

May 4, 2001

Director (630)
Bureau of Land Management
Administrative Record
Room 401 LS
1849 C Street, NW
Washington, DC 20240

**Re: Bureau of Land Management
Mining Claims Under the General Mining Laws; Surface Management
43 CFR 3809
Proposed Suspension of Rules
66 Fed. Reg. 16162 (March 23, 2001)**

INTRODUCTION

The Northwest Mining Association (“NWMA”) is a 106 year old, 2,200 member non-profit, non-partisan trade association based in Spokane, Washington. NWMA’s purpose is to support and advance the mineral resource and related industries, represent and inform members on technical, legislative and regulatory issues, provide for the dissemination of educational materials related to mining, and to foster and promote economic opportunity and environmentally responsible mining. Thus, our keen interest in any federal regulatory proposal pertaining to mining and the environment.

Our members reside in 42 states and are actively involved in exploration and mining operations on BLM administered land in every western state. Our membership represents every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. Our broad-based membership includes many small miners and exploration geologists as well as junior and large mining companies. More than 90% of our members are small businesses or work for small businesses. Most of our members are individual citizens.

In addition, NWMA’s members have extensive first-hand experience with the original 43 CFR 3809 regulations (“3809 regulations”) and are directly and immediately affected by any changes to these regulations. Those regulations, which were developed under the direction of Interior Secretary Cecil Andrus in 1980, have proven to be flexible, reasonable and effective in accomplishing their stated purpose, which is to prevent unnecessary or undue degradation of the public lands and to require reclamation during and upon termination of mining activities. The original 3809 regulations (hereinafter the “Andrus regulations”), have served the public, BLM and the mining industry well in assuring that our Nation’s mineral resources are developed in an economically viable and environmentally sound manner.

In December 1997, Governor Andrus, in commenting on the BLM's effort to propose new and substantially different surface management regulations stated:

In twenty years, I submit, the 3809 regs have stood the test of time... those regulations revolutionized mining on the public lands. Bruce Babbitt - who should know better - is trying to fix things that are not broken, and I suspect accomplish some mining law reform through the back door.

NWMA agrees with Governor Andrus. The Andrus regulations have served the public well and have had a positive impact on environmental quality. Many of our members can personally attest to the success which the Andrus regulations have had in promoting environmentally responsible mining, preventing unnecessary or undue degradation of the public lands, and requiring effective reclamation of mines on BLM-administered land. They should be reinstated with only those modifications needed to fill the narrow regulatory gaps identified in the report produced by the National Academy of Sciences/National Research Council in October 1999 at the explicit direction of the U.S. Congress.

The public lands provide a major source of domestic mineral production. Development of hardrock minerals creates new wealth, which is distributed throughout the U.S. economy and society. Mining on BLM-administered lands also provides the Nation's highest paid non-supervisory wage jobs. These jobs are the cornerstone of western rural economies and are the foundation for the creation of many non-mining service and support businesses. Hardrock mining on BLM administered land also provides substantial federal and state tax revenues. The Andrus regulations allowed this to happen, while at the same time protecting environmental values.

NWMA has been actively involved in every step of the 3809 rulemaking process that began in January 1997, and culminated with the rules published on November 21, 2000 with an effective date of January 20, 2001 (hereinafter the "Babbitt regulations"), which are the subject of this proposal to suspend. We filed comments dated May 3 and May 7, 1999 and February 22, 2000. We will not repeat those comments here, but incorporate by reference the comments previously filed by NWMA during the 3809 rulemaking.

In addition to this comment letter, NWMA fully supports and adopts the comments filed by the National Mining Association, the Alaska Miners Association, the Colorado Mining Association, the Nevada Mining Association, the Women's Mining Coalition, and Barrick Goldstrike Mines, Inc. as though fully set forth herein.

GENERAL COMMENTS

1. BLM Should Suspend the Babbitt Regulations, Reinstate the Andrus Regulations and Fill the Regulatory Gaps Identified in the NRC Report

NWMA strongly supports suspension of the Babbitt regulations and reinstatement of the Andrus regulations modified only to the extent necessary to implement the recommendations of the National Academy of Sciences/National Research Council's October 1999 report

entitled “*Hardrock Mining on Federal Land*,” (hereinafter “NRC Report”) as described in Alternative 5 of BLM’s Final Environmental Impact Statement (FEIS) issued in October 2000. **We believe the only way to achieve the result mandated by Congress is to start with the Andrus regulations and add regulatory language to address the narrow regulatory gaps identified in the NRC report.**

This approach is fully consistent with the conclusions and recommendations of the NRC report and does not run afoul of Congress’ prohibition to promulgate final rules to revise the 3809 regulations, except rules “which are not inconsistent with the recommendations contained in the National Research Council report entitled ‘*Hardrock Mining on Federal Lands*.’” (Pub. L. No. 106-113, § 357 and Pub. L. No. 106-291, § 156).

The first conclusion of the NRC report was that the existing federal (Andrus regulations) and state regulations “are generally well-coordinated, although some changes are necessary. The overall structure of federal and state laws and regulations that provide mining-related environmental protection is complicated, but generally effective.” (NRC report, pages 89-90). Thus, since the NRC report found that the Andrus regulations were “generally effective,” it is consistent with the NRC recommendations and the congressional mandate to begin with the Andrus regulations. It is worth noting that the Babbitt regulations are vastly more complicated and burdensome than the structure reviewed by the NRC.

Further support for NWMA’s recommended approach is found in the second conclusion of the NRC report, “improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection and the efficiency of the regulatory process.” (NRC report page 91). In a practical way, the NRC report told the BLM that it needs to make better use of the tools it has, and does not need more regulations or a complete restructuring of the then-existing federal and state regulatory scheme. The Babbitt regulations completely ignored this conclusion.

After reaching these two primary conclusions, the NRC report set forth 16 recommendations, four which specifically called for changes to BLM regulations, nine which address non-regulatory management improvements to the surface management program policies and guidelines, one (recommendation 3) as directed specifically to the U.S. Forest Service, and two (recommendations 7 & 8) which require congressional action.

Clearly, an approach which starts with the Andrus regulations and adds language to address the specific regulatory gaps identified in the NRC report is not only consistent with the NRC report and congressional direction, but it also represents better public policy. The Andrus regulations have stood the test of time and virtually every question of interpretation has been addressed in policy manuals, guidance documents, IBLA decisions and court decisions. Thus, the industry, the public, and the regulators know what the Andrus regulations mean.

On the other hand, the Babbitt regulations contain new regulatory language that is vague, complex, confusing, and in some cases contradictory. In fact, **the FEIS, in several instances, comments that no one knows what much of the new language means or how**

it will be interpreted. Thus, any attempt to comply with the congressional mandate in Section 357 of the 2000 Consolidated Appropriations Act, or Section 156 of the 2001 Interior Department Appropriations Act, by beginning with the Babbitt regulations and eliminating those provisions that are inconsistent with the recommendations of the NRC report is fraught with uncertainty and the potential for much mischief.

Furthermore, based on our review of the Babbitt regulations and a comparison of those regulations with the NRC report, we believe that over 90% of the new regulatory language would have to be eliminated in order to comply with congressional direction. The FEIS confirms this view. Tables 2.1 and 2.2 from the FEIS clearly demonstrate that Alternative 5, the NRC recommendation, is the same as Alternative 1 (the Andrus regulations) with the exception of six well-defined issues, which were adequately addressed in Alternative 5.

2. The NEPA and APA Processes are Designed to Illicit Meaningful Public Comment

The goal of the National Environmental Policy Act (NEPA) and the procedural safeguards of the notice and comment provision of the Administrative Procedure Act (APA) are designed to illicit meaningful public comment. The rulemaking process is not a popularity contest, nor is it a democracy where comments are counted as “votes.” It is a process designed to ensure that the public, and especially the regulated community, receives adequate notice and an opportunity to provide meaningful comment on regulatory proposals that will impact the regulated community and the environment. Many environmental organizations and other groups opposed to mining have been known to submit tens of thousands of comments which are nothing more than copies of the same comment, often on mass produced post cards or computer generated e-mail, and then claim that the public overwhelmingly supports their position. Forty thousand copies of the same comment is nothing more than a single comment repeated forty thousand times. It is not useful or meaningful public comment that addresses the substantive and procedural issues of a regulatory proposal.

BLM should give little weight to sheer volume of a comment and pay particular attention to the practical concerns contained in comments of those parties most directly impacted by the regulatory proposal. Unfortunately, it is clear that the process used to promulgate the Babbitt rules were a sham, probably illegally so. Virtually none of the legitimate implementation concerns expressed by industry, let alone BLM personnel, were reflected in the final rule. This alone is reason enough to suspend and reconsider the Babbitt rules.

SPECIFIC COMMENTS

We believe the BLM is justified in suspending all of the Babbitt regulations, reinstating the Andrus regulations and modifying them to implement the NRC report as described in Alternative 5 of the FEIS for the following reasons:

1. BLM Has the Authority and Duty to Suspend, Reconsider and Rescind the Babbitt Regulations

It is well established that an agency delegated the authority to promulgate rules and regulations retains the authority to reconsider and rescind them as well. Where the

regulations in question reflect unwise public policy, the agency's exercise of such power is both prudent and responsible. Where the regulations are unlawful due to substantive or procedural deficiencies, the agency *must* reconsider, and reverse course in order to cure such deficiencies. The most compelling basis for exercising this power exists where, as here, the regulations are both unwise and unlawful, as is the case with the Babbitt regulations.

The deficiencies in the rulemaking resulting in the complete replacement of BLM's longstanding rules governing hardrock mining on public lands (the Andrus regulations) are obvious, both substantively and procedurally. To begin with, the record is replete with information supplied by those with the direct, first-hand experience under the Andrus regulations supporting NWMA's position that the complete replacement of the former rules was both unjustified and counterproductive to the stated objective of improving environmental protection and the effectiveness of regulation of mining operations on public lands. This view was confirmed by the very objective NRC report, which concluded that: (1) the *existing* regulations (Andrus) are generally effective; and , (2) improvements in implementation of the *existing* regulations (Andrus) present the greatest opportunity for improving environmental protection.

The legal deficiencies are, in part, related to the unwise policy embodied in the regulations. The entire 3809 rulemaking effort was, in reality, Secretary Babbitt and Solicitor Lesly's attempt to administratively amend the General Mining Law. This was made clear from the very outset by Secretary Babbitt himself. The rulemaking process began with a January 6, 1997 memorandum from Secretary Babbitt to the Assistant Secretary for Land and Minerals and the Acting Director of the Bureau of Land Management. This memo tied the need to revise the 3809 regulations to Congress' failure to enact changes to the General Mining Law that Secretary Babbitt and Solicitor Lesly supported: "It is plainly no longer in the public interest to wait for Congress to enact legislation that corrects the remaining shortcomings of the 3809 regulations."

