaint was an excerpt of a transcript from the district court proceeding.

The government moved to dismiss Mr. Strubel's complaint for failure to state a claim, and moved in the alternative to require plaintiff to file an amended, more specific complaint. Def.'s Mot. to Dismiss (2006) at 1, 3. Considering the leniency to be afforded a plaintiff such as Mr. Strubel who acts in a *pro se* capacity, *see*, *e.g.*, *Castro v. United States*, 540 U.S. 375, 381-82 (2003); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Paalan v. United States*, 57 Fed. Cl. 15, 16 (2003); *Cavin v. United States*, 19 Cl. Ct. 190, 194 (1989), *aff'd in part*, 956 F.2d 1131 (Fed. Cir. 1992), the Court permitted Mr. Strubel to file an amended complaint. Order (Dec. 4, 2006). This he submitted in the form of a four-page, typed document, which was accompanied by a loose compilation, consisting of well over a hundred pages in no discernible order -- photographs, copies of personal and official correspondence, and records of quitclaim deeds and other legal documents. By leave of the Court, the Clerk filed the amended complaint despite its irregularities. Order (Jan. 23, 2007). The amended complaint did identify by name, serial number, and other information the six mining claims plaintiff apparently once owned, Am. Compl. at 1, and stated that he "bought" the property "in '92'." *Id*. at 3. Defendant, however, had already filed a renewed motion to dismiss in light of "the failure by Mr. Strubel to identify a cognizable basis upon which to bring a claim in this Court." Def.'s Renewed Mot. to Dismiss at 1.

On May 14, 2007, the Court held a hearing by telephone on the government's motion to dismiss the amended complaint, and gave Mr. Strubel the opportunity to detail his allegations. At the conclusion of the hearing it was agreed that plaintiff's assertions, made as they were on the record, would be treated as a second amended complaint. Hr'g Tr. at 48, May 14, 2007 ("Tr. 2007"). Accordingly, the motion to dismiss the first amended complaint was denied as moot.

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[1] Mister Strubel also claimed an "estimated $.50 a gallon on vested water rights for 5.5 years at 3 [cubic feet per second]," *see* Compl. at 8; *see also* Hr'g Tr. at 44, May 14, 2007, and demanded compensation from the OWRD in the amount of $1,000,000,000. *See* Compl. at 8. The Court, however, has no power to hear claims brought against state agencies. *See* 28 U.S.C. § 1491 (2006) (limiting jurisdiction to claims against the federal government); *Hassan v. United States*, 41 Fed. Cl. 149, 150 (1998).

Order (May 15, 2007). Defendant then moved to dismiss Mr. Strubel's second amended complaint: first for lack of subject-matter jurisdiction, based on the arguments that plaintiff had no standing to challenge the government actions which allegedly took the property, never received a final agency decision which ripened a takings claim, and sought to challenge regulations after the statute of limitations had run; and second for failure to state a claim, namely that the reasonable regulation of mining operations does not constitute a taking. *See* Def.'s Mot. to Dismiss (2007) ("Def.'s Mot.") at 20-32. Mister Strubel opposed the government's motion with a document entitled "Plaintiff's motion to [re-adjud]icate and not to dismiss," filed by leave of the Court as plaintiff's opposition to the government's motion to dismiss ("Pl.'s Opp'n"). Order (Oct. 5, 2007).

Oral argument was held on February 20, 2008 on the government's motion to dismiss. Record of the argument was lost before it could be transcribed, however, and argument was held again, by telephone, on October 23, 2008 ("Tr. 2008"). Pursuant to the Court's subsequent order, Mr. Strubel was to submit certain materials to supplement the record, including any documents that supported his claim to ownership of a property interest in the Leopold Mine prior to Cheryl Strubel's quitclaim deed of November 7, 2000. Order (Oct. 27, 2008). Yet another loose compilation of materials arrived from the plaintiff, filed by the Clerk as Plaintiff's Response ("Pl.'s Resp."), by leave of the Court. Order (Nov. 12, 2008). This included a photocopied, handwritten note to Jack and Cheryl Strubel regarding the repayment in full of a personal loan "for moving expenses" signed by Daniel Johnson and dated September 22, 1993; the cover page of the transcript from the government's motion for a preliminary injunction dated May 12, 2000; correspondence and technical materials related to the December 1996 slope failure at Leopold Mine; and notes dated March 16, 1999 from a meeting held by BLM with Jack and Cheryl Strubel concerning its February 5, 1998 Notice of Noncompliance and Letter of Nonconcurrence/Immediate Suspension Order.

Three additional sets of materials were sent by plaintiff to the Court and to the defendant (albeit without proper proof of service) -- on November 19, 2008; November 21, 2008; and December 2, 2008. These were designated as Appendix I, II, and III, respectively, to Plaintiff's Response, and filed by the Clerk, despite irregularities, by leave of the Court. Order (Dec. 8, 2008). The submitted documents include excerpts from *The American Law of Mining 2d Edition* (undated); a handwritten and self-titled "bill of sale" by which Daniel Johnson and Juanita Morrison purportedly sold to Jack and Cheryl Strubel one-half of their ownership in the Leopold Mine, dated September 22, 1992; an undated and handwritten "notice of intent to conduct mining operations" addressed to BLM and signed by Cheryl Strubel; a copy of plaintiff's divorce decree; a series of permits from the Oregon Department of Forestry for timber harvesting, dated June 18, 1996 through July 23, 1999; a notice of noncompliance by the Oregon Department of Environmental Quality ("DEQ") to Cheryl and Jack Strubel dated June 3, 1998, and a copy of Cheryl Strubel's subsequent application to the agency. Appendices I-II to Pl.'s Resp. Scattered throughout plaintiff's last submissions are arguments to the Court, typically typed out in the form of numbered paragraphs.

Rounding out this stage of the litigation are defendant's responses to the Court's orders of October 27, 2008 and January 8, 2009, respectively. The government clarified for the Court the requirements for a valid transfer of interest in a mining claim. *See* Def.'s Resp. to Court Order Dated October 27, 2008 at 2-4. It further informed the Court that "after reviewing plaintiff's filings, we are aware of nothing contained in plaintiff's submission that in any way detracts from the merits of our motion." Ex. A to Notice of Filing.

B. The Property Interest Allegedly Taken

Mister Strubel asserts a property interest in six unpatented placer mining claims, each consisting of twenty acres, which together constitute the Leopold Mine. *See* Tr. 2007 at 3-4, 27. The six mining claims are individually named Gold Bar, Wonder, Wedding Present, Hope, and Red Head 1 and 2. Am. Compl. at 1; App. to Def.'s Mot. at 145-57 (BLM Serial Register Pages). The Leopold Mine is located in a rugged and hilly area in Josephine County, Oregon, and straddles the North Fork of Galice Creek. *See* App. to Def.'s Mot. at 73.[2]

Placer mining is the hydraulic extraction of gold and other metals from stream gravel, the patchy remnants of ancient stream beds. These long-gone watercourses had once eroded the original metallic veins, and therefore the precious deposit must be mechanically separated from alluvial sand and gravel, through the use of water. *See* Att. to Pl.'s Opp'n at 2-3 (Howard Brooks and Len Ramp, *Gold and Silver in Oregon*, 1968); Tr. 2008 at 92-93. In this particular mining district, however, "[m]uch of the placer gold taken from the Galice Creek placers is probably a reconcentration eroded from the old channel deposit. Nuggets derived from the old channel gravels are characteristically well smoothed and flattened from having been transported a long distance from streams. They are also purer . . . ." Att. to Pl.'s Opp'n at 3.

1. Mining Laws and Administration

This regulatory takings case involves, most fundamentally, the General Mining Law, now codified in parts throughout 30 U.S.C. §§ 22-47, which has been described as "the foundation of the existing system by which the citizen acquires right to the lands of the United States containing the precious metals." *Reynolds v. Iron Silver Min. Co.*, 116 U.S. 687, 693 (1886). Placer claims "may be entered on similar proceedings as those provided for vein or lode claims.

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[2] Gold was discovered on Galice Creek in 1851, approximately eight years before Oregon statehood, *see* Compl. at 2; work on the highly-productive Old Channel Mine, which lies adjacent to the Leopold Mine, began around 1860. Att. to Pl.'s Opp'n at 2-3. Ditches were built by Chinese laborers to divert water from the North Fork of Galice Creek, and were completed on October 31, 1856. Tr. 2007 at 34. The ditches, according to plaintiff, have been in continuous use for mining purposes. *See id.* at 25. Although local production has declined precipitously, an estimated $3,000,000 worth of gold was extracted from the Galice Creek district between 1854 and 1912, and between 1912 and 1948, 7,890.74 ounces of placer gold were extracted. Att. to Pl.'s Opp'n at 2.

The surveys for these shall conform as near as may be to Congressional surveys, and may include in each claim twenty acres of superficial area." *Id.* at 694. *See generally* 30 U.S.C. §§ 35-37 (governing placer claims); *Smelting Co. v. Kemp*, 104 U.S. 636, 650-51 (1882) (describing how the Mining Act of July 9, 1870 was the first to regulate placer mines, permitting claims as large as 160 acres per person or association).

