



United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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M-37077

Memorandum

To: Secretary
Director, Bureau of Land Management

From: Solicitor

Subject: Use of Mining Claims for Mine Waste Deposition, and Rescission of M-37012
and M-37057

I. Introduction.

The Mining Law of 1872 (Mining Law), R.S. §§ 2319 *et seq.* (codified at 30 U.S.C. §§ 22 *et seq.*), allows exploration for and development of valuable minerals on public lands.¹ Miners who discover valuable minerals may locate mining claims on those lands and obtain rights to occupy the land and extract the minerals. 30 U.S.C. §§ 22, 23. Miners may also locate “mill sites”—i.e., sites supporting mining claims—where, *inter alia*, the lands are nonmineral in character. 30 U.S.C. § 42. Prior to development of a claim, miners must submit—and the Department of the Interior (Department) must approve—a mining plan that describes proposed operations on the mining claims and mill sites. 43 C.F.R. §§ 3809.11; 3809.401; 3809.412.

Some mine operators site activities ancillary to the mining itself on mining claims, rather than on mill sites. In these cases, the relevant plans of operations frequently do not contemplate extraction of any minerals from the mining claims on which the ancillary uses are situated. Rather, ancillary activities sometimes include uses that would result in permanent occupation of federal lands, such as waste rock disposal. Because this type of use may foreclose the profitable extraction of any minerals in the underlying claims, such practices are potentially inconsistent with the discovery of “valuable” minerals and, therefore, with the existence of a valid claim.

The Bureau of Land Management (BLM) has discretion to undertake a “validity determination”—a comprehensive investigation of a mining claim to verify discovery of valuable minerals—at any time, including when reviewing a proposed plan of operations.² But

¹ For purposes of this memorandum, we cite to the codification of the Mining Law in Title 30 of the United States Code.

² See *Cameron v. United States*, 252 U.S. 450 (1920).

neither the Mining Law nor related regulations *require* BLM to conduct such a determination prior to approving a plan of operations on open lands.³ When evaluating a plan of operations on open lands, therefore, BLM generally has not required evidence demonstrating that mining claims used for ancillary activities contain valuable minerals, nor has the agency generally verified the presence of those minerals. This practice has raised questions regarding whether and how BLM may approve plans or portions thereof on open lands where the discovery of valuable minerals is in doubt *and* the planned use will lead to permanent occupation of the claim.

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 such 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 the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785 (FLPMA) and its implementing regulations, or seek to acquire title to the land through a land exchange or sale. Notably, my decision does not require BLM to conduct a validity determination or its equivalent when approving such plans of operations: under applicable law, it is enough for plan approval that there is some evidence of discovery.

II. Background.

A. The Mining Law.

Congress passed the Mining Law to “reward and encourage the discovery of minerals that are valuable in an economic sense.” *United States v. Coleman*, 390 U.S. 599, 602 (1968). Section 22 of the Mining Law provides that “all *valuable* mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase . . . under regulations prescribed by law, and according to the local customs or rules of miners.” 30 U.S.C. § 22 (emphasis added). *See Waskey v. Hammer*, 223 U.S. 85, 90-91 (1912) (“The mining laws . . . make the discovery of mineral within the limits of the claim a prerequisite to the location of a claim . . . , the purpose being to reward the discoverer and to prevent the location of land not found to be mineral.”) (quotation omitted). The Mining Law also authorizes the location of “mill sites,” on “*nonmineral land* not contiguous to the vein or lode” used or occupied to support mining, milling, processing, beneficiation, or other operations in connection with a mining claim. 30 U.S.C. § 42 (emphasis added).

Mining claimants who discover a valuable mineral deposit in a mining claim may establish rights in the mining claim against third parties, including rights to occupy the land and extract the minerals. 30 U.S.C. §§ 22, 23. *See Cameron v. United States*, 252 U.S. at 456 (“To make the claim valid, or to invest the locator with a right to the possession, it was essential that the land be

³ Lands are considered “open” if they have not been withdrawn from entry under the Mining Law, such as through an administrative or legislative withdrawal. This Opinion addresses mining claims on open lands. BLM is required to conduct a validity determination prior to approving a plan of operations if the mining claim is on land that has been withdrawn from mineral entry. 43 C.F.R. § 3809.100(a).

mineral in character and that there be an adequate mineral discovery within the limits of the claim as located . . .”).

