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ABUSE OF POWER: THE HARDROCK BONDING RULE

R E P O R T

BY THE

COMMITTEE ON RESOURCES

together with

DISSENTING VIEWS

JUNE 5, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, June 5, 1998.

Hon. NEWT GINGRICH,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: By direction of the Committee on Resources, I submit the Committee's report to the 105th Congress on "Abuse of Power: The Hardrock Bonding Rule." The report is based on a study conducted by the Subcommittee on Energy and Mineral Resources. The report was adopted and ordered reported to the House of Representatives by voice vote on May 20, 1998.

Sincerely,

DON YOUNG,
Chairman.

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Union Calendar No. 322

105TH CONGRESS, 2d Session } HOUSE OF REPRESENTATIVES { REPORT 105–569

ABUSE OF POWER: THE HARDROCK BONDING RULE

JUNE 5, 1998.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Resources, submitted the following

REPORT

together with

DISSENTING VIEWS

EXECUTIVE SUMMARY

In February 1997, the Bureau of Land Management (BLM) published a "Final Rule on Hardrock Bonding," which amended its surface management regulations under the Federal Land Management Policy Act (FLPMA). The Committee on Resources has jurisdiction over FLPMA and the regulations issued pursuant to this law, jurisdiction that is delegated, in this case, to the Subcommittee on Energy and Mineral Resources. The Subcommittee, in concert with the Full Committee, undertook its Congressional oversight responsibility after concluding that the process for developing the new rule was seriously flawed.

The hardrock bonding rule provides an example of rulemaking at its worst. Documents obtained by the Committee clearly show that undue interference of political appointees at the Department of Interior (DOI) in the BLM rulemaking was so great that the integrity of the rulemaking process itself was discredited. The political bosses controlling the regulatory authority at DOI used their power to implement an agenda that Congress had refused to enact—even when controlled by their own party. In doing this, DOI silenced the voice of those who participated in the legislative process through their elected representatives, thereby denying them participation in our democratic process.

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The problems with the hardrock bonding rulemaking result from the refusal of a few, high-level political appointees in DOI to obey the laws that govern the rulemaking process, thereby demonstrating contempt for both the spirit and the letter of the law. These bureaucrats refused to comply with the Administrative Procedures Act (APA) and Regulatory Flexibility Act (RFA), concealed the significance of the new rule, obstructed the impartiality of the rulemaking process, excluded interested parties from participating in the rulemaking process in a meaningful way, attempted to prevent Congress from carrying out its Constitutional oversight responsibilities, and tried to use various inapplicable claims of "privilege" to hide these actions. These actions, taken together, constitute a coordinated effort by DOI policy-makers to affirmatively mischaracterize the hardrock bonding rule's import and impact and prevent any Congressional oversight of their actions. These politically-motivated bureaucrats did not allow interested members of the public an opportunity to comment on the rule once they had dictated its contents.

The hardrock bonding rulemaking process can be divided into three periods: (1) development and publication of a draft rule for public comment followed by completion of a final rules package for publication (January 1990 through September 1992); (2) DOI management decision to disregard previous rulemaking efforts and issue a new, substantially different bonding rule without further public comment (August 1993 through November 1994); and (3) extensive rewriting of the preamble several times by the regulation writers in an attempt to evade legal problems with the rulemaking process and meet the mandates they were given by their political bosses (late November 1994 through February 1997).

One crucial problem with the hardrock bonding rulemaking is that an upper-level DOI political appointee, who played a major role in determining the contents of the new rule, appeared to have a serious conflict of interest. Mr. David Alberswerth, only recently employed by the National Wildlife Federation (NWF), laid out the terms of the hardrock bonding rule. Coincidently, Mr. Alberswerth's co-signed comments on the draft rule submitted on behalf of NWF and the new rule he dictated are strikingly similar. Meaningful input into the new rulemaking from anyone other than environmental advocacy groups was stifled by refusing to publish the new rule for a period of comment by other interested parties.

The final rule violates the APA because: (1) it was based on information that was more than six years old; (2) it is a substantive alteration of the draft rule; and (3) interested parties were denied participation in the rulemaking process in any meaningful way through a period of public comment after substantive alterations were made. Examples of substantial modifications made to the regulation are the requirement that reclamation cost estimates be certified by a professional engineer, a standard which was not mentioned at all in the notice of proposed rulemaking, and changing proposed *maximum* bonding amounts per acre to *minimum* bonding amounts. The latter alteration was made even though the notice of proposed rulemaking stated that in order to "reduce the impacts on industry . . . these bond caps would be intended to be in effect for

3 years after promulgation of the final rule, and their adequacy would be reevaluated at that time."

Either of these substantive changes to the draft rule may in and of itself be enough to trigger a violation of APA. For example, the professional engineer certification requirement was not mentioned at all in the notice of proposed rulemaking. However, when all of the changes to the draft rule are considered together, there is no doubt that the new bonding rule is substantively modified from the draft rule. Many interested parties, who did not comment on the draft rule because they had no reason to believe that it would have a material effect on them, certainly would have commented on the new rule.

DOI's RFA violations include: (1) no effort to address the concerns of small business entities; and (2) major defects in the analysis of the effect of the regulation on small entities in the Determination of Effects of Rule (the Determination of Effects), including use of an illegal definition of a small entity. This definition is illegal because DOI did not bother to adhere to any of the requirements, including consulting with the Small Business Administration's Office of Advocacy, mandated by the RFA if an agency wishes to deviate from the lawful definition of a small entity; thus, the Determination of Effects is invalid. If the primary document which DOI relies on to certify that the final rule has no significant effect on small entities is illegal, the resulting certification cannot be legal.

DOI concealed the fact, shown by its own analysis, that the hardrock bonding rule was a significant regulatory action with an annual economic impact exceeding $100 million. This effect is greatly underestimated because DOI made no attempt to consider the effects incurred when a project is delayed or canceled because certification by a professional engineer cannot be obtained due to uncertain risks associated with calculation of reclamation costs. By concealing the fact that the bonding rule was a significant regulatory action, DOI avoided more rigorous scrutiny of the new rule and evaded the legal requirement to consider alternatives to the rule.

There is no doubt that the hardrock bonding rule is significantly different from the draft rule, nor is there any doubt that political appointees at DOI denied the general public an opportunity for full and meaningful input into the rulemaking. The new rule was published despite warnings from BLM regulation writers and DOI solicitors that they had significant APA concerns.

DOI's actions, taken together, constitute a coordinated effort by politically-motivated bureaucrats to misrepresent the hardrock bonding rule's import and impact. These individuals continually mischaracterized the economic effect of the rule and the nature of the alterations made to the rule to deny interested members of the public full and meaningful participation in the rule-making process. Even if the notice of proposed rule-making was facially sufficient, it is rendered inadequate by DOI's affirmative mischaracterization of the new rule.

After the new regulation was published, DOI attempted to obstruct the Committee from carrying out its Constitutional oversight responsibilities. A drawn-out string of dilatory tactics was initiated

after all documents pertaining to this rule-making were requested. Some records were produced by DOI pursuant to this request, but many documents were withheld from the Committee under a prospective claim of "privilege." DOI also tried to impose rules and conditions under which the Committee could have access to documents. After DOI's dilatory tactics continued for more than three months, the Committee subpoenaed the documents. The delay in producing the requested documents thwarted efforts of the Committee to properly undertake its Constitutional oversight duties. Two Subcommittee hearings on the matter had already been held and remaining days in the first session of the 105th Congress were limited.

This hardrock bonding rule reflects a prevalent perspective within the upper levels of DOI, an attitude that if Congress does not enact their favored legislation, it is appropriate to establish the failed legislation through new regulations. This attitude turns the Constitution into a sham. Under the Constitution, Congress possesses the ultimate power to regulate or dispose of lands belonging to the United States. The Executive Branch (DOI) holds only such regulatory power over these lands as delegated to it by Congress. DOI possesses no power to act because Congress failed to enact policies advocated by DOI. Congress has a right to refuse to act.

When bureaucrats make laws on behalf or in lieu of Congress, those legislative hurdles so carefully constructed by the authors of the Constitution are circumvented and the restraints on promiscuous lawmaking are demolished. Government as a result runs riot, and the people's voice through their elected representatives is muted.

INTRODUCTION: COMMITTEE REVIEW OF BONDING RULE FOR HARDROCK MINING

On February 28, 1997, the Bureau of Land Management (BLM) published a "Final Rule on Hardrock Bonding" (the Rule) in the Federal Register (v. 62, No. 40, p. 9083; Exhibit 1), which amended its surface management regulations at 43 CFR subpart 3809 pursuant to the Federal Land Management Policy Act (FLPMA). According to DOI, the new rule requires submission of financial guarantees for reclamation of all hardrock mining operations greater than casual use, increases the types of financial instruments acceptable to satisfy the requirement for a financial guarantee, and amends the noncompliance section of the regulations to require the filing of plans of operations by operators who have a record of noncompliance.

The Committee on Resources has jurisdiction over FLPMA and the regulations issued pursuant to this law under Articles I and IV of the U.S. Constitution, Rules X and XI of the U.S. House of Representatives and Rule 6 of the Rules for the Committee on Resources (Committee Rules), jurisdiction that, in this case, is delegated under Rule 6(a) of the Committee Rules to the Subcommittee on Energy and Mineral Resources. The Subcommittee has a continuing responsibility under Rule 6(a) of the Committee Rules to monitor and evaluate administration of laws within its jurisdiction. In relevant part, Rule 6 states: "Each Subcommittee shall review and study, on a continuing basis, the application, administration,

execution, and effectiveness of those statutes or parts of statutes, the subject matter of which is within that Subcommittee's jurisdiction; and the organization, operation, and regulations of any Federal agency or entity having responsibilities in or for the administration of such statutes, to determine whether these statutes are being implemented and carried out in accordance with the intent of Congress."

The Subcommittee, in concert with the Full Committee, undertook its Rule 6 responsibility when, on March 6, 1997, Chairman Don Young and Subcommittee Chairman Barbara Cubin initiated a review of the rule-making process for the new BLM bonding regulation. They had concerns about the regulation because:

(1) The new regulation was stale because the comment period closed on October 9, 1991, nearly six years previously.

(2) The regulation was substantively different from the draft rule published in the Federal Register.

(3) The BLM did not comply with requirements of the Administrative Procedures Act (APA) or the Regulatory Flexibility Act (RFA) in the rule-making process.

Congress delegates rule-making power under FLPMA to the Department of Interior (DOI) on the presumption that the agency will act responsibly and guarantee a fair rule-making process with full and meaningful public input. Congress also has the responsibility to ensure that these objectives are met to the maximum possible extent. In conducting oversight, the Committee is simply asking DOI to demonstrate that DOI has respected both the letter and the spirit of the laws passed by Congress which govern the rule-making process and bonding of federal hardrock mining operators.

DOI conducted a long, drawn-out sequence of dilatory and delaying tactics from March through mid-August to avoid turning embarrassing documents over to the Committee. These tactics ceased only after the Committee subpoenaed the documents.

As a result of this delay, Chairman Young and Subcommittee Chairman Cubin requested this report which analyzes and appends relevant documents (Appendix A, Exhibits) that show whether DOI abused the rule-making process in making this rule and whether DOI conducted rule-makings authorized under FLPMA in accordance with the intent of Congress as expressed in the APA and the RFA. This report is developed for Members of the Committee on Resources so that they may undertake their legislative and oversight responsibilities under the Constitution, the Rules of the U.S. House of Representatives, and the Rules for the Committee on Resources.

PART I: HOW THE RULE WAS MADE

A. INTRODUCTION

From Subcommittee on Energy and Mineral Resources hearings held on March 20, 1997 (Rpt. No. 105–8), and June 19, 1997 (Rpt. No. 105–24), and a review of documents obtained by the Committee, the hardrock bonding rule-making process can be divided into three major periods: (1) development and publication of a draft rule for public comment followed by completion of a final rule package for publication (January 1990 through September 1992); (2) deci-

sion by DOI political appointees to disregard previous rule-making efforts and issue a new, substantive different bonding rule without further public comment (August 1993 through November 1994); and (3) extensive rewriting of the preamble several times by regulation writers in an attempt to circumvent APA deficiencies in the rule-making process while meeting the mandates they were given by DOI political appointees (late November 1994 through February 1997).

B. FIRST PERIOD (JANUARY 1990—SEPTEMBER 1992)

The development of a final rules package for bonding of hardrock mining operations during the period from January 1990 through September 1992 (hereinafter referred to as the 92 iteration) is well documented in BLM Bond Policy Chronology (Exhibit 2). As a result of a General Accounting Office report, vocal Congressional criticism of BLM bonding practices in the late 1980's, and a recommendation by a BLM mining task force, BLM Director Cy Jamison asked for a proposal that would implement mandatory bonding for all operators under the general mining law. A bonding proposal presented to the Director on January 11, 1990, was approved and circulated for comment within BLM. After internal BLM review, the draft bonding rule was published in the Federal Register on July 11, 1991 (Exhibit 3).

The draft rule required all operators to post financial guarantees. "Notice level operators" (less than 5 acres surface disturbance) were required to post a maximum bond of $5,000 whereas plan level operators (more than 5 acres of surface disturbance) were required to post a maximum bond of $1,000 per acre for exploration activities and $2,000 per acre for mining activities. Operations utilizing cyanide were required to post a bond covering 100 percent of their reclamation costs regardless of surface disturbance. The proposed rule also required operators with an established record of noncompliance to conduct all activities under a plan of operations and to post financial guarantees equal to 100 percent of their reclamation costs.

The comment period on the draft rule, after an extension, ended on September 9, 1991. Comments were evaluated and language for the final rule reviewed by BLM in the ensuing year. The 92 iteration was ready for publication in the Federal Register by the end of September 1992, but the package stalled in the Solicitor's Office at DOI (Exhibit 4A). The 92 iteration differed from the draft rule in that bonds for notice operations were changed from a maximum of $5,000 to a maximum of $1,000 per disturbed acre or any part thereof and the noncompliance provision was substantially rewritten to add "death penalty" provisions. A standard bond forfeiture clause and penalties for violations were added. Violators were made subject to a maximum fine of $1,000 or a maximum prison term of 12 months under a provision of FLPMA.

The 92 iteration was apparently redone several times in an effort to address concerns of small business entities that lacked access to surety bonds or sources of capital available to large mining companies. Also, a memo dated November 29, 1991 (Exhibit 4B), expresses concern that some of the proposed changes, particularly the forfeiture, "death sentence" and penalty provisions, were substan-

tial enough to require re-publication as a proposed rule to comply with the APA.

The changes in the 92 iteration were far less substantive than ones later included in the ultimately published final rule. The 92 iteration was left to the incoming Clinton administration after the 1992 election and, according to Exhibit 4A, remained in the Solicitor's Office essentially on hold until well into 1993.

C. SECOND PERIOD (AUGUST 1993—NOVEMBER 1994)

The second period of activity on the hardrock bonding rule-making began in early August 1993 when the 92 iteration was retrieved from the Solicitor's Office and sent to Mr. David Alberswerth, Special Assistant to the Assistant Secretary for Land and Minerals Management. Mr. Alberswerth, a political appointee, apparently held the 92 iteration until the Fall of 1994, when after review, he initiated several memos (Exhibits 5 and 6) and at least one meeting (Exhibit 7) during the latter part of October and early November.

This spurt of activity culminated in Mr. Alberswerth's memorandum to Mr. Hord Tipton (then acting Director of BLM), dated November 8, 1994 (Exhibit 6), in which he laid out the revisions to be made to the 92 iteration and directed that the preamble was to be modified to reflect these changes. Mr. Alberswerth insisted on the following modifications to the 92 iteration:

1. Bonds should be *required for all operations* on public lands (except for "casual use"), regardless of "prior record."
2. Bonds should be set at a level to cover 100 percent of the costs of reclamation, with bonds for operations requiring an approved plan of operation set at a *minimum* level of $2,000 per acre, and "notice" operations set at a *minimum* of $1,000 per acre.
3. Financial instruments used to provide financial guarantees of reclamation should not allow equipment liens or bonds, nor property or mortgage bonds.
4. Each individual operation should be bonded to the full estimated costs of reclamation—"Statewide" and "nationwide" bonds should not be allowed.
5. Since all operations would be required to be fully bonded, provision should be made for phased bond release on a case-by-case basis at the discretion of the authorized officer.

Mr. Alberswerth also emphasized that the bonding requirements must provide a guarantee[1] that reclamation would be completed, rather than act as an economic incentive to encourage satisfactory completion of reclamation, the stated purpose in the 92 iteration. The Alberswerth modifications significantly changed the nature

[1] The problem with this approach is that it assumes that all risk can be avoided, but risk is the inescapable partner of any human endeavor. In reality, there are no guarantees. Managing or reducing risk is achieved by defining its nature so that we can make rational choices among alternatives. As Arthur Rudolph, developer of the Saturn 5 rocket said, "You want a valve that doesn't leak, and you try everything possible to develop one. But the real world provides you with a leaky valve. You have to determine how much leaking you can tolerate." However, using Mr. Alberswerth's approach, the risk of a leaky valve would be reduced by doing away with valves altogether or making them so expensive that few could afford one. Neither of these alternatives is a wise choice in a contemporary society based on economic growth, improved quality of life and technological progress.

and scope of the proposed rule (for clarity, the Alberswerth modification is hereinafter referred to as "the Rule").

D. THIRD PERIOD (LATE NOVEMBER 1994—FEBRUARY 1997)

Regulation writers at BLM spent the remaining time from November 1994, until the Rule was issued in February 1997, modifying and rewriting the preamble again and again in an attempt to evade APA problems that they had identified while at the same time meeting mandates given them by high-level DOI political appointees. An obvious question that arises is "Why not encourage meaningful public input into the rule-making process instead of spending 27 months trying to conceal problems caused by not allowing a one or two month public comment period?"

Much time was also spent writing a Determination of Effects of Rule *after the fact* to justify DOI's certification that the Rule had no significant impact on small business entities. Several significant changes and new requirements, which were not a part of the modifications listed in Mr. Alberswerth's November 11, 1994 memo, were also added to the 92 iteration. These new changes included: (1) a requirement that a third party professional engineer certify the estimated reclamation costs; and (2) acceptance of statewide and nationwide bonding.

The reasons for the requirement for a third party professional engineer to calculate reclamation costs cannot be drawn from the record. The professional engineer requirement, which was not in the draft rule published in 1991, first appears in a draft dated February 20, 1995. There is no evidence from the record in the Committee's possession explaining the origin of this requirement nor was any justification given for it in the preamble.

The reasons for the decision to accept statewide and nationwide bonding are not obvious from the record but can be discerned after considerable effort on the part of the examiner. *This decision was apparently made because DOI solicitors determined that if these bonds were prohibited, the rule-making would unquestionably be a significant regulatory action as well as an undeniable APA violation.*

PART II: PROBLEMS WITH DOI'S RULE-MAKING PROCESS

A. FAIR AND MEANINGFUL PUBLIC INPUT DENIED

Administrative Procedures Act problems

The Administrative Procedures Act (APA, 5 U.S.C 500–559) is the basic statute governing the process whereby agencies of the executive branch propose informal rule-makings to implement statutes within their jurisdiction. A general requirement of APA is that an agency solicit public comment on a proposed rule-making, digest the comments received, and explain their disposition in the preamble to a final rule-making before the new rules become effective. Court decisions concerning the intent of APA make clear that the Act requires *fair and meaningful public input.*

In the initial examination of the Rule, Committee staff concluded that DOI had apparently violated APA because:

1. the comment period closed on October 9, 1991, nearly six years prior to the date that DOI issued the Rule; and

2. the Rule was significantly different from the draft rule published in the Federal Register requiring a new round of public notice and comment.

Documents provided by DOI to the Committee show that DOI's own lawyers and regulation writers were very concerned that the bonding regulation violated provisions of the APA (Exhibits 8–13). They warned their superiors at DOI about APA problems and advised them to finalize a rule for bonding requirements limited to notice level operators and propose the rest as a draft rule for public comment (Exhibit 9 and 12). This recommendation was ignored.

Staleness issue

The Rule was published on February 28, 1997 (Exhibit 1), almost six years after the comment period on the draft rule had ended on October 9, 1991. During this time, many states had passed new reclamation and bonding laws or implemented significant, new regulations covering these areas. Alaska, for example, was in the initial stages of implementing a new bonding and reclamation law when the 1991 comment period closed. In the March 20th hearing before the Energy and Mineral Resources Subcommittee, Paul Jones, Executive Director of the Minerals Exploration Coalition, a group that routinely tracks mineral exploration permitting requirements, testified that since the comment period had closed on the draft rule in 1991, Colorado, Montana and Nevada had substantially revised their regulations and that Arizona and New Mexico had issued completely new regulations. Since DOI failed to re-open the record on the Rule for comments by interested parties, *outdated information was used in the rule-making process.*

Substantial modification issue

A new round of public notification and comment is not necessarily triggered by the APA just because an agency makes substantive modifications to a draft rule. In determining if a new period of publication and comment is required, the courts usually use one or both of the following tests:

1. whether the final rule is a logical outgrowth of the notice and comments made during the rule-making period following publication of the proposed rule, and

2. whether the notice of proposed rule-making fairly appraised interested parties so that they had an opportunity to comment.

The Rule contained a number of alterations of the draft rule (Exhibit 14), such as the requirement that bonds be set at a level to cover 100 percent of the costs of reclamation; *minimum* bond of $2,000 per acre for "plan" operations instead of a *maximum* bond of $2,000 per acre; *minimum* bond of $1,000 per acre for "notice" operations instead of a *maximum* bond of $1,000 per acre; and prohibition of equipment, property and mortgage bonds. One other noteworthy change is the requirement that reclamation cost estimates be certified by a professional engineer, which was discussed in a previous section.

DOI argues that the change from a bonding *cap* of $1,000 per acre for notice operations ($2,000 per acre for plan operations) to full cost bonding with a *floor* of $1,000 per acre for notice operations ($2,000 per acre for plan operations) is a logical outgrowth of the draft rule. Requirement of full cost bonding voids any bonding caps. However, how are bonding floors or minimums a logical outgrowth of full cost bonding? Under 100 percent bonding, there is no more justification for minimum bonding levels than maximum bonding levels. In fact, with minimum bonds, a miner may actually have to bond for more than 100 percent of reclamation costs.

DOI's logical outgrowth argument is also difficult to defend when the notice of the proposed rule (July 11, 1991; Exhibit 3) stated that to "reduce the impacts on industry . . . these bond caps would be intended to be in effect for 3 years after promulgation of the final rule, and their adequacy would be reevaluated at that time." In light of this statement, *there was no reason for any member of the public to anticipate the final form of the Rule.*

A substantive change to the draft rule such as the professional engineer certification may alone be reason enough to trigger a violation of APA, since this change was not mentioned at all in the notice of proposed rule-making and the change has no support in the rule-making record. The logical outgrowth of nothing is nothing.

However, when considered together, there is no doubt that all of the changes in the Rule (Exhibit 14) make it significantly different from the draft rule. Political appointees at DOI denied an opportunity for full and meaningful public input into the rule-making. Many people, who did not comment on the draft rule because they had no reason to believe that it would have a material effect on them, would certainly have commented on this new, substantively expanded regulation. DOI failed to meet either one of the tests used to determine whether or not the APA requirement for meaningful public comment has been met.

B. FORCING UNDUE HARDSHIP ON SMALL BUSINESSES

Regulatory Flexibility Act (RFA) violated

Political bosses at DOI showed disdain for the provisions of the Regulatory Flexibility Act (RFA), which Congress enacted in 1980 to curb government regulatory abuse of small businesses. A primary purpose of the RFA is to prevent a disproportionate adverse economic hardship caused by regulatory actions from falling on the shoulders of small business entities. RFA requires federal agencies to prepare and publish an initial regulatory flexibility analysis when proposing a regulation and a final regulatory flexibility analysis when issuing a final rule if such rule will have a significant economic impact on a substantial number of small entities. The RFA exempted an agency from these requirements if the agency certified that a rule would not have a significant effect on small entities. Agencies routinely avoided RFA requirements by making this certification.

Recognizing that the certification exemption provided an overly broad loophole in RFA, Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA) in 1996, which re-

quired that agencies must provide more substantial reasons for their certification if they wanted to avoid preparing a full regulatory flexibility analysis. SBREFA also provided for judicial review of an agency's decisions under RFA.

DOI has four major problems with RFA and the Rule: (1) the modifications made to the 92 iteration by Mr. Alberswerth nullified all of DOI's previous efforts to address the concerns of small entities; (2) the analysis of the effect of the Rule on small entities in the Determination of Effects contains major defects leading to erroneous conclusions; (3) the Determination of Effects was completed just days before the Rule was published and could not possibly have been seriously considered by DOI in making the Rule; and (4) the definition of a small entity in the Determination of Effects is illegal, rendering the RFA analysis invalid.

Efforts to comply with RFA nullified

As previously discussed, the 92 iteration was apparently redone several times before the Clinton Administration came into office, in an effort to address concerns of small business entities (Exhibit 4A) that lacked access to surety bonds or sources of capital available to large mining companies. To address these concerns in the 92 iteration, DOI allowed the use of equipment liens and real estate mortgages as collateral for a bond. However, Mr. Alberswerth directed BLM regulation writers to eliminate equipment liens and real property mortgages as collateral for a bond (Exhibit 4B), nullifying previous efforts to address the concerns of small business entities.

There would be no attempt by DOI to address the concerns of small business entities in the rule-making. As Mr. Karl Hanneman, President of the Alaska Miners Association, testified at the March 20th hearing, "They [DOI] eliminated the right to use real property or mining property, that is your house or your mining property. They eliminated the right to use your mining equipment, so for most small operators in Alaska the assets that they might otherwise have available to meet a bond have simply been removed." To make matters worse, required bonding levels on many small entities were further increased by DOI, creating an even greater burden on small mining entities.

Major defects in determination of effects result in erroneous conclusions

The Determination of Effects used by DOI to justify the Department's RFA certification of the Rule is based on confusing and contradictory definitions of a small entity. According to the Determination of Effects, a small entity for the purpose of DOI's analysis is "an individual, small firm, or partnership at arm's length from the control of any parent companies." The Determination of Effects goes on to say that "The juniors and majors (not considered small entities), as discussed in the previous paragraphs, and entities under their direct control, have access to lines of credit and internal corporate cash flows that are not available to small entities." *This definition is based on how a business is legally structured or organized rather than on the number of employees. Both small and large entities exist in all of these categories.*

DOI then goes on to make the inaccurate assumption that small entities will only be operating under a notice—not under a plan of operations. Compounding this error, DOI assumes that one-third of the notice level operations are small entities whereas the rest are plan level operations. The rationale for this appears to be based on an analysis showing that about one-third of the mining claimants in Arizona and Nevada filed assessment work (had less than ten mining claims) in lieu of paying an annual fee of $100 per claim. *According to DOI's logic, small entities cannot have more than ten mining claims or operate under a plan of operations.* What this has to do with the number of employees of an entity, one can only guess.

An example of a small entity operating under a plan of operations and having more than ten mining claims is Alaska Placer Development, which operates a gold mine in Livengood, Alaska. This company has 14 employees and would be a small entity under any definition. Karl Hannemann, President of Alaska Placer Development, testified at the March 20th hearing: "They [DOI] estimated the cost to plan operators [of the Rule] in Alaska is $470,000. Under this proposal, the cost to my operation alone would be $312,000 or 66 percent of this total. I am only one of 59 operators. It is clear that they have misestimated the economic impacts." Clearly, DOI's analysis of the Rule's impact is based on faulty assumptions and bad interpretations, leading to results that grossly understate the effect of the Rule on small businesses. *Thus, the Determination of Effects does not justify the certification that the Rule has no effect on small entities.*

Determination of effects not considered in rule-making

The Determination of Effects was done only *after* the Rule had been finalized, and it was completed only days before the Rule was published in the Federal Register. The major tenets of the Rule were largely determined in Mr. Alberswerth's memo dated November 8, 1994 (Exhibit 4B). Remaining modifications to the Rule were decided by the end of June after a series of meetings within DOI concerning remaining issues with the Rule. The Solicitor's Office approved the Rule in September, 1996, *subject to seeing the Determination of Effects* (Exhibit 15). The Determination of Effects was compiled from October 1996 to mid-February 1997, and DOI was still completing major sections of the Determination of Effects in early 1997, just prior to publication of the Rule on February 28, 1997. The ink on the Determination of Effects was barely dry on the day the rule was published. In fact, DOI decided on February 24th to omit the date of the Determination of Effects in the preamble because they "didn't need to highlight how recent the Determination of Effects was." (Exhibit 16)

Very little, if any, of the Determination of Effects could have been taken into account by DOI when making the Rule. Congress intended that a federal agency consider the effects of a rule on small entities during the rule-making process and modify the rule, if necessary, to lessen disproportionate impacts on them. The record shows that DOI superficially examined the effect of the bonding rule on small entities *only after the rule-making was essentially completed.*

RFA requirements ignored

DOI did not comply with requirements of RFA in preparing the economic analysis of the Rule. In the Determination of Effects, a "small entity" was defined as "an individual, small firm or partnership, at arm's length from the control of any parent companies." This definition is not the definition presently allowed in section 3 of RFA (5 U.S.C. 601). *A different definition can be used only if three conditions are met:*

1. the definition is determined after consultation with the Office of Advocacy of the Small Business Administration;
2. an opportunity for public comment is provided; and
3. the new definition has been published in the Federal Register.

During the hearing on March 20, 1997, DOI Solicitor John Leshy was queried whether DOI consulted with the Office of Advocacy of the Small Business Administration (SBA), as required by law, in developing its definition of a "small entity" since the definition used in the Determination of Effects differed from the one used by the SBA. Mr. Leshy testified that he did not know the answer and would provide it to the Committee at a later date.

In a letter dated March 24, 1997, Chairman Cubin formally requested that DOI provide a written answer to this question for the hearing record. She further stated her belief that the Rule should be withdrawn if DOI did not comply with procedural requirements required by law.

Mr. Leshy replied on April 3rd that DOI used the "guidance of the Congress" as provided in the Omnibus Reconciliation Act of 1993 in defining a small entity. Based on this argument, he maintained that DOI defined a small entity as a miner having ten mining claims or less since that was the definition used by the Omnibus Reconciliation Act.[2] Chairman Cubin countered that the Omnibus Reconciliation Act of 1993 did not amend the RFA and again asked for an answer to the question originally posed at the March 20th hearing. On May 12th, Mr. Leshy replied (Exhibit 17) that "for reasons stated in our letter of April 3, 1997, we believe that we have complied with the applicable provisions of the Regulatory Flexibility Act." He further said that DOI analyzed the effect of the bonding rule on small business in the Department's Determination of Effects and contended that DOI complied with the "applicable provisions" of RFA.

Chairman Cubin also wrote the SBA's Office of Advocacy on May 7, 1997, and asked if the office had been consulted by DOI about the Rule. From the documents supplied by SBA (Exhibit 18), it is apparent that DOI first contacted the SBA on April 2nd, three days after the Rule became final and almost two weeks after the March 20th hearing. It is quite clear that DOI failed to comply with RFA requirements in promulgating the Rule. In fact, DOI contacted the SBA only *after* this issue was raised during the March hearing in

[2] This specious assertion is based on a lack of understanding about why ten claims was used as the benchmark in the Appropriations bill. This Committee was consulted when that provision was being drafted in 1992. Ten claims or less was the only available statistical breakdown of claims kept by the BLM, and a precise number of claimholders falling in a particular category of claims was needed to obtain a cost estimate on the provision from the Congressional Budget Office.

an attempt to get SBA to agree with DOI's action *after the fact.* This calls into question the veracity of Solicitor Leshy's replies of April 3rd and May 12th. *If Solicitor Leshy and DOI had complied with the SBA consultation requirements in RFA, then there would have been no need for after-the fact attempts to establish the appearance of compliance.*

The definition of a small entity used in the Determination of Effects is an improper definition under RFA because DOI did not bother to follow the process mandated by law if an agency wishes to deviate from the legal definition of a small entity; thus, the Determination of Effects is invalid. *If the primary document which DOI relies on to certify that the Rule has no significant effect on small entities is illegal, the resulting certification cannot be legal.*

C. APPEARANCE OF IMPROPRIETY

Mr. David Alberswerth, a political appointee who was a special assistant to the Assistant Secretary for Land and Minerals Management, a high-level policy-making job, played a major role in the evolution of the Rule (Exhibits 4A, 5, 6, 8–10, and 20). Prior to accepting his appointment in late June 1993, Mr. Alberswerth was Director for the Public Lands Division of the National Wildlife Federation (NWF), a national environmental advocacy group. He was a well-known environmental activist and a vocal critic of the mining industry. In fact, he co-signed NWF's comments (Exhibit 19) on the draft rule in 1991. DOI documents show that from early August 1993 until publication of the Rule, Mr. Alberswerth was deeply involved in determining the contents of the Rule and that it is largely a product of his decision-making authority. He also apparently initiated the concealment that the hardrock bonding rule was a significant regulatory action (Exhibit 8).

As discussed previously, an August 6, 1993, memo (Exhibit 4A) to "Dave" from "Dan" makes it clear that Mr. Alberswerth was actively involved in developing what was to become the Rule, less than two months after he joined the Clinton Administration. In the November 8, 1994, memo to the acting Director of the BLM, Mr. Hord Tipton (Exhibit 6), Mr. Alberswerth laid out the major points that the final hardrock bonding rule would contain. These points largely mirrored the NWF comments (Exhibit 19) on the draft rule that he co-authored in 1991.

Many of the restrictive provisions of the Ethics in Government Act concern themselves with the end of the government employment relationship: limits on activities by a federal employee after leaving the government. The Ethics Act contemplates further limits on current employee activities, however, by establishing the Office of Government Ethics, with a Director empowered to promulgate regulations "pertaining to the identification and resolution of conflicts of interest" in matters before the executive branch. 5 U.S.C. App. IV 402(b)(2). Accordingly, the Office of Government Ethics (OGE) has published, at 5 CFR 2635.501 et seq. and 2638.501 et seq., regulations intended " to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties." 5 CFR 2635.501(a). One focus of the regulations involves official actions which could affect the inter-

ests of a previous employer. Throughout the regulations, the thrust is *to avoid any appearance of partiality.*

Section 2635.501(a) of the regulations states that, absent prior authorization, "an employee should not participate in a particular matter involving specific parties which he knows is likely to affect the financial interests of a member of his household, or in which he knows a person with whom he has a covered relationship is or represents a party, *if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter.*" (Emphasis added). An OGE ethics pamphlet designed to clarify issues for government employees states: "You should not act on a matter if a reasonable person who knew the circumstances of the situation could legitimately question your fairness."[3] "The general rule," according to the OGE, "is that if your participation is going to raise eyebrows, you will need to stop working on the matter unless your agency specifically authorizes you to participate."[4]

A "covered relationship" is defined in section 2635.502 (b)(1)(4) as including "[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee." *Mr. Alberswerth was a lobbyist employed by the NWF until June 1993, on whose behalf he filed official comments pertaining to DOI's proposed bonding regulations. As an employee of the NWF, he obviously had a "covered relationship" with them.* In November, 1994, he was in the Clinton Administration making *final* decisions on those same bonding regulations (Exhibit 6). The "Dan to Dave" memo, written on August 6, 1993 (Exhibit 4A), shows that Mr. Alberswerth first involved himself in BLM's bonding policy less than two months after going to work in his policy-making position at DOI. Any action prior to June of 1994 is subject to rules governing the "covered relationship" he had with NWF. Any reasonable person would question his fairness.

The OGE regulations do not provide a definition for the term "party." Black's Law Dictionary defines "parties" as: "persons who take part in the performance of any act, or who are directly interested in any affair, contract, or conveyance, or who are actively concerned in the prosecution and defense of any legal proceeding." Mr. Alberswerth's former employer, NWF, actively lobbied and officially commented on the proposed bonding regulations, making NWF directly interested in the outcome.

Mr. Alberswerth knew that the bonding rule was a matter in which his former employer—and those NWF represented—had a strong interest. He signed and filed the comments on the proposed bonding rule on behalf of NWF. In fact, the cover letter that he signed, which accompanied NWF's specific comments on the proposed rule, emphasized that NWF and its members had a strong interest in the outcome of the bonding and reclamation regulations (Exhibit 19).

If these prohibitions were still somehow too unclear for Mr. Alberswerth to understand, he should have relied on section

[3] USOGE, A Brief Wrap on Ethics: An Ethics Pamphlet for Executive Branch Employees, February 1995, p. 11.

[4] USOGE, Take the High Road: An Ethics Booklet for Executive Branch Employees, January 1995, p. 14.

2635.502(a)(1), which states: "In considering whether a relationship would cause a reasonable person to question his impartiality, an employee may seek the assistance of his supervisor, an agency ethics official or the agency designee." The OGE advises federal employees to double-check if there is any doubt: "If you have a situation that you think might raise such a concern, then you should talk to an ethics official at your agency. He or she will be able to tell you whether or not there is an appearance problem and give you advice on how to deal with it."[5] At the June 19th Subcommittee on Energy and Mineral Resources hearing, Mr. Alberswerth testified that he never asked for advice, or received a waiver, to resolve these ethical questions.

Imagine how Mr. Alberswerth, a frequent critic of the mining industry, would have reacted had DOI hired a former mining industry lobbyist to make judgements and decisions about the very same regulations for which he had lobbied, and then, this former mining industry lobbyist had acted to prevent any interested parties such as NWF from commenting on the new rules in the rule-making process.

In fact, Mr. Alberswerth has raised questions in the past about the impartiality of even long-term public servants such as James Cason, President Bush's nominee to be Assistant Secretary of Natural Resources at the Department of Agriculture, because Mr. Alberswerth felt he was biased in favor of industry: "We're going to tell the Senate Agriculture Committee we believe he's totally unsuitable," Alberswerth said, adding that he believed Cason's position is "so pro-industry * * * it's appalling." "He's a person we simply cannot trust to be an arbiter on those issues."[6] He also attacked retiring Reagan Administration Interior official Bob Burford for having an anti-environmentalist agenda that affected his impartiality: "Burford successfully set back the clock. That was his agenda."[7]

Mr. Alberswerth's agenda is the agenda of his former bosses at NWF, and his bias appears in the outcome of the rule. To preserve fairness in the rule-making process for hardrock bonding, Mr. Alberswerth should have either recused himself from this rule-making or published his version of the rule for public comment—giving others, particularly those to be regulated—an opportunity to meaningfully and fully participate in the process. Mr. Alberswerth did neither. His actions during the rule-making process showed partiality to one advocacy group that participated in the rule-making comment period, while ignoring the input of most other participants. His regulation should have been published for public comment so that those left out of the rule-making could have a voice in the process.

D. A SIGNIFICANT REGULATORY ACTION IS CONCEALED

In the informal rule-making process, a significant regulatory action is defined as any regulatory action that is likely to result in a rule having an annual effect on the economy of $100 million or more or adversely affecting in any material way the economy, a

[5] See footnote 3.
[6] Inside Energy, September 9, 1995.
[7] San Diego Union Times, July 9, 1989, p. A25.

sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal communities (Executive Order 12866). Major regulatory actions receive greater scrutiny before an agency can finalize the rule. The resulting rule undergoes greater review and must meet tougher legal standards. If DOI could avoid identifying the Rule as a significant regulatory action, it would likely bypass close scrutiny of the Rule by the public, the Office of Management and Budget, Congress, the courts and to a large extent, the affected parties.

For example, under Executive Order 12866, the agency is required to provide the Office of Management and Budget with the following information:

1. An assessment, including the underlying analysis, of benefits anticipated from the regulatory action together with, to the extent feasible, a quantification of the benefits;
2. An assessment, including the underlying analysis, of costs anticipated from the regulatory action, together with, to the extent feasible, a quantification of those costs; and
3. An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public, and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

Also, a significant regulatory action requires more stringent analysis of a proposed rule's effect on small business entities, and a final rule cannot take effect until Congress has had a 60-day period in which to review the rule.

From documents in the Committee's possession (Exhibits 8 and 9), it is apparent that DOI's own analysis showed that the Rule would have an annual economic impact of $100 million on Nevada and Arizona alone; *thus, the Rule was a major rule.* Rather than follow the procedures laid out for a significant regulatory action, political appointees at DOI tried to conceal this fact by giving the Nevada State BLM Director discretionary authority to exclude Nevada from some of the bonding requirements (Exhibit 10). This "solution" is a charade. Giving discretionary authority conveys the power to deny as well as the power not to deny. This action merely obfuscated the $100 million effect of the Rule.

The requirement that a professional engineer must certify the reclamation costs also adds millions of dollars to the economic effect of the Rule. DOI limited the analysis of this requirement to a direct calculation of the costs of obtaining certification of the estimated total number of bonds that would be obtained.

DOI made no attempt to consider the resulting costs when a project is delayed or canceled because certification by a professional engineer cannot be obtained due to uncertain risks associated with calculation of reclamation costs. One example of this problem is provided by a copper mining project owned by Summo Minerals Corporation. The project, located in an industrial area in Lisbon Valley, Utah, was in the final stages of permitting, having received its permits from the State of Utah and a favorable Environmental Impact Statement and Record of Decision (ROD). The ROD provided for a $2.6 million initial bond, increasing to $8.6 million in the third year to cover reclamation costs. Almost all analyses of

this project conclude that bonds covering groundwater standards could not be determined until enough data was collected to quantify these costs with reasonable certainty. The latter can not be done until mining has been completed to a certain depth below the surface. The ROD provided that the bond amount would be reviewed and adjusted when the groundwater issues could be realistically evaluated. The ROD was appealed by the NWF and the Mineral Policy Center who argued that the new bonding rule applied, and the Interior Board of Land Appeals ruled that the new regulations require that the bond must be determined up front. Whatever bond amount is determined up front will not meet the certification requirement because no professional engineer is going to certify reclamation costs in cases where there is a lack of reliable data to support these calculations.

