

December 28, 2001

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

Re: Proposed Rule on Surface Management Regulations, 66 Fed. Reg. 54863 (October 30, 2001).

I. INTRODUCTION

The Northwest Mining Association (“NWMA”) submits these comments in response to the Bureau of Land Management’s (BLM) October 30, 2001 proposed rule requesting comment on the 43 CFR 3809 surface management regulations (“3809 regulations”) for hardrock mining published the same day. 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, and Barrick Goldstrike Mines, Inc. as though fully set forth herein.

NWMA is a 107 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, mining operations and reclamation/closure activities 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.

NWMA’s members have extensive first-hand experience with 3809 regulations and are directly and immediately affected by any changes to these regulations. The regulations in effect prior to the November 2000 final regulations were 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. Many of our members can personally attest to the success which the pre-November 21, 2000, 3809 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. Those regulations have served the public, BLM and the mining industry well in assuring that our Nation's mineral resources are discovered, developed and the lands reclaimed in an economically viable and environmentally sound manner.

NWMA has been actively involved in every step of the 3809 rulemaking process that began in January 1997. We filed comments dated May 3 and May 7, 1999, February 22, 2000 and May 4, 2001. We will not repeat those comments here, but incorporate by reference those comments previously filed by NWMA during the 3809 rulemaking.

NWMA strenuously objected to the November 21, 2000 final regulations because they exceeded the Secretary's authority under the General Mining Laws and the Federal Land Policy and Management Act (FLPMA), violated the Mining and Minerals Policy Act of 1970, violated federal law that prohibited the Secretary from promulgating new 3809 regulations except to the extent new regulations were "not inconsistent with" the National Academy of Sciences/National Research Counsel's report entitled *Hardrock Mining on Federal Lands*, (NRC Report) published in 1999, and because the rulemaking process violated the Administrative Procedures Act, the National Environmental Policy Act and the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act.

The November 21, 2000 final rules were challenged in court. BLM, expressing serious concerns about the issues raised in those legal challenges, proposed to suspend the November 21, 2000 final rules and requested public comment (*See* 66 Fed. Reg. 16162, March 23, 2001). On October 30, 2001, BLM issued a new final 3809 rule that made important and necessary changes to the November 2000 rule in order to bring the 3809 regulations into compliance with federal law, to ensure that the final rule was "not inconsistent with" the NRC Report, and to restore balance and regulatory certainty.

NWMA believes that the October 30, 2001 rule is a vast improvement over the November 2000 rule and fully supports **all** of the changes made. The October 2001 revisions and final rule are fully supported by the administrative rulemaking record. However, NWMA believes that additional changes are necessary in order to bring the final rule into full compliance with the requirements of federal law, to ensure consistency with the NRC Report and to provide a balanced and workable regulatory program. NWMA also is sensitive to the need to conclude a rulemaking effort that has spanned five years in order to provide a sense of finality and regulatory certainty for the regulated community and the public. Therefore, we have carefully crafted our comments to focus on those few areas that require further change.

II. Reinstate Section 3809.0-6 from the 1980 Regulations

The 3809 regulations derive their authority from FLPMA and it is important that they are interpreted in a manner that is consistent with congressional intent. The October 2001 rule lacks an important overarching policy statement consistent with the congressional intent of the General Mining Laws, FLPMA and the Mining and Mineral Policy Act of 1970. The 1980 regulations did contain such a policy statement in section 3809.0-6. This policy also was recognized in the first two sentences of Solicitor Myers' recent opinion, M-37007, Surface Management Provisions for Hardrock Mining, dated October 23, 2001:

The Mining Law of 1872, 30 U.S.C. §§ 22-54 (Mining Law), and the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701- 1784, provide the legal framework for hardrock mining operations of the public lands. In conjunction with the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a, *they reflect longstanding congressional intent to support the development of minerals that are critical to the Nation.* (emphasis added.)

As the Solicitor notes in his opinion, it is important that the 3809 regulations are interpreted in a manner that is consistent with this “*longstanding congressional intent to support the development of minerals that are critical to the Nation.*” Therefore, the following Policy section of the 1980 regulations, 3809.0-6, should be added to the October 2001 rule to ensure that all BLM offices are “on the same page” when it comes to implementing the October 2001 rule:

Consistent with section 2 of the Mining and Minerals Policy Act of 1970 and section 102(a)(7), (8), and (12) of the Federal Land management Policy Act, it is the policy of the Department of 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.

III. The Definition of Casual Use Should Be Expanded to Include Motorized Dry Washers and 6” or Less Portable Suction Dredges

NWMA fully supports BLM’s proposal to expand the definition of casual use to include motorized dry washers. NWMA believes that a 10 horsepower or less (not less than 10) limitation on the size of the motor is reasonable and appropriate.

NWMA also recommends that BLM include portable suction dredges with a 6 inch intake or less in the definition of casual use. There is ample independent evidence to support this addition to the casual use definition. For example, the USGS recently conducted a study on the environmental impact of suction dredges with up to a 10 inch intake operating in the Fortymile River in Alaska. This study concluded that the disturbance from such suction dredges was negligible. Furthermore, including 6 inch or less portable suction dredges in the definition of casual use is consistent with the recommendations of the NRC Report (pages 95-96).

The real issue in determining whether an activity is casual use is not necessarily the intended purpose of the activity (prospecting, exploration or mining) or the equipment being used, but the level of disturbance. If the level of disturbance is negligible, then the activity, whether it is prospecting, exploration, or mining, is casual use and no Notice, Plan of Operations, or financial assurance is required. In all cases, including casual use, reclamation is required. Both the definition and the preamble should make this clear. This approach is consistent with the

conclusions of the NRC Report, which recognized that mining and milling operations can be classified as casual use if the level of disturbance is negligible (NRC Report, pages 8, 93).

IV. The Definitions of Mitigation and Minimize Cannot Provide A Basis for Denial of A Plan of Operations

Section 3809.5, in part, defines mitigation to mean: “avoiding the impact altogether by not taking certain action or part of an action.” Minimize is defined as meaning “to reduce the adverse impact of an operation to the lowest practical level. During review of operations, BLM may determine that it is practical to avoid or eliminate particular impacts.” Section 3809.420(a)(4) then requires mine operators to “take mitigation measures specified by BLM to protect public lands.”

NWMA is concerned that it is possible to interpret these sections to give BLM the authority to deny a plan of operations (POO) where a certain impact could not be avoided. BLM must clarify that the definition of mitigation does not provide authority for denial of a plan of operations.

