



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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Memorandum

To: Director
Bureau of Land Management

From: Solicitor

Subject: Limitations on Patenting Millsites under the Mining Law of 1872

I. Introduction and Summary

Since adoption of Secretarial Order 3163 in March 1993, my office has been reviewing patent applications under the Mining Law of 1872. We have learned during these reviews that a number of applicants seek to patent more than one "dependent" millsite per patented mining claim (hereinafter "multiple millsites").¹

These applications appear to be at variance with the statutory text and a body of administrative and judicial decisions. Therefore, with the assistance of the Bureau of Land Management's Deputy Director, an informal survey was conducted of BLM's state offices. The survey revealed that BLM has, on occasion, issued patents for more than one millsite associated with only one mining claim.² There has never been, so far as we can determine, a

¹ There are two types of millsites: (1) "dependent" or "associated" millsites, which are used for mining or milling purposes in connection with a specific mining claim, and (2) "independent" or "custom" millsites, which are quartz mills or reduction works that service mining operations. 30 U.S.C. § 42(a). Dependent millsites are by far the more common type. They can be used not only for mills, but for any number of purposes related to milling or mining. Charles Lennig, 5 L.D. 190 (1886).

² BLM's survey responses revealed no general or uniform policy or practice among the BLM State Offices on this question, nor did it indicate any precise date on which multiple millsite applications began to be entertained. The Colorado State Office reported, for example, that it first issued a multiple millsite patent in 1984, to Homestake Mining Company. The Idaho State Office reported that, while 178 patents were issued between 1950 and 1985, only eleven involved millsites of any kind, and the first patent for multiple millsites in Idaho was apparently issued to the Thompson Creek molybdenum mine in 1985. The Montana State Office reported suggestions from discussions with retired mineral examiners that multiple millsites may have been patented as early as the 1950s. But the

written legal opinion addressing the legality of this practice.³

My Office has closely examined these questions. The Mining Law of 1872 provides that only one millsite of no more than five acres may be patented in association with each mining claim.⁴ However, Secretarial decisions indicate that multiple millsites may be patented with a lode or placer claim, provided that the total area covered by these millsite claims does not exceed five acres (e.g., one millsite claim for two acres, and another millsite claim for three acres).⁵ I believe such decisions can be defended, and therefore confirm that while only a total of five acres per lode or placer claim may be patented as a millsite, that five acres may be broken up into more than one millsite claim.

Because the statute does not support issuing patents for millsite claims totalling more than five acres per placer or lode claim, the Department should reject those portions of millsite patent applications that exceed this acreage limitation. In addition, the Bureau should not approve plans of operation which rely on a greater number of millsites than the number of associated claims being developed unless the use of additional lands is obtained through other means.

Our confirmation of the limits on millsite patenting may to some extent limit the acquisition of federal land for milling and mining purposes under the Mining Law. There are, however, at least two other ways that mining operators can gain the use of federal land for millsite purposes. These are by exchange under § 206 of the Federal Land Policy and Management Act (FLPMA), and by permits and leases under Title III of FLPMA.⁶ We understand that

Montana Office also reported on all of the millsite patents it had issued since 1975, and in only two instances, in 1980 and 1987, did it patent multiple millsites.

³ The Reno Field Solicitor wrote a memorandum dated August 17, 1960 to the BLM State Office in Phoenix that discussed whether millsites can be used to dump tailings, and whether a single millsite patent application can cover three different millsites totaling fourteen acres, but did not directly address the issue discussed here.

⁴ There are other ways the Mining Law limits (and possibly even prohibits) obtaining federal land for millsite purposes. The Mining Law requires that millsites be located only on non-mineral land that is not contiguous to the vein or lode. Depending upon the geology and terrain, there simply may be no federal land in the vicinity of the mineral claim that meets these requirements.

⁵ These decisions are discussed in Part II.D. below.

⁶ Section 206 authorizes the Secretary to exchange tracts of public land for interests in land of equal value elsewhere when "the public interest will be well served by making that exchange." 43 U.S.C. § 1716(a). Under section 302(b), the Secretary may issue permits for the "use, occupancy and development of the public lands" for various purposes. 43 U.S.C.

both exchanges and permits have been used in the past by mining companies for ancillary facilities in lieu of millsites.⁷ Several exchanges have recently been completed or are in negotiation. Nothing in the Mining Law or in this Opinion limits the use of those other authorities to obtain land for use in locatable mining operations.