This mine, with an estimated capital cost of $48 million, offers significant economic benefits to one of the poorest counties in Utah. It has an average annual payroll of $5.4 million and will employ 140 people for a ten-year period. Corporate and employee income taxes are estimated at $7.6 million yearly. This project, on the verge of construction when the Rule was published, is now in limbo because of this regulation; thus, the Rule has destroyed jobs and extinguished millions of dollars in crucial state and local tax revenues.

The preceding example combined with DOI's own analysis clearly show that the Rule has an annual economic impact exceeding $100 million, which is concentrated in a handful of western states. DOI's action to conceal the fact that the hardrock bonding regulatory action was a significant rule-making avoided a more rigorous review, forestalled greater public input into the Rule, and short-circuited meaningful public input into the rule-making.

By hiding the fact that the bonding regulation was a significant rule, DOI was also able *to avoid considering any alternatives to the Rule.* One alternative which appears to work well is a bonding pool. Alaska has operated a state-run bonding pool since 1992. A miner pays a deposit, refundable upon completion of reclamation, as surety and pays a non-refundable charge, currently amounting to about 33 percent of the refundable deposit. The non-refundable charge goes into a bond pool to pay for the full cost of reclamation in the event of a default. Alaska's reclamation law was passed with the help and support of miners, and there have been no bond forfeitures or draws against the bond pool since its inception. A similar approach by DOI could ensure reclamation was completed, free scarce capital for investment in more productive uses and have significantly less impact on small business entities.

E. POOR RECORD KEEPING UNDERCUTS LEGITIMACY OF THE RULE

A consensus has emerged under the APA that a rule-making record or file should be created in informal rule-making. In *Citizens to Preserve Overton Park* v. *Volpe,* the Supreme Court stated that, although agency action is entitled to a presumption of regularity, "that presumption is not to shield [the] action from a thorough, probing, in-depth review." 401 U.S. 402 (1971). The importance of a rule-making record in the review process was enunciated in *Home Box Office, Inc.* v. *FCC* where the District of Columbia Cir-

cuit Court said, "there can be no doubt that implicit in the decision to treat the promulgation of rules as a 'final event' in an ongoing process of administration is an assumption that an act of reasoned judgement has occurred, an assumption which further implicates the existence of a body of material—documents, comments, transcripts, and statements in various forms declaring agency expertise or policy—with reference to which such judgement was exercised." 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). The Court went on to say that it is the record in existence at the time that an agency publishes a final rule which is used "to test the actions of the agency for arbitrariness or inconsistency with delegated authority."

In enacting rule-making statutes, Congress has specifically required an agency to maintain a record to support a final rule. Some rule-making statutes explicitly require the agency to maintain the record for judicial review, a few even going so far as to provide detailed record-keeping requirements.

The requirement for a rule-making record for informal rule-making is also dealt with in Executive Order 12291 on Federal Regulation which states that prior to approving any final major rule, an agency shall:

> [M]ake a determination that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular.

DOI failed to meet the above standard after October 1992. Prior to this date DOI kept a supporting record, entitled BLM Bond Policy Chronology (Exhibit 2), documenting each action on the bonding policy, but this record was not maintained after September, 1992. After the BLM Bond Policy Chronology ends, DOI is unable to identify, much less provide support for, changes made to the Rule during the rule-making process. Several examples of a defective rule-making record, such as the professional engineer certification requirement have been discussed previously, but several other examples include DOI's inability: (1) to identify and document modifications to the Rule on at least six occasions; and (2) to identify or provide documents that were faxed to SBA on April 18, 1997.

Many of the documents that DOI supplied the Subcommittee had dates that reflected the date that the document was printed in response to the Committee's document request rather than the date on which the document was originated, making it very difficult for the Committee to determine either the sequence or the justifications for decisions made during the rule-making process. However, Committee staff found the following filing data on some of the draft preamble documents in its possession:

Amended throughout per SOL 1/19/95.

Amended throughout per SOL 7/28/95.

Amended throughout per SOL 5/30–31/96, 6/21–6/24/96, 8/4/96.

Amended per OPA 11/7/96 at p. 5–6, 29–30.

Amended throughout per SOL 2/5/97.

From the above notations, it is clear that the proposed rule underwent at least six rewrites. To better understand the rule-making process that DOI used in developing the Rule, the Committee asked DOI to provide a summary of the major changes and the reasons for each of the changes to the proposed rule made for each rewrite cited. DOI Solicitor Leshy answered that "rather than designating a change as 'minor' v. 'major', each commentator merely provided suggested deletions and additions to the rule. As we have stated previously, we believe that any changes made to the rule were well within the scope of changes allowable under the Administrative Procedures Act and none of the changes made were 'major' in the sense of suggesting that reproposal of the rule was appropriate." Using Solicitor Leshy's logic, no rule-making record is necessary if the rule-making agency makes a determination that any changes made to its rule are within the scope allowable under the APA.

One example of key documents that DOI has been unable to locate or even identify are those documents which were faxed to SBA's Office of Advocacy on April 18, 1997. In a letter dated July 1, 1997, Solicitor Leshy responded to the Subcommittee's request: "Let me also take this opportunity to respond to your June 17 letter requesting any material the Office of the Solicitor faxed to the SBA's Office of Advocacy on April 18, 1997. . .We have not been able to determine what materials were faxed to the SBA's Office of Advocacy on that date because we did not separately identify in our files or anywhere else what materials we transmitted." Contacts with SBA are important in establishing a record of compliance with RFA, yet DOI cannot even identify what documents they provided to SBA. One can only wonder how many other actions during this rule-making lack any documentation whatsoever.

DOI did not maintain an adequate supporting record for this rule-making after September 1992; thus, the rule-making is essentially undocumented from August 1993 through February 1997, when it underwent major alterations. Several decisions made during this rule-making, such as the professional engineer certification requirement, have no justification at all in the record and other important decisions and meetings, such as those dealing with the RFA certification, are inadequately documented. Much of the reason for this appears to be because this rule-making was done by political bosses at DOI. These individuals saw no reason to allow meaningful public input into their decisions, to let a fair and impartial rule-making process interfere with implementing their plans or to provide any explanation for their rule-making actions.

PART III: DOI'S UNCOOPERATIVE ATTITUDE

A. EXAMPLE ONE—AVOID, DODGE AND DELAY

DOI impeded this Committee from conducting its oversight responsibility by using dilatory tactics and trying to impose rules and conditions under which this Committee could have access to documents.

DOI initiated a drawn-out string of dilatory and delaying tactics (Appendix B) shortly after March 12, 1997, when Chairman Cubin requested all documents pertaining to this rule-making in order to

prepare for an oversight hearing scheduled for March 20, 1997. Some records were produced by DOI pursuant to this request, but many documents were withheld from the Committee under a prospective claim of "privilege."

During the March 20, 1997, hearing, Chairman Cubin reiterated her request for withheld documents, pointing out that only the President, not DOI, could assert executive privilege and that the Congress and the Subcommittee have oversight responsibility under Articles I and IV of the U.S. Constitution, Rules 10 and 11 of the U.S. House of Representatives and Committee Rule 6 that requires virtually unfettered access to nearly all DOI documents.

Moreover, as to judicially created attorney-client and deliberative process privileges for litigation, precedent dictates that those privileges do not apply to Congressional Committees. Chairman Cubin stated that it is "for the Congress to determine at its sole and sound discretion to accept any claim of any attorney privilege that the executive exerts." Additional documents were produced after the March 20th hearing. However, many were improperly dated, and DOI continued to withhold others. The new documents gave rise to more questions, the most serious being that a political appointee who played a major role in formulating the Rule appeared to have a conflict of interest. More documents were requested, and an additional hearing was held on June 19, 1997.

After the June 19th hearing, DOI continued to refuse to provide copies of embarrassing documents, timely responses or direct answers to questions. DOI claimed and enlarged upon previous inapplicable assertions of confidentiality and privilege to excuse withholding or limiting access to key documents from the Subcommittee. At one point, DOI "offered" to allow designated members of the majority and minority staff of the Committee to make an appointment to come to DOI and "inspect" requested documents. The Subcommittee refused any preconditions because they restricted when and under what conditions Congress could perform its oversight responsibility. This is a precedent that the Subcommittee had no desire to set for routine document productions.[8]

After DOI's dilatory tactics continued for more than three months, the Committee authorized Chairman Young on July 16, 1997, to issue a subpoena requiring that the documents be produced by August 15, 1997. The subpoena was issued on July 30, 1997, and DOI finally provided the documents on August 19, 1997.

The delay—from March through mid-August 1997—in producing the ultimately subpoenaed documents thwarted efforts of the Subcommittee and Committee to properly undertake their duties under Article I and Article IV of the U.S. Constitution, Rules X and XI of the Rules of the House and Rule 6 of the Committee Rules. Two Subcommittee hearings on the matter had already been held and remaining days in the first session of the 105th Congress were limited.

[8] While not accepting DOI conditions, Committee Staff did go to DOI and look at the documents. They were certainly embarrassing. However, with one possible exception, which the Committee has not released, a court would most likely order DOI to produce all of these documents as part of the rule-making record.

B. EXAMPLE TWO—MISLEADING ANSWERS TO IMPORTANT QUESTIONS

Regarding DOI's compliance with the RFA, Solicitor Leshy in his May 12th letter (Exhibit 17) to Chairman Cubin stated, "Among other things, before providing you with our reply to your letter of March 24, 1997, we discussed this matter with the Office of Advocacy, Small Business Administration. We explained our legal interpretation of the applicable provisions of the Regulatory Flexibility Act, the mining laws, and the analysis set forth in the BLM's Determination of Effects." This statement was clearly intended to leave the impression that the SBA did not have a problem with DOI's analysis.

However, a memo dated April 21, 1997, from SBA to the DOI Office of the General Counsel (Exhibit 18), states, "Our recollection of that conversation (April 2nd) is that initially Advocacy told you that the Bureau of Land Management was not in compliance with the Regulatory Flexibility Act because you did not define a small entity in compliance with SBA's definition of a small entity in the mining industry. After giving you our initial opinion, you stated that the definition of a 'small miner' was mandated by statute. We responded that if the definition of small miner was mandated by statute, then the statutory definition would prevail."

The memo further states that, "With regards to the 'statutory mandate', Advocacy was under the impression that the mandated definition was not from the 'Omnibus Reconciliation Act of 1993.' Advocacy believed that the mandated definition was specific to the regulation that you were attempting to implement."

Thus, SBA clearly disagreed with the position Solicitor Leshy conveyed to Chairman Cubin in his letter dated May 12, 1997.

C. EXAMPLE THREE—THE LITIGATION EXCUSE

After the Subcommittee was well into its review, a private party filed suit to set aside the Rule because it also believed that rulemaking process was illegal. DOI continued to refuse to produce copies of embarrassing documents using the lawsuit as their reason. Solicitor Leshy said in his June 11, 1997, letter to Mr. Duane Gibson, Resources Committee Staff, "Given the pendency of the litigation, we believe the federal court, and not the Subcommittee, is the proper forum for determining the extent to which these documents are subject to disclosure to the plaintiff or the public."[9] This absurd position ignored the responsibilities of the Congress under Article I of the U.S. Constitution.

DOI's position that a pending lawsuit shields the Department from disclosing documents to Congress turns the Constitution into a sham. Litigation is not cause to delay or condition turning over documents to Congress. The Congress' oversight responsibility and obligation is Constitutionally derived; therefore, Congress' power to obtain information in furtherance of its oversight reviews is almost plenary. DOI must turn over the information unless there is a con-

[9] The voluminous correspondence between DOI and the Committee concerning various arguments of "privilege" and the litigation excuse are included in Appendix B. Appendix B illustrates the protracted series of numerous dilatory tactics employed by DOI to obstruct the Committee's access to important documents needed to carry out its oversight responsibilities under Articles I and IV of the U.S. Constitution, Rules X and XI of the U.S. House of Representatives and Rule 6 of the Committee Rules.

stitutionally-based excuse. A legitimate excuse is executive privilege, which is, by its nature, invalid in a rule-making. Using DOI's logic, the mere filing of a lawsuit would shield an agency from Congressional oversight. Congress would rarely be able to effectively carry out its oversight responsibilities since the U.S. Government is being sued over many of the contentious issues before Congress.

PART IV: ANALYSIS AND CONCLUSIONS: DOI'S ACTIONS CORRUPTED THE RULE-MAKING PROCESS

The Committee is very concerned about the attitude that appears to be prevalent in DOI from Interior Secretary Babbitt on down to the middle management levels that are staffed by political appointees. This attitude was expressed by Secretary Babbitt in a memo, dated January 6, 1997, concerning 43 CFR 3809 regulations. He said, "It is plainly no longer in the public interest to wait for Congress to enact legislation that corrects the remaining shortcomings of the 3809 regulations." Solicitor Leshy used a similar argument during the hearing on March 20th to justify DOI's hardrock bonding informal rule-making. In response to a question, Solicitor Leshy replied that DOI had put the rule-making "on hold until Congress solved the problem for us." He went on to say, "Now Congress did not solve the problem, so in early 1994 we resumed the process of going forward with a final rule."

Mr. Alberswerth also used this refrain in justifying the modifications to the draft rule in his November 8, 1994, memo (Exhibit 6) saying, "Since Congress did not enact comprehensive changes in the Mining Law, it is now appropriate to modify and finalize new bonding regulations." In fact, from an earlier memo written on October 25, 1994, by Mr. Alberswerth, it appears that DOI is attempting to rewrite the draft bonding regulations to incorporate failed legislation that it supported. In this memo, Mr. Alberswerth states:

> Rates for individual operations should be set at a level that "is not less than the estimated cost to complete reclamation if the work were to be performed by the Secretary in the event of forfeiture (see House offer to Senate of 7/26/94, p. 23)."

DOI supported the mining law bill passed by the House and opposed the Senate bill.

Under Article IV, section 3 of the U.S. Constitution, Congress possesses the ultimate power to regulate or dispose of lands belonging to the United States. The Executive Branch (DOI) holds only such regulatory power over these lands as *delegated to it* by Congress. The Executive Branch possesses no power to act because Congress failed to enact policies advocated by DOI. Congress has a right to refuse to act. As Congressman Chris Cannon (R–UT) told Mr. Leshy at the March 20th hearing, "I do not think it is proper for the Department to substitute its judgement for Congress and if we have issues that are difficult here they ought to be perhaps left to wait on us."

The political appointees controlling the regulatory authority at DOI used their power to implement an agenda that the Congress refused to enact—even when controlled by their own party. In doing this, DOI silenced the voice of many of those who participated in the legislative process through their elected representa-

tives, effectively denying those with differing opinions participation in our democratic process.

The legislative process was meant to be cumbersome, with numerous checks and balances to ensure that law-making is something more than a casual affair. But when bureaucrats make laws by regulation on behalf or in lieu of Congress, those legislative hurdles so carefully constructed by the authors of the Constitution are circumvented and the restraints on promiscuous lawmaking are demolished. Government as a result runs riot, and the people's voice through their elected representatives is nullified.

One of the Committee's chief concerns in this particular case of rule-making is whether DOI followed procedural law and rules laid down by numerous past Congresses to ensure an impartial regulatory process. Congress delegates rule-making power to a federal agency on the presumption that the agency will act responsibly and guarantee all interested parties full and meaningful participation in an open and impartial rule-making process. The American people deserve a fair and open rule-making process which is accessible to all groups with an interest in a proposed regulation—not a politically driven regulatory system that is used by those in control of the Executive Branch to punish their perceived opponents and deny them any voice in determining regulations they are expected to obey.

As the Supreme Court stated in *Sierra Club* v. *Costle:*

> Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. 657 F.2d 298, 410 (D.C. Cir. 1981). Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.

Unfortunately, development of the hardrock bonding rule provides an example of rule-making at its worst—rule-making dominated by politics. Documents obtained by the Committee clearly show that the undue interference of upper echelon political bosses at DOI in the BLM hardrock bonding rule-making process was so great that the integrity of the rule-making process itself is discredited. It is also apparent that high-level, political appointees at DOI did not intend to reopen the comment period to interested parties, particularly the regulated community, once they decreed their changes to the Rule.

Mr. David Alberswerth, an upper level DOI political appointee, had recently been closely associated with one of the 12 largest national environmental groups. In fact, in laying out the terms of the Rule, the input during the draft rule-making from anyone other than environmental advocacy groups was essentially ignored. The

similarity between Mr. Alberswerth's comments on the draft rule submitted on behalf of NWF in October 1991, and the major changes he mandated be made to the 92 iteration in his November 1994 memo, are striking.

Mr. Alberswerth's directive substantially altered the direction that BLM regulation writers were moving with bonding regulations in both the draft rule and the 92 iteration. Mr. Alberswerth changed the objective from using a bond as a tool to encourage reclamation to using it as a means to make it as expensive as possible for mines to operate on public lands. His approach is designed to tie up as much scarce investment capital as possible in a bond, a relatively inefficient use of resources. More reasonable alternatives, which could accomplish the same objectives at far lower costs, were never considered.[10] At the same time, Mr. Alberswerth denied miners any meaningful input into these decisions, which were designed to have a major impact on their operations.

According to the notice of the proposed rule (July 11, 1991; Exhibit 3), DOI was capping the bonding amount in order to "reduce the impacts on industry . . . these bond caps would be intended to be in effect for 3 years after promulgation of the final rule, and their adequacy would be reevaluated at that time." Mr. Alberswerth totally abandoned this approach, even going so far as to require operators to post bond for any additional reclamation costs that would be incurred if the BLM did the reclamation. Certainly, interested parties cannot be expected to anticipate the Rule from this notice of the proposed rule-making.

The memo also rendered comments made during the public comment period by anyone other than environmental advocacy groups moot and annulled previous efforts by the BLM to reach out to the regulated community, particularly small entities, to win needed support for its program. From November 4, 1994, onward, meaningful input into the Rule was to be denied to anyone who did not agree with DOI political appointees.

Mr. Alberswerth's memo determining the Rule is significant because it shows that the rule-making was arbitrary and capricious. In reality, the normal rule-making process ceased on November 4, 1994. A rule-making is an ongoing process that assumes that an act of reasoned judgement has been made by the agency with expertise in the area covered by the rule. BLM, the agency with expertise in mining and direct responsibility for regulating mining on public lands, was shut out of the rule-making process. Hereafter, BLM's role would be to mold a preamble to fit the Rule dictated by DOI political bosses. The lack of a record justifying decisions made in the rule-making process indicates that these political appointees lacked the necessary experience to make the reasoned judgements required during the rule-making process.

DOI political bosses acted to move the Rule to publication despite warnings from BLM regulation writers and DOI lawyers that there were significant APA concerns with the Rule. These personnel met with Mr. Alberswerth in early June to express their concerns (Exhibit 8). An E-mail to Mr. Hord Tipton, acting Director of the BLM,

[10] This approach punishes everyone in the mining industry, not just the few problem operators. Solicitor Leshy testified at the March 20th hearing that "most members of the mining industry are responsible operators who live up to their reclamation obligations. . . ."

from Mr. Rick Deery stated that all of the participants in this meeting (presumably excluding Mr. Alberswerth) agreed on the APA issue (Exhibit 9). Other than the meaningless word-smithing to hide the significant rule issue, these concerns were ignored by upper level DOI policy-makers.

The problems with the hardrock bonding rule-making result from the refusal of a few imperious, high-level, politically-motivated bureaucrats to obey the laws that govern the rule-making process. These political bosses refused to comply with laws such as RFA, obstructed the impartiality of the rule-making process, excluded interested parties from participating in the rule-making process in a meaningful way, attempted to prevent and obstruct Congress from carrying out its Constitutional oversight responsibilities, and tried to use various inapplicable claims of "privilege" to hide these actions.

The above actions, taken together, constitute a coordinated effort by DOI policy-makers to affirmatively misrepresent the Rule's import and impact. Even if the notice of a proposed rule-making is facially sufficient, the courts have ruled in *Natural Resources Defense Council* v. *Hodel* that the notice is rendered inadequate by an agency's affirmative mischaracterization of the rule's import and impact. 618 F. Supp. 848 (ED Cal 1985). DOI continually mischaracterized the economic effect of the rule and the nature of the alterations made to the rule by Mr. Alberswerth to deny interested members of the public full and meaningful participation in the rule-making process.

APPENDIX A—EXHIBITS

Exhibit and description:

1. Notice of Final Rule (published February 28, 1997).
2. BLM Chronology 1983 to September, 1992.
3. Notice of Proposed Rule (published July 11, 1991).

4A. Memo from Dan to Dave dated 8/6/93.

4B. Memo Laying Out Groundwork for Final Rule dated 11/29/91.

5. Memo dated 10/25/94 from Dave Alberswerth to Bob Armstrong, John Leshy, Mike Dombeck, and Patty Benecke on Hard Rock Bonding Regulations.
6. Memo dated 11/8/94 from Dave Alberswerth to Hord Tipton.
7. Handwritten Notes on Meeting Held on 11/2/94.
8. Memo dated 6/14/96 to John Leshy from Dave Alberswerth on Status of Hardrock Bonding Rule.
9. Memo dated 6/19/96 from Rick Deery to Hord Tipton Concerning "Just Talked to Dave A—Forwarded—Reply—Reply".
10. Memo dated 6/19/96 from Rick Deery to Ted Hudson and Natalie Eades Concerning "Just Talked to Dave A—Forwarded" With Memo dated 6/17/96 From Annetta Cheek to Rick Deery Concerning "Just Talked to Dave A" Attached.
11. Memo dated 6/3/96 from Annetta Cheek to Ted Hudson.
12. Memo dated 6/7/96 from Annetta Cheek to Monica Burke.
13. Memo dated 6/17/96 to Rick Deery from Annetta Cheek on Bonding.
14. Side by Side Table Comparing Draft Rule and Final Rule.

15. Memo dated 9/17/96 from Sharon Allender to Hord Tipton, Mike Schwartz and Rick Deery Concerning "Bonding Regs".

16. Changes dated 2/24/97 Made by Ted Hudson to Preamble.

17. Letter dated May 12, 1997, from John Leshy to Chairman Cubin.

18. SBA Communication dated 4/21/97 from Shawne Carter and Jennifer Smith to Natalie Eades and A Note (undated) from Natalie Eades to Shawne Carter and Jennifer Smith.

19. Comments by National Wildlife Federation on Draft Rule (Submitted by Dave Alberswerth and Cathy Carlson).

20. Memo dated 2/11/97 from Dave Alberswerth to Mike Schwartz Concerning "Comments on 2/11/97 draft DOE on hard rock bonding reg.".

Appendix A – Exhibit 1

not limited to, the parameters and assumptions used in the applicable equation in paragraph (a)(1) or (b)(1) of this section, shall demonstrate compliance with those paragraphs.

* * * * *

5. Section 63.421 is amended by adding in alphabetical order definitions for "bulk gasoline terminal" and "limitation(s) on potential to emit" to read as follows:

§ 63.421 Definitions.

* * * * *

Bulk gasoline terminal means any gasoline facility which receives gasoline by pipeline, ship or barge, and has a gasoline throughput greater than 75,700 liters per day. Gasoline throughput shall be the maximum calculated design throughput as may be limited by compliance with an enforceable condition under Federal, State or local law and discoverable by the Administrator and any other person.

* * * * *

Limitation(s) on potential to emit means limitation(s) limiting a source's potential to emit as defined in § 63.2 of subpart A of this part.

* * * * *

6. Section 63.428 is amended by revising paragraphs (g) introductory text and (h) introductory text to read as follows:

§ 63.428 Reporting and recordkeeping.

* * * * *

(g) Each owner or operator of a bulk gasoline terminal or pipeline breakout station subject to the provisions of this subpart shall include in a semiannual report to the Administrator the following information, as applicable:

* * * * *

(h) Each owner or operator of a bulk gasoline terminal or pipeline breakout station subject to the provisions of this subpart shall submit an excess emissions report to the Administrator in accordance with § 63.10(e)(3), whether or not a CMS is installed at the facility. The following occurrences are excess emissions events under this subpart, and the following information shall be included in the excess emissions report, as applicable:

* * * * *

[FR Doc. 97–4885 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 180

[PP–5F4578/R2277A; FRL–5590–4]

RIN 2070–AB78

Glufosinate Ammonium; Tolerances for Residues

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: EPA is correcting the table under § 180.473, paragraph (c) to reflect the tolerance for residues of glufosinate ammonium on corn, field, forage as stated in the petition submitted by AgrEvo USA Co.

DATES: This correction is effective on February 5, 1997.

FOR FURTHER INFORMATION CONTACT: By mail: Joanne Miller, Product Manager (PM) 23, Registration Division, (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Rm. 237, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, 703–305–7830, e-mail: miller.joanne@epamail.epa.gov.

In FR Doc. 97-2838, appearing at page 5333 in the issue for Wednesday, February 5, 1997, on page 5338, in § 180.473, in the table to paragraph (c), the entry for "corn, field, forage," is corrected as follows:

§ 180.473 Glufosinate ammonium; tolerances for residues.

* * * * *

Commodity	Parts per million	Expiration
* * *	* * *	* * *
Corn, field, forage	4.0	July 13, 1999
* * *	* * *	* * *

List of Subjects in Part 180

Environmental protection.

Dated: February 18, 1997.

Stephen L. Johnson,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 97–4624 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 3800

[WO–660–4120–02–24 1A]

RIN 1004–AC40

Mining Claims Under the General Mining Laws; Surface Management

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Land Management (BLM) is amending its surface management regulations at 43 CFR subpart 3809. The final rule requires submission of financial guarantees for reclamation of all hardrock mining operations greater than casual use, increases the types of financial instruments acceptable to satisfy the requirement for a financial guarantee, and amends the noncompliance section of the regulations to require the filing of plans of operations by operators who have a record of noncompliance. In addition, the final rule removes section 3809.1–8 on existing operations, which is no longer applicable, because all activities that were in operation in 1980 and continue in operation have now complied with this section.

EFFECTIVE DATE: March 31, 1997.

ADDRESSES: Inquiries or suggestions should be sent to the Solid Minerals Group at Director (320), Bureau of Land Management, Room 501 LS, 1849 C Street, N.W., Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Richard Deery, (202) 452–0350.

SUPPLEMENTARY INFORMATION: On July 11, 1991 (56 FR 31602), BLM published a proposed rule to require submission of financial guarantees for reclamation for all hardrock mining operations greater than casual use, to designate additional financial instruments that would satisfy the requirement for a financial guarantee, and to amend the noncompliance section of the regulations to require the filing of plans of operations by operators who have a record of noncompliance. The extended 90-day comment period expired on October 9, 1991. The BLM received 218 comments on the proposed rule, including 3 citizen-petitions with numerous signatures. Of these comments, 58 were from public interest groups, 51 were from business entities or associations, 22 were from government agencies, and 135 were from individuals, not including the petitions. All of the comments were

carefully considered in developing this final rule.

Three basic points of view as to the proposed rule emerged in the comments. First, a number of comments dealt with the adequacy of the bond levels, self-certification, and the number of financial instruments acceptable under the rule. The comments stated that the bond levels set in the proposed rule were too low, and that BLM should require full cost bonding for both notices and plans of operation. Those expressing concern regarding self-certification and the number of financial instruments believe the proposed rule could lead to less security. Others simply objected to self-bonding in any form. Second, mining associations and some individuals agreed that the proposed rules were necessary, but argued that the $5,000 bond for notice level operations is excessive. Third, many of the individuals argued that the proposal discriminates against small miners and would force them out of business, if implemented.

In response to the comments regarding bond levels, BLM has amended the rule to require bonds for 100 percent of the amount that would be needed to pay for reclamation by a third-party contractor using equipment from an off-site location. This will ensure that, if the bonded party fails to perform its reclamation responsibilities, BLM will have access to adequate funds through these financial guarantee arrangements to reclaim the lands, and thereby protect the interest of the public, including Federal taxpayers. Calculation of the amount is at the operator's expense, and must be certified by a third-party professional engineer registered to practice in the State in which the operations are proposed. However, this engineer's certification is not required when the requirement for a financial guarantee is met by providing evidence of an instrument held or approved by a State agency.

The comments suggesting that the bonds were insufficient also raised several other issues. For example, they asserted that the rule did not contain detailed reclamation and bond release language. Detailed guidance on reclamation is beyond the scope of this rule. However, the final rule addresses concerns about bond release in section 3809.1–9(m), as discussed below. Under the subpart 3809 regulations, further guidance on the standards for reclamation and bond release will be dealt with on a case-by-case basis at the time a notice provided for under section 3809.1–3 or a plan of operations provided for under section 3809.1–4 is received and reviewed, and would be covered as part of the review of reclamation measures incorporated into the notice or plan.

The majority of the individual comments objected to the $5,000 minimum bond required for a notice level operation. They stated that the $5,000 self-certification would be an unnecessary regulation, because reclamation of any damage caused by small miners occurs naturally during the first winter. Those who identified themselves as recreational miners considered the proposal to be unfair, because it requires too great an expenditure. Many individual comments opposed the $5,000 financial guarantee, arguing that even self-certification would be burdensome and force small miners and prospectors out of business. Two individual comments favored the proposal, citing firsthand experience of the environmental impact of small mining operations.

The proposed rule was drafted with the assumption that notice-level operators likely would use the full 5 acres allowed and certify the existence of the full $5,000 guarantee for the entire acreage at the $1,000 per acre exploration level cap. The final rule requires the financial guarantee to cover 100 percent of the estimated costs of reclamation, with the minimum acceptable amount being $1,000 for each acre or fraction thereof disturbed.

Specific Comments

In the following portion of the preamble, comments will be discussed as they relate to various specific sections of the rule.

Section 3809.0–5 Definitions

This section of the proposed rule would have added definitions for the terms "exploration operations" and "mining operations," and redesignated the other paragraphs to accommodate these additions. These proposed definitions were to be used to differentiate between the maximum guarantee amounts ordinarily to be required. However, since the rule has been changed elsewhere in accordance with public comments to require financial guarantees to cover 100 percent of the estimated costs of reclamation for all operations other than casual use, these definitions are no longer needed. Therefore, the proposed revisions to section 3809.0–5 are omitted in the final rule.

Section 3809.0–9 Information Collection

This section codifies the note that appeared at the beginning of Group 3800, and revises it to comply with current OMB regulations. A notice of BLM's request for approval of the information collections in subparts 3802 and 3809 was published in the **Federal Register** on March 5, 1996. Three comments responded to the notice, two within the public comment period. Two of the comments supported the information collection. A third objected to perceived redundancies in the information collection proposal. The supposed repetitiveness was only apparent; similar information is to be collected under each of two subparts covered by the request, but will not be collected twice for the same operation. The comment also seemed to treat the notice as pertaining to a proposed rule rather than in part to existing regulations, and objected to provisions dealing with aircraft operations in subpart 3802, arguing that BLM lacked jurisdiction. However, BLM managers do in fact manage aircraft landing areas in wilderness study areas under subpart 3802. These comments did not lead to changes in the information collection. The estimated public reporting burden is estimated to be 16 hours per response for notices and 32 hours per response for plans of operations.

Section 3809.1–9 Financial Guarantees

This section states clearly that obtaining a bond or other financial guarantee is a prerequisite to operating on an unpatented mining claim under a notice or plan of operations. It lists the types of guarantees that are acceptable, and requires that they cover the entire estimated cost of reclamation. It requires that operators report their financial guarantees to BLM and include certain enumerated information with the report. The section also provides for partial release under the guarantees when phases of reclamation are completed, and states the consequences of default or bond deficiency.

A new paragraph (a) has been added to this section in the final rule to make it clear that initiating operations under a notice or conducting operations under a plan of operations without a required financial guarantee is prohibited by regulation. Among other remedies available to the government, such conduct may be prosecuted under section 303(a) of the Federal Land Policy and Management Act (FLPMA), which provides criminal penalties for the knowing and willful violation of the regulations.

Proposed paragraph (a) is redesignated as (b) in the final rule. This paragraph, as proposed, removed language from the current regulations

exempting notice level operations from posting a financial guarantee. One comment observed that almost any normal mining activity exceeds the definition of casual use in subpart 3809 and implied that the paragraph excepting casual use from bonding requirements serves no use. No change is made in the final rule as a result of this comment. Much exploratory activity that does not require a notice to be submitted can and does take place on public lands, whether on mining claims or not: for example, exploratory activity that does not require mechanized earth-moving equipment or explosives.

Section 3809.1–9(c). Proposed paragraph (b), which has been redesignated as paragraph (c) in the final rule, would have: (1) Required certification of a financial guarantee, (2) established a guarantee amount of $5,000, (3) allowed a choice of financial instruments, (4) provided that the guarantee may be met by providing evidence of a State-held bond, (5) required the certification to accompany the filed notice, (6) permitted the authorized officer to return incomplete notices for failure to have the certification, (7) required the funds to remain available until the authorized officer has absolved the operator of reclamation responsibilities, and (8) held the operator to the reclamation standards in section 3809.1–3(d).

A number of comments addressed the various proposed requirements in this paragraph of the proposed rule.

(1) Certification of a financial guarantee.

Two comments suggested that a better course of action would be for the BLM to have the guarantee in hand rather than a certification that a guarantee exists. They cited a perceived tendency for small operators who commit violations to leave the vicinity or not restart operations on public lands, because many miners only have one operation in their lifetime and the possibility of not being able to obtain a financial guarantee for future operations is not a credible deterrent. They also cite the high cost of prosecutions.

We acknowledge the potential for such problems. The model for this proposal is the self-certification system used in administering State requirements for automobile insurance. Citizens do not customarily hand the policy to the State, but certify that it has been obtained and is available for use. Failure to have the insurance brings the imposition of penalties by the State. Notices and plans of operation will be required to contain the social security number of the operator or the employer identification number of operators or agents. Ultimately, however, the mining claimant will be responsible for the activity on the mining claim.

There will be a lower administrative cost using the certificate system since collecting the actual financial instruments necessarily would require funding for the administrative overhead to accept, sort, and process the instruments, and maintain facilities for secure storage. Second, the sanctions for noncompliance can be severe, and can in appropriate cases include criminal penalties authorized by Section 303(a) of FLPMA for knowing and willful violations of these regulations. These sanctions will be used against operators who abandon operations after committing violations.

This rule also incorporates the maximum penalties provided for in the Sentencing Reform Act of 1989 (18 U.S.C. 3571 *et seq.*). Penalty provisions such as those in FLPMA that provide for up to a year in jail or a fine of $1,000 for violators are classified as Class A misdemeanors under 18 U.S.C. 3571, and the Sentencing Reform Act provides for fines for Class A misdemeanors of up to $100,000 for individuals and $200,000 for organizations.

(2) The guarantee amount of $5,000.

This provision of the proposed rule generated the largest number of comments. Many stated that the proposed $5,000 guarantee would be excessive, burdensome, discriminatory, and damaging to small operators. On the other hand, other comments stated that the amount was insufficient for complete reclamation.

In drafting the proposed rule, it was assumed that notice level operators would use the full 5 acres allowed and be bonded for the same at the proposed exploration level cap, which was $1,000 per acre. Many comments suggested that financial guarantee requirements should be based on actual acreage disturbed. This suggestion has been adopted in the final rule. The final rule requires bonding sufficient to cover 100 percent of the estimated costs of reclamation with a $1,000 minimum rate for each acre disturbed. The minimum acceptable amount will be $1,000 if the area disturbed is less than one acre.

(3) Allowing for a choice of financial instruments.

Individual and industry association comments generally approved of the option to choose the financial instrument. Environmental groups expressed reservations as to the use of instruments with greater associated risk, such as mortgages on mining properties and liens on equipment. We acknowledge the increased risk associated with these types of instruments. In response, the rule has been amended to remove the provision for the use of mortgages on mining property and first liens on equipment.

One comment suggested that whatever financial instrument is approved, it must be redeemable by the Secretary. For plan level operations, the suggestion is a logical extension of the BLM holding the guarantee. The rule has been amended to incorporate this change for plan-level operations. For notice-level activities, this would be an unnecessary administrative burden on the operator and the authorized officer. The authorized officer does not hold the guarantee for notice-level activities, but rather the certification. If the comment were adopted in the final rule, operators would be required to get the instrument released by the authorized officer, creating an unnecessary administrative burden. Therefore, the comment is not adopted for notice-level activities.

(4) The guarantee may be met by providing evidence of a State-held bond.

This continues the provisions of the existing regulations.

(5) The certification is required to accompany the filed notice.

(6) The authorized officer may return incomplete notices for failure to have the certification.

One comment observed that nothing in the regulations requires the notice to be complete and that the notice does not have to be approved, adding that the provision regarding the notice should be modified to create a completeness review or a notice approval process. The comment observed that the situation renders the return of the notice irrelevant. As a clarification and to achieve the same purpose as the return of a notice submitted without a financial guarantee certificate, the final rule incorporates language at section 3809.1–9(a) stating that conducting operations under either a plan or a notice prior to submission of the appropriate financial guarantee is prohibited. Section 3809.3–2 on noncompliance has been amended by adding paragraph (f) to set forth the penalties contained in the statute for those who commit prohibited acts. For notices filed after the effective date of the regulations, the certification set out in paragraph (c) of this section must accompany the notice. For existing notices on file with BLM that cover active ongoing operations predating the effective date of this rule (including operations suspended due to weather), no certification is required until a new notice is filed. For existing notices on file with BLM, the claimant or operator will have to provide the certification before initiating operations.

(7) The funds are required to remain available until the authorized officer has absolved the operator of reclamation responsibilities.

As discussed below, in response to comments, a procedure for phased release or reduction of bonds as reclamation phases are completed has been included in section 3809.1–9(m) of the final rule.

(8) The operator is held to the reclamation standards in section 3809.1–3(d).

Among the general comments were several statements that BLM should develop "clear reclamation standards" and, as a Federal agency, should take the lead in "defining performance standards." The BLM currently has regulations at 43 CFR 3809.1–3(d) and 3809.1–3(c) that govern reclamation standards. Reexamination of their adequacy is beyond the scope of this rule.

Section 3809.1–9(d). This paragraph was paragraph (c) in the proposed rule, and has been redesignated as (d) in the final rule. In the final rule, this provision requires the certification for notice-level operations to include the name, home address, home and office phone number, and social security or employer identification number of the operator, mining claimant, or its agent. It requires the operator, mining claimant, or its agent to make various statements about the financial guarantee as part of the certification, including: (1) That the mining claimant or operator for whom the individual is submitting the certification is responsible for the reclamation; (2) that the financial guarantee exists in the required amount, and its location; (3) that the guarantee will be delivered on demand within 45 days; (4) a statement acknowledging that surrender of the guarantee does not absolve the operator, mining claimant, or agent, from responsibility and does not release or waive any claim BLM may have under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, or any other applicable statutes, or any regulations; and (5) a statement acknowledging that failure to have the guarantee as certified, or failure to provide the guarantee upon demand by the authorized officer may result in prosecution under the appropriate Federal statutes.

Many of the comments that generally objected to the proposed rule also objected to the content of this certification, suggesting that it assumed all operators were guilty until proven innocent. The purpose of the regulation is, however, to create a set of known standards by which to judge the performance of the notice-level operator with respect to having and maintaining the financial guarantee. Because BLM is not now requiring notice operators to supply the guarantee itself to BLM, but only to certify its existence, it is important that the operator understands fully and acknowledges his or her obligations in this regard.

One comment stated that 45 days (plus an additional 45 days, if authorized) was too long a period of time for the Government to wait for the guarantee. The time period is retained in the final rule because some instruments allowed under the rule may take time to be liquidated.

One statement observed that there was some confusion in determining the responsible party in the proposed language. The purpose of the provision is to designate a responsible party. That party may be a representative of a corporate operator. If an individual can speak for the corporation in filing a notice and a guarantee, then the same individual can bind the company to do the reclamation.

Proposed section 3809.1–9(d), redesignated as (e) in the final rule, requires each of the statements included with the certification to be initialed and dated. Failure to initial each statement will result in return of the certificate. One comment stated that this was unnecessary and that the signing and the dating of the entire certificate should suffice. Another comment noted that this procedure was overly bureaucratic. Section 3809.1–9(e) is retained in the final rule, because these separate acknowledgments will serve to establish the knowledge and legal accountability of mining claimants and operators who will be permitted under the regulations to self-certify that they have adequate financial guarantees.

Proposed section 3809.1–9(e), redesignated as (f) in the final rule, has been amended for clarification to limit its application to notice-level operators.

Proposed paragraphs (f) and (g) of section 3809.1–9, redesignated as (g) and (h) in the final rule, would have required the plan-level operator to post a bond, and required the authorized officer to set the amount at a level sufficient to pay for reclamation if the plan-level operator fails to perform the work. However, the bond requirements for exploration and mining would have been limited to $1,000 and $2,000 per acre, respectively, except that operators in noncompliance with submitted plans of operations and notices would have been required to post 100 percent bonds.

Numerous comments opposed the provisions for bond caps in the proposed rule. Many stated that the caps were far too low. One comment stated that they were too high. Another stated that there should be no bonds required of operators who do not have a record of noncompliance.

The BLM has reviewed the bonding requirements proposed in light of the comments and has decided to amend the bond amounts based on these comments. The financial guarantee requirements in the rule have been amended to require the guarantee to cover 100 percent of the estimated costs of reclamation. The final rule also states the minimum amount required for a financial guarantee, $1,000 per acre for notice-level activities and $2,000 per acre for plan-level activities. The role for financial guarantees required and held by BLM will be to ensure that money sufficient to cover full reclamation costs is available.

