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The Mining Law Millsite Debate

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ABSTRACT

This report provides background and analysis on the debate over whether the millsite language (30 USC 42) in the Mining Law of 1872 allows only one five-acre millsite per mining claim. In practice, the Bureau of Land Management (BLM) has allowed for as many millsites as can be justified for developing the orebody. Language in the BLM's Mineral Examiners handbook allows for this practice even though it has no explicit statutory basis. The Solicitor of the Department of the Interior ruled in November 1997 that the millsite provision does indeed mean only one millsite per mining claim. Based on this interpretation the Department of the Interior disapproved a plan of operations for the Battle Mountain Gold Company's Crown Jewel Gold Mine in the state of Washington. Subsequently, the Solicitor's ruling on the Crown Jewel Mine was overturned by Congress via the FY1999 Emergency Supplemental Bill (P.L. 106-31). Both the House and the Senate have addressed the millsite issue in the context of the Interior Appropriations bill for FY2000. The Senate Appropriations Committee agreed to an amendment to permanently prohibit placing limits on acreage or millsites based on the number of mining claims (S. 1292 Sec. 336). The House adopted an amendment to its version of the appropriation bill (H.R. 2466, Sec. 332) to support the Opinion of the Solicitor.

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Summary

Under the General Mining Law of 1872, the holder of a mining claim has the right to claim and patent nonmineral, noncontiguous lands for millsites to mill and process ore from mining claims on federal lands. At issue is whether language in the statute that states, " ... no location made on and after May 10, 1872 of such nonadjacent land shall exceed five acres," limits the claimant to a maximum of five acres per mining claim. An Opinion by the Solicitor of the Department of the Interior, John Leshy, in November 1997 concluded that the Mining Law provides only one millsite of no more than five acres per mining claim. Critics argue that nowhere in the statute (30 USC 42), does it state that there can be only one millsite per mining claim. Based on the November 1997 Opinion, the Solicitor ruled in March 1999 that the Battle Mountain Gold Company's plan of operation could not be approved for the Crown Jewel Mine in the state of Washington because the number and acreage of millsites exceeded the five acre limit per mining claim. As part of the Emergency Supplemental Bill (P.L. 106-31), Congress overturned the Solicitor's decision at least for the remainder of FY1999.

Two opposing views have been staked out within the context of the Interior Appropriations bill for FY2000. The Senate Appropriations Committee approved language that would permanently prohibit limits on the number and acreage of millsites per mining claim. The House passed language that supports the Solicitor's view. Some would like the issue resolved in the context of broader revisions of the General Mining Law of 1872.

The House language supporting the Solicitor's Opinion is considered far too restrictive by the industry. According to the National Mining Association (NMA), many operations would not survive. The NMA contends that modern mining operations typically require much larger tracts of land for waste disposal. Miners also believe that a one-to-one claim to millsite ratio would make it necessary to go outside the federal domain to obtain sufficient area to locate milling facilities.

An alliance of environmental groups known as the Okanogan Highlands Alliance has opposed the Crown Jewel mine and contends that overall tougher environmental provisions are needed in the Mining Law. Specifically, the Alliance has expressed concern over how the "excess" acreage for waste disposal would affect water quality. The Alliance argues that the mine waste would have significant impact on the headwaters of several creeks that flow into the Kettle and Columbia rivers.

Solicitor Leshy had stated that the millsite provision is a "hopelessly anachronistic or ambiguous provision of the General Mining Law because of Congress's inability to confront head-on the need for new laws better suited for modern conditions."

Contents

List of Figures

The Mining Law Millsite Debate

Background

The General Mining Law of 1872 grants free access to individuals and corporations to prospect for minerals on federal public domain lands and allows prospectors, upon discovery, to stake a claim on land believed to contain a valuable mineral. Once a deposit is determined to be economically recoverable and at least $500 worth of development has taken place, the claim holder may obtain a patent or title to surface and mineral rights. The minerals within a properly located claim can be developed even without a patent.

To support the development of a mining claim, the claimant has the right to use and patent nonmineral, noncontiguous lands for the purposes of setting up ancillary facilities or millsites to mill and process ore. More specifically, the Mining Law states that, "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 ... but no location made on and after May 10, 1872 of such nonadjacent land shall exceed 5 acres" (30 USC 42). In 1960 this law was amended (P.L. 86-390, 74 Stat. 7.) to apply to placer claim holders. The patent fees for millsites are the same as the fees for lode and placer mineral claims: $2.50 per acre for placer claims or $5 per acre for lode claims.[1] Over the years the millsites have also been used to dispose of waste rock. There are two types of millsites, dependent and independent. The current millsite debate revolves around dependent millsites associated with a lode or placer deposit. (For more details on the General Mining Law of 1872 see CRS Issue Brief 89130 Mining Law of 1872: Time for Reform?).

