No. 20-5382
Not Yet Scheduled for Oral Argument

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EARTHWORKS, WESTERN SHOSHONE DEFENSE PROJECT, HIGH COUNTRY CONSERVATION ADVOCATES, GREAT BASIN RESOURCE WATCH, and SAVE THE SCENIC SANTA RITAS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants-Appellees,

BARRICK NORTH AMERICAN HOLDING CORP., ABX FINANCECO INC, NATIONAL MINING ASSOC., ROUND MOUNTAIN GOLD CORP., ALASKA MINERS ASSOC., AMERICAN EXPLORATION & MINING ASSOC., and STATE OF ALASKA,

Intervenor-Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

EARTHWORKS' INITIAL OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties: The parties who appeared in the district court are also the parties in this Court:

i. Plaintiffs-Appellants, Earthworks, Western Shoshone Defense Project, High Country Conservation Advocates (formerly known as High Country Citizens' Alliance), Great Basin Resource Watch, and Save the Scenic Santa Ritas;

ii. Defendants-Appellees, U.S. Department of the Interior, U.S. Department of Agriculture, U.S. Bureau of Land Management, and U.S. Forest Service; and

iii. Intervenors-Defendants-Appellees, Barrick North American Holding Corp., ABX Financeco Inc., National Mining Association, Round Mountain Gold Corp., Alaska Miners Association, American Exploration & Mining Association, and State of Alaska,

B. Rulings Under Review: The rulings under review are the October 26, 2020 Order and Judgment of the district court denying Earthworks' motion for summary judgment. *Earthworks v. U.S. Dept. of the Interior*, 496 F.Supp.3d 472 (D.D.C. 2020)(Contreras, J.). Joint Appendix ("JA")____.

C. Related Cases: There are no related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellants Earthworks, Western Shoshone Defense Project, High Country Conservation Advocates (formerly known as High Country Citizens' Alliance), Great Basin Resource Watch, and Save the Scenic Santa Ritas, all non-profit organizations—state that they have no parent corporations or any publicly held corporations that own 10% or more of their stock.

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants Earthworks, et al., challenge the Defendant-Appellee Department of the Interior's ("Interior") Final Rule titled "Locating, Recording, and Maintaining Mining Claims or Sites," 68 Fed.Reg. 61046-61081 (Oct. 24, 2003) ("2003 Millsite Rule," or "2003 Rule"), particularly those portions of the Rule related to millsites, or millsite claims under federal mining law. This Rule has broad effect, governing a significant part of Interior's review and permitting of, and regulatory authority over, hardrock mining operations on the western public lands.

The 2003 Millsite Rule does not comply with the statutes under which it was promulgated: the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§1701 *et seq.*, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321 *et. seq.*, the Mining Law of 1872 ("Mining Law"), 30 U.S.C. §§21-47; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§553, 701-706.

The district court had subject matter jurisdiction under 28 U.S.C. §1331 because the action arose under these federal laws. Earthworks appeals from the district court's October 26, 2020 Order and Judgment denying Earthworks' motion for summary judgment. Joint Appendix ("JA")_____. This Court has jurisdiction to review the district court's decision under 28 U.S.C. §1291.

This case has taken a long procedural path. Briefing on the merits was

delayed by a years-long dispute over the administrative record. Earthworks' complaint was filed in 2009 and Interior filed its version of the administrative record in February 2011. Earthworks filed a motion to complete the record in April 2011. In 2012, the case was reassigned from Judge Henry Kennedy of the D.C. District Court to Judge Frederick Scullin, Jr., of the Northern District of New York. Earthworks filed partial Objections to the Magistrate's recommendations on the record motion in 2012, and after further briefing and argument, Judge Scullin eventually resolved the record issues in December of 2016, granting Earthworks' motion in part. After the government supplemented the record, summary judgment motions were filed in 2017. The case was reassigned to Judge Rudolph Contreras of the D.C. District Court in November of 2019, who ruled on the cross motions in October of 2020, leading to this appeal.

Before the district court, and in its appeal, Earthworks had also challenged Interior's Interim Final Rule, "Mining Claims Under the General Mining Laws," 73 Fed.Reg. 73789-73794 (Dec. 4, 2008). Earthworks hereby withdraws its challenge to the 2008 Rule and appeal of the district court's decision regarding that Rule. Thus, this appeal is now limited to Earthworks' challenge to the 2003 Millsite Rule.

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STATEMENT OF ISSUES

1. Whether the 2003 Millsite Rule erroneously interpreted the 1872 Mining Law in reversing the Interior Department's previous legal position that had recognized the statutory acreage limits on the use of nonmineralized public land for mining operations contained in the millsite provision of the Mining Law, 30 U.S.C. §42, especially for the dumping of waste and chemical processing facilities that often cover thousands of acres at western mine sites.

2. Whether Interior violated NEPA in supporting the 2003 Rule with an inadequate Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") that failed to analyze the environmental impacts of implementing the 2003 Rule, and failed to allow any public review of the EA at all.

3. Whether Interior's failure to give any public notice or opportunity to comment on the 2003 Rule's reversal of Interior's previous millsite policy, as was embodied in the agency's proposed Rule in 1999, violated the APA where the new 2003 policy was not a "logical outgrowth" of the previous policy.

STATUTES AND REGULATIONS

The Addendum contains the cited statutes, regulations, and authorities.

STATEMENT OF THE CASE

This case centers on the amount of nonmineralized public land that mining interests may claim, as a statutory right, to use, occupy, and patent and privatize, for

waste dumping and other industrial uses at mining sites, often covering thousands of acres at each mine, under the "millsite" provision of the 1872 Mining Law, 30 U.S.C. §42. In the 2003 Millsite Rule, Interior reversed its previous policy and legal orders, which had limited the amount of allowable nonmineral lands that could be validly claimed, used, occupied, and patented under the Mining Law.

This has important ramifications across the West, as the federal government's authority and regulatory discretion over mining operations, and the ability of mining interests to patent and privatize these lands, depends greatly on whether or not a millsite claimant has a statutory right to conduct its operations on, and privatize, its millsite claims. The operators of modern open-pit mining operations seek to obtain property rights in these millsite claims, which are used primarily for the permanent dumping of waste and construction of chemical leaching facilities, each holding hundreds of millions of tons of rock, covering thousands of acres at a mine site.

The prevailing Interior Department legal interpretation of §42, prior to the 2003 Rule, held that the number and acreage of allowable millsite claims was limited to five acres of millsite claims (usually one claim up to five acres) for every twenty acres of mining claims (usually one claim up to twenty acres) to be used at a mine site or as part of an application to patent and privatize the mining and millsite claims. As enacted in 1872, §42 restricted the total amount of "nonmineral" public lands on which millsite claimants could assert a statutory right of occupation and

use, and the right to obtain a fee simple patent – recognizing the other congressionally-encouraged uses of nonmineral lands in the West at the time.

In contrast, the 2003 Rule allows claimants to file as many 5-acre millsite claims as needed to support mining operations, with the accompanying statutory right to develop and permanently occupy, and potentially patent, these lands at the expense of other beneficial public uses of these lands and federal agency discretion over the operations.

The Millsite Provision of the 1872 Mining Law.

The Mining Law permits a person to locate (stake) a mining claim and extract minerals on public lands shown to contain "valuable minerals." 30 U.S.C. §22. In association with use of that mineralized mining claim, the Law also allows the filing of a "millsite" claim on "nonmineral" lands to support development of that mining claim. §42.

Section 42, the only provision in the Mining Law dealing with nonmineral land and millsites, provides, in relevant part: "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 non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode." §42(a). "[N]o [millsite] location … of such nonadjacent land shall exceed five acres." *Id.* A similar provision was added in 1960 to allow placer mining claimants to file a

millsite claim associated with each placer mining claim. §42(b).[1]

The Interior Department Confirms Section 42's Limits in 1997.

Beginning in 1993, the Interior Department began a comprehensive review of mining operations and patent applications and the increasing use of millsites for large waste and processing operations at open-pit mines. As a result, in 1997 the Department's Solicitor, with concurrence by the Secretary of the Interior, confirmed Interior's interpretation of §42, which was binding upon the agency's review of mining and patent applications across the West. Memorandum M-36988, "Limitations on Patenting Millsites Under the Mining Law of 1872," November 12, 1997 ("1997 Millsite Opinion"). JA___.

The 1997 Millsite Opinion held in relevant part:

> **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**.… In addition, the Bureau [BLM] should not approve plans of operation which rely on a greater number of millsites than the number of associated [mining] claims being developed unless the use of additional lands is obtained through other means.

[1] Although the language of the Mining Law is geared towards a claimant's ability to eventually seek a fee simple patent for the claims, the rights and limitations contained in the Law also govern the federal land agencies' regulatory authority and oversight of mining operations. *See Mineral Policy Center v. Norton*, 292 F.Supp.2d 30, 32-36 and 46-51 (D.D.C. 2003)(discussing Interior's authority). While there is currently a temporary moratorium on new patent applications, it must be renewed each year by Congress. Thus, by establishing valid rights in vast millsite acreages, the 2003 Rule not only grants statutory rights to claimants to use and permanently occupy thousands of acres of nonmineralized lands at a mine site, it could also result in the privatization of those lands. The price for a patent of a millsite claim, $5/acre, has not changed since 1872. 30 U.S.C. §29.

Id. at 2, JA____(emphasis added).