The November 2000 rule contained a definition of “undue and unnecessary degradation” that essentially would have authorized BLM to deny plans of operations that otherwise met all applicable requirements and complied with all state and federal environmental laws and regulations, if such operations could cause substantial irreparable harm (SIH) to significant scientific, cultural, or environmental resource values of the public lands that could not be mitigated. This SIH or “mine veto” provision, which was included in the November 2000 rule without first appearing in either of BLM’s proposed rules, improperly embodied unfettered discretion without any sideboards or clear, objective standards. In the October 2001 final rule, BLM deleted this mine veto provision citing significant problems:

Because the potential impacts of the SIH standard are so dramatic, BLM is reluctant to continue to include such a provision at all. BLM is also concerned that it would be very difficult to implement the standard fairly as it relates to significant cultural resource values. In addition, the Interior Department Solicitor has issued an opinion (M-37007) addressing the legal authority of the SIH standard.

66 Fed. Reg. at 54837.

The Solicitor’s Opinion referenced in the October 2001 rule, M-37007, “Surface Management Provisions for Hardrock Mining,” completely rejected the notion that BLM had such mine veto authority, concluding “relevant legal authorities require removal of the ‘substantial irreparable harm’ criterion from the definition of ‘unnecessary or undue degradation’ in 3809.5 of the 2000 regulations.” Sol. Op. at 15. The Solicitor’s Opinion indicated that the criterion is not supported by either the language or legislative history of FLPMA, and stressed that FLPMA amended the Mining Law in four limited ways, but “preventing necessary and due degradation [was] not one of them.” *Id.* More specifically, the Opinion concluded that:

the statute’s relatively common words and limited legislative history are devoid of evidence that Congress intended to amend the Mining Law to impair claimant’s

rights by preventing necessary and due degradation. Because the “substantial irreparable harm” criterion as described in the 2000 regulations would likely impede such lawful degradation, FLPMA does not authorize it.

Id. at 14.

The same flaw arises with respect to the definitions of “mitigation” and “minimize” and the performance standard requiring mine operators to take mitigation measures specified by BLM to protect public lands. Accordingly, BLM should clarify that these provisions provide no authority to prevent necessary or due degradation. NWMA suggests BLM amend section 3809.420(a)(4) to state “to take mitigation measures specified by BLM to prevent undue or unnecessary degradation.” At a minimum, however, BLM could provide such clarification in the preamble to any further rulemaking on 3809 regulations or in an instruction memorandum. Clearly, the definition cannot grant BLM any authority that FLPMA and other relevant laws, as well as the Department’s Solicitor, say it does not have.

V. **BLM Must Clarify That the Role of Land Use Planning Remains Unchanged**

Section 3809.420(a)(3) provides that, “consistent with the mining laws, your operations and post-mining land use must comply with the applicable land uses plans and activity plans . . . , as appropriate.” NWMA expressed concern in previous comments that this section is inconsistent with FLPMA. Section 202 of FLPMA authorizes the BLM land use planning process and provides that the only way the land use plans can affect locatable mineral activities is through the withdrawal provisions of FLPMA. *See* 43 U.S.C. § 1712(e)(3).

Notably, Section 302 specifies each section of FLPMA that constitutes an amendment of the General Mining Laws, and Section 202 is *not* one of the specified sections. This analysis is fully consistent with the Aug. 22, 1990 opinion of the Interior Department’s Montana Field Solicitor, Pacific N.W. Region, Richard Aldrich. That opinion, which was copied to the Associate Solicitor for Energy and Resources in Washington, D.C., concluded as follows:

[A] plan of operations must be considered and assessed individually, and the measuring stick for unnecessary or undue degradation will be that found in § 3809.0-5(k), rather than a standard set forth in a particular land use plan

[A] land use plan may be consulted to determine what effects an operation will have on other resources and land uses, including resources and uses outside the area of operations. *If mining is found to be inconsistent with other resources, a withdrawal under FLPMA is the BLM’s only recourse to prevent mining.* The land use plan would have to be amended to reflect the withdrawal, and the withdrawal would not prevent mining on existing claims. [*Id.* at 3 (emphasis added).]

Moreover, the NRC Report accurately describes the interaction of the land use plans and mineral activity:

BLM land use plans under FLPMA “establish the parameters within which surface-disturbing activities may occur on BLM lands . . . subject to the interests created by the General Mining Law. These planning processes are not linked to specific mining proposals, but are intended to guide broad agency management decisions about the use of federal lands and the management of the resources on the land. These land management plans do not override the interests acquired by the mining claimant under the General Mining Law, but provide a framework for agency consideration and protection of other resources.

NRC Report, page 41.

In order to ensure consistency with the statutory language of FLPMA, BLM should delete section 3809.420(a)(3). At a bare minimum, BLM must clarify that Section 3809.420(a)(3) does not attempt to change FLPMA or BLM’s past interpretation of FLPMA. Land use plans cannot be used to prevent mineral activity and should be no more than guides for determining what site-specific mitigation measures should be imposed.

VI. BLM Should Not Require Mandatory Validity Exams

In the proposed rule, BLM specifically requested comments on whether BLM should always perform a validity examination before approving a plan of operations on withdrawn lands. NWMA believes that such an exam is not relevant to the purposes of FLPMA or the 3809 regulations and that the entire section concerning validity exams should be removed. The simple fact of the matter is that a mining claim does not have to be valid against the United States for the holder to engage in activities regulated by 3809.

A. BLM Has A Long-Standing Policy of Not Addressing Mining Claim Validity Prior to Plan of Operation Approval

As discussed in the FEIS, prior to the November 2000 rule, the 3809 regulations did not address mining claim validity. *See* FEIS v. 1 p. 36. The FEIS further noted “in fact, the Mining Law does not require operators to have a mining claim or mill site before conducting operations on BLM land.” *Id.* With the exception of mining claims located in congressionally designated wilderness areas closed to mineral entry (*see* 43 CFR § 8560.4-6(j)), BLM has never before mandated mining claim validity exams prior to approving any Plan of Operation. BLM’s long-standing policy had been to require claim validity determinations only in limited circumstances. As explained in BLM’s Manual 3060 on Mineral Reports, actions prompting a mining claim validity examination report are:

(1) the need to establish the validity of an unpatented mining claim or mill site in response to a mineral patent application or (2) to verify the presence of a valid existing right to a mining claim or millsite within a withdrawal. *The government may choose to examine, and where appropriate, bring contest action against mining claims and mill sites in other situations only when such action is deemed to be in the public’s interest.*

Section .12 A of Manual 3060 (emphasis added).