The Babbitt regulations were part of an orchestrated campaign by Secretary Babbitt and Solicitor Lesly to make the Mining Law unworkable, and stop mining on the public lands. In his 1987 book, *The Mining Law: A Study in Perpetual Motion*, Solicitor Lesly stated, "At the extreme, it might even be appropriate for the Interior Department and the courts to consciously reach results that make the statutes unworkable."

And in a 1988 Law Review Article entitled *Reforming the Mining Law: Problems and Prospects* 9 Pub. Land L. Rev. 1, Solicitor Lesly stated:

A hoary maxim of life on Capitol Hill is that Congress acts only where there is either a crisis or a consensus. Currently, there is no genuine crisis involving hardrock mining, but with a little effort, crisis sufficient to bring about reform might be imagined.... Some particularly dramatic episode that highlights the peculiar anachronisms of the Mining Law might also encourage Congress to perform surgery on the Law.... Bold administrative actions like major new withdrawals, *creative rulemakings*, and aggressive environmental enforcement could force Congress's hand.... Legislative-forcing steps by the executive

branch may not be without political costs, but tools remain available to an administration determined ... to bring about Mining Law reform.
Id. at 10 (emphasis added).

The Babbitt regulations, and in particular the mine veto provision, the new definition of undue or unnecessary degradation, and the prescriptive performance standards are the fruit of the illegal Babbitt/Leshy plan to make the Mining Law unworkable and end mining on the public lands. They are “bold administrative action,” and “creative rulemaking,” but in a foolhardy and negative sense. The Babbitt regulations purport to assert regulatory authority that BLM, since the enactment of FLPMA in 1976, had consistently disclaimed.

The Babbitt regulations ignored the primary recommendation of the NRC on how best to improve environmental protection in the regulation of operations under the Mining Law. Further, they imposed a long series of complex new requirements, and delay-inducing procedures, on claimants’ exercise of the rights Congress provided them in the Mining Law. In sum, the Secretary and the Solicitor, unable to amend the law, “imagined” how to create a “crisis.” They promulgated a set of regulations that will delay, render uncertain, and threaten with disapproval significant portions of exploration and mining that would otherwise occur under the law they could not “reform” as they wished. The Babbitt regulations are their attempt to “reform” the law without legislation, but “Congress has refused to repeal the mining Law of 1872,..., [and] agencies lack authority to effectively repeal the statute....” United States v. Shumway, 199 F.3d 1093, 1098-99 (9th Cir. 1999). The prior Administration created its own “dramatic episode,” which the Suspension Proposal can, when finalized, put to an end. The BLM now has a legal obligation to completely reject and rescind the Babbitt regulations and reinstate the Andrus regulations modified to fill the regulatory gaps identified in the NRC report as described in Alternative 5 of the FEIS.

Other deficiencies arise independently as a result of procedural errors and substantive flaws with respect to the agency’s fidelity to the statutes it relies upon as the source law for the rules. First, the product of BLM’s wholesale revisions to the Andrus regulations unlawfully exceeds the constraints Congress imposed on the agency’s policy discretion for this endeavor. The breadth and content of the Babbitt regulations simply cannot be reconciled with the congressional directive that the agency may issue only rules that are not inconsistent with the recommendations of the NRC report. Quite apart from their direct conflict with this specific directive from Congress, the Babbitt regulations exceed the agency’s statutory authority; conflict with those statutes, as well as other laws that address the subject matter; often lack any reasonable basis in the record; and, were promulgated in a manner that violates the procedural requirements of various laws including the Administrative Procedure Act (APA), Regulatory Flexibility Act (RFA), and the National Environmental Policy Act (NEPA), to name a few.

All of these policy and legal deficiencies provide a perfectly reasonable and lawful basis for the agency to suspend the regulations while it performs a reappraisal of their efficacy in terms of the wisdom and lawfulness of the agency’s decision. Some may contend that the agency cannot suspend the regulations absent new information that became available since the rulemaking. Such a view is incorrect. The legal deficiencies present with the rulemaking

alone supply a reasoned basis for suspending the rules. Of course, there are those who would argue that the record here supports the Babbitt regulations. However, it does not follow that the record does not support another outcome. As long as BLM can offer a reasoned explanation supported by the record for its decision to suspend the rule, the agency's choice governs. *See Association of Public-Safety Communications Officials v. Federal Communications Commission*, 76 F. 3d 395, 398 (D.C. Cir. 1996). We submit that the record here contains ample support for the outcome proposed by BLM to suspend the Babbitt regulations while it examines what, if any, changes to the Andrus regulations would result in improved protections and efficiencies in the regulation of hardrock mining operations on public lands administered by BLM.

2. The Babbitt 3809 Regulations Are Illegal.

In the Federal Register notice, BLM acknowledges that:

“[U]ndertaking implementation of a complex new regulatory program applicable to hardrock mining on public lands before additional examination of the legal, economic and environmental concerns that the plaintiffs [in four lawsuits] and the Nevada governor raise could prove unnecessarily disruptive and confusing to the mining industry and the states that, together with BLM, regulate the mining industry.” 66 Fed. Reg. 16163-64.

NWMA believes BLM is right to be concerned about the legal challenges to the Babbitt regulations. As discussed in more detail in our previously filed comments in this rulemaking, we believe the Babbitt regulations exceed the Secretary's authority under the Mining Law of 1872 and the Federal Land Management and Policy Act (FLPMA). We also believe the **Babbitt regulations were promulgated in violation of the APA, the RFA, NEPA, and expressly violate congressional mandates prohibiting BLM from promulgating final rules to revise the 3809 regulations, except those rules “which are not inconsistent with the recommendations contained in the [NRC] report, so long as these regulations are also not inconsistent with existing statutory authorities.”** Public Law 106-113, § 357.

a. FLPMA Provides BLM with Only Limited Authority to Regulate Activities that Are Authorized by the General Mining Law.

FLPMA expressly provides that, with four narrow exceptions, none of its provisions **“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.”** One of the exceptions is that FLPMA does authorize BLM “by regulation or otherwise, to take any action necessary to prevent unnecessary or undue degradation of the lands.” Aside from the four narrow exceptions, FLPMA does not authorize or permit BLM to regulate operations authorized by the General Mining Law to prevent degradation of the resources situated on public lands (as opposed to the land themselves), to afford environmental protection to such lands or their resources, to protect against undue impairment of the scenic, scientific or environmental values of such lands, or to

assure against stream and water pollution. Rather, Congress delegated these tasks to other federal agencies or left them for state regulation.

Pursuant to § 302(b) of FLPMA, BLM may regulate operations authorized under the General Mining Law only where “necessary to prevent unnecessary or undue degradation of the lands.” This section refers to surface disturbances and prohibits such disturbances that are either not necessary for the conduct of mining operations, or where necessary, are greater than that which would normally result when an activity is being accomplished by a prudent operator in a usual, customary and proficient manner. **§ 302(b) does not authorize BLM to prohibit impacts caused by operations authorized under the General Mining Law where those impacts are necessary and due, regardless of whether such impacts are irreparable or can be mitigated.**

b. The Revised Definition of Undue or Unnecessary Degradation Exceeds BLM’s Statutory Authority

§ 3809.5 of the Babbitt regulations redefines the term “unnecessary or undue degradation” to include conditions, activities or practices that, among other things, occur on mining claims or millsites located after October 21, 1976, or on unclaimed lands, that result in “substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.” Similarly, § 3809.415(d) provides that an operator “prevent(s) unnecessary or undue degradation” by “avoiding substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.” This is the so-called mine veto provision, which is far beyond the authority delegated to the Secretary by Congress.

The substantially revised definition of “unnecessary or undue degradation” in the Babbitt regulations represents a major departure from the long-established meaning of the term and it exceeds the statutory authority granted to BLM by FLPMA. Further, the vague and broad discretion to veto proposed mine operations granted by the new definition to BLM will have devastating effects on the domestic mining industry in the western states, and therefore represents an unwise change in public land policy. This is especially true as it is totally contrary to well-settled expectations of the parties involved. Quite simply, BLM’s “mine veto” provision has destroyed private sector investment incentives for grassroots mineral exploration and development. This is because the approval process is no longer transparent. As one of our members put it, “It’s worse than trying to permit a mine in Russia.”

The original definition of “unnecessary or undue degradation” was promulgated in 1980, shortly after the enactment of FLPMA. As such, the definition was unchanged for twenty years prior to this recent rulemaking. In the preamble to the proposed rule for the recent Subpart 3809 rulemaking, BLM discussed the need to “upgrade” the definition. 64 Fed. Reg. 6424. BLM’s assertion that the definition needed upgrading reflected, at best, a fundamental misunderstanding of the previous definition and how it applied. In addition to the definition previously found at 43 C.F.R. § 3809.0-5(k), the Andrus regulations

required that all operations “shall be conducted to prevent unnecessary or undue degradation of the Federal lands and shall comply with all pertinent Federal and State laws” 43 C.F.R. § 3809.2-2 (2000). Thus, the operational definition of “unnecessary or undue degradation” under the former regulations was dynamic; it was constantly changing to incorporate changes to state and federal standards as well as new developments in environmental sciences or industry practices, and thus was not in need of further regulatory “upgrading.”

Under the Andrus regulations, whenever federal or state laws or regulations relating to air quality, water quality, solid waste or other environmental media were modified, those new standards and regulations were automatically incorporated into BLM’s hardrock mining program. They were modified to include new state requirements for groundwater protection, new state reclamation statutes and changes to the federal Clean Air and Clean Water Acts. Furthermore, the BLM has issued policy statements, manuals and guidance documents to change, upgrade and update the working definition and on-the-ground implementation of its FLPMA directive to prevent “unnecessary or undue degradation.” Thus, the meaning of “unnecessary or undue degradation” under the prior regulations was amended or modified literally hundreds of times since it was initially adopted by BLM in 1980.

The effort by BLM to illegally “upgrade” the definition by incorporating proposed performance standards ignores the ongoing, evolving nature of the Andrus regulations, which were contemporaneously promulgated with FLPMA’s enactment twenty years ago, and have been consistently applied by BLM and relied upon by the mining industry, as well as other state and federal agencies that have regulatory responsibilities, since that time.

BLM must also recognize that there are limits on the agency’s authority to impose regulations that will eliminate environmental impacts – especially if those regulations also effectively preclude any opportunity to develop mining claims on public lands (as the new discretionary mine veto provision will surely do). This issue was addressed in the FEIS for the Andrus regulations in 1980, as the Department explained why it was not adopting an alternative that would have imposed overly strict environmental standards:

The general management standard under FLPMA is to prevent unnecessary or undue degradation Under [this] standard, the Secretary is authorized and required to take some steps to prevent or minimize those impacts due to mining activity which are avoidable. However, it does not go so far as to authorize him to prevent any and all impacts. This is evident by the use of the word “unnecessary.” This implies he may permit some necessary impacts which cannot be prevented because steps necessary to prevent those impacts are too expensive (to the point of making an entire operation uneconomic), technologically impossible, or highly impractical. He can only hope to minimize those impacts.