Mining claims upon land owned by the United States arise initially from successful prospecting which results in a mineral discovery. *Creede & Cripple Creek Min. & Milling Co. v. Uinta Tunnel Min. & Transp. Co.*, 196 U.S. 337, 349 (1904). Location must next occur, which is a means of giving notice: staking the corners of the claim, posting on the land, and following state law for recording the location in the county recorder's office. *See Freese v. United States*, 226 Ct. Cl. 252, 253 (1981); *see generally Del Monte Min. & Milling Co. v. Last Chance Min. & Milling Co.*, 171 U.S. 55, 74-77 (1898) ("The purpose [of location] is to reach the vein which is hidden in the depths of the earth, and the location is made to measure rights beneath the surface."). An owner of a mining claim "shall have the exclusive right of possession and enjoyment" of the claim. *See* 30 U.S.C. § 26 (2006); *see also Gwillim v. Donnellan*, 115 U.S. 45, 49 (1885) ("A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located."). Ownership of a mining claim does not confer fee title to the land upon which the claim is located; the fee interest in obtained only upon the issuance of a patent. *See Best v. Humboldt Min. Co.*, 371 U.S. 334, 336-37 (1963) (excerpting from *Cameron v. United States*, 252 U.S. 450, 459-60 (1920)); *see generally* 30 U.S.C. § 29 (requirements for patenting a mining claim).[3] Even absent title in fee, however, "[a] mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent." *Belk v. Meagher*, 104 U.S. 279, 283 (1881); *see generally Freese*, 226 Ct. Cl. at 256 ("Legal title to the land remains in the United States, but the claimant enjoys a valid, equitable, possessory title . . . ." (citation omitted)).

The acquirer of an interest in an unpatented mining claim is not required to file with BLM in order to perfect that interest, as the requirements for the transfer of such an ownership interest are a matter of state law, and a transfer is effective once the state requirements are met. 43 C.F.R. § 3833.32(a).[4] Under Oregon state law, "[a]ll mining claims, whether quartz or placer,

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[3] Since October 1, 1994, BLM has not accepted new mineral patent application due to a congressional budget moratorium. BLM, http://www.blm.gov/wo/st/en/info/regulations/mining_claims.html (last visited June 5, 2008).

[4] Since 2000, when the federal enforcement action was brought against the Strubels, the numbering (but not the substance) of certain sections of Title 43 to the Code of Federal Regulations has changed. For ease of reference, the regulations are cited in this opinion by their current location in the 2008 revision. The old and the new regulations are cross-referenced at 68 Fed. Reg. 61,046, 61,048-49 (Oct. 24, 2003).

are real estate." Or. Rev. Stat. § 517.080 (2007); *see Lohmann v. Helmer*, 104 F. 178, 182 (C.C.D. Or. 1900) (No. 2,627). "All conveyances of mining claims or of interests therein, either quartz or placer, whether patented or unpatented, are subject to the provisions governing transfers and mortgages of other realty as to execution, recordation, foreclosure, execution sale, and redemption." Or. Rev. Stat. § 517.090 (2007). Furthermore,

> [n]o estate or interest in real property, other than a lease for term not exceeding one year, nor any trust or power concerning such property, can be created, transferred or declared otherwise than by operation of law or by a conveyance or other instrument in writing, subscribed by the party creating, transferring or declaring it, or by the lawful agent of the party under written authority, and executed with such formalities as are required by law.

Id. § 93.020(1) (2007); *see also Hinderliter v. McDonald*, 164 P. 378, 379 (Or. 1917) (oral proof of an agreement to purchase a mining claim interest is inadmissible). The Bureau of Land Management, however, is to be notified of the valid, completed transfer. *See* 43 C.F.R. § 3833.32(b). Until record of the transfer is filed with the agency, BLM warns that it will not recognize the acquired interest, or send notice of any BLM action or decision, and it "will treat the last owner of record as the responsible party for maintaining the mining claim." *Id.* § 3833.92.

Because, in the context of an unpatented mining claim, title to the land itself remains in the United States, owners of such claims must meet certain federal requirements to maintain their ownership interests. *See Belk*, 104 U.S. at 284; *cf. Grover v. United States*, 73 Fed. Appx. 401, 404 (Fed. Cir. 2003) (unpublished opinion) (stating, with regard to unpatented oil shale mining claims, that "the government, as the holder of the underlying fee title, is free to exercise 'substantial regulatory power over those interests'") (quoting *United States v. Locke*, 471 U.S. 84, 105 (1985)). Initially, the owners of unpatented mining claims (located after May 10, 1872) were required to perform assessment work, in the value of $100, on each of their claims every year (individually or as averaged over contiguous claims) -- otherwise their claims would be legally abandoned and once again open to location. 30 U.S.C. § 28; 43 C.F.R. § 3836.11; *see also id.* § 3836.15 (consequences of failure to perform assessment work). Starting in 1976, with promulgation of the Federal Land Policy and Management Act ("FLPMA"), they also were required to file with BLM, on or before December 30th, an affidavit attesting to their satisfaction of the past year's assessment work requirement. 43 U.S.C. § 1744(a)(1) (2000); 43 C.F.R. §§ 3835.31 & 3835.91; *see also id.* § 3836.12 (types of assessment work). An annual maintenance fee of $125 is now required in lieu of the assessment work and its associated filing, and is to be paid on or by September 1st of each year, for the upcoming assessment year. 30 U.S.C. § 28f(a); 43 C.F.R. §§ 3830.21(d) & 3834.11(a). Small miners, holding fewer than ten claims, who have performed the requisite assessment work, may be exempted from the claim maintenance fee by timely filing a waiver request. 30 U.S.C. § 28f(d); 43 C.F.R. § 3835.1.

Thus, small miners make two filings a year: the first, prospectively on or by September 1st, covering the calendar year through the following August 30th (fee waiver certification), 43

C.F.R. § 3834.11(a)(2); and the second, on or by December 30th, for the assessment year that just passed (assessment work affidavit, colloquially known as proof of labor). 43 U.S.C. § 1744(a); 43 C.F.R. § 3835.16(a). In FY 2009, the processing and recording fee for the proof of labor was $10 per owner, per claim. 43 C.F.R. § 3000.12. Failure to pay the maintenance fee, or to submit a fee waiver certification with the signatures of all owners of record, results in the forfeiture of the unpatented mining claim. 30 U.S.C. § 28i; 43 U.S.C. § 1744(c); 43 C.F.R. §§ 3835.91 & 3835.92.[5] Small miners may cure defects in their waiver requests by filing a corrected request or by paying the maintenance fee for each claim within sixty days of BLM notification. 30 U.S.C. § 28f(d)(3); 43 C.F.R. § 3835.93. Similarly, because assessment work may be deferred under some circumstances, 43 C.F.R. § 3836.20-21, a small miner has until the end of the following assessment year to complete the deferred work, *id*. § 3836.27, but only sixty days from BLM's denial of the petition for deferment to pay the maintenance fee for the past year. *Id*. § 3836.25.

Where a mining claimant undertakes the assessment work or pays the maintenance fees as required, but a co-claimant fails to contribute, an enforcement process is available. First, the former notifies the latter of the alleged delinquency. *Id*. § 3837.11. The written notification must be sent by registered or certified mail, or personal service; if the co-claimant cannot be found, notice is to be published in a local newspaper at least once a week for ninety days. *Id*. § 3837.21. The delinquent co-claimant then has ninety days after service or after the end of publication to contribute his share of the expenditures. *Id*. § 3837.22. Upon proper submission to BLM (listing evidence of notification, statement by compliant claimants of the delinquency, and a non-refundable service charge for a transfer of interest), 43 C.F.R. § 3837.23, a mining claimant acquires a delinquent co-claimant's interest. *Id*. § 3837.11(4). Disputes among co-claimants regarding the acquisition of a delinquent co-claimant's interest are resolved through the state courts, not by BLM. *Id.* § 3837.30.

Under the Surface Management Program, which is mandated by FLPMA, a mine operator must submit a mining plan of operations ("MPO") before working at a level greater than casual use (hand work) which will disturb an area greater than five acres. *Id.* §§ 3809.5,

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[5] Claims located prior to May 10, 1872 do not revert to the United States upon abandonment, but are absorbed by the remaining co-owners, provided they have continued to work the claim and can demonstrate a chain of title from the original locator. 30 U.S.C. § 28. In contrast, one court described how a co-claimant's abandonment of his mining interest, located after enactment of the General Mining Law, did not effectuate a transfer of that interest to the other owners: "By an abandonment an occupant leaves the claim free to the location of the next comer. His interest reverts to the United States, and the claim is open to relocation. His abandonment inures to the benefit of no one except a relocator . . . ." *Badger Gold Min. & Milling Co. v. Stockton Gold & Copper Min. Co.*, 139 F. 838, 841 (C.C.D. Or. 1905) (No. 2,846); *see* Tr. 2008 at 39-40.

3809.10, 3809.21 & 3809.412.[6] The stated purpose of the filing is to assure the agency "that the proposed operations would not result in unnecessary or undue degradation of public lands." *Id.* § 3809.401(a).[7] An MPO contains the operator's contact information and a description of the proposed operations, including maps of the mining areas and processing facilities, plans for managing water and rock, a general schedule of operations, and a reclamation plan for areas no longer worked. 43 C.F.R § 3809.401(b); *see also id*. § 3809.420 (performance standards for mining activities conducted under an MPO, including compliance "with all pertinent Federal and state laws").

