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THE ENVIRONMENTAL PROVISIONS IN THE HOUSE MINING LAW BILL (H.R. 699) ARE SOLUTIONS IN SEARCH OF A PROBLEM

27 Mineral Project Case Histories Demonstrate Why the Sweeping Changes in this Bill are Unnecessary to Protect the Environment

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I. EXECUTIVE SUMMARY

The House Mining Law bill, H.R. 699, contains sweeping changes to the public participation process and environmental standards for hardrock exploration and mining projects on federal lands. Written as if starting with a blank slate, H.R. 699 ignores the fact that a public participation process and comprehensive and effective environmental standards already exist. As such, H.R. 699 reinvents the wheel – but adds some corners to that wheel to slow it down and ultimately stop hardrock exploration and mining on federal lands.

This Northwest Mining Association white paper presents environmental permitting case histories for 27 hardrock exploration and mining projects on U.S. Bureau of Land Management (BLM) and U.S. Forest Service (USFS) lands to document how the existing public participation process and the environmental laws and regulations governing hardrock minerals on federal lands effectively protect the environment. These case histories clearly demonstrate that the existing BLM and USFS standards and regulations for mining and the National Environmental Policy Act (NEPA) environmental review process work seamlessly together to provide the agencies with sufficient regulatory authority to regulate mineral projects.

The case histories show a consistent pattern of thorough environmental reviews during which both BLM and the USFS identified and imposed environmental controls, project modifications, and mitigation requirements to eliminate or minimize environmental impacts. It is also evident from the case histories that the NEPA process gives the public ample opportunities to participate in these environmental reviews and influence regulators' decisions about project proposals. The following is a summary of key findings:

- The case histories document that the existing land management regulations governing mineral activities on federal lands satisfy Congressionally-mandated land management objectives to prevent unnecessary or undue degradation of BLM lands and to minimize adverse impacts on National Forest System lands.

    - BLM and the USFS already have clear and effective authority with which to regulate mineral projects. The case histories show how the agencies use these authorities to require project modifications or to demand specific environmental controls or mitigation measures to eliminate or minimize impacts. Agency-imposed changes span the gamut from adding environmental protection, mitigation, or monitoring measures, to selecting a project alternative that differs from the applicant's project proposal, to denying proposed projects that the agencies believe would violate federal laws and regulations.

    - The case histories do not reveal any inadequacies or gaps in the current regulations or suggest that the environmental provisions in H.R. 699 would be useful or desirable.

    - The case histories show that both BLM and the USFS have verifiable track records of effectively tailoring the on-the-ground application of their environmental performance standards to provide optimal environmental protection and reclamation success at a given site. The case histories provide examples of agency requirements for site-specific measures to protect cultural resources, wildlife and fisheries habitat, scenic values, water quality, air quality, wetlands, public safety, species of concern, special mine waste management measures, and protocols addressing noxious and invasive species controls.

    - The case histories also demonstrate how the NEPA process and the agencies' surface management regulations work together to achieve the agencies' land management objectives. Agency mandated changes to proposed projects typically respond to public comments received in conjunction with the NEPA process.

- The H.R. 699 definition, "undue degradation," is unrealistic and unworkable because it changes the current FLPMA standard of "unnecessary or undue degradation," which recognizes that some degradation may be necessary (i.e., unavoidable) in order to mine.

    - The undue degradation definition in H.R. 699 singles out hardrock mining compared to all other activities on public lands by imposing a higher, impractical, and unfair standard that precludes unavoidable degradation due to mining.

    - The case histories do not identify any real-life, on-the-ground problems with the unnecessary or undue degradation standard or suggest any need to change this standard.

- All of the environmental provisions in H.R. 699 are at odds with the 1999 National Research Council (NRC) report entitled "Hardrock Mining on Federal Lands."

    - This prestigious and unbiased report found that the then existing regulations provided adequate environmental protection at mines on public lands. BLM's regulations were updated in 2001 to fill the five regulatory gaps identified in the NRC Report. H.R. 699 treats these same gaps as if they remain unfilled.

    - The NRC Report places special emphasis on the effectiveness of the NEPA process for gathering public input, evaluating environmental impacts, and identifying any unnecessary or unacceptable impacts associated with proposed mineral projects. The H.R. 699 parallel public participation process for mining projects will not improve public participation. It will only add redundant bureaucratic hurdles to an already time-consuming mine permitting process and create additional burdens on the agencies, the public, and mining companies.

    - The NRC Report also stressed the importance of using site-specific, environmental performance standards to achieve optimal environmental and reclamation results at the diverse geographic and ecological settings in which mining occurs. The prescriptive technology-based standards included in H.R. 699 are inappropriate and will produce second-rate environmental results.

- The environmental provisions in H.R. 699 are solutions in search of a problem.

    - The new public participation process is not needed to give the public more opportunities to comment on proposed mining projects.

    - The new definition of undue degradation and the new environmental standards are not needed to protect the environment.

    - BLM's October 2000 EIS for the 3809 rulemaking predicted that the alternative containing a Significant Irreparable Harm standard and environmental standards similar to those in H.R. 699 would result in "significant adverse effect to mining-dependent communities, including declines in social well-being due to potential for up to 75% decrease in some types of mining."

    - The real purpose of H.R. 699 is to create intolerable delays in the permitting process, to eliminate all impacts from mining, and ultimately to stop exploration and mining on federal lands.

II. BACKGROUND

Representative Nick J. Rahall II introduced H.R. 699, the Hardrock Mining and Reclamation Act of 2009, on January 27, 2009. H.R. 699 is a disastrously bad bill for the mining industry – and, more importantly, for the country. It eliminates security of land tenure, creates insurmountable regulatory hurdles, empowers third-parties to petition to withdraw lands from mining – even after valuable minerals have been discovered, and creates new unrealistic and impractical standards for mining. Two outcomes are certain if H.R. 699 becomes law:

1. H.R. 699 will severely curtail mineral production on America's public lands; and

2. H.R. 699 will dramatically increase the Nation's already extensive reliance on foreign minerals due to the significant reduction in domestic mineral production.

The unfair and burdensome gross royalty in H.R. 699 will certainly cause economic hardships and will contribute substantially to the two negative outcomes listed above. However, the environmental components of H.R. 699 will be equally responsible for reducing domestic mineral production and increasing the country's dependence on foreign minerals.

The environmental and regulatory problems in H.R. 699 are two fold. First, Title I, Sec. 2(a)(19) of H.R. 699 creates a new unrealistic and unfair environmental performance standard, "undue degradation," for mineral activities. This undue degradation standard imposes what is essentially a "zero-impact" mandate on hardrock mining – in marked contrast to other sanctioned activities on federal lands. Second, the new and duplicative public participation process and the problematic environmental standards in Title III, "Environmental Considerations of Mineral Exploration and Development," will cause intolerable uncertainties and delays and create insurmountable roadblocks. Taken together, the undue degradation standard and Title III reflect an underlying philosophy that mineral activities must not affect the environment and are clearly intended to thwart exploration and mining on federal lands.

As each of the case histories proves, current regulations and policies are effectively minimizing impacts from mineral activities and mitigating those impacts that cannot be avoided. But H.R. 699 chooses to ignore this successful track record. Instead, this bill proposes radical changes in an apparent attempt to fix a system that clearly is not broken.

If the goal of H.R. 699 were to address the well recognized shortcomings in the current Mining Law – the lack of a royalty or a fund to reclaim historic abandoned mined lands (AML) – the bill would not include the undue degradation standard or Title III. Unfortunately, H.R. 699 has a much different goal. Rather than making the surgical changes needed to require royalty payments and to create an AML fund, H.R. 699 takes a very different approach that proposes far-reaching changes that are specifically designed to stop hardrock exploration and mining on federal lands.

III. COMPARING FLPMA's UNNECESSARY OR UNDUE DEGRADATION MANDATE WITH THE H.R. 699 UNDUE DEGRADATION STANDARD

A. The FLPMA Mandate to Prevent Unnecessary or Undue Degradation

The term "undue degradation" originates in the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S. C. 1701 *et seq*. Section 302(b) of FLPMA requires the Secretary of the

Interior to manage the public lands to prevent "unnecessary or undue degradation." The FLPMA unnecessary or undue degradation standard, often described in shorthand as "U&UD," applies to all activities on BLM-administered public lands. As such, it is not a standard that is unique to mining.

