



2024 Annual Conference

OCTOBER 28, 2024 | BOISE CENTRE WEST

A Different
**LEGAL
PERSPECTIVE**

parsonsbehle.com

**PARSONS
BEHLE &
LATIMER**

A Professional
Law Corporation

Permitting Ancillary Facilities on Public Lands

**Ashley Nikkel (Reno), Norman Semanko (Boise)
& Jason Mau (Boise)**

Digital Copy of Today's Presentation

You can scan the following QR code or visit parsonsbehle.com/2024-idaho-mining-law to download a PDF copy of today's presentation.



Legal Disclaimer

This presentation is not a substitute for legal advice and does not create an attorney-client relationship. If you have project-specific questions, you should contact your own legal counsel. This presentation is not intended to and will not serve as a substitute for legal counsel on these issues. It is informational only and based on law and guidance as of October 28, 2023.

Overview – the “Rosemont” Problem

- BLM and USFS Regulations
- The Debate Over Ancillary Use
- Four Major Federal Court Cases
 - Rosemont (district and appellate), Thacker Pass, Eureka Moly
- Solicitor’s Opinion
- USFS Approach
- Instructive projects
- Where do we go from here?

Background - BLM

- All mining operations and exploration on BLM lands with more than five acres of disturbance must have an approved plan of operations from BLM
- BLM regulations (3809 regulations) were approved in 1980 and authorize BLM to approve mining and ancillary facilities on federal land without any inquiry into mining claim status
- Internal attorneys at the BLM: Office of the Solicitor

Background - USFS

- On USFS lands, operations must be conducted so as to “minimize adverse environmental impacts on National Forest System” lands
- USFS regulations (“Part 228A regulations”) were approved in 1974 and authorize USFS to approve mining and ancillary facilities on federal land without any inquiry into mining claim status
- Internal attorneys at Forest Service: Office of General Counsel (OGC)

The Debate

- Historically, operators put facilities that support the extraction of ore (waste rock, tailings and processing facilities, other infrastructure) atop unpatented mining claims
- 1990s Congressional Mining Law reform attempts failed
- 2001 Solicitor Opinion – in approving Plan, BLM directed to inquire into the validity of mining claims used for ancillary purposes
 - Contrary to BLM mining regulations adopted in 2001 and formally withdrawn
- 2005 Solicitor Opinion - Interior does not know or need to know whether mining claims and mill sites are valid before approving a Plan on open lands
- 2020 Solicitor Opinion supplanted & explained the 2005 Opinion

Section 22 of the Mining Law

- “That all **valuable mineral deposits** in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and **the lands in which they are found** to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.”
- Self-executing statutory right

Four-ish Major Federal Court Decisions

- **2019**: Federal District Court for Arizona, *Center for Biological Diversity v. USFWS* (Rosemont copper mine (USFS) – lower court)
- **2022**: Ninth Circuit Court of Appeals, *Center for Biological Diversity v. USFWS* (Rosemont copper mine (USFS) – appeal)
- **February 2023**: Federal District Court for Nevada, *Bartell Ranch v. McCullough* (Thacker Pass Lithium Mine (BLM) – lower court)
 - July 2023: Ninth Circuit affirmed but punted the mining claim issue
- **March 2023**: Federal District Court for Nevada, *Great Basin Resource Watch v. DOI* (Mt. Hope molybdenum mine (BLM) – lower court)

Rosemont Lower Court Decision

- Forest Service could not use authority under its mining regulations to approve proposed waste rock and tailings storage facilities on National Forest land because the claims underlying those facilities were not valid
- Only activities on “valid” claims were authorized by the Mining Law
 - Any activities not on “valid” claims needed to be authorized under other laws
- Forest Service and Rosemont appealed

Rosemont Appeal Decision

- Two-judge majority opinion agreed that Rosemont's claims were invalid and remanded to the Forest Service with no guidance
 - Narrow holding, but lots of dangerous dicta
- The Mining Law does not give claimants the right to occupy claims unless they are "valid"
 - Mining Law also allows occupation of non mineral land for mill sites
 - No weight to 2020 Solicitor's Opinion because of inconsistent positions the solicitor's office had taken over the years
- Dissenting opinion – Forest Service properly read and applied its regulations
- Government did not appeal or seek rehearing