If an operator fails to the comply with the MPO requirements and environmental harm might ensue, BLM is authorized to issue a noncompliance order, and then a suspension order (upon the appropriate giving of notice). *Id.* § 3809.601; *see also id.* § 3809.605 (prohibiting operations prior to MPO approval). An operator may appeal an agency decision either to the director of the appropriate BLM state office, or directly to the Department of the Interior's Office of Hearings and Appeals. *Id.* § 3809.800. BLM may also move for injunctive action in federal district court against a noncompliant operator, and damages. *Id.* § 3809.604.

Similarly, under the Surface Resources Act of 1955 ("SRA"), 30 U.S.C. §§ 611-615, the claimant of unpatented land, while protected from "material interference" of his mining activities by other surface licensees, is restricted to using the surface for uses reasonably incident to mining. *See id.* § 612(a) (2006). An operator has ninety days after the end of authorized operations to remove all structures, equipment, and personal property from the site, otherwise these items become the property of the federal government and subject to BLM's removal. 43 C.F.R. §§ 3715.5-1, 3715.5-2. To prevent mining claimants from over-exploiting the surface resources, and to open those surface resources to multiple users, the statute dictated that "no mining claim located after [July 23, 1955] could be used, prior to the issuance of a patent, for purposes other than prospecting, mining and processing." *Converse v. Udall*, 262 F. Supp. 583, 585-86 (1966), *aff'd*, 399 F. 2d 616 (9th Cir. 1968). The owners of unpatented mining claims which were located prior to the 1955 statute are, however, still subject to the government's right to require that their exclusive possession further the development and extraction of mineral resources, commensurate with applicable laws and regulations. *See Freese v. United States*, 6 Cl. Ct. 1, 10-11 (1984), *aff'd*, 770 F. 2d 177 (Fed. Cir. 1985).

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[6] Between casual use and plan-level operations are notice-level operations, which cause "surface disturbance of 5 acres or less of public lands on which reclamation has not been completed." 43 C.F.R. § 3809.21; *see also id*. § 3809.301 (prescribing the information to be included in such notice to BLM, which is very similar to that required in an MPO).

[7] According to another subpart of the regulations, "[m]ining operations means all functions, work, facilities, and activities reasonably incident to mining or processing of mineral deposits." 43 C.F.R. § 3715.0-5.

Section 5 of the SRA establishes a procedure for federal agencies to determine whether certain mining claims were validly located prior to the effective date of the statute. Notice is published in a local newspaper of general circulation, giving the legal description of the areas in question and informing claimants that they are required to file, within 150 days, a verified statement with information regarding their mining claim or claims that are located in the described area. 30 U.S.C. § 613(a). Failure to file such a statement within the specified time is deemed to constitute consent by the claimant that the mining claim is subject to the limitations of the statute, namely that the federal government may allow other surface users onto the claim. *See id*. § 613(c); *see generally United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1285 (9th Cir. 1980) ("One of the clear purposes of the 1955 legislation was to prevent the withdrawal of surface resources from other public use merely by locating a mining claim."); *United States v. Langley*, 587 F. Supp. 1258, 1261 n.4 (E.D. Cal. 1984) ("The Ninth Circuit has observed that Congress did not intend to change the basic principles of the mining laws when it enacted the Surface Resources Act. Instead, the Act was intended as corrective litigation which attempted to clarify the law and to alleviate abuses which had occurred under the mining laws." (citation omitted)).

2. The Plaintiff's Involvement with the Property

Mister Strubel alleges that in 1992 he, along with his then-wife Cheryl, first purchased interests in the six unpatented mining claims which together comprise the Leopold Mine. *See* Tr. 2007 at 4; Tr. 2008 at 9-10. He acknowledges he was not listed in BLM's records as an owner at that time, *see* Tr. 2007 at 4, nor was listed as one after he and Cheryl published a notice demanding that other co-owners contribute their share of assessment work costs or lose their interests. *See* Tr. 2008 at 23-26; *but see* Tr. 2007 at 4 (alleging he "got on the papers," presumably after publishing out the other co-owners).[8]

The six constituent claims of the Leopold Mine were allegedly located between 1919 and 1936, and by 1959 came to be owned by Wesley Pieren. *See* Att. to Am. Compl. at 58; App. to Def.'s Mot. at 145, 148, 150, 152, 154 (BLM Serial Register Pages); *but see* Att. to Def.'s Mot. at 156 (BLM Serial Register Page, showing the location of Wonder Placer in 1988).[9] By mid-

[8] Mister Strubel's memory appeared to fail him concerning the year when the notice to co-owners was published, as he remembered it to be 1997 or 1998. *See* Tr. 2008 at 24, 26. The attempt to publish out the others actually occurred in 1996. *See* Att. to Am. Compl. at 114; App. to Def.'s Mot. at 99.

[9] It is not clear whether, for purposes of the SRA, BLM had ever determined that the six constituent claims of the Leopold Mine were validly located prior to the statute's effective date, thereby precluding non-claimants from using these public lands. Mister Pieren's verified statement concerning these claims, filed in June 1959, was rejected because the claims fell in a section of land for which BLM had not yet requested verification. *See* Att. to Am. Compl. at 56-57. One of the actions that particularly perturbed plaintiff was the statement by a BLM official,

1992, the Leopold Mine was apparently owned by seven individuals: Helen Cook; Oscar, Irene, and Daniel Johnson; Paul John Mohr; Juanita Morrison; and Donna Sexton. *See* App. to Def.'s Mot. at 98 (identifying owners as of May 21, 1992); Att. to Am. Compl. at 17 (Aff. of Annual Assessment Work for 1991-92, listing all but Ms. Cook as benefitted owners). Mister Strubel produced for the Court a copy of a handwritten "bill of sale," dated September 22, 1992, from Daniel Johnson and Juanita Morrison to Jack and Cheryl Strubel, of:

> ½ of our holding in the Leopold Mine. Or 25% of the own[er]ship of the following claims . . . .
> All claims located in Josephine County T 35 S, R-8-W; Sec. 3
> For the sum of $4,000.00.
> $3,000.00 down payment. The bal[a]nce to be pa[i]d $1,000.00 in the following manner. $1,000.00 to be paid by 9-22-93. If payment is not made by said date, a $250.00 late fee [shall] be added to [sale] price, and 6 months will be extend[ed] for said fee.

App. III to Pl.'s Resp. at 1.

Although this sale allegedly occurred in September 1992, it was not until March 28, 1994 that any deed conveying property between the parties to the contract was executed -- and this quitclaim deed was a grant from Juanita Morrison alone, to Cheryl Strubel and someone other than plaintiff, named Joseph R. Smith. *See* Att. to Am. Compl. at 100 (Quitclaim Deed, Mar. 28, 1994).[10] According to plaintiff, Mr. Smith was a neighbor who was entrusted with recording the quitclaim deed for the Strubels, but who apparently erased plaintiff's name and placed his own in its stead. Tr. 2008 at 9-10; *see also* Att. to Am. Compl. at 109-10 (Jan. 3, 1996 letter to Mr. Smith alleging that he fraudulently placed name on deed), 117 (Cheryl Strubel Am. Min. Claim Aff., notarized Aug. 26, 1996, alleging Mr. Smith's name was improperly placed on her deed). One document submitted by plaintiff suggests that the delay from the date of the sale to the conveyance of the deed was due to the Strubels' failure to make the payments under the contract. *See id*. at 106 (handwritten notice dated Feb. 3, 1994, signed by Mr. Johnson and Ms. Morrison). Mister Strubel, on the other hand, stated that Daniel Johnson -- who was not a miner himself --

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in the course of the district court enforcement action brought against the Strubels, that BLM had "treated the occupants as having surface rights but, in fact, it has not been adjudicated." Att. to Compl. at 6; *see* Compl. at 5; Pl.'s Opp'n at 1-2; Tr. 2007 at 30-31. But whether or not the owners of the unpatented mining claims at issue could prevent non-miners from using the land was not decided in that proceeding, and was irrelevant to its outcome -- as this issue had no bearing on whether an approved MPO was required. *See* 43 C.F.R. § 3809.1.

[10] The deed conveyed 75% of an undivided one-third interest in the six unpatented mining claims. *See* Att. to Am. Compl. at 102. This amounts to a 25% interest, the same percentage as was purportedly transferred by the "bill of sale." *See* App. III to Pl.'s Resp. at 1.

made him work for a year-and-a-half to refurbish the water ditches of the Leopold Mine before Mr. Johnson would release the deed to him. Tr. 2008 at 16-17.

In any event, on August 24, 1994, the transfer of the interest to Cheryl Strubel (and Mr. Smith) was filed with BLM. *See* Att. to Am. Compl. at 100 (BLM date stamp); *see also* App. to Def.'s Mot. at 146, 149, 151, 153, 155, 157 (BLM Serial Register Pages). After that date, Cheryl Strubel began to file the annual assessment work affidavits as an owner, identifying work performed on her behalf by plaintiff. *See* Att. to Am. Compl. at 21 (Cheryl Strubel Min. Claim Aff., Aug. 30, 1994); *id.* at 117 (Cheryl Strubel Am. Mining Claim Aff. for the Assessment Year 1994); *id.* at 26 (Cheryl Strubel Min. Claim Aff., Aug. 7, 1995). The previous year, corroborating Mr. Strubel's recollection, *see* Tr. 2008 at 16-17, Mr. Johnson's annual assessment work affidavit also identified work performed by plaintiff. *See* Att. to Am. Compl. at 18. And, consistent with the allegation that the 1992 "bill of sale" transferred a property interest to the Strubels, notices were sent by the Strubels to co-owners of the six claims, requesting that Cheryl Strubel, as a co-owner, be reimbursed for assessment work expenses beginning in the *1992-93* assessment year. Att. to Am. Compl. at 98, 99, 105. Thus, as early as 1992, plaintiff worked on the Leopold Mine: refurbishing the water ditch (uprooting trees, plugging leaks, and repairing washouts), burning brush, building bridges, installing culverts, clearing timber, maintaining the access trail, and testing mineral assessments. Am. Compl. at 3; Att. to *id.* at 18, 21, 26; *see also* Att. to *id*. at 92 (Miner's Lien, Sept. 19, 1995).