In certain circumstances, Department regulations require the agency to comprehensively determine whether mining claims are valid, i.e., whether the claims contain a discovery of valuable mineral deposits. *See, e.g.*, 43 C.F.R. § 3809.100(a) (requiring mineral examination report for claims on withdrawn lands before approving a plan of operations or allowing notice-level operations). That determination requires a certified mineral examiner’s field examination of the mining claim and preparation of a mineral report documenting whether a valuable mineral deposit is present. *See* BLM Mineral Reports -- Preparation and Review Manual 3060 (1994); BLM Validity Mineral Reports Handbook H-3890-3 (2003). These mineral reports provide an in-depth analysis of the claim, including information on the geology and mining history of the region, mineralization of the specific claims, a depiction of the mining claimant’s exploration and development work, and any operations on the claim. *Id.* The report also includes an economic evaluation that considers cost estimates and market studies, among other components. *Id.*

On open lands, BLM has wide discretion to decide whether to undertake a mining claim validity determination. Therefore, when evaluating a plan of operations on those lands, BLM has generally not required operators to provide evidence that the mining claims that will be used in the proposed plan contain valuable mineral deposits, nor has the agency verified the presence of those minerals. *See Earthworks v. U.S. Dep’t of the Interior*, 496 F. Supp. 3d 472, 479 (D.D.C. 2020).

B. The Federal Land Policy and Management Act.

FLPMA requires the Department to manage the public lands “by regulation or otherwise, tak[ing] any action necessary to prevent unnecessary or undue degradation” of BLM-managed lands. 43 U.S.C. § 1732(b). With four specified exceptions, FLPMA did not “in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act.” 43 U.S.C. § 1732(b). The only exception relevant here is the Secretary’s obligation to “take any action necessary to prevent unnecessary or undue degradation of the lands,” which, under FLPMA, applies to operations under the Mining Law. *Id.* The Department promulgated its surface management regulations based on this standard, *see* 43 C.F.R. Subpart 3809, which establish “procedures and standards to ensure that operators and mining claimants [prevent unnecessary or undue degradation].” 43 C.F.R. § 3809.1(a).

Under these regulations and prior to engaging in mining operations, mining claimants must submit—and the Department must approve—a plan of operations that describes the proposed operations on the mining claims and mill sites. 43 C.F.R. §§ 3809.11; 3809.401. BLM reviews these plans to ensure compliance with the National Environmental Policy Act and other relevant statutes, including FLPMA’s direction to prevent unnecessary or undue degradation of the public lands. 43 U.S.C. § 1732(b); 43 C.F.R. § 3809.411(a), (d). BLM may deny the plan if, *inter alia*, it results in unnecessary or undue degradation, *id.* § 3809.411(d)(3)(iii), or if it fails to meet “applicable content requirements,” *id.* § 3809.411(d)(3)(i).

III. Plans to Place Significant Waste Rock or Tailings Facilities on a Mining Claim Create a Rebuttable Presumption Against Discovery.

Section 22 of the Mining Law predicates a miner's ability to maintain possession of federal lands for mineral development on the discovery of valuable mineral deposits. 30 U.S.C. §§ 22, 23; *Union Oil Co. v. Smith*, 249 U.S. 337, 346 (1919); *Ctr. for Biological Diversity v. U. S. Fish & Wildlife Serv.*, 33 F.4th 1202, 1209-10 (9th Cir. 2022) (referred to here and in caselaw as "*Rosemont*," after the mine at issue in that case). In most cases, neither the Mining Law nor Departmental regulations explicitly require the Department 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.

But this general rule does not address whether the Department may reasonably approve a plan of operations under the Mining Law where an operator proposes to bury a mining claim under a waste rock pile or tailings facility, and—independent of BLM's comprehensive process for determining claim validity—therefore presents BLM with apparent evidence that there has been no discovery of valuable mineral deposits. In these cases, the Department may not "look the other way" and approve a plan of operations that relies on evidently invalid mining claims: although BLM's regulations do not require the agency to undertake a validity determination when approving plans of operations, those plans nevertheless logically and explicitly depend on the existence of operations "authorized by the mining laws." 43 C.F.R. § 3809.2(a). *See Bartell Ranch LLC v. McCullough*, No. 321-cv-80, 2023 WL 1782343, at *4 (D. Nev. Feb. 6, 2023) (describing the Mining Law's requirements as "implicit" in review of plans of operations); *accord Cameron*, 252 U.S. at 460 ("[N]o right arises from an invalid claim of any kind.").

