Mining and Metallurgical
Society of America

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

VIA U.S. MAIL & E-MAIL
WOComment@blm.gov

Attn. AD44

Re: Surface Management of Mining Claims – Proposed 3809 Regulations
43 CFR 3809 – October 30, 2001 – 66 FR 210, Pg. 54863 ff

Dear Madam/Sir:

The *Mining and Metallurgical Society of America* (herein, *"MMSA"*) commends the Bureau of Land Management for making strongly needed changes to the 3809 Rule which the previous administration issued on November 21, 2000 and became effective as of January 20, 2001. The recent changes published as a Final Rule on October 30, 2001 make numerous, but necessary changes to the January rule to correct poorly based, unnecessary and, in part, illegal portions of that rulemaking. The Nov. 21, 2000 rule exceeded the Secretary's authority under the General Mining Laws and the Federal Land Policy and Management Act (FLPMA) and violated the Mining and Minerals Policy Act of 1970. Most importantly, the November 21, 2000 rule violated federal law that prohibited the Secretary from promulgating new 3809 regulations except to the extent new regulations were "not inconsistent with" the National Academy of Sciences/National Research Counsel's report entitled *Hardrock Mining on Federal Lands*, (NRC Report) published in 1999. Your agency is to be highly commended in making those changes appearing in final form on October 30, 2001.

The Bureau of Land Management also published a Proposed Rule related to 3809 Regulations on October 30, 2001 requesting comments on that rule. *MMSA* believes the October 30, 2001 Proposed Rule is vast improvement over the November 2000 rule and fully supports the changes made. The

October 2001 revisions and final rule are fully supported by the administrative rulemaking record. However, *MMSA* suggests that additional changes are necessary in order to bring the final rule into full compliance with the requirements of federal law, to ensure consistency with the NRC Report and to provide a balanced and workable regulatory program.

In preparing these comments on your proposed regulations, your attention is drawn to the comments filed with your agency by other mining organizations, particularly the Northwest Mining Association (herein, "NWMA"). *MMSA* has specifically incorporated portions of NWMA's comments in formulating its comments as outlined below.

SPECIFIC COMMENTS

Reinstate Section 3809.0-6 from the 1980 Regulations

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

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

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

> "Consistent with section 2 of the Mining and Minerals Policy Act of 1970 and section 102(a)(7), (8), and (12) of the Federal Land management Policy Act, it is the policy of the Department of Interior to encourage the development of Federal mineral resources and reclamation of disturbed lands. Under the mining laws a person has a statutory right consistent with Departmental regulations to go upon the open (unappropriated

> and unreserved) Federal lands for the purpose of mineral prospecting, exploration, development, extraction and other uses reasonably incident thereto. This statutory right carries with it the responsibility to assure that operations include adequate and responsible measures to prevent unnecessary or undue degradation of the Federal lands and to provide for reasonable reclamation."

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

MMSA is concerned that the definitions of "mitigation" and "minimize" does not become a method to deny proposed operating plans on the basis of unduly or unnecessarily limiting activities on a highly restrictive interpretation of those terms.

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

The interpretation of these sections should not be so broad as to give BLM the authority to deny a plan of operations (POO) where a certain impact could not be avoided. BLM must clarify that the definition of "mitigation" and "minimize" do not provide authority for denial of a plan of operations. Accordingly, BLM should clarify that these provisions provide no authority to prevent necessary or due degradation. At a minimum, however, BLM should provide such clarification in the preamble to any further rulemaking on 3809 regulations or in an instruction memorandum. Clearly, the definition cannot grant BLM any authority that FLPMA and other relevant laws, as well as the Department's Solicitor, say it does not have.

Financial Assurance

MMSA fully supports the need for adequate financial assurance requirements in the 3809 Regulations. At the same time, such financial assurance requirements must be both fiscally adequate from the standpoint of providing adequate funds for the agency to close and reclaim an abandoned property - and practical from a business standpoint. We are concerned, however, that the current rule is both too restrictive from a fiscal standpoint, and precludes smaller to medium sized companies from any form of bonding other than a cash bond – which may be overly excessive and/or impractical from a business point of view.

