



United States Department of the Interior

OFFICE OF THE SOLICITOR

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Memorandum

To: Secretary

From: Deputy Solicitor¹

Subject: Mill Site Location and Patenting under the 1872 Mining Law

I. Introduction

The Mining Law of 1872 (hereinafter "Mining Law") allows miners to locate and patent lode and placer mining claims, subject to certain restrictions regarding the size of the claims. 30 U.S.C. §§ 23, 29, 35, 36. The Mining Law also allows miners to locate and patent nonmineral lands for mill sites. 30 U.S.C. § 42. A mill site consists of a parcel of nonmineral land that is used or occupied for mining or milling purposes in association with lode or placer claims. *Id.*² Under the Mining Law, a mill site may not exceed five acres. *Id.* This provision of the Mining Law will be referred to as the "mill site provision" or "five-acre mill site provision."

In 1997, former Solicitor John D. Leshy issued an opinion, concurred in by former Secretary of the Interior Bruce Babbitt, that concluded that the mill site provision not only limits the *size* of mill sites to five acres, but also limits the *number* of mill sites that may be located and patented to no more than one five-acre mill site in association with each mining claim. *Limitations on Patenting Millsites under the Mining Law of 1872*, M-36988 (Nov. 7, 1997)

¹ The Solicitor has recused himself from involvement in the matters discussed in this opinion.

² Claimants may use mill sites for a wide range of purposes related to mining or milling. The structures and activities on mill sites include, among other things, water treatment facilities, overburden storage, crushing units, warehouses, equipment maintenance buildings, employee parking, top soil storage for reclamation use, mineral processing pads, and air-quality and other environmental monitoring stations. *Alaska Copper Co.*, 32 Pub. Lands Dec. 128, 131 (1903); 2 *Lindley on Mines* § 523, at 1178-80 (1914); Terry S. Maley, *Mineral Law* 395-405 (6th ed. 1996). Under the mill site provision, there are two types of mill sites. Independent or custom mill sites are used for quartz mills or reduction works. Dependent mill sites are used for mining or milling purposes in association with mining claims and are the most common type. Unless otherwise noted, future references to mill sites in this opinion are to dependent mill sites.

(hereinafter "1997 Opinion").³ The 1997 Opinion advised that "the Department should reject those portions of millsite patent applications that exceed" five acres per associated placer or lode claim and "should not approve plans of operations 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." 1997 Opinion, at 2.

The 1997 Opinion represented a departure from the Department's long-standing administrative practice and interpretation that the mill site provision does not limit mill sites to one per mining claim. The Bureau of Land Management (BLM), which is charged with enforcement responsibility for the mill site provision, issued written guidance in 1954 that clearly provided that more than one mill site could be located for each mining claim. The BLM has consistently followed this written guidance in administering the mill site provision for nearly a half century prior to the 1997 Opinion. Consequently, the 1997 Opinion departed from nearly a half century of settled administrative practice regarding the mill site provision.

Indeed, Congress has recognized that the 1997 Opinion represented a departure from the Department's settled administrative practice and interpretation, and has taken action to restore that administrative practice with respect to prior and pending mining plans and patent applications. In 1999, Congress enacted legislation expressly prohibiting the Department of the Interior from applying the 1997 Opinion to deny patent applications and plans of operation submitted before the date of the law's enactment on grounds that they contain more than one mill site for each mining claim. Pub. L. No. 106-31, § 3006, 113 Stat. 57, 90-91 (1999); Pub. L. No. 106-113, § 337, 113 Stat. 1501, 1501A-199 (1999). According to the Conference Report, the 1997 Opinion was "particularly troubling because both the Bureau of Land Management and the Forest Service have been approving patents with more than one five-acre millsite per patent based on procedures outlined in their operations manuals." H.R. Conf. Rep. No. 106-143, at 90 (1999). As a result of the 1999 enactments, the 1997 Opinion has not been applied as the basis for denying a proposed mining plan or a patent application.

After reviewing the matter, we conclude that the mill site provision does not categorically limit the number of mill sites that may be located and patented to one for each mining claim and that the Department's traditional practice of not applying such a numerical limitation is in

³ Strictly speaking, the 1997 Opinion concluded that the mill site provision limits claimants to locating and patenting five acres of nonmineral lands in association with each mining claim, allowing that more than one mill site may be located for each mining claim as long as the aggregate acreage of the mill sites does not exceed five acres. The practical effect of this interpretation in most cases is to limit the number of mill sites to one for each associated claim. In this memorandum, we will often characterize the interpretation of the 1997 Opinion as a categorical or numerical limitation that limits claimants to locating one mill site for each mining claim. In such instances, we are referring to a five-acre mill site. The 1997 Opinion also relied on this shorthand, stating that the statute "imposes a limitation that only a single five-acre millsite may be claimed in connection with each mining claim." 1997 Opinion, at 4-5.

conformity with the requirements of the Mining Law. Accordingly, we conclude that the 1997 Opinion, in reaching the opposite conclusion, does not properly interpret the mill site provision and improperly departs from the Department's traditional practice and interpretation. Our conclusion is based on analysis of the Mining Law, its legislative history, the congressional purpose, and the Department's settled administrative practice and interpretation.

First, although the mill site provision of the Mining Law expressly limits the *size* of mill sites, the provision does not expressly limit the *number* of mill sites that may be located for a mining claim. Absent some other indication of congressional intent, a statute should not be construed as containing an implied limitation that does not appear in the statute itself. The absence of any numerical limitation in the mill site provision is particularly important in light of the fact that, as Congress knew in enacting the Mining Law in 1872, mining companies at that time used many more than five total acres of land for milling purposes to support a single mining claim, as in the case of a Comstock Lode mine in Nevada. If Congress had intended to overturn this existing mining practice by precluding mining companies from locating more than a single five-acre mill site, Congress presumably would have expressly so provided in the Mining Law. The absence of any such language strongly indicates that no such result was intended.

Second, other provisions of the Mining Law limit the size of lode and placer mining claims, and these provisions have been held by the courts not to limit the number of such claims that may be located and patented by an individual claimant. Since these other provisions do not categorically limit the number of lode or placer claims, the mill site provision should not be construed as categorically limiting the number of mill sites that may be located and patented for each mining claim. Under settled rules of statutory construction, the overall context of the Mining Law should be considered in interpreting its provisions, and similar provisions should be construed harmoniously.

Third, the congressional purpose of the Mining Law was to encourage the development of the nation's mineral resources. This congressional purpose is not served by artificially limiting the number of mill sites that may be located and patented with mining claims. Otherwise, mill sites would, in many cases, be inadequate to develop the mineral resources located within the mining claims. It is unlikely that Congress intended to limit categorically the availability of milling capacity to develop the minerals that Congress itself had opened for exploration and purchase. To construe the Mining Law as containing such a restriction would impair the congressional goal of encouraging development of the nation's mineral resources.

Fourth, as noted above, the Department's prevalent administrative practice and interpretation has been in accordance with the view that the five-acre mill site provision does not impose a numerical limitation on mill sites, and under settled rules of statutory construction the interpretation of a statute by an agency charged with its enforcement is relevant in construing the statute.

Although the mill site provision does not preclude locating and patenting multiple mill sites for each mining claim, the provision does restrict the amount of mill site acreage a claimant may locate and patent to that which is “used or occupied . . . for mining or milling purposes” 30 U.S.C. § 42. This provision of the Mining Law will be referred to as the “use-or-occupancy requirement.” Under this provision, the Department of the Interior may limit excessive mill sites by challenging the validity of mill sites that claimants do not actually need for mining or milling purposes.

Based on these factors, we conclude that the mill site provision does not categorically limit the number of mill sites to one for each mining claim, and that the 1997 Opinion erred in concluding otherwise. Accordingly, the Department should return to its prevalent, pre-1997 administrative practice and interpretation, under which the mill site provision was interpreted as not imposing such numerical restrictions.

II. The Mill Site Provision

Under the Mining Law, claimants may locate⁴ and patent⁵ lode claims and placer claims. 30 U.S.C. §§ 23, 29 (lode claims); *id.* §§ 35, 36 (placer claims). The Mining Law also provides for locating and patenting mill sites that are attendant to lode claims and, as amended in 1960, attendant to placer claims as well. The mill site provision states:

⁴ “Location” is the act of taking or appropriating a parcel of land. *St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636, 649 (1881). The act of “location” includes posting a location notice on the mining claim or mill site, recording the location notice, and marking the mining claim or mill site boundaries on the ground. *Smith v. Union Oil Co.*, 135 P. 966, 968 (Cal. 1913), *aff’d* 249 U.S. 337 (1919). A “lode” claim is a location made upon a vein or lode of quartz or other “rock in place” bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits. 30 U.S.C. § 23. A “placer” claim includes all forms of deposit except veins of quartz or other rock in place and is characterized by mineral deposits formed by sedimentary processes. *Id.* § 35; *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 678-79 (1888). In order to have a valid mining claim location, there must be a discovery of a valuable mineral deposit within the boundaries of the claim. 30 U.S.C. § 23. Before beginning mining activities, a mining claimant must submit a notice for surface disturbance of five acres or less or obtain agency approval of a plan of operation that complies with the BLM’s surface management regulations, under which BLM applies the “unnecessary or undue degradation” standard found in the Federal Land Policy and Management Act. 43 C.F.R. subpart 3809; 43 U.S.C. § 1732(b).

⁵ A patent is the instrument by which the United States conveys legal title to a parcel of federal land. The Mining Law allows a mining claimant to seek to obtain a patent to mining claims and mill sites. 30 U.S.C. §§ 29, 35, 42. A mining claimant does not need to obtain a patent for a mining claim or mill site before beginning mining activities on the claim or site. *United States v. Locke*, 471 U.S. 84, 86 (1986); *Independence Mining Co. v. Babbitt*, 105 F.2d 502, 509 (9th Cir. 1997).