Similarly, BLM Handbook H-3870-1 on Contests offers only four reasons for government contests of unpatented mining claims for lack of discovery of a valuable minerals: (a) the lands are needed for another federal use such as a withdrawal for recreation purposes; (b) the mining claim is in conflict with a surface disposal such as an exchange of lands; (c) the claim is being used for non-mining purposes such as a vacation home site; or (d) the mineral claimed is subject to the mineral leasing or material sale laws. Thus, Solicitor's Opinion M-37004, Use of Mining Claims for Purposes Ancillary to Mineral Extraction, describes BLM's long-standing approach to validity exams and provides some reasons as to why BLM does not use its discretion to exam the validity of all claims:

Historically, BLM has not always scrutinized the validity of mining claims on public lands when it considers whether to approve plans of operations or modifications thereof. This is especially true when the lands are still open to the location of mining claims. In those circumstances, contesting the validity of existing claims may be an empty exercise. That is, even if the validity determination demonstrates that the claims are invalid, and BLM institutes a contest against the claims and eventually prevails, the claimant (or someone else) may simply locate new claims on the land.

Sol. Op. at 14.

With the exception of mining claims located in congressionally designated wilderness areas closed to mineral entry, BLM has never before mandated mining claim validity exams prior to approving any plan of operation, even with respect to mining claims on withdrawn lands. The references in the BLM manual and handbook to withdrawals relates to whether BLM will contest existing operations in withdrawn areas; they have not been read to require claim validity prior to POO approval. Thus, the November 2000 rule was the first attempt to impose such a requirement in any form as part of the 3809 regulations. This section should be removed from the final rule.

B. BLM Has Not Supplied a Compelling Reason for Its Departure from Long-Standing Policy

Review of the proposed rule, final rule and FEIS do not provide a rationale for why a change in this general policy is needed for withdrawn and segregated lands. The February 9, 1999, proposed rule asserted that section 3809.100 would enable BLM to "deal with operations on lands where additional protection has been deemed necessary through segregations or withdrawals." The final November 2000 rule notes that "the 1980 regulations have no requirement for preventing disturbances in areas closed to mineral entry until a discovery is determined to be valid or not. In areas closed to the operation of the mining laws, surface disturbance should be allowed only where the right to mine predates the segregation or withdrawal." 65 Fed. Reg. 70099. Presumably then, the main purpose of section 3809.100 is to prevent surface disturbances in areas that need additional environmental protection. Yet, nowhere in the rulemaking record does BLM document the occurrence of harms that require this measure. Indeed, since as noted in the FEIS, BLM has the option of determining valid existing rights before approving plans in segregated or withdrawn areas, such harm is already preventable. BLM can require mineral exams to prevent such harm pursuant to the "in the public interest" provision of BLM's Mineral Report Manual.

In addition, the type of protection BLM appears to want to provide is not necessary for all segregated and withdrawn areas. In the November 2000 rule, BLM acknowledged as much regarding segregated areas stating the decision to require a validity examination prior to approval of a plan of operation in a segregated area is “based on the magnitude of disturbance under the proposed activities, measured against the purpose of the segregation.” For example, as mentioned in the February 1999 proposed rule, some segregations occur for purposes other than environmental protection such as those in advance of a realty action. *See* 64 Fed. Reg. 6430.

BLM fails to acknowledge that some withdrawals also occur for purposes other than environmental protection. For example, in Alaska the primary set of “withdrawn” lands subject to the 3809 regulations are those within the “corridor” withdrawn for the Trans-Alaska Pipeline System (TAPS). The TAPS corridor was initially withdrawn by Public Land Order No. 5150, 36 Fed. Reg. 25410-13 (Dec. 28, 1971), which provided in part, “Subject to valid existing rights, the [described] lands are hereby withdrawn from all forms of appropriation under the public land laws” The Trans-Alaskan Pipeline was established because “the early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.” *Id.* Furthermore, because the pipeline had not yet been designed and the precise location of pipeline had not been established, the width of the withdrawal was purposely much wider than needed for the actual pipeline right-of-way. In some cases the withdrawal was five or more miles wide whereas the final pipeline right-of-way is typically 50 or 100 feet wide with wider nodes at some locations for pump stations and other facilities. Obviously, withdrawals to further the development of the pipeline cannot be considered to be done for environmental protection.

Other lands in Alaska were withdrawn under the Alaska Native Claims Settlement Act. *See* 43 U.S.C. §§ 1601,1610. The purpose of the withdrawals was to assist in the “settlement of claims by Natives and Native groups of Alaska, based on aboriginal land claims.” *Id.* Again, the withdrawal was not for any environmental purpose.

Finally, other lands in Alaska were withdrawn for an environmental purpose which no longer exists. This is the situation along the Fortymile River where a one-half mile width along many of the stretches of that river and its major tributaries have been designated components of the Wild and Scenic Rivers System under the Wild and Scenic Rivers Act (WASRA). *See* 16 U.S.C. § 1271 *et seq.* Subsection 605(b) of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. at 2415, designated listed segments of the Fortymile River as “wild river areas,” while subsection 605(c) of ANILCA, 94 Stat. at 2415-16, designated other listed segments of the Fortymile River as “scenic river areas.” In subsection 606(a) of ANILCA, 94 Stat. at 2416, Congress amended how the WASRA applies to designated rivers in Alaska. Subsection 606(a) added section 15 to the WASRA, 16 U.S.C. § 1285b, containing the following provision:

(2) the withdrawal made by paragraph (iii) of section 9(a) shall apply to the minerals in Federal lands which constitute the bed or bank or are situated within one-half mile of the bank of any river designated a wild river by [section 605(b) of ANILCA].

However, the original withdrawal was one mile or more wide on both sides of the bank. The result is that there are strips along the designated river segments that remain withdrawn, even though the environmental purpose for the withdrawal no longer exists. There are mining claims within these strips that predate the withdrawal and under the new regulations a validity exam would be required before a POO could be approved.

In short, at a minimum, BLM should not require claim validity exams for withdrawals that were not done for environmental purposes or that were done for environmental purposes where that purpose longer exists.