Proposed section 3809.1–9(h) would have required those portions of operations utilizing cyanide or other leach solutions to be bonded at 100 percent. Several comments said that the failure to include vat leach and other facilities storing or receiving solutions containing cyanide or other leach solutions in this section was improper. One comment considered the entire proposal onerous and objected to the inclusion of other leach solutions. Other comments suggested that this section be made discretionary. These comments are resolved by changes made elsewhere in the final rule, which requires all plan-level operations to be covered by 100 percent financial guarantees. A separate specific 100 percent bonding requirement for cyanide and similar operations is therefore no longer necessary—it is subsumed in the general requirement. Accordingly, this paragraph has been removed in the final rule.

Section 3809.1–9(i), as proposed, would have allowed the authorized officer to review and accept or reject any of the types of financial instruments offered by the plan level operator, including first lien security interests on mining equipment. Several comments questioned the use of this instrument, as well as first mortgages and first deeds of trust, as too risky. Upon reflection, we agree. The provisions for allowing such instruments as guarantees have been removed in the final rule. However, this paragraph has been amended in the final rule to make clear that, for purposes of the financial guarantee requirements of this section, BLM will honor the financial guarantees chosen by the affected State, if the BLM finds

that the instrument held by the State provides the same guarantee as that required by the final rule.

Section 3809.1–9(j) allows for review of operations conducted under an approved plan of operations and readjustment of the financial guarantee. The final rule allows the operator to submit a new (and less expensive, if available) form of guarantee subject to the approval of the authorized officer.[4] This was generally supported by the comments.

Section 3809.1–9(k) allows the use of traditional instruments and expands the list to include a large number of non-traditional instruments. Most of the comments that addressed this provision generally supported it, some suggesting that second mortgages should be added to the list. One comment suggested that any instrument acceptable to the State should be acceptable to BLM. So long as the State holds the instrument the BLM will not intervene, but for security interests to be held by the United States, acceptable instruments are limited to those listed in the regulations. One comment suggested that taking a first mortgage on a mining property might lead to difficulties and potential liability risk to the United States from with hazardous materials. Upon reflection, we agree. Therefore, mortgages and liens on real property will not be acceptable as financial guarantees under this final rule.

Some comments generally disapproved of this expansion of possible security instruments, stating that there appeared to be no problem in getting traditional surety bonds. Contrary to this view, it appears that there may be a problem for the smaller operator. These same comments also took exception to the use of instruments that might not be entirely liquid and which upon liquidation may not cover the full amount. While the list of acceptable instruments is expanded to include State and municipal bonds, the final rule also incorporates changes to ensure that the security provided at the time required is not reduced by market fluctuations in the value of government-issued and commercial securities. The BLM has determined that the risk associated with expanding the range of choice of security instruments is acceptable. Whatever additional risk may be involved is offset, at least somewhat, by the amendment requiring that financial guarantees be equal to an independent professional engineer's estimate of reclamation costs. It is important to recall, in this connection, that the financial guarantee and the duty to reclaim are backed up by criminal penalties, and by the provision that the operator is not free of liability if the guarantee is cashed in and found insufficient.

By irrevocable letter of credit, section 3809.1–9(k)(3) means a letter of credit, such as described in 43 CFR 3104.1(c)(5), that identifies the Secretary of the Interior as sole payee with full authority to demand immediate payment in case of default. It must be subject to automatic renewal for periods of not less than 1 year if the mining claimant or operator fails to notify the proper BLM office of its nonrenewal and replacement by other suitable financial guarantee before the originally stated or any extended expiration date. Such letters of credit must also provide that they can be forfeited and collected by the authorized officer if not replaced by other suitable financial guarantee before their expiration date.

Section 3809.1–9(l) continues the current practice of accepting blanket statewide and nationwide bonds found in the existing regulations. This provision was generally supported in some comments, and generally opposed, without stated rationale, in others. No change is made in the final rule. Failure to reclaim will lead to forfeiture of an appropriate portion of the statewide or nationwide bond and could result in the loss of the ability to obtain any future bonds.

Section 3809.1–9(m) covers reclamation and bond release. Two comments suggested that BLM allow for bond reduction as reclamation steps are completed. Upon reflection, we agree.

Section 3809.1–9(m) in the final rule includes a procedure for phased release or reduction of bonds as reclamation phases are completed, as suggested in the comments. A guarantee will not be released until successful revegetation has been demonstrated. Limitations are also placed on release of financial guarantees in order to protect water quality.

Paragraphs (n) through (p) of section 3809.1–9, were added to the final rule based on public comment. They describe the procedures used by BLM to collect financial guarantees in order to carry out or contract for any needed reclamation not performed by the operator or mining claimant. These sections are being incorporated in the final rule to ensure a degree of uniformity in the procedures used by the various offices of the BLM in the collection and use of financial guarantees, and to complete the logical sequence of events encouraging reclamation.

Section 3809.1–9(n) of the proposed rule, redesignated as paragraph (q) in the final rule, covers release of the operator from the financial guarantee or a portion thereof upon patenting of a mining claim. One comment suggested requiring all portions of the patented claim not then being mined to be reclaimed and the part still being mined to be covered by the State requirements prior to title transfer. Such requirements would be unnecessary, because most States have mining and reclamation programs that require reclamation of private lands, including lands obtained through patents from the United States. As elsewhere, references to the mining claimant have been added in this paragraph to make it consistent with other provisions in the final rule.

Section 3809.3–1. This proposed section added a requirement in paragraph (b) for the State Director to review the list of appropriate and legal financial instruments available in the State and to publish it on a yearly basis. No significant comments were noted. However, this section has been amended editorially for purposes of brevity and clarity in the final rule.

Section 3809.3–2(e). This proposed section explained what is meant by a record of noncompliance, imposed mandatory BLM-held bonding on operators with a record of noncompliance, made State-held bonds unacceptable for those with records of noncompliance, and allowed the BLM to require all existing and subsequent notice-level operations by such an operator to be conducted only under a plan. It also allowed the State Director to determine the length of time that an operator will be held to the mandatory plan provisions (not less than 1 year and not more than 3 years).

One comment objected to the proposed language stating that financial guarantees held by the State would not be acceptable and would result in the double bonding of operators by the State and the BLM. We acknowledge this possibility, but additional security is justified when operators have compiled a record of noncompliance. No change to accommodate this comment is made in the final rule.

Two comments stated that provisions of section 3809.3–2(e) do not allow for due process. One suggested alternative language that incorporated "due process" while the other suggested that the language of the existing section (e) would be more balanced in protecting the due process rights, because it uses "may" rather than "shall." The rule applies to an operator who ignores a notice of noncompliance. The appeals section of the existing regulations (not amended in this rule) includes opportunity for appeal at two levels, State Director and Interior Board of

Land Appeals. This provides sufficient protection of a party's due process rights.

One comment stated that the language in the proposed section would allow an operator to move across a State line and start with a clean record. This result was not intended in the proposed rule, and nothing in the rule requires such a narrow reading. The BLM's recordkeeping system allows proscriptions imposed in one State to be maintained BLM-wide.

One comment suggested alternative language to define when an operator has compiled a record of noncompliance and to provide additional clarity to the rule:

1. To make it clear that operators who establish a record of noncompliance will be considered in active noncompliance until the necessary actions required by the notice of noncompliance have been completed;

2. To include a 30-day time frame for the conversion of existing notices to plans;

3. To include 90-day deadlines for the filing of the mandatory financial guarantees with the authorized officer, specifying that failure to provide the guarantee will result in the withdrawal of all existing plan approvals;

4. To provide that BLM will approve no new or additional plans or plan amendments of operators who have established a record of noncompliance and who remain in active noncompliance;

5. To extend the prohibition to proprietors, partners, principals, managers, directors, or officers of the operator in active noncompliance who are responsible for the continuing noncompliance.

Another comment suggested that an operator who has a record of noncompliance should be denied all additional approvals until all prior reclamation commitments have been satisfied and all costs incurred by the surety companies or the government have been reimbursed.

The suggestion that would have BLM bar an operator or mining claimant in noncompliance, and its responsible affiliates, from obtaining new or additional approvals has not been adopted in the final rule. The BLM will study this suggestion further and may propose such a change in a future rulemaking. With limited modifications to the suggested language, the remaining suggestions are adopted, so that proposed section 3809.3–2(e) is revised in the final rule.

Section 3809.3–2(f) is added merely to reiterate the penalties contained in Section 303 of FLPMA for those who violate the regulations of subpart 3809. In response to a comment that discussed the weakness of the proposed language authorizing the return of incomplete notices, a new paragraph 3809.1–9(a) is being added to prohibit the conduct of operations without posting the appropriate financial guarantees. Then, to notify the public of the penalties associated with the violation of the regulations in subpart 3809, and to codify the penalties contained in FLPMA, the noncompliance section is also amended by adding paragraph (f). This paragraph incorporates the maximum penalties provided for in the Sentencing Reform Act of 1984 (18 U.S.C. 3571 *et seq.*), in order to bring the rule into compliance with law, and to avoid the misleading impression created by the current regulations that penalties are limited to the minimal amounts provided for in FLPMA. Penalty provisions such as those in FLPMA that provide for up to a year in jail or a fine of $1,000 for violators are classified as Class A misdemeanors under 18 U.S.C. 3561, and the Sentencing Reform Act provides for fines for Class A misdemeanors of up to $100,000 for individuals and $200,000 for organizations. As noted in the rule, the Sentencing Reform Act also authorizes the imposition of alternative fines based upon a doubling of the pecuniary gain to the defendant or loss to other persons resulting from a violation.

The principal author of this final rule is Richard Deery of the Solid Minerals Group, assisted by Ted Hudson of the Regulatory Management Group, BLM.

Compliance With the National Environmental Policy Act

It is hereby determined that this final rule does not constitute a major Federal action significantly affecting the quality of the human environment, and that no detailed statement pursuant to Section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4332(2)(C)) is required. It has been determined that this final rule is categorically excluded from further environmental review pursuant to 516 Departmental Manual (DM), Chapter 2, Appendix 1, Item 1.10. This item states that "Policies, directives, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature * * *" are categorically exempt. Because this rule addresses financial guarantees, we believe that it falls into this category, thereby obviating any further review under NEPA. It has also been determined that the proposal would not significantly affect the 10 criteria for exceptions listed in 516 DM 2, Appendix 2. Pursuant to the Council on Environmental Quality regulations (40 CFR 1508.4) and environmental policies and procedures of the Department of the Interior, "categorical exclusions" means a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency and for which neither an environmental assessment nor an environmental impact statement is required.

Compliance With Executive Order 12866

This rule has been reviewed under Executive Order 12866. The Department of the Interior has found, based on the economic analysis contained in a Determination of Effects of Rule that is available for inspection in the office of the Solid Minerals Group at the address given in ADDRESSES, above, that this document is not likely to result in an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

The current surface management regulations at 43 CFR subpart 3809 provide for 3 levels of activity involving surface use of public lands for mineral exploration and mining: (1) Casual use, causing no noticeable surface disturbance, which does not require notification to BLM of the activity; (2) notice-level activity, exceeding the threshold of casual use but not disturbing more than 5 acres per calendar year, which requires a notice to BLM before proceeding but no BLM approval or operator financial guarantee; (3) plan-level activity, disturbing more than 5 acres annually, which requires a plan approved by BLM, full NEPA compliance, and, since 1990, full cost financial guarantees.

Except for Arizona, Nevada, Alaska, and Utah, the public lands States all require some bonding for notice-level mining and mineral exploration activities. Under this rule, BLM will accept these State bonds in satisfaction of the Federal bonding requirement in most circumstances for notice-level activities—most operations at this level are bonded at "full cost bonding" under State laws. It follows that this rule will have an effect on notice-level activities in primarily the four States mentioned above. The effects on activities in these States cannot be assigned to specific localities within the States, and are presumed to be distributed evenly

throughout each State for purposes of this analysis.

BLM expects that corporate operators will use nationwide or statewide financial instruments, and that individual and other small operators will use project-specific financial instruments. The total economic effect of this rule is projected to be $17.10 million. The Determination of Effects includes details on how BLM reached this conclusion.

The benefits attributable to this rule result from avoiding future costs through mandatory bonding. While these savings are not predictable in the strict benefit-cost analysis sense, we, discuss them here. Primarily, savings will be derived from marginal activities with limited capitalization being postponed or not carried out, and failures will not occasion reclamation costs to the public. Remaining operations would be financially stronger and less likely to fail, and if bonds are in place, public costs of failure will be minimized. Other savings will be caused by the discouraging of illegal activities or non-mining industrial activities that are sometimes disguised as mining on public lands. The bonding requirement will tend to reduce the initiation of such activities and pay for costs of cleanup.

The final rule will not adversely affect the ability of the mineral industry to compete in the world marketplace, nor should it affect investment or employment factors locally. Major corporations, large-scale companies with world-wide operations and lines of credit with commercial banks can easily absorb any additional financial responsibility created by the rule.

"Junior companies," large limited partnerships or wholly-owned domestic subsidiaries of venture capital-based mining companies, many of which are based in Canada, tend to grow or merge into smaller major corporations, or to fail. Generally regarded as risk takers, they are often found in frontier areas and are willing to acquire properties overlooked or discarded by majors. Their options for complying with the rule will range from resorting to established lines of credit to posting company assets as collateral to internal cash flows. The amended dollar amounts for notices in the final rule will benefit these operators by encouraging them to minimize surface disturbance and reduce the amount of reclamation liability.

Individuals and other small operators will have the fewest options for funding financial guarantees: operating cash flows, individual or company assets. The likely effect of this rule will be to limit the number of notice-level operations for each such operator at any one time. They may elect to restrict activities under a notice to only the most promising mineral prospects or to attempt to option out the property to a junior or major company with a lease agreement that includes a clause requiring the lessee to obtain and maintain the necessary financial guarantee with BLM.

Compliance With Regulatory Flexibility Act

The Department has determined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the final rule will not have a significant economic impact on a substantial number of small entities. The reasons for this determination are stated here and may also be found in the Determination of Effects cited above.

For the purposes of this analysis, a small entity is considered to be an individual, small firm, or partnership at arm's length from the control of any parent companies. The juniors and majors (not considered small entities), as discussed in the previous paragraphs, and entities under their direct control, have access to lines of credit and internal corporate cash flows that are not available to small entities.

The economic effect on these small operators will be either to require them to acquire a financial guarantee for each new notice or avoid new operations on claims for which they do not acquire a financial guarantee. Since small entities often hold several properties, the practical effect will be the elimination of new activities on certain claims, especially the marginal ones, and the removal of some properties from their inventory of holdings, or else operators will attempt to lease the claim to a junior or major company that has the financial resources to post financial guarantees. Therefore, the short-term impact of this rule on small entities will be to curtail some of their prospective notice-level activities.

Compliance With Executive Order 12630

The Department certifies that this final rule does not represent a governmental action capable of interference with constitutionally protected property rights. It does not provide for the taking of any property rights or interests. Therefore, as required by Executive Order 12630, the Department of the Interior has determined that the rule would not cause a taking of private property.

Compliance With Paperwork Reduction Act

The information collection requirement(s) contained in this rule have been approved by the Office of Management and Budget for approval as required by 44 U.S.C. 3501 *et seq.*, and assigned clearance number 1004–0176.

Compliance With Unfunded Mandates Reform Act

BLM has determined that this rule is not significant under the Unfunded Mandates Reform Act of 1995, because it will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Further, this rule will not significantly or uniquely affect small governments.

Compliance With Executive Order 12988

The Department has determined that this rule meets the applicable standards provided in sections 3(a) and 2(b)(2) of Executive Order 12988.

List of Subjects in 43 CFR Part 3800

Administrative practice and procedure, Environmental protection, Intergovernmental affairs, Mines, Public lands-mineral resources, Reporting and recordkeeping requirements, Surety bonds, Wilderness areas.

For the reasons stated in the preamble, and under the authorities cited below, Part 3800, Subchapter C, Chapter II, Title 43 of the Code of Federal Regulations is amended as set forth below.

Dated: February 24, 1997.

Sylvia V. Baca,

Assistant Secretary of the Interior.

1. The authority citation for part 3800 is revised to read as follows:

Authority: 16 U.S.C. 351; 16 U.S.C. 460y–4; 30 U.S.C. 22; 31 U.S.C. 9701; 43 U.S.C. 154; 43 U.S.C. 299; 43 U.S.C. 1201; 43 U.S.C. 1740; 30 U.S.C. 28k.

Subpart 3809—Surface Management

2. The authority citation for 43 CFR subpart 3809 is removed.

3. Section 3809.0–9 is added to read as follows:

§ 3809.0–9 Information collection.

(a) The collections of information contained in subpart 3809 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1004–0176. BLM will use the information in regulating and monitoring mining and exploration operations on public lands. Response to requests for information is

mandatory in accordance with 43 U.S.C 1701 *et seq.* The information collection approval expires December 31, 1999.

(b) Public reporting burden for this information is estimated to average 16 hours per response for notices and 32 hours per response for plans of operations, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer (783), Bureau of Land Management, Washington, D.C. 20240, and the Office of Management and Budget, Attention Desk Officer for the Interior Department, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, referring to information collection clearance number 1004–0176.

§ 3809.1–8 [Removed]

4. Section 3809.1–8 is removed.

5. Section 3809.1–9 is revised to read as follows:

§ 3809.1–9 Financial guarantees.

(a) No operator or claimant shall—

(1) Initiate operations under a notice without providing the authorized officer certification of the existence of the appropriate financial guarantee as required by paragraph (c) through (f) of this section; or

(2) Conduct operations under a plan of operations without providing the authorized officer with the appropriate financial guarantee as required by paragraphs (g) through (j) of this section.

(b) No financial guarantee is required for operations that constitute casual use under § 3809.1–2.

(c) No operations conducted under a notice in accordance with § 3809.1–3 shall be initiated until the operator or mining claimant provides to the authorized officer a certification that a financial guarantee exists to ensure performance of reclamation in accordance with the requirements of § 3809.1–3(d). Each certification must be accompanied by a calculation of reclamation costs of the proposed activities covered by the notice, as if third party contractors were performing the reclamation after the site is vacated by the operator. This calculation must be certified at the operator's or mining claimant's expense by a third party professional engineer registered to practice within the State in which the activities are proposed. However, when the requirement for a financial guarantee is met by providing evidence of an instrument held by a State agency as provided in this paragraph, the certificaton of costs by a third party professional engineer is not required. The financial guarantee must be sufficient to cover 100 percent of the estimate of the costs of reclamation, as calculated above, required by State and Federal laws and regulations, and may be in any of the forms described in paragraphs (k) and (l) of this section. In calculating the amount of the financial guarantee, each acre of disturbance or fraction thereof shall require not less than $1,000. The financial guarantee may also be met by providing evidence of an appropriate instrument held or approved by a State agency pursuant to State law or regulations so long as the instrument is equivalent to that required by this section, is redeemable by the Secretary, acting by and through BLM, and covers the same area covered by the notice. The certification must accompany the notice submitted to the proper BLM office having jurisdiction over the land in which the claim or project area is located. Failure to submit a complete certification will render the notice incomplete and it will be returned by the authorized officer. The financial guarantee covered by the certification must be available, until replaced by another adequate financial guarantee with the concurrence of the authorized officer or until released by the authorized officer, for the performance of such reclamation as required by § 3809.1–3. Such reclamation shall also include all reasonable measures identified as the result of the consultation required by the authorized officer under § 3809.1–3(c). If there is a material change in any financial guarantee on which the operator or mining claimant's certification is based, the operator or mining claimant must submit an amended certification to the authorized officer within 45 days after the material change occurs.

(d) The certification submitted by the operator, mining claimant, or its authorized agent, for any operations conducted under a notice, shall include:

(1) The name, home address, office and home telephone numbers, and social security number or employer identification number of the operator, mining claimant, or authorized agent;

(2) A statement that the mining claimant or operator for whom the individual is submitting the certification will be responsible for the required reclamation;

(3) A statement that the authorized officer will be notified at the completion of reclamation operations to arrange for a final inspection;

(4) A statement that the financial guarantee in the amount of the estimated reclamation costs, as calculated under § 3809.1–9(c), or $1,000 per acre or fraction thereof of disturbance as described in the attached notice, whichever is greater, exists, followed by a complete description of the financial guarantee and its location;

(5) A statement that the financial guarantee in the amount of the estimated reclamation costs, as calculated under § 3809.1–9(c), or $1,000 per acre or fraction thereof of disturbance, whichever is greater, will be delivered to the authorized officer within 45 days of a demand for its surrender, following failure to complete reclamation, unless an additional period of time not to exceed 45 days is granted in writing by the authorized officer;

(6) A statement acknowledging that surrender of the financial guarantee will not release the operator, mining claimant, or authorized agent from responsibility to ensure completion of the reclamation should the amount of the guarantee be insufficient to complete all required reclamation;

(7) A statement acknowledging that release of the requirement to maintain the financial guarantee does not release or waive any claim the Bureau of Land Management may have against any person under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, or any other applicable statutes or any applicable regulations; and

(8) A statement acknowledging that non-existence of the financial guarantee or the failure to provide the guarantee upon demand for its surrender by the authorized officer may result in prosecution under 18 U.S.C. 1001, 43 U.S.C. 1733, or other appropriate authorities.

(e) Each statement required by paragraph (d) of this section to be included with the certification must be initialed and dated by the individual submitting the certification. Failure to initial all statements will result in the certification and the notice being returned as incomplete by the authorized officer.

(f) At any time, the authorized officer may require the notice-level operator or mining claimant to demonstrate the existence of the guarantee set out in the certification described in paragraph (c) of this section.

(g) Each operator or mining claimant who conducts operations under an approved plan of operations shall furnish to the authorized officer a

financial guarantee in an amount specified by the authorized officer. In determining the amount of the guarantee, the authorized officer shall consider the estimated cost of reasonable stabilization and reclamation of areas disturbed, including the cost to the BLM of conducting the reclamation, using either contract or government personnel.

(h) For activities conducted under a plan of operations, the financial guarantee must be sufficient to cover 100 percent of the costs of reclamation required by State and Federal statutes and regulations and calculated as if third party contractors were performing the reclamation after the site is vacated by the operator. This calculation must be certified at the operator's or mining claimant's expense by a third party professional engineer registered to practice within the State in which the activities are proposed, but when the requirement for a financial guarantee is met by providing evidence of an instrument held or approved by a State agency, the certification of costs by a third party professional engineer will not be required. This calculation must be agreed to by the authorized officer. In no case shall the financial guarantee be less than $2,000 per acre or fraction thereof.

(i) In lieu of requiring the financial guarantee as provided in paragraph (g) of this section, the authorized officer may accept evidence of an existing financial guarantee under State law or regulations, if it is redeemable by the Secretary, acting by and through the authorized officer, and held or approved by a State agency for the same area covered by the plan of operations, upon determining that the instrument held or approved by the State provides the same guarantee as that required by this section, regardless of the type of financial instruments chosen by the State. The operator or mining claimant proposing a plan of operations may offer for the approval of the authorized officer any of the financial instruments listed in paragraphs (k) and (l) of this section. The authorized officer may reject any of the submitted financial instruments, but will do so by decision in writing, with a complete explanation of the reasons for the rejection, within 30 days of the offering. If the State makes a demand against the financial guarantee, thereby reducing the available balance, the operator or mining claimant must replace the amount of reduced financial guarantee with another financial guarantee instrument acceptable under this subpart.

(j) In the event that an approved plan is modified in accordance with 3809.1–7, the authorized officer will review the initial financial guarantee for adequacy and, if necessary, require the operator or mining claimant to adjust the amount of the financial guarantee to cover the estimated cost of reasonable stabilization and reclamation of areas disturbed under the plan as modified. Operators or mining claimants with an approved financial guarantee may request the authorized officer to accept a replacement financial instrument at any time after the approval of an initial instrument. The authorized officer shall review the offered instrument for adequacy and may reject any offered instrument, but will do so by a decision in writing, with a complete explanation of the reasons for the rejection, within 30 days of the offering.

(k) Provided that the State Director has determined that it is a legal financial instrument within the State where the operations are proposed, the financial guarantee may take the form of any of the following:

(1) Surety bonds, including surety bonds arranged or paid for by third parties.

(2) Cash in an amount equal to the required dollar amount of the financial guarantee, to be deposited and maintained in a Federal depository account of the United States Treasury by the authorized officer.

(3) Irrevocable letters of credit from a bank or financial institution organized or authorized to transact business in the United States.

(4) Certificates of deposit or savings accounts not in excess of the maximum insurable amount as set by the Federal Deposit Insurance Corporation.

(5)(i) Any instrument listed in paragraph (k)(5)(i)(A) or (B) of this section having a market value of not less than the required dollar amount of the financial guarantee and maintained in a Securities Investors Protection Corporation insured trust account by a licensed securities brokerage firm for the benefit of the Secretary of the Interior, acting by and through the authorized officer.

(A) Negotiable United States Government, State and Municipal securities or bonds.

(B) Investment-grade rated securities having a Standard and Poor's rating of AAA or AA or an equivalent rating from a nationally recognized securities rating service.

(ii) Notwithstanding the provision in paragraph (c) of this section that an operator or mining claimant conducting operations under a notice need only provide the authorized officer with a certification of the existence of the required financial guarantee, and notwithstanding the provision in paragraph (g) of this section that an operator or mining claimant conducting operations under an approved plan of operations must furnish the required financial guarantee to the authorized officer, any operator or mining claimant who chooses to use the instruments permitted under this paragraph (k)(5) in satisfaction of such provisions, must provide the authorized officer, prior to the initiation of such operations and by the end of each quarter of the calendar year thereafter, a certified statement describing the nature and market value of the instruments maintained in that account, and including any current statements or reports furnished by the brokerage firm to the operator or mining claimant concerning the asset value of the account.

(iii) The operator or mining claimant must review the market value of the account instruments by no later than December 31 of each year to ensure that their market value continues to be not less than the required dollar amount of the financial guarantee. When the market value of the account instruments has declined by more than 10 percent of the required dollar amount of the financial guarantee, the operator or mining claimant must, within 10 days after its annual review or at any time upon the written request of the authorized officer, provide additional instruments, as defined in paragraphs (k)(5)(i)(A) and (B), to the trust account so that the total market value of all account instruments is not less than the required dollar amount of the financial guarantee. The operator or mining claimant must send a certified statement to the authorized officer within 45 days thereafter describing the actions taken by the operator or mining claimant to raise the market value of its account instruments to the required dollar amount of the financial guarantee. The operator or mining claimant must include copies of any statements or reports furnished by the brokerage firm to the operator or mining claimant documenting such an increase.

(iv) Whenever, on the basis of a review conducted under paragraph (k)(5)(iii) of this section, the operator or mining claimant ascertains that the total market value of its trust account instruments exceeds 110 percent of the required dollar amount of the financial guarantee, the operator or mining claimant may request and the authorized officer will authorize a written release of that portion of the account that exceeds 110 percent of the required financial guarantee, if the operator or mining claimant is in compliance with the terms and

conditions of its notice or approved plan of operations.

(l) In place of the individual financial guarantee on each separate operation, a blanket financial guarantee covering statewide or nationwide operations may be furnished at the option of the operator or mining claimant, if the terms and conditions are determined by the authorized officer to be sufficient to comply with the regulations in this subpart.

(m) When all or any portion of the reclamation has been completed in accordance with a notice submitted pursuant to § 3809.1–3 or an approved plan of operations, the operator or mining claimant may notify the authorized officer that such reclamation has occurred and may request a reduction in the financial guarantee or BLM approval of the adequacy of the reclamation, or both. Upon any such notification, the authorized officer will promptly inspect the reclaimed area with the operator. The authorized officer will notify the operator, in writing, whether the financial guarantee can be reduced, the reclamation is acceptable, or both. The authorized officer may reduce the financial guarantee by an appropriate amount, not to exceed 60 percent of the total estimated costs of reclamation as calculated in accordance with paragraph (c) or (h) of this section, if the authorized officer determines that a portion of the reclamation has been completed in accordance with applicable requirements, including, but not limited to, requirements for backfilling, regrading, establishment of drainage control, and stabilization and neutralization of leach pads, heaps, leach-bearing tailings, and similar facilities. The authorized officer will not release that portion of the financial guarantee equal to 40 percent of the total estimated costs of reclamation until the area disturbed by operations has been revegetated to establish a diverse, effective, and permanent vegetative cover, and until any effluent discharged from the area has met, without violations and without the necessity for additional treatment, applicable effluent limitations and water quality standards for not less than 1 full year. Any such release of the financial guarantee does not release or waive any claim BLM may have against any person under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, or under any other applicable statutes or any applicable regulations.

(n) If an operator or mining claimant refuses or is unable to conduct reclamation as provided in the reclamation measures incorporated into its notice or approved plan of operations or the regulations in this subpart, if the terms of the notice or decision approving a plan of operation are not met, or if the operator or mining claimant defaults on the conditions under which the financial guarantee rests, the authorized officer shall take the following action to require the forfeiture of all or part of a financial guarantee for any area or portion of an area covered by the financial guarantee:

(1) Send written notification by certified mail, return receipt requested, to the operator or mining claimant that provided the financial guarantee, and the surety on the financial guarantee, if any, and the State agency holding the financial guarantee, if any, informing them of the decision to require the forfeiture of all or part of the financial guarantee. The notification must include the reasons for the forfeiture and the amount to be forfeited. The amount shall be based on the estimated total cost of achieving the reclamation plan requirements for the area or portion of the area affected, including the administrative costs of the Bureau of Land Management.

(2) In the written notification, advise the operator or mining claimant and surety, if applicable, of the conditions under which forfeiture may be avoided. Such conditions may include, but are not limited to——

(i) Written agreement by the operator, mining claimant, or another party to perform reclamation operations in accordance with a compliance schedule which meets the conditions of the notice or decision approving a plan of operations and the reclamation plan, and a demonstration that such party has the ability to satisfy the conditions; or

(ii) Written permission from the authorized officer to a surety to complete the reclamation, or the portion of the reclamation applicable to the bonded phase or increment, if the surety can demonstrate an ability to complete the reclamation in accordance with the reclamation measures incorporated in a notice or approved plan of operations.

(o) In the event the operator or mining claimant fails to meet the requirements of the written notification provided under paragraph (n) of this section, the authorized officer will—

(1) Proceed immediately to collect the forfeited amount as provided by applicable laws for the collection of defaulted bonds or other debts if actions to avoid forfeiture have not been taken, or if an appeal has not been filed under § 3809.4, or if such appeal is filed and the decision appealed is confirmed.

(2) Use funds collected from financial guarantee forfeiture to implement the reclamation plan, or portion thereof, on the area or portion of the area to which bond coverage applies.

(p)(1) In the event the estimated amount forfeited is insufficient to pay for the full cost of reclamation, the operator or mining claimant is liable for the remaining costs. The authorized officer may complete or authorize completion of reclamation of the bonded area and may recover from the operator or mining claimant all costs of reclamation in excess of the amount forfeited.

(2) In the event the amount of financial guarantee forfeited was more than the amount necessary to complete reclamation, the unused funds shall be returned, within a reasonable amount of time, by the authorized officer to the party from whom they were collected.

(q) When a mining claim is patented, the authorized officer will release the operator or mining claimant from the portion of the financial guarantee that applies to operations within the boundaries of the patented land. The authorized officer shall release the operator or mining claimant from the remainder of the financial guarantee, including the portion covering approved means of access outside the boundaries of the mining claim, when the operator or mining claimant has completed acceptable reclamation. However, existing access to patented mining claims, if across Federal lands, shall continue to be regulated under the approved plan and shall include a financial guarantee. The provisions of this paragraph do not apply to patents issued on mining claims within the boundaries of the California Desert Conservation Area (see § 3809.6).

6. Section 3809.3–1 is amended by revising paragraph (b) to read as follows:

§ 3809.3–1 Applicability of State law.

* * * * *

(b) Each State Director will publish a notice identifying all legal financial guarantees that may be accepted by any authorized officer under his or her jurisdiction, after consultation with the appropriate State authorities to determine which of the financial instruments in § 3809.1–9(k) are allowable under State law to satisfy the financial assurance requirements relating to the reclamation requirements of that State. This list will be updated annually.

* * * * *

7. Section 3809.3–2 is amended by revising paragraph (e) and adding paragraph (f) to read as follows:

§ 3809.3–2 Noncompliance.

* * * * *

(e) An operator or mining claimant who compiles a record of noncompliance is one who has been served with a notice of noncompliance, whose response period has passed, and who has not commenced the actions required by the authorized officer within the time frames set forth in the notice of noncompliance. An operator or mining claimant with a record of noncompliance will continue in noncompliance status until the actions required in the notice of noncompliance have been completed. Any operator or mining claimant with a record of noncompliance must submit a plan of operations within 30 days under § 3809.1–9 of this subpart for all existing and subsequent operations that would otherwise be conducted pursuant to a notice under § 3809.1–3 of this subpart. Operators or mining claimants with a record of noncompliance will be required to post financial guarantees with the authorized officer under § 3809.1–9 within 90 days after notification for all existing disturbance for which said operators or mining claimants are responsible. Failure to post such financial guarantees within the prescribed 90 days will result in the withdrawal of approval of all existing plans of operation, except that the authorized officer may approve actions proposed by an operator with a record of noncompliance to resolve the cause of the noncompliance or to protect public safety or health or prevent further unnecessary or undue environmental degradation. Financial guarantees held by a State will not be acceptable for purposes of this section, and the calculation must be certified at the operator's or mining claimant's expense by a third party professional engineer registered to practice within the State in which the activities are proposed, and agreed to by the authorized officer. The requirements of this paragraph continue in force until the operator or mining claimant has come into and remained in compliance with them and the regulations of this subpart for a period of not less than 1 calendar year but not more than 3 calendar years. The duration of the requirement will be determined by the State Director.

(f)(1) Any person constituting an operator, mining claimant, or its authorized agent, who knowingly and willfully violates any provision of this subpart is subject to arrest and trial by a United States magistrate and, if convicted, shall be subject to a fine of not more than $100,000, or the alternate fine provided for in the applicable provisions of 18 U.S.C. 3571, or imprisoned for no more than twelve months, or both.

(2) Any organization constituting an operator, mining claimant, or its authorized agent, that knowingly and willfully violates any provision of this subpart is subject to criminal prosecution and, if convicted, shall be subject to a fine of not more than $200,000, or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571.

[FR Doc. 97–5016 Filed 2–27–97; 8:45 am]

BILLING CODE 4310–84–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 22

[CC Docket No. 90–6; FCC 96–56]

Amendment of Part 22 of the Commission's Rules To Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and To Modify Other Cellular Rules

AGENCY: Federal Communications Commission.

ACTION: Further memorandum opinion and order on reconsideration.

SUMMARY: In this *Memorandum Opinion and Order on Reconsideration*, the Commission denies the petitions for reconsideration and petitions for partial reconsideration of the Commission's *Third Report and Order and Memorandum Opinion and Order on Reconsideration* 57 FR 53446, November 10, 1992 in this Docket.

FOR FURTHER INFORMATION CONTACT: Ramona Melson, Commercial Wireless Division, Wireless Telecommunications Bureau, (202) 418–7240.

SUPPLEMENTARY INFORMATION: This *Further Memorandum Opinion and Order on Reconsideration* in CC Docket No. 90–6, adopted on February 13, 1996 and released on January 31, 1997, is available for inspection and copying during normal business hours in the FCC Reference Center, Room 575, 2000 M Street N.W, Washington, D.C. The complete text may also be purchased from the Commission's copy contractor, International Transcription Service, Inc. 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857–3800. Synopsis of *Further Memorandum Opinion and Order on Reconsideration*

I. Introduction

1. By these actions, we respond to petitions for reconsideration and partial reconsideration of the *Third Report and Order on Reconsideration and Memorandum Opinion and Order on Reconsideration* 58 FR 27213, May 7, 1993 in this docket. Applicants Against Lottery Abuses (AALA) and the Committee for Effective Cellular Rules (CECR) have filed petitions for reconsideration of the *Third Report and Order*, 58 FR 27213, May 7, 1993 and Cellular Information Systems, Inc., Debtor in Possession (CIS), has filed a petition for partial reconsideration (CIS Petition) of the *Third Report and Order* 58 FR 27213, May 7, 1993. In addition, we have before us five petitions for reconsideration and three petitions for partial reconsideration of our *Memorandum Opinion and Order on Reconsideration* 58 FR 11799, March 1, 1993. We also received a request by PetroCom and Coastel for expedited action on the CIS petition (PetroCom/Coastel Request). For the reasons stated below, we deny the requests for reconsideration and partial reconsideration of the *Third Report and Order and the Memorandum Opinion and Order* 58 FR 27213, May 7, 1993. We dismiss the request for expedited action as moot.

2. As a related matter, we note that PetroCom and Coastel (collectively, "petitioners") filed petitions for review with the United States Court of Appeals for the District of Columbia Circuit challenging Sections 22.903(a) and 22.903(d)(1) of the Commission's rules. Petitioners contend, inter alia, that the Commission promulgated a consent requirement for de minimis extensions under Section 22.903(d)(1) without providing proper notice and opportunity for comment as required under the Administrative Procedure Act (APA), 5 U.S.C. § 553. On May 13, 1994, the court denied the petition with respect to petitioners' claim that proper notice and comment was not provided because another party, CIS, had already filed a petition for reconsideration with the Commission alleging similar violations and the petition had not yet been resolved. This *Further Memorandum Opinion and Order* addresses the notice and comment issues raised by the CIS petition and the comments filed by petitioners in support of the CIS petition. Other issues raised by petitioners and the court will be addressed in separate orders.

II. Background

3. The first licensee of a cellular radio system authorized on a channel block in

Appendix A – Exhibit 2

BLM Bond Policy Chronology

1983 to 1986

1983	Instruction memorandum establishing bonding policy of requiring bonds only when an operator establishes a record of non-compliance. Prepared after inquiry from field office regarding bond form reveals that Cyprus Amoco Minerals was asked to post a total of four bonds (two state, one FS, and one BLM) for the same operation (Thompson Creek Molybdenum Mine).
26 July 1985	Final BLM manual section 3809 released, includes the 1983 bonding policy.
27 Mar 1986	GAO report "Public Lands: Interior Should Ensure Against Abuses from Hardrock Mining", GAO/RCED-86-48, is critical of BLM bonding policy and calls for mandatory bonding of all operations which cause "significant surface disturbance".
Summer 1986	Congressional committees prepare language mandating bonds for inclusion in the budget. The language is rescinded with an understanding that a BLM Task Force will evaluate the issue.
3 June 1986	DOI advises appropriate congressional committees that a BLM Mining Law Task Force will evaluate the issue.
25 Sep 1986	Separate BLM Oil and Gas Task Force on oil & gas bonding makes recommendations for mandatory bonding for surface management activities. The recommendations are rejected by WO.

1987

1 May 1987	Bonding Task Force final report sent to appropriate Congressional committees. Task force finds that non-compliance is not widespread. TF recommends: - certain types of plan level activities and plan level activities in sensitive areas (eg DWAs, WSRs, ACECs, etc) be bonded on a discretionary basis. - allow increased flexibility in operator's choice of financial instruments, - allow for less than full bonding, - increase inspection and enforcement, - modify the surface management rules to add a list of activities that would require a plan, allowing them to be bonded (keep the sensitive area concept and the threshold).
24 August 1987	GAO report on the "successful" FS bonding program.
26 August 1987	Modified bond policy allows for discretionary bonding of plan level operations involving mining activities. Exploration activities at plan level may not be bonded. Bonding for notices still not authorized by 3809 rules. Long term goal of modifying bonding provisions of 3802/3809 rules is set out.
October 1987	Congressional recognition of the Mining Law Task Force's work, including language modifying parts of FLPMA relative to bonding.
21 October 1987	GAO again critical of BLM bonding policy with report entitled, "Federal Land Management: Limited Action taken to Reclaim Hardrock Mine Sites."

1989 (Continued)

December 1989 — TF Final Report recommends, among other things, mandatory bonding for all plan level activities.

6 Dec 1989 — Follow - up briefing, Director Jamison "accepted" the concept of mandatory self-certification of financial assurances by operators and mining claimants. The options presented included:

1. ELIMINATE THE THRESHOLD. Retain only two levels of activity.
2. REDUCE THE THRESHOLD ACREAGE. Retain the three levels of activity
3. REDEFINE THE THRESHOLD Retain three levels of activity; Casual Use, Exploration, and Development/Mining Operations
4. RETAIN THRESHOLD WITH ADDITIONS. Retain the three levels of activity, add types of operations that would prompt a mandatory plan and add new land categories that would prompt a mandatory plan.
5. DEVELOP MANDATORY FINANCIAL GUARANTEES FOR ALL OPERATORS. Retain the three levels of activity Require all operators to certify that they have a financial guarantee, regardless of activity level. BLM would not accept or reject the certification.

The Director tentatively accepted the concept of Option Number 5 and asked for a fleshed out proposal.

