

**SURFACE MANAGEMENT REGULATIONS
FOR LOCATABLE MINERAL OPERATIONS
(43 CFR 3809)**

**Final EIS, Volume 2:
Comments and Responses**

**Prepared by
U.S. Department of the Interior
Bureau of Land Management**

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**SURFACE MANAGEMENT REGULATIONS
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Final EIS, Volume 2: Comments and Responses

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COMMENTS AND RESPONSES

Introduction

Volume 2 of the final EIS contains the substantive public comments received on the draft EIS and BLM's responses to those comments. We considered and responded to all substantive comments in preparing the final EIS. A substantive comment requests clarification or more discussion, gives new information, questions analytical techniques, or suggests new alternatives. We did not respond to comments that simply expressed a preference, such as, *I support Alternative 1*, but we did consider these comments when preparing the final EIS and regulations.

Because of the large volume of comments, we have grouped similar comments together, where possible, to create comment statements that capture the essence of two or more commenters. Therefore, comment statements may not be exact quotes of any one person or organization. We have also edited the comments for brevity, clarity, and grammar. We have organized comments on similar regulation provisions or topics under the headings listed in the table of contents. Please review the preamble to the final regulations for more comments and agency responses specific to the development of the regulations.

PLANNING PROCESS

1.01 **Comment:** The comment period with the May 10 deadline does not give us a full 90-day period for comments as it was published in the *Federal Register* on Feb. 17, 1999. With the length of the draft EIS at over 400 pages and the pending NAS study, it is important that we have enough time to digest the contents to be better informed in our comments. Review of the proposed regulations, regulatory preamble, draft EIS, cost-benefit analysis and Regulatory Flexibility Act analysis is an extremely time-consuming and complicated task. The comment period should be extended.

Response: The proposed rules were published in the *Federal Register* on February 9, 1999, with a 90-day comment period through May 10, 1999. The notice of availability for the draft EIS was published by EPA in the *Federal Register* on February 19, 1999. The comment period on the draft EIS also went until May 10, 1999. But comment periods on EIS drafts are only required to be 45 days under the NEPA regulations and 60-days by Department of the Interior policy. The period from February 19, 1999 to May 10, 1999 meets the 60-day minimum requirement for comment periods on a draft EIS. After the first comment period closed, the comment period on the proposed regulations and draft EIS was again open from October 26, 1999 until February 23, 2000. This was to give an 120 more days for comment on the proposed rule in the context of the results of the National Research Council study (NRC 1999). Congress required this additional comment period under Public Law 106-31, section 3002.

1.02 **Comment:** The BLM fact sheet describes turn-of-the-century mining and the problems of vast expansion of new mining without informing the public that the regulations have gone from none in the turn of the century to vast myriad of state, local, and federal interwoven regulations we have now. Clean Water Act, Clean Air Act, and discharge permits, and the list goes on. References to impacts that occurred in the late 1800s in the Clark Fork Basin have no relevance to the current proposed regulations. It is wrong to describe mining impacts from the “late 1800s” at “several sites” in the Clark Fork Basin (B/C study, p. 54) without describing the extent, if any, that those impacts are directly related to mining on public lands under the existing regulations since 1981, the effective date of the existing 3809 mining regulations. The erroneous and biased implication is that those events show the current regulations cause unnecessary or undue degradation.

Response: The examples presented were to illustrate the types of environmental impacts that mining can cause and not to imply that mining is currently unregulated.

1.03 **Comment:** The fact sheet calls cyanide technology new. It has been used in the gold process since the turn of the century. I guess we must define Edsels and Ford 500 Galaxies as new cars now.

Response: BLM acknowledges that cyanide has been used in gold recovery for more

than 100 years. The technology referred to was heap leaching technology. This technology, in combination with high gold prices, has allowed for the economic recovery of gold from large tonnage, low-grade ores.

- 1.04 **Comment:** I saw the thick booklet that was handed out, and a lot of people got it. I didn't get it. How come all of us that came to the scoping meetings didn't get these? I was just wondering. I could get this 3809 regulations out of the computer, but I don't have a computer and I don't believe in computers. So I couldn't get it that way.

Response: BLM is uncertain as to which thick booklet you are referring to. Attendees at the scoping meetings got copies of the scoping brochure. The proposed regulations were not released until after the scoping meetings but are available at any BLM office if you did not receive one in the mail.

- 1.05 **Comment:** Scoping: BLM began the formal scoping process in April 1997. The notice of intent (NOI) did not describe a proposed action other than to state that the 3809 regulations would be revised. The NOI requested comments on the issues in the Secretary's directive. The NOI told the public to confine its comments to issues articulated in the NOI. See 62 Fed. Reg. 16177 (1997). The NOI did not contain any statement of purpose and need. Perhaps in the spirit of the adage "Better later than never," BLM later distributed more information at the scoping meetings.

Response: BLM did not direct the public to limit its comments to those issues. In fact, the public was invited to submit comments on other concerns or issues in the scoping handout. BLM also produced two working drafts of the 3809 regulations during the scoping process (February 1998 and August 1998) to get feedback from the public on issues.

- 1.06 **Comment:** Consultation with western states: The draft EIS discusses BLM's "consultation" with western States. (See draft-EIS, pages 1-4.) Governors and state regulators demonstrated a lot of interest in the process. For example, the Western Governors' Association (WGA) adopted a policy resolution and requested that it be consulted, which was backed up by a congressional enactment requiring the Secretary of the Interior to consult with the states. BLM sent a notice to Congress declaring that it had consulted with the States. But that declaration was sent just 3 days after the enactment without even one phone call to any of the governors. See February 5, 1998 letter from WGA to BLM Director Pat Shea. This episode was particularly grating here in Idaho. In Idaho's opinion, a meaningful coordination process did not take place. At best, we believe the BLM solicited comments from the state agencies and Western Governors' Association. With regard to Idaho, there was never any dialogue on the purpose and need for the regulations or why the BLM did or did not incorporate comments in the regulations. BLM's certification letter said that its consultation with Idaho was based solely on one and a half pages of comments submitted by the Idaho Department of Lands.

It's simply amazing that the agency actually believes that such an attitude will foster improved relations with the states.

Response: Consultation with the states had been an ongoing process since before the 3809 regulation initiative was even formally announced in April 1997. The congressional consultation requirement did not exclude consultation before its passage. While the letter may have been sent just a few days after passage of the requirement, it documented more than 4 months of consultation work. Consultation efforts on a state-by-state basis are detailed on BLM's website at <http://www.blm.gov>.

- 1.07 **Comment:** BLM's successive releases of "working drafts" of the proposed regulations (February 1998 and August 1998) resulted in many voices expressing concern about duplication of state laws and questioning whether there was a need for such a proposal. But BLM made only minor revisions to each "working draft." The states continue to have the same concerns.

Response: Although BLM did not incorporate all the changes the states requested, as the comment illustrates, BLM did consult with the states on successive working drafts of the regulations before publishing them as proposed. Consultation does not always mean concurrence. BLM has incorporated into the final regulations state suggestions for addressing concerns about duplication.

- 1.08 **Comment:** The relevant regulations and guidance documents make clear that the public is in no position to help an agency identify concerns, potential impacts, and reasonable alternatives in the scoping process unless and until the agency has tipped its hand about what it proposes to do. As CEQ has emphasized, "scoping cannot be useful until the agency...present[s] a coherent proposal and a suggested initial list of environmental issues and alternatives." Until that time, "there is no way to explain to the public or other agencies what you want them to get involved in." BLM precluded a meaningful scoping process by not issuing a coherent proposal before or during the scoping hearings. The draft EIS and preamble suggest that comments on the working drafts were considered in the rulemaking context, but there is no evidence that they were used for the NEPA process. As a result, BLM must now prepare a supplemental draft EIS before finalizing the EIS or any regulatory revisions to 3809.

Response: NEPA scoping for the rulemaking was extensive and complete. The CEQ regulations at 40 CFR 1501.7 mandate early and open scoping. BLM did not want to develop a detailed proposed rule without input from the public on what the scope of such a rulemaking should include. The Proposed Action initially presented to the public was to change the 3809 regulations to address the eight issues that had been identified internally. The public took these under consideration and raised more issues and suggested regulatory alternatives (see Scoping Report, BLM 1997a). During scoping BLM consulted with industry, the states, and environmental groups on specific content

that they wanted to see included in the revised regulations. BLM even told these groups to submit suggested regulation language as part of their scoping comments. Later on in the scoping process BLM put out for review working drafts of the proposed regulations and met with the interest groups to get their feedback during scoping. This occurred not once, but twice. As a result of this feedback, the alternatives presented in the draft EIS were developed. Note that scoping does not end until the final decision is made. In developing the final rules and EIS, BLM continues to receive and consider new scoping input, such as the National Research Council report (NRC 1999).

- 1.09 **Comment:** Participants at the scoping meetings were advised that, while they were free to comment on any issue, they were directed to address the eight questions identified by BLM first before commenting on any other issues (e.g. issues and alternatives for the draft EIS). Because of the format of the scoping meetings (workshop tables) and the time constraints of the meetings, few of the working groups were able to completely address the eight issues identified by BLM, let alone move on to discuss traditional NEPA scoping topics.

Response: Many of the groups at the initial scoping meetings did address other issues beyond the eight suggested by BLM. In addition, during scoping BLM received expansive written comments that raised other issues. These suggested issues are described in the scoping report (BLM 1997a).

- 1.10 **Comment:** BLM also failed to properly use the results of its “scoping process.” Again, CEQ explained that “Every issue that is raised as a priority matter during scoping should be addressed in some manner in the EIS, either by in-depth analysis, or at least a short explanation showing that the issue was examined, but not considered significant for one or more reasons.” CEQ 1981 Scoping Guidance (emphasis added). The draft EIS briefly describes the scoping process, (page 4) and lists “issues,” (page 5), but because of the way BLM prepared the scoping report, it is impossible to determine what are “priority issues.” BLM’s scoping report summarizes in a few words or phrases the comments collected from the workshop tables.

Response: Draft EIS, pages 4 and 5 are part of the EIS summary section and are by definition just a brief list. The detailed discussion of the issues and concerns identified during scoping is on pages 18 through 22 of the draft EIS. The draft EIS then discusses in detail, on pages 22-24, the issues raised during scoping but not addressed and why. On pages 26 to 28 the draft EIS discusses the priority significant issues from scoping that formed the basis for the alternatives.

- 1.11 **Comment:** One meeting per affected state cannot possibly allow all the interested or affected persons to attend. Why were no hearings scheduled in Utah? Why are the public hearings on the proposed rule only in the western states? The people of the Midwest and eastern states also need to know what is going on. Other meetings in Globe, Morenci, or

Safford, and various parts of Arizona are needed to allow full public participation. There is no provision for public hearings in Redding, the Mother Lode Regions, San Diego, or Los Angeles. The location for the hearings was very unfair. You had three in California, one in Washington D.C., one in Oregon, and none in Denver, Las Vegas, or Casper, where those who are most affected could have attended and expressed their views. Here you go having all the meetings in California in locations where there aren't any miners. There should be hearings in Redding, Chico, Yreka, and Eureka. The hearings that are scheduled to begin on 23 March should be held in three locations in Montana (east, central, and west). We the members of the 40 Mile Mining District request a public meeting in Chicken, Alaska. We the undersigned, [35 Individuals] request that BLM hold a public hearing on the proposed 43 CFR 3809 Mining regulations in Safford Arizona.

