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The Crown Jewel Decision: Recognizing the Mining Law's Inherent Limits

Nicole Rinke*

The Mining Law of 1872 has traditionally been interpreted as granting miners a near-carte blanche right to develop federal lands for mining. In fact, however, the Mining Law contains several important provisions that, taken together, impose serious limitations on the ability of modern miners to operate on federal lands. The Departments of Interior and Agriculture recently recognized these limitations and applied them to the Crown Jewel mine proposal in Washington state—a move that stands to dramatically alter the status of modern mining. This Note provides a brief overview of the Mining Law, an analysis of the Crown Jewel decision, and an explanation of its ramifications.

CONTENTS

Introduction ................................................................. 820
I. The General Mining Law of 1872 820
   A. The Discovery Requirement 822
   B. The Mine-Millsite Ratio 823
   C. The Use Restrictions 824
   D. The Net Effect 825
II. The Reality of Modern Mining 825
III. The Crown Jewel Decision 826
IV. Analysis 829
V. The Aftermath of Crown Jewel 830
   A. Congress Responds 830
   B. Mining after Crown Jewel 833
Conclusion ................................................................. 838

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INTRODUCTION

The Department of the Interior (DOI), with the Department of Agriculture, recently issued a five page decision regarding the Crown Jewel Mine proposal that has the potential to drastically change the status of modern mining on federal lands. Until this decision, these two federal agencies had essentially ignored three provisions of federal mining law that severely limit the ability of modern miners to operate on federal lands. These provisions include: (1) the discovery requirement, (2) the mine-millsite ratio, and (3) the use limitations imposed on each. While each is significant in its own right, the real force of these limitations lies in their cumulative effect. Taken together, these provisions serve as a built-in alarm clock—set to go off when mining on federal land loses its luster. By invoking all three of these provisions in its Crown Jewel decision, the Departments of Interior and Agriculture have sounded that alarm, suggesting a marked shift away from the government's traditional pro-mining stance.

This Note seeks to explain and analyze the Crown Jewel decision and its ramifications. Part I begins with a brief introduction to the Mining Law of 1872, including a discussion of the three aforementioned limiting provisions. Part II then juxtaposes those limitations against the reality of modern mining. Part III outlines, explains, and analyzes the Crown Jewel decision. Part IV examines the aftermath of Crown Jewel—first, with a discussion of how Congress has responded; second, with an explanation of how the decision will affect hardrock mining on federal lands.

THE GENERAL MINING LAW OF 1872

The General Mining Law of 1872 is the federal statute that governs hardrock mining on federal lands. Passed in the spirit

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1. Both departments shared discretion over the proposed mineral project because it was located on both Bureau of Land Management and United States Forest Service land. See Letter from the Office of the Solicitor General of the DOI, signed by John D. Leshy, Solicitor, Department of the Interior; James R. Lyons, Undersecretary for Natural Resources and Environment, Department of Agriculture; Charles R. Rawls, General Counsel, Department of Agriculture; and Sylvia Baca, Acting Assistant Secretary for Lands and Minerals Management, DOI, to Greg Etter, Vice President and General Counsel, Battle Mountain Gold Company (Mar. 25, 1999) (on file with author) [hereinafter Crown Jewel].


3. Id. The law governs the mining of locatable hardrock minerals on federal land including but not limited to, gold, silver, copper, platinum, and uranium. The 1920 Mineral Leasing Act removed coal, oil, gas, sodium, and phosphate from the law's
of Manifest Destiny, the Law was designed to encourage development and settlement of the West. In fact, as its basic premise, the Law posits that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase."

To those ends, the Law affords miners two primary options. Upon making a discovery of a valuable mineral deposit on public lands, prospectors may: (1) file a mineral claim granting them the right to extract the minerals contained therein; or (2) patent the land for title. Unpatented claims afford the miner full rights to extract, process, and market the valuable minerals contained therein. While unpatented claims may be held indefinitely, the miner also has the option of purchasing title to the land. To do so, the claimant must make $500 worth of improvements or labor on the claim. Upon meeting that requirement, the claim holder may purchase title to the land at a purchase price of $2.50 per acre for placer claims and $5.00 per acre for lode claims. This process of acquiring title is referred to as patenting.

Consistent with the goals of Manifest Destiny, mineral patents and mining projects on federal lands were rarely denied during the early years of the law's administration. The DOI, the primary agency responsible for administering federal lands, has

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6. Id. §§ 26, 29.
9. See id.
10. See infra p. 823 (discussing the difference between lode and placer claims).
12. See ROCKY MOUNTAIN MINERAL LAW FOUNDATION, AMERICAN LAW OF MINING § 51.02 (2nd ed. 1999).
traditionally interpreted the Mining Law as granting miners a near-carte blanche right to develop federal lands for mineral extraction. However, as land management policies have begun to shift and the nature of mining has evolved, mineral proposals have come under increasing scrutiny. Although largely irrelevant in the early years, three provisions of the Law have emerged to seriously limit its scope: (1) the discovery requirement, (2) the mine-millsite ratio, and (3) the use restrictions imposed on each.

