No. 15-5084

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REOFORCE, Inc., Theodore SIMONSON, and Ronald STEHN,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the
United States Court of Federal Claims
Honorable Bohdan A. Futey, Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN EXPLORATION & MINING ASSOCIATION, AND INDUSTRIAL MINERALS ASSOCIATION - NORTH AMERICA, IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565

Counsel for Amici Curiae Pacific Legal Foundation, American Exploration & Mining Association, and Industrial Minerals Association - North America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public. Amicus American Exploration & Mining Association, a nonprofit trade association, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public. Amicus Industrial Minerals Association - North America, a nonprofit trade association, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REOFORCE, Inc., et al. v. UNITED STATES OF AMERICA

No. 15-5084

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) AMICUS certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Pacific Legal Foundation, American Exploration & Mining Association, and Industrial Minerals Association - North America

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

4. ☐ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

None.

July 17, 2015
Date

s/ Brian T. Hodges
Signature of counsel

Brian T. Hodges
Printed name of counsel

Please Note: All questions must be answered

cc: All parties via appellate CM/ECF

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CONSENT TO FILING

All parties consent to the filing of this brief.

IDENTITY AND INTEREST OF AMICI

Pursuant to Federal Rule of Appellate Procedure 29, Pacific Legal Foundation (PLF), American Exploration & Mining Association (AEMA), and Industrial Minerals Association - North America (IMA-NA) submit this brief amicus curiae in support of Plaintiffs-Appellants Reoforce, Inc., Theodore Simonson, and Ronald Stehn, and in support of reversal. Because of their history and experience with regard to issues affecting private property rights and mining rights, amici believe that their perspectives will aid this Court in considering the parties' arguments.

PLF was founded over 40 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Horne v. Department of Agriculture*, __ S. Ct. __ (June 22, 2015); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Palazzolo v. Rhode Island*, 533 U.S.

606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

AEMA (formerly Northwest Mining Association) is a 120-year-old, 2,500-member national association representing the minerals industry with members residing in 42 states, 7 Canadian provinces or territories, and 10 other countries. AEMA is the recognized national voice for exploration, the junior mining sector, and maintaining access to public lands, and represents the entire mining life cycle, from exploration to reclamation and closure. Its broad-based membership includes many small miners and exploration geologists as well as junior and large mining companies, engineers, equipment manufacturers, technical services, and vendors of equipment and supplies. More than 80% of AEMA's members are small businesses or work for small businesses. Most of its members are individual citizens.

IMA-NA is a nationally recognized trade organization that represents producers and processors of industrial minerals in North America and associate members providing goods and services to the industrial minerals sector. Membership comprises companies that are leaders in the ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, magnesia, mica, soda ash (trona), talc, wollastonite and other industrial minerals industries. Industrial minerals are critical to the manufacturing processes of many everyday products,

including glass, ceramics, paper, plastics, rubber, detergents, insulation, pharmaceuticals, and cosmetics. They also are used in foundry cores and molds used for metal castings, paints, filtration, metallurgical applications, refractory products, and specialty fillers. IMA-NA is the principal trade association representing the industrial minerals industry in North America.

No counsel for a party authored this brief in whole or in part. No person or entity other than amici curiae contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION

This case raises issues of vital importance to mining interests across the nation. Specifically, this Court must determine *when* a protected property interest in an unpatented mining claim arises. Does the property interest arise when the owner satisfies the criteria for establishing a claim? Or does it arise as the result of an after-the-fact administrative procedure designed to settle disputes over whether the owner had satisfied the criteria? Both case law and common sense say that it is the former—when a valuable mineral deposit is properly located in accordance with the applicable federal statutes and regulations, the mining claim becomes a fully vested property right. *See, e.g., Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 316 (1930). In the decision below, however, the trial court concluded that Reoforce's mining claims did not vest and become compensable property rights until the Bureau

of Land Management (BLM) agreed to issue a determination of validity as part of a 2008 settlement agreement—decades after Reoforce first located the claims. *Reoforce, Inc. v. United States*, 118 Fed. Cl. 632, 663, 666 (2014).