Fundamental to FLPMA's U&UD standard is the plainly-stated concept that human activities cause degradation – and some degradation is necessary to achieve FLPMA's stated public land management goals at 43 C.F.R. §1701. In the case of mineral production, FLPMA establishes the following Congressional declaration of policy at 43 U.S.C. §1701(a)(12):

> "Congress declares that it is the policy of the United States that – the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands."

The Minerals Policy Act of 1970 states:

> "The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs…"

Practical, on-the-ground standards to implement the FLPMA U&UD mandate must consider two fundamental geologic realities: 1) mineral deposits can only be found in geologically favorable places; and 2) mines can only be developed where mineral deposits are found. The current BLM and USFS regulations for hardrock minerals reflect this reality by being responsive to the wide range of geographic settings and environments in which hardrock minerals are located and developed. The environmental impacts associated with mining are always site specific and dependent upon site topography, climate, hydrology, mineralogy, mining method, and other factors that may be unique to a particular project.

BLM Regulations to Prevent U&UD

BLM's surface management rules for hardrock minerals at 43 C.F.R. Subpart 3809 (hereinafter called "the 3809 regulations") implement the FLPMA mandate to prevent U&UD. BLM's environmental performance standards at § 3809.420 include a comprehensive list of site-specific, outcome-based performance standards for mineral activities that define how mineral projects must be designed, operated, and reclaimed in order to comply with the FLPMA U&UD requirement. These environmental performance standards also consider the diversity of settings in which hardrock exploration and mining occur.

The case histories discussed in Section V demonstrate BLM's track record of effectively tailoring the on-the-ground application of the § 3809.420 environmental performance standards to provide optimal environmental protection and reclamation success at a given site, and the agency's commitment to prevent U&UD. These case histories provide ample proof that BLM's interpretation and management of the 3809 regulations prevents U&UD and show that the

existing regulations are working as intended to protect the environment and achieve BLM's land management objectives. As described in Section V, BLM consistently exercises its authority to require project proponents to modify their project proposals to address site-specific concerns in order to comply with the U&UD mandate. The case histories show absolutely no need for the far-reaching environmental changes in H.R. 699.

The USFS Regulations Use a Minimize Adverse Impacts Standard

The USFS regulations at 36 C.F. R. Part 228, Subpart A (hereinafter called "the 228A regulations) for locatable minerals take a similarly practical approach that recognizes mining creates some necessary and unavoidable impacts and that miners must avoid and minimize impacts whenever and wherever feasible:

> Sec. 228.8 Requirements for environmental protection: All operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources...

The USFS regulations at § 228.8 provide detailed requirements for air quality, water quality, federal solid waste disposal and management, scenic values, fisheries and wildlife habitat, roads, and reclamation. This section of the regulations mandate compliance with federal environmental protection laws and establish the concept that impacts must be minimized "to the extent practicable." For example, the paragraph dealing with solid wastes says:

> "All garbage, refuse, or waste, shall either be removed from National Forest lands or disposed of or treated so as to minimize, so far as is practicable, its impact on the environment and the forest surface resources. All tailings, dumpage, deleterious materials, or substances and other waste produced by operations shall be deployed, arranged, disposed of or treated so as to minimize adverse impact upon the environment and forest surface resources." (36 C.F.R. §228.8(c))

Similarly, the paragraph on solid wastes states:

> "In addition to compliance with water quality and solid waste disposal standards required by this section, operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations". (36 C.F.R. §228.8(e))

The requirements for protecting scenic values and road building also contain requirements to minimize impacts to the extent "practicable."

The USFS requirement to "minimize adverse impacts" is functionally similar to the FLPMA mandate to prevent U&UD. The USFS's standard requires miners to take appropriate steps to avoid, minimize, or mitigate impacts. Like FLPMA and BLM's 3809 regulations, the USFS regulations for mining recognize that some impacts are unavoidable. The use of the word "practicable" in the USFS regulations adds the concept of economic feasibility based upon a consideration of site-specific factors.

The case histories described in Section V for exploration and mining projects on National Forest System lands demonstrate that the USFS requirement in the 228A regulations to minimize

adverse impacts requirement is successfully protecting the environment. These case histories also show that the USFS regularly exercises its regulatory authority to require changes to project proposals in order to comply with the minimize adverse impacts standard. Just like the case histories for projects on BLM-administered lands, the USFS case histories document a consistent agency commitment to enforce all environmental protection standards and requirements.

The case histories include two projects that the USFS approved using a NEPA Categorical Exclusion (CE). Yet in spite of the streamlined NEPA process used for these projects, the USFS placed numerous environmental protection requirements and conditions on both projects, documenting the broad scope of the USFS's 228A regulatory authority. The case histories also include one project where the USFS used the 228A regulations to reject a project proposal.

The Case Histories Show No Need for the H.R. 699 Undue Degradation Standard

Taken together, the case histories for projects on both BLM and USFS lands present compelling evidence that the existing environmental regulations and performance standards are working well and should not be changed. Even if the undue degradation standard in H.R. 699 were practical or achievable – which it most certainly is not – there is absolutely no on-the-ground need or justification for this new standard. The only reason to include the undue degradation standard in H.R. 699 is to eliminate all exploration and mining on federal lands.

B. The H.R. 699 Undue Degradation Standard Creates a Higher Standard for Mining Compared to Other Activities on Public Land

Title I, Sec. 2(a)(19) of H. R. 699 defines undue degradation as "irreparable harm to significant scientific, cultural, or environmental resources on public lands that cannot be mitigated." This "undue degradation" standard is radically different from the FLPMA U&UD standard and the USFS "minimize adverse environmental impacts" standard because it fails to recognize that some degradation is unavoidable in order to mine. The practical meaning of the H.R. 699 undue degradation standard is that it empowers BLM and the USFS to deny plans of operation for proposed mineral projects even if the project complies with federal environmental laws and regulations and can satisfy all other environmental standards and requirements.

H.R. 699 singles out hardrock mining by placing a higher standard of environmental performance on mining activities while preserving the U&UD standard for all other activities on public lands. Thus, the world according to H.R. 699 recognizes and accepts the necessary (i.e., unavoidable) degradation associated with hiking, fishing, camping, hunting, ORV use, developed recreation, logging, extracting coal or oil and gas, film making, livestock grazing, and all other activities that impact public lands. However, it does not acknowledge or accommodate the necessary degradation associated with hardrock mining. In this manner, the definition of undue degradation imposes an impractical, unrealistic, and unfair standard hardrock mining.

Irreparable Harm is Not a New Concept

H.R. 699 is not the first mining proposal to introduce the concept of irreparable harm or to create an irreparable harm-based standard. In 1997, then Secretary of the Interior Bruce Babbitt announced he intended to use the rulemaking process to change the 3809 regulations as a surrogate for Congressional action to amend the Mining Law. In November 2000, after a four-year long rulemaking process, BLM published new 3809 regulations. This version of the rule,

hereinafter referred to as the "2000 § 3809 rule," included a new and controversial standard – Substantial Irreparable Harm (SIH). BLM added SIH to the definition of unnecessary or undue degradation in the final rule, without giving the public an opportunity to comment.

It should be noted that BLM analyzed an alternative (Alternative 4) in the EIS for the 3809 rulemaking that included an SIH concept. However, BLM did not select this as the Agency Preferred Alternative in the EIS due in part to the severe economic hardships associated with this alternative. The following excerpt from the EIS describes the dramatic impact Alternative 4 would have on mining communities:

> "Potential for significant adverse effect to mining-dependent communities, including declines in social well-being due to potential for up to 75% decrease in some types of mining." (October 2000 EIS, *Surface Management Regulations for Locatable Minerals*, page 121.)

The undue degradation standard in H.R. 699 is clearly modeled after Alternative 4 and the SIH standard in the 2000 § 3809 rule.

In fact, most of the H.R. 699 Title III environmental provisions are modeled after the prescriptive environmental performance standards included in Alternative 4 in the EIS prepared for the 3809 rulemaking. It should be abundantly clear from the environmental consequences described in the 3809 EIS that this approach – whether in regulations or in statute – will be disastrous for western mining communities. It will also be disastrous for the Nation as we become even more reliant on imported foreign minerals to replace what used to be produced from U.S. mines.