Response: The hearing schedule for the proposed regulations was established to cover a broad geographic area as well as allow input from a variety of rural and urban settings. Unfortunately BLM cannot hold a hearing in every location where one is requested. But attendance at a hearing is not necessary to comment on the proposed regulations or draft EIS. Written comments, submitted by mail or electronically, receive the same consideration as testimony given at a public hearings.

- 1.12 **Comment:** The National Research Council report could provide valuable wisdom and a starting point to an open debate among all shareholders with a cooperative spirit rather than meeting a deadline to promote the vanity of some within the Department of the Interior. The proposed regulations should be withdrawn and cooperation sought from all interested parties, including the western governors, state legislators, U.S. Congress and the shareholders of the land they are to manage for the people of the United States. NWMA urges the Department of the Interior not to ignore the intent of Congress in mandating the NRC study. Revise your rulemaking process to allow full consideration of the results of the ongoing NRC study as mandated by Congress. BLM must therefore reopen the comment period and allow the public to consider the proposed rule in light of the NRC study.

Response: The comment period on the proposed regulations and draft EIS was reopened for 120 days after the NRC (1999) report was released. Copies of the NRC report were mailed to all people on the EIS mailing list to solicit more comments on the proposed regulations and draft EIS in light of the NRC findings. BLM then considered these comments, along with previously collected comments, in preparing the final regulations and EIS.

- 1.13 **Comment:** The Nevada Division of Environmental Protection submits that commenting on the proposed rules, the preferred action, while simultaneously reviewing the NEPA documents is not acceptable and runs counter to CEQ regulations.

Response: The proposed regulations are also the proposed action and preferred alternative under consideration in the draft EIS. It is not only logical that you would comment on the proposed regulations at the same time you comment on an analysis of its impacts, but the CEQ regulations at 1501.2 recommend that the NEPA process be integrated with other planning processes.

- 1.14 **Comment:** Since the 3809 rulemaking effort began in 1997, state regulators and the Western Governors' Association (WGA) have expressed their concerns about the Secretary of the Interior's proposed rulemaking and have stated that many of the Secretary's 3809 proposals will detract from the current high level of coordination and cooperation between state regulatory programs and BLM. State regulators and the western governors have consistently voiced their concerns and objections to BLM's 3809 proposal as being duplicative, unnecessary, and preemptive of state regulatory authorities. The WMC is appalled that the Secretary has chosen to ignore these comments and concerns. Although we feel comments on this aspect of the proposed regulations are best left to state regulators and the WGA, we would ask the Secretary to extend proper weight to the state and WGA comments.

Response: BLM has undertaken consultation with the states and through the Western Governors' Association to solicit and consider state comments on the proposed regulations. BLM has given considerable weight to the states' comments on ways to provide for joint federal-state program administration while still preventing unnecessary or undue degradation.

- 1.15 **Comment:** If any undisclosed changes in agency policy behind the proposed rules could influence the future interpretation of the proposed rules, those proposed changes in policy should be discussed in the draft EIS and the preamble to the proposed rules so there can be reasoned public comment and debate of those policy changes. The disclosure and open discussion of such policy changes, if indeed they are intended by the Department of the Interior and BLM, and are a basis for proposed rule changes, are not only needed to comply with the Administrative Procedures Act but conform to the Administration's policies on increasing the transparency of the public process and meaningful public participation in public policy decisions. No rule changes should be adopted without full disclosure and discussion of all policy changes intended by and resulting from the proposed rules.

Response: All policy changes that underlie changes in the 3809 regulations are apparent from the rules themselves. Mining will continue to be a legitimate use of public lands, but it must be conducted so as not to cause unnecessary or undue degradation.

- 1.16 **Comment:** The draft EIS and other documents are fatally flawed in that they did not consider the reasonable range of alternatives. No consideration was given to reducing or relaxing the items that are now in the regulations but are excessively costly and time

consuming and do not benefit the environment, the company, the agency, or the public. BLM made no attempt to identify such items and disregarded the scoping comments made along those lines. On page 5 of our scoping letter to Mr. Paul McNutt, 3809 Team Leader, dated June 23, 1997, we made recommendations as to how such alternatives could be designed.

Response: BLM developed Alternative 2 to relax BLM regulatory requirements, which some suggested were excessively costly or time consuming.

- 1.17 **Comment:** There is no indication that other federal or state agencies were consulted or reviewed the draft EIS before it was released. A document of this magnitude and potential impact should have at least a peer-type review, if anything just to defend other regulations and to provide input on any new provisions.

Response: Consultation and coordination efforts are described in Chapter 4 of the draft EIS, page 221. BLM consulted the states, the Bureau of Indian Affairs, the Environmental Protection Agency, and the Fish and Wildlife Service on the regulation provisions.

- 1.18 **Comment:** Page 222, Public Participation The draft EIS text describes the extensive scoping process but does not provide full disclosure. Much of the public comment received was not incorporated or addressed in the regulations or draft EIS. Despite extensive comment, BLM made few changes to the regulations. We were told that our input was of value and would be used, but it doesn't seem to matter.

Response: Because of the wide variety of scoping comments received suggesting differing regulatory approaches, ranging from no change to extensive changes, not all could be incorporated into the proposed final regulations. Alternatives were developed in response to scoping comments. These alternatives consider a spectrum of regulatory approaches as a response to the comments received during scoping. This process is discussed in the draft EIS on pages 25-28 and in the final EIS.

- 1.19 **Comment:** Members of the CMA, as well as small miners in California who are not represented by trade associations, have had difficulty obtaining copies of the draft regulations, the draft EIS, and the administrative record. Members of the CMA have called their local BLM office and were told the regulations were available only over the Internet. Those without Internet access were at a complete loss as to how to get a copy for review. Other members called BLM's California State Office and were told they had to travel to Sacramento to the BLM public room to review the draft EIS. Those who called the BLM Nevada State Office to get copies did not receive them for 2-3 weeks after ordering them. These actions to restrict the availability of public documents precluded all but the most tenacious and well-informed mining operators from getting copies of the draft regulations. In addition, the delay in shipping the documents

significantly restricted the ability of companies to comment on the regulations and draft EIS.

Response: The proposed regulations were included in the draft EIS, which was mailed to everyone who provided scoping comments or requested to be placed on the mailing list. BLM apologizes for any inconvenience to those that did not promptly receive a copy of the draft EIS upon request. Hopefully, the additional 120-day comment period from October 26, 1999 through February 23, 2000, allowed people to get their comments to BLM.

- 1.20 **Comment:** For this rulemaking BLM has created a “system” that makes it difficult, if not impossible, for the public, and particularly small entities, to secure access to the information in the administrative record. NMA has requested that BLM provide an index to the administrative record and was told that no index exists. The problems caused by the lack of such an index are compounded by the fact that BLM has chosen to maintain the only copies of the complete administrative record in Reno, Nevada. Consequently, it is nearly impossible to examine the administrative record to aid in the preparing comments. In addition, the administrative record office in Reno is the only place that we are aware of where certain records may be found. One of our members, the Alaska Miners’ Association, requested and was denied access to a copy of the economic and small business regulatory flexibility analysis prepared by BLM for this rule. Fortunately, NMA was able to obtain a copy of the analysis from BLM. Apparently, some others, including some representatives of small entities, have not been so lucky. BLM’s actions in restricting the availability of these documents to a single location have very likely precluded many members of the interested public, including small entities, from reviewing these important materials. Such actions by the agency run counter to the requirements of the Administrative Procedures Act (APA), the Regulatory Flexibility Act, and Small Business Regulatory Enforcement Fairness Act (SBREFA).

Response: The administrative record contains public information that is available for review. The administrative record on the EIS preparation is maintained in the BLM Nevada State Office in Reno. A duplicate record is maintained in BLM Headquarters Office in Washington, D.C. Other portions of the administrative record that support the APA and SBREFA are also kept at BLM Headquarters Office. BLM apologizes for any inconvenience you may have experienced in obtaining this information. Hopefully, the additional 120-day public comment period has allowed ample time for review of and comment on this material.

- 1.21 **Comment:** The plans appear to have been developed with bias and little objectivity as it has solicited the participation of the GAGS [green advocacy groups] but little input from the miners, let alone a full spectrum of miners, the people that are most affected by the regulations. See page 193. If there are any changes in the regulations, they should be made with the assistance and input of the small-scale miner. Involve a spectrum of

mining people from casual users and recreational groups to full-scale commercial operators in the redevelopment of a new draft plan, not just the GAGS.

Response: BLM has received considerable input from all spectrums of the mining community ranging from large mining companies and associations to small-scale individual miners or mineral collectors. On a strictly numeric basis, BLM has received more comments, or input, from people we would classify as miners than anyone else. In addition, BLM has conducted an extensive outreach program, meeting with the mining associations and trade groups to discuss the regulatory issues before preparing the proposed regulations.

- 1.22 **Comment:** I went carefully through the lists of persons and agencies who received a copy of the book for commentary and noted that, while there are a number of mining associations listed, nowhere could I find any mention of individual rock and mineral clubs or their national parent groups. I find this strange and sad, for we will be strongly affected by the new regulations, should they be adopted.

Response: The mailing list was assembled during scoping. Persons or organizations wishing to be on the mailing list had only to contact BLM and request they be listed. Rock and mineral clubs that generally collect hand specimens without mechanized surface disturbance would not likely be affected by the proposed regulations.

- 1.23 **Comment:** I wonder why I am not on your mailing list because I had to prepare a letter of intent to look for minerals in the Los Padres National Forest and they have a record of my name and address. How come North and South Dakota were not mentioned in this group as they have minerals and I lived back there?

Response: The mailing list was not compiled from listings of Notices of Intent filed on National Forest lands. While North and South Dakota are within the study area, the amount of public land operations that would potentially be affected by the 3809 regulations is quite small and is not listed individually.

- 1.24 **Comment:** I can't help but wonder how many small or casual use miners know what action BLM is proposing. Notice has been too short. I think public comments would be more effective if the public knew about the regulations being considered. I found out 2 days ago about Mining Reform 3809 and received the EIS yesterday, almost too late for comment. How come you're doing this so secretly?

Response: The process has certainly not been conducted in secret. This rulemaking has been accompanied by an expansive public involvement and outreach effort. Beginning in early 1997, before the official notice of intent to prepare the EIS, BLM consulted with state political leaders, industry groups, and the environmental organizations about the rulemaking effort. BLM then conducted 19 scoping meetings in 12 cities, issuing

nationwide press releases to inform people of the rulemaking and explain how to become involved. Once the proposed rule and draft EIS were prepared, BLM held more meetings and briefings with all interest groups. BLM then conducted 29 hearings in 16 cities to get public comments on the proposed rules and draft EIS.

- 1.25 **Comment:** I attended a meeting this last (99) 2nd of April of the Eastern Oregon Mining Association (EOMA) and when I brought to the attention of its members the new Revised BLM 43CFR3809 (EIS) rules, not one member knew about the proposal.