By late 1995, Mr. Strubel placed a miner's lien on the Leopold Mine for 7,280 hours of work, discounting the $50,960 he demanded of the four titled claimants (not including his wife) by an unexplained "58.33% ownership." Att. to Am. Compl. at 92-93 (Miner's Lien, Sept. 19, 1995). The following year, because the miner's lien did not result in payment from then-co-owners Oscar Johnson, Donna Sexton, Juanita Morrison and Daniel Johnson, Tr. 2008 at 33, the Strubels published a fourteen-week series of notices in the *Grants Pass Daily Courier*, reading as follows:

> . . . to any and all other co-owners or any other persons claiming any interest in the [Leopold Mine] who do not already have notice, of their failure to contribute the proper proportion of the required expenditures that co-owners Cheryl Strubel and Jack Strubel have made for improvements, labor and maintenance fees . . . for the assessment years of 1993, 1994 and 1995.

Att. to Am. Compl. at 114. While BLM acknowledged the Strubels' attempt to publish out their co-claimants, it noted that the other co-owners "continued to claim ownership." *See* App. to Def.'s Mot. at 99 (Att. to Decision, Jan. 8, 2003); *see also* Att. to Am. Compl. at 95 (notice to Cheryl Strubel from Daniel Johnson, on behalf of other co-owners, denying delinquency based on their own assessment work through the 1993-94 year). Mister Strubel alleges that, after the publishing out of the other co-owners, he was unconcerned about placing his name on the title because various personnel at BLM represented that he did not need to -- as the agency would conform its records to the new ownership in the course of time. Tr. 2008 at 19, 23-25, 30-32; *see also id.* at 33 (plaintiff representing that BLM told him not to worry about placing his name on

the title because he and Cheryl Strubel were a married couple). On November 7, 2000, Cheryl Strubel quitclaimed to Jack Strubel fifty percent of her interest in the Leopold Mine. App. to Def.'s Mot. at 90 (Quitclaim Deed, Nov. 7, 2000).

C. Administrative and Court Proceedings Against the Strubels

In early 1998, Mrs. Strubel was notified by BLM that her and plaintiff's activities at the Leopold Mine violated BLM's surface management regulations for unpatented mining claims: they had felled timber and milled it, disturbed more than five acres without a plan of operations, failed to properly stabilize the site of a 1997 landslide, and did not comply with water quality standards (resulting in the deposition of silt in Galice Creek). *See* App. to Def.'s Mot. at 62-64 (Not. of Noncompliance, Feb. 5, 1998). The BLM staff had "not observed any mining equipment and/or mining activities that would be considered legitimate mining operations." *Id.* at 63. On February 5, 1998, Mrs. Strubel was requested to file a plan of operations and to post bond (at a minimum of $2,000 per disturbed acre, estimated at ten acres), and to mitigate all erosion and runoff into Galice Creek to the satisfaction of BLM and the Oregon Department of Environmental Quality. *Id.* at 64.

Because an August 18, 1997 deadline for compliance with BLM's new use and occupancy regulations for unpatented mining claims had come and gone, the agency ordered Mrs. Strubel "to suspend her occupancy of the public lands at the location of the Leopold Mine," within thirty days. *Id.* at 56 (Letter of Nonconcurrence/Immediate Suspension Order, Feb. 5, 1998). The agency based its order on her alleged failure to regularly and substantially mine the site, and on the allegations that she muddied Galice Creek through excessive wastewater, seasonally dredged without a variance from the Oregon Department of Fish and Wildlife, and created a public nuisance by maintaining non-code structures lacking residential septic and sanitation facilities. *See id*. at 55-56. The Bureau of Land Management mandated that Mrs. Strubel file a plan of operations within thirty days. *See id.* at 57. Agency concurrence in the MPO would necessitate her acquisition of all necessary permits before resuming work at the Leopold Mine, while nonconcurrence would necessitate her removal of structures, reclamation, and cessation of all non-authorized uses. *Id.*

More than eighteen months later, BLM issued Mrs. Strubel a second notice, citing recent "mining activities above the casual use level." *See* App. to Def.'s Mot. at 68 (Not. of Non-compliance, Aug. 26, 1999). Mister Strubel maintained that he and his wife, as co-owners, submitted five proposed plans, although they never personally disturbed more than five acres annually. Tr. 2008 at 37-38, 53, 58. The record contains no document that may be unambiguously identified as the initial proposed MPO, but a letter from the Strubels' counsel to BLM seeks to clarify an August 25, 1999 submission. *See* App. to Def.'s Mot. at 71-73 (letter from the Strubels' counsel to Robert C. Korfhage, Field Manager, BLM, Nov. 10, 1999). A BLM official responded that this information was "of adequate content for us to begin the review of the plan of operations." *Id.* at 74 (letter from Robert Korfhage, Field Manager, BLM to Strubels' counsel, Dec. 22, 1999).

On February 23, 2000, BLM and state agency representatives apparently accompanied the OWRD deputy watermaster for Josephine County, when he posted notice of the unauthorized use of water near the right abutment of a reservoir above the Strubels' house at the Leopold Mine. *Id.* at 75 (letter from Norman Daft, Deputy Watermaster, OWRD to Jack Strubel, Feb. 29, 2000). In his follow-up letter to Mr. Strubel, the deputy watermaster claimed:

> Last August, I sent you a letter stating the record shows no water rights in the south ½ of section 3 where your mining claim is located. The record may be in error, however as I stated, we must regulate water use according to rights of record. In addition, I do not find any authorization for use of surface water for domestic purposes or for landscaping. . . .
>
> So there is no misunderstanding, continued use of water for any purpose which is not authorized may lead to the assessment of civil penalties or other legal action.

Id.[11]

In Spring 2000, the United States sought injunctive relief against Cheryl Strubel (as owner, occupant, and operator of the Leopold Mine) and Jack Strubel (as operator and occupant), including removal of an earthen dam, cessation of mining and occupancy, and reclamation. *Id.* at 111-12, 114 (Compl., *United States v. Strubel*, No. 6:00-cv-06102-TC (D. Or. Apr. 12, 2000)). At a hearing on May 12, 2000, the district court issued a preliminary injunction to prohibit the Strubels from further mining and timbering without an approved MPO. *Id.* at 115-16 (Prelim. Inj., *United States v. Strubel* (May 19, 2000)). Because the government had promised the court to review the Strubels' proposed MPO by July 11, 2000, BLM wrote to Cheryl Strubel shortly after the hearing and requested:

> documentation from you showing that you have all required permits from local, state, and federal agencies necessary to allow you to mine as described in your plan. I will need to either see a copy of those permits or written documentation from the permitting agency showing that you are exempt from the permit requirements of that agency.

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[11] A notice of violation was subsequently delivered to the Strubels on May 10, 2000 "for diverting water over the Watermaster's posting and instructions not to use water." *Id.* at 84 (letter from Alan Cook, Southwest Region Manager, OWRD to Jack and Cheryl Strubel, Aug. 2, 2000). By August 2, 2000, after water from the North Fork of Galice Creek again flowed in the Leopold Mine ditch, the OWRD had initiated formal enforcement proceedings against the Strubels. *Id.* According to Mr. Strubel, these proceedings resulted in a $750 fine, later forgiven. *See* Tr. 2007 at 25; Tr. 2008 at 45.

> Below is a list of regulating agencies that may require you to acquire a permit, bond, or other authorization to allow you to mine as you propose in your plan of operations. . . .
>
> In addition to acquiring authorization or exemption from the above agencies to mine, you will need to demonstrate to me that you have acquired all water rights that would be necessary to allow you to mine as outlined in your plan of operations. In testimony at the May 12th hearing, Norman Daft . . . testified that you currently do not have rights to divert water from the North Fork Galice Creek for mining purposes. It is imperative that you show this office documentation from the [OWRD] that you have water rights to mine as you proposed in your plan of operations. Without water rights sufficient to allow you to mine your plan of operations would appear moot.

App. to Def.'s Mot. at 76-77 (letter from John Prendergast, Field Manager, BLM to Cheryl Strubel, May 24, 2000).[12] Three months later, BLM rejected the Strubels' proposed MPO because they failed to obtain the state permits the agency required, and furthermore could not demonstrate perfected water rights in the area of the Leopold Mine. *See id.* at 79-81 (Decision, Aug. 30, 2000). The Strubels appealed the rejection of the proposed MPO to the BLM Oregon State Director, citing its "numerous inaccuracies" and claiming that they had "done everything in our power to comply with the mining law." *Id.* at 86 (Appeal, Sept. 29, 2000). They argued that two of the permits were not needed due to exceptions, that they were litigating a third, and that the OWRD was mistaken in not recognizing their water rights. *See id.* at 86-87; *see also* Tr. 2008 at 50, 55, 58-59 (plaintiff asserting no greater use than casual use).