Nevertheless, there are a number of major differences between the use of these other authorities and the millsite provision of the Mining Law. First, the payment to the federal treasury from a millsite patent applicant is fixed by statute (\$5.00 per acre for a millsite associated with a lode claim; \$2.50 per acre for a millsite associated with a placer claim), while payments under FLPMA are based on fair market value. Second, issuance of millsite patents is not discretionary once all the statutory requirements for patenting have been met, while FLPMA-authorized exchanges and permits are discretionary. Third, fee title may be acquired by the operator through either exchanges or millsite patents, but a Title III lease creates only a possessory interest in the land and a Title III permit conveys no possessory interest. 43 C.F.R. §§ 2920.1-1(a),(b).

II. The Mining Law's Language and Legislative History, Together With Departmental Decisions, Restrict Millsite Patents to a Maximum of Five Acres Per Associated Mining Claim.

- A. The plain language of the Mining Law indicates that only one five-acre millsite per mining claim may be patented.

The Mining Law provides that a millsite may be patented as follows (emphasis added):

(a) Vein or lode and millsite owners eligible

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made on and after May 10, 1872 of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by sections 21, 22 to 24, 26 to 28, 29,

§ 1732(b). Under certain circumstances, consideration also may be given to the grant of a right-of-way under Title V of FLPMA. See 43 U.S.C. § 1761(a)(7).

⁷ In addition, the Colorado State Office reported that, prior to its repeal under FLPMA, the Small Tract Act was used to issue a patent to a mining operation in lieu of a millsite patent. See 43 U.S.C. § 682a-e (repealed Pub. L. 94-579, Title VII, § 702, 90 Stat. 2787).

30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of Title 43 for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

(b) Placer claim owners eligible

Where nonmineral land is needed by the proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim, and is used or occupied by the proprietor for such purposes, such land may be included in an application for a patent for such claim, and may be patented therewith subject to the same requirements as to survey and notice as are applicable to placers. No location made of such nonmineral land shall exceed five acres and payment for the same shall be made at the rate applicable to placer claims which do not include a vein or lode.

30 U.S.C. § 42.⁸

Paragraph (a), which applies to millsites for lode claims and to custom millsites, begins by describing land that is: (1) non-mineral; (2) not contiguous to the vein or lode; and (3) used or occupied by the proprietor of the vein or lode for mining or milling purposes. Paragraph (b), which applies to millsites for placer claims, is slightly more specific, allowing non-mineral land that is both "needed" as well as "used or occupied" for mining or milling in connection with "a placer claim."⁹

The statute imposes a limitation that only a single five-acre millsite may be claimed in

⁸ As originally enacted in 1872, this section contained only what is now paragraph (a), and thus allowed millsites to be patented only in connection with vein or lode claims, or as independent quartz mills or reduction works. Act of May 10, 1872, § 15, 17 Stat. 96, codified as R.S. 2337. It was not until 1960 that Congress amended the statute to add paragraph (b), allowing millsites to be patented in connection with placer claims. Pub. L. No. 86-390, 74 Stat. 7 (1960).

⁹ Although the body of law governing "use and occupancy" of millsites is beyond the scope of this Opinion, it is important to note that the application for a millsite patent must show present use, by proper means, of each 2 1/2 acre portion of each millsite. See United States v. Swanson, 93 IBLA 1 (1986); 34 IBLA 25 (1978); 14 IBLA 158 (1974). Generally, whether a millsite is "presently in use" is determined at the time of review of the application (by BLM or, on appeal, by the IBLA), and not at the time the application is filed. See Utah Int'l Inc., 45 IBLA 73 (1980). Similarly, the lode or placer claim must be valid at the time the millsite application is reviewed for the millsite to be valid. Pine Valley Builders, 103 IBLA 384 (1988).

connection with each mining claim. With regard to lode claims, subsection (a) states that "such" land may be "embraced and included in" the application for the vein or lode with which it is associated. 30 U.S.C. § 42(a). Further, the subsection requires that "no location" of "such" land shall exceed five acres. *Id.* The use of the word "such" indicates that the same parcel of land that meets the other requirements for a millsite claim is the land that is being limited to a five-acre area. See Denver Union Stock Yard Co. v. Producers Livestock Marketing Ass'n, 356 U.S. 282, 285-86 (1958) (defining "such stockyard" used in Stockyard's Act); Black's Law Dictionary 1432 (6th ed. 1990) ("such" defined as, among other things, "[i]dential with, being the same as what has been mentioned").