Response: BLM conducted a scoping meeting on June 16, 1997, in Eugene, Oregon, in direct response to a request by the Oregon Mining Association to make their members aware of the 3809 rulemaking. Many members of the association were on the mailing list. A hearing on the proposed rules was also held in Eugene in 1999. See Chapter 4 of the final EIS for details on the public involvement efforts.

- 1.26 **Comment:** The draft EIS fails to consider and discuss how the proposed rule complies with Vice President Gore’s Reinvention of Government Initiative. On page 1 of the Executive Summary, the Department of the Interior report states “several DOI issues involve stripping away barriers that prevent the effective, efficient governance; eliminating federal micromanagement of state and local government; or managing across agency lines through boundary spanning mechanisms.” (Emphasis added.) Throughout the public hearings conducted by BLM during the comment period and in these comments, countless examples have been presented of how the proposed rule flies in the face of this objective. Existing memorandums of understanding (MOUs) and memorandums of agreement (MOAs) between the individual states have proved effective and have reduced duplication of state and federal resources. On page 49 of the Department of Interior portion of the Gore report, Action Item 10 states: “DOI should identify all parties that may be interested in a rulemaking and involve them early in the process. Examples of BLM’s failure to accomplish this objective can be found in the oral testimony given in Salt Lake City, Utah, and Ontario, California. In Salt Lake City several commenters stated that BLM failed to give notice of the rulemaking to mining claimants. In Ontario, California, Barrett Wetherby, a California native and prospector, said he was not given the necessary reference materials he needed to comment on the proposal. During the evening session in Ontario, Jack Liget said he asked for notification of meetings from BLM and never received notice. He also asked to be put on a BLM 3809 mailing list, but his name was never put on such a list. This is hardly an effective way for BLM to encourage participation in the rulemaking process.

Response: Chapter 4 of the final EIS describes the public participation effort made to inform people of the rulemaking. The massive amount of outreach done for this rulemaking is consistent with the reinventing government initiative. Individual mining claimants were not notified because the list of claimants is orders of magnitude greater than the number of operators actually working under the 3809 regulations.

1.27 **Comment:** As a former member of the Lower Snake River Resource Advisory Council (RAC), it is unconscionable that detailed discussion of the proposed 3809 regulatory changes and associated environmental and economic impacts has not occurred in the majority of the RACs. If BLM is indeed proposing “environmental standards and guidelines” for the mining industry, then the RACs represent an integral review panel that BLM has not used. The RACs were put together to provide standards and guidelines for mining; it needs to be discussed. The proposed 3809 regulations must be discussed thoroughly at the RACs, and BLM should request opinions from the RACs before this regulatory process proceeds any further.

Response: The resource advisory councils were made aware of the 3809 regulation rewrite. It was then up to the individual RACs if they wanted a more detailed briefing on the 3809 effort from BLM. Many RACs did request more information, which we provided. But few of the RACs submitted detailed comments or input on the proposed regulations.

1.28 **Comment:** I suggest that a 10-member panel be assembled to rewrite these regulations. Five members should be from industry and five from BLM. Two of industry’s representatives should be small operators, two should be large operators, and one should represent a mining organization. On the BLM side, three should be field mineral administrators, one should be a field manager, and one should be a lawyer. Of the three, one should be a geologist, one should be a mining engineer, and one should have extensive placer experience. Maybe then the result would be functional.

Response: BLM cannot delegate the task of writing regulations to a panel. BLM has drafted the proposed final regulations in response to input received from a variety of public land users.

1.29 **Comment:** The only comment needed on this first part of the draft EIS [summary] regards notice. In the Public Participation (p.3) section and elsewhere, it is repeatedly stated that efforts were made to encourage comment from groups and ‘stakeholders.’ And “Beginning in April 1997, information packages were....mailed to interested or affected stakeholders.” (emphasis added). Apparently claim holders, although directly affected, are not considered to be stakeholders for this regulatory Pearl Harbor process. According to BLM records, in 1994 they received over 31,000 small miner exemptions for claims held on the public lands. Current figures reveal the current number to be about 75% lower, something over 8,000. Although the Federal Land Policy and Management Act (FLPMA) requires that claim holders record their claims with BLM and BLM graciously notifies them of their need for annual filings, etc., not one claimholder I’ve asked has ever received notice of these proposed changes. A few have been aware that something was in the works and have heard about hearings on occasion. As it turns out, they have mistakenly believed that since they faithfully filed the appropriate paperwork each year that when changes were definitely being considered, they would be notified. As

a result, literally thousands of claimholders trusted BLM and are unaware that they are being targeted by the regulatory process for major changes, which, if Mr. Babbitt et al. have their way, will take effect in only a few months' time. When I asked BLM how this situation occurred, the response was "Washington doesn't want to do it." Although it could be pleaded that *Federal Register* notice is sufficient, given the aforementioned situations, something is radically awry here. Aside from common courtesy, it would appear that the Administrative Procedures Act (APA) has been violated. The draft EIS cites the APA (page 4) requires an EIS for the Proposed Action, noting that "the proposed changes constitute a major federal action significantly affecting the human environment" (emphasis added). More specifically, this malfeasance of notice may become a direct violation of Executive Order 12291 on Federal Regulation, which states that before 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." (emphasis added.) To date, no notice has been sent to the claim holders, the persons directly affected by the rule for their comments, even though they are known to BLM. Lack of direct notice effectively assures that only a small portion of those affected could comment. You are required to give me personal notice. Not *Federal Register* notice.

Response: Individual mailings on the 3809 regulation rewrite were not sent to all mining claimants because the number of claimants exceeds the number of operators actually working under the 3809 regulations by several orders of magnitude. Instead, an expansive public involvement and outreach effort was conducted to make individuals aware of the 3809 effort. Beginning in early 1997, before the official notice of intent to prepare the EIS, BLM consulted with state political leaders, industry groups, and the environmental organizations about the rulemaking effort. BLM then conducted 19 scoping meetings in 12 cities, issuing nationwide press releases to inform people of the rulemaking and explain how to become involved. Once the proposed rule and draft EIS were prepared, more meetings and briefings were held with all interest groups. BLM then conducted 29 hearings in 16 cities to get public comments on the proposed rules and draft EIS. Additional details of the public involvement process can be found in Chapter 4 of the final EIS.

- 1.30 **Comment:** The draft EIS fails to consider issues and alternatives raised by the WMC during scoping. The WMC submitted detailed written comments to BLM in a June 18, 1997, in a letter addressed to Mr. Paul McNutt, 3809 EIS Team Leader. The WMC finds that BLM's draft EIS and the accompanying proposed rule have failed to acknowledge or consider issues, concerns, and questions raised in this letter. This is just one of the many reasons why the WMC deems the draft EIS to be substantively flawed and procedurally inadequate. The National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) regulations for implementing NEPA (40 CFR 1500) and for preparing documents such as this draft EIS require BLM to acknowledge, track, and

respond to issues raised during project scoping. In preparing this draft EIS, it appears that BLM has ignored its own internal guidance on comments received during public scoping.

Response: There is no requirement that an agency respond directly to the commenter about scoping comments. The purpose of scoping is determine issues for analysis and to help develop alternatives. Page 65 of the draft EIS describes alternatives considered but eliminated from detailed analysis. BLM developed four alternatives for detailed analysis in the draft EIS and five alternatives for analysis in the final EIS in response to public comments received during initial scoping or on the draft EIS. A list of issues, along with suggested alternatives, identified by the public during scoping is presented in the draft EIS starting on page 18. Starting on page 22, the draft EIS lists issues and concerns not addressed along with a rationale for limiting the scope of the analysis.

- 1.31 **Comment:** BLM states that what we see, what we review, what we comment on may not even be in the final EIS and rule. Why? What is that all about then? That statement seems to say that BLM will change the final rules to cater to the enviros and screw the miners. It allows BLM to adapt Alternative 4, Babbitt's preferred alternative, without the miners being able to do anything about it, and it is an acknowledgment by BLM that it doesn't need to follow the rules. BLM must allow us, the stakeholders, to comment one more time on the final before it is final. Sure it won't make a difference, but at least we will know what is being crammed down our throats.

Response: The purpose of producing a *proposed* regulation and a *draft* EIS is to solicit public comment. The final regulations and EIS have changed in response to public comment.

- 1.32 **Comment:** It is important to note that the working draft represents much more than a "revision" to the exiting 3809 program. Instead, it is a fundamental change in the way that mines and mining are regulated and an incredible (and unauthorized) expansion of BLM's role in mine permitting. These dramatic changes were not foreseeable from the description of BLM's proposal that was circulated at the NEPA scoping meetings last year. Accordingly, if BLM intends to go forward with proposed regulations similar to those in the working draft, Barrick once again states its request that BLM conduct more NEPA scoping. We have been informed that BLM considers that the scoping period had never been "formally" closed and that the agency will continue to accept scoping comments. This information is inconsistent with the material that BLM distributed at the scoping meetings and with the general understanding in the industry and among the public about the scoping process. It is deceptive for BLM to inform a limited audience that the scoping comment period has not "formally" closed without publishing notice of that conclusion and inviting more public comments. It is also difficult for those who have been invited to give comments in this informal process to gauge the time and effort that should be invested and the level of detail that is appropriate or would be helpful when the agency gives no clear guidance and no formal deadline for submitting comments.

Response: The working drafts were produced to aid the public in preparing their scoping comments and in response to industry's concern that BLM did not have a well enough defined proposed action for scoping purposes. This is similar to the continued evolution of a proposed Plan of Operations during project-level EIS scoping.

- 1.33 **Comment:** The DOI/BLM has failed to provide copies of referenced documents, which violates the intention of the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA) and other regulations and policies. To name only a few that have not been provided: (1) failure to provide a copy of "recent district court case on BLM's 1997 bonding regulations," (2) failure to provide a copy of 43CFR3715 Surface Occupancy Laws, (3) failure to provide a copy of "Nevada BLM reclamation revegetation standards," (4) failure to provide a copy of Nevada BLM water resource policy, and (5) failure to provide a copy of or information on the predictive modeling BLM uses "to estimate pit lake geochemistry and potential toxicity." Failure to provide all referenced materials as part of the EIS violates the intent of NEPA that an INFORMED public provide comment.

Response: NEPA does not require that the referenced material be provided. In fact, NEPA encourages material to be incorporated by reference to reduce the bulk of the analysis (40 CFR 1502.21). Reference material need only be reasonably available for inspection by interested persons. This does not mean copies have to be provided. The documents listed in the comment are all available upon request.

- 1.34 **Comment:** The public must be given time and notice to review each revision of a proposed rule. The "Opinion of the Secretary," after formal consultation with the Fish and Wildlife Service would constitute such a revision because that opinion would constitute a significant change or significant new information. Since, the Secretary proposes formal consultation after public review closes and does not intend to seek formal consultation with the Fish and Wildlife Services, he proposes to fail to provide the required public review of the "Opinion of the Secretary."

Response: Formal consultation with the U.S. Fish and Wildlife Service is not being conducted for this rulemaking.

- 1.35 **Comment:** The Secretary referenced the "September 1997 Scoping Report." That report does not mention the scoping Congress provided in S.2237 and, again in the final Public Law, P.L. 105-277. Nor did the Secretary of the Interior observe any of the scoping Congress provided by law in the preparation of this draft EIS. Hence, the draft EIS fails to respond to significant scoping comments.

