19

A WINDING ROAD: SECURING LAND TENURE FOR MINING OPERATIONS

Ashley Nikkel
Parsons Behle & Latimer
Reno, Nevada

Kaycee Royer
Parsons Behle & Latimer
Boise, Idaho

§ 19.01 An Operator's Conundrum*

Access to secure land tenure[1] is a critical element of any mining operation. But twenty-first century mining operations face twin pressures: from one side, an unprecedented need for mined metallic minerals such as copper, silver, gold, lithium, and others to support evolving technical and economic needs; and from the other side, changes in law and policy that create uncertainty in land tenure. This uncertainty arises out of all three branches of government. Variability in the underlying legal basis for land tenure, premised largely on the Mining Law of 1872 (Mining Law),[2] jeopardizes investment and project timelines while creating litigation risk. Certainty in the interpretation and implementation of the laws supporting the right to use and occupy lands on which a hard rock mine operates is critical given the massive amount of capital that development of these operations requires and long lead-times from staking to production. These long-brewing issues have become supercharged in the past few years because of significant developments in all three branches of the federal government.[3]

This chapter addresses recent federal executive and legislative efforts to alter or adjust the Mining Law, including recommendations by the U.S. Department of the Interior's Interagency Working Group on Mining Laws, Regulations, and Permitting (IWG), the proposed Mining Regulatory

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Ashley Nikkel is the managing shareholder of Parsons Behle & Latimer's Reno, Nevada, office. Kaycee Royer is an of counsel attorney at Parsons Behle & Latimer in Boise, Idaho. Both specialize in the Mining Law, mine permitting, environmental law, public lands, and natural resources issues. The authors thank peer reviewers Katie Sweeney, National Mining Association, Mark Compton, American Exploration & Mining Association, and Travis Annatoyn, Arnold & Porter, for their helpful input in the drafting and editing of this chapter. The views expressed in this chapter are those of the authors and do not necessarily represent the views of their law firm or peer reviewers.

[1]This chapter uses the term "security of tenure" to refer to the ability of a miner to hold an area with confidence and explore long enough to determine whether it contains a viable mineral deposit or not and, if justified, develop it into a mine. Security of tenure guarantees both the right to exclude others from developing their mineral discovery and the right to mine until exhaustion of the mineral deposit.

[2]30 U.S.C. §§ 22–47.

[3]For additional historic context and discussion from prior Foundation publications, see Jim Butler & Roy W. Fuller, "Public Lands, the Courts, and the Mining Law of 1872," 67 *Rocky Mt. Min. L. Inst.* 17-1 (2021); Jim Butler, "The Millsite Opinion," 48 *Rocky Mt. Min. L. Inst.* 16C-1 (2002); Frank Erisman, "Ancillary Use of Mining Claims," 48 *Rocky Mt. Min. L. Inst.* 16E-1 (2002); Patrick Garver & Mark Squillace, "Mining Law Reform—Administrative Style," 45 *Rocky Mt. Min. L. Inst.* 14-1 (1999); George E. Reeves & Stephen D. Alfers, "Dumps and Tailings," 23 *Rocky Mt. Min. L. Inst.* 419 (1977).

Clarity Act, and the proposed Clean Energy Minerals Reform Act. It also reviews recent judicial decisions related to land tenure for support and processing facilities on public lands, including *Earthworks v. DOI*[4] and *Center for Biological Diversity v. U.S. Fish & Wildlife Service* (*Rosemont*),[5] along with their progeny. This chapter then evaluates potential future action on these issues while providing practical guidance for mining companies to navigate the uncertain legal landscape and mitigate risks as law and guidance continues to evolve.

§ 19.02 Land Tenure Options

Private land ownership of both surface and minerals is typically the most secure land tenure option. But particularly in the western United States, most hardrock mining operations use a mix of public and private land. The nation's westward expansion in the 1800s opened new public domain,[6] and with it, the need for a system to address competing claims of ownership to a variety of resources. Miners cannot control where deposits are located, and a system of self-initiation for exploration and development of mines formed the common core of the customs and practices of mining camps and districts.[7] This right of self-initiation eventually emerged as the core characteristic of federal mining law and is fundamental to America's system of hard rock mining.

The Mining Law is fundamentally a land tenure law. This statute declared public lands containing valuable mineral deposits "free and open to exploration and purchase, and the lands in which they are found to occupation and purchase . . . ."[8] The Mining Law, which replaced the 1866 Lode Law, codified miners' long-standing customs for establishing and protecting rights to explore, occupy, and develop minerals by locating mining claims.[9] Provided they comply with relevant laws, "locators of all mining locations . . . situated on the public domain . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth . . . ."[10] Miners may locate unpatented mining claims and in the past had the opportunity to patent those claims, converting them from

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[4]496 F. Supp. 3d 472 (D.D.C. 2020), *aff'd*, 105 F.4th 449 (D.C. Cir. 2024).

[5]409 F. Supp. 3d 738 (D. Ariz. 2019), *aff'd*, 33 F.4th 1202 (9th Cir. 2022).

[6]This chapter focuses on federal, rather than state, public lands.

[7]*See* John C. Lacy, "Going with the Current: the Genesis of the Mineral Laws of the United States," 41 *Rocky Mt. Min. L. Inst.* 10-1, § 10.04 (1995).

[8]30 U.S.C. § 22.

[9]*See id.* §§ 23, 26, 35, 36, 42.

[10]*Id.* § 26.

a possessory interest to fee simple ownership. But since 1995, a series of moratoria in annual appropriations laws have functionally prevented any further patenting.[11]

To further facilitate mineral development, the Mining Law included a provision allowing the location of nonmineral land to be used as mill sites.[12] Mill site locations are used "for activities reasonably incident to mineral development on, or production from," mining claims, including milling and processing of minerals, plus storage of waste rock and materials.[13]

The scope and applicability of the Mining Law have been gradually narrowed and adjusted by Congress over the years. Some of the narrowing has focused on what materials the Mining Law governs. For example, the statute originally applied to all minerals; coal was later withdrawn—as were oil, gas, oil shale, phosphates, sodium, and common variety minerals.[14] But equally as important has been the reduction in inventory of lands available for mineral location. A slew of federal laws authorized removal of public lands from the operation of the Mining Law based on their characteristics, including the Antiquities Act, the Wilderness Act, the Wild and Scenic Rivers Act, and legislation establishing national parks.[15]

With the passage of the Federal Land Policy and Management Act of 1976 (FLPMA), Congress consolidated management of many of the nation's public lands in the Bureau of Land Management (BLM).[16] FLPMA provided the Secretary of the Interior with a new tool: the authority to

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[11] *See, e.g.*, Department of the Interior and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-332, § 112, 108 Stat. 2499, 2519 (1994); Consolidated Appropriations Act, 2024, Pub. L. No. 118-42, div. E, tit. IV, § 404, 138 Stat. 25.

[12] *See* 30 U.S.C. § 42.

[13] 43 C.F.R. §§ 3832.31, .34.

[14] *See* Mineral Leasing Act of 1920, 30 U.S.C. §§ 181–263; Materials Act of 1947, 30 U.S.C. §§ 601–604.

[15] *See, e.g.*, Antiquities Act, 54 U.S.C. §§ 320301–320303 (authorizing the president to create national monuments); Wilderness Act, 16 U.S.C. §§ 1131–1136 (establishing wilderness and wilderness study areas and requiring BLM and the Forest Service to identify qualifying federal public lands within their respective management); Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287 (establishing the National Wild and Scenic Rivers System); Great Basin National Park Act of 1986, 16 U.S.C. §§ 410mm to 410mm-3 (establishing a national park in eastern Nevada).