Interior's interpretation of §42 has important ramifications across the West. If the majority of the millsite claims at a modern mine were considered invalid because they exceed the strict limits in §42 (as set out in the 1997 Opinion), mining interests would not have a statutory right to patent, or permanently occupy, those lands with large-scale facilities such as waste dumps. Rather, the federal land agencies would have much greater discretion over how to manage these lands and protect and encourage other, nonmineral, public land resources such as energy development, hunting and fishing, watershed protection, wildlife, historic sites, and recreation.

As a result, the 1997 Opinion generated controversy regarding its application to mining in the West. Congress struck a balance by prohibiting application of the 1997 Opinion only for fiscal years 2000 and 2001, to existing patent applications and to mining plans submitted before November 7, 1997, or that BLM approved before November 1999. Pub. L. No. 106-113, §337. Under this compromise, Congress acceded to the application of the 1997 Opinion to future operations and took no legal position regarding the 1997 Opinion.

In 1999, Interior proposed a set of regulations streamlining and affirming Interior's existing policy on numerous issues related to mining and millsite claims. *See* "Location, Recording, and Maintenance of Mining Claims or Sites," 64

Fed.Reg. 47023-47046 (August 27, 1999)("1999 Proposed Rule"). Regarding the number and acreage of millsites that may be legally claimed and associated with proposed mining operations – the central issue in this case – the Proposed Rule confirmed the existing Interior millsite policy and directives that had been detailed in the 1997 Millsite Opinion:

> In accordance with the Mining Law, **this rule proposes to make clear that you may not locate more than an aggregate of 5 acres of mill site land for each associated placer or lode mining claim.** The provision allowing a maximum of 5 acres of mill site land for each lode or placer mining claim held is contained in 30 U.S.C. 42…. This requirement was recently reviewed and Solicitor's opinion M-36988 reaffirmed it on November 7, 1997.

64 Fed.Reg. 47028 (emphasis added).

The 1999 Proposed Rule would codify these existing millsite requirements at 43 CFR §3832.32:

> You may locate more than one mill site, so long as you do not locate more than an aggregate of 5 acres of mill site land for each 20-acre parcel of patented or unpatented place or lode mining claims associated with that mill site land, regardless of the number of lode or placer claims located in the 20-acre parcel.

64 Fed.Reg. 47037. The 1999 Proposed Rule thus "reaffirmed" and "made clear" existing Department legal interpretation and policy regarding §42, as stated in the 1997 Opinion. 64 Fed.Reg. 47028. "[T]his rule does not substantially change BLM's overall management objectives or environmental compliance requirements." *Id*. 47030.

The Interior Department Reverses Itself in 2003.

After the change in administrations in 2001, the new Deputy Solicitor and Secretary of the Interior issued an Opinion which reversed the legal findings contained in the 1997 Millsite Opinion and the 1999 Proposed Rule. M-37010, "Mill Site Location and Patenting Under the 1872 Mining Law" (October 8, 2003)("2003 Millsite Opinion"). JA_____

The 2003 Opinion eliminated the statutory link between mining claims and the number and acreage of millsite claims. It stated that a mining claimant may now locate/claim as many millsite claims, covering as many acres of nonmineralized lands as needed, to support a proposed mining operation, creating statutory rights to the use and occupation, and potential patenting, of these public lands.

Roughly two weeks later, and without any prior public notice that the agency was reversing its millsite policy, Interior issued a new regulation, the 2003 Millsite Rule, which codified the 2003 Opinion's new interpretation of the Mining Law. 68 Fed.Reg. 61046-61081 (Oct. 24, 2003). The 2003 Rule reversed Interior's previous (1997 and 1999) interpretation of §42. 68 Fed.Reg. 61054-55.

> How much land may I include in my mill site?
> The maximum size of an individual mill site is 5 acres. You may locate more than one mill site per mining claim if you use each site for at least one of the purposes described in §3832.34 of this part.

Id., 61070-71; codified at 43 C.F.R. §3832.32.

In other words, mining claimants were now free to claim, use, occupy, and

potentially patent, as much nonmineral land as they needed for waste dumping, chemical processing facilities, and other operations, pursuant to a statutory right – largely eliminating the federal agencies' discretion over these permanent uses and occupations of public lands.

As compared to Interior's Proposed Rule in 1999, which proposed to codify the then-existing millsite policy detailed in the 1997 Opinion, the 2003 Millsite Opinion and Rule reversed Interior's millsite policy. The public was unaware that this shift was being contemplated, as there was no language in the 1999 Proposed Rule even implying that the then-current millsite policy was being considered for reversal. 64 Fed.Reg. 47023-47046.

In issuing the 2003 Millsite Rule, Interior "conducted an environmental assessment and have [has] concluded that this rule would not have a significant impact on the quality of the human environment under [NEPA], and therefore an Environmental Impact Statement is not required." 68 Fed.Reg. 61063. Yet this "environmental assessment" was never submitted for public review and ignored the very real environmental impacts that implementing the 2003 Rule will have on public land in the West.

History and Interpretation of the Millsite Provision.

Because this case centers on Congress' intent in enacting the 1872 Mining Law, especially §42, this Court's review necessarily focuses on the laws and

policies governing the western public lands at that time. "[P]ublic land statutes should be interpreted in light of the condition of the country when the acts were passed." *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 875 (1999).

The Mining Law was enacted in the midst of the nation's rapid post-Civil War westward expansion. Competition for use and acquisition of property rights in nonmineral western public lands for farming, ranching, homesteading, railroads, and mining, was fierce. The constraints on the allowable millsite acreage in §42, limiting the amount of nonmineral land that could be patented or dedicated solely for mining purposes, recognized these other equally-valuable uses of the nonmineralized western public lands.

After the initial gold rushes of instream and surface "placer" mining starting in California in 1848, western mining by 1872 focused on extracting high-grade underground "lode" deposits of gold, silver, and other valuable metals. What little ore processing that was needed back then was often done far from the actual mine tunnels in off-site smelters and other refining facilities. There was little need for additional lands beyond the basic 20-acre mining claim, or its associated 5-acre millsite, let alone the large tracts used today for processing and waste disposal.

As noted by the definitive legal study of the Mining Law prepared for Congress in 1970: "The typical mine then [in 1872] was a high-grade lode or vein deposit from which ore was removed by underground mining. The surface plant

was usually relatively small, and the surface of the mining claims together with the incident mill sites adequately served the needs of the mines for plant facilities and waste disposal areas." Twitty, Sievwright & Mills, "*Nonfuel Mineral Resources of the Public Lands: A Study Prepared for the Public Land Law Review Commission*," (Dec. 1970), at 1047-48 (excerpts in Addendum).

This understanding, that there was little need for large tracts of land to handle waste, processing and other non-extraction activities, was embodied in §42 when Congress provided only limited nonmineral acreage for such activities. Section 42 limits each millsite claim to a maximum of five acres, compared to a maximum of approximately twenty acres for mining claims.

Early on, mining scholars and lawyers noted this limitation. Curtis Lindley, a preeminent authority on the Mining Law in the late 19th and early 20th Centuries, wrote in his authoritative treatise that the holder of a mining claim "may select more than one tract [for a millsite] **if** the aggregate does not exceed five acres." Lindley, "*A Treatise on the American Law Related to Mines and Mineral Lands*," at 1175 (3d edition, 1914)(excerpts in Addendum)(emphasis added).

Professor Lindley addressed the central question in this case, finding that §42 only entitles the holder of a mining claim to up to five acres for a millsite for use in support of that one mining claim. Allowing the patenting and permanent occupation of additional nonmineral lands was not contemplated:

> With reference to the number of millsites one may locate in connection with the ownership of a number of lode [mining] claims, the popular impression for a long time obtained that **for *each* lode claim … the lode claimant was entitled to *a* millsite**, and it is quite common to find a series of five-acre tracts located side by side as **millsites equal in number to the [lode mining] claims owned**.

Id. (emphasis added).

With these limitations on millsite claims, the Mining Law served its purpose well based on the needs of the mining industry in 1872. As stated in a 1979 study by the Congressional Office of Technology Assessment: "These limitations were probably not too restrictive in 1872 when mining operations were small[er and] involved high-grade deposits." Office of Technology Assessment, *Management of Fuel and NonFuel Minerals in Federal Land*, at 127 (1979)(excerpts in Addendum).

However, modern mining bears little resemblance to the type of mining and processing done in 1872. Today, mining often utilizes vast amounts of land, resources, equipment, and capital. Modern gold and copper operations, for example, involve the excavation of open pits hundreds or thousands of feet deep, covering hundreds or thousands of acres.

Most critically for this case and the millsite provision, these operations require many more times that amount of land for the disposal of the correspondingly immense amount of uneconomic waste rock that is removed from the earth to gain access to the ore deposit and for the processing of the low-grade minerals (usually in large chemical-leach "heap" facilities). As a result, modern open pit mines need

vastly more land for these ancillary facilities than for the actual mine pit. Twitty, at 1047-48.

As modern mines began to proliferate across the West, there was a growing recognition that the strictly limited acreage available for millsites in the Mining Law was not adequate. "Such mining operations 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**." *Id*. at 1048 (emphasis added).

> [T]he acquisition of adjacent nonmineral land from the United States for necessary facilities is now frequently extremely difficult because the laws do not provide a satisfactory way to make these acquisitions. Small areas may be acquired as mill sites….

Id. "Under the first clause of subsection (a) of [§42], each lode claimant is allowed, in addition to his lode claim, five acres of land to be used for mining or milling purposes." *Id*. at 323.

