



United States Department of the Interior
OFFICE OF THE SOLICITOR
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M-37057

Memorandum

To: Director, Bureau of Land Management

From: Solicitor

Subject: Authorization of Reasonably Incident Mining Uses on Lands Open to the Operation of the Mining Law of 1872

I. Introduction

In 2005, the Solicitor issued an opinion that addressed when the Bureau of Land Management (BLM) was required to determine mining claim¹ validity before approving a mining plan of operations under 43 C.F.R. subpart 3809 (Subpart 3809). *Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations*, M-37012 (Nov. 14, 2005) (2005 Opinion). The 2005 Opinion reviewed the Mining Law of 1872, 30 U.S.C. §§ 22-54 (the Mining Law), the Surface Resources Act of 1955, 30 U.S.C. §§ 611-615 (Surface Resources Act), and the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785 (FLPMA), and concluded that nothing in those authorities obligates BLM to determine mining claim validity before approving plans of operations under Subpart 3809 on federal lands open to the operation of the Mining Law. 2005 Opinion, at 2, 4, 5.

The 2005 Opinion replaced a Solicitor's Opinion issued just a few years prior. *See Use of Mining Claims for Purposes Ancillary to Mineral Extraction*, M-37004 (Jan. 18, 2001) (2001 Opinion), *rescinded by Rescission of 2001 Ancillary Use Opinion*, M-37011 (Nov. 14, 2005). The 2001 Opinion's core legal tenet was that the Secretary could authorize exploration, mining, or processing operations and uses reasonably incident thereto² "as a matter of right" under the Mining Law only if the operator had a valid mining claim. *See id.* at 11-13. The 2001 Opinion

¹ Unless otherwise noted, references to "mining claims" include lode mining claims, placer mining claims, mill sites, and tunnel sites. Additionally, because a mining claim ceases to exist after the Department of the Interior (Department) issues a patent to the underlying lands and thus no longer represents a "claim" against the United States, references to "mining claims" should be understood to include only those mining claims for which a patent has not been granted (*i.e.*, "unpatented").

² In this memorandum, the phrase "reasonably incident mining uses" includes exploration, mining, or processing operations and uses reasonably incident thereto. *See* 30 U.S.C. § 612(a); 43 C.F.R. § 3809.5 (definitions of "operations" and "unnecessary or undue degradation").

thus advised BLM that it was required to verify the existence of such “rights” through a mining claim validity determination before it could authorize reasonably incident mining uses under Subpart 3809 in some instances—in particular “ancillary operations”³ that the 2001 Opinion asserted could render a mining claim invalid—even on open federal lands. *Id.* at 2, 15. In the absence of a valid mining claim, the 2001 Opinion advised that the agency’s decision to allow proposed reasonably incident mining uses could not be “a matter of right under the Mining Law,” but rather “a matter of discretion” and regulated only under the multiple-use provisions of FLPMA. *Id.* at 15-16.

It has been nearly 15 years since the 2005 Opinion formally⁴ rescinded the 2001 Opinion’s conclusion that certain proposed reasonably incident mining uses of open lands could trigger a requirement to verify mining claim validity before BLM could approve a plan of operations under Subpart 3809. Since then, consistent with the 2005 Opinion and the plain text of its regulations, BLM has looked only to land status (*i.e.*, whether the lands are open to or withdrawn from the operation of the Mining Law) to ascertain whether a validity determination is required before authorizing reasonably incident mining uses under Subpart 3809. *See* 43 C.F.R. § 3809.100 (requiring a validity determination on lands withdrawn from the operation of the Mining Law). I have reviewed the 2005 Opinion—as well as the 2003 Opinion, *see supra* note 4, which presented a similar legal framework—and hereby reaffirm both.

Additionally, my review of these opinions has persuaded me that further explanation of the legal principles supporting the 2005 Opinion’s conclusion would benefit BLM and the Department as a whole. This Opinion therefore supplements the 2005 Opinion, beginning with a review of the text and purpose of the Mining Law. It then examines the Department’s administration of reasonably incident mining uses on open lands, and its consistent reliance on the mineral disposal authority and the statutory right of free access under 30 U.S.C. § 22 as the basis for considering such uses as authorized by the mining laws and not as trespasses.

³ The phrase “ancillary operations” in the 2001 and 2005 opinions was a catch-all term for “operations intended to support mineral extraction from *other* mining claims or *other* lands, and not looking to extract minerals from these particular claims.” 2001 Opinion, at 1 (emphasis in original); *see* 2005 Opinion, at 1 (defining “ancillary” surface uses as those that are “related to or accompany the mining activities or . . . are viewed as supplementary or as an auxiliary activity relative to the removal of the mineral from the ground”). BLM’s surface management regulations, however, govern all mining use, whether it qualifies as “mineral extraction” or as “supplemental” or “auxiliary” processing, such as placement of tailings or waste rock facilities. *See* 43 C.F.R. § 3809.5 (defining “operations” as “*all* functions, work, facilities, and activities . . .”). Moreover, the history and text of the Mining Law do not support the notion that reasonably incident mining uses should be the basis for questioning the validity of mining claims, or for deeming certain types of mining operations not “authorized” by the Mining Law. Only *non-mining* uses should. *See, e.g., United States v. Bagwell*, 961 F.2d 1450 (9th Cir. 1992); *Teller v. United States*, 113 F. 273 (8th Cir. 1901).

⁴ While a formal rescission did not occur until 2005, the 2001 Opinion was largely superseded in 2003. *See* M-37011, at 1 (noting that *Mill Site Location and Patenting under the 1872 Mining Law*, M-37010 (Oct. 7, 2003) (2003 Opinion) had displaced many key legal assumptions on which the 2001 Opinion relied).

This Opinion then supplements the 2005 Opinion’s conclusion that mining claim validity determinations are not required before allowing reasonably incident mining uses on open lands by providing further analysis showing: (1) that a mining claim is not a condition precedent to conducting or obtaining authorization to conduct reasonably incident mining uses on open lands; (2) that the need to verify rights correlates to the rights being asserted; and (3) that BLM’s regulations at 43 C.F.R. subparts 3715, 3802, and 3809 are the appropriate regulatory authorities for such uses. Finally, this Opinion reviews existing Department case law, regulation, and policy for consistency with the legal principles presented herein. This further analysis of the legal principles underlying the Department’s regulation of reasonably incident mining uses should lead to greater consistency in the application of BLM’s regulations.

II. Text and Purpose of the Mining Law

A. Statutory Language

The Mining Law of 1872, as enacted, begins:

That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Mining Law of 1872 § 1, 17 Stat. 91 (codified at 30 U.S.C. § 22). With this single statement, the Mining Law changes the status of the lands to which it applies by bestowing on citizens a right to enter the lands to explore for and develop minerals.

This first section of the Mining Law does not limit or condition acceptance of the statute’s “free and open” invitation to enter federal lands and engage in reasonably incident mining uses on obtaining prior federal approval or verification of miners’ qualifications. *See* 30 U.S.C. § 22. The statute does acknowledge that “local customs or rules of miners, in the several mining-districts” might have their own requirements governing how reasonably incident mining uses might occur. *Id.* However, the text of the statute authorizes “citizens and those who have declared their intention to become such” to remove freely federal minerals⁵ and engage in “occupation” for purposes reasonably incident to that removal on any “open” lands. *Id.* This self-executing and unqualified authorization is properly characterized as “statutory authority” or a “statutory right.” *See Davis v. Nelson*, 329 F.2d 840, 846 (9th Cir. 1964); *United States v. Good*, 257 F. Supp. 2d 1306, 1308 (D. Colo. 2003) (stating that the “statutory right to mine on public lands is long-standing” (quoting 30 U.S.C. § 22)); *see also United States v. Locke*, 471 U.S. 84, 86 (1985)

⁵ Congress has removed certain minerals from disposal under the Mining Law. *See, e.g.*, Mineral Leasing Act of 1920, 30 U.S.C. § 181 (removing coal, oil, gas, and other minerals); Surface Resources Act, 30 U.S.C. § 611 (removing “common varieties” of sand, stone, gravel, pumice, and other minerals).

(stating that the Mining Law “still in effect today, allow[s] United States citizens to go onto unappropriated, unreserved public land to prospect for and develop certain minerals”); *Duguid v. Best*, 291 F.2d 235, 238 (9th Cir. 1961), *cert. denied*, 372 U.S. 906 (1963) (describing a prospector’s “statutory right” to enter federal lands in search of minerals).

B. Purpose of the Mining Law

The stated purpose of the Mining Law was “to promote the development of the mining resources of the United States,” Cong. Globe, 42d Cong., 2d Sess. 395 (1872) (emphasis added), which was apt, given that development of federal minerals was already well underway by the time of its enactment.