[16] 43 U.S.C. §§ 1701–1782. *But see* FLPMA § 302(b) ("[N]o provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators of claims made under that Act, including but not limited to right of ingress and egress.").

formally close or withdrawal public lands to location and entry under the Mining Law, subject to valid existing rights.[17]

According to the U.S. Government Accountability Office (GAO), the federal government manages about 650 million acres, or 29%, of the 2.27 billion acres of land in the United States.[18] Former Solicitor of the Interior John Leshy estimated in 2021 that of the approximate 650 million acres, roughly 400 million acres have been set aside for conservation and preservation purposes and are functionally off-limits to mining.[19]

In addition to the self-initiating rights under the Mining Law, a handful of other options are available to miners—in theory. FLPMA created two mechanisms to convert public lands to private lands: (1) public land sales, and (2) land exchanges.[20] First, lands may be sold, once identified for disposal through the land use planning process, if they are difficult and uneconomic for BLM to manage and not suitable for management by another agency, the tract is no longer needed for the purpose for which it was acquired or for any other federal purpose, or the disposal of the tract will serve important public objectives.[21] These land sales are usually a competitive bidding process, though modified and noncompetitive sales can occur if certain criteria are met.[22] Second, BLM may exchange federal lands for nonfederal lands. The exchange must be in the public interest, and the federal and nonfederal lands must be in the same state and essentially equal in value. Some exchanges involve single parcels, but BLM regulations also allow for the use of assembled land exchanges, which consolidate

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[17] 43 U.S.C. § 1714. The Forest Service Manual 2700, Chapter 2760, addresses the Forest Service's ability to withdraw lands under different authorities. Notably, FLPMA also created a new substantive standard that applied to mining operations, mandating that the Secretary take action to prevent "unnecessary and undue degradation" of public lands. *See* 43 U.S.C. § 1732(b) (FLPMA § 203(b)). In response to this substantive statutory mandate, BLM included the unnecessary and undue degradation standard in its locatable minerals surface management regulations. *See* 43 C.F.R. §§ 3809.1 (purpose statement), .5 (defining unnecessary and undue degradation), .451 (outlining how to prevent unnecessary and undue degradation while conducting operations on public lands).

[18] GAO, Letter Report to Senator Tom Udall, "Hardrock Mining: Availability of Selected Data Related to Mining on Federal Lands" (May 16, 2019).

[19] John D. Leshy, "America's Public Lands—A Look Back, a Look Ahead," 67 *Rocky Mt. Min. L. Inst.* 1-1 (2021).

[20] Both public land sales and land exchanges under FLPMA are subject to federal environmental review under the National Environmental Policy Act (NEPA). Other substantive federal statutes may be implicated as well, including the Endangered Species Act and National Historic Preservation Act.

[21] *See* 43 U.S.C. § 1713(a).

[22] 43 C.F.R. § 2710.0-6(c).

multiple parcels for one or more exchanges over time.[23] Other disposal authorities have developed after FLPMA and built off these themes for specific geographic areas and needs.[24]

Finally, under FLPMA, operators may seek discretionary authorizations for use of public lands. These discretionary authorizations include Title V rights-of-way[25] along with Title III leases, permits, and easements.[26] Unlike the claims system under the Mining Law, these authorizations are not self-initiated. Instead, they operate as a license and share the common element of a public interest analysis. These discretionary authorizations are limited in duration and scope such that they are usually not suitable for maintaining security of tenure throughout the time it takes to develop and then exhaust a deposit.

§ 19.03 Inter-Executive Dialogue

The current conversation over the Mining Law's suitability for present and future needs draws its immediate lineage from late 1980s and early 1990s. These arguments seek to alter the Mining Law's self-initiated claims system and convert land tenure for mining operations into either existing discretionary authorizations or shifting to a leasing system akin to fluid minerals.

[1] Solicitor M-Opinions

The Solicitor is granted authority over the Department of the Interior's (Department) legal work.[27] In particular, the Solicitor has "all of the authority of the Secretary" to:

> issue final legal interpretations, in the form of M-Opinions published in the Decisions of the United States Department of the Interior, on all matters within the jurisdiction of the Department, which shall be binding, when signed, on all other Departmental offices and officials and which may be overruled or modified only by the Solicitor, Deputy Secretary, or the Secretary.[28]

These M-Opinions interpret the law and give legal advice to the Department. In the context of the executive dialogue over the Mining Law, they have illustrated divergent views over the extent mining operations are legally entitled to land tenure under the law. The dialogue first focused

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[23] *Id.* § 2200.0-5(f).

[24] *See, e.g.*, Federal Land Transaction Facilitation Act, 43 U.S.C. §§ 2301–2306; Carey Act, 43 U.S.C. § 641; Desert Entry Land Act, 43 U.S.C. § 321; Southern Nevada Public Land Management Act of 1998, 31 U.S.C. § 6901.

[25] *See* 43 C.F.R. subpt. 2800.

[26] *See id.* subpt. 2920.

[27] *See* 43 U.S.C. § 1455.

[28] 209 DM 3, § 3.2(A)(11) (2020).

on mill sites, a special form of mining claims, and then on uses of mining claims for support and processing. But the overall influence of these M-Opinions appears to have declined in the past few years, emphasized in the *Rosemont* and *Earthworks* cases (discussed later in this chapter) and underscored by the end of the *Chevron* doctrine last term[29] and mass rescission of M-Opinions as the second Trump administration assumed power in early 2025.

[a] Mill Sites

In 1997, then-Solicitor Leshy issued Opinion M-36988, titled "Limitation on Patenting Millsites Under the Mining Law of 1872" (1997 Mill Site Opinion).[30] The 1997 Mill Site Opinion considered applications for patents and determined that the Department should reject patent applications for more than five acres of mill sites per placer or lode claim.[31] Importantly, the M-Opinion stated that BLM "should not approve plans of operation which rely on a greater number of millsites than the number of associated claims being developed unless the use of additional lands is obtained through other means."[32] Critical to that position was an interpretation of the word "such" in the Mining Law's mill site provision. That statutory provision states:

> 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 patent for *such* vein or lode, and the same may be patented therewith . . . but no location made on or after May 10, 1872 of *such* nonadjacent land shall exceed five acres . . . .[33]

Leshy argued that multiple mill sites could be staked if they were associated with a lode or placer claim so long as the total area covered by these mill site claims in aggregate did not exceed five acres.[34] The 1997 Mill Site Opinion concluded that the use of the word "such" in subsection (a) "indicates that the same parcel of land that meets the other requirements for a millsite claim is the land that is being limited to the five-acre area."[35] Leshy

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[29] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

[30] Solicitor's Opinion M-36988, "Limitation on Patenting Millsites Under the Mining Law of 1872" (Nov. 7, 1997).

[31] *Id.* at 2.

[32] *Id.*

[33] *Id.* at 3 (emphasis added) (quoting 30 U.S.C. § 42(a)); *see also id.* at 5 ("The use of the word 'such' indicates that the same parcel of land that meets the other requirements for a millsite claim is the land that is being limited to a five-acre area.").

[34] *Id.* at 2.

[35] *Id.* at 5.

reasoned that BLM's regulations, subsequent amendments to the Mining Law, Department of Interior decisions, plus treatise and scholarship supported this conclusion.[36]

The 1997 Mill Site Opinion's recommendations were never implemented. In 1999, the Department attempted to rely on the 1997 Mill Site Opinion to deny approval of a plan of operations for the Crown Jewel Mine in Okanogan County, Washington. But Congress blocked its application to that project, along with all other plans of operations and patent applications that were submitted prior to the congressional action.[37] Congress later appeared to reject application of the 1997 Mill Site Opinion to limit mill sites on a permanent basis with a subsequent appropriations bill.[38]

Attempting to implement the 1997 Mill Site Opinion by regulation, in 1999 the Department introduced a proposed rule that would have limited claimants to locating and patenting up to five acres of mill site land "for each 20-acre parcel of patented or unpatented placer or lode mining claims associated with that mill site land, regardless of the number of lode or placer claims located in the 20-acre parcel."[39] According to the Department, the new language in the proposed rule was designed to "prevent claimants from circumventing the limitation on the number of millsite acres a claimant may locate . . . by limiting the millsite acreage you may locate to 5 acres per associated 20 acre parcel of lode or placer claim lands."[40] The limitation on mill site acreage in the proposed rule was never finalized.