Establishing *when* the property rights arose in this case is a matter of constitutional significance because determining the date when the company acquired a compensable property establishes the period of the alleged temporary taking and will set a baseline for evaluating both the impact and character of the government's actions. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987); *see also American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). The trial court's decision undermines mining interests across the nation by casting a shadow of uncertainty over the vesting process. If the decision were to stand, it would subvert the protections guaranteed by both the General Mining Law of 1872 and the Takings Clause by giving agencies plenary power to divest owners of lawfully established property rights simply by filing an after-the-fact administrative contest challenging the validity of an unpatented mining claim.

ARGUMENT

I

PROPERTY RIGHTS IN AN UNPATENTED MINING CLAIM EXIST WITH OR WITHOUT AGENCY RECOGNITION

A. Property Rights Vest upon the Discovery of a Valuable Mineral Deposit

Congress enacted the General Mining Law of 1872 (General Mining Law), 30 U.S.C. § 21, *et seq.*, to create an orderly and predictable system for establishing protected property rights in mining claims in the wake of the claim-jumping mayhem that surrounded the California Gold Rush of 1849 and other mining booms during the Civil War.[1] *See United States v. Coleman*, 390 U.S. 599, 602 (1968) ("The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense."). Under the General Mining Law, individuals could, upon their own initiative and investment, acquire valuable property rights in federal lands in exchange

[1] General Mining Law of 1872, ch. 152, 17 Stat. 91 (1872), amended by Mining and Minerals Policy Act of 1970, Pub. L. No. 91-631, 84 Stat. 1876 (codified as amended at 30 U.S.C. §§ 21-54 (1994)). The General Mining Law modified the Mining Law of 1866, ch. 262, 14 Stat. 251 (1866), and the Placer Act of 1870, ch. 235, 16 Stat. 217 (1870), which were the first federal efforts at a comprehensive legislative scheme for mining on the public lands. In addition, the General Mining Law modified the Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862). For a description of the evolution of American mining law, *see* John D. Leshy, *The Mining Law, A Study in Perpetual Motion* 9-25 (1987); Stephen D. Alfers et al., *Coping with Mining Law Reform*, 37 Rocky Mtn. Min. L. Inst. § 12.02, at 12-5 to 12-13 (1991).

for the discovery and development of this nation's natural mineral resources.[2]

Essential to this system is the provision for the location of mining claims by those who have discovered mineral deposits:

> [A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States . . . under regulations prescribed by law. . . .

30 U.S.C. § 22. In addition, the General Mining Law provides that locators of mining claims on such mineral deposits have the exclusive right of possession to that deposit:

> The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain . . . so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all of the veins, lodes, and ledges . . . .

30 U.S.C. § 26. Together, sections 22 and 26 of the General Mining Law provide that locators can acquire an exclusive possessory interest in federal land for mining

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[2] Federal law requires that mining locations be made in good faith for the purpose of mining, processing, or prospecting for valuable minerals. 30 U.S.C. § 612; *United States v. Nogueira*, 403 F.2d 816, 823-24 (9th Cir. 1968). Federal law also subjects mineral locators to such state location requirements as are not inconsistent with federal mining provisions. *Kendall v. San Juan Silver Mining Co.*, 144 U.S. 658 (1892). Over time, the Western states enacted supplemental state laws that assist in determining: (1) the manner for marking claim boundaries; (2) the amount and type of discovery work required at the time of locating a claim; (3) the recording requirements of notices of location; and (4) the documentation requirements of annual assessment labor. *See, e.g.*, Cal. Pub. Res. Code § 2710-19 (California Surface Mining and Reclamation Act of 1975).

purposes and an exclusive right to extract and sell minerals.[3] *Kunkes v. United States*, 78 F.3d 1549, 1550-51 (Fed. Cir. 1996).

The General Mining Law created a system that is self-executing—*i.e.*, no federal permit or approval is necessary to locate and perfect an unpatented mining claim. *See Union Oil Co. of Cal. v. Smith*, 249 U.S. 337, 346 (1919); *Davis v. Nelson*, 329 F.2d 840, 845 (9th Cir. 1964). By operation of law, the locator of a mining claim will acquire equitable title to the mineral rights—a compensable property right—upon the discovery of a valuable mineral deposit within the limits of the claim, and when all statutory requirements are met. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963). Although legal title to the land remains in the United States, an unpatented mining claim "is a property right in the full sense, unaffected by the fact that the paramount title to the land is in the United States." *Union Oil Co. of Cal.*, 249 U.S. at 349; *see also Skaw v. United States*, 13 Cl. Ct. 7, 29 (1987) (Unpatented mining claims are "real property in the highest sense."), *aff'd*, 847 F.2d 842 (Fed. Cir. 1988); *Kunkes v. United States*, 32 Fed. Cl. 249, 252 (1994) (The holder of an unpatented claim "enjoys a valid, equitable title in the claim, possessing all of the incidents of real property."), *aff'd*, 78 F.3d 1549 (Fed. Cir. 1996); *Ford v. United*