Independent of the progress of the Strubels' appeal to BLM (the resolution of which is not in the record, but presumably ended in denial), the district court held a second hearing on September 26, 2000, and then permanently enjoined the Strubels from operating the Leopold Mine without an approved MPO, and from occupying or timbering the site without written authority from BLM. App. to Def.'s Mot. at 117-18 (J. & Perm. Inj., *United States v. Strubel* (Oct. 17, 2000)). The judge further ordered the Strubels to remove "all personal property, mining equipment and structures" from the Leopold Mine within ninety days of the hearing. *Id.* at 118-19.

The Strubels requested a rehearing, which motion was denied on February 28, 2001. *Id.* at 109 (Order, *United States v. Strubel* (Feb. 28, 2001)). They moved for a stay of the permanent injunction, *id.* (Mot. for Stay, *United States v. Strubel* (Apr. 25, 2001)), and for reconsideration of the denial. *Id.* (Not. of Appeal, *United States v. Strubel* (Apr. 25, 2001)). The Ninth Circuit

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[12] Permits were required from DEQ (impoundment of wastewater and dredging), the Oregon Division of State Lands (dredging and bridge construction), the Oregon Department of Geology and Mineral Industries (reclamation), the OWRD (diversion from the North Fork of Galice Creek), and the Oregon Department of Forestry (use of motorized equipment).

affirmed the denial of plaintiffs' motion for reconsideration, *United States v. Strubel*, 22 Fed. Appx. 918 (9th Cir. 2002), and denied plaintiffs' petition for a panel rehearing and motion for a stay. App. to Def.'s Mot. at 125 (Case Summ., *United States v. Strubel*, 01-35428 (9th Cir. July 30, 2002)). On January 13, 2003, the Supreme Court denied plaintiffs' petition for a writ of certiorari, *Strubel v. United States*, 537 U.S. 1133 (2003), and on May 27, 2003 denied plaintiffs' petition for a rehearing of that denial. *Strubel v. United States*, 538 U.S. 1069 (2003).

D. Physical Expulsion of the Plaintiff and Termination of the Plaintiff's Title

On May 9, 2001, the district court ordered the United States Marshals Service to remove the Strubels and their belongings from the Leopold Mine. App. to Def.'s Mot. at 124 (Writ of Assistance, *United States v. Strubel* (May 10, 2001)). The marshals did so on July 3, 2001. Tr. 2007 at 20, 24-26; *see also* Att. to Am. Compl. at 1-2 (pictures of the site after the eviction). It was only the previous autumn that Cheryl Strubel had quitclaimed to Jack Strubel fifty percent of her interest in the Leopold Mine. App. to Def.'s Mot. at 90 (Quitclaim Deed, Nov. 7, 2000).

Unrelated to the eviction, on January 8, 2003, BLM declared all six constituent mining claims of the Leopold Mine forfeited as of September 1, 2002 -- because one of the record claimants had not signed the small miner's maintenance fee waiver certification for the 2002-03 assessment year, and the annual maintenance fee in lieu of the waiver was not paid. *Id.* at 95-96 (Decision, Jan. 8, 2003). Leading up to the decision is the following sequence of events. On August 22, 2002, the Strubels had filed a fee waiver certification for the 2002-03 assessment year, *id.* at 91 (Maintenance Fee Waiver Certification, Aug. 22, 2002), as did Joseph Smith, Donna Sexton, and Gerald Casey on August 30, 2002. *Id.* at 92 (Maintenance Fee Waiver Certification, Aug. 30, 2002). The agency gave notice of the defect, *i.e.*, the absence of record claimant Don Leach's signature, to each claimant of record, on October 16, 2002. *Id.* at 95 (Decision, Jan. 8, 2003).[13] The Strubels appealed the decision to the IBLA, which affirmed, despite the fact that the Strubels contested the validity of the other claimants' ownership

[13] Effective October 28, 1996, Cheryl Strubel had quitclaimed to Don Leach an undivided twenty-five percent interest in the Leopold Mine. Att. to Am. Compl. at 118 (Quitclaim Deed, Sept. 6, 1996). Don Leach was the attorney Mr. Strubel had enlisted to collect assessment work contributions from the Leopold Mine's co-owners. *See id*. at 109-10, 112-13. Mister Leach advised plaintiff to publish out the other claimants: "[C]lean up the title and then put my name on the title." Tr. 2008 at 21. According to Mr. Strubel, Mr. Leach persuaded him to surrender a three-ounce gold nugget, that the lawyer could use to pay off a $2,800 tax lien, and in return Mr. Strubel was to receive from Mr. Leach a quitclaim deed of his interest in the Leopold Mine. *Id.* at 26-27. The nugget was sold, the taxes paid, the quitclaim deed was never granted, and the certified mail sent to Mr. Leach the following year was returned. *Id.* at 27. Mister Strubel apparently sent BLM several hundred dollars to pay the annual maintenance fee for the 2001-02 assessment year which was owed due to the lack of Don Leach's signature, but refused to do so "for the next eight years until you decide to correct the file or records." *Id.* at 27; *see also id.* at 28-29.

interests. *See id.* at 101, 104-05 (Order, Jan. 14, 2004)). Accordingly, BLM returned the Strubels' fee waiver certification for the 2003-04 assessment year, as well as their 2003 mining claim assessment work affidavit and filing fee of $5 per claim. *See* Att. to Def.'s Mot. at 100 (letter from BLM to Cheryl and Jack Strubel, Nov. 6, 2003)); *see also* Tr. 2007 at 13-15 (Mr. Strubel discussing return of the September 2001 payment, by which he presumably meant the September 2002 payment).[14]

E. Prior Litigation Brought by Plaintiff

On July 9, 2004, Cheryl and Jack Strubel filed an exceedingly confusing complaint in the Oregon federal district court, naming BLM and the OWRD as "Defendants-Appellee," and including our Court and the Federal Circuit on the prefatory caption pages. *See* Compl. at 1-2, *Strubel v. United States*, No. 1:04-cv-03056-CO (D. Or., Jul. 9, 2004).[15] The complaint was a compilation of documents, and alleged, among other things, a taking of vested mining rights. *Id.* at 3. The Strubels submitted excerpts from county histories to substantiate the inviolability of their mining rights, and challenged the validity of the MPO requirement, particularly in that it called for six state permits. *See id.* at 6, 9. One portion of the complaint concluded with a prayer to our Court: "[G]rant us summary judgment in favor of the Appellants of $551,000,000,000.00 [w]hich we would like in silver and gold coins." *Id.* at 12. Another portion is a separately signed and dated handwritten complaint directed to the OWRD and one of its employees. *See id.* at 19-24 ("Formal Complaint" dated Feb. 13, 2004). The Strubels alleged that their constitutional rights were violated when the OWRD ignored a cadastral survey showing water rights, as the state instead claimed "the [diversion] point was wrong on the maps," and they requested $1 billion in damages. *Id.* at 21, 22-24 (¶¶ 8-9, 13-14).[16]

The magistrate judge could not determine from the initial complaint whether the district court had subject matter jurisdiction. *See Strubel v. United States*, 2004 U.S. Dist. LEXIS 12860, at *1 (D. Or. July 9, 2004). The Strubels then submitted an amended complaint alleging that the OWRD trespassed on their mining claims due to its own faulty maps, and misled the judge who presided over the injunctive action. *See* Am. Compl. at 1, *Strubel v. United States*

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[14] Plaintiff alleges the taking of his property occurred prior to this forfeiture decision. *See* Tr. 2008 at 44-45. The forfeiture would not have been recognized as a taking. *See generally United States v. Locke*, 471 U.S. 84, 87-89, 98-100, 104-08 (explaining and upholding the automatic forfeiture provision of 43 U.S.C. § 1744(c)); *Kunkes v. United States*, 32 Fed. Cl. 249, 254-56 (1994), *aff'd*, 78 F.3d 1549 (Fed. Cir. 1996) (finding the "$100 claim rental fee" a "reasonable regulatory restriction" for eliminating stale or worthless claims).

[15] In citing this document, the Court has assigned page numbers beginning with the first caption page (of many). The first dozen pages of this complaint are also found in defendant's appendix. *See* App. to Def.'s Mot. at 127-38.

[16] Under Oregon law, a specific point of diversion must be identified before a water use is permitted. *See* Ore. Rev. Stat. § 537.140(4).

(July 21, 2004). They asserted that BLM "has taken Private Property and rights by Rules and Regulations without Constitutional Due Process of Law." *See id.* at 3. Plaintiffs again requested compensation of $1 billion from the state and $551 billion from the federal government. *See id.* at 4-6. The magistrate judge recommended dismissal of the takings claim against the federal government, as falling within our Court's exclusive jurisdiction. *See Strubel v. United States*, 2004 WL 1662026, at *1 (D. Or. July 26, 2004). The magistrate judge later recommended dismissal of the state defendants, finding no waiver of the State of Oregon's sovereign immunity to allow suit in federal court. *See Strubel v. United States*, 2004 U.S. Dist. LEXIS 17655, at *3-7 (D. Or. Aug. 25, 2004). The district court ultimately adopted the magistrate judge's findings and recommendations and dismissed the case, noting that the taking claim against the federal government was in our Court's jurisdiction and that any purported due process claims were time-barred. *See Strubel v. United States*, 2004 U.S. Dist. LEXIS 22051, at *2 (D. Or. Oct. 26, 2004).