The 1970 Public Land Law Review Commission Report to Congress confirmed that §42 strictly limited the allowable millsite acreages. *One Third of the Nation's Land: A Report to the President and to the Congress by the Public Land Law Review Commission* (1970)("*PLLRC Report*")(excerpts in Addendum). The Report was commissioned by Congress in 1964 because "it is necessary to have a comprehensive review of those laws and the rules and regulations promulgated thereunder and to determine whether and to what extent revisions thereof are

necessary." Pub. L. 88-606, §2, 78 Stat. 982. The bipartisan Commission was comprised of the leading Senators and Members of Congress from the Western states, as well as Presidential appointees.

The Supreme Court and the D.C. Circuit have recognized the *PLLRC Report* as a definitive source of authority on the interpretation of public land and mining laws – especially those that have not changed since their enactment (such as the Mining Law). *See Lujan v. NWF*, 497 U.S. 871, 876-77 (1990); *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 754, n. 10 (D.C. Cir. 2007); *Wilderness Society v. Morton*, 479 F.2d 842, 881 (D.C. Cir. 1973).

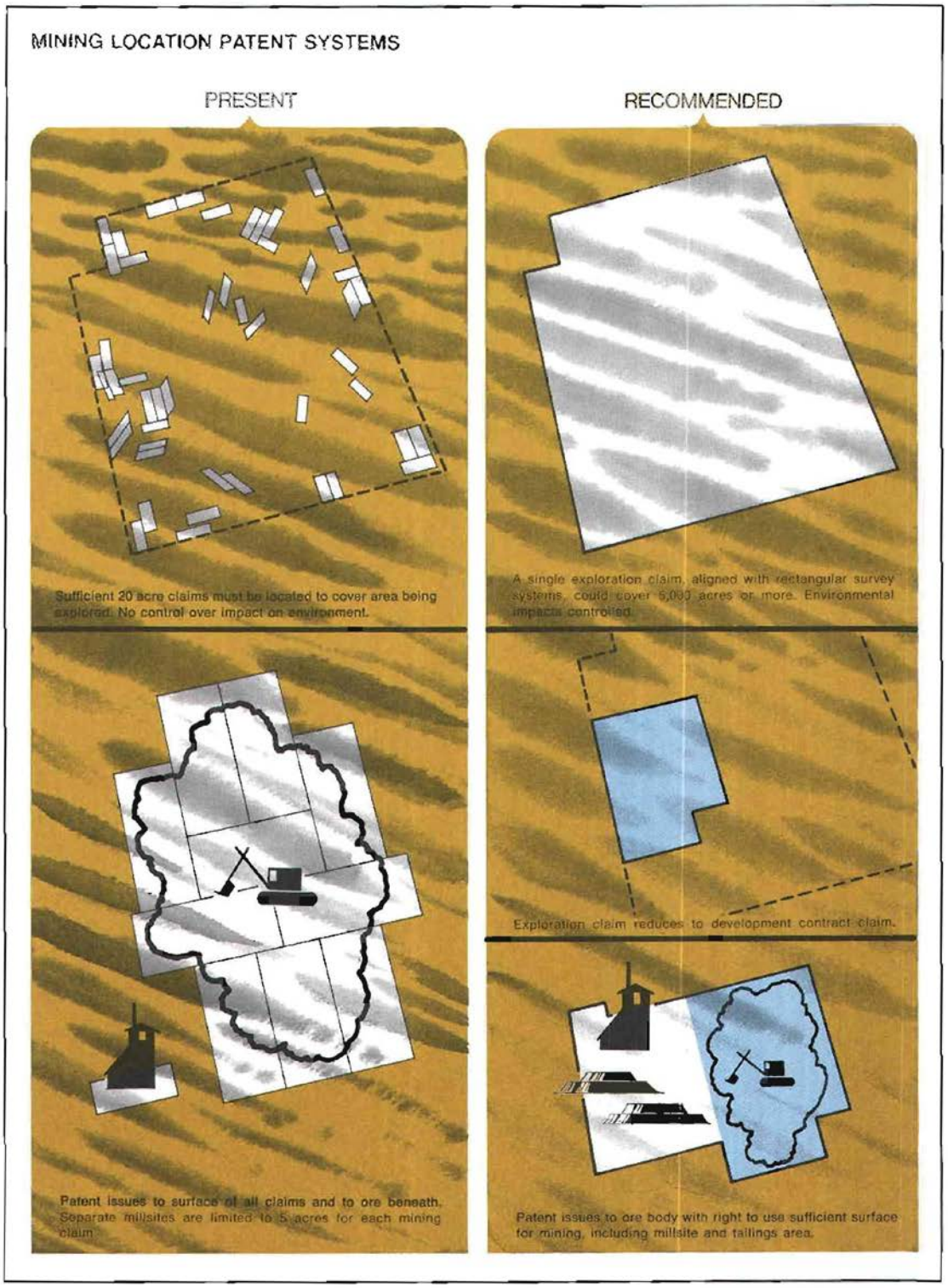
The *PLLRC Report* analyzed §42 and confirmed that it did **not** allow for the expansive interpretation asserted by the 2003 Millsite Opinion and Rule. It found that the Mining Law presented **"weaknesses from the standpoint of the using [mining] industry in that there is … (3) *inadequate provision for the acquisition of land for related purposes such as locating a mill.*"** *Report* at 124 (emphasis added). This is the exact opposite of what the 2003 Millsite Opinion and Rule assert (i.e., that §42 grants a mining company as much millsite land as it needs for processing, dumping, etc. and that the Mining Law required no change to accommodate these expansive acreage needs).

In order to remedy this problem, the *PLLRC Report* recommended that §42 be substantively revised to accommodate the growing need for larger millsite

acreages. The *Report* proposed that "Development and production rights . . . should embrace use of enough land to meet all reasonable requirements for a mineral operation, such as settling ponds, mills, tailings deposits, etc." *Report* at 128. This was because, as found by the Public Land Law Commission: "**Present law allows only 5 acres for each millsite in addition to the actual [mining] claim acreages, and this clearly has been inadequate in many cases**." *Id*. (emphasis added). That was the same finding detailed in Interior's 1997 Millsite Opinion.

Further highlighting the existing law and its problems for the modern mining industry, the *PLLRC Report* included a full-page diagram explaining how "Present" law only allowed one 5-acre millsite for each mining claim – the same interpretation as the 1997 Opinion and as Earthworks asserts in this case. *Report* at 131 (shown below). The diagram depicted how large-scale modern mining, covering multiple mining claims to profitably extract low grade deposits, was expressly limited by the millsite provision, stating that: **"Separate millsites are limited to 5 acres for each mining claim."** *Id*. (emphasis added).

That diagram offered the recommended congressional solution: expand the number and acreage of allowable millsite lands so the operator could obtain the "right to use sufficient surface for mining, including millsite and tailings area." *Id*. That was essentially what the 2003 Rule did, but critically for this case, without the needed congressional revision of the Mining Law.


MINING LOCATION PATENT SYSTEMS
PRESENT
RECOMMENDED
Sufficient 20 acre claims must be located to cover area being explored. No control over impact on environment.
A single exploration claim, aligned with rectangular survey systems, could cover 5,000 acres or more. Environmental impacts controlled.
Exploration claim reduces to development contract claim.
Patent issues to surface of all claims and to ore beneath. Separate millsites are limited to 5 acres for each mining claim.
Patent issues to ore body with right to use sufficient surface for mining, including millsite and tailings area.

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Congress did not revise §42 despite the urging of the *PLLRC Report* (although many of the *Report's* other recommendations formed the foundation for FLPMA's substantial modernization of public land law in 1976). In 1979, the Congressional Office of Technology Assessment reiterated the existing limitations in §42, finding that "it is highly doubtful that [millsites] could satisfy all the demands for surface space. **There could be at most as many millsites as there are mining claims**, and 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." *Office of Technology Assessment, Management of Fuel and Nonfuel Minerals in Federal Land*, at 127 (April 1979)(emphasis added)(excerpts in Addendum).

Expanded Use of Millsites Under the 2003 Rule Has Important Ramifications for the Western Public Lands.

Implementation of the 2003 Millsite Rule significantly impacts economic, environmental, and other resources in the West. Under FLPMA, BLM has broad discretion to regulate or deny mining operations proposed on lands not covered by valid millsite claims. "Before an operator perfects her claim, because there are no rights under the Mining Law that must be respected, BLM has wide discretion in deciding whether to approve or disapprove of a miner's proposed plan of operations." *Mineral Policy Center v. Norton*, 292 F.Supp.2d 30, 48 (D.D.C. 2003).

This broad discretion to protect nonmineral resources, however, is limited if it

would "impair rights of any locators or claims under that Act [Mining Law]." FLPMA, 43 U.S.C. §1732(b). Thus, whether or not a millsite claimant/locator has valid rights under the Mining Law is a critical factor in delineating the federal government's authority over mining operations.

Interior, and its Bureau of Land Management ("BLM") which regulates mining operations, is directed by FLPMA to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" of the public's land. 43 U.S.C. §1701(a)(8). FLPMA requires that Interior "manage the public lands under the principles of multiple use and sustained yield…." 43 U.S.C. §1732(a). Under this "multiple use" mandate, BLM can only approve activities that "best meet the present and future needs of the American people." 43 U.S.C. §1702(c). FLPMA also requires "management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources…." *Id.*

But the 2003 Millsite Rule, by granting unlimited acreages for waste dumping and other uses on millsite claims, de-facto declares that all nonmineralized millsite claims used for mining-related purposes to be valid – granting statutory rights not allowed by the statute. The result is the elimination of the agencies' lawful discretion under FLPMA over mining that threatens other valuable public resources,

with the associated increase in the size and number of mining operations and related environmental impacts.