Recent caselaw has recognized these limitations. *See Rosemont*, 33 F.4th at 1221. In *Rosemont*, the Ninth Circuit held that the Forest Service had unlawfully approved a plan of operations proposing to dump 1.9 billion tons of waste rock and tailings on nearly 2,500 acres of mining claims. *Id.* at 1207. The *Rosemont* Court concluded that, as a matter of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, and the Mining Law, "undisputed evidence showing that no valuable minerals have been found on the claims [underlying the waste and tailings facilities] . . . compel[ed] a conclusion that they are invalid" and precluded the Forest Service's approval of the plan insofar as it relied on those claims and on the record then before the Court. *Id.* at 1223.

Rosemont does not categorically determine the types and quanta of evidence sufficient to demonstrate a discovery of valuable minerals or lack thereof. However, the *Rosemont* Court strongly implied that the scale and permanence of the waste and tailings facilities at issue in that case was inconsistent with any future extraction of valuable minerals from the mining claims at issue, describing as "counterintuitive" the operator's proposal "to permanently occupy land that supposedly contains [such] minerals with a 700-foot layer of waste rock." *Id.* at 1217. *See also id.* at 1221 ("Rosemont's 1.9 billion tons of waste rock will occupy that land forever, obstructing countless alternative uses."). The District Court likewise emphasized the Forest Service's characterization of the formations undergirding the waste and tailings facilities as itself "waste rock," i.e., rock that "contain[ed] no ore metals or contains ore metals at levels below the economic cutoff value." *Ctr. for Biological Diversity v. U. S. Fish & Wildlife Serv.*, 409 F. Supp. 3d 738, 760 (D. Ariz. 2019). *See also Bartell Ranch*, 2023 WL 1782343, at *8 (characterizing

Rosemont as requiring the “agency [approving a plan of operations] to determine whether a . . . project proponent has discovered valuable mineral deposits before permitting that proponent to permanently occupy those federal lands with waste dumps and tailings piles”).

In cases like these—where a plan of operations proposes to site significant waste or tailings facilities on mining claims, and there is no evidence of an underlying discovery of valuable mineral deposits on those mining claims—the Mining Law, in conjunction with the Department’s surface management regulations in 43 C.F.R. Subpart 3809, forecloses BLM’s approval of those portions of the proposed plan of operations. To warrant approval in these circumstances, the record for these portions of the proposed plan must include sufficient evidence of discovery (e.g., the type of evidence in a mineral potential report) to support a reasonable conclusion that there are valuable mineral deposits underlying each mining claim on which the waste rock and tailing facilities would be located. Put otherwise, because the proposed placement of large-scale waste or tailings facilities qualifies as evidence that there has been no discovery, those facilities will foreclose approval of the relevant portions of the proposed plan of operations unless “[t]here is at least some evidence in the record of sufficient . . . mineralization in [the relevant] land.” *Bartell Ranch*, 2023 WL 1782343, at *24.⁴

IV. Alternatives for Operators.

Where the information that an operator submits with a proposed mining plan of operations lacks evidence of a discovery of a valuable mineral deposit on mining claims that would be buried by a significant waste or tailings facility like that in *Rosemont*, the BLM should not approve those portions of the proposed plan. In those circumstances, an operator has several options, depending on the terms and conditions of the land use plan and other applicable law.

First, the operator may submit additional evidence of discovery on the relevant mining claims.

Second, the operator may relocate the relevant mining claims as mill sites if the lands are nonmineral in character, consistent with the Mining Law’s requirements for those sites. Or the operator may redesign the proposed plan of operations to place the waste rock piles or tailings facilities on other lands, including nearby private lands or on other mill sites.

⁴ Consistent with the logic of the caselaw and with the reservation of validity determinations to specific contexts not relevant here, BLM need not subject every potentially contestable claim in a proposed plan of operations to a detailed and completely independent examination of the relevant mineral content.

Insofar as certain judicial decisions have used the phrase “validity” to describe the type of determination that BLM needs to make about mining claims on which an operator proposes to place significant waste rock piles or tailing facilities in a proposed plan of operations, those decisions have also suggested that the adjective invokes something less formal than the BLM validity determinations reports referenced in 43 C.F.R. § 3809.100(a). *See Rosemont*, 33 F.4th at 1222 (describing such determinations as “irrelevant” to its holding); *Bartell Ranch*, 2023 WL 1782343, at *6 (faulting BLM for declining “to make *any* determination”—as opposed to a validity determinations—“as to whether [the project proponent] had discovered valuable minerals in the land it plans to bury under waste dumps and tailings piles”) (emphasis added). Similarly, if BLM declines to approve portions of a mine plan of operations under the standards described in this Opinion and related caselaw, that decision is not tantamount to a formal determination under 43 C.F.R. § 3809.100(a) that the associated claims are invalid.