F. Plaintiff's Claims in this Case

Mister Strubel basically claims that BLM's insistence on an approved MPO before he could mine and occupy the Leopold Mine property constituted a taking of his property interest in the six placer mining claims. *See* Tr. 2007 at 19.[17] Plaintiff approaches this taking from many angles. First he challenges the mere application of the MPO requirement to his property. The Court understands Mr. Strubel's reasoning to be that the Leopold Mine was free from any regulatory regime due to its claimants' allegedly vested rights arising from the long history of active mining at the site. *See id.* at 18; Tr. 2008 at 55. The BLM use and occupancy regulations, 34 C.F.R. subpart 3715, only date from 1996, *see* 61 Fed. Reg. 37,125 (July 16, 1996), and its surface management regulations, 34 C.F.R. subpart 3809, were first issued in 1980 with an effective date of January 1, 1981, *see* 45 Fed. Reg. 78,902 (Nov. 26, 1980), and reissued in 2000 with an effective date of January 20, 2001. *See* 65 Fed. Reg. 69,998 (Nov. 21, 2000).

Second, plaintiff claims that the regulations were incorrectly applied, contending that he never disturbed more than five acres (the level at which a plan of operations is needed). *See* Tr. 2008 at 38, 53, 58. Next, he argues that the Strubels' proposed MPO could not possibly have been approved because several state permits were prerequisite, and he could not acquire all of them. *See* Tr. 2007 at 18, 35-36; Tr. 2008 at 44-45, 46-50, 59-63. If not allowed to

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[17] As discussed above, *see supra* note 9, plaintiff also complains that his surface rights were taken in the enforcement proceedings in the district court. *See* Tr. 2007 at 9-10, 17-18, 33. "Surface rights" in this context means an exclusionary right in the vegetative surface resources found on unpatented mining claims that were located prior to passage of the Surface Resources Act of 1955, and subsequently verified if published. *See Converse*, 262 F. Supp. at 585-86; *cf.* 30 U.S.C. § 612(b) (granting the government the right to manage and dispose of the vegetative surface resources found on unpatented claims that were located *after* passage of the Surface Resources Act). Vegetative surface resources include timber (other than clearance) but exclude ground and surface waters, which fall under state jurisdiction in the western United States. *See* 30 U.S.C. § 612(b), (c).

hydraulically mine the land as he proposed, Mr. Strubel alleged that he had "no remedy but to go out of business." *See* Tr. 2007 at 33, 44, 49; Tr. 2008 at 49-50, 60-61. While not at all clear, Mister Strubel seems to contend that this taking occurred either when BLM rejected the Strubels' proposed plan of operations, or when the district court issued the permanent injunction. *See, e.g.*, Tr. 2007 at 17-20, 32-34.

Mister Strubel alternatively alleges that the taking of his property interest occurred on July 3, 2001 when the United States Marshals Service physically removed him and his family from the property, based on the permanent injunction of October 17, 2000 and the district court's order of removal on May 19, 2001. *See* Tr. 2007 at 20-21 (misdating the year of eviction); Tr. 2008 at 51; Pl.'s Opp'n to Def.'s Mot. for Enlargement of Time (filed July 18, 2007) (also misdating the year of eviction). As a direct consequence of the removal, the plaintiff allegedly suffered damages from the loss of personal property, the inaccessibility of real property, and the loss of future income. *See* Tr. 2007 at 38-39; Tr. 2008 at 50-51. Although Mr. Strubel was unable to estimate the value of his property interest, *see* Tr. 2007 at 45, or his annual revenue, *see id.* at 45-47, he did ascribe enough of a return from the Leopold Mine, over several years, to finance milling fifty thousand board feet of lumber, remodeling a cabin, building a sizable shop and bunkhouse, and generally operating the mine. *See id.* at 46. He alleges that he paid his labor in gold nuggets, in the amount of about $60,000 a year. *See id.* at 47.

The plaintiff also alleges that a number of actions violated his right to due process. He alleges that BLM misled the district court when it sought the preliminary and then the permanent injunction against the Strubels' mining activities. *See* Tr. 2007 at 30. Specifically, he asserts that an official falsely claimed that surface rights for the Leopold Mine property were not adjudicated. *See id.* at 17. Mister Strubel also contends his mining rights could only be divested after a hearing that explores whether the Leopold Mine were validly discovered, located, and consistently worked. *See id.* at 33, 37. Finally, he claims that of all the miners in the immediate area, he was singled out for enforcement by BLM due to a mountain slide above the site. *See* Tr. 2008 at 55, 56-57.

II. DISCUSSION

The government has moved to dismiss this case on two separate grounds. First, the government argues the case should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"). *See* Def.'s Mot. at 21-25. Three reasons are given for this ground. Defendant contends that Mr. Strubel did not acquire a property interest in the Leopold Mine until November 7, 2000, several weeks after the permanent injunction was issued, and thus lacks standing to challenge the government actions at issue. *See id*. at 21-23. Defendant also argues that plaintiff's claims are not ripe because the BLM was never able to review -- much less reject in the form of a final decision -- a meaningful MPO from Mr. Strubel because he and Cheryl Strubel failed to acquire all the prerequisite state permits prior to submission. *See id.* at 23-25. And the government lastly asserts that insofar as Mr. Strubel may be understood to be making a facial challenge to the BLM Surface Management Regulations (43 C.F.R. subpart 3809), which were enacted in 1980 and

reissued in 2000, and to the BLM Mining Claim Use and Occupancy Regulations (43 C.F.R. subpart 3715), which were enacted in 1996, this challenge is time-barred by our court's six-year statute of limitations found at 28 U.S.C. § 2501. *See* Def.'s Mot. at 25-26.[18]

Second, the government has moved to dismiss the case for failure to state a claim upon which relief can be granted, under RCFC 12(b)(6). The basis of this alternative motion is that permitting requirements alone do not constitute a taking, and that Mr. Strubel could have exercised all the mining rights inherent to his co-ownership of the Leopold Mine "by obtaining authorization for his occupancy and approval of an MPO," which he elected not to do. *See* Def.'s Mot. at 27-30. Finally, the government argues that to the extent Mr. Strubel is alleging that the OWRD took his vested water rights, those claims are not ones for which the Court may grant relief, because water rights do not belong to the rights inherent to ownership of an unpatented mining claim, on federal land. *See id.* at 31. In any event, the government argues that the proper defendant for this claim would be the State of Oregon and not the United States. *See id.* at 31-32.

A. Applicable Legal Standards

The condition precedent to all litigation is subject matter jurisdiction, without which '"the court cannot proceed at all in any cause.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). Thus, "federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). *See generally Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986) ("'The rules of standing . . . are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute . . . .'") (quoting *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975)). Subject matter jurisdiction may be challenged at any time by the parties, or by the court on its own initiative, or on appeal. *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804); *Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1127 (2005). Both parties must therefore be afforded the opportunity to submit all available evidence supporting the facts upon which their respective jurisdictional allegations are based. *See Barrett v. Nicholson*, 466 F.3d 1038, 1042 (Fed. Cir. 2006); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). A court will consider this evidence even where, as is likely, it takes the form of material outside the pleadings. *See Land v. Dollar*, 330 U.S. 731, 735 & n.4 (1947); *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936); *Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999); *Indium Corp. of Am. v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985); *Forest Glen Props., LLC v. United States*, 79 Fed. Cl. 669, 676-77

[18] Recent Supreme Court jurisprudence affirms that the running of the limitations period is a jurisdictional obstacle to suit in our Court, and thus may be raised under RCFC 12(b)(1). *See John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 752, 753-55 (2008).

(2007); *Patton v. United States*, 64 Fed. Cl. 768, 773 (2005). Mere denials or conclusory statements will fail to establish an evidentiary conflict. *See SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985).

When examining these jurisdictional facts, a court draws all reasonable inferences in favor of the non-moving party. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). If it nonetheless finds that the material facts of the case are not genuinely disputed, and that these facts establish a lack of subject matter jurisdiction, the moving party would prevail, and the case would be dismissed without prejudice. *KVOS*, 299 U.S. at 278-79; *Rocovich v. United States*, 933 F.2d 991, 994-95 (Fed. Cir. 1991). Were the court in contrast to find a genuine issue as to a material fact, "the movant has succeeded in raising a serious doubt as to the court's subject matter jurisdiction." *Forest Glen*, 79 Fed. Cl. at 678; *see McNutt v. GMAC*, 298 U.S. 178, 189 (1936). The party invoking the court's power, however, still has the chance to establish jurisdiction and thus defeat the motion to dismiss, *see Contreras v. United States*, 64 Fed. Cl. 583, 586 (2005), but "bears the burden of supporting the allegations by competent proof." *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) (citing, *inter alia*, *Gibbs v. Buck*, 307 U.S. 66, 72 (1939)); *see also Reynolds*, 846 F.2d at 748 (calling for a preponderance of the evidence).

Similarly, when considering a motion to dismiss for failure to state a claim, a court accepts all well-pleaded facts as true and draw all reasonable inferences in the plaintiff's favor. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Pixton v. B&B Plastics, Inc.*, 291 F.3d 1324, 1326 (Fed. Cir. 2002); *Englewood Terrace Ltd. P'ship v. United States*, 61 Fed. Cl. 583, 584 (2004). Under RCFC 12(b)(6), a complaint will not be dismissed "unless it is beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *see also Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000) (dismissal appropriate "when the facts asserted by the plaintiff do not entitle him to a legal remedy").