Such operations literally reduce mountains to massive open pits and create waste rock dumps, tailings piles, and processing heaps hundreds of feet tall covering thousands of acres each. Many of these open pits—some over a mile wide—must constantly dewater groundwater aquifers by pumping, a process that severely disrupts hydrology over thousands of acres. These operations excavate and crush millions of tons of rock, then treat the ore with toxic chemicals such as cyanide and sulfuric acid. *See, e.g.* Declaration of John Hadder submitted with Plaintiffs' summary judgment motion (describing various scientific reports showing the scale and impacts from mining, especially large open pit mines subject to the 2003 Rule). JA____.

The U.S. EPA has detailed some the resulting environmental impacts:

> surface mines generate dust, large piles of waste rock, and large, usually permanent holes in the earth's surface. The corresponding amount of waste rock and tailings being mined and deposited is increasing as a result of these large-scale mining operations…. Such large-scale operations cause a significant increase in exposure of ore constituents to precipitation, resulting in the leaching of hazardous substances to ground and surface waters, and to the wind, resulting in air emissions.

82 Fed.Reg. 3388, 3472 (January 11, 2017). The metals (hardrock) mining industry is the nation's single largest source of toxic waste. According to the EPA's 2019 Toxic Release Inventory, the metal mining sector accounted for 41 percent of the

3.4 billion pounds of toxic substances released into the environment that year. U.S. EPA, *Toxics Release Inventory (TRI) National Analysis, 2019 TRI Factsheet: Industry sector: Metal Mining*, (2020). https://enviro.epa.gov/triexplorer/industry.html?pYear=2019&pLoc=2122&pParent=TRI&pDataSet=TRIQ1 (viewed March 31, 2023). As the D.C. district court has recognized:

> Mining activity emits vast quantities of toxic chemicals, including mercury, hydrogen, cyanide gas, arsenic, and heavy metals. The emission of such chemicals affects water quality, vegetation, wildlife, soil, air purity, and cultural resources. The emissions are such that the hardrock/metal mining industry was recently ranked the nation's leading emitter of toxic pollution.

Mineral Policy Center, 292 F.Supp.2d at 33.

Despite these significant, often permanent, on-the-ground implications of removing Interior's discretion to protect public resources by creating statutory rights for expansive millsite use, the EA prepared in support of the 2003 Millsite Rule contained no environmental analysis (except for a brief discussion of the minimal impacts from placing claim stakes in the ground). JA____.

SUMMARY OF ARGUMENT

The 2003 Millsite Rule illegally reversed and overturned the Interior Department's previous interpretation of the millsite provision of the 1872 Mining Law, 30 U.S.C. §42. That provision sets strict limitations on the number and allowable acreages of millsite claims that can be patented, or used and permanently

occupied as a statutory right by mining operations. Based on the plain language in the Mining Law, embodying congressional intent in 1872, the previously-existing Interior Department interpretation held that a millsite claimant was limited to claiming up to 5 acres of nonmineral land for millsite use in association with each valid mining claim (roughly 20 acres) to be used at a proposed mining operation.

In the 2003 Millsite Rule, however, Interior reversed itself and stated that a claimant had a statutory right to locate/claim and patent as many millsite claims and acres as the claimant needed for mining operations, regardless of the number of mining claims at the site. By greatly expanding the number and acreage of millsite claims that can be claimed and developed at a mine site in excess of what the Mining Law allows, the 2003 Millsite Rule illegally created statutory rights against the United States, and severely limited the regulatory authority of the federal land agencies to protect the environment and balance non-mining resources of the public lands as required by FLPMA.

In promulgating the 2003 Millsite Rule, Interior also failed to comply with NEPA, as it failed to conduct the proper environmental analysis, and failed to provide for any public review of the environmental impacts that will occur on public land as a result of implementing the 2003 Rule. Interior issued an extremely truncated EA of a few pages, which was never submitted, even in draft form, for public review.

The EA only mentioned the minimal impact from putting stakes in the ground during the millsite claiming process, completely ignoring the major ramifications from allowing large acreages of public land to be claimed, used, occupied and potentially patented as now-valid millsites – at the expense of other uses and the agency's discretion to protect other resources, as compared with the limited allowances under Interior's previous interpretation of §42.

Lastly, similar to the failure to subject the EA to any public review, the 2003 Millsite Rule was issued without the required public notice and comment procedures of the APA. The 2003 Rule reversed the then-existing Interior millsite policy as detailed in the 1999 Proposed Rule. No public notice was given of this switch, and the public was never given an opportunity to respond to or comment on Interior's new legal interpretation and policy (and its significant environmental impacts), in violation of the APA. 5 U.S.C. §553.

ARGUMENT

I. Standard of Review.

"The court reviews de novo the district court's denial of summary judgment and its statutory interpretation." *United States for Use and Benefit of American Civil Construction v. Hirani Engineering & Land Surveying*, 26 F.4th 952, 956 (D.C. Circ. 2022). Pursuant to the APA, a federal court "shall … hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious,

an abuse of discretion, or otherwise not in accordance with law; [or] … (D) without observance of procedures required by law." 5 U.S.C. §706(2). "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984).

II. The 2003 Millsite Rule Violates the Mining Law and FLPMA.

A. The 1997 Millsite Opinion Correctly Applied the Language of Section 42.

Interior's 1997 Millsite Opinion included a detailed analysis of §42, as enacted in 1872 and as interpreted and applied in the early years of its implementation, correctly concluding that the number of millsite claims and acreages is tied to the number and size of the mining claims associated with the millsites. "Nothing in the statutory language suggests that the five-acre restriction on millsites may be avoided by locating multiple millsites in connection with a single mining claim." 1997 Opinion at 5, JA____.

Relying on the specific language of §42, the 1997 Opinion appropriately focused on the singular nature of use of a millsite in connection with a singular lode (and later placer) mining claim. "The statute imposes a limitation that only a single five-acre millsite may be claimed in connection with each mining claim." 1997 Opinion at 4-5, JA ____. The Solicitor and Secretary focused on the language connecting each, i.e., "such," mining claim with each, i.e., "such," millsite claim:

> With regard to lode claims, subsection (a) states that "such" land may be "embraced and included in" the application for the vein or lode with which it is associated. 30 U.S.C. §42(a). Further, the subsection requires that "no location" of "such" land shall exceed five acres.

Id. at 5, JA____.

Based on that language, the 1997 Opinion rightly concluded that "[t]he use of the word 'such' indicates that the same parcel of land that meets the other requirements for a millsite claim is the land that is being limited to a five-acre area." *Id*. The Opinion then discussed the similar language in §42(b), the 1960 congressional amendment, linking "such" millsite with "such" placer claim. "Thus, the statute maintains the link between mining and millsite claims and the five-acre limitation with regard to placer claims as well." *Id*.[2]

The 1997 Opinion further noted that allowing an unlimited number of millsites tied to a mining claim (or group of claims) – the position urged by the mining industry and later taken in the 2003 Millsite Rule – would nullify the congressional limitation of 5 acres. "Construing the statute to permit multiple millsites without regard to the aggregate size limit would vitiate the five-acre statutory limit on the size of millsites." *Id*.

[2] Both the 1997 and 2003 Millsite Opinions assumed that a specific millsite claim satisfied the other requirements in §42 – that the claim (up to 5 acres each) be on nonmineral land, not contiguous to the lode, and used for mining and milling purposes associated with developing a specific valid mining claim. Thus, the difference between the Opinions centers on the number of millsite claims and total acreages a mining claimant may assert as a statutory right under §42.

B. Congressional Intent in 1872 Controls, Not the Expediencies of Modern Mining.

The critical inquiry in this case focuses on Congress' intent in enacting the millsite provision in 1872. "In discerning congressional intent, we owe no deference to the agency's views." *Martini v. FNMA*, 178 F.3d 1336, 1342 (D.C. Cir. 1999). This Court's review focuses on the situation in 1872 and cannot be based on the wishes of modern mining operations for rights to unlimited acreages for millsite uses. *See Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 611 (1978) (determination of what constituted a "valuable mineral" based on intent of the "1872 Congress").

As the Supreme Court recently noted, government policies and legal interpretations must comport with the statutory language and intention as written at the time. "Nor may a court favor contemporaneous or later practices *instead* of the laws Congress passed." *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2468 (2020)(emphasis in original). Whatever "practical advantages" government policies may afford modern circumstances cannot control if they "ignore the written law." *Id*. at 2474.

Thus, the question is whether the 1872 Congress intended to give millsite claimants unlimited amounts of "nonmineral" public land for milling purposes (the Department's 2003 view), or whether §42 limits the amount of nonmineral public land that a mining claimant could claim as a statutory right, tying the acreage and number of millsite claims to the number of mining claims used in that mining

operation. The latter was the Department's previous policy as detailed in the 1997 Opinion (and Proposed Rule in 1999).

This was because, as detailed *supra*, based on the prevailing situation in the western mining regions in 1872, more than 5 acres per mining claim was **not** needed to support extraction of minerals from mining claims, and Congress was mindful of, and encouraging, equally-important and competing uses of nonmineral public land.

