# United States Department of the Interior

OFFICE OF THE SOLICITOR

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Memorandum

To: Secretary

From: Deputy Solicitor[1]

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)

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[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 ($6^{th}$ 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

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[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 locate[4] and patent[5] 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:

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[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]

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[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.

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> 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

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[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.

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[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

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[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

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[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

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[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.

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[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.

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[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, "vitiate 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

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[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

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[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

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[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*

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[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

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[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

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[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.*

particular, the 1997 Opinion quoted language from the decision stating that the Mining Law limits mill sites "by acreage and not by dimensions." *Id.* In this case, the Commissioner of the General Land Office had canceled a mill site entry because the mill site was contiguous to one of the four lode claims in the patent application. The Secretary reversed the Commissioner's decision, ruling that a mill site located contiguous to a lode claim is not objectionable if the mill site embraces only nonmineral land. Although the Secretary stated that the law limits mill sites by acreage, the Secretary did not state that a claimant is limited to one mill site per mining claim. According to the Secretary:

> It seems to the Department, upon further consideration, to be but a logical conclusion, that when by the act of 1872, whereunder a definite superficial area was made available in the case of every lode mining location, a new provision for an additional area, "for mining or milling purposes," was made, with a limitation by acreage and not by dimensions, the prohibition in that connection against the contiguity of the so-called mill-site with "the vein or lode" was intended, in the light of the previously existing practice, to prevent the appropriation within any such area of a further segment of the actual vein or lode upon which the mining claim itself was to be predicated.

*Yankee Mill Site*, 37 Pub. Lands Dec. at 677. The statement that the mill site provision limits mill sites "by acreage and not by dimensions" refers to the lack of any dimensional requirements for mill sites. In other words, the mill site provision does not require mill sites to be, for example, square in shape; rather, the provision limits mill sites by acreage, allowing mill sites to assume various shapes. Accordingly, the Secretary determined only that the contiguity requirement was intended to "prevent the appropriation within any such area of a further segment of the actual vein or lode" that may be mined, and did not address the question whether the mill site provision limits mill sites to one per claim.

7. *United States v. Swanson*, 14 IBLA 158 (1974). The 1997 Opinion quoted from this decision–which was rendered well after BLM adopted written guidance that the mill site provision does not limit mill sites to one per claim–as support for the view that the provision limits mill sites to one per claim. 1997 Opinion, at 11. In fact, this decision holds only that the Mining Law does not automatically allow claimants to patent all five acres of a mill site if the claimant is using or occupying less than five acres. According to the decision:

> The Secretary's interpretation of how the statute should be administered clearly indicates that a claimant is entitled to receive only that amount of land needed for his mining and milling operations, and this amount can embrace a tract of less than five acres. Furthermore, there is nothing within the statute which prevents the Government from granting less than five-acre tracts when need for a lesser amount of surface area is indicated. The statute states that the location shall not "exceed five acres." Webster's New World Dictionary, College Edition (1973) defines exceed as follows: "to go or be beyond (a limit, limiting regulation,

measure, etc.) * * *." The reference to five acres in the statute is clearly a ceiling measure, not an absolute, automatic grant.

*Id.* at 173. The decision did not consider whether more than one mill site may be located and patented per claim, if needed. The decision demonstrates that the Department has historically relied on the use-or-occupancy requirement in administering the mill site provision, rather than categorically restricting mill sites to one per claim.

8. *Utah International, Inc.*, 36 IBLA 219 (1978). In this decision, the Department appears to have recognized that the mill site provision does not impose a categorical limitation on the number of mill sites per mining claim. The applicant filed two patent applications for 201 mill sites associated with a uranium mine.[24] *Id.* at 220. The BLM wholly rejected one application, and partly rejected the other one. *Id.* In rejecting the applications, the BLM reasoned that the Secretary has discretion to deny applications even if an applicant has met all patenting requirements. *Id.* at 223, 225. The patent applicant appealed to the IBLA. The IBLA upheld both applications and overturned the BLM decision. *Id.* at 227. The IBLA did not consider whether the applicant was seeking more than one mill site for each associated lode claim. Instead, the IBLA considered only whether the applicant had met other requirements of the mill site provision, *i.e.*, whether the claimant was using or occupying the mill sites for mining or milling purposes and whether the land was nonmineral in character. *Id.* at 225-26. After concluding that the applicant had met these requirements, the IBLA ordered the issuance of the patent. *Id.* at 226.

