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April 23, 2007

Director (630)  
Bureau of Land Management  
U.S. Department of Interior  
Mail Stop 401 LS  
1849 C Street NW  
Washington, DC 20240  
Attn: 1004-AD69

**Re: Bureau of Land Management Advance Notice of Proposed Rulemaking  
43 CFR Part 3800  
72 Fed. Reg. 8139  
Surface Management Regulations for Locatable Mineral Operations**

## **I. Introduction**

The Northwest Mining Association (NWMA) submits these comments in response to the Bureau of Land Management's (BLM) Advance Notice of Proposed Rulemaking (ANPR) to assist the BLM in the evaluation ordered by the United States District Court in *MPC v. Norton*, 292 Fed. Supp 2d 30 (D.D.C. 2003)

NWMA is a 112 year-old, 1,650 member non-profit, non-partisan trade association based in Spokane, Washington. Our members reside in 33 states and are actively involved in prospecting, exploring, mining, 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, legal 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.

NWMA's members have extensive knowledge of the General Mining Laws of the U.S. the Federal Land Policy and Management Act (FLPMA), The Surface Resources Act of 1955, administrative and judicial decisions interpreting those laws, and the issues raised in the ANPR. NWMA's membership includes the most respected and experienced Mining Law attorneys in the United States, and many of those attorneys assisted in the preparation of these comments. In addition, many former public land managers with extensive experience interpreting and administering the General Mining Laws who are NWMA members also assisted in the preparation of these comments. Our members are directly affected by the decision BLM reaches in response to the evaluation ordered by the court in *MPC v. Norton*.

**I. The Mining Law of 1872, as Amended, Authorizes Prospecting, Exploring, Developing, Mining, Extracting, Processing, Reclaiming and All Uses Reasonably Incident Thereto, Including Occupation, on Federal Public Lands Open to Mineral Entry, with or without a Mining Claim.**

This ANPR is in response to a federal district court's remand order in *Mineral Policy Center v. Norton*, in which the court remanded the 43 CFR 3809 regulations to the Department of Interior (DOI) to evaluate the competing priority set forth in FLPMA as applied to invalidly claimed or unclaimed lands "in light of Congress's express policy goal for the United States to 'receive fair market value for the use of public lands and their resources'."

We believe the court relied on two Solicitor Opinions issued by former Department of Interior Solicitor John Leshy and concurred in by former Secretary Bruce Babbitt that incorrectly interpreted the Mining Law. These two opinions, the November 7, 1997 Limitations on Patenting Millsites under the Mining Law of 1872 Opinion, (hereinafter Millsite Opinion), and the January 18, 2001 Use of Mining Claims for Purposes Ancillary to Mineral Extraction Opinion (hereinafter Ancillary Use Opinion), have been rescinded and replaced because both opinions incorrectly interpreted the Mining Law and were contrary to more than 125 years of agency, administrative and judicial interpretation. The Leshy Millsite Opinion was rescinded and replaced on October 7, 2003. The Ancillary Use Opinion was rescinded on November 14, 2005. Secretary Norton concurred in the October 7, 2003 Millsite Opinion (M-37010) and the rescission of the Ancillary Use Opinion (M-37011).

NWMA believes, for the reasons set forth below, that FLPMA's fair market value policy does not and can not apply to any reasonably necessary locatable mineral activities, conducted on federal public land open to mineral entry. This conclusion does not depend on the presence of a discovery of a valuable mineral deposit or even the existence of a mining claim.

30 USC § 22 provides that "all valuable mineral deposits and lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands on which they are found to occupation and purchase, by citizens of the United States..." Thus, 30 USC § 22 gives citizens the right to freely access, occupy, use, prospect, explore, discover, develop, extract, mine, process, store mined and processed materials and reclaim public lands open to the operation of the Mining Law. 30 USC § 26 gives those who discover a valuable mineral deposit an exclusive right of possession and use of that land for mining purposes.