It took nearly 100 years after Independence for Congress to exercise its power under the Property Clause to create a general disposal system for federal minerals.⁶ See Lode Law of 1866, ch. 262, § 4, 14 Stat. 251, 252; see also Placer Act of 1870, ch. 235, 16 Stat. 217. In the wake of the California gold rush and faced with widespread mineral trespass, Congress initially considered a system of prior authorization wherein miners would be required to obtain permits from the government to remove federal minerals, with a cap on the number of permits each miner was allowed at any given time. See Cong. Globe App., 31st Cong., 1st Sess. App’x 1362, 1370 (1850) (discussing proposed bill providing for a 30-foot square placer permit or a one-acre lode permit). But a system of prior authorization would have resolved only a small fraction of the ongoing—and what would otherwise be future—unauthorized removal of federal mineral deposits, let alone occupancy for reasonably incident mining uses. Moreover, a permitting scheme would have been practically unenforceable given the geographic extent, scope, and duration of the mineral trespass. Congress thus pragmatically chose to embrace and facilitate a system of self-initiated free access as the best way to accomplish its purpose. See 14 Stat. at 251-53; *United States v. Cal. Midway Oil Co.*, 259 F. 343, 351-52 (S.D. Cal. 1919), *aff’d*, 279 F. 516 (9th Cir. 1922), *aff’d mem.*, 263 U.S. 682 (1923) (recognizing that “the policy of the government seems to be to encourage the development of its mineral resources and to offer every facility for that purpose”); see also Cong. Globe, 39th Cong., 1st Sess. 3227 (1866) (noting the government’s “tacit consent and approval”).

The first phrase of the Mining Law is almost identical to the opening phrase of the Lode Law. 14 Stat. at 251 (“That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States . . .”). Congress did use slightly different terminology in the Mining Law—“valuable mineral deposits,” instead of “mineral lands,” as it did in the Lode Law. Writing in 1914, Professor Lindley examined the case law involving lands and minerals, and all the different permutations of statutory language used in the various public land laws, including the mining laws, and concluded that the terms “mineral lands,” “valuable mineral deposits,” and “mines” “are, generally speaking, legal equivalents, and may be, and frequently are, used interchangeably.” 2 *Lindley on Mines* § 86, at 134-35 (3d ed. 1914) (citing *Brady’s Mortgagee v. Harris*, 29 Pub. Lands Dec. 426 (1899)). The references to “valuable mineral deposits” and “lands in which they are found” together thus operate to apply the Mining Law’s disposal authority to mineral lands in

⁶ There were a handful of earlier statutes reserving mineral lands in the eastern states or authorizing the sale or lease of such lands. However, there was no general authority for mineral disposal prior to 1866, and no authority of any kind until then for lands in the western states.

the public domain,⁷ as opposed to agricultural lands, which were subject to disposal under other authorities. *See Davis v. Wiebold*, 139 U.S. 507, 522 (1891) (discussing meaning of “mineral land”).

Broad though it was, the authorization to enter federal lands and engage in reasonably incident mining uses found in the first section of the Mining Law did little more than ratify the status quo. While miners surely welcomed the Mining Law’s legitimization of what previously had been mineral trespass, the statutory authority in that first section was, on its own, faint incentive to mineral development over and above what the miners were accomplishing without federal mineral disposal authority. *See Erhardt v. Boaro*, 113 U.S. 527, 535 (1885) (discussing the “complete protection” afforded as among miners with respect to local rules and customs).

The real inducement for exploration and development came in subsequent sections of the Mining Law, where Congress offered something that the miners did not yet enjoy and could only be obtained through federal legislation: security of tenure in the form of a property right as against the United States. *See S. Rep. No. 39-105 at 1* (1866) (report of the Senate Committee on Mines and Mining stating, while considering what ultimately became the Lode Law of 1866, that its purpose was “to provide the most generous conditions looking toward further explorations and development”). Under these subsequent sections, *see* 30 U.S.C. §§ 23, 26, 35, 36, 38, any “mining claims”⁸ or “mining locations” that the miners might have staked or “located” according to local customs, rules, and regulations in order to establish *pedis possessio*⁹ as against each other would become cognizable property rights as against the United States once the miner made a discovery of a valuable mineral deposit and continued to comply with applicable maintenance requirements. *See Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 316 (1930) (mining

⁷ The Mining Law also applies to certain lands that were not part of the public domain when the statute was enacted, as well as lands that were classified as “reserved.” In particular, the Organic Administration Act of 1897 reapplied the Mining Law to National Forest System lands that Congress had reserved from the public domain pursuant to the Creative Act of 1891. 16 U.S.C. § 482; *see Wilderness Soc’y v. Dombeck*, 168 F.3d 367, 374 (9th Cir. 1999); *Pathfinder Mines Corp. v. Hodel*, 811 F.2d 1288, 1291 (9th Cir. 1987). Other than forest reserves, lands reserved from the public domain are generally not subject to the operation of the Mining Law. *See Oklahoma v. Texas*, 258 U.S. 574, 600 (1922) (noting that the Mining Law does not apply “to the grounds about the Capitol in Washington or to the lands in the National Cemetery at Arlington, no matter what their mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, the Yellowstone National Park, and the military reservations throughout the Western States.”).

⁸ The Mining Law also allows miners to claim and patent nonmineral lands, which become compensable property rights when properly used and occupied for mining purposes. 30 U.S.C. § 42 (authorizing location and patent of “mill sites”). There is a fourth type of claim, known as a tunnel site, which is a subsurface right-of-way that, when properly used and occupied, shares the same property right characteristics as mining claims and sites, but cannot be patented. *Id.* § 27.

⁹ *Pedis possessio* is the legal basis on which miners defend their investments of time, money, and effort against “rival claimants” or “claim jumpers.” *See Nelson*, 329 F.2d at 845 (discussing *pedis possessio*). Miners used *pedis possessio* to enforce their possessory rights as against each other before statutory mineral disposal authority was enacted and continue to do so today.

claims are “property within the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited”). And not only would mining claims themselves be recognized as property, Congress even provided to the mining claimants the ability to obtain fee title or “patent” to the claimed lands. 30 U.S.C. § 29.

These opportunities for qualified persons to establish property interests as against the government in the form of both mining claims and patents is unquestionably the statute’s most compelling “inducement” to exercise the statutory right provided for in 30 U.S.C. § 22.¹⁰ See *Cole v. Ralph*, 252 U.S. 286, 294 (1920); *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 676 (1888) (“The statutes providing for the disposition of the mineral lands of the United States are framed in a most liberal spirit, and those lands are open to the acquisition of every citizen upon conditions which can be readily complied with.”). But the text and structure of the statute make clear that it is the statutory right in § 22 itself—which does not mention or even reference mining claims or the establishment of any property rights—that is the foundation of the Mining Law’s self-executing disposal framework and the essential component to accomplish Congress’s purpose. See *Andrus v. Shell Oil Co.*, 446 U.S. 657, 658 (1980) (stating that “30 U.S.C. § 22 *et seq.*, provides that citizens may enter and explore the public domain, and search for minerals”); *United States v. Coleman*, 390 U.S. 599, 600 n.1 (1968) (noting that the Mining Law is the “cornerstone of federal legislation dealing with mineral lands” under which “citizens may enter and explore the public domain”).

III. The Department’s Administration of the Mining Law

A. Mining Law Enactment to 1981¹¹

The Department’s administration of reasonably incident mining uses for the first century following enactment of the Mining Law and its predecessor statutes was remarkable in that it was not qualitatively different from before Congress enacted statutory mineral disposal authority. Miners operating on open lands initiated and conducted nearly all reasonably incident mining uses

¹⁰ The incentive of property rights is why the scenario of a miner intentionally relying only on the statutory authority in § 22 for reasonably incident mining uses on federal lands is a practical improbability. See 73 Fed. Reg. 73,789, 73,790 (Dec. 4, 2008) (stating BLM’s conclusion, after soliciting public comment as to whether miners intentionally use unclaimed lands for operations that go beyond exploration, that “no mining operations amounting to more than initial exploration activities occur on unclaimed Federal lands under the Mining Law”). But as a legal matter, the statutory authority is all a miner would need to conduct reasonably incident mining uses on open federal lands from cradle-to-grave, in compliance with applicable regulations.

¹¹ The first Departmental regulations governing reasonably incident mining uses under the Mining Law were promulgated by the National Park Service in 1977 to implement the Mining in the Parks Act. See 36 C.F.R. Part 9, Subpart A; 42 Fed. Reg. 4835 (Jan. 26, 1977). Because all National Park System lands are withdrawn from the operation of the Mining Law, the Park Service’s regulations understandably allow reasonably incident mining uses only on valid mining claims or other valid existing rights on National Park System lands. See 36 C.F.R. § 9.1. As this Opinion addresses only mining operations on lands open to the operation of the Mining Law, its conclusions will not affect the Department’s management of National Park System lands or application of the Park Service’s mining regulations.

during this phase without specific authorization from or even notice to the United States—just as before enactment of the Mining Law.¹² See, e.g., *United States v. Friedland*, 152 F. Supp. 2d 1235, 1244 (D. Colo. 2001) (describing government involvement in mining operations before federal regulations).