[3] The holder of an unpatented mining claim may apply for a patent, which transfers a fee simple to the owner. 30 U.S.C. § 29. But, as discussed below, a claim holder does not need to apply for a patent in order to hold property rights protected by the Fifth Amendment.

States, 101 Fed. Cl. 234, 238 n.6 (2011) ("An unpatented mining claim is an interest in only the minerals in the land and not in the land's surface; the government retains fee title to the land."), *appeal dismissed*, 463 Fed. Appx. 926 (Fed. Cir. 2012). Furthermore, this right constitutes a property interest "which is within the protection of the Fifth Amendment's prohibition against the taking of private property for public use without just compensation." *Skaw v. United States*, 740 F.2d 932, 936 (Fed. Cir. 1984) (citations omitted).

The government, as the holder of fee title to the public lands, has authority to stop the public from establishing new claims by withdrawing certain lands from mineral entry. *Kosanke v. U.S. Dep't of Interior*, 144 F.3d 873, 874 (D.C. Cir. 1998). But the effect of withdrawal is prospective in nature—it stops prospectors from continuing in their efforts to discover a valuable mineral deposit on those public lands. *National Wildlife Federation v. Burford*, 835 F.2d 305, 308 (D.C. Cir. 1987). Persons who established a valid claim prior to withdrawal continue to hold protected property rights in that claim. *See Center for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 638 (9th Cir. 2010) ("[O]nly persons who had established a valid mining claim before withdrawal would be permitted to mine on those parcels.") (citing *Clouser v. Espy*, 42 F.3d 1522, 1524-25 (9th Cir. 1994)). Thus, in order to avoid liability for a taking when the government withdraws land from the scope of the General Mining Law, it will typically include a grandfather provision—as it did in this

case—that allows for the continuance of mining activity on claims deemed to be valid at the time of withdrawal. *See, e.g.*, *Cameron v. United States*, 252 U.S. 450, 456 (1920); *Skaw*, 740 F.2d at 935-38; *Converse v. Udall*, 399 F.2d 616, 622 (9th Cir. 1968).

B. A Validity Proceeding Does Not Create a Property Right in a Mining Claim; Rather, It Confirms the Right's Existence

The purpose of a validity proceeding is to resolve a dispute whether a locator satisfied the criteria for establishing a valid mining claim.[4] *Skaw*, 740 F.2d at 936. In this case, BLM, as part of an agreement to transfer ownership of a larger section of forest lands to California, decided to withdraw the lands on which Reoforce had located claims. *Reoforce*, 118 Fed. Cl. at 652. In the 1995 memorandum of understanding, BLM agreed to conduct validity examinations in order to determine what lands were not conveyed to California due to being encumbered by unpatented mining claims. *Id*.; *see also* 43 C.F.R. § 6304.12(a) ("BLM will conduct a mineral examination to determine whether your claim or site was valid as of the date that lands

[4] Not every discovery of a mineral deposit will confer property rights to the locator. Over the years, courts have qualified the phrase "valuable mineral deposit" to require the discovery of *marketable* minerals. *See Coleman*, 390 U.S. at 602 ("The obvious intent [of the General Mining Law] was to reward and encourage the discovery of minerals that are valuable in an economic sense."). "To determine whether a claim is valid, BLM conducts a mineral examination. If the examination indicates the lack of discovery of a valuable mineral deposit or that the applicant failed to meet other administrative requirements under the Mining law, the BLM may initiate an administrative mining contest proceeding to challenge the validity of the claim[.]" *Freeman v. U.S. Dep't of Interior*, 37 F. Supp. 3d 313, 321 (D.D.C. 2014).

within the wilderness area were withdrawn from appropriation under the mining laws. We also will determine whether your claim or site remains valid at the time of the examination."). In 2006, BLM completed its examination of Reoforce's claims and initiated a contest proceeding to determine whether the mining company had, in fact, discovered marketable minerals. *Reoforce*, 118 Fed. Cl. at 658-59. Two years later, BLM agreed to settle the contest proceeding with a determination that several of the challenged claims were valid. *Id*. at 659-60.