A. The Discovery Requirement

The discovery requirement has historically been the greatest hurdle to making a valid location. As prescribed by the Mining Law, the discovery requirement consists of two essential elements. First, there must be an actual discovery. Discovery means “the actual physical disclosure of a valuable mineral deposit.” A mining claim location does not, in itself, give the presumption of a discovery. In Cole v. Ralph, the Supreme Court held that “[l]ocation is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery . . . .” Second, that discovery must be of a valuable mineral deposit. In what became the crux of the Mining Law, the Supreme Court held in 1968 that to qualify as a valuable mineral deposit, “it must be shown that the mineral can be 'extracted, removed and marketed at a profit'—the so called

13. Until the 1960s, the primary focus of federal land management policy was resource development and disposal. However, since the 1960s, in response to a growing nationwide environmental sentiment, Congress has been redefining the role of federal lands. In 1916, it created the National Park System, officially recognizing for the first time the importance of preservation and recreation on federal lands. See 16 U.S.C. § 1. In 1964, it passed the Wilderness Act whereby vast amounts of land have been set aside from development. 16 U.S.C. §§ 1131-1136. Perhaps most notably, in 1976, Congress passed the Federal Land Management Policy Act, whereby federal land managers were instructed to prohibit unnecessary and undue degradation on all federal lands. 43 U.S.C. § 1701, et seq. For a more in-depth discussion regarding the evolution of federal land management policies, see generally Scott W. Hardt, Federal Land Management in the Twenty-first Century: From Wise Use to Wise Stewardship, 18 HARV. ENVT'L. L. REV. 345 (1994).

14. For a discussion regarding the evolution of mining, see infra Part II.

15. The term “location” refers to the act of appropriating a mining claim according to law or to certain established rules. See St. Louis Smelting & Ref. Co. v. Kemp. 104 U.S. 636 (1882); ROCKY MOUNTAIN MINERAL LAW FOUNDATION, supra note 12, § 51.07181.

16. Lara v. Secretary of the Interior, 820 F.2d 1535, 1537 (9th Cir. 1987).


18. 252 U.S. 286 (1920).

19. Id. at 296.
marketability test."20 There must be a valid discovery on each of the locations proposed in the application.21 Once these requirements are satisfied,22 the Mining Law states that miners may stake their claim and acquire the "right of possession and enjoyment of all the surface included within the lines of their location."23 That right exists "so long as they comply with the laws of the United States, and with the state, territorial and local regulations . . . ."24

B. The Mine-Millsite Ratio

There are two types of mining claims: (1) lode claims and (2) placer claims. Lode claims refer to mineral deposits surrounded by hard rock, usually in the form of a mineral vein. According to the Mining Law, lode claims cannot exceed 1500 feet along the length of the deposit and cannot extend more than 300 feet to either side of the center of the deposit—dimensions amounting to roughly 20 acres.25 Placer claims are those located upon deposits of loose, unconsolidated material. A single placer claim cannot exceed 20 acres.26 While the Mining Law limits the maximum size of mining claims, it does not explicitly set a minimum. However, unless it is impossible to do so, it is customary for miners to locate claims 20 acres in size.27

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20. United States v. Coleman, 390 U.S. 599, 600 (1968). This decision raised the "valuable discovery" threshold from the prudent man test previously espoused in Castle v. Womble, 19 Public Lands Dec. 455 (1894), defining a mineral deposit as valuable when "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success . . . ." Id. In Coleman, the Supreme Court held that the marketability test was merely a complement to this earlier test rather than a repudiation. However, critics have suggested that the two tests are inherently contradictory, that is, present marketability at a profit does not necessarily equal a reasonable prospect of success. See George E. Reeves, The Law of Discovery Since Coleman, 21 ROCKY MT. MIN. LAW INST., 415, 418-19 (1975).
22. As explained by the Supreme Court in Best v. Humboldt, 371 U.S. 334, 336 (1963), whether there has been a valid discovery is a question of fact peculiarly within the expertise of the department.
24. Id.
25. See id. § 23.
26. See id. § 55; see also, Hall v. McKinnon, 193 F. 572, 574 (9th Cir. 1911).
27. See Decision of Acting Commissioner, June 17, 1873, reprinted in HENRY N. COPP, U.S. MINING DECISIONS 207 (1874); see also Roger Flynn, The 1872 Mining Law as an Impediment to Mineral Development on the Public Lands: A 19th Century Law Meets the Realities of Modern Mining, 34 LAND & WATER L. REV. 301, 310 (1999). Based on a review of legislative history, Flynn suggests that when Congress passed the Mining Law it intended to regulate the size of claims and assumed that miners would patent at 20 acres. Prior to the law's passage, miners would locate claims of
In addition to mining claims, the Mining Law also allows claimants to locate and patent millsite claims for $5.00 an acre for the purpose of milling, smelting, and processing minerals.\textsuperscript{26} One millsite claim, not to exceed five acres, may be located per each mining claim.\textsuperscript{29} The DOI has interpreted the millsite provision to allow for more that one millsite claim per mining claim as long as the total acreage does not exceed five acres and the land involved is non-mineral and is non-contiguous to the vein or lode with which it is associated.\textsuperscript{30} Because mining claims are restricted to 20 acres apiece, the effect of the millsite provision is to establish a 4:1 ratio of mining to millsite acres. A 1979 report by the Office of Technology Assessment confirmed that effect, finding that "each millsite would be at most one fourth the size of the typical 20 acre claim, so that the millsites, in the aggregate, would be one fourth the size of the ore body encompassed by the claims."\textsuperscript{31}

C. The Use Restrictions

The Mining Law requires that millsite claims "be used or occupied distinctly and explicitly for mining or milling purposes in connection with the lode claim with which it is associated."\textsuperscript{32} Moreover, the Mining Law requires that the surface of a valid mining claim be used only for purposes incident to the extraction of minerals from that claim.\textsuperscript{33} As the court explained in \textit{Teller v. United States}, if mining claimants could use a mining claim for any purpose other than those incident to the extraction of minerals from that same claim, appropriation of land under the Mining Law would be rife with abuse.\textsuperscript{34} Because mining claims can only be used for mining and millsite claims are limited in number, the amount of land an operation has available for waste
management, and therefore, the amount of waste an operation can produce, is necessarily limited.