Despite the lack of any Departmental permit, prior approval, or verification of property rights, miners entering federal lands and conducting reasonably incident mining uses during this period were universally acknowledged to not be trespassers; rather their use was recognized as authorized by the plain language of § 22. See *Union Oil Co. v. Smith*, 249 U.S. 337, 346 (1919) (noting that persons proceeding under the Mining Law “are not treated as mere trespassers”). Indeed, the Department even provided financial incentives for some reasonably incident mining uses, knowing that it had not issued any specific permit or approval for such uses.¹³

Although the Department did not issue permits to miners or otherwise regulate reasonably incident mining uses on federal lands, the Department was actively engaged in administering and adjudicating the Mining Law’s mineral disposal framework. Many, if not most, of the foundational cases in administrative and judicial Mining Law jurisprudence are related to the Department’s exercise of its adjudicative function. See *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Cameron v. United States*, 252 U.S. 450 (1920). In those cases, the Department determined the nature and extent of possessory rights, surface use rights, and property rights under the Mining Law and subsequent amendments. The courts have long recognized the Department as

¹² During this time, a handful of statutes and the Department’s implementing regulations did impose operating standards or procedural requirements for engaging in reasonably incident mining uses on open lands. For example, miners on revested Oregon and California Railroad and Reconveyed Coos Bay Wagon Road Grant Lands (O&C lands) were required to obtain permission from the Department to cut timber, including for mining purposes. See 43 C.F.R. § 185.37d (1954). Additionally, the Mining Claims Rights Restoration Act of 1955 provided a discretionary procedure for a “public hearing,” one outcome of which was the Secretary giving “permission” before reasonably incident placer mining uses occurred on powersite lands. 30 U.S.C. § 621(a). Notably, none of these limited prior authorizations required proof of a valid mining claim. See *id.* Moreover, miners could still begin reasonably incident mining uses without any federal permission where the statutory requirements were not triggered—e.g., if no timber were needed on O&C lands, or if the Department did not exercise its discretion to hold a public hearing after a placer claim was located on former powersite lands, or when the a lode mining claim, mill site, or tunnel site had been located; or when no mining claim was located on such lands.

¹³ See David. G. Frank, *Historical Files from Federal Government Mineral Exploration-Assistance Programs, 1950-1974: U.S. Geological Survey Data Series 1004* (2016), <https://dx.doi.org/10.3133/ds1004>. The Department’s loan programs in the mid-20th century provided federal funding for exploration of known mineral prospects up to “discovery.” Although the programs were established under the auspices of the Defense Production Act of 1950 § 302, 50 U.S.C. § 4532, that act did not contain independent mineral disposal authority. Without the authority provided by the Mining Law that allowed mining companies to explore for and remove minerals, the mining companies who were removing minerals from federal lands under those programs would have been trespassers, with such trespass financed by the federal government.

a “special tribunal” in which the Secretary has primary jurisdiction to adjudicate such matters. *See Cameron*, 252 U.S. at 460; *see also* 43 U.S.C. § 2.

The Department exercised its adjudicative function by resolving questions of fact related to mining claim validity and the extent of compensable property rights, such as when the government sought to condemn lands for other purposes. *See Best*, 371 U.S. at 334-35. Departmental guidance documents called “circulars” set forth the procedures for how these adjudicative procedures would be carried out, with specific instructions governing the proofs required to establish and verify compliance with applicable law when a mining claimant sought to obtain a mineral patent under 30 U.S.C. § 29, or when an adverse claimant asserted a conflict with its own possessory title. *See, e.g.*, 54 Interior Dec. 134 (1932) (Circular No. 1278 entitled, “Information in Regard to Mining Claims on the Public Domain”). The Department also exercised its adjudicative function if a miner alleged a taking of property rights associated with a mining claim. *Skaw v. United States*, 13 Cl. Ct. 7 (1987).

Additionally, while no Departmental rule restricted reasonably incident mining uses on open lands to mining claims, the converse rule—that mining claims could only be used for reasonably incident mining uses—was true for all federal lands. *See United States v. Etcheverry*, 230 F.2d 193, 195 (10th Cir. 1956) (“[T]he exclusive possession of the surface of the land to which the locator is entitled is limited to use for mining purposes.”); *see also United States v. Rizzinelli*, 182 F. 675, 684 (N.D. Idaho 1910) (applying this rule in the national forests and noting that “the right of a locator of a mining claim to the ‘enjoyment’ of the surface thereof is limited to uses incident to mining operations”). Accordingly, the Department had procedures during this time for investigating mining claim validity as a way to curtail the practice of misusing the sections of the statute related to mining claims and patents to obtain lands for purposes unrelated to the Mining Law. *See, e.g., H.H. Yard*, 38 Pub. Lands Dec. 59, 67 (1909) (disallowing use of the Mining Law to assert possessory rights over federal lands for “telephone lines, wagon roads, trails, ditches, dams, and reservoirs”). The Department’s use of its adjudicative responsibilities thus led to enactment of the Surface Resources Act. *See S. Rep. 84-554*, at 4 (1955) (discussing Congress’s goal of ensuring that the Mining Law would not be used as a sham to obtain title to lands that were more valuable to the patentee or claimant for values other than the development of minerals subject to disposal under the Mining Law).

But where only reasonably incident mining uses of open lands were involved, the Department’s adjudicative functions were not required under the plain language and purpose described above. Consequently, during this period, the Department’s only concern if it became aware of the reasonably incident mining uses would have been to verify that the lands were “free and open” to the operation of the Mining Law. If the lands were open, the Department considered the reasonably incident mining uses “authorized” as a matter of right—*i.e.*, the self-executing statutory right in § 22—and nothing in the language of the Mining Law gave the Department discretion to prevent or condition the exercise of that statutory right in the course of the miner’s reasonably incident mining uses.

B. 1981 to Present

In 1976, Congress enacted FLPMA, which specifically amended the Mining Law to require the Secretary to, “by regulation or otherwise, take any action to prevent unnecessary or

undue degradation of the lands.”¹⁴ 43 U.S.C. § 1732(b). This mandate to prevent “unnecessary or undue degradation,” found in section 302(b) of FLPMA, gave BLM the authority to impose limits on how existing and future reasonably incident mining uses under the Mining Law could be conducted. BLM accordingly promulgated three new subparts of 43 C.F.R. Subchapter C—Minerals Management: 43 C.F.R. subparts 3715, 3802, and 3809 (collectively, the Subchapter C Mining Law regulations). Each set of regulations provided specific requirements and conditions to ensure that reasonably incident mining uses authorized by § 22 would meet FLPMA’s “unnecessary or undue degradation” standard.

BLM’s Subpart 3809 regulations, which became effective in 1981, implemented FLPMA’s mandate to prevent “unnecessary or undue degradation” by imposing for the first time operational standards on any reasonably incident mining uses that caused more than negligible disturbance of the public lands. *Surface Management of Public Lands Under U.S. Mining Laws*, 45 Fed. Reg. 78,902 (Nov. 26, 1980); *see* 43 C.F.R. § 3809.0-1 (1982) (“The purpose of this subpart is to establish procedures to prevent unnecessary or undue degradation of Federal lands which may result from operations authorized by the mining laws.”). These operational standards included rigorous environmental protection and reclamation requirements. 43 C.F.R. §§ 3809.1-1 (reclamation), 3809.2-2 (environmental protection) (1982). The Department substantially revised Subpart 3809 in 2001 to strengthen and modernize their environmental protections. *Mining Claims Under the General Mining Laws; Surface Management*, 66 Fed. Reg. 54,834 (Oct. 30, 2001); *see* 43 C.F.R. § 3809.420 (performance standards applicable to all notices and mine plans).

The regulations at 43 C.F.R. subpart 3802 (Subpart 3802), also effective in 1981, implement the “unnecessary or undue degradation” standard with respect to reasonably incident mining uses on any lands that BLM designates as “wilderness study areas” (WSAs) pursuant to section 603 of FLPMA. *See Exploration and Mining, Wilderness Review Program*, 45 Fed. Reg. 13,968 (Mar. 3, 1980); *see also* 43 U.S.C. § 1782(c); 43 C.F.R. § 3802.0-1 (stating that the purpose of the regulations is “to prevent impairment of the suitability of lands under wilderness review for inclusion in the wilderness system and to prevent unnecessary or undue degradations by activities authorized” by the Mining Law). Unlike lands designated by Congress for inclusion within the National Wilderness System under the Wilderness Act of 1964, which are withdrawn from the operation of the Mining Law, subject to valid existing rights, 16 U.S.C. § 1133(d)(3), and thus, like National Park System lands, not affected by the conclusions in this Opinion, *see supra* note 11, lands designated by BLM as WSAs under section 603 of FLPMA generally remain open to the Mining Law. 43 U.S.C. § 1782(c) (“Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 1714 of this title for reasons other than preservation of their wilderness character.”). In leaving open BLM-designated WSA lands, Congress clearly contemplated that reasonably incident mining uses would

¹⁴ Among the other ways FLPMA specifically amended the Mining Law was the imposition of federal recording requirements for all mining claims. *See* 43 U.S.C. § 1744. The enactment of FLPMA thus also substantially changed the Department’s adjudicative function in administering the Mining Law. *See* 43 C.F.R. Part 3830.

continue,¹⁵ as evidenced by the fact that it placed an additional condition on such uses that is not applicable to other public lands: the “nonimpairment” standard. Thus, while the Subpart 3802 regulations are similar in structure and operational standards to those in Subpart 3809, because Subpart 3802 implements the heightened “nonimpairment” standard with respect to any new or expanded reasonably incident mining uses in WSAs, the regulations in Subpart 3802 are in many ways more environmentally protective than Subpart 3809. *See* 43 C.F.R. §§ 3802.0-1 (stating that, in addition to preventing impairment and unnecessary or undue degradation, the regulations would “provide for environmental protection of the public lands and resources”); 3802.3-2 (“Requirements for environmental protection.”).