Importantly, a validity proceeding is a *discretionary* administrative proceeding initiated by the filing of a contest complaint by the government or a private party. *See Best*, 371 U.S. at 337; *Cook v. United States*, 85 Fed. Cl. 820, 824 (2009) ("Consistent with the power to inquire into the validity of the claims, the government may initiate an administrative contest proceeding 'for any cause affecting the legality or validity' of mining claims within federal ownership.") (quoting 43 C.F.R. § 4.451), *aff'd*, 368 F. App'x 143 (Fed. Cir. 2010). A determination of validity is not a necessary prerequisite for mining activities to occur—if no one contests a claim, the mine can operate, subject to an approved plan of operations. *See United States v. Schumway*, 199 F.3d 1093, 1108 (9th Cir. 1999) (Holding that an owner, who was in compliance with mining law, had vested rights in an unpatented mining claim, even where the government had not yet acted on an application for a patent).

The sole purpose of a contest proceeding is to "recognize" valid mining claims while "eliminating" invalid ones. *Best*, 371 U.S. at 336 (quoting *Cameron*, 252 U.S. at 459-60); *Skaw*, 13 Cl. Ct. at 28-29. Such a validity proceeding cannot create property rights. The Court of Federal Claims addressed this precise point in *Cook v. United States*, 37 Fed. Cl. 435, 440-43 (1997).[5] In that case, the government argued that a vested property right in a mining claim will only accrue after an administrative determination of validity. *Id*. at 440. The court rejected the government's argument, explaining that the validity proceeding is determined based on objective facts that occurred at the time the claim was first registered—specifically, the discovery of a valid valuable mineral deposit. *Id*. at 443 ("either the land contains such a deposit or it does not"). The court continued, "at the time an applicant files an application and describes the land for which it seeks a patent, the applicant either has or has not satisfied the term and condition that the land contain a valid valuable mineral deposit." *Id*. An after-the-fact "mineral examination by the BLM does not alter the existence or nonexistence of a valid mineral deposit but instead merely enables the BLM to confirm or dispute that the applicant has made such a discovery." *Id*. Thus, to the extent the validity contest "confirms the applicant's claim that the land contains the requisite valuable mineral deposit, it necessarily follows that at the time the applicant

[5] *Cook* involved a patent application, which requires BLM to conduct a determination of validity and review the application for compliance with regulations.

filed the patent application, it had complied with [the requirement] that it had discovered a valid valuable mineral deposit on public land." *Id*.

As the *Cook* court recognized, "there is a critical distinction between the discovery [. . .] of a valid valuable mineral deposit [. . .] and the BLM's verification of that discovery." *Id*. at 443. The former is a statutory requirement for establishing a valid mining claim, whereas the latter "involves the BLM's administration of its own affairs and is not a provision with which the applicant can comply." *Id*.

This principle is exemplified in two of the Supreme Court's foundational mining law cases. In *Cameron v. United States*, for example, the Supreme Court explained that the passing of equitable title—the title at issue with regard to unpatented mining claims—is not coincident in time with the BLM making a final determination of validity. 252 U.S. at 460-61. At issue in that case was whether BLM could determine the validity of a mining claim after the owner filed an application for a patent, the issuance of which would divest the government of the ability to contest a claim. *Id*. The Court held that BLM had authority to determine the validity of such a claim. *Id*. But in so holding, the Court confirmed that an unpatented mining claim was a present property interest, explaining that until the patent issued the government held the title in trust for the claim owner, who "may not be dispossessed of his equitable rights without due process of law." *Id.* Therefore, under *Cameron*, a validity determination is not a prerequisite to the existence of property rights, "but

rather merely confirms whether or not equitable title previously passed." *Cook*, 37 Fed. Cl. at 444; *see also Preston v. Hunter*, 67 F. 996, 998 (9th Cir. 1895) (A mineral locator's rights will attach from the date he or she perfects the record supporting the claim.).