In drafting any rule or departmental policy in regard to FLPMA's fair market value policy, BLM must recognize and follow the correct interpretation of the Mining Law, which is that 30 USC § 22 creates a valid existing right for the free use and occupancy of public lands open to operation of the Mining Law. This valid existing right exists from entry and extends through exploration, development, extraction, production, closure and reclamation. In other words, this continuous valid existing right covers all mineral activity from entry and prospecting through closure, including the right to store mined and processed materials. DOI cannot eliminate or diminish this valid existing right.

It is no exaggeration to say that if BLM were to ignore this valid existing right, it would violate the purpose and provisions of the 1872 Mining Law and render it meaningless. The 1872 Mining Law grants miners a right to enter and use unclaimed public domain lands to the extent reasonably necessary to make a discovery of a valuable mineral deposit and having made that discovery, to stake claims and obtain title. Without this right, there would be the preposterous and illogical "Catch 22" situation of a miner with no rights under the Mining Law to prospect, explore, and use the lands to make a discovery and stake a claim unless he had already made a discovery and located a claim. Only Congress (and, to a much lesser extent, the President) can revoke this right by withdrawing land from the operation of the Mining Law.

We encourage BLM to consider existing policy directives, administrative decisions, and a handbook that the USDA Forest Service has issued in regard to 30 USC § 22 rights. In 1974, when it promulgated its locatable minerals regulations at 36 CFR 228 Subpart A, the U. S. Forest Service (USFS) correctly acknowledged this continuous valid existing right that miners have under 30 USC § 22. USFS locatable mineral regulations at 36 CFR 228.3 (a) defined the comprehensive nature of operations authorized under the Mining Law, regardless of claim status:

Sec. 228.3 Definitions.

For the purposes of this part the following terms, respectively, shall mean:

(a) Operations. All functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations in this part, regardless of whether said operations take place on or off mining claims

Other Forest Service documents that state this policy in regard to 30 USC § 22 rights are reflected in the following:

- a. The 2001 Lodestar Decision: Reviewing Officer & Deciding Officer analysis and conclusions on the extent of miner's rights regardless of claim status. We understand this administrative decision was upheld by the Forest Service Chief and thus reflects national policy.
- b. The 2003 Undersecretary of Agriculture Mark Rey policy letter, explaining that USDA policy is "not to inquire into claim validity before processing and approving proposed plans of operations" and that the Mining Law standard is whether operations are reasonably incidental to mining, not claim validity.
- c. The 2003 letter from USFS Deputy Chief to field units reinforcing the 2003 Mark Rey letter referenced above.
- d. The 2004 letter from the USFS Chief to the BLM director explaining the USFS policy on miner's general rights and asking BLM to clarify its position.

- e. The 2006 USFS policy handbook on conducting surface use determinations to determine whether proposed uses are reasonably incidental to mining regardless of claim validity or whether the use is on claimed or unclaimed land.

There is no reason why BLM's and the Forest Service's legal positions should vary on this important issue.

This valid existing right established in 30 USC § 22 authorizes a non-discretionary statutory right to surface use and occupancy that is continuous throughout the entire mining life cycle, from entry and exploration through closure and reclamation. At the discovery of a valuable mineral deposit, the valid existing rights of section 22 become irrevocably augmented with the exclusive possessory title to the land granted under 30 USC § 26. The section 26 property right is compensable in the event Congress or the President chooses to take the land for public purposes and withdraw it from operation of the Mining Law.

In *MPC v. Norton*, the court distinguished between claimed and unclaimed lands, "affording greater right to those who hold a valid claim" as opposed to those who do not. In considering this distinction, the court twice referred specifically to the discredited and now withdrawn 2001 Ancillary Use Opinion. This distinction between claimed and unclaimed lands may be useful in regard to 30 USC § 26 property rights, since upon a miner making a discovery, the 1872 Mining Law authorizes him to locate a claim to obtain exclusive possessory title. But with respect to the broad scope of valid existing rights authorized by 30 USC § 22, there is no basis in law for this distinction and no requirement that one stake a mining claim. This position is consistent with congressional intent and 135 years of administrative and judicial interpretation of the 1872 Mining Law, as amended.