1980 FEIS at 8-5 – 8-6. This statement clearly describes the intent of the Act, which has not changed since that time. BLM also determined in 1980 that its policy of preventing unnecessary or undue degradation was not intended to impede the development of public lands mineral resources:

Consistent with § 2 of the Mining and Mineral Policy Act of 1970 and § 102(a)(7), (8), and (12) of [FLPMA], it is the policy of the Department of the Interior to encourage the development of Federal mineral resources and reclamation of disturbed lands. 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 the Federal lands and to provide for reasonable reclamation.

43 C.F.R. § 3809.0-6 (2000). These policy objectives reflect the Department’s reasoned balancing of the statutory rights of mining claimants with FLPMA’s regulatory authorities. The authorizing statutes which governed BLM’s initial promulgation of the 3809 regulations remain in force virtually unchanged today. The revised definition of “unnecessary or undue degradation” completely discards these statements of policy, which were the proper and contemporaneous interpretation of Congressional intent as expressed in the public land laws.

In addition, the new definition eliminates the former “prudent operator” standard and any comparison with similar operations to determine what is reasonable and prudent. As a consequence, there is no consideration of cost or feasibility in the revised definition. BLM’s wholesale departure from the long-standing interpretation of unnecessary or undue degradation is legally unsupportable. *See Motor Vehicles Manuf. Ass’n v. State Farm*, 463 U.S. 29, 41-42 (1983) (“an agency changing course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required . . . in the first instance”). BLM’s “analysis” in the final rule does not meet this standard.

The General Mining Law, 30 U.S.C. § 22, and FLPMA expressly leave the public lands free and open to citizens to explore for minerals, locate mining claims, and obtain the exclusive right to extract valuable minerals from the land. BLM has no authority to veto a proposed mining operation,¹ but may only regulate as necessary to prevent “unnecessary

¹ As a recent decision of the U.S. Court of Appeals for the Ninth Circuit held: Despite much contemporary hostility to the Mining Law of 1872 and high level political pressure by influential individuals and organizations for its repeal, all repeal efforts have failed, and it remains the law. . . . [Miners] are not . . . mere social guest[s] of the Department of the Interior to be shooed out the door when the Department chooses. . . . *Congress has refused to repeal the Mining Law of 1872 . . . , [and] agencies lack authority to effectively repeal the statute. . . .*

and undue degradation.” The Secretary acknowledged this lack of authority in 1993 when he sought legislation to create “a process . . . for determining that mining does not occur on lands that are unsuitable for it – that have higher values for other uses.” Hearing Before Senate Subcomm. On Mineral Resources Development and Production of the Comm. On Energy & Natural Resources, 101st Cong., 1st Sess. at 43 (May 4, 1993). Of course, there was already an established process by the BLM pursuant to FLPMA to make such determinations and then withdraw selected lands from mineral entry: it is the BLM Resource Planning Process.

In fact, since FLPMA was enacted, BLM has always recognized that some adverse impacts from mining were necessary and due, and therefore outside of its regulatory authority. For example, the Andrus regulations define “unnecessary or undue degradation” as follows:

Unnecessary or undue degradation means surface disturbances greater than what would normally result when an activity is being accomplished by a *prudent* operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete *reasonable* mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation. Where specific statutory authority requires the attainment of a stated level of protection or reclamation, such as in the California Desert Conservation Area, Wild and Scenic Rivers, areas designated as part of the National Wilderness System administered by the Bureau of Land Management and other such areas, that level of protection shall be met.

43 C.F.R. 3809.0-5(k) (2000) (emphasis added). Correspondingly, the FEIS for the Andrus regulations issued by BLM also clearly recognized that FLPMA did not permit BLM to prohibit adverse impacts that were “necessary and due.” For example, BLM made clear that it lacks the authority to deny a plan of operations because adverse impacts cannot be mitigated, *see* FEIS quote at p. 3, *supra*, and that Congress could have made explicit an intent to prohibit any and all adverse environmental impacts:

An alternative . . . is to seek legislation which would give the Secretary authority to impose environmental standards in all areas (air, water, visual resource, reclamation, wildlife, etc.) which require prevention of any or all impacts and require the highest possible standard of reclamation.

1980 EIS at 8-6. *See also, e.g., id.* at 5-1 (“Even well regulated, carefully conducted mining activities will result in some degree of conflicts and unavoidable adverse impacts to resources other than mineral, such as rangeland, recreation, wildlife, etc.”); and (“Applicable laws do not authorize denial of mining activities because of unavoidable impacts.”) *Id.* at 9-33.

The NRC report recognizes that some impacts from mining are necessary and due:

Mining inevitably affects these resources. The significance of potential negative impacts depends on the extent to which they can be avoided or mitigated. This to some extent depends on compliance with regulations. Mining, its impacts on other resources and uses, and the regulatory structure are related matters that require balance and reason when dealing with the potentially competing issues of protection of the environment, production of minerals and metals and employment for society, and associated federal and state statutory responsibilities. (NRC report page 2).

Actions based on environmental regulations may avoid, limit, control, or off-set many of these potential impacts, but mining will, to some degree, always alter landscapes and environmental resources. Regulations intended to control and manage these alterations of the landscape and the environment in an acceptable way are **generally in place and are updated as new technologies are developed to improve mineral extraction**, to reclaim mined lands, and to limit environmental impacts. Therefore, the committee emphasizes that these potential impacts will not necessarily occur, and when they do, they will not occur with the same intensity in all cases. (emphasis added, NRC report, page 3)

Now, in the Babbitt regulations, BLM has defined “unnecessary and undue degradation” to allow it to do precisely what it has always previously, and correctly, interpreted as outside its statutory authority. The Babbitt regulations substantially redefine “unnecessary or undue degradation” to mean, in part, an activity that will result in “substantial irreparable harm” to a “significant” scientific, cultural or environmental resource that cannot be “effectively mitigated,” notwithstanding the use of best available mine reclamation practices. *See* 43 C.F.R. § 3809.5(4) (2001). Rather than recognize that such adverse effects would be necessary and due, this unlawful measure would effectively create a new arbitrary and capricious “mine veto” power in BLM. Legislation, not regulatory legerdemain, is necessary to create any lawful mine veto power.

Thus, the mine veto provision attempts to *illegally* allow BLM to preclude operations authorized under the General Mining Law on lands that BLM believes, in retrospect, to possess significant resource values consistent with the mineral withdrawal provision specified in Section 204 of FLPMA. Section 302(b) of FLPMA does not grant BLM

authority to “veto” an operation that complies with all other federal and state laws, even though the operation results in “substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.” In short, FLPMA does not give the Secretary of Interior the authority to say no except prospectively by using the withdrawal authority in Section 204 of FLPMA. The “mine veto” provision represents a “taking,” with all the legal and financial compensation that the Fifth Amendment requires.

c. There is no statutory authority under FLPMA for the environmental performance standards.

§ 302(b) of FLPMA does not authorize BLM to regulate, preclude or require that operations authorized by the General Mining Law minimize or mitigate the impacts of water uses or discharges to surface waters, ground waters, wetlands or other environmental media. Nor does § 302(b) authorize BLM to require operators to comply with standards or measures for the protection of environmental media different from, duplicative of, and/or more stringent than those prescribed by state and other federal agencies pursuant to state and federal laws and regulations specifically designed to regulate water uses or discharges to such media. By definition, compliance with such laws and regulations and the permits issued pursuant thereto do not constitute “unnecessary or undue degradation;” in fact, just the opposite would be true.

Contrary to BLM’s long-standing construction of its authority under § 302(b) of FLPMA, the Babbitt regulations (including §§ 3809.415 and 3809.420(b)(2), (b)(3), (b)(6), (c)(3), (c)(4), and (c)(5)) purports to require operators undertaking activities pursuant to the General Mining Law to comply with performance standards and other requirements for the protection of environmental media (including surface waters, ground waters, and wetlands), fish and wildlife, and water quantity in a manner different from, duplicative of, and/or more stringent than requirements imposed by state and other federal programs. BLM does not have the statutory authority to impose such standards. That authority has been given by Congress to the U.S. EPA and the states.

§§ 3809.5 and 3809.415 of the Babbitt regulations purport to require operators conducting activities authorized by the General Mining Law to prevent what BLM personnel deem irreparable harm to scientific, cultural, or environmental resource values, even when those harms would normally result when an activity is being accomplished by a prudent operator in a usual, customary and proficient manner, and even where those harms would *not* be in violation of other state and federal laws whose express purpose is to protect such resource values. Thus, when it promulgated the Babbitt regulations, including §§ 3809.5, 3809.415 and 3809.420(a)(4), (b)(2), (b)(3), (b)(6), (c)(3), (c)(4), and (c)(5), BLM exceeded its statutory authority under FLPMA.

d. The Mine Veto Provision Violates the Notice and Comment Provisions of the Administrative Procedures Act

Regardless of whether BLM had authority to implement the mine veto provision, it must nonetheless be suspended because its promulgation violated the notice and comment requirements of the APA. The mine veto provision *first* appeared in the *final* rule – it was not in the proposed rule and, therefore, NWMA and the public at large had no notice of, or opportunity to comment on, this highly significant and substantive provision. Nor can this substantial arbitrary and capricious veto power be construed as a logical outgrowth of any provision of the proposed rule. *See Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. 1991) (vacating final rule provision due to lack of notice in proposed rule). The provision is enormously damaging to the mining industry and even BLM has admitted that it may cause greater economic harm than any other provision in the rule. *See* FEIS, V. 1 at 287 (“the requirement . . . has the greatest potential for affecting mineral activities (both large and small)” and “[i]n some cases, could preclude operations altogether”). Thus, this provision violates the notice and comment requirements of the APA and is, therefore, invalid. *See* 5 USC § 553.²

e. The Mine Veto Provision Violates NEPA and Is Inconsistent with the Conclusions and Recommendations of the NRC Report

The NEPA environmental review process has become particularly problematic as currently administered by BLM and other federal agencies. BLM’s current handling of the NEPA process is not consistent with the NRC Report finding that NEPA environmental analyses should form the backbone of the federal permitting process:

The NEPA process is the key to establishing an effective balance between mineral development and environmental protection. The effectiveness of NEPA depends on the full participation of all stakeholders throughout the NEPA process. Unfortunately, this rarely happens in a timely fashion.
Recommendation: From the earliest stages of the NEPA process, all agencies with jurisdiction over mining operations or affected resources should be required to cooperate effectively in the scoping, preparation, and review of environmental impact assessments for new mines. Tribes and nongovernmental organizations should be encouraged to participate and should participate from the earliest stages.

(NRC Report, pages 6 - 7).