Solicitor's Interpretation and Decision

At issue is whether the five-acre-per-millsite language in the statute limits a claimant to a maximum of 5 acres per mining claim, (a one-to-one millsite to mining claim ratio). After a review of patent applications, the Solicitor of the Department of the Interior in a November 7, 1997, opinion concluded that a one-to-one ratio is the correct interpretation. Solicitor John Leshy states: "My office has closely examined these questions. The Mining Law of 1872 provides that only one millsite of no more than five acres may be patented in association with each mining claim."However, multiple millsites may be patented with a lode or placer claim if the total area covered

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[1]A placer deposit is an alluvial deposit of sand or gravel containing valuable minerals derived from rocks or veins; a lode or vein deposit is of a valuable mineral consisting of quartz or other rock in place with definite boundaries. Source: Dictionary of Mining, Mineral and Related Terms, Bureau of Mines, 1968.

by these millsite claims does not exceed five acres. The Solicitor further asserts that because the statute does not support issuing patents for millsite claims totaling more than five acres per placer or lode claim, the Department should "reject those portions of millsite patent applications that exceed this acreage limitation." The ruling could invalidate a number of millsite claims and call into question operating plans for other mines if it were determined that millsite claims exceeded the five-acre-limit per mining claim. However, the Solicitor's ruling does not affect those plans of operations on BLM land that have already been approved.[2]

The Solicitor noted that the plain meaning of the statute, its legislative history and past departmental rulings support his decision. Although some Departmental rulings have indicated that only one millsite per claim could be allowed, other rulings have held that more than one millsite may be patented with a lode claim, provided that the aggregate land is no more than five acres (J.B. Hoggin 2 LD 755). The Secretary ruled in 1891 that the Mining Law "evidently intends to give to each operator of a lode claim, a tract of land not exceeding five acres in extent for the purposes of conducting mining milling operations thereon" (Mint Lode and Millsite, 12 LD, 624). "The Department has never held, however, that a claimant may patent more than five acres of land for a millsite in connection with one mining claim," according to the 1997 ruling.

However, at least in recent years the Bureau of Land Management's (BLM)[3] Mineral Examiners Handbook[4] has contained language that appears to contradict the Solicitor's conclusion, and which the Solicitor has characterized as "ad hoc" changes that did not result from formal changes to the Bureau's or the Department's rules and regulations and were not subject to the Solicitor's Office review.[5] It states that "each millsite is limited to a maximum of five acres in size and must be located on nonmineral lands. Any number of millsites may be located but each must be used in connection with the mining or milling operation" (H 3890-1). Also, in every case there must be proof that the land claimed as a millsite is not mineral in character (43 CFR) 3864.1-4). The BLM Manual has similar language: "a millsite cannot exceed five acres in size. There is no limit to the number of millsites that can be held by a single claimant."[6] Neither the handbook nor the Manual are binding on the Department.

Critics of the Solicitor's opinion argue that the statute (30 USC 42) does not state that there can only be one millsite per mining claim. Opponents of the ruling dispute many of the cases cited by the Solicitor to support his decision. One of the

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[2]U.S. Department of the Interior, Memorandum to the BLM from the Solicitor, John Leshy, *Limitations on Patenting Millsites under the Mining Law of 1872*, November 7, 1997 (M-36988).

[3]The BLM administers the mineral resources, both surface and subsurface, of the onshore federal estate available for development.

[4]Handbook for Minerals Examiners, Rel. 3-234, H-3890-1 3/17/89.

[5]Office of the Solicitor, U.S. Department of the Interior, Limitations on Patenting Millsites under the Mining Law of 1872. November 7, 1997, P. 15.

[6]BLM Manual, Rel. 3-270, 3864-Mill Site Patent Applications, 7/9/91.

cases mentioned is Smelting v. Kemp, 104 U.S. 636, 651 (1881). According to industry attorneys, that case states that it has long been recognized that, consistent with the Mining Law's purpose of promoting mining, "limitations are not put upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent."[7] Attorneys representing the industry's view place many of the historical court decisions and Interior Department positions in the context of the central issue at the time, which in most cases was whether the mine operator was using the land for milling purposes or whether the amount of land in question was needed for the mine operation, and not whether it violated a one-to-one millsite-to-mine claim ratio.