Additionally, in 1996, BLM promulgated regulations to implement the Surface Resources Act’s limitations on reasonably incident mining uses and occupancies. *Use and Occupancy Under the Mining Laws*, 61 Fed. Reg. 37,116 (July 16, 1996). The Subpart 3715 regulations specifically define “unnecessary or undue degradation” as “those activities that are not reasonably incident and are not authorized under any other applicable law or regulation.” 43 C.F.R. § 3715.0-5 (cross-referencing definitions of “unnecessary or undue degradation” in Subparts 3802 and 3809).

Whereas the advent of federal mineral disposal authority had made little noticeable difference with respect to how miners conducted reasonably incident mining uses on federal lands, the enactment of FLPMA and promulgation of the Subchapter C Mining Law regulations described above effected a substantial qualitative change. The “unnecessary or undue degradation” and “nonimpairment” standards, as applicable, gave the Department strong regulatory tools to temper the environmental effects from miners’ reasonably incident mining uses as they availed themselves of the statutory right of access in § 22. For the first time, most miners were required to provide at least notice to the Department before initiating reasonably incident mining uses, *see* 43 C.F.R. § 3715.3; *see also id.* § 3809.1-3 (1982); in some cases, they were required to obtain formal approval of a mining plan of operations. *See id.* § 3802.1; *see also id.* § 3809.1-4 (1982). And while none of the Subchapter C Mining Law regulations gave BLM discretion to withhold or deny surface use authorization to miners that otherwise met the regulatory requirements, the regulations made clear that compliance with provisions to prevent unnecessary or undue degradation was the core condition of engaging in reasonably incident mining uses on the public lands, and that failure to comply could result in curtailment of the miners’ use. *See id.* §§ 3715.7-2 (stating that noncompliance could result in the United States seeking an injunction), 3802.4-1(a) (stating that operators failing to comply with the regulations could be “enjoined by an appropriate court order from continuing such operations”); *see also id.* § 3809.3-2 (1982) (similar).

Importantly, several aspects of the Department’s administration of reasonably incident mining uses did remain the same as before BLM promulgated the Subchapter C Mining Law regulations, however. For example, the Department continued to use only the “free and open”

¹⁵ Not only was continued mining in WSAs specifically contemplated by Congress, section 603(c) of FLPMA also expressly allowed for “the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted” on the date of FLPMA’s enactment. 43 U.S.C. § 1781(c). Existing mining operations would not be subject to the heightened “nonimpairment” standard, although operators would, of course, be required to prevent “unnecessary or undue degradation.” *See* 43 C.F.R. § 3802.1-3.

criteria to determine which lands could be used for reasonably incident mining uses under the regulations, as opposed to looking to FLPMA's discretionary land use planning process to identify the lands where mining operations would occur, as is the case for the mineral leasing and mineral materials disposal programs. *See* 43 U.S.C. § 1712(e)(3). In addition, just as before BLM promulgated the Subchapter C Mining Law regulations, qualified persons entering and conducting reasonably incident mining uses on open lands would not be liable for trespass—even if they failed to obtain any required specific permission from BLM—although they could be subject to an enforcement action in the event of noncompliance with the applicable regulations. *Compare* 43 C.F.R. § 3715.7-1 (describing enforcement actions), and *id.* § 3809.601 (same), *with id.* § 2920.1-2(a) (stating that use, occupancy, or development without authorization “shall be considered a trespass” and setting forth penalties), and *id.* § 9239.0-7 (making “extraction, severance, injury, or removal of . . . mineral materials from public lands” without compliance with law and Departmental regulations an “act of trespass”).

Also, and of particular relevance here, BLM's original Subpart 3809 regulations continued to allow miners to conduct some reasonably incident mining uses without prior or formal approval, including extractive mining, if the reasonably incident mining “operations, including access across Federal lands to the project area, cause a cumulative surface disturbance of 5 acres or less during any calendar year” 43 C.F.R. § 3809.1-3(a) (1982). So long as the operator provided notice to BLM containing all of the information required in the regulations, complied with the operational standards, and limited the disturbance to 5 acres or less, the operator could conduct “all functions, work, facilities, and activities in connection with prospecting, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the mining laws and all other uses reasonably incident thereto” without receiving any permit or prior approval from BLM, just as before FLPMA and the Subpart 3809 regulations. *Id.* § 3809.0-5(f) (1982) (definition of “operations”); *see id.* § 3809.1-3(b) (1982) (“Approval of a notice, by the authorized officer, is not required.”); *Sierra Club v. Penfold*, 857 F.2d 1307, 1309, 1314 (9th Cir. 1988) (“BLM cannot require approval before an operation can commence developing the mine. 43 C.F.R. § 3809.1-3(b) [1982].”). BLM's decision to include in the current regulation a requirement to obtain approval for all extractive mining was based on environmental concerns, rather than because it believed that the previous regulation was infirm or that such operations were not authorized by the statutory right in § 22. *See Mining Claims Under the General Mining Laws; Surface Management*, 65 Fed. Reg. 69,998, 70,002 (Nov. 21 2000) (“Some small mining operations disturbing less than 5 acres have created significant environmental impacts or compliance problems.”); *see also* 43 C.F.R. 3809.10 (BLM's classification system for “operations” that requires approval only for “plan-level” operations).¹⁶

That FLPMA did not change every aspect of the Department's administration of reasonably incident mining uses is consistent with the Department's understanding of how the new operational limitations arising out of FLPMA's “unnecessary or undue degradation” mandate related to the existing statutory disposal authority under § 22, as stated in BLM's policy

¹⁶ Additionally, the Subchapter C Mining Law regulations have never required miners to notify BLM if their reasonably incident mining uses would ordinarily result in minimal disturbance of federal lands. *See* 43 C.F.R. §§ 3802.1-2 (when authorization not required), 3809.5 (definition of “casual use”); *see also id.* §§ 3809.1-2 (“No notification to or approval by the authorized officer is required for casual use operations.”); 3809.0-5(b) (1982) (definition of “casual use”).

statements in the Subchapter C Mining Law regulations. For example, the original Subpart 3809 regulations stated:

Under the mining laws a person has a statutory right, consistent with Departmental regulations, to go upon the open (unappropriated and unreserved) Federal lands for the purpose of mineral prospecting, exploration, development, extraction and other uses reasonably incident thereto. This statutory right carries with it the responsibility to assure that operations include adequate and responsible measures to prevent unnecessary or undue degradation of Federal lands and to provide for reasonable reclamation.

43 C.F.R. § 3809.0-6 (1982); *see also id.* § 3809.1(a) (stating that the purpose of the current regulations is to “prevent unnecessary or undue degradation of public lands by operations authorized by the mining laws”). The Subpart 3802 and 3715 regulations contain similar rationale. *See* 43 C.F.R. §§ 3715.0-1(a) (stating that the purpose of the regulations is to “prevent abuse of the public lands while recognizing valid rights and uses under the Mining Law of 1872”), 3802.0-2(a) (stating that the objective of the regulations is to allow “location, prospecting, and mining operations” in WSA “but only in a manner that will not impair the suitability for inclusion in the wilderness system unless otherwise permitted by law”), 3802.0-6 (similar to the opening sentence of § 3809.0-6, above).

The balancing evident in each of these statements, as well as the fact that some such uses continued to be allowed without requiring specific or prior approval—or, in the absence of such approval, without imposing trespass liability—shows that even after FLPMA, the Department continued to recognize the statutory authority in § 22 as an independent, self-executing authorization distinct from FLPMA’s operational obligations for reasonably incident mining uses. Thus, while FLPMA certainly changed the Department’s administration of the Mining Law by providing standards for *how* reasonably incident mining uses could occur, FLPMA did not change the question of *whether* reasonably incident mining uses fell within the scope of § 22’s statutory authority.

IV. The Subchapter C Mining Law Regulations Apply to All Reasonably Incident Mining Uses on Open Lands

The 2005 Opinion correctly concluded that the Secretary has no obligation to determine mining claim validity before approving plans of operations on open lands under the Subpart 3809 regulations. *See* 2005 Opinion, at 2-4. This conclusion was based on the 2005 Opinion’s review of the Mining Law, Surface Resources Act, and FLPMA, as well as the Subpart 3809 regulations themselves, which impose such a requirement only where lands are withdrawn. *Id.* at 3-5 (citing 43 C.F.R. § 3809.100).

Although the 2005 Opinion was specific to plans of operations under Subpart 3809, BLM’s practice has been to apply the legal principles described in the 2005 Opinion in administering all of the Subchapter C Mining Law regulations on open lands. In other words, BLM similarly does not routinely inquire into mining claim validity when authorizing or allowing reasonably incident mining uses under the Subpart 3802 regulations governing wilderness study areas, the Subpart 3715 regulations governing use and occupancy, or the provisions of Subpart 3809 governing exploration notices. I advise BLM that this practice is legally sound because

administering all of the Subchapter C Mining Law regulations under the legal framework in the 2005 Opinion and in the analysis below gives effect to the text and the purpose of the statute and to the Department's historic administration of reasonably incident mining uses on open lands as authorized by the independent statutory right in § 22.