Proposed financial assurance requirements are often structured with a "worst case" situation envisioned and with multi-tiered overhead requirements. Such requirements are impractical and do

not represent a "real-world" situation. BLM should engage third party financial risk analysis expertise to assist the agency in formulating methods to determine adequate, but not excessive levels of financial assurance for individual projects. All methods established must include "risk analysis" procedures in all bond calculations. Such bonding calculations should not contain excessive or multi-tiered levels of agency overheads.

The current rule is excessively restrictive on the methods of financial assurance. As currently written, it is almost, if not impossible for an otherwise well qualified small or medium sized company to acquire "bonding insurance" or financial assurance coverage from a commercial surety firm. As such, under the proposed rule the only avenue for providing financial assurance is by posting a cash bond for the operation, or providing coverage through a State Bond Pool. The BLM should evaluate methods of "sequential bond posting" covering an ongoing two or three year disturbance area, with portions of posted bonds covering already reclaimed lands to be allowed to be used on areas to be disturbed in the future. Also, use of personal or real property should be allowed as coverage for portions of the required financial assurance.

Provisions must be made to allow effective use of State or Regional Bonding Pools as recommended in the NRC Report (NRC Report, p. 97). Such State Bonding Pools are often the only manner in which smaller companies may post financial assurance because of the lack of commercial forms of financial instruments applicable to their reclamation responsibilities. In the State of Alaska, the State Bond Pool has worked very well for more than 10 years. There has not been a single default by miners on either State or BLM lands. Because the State reclamation law, and availability of the State bonding pool applies to all mining in Alaska irrespective of land ownership, the bonding pool has been successfully utilized by miners on BLM lands during this 10 year period. The BLM is encouraged to work with the various State Bonding Pools, such as that in Alaska, to formulate financial assurance regulations which provide for such vehicles an effective and viable method of bonding for smaller companies or mining operations.

The BLM is encouraged to revisit its need to eliminate Corporate Guarantees as a form of financial assurance. Other agencies of the federal government have successfully used such corporate guarantees for quite some time in mineral activities – i.e., the U.S. Nuclear Regulatory Agency. BLM is encouraged to consult with the USNRC to determine if such a corporate guarantee as used by USNRC can be structured to provide adequate financial assurance protection for BLM governed projects.

Casual Use

MMSA fully supports BLM's proposal to expand the definition of casual use to include motorized dry washers. *MMSA* believes that a 10 horsepower or less (not less than 10) limitation on the size of the motor is reasonable and appropriate. In addition, we also encourage BLM to include portable suction

dredges with a 6 inch intake or less in the definition of casual use. There is ample, independent evidence to support this addition to the casual use definition. For example, the USGS conducted a study on the environmental impact of suction dredges with up to a 10 inch intake operating in the Forty Mile River in Alaska. This study concluded that the disturbance from such suction dredges was negligible. Also, including 4 to 6 inch or less portable suction dredges in the definition of casual use is consistent with the recommendations of the NRC Report (pages 95-96).

The real issue in determining whether an activity is casual use is not necessarily the equipment being used or the intended purpose of the activity (prospecting, exploration or mining), but the level of disturbance. If the level of disturbance is negligible, then the activity, whether it is prospecting, exploration, or mining, is casual use and no Notice, Plan of Operations, or financial assurance is required. In all cases, including casual use, reclamation is required. Both the definition and the preamble should make this clear. This approach is consistent with the conclusions of the NRC Report, which recognized that mining and milling operations can be classified as casual use if the level of disturbance is negligible (NRC Report, pages 8, 93).

Claim Validity Examination

The October 30, 2001 Proposed Rule requires a Claim Validity Examination as a part of the Operating Plan review process. This requirement is quite frankly not authorized by law. Claim validity is required only as a part of the patenting process under the General Mining Law. The simple fact of the matter is that a claim does not have to be ascertained to be valid by Validity Examination for the holder to engage in activities covered by 3809. That right of activity is categorically granted under the provisions of the General Mining Law. In fact, how would pre-discovery efforts to prove up a claim ever be achieved if the claim had to first be declared valid against the property interest of the United States? As to whether the claim is valid against the interest of rival locators, that is a private matter to be resolved among the disputants or in the courts. BLM has no role in sorting out that sort of dispute.