(a) 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, 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) 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 (emphasis added). Subsection (a) establishes requirements for mill sites located in association with lode claims and subsection (b) establishes requirements for mill sites located in association with placer claims. The requirements of the two subdivisions are virtually identical. That is, both subdivisions provide that mining claimants may locate and obtain a patent for mill sites in association with mining claims if (1) the land is nonmineral in character, (2) the land is used or occupied by the claimant for mining or milling purposes, and (3) the location of the nonmineral land does not exceed five acres.⁶ Neither subdivision contains any language explicitly limiting the number of mill sites to one for each mining claim.⁷

⁶ Mill sites located in association with lode claims also must be noncontiguous or nonadjacent to a vein or lode. 30 U.S.C. § 42(a).

⁷ The 1997 Opinion argued that the use of the word “such” in the mill site provision supports a conclusion that the provision “imposes a limitation that only a single five-acre millsite may be claimed in connection with each mining claim.” 1997 Opinion, at 4-5. If we replace the four instances of the word “such” in the provision with the language to which it refers, however, it becomes evident that the mill site provision limits the size but not the number of mill site locations a claimant may locate and patent per mining claim:

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of *the noncontiguous* vein or lode for mining or milling purposes, *the nonmineral* non-adjacent surface-ground may be embraced and included in an application

As we now explain, the mill site provision does not categorically restrict the number of mill sites that may be located and patented for each mining claim. This construction is supported by the statutory language, the overall context of the Mining Law, the congressional purposes underlying the statute, and the Department's prevalent, long-standing administrative practice and interpretation.

A. Statutory Language

The mill site provision expressly limits the size of individual mill sites by providing that a mill site may not exceed five acres. 30 U.S.C. § 42. Also, the provision provides that mill sites may be located only for lands that are "used or occupied" for mining or milling purposes. *Id.* The provision does not, however, contain any language limiting the number of mill sites per mining claim. Presumably if Congress had intended to impose such a limitation, it would have added language providing that "no more than one mill site may be located per mining claim." No such language appears in the statute. We are reluctant to construe the statute as containing an implied limitation that does not appear on the face of the statute, at least in the absence of other indications that Congress intended for such a restriction to apply. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108-09 (1980) ("Absent a clearly expressed legislative intention to the contrary, th[e] language [of the statute itself] must ordinarily be regarded as conclusive We are consequently reluctant to conclude that Congress' failure to include [certain language] was unintentional."). As we now explain, we do not believe that Congress either imposed or intended to impose a numerical limitation on the mill sites that may be located and patented for each mining claim.

B. Overall Statutory Context: Lode Claims, Placer Claims and Mill Sites

Under established rules of statutory construction, the provisions of a statute must be construed in light of the overall statutory context and purpose rather than considered in isolation. The "literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use. In short, 'the meaning of statutory language, plain or not, depends on context.'" *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)); see also *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164 (9th Cir. 1999) (quoting *Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1173 (9th Cir. 1999) ("Rather than focusing just on the word or phrase at issue, we look to the entire statute to determine Congressional intent.")); see also Sutherland Stat. Const. § 46.05 (6th ed. 2000). Accordingly, the overall context of the Mining Law must be considered in construing the mill site provision. We now consider the overall statutory context by examining the related provisions governing lode claims, placer claims and mill sites.

for a patent for *the noncontiguous* 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 hereafter made of *nonmineral* non-adjacent land shall exceed five acres.

1. Lode and Placer Claims

The Mining Law contains separate provisions relating to the location and patenting of lode claims and placer claims. Regarding *lode* claims, the Mining Law states that a mining claim located after May 10, 1872, “whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode . . .” and “[n]o claim shall extend more than three hundred feet on each side of the middle of the vein at the surface . . .” 30 U.S.C. § 23.⁸ Regarding *individual placer* claims, the Mining Law states that “no such location shall include more than twenty acres for each individual claimant . . .” *Id.* § 35. Regarding so-called “*association placer*” claims, the Mining Law provides that “no location of a placer claim . . . shall exceed one hundred and sixty acres for any one person or association of persons . . .” *Id.* § 36.

Therefore, the Mining Law expressly limits the size of lode and placer claims. Under these limitations, a lode claim may not exceed 1500 feet in length and 600 feet in width (approximately twenty acres), an individual placer claim may not exceed twenty acres, and an association placer claim may not exceed 160 acres.

The Department’s contemporaneous construction of the Mining Law was that since the statute does not limit the number of lode or placer claims that may be located, no such numerical limitation should be deemed to exist. In 1873, shortly after the Mining Law’s enactment, the Commissioner of the General Land Office concluded that the Mining Law does not limit the number of mining claims that a claimant may locate on a given lode deposit. The Commissioner stated:

[T]here is no provision of law to prevent parties from locating other claims upon the same lode, outside of the first location made on the lode or vein.

If a lode or vein three thousand feet in length is discovered, two locations may be made, each of fifteen hundred feet, thereon.

Letter from Acting Commissioner, General Land Office, to Messrs. Hoyt and Brothers (June 17, 1873), Henry N. Copp, *Decisions of the General Land Office and Secretary of the Interior* 207 (1873-1874). This conclusion was reaffirmed in the Commissioner’s annual report in 1875. That report concluded that although the Mining Law prohibited an individual from locating more than twenty acres and an association from locating more than 160 acres for placer claims, “[t]here is nothing in the mining acts of Congress forbidding one person or an association of persons purchasing as many *separate and distinct locations* as he or they may desire, and embracing in one application for patent the entire claim . . .” Annual Report of the

⁸ A lode claim that is 1500 feet long and 600 feet wide, as provided for in the Mining Law, amounts to just over twenty acres in size or 20.661 acres exactly.

Commissioner of the General Land Office for the Fiscal Year Ending June 30, 1875, at 97 (1875) (emphasis in original).

In 1881, shortly after the Commissioner of the General Land Office issued his report, the United States Supreme Court held that the Mining Law does not impose numerical limitations on the number of mining claims that a person may locate and patent, at least in cases where the miner purchased the claims from others. *St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636 (1881). There, the St. Louis Smelting & Refining Company brought an action against the defendant, Kemp, arguing that Kemp was interfering with its rightful possession of certain land in Leadville, Colorado. *Id.* As proof of its ownership, St. Louis Smelting produced a United States patent issued in 1879 to Thomas Starr, St. Louis Smelting's predecessor in interest. *Id.* The patent was issued for several placer locations amounting to 164.61 acres. *Id.* at 636-38. The defendant argued that the General Land Office had issued the patent in error because the patent included more acreage—164.61 acres—than could be permissibly patented to one person or association under the Mining Law.

The Supreme Court, reviewing the matter, upheld the patent on grounds that the Mining Law did not impose any limitation on the number of mining claims that may be patented by an individual. *Id.* at 648. The Court stated that the patent “is regular on its face, unless some limitation in the law, as to the extent of a mining claim which can be patented, has been disregarded.” *Id.* The Court concluded that:

[T]here is nothing in the acts of Congress which prohibits the issue of a patent for that amount [164.61 acres]. They are silent as to the extent to a mining claim. They speak of locations and limit the extent of mining ground which an individual or an association of individuals may embrace in one of them. There is nothing in the reason of the thing, or in the language of the acts, which prevents an individual from acquiring by purchase the ground located by others and adding it to his own.

Id. The Supreme Court explained that before the Placer Act of 1870, “Congress imposed no limitation to the area which might be included in the location of a placer claim.” *Id.* at 649. After 1870, however, Congress “provided that no location of a placer claim thereafter made should exceed one hundred and sixty acres for one person or an association of persons.” *Id.* at 651. Moreover, the Court noted that the 1872 Mining Law “declared that a location of a placer claim subsequently made should not include more than twenty acres for each individual claimant.” *Id.* The Court stated that “[t]hese are all the provisions touching the extent of locations of placer claims A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, *nor upon the number which may be included in a patent.*” *Id.* (emphasis added). Thus, the Court held that although the Mining Law limited the size of individual mining claims, the statute did not prevent a mining claimant from obtaining a patent for more than one mining claim by purchasing the claims from others.

Addressing the policy reasons for this result, the Supreme Court stated that “it is difficult to perceive what object would be gained, what policy subserved, by a prohibition to embrace in one patent contiguous mining ground taken up by different locations and subsequently purchased and held by one individual.” *Id.* at 651-52. The Court stated further that an individual “can hold as many locations as he can purchase, and rely upon his possessory title.” *Id.* at 652. The Court also noted that “[e]very one, at all familiar with our mineral regions, knows that the great majority of claims, whether on lodes or on placers, can be worked advantageously only by a combination among the miners, or by a consolidation of their claims through incorporated companies.” *Id.* at 654. The Court noted that the “object in allowing patents is to vest the fee in the miner, and thus encourage the construction of permanent works for the development of the mineral resources of the country” and “[r]equiring a separate application for each location . . . where several adjoining each other are held by the same individual, would confer no benefit beyond that accruing to the land-officers from an increase of their fees.” *Id.* at 653.⁹

Although the Supreme Court’s decision in *St. Louis Smelting* concluded that individual claimants may *purchase* multiple mining locations, later courts made clear that individual claimants may also *locate* multiple mining claims as well. In 1904, the United States Court of Appeals for the Ninth Circuit held:

The fact that one individual, company, or corporation locates or acquires many such claims is wholly unimportant. Congress has never yet seen proper to put a limit on the number of such claims that one individual, company, or corporation may locate or acquire. Whether, in view of its well-known policy to encourage the development of the mineral wealth of the country, it shall ever deem it wise to do so, rests with Congress, and is a matter with which the courts have nothing to do.

Last Chance Mining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 131 F. 579, 583 (9th Cir. 1904), *cert. denied*, 200 U.S. 617 (1906).

Likewise, in 1919, the United States District Court for the Southern District of California held:

There is so far no law of Congress or regulation made in pursuance thereof limiting the number of placer mining claims an individual or association of individuals may make. On the contrary, the policy of the government seems to be to encourage the development of its mineral resources and to offer every facility for that purpose.