Thacker Pass Lower Court and Appeal

- Rosemont decision applies to BLM as well as USFS
 - BLM must confirm that claims underlying waste rock and tailings facilities are valid before approving mine plan
 - Confirms this is not a NEPA issue
 - Remanded to BLM for more claim analysis (did not vacate ROD)
- Upheld BLM's plan approval on all other issues
- Environmental groups appealed to the Ninth Circuit
 - On remand, BLM prepared an appendix evaluating claims
 - Ninth Circuit declined to address the appendix or this issue

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Serial Number
NVN098586

THACKER PASS PROJECT
PLAN OF OPERATIONS AND
RECLAMATION PERMIT

LANDS INVOLVED

Mount Diablo Baseline & Meridian

T44N, R34E, sections 1 and 12.
T44N, R35E, sections 2-17.
T44N, R36E, sections 7, 8, 14-23, and 29.
Humboldt County, Nevada

16 May 2023

(Date)

Mount Hope Lower Court Decision

- Mt. Hope molybdenum mine in BLM Battle Mountain District
- Complicated litigation history involving, among other things, Public Water Reserve lands
- Agreed with Thacker Pass judge that Rosemont applies to BLM waste rock and tailings facilities
 - “On this record, the Court cannot conclude the PWR 107 springs and lands within the Project area meet the prerequisite to occupation under the mining laws” – remanded
- No appeal

New BLM Solicitor's Opinion M-37077

- May 16, 2023: adopted the Rosemont view of the Mining Law (claimant can only occupy “valid” claims as what the Mining Law has always said)
- Recognizes the history of operators locating ancillary facilities on mining claims and not mill sites, but the opinion says that operators (and BLM) have been violating the law for 150 years (and contradicts 2020 M Opinion)
- Rescinds prior M Opinions (2005, 2020)

Opinion Language

- “Upon review of the Mining Law’s text and recent caselaw, and prior Solicitor’s Opinions, I have concluded that BLM should not approve plans of operations where the operator proposes to place significant waste or tailings facilities on mining claims and where BLM’s record lacks evidence of the discovery of valuable mineral deposits underlying those facilities.”
 - Where evidence is absent, the operator may:
 - submit additional evidence of discovery for the affected claims
 - Re-site the ancillary uses on mill sites (as appropriate)
 - Seek a land use authorization under FLPMA and its implementing regulations
 - Acquire title to the land through a land exchange or sale

What about USFS?

- Rosemont remand not particularly educational
 - Operator staked mill site claims after the district court decision
 - Ultimately decided to relocate tailings and waste rock facilities on private land rather than go back through USFS permitting
- No formal guidance from OGC
- Agency approach at this point can only be gleaned from project-specific examples

Instructive Projects

- Recent Nevada BLM authorizations:
 - Gibellini
 - Goldrush
 - Juniper
- Upcoming Nevada BLM authorizations:
 - Rhyolite Ridge
 - Robertson
- USFS:
 - Stibnite Mine

Where do we go from here?

- Unanswered questions from Solicitor's Opinion
 - Level of evidence? Use of mill sites? Any other facilities?
 - Likely to be answered or explored further in litigation
- More formal guidance from BLM and USFS?
 - BLM NV knows what it is looking for, good guidance for operators
 - How will other jurisdictions address?
 - Rumored instruction memorandum still pending at BLM HQ
- Federal legislative fix

To download a PDF copy of today's presentation, scan the QR code or visit parsonsbehle.com/2024-idaho-mining-law



Thank You

PARSONS
BEHLE &
LATIMER

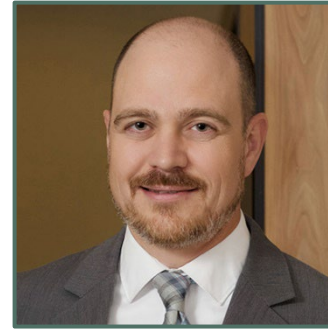
Questions?



Ashley Nikkel

775.789.6554

anikkel@parsonsbehle.com



Jason Mau

208.562.4898

jmau@parsonsbehle.com



Norman Semanko

208.562.4909

nsemanko@parsonsbehle.com