The SIH standard is not currently in the § 3809 rules because in 2001, then Secretary of the Interior Gale Norton reopened the § 3809 rulemaking. Secretary Norton issued a final rule in October 2001 which does not contain the SIH standard. The 2001 final § 3809 rule (hereinafter referred to as the "2001 § 3809 rule") preserved many aspects of the 2000 § 3809 rule, but eliminated SIH from the definition of undue or unnecessary degradation and from § 3809.415. Secretary Norton's decision to remove SIH from the 2001 § 3809 regulations was based in part upon an October 2001 Department of the Interior Solicitor's Opinion (M-37007) which found that the SIH provision is not consistent with FLPMA. Additionally, the way in which SIH was added to the 2000 § 3809 rule violated the Administrative Procedures Act and NEPA.

C. A Recent NRC Study Demonstrates there is No Justification for Changing U&UD

In 1998, Congress appropriated $800,000 in the FY 1999 Omnibus Appropriations Bill (Department of the Interior and Related Agencies Appropriations Act, 1999 P.L. 105-277, Division A, Title I, Sec. 120) for a National Research Council (NRC) study of hardrock mining on federal lands. The purpose of this study was to "identify and consider the adequacy of federal and state environmental, reclamation and permitting statutes and regulations applicable in any state or states where mining or exploration of locatable minerals on federal lands is occurring, to prevent unnecessary or undue degradation."

The NRC published its findings in a 1999 report entitled *Hardrock Mining on Federal Lands* (hereinafter called "the NRC Report.") This carefully researched and impartial study contains significant useful information regarding the scope and effectiveness of the state and federal regulations for hardrock mining. In the context of H.R. 699, the NRC Report provides an

appropriate framework for evaluating the environmental components of the bill including the substitution of undue degradation for U&UD, and the many far-reaching provisions in Title III that are discussed in Section IV.

The NRC Report does not suggest any environmental problems or regulatory deficiencies stemming from the FLPMA mandate to prevent U&UD. Because Congress specifically directed the NRC to examine the adequacy of the environmental regulations to prevent U&UD, it is highly unlikely that this report would overlook any environmental problems due to the U&UD standard itself. Therefore, the NRC report's finding that the existing regulations are protecting the environment strongly supports the conclusion that the U&UD standard is resulting in environmental protection at exploration and mining projects on BLM lands and that the "minimize adverse impacts" standard in the USFS's 228A regulations is providing similarly satisfactory environmental protection on National Forest System lands.

Because the NRC Report was thoroughly researched, unbiased, and independently reviewed, its findings are considered authoritative. Based on the NRC Report, it is clear that there is no justification for changing the environmental performance standard for mining from U&UD to the undue degradation standard in H.R. 699. The NRC Report demonstrates that the current FLPMA U&UD standard for projects on BLM lands and the USFS standard to minimize adverse impacts for projects on National Forest System lands are working well and consistently achieve their stated goals.

IV. THE NEW PROCEDURES AND STANDARDS IN TITLE III SEEK TO SOLVE PROBLEMS AND FILL GAPS THAT DO NOT EXIST

Title III includes a new and duplicative public participation procedure and impractical environmental standards. H.R. 699 creates both the public participation procedure and the new environmental standards out of whole cloth – as if there are no existing public review processes or environmental standards.

The 1999 NRC Report provides useful information for assessing the need for the new public participation process and the environmental standards in H.R. 699 Title III. As discussed below, it is clear from the NRC Report that these elements of Title III are both unnecessary and undesirable and seek to fix problems and fill gaps where none exist.

A. Title III Creates a New Public Participation Process for Mining That Duplicates NEPA

The new public review requirement in Section 304(i) is one of the most troublesome aspects of Title III. This section requires the Secretary of the Interior and the Secretary of Agriculture to:

> "…jointly promulgate regulations to ensure transparency and public participation in permit decisions required under this Act, consistent with any requirements that apply to such decisions under section 102 of the National Environmental Policy Act of 1969."

It is clear from Section 302(a) that H.R. 699 intends to layer the new mining-specific public participation process described in Section 304(i) onto the existing NEPA process. The H.R. 699 public participation process is not a substitute for NEPA – rather it is a parallel process:

"To the extent practicable, the Secretary and the Secretary of Agriculture shall conduct the permit processes under this Act in coordination with the timing and other requirements under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332)."

The NEPA Process Provides Ample Public Participation Opportunities

There is no demonstrated need whatsoever for creating a new and duplicative public participation process unique to mining projects on federal lands. The NEPA process already affords the public ample opportunities to provide comments on proposed mining projects on federal land. For example, the Battle Mountain Field Office of BLM has received over 6,000 comments on the July 2007 Draft Environmental Impact Statement (EIS) for the Cortez Hills Expansion Project. For the Buckhorn Access Project in Washington, the Okanogan and Wenatchee National Forests received over 100 letters during project scoping, 116 letters on the Draft Environmental Assessment (EA), and 42 letters on the subsequent Draft EIS. The Idaho Falls District Office and the USFS/Caribou-Targhee National Forest received 1,055 original comment letters and a staggering 37,561 identical form letters on the October 2007 Draft EIS the agencies jointly prepared for the Smoky Canyon Mine. (Although Smoky Canyon is a phosphate mine which is governed by the regulations for leasable minerals rather than hardrock minerals, the NEPA statistics dramatically illustrate that the NEPA process already gives the public unfettered ability to comment on proposed mineral projects.)

Given the robust nature of public response to NEPA documents for mining projects, there is simply no evidence that the public is being deprived of an opportunity to provide comments or would benefit from a mining-specific public participation process like that proposed in H.R. 699. BLM's and the USFS's administration of the NEPA process is clearly complying with the NEPA requirement to seek public comment and the volume of responses being received more than satisfies NEPA's objectives to obtain public comment.

It should be evident from the sheer number of public comments submitted in response to recent draft NEPA documents that BLM and USFS are already burdened with an enormous administrative task of cataloguing and responding to comments. Adding a mining-specific public participation process that would run in parallel to the NEPA process would be an administrative nightmare for all parties – BLM, the USFS, and the interested public. The current NEPA process is more than adequate.

In addition to soliciting public comments on proposed projects through the NEPA process, both the BLM and USFS permitting processes includes administrative appeal procedures that give the public a formal opportunity to challenge the adequacy of the agency's NEPA analysis and its decisions to approve or deny a proposed project. . Interest groups frequently use these administrative procedures to try to overturn agency decisions.

Once again, H.R. 699 is a solution in search of a problem. The proposed mining-specific public participation process in Title III sets out to fill a gap that simply does not exist. There is absolutely no need to duplicate the well-established, highly-structured NEPA public review process that federal agencies have used to make decisions about significant federal actions since 1970.

The NRC Report Concludes that the NEPA Process is Protecting the Environment

The 1999 NRC Report mentioned in Section III characterizes NEPA as the backbone of the environmental and regulatory program for evaluating proposed mining projects: "The NEPA process is the key to establishing an effective balance between mineral development and environmental protection." (NRC Report, page 6). H.R. 699 destroys this balance.

The NRC Report found the NEPA process to be a meaningful opportunity to evaluate ways to make a proposed mine the best possible project for the community and the environment and confirms that the NEPA process is adequate in scope to accommodate all potential issues. In summary, the NRC Report presents the following findings regarding the efficacy of the NEPA process for hardrock mineral projects (NRC report pages 108 – 110):

- The NEPA process and its various state equivalents provide the most useful and efficient framework for evaluating proposed mining activities;

- NEPA provides the most comprehensive and integrated framework for undertaking an environmental evaluation that includes the full range of environmental concerns, whether or not they are specifically addressed by some other regulatory program, as well as cultural and other concerns.

- NEPA environmental reviews examine tradeoffs between different and sometimes competing values, and promote a better understanding of the implications of the many decisions involved in the preparation and approval of a mine's operating plan....No other regulatory program provides such a comprehensive, integrated mechanism for decision making.

- The NEPA process ensures that the decisions are based on careful analyses of site-specific conditions. An operating plan for mining activities must adapt and respond to site-specific conditions and sensitivities. The NEPA process allows this responsiveness; regulatory programs relying on inflexible, technically prescriptive standards often do not.

