



# United States Department of the Interior

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IN REPLY  
REFER TO:

BLM.PS.8274

October 7, 1991

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## MEMORANDUM

TO: Edward L. Haste, State Director, Bureau of Land Management, Sacramento, CA  
ATTN: Richard F. Johnson, Deputy State Director, Lands and Renewable Resources

FROM: Clementine Berger, Attorney  
Pacific Southwest Region, Sacramento, CA

SUBJECT: Vinnell Mining and Minerals Corp. v. BLM  
Civ. No. 91-1321 (D.D.C.)

The Bureau of Land Management is required to file its response to the above-referenced litigation, as well as any cross-complaint for recovery of costs by October 25, 1991. To assist the Department of Justice (DOJ) in representing BLM in both the defense and potential enforcement actions, a litigation report containing relevant facts and legal analysis is being prepared by this office.

Your assistance in completing the litigation report is needed. Please provide a narrative response to the questions contained in the attachment. Please provide BLM's response by c.o.b. October 10, 1991.

Questions concerning this request should be directed to either me at ext. 4831, or David Jones, our law clerk at ext. 4821.

*Clementine Berger*  
Clementine Berger  
Attorney

Attachment

CTB:mm

Please answer the following questions in a complete and narrative fashion. As appropriate include any and all authority for each answer, such as citations to federal statute, federal regulation, BLM regulation, procedure or practice.

1. What is/was the proper procedure for determining if a particular mine site is abandoned both now and prior to FLPMA?

2. Upon determination that a mining claim is abandoned, what is the process for inventorying the abandoned site?

3. What steps are generally taken by BLM to or reclaim an abandoned mine site?

4. Are the "3809" regulations promulgated by FLPMA, applicable to "Pre-FLPMA" mine sites?

5. Did BLM ever contact either Atlas Corporation or Vinnell Mining and Minerals Corporation, regarding remediation of the Atlas site?

6. What was the specific date, when BLM posted asbestos hazard signs at, or in the vicinity of the site?

7. What is BLM's knowledge or estimate of the amount of OHV disturbance at the site, especially on the tailing piles?

8. In which watershed is the Atlas Mine located?

9. Are the remedial measures required in the Atlas Mine OU ROD expected to remove all sources of other than naturally-occurring asbestos from the watershed in which the Atlas Mine is located?

10. If BLM approached remediation of the Atlas site from a mine reclamation perspective, believing that the site should be reclaimed to a level consistent with sound mining practices, what would this require?

11. Has/is BLM re-assessing potential natural resource damages at the Atlas Mine site attributable to mining operations?

12. How is access granted by BLM to the roadway crossing the Atlas Mine site? If this process is accomplished by right-of-way, please provide a description (example) of the right-of-way language used and a list of right-of-way holders.

13. Please provide a map which depicts the road (right-of-way).

14. How long does it take for a "crust" to form on mine tailing piles, such as those found at the Atlas site?

15. To what extent would the "crust" prevent the release of asbestos into the air or watershed?

16. What is/was the industry standard/practice with regard to operations similar to the Atlas mine? If the KCAC operations is "typical" please provide a copy of the Plan of Operations for the KCAC Mine.

17. What, if any authority or duty did BLM have to enter the site in question, during the actual mining operations?

Memorandum

To: Clementine Berger, Attorney  
Pacific Southwest Region, Sacramento, CA

From: State Director

Subject: Vinnell Mining and Minerals Corp. v. BLM  
Civ. No. 91-1321 (D.D.C.)

Pursuant to your October 7, 1991 memorandum on the subject issue, we submit the following information.

Question 1. What is/was the proper procedure for determining if a particular mine site is abandoned both now and prior to FLPMA?