Response: The draft EIS incorporates the results of consultation with the states. The draft EIS was released before the completion of the National Research Council report

(NRC 1999) required by PL 105-277, so it does not incorporate the results of that report. The final EIS has been reopened for public comment in light of the NRC report, revised to incorporate the NRC report results in the analysis, and used it in determining the scope of alternatives analyzed.

- 1.36 **Comment:** When I requested a copy of the Department of the Interior documentation certifying that the draft EIS and proposed regulations did legally satisfy the requirements of the successful litigation by the *Northwest Miners Association v. Babbitt*, I was informed that all supporting documents were available only in Reno.

Response: The proposed rules and draft EIS are not associated with the Northwest Mining Association lawsuit over the bonding regulations that were issued in early 1997. The administrative record for the EIS is located at the Nevada State Office in Reno with a copy maintained at BLM Headquarters in Washington, D.C.

- 1.37 **Comment:** It is hard to believe that a draft EIS of national scope and impact can be completed in such a short time frame and without enough time for public comment and study. A comparison of this time schedule with the schedule for the implementation of any single mining Plan of Operations and EIS would clearly show that a Plan and EIS for only one operation in one state covering a very limited area, typically takes BLM 3 to 5 years to complete. That lengthy time frame includes expediting the process caused by the proponent of the action paying for third-party consultants to complete studies that BLM does not have the resources to complete. Because of the unreasonably rushed public comment period, the WMC has not had enough time to complete our review of the significant volume of materials furnished with this rulemaking. Therefore, the absence of specific comments in this letter should not be construed as agreement with any of the issues or concepts presented in the draft EIS, the Initial Regulatory Flexibility Act, the proposed rule, or any other BLM materials associated with this rulemaking.

Response: Work on the EIS and regulations has taken nearly 4 years to complete. The comment period on the proposed regulations was for 90 days, and the draft EIS was available for comment nearly that long. This is hardly an “unreasonably rushed public comment period.” Furthermore, the comment period was later reopened for a 120 days on both documents in October 1999.

- 1.38 **Comment:** The draft EIS completely ignores the additional length of time the new regulations will impose on exploration and mining operations. A detailed analysis should be made on how long the studies for each new regulation will take to analyze. How long will it take for surface and ground water studies; wetlands and riparian protection; soil handling; revegetation requirements; fish and wildlife protection and habitat restoration studies; cultural and paleontological resource studies; American Indian analysis; handling of acid-forming, toxic, or other deleterious materials; leaching and processing operations and impoundments; stability grading and erosion control; pit backfilling and reclamation.

As the draft EIS purports that these issues are not adequately addressed under existing regulations, it can only follow that more study needs to be done on each of these issues, and there has to be an additional time factor and cost to complete these studies, and this must be presented in detail in the draft EIS.

Response: The amount of time it will take operators to comply with the performance standards is highly site specific and project specific. Presently, these issues are being addressed by a lot of operations, and the detailing of the requirements in the regulations would not add any more time. In other locations they may require more study. The amount of time and cost has been included in the evaluation of impacts to mineral activity in Chapter 3 and Appendix E of the draft and final EISs.

- 1.39 **Comment:** To prevent unnecessary or undue degradation, the regulations should clarify what is meant by “not unduly hinder such activities but will assure” that they not degrade public lands. These statements are contradictory in that it may be that to “assure” there will not be “unnecessary or undue degradation,” some operations will be unduly hindered. BLM need not consider economics (Great Basin Mine Watch, et al., 148 IBLA 248,256). Therefore there is no reason to prevent the hindrance of some activities. In other words, the objective that provides “for the reclamation of disturbed areas” should be amended to clarify that “disturbed areas” include areas that are affected both directly by surface-disturbing activities and indirectly by dewatering, contamination, spills, etc.

Response: The term “unduly” means beyond that needed to prevent unnecessary or undue degradation. BLM does include economic factors when deciding upon the practicality of most mitigating measures in meeting the performance standards and in preventing unnecessary or undue degradation. Regarding “disturbed areas,” the regulations are for purposes of regulating mining-related surface-disturbing activities, but the mandate to prevent unnecessary or undue degradation extends to all public land resources, whether on, under, or above the public land surface.

- 1.40 **Comment:** I find that in the draft EIS it is very difficult to understand the complex nature of interlocking concepts. The draft EIS is so lengthy that one will have to read it several times to digest it. I think the entire document should be reviewed and rewritten to make the language clearer and better organize the text.

Response: The draft EIS has been revised to produce a final EIS. To aid in reading, we suggest that you first review the EIS summary in the front of the document and then review the alternative summary tables and impact summary tables in Chapter 2. After this review, you can find more detail on points of interest in the remainder of the EIS.

- 1.41 **Comment:** BLM’s fact sheet incorrectly states that 3809s will cover all hardrock mining operations. We’ve already commented on the differentiation between locatable and leasable minerals.

Response: The term “hardrock” minerals or mining, although technically incorrect, is commonly used when referring to mineral resources that are locatable under the mining laws.

- 1.42 **Comment:** On page 92 the EIS states that option 2 could lead to either more or fewer notices being submitted. Here we go again, depending on what impact BLM would perceive. Operators would not necessarily know if a Plan or a Notice would be required until they had submitted a Notice or talked to BLM.

Response: Since option 2 would be the same way that the Forest Service now regulates small operations, that would be correct. Operators would not necessarily know if a Plan or a Notice would be required until they had submitted a Notice or talked to BLM. That option has been removed from the final regulations.

- 1.43 **Comment:** Page 12, Introduction. The last “gap” (bulleted list) is an incomplete sentence or thought. Comment cannot be provided until a complete sentence is provided.

Response: The missing word is, “until.” The sentence should read, “No requirements exist for preventing disturbances in areas closed to mineral entry until a discovery is determined to be valid or not.”

- 1.44 **Comment:** Another aspect of the proposal that readers will quickly notice is that the section headings are phrased as questions that readers might ask themselves, complete with first-person personal pronouns. For example, the heading of proposed Sec. 3809.430 is “May I modify my plan of operations?” The text of each section contains the answer to the question posed in the heading. Frequently, the answer is stated in terms of what “you” (the reader) must do. For example, the answer to “May I modify my plan of operations?” is “Yes. You may request a modification of the plan at any time during operations under an approved plan of operations.” The organization from lowest to highest levels seems to be a logical step. The question-answer format leaves too many ambiguities and should be abandoned. Although currently popular with some, the use of questions for titles is more suitable for an informational pamphlet rather than a regulatory document. Such questions belie the changes being proposed and limit the interpretation of the regulation itself.

Response: The question-answer format is designed to make it easier for the layperson to locate regulations that apply to a question they may have about the requirements.

- 1.45 **Comment:** We wish to state today that we find the presentation of the No Action Alternative profoundly insufficient because it fails to incorporate BLM policies, memorandums, etc.. It also fails to incorporate an adequate discussion of state programs. Since the current definition of unnecessary or undue degradation provides for, among other things, compliance with state requirements, it’s therefore important to describe

these requirements. These omissions lead a reader to believe that much of what is being proposed does not exist in some form today, which is completely erroneous. BLM needs to more accurately portray the current mining regulatory environment. This could be accomplished at least in part by genuinely and realistically describing the No Action Alternative.

Response: The No Action (existing regulations) Alternative is described in the draft EIS on pages 29 to 36. It includes references to the state regulations and programs in Appendix D and discusses BLM cyanide, acid rock drainage, and other policies. We acknowledge that many of the proposed final regulations are within the existing policy and procedures. The description of the No Action Alternative has been revised in the final EIS.

- 1.46 **Comment:** The statement in paragraph 3, Chapter 1 of draft EIS on page 13 that “everyone was technically in trespass on the public domain” is ludicrous. Upon close examination you will find that the public domain is in fact unowned. Trespass on the public domain is technically not possible.

Response: The public domain is owned by the people of the United States.

- 1.47 **Comment:** Several speakers this afternoon pointed out some glaring flaws and inadequacies in the draft EIS. Notable was the odd timing of conducting the environmental impact statement concurrent with the drafting of the regulations. BLM has confused the public in such a fashion that it taints this regulatory process. With the release of the draft EIS in conjunction with the proposed regulations, I found that most of the public (that I have been in contact with) believes that the draft EIS is the proposed regulations. This deception, whether innocent or by design, has led to confusion. I believe this is reason enough for BLM to clarify this confusion and reopen this process.

Response: The timing of the release of the draft EIS and the proposed regulations was very much intentional because the proposed regulations also constitute the Proposed Action being considered in the EIS. The draft EIS makes very clear that the proposed regulations constitute only Alternative 3 and includes a copy of the proposed regulations as Appendix B. To use the EIS as a decision making tool, as intended by NEPA, it was produced and presented to the public and decision makers simultaneously with the proposed regulations. This process allows all parties in formulating their comments to consider not only the proposed regulations but alternatives to the proposed regulations and impacts of the regulatory alternatives. If the proposed regulations had been released before preparation of the draft EIS, there may not have been fair consideration of other regulatory options. If the proposed regulations were not prepared until after release of the draft EIS, then the draft EIS would have been deficient in not containing a proposed action for analysis. It is not only logical that to release the proposed regulations for comment at the same time as the draft EIS, but it is recommended in the CEQ regulations

at 1501.2 that the NEPA process be integrated with other planning processes.

1.48 **Comment:** How much did the draft EIS cost us for 516 pages?

Response: Specific information on the cost to prepare the EIS is not available. But the EIS was prepared by existing agency staff operating in their existing offices with the some help from Forest Service and Bureau of Reclamation specialists. Costs were fairly minimal and related mostly to travel expenses and reimbursement of expenses to those other government agencies.

1.49 **Comment:** I would suggest that the question-and-answer format be applied to the regulations as they now stand. I think they have served quite well, and a more readily understandable presentation would facilitate the goals of all concerned.

Response: Under whatever alternative is selected, BLM would eventually want to rewrite the regulations in the Plain English, question-and-answer format. The impacts would still be the same as described in the EIS under Alternative 1.

1.50 **Comment:** At a minimum, BLM needs to reinsert that word “reasonable.” The flexibility is needed to consider site-specific factors, cost, and feasibility. Another problem with the definition is the list of components included in term “reclamation.” Even though BLM has now clarified that these components are included where applicable, this list is unnecessary in light of the proposed performance standards at proposed 3809.420, which are sometimes duplicative and sometimes conflict with the reclamation components laid out in this definition.

Response: The definition is not in itself a standard. It is intended to define what BLM means when the term “reclamation” is used elsewhere in the regulations. “Where applicable,” replaced “reasonable” in the definition. Site-specific reclamation measures arrived at during Notice review or Plan of Operations approval would control the final on-the-ground reclamation requirements.

1.51 **Comment:** 3809.11(g) The term “reasonably incident” is used in this section. What do you mean by “reasonably incident”?

Response: “Reasonably incident” is defined in the regulations at 43 CFR 3715 and means activity reasonably incident to prospecting mining and mineral processing operations.

1.52 **Comment:** I’m disappointed that it is described as no action. I think it should be described as no additional action, because as the EIS is drawn up, it wants to lead the readers, who are really trying to educate themselves as to what this all means, that no action means that the miner is out there to do as he wishes, to do as he pleases, no action.