If the NRC Report conclusions and recommendations regarding NEPA were implemented by BLM, the NEPA process would become a meaningful opportunity to

² The lack of prior notice of the “mine veto” provision also violates the Regulatory Flexibility Act which requires that small entities have “an opportunity to participate in the rulemaking” by providing notice of the provisions in the rule. *See* 5 USC § 609(a).

evaluate ways to make a proposed mine the best possible project for the community and the environment. Unfortunately, as currently administered by BLM, NEPA represents a mammoth hurdle, and frequently a roadblock, that requires an enormous expenditure of federal and corporate resources that should be focused instead on local and site-specific issues. Some of the cost and delay stems from BLM's practice to accord every comment equal weight, including those from people with no expertise or direct stake in the decisions to be made. Many of these individuals, especially those representing national anti-mining groups, use the NEPA process as a powerful tool to thwart proposed projects. NWMA respectfully but strongly urges BLM to take whatever action it can to implement the NRC Report conclusions regarding improving the NEPA process to end such abuses.

Additionally, NWMA believes the significant irreparable harm standard added to the definition of unnecessary or undue degradation at § 3809.415(d) in the Babbitt regulations is completely inconsistent with the NRC Report's findings on NEPA. This mine veto provision turns the NEPA process on its ear, and renders the NEPA environmental analysis mute because it inserts a last-minute discretionary veto that can override the findings of the NEPA process. As stated above, the NEPA process affords basically anyone standing and the ability to require detailed analysis of the potential impacts associated with a proposed project. The scope of this veto evaluation can go far beyond on-the-ground environmental resources and can include a number of far-reaching and highly subjective social and cultural issues.

There is absolutely no need or justification to create another procedural vehicle, like the arbitrary "significant irreparable harm standard," for evaluating the potential effects of a proposed project. All meaningful analysis can, should, and must be conducted under the aegis of NEPA. Furthermore, as recommended by the NRC Report, stakeholders should be *required* to participate early on in the NEPA process. If implemented as recommended by the NRC Report, NEPA and the previous 3809 rules already provide BLM with all of the necessary tools to protect the environment and effectively manage BLM lands affected by mining. They also give stakeholders meaningful opportunities to voice their concerns and influence the outcome of the permitting process.

The new mine veto provision will not improve the environmental analysis performed for a proposed project or result in improved on-the-ground environmental protection. The significant irreparable harm standard in the Babbitt regulations creates a new process outside of NEPA that allows a third-party to create a new issue out of whole cloth and to inject this issue at the eleventh hour, with the sole purpose of disrupting, circumventing, and potentially overruling NEPA and other relevant statutes. The significant irreparable harm provision is indeed a mine veto provision – a last minute, powerful tool that anti-mining groups will wield to obstruct proposed mining projects. Mining opponents who choose not to participate in a constructive way in the NEPA process and who withhold their comments and concerns until the very end of the NEPA environmental review and 3809 permitting processes should not be rewarded with a tool to thwart the entire permitting process.

f. The Attempt to Impose Joint and Several Liability Exceeds BLM's Authority

Another major example of how BLM ignored its statutory constraints is the Babbitt regulation's imposition of joint and several liability on mining projects. The Babbitt rule states that "mining claimants and operators (if other than the claimant) are jointly and severally liable for obligations under this subpart" Joint and several liability is a serious departure from current practice and should not be imposed absent clear Congressional intent and statutory authority. BLM imposition of this scheme has no statutory basis since no provision of FLPMA contemplates or supports the imposition of such a liability scheme. In addition, there are both practical and due process problems with imposing joint and several liability for civil and criminal penalties as such penalties could be considered "obligations under this subpart."

Only operators should be liable for operators' compliance. Claimants who have leased claims, sold them reserving a royalty, or contributed them to a joint venture have no control over operations other than those conferring operator status. Making them liable for the acts of others at least chills, and probably eliminates, these types of transactions in mining claims. Since mining claims are property, such a restraint on alienation so diminishes the property value in a mining claim as to amount to a taking in violation of the Fifth Amendment of the Constitution. Further, these liability provisions will constitute severe disincentives to mineral exploration activities, a "significant factor" that should have been analyzed in the draft environmental impact statement.

In addition, the imposition of joint and several liability is inconsistent with the NRC Report recommendations. The NRC report did not endorse such a liability scheme. In fact, a joint and several liability scheme undermines the NRC recommendation to remove barriers to reclaiming abandoned mine sites through limiting the liability of the new operator as relates to previous contamination. The imposition of joint and several liability obviously will discourage such cleanups.

3. The Babbitt 3809 Regulations Are Inconsistent with the Recommendations of the NRC Report and Violate Express Congressional Direction.

In 1998, at the request of Nevada Governor Bob Miller and the Western Governors' Association (WGA), the Congress directed the National Academy of Sciences/National Research Council (NRC) to fully evaluate whether existing federal and state regulatory programs governing mining were adequate to prevent "unnecessary or undue degradation" of the public lands.

Specifically, the congressional directive was to conduct a study with the following objectives:

- Identify the federal and state statutes and regulations applicable to environmental protection of federal lands in connection with mining activities;
- Consider the adequacy of statutes and regulations to prevent unnecessary or undue degradation of the federal lands; and

- Make recommendations for the coordination of federal and state regulations to ensure environmental protection, increase efficiency, avoid duplication and delay, and identify the most cost-effective manner for implementation.

In order to conduct this study, the NRC appointed 13 individuals with a broad range of expertise and viewpoints relevant to mining to the “Committee on Hardrock Mining on Federal Lands.” The NRC report presents the following consensus findings and recommendations based on scientific research, comprehensive information, public meetings, field investigations, careful substantiation, and peer review (also see attached NRC press release):

- 1) Although they are unevenly and in some cases inexpertly applied, the existing array of federal and state laws regulating mining is generally effective in protecting the environment;
- 2) **Better implementation of existing laws and regulations presents the greatest opportunity for improving environmental protection and regulatory efficiency;** and
- 3) Specific issues or gaps in the existing regulations should be filled. “In spite of these issues or gaps, and based on numerous discussions and meetings with federal and state regulators, mining industry representatives, and the public, **the Committee finds that the existing regulations are generally well coordinated and effective.**” (emphasis added, NRC report, page 63).

NRC’s Recommendations to Improve Implementation and Close Regulatory Gaps:

- Review the adequacy of BLM and Forest Service staff and resources devoted to regulating mineral exploration and mining operations.
- Update technical and policy guidance documents on a regular basis.
- Increase and improve agency and stakeholder participation in the NEPA process from its earliest stages.
- Expedite the review of permit applications for exploration projects affecting fewer than 5 acres of Forest Service-managed lands.
- Require financial assurance for all mining and exploration activities that are not classified as casual use.
- Mandate Plans of Operation for any mining or milling operation regardless of size.
- Develop criteria and procedures for modifying Plans of Operation.
- Adopt regulations that define temporary closure and require interim management plans.
- Plan for and assure long-term, post-closure management of closed and reclaimed mines.
- Provide authority to issue administrative penalties and develop clear guidelines for involving other state or federal enforcement authorities.
- Modify existing environmental laws and regulations to allow and promote industry cleanup of abandoned mines and remove institutional and legal barriers currently thwarting such cleanup.

- Secure congressional funding for aggressive and coordinated research programs on the environmental impacts of hardrock mines.

The NRC report recommendations and findings are accurate, useful, and balanced. They provide an effective guide for future public policy discussions about environmental regulations for mining activities. The NRC report conclusions do not support the wholesale revision of the Andrus regulations as embodied in the Babbitt regulations. Moreover, many of the prescriptive performance standards mandated in the Babbitt regulations are inconsistent with the NRC's findings that mining regulations should be based on site-specific, performance-based standards.

In October 1999, in response to then Secretary of Interior Bruce Babbitt's refusal to reopen the comment period to consider the NRC report, Congress directed BLM to reopen the comment period to allow adequate and meaningful public comment on the 3809 rulemaking in light of the NRC report. BLM's compliance was, at best, superficial. Given Secretary Babbitt's public statements about the NRC report and the 3809 rulemaking, Congress felt compelled to once again take legislative action to bar unwarranted revisions to the existing 3809 rules and compel BLM to follow the NRC report's conclusions and recommendations. Section 357 of the 2000 consolidated appropriations act provided:

None of the funds in this Act or any other Act shall be used by the Secretary of the Interior to promulgate final rules to revise 43 C.F.R. Subpart 3809, except that the Secretary, following the public comment period required by Section 3002 of Public Law 106-31, may issue final rules to amend 43 C.F.R. Subpart 3809, which are not inconsistent with the recommendations contained in the National Research Council report entitled "*Hardrock Mining on Federal Lands*" so long as these regulations are also not inconsistent with existing statutory authorities. Nothing in this section shall be construed to expand the existing statutory authority of the Secretary.

Despite this explicit and unambiguous congressional directive in Section 357, BLM continued to pursue an expansive revision of the Andrus regulations, which, in reality, amounted to an improper attempt at administrative Mining Law reform. In an internal memorandum dated December 8, 1999, Interior Department Solicitor John Lesly attempted to dismiss the clear intent of Congress when he interpreted Section 357 of the 2000 Consolidated Appropriations Act to achieve the Department's pre-determined policy result. The memorandum instructed BLM that:

[F]inal [3809] rules addressing subjects which lie outside the specific recommendations of the NRC report would not be effective by Section 357.... Rules addressing issues that are not directly covered by the NRC's recommendations would not run afoul this limitation, since there would be no question of their inconsistency with those recommendations.

In response to Solicitor Lesly's gross misinterpretation of Section 357, Congress reenacted Section 357 in the fiscal year 2001 Interior Department Appropriations Act and expressly

rejected Solicitor Leshy's interpretation of Section 357. Pub. Law 106-291, Section 156. The conference report is unambiguous in its rejection of Solicitor Leshy's interpretation.

Section 156 allows the Bureau of Land Management to promulgate new hardrock mining regulations that are not inconsistent with the National Research Council report entitled "Hardrock Mining of Federal Lands." This provision reinstates a requirement that was included in Public Law 106-113. In that Act, Congress authorized changes to the hardrock mining regulations that are "not inconsistent with" the report The statutory requirement was based on a consensus reached among Committee Members and the Administration. On December 8, 1999, the Interior Solicitor wrote an opinion concluding that this requirement applies only to a few lines of the Report, and it imposes no significant restrictions on the Bureau's rulemaking authority. **The Committee does not agree with the Solicitor's opinion** and does not intend the language in this section to constitute any ratification of, or agreement with, that opinion. H.R. Rep. No. 106-914 at 154. (emphasis added).

Despite congressional mandates to develop only 3809 rules that are consistent with the NRC report's recommendations and to consult with each of the Western Governors, BLM improperly forged ahead with comprehensive new 3809 regulations dramatically broader and inconsistent with the recommendations of the NRC report.

Again, the NRC Report concluded that the Andrus regulations and state regulations "are generally well-coordinated, although some changes are necessary. The overall structure of federal and state laws and regulations that provide mining-related environmental protection is complicated, but generally effective." (NRC report pages 89-90). The report went on to state, "improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection and the efficiency of the regulatory process." (NRC report page 91). The NRC report also identified several narrow "regulatory gaps" that could be addressed by making specific limited and focused changes and additions to the Andrus regulations.