Answer. Prior to FLPMA mining claims were not recorded with BLM. There was no legally defined procedure for determining the abandoned status of a mining claim or operation except through civil action in instances of contention. A break in the recordation of "paper work" with the local officials, usually the county clerk, indicated that a claimant may not have further interest in a claim and the claim was generally accepted as abandoned. However, this was not always the case. We believe that numerous legal decisions exist which affect this concept, including the "intent" to hold a mining claim. Abandonment of a mining claim or operation prior to FLPMA was determined by cessation of activities and discontinuance of any required written notification required by the state or local regulatory agency, or by any interested party through civil action.

With the passage of FLPMA, existing mining claims were given a three year time period from the date of FLPMA approval to record their claims with BLM. If they did not record their claim with BLM by October 22, 1979, then the claim was declared by Sec. 314.(c) of FLPMA to be abandoned, although an actual written determination was never prepared. The claim simply ceased to exist through the omission of required notification. Active mining operations were required to submit a notice within 30 days, or a plan of operations including a reclamation plan within 120 days of the effective date of 43 CFR 3809 Regulations (July

1, 1980). Upon the showing of good cause, an extension of up to 180 additional days could be granted. BLM was then required to make an environmental assessment (perhaps including an EIS) of the plan of operations to determine the impacts of the operations and adequacy of mitigation and reclamation measures to prevent unnecessary and undue degradation. BLM was required to provide assistance to any operator not having the necessary technical resources in developing a plan of operations, including a reclamation plan, and any changes to prevent unnecessary and undue degradation. Operations were allowed to continue, pending plan approval. Operators are required to notify the authorized officer (BLM) whenever a suspension of operations is anticipated.

After the passage of FLPMA, with the accompanying regulations and their requirements for claim recordation and submittal of notices and plans of operations, determination of abandoned claims or mining operations became possible. BLM developed policies to implement such a procedure. At present, BLM Instruction Memorandum No. 90-59 (see attachment 3, Copy of IM No. 90-59) sets forth procedures for no less than semi-annual inspections of all active mining operations. If no activity is observed and the lack of activity does not conform to an approved plan of operations and a notice of suspension of operations has not been submitted to the BLM in accordance with 43 CFR 3809.3-7, the operator of record is notified that the approved mining plan portion of the plan of operations is cancelled and reclamation should proceed according to the approved reclamation plan. If any mining activity occurs which does not conform to regulation, including operators which have not submitted a notice or are operating without an approved plan of operations when requires to do so, are subject to issuance of a notice of noncompliance.

Question 2. Upon determination that a mining claim is abandoned, what is the process for inventorying the abandoned site?

Answer. Mining claims that are abandoned are not subject to any "inventory" process, unless the BLM is aware that mining activities were conducted. If a plan of operations was submitted then the operations would be considered "active". Prior to approval of a plan of operations, 43 CFR 3809.2-1 requires that an environmental assessment (inventory) be made and proper mitigation and reclamation measures developed. After plan approval or submittal of a notice, an operation becomes subject to regular inspection for compliance, including fulfillment of the reclamation plan. Routine inspection reports are completed in accordance with IM 90-59. If mining operations were conducted on a mining claim without the proper notification (notice or plan of operations) to BLM, knowledge of the operation would be documented by visual observation by a BLM ranger or other resource specialist or other interested party and a file search would be accomplished to determine whether the operations were pre or post FLPMA. Mining claims alone are too numerous to permit regular inspection on a site by site basis. If abandoned mining activities are found on active mining claims and a

determination can be made that the activity is recent then the claimant can be cited with a notice of noncompliance and instructed to reclaim the site in accordance to 43 CFR 3809.3-2. "Inventory" would depend upon the particular site and would include noting those disturbances that constitute unnecessary and undue degradation in the resource specialists opinion.

Question 3. What steps are generally taken by BLM to reclaim an abandoned mine site?