Similarly, a millsite associated with a placer claim may be "included in an application for a patent for such claim, and may be patented therewith" and no location of "such" land may exceed five acres. 30 U.S.C. § 42(b). Thus, the statute maintains the link between mining and millsite claims and the five-acre limitation with regard to placer claims as well.¹⁰

Nothing in the statutory language suggests that the five-acre size restriction on millsites may be avoided by locating multiple millsites in connection with a single mining claim. Construing the statute to permit multiple millsites without regard to the aggregate size limit would vitiate the five-acre statutory limit on the size of millsites. This would violate a fundamental rule of statutory construction: to give effect to all of a law's provisions. See, e.g., United States v. Menasche, 348 U.S. 528 (1955); Sutherland, *Statutory Construction* § 46.06 (5th ed. 1992).

B. The Bureau of Land Management's regulations limit millsite acreage.

The first regulations issued by the General Land Office in 1872 stated unequivocally: "The law expressly limits mill-site locations made from and after its passage to five acres, but whether so much as that can be located depends upon the local customs, rules, or regulations." Mining Regulations § 91, June 10, 1872, Copp, U.S. Mining Decisions 270, 292 (1874) (emphasis in original).¹¹

The current BLM regulation on millsite patenting continues to refer to the five acre limit, and is fairly interpreted to prohibit locating more than one five-acre millsite in connection with each mining claim:

¹⁰ A dependent millsite must be patented either contemporaneously with the associated mining claim or by an application after the associated mining claim has been patented. Pine Valley Builders, Inc., 103 IBLA 384 (1988); Eclipse Mill Site, 22 L.D. 496 (1896); see also 43 C.F.R. § 3864.1-1(b). A dependent millsite may not be patented prior to the issuance of a patent on the associated mining claim. Union Phosphate Co., 43 L.D. 548 (1915).

¹¹ By 1907, for reasons that are not apparent, the Land Office had dropped this paragraph from the regulations.

[P]arties holding the possessory right to a vein or lode claim, and to a piece of nonmineral land not contiguous thereto for mining or milling purposes, not exceeding the quantity allowed for such purpose by R.S. 2337 . . . may file in the proper office their application for a patent, which application . . . may include, embrace, and describe . . . such noncontiguous millsite.

43 C.F.R. § 3864.1-1(b) (emphasis added).¹²

The regulation speaks of millsites exclusively in the singular: a party holding the right to "a" mining claim and "a piece of nonmineral land" may apply for a patent, and shall describe "such . . . millsite" in the application. There is no suggestion in the regulation that more than one millsite may be patented in connection with a mining claim.

BLM's Handbook for Mineral Examiners, on the other hand, currently provides that "[a]ny number of millsites may be located but each must be used in connection with the mining or milling operation." BLM Handbook for Mineral Examiners, H-3890-1, Ch. III § 8 (Rel. 3/17/89). The handbook cites no authority for this interpretation.

This provision may come from a handbook that is often used by BLM mineral examiners: Terry Maley's *Handbook of Mineral Law* (5th ed. 1993).¹³ In this handbook Maley, himself a BLM mineral examiner, states:

There is no specific direction in the Federal law or regulations concerning how a millsite may be located or how many mill sites may be located. . . . [T]here is no limitation to the number of mill sites that may be located as long as each mill site is properly "used or occupied" for "mining or milling purposes."

Id. at 191.¹⁴ No authority is cited for these statements. There is no legal analysis or

¹² This language dates, with little alteration, from the earliest circulars issued by the General Land Office following enactment of the 1872 Mining Law. See Mining Regulations §§ 86-92, June 10, 1872, Copp, U.S. Mining Decisions 270, 292 (1874); Mining Regulations §§ 71-77, April 1, 1879, Copp, U.S. Mineral Lands 43, 55 (1881); Mining Regulations §§ 63-67, Dec. 15, 1897, 25 L.D. 561, 581 (1898); Mining Regulations §§ 61-65, July 26, 1901, 31 L.D. 453, 485 (1901); Mining Regulations § 61-65, May 21, 1909, 37 L.D. 728, 771 (1909); 43 C.F.R. §§ 185.67-185.70 (1938); 43 C.F.R. §§ 3460.1-3460.4 (1969).