As we have explained, 30 USC § 22 guarantees a seamless right from entry to exploration to development to extraction to production to closure to reclamation without ever locating a mining claim. Although, as a practical matter, miners will locate claims to protect against rival claimants, to protect their rights in the event of a mineral withdrawal, and to acquire a perfected title to the minerals, the 1872 Mining Law does not require a mining claim in order to prospect, explore, develop, mine, extract, produce, process, reclaim and close a mine on federal public lands open to mineral entry. The only requirements are that the use and occupancy of those lands be reasonably incidental to those activities and not cause unnecessary or undue degradation of the land.

Thus, the General Mining Law establishes a free invitation for citizens to enter upon the public lands and, further, the right to do those things which, if successful, may lead to the discovery, development and mining of valuable mineral deposits. The statutory consent thus grants to the prospector or miner a private right – something more than a mere license to enter upon the land – leading to vested rights which may ripen into valid claims against the federal government's title. Even before title is perfected, those rights do not work an unlawful private appropriation and derogation of the rights of the public because they conform to the law under which they are initiated. As stated in the famous departmental decision in *Castle v. Womble*:

To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in lands belonging to the United States.... are ... declared to be free and open to exploration and purchase." For, if ... at any time during exploration ... the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light ... the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do. (19 L.D. 433, 457)

The question for BLM then is "what use and occupancy can be made of public lands by private citizens for mining purposes?" The answer depends on the clearly apparent congressional understanding that there are two successive antecedent processes which lead up to mining on the public lands. Mineral exploration necessarily precedes the development of a mine, and mine development necessarily precedes extracting and mining. That is, extracting and mining cannot commence until minerals have been found and a mine has been opened in the newly developed area. The ultimate right to mine begins as a right to enter, explore, occupy and make a discovery. This statutory right is inchoate in the beginning and until discovery, but prior to discovery, it is a right nonetheless and Congress has fully recognized it.

BLM must resist the tendency to read the language of 30 USC § 22 without recognizing the breadth of the rights which this statute grants, which is exactly what happened in *MPC v. Norton*. The court quotes from Section 22 on more than one occasion, but limits the quotation to "shall be free and open to exploration and purchase," and unfortunately missed the next part of the statute which says, "and the lands in which they are found to occupation and purchase."

In other words, 30 USC § 22 opens the public lands to free exploration, occupation, and uses necessary to explore discover, develop, extract, mine, process, and reclaim valuable mineral deposits. This right to use the public lands open to mineral entry arises even before valuable mineral deposits are found because without those rights nothing found could be either developed or mined. A valid claim to the title of the United States can not be perfected unless there is a right to use and occupancy of the public land for purposes reasonably incident to the grant. That right does not arise and disappear, only to reappear when perfection becomes possible. Rather, it is a continuum which, unless abandoned, progresses seamlessly through discovery to closure and reclamation, and may be exercised with or without a claim location, on land which may or may not be mineral. It cannot however, be used for purposes other than mining purposes and uses reasonably incident thereto.

The exclusive right of possession provided by 30 USC § 26 was modified by the Surface Resources Act of 1955 (30 USC § 612), which makes unpatented mining claims located after July 23, 1955 subject "to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary" to manage and take surface resources "or for access to adjacent land" provided no such surface use shall "endanger or materially interfere with prospecting, mining or processing operations, or uses reasonably incident thereto."

Thus, the Surface Resources Act of 1955 also authorizes the use and occupancy of public lands for prospecting, mining or processing and purposes reasonably incident thereto and prohibits non-mineral use and occupancy of unpatented claims.