In 2003, the Bush administration's first Solicitor, William G. Myers III, issued a new M-Opinion (2003 Mill Site Opinion).[41] The 2003 Mill Site Opinion rescinded the interpretation of the Mining Law's mill site provision that the 1997 Mill Site Opinion had taken. The 2003 Mill Site Opinion

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[36] *Id.* at 5–14.

[37] *See* Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, § 3006, 113 Stat. 57.

[38] *See* Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, app. C, § 337(b), 113 Stat. 1501A (1999); 2003 Mill Site Opinion, *infra* note 41, at 2 ("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."); *id.* at 39 ("the Department has not applied the 1997 Opinion to any patent application or plan of operations").

[39] *See* Locating, Recording, and Maintaining Mining Claims or Sites; and Extension of Currently Approved Information Collection, OMB Approval Number 1004-0114, 64 Fed. Reg. 47,023, 47,037 (proposed Aug. 27, 1999).

[40] *Id.* at 47,028.

[41] Solicitor's Opinion M-37010, "Mill Site Location and Patenting Under the 1872 Mining Law" (Oct. 7, 2003) (2003 Mill Site Opinion).

stressed that the Mining Law does not contain "any language explicitly limiting the number of mill sites to one for each mining claim."[42] The Solicitor then surveyed the text of the Mining Law, its legislative history, the congressional purpose, and the Department's settled administrative practice and interpretation to conclude that the Mining Law's mill site provision does not limit the number of mill sites that may be located per mining claim.[43] The Solicitor reasoned that:

> the mill site provision authorizes the Department . . . to regulate mill sites by requiring claimants to show that they are using or occupying the nonmineral lands for mining or milling purposes, but . . . the provision does not categorically limit claimants to one mill site for each mining claim.[44]

BLM then codified this interpretation of the Mining Law's mill site provision as set forth in the 2003 Mill Site Opinion in a reorganization and update to its mining regulations.[45] The final rule confirmed the 2003 Mill Site Opinion regarding the number of mill sites and the amount of mill site acreage that could be located:

> The maximum size of an individual mill site is 5 acres. You may locate more than one mill site per mining claim if you use each site for at least one of the purposes described in [43 C.F.R. § 3832.34]. You may locate only that amount of mill site acreage that is reasonably necessary to be used or occupied for efficient and reasonably compact mining or milling operations.[46]

This rule prompted the *Earthworks* litigation, discussed in further detail in § 19.04[1], below.

[b] Ancillary Use

In 2001, during the waning hours of the Clinton administration, Solicitor Leshy issued Opinion M-37004 (Ancillary Use Opinion).[47] Though not expressly stated as such, due to its timing, the Ancillary Use Opinion was likely written in response to a BLM request for assistance with the review of the Yarnell mining plan of operations in Arizona where the operator proposed to use lode mining claims for "ancillary operations," in other

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[42] *Id.* at 5.

[43] *Id.* at 6–38.

[44] *Id.* at 41.

[45] Locating, Recording, and Maintaining Mining Claims or Sites, 68 Fed. Reg. 61,046 (Oct. 24, 2003) (codified at 43 C.F.R. pts. 3710, 3730, 3810–3850).

[46] 43 C.F.R. § 3832.32.

[47] Solicitor's Opinion M-37004, "Use of Mining Claims for Purposes Ancillary to Mineral Extraction" (Jan. 18, 2001). The phrase "ancillary use" is not used in the Mining Law or applicable regulations; the appropriate term used in the definition of "operations" in the surface management regulations is "reasonably incident mining uses." The two terms are used interchangeably with that qualification in this chapter.

words, "operations intended to support mineral extraction from other mining claims or other lands, and not looking to extract minerals from these particular claims."[48] The Yarnell mine was not unusual and it was common for mining plans to include ancillary facilities on lode claims.

The Ancillary Use Opinion contained only limited discussion of the rights available under the Mining Law: "The Mining Law makes 'all valuable mineral deposits in lands belonging to the United States . . . free and open to exploration and purchase,' " and "[u]nder the Mining Law, persons can obtain the right to develop these minerals by staking or 'locating' mining claims."[49] According to the Opinion, where a miner proposes a plan of operations to use mining claims for ancillary facilities in a manner that raises questions about the validity of the claims (such as, in the Opinion's language, a "gigantic waste rock dump or tailings pile that is a relatively permanent feature of the landscape"), the Secretary should make an "initial inquiry" into the validity of the claim.[50] If that inquiry demonstrates "grounds" for questioning the validity of the claim, then the plan of operations should not be approved until (1) the claim is determined to be valid; (2) the claims are relocated as mill sites; or (3) the Secretary, "in his discretion," authorizes the use of the public lands for ancillary operations "not influenced by any claim of right under the Mining Law."[51] The Ancillary Use Opinion changed the Department's long-standing interpretation of the Mining Law with the key objective of providing the Department with the ability to exercise "discretion" to withhold approvals of plans of operations until BLM verified the validity of claims being used for ancillary purposes. Under that M-Opinion, ancillary uses could only be authorized without a validity determination if claims were relocated as mill sites or under BLM's discretionary special use authorizations.

Neither BLM nor the U.S. Forest Service (Forest Service) ever relied on the Ancillary Use Opinion to reject or to modify a proposed mining plan of operations under either agency's surface management regulations. In 2005, the second Bush administration Solicitor, Sue Ellen Wooldridge, formally rescinded the Ancillary Use Opinion and issued a new M-Opinion

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[48] *Id.* at 1.

[49] *Id.* at 4 (quoting 30 U.S.C. §§ 22, 26). The Ancillary Use Opinion ignored any rights that might be associated with exploration or development of minerals on open lands under 30 U.S.C. § 22.

[50] *Id.* at 15.

[51] *Id.* at 3–4, 15. The example of "grounds" used by the Ancillary Use Opinion included a plan "to site two waste rock dumps and a heap leach pad, each 100 to 200 feet high." *Id.* at 4.

clarifying the Department had no legal obligation to determine mining claim validity before approving a plan of operations (2005 Opinion).[52]

In the 2005 Opinion, the Solicitor acknowledged that the Mining Law, in addition to establishing requirements for self-initiating property rights through locating mining claims and mill sites, includes broad authorization to enter federal lands to explore for and to develop minerals on federal lands open to location.[53] Solicitor Wooldridge reasoned that:

> the Mining Law allows citizens to enter the public lands and locate mining claims and mill sites without pre-approval from the government. The Department is not involved in a mining claimant's decision to locate a mining claim or mill site. As a result, the Department simply does not know and . . . *need not know*, whether these mining claims and mill sites are valid before approving a proposed plan for exploration or mining operations on open lands.[54]

The 2005 Opinion underscored elements of the Mining Law ignored by the Ancillary Use Opinion, including that miners may "explore for valuable mineral deposits and develop those minerals" and that the law includes "self-initiating property rights in the form of unpatented mining claims."[55]

While recognizing the Department's discretionary authority to determine mining claim validity at any time until a patent is issued, and after examining the relevant legal authorities, Solicitor Wooldridge concluded that "the Department is under no legal obligation to determine mining claim or mill site validity before approving a proposed plan of operations to explore for or develop minerals on lands open to the Mining Law's operation."[56] The 2005 Opinion therefore returned the Department's legal interpretation of the Mining Law to what it was before the Ancillary Use Opinion.

In 2020, the first Trump administration Solicitor, Daniel Jorjani, issued Opinion M-37057 (2020 Opinion) to supplement and to explain the 2005 Opinion, after determining that "further explanation of the legal principles supporting the 2005 Opinion's conclusion would benefit BLM and

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[52] Solicitor's Opinion M-37011, "Rescission of 2001 Ancillary Use Opinion" (Nov. 14, 2005); Solicitor's Opinion M-37012, "Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations" (Nov. 14, 2005) (2005 Opinion); *see also* 43 C.F.R. §§ 3809.100, 3862.1-1 (BLM is required to complete a validity determination only if a claimant: (1) proposes mining operations on lands that were withdrawn or segregated from the operation of the Mining Law, or (2) has applied for a patent.).

[53] 2005 Opinion, *supra* note 52, at 2.

[54] *Id.* (emphasis added).

[55] *Id.* at 1.