A. A Valid Mining Claim is Not a Condition Precedent to Reasonably Incident Mining Uses on Open Lands

One of the central legal flaws of the 2001 Opinion was its premise that establishment of a valid mining claim was a condition precedent to the Mining Law's mineral disposal authority. *See* 2001 Opinion, at 13. In the 2001 Opinion's view, reasonably incident mining uses do not fall under the authority of the Mining Law at all—not even the “free and open” provisions of § 22—unless or until a valid mining claim has been established. *See id.* at 7 (stating that without a valid mining claim, a mining claimant “has no rights under the Mining Law to use the federal land encompassed by that claim for any purpose” (citing *Cameron*, 252 U.S. at 460)). Admittedly, at first glance, the 2001 Opinion's premise is not entirely without some general textual appeal in the Mining Law. After all, the Mining Law appears to require discovery before a mining claim can be located. *See* 30 U.S.C. § 23.¹⁷

Yet the 2005 Opinion's interpretation better comports with the Mining Law's text and statutory purpose. As discussed above, the plain language of § 22 is self-executing, and not dependent on any prior action by the United States. *See supra* section II.A. The plain language of § 22 also contains no mention of or reference to mining claims—let alone a specific requirement to have a valid mining claim—as a condition precedent to act on its statutory authorization. *See* 30 U.S.C. § 22. This is in contrast to the patenting provisions of the Mining Law, where Congress expressly made acceptance of the statute's offer of fee title dependent on several conditions precedent. Unlike § 22, the patenting section specifically requires a “person, association or corporation” seeking a patent to have properly “claimed and located a piece of land” under the Mining Law, and to “have[] complied with the terms of” the sections setting forth the requirements to validly locate mining claims or mill sites. *Id.* § 29 (citing §§ 22-24, 26, 35, 36, 42). The patenting section of the Mining Law also requires applicants to have properly maintained their mining claims in order to obtain the benefit of that provision—a clear condition precedent. *Id.* (citing § 28).

Viewing the statutory authority in § 22 as independent of the existence of a valid mining claim is also consistent with Congress's goal of resolving the widespread trespass through blanket statutory authority for reasonably incident mining uses. Requiring miners to demonstrate a valid mining claim before they may lawfully enter open lands and engage in reasonably incident mining uses under the statutory authority in § 22 would be contrary to Congress's intent. *Creede & Cripple Creek Mining*, 196 U.S. at 351 (acknowledging that “the principal thought of [30 U.S.C.] chapter [2] is exploration and appropriation of mineral”). All stages of mineral development

¹⁷ While the plain language of the Mining Law requires discovery before mining claim location, the courts have long since acknowledged that pre-discovery location of mining claims does not violate the statute. *See Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transp. Co.*, 196 U.S. 337, 354 (1905) (“[I]t is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location . . .”).

involve removal of minerals and reasonably incident mining uses—even those stages that occur before “discovery” and after a mining claim has been “mined out.” *Best*, 371 U.S. at 336 (noting the possibility of “worked-out claims not qualifying” as having a discovery). As a practical matter, requiring the discovery of a valuable mineral deposit before allowing any reasonably incident mining uses, including the removal of any minerals, puts the cart before the horse, since such uses and removal are necessary to make a discovery. If entering open lands to explore for and develop minerals is considered “unauthorized” unless or until miners have proven a discovery of a valuable mineral deposit, they could not, as a practical matter, ever discover a valuable mineral deposit and all mining would be effectively prohibited. Such an outcome was clearly not the intent of Congress, in no small part because such an interpretation would also leave many, if not most, miners legally in trespass.¹⁸

That Congress did not intend for the statutory authority under § 22 to exist only as a consequence of establishing a valid mining claim is further confirmed by the provenance of that section. The Lode Law expressly opened “all mineral lands,” without regard to the mineral or type of deposit. Lode Law § 1, 14 Stat. at 251. As discussed above, the Lode Law’s opening sentence ratified what had previously been mineral trespass and served as blanket authorization for disposal of all minerals. *Id.* The Lode Law, however, authorized only the location and patenting of mining claims for certain types of certain mineral deposits. *See id.* § 2, 14 Stat. at 251-52 (limiting location of mining claims to “a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper”). Miners mining and removing minerals from deposits other than those identified in the Lode Law were nonetheless authorized to access and remove federal minerals by the “free and open” mineral disposal authority in the first sentence, even though they could not obtain title to the lands or secure tenure under federal law in the form of a mining claim or patent until several years later. Placer Act, 16 Stat. at 217 (amending the Lode Law to add §§ 12-17, which authorized the location and patenting of “all forms of deposit, excepting veins of quartz, or other rock in place”). Had the statutory authority in the first section of the Lode Law—similar to § 22 in every relevant way—depended on the existence of a mining claim, all placer mining between 1866 and 1870 would have remained in trespass.

The Surface Resources Act’s specific references to mining claims, *see* 30 U.S.C. §§ 611-615, are not indicative that Congress narrowed its open invitation in § 22. Congress enacted the Surface Resources Act in 1955 to amend the Mining Law in three ways: (1) remove “common varieties” of certain minerals from disposal under the Mining Law; (2) limit surface use to that which is “reasonably incident” to prospecting, mining or processing operations; and (3) change the “exclusive right of possession” afforded to valid mining claims in § 26 to a nonexclusive right in mining claims located thereafter. *See id.* §§ 611, 612. These provisions grew largely out of the Department’s experience and exercise of its adjudicative function. *See supra* section III.A. The three amendments to the Mining Law were intended to curtail use of mining claims and patents to obtain protected property rights by those intending to use the lands for purposes other than the development of minerals that were “free and open” under the statutory disposal authority in § 22.

¹⁸ Conditioning a miner’s ability to conduct reasonably incident mining uses on the existence of a valid property right would also be contrary to Congress’s intent because the required verification would have created a vast administrative burden and authorization bottleneck—the opposite of what the self-executing, blanket statutory authorization was meant to promote. *See Cong. Globe*, 42d Cong., 2d Sess. at 395.

See S. Rep. 84-554, at 5 (discussing how locators were filing mining claims “under color of existing mining law” solely to use the lands for *nonmining* purposes, including “commercial enterprises such as filling stations, curio shops, cafes, or for residence or summer camp purposes, and as private hunting and fishing preserves,” resulting in “uncontrolled waste of valuable resources of the surface on lands embraced within claims which might satisfy the basic requirement of mineral discovery, but which were in fact, made for a purpose other than mining”); see also *United States v. Shumway*, 199 F.3d 1093, 1101 (9th Cir. 1999) (discussing purposes of the Surface Resources Act). Nothing in the statutory language or the legislative history of the Surface Resources Act shows an intent to amend the Mining Law in a fourth way: to make mining claim validity a condition precedent to allowing reasonably incident mining uses under the statutory authority in § 22.

The Department’s regulations governing the public lands and mineral resources have also never required confirmation of a valid mining claim before allowing reasonably incident mining uses on open lands. Moreover, there does not appear to be any instance of the Department treating such uses on open lands as mineral trespass—whether the uses occurred in the earliest stages of prospecting when the claim might not yet support a valid discovery or at the final stages of reclamation at which time the discovery supporting the validity of the claim might have been exhausted. Compare, e.g., 43 C.F.R. Part 3500 (describing a progressive series of mineral disposal authorizations for solid minerals other than oil shale and coal, without which an operator would be in trespass).

In sum, conflating the statutory mineral disposal authority set forth in the first section of the Mining Law with the process for initiating property rights as against the United States set forth in the subsequent sections would require reading extra words into the statutory language of § 22. Canons of construction, and indeed common sense, demand otherwise. See Sutherland Stat. Const. §§ 46.1, 46.5, 47.28 (7th ed. 2007) (discussing the plain meaning rule, the “whole statute” interpretation, and common meaning canon). See generally Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56-59 (2012) (describing the “Supremacy-of-Text Principle” as: “The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.”).

B. The Need to Verify Rights Correlates with the Rights Being Asserted

The 2005 Opinion properly describes when mining claim validity must be verified. As the 2005 Opinion accurately observed, the Department “simply does not know and . . . *need not know*” whether the open lands on which an operator proposes reasonably incident mining uses are covered by valid mining claims before authorizing those uses. See 2005 Opinion, at 4 (emphasis in original).