Answer. BLM is not required to and does not undertake pre-FLPMA abandoned mine reclamation on a regular basis. BLM currently requires reclamation bonds for all active approved mining operations, according to IM 90-582 (see attachment 4, copy of IM No. 90-582). If an operator conducts mining activities under an approved plan of operations, BLM routinely inspects the operation in accordance with IM 90-59 to ensure compliance with the plan. If an operator abandons a mine site without satisfactory reclamation he is subject to a notice of noncompliance, and is notified in writing of his legal responsibility, subject to appeal, to properly reclaim the disturbance. Most legitimate operators comply in a reasonable fashion. If an operator fails to comply with a notice of noncompliance regarding reclamation and the operations are covered by a reclamation bond, BLM initiates bond forfeiture procedures. After collecting a bond for an abandoned mine site, BLM will reclaim the site either itself or through contract, depending upon the nature of the required reclamation.

If a mining operation is abandoned without adequate reclamation and the operator was not covered by a reclamation bond, BLM must pursue other courses of action. Sec. 303.(a) of FLPMA provides for criminal penalties of up to \$1000 fines or twelve months imprisonment. Sec. 303.(b) authorizes civil action for injunction to prevent acts in violation of regulations. As most operators who abandon mine sites without reclamation are few in number and hard to locate and without measurable assets, civil action is generally not initiated. BLM is not publicly funded to assume the responsibilities of reclaiming abandoned mine sites nor are there existing funds available from industry contributed monies.

Question 4. Are the "3809" regulations promulgated by FLPMA, applicable to "Pre-FLPMA" mine sites?

Answer. Regulations are applicable only to those operations active on the effective date of the regulations. FLPMA became effective on October 21, 1976. Sec. 310. of FLPMA specifically directed the Secretary to promulgate rules and regulations to carry out the purposes of the act. Prior to the promulgation of such rules and regulations Federal lands were to be administered according to existing rules and regulations. Regulations at 43 CFR 3809 implementing FLPMA became effective on January 1, 1981, and all mining activities operating on or after that date were

and are subject to those requirements.

Similarly, mining operations become subject to additional laws as those laws and associated regulations or amendments become effective, although, not retroactively.

Question 5. Did BLM ever contact either Atlas Corporation or Vinnell Mining and Minerals Corporation, regarding remediation of the Atlas site?

The answer to this question is unknown by current state and field office staff. Attempts to determine the answer have not been fruitful.

Question 6. What was the specific date, when BLM posted asbestos hazard signs at, or in the vicinity of the site?

Answer. No specific date can be located in our files that pinpoint an actual date of installation of the first warning signs in the mine site vicinity. However, a November 1, 1978, Sacramento Bee newspaper article refers to these warning signs. It is our best understanding these signs were installed sometime in 1977.

Later, in 1988, Superfund mandated asbestos warning signs (which were reviewed and approved by EPA) were installed at the Atlas Mine site.

Question 7. What is BLM's knowledge or estimate of the amount of OHV disturbance at the site, especially on the tailing pile?

Answer. BLM patrols of the Atlas Mine site reveal limited OHV activity occurring at the site. Prior to the construction of the eight foot high fence (1988), BLM posted signs along the Atlas Mine haul road, which stated the Atlas Mine site was closed to OHV use. In 1990, BLM assisted the EPA contractor (Woodward-Clyde) in an aerial overflight of the site to evaluate OHV use. BLM's evaluation of the OHV use was "low". The EPA contractor's evaluation of the OHV use was "moderate". Because of our many years of experience in the Clear Creek area, we believe our estimate is correct.

Recently, someone abandoned a passenger vehicle on one of the tailing piles.

We believe the major public attraction to the site is the "attractive nuisance" of the large abandoned milling structures which over the last 10 years have become scavenged for scrap materials.

Question 8. In which watershed is the Atlas Mine located?