C. BLM Did Not Analyze Adequately the Impact on Small Businesses of Requiring Validity Exams Prior to Approving Plans of Operations on Withdrawn Lands

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) requires BLM to analyze adequately the impacts of its proposal on small entities. A close examination of the DEIS, the FEIS, the Initial Small Business Regulatory Flexibility Analysis (IRFA) and the Final Regulatory Flexibility Analysis (FRFA) reveals that BLM did not consider the adverse impact on small businesses of requiring validity exams prior to approving a POO on withdrawn or segregated lands. Most of the FRFA focuses on the impact of the new financial assurance requirements and the now illegal SIH requirement. The FRFA is devoid of any analysis or discussion of the impact of requiring validity exams prior to approval of POOs in withdrawn or segregated areas. Moreover, as discussed in subsection D., below, BLM grossly underestimated the cost of conducting a mineral examination and the time required.

Many operations, especially placer operations in Alaska, that previously operated under a Notice of Intent will now be required to file and obtain approval of a POO. As discussed above, many of these operations are on lands withdrawn or segregated for purposes other than wilderness or environmental values. Subjecting these operations to the uncertainty, the costs and the time delays of conducting a validity exam prior to approving their POO will likely force many of them out of business. Others will find the requirements of a validity exam to be overly burdensome and time consuming, and will abandon their operations and/or claims.

Because BLM did not analyze adequately the impacts of a mandatory claim validity exam on small entities as required by the RFA and SBREFA, BLM risks the validity of the entire rule if it does not remove this section from the final rule. As BLM discovered in *Northwest Mining Association v. Babbitt*, 5 F.Supp.2d 9 (D.D.C. 1998), failure to comply with the RFA and SBREFA will invalidate a rulemaking. BLM can remove the risk that a court could invalidate this rulemaking for violating the RFA by eliminating the section on mandatory validity exams in withdrawn areas.

D. Mandatory Claim Validity is Bad Public Policy

BLM's abandonment of its long-standing policy that claim validity exams are not required prior to POO approval unless so dictated by site-specific circumstances will result in an unjustifiable waste of resources for both government and the mining industry. Instead of conducting claim validity exams on withdrawn lands prior to POO approval only when such action is in the public

interest, section 3809.100 requires costly mandatory claim validity exams across the board. The final benefit-cost analysis estimates that each validity determination will cost \$10,000 and NWMA believes this underestimates the actual cost by at least a factor of ten. The FEIS identified “more validity examinations for proposed operations on withdrawn and segregated lands” as one of the factors causing the greatest increases in the costs to process notices and plans. FEIS v. 1 at p. 65.

Moreover, the FEIS notes that “BLM’s workload would increase because of the exam requirement. The validity exam is an extensive process that only BLM-certified mineral examiners can complete.” v. 1 p. 144. Given the number of years it has taken for BLM to conduct all of the mineral examinations necessary to contest or patent all the mining claims in the patent applications “grandfathered” from the “patenting moratorium” contained in sections 112 and 113 of Pub. L. 103-332, 108 Stat. 2499, 2519, mineral examinations can take years, raising questions as to whether BLM has adequate staff resources. *See* also section 322 of Pub. L. 104-134, 110 Stat. 1321, 1321-390 through 1321-392. An additional consequence is longer permitting times that “are more likely for operations within withdrawn areas because of the need for mining claim validity examinations before BLM would approve mining permits.” *Id.* at 287. Additional staff resources and mandatory time frames for completion of mineral exams would help alleviate concerns about longer permitting times. As the NRC Report recommended, BLM needs to carefully review the adequacy of its staff and other resources, to ensure the agency can conduct required activities. *See* NRC Report, page 115.

Above and beyond the length of time for the actual mineral exam, additional time will be involved with the contest proceeding itself. According to the BLM Handbook, it takes the administrative law judge who conducts the contest hearing approximately four to six months to render a decision after final briefs are filed. If the decision is then appealed to the Interior Board of Land Appeals (IBLA), it would add years to the IBLA’s backlog.

Furthermore, section 3809.100 violates the spirit and congressional intent of the General Mining Laws, FLPMA and the Mining and Minerals Policy Act of 1970. As stated in these acts, and highlighted in the recent Solicitor’s Opinion M-37007, cited above, it is the longstanding congressional intent to encourage and support the development of federal mineral resources. For the reasons set forth in this subsection, subsection C., *above*, and other reasons set forth in this comment letter, requiring validity exams prior to approving POOs in withdrawn or segregated areas subverts this policy by discouraging the development of federal mineral resources.

In the interest of fiscal prudence, the proper allocation of its own resources, and complying with congressional intent, BLM must eliminate or substantially revise section 3809.100.

E. BLM Should Allow Operations to Proceed Pending Outcome of Mineral Exam

Given the potential for such extraordinary delays and potentially needless expenditure of resources, BLM must reconsider its decision not to allow operations to proceed pending a final determination that a claim is invalid. In the proposed rule, BLM noted it considered an alternative approach that would allow BLM the option to approve a plan of operations pending the outcome of a validity determination but “decided not to propose this option because of the potential for unnecessary disturbance of segregated or withdrawn public lands.” 64 Fed. Reg. at

6430. BLM, however, must reconsider the decision to forbid operations pending the outcome of the determination given the nature of the interest involved.

As stated at the beginning of this section, the simple fact of the matter is that a mining claim does not have to be valid against the United States for the holder to engage in exploration, development, mining and reclamation activities governed by the 3809 regulations. The General Mining Laws make this quite clear, and nothing in FLPMA eliminates or changes this general rule.

A mining claim is “a claim to property which may not be declared invalid without proper notice and adequate hearing and in accordance with due process of law” *U.S. v. O’Leary*, 63 I.D. 341, 345 (1956). While it is true that a mineral exam may be necessary to ascertain whether a claim is valid, and thus, “property in the fullest sense” (*see Cole v. Ralph*, 252 U.S. 286, 295 (1920)), the Department of Interior has concluded that “a hearing on the validity of a mining claim is a hearing on a claim to property. Although there are no statutory requirements that a hearing be held before the Department declares a mining claim null and void, it has long been recognized that the power of this Department to determine that such a claim is invalid requires an adequate hearing, and that an equitable or legal claim to property against the United States may not be invalidated except in accordance with the requirements of due process of law.” *O’Leary* at 343.

It is only a final decision of the Department of the Interior that renders a mining claim invalid, not the mineral examination. When a BLM mineral examiner completes a report, the report is merely a recommendation to BLM regarding the application of the law of discovery to the facts of the specific claims. As discussed in the BLM Handbook, one purpose of the mineral report is to provide evidence at a contest hearing. The report is, therefore, only evidence, not a final determination of invalidity. When BLM issues a contest complaint in response to a recommendation in a mineral report that a claim is not valid, that is a charge, not a conclusion.