Unfortunately, Secretary Babbitt and Solicitor Leshy chose to ignore the conclusions and recommendations of the NRC report, as well as the congressional direction that prohibited BLM from promulgating final rules to amend the 3809 regulations, except those "which are not inconsistent with the recommendations contained in the National Research Council report entitled *Hardrock Mining on Federal Lands*. The Babbitt regulations introduce new and burdensome requirements that go far beyond the narrow "regulatory gaps" identified in the NRC report and, taken as a whole, are clearly not consistent with the conclusions and recommendations of the NRC report.

In addition to failing to address the extent to which improved implementation of the Andrus regulations would achieve BLM's stated goals of improved environmental protection, the Babbitt regulations are inconsistent with the NRC report's conclusions

and recommendations because they exceed the scope of and/or are in direct conflict with the NRC report in the following areas:

- The substantially revised regulatory definition of the FLPMA term “unnecessary or undue degradation,” which would purport to grant to BLM unbridled mine veto authority to deny Plans of Operation;
- The introduction of rigid prescriptive environmental performance standards, including standards for surface water and ground water quality and quantity, wetlands and riparian areas that duplicate or conflict with existing legitimate federal and/or state environmental regulatory schemes;
- The introduction of performance standards for water quantity and use that lack any statutory authority and conflict with the exclusive jurisdiction of state and local governments to regulate the consumptive use of water on federal lands;
- The requirement to use “native species” for mine reclamation where “technically feasible,” regardless of cost considerations and regardless of whether non-native species would lead to more successful revegetation and reclamation;
- The requirement to “rehabilitate” all fisheries and wildlife habitat affected by mine operations, without consideration of technical and economic feasibility, and without regard to whether the affected species are threatened or endangered;
- A new liability scheme that lacks any statutory basis and included the imposition of joint and several liability upon operators, and a revised definition of “operator” to include corporate parents and affiliates contrary to federal and state law; and
- Considerable new and burdensome information gathering and application requirements for proposed mining Plans of Operation.

4. The Impacts of the Babbitt Regulations Were Not Adequately Analyzed or Considered

a. BLM Failed to Properly Analyze the Impacts of the Mine Veto Provision

While NWMA believes the impacts of the Babbitt regulations as a whole on the mining industry were inadequately considered by BLM, the total failure to analyze the impacts of the mine veto provision stands out. In the FEIS, BLM acknowledges that the potential impacts of the mine veto provision may be significant stating:

waiting and uncertainties associated with new standard would reduce mineral activities” and that “the requirement to avoid substantial irreparable harm to significant resources has the greatest potential for affecting mineral activities. In some cases, the provision could preclude operations altogether.

Again, it must be pointed out that the public had no opportunity to submit information to BLM characterizing the chilling effects of the mine veto provision. Without such public

input and evaluation, BLM has grossly underestimated the economic impacts of the rule. This mine veto power presents intolerable risks to investment in mineral exploration and mine development and would, almost single-handedly, end the viability of the domestic hardrock mining industry.

For example, the FEIS admits that plans of operations may be denied on a widespread basis, creating enormous uncertainty about exploration and development investments:

[agency] concerns about Native American religious and cultural issues may mean that *the [substantial irreparable harm] provision may be extensively applie[d]* as it relates to those concerns. Thus, *there is [a] great amount of uncertainty associated with the substantial irreparable harm standard.*

FEIS, V. I at 287-88. BLM further admitted that application of the substantial irreparable harm standard will involve wholly *subjective* decisions that it believes ultimately reside *outside* its own control and in the hands of potential mine opponents:

[W]e assume that BLM would rarely deny a Plan of Operations or reject a Notice on the basis of this substantial irreparable harm provision for most resources. But we also recognize that the determination of what constitutes substantial irreparable harm, significant resources, and effective mitigation is not always straightforward to BLM or the public. Of specific concern are activities that will potentially affect Native American sacred or religious values. One can argue that religious significance, substantial irreparable harm, and effective mitigation are determined *by those who hold those beliefs, not by BLM.* Analyzing the implementing and impact of this provision as it applies to sacred and religious values is further complicated by the fact that most of the Native American religions are based on or incorporate the concept that *each individual determines what is significant for herself/himself.* Because of these concerns, *we assume that this provision as it relates to sacred and religious values will be applied extensively.*

FEIS, V. I at 126-27 (emphasis added). Such a statement is a model for the definition of arbitrary and capricious, as the determination will be made without the benefit of any objective standard and implies that any single citizen can step forward and halt a project if they believe it affects one of their religious values. First, this raises an extremely serious constitutional question as the BLM is attempting to elevate Native American religions to the status of a state religion. Second, the disruption in investment confidence on its own (let alone the value of actual mining activity vetoed) will have significant and immediate adverse effects on the domestic hardrock mining industry. BLM even predicted that the Babbitt regulations will have severe adverse economic and social impacts:

The value of mine production originating from public lands under the Proposed Action is estimated to decrease by 10% to 30%, or by \$169 million to \$484 million across the study area. This level of decreased production would cause the following decreases across the study area:

- 2,100 to 6,050 jobs.
- \$305 million to \$877 million in total industry output.
- \$138 million to \$396 million in total personal income (of which \$76 million to \$218 million is employee compensation).
- \$157 million to \$453 million in value-added. . . .

Most states would see decreased levels of mining on public lands, ranging from \$101,000 to \$302,000 in Oregon to \$117 million to \$351 million in Nevada. . . .

Some potential future operations would now be considered subeconomic and therefore would not be developed. Future operations might have shorter mine lives. Or *current operations that might expand under these regulations might close sooner than they otherwise would*, holding constant other factors such as technology, commodity prices, and political and economic conditions for mining in other countries. A lower level of exploration due to more restrictions would also tend to decrease opportunities for future development, so some deposits would not even be found.

FEIS, V. 1 at 288 (emphasis added).

b. New Information on Substantial Adverse Impacts since the Effective Date of the Babbitt Regulations

New information regarding impacts of the Babbitt regulations has surfaced since the promulgation of those regulations in November 2000. As BLM notes in the proposal to suspend, shortly after the Babbitt regulations became effective on January 20, 2001, the Governor of Nevada wrote to BLM urging the rules be repealed due to the severe impact it would have on the mining industry stating:

These new regulations will . . . impose significant new and unnecessary regulatory burdens on Western States and will preclude mining companies from engaging in operations they might otherwise pursue, thereby leading to a dramatic decrease in employment and revenue in the mining sector and a corresponding decrease in tax revenue and other economic benefits to Western states.

More detailed information about impacts of the Babbitt regulations was provided by several witnesses at a field hearing in Reno, Nevada on April 20, 2001, held by the House Committee on Resources, Subcommittee on Energy & Mineral Resources. For example:

- Mr. Lyle Taylor, President and CEO of NWMA member Geotemps Inc., estimates that in 2001, in large part due to the Babbitt regulations, almost none of his clients appear to be requesting mineral exploration-related labor and that the near total demise of grass roots exploration in 2001 in the western United States will prevent Geotemps from placing hundreds of individuals in jobs in the exploration sector in the upcoming year. He explains that “essentially, the new final 3809 regulations will spell the demise of the domestic exploration industry, already crippled by BLM’s and other agencies’ recent tightening grip. These final regulations will essentially kill the remaining limited incentives for the new mineral exploration and mine development investments.”
- Ms. Debbie Laney, President, Women's Mining Coalition testified that “even though the mine veto provision surfaced for the first time last November when BLM published the final rule, we can already see the impacts. Mining exploration dollars are moving out of the United States – drill rigs, geologists, landmen, and suppliers, in Nevada are idle. For those us who live and work in Northern Nevada the impacts are obvious. Larger companies have slashed exploration budgets and smaller companies may not be doing any exploration this field season. Suppliers and businesses that rely on the mining industry are cutting back and state and local government revenues are down.”
- Mr. Nolan Lloyd, Chairman, Elko County Commissioner, explained that the Babbitt regulations have further decreased the exploration dollars spent in Nevada.
- Dr. Jonathan Price, Director/State Geologist, Nevada Bureau of Mines and Geology testified that his “office has noticed a significant downturn in exploration activity in Nevada . . . some of this can be attributed to relatively low prices for gold and other metals, [but] results of a survey (conducted by the Nevada Division of Minerals and published in September 2000) of companies exploring in Nevada suggest that the regulatory environment has become a significant disincentive for exploration.” He noted that according to the Bureau of Land Management, the number of mining claims declined from 1999 to 2000 by approximately 8 percent, to 105,555 and stated that the decrease in exploration activity is particularly troublesome, because the deposits found today will become the mines of the future, and because the expertise needed to find these deposits is leaving the United States.

In addition, NWMA has already received calls from its members in other states expressing serious concerns about the new rules. Two examples from Oregon typify the

kinds of problems being created by the ambiguity of the Babbitt regulations on one hand, and the prescriptive one-size-fits-all approach on the other.

In the first case, a small two-person building stone quarry that had been operating responsibly for several years under a Notice of Intent was correctly informed that they would need to submit a Plan of Operations for approval. However, due to uncertainties on the part of the local BLM office on how to implement the new requirements, this small (3 acre) husband and wife operation was informed that they could not conduct any further work at the site, including removal of building stone still stockpiled at the operation from the 2000 work season, until an EIS had been completed. They were told the process could take a year or more. This edict was imposed on a micro-scale operation that was in full compliance with all stipulations the BLM had imposed on the activity under the Notice.

The second case is a medium size industrial mineral operation that has successfully operated under an approved operating plan for over a decade. The EA used as a basis for the Record of Decision for the approved operating plan identified **and evaluated** several adjacent areas where future expansion was expected to occur. When this operator recently applied for a minor amendment to the existing operating plan to move into one of these expansion areas, they were informed that a full EIS would have to be performed first. Again, it was expected that this could take a year or more and cost the operator several hundred thousand dollars, at a minimum. This was predicated solely due to the unyielding, prescriptive EIS inventory and process requirements established by the Babbitt regulations, and not by the presence of sensitive or endangered species, cultural sites, or potential impact to surface or ground waters.

These two examples show the immediate and substantial harm being perpetrated on the mining industry by regulations that mandate procedure simply for the sake of process, rather than substantive improvements in environmental protection.

MODIFICATIONS TO THE ANDRUS REGULATIONS REQUIRED TO FILL THE REGULATORY GAPS IDENTIFIED IN THE NRC REPORT

As mentioned above, after reaching the conclusions that the Andrus regulations were “generally effective” in protecting the environment, and that improvements in implementation of those regulations presented the greatest opportunity for improved environmental protection, the NRC report set forth 16 recommendations, four which specifically called for changes to BLM regulations, nine which address non-regulatory management improvements to the surface management program policies and guidelines, one (recommendation 3) as directed specifically to the U.S. Forest Service, and two (recommendations 7 & 8) which require congressional action. This section of NWMA’s comments will address the four NRC recommendations that called for changes to the Andrus regulations and provide suggested regulatory language.