1988 to 1989

11 Feb. 1988	DOI responds to report stating that the GAO proposal would be horrendously expensive for the BLM, on the order of $4.6 million.
8 April 1988	GAO issues a report on coal bonding which concludes that coal surety bonds have become difficult to obtain, leading to a liquidity crisis for small operators.
14 Sep 1988	AS/LM letter to Congressman Synar discusses the BLM position in light of the April GAO report. All criticism from Congressman Synar ceases.
11 Jan 1989	Mining Law Task Force chartered. First task is to respond to Congressman Miller on duck kills at gold mines using cyanide.
7 Mar 1989	Oversight hearing on Bonding and Reclamation.
Spring, Summer Fall, 1989	Pursuant to Director's directions the Task Force evaluates a variety of short term issues, including bonding options.
7 Nov 1989	Task Force findings presented to Bureau Management Team in Salt Lake City. BMT accepts tentative recommendations, with changes from draft report.
22 Nov 1989	The first meeting with the Director to gain a better understanding of the Director's motivations for seeking the bonding of all notice level operations. Director Jamison seeks to shift the mining law debate from environmental issues to tenure and royalty issues. Director Jamison directed WO E&MR Staff to: 1. Further examine various bonding alternatives, 2. Discuss these alternatives in a second meeting, 3. <u>Begin implementation</u> of the Task Force recommendations including mandatory bonding of all plans, and 4. Delay action on TF/BMT Item No. Seven (Bonding Notices) until Jan 1990.

1990

11 Jan 1990	Bonding proposal presented to the Director and was accepted. The general outline of the accepted proposal was as follows: 1. Resembles automobile insurance certification: eg- no approval, simply required to have. 2. Self-actuating, not requiring BLM approval, therefore no federal action. 3. Certification of financial guarantee must accompany notice when filed.The failure to provide certification will result in the return of the filing as incomplete. 4. Operator/agent assumes personal liability for doing the required reclamation/stabilization. 5. Failure to have or provide the financial guarantee results in prosecution. 6. Surrender of instrument does not absolve the operator of the 3liability to reclaim. 7. Broadens the scope of acceptable bonding instruments for both notice and plan level.
26 Jan 1990	AD,E&MR transmits revised bonding policy to the field. Policy requires mandatory bonding, at 100% of the cost required to reclaim, for all plan level activities. Policy is withdrawn by Director, due to Congressional and Departmental concerns within 48 hours.
8 Feb 1990	Briefing material sent to SDs along with request for additional input to the bonding policy.
8 March 1990	AD,E&MR accepts concept of bond caps to reduce impacts on industry.

1990 (Continued)

28 March 1990	Director Jamison views changed policy, gives tentative OK. Bonding for Cyanide risk deferred to rules. Bond policy is revised to incorporate caps of $1,000 (exploration) & $2,000 (mining) per acre.
2 April 1990	Revised bond policy sent to the field for comments. Comments reveal dissatisfaction with the bonding caps.
April 1990	Senate Oversight Hearings, Director Jamison announces intent to require mandatory bonding of all operators, including notice level operators.
27 April 1990	AD,E&MR accepts Spang proposal to make bond caps temporary, proposed rules to be used to air all of the related issues, including bond caps.
8 May 1990	Further revisions to bond policy discussed and decided upon by Director Jamison. General OK for outreach planning.
13 July 1990	Outreach planning meeting. Hill briefings week of 23rd. NPLAC to be briefed. Courtesy copy to go to AS/PBA. Copies to SDs.
23 July 1990	Individual briefings for Senate staff Patty Kennedy, Lisa Vhemas, Debra Estes.
30 July 1990	Director Jamison directs bond rules package ready to go to Department by August 21.
August 1990	Briefing for NWF and Public Resources Associates on bonding policy. Concern raised about the bond caps.
7 August 1990	Briefing for mineral industry representatives in Denver, CO. Overall response is one of "accepting the inevitable"
08 August 1990	Briefing for the AS/LM on the bonding policy, go ahead given.
13 August 1990	Briefing for additional environmental groups (Wilderness Society, Minerals Policy Center, NWF, etc.) in Washington. Bond caps again raised as an issue.
14 August 1990	Final bonding policy signed by Director and press briefing held.

28 August 1990	Proposed Rule package sent to OMB.
	1991
?? June 1992	OMB clears rule for publication.
11 July 1991	Rules Published as Proposed in Federal Register.
September 1992	Comment Period extended.
9 October 1991	Comment period closes.
	1992
Jan-Jun 1992	Final rules language under rview in BLM.
06 August 1992	Exemption from Regulatory Moratorium requested.
13 August 1992	Exemption from Regulatory Moratorium received.
Aug-Sept 1992	Final rules package readied for Federal. Register.

Appendix A – Exhibit 3

2ND DOCUMENT of Level 1 printed in FULL format.

DEPARTMENT OF THE INTERIOR
Bureau of Land Management
AGENCY: Bureau of Land Management, Interior.

43 CFR Part 3800
Mining Claims Under the General Mining Laws; Surface Management

[AA-680-00-4130-02]
RIN 1004-AB36

56 FR 31602

July 11, 1991

ACTION: Proposed rule.

SUMMARY: The Bureau of Land Management proposes to amend its financial guarantee (bonding) policies found in the surface management regulations at 43 CFR subpart 3809. The proposed rule would require submission of financial guarantees for reclamation for all operations greater than casual use, create additional financial instruments to satisfy the requirement for a financial guarantee, and amend the noncompliance section of the regulations to require the filing of plans of operations by operators who establish a record of noncompliance. In addition, the proposed rule would remove @ 3809.1-8 on existing operations, which is no longer applicable because all activities that were in operation in 1980 and continue in operation have now complied with this section.

DATES: Comments should be submitted by September 9, 1991. Comments received or postmarked after the above date may not be considered in the decisionmaking process on the final rulemaking. Comments should be sent to: Director (140), Bureau of Land Management, room 5555, Main Interior Building, 1849 C Street, NW., Washington, DC 20240. Comments will be available for public review at the above address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Richard Deery, (202) 208-4147.

TEXT: SUPPLEMENTARY INFORMATION: The existing regulations of the Bureau of Land Management (BLM) do not require operators to post bonds for operations that constitute casual use or, because they disturb 5 acres or less, are conducted under a notice under 43 CFR 3809.1-3. Administration of the surface management program under these regulations for the past 10 years has led BLM to conclude that bonding or other financial or surety arrangements would be useful additions to the tools available to land managers to protect against unnecessary or undue degradation of the land caused by operations under section 3809.1-3 disturbing 5 acres of land or less (notice-level operations). In addition, because surety bonds have become increasingly unavailable, it is necessary to establish alternative financial guarantee arrangements.

Mandatory Financial Guarantees for All Operations

The posting of a financial guarantee would be made mandatory under this proposed rule for all operations other than casual use. The requirement for a financial guarantee would be extended to operations proceeding under a notice in accordance with @ 3809.1-3, those operations that disturb 5 acres or less per calendar year. All other provisions of the notice would remain unchanged. A notice-level operator would be required to certify the existence of a financial guarantee in the amount of $5,000.

Operators proceeding under a plan of operations in accordance with @ 3809.1-4 (plan-level) woula be required to provide the authorized officer with a financial guarantee sufficient to cover the performance of the reclamation required by @ 3809.1-3(d) and under the approved reclamation plan required by @ 3809.1-5(c)(5). The financial guarantee would be required to take into account the cost of completing the reclamation should the operator fail to reclaim. To reduce the impacts on the industry, bond amounts would be capped at $1,000 per acre for exploration activities and $2,000 for mining activities. The proposed rule would define both categories of activity. Comments are specifically requested on the adequacy of these definitions. These bond caps would be intended to be in effect for 3 years after promulgation of the final rule, and their adequacy would be reeevaluated at that time. The final rule is also expected to include provision for variations in or phasing in of its effective date, if determined necessary by the respective State Directors of the BLM to cooperate with State agencies pursuant to the negotiation and implementation of cooperative agreements or the pendency of State legislation and regulations relating to financial guarantees.

The exception to the caps will be those portions of operations that make use of cyanide or other leachates, which would be required to post a financial guarantee in an amount equal to 100 percent of the cost of reclamation.

The purpose of the financial guarantee would be to ensure performance of the reclamation. For notice-level operations, the requirement of a financial guarantee would be satisfied by the filing of a certification of the existence of a financial guarantee in the specified amount. Failure to submit the certification with the notice would cause the notice to be rejected as incomplete. In contrast to the certification requirements placed on notice-level operations, operators proposing plan-level activities would be required to submit the financial guarantee itself, rather than just a certification, to BLM. It would be reviewed by the authorized officer and approved or rejected.

Once submitted to the authorized officer, financial guarantees would be required to remain available until the authorized officer has released the operator from any further responsibility for the reclamation. Any failure to complete the required reclamation could result in the attachment of the guarantee. All guarantees described in a certification by notice-level operators would be subject to periodic physical inspection by the authorized officer in order to verify the existence of the financial guarantee. Failure to have the financial guarantee promised by the certification might subject the individual making the filing to criminal prosecution under the appropriate Federal statutes.

Diversification of Instruments Available for Financial Guarantees

The proposed regulations significantly expand the number and types of instruments available to the operator when filing a financial guarantee. The existing regulations allow BLM to hold only three types of guarantees: cash, surety bonds, and negotiable United States securities. In lieu of these instruments, existing regulations also allow BLM to acknowledge and honor a State-held bond.

Use of all of the financial instruments provided for in the existing regulations would be retained under this proposal. Additional instruments would be made available by providing for acceptance by the authorized officer of all available financial instruments within a State. State Directors would consult with the appropriate State authorities to identify and publish a list of acceptable instruments. The purpose of this broadening would be to provide operators with options other than cash, surety bonds, or negotiable United States securities, because the traditional surety bonds have been too limited in availability. In doing so operators may be able to structure financial guarantees in a fashion that would not be excessively costly or damaging to a firm's liquidity and thus harm its ability to continue exploration and development activities on Federal Lands or to reclaim disturbed land.

The traditional surety bond is generally no longer available. This lack of availability was clearly documented in the 1988 General Accounting Office report, GAO/PEMD-88-17, Surface Mining: Cost and Availability of Reclamation Bonds. This report investigated the availability of surety bonds as required by the Surface Mining Control and Reclamation Act of 1977. The report found that surety bonds were much harder to obtain than when the existing regulations were promulgated, because of tightening of requirements in the surety industry during the 1980's, and that even when obtainable they required large amounts of collateral. The report concluded that small and mid-sized coal operators face a liquidity crisis when forced to use high cost alternatives to surety bonds or to offer large amounts of collateral to obtain a surety bond. Available data suggest that the same conclusions would be reached in any study of the locatable mineral industry.

While the proposed rule would broaden the types of acceptable financial instruments, it would not include any proposals for BLM managed bond pools, insurance funds, reclamation sinking funds, and the like. Such forms of guarantee would require legislation. However, public comments are invited on these forms of guarantee and their potential applicability to the locatable mineral industry. It is possible that the State of Alaska's recently enacted bond pool may provide a suitable model for other States or for a Federal version. The proposed rule also does not provide for self-bonding. However, the BLM is considering self-bonding as a potential tool. Readers are referred to the self-bonding rules of the Office of Surface Mining Reclamation and Enforcement at 30 CFR 800.23. Public comments are invited on the potential adoption of self-bonding.

Noncompliance

The proposed rule would amend the noncompliance section to define when an operator has established a record of noncompliance, to require the filing of a

mandatory financial guarantee with BLM, and to require all existing and subsequent notice-level activity to be conducted under an approved plan of operations. These changes would incorporate language required by Public Law 99-500, October 18, 1986, 100 Stat. 1783-243, and Public Law 99-591, October 30, 1986, 100 Stat. 3341-243.

The principal author of this proposed rule is Richard Deery of the Division of Mining Law and Salable Minerals, assisted by the staff of the Division of Legislation and Regulatory Management, BLM.

It is hereby determined that this proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment, and that no detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is required.

The Department of the Interior has determined under Executive Order 12291 that this document is not a major rule, and under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that it will not have a significant economic impact on a substantial number of small entities. Additionally, as required by Executive Order 12630, the Department has determined that the rule would not cause a taking of private property.

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 et seq. The collection of this information will not be required until it has been approved by the Office of Management and Budget.

List of Subjects in 43 CFR Part 3800

Administrative practice and procedure, Environmental protection, Intergovernmental affairs, Land Management Bureau, Mines, Public lands-mineral resources, Reporting and recordkeeping requirements, Surety bonds, Wilderness areas.

Under the authorities cited below, part 3800, subchapter C, chapter II, title 43 of the Code of Federal Regulations is proposed to be amended as set forth below.

PART 3800 -- MINING CLAIMS UNDER THE GENERAL MINING LAWS (AMENDED)

1. The authority citation for part 3800 is revised to read as follows:

Authority: Act of April 25, 1812 (43 U.S.C. 2); Act of September 28, 1850 (43 U.S.C. 1201); Act of July 4, 1966 (30 U.S.C. 21); Lode Law of 1866 (30 U.S.C. 22 et seq.); Placer Act of 1870 (30 U.S.C. 36); General Mining Law of 1872, as amended (30 U.S.C. 21 et seq.); Stockraising Homestead Act (43 U.S.C. 299); Act of December 22, 1928 (43 U.S.C. 1068 et seq.); Act of April 23, 1932 (43 U.S.C. 154); Act of June 18, 1934 (25 U.S.C. 463); Act of July 16, 1946, Reorganization Plan No. 3 (43 U.S.C. 1457); Act of April 8, 1948 (62 Stat. 162); Alaska Public Sale Act of 1949 (43 U.S.C. 687b-687b-4); Act of July 23, 1955 (30 U.S.C. 621 et seq.); Wilderness Act 16 U.S.C. 1131-1136; Wild and Scenic Rivers Act (16 U.S.C. 1271-1287); Mining and Minerals Policy Act of 1970 (30 U.S.C. 21a); Mining in the Parks Act of 1976 (16 U.S.C. 1901); Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.); National Materials and Minerals Policy,

Research, and Development Act of 1980 (30 U.S.C. 1601); and Freedom of Information Act, 5 U.S.C. 552. 43 U.S.C. 1782, unless otherwise noted.

Subpart 3809 -- Surface Management [Amended]

2. The authority citation for 43 CFR subpart 3809 continues to read as follows:

Authority: Secs. 2319 (30 U.S.C. 22); 2478 (43 U.S.C. 1201) of the Revised Statutes, and the Federal Land policy and Management Act of 1976 (43 U.S.C. 1701 et seq.).

3. Section 3809.0-5 is amended by redesignating paragraphs (c), (d), (e), (f), (g), (h), (i), (j), and (k) as (d), (e), (f), (h), (i), (j), (k), and (l), and adding paragraphs (c) and (g) to read as follows:

@ 3809.0-5 Definitions.

* * * * *

(c) Exploration operations means all activities not expressly described as mining operations, for purposes of determining appropriate bond amounts.

* * * * *

(g) Mining operations means any one of the following or any combination of the following activities:

(1) Any combination of underground excavation or removal of overburden from a mineral deposit by strip, open pit, dredge, placer, or quarry methods that leads to the direct removal of minerals from the exposed deposit;

(2) Operations removing overburden by trenching or test-pitting to expose possible indications of mineralization; or

(3) Recovery of mineral values by surface or in-situ leaching methods.

* * * * *

@ 3809.1-8 [Reserved]

3. Section 3809.1-8 is removed in its entirety and the designation reserved for future use.

4. Section 3809.1-9 is revised to read as follows:

@ 3809.1-9 Financial guarantees.

(a) No financial guarantee shall be required for operations that constitute casual use under @ 3809.1-2 of this subpart.

(b) No operation conducted under a notice in accordance with @ 3809.1-3 shall be initiated until the operator provides to the authorized officer a certification that a financial guarantee exists to ensure performance of reclamation in accordance with the requirements of 3809.1-3(d) of this subpart. The financial guarantee shall be for $5,000 and may be in any of the forms described in paragraph (k) of this section. The financial guarantee may also be met by providing evidence of an appropriate instrument held by a State agency pursuant to State law or regulations so long as the coverage would be equivalent to that required by this section. The certification shall accompany the notice submitted to the proper BLM office. Failure to submit a complete certification will render the notice incomplete and it will be returned by the authorized officer. The funds guaranteed by the certification shall be available, until released by the authorized officer, for the performance of such reclamation as required by @ 3809.1-3 of this subpart. Such reclamation shall include all reasonable measures identified as the result of the consultation required by the authorized officer under @ 3809.1-3(c).

(c) The certification submitted by the operator, mining claimant, or its agent shall include:

(1) The name, home address, and office and home telephone numbers of the operator, mining claimant, or agent;

(2) A statement that the individual submitting the certification will be responsible for the required reclamation;

(3) A statement that the authorized officer will be notified at the completion of reclamation operations to arrange for a final inspection;

(4) A statement that the financial guarantee in the amount of $5,000 exists, followed by a complete description of the financial guarantee and its location;

(5) A statement that the financial guarantee in the amount of $5,000 is to be delivered to the authorized officer within 45 days of a demand for its surrender, following failure to complete reclamation, unless an additional period of time not to exceed 45 days is granted in writing by the authorized officer;

(6) A statement acknowledging that surrender of the financial guarantee will not release the operator, mining claimant, or agent from personal responsibility to ensure completion of the reclamation should the amount of the guarantee be insufficient to complete all required reclamation; and

(7) A statement acknowledging that non-existence of the financial guarantee or the failure to provide the guarantee upon demand for its surrender by the authorized officer may result in prosecution under 18 U.S.C. 1001, 43 U.S.C. 1733, or other appropriate authorities.

(d) Each statement required by paragraph (c) of this section within the certification shall be initialed and dated by the individual submitting the certification. Failure to initial all statements will result in the certification and the notice being returned as incomplete by the authorized officer.

(e) At any time the authorized officer may require the operator to demonstrate the existence of the guarantee set out in the certification.

(f) Each operator who conducts operations under an approved plan of operations as described in @ 3809.1-5 of this subpart shall furnish a financial guarantee in an amount specified by the authorized officer. In determining the amount of the guarantee, the authorized officer shall consider the estimated cost of reasonable stabilization and reclamation of areas disturbed, including the cost to the BLM of conducting the reclamation, using either contract or government personnel.

(g)(1) The maximum amount of a financial guarantee for exploration operations held by the authorized officer shall be $1,000 per acre.

(2) The maximum amount of a financial guarantee for mining operations held by the authorized officer shall be $2,000 per acre.

The maximum financial guarantee amounts in subparagraphs (g) (1) and (2) of this section shall not apply to financial guarantees required of operators who have failed to take necessary actions on a notice of noncompliance and are subject to the provisions of @ 3809.3-2(e).

(h) Operators who utilize cyanide or other leachates will be required to post a financial guarantee equal to 100 percent of the authorized officer's estimate of the costs of reclamation required by State or Federal regulations and included in the reclamation plan, including neutralization, for those portions of the operation that utilize cyanide or other leachates. The affected areas include leach heaps, pads or dumps, or those parts of an operation discharging cyanide-bearing tailings and fluids to impoundments or ponds. This requirement will only apply to those portions of the operations encumbered by the listed facilities. All other portions of the operation will be subject to the provisions of this subpart as may be appropriate. The various forms of vat leach facilities, metal recovery facilities, and refining facilities will not be included in this category.

(i) The authorized officer may accept evidence of an existing financial guarantee pursuant to State law or regulations and held by a State agency for the same area covered by the plan of operations, upon a determination that the coverage would be equivalent to that provided in this section. The operator proposing a plan of operations may offer for the approval of the authorized officer any of the financial instruments listed in paragraph (k) of this section. In addition to those instruments, an operator proposing a plan of operations may offer a first-lien security interest for mining equipment. The authorized officer may reject any of the submitted financial instruments, but will do so by decision in writing, with a complete explanation of the reasons for the rejection, within 30 days of the offering.

(j) In the event that an approved plan is modified in accordance with @ 3809.1-7 of this subpart, the authorized officer shall review the initial financial guarantee for adequacy and, if necessary, adjust the amount of the financial guarantee to cover the estimated cost of reasonable stabilization and reclamation of areas disturbed under the plan as modified.

(k) Provided that the State Director has determined that it is a legal financial instrument within the State where the operation is proposed, the financial guarantee may take the form of any of the following:

(1) Surety bonds, including third party surety bonds.

(2) Cash in an amount equal to the required dollar amount of the financial guarantee deposited and maintained in a Federal depository account of the United States Treasury, as directed by the authorized officer.

(3) Irrevocable letters of credit from a bank or financial institution organized or authorized to transact business in the United States.

(4) Certificates of deposit or savings accounts not in excess of the maximum insurable amount as set by the Federal Deposit Insurance Corporation.

(5) First mortgages, first deeds of trust, or first-lien security interests for mining or non-mining fee simple real property, excluding personal property.

(6) United States Government, State and Municipal bonds or negotiable government securities having a market value at the time of deposit of not less than the required dollar amount of the financial guarantee.

(7) Investment-grade rated securities having a rating of AAA or AA or an equivalent rating issued by a nationally recognized securities rating service.

(l) In place of the individual bond on each separate operation, a blanket financial guarantee covering statewide or nationwide operations may be furnished at the option of the operator, if the terms and conditions are determined by the authorized officer to be sufficient to comply with these regulations.

(m) When all or any portion of the reclamation has been completed in accordance with the approved plan, the operator may notify the authorized officer that such reclamation has occurred and may request a reduction in the financial guarantee or BLM approval of the adequacy of the reclamation, or both. Upon any such notification, the authorized officer will promptly inspect the reclaimed area with the operator. The authorized officer shall then notify the operator, in writing, whether the reclamation is acceptable. When the authorized officer has accepted as completed any portion of the reclamation, the authorized officer shall authorize that the financial guarantee be reduced proportionally to cover only the remaining reclamation to be accomplished, or may use the balance of the guarantee to cover other proposed activities.

(n) When a mining claim is patented, the authorized officer shall release the operator from the portion of the financial guarantee that applies to operations within the boundaries of the patented land. The authorized officer shall release the operator from the remainder of the financial guarantee, including the portion covering approved means of access outside the boundaries of the mining claim, when the operator has completed acceptable reclamation. However, existing access to patented mining claims, if across Federal lands, shall continue to be regulated under the approved plan and shall include a financial guarantee. The provisions of this subsection do not apply to patents issued on mining claims within the boundaries of the California Desert Conservation Area (see @ 3809.6 of this subpart).

@ 3809.3-1 [Amended]

5. Section 3809.3-1 is amended by revising paragraph (b) to read as follows:

* * * * *

(b) After the publication date of these regulations, the Director, BLM, shall conduct a review of State laws and regulations in effect or due to come into effect relating to unnecessary or undue degradation of lands disturbed by exploration for, or mining of, minerals locatable under the mining laws. Each State Director will consult with the appropriate State authorities to determine which of the financial instruments in 3809.1-9(k) are legal tenders under State law. Each State Director will publish a notice identifying all legal financial guarantees that may be accepted by the authorized officer. This list shall be maintained and published on not less than an annual basis.

@ 3809.3-2 [Amended]

6. Section 3809.3-2 is amended by revising paragraph (e) to read as follows:

* * * * *

(e) Failure of an operator to take necessary actions on a notice of noncompliance will obligate the operator to submit a plan of operations under @ 3809.1-5 of this subpart for all existing and subsequent operations that would otherwise be conducted pursuant to a notice under @ 3809.1-3 of this subpart. Such operator shall file with the authorized officer a financial guarantee to be held by BLM for the full cost of reclamation for all proposed and existing disturbance as a condition of approval of any subsequent plans. Financial guarantees held by the State will not be acceptable. This requirement shall apply to all activities in the State and continue in force for a period of not less than one calendar year, but not more than three calendar years, after the failure to take the necessary actions. The duration of the requirement shall be determined by the State Director.

Dated: August 28, 1990.

Dave O'Neal,

Assistant Secretary of the Interior.

Note: This document was received by the Office of the Federal Register on July 3, 1991.
[FR Doc. 91-16303 Filed 7-10-91; 8:45 am]

BILLING CODE 4310-84-M

Appendix A – Exhibit 4A M.L. BONDING

Dave:

Here is a package of materials relating to the bonding rules.

As you will see almost immediately they have been stalled for almost a year. Much of that has involved being backlogged in the Solicitor's office. On the attached copy of the rulemaking package the annotations that you see are the result of SOL staff review that would need to be completed and accommodated were we to move to final rules. If that were done we could move fairly rapidly through the Department's surname process and get them over to OMB.

To give a little history, in 1991 Cy Jamison committed to these rules in testimony, and we began accordingly. The response, both as part of the formal process, and through some informal channels, was quite ferocious, largely from small miners. Cy and staff actually travelled the west and visited with miners and associations to try to move the package. We redid the final package a couple of times to address their concerns. Note that the other part of the industry, represented by AMC, was largely supportive.

By the time the election was over this was largely viewed as a piece of bad news for industry that was going to be left for the incoming administration. Throughout transition and until this day the package has essentially been on hold.

Let us know if you need anything else.

Dan
8/6/93

cc: Oden
660

Appendix A – Exhibit 4B

CONFIDENTIAL

11/29/91
NOTE

To: Assistant Director, E&MR

From: 680

Subject: Proposed language for the final bonding rules.

The attached side by side contains the our draft language changes to be made to the proposed rules. The final rule would be the sum of the two columns. There are several elements in our draft that will require the blessing of those who guard the gates of the rulemaking process. The inclusion of these elements may go beyond what is allowed by the rulemaking process and may require their publication as a proposed rule first. These elements are included as the result of Dan Sokoloski's charge in the 11/08/91 meeting, to push the process as far as it will go.

These elements are;

requesting the operator, mining claimant, agent or whoever to supply their social security number or their taxpayer identification number (as a part of the certification for notice level operators in 3809.1-9(c)[1] and as part of the information require of a plan level operator in .1-9f),

the extensive forfeiture provisions (to be added between 3809.1-9m and .1-9n of the proposed rules) included at the suggestion of American Barrick,

the "death sentence" provisions for operators with unresolved notices of noncompliance (to be added as 3809.3-~~2f~~) included at the suggestion of the Nevada Outdoor Recreation Association, and

the inclusion of a FLPMA misdemeanor penalty for all operator who conduct activities without providing the financial guarantee first, (included as the result of a comment made by NWF that failure to provide the financial certification, which renders a notice incomplete is meaningless unless the 3809 provisions regarding notices are modified to include an approval process or a completion determination in .1-3b).

If, on procedural grounds, these elements fall outside of what we can do in the final rule, we suggest that the elements be put into a proposed rule to be published coincident with the final rule.

Appendix A – Exhibit 5

CONFIDENTIAL

October 25, 1994

Memorandum

To: Bob Armstrong, John Leshy, Mike Dombeck, Patty Benecke

From: Dave Alberswerth

Subject: Hard rock bonding regulations

I have reviewed the BLM's proposed final hard rock bonding regulations (43 CFR 3809), and believe that a few key provisions need to be revised and improved before they go final. (The draft proposal was published in July of 1991.) My comments are as follows.

POLICY AND MINIMUM BONDING LEVEL

The basic policy of the bonding regulations needs to be changed. The preamble states that the purpose of the proposal "...is to encourage reclamation, not guarantee reclamation completely." As a consequence, the proposal limits bonds to a maximum level of $2,000 per acre for mining operations and $1,000 for exploration (except for cyanide operations and operators with a history of noncompliance.) For "notice" operations, a maximum of $1,000 bond per acre disturbed is required in the final rule, although the draft rule proposed that all "notice" level operations post a minimum $5,000 bond.

In fact, our policy should be to require bonds at a level which will "guarantee reclamation, not just encourage it." Rates for individual operations should be set at a level that "...is not less than the estimated cost to complete reclamation if the work were to be performed by the Secretary in the event of forfeiture" (see House offer to Senate of 7/26/94, p. 23).

As a remedy to the current BLM proposal, a minimum bonding level of $2,000 per acre could be established for mining operations (which do not use cyanide), and a $1,000 minimum for exploration, plus language in the rule similar to that of the House offer requiring bonds to be established at a level which will cover the actual costs of reclamation. For "notice" level operations, we should go with the originally proposed $5,000 minimum. The preamble and response to comments should be modified to reflect this bonding policy (ex., the discussion of bonds as "filters" and the analogy to automobile insurance should be deleted).

CONFIDE

FINANCIAL INSTRUMENTS

The BLM proposal allows use of a wide variety of financial instruments to be substituted for bonds, including liens on mining equipment, nation-wide and state-wide bonds, mortgages, etc.

Property bonds, collateral bonds, equipment liens frequently are inadequate to guarantee reclamation (ref. the Mid-Continent coal mine in Colorado). The challenge here is to provide enough flexibility in the type of financial instruments allowed, while minimizing risk to the government. I think we should at least rule out equipment liens and property bonds, as well as nation-wide and state-wide bonds.

With these adjustments, the bonding proposal could be finalized and published relatively quickly.

Appendix A – Exhibit 6

November 8, 1994 CONFID

Memorandum

To: Hord Tipton

From: Dave Alberswerth

Subject: Hard rock bonding regulations

This is to follow up on our conversation yesterday about the hard rock bonding regulations. As you know, in July, 1991, the BLM proposed changes to its bonding regulations for hard rock mineral activities on public lands at 43 C.F.R. 3809. A proposed final version of these regulations was developed, but never approved or implemented in deference to Congress' deliberations regarding proposed legislation to amend the 1872 Mining Law. Since Congress did not enact comprehensive changes in the Mining Law, it is now appropriate to modify and finalize the bonding regulations.

I have reviewed the current proposal and consulted with your staff and staff of the Office of the Solicitor, and request that the proposed final bonding regulations at 43 C.F.R. 3809 be modified to provide for the following:

1. Bonds should be required for all operations on public lands (except for "casual use"), regardless of "prior record."

2. Bonds should be set at a level to cover 100% of the costs of reclamation, with minimum bonds for operations requiring an approved plan of operation set at a minimum level of $2,000 per acre, and "notice" operations set at a minimum of $1,000 per acre.

3. Financial instruments used to provide financial guarantees of reclamation should not allow equipment liens or bonds, nor property or mortgage bonds.

4. Each individual operation should be bonded to the full estimated costs of reclamation -- "Statewide" and "nationwide" bonds should not be allowed.

5. Since all operations will be required to be fully bonded, provision should be made for phased bond release on a case-by-base basis at the discretion of the authorized officer.

The preamble to the final regulations needs to be modified in accordance with these changes, to reflect the policy that reclamation bonds are intended to guarantee reclamation of disturbed lands (not just "encourage" it), and that the financial instruments used to assure reclamation be reliable ones.

CONFI

These modifications should be incorporated into a new surnaming package and moved through the approval process as soon as possible. Paul Politizer asures me that a surnaming package can be ready by the end of November, assuming close coordination with the Solicitor's Office. I understand that Natalie Eads will be assigned to work with your staff on preparing the final proposal.

If you have any questions, please call.

Appendix A – Exhibit 7

11/2/94. Had real lively prepared discussion (Bob Bates, Jim Ka, Rick Dees, Nellie Cash, DA, Susan Selah.

Concern about adequacy of funds. Want assurance that we get to land.

- Do we wish to expand until land for sites?
- Type of lively reclamation

(+) Could obviate day entirely by really it realized to get IM (1990)

Pay: $24 mil. actual max borrow for until dept moving. Could be closed if easily to 100% lovely via policy chg

Jim: Want 100% for SLD actions in [redacted] addition to grants

(2)

first — perhaps floor and + OSB

Cook, T-bill, must look as
only without correct accepted
signal reflects OSU cannot
exp.
(Problem with equipment look of
puppet look)
Perhaps we shd look at that
record of OSU body policy.

Dang: decorations — don't the puppet
look or equipment look

Dang: Didn't criminal justice for people who
don't entire look, and fail to
accept entire as principal
If they take a work on
reputation look (don't block)
[In editing package]

(a)

PP: he cannot produce, "bad actors" are required to be held at 100%.
Q: What are "bad actors"?
A: Proof of non-compliance

Appendix A – Exhibit 8

CONFIDENTIAL

June 14, 1996

To: John Leshy

From: Dave Alberswerth

Subject: Status of hard rock bonding rule

Last Friday (6/7) I met with Anetta Cheek (BLM), Natalie Eads (SOL), Ted Hudson (BLM), and Rick Deery (BLM) to discuss the status of the hard rock bonding rule.

Several concerns emerged which you should be aware of:

I had been under the impression as a consequence of numerous previous discussions over the past year and several iterations of the rule language -- which has been scrubbed repeatedly by various attorneys assigned to the task -- that SOL was satisfied that changes made from the original draft were not significant enough to warrant concern about a successful APA challenge. That is, no changes were made that went beyond the scope of the original proposal, and that all changes which were made to the original proposal (ex., changing the proposed $2,000/acre bonding cap to a $2,000/acre floor for activities taking place under "plans of operation") were done so in response to comments considered. Natalie, however, seemed to signal during the meeting that Solicitors had remaining concerns regarding this issue. I recommend you discuss with Sharon, Kay, and Natalie any concerns they may have.

Secondly, Rick Deery raised the concern (not articulated previously) that because our new rule does not explicitly recognize "self-bonding" as a suitable bonding instrument, and several states do, we may not be able to accept such bonds under the new rule. If we cannot, the total financial impact of the rule would exceed $100,000,000, because the states of Nevada and Arizona have accepted approximately $100,000,000 in self-bonds which we may not be able to recognize as complying with our rule. Therefore, we would be required to prepare an economic impact analysis, and probably have to re-publish the proposal in draft, before we could move forward with it.

I subsequently reviewed the language of the new rule. Under it the authorized officer may,

> accept evidence of an existing financial guarantee redeemable by the Secretary acting by and through the authorized officer, under State law or regulations and held or approved by a State agency for the same area covered by the plan of operations, upon a determination that the coverage would be equivalent to that provided (in the rule)...

The language goes on to specify certain types of bonding arrangements that may be accepted by BLM, and provides discretion to the authorized officer to reject proposed bonding instruments for reasons provided in writing.

On the one hand, though none of the enumerated financial instruments in the rule includes "self-bonding", on the other hand self-bonding is not explicitly ruled out as an acceptable financial instrument. When I mentioned this to Deery, he indicated that it was a matter of interpretation.

I suggest you take a look at the language and see if a problem really exists. It seems to me that we can interpret the rule language at 3809.1-9(i) to encompass recognition of state-authorized self-bonding instruments at the discretion of the BLM authorized officer. If Nevada has questions about it, the BLM Director could clarify in an instruction memorandum after publication of the final rule that Nevada's self-bonding arrangements should be recognized by the BLM.

Finally, we once again need to publish an "information collection burden" notice in the Federal Register prior to publication of the final rule. This notice triggers a 60-day comment period. I think we should publish this ASAP if we are going to move forward with the rule. There is no point in doing that, however, unless we are confident that no problems exist with the first two issues described above.

Department of the Interior
Privileged Document

Appendix A – Exhibit 9

From: Rick Deery
To: htipton
Date: Wed, Jun 19, 1996 4:56 pm
Subject: just talked to Dave A - Forwarded - Reply - Reply

TIp

I don't think there's any disagreemnt on the APA issue... the $100 mil. issue (NV & AZ combined) was simply another expression of the disfunctional nature of this whole process...

In our meeting with Dave A. Annetta, Ted, Natalie & I all agreed that a minimal rule extending bonding to notice level activites was the best next step... to be followed by another proposed rule putting Dave's wants & desires into play... followed by a longer term effort to find a way to redesign the entire bonding system... with the partnership if the industry & the enviros... prime stuff for re-invention using ISO 14001...

Rick

Department of the Interior **Appendix A – Exhibit 10**
Privileged Document **Deliberative Process**

From: Rick Deery
To: ilmwoals.ilmwobls.THUDSON,INTERIOR-CCM.~ISOL.EADES...
Date: Wednesday, June 19, 1996 3:46 pm
Subject: just talked to Dave A - Forwarded

Greetings,

The attached missive from Anetta is clear... the NV 80 million dollar impact is to be willed away... as an act of mangement direction.... one however that leaves NV's program intact... we now need to tie up a few loose ends...

1) per Dave A we have to modify the language of the final regs -- at the appropriate position in the final (somewhere about page 43 , sub-sub...para . (i). I think...) we need to add language that says sometning like , " ...provides equivalent on the ground coverage, regardless of the financial instruments chosen by the State...."

2) somewhere in the preamble to the rule we also need to explain that we don't really care what instruments the State chooses to use as long as the calcualtionof the amount approximates ours and the elements that go into the calculation reasonably cover our issues....

3) we will need to satisfy ourselves that we have some where to go if a self bonded entity goes down the tubes... do we visit the State?... after all, its their instrument, shouldn't they have to pay? I can easily see a defense lawyer raising that when we go after the company...

4) do we have any rights to company assets as secured creditors, or are we among the unsecured masses in the eyes of the bankrupcy court?.. this was a general question that came up in our meeting with Dave A. a couple of weeks ago and we still need to get an answer.

Rick

CC: htipton,ilmnvc91.ilmnvd91.tleshend

Department of the Interior
Privileged Document

Deliberative Process

From: Annetta Cheek
To: rdeery
Date: Mon, Jun 17, 1996 1:14 pm
Subject: just talked to Dave A

He thinks that the current language in the final reg. allows us to accept the NV self bonds, and he is willing to go with that for now. If the current final language is not permissive of this, make it so.

Regarding the other issues, he has asked Leshy to get together with his SOLs and see what remaining problems, if any, they have with APA. He clearly believes they have changed their tune from last year, and now have more APA problems than they did then. I believe he is correct about this. However, i also believe there are APA issues. Hopefully, SOL will make one uniform decision on this.

CC: htipton

Department of the Interior
Privileged Document

3 of P

Deliberative Process

Appendix A – Exhibit 11

From: Annetta Cheek
To: THUDSON
Date: 6/3/96 12:32pm
Subject: permanent vegetation

The reg. language on this issue is a quote from SMCRA. Sharon also says it was agreed to by all parties way back when we were talking to the hill.

While I remain uncomfortable with the language, on the basis that it's a SMCRA quote i think we should just go ahead. however, it may be useful to note in the preamble that it is a SMCRA quote. You might also go on in the preamble to discuss what it means, relying on the further language in SMCRA (515(b)(19)) and/or the language in the SMCRA regs (30 CFR 816.111-116).

Leshy is asking about progress on this rule. I've said we'd have it out of here by the middle of next week. I realize we are still waiting on info collection from Rick.

Do you have any other issues with SOL we should discuss?

How do you feel about the APA problems?

Appendix A – Exhibit 12

3048

Department of the Interior

Privileged Document

Deliberative Process

From: Annetta Cheek
To: INTERIOR-CCM.~ISOL.BURKE MONICA
Date: Fri, Jun 7, 1996 11:59 am
Subject: bonding regs.

What I stopped by to discuss was the bonding regs. For whatever my non-legal opinion is worth as a reg. writer for the last 12 years, I have very serious APA concerns with this regulation. I believe that some of the changes from the proposed to the final exceed what we are allowed to do under APA - we have not given the public an opportunity to comment. One major example - changing a bonding requirement from a ceiling of $2000 to a floor of $2000.

I worked on OSM regs. for a long time, and that agency was routinely sued over its regulatory products. With very few exceptions, OSM would lose litigation because of procedural deficiencies such as this. The court normally deferred to the Secretary's discretion on substantive matters. If John doesn't mind a time consuming legal challenge that very possibly will end up in a loss, because this is part of our hardrock strategy, fine, but he needs to proceed with his eyes open.

CC: INTERIOR-CCM.~ISOL.HENRY KATHRINE, INTERIOR-CCM.~I...

Department of the Interior Appendix A – Exhibit 13 3ccc

Privileged Document

Deliberative Process

From: Annetta Cheek
To: ilmwocls.ilmwodls.rdeery
Date: Mon, Jun 17, 1996 12:42 pm
Subject: bonding

I have to leave town to visit a sick mother (really!!). I know Dave would like the bonding reg. issue to be resolved. For what it's worth, in case this comes to a head in my absence (I'll be in thurs)--

As it now stands, I believe the rule has changed too much from proposed to final to withstand an APA challenge. The matter of the $2000 ceiling becoming a floor in the final is just one example. The matter of the Nevada self-bonds being not acceptable in the current final language is another serious matter, separate from the APA issue.

My advice at this time is to move ahead with whatever issues we can finalize to our satisfaction, such as bonding requirements for notice level operations. We should then proceed promptly to propose something we want and let the public comment on it. If 100% bonding is what we want to put out politically, we can do that under the existing regs, although for plan level operators only, simply by having Mike issue an IM. For other operations, we would have to propose that.

CC: ilmwocls.ilmwodls.htipton, interior-ccm.~MMS-DOI.A...

43 CFR 3809 "Bonding Regulations" Side By Side Analysis
Proposed Rule versus Draft Final Rule

1) **Proposed Rule Section** - Denotes the sections of the 43 CFR 3809 regulations proposed for modification by the July 11, 1991 proposed rule (56 FR 31602).

2) **Effect of Section on the Existing Rule** - Describes the intended effect of the proposed modification.

3) **Modified YES/NO? Per Who or What? or NEW** - Identifies the section as modified (if a section in the proposed rule is modifies); YES means modified, NO means no modification. Per: indicates the source of the modification. NEW means a completely new section of a section so modified as to bear little resemblance to the proposed rule section.

1) Changes resulting from editorial changes and formatting are denoted by "formatting".
2) Changes resulting from BLM staff and management reviews are denoted by "BLM".
3) Changes directed by the Solicitor's Office are denoted by "SOL".
4) Changes directed by the Assistant Secretary's Office are denoted by "ASLM"
5) Changes suggested by the public commentors are denoted "Public"

4) **Final Rule Section** - Identifies the sections found in the draft final rule, including new sections.

5) **Effect of Modifications on This Section** - Describes the effect of the proposed changes in the draft final rule and where appropriate, contrasts the final section with those in the proposed rule.

