AN UNAMBIGUOUS TAKING, THE ORANGE HILL STORY

A TENUOUS RIGHT

In 2005, former U.S. Attorney General Edwin Meese III commented in a Wall Street Journal article ("The Property Rights Test", WSJ, August 2, 2005) that, 'Few constitutional protections are less ambiguous than the requirement that private property must not be taken for public use "without just compensation.'" In the eyes of a growing number of property owners, Mr. Meese cast his words in the wrong tense. What was an unambiguous right in the minds of the drafters of the Fifth Amendment is today a tenuous right, at best.

The history of the Orange Hill property stands as proof of the ambiguity of the law as it stands interpreted today. By every historical measure, the loss of freedom at Orange Hill is a private property taking, but in today's legal context, the action of the government in denying the beneficial use of the property for thirty one years and an unwillingness to provide compensation has yet to be recognized as a taking.

THE PROPERTY

Orange Hill is located at the terminus of the Nabesna Glacier, the head water of the Nabesna River on the north flank of the Wrangell Mountain, Alaska. The distinctive orange color of the hill stems from the weathering of a large body of disseminated copper, molybdenum, silver and gold mineralization that forms the bedrock of the hill and surrounding area.

At the time of the organization of Northwest Explorations the property ("Property) consisted of the patented claims plus a contiguous group of unpatented mineral claims encompassing approximately 1900 acres. Ultimately, the Property was increased in size to 3,606 acres of contiguous mining claims

The Orange Hill Property is currently a parcel of eighteen patented mineral claims and one patented mill site encompassing 363.23 acres.

A WORLD CLASS COPPER DEPOSIT

At the time of the enactment of ANILCA, the property was under exploration in the third year of an Exploration and Option to Purchase Agreement by U.S. Borax and Chemical Co. At the time of entering into the Agreement, in 1977, Northwest Explorations estimated the indicated reserve to be 165 million tons at a copper equivalent (copper plus molybdenum) grade of 0.40% Cu. In a study conducted by Aventurine Engineering Inc. in 2007 for the National Park Service, Aventurine estimated the Indicated resource of the Orange Hill deposit to be 172,158,000 ton at a grade of 0.309% Cu and 0.028% Mo equal to a Cu equivalent grade of 0.42%, thereby confirming that the Orange Hill

deposit is among the 50% largest copper deposits in the world as determined by the Quantitative Analysis of World Class Deposits published in Economic Geology, Volume 90, 1995 and, thereby, categorized as WORLD CLASS. The gross metal value of the copper and molybdenum in NPS sponsored study, at current (March15, 2012) metal price is $5.4 billion. The NPS study excluded any value assignable to the silver and gold assays, of which the current value alone is of the order of a billion dollars. There are additional values in zinc.

THE HISTORICAL RECORD

Orange Hill was the site of placer gold mining during the early decades of the last century, thus, confirming the existence of gold. By the 1920s, the potential for the development of a large tonnage copper-molybdenum deposit was recognized by the Alaska Nabesna Company, which in 1928 brought to patent a group of eighteen contiguous mining claims covering the hill and surrounding area.

The claims were acquired by the AJV Company (now Geo-Enterprises, Inc.) in 1967 and were contributed to Northwest Explorations Joint Venture at the time of organization in 1970. The organizing participants of Northwest Explorations were the AJV Corporation (Geo-Enterprises), Louisiana Land & Exploration Company, Brown & Root, Inc., and Highland Resources, Inc. The AJV Corporation is a privately owned company headquartered in Spokane. The Louisiana Land & Exploration Company was a NYSE listed company (subsequently merged into Echo Bay Mines, Inc.) Brown & Root, Inc. was a private company organized by the Brown brothers that through mergers is now the NYSE listed company, KBR. Highland Resources, Inc. was a privately owned company owned by George R. Brown founder of Brown & Root, Inc. In 1984, the mineral and petroleum assets of Highland Resources, Inc. were merged into The George R. Brown Partnership, LP. In 1998, the interest of Louisiana Land & Exploration Company was acquired by the remaining Joint Venturers.

Once organized, NWE focused primary attention on exploration of the Orange Hill porphyry copper-molybdenum deposit though it was also active in exploration of the Venture's other holdings of porphyry copper-molybdenum deposits located on Baultoff Creek and Horsfeld Creek on the northeastern flank of the Wrangell Range (also enclosed in the Wrangell-St. Elias National Park), as well as, massive sulfide mineralization in the area of Prince William Sound.

At the close of the 1976 field season drilling at Orange Hill had established an ore reserve estimated to be 165 million tons at an average grade copper equivalent grade of 0.4% (copper plus molybdenum credits). The likelihood of doubling the reserves was considered excellent with the result that the Venture instituted its exit strategy by entering into a five year term Exploration and Option to Purchase Agreement ("Agreement") with U. S Borax and Chemical Co. ("Borax") on June 28, 1977. The terms of the Agreement provided for escalating annual exploration investments during an option period of five years and a purchase option with a cash consideration of $2.0 million and a royalty on production of 2.25% on net smelter returns. Borax had begun

drilling on the property before the agreement was signed in order to capitalize fully on the 1977 field season.