⁹ Although not noted by the Supreme Court, the Mining Law’s patenting provision explicitly provides that patent applications may include more than one claim, stating that patent applications must include a “plat and field-notes of the claim *or claims in common* . . . showing accurately the boundaries of the claim *or claims*” 30 U.S.C. § 29 (emphasis added).

United States v. Cal. Midway Oil Co., 259 F. 343, 351-52 (S.D. Cal. 1919), *aff'd* 279 F. 516, 521 (9th Cir. 1922) (“[S]o far Congress has never fixed any limit to the number of locations that may be made by the same person or persons—its policy having always been to encourage the exploration of the public lands and the discovery and development of such mineral as may be found in them.”), *aff'd mem.* 263 U.S. 682 (1923). See also *Consol. Mut. Oil Co. v. United States*, 245 F. 521, 523 (D. Cal. 1917); *United States v. Brookshire Oil Co.*, 242 F. 718, 721 (S.D. Cal. 1917) (“It is true there is no limitation as to the number of mining claims an individual or association of individuals may locate . . .”); *The Riverside Sand & Cement Mfg. Co. v. Hardwick*, 120 P. 323, 324 (N.M. 1911); 2 *Lindley on Mines* § 450, at 1062-68 (1914).

Thus, the courts have unequivocally held that an individual miner may locate more than one mining claim, whether the claim is acquired by purchase or otherwise. In accordance with these decisions, the Department of the Interior adopted regulations in 1935 declaring that “United States mining laws do not limit the number of locations that can be made by an individual or association.” *Mining Claims on the Public Lands*, Circular No. 1278, 55 Interior Dec. 235, 236 (1935).

2. Mill Sites

As noted above, both judicial and administrative authority holds that the Mining Law limits the size of lode and placer locations but does not categorically limit the number of such claims that may be located and patented by an individual. The mill site provision was constructed similarly to the lode and placer claim provisions. The provision states that, for mill sites located along with lode claims, “no location made on and after May 10, 1872 of such nonadjacent land shall exceed five acres . . .” and that, for mill sites located along with placer claims, “[n]o location made of such nonmineral land shall exceed five acres . . .” 30 U.S.C. § 42.

Since the mill site provision was constructed similarly to the lode and placer claim provisions, the mill site provision should be interpreted similarly to those provisions. Just as the Mining Law expressly limits the size but not the number of lode and placer claims, the Mining Law should be construed as also limiting the size but not the number of mill sites. Since these provisions are parallel, they should be interpreted in the same way, rather than inconsistently. In construing the lode and placer claim provisions as not imposing numerical limits, the Ninth Circuit in the *Last Chance Mining* case held that Congress has adopted a “well-known policy to encourage the development of the mineral wealth of the country” and said that the responsibility to change the policy “rests with Congress.” *Last Chance Mining*, 131 F. at 583. By the same reasoning, the congressional policy of encouraging the “development of the mineral wealth of the country” supports the conclusion that Congress did not intend to restrict mill sites to an unworkably small acreage. Absent a clear indication that Congress intended to differentiate between lode claims, placer claims and mill sites with respect to numerical limitations, we are reluctant to construe these similarly-constructed provisions as imposing different limitations. Thus, the overall context of the Mining Law supports the conclusion that the five-acre mill site

provision does not preclude more than one mill site being located and patented for a mining claim, assuming that the other requirements of the mill site provision are met. This construes parallel provisions of the Mining Law congruently, and harmonizes the various statutory provisions.

Indeed, it would have been illogical for Congress to place no limit on the number of mining claims that a claimant may locate or patent but limit the number of mill sites that may be used to support the mining claims. Congress presumably intended that the lode and placer claims it authorized would be effectively mined, and these claims cannot be effectively mined if there are insufficient mill sites to support the extraction of the minerals from the claims. It makes little sense that Congress would have enacted the Mining Law for the purpose of fostering mineral development on the public lands, only to constrain miners from operating large mines by restricting mill space to an unworkably small area. Congress can hardly have intended to prevent miners from using the number of mill sites necessary to support the mining claims that Congress itself had authorized. Such a result cannot be reconciled with the congressional purpose, as described by the Supreme Court in *St. Louis Smelting*, of “encourag[ing] the construction of permanent works for the development of the mineral resources of the country.” *St. Louis Smelting & Refining Co.*, 104 U.S. at 653.

The 1997 Opinion reached the opposite conclusion by focusing on the mill site provision in isolation, and made no attempt to reconcile its conclusion with related provisions governing lode and placer claims. Viewing the mill site provision in isolation, the 1997 Opinion argued that “[c]onstruing 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.” 1997 Opinion, at 5. On the contrary, since the location of more than one lode or placer claim by a mining claimant does not vitiate the statutory limitations on the size of such claims, the location of more than one mill site for each mining claim does not vitiate the statutory limitation on the size of mill sites. By failing to consider the overall context of the Mining Law, the 1997 Opinion interpreted the various provisions of the statute inconsistently.

Nonetheless, the Mining Law does contain another provision that practically limits the number of mill sites that a claimant may locate and patent. Under the mill site provision, a claimant may locate mill sites only on nonmineral land that is “used or occupied” by the claimant for mining or milling purposes. 30 U.S.C. § 42. This use-or-occupancy requirement precludes a claimant from locating and patenting more mill sites than are used or occupied for mining or milling purposes and authorizes the Department to challenge the validity of mill sites that are not used or occupied for mining and milling purposes.¹⁰ In determining whether a claimant is properly using or occupying a mill site, the Department must verify whether the claimant needs the mill site for mining or milling purposes. *United States v. Swanson*, 14 IBLA 158, 173-74

¹⁰ Nothing in this memorandum is intended to change the way in which administrative and judicial case law has defined what is appropriate mill site use and occupancy under the Mining Law.

(1974) (“[A] claimant is entitled to receive only that amount of land needed for his mining and milling operations” and “the Government is entitled to require efficient usage, so that only the minimum land needed is taken.”). The use-or-occupancy requirement is the only provision in the mill site provision that effectively limits the number of mill sites a claimant may locate and patent.

C. Legislative History

The legislative history and congressional purposes of the Mining Law are relevant in construing the mill site provision. “As in all cases of statutory construction, [a court’s] task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.” *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 118 (1983) (second alteration in original) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979)). We must “look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.” *Crandon v. United States*, 494 U.S. 152, 158 (1990). In particular, a statute should not be construed in a way that undermines the manifest purpose of the statute. Sutherland Stat. Const. § 363 (6th ed. 2000). The courts “must reject administrative constructions of [a] statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.” *Sec. Indus. Assoc. v. Bd. of Governors of the Fed. Reserve Syst.*, 468 U.S. 137, 143 (1984) (alteration in original) (quoting *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)).

Although the legislative history of the mill site provision is scant and provides little guidance regarding congressional intent, the legislative history of the Mining Law itself is copious and generally clarifies Congress’ purpose in enacting the statute. The Mining Law is an exercise of Congress’ power under the Property Clause of the Constitution to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. Const. Art. IV, § 3. The primary purpose of the Mining Law, as explained in the congressional debates that led to its passage, is to exercise Congress’ disposal authority under the Property Clause “to promote the development of the mining resources of the United States.” 45 Cong. Globe, 42d Cong., 2d Sess. 395 (1872). The Supreme Court has recognized the legislative purpose of developing the nation’s mining resources, stating that:

Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense.

United States v. Coleman, 390 U.S. 599, 602 (1968) (footnote omitted). Congress viewed the nation’s mineral resources as an important national resource, and intended to encourage development of this important national resource and to reward those who actually developed it.

The 1997 Opinion cited a 1957 Supreme Court decision for the proposition that “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.’” 1997 Opinion, at 15 (quoting *United States v. Union Pac. Ry. Co.*, 353 U.S. 112, 116 (1957)). Subsequently, however, the Supreme Court has construed certain federal land grants more broadly when the congressional purpose is to secure public advantages by inducing individuals to engage in costly operations on the public lands. The Supreme Court has stated:

[P]ublic grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. . . .

. . . When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the *purposes* for which it was enacted.

Leo Sheep Co. v. United States, 440 U.S. 668, 682-83 (1979) (omissions in original) (emphasis added) (quoting *United States v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1, 14 (1893)).

The Mining Law is such a general law. In order to accomplish its goal of promoting development of the nation’s mineral resources, Congress enacted a general law that offers inducements to individuals to undertake enterprises of a *quasi* public character by mining on the nation’s public domain lands in order to supply the nation’s mineral needs. Under the Mining Law, Congress authorized individuals to acquire property rights by discovering valuable mineral deposits on the federal lands and by complying with certain procedural requirements. See 30 U.S.C. §§ 22-54. These self-initiated property rights were for the broad national purpose of encouraging development of the nation’s mineral resources. The Mining Law should be construed to effectuate this broad public purpose. If that public purpose is to be changed, the responsibility for making the change belongs to Congress.

We now examine the legislative history of the Mining Law in more detail. As will be explained, earlier versions of the Mining Law included specific limitations on the number of mining claims that could be individually located and patented. The Mining Law adopted in 1872, however, including the mill site provision, contained no such numerical limitations. Since the earlier versions contained numerical limitations and the Mining Law of 1872 did not, the absence of numerical limitations in the 1872 enactment must be regarded as purposeful rather than accidental. It appears that Congress consciously decided not to limit categorically the number of claims and mill sites.

1. 1850 Mining Bill: 30-Foot-Square Placers and One-Acre Lodes

Senator John C. Fremont proposed the first mining bill in 1850. The bill would have provided for two kinds of permits:¹¹ 30-foot-square placer mineral deposits and, as Senator Fremont described it, one-square-acre “mines” (for gold deposits discovered in lodes or veins). 19 Cong. Globe App., 31st Cong., 1st Sess. 1362, 1370 (1850). The bill also stated that “no person can have two permits at the same time, it being for the public interest to avoid monopolies.” *Id.* at 1363. Therefore, the Fremont bill contained a provision expressly limiting the number of mining permits that could be acquired by an individual at any given time.