There is no dispute that mining claimants must demonstrate the validity of their mining claims whenever they assert a property interest as against the federal government, such as when they seek to obtain a patent or to extract minerals on lands that were withdrawn from disposition under the Mining Law, “subject to valid existing rights.” See *Lara v. Sec’y of the Interior*, 820 F.2d 1535, 1537 (9th Cir. 1987) (describing a miner’s attempt to prove his right to conduct operations on lands that were withdrawn, subject to valid existing rights, and noting that in such situations “[a] mining claimant has the right to possession of a claim only if he has made a mineral discovery on the claim”). The federal government need not—indeed, may not—recognize a

mining claimant's assertion of a property interest as against the government unless and until the Secretary has confirmed mining claim validity. *Cameron*, 252 U.S. at 460 (confirming the Secretary's authority to determine the validity of the claims on withdrawn lands and to recognize "certain exclusive possessory rights" as against the government in valid claims on such lands because "no right [as against the government] arises from an invalid claim of any kind"); *Freeman v. United States Dep't of the Interior*, 37 F. Supp. 3d 313, 319 (D.D.C. 2014) (stating, where a mining claimant alleged that he was owed compensation under the Fifth Amendment because his property rights in his mining claims were "taken," that without a valid mining claim, "the claimant has no right to the property against the United States or an intervenor").

Seeking authorization to conduct reasonably incident mining uses on open lands under BLM's Subchapter C Mining Law regulations, however, does not require the miner to assert property rights as against the government, nor does such an authorization constitute a grant of a property right to the operator or the mining claimant. *See, e.g.*, 65 Fed. Reg. at 70,007-08 (preamble to the Subpart 3809 regulations stating that "approvals of plans of operations on unclaimed lands are not based on property rights under the mining laws, and that approval of a plan of operations under Subpart 3809 does not create property rights where none previously existed"). In addition, authorization for reasonably incident mining uses on open lands does not even require the assertion of a *possessory* interest in the surface of the lands. Operators are required by regulation to list the serial numbers of mining claims situated where the proposed disturbance would occur, 43 C.F.R. §§ 3802.1-4(c)(5), 3809.401(b)(1), but nothing in the Mining Law or the Subpart 3809 regulations requires the operator to be the claim owner or substantiate that it has been authorized by the owner of the listed mining claims to possess or use the lands.

Rather, when miners seek to engage in reasonably incident mining uses on open lands under the Subchapter C Mining Law regulations, the only right under the Mining Law that miners assert as against the government is the statutory right in § 22.¹⁹ Verification of that statutory right requires only a review of BLM's records to confirm that the lands remain "free and open" to the operation of the Mining Law. If the lands are open, then the right asserted by the operator—the statutory right of access under § 22—is confirmed. *See* 2005 Opinion, at 4.

C. BLM's Subchapter C Mining Law Regulations Apply Regardless of Mining Claim Validity

An issue not expressly explored in the 2005 Opinion is the legal effect that a determination of mining claim invalidity on open lands might have on BLM's authorization of reasonably incident mining uses under any of the Subchapter C Mining Law regulations. *See* 2005 Opinion, at 2-3 (concluding that a validity determination was not required before mine plan approval under

¹⁹ As noted in the 2005 Opinion, there may be circumstances where the Department must first confirm that the particular type of mineral deposit is still "free and open" to disposition under the Mining Law (as opposed to disposition under the mineral materials or mineral leasing laws). *See* 2005 Opinion, at 3 n.2 (distinguishing "common variety" determinations from mining claim validity determinations). Such a determination regarding the character of the deposit, however, does not involve an assertion of property rights to the mineral deposit or to the lands on which the reasonably incident mining uses would occur, and thus would not require verification of property rights.

Subpart 3809). Consistent with the principles and analysis above, this section of the Opinion makes clear that, so long as lands remain “free and open” and subject to the statutory right in § 22, whether lands are covered by a valid mining claim has no effect on: (1) BLM’s ability to authorize reasonably incident mining uses under BLM’s Subchapter C Mining Law regulations on those lands; or (2) any active authorizations under those regulations that predate when a mining claim is determined to be void.

As discussed above, before FLPMA and the Subchapter C Mining Law regulations, the Department administered the statutory right under § 22 by allowing all reasonably incident mining uses on any open public lands without prior approval and without regard to whether the uses were occurring on valid mining claims. *See supra* section III.A. Miners needed only to satisfy two requirements for their use and occupancy to be considered authorized by the Mining Law: the lands had to be “free and open” to the operation of the Mining Law under § 22, and the miner had to be using the lands for “prospecting, mining or processing operations and uses reasonably incident thereto.” 30 U.S.C. § 612(a). During this time period, upon becoming aware of uses that were not “reasonably incident” or uses that, while reasonably incident, were occurring on withdrawn lands not covered by a valid mining claim, the Department generally used its adjudicative function to disallow the use. *See Teller*, 113 F. at 273. But there do not appear to be any instances where the Department took the position that a miner lost all authority to conduct reasonably incident mining uses upon the abandonment or other voidance of its mining claims.

Despite the fact that neither the text and statutory purpose of the Mining Law, nor the Department’s administration of § 22 before FLPMA’s enactment, made a valid mining claim a prerequisite for reasonably incident mining uses, the notion surfaced that BLM authorization pursuant to the regulations promulgated under FLPMA might be dependent on—or at least connected to—mining claim validity. The origin of that notion appears to be *Southwest Resource Council*, 96 IBLA 105 (1987), an administrative challenge to BLM’s approval of a mine plan on open lands under Subpart 3809 and, in particular, the agency’s determination that the proposed reasonably incident mining uses at issue satisfied the requirement to prevent “unnecessary or undue degradation” under those regulations. In rejecting the appellant’s argument that a determination of mining claim validity was necessary for BLM to ascertain whether “unnecessary or undue degradation” would occur, the decision of the Interior Board of Land Appeals (IBLA) also included dictum stating that, when reviewing a mining plan of operations, BLM was not “precluded from determining the validity of a [mining] claim and, upon a proper determination of invalidity, denying approval of a plan of operations therefor.”²⁰ *Id.* at 22 (emphasis added).

²⁰ The IBLA properly rejected the environmental groups’ assertion that allowing mining on lands not subject to valid mining claims is “necessarily undue and unnecessary.” *Sw. Res. Council*, 96 IBLA at 122-23 (relying on the regulatory definition of “unnecessary or undue degradation” in force at that time, 43 C.F.R. § 3809.0-5(k) (1982)). As the IBLA correctly pointed out, applying the “unnecessary or undue degradation” standard “presumes the validity of the use.” *Id.* at 123; *see id.* at 122 (noting that “operations authorized by the mining laws run the full gambit [sic] from prospecting, discovery, and assessment work to the development, extracting, and processing of the mineral” (citing 43 C.F.R. § 3809.0-5(f) (1982) (regulatory definition of “operations”))); *see also* Surface Management Handbook H-3809-1 § 4.4.2, at 4-40 (2012) (BLM internal policy guidance stating that its analysis of the environmental effects of approving a mine plan under Subpart 3809 “does not need to address mining claim status or validity”).

The portion of the IBLA's quoted language that states the principle that the Secretary is not precluded from determining mining claim validity before approving a mine plan is black letter law. *See* 2005 Opinion, at 3 n.1 (stating that "the BLM has unconstrained discretion to initiate mining claim validity examination at any time before a patent is issued" (citing *Cameron*, 252 U.S. at 460)). The IBLA's legal foundation for the italicized language was less clear, however, particularly since the Board provided no statutory, regulatory, or case law to support its faulty assumption that BLM could deny approval of a mine plan on open lands if a mining claim has been determined to be invalid.

As noted above, the Department's administration of the Mining Law and the Surface Resources Act had never conditioned the exercise of the statutory right under § 22 or reasonably incident mining uses on open lands on mining claim validity; thus the IBLA would not have been implicitly relying on previous Departmental interpretations of the Mining Law or the Surface Resources Act for its connection between mining claim validity and reasonably incident surface uses. And while FLPMA's protective mandates unquestionably changed how miners could conduct reasonably incident mining uses by imposing substantial operational protections on the exercise of the statutory right under § 22, *see* 43 U.S.C. § 1732(b) (identifying the "unnecessary or undue degradation" standard, as well as additional standards for new operations in wilderness study areas and the California Desert Conservation Area), FLPMA did not amend the "free and open" language of § 22 or otherwise change the Mining Law to add a valid mining claim as a precondition to exercising the statutory right. *See id.* Indeed, section 302(b) of FLPMA expressly provided that it was amending the Mining Law only in the four ways noted in section 302(b). *See id.* ("Except as provided in section 1744, section 1782, and subsection (f) of section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress."). As noted in the 2005 Opinion, requiring mining claim validity before authorizing reasonably incident mining uses was not one of these four sections of FLPMA. *See also* 2005 Opinion, at 2 ("None of the four provisions require that the Secretary determine mining claim or mill site validity before approving a plan of operations.").