1. NRC Recommendation 1: Financial assurance should be required for reclamation of disturbance to the environment caused by all mining activities beyond those classified as casual use, even if the area disturbed is less than 5 acres.

NWMA fully supports a requirement for financial assurances to guarantee reclamation of all exploration and mining related disturbances above casual use. Set forth below is suggested regulatory language modifying §3809.1-9 of the Andrus regulation (new language in **bold**, deleted language shown by ~~strike through~~):

Sec. 3809.1-9 Bonding requirements.

(a) No bond shall be required for operations that constitute casual use (Sec. 3809.1-2) ~~or that are conducted under a notice (Sec. 3809.1-3 of this title).~~

(b) Any operator who conducts operations under ~~an~~ **a Notice (Sec. 3809.1-3 of this title) or an approved plan of operations** as described in Sec. 3809.1-5 of this title ~~may, at the discretion of the authorized officer, be required to~~ **prior to commencing activities** must furnish a bond in an amount **sufficient to allow BLM to complete reclamation the site according to the terms of the Notice or plan of operations using the services of contractors.** ~~specified by the authorized officer. The authorized officer may determine not to require a bond in circumstances where operations would cause only minimal disturbance to the land. In determining the amount of the bond, the authorized officer shall consider the estimated cost of reasonable stabilization and reclamation of areas disturbed.~~

(c) **For exploration activities conducted under a Notice and small scale mining activities, including Alaska placer operations, State Directors may establish through public notice in the Federal Register, standard bond amounts for certain types of activities on specific kinds of terrain within their administrative states to be used in lieu of detailed calculations based on the engineering designs.**

(d) In lieu of the submission of a separate bond, the authorized officer may accept evidence of an existing bond pursuant to State law or regulations for the same area covered by the plan of operations, upon a determination that the coverage would be equivalent to that provided in this section **and provided further that the Secretary is a named beneficiary of the bond or bond pool.**

~~(e)~~-(e)-In lieu of a bond, the operator may:

(1) deposit and maintain in a Federal depository account of the United States Treasury, as directed by the authorized officer, cash in an amount equal to the required dollar amount of the bond, ~~or negotiable securities of the United States having a market value at the time of deposit of not less than the required dollar amount of the bond.~~

(2) offer an insurance policy, if its form and function is such that the funding or enforceable pledges of funding are used to guarantee performance of regulatory obligations in the event of default on such obligations by the operator. Insurance must have an A.M. Best rating of “superior” or an equivalent rating from a nationally recognized insurance rating service.

(3) offer irrevocable letters of credit from a bank or financial institution organized or authorized to transact business in the United States;

(4) offer certificates of deposit or savings accounts not in excess of the maximum insurable amount as set by the Federal Deposit Insurance Corporation; and

(5) Either of the following instruments having a market value of not less than the required dollar amount of the financial guarantee and maintained in a Securities Investors Protection Corporation insured trust account by a licensed securities brokerage firm for the benefit of the Secretary of the Interior, acting by and through BLM:

(i) Negotiable United States Government, State and Municipal securities or bonds; or

(ii) Investment-grade rated securities having a Standard and Poor’s rating of AAA, AA, A or BBB, or an equivalent rating from a nationally recognized securities rating service that are unrelated to the company or the property being bonded.

(f)(d) In place of the individual bond on each separate operation, a blanket bond covering statewide or nationwide operations may be furnished at the option of the operator, if the terms and conditions, as determined by the authorized officer, are sufficient to comply with these regulations.

(g) (e) In the event that an approved plan is modified in accordance with Sec. 3809.1-7 of this title, the authorized officer shall review the initial bond for adequacy and, if necessary, adjust the amount of the bond to conform to the plan as modified.

(h) (f) When all or any portion of the reclamation has been completed in accordance with the approved plan, the operator may notify the authorized officer that such reclamation has occurred and that she/he seeks a reduction in bond or Bureau approval of the adequacy of the reclamation, or both. Upon any such notification, the authorized officer shall promptly inspect the reclaimed area with the operator. The authorized officer shall then notify the operator, in writing, whether the reclamation is acceptable. When the authorized officer has accepted as completed any portion of the reclamation, the authorized officer shall authorize that the bond be reduced proportionally to cover the remaining reclamation to be accomplished.

(i) ~~(g)~~ When a mining claim is patented, the authorized officer shall release the operator from that portion of the performance bond which applies to operations within the boundaries of the patented land. The authorized officer shall release the operator from the remainder of the performance bond, including the portion covering approved means of access outside the boundaries of the mining claim, when the operator has completed acceptable reclamation. However, existing access to patented mining claims, if across Federal lands shall continue to be regulated under the approved plan. The provisions of this subsection do not apply to patents. Issued on mining claims within the boundaries of the California Desert Conservation Area (see Sec. 3809.6 of this title).

(j) When an operator uses the instruments permitted under 3809.1-9(e)(5)(e), prior to beginning activities and by the end of each calendar year thereafter, a certified statement describing the nature and market value of the instruments maintained in that account, and including any current statements or reports furnished by the brokerage firm to the operator or mining claimant concerning the asset value of the account.

(1) The operator must review the market value of the account instruments by December 31 of each year to ensure that their market value continues to be not less than the required dollar amount of the financial guarantee.

(2) When the market value of the account instruments has declined by more than 10 percent of the required dollar amount of the financial guarantee,

(i) the operator must, within 10 calendar days after the annual review or at any time upon the written request of BLM, provide additional instruments, as defined in Sec. 3809.1-9(e)(5), to the trust account so that the total market value of all account instruments is not less than the required dollar amount of the financial guarantee, and

(ii) the operator must send a certified statement to BLM within 45 calendar days thereafter describing the actions to raise the market value of its account instruments to the required dollar amount of the financial guarantee. The certified must include copies of any statements or reports furnished by the brokerage firm that will document such an increase.

(3) If the review under 3809.1-9(e)(1) of this section demonstrates that the total market value of trust account instruments exceeds 110 percent of the required dollar amount of the financial guarantee, the operator may ask BLM to authorize a written release of that portion of the account that exceeds 110 percent of the required financial guarantee. BLM will approve the request only if the operation is in compliance with the terms and conditions of the submitted notice or approved plan of operations.

2. Recommendation 2: Plans of Operations should be required for mining and milling operations other than those classified as casual use or exploration activities, even if the area disturbed is less than 5 acres.

NWMA fully supports this recommendation of the NRC report and suggests the following modification to Sec. 3809.1-3 and 3809.1-4 of the Andrus regulations to implement this recommendation (new language in **bold**, deleted language shown by ~~strike through~~):

Sec. 3809.1-3 Notice: Disturbance of 5 acres or less.

(a) All operators on project areas whose **surface exploration** operations, including access across Federal lands to the project area, cause a cumulative surface disturbance of 5 acres or less during any calendar year shall notify the authorized officer in the District office of the Bureau of Land Management having jurisdiction over the land in which the claim(s) or project area is located. Prior to conducting additional operations under a subsequent notice covering substantially the same ground, the operator shall have completed reclamation of operations which were conducted under any previous notice. Notification of such activities, by the operator, shall be made at least 15 calendar days before commencing operations under this subpart by a written notice or letter.

(b) Approval of a notice, by the authorized officer, is not required. Consultation with the authorized officer may be required under paragraph (c)(3) of this section when the construction of access routes are involved. Notices properly filed under this section constitute authorization under part 8340 of this title (Off-Road Vehicles).

(c) The notice or letter shall include:

(1) Name and mailing address of the mining claimant and operator, if other than the claimant. Any change of operator or in the mailing address of the mining claimant or operator shall be reported promptly to the authorized officer;

(2) When applicable, the name of the mining claim(s), and serial number(s) assigned to the mining claim(s) recorded pursuant to subpart 3833 of this title on which disturbance will likely take place as a result of the operations;

(3) A statement describing the activities proposed and their location in sufficient detail to locate the activities on the ground, and giving the approximate date when operations will start. The statement shall include a description and location of access routes to be constructed and the type of equipment to be used in their construction. Access routes shall be planned for only the minimum width needed for operations and shall follow natural contours, where practicable, to minimize cut and fill. When the construction of access routes involves slopes which require cuts on the inside edge in excess of 3 feet, the operator may be required to consult with the authorized officer concerning the most appropriate location of the access route prior to commencing operations;

(4) A statement that reclamation of all areas disturbed will be completed to the standard described in Sec. 3809.1-3(d) of this title and that reasonable measures will be taken to prevent unnecessary or undue degradation of the Federal lands during operations.

(5) A written estimate of the cost to fully reclaim your operations as required by this paragraph.

(d) The following standards govern activities conducted under a notice:

(1) Access routes shall be planned for only the minimum width needed for operations and shall follow natural contours, where practicable to minimize cut and fill.

(2) All tailings, dumps, deleterious materials or substances, and other waste produced by the operations shall be disposed of so as to prevent unnecessary or undue degradation and in accordance with applicable Federal and State Laws.

(3) At the earliest feasible time, the operator shall reclaim the area disturbed, except to the extent necessary to preserve evidence of mineralization, by taking reasonable measures to prevent or control on- site and off-site damage of the Federal lands.

(4) Reclamation shall include, but shall not be limited to:

(i) Saving of topsoil for final application after reshaping of disturbed areas have been completed;

(ii) Measures to control erosion, landslides, and water runoff;

(iii) Measures to isolate, remove, or control toxic materials;

(iv) Reshaping the area disturbed, application of the topsoil, and revegetation of disturbed areas, where reasonably practicable; and

(v) Rehabilitation of fisheries and wildlife habitat.

(5) When reclamation of the disturbed area has been completed, except to the extent necessary to preserve evidence of mineralization, the authorized officer shall be notified so that an inspection of the area can be made.

(e) Operations conducted pursuant to this subpart are subject to monitoring by the authorized officer to ensure that operators are conducting operations in a manner which will not cause unnecessary or undue degradation.

(f) Failure of the operator to prevent undue or unnecessary degradation or to complete reclamation to the standards described in this subpart may cause the operator to be subject to a notice of noncompliance as described in Sec. 3809.3-2 of this title.

Sec. 3809.1-4 Plan of operations: when required.

An approved plan of operations is required prior to commencing:

(a) **All mining, milling, beneficiation or processing operations and surface exploration** ~~Operations-operations~~ which exceed the disturbance level (5 acres) described in Sec. 3809.1-3 of this title **or which involve bulk sampling that removes more than 1000 tons of excavated material for testing.**

(b) Any operation, except casual use, in the following designated areas:

(1) Lands in the California Desert Conservation Area designated as controlled or limited use areas by the California Desert Conservation Area plan;

(2) Areas designated for potential addition to, or an actual component of the national wild and scenic rivers system,

(3) Designated Areas of Critical Environmental Concern;

(4) Areas designated as part of the National Wilderness Preservation System and administered by the Bureau of Land Management;

(5) Areas designated as closed to off-road vehicle use as defined in subpart 8340 of this title.