[56] *Id.* at 5.

the Department as a whole."[57] In the 2020 Opinion, the Solicitor reiterated the position that, where lands are open to location, "a valid mining claim is not required for reasonably incident mining uses" and that BLM is not required to determine mining claim validity on those lands before approving a plan of operations.[58] The Solicitor further emphasized that BLM's Mining Law regulations, not the agency's discretionary special use regulations, apply to mining and uses reasonably incident thereto, regardless of whether a mining claim exists.[59]

In reaching this conclusion, the Solicitor focused on language in section 22 of the Mining Law creating a "free and open" invitation to enter federal lands for exploration, mining, and "reasonably incident mining uses" amounting to a statutory right.[60] Key to this interpretation is the contemporary reading of the phrases "valuable mineral deposits" and "lands in which they are found."[61] The textual references to "valuable mineral deposits" and "lands in which they are found" operate together to "apply the Mining Law's disposal authority to mineral lands in the public domain, as opposed to agricultural lands, which were subject to disposal under other authorities."[62] This analysis did not create new policies or position of the Departments; instead, it explained the Department's long-standing positions and the legal authority related thereto while confirming historical practices and implementation of BLM's Subpart 3809 regulations.

The 2020 Opinion set forth the Department's view that its historical regulations, policies, and procedures were consistent with the self-executing

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[57] Solicitor's Opinion M-37057, "Authorization of Reasonably Incident Mining Uses on Lands Open to the Operation of the Mining Law of 1872" (Aug. 17, 2020). The 2020 Opinion was released between the *Rosemont* district court decision and Ninth Circuit decision.

[58] *Id.* at 24.

[59] *See* 43 C.F.R. § 3809.5 (defining operations to include "all other reasonably incident uses, whether on a mining claim or not"); *see also* 45 Fed. Reg. 78,902, 78,903 (Nov. 26, 1980) ("One does not need a mining claim to prospect for or even mine on unappropriated Federal lands. The definition [of operations] was designed to include those operations on a mining claim and uses incidental thereto on Federal lands."); 65 Fed. Reg. 69,998, 70,013 (Nov. 21, 2000) (similar).

[60] 2020 Opinion, *supra* note 57, at 2. The "free and open" invitation was necessary to achieve the congressional goal of resolving widespread trespass of miners on federal land "through blanket statutory authority for reasonably incident uses." *Id.* at 13. If the invitation had applied only to claimants, then all miners on the land when the law was enacted would have remained in trespass until the claims were filed. *Id.* This outcome clearly would have been at odds with the purpose of the Mining Law.

[61] *Id.* at 3. The 2020 Opinion considered Professor Curtis H. Lindley's treatise, and a 1914 survey of language used in cases and statutes involving lands and minerals and concluded that the terms "mineral lands," "valuable mineral deposits," and "mines" were legal equivalents and used interchangeably. *Id.* at 4.

[62] *Id.* at 4–5.

statutory right that Congress granted in section 22 of the Mining Law and surveyed the policies and actions that predated the surface use regulations.[63] This conclusion is also consistent with a paper delivered to the Annual Institute in 1977 that surveyed the "traditional law of dumps and tailings" and concluded that "[t]he right of the miner to dump waste rock and tailings upon vacant and unoccupied public domain seems to be unquestioned."[64] In the wake of *Rosemont*'s divergence from this long-standing interpretation and practice, the Department would issue yet another M-Opinion to guide implementation of this unprecedented shift.[65]

[2] Interagency Working Group Recommendations

In 2022, the Biden administration convened the IWG.[66] The IWG was charged with providing recommendations for "[r]egulatory and legislative mining reform" to the Mining Law.[67]

In September 2023, the IWG released its report, titled "Recommendations to Improve Mining on Public Lands."[68] The 65 recommendations were divided into three categories: (1) policies that could be implemented quickly; (2) policies that required rulemakings to implement; and (3) policies that required congressional action to implement.[69] While some of the recommendations, such as additional funding for land management agencies and implementation of the Nevada BLM's permitting process model, were largely uncontroversial,[70] others were not. The IWG recommended conversion of the Mining Law's locatable mineral system to a leasing

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[63] *Id.* at 6–8.

[64] Reeves & Alfers, *supra* note 3.

[65] *See* § 19.04[2][a][i], *infra*.

[66] *See* Exec. Order No. 14,017, "America's Supply Chains," 86 Fed. Reg. 11,849 (Feb. 24, 2021) (requiring agency heads to prepare a 100-day supply chain review); The White House, "Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100-Day Reviews under Executive Order 14017" (June 8, 2021) (recommending that the President establish "an interagency team with expertise in mine permitting and environmental law" to, among other things, "identify gaps in statutes and regulations that may need to be updated").

[67] The White House, "Biden-Harris Administration Fundamental Principles for Domestic Mining Reform" (Feb. 22, 2022), https://www.doi.gov/sites/doi.gov/files/biden-harris-administration-fundamental-principles-for-domestic-mining-reform.pdf.

[68] IWG, "Recommendations to Improve Mining on Public Lands" (Sept. 2023).

[69] *See id.* at 98.

[70] *See* BLM Instruction Memorandum 2025-009, "Plan of Operations Coordination Process (43 CFR 3802, 3809)" (Nov. 24, 2024), *rescinded* Feb. 27, 2025, under Exec. Order No. 14,148.

system, imposition of a 4 to 8 percent net royalty, and prohibition of operations that would need perpetual water treatment.[71]

Given the short amount of time between the release of the IWG report and the end of the Biden administration, few of the elements of the IWG report have been implemented.[72] With the second Trump administration taking over in January 2025 and its slew of executive orders and guidance changes signaling a significant change in policy, it is anticipated the IWG report will be shelved until a different administration elects to evaluate its usefulness in the future.

[3] Current Administration

With the onset of the second Trump administration, the mining industry has seen a tremendous uptick in executive activity related to federal permitting of mining operations.[73] This flurry of activity has largely focused on permitting efficiencies instead of securing land tenure. While predictable and efficient permitting is critical to any mining operation, so too is the assurance that an operator has a predictable ownership interest in the land on which facilities are permitted to be built. The speediest permitting is useless without land to mine and process and it is unclear if or when focus will turn to this issue.

§ 19.04 Judicial Dialogue

The judicial dialogue over land tenure under the Mining Law has mirrored the M-Opinions, focusing on both mill sites and claim validity. Arguments arising out of the M-Opinions from the Clinton era were largely unsuccessful for decades but recently have regained the spotlight to shake

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[71] *Id.* at 99, 104, 130.

[72] In addition to IM 2025-009, BLM finalized performance metrics to improve efficiency and transparency. *See* BLM Instruction Bulletin IB 2025-013, "Availability of Critical Minerals Performance Metrics Final Report" (Nov. 18, 2024). BLM also issued a policy to notify tribes upon receipt of exploration notices, but that guidance was rescinded under the new administration. *See* BLM Instruction Memorandum 2024-048, "Notifying Tribal Governments of the Bureau of Land Management's Receipts of Exploration Notices Under 43 CFR Part 3809; Surface Management" (Sept. 6, 2024), *rescinded*.

[73] *See, e.g.*, Exec. Order No. 14,148, "Initial Rescissions of Harmful Executive Orders and Actions," 90 Fed. Reg. 8237 (Jan. 20, 2025); Exec. Order No. 14,154, "Unleashing American Energy," 90 Fed. Reg. 8353 (Jan. 20, 2025); Exec. Order No. 14,156, "Declaring a National Energy Emergency," 90 Fed. Reg. 8433 (Jan. 20, 2025); Exec. Order No. 14,192, "Unleashing Prosperity Through Deregulation," 90 Fed. Reg. 9065 (Jan. 30, 2025); Exec. Order No. 14,213, "Establishing the National Energy Dominance Council," 90 Fed. Reg. 9945 (Feb. 14, 2025); Exec. Order No. 14,219, "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative," 90 Fed. Reg. 10,583 (Feb. 19, 2025); Exec. Order No. 14,241, "Immediate Measures to Increase American Mineral Production," 90 Fed. Reg. 13,673 (Mar. 20, 2025).

up the decades of certainty in land tenure that mining companies have come to expect of the Mining Law as it relates to mill sites and support facilities. The two primary lines of cases are *Earthworks* and *Rosemont*. This chapter addresses each in turn.