The IBLA also could not reasonably have been relying on BLM's Subpart 3809 regulations, which did not include mining claim invalidity as a basis for denying a mine plan on open lands at the time. 43 C.F.R. § 3809.1-6(a) (1999) (regulation in force at the time the IBLA decision was issued). Furthermore, none of BLM's current Subchapter C Mining Law regulations contain such language today. *See* 43 C.F.R. §§ 3715.3 (describing outcome of consultation), 3802.1-5 (requirements for mine plan approval in wilderness study areas), 3809.411(d)(3) (stating the bases upon which BLM can deny a mine plan); 65 Fed. Reg. at 70,005 ("It should be noted, however, that approval of a plan of operations under this subpart constitutes BLM approval to occupy public lands in accordance with its provisions whether or not associated mining claims [or] millsites are determined invalid. Such authority is provided by section 302(b) of FLPMA."), 70,013 ("The sequence of activity set out in the text of the law itself (exploration, then discovery, followed by claim location) presupposes that activities will be carried out on unclaimed land."). Rather, BLM's regulations only state that they apply to uses of federal lands "authorized by the mining laws." *See, e.g.*, 43 C.F.R. §§ 3802.0-7(a) ("These regulations apply to mining operations conducted under the United States mining laws, as they affect the resources and environment or wilderness suitability of lands under wilderness review."), 3809.2(a) (BLM's current regulation

stating that “[t]his subpart applies to all operations authorized by the mining laws on public lands where the mineral interest is reserved to the United States”).²¹

The Subchapter C Mining Law regulations do not connect mining claim validity to authorization for reasonably incident mining uses. Rather, the provisions mandate only that operators identify any mining claims on the lands for which surface use authorization is sought. See 43 C.F.R. §§ 3802.1-4(c)(5) (stating that plans of operations must include, “[i]f and when applicable, the serial number assigned to the mining claim, mill or tunnel site”) (emphasis added), 3809.401(b)(1) (requiring operators to include “the BLM serial number(s) of any unpatented mining claim(s) where disturbance would occur”). Moreover, there is no corresponding regulation under which BLM could reject a request for surface use authorization if the lands did not, in fact, contain any mining claims, valid or otherwise. See, e.g., 43 C.F.R. § 3809.411(d)(3) (listing reasons BLM could disapprove or withhold approval of a plan of operations); 45 Fed. Reg. at 78,903 (responding to comment that no significant activities should take place off the mining claim unless authorized by some other law by stating: “This is not technically correct. One does not need a mining claim to prospect for or even mine on unappropriated Federal lands.”).

The language in *Southwest Resource Council* nevertheless became the primary source for subsequent assertions of a connection between mining claim validity and authorization of reasonably incident mining uses. In a later administrative case entitled *Great Basin Mine Watch*, the IBLA relied on *Southwest Resource Council* for its assertion that “[r]ights to mine under the general mining laws are derivative of a discovery of a valuable mineral deposit, without which denial of the plan of operations is entirely appropriate.” 146 IBLA 248, 256 (1998) (citing *Sw. Res. Council*, 96 IBLA at 123). And, likely because the Board described the *Southwest Resource Council* language as the holding, rather than dictum, see *id.* (calling the *Southwest Resource Council* language the “express holding”), other IBLA decisions relied on the *Southwest Resource Council* for that proposition. See *Ctr. for Biological Diversity*, 162 IBLA 268, 278 (2004) (citing *Great Basin Mine Watch* for the proposition that BLM may reject a mine plan on open lands if the mining claims were invalid); *W. Shoshone Def. Proj.*, 160 IBLA 32, 57 (2003) (same).²²

²¹ Additionally, nothing in the Subchapter C Mining Law regulations requires or even allows BLM to rescind an authorization of reasonably incident mining uses on lands subject to a mining claim that was known to be valid at the time of authorization if the mining claim subsequently became invalid—for example, if the mining claimant failed to comply with annual maintenance requirements and the claims were forfeited by operation of law. 30 U.S.C. § 28i. Under BLM’s longstanding practice, the status quo would remain despite the lack of a valid mining claim: the miner’s operations on open lands would continue to be “authorized by the mining laws” as reasonably incident mining uses on open lands. Only if the lands had been withdrawn from the operation of the Mining Law at the time of mining claim forfeiture or voidance would reasonably incident mining uses cease to be “authorized” because, in that instance, the statutory right would no longer apply to those lands. See *Sw. Res. Council*, 96 IBLA at 124 (discussing requirement to reject a plan of operations where the mining claim on withdrawn lands was void).

²² *Western Shoshone Defense Project* additionally cited to *Pass Minerals* for the proposition that BLM may suspend review of a mine plan on open lands pending a validity examination and any resulting contest proceeding. *W. Shoshone Def. Proj.*, 160 IBLA at 57 (citing *Pass Minerals*, 151 IBLA 78, 86-87 (1999)). But *Pass Minerals* was inapposite. As an initial matter, *Pass Minerals*

The notion that mining claim validity determined whether reasonably incident mining uses would be considered “under the general mining laws” also became the cornerstone of the 2001 Opinion. 2001 Opinion, at 11 (citing to *Great Basin Mine Watch* and stating that “[t]his principle has been followed by the Interior Board of Land Appeals”). Using the reasoning that grew out of the *Southwest Resource Council* dictum, the 2001 Opinion concluded that if the lands were not subject to a valid mining claim, BLM could not authorize reasonably incident mining uses “as a matter of right under the Mining Law” but rather only as a “matter of discretion” under the multiple-use provisions of FLPMA. 2001 Opinion, 2, 14; *see id.* at 6 (citing 30 U.S.C. § 23 and stating that “the extent to which use of mining claims for ancillary operations can be authorized as a matter of right under the Mining Law turns on the Law’s fundamental requirement that a mining claim must contain a ‘discovery’ of a valuable mineral deposit in order to create any rights against the United States”).

I have no quarrel with the 2001 Opinion’s account of what is necessary for a mining claim to constitute a property right enforceable as against the United States. Once there is a “discovery” of a valuable mineral deposit on a properly located mining claim, the claim is a “fully recognized possessory interest.” *Locke*, 471 U.S. at 86 (citing *Best*, 371 U.S. at 335). A valid mining claim is a “unique form of property” that is “valid against the United States if there has been a discovery of mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met.” *Best*, 371 U.S. at 336; *Freese v. United States*, 639 F.2d 754, 757 (Cl. Ct. 1981) (stating that “federal mining claims are ‘private property’ enjoying the protection of the fifth amendment”). The same is true for a validly used and occupied mill or tunnel site. *Bagwell*, 961 F.2d at 1456.

But the 2001 Opinion’s consideration of the Mining Law saw only the haves and have-nots: either a miner had compensable property rights in a perfected mining claim or had nothing. 2001 Opinion, at 2 (concluding that BLM could not authorize reasonably incident mining uses on lands without valid mining claims “based on *any* rights that the Mining Law may otherwise be characterized as conveying” (emphasis added)). That opinion overlooked the fact that the plain text and purpose of the Mining Law authorize rights other than property rights in mining claims and patents. *Id.* (stating that without a discovery, “the claimant’s right to use the claimed lands is no greater nor more secure than the right of anyone else seeking to use the public lands”);²³ *see id.* at 4 (the only specific reference in the 2001 Opinion to § 22, which was not identified as statutory

expressly stated that there was no authority to suspend review of a plan of operations simply because a validity exam was pending. *See* 141 IBLA at 86. More importantly, however, the lands at issue in *Pass Minerals* were withdrawn, making the legal analysis in that appeal inapplicable to the facts of *Western Shoshone Defense Project*. *See id.*

²³ The text and purpose of the Mining Law described above distinguish miners engaging in reasonably incident mining uses pursuant to the statutory right in § 22 from users of the public lands in general. For example, a film maker has no statutory right to access and use the public lands and must seek a permit under FLPMA, 43 C.F.R. § 2920.1-1(b); oil and gas producers have no statutory use right and must seek issuance of a lease under the Mineral Leasing Act, 30 U.S.C. §§ 181-287; and sand and gravel developers must, by statute, obtain a sales contract under the Materials Act of 1947. *Id.* §§ 601-604.

authority).²⁴ True, the self-executing right of free access for reasonably incident mining uses found in § 22 is not a compensable property right and thus is revocable. Nevertheless, the right of free access is a statutorily granted right that may be cognizable judicially²⁵ as well as—relevant to the conclusions of this Opinion—administratively, as the authority for applying the Subchapter C Mining Law regulations to those uses. Thus, the 2005 Opinion’s rejection of the earlier opinion’s “matter of right” versus “matter of discretion” false dichotomy was altogether proper.²⁶ See 2005 Opinion, at 2.

The Department may not abridge the statutory right in § 22 by regulation or policy that imposes mining claim validity as a condition of reasonably incident mining uses on open lands.

²⁴ This error found its way into an opinion by the United States District Court for the District of Columbia, which relied on the 2001 Opinion for its analysis of a facial challenge to BLM’s Subpart 3809 regulations. See *Mineral Pol’y Ctr. v. Norton*, 292 F. Supp. 2d 30, 48 (D.D.C. 2003) (quoting the 2001 Opinion to “properly describe[]” BLM’s discretion to regulate based on whether there are valid mining claims or mill sites). As in the 2001 Opinion, the district court’s assertion that BLM’s authority to regulate reasonably incident mining operations on open lands was related to the existence of a mining claim failed to recognize the statutory right in § 22 as anything other than “the right to *explore for* valuable mineral deposits.” *Id.* at 47 (emphasis added). Moreover, the cases it cited for the proposition that a mining claimant’s “use of the land may be circumscribed beyond the [“unnecessary or undue degradation”] standard because it is not explicitly protected by the Mining Law” refer only to a mining claimant’s ability to establish property rights, not the statutory right to access and use open lands. *Id.* at 48 (citations omitted).