Senator Fremont explained that his bill would authorize small permits because of the “great value of the land, in order to give an opportunity to all people to get possession of some place to work upon. . . . and if we now give too large a quantity of lands, we may exclude many individuals from the mines by giving so large a space to those that are occupied.” *Id.* at 1362. In addition, Senator Fremont stated that “[t]he quantity allowed to each person is ample, considering the privilege he has of changing his location as often as he pleases, and selling his lot when he is offered a good price.” *Id.* at 1370. Nonetheless, Senator Fremont acknowledged that the permit size would be inadequate for future development, stating that “[t]he machinery necessary to work a mine will eventually cover a large space; but in the meantime one man may get possession of too much.” *Id.* at 1362. He stated further that “[i]n a mineral country, reputed to be of such extraordinary richness, these dimensions were considered abundantly large for the mine itself, and sufficiently so to afford room for temporary buildings in the beginning of operations.” *Id.* at 1370. He warned, however, that “when the mineral districts shall be better known, and the locality of the lodes or veins precisely marked out, larger contiguous spaces may be granted to miners for the construction of the buildings absolutely necessary for extensive works.” *Id.* Senator Fremont’s bill, which would have precluded an individual miner from obtaining more than one mining permit, was not enacted. At the same time, his concern for adequate “machinery” space foreshadowed the adoption of the mill site provision.

2. The 1866 Lode Law: 200-Foot Lode Claims

In 1866, Congress enacted the Lode Law, which provided for lode claims of 200 feet in length along the vein for each locator. The Lode Law allowed the discoverer of the lode or vein to locate an additional claim of 200 feet in length, “together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules” Lode Law of 1866, ch. 262, sec. 4, 14 Stat. 251, 252 (1866). In addition, the Lode Law expressly limited the number of lode claims that each person could locate and patent by providing that “no person may make more than one location on the same lode” *Id.* Although the House of Representatives originally

¹¹ The term “mining claim” seems not to have entered legislative jargon until 1870, when Congressman Sargent, who, in proposing the Placer Act amendments to the 1866 Lode Law, referred to miners “proving up their preemptions, or ‘claims,’ as they are called in mining parlance.” 42 Cong. Globe, 41st Cong., 2d Sess. 2028 (1870).

considered a bill that would have restricted lode claims to forty acres,¹² Congress ultimately passed the Senate bill that provided for 200-foot lode claims, and that became known as the Lode Law.

The Senate Committee on Mines and Mining stated that one of the purposes of the Senate proposal was “to provide the most generous conditions looking toward further explorations and development.” S. Rep. No. 39-105, at 1 (1866). Senator Stewart, one of the bill’s principal proponents, argued that the law would grant miners “such reasonable amount of surface as the miners shall determine by local rules to be necessary for the working of the same.” 36 Cong. Globe at 3227 (statement of Sen. Stewart). Another senator explained that this allowed “as much land on either side of that lode as is necessary to carry on his operations, which is determined by the local law.” *Id.* at 3952 (statement of Sen. Conness). This was viewed to allow a miner to take unlimited amounts of land on either side of the vein, if necessary, to carry on mining operations. *See* 45 Cong. Globe, 42nd Cong., 2d Sess. 534 (1872).¹³

3. The 1870 Placer Act Amendments to the Lode Law: 160-Acre Placer Claims

In 1870, Congress enacted the Placer Act, which amended the Lode Law by adding provisions for locating and patenting placer claims. Placer Act of 1870, ch. 235, sec. 12, 16 Stat. 217 (1870). The 1870 Act provided that “no location of a placer claim” was to “exceed one hundred and sixty acres for any one person or association of persons . . .” *Id.* The purpose for the Act was to extend the principle of the homesteading preemption laws to placer mines in the same way Congress had applied the principle to lode mines. 42 Cong. Globe, 41st Cong., 2d Sess. 3054 (1870). The Senate floor debates reveal differing opinions regarding the amount of

¹² The House bill stated that “[n]o person, corporation, or association shall be permitted to purchase at public or private sale more than forty acres of any such mineral lands . . .” and “no such mining lot shall contain more than forty acres . . .” 36 Cong. Globe, 39th Cong., 1st Sess. 4049 (1866); *see also* H. Rep. No. 39-66, at 11 (1866).

¹³ Senator Stewart also expressed the need to “guard[] against every form of monopoly, and requir[e] continued work and occupation in good faith to constitute a valid possession.” 36 Cong. Globe at 3226 (statement of Sen. Stewart). Congress’ intent, he argued, was to recognize “the obligation of the Government to respect private rights which have grown up under its tacit consent and approval.” *Id.* at 3227. Despite his concerns about monopolies, Senator Stewart objected to specific size requirements in the legislation. He argued that “[i]n exploring for vein mines it is a vein or lode that is discovered, not a quarter section of land marked by surveyed boundaries,” *id.* at 3226, and that “[i]n working a vein more or less land is required, depending upon its size, course, dip, and a great variety of other circumstances not possible to provide for in passing general laws.” *Id.* Nonetheless, the Lode Law that was finally passed limited both the size and number of claims that a person could locate and patent.

land each placer miner would be able to locate and patent. Senator Cole reminded the Senate that the Lode Law “restricted the amount upon any lode or vein that could be taken by any one person to two hundred feet, and with an additional two hundred feet to the discoverer of the mine, and it restricted associations, no matter how numerous the members of them might be, to three thousand feet.” *Id.* He then proposed to “restrict the amount that may be taken in any placer mine to ten acres,” which was, in his judgment, “a very large amount to award to any one person in the mining regions.” *Id.* Congress ultimately chose a 160-acre size for placer claims because it was equivalent to the acreage allowed to an agricultural entryman under the homestead or preemption laws. *See id.* at 2028, 4402.

4. The 1872 Mining Law: Twenty-Acre Mining Claims and Five-Acre Mill Sites

On January 15, 1872, Congressman Sargent introduced the bill that would, after further amendment, become the Mining Law. 45 Cong. Globe at 395. The proposed maximum size for lode claims was to be the same as that of the Lode Law—200 feet long—but with a width restriction of 300 feet on each side of the middle of the vein at the surface. *Id.* at 532. For placer claims, the bill proposed to keep the 1870 Placer Act, including its claim size requirements, “in full force.” *Id.* at 533. Representative Sargent explained that “[t]he bill [as proposed] does not make any important changes in the mining laws as they have heretofore existed. . . . It does not increase or decrease the amount of lands or extent of lands that a miner may acquire under the mining laws.” *Id.* at 534.

The Senate substantially amended the House bill in several significant ways. First, the Senate amended the 1870 Placer Act provisions by creating two classes of placer claims: 20-acre individual placer claims and 160-acre association placer claims. For individual placer claims, the Senate’s amendment stated that “no such location shall include more than twenty acres for each individual claimant . . .” *Id.* at 2460; *see also* Mining Law of 1872, ch. 152, sec. 10, 17 Stat. 91, 94 (1872) (codified at 30 U.S.C. § 35). At the same time, the Senate retained the existing, and conflicting, language of the Placer Act which states that “no location of a placer claim . . . shall exceed one hundred and sixty acres for any one person or association of persons . . .” 30 U.S.C. § 36. In addition, the Senate amendment changed the length of lode claims from 200 feet to 1500 feet, while retaining the width—300 feet on each side—contained in the House bill.

More importantly here, the Senate amendment effectively terminated the restriction that each person could locate and patent only a single mining claim on the same lode. As noted above, the 1866 Lode Law had expressly provided that “no person may make more than one location on the same lode.” Sec. 4, 14 Stat. at 252. The Mining Law, as enacted, provided instead that:

A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a

mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located.

Sec. 2, 17 Stat. at 91 (codified at 30 U.S.C. § 23). Although the Mining Law imposed size limitations on mining claims, the statute removed the restriction of the Lode Law that “no person may make more than one location on the same lode.” One senator recognized that this provision would “allow every individual to take up a claim of fifteen hundred feet” and “any number may afterward combine.” 45 Cong. Globe, 42d Cong., 2d Sess. 2458 (1872) (statements of Sen. Cole). The congressman who introduced the bill expressed the belief that “a quartz lode of fifteen hundred feet will be perhaps as much as any company can profitably work.” *Id.* at 2898 (statement of Rep. Sargent). Nonetheless, the important point is that the Mining Law removed the 1866 Lode Law’s specific restriction against a person locating more than one mining claim on the same lode.

When the bill that became the Mining Law was introduced, the bill contained no provision for mill sites. The Senate added a provision to the bill, now known as the mill site provision, that allows claimants to patent nonmineral land for mill sites in association with lode claims. *Id.* at 2457. The provision stated that where “non-mineral 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,” the land may be included in the application for a patent for the lode claim, provided that “no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this act for the superficies of the lode.” *Id.* This provision established both the use-or-occupancy requirement for mill site locations, and also the requirement that mill sites cannot exceed five acres. Importantly, the provision did not expressly limit the number of mill sites that a person could locate and patent in conjunction with a mining claim, just as the Mining Law did not limit the number of lode and placer claims that a person could locate and patent. The legislative history does not discuss the mill site provision, as the 1997 Opinion notes. 1997 Opinion, at 7 n.15. In fact, Congress did not mention the subject of mill sites in the legislative history until shortly before the Mining Law was enacted, and, except for minor word changes, the mill site provision was enacted in essentially the same form in which it was introduced.