That the 1872 Mining Law includes rights to use and occupy public lands to conduct reasonably necessary excavations and disturbances prior to making a discovery and establishing a valid claim is also supported by 30 USC § 27. It specifically provides miners one means of conducting exclusive exploration prior to making a discovery or staking any mining claims. With a tunnel site, the locator obtains the exclusive right to drive a tunnel, prospect 3,000 feet along the line of the tunnel, and through the subsequent staking of lode mining claims, to obtain a possessory right to 1,500 feet of any blind lodes cut, discovered, or intersected by the tunnel. Just as with mining activities authorized under 30 USC § 22, it would defy logic if exploration under 30 USC § 27 did not include the right to use and occupy unclaimed public lands for all purposes reasonably incident to excavating a mine tunnel and storing the resulting rock material somewhere on the surface.

Long-standing case law confirms an operator's rights to go on the public lands for prospecting, exploration, development, extracting, mining and other locatable mineral operations, and that as a practical matter, necessary occupation and use of the public lands is part of these operations. In *Union Oil Co. v. Smith*, 249 U.S. 337 (1919), the U.S. Supreme Court held that 30 USC § 22:

... extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits, and this and the following sections hold out to one who succeeds in making discovery the promise of a full reward. Those who, being qualified, proceed in good faith to make such explorations and enter peaceably upon vacant lands of the United States for that purpose are not treated as mere trespassers, but as licensees or tenants at will. For since, as a practical matter, exploration must precede discovery of minerals and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of *pedis possessio* of a *bona fide* and qualified prospector is universally regarded as a necessity. *Id* at 346

The *Union Oil* case clearly establishes that prior to discovery of a valuable mineral policy under the Mining Law; the doctrine of *pedis possessio* applies. That is, as long as a miner is actively seeking a discovery, a mining claim will hold against adverse locators or the general public, although such a claim would not constitute a possessory right against the U.S., which would continue to hold superior title. However, in order to prospect, explore and make a discovery of a valuable mineral deposit or establish valid mining claims, miners have a right under both the 1872 Mining Law and the 1955 Surface Resources Act to enter upon the lands of the United States open to mineral entry and to conduct upon those lands reasonable activities to prospect and explore for mineral resources. FLPMA did not abrogate or lessen those rights.

The statutory language of the 1872 Mining Law and the 1955 Surface Resources Act, together with the administrative and judicial decisions interpreting these statutes demonstrate that these laws recognize that mining progresses through several logical stages which may include

prospecting, exploration, development, extraction, mining, production, storage of mined and processed materials, reclamation and abandonment, and uses reasonably incident thereto. All of these stages are "authorized by statute" and, as discussed below, FLPMA's policy to receive fair market value for the use of the public lands and their resources does not apply.

## II. FLPMA Policy Goals

The Federal Land Policy and Land Management Act (FLPMA) declared 13 policy goals for the public lands, two of which are:

- The public lands "be managed in a manner which recognizes the Nation's need for domestic sources for minerals" (43 USC 1701(a)(12) and,
- "The United States receive fair market value for the use of the public lands and their resources *unless otherwise provided by statute.*" (43 USC 1701(a)(9) (emphasis added).

As BLM correctly notes, the FLPMA policy goal that the United States should receive fair market value for the use of public lands and their resources specifically states, "unless otherwise provided for by statute." The Mining Law of 1872 and the 1955 Surface Resources Act clearly meet the "otherwise provided for by statute" exception.

After enumerating FLPMA's 13 policy declarations, Congress stated that:

The policies of this Act shall become effective only as specific statutory authority for the implementation is enacted by this Act, *or by subsequent legislation* and shall then be construed as supplemental to and not interrogation of the purposes for which the public lands are administered under other provisions of law. (43 USC 1701(b)) (emphasis added).

It is important to note that no such subsequent legislation exists.

Furthermore, locatable mineral activities are one of the purposes for which the public lands are administered as set forth in the General Mining Laws of the United States, 30 USC § 21, *et. seq.* This purpose was reaffirmed in the Mining and Minerals Policy Act of 1970, 30 USC § 21 (a), wherein Congress declared that it is the "continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries ...."

The Mining and Minerals Policy Act of 1970 has not been amended or superseded by any subsequent law, including FLPMA. In fact, section 102 (a) 12 of FLPMA requires that "the public lands be managed in a manner which recognizes the Nation's need for minerals, ... from the public lands *including implementation of the Mining and Minerals Policy Act as it pertains to the lands.*" (emphasis added).