The Property, with a 1700-foot long airstrip, afforded ready access to hunters of Dall sheep that inhabit the area. In 1978, the use of the airstrip increased dramatically. The drilling activities of Borax had become known attracting the attention of high profile environmentalists such as Johnny Denver; National Park Service personnel; and Congressional delegations, including Senator Mike Gravel, who flew in to inspect the drilling activities.

The reason for the great curiosity became apparent when, on November 16, 1978, the Secretary of Interior exercised his authority under Section 204(e) of FLPMA to withdraw 105 million acres of federal lands in Alaska placing the Orange Hill Property and the other mining claim holdings of NWE located in the Wrangell Range off limits to further exploration or mining.

The land withdrawal had a major impact on the Orange Hill exploration program. Unable to continue exploration within the term of the Agreement, the Agreement was amended under the force majeure clause and by mutual agreement on May 21, 1979. The term of the Agreement was extended five years and the minimum expenditure commitments were reduced in recognition of the limitation to conduct work on the patented claims only. Thereafter, Borax continued to conduct drilling confined to the patented claims but with a focus of attention on the higher grade strata-form mineralization that projected with extra lateral rights beyond the patented claim boundaries. Even with the limitations being imposed by the Interior Department, as late as the spring of 1980, Borax took steps to acquire additional claims within the area of influence of the Option Agreement.

Upon the passage of ANILCA on December 2, 1980 establishing the Wrangell-St. Elias National Park and Preserve ("WRST") all exploration on the Property was brought to a halt. Faced with the prohibition of exploration on the Property imposed by the NPS for an unknown term, the Venture and Borax agreed once again to amend the Agreement. The assumption underlying the second amendment was that property rights would be restored and that resumption of exploration would eventually be allowed at some time in the future. Thus, the Agreement was amended on September 21, 1981 providing for the extension of the term of the Agreement to a total of 15 years from May 4, 1979 to May 4, 1994. The amendment provided for an escalating schedule of the purchase cash consideration over the 15-year period; and an indexing of the cash consideration to the "Product Price and Price Indexes for the Non-ferrous Metals Commodity Code 102, U.S. Department of Labor Statistics".

HISTORY FOLLOWING THE PASSAGE OF ANILCA

With an estimated minimum of $2 million having had been expended on exploration of the Property by the close of the 1980 field season, neither NWE nor Borax was prepared to believe at the outset that the intent of Congress was to deny the right to mine. However, when in 1985, the National Park Service was enjoined from approving

any mining plans of operation, and then in 1986 when the WRST published its General Management Plan (WRST GMP) stating that mining would not be allowed and citing the Orange Hill property as a major threat to the Park, the parties read the writing on the wall, as did other property owners in the area. With no end to the moratorium sight, the parties concluded that neither the resumption of the right to explore nor the right to conduct mining within the Park was a realistic expectation. The Exploration Agreement and Option to Purchase was terminated by mutual agreement. In keeping with the decision, the Venture thereafter could not justify the payment of the rental fee to the government required to file assessment notices on the unpatented claims on which it could not conduct exploration, let alone mine. At the same time, Kennecott Copper Co., in like manner, terminated its holding on the Bond Creek copper–molybdenum deposit located approximately four miles to the east of Orange Hill. The Venture lapsed into limbo awaiting the outcome of FEIS and the resolution of environmentalist lawsuits against the NPS.

By Record of Decision dated August 21, 1990, WRST announced that the decision had been made to implement Alternative D of the proposed action in the FEIS: Acquire All Claims. The publication cited an estimate of the then current gross value of the mining claims in the WRST to be between $13.5 million and $19.0 million.

On Nov. 5, 1990 the Venture wrote to the Regional Director of the NPS requesting, under the Freedom of Information Act, copies of all the information used by the NPS to arrive at the value of the patented claims at Orange Hill. A reply dated December 5, 1990 enclosed comparable sales sheets, none of which were based on mineral estate values. The information provided, included nothing specific to the Property but did include a page entitled “Lode Values – WRST” which briefly described the significant mineral property holdings within the Park. The information disclosed that the Orange Hill Property was the largest holding of unpatented mining claims (35% of the total unpatented claims) and the second largest behind Kennecott (21% of the total unpatented and patented claims). Significantly, the report made note that the Development Potential for Orange Hill was “High future.” A cover letter to the report noted that, “when the 1987 mineral estate value estimates were made, copper had traded at 60 to 80 cents per pound. This represents an increase of about 70 percent more than the increase in the cost of production”.

A further request for documents relating to transactions within the WRST resulted in a reply that the only transactions disclosed were those of donations to WRST.