The charge becomes a conclusion only when the claimant chooses not to answer or deny the contest charge, and thereby admits the invalidity of the claim. 43 CFR 4.450-7. This is the first possible moment when a duly located and recorded mining claim is no longer a property interest that the Department must acknowledge and respect under *O’Leary*. If the claimant denies the contest charge of claim invalidity, the claim is not yet invalid. On the contrary, the contested charge of invalidity is then referred to an Administrative Law Judge (ALJ) of the Department for hearing. If the ALJ does not dismiss the contest charge, but instead concludes that the claim is invalid, and the claimant fails to appeal that adverse decision, then there is a final agency determination that the claim is invalid. Only when such a final determination is made, can the agency declare the claim null and void. Due process therefore requires that operations be allowed to proceed until such time as administrative remedies are exhausted a final agency action is taken with respect to the issue of validity.

VII. Financial Assurances

NWMA’s comments on financial assurance and the way in which BLM is currently implementing the 3809 bonding program are in response to BLM’s request for comments published at 66 Fed. Reg. 54863 in conjunction with the October 2001 final 3809 rules:

In addition to the specific issues addressed in the proposed rule language, we are particularly interested in comments on the following topics:

- Whether additional innovative means are available to provide sound and reliable financial guarantees; and
- Whether the 3809 regulations published today contain other provisions which are either overly burdensome or fail to provide adequate environmental protection.

On June 15, 2001, BLM published a final rule (66 Fed. Reg. 32571) revising § 3809.505 addressing financial guarantees. This final rule made few substantive changes to the financial assurance requirements established in the November 2000 rule (65 Fed. Reg. 69998). In addition to requiring bonds for Notice-level activities, the final 3809 bonding rule eliminates the prospective use of corporate guarantees as an acceptable financial assurance instrument.

NWMA supports the new 3809 financial guarantee requirements in so far as they implement Recommendation No. 1 in the NRC Report. The NRC Report recommends that financial assurance should be required for all surface disturbance created by mineral exploration and mining activities beyond casual use, including Notices of Intent-level projects:

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. (NRC Report, page 93).

Unfortunately, there is a disconnect between the new financial assurance requirements in the October 2001 final rule and the reality of the financial assurance and reclamation bonding markets in the U. S. Even before the September 11 terrorist attacks, some mining companies were unable to obtain reclamation or surety bonds at any price. Numerous bonding companies have withdrawn from this market and no longer offer surety or reclamation bonds for mine reclamation. This problem has been exacerbated by the events of September 11 and the recent bankruptcy filings of Enron and W. R. Grace, and the tremendous financial impact of those events on the insurance and surety industry. The likelihood of any new entries into the mine reclamation bonding market is minimal at best.

The bonding market only will tighten, and the possibility of several bonding companies seeking protection of the bankruptcy laws is very real. In fact, NWMA is aware of a mining company with a mine in Nevada where the bonding company is now in bankruptcy, leaving the mine without bonding. This company has not been able to obtain a new bonding source, despite the fact that all manner of creative bonding approaches have been investigated. The result is that today, for this company and many others, only cash or cash equivalent instruments are available to meet the current bonding requirements. This scenario is likely to spread and will soon impact all mining companies.

A. Problems with BLM's Bonding Program

NWMA believes that unintended consequences are emerging as a result of the way in which BLM is currently envisioning and implementing the new 3809 financial guarantee program. The elimination of corporate guarantees has forced mine operators to obtain reclamation surety bonds, or to provide other cash-equivalent forms of financial assurance. However, BLM's recently developed policy to expand the scope of reclamation bonding requirements to include bond coverage for contingencies, future uncertainties, and potential liabilities has made surety companies very reluctant, if not unwilling, to provide surety to the hardrock mining industry. This has created a severe shortage of commercially available reclamation bonds which has the very real potential to precipitate a bonding crisis. The hardrock mining industry is no longer able to obtain reclamation bonds at a reasonable, or in some cases, at any price. This is creating considerable hardship for the entire industry, and is particularly burdensome on small entities. Furthermore, companies are having to set aside substantial cash, which is no longer available to do environmental reclamation work on the ground. It is considerably less expensive for mining companies to do the reclamation work themselves, than for the BLM to do the work. BLM should modify the financial assurance regulations to ensure that limited cash resources are available for on-the-ground environmental work and not "locked up" in an unworkable bonding program.

B. Suggested Changes in BLM's Bonding Program

NWMA offers the following comments and suggestions for modifying the way in which BLM is implementing the new bonding program to help alleviate the current shortage of available reclamation sureties, and to avoid a very real impending bonding crisis scenario in which even financially robust companies could be faced with curtailing their activities because they cannot obtain reclamation bonds.

1. Corporate Guarantees

Although NWMA is not categorically endorsing BLM's elimination of corporate guarantees as an acceptable form of financial assurance, it recognizes the problems that both BLM and state agencies have experienced with corporate guarantees from companies whose financial health declined precipitously during the last several years in response to depressed commodity prices. However, NWMA believes that the wholesale jettisoning of corporate guarantees is not necessary to eliminate the problems that BLM and the states (particularly the State of Nevada) have recently had with corporate guarantees.

The past problems with corporate guarantee programs stemmed largely from lax, incomplete, or inappropriate qualification criteria that allowed financially troubled companies to qualify for a corporate guarantee. Other federal agencies such as the U.S. Nuclear Regulatory Commission (USNRC) recognize parent company corporate guarantees as an acceptable financial assurance instrument. The USNRC has a regulatory guidance document, Reg. Guide 3.66 (DG-3002), that provides qualification mechanisms for Escrow Agreements, Certificates of Deposit, Trust Funds & Standby Trust Agreements, Government Security Transactions, Payment Surety Bonds, Irrevocable Standby Letters of Credit, and Corporate Guarantees. BLM has accepted USNRC-

approved Parent Company Guarantees for uranium projects on BLM-managed lands in Wyoming, Utah, and New Mexico.

BLM could develop a corporate guarantee program for the hardrock mining sector based upon sound and stringent qualification criteria similar to the USNRC program. It may even be appropriate to use some of the requirements in the USNRC's guidance document as a template. The following are some general suggestions for a corporate guarantee program in the event BLM decides to re-evaluate the use of corporate guarantees:

- BLM should obtain financial expertise in evaluating each company's financial strength and ability to satisfy the qualification criteria;
- The program should establish stringent qualification criteria based upon measurable parameters using generally accepted accounting practices;
- The program should specifically give BLM discretionary authority to exclude companies with marginal financial criteria from the corporate guarantee program;
- BLM may wish to implement a variable or sliding scale corporate guarantee program in which companies could use a corporate guarantee to satisfy a predetermined percentage of their reclamation bonding obligation depending upon their financial strength and their ability to meet the qualification criteria; and
- A reinvigorated corporate guarantee program could be designed to create an incentive for companies to aggressively pursue effective reclamation of their sites. Companies with a documented track record of successful reclamation projects could be afforded preference in qualifying for future corporate guarantees, (if they can also meet the financial performance parameters).