¹³ The Alaska State Office's response to BLM's survey reported that Maley's book is "consulted for technical direction" in that Office.

¹⁴ An earlier edition of Maley's handbook contained a more watered-down version of this statement. The second edition, published in 1979, stated only: "There is no information in the federal law or regulations concerning how a millsite may be located or how many

discussion of the legislative history, regulations and caselaw related to this provision. These assertions may, however, explain why some BLM field offices apparently have, in recent years, ignored the limitations of the Mining Law and BLM's regulations.

- C. The legislative history of the 1960 amendment to the Mining Law indicates that no more than five acres of land per mining claim may be patented for millsite purposes.

In 1960, Congress amended the Mining Law to permit location of millsites in connection with placer claims, adding subsection (b) to 30 U.S.C. § 42. Pub. L. No. 86-390, 74 Stat. 7 (1960). The legislative history of that amendment makes clear that Congress and the Department understood both the existing statute and the amendment to permit only one five-acre millsite in connection with each mining claim.¹⁵

The amendment was introduced in 1959 as S. 2033. 105 Cong. Rec. 8734 (1959). As originally proposed, the bill would have allowed a millsite location of "ten acres for each individual claimant" in connection with a placer claim. In comments on the bill, the Department recommended S. 2033 be enacted, with amendments:

As it is written, [S. 2033] would permit the location of nonmineral land to the extent of "ten acres for each individual claimant." The acreage permitted under section 2337 as it now exists is limited to 5 acres, and we do not see the need for permitting the location of greater nonmineral land acreage for placer claims than for the other types of mining claims. Moreover, permitting the location of 10 acres "for each individual claimant" would be most undesirable since it would permit a number of individual claimants to band together to receive far more than 10 acres at one site. Accordingly, we recommend that the bill be amended . . . by the deletion of the word "ten" and the substitution therefore of the word "five", and by the deletion of the words "for each individual claimant".

Letter to Chairman, Senate Committee on Interior and Insular Affairs from Assistant Secretary of the Interior Roger Ernst, July 20, 1959, reprinted in S. Rep. No. 904, 86th Cong., 1st Sess., at 3.

In its report on the bill, the Senate Interior Committee accepted the Department's recommendations, stating:

millsites may be located." Maley, *Handbook on Mineral Law*, at 179 (2nd ed. rev. 1979).

¹⁵ A review of the legislative history of the 1872 Mining Law reveals no discussion of the acreage limitation in the millsite provision.

[T]he word "ten" was stricken and the word "five" inserted in lieu thereof. The purpose of this amendment is to restrict the area of a millsite in conjunction with a placer claim to 5 acres of land to make it conform with the allowable millsite acreage for lode claims which has been the statutory requirement since 1872. . . .

[T]he words "for each individual claimant" were stricken so as to impose a limit of one 5-acre millsite in any individual case preventing the location of a series of 5-acre millsites in cases where a single claim is jointly owned by several persons. . . .

In essence, S. 2033 merely grants to holders of placer claims the same rights to locate a 5-acre millsite as has been the case since 1872 in respect to holders of lode claims, and the committee unanimously urges enactment.

Id. at 2. The Senate and House passed the bill as amended, and the President signed it on March 18, 1960. 105 Cong. Rec. 18741 (1959); 106 Cong. Rec. 6057 (1960).

This legislative history demonstrates that Congress understood both the amendment in 1959 and the existing Mining Law to permit location of only one five-acre millsite per mining claim. The Senate Interior Committee removed the phrase "for each individual claimant" from the bill for the express purpose of preventing the aggregation of multiple five-acre millsites by a mining claimant, and made it clear that the Committee understood this to be consistent with the existing law applicable to millsites associated with lode claims.

D. The Department's decisions have consistently limited the number of acres patented as millsites to five acres per associated mining claim.