[1] *Earthworks*

In federal district court, a coalition of environmental groups challenged the 2003 Mill Site Rule, claiming that it allowed "excessive mill site acreage" and relying on the arguments in the 1997 Mill Site Opinion.[74] The court upheld the 2003 Mill Site Rule, finding that in the text of the 1872 Mining Law, Congress was silent on the number of mill sites that can be located per mining claim, and that silence was "particularly glaring in light of the fact that the Mining Law's predecessor, the Lode Law of 1866, not only capped the size of lode claims . . . but also limited the number of claims that a miner could locate and patent to one per lode."[75] Therefore, the court "[could not] say that Congress meant the Mining Law to include a one-mill-site-per-claim rule."[76] The court then concluded that the 2003 Mill Site Rule was a reasonable interpretation of the mining law.[77]

On appeal, a majority of the three-judge panel concluded BLM's mill site rule (no one-for-one limit on mill sites) was a reasonable construction of the Mining Law in light of two judges' reading of the word "such."[78] In his majority opinion, Judge Ginsburg concluded the statutory language was unambiguous, obviating the need to rely on BLM's interpretation of the statute in the first instance.[79] Noting the statute plainly contained no limit on the number of mill sites a claim owner may locate,[80] the majority rejected the plaintiffs' reading of the section. Judge Ginsburg emphasized it would have required the panel to "ascribe different meanings to identical uses of the word 'such' in successive clauses," which would have been "strained" and "convoluted."[81] After analyzing the statutory language, the majority reviewed the history of the statute and related

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[74] Earthworks v. DOI, 496 F. Supp. 3d 472, 485 (D.D.C. 2020), *aff'd*, 105 F.4th 449 (D.C. Cir. 2024).

[75] *Id.* at 494–95.

[76] *Id.* at 495.

[77] *Id.*

[78] Earthworks v. DOI, 105 F.4th 449, 452 (D.C. Cir. 2024).

[79] *Id.* at 456.

[80] *Id.*

[81] *Id.* at 457.

provisions of the Mining Law, concluding that doing so only strengthened its conclusion.[82]

In her dissent, Judge Pan reached the opposite conclusion on the statutory language.[83] While she agreed with her colleagues that the maximum size of a single mill site is five acres, she read the statutory language to mean that "all of the nonmineral land that can be claimed in connection with a particular mining claim" may not exceed five acres, therefore articulating a statutory basis for the one-for-one rule previously articulated in the 1997 Mill Site Opinion.[84] Judge Pan then engaged in a lengthy analysis of her view of the statutory context and structure, original intent and original public meaning, and BLM guidance.[85]

Due to the timing of the opinions, the panel decision appeared it might be ripe for further consideration by the en banc court or even the U.S. Supreme Court—the game of "my one true meaning of the statute is better than yours" has only just begun in the wake of *Loper Bright*. But the U.S. Court of Appeals for the D.C. Circuit declined the en banc petition and the appellants did not seek further review by the Supreme Court. After decades of uncertainty in this area, the industry appears to have found some solid ground related to quantities of mill sites. This certainty is sorely needed in the wake of the turmoil from the *Rosemont* decision.

[2] *Rosemont*

The *Rosemont* case represents a judicial pivot in the dialogue over the Mining Law, arising out of the Rosemont Copper Company's (Rosemont) proposal to operate a large open-pit copper mine in the Santa Rita Mountains, south of Tucson, Arizona.[86] The company's plan of operations encompassed a combination of private lands and lode claims, with the creation of waste rock storage facilities on approximately 2,447 acres of lands managed by the Forest Service.[87] The Forest Service initially determined that Rosemont had the right to occupy lands for its waste rock and tailing storage facilities under section 4 of the Multiple Use Mining Act of 1955

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[82] *Id.* Evaluating other provisions in the Mining Law, the majority concluded that Congress knew how to put a limit on the number of claims and elected not to do so with mill sites.

[83] *Id.* at 462–63 (Pan, J., dissenting).

[84] *Id.* at 467–68.

[85] *Id.* at 468–72.

[86] *See* Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv. (*Rosemont*), 409 F. Supp. 3d 738 (D. Ariz. 2019), *aff'd*, 33 F.4th 1202 (9th Cir. 2022). This chapter distinguishes the district court and Ninth Circuit decisions where appropriate, but where otherwise not clarified, references the Ninth Circuit decision.

[87] *Id.* at 743.

(Multiple Use Act),[88] as the use was reasonably incident to operation of a mine pit.[89] The Forest Service also determined that Rosemont held valid mining claims on the 2,447 acres it intended to occupy with waste rock under the Mining Law.[90]

In a watershed divergence from existing law, the district court determined that the Forest Service could not review or approve the mining plan of operations under its Part 228A regulations without first examining and concluding that all claims underlying the waste rock facilities were valid.[91] In so holding, the U.S. District Court for the District of Arizona revived, without citation, the reasoning of the rescinded Ancillary Use Opinion. As claim validity had not been confirmed,[92] the agency should have applied its special use regulations, codified at 36 C.F.R. pt. 251, subpt. B.[93] The *Rosemont* district court decision does not address mill sites because the operator had not staked them, though the district court did note that other lands might be available for storage of tailings and waste rock.[94]

Both the government and operator appealed. In a 2–1 panel decision on de novo review, the U.S. Court of Appeals for the Ninth Circuit upheld the district court's decision to vacate the Forest Service record of decision,

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[88] 30 U.S.C. § 612.

[89] *Rosemont*, 409 F. Supp. 3d at 749. The Forest Service evaluated the operator's mining claims in accordance with the long-standing definition of mining "operations" that all activities in the proposed plan of operations were to be reviewed under its mining regulations without regard to the status of its claims. *See Rosemont*, 33 F.4th at 1212 ("In the [final environmental impact statement], the [Forest] Service either assumed that Rosemont's mining claims on that land were valid or . . . did not inquire into the validity of the claims." Those two options are equivalent under the agency's regulations.).

[90] *See Rosemont*, 33 F.4th at 1207–08.

[91] *Rosemont*, 409 F. Supp. 3d at 766. Interplay between the Multiple Use Act and the Forest Service's Part 228A regulations was a fundamental element of the district court's decision, but ultimately proved unimportant in the Ninth Circuit's subsequent affirmance. *Id.* at 758–62.

[92] The district court embarked upon an examination of the geologic information in the administrative record to conclude that the record contained "no information to show Rosemont discovered a valuable mineral deposit within the ore processing, or tailings and waste rock pile areas." *Id.* at 757. Because mining claim validity was not previously at issue in the plan of operations or environmental impact statement due to the state of existing law, the geologic evidence in the record was unsurprisingly generalized.

[93] However, the Forest Service special use regulations explicitly exclude (1) uses authorized by the regulations governing minerals while failing to include any provision for the review or management of any mining or mining-related facilities, *see* 36 C.F.R. § 251.50(a); and (2) disposal of "solid waste . . . or other hazardous substances," 36 C.F.R. § 251.54(e)(1)(ix).

[94] *Rosemont*, 409 F. Supp. 3d at 763 n.13. However, the simplified example the district court used in this footnote was incorrect, because it used the "one-for-one" rule that was rejected (and the subject of the *Earthworks* litigation).

albeit on slightly different grounds.[95] It agreed that the Multiple Use Act did not provide rights beyond those granted under the Mining Law.[96] However, it emphasized in dicta that the Mining Law requires mineral claimants to provide *some evidence* of the presence of valuable minerals to establish claim validity.[97] Without such evidence, the Forest Service should not have approved the operator's plan of operations.[98] The panel remanded the decision back to the Forest Service for further work.[99]

Along the way, the Ninth Circuit brushed aside arguments that the Mining Law and FLPMA precluded—or, at the very least, did not require—anything resembling a formal validity determination prior to plan approval.[100] Despite the decades of back and forth in the M-Opinions on this issue, the Ninth Circuit concluded they were of little value because "the Solicitor has taken inconsistent positions."[101] To the extent the 2020 Opinion provided any useable guidance, it was only due *Skidmore* deference.[102]

The *Rosemont* decision has faced intense scrutiny since its inception, including in the dissenting opinion by Judge Forrest, who criticized the majority for disregarding the Forest Service's Part 228A regulations under reasoning consistent with the 2020 Opinion. Judge Forrest characterized the Mining Law under the majority's opinion as "self-defeating."[103] These regulations, she argued, should govern the use of mineral claims for waste rock storage facilities.[104] No further appeal was pursued by the

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[95] *See Rosemont*, 33 F.4th at 1208.