2. Preservation of Grandfathered Corporate Guarantees

The final 3809 rule clearly prohibits BLM from accepting any new corporate guarantees as of January 19, 2001. However, the rule is silent on whether BLM has any authority to reduce a grandfathered corporate guarantee. NWMA believes that BLM has no authority to diminish a grandfathered corporate guarantee so long as the company continues to meet the state's qualification criteria. For example, a company should be allowed to transfer a portion of a grandfathered corporate guarantee for a mine site that has been reclaimed and granted partial bond release to cover expansion activities at another mine site, while maintaining the amount of the corporate guarantee at the grandfathered level.

The final 3809 rule needs to clarify that BLM lacks the authority to diminish a grandfathered corporate guarantee. Furthermore, BLM should prepare guidance regarding the transferability of a corporate guarantee from one site to another where reclamation has taken place and BLM has granted partial release.

3. Bonding for Uncertainties, Potential Long-Term Liability and Contingencies

BLM's recent demands for surety coverage for uncertainties, potential future liabilities and contingencies have failed to consider the nature of the reclamation surety market. Traditionally, financial assurance companies have provided reclamation bonds for site-specific, on-the-ground reclamation measures that were clearly quantified in terms of costs and performance objectives defined in project reclamation permits. Regulatory authorities could readily verify satisfactory performance of the reclamation measures by evaluating the reclamation results in the context of the reclamation requirements established in project permits. Thus, once an operator had completed discrete reclamation tasks specified in the reclamation permit such as recontouring and replacing topsoil, or reseeding an area, that portion of the reclamation bond earmarked for these tasks could be released (or at least partially released). In this manner, reclamation bonds are, and should be, considered a performance-type bond, similar to a construction performance bond in which bond release is triggered when specified tasks have been accomplished according to contract or permit expectations.

BLM's recent expansion of the scope of reclamation bonds to include financial assurance for long-term uncertainties and potential liabilities has defined a new kind of bond that includes a "what if scenario" in addition to the traditional performance-based reclamation measures. This has created a significant problem both for surety providers and for mine operators because surety companies are reluctant (or refuse), to provide bonds for tasks with unknown future costs and/or that have the potential to remain unresolved for many years into the future. This expanded scope of reclamation bonding requirements to cover uncertainties and potential future liabilities has thus created a "bonding unicorn" – a bonding obligation for which there is no commercial provider. This development is an undesirable, and hopefully unintended, consequence of BLM's current 3809 bonding program. BLM should consult with representatives from the commercial surety market to ensure that the scope of BLM's reclamation bonding requirements is compatible with commercially available surety instruments.

The blending of reclamation bonding requirements and providing financial assurance for environmental liabilities is inconsistent with the NRC Report's recommendations on bonding. The NRC Report clearly discusses the need for an expanded bonding requirement in the context of land disturbing activities and as a mechanism to guarantee reclamation of surface disturbance:

"The objective of this recommendation (Recommendation No. 1) is to guarantee financial assurance for all significant disturbances. . . ." (NRC Report, page 94).

The NRC Report does not cite a need to expand financial assurance requirements to bond for future uncertainties.

NWMA acknowledges that BLM has a fiduciary responsibility to address potential long-term liabilities and future uncertainties associated with hardrock mining on BLM-managed public lands. However, the scope of these concerns must be based on a site-specific and realistic analysis of what is likely to occur in the future. For example, it is reasonable for BLM to require some form of financial assurance for future maintenance requirements due to infrequent but not improbable events such as big storms and vandalism. In contrast, it is not reasonable or practical

for BLM to require financial assurance for “what-if, worst-case scenarios” with no site-specific evidence that such an event or events are likely.

To address the legitimate need for some form of financial assurance to enable BLM to respond in the future to discrete and infrequent problems, BLM needs to create a separate financial assurance requirement that is distinct from the reclamation bond. BLM policies to require financial assurance instruments for identified environmental liabilities, long-term monitoring, or other future contingency-type uses must clearly discriminate between reclamation and closure costs that can be covered by a traditional performance-type reclamation bond versus the need for funds to address potential future maintenance requirements or other identified site-specific conditions. BLM has already taken this approach at several mines at which trust funds have been established to address the need for long-term monitoring and/or water treatment. These funds are in addition to and separate from the reclamation bonds for these sites.

Similarly, BLM may wish to create a programmatic long-term fund applicable to all 3809 mining and mineral exploration projects comprised of trust accounts, annuities, or insurance policies specifically earmarked to address future situations. The long-term fund could be developed on a project-by-project basis where there is a recognized need based on site-specific conditions. Additionally, BLM may wish to consider statewide or nationwide long-term funds that could serve as a bond pool. This concept may be particularly appropriate for generic future events due to “Acts of God” (e.g., major storms, floods, earthquakes, etc.) that will occur at sometime at someplace, but that will not occur at all mines simultaneously. Thus, if there were a long-term bond pool, it would not be necessary for each mine to have a separate long-term fund to cover this type of event. The use of a bond pool would be consistent with the NRC Report recommendation on bonding that encourages the use of bond pools, especially to reduce the financial burden on small operators (NRC Report, page 95).

4. BLM Has Specifically Rejected Bonding for Uncertainties

The way in which BLM is interpreting its 3809 bonding program conflicts with BLM’s clear rejection of bonding for uncertainty. Alternative 4 presented in the FEIS describes financial guarantee (bonding) requirements as follows:

Reclamation bonding requirements would be the same as described for Alternative 3. In addition, bond coverage would be expanded to include unplanned events such as spills or facility failures. (FEIS, page 59).

The October 2001 preamble explains and justifies BLM’s rejection of this Alternative:

Alternative 4 requires financial guarantees for reclamation of all disturbance at 100 percent of the estimated reclamation costs. Alternative 4 would also require bonding for undesirable events, accidents, failures, or spills. BLM believes it would be overly burdensome on the operator to require a financial guarantee for the remediation of events with a low probability of occurrence and therefore did not select the Alternative 4 financial guarantee provisions. Such potential problems are best addressed by a thorough review of the operating plans and the

development of contingency measures which are part of the selected alternative.
(66 Fed. Reg. 54847).

Regrettably, BLM's current implementation of the 3809 bonding program is inconsistent with this decision as illustrated by the Reclamation Cost Estimation Summary Sheet and Reclamation Bond Checklist that is included as Attachment 1 to BLM Nevada State Office Instruction Memorandum No. NV-2001-077. This reclamation cost estimation checklist includes a line item labeled "Contingency" that is described as follows:

A contingency cost is included in the reclamation cost estimation to provide for project uncertainties and unexpected natural events. Calculate the contingency cost as a percentage of the operation project costs as follows: up to and including \$500,000, use 10%; over \$500,000 to \$5 million, use 8%; over \$5 million to \$50 million, use 6%; and greater than \$50 million, use 4%.

This blanket approach ignores site specific conditions and unreasonably assumes that a generic one-size-fits-all contingency formula works for all mines in all geological, geographic and environmental settings. Not only was this approach rejected by the BLM when it rejected Alternative 4, it is inconsistent with the recommendations of the NRC Report:

Recommendation 9: BLM . . . should continue to base their permitting decisions on the site-specific evaluation process provided by NEPA. . . .

NRC Report, page 108

5. The 3809 Regulations Should Require BLM to Include Risk Analysis in Its Bond Calculation and Allow and Encourage a Variety of Financial Guarantees, Including Risk-based Instruments

At the heart of the problems discussed above is the fact that BLM does not include a risk-based analysis in its bond calculation. BLM is treating all "what if scenarios" as if there is a 100% certainty that they will occur. Clearly, this is an unreasonable assumption. There are risk management professionals who can assist BLM incorporate risk analysis into the financial assurance calculation.

Also, allowing risk-based instruments would permit BLM to separate measurable reclamation requirements from the world of contingencies and uncertainties. Industry could then provide a reclamation surety bond for performance based, measurable reclamation requirements and a separate risk-based instrument, such as a liability insurance policy, to cover the "what if scenarios." NWMA understands that the solid waste industry faced a similar dilemma several years ago and implemented a bifurcated financial guarantee scheme that separated the measurable, performance based reclamation requirements (surety), from the unknown contingencies (insurance or other risk-based instruments).

Though NWMA recognizes that the purpose of financial assurance is to protect BLM and the public against abandonment or noncompliance with regulatory requirements, it must be understood that instruments of financial assurance are obtained in a market setting, and that the

system will be successful only if there are a variety of instruments available in the marketplace. That will be the case only if the rule balances BLM's needs against the realities of that marketplace. If the terms of release of the financial guarantee are too uncertain, or if release is too far in the future, some guarantees will not be obtainable. The surety market will not expose itself to unknown and therefore unacceptable risks.

Given the lack of a viable surety market for mining, and for the reasons set forth herein, BLM should add language to 3809.555 that specifically allows liens against real property and equipment, and further allows BLM the flexibility to accept, on a case by case basis, other financial assurance instruments and/or mechanisms to meet the financial guarantee requirements.

NWMA is committed to working with the BLM to address bonding availability as well as proper ways to address future contingencies. NWMA notes according to the Department of Interior Semi-Annual Regulatory Agenda that BLM will be working on a rulemaking to

establish procedures for obtaining, management, forfeiture, and release of bonds and other financial guarantees of performance under the various program regulations of BLM. It would provide what forms of financial guarantees are acceptable, and when bonds would be called in the event of non-performance.

66 Fed. Reg. 61755.

This rulemaking would be an appropriate vehicle for BLM to address NWMA's long term concerns about implementation of the 3809 financial assurance regulations. However, some immediate changes are necessary in these regulations to provide additional financial guarantee alternatives.

6. Consistent with the NRC Report Recommendations, BLM Should Provide for Expanded State Bond Pool Coverage

The NRC Report specifically encouraged "the use of bond pools to lessen the financial burden on small miners." (NRC Report, p. 97). BLM must recognize that as a practical matter, for many, if not most, small miners, the use of a state bond pool is the **only** available financial assurance alternative. Although the preamble to the October 2001 final rule addresses issues raised by the Alaska Miners Association with respect to the continued viability of the Alaska State Bond Pool under the current bonding regulations (66 Fed. Reg. 54842), NWMA believes that the preamble language is inconsistent with the final rule.

In the November 2000 rule, BLM permitted the use of bond pools "provided the pool is adequate to protect the public in case of default." Specifically, section 3809.571 commits BLM to accept state bond pool coverage, but contains a critical condition, namely, "if . . . (2) The BLM State Director determines that the State bond pool provides the equivalent level of protection as that required by [the new 3809 regulations]."

By their very nature, bond pools are not the same as cash equivalent financial assurance mechanisms. Bond pools, however, can meet the intent of the new financial assurance requirements by protecting the public in case of default. For example, in the State of Alaska, the

State Bond Pool has worked very well for more than 10 years. There has not been a single default by miners on either State or BLM lands but state statutory protections are in place in case of default including: if a default were to occur, the bonding pool must be available for the full cost of reclamation, even though the individual miner in default had not paid that much into the bonding pool; and, if a miner defaults, that miner would still be responsible for the full cost of the reclamation and, unless and until he could pay the full cost of that reclamation, he would be barred from using the bonding pool. Because the State reclamation law, and availability of the State bonding pool applies to all mining in Alaska irrespective of land ownership, the bonding pool has been successfully utilized by miners on BLM lands during this 10 year period.

If section 3809.571(2) were interpreted to require the bond pool to assure full-cost bonding of the multiple obligations it covers, and immediate unlimited access by BLM to the full amount in the Alaska State Bond Pool, it would not work and this coverage would cease. Such a result would be contrary to the NRC Report recommendations, is unnecessary for purposes of appropriate regulation and environmental protection in connection with these mining operations, and would have a devastating impact on small operations. Furthermore, this interpretation would be inconsistent with the preamble language at 66 Fed. Reg. 54842. The language of the rule should be re-written to ensure that it is consistent with the interpretation given in the preamble.

7. Consistent with the NRC Report Recommendations, BLM Should Provide for Standard Bond Amounts

In the “*Implementation*” discussion following Recommendation 1 on financial assurance, the NRC Report states:

Standard bond amounts for certain types of activities on specific kinds of terrain should be established by the regulatory agencies. It should be recognized that certain types of activities are less costly to reclaim than others. A set of activity- and terrain-dependent standard bond amounts (by state, BLM district, or forest) should be established for typical activities, especially those of prospectors, small exploration companies, and small miners, so that adequate bonds are posted for activities under 5 acres and so that the permitting process is expedited. *Standard bond amounts (a certain number of dollars per acre of land disturbed for a particular type of activity) should be used in lieu of detailed calculations of bond amounts based on engineering design of a mine or mill.* In addition, the Committee encourages the use of bond pools to lessen the financial burden on small miners (emphasis added).