As noted above, the statutory language and legislative history of the Mining Law indicate that only one five-acre millsite claim per mining claim may be patented. However, case law in the form of the Department's own administrative decisions¹⁶ indicates that more than one millsite claim may be patented, so long as they collectively do not cover more than a total of five acres. These decisions are faithful to the overall five-acre limitation and therefore, it is not necessary to disturb them.

Only one reported case, decided shortly after the Mining Law was enacted, directly addresses the question of how many millsites may be located in connection with a mining claim. In

¹⁶ Very few reported federal or state court cases concern the millsite provision of the Mining Law, and none addresses how many millsites may be located. Swanson v. Babbitt, 3 F.3d 1348 (9th Cir. 1993), one of the few federal cases concerning the millsite provision, involved whether a mining claimant had a vested right to patents on millsites at the time Congress prohibited further patenting in a recreation area.

J.B. Hoggin,¹⁷ 2 L.D. 755 (1884), the General Land Office had cancelled the entry of one of two millsites located in connection with one lode claim, holding that the law did "not contemplate that more than one millsite or tract of land for milling purposes may be embraced in an application for patent for a lode claim." Id. One of the millsites covered four and one-half acres, and the other one-half acre. Id.

On appeal, the Secretary framed the question presented as "whether, keeping within the restriction of 5 acres of nonmineral land, more than one mill site may be embraced in an application for a vein or lode and patented therewith." Id. The Secretary held that:

[S]ince the amount in both locations does not exceed five acres, I think in this instance both mill-site entries should be permitted to stand. . . . I think the practice under [R.S. 2337] should be to allow the entry of such number of pieces, within the restriction of five acres, as may appear to be necessary for such mining and milling purposes.

Id. at 756. The Secretary made it clear, therefore, that a single mining claim could support multiple millsite locations only where the combined area of the millsites was five acres or less. See also Yankee Mill Site, 37 L.D. 674, 677 (1909) (Mining Law contains "provision for an additional area, 'for mining or milling purposes,' . . . with a limitation by acreage and not by dimensions"); United States v. Collord, 128 IBLA 266, 314 (1994) (Burski, J., concurring) (millsite provision of Mining Law "permits only a single appropriation of additional land, not to exceed 5 acres, per mining claim.").¹⁸

In 1891, the Department reaffirmed the five-acre millsite limit. Hecla Consolidated Mining Co., 12 L.D. 75 (1891), involved an application under the "second clause" or "custom" millsite provision of R.S. 2337 for patent on a millsite used for storage of tailings in connection with adjacent millsites that contained a number of charcoal kilns used for smelting. The additional millsite was not used in connection with any specified claim, and hence did not qualify as a dependent millsite under the first clause of R.S. 2337. Id. at 77. The applicants sought the site because the area of the existing sites was "not sufficient for their purposes." Id. The Secretary held that General Land Office's rejection of the application was proper, stating:

¹⁷ The case name is spelled "Hoggin" in the caption, while the claimant's name is spelled "Haggin" in the text of the decision.

¹⁸ Collord appealed the IBLA's decision to the district court. The court remanded the case to the IBLA to determine the validity of two millsites and to assess whether occupancy had been established on the millsites. See Collord v. Department of the Interior, No. 94-0432-S-BLW, at 5-11 (D.Idaho, Aug. 27, 1996). On remand, the IBLA may be forced to address whether Collard is inappropriately seeking to patent millsites acreage in excess of the statutory limitation, because only one valid lode claim remains in Collord's application.

The law makes no provision for acquiring land as mill sites additional to or in connection with existing mill sites, but on the contrary expressly limits the amount of land to be taken in connection with a mill to five acres.

Id.¹⁹

There are also cases addressing whether applicants may patent millsites in connection with more than one mining claim. The outcome of these decisions has not been uniform, but they have uniformly maintained the five-acre limitation and imposed the rule that applicants must demonstrate the need for all five acres of millsite per mining claim.

The earliest decision we have found is Mint Lode and Mill Site, 12 L.D. 624 (1891), where the Department took a strict "one-for-one" view of the relation between a dependent millsite and the mining claim with which it is associated. The case involved an application for a patent on a millsite that was one of five millsites used in common in connection with five lode claims. The Acting Secretary held:

[The Mining Law] evidently intends to give to each operator of a lode claim, a tract of land, not exceeding five acres in extent, for the purpose of conducting mining or milling operations thereon, in connection with such lode. This excludes the idea that the millsite is to be used in connection with other lodes. The object of the millsite is to subserve the necessities of the lode to which it is attached, for mining and milling purposes.