If the IBLA in *Utah International* had taken the view that an applicant may not locate and patent more than one mill site per claim, the IBLA obviously would have considered, as a threshold matter, whether each of the mill sites included in the applications was associated with a separate mining claim. The fact that the IBLA granted the applications without making this inquiry demonstrates that the IBLA did not consider the issue relevant, and it could have drawn this conclusion only if it believed that the mill site provision does not limit the number of mill sites to one per claim. Indeed, since the applicant had submitted applications for 201 mill sites, the IBLA would have likely held invalid at least some of the mill sites if it had believed that the mill site provision imposed such numerical restrictions. The 1997 Opinion attached little weight to the decision because it did not specifically consider the number of associated mining claims. 1997 Opinion, at 13 n.21. On the contrary, the fact that the decision did not specifically consider the issue is highly significant, because it demonstrates that the IBLA believed that the issue was not relevant since the mill site provision did not impose numerical restrictions.[25]

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[24] In addition to the two applications at issue, the relevant mineral reports also examined 113 mill sites included in two other patent applications filed by Utah International, Inc. *Utah International, Inc.*, 36 IBLA 219, 220 n.1 (1978).

[25] The 1997 Opinion also relied on the concurring opinion of an administrative law judge in *United States v. Collord*, 128 IBLA 266 (1994). 1997 Opinion, at 9. In that case, the IBLA

To summarize, the Department's administrative decisions have not definitively addressed or resolved the legal question whether the mill site provision limits claimants to one mill site per claim. None of the existing administrative case law is based on a factual dispute that raised the issue. Indeed, no administrative decision of which we are aware has denied a plan of operations or a patent application on grounds that the plan or application included more than one mill site for each mining claim, except for the denial of the Crown Jewel mine plan, which occurred after the 1997 Opinion and was later rescinded. *See infra* note 29. These administrative decisions do not establish any kind of cognizable administrative practice or interpretation sufficient to contravene the Department's clear policy–reflected in the BLM's written guidance and consistently followed by BLM state offices–that interprets the five-acre mill site provision as not limiting the number of mill sites that may be located in association with a mining claim.[26]

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heard an appeal from an Administrative Law Judge (ALJ) decision invalidating two lode claims and two mill site claims. *Id.* at 267. The ALJ invalidated the two mill site claims because the claimant failed to use or occupy them for mining or milling purposes. *Id.* at 292. The IBLA, although reversing the ALJ on one of the lode claims, affirmed the ALJ's invalidation of the other lode claim and the two mill sites. *Id.* One of the administrative judges who concurred in the decision stated, as an alternative basis for his decision, that "at least one of the millsites is also invalid as a matter of law, since the applicable statute . . . permits only a single appropriation of additional land, not to exceed 5 acres, per mining claim." *Id.* at 314 (Burski, J., concurring) (citation omitted). This statement by the concurring judge did not represent the IBLA majority decision, was not based on any citation of authority, and in any event was dictum because the IBLA holding was that a claimant must use or occupy a mill site for mining or milling purposes in order to obtain a patent for a mill site.