[96] *Id.* at 1218. This conclusion was based on the agency's abandonment of any argument based on 30 U.S.C. § 612.

[97] *Id.* at 1221–22.

[98] *Id.* at 1224. The majority rejected the district court's conclusion that the Forest Service used the wrong regulations (Subpart 228A instead of special use regulations), instead finding that concern "premature." *Id.* at 1218.

[99] The majority remanded the decision back to the agency to determine if the Part 228A regulations were "applicable to Rosemont's proposed occupancy of invalid mining claims with its waste rock." *Id.* at 1224.

[100] *Id.* at 1221–24.

[101] *Id.* at 1216. This assessment is likely an overstatement, as the Solicitor only changed in position on this issue once, that M-Opinion was only in place for three years, never implemented, and rebuked twice afterwards. The Ninth Circuit majority clearly had no desire to wade into the executive dialog on this issue and instead attempted to ground its analysis in the statutory language contained in section 22.

[102] *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[103] *Id.* at 1235 (Forrest, J., dissenting).

[104] *Id.* at 1231–34.

government[105] and subsequent cases have extended its holdings to lands managed by BLM.[106]

[a] *Rosemont* Progeny

In the aftermath of *Rosemont*, both the government agencies charged with approving new mines and the mining industry have struggled to understand its implications and implementation. BLM[107] has discretion as to whether it needed to undertake a validity determination.[108] These validity determinations typically arose where mining claims existed on land that was subsequently withdrawn[109] or in the patenting process.[110] As a result, BLM did not conduct such a determination prior to approving a plan of operations on open lands.[111]

The *Rosemont* decision changed this perspective and introduced a variety of new questions that now must be wrestled with. What quantum of evidence is necessary to demonstrate validity during plan approvals? Is that process different from formal validity determinations? Does the siting of waste storage or tailings facilities automatically imply that there is no mineralization on the claims? Do operators need to show mineralization for temporary facilities like power or water lines? And finally, how is

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[105] The operator sought rehearing by the three-judge panel and rehearing en banc, and the request was denied. The government did not join in that request and expressed no desire to pursue the appeal to the U.S. Supreme Court. The operator ultimately decided to abandon the project and pursue other options. Accordingly, the Forest Service made no further determinations on remand.

[106] Bartell Ranch LLC v. McCullough, No. 3:21-cv-00080, 2023 WL 1782343, at *7 (D. Nev. Feb. 6, 2023), *aff'd sub nom.* W. Watersheds Proj. v. McCullough, No. 23-15259, 2023 WL 4557742 (9th Cir. July 17, 2023) (remanded without vacatur); Great Basin Res. Watch v. DOI, No. 3:19-cv-00661, 2023 WL 2744682, at *4 (D. Nev. Mar. 31, 2023) (vacated and remanded).

[107] Unlike BLM, the Forest Service does not have adjudicative authority over validity determinations. Instead, it may express a "statement of belief" regarding mineral validity, but such statements have never been considered formal determinations. *See Forest Service Manual* § 2819—"Mining Claim Contests."

[108] Memorandum M-37077 from Robert T. Anderson, Solic., DOI, to Sec'y of the Interior and Director, BLM, Use of Mining Claims for Mine Waste Deposition, and Rescission of M-37012 and M-37057, at 1–2 (May 16, 2023) (2023 Opinion).

[109] *See* 43 C.F.R. § 3809.100; *see also id.* § 6304.12.

[110] 30 U.S.C. §§ 29–30, 35, 37, 42.

[111] Mineral examinations are extremely time-intensive and expensive—they have only become longer and more expensive as the remaining mineral examiners have found other work or passed away following the patenting moratorium. *See* Byrd v. Jossie, No. 1:08-cv-03054, 2009 WL 348733, at *12 (D. Or. Feb. 11, 2009) (noting that there still was no final mineral report in patent proceedings "after eighteen years, including nine years in contest proceedings, and . . . that the BLM anticipates at least another year . . . before a mineral report would be final").

the agency supposed to assess geologic information for mill sites where they must be non-mineral in character? These questions pose substantial uncertainty for regulators and industry. While some guidance has developed in the immediate aftermath, the only thing that is certain is more litigation—that is, without a congressional fix.

As it stood following the Ninth Circuit decision, *Rosemont* applied only to projects on National Forest land, was geographically limited to the states in the Ninth Circuit, and only to waste rock and tailings facilities. But subsequent litigation expanded the decision to BLM authorizations and a new Solicitor M-Opinion forced the issue nationwide.

[i] Thacker Pass

When the Ninth Circuit released the *Rosemont* opinion, litigation was already pending in the U.S. District Court for the District of Nevada that challenged BLM's approval of the Thacker Pass lithium mine.[112] Among other issues in the litigation, the plaintiffs argued that *Rosemont* applied equally to BLM's review and approval of the mining plan at issue because the Forest Service and BLM regulations were very similar and because both agencies were constrained by the Ninth Circuit's reading of the Mining Law.[113] Both the operator and BLM emphasized the differences in the two agencies' regulations and stressed the *Rosemont* decision was unique to the Forest Service's regulations; it was not a statutory case.[114]

The district court ultimately concluded that *Rosemont* was a statutory case and that BLM's approval of the project violated FLPMA as it related to the land the operator wanted to use for waste rock storage.[115] Extensively quoting and adopting dicta from the Ninth Circuit *Rosemont* decision, the district court concluded section 22 of the Mining Law required BLM to "make a determination about claim validity . . . before authorizing a project proponent to occupy non-mill site lands outside a mine pit with waste dumps and tailings piles under *Rosemont*."[116] Unlike the operator in *Rosemont*, the district court found enough evidence of lithium mineralization in the record to conclude there was a serious possibility BLM would be

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[112] *See* Bartell Ranch LLC v. McCullough, No. 3:21-cv-00080, 2023 WL 1782343 (D. Nev. Feb. 6, 2023), *aff'd sub nom.* W. Watersheds Proj. v. McCullough, No. 23-15259, 2023 WL 4557742 (9th Cir. July 17, 2023) (remanded without vacatur).

[113] *See id.* at *4.

[114] *Id.* at *5.

[115] *Id.* at *1, *5. In a conclusion ripe for further critique, the district court reasoned without citation that "the Court essentially looks through FLPMA to the Mining Law" to find that BLM violated FLPMA "under *Rosemont*" in approving land for waste rock and tailings storage. *Id.* at *8.

[116] *Id.* at *5.

able to substantiate its decision on remand.[117] Therefore, the district court declined to vacate the record of decision.[118]

On remand, BLM prepared a report that included information from a feasibility study and market overview and drilling data, analyzed the geology of the area, drill hole database and block model, and applied that information to areas of the waste rock and tailings storage facilities to make an administrative determination that valuable minerals existed on those lands.[119] This report has not been evaluated by a district court, as the plaintiffs' appeal to the Ninth Circuit did not directly implicate the *Rosemont* issue.[120] Therefore, uncertainty still exists as to whether a court would find that administrative determination and supporting documentation sufficient under *Rosemont*.

[ii] Mt. Hope

Within weeks of the *Rosemont* Ninth Circuit decision, plaintiffs in another pending Nevada mine plan challenge presented the decision as supplemental authority in Nevada federal district court.[121] That case concerned BLM's approval of the Mt. Hope molybdenum mine, which had been the subject of prior litigation, appeal, and supplemental environmental analysis.[122] There, the *Rosemont* issue was not squarely teed up because it involved a challenge concerning federally reserved water rights. An iteration of the Ancillary Use Opinion argument in that context had been rejected in a prior version of the litigation years earlier, and the lands at issue were managed by BLM.[123] Without the benefit of full briefing, the

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[117] *Id.* at *6.