- The NEPA process allows the agencies to be responsive to changes in technology and site-specific conditions. Less flexible regulatory approaches do not allow this flexibility and, as a result, can cause technologies to be "frozen," often with adverse impacts for both the mining operators and the environment.

The inescapable conclusion from these NRC Report findings is there is absolutely no need to create the new public participation process in H.R. 699. According to the NRC Report, the NEPA process is not only adequate – it is ideal for gathering public input, evaluating environmental impacts, and identifying any unnecessary or unacceptable impacts associated with proposed mining projects.

There is no demonstrated need for the new public participation process mandated in Section 304(i). It is unnecessary and is completely at odds with the findings in the NRC Report.

<u>The Case Histories Also Document that NEPA is Effective and that Another Public Participation Process is Not Necessary</u>

The case histories presented in Section V for projects on both BLM and USFS lands provide compelling and specific evidence of the pivotal role that NEPA plays in the environmental review and permitting process for mineral projects on federal lands. These case histories consistently document that issues and concerns are raised during public scoping for NEPA documents and in public comments on draft NEPA documents.

More importantly, the case histories provide a verifiable track record of how BLM and the USFS consider public comments when making decisions about proposed projects. It is clear from the case histories that public comments frequently influence agency decisions. Both BLM and the USFS routinely require changes to a proposed project in response to public comments or select one of the alternatives analyzed in the NEPA document rather than the project proponent's Proposed Action. The case histories also show how the NEPA process and the 3809 and 228A regulations work smoothly together to evaluate and refine a project proposal to prevent U&UD on BLM lands or to minimize adverse impacts on National Forest System lands.

B. Title III Contains Impractical and Unattainable Standards and Duplicative Requirements

Title III contains impractical and unattainable standards and requirements as well as numerous requirements that duplicate existing BLM and USFS regulations and policies. The problematic standards are designed to make securing permits for new exploration, mining, and ancillary activities very difficult – and in some cases impossible.

The duplicative requirements are another example of the way in which H.R. 699 provides a solution to an imaginary problem. The regulatory agencies have already developed comprehensive and effective programs that provide environmental protection at mines on federal lands. Table 1 summarizes the troublesome standards and the numerous duplicative requirements in Title III.

Table 1
Examples of Impractical or Unattainable Environmental Standards and Duplicative Requirements in Title III, H.R. 699

H.R. 699 Impractical or Unattainable Standard	Discussion
Limits exploration permits to 10 years §304(e)	It typically takes more than 10 years to discover, explore and define a mineral deposit. The exploration case histories do not demonstrate a need for this limit.
Limits life of mine permits to 20 years – with one possible 20-year renewal §304(d)(1)(A – B)	Some deposit types take longer to mine than 20 years. Some mines have operated for over 100 years. The possibility (but no guarantee) of a 20-year one-time permit renewal creates too much uncertainty to make the necessary investment decisions to develop the mine. The mining case histories do not demonstrate a need for this limit. This arbitrary time limit will cause premature mine closures, leaving minerals in the ground,

Table 1 Examples of Impractical or Unattainable Environmental Standards and Duplicative Requirements in Title III, H.R. 699	
	and wasting mineral resources. This will hurt local and state economies that depend on mining.
Restricts Plans of Operations to claims with valid discoveries and requires discretionary permits to use federal lands for processing facilities, roads, mine waste storage areas, etc. §304(a)(1)(A - B)	Most surface mines use more claims without a discovery than valid claims. Limiting Plans to valid claims and the requirement to obtain discretionary approvals to use non-mineralized ground creates too much uncertainty to make the necessary investment decisions to develop the mine. Additionally, this creates a new onerous requirement to establish the validity status of each claim and distinguish it in the permitting process. Inserting claim validity into the permitting process will create an enormous administrative burden for the agencies and further delays for permit applicants. The mining case histories do not demonstrate a need for this limit and requirement.
Limits water treatment to 10 years after mine closure §304(c)(H)	This will make mining of many sites that use water treatment during mining difficult or even impossible. There should be no prohibition against long-term water treatment so long as the applicant provides adequate financial assurance and/or a long-term funding mechanism to operate the treatment facility. From a practical perspective, it is unclear how applicants will be able to demonstrate this during the permitting process before the water treatment system is built.
Only claim holders may apply for an operations permit §304(a)(1)	Mine operators are commonly different entities than the claim owners. It is fairly unusual for a claim owner to operate the mine. This restriction reflects a lack of understanding of typical mining industry business relationships.
Operations must prevent “material damage to the hydrologic balance outside the permit area”§304(c)(E)	This may prohibit the development of both surface and underground mines that require significant dewatering, a common need in many mines
Preserving cultural, paleontological and cave resources	It may be impossible to preserve these resources at sites where the orebody and these features are co-located. (See 3809.420(b)(8)(i)). Current mitigation policies are appropriate.
H.R. 699 Duplicative Requirements	**Existing BLM and USFS Regulations**
Restoring mined land for productive post-	3809.420(a)(3)

Table 1 Examples of Impractical or Unattainable Environmental Standards and Duplicative Requirements in Title III, H.R. 699	
mining uses	228.8(g)
Contemporaneous reclamation	3809.420(a)(5) and 3809.420(b)(3)(i) 228.8(g)
Salvaging topsoil or growth medium s	3809.420(b)(3)(ii)(A) 228.8(g)
Maintaining stability of the site	3809.420(a)(2) 228.8(g)(1-2)
Controlling sedimentation and erosion	3809.420(b)(3)(ii)(B), 228.8(g)
Minimizing the formation and migration of acidic, alkaline, or metal-bearing leachates	3809.420(b)(3)(ii)(C) and 3809.420(b)(11) 228.8(g)(3)
Reducing visual impacts	3809.420(b)(3) 228.8(d)
Revegetating disturbed areas	3809.401(3)(viii) and 3809.420(b)(3) 228.8(g)(4)
Using standard engineering practices to achieve stability and reclamation	3809.420(b)(12), 228.8(g)
Removing structures and roads and sealing drill holes	3809.401(3)(ix), 3809.401(3)(i), and 3809.420(b)(3) 228.8(f) and 228.8(g)
Restoring or mitigating impacts to fish and wildlife habitat	3809.420(b)(3)(ii)(E) 228.8(e)
Fire suppression and prevention	3809.420(b)(10), 228.11

Title III Proposes Using Inappropriate Technology-Based Standards

Although duplicating requirements that are in existing regulations is not necessarily problematic, the fact that H.R. 699 Sec. 307(b) gives the Secretaries the discretionary authority to require the use of technology-based design standards versus outcome-based performance standards creates a serious problem. The NRC Report clearly establishes that one-size-fits-all, technology-based standards are inappropriate for mineral projects given the need to accommodate site-specific conditions. For example, Recommendation No. 9 in the NRC Report states:

> BLM and the Forest Service should continue to base their permitting decisions on the site-specific evaluation process provided by NEPA. The two land management agencies should continue to use comprehensive performance-based standards rather than using rigid, technically prescriptive standards. (NRC Report, page 108).

The NRC Report explains that technology-based standards are especially unsuitable for mineral projects in light of the rapidly changing nature of mining methods and environmental protection technology. Federal land managers need to have the authority to require the newest and best technology rather than having to adhere to specific technologies that may be outmoded or not optimal for a certain site.

Many of the case histories described in Section V describe how BLM and the USFS have required site-specific environmental controls to respond to unique ecological conditions at project sites. It is clear from these case histories that imposing cookie-cutter-type, technology-based standards would not have been ideal at these sites.

The technology-based standards sanctioned in Sec. 307(b) are likely to result in inferior environmental protection and reclamation compared to the performance-based standards currently in place. Thus, in the case of Sec. 307(b), H.R. 699 does not solve any identified environmental problem. Instead, it promotes second-rate environmental results.

C. BLM has Already Taken Care of all of the Gaps Identified in the NRC Study – the Title III Measures are Not Necessary

Although the NRC Report clearly states that the regulations in place during the 1998 – 1999 timeframe were adequate to protect the environment, the Report also identified five regulatory gaps. The NRC Report contains specific recommendations for how BLM should modify its regulations to fill these gaps. The 2001 3809 regulations contain a number of specific changes to eliminate the gaps discussed in the NRC Report. Table 2 lists the gaps identified in the NRC Report and the 2001 gap-filling measures.