Third, the operator could apply for a permit or lease under FLPMA. Title III of FLPMA and its implementing regulations—found in Subpart 2920 of Title 43 of the Code of Federal Regulations—provide a mechanism for BLM to lease or permit activities ancillary to mining operations where those activities are not authorized by the Mining Law. (In general, the requirements for lease or permit applications under Subpart 2920 are similar to those for plans of operations. *Compare* 43 C.F.R. § 2920.5-2 (requirements for a land use authorization) *with* 43 C.F.R. § 3809.411 (requirements for a plan of operations).)

Fourth, the Department’s “rights of way” regulations—found in Part 2800 of Title 43 of the Code of Federal Regulations—provide a mechanism for BLM to grant rights-of-way on public lands for “pipelines, slurry and emulsion systems, and conveyor belts for transportation and distribution of solid materials, and facilities for the storage of such materials in connection therewith.” 43 U.S.C. § 1761(a)(3).

Finally, the applicant may seek to obtain title to the relevant lands through a land exchange under 43 U.S.C. § 1716 or purchase under 43 U.S.C. §§ 1713, 1719. FLPMA authorizes BLM to exchange lands when in the public interest, 43 U.S.C. § 1716, including upon consideration of “needs for lands for . . . minerals.” *Id.* FLPMA also authorizes the sale of public land tracts, including when “disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development.” 43 U.S.C. § 1713(a)(3).

V. Inconsistent Prior Opinions Rescinded.

This is not the first Solicitor’s Opinion to touch on ancillary uses under the Mining Law. In 2001, the Department issued *Use of Mining Claims for Purposes Ancillary to Mineral Extraction*, M-37004 (Jan. 18, 2001) (2001 Opinion). That Opinion concluded that the Secretary should, “when reviewing new plans of operation and plan modifications . . . [,] determine whether a claimant is proposing to use mining claims solely for ancillary operations.” 2001 Opinion, at 15. If that review gave “the Secretary reasonable grounds for *questioning* the validity of a mining claim,” the 2001 Opinion generally recommended that the Secretary deny the plan of operations. *Id.* (emphasis added). Notably, the review was to be circumscribed—“straightforward” and “preliminary,” in the Opinion’s framing—and not tantamount to a validity determination under BLM regulations. *Id.* at 14.

The 2001 Opinion was first withdrawn and then replaced by a pair of 2005 Opinions. *See Rescission of 2001 Ancillary Use Opinion*, M-37011 (Nov. 14, 2005); *Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations*, M-37012 (Nov. 14, 2005) (2005 Opinion). The 2005 Opinion concluded that “although the Department is authorized to determine claim validity at any time until a patent is issued, the Department is under no legal obligation to determine mining claim or mill site validity before approving a proposed plan of operations.” 2005 Opinion, at 5.

In 2020, the Department issued M-37057, *Authorization of Reasonably Incident Mining Uses on Lands Open to the Operation of the Mining Law of 1872*, which “supplement[ed]” and “reaffirm[ed]” the 2005 Opinion. M-37057, at 2 (Aug. 17, 2020) (2020 Opinion).

The 2005 and 2020 Opinions characterized themselves as a response to the 2001 Opinion, but both appeared to misread that Opinion as requiring a comprehensive “validity determination”—not, as the 2001 Opinion actually required, a preliminary inquiry for certain ancillary uses described in a plan of operations.⁵ This misreading is significant because, as the *Rosemont* court has explained, comprehensive “validity determinations” are “irrelevant” to the much narrower questions implicated by that case, by this Opinion, and by the withdrawn 2001 Opinion. 33 F.4th at 1222. Those questions do not ask whether and when the Secretary *must* render a validity determination when passing upon plans of operations, but instead consider whether the Secretary *may* approve plans of operations where “evidence show[s] that no valuable minerals have been found on the claims” underlying proposed waste rock and tailings facilities. *Id.*

On their face, the 2005 and 2020 Opinions do not address this issue, and much of their reasoning is therefore inapplicable to the conclusions set forth in this Opinion. For example, the 2020 Opinion determined that “[r]equiring miners to *demonstrate* a valid mining claim before they may lawfully enter open lands and engage in reasonably incident mining uses” would preclude or discourage exploration for valuable minerals, contrary to the intent of the Mining Law. 2020 Opinion, at 13-14 (emphasis added). But the review contemplated by this Opinion and the 2001 Opinion considers significant waste rock and tailings facilities that would call into question the existence of valuable mineral deposits on the mining claims—not mere exploration. And to the extent that BLM’s review of a proposed plan of operations is *already* mandatory under the Department’s FLPMA regulations, the agency’s review of the proposed plan for consistency with the Mining Law cannot delay development of valuable mineral deposits nor give rise to a new and “vast administrative burden,” as the 2020 Opinion feared. 2020 Opinion, at 14 n.18.