Id. at 625.

While Mint Lode was never expressly overturned, subsequent decisions took a different approach, permitting a dependent mill site to serve more than one lode claim. In Alaska Copper Co., 32 L.D. 128 (1903), the Acting Secretary adopted a rule that generally allowed only one five-acre millsite in connection with a group of lode claims. Alaska Copper Co. involved eighteen millsites located around a harbor in connection with eighteen lode claims. The evidence indicated that only one of the millsites was even arguably being used for mining purposes. Id. at 130.

The Acting Secretary held the millsite locations invalid for several reasons, among them that

¹⁹ One year later, the Secretary decided another case involving the same applicant. Hecla Consolidated Mining Co., 14 L.D. 11 (1892), involved an application for two adjoining five-acre millsites with a custom quartz mill straddling the line between the sites. The Secretary held that, because the Mining Law limited each location of a custom millsite to five acres, the entries could not stand unless the applicant could demonstrate that the improvements on each site could operate as a quartz mill or reduction works independently of the other. Id. at 12.

applicants are not automatically entitled to one millsite per mining claim.

[The] manifest purpose [of R.S. 2337] is to permit the proprietor of a lode mining claim to acquire a small tract of noncontiguous nonmineral land as directly auxiliary to the prosecution of active mining operations upon his lode claim, or for the erection of quartz-mills or reduction works for the treatment of the ore produced by such operations. The area of such additional tract is by the terms of the statute restricted to five acres as obviously ample for either purpose. . . . Whilst no fixed rule can be established, it seems plain that ordinarily one mill site affords abundant facility for the promotion of mining operations upon a single body of lode claims. It is not to be supposed that Congress intended a grant of an equal number of such tracts as rightfully incident to all the lode claims of a compact group held and worked under a common ownership.

Id. at 129-30.

Regardless of the number of millsites sought, the Department has consistently required applicants to demonstrate the necessity of the acreage sought to be patented as a millsite. For example, in another case involving an application for more than one millsite, the Secretary held that "where more than one mill site is applied for in connection with a group of lode claims a sufficient and satisfactory reason therefor must be shown." Hard Cash and Other Mill Site Claims, 34 L.D. 325, 326 (1905). Decades later, in United States v. Swanson, 14 IBLA 158 (1974), the Interior Board of Land Appeals (IBLA) stated:

[A] claimant is entitled to receive only that amount of land needed for his mining and milling operations, and this amount can embrace a tract of less than five acres. The statute states that the location shall not "exceed five acres." . . . The reference to five acres in the statute is clearly a ceiling measure, not an absolute, automatic grant.

We believe that in granting a gratuity of a millsite the Government is entitled to require efficient usage, so that only the minimum land needed is taken.

Id. at 173-174.

Thus, where the need is shown, a patent applicant may claim more than one five-acre millsite in connection with a group of mining claims. The Department has never held, however, that a claimant may patent more than five acres of land for a millsite in connection with one mining claim.

- E. Treatises and scholarship on the millsite provisions of the Mining Law support the Department's regulations and decisions to permit, at a maximum, five acres of millsite for each associated mining claim.

Since enactment of the Mining Law, there appears to have been little doubt among miners and mining lawyers that the law allowed no more than five acres of millsite area in connection with each mining claim. See 2 *Lindley on Mines* § 520, at 1173-74 (3d ed. 1914) (noting that a "lode proprietor may select more than one tract if the aggregate does not exceed five acres"); see also Barringer & Adams, *The Law of Mines and Mining*, at 504-05 (1897) ("Each lode claimant is entitled to take up to five acres of non-mineral land not contiguous to his lode A mill site may be composed of several tracts, provided they do not exceed five acres in the aggregate."); Snyder, *Mines and Mining* § 324 (1902) ("The statute authorized the location, by the owner or proprietor of a lode or placer claim, of non-adjacent surface ground, not to exceed five acres, as a mill site."); Greer, "Millsites: Nonmineral Mining Claims," 13 *Rocky Mtn. Min. L. Inst.* 143, 169 (1967)("[A]s to claim-connected millsites, there is a limitation on the number of claims which may be located in connection with a lode claim or claims. The owner of several contiguous lode mining claims is not necessarily entitled to a millsite for each lode claim.").