(6) The area designated as the King Range Conservation Area pursuant to 16 U.S.C. 460y et seq. , as amended by section 602 of the Federal Land Policy and Management Act of 1976.

(7) Areas designated as National Monuments and National Conservation Areas and administered by the Bureau of Land Management.

(c) Plans properly filed and approved under this section constitute authorization under part 8340 of this title (Off-Road Vehicles).

3. Recommendation 4: BLM and the Forest Service should revise their regulations to provide more effective criteria for modifications to plans of operations, where necessary, to protect federal lands.

NWMA fully supports this recommendation of the NRC report and suggests the following modification to Sec. 3809.1-7 of the Andrus regulations to implement this recommendation (new language in **bold**, deleted language shown by ~~strike through~~):

Sec. 3809.1-7 Modification of plan.

(a) At any time during operations under an approved plan, the operator on his/her own initiative may modify the plan. ~~or the authorized officer may request the operator to do so.~~

(b) The authorized officer may require the operator to furnish a proposed modification of an approved plan of operations:

(1) when continuation of activities authorized by the current plan of operations will cause unnecessary or undue degradation, or

(2) when necessary to address unanticipated events or conditions including but not limited to:

(i) development of acid or toxic drainage,

(ii) actual or potential failure of either natural or engineered slopes and containment structures within the project area that will affect public health and safety on adjacent Federal lands, and

(3) before final closure of a mining, milling, beneficiation or processing site to address post-closure management, including the need for long-term financial guarantees.

~~(b) A significant modification of an approved plan must be reviewed and approved by the authorized officer in the same manner as the initial plan.~~

~~(c)(1) If, when requested to do so by the authorized officer, the operator does not furnish a proposed modification within a reasonable time, usually 30 days, the authorized officer may recommend to the State Director that the operator be required to submit a proposed modification of the plan. The recommendation of the authorized officer shall be accompanied by a statement setting forth the facts and the reasons for the recommendations.~~

~~(2) In acting upon such recommendations the State Director shall determine, within 30 days, whether:~~

~~(i) All reasonable measures were taken by the authorized officer at the time the plan was approved to ensure that the proposed operations would not cause unnecessary or undue degradation of the Federal land;~~

~~(ii) The disturbance from the operations of the plan as approved or from unforeseen circumstances is or may become of such significance that modification of the plan is essential in order to prevent unnecessary or undue degradation; and~~

~~(iii) The disturbance can be minimized using reasonable means.~~

~~(3) Once the matter has been sent to the State Director, an operator is not required to submit a proposed modification of an approved plan until a determination is made by the State Director. Where the State Director determines that a plan shall be modified, the operator shall timely submit a modified plan to the authorized officer for review and approval.~~

- 5. BLM and the Forest Service should adopt consistent regulations that a) define the conditions under which mines will be considered to be temporarily closed; b) require that interim management plans be submitted for such periods; and c) define the conditions under which temporary closure becomes permanent and all reclamation and closure requirements must be completed.**

NWMA fully supports this recommendation of the NRC report and suggests the following modification to Sec. 3809.3-7 of the Andrus regulations to implement this recommendation (new language in **bold**, deleted language shown by ~~strikethrough~~):

Sec. 3809.3-7 Periods of non-operation.

~~(a) All operators shall maintain the site, structures and other facilities of the operations in a safe and clean condition during any non-operating periods. All operators may be required, after an extended period of non-operation for other than seasonal operations, to remove all structures, equipment and other facilities and reclaim the site of operations, unless he/she receives permission, in writing, from the authorized officer to do otherwise.~~

(b) If the period of non-operation is likely to cause unnecessary or undue degradation, BLM, in writing, will require the operator or the mining claimant

(1) to take all steps necessary to prevent unnecessary or undue degradation; and

(2), to remove all structures, equipment, and other facilities and reclaim the project area after an extended period of non-operation for other than seasonal operations.

(c) If an operator stops conducting activities on a submitted Notice for any period of time, the operator must continue maintain an adequate financial guarantee.

(d) A plan of operations submitted for approval under 3809.1-4 of this subpart must include measures to manage the project area during periods of temporary closure (including periods of seasonal closure) to prevent unnecessary or undue degradation. The interim management plan must include, where applicable, the following:

- (i) **Measures to stabilize excavations and workings;**
 - (ii) **Measures to isolate or control toxic or deleterious materials**
 - (iii) **Provisions for the storage or removal of equipment, supplies and structures;**
 - (iv) **Measures to maintain the project area in a safe and clean condition;**
 - (v) **Plans for monitoring site conditions during periods of non-operation; and**
 - (vi) **A schedule of anticipated periods of temporary closure during which you would implement the interim management plan, including provisions for notifying BLM of unplanned or extended temporary closures.**
6. **Recommendation 6: Federal land managers in BLM and the Forest Service should have both (1) authority to issue administrative penalties for violations of their regulatory requirements, subject to appropriate due process, and (2) clear procedures for referring activities to other federal and state agencies for enforcement.**

BLM does not presently have statutory authority to implement this recommendation. NWMA does not necessarily object to BLM having the authority to issue administrative penalties, but notes that BLM will need to seek additional statutory authority from Congress.

7. **Recommendation 14: Plan for and assure the long-term post-closure management of mine sites on federal lands.**

NWMA supports this recommendation of the NRC report, provided that for projects for which a long-term financial guarantee may be necessary, this guarantee is not be included as part of the reclamation bond. Rather, it should be a separate financial instrument. Additionally, NWMA wishes to stress that the amount of required long-term financial guarantees should be based on a realistic and technically justifiable prediction of likely costs to address a specific potential long-term impact. The long-term guarantee amount should not be based on unlikely “what if”, worst-case scenarios. NWMA suggests the following modification to Sec. 3809.2-2 of the Andrus regulations to implement this recommendation (new language in **bold**, deleted language shown by ~~strike through~~):

Sec. 3809.2-2 Other requirements for environmental protection.

All operations, including casual use and operations under either a notice (Sec. 3809.1-3) or a plan of operations (Sec. 3809.1-4 of this title), shall be conducted to prevent unnecessary or undue degradation of the Federal lands and shall comply with all pertinent Federal and State laws, including but not limited to the following:

- (a) Air quality. All operators shall comply with applicable Federal and State air quality standards, including the Clean Air Act (42 U.S.C. 1857 et seq.).

(b) Water quality. All operators shall comply with applicable Federal and State water quality standards, including the Federal Water Pollution Control Act, as amended (30 U.S.C. 1151 et seq.).

(c) Solid wastes. All operators shall comply with applicable Federal and State standards for the disposal and treatment of solid wastes, including regulations issued pursuant to the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.). All garbage, refuse or waste shall either be removed from the affected lands or disposed of or treated to minimize, so far as is practicable, its impact on the lands.

(d) Fisheries, wildlife and plant habitat. The operator shall take such action as may be needed to prevent adverse impacts to threatened or endangered species, and their habitat which may be affected by operations.

(e) Cultural and paleontological resources.

(1) Operators shall not knowingly disturb, alter, injure, or destroy any scientifically important paleontological remains or any historical or archaeological site, structure, building or object on Federal lands.

(2) Operators shall immediately bring to the attention of the authorized officer any cultural and/or paleontological resources that might be altered or destroyed on Federal lands by his/her operations, and shall leave such discovery intact until told to proceed by the authorized officer. The authorized officer shall evaluate the discoveries brought to his/her attention, take action to protect or remove the resource, and allow operations to proceed within 10 working days after notification to the authorized officer of such discovery.

(3) The Federal Government shall have the responsibility and bear the cost of investigations and salvage of cultural and paleontology values discovered after a plan of operations has been approved, or where a plan is not involved.

(f) Protection of survey monuments. To the extent practicable, all operators shall protect all survey monuments, witness corners, reference monuments, bearing trees and line trees against unnecessary or undue destruction, obliteration or damage. If, in the course of operations, any monuments, corners, or accessories are destroyed, obliterated or damaged by such operations, the operator shall immediately report the matter to the authorized officer. The authorized officer shall prescribe, in writing, the requirements for the restoration or reestablishment of monuments, corners, bearing and line trees.

(g) Where necessary to ensure compliance with water quality standards or to treat discharges after mine closure, operators must construct treatment facilities and infrastructure, establish a post-closure monitoring and

maintenance program and provide an appropriate funding mechanism. Long term financial guarantees may take the form of a trust fund that will be to the benefit of the Secretary acting through the BLM.

NON-REGULATORY RECOMMENDATIONS OF NRC REPORT

1. BLM Should Evaluate Improved Implementation

As mentioned above, with regard to the efficacy of the existing 3809 regulations, the NRC Report's paramount conclusions were clear:

The overall structure of the federal and state laws regulations that provide mining-related environmental protection is complicated but *generally effective*. The structure reflects regulatory responses to geographical differences in mineral distribution among the states, as well as the diversity of site-specific environmental conditions. It also reflects the unique and overlapping federal and state responsibilities. *Improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection and the efficiency of the regulatory process.*

NRC Report at 5-6 (emphasis added).³ The adoption of the overly broad and burdensome revisions to the Andrus regulations on November 21, 2000, ran directly contrary to the NRC's paramount recommendation.

In October 2000, BLM released the FEIS for the Babbitt regulations. In it, BLM admitted that NRC report was a "reasonable and objective" study of the issues that "did an excellent job . . . of identifying and addressing the program issues of concern" (FEIS, V. II at 37, 64), but BLM failed to assess the NRC's numerous non-rulemaking recommendations, such as improved implementation of the Andrus regulations.

Instead, BLM admitted that – one year after release of the NRC Report – it had yet to develop even a "strategic plan" to assess the NRC non-rulemaking alternatives, including improved regulatory implementation. *Id.* at 523. On November 21, 2000, BLM concluded its rulemaking process by publishing the Babbitt regulations that radically exceeded and conflicted with the NRC recommendations, along with a Final Regulatory Flexibility Analysis and Final Cost-Benefit Analysis, neither of which assessed the environmental

³ The NRC Report (at 75) also pointedly criticized Interior for failing to manage competently and implement effectively the existing rules governing mining on public lands:

The Committee was consistently frustrated by the inability of federal land management agencies to provide timely, accurate information regarding how they manage their lands and the status of mining projects under their jurisdiction. . . . Information about current mining activities was even scarcer. *The lack of information appeared to be greatest among highly placed officials who have the greatest need to know.* (Emphasis added.)

benefits and reduced economic burdens associated with the NRC recommendation for “improved implementation” of the existing regulations.

It cannot be over-emphasized that the NRC Report’s first two paramount conclusions were

- the existing regulations are “generally effective”; and
- “[i]mprovements in the implementation of existing regulations present the greatest opportunity for improving environmental protection and the efficiency of the regulatory process.”