Response: Under the National Environmental Policy Act, an agency's not taking any action on a proposal under consideration is termed as "no action." Throughout the draft and final EISs we have tried where practical to associate "no action" with continued implementation of the existing regulations.

- 1.53 **Comment:** The Alternative 4 requirement to "prevent irreparable harm" is too vague. Any disturbance could be deemed "irreparable."

Response: The definition would be tied to productivity of the land, which does give some objective measurement such as vegetation condition, slope, soil thickness, or watershed protection. But some judgment would have to be made on a site-specific basis as to what constitutes irreparable harm.

- 1.54 **Comment:** Relying on BLM's asserted use of plain language, we can only conclude that the "minimization" performance standards proposed at 3809.420 are designed to give BLM regulatory tools that will justify rejecting mining proposals and making mining and mineral exploration on BLM-administered lands impossible. This outcome would be completely inconsistent with the direction Congress has given BLM on mineral development on public lands.

Response: The definition of minimize has been revised in the final regulations to provide for reducing impacts to the lowest practical level. Practical means that the operation could still proceed with due consideration for other resources.

- 1.55 **Comment:** Parts of the proposed provisions are too vague to ensure consistent application. For example, the terms "deleterious," "undesirable effluent," "alkaline" and "metal bearing" are not clearly defined, could be interpreted in any number of ways, and should be deleted.

Response: BLM believes the terms have standard accepted definitions that are consistent with the intent of the regulations.

- 1.56 **Comment:** BLM proposes to change long-held and adjudicated definitions of terms such as "drifts," "casual use" and "prudent operator" (the politically correct term now used for the prudent man). I am troubled by the failure of BLM to define "potentially toxic" and "negligible disturbance." Understanding these two terms is critical to being able to give informed comment. BLM defines the term "drift," which is described as "voluntary or accidental dislodgement of aquatic invertebrates from the stream bottom into the water column where they move or float with the current." The scope of the 3809 Draft Environmental Impact Statement, is designed for mining-related issues and therefore should not complicate terminology by improperly using mining-related terms such as "drift" without identifying both applicable terms.

Response: Terms such as “drift,” used in the EIS glossary, are there to aid the reader in understanding what the EIS text writer intended. They do not have any legal effect, especially when the two usages of “drift” have such different meanings depending on context. Moreover, “drift” as a mining term did not appear in the draft EIS. Other terms, such as “casual use” are intentionally being changed to meet objectives of the regulations. Where this occurs, the term is defined in the regulations, not just the glossary.

- 1.57 **Comment:** The proposed regulation is lengthy and extremely complex. How does an individual, without a staff of lawyers understand it? I am an engineer, and I find it very hard to understand.

Response: The Alternatives Summary Table in Chapter 2 of the draft and final EISs gives an overview of the major components of the proposed regulations and proposed final regulations.

- 1.58 **Comment:** I think the term activity plan is poorly defined. Its definition doesn’t give me any definition. I would cite one case study. What is an activity plan? I worked on a Plan of Operations in Nevada. There was a situation where certain activity was not going to be allowed because it was in a Class 1 visual area. When I investigated that Class 1 visual area, it turns out it was on some district or some area management plan maps, but it had never been subjected to public review, and, in fact, it was not part of the publicly reviewed resource management plan for the BLM district. This is one example of current definitions that perhaps leads me as an operator wondering what is an activity plan. It would absolutely be required that any activity plan would have to have been subjected to public review and scrutiny. Otherwise, it does not exist.

Response: An “activity plan” is a plan prepared to implement a portion of a resource management plan (RMP). It is a formal part of BLM’s planning process. An example would be an activity plan for the management of a designated area of critical environmental concern or other special area or resource.

- 1.59 **Comment:** The language used in these proposed regulations is misleading and contradictory. To complicate matters more, when reviewing the draft EIS, the alternatives (1 and 2) are inconsistent with the language of the proposed regulations. In other words, two of the four alternatives in the draft EIS could not be implemented, if these proposed regulations are enforced. I propose that these proposed regulations be rewritten in such a fashion so they would allow the option of implementing Alternatives 1 and 2 in the draft EIS.

Response: Alternatives 1 and 2 are inconsistent with the proposed regulations because they constitute entirely separate regulatory approaches from the proposed regulations

under Alternative 3. The proposed regulations could be used only to implement Alternative 3. Alternative 1 would continue to use the existing 3809 regulations in Appendix A. Alternative 2 would not use any BLM regulations, relying instead on the state regulations. Alternative 4 would create a separate set of regulations that implemented the elements described for Alternative 4.

- 1.60 **Comment:** Proposed Section 3809.415(a) provides that unnecessary or undue degradation (UUD) is prevented by complying with “the terms and conditions of your approved plan of operations.” This opens the door for BLM to prescribe any terms and conditions not limited to the UUD standards. It is difficult to imagine a definition and application of UUD that could be more vague and subjective. In paragraph (a) the phrase “necessary to prevent unnecessary or undue degradation” should be added after the phrase “plan of operations.” The rules should be crafted so that compliance with an approved Plan of Operations is sufficient to demonstrate compliance with any performance standards.

Response: As stated in revised 3809.411(d), any terms or conditions BLM places on a Plan of Operations approval would be those needed to meet the performance standards in 3809.420.

- 1.61 **Comment:** The proposed regulations and associated documents are incomplete and fatally flawed in that BLM has not evaluated or considered the adverse impact of “minor” editing to existing regulations. As BLM notes, the existing regulations have been in effect for almost 2 decades. During this time a significant number of applications have been submitted to BLM and approved as submitted or with modification. Some of these BLM decisions have been challenged, and there is now a body of decisions and litigation that reflects the language of the existing regulations. When modifying existing regulatory language to make it read better, BLM also creates vagueness, ambiguity, and uncertainty. This vagueness, ambiguity, and uncertainty create a new learning curve for BLM staff, the public, the mining industry, and owner/operators on whether the editing actually changed the existing body of decisions, and if so, to what extent. This uncertainty will cause delay in getting otherwise prudent and environmentally responsible mining operations approved and will open the door for frivolous appeal/litigation by anyone who does not want mining on federal land.

Response: The draft EIS evaluates the impacts from complete implementation of the regulations as written. All changes from the existing regulations are considered in the impact assessment. However, the impact assessment is a prediction only, and does not guarantee against different future interpretations resulting from litigation. Minor editing between the proposed and final regulations is accounted for in the final EIS as changes to the proposed action.

- 1.62 **Comment:** The term “recreational mining” has never been defined and therefore has no

place in any federal EIS.

Response: “Recreational mining” has been removed from the final regulations, and instead the focus is on casual use activities. The EIS still discusses mining for largely recreational purposes.

- 1.63 **Comment:** The Glossary is missing key definitions used in the proposed regulations. “Mitigation” and “minimize” are examples. Consider vastly expanding the index to cover all major boldface sections in the text, many more words in the text appearing in the glossary, and critical terms. “Patents” and “claims” are not listed, for example, in the index. “Patent,” but not “claim,” is defined in an excellent glossary section. “Attenuation” appears in neither, understandably in light of its limited use, but it (p. 113) and all such terms should be properly defined in the text when they first appear. “Mitigation” is referenced in your state-by-state regulation summary and referred to on p. 176, but appears neither in the glossary nor the index, and calls for discussion.

Response: The purpose of the Glossary is to aid the EIS reader and not to define terms for regulatory or legal purposes. Changes have been made to the glossary where needed to further clarify terms used in the EIS.

- 1.64 **Comment:** Table 3-5 should show these data by year and indicate the seriousness of the noncompliance.

Response: Table 3-6 shows the noncompliance and reason for issuance, which can be used to judge the seriousness of the noncompliance. A breakdown by year is not available.

- 1.65 **Comment:** We disagree with the definition of “exotic species” on page G-7 of the Glossary as “an animal or plant that has been introduced from another continent.” Since “native species” is defined on page G-15 as “a species that is part of an area’s original fauna or flora,” “exotic species” should accordingly be defined as “a species that is NOT part of an area’s original fauna or flora.” This is an important conservation issue in Nevada, where species native to one part of the state are increasingly being planted in other parts of the state where they do not occur naturally, sometimes with the potential for adverse consequences. Species native to the North American continent have the potential to do just as much damage as those from other continents, if introduced where they do not naturally occur. We recommend that the definition of “exotic species” be revised, and that use of species native to each project area be emphasized in the final selected alternative.

Response: The final regulations do emphasize the use of native species in section 3809.420(b)(5). The definition of exotic species has been revised in the final EIS to reflect your comment.

1.66 **Comment:** Figure 3-1 uses data that is 20 years old and does not reflect current land status in Alaska.

Response: Figure 3-1 identifies class I areas for prevention of significant deterioration related to air quality. It does not reflect land status. This figure shows the mandatory PSD class I areas in the West established by the U.S. Congress on August 7, 1977, which also provided a mechanism by which each applicable air quality regulatory agency could establish more federal PSD class I areas. But only five tribal governments have conducted such PSD class I area redesignations since 1977. Of the nearly 625 current wilderness areas, only 120 are mandatory PSD class I areas. Figure 3-1 has been revised to include all five tribal class I areas and more detailed class I area boundaries.

1.67 **Comment:** Pages R-1 to R-21, References: Some of the studies and sources cited by BLM in the draft EIS have been written by advocacy groups or individuals openly promoting an agenda. Although BLM can certainly reference these publications, it is inappropriate for BLM to cite to those reports as authority for a proposition. To do so raises questions about reliability, independence, and the nonbiased nature of the information BLM relies upon in its analysis. NEPA obligates the preparer of an EIS to use legitimate scientific information pertaining to the Proposed Action.

Response: References are provided so that the reader knows what material was used by the authors to reach their conclusions. Readers can then judge the objectivity or reliability of the reference material for themselves.

1.68 **Comment:** Table 2-3, Regulations Summary of Impacts by Alternative, you have not listed the impact of BLM costs for this added and sometimes judgmental regulation in Alternatives 3 and 4 to the taxpayers of this country. I would prefer to believe this was an oversight and not an intentional omission.

Response: The costs of the alternatives to BLM, and eventually the taxpayers, is not the focus of the analysis. The analysis evaluates the regulatory program merits, assuming full implementation. Relative costs of the alternatives are estimated at the end of each alternative description in Chapter 2.

1.69 **Comment:** As to the Table 2-3 “Mineral Exploration and Development Chart,” your changes, which will cause a lot of headaches for the casual prospector in particular, will only cause a 5% reduction in all categories over a 20-year period. This surely is a case where costs of increased regulation and surveillance by BLM and the Forest Service outweigh benefits.

Response: The environmental benefit is not based on the reduction in mineral activity, but on the improved environmental protection measures in the substance of the regulations.

1.70 **Comment:** Number all pages, including those with Tables 2-2, and 2-3.

Response: Page numbers have been added as requested.

1.71 **Comment:** The EIS should discuss that in some states like California the counties are the regulating authority and that any discussion of state authority should be understood to mean state or county as appropriate.

Response: Appendix D discusses the delegation of state regulation authority to the counties in California.

1.72 **Comment:** Add something to the regulations that BLM can initiate a new reclamation plan like the state of Montana in the Metal Mine Reclamation Act section 82.4-337.

Response: Proposed and final regulations at 3809.431 provide that BLM may require a modification to a Plan of Operations when needed to prevent unnecessary or undue degradation. This includes modifying the reclamation plan when needed to meet the performance standards.