[26] The 1997 Opinion also refers to a handful of treatises, concluding that "there appears to have been little doubt among miners and mining lawyers that the law allowed no more than five acres" of mill site land per mining claim. 1997 Opinion, at 12. Many of the treatises cited merely reflect the dicta found in the administrative case law that we have already discussed. For example, the 1997 Opinion quotes certain language from *Lindley on Mines* that is merely a restatement of dictum from the *Hoggin* decision. In his treatise, Curtis H. Lindley also restates the dicta from the *Alaska Copper Co.* and *Hard Cash and Other Millsite Claims* cases. 2 *Lindley on Mines* § 520, at 1173-75 (1914). Quoting dicta in legal treatises cannot imbue that dicta with added significance. Some mining lawyers have expressed the view that the Mining Law allows mining claimants to locate more than one mill site per mining claim. As the 1997 Opinion acknowledged, the second edition of *American Law of Mining* stated that "[i]n theory, an unlimited number of millsites might be appropriated by a single mining operator and held or patented as long as each independently meets the requirements of the law." *Id.* at 13 (citing 1 *Am. L. Mining* § 32.06[4] (2d 3d. Rev. 1987). In addition, another commentator stated that "[i]t is first to be noted that the statute does not limit the millsite locator to only one millsite. It merely says that no location may exceed five acres." Gary L. Greer, "Millsites: Nonmineral Mining Claims," 13 *Rocky Mtn. Min. L. Inst.* 143, 169 (1967)). Another mining lawyer has

### D. Solicitor's Office Staff Opinions

Prior to the 1997 Opinion, various offices within the Solicitor's Office of the Department of the Interior have on occasion briefly opined on the mill site provision. Although some of the opinions support the view that the provision does not categorically limit mill sites to one for each claim, the language of some other opinions can be construed as taking a contrary view. None of the opinions contains an extensive, authoritative discussion of the issue supported by citations of authority. Therefore, none of the opinions can be construed as altering the Department's long-standing policy of interpreting the mill site provision as imposing no categorical limitation, as this policy is reflected in the BLM's written guidance and followed by BLM state offices in administering the provision. We now examine each of these Solicitor's Office staff opinions more closely.

In 1960, the Field Solicitor in Reno, Nevada, issued a memorandum expressing the view that the mill site provision does not limit the number of mill sites that may be located for each mining claim. The memorandum, sent to the State Supervisor of the BLM's Arizona State Office, stated:

> More than one mill site may be embraced in a single application for patent. There appears to be no requirement that the total acreage of several mill sites, embraced in a single application, may not exceed five acres. A mill site located under the first provision of [30 U.S.C. § 42] . . . must be used and occupied by the proprietor of a vein or lode for mining or milling purposes.

Memorandum from Otto Aho, Field Solicitor, Reno, Nevada, to State Supervisor, Arizona State Office, BLM 2 (Aug. 17, 1960). The Field Solicitor also stated that:

> The cited law speaks of location in the singular. It does not say "no location or a group of locations * * * shall exceed five acres." . . . [I]t is my view that the total acreage of several mill sites, embraced in a single application, may exceed five acres. However, each mill site may not exceed five acres.

*Id.* at 8.

In 1974, the Field Solicitor in Phoenix, Arizona, also expressed the same view in a memorandum to the Chief of the Branch of Minerals in the BLM's Arizona State Office. The

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stated that "[s]ince the statute does not limit the millsite locator to a single claim, the obvious response is to locate several millsites, thereby acquiring enough land for all present and future needs." Richard W. Harris, *The Law of Millsites: History and Application*, 9 Nat. Res. Law. 103, 121 (1976). More importantly, the viewpoints expressed by lawyers in privately-published treatises and articles, no matter what position they take, do not provide a persuasive basis for changing the Department's prevalent practice and interpretation of the mill site provision.

memorandum listed the requirements for mill site locations and pointedly did not mention any limitation on the number of mill sites per mining claim. Memorandum from the Field Solicitor in Phoenix, Arizona, to the Chief, Branch of Minerals, Arizona State Office, BLM 1 (Mar. 27,1974).[27]

On the other hand, we have discovered a 1962 memorandum from the Regional Solicitor in Portland, Oregon, not mentioned in the 1997 Opinion, that contains language suggesting a contrary view. The memorandum, sent to the Chief of the Division of Lands and Minerals Management in the BLM Oregon State Office, stated:

> "[N]eed" is a governing factor as to how many millsites may be patented to one corporation. Of course, it must be remembered that each millsite application must be linked to a placer patent application so that the number of millsites should not exceed the number of placer claims. Also, it must be shown that each millsite is actually being occupied or used for purposes specified by the statute . . . . It therefore appears that the number of millsites which may be patented by an owner of placer claims must be determined by investigation of the facts as to how many millsites are "needed" by the owner of the placer claims "for mining, milling, processing, beneficiation, or other operations in connection with such claims . . . and whether the millsites are actually "used or occupied" for such purposes by the owner of the claims.