In early April 1992, a telephone call was received from Russell Lesko of the Superintendent’s office of WRST, inquiring about the interest of NWE to sell its inholdings. On April 6, 1992, NWE wrote to the Superintendent Karen Wade to confirm the Venture’s interest to convey the property based upon a fair and equitable value. On April 30, 1992, a telephone call was made to Charles Gilbert, Chief, Land Resources Division, Alaska Region, to discuss what could be done to move the process of acquisitions ahead. Lacking a reply or acknowledgment of the letter to Superintendent Wade, a follow-up letter was written to her on May 5, 1992. On May 10, 1992, Mr.

Norman Lee, Chief Appraiser of the Alaska Office of NPS was contacted following which NWE wrote a letter to the NPS Regional Director on May 11, 1992 requesting that the NPS carry out mineral and surface appraisals of the Property and offered to cooperate and facilitate the appraisals.

Copies of the letter were sent to Senators Stevens, Gorton, and Murkowski and to Congressmen Young, Foley, and Morrison. Senators Stevens' and Gorton's offices were particularly helpful. In one exchange of correspondence, Senator Gorton wrote to Senator Stevens requesting an answer to the question as to why funds were being appropriated only for acquisitions in the Kantishna area of the Denali National Park and Preserve. In his reply to Senator Gorton, Senator Stevens made the point that the NPS would not approve plans of operation to mine in the Denali National Park. Senator Stevens apparently failed to understand that the same circumstances were true of WRST inholders who were also being denied the right to explore, much less the right to mine.

The Regional Director responded to the letter of request dated May 11 by letter dated June 19, 1992. The response received was that, "Until money is appropriated for claim acquisition in WRST, we cannot proceed with the appraisal of your property". Ms. Wade replied on June 18, saying that she could add nothing to the comments of Mr. Gilbert.

On June 30, 1992 the Venture inquired of Ms. Wade to clarify the terms of RS 2477 to which she replied on July 29, 1992 that, "The NPS is not currently processing RS 2477 Assertions pending completion of internal procedures". On August 17, 1992 NWE Management Committee met to review the status of the property for the purpose of developing a strategy to compel the NPS to acquire the property as set forth in the Record of Decision.

In a telephone conversation with Charles Gilbert on December 8, 1992, he assured that the right of access across the NPS lands is guaranteed with or without the assertion of RS 2477. Nevertheless, NWE submitted an application on December 12, 1992 to nominate the trail into Orange Hill an RS2477 right of way for certification. The grant of the RS2477 right-of-way for the Orange Hill trail was accepted by the Alaska State Department of Natural Resources and designated Case file RST #400 on March 10, 1994.

As a follow through of the strategy agreed to by the Management Committee in August 1992, NWE planned a concerted effort to arrange a land exchange in 1993. The effort was begun with a letter dated February 5, 1993 to Senator Steven's office seeking his help. In his reply dated February 23, 1993, Senator Stevens expressed appreciation for being kept informed on NWE's situation but said that he could not get involved in negotiations regarding an exchange. A member of the Senator's staff reported by telephone on February 25, 1993 that the NPS "resists the idea of exchanges". The stonewall was impenetrable.

On November 6, 1993, Senator Murkowski of the Subcommittee on Public Lands, National Parks and Forests of the Committee on Energy and Natural Resources held a hearing in Anchorage to which the Venture presented a statement. The results of the hearing led to the introduction of a bill, S2542 on September 12, 1994, which ultimately resulted in the passage of the "Denali Mining Claims Act" in the following session of Congress. One of the means to gain compensation provided to the owners of mineral rights by the Act was the declaration of taking, but the means to declare a Taking was not provided the inholders of the Wrangell St. Elias National Park.

Noting the degree of interest being shown by Senator Murkowski and other Congressmen with regard to the plight of the mineral inholders in the Denali National Park, letters were sent to Senator Murkowski by Tom Henricksen, Project Manager at Orange Hill for Borax from 1979 through 1980 and by Jackie E. Stephens, Northwest District Geologist for Borax during the same period. In their letters they expressed their strongly held views about the importance of the Orange Hill deposit and their concerns about the issue of takings.

In August of 1993, NWE learned that the NPS had closed on the purchase of the surface estate of a 1,000-acre parcel of the Kennecott property in the vicinity of McCarthy at a purchase price of $3.6 million. The news appeared to suggest that the NPS had initiated of a new policy dealing with inholders. It was later revealed by the landowner's attorney, however, that the negotiations had been in progress eight years and that during the period that the NPS had claimed not to have the funds available for appraisals in the WRST, it had been funded time and again appraisals related to the Kennecott acquisition.