Answer. Over 99 percent of the Atlas Mine site is located in the headwaters of the Arroyo Pasajero which flows southeasterly past

the town of Coalinga and then into the San Joaquin Valley, some 20 miles from the mine. Less than one percent of the mine site is located in the headwaters of the San Benito River which flows northerly into Hernandez Reservoir, approximately 15 miles from the mine (see attachments 1. Map of Atlas Mine haul road/site & 2. Map of exploration pits/watersheds)

Question 9. Are the remedial measures required in the Atlas Mine OU ROD expected to remove all sources of other than naturally-occurring asbestos from the watershed in which the Atlas Mine is located?

Answer. The remedial actions to be taken at the Atlas Mine site include sediment retention structures which would in concept trap all sediments that occur within the upper watersheds including natural erosion sediments. There are numerous other historic mining disturbances in the Arroyo Pasajero watershed, including exploration pits and access two-track roads related to annual assessment work done by the claimants. The remedial measures for the Atlas Mine do not include these disturbances (see attachment 2).

Question 10. If BLM approached remediation of the Atlas site from a mine reclamation perspective, believing that the site should be reclaimed to a level consistent with sound mining practices, what would this require?

Answer. Mined land reclamation does not imply restoration to pre-existing landscape conditions. Sound mined land reclamation standards include stabilization of all mine face and waste slopes, revegetation of disturbed areas where practical, and reduction of potential safety and health hazards. Reclamation is defined by regulation at 43 CFR 3809.0-5(j):

"Reclamation means taking such reasonable measures as will prevent unnecessary or undue degradation of the Federal lands, including reshaping land disturbed by operations to an appropriate contour and, where necessary, revegetating disturbed areas so as to provide a diverse vegetative cover. Reclamation may not be required where the retention of a stable highwall or other mine workings is needed to preserve evidence of mineralization";

is further described at 43 CFR 3809.0-5(k):

"Unnecessary or undue degradation means surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to mitigate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue



degradation. . . ";  
and must include, at least, the standards outlined in 43  
CFR 3809.1-3(d)(4):

- "Reclamation shall include, but shall not be limited to:
- (i) Saving of topsoil for final application after reshaping of disturbed areas have been completed;
  - (ii) Measures to control erosion, landslides, and water runoff;
  - (iii) Measures to isolate, remove, or control toxic materials;
  - (iv) Reshaping the area disturbed, application of the topsoil, and revegetation of disturbed areas, where reasonably practicable; and
  - (v) Rehabilitation of fisheries and wildlife habitat.

These standards provide a framework for a comprehensive mined land reclamation plan driven by the post-mining land use of the site. All mining activity, including reclamation, is subject to all other applicable State and Federal laws, as stated in 43 CFR 3809.3-1. Because this site contains what is believed to be hazardous wastes or toxic materials, any reclamation attempted now cannot be simplified to exclude any other requirements that might apply.

Specific reclamation requirements for this site must be developed through a thorough inspection of the area and consultation with other regulatory agencies and technical experts. According to the Hollister RA staff, the KCAC Plan of Operations contains stipulations and reclamation requirements that would probably apply to the Atlas Mine site. However, the EPA has developed a remediation design which would probably require some additional procedures.

Question 11. Has/is BLM re-assessing potential natural resource damages at the Atlas Mine site attributable to mining operations?

Answer. A letter was sent to the EPA in September of 1989 in response to their request for a Preliminary Natural Resource Survey. In our response, we concluded that the natural erosion process in this area has been accelerated by man induced activities including mining and OHV use. Asbestos levels in the water exceeded safe drinking water levels and often exceeded air quality standards.

BLM is not currently considering developing a natural resources damage assessment in the Atlas Mine site area. However this position may change depending on the need to evaluate man caused damages to the environment in the Atlas Mine area.

Question 12. How is access granted by BLM to the roadway crossing the Atlas Mine site? If this process is accomplished by right-of-way, please provide a description (example) of the right-of-way language used and a list of right-of-way holders.