Proposed Rule Section	Effect of Section on the Existing Rule	Modified YES/NO? Per Who or What? or NEW	Final Rule Section	Effect of Modifications on This Section.
.0-5	add definitions of exploration and mining	YES **Per:** BLM/SOL?	.0-5	deleted in final, thus no change to existing rule
		NEW **Per:** BLM	.0-9	adds information collection boiler-plate material
.1-8	removes section; reserves for future use	NO	.1-8	no change
.1-9(a)	removes reference to notices - notices now subject to bonds	YES NEW **Per:** Public BLM	.1-9(a)	1) old .1-9(a) is now .1-9(b) 2) conduct of operations absent a financial guarantee is prohibited.

Proposed Rule Section	Effect of Section on the Existing Rule	Modified YES/NO? Per Who or What? or NEW	Final Rule Section	Effect of Modifications on This Section.
.1-9(b)	1) establishes notice bond provisions - certification of existence of $5K bond use any of forms allowed by .1-9(k) 2) cites reclamation standards as those of .1-3(d) and resulting from consultation under .1-3(c)	YES **Per:** formatting	.1-9(b)	1) is now the former .1-9(a) with minor editorial changes - otherwise no change to the former section 2) old .1-9(b) is now a significantly modified .1-9(c)

Proposed Rule Section	Effect of Section on the Existing Rule	Substantive Revisions to Proposed Rule? Is it NEW	Final Rule Section	Effect of Modifications on This Section.
.1-9(c)	specifies the statements required by the certification	YES **Per:** ASLM formatting	.1-9(c)	1)formerly .1-9(b) significantly modified as follows: a) Full cost bonding to cover 100% of est. costs of reclamation b) $1K per acre is minimum bond amount to act as "bond floors" c) assume BLM is doing work w/ a contractor d) calculation of costs must accompany certification e) 3rd party professional engineer must certify cost est. f) language on replacemnt of guarantees with adequate guarantees with the AO's concurrence is added f) editorial changes (shall v. must, etc.)

Proposed Rule Section	Effect of Section on the Existing Rule	Modified YES/NO? Per Who or What? or NEW	Final Rule Section	Effect of Modifications on This Section.
.1-9(d)	requires each certification statement to be dated and initialled - specifies failure as incompleteness and subject to return	YES **Per:** Public BLM ASLM formatting	.1-9(d)	1) formerly .1-9(c) it has been modified as follows: a) added requirement for SSN or EIN or TIN b) bond amounts modified to take into account 100% bonding and bond "floors" c) clarifying language as to who will be responsible for reclamation. c) addition of clarifying language eg - "authorized" agent
.1-9(e)	allows AO to require proof of the existence of the instrument specified in the certification.	YES **Per:** BLM formatting	.1-9(e)	1) formerly .1-9(d), it has been moved with minor editorial changes (eg - shall vs must)

Proposed Rule Section	Effect of Section on the Existing Rule	Modified YES/NO? Per Who or What? or NEW	Final Rule Section	Effect of Modifications on This Section.
.1-9(f)	requires plan level operator to conduct operations - eliminates the original language allowing waiver of bond for minimal disturbance, retails requirement to consider cost to reclaim.	YES **Per:** BLM formatting	.1-9(f)	1) formerly .1-9(e) it has minor editorial changes for clarity.
.1-9(g)	.1-9(g)(1) & .1-9(g)(2) set maximum bond amounts for: 1) exploration ($1K) 2) mining ($2K); 3) waives max amount for operators w/ record of non- compliance (see .3-2).	YES **Per:** formatting	.1-9(g)	1) formerly .1-9(f) now .1-9(g) with language editing for clarity. 2) sections (g)1 & (g)2 are eliminated, replaced with new .1-9(h).

Proposed Rule Section	Effect of Section on the Existing Rule	Was this a change Per Who or Why? or NEW	Final Rule Section	Effect of modifications on this Section.
.1-9(h)	1) requires 100% bonds for portions of operations using cyanide or other leaching solutions 2) lists the types of facilities covered and those not covered by the requirement	YES NEW **Per:** ASLM BLM formatting	.1-9(h)	1) old .1-9(h) is eliminated 2) modified as follows: a) Full cost bonding to cover 100% of est. costs of reclamation b) $2K per acre is minimum bond amount c) assume BLM is doing work w/ a contractor d) calaulation is certified by a 3rd party professional engineer (PE) registered to practic in the state where the activity is located

Proposed Rule Section	Effect of Section on the Existing Rule	Modified YES/NO? Per Who or What? or NEW	Final Rule Section	Effect of Modifications on This Section.
.1-9(i)	1) retains existing language accepting State bonds of equivalent protection (also per modification of 43 USC 1733 in PL 99-500, 100 Stat 1783-243.) 2) adds equipment based bonds the list of acceptable instruments for plan level operators. 3) allows AO to review and reject any of the offered instruments	YES **Per:** ASLM BLM SOL formatting	.1-9(i)	1) editing changes for clarity 2) language reflecting roles of SOI and AO (redeemable by the Secretary... & acting by and through...) 3) eliminates equipment based bonds
.1-9(j)	retains existing language that allows for modification of bond amount after modification of plan.	YES **Per:** BLM Public	.1-9(j)	1) editing for clarity 2) allows for the replacement of instruments on operator's motion.

Proposed Rule Section	Effect of Section on the Existing Rule	Modified Version? Per Who or Where of NEW	Final Rule Section	Gist of Modifications on This Section.
.1-9(k)	modifies the types of financial instruments that the AO can accept is the SD finds they are legal in that state:	YES **Per:** BLM	.1-9(k)	minor editing for clarity
(k)(1)	1) retains existing language on surety bonds, 2) includes 3rd party surety bonds per modification of 43 USC 1733 in PL 99-500, 100 Stat 1783-243.	YES **Per:** BLM	.1-9(k)(1)	minor editing for clarity
(k)(2)	retains original language on the use of cash bonds	YES **Per:** BLM	.1-9(k)(2)	minor editing for clarity & change to reflect AO's "ownership" of a Federal depository account.

Proposed Rule Section	Effect of Section on the Existing Rule	Modified YES/NO? Per Who or What? or NEW	Final Rule Section	Effect of Modifications on This Section.
(k)(3)	allows for use of irrevocalble letters of credit per modification of 43 USC 1733 in PL 99-500, 100 Stat 1783-243.	NO	.1-9(k)(3)	---
(k)(4)	allows for the use of CDs and savings accounts not in excess of FDIC insurance limits	NO	.1-9(k)(4)	---

Proposed Rule Section	Effect of Section on the Existing Rule	Modified YES/NO? Per Who or What? or NEW	Final Rule Section	Effect of Modifications on This Section.
(k)(5)	allows use of mortgage based bonds	YES NEW **Per:** ASLM SOL	.1-9(k)(5)	1) old .1-9(k)(5) deleted & mortagage based bonds eliminated in revised section. 2) replaced with **new** .1-9(k)(5) which: a) requires **both Notice and Plan level** operators to establish SIPC brokerage house accounts for: i) US Govt securities ii) State & Municipal bonds iii) Investment grade corporate paper b)operator must provide the AO quarterly statements on account's value c) operator/claimant must conduct annual review of the account to determine value of the account d) if the value has declined > 10%. must take corrective actions and provide the AO with an account of those actions. d) if the account grows in value, the AO may release to the mining claimant or operator that amount >110% if claimant or operator is in compliance w/ Notice or Plan.

Proposed Rule Section	Effect of Section on the Existing Rule	Modified YES/NO? Per Who or What? or NEW	Final Rule Section	Effect of Modifications on This Section.
(k)(6)	1) continues to use US government securities & bonds 2) allows for use of state and municipal bonds 3) continues to use the existing language on market value at time of deposit	YES **Per:** SOL	---	deleted and replaced with new .1-9(k)(5) (See above)
(k)(7)	allows for the use of investment grade commercial paper	YES **Per:** SOL	---	deleted and replaced with new .1-9(k)(5) (See above)
.1-9(l)	continues the existing use of state- and nation- wide bonds	YES **Per:** formatting	.1-9(l)	editorial changes for clarity

Proposed Rule Section	Effect of Section on the Existing Rule	Modified YES/NO? Per Who or What? or NEW	Final Rule Section	Effect of Modifications on This Section.
.1-9(m)	retains the existing language on bond reduction (with the exception of he/she...)	YES **Per:** SOL ASLM	.1-9(m)	1) adds language on: a) SMCRA-like bond release - 60% release at end of "dirtwork" and 40% at conclusion of revegatation (NB! language is not settled in the draft....) b) adds language on "no release from CERCLA liability" due to bond release or reduction.
.1-9(n)	retains the existing language on bond release due to patenting	YES NEW **Per:** Public	.1-9(n)	1) old .1-9(n) moved to .1-9(q) and edited for clarity 2) new .1-9(n) language on forfeiture procedures including: a) written notification to operator, claimant, surety b) notice of procedures to avoid forfeiture
---	---	NEW **Per:** Public	.1-9(o)	1) describes steps to be followed in the event the claimant or operator fails to meet requirements of .1-9(n)

Proposed Rule Section	Effect of Section on the Existing Rule	Modified YES/NO Per: Pub/Bmg or Wash or NEW	Final Rule Section	Effect of Modifications on This Section.
---	---	NEW **Per:** Public	.1-9(p)	1) addresses funds available for full cost of reclamation: a) provides for recovery of costs not covered by funds b) requires return of unused funds to party from whom they were collected w/in a reasonable time.
---	---	YES **Per:** formatting	.1-9(q)	1) formerly section .1-9(n) no change in original (1980) rule language regarding effects of patents on bonds & release 2) editing for clarity
.3-1(b)	retained existing language for SD review of State laws and required review of "legality" of financial instruments w/in the state.	YES **Per:** BLM	.3-1(b)	1) removes obsolete language from original (1980) rule making 2) edits for clarity

Proposed Rule Section	Effect of Section on the Existing Rule	Modified YES/NO? Per Who or What? or NEW	Final Rule Section	Effect of Modifications on This Section.
.3-2(e)	required full cost bonds held by BLM for noncompliance, even if States held similar bond, in effect creating double bonding for non-compliance	YES **Per:** BLM Public	.3-2(e)	1) proposed .3-2(e) eliminated 2) replacement .3-2(e) established a) defines history of noncompliance b) requires operator to submit plans for **all** other activities in excess of casual use (eg - no Notices allowed) w/in 30 days ***[NB! this language might not be sufficient to encompass all subsequent operations at any other sites and IBLA could look at this language as limited to the site at which the noncompliance occurred... there has been some recent activity on thier part that justifies this...see the Jan 10, 1995 IBLA Order in Consolidated Mineral Resources [94-856]... this needs some additional thought...]*** c) all former Notices must have an appropriate bond w/in 90 days d) creates double State & BLM bonding e) keeps the history of non-compliance designation in place for not less than 1 year and not more than 3.

Proposed Rule Section	Effect of Section on the Existing Rule	Modified YES/NO? Per Who or What? or NEW	Final Rule Section	Effect of Modifications on This Section.
---	---'	NEW **Per:** BLM	.3-2(f)	.3-2(f)(1) and .3-2(2) establish criminal penalties for violating **any** provisions of the 43 CFR 3809 rules (issue - how far does this language go? Only to specified prohibited acts [see new .1-9(a) or any part of the rule?).

Appendix A – Exhibit 15

From: SHARON ALLENDER at ~DOI/SOL_HQ
To: ilmwocls.ilmwodls(htipton,mschwart,rdeery),ilmwoal...
Date: Tue, Sep 17, 1996 3:23 pm
Subject: Bonding Regs

Last week, Tom Hewitt brought me the final bonding rule for hardrock mining because he said that he couldn't see a SOL surname. I told him I would take another look at it since I knew that there had been a few more changes in it after we had formally cleared it.

As a result of my latest review I have pencilled in a few changes on the white copy which need to be incorporated in the version signed by the Assistant Secretary.

The changes I have made on pp. 3, 31, 32, and 35 are made to make the provisions for instruments held or approved by states consistent with respect to both notice and plan level operations, and to ensure that they are properly described in the preamble. These came to my attention because of a late change in the rule text which hadn't been described in the preamble.

I made one deletion from the preamble on p. 11 because it described something for which I couldn't find a counterpart in the reg text.

We also made a change on the last page of the rule, p. 48, to more accurately describe criminal prosecution of organizations. It was wrong as previously written.

I have discussed all these changes with Rick Deery and he agreed. I have described them generally to Annetta Cheek and told her that I would leave this rule for her in Maitland Sharpe's office.

I also noted for Annetta that the rule has several blanks, flagged by Natalie, which still have to be filled in--these relate to information collection numbers, hours, and the date of the DOE. Our earlier clearance of the rule was conditioned on reviewing the DOE, which we still haven't seen.

Finally, I would note that the formal SOL clearance is denoted by the "K. Henry" on the outer routing slip.

CC: IOS.IOSCCMAIL("NATALIE EADES","PETER SCHAUMBERG")

Appendix A – Exhibit 16

BUREAU OF LAND MANAGEMENT

REGULATORY MANAGEMENT (420)

FAX TRANSMITTAL SHEET CONFIDENTIAL

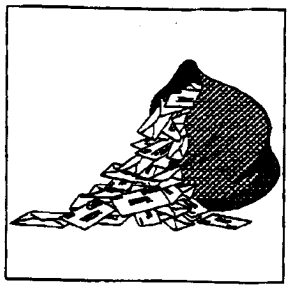
FAX NO: 202/452-5002

DATE: 2/24

TO: Natalie Eades

CODE:

PHONE #:



****

FROM: Ted Hudson

CODE:

PHONE #: 452-5042

Sharon, Ted made the additional changes to the preamble after reviewing it to make sure there were no differences b/w it and the DOE. Natalie

7 **NUMBERS OF PAGES (INCLUDING FAX SHEET)**

COMMENTS: Changes in preamble indicated by interlineation & deleting

CONFIDENTIAL

DM 2, Appendix 2. Pursuant to the Council on Environmental Quality regulations (40 CFR 1508.4) and environmental policies and procedures of the Department of the Interior, "categorical exclusions" means a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency and for which neither an environmental assessment nor an environmental impact statement is required.

Compliance with Executive Order 12866

This rule has been reviewed under Executive Order 12866. The Department of the Interior has found, based on the economic analysis contained in a ~~amended~~ ??? Determination of Effects of Rule ~~dated _____, 1996, and~~ that is available for inspection in the office of the Solid Minerals Group at the address given in ADDRESSES, above, that this document is not likely to result in an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

Ted made this change because he thought we didn't need to highlight how recent the law was. But, this is what BLM usually does.

The current surface management regulations at 43 CFR subpart 3809 provide for 3 levels of activity ~~causing~~ involving surface ~~disturbance~~ use of public ~~related to~~ lands for mineral exploration and mining ~~on public lands~~: (1)

this is only editorio

IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Appendix A – Exhibit 17

May 12, 1997

The Honorable Barbara Cubin
Chairman, Subcommittee on Energy and Minerals
Committee on Resources
U.S. House of Representatives
1626 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Cubin:

This responds to your letter of April 15, 1997, in which you again assert that the Department has failed to comply with the Regulatory Flexibility Act and request that the Department of the Interior rescind the final hardrock bonding rule.

For the reasons stated in our letter of April 3, 1997, we believe we have complied with the applicable provisions of the Regulatory Flexibility Act.

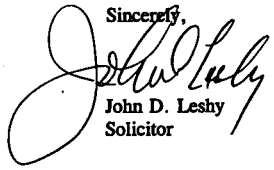
Your letter further states you "find no credible analysis of the burden of this rule upon the [small miners]." That analysis can be found in the Bureau of Land Management's (BLM) Determination of Effects beginning on page 10. The supporting documentation for the conclusions made by BLM on those pages can be found in Appendix A. In preparing the table set out in Appendix A, BLM assessed the potential impacts of the rule on a state-by-state basis.

Among other things, before providing you with our reply to your letter of March 24, 1997, we discussed this matter with the Office of Advocacy, Small Business Administration. We explained our legal interpretation of the applicable provisions of the Regulatory Flexibility Act, the mining laws, and the analysis set forth in the BLM's Determination of effects. In our letter of April 3, 1997, we did not assert that the Omnibus Budget Reconciliation Act of 1993 amends the requirements of the Regulatory Flexibility Act. We continue to believe, however, that such a recent enunciation by Congress of what constitutes a small entity in the context of administration of the Mining Law of 1872 should guide any analysis performed by the Department regarding an impact of a regulation on the mining community, particularly when the alternative is an administrative criterion of general applicability. BLM has been sensitive to the impacts of this rule on the mining community as a whole, and in particular those small miners most likely to be affected by the rule, and has made substantive changes to the rule benefiting that community of miners.

For these reasons, we continue to see no need to rescind this rule. Moreover, a suspension of the rule at this point, when many miners have begun or are beginning their mining season, would only create confusion. I have consulted with the BLM and have been told that BLM is not experiencing any problems with implementation of the new rule.

I regret we continue to disagree over the adequacy of the procedures followed by the Department in promulgating this final rule. I believe the Department proceeded in good faith and in compliance with all applicable legal requirements in its adoption of the final rule.

Sincerely,



John D. Leshy
Solicitor

Appendix A – Exhibit 18

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

APR 21 1997

CONFIDENTIAL

To: Natalie Eades
Office of the General Counsel
Fr: Shawne Carter
Jennifer Smith
Office of Advocacy
Small Business Administration
Re: Definition of "Small Miner"

This is in response to the material that you sent by facsimile on April 18, 1997 which refers to a conversation that you had with the Office of Advocacy on April 2, 1997. The Office of Advocacy will review the rule and the Omnibus Reconciliation Act of 1993 and provide an "official" answer to your inquiry by the close of business on Wednesday, April 23, 1997. In the meantime, below please find an unofficial response to your request that you include the Bureau of Land Management's April 2nd consultation with Advocacy in your letter of response to Congresswoman Cubin.

Our recollection of that conversation is that initially Advocacy told you that the Bureau of Land Management was not in compliance with the Regulatory Flexibility Act because you did not define a small entity in compliance with SBA's definition of a small entity in the mining industry. After giving you our initial opinion, you stated that the definition of a "small miner" was mandated by statute. We responded that if the definition of small miner was mandated by statute, then the statutory definition would prevail.

After reviewing the letter from Congresswoman Cubin, it is Advocacy's opinion that the Bureau of Land Management did not comply with the Regulatory Flexibility Act (RFA). With regards to the "statutory mandate", Advocacy was under the impression that the mandated definition was not from the "Omnibus Reconciliation Act of 1993". Advocacy believed that the mandated definition was specific to the regulation that you were attempting to implement. Furthermore, you requested Advocacy' s assistance in obtaining a new definition standard after the rule was in its final stages. The RFA requires consultation with the Office of Advocacy before determining a size standard definition that deviates from SBA standards. Consulting with Advocacy after the fact does not fulfill the requirements of the RFA.

FEDERAL RECYCLING PROGRAM PRINTED ON RECYCLED PAPER

NOTE

To: Shawne Carter
Jennifer Smith
Office of Advocacy, Small Business Administration

From: Natalie Eades
Attorney-advisor, Department of the Interior

As we discussed in our recent meeting, I believe I should correct an impression left by your informal response dated April 21, 1997, regarding the definition of a small miner. I believe there has been some miscommunication regarding our position on this issue. The purpose of our meeting was not to seek your assistance in obtaining a new definition after the hardrock bonding rule was final, but rather to obtain your perspective on our legal analysis.

We continue to believe that our legal analysis is sound and that the Department has complied with the applicable provisions of the Regulatory Flexibility Act.

Appendix A – Exhibit 19

Working for the Nature of Tomorrow

NATIONAL WILDLIFE FEDERATION

1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

October 9, 1991

Mr. Cy Jamison
Director, Bureau of Land Management
U.S. Department of the Interior
Room 5555, 1849 C St., NW
Washington, D.C. 20240

RE: Proposed Surface Management Regulations
56 Fed. Reg. 31602

Dear ~~Director~~ Cy Jamison:

Thank you for the opportunity to comment on the Bureau of Land Management's (BLM) recent proposed rule governing the financial guarantee or bonding policies that will be in effect for hardrock mining operations on federal lands, published in the Federal Register on July 11, 1991. The National Wildlife Federation (NWF) represents over 5.3 million members and supporters throughout the United States and territories. Many of our members reside near or recreate on public lands administered by the BLM and U.S. Forest Service in the western United States. Our members would be adversely impacted by mining operations occurring on federal lands that were not adequately reclaimed to achieve a productive post-mining use.

We are pleased to see that BLM recognizes the inadequacies of its current bonding policy, and has identified the need to improve that policy. However, your proposed solution to the need for an improved bonding policy mainly serves to highlight the failure of the BLM to address the problems with its hardrock surface management program administratively. Your proposed bonding policy is so biased in favor of industry concerns, to the detriment of effective management of hardrock mining impacts on federal lands, that this proposal simply creates yet another example of the need for Congress to address the environmental problems created by hardrock mining.

NWF believes the proposed bonding policy, if implemented, will fall far short of achieving the objective that mineral activities on federal lands will be adequately reclaimed, in the event an operator fails to fulfill his reclamation obligations. The proposed bonding levels are simply too low to cover even minimal costs of reclaiming hard rock mining sites. Further, the proposed bonding policy fails to take into consideration one of the most devastating, and costly, impacts of hardrock mining -- the impact on water resources. Finally, we have a number of concerns about the financial guarantee instruments that you propose to fulfill the bonding policy. Specific comments on the proposed bonding policy are attached.

Thank you for your consideration of the comments on the proposed rule in your deliberations on the final proposal.

Sincerely,

David Alberswerth
Director
Public Lands and Energy Division

Cathy Carlson
Legislative Representative
Public Lands and Energy Division

Attachment

cc: Representative Nick Rahall
Senator Dale Bumpers

NATIONAL WILDLIFE FEDERATION
COMMENT ON THE PROPOSED RULE
HARDROCK BONDING POLICIES
56 FED. REG 31602, JULY 11, 1991

Introduction

The National Wildlife Federation (NWF) has a long-standing interest in the effective management of our federal lands. In particular, NWF is concerned that the environmental impacts of hardrock mining are adequately addressed in the surface management program of the Bureau of Land Management (BLM). Hardrock mining can have major adverse effects on the lands and waters disturbed by mining activities. The very nature of mining involves disruption of the surface resources, and creation of sometimes massive quantities of waste. Wildlife habitat is eliminated, and wildlife are displaced during the mining operation. Scenic qualities adjacent to the mining area are disrupted, as well as recreational opportunities. In short, hardrock mining tends to preclude other public lands uses in the vicinity of the mining operation.

To ensure that other public land uses are not displaced permanently from mineral activities, the lands and water disturbed by mining must be restored to a productive use. This reclamation principle is the cornerstone of the BLM's assertion that hardrock mining is a compatible use with other "major uses" of the public lands. In fact, BLM land use plans repeatedly claim that adverse impacts from hardrock mining activities will be minimal because the land will be reclaimed. (See, e.g., Judith Valley Phillips Draft Resource Management Plan/ Environmental Impact Statement, p. 181, July 1991)

Reclamation bonds serve as a guarantee for the federal agencies responsible for surface management, to ensure that sufficient resources are available to restore the land to a condition capable of supporting some other use, in the event that the mine operator fails to fulfill his or her reclamation responsibilities. Further, the bonds should be sufficiently large enough to cover the costs of BLM completing the reclamation, or a third party contractor. Finally, the reclamation bond should be large enough to create an incentive for the mine operator to reclaim the minesite, in order to have his or her bond returned. These objectives are the basis for NWF review of the BLM bonding policy.

Proposed Bonding Ceilings Do Not Reflect True Reclamation Costs.

BLM's proposed bonding rule sets an arbitrary upper limit of $2000 per acre ($1000 per acre for exploration operations) on the amount of bond that will be held for non-cyanide processsing operations. These proposed bond amounts are far below the cost of reclamation of the public lands from hardrock mining activities.

To illustrate this point, BLM need only look to the reclamation bonds that are being calculated under a number of state programs that have at least considered the complete costs of reclamation. State bonding policies and costs should be evaluated by BLM to come up with a meaningful bond calculation.

- The Stillwater platinum-palladium Complex in Montana has been considered a fairly clean operation, yet the reclamation costs have been calculated at $8,500 per disturbed acre.
- Kennecott Copper-4th Line mining operation in Utah carries a bond of $5.017 million for 117 acre site, or $42,880 per acre. It is our understanding that this bond is calculated just to cover reclamation of the "surface disturbance."
- Oregon requires the operator to post a $5000 bond for every exploratory hole that is drilled in the state.

A review of state program bonding policies indicates that some states, such as Montana and Utah, calculate bonds based on the estimated costs to complete all the reclamation obligations at the site, using manuals of engineering costs published annually. The engineering manuals identify the costs of dirt removal and replacement, equipment costs, revegetation costs, and the like.

Costs for reclaiming exploration activities also should be increased to reflect real costs of reclamation. The Oregon example illustrates the proposed bond ceiling for these types of operations is well below what the anticipated reclamation costs.

Inadequate bonding levels will have a major impact on public lands management. BLM needs adequate financial resources to reclaim the minesite in the event of failure by the operator. If the bond is not calculated to cover the full costs of reclamation, the federal government is left with the financial liability to reclaim the mine, or retains the environmental and health and safety liability of an unreclaimed mine. Unfortunately, the federal government already faces significant clean-up costs from the mines on federal lands that have already been abandoned. It is not in the public interest to add to this burden.

Therefore, if BLM wants to adopt a per acre bond, the bonding levels should create a floor for the bonding calculations for the different categories of operations, not a ceiling. Further, that floor should reflect real life reclamation costs for hardrock mining operations. Based on our review of reclamation costs, it appears that a minimum of $5000 per acre would be a good baseline for reclamation bonds on federal lands.

In addition to the minimum bonding level, BLM should direct its surface managers to calculate the bond to cover the complete costs of reclamation. While the $5000 per acre may create a floor for all reclamation bonds, actual reclamation costs could be much higher, and in fact are higher in a number of circumstances, which would be reflected in the actual bond calculation.

Cyanide Bonding Proposal is Inadequate.

Another aspect of the proposed bonding rule would require the calculation of full reclamation costs for the heap and pads involved in operations using cyanidation. However, the full-cost calculations only apply to these features in a mineral activity using cyanide. The limitation imposed on the portion of operation is short-sighted, and the bonds established under this proposal will not provide adequate financial resources to reclaim a heap leach operation in the event of forfeiture by the operator.

There are numerous aspects of a heap leach operation that can cause major environmental impact. At large gold mining operations, the pit excavated for the ore presents a massive reclamation liability. The pads and heaps contain cyanide and toxic and heavy metals that can be released into the environment. Ponds represent environmental risks, if the berms or barriers break and the cyanide solution escapes into surface or groundwater. Heavy metals and acid mine drainage can leach from sub-grade ore piles left on the site. All of these attributes of cyanide mining should be covered under full-cost reclamation calculations.

Water Resource Impacts Must be Included.

BLM staff stated in a briefing with NWF representatives and other environmental organizations prior to release of the proposed rule that the bonding proposal does not cover the costs of reclaiming waters adversely affected by mineral activities. The arbitrary determination to ignore impacts on water resources from mining on federal lands is indefensible.

Perhaps the greatest public resource on federal lands in the western United States is the water, and the life that is dependent on that water for survival. Unfortunately, some of the greatest, and most expensive, impacts from mineral development are to the water resources on public lands. Spills and leaks of heavy metal laden water can contaminate surface and groundwater resources. Waste ore piles or other waste exposed to air and rain can produce acidic or toxic runoff that will contaminate surface and ground water. Mining activities can displace or disrupt aquifers and surface stream flows, resulting in locally significant water losses. Impacts on water resources can be long-term, can occur well beyond the boundary of the mining operation, and tend to be expensive to correct.

All mining related impacts on the resources on our federal lands must be subject to the bonding policy, including impacts on water resources. The liability for destruction or diminution of the water resources should not be transferred to the federal government. Similarly, the cost of cleanup of water related impacts from mining must not be passed on to the taxpayer by ignoring these impacts when calculating reclamation bonds.

Notice Level Bonding is Inadequate.

Similar to the bonding levels set for operations occurring under a plan of operations, BLM sets an arbitrary limit on notice level operations of $5000. This means that for all operations less than 5 acres in size, where the operator has no outstanding notices of violation, $5000 is the maximum bond that would be required. NWF encourages BLM to look to its own experience with the devastating impacts small operations can have and withdraw this limitation. The cost of clean-up of these small operations can be very high. Here are just a few examples.

- At the Timberline Heap Leach Mine on the Pony Express Resource Area in Utah, a four acre heap leach operation was left unreclaimed. The $20,000 bond was used in an effort to clean up the site, but a bond that is 4 times the proposed limit was inadequate to reclaim the mine site. Even with the incorporation of the "full cost calculation" for the heap on this site, under this proposal the bond required would have fallen far short of the reclamation costs of this mine.

- The 5 acre Golden Maple Mining and Leaching site near Lewistown Montana was abandoned, and a $36,500 acre bond was forfeited in 1986. Since 1987, the state has spent over $300,000 to reclaim the site; so far, with little success.

The $5000 cap on bonds for notice level operations should be deleted, in favor of full cost calculation of reclamation bonds for all hardrock mining activities on federal lands.

Bonding Levels May Adversely Affect State Bonding Programs.

BLM has argued that, despite the low ceilings placed on reclamation bonds on federal lands under this proposal, the new bonding proposal may have little impact in most states because the state already has in place a reclamation bonding program, and BLM will defer to the state bonding policy provides if it satisfies the minimum criteria set forth in this proposal. However, the federal bonding policy may have an adverse impact on state bonding programs, by creating a low ceiling for bond calculations. Operators may be able to use the low bond ceilings in this proposal to argue for lower bond calculations from the state. If this is the case, the net effect of the bonding proposal will be to minimize bonding levels in many state programs. This is yet another reason why the proposed bonding proposal should be revised.

Section by Section Analysis.

3809.0-5 Definitions.

The area, facilities, and impacts that are subject to the new bonding requirements should be clearly delineated. In the definition of "mining operations" under (g), for example, it is unclear whether the primary beneficiation facility that is on-site next to the pit on BLM land would be covered by the reclamation bond. Would the impacts of these activities be covered?

To avoid any ambiguity in the proposal, NWF urges you to clarify that all areas affected by mineral activities would be subject to the bonding provisions of this section. Mineral operations include the lands and waters impacted by the excavation of overburden and mineral deposits, by processing or beneficiation of the mineral deposit, and by the placement of waste ore, sub-grade ore, and any permanent facilities located on or near the mine site.

In addition, the definition should make clear that mining impacts on lands and water affected by the mineral activity are covered by the reclamation bond.

3809.1-9 Financial Guarantees. (Notice).

1. As previously discussed, financial guarantees for notice operations are inadequate and must be increased to reflect the true costs of reclamation.

2. The financial guarantee must be in hand as payable to the Secretary at the time the notice if submitted. Given the lack of manpower to inspect all notice level operations, BLM would not be able to effectively regulate whether a surface disturbance occurred on a notice site prior to approval of the financial guarantee. The approval of the financial guarantee should be concurrent with submission of the notice.

3. BLM states in the preamble at 56 Fed. Reg. 31603 that operators need to submit the certification with the notice in order for the notice to be considered complete. We agree with this statement, but this relationship is rendered irrelevant because nothing in the regulations requires the notice to be complete, and the notice does not have to be approved. It is meaningless to assert that failure to submit certification will result in the notice being returned to the operator, unless the provision of 3809.1-3(b) is modified to require that the notice be found complete, or to establish a notice approval process.

4. Further, the relationship between the submission of the financial guarantee and the notice is not clear in the proposed rule. BLM should clarify that the financial guarantee must accompany the notice to the BLM office.

5. The proposal does not make it clear that whatever financial instrument is approved must be redeemable by the Secretary for activities on federal lands. If there is a failure to perform the reclamation, it is the BLM that will bear the responsibility for cleaning up the site. The financial guarantee must be payable to the Secretary.

6. NWF has a major concern with the BLM's reliance on certification to establish that an adequate financial guarantee exists that would stand liable for the reclamation of a notice operation if the operator defaults. How does the BLM propose to ensure the adequacy of the financial instrument, if it never actually sees it? Further, what authority does the BLM have to audit the operators engaged in mining activities under a notice provision to confirm that the financial guarantee exists? The shortcomings in BLM's ability to enforce this provision may lead to abuse of this self-reporting requirement. NWF believes that notice level operations should be subject to the same bonding calculations as any plan of operations.

3809.1-9 Financial Guarantees -- Plans of Operations.

1. As discussed earlier, the proposed bond levels for activities conducted under a plan of operations are inadequate, and the ceilings imposed on the bond calculations may have an adverse impact on state bonding programs.

2. Under 3809.1-9(i), the operator must demonstrate unspecified "evidence" that a financial guarantee has been accepted by the state. This provision must be modified. The Secretary places too much reliance on the states to confirm the adequacy of the financial guarantee. The Secretary has an independent responsibility to review the financial guarantee to determine if it will provide sufficient resources to prevent undue and unnecessary degradation. Further, it is the Secretary for implementing a surface management program on federal lands, and it is the Secretary who should determine that the bonds meet the requirements of this section.

3. NWF supports the provision at 3809.1-9(j) which gives the Secretary authority to review and revise the bond based on modifications to the plan of operations. Plan modifications occur all the time, and changes in the plan that result in additional acreage should result in a recalculation of the reclamation bond. Similarly, reductions in the amount of affected acreage, or modifications in the mining design to produce less waste material, may result in the need to recalculate the bond.

However, BLM should clarify under this section that the bond will be recalculated to cover the complete costs of reclamation. The recalculation should not be limited to the costs of "reasonable stabilization and reclamation of areas disturbed." This reference should be deleted, and replaced with a reference to full-cost reclamation calculations.

3809.1-9(k) Financial Instruments.

1. BLM seeks to greatly expand the kind of financial guarantees that would stand liable for reclamation work in the event that the operator defaults on his or her reclamation responsibilities. Currently, BLM regulations only authorize the use of surety bonds, certificates of deposit, and cash. To support its efforts to broaden the type of financial instruments available for mining on federal lands, BLM makes a number of assertions. First, BLM states in the preamble at 56 Fed. Reg. 31603 that "traditional surety bonds have been too limited in availability." The preamble goes on to assert that "[t]he traditional surety bond is generally no longer available." Ibid. For support, BLM cites a

1988 General Accounting Office report on the availability of reclamation bonds. GAO/PEMD-88-17 (April 1988). These two assertions form the sole basis for BLM's arguments to expand the type of financial guarantees available.

NWF challenges these assertions. There is no evidence presented to indicate the surety bonds are hard to come by, or even worse, no longer available. In fact, the General Accounting Office report came to almost the opposite conclusion. The General Accounting Office reported that 90 percent of the value of the bonds used operators in the coal mining states reviewed were surety bonds. They clearly have not been hard to come by. While NWF has no objections to the BLM diversifying the types of financial guarantees available, we strongly urge the agency to exercise caution on the use of instruments other than surety bonds.

The great benefit of requiring a surety bond is the risk transfer that occurs. The surety takes the risk of the failure of the operator, not the federal government. Under the other bonding mechanisms, the burden falls to the federal government to ensure the viability of the financial instrument, and collect the financial instrument in the event of forfeiture.

2. NWF has a number of concerns about some of the proposed financial instruments proposed: blanket statewide or nationwide bonds, and self-bonding. Clearly, there is not enough detail presented in the proposed rule to make an informed decision about the impact of these proposals. Given the agency's past use of statewide bonds for oil and gas development, however, we are not encouraged that a statewide bond would provide sufficient resources to clean up mining operations. BLM already has the experience that its statewide bond in the oil and gas program has not provided enough revenues for well-site reclamation, and BLM faces an increasing liability for reclamation of these areas. We strongly object to the use of state-wide bonds for hardrock reclamation, and urge the BLM to delete consideration of statewide bonds from its list of proposed instruments.

With regard to self-bonding, there are a number of critical elements that must be included in a self-bonding policy. I refer you to 30 C.F.R. 800.23 for a detailed regulatory approach to self-bonding that has been adopted by the Office of Surface Mining Reclamation and Enforcement. Self-bonding is a high risk option for the BLM. With self-bonding, the operator takes responsibility for the reclamation without assuming any additional financial liability. In the event of insolvency or forfeiture, the BLM is likely to receive no financial resources to assist in reclamation.

Companies that self-bond must have sufficient financial capital and meet some minimum level of qualifications. However,

regulatory agencies do not have the expertise to determine a mining company's short or long term financial condition to determine the risks of self-bonding. As the General Accounting Office found in their review of bond availability, many states do not allow self-bonding. Even in the states that do, the regulatory authorities and operators are not using this option with regularity.

If BLM is going to actively consider a self-bonding option, it must address a number of issues. What standards will be used to determine the solvency of the company? How will BLM determine if the standards have been met by the company? Will new companies be allowed to self-bond, or is this provision restricted to established companies? Are third-party self bonds included in this option?

3809.3-2(e) Operator Compliance and Bond Calculation.

BLM seeks to ensure that operators with outstanding violations are penalized by no longer being eligible for notice level operations. In addition, the full cost of reclamation of all existing and proposed disturbances will be calculated. NWF supports this concept, although the full cost calculation of reclamation bonds should apply to all operations.

To have a substantive impact on bad operators, this provision should be strengthened in two ways. First, the revocation of notices, and requirement that operations be subject to approved plan of operations should apply to all sites under the control of the operator, not just the sites within a state's boundaries. Second, the sanction should remain in effect until all violations are corrected to the satisfaction of the Secretary. As written, the sanction would be lifted one year after it was imposed, regardless of the disposition of the violations.

Conclusion

BLM should withdraw this proposal in favor of full cost calculations for reclamation bonding. The bond should be calculated to cover the full cost to the government of the reclamation of all lands and waters affected by the mineral development on federal lands. The Secretary needs to be the recipient of any financial instrument that stands liable for activities on federal lands.

There are a number of issues that should be considered in a comprehensive bonding policy that are not considered here. It is critical for the BLM to address the standards for bond release and bond forfeiture. The limitations and availability of phased bonding and incremental bonding also need to be addressed.

As a final note, in the absence of clear reclamation standards for hardrock mining activities on federal lands, this new bonding proposal will have little impact on the continuing environmental abuse of our public lands from mining. State reclamation laws are full of gaps, and both the BLM and the states lack the manpower to enforce what few reclamation provisions may be applicable in that state. NWF made every effort to address the bonding proposal individually, but it does not stand alone in resolving the major deficiencies in BLM's surface management program.

Respectfully Submitted,

David Alberswerth
Director
Public Lands and Energy Division

Cathy Carlson
Legislative Representative
Public Lands and Energy Division

Appendix A – Exhibit 20

CONFIDENTIAL

February 12, 1997

To: Mike Schwartz

From: Dave Alberswerth

Subject: Comments on 2/11/97 draft DOE on hard rock bonding reg.

Per my discussion with you, Mike, here are my comments on the current draft.

1) In the section on "Federal and State Policies", the discussion in the eighth paragraph states, "The upgrading of existing bonds will *cost* operators about $14.77 million dollars [sic] in the first year of implementation." (Emphasis added) The subsequent sentence points out that it this is not really a "cost" to operators, but the value of new bonds required by the rule. Given the confusion that the term "cost" may cause in this discussion to outside readers, I recommend changing the above sentence to read as follows: "BLM estimates the value of bonds will have to be increased by $14.77 million in the first year of implementation."

2) Ninth paragraph, second sentence: Change "The cost for a mix of collateralized guarantees..., etc.", to read, "The value for a mix of collateralized guarantees..., etc." Same rationale as above.

3) In the discussion regarding impacts in Alaska (eleventh paragraph), change "The total *cost* for the additional guarantees in Alaska, for all remaining plans of operation is $470,000" to read instead, "The total *value* for additional guarantees in Alaska,..., etc." Same rationale as above.

4) In the discussion regarding Idaho, change "The full cost of achieving compliance is approximately $710,000." To read, The value of the additional guarantees in Idaho are estimated to be $710,000."

5) The last sentence in that section reads, "Based on the above analysis, as more fully detailed in Attachment A, BLM has estimated that the total economic impact of this regulation for both notice and plans would be $17.10 million." Suggest changing it to read, "Based on the above analysis,... BLM has estimated the total increase in value of the extended bond coverage for both notice and plans to be $17.10 million."

6) Finally, I think a more accurate sub-heading for the chart heading "costs" would be "Increased bond liability".

In conclusion, these changes are recommended to reflect the fact that although the bond coverage will have to increase in the cases described by the analysis, the figures used generally do not represent actual costs to operators, which are likely to be considerably less than the bond liabilities.

APPENDIX B—EXHIBITS

Exhibit and description

1. Letter from Chairman Cubin to Interior Secretary Babbitt dated March 12, 1997.
2. Letter from Chairman Cubin to Deputy Interior Solicitor Cohen dated March 20, 1997.
3. Letter from Deputy Interior Solicitor Cohen to Chairman Cubin dated March 21, 1997.
4. Letter from Chairman Cubin to Interior Secretary Babbitt dated May 14, 1997.
5. Letter from Interior Secretary Babbitt to Chairman Young dated May 21, 1997.
6. Letter from Interior Solicitor Leshy to Chairman Cubin dated June 9, 1997.
7. Letter from Mr. Duane Gibson to Deputy Interior Solicitor Cohen dated June 9, 1997.
8. Letter from Interior Solicitor Leshy to Mr. Duane Gibson dated June 11, 1997.
9. Letter from Interior Solicitor Leshy to Mr. Duane Gibson dated June 11, 1997.
10. Letter from Honorable George Miller to Chairman Young dated June 11, 1997.
11. Letter from Chairman Young to Honorable George Miller dated June 11, 1997.
12. Letter from Interior Solicitor Leshy to Chairman Cubin dated July 1, 1997.
13. Letter from Deputy Interior Solicitor Cohen to Mr. Duane Gibson dated July 7, 1997.
14. Letter from Interior Solicitor Leshy to Chairman Young dated July 15, 1997.
15. Letter from Chairman Cubin to Deputy Interior Solicitor Cohen dated July 15, 1997.
16. Letter from Deputy Interior Solicitor Cohen to Chairman Cubin dated July 16, 1997.
17. Memo dated July 21, 1997, from Mr. Lloyd Jones to Chairman Young.
18. Memo dated July 22, 1997, from Mr. Doug Fuller *et al* to File.
19. Letter from Chairman Young to Honorable George Miller dated July 22, 1997.
20. Letter from Chairman Young to Honorable George Miller dated July 29, 1997.
21. Memo dated July 31, 1997, from Chairman Young to Members, Committee on Resources.