Similarly, in *Best*, the government filed a lawsuit in a federal district court, seeking to condemn an unpatented mining claim and to eject the owner from the lands on which the claim was located. 371 U.S. at 336-37. The owner argued that, by filing a condemnation action, the government was enjoined from contesting the validity of the claim in an administrative proceeding, which, if determined in favor of the government, would render the property right null and absolve the government of any obligation to pay just compensation. *Id*. The Supreme Court rejected the owner's argument, but in doing so, confirmed that the rights in an unpatented claim are not coincident in time with a determination of validity. *Id*. at 340. The Court explained that, if the claim was determined to be valid, the period of the compensable taking would be from the date of the location of the claim until the date of the condemnation order—a period wholly unrelated to the validity proceeding. *Id*.

The decision below, which concluded that Reoforce did not have a protected property interest in its unpatented mining claims until BLM issued a determination of validity as part of a 2008 agreement to settle the government's contest proceeding,[6]

[6] *Reoforce*, 118 Fed. Cl. at 663, 666.

is in conflict with binding precedent and must be reversed. If the trial court's decision were to stand, it would create an "equitable title" that is devoid of any rights, contrary to the Supreme Court's understanding of property law. *Best*, 371 U.S. at 336; *Union Oil Co. of Cal.*, 249 U.S. at 349. Furthermore, the lower court's decision conflicts with the plain language of BLM's 2008 memorandum of understanding, which stated that the agency would conduct validity examinations in order to determine what lands were not conveyed to California due to being encumbered by unpatented mining claims. *Reoforce*, 118 Fed. Cl. at 652.

II

THE TRIAL COURT'S MISUNDERSTANDING OF THE RIGHTS ASSOCIATED WITH UNPATENTED CLAIMS UNDERMINED ITS TAKINGS ANALYSIS

A. The Government May Be Held Liable for a Temporary Taking for Blocking Productive Use of a Valid Unpatented Mining Claim

The trial court's conclusion that Reoforce's property rights arose only as the result of BLM's determination of validity is harmful to mining interests across the nation. In order to prove a compensable taking, the claimant must first show that he or she possesses a valid property right affected by governmental action, and then, if claimant does possess a compensable property right, he or she must next show that the governmental action at issue constituted a taking of that right. *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000). This entire analysis, however, was

short-circuited by the lower court's threshold conclusion that, even if BLM had suspended mining operations on Reoforce's claims, such actions could not have effected a taking so long as BLM's contest proceedings remained to be completed. *Reoforce*, 118 Fed. Cl. at 663, 665-66. Carrying that erroneous logic forward, the trial court found every factor of its regulatory takings analysis against Reoforce because, according to the court, the company could not have any reasonable investment-backed expectations, nor could it be negatively impacted, when the company had no right to make use of its claims until BLM issued a determination of validity.[7] *Id*. at 665-68.

The Supreme Court has repeatedly recognized that a temporary interference with property rights by the government can give rise to a taking. *See, e.g., Arkansas Game & Fish Comm'n*, 133 S. Ct. at 522-23. This recognition is based on the fundamental principle that the government must compensate a landowner to the extent that it exercises dominion over the landowner's rights and inflicts irreparable harm thereto. *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177-78 (1871). Thus, a temporary regulatory policy that takes an interest in property is no different in kind than a permanent appropriation in that both have the effect of depriving an

[7] Reoforce's temporary regulatory takings claim was decided under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), where takings liability turns on an "essentially ad-hoc, factual inquiry" that takes into account the economic impact, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action. *Reoforce*, 118 Fed. Cl. at 666.

owner of his or her rights in the land. *First English*, 482 U.S. at 318. Just compensation for a taking must be made regardless of whether the interference continues for a period of months, years, or indefinitely. *See, e.g.*, *United States v. Dow*, 357 U.S. 17, 18-19 (1958); *International Paper Co. v. United States*, 282 U.S. 399, 407-08 (1931). Simply put, where the government has taken private property, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English*, 482 U.S. at 321.

Contrary to the lower court's decision, BLM's decision to contest the validity of Reoforce's claims cannot preclude a takings claim. In *Pettro v. United States*, for example, the Court of Federal Claims found a compensable taking of both full and equitable titles to minerals where the United States, after receiving the results of a title search, informed the owner, Shirl Pettro, that the government owned the rights and ordered him to cease all mining operations. 47 Fed. Cl. 136, 140-43 (2000). The United States sued Pettro to quiet title to the mineral rights and Pettro counterclaimed. *Id*. at 143. The parties eventually settled the lawsuit, agreeing that Pettro did in fact own the mineral estate. *Id*. After the quiet title action was concluded, Pettro sued the United States for a temporary taking, based on the government's refusal to allow him to use the mineral estate during the time period he was subject to the cease and desist orders. *Id*. The court found that the government had effectively deprived Pettro of

his property during the period of time it contested ownership of the mineral rights: "[T]he government's words and actions indicated to all involved that the United States considered itself the owner of the sand and gravel rights. Thus, the court holds that the Forest Service's actions constituted a taking, as they temporarily deprived Shirl Pettro of his entire property interest." *Id.* at 148 (citations omitted).