1.73 **Comment:** Draft EIS, [page 83, Mining Methods] “Ore from massive bodies is generally extracted by open pit mining,” reference, Hartman 1992. Actually, the trend has moved more to underground mining and less surface disturbance for large ore bodies.

Response: Open pit mining is still the dominant extraction method for large-tonnage, low-grade, disseminated deposits.

1.74 **Comment:** While the EIS effectively discusses the alternatives and their impacts, it is important to note weaknesses and correct them. In our copy, the final sentence on page 9, Summary, Alternatives Considered but Eliminated, is clearly incomplete and page 10 is blank. What material are we missing?

Response: The material at the end of the summary on Alternatives Considered but Eliminated was mistakenly left incomplete. The complete text is contained in the same section of the main draft EIS body on page 65. This has been corrected in the final EIS.

1.75 **Comment:** [3809.433 and 3809.435] the last sentence of subsection (b) (in the ‘Then’ table) contains two defects. As minor detail, “areas” do not “operate.” Rather, “operators use areas.” It should be phrased, “You may continue to operate....” The important point is that, as written, it only expressly provides for the operator to continue to operate facilities, or in areas, not subject to the modification. The negative implication is that all use of facilities or areas in the modification area must cease (leaching must cease in the pad to be enlarged; excavation must cease in the pit to be laid back). This cannot have been intended. Operations may continue, under the existing terms of approval, in the area

or facility subject to the modification. The sentence should read, “You may continue to operate under your existing Plan of Operations, including at those facilities and in those areas that are the subject to the modification.”

Response: In response, BLM intended that operations that are not a part of the modification, including portions of the facility to be modified, would not be subject to the new regulations and could continue to operate as approved under the existing Plan of Operations. The sentence has been deleted to avoid confusion.

1.76 **Comment:** Page 210, Use and Nonuse Values. Table 3-30 [is] mis-identified in the draft EIS as table 30.

Response: Thank you. The text has been corrected in the final EIS.

1.77 **Comment:** In general, the discussions relative to Alternative 2: State Management are brief and incomplete compared to the other alternatives. We recommend that descriptions of Alternative 2 summarize programs in all states where surface mining occurs. This could be provided in table format and would give the reader a better understanding of the relative effects of this alternative on resources.

Response: State programs are described in detail in Appendix D.

1.78 **Comment:** Forest Service Alternative. The term “significant” MUST be changed since it has a very specific meaning in NEPA. Even though the Forest Service regulations in 36 CFR 228.4(a) use the term “significant,” BLM would eliminate much confusion with operators by using a different term. Generally, the Forest Service uses the term “significant” to mean any disturbance greater than casual use. If BLM were to adopt the same criterion, then items (a, b and c) should read “Are determined by BLM to cause more than a negligible disturbance of surface resources.” Then the disturbance level is tied directly to the definition of casual use.

Response: The term significant as used here was not intended to be applied in the NEPA context. BLM has dropped the Forest Service subalternative from the proposed final regulations.

1.79 **Comment:** Please give a complete definition of what you mean by a "business day." This should be included in the list of definitions.

Response: The term “business day” refers to any day on which BLM offices were open. BLM has dropped “business day” from the final regulations and is using calendar days unless specified otherwise.

1.80 **Comment:** The Implementation heading on page 36, “Overall activity levels in the form

of new or amended Notices and Plans are decreasing.” I don’t know if–I would be very interested to know where BLM got that information, because earlier, or later, in these 500-plus pages, the EIS says that they’re very afraid that the requests for Plans and Notices and mechanical use are going to increase in tremendous numbers and be very degrading to the surface.

Response: Projections for future activity levels are that they will remain steady to slightly decreasing. A complete set of assumptions for future mineral activity levels is presented at the beginning of Appendix E of the final EIS.

- 1.81 **Comment:** Section 3809.2-1(b) discusses how the environmental assessment would be used to determine the adequacy of mitigation measures. We suggest using the term NEPA document rather than environmental assessment.

Response: The regulation citation is to the existing 3809 regulations. In the proposed final regulations the term environmental assessment has been replaced with NEPA analysis.

- 1.82 **Comment:** Subsection (d) [3809.2] should be revised as follows: This subpart applies to operations that involve locatable [delete metallic] minerals; [delete some industrial minerals, such as gypsum; and a number of other non metallic minerals that have a unique property, which gives the deposit a distinct and special value.] This subpart does not apply to leasable and salable minerals. Leasable minerals, such as coal, phosphate, sodium, and potassium; and salable minerals, such as common varieties of sand, gravel, stone, and pumice, are not subject to location under the mining laws. Parts 3400, 3500 and 3600 of this title govern mining operations for leasable and salable minerals.

Response: This paragraph has been moved to 3809.2(e) and revised to make clearer the scope of the regulations for mineral commodities.

- 1.83 **Comment:** Suggested change that in addition to compliance with the foregoing performance factors, your operation must not be found by BLM to involve undue degradation of the land. This could arise if the operation damages scenic, environmental, wildlife, recreational, cultural, or other valuable land resources and the damage singly or in combination, outweighs the benefits of exploitation of the particular mineral resource. This requirement arises from the provision in the Federal Land Policy and Management Act, which mandates action by the Secretary of the Interior to manage the public land to prevent undue degradation thereof. BLM will be glad to discuss with you the details and significance of this requirement in light of the facts surrounding your operation.

Response: In the final regulations BLM has added a requirement to the definition of unnecessary or undue degradation that operations not result in substantial irreparable harm to significant resources which cannot be mitigated.

1.84 **Comment:** I propose that 3809.11(h) be eliminated from the proposed regulation and that all language pertaining to the use of a suction dredge be eliminated from the proposed regulations.

Response: Suction dredging falls within the scope of the 3809 regulations.

1.85 **Comment:** I propose that the term “riparian” be eliminated as it would constitute a taking of state property.

Response: Not all riparian areas are part of navigable waterways that belong to the state. The purpose of the regulations is to protect riparian resources that are under BLM management.

1.86 **Comment:** The Secretary of the Interior claims that the existing 3809 regulations in 1981 define “Notice-level” operations as operations that “use mechanized earth-moving equipment and disturb 5 acres or less during any calendar year.” (draft EIS, page 16) The actual definition for “Notice-level” operations did not mention the use of mechanized earth-moving equipment. (43 CFR Section 3809.1-3) In practice, “Notice-level” operations have almost always been run without earth-moving equipment. This error is consistent throughout the draft EIS; i.e., it infects the analyses of the alternatives. This error is so misleading as to render the draft EIS completely inoperative as an informative document. Decision makers with this misleading information cannot make an informed decision.

Response: The existing regulations require a Notice-for disturbance exceeding casual use but disturbing less than 5 acres not in a special category land. Casual use is defined as only negligible disturbance not involving the use of mechanized earth-moving equipment. BLM has thousands of Notices on file for the use of mechanized earth-moving equipment disturbing less than 5 acres. The definition is functionally correct.

1.87 **Comment:** The Secretary of the Interior claims that “The factual basis for the regulations and the legal status of the Notice were the main issues in the 1986 suit filed by the Sierra Club” (draft EIS, page 16). The Secretary also claimed that the Ninth Circuit Court of Appeals ruled that “a Notice, as constructed in the 3809 regulations, was essentially an enforcement tool (to remind operators of their reclamation responsibilities), and enforcement actions were exempt from the requirements of NEPA” (draft EIS, p. 17). Two court cases were cited. The first of the two cases cited, *Sierra Club v. Penfold*, (Dist. Of Alaska, 1987), did not rule on the Notice issue. *Sierra Club V. Penfold* (CA9, 1988) did rule on the Notice issue but not in the manner claimed. The Ninth Circuit stated, “We believe BLM does not sufficiently involve itself in the approval process to render Notice mine review a major Federal action requiring NEPA compliance. Without NEPA’s applicability, an EA on each Notice mine is not required” (*Sierra Club v.*

Penfold, (CA9, 1988), 857 F.2d 1307 at 1314). The Court also rationalized that BLM would not be required to expend sufficient funds to trigger an EIS for each Notice-level of operations. Additionally, the Court rejected the challenge to the validity of the 1980 regulations permitting Notice-level operations on grounds that it was untimely filed. That Court also noted that the Notice-level regulation was issued with an EIS and that all Notices submitted under that regulation were planned for under NEPA and with an EIS, thereby not requiring a separate EIS for each Notice. Here the Secretary appears, through his misleading statement, to be rationalizing that regulations for Notice-level operations should be changed because of the Court's decision. He forgets that the EIS for the new regulations on Notice-level operations can and should encompass the potential impact of all such operations. This draft EIS did not reflect the Court's decision. Nor does it attempt to set up a programmatic plan for Notice-level operations as did the last EIS. Programmatic planning should have been an alternative, but it was not even discussed.

Response: The cases are cited to make clear that BLM's position that Notices are not federal actions has been judicially reviewed and found to be correct. Any programmatic planning for multiple Notices on a national level is part of this EIS analysis. More programmatic analysis could be conducted by BLM field offices or states if later determined necessary.

- 1.88 **Comment:** Regulations should be written in clear, unequivocal terms. Eliminate vague wording. Vague words, that are open to interpretation, should not be used. Such words can mean anything, either have too many loopholes that will not protect the environment, or will be used against the operator, and open the door to expensive legal maneuvering for which the public has to pay. Terms require precise definitions.

Response: BLM has revised definitions in the final regulations in response to comments. These revisions should reduce or eliminate uncertainty about specific meanings. In addition, the preamble to the final regulations explains what BLM intended, or did not intend, regarding definitions or concepts. As future policy or definition questions arise, BLM will issue policy memorandums or manuals and handbooks to guide the field offices.

- 1.89 **Comment:** The proposed regulation equates "minimize" with "avoid or eliminate," which is a corruption of the English language. For example, BLM includes the word "minimize" in a number of performance standards that are critical to preventing unnecessary or undue degradation. BLM's definition of minimize could mean reducing the adverse impact to the lowest practical level. Or depending on the BLM reviewer of the operation, it may also avoid or eliminate impacts, which is entirely contrary to the meaning of minimizing impacts. To prevent something like erosion, which is in the new proposed regulations, BLM not only has to implement these proposed regs, but also has to repeal the law of gravity. To prevent pollution or prevent acid rock drainage, not only does BLM have to impose these new regulations, but it also has to repeal several laws of

thermodynamics that govern how aqueous geochemical reactions occur. This double standard entirely changes the meaning and scope of the particular standard and needs correction. BLM should not allow itself to be drawn into inconsistent implementation of this definition.

Response: The definition of minimize has been revised in the final regulations to provide for reducing impacts to the lowest practical level. Practical means that the operation could still proceed with due consideration for other resources. BLM understands that some impacts or conditions cannot be eliminated.

- 1.90 **Comment:** The draft uses “minimize” in a number of places and should instead use the term “prevent.” Just because a mining company cannot afford to adhere to an environmental standard, it should not be permitted to ignore environmental protection standards. Both BLM managers and mining companies need and will benefit from language that describes in clear and straightforward language the environmental standards to which the companies will be held.