D. The Net Effect

Operating in conjunction, these three aspects of the 1872 Mining Law— the "valuable discovery requirement," the mine-millsite ratio, and the use restriction imposed on each— serve to severely limit the mining of exceptionally low-grade ore bodies on federal lands. Until the Crown Jewel Decision, the DOI, however, has been reluctant to enforce this limitation as it directly conflicts with the reality of modern mining.

II
THE REALITY OF MODERN MINING

When the Mining Law was passed, the mineral resources of the West remained largely untapped. As such, miners were rewarded with the frequent discovery of high-grade ore bodies that were relatively easy to develop and exploit.35 During this era, mining was a small-scale operation requiring only light infrastructure.36 Surface plants were usually small, processing was minimal, and the small amount of waste produced was easily managed within the Mining Law's limits.37

Today, however, the situation is significantly different. The high-grade mines of yesterday have long since been mined and have given way to low-grade deposits of significantly inferior quality.38 These low-grade deposits require massive infrastructure and produce a disproportionate amount of waste.39 A 1969 study, conducted for the Public Lands Commission, found that:

[the mining industry now relies on mechanization, the handling of large tonnage of overburden and ore, and the utilization of large surface plants. . . . Such mining operations

35. See Flynn, supra note 27, at 305.
36. See John E. Young, Mining the Earth, in WORLDWATCH PAPER 109, 116 (Jul. 1992). In just ten years, the typical truck used in hardrock mining in the United States more than doubled in size, from 20-40 tons in 1960, to 80-200 tons in 1970. During this same period, the size of shovels used also increased, from 2 to 18 cubic meters. See id.
37. See id; see also, Crown Jewel, supra note 1, at 169-81.
38. The average gold mine today has a grade-metal to ore content of .00033%. See Young, supra note 36, at 22.
require not only substantial areas for plant facilities, but much larger areas than formerly for the disposal of overburden and mill tailings. The surface areas of mining claims and mill sites are no longer adequate for such purposes.\textsuperscript{40}

According to the Environmental Protection Agency's Toxic Release Inventory for the year 1998, the mining industry generates more toxic waste than all other industries in the United States combined.\textsuperscript{41}

Despite the wasteful reality of modern mining, mining has continued to enjoy relatively unchecked preference on federal lands. The DOI has allowed a number of mines that violate the language of the law to go forward.\textsuperscript{42} Between 1993 and 1997, the DOI conducted an informal survey of BLM state offices. The survey showed that some state offices, including those in Colorado, Idaho, and Montana, have issued patents that violate the millsite provision.\textsuperscript{43} The Crown Jewel Decision, however, suggests that the DOI, as well as the Department of Agriculture, is now ready to uphold the Mining Law and acknowledge that mining on federal lands may be losing its luster.

III
THE CROWN JEWEL DECISION

Recently, Battle Mountain Gold (BMG),\textsuperscript{44} an American

\textsuperscript{40} Twitty, Sievwright & Mills, \textit{LEGAL STUDY OF NONFUEL MINERAL RESOURCES} 1047-48 (1970) (prepared under contract with the Public Lands Review Commission). For a discussion of three modern examples, all of which propose to use far more land as millsites than allowed by law, see also, Flynn, supra note 27, at 360 n.58. For example, the Yarnell Project proposes to use 173 acres for waste management and processing and only 38 for actual mining. See \textit{id}. Likewise, the Imperial Project proposes to use 961 acres for waste management while using only 341 for mining. See \textit{id}.


\textsuperscript{42} See Memorandum from the DOI Office of the Solicitor to the BLM, \textit{Limitations on Patenting Millsites under the Mining Law of 1872} 1-2 (Nov. 1997) (on file with author).

\textsuperscript{43} See \textit{id}.

\textsuperscript{44} BMG is a Houston-based company engaged in gold, silver, and copper mining in Australia, Bolivia, Canada, and the United States. Noranda, a Canadian natural resources firm, owns a 28\% interest in BMG. BMG got its start in 1985 as a spin-off company from Penzoll Corp. As of 1998, BMG was \$250 million in the red, due in part to low gold prices. See Hoover's Company Profile Database, \textit{American Public Companies} (visited Jul. 15, 2000) <http://hoovers.com/premium/profile/6/0.2147,10186.00.html>. BMG has agreed to be purchased by Newmont Mining for more than \$500 million in the year 2000. Newmont Mining, based in Denver, Colorado, is the second largest gold producer in
mining company, proposed to develop a large, open pit, cyanide heap leach, gold mine\(^4\) in Washington State on a mixture of private, state, and federal lands.\(^5\) If approved, the Crown Jewel Mine would be the first large scale, open-pit mine in Washington State.\(^6\) As proposed, the pit would cover 116 acres that BMG did not plan to reclaim or backfill.\(^7\) Rather, BMG planned to let the pit fill with water—forming a lake 350 feet deep; if formed, this lake, it is expected, would violate numerous state water quality standards.\(^8\)

Operating seven days a week, 24-hours a day, for eight years, BMG planned to remove over 105 million tons of rock from the pit.\(^9\) The rock is of a low grade—containing only 0.2 ounces of gold per ton.\(^10\) As a result, each year it was expected that 34,000 tons of waste rock would be generated.\(^11\) BMG planned to dump this waste rock into two unlined dumps at the headwaters of two important watersheds.\(^12\) The operation would disturb approximately 787 acres of land.\(^13\) To accommodate that disturbance, BMG proposed to develop 15 mining claims for a total of 300 acres and 117 millsite claims—totaling 565 acres of developed land.\(^14\) BMG’s plan also called for the use of 22 additional lode claims for waste management.\(^15\)

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45. Today, heap leaching is the most commonly employed method for the extraction of gold. Once removed from the ground, the ore is stacked atop pads in large piles rising up to 300 feet high and stretching over hundreds of acres. The piles are soaked with a cyanide solution that percolates through the ore body, bonding with gold particles, thereby enabling the gold to be removed from the undesired ore. The remaining cyanide solution is usually stored in large outdoor ponds for reuse in subsequent leaching cycles. Sodium cyanide is lethal to humans and wildlife. Cyanide spills and leaks are fairly common at cyanide retention ponds as are massive bird kills. See MINERAL POLICY CENTER, THE TRUE PRICE OF GOLD (1997). The Crown Jewel project expects to use over 13,000 tons of sodium cyanide. See Flynn, supra note 27, at 326.

46. See Flynn, supra note 27, at 326.


48. See Flynn, supra note 27, n.124.


50. See Flynn, supra note 27, at 31.

51. See Kramer, supra note 47, at D1.

52. See Flynn, supra note 27, at 326.

53. See id.

54. See id.

55. See id. If each millsite were 5 acres a piece, the total number of millsite acreage would be 585 acres, 20 more than the decision says BMG proposed.

56. See Crown Jewel, supra note 1, at 1-2.
The DOI and USDA denied BMG's proposal to develop the Crown Jewel Mine based on the company's failure to comply with both the millsite and mining claim provisions of the Mining Law.\textsuperscript{57} This decision constitutes a final agency decision that is not subject to further administrative review.\textsuperscript{58}

In rejecting the plan, the departments emphasized that the plan violated the millsite provision of the law.\textsuperscript{59} According to the Mining Law, BMG would be allowed to patent five millsite acres per every valid mining claim for a total of 75 acres of millsite claims.\textsuperscript{60} BMG, however, proposed to develop 565 millsite acres—an amount at least 490 acres in excess of the legal limit.\textsuperscript{61}

In its decision to reject the Crown Jewel Project, the DOI and USDA questioned not only the validity of the millsite claims but also the validity of the mining claims themselves.\textsuperscript{62} The decision suggested two ways in which the mining claims might be found invalid: (1) the claims fail to comply with the use restriction the Mining Law imposes on mining claims; and (2) the claims fail to satisfy the "valuable" deposit requirement fundamental to the development of mining claims.\textsuperscript{63}

Of the 22 lode claims BMG sought to develop, a number were to be used solely for surface facilities including waste rock dumps, soil stockpiles, and sediment traps.\textsuperscript{64} The departments held that, "While the Mining Law does permit the use of a valid lode claim for facilities that are ancillary to mining on that claim, it does not permit use of a lode claim for facilities to support

\textsuperscript{57} See id. In so doing, the departments rejected BMG's argument that the Mining Law should not be enforced against projects for which a Record of Decision had already been signed by the BLM and the United States Forest Service. See id. at 4. Agencies are required to ensure that operation plans are in accordance with the National Environmental Policy Act, 42 U.S.C. § 4321, et seq. (NEPA). See 40 C.F.R. § 1505.2 (2000). To do so, agencies must prepare a public record of decision that includes a description of the alternatives considered. The DOI and USDA explained that the ROD vested no rights with BMG and, therefore, the Mining Law should apply. Citing the Record of Decision, DOI stated that, "Approval of the Selected Alternative will not now, nor in the future, serve as a determination of ownership or validity of any mining claim to which it may relate, and this Record of Decision does not give the claim owner or operator any rights they are not otherwise entitled to by law." Crown Jewel, supra note 1, at 3-4.

\textsuperscript{58} See id. at 5.

\textsuperscript{59} See id. at 2.

\textsuperscript{60} See id.

\textsuperscript{61} See id.

\textsuperscript{62} See id.

\textsuperscript{63} See id. at 1-2.

\textsuperscript{64} See id. at 2.
mining solely on other lode claims."65 Since BMG had already exceeded the allowable number of millsite claims, these lode claims could not be reclassified.66 The departments also suggested that the mining claims, irrespective of their proposed use, might be invalid for failure to satisfy the valuable deposit requirement of the law.67 As the Crown Jewel decision explains, the validity of these deposits is questionable because the "permanent deposit of waste rock indicates BMG's own belief that the lode claims do not contain a valuable mineral deposit, one of the fundamental requirements for a valid mining claim."68

IV
ANALYSIS

The Crown Jewel decision represents a giant step forward in the federal government's interpretation and application of the Mining Law. The DOI and USDA were correct when they stated at the close of their decision that "[i]n these circumstances, we have no choice but to enforce the law."69 When they did enforce the law, they rightfully found that the Crown Jewel Project did not comply.70

The departments were correct to hold that BMG's plan violated the millsite provision of the Mining Law. BMG's attempt to use and eventually patent 490 extra acres of millsite claims is a blatant violation of the millsite provision of the Mining Law which, as discussed earlier, limits the amount of millsite acres a claimant is allowed to claim and patent to 5 millsite acres per mining claim.71 In 1960, Congress confirmed its commitment to the mine-millsite ratio when it considered language that would have increased the allowable millsite acreage to ten acres per mining claim. That language, however, was rejected and the five acre limitation was retained.72

The DOI and USDA were also correct to hold that the 22 lode claims may themselves be invalid for violating the use and discovery requirements of the Mining Law.73 In Teller, the Eighth

65. Id. at 2 (quoting Teller, 113 F. at 273).
66. See id. at 3.
67. See id. at 3, n.7.
68. Id.
69. Id. at 5.
70. See id.
71. See id. at 5-6.
72. See Flynn, supra note 27, at 312. What Congress did do was extend the right to patent millsite acres to holders of placer claims. Prior to 1960, that right only existed in association with lode claims.
73. See Crown Jewel, supra note 2, at 2-3.
Circuit held that the right to patent mining claims is not unlimited and exists only for purposes incidental to the extraction of minerals from that claim.\textsuperscript{74} BMG's plan is a blatant violation of this rule as it did not propose to mine any of the 22 claims.\textsuperscript{75}

In addition, to qualify as a valid claim, "it must be shown that the mineral can be 'extracted, removed and marketed at a profit'—the so called marketability test."\textsuperscript{76} The ability to mine a deposit for a profit is clearly undermined when the ore that justifies the claim in the first place is buried under piles of waste rock. As noted in the American Law of Mining,\textsuperscript{77} marginal deposits are subject to an increased risk as their status as valuable is rather tenuous:

A claim of marginal value can be lost, due to changed economic conditions or loss of a market for the minerals it contains. Ancillary activities on such [marginal] claims can exasperate the risk. For instance, a peripheral claim [a lode claim proposed for ancillary use but not mining] which was, at best, only marginally economical may become uneconomical when covered by mine overburden or a tailings pond.\textsuperscript{78}

Further, the fact that BMG does not desire to mine the 22 claims suggests that the claims are not based on a valuable mineral deposit.

\section{V}
THE AFTERMATH OF CROWN JEWEL

\subsection{A. Congress Responds}
Since the Departments of Interior and Agriculture issued

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\item \textsuperscript{74} 113 F. 273 (8th Cir. 1901); see also supra text accompanying note 33.
\item \textsuperscript{75} The use limitations imposed on mining claims has, since the Crown Jewel decision, been enforced by at least one division of the USFS. The Southwestern Region 3 Office has recently denied a Plan of Operations for the U.S. Hill Mine that proposed to develop approximately 200 acres of federal mining claims solely as waste management facilities for an ore body located on private land. Because the Mining Law does not allow the development of lode claims solely for purposes ancillary to a separate ore body, the District Ranger denied the plan. See Letter from the District Ranger, Southwestern Region 3, Carson National Forest to Governor Red Eagle Rael of the Picuris Pueblo (May 26, 2000) [on file with author]; Memo from Roger Flynn of Western Mining Action Project to Governor Red Eagle Rael of the Picuris Pueblo (Feb. 17, 2000) [on file with author].
\item \textsuperscript{76} Coleman, 390 U.S. at 600.
\item \textsuperscript{77} ROCKY MOUNTAIN MINERAL LAW FOUNDATION, supra note 12, § 110.02[3][c].
\item \textsuperscript{78} Id.
\end{itemize}
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their decision, there has been a flurry of action on Capitol Hill. Senator Slade Gorton (R-WA) attached a rider to the Kosovo Emergency Supplemental Appropriations Bill that proposed to eliminate the millsite provision of the 1872 Mining Law. Representative Ralph Regula (R-OH) offered a compromise that proposed to postpone enforcement of the millsite provision until the end of the fiscal year and directed the Departments of Interior and Agriculture to approve the Crown Jewel Project. Regula's rider became law. On June 1, 1999, the United States Forest Service (USFS) approved the Crown Jewel Project; the very next day the BLM followed suit.

A coalition of Native Americans and environmentalists have since challenged the constitutionality of that decision claiming that (a) the Departments' approval of the project violates the Mining Law; and, (b) that Congress, in its decision to postpone enforcement of the millsite provision, has usurped the powers of the Executive. The Departments initially rejected the Crown Jewel proposal because it violated both the Mining Law's millsite limitations and the limitations imposed on lode claims. Although the rider waived the application of the millsite limitation, it did not address BMG's proposed illegal use of its 22 lode claims. Because the rider did not waive the restriction regarding the use of lode claims, appellants argue that part of the earlier DOI decision still stands and renders the project illegal. Therefore, they assert that the BLM was acting contrary to the law as well as to the prior final agency decision issued by the DOI and USDA. Furthermore, appellants argue that while it is within Congress' power to rewrite the laws, it is not within its power to execute them. That is a power reserved to the Executive. By directing the Executive branch to approve the project, despite its remaining illegality, Congress usurped the powers of the Executive and therefore violated the separation of powers

82. See Flynn, supra note 27, at nn.351, 377.
83. The appeal on constitutional grounds was first brought unsuccessfully before the Interior Board of Land Appeals. See Okanagon Highlands Alliance, IBLA 99-345, 99-349 (Sept. 3, 1999). The same challenge has now been filed by the appellants in the federal district court of Oregon but has yet to be decided. See Okanagon Highlands Alliance v. Department of Interior, Case No. 990-1598-JE (filed Nov. 12, 1999).
Since Regula’s rider became law, the millsite battle has found a new forum—the Interior Appropriations Bill. In the fall of 1999, Senator Larry Craig (R-ID) attached a rider to the Interior Appropriations Bill that would have eliminated the millsite provision for all mines. The House adopted a contrary rider supporting the millsite provision. The differences were hashed out in conference committee. The fate of the millsite provision was finally settled with the passage of the Interior Appropriations Bill on November 20, 1999. Reaching a compromise, Congress allowed some mines to proceed but agreed to apply the millsite provision prospectively to all new mines proposed after November 7, 1997.

As for the Crown Jewel battle, it too has found a new forum. On January 19, 2000, the Washington State Pollution Control Hearings Board (PCHB), upon an appeal filed by local conservation and Native American groups, ordered the revocation of BMG’s Clean Water Act 401 certification along with 16 other water rights the State Ecology Board had previously granted BMG for the Crown Jewel project. The PCHB concluded that the project would increase consumptive water use and violate

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85. See generally Appellant's Brief (on file with author).
86. See U.S. CONST. art. II, § 1, art. I, § 1.
90. It is not clear how expansions of existing mines will be classified under the new rule. How they are ultimately classified is significant because many new mines are merely expansions of existing projects. If expansions proposed after November 7, 1997 are not classified as new mines, they will be exempt from the millsite provision. See Mineral Policy Center, supra note 88, at 2.
91. The millsite provision will not apply to proposals made before November 7, 1997, even if they have not yet been approved. See id. Originally, the exemption would apply only to projects proposed after May 1999. Moving the exemption date back to November 1997 subjects at least 40 mines to the millsite provision that would otherwise have been exempt. See id. Numbers from the DOI indicate that there are currently 338 proposed mines awaiting approval; of these at least 40 have been proposed since November 1997. See id.
92. Under Section 401 of the Clean Water Act (CWA), the state is required to certify that all activities that may result in discharge into navigable waters are in compliance with applicable water quality laws set forth in the CWA. 33 U.S.C. § 1341 (2000).
state water quality standards. Although BMG had proposed mitigation measures to address such concerns, the PCHB held the measures to be highly speculative and uncertain. As a result, the PCHB revoked the permits, presenting a large, likely insurmountable roadblock to BMG's commencement of the project.

B. Mining after Crown Jewel

The Crown Jewel decision has significant implications for the management of federal lands. It suggests that the Mining Law does not, despite traditional interpretation and application, grant miners the right to develop federal lands carte blanche. To the contrary, the Mining Law is infused with limitations, which taken in conjunction, establish a quality threshold that mines developed on federal lands must meet. That threshold, as defined by the 4:1 acre mine to millsite ratio, the valuable mineral requirement, and the use restrictions imposed on both millsite and mining claims, serve to restrict the development of exceptionally low-grade ore bodies on federal lands. Proposals that cannot meet that threshold should not, according to the law, enjoy unchecked preference over other land use values. The Crown Jewel decision suggests that the Departments of Interior and Agriculture are ready to enforce the letter of the law, which, given the reality of modern mining, many proposals fail to meet.

Modern mining projects that fail to fall within the guidelines the Mining Law establishes may, nonetheless, still be approved on federal lands. There are at least two alternatives that potentially exist. Miners may: (1) attempt to exploit a potential loophole in the Mining Law by breaking up mining claims into claims of less than 20 acres each in an attempt to get additional millsite acreage; or (2) obtain ownership or possessory rights of land for mining via a land exchange under Section 206 of the Federal Lands Policy and Management Act (FLPMA) or via a special-use permit granted under Section 302(b) of the FLPMA.

One alternative which the DOI mentioned but did not seem to advocate in its Crown Jewel decision is breaking up mining

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94. See id.
95. See id.
96. BMG is currently challenging that decision in state court.
97. See generally Lighthawk, supra note 39; Editorial, supra note 49.
100. Crown Jewel, supra note 1, at 3.
claims into claims of less than 20 acres in order to gain additional millsite acreage.\textsuperscript{101} The plain language of the Mining Law does not require that mining claims be 20 acres, but only that they not exceed 20 acres.\textsuperscript{102} However, traditional practice is to patent claims at 20 acres unless it is logistically impossible.\textsuperscript{103}

One mining claimant has, nonetheless, attempted to avoid violating the millsite provision by breaking its 20 acre claims into smaller plots.\textsuperscript{104} Glamis Imperial Corporation (GIC) originally proposed to develop 46 lode claims and nearly 200 millsite claims.\textsuperscript{105} However, after the BLM announced its plan to withdraw the land from mineral entry\textsuperscript{106}—a move that would bar any new claims if GIC's were denied\textsuperscript{107}—GIC withdrew its claims. It then quickly refiled; however, this time it sought approval for 187 lode claims and a similar number of millsite claims.\textsuperscript{108} In so doing, GIC increased the number of lode claims it was seeking but did not actually alter the total acreage. As a result, the new lode claims are less than 20 acres apiece—some of the new lode claims are as small as 20 by 130 feet; at least 15 claims are under one quarter of an acre; 33 claims are between one quarter and one half of an acre; and a total of 103 claims are less than one acre.\textsuperscript{109} The effect of GIC's claim division is that GIC is now claiming only one millsite claim per mining claim but is nevertheless still in excess of the 4:1 mine-millsite acreage limitation.

The DOI is currently reviewing whether this division of claims is valid.\textsuperscript{110} As the DOI explained in its Crown Jewel

\textsuperscript{101} \textit{id.} at 2 n.4.
\textsuperscript{102} 30 U.S.C. § 23 (2000)("A mining-claim ... may equal, but shall not exceed ....").
\textsuperscript{103} \textit{See infra} Part I.B.
\textsuperscript{104} \textit{See} Crown Jewel, \textit{supra} note 1, at 2 n.4. For a lengthier discussion of this proposal see Flynn, \textit{supra} note 27, at 333-36.
\textsuperscript{105} \textit{See} Flynn, \textit{supra} note 27, at 334.
\textsuperscript{106} Once land is withdrawn from mineral entry, new claims cannot be made. However, existing claims, so long as they were in compliance with the law prior to withdrawal, are still valid. See Flynn, \textit{supra} note 27, at n.157 (citing United States v. W.E. Polk, A-30859, at 4, SO-1968-24, Mining (Apr. 17, 1968)).
\textsuperscript{107} Originally, denying a patent application did not void a claim; rather, an owner could retain ownership of the claim while continuing to develop the requisite proof. In 1960, the Supreme Court's holding in \textit{United States v. Carlisle}, 67 I.D. 417 (1960) changed that rule. Now, once a patent application is denied, the claimant's status is relegated to that of an explorer.
\textsuperscript{108} \textit{See} Flynn, \textit{supra} note 27, at 334.
\textsuperscript{109} \textit{See} id.
\textsuperscript{110} \textit{See} Crown Jewel, \textit{supra} note 1, at 2. The BLM has issued a proposed rule that would essentially codify the Crown Jewel decision and prevent claimants from circumventing the Mining Law's limitation on the number of millsite acres a claimant
decision, the case history does not bode well for approval. In Boise Cascade Corp. v. Environmental Protection Agency, the court, following a well established canon of statutory interpretation, held that statutes should be constructed such that other provisions of the same statute are not rendered meaningless. Here, if the 20 acre size limit is not upheld, the mine-millsite ratio and its limiting effect will be destroyed. Furthermore, the courts have frowned upon such tactical maneuvers as a means of obtaining "extra" federal lands. For example, in Leavenworth, Lawrence, and Galveston R.R. v. United States, the Supreme Court held that federal land grants should not be enlarged by ingenious reasoning. Again in 1940, the Court held that "ingenuity of contractual expression" will not be permitted to thwart Congress' intent to restrict federal land grants.

In addition, the Mining Law contains an inherent good faith requirement that a strategy like the one described above would likely violate. The Mining Law does not explicitly contain a good faith requirement, but the courts have nonetheless inferred its existence and used it to defeat otherwise valid claims. Proving bad faith, however, is a highly subjective process. In the present situation, the mining company's filing and refiling of claims suggests bad faith.

GIC's proposal may also fail to meet the valuable discovery requirement. It is unlikely that a discovery has been made on each and every claim, and it is equally unlikely that each and every such discovery would pass the marketability test described earlier. Although the IBLA has allowed claimants to aggregate adjacent claims in order to pass the marketability test, this
interpretation of the test has never been appealed; therefore, it is legally tenuous.125

The Crown Jewel decision also explains that mining projects that do not satisfy the Mining Law may be approved via the Federal Lands Policy and Management Act.126 The FLPMA, passed by Congress in 1974, sets forth the basic substantive and procedural management policies for federal lands.127 FLPMA mandates that the Secretary of the Interior "shall manage the public lands under the principles of multiple use and sustained yield,"128 defining multiple use as "management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people."129 The FLPMA outlines the various resource values that are to be considered including: recreation, range, timber, minerals, watershed, wildlife, fish, natural, scenic, scientific, and historical values.130 The multiple-use mandate also requires that resources be managed "without permanent impairment of the productivity of the land and the quality of the environment . . . ."131

Although FLPMA's multiple-use mandate does not apply to projects approved via the Mining Law,132 mineral projects that cannot satisfy the Mining Law's requirements must, if they wish to move forward, comply with FLPMA's standards. FLPMA allows mining projects, otherwise invalid under the mining law, to be approved either by way of land exchange or by special-use authorization.133 Section 206 of FLPMA authorizes the Secretary of the Interior to exchange tracts of lands for interests in land of equal value elsewhere when "the public interest will be served by making that exchange."134 In general, however, land exchanges are disfavored, as FLPMA declares that it is the policy of the United States that "public lands be retained in federal

125. See id.
126. 43 U.S.C. §§ 1701-1785 (2000); see also Crown Jewel, supra note 1, at 3.
128. Id. § 1732(a).
129. Id. § 1702(c).
130. Id.
131. Id.
132. Mining projects approved under the Mining Law are removed from FLPMA's requirements. 43 U.S.C. § 1732(a) (2000). FLPMA provides that where a tract of land has been dedicated to specific uses according to any other provision of law, it shall be managed in accordance with such law. See id.
133. 43 U.S.C. §§ 1716(a), 1732(b).
134. Id. § 1716(a). Regulations for land exchanges involving USFS land are codified at 36 C.F.R. § 254 (2000), whereas regulations regarding the exchange of BLM lands, are codified at 43 C.F.R. § 2200 (2000).
THE CROWN JEWEL DECISION

ownership."135 The far more likely alternative is provided in Section 302(b), which authorizes the Secretary of the Interior to issue permits for the "use, occupancy and development of public lands" for various purposes.136

Pursuant to this section, mineral projects that do not meet the requirements of the Mining Law may receive special authorization from the BLM.137 In accordance with regulations codified at 43 C.F.R. § 2920, the BLM may grant leases for long-term uses, like large-scale mineral projects "involving substantial construction, development or land improvement and the investment of large amounts of capital which are amortized over time."138 According to the regulations, no such uses are to be authorized unless the BLM receives fair market value for the lands.139 The BLM is also required to ensure that approved special uses will minimize damage to scenic, cultural, aesthetic, fish and wildlife habitat, and other environmental values.140

The land-exchange and special-use alternatives provided by FLPMA are significant for several reasons. First, they provide a means for modern mineral proposals that fail to satisfy the requirements of the Mining Law to nevertheless move forward.141 Second, they ensure that such approval will be in accordance with modern land management policies.142 The Mining Law of 1872, by definition, precludes that result.