Memorandum from John L. Bishop, Assistant Regional Solicitor, Office of the Regional Solicitor, Portland, Oregon, to the Chief, Division of Lands & Minerals Management, Oregon State Office, BLM 5-6 (May 11, 1962). Although the memorandum stated that "the number of millsites should not exceed the number of placer claims," it cited no authority in support of this conclusory remark. As a result, the opinion lacks probative value regarding whether the mill site provision categorically limits the number of mill sites.

Finally, the Associate Solicitor for the then-Division of Public Lands sent a memorandum in 1963, also not mentioned in the 1997 Opinion, that expressed the view that more than one independent mill site may be located. The memorandum responded to an inquiry from the BLM Director regarding whether it is "permissible to issue [a] patent for two or more contiguous millsites not associated with patented mining claims when the milling operation occupies two or more contiguous millsites." Memorandum from the Associate Solicitor, Division of Public Lands, Office of the Solicitor, to Director, BLM 1 (July 1, 1963). The Associate Solicitor

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[27] Three years earlier, the same Field Solicitor responded to a question from the BLM Arizona State Office regarding the propriety of patenting mill sites located in an area withdrawn for the San Carlos Irrigation Project. Interestingly, although the patent application at issue contained 130 mill sites, the Field Solicitor did not raise any concerns regarding the large number of mill sites. Memorandum from Field Solicitor, Phoenix, Arizona, to Chief, Branch of Minerals, Arizona State Office, BLM (Feb. 11, 1971).

acknowledged that some view the mill site provision as limiting claimants to one five-acre mill site per lode claim, but the Associate Solicitor did not endorse the view for independent mill sites, stating:

> It is sometimes said that under the first sentence [of section 42 of Title 30 of the United States Code], even though multiple nonmineral locations may be permitted, there can be no more than one five-acre nonmineral location for each lode location. Such a restriction can have no applicability to the second sentence [of section 42, pertaining to independent mill sites] since there can be not even one lode location in connection with a mill site sought thereunder. We hold that the second sentence, by incorporating by reference the requirements of the first sentence where not necessarily inconsistent with the explicit words or intent of the second sentence, permits the patenting of two or more contiguous five acre locations where collectively they form a mill site.

*Id.* at 3-4. In other words, the Associate Solicitor concluded that even if the mill site provision disallows locating more than one five-acre dependent mill site per associated mining claim–a view that the Associate Solicitor did not necessarily endorse–the mill site provision does not so limit the number of independent mill sites, because independent mill sites are not associated with any particular mining claim. *See supra* note 2 (discussing distinction between dependent and independent mill sites).

## IV. Congressional Response to 1997 Opinion

Congress recognized that the 1997 Opinion represented a significant departure from the Department of the Interior's established practice regarding the mill site provision. In May 1999, Congress enacted a statute prohibiting the Department from relying on the 1997 Opinion to deny patent applications and plans of operation submitted before the date of the law's enactment. Pub. L. No. 106-31, § 3006, 113 Stat. 57, 90-91 (1999). The Conference Report and several senators objected that the 1997 Opinion constituted an improper amendment of existing law, and was an attempt to change the Department's practice without going through the necessary rulemaking process. According to the Conference Report, the 1997 Opinion "is 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).[28] The 1999 statute did not explicitly expire at the end of the 1999 fiscal year and apparently remains in effect.