In a telephone discussion with Wallace McGregor on October 21, 1998, Superintendent Jarvis of the Wrangell – St. Elias National Park offered to conduct a mineral appraisal. NWE was thereafter directed to deal with Charles Gilbert, Chief, Land Resources Program Center. Communications ensued. In a letter of reply to NWE on November 5, 1998, Chief Gilbert stated, "We remain interested in acquiring the Orange Hill Property and will be glad to arrange to have an appraisal done next field season". An authorization form, Owner's Permission to Inspect and Appraise, was enclosed with a request to review and sign. The letter referred to Chief Appraiser, Mr. Stuart Snyder for questions about the mining claim acquisition program.

Mr. Snyder was immediately called with the purpose of the inquiry was to gain information about the appraisal process with the hope of coming to an understanding regarding the parameters of the appraisal and to mutually agree upon the selection of the appraiser. In the telephone discussion, Mr. Snyder seemed amendable to such a working relationship and offered to inquire with other government agencies about mineral appraisers acceptable to the NPS. Mr. Snyder complied with the request within about ten days, offering the name of a mineral appraiser considered sanctioned by the NPS. After conducting an independent research into the qualifications of several mineral appraisers, in addition to conducting a due diligence investigation of the

recommended appraiser, a meeting was held with Mr. Snyder at his office on December 18, 1998. NWE reported its approval of the NPS recommended appraiser. Mr. Snyder's cooperative demeanor immediately changed. His new position was that WRST has a contractual relationship in place for all appraisals making it impossible to hire a specific appraiser for each appraisal. He made the point that the process of hiring an appraiser entails advertising and the hiring of the appraiser from those responding to the advertisement. He said that the decision regarding the selection resides, in any case, with Mr. Gilbert.

Mr. Gilbert was contacted by telephone a few days after the meeting with Snyder. Upon questioning, Mr. Gilbert confirmed the statement of Mr. Snyder that all appraisals are currently under contract. He allowed as how it might be possible to subcontract the appraisal with the current contractor and said that he would give the idea consideration but he was absolutely insistent that the current contractor be the appraiser.

Remaining concerned about the inability to arrive at an understanding regarding the parameters of the appraisal, but believing that all that could be done had been done to prepare for a meaningful appraisal of the Property; NWE authorized the appraisal to proceed by application dated February 18, 1999. Yet, in a telephone call on May 24, 1999 with Mr. Gilbert's assistant, Diane Wohlwend, made for the purpose of arranging to accompany the appraiser to the Property, she reported that an appraiser to conduct the Orange Hill appraisals had not yet been hired. This fact was latter confirmed in a telephone discussion with the appraisal team of Jim and Ellen Hodos of Onstream Resources Managers, Inc., who commented during a telephone conversation in mid June that they had yet to sign a contract for the appraisals they were about to perform.

Finally, by letter dated June 10, 1999 it was reported by Mr. Gilbert, "that we now have a mineral appraisal contract in place and an approved scope of work for the 1999 summer season appraisal field work. Your property has been included on the list for appraisal this summer." It was later confirmed through contact with the Hodos' that they had contracted for a field examination of the Orange Hill Property to be carried out on July 10 and 11, 1999. Arrangements were made by Wallace and Darlene McGregor as representatives of NWE to accompany Jim and Ellen Hodos on the property examination.

The Hodos' and McGregors met on the morning of July 10 at the Devils Mountain Lodge, the closest point to Orange Hill accessible by road. McGregor gave a briefing on the geology of the Property to the Hodos. Noting the comprehensiveness of the geologic data and the magnitude of the reserve estimates, Mr. Hodos commented that he doubted that NPS would proceed with the appraisal. Taken back by the comment, McGregor asked, "Why?" The Hodos' were non-committal while reiterating their doubts about the NPS's willingness to proceed with the appraisal. Following the geologic discussion at the lodge, the parties flew by helicopter to the Property and carried out a daylong examination. On July 11 a meeting was again held at the Devils Mountain Lodge in order to review the geology and mineral reserves, after which, a helicopter fly over the Property was made as a final orientation for the appraisers. Following the

examination the complete database pertaining to the property was sent to the appraisers. In a telephone call on September 2, 1999, Mr. Hodos' informed Mr. McGregor that he did not have a contract to proceed with the appraisal. By letter dated September 29, 1999 Mr. Gilbert, confirmed that the decision had been made by the NPS not to conduct the appraisal. No explanation was offered, but given the circumstances, the reason was obvious.

Faced with the pending loss of the right to appeal under the Statute of Limitations, which had been extended for ten years by Senator Stevens due to expire on December 31, 1999, the owners were left with no recourse but to file suit. They informed the Park Service of their need to protect their right by pursuing an inverse condemnation action by year-end unless the Park Service proceeded with its commitment to timely complete the appraisal, as agreed. Officer Gilbert responded, claiming not to know about a deadline for filing a takings action and steadfastly refused to proceed with the mineral appraisal.