If the correct interpretation of the law is a one-to-one ratio, the Department could not lawfully allow patenting of additional lands. However, Congress might wish to consider the issues in order to address the practical problems that might have resulted from agency practices.

The Crown Jewel Mine

Based on the Nov. 7, 1997, decision, the Solicitor ruled on March 26, 1999, that the Battle Mountain Gold (BMG) Company's plan of operation for the Crown Jewel gold mine in Washington State could not be approved. The denial of the operating plan cited noncompliance with the General Mining Law of 1872. Specifically, 15 claims were located for mining but over 500 acres had been located for millsites. When applying the one-to-one rule, BMG would be entitled to only as much as 75 acres for millsites. Thus, a number of millsites were deemed invalid. The 1999 decision reversed an earlier record of decision by BLM and the Forest Service (FS) and denied the company's plan of operations.

BMG, based in Houston, TX, began the permitting process for the Crown Jewel Gold Mine in 1992. After expenses of about $80 million and an environmental impact statement, a positive record of decision was made by the BLM and the FS in January 1997. At this point 50 permits had been granted, including a water quality certification from the state Department of Ecology, and the company had posted $50 million in environmental securities. A total of 70 county, state and federal permits are needed for operation, closure and reclamation.

The Crown Jewel Mine is located on Forest Service land near Chesaw, Washington (Okanogan County, **see Figure 1 on page 4**). The Forest Service has responsibility for surface management and the BLM has responsibility for mineral management. The mine is expected to yield 1.45 million ounces of gold over an 8.5 year life. About 97 million tons of non-orebearing rock will be removed in the process and disposed of in nearby waste-rock disposal areas. The gold will be processed using a heap-leach sodium cyanide solution technique to separate the gold from the ore. The tailings slurry, containing residual amounts of cyanide, would be routed to a tailings disposal facility for neutralization on adjacent federal lands. The company intends to use the INCO (Inco Nickel Co.) cyanide destruction process

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[7]Statement of R. Timothy McCrum, Esq., Crowell & Moring, LLP. Oversight Hearings, Subcommittee on Energy and Mineral Resources, August 3, 1999.