Although the legislative history does not mention the mill site provision, it was well known at the time of the Mining Law’s enactment in 1872 that mining companies used more than five total acres of surface land for mill site purposes to support a single mining claim. In 1863, for example, the Gould and Curry Gold and Silver Mining Company recorded a survey of a 272.72-acre claim that it used for milling purposes to support a 608-foot length of the most famous mining lode in the West—the Comstock Lode near Virginia City, Nevada. Elliot Lord, *Comstock Mining and Miners* 124-25 (Howell-North ed., 1959) (1883); Dennis J. Mahoney, *The History of the Comstock Mines: The Gould and Curry*, in *Individual Histories of the Mines of the Comstock: A Joint Project of the W.P.A. Nevada State Writer’s Project and The Nevada State Bureau of Mines*, at 94 (Max Crowell & Robert W. Prince eds., 1941); abstract from Comstock Mining Services, April 7, 2001. This demonstrates that, contrary to the 1997 Opinion, mining

companies even in 1872 used more than five total acres for mill-site purposes to develop individual mining claims, and that this practice is not simply a modern phenomenon. In the Mining Law, Congress clearly set the size of individual mill sites at five acres. It is doubtful, however, that Congress intended to preclude mining companies from obtaining more than one mill site per mining claim, in light of the historical fact, as in the case of the Comstock Lode, that mining companies were using much more than five total acres for milling purposes for individual claims. If Congress had intended to stop this existing practice in the 1872 Mining Law, Congress presumably would have made its intent clear in the legislative history, if not the statute itself. The silence of the statutory language and legislative history suggests that Congress did not mean to fundamentally alter this practice.

5. The 1960 Amendment

In 1960, Congress amended the Mining Law to allow mining claimants to locate five-acre mill sites for placer claims. Pub. L. No. 86-390, 74 Stat. 7 (1960) (codified at 30 U.S.C. § 42(b)).¹⁴ As noted, the 1872 Mining Law authorized five-acre mill sites only for lode claims; the 1960 amendment extended the same authorization to placer claims. The 1960 amendment, similarly to the original mill site provision for lode claims, did not expressly limit the number of mill sites that could be located and patented per mining claim.

The legislative history of the 1960 amendment indicates that Congress adopted the recommendations submitted by the Department of the Interior, through the Assistant Secretary for Public Land Management. S. Rep. No. 86-904, at 2 (1959). The Assistant Secretary stated that the amendment was necessary to allow placer claimants to obtain mill sites under the same terms as lode claimants. *Id.* at 3. In addition, the Assistant Secretary recommended deletion of the words “for each individual claimant” in the bill, because “permitting the location of [the originally proposed] 10 acres ‘for each individual claimant’ would . . . permit a number of individual claimants to band together to receive far more than 10 acres at one site.” *Id.* The Senate Committee on Interior and Insular Affairs accepted the recommendation “so as to impose a limit of one 5-acre millsite in any individual case preventing the location of a series of 5-acre

¹⁴ The 1960 amendment provides:

(b) 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.

Pub. L. No. 86-390, 74 Stat. 7 (1960) (codified at 30 U.S.C. § 42(b)).

millsites in cases where a single claim is jointly owned by several persons.” *Id.* at 2. The Senate Report also explained that modern placer mining “is now primarily concerned with the production of nonmetallic minerals for industrial purposes, such as gypsum, limestone, quartzite, bentonite, and related clay minerals and building materials,” and “[t]hese minerals generally require substantial plants for their processing, and the investment in the necessary installations often involves millions of dollars.” *Id.* at 1-2.

This legislative history shows that the Assistant Secretary and the Senate committee did not want to allow several placer claimants to “band together” to locate a single mining claim and thereby become automatically entitled to multiple mill sites, without regard to whether the claimants actually needed to use or occupy the mill sites to develop the claim. This history does not indicate, however, that the Assistant Secretary and the Senate committee intended to limit categorically the number of mill sites that could be located and patented per mining claim. In fact, the statutory language contains no explicit restriction on the number of mill sites for each placer claim. Moreover, when the Assistant Secretary recommended that the mill site provision for placer claims be added to the Mining Law, the BLM Manual contained a provision interpreting the Mining Law as authorizing multiple mill sites for lode claims. According to the BLM Manual, “[m]ore than one millsite may be located, provided each tract is of no more than 5 acres of nonmineral land and that each is needed and used for millsite purposes.” BLM Manual, ch. 5.2.15 B. (Nov. 19, 1958). It is unlikely that the Assistant Secretary would have supported proposed legislation that would overturn the Department’s settled administrative practice, or that Congress would have altered this settled practice without comment. Indeed, since the Senate committee recognized that the development of placer claims “require substantial plants for their processing, and the investment in the necessary installations often involves millions of dollars,” *see* S. Rep. No. 86-904, at 1-2 (1959), Congress can hardly have intended to deny claimants the requisite number of mill sites necessary to process their placer claims and protect their investments. Therefore, it does not appear that Congress intended to impose a restriction of one mill site for each placer claim.

The Senate Committee on Interior and Insular Affairs stated that the 1960 amendment “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.” *Id.* at 2. This demonstrates that Congress intended to apply the same requirements for placer-related mill sites that already applied under the Mining Law to lode-related mill sites. Since the Mining Law imposed no numerical limits on lode-related mill sites, the 1960 amendment imposed no numerical limits on placer-related mill sites. Since the Department was contemporaneously applying the Mining Law as not categorically restricting the number of lode-related mill sites that could be located and patented, Congress obviously did not intend to adopt a different result for placer-related mill sites, by applying numerical restrictions to the latter that did not apply to the former. Congress intended to conform the mill site requirements for both kinds of claims, and thus did not intend to impose numerical mill site restrictions for either kind of claim.

6. Summary of Legislative History

The legislative history indicates that the Mining Law of 1872 does not categorically limit the number of mill sites that a claimant may locate and patent per mining claim. The fact that the 1866 Lode Law, as well as the original 1850 Fremont bill, contained express provisions limiting the number of mining claims that an individual could locate and patent—but that these limitations did not appear in the Mining Law enacted in 1872—indicates that the Mining Law was not intended to prevent individual claimants from locating and patenting multiple mining claims, as the courts have held. The absence of numerical restrictions in the mill site provision similarly indicates that the provision does not prevent mining claimants from locating and patenting multiple mill sites per mining claim.

To imply that the mill site provision contains a numerical limitation of one mill site per mining claim would frustrate the congressional purpose of the 1872 Mining Law, which was “to promote the development of the mining resources of the United States . . .” 45 Cong. Globe, 42d Cong., 2d Sess. 395 (1872). Such a numerical limitation would make it difficult in many cases for miners to develop the minerals that Congress itself had opened for exploration and development, because a single five-acre mill site is in many cases inadequate to serve the associated mining claim. For example, most low-grade-ore-deposit mines on the public lands require more than five acres of nonmineral mill site lands in order to develop the mineral deposits encompassed by a twenty-acre mining claim.¹⁵ Thus, much of modern mining could not take place if mill sites were limited to one five-acre site per mining claim. This does not suggest that the Mining Law should be interpreted simply to harmonize with modern mining practices. As indicated earlier, mining practices at the time of the Mining Law’s enactment in 1872 relied on more than five acres for milling purposes for individual mining claims, as in the case of the Comstock Lode. The Mining Law should not now be interpreted in a way that makes modern mining practices infeasible and interferes with the congressional goal of promoting development of the nation’s mineral resources, unless Congress indicated that it intended this result. No such indication appears in the legislative history of the Mining Law. On the contrary, the legislative history indicates that Congress intended to impose no numerical restriction on locating and patenting either mining claims or mill sites.

¹⁵ Today, “most of the large mines in this country are operating on ore so low in grade that it would have been back-filled or thrown over the dump not many years ago.” J.B. Knaebel, “Land Acquisition for Mining Development,” *Symposium on American Mineral Law Relating to Public Land Use* 63 (1966). According to Knaebel, a miner would need 252 acres of surface area to excavate a 23-acre low-grade disseminated-copper ore body from under 400 feet of overburden. *Id.* at 70. Miners have been developing low-grade copper, lead, gold, and iron ore deposits since use of froth flotation began in the early 20th Century. Frederick Merck, *History of the Westward Movement* 495-500 (1978); J.M. Lucas, “Gold,” *Mineral Facts and Problems* 323 (Bureau of Mines 1985); Janice L.W. Jolly, “Copper,” *Mineral Facts and Problems* 204-05 (Bureau of Mines 1985).

The use-or-occupancy requirement of the mill site provision disallows claimants from locating and patenting more mill sites than are necessary for mining or milling purposes. This requirement authorizes the Secretary to exercise discretion in challenging the validity of mill sites that are unnecessary for mining or milling purposes, while not precluding claimants from locating and patenting multiple mill sites if each site satisfies the use-or-occupancy requirement. This construction furthers the congressional purpose of encouraging mineral development of the public lands and also disallows miners from using the public lands in a wasteful manner or for purposes unrelated to mining or milling. The 1997 Opinion, on the other hand, would preclude the Department from approving a proposed mining plan to develop federal mineral resources if the plan proposes to use more than one five-acre mill site per mining claim, even though the applicant could show that a single five-acre mill site was inadequate to effectuate the mining plan. The 1997 Opinion's categorical approach cannot be reconciled with Congress' goal of promoting development of mineral resources on the public lands.

If the 1997 Opinion were in effect, mining companies apparently would be able to avoid a numerical restriction on mill sites simply by subdividing their mining claims into smaller, contiguous claims, so that they could locate more mill sites to obtain adequate mill site acreage for their proposed operations. This is possible because the Mining Law imposes no automatic *minimum* limitation on the size of a mining claim.¹⁶ Prior to the 1997 Opinion, no mining company in fact subdivided its mining claims for this purpose, obviously because the Department's administrative practice did not limit the owner of a mining claim to a single mill site. After the 1997 Opinion was issued, however, at least one mining company subdivided its maximum-sized lode claims into several smaller contiguous claims so the company could keep all of its otherwise multiple mill sites. The company's effort was successful because the Department has concluded that the subdivided lode claims are valid. BLM Mineral Report for Glamis-Imperial Gold Company (Sept. 27, 2002). Thus, the 1997 Opinion's conclusion that a claimant may locate only a single mill site per mining claim could be easily circumvented, which demonstrates that Congress likely did not intend to impose such a limitation. If Congress were concerned about allowing claimants to locate and patent only one mill site per mining claim, it presumably would have placed a minimum-size limitation on mining claims to prohibit subdividing mining claims to obtain additional mill site acreage. The Mining Law, however, contains no such limitation.