Answer. Authorized right-of-way (ROW) holders and the public can use the access road (White Creek Road or Atlas Asbestos Mine haul road). The public can gain access from the Clear Creek Management Area along the ridge line above the Atlas Mine site. The authorized ROW holders can gain access (a more direct route) from the bottom of the canyon along White Creek. Our records indicate four ROW holders. California Department of Water Resources has a ROW for a rain gauge, Texaco Exploration and Production for a communication site along the ridgeline, Pacific Gas and Electric for an electric transmission line to the Atlas Mine Millsite, and Pacific Bell for communication microwave tower access to the ridgetop above the mine site. See attachment 5, Typical ROW language.

Question 13. Please provide a map which depicts the road (ROW).

Answer. See attachment 1, Map of Atlas Mine site haul road/site.

Question 14. How long does it take for a "crust" to form on the mine tailing piles, such as those found at the Atlas site?

Answer. Part of BLM's site security construction activities at the mine site included the placement of an eight foot high earthen berm at the mine entrance. BLM monitored the berm for stability and found that within one year a very thin mineral crust had developed on the berm. The berm was constructed from on-site surface materials found at the site which consisted of high asbestos concentrations (over 50 percent asbestos).

Question 15. To what extent would the "crust" prevent the release of asbestos into the air or watershed?

Answer. The mineral "crust" consists of a weakly cemented hydro-magnesite which is precipitated on the highly sheared, flakey and/or powdered chrysotile asbestos fibers. Given optimum conditions over time, this mineral precipitation and cementation can develop into thick vertical and extensive lateral deposits. Good examples of this can be observed in the stream channels of this area.

EPA has estimated the "crust" that forms on the mine waste and tailings, if left undisturbed, does provide some protection against sheet-flow and wind erosion. BLM's field observations indicate that the soil "crust" can be effective in preventing the airborne release of asbestos fibers. The "crust" however, during major storm events does not afford as much protection against gully erosion.

Question 16. What is/was the industry standard/practice with regard to operations similar to the Atlas Mine? If KCAC operations is "typical" please provide a copy of the Plan of Operations for the KCAC Mine (See attachment 6 KCAC Plan of Operations).

Answer. Although there are some differences between the mining operations at the KCAC mine and the Atlas mine, in general the two mining techniques are similar. The major differences and similarities are:

Mining Techniques	
KCAC Mine	Atlas Mine
Bench mine with terraces	Open pit mine
Surface Geology	
KCAC Mine	Atlas Mine
Stable landform	Large landslide
Waste Rock Management	
KCAC Mine	Atlas Mine
Both operations filled adjacent	ephemeral drainages
Milling Techniques	
KCAC Mine	Atlas Mine
Offsite/wet process	Onsite/dry process
Reclamation Procedures	
KCAC Mine	Atlas Mine
Reviewed/approved by BLM	None

Question 17. What if any authority or duty did BLM have to enter the site in question, during the actual mining operations?

Authority for BLM inspection of pre-FLPMA mining operations is contained at 30 USC 621, 43 USC 1201 and 1457.