On December 22, 1999 the owners filed a complaint charging the National Park Service with, "committing a compensable taking of its eighteen patented and ninety-nine unpatented mining claims when mining operations having environmental impact were prohibited in the Wrangell-St. Elias National Park." The filing was made with the offer to withdraw the suit upon the agreement of the National Park Service to complete the conduct of the appraisal. Former Secretary of the Interior, Cecil Andrus, on whose watch ANILCA had been passed, took note of the injustice and in a letter to National park Service Director Phillip Stanton, urged him to proceed with the appraisal. Director Stanton replied to Andrus stating his determination to proceed with an appeal of the taking action while refusing to proceed with the appraisal. It was a calculated decision purposely taken to mute the charge of taking thereby effectively validating the government's action while not being compelled to compensate for the taking.

The motivation for the Director Stanton's decision became clear when it was learned that the judge selected to hear the case, Judge Sedwick, was known to have a bias on takings. Judge Sedwick's decisions in previous cases had turned on the premise that, if a Plan of Operation had not been submitted and denied, a taking had not occurred. Thus, rather than pursue completion of the appraisal, the Justice Department stepped in to dismiss the case maintaining that the owners must have submitted a plan of operation that, short of arbitrary inconsistency, the Park Service could not approve. According to the Government, in the absence of this formalistic process, the Court has no jurisdiction to address the owners' cause of action.

The Government prevailed in its argument. The Case was dismissed on the grounds that it was not ripe for adjudication. In retrospect it could be seen that, given its stated commitment to convey the property to the NPS, it was an act of naivety to accept in good faith the government's statement of "Acquire All Claims." In retrospect, the Orange Hill owners overlooked, to their disadvantage, the need to abide by the caveat that one must first submit a Plan of Operation and in so doing were caught in a disingenuously designed Catch 22 that proved to be its undoing.

Notwithstanding the loss of its inverse condemnation suit, the owners continued to press for an appraisal and turned their efforts to gain Congressional support for funding appraisals and acquisitions in the WRST. Cecil Andrus, once again, urged Director Stanton to follow through on the appraisal of the Orange Hill property. In a letter dated September 13, 2000 governor Andrus made note that the owners were pursuing support for an appropriation of $3.8 million for acquisitions of inholdings within the Wrangell-St. Elias National Park. Director Stanton's reply to Andrus in a letter dated October 26, 2000 gave assurance that the appraisal would be completed and that an offer would be made to the Owners.

Director Stanton's intent can be assumed to have been honorable but the implementation of his intent under circumstances of a change of administration was left to the behest of the bureaucracy, which made clear its intent to the contrary. Extensive negotiations with Alaska Regional Resource Officer Gilbert were carried out during the later half of 2000 without the achievement of an agreement on either a mutually approved appraiser or the appraisal parameters. As a means to overcome the impasse, it was arranged to meet with NPS Chief Appraiser Gerald Stoebig and Chief Realty Officer Eugene Repoff and staff in Washington, D.C. on March 5, 2001. In opening the meeting, counsel for the owners referred to the language of the FY 2001 appropriations bill that instructed the National Park Service to set a "purchase price that is objectively fair and equitable." He asked for their view of the term "fairness." The gist of the response of the National Park participants was that the basis for judging fairness was an unknown. The comment was made, "never heard of basis for fairness." The answer set the tenor of the meeting. Typical of the unyielding stance was the position expressed by Appraiser Stoebig's to the effect that the mineral rights had not been diminished by enclosure within the Park. It was impossible to achieve mutual agreement on any parameter. As the negotiations came to a close without agreement, Realty Officer Repoff observed that without a mutual agreement on the proposed parameters, the need for an appraisal was mute. The statement was made with an air of 'mission accomplished.'

The silence that followed was broken by the Alaska Regional Resource Officer Gilbert's interjection that a fair market appraisal had been completed. The Park Service would argue that the real estate appraisal had been conducted with the approval of the owners, but the fact is, no such approval had been given. When earlier reported to the owners, they refused disclosure and responded with a reaffirmation of their decision to refuse acceptance of a real estate appraisal without the mineral appraisal. The meeting closed on the note of irreconcilable differences.

After the meeting, at the recommendation of counsel, the owners relented on their refusal to review the release of the real estate appraisal. It was learned that the Park Service had commissioned the appraisal on November 29, 2000 without notice to the owners. In the appraisal report dated December 29, 2000 with an opinion date of December 5, 2000 based upon the timing of a flyover of the property, the appraiser reported that "the fair market value of the fee simple estate, less the mineral estate, in

the subject property, is: ONE HUNDRED FORTY-SIX THOUSAND DOLLARS ($146,000.)"

In judging the fairness of the value attributed to the surface estate it is significant to note the appraiser's statement to the effect that, "The future or speculative highest and best use of the subject parcel is considered a commercial lodge operation exploiting the view offered from the subject property and the increasing tourism growth in the Wrangell-St. Elias market area. A lodge…is considered the ultimate highest and best use of the subject parcel." Disregarding his own description of the "highest and best use" the appraiser concluded that the fee simple value was at the lowest per acre value of all WRST appraisals with one known exception that of a property described as "rocky talus slopes."