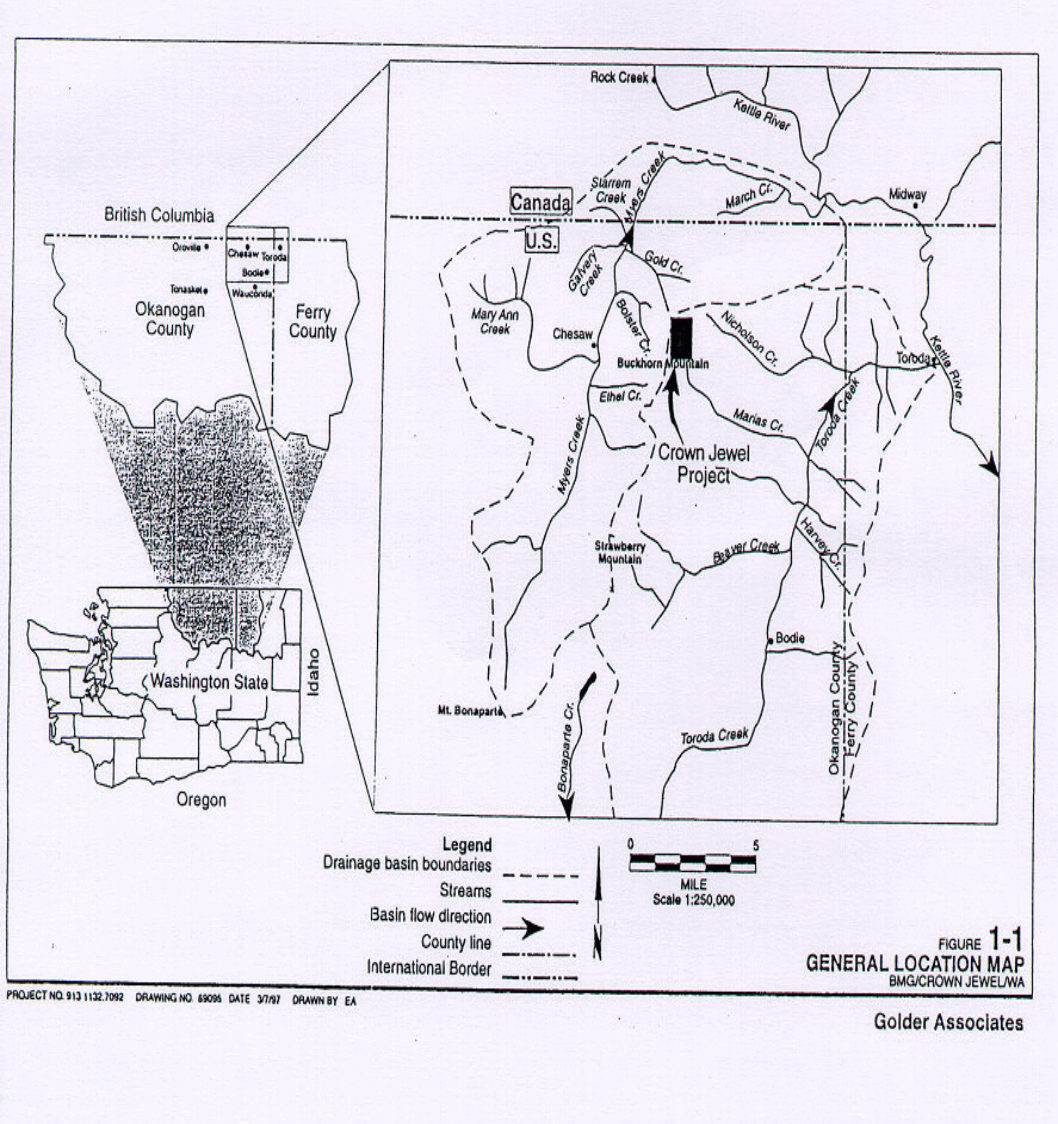

Figure 1. Location of the Crown Jewel Mine

approved by the state of Washington. The company has 15 mining claims and 100 millsite claims. According to BMG, without the necessary millsites, development of the mine as it is presently conceived could not take place. If the Interior Department's decision is upheld, then the Crown Jewel Mine would have to review other options for locating the desired number of millsites in excess of the 5 acres per claim. Such options include land exchanges, leases, or a government buyout, which could require congressional action.

Legislation

The denial of the plan of operations for the Crown Jewel Mine was overturned in Congress as part of the Emergency Supplemental Appropriations Bill for FY1999 (P.L. 106-31, Section 3006). This law removed the millsite limitations for the Crown Jewel Mine, notwithstanding the Opinion of the Interior Solicitor. More specifically the law states that "in accordance with millsite provisions of the BLM Handbook for mineral examiners ... the statute shall not limit the number or acreage of millsites

based on the ratio between the number or acreage of millsites and the number or acreage of associated lode or placer claims with respect to the Crown Jewel project for any fiscal year. The Department of Agriculture and the Department of the Interior shall approve the plan of operations and reinstate the record of decision for the Crown Jewel Mine." Further, it states that patent applications and plans of operations submitted prior to this law not be denied based on the Nov. 7, 1997, Opinion, thereby giving the Solicitor's Opinion only prospective application.

Additionally, Both the House and Senate have addressed the millsite issue (taking opposing views) in the context of the FY2000 appropriations for the DOI:

The Senate Appropriations Committee agreed to an amendment to permanently prohibit placing limits on acreage or millsites based on the number of mining claims (S. 1292, Sec. 336). This proposal is based on the BLM Handbook for Minerals Examiners and the BLM Manual. Supporters of this view maintain that nowhere in the statute is there expressly stated a fixed number of millsites per claim and that current practice allows for millsites to exceed a one-to-one ratio. The Senate defeated a floor amendment on July 27, 1999, that sought to delete the millsite language reported by the Appropriations Committee. DOI's reaction to this amendment was to call for the millsite limitation issue to be discussed in the context of broader Mining Law reforms.

The House, on the other hand, adopted an amendment to its version of the appropriation bill (H.R. 2466, Sec. 332) that supported the opinion of the Interior Solicitor on the millsite issue. The language bars funds "appropriated by this Act" from being used to process applications for approval of patents, plans or operations, or amendments to plans that conflict with the opinion of the Solicitor. Following the completion of the Senate floor action it appears likely that the issue will be addressed at a conference on the appropriation bill. In a related matter, the House Resources Subcommittee on Energy and Mineral Resources held hearings on August 3, 1999, to discuss, among other issues, the possible impact of the Solicitor's millsite opinion on the mining industry.