B. Analysis

Mister Strubel contends that he was one of the owners of six unpatented mining claims, together comprising the Leopold Mine, and that his property was taken by the United States when the government restricted his purported vested rights to use and occupy the land. He is uncertain about the specific action which took his property, and makes several arguments in the alternative. First, there is the mere application of regulations to his property. Plaintiff argues that his right to occupy and use the land did not need BLM approval, and that BLM's determination that he needed to obtain several state permits and have an MPO approved before he could continue to occupy and hydraulically mine the land was an action which took his vested property rights. *See* Tr. 2007 at 18. Second, Mr. Strubel argues that the permanent injunction issued by the district court was the action which took his property. *See id.* at 20. The injunction prohibited the Strubels from mining the property without an approved MPO, from occupying the land without BLM authorization, and from cutting and removing timber, and ordered them remove their personal property, equipment, and structures from the Leopold Mine. *See* App. to

Def.'s Mot. at 117-20. One aspect of this argument is that the district court was misled into thinking that plaintiff had no water rights and had disturbed more than five acres of land. *See* Tr. 2008 at 44, 50-53, 55; Tr. 2007 at 9-10, 34, 51. Finally, Mr. Strubel argues that the taking was accomplished when United States Marshals enforced the injunction under a writ of assistance, and removed the Strubels and their belongings. Tr. 2007 at 32.

The government contests the timeliness of plaintiff's acquisition of an ownership interest in the Leopold Mine, *see* Def.'s Mot. at 21-22, and of the lawsuit challenging the regulatory imposition (on both ripeness and statute of limitations grounds), arguing that our Court lacks jurisdiction to consider the matter. *See id*. at 23-26. It also argues that Mr. Strubel's allegations fail to state a takings claim against the federal government. *See id*. at 27-30.

1. Subject-Matter Jurisdiction

a. The plaintiff has standing to bring this action.

The government's first argument under its motion to dismiss Mr. Strubel's claim for lack of subject-matter jurisdiction is grounded in the date of the quitclaim deed granted by Cheryl Strubel to Jack Strubel -- November 7, 2000 -- for fifty percent of her ownership interest in the six constituent claims of the Leopold Mine. *See* Def.'s Mot. at 21. Because this date fell several weeks *after* the district court issued its permanent injunction on October 17, 2000, defendant argues that the plaintiff lacked standing to challenge the permanent injunction or the enforcement of that injunction, which was the Strubels' removal from the Leopold Mine by federal marshals on July 3, 2001. *See id.*

In support of his allegation that he acquired an interest in the Leopold Mine in 1992, *see* Tr. 2007 at 4, Tr. 2008 at 9-10, Mister Strubel has produced evidence, in the form of a copy of a sales contract handwritten on a sheet of notebook paper. App. III to Pl.'s Resp. at 1. The document is dated September 22, 1992 (and apparently signed by all four parties), and reflects the sale, for $4,000, to Jack and Cheryl Strubel of one-half of the interest in the Leopold Mine then held by Daniel V. Johnson and Juanita D. Morrison (or a one-quarter ownership of the six constituent claims). *Id*. As discussed earlier, although BLM will not recognize the transfer of an interest in a mining claim unless it is filed with the agency, perfection of the interest follows the requirements of state law. *See* 43 C.F.R. § 3833.32(a). Under Oregon state law, interests in mining claims are conveyed like other realty, Or. Rev. Stat. § 517.090, and must be done in writing, *see id.* § 93.020(1), and thus the bill of sale would seem to suffice to convey the described property interests to plaintiff. *See also Hinderliter*, 164 P. at 379.

When given the opportunity to respond to this evidence, the government instead passed, and thus identified no evidence of its own at this stage of the proceedings that would place the fact of the 1992 transfer into dispute. *See* Ex. A to Notice of Filing. The Court notes the existence in the record of additional evidence of a circumstantial nature which supports plaintiff's claim to an ownership interest earlier than the November 7, 2000 quitclaim deed -- such as the notice published between April and July 1996, which identified both Cheryl and Jack

Strubel as co-owners of interests in the six claims, Att. to Am. Compl. at 114, App. to Def.'s Mot. at 99; a January 1998 permit issued by the Oregon Department of Forestry which identifies both Strubels as owners of the Leopold Mine, App. II to Pl.'s Resp. at 27; and the notes of a BLM employee concerning a March 16, 1999 meeting, which identify the plaintiff as one of the owners of the Leopold Mine. Pl.'s Resp. at 15.

To be sure, there are other documents which can be read to suggest that Mr. Strubel was not yet one of the owners, such as the March 28, 1994 quitclaim deed from Juanita Morrison conveying three-quarters of an undivided one-third interest in the six claims, to Cheryl Strubel and *Joseph R. Smith*, rather than to Mr. Strubel, Att. to Am. Compl. at 30, and the annual assessment work filings which identify Cheryl Strubel as owner and plaintiff as the person performing the work. *See id*. at 20-21, 26. But plaintiff has plausibly explained that he understood that having just his wife's name in the BLM records was sufficient for interests held by the two of them, *see* Tr. 2008 at 30-33, and recounts the allegation that Mr. Smith's name was improperly substituted for his own on the March 28, 1994 quitclaim deed, *id*. at 9-10, 14-16 -- an allegation which appears in documents from 1996, which well pre-date plaintiff's administrative and judicial proceedings here and elsewhere. *See* Att. to Am. Compl. at 109-10 (letter from Mr. Leach to Mr. Smith, Jan. 3, 1996), 117 (Cheryl Strubel Am. Min. Claim Aff., notarized Aug. 26, 1996). In any event, while discovery, were the case to proceed, might yield evidence undermining the validity of the 1992 transfer, at this point in the proceedings there is no reason to doubt that Mr. Strubel obtained an interest in the Leopold Mine before the events occurred of which he complains, and thus the government's motion to dismiss for lack of standing must at this time be DENIED.

Moreover, defendant's argument rests on the unqualified position that a subsequent acquirer cannot challenge the taking of his or her predecessor's interest in property. *See* Def.'s Mot. at 21-22. But, as this Court explained in *Bailey v. United States*, 78 Fed. Cl. 239 (2007), this rule was developed in the context of physical takings. *Bailey*, 78 Fed. Cl. at 258-64. The Supreme Court has cautioned that physical takings precedents are not necessarily applicable in the context of regulatory takings. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002); *see Bailey*, 78 Fed. Cl. at 268. This Court has held that the physical takings precedents that restrict standing to owners at the time of an alleged taking are not applicable to regulatory takings, due to the government's ability to transform regulatory takings into temporary takings by removing use restrictions. *Bailey*, 78 Fed. Cl. at 268-75. The rule the government invokes is based on the *permanence* of the deprivation under the normal circumstances of a physical invasion. *See id*. at 261-64. The Federal Circuit has frequently recognized that the government may cut its losses by making a regulatory taking temporary. *See, e.g.*, *Seiber v. United States*, 364 F.3d 1356, 1365 (Fed. Cir. 2004); *Cooley v. United States*, 324 F.3d 1297, 1305-06 (Fed. Cir. 2003); *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1347 (Fed. Cir. 2002); *see also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987). Thus, the rule which applies in the rare occasion when physical takings are intended to be temporary, entitling subsequent acquirers to receive just compensation, *see Eyherabide v. United States*, 170 Ct. Cl. 598, 608 (1965), should be used in the context of regulatory takings. *See Bailey*, 78 Fed. Cl. at 269-71; *see also Nollan v. Cal.*

Coastal Comm'n, 483 U.S. 825, 834 n.2 (1987); *Palazzolo v. Rhode Island*, 533 U.S. 606, 627-28, 630 (2001).

b. The plaintiff's claim is ripe.

The government moves to dismiss plaintiff's case for lack of subject-matter jurisdiction on ripeness grounds, arguing that Mr. Strubel failed to receive a "'final decision regarding the application of the regulations to the property at issue.'" Def.'s Mot. at 25 (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985)).[19] According to defendant, Mr. Strubel "steadfastly refused to participate in the regulatory process by obtaining BLM authorization for his occupancy and BLM approval of his MPO." Def.'s Mot. at 23. Thus, the government contends, the "extent" of allowable mining was never determined. *See id*. at 24-25.

This case, however, is not at all similar to the Supreme Court precedents cited by defendant, in which the wide range of potential development available rendered an analysis of the economic impact of application denials premature. In *Williamson County*, the denial of an application to develop 688 housing units was challenged, with the property owner contending that but 67 units would be allowed under the regulations as applied, and the local government representing that as many as three hundred units could be approved. 473 U.S. at 181-82. The Supreme Court held that until variances were sought to resolve some of the government's objections to the proposed development, the scope of use and resulting economic impact could not be determined. *Id*. at 188-91, 193-94. In *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), the government denial concerned "only one intense type of residential development," and the property owner did "not contend that only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking." 477 U.S. at 352 n.8. There remained "the possibility that some development will be permitted." *Id*. at 352.

In contrast, an unpatented mining claim is a possessory interest in minerals located on public land, *see Locke*, 471 U.S. at 86, and mining can be performed in but a finite number of ways. Plaintiff alleges that only by use of a hydraulic means of mining could gold be profitably extracted from the subject properties. *See* Tr. 2008 at 92-94; Tr. 2007 at 33-34 (Mr. Strubel alleging that the application of the BLM regulations "left [him] no remedy but to go out of business"), 36, 50 (plaintiff alleging that current occupants of the Leopold Mine were able to make economical use of it by illegally using water, mining at night to escape detection). His takings claim can thus be understood as alleging that only the hydraulic mining he proposed "would avert a regulatory taking." *MacDonald*, 477 U.S. at 352 n.8.