The 2003 Millsite Opinion and Rule contravene congressional intent, based on a perceived modern need for statutory rights to unlimited millsite acreages that did not exist in 1872. "[P]ublic land statutes should be interpreted in light of the condition of the country when the acts were passed." *Amoco Prod. Co.*, 526 U.S. at 875.

The 2003 Millsite Opinion and Rule are based on the assumption that because a claimant could file as many mining claims containing the discovery of "valuable minerals" in those lands, the same must hold true for millsites covering "nonmineral" land. 2003 Opinion at 3, JA____ . The 2003 Rule states that this interpretation is "[c]onsistent with Congress's goal in the Mining Law to promote mineral development on the public lands," and that "Interior consistently followed this practice and interpretation for at least 50 years immediately preceding the 1997 Opinion." 68 Fed.Reg. 61054. As noted above, however, what Interior allows today, or 50 years ago, is not determinative. It is what Congress intended in 1872.

C. The 2003 Millsite Rule Ignores the Congressional Distinction in 1872 Between Mining Claims on Mineral Lands and Millsite Claims on Nonmineral Land.

The 2003 Millsite Opinion and Rule are based on the view that Congress must have intended to allow unlimited lands for millsite activities on nonmineral land in 1872 (limited primarily only by the requirement that the uses of nonmineral millsite claims be reasonably related to mining/processing) because the general aim of the Law was to "promote mining." Yet this ignores what was happening in the West at the time. While it is true that the Mining Law promoted mining, it was just one of many competing laws encouraging, promoting, and sanctioning development and settlement of the West in 1872, particularly for uses of nonmineral lands.

Unlike lands containing valuable minerals, nonmineralized public land had many other equally important, contending, and congressionally-encouraged uses. Therefore, limiting a millsite claimant to five acres of nonmineral land for each valid mining claims is consistent with congressional intent at the time for efficiently and fairly allocating uses and rights to nonmineral land across the West.

Although a congressional purpose of the Mining Law was to encourage mining, Congress sought to achieve this goal by granting broad rights to *mineralized* land. 30 U.S.C. §21 ("In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."). *See* Act of July 4, 1866, ch. 166, §5, 14 Stat. 86 ("[I]n all cases lands valuable for mines of gold, silver,

quicksilver, or copper shall be reserved from sale."). *See also* 30 U.S.C. §22 (only lands containing "valuable mineral deposits" were "free and open to exploration and purchase, and the lands in which they are found to occupation and purchase.").

Congress clearly recognized the importance of other uses for *nonmineral* land, as evidenced by other land disposal legislation at the time:

> [M]ineral land was exempted from the homestead laws, from statutes granting lands to railroads, and from a statute granting land to states for agricultural colleges. If land was classified as mineral land, it could not be conveyed under these statutes.

Watt v. Western Nuclear, Inc., 462 U.S. 36, 47, n. 8 (1983)(citations omitted). "[I]t has been the practice of Congress to make a distinction between mineral lands and other lands, to deal with them along different lines, and to withhold mineral lands from disposal save under laws specifically including them." *U.S. v. Sweet*, 245 U.S. 563, 567 (1918).

Although mining activities were given precedence over other uses of land, this hierarchy only applied to **mineralized** land. *See Watt*, 462 U.S. at 47-48. Land that was not mineralized was open for other equally important uses. *Id*. "With respect to land deemed mineral in character, the mining laws provided incentives for the discovery and exploitation of minerals, but the land could not be disposed of under the major land-grant statutes. With respect to land deemed non-mineral in character, the land-grant statutes provided incentives for parties who wished to use the land for the purposes specified in those statutes." *Id*.

In other words, Congress in 1872 recognized that other equally-important users of public land, such as farmers, ranchers, railroads, and settlers had rights to nonmineral land. Allowing mining companies to claim and acquire essentially unlimited nonmineral lands for millsite use (as asserted by the 2003 Millsite Opinion and Rule) does not square with the prevailing congressional intent. Indeed, unlimited use of nonmineral public lands for millsite purposes would create uncertainty and risk for claimants and beneficiaries under the other land grant statutes and undermine Congress's overarching scheme to allocate public lands based on their mineral character and the uses to which they would be put.

D. The 2003 Millsite Rule Contradicts the Language of Section 42, Longstanding Rulings and Analysis, Congressional Reports, and Congressional Action on the Mining Law.

The 1997 Opinion was based on the language of the statute, congressional intent in 1872, as well as Interior Department rulings handed down in the early years of the Mining Law, that held that millsite claims were limited to five acres per mineral claim. 1997 Opinion at 8-11 (discussing cases), JA____. For example, *J.B. Hoggin*, 2 L.D. 755 (1884), concluded that, "[t]he Secretary made it clear, therefore, that a single mining claim could support multiple millsites only where the combined area of the millsites was five acres or less." 1997 Opinion at 9, JA____. *See also* Lindley, at 1175 (citing *Hoggin* with approval). That makes sense, and matches the prevailing conditions at underground mines at the time. *See* discussion *supra* on

mining practices in the 1860s and early 1870s; Twitty Legal Study, at 323-330 (discussing early Interior cases and Secretarial decisions).

These 19th Century and early rulings carry much greater weight than the more recent agency statements and actions that were relied on by the 2003 Opinion and Rule. "Particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

The 2003 Millsite Opinion attempted to refute these early cases, asserting that prior to 1997, it was Interior's "administrative practice and interpretation" that the Mining Law allows miners to claim multiple 5-acre mill sites in connection with a single mining claim. 2003 Opinion at 2, JA____. The 2003 Opinion reaches this conclusion only by ignoring clear authority and powerful historical evidence to the contrary, and by inappropriately relying on more recent Interior practices.

As correctly noted by the 1997 Opinion, the fact that some BLM offices were erroneously allowing excess millsites does not make it legal. "BLM's apparently recent ad hoc changes in practice to permit patenting of multiple millsites" violated the Mining Law, BLM regulations, and were never subject to Solicitor or Secretarial review. 1997 Opinion at 15 (emphasis in original), JA___.

The only time Congress amended the millsite provision was in 1960, when it extended the ability to claim and patent a millsite in association with a placer as well as a lode claim. "As originally enacted, the statute did not permit the location of a mill site in connection with a placer claim. Under the 1960 amendment, each placer claimant is allowed, in addition to his placer claim, five acres of land to be used and occupied for mining, milling, processing, and beneficiation purposes, or other operations in connection with his placer claim." Twitty, at 330 (discussing the addition of 30 U.S.C. §42(b)).

Congress rejected the original bill's proposal to allow a millsite location of "ten acres for each individual claimant" in connection with a placer claim.

> [T]he word "ten" was stricken and the word "five" inserted in lieu thereof. The purpose of this amendment is to restrict the area of ***a*** millsite in conjunction with ***a*** placer claim to 5 acres of land to make it conform with the allowable millsite acreage for lode claims which has been the statutory requirement since 1872….
>
> [T]he words "for each individual claimant" were stricken ***so as to impose a limit of one 5-acre millsite in any individual case preventing the location of a series of 5-acre millsites in cases where a single claim*** is jointly owned by several persons….
>
> In essence, S. 2033 merely grants to holders of placer claims the same rights to locate ***a*** 5-acre millsite as has been the case since 1872 in respect to holders of lode claims, and the committee unanimously urges enactment.

S.Rep.No. 904, 86th Cong., 1st Sess., at 2 (emphasis added), quoted in 1997 Opinion at 8, JA_____.

This comports with the provision for lode claims where "such" millsite land

may be included in a patent application for "such [lode] claim." 30 U.S.C. §42(a). "This legislative history demonstrates that Congress understood both the amendment in 1959 and the existing Mining Law to permit location of only one five-acre millsite per mining claim." 1997 Opinion at 8, JA___.

Further, the 2003 Millsite Opinion largely ignored the position *the mining industry itself* had consistently taken for decades – that §42 constrained the amount of land that could be acquired for surface facilities. As modern mining operations needed more and more lands for waste and processing facilities, industry lawyers acknowledged that §42 was "inadequate" and "insufficient" to allow for the large acreages needed by mining operators for nonmineral millsite land for waste dumping and other facilities.

> One subject extremely important to the mining industry ... is suggested amendments to the public land laws ... to assure the operator of a mining property that he may acquire adequate surface rights for mine, mill and related facilities, for dumps and tailings . . . . **Existing laws, such as 30 U.S.C. §42 providing for mill sites, are inadequate.**

Twitty, "Amendments to the Mining Laws," 8 *Ariz. L. Rev.* 63, 73 n.15 (1966) (emphasis added)(Addendum).

The mining industry recognized that this limited amount of millsite acreage allowed in §42 was not enough to handle the large acreages of waste and chemical processing facilities needed at modern mining operations. In 1968, the American Mining Congress (the forerunner of Intervenor-Appellee National Mining

Association) urged Congress to amend the Mining Law to allow the unlimited use of millsites, as it stated to the Public Land Law Review Commission:

> When the mining laws were enacted in 1872, provision was made for the acquisition of five-acre millsites to be used for plant facilities on mining claims. The typical mine then was a high-grade lode or vein deposit from which ores were removed by underground mining. The surface plant was usually relatively small, and acquisition of five-acre millsites in addition to the surface of mining claims … adequately served the needs of the mines….
>
> Today, the situation is frequently different…. A mine having 500 acres of mining claims may, for example, require 5000 acres for surface plant facilities and waste disposal areas. **It is obvious that such activities may not be acquired through five-acre millsites**.

American Mining Congress, *The Mining Law and Public Lands*, at 29 (1968) (emphasis added), quoted in 1997 Opinion at 12, JA____.

Leading industry lawyers continued to stress the need to reform the Mining Law to eliminate the restrictions on millsite acreage. "[O]ne five-acre millsite can be acquired for each valid mining claim." Parr & Kimball, "Acquisition of Non-Mineral Land for Mine Related Purposes," *23 Rocky Mtn. Min. L. Inst.* 595, 641-42 (PDF p. 19)(1977)(Addendum)[3]. The authors specifically recognized that the limitations in §42 precluded the filing of millsites for most of the lands needed for modern large operations. "[I]f some 2,000 to 2,500 acres are needed for tailings ponds, dumps, and other mine-related uses, **the five acres permitted for each valid lode mining claim would be insufficient.**" *Id*. (emphasis added).

[3] Dale A. Kimball later became a Federal District Judge for the District of Utah.

In an attempt to bypass the statutory language and clear evidence of congressional intent, the 2003 Millsite Opinion relies heavily on caselaw acknowledging that multiple *mining* claims can be filed by a single claimant, despite the lack of any specific limitation on the number of mining claims on mineral land. From this, it assumes that this automatically meant that Congress intended to similarly allow an unlimited number of *millsite* claims for nonmineral land. But as detailed *supra*, that ignores the clear congressional distinction between allowing claimants to follow valuable mineral deposits (by staking additional mining claims), compared with the limitations on nonmineral land available for the equally-encouraged other uses of public land in 1872.

The 2002 Opinion relies on one alleged instance, from 1863, where someone "recorded a survey" for "a 272.72-acre claim" under Nevada territorial law for "milling purposes," citing a general history of the Comstock mining area in Nevada. 2003 Opinion at 17. JA___. There is no way to know anything about the facts of this claim, as neither the Federal Defendants nor the mining industry intervenors submitted any details into the record.

In any event, this contradicts the 2003 Opinion's acknowledgement that the need for large acreages of land for waste dumping and other ancillary uses to support the mining of low-grade deposits **first arose decades after 1872**: "Miners have been developing low-grade copper, lead, gold, and iron ore deposits since the

use of froth flotation began **in the early 20th Century**." 2003 Opinion at 20, n. 15 (emphasis added), JA____.

The assertion that Congress in 1872 granted mining claimants large tracts of nonmineral land for waste dumps and processing mills, when that need did not even yet exist – to the exclusion of the various other congressionally-sanctioned property interests and uses on these lands – contradicts the statutory language, congressional intent, and decades of analysis by Congress and the mining industry itself. These all acknowledged that §42 was insufficient to accommodate the changes in modern mining as it developed in the 20th Century.

Rather, the situation in those years refutes the argument that allowing an unlimited number of mining claims (so long as they contained "valuable" minerals) automatically translates into an unlimited number of "nonmineral" millsite acreages for each valid mining claim (so long as they support mining). As shown above, Congress distinguished between mineral and nonmineral land because Congress promoted the use of the latter for farms, ranches, railroads and townsites. Limiting a claimant's ability to assert absolute rights to, and to patent, nonmineral land is thus entirely consistent with Congress' overall approach to public land policy at the time.

Moreover, the 2003 Millsite Opinion ignored the conclusion of the congressional *PLLRC Report*, which highlighted the existing law and its problems for the modern mining industry desiring to obtain property and use rights for excess

millsite lands. *See PLLRC Report* at 131 (diagram depicted how large-scale modern mining, covering multiple mining claims to profitably extract low grade deposits, was expressly limited by the millsite provision, stating that: "Separate millsites are limited to 5 acres for each mining claim."). The *PLLRC Report* proposed its congressional solution: expand the number and acreage of allowable millsite lands so the operator could obtain the "right to use sufficient surface for mining, including millsite and tailings area." *Id*. But the 2003 Rule cannot, by changing the Department's interpretation of §42, give claimants more land when Congress chose not to.

Further, as detailed *supra*, the Congressional Office of Technology Assessment (OTA), a non-partisan research arm of Congress, confirmed that §42 only allows that "a separate millsite may be located for each lode or placer claim" (i.e., the same legal conclusion as the 1997 Opinion and *PLLRC Report*). JA ____. After discussing how the vast acreage needs of modern open pit mining were not contemplated in 1872, OTA determined that "Because the Mining Law does not adequately provide for land needed for surface facilities and uses, the miner must seek to obtain such land independently through purchases and exchanges." *Management of Fuel and Nonfuel Minerals in Federal Land*, at 127 (1979).

The 2003 Millsite Opinion dismisses these legal commentaries as "viewpoints expressed by lawyers in privately-published treatises and articles" that were

inconsistent with "the Department's prevalent practice and interpretation of the mill site provision." 2003 Millsite Opinion at n. 26, JA___. But the 2003 Opinion completely ignored the *PLLRC Report*, which remains one of the fundamental source documents in American public land law, as well as Congress' 1979 Report.

Overall, it is telling that if Interior's "prevalent practice" and §42 allowed the location of multiple millsites per mining claim, the congressional and industry authors would have had no reason to describe §42 as "inadequate," "insufficient," and an impediment to modern large-scale mining operations, and in need of reform. If the Mining Law already allowed operators to claim as many millsites as they needed, there would be no reason to amend the Mining Law to provide for more lands for surface facilities.

Yet instead of seeking congressional action to change §42 as recommended by the PLLRC, the congressional OTA Report, and the mining industry itself, Interior in 2003 simply reversed its 1997 interpretation in order to accommodate modern mining operations.

This unilaterally eliminated Interior's discretion under FLPMA to decide whether to allow thousands of acres of public lands – regardless of their other values and uses – to be permanently used for waste and tailings dumps and other large facilities. By erroneously interpreting §42, the agency abdicated its duties and discretion under FLPMA's public resource protection mandates noted above.

E. The District Court's Order Contradicts the Reasoning of Four Federal Courts.

Four other federal court decisions have addressed §42 since 1997, discussing the strict limitations on the millsite acreage available to modern open pit mines. In describing the scope of the various statutory rights under the Mining Law, the District of Columbia stated that a millsite claimant has "the right to locate up to five acres of nonmineral land for mill site use in association with **each** valid mining claim. 30 U.S.C. § 42." *Mineral Policy Center*, 292 F. Supp. 2d at 47 (emphasis added).

In 2019, the District of Arizona reached the same result after a comprehensive review of the Mining Law and the purported "rights" asserted by the claimant and federal agency. *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 409 F.Supp.3d 738, 763 (D. Ariz. 2019). That case involved a large open pit mining operation, the "Rosemont" mine, where the waste dumps were covered by mining claims. The court explained the various limitations on rights for claimants of mining claims and millsite claims. It noted that any rights to millsite claims under §42 are strictly limited and are directly tied to the number/acreage of mining claims proposed for use at a mining operation. "In the Mining Law of 1872, Congress anticipated that claimants would need more than the land directly above a deposit to extract minerals. *See* §§23, 42. Where Congress anticipated such use, it provided for such use. *See id.*" *Center for Biological Diversity*, 409 F.Supp.3d at 763.

The court then detailed the limitations under §42, where the claimant only "has the ability to patent up to 5 acres of non-contiguous, non-mineral land in conjunction with ***each*** valid mineral claim which can be up to 20 acres" – the same position stated in the 1997 Millsite Opinion. *Center for Biological Diversity*, at 763, n. 13 (emphasis added). As an example, the court explained that under §42, the claimant "has fee title to use 25 acres of separate non-mineral land to support extraction of [valuable minerals] from his 100 acres of mineral land (*see* §42, 23, 29)." *Id*. After discussing this strict statutory limitation in §42, the court stated that "[P]resent-day mining operations may exceed the rights granted, and limitations imposed, by the Mining Law of 1872." *Id*.

That decision was recently affirmed in *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 33 F.4th 1202 (9th Cir. 2022). The Circuit Court described the company's need to dispose of its waste, but stated that due to the Mining Law's millsite acreage limitations, "the amount of waste rock produced by modern pit mines is much greater than can typically be accommodated on the mill site land available to a mine operator." *Id*. at 1217. "Because the mill site land available to Rosemont does not serve its purpose as fully or as well as the land on which it has the mining claims at issue, Rosemont's proposed solution in its MPO [Mining Plan of Operations] is to dump its waste rock on those [mining] claims." *Id*.

This year, the federal district court in Nevada, in discussing the limits on the

use of mining claims, reiterated the limits on millsites under §42: "unfortunately for mining project proponents like Lithium Nevada, the statute limits mill sites to five acres, though regulations permit the potential authorization of the use of multiple mill sites. *See id.; see also* 30 U.S.C. §42(b). This is not enough land for modern mining projects like the one Lithium Nevada is pursuing here." *Bartell Ranch v. McCullough*, 2023 WL1782343, *6, n. 10 (D. Nev. 2023). In noting that these limits place restrictions on mining development, however, the court stated that the solution was to amend the Mining Law in Congress: "as the Rosemont court explained, that is a problem with the statute best fixed by Congress. *See* 33 F.4th at 1224." *Id*.