A number of the requirements in Title III mimic the gap-filling measures contained in the 2001 § 3809 rules. Because BLM's rules already respond to all of the shortcomings identified in the NRC Report, these Title III provisions are unnecessary. Once again, there are no remaining gaps that need to be filled; Title III seeks to fill gaps that have already been filled.

Table 2
Changes Made in 2001 to the 3809 Rules in Response to the NRC Report

NRC Report Issue or Gap	Changes Made
Require financial assurance for all mining and exploration activities that are not classified as casual use	3809.500, 3809.503
Mandate Plans of Operation for any mining or milling operation regardless of size	3809.5, 3809.11(b)
Develop criteria and procedures for modifying Plans of Operation	3809.430 - 434
Adopt regulations that define temporary closure and require interim management plan;	3809.401(5)
Plan for and assure long-term, post-closure management of closed and reclaimed mines	3809.401(3)(ix)

V. CASE HISTORIES DEMONSTRATE THE ENVIRONMENTAL PROVISIONS IN H.R. 699 ARE UNNECESSARY TO PROTECT THE ENVIRONMENT

A. BLM and USFS Use NEPA and the Surface Management Regulations Effectively to Achieve Environmental Protection and Land Management Objectives

The case histories listed in Table 3 and discussed below demonstrate that BLM and the USFS consistently – in fact on almost all projects – require companies to modify proposed Plans of Operation for exploration and mining projects. The agencies imposed these changes to eliminate, minimize, or mitigate impacts to one or more environmental resource and/or to respond to issues raised during public scoping and in public comments submitted on draft NEPA documents.

All of the examined case histories underscore the effective relationship between the NEPA process and the 3809 and 228A surface management regulations. The NEPA process provides BLM and the USFS with an analysis tool to identify and quantify potential environmental impacts, to analyze project alternatives, and to develop appropriate mitigation and monitoring measures to minimize impacts. Once the NEPA process has identified project alternatives, analyzed impacts (including those associated with the No Action alternative), and specified mitigation measures, BLM and the USFS then use their respective authorities in the 3809 and 228A regulations to require project applicants to modify the project proposal to enhance environmental protection, and to eliminate or minimize impacts whenever and wherever possible. The case histories show that NEPA and the surface management regulations work seamlessly together to achieve the agencies' land management mandates – to prevent unnecessary or undue degradation from mining on BLM lands and to minimize adverse environmental impacts from mining on National Forest System lands.

The changes made to projects as a result of the NEPA process include agency-required mitigation and other measures and stipulations that go beyond those offered by the project proponent. In fact, it is highly unusual for BLM and the USFS to NOT mandate additional requirements for a project. The case histories include many examples of BLM and USFS invoking their respective 3809 and 228A authority to select an "Agency Preferred Alternative" that differs (sometimes substantially) from the project proponent's "Proposed Action." Additionally, even some projects approved under a NEPA Categorical Exclusion (CE) may have extensive environmental protection requirements attached.

Alternatively, project proponents sometimes chose to modify their project proposals in response to the issues and concerns identified during NEPA public scoping and in public comments submitted on draft NEPA documents. It is not uncommon for companies to take the lead in changing their Proposed Action by adding new mitigation, monitoring, and environmental protection measures, or by changing some aspect of the project proposal based on public input and agency suggestions. This is often preferable to waiting for the agency to impose these changes in the form of agency-required measures or as an Agency-Preferred Alternative that differs from the Proposed Action. Project proponents typically make these changes in close coordination with BLM and the USFS. Either way, whether a company initiates the changes or whether the agencies require the changes, the process results in a project with enhanced environmental protection and mitigation measures that ensure compliance with the mandate to prevent unnecessary or undue degradation on BLM lands and to minimize adverse impacts on National Forest System lands.

It is thus readily apparent from the case histories that the existing regulations for mineral activities on both BLM and National Forest System lands, coupled with the NEPA environmental review process, are working well. There is nothing in the case histories to suggest that an additional public review process or different environmental standards are warranted. The agency track records and the environmental measures described in the case histories provide compelling substantiation that the environmental provisions in H.R. 699 seek to reinvent the wheel, to solve imaginary problems, and to fill gaps that do not exist.

B. Case Histories for Mineral Projects on BLM and USFS Lands

The 27 case histories summarized in Table 3 and discussed below were developed from NEPA EIS and EA documents for proposed exploration, mining, and mining-related projects on BLM and National Forest System lands in Nevada, Arizona, California, New Mexico, Idaho, Washington, Oregon, and Colorado. Each project described below presents a clear example of how the agencies' surface management regulations authorize BLM and the USFS to require additional or modified environmental protection, mitigation, and monitoring measures, and other project changes that differ from the applicant's Proposed Action. A number of the case histories demonstrate that BLM and the USFS frequently select an Agency-Preferred Alternative that is different than the project proponent's Proposed Action.

Table 3 Mineral Project Case Histories on BLM and National Forest System Lands						
Date	**State**	**Type of Mineral Project**	**Project Name**	**NEPA Review**	**BLM Office/ National Forest**	**Agency -Added Conditions and Changes**
BLM Projects						
1996	NV	Mining	Cortez Pipeline Gold Deposit	EIS	Battle Mountain	$1 million contingency fund for water quality issues
1996	NV	Mine Expansion	Lone Tree Expansion	EIS	Winnemucca	BLM added 10. Plus mitigation and monitoring requirements
1997	NV	Mining	Ruby Hill Project	EIS	Battle Mountain	BLM added pit-backfill, development of county advisory group, and others
1998	NV	Mining	Trenton Canyon Project	EIS	Winnemucca	BLM added partial pit-backfill modification
2001	NV	Mine Expansion	Marigold Mine Expansion	EIS	Winnemucca	BLM added partial pit-backfill modification, additional mitigation and monitoring
2001	NV	Mining	Reno Clay Plant Project	EIS	Carson City	Access road change, operations time restrictions, others
2002	NV	Mining	Leeville Project	EIS	Elko	BLM added three alternatives and required a long-term mitigation and monitoring plan
2003	NV	Mine Expansion	Phoenix Project	EIS	Battle Mountain	BLM added 4 major stipulations and 37 requirements
2005	NM	Mine Expansion	Copper Mountain South Pit	EA	Las Cruces	BLM added 5 requirements
2005	NV	Placer Mine	Nick Claims Mining Project	EA	Winnemucca	BLM added 7 stipulations
2006	CA	Mining	Jawbone Canyon Project	EA	Ridgecrest	BLM added 6 mitigation measures and 4 reclamation
2006	AZ	Exploration	Rock Mining Claims	EA	Arizona Strip	11 mitigation measures required
2007	NV	Exploration	Spring Valley Exploration	EA	Winnemucca	Numerous mitigation measures added
2007	NV	Mine Expansion	Cortez Hills Expansion	Draft EIS	Battle Mountain	Clear statement that BLM should

Table 3 Mineral Project Case Histories on BLM and National Forest System Lands						
Date	**State**	**Type of Mineral Project**	**Project Name**	**NEPA Review**	**BLM Office/ National Forest**	**Agency -Added Conditions and Changes**
						select BLM preferred alternative
2007	NV	Mine Expansion	Big Ledge Project	EA	Elko	BLM added 4 additional protection measures
2007	NV	Exploration	Tonkin Springs Exploration	EA	Battle Mountain	31 specific conditions included in the draft EA
National Forest System Land Projects						
1988-2003	ID	Exploration	Golden Hand Mine Project	EIS	Payette	USFS selected different, restrictive alternative
2006	NM	Mining	Cerro Del Pino Pumice	EA	Santa Fe	USFS added 19 conditions
2006	NV	Mining	Mount Moriah Stone Quarry	EA	Humboldt-Toiyabe	USFS added 34 conditions
2006	OR	Mine Expansion	Star Rock Pit	EA	Malheur	USFS added 11 conditions. Proponent was state agency
2006	OR	Mine Expansion	Tamarack Quarry	EA	Mt. Hood	USFS added multiple additional conditions. Proponent was state agency
2006	WA	Mine Continuation	Black Diamond Star Claim	CE	Colville	USFS added 16 conditions
2006	WA	Exploration	2007 Exploration Drilling	CE	Colville	USFS added 13 conditions
2007	WA	Mine Access	Buckhorn Access Project	EIS	Okanogan and Wenatchee	USFS selected a different alternative and added 15 terms and conditions plus large bond
2007	ID	Mining	Idaho Cobalt Project	EIS	Salmon-Challis	USFS selected a different alternative with significant additional provisions
2007	CO	Mine Expansion	Red Dirt Pit Expansion	EA	Yampa	USFS added 16 conditions
2007	CO	Mining	Robin Redbreast	EIS	Uncompahgre and Gunnison	Project plan was rejected and denied

BLM Case Histories

Cortez Gold Mines. Cortez Pipeline Gold Deposit. Final EIS. January 1996. Battle Mountain District Shoshone - Eureka Resource Area, Battle Mountain, Nevada

This EIS demonstrates how the project proponent, Cortez Gold Mines (Cortez), responded to public concerns and potential environmental impacts identified during the NEPA process by amending the Proposed Action to address these issues. Cortez modified its original project proposal by adding a number of "Applicant-Committed Design Measures" to mitigate public concerns and potential impacts. Additionally, BLM stipulated agency-required mitigation measures "to reduce potential significant impacts that may occur despite the applicant-committed design measures." BLM designated Cortez's Proposed Action modified with the "Applicant-Committed Design Measures" and the agency-required mitigation measures as the Agency-Preferred Alternative.