[118] *Id.* at *6–7.

[119] *See* Notification of Recent Developments Under Fed. R. App. 25(j), W. Watersheds Proj. v. McCullough, No. 23-15259 (9th Cir. May 19, 2023), ECF No. 89.

[120] *See* W. Watersheds Proj. v. McCullough, No. 23-15259, 2023 WL 4557742, at *3 n.4 (9th Cir. July 17, 2023) ("We do not address whether the BLM violated FLPMA by approving the Project without requiring compliance to certain RMP provisions [related to discretionary uses and greater sage-grouse], because the district court awarded summary judgment to the Plaintiffs on the threshold issue . . . and, if the Plaintiffs disagree with the BLM's analysis on remand, they should make those arguments first to a district court on the appropriate record. We decline to address whether the BLM is required to inquire into the validity of [the operator's] mining claims as to the water and power lines under [*Rosemont*] because this argument was not specifically presented and developed before the district court.").

[121] *See* Notice of Supplemental Auth., Great Basin Res. Watch v. DOI, No. 3:19-cv-00661 (D. Nev. Feb. 22, 2023), ECF No. 89. **Editor's Note:** Ashley Nikkel and Parsons Behle & Latimer were counsel of record for the operator in this litigation.

[122] *See* Great Basin Res. Watch v. DOI, No. 3:13-cv-00078, 2014 WL 3696661 (D. Nev. July 23, 2014), *aff'd in part*, *rev'd in part sub nom.* Great Basin Res. Watch v. BLM, 844 F.3d 1095 (9th Cir. 2016).

[123] *See id.* at *8.

Mt. Hope district court agreed with the Thacker Pass district court that the *Rosemont* decision applied to BLM-authorized plans of operations.[124] The district court vacated the record of decision and sent the project back to BLM to evaluate the project's mining claims in light of the *Rosemont* decision.[125] The operator and government declined to pursue further appeal.

[iii] 2023 M-Opinion

In response to the *Rosemont* decision and following the decisions in the Thacker Pass and Mt. Hope challenges, the Office of the Solicitor released an M-Opinion on May 16, 2023 (2023 Opinion). The 2023 Opinion purported to clarify the application of *Rosemont* to mine plan of operation approvals but raised issues beyond the scope of the *Rosemont* decision.[126]

The 2023 Opinion explicitly found that there were no laws or regulations that required BLM to "proactively and independently gather and determine evidence of discovery before a miner begins development, including when a miner submits a proposed plan of operations for approval."[127] However, it also concluded that this general rule does not address situations in which a miner seeks to place waste rock storage or tailings facilities on claims that do not have evidence of valuable mineral deposits.[128]

The 2023 Opinion clarifies that formal validity determination is not necessary when determining whether the claims are valid for ancillary mining activities.[129] However, the 2023 Opinion stops short of providing specific guidance related to the agency's evaluation of geologic and facility information for validity purposes—all the regulated community can take from this guidance is that it is something short of the type of validity determination that would support a patent. Instead, the 2023 Opinion outlines five options for operators to place waste rock or tailings facilities:

(1) Submit additional evidence of discovery on the relevant mining claims to the agency;

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[124] *See* Great Basin Res. Watch v. DOI, No. 3:19-cv-00661, 2023 WL 2744682, at *4–5 (D. Nev. Mar. 31, 2023).

[125] *Id.* at *11.

[126] *See* 2023 Opinion, *supra* note 108, at 1.

[127] *Id.* at 4.

[128] The argument is that if valuable mineral deposits existed on these claims, the mine operators would not seek to bury them beneath waste rock or tailings facilities. This reasoning is overly credulous. Operators regularly move waste rock and tailings facilities as economic conditions change, and they may choose to pursue a deposit through underground methods rather than open-pit mining.

[129] *Id.* at 2.

(2) Relocate mining claims as mill sites if the lands are nonmineral in nature (or redesign the plan of operations to put waste rock or tailings facilities on other lands, such as nearby private lands or other mill sites;

(3) Apply for a permit or lease under FLMPA, i.e., a discretionary land use authorization under 43 C.F.R. subpt. 2920;

(4) Obtain a right-of-way under 43 C.F.R. pt. 2800; or

(5) Obtain title to the lands through a land exchange performed under 43 U.S.C. § 1716 or purchase under 43 U.S.C. §§ 1713, 1719.

These alternatives are presented as options to provide operators with multiple avenues to build their waste rock and tailings facilities, and in certain situations they may be viable. But many of these options will be functionally unavailable to many operators. Given the predominance of public lands in states like Nevada, private land may not be available at all; if it is available, it may already be committed for another purpose or unsuitable for waste rock and tailings facility construction due to geographic constraints or distance from the extraction location. Further to this theme, siting mill sites to support waste rock and tailings facilities can be problematic due to the specific geologic conditions surrounding extractive deposits. Some areas close to the mine pit (where an operator would want to locate support facilities to keep the operation compact and minimize transport costs) might have too little mineralization to qualify as a valuable mineral deposit, but too much mineralization to qualify as "non-mineral in character."

Moreover, in areas where greater sage-grouse land use plans impose a disturbance cap and that cap has been exceeded, land use authorizations not premised on the Mining Law, such as discretionary land use authorizations under 43 C.F.R. subpt. 2920, might be unavailable. Additionally, rights-of-way might be appropriate for linear facilities such as pipelines or conveyor belts but are probably less suitable for large facilities such as waste rock storage. Finally, land exchanges and purchases are incredibly time-consuming and capital-intensive endeavors and are frequently caught in decades-long policy and litigation battles, making them unreliable and uncertain solutions to the land tenure problem.

[iv] Ongoing Litigation and Open Questions

Since the *Rosemont* decision, the process for mine approvals has become more complex and uncertain, with operators and agencies taking diverse approaches to compliance. However, this process is complicated by a general lack of mineral development knowledge and staffing resources in some BLM and Forest Service offices. Some offices that regularly conduct mine plan reviews, including some BLM offices in Nevada, know exactly

what they are looking for to comply with *Rosemont*. Others are less certain or struggle with application, mistakenly viewing the issue as one for the National Environmental Policy Act (NEPA) instead of the land management agency's plan approval.[130]

In February 2025, the Trump administration suspended the 2023 Opinion—along with a handful of other Biden-era M-Opinions—pending internal review. During suspension, the 2023 Opinion may not be relied upon as authoritative and binding without first consulting with the Office of the Solicitor for guidance. Administrative determinations made since Thacker Pass under *Rosemont* have largely followed the same model as BLM's analysis on remand—data, geologic narrative, facility discussion, and analysis of the mineral deposits underlying the facilities. Where data or geologic inference does not support a valuable mineral deposit underlying a waste rock or tailings facility, operators have been staking mill sites to cover those areas.

Questions persist about the extent of the *Rosemont* decision. The case and its progeny focus on waste rock and tailings facilities, but subsequent litigation indicates a desire to expand the decision to temporary facilities (roads, pipelines, stockpiles, shops, and transmission lines).[131] The use of mill sites has yet to be directly addressed, and in turn, the quantum of evidence to show lands are "non-mineral in character" in this context. There is additionally some discussion of the case's applicability to existing operations.[132] Agencies and applicants continue to navigate the process of determining claim validity before plan authorization. However, it is likely that Congress will have to step in to address the impacts of *Rosemont* on the development of minerals in the United States.

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[130] This misunderstanding is likely fueled and reinforced by robust comments from environmental groups on NEPA documents chastising the agency for not reviewing the *Rosemont* issue as part of the environmental analysis. However, as underscored by *Rosemont*, Thacker Pass, and Mt. Hope, this determination is a Mining Law issue that the courts have reached by "look[ing] through" the land management agency's organic act—not NEPA.