The district court's decision on appeal here noted that the Arizona district court's discussion of the limits on aggregate millsite acres in Section 42 was background and not central to that case, as the company had only filed mining claims. Order at 22, n. 12, JA ____. Yet, these Ninth Circuit, and District of Columbia, Arizona, and Nevada courts all discussed the same situation as exists here — the statutory limits on rights to use excess millsite claims for waste and other operations on nonmineral land. Whether background or not, the legal conclusions drawn by these courts – the leading federal court decisions on rights under the Mining Law in the last 20 years – which essentially match the 1997 Opinion and Earthworks' arguments here – cannot be ignored.

III. The 2003 Rule Was Issued in Violation of NEPA.

A. NEPA Statutory Background.

NEPA is "our basic national charter for protection of the environment." 40 C.F.R. §1500.1(a). NEPA "prevent[s] or eliminate[s] damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." *Marsh v. ONRC*, 490 U.S. 360, 371 (1989). Requiring all federal agencies to analyze the environmental consequences of proposed actions, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

"The agency must comply with principles of reasoned decisionmaking, NEPA's policy of public scrutiny, and the Council on Environmental Quality's regulations." *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).[4] "[T]he court owes no deference to the [agency's] interpretation of NEPA or the CEQ [NEPA] regulations because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA to the [one agency] alone." *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 342 (D.C. Cir. 2002).

[4] The CEQ NEPA regulations were revised in 2017 and in 2022, but since the EA in this case was issued in 2003, the previous (issued in 1978) CEQ rules apply.

NEPA has "'twin-aims': (1) to ensure that the agency takes a 'hard look' at the environmental consequences of its proposed action and (2) to make information on the environmental consequences available to the public, which may then offer its insight to assist the agency's decision-making through the comment process." *Young v. General Services Admin.*, 99 F.Supp.2d 59, 67 (D.D.C. 2000). *See also Robertson*, 490 U.S. at 349 (same).

To fulfill these goals, NEPA requires federal agencies to prepare an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C); 40 C.F.R. §1501.4. "Major federal actions" include the issuance of "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. §1508.18(a). *See also* §1502.4(b). The agency must "provide [a] full and fair discussion of significant impacts" associated with a federal action such as the issuance of the 2003 Rule and "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." §1502.1.

If an agency is not certain as to whether its action may significantly affect the environment, it must prepare an EA. §1501.4(b). An EA must provide sufficient evidence and analysis for determining whether to prepare an EIS or issue a FONSI. §§1508.9, 1501.4(e), 1508.13.

This Circuit's "long established standard" for reviewing an agency's decision not to prepare an EIS is: "First, the agency [has] accurately identified the relevant environmental concern. Second, once the agency has identified the problem it must have taken a 'hard look' at the problem in preparing the EA. Third, if a finding of no significant impact is made, the agency must be able to make a convincing case for its finding." *Grand Canyon Trust*, 290 F.3d at 340-41. "But if *any* significant environmental impacts might result from the proposed action, then an EIS must be prepared *before* the action is taken." *American Bird Conservancy v. F.C.C.*, 516 F.3d 1027, 1034 (D.C. Cir. 2008)(emphasis in original).

B. The EA Ignored the Fact that the 2003 Millsite Rule's Reversal of Interior's Previous Position Has Extensive Ramifications for Western Mines and the Environment.

In attempting to comply with NEPA in issuing the 2003 Rule, Interior prepared a short EA and a one-page FONSI just two days after the 2003 Millsite Opinion was issued. EA (JA____), FONSI (JA___). But the EA contains no consideration of the significant environmental impacts of mining operations that would result under the 2003 Rule as compared to the 1997 Millsite Opinion. "We have determined that the proposed action would not cause any significant impacts." EA at 5, JA____. Yet "simple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." *Delaware Riverkeeper Network*, 753 F.3d at 1313.

At the outset, this ignores the real on-the-ground impacts from the two differing regulatory approaches embodied in the 1997/99 and 2003 positions – as acknowledged by the industry intervenors who described how the two differing millsite interpretations would alter the number and type of mining operations approved by the federal agencies in the West.

Indeed, the main reason the various mining companies, trade associations, and Alaska all joined this case was to attempt to ensure that Interior does not have the discretionary authority under FLPMA over large facilities proposed on lands not covered with valid millsite claims – which would be the case if the policies and rules under the 1997 Opinion were reinstated. JA___.

As stated by the mining industry intervenors, the implementation of the 2003 Rule will result in increased mining and its resultant impacts, for if Plaintiffs are successful in overturning it (or if the Rule interpreted the laws differently in the first place), some mining projects would not occur, or be subject to substantial agency discretion that would not exist if a company had valid statutory rights to thousands of acres of millsite claims.

The National Mining Association stated that "Plaintiffs' interpretation would impermissibly restrict, and in many instances could eliminate altogether, the ability of citizens (including NMA's members) to… develop valuable minerals on public lands." NMA Intervention Motion at 4 (Dkt. 11). JA___. Similarly, Barrick, which

owns and operates large gold mines in Nevada, stated that returning to the previous Interior interpretation of §42 "could in turn preclude the expansion of existing mines or construction of new mines." Barrick Intervention Brief at 14 (Dkt. 10), JA____.

The Northwest Mining Assoc. and Alaska Miners Assoc. asserted that implementing the 2003 Millsite Rule was needed so that millsite claimants would have property rights to all of the public lands at a mine site, as under the previous (1997/1999) interpretation, the resulting agency discretion over operations would "chill investment… and make development of future mines much more difficult." NMA/AMA Motion to Intervene, at 10 of 92 (Dkt. 21), JA___.

While these assertions of economic and regulatory restrictions appear exaggerated, they demonstrate that the implementation of the 2003 Rule, as compared to keeping the pre-existing Interior policy from 1997, would allow for significantly more mining in the West, and the resulting significant environmental impacts.

But instead of conducting any serious analysis, the EA reviewed only the minimalistic impacts of "staking" additional millsite claims on the ground. EA at 5, JA____. This was because the agency believed, erroneously, that the 2003 Rule's reversal of the 1997 Opinion and 1999 Proposed Rule would have no effect on the agency's review and approval of mining projects. "Because this rule would maintain BLM's long-standing practice regarding millsites, the rule does not create

any new environmental impacts. Publishing this rule leads to the same environmental impacts as the no-action alternative because BLM is not changing the existing rules in any substantive way." EA at 6, JA____.

This flies in the face of what the 2003 Rule, and 2003 Millsite Opinion, actually did: reverse the 1997 Opinion (which as a Secretarial Order was binding on Interior/BLM actions in the field) and allow for essentially unlimited millsites and the associated waste dumping, toxic tailings impoundments, and other ancillary uses. The EA misleadingly states that the 2003 Millsite Opinion/Rule "will continue BLM's past practice regarding the five-acre millsite provision." EA at 6, JA____.

Yet the 2003 Opinion, which reversed and abrogated the 1997 Opinion, acknowledged that it was returning (i.e., not "continuing") Interior back to what it believed was agency practice prior to 1997. "Accordingly, the Department should return to its prevalent, pre-1997 administrative practice and interpretation." 2003 Opinion, at 4, JA____

Further, the 1999 Proposed Rule (reversed by the Final Rule in 2003) stated that the 1997 Opinion reflected then-current DOI policy. "The provision allowing a maximum of 5 acres of mill site land for each lode or placer mining claim is contained in 30 U.S.C. 42, and derives from the lode law of 1866 (14 Stat. 251). This requirement was recently reviewed and Solicitor's Opinion M-36988

reaffirmed it on November 7, 1997." 64 Fed.Reg. 47028.

In other words, the 2003 EA's basic assumption, that nothing changed in 2003, i.e., that the 2003 Rule was merely "continuing" current Interior policy and legal determinations, is flatly contradicted by the agency's own Proposed Rule in 1999, as well as the 2003 Millsite Opinion's admission that it was "returning" Interior back to what it believed was the agency's pre-1997 position. 2003 Opinion, at 4, JA____.

Accordingly, the EA contains none of the required analysis of impacts from changing how mining would be regulated under the 2003 Opinion/Rule as compared to the 1997 Opinion and 1999 Proposed Rule. "The agency's EA must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum." *Grand Canyon Trust*, 290 F.3d at 342.

C. The EA Failed to Consider Any of the Impacts from the Alternative of Keeping the 1997/1999 Policies, as Required by NEPA.

In addition, the EA failed to comply with NEPA's mandate that the agency fully analyze the impacts from all "reasonable alternatives" to the 2003 Rule. NEPA requires that federal agencies consider alternatives to recommended actions whenever those actions "involve[] unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. §4332(2)(E). NEPA's requirement that an agency provide an objective evaluation of a range of reasonable alternatives to the proposed action "is the heart of the NEPA process." 40 C.F.R. §1502.14. This

provides "a clear basis for choice among options by the decisionmaker and the public." *Id.*

Federal agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives." *Id.*; *see also* §1502.14(c). "Nor is the failure to consider reasonable alternatives without consequences. NEPA's requirement to consider alternatives is an independent requirement of an EA, separate from its function to provide evidence that there is no significant impact." *Public Employees for Environmental Responsibility v. U.S. Fish and Wildlife Service*, 177 F.Supp.3d 146, 157 (D.D.C. 2016)(citations omitted).

Interior acknowledged that it was required to analyze the impacts from keeping the existing millsite policy embodied in the 1997 Opinion and 1999 Proposed Rule, as an "Alternative Action" to be reviewed in the 2003 EA. "An alternative action would be to publish in final the rules as initially proposed, including the mill site limitation described in the 1997 Opinion." EA at 7, JA___. Yet in reviewing the environmental impacts from keeping the 1997 Opinion, the EA irrationally states that there would be **no** difference in how the agency would regulate mining under the different millsite Opinions. *Id*.