One of the Applicant-Committed Measures added to the proposed project was a long-term $1,000,000 interest-bearing contingency fund to provide for long-term monitoring and corrective action, if required, for pit lake water quality and/or dewatering-related impacts. BLM State Director, Ms. Ann Morgan, describes this fund in a January 12, 1996 "Dear Interested Party" letter as a fund established "in the interest of protecting the environment." Ms. Morgan's letter also describes changes made to the Proposed Action as a result of the NEPA evaluation as follows:

> "A number of refinements to the proposed action have resulted from public comments on the Draft Environmental Impact Statement. These refinements have been incorporated into the proposed action and the Pipeline Project Plan of Operations."

Santa Fe Pacific Gold Corporation. Lone Tree Mine Expansion Project. Final EIS. September 1996. Winnemucca District Office, Winnemucca, Nevada

BLM selected Santa Fe Pacific Gold Corporation's (SFPG's) Proposed Action, modified with mitigation and monitoring measures, as the Agency-Preferred Alternative. BLM's Record of Decision (ROD) approves the Lone Tree Mine Expansion Project Plan of Operations subject to ten stipulations and numerous mitigation and monitoring requirements for water resources; soils; avian, terrestrial, and aquatic wildlife; livestock; recreation; air resources; geology; visual resources; vegetation; and cultural resources.

Homestake Mining Company. Ruby Hill Project. Final EIS. January 1997. Battle Mountain District, Battle Mountain, Nevada

As a result of the NEPA analysis conducted for the Ruby Hill Project, BLM selected a Preferred Alternative that consisted of Homestake Mining Company's (Homestake's) Proposed Action, plus a Partial Backfill Alternative that was one of the alternatives considered in detail in the EIS. This backfilling alternative would result in a slightly larger (approximately 6 acres) area that could be reclaimed. Additionally, BLM stipulated several agency-required mitigation measures

to address community concerns about visual impacts, noise and vibration from blasting, and air quality due to dust generated by mining activities. These mitigation measures are described as being developed by BLM in collaboration with Homestake and included the development of an advisory group in Eureka County. The advisory group was established to identify areas where monitoring for dust, noise, or blasting vibration may be needed, and to develop additional mitigation to address impacts that could not be fully identified in the EIS (i.e., before mining started). The BLM also required a visual resources mitigation measure to reduce the height of a waste rock dump visible from town.

Newmont Mining Company. Trenton Canyon Project. Final EIS. August 1998. Winnemucca District Office, Winnemucca, Nevada

For the Trenton Canyon Project, BLM selected an Agency Preferred Alternative comprised of Newmont Mining Company's Proposed Action, modified with the Partial Sequential Backfill Alternative evaluated in the EIS. As described in the EIS, the Agency-Preferred Alternative would reduce the total area of mine disturbance, reduce or eliminate some overburden disposal areas, reduce the reclamation effort for the overburden disposal areas, maximize the total amount of land reclaimed to beneficial use, and reduce potential sedimentation to a nearby creek.

Glamis Marigold Mining Company. Marigold Mine Expansion Project. Final EIS. March 2001. Winnemucca Field Office, Winnemucca, Nevada

BLM selected a partial backfill alternative as the Agency-Preferred Alternative for the Marigold Mine Expansion Project. This alternative requires the project proponent, Glamis Marigold Mining Company (GMMC), to add partial backfilling of the 8-South Pit to the Proposed Action. BLM required this backfilling alternative to eliminate the potential for a pit lake to form in this pit. This alternative also reduces surface disturbance associated with the project, thereby lessening impacts to soils, vegetation resources, wildlife habitat, range resources, and recreation. BLM also required GMMC to perform water resources, air quality, and cultural resource mitigation and monitoring measures in addition to those included in the Proposed Action.

Oil-Dri Corporation. Reno Clay Plant Project. Final EIS. September 2001. Carson City Field Office, Carson City, Nevada

BLM selected an alternative project access route as the Agency-Preferred Alternative. This alternative required the project proponent, Oil-Dri Corporation of Nevada (Oil-Dri), to change the access route to the project in response to public concerns about traffic safety and social concerns related to transporting the clay product from the processing facility. The Proposed Action involved constructing approximately 0.8 mile of new access road on public land. At the Final EIS stage, BLM rejected this aspect of Oil-Dri's Proposed Action. The Agency-Preferred Alternative required Oil-Dri to construct a new access road on private land.

BLM also stipulated the following agency-required mitigation measures beyond those included in the Proposed Actions:

1. Restricting the hours of nighttime operation and prohibiting backfill operations in the North Mine areas on weekends and holidays to address public concerns about noise;

2. Enforcing a 25-miles per hour speed limit on all haul, access, and transport routes to reduce traffic impacts; and

3. Potential temporary changes to Oil-Dri's operating schedule to accommodate planned recreational events on public land.

It is interesting to note that the Draft EIS selected the Proposed Action as the Agency Preferred Alternative. At that time, the private land needed for Alternative C was not available. However, during the interim between the Draft and Final EIS documents, Oil-Dri was able to obtain the private land. BLM responded by changing the agency's Preferred Alternative. This is a good example of how BLM used their authority to prevent unnecessary or undue degradation to public land. The BLM-required changes to this project demonstrate that BLM has ample authority to prevent unnecessary or undue degradation.

Newmont Mining Company. Leeville Project. Final EIS. ROD September 2002. Elko Field Office, Elko, Nevada

In the Draft EIS for the Leeville Project, BLM selected an Agency-Preferred Alternative that added the three alternatives analyzed in detail in the Draft EIS to Newmont Mining Company's (Newmont's) Proposed Action. These alternatives included eliminating the canal portion of the water discharge pipeline system, backfilling the production and ventilation shafts with waste rock rather than with reinforced concrete as proposed by Newmont, and relocating the waste rock disposal facility and refractory ore stockpile to eliminate 118 acres of new surface disturbance. In addition, BLM required Newmont to prepare and add a comprehensive, long-term Mitigation and Monitoring Plan to the Final EIS.

Battle Mountain Gold. Phoenix Project. Final EIS. ROD November 2003. Battle Mountain Field Office, Battle Mountain, Nevada

Battle Mountain Gold (BMG) conducted gold, exploration, mining and recovery operations in the Copper Canyon area (Lander County, Nevada) since the 1980s under various Plans of Operations and EAs. A Plan of Operations submitted in 1994 was updated four times to incorporate additional information developed in the interim. The Phoenix Project, an expansion of open pit gold operations in four pits, was determined by the BLM to be significant enough in size, scope and impact to warrant preparation of a full EIS. The BLM Battle Mountain Field Office selected BMG's proposed alternative analyzed in the Phoenix Project Final EIS as modified by the BLM with mitigation and monitoring requirements, as the BLM's preferred alternative.

Prior to construction, the BLM required BMG to: 1) Submit an approved long-term funding mechanism to satisfy all costs to implement the Contingent Long-Term Groundwater Management Plan; 2) Submit financial guarantee for reclamation; 3) Implement the monitoring and mitigation measures developed with the BLM and discussed in the ROD; and 4) Secure all required federal, state, and local permits. Approval of the BMG Plan of Operations and the

FEIS was contingent upon 37 wide-ranging additional requirements as set forth in the ROD. These very specific requirements again illustrate the latitude and flexibility allowed the BLM under the 3809 rules to alter mining proposals to manage and protect public lands at the site-specific level.