Nonetheless, both the 2005 and 2020 Opinions depend on a rationale that conflicts with this Opinion and recent caselaw and that justifies the Opinions’ rescission. Most notably, they wrongly imply that the Mining Law forecloses the Department from withholding approval for portions of a plan of operations if the operator cannot, as a matter of law, demonstrate discovery. *See, e.g.*, 2005 Opinion, at 4 (“The Department . . . *need not know*[] whether . . . mining claims . . . are valid before approving a proposed plan”); 2020 Opinion, at 15 (same). This is so, according to the 2020 Opinion, because the Mining Law provides an authorization—to enter open lands for “‘occupation’ for purposes reasonably incident to” mineral extraction—that is “unqualified,” 2020 Opinion, at 3, and “independent” of any related process, *id.* at 12. But the terms “unqualified” and “independent” do not appear in the Mining Law itself, and, as applied to the Mining Law, are inaccurate.

Most obviously, use of the public lands under the Mining Law *is* qualified: the Mining Law explicitly provides for use of lands in which “valuable mineral deposits” are found, and, by extension, does not authorize that use where valuable mineral deposits are *not* found, such as any

⁵ *See* 2005 Opinion, at 2 (describing a “conclusion” that “validity examinations might be required under certain circumstances where the claimant is proposing to use mining claims solely for purposes ancillary to mining without also developing minerals from those claims”); 2020 Opinion, at 1-2 (“The 2001 Opinion . . . advised BLM that it was required to verify the existence of . . . ‘rights’ through a mining claim validity determination before it could authorize reasonably incident mining uses under Subpart 3809 in some instances”); *id.* at 20 (implying that the process contemplated by the 2001 Opinion was that “necessary for a mining claim to constitute a property right enforceable as against the United States”).

case where ancillary uses render any underlying minerals inaccessible and thus legally worthless. *See* Section III above.

Nor is this authorization “independent” of related processes, such as BLM’s review and approval of plans of operations under 43 C.F.R. Subpart 3809. *See id.* at 4-5.

The 2020 Opinion appears to have reached the opposite conclusion for several reasons. First, the 2020 Opinion pointed to BLM’s Subpart 3800 regulations (“Mining Claims under the General Mining Laws”) as evidence that FLPMA did not eliminate a general statutory grant of authority under the Mining Law to enter open lands and engage in reasonably incident mining uses. It characterized those regulations as “balancing” the imperatives of FLPMA and the Mining Law, 2020 Opinion, at 12. But even reasonably incident mining uses cannot override the fundamental principles of the Mining Law, which open only valuable mineral deposits and the lands in which they are found to exploration and occupation. And the Opinion’s characterizations—and the regulations cited in support—are general and precatory, and therefore do not address with specificity how the Mining Law and FLPMA interact with one another in the context of significant mining waste.⁶ (The 2020 Opinion also concluded that BLM’s Subpart 3809 regulations do not include and have not “include[d] mining claim invalidity as a basis for denying a mine plan,” *id.* at 18, but, as noted above, that basis is implicit in the statutory framework. *See supra* at 4-5.)

Second, the 2020 Opinion appealed to BLM’s post-FLPMA practice of allowing operators to engage in activities that would result in minimal surface disturbance without prior approval. According to the Opinion, “that some [reasonably incident] uses continued to be allowed [under the regulations] without requiring specific or prior approval—or, in the absence of such approval, without imposing trespass liability—shows that . . . [BLM] continued to recognize . . . [Section 22] as an . . . authorization distinct from FLPMA’s operational obligations[.]” *Id.* at 12. But this practice was motivated by an interest in conserving administrative resources for use on large plans of operations rather than mining activities that would cause only minimal surface disturbance. That practice in no way constrains the BLM’s discretion and prospective obligation to assess whether waste rock and tailings facilities are authorized by the Mining Law when the agency *does* review plans of operations.