¹⁶ While the Mining Law provides that the maximum width of a lode claim is six hundred feet, it also allows the Department to limit the width of lode claims to fifty feet. 30 U.S.C. § 23. Assuming a five-acres-per-claim limitation, had the Department ever chosen to exercise this authority, claimants would have automatically gained rights to locate and patent twelve mill sites in association with twelve fifty-foot-wide claims in place of the one mill site in association with one six-hundred-foot-wide claim. Consequently, doling out mill sites based on the number of mining claims makes little sense given the lack of any uniform claim size.

Although the legislative history does not indicate why Congress chose to limit the size but not the number of mining claims and mill sites, Congress presumably intended to require mining claimants to demonstrate that they are entitled to or need more than one mining claim or mill site of a specified size for mineral purposes. By imposing this burden on claimants, Congress required them to establish each claim on a discrete, parcel-by-parcel basis, thus preventing them from attempting to patent huge swaths of federal lands. Under the Mining Law, a mining claimant must demonstrate that the lands included in each mining claim contain a discovery of a valuable mineral deposit, 30 U.S.C. § 23, and a mill site claimant must demonstrate that the lands included in each mill site location are used or occupied for mining or milling purposes. *Id.* § 42. The size limitations adopted by Congress ensure that mining and mill site claimants are able to patent only the minimum amount of public domain land necessary or appropriate to support their claims. Thus, for example, one who proposes to patent a 100-acre parcel for mill site use to support a 500-acre mining parcel must show that *each* 5-acre segment of nonmineral land is necessary for mill site use, rather than claiming the entire 100-acre parcel as a single mill site. This ensures that claimants must demonstrate their good faith while disallowing them from gaining title to huge tracts of public lands for purposes altogether unrelated to mining, such as for agricultural use.¹⁷

Congress may also have intended to standardize the amount of surface lands conveyed for mining claims or mill sites by preventing conveyances of grossly disproportionate amounts of public lands for individual claims or mill sites. The size limitations altered the practice the Department adopted after the 1866 Lode Law of conveying wildly variant amounts of surface acreage along with the vein or lode. *See* 1 *Lindley on Mines* § 59, at 97-99 (describing various amounts of surface acreage the Department conveyed with a vein or lode, including “around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom,” and lands “covering a few hundred feet of a lode, embraced within irregular surface boundaries which covered an area of several hundred acres”).

By requiring claimants to demonstrate their good faith and actual need or entitlement, and by standardizing the size of claims and sites, Congress provided for more efficient administration of the Mining Law. Certainly it is administratively easier, for example, to apply the use-or-occupancy requirement by focusing on discrete, size-limited segments of federal land to determine the actual needs of the claimant, rather than evaluating a claim seeking title to a virtually unlimited expanse of federal lands. There are various plausible explanations for why Congress decided not to place numerical restrictions on mill sites, and these explanations would not, as argued in the 1997 Opinion, “vitate the five-acre statutory limit on the size of millsites.” 1997 Opinion, at 5. We need not determine why Congress reached its decision. The overall

¹⁷ The Mining Law contains additional provisions that require claimants to demonstrate good faith, such as the requirements that claimants perform at least \$100 worth of labor annually to maintain the claim and expend at least \$500 worth of labor on each claim before the claim qualifies for patenting. 30 U.S.C. §§ 28, 29.

structure of the Mining Law and its legislative history indicate that Congress decided not to impose numerical limits, and our conclusion is consistent with that congressional intent.

III. The Department's Administrative Practice and Interpretation

The Supreme Court has “long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer” *Chevron, U.S.A. Inc., v. NRDC*, 467 U.S. 837, 844 (1984). Indeed, courts give considerable respect to the interpretation given a statute “by the officers or agency charged with its administration.” *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) (quoting *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978)). The Supreme Court has recognized that “execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department” *Cameron v. United States*, 252 U.S. 450, 459-60 (1920). As we now explain, the Department of the Interior’s prevalent administrative practice and interpretation has been that the mill site provision limits the size of individual mill sites but does not categorically limit the number of mill sites that a claimant may locate and patent per mining claim. The Department has administered the mill site provision in accordance with that view.

A. The Department's Regulations

Turning first to the Department’s regulations, the regulations adopted by the Department regarding the mill site provision mirror the statutory language.¹⁸ A patenting regulation, promulgated in 1872 and unchanged since then, describes a mill site as “a piece of nonmineral land not contiguous [to a vein or lode] for mining or milling purposes, not exceeding the quantity allowed for such purpose by section [42 of the Title 30 of the United States Code]” *See, e.g.*, 43 C.F.R. § 3864.1-1(b) (2002); *id.* § 3864.1-1(b) (1992); *id.* § 3460.1(b) (1969); *id.* § 185.65 (b) (1964); 37 Pub. Lands Dec. 757, 771 (1909); 28 Pub. Lands Dec. 594, 605 (1899); 25 Pub. Lands Dec. 561, 581 (1897); *see also* 1997 Opinion, at 6 n.12. The regulatory subpart that deals with locating mill sites, 43 C.F.R. subpart 3844 (2002), contains two sections, one of which simply quotes the statutory mill site section, *id.* § 3844.0-3, and the other of which requires claimants to use or occupy mill sites for mining or milling purposes “in connection with the lode or placer claim with which it is associated,” and also provides that claimants may locate independent mill sites for quartz mills or reduction works. *Id.* § 3844.1. Another regulatory provision, published in 1970, states that “[n]o one millsite may exceed five acres” for placer

¹⁸ The Department’s first Mining Law regulations stated that 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, Henry N. Copp, *United States Mining Decisions* 170, 192 (1874) (emphasis in original). This early regulation, since rescinded, clearly limited each mill site location to five acres but did not limit claimants to one mill site per mining claim.

claims, 43 C.F.R. § 3864.1-1(c) (2002). These regulations are broadly written and allow for the Department's past prevalent practice and interpretation of the mill site provision, as described below. The Department has acted appropriately under these regulations to allow claimants to locate and patent more than one mill site per mining claim if each mill site does not exceed five acres in size and is used or occupied for mining or milling purposes.

B. The BLM Guidance and Practice

As we now show, the BLM, which is charged with administering and enforcing the mill site provision, has consistently interpreted the mill site provision as allowing claimants to locate and patent more than one mill site for each mining claim if the mill site is used or occupied for mining or milling purposes. This interpretation is reflected in the BLM's extant written guidance from 1954 to the present and in the BLM's administrative practice through its state offices conforming with the written guidance. In some instances, this interpretation is also reflected in departmental documents that list the statutory requirements for mill sites without mentioning any categorical limit on the number of mill sites. The failure to mention any categorical limitation on the number of mill sites reflects an assumption that the mill site provision does not impose such a limitation.

1. BLM Guidance

For nearly a half century, the BLM's written guidance has reflected the view that the mill site provision does not categorically limit the number of mill sites that may be located and patented for each mining claim. The BLM Manual, adopted in 1954, sets forth three requirements for mill sites to qualify for patenting: (1) the lands must be nonmineral in character, (2) the mill site cannot be contiguous to a vein or lode, and (3) "[t]he mill site does not include an area exceeding 5 acres." BLM Manual, ch. 3.3.2 (Apr. 20, 1954). The 1954 BLM Manual contained no restriction on the number of mill sites that may be located for a mining claim. Additionally, the BLM in 1954 issued a document entitled "Mining Locations, Entries and Patents," which stated, on page 28, that "[i]t has been held that more than one mill site may be embraced in an application for a patent, provided each such tracts [sic] keep within the restriction of 5 acres of non-mineral land and that each is needed and used for mill site purposes." Similarly, a BLM Manual issued in 1958 stated, "More than one millsite may be located, provided each tract is of no more than 5 acres of nonmineral land and that each is needed and used for millsite purposes." *Id.* ch. 5.2.15 B. (Nov. 19, 1958). Thus, the BLM guidance and accompanying documents made clear that the Mining Law imposes no categorical restrictions on the number of mill sites that may be located and patented for each mining claim.

The BLM continued to adhere to this view. In 1966, a BLM minerals specialist prepared a summary of mill site requirements. Under the topic heading "Number of Millsites," the minerals specialist stated, "Although there is no number specified, it has been held that as many millsites as are actually needed for the operation can be located. There must be a clear showing of need and use if more than one millsite is taken. This also applies to custom mills."

Memorandum from Minerals Specialist, PSC, to Chief, Mining Staff, Washington Office, BLM 1 (May 11, 1966). In another 1966 document entitled "Mineral Patents—Information Relative to the Procedure for Obtaining Patent to a Mining Claim," the BLM stated, "Lands entered as mill sites may be for an area of not more than 5 acres for each mill site and must be shown to be nonmineral in character and not contiguous to a vein, lode, or placer." Mineral Patents—Information Relative to the Procedure for Obtaining Patent to a Mining Claim 13 (1966). These documents support the view that the five-acre mill site provision defines the size of individual mill sites but does not limit their number.

In 1976, the BLM Manual stated that a mineral examiner, in conducting a field examination, must make certain determinations regarding mill sites: (1) the lands must be nonmineral in character, (2) the claim must be occupied and used for mining or milling purposes; and (3) there must be a quartz mill or reduction works on the claim if for custom mill. BLM Manual § 3930.14 C (Oct. 8, 1976). The BLM Manual also stated, "The maximum size of a mill site claim is 5 acres. However, several mill site claims may be embraced in a single application, provided the total acreage does not exceed 5 acres per mill site." *Id.* § 3864.11 B (Oct. 6, 1976). Again, the BLM Manual articulated limitations on the size of mill sites but not their number, except to the extent it applied the use-or-occupancy requirement.

In 1980, the BLM Washington Office issued a "Mineral Survey Procedures Guide" that stated, on page 26, "There is no limit to the number of mill sites that may be located, so long as they are necessary for the operation of a mine or mill." Today, BLM's Handbook for Mineral Examiners 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 (Mar. 17, 1989). Additionally, the BLM Manual states that "[a] mill site cannot exceed 5 acres in size. There is no limit to the number of mill sites that can be held by a single claimant." BLM Manual § 3864.11 B (1991).