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[28] The Conference Report incorrectly describes the 1997 Opinion as limiting the number of mill sites to one five-acre mill site *per patent*. In fact, the 1997 Opinion would have limited the number of mill sites to one five-acre mill site *per associated mining claim*. The mill site section provides that nonmineral land "may be embraced and included in an application for a patent for such vein or lode." 30 U.S.C. § 42. This has been interpreted to mean that mining claimants may seek to patent mill sites concurrently or subsequently to associated mining claims. *United States v. Shiny Rock Mining Corp.*, 112 IBLA 326, 360 (1990). It does not mean that claimants may include only one mill site in any one patent application.

In November 1999, Congress enacted legislation limiting the 1997 Opinion for fiscal years 2000 and 2001 by prohibiting the Department from expending appropriated funds to deny, based on the 1997 Opinion, any patent application that is grandfathered from the patenting moratorium or any plan of operations that an operator had submitted before November 7, 1997, or that the Department had approved before November 29, 1999. Pub. L. No. 106-113, § 337, 113 Stat. 1501, 1501A-199 (1999). This legislation stated that neither the May 1999 legislation nor the November 1999 legislation could "be construed as an explicit or tacit adoption, ratification, endorsement, approval, rejection or disapproval of the opinion dated November 7, 1997, by the Solicitor of the Department of the Interior concerning millsites." *Id.*

Since Congress has prohibited the Department from denying any plan of operations or patent application submitted before the 1999 law was enacted based on the 1997 Opinion, the Department has not applied the 1997 Opinion to any patent application or plan of operations.[29] This explains the absence of any legal challenge to the 1997 Opinion, as well as the absence of any administrative decision carrying it out.

The 1997 Opinion, if followed by the Department, would effectively subject mining claimants and operators to significant, new requirements respecting their mining operations. Under existing case authority, when federal agencies adopt new substantive rules and policies that represent a significant departure from long-established and consistent administrative practice, the agencies are required to comply with the Administrative Procedure Act (APA), 5 U.S.C. § 553, which requires notice and an opportunity for public comment. *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001). If an agency fails to follow these APA requirements in promulgating a rule, the industry cannot be required to follow the rule. *Id.* In *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999), the United States Court of Appeals for the District of Columbia Circuit concluded that consistent policy guidance given out by staff in the Federal Aviation Administration's Alaska Region for almost thirty years constituted authoritative interpretation that could be changed only through notice and comment rulemaking. The court stated that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Id.* at 1034.

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[29] By letter dated March 25, 1999 (hereinafter "Crown Jewel decision letter"), the Department denied a proposed plan of operations for the Crown Jewel mine in Washington State based on the 1997 Opinion. Shortly thereafter, Congress enacted a law prohibiting the Department from applying the 1997 Opinion to the Crown Jewel project and instructing the Department to apply instead the mill site provisions in BLM's Handbook for Mineral Examiners. Congress also instructed the Department to approve the plan of operations and reinstate the Record of Decision as soon as practicable. Pub. L. No. 106-31, § 3006, 113 Stat. 57, 90-91 (1999). The Department did so. The instant opinion supersedes the Crown Jewel decision letter.

## V. Conclusion

Based on the foregoing analysis, we conclude the mill site provision restricts the size of a mill site to five acres, but does not categorically preclude the location of more than one mill site for each associated mining claim. This conclusion is supported by several factors. First, the statutory language expressly limits the size of mill sites but does not expressly limit the number of mill sites per mining claim. Additionally, other provisions of the Mining Law limit the size but not the number of mining claims an individual claimant may locate and patent; since these statutory size limitations are constructed similarly and do not impose numerical limitations on mining claims, the statutory size limitation for mill sites should not be construed as a numerical limitation on mill sites. If the result were otherwise, a claimant would be unable to locate and patent more than one mill site to serve a mining claim, even though the claimant could show that more than one mill site is necessary to develop and process the minerals from the claim. The Mining Law has sufficient flexibility to allow for evolving mining practices,[30] and does not, at least in the mill site provision, impose rigid limitations that would make modern mining practices unworkable. The congressional purpose of the Mining Law was to encourage development of the nation's mineral resources, and a limitation of one mill site per mining claim would frustrate that congressional purpose by obstructing the development of mineral resources in particular areas. If this congressional policy is to be changed, it must be changed by Congress.