In a 1968 statement submitted to the Public Land Law Review Commission, the leading trade association for the mining industry identified the limited acreage available under the millsite provision of the Mining Law as an impediment to modern mining.

When the mining laws were enacted in 1872, provision was made for the acquisition of five-acre millsites to be used for plant facilities on mining claims. The typical mine then was a high-grade lode or vein deposit from which ores were removed by underground mining. The surface plant was usually relatively small, and acquisition of five-acre millsites in addition to the surface of mining claims . . . adequately served the needs of the mines

Today, the situation is frequently different A mine having 500 acres of mining claims may, for example, require 5000 acres for surface plant facilities and waste disposal areas. It is obvious that such activities may not be acquired through five-acre millsites.

American Mining Congress, *The Mining Law and Public Lands*, at 29 (January 11, 1968).

Nine years later, as part of their comprehensive treatment of the law governing millsites, two mining industry lawyers wrote:

Theoretically one five-acre millsite can be acquired for each valid mining claim. However, only as much as ground as is needed for a particular use can be appropriated under a single millsite or a connected group of millsites.

Parr & Kimball, "Acquisition of Non-Mineral Land for Mine Related Purposes," 23 *Rocky Mtn. Min. L. Inst.* 595, 641-42 (1977).

Similarly, a 1979 study by the Congressional Office of Technology Assessment stated:

[I]t is highly doubtful that [millsites] could satisfy all the demands for surface space. There could be at most as many millsites as there are mining claims, and each millsite would be at most one-fourth the size of the typical 20-acre claim, so that the millsites, in the aggregate, would be one-fourth the size of the ore body encompassed by the claims.

Office of Technology Assessment, *Management of Fuel and Nonfuel Minerals in Federal Land*, at 127 (April 1979).

The second edition of *American Law of Mining*, however, began to suggest there was some flexibility in the law:

In theory, an unlimited number of millsites might be appropriated by a single mining operator and held or patented as long as each independently meets the requirements of the law.

1 *Am. L. Mining* § 32.06[4] (2d ed. rev. 1987).²⁰ The meaning of this statement is unclear. If the proviso that each millsite "independently meets the requirements of the law" means that, in addition to being non-contiguous, non-mineral, and used or occupied for mining or milling purposes, each site must be associated with a separate, valid mining claim, then it is consistent with the Department's interpretation of the statute.²¹

It is possible that the treatise's authors and editors were themselves unsure of the import of their statement. In a subsequent part of the same edition of the treatise, in a section entitled "Unresolved Issues Concerning Mill Sites," the treatise states that "[u]ncertainty also

²⁰ The first edition of this book contained no such statement. To the contrary, it stated, "A mill site may, if necessary for the claimant's mining or milling purposes, consist of more than one tract of land, provided that it does not exceed five acres in the aggregate." 1 *Am. L. Mining* § 5.35 (1960). *American Law of Mining* is written and edited primarily by attorneys for the mining industry, with the assistance of some academics. This particular section of the ALM was written by Loren L. Mall of Brega & Winters, P.C. in Denver and Donald Salcito of Ballard, Spahr, Andrews and Ingersoll, also in Denver.

²¹ The only authority the treatise cites is *Utah Int'l. Inc.*, 36 IBLA 219 (1978), in which 84 of 314 millsites included in a patent application were approved. However, IBLA did not address the question of how many millsites could be patented, and nothing in the decision indicates the number of mining claims associated with the millsite claims.

surrounds the issue of the amount of land that may be used by millsite claimants." *Id.* at § 110.03[4] (2d ed. 1984).²² Indeed, another passage in the treatise suggests that the editors and authors do not believe that an unlimited number of millsites may be claimed:

The acquisition of federal lands or interests therein by means other than the locating of mining claims or mill sites is sometimes necessary to provide the additional ground needed for a planned mining operation. The restraints on the number and size of mill site claims can limit their usefulness as a land acquisition method.