Thus, the BLM has, through its written guidance, consistently interpreted the five-acre mill site provision as limiting the size of individual mill sites but not as precluding claimants from locating and patenting multiple mill sites in association with a single mining claim.

2. BLM Practice: 1996 Survey

In order to assess BLM's ongoing practice, BLM's Deputy Director in 1996 conducted a survey of all BLM state offices to determine the practice of each office regarding patenting and approving plans of operations involving more than one five-acre mill site per mining claim. Memorandum from Mat Millenbach, Deputy Director, BLM, to Assistant Directors and State Directors, BLM (Mar. 5, 1996). Although the 1997 Opinion stated that "BLM's survey responses revealed no general or uniform policy or practice among the BLM State Offices on this question," 1997 Opinion, at 1 n.2, the state office responses in fact reveal that BLM's widely-accepted practice was to treat the five-acre requirement in the mill site provision as a limit on the size of individual mill sites and nothing more. Indeed, the survey responses reveal that the state

offices frequently have patented more than one mill site per associated mining claim. The survey responses also demonstrate that BLM's principal concern regarding mill site validity is in determining whether claimants are using or occupying each mill site for mining or milling purposes.

A summary of the responses of the state offices is provided in the Appendix attached to this opinion. We will now give some examples of the responses to demonstrate the extent to which the state offices have followed a policy of issuing patents or approving plans of operations that involve multiple mill sites when the applicant is able to demonstrate that each mill site is necessary for mining or milling purposes.¹⁹

The California State Office stated that "[i]t has been common practice in California to issue patents for multiple millsites." Memorandum from Leroy M. Mohorich, Acting Deputy State Director, Division of Energy and Minerals, California State Office, BLM, to Director, BLM 3 (Apr. 10, 1996). The office reported having issued thirty-two patents for 455 mill sites since 1966, and that it had at least fifteen multiple-mill-site patent applications pending. *Id.* The office also reported having approved two plans of operations for large open-pit, heap-leach operations wherein the mill-sites-to-mining-claims ratio was 3 to 1 and 6 to 1. *Id.* According to the California office:

In the decision *Utah International, Inc.* (36 IBLA 219 (1978)), the IBLA recognized multiple mill sites in a patent application, most of which were approved. Some confusion may have been generated from earlier decisions where the Land Office stated that only one mill site was needed for a particular operation. The decisions were not based on any rule related to one mill site per mining claim, but that only one mill site was needed.

Id. at 2.

The Nevada State Office reported having 20 pending multiple-mill-site patent applications. Memorandum from Thomas V. Leshendok, Deputy State Director, Mineral Resources, Nevada State Office, BLM, to Director, BLM Attach. 8-1 (Apr. 23, 1996). According to that office:

Patenting and use authorizations for multiple millsites is common in Nevada. Use authorizations started on January 1, 1981, the effective date of the 43 CFR 3809

¹⁹ In describing the state office findings, we will refer to a patent application or a plan of operations that encompasses more than one five-acre mill site in association with each mining claim as a "multiple-mill-site patent application" or "multiple-mill-site plan of operations," respectively.

regulations. It is not known when the patenting of multiple mill sites first occurred. Available records show that the practice was occurring by June 1, 1964.

Id. at 1. The Nevada State Office stated further that in reviewing patent applications and plans of operations, “the ratio of mill sites to associated mining claims is not determined.” *Id.* In mill site patenting review, the state office evaluates “the mineral character, need and current use of each mill site.” *Id.* Although not mentioned by the Nevada State Office in its response to the 1996 survey, the Nevada State Office has apparently issued at least nine patents since 1979 that include more mill sites than mining claims. *See Effect of Federal Mining Fees and Mining Policy Changes on State and Local Revenues and the Mining Industry: Hearing Before the House Comm. on Natural Resources, 106th Cong. 5-6 (2001)* (statement of Richard W. Harris, Attorney at Law, Harris & Thompson, based on his own research in the BLM Nevada State Office). The average mill-sites-to-mining-claims ratio in those patents was nearly seven mill sites to one mining claim. *Id.*

The Idaho State Office reported having six pending multiple-mill-site patent applications and having issued a multiple-mill-site patent in 1985. Memorandum from J. David Brunner, Deputy State Director, Resource Services Division, Idaho State Office, BLM, to Director, BLM 1 (Apr. 22, 1996). The office stated that “we do not review patent applications or plans of operation with respect to a strict ratio of millsites to associated claims.” *Id.* at 2. It also reported having refused to patent mill sites included in two patent applications because they were not associated with any mining claims and did not meet the requirements for independent mill sites. *Id.*

The Oregon State Office stated that “[p]atenting of multiple millsites has been an accepted practice in this office, as far back as the mid to late sixties.” Memorandum from Associate State Director, Oregon & Washington State Office, BLM, to Roger Haskins, Senior Specialist, Mining Law Adjudication, Solid Minerals Group, Washington Office, BLM 2 (Apr. 30, 1996).

Several other state offices affirmed that they examine mill site applications by considering the use-or-occupancy requirement, but that they do not impose any “set ratio” of mill sites to associated mining claims. *See, e.g., App. at 1* (Arizona, Colorado), 2 (Montana). Significantly, none of the state offices indicated that they limited mill sites to one per claim.

This survey indicates that BLM state offices charged with enforcement responsibility have interpreted and applied the mill site provision as limiting the number of mill sites to those that are reasonably necessary to support mining operations, but not as categorically restricting the number of mill sites to one for each mining claim. The BLM state offices have applied the mill site provision in conformity with the BLM’s extant written guidance since at least 1954, which allows claimants to locate and patent multiple mill sites per mining claim if each mill site is properly used and occupied. Hence, the Department’s prevalent interpretation and application of the mill site provision for at least a half century has been that the provision does not preclude

claimants from locating and patenting multiple mill sites so long as each mill site is used or occupied for mining or milling purposes.

3. Forest Service Guidance

The Forest Service's practice and interpretation of the mill site provision has been similar to the BLM's. Under the 1897 Organic Act and the Surface Resources Act of 1955, the Secretary of Agriculture manages the surface of National Forest System lands, including surface disturbance from mining activities. 16 U.S.C. §§ 478, 482, 551; 30 U.S.C. §§ 611-14; 36 C.F.R. Part 228, Subpart A. The BLM manages the mineral estate for purposes of the Mining Law. 16 U.S.C. § 472; 43 U.S.C. § 1457. Under a memorandum of understanding between BLM and the Forest Service dated April 1, 1957, the Forest Service conducts validity examinations for mining claims and mill sites located on National Forest System lands. As a result, the Forest Service has developed a minerals and geology manual for its mineral examiners. Since at least 1990, the Forest Service manual has stated that:

The number of millsites that may be legally located is based specifically on the need for mining or milling purposes, irrespective of the types or numbers of mining claims involved.

Forest Service Manual § 2811.33 (1990). Therefore, the Forest Service's written guidance recognizes that the mill site provision does not limit mill sites to one per mining claim.

C. The Department's Administrative Decisions

The Department's administrative decisions indicate that—similarly to the BLM written guidance and the practice of the BLM state offices—the Department has relied on the use-or-occupancy requirement to regulate the amount of mill site acreage a claimant may locate and patent. As we have noted, this requirement provides that a mining claimant's mill site acreage for lode claims is limited to the amount of nonmineral land “used or occupied . . . for mining or milling purposes,” and for placer claims, the amount of nonmineral land that is “needed . . . for mining, milling, processing, beneficiation, or other operations . . . and is used or occupied . . . for such purposes” 30 U.S.C. § 42. An early departmental decision recognized the importance of this requirement, stating that the “manifest purpose of Congress [in the mill site provision of the Mining Law] was to grant an additional tract to a person who required or expected to require it for use in connection with his lode; that is, to one who needed more land for working his lode or reducing the ores than custom or law gave him with it.” *Charles Lennig*, 5 Pub. Lands Dec. 190, 192 (1886). The Interior Board of Land Appeals has recognized that the “essence of the millsite appropriation is use or occupancy.” *United States v. Swanson*, 93 Interior Dec. 288, 299 (1986). The factual controversies involved in administrative mill site validity or patenting cases have, almost without exception, turned on application of the use-or-occupancy requirement, that is, on whether the claimants used or occupied or expected to use or occupy the mill sites for mining or milling purposes. *See, e.g., United States v. Rukke*, 32 IBLA 155, 160 (1977); *United*

States v. Dietemann, 26 IBLA 356, 364-65 (1976); *United States v. Pressentin*, 71 Interior Dec. 447, 458 (1964); *Ash Peak Mining Co.*, 47 Pub. Lands Dec. 580, 581 (1920); *Alaska Mildred Gold Mining Co.*, 42 Pub. Lands Dec. 255 (1913); *Alaska Copper Co.*, 32 Pub. Lands Dec. 128 (1903); *Gold Springs & Denver City Mill Site*, 13 Pub. Lands Dec. 175 (1891); *Peru Lode & Mill Site*, 10 Pub. Lands Dec. 196 (1890); *Rico Town Site*, 1 Pub. Lands Dec. 556, 557 (1882).²⁰ Over one hundred administrative and judicial decisions have examined the validity of mill sites by determining whether the claimant was properly using or occupying the mill sites at issue. The controversies regarding the mill site provision have almost always focused on the use-or-occupancy requirement, and not on whether the provision imposes numerical limitations on mill sites.

The 1997 Opinion stated that “[t]he Department has never held . . . that a claimant may patent more than five acres of land for a millsite in connection with one mining claim.” 1997 Opinion, at 11. In fact, we have seen that the BLM’s written guidance clearly takes the view that more than one mill site may be located for each mining claim—assuming that the use-or-occupancy requirement is met—and this written guidance has been followed in actual practice by BLM state offices for nearly a half century, as the 1996 survey shows. Indeed, the 1996 survey reveals that the Department has often patented more than five acres of nonmineral lands in connection with a single mining claim. See Appendix. The 1997 Opinion acknowledged that “[v]ery few reported federal or state court cases concern the millsite provision of the Mining Law, and none addresses how many millsites may be located.” *Id.* at 8 n.16. The dearth of judicial and administrative cases may be explained by the fact that the patentees have no reason to challenge the Department’s view that numerical limitations do not apply. This strengthens the conclusion that the Department has never imposed this requirement in administering the mill site provision.