NWE then turned once again turned its efforts to seeking the help of Congress, hoping to capitalize on the change of Administrations to provide guidance to the NPS in abiding by the tenets of the Constitution. The effort resulted in the inclusion of generalized instructions in the 2002 Appropriations Bill directing the NPS to conduct appraisals of inholdings within the Wrangell-St. Elias National Park as a step to negotiating the acquisition of the properties.

The NPS response to the congressional instructions was to ignore them. In the absence of any progress in dealing with the NPS, NWE undertook to investigate the potential for a lodge at Orange Hill in line with the views of the appraiser. The architectural firm of Degen & Degen was hired to develop a plan for an Orange Hill Wilderness Resort. As described by Degen & Degen in its plan dated January 18, 2002, "this site (is) superlative as a world-class destination for ecotourism, wilderness adventures, and education."

Nevertheless, the Venture persisted in applying political pressure to bring the NPS to the table. With the help of Washington, D.C. based counsel, NWE gained a provision in the FY 2005 Appropriations Bill, (enacted in 2004) which gave explicit instructions to the NPS: "For the purposes of acquiring the Orange Hill patented mining claims within the Wrangell-St. Elias National Park and Preserve, the Committee expects the Service to commence acquisition negotiations based upon an appraisal of the market value of the property ….." The instructions continued in great detail for a full paragraph. The NPS had been clearly instructed to take action to acquire the Orange Hill Property at a purchase price that is objectively fair and equitable.

The NPS was unmoved. It continued to stonewall on the implementation of the Congressional directive. Greatly frustrated, NWE took action to submit a Plan of Operation for the purpose of conducting further diamond drilling to better define the limits of the reserves. The action stimulated the NPS to call for a meeting between representatives of NWE and the NPS Alaska Regional Director Blaszak. In the meeting held on June 13, 2006, Ms. Blaszak verbally committed to proceed with an appraisal and had a call placed to the Appraisal Services Directorate (ASD) during the meeting to inquire about the possibility of initiating the appraisal that season. The ASD responded

that it was too busy to conduct an appraisal in the current year, but the impression was left that Orange Hill would be first in line for an appraisal the following season. The impression proved to be ill founded.

It was at that point that the NWE management decided to seriously consider the prospects of a private sale of the surface rights while retaining the mineral estate rights. As a first step, it commissioned the appraisal firm of Greenfield Advisors to conduct an independent evaluation of the property for the purpose of determining the value of the surface estate and the likelihood of sale. In a six months long study that drew upon the work of Degen & Degen and drawing upon considerable experience in appraising high end properties, Greenfields Advisors' concluded that the surface estate had a value in the range of $1.2 million to $1.5 million.

It was not until April of 2007 that the NPS took the first ostensible action. The action was not, however, to launch an appraisal but to conduct a "study" of the Orange Hill geologic data. The NPS requested that NWE provide the full geological data to a Spokane, Washington based firm, Aventurine Mine Cost Engineering, which the NPS claimed to have contracted to conduct an economic study of the Orange Hill deposit. The study was to be completed in six weeks and to be made available to the ASD in time to initiate the appraisal during the 2007 field season. Two weeks after NWE submitted the wealth of the Orange Hill data base, the NPS summarily terminated the study. It was a repeat of the NPS action in 1999.

Northwest Explorations' reaction was to immediately turn to upper echelon Interior Department officials who quickly set up a telephonic meeting on May 25, 2007 participated in by Alaska Regional Director Blaszak and her staff together with a number of mid-echelon Department of Interior management members. The NWE management committee was allowed to listen but not to participate in the meeting. The meeting began with a castigation of Wallace McGregor by the NPS Alaska Property Manager Charles Gilbert for creating the delays. However, following the meeting, Director Blaszak wrote a letter to NWE stating, "We will work diligently with the Department of the Interior, Appraisal Services Directorate (ASD) to proceed with the appraisal this summer."

By design, it was not to be. As a first step resumption of the study was delayed six weeks, a delay that made certain that the appraisal would be delayed until the following year. What followed made a mockery of the study. In the course of handing off the data, McGregor worked closely with the principal of the research firm, Scott Stebbins. Within weeks of the re-start of the study Mr. Stebbins expressed frustration in his relationship with the NPS. Shortly thereafter, Stebbins informed McGregor that he had been instructed by the NPS that he was to have no further communication with him. Thereafter, it took a half a year to complete the study. When the report was finally completed in January 2008, the conclusion drawn was that the "Orange Hill Deposit Development Scenario would produce a minus $74,192,400 Net Sum of Cash Flows." The findings were presented by the NPS to the ADS as justification for limiting the appraisal to the surface estate only.

The NWE management committee thereupon had the Aventurine Study critiqued by the Fairbanks, Alaska based engineering firm, H2T Mine Engineering Services, LLP. (H2T Engineering) The critique revealed major short comings, citing specific cost excesses, in the net amount of $189.1 million. The Critique findings were presented to the ASD, which summarily rejected the substance of the Critique and proceeded to prepare for the appraisal without provision for appraising the mineral estate.

To be noted are some of the purposeful short comings of the Aventurine study, one of which of is the assumption of value limited solely to the value to copper and molybdenum, The values of zinc, gold and silver were summarily excluded in the Aventurine study even though the property had been the sight of gold placer mining during the 1920s and the fact that the reserves compilations from drill hole data by Borax included gold and silver in their reserve calculation. Considering only the value of the silver at the grade of 0.175 ounces per ton reported in the US Borax data, the Aventurine Study disregards the recoverable value of 10,924,725 ounces of silver. Assuming as low as a 75% recovery and applying the price of silver as of the date of the Aventurine Report (January 2008), at $18.06 per oz., the inclusion of the recoverable silver would have increased the gross recoverable value by $148 million, considerably more than the estimated loss. As of the current (March 1, 2012) price of silver of at $34.48 per oz., the estimated recoverable silver value would be $282.5 million, thus, increasing the gross recoverable value not taken into account in Aventurine study by $471 million.)

Additionally questionable in the Aventurine study and left unexplained was the insertion of a miscellaneous charge at the arbitrary percentage rate of 10%. Such a miscellaneous charge alone served to increase the operating costs by $150.4 million dollars, an amount twice the cash flow loss estimated in the study. Thus, taking just the most obvious shortcomings together with the itemized cost excesses noted in the H2T Engineering critique, there is reason to surmise the reason for Aventurine study to have been conducted in secrecy.

On the other hand, it can be seen that the geologic study of the deposit conducted by Stebbins apparently before the imposition of NPS oversight, was competently conducted. The conclusion drawn in the Aventurine study concerning the total reserves within the area of the patented and unpatented claims held by NWE at the time of the passage of ANILCA was that the reserves in total classified as “indicated” reserves, were 172,200,000 tons at a copper grade of 0.309% and a molybdenum grade of 0.028% (copper equivalent grade of 0.42%). This estimate of the resource is essentially the same, though 5% greater in both tonnage and copper equivalent grade than the 1970 estimate of McGregor and substantially greater than the 115,700,000 tons reserves at essentially the same copper equivalent grade (copper plus molybdenum values) reported by U.S. Borax & Chemical Co., the intended purchaser, at the close of the field season in 1980.

Needless to say, the economics of mining an ore body that two to three times larger, without the boundary restrictions imposed by the limits of the patented claims, would be many orders of magnitude more profitable than the tonnage of "recoverable" tons confined to the patented claims included in the Aventurine study. The Aventurine study conclusion concerning the size of the mineral reserves owned by NWE at the time of the enactment of ANILCA simply highlights the impact of enclosure within the Park on the ultimate determination of value.

Based upon the clear evidence that the conduct of the study had been influenced by the NPS with the purpose of denying the attribution of any value to the mineral estate, NWE management sent ASD Northwestern Regional Director Helen Honse a three page letter dated April 7, 2008. The letter stated that, "Given this property history, the need to perform a mineral appraisal of Orange Hill could not be more compelling. Moreover, it goes without saying that the double decades of delays have been enormously costly to Northwest Explorations. Time is of the essence to carry out the instructions of the Congress." The letter included the request to, "consider the following conditions in the scope of work for the appraisal: A) The appraisal will be conducted by a state certified real estate appraiser and a state certified mineral appraiser; B) The mineral appraiser will accompany the real estate appraiser on the site examination; C) Northwest Explorations will have the right to present additional information relevant to the appraisal of the mineral estate.

Ignoring the appeal to conduct a mineral appraisal, the ASD advertised the appraisal without mention of the minerals. Only one appraiser responded, that of a Utah based real estate appraiser, Paul H. Meiling, with no mineral appraisal credentials and a history of government agency bias for which he had been reprimanded. The appraisal contract was awarded to Meiling on August 26, 2008. Meiling initiated the appraisal on September 5, 2008 with a visit to the property, accompanied by Dr. Robert Trent, retired Dean of the School of Mineral Engineering, University of Alaska, Fairbanks. Dr. Trent reported that Meiling's examination was limited to two hour on the ground during which simply walked the base of the hill. In his appraisal report dated December 9, 2008, Meiling reported having revisited the property again on September 23. Given the desultory nature of the initial examination, the question arises as to the purpose for the second visit. The answer is obvious. By resetting the effective date of the appraisal from September 5 to September 23 as determined by the date of the visitation, Meiling sought to capture the precipitous decline in metal prices that occurred immediately after the first field examination as the economy sank into recession. While the mineral estate value was not to be considered, by establishing a lower metal price on the effective date of the appraisal, Meiling could be better assured that a final nail had been driven in the mineral estate coffin in the event that the mineral estate value were to become an issue. In his appraisal report dated September 23, 2008 submitted on December 9th, 2008, Meiling concluded that the mineral estate was valueless and assigned a value of $290,000 to the surface estate. Let it be noted clearly that whereas Mr. Meiling describes the appraisal as embracing "the fee simple estate of the subject mining claims *"including the mineral estate",* Mr. Meiling did not conduct a mineral appraisal.

Undeterred by the expected outcome, NWE management proceeded to commission H2T Engineering to conduct a comprehensive economic evaluation of the Orange Hill ore reserves. In the study that followed, a mining plan was developed to mine the same 64,451,000 tons of recoverable ore within the limited area of the patented claims upon which the Aventurine estimate was made. In a report dated May 2009, H2T Engineering reported an estimated discounted (5% disc. Rate) cash flow value of $43 million as of the date of the initial property examination.

The many obvious shortcomings in the conduct of the ASD appraisal left NWE with every reason to pursue a comprehensive review of the ASD appraisal practices. In a letter dated December 16, 2009, NWE counsel submitted a letter to Ms. Honse documenting the deficiencies in the Interior Department's appraisal practice, noting that, "This submission demonstrates the National Park Service (NPS) and the Appraisal Services Directorate (ASD) have failed to provide a fair mineral valuation and therefore requests that valuation be resolved through arbitration or mediation, Northwest Explorations' only recourse is to pursue takings litigation or seek condemnation." It took over four months for Ms. Honse to reply. In a letter dated April 27, 2010, Ms. Honse rejected the need for a mineral appraisal and declined to consider arbitration as a means to resolution.

As of the closing of the year 2010 the issue of the Orange Hill Taking remained unresolved and in stalemate. As a result, NWE management turned to an approach that it had previously used, though with minimal success, that of an administrative approach, one in which the NPS management would be instructed to take action in compliance with the law. Support for the idea was gained from Congressmen Young and Simpson and their congressional staff and other Congressmen on an informal basis. As the idea developed over the course of the summer, former Secretary of the Interior Andrus, once again stepped forward, as he had during the legal impasse in 2000. In a letter addressed to Interior Secretary Salazar dated September 19, 2011, Andrus cited the "callous, imperious, arrogant manner" in which "the NPS long ago embarked on a deliberate strategy of denying Mr. McGregor and partners any return on a de facto taking of a valid property right."

Meetings were held in November by McGregor with the assistance of Tim Olson with members of Congress and their Congressional staff. In turn, Republican Staff Director Campbell of the Senate Committee on Energy and Natural Resources accompanied by members of the congressional staff met with NPS Director Jarvis. The reported outcome of the meeting was an unyielding stance on the part of Director Jarvis, a stance in diametric opposition to his helpful supportive stance in 1998.

By letter dated February 15, 2012, Secretary Salazar replied to Governor Andrus' letter of September 19, 2011. The position taken by the Secretary was to decline to resolve the dispute by administrative dispute resolution. He based his decision upon his belief that, *"The major issue is the vast difference in valuation between claim owners and the valuation done after an extensive appraisal process, including a mine feasibility study done by a firm the owners recommended." The Department of the Interior does not*

believe the case is suitable for an administrative dispute resolution given these vast differences."

Given the legal background of Secretary Salazar, and the fact of his having held the position of Attorney General of Colorado, it is inconceivable that the Secretary would disregard a basic tenant of the Constitution in arriving at his decision. Clearly at stake is Northwest Explorations' Fifth Amendment protection from Taking, a protection that has been wantonly abridged with impunity by the National Park Service over the period since publication of the WRST General Management Plan (WRST GMP) in 1986.

The stark reality of the Orange Hill Taking is that the impediments to the resolution posed by Federal Agencies, as illustrated by the actions of the Secretary of the Interior, when taken in conjunction with the power of the Justice Department are so onerous and egregious that to launch into litigation offers little more than financial devastation to the Northwest Explorations stakeholders. Accepting the inevitable, the Management Committee concluded with unanimous agreement in a meeting held on March 13, 2012 that the path to retrieving their Private Property right to Orange Hill Patented Mineral Claims under circumstances of dealing with the disingenuousness of the National Park Service culture would be so tortuous, the financial resources required so great and the bureaucratic impediments to success so overwhelming, that the achievement of equitable compensation for the Taking under the current circumstances is no longer viewed as a viable goal. On the other hand, the Orange Hill deposit being a major mineral resource, at some point in the reasonably near future the demand for metals, will require its exploitation.

The history of the Orange Hill Taking stands as proof that the unambiguous Right of freedom from the taking of property without just compensation as set forth in Amendment V of the Constitution no longer holds the status of a Constitutional Right. In reality, the Constitutional Right of the Fifth Amendment no longer exists.

Wallace McGregor
March 15, 2012