Id. at § 111.01 (2d ed. rev. 1987).²³

III. Conclusion

The evolution of the mining industry over the years has increased the need, with some mining practices, to secure the use of ancillary acreage to support locatable mining operations. For some kinds of mining, the five-acre limitation precludes obtaining that acreage. From this perspective, the five-acre limit may be seen as a hopeless anachronism, even though it was affirmed by Congress as recently as 1960.²⁴ But many aspects of the Mining Law have that appearance, simply because of the vintage of the statute. The \$2.50 and \$5.00 per acre patent fees, fixed in 1872 by Congress and never changed since, have fallen totally out of step with the times, but the Department is not free to fix higher fees for patenting without the consent of Congress.

So it is with the millsite limitations. As Judge J. Skelly Wright once wrote, in holding that a statutory acreage limitation on a public land grant must be followed despite its seemingly anachronistic character:

Congress, by enacting Section 28, allowed . . . companies to use a certain amount of land. . . . These companies have now come into court . . . and have said, "This is not enough land; give us more." We have no more power to grant their request, of course, than we have the power to increase congressional appropriations to needy recipients.

²² This section was written by Patrick Garver of Parsons, Behle & Latimer in Salt Lake City.

²³ This section was written by Jerry L. Haggard of Apker, Apker, Haggard & Kurtz, P.C. in Phoenix and by Daniel L. Muchow of Quarles, Brady & Fannin, also in Phoenix.

²⁴ Still, as noted earlier, various strategies are available to, and have been employed by, mining operations to cope with this limitation, including obtaining leases, permits, or authorizations under other laws for permission to use public lands for milling and ancillary operations, and exchanging land elsewhere for public land.

Wilderness Society v. Morton, 479 F.2d 842, 891 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973).

Further, BLM's current administrative practice cannot supersede the plain words of the statute. "We cannot accept the contention that administrative rulings -- such as those here relied on -- can thwart the plain purpose of a valid law." United States v. City and County of San Francisco. 310 U.S. 16, 31-32 (1940).

Finally, grants of federal land are to be "construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." United States v. Union Pacific R. Co., 353 U.S. 112, 116 (1957); see also Watt v. Western Nuclear, Inc., 462 U.S. 36, 59 (1983) (mineral reservation under Stock-Raising Homestead Act construed in favor of government to include gravel); Andrus v. Charlestone Stone Products Co., Inc., 436 U.S. 604, 617 (1978) (Mining Law construed in favor of government to exclude water from locatable "valuable minerals"); Sutherland, supra at § 64.07.

The Secretary faces a heavy responsibility in administering patenting under the Mining Law of 1872. As Justice Van Devanter, a former Departmental chief legal officer, once wrote: "[The Secretary is] charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460 (1920). In order to exercise this responsibility most prudently, the Department should reject patent applications which seek to patent more than five acres per associated mining claim.

Therefore, for the reasons explained above, I recommend that the Bureau promptly, with the help of my Office, update its Manual to be consistent with this Opinion. These modifications to the Manual and to BLM's administrative practice should be applied immediately, including with regard to pending patent applications. As is clear from this Opinion, those BLM offices that have approved patent applications for multiple millsites have been doing so in contravention of the Mining Law, BLM's regulations, and Departmental decisions. Further, BLM's apparently recent ad hoc changes in practice to permit patenting of multiple millsites did not result from formal changes to the Bureau's or the Department's rules and regulations, and were not subject to wide public review and comment, nor to Solicitor's Office review. Finally, as reflected in treatises and other commentary, including those by industry lawyers, the limitations of the millsite provision appear to have been widely, if not uniformly, appreciated. Therefore, I do not regard immediate application of this Opinion to pending applications to be unreasonable or to thwart any legitimately held expectation to the contrary.

This Opinion was prepared with the assistance of Eric Nagle, Portland Regional Solicitor's Office; Monica Burke, formerly an attorney in the Office of the Solicitor; Sharon Allender, formerly Assistant Solicitor, Onshore Minerals, Division of Mineral Resources, Office of the Solicitor, Karen Hawbecker and Joel Yudson, Division of Mineral Resources, Office of the Solicitor, and Wendy Thurm, Special Assistant to the Solicitor.



John D. Lesly
Solicitor

I concur: 
Secretary of the Interior

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Date