Similarly, in *Yuba Goldfields, Inc. v. United States*, the U.S. Army Corps of Engineers wrote the property owner, asserting "that Yuba had no extraction or other rights, [and] that Yuba would be held accountable for removal of any precious metals that may legally belong to the government . . ." 723 F.2d 884, 885-86 (Fed. Cir. 1983). Yuba, whose title in the mineral rights dated back to 1905, sued for a regulatory taking. On summary judgment, the trial court ruled that Yuba owned the mineral rights, but rejected its takings claim. *Id*. at 886. The Federal Circuit reversed and remanded the case for a trial on the merits, concluding that there was evidence on the record showing that the government had exercised control over Yuba's property—specifically, the government's decision to prohibit the company from engaging in ordinary mining operations for a period of six years under threat of legal action. *Id*. at 887-88, 891. In subsequent proceedings, the Federal Circuit confirmed that the Corps' letter, in which the government contested Yuba's title and barred any

economic use of the mineral rights during the pendency of the title dispute, effected a temporary taking. *Yuba Natural Res., Inc. v. United States*, 821 F.2d 638, 641 (Fed. Cir. 1987).

In both *Pettro* and *Yuba*, the United States had restrained property owners from exercising mining rights during the time when the government contested ownership of the claims. In both cases, the courts concluded that government title contests—even when brought in good faith—did not preclude the owners from bringing a takings claim where the government did more than simply assert a claim, but rather interfered with private property rights pending resolution of the ownership challenge. *Yuba Goldfields*, 723 F.2d at 889; *Pettro*, 47 Fed. Cl. at 148. The same principles should apply in this case. Throughout the 1980s and early 1990s, Reoforce located, invested in, and registered multiple claims. *Reoforce*, 118 Fed. Cl. at 641-52. In 1987, BLM conditionally approved Reoforce's plan of operations. *Id*. at 643. Then, in 1995, the government entered into a memorandum of understanding with California, withdrawing the subject lands from mining location and suspending operations on Reoforce's claims pending a BLM determination of existing rights. *Id*. at 652. It took 13 years, however, for the agency to issue a determination of validity as part of a settlement agreement in 2008. *Id*. at 658-59. During that 13-year period,

the government barred Reoforce from making any economically viable use of its mining claims, giving rise to a cognizable temporary regulatory takings claim. The lower court's conclusion to the contrary should be reversed.

B. The Decision Below Revives the "Notice Rule," Which the Supreme Court Rejected in *Palazzolo v. Rhode Island*

The trial court, in assessing Reoforce's regulatory takings claim, resurrected the unconstitutional "notice rule" that the Supreme Court expressly repudiated in *Palazzolo*, 533 U.S. at 626-30 (2001). *See Reoforce*, 118 Fed. Cl. at 667-8. The notice rule prevents property owners from challenging regulations that were enacted prior to their acquisition of property. *See* Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. Haw. L. Rev. 533, 533 (2002) ("[T]he 'notice rule' is the doctrine limiting the regulatory takings claim of property owners who acquire their interest after governmental restrictions are promulgated or deemed foreseeable."). In this case, the lower court held that Reoforce lacked investment-backed expectations in its mining claims merely because mining is a highly regulated industry. *Reoforce*, 118 Fed. Cl. at 667-8. The trial court's reasoning leads to the same problem that caused the Supreme Court to reject the notice rule in *Palazzolo*—it does not allow a property owner to challenge a regulation that preexisted his ownership as having effected a

taking, even if that regulation deprives the owner of a substantial part of the value of his property. *See* Eagle, *supra*, at 537 (describing notice rule as "an unbounded subversion of property rights").