Response: BLM recognizes that all impacts cannot be eliminated or prevented. The intent of the regulations is that impacts be minimized to the lowest practical level. Practical is not based upon what a company can afford but upon technologies and practices reasonably considered to be cost effective.

- 1.91 **Comment:** In conjunction with a new proposal consistent with the National Research Council report, BLM should issue a new or supplemental EIS analyzing in detail the alternatives to BLM’s proposed 3809 effort that were the subject of the NRC report conclusions and recommendations; and new regulatory flexibility analyses (RFA) to reflect the more limited issues addressed in the new proposal. The draft EIS and initial RFA (IRFA) prepared by BLM in conjunction with the proposed rule were completely inadequate, and the failures of those documents are magnified in light of the recommendations and conclusions of the NRC report.

Response: The final EIS incorporates the conclusions and recommendations of the NRC report.

- 1.92 **Comment:** Before instituting reform of the existing regulations, BLM should perform a careful analysis of the existing regulatory system, including a careful analysis of the adequacy of BLM staff and resources to implement 3809. There are doubtless many opportunities to enhance the effectiveness of 3809 implementation through measures such as reallocation of current resources, improved training, and development of policy manuals and guidance documents.

Response: BLM has been reviewing program resources; developing training, policy, and guidance documents; and looking for opportunities to improve the program since its

inception in 1981. BLM is proposing many of the regulation provisions because administrative changes have not proven effective in addressing program deficiencies.

- 1.93 **Comment:** The CEQ rules require that an agency must revise a scoping determination “if substantial changes are made later to the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts” (40 CFR Section 1501.7(c)). Under this standard, the NRC report must be considered in the scoping context because it presents “significant new circumstances or information which bear on the proposal or its impacts.” Failure to consider the NRC report at this point and to allow public comment as part of the EIS process appears to be a violation of the CEQ rules and Administrative Procedures Act.

Response: BLM did reopen the comment period upon release of the NRC report so that the public could comment on the draft EIS and proposed regulations in light of this new information. The NRC report and additional comments were used in further scoping and resulted in the formulation of more alternatives for the final EIS.

- 1.94 **Comment:** Only now that the proposed rules have been given to the public and the existing regulatory system has been discussed by the National Research Council (NRC), can adequate scoping meetings be held to determine what would constitute the proper scope of any proposed changes to the existing 3809 regulatory program. The proposed rules are not only inconsistent with the recommendations of the NRC report, but in light of the NRC report, the proposed rules cannot be issued before completion of an adequate EIS. BLM needs to acknowledge the fact that its draft EIS is inadequate and reopen its scoping process to address the problem that exists with the 3809 program.

Response: The scoping process does not close until the final decision is made. BLM did reopen the comment period on the draft EIS and proposed regulations in light of the NRC report. The final EIS adequately considers both aspects of the NRC report relevant to the 3809 regulations and public comments on the proposed regulations and draft EIS.

- 1.95 **Comment:** It is readily apparent from the December 8, 1999, memorandum that the leadership of the Department of the Interior has already directed, for all intents and purposes, BLM to completely disregard the instructions from Congress in Sec 357 of H.R. 3423. Content aside for the moment, that the internal memorandum was not made available to BLM staff until almost 6 weeks after the comment period was reopened begs the question of how BLM was able to proceed in reopening the comment period if there was still a question of how Sec. 357 might apply to the NRC study and the proposed rule. Once BLM received the memorandum, the Administrative Procedures Act (APA) required BLM to republish the notice reopening the comment period and give the public the Solicitor’s interpretation of 357. The APA and the tenets of fair and rational rulemaking require that the congressionally mandated 120 days for accepting public comment not begin until after BLM gives the public notice of the December 8, 1999

memorandum. Since both congressional action in the form of Sec. 357 and the “interpretive” memorandum issued by the Solicitor changed the scope of the rulemaking, NEPA procedures require BLM to withdraw the entire proposed rule and formally rescope the entire proposal. The mandate by Congress to include consideration of the NRC study recommendations has definitely caused issues to be raised that are not reasonable extensions of those already considered by the public.

Response: The memorandum issued by the Solicitor on interpretation of section 357 of HR 3423 is merely the internal legal opinion of the departmental counsel. The memorandum did not change the scope of the rulemaking. BLM has considered all comments received on the proposed regulations and draft EIS in light of the NRC report. Only upon publication of the final regulations can the Department and BLM take a position on how the final regulations satisfy the requirements of section 357 not to be inconsistent with the NRC recommendations.

- 1.96 **Comment:** In the October 26, 1999 notice reopening the comment period, BLM failed to address any of the issues raised above in our letters submitted in May 1999. BLM’s failure to address these issues renders the proposal, even one that complies with 357 of HR 3423, vulnerable to legal challenge. BLM must correct these flaws, prepare a proper and legally sufficient supplemental EIS (SEIS), and publish that SEIS along with whatever rules BLM proposes for public comment before proceeding to a final rule.

Response: The purpose of the reopening notice was to reopen the public comment period, not to respond to comments already received during the previous comment period. BLM has considered comments collected during both periods in preparing the final regulations and final EIS.

- 1.97 **Comment:** An overarching comment is the absence of any summary and analysis of responses to the 21 “invited” issues listed in the February 9, 1999 *Federal Register* notice about the proposed rules that were later partially amended on October 26, 1999. There is overlap between the total 31 “invited” issues that BLM has not clarified.

Response: BLM has considered comments collected in response to the *Federal Register* notice and reopening notice in preparing the preamble for the final regulations and the final EIS.

- 1.98 **Comment:** The proposed regulations, draft EIS, and Benefit-Cost study do not reflect the significant findings and 16 recommendations in the Research Council study. The draft EIS is so inadequate that it precluded meaningful analysis. CEQ’s NEPA regulations direct that an agency shall prepare a supplement to a draft environmental impact statement if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 CFR Section 1502.9(c). The NRC report presents a textbook example for application of the

CEQ rule. The NRC Committee was convened at the direction of the Congress to look at the adequacy of existing regulations for hardrock mining on public lands and to make recommendations for needed changes. The committee gathered data and information, including information that BLM did not consider the draft EIS, evaluated that data, applied its expertise to that data and analysis, and made recommendations relating to the proposed action that was the subject of the draft EIS. The congressional limitation that BLM may promulgate only rules that are not inconsistent with the NRC report is also a significant “new circumstance” that should be disclosed and discussed in a supplemental draft EIS. Therefore, BLM should withdraw the present rule and publish a new supplemental EIS evaluating the alternatives proposed in the NRC study. The NRC study is clear. Very few changes are required in the federal regulatory programs that govern hardrock mining. In fact, many of the BLM proposals conflict directly with the NRC conclusions and recommendations. BLM must, therefore, withdraw the current proposal and publish a new proposal, together with a revised EIS, that addresses only the limited regulatory gaps recognized by the NAS study. See, NRC report, pages 7-9. A supplemental EIS would be a suitable vehicle for a consistency evaluation. This consistency evaluation should consist of two elements: (1) an analysis of how and whether the proposed rule addressed recommendations and conclusions presented in the NRC study and (2) a detailed discussion of the consistency of each element of the proposed 3809 rule with the NRC study.

Response: Because the NRC (1999) report was released after publication of the draft EIS, it is not considered in the draft EIS analysis. The final EIS has been updated to include the conclusions and recommendations of the NRC report. A table has been added to the final EIS that to compare provisions of the existing regulations and proposed final regulations with the conclusions and recommendations of the NRC report. The Proposed Action has been changed in response to public comments, the NRC report, and later congressional requirements. An additional alternative has been included in the analysis. But a supplemental EIS does not need to be prepared. CEQ regulations do not require a supplemental EIS if the agency does not substantially change the Proposed Action or the new information is not significant. That is the situation with the NRC report. Changes made to the final EIS do not constitute a substantial change in the Proposed Action because the preferred alternative in the final EIS is still within the range of alternatives analyzed in the draft EIS. Nor does the NRC report constitute significant new information or circumstances relevant to environmental concerns. The environmental issues discussed by the NRC report are also long-standing program issues that were previously identified through scoping. Alternative 5 of the final EIS does address specifically the regulatory gaps found by NRC (1999). The features of that alternative were for the most part already considered by the other alternatives and have been separately set forth in a separate alternative for ease of consideration.

- 1.99 **Comment:** BLM should initiate a much more limited rulemaking that would implement only the regulatory changes recommended by the NRC Committee. BLM should consult

with western states to determine how the NRC recommendations may already be implemented by state laws and regulations, and then consult with the states to craft appropriate regulatory language that would implement the NRC recommendations without preempting or duplicating existing state programs. If BLM decides to proceed with the current rulemaking, it should revise the proposed rules to conform to the NRC recommendations, revise the draft EIS to reflect the new information in the NRC report, and respond to comments, incorporate an “NAS Alternative” and republish both the proposed rule and draft EIS for public comment.

Response: After the NRC released its report (NRC 1999), BLM consulted with the states on how to best address the report’s recommendations. BLM has added to the EIS analysis an alternative that is limited to the NRC’s regulatory change recommendations. In addition, BLM has revised Alternative 3, the Proposed Action, so that it is not inconsistent with NRC’s recommendations. We have added Alternative 5 to cover the alternative to which you have referred.

- 1.100 **Comment:** The public comment process on the proposed regulations, draft EIS, and Benefit-Cost study are segmented and fatally flawed in that the pertinent documents were not prepared concurrently and were unavailable for timely, meaningful review and comment.

Response: BLM disagrees that the documents were unavailable. Although not all documents were included within the draft EIS, they were available upon request at various locations. Between the first comment period of 60 days and the second comment period of 120 days, individuals had ample opportunity to obtain, review, and comment on relevant documents.

- 1.101 **Comment:** Because BLM’s draft EIS fails to even consider a large number of reasonable alternatives, BLM must supplement its draft EIS. See 40 CFR 1502.9(a) (the ‘draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements...’). If BLM fails to consider these alternatives in its final EIS, any final 3809 rules will be invalid. See, e.g., *Natural Resources Defense Council v. Hughes*, 437 F. Supp. 981, 990 (D.D.C. 1977) (holding federal coal leasing program invalid for failure to adequately consider alternatives and enjoining the federal defendants from taking any steps to implement the program). Even if BLM addresses these alternatives in its final EIS, that alone will not be sufficient to cure the defects in the current draft EIS because the purpose of having two stages to environmental impact analysis is to allow a meaningful opportunity for public comment on BLM’s analysis and to allow BLM to take adequate response measures to correct errors or explain its position. Unless a new supplemental draft EIS is issued providing a hard look at all reasonable alternatives, the entire final 3809 rule is legally defective. The consideration of all reasonable alternatives is at the ‘heart of the environmental impact statement.’ Yet, as these and previous comments make clear, BLM has ignored several reasonable

alternatives, including those in the NRC report, that seem to be at the forefront of interest to most parties—including Congress—but not BLM. Indeed, the errors in the alternative analyses are so fundamental and pervasive that a new draft EIS, with further public comment, is needed to cure those defects.

Response: BLM considered a broad range of alternatives in the draft EIS, eliminating some from further study while carrying others forward for detailed analysis in the draft EIS. The public commented on these alternatives, both before and after NRC report was released. (The NRC report was mailed to everyone on the EIS mailing list by the National Academy.) Conclusions and recommendations for regulatory and program changes made in the NRC report fall within the range of alternative considered in detail by the draft EIS. BLM has further refined these alternatives in the final EIS in response to comments from those who were given copies of the NRC report. The resulting final EIS alternatives are a logical extension of the alternatives presented in the draft EIS and do not warrant preparing a supplemental EIS.