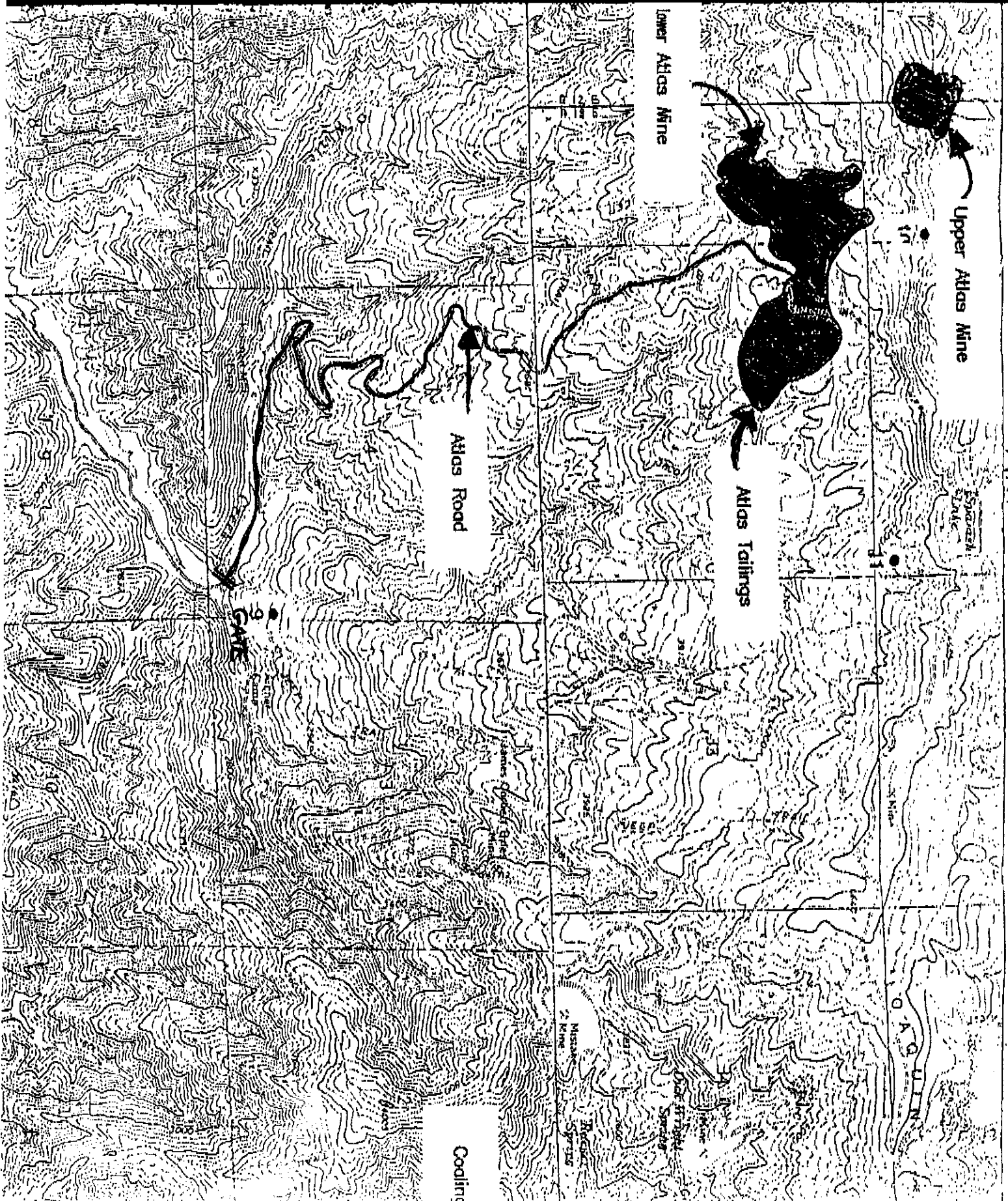
We hope this information will be useful. If you need additional assistance, please contact either Dick Johnson or Dick Forester of my staff.

Attachments (6)