In support of its argument to the contrary, the 1997 Opinion cited several administrative decisions rendered by the Department of the Interior that purportedly concluded that the mill site provision restricts mill sites to one for each mining claim. 1997 Opinion, at 8-11. Closer examination of these decisions reveals that they do not support this conclusion. As we have seen, most administrative decisions regarding mill site validity turned on whether the mill sites were being properly used or occupied and did not mention a numerical limitation. As will be seen, at least one administrative decision appeared to assume that the claimant could locate and patent more than one mill site per claim, contrary to the 1997 Opinion. Other decisions, particularly some early ones, appeared to assume the opposite, *i.e.*, that the claimant could *not*

²⁰ See also Richard W. Harris & Richard K. Thompson, *Millsites: Current Law and Unanswered Questions*, 38 Rocky Mtn. Min. L. Inst. § 12.03[3] (1992) (“The greatest number of IBLA decisions concerning millsite claims center around the doctrine of ‘present use and occupancy.’”); Richard W. Harris, *The Law of Millsites: History and Application*, 9 Nat. Res. Law. 103, 122 n.101 (1976) (“Failure to demonstrate present use or occupancy appears to be the leading cause of millsite invalidation, as a brief reading of the *Gower Federal Service -- Mining* will show.”).

locate or patent more than one mill site per claim. In the latter decisions, however, the question did not arise factually and the decisions were reached on other legal grounds. Consequently, any statements in the latter decisions regarding the number of mill sites per claim were dicta, in that they were unnecessary to the decisions. Just as the courts are not bound to apply dicta from earlier decisions, the Department is not bound by dicta appearing in its administrative decisions. *George H. Smith (On Review)*, 10 Pub. Lands Dec. 184, 186 (1889) (“Any remarks made by the court upon questions outside the one under consideration, and not necessary to a decision in the case then before it may properly be considered *obiter dicta* and consequently not binding upon other courts or this Department.”); see also *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 24 (1994) (describing as customary the Supreme Court’s refusal to be bound by dicta).

We now examine chronologically the administrative decisions cited by the 1997 Opinion to demonstrate that, outside of dicta appearing in some early decisions, they do not support the conclusion of the 1997 Opinion.

1. *J.B. Hoggin*, 2 Pub. Lands Dec. 755 (1884). The 1997 Opinion stated that *J.B. Hoggin* is the only reported case that “directly addresses the question of how many millsites may be located in connection with a mining claim.” 1997 Opinion, at 8. In fact, the combined acreage of the two mill sites at issue in the case did not exceed five acres. 2 Pub. Lands Dec. at 755. The General Land Office Commissioner had canceled the entry for one of the two mill sites. On appeal, the Secretary asked “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.*²¹ The Secretary concluded that “since the amount in both locations does not exceed five acres, I think in this instance both mill-site entries should be permitted to stand.” *Id.* at 756. The decision held that patenting two mill sites that do not exceed five acres combined does not violate the Mining Law’s requirements. Although the Secretary assumed in the analysis that the law restricts mill site acreage in a patent application to five acres per lode claim, this assumption was irrelevant to the holding, because the two mill sites together did not exceed five acres.

2. *Hecla Consolidated Mining Co.*, 12 Pub. Lands Dec. 75 (1891). The 1997 Opinion stated that *Hecla* “reaffirmed the five-acre millsite limit.” 1997 Opinion, at 9. In that case, however, the applicant sought a patent for a mill site that was neither dependent on a mining claim nor used as an independent mill site. The Secretary affirmed the Commissioner’s decision cancelling the mill site entry, concluding that the independent mill site clause “makes no

²¹ We note that at the time of this decision and until 1885, the departmental regulations provided that “[n]o [patent] application will be received or entry allowed which embraces more than one lode location.” 2 Pub. Lands Dec. at 725. In 1885, the Secretary overruled this regulation and recognized that patent applications may embrace more than one location. *Good Return Mining Co.*, 4 Pub. Lands Dec. 221, 224-25 (1885) (citing *St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636 (1881)).

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.” 12 Pub. Lands Dec. at 77. The Secretary, to be sure, stated that the proprietor of a quartz mill or reduction works may locate only one five-acre independent mill site under the mill site section’s second clause, relating to independent mill sites. The Secretary did not rely on this assumption in denying the mill site application, however, and instead denied the application on grounds that a claimant may not locate mill sites that are not dependent on any mining claims or that do not contain a quartz mill or reduction works. *Id.*

3. *Mint Lode and Mill Site*, 12 Pub. Lands Dec. 624 (1891). The 1997 Opinion argued that this decision “took a strict ‘one-for-one’ view of the relation between a dependent millsite and the mining claim with which it is associated.” 1997 Opinion, at 10. Although the decision refers to five lode claims and five mill sites, the case involved the validity of a single mill site that was associated with a single lode claim.²² Consequently, the mill site, in order to be patented, had to be used or occupied for mining or milling purposes related to the associated lode claim. The Acting Secretary invalidated the mill site on grounds that there was no evidence that the “mill site is used for mining or milling purposes in connection with the Mint lode.” *Mint Lode & Mill Site*, 12 Pub. Lands Dec. at 625. He also opined that the statute “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.” *Id.* Since the latter statement was unnecessary to the conclusion that the mill site was not being used for mining or milling purposes, the statement was dictum.

4. *Alaska Copper Co.*, 32 Pub. Lands Dec. 128 (1903). The 1997 Opinion argued that this decision “adopted a rule that generally allowed only one five-acre millsite in connection with a group of lode claims”—which, although not consistent with the 1997 Opinion’s view that mill sites are limited to one for each mining claim, at least would be contrary to the view that the mill site provision contains no numerical restriction. 1997 Opinion, at 10 (emphasis added). The *Alaska Copper* case, however, turned on whether a mill site could be located on certain lands reserved by Congress for purposes unrelated to mining, and did not turn on an interpretation of the mill site provision. The patent application in the case involved eighteen lode claims and eighteen mill sites. As the 1997 Opinion noted, “[t]he evidence indicated that only one of the millsites was even arguably being used for mining purposes.” *Id.* at 11. The Acting Secretary cited numerous objections regarding the validity of the mill sites at issue, including a dispute over interpretation of the mill site provision; “[w]hilst no fixed rule can well 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.” 32 Pub. Lands Dec., at 130. The Acting

²² The decision is not clear regarding whether the five referenced lode claims were contiguous to each other or whether the claimant had located them in separate areas. In order to apply for a patent for a group of mining claims, they must be contiguous. *Charles House*, 33 IBLA 308, 309-10 (1978). If a mining claim is not contiguous to any others, a claimant must file a separate patent application for that claim.

Secretary ultimately concluded, however, in the judgment at the end of his decision, “All other considerations aside, the mill-site claims in question should not have been allowed to pass to entry in the positions in which they are located” because Congress had withdrawn the shoreline on which the claimant had located the mill sites. 32 Pub. Lands Dec. at 131. Congress had reserved a roadway for public use along all navigable waters in Alaska, excepting on mineral lands, *id.*, and had reserved the lands on which the mill sites were located. Since the claimant could not properly locate the mill sites on the reserved lands, the Acting Secretary canceled the entry. *Id.*²³ The case did not involve the question whether more than one mill site could be located for each claim. Moreover, the Acting Secretary’s extraneous comments suggested only that one mill site is “ordinarily” needed to develop a group of claims and that “no fixed rule can well be established,” *id.* at 130, thereby appearing to suggest that the question ultimately turns on the facts of the case rather than a categorical rule limiting a group of claims to a single mill site.

5. *Hard Cash and Other Mill Site Claims*, 34 Pub. Lands Dec. 325 (1905). The 1997 Opinion cited this case for the proposition, with which we agree, that when a patent application includes more than one mill site, the applicant must show that all of the acreage is necessary. 1997 Opinion, at 11. In this case, the Secretary appeared to adopt the view that the mill site provision does not categorically provide that only one mill site may be located for a group of claims. The Secretary considered an appeal from a decision by the Commissioner of the General Land Office canceling entry for four mill sites that were related to four lode claims, because the applicant had not posted a patent application notice on each mill site. *Id.* at 327. The Secretary affirmed the cancellation on different grounds, concluding that “the mill-site claims are not used or occupied for mining or milling purposes in connection with the lode claim as required by law” *Id.* at 328. Although the decision was based on the use-or-occupancy requirement, the Secretary suggested a flexible interpretation of the mill site provision, stating that “if 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.” *Id.* at 327. Thus, the Secretary suggested that—assuming that a “sufficient and satisfactory reason” exists—more than one mill site may be located for an operation.

6. *Yankee Mill Site*, 37 Pub. Lands Dec. 674 (1909). The 1997 Opinion cited this case as support for the conclusion that a “single mining claim could support multiple millsite locations only where the combined area of the millsites was five acres or less.” 1997 Opinion, at 9. In

²³ The Department later refused to disallow mill site locations within lands withdrawn under the Act of May 14, 1898. *Alaska Mildred Gold Mining Co.*, 42 Pub. Lands Dec. 255, 258 (1913). In the *Alaska Copper Co.* decision and many other decisions discussed in this section, the decisions from which the appeal arises are decisions canceling the mining claimant’s “entry” in the lands. “Entry” is a term used to refer to a step in “the statutory procedure required to obtain the fee simple title from the Government” *Alaska Copper Co.*, 43 Pub. Lands Dec. 257, 259 (1914). Significantly, while canceling entry serves to reject the patent application, it “does not declare that the mill site claims or locations were invalid nor does it purport to affect the claimant company’s possessory rights or ownership in the premises.” *Id.*