Phelps Dodge Tyrone Inc. Copper Mountain South Pit Expansion. Final EA. January 2005. ROD March 2005. Las Cruces Field Office, Las Cruces, New Mexico

Phelps Dodge Tyrone Inc. proposed to expand the existing Copper Mountain Pit at the Tyrone Mine by 31 acres in order to mine and recover approximately 72 million pounds of copper. The BLM determined that an EIS was not necessary and conducted an EA instead. The BLM's preferred alternative consisted of the Phelps Dodge proposed action and a FONSI was issued with additional BLM requirements relative to noxious weed monitoring and control, special status plant and wildlife species, dust control, and acid producing material monitoring. This project was conducted under existing 3809 rules.

Geodesy Resources, Inc. Nick Claims Mining Project. Final EA. January 2005. ROD September 2007. Winnemucca Field Office, Winnemucca, Nevada

Geodesy Resources, Inc. proposed a gold placer mining operation at the Nick Claims in Pershing County, Nevada. Geodesy's initial proposal was modified during the public comment period. The BLM Winnemucca Field Office preferred alternative consisted of the proponent's alternative as modified with seven stipulations added by the BLM during the Environmental Assessment process. These stipulations pertained to cultural resource protection and data recovery, weedy and invasive species control, wildlife mitigation and monitoring relative to the Migratory bird Treaty Act with provisions relative to nesting birds, development of a detailed reclamation plan, spill response and control, permits and Rights of Way, and a fire prevention plan. This project was conducted under the 3809 rules presently in effect.

Matcon Corporation, Inc. Jawbone Canyon Project. Final EA and ROD. 2006. Ridgecrest Field Office, Ridgecrest, California

Matcon Corporation, Inc. submitted a Plan of Operations under the 3809 rules to excavate and commercially develop a deposit of zeolite on claims administered by the BLM Ridgecrest Field Office in California. The BLM determined that an Environmental Assessment would suffice given the nature of the disturbances described in the Plan of Operations. Following an in-depth review and assessment of the Plan of Operations, the BLM required of the proponent six additional mitigation measures and four additional reclamation requirements in addition to those measures and stipulations discussed in CFR Title 43, Subpart 3809.420.

Quaterra Resources, Inc. Uranium Exploration, Rock Mining Claims. Final EA and ROD. September 2006. Arizona Strip Field Office, St. George, Utah

In 2006, Quaterra Resources submitted a Plan of Operations to the BLM for uranium exploration on BLM administered claims on the Kanab Plateau. The BLM required that an Environmental

Assessment (EA) be conducted. The EA detailed 11 mitigation measures required of the proponent by the BLM. These measures involved cultural and archaeological resources, noxious weeds, reclamation, drill-hole abandonment, waste management, wildlife, and water quality and usage.

MGC Resources, Inc. Spring Valley Exploration Project. Final EA April 2007. ROD May 3007. Winnemucca Field Office, Winnemucca Nevada

In September 2005, MGC Resources, Inc. submitted a Plan of Operations (upgraded from the Notice level) to the BLM for mineral exploration activities that would cause disturbances on approximately 76 acres of public and private lands in Pershing County, Nevada with various drill pads, sumps, new roads, and ancillary activities that accompany intensive mineral exploration. The BLM, Winnemucca Field Office determined that an Environmental Assessment would suffice to assess the impact of the proposed project. Following completion of the EA and a 30-day comment period, the BLM selected MGC's proposed alternative, but added significant mitigation and monitoring requirements in approving the project in the ROD. Monitoring and mitigation requirements involved prevention of noxious and invasive weeds, surveys or and monitoring for breeding birds and bird nests and their protection under the Migratory Bird Treaty Act. Compliance monitoring was very specific and detailed. This exploration project was conducted under existing 3809 rules.

Cortez Gold Mines. Cortez Hills Expansion Project. Draft EIS. July 2007. No ROD. Battle Mountain Field Office, Battle Mountain, Nevada

Cortez Gold Mines (CGM) proposed a Plan of Operations for a significant expansion of its gold mining and processing operations in the BLM Battle Mountain Field Office jurisdictional area. The Draft EIS was submitted in July 2007. While the Record of Decision has not been released at the time of this document, the final two paragraphs in the Executive Summary are emblematic of BLM's approach to selecting an alternative that differs from the Proposed Action in order to minimize environmental impacts and enforce the land management directive to prevent unnecessary or undue degradation:

> "Chapter V, Section B.2.b. of the BLM's National Environmental Policy Act Handbook directs that "the Manager responsible for preparing the EIS should select the BLM's preferred alternative. ... For externally initiated proposals, ... the BLM selects its preferred alternative unless another law prohibits such an expression. ... The selection of the preferred alternative should be based on the environmental analysis as well as consideration of other factors that influence the decision or are required under another statutory authority."
>
> The BLM has selected a preferred alternative based on the analysis in this EIS. This preferred alternative is the alternative that best fulfills the agency's statutory mission and responsibilities, considering economic, environmental, technical, and other factors. The BLM has determined that the preferred alternative is the Proposed Action as outlined in Chapter 2.0 with mitigation measures specified in Chapter 3.0 of this EIS."

Spirit Minerals LP. Big Ledge Project Mining and Processing. Final EA, November 2007. ROD December 3, 2007. Elko Field Office, Elko, Nevada

Spirit Minerals proposed to incorporate an approved Plan of Operations for the Big Ledge barite mine exploration into a mine plan that would allow the company to expand and renew mining for barite on fee lands and federal lands. The BLM determined that an EIS was not necessary and conducted an EA instead. The BLM's preferred alternative consisted of Spirit Minerals proposed action and a FONSI was issued with additional BLM requirements relative to protection of cultural resources, establishment of buffer strips, fencing, and monitoring and inspection plan.

Tonkin Springs LLC. Tonkin Springs Exploration Project. Draft EA. December 2007. No ROD. Battle Mountain Field Office, Battle Mountain, Nevada

Tonkin Springs LLC submitted a Plan of Operations to upgrade its long-time mineral exploration project from the Notice level. The BLM, Battle Mountain Field Office, determined that an Environmental Assessment would suffice to assess the impact of the proposed project. While no ROD has been issued at the date of this document, it is worth noting that Tonkin Springs LLC committed to 31 specific conditions regarding environmental protection. These conditions were developed with specific input from the BLM and included air quality, cultural resources, waste, water quality, wetlands, public safety, fire management, wildlife, invasive and weedy species control, and protection of wild horses and burros.

USFS Case Histories

American Independence Mines and Minerals, Inc. Golden Hand Mine Project. EIS. 1988, 1996, 2003. Krassel Ranger District, Payette National Forest, Idaho

American Independence Mines and Minerals, Inc. first submitted a Plan of Operations to mine on patented claims within the Frank Church-River of No Return Wilderness as authorized under the 1872 Mining Laws. The USFS did not deny the right of the proponent to mine their claims within the wilderness area. However, through a long and disputed process, the USFS required the proponent to make numerous changes to their plan in order to protect the environment and address the many environmental issues that arose relative to access, water quality, development methods, etc. The proponent's proposed plan, Alternative B was not accepted by the USFS during the EIS process. Rather, the USFS's Agency Preferred Alternative was Alternative C which contained significant agency-directed protective changes as allowed under the USFS rules.

Utility Block Co. Cerro Del Pino Pumice Mine. EA and ROD. 2006. Jemez Ranger District, Santa Fe National Forest. Sandoval County, New Mexico

Utility Block Co. submitted a Plan of Operations to mine pumice from an approximate 6 acre open pit on USFS-administered lands. The USFS determined that an EA would suffice for NEPA analysis of the project. Following analysis of the EA, the USFS issued a FONSI for the project that selected the proponent's alternative but added 19 specific conditions for approval

plus a monitoring stipulation. These conditions included safety, threatened and endangered species, visual aesthetics, erosion control, waste management, and others.