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[19] Although this specific ripeness argument was developed under the *prudential* branch of the Supreme Court's ripeness jurisprudence, *see Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997), the Federal Circuit has held it to be a jurisdictional question. *See Morris v. United States*, 392 F.3d 1372, 1375 (Fed. Cir. 2004).

And as to that extent of use, plaintiff received a final decision from BLM. The government oddly equates the rejection of plaintiff's plan of operations for failing to meet its requirements as a "refus[al] to participate in the regulatory process," and argues that failure to obtain government approval precludes a takings claim from ripening. Def.'s Mot. at 23. But, unlike *Morris v. United States*, 392 F.3d 1372 (Fed. Cir. 2004), in which the relevant application was never filed, *see* 392 F.3d at 1374-76, here a mining plan of operations was filed and rejected. *See* App. to Def.'s Mot. at 79-82. And while it is true that BLM, in rejecting the plan, noted that until various state permits are issued the agency could not determine the impact of any permit conditions on "the scope of the mining allowed," the decision also stated:

> In your situation, you must have water rights in order to divert water from the N. Fork of Galice Creek for your proposed activities. Without water rights, you cannot legally mine. You depend on water in every facet of your operations, and without the right to use water, your proposed activities cannot occur.

Id. at 81; *see also id.* at 77 (BLM letter stating: "Without water rights sufficient to allow you to mine your plan of operations would appear moot."). Thus, BLM determined that plaintiff could not run his proposed hydraulic mining operation unless he had water rights. Attached to the decision were a letter from the OWRD to the Strubels informing them that their diversion of water was illegal, *see id*. at 84, and an OWRD memorandum stating that there was no water right of record for the Leopold Mine. *See id*. at 85. Furthermore, the OWRD deputy watermaster for Josephine County testified in the district court proceedings that the Leopold Mine had no water rights, that "no water [was] available for new types of uses," and that Mr. Strubel could not legally divert water from Galice Creek. Att. to Compl. at 2-3.

Under these circumstances, the Court concludes that the rejection of the proposed MPO constituted a final decision by the federal government that Mr. Strubel could not use hydraulic methods to operate the Leopold Mine. Plaintiff maintains that it would have been futile to make any further applications to BLM, because the water rights were denied by the state. *See* Tr. 2007 at 34; Pl.'s Opp'n at 2 (arguing "application couldn't possibly pass"). As the Federal Circuit has explained, "[s]ubmitting a new application is futile when unchanging facts and applicable law preclude a permit." *Cooley*, 324 F.3d at 1303 (citing *Bayou des Familles Dev. Corp. v. United States*, 130 F.3d 1034, 1040 (Fed. Cir. 1997)). Since plaintiff's plan of operations could not be approved unless he had water rights, and this fact seems to have been decided against him by the State of Oregon, it would have been futile to submit additional applications. Insofar as Mr. Strubel is contending that his interests in the unpatented mining claims had value only if hydraulic methods of mining are utilized, this claim is ripe for review. *Cf. MacDonald*, 477 U.S. at 352 n.8. The government's Rule 12(b)(1) motion to dismiss the case on ripeness grounds is thus DENIED.

c. A challenge to the application of the regulations is not time-barred.

One of the takings theories that Mr. Strubel appears to advance is that the mere application of regulations to his unpatented mining claims, regardless of the resulting economic

impact, deprived him of vested property rights. *See* Tr. 2007 at 17-18. Plaintiff lays the blame for this application on the district court, *id*. at 19, but defendant contends that this theory amounts to a facial challenge to the regulations. *See* Def.'s Mot. at 25-26. The government's position is that if plaintiff contends that the regulations' "very existence abrogated his rights," *id.* at 26, the six-year limitations period of 28 U.S.C. § 2501 began to run when the regulations were first promulgated -- the Title 43 subpart 3715 regulations in 1996, and the subpart 3809 regulations in 1980. Def.'s Mot. at 26 (citing 61 Fed. Reg. 37,125-30 (July 16, 1996); 45 Fed. Reg. 78,902, 78,909-15 (Nov. 26, 1980)).

The government's argument, in essence, is that if a property owner alleges that a law or regulation would necessarily result in a taking when applied to his property, then his takings claim may only be brought as a facial challenge, within six years of the enactment of the law or regulation. Defendant cites no authority for this proposition, which would "put an expiration date on the Takings Clause," contrary to the Supreme Court's admonition in *Palazzolo*, 533 U.S. at 627. Moreover, the proposition seems particularly inapt in this case, where plaintiff complains of the application of an MPO requirement that does not apply to all mining claims in all circumstances, but only to "operations greater than casual use," 43 C.F.R. § 3809.11(a) -- which appears to mean the disturbance of more than five acres of public lands. *Cf.* 43 C.F.R. § 3809.21(a) (providing that mere notice suffices when five acres or fewer are disturbed). Hence, plaintiff's takings claim is of the as-applied variety, and was filed within six years of BLM's August 30, 2000 denial of the proposed MPO, *see* App. to Def.'s Mot. at 79-82, and the subsequently-issued permanent injunction. *See id*. at 117-20. The government's RCFC 12(b)(1) motion to dismiss based on the statute of limitations is thus DENIED.[20]

2. Failure to State a Claim

The government moves in the alternative for a dismissal of the case under RCFC 12(b)(6), for failure to state a claim upon which relief can be granted. Def.'s Mot. at 1, 26-32. After carefully considering the arguments of the parties, and scrutinizing the various submissions of the plaintiff, the Court concludes that the government's motion to dismiss is warranted.

First, Mr. Strubel's allegations do not state a claim for a Takings Clause violation insofar as he is alleging that his property was taken by the district court's determination that he needed an approved MPO in order to hydraulically mine, and occupy, the lands comprising the Leopold Mine, *see* Tr. 2007 at 19; by the subsequent permanent injunction that was issued after the MPO was rejected, *id.* at 11-12, 20; or by the United States Marshals' removal of the Strubels and their

[20] To the extent that plaintiff's complaint can be construed as raising claims of Due Process Clause violations, *see* Tr. 2007 at 31, such claims would be beyond our Court's jurisdiction -- as that constitutional provision is not money-mandating. *SeeLeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995); *Carruth v. United States*, 224 Ct. Cl. 422, 445 (1980). Plaintiff's due process claims are thus DISMISSED for lack of subject-matter jurisdiction.

belongings, under a writ of assistance issued to enforce the injunction. *Id* at 32. Plaintiff's argument that the district court erred in applying the regulations to his property is a matter for the United States Court of Appeals for the Ninth Circuit, which denied plaintiff's appeal. *United States v. Strubel*, 22 Fed. Appx. 918; *see* App. to Def.'s Mot. at 125. Because our Court cannot review the decisions of federal district courts, we "cannot entertain a taking claim that requires [our Court] to 'scrutinize the actions of' another tribunal." *Vereda, Ltda. v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001) (quoting *Allustiarte v. United States*, 256 F.3d 1349, 1352 (Fed. Cir. 2001)). Moreover, to the extent plaintiff is arguing that a *mistake* (by either the district court or BLM) in applying the regulations to require that he obtain approval for an MPO constituted a taking, as opposed to the impact of that mistake, he fails to articulate a takings claim. *See Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 803 (Fed. Cir. 1993).

Second, plaintiff's allegations that a taking resulted from the mere requirement that he obtain approval from BLM before he could mine and continue to occupy the land, *see* Tr. 2007 at 18, fail to properly state a claim. As defendant notes, *see* Def.'s Mot. at 29, the Supreme Court has explained: "A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985).

Finally, the closest that Mr. Strubel comes to stating a claim upon which relief can be granted is in his allegations that the only economically viable use of the six unpatented mining claims is by hydraulic mining, which was foreclosed by BLM's rejection of his proposed MPO. *See* Tr. 2008 at 60-61, 92-94; Tr. 2007 at 33, 36, 50. As the Court noted above, BLM expressly and with finality determined that "without the right to use water, [plaintiff's] proposed activities cannot occur." App. to Def.'s Mot. at 81. But in this regard, it is not BLM's rejection of the proposed plan of operations that eliminates viable use of the mining claims, but rather the lack of water needed to hydraulically mine the land. This is a matter between Mr. Strubel and the State of Oregon, not a takings claim against the United States. It was not the federal government which denied water rights for the Leopold Mine, but rather the state. *See id*. at 84-85. As this is not an instance where a state agency is acting as an agent of the United States, a takings claim against the OWRD may not be brought here, *see Hassan v. United States*, 41 Fed. Cl. 149, 150 (1998), and plaintiff's allegations fail to state a takings claim against the United States. For this reason and the reasons stated above, the government's RCFC 12(b)(6) motion to dismiss the case is GRANTED.

III. CONCLUSION

The Court has determined that plaintiff had standing to bring his as-applied takings challenge against BLM, and that this challenge was ripe and was timely brought. Defendant's motion to dismiss the case for lack of subject matter jurisdiction is thus **DENIED.** The Court further determined that plaintiff has failed to state a claim upon which relief can be granted; defendant's motion to dismiss the case under RCFC 12(b)(6) is thus **GRANTED.** The Clerk shall enter judgment accordingly. No costs shall be awarded.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge