

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

March 17, 2010

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Instruction Memorandum No. 2010-088
Expires: 09/30/2011

To: All State Directors
From: Director
Subject: Guidance on 43 CFR 3809.100 and its Application

Program Area: Mining Law Administration

Purpose: To provide guidance on the implementation of 43 CFR 3809.100 as it affects lands within areas segregated from the operation of the 1872 Mining Law.

Policy/Action: Under 43 CFR 3809.100(a), "BLM may require preparation of a mineral examination report before approving a plan of operations or allowing notice-level operations to proceed on segregated lands." (Emphasis added). BLM managers therefore have discretion to determine the validity of mining claims within a segregated area before approving a plan of operations or acknowledging an exploration notice. This also means that BLM managers have discretion to approve a proposed plan of operations or acknowledge an exploration notice on segregated lands without first determining the validity of the underlying mining claims. BLM managers should take the following considerations into account before exercising this discretion.

New Plans and Notices. When considering new or pending exploration notices or proposed plans of operations on segregated lands, BLM managers should ask the operator who is proposing the exploration or mining activities for data or other evidence showing that a physical exposure of a locatable mineral deposit existed as of the segregation date. For purposes of deciding whether to conduct a validity determination on segregated lands, BLM managers need not determine whether the exposure evidences a valuable mineral deposit. That is a question left for a mineral examination.

In assessing whether the operator has exposed a locatable mineral deposit, BLM managers may accept the use of a variety of industry standard methods, including, but not limited to, assays, physical tests, chemical analysis, on-site concentration and processing, x-ray fluorescence, neutron activation, or gamma ray logging

methods. BLM managers should consult with a Certified Mineral Examiner or a Certified Review Mineral Examiner who is experienced with the type of deposit at issue and applicable analysis methods.

- If the operator cannot show an exposure of a locatable mineral deposit that was disclosed before the segregation date, the BLM manager should not accept the notice or approve the plan without conducting a discretionary validity determination under 43 CFR 3809.100(a). In such cases, the BLM manager should advise the operator that, if BLM initiates a mineral examination, it is possible that BLM may find the mining claims invalid. The operator should be given the opportunity to withdraw the proposal for exploration or operations before BLM commences a validity determination.
- If the operator can show an exposure of a locatable mineral deposit that was disclosed before the segregation date, the BLM manager will exercise discretion under 43 CFR 3809.100(a) on a case-by-case basis before deciding whether to acknowledge a notice for exploration activities or approve a plan of operations without first conducting a mineral examination.

Factors that BLM managers may consider before making a decision to require a validity determination under 43 CFR 3809.100(a) include but are not limited to:

- Whether the segregation at issue closes the lands to the operation of the 1872 Mining Law;
- The purpose of the segregation;
- Whether a validity exam is necessary to protect the lands, based on the segregation's purpose; and
- Whether a proposed plan of operations appears to be of marginal or questionable profitability. Because this type of initial profitability assessment is not based on all of the data and information used in a mineral examination, it does not bind the Department in any later mineral examination and cannot serve as a substitute for a mineral examination.

Consideration of these and other factors may constitute a public interest determination, as recommended in BLM Manual 3060.12 A.

Plans Approved or Notices Acknowledged Before the Segregation Date. 43 CFR 3809.100 does not address whether BLM should conduct mineral examinations for plans of operations that BLM approved or for notices that BLM acknowledged before the segregation date. Nevertheless, BLM may choose to determine the validity of any mining claim at any time until a patent is issued, whether or not the lands are segregated or withdrawn. Cameron v. United States, 252 U.S. 450, 460 (1920). As a matter of policy, BLM may allow the activities under these plans and notices to continue (including, for notices, any extensions under 43 CFR 3809.333) without BLM conducting a mineral examination unless or until there is a material change in the activity that would require a modification to the notice under 43 CFR 3809.331(a)(2) or a plan modification under 43 CFR 3809.431(a).

Notice or Plan Modifications. BLM processes modifications to a notice or plan as a new notice or plan. Consequently, BLM may apply the same considerations discussed above before acknowledging the modified notice or approving a plan

modification on segregated lands. If, at the time of the modification, the lands on which the proposed operations or exploration have been withdrawn from the operation of the 1872 Mining Law, BLM is required to conduct a validity examination before accepting the notice or approving the plan of operations.

Cost Recovery. If the BLM manager decides to conduct a mineral examination before acknowledging notice-level exploration activities or approving a plan of operations on segregated lands, as provided under 43 CFR 3809.100(a), the operator must be charged for the cost of the examination, as required by 43 CFR 3800.5(b). BLM has the authority to determine the validity of any mining claim at any time until a patent is issued, whether or not the lands are segregated or withdrawn. However, if the BLM manager decides to conduct a mineral examination, unconnected to a patent application, in situations other than under the authority of 43 CFR 3809.100 or 3809.101, the BLM must pay the cost of the examination. For example, 43 CFR 3809.100 does not apply to plans of operations that have been previously approved or notices that have been previously allowed in areas segregated from mineral entry and, therefore, the BLM would be responsible for the cost of any discretionary mineral examination of mining claims underlying a plan that was approved or an exploration notice that was acknowledged before the segregation date.

Timeframe: Immediately upon receipt

Budget Impact: Unknown

Background: Section 204 of FLPMA gives the Secretary of the Interior authority to withdraw lands from the operation of the 1872 Mining Law. 43 U.S.C. § 1714. When the Secretary publishes notice of a proposed withdrawal in the Federal Register, the lands may be segregated from location of new mining claims for up to two years while the Secretary considers the proposed withdrawal. When operations are proposed on pre-existing mining claims within the segregated lands, the surface management regulations at 43 CFR 3809.100 give BLM discretion regarding whether to prepare a mineral examination report before approving a plan of operations or allowing notice-level operations to proceed.

Manual/Handbook Sections Affected: Surface Management Handbook and Manual are currently being updated. We will incorporate this policy in the final updates.

Coordination: Arizona State Office, WO Solicitors and WO-320 Staff.

Contact: Mitchell Leverette, Chief, Division of Solid Minerals, Washington Office, WO-320 (202) 912-7113 or Rick Deery at (202) 912-7119.

Signed by:
Robert V. Abbey
Director
Governance, WO-560

Authenticated by:
Robert M. Williams
Division of IRM