The assertion that FLPMA creates “competing priorities” is incorrect and misapplied to locatable minerals activities on public lands. FLPMA explicitly eliminates the potential for competing priorities for locatable mineral activities on public lands because there is specific statutory authority in section 21a of the Mining Law that requires the Secretary of the Interior to implement the mineral policy directive at 43 USC § 1701(a)(12) to manage the public lands “in a manner which recognizes the Nation’s need for domestic sources of minerals....”

In marked contrast to the FLMPA fair market value provision at 43 USC § 1701(a)(9) for which there is no specific implementing statutory authority, there is specific statutory authority implementing the FLMPA mineral directive at 43 USC § 1701(a)(12). Thus, FLPMA establishes a clear and fundamental priority requiring the Secretary of the Interior and BLM to manage the public lands “in a manner which recognizes the Nation’s need for domestic sources of minerals.” There are, therefore, no inherent conflicts or “competing priorities” in FLPMA that affect locatable mineral activities on public lands.

To require BLM to collect fair market value for the use of public lands for reasonably necessary locatable mineral activities, as described and discussed in I. above, would be contrary to and in derogation of the congressionally recognized purpose to manage the public lands “in a manner which recognizes the Nation’s need for minerals” and the fact that in passing FLPMA Congress also reaffirmed the Mining and Minerals Policy Act of 1970 and told BLM to implement it.

### **III. FLPMA's Application is Limited and Did Not Impair Any Mining Rights**

In discussing the relationship between FLPMA and the Mining Law, BLM fails to note an important provision of FLPMA which limits FLPMA's application to locatable mineral activities conducted pursuant to the General Mining Laws of the United States. Congress expressly limited FLPMA's applicability to rights under the Mining Law of 1872, which, as we have explained previously, includes not only the right to locate and use claims but also the right to the use of unclaimed public lands for purposes reasonably incidental to mining activities. In section 302 (b) of FLPMA [43 USC Sec. 1732 (b)], Congress stated:

Except as provided in section 314 [providing for the recordation of mining claims and abandonment], section 603 [providing for management of Wilderness Study Areas], and subsection (f) of section 601 [relating to the California Desert Conservation Area] and in the last sentence of this paragraph [prevent unnecessary or undue degradation of the lands], *no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress.*" (emphasis added)

Congress declared 13 policy goals for the public lands which are set forth in section 102 of FLPMA. Section 102 is *not* one of the four limited provisions of FLPMA that amends the Mining Law of 1872. Thus, policy goals set forth in section 102 can not be used to 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." In other words, Congress has clearly and explicitly

provided that FLPMA's policy of requiring fair market value payment for the use of federal lands and their resources does not apply to activities authorized by the Mining Law of 1872.

While NWMA agrees with BLM's tentative conclusion "that it may not apply FLPMA's fair market value policy to approved mining operations that occur on mining claims of unknown validity," NWMA believes BLM's analysis approaches this issue from the wrong perspective. NWMA submits that because the Mining Law of 1872 and the 1955 Surface Resources Act authorize all activities reasonably incident to mining on lands open to mineral entry, with or without a mining claim, the status of a mining claim, whether valid, invalid or of unknown validity, is irrelevant to the determination that FLPMA's fair market value policy does not apply to locatable mineral activities on federal public lands.

#### **IV. Unclaimed Lands**

BLM requests comments on whether any miners or mining companies use unclaimed land for mining operations that go beyond exploration activities. BLM states that it is their "tentative conclusion that no one uses unclaimed lands for mining operations that go beyond exploration activities on the public lands." This statement is incorrect, and also irrelevant to the determination that FLPMA's fair market value policy does not apply to locatable mineral activities authorized by the Mining Law of 1872 and the Surface Resources Act of 1955.