²⁵ Thus, if BLM were to deny a proposed plan of operations on open lands that otherwise complies with BLM’s regulations, the miner might have sufficient injury-in-fact to support a challenge to the agency’s action. But the miner certainly would not be able to assert any cognizable claim for a taking of a property right under the Fifth Amendment because the mineral disposal authority in § 22 alone is not a protected property right. See 2 *Lindley on Mines* § 216, at 475 (stating “the general rule that mere occupancy of the public lands and placing improvements thereon give no vested right therein as against the United States . . .”).

²⁶ Rescission of the 2001 Opinion also remedied the legal infirmity inherent in that opinion’s assertion that the multiple use provisions in section 302(a) of FLPMA and BLM’s “special use” regulations in 43 C.F.R. Subchapter B—Land Resource Management (2000) could be used to regulate—and even prohibit—reasonably incident mining uses as a “matter of discretion” on any lands not covered by a valid mining claim. See 2001 Opinion, at 13; see, e.g., 43 C.F.R. §§ 2920.0-6(a), 2920.7 (examples of considerations before discretionary authorizations). Such an interpretation would require miners to seek a new authorization for the same reasonably incident mining uses each time the mining claim’s status changed, including through accidental forfeiture. Miners would similarly need to seek a new authorization each time there was a change in the commodities price that affected the mineral deposit’s marketability—and thus the mining claim’s validity—or be in jeopardy of a possible enforcement or trespass action for not holding the appropriate permit. Even more fundamentally, though, the suggestion that the multiple use provision applies to reasonably incident mining uses ignores that section 302(a) was not one of the four identified ways that FLPMA amended the Mining Law. See 43 U.S.C. § 1732(b) (listing the four amendments). As such, the 2001 Opinion clearly erred in suggesting that the Subchapter B regulations could be applied to reasonably incident mining uses.

The Department did not have authority to do so before it began to regulate reasonably incident mining uses, and none of the ways that FLPMA amended the Mining Law included the discretionary authority to limit the lands or minerals to which the disposal authority in § 22 applied. Rather, Congress made clear that the only way to withhold access or prohibit citizens from entering lands otherwise subject to the statutory right of free access in § 22 is to withdraw lands from the operation of the Mining Law under section 204 of FLPMA, 43 U.S.C. § 1714. *See* 43 U.S.C. § 1712(e)(3) (stating, in FLPMA’s land use planning provisions, that “public lands shall be removed from or restored to the operation of the Mining Law of 1872 . . . only by withdrawal action pursuant to section 1714 of this title or other action pursuant to applicable law”).²⁷ Consequently, so long as lands remain “free and open” and subject to the statutory right in § 22, whether lands are covered by a valid mining claim has no effect on BLM’s ability to authorize reasonably incident mining uses under BLM’s Subchapter C Mining Law regulations.

V. Related IBLA Decisions

As noted above, some of the lingering uncertainty regarding the Department’s legal position on these subjects stems from certain IBLA decisions that predate and are inconsistent with the 2005 Opinion. *See, e.g., Ctr. for Biological Diversity*, 162 IBLA 268 (2004); *W. Shoshone Def. Proj.*, 160 IBLA 32 (2003); *Great Basin Mine Watch*, 146 IBLA 248 (1998); *Sw. Res. Council*, 96 IBLA 105 (1987). To the extent these IBLA cases misconstrue the Mining Law, FLPMA, and BLM’s implementing regulations by stating or implying that the authority to use lands for reasonably incident mining uses depends in any way on the existence of a valid mining claim, the Department should no longer reference or rely on these statements or implications in these decisions, or similar propositions in any others, when describing the authority to mine on open federal lands. Nor should the Department reference or rely on these decisions, or any others stating similar propositions, to support the notion that a valid mining claim is a prerequisite for regulating any reasonably incident mining uses on open lands under BLM’s Subchapter C Mining Law regulations. Finally, because BLM’s regulations do not contain any provision allowing the agency to suspend consideration of a proposed plan of operations on open lands during the pendency of any discretionary validity examination that BLM may conduct, those decisions and any others stating similar propositions are not precedent or authority for imposing such a requirement.

²⁷ Thus, where there is a conflict between mining and another significant resource use of the public lands—or even where, in the absence of conflict, BLM merely wishes to prioritize other resource uses over mining—the appropriate resolution is a withdrawal under section 204 of FLPMA. *See* 43 U.S.C. § 1702(j) (“The term ‘withdrawal’ means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program;”); *Nat’l Mining Ass’n v. Zinke*, 877 F.3d 845, 873 (9th Cir. 2017) (upholding the Department’s decision to withdraw lands in order to prioritize the identified resources, because regulation of reasonably incident mining uses was “inadequate to meet the purposes of the withdrawal”). Such action serves to rescind the “open invitation” in § 22, and prevents all reasonably incident mining uses, except on mining claims that are found to be valid as of the date of the withdrawal, and remain valid.

VI. Related Regulations and Policy Guidance

In researching this Opinion, I identified language in the BLM's Subchapter C Mining Law regulations and policy guidance that could be read as stating that BLM's authority to allow reasonably incident mining uses is dependent on or related to the existence of a mining claim. For example, the definition of "mining operations" in Subpart 3715 includes "building roads and other means of access to a mining claim or millsite on public lands." 43 C.F.R. § 3715.0-5 (emphasis added). One might infer from this language that the converse is not true—*i.e.*, that building roads and other means of access to a mine site where no mining claim or mill site is situated would not be considered "mining operations." Subpart 3802's definition of "mining operations" similarly might lead one to infer that a mining operation in a WSA would require at least one mining claim. *Id.* § 3802.0-5(f) (noting that the broad definition of "mining operations" applies "whether the operations take place on or off the claim" (emphasis added)); *see also id.* § 3802.0-5(e), (k) (defining "mining claim" and "valid existing right").²⁸

At least one section of the BLM Manual also contains statements that appear inconsistent with the Department's legal position regarding whether a mining claim is required for reasonably incident mining uses of open lands. *See* Management of Wilderness Study Areas, MS-6330 (July 13, 2012). BLM Manual Section 6330 (MS-6330) states that the "degree and types of development allowed for various mineral uses depend on the date of the mineral right" with respect to the WSA designation. *Id.* § I.D.5.a., at 1-21. MS-6330 thus could be read to imply that BLM would, under some circumstances, require a determination regarding a "mineral right" (presumably a mining claim) before authorizing reasonably incident mining uses within WSAs, even on WSA lands that are open to the operation of the Mining Law. *See id.* § I.D.4.e., at 1-21 (acknowledging that WSA designation alone does not withdraw lands from the operation of the Mining Law and quoting section 603 of FLPMA, 43 U.S.C. § 1782(c)); *see also* 43 C.F.R. § 3802.1-5(b)(2) (stating that plans of operations "on a claim with a valid existing right are approved subject to measures that will prevent undue and [sic] unnecessary degradation of the area" (emphasis added)). While, as noted above, BLM has the discretion to determine validity at any time, this policy provision in MS-6330 could be read and applied in a manner that might be inconsistent with this and previous Opinions.²⁹

Therefore, I recommend that BLM incorporate changes consistent with this Opinion in the course of revising its Subchapter C Mining Law regulations. I similarly recommend that BLM amend any sections of its Manual that contain policy guidance that implies or states that a mining

²⁸ The regulatory preambles to the Subchapter C Mining Law regulations, which reflect BLM's policy positions at the time the regulations were promulgated, also contain statements that state or imply that the existence of a mining claim is relevant to whether the regulations apply on open lands. 65 Fed. Reg. at 70,047 (2000 version of preamble to Subpart 3809); 61 Fed. Reg. at 37,116 (stating that the "regulations address[] the unlawful use and occupancy of unpatented mining claims for non-mining purposes[,]") implying that the use and occupancy provisions do not apply on all open land).

²⁹ Based on my review of previous Solicitor's Opinions, BLM's Subpart 3802 regulations and policy, and relevant federal and administrative case law, it is not surprising that the BLM's policy guidance regarding administration of reasonably incident mining uses in WSAs has been uneven. I am leaving that issue for more careful examination in a future opinion.

claim is relevant to authorizations of reasonably incident mining uses on open lands under its Subchapter C Mining Law regulations. In particular, BLM should immediately discontinue reliance on the minerals sections of MS-6330 and, with the help of my Office, promptly amend those provisions. Until MS-6330 is amended, I recommend that the BLM Director formally rescind that section of the BLM Manual to the extent it is contrary with this Opinion and applicable law.

VII. Conclusion

Based on the foregoing analysis, I reaffirm the Department's longstanding legal position that a valid mining claim is not required for reasonably incident mining uses of open lands, and BLM need not determine mining claim validity before deciding whether to approve such uses under any of the Subchapter C Mining Law regulations or before allowing such uses where approval is not required. Additionally, mining claim forfeiture or voidance has no effect on any existing authorization under the Subchapter C Mining Law regulations on open lands. Such reasonably incident mining uses of open lands are lawfully exercising the statutory right of free access embodied in the Mining Law's express invitation at 30 U.S.C. § 22 and are, axiomatically, operations "authorized by the mining laws" and properly regulated under BLM's Mining Law regulations in 43 C.F.R. Subchapter C.



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