

The BLM continued to adhere to this view. In 1966, a BLM minerals specialist prepared a summary of mill site requirements. Under the topic heading "Number of Millsites," the minerals specialist stated, "Although there is no number specified, it has been held that as many millsites as are actually needed for the operation can be located. There must be a clear showing of need and use if more than one millsite is taken. This also applies to custom mills." Memorandum from Minerals Specialist, PSC, to Chief, Mining Staff, Washington Office, BLM 1 (May 11, 1966). In another 1966 document entitled "Mineral Patents—Information Relative to the Procedure for Obtaining Patent to a Mining Claim," the BLM stated, "Lands entered as mill sites may be for an area of not more than 5 acres for each mill site and must be shown to be nonmineral in character and not contiguous to a vein, lode, or placer." Mineral Patents—Information Relative to the Procedure for Obtaining Patent to a Mining Claim 13 (1966). These documents support the view that the five-acre mill site provision defines the size of individual mill sites but does not limit their number.

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

In 1980, the BLM Washington Office issued a "Mineral Survey Procedures Guide" that stated, on page 26, "There is no limit to the number of mill sites that may be located, so long as they are necessary for the operation of a mine or mill." Today, BLM's Handbook for Mineral Examiners provides that "[a]ny number of millsites may be located but each must be used in connection with the mining or milling operation." BLM Handbook for Mineral Examiners, H-3890-1, Ch. III § 8 (Mar. 17, 1989). Additionally, the BLM Manual states that "[a] mill site cannot exceed 5 acres in size. There is no limit to the number of mill sites that can be held by a single claimant." BLM Manual § 3864.11 B (1991).

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

2003 Opinion, at 24–25.

In addition, in 1996, BLM's Deputy Director asked all BLM State Offices to describe state office practice regarding

patenting and approving plans of operations involving more than one 5-acre mill site per mining claim. Memorandum from Mat Millenbach, Deputy Director, BLM, to Assistant Directors and State Directors, BLM (Mar. 5, 1996). The state office responses support the conclusion that BLM's consistently-held practice was to treat the 5-acre mill site provision as a limit on the size of individual mill sites. The survey responses also show that BLM's primary determination regarding mill site validity is to determine whether claimants are using or occupying each mill site for mining or milling purposes. See 2003 Opinion Appendix.

After former Solicitor Leshy issued his mill site opinion in 1997, BLM's practice effectively did not change. The Department of the Interior attempted to deny a proposed plan of operations for the Crown Jewel mine in Washington State, in part, based on the interpretation of the 5-acre mill site provision described in the 1997 Opinion. However, Congress quickly enacted a provision disallowing the Department from applying the 1997 Opinion to the Crown Jewel mine or any other patent or proposed plan of operations that was filed before the provision's date of enactment. Pub. L. 106–31, 113 Stat. 90–91 (1999).

Thereafter, Congress enacted a second law, the FY 2001 Appropriations Act for the Department of the Interior and Related Agencies, prohibiting the Department from applying the 1997 mill site opinion. Pub. L. 106–291, 144 Stat. 922 (Oct. 11, 2000). As a consequence, beyond the unsuccessful denial of the Crown Jewel plan of operations, the Department has not applied the 1997 Opinion to any other proposed plans of operations or patents. Because of these intervening laws, the Department effectively has not departed in practice from its earlier consistently-held interpretation of the 5-acre mill site provision. In addition, because the proposed rule published on August 27, 1999, was never finalized, the Department has not departed by regulation from its earlier interpretation of the 5-acre mill site provision. Thus, the language of this rule does not change BLM's prevalent practice and interpretation regarding mill site locations; rather, it confirms the practice and interpretation that existed before Solicitor Leshy's 1997 Opinion, as well as the effective practice following the 1997 Opinion.

In response to comments on the initial proposed rule and in accordance with the 2003 Opinion, we are adopting mill site regulations that continue the Department's past prevalent practice

and interpretation under the pre-existing regulations and that make clear that the 5-acre mill site provision in the Mining Law is a limit on the size of individual mill sites and not a limit on the allowable mill site acreage per mining claim. That is, the final rule maintains BLM's past practice regarding the 5-acre mill site provision.

Section 3832.31 What Is a Mill Site?

One comment recommended that we state the limitation, if any, on the acreage of independent or custom mill sites that you can locate. Section 3832.32 addresses the size limitations of all mill sites, including independent or custom mill sites. The maximum size of individual mill sites is 5 acres.

Section 3832.32 How Much Land May I Include In My Mill Site?

As discussed above, we have withdrawn the proposed amendment to this section in response to comments and the 2003 Opinion and have conformed the rule to the Department's prevalent practice under the pre-existing regulations as described in the 2003 Opinion.

Comments from various mining industry groups and mining companies stated that the Department's prevalent practice for at least the past fifty years has not required a one-to-one ratio between mill sites and lode (or placer) claims, let alone a 5-to-20 acre ratio, as provided in the proposed rule.

Comments from environmental interests supported the limits on mill sites in the proposed rule, saying they were necessary to prevent improper waste dumping on the public lands. We have addressed this concern by requiring claimants to locate only that amount of mill site acreage that is necessary to be used or occupied for efficient and reasonably compact mining or milling operations. This is a new regulatory requirement, which BLM will implement by applying this standard in its review of proposed plans of operations under 43 CFR subpart 3809. In addition, the regulations at 43 CFR subparts 3715 and 3809 prohibit the unauthorized placement of waste rock, tailings, or other mining materials.

Section 3832.34 How May I Use My Mill Site?

Several comments addressed permitting requirements for mill site use. One comment asked for language limiting the use of National Park System lands for rock and soil dumps. In response to this comment, we added language to advise a mill site owner to comply with the regulations of the