NRC Report at 4-5 and 89-92. The NRC Report simply does not recommend, but rather rejects any need for, a massive regulatory initiative like the new Babbitt Regulations which impose an entirely new regulatory regime upon the hardrock mining industry.

Instead of a wholesale rulemaking revision like the new 3809 Regulations, the NRC Report primarily recommended improved implementation of *existing* regulations, supplemented by limited, discrete regulatory gap filling. NRC Report at 5-6. The Babbitt Regulations effectively rejected this overarching recommendation, instead rescinding all of the Andrus regulations and replacing them with an expansive regime which will cause many thousands of job losses and devastating economic harm. As for the NRC recommendation of improved implementation, BLM stated that it *plans to study it later*.⁴ NWMA strongly suggests that, in connection with this proposed suspension, *BLM should begin studying methods for improving implementation of its regulations now and implement those improvements as soon as possible*. This proposed strategy is so critical that the experts in the NRC Report identified it as “present[ing] the greatest opportunity for improving environmental protection and the efficiency of the regulatory process.” NRC Report at 4-5.

Thus, the NRC Report supports returning to the sound regulatory regime that has governed hardrock mining on public lands since the passage of the Federal Land Policy and Management Act of 1976 (“FLPMA”), 43 USC § 1701 *et seq.*, which authorized those

⁴ In connection with promulgating the final rule, BLM claimed that it is only now “*developing* a strategic plan to *evaluate* the implementation of NRC’s nonregulatory recommendations.” See FEIS, V. II at 523 (emphasis added). BLM made this admission in specific response to one of the many comments which stated: The NRC “named improved implementation as the single greatest opportunity for improving environmental protection. BLM should implement the many NRC non-regulatory recommendations for improving implementation of the program.” FEIS V. II at 523. Although the BLM stated in the FEIS that it “assume[s] full implementation” and “adequate agency funding and staffing . . .” for each FEIS alternative (FEIS, V. I at 125), BLM never identified and evaluated the environmental benefits which would have resulted from improved implementation of the many non-regulatory recommendations made by NRC in conjunction with the existing regulations. The NRC Report was published more than a year before the new 3809 Regulations were published in final form, providing ample time to have analyzed improved implementation of the existing regulations as a regulatory option, let alone develop a “strategic plan” for such analysis.

regulations, with only a few discrete regulatory changes. Otherwise, if BLM truly wants to improve protection of the environment, it should look within itself and improve its inner workings.

2. Other Non-regulatory Recommendations that BLM Should Consider Implementing

In order to carry out the NRC Report's paramount recommendation to improve implementation of the 3809 regulatory program, NWMA believes that BLM should seriously evaluate the non-regulatory recommendations contained in the NRC Report. NWMA particularly supports the following non-regulatory recommendations, which BLM should implement promptly:

- The agencies should regularly update technical and policy guidance documents to clarify how statutes and regulations should be interpreted and enforced. Administrative and operating procedures that are out of date or inefficient should be updated. NRC Report at 5, 75, 110.
- BLM should enhance information management, and obtain a greater understanding of existing laws and regulations. *Id.* at 6.
- BLM should maintain a management information system that effectively tracks compliance with operating plans and environmental permits, and communicate this information to agency managers, the interested public, and other stakeholders. *Id.* at 6.
- BLM should carefully review the adequacy and expertise of staff and other resources devoted to regulation mining on federal lands and, to the extent required, expand and/or reallocate existing staff, provide training to improve staff capabilities, secure supplemental technical support from inside and outside the agencies, and provide other support as necessary. *Id.* at 7, 73.
- From the earliest stages of the NEPA process, all agencies with jurisdiction over mining operations or affected resources should be required to cooperate effectively in the scoping, preparation, and review of environmental impact assessments for new mines. *Id.* at 6. BLM should undertake an aggressive, critical review of their current NEPA implementation practices and identify sources of delay and inefficiency. *Id.* at 112.
- BLM should plan for and implement a more timely permitting process, while still protecting the environment. *Id.* at 7.
- BLM should plan for and assure the long-term post-closure management of mines on federal lands. *Id.* at 9.

Recommendation No. 7 describes the existing legal and institutional barriers that currently thwart voluntary cleanup of abandoned mines due to liability concerns. The NRC Report suggests that implementing Recommendation No. 7 will require Congressional action to enact changes to the Clean Water Act and CERCLA to remove these barriers. Although these necessary statutory changes are outside BLM's authority, the NRC Report urges BLM to take an active role in working with Congress and other agencies to modify these laws: "The federal land management agencies, in cooperation with EPA, and other state or federal agencies with potential regulator authority, should proposed changes in regulatory authority that would promote voluntary cleanup to Congress for legislative approval." (NRC report, page 106).

NWMA fully concurs with this NRC finding and urges BLM to work with Congress and others on this issue. Immediate steps should be taken to remove the institutional and legal barriers that currently prevent or discourage mining companies from reclaiming and improving abandoned mine lands.

RETAINING THE BABBITT REGULATIONS WILL CAUSE ENVIRONMENTAL HARM

One of the most important findings in the NRC Report is that federal land managers, especially those in the highest echelons of the BLM (and Forest Service) do not have sufficient information to make a sound, informed evaluation of how well the existing regulations perform:

The lack of information [about the existing program] appeared to be greatest among highly placed officials who have the greatest need to know. Consequently, those responsible for regulatory management and change, and for keeping the public and Congress adequately informed, appear to be severely limited in their ability to do so. (NRC report, page 75).

NWMA is convinced that the same "uninformed, highly placed officials" described in the NRC report developed the Babbitt regulations and then imposed them on BLM staff. The NRC's finding regarding the lack of necessary information at high levels within the Department of Interior (DOI) and BLM unquestionably places these regulations in a very unfavorable light, and makes it abundantly clear that the decision-makers in DOI and BLM did not have sufficient information about the environmental performance of the Andrus regulations that would justify the radical, wholesale revision of these regulations. Thus, the decision to undertake wholesale revisions to the Andrus regulations was, at best, based on incomplete information which was misleading.

NWMA also has serious concerns that the Babbitt regulations will actually harm the environment at mines on BLM-managed lands. If the Babbitt regulations are not suspended, the obvious near-term environmental benefits that would result from 1) quickly reinstating the Andrus regulations with appropriate modifications to implement the NRC report findings (Alternative 5 of the FEIS); and 2) focusing on ways to achieve better implementation of the Andrus regulations will be foregone.

Moreover, the NRC Report specifically states that environmental protection will likely diminish if the regulatory burden increases:

The Committee found that BLM offices are often unable to meet their field site inspection goals...Oversight of critical mine development projects requires greater staff allocations than some agencies and offices are apparently capable of making... Staff shortages are likely to be at least partially responsible for the excessive delays experienced in NEPA reviews and issuance of permits...The availability of competent staff was another concern raised during the Committee's study....The needed levels of expertise are not always readily available to individual regulatory agencies....**Issues of staff numbers and competence will more seriously affect environmental protection** and regulatory efficiency if agencies are required to further reduce the resources devoted to regulating mining activities *or if the regulatory burden is increased*. (Emphasis added). The Committee also received evidence that staff training is inadequate, for example, in the interpretation of the agency's regulatory authority and enforcement options. (NRC report, pages 73 - 74).

The exceptionally complex regulatory scheme established in the Babbitt regulations certainly will impose substantial additional regulatory burdens on *both* the mining industry and BLM. This environmentally damaging consequence of the Babbitt regulations is clearly inconsistent with the NRC report findings, and does not comply with the previously cited Congressional directives requiring consistency with the NRC report. This outcome would be completely at odds with the environmental interests of NWMA members, other members of the public affected by mining on BLM-managed lands, and *the raison d'être* of the 3809 regulations – to implement FLPMA's mandate to prevent unnecessary or undue degradation of the public lands.

REINSTATING THE ANDRUS REGULATIONS WITH THE APPROPRIATE MODIFICATIONS TO IMPLEMENT THE NRC REPORT RECOMMENDATIONS (ALTERNATIVE 5) WILL MINIMIZE ADVERSE ECONOMIC IMPACTS

Earlier in this comment letter, NWMA documented some of the serious and substantial economic hardships already being felt by NWMA members as a result of the Babbitt regulations. NWMA's previous comments during the 3809 rulemaking process included extensive comments on the substantial inadequacies of the BLM's Initial Regulatory Flexibility Analysis (IRFA) and the dramatic, negative impact that the proposed revisions to the 3809 regulations (the Babbitt regulations) would have on small business entities. This issue continues to be of considerable concern to NWMA because many NWMA members work as independent consultants, contract exploration geologists, or are employed by small businesses. Our May 3, 1999 letter stated our concerns that the Draft EIS was grossly dismissive of the adverse economic impact that the then proposed Babbitt regulations would have on small businesses.

Our concerns regarding the impacts to small business are magnified and exacerbated by the actual Babbitt regulations. Specifically, the economic consequences precipitated by the significant irreparable harm provision have not been adequately considered. BLM's EIS predicts that the Babbitt regulations will have severe adverse economic and social impacts and estimates that up to 6,000 jobs and up to \$877 million in annual mining industry output will be lost.

Several of the witnesses at the above noted April 20, 2001 House Subcommittee hearing provided compelling testimony regarding the severe adverse effect the Babbitt regulations have had on their businesses and personal financial well being within just 90 days of the regulation taking effort. Similar testimony was provided by several individuals at a March 29, 2001 hearing before the same Subcommittee.

By reinstating the Andrus regulations modified to implement the NRC “regulatory gap” recommendations (Alternative 5 in the FEIS), BLM could greatly reduce the economic hardships associated with changes to the 3809 regulations (*see* FEIS, pages 293-296). This would help minimize the adverse effects on small business entities, which includes the vast majority of NWMA. Such an approach would substantially alleviate our concerns, and would probably bring the scope of the rulemaking into conformance with SBREFA.

CONCLUSIONS

The NRC Report presents the consensus findings of a diverse group of experts that the then existing array of federal (Andrus regulations) and state laws regulating mining is generally effective in protecting the environment and that better implementation of existing laws and the Andrus regulations presents the greatest opportunity for improving environmental protection and regulatory efficiency. In order to avoid the above described undesirable consequences that will result from the Babbitt regulations, and to eliminate further uncertainty for the domestic mining industry, NWMA supports a final rulemaking that would promptly implement the NRC recommendations as fully described in Alternative 5 from the EIS, by reinstating the Andrus regulations with the modifications suggested above. Modifying the Andrus regulations with the specific and focused changes outlined in Alternative 5 to fill the NRC regulatory gaps would be responsive to the findings of the NRC Report and would enhance and fine-tune a regulatory program described by NRC as “generally effective.”

Thus, NWMA urges BLM to suspend and rescind the Babbitt regulations, and reinstate the Andrus regulations with the modifications recommended by the NRC report and described in Alternative 5 of the FEIS.

Yours truly,

Laura Skaer
Executive Director

LS/kw