Issues and Analysis

Industry Concerns. The House language backing the Interior Solicitor's opinion is considered far too restrictive by the industry. According to the National Mining Association (NMA), many operations would not survive, especially if grandfathered patent applicants (which can still receive patents under the current patent moratorium) are not permitted.[8] The Department of the Interior reports that seventeen patent applications that have received their first-half final certificate to be processed for patent approval have been subsequently rejected or modified because

[8]The patent moratorium allows those patent applications that have received their first-half final certificates to be processed for patent approval. The first-half final certificate is given to patent applicants that are awaiting the mineral examiner's verification of the validity of the claim for final approval.

of the November 1997 Opinion and another twenty application have excess millsites. [9] Another 27 out of a total of 338 pending plans of operations are reported to have excess acreage. The industry argues that to uphold a one-to-one millsite-to-claim ratio would not be in keeping with common practice by the BLM and the mining industry. It is recognized throughout the mining and regulatory community that a five acre millsite is inadequate for most modern commercial mining operations. Mining operations typically require much larger tracts of land for waste disposal, particularly open pit gold mining operations using heap leach technology, which allows lower grades of ore to be mined. This process results in larger amounts of rock to be dug and larger disposal ponds needed to contain the waste.

Miners also believe that enforcing a one-to-one claim to millsite ratio would make it necessary to go outside the federal domain to obtain sufficient area to locate milling facilities. A major question facing both industry and government is: Are other public or private lands available and suitable? In an earlier article written by him, Solicitor John Leshy stated that a five acre millsite is likely to be insufficient for most modern mining operations. Thus, the "miner's only remedy is to acquire the needed land by exchange or purchase." Often the only land available is federal land, which the government is not required to sell.[10]

Solicitor Leshy also stated that the millsite provision is a "hopelessly anachronistic or ambiguous provision of the Mining Law because of Congress's inability to confront head-on the need for new laws better suited to modern conditions."[11] Many believe that the solution to the millsite and other issues is to amend the entire Mining Law.

Environmental Concerns. An alliance of environmental groups known as the Okanogan Highlands Alliance has opposed the Crown Jewel mine and contends that tougher environmental provisions are needed in the Mining Law. Specifically, there is concern over how the "excess" acreage for waste disposal purposes would affect the environment, especially as to water quality. According to the Washington Department of Ecology, the proposed project would directly affect 3.76 acres of wetlands, and eight springs and seeps. Indirect impacts would occur on about 15 acres of wetlands and nine springs and seeps. Discharges of leachate from the waste rock to the groundwater are expected to exceed the state's groundwater and surface water

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[9]Report to Congress detailing by State: all past present and pending mining operations, including all grandfathered mineral patent applications and plans of operations, that could be impacted by the Solicitor's Opinion of November 7, 1997. Prepared by the Bureau of Land Management, August 11, 1999.

[10]Under the Federal Land Policy and Management Act (FLPMA, P.L. 94-579, 90 Stat. 2756), "a tract of public land or interests therein may be disposed of by exchange by the Secretary under this Act." And, further in Section 302(a), "The Secretary shall manage the public lands under principles of multiple use and sustained yield ..., (b) and ... regulate through easements, permits, leases, licenses, rules , or other instruments as the Secretary deems appropriate for the use, occupancy and development of public lands."

[11]Leshy, John D., The Mining Law, A Study in Perpetual Motion, Resources for the Future, 1987, p. 181.

standards. However, the Department accepted a mitigation plan from BMG and issued a water right permit for the project. A coalition of environmental groups has filed suit to halt the implementation of this "untested" plan. The Alliance argues that the mine waste would have significant impact on the headwaters of several creeks that flow into the Kettle and Columbia rivers and BMG's water use would violate the "senior rights" of downstream users. [12]

Broader Mining Law Reforms

The millsite debate may place the General Mining Law of 1872 under more scrutiny this Congress. This is partly because the debate raises many broad policy issues. For instance, to grandfather all the patent applicants (under patent moratorium provisions) that have received their first-half final certificate would appear to defeat the Administration's policy of limiting the number of patents issued. The millsite ruling would assist the Administration's efforts to slow down the patent process even further by invalidating a number of mining claims. However, to settle the millsite issue based on the current legislative proposals could either allow the mining industry to use and patent as much public land as it needed for ancillary facilities associated with a mining operation (S. 1292) or, on the other hand (H.R. 2466), possibly shut down many mining operations. Both parties have developed versions of Mining Law reform they would prefer to advance.[13] The industry wants a mining law bill that would continue to allow patenting of federal lands and generally minimize the impact of any royalty. The environmentalists are opposed to open pit heap leach mining using cyanide to extract gold and would prefer comprehensive reform that includes environmental provisions.

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[12]The Battle Mountain Gold Company, Houston, TX., The Crown Jewel Mine: A Brief Overview, 7/8/99. And, Washington State Gold Mine Under Fire From Conservationists, Okanogan Highlands Alliance, Press Release, December 3, 1997.

[13]See CRS Issue Brief 89130, The 1872 Mining Law: Time for Reform?