Mt. Moriah Stone Quarry. Mount Moriah Stone Quarry Phase II. EA and ROD. December 2006. Ely Ranger District, Humboldt-Toiyabe National Forest. White Pine County, Nevada

Mt. Moriah Stone Quarry submitted a Plan of Operations to the USFS to mine quartzite building stone materials from a 50-acre site on USFS-administered lands. The USFS determined that an EA would suffice for NEPA analysis of the project. Following analysis of the EA, the USFS issued a FONSI for the project that selected the proponent's alternative but added 34 specific conditions for approval plus a monitoring stipulation. These conditions included safety, waste rock, weeds, wildlife, wildfires, erosion control, and reclamation.

Oregon Department of Transportation. Star Rock Pit Project. EA and ROD. 2006. Blue Mountain Ranger District, Malheur National Forest. Grant County, Oregon

The Oregon Department of Transportation submitted a Plan of Operations to the USFS to expand the existing Star Quarry on USFS administered lands to continue to provide high quality aggregate materials, some of which would be used by the USFS. The USFS determined that an EA would suffice for NEPA analysis of the project. Following analysis of the EA, the USFS issued a FONSI for the project that selected the proponent's alternative but added 11 multi-component additional environmental protection and design elements, mitigation measures, best management practices and monitoring for approval. This project is a good example of the interaction of the USFS and its rules when the project proponent is another agency (in this case a state agency), and illustrates that the USFS can and generally does add additional conditions to project approval.

Oregon Department of Transportation. Tamarack Quarry Expansion. EA and ROD. 2006. Zig Zag Ranger District, Mt. Hood National Forest. Clackamas County, Oregon

The Oregon Department of Transportation submitted a Plan of Operations to the USFS to expand the existing Tamarack Quarry on USFS administered lands to continue to provide high quality aggregate materials, some of which would be used by the USFS. The USFS determined that an EA would suffice for NEPA analysis of the project. Following analysis of the EA, the USFS issued a FONSI for the project that selected the proponent's alternative but added a number of multi-component additional environmental protection and design elements, mitigation measures, best management practices and monitoring for approval. This project is another good example of the interaction of the USFS and its rules when the project proponent is another agency (in this case a state agency), and illustrates that the USFS can and generally does add additional conditions to project approval.

Mr. Joe Vines. Black Diamond Star Mining Claim. Categorical Exclusion. 2006. Three Rivers Ranger District, Colville National Forest. Ferry County, Washington

Mr. Joe Vines submitted a Plan of Operations to the USFS seeking approval to continue removal

of decorative stone materials from his existing claim. Following USFS review and public scoping and notification, the USFS determined to grant a categorical exclusion to NEPA under its rules. However, as conditions of approval under the CE, the USFS required the proponent to adhere to 16 specific conditions pertaining to access, blasting, threatened and endangered species, invasive weeds, reclamation, cultural resources, safety, and others. Even though this project was approved using a CE, it illustrates the ability of the USFS to apply specific environmental protection conditions under the existing rules to any project on USFS administered lands.

Teck Cominco American Inc. 2007 Exploration Drilling. Categorical Exclusion. 2007. Sullivan Ranger District, Colville National Forest. Pend Oreille County, Washington

Teck Cominco American submitted a Plan of Operations to the USFS seeking approval for mineral exploration and drilling 8 drill holes at different locations on USFS administered lands. Following USFS review and public scoping and notification, the USFS determined to grant a categorical exclusion to NEPA under its rules. However, as conditions of approval under the CE, the USFS required the proponent to adhere to 13 specific conditions pertaining to drilling and abandonment of drill holes, access, threatened and endangered species, invasive weeds, reclamation, cultural resources, safety, waste handling, and others. Even though this project was approved using a CE, it is another excellent example of the ability of the USFS to apply specific environmental protection conditions under the existing rules to any project on USFS administered lands.

Crown Resources/Kinross Gold. Buckhorn Access Project. January 2007. FEIS and ROD. Tonasket Ranger District, Okanogan and Wenatchee National Forests. Tonasket, Washington

Crown Resources submitted a Plan of Operations to access their patented claims and fee lands for the purpose of developing an underground mine on private land and hauling the ore to an existing milling facility which also is on private land. The USFS prepared an Environmental Assessment but then determined that an EIS would be required to approve the project. During the EIS process, the USFS developed and ultimately selected an Agency Preferred Alternative, Alternative B1, which made a number of modifications to the Proposed Action. In addition to selecting this alternative, the USFS added 15 terms and conditions including a $967,000 reclamation bond for access area reclamation.

Formation Capital Corporation. Idaho Cobalt Project. EIS. February 2007. Salmon-Cobalt Ranger District. Salmon-Challis National Forest, Lemhi County, Idaho

In 2001, Formation Capital submitted a Plan of Operations to mine and process polymetallic ore on USFS unpatented mining claims in the Salmon-Challis National Forest. Over the intervening years, the USFS and Formation negotiated a series of agency-required and requested changes under the USFS's land management rules. The proponent's proposal was detailed in the DEIS as Alternative II. However, using its authority to select an Agency Preferred Alternative, the USFS selected Alternative IV. Under this alternative, tailings backfill and any waste rock left underground as backfill will be amended with limestone or equivalent material to limit metals

mobility and potential impacts to groundwater. The remainder would be disposed of in the disposal facility using a dry stacking method, and thus, eliminating the need for a tailings dam.

USFS Yampa Ranger District. Red Dirt Pit Expansion. EA and ROD. January 2007. Yampa Ranger District, Yampa, Colorado

The USFS proposed to expand the Red Dirt aggregate pit in order to produce additional rock materials for various projects within the Medicine Bow-Routt National Forest. As with any project proponent, once a Plan of Operations was submitted, the NEPA process was triggered. The USFS determined that an EA would suffice given the size and scope of the project. Through internal review of the project and input from several members of the public, the USFS imposed 16 specific conditions on the project, including stipulations regarding timing of operations, wildlife, dust control, traffic control, and others.

Robert and Marjorie Miller. Robin Redbreast Unpatented Lode Claim Mining Plan of Operations. FEIS and ROD. May 2007. Ouray Ranger District, Grand Mesa, Uncompahgre, and Gunnison National Forests, Hinsdale County Colorado

In this highly contentious case that in a previous variation went before the IBLA, the Millers submitted a Plan of Operations to extract minerals under the 1872 Mining Law on USFS unpatented claims located entirely within the Uncompahgre Wilderness Area. The Plan of Operations included access to the claims, mining plans, and plans for on-site housing. The USFS made this statement in the EIS and in the ROD:

> "The Millers have established a statutory right to develop the Robin Redbreast lode claim. This is accepted as a premise on which all analysis in the FEIS, and this Decision, is based."

The ROD denies approval of the Plan of Operations. The USFS stated their denial as follows:

> "It is my decision that the "plan of operations" as submitted cannot be approved, and that changes or additions to the plan of operations are necessary to minimize or eliminate adverse environmental impacts from mineral activities on National Forest System (NFS) lands, as required by Forest Service Regulations (36 CFR 228A). (See "Legal Framework" FEIS)."

The USFS ROD goes on to say:

> "I wish to address potential criticism that environmental protection measures required through this decision are imposed either unfairly, or as a purposeful means to prevent mining. I am fully cognizant of the long history of dispute between the agency and the Millers, culminating in decisions by OHA and then IBLA. I have read these decisions and I fully acknowledge the Millers right to mine and develop the mineral deposits on the Robin Redbreast mining claim. This is made clear in the "Legal Framework" section of this ROD, and is a foundation for the EIS (See Chapter 1, FEIS).
>
> At the same time, I have a positive duty to ensure that, considering the environmental

> effects identified in the FEIS, all reasonable and feasible environmental protection measures are in place and are enforced. The fact that this mining claim lays within the Uncompahgre Wilderness at 11,500 feet in elevation calls for protection measures and requirements appropriate for this setting. With the assistance of my Interdisciplinary (ID) Team, I have exercised every possible diligence to ascertain that those measures or alternatives that are required are necessary and reasonable when considering the location and nature of the proposed mining activity and cost and effectiveness of required measures. I have made these decisions specifically in accordance with the requirements at 36 CFR, Part 228, Subpart A, as cited in the Legal Framework section of the FEIS."

The USFS as stated that the Millers are free to resubmit a modified Plan of Operations. However, this case is an example of the agency exercising its ability under the rules to deny approval of a project as submitted because it did not, in the agency's view, comply with all federal laws and regulations.