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JOHN LAWRENCE
DEMOCRATIC STAFF DIRECTOR

Appendix B – Exhibit 1

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

March 12, 1997

The Honorable Bruce Babbitt
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Secretary Babbitt:

In order to prepare for the Subcommittee's oversight hearing scheduled for March 20, 1997, I am hereby requesting copies of all documents in the Department's possession pertaining to the proposed rulemaking on bonding of mining operations published on July 11, 1991 and to final rulemaking on this issue published on February 28, 1997. Please provide the Subcommittee with copies of the proposed rulemaking referenced in the preamble to the final rule, all comments received in response to the proposal, and memoranda or other correspondence between the Office of the Solicitor, the Assistant Secretary for Land and Minerals Management, and the Bureau of Land Management during the five and one-half year interval from proposed regulations to publication of the final rule in which the subject matter is discussed. Any documentation in Departmental files which addresses the following requirements of the final rulemaking should also be provided:

* the Paperwork Reduction Act;
* the Regulatory Flexibility Act;
* the Unfunded Mandates Reform Act of 1995;
* applicable Executive Orders (and in particular: Executive Order 128666);
* the Small Business Regulatory Enforcement Fairness Act of 1996; and

Your prompt attention to this request is appreciated.

Sincerely,

Barbara Cubin

Barbara Cubin
Chairman, Subcommittee on
Energy and Mineral Resources

DON YOUNG, CHAIRMAN

Appendix B – Exhibit 2

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

March 20, 1997

Mr. Edward B. Cohen, Esq.
Deputy Solicitor
Department of the Interior
1849 C Street, N.W.,
Washington, D.C. 20240

Dear Mr. Cohen:

In a letter dated March 12, 1997, I requested documents concerning the decision by the Department to publish final rules on bonding of hardrock mining operations on public lands for an oversight hearing in the Subcommittee on Energy and Mineral Resources. This letter memorializes and provides rationale for how the Subcommittee intends to handle such documents provided in response to the request.

The Department has asserted that privileges including attorney-client, attorney work product, and deliberative process privileges apply to some of the requested documents. Based on this assertion, the Department seeks (1) to limit access to the documents to Members and staff of the Committee, (2) to control copying of the documents, and (3) to require consultation before providing access to persons other than Members and staff who seek access to or release of the documents.

I appreciate the Department's willingness to provide the documents. However, the Department's position concerning the three asserted privileges contradicts the broad Congressional legislative and oversight responsibility of the Subcommittee on Energy and Mineral Resources under Rule X and Rule XI of the Rules of the United States House of Representatives, Rule 6 of the Rules For the Committee on Resources, and Article I of the U.S. Constitution. In discharging responsibilities and powers pursuant to these rules, the needs of the Subcommittee and its Members may conflict with the what the Department seeks concerning access to, copying of, and consultation concerning the documents that the Department believes may be privileged.

With respect to the claim of deliberative process privilege, you should note that the Department is not in a position to assert such a privilege. Long-established executive branch procedures dictate that the President must himself assert such a privilege. While such a claim may be sufficient legal ground to withhold the release of documents from a citizen requester under Exemption 5 of the Freedom of Information Act, such grounds are not a justification to withhold from or condition release of documents to the Subcommittee. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) makes clear that Congress has greater powers of inquiry than a citizen asserting a statutorily derived FOIA request, and the FOIA itself specifically

provides that its exemptions are "not authority to withhold information from Congress." 5 U.S.C 552(d). FOIA also provides no authority to condition the release of documents to the Congress.

Similarly inapplicable to the Subcommittee are the Department's claims of attorney-client and work product privileges. It is well established by congressional practice that acceptance of assertions of such privileges before a committee rests in the sound discretion of that committee. Neither can be claimed as a matter of right, and a committee can deny them simply because it believes it needs the information sought to be protected by a privilege to accomplish its legislative functions.

In practice, all committees that have denied claims of privilege have engaged in a process of weigh in considerations of legislative need, public policy, and the statutory duties of congressional committees to engage in continuous oversight of the application, administration, and execution of the laws that fall within its jurisdiction, against any possible injury to witnesses. See, e.g., : "Proceedings Against John Quinn, David Watkins, And Matthew Moore", H. Rept 104-598, 104 Cong,. 2d Sess. 40-54 (1996); "Refusal of William H. Kennedy III to Produce Notes Subpoenaed By the Special Counsel to Investigate Whitewater Development Corporation", Sen Rpt. 104-191, 104th Cong. 2d Sess. 9-19 (1995).

Nevertheless, the Subcommittee recognizes the Department's concerns and acknowledges the apparent willingness of the Department to provide the Subcommittee with the documents requested. Of course you are aware that disclosure to Congress during the course of a legitimate oversight and investigation of the Executive Branch would not result in a waiver of any privileges in a judicial forum. See, e.g. *Florida House of Representative v. U.S. Department of Commerce*, 961 F. 2d 941, 946 (11the Cir.) Cert dsmsd, 113 S. CT. 446 (1992); *Murphy v. Department of the Army*, 613 F. 2d 1151, 1155 (D.C. Cir. 1979). Therefore, I must reserve the right for myself and the Members of the Subcommittee to utilize the documents where necessary in the course of the legislative process, in hearing, reports, and attachments to official correspondence. I will advise you of any such use in advance.

Sincerely,

Barbara Cubin

BARBARA CUBIN
Chairman
Subcommittee on Energy

Appendix B – Exhibit 3

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

March 21, 1997

The Honorable Barbara Cubin
Chairman
Subcommittee on Energy and Mineral Resources
Committee on Resources
United States House of Representatives
Washington, DC 20515

Dear Madam Chairman:

This responds to your letter of March 20, 1997, in which you discussed the concerns we have had about Departmental documents requested by the Subcommittee. Specifically, our objective has been to preserve the privileged status that these documents may have in a judicial or other context while responding to the Subcommittee's request in the context of its legislative oversight activities. We agree with your conclusion that disclosure to the Congress does not waive applicable privileges and appreciate your willingness to assist us in maintaining those privileges.

As you pointed out in your letter, the Subcommittee seeks the documents in order to accomplish its legislative functions. We agree that is appropriate; our concern, which you also recognize, is with disclosure beyond the Congress. If the documents are disclosed outside of the Congress and its need for them for legislative functions, we are fearful that such disclosure may compromise our ability to assert the applicable privileges. This is not simply a theoretical fear. One of the cases which you cite in your letter, Murphy v. Army, 613 F.2d 1151, 1158 (D.C. Cir. 1979), indicated that disclosure by a Member of Congress may result in a loss of a privilege.

We appreciate your recognition of our concerns that the interests of the United States not be adversely impacted by release of the documents outside the government and your willingness to work with us toward that end. Accordingly, we are providing to you with this letter the documents we have that are within the scope of your request and which we have identified as privileged and marked as "Confidential". We look forward to working with you and your staff

so as to avoid any actions that might result in a loss of privileges by the United States.

Sincerely,

Edward B. Cohen
Deputy Solicitor

cc: The Honorable Carlos Romero-Barcelo, w/ enclosures

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Appendix B – Exhibit 4

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

May 14, 1997

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RON KIND, WISCONSIN

LLOYD A. JONES
CHIEF OF STAFF

ELIZABETH MEGGINSON
CHIEF COUNSEL

JOHN LAWRENCE
DEMOCRATIC STAFF DIRECTOR

The Honorable Bruce Babbitt
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C. 20250

Dear Mr. Secretary:

I appreciate your making available to the Subcommittee on Energy and Mineral Resources certain documents regarding the final rulemaking on bonding of hardrock mining operations which was published on February 28, 1997. However, upon review of these materials there appear to be other documents which have not been provided that may aid the Subcommittee's exercise of its oversight function. Therefore, please provide the materials outlined below.

1. According to notations at the end of some of the documents that you have supplied, the draft for the hardrock bonding rule was amended on 1/19/95; 7/28/95; 5/30-31/96; 6/21-6/24/96; 8/4/96; and 11/7/96. Please provide a summary of the major changes made on these dates and the reasons for the changes.

2. At the March 20th hearing on the hardrock bonding rules Phil Hocker, president of the Mineral Policy Center (MPC), testified that in early 1993, the MPC telephoned the BLM and urged that they move forward with the bonding rules. Please provide the details of all telephone contacts and meetings between BLM or upper level Interior Department personnel based in Washington, D.C. and the MPC or anyone working for the MPC from January 1, 1993 through October 31, 1993.

3. Please provide all notes and e-mail messages from or pertaining to any and all meetings held on November 8, 1994 between Dave Alberswerth and Hord Tipton.

4. Please provide all records, including telephone logs, e-mails, and meeting notes, of BLM staff consultation, staff of the Office of the Solicitor and David Alberswerth concerning the hardrock bonding regulations from October 1, 1994 through November 8, 1994.

5. Please provide a copy of the proposed final bonding rule as it was before any of the 1/19/95 changes were made.

6. Please provide a copy of the side-by-side, section-by-section comparison of the draft rule and the proposed final rule requested by Patty Beneke and referenced in a memo from Dave Alberswerth to Hord Tipton dated May 2, 1995.

7. Please provide a detailed description of Solicitor's hardrock strategy referenced in a memo from Annetta Cheek to Monica Burke dated June 7, 1996.

8. Please provide a copy of the "attached missive from Annetta" referenced in an e-mail from Rick Deery to T. Hudson and N. Eades dated June 19, 1996.

9. Please provide all records, including notes from meetings, telephone logs, and e-mails, for any meetings, telephone calls or e-mail conversations on hardrock bonding during the month of June, 1996 involving any of the following individuals: Dave Alberswerth, Natalie Eades, Annetta Cheek, Rick Deery, Ted Hudson, or Monica Burke.

10. Please provide copies of any correspondence, including letters, meeting notes, telephone logs or e-mails, between the BLM and the Small Business Administration's Office of Advocacy pertaining to the definition of a "small entity" for purposes of this rulemaking.

11. Please provide a complete copy (i.e., pages 1-8) of the undated partial document which I have labeled Attachment A.

Your prompt attention to this request is appreciated. I have yet to hear from you regarding my request to make available to testify certain persons within the Department of the Interior. I, too, regret this continuing disagreement, but I find this matter of sufficient importance to pursue our inquiry further. Let me reiterate my paramount concern: the public must always be given proper opportunity to comment upon any and all rulemakings. Furthermore, an agency charged with formulating a rule must be totally forthcoming about its rationale for the rule and changes from proposed rules, and rigorous in the analysis of the rule's impact upon our citizens. To do otherwise invites the cynicism with which so many of my constituents already view the federal government's actions. Thus, I ask again, together with several governors, the legislature of the State of Nevada, and other elected officials, do the right thing Mr. Secretary, withdraw this rule.

Sincerely,

Barbara Cubin

Barbara Cubin
Chairman, Subcommittee on
Energy & Mineral Resources

cc: Ranking Member Carlos Romero-Barceló
Congressman Chris Cannon

Appendix B – Exhibit 5

THE SECRETARY OF THE INTERIOR
WASHINGTON

MAY 21 1997

Honorable Don Young
Chairman, Committee on Resources
House of Representatives
1324 Longworth House Office Building
Washington, D.C. 20515-6201

Dear Mr. Chairman:

I understand that a number of different document requests have recently been made by you and Resources Subcommittee Chairmen, and that the production and handling of these documents has become a significant point of contention between the Department and the Committee. In an effort to ensure that both of us can carry out our respective responsibilities, I suggest that we work together to develop overall procedures governing these requests.

Of particular concern to the Department is Chairman Hansen's decision to place in the public record all documents provided by the Department in response to a written request from you and Congressman Hansen. When the Department responded to this request on April 23, we listed certain documents as subject to "privileges which could be asserted in response to a request for disclosures other than to the Committee in the exercise of its legislative and oversight authority." These included documents protected by the deliberative process and attorney work product privileges, as well as one containing personal and privacy information. In transmitting the documents, we explicitly requested in writing that if the Committee determined, in the exercise of its legislative and oversight responsibilities, a desire to publicly disclose the privileged documents, we be provided an opportunity to discuss our concerns about such disclosure.

This has been our standard practice with respect to documents requested by Congress. It generally has been a successful process, enabling the Congress to obtain documents which are otherwise privileged.

Before the documents were provided to the Subcommittee, your staff stated a willingness to negotiate terms and conditions regarding the release of sensitive documents. Yet, despite our specific written request for consultation, the Subcommittee made a blanket and immediate public release of all the documents. We were not given an opportunity to discuss our concerns about public disclosure of predecisional expressions of Departmental officials, an attorney's preliminary

assessment of the legal position of the United States, nor of personal information such as a social security number.

The Department respects the legislative and oversight authority of Congress. We have fully responded to all of the Committee's past comprehensive requests. We have freely provided documents to the Committee, upon a simple written request, as long as such requests were consistent with the Committee's procedures for conducting oversight.

Although the Courts have supported Congressional access to privileged materials for legislative purposes, they have done so on the presumption that the "committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties." Ashland Oil, Inc. v. Federal Trade Commission, 409 F. Sup. 297, 308 (D.D.C. 1976) affirmed in Ashland Oil, Inc. v. Federal Trade Commission, 548 F. 2d. 977, 979 (D.C. Cir. 1976); Exxon Corp. v. Federal Trade Commission, 589 F. 2d. 582 (D.C. Cir. 1978) cert. denied, 441 U.S. 943 (1979). In protecting Congress' access to information, the Courts have held that disclosure to Congress, by itself, does not waive any legal privileges. Florida House of Representatives v. United States Department of Commerce, 961 F. 2d. 941, 946 (11th Cir. 1992), cert. dismissed, 506 U.S. 969 (1992); Aspin v. Department of Defense, 491 F. 2d. 24, 26 (D.C. Cir. 1973). Further disclosure by Congress, however, can and does lead to a compromise of the interests of the United States.

Moreover, the powers of Congress are not without limitation. McGrain v. Daugherty, 273 U.S. 135 (1927), Watkins v. United States; 354 U.S. 178 (1957) and Barenblatt v. United States, 360 U.S. 109 (1959). Its authority is limited to those matters on which legislation could be had. As the Supreme Court stated in Watkins, there "is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress .... Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government." 354 U.S. 178, 187. In the instance of this public disclosure, it is impossible to determine, from either the record of the hearing or the circumstances of the disclosure, whether any legislative function was implicated in the release of the privileged documents. Rather, it appears that the documents may have been released in a pique of anger over the timing of the production of the documents. We believe that such public disclosure, in the face of a specific statement of concern from the Department, was without regard to its potentially serious ramifications. Not only were privacy interests at stake, but such disclosures potentially undermine the ability of the Executive Branch to carry out functions which are uniquely the province of the Executive Branch.

We desire to continue to be responsive to requests for information that are within the oversight and legislative jurisdiction of the Committee. We do not want to return to a practice of challenge and confrontation with the Congress. However, we believe that new procedures to govern the handling of sensitive documents are necessary.

Accordingly, we request a meeting with you or your staff to discuss our response to outstanding and future Committee requests for documents. We hope to establish a

written protocol between us that will govern such requests. Until such a protocol is in place, we will make privileged documents (with the exception of information covered by the Trade Secrets Act, 18 U.S.C.§ 1905) available to the Committee for inspection in our offices. We will provide copies, on a case by case basis, with appropriate assurances that the confidentiality of such documents will be maintained. We will allow inspection of information covered by the Trade Secrets Act only after agreement is reached regarding its protection.

We believe that this approach is consistent with the appropriate balancing of interests between the Executive and Legislative branches that the courts have recognized in the context of Congressional oversight activities. As President Reagan stated in his November 4, 1982, Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information:" "Historically, good faith negotiations between Congress and the executive branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches."

We believe that discussions about a written protocol to govern Committee requests in an atmosphere untainted by the time constraints of a particular request will help insure a thoughtful discussion and resolution of Committee and Departmental concerns. We are available at your and your staff's convenience to meet to establish the protocols proposed in this letter. Please contact Timothy Elliott, Acting Associate Solicitor for General Law, at (202) 208-4722 to arrange a time to meet.

Sincerely,

cc: Honorable George Miller

Appendix B – Exhibit 6

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JUN - 9 1997

Honorable Barbara Cubin
Chairman, Subcommittee on Energy and Mineral Resources
Committee on Resources
House of Representatives
Washington, D.C. 20515

Dear Chairman Cubin:

This responds to your letter of May 14, 1997, requesting the Department to provide further documents regarding the Department's rule for bonding of hardrock mining operations to the Subcommittee. As you may be aware, the Mountain States Legal Foundation, on behalf of the Northwest Mining Association, has recently filed suit challenging the Department's hardrock bonding regulations. Given this litigation and our concern for maintaining any litigation-related privilege that may attach to documents responsive to your May 14th request, we will make any responsive documents available for your inspection at our offices at a mutually convenient time. This procedure is in keeping with the procedures outlined by Secretary Babbitt in his May 21, 1997, letter to Chairman Young regarding requests for documents by the Resources Committee and its Subcommittees. A copy of the letter is enclosed.

Our enumerated responses correspond to the numbered paragraphs in your letter of May 14th.

1. During the periods set out in your letter, various employees of the Department reviewed the draft final rule and made changes to it. In accordance with customary practice, rather than designating a change as "minor" v. "major", each commenter merely provided suggested deletions and additions to the rule. As we have stated previously, we believe that any changes made to the rule were well within the scope of changes allowable under the Administrative Procedure Act and none of the changes made were "major" in the sense of suggesting that reproposal of the rule was appropriate. We will make the remaining drafts of the rule available to you and your staff for inspection at a mutually convenient time at our offices.

2. We have found no documents memorializing any contacts between the Department and the Mineral Policy Center regarding hardrock bonding.

3. We have not found any documents responsive to this request.

4. We have not found any documents responsive to this request.

5. We have located one document which we believe may be responsive to your request, but we can not be certain. Although some of the draft documents are dated, we did not, as a routine matter, date each of the drafts. In addition, as the document was maintained on a computer, often changes were made to a document without a copy being printed and without saving a hard copy of the document. The document that we believe may be responsive to your request will be made available for your inspection.

6. Although such a document is referenced in the memorandum dated May 2, 1995, we are not certain that any document fitting the description of the memorandum was ever created. However, the Bureau of Land Management did prepare two separate side-by-sides comparing the proposed and draft final of the rule as it stood on the dates noted on the documents. These two documents will be made available for your inspection.

7. No such document exists.

8. A copy of that e-mail will be made available for your inspection.

9. The documents responsive to this request will be made available for your inspection.

10. The Bureau of Land Management has not located any documents responsive to this request. However, as we believe from your request that you are interested in documents regarding the definition of "small entity", two staff-level memoranda between the Small Business Administration and the Office of the Solicitor will be made available for your inspection.

11. A copy of the document responsive to this request will be made available for your inspection.

While we are willing to make these documents available for your inspection, we are in the midst of litigation, and therefore want to limit access to these documents to designated members of your and the minority staff. Please contact Shayla Simmons of the Office of Congressional and Legislative Affairs at (202) 208-4615 to arrange for inspection of the documents referenced above.

Sincerely,

John D. Leshy
Solicitor

Enclosure

Appendix B – Exhibit 7

DON YOUNG, CHAIRMAN

U.S. House of Representatives
Committee on Resources
Washington, DC 20515
June 9, 1997

Mr. Ed Cohen
Deputy Solicitor
U.S. Department of the Interior
Washington, D.C. 20240

Dear Ed:

On March 20, 1997, Chairman Cubin offered to advise you of anticipated use of certain documents provided to the Committee by the Department on the issue of hardrock mining bonding regulations. Chairman Cubin's subcommittee is scheduled to hold a hearing on the bonding regulation this week and the following documents are anticipated to be used in the legislative and oversight process at the hearing or subsequently.

1) 11/29/91 Note to Assistant Director from 680
2) Memorandum to Assistant Secretary from the BLM w/ Final Rule attached
3) 10/25/94 Memorandum to Bob Armstrong, et. al. from Dave Albersworth
4) 8/28/95 Memorandum to Ted Hudson from Sharon Allender
5) 2/10/97 Memorandum/e mail to Rick Deery from Sharon Allender
6) 2/12/97 Memorandum to Mike Schwarz from Dave Albersworth
7) E mail messages-- 6-7-96 from Anneta Cheek
   6-13-96 from Rick Deery
   6-19-96 from Rick Deery
   6-20-96 from Tom Leshendok
   6-21-96 from Rick Deery
   7-3-96 from Natalie Eades
   9-17-96 from Sharon Allender
8) 6-14-96 Memorandum to John Leshey from Dave Albersworth
9) pages 7-8 of an unidentified memoranda

This list includes the documents that are anticipated to be needed, but the situation may change at the hearing due to new information. If you wish to discuss this matter, please give me a call. Thank you.

Sincerely,

DUANE GIBSON
Counsel

cc: Mr. Bill Condit
Mr. John Rishel
Mr. Lloyd Jones

Appendix B – Exhibit 8

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

June 11, 1997

Mr. Duane Gibson
Counsel
House of Representatives
Committee on Resources
Washington, D.C. 20515

Dear Mr. Gibson:

We received your letter of June 9, 1997, to Mr. Ed Cohen listing the documents Chairman Cubin anticipates using during the hearing scheduled for June 12, 1997. In response to the Subcommittee's request for documents in the exercise of its oversight functions, the Department provided the documents requested and marked those covered by a privilege (such as attorney-client, work product or deliberative process) against public disclosure as confidential. Our concern about disclosure is heightened by the fact that litigation is pending on issues that are addressed in these documents. Northwest Mining Association v. Babbitt, CV-97-1013-JLG (D. D.C.).

Although providing these documents to Congress does not waive any privilege we may assert, we are concerned that the Subcommittee's introduction of these documents into the hearing record may affect the preservation of the privilege. We have no intention of waiving the privilege and object to the introduction or use of these documents in the hearing.

Your letter also states that these documents may be used subsequent to the hearing. Again, we object to any use of these documents in any manner which could affect our ability to maintain the privileged nature of these documents.

We believe that release of these documents could harm the interest of the United States in the litigation with the Northwest Mining Association. Given the pendency of the litigation, we believe the federal court, and not the Subcommittee, is the proper forum for determining the extent to which these documents are subject to disclosure to the plaintiff or the public.

Sincerely,

John D. Leshy
Solicitor

Appendix B – Exhibit 9

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

June 11, 1997

Mr. Duane Gibson
Counsel
House of Representatives
Committee on Resources
Washington, D.C. 20515

Dear Mr. Gibson:

Upon further review of those documents listed in your letter of June 9, 1997, there are four documents listed in item 7 of your letter which we do not believe are privileged or for which we did not initially assert a privilege. Those documents are:

June 13, 1996 e-mail message from Rick Deery to Dave Alberswerth
June 20, 1996 e-mail message from Tom Leshendock to Rick Deery
June 21, 1996 e-mail message from Rick Deery to Tom Leshendock
July 3, 1996 e-mail message from Natalie Eades to Rick Deery

With respect to the rest of the documents, we maintain our belief that those documents are privileged.

Sincerely,

John D. Leshy
Solicitor

Appendix B – Exhibit 10

DON YOUNG, CHAIRMAN

U.S. House of Representatives
Committee on Resources
Washington, DC 20515
June 11, 1997

The Honorable Don Young
Chairman
Committee on Resources
Washington, D.C. 20515

Dear Mr. Chairman:

I have just learned that your committee staff has informed the Department of the Interior that Chairman Cubin intends to use tomorrow's Subcommittee on Energy and Mineral Resources' hearing as a forum for disclosing to the public certain documents which are marked "confidential" and considered by the Solicitor to be privileged.

Once again, Democratic Members of the Subcommittee were not notified of the intended disclosure of the confidential materials, but had to learn of this decision through a third party. After our recent meeting on this subject, I believed that we had an agreement on the handling of document requests, and an assurance that Democrats would be given copies of correspondence. This is obviously not the case.

As noted in Solicitor Leshy's letter (copy attached), litigation is pending on the subject matter and public disclosure could jeopardize the ability of the Department to assert attorney-client, work product or other privilege in court. These documents were provided at the request of the Subcommittee prior to the Northwest Mining Association suing the Secretary over the BLM's bonding regulations. Now that lawsuit has been filed, it is clearly inappropriate for the Committee to release the privileged documents. To do so would create the impression that the Majority is using the power of the Congress to conduct discovery for the mining industry, obtaining and disclosing materials that would not otherwise be available through the normal judicial process.

Accordingly, until such time as safeguards are provided to assure the confidentiality of such items, I must advise the Administration and other not to provide this Committee with physical custody of documents or records that involve sensitive matters such as attorney-client, work process or deliberative process privileges. I would hope that you and I could again attempt to work out a mutually agreed upon protocol to assure that the legitimate concerns of the Minority are protected, and that sensitive documents are treated appropriately when acquired by the Committee.

Sincerely,

George Miller

GEORGE MILLER
Senior Democratic Member

cc: Members, Committee on Resources

DON YOUNG, CHAIRMAN

Appendix B – Exhibit 11

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

June 11, 1997

The Honorable George Miller
U.S. House of Representative
Washington, D.C. 20515

Dear George:

I received your letter dated today about Chairman Cubin's hearing tomorrow and the use of certain documents establishing what appears to be an improperly issued bonding regulation--a regulation that places unnecessary financial burdens on the back of small mining firms that produce a good part of this nation's wealth. I was dismayed at the intimations in your letter, particularly because Chairman Cubin specifically complied with her gracious written assurances to Solicitor Leshy that the Department would be notified in advance of the intention to utilize the documents. Quoting Chairman Cubin's March 20, 1997 letter to the Deputy Solicitor,

> "I must reserve the right for myself and the Members of the Subcommittee to utilize the documents where necessary in the course of the legislative process, in hearings, reports, and attachments to official correspondence. I will advise you of any such in advance."

Chairman Cubin kept her word. On June 9, 1997, Duane Gibson, Counsel to the Committee, advised Mr. Cohen, the Deputy Solicitor, on behalf of Mrs. Cubin, of the intended use of 9 documents which are anticipated to be needed in the course of the hearing (see attached). Mr. Gibson notified Mr. Cohen that the new information learned at the hearing may also necessitate use of other documents. He also offered to discuss this matter if there were any questions. As of this time, no discussions were sought by the Department.

When we discussed the matter of reviews some weeks ago, I said I would be fair to you and follow Committee and House Rules regarding activities of the Committee. Our staff subsequently met and reviewed the outstanding requests related to ongoing reviews. Staff confirmed that the Minority had its own copies of the documents for ongoing reviews, thereby having the same access to the same information as the Majority. I told you when we met that I intend, under most circumstances, to provide you with copies of letters requesting documents on behalf of the Full Committee in anticipation of a Committee investigation. You may recall at our meeting that on the advice of Counsel, my letters that may contain strategic information (such as Mr. Gibson's June 9, 1997 letter to Mr. Cohen on what material may or may not be used by the Members of the Committee in carrying out their legislative and oversight responsibilities) may be quite strategic in nature and may not be routinely shared. Our understanding as memorialized in

past correspondence, places obligations on the Minority to comply with the arrangements that the Majority makes with the Administration as to use, access, and related issues with respect to materials obtained for the reviews. Therefore, I would expect that you would have notified the Department of any anticipated use of documents at the Energy and Minerals Subcommittee hearing that was to be held tomorrow.

As to the issues that you raised regarding pending litigation, you should understand that the Subcommittee's review of the bonding regulations are quite separate and quite apart from any litigation on the matter of the bonding regulations. In fact the Subcommittee review of the matter began on March 12, 1997, well before any litigation on the matter was filed. The requests to the Department were made well before any litigation was filed. The outcome of that litigation is the business of the litigants in the judicial branch forum, not the Committee's or mine in our legislative branch forum. It is not unusual for the Committee to hold a hearing on a rule-making that is the subject of litigation. This has not in the past nor will it be in the future, a hindrance to the ability of Congress to exercise its oversight responsibility.

To suggest as you do that our purpose is "to conduct discovery for the mining industry" ignores the serious responsibilities that Mrs. Cubin has undertaken. Her review encompasses the issues of (1) the basis for finalizing a rule that was shelved for five years, (2) substantially changing the rule in a way aimed to put an essential, job-creating, taxpaying American enterprise out of business, (3) destroying the future of those who work for a living in that business, and (4) failing to follow proper procedures in issuing the rule. It ignores the serious ethical issues on how the rule came to be finalized--issues that are now raised by information in the material provided for the review. While I can understand the Administration's desire to squelch this information from coming into the true light of day at the hearing, I fail to understand why or whether that may be the case on your part.

The Committee should not be in the business of covering up Departmental mismanagement and abuse under the guise of a legalistic "attorney client" privilege that the Department has merely asserted. Indeed, the reason Mrs. Cubin offered to give the Department notice of an intention to use the material is so the Department's lawyers could make the arguments to staff on precisely why, with legal citation and supporting analysis, the Department believed a particular privilege applied to Congress or is relevant for another reason. Instead, the June 11, 1997 letter from Mr. Leahy to the Counsel of the Committee merely restated the same unsubstantiated assertion that use of the documents by the Committee in and for the hearing might result in a waiver of a privilege in a civil litigation forum.

I would think that you share my questions and those of Mrs. Cubin as to why the Department even needs to assert a privilege if its employees did nothing wrong, unethical, or improper? What is wrong with shining a little "sunshine" on the legally unsubstantiated rationale for the Department dusting off a rule that has been on the shelf for years? I support Mrs. Cubin's effort to get the facts on the table so we know how we might modify the laws within the jurisdiction of our Committee. What goes on in any other forum--judicial or otherwise--is frankly irrelevant to the important review now underway in Mrs. Cubin's Subcommittee.

The Department's assertion and your letter implies that documents we can obtain, cannot be used in the course of the business of the Committee--an illogical implication. Such a proposition is unacceptable. As you well know, Article I of the Constitution is the basis for broad powers of the Congress and its Committees to obtain information for its legislative, oversight, and investigative functions.

Mrs. Cubin did what she promised to do--notify the Department of the intended use of the documents. The Department elected not to discuss this matter with the staff of the Committee and instead sent a short, four paragraph letter reasserting without citation its belief that some privilege meant our Committee could not use what it had obtained when we need what was obtained. The hearing that was scheduled for tomorrow has been postponed, but I support Mrs. Cubin's decision to use any or all of the documents referenced in Mr. Gibson's June 9, 1997 letter to Mr. Cohen as she sees fit in preparation for, during, and following the hearing to carry out the responsibilities of the Subcommittee.

I appreciate you telling me of your advice to the Administration. You are obviously free to advise the Administration as you wish. While my requests for information from the Department have to date been accomplished by letter, more formalized, encompassing procedures can be utilized if necessary to ensure that Members of the Committee obtain copies of documents necessary to fulfill legislative, oversight, and investigative responsibilities under Article I of the Constitution, the Rules of the House of Representatives, and the Rules of the Committee on Resources (Rule 6(a)(4), (6), and (9) concerning the Subcommittee on Energy and Mineral Resources and Rule 4 (e) of the Rules for the Committee on Resources).

In addition, you should be aware, because your staff attended the meeting last week, that the Department officials met with my staff concerning Secretary Babbitt's letter to me on document request issues generally and with respect to Escalante. I withheld responding to the letter to give the Secretary's staff a chance to discuss the document matters, but I will be responding to the Secretary. I will copy you with the response.

Sincerely,

DON YOUNG
Chairman

cc: Chairman Barbara Cubin
Other Member of the Committee on Resources

Appendix B – Exhibit 12

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

July 1, 1997

The Honorable Barbara Cubin
Chairman, Subcommittee on Energy and Minerals Resources
Committee on Resources
U.S. House of Representatives
1626 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Cubin:

This is the followup information I promised in response to several issues raised during the hearing held on June 19, 1997, regarding BLM's bonding rule for hardrock mining operations.

The first issue concerns the effect on the U.S. position in litigation of any disclosure by the Subcommittee of documents the Department supplies to the Committee but regards as privileged from disclosure in the judicial process. It is a very well-established principle of evidence law that disclosure of otherwise privileged materials waives the privilege. See, e.g., Hunt v. Blackburn, 128 U.S. 464 (1888). This is so, moreover, even where the disclosure was inadvertent. Wichita Land & Cattle v. American Federal Bank, 148 F.R.D. 456, 457 (D.D.C. 1992). See also In Re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (inadvertent disclosure waives privilege not only as to specific document, but also as to all other communications relating to the same subject matter.)

We have not found any federal court cases that resolve this precise issue in the context of congressional committee disclosure. But some federal court opinions plainly suggest that disclosure by a congressional committee of privileged documents furnished to it by the executive branch could waive the privilege. See Murphy v. Army, 631 F.2d 1151, 1158 (D.C.Cir. 1979) ("had [the Congress] actually disclosed the document to others outside the Congress the privilege might have been lost"); Moon v. Central Intelligence Agency, 514 F. Supp. 839, 840-41 (S.D.N.Y. 1981). Further, an administrative decision of the Department of Labor actually decided that the privilege is waived by disclosure in the context of a congressional disclosure of documents. Robert Scott v. Alyeska Pipeline Service Company, Case No. 92-TSC-2, March 4, 1992 (motion for protective order denied because "it is clear that this document is no longer privileged, since it has been made public by the House Committee") (copy enclosed).

This Department and the Subcommittee agree that our merely furnishing documents to the Subcommittee does not waive litigation-related privileges that may attach to them. Yet there

remains a substantial risk that disclosure of these documents by the Subcommittee may be deemed to be a waiver. Opinions like Murphy suggest, and the Scott opinion holds, that it is not sufficient for us merely to advise you of our claimed privilege; we must also reasonably expect that the subcommittee will not release the document to the public.

I emphasize that our concern is institutional, not political. On this general subject, I am also enclosing, for your information, a 1989 opinion from William P. Barr, Assistant Attorney General, Office of Legal Counsel, which addresses the general subject of "Congressional Requests for Confidential Executive Branch Information." This opinion notes, among other things, that the Executive and the Congress ought to strive to reach accommodations that protect

> "whatever legitimate interests Congress may have in obtaining [confidential executive branch] information, while, at the same time, preserving executive branch interests in maintaining essential confidentiality.

In this connection, I believe the relative lack of court decisions addressing this precise question stems from the fact that congressional committees have generally accommodated executive branch concerns by not disclosing such documents.

Second, you asked why BLM's draft rule, unlike the final rule, made no specific reference to compliance with state water quality standards for one year prior to BLM's release of the remaining portion of the bond. The bonding rulemaking does not change the preexisting requirement that hardrock mining operations conducted on federal lands comply with all applicable federal and state water quality standards. 43 C.F.R. 3809.2-2(b). BLM's draft rule provided simply that bonds may be released or reduced when all or a portion of the reclamation had been completed in accordance with the approved plan. 56 Fed. Reg. 31602, 31605 (July 11, 1991). Several environmental groups (including the Sierra Club Grand Canyon Chapter, the Lane County Audubon Society, and the National Wildlife Federation) submitted comments to the effect that the proposed rule failed to adequately address water quality issues. In response to such comments, and to provide more specificity about the obligations of a prudent operator, BLM decided to include the provision requiring it to retain 40% of the bond amount until revegetation efforts were completed and any effluent discharged had met applicable effluent and water quality standards for one year.

Third, Congressman Gibbons also requested information regarding instances of non-compliance in Nevada. Enclosed for your information is a letter from the BLM State Director of Nevada to Assemblywoman Marcia de Braga which we believe answers the question on instances of non-compliance in Nevada. This letter was in response to a question from Assemblywoman de Braga regarding BLM's evidence demonstrating a need for Federal bonding of notices.

Fourth, Congressman Gibbons also requested an analysis of Nevada's state bonding requirements as compared to BLM. Prior to BLM's final rule, the State of Nevada did not require bonding for notice level operations, apparently because under current Nevada law only plan level operators may participate. I understand the Nevada legislature is considering a law to permit the State's Department of Conservation and Natural Resources to amend its regulations to permit notice level operators to participate in the state bond pool.

BLM and the State of Nevada have entered into a memorandum of understanding (MOU) to provide for joint administration of reclamation and bonding of plan level operations. Under the terms of the MOU, once BLM and the State agree upon a bond amount the operator provides a single bond in that amount. For BLM-approved plans, BLM is the lead agency to receive, process, and hold the bond unless it and the State mutually agree otherwise. The State is the lead agency for other operations.

Fifth, you requested an explanation for the inclusion in the final rule of a provision setting out the criminal penalties for violation of the rule. The preamble to the final rule explains that this provision simply reiterates the penalties fixed in section 303 of the Federal Land Policy and Management Act. The provision was included, in other words, to provide a more complete notice to affected persons of the potential consequences of violating the rule.

Finally, you requested information on the extent to which bonding policy may be addressed in the ongoing general review of the 3809 regulations. Enclosed for your information is a copy of the Federal Register notice dated April 4, 1997, announcing BLM's intent to prepare an environmental impact statement (EIS) covering revision of the 3809 regulations and a document entitled "43 C.F.R. 3809 Surface Management Regulations - Scoping Information." This last document provides more specific information regarding the EIS and BLM's purpose in seeking to revise the regulations, and it includes a list of the items BLM has identified as issues or concerns to be addressed during this process. Bonding is one of the listed items.

Let me also take this opportunity to respond to your June 17 letter requesting any material the Office of the Solicitor faxed to the SBA's Office of Advocacy on April 18, 1997, and the official answer SBA provided the Department. We have not been able to determine what materials were faxed to the SBA's Office of Advocacy on that date because we did not separately identify in our files or anywhere else what materials we transmitted. Further, SBA's Office of Advocacy never provided the Department with an official answer.

Finally, your June 17 letter also sought answers to two further questions, as follows:

1. **On what date did the BLM first contact the Office of Advocacy regarding the definition of a "small entity" and who made the contact?** First, our conversations with the staff of the Office of Advocacy were not primarily and specifically concerned with the definition of "small entity." Rather, they were more generally to discuss the legal

requirements of the Regulatory Flexibility Act. We are not sure of the exact date of the first contact. The initial phone call was made by Sharon Allender and Natalie Eades of the Solicitor's Office to Russ Orban about a week after your letter of March 24. We have no notes, memoranda or other records of this conversation.

2. **Who were the participants in the April 2, 1997 conversation between the BLM and the Office of Advocacy concerning the definition of "small entity"?** See first two sentences of previous answer. The participants in that conversation were Sharon Allender and Natalie Eades of the Office of the Solicitor and Shawne Carter and Jennifer Smith of the Office of Advocacy. We do not have any records of this conversation either.

Let me know if you need any additional information.

Sincerely,

John D. Leshy
Solicitor

Enclosures

cc: Honorable Carlos A. Romero-Barcelo, Ranking Minority Member
Honorable Jim Gibbons

Appendix B – Exhibit 13

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

July 7, 1997

Mr. Duane Gibson
Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515-6201

Dear Duane:

I want to respond further to our various discussions about the Energy and Minerals Resources Subcommittee's recent request for copies of additional privileged documents relating to BLM's bonding rule for hardrock mining operations.

As you know, our concern about providing copies of these privileged documents relates to the effect on the litigation position of the United States in the event the documents are disclosed to the public. As the attached letter to Congresswoman Cubin demonstrates, this concern is not simply theoretical. Our research indicates that it is not sufficient for the executive branch agencies merely to advise a Congressional Committee of the claimed privilege; we must also reasonably expect that the Committee will not release the document to the public.

With these principles in mind, Chairman Young's letter to Congressman Miller dated June 11, 1997 gives us pause. The Chairman states that "[w]hat goes on in any other forum - judicial or otherwise - is frankly irrelevant to the important review now underway in Mrs. Cubin's Committee." While we certainly agree that the Congress possesses broad powers to obtain information for its legislative, oversight and investigative functions, our research indicates that the disclosure of otherwise privileged information by the Committee is not "irrelevant" to what goes on before the courts. We continue to believe that we must find ways to accommodate the Committee's legitimate access to Departmental information with the Executive branch's responsibility and authority to manage litigation. Unfortunately, that responsibility and authority can be preempted when otherwise privileged documents are publicly disclosed by Congress.

So that there is no mistake about our position, we do not seek to inhibit the Committee's exercise of its legitimate legislative, oversight and investigative functions. We already have made the privileged documents available to the Committee for inspection. However, we must continue our joint efforts to define procedures and safeguards that will protect the relatively few documents that are privileged from public disclosure. As we previously have indicated, we believe a generic agreement or policy statement by

the Committee assuring the Department that the Committee will maintain the confidentiality of privileged documents would be a constructive approach to this issue.

I look forward to hearing from you.