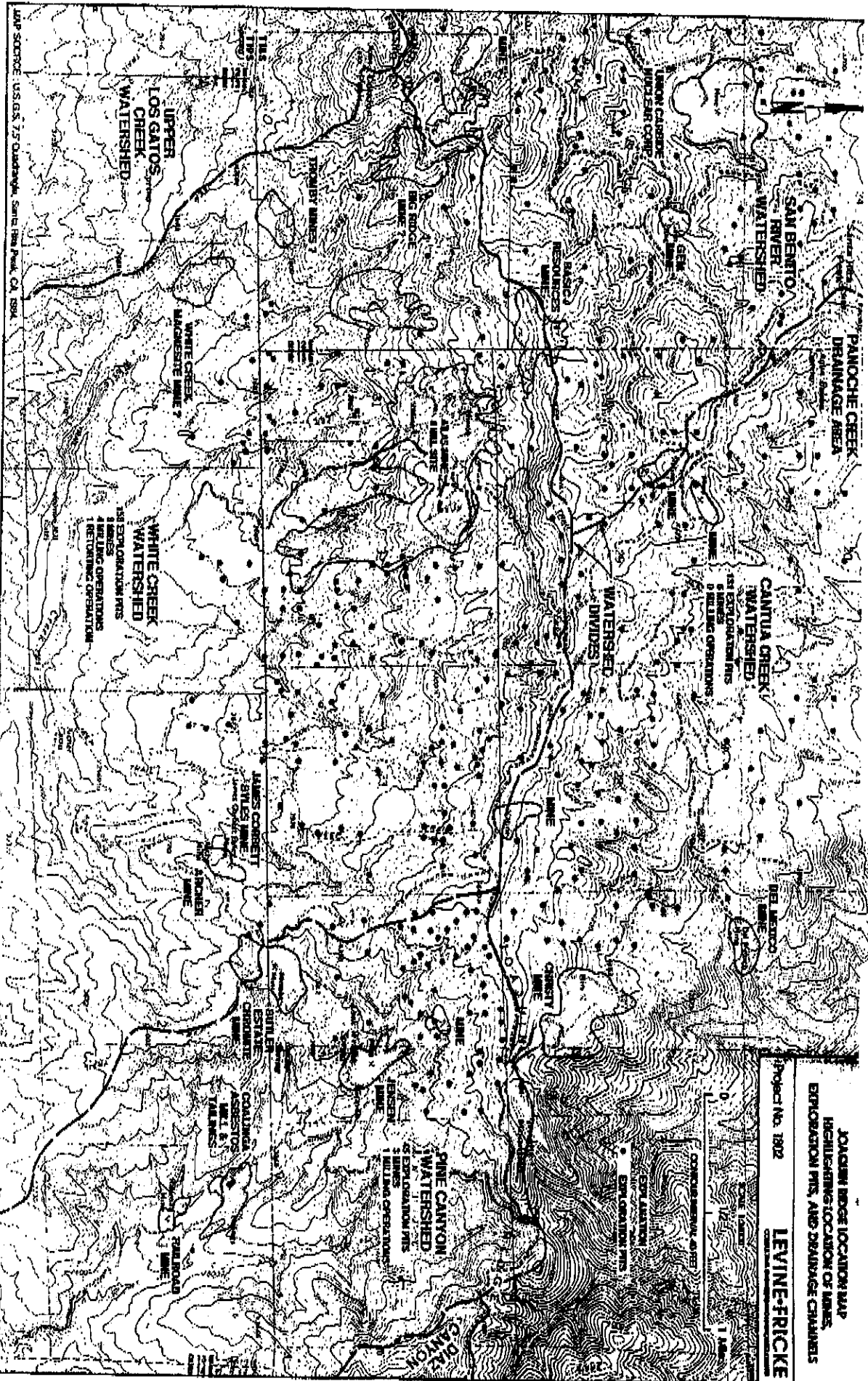
- Attch. 1. Map of Atlas Mine haul road/site
- Attch. 2. Map of exploration pits/other mining in area
- Attch. 3. IM No. 90-59
- Attch. 4. IM No. 90-582
- Attch. 5. Typical ROW language
- Attch. 6. KCAC Plan of Operation

CC: DM, Bakersfield District  
AM, Hollister Resource Area  
W.O. 750  
DSD, Mineral Resources CASO

# ATTACHMENT 1



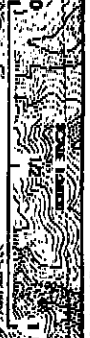
ATTACHMENT  
MAP #2



JOAQUIN RIDGE LOCATION MAP  
HIGHLIGHTING LOCATION OF MINES,  
EXPOSURE PITS, AND DRAINAGE CHANNELS

Project No. 1802

**LEVINE-FRICKE**



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