[131] *See, e.g.*, Ctr. for Biological Diversity v. Burgum, No. 2:24-cv-02043 (D. Nev. filed Oct. 31, 2024) (challenging Rhyolite Ridge Lithium Project on grounds including *Rosemont*); Save the S. Fork Salmon v. U.S. Forest Serv., No. 2:25-cv-00086 (D. Idaho filed Feb. 18, 2025) (challenging Stibnite Gold Project on grounds including *Rosemont*).

[132] 2023 Opinion, *supra* note 108, at 9 n.7. This footnote was likely intended to anticipate arguments by project challengers and cauterize *Rosemont*. However, no litigant had challenged an existing authorization under *Rosemont* at that point. Accordingly, the footnote has been viewed by some as inviting significant uncertainty for projects that had been operating for decades by implying that those authorizations could be subject to *Rosemont* scrutiny.

§ 19.05 Legislative Dialogue

Congressional dialogue over land tenure options for mining claims has been both the driving force and aftermath of the executive and judicial conversations, the push and pull. Some would argue that congressional inaction spurred the series of M-Opinions that after years of failure in the courts finally broke through in *Rosemont*. This group argues the statute is an artifact of Reconstruction-era America and ill-suited for meaningful regulation of modern mining operations. Others would point out that Congress's decision not to dismantle the Mining Law (or large portions of it) recognizes the valuable role the statute still plays in our modern legal and regulatory system, despite its age. This group points to efforts by a small minority to "break" the Mining Law through executive guidance that eventually gained traction with a handful of judges to install a regime of revisionist history that overrides the will of Congress and over a century and a half of implementation.

Legislative proposals in the wake of *Rosemont* seek to amend the Mining Law through a series of technical changes to restore land tenure for support facilities to their pre-*Rosemont* status. At the same time, Congress has been considering legislation that would implement some of the more aggressive provisions of the IWG Report.

[1] Clinton Administration Reform Efforts

In the wake of FLPMA's implementation of the "unnecessary and undue degradation" standard in 1976, significant Mining Law reform proposals in Congress were discussed, introduced, and ultimately failed. The conversation reached a fever pitch in the Clinton administration and when the legislation ultimately failed,[133] the administration made a push to amend the Subpart 3809 regulations.[134] These proposals spawned a new chapter of the policy debate that spanned all three branches of government, captured in part in the M-Opinion discussion in § 19.03[1] of this chapter.[135] The legacy of those M-Opinions persist in *Earthworks* and *Rosemont*, ultimately illustrating decades of aftershocks from a failed congressional agenda.

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[133] *See, e.g.*, Mineral Exploration and Development Act of 1993, H.R. 322, 103d Cong. (1993).

[134] *See, e.g.*, Intent to Prepare an Environmental Impact Statement for the Revision of the Surface Management Regulations, 62 Fed. Reg. 16,177 (Apr. 4, 1997); Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 70,115 (Nov. 21, 2000).

[135] *See, e.g.*, Mineral Pol'y Ctr. v. Norton, 292 F. Supp. 2d 30 (D.D.C. 2003).

[2] Ongoing Reform Proposals

Iterations of the "Mining Reform Act," "Hardrock Mining Reform Act," "Hardrock Leasing and Reclamation Act," and similarly titled bills have been introduced in Congress over the years like clockwork on the Mining Law's anniversary (May 10)—and odds are usually high that the late Congressman Raul M. Grijalva (D-Ariz.) was involved.[136] The last Congress's effort, the Clean Energy Minerals Reform Act (CEMRA), was introduced by Senator Martin Heinrich (D-N.M.) and Representative Grijalva.[137] The CEMRA sought to amend the Mining Law to provide additional protections for federal lands, including: (1) annual rental payments for claimed public land; (2) payment of a 5–8% royalty on gross income from production on federal lands; (3) creation of a Hardrock Minerals Reclamation Fund for abandoned mine cleanup; (4) requirements that exploration and mine operations be permitted for non-casual mining operations on federal land; (5) provisions for states, political subdivisions, and tribes to petition the Secretary of the Interior to have lands withdrawn from entry under the Mining Law; and (6) expedited review of areas identified as inappropriate for mining, allowing them to be reviewed for possible withdrawal. The bill never made it beyond committee hearings and given the current composition of Congress, is unlikely to proceed in the near term.

[3] Mining Regulatory Clarity Act

On the other hand, congressional efforts to situate support facility permitting back to the pre-*Rosemont* understanding of the Mining Law have gained some traction. The most recent iteration of this legislation, the Mining Regulatory Clarity Act,[138] would create a second type of mill site that can be used to locate activities that are reasonably incident to mining. The "subsection (c) mill sites" would be located by an operation in connection with a mining plan of operations submitted to the agency for review or approval. Once the plan is approved, the operator would be able to use these new mill sites (five acres or less) for any mine support facilities approved in the plan. The operator could locate, and the federal land manager could approve, the use of as many new mill sites as reasonably necessary to support operations within the mine plan boundary. Subsection (c) mill sites

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[136] *See, e.g.*, Hardrock Mining and Reclamation Act of 2009 (H.R. 699); Hardrock Leasing and Reclamation Act of 2019 (H.R. 2576).

[137] Clean Energy Minerals Reform Act of 2022, H.R. 7580, 117th Cong. (2022); Clean Energy Minerals Reform Act of 2023, S. 1742, 118th Cong. (2023). The current Congress is considering a renewed iteration of this legislation. *See* Mining Waste, Fraud, and Abuse Prevention Act of 2025, H.R. 1865 & S. 859, 119th Cong. (2025).

[138] S. 544, 119th Cong. (2025).

could be located on public land regardless of the mineral character of the land in connection with the mine plan review and approval.

This technical solution would negate the risk of further *Rosemont* challenges by eliminating the federal land management agency's obligation to inquire into the mineral character of the lands atop which support facilities—permanent or temporary, non-linear or linear—are situated inside a mine plan boundary. As of April 9, 2025, the Senate Committee on Energy and Natural Resources ordered that the bill be reported without amendment favorably. If passed, this legislation would reduce some of the uncertainty created by the *Rosemont* decision and its progeny.

§ 19.06 The Future and Practical Takeaways

Whether a new administration might make progress on improving certainty in land tenure is unclear given the current political context. The current majority in Congress, aligned in party with the President, has limited time to implement its wide-ranging policy agenda. Given these slim margins and finite political capital, existing priorities like the Mining Regulatory Clarity Act have the highest probability of enactment versus more sweeping policy changes. On the executive side, changes in M-Opinion guidance are being evaluated along with a slew of new executive orders that are stressing the need for domestic mineral production and permitting reform. But without meaningful reduction of risk on the land tenure side, the operator's conundrum referenced at the beginning of this chapter will persist.

In the wake of this period of turmoil and then transition, pragmatic advice for operators can be frustratingly simple. Exploration-stage and operating mines should evaluate their land packages carefully. Though they cannot control where deposits are found, mining companies can evaluate the geology and geography surrounding these deposits for risks to land tenure. Mine plan design should be evaluated in light of these potential risks as design is an element within the operator's control (to a degree). Where private land might be available for purchase near a potential operation, operators may wish to target that land for critical support facilities instead of relying on public land mining or mill site claims, or discretionary use authorizations.

Even given this slate of theoretical options, the reality is that public lands are the only choice given where some deposits lie. In those situations, careful discussion of mining claims versus mill sites will require close geologic scrutiny and planning. Placing support facilities on already disturbed land or land less likely to contain sensitive resources can reduce overall risk profile. Further, understanding the geology of the area surrounding the deposit (not just the deposit itself) can help prepare operators to respond

quickly if underlying laws or regulations are adjusted—or courts decide to reverse long-standing understandings of those authorities. Finally, evaluating project geology not just for the target mineral, but other minerals that might be processed economically can improve operator flexibility. The operator should ensure this information is analyzed by experienced professionals, documented, and kept at the ready should the land management agency need to engage in a dialogue. In more extreme cases, operators may consider underground options that minimize surface disturbance and use of existing storage and processing facilities.

Given the decades-long dialogue among and within the branches of government on land tenure issues for mining operations, the long and winding road is unlikely to disappear. But careful understanding and anticipation of these challenges can certainly help with navigation.