Sincerely,

Edward B. Cohen
Deputy Solicitor

cc: Jeff Petrich

Enclosure

Appendix B – Exhibit 14

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

July 15, 1997

Hon. Don Young, Chairman
Committee on Resources
Washington, D.C. 20515-6201

Dear Mr. Chairman:

I have been advised that the Committee on Resources may tomorrow consider issuing a subpoena to the Department for copies of documents relating to BLM's bonding rule for hardrock mining operations which the Department has determined are privileged for purposes of litigation. I write to make sure that the Committee is apprised of all the relevant facts.

On February 28, 1997, the Bureau of Land Management published a final rule upgrading the standards for bonding hardrock mining operations on public lands. The purpose of the rule is to make sure that the hardrock mining industry, and not the Nation's taxpayers, bear the cost of protecting public health, safety, and the environment in connection with such mining activity. The final regulation published in February culminated an initiative to upgrade BLM's bonding policy that dates back to the Reagan and Bush Administrations.

After the final rule was published, the Subcommittee on Energy and Minerals Resources requested documents from the Department that relate to the rule. The Department supplied a large number of documents in response. In addition, Departmental personnel have testified at two separate hearings on the subject held by the Subcommittee and fully answered the Subcommittee's questions about the rule.

In the meantime, some hardrock mining industry groups have filed a lawsuit in federal district court that seeks to stop implementation of the Department's final rule on various grounds. Because of the lawsuit, we carefully reviewed the documents we supplied to the Subcommittee, and have not sent copies of a very limited number of documents (such as preliminary drafts and communications covered by the attorney client privilege) that we believe are privileged from disclosure to adverse parties in litigation.

We informed the Subcommittee staff on June 3 that we would be happy to make these documents available to the Subcommittee staff for inspection. We have repeated that offer orally and in writing on several subsequent occasions.

We are not, in other words, seeking to keep the information in these documents from the Subcommittee. We simply do not want to give the Subcommittee copies of these documents until we have some assurances regarding how they will be used.

As we have repeatedly stated, our concern is that public disclosure of such documents could

adversely affect the litigation position of the United States. We have provided the Subcommittee with a full written explanation, citing relevant court decisions and Attorney General opinions, of the legal basis for our concern. The Subcommittee has not provided us with any arguments or information to assuage our concern.

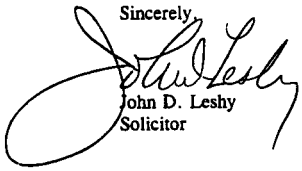
Given a recent incident in which one of your Subcommittees knowingly placed confidential documents in the public record despite our expressed concerns, we are certainly being reasonable in seeking safeguards to assure that the legal position of the United States is not compromised.

We have suggested to the Subcommittee staff that we work together to develop procedures for preserving the confidentiality of privileged documents, including assuring the physical custody of documents. One possible model is procedures adopted by the Committee on Government Reform and Oversight. We believe that such procedures are very much in the spirit of the obligation of each branch of the government to accommodate the legitimate needs of the other. United States v. American Tel. & Tel. Co., 567 F.2d 121, 127, 130 (D.C. Cir. 1977), cited in Opinion of Attorney General William French Smith (October 13, 1981). Such procedures could, in other words, accommodate both the authority of the Congress to engage in oversight and the Executive Branch's legitimate constitutionally recognized need to defend the United States in litigation.

The Subcommittee has not agreed to any process that would meet our concerns about public disclosure, possible waiver of litigation-related privileges, and harm to the litigation position of the United States. Indeed, the Subcommittee has not even sought to examine the documents in question, despite our repeated invitations. In these circumstances, we find it curious that a subpoena for copies of these documents would be considered now.

To reiterate, our offer to make the documents available for inspection stands. We also are prepared to provide copies of the privileged documents to the Committee without the necessity of a subpoena with adequate assurances from the Committee that the confidentiality of the documents will be preserved through appropriate procedures.

Sincerely,



John D. Leshy
Solicitor

cc: Hon. George Miller, Ranking Minority Member
Members of the Committee

Appendix B – Exhibit 15

DON YOUNG, CHAIRMAN

31cc

U.S. House of Representatives
Committee on Resources
Washington, DC 20515
July 15, 1997

Edward B. Cohen
Deputy Solicitor
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. Cohen:

I appreciate your letter of July 1, and your July 7 letter to Duane Gibson, addressing the Interior Department's views on the document requests made by the Subcommittee on Energy and Mineral Resources. I must say, however, that I did not find your arguments particularly helpful. In several discussions on this topic, you have asserted to staff that the Interior Department can lawfully withhold certain documents requested by a Committee of Congress if the Government faces litigation in which it may assert a privilege over such documents, unless the Committee provides assurances that the material will not be made a part of the official record. You have stated that the documents are privileged, and that in the absence of such an agreement, waiver of the privilege could be inferred. You have at times referred to "case law" supporting this assertion, but have yet to supply any. For the record, staff has been able to find no such authority, and I do not believe it exists.

On the contrary, the law is quite settled that attorney-client privilege cannot be used to shield information from Congress, because the privilege is not rooted in the Constitution, but is instead a judicial creation. See Maness v. Meyers, 419 U.S. 449, 466 n.15 (1975); Clinchette v. Rushen, 770 F.2d 1469, 1471 (9th Cir. 1985), cert. denied, 475 U.S. 1088 (1986). See also Morton Rosenberg, "Investigative Oversight: an Introduction to the Law, Practice, and Procedure of Congressional Inquiry," CRS Report No. 95-464A, at 43 (April 7, 1995).

The law is also clear that disclosure of arguably privileged documents to Congress does not constitute a waiver of the privilege. See Murphy v. Department of the Army, 613 F.2d 1151, 1155 (D.C. Cir. 1979). In fact, the reading you give Murphy misses the point entirely. The decision in Murphy stands for the need for "broad Congressional access to governmental information" from the executive branch even where it might not be available to others. Id. at 1156. The disclosure the court briefly contemplated as problematic involved a single Member of Congress giving documents to outside parties --not Congress acting through its Committee structure, using the documents to perform legislative responsibilities under Article I of the Constitution. Further, in Florida House of Representatives v. U.S. Department of Commerce, 961 F.2d 941 (11th Cir.), cert. dismissed, 113 S.Ct. 446 (1992), the court held that the mere threat of a subpoena from Congress was enough to ensure that the production of documents would not act as a waiver: "The disclosure to Congress similarly does not sustain a finding of waiver.

The record again reveals that this disclosure was involuntary. A December 10, 1991 letter from Under Secretary Michael R. Darby to the House Subcommittee on Census and Population makes it clear that the Department was dead set against releasing this information to Congress. It was only under the threat of Congress's power of subpoena that they reluctantly released half the data. The Subcommittee Chairman's reply letter only confirms the forced nature of the disclosure." Id. at 946.

The only authority you have provided on point is an Administrative Law Judge order from the Department of Labor dealing with a privilege asserted by a private company. I do not find this order dispositive of the issue, because (1) it is an A.L.J. order, not case law; (2) it deals with privileges of private entities, not the government; (3) it is not clear that your documents are privileged, or that the claim will ever be made --you are dealing with the privilege prospectively; and (4) in the light of numerous court opinions at odds with this A.L.J. order on the issue of waiver, I believe the A.L.J. to have been in error on this point. Further, you have overlooked the fact that the A.L.J. agrees with the position of the subcommittee on its right to make such documents a part of the record if it deems appropriate: "[t]here is nothing in the voluminous documentation attached to respondent's motion indicating that the Committee acted illegally or improperly in making the [attorney's] notes public." Scott v. Alyeska Pipeline Service Co., U.S. Department of Labor, A.L.J., Case No. 92-TSC-2 at 1 (March 4, 1992). The other cases you cite in your letter to me are simply beside the point, as they do not address the right of Congress to have access to this type of information, nor do they address constructive waiver as it applies to disclosures to Congress.

Our research indicates that the A.L.J. was quite right on one point: pending criminal or civil litigation is no bar to the requirement that agencies of the United States government provide information necessary to Congressional reviews such as this, and such information may be made public if Congress, acting through its committees, deems appropriate. The Supreme Court clarified the issue in Sinclair v. United States, 279 U.S. 263 (1929), a case involving a government witness at a Congressional hearing who had refused to answer questions, noting pending litigation involving the United States. The Supreme Court upheld the conviction of the witness for contempt of Congress, ruling that pending litigation did not remove from Congress the power to investigate administration of the laws. Id. at 295. The Court stated, "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits." Id.

The interest of the Subcommittee on Energy and Mineral Resources in using the documents currently being requested is decidedly not for the purpose of aiding the prosecution

of any pending suit; the Committee's interest is solely in pursuing a valid review of matters under its jurisdiction pursuant to Article I of the Constitution and Rule X of the House Rules. Certainly the manner in which federal regulations are promulgated is a valid and important area of Congressional interest, and information about changes in mining regulations is of great interest to this subcommittee --particularly where public comment on those changes has not been allowed. The Supreme Court has been very clear in its protection of the Congressional right to have access to information such as this. See, e.g., McGrain v. Daugherty, 273 U.S. 135, 174-175, 177 (1927); Watkins v. United States, 354 U.S. 178, 187, 194-195, 200 n.33 (1957); Barenblatt v. United States, 360 U.S. 109, 111 (1959); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504-505 (1975); Nixon v. Administrator of General Services, 433 U.S. 425, 452-454 (1977). Indeed, with the sole exception of information which would violate the secrecy requirement of Grand Jury proceedings under Rule 6(e) of the Federal Rules of Criminal Procedure, I can find no authority whatever for the Interior Department to place any concerns about pending litigation ahead of the authority of Congress in legislation, oversight, and investigation (since we are not presently dealing with a criminal case, I do not believe we have a Rule 6(e) problem here; if I am mistaken, please let me know).

Indeed, courts have supported the right of Congress to hold public hearings and disclose information even where the disclosures would air evidence that will inevitably prejudice a pending criminal case. The 1st Circuit Court of Appeals has held that it is for the Congressional Committee to decide whether the information should be disclosed, not the executive branch:

> ...[I]t may be said that the prejudicial effect of the pre-trial publicity in this case was only a by-product of the conscientious performance by the legislative committee of the investigative function constitutionally confided to the Congress. We mean to imply no criticism of the action of the King Committee. We have no doubt that the committee acted lawfully, within the constitutional powers of Congress duly delegated to it. It was for the committee to decide whether considerations of public interest demanded at that time a full-dress public investigation." Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952).

I am unaware of any examples of subsequent court decisions which have not followed these rulings, nor have I been able to find examples of Congressional committees, whether chaired by Democrats or Republicans, which have ceded the authority to government agencies to decide whether valid requests for information pertinent to ongoing reviews will be complied with. In fact, in 1993 and 1994, the Justice Department was compelled by the Committee on Energy and Commerce to provide testimony, interviews, and documents in a review of Environmental enforcement actions. In repeated letters to the Justice Department, then-Chairman Dingell stressed that his Subcommittee's right to have access to the information, which included confidential pre-decisional prosecution documents, was not subject to prosecutorial discretion. See Staff

Report, "Damaging Disarray: Organizational Breakdown and Reform in the Justice Department's Environmental Crimes Program", House Subcomm. On Oversight and Investigations, Comm. On Energy and Commerce, 103d Cong., 2d Sess. (Comm. Print No. 103-T, 1994). See also "Proceedings Against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, United States Code, Sections 192 and 194)", H. Rept. No. 104-598, 104th Cong., 2d Sess. 40-54 (1996); and "Refusal of William H. Kennedy, III, to Produce Notes Subpoenaed by The Special Committee To Investigate Whitewater Development Corporation and Related Matters," Sen. Rept. No. 104-191, 104th Cong. 1st Sess. 9-19 (1995).

In its staff report, the Dingell subcommittee attached a CRS Report prepared by the American Law Division which agreed with its position --and which confirms the right of this Subcommittee to the material. Citing Sinclair, the report states: "In other words, those having evidence in their possession, including officers and employees of the Justice Department, cannot lawfully assert that because lawsuits are pending involving the government, 'the authority of [the Congress], directly or through its committees, to require pertinent disclosures' is somehow 'abridged'." "Legal and Historical Substantiality of Former Attorney General Civiletti's Views as to the Scope and Reach of Congress' Authority to Conduct Oversight of the Department of Justice", Memorandum from American Law Division, Congressional Research Service, to House Comm. on Energy and Commerce, Subcomm. on Oversight and Investigations, at 4 (October 15, 1993).

The law is very clear on this issue: Congress, acting through its Committees and Subcommittees, has the power to request and to compel production of documents necessary to assist it in its legislative, oversight, and investigative duties. It is then for Congress to decide when, whether, or how such documents may be disclosed to the public if it deems appropriate, regardless of the impact on pending litigation. Providing such documents to Congress in response to a formal request does not constitute a waiver of any privilege over the documents as to third parties. Therefore, I request that the documents in question be provided to the Subcommittee by 4:00 p.m. Wednesday, July 23, 1997, and remind you that the Subcommittee has the power to compel production by subpoena if necessary. Please indicate in writing to this committee no later than 4:00 p.m. Wednesday, July 16, 1997, whether you intend to provide the documents as requested.

Sincerely,

BARBARA CUBIN
Chairman

cc: Mr. John D. Leshey, Solicitor
The Honorable George Miller
Members of the Committee on Resources

Appendix B – Exhibit 16

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

July 16, 1997

Via Facsimile: 225-5255
Original By United States Mail

The Honorable Barbara Cubin
Chairman, Subcommittee on Energy and Minerals
Committee on Resources
U.S. House of Representatives
1626 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Cubin:

This responds to your letter dated July 15, 1997 (sent by facsimile to the Department well after the close of business at 9:00 p.m.) in which you reiterate your request for the production of documents sought by you in your letter of May 14, 1997. You requested our response to your letter by 4:00 p.m. today.

Given the short response time you have provided us, we have not had a chance to analyze thoroughly the cases cited in your letter. However, our rapid review of those cases demonstrates that you may misunderstand our position. The cases cited in your letter support the proposition that Congress has the right to obtain documents from the Executive branch. We do not now and never have disputed the right of Congress to obtain documents in pursuit of legitimate oversight and legislative purposes. Indeed, we have not withheld Committee access to any documents that you have requested. Further, we agree that the Department's disclosure of documents to Congress does not constitute a waiver of any privileges that attach to those documents.

The only issue is the effect of any release of the documents outside of Congress on the Department's ability to assert, in litigation, applicable privileges that attach to those documents. So far as we have been able to discern, none of the case law cited in your letter addresses this issue. The only case on point, despite your characterization of its inapplicability, is the opinion of the Administrative Law Judge in Scott v. Alyeska Pipeline Service Co., U.S. Department of Labor, A.L.J., Case No. 92-TSC-2 (March 4, 1992). We believe this case, as well as general principles of federal law governing the assertion and waiver of the applicable privileges, justifies our concerns.

We are not denying Congress' right to documents in furtherance of its legitimate oversight functions, and therefore repeat our offer to make the documents available for inspection by your staff. However, the colloquy between you and Mr. Miller

during today's markup only reinforces our concern that the Subcommittee may release the documents beyond Congress. Just as we acknowledge Congress' legitimate oversight authority and authority to compel production of documents necessary to assist it in furtherance of its oversight functions, the Executive Branch has both the obligation and the authority to protect the litigation interests of the United States. We would hope Congress would recognize the obligation of the Department to control production of privileged documents outside the government in the context of litigation.

Should the Committee issue a subpoena to compel production of the privileged documents, the Department will respond accordingly.

Sincerely,

Edward B. Cohen
Deputy Solicitor

DON YOUNG, CHAIRMAN

Appendix B – Exhibit 17

3111

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

TO: Don Young
Chairman, Committee on Resources

FROM: Lloyd Jones
Staff Director

DATE: July 21, 1997

RE: Efforts to obtain documents from Department of Interior; recommendation for a subpoena request.

As you know, since March 14, the Committee on Resources has been seeking to obtain certain documents from the Department of the Interior relative to changes in the hardrock mining bonding regulations. The Department has stalled and delayed, asserting various privileges over some of the documents -- including the attorney-client privilege which, of course, does not apply to Congress. These tactics, which appear dilatory, have had the effect of denying the Committee access to information which is critical to performing its oversight function.

The subject matter of the documents falls within the jurisdiction of this Committee under Article I of the United States Constitution and Rule X, clause 1(j)(2), of the House Rules. The documents are related to the process under which the regulations were promulgated, and contain information vital to an ongoing review of that process. I therefore recommend that you request the issuance of subpoenas to Secretary of the Interior Bruce Babbitt, Solicitor of the Department of the Interior John D. Leshy, and Counselor to the Secretary of the Interior Edward Cohen, who have custody of the documents. The Committee staff's repeated, unsuccessful efforts to obtain the documents are detailed below.

Background

For nearly five months -- as part of an ongoing review, at the direction of the Chairman, of matters associated with the promulgation of the new regulations by the Interior Department -- Committee staff has been attempting to obtain documents pertaining to the new regulations. At every step of the process, Committee staff has been met by the Interior Department with resistance bordering on the absurd. First, the Department staff tried to claim executive privilege, which of course would not apply to changes in a proposed regulation. Then, convinced of the lack of merit in their earlier tactic, the Department tried to assert an attorney-client privilege over the documents. By the time they could be convinced that this privilege is a judicial creation with no application to Congress, a lawsuit had been filed against the Department by a group seeking to overturn the new regulations. The Department then changed their tactic yet again and claimed that, in light of the pending litigation, it was forced to refuse the Committee's request for certain documents because providing them to Congress might waive their privilege, especially if the

Committee used the documents in a hearing. Counselor to the Secretary Ed Cohen indicated that if the Committee would only sign a protocol pledging not to use the documents in a hearing or in any Committee documents, they could be provided. In other words, the Department sought to dictate to the Committee how it could perform its Constitutional duties. Worse, signing such a protocol a priori would tie the hands of the members and the Chairman as the review of these matters unfolds.

Committee staff sought to assure the Department that no waiver of privileges would occur if the documents were submitted to the Committee under these circumstances, but Mr. Cohen stated that he knew of case law on point that ruling such disclosure a waiver. With the exception of a single Administrative Law Judge opinion, which apparently misstated the law, such authority was never supplied. On July 15, Subcommittee Chairman Barbara Cubin sent a letter to the Department explaining that case law solidly supports the right of the Subcommittee to this material, while protecting judicial privileges under circumstances such as these. Chairman Cubin's July 15 letter to the Department renewed the request for the documents, reminded the Department of the Committee's power to compel production of the documents, and asked for a reply by the end of the next day, July 16.

As you are aware, the Committee held a markup on July 16, where it voted to authorize you to issue subpoenas for documents pertaining to these regulations. Also on July 16, the Department issued a letter responding to Chairman Cubin, restating its concerns about protecting its privilege, and about the Subcommittee's use of the documents harming the Department's position in the suit. In fact, on the same day, the Department issued a news release stating the Department's concern that, by providing the validly requested documents to the Subcommittee, the documents might be "funneled to the mining industry which has sued the Department."

On July 18, Committee staff reviewed the documents, at the invitation of the Department, in the offices of the Solicitor of the Department. The documents, which are listed below, are various versions of the proposed regulations, together with E-mails and memoranda about the proposed changes and their impact. It is the opinion of the Committee staff that most, if not all, of the documents would be discoverable in a judicial proceeding, since they were prepared months or years before a lawsuit was filed. Further, the documents in question are policy documents, not the work product of lawyers and staff preparing for a specific lawsuit. When Committee staff noted these discrepancies to Mr. Cohen, his response was, "We knew a lawsuit was inevitable."

While the Department may find it unpleasant to allow the Subcommittee to have access to these documents, Committee staff is aware of no legal basis for their being withheld. In fact, the expert on American Law at the Congressional Research Service, after reviewing the matter and the attached correspondence, issued a memorandum concluding that (1) the Subcommittee has a Constitutional right to the documents, and to use them as the Subcommittee deems appropriate; (2) "[a]s your Subcommittee letter of July 15 to the Department accurately points out, the Supreme Court and federal appellate tribunals have consistently ruled that pending civil and criminal proceedings are no impediments to congressional exercise of its oversight and

investigative prerogative, no matter the consequence of possible impeding the successful governmental prosecution or defense of such actions;" (3) "if the Department produces the documents sought and the Committee discloses any or all of them during the pendency of a related judicial proceeding, it is likely that the Court will hold the agency's compliance with the Committee's demand to be involuntary and not to effect the waiver of any applicable privileges." "Propriety of Agency withholding Documents Requested by a Congressional Committee on the Ground that Committee Disclosure Would Affect a Waiver of Common Law Privileges in a Pending Court Proceeding," Memorandum from American Law Division, Congressional Research Service, to House Committee on Resources (July 18, 1997).

Subpoena Request

Therefore, I recommend that the Committee request subpoenas be issued to Secretary of the Interior Bruce Babbitt, Solicitor of the Department of the Interior John D. Leshy, and Counselor to the Secretary of the Interior Edward Cohen for the following material, which is relevant to our ongoing review of the promulgation of the hardrock bonding regulations, and is within the jurisdiction of this Committee under House Rules and the United States Constitution:

Department of Interior
Hard Rock Bonding Regulations
List of Withheld Documents

Folder #5 (documents responding to Question #5 in the May 14, 1997, document request):

- Memorandum to: Assistant Secretary, Land and Minerals Management; from: Director of the Bureau of Land Management; subject: Final Rule Amending Surface Management Requirements for Mining Claims Under the General Mining Laws. Labeled "Document #3809BOND.WPF." Final rule attached.

Folder #6 (documents responding to Question #6 in the May 14, 1997, document request):

- Document, hand-labeled "5/18/95" at the top, entitled "43 CFR 3809 'Bonding Regulations' Side by Side Analysis, Proposed Rule vs. Final Draft Rule.

- Document, hand-labeled "6/96" at the top, entitled "43 CFR 3809 'Bonding Regulations' Side by Side Analysis, Proposed Rule vs. Final Draft Rule.

Folder #8 (documents responding to Question #8 in the May 14, 1997, document request):

- E-mail message, dated 6/19/96, from Rick Deery to THUDSON and Jennifer Eades. Subject: Just talked to Dave A - Forwarded.

- E-mail message, dated 6/17/96, from Anetta Cheek to Rick Deery. Subject: Just talked to Dave A.

Folder #9 (documents responding to Question #9 in the May 14, 1997, document request):

- E-mail message, dated June 7, 1996, from Thomas Leshendok to Rick Deery. Subject: Corporate Guarantees. Attached: June 8, 1996, E-mail message from Thomas Leshendok to Rick Deery. Subject: WO Bonding Rules.

- E-mail message, dated 6/17/96, from Anetta Cheek to Rick Deery re: Bonding (She notes that the rule won't withstand an APA challenge). Stapled together with the following documents:

  a) 6/19/96 E-mail message from Hord Tipton to Rick Deery. Subject: Just talked to Dave A-forwarded - reply.

  b) 6/19/96 E-mail message from Rick Deery to H. Tipton. Subject: Just talked to Dave A - forwarded - reply - reply.

  c) 6/20/96 E-mail message from Thomas Leshendok to Rick Deery. Subject: Just talked to Dave A. - reply.

  d) 6/21/96 E-mail message from Rick Deery to TLESHEND (Thomas Leshendok). Subject: Just talked to Dave A. - forwarded - reply - reply.

- 6/3/96 E-mail message to THudson from Anetta Cheek. Subject: Permanent Vegetation. Clipped together with the following documents:

  a) 6/21/96 E-mail message to Natalie Eades from Rick Deery Subject: Just talked to Dave A. - forwarded - reply - forwarded. Attached is a 6/20/96 E-mail message from Thomas Leshendok to Rick Deery.

  b) 6/10/96 E-mail message from Rick Deery to Natalie Eades. Subject: Side-by-side - Bond Rules.

  c) 6/7/96 E-mail message from Anetta Cheek to Monica Burke. Subject: Bonding Regs.

- Handwritten notes, 4 pages in length. First page is dated 6/7/96 with 6 points noted. Next three pages are handwritten notes from a meeting held on 11/2/94. Meeting was attended by Paul Politzer, Jinx Fox, Rick Deery, Natalie Eades, Sharon Allender and DA.

- Clipped package containing a memo, dated 6/10/96, from Rick Deery to Natalie Eades concerning Side by Side and Bond Rules. 3 items attached:

  a) Memo from Director of Bureau of Land Management to Assistant Secretary of

Interior for Land and Minerals Management concerning Final Rule Amending Surface Management Regulations for Mining Claims under the General Mining Laws;

b) Final Rule (undated draft);

c) 43 CFR 3809 "Bonding Regulations" Side by Side Analysis, Proposed Rule Versus Draft Final Rule, Version Two of 6/10/96.

- 6/13/96 E-mail message to David Alberswerth from Rick Deery. Subject: Bonding Rule - forwarded.
- 5/13/96 E-mail message from Ted Hudson to Rick Deery. Subject: Bonding Rule.
- 6/17/96 E-mail message from Anetta Cheek to Rick Deery. Subject: Bonding. (APA concerns).
- 6/19/96 E-mail from Hord Tipton to Rick Deery. Subject: Just talked to Dave A. - reply.
- 6/20/96 E-mail from Thomas Leshendok to Rick Deery. Subject: Just talked to Dave A. - forwarded - reply.

Folder #10 (documents responding to Question #10 in the May 14, 1997, document request):

- 4/21/97 fax from SBA Office of Advocacy (Jennifer Smith) to Natalie Eades. Cover page and memo to Natalie Eades from Shawne Carter, Jennifer Smith, SBA. Subject: Definition of a "small miner." (Expresses view that Bonding Regs violate Reg Flex Act.)
- Undated "note" (memorandum) from Natalie Eades to Shawne Carter and Jennifer Smith. Subject: Clarification of purpose of meeting. (Explains that DOI wasn't looking for SBA's opinion.)

Folder #11 (documents responding to Question #11 in the May 14, 1997 document request):

- Undated memorandum to Patricia Beneke, Associate Solicitor, Division of Energy and Resources, from Sharon Allander, Assistant Solicitor, Onshore Minerals Branch. Subject: Review of Changes to Draft Final Bonding Regulations.

Draft Versions of the Final Bonding Rule, and Related Documents:

1. Version with handwritten notation at top of first page which reads "This version was returned to Ted Hudson on 7/27/95."

2. Version with cover memo with handwritten notation "4/5" above the 1760 (140) code, and in which handwritten words "bond release" occurs twice on page 4.

3. Version with cover routing slip dated 3/10/95 to Ted Hudson, and on first page of the rule has handwritten notation "Allender subject to further review to resolve outstanding questions 3/10/95."

4. Version with handwritten cover note from Natalie to Sharon that end with a reference to a memo on bounding issues in "S:\er\onshore\NAE\bonding.leg," and on which the second page of the rule corrects Richard Deery's phone number from 452-5350 to 452-0350.

5. Version with cover memo with handwritten notation "6.0 3809 Bond.sur additional changes by Sharon 1/23/97."

6. Version with handwritten notation on the first page which reads "Returned to BLM 8/28/96."

7. Version labeled "4310-84" with handwritten notation on first page reading "deliberative process - Attorney work product," which is then crossed out. Version is stamped "DRAFT," and is further labeled "[AA-680-00-4130-02]".

8. Version with cover page (routing slip) with the handwritten notation that says: "Natalie -- I found this on my table. I'm going to clean up my office to see if I find anything else." The note is signed "SA" (Sharon Allender?). The draft is not stamped Draft, and is labeled "4310-84-P," and "[WO-660-4120-02-24 IA; Circular No.]".

9. Loose pages, numbered iii through liv (on the first page, there is a handwritten notation with the number "8"), partial pages from an analysis of public comments. Some of the pages had paper clips on them (xii, xxxvi, xxxviii, xli).

10. Memorandum to Assistant Secretary, Land and Minerals Management, from Director, Bureau of Land Management. Subject: Final Rule Amending Surface Management Requirements for Mining Claims Under the General Mining Laws. Labeled "1760 (140)" in the upper right corner. Handwritten notation: "7". Attached: draft rule marked "4310-84-P," and "[WO-660-4120-02-24 IA; Circular No.]."

11. Version with cover page labeled: "Markup and Rodino versions." Includes cover memo to Assistant Secretary, Land and Minerals Management, from Director, Bureau of Land Management. Subject: Final Rule Amending Surface Management Requirements for Mining Claims Under the General Mining Laws. Handwritten notation in upper right corner: "Returned to BLM on 5/24/96." Further handwritten notation: "6".

DON YOUNG, CHAIRMAN

Appendix B – Exhibit 18

31 oc

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

TO: FILE

FROM: DOUG FULLER, JOHN RISHEL, BILL CONDIT

DATE: JULY 22, 1997

SUBJECT: REVIEW OF WITHHELD DOCUMENTS AT DEPARTMENT OF INTERIOR

On Friday, July 18, 1997, at the invitation of the Department of the Interior, Doug Fuller, John Rishel, and Bill Condit went to the offices of the Solicitor of the Department to review several documents that had been withheld from the Committee. Attached is a list of the documents we reviewed, according to the contemporaneous notes we took. Present in the offices was Ed Cohen, Counselor to the Secretary of Interior.

Mr. Cohen indicated that the Department's concern was release of the documents by the Committee to the public, which could damage the Department's position in court. He said they wanted to make sure the profile of the issue was heightened so that if there was a vote on using the documents, as had happened with the Escalante documents, that the Committee had all the information necessary to be able to cast an informed vote. Doug Fuller responded that the circumstances under which the Committee casts its votes was a matter of legislative, not executive, concern, and that it would be inappropriate to use this document request in an attempt to tell Congress how to do its business.

Mr. Cohen said it was unfortunate that the Committee was forcing this issue to the point of a subpoena, instead of agreeing to a protocol on how the Committee could use the documents. Mr. Fuller responded that it was the Department, not the Committee, which was forcing the issue to this point. Mr. Fuller explained that the Committee has a Constitutional right and obligation to review these matters, and is only resorting to a subpoena because the Department is responding in a dilatory fashion. Mr. Cohen indicated that, absent such protocols, all future document requests involving documents such as these will have to be subpoenaed. Mr. Fuller explained that the Committee would probably never agree to such terms.

Mr. Fuller expressed some surprise to Mr. Cohen at the nature of some of the documents over which the Department had been trying to assert a privilege, including a policy memo labeled "attorney work product". Mr. Fuller indicated that the memo, which was prepared in October 1995, was not produced by attorneys in preparation for a specific legal action, and would therefore probably not be privileged, no matter how it was labeled. The legal challenge to the rule was not filed until nearly two years later, on May 9, 1997. Mr. Cohen responded by voice mail, left for Mr. Fuller at 4:47 p.m. on Friday, July 18, 1997, that the claim of the privilege was valid because "litigation was inevitable with regard to this rule, and that was an appropriate use of the designation in that context."

Following is a list of the documents that were reviewed:

Department of Interior
Schedule of Withheld Documents

1) Documents in Department-labeled Folder #5 (documents responding to Question #5 in the May 14, 1997, document request):

a) Memorandum to: Assistant Secretary, Land and Minerals Management; from: Director of the Bureau of Land Management; subject: Final Rule Amending Surface Management Requirements for Mining Claims Under the General Mining Laws. Labeled "Document #3809BOND.WPF." Final rule attached;

2) Documents in Department-labeled Folder #6 (documents responding to Question #6 in the May 14, 1997, document request):

a) Document, hand-labeled "5/18/95" at the top, entitled "43 CFR 3809 'Bonding Regulations' Side by Side Analysis, Proposed Rule vs. Final Draft Rule;

b) Document, hand-labeled "6/96" at the top, entitled "43 CFR 3809 'Bonding Regulations' Side by Side Analysis, Proposed Rule vs. Final Draft Rule;

3) Documents in Department-labeled Folder #8 (documents responding to Question #8 in the May 14, 1997, document request):

a) E-mail message, dated 6/19/96, from Rick Deery to THUDSON and Jennifer Eades. Subject: Just talked to Dave A -Forwarded;

b) E-mail message, dated 6/17/96, from Anetta Cheek to Rick Deery. Subject: Just talked to Dave A.;

4) Documents in Department-labeled Folder #9 (documents responding to Question #9 in the May 14, 1997, document request):

a) E-mail message, dated June 7, 1996, from Thomas Leshendok to Rick Deery. Subject: Corporate Guarantees. Attached: June 8, 1996, E-mail message from Thomas Leshendok to Rick Deery. Subject: WO Bonding Rules;

b) E-mail message, dated 6/17/96, from Anetta Cheek to Rick Deery re: Bonding (She notes that the rule won't withstand an APA challenge). Stapled together with the following documents:

1) 6/19/96 E-mail message from Hord Tipton to Rick Deery. Subject: Just talked to Dave A-forwarded -reply;

2) 6/19/96 E-mail message from Rick Deery to H. Tipton. Subject: Just talked to Dave A -forwarded -reply -reply;

3) 6/20/96 E-mail message from Thomas Leshendok to Rick Deery. Subject: Just talked to Dave A. -reply;

4) 6/21/96 E-mail message from Rick Deery to TLESHEND (Thomas Leshendok). Subject: Just talked to Dave A. -forwarded -reply -reply;

c) 6/3/96 E-mail message to THudson from Anetta Cheek. Subject: Permanent Vegetation. Clipped together with the following documents:

1) 6/21/96 E-mail message to Natalie Eades from Rick Deery Subject: Just talked to Dave A. -forwarded -reply -forwarded. Attached is a 6/20/96 E-mail message from Thomas Leshendok to Rick Deery;

2) 6/10/96 E-mail message from Rick Deery to Natalie Eades. Subject: Side-by-side -Bond Rules;

3) 6/7/96 E-mail message from Anetta Cheek to Monica Burke. Subject: Bonding Regs;

d) Handwritten notes, 4 pages in length. First page is dated 6/7/96 with 6 points noted. Next three pages are handwritten notes from a meeting held on 11/2/94. Meeting was attended by Paul Politzer, Jinx Fox, Rick Deery, Natalie Eades, Sharon Allender and DA;

e) Clipped package containing a memo, dated 6/10/96, from Rick Deery to Natalie Eades concerning Side by Side and Bond Rules. 3 items attached:

1) Memo from Director of Bureau of Land Management to Assistant Secretary of Interior for Land and Minerals Management concerning Final Rule Amending Surface Management Regulations for Mining Claims under the General Mining Laws;

2) Final Rule (undated draft);

3) 43 CFR 3809 "Bonding Regulations" Side by Side Analysis, Proposed Rule Versus Draft Final Rule, Version Two of 6/10/96;

f) 6/13/96 E-mail message to David Alberswerth from Rick Deery. Subject: Bonding Rule -forwarded;

g) 5/13/96 E-mail message from Ted Hudson to Rick Deery. Subject: Bonding Rule;

h) 6/17/96 E-mail message from Anetta Cheek to Rick Deery. Subject: Bonding. (APA concerns);

I) 6/19/96 E-mail message from Hord Tipton to Rick Deery. Subject: Just talked to Dave A. - reply;

j) 6/20/96 E-mail message from Thomas Leshendok to Rick Deery. Subject: Just talked to Dave A. - forwarded - reply;

5) Documents in Department- labeled Folder #10 (documents responding to Question #10 in the May 14, 1997, document request):

a) 4/21/97 fax from SBA Office of Advocacy (Jennifer Smith) to Natalie Eades. Cover page and memo to Natalie Eades from Shawne Carter, Jennifer Smith, SBA. Subject: Definition of a "small miner." (Expresses view that Bonding Regs violate Reg Flex Act.);

b) Undated "note" (memorandum) from Natalie Eades to Shawne Carter and Jennifer Smith. Subject: Clarification of purpose of meeting. (Explains that DOI wasn't looking for SBA's opinion.);

6) Documents in Department- labeled Folder #11 (documents responding to Question #11 in the May 14, 1997 document request):

a) Undated memorandum to Patricia Beneke, Associate Solicitor, Division of Energy and Resources, from Sharon Allender, Assistant Solicitor, Onshore Minerals Branch. Subject: Review of Changes to Draft Final Bonding Regulations;

7) Draft Versions of the Final Bonding Rule, and Related Documents:

a) Version with handwritten notation at top of first page which reads "This version was returned to Ted Hudson on 7/27/95";

b) Version with cover memo with handwritten notation "4/5" above the 1760 (140) code, and in which handwritten words "bond release" occurs twice on page 4;

c) Version with cover routing slip dated 3/10/95 to Ted Hudson, and on first page of the rule has handwritten notation "Allender subject to further review to resolve outstanding questions 3/10/95";

d) Version with handwritten cover note from Natalie to Sharon that end with a reference to a memo on bounding issues in "S:\er\onshore\NAE\bonding.leg," and on which the second page of the rule corrects Richard Deery's phone number from 452-5350 to 452-0350;

e) Version with cover memo with handwritten notation "6.0 3809 Bond.sur - additional changes by Sharon 1/23/97";

f) Version with handwritten notation on the first page which reads "Returned to BLM 8/28/96";

g) Version labeled "4310-84" with handwritten notation on first page reading "deliberative process -Attorney work product," which is then crossed out. Version is stamped "DRAFT," and is further labeled "[AA-680-00-4130-02]";

h) Version with cover page (routing slip) with the handwritten notation that says: "Natalie --I found this on my table. I'm going to clean up my office to see if I find anything else." The note is signed "SA" (Sharon Allender?). The draft is not stamped Draft, and is labeled "4310-84-P," and "[WO-660-4120-02-24 IA; Circular No.]";

I) Loose pages, numbered iii through liv (on the first page, there is a handwritten notation with the number "8"), partial pages from an analysis of public comments. Some of the pages had paper clips on them (xii, xxxvi, xxxviii, xli);

j) Memorandum to Assistant Secretary, Land and Minerals Management, from Director, Bureau of Land Management. Subject: Final Rule Amending Surface Management Requirements for Mining Claims Under the General Mining Laws. Labeled "1760 (140)" in the upper right corner. Handwritten notation: "7". Attached: draft rule marked "4310-84-P," and "[WO-660-4120-02-24 IA; Circular No.]"; and

k) Version with cover page labeled: "Markup and Rodino versions." Includes cover memo to Assistant Secretary, Land and Minerals Management, from Director, Bureau of Land Management. Subject: Final Rule Amending Surface Management Requirements for Mining Claims Under the General Mining Laws. Handwritten notation in upper right corner: "Returned to BLM on 5/24/96." Further handwritten notation: "6".

Appendix B – Exhibit 19

DON YOUNG, CHAIRMAN

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

July 22, 1997

The Honorable George Miller
Ranking Member
Committee on Resources
United States House of Representatives
Washington, D.C. 20515

Dear George:

I was unable to attend the full committee meeting last week. I was told of a rather surprising exchange between you and Mrs. Cubin about the motion to authorize me to issue subpoenas on the illegally issued hardrock mining bonding regulation.

Our problem, George, is that the Solicitor at the Department of the Interior has refused to deliver documents requested by the Subcommittee on Energy and Mineral Resources. Those documents are needed to conduct the oversight review of the illegally issued hardrock mining bonding regulations.

You reportedly implied that Mrs. Cubin did not intend to follow the Rules of the Committee in her handling of the documents. You reportedly said that another subcommittee did not follow the rules as well.

If the account of your comments is accurate, it has no basis in fact. I am surprised that you would again imply that the subcommittee's review--which began in March--is in concert with and being conducted to assist an industry lawsuit to set aside the illegal rule--which began in May. I reiterate the points made in my June 11, 1997 letter to you: the oversight review is a serious responsibility and we intend to follow all House and Committee rules in conducting the business of the Committee. The rules have been followed. To date you have not alleged otherwise, which makes me wonder about the basis of your concern.

Regarding the review of the illegal bonding rule, none of the supposed "privileged" documents that the Department wished to withhold from the public and the subcommittee were released in the hearing. This was an accommodation; it was not required. Mrs. Cubin was sensitive to the executive branch's legalistic assertion of a "privilege," to keep the facts from the public and our Committee. Mrs. Cubin's restraint has been gracious and should be appreciated, not lambasted.

Sincerely,

DON YOUNG

cc: The Hon. Barbara Cubin

http://www.house.gov/resources/

DON YOUNG, CHAIRMAN

Appendix A – Exhibit 20

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

July 29, 1997

The Honorable George Miller
Senior Democratic Member
Committee on Resources
U.S. House of Representatives
Washington, D.C. 20515

Dear George:

Unfortunately I am forced to exercise the authority provided by the Committee at the last meeting to subpoena certain documents and records that are relevant to the review being conducted by the Subcommittee on Energy and Mineral Resources on the hardrock mining bonding regulations. I write to inform you of the fact that I expect the subpoena will be issued today and did not want you to be caught by surprise.

I regret the need to compel production of this information by the extraordinary means of a subpoena. The material requested does not qualify for any privilege that applies to the Congress and it should be a rather routine matter to comply with these repeated requests. Nevertheless, the Department has refused to provide the basic information that is needed to conduct oversight reviews of the subcommittee.

A copy of the subpoena is attached for your information.

Sincerely,

Don Young

DON YOUNG
Chairman

cc: The Honorable Barbara Cubin
The Honorable Carlos Romero-Barcelo

DON YOUNG, CHAIRMAN

Appendix B – Exhibit 21

U.S. House of Representatives
Committee on Resources
Washington, DC 20515
MEMORANDUM

TO: MEMBERS,
COMMITTEE ON RESOURCES

FROM: DON YOUNG
CHAIRMAN

DATE: JULY 31, 1997

RE: INTERIOR DEPARTMENT SUBPOENA

At the last meeting of the Committee, I was authorized to subpoena certain documents and records that are relevant to the ongoing review being conducted by the Subcommittee on Energy and Mineral Resources into the Interior Department's hardrock bonding regulations. Unfortunately, because the Interior Department has refused to comply with numerous requests for these documents, I have been forced to exercise this authority, and have issued a subpoena to Interior Secretary Bruce Babbitt compelling him to produce the documents. I do so with reluctance, but also with resolve.