In fact, Congress has reaffirmed its historic policy of encouraging development of the nation's mineral resources. In 1970, Congress enacted the Mining and Minerals Policy Act, 30 U.S.C. § 21a, which provides:

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining . . . [and] the orderly and economic development of domestic mineral resources . . . .

*See also* National Materials and Minerals Policy, Research and Development Act of 1980, 30 U.S.C. § 1602.

Finally, an interpretation that the mill site provision categorically restricts the number of mill sites is inconsistent with the Department's prevalent, long-standing interpretation of the provision. The BLM's state offices have consistently followed BLM's written guidance, which provides that the mill site provision limits the size of individual mill sites but does not limit the number of mill sites that may be located for each mining claim. On the other hand, the Department has traditionally used the use-or-occupancy requirement of the mill site provision to

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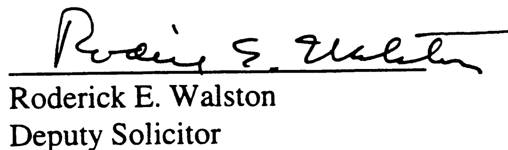
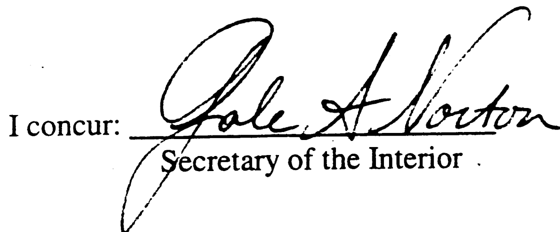
[30] *See* Karen Hawbecker & Peter J. Schaumberg, *Patent Pending: Department of the Interior Administration of the Mining Laws*, 46 Rocky Mtn. Min. L. Inst. § 16.01 (2000) ("[T]he Secretary's authority over the public lands is broad enough to allow for wide variations in Mining Law administration.").

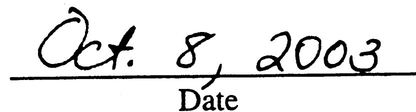
limit the number of mill sites that may be located for mining claims, by providing that mill sites may be located only where miners demonstrate that they reasonably need the lands for mining or milling purposes. There is no evidence that the Department has acted inconsistently with BLM's written guidance since it was adopted. The Department's prevalent interpretation, from at least the time that the BLM adopted its written guidance in 1954 until the 1997 Opinion was issued, has been that the mill site provision places no numerical limitations on the mill sites that may be located and patented in association with a mining claim.

For these reasons, we believe that the mill site provision authorizes the Department of the Interior to regulate mill sites by requiring claimants to show that they are using or occupying the nonmineral lands for mining or milling purposes, but that the provision does not categorically limit claimants to one mill site for each mining claim. The Department's traditional practice of applying the mill site provision without limiting mill sites to one per mining claim is in conformity with the requirements of the Mining Law. The Department should continue its traditional practice as described in this opinion and as reflected in the BLM's written guidance prior to the 1997 Opinion. This opinion supersedes all previous Solicitor's Office opinions and any other departmental decisions that conflict with this opinion.



Roderick E. Walston
Deputy Solicitor

I concur: 
Secretary of the Interior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## APPENDIX (1996 SURVEY OF BLM STATE OFFICE PRACTICE)

**Alaska.** The Alaska State Office indicated that in its practice, it looks "at the current use and occupancy of the millsite to insure it is mining related. If the millsite is not in use (vacant or use other than mining related) we don't consider it valid." Memorandum from Nolan Heath, Deputy State Director, Lands, Minerals, and Resources, Alaska State Office, BLM, to Director, BLM 2 (Mar. 20, 1996). The Alaska State Office stated that it had only one pending multiple-mill-site patent application.