Palazzolo gave three reasons for rejecting the notice rule. First, the notice rule allows the government to put an "expiration date" on the Takings Clause, since transferring title from one owner to another would deprive the new owner of the ability to bring a takings claim and thereby validate any unconstitutional regulations that affect the property. 533 U.S. at 627. Second, the notice rule prejudices current owners by depriving them of the ability to transfer the full property interest they owned prior to the enactment of the challenged regulation. *Id.* at 627-8. This is because the current owner—who could bring a takings claim and has a right to just compensation—would be transferring to the new owner property encumbered by regulations for which the new owner could not be compensated. *Id.* Third, the transfer of title does not convert an existing regulation into a "background principle" of state law that will prevent a new owner from bringing a takings claim. *Id.* at 629-30 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029-30 (1992)). In sum, a property owner is not barred from prevailing on a takings claim merely because he acquired the property after the challenged regulation went into effect. *Id.* at 630.

Nevertheless, the trial court concluded that Reoforce could not prevail on its takings claim because it must have taken possession of the property subject to such

intrusive regulation. *Reoforce*, 118 Fed. Cl. at 667-68. Such reasoning runs counter to the Supreme Court's rejection of the notice rule in *Palazzolo* and should be reversed. Reoforce deserves to have its takings case determined on the merits, not dismissed based on a rule that precludes inquiry into "the actual burden imposed on property rights, [] how that burden is allocated, [or] when justice might require that the burden be spread among taxpayers through payment of compensation." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542-43 (2005).

C. The Decision Below Creates an Incentive for Agencies to Over-Regulate Mining Claims to Avoid Liability for a Regulatory Taking

The lower court's opinion also creates the perverse incentive for BLM to both contest valid claims and delay the resolution of those challenges. The clear goal of the Supreme Court's takings jurisprudence is to prevent the government from over-regulating without compensating the landowner, because the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). A doctrine so fundamental to takings law should not be twisted to allow the government to avoid liability by imposing more restrictions on private property. But the decision below encourages the government to do exactly that. The trial court determined that Reoforce lacked a protected property interest in its mining claims—and therefore could not prevail on its takings

claim—because BLM decided to conduct a lengthy validity examination. The lesson for government is that it can avoid regulatory takings liability by subjecting property to more regulation, effectively stripping owners of their protected rights and making it impossible for owners of unpatented claims to win takings cases.

The trial court's conclusion conflicts with the purpose of the Takings Clause, which is designed "to preserve practical and substantial rights" that individuals have in their property. *United States v. Dickinson*, 331 U.S. 745, 748-49 (1947). That purpose is not served when courts develop procedures designed to dispose of otherwise meritorious takings claims. *Id.*; *see also Boyd v. United States*, 116 U.S. 616, 635 (1885) ("Illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."). As shown in *Yuba Goldfields* and *Pettro*, the fact that a validity contest is authorized by regulation does not automatically render BLM immune from takings liability for actions that interfere with an owner's rights in his or her property, nor does it reduce an owner's property rights. Indeed, the lesson of *Palazzolo* is that a court should give no weight to a regulation that is alleged to effect a taking when determining whether the owner has a legitimate expectation to use of his or her property: "The 'investment-backed expectations' that the law will take into account do not include the assumed validity

of a restriction that in fact deprives property of so much of its value as to be unconstitutional." *Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring).

Creating a rule that removes all agency actions against unpatented mining claims from the protections of the Takings Clause is both unnecessary and overly broad. Reoforce deserves to have its takings claims resolved under the established principles of takings law—not under a rule that precludes meaningful consideration of the case on its merits. *See Arkansas Game & Fish Comm'n*, 133 S. Ct. at 519.

CONCLUSION

The purpose of the validity determination in this case was to find out whether Reoforce had established property rights in the mining claim *before the land was withdrawn from mining activities*. The trial court's conclusion to the contrary conflicts with well-settled law that it is the discovery of valuable mineral deposits—rather than an after-the-fact administrative procedure—that gives rise to a protected property interest in an unpatented mining claim. For the reasons set out above, amici curiae respectfully request that this Court reverse the decision of the Court of Federal Claims.

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Respectfully submitted,

s/ BRIAN T. HODGES

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565

Counsel for Amici Curiae Pacific Legal Foundation, American Exploration & Mining Association, and Industrial Minerals Association - North America

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief complies with type-volume limitation of Rule 32(a)(7)(B), in that it contains 6,463 words.

s/ BRIAN T. HODGES
BRIAN T. HODGES

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ BRIAN T. HODGES
BRIAN T. HODGES