This is based on two erroneous positions. First, the EA argues that "[t]he Leshy [1997] interpretation would not diminish environmental impacts because, as mentioned above, by imposing a categorical limit on the number of mill sites a

claimant may locate in association with each mining claim, claimants would likely subdivide their maximum-sized mining claims into smaller claims to obtain the number of mill sites they need." *Id*.

Yet, this directly contradicts the 1999 Proposed Rule (the alternative the EA was considering) which specifically precluded such a "subdivide" scheme. "This rule proposes to prevent claimants from circumventing the limitation on the number of millsite acres a claimant may locate ... by limiting the millsite acreage you may locate to 5 acres per associated 20 acre parcel of lode or placer claim lands." 64 Fed.Reg. 47028. *See also* 64 Fed.Reg. 47037 (same). Relying on this, the district court recognized that the 2003 Rule's reliance on a supposed "subdivide" scheme was not persuasive. Order at 33-34, JA___.

Second, the EA asserts that, even if Interior adopted the 1997 Opinion and 1999 Proposed Rule, "the Leshy [1997] interpretation would not necessarily diminish the environmental impacts from mining operations." EA at 7, JA___. This is because if statutory rights in excess millsite acres were limited, the companies could apply to use these public lands under other ways, "including land exchanges and permits or leases." *Id*. Yet this ignores the entire controversy over the differing Opinions and is extremely misleading.

As the industry intervenors correctly state, if companies did not have rights under the Mining Law to locate their waste dumps and tailings on excess millsite

claims, then getting approval of modern mining would be under a much more discretionary regime. "By interpreting the Mining Law to restrict the allowable acres of unmineralized land that can be used for waste rock and tailings disposal facilities, mineral processing facilities, and other reasonably incident uses, Plaintiffs seek to make development of large surface mines difficult and even impossible because these facilities would require discretionary land use authorizations derived from other statutes." NMWA/AMA Motion to Intervene, at 3 (p. 5 of 92). JA___. "NWMA and AMA members' mineral prospecting and exploration activities could become fruitless if the facilities necessary to develop a discovered deposit into a mine could not be authorized under the Mining Law." *Id*.

While these doomsday industry assertions are certainly exaggerated, the different on-the-ground results from implementing either the 1997/99 or 2003 millsite interpretations are undisputed. Thus, whether in reviewing the impacts from implementing the 2003 Rule, or the alternative of keeping the 1997/1999 policies, Interior was required to analyze the impacts under these very different legal regimes covering mining on western public lands.

D. Interior Failed to Provide Any Public Review Under NEPA.

It is undisputed that the EA was never subject to any public review, as required by NEPA and Interior policy. Agencies "shall to the fullest extent possible ... [e]ncourage and facilitate public involvement in the decisions which affect the

quality of the human environment." 40 C.F.R. §1500.2(d). "NEPA procedures must insure that environmental information is available to public officials and citizens **before** decisions are made and **before** actions are taken ... Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." §1500.1(b)(emphasis added).

Interior's national NEPA policy requires that: "You must have some form of public involvement in the preparation of all EAs." National Environmental Policy Handbook, at 76 (Addendum)(excerpts). "For preparation of an EA, public involvement may include any of the following: external scoping, public notification before or during preparation of an EA, public meetings, or public review and comment of the completed EA and unsigned FONSI." *Id.* Although the specific form of adequate public involvement involves some agency discretion, Interior cannot simply shut out the public. *Id.*

Yet that is what the agency did here, as there was no public involvement whatsoever, as the EA came out just two days after the 2003 Millsite Opinion was released which reversed Interior millsite policy. The 2003 Rule was promulgated just two weeks later. The public had no idea that BLM was preparing an EA, let alone afforded any opportunity to provide input on BLM's decisionmaking.

Interior must "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. §1506.6(a). The agency "shall

involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by 1508.9(a)(1).” §1501.4(b). “Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSIs.” 46 Fed.Reg. 18026 (March 23, 1981)(“Forty Most Asked Questions Concerning CEQ’s NEPA Regulations,” answer to question 38).

Interior cannot credibly argue that the minimal EA and FONSI, issued without **any** public input, comply with the strict requirements of NEPA.

IV. The 2003 Rule Was Not a “Logical Outgrowth” of the 1999 Proposed Millsite Rule Under the APA, Which It Completely Reversed, With No Public Notice.

Similar to the failure to subject the EA to any public review, Interior failed to subject the 2003 Millsite Rule to the required public notice and comment procedures of the APA. The APA requires that agencies provide adequate notice of proposed rulemaking, 5 U.S.C.§553(b), and provide the public with adequate “opportunity to participate in the rule making.” §553(c). While an agency may promulgate a final rule that is somewhat different than the proposed rule, the final rule must be a “logical outgrowth” of the proposed rule. *International Union, United Mine Workers of America v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

“Given the strictures of notice-and-comment rulemaking, an agency’s

proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former." *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). "[I]f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 546, 547 (D.C. Cir. 1983). "Thus, we have refused to allow agencies to use the rulemaking process to pull a surprise switcheroo" on the public in the final rule. *Environmental Integrity Project*, 425 F.3d at 996.

Here, the 2003 Millsite Rule completely reversed the then-existing Interior millsite policy and legal interpretation, as stated in the 1999 Proposed Rule and the 1997 Millsite Opinion. No public notice was given of this "switcheroo," and the public was never given an opportunity to respond to or comment on Interior's new legal interpretation and policy – in violation of the APA.

"The necessary predicate [in revising proposed rules], however, is that the agency has alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed. The adequacy of the notice depends, according to our precedent, on whether the final rule is a 'logical outgrowth' of the proposed rule." *Kooritsky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994). This Circuit further noted that: "The Federal Register Act, 44 U.S.C. §§ 1501–1511, and the regulations thereunder, require agencies to include a preamble to their notice of proposed

rulemaking 'which will inform the reader, who is not an expert in the subject area, of the basis and purpose for the ... proposal.' 1 C.F.R. §18.12(a)." *Id*.

But the 1999 Proposed Rule said nothing that would alert the "non-expert" general public that Interior was considering wholly reversing its then-existing millsite policy, which the 2003 Rule did without any opportunity for public review and comment on the switch.

As noted, the 2003 Millsite Opinion, EA, and 2003 Millsite Rule were all issued within roughly 2 weeks, with the public left entirely in the dark during the agency's reform efforts. Up to that time, the public had no idea whether, or how, Interior would change its mining policy and rules, as the 1997 Opinion and 1999 Proposed Rule had represented the agency's position prior to the abrupt reversal in 2003.

The public cannot adequately comment on major agency legal and policy changes when it was never notified that those changes were being contemplated.

CONCLUSION

Accordingly, Earthworks respectfully requests that this Court reverse the district court, and set aside, vacate and remand the 2003 Millsite Rule with instructions to the Interior Department to reinstate the 1997 Millsite Opinion as the proper interpretation of the Mining Law, and to revise its policy and regulations consistent with its Order and federal law.

Respectfully submitted this 6th day of April, 2023.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(B)

I hereby certify that the foregoing Opening Brief contains 12,961 words excluding the parts of the brief exempted by the Federal Appellate and Circuit Rules, complying with FRAP 32(a)(7).

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CERTIFICATE OF SERVICE

I, Roger Flynn, hereby certify that the foregoing Opening Brief and accompanying Addendum was served on April 6, 2023 all counsel of record in this case through the electronic filing system (CM/ECF) of the U.S. Court of Appeals for the District of Columbia Circuit.

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INDEX OF STATUTORY AND REGULATORY ADDENDUM

Statutes and Regulations

1. Pub. L. 88-606, §2, 78 Stat. 982.
2. Pub. L. No. 106-113, §337.
3. Act of July 4, 1866, ch. 166, §5, 14 Stat. 86.
4. Administrative Procedure Act (APA), 5 U.S.C. §§ 553, 701-706.
5. 28 U.S.C. §1291, §1331.
6. Mining Law of 1872, 30 U.S.C. §§ 21-42.
7. National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4335.
8. Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 (excerpts).
9. Federal Register Act, 44 U.S.C. §§1501-1511.

10. Council on Environmental Quality NEPA Regulations, 40 C.F.R. §§ 1500-1508.

11. Interior Millsite regulation, 43 C.F.R. §3832.32.

Additional Authority

12. BLM NEPA Handbook, H-1790-1 (excerpts).

13. Lindley, "*A Treatise on the American Law Related to Mines and Mineral Lands*," (3d edition, 1914)(excerpts)

14. *One Third of the Nation's Land: A Report to the President and to the Congress by the Public Land Law Review Commission* (June 1970)(excerpts)

15. Office of Technology Assessment, *Management of Fuel and Nonfuel Minerals in Federal Land*, at 127 (April 1979)(excerpts).

16. Parr & Kimball, "Acquisition of Non-Mineral Land for Mine Related Purposes," 23 *Rocky Mtn. Min. L. Inst.* 595 (1977).

17. Twitty, Sievwright & Mills, "*Nonfuel Mineral Resources of the Public Lands: A Study Prepared for the Public Land Law Review Commission*." (excerpts).

18. Twitty, "Amendments to the Mining Laws," 8 *Ariz. L. Rev.* 63 (1966).