136. Id. § 1732(b).
137. See 43 C.F.R. § 2920.1-1(2000) (stating that, "any use not specifically authorized under other laws and regulations and not specifically forbidden by law may be authorized under this part."). Note, however, that proposals for special use in the national forests must be approved by the USFS. USFS approval of special-use permits is governed by 36 C.F.R. § 251.52 (2000).
139. See id. Preamble-§ 2920.
140. See id. § 2920.7(b)(2).
141. Mineral projects proposed on USFS land are unlikely unless the applicant and the agency arrange a land exchange. The USFS is allowed to grant special-use permits in national forests in accordance with the Organic Act, 16 U.S.C. §§ 473-481 (partially repealed 1976), and 36 C.F.R. § 251.52 (2000). However, no special-use permits are to be issued for permanent and exclusive uses, 36 C.F.R. § 251.54(e)(1)(iv), nor for the disposal of solid waste, 36 C.F.R. § 251.54(e)(1)(ix).
142. FLPMA declares that it is the policy of the United States that "public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animal; and that will provide for outdoor recreation and human occupancy and use." 43 U.S.C. § 1701(a)(8) (2000). For an in-depth discussion of modern federal land law, see Marla Mansfield, A Primer of Public Land Law, 68 WASH L. REV. 801 (1993).
The practical difference between the Mining Law and FLPMA is enormous: FLPMA ensures that mineral development will no longer be given statutory preference on federal lands, but will instead be fairly balanced against a host of other competing land use values. FLPMA ensures that miners will pay a fair price for the land they exploit. Under the modern public lands mandate, federal agencies are required to receive a fair market return for lands leased for special use, as opposed to the $5.00 maximum return on lands granted via the Mining Law. Finally, the FLPMA alternatives ensure that federal lands will be retained in federal ownership. Modern land management policies favor a retention of federal lands. In contrast, the Mining Law continues to foster the give-away of federal lands. In total, since the Mining Law’s passage, 3.5 million acres of public land have been transferred to private hands.

CONCLUSION

The significance of the Crown Jewel decision is not, then, that it will prevent mining on federal lands, but rather, that it will level the playing field between mining and other competing land use values. The Mining Law, as it has traditionally been interpreted and applied, grants miners the statutory right to mine. The result of this historical interpretation is that where a mining project complies with the statutory provisions of the law, it may not be blocked from going forward regardless of competing


144. See id. § 1701(a)(9).

145. 30 U.S.C. §§ 29, 37 (2000). In addition to receiving cheap land, miners under the Mining Law of 1872 also receive free minerals. The Mining Law does not require royalty payments for minerals removed from federal lands. This is entirely unique to the mining industry; all others users of federal lands are required to pay for the land they use and for the resources they extract. For example, ranchers are required to pay monthly grazing fees, logging companies bid on timber sales, coal producers pay an 8% royalty and are required to pay for land restoration, and the offshore oil and gas industry is required to pay a 12.5% royalty for the minerals it extracts. See Michael Satchell, The New Gold Rush, U.S. NEWS AND WORLD REPORT, Oct. 28, 1991, at 46.


While such a privilege may have been justified in 1872, it is not justified today.\textsuperscript{149} Federal land management policies no longer support sweeping development of federal lands; in fact, modern land management policies require the Secretary of the Interior to consider alternative land use values and to prevent undue and unnecessary degradation of federal lands.\textsuperscript{150} The modern mining industry, however, has consistently proven its propensity to cause such degradation.\textsuperscript{151}

Passed over 120 years ago, the Mining Law of 1872 has reached its limit. The federal lands and the mineral resources of the West have been developed. The small scale miner has given way to large corporations—a 1997 report by the Mineral Policy Center found that 76 percent of U.S. gold is produced by a mere 35 companies, many of which are foreign owned.\textsuperscript{152} The privilege the Mining Law has traditionally afforded miners is dated and it is no longer necessary. Jill Lancelot of Taxpayers for Common Sense phrased it well when she said, "When these policies were originally enacted, they may have been called progress. However, over a century later, we call it corporate welfare."\textsuperscript{153}

The DOI's Crown Jewel decision is in step with this reality and suggests that the mining industry will no longer enjoy preferential treatment on federal lands via the guise of the 1872 Mining Law.\textsuperscript{154} The Mining Law is the last sleeping giant of its era. It is about time it was disturbed.

\begin{thebibliography}{9}
\bibitem{148} In 1998, Congress had to allocate $65 million to prevent the New World Mine from being developed directly adjacent to Yellowstone National Park. \textit{See id.}
\bibitem{149} \textit{See id.} at 1.
\bibitem{151} \textit{See MINERAL POLICY CENTER, supra note 147, at 4. See generally CARLOS D. DAROSA & JAMES S. LYON, GOLDEN DREAMS, POISONED STREAMS ch. 3 (1997); Lighthawk, supra note 38; Young, supra note 36.}
\bibitem{152} \textit{See MINERAL POLICY CENTER, WHO OWNS THE GOLD MINES? (1997).}
\bibitem{154} The shift in the administration's posture is already being felt. With regards to the Imperial Project, described supra at page 834, the Secretary of the Interior just recently sent a memo to the BLM explaining that the Mining Law does not convey a statutory right to mine. \textit{See Memorandum from the DOI Office of the Solicitor to the BLM, Regulation of Hardrock Mining 1 (Jan. 3, 2000) (on file with author).}
\end{thebibliography}