It is unfortunate that the Interior Department has forced the Committee to take such drastic action to obtain documents that should have been provided to the Committee as a matter of course. To date, the Interior Department has provided no valid legal authority for the withholding of the documents -- to the contrary, the courts have been very clear in support of the right of Congress to documents such as these, under very similar circumstances. Please see the attached memorandum from the American Law Division of the Congressional Research Service, which confirms the Committee's reading of the law on this issue.

Committee members should be aware that if the Secretary refuses to comply with the subpoena by August 15, it will be necessary for the Committee to consider the option of issuing a citation for contempt of Congress. Although contempt citations are rare, they have been issued under similar circumstances -- such as the citation issued to former EPA Administrator Anne Burford -- where custodians of documents have refused to comply with Congressional subpoenas. Indeed, contempt citations are rare because subpoenas themselves are rare and, when they are issued, the recipients usually recognize their importance and comply.

I remain hopeful that the Secretary will realize that Congress has a right to these documents, and that the Interior Department cannot be allowed to dictate the terms of its own oversight. But if necessary, members should be prepared to consider a contempt citation at the end of the August recess.

DISSENTING VIEWS ON THE REPORT

The catalyst for the Majority report is a 1997 regulation issued by the Bureau of Land Management (BLM). This rule was designed to enhance protection of the environment by requiring that all mining operations secure adequate financial guaranties to assure that the taxpayer not be left with the bill for cleaning-up after irresponsible miners.

Since 1981, BLM has required mining operators to provide bonds, or financial guaranties for reclamation of the public land disturbed by mining activities. However, that regulation was flawed in a number of aspects. The General Accounting Office (GAO) found in 1988 that at least a half million acres of land abandoned by hardrock miners needed to be reclaimed at taxpayers' expense (U.S. General Accounting Office, Federal Land management: An Assessment of Hardrock Mining Damage, April 1988). Consequently, using statutory authority under the Federal Land Policy and Management Act (FLPMA) that requires the BLM to "take any action necessary to prevent unnecessary or undue degradation of the public lands" by "regulation or otherwise," in 1991, the Bush Administration published a proposed rule to reform the hardrock mining bonding requirements.

When the Clinton Administration came into office, Congress was actively debating comprehensive reform of the 1872 Mining Law. After the 1994 elections, it became obvious that the new Republican-led Congress was no longer interested in this subject. The Administration reinitiated promulgation of the mining regulations that had been deferred pending Congressional action, publishing a final rule on bonding in February 1997. In the last year, DOI has also issued new rules relating to the use and occupancy of public lands for mining purposes (also after a six-year hiatus but not opposed by the mining industry or the Majority) and is currently revising the surface management rules for hardrock mining.

On May 12, 1997, in response to the new rules, the Mountain States Legal Foundation filed suit in U.S. District Court for the Northwest Mining Association, seeking to overturn the bonding regulations. Mountain States asserted that DOI violated the Administrative Procedures Act (APA) and the Regulatory Flexibility Act (RFA) by improperly issuing the regulations.[1] Subsequently,

[1] *Northwest Mining Association* v. *Babbitt*; Civil Action No. 97–1013 (JLG). Mountain States Legal Foundation, which litigates on behalf of conservative interests and causes, appears to have a close working relationship with Republican Members of the Committee. In addition to a mutual interest in seeking to overturn the mining bonding regulation, Mountain States gained access to subpoenaed White House documents which were released in a Republican staff report on the establishment of the Grand Staircase-Escalante National Monument (Committee Print 105–D, Nov. 7, 1997). Mountain States had filed suit in federal district court in Utah on June 13, 1997 to overturn the monument declaration and filed a revised lawsuit *Mountain States Legal Foundation* v. *Clinton;* Civil Case No. 2:97CV–0863G (Dec. 15, 1997), after release of the Republican staff report containing the subpoenaed documents. Moreover, Mountain States di-

Continued

the Arizona Mining Association and Nevada Mining Association filed amicus briefs in support of Northwest. The Department of Justice (DOJ) argued on behalf of DOI the Court should issue a ruling in favor of DOI as the Northwest Mining Association had failed to establish that the BLM has not complied with the APA and the RFA.

On May 13, 1998, the U.S. District Court for the District of Columbia ruled in favor of the mining association, finding that the DOI had violated a procedural requirement of the Regulatory Flexibility Act by not properly consulting with the Small Business Administration on the definition of "small business" used in the rule. The BLM had relied on the statutory definition of "small miner" provided in the Omnibus Budget Reconciliation Act of 1992. The Court did not find that the DOI had violated the APA.

As a result, the rule was remanded to DOI. Normally, this would mean that DOI would reissue the rule as a proposed rule, solicit and consider comments and then issue a final rule. However, Congress placed a rider on the FY 1998 DOI Appropriations bill last year that will prevent the DOI from issuing new rules on hardrock mining activities, including bonding, until November 14, 1998. In the interim, it is unclear what steps, if any, are available to DOI to assure that mining operations are adequately bonded.

The 100-plus page report prepared by Majority Committee Staff contains many confidential documents secured under a subpoena. These confidential documents are part of the DOI's deliberative process on the development of the bonding rule. The DOI supplied these documents to this Committee under subpoena only after the Committee Majority refused to respect the DOI's determination to keep these documents confidential (See attachment 1). The report unfairly accuses DOI of engaging in delay tactics to defer turning the documents over to Congress. In fact, the DOI Solicitor has spent months attempting to negotiate a protocol with the Majority for use of confidential documents. The Department sought this assurance to protect its position in the litigation brought by the mining industry after the Republican majority had released other confidential documents. Democratic Members of the Resources Committee have similarly sought, without success, a protocol to establish effective and fair procedures for the solicitation, management and disposition of confidential documents. On February 12, 1998, all 23 Democratic Members of the Resources Committee requested that Chairman Don Young convene the Committee for the purpose of devising such a protocol.

By issuing this report, with the privileged documents appended, the Majority proves the Department's concerns to have been well founded.

The Majority report closely parallels the arguments made by the Northwest Mining Association in its lawsuit. The arguments presented by industry to the District Court are essentially the same as those made in the Majority report. Both documents include the same examples to support their allegations. For example, both the report and the industry brief erroneously cite an issue now pending

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rectly represented four Republican Members (Reps. Chenoweth, Pombo, Schaffer, and Young) seeking to prevent the Administration from implementing the American Heritage Rivers Initiative. *Chenoweth, et al.* v. *Clinton;* Civil Action 1:97CV02954 (Dec. 12, 1997).

before the Interior Board of Land Appeals relating to the Summo Corporation's plan to develop a large copper mine in Utah. Both documents specifically target and denigrate Mr. David Alberswerth, a political appointee in the Clinton Administration, who served as a special assistant to the Assistant Secretary of Lands and Minerals. Prior to his public service, Mr. Alberswerth worked as the Director of the Public Lands and Energy Program of the National Wildlife Federation. By issuing this report, the Majority usurps the traditional role of the Courts and provides to the mining industry litigants documents that would not be available to them through either the Courts or through this Freedom of Information Act.

The Majority report ignores the need for an adequate bond, or financial guaranty, to cover the estimated costs of mining reclamation on public lands. Mining causes serious environmental problems for local communities across the United States and throughout the world, including perpetual water pollution caused by acid mine drainage, cyanide spills and heavy metals contamination, wildlife habitat destruction and fish kills and creation of toxic waste rock despite existing environmental laws and regulations The GAO noted in 1988 that 424,049 acres of public land were unreclaimed. More recently, in 1993, the Mineral Policy Center, a nonprofit public interest group, estimated that more than 557,000 abandoned hardrock mine sites exist throughout the United States. Mine effluents have polluted more than 12,000 miles of American rivers and streams and 180,000 acres of our lakes and reservoirs. Such contamination presents a growing threat to underground aquifers.

Superfund was created by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) which as enacted to ameliorate hazardous waste sites across the country, including abandoned hardrock mine sites. The law requires the U.S. Environmental Protection Agency (EPA) to identify and investigate actual or threatened releases of hazardous wastes The worst hazardous waste sites are placed on the National Priorities List (NPL) for emergency intervention and priority cleanup. Although the government attempts to identify parties responsible for the contamination, taxpayer money is used to clean up sites where responsible parties cannot be identified or are unable to pay cleanup costs.

Sixty-six hardrock mine sites were listed on the NPL as of August 1996. (Hardrock mine sites representing six percent of the 1,100 sites on the list. Hardrock mine sites, many of which stem from 1872 Mining Law claims, are among the largest and most expensive Superfund sites to remediate.

Acid mine drainage is a major contaminant at several NPL mine sites, including Iron Mountain outside Redding, California, and Bunker Hill, near Kellogg, Idaho. A threat to human health and aquatic life, Acid mine drainage also leaches potentially toxic heavy metals from surrounding rock. Every day, thousands of pounds of copper and zinc leach into surface waters surrounding Iron Mountain, and have contributed to drinking water contamination and major fish kills.

Similar conditions exist at Bunker Hill—one of the largest Superfund sites in the nation. The abandoned silver mine has deposited Acid mine drainage in the south fork of the Coeur d'Alene River for more than 90 years. A lead smelting operation on the site has emitted extensive toxins to surrounding soils and nearby communities, including some six million pounds of lead and 860,000 pounds of zinc.

The four contiguous Superfund sites in the Clark Fork River Basin, Montana, comprise the country's largest hazardous waste repository. The Anaconda Smelter at Mill Creek, the Milltown Reservoir, Silver Bow Creek, and East Helena, together cover some 57,000 acres (approximately 90 square miles) and encompass two entire cities—Butte and Walkersville, The area contains millions of cubic yards of tailings, slag, and flue dust, and billions of gallons of arsenic-laced groundwater and surface water. Besides arsenic, other heavy metals detected in soil and water (including drinking water) include cadmium, copper, lead, and zinc.

Cyanide is a serious contaminant frequently associated with hardrock mining. Used to leach gold from piles or "heaps" of crushed ore, cyanide has become a major contaminant only in the last 20 years, as such "heap leach" technology has come into increasing use to exploit remaining low-grade deposits. Not only do the heaps and mill tailings become hazardous waste, but cyanide itself will leach other metals besides gold, including arsenic and lead.

The most notorious example of cyanide contamination is the Summitville Mine Superfund site in southwestern Colorado, a heap leach gold mine that had been in operation only seven years before being taken over by EPA in 1992. Summitville suffered from a serious of poor design and management decisions, including the placement of the ore heap behind a dam in a narrow valley, not on level land; damage to the heap liner due to faulty installation; and the lack of any liner whatsoever for an on-site waste rock pile. After the mine's start-up, nearby watersheds and groundwater were contaminated by cyanide solution leaking through the torn liner, and by acid runoff from the waste pile. After the operators declared bankruptcy, EPA, using the emergency provisions of CERCLA, intervened, stabilizing the site and beginning the cleanup. As of August 1996, EPA put cleanup costs at Summitville at $142 million. Had Summitville been adequately bonded the federal taxpayer would not be paying for this cleanup now.

In 1993, EPA estimated that reclamation of the 52 hardrock mine sites then listed on the NPL would cost a minimum of $15 billion. However, only a small percentage of abandoned hard rock mine sites are targeted for cleanup under Superfund. Moreover, progress in cleaning up and de-listing these sites has been slow with only three hardrock mining sites deleted from the NPL, while 12 new sites have been added.

BLM'S BONDING POLICY

Prior BLM regulations gave each BLM State Director discretion to decide whether to require a bond at all and the amount that such a bond should equal for operations encompassing more than five acres on public land. Operations covering less than five acres,

approximately 80 percent of all operations, were not required to carry a bond or any other financial guaranty.

On July 11, 1991, in response to criticism from Congress and others that these rules were inadequate, BLM issued a proposed rule calling for certification from the operator for operations covering five acres or less that a bond had been secured in the amount of $5,000. Operations on more than 5 acres were required to secure financial assurance in the amount of either $1,000 or $2,000 per acre depending on the type of activity proposed. Operations using cyanide would be required to post a 100 percent financial guaranty to cover the cost of reclaiming the cyanide heap. Casual-use operations causing negligible damage would not require a financial guaranty. To avoid duplication, BLM proposed allowing an operator the use of a state bond if it were equal to at least 75 percent of the amount required by BLM.

Following the close of the public comment period in October 1991 through June 1992, the BLM organized and revised the proposed rule to accommodate the 218 comments provided by three citizen-petitions, 58 public interest groups, 51 business entities or associations, 22 government agencies and 135 individuals, not including the petitions. The comments addressed three major perspectives. A number of comments addressed the adequacy of the bond levels, self-certification and the number of financial instruments available under the rule. The commentors expressed concern that the bond levels were too low and that BLM should require full cost bonding for all mining operations. Those expressing concern regarding self-certification and the use of certain financial instruments questioned the efficacity of the rule. Mining associations and some individuals agreed that the rules were necessary but expressed reservations regarding the cost of a $5,000 bond proposed for smaller operations. Finally, many of the individuals asserted that the rule would force small miners out of business.

An audit released by the USDI Inspector General in March 1992, found that the proposed rule would not provide an adequate financial guaranty. As the Inspector General concluded, "BLM's proposed amendment to the regulations governing bonding of mining operators does not provide the financial guaranty necessary to ensure that funds will be available to reclaim mining sites abandoned by mining operators." In addition, the Inspector General strongly urged the BLM to modify the rule to require all operators engaged in mining activities greater than casual use to "post financial guarantees with the Bureau that are commensurate with the anticipated type and size of the operations."

Since the Bush Administration had placed a moratorium on promulgation of new rules, BLM sought an exemption to enable promulgation of the final rule which was received in August 1992. The BLM readied the rules package during the next few months. However, Secretary Lujan did not approve the final rules prior to the Presidential elections and subsequent change in Administration. As noted previously, the Congress, then under Democratic leadership, was actively considering comprehensive mining reform. Therefore, Secretary Babbitt deferred completion of the rule pending resolution of Congressional action. Consideration of the bonding rule resumed following the 1994 elections, when the Republican Party as-

sumed control of the Congress and the future of mining law reform became more difficult to predict.

In February 1997, the DOI issued its final rule on bonding including modifications made in response to comments received on the proposed rule. The proposed rule would have required each small miner to put up a $5,000 bond; the final rule requires the greater of either $1,000 per acre bond or the estimated costs of reclamation. The final rule would therefore impose a potentially lower cost than the proposed rule for those miners occupying less than five acres of public land. Also, the final rule allows use of bonding pools in Nevada and Alaska. Both of these provisions respond to the concerns expressed by the smaller mining operators that they would not be able to secure or afford financial guaranties.

The Majority report criticized the DOI for not factoring in the implementation of new state laws or regulations. However, they fail to recognize that the final rule allows the substitution of any state requirement that is as strict as the federal baseline established in the rule.

The final rule requires the certification of a professional engineer that the estimated costs of reclamation. Contrary to the evidence in the record, the Majority report inaccurately asserts that BLM did not support the requirement for a professional engineer certification in the rulemaking record (see Exhibit 7 of the Majority Report).

ADMINISTRATIVE PROCEDURES ACT

The Majority asserts that BLM violated the APA because the final rule was based on information that was more than six years old. Although a proposed rule can become outdated, the APA "does not establish a 'useful life' for a notice and comment record." *Action on Smoking and Health* v. *CAB* 713 F2d 795, 799–800 (D.C. Cir. 1983). The District Court in its May 13, 1998 ruling did not find that DOI violated the APA.

The Majority argues that there was a substantial alteration from the draft rule to the final rule that required an additional public review and comment period. In its brief to the Court, DOJ argued that the final rule was a "logical outgrowth" of the draft rule and therefore did not require additional public review and comment. The preamble to the final rule states: "Some comments generally disapproved of [the proposed rule's] expansion of possible security instruments [to allow use of equipment bonds] stating that there appeared to be no problem in getting traditional surety bonds. Contrary to this view, it appears that there may be a problem for the smaller operator . . . the list is expanded State and municipal bonds . . . Whatever additional risk may be involved is offset, at least somewhat, by the amendment requiring that financial guarantees be equal to an independent professional engineer's estimate of reclamation costs. It is important to recall, in this connection, that the financial guarantee and the duty to reclaim are backed up by criminal penalties, and by the provision that the operator is not free of liability if the guarantee is cashed in and found insufficient."

Further, as noted in the DOJ brief, in *Kooritzky* v. *Reich,* 17 F.3d 1509, 1513, (D.C. Cir. 1994) the Court stated: "It is an elementary

principle of rulemaking that a final rule need not match the rule proposed, indeed must not if the record demand a change. [cites omitted]. The reason is plain enough. Agencies should be free to adjust or abandon their proposal in light of public comments or internal agency reconsideration without having to start another round of rulemaking. The necessary predicate, however, is that the agency has alerted parties of the agency's adopting a rule different than the one proposed."

BLM made changes in the final rule specifically in response to comments received on the draft rule from States, another federal agency, the regulated community and other interested parties. For example, the BLM stated in the preamble (Federal Register, Vol. 62, No. 40, Friday, February 28, 1997, page 9094):

> In response to the comments regarding bond levels, BLM has amended the rule to require bonds that would be needed to pay for 100 percent of the amount that would be needed to pay for reclamation by a third-party contractor using equipment from an off-site location. This will ensure that, if the bonded party fails to perform its reclamation responsibilities, BLM will have access to adequate funds to reclaim the lands, and thereby protect the interest of the public, including federal taxpayers.

and

> The guarantee amount of $5,000 * * * generated the largest number of comments * * * In drafting the proposed rule it was assumed that notice-level operators would use the full 5 acres allowed and be bonded for the same at the proposed exploration level cap which was $1,000 per acre. Many comments should be based on actual acreage disturbed. This suggestion has been adopted in the final rule.

and

> As discussed below, in response to comments, a procedure for phased release or reduction of bonds as reclamation phases are completed has been included in the final rule.

REGULATORY FLEXIBILITY ACT AND THE SMALL BUSINESS ADMINISTRATION

The Majority report is especially critical of the DOI for deleting certain provisions of the proposed rule that were aimed at satisfying small miners' concerns. As an example, the Majority notes that the Alaska Placer Development Co., employing 14 people, operates a gold mine in Livengood, Alaska, would not fit within the statutory definition of a "small miner" incorporated in the rule. Congress created the "small miner definition" in the 1992 Omnibus Budget Reconciliation Act as part of the provision that established rental fees for mining claims. Under that law, a "small miner" is one who hold ten or fewer mining claims. "Small miners" are not required to pay the $100 per 20-acre mining claim that others holding more than ten claims must. The Majority also fails to note that the final rule enabled BLM to negotiate a Memorandum of Understanding

with the State of Alaska (as well as Nevada and others) that allows Alaska Placer, and other similar small mining operators, to meet their bonding requirements through the State's bonding pool, a relatively low-cost option aimed specifically at small miners' needs and financial concerns.

The report also criticizes the DOI for deleting the provision of the proposed rule that would have allowed small miners to use "equipment bonds" (i.e., pick-up trucks, bulldozers, etc.) as a legitimate bond or financial guaranty. Under the proposed rule, BLM would repossess the "equipment" or home of a miner who failed to reclaim public land disturbed by his mining activities. Several commentors on the proposed rule suggested that this provision be eliminated since such instruments would not be entirely liquid and which might not cover the costs of reclamation and the BLM agreed. However, according to the preamble of the final rule, the BLM concurred with the concern that acquisition of financial guarantees could be problematic for small mining operators and therefore, allowed the use of state and municipal bonds. The final rule retained additional options for the smaller mining operation. This was intentional as noted in "Exhibit 5/6" of the Majority report, a memorandum from Mr. Alberswerth to his superiors, that states.

> The BLM proposal allows use of a wide variety of financial instruments to be substituted for bonds, including liens on mining equipment, nationwide and statewide bonds, mortgages, etc.
>
> Property bonds, collateral bonds, equipment liens frequently are inadequate to guarantee reclamation (ref. The Mid-Continent coal mine Colorado). The challenge here is to provide enough flexibility in the type of financial instruments allowed, while minimizing the risk to the government. *I think* [emphasis added] we should at least rule out equipment liens and property bonds, as well as nationwide and statewide bonds.

DOI decision makers concurred with Mr. Albersweth's recommendation to eliminate equipment bonds. However, the decision makers did not accept his recommendation regarding statewide or nationwide bonds. The final rule allows statewide and nationwide bonds to be used. In Nevada and Alaska, BLM allows small business entities to use statewide bonding pools. In so, doing, BLM clearly acted in consideration of small business concerns.

These facts notwithstanding, the Court did find that DOI violated only the procedural requirement of the RFA by not consulting with the SBA on the definition of a "small entity." The substance of the rule was not challenged. The mining industry argued and the Court upheld only that BLM did not use the proper definition of "small entity" when it certified that the rule would have no "significant impact" on a substantial number of small entities (small businesses). Consequently, the Court remanded the rule to BLM so that it may reconsider the impact the rule will have on small miners. As the Court noted, "While recognizing the public interest in preserving the environment, the Court also recognizes the public interest in preserving the rights of parties which are affected by government regulation to be adequately informed when their inter-

ests are at stake and to participate in the regulatory process as directed by congress. For this reason. . . the Court remands the final rule to the BLM for *procedures consistent with this opinion.*" [emphasis added].

APPEARANCE OF IMPROPRIETY

The Majority report aggressively questions the impartiality, fairness and professionalism of Mr. David Albersweth. The Majority report mentions Mr. Alberswerth no less than 56 times. Despite assurances from Representative Cubin to the contrary during two oversight hearings in 1997, the report argues that because Mr. Alberswerth worked for the National Wildlife Federation before his tenure as Special Assistant to the Assistant Secretary for Land and Minerals, his involvement in the development of the final rule constitutes a "serious conflict of interest." The transcript from the March 1997 Subcommittee Oversight hearing contains the following dialogue:

> Mr. ALBERSWERTH. But there is no conflict of interest here at all. I have no financial interest in this matter. The organization I worked for had no financial interest.
>
> Mrs. CUBIN. I am not implying that there is a conflict of interest. I am not implying that at all.

Not only does the Majority report conflict with the statements of the Subcommittee Chair, but it also inaccurately describes Mr. Alberswerth's duties. As the Committee hearing record clearly shows, Mr. Alberswerth was a special assistant who advised others but did not make policy himself. As Solicitor Leshy testified under oath: "So that is all assuming, by the way, that someone in Mr. Alberswerth's position is a real decision maker on the rules. Mr. Alberswerth obviously played a role here, but the decision makers on the rules, in fact, were the Assistant Secretary for Land and Minerals, the Director for the BLM. On the legal issues it was my office and obviously the Secretary ultimately has responsibility as decision maker on these rules. . ."

The Majority report exaggerates Mr. Alberswerth's authority within the Department by misrepresenting his actions related to the development of the rule. Further, the report fails to note, or otherwise reference, sworn testimony by both Mr. Alberswerth and Mr. John Leshy, Solicitor of the DOI, that Mr. Alberswerth's prior employment did not constitute a conflict of interest. According to Solicitor Leshy during the March 1997 oversight hearing: "A rulemaking such as we are concerned with here with the bonding rule is a legislative matter, not an adjudicatory matter, so it is quite clear, and I can cite you and am happy to supply court cases that address the subject, that in a rulemaking kind of process, the fact that Mr. Alberswerth signed comments for an outside organization on a rule in no way limits his ability to work on the rule inside the government because it is considered a legislative type of function." Finally, at no time during the Subcommittee's meetings, did the Chair call an expert on the question of conflict of interest to support or refute the Administration's interpretation of the ethics rules. On June 1, 1998, DOI Solicitor John Leshy wrote to Chairman Don Young outlining the DOI's objections to the Majority's

characterization of Mr. Alberswerth, "so that the baseless and harmful character of these allegations of misconduct can be exposed." (Attachment 3)

THE ROLE OF THE MINORITY

Throughout the development of this report the Majority has disregarded the legitimate role of the Minority. In 1997, all the Democratic Members of the Resources Committee requested of the Chairman that the Committee adopt a protocol covering the solicitation and management of documents that are sought during investigations in the name of the Committee. The Senior Democrat has personally raised this issue several times with Chairman Young. However, there still is no procedure in place to assure the Minority a fair role in these Committee activities. Nor can the Interior Department or anyone else who provides confidential material to the Committee rest assured that it will be treated with caution or discretion.

We are pleased that in this case, the Majority sought Committee authorization to issue subpoenas, which was provided on a 20 to 19 partisan vote. And, we appreciate that the Majority report was subjected to a vote before its release to the general public. However, we remain very concerned at the total lack of procedures, safeguards and guarantees for the Minority and for those providing confidential materials to the Committee.

CONCLUSION

The Majority report erroneously characterizes the regulatory action of the Clinton Administration, taken as a result of Congressional inaction in addressing the need for comprehensive mining reform as supplanting the role of Congress by issuing new rules for bonding mining operations. However, the Executive Branch clearly possesses the authority to issue appropriate regulations under existing law to protect the public lands. Under FLPMA, the DOI is required to take any action necessary to protect the public lands from unnecessary or undue degradation.

The 1988 GAO report estimated that 424,049 acres of federal land were unreclaimed from hardrock mining operations in 11 western states. At that time, GAO estimated the reclamation costs for these lands to be about $284 million. Had these sites been adequately bonded, industry funds, not taxpayer dollars, would have paid for remediation. Ironically, the Majority's report does not address the need to save the taxpayers from picking up the multi-million dollar cost of reclamation.

The Majority report states that the Department's regulations are "illegal" and that their promulgation violated the Administrative Procedure Act and the Regulatory Flexibility Act. The Majority report concludes that the bonding regulation is illegal. However, the Court found only that DOI had violated a procedural requirement to consult with the Small Business Administration. The substance of the rule was not challenged.

This report does indeed address an "abuse of power" but an abuse by the Majority that is using the powers of this Committee to aid and abet the mining industry, all the while running rough-

shod over the duties of the judicial system and the financial interests of taxpayers.

ATTACHMENT 1—EXCERPT FROM FEBRUARY 28, 1997 OVERSIGHT HEARING—CONFIDENTIALITY

Mrs. CUBIN. You may be aware that I wrote the Secretary asking for internal documents within the Department which may shed light on the final decision on why this decision became final. These have not yet been provided to me.

I appreciate the Department for providing the Subcommittee with some of the documents that I requested for this hearing. However, the Congress and this Subcommittee have a responsibility under House Rule 10 and 11, Committee Rule 6 in Article 1 of the U.S. Constitution that requires this Subcommittee to have virtually unfettered access to nearly all departmental documents.

Therefore, I expect all requested documents to be produced——

Mr. ROMERO-BARCELÓ. Madam Chair.

Mrs. CUBIN. Mr. Barceló.

Mr. ROMERO-BARCELÓ. I just wanted to make sure, I understand that the Department believes some of the documents to be turned over are considered privileged documents and if that is so I am sure that before they turn over the documents they would like to enter into some kind of a written agreement or stipulation to make sure that those privileged documents are not made available to anyone else.

Mrs. CUBIN. Mr. Barceló, I would suggest to you that is not within the authority nor the purview of the Department. The President, yes, but the Department, no.

Mr. LESHY. May I speak to that issue?

Mrs. CUBIN. Please.

Mr. LESHY. The concern expressed by Congressman Romero-Mr. Barceló is exactly right. We have no desire to withhold documents that you have requested. We will make them available to you. The procedure we are trying to work out here on quite short notice, since we got the document request I think last week, is a procedure that we have worked out with any number of congressional committees, I think including this one in the past, which is to just have an understanding that the documents we turn over to you will not be disclosed outside of the committee without at least checking with us, because they involve things that could become privileged in litigation and if they are disclosed——

Mrs. CUBIN. Well, Mr. Leshy, why did we have to have this hearing for you to tell us that?

Mr. LESHY. We have told you that previously. My deputy wrote the committee counsel a letter a couple days ago, I believe, which spelled all this out. They have had numerous phone conversations. I thought it was well on its way

to being resolved. We are asking for no special treatment here.

We have worked this out with Congressman Burton's committee, we have worked this out with any number of other committees under which we make available documents that could be sensitive where we could waive privilege if litigation ensued over a matter, documents that we would normally keep privileged and not disclose in litigation. All we are trying to work out is an understanding of how these documents will be treated. We are not trying to withhold any documents.

Mrs. CUBIN. Just because you give them to us does not waive the privilege in a judicial process.

Mr. LESHY. We have to have an understanding about what you are going to do with the documents in order for us to be assured when we turn them over that the privilege——

Mrs. CUBIN. And I believe you have had that under—I believe that you have understood very well. I believe that you have been very disagreeable about providing those documents to us but there is no question there has never been—how simple can it be? We want to understand how the decision for the final rule was derived and we need these documents. How simple can it be?

Mr. LESHY. We have reached arrangements like this with any number of other committees without difficulty. We are simply trying to reach an equivalent understanding here. We have had no problem in this area. We have had numerous discussions with your counsel and your staff on this. I thought we were working this out.

Mrs. CUBIN. We can get you a letter today if it will be satisfactory and I hope the documents will be coming forthwith. Mr. Romero-Barceló, do you have questions?

Mr. ROMERO-BARCELÓ. Do I understand it is all right to word the agreement, to make an agreement as to how the committee is going to proceed with what is considered privileged documents?

Mrs. CUBIN. We will agree to discuss why we need the documents. However, we are not obligated to do that and I would like to make that very clear on the record. I will give them written assurance as to how we will handle the documents if that is the problem.

Mr. ROMERO-BARCELÓ. Is that a concern of the Department?

Mr. LESHY. The Concern of the Department is simply that some of the documents that have been requested, that we are willing to supply, are documents that we could assert a disclosure privilege on if the matter concerning these rules ends up in litigation, and we need to just have an assurance, an understanding with the committee, about how those documents will be treated.

Again, this is something we have worked out with any number of congressional committees on matters like this. This is not anything unique to this arrangement, and we

have worked this out without problem everywhere else. I am not sure why we are having a problem here.

ATTACHMENT 2—EXCERPT FROM THE MARCH 1997 OVERSIGHT HEARING—CONFLICT OF INTEREST

Mr. LESHY. Could I interject here, Madam Chair? This issue, we have looked at this issue in many different contexts in the past. To the extent that you are raising a possible conflict of interest concern about someone coming in from outside into government to work on a matter, that is the same matter that they had represented or worked outside the government, in the rulemaking context, the rule and the principles are very clear.

A rulemaking such as we are concerned with here with the bonding rule is a legislative matter, not an adjudicatory matter, so it is quite clear, and I can cite you and am happy to supply court cases that address the subject, that in a rulemaking kind of process, the fact that Mr. Alberswerth signed comments for an outside organization on a rule in no way limits his ability to work on the rule inside the government because it is considered a legislative type of function.

And frankly, the purpose for that, and the courts talk about this, is it is important that the government at all levels, including the executive branch have access to expertise, and it is certainly an advantage to hire employees who know something about the issues that they are working on. And often the way those employees get that experience and knowledge is by working for industry associations or other environmental groups, and it would be a severe problem for the government generally, and that, again, goes to the legislative branch as well as the executive branch, if people were disabled from coming in and lending their expertise to rules that they participated in on the outside.

So that is all assuming, by the way, that someone in Mr. Alberswerth's position is a real decision maker on the rules. Mr. Alberswerth obviously played a role here, but the decision makers on the rules, in fact, were the Assistant Secretary for Land and Minerals, the Director for the BLM. On the legal issues it was my office and obviously the Secretary ultimately has responsibility as decision maker on these rules. . .

Mr. ALBERSWERTH. But there is no conflict of interest here at all. I have no financial interest in this matter. The organization I worked for had no financial interest.

Mrs. CUBIN. I am not implying that there is a conflict of interest. I am not implying that at all.

Mr. ALBERSWERTH. Thank you.

JUNE 1997 OVERSIGHT HEARING

Mr. ALBERSWERTH. I would say, sir, that I think an analogous situation in terms of my role in the development of this rule is analogous to a congressional staff person's role

in the development of a legislation. That is I make recommendations. My job is to make some recommendations to various individuals in the Department who had decision making authority with respect to this matter. I was not the decision maker, and I made those recommendations, very similar to the congressional staff person making recommendations to a Member of Congress or a committee. And I think my role is very analogous in that regard, so I think what you might want to ask yourself is would you apply the same sort of standards to a congressional staff person as you would to me in this instance?

Mr. CANNON. The point is if you continue, you have a definition of covered relationship, including any person for whom the employee has within the last year served as financial or as officer, director, trustee, general partner, et cetera. It seems to me there are two issues here that I would like to understand. In the first place, you were employed by NWF and received a salary, and therefore had an interest; and in addition, I understand you were a director. Don't those with particularity qualify you as having to be in a position where you need a prior authorization before you participate in that process?

Mr. ALBERSWERTH. The National Wildlife Federation has no interest, no financial interest whatsoever.

Mr. CANNON. You had a financial interest because they paid you a salary. You also had a covered relationship because you were a director. Is that true?

Mr. ALBERSWERTH. No, sir, I was a director of the program. I was not on the board of directors.

Mr. CANNON. Oh, okay.

Mr. LESHY. I should go back because I think there is a fundamental misunderstanding. First of all, he severed all his ties when he came to the Department. Second, the regulation you were quoting talks about a particular matter, and the rules and the case law in this are quite clear. A legislative rulemaking is not a particular matter. That was the point I was trying to make earlier. In other words, the principles and the constraints that you apply when you come into government or go out of government in terms of working on particular matters that you worked on in one place or another, a legislative rule is not a matter. It is well understood that is the case. The courts basically said that. So we really don't have that kind of problem in this case. Everybody in the Department knew where Mr. Alberswerth came from the knew of his interest, but he has not, in our view, behaved inappropriately at all by working on this kind of rule, having worked on it outside, because it is not a particular matter involving a particular party.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, DC, June 1, 1998.

Hon. DON YOUNG,
Chairman, Committee on Resources, House of Representatives, Washington, DC.

DEAR CHAIRMAN YOUNG: I write to register our objection to the accusation in the report the Resources Committee issued last week (Abuse of Power: The Hardrock Bonding Rule) that Mr. David Alberswerth of this Department has or had an appearance of a "conflict of interest" in his work on the Department's hardrock mining bonding rule (the Rule). Report, pp. 2, 14–17. It reaches this conclusion through its analysis of 5 CFR §§ 2635.501 and .502, provisions of Subpart E ("Impartiality In Performing Official Duties") of the Office of Government Ethics (OGE) Standards of Ethical Conduct for Employees of the Executive Branch.

For several reasons, we believe the regulations cited in the Report do not apply to Mr. Alberswerth's situation.

First and most important, the cited regulations do not apply to Mr. Alberswerth's work regarding the bonding rulemaking because it is not a particular matter involving specific parties within the meaning of the applicable OGE regulations. The regulations make clear that rulemakings and regulations are not such matters. *See* 5 CFR § 2637.102(a)(7) and 5 CFR § 2637.201(c)(1).

The restrictions of 5 CFR § 2635.502, dealing with the appearance of loss of impartiality, apply only where a "particular matter involving specific parties" is involved.[1] At 5 CFR § 2635.502(b)(3) OGE defines "particular matter involving specific parties" as having "the meaning in § 2637.102(a)(7) of this chapter", thus adopting that definition. That definition is contained in a section of OGE's regulations dealing with post-employment issues. It provides (emphasis supplied):

> (7) Particular Government matter involving a specific party means any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other *particular matter involving a specific party or parties* in which the United States is a party or has a direct and substantial interest.

This list of covered items does *not* include *regulations*, legislation, or general policy issues.

5 CFR § 2637.102(b) (6) and (7) go on to supplement the definition of particular matter (with or without specific parties); specifically, 5 CFR § 2637(b)(6) cites to 5 CFR § 2637.201(c) for an interpretive definition of "particular matter involving a specific party or parties." This latter regulation states in part: "Rulemaking, legislation, the formulation of general policy, standards or objectives, or

[1] The Report correctly points out that the OGE regulations do not define "party". This is because OGE has traditionally focused heavily on the entire phrase "particular matter involving specific parties," an issue with which it deals regularly in the conflict of interest laws. The Report ignores that focus, and instead cites a general definition of "parties" from Black's Law Dictionary to conclude that Mr. Alberswerth's former employer was a "party" to the rulemaking.

other action of general application *is not such a matter*." (emphasis added)

5 CFR § 2637.102(b)(7) cites to 5 CFR 2637.204(d) for an interpretive definition of "particular matter (without parties)". This latter regulation makes it clear that the phrase "particular matter" without the qualifier "involving a specific party or parties" must be read to include regulations. This further confirmation that OGE intended there be a different meaning to the term "particular matter" when it is used with the extra phrase "involving a specific party or parties" (or some version thereof), as contrasted with situations where there is no extra phrase. The regulation cited in the Report (5 CFR §§ 2635.501 and .502) employs the extra phrase, thereby eliminating consideration of policies, regulations, and legislation from the prohibition.

In short, 5 CFR § 2635.502(b)(3)'s adoption of the definition of 5 CFR § 2637.102(a)(7) for "particular matter involving specific parties" leads inexorably to the conclusion that rulemakings are not covered by 5 CFR §§ 2635.501, .502. Thus, the bottom line is that the activities of Mr. Alberswerth to which the Report refers are not covered by 5 CFR §§ 2635.501, 502, because they are not "particular matters involving specific parties."

Even if the regulations discussed above did cover rulemaking, Mr. Alberswerth did not violate them. As the Report points out, the regulation indicate that an employee should not participate in a particular matter involving specific parties when the employee has a "covered relationship" with one who is a party or represents a party to the matter. 5 CFR § 2635.502(a). A "covered relationship" is defined in 5 CFR § 2635.502(b)(1)(iv) to include situations in which the employee has been an employee of a person within the last year.

Mr. Alberswerth joined the Department in June of 1993 from the National Wildlife Federation, His one year "cooling-off" period expired in June 1994.

The Committee cites no concrete evidence that Mr. Alberswerth participated in Departmental decisions on the content of the Rule prior to November of 1994, more than sixteen months after beginning his employment at the Department. During all of this period, the bonding rulemaking was on hold as the Secretary sought to devote the Department's full attention to getting Mining Law reform through the Congress, where the House and Senate had each passed wildly differing reform bills.

The Report suggests that evidence of Mr. Alberswerth's participation in Departmental deliberations on this issue during the one year cooling off period is found in an August 6, 1993, note from "Dan to Dave". (Report, p. 15) It seems clear that merely being a passive recipient of an internal message relating to the bonding rulemaking does not make Mr. Alberswerth a participant in the matter. To conclude otherwise would in essence allow any employee—or indeed, any person outside the Department—to put a Departmental official in violation merely by sending them a message, whether or not the recipient responded in any way.

Finally, 5 CFR § 2635.502(b)(1) *Note* States: "Nothing in this section shall be construed to suggest that an employee should not par-

ticipate in a matter because of his political, religious or moral views."

The inclusion of this Note in the regulation is a recognition that federal political appointees should not be restricted under the standards on an appearance of loss of impartiality in 5 CFR § 2635.501 because of their political affiliation. Mr. Alberswerth has been in a Schedule C political appointee position since his appointment in June of 1993. He was, therefore, appointed because of his political affiliation and the need of the administration to have his political views factored into its decisions. Even if the regulation cited in the Report otherwise applied in this situation, the note in the regulations supports the conclusion that it was not so intended.

Finally, I should also note that at no time prior to the publication of this report did anyone on the Committee or its staff interview Mr. Alberswerth or anyone else at he Department regarding these allegations. Mr. Alberswerth in fact testified under oath at the subcommittee hearing on June 19, 1997, and responded to a number of questions regarding his role in the development of the rule in question. The following is the transcript of the relevant portions of the hearing, as published on the Committee's website:

> Mr. ALBERSWERTH. But there is no conflict of interest here at all. I have no financial interest in this matter. The organization I worked for had no financial interest.
>
> Mrs. CUBIN. I'm not implying that there is a conflict of interest. I'm not implying that at all.
>
> Mr. ALBERSWERTH. Thank you.

Later on in the hearing, Mrs. Cubin reiterated that she "did not imply in any way that there was a conflict of interest" with regard to Mr. Alberswerth's role in the development of the hard rock bonding rule.

We believed that the subcommittee chair's statements that no conflict of interest existed or would be implied ended the matter. We are, to say the least, surprised that your committee would nearly a year later, without further discussion, issue a report alleging the appearance of such a conflict.

We have serious problems with other aspects of the report which we would be happy to discuss with you and the Committee's staff and put in writing if necessary. Because of the personal nature of the allegations against Mr. Alberswerth, however, we see a particular need to ensure that those allegations do not stand unanswered. I request that you include this letter in the record so that the baseless and harmful character of these allegations of misconduct can be exposed.

Sincerely

JOHN D. LESHY,
Solicitor.

GEORGE MILLER.
WILLIAM D. DELAHUNT.
DONNA M. CHRISTIAN-GREEN.
LLOYD DOGGETT.
MAURICE D. HINCHEY.
CARLOS ROMERO-BARCELÓ.
PETER A. DEFAZIO.

DALE E. KILDEE.
BRUCE F. VENTO.
ENI F.H. FALEOMAVAEGA.
NICK RAHALL.
FRANK PALLONE. JR.
ROBERT A. UNDERWOOD.
SAM FARR.
CALVIN M. DOOLEY.
NEIL ABERCROMBIE.
EDWARD J. MARKEY.
SOLOMON P. ORTIZ.
OWEN B. PICKETT.
ADAM SMITH.
PATRICK J. KENNEDY
RON KIND.
CHRIS JOHN.

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