The agency has a long-standing policy not to address claim validity prior to patenting. In the rulemaking process BLM has not made a compelling argument for the need for such timing of a validity examination nor made an adequate analysis of how such an examination would affect small business which control most claims. Furthermore, such timing for claim validity is bad public policy. For such reasons the Claim Validity Examination provision should be removed in its entirety.

Land Use Planning

Section 3809.420(a)(3) provides that, "consistent with the mining laws, your operations and post-mining land use must comply with the applicable land uses plans and activity plans . . ., as appropriate." *MMSA* joins with other organizations in expressing concern that this section is

inconsistent with FLPMA. Section 202 of FLPMA authorizes the BLM land use planning process and provides that the only way the land use plans can affect locatable mineral activities is through the withdrawal provisions of FLPMA. *See* 43 U.S.C. § 1712(e)(3).

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

> "[A] plan of operations must be considered and assessed individually, and the measuring stick for unnecessary or undue degradation will be that found in § 3809.0-5(k), rather than a standard set forth in a particular land use plan . . . .
>
> "[A] land use plan may be consulted to determine what effects an operation will have on other resources and land uses, including resources and uses outside the area of operations. *If mining is found to be inconsistent with other resources, a withdrawal under FLPMA is the BLM's only recourse to prevent mining*. The land use plan would have to be amended to reflect the withdrawal, and the withdrawal would not prevent mining on existing claims." [*Id*. at 3 (emphasis added).]

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

> "BLM land use plans under FLPMA "establish the parameters within which surface-disturbing activities may occur on BLM lands . . . subject to the interests created by the General Mining Law. These planning processes are not linked to specific mining proposals, but are intended to guide broad agency management decisions about the use of federal lands and the management of the resources on the land. These land management plans do not override the interests acquired by the mining claimant under the General Mining Law, but provide a framework for agency consideration and protection of other resources." [NRC Report at p. 41.]

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

Enforcement Actions

Section 3809.601 & .602 of the Proposed Rule purports to allow BLM to issue immediate temporary suspension orders and administratively revoke a Plan of Operation. Put quite simply, *MMSA* believes this rule is contrary to BLM's longstanding interpretation of FLPMA and its implementation requires Congressional action. As such it should be removed until such Congressional authority is acquired.

CONCLUSIONS

The *Mining and Metallurgical Society of America* again voices its support of the recent actions on the part of the Bureau of Land Management to correct egregious portions of the November, 2000 3809 Rule. It does, however, believe the Proposed Rule published on October 30, 2001 can be measurably improved by making suggested modifications outlined above in the above-stated comments and those of other industry organizations and/or other individuals from industry commenting as a part of the same rulemaking process.

The Bureau of Land Management will undoubtedly receive many comments on this proposed action. *MMSA's* views are clearly described above. However, *MMSA* would also like to incorporate the comments submitted to the Bureau of Land Management by the *National Mining Association, Northwestern Mining Association, Alaska Miners Association, Colorado Mining Association* and the *Nevada Mining Association* as though the comments of those organizations were also submitted by *MMSA*.

The *Mining and Metallurgical Society of America* is a unique organization formed in 1908 and dedicated to heightening public awareness and understanding of the minerals industry. Our membership includes executives, leaders, and decision-makers in engineering, law, education, and scientific disciplines related to mining and mineral processing needs in the United States. If our expert members can be of service to the Bureau of Land Management in providing guidance and testimony throughout this process, please do not hesitate to contact us and we will be pleased to arrange for the needed assistance.

Respectfully submitted,

/ss/

Paul C. Jones
Chair – Governmental Affairs Committee
The Mining and Metallurgical Society of America

/ss/

K. Marc LeVier
President
The Mining and Metallurgical Society of America

cc: Director of the Bureau of Land Management Kathleen Clarke
Members of Congress
Secretary of Interior Gale Norton
Deputy Secretary of Interior J. Steven Griles
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