**Arizona**. The Arizona State Office stated that "patents and use authorization for multiple millsites have always been evaluated based on the appropriate use and need for millsites." Memorandum from Michael A. Ferguson, Deputy State Director, Resource Planning, Use and Protection, Arizona State Office, BLM, to Director, BLM 2 (Apr. 25, 1996). This state office stated further that, in its practice, there "is no set ratio of millsites to associated mining claims. The patent review and plan of operation approval are based on authorized uses and the number of millsites necessary to accommodate the mining and milling needs." *Id.* The Arizona State Office noted that it had nine pending multiple-mill-site patent applications. *Id.* at 1.

**California**. The California State Office stated that it had at least fifteen multiple-mill-site patent applications pending. Memorandum from Leroy M. Mohorich, Acting Deputy State Director, Division of Energy and Minerals, California State Office, BLM, to Director, BLM 1-2 (Apr. 10, 1996). It stated:

> 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. Moreover, the California State Office stated that "[i]t has been common practice in California to issue patents for multiple millsites." *Id.* at 3. It reported having issued 32 patents for 455 mill sites since 1966. *Id.* It 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.*

**Colorado**. The Colorado State Office stated that it had one multiple-mill-site patent application pending. Memorandum from Richard Tate, Colorado State Office, BLM, to Director, BLM 1 (Apr. 12, 1996). With regard to reviewing patents and plans of operations for a mill-sites-to-mining-claims ratio, the state office stated that "we do not make such inquiries." *Id.* at 2. It reported having issued a multiple-mill-site patent in 1984. *Id.* at 1.

**Idaho.** In Idaho, the 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). It 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.*

**Montana**. The Montana State Office similarly reported having patented two multiple-mill-site applications in 1980 and 1987. Memorandum from Larry E. Hamilton, State Director, Montana State Office, BLM, to Director, BLM 4 (Apr. 19, 1996). The state office explained that "discussions with several retired mineral examiners suggest that the practice [of patenting multiple mill sites] was common when they started their careers in the late 1950s." *Id.* at 2. It stated further that:

> [W]e have never looked at a specific ratio of millsites to associated mining claims. We do, however, verify that any lands being sought are, in fact, being used and occupied for mining and milling purposes, and that the land configuration is reasonably compact such that the minimum of land required for the operation to effectively function is patented.

*Id.*

**Nevada.** In Nevada, the 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). It stated:

> 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 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.*

**New Mexico.** The New Mexico State Office reported that it had a mill site patent application pending but that it did not contain multiple mill sites. Memorandum from Robert S. Armstrong, Deputy State Director, Resource Planning, Use and Protection, New Mexico State Office, BLM, to Solid Minerals Group, Washington Office, BLM 1 (Apr. 25, 1996). The state office stated that the "last mill site patents were issued in the early 1970s" and "[t]hey were multiple millsites." *Id.*

**Oregon.** The Oregon State Office reported two pending multiple-mill-site patent applications. Memorandum from Associate State Director, Oregon & Washington State Office, BLM, to Roger Haskins, Senior Specialist, Mining Law Adjudication, Solid Minerals Group, Washington Office, BLM 1 (Apr. 30, 1996). It stated that "[p]atenting of multiple millsites has been an accepted practice in this office, as far back as the mid to late sixties." *Id.* at 2.

**Utah.** In Utah, the state office reported six pending multiple-mill-site patent applications. Memorandum from Robert Lopez, Deputy State Director, Natural Resources, Utah State Office, BLM, to Director, BLM 1 (undated). It reported having patented only 40 mill sites since 1962 but does not make clear whether those patents included multiple mill sites.

**Wyoming.** The Wyoming State Office stated that it had never issued a multiple-mill-site patent, having issued patents for only 13 mill sites since 1962, but "[i]f the applicant could show 'reasonable need' and the mill sites were necessary to the mining and milling operation, the mill sites would most likely have been patented if all other requirements were met." Memorandum from Dale Wadleigh, Wyoming State Office, BLM, to Roger Haskins, Senior Specialist, Mining Law Adjudication, Washington Office, BLM 1-2 (Mar. 21, 1996).