Third, the 2020 Opinion took issue with any proposed use of BLM’s Subpart 2920 regulations to approve ancillary uses on public land. The Opinion initially contended that reliance on these regulations “would require miners to seek a new authorization for . . . reasonably incident mining uses each time the mining claim’s status changed, including through accidental forfeiture . . . [or] a change in the commodities price that affected the mineral deposit’s marketability.” 2020 Opinion, at 21 n.26. But as noted above, BLM’s obligations to assess the existence of discovery arise in the context of decisions that are put to the agency (such as approval of plans of operations), and miners are generally under no obligation to apply to BLM for any relief or authorization in the circumstances described by the 2020 Opinion. Moreover, the changed

⁶ Specifically, the 2020 Opinion cited a regulation stating that the purpose of the Department’s Subpart 3809 regulations is to “[p]revent unnecessary or undue degradation of public lands by operations authorized by the mining laws.” 43 C.F.R. § 3809.1(a). On its face, this sentence supplies no detail regarding whether and how the Department should determine if operations are “authorized by the mining law.”

circumstances described by the 2020 Opinion are unlikely to bear on the scenario contemplated by this Opinion and in *Rosemont*, namely a proposed plan of operations for the siting of waste or tailings facilities *prior* to operations. And in any event, the 2020 Opinion’s practical objections to the plain text of the law are of limited value as “policy arguments cannot supersede . . . clear statutory text.” *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 192 (2016).

“[M]ore fundamentally,” the 2020 Opinion appears to have contended that “[FLPMA] section 302(a)” —which provides the authority for BLM’s Subpart 2920 regulations—“was not one of the four identified ways that FLPMA amended the Mining Law.” 2020 Opinion, at 21 n.26. Put otherwise, the 2020 Opinion appears to have concluded that any application of the Subpart 2920 regulations to mining-related activity would necessarily amend the Mining Law. Because that type of amendment is not enumerated among FLPMA’s changes to the Mining Law, the 2020 Opinion apparently went on to conclude that land use authorizations under FLPMA section 302 were *per se* inapplicable to, e.g., waste and tailings facilities.

Here, the 2020 Memorandum misapprehends the role of BLM’s authority under FLPMA to permit ancillary uses. FLPMA section 302 and its implementing regulations do not displace the Mining Law, but rather fill a gap left by the law, namely a need for miners to site significant ancillary uses on public lands where the miner cannot rely on mining claims themselves. The regulations, in short, supplement the Mining Law and are thus entirely in keeping with FLPMA.

In sum, the 2005 and 2020 Opinions contain material errors and are hereby withdrawn.

VI. Conclusion.

BLM should not approve the relevant portions of a proposed plan of operations where the underlying mining claims would support large-scale waste and tailings facilities and where BLM cannot reasonably conclude that those mining claims contain valuable mineral deposits. This standard does not call on BLM to conduct a validity determination in connection with a proposed plan of operations.⁷

If BLM finds that it cannot approve a portion of a proposed plan of operations because those portions relied on mining claims that lack evidence of valuable mineral deposits underlying significant waste rock disposal or tailings facilities, an operator may be able to offer additional evidence tending to substantiate discovery; relocate those mining claims as mill sites under 30 U.S.C. § 42, if appropriate, or re-site the proposed ancillary use on other mill sites or private lands. The operator may also apply for a lease or permit under 43 C.F.R. Subpart 2920 or a right-

⁷ In rendering this conclusion, the Office of the Solicitor acknowledges that the Department’s reading of the Mining Law has not remained static in the last several decades, and that BLM may have approved mining plans that, at least in part, are not strictly consistent with this memorandum. Here, the Department notes that many “legal doctrines . . . are designed to protect those who have reasonably labored under a mistaken understanding of the law,” *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481 (2020). Given the substantial reliance interests that may have accrued where BLM has approved a plan of operations inconsistent with this Opinion, the Department generally expects operations on those plans to remain undisturbed. In particular, the Department notes that, in any action under the Administrative Procedure Act challenging the BLM’s past approval of such a plan, vacatur would likely be highly disruptive and therefore inappropriate. *See, e.g., Ctr. for Food Safety v. Regan*, 56 F.4th 648, 668 (9th Cir. 2022) (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

of-way grant under 43 C.F.R. Part 2800, or obtain title to the relevant lands through a land exchange under 43 U.S.C. § 1716 or purchase under 43 U.S.C. §§ 1713, 1719.

Finally, we recommend that BLM amend its regulations and its manual (H-3809-1) to comport with this Opinion.


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