NRC Report, pages 94-95.

The final rule is inconsistent with this recommendation of the NRC Report. The final rule must allow standard bond amounts for certain types of activities. For example, in Alaska, the BLM should recognize that including full mobilization and demobilization calculations with respect to remote placer mining operations is unreasonable given the weather related limitations on access, and provide for standard bond amounts for small placer mining operations. BLM also should provide standard bond amounts for Notice level exploration activities, including exploration

drilling, and especially exploration activities that do not require building roads, and small mining and milling operations that do not use chemicals.

Consistent with the NRC Report recommendations, the activities covered and the standard bond amounts should be developed on a state by state or BLM district basis to ensure that they are site-specific. Guidance should be developed at the earliest possible opportunity to assist the state or district offices.

8. BLM Must Eliminate Duplicate Overhead Charges from the Bond Calculation Formula

At the recent BLM Solid Minerals Conference in Las Vegas, NV, BLM personnel showed examples of bond calculations under the new 3809 financial assurance rules. These examples included an 18% contract administration fee and an 18.6% to 19.6% National Business Center overhead charge, for a total overhead charge of 36% to 38%. This is clearly excessive. It is obvious that BLM is “double dipping.” When questioned, the BLM personnel at the conference readily admitted that there are duplicate charges in the contract administration fee and the National Business Center fee. Any contract administration or overhead charge greater than 15% to 20% is unreasonable and excessive. The National Business Center charge must be eliminated from the bond calculation formula.

C. Better Implementation of the Existing Regulations

A significant component of ensuring adequate reclamation bonding is a regular review process in which BLM examines the adequacy of a project’s reclamation bond. This review should consist of a site-specific evaluation that establishes financial assurance requirements based on actual, on-the-ground conditions. Section 3809.431 of the new rule expands BLM’s authority to require an operator to modify a Plan of Operations to address unanticipated problems and new developments¹:

§3809.431 When must I modify my plan of operations?

You must modify your plan of operations when any of the following apply:

- (a) Before making any changes to the operations described in your approved plan of operations;
- (b) When BLM requires you to do so to prevent unnecessary or undue degradation; and
- (c) Before final closure to address impacts from unanticipated events or conditions or newly discovered circumstances or information including the following:
 - (1) Development of acid or toxic drainage;
 - (2) Loss of surface springs or water supplies;
 - (3) The need for long-term water treatment and site maintenance;
 - (4) Repair of reclamation failures;

¹ This requirement was included in the November 2000 rule and remains unchanged in the final October 2001 rule.

- (5) Plans for assuring the adequacy of containment structures and the integrity of closed waste units;
- (6) Providing for post-closure management; and
- (7) Eliminating hazards to public safety.

Clearly, §3809.431 also includes the underlying requirement for operators to provide a new reclamation cost estimate, and an increased reclamation bond if necessary, in conjunction with a modified Plan of Operations. BLM is also authorized to use the §3809.431 Plan modification requirements to determine whether an operator needs to provide financial assurance to address newly identified problems that may require long-term monitoring, treatment, or remediation.

Section 3809.552 of the new 3809 rules gives BLM additional bond review authority and also describes the types of conditions and liabilities for which BLM may require a trust fund or similar funding mechanism:

§3809.552(b) BLM will periodically review the estimated cost of reclamation and the adequacy of any funding mechanism established under paragraph (c) of this section and require increased coverage, if necessary.

§3809.552 (c) When BLM identifies a need for it, you must establish a trust fund or other funding mechanism available to BLM to ensure the continuation of long term treatment to achieve water quality standards and for other long term, post-mining maintenance requirements. The funding must be adequate to provide for construction, long-term operation, maintenance, or replacement of any treatment facilities and infrastructure, for as long as the treatment and facilities are needed after mine closure. BLM may identify the need for a trust fund or other funding mechanism during plan review or later.

Thus, the October 2001 3809 rule gives BLM a mechanism to require regular bond adequacy reviews and to adjust the bond requirements for projects where this review reveals a reclamation bond shortfall. Similarly, this review also provides BLM with a tool to define additional financial assurance requirements outside of the reclamation bond (i.e., as insurance, trust funds, annuities, etc.) to address newly identified or unanticipated site-specific problems.

Regrettably, it appears that BLM has failed to properly exercise the authority provided by §3809.431 and §3809.552. The current manner in which BLM is implementing the bonding program is as if BLM feels the need to envision today any and all conceivable future events or possible problems. This mind set has led BLM to establish the problematic requirement that mine operators must now provide immediate financial assurance for potential eventualities. This apparent attempt at prescience is unnecessary in light of the authorities granted in §3809.431 and §3809.552, and has precipitated the significant problems in the availability of reclamation surety described above. Moreover, BLM's current "bond for what if" policy is unauthorized. Section 3809.552 defines BLM's authority to require additional financial assurance in the context of an identified need – not a prediction of what could occur.

BLM should recognize and exercise its new authority to require Plan modifications and associated bond adequacy reviews. Establishing the correct reclamation bond amount and the need for other financial assurance instruments to address identified or likely problems should be

viewed as iterative and evolutionary, and should be based on actual site-specific, on-the-ground conditions. BLM should not feel compelled to base financial assurance requirements on predictions of things that might possibly happen in the future. The regulations do not demand (or authorize) clairvoyance. To the contrary, the October 2001 rule gives BLM ample authority to revisit the adequacy of a project's reclamation bond and other financial assurance instruments on a regular basis, and to require additional financial assurance to address identified problems and concerns.

Finally, in evaluating the scope and strength of BLM's existing bond review and financial assurance requirements, it is useful to recall one of the key findings in 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 6).

In order to improve the implementation of the 3809 program, there must be sufficient field personnel who are properly trained and provided adequate financial resources. NWMA encourages BLM to ensure that there is adequate funding in their budget request to Congress to provide the necessary personnel, training and financial resources.

Conclusion

NWMA fully supports **all** of the changes made in the October 2001 final rule and encourages BLM to act quickly to make the additional changes suggested in these comments. NWMA believes the administrative rulemaking record fully supports both the changes BLM made in October 30, 2001 final rule and the additional changes requested in this comment letter.

Sincerely,

Laura Skaer
Executive Director