The issue is not whether the land is claimed or unclaimed under the Mining Law. We again emphasize the real issue for BLM is whether the activities consist of prospecting, exploring, extracting, mining or processing, and uses reasonably incident thereto. If they are, then they are authorized under the Mining Law and FLPMA's fair market value policy does not apply. In other words, 30 USC § 22 authorizes all activities reasonably incident to exploration, development, extraction, mining, processing, storing of mined and processed materials and reclamation on lands open to mineral entry, whether or not a mining claim has been filed.

While, as a practical matter, miners and mining companies will locate mining claims to protect against the rights of rival claimants, the law does not require them to locate claims in order to conduct prospecting, exploration, development, processing and uses reasonably incident thereto. It is quite common that access roads and utility corridors are located on unclaimed lands and are covered in the Plan of Operation approval process. The miner and mining company have the statutory right to use unclaimed lands for these purposes as long as the lands remain free and open to mineral entry.

#### **V. Payment of Claim Maintenance Fees**

In further support of its tentative conclusion that BLM may not apply FLPMA's fair market value policy to approved mining operations that occur on mining claims of unknown validity, BLM cites section 314 of FLPMA (43 USC § 1744) where Congress amended the Mining Law to require mining claimants to record each mining claim and file annual proof of assessment work. BLM correctly notes that these requirements apply to all mining claims without having to demonstrate claim validity. NWMA agrees with BLM that Congress applied these requirements

to *all* mining claims confirming that claimants may maintain mining claims without regard to validity for *all* purposes reasonably incident to mining (emphasis added).

When Congress passed the *Department of Interior and Related Agencies Appropriations Act of 1993* requiring holders of unpatented mining claims to pay an annual rental fee, it did so without regard to the underlying validity of the claims. As BLM correctly notes, Congress has extended this rental or maintenance fee requirement four times in subsequent legislation. Current law requires the fee payment until 2008. The claim maintenance or rental fee replaced the assessment work requirement (with an exception for claimants holding 10 claims or less), and amounted to a declaration by Congress that locators of mining claims were to pay for the continued use of mining claims for all purposes reasonably incident to mining.

In enacting the claim maintenance fee, Congress knew that FLPMA would not allow the BLM to apply FLPMA's fair market value policy to activities authorized by the 1872 Mining Law and the 1955 Surface Use Act because, as explained above, FLPMA clearly did not intend to apply the fair market value policy to activities authorized by the 1872 Mining Law.

We know this is the correct interpretation because FLPMA explicitly provides that FLPMA's language amended the Mining Law in only four respects (two general, two special) and that the fair market value policy was not one of those. Instead, Congress adopted a new policy in lieu of assessment work that required holders of more than 10 mining claims to pay value for the continued use of those mining claims to the federal government.

What Congress has done in enacting the claim location and maintenance fee system is to affirm that the Mining Law authorizes all activities reasonably incident to mining, without regard to the validity of a mining claim, both prior to and after discovery.

## **VI. Conclusion**

For the reasons set forth above, BLM should adopt a final rule that puts this issue to rest once and for all time by clearly stating that all locatable mineral activities authorized under the Mining Law, when they are reasonably incident to prospecting, exploration, development, extraction, mining, processing, storage of mined and processed materials, and reclamation, including rights of ingress and egress, are not subject to FLPMA's fair market value policy, whether on or off of mining claims and without regard to whether a discovery has been made.

This conclusion is consistent with BLM's definition of "operations" at 43 CFR 3809.5:

*Operations* means all functions, work, facilities, and activities on public lands in connection with prospecting, exploration, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the mining laws; reclamation of disturbed areas; and all other reasonably incident uses, whether on a mining claim or not, including the construction of roads, transmission lines, pipelines, and other means of access across public lands for support facilities.

Finally, NWMA adopts and incorporates the comments of Kinross Gold and the National Mining Association as though fully set forth herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Laura Skaer". The signature is written in a cursive, flowing style.

Laura Skaer  
Executive Director

LS/kw

cc: Michael Bogert, Counselor to the Secretary of Interior  
C. Stephen Allred, Assistant Secretary, Land & Minerals Management