- 1.102 **Comment:** If changes to the regulations move forward, NMA endorses the NRC report as the best template for appropriate rulemaking and related actions under the current statutory scheme. Given the NRC report finding that ‘improvements in implementation of existing regulations present the greatest opportunity for improving environmental protection and the efficiency of the regulatory process,’ it does not make sense from a public policy, resources, or environmental protection perspective to proceed with the current overreaching proposal. BLM should, therefore, withdraw the current 3809 proposal in favor of (1) adopting the administrative and implementation improvements recommended by the NRC report, (2) developing limited rules consistent with the NRC report, and (3) seeking new legislative authority, as needed, to implement NRC report recommendations not now within the statutory authority of BLM or the Department of the Interior.

Response: Making regulatory changes does not preclude also making administrative improvements in program implementation. BLM intends to proceed with both courses of action as a way to address all of the NRC recommendations, both regulatory and nonregulatory.

- 1.103 **Comment:** Given the NRC Committee’s recommendations and the congressional mandate that BLM may not promulgate rules inconsistent with those recommendations, BLM should withdraw its proposed 3809 rulemaking and draft EIS. In place of the current regulatory proposal, BLM should begin a more limited rulemaking that would implement the regulatory changes discussed in the NRC report. In addition, BLM should issue a new or revised draft EIS discussing and considering an alternative within the context of the NRC report.

Response: BLM has added an alternative in the final EIS that would limit changes to the

regulations to just those “regulatory gaps” identified in the NRC report.

- 1.104 **Comment:** Most irritating about NRC’s report is that NRC refused to allow PLP to participate in the scoping and commenting on drafts of its report. Gregg Clark, on behalf of PLP, requested to be permitted to scope and to comment on drafts on the NRC report but was denied. Though, he presented some comments, without seeing any draft, those comments were not addressed in the report. When Congress ordered the NRC study, it did not confine its study parameters to large miners or to even medium miners. Certainly the NRC study was also to address small miners. But the NRC study is a dismal failure in that regard. Clearly, it failed to address the concerns of small miners. The reason for NRC’s ignoring small-miner concerns is that over regulation has prevented most small miners from mining, and NRC was looking only at existing mining operations, i.e. large-to medium-scale operations. Had NRC interviewed small miners who cannot operate due to over regulation, it would have made other recommendations. Congress believed that it was reasonable, in the preparation of the ordered study, for NRC to interview a number of small miners, especially those who cannot mine though they keep their mining claims. (P.L. 105-277, Sec. Of the Interior, Title I, sec. 120, signed by the President on Oct. 21, 1998) This, NRC clearly failed to do. Because the NRC report failed to address small miners and their concerns, it did not do what Congress directed, and it is therefore unreasonable. Only reasonable studies can be incorporated by reference. Because the NRC report is unreasonable, it cannot therefore be incorporated by reference into the Proposed 3809 Regs. or the draft EIS.

Response: BLM did not control, direct, or otherwise oversee the NRC report effort. Comments on the report and process used to prepare the report should be sent directly to NRC. As for using the NRC report in preparing the regulations and EIS, Congress directed BLM to consider the report in the rulemaking. Furthermore, BLM believes the NRC report was a reasonable and objective study, which can be used in combination with other information to guide preparation of the draft EIS and Final Regulations.

- 1.105 **Comment:** Most of us have attended and spoken at BLM meetings held within our local areas. The local BLM people were attentive, polite, and took a lot of notes. Here in Montana the prospector/small miner was lumped right in with the large mining operations, and any attempt to make a distinction was ignored. The question and answer period was quite useless, as the questions asked were responded to by “I don't know” or “We are unable to answer that question.” Nearly everyone left the meeting feeling quite betrayed by BLM in general.

Response: Attendees at all public hearings were allowed to speak and identify themselves as those chose. Some said they represented large mining companies. Others said they were small miners or prospectors. No one was restricted from making comments because of their affiliation or lack thereof.

1.106 **Comment:** The *Federal Register* dated 10/26/99 asserts that BLM made numerous revisions to the proposed regulations as a result of comments received on or before May 10, 1999, but has given no summary or analysis of those comments—only that some are being considered without rationale or description of ones rejected and why. Further, the *Federal Register* (page 5674) says that BLM is “supplementing the proposed rule with recommendations from the NRC report and raising some related topics.” The *Federal Register* also notes that it is responding to comments on the BLM estimate of burden hours for the original proposed rule—only to then say it will be done at an unspecified future date. With one exception, the proposed regulations have not been revised, only that they will be. The Benefit-Cost study is being revised, but 90+ days after the *Federal Register* notice has not been completed and released for public review and comment.

Response: BLM has revised the analyses required under Executive Order 12866 and the analysis will be released to the public when the final rule is published.

1.107 **Comment:** PUBLIC PARTICIPATION: Should the public be allowed to review existing agreements. BLM has not stated the purpose, costs, and pros and cons of the public review of an existing agreement that is in compliance with both federal and state law and regulation. It is not clear whether:

- (a) BLM, the state, or both take public comment since both federal and state programs are involved, or
- (b) the scope of public review, or
- (c) whether BLM or the state will respond to comments about state law, regulation, or policy.

Response: BLM has determined that advance public participation will occur for 43 CFR 3809.200(b) agreements where BLM defers to state administration of some or all of the requirements of the regulations. Existing agreements that do not defer administration to the states have BLM and the state retain their respective authorities and mainly share information between the agencies are not expected to have issues of any conflict of law, regulation or policy or cost impacts. Such agreements should be made available to the public.

1.108 **Comment:** With respect to BLM’s consideration of and response to these and prior comments, Barrick asks that BLM review and respond directly to its comments rather than relying on or responding to a “content analysis” of the comments. Barrick has reviewed the “content analysis” of the comments on the proposed rulemaking and draft EIS that was prepared by the USDA Forest Service Content Analysis Enterprise Team and distributed by BLM in July 1999. Barrick has not, of course, completed a detailed comparison of the content analysis report with the actual comments filed with BLM. But after just a cursory review it is apparent that the content analysis report has omitted important comments; there is at least one glaring omission. Barrick and others commented extensively on Appendix E to the draft EIS. (See Barrick’s 1999 Comments

at 32-41.) Appendix E describes the methodology and assumptions used by BLM to project environmental impacts in the draft EIS. Barrick commented that “the analysis and conclusions contained in Appendix E, . . . are the linchpin of the draft EIS”(Barrick’s 1999 Comments at 32). Barrick then explained that BLM had ignored important factors, overlooked significant information, selected inappropriate methodologies, and then properly implemented those methodologies. Barrick is also aware that other mining companies, organizations, and individuals commented on Appendix E of the draft EIS. The extensive comments on Appendix E are completely omitted from the interim content analysis report. To the extent that BLM decision makers, including members of BLM’s 3809 Task Force and EIS team, have looked at the content analysis report rather than the actual comments, those people are unaware of one of the most significant criticisms of the draft EIS and its analysis.

Response: BLM only used the content analysis report only as an example of types of comments received. We agree that the report did not contain all substantive comments. We reviewed all comments before revising the final regulations and preparing the final EIS and considered all comments received during both comment periods. We considered all substantive comments and responded to them in the final EIS, preamble to the final regulations, or both. We have combined similar to facilitate the analysis and preparing of responses.

- 1.109 **Comment:** BLM has not appropriately responded to our concerns. As you mentioned earlier, there were some draft scoping regulations, the informal versions that went out for public comment. In spite of hundreds if not thousands of comments from the mining industry and state and local governments, these informal regulations have not been substantially changed. They are just about the same they were before. And that is troublesome. One could conclude from this track record that BLM may take a similar approach to comments on the proposed regulations and the EIS before us. We wish to remind BLM that public comments are to be fully considered, as you’ve stated at the outset, and they are to be fully considered in rulemaking for the proposed regulations as well as mandated by NEPA. We trust and encourage BLM to hear our voices and to modify the proposed regulations in the draft EIS to recognize existing regulatory programs and the NRC report.

Response: BLM has considered all public comments received during scoping. We have modified the final regulations and final EIS in response to comments received and the results of the NRC study (NRC 1999). Responses to comments are presented in both the preamble to the final regulations and in the final EIS.

- 1.110 **Comment:** I believe that the information in your 43 CFR 3809 should have been disseminated more in the public domain, over radio stations and newspapers so that the public would know more about these meetings. If it wasn’t for the clubs and PLP putting out the information, there wouldn’t be half the crowd that is here today.

Response: For each public hearing, press releases were given to the local media. But BLM has no control over whether radio stations or newspapers choose to publish the information.

- 1.111 **Comment:** What is going on with the address change? Originally we were supposed to send all letters to Reno; now we are supposed to send them to some place in Washington, D.C. We want to make sure that all the filings get counted. We are familiar with your tactics.

Response: The Reno mailing address was used for all comment on documents for this rulemaking.

- 1.112 **Comment:** I have sat on water board committees, ad hoc committees, and it is appalling, gentlemen, that you would come up with these regulations without the input of the people. It's ridiculous. It's arrogant. And it's not right.

Response: We held many scoping meetings with the public, consulted with the states, and met with industry and environmental organizations, all before developing the proposed regulations, which have then been subject to further public review and comment.

- 1.113 **Comment:** There should have been a longer time frame between the books [draft EIS] coming out and the scheduled meetings like this.

Response: BLM scheduled the public hearings so that everyone had at least 30 days to review the material before the hearing. Not all comments had to be provided at the hearings. Written comments could be provided up to the close of the 90-day public comment period. Comments were again solicited for 120 days at the end of 1999. Overall, commenters had more than a year to review and prepare comments on the proposed regulations and draft EIS.

- 1.114 **Comment:** When the dust clears and BLM determines which alternative it will proceed with, I surely hope that proposed regulations will again be circulated and all parties will be given a chance to comment. The time frames involved for developing fair and enforceable regulations cannot be hurried even though it appears that the Administration is pressing for final actions before the next elections.

Response: The proposed regulations constitute the alternative with which BLM is proposing to proceed. Comments on the proposed regulations are then used to develop final regulations.

- 1.115 **Comment:** These rules follow a directive from Secretary of the Interior Babbitt to

promulgate new rules, and many of these rules seem to follow Secretary Babbitt's directive without due consideration and response to thousands of public comments questioning the need for new regulations. BLM should reconsider its decision to cut off public comment and should take more time to consider public comments on the proposed rules. BLM should not take any further action on these regulations until the NRC study is complete. Then, if there are any recommended changes, there should be a comment period long enough to give seasonal operators in the field enough time to receive the information and respond to it after their field season.

Response: BLM reopened the proposed regulations for public comment after the NRC (1999) report came out. The public could review and comment on the proposed regulations for more than a year before the last comment period closed. BLM has considered the public comments questioning the need for the proposed regulations and believes the changes are warranted. Chapter 1 of the final EIS has been written to provide additional rationale for the proposed regulations.

- 1.116 **Comment:** We attended the public hearing in Elko, Nevada on 3/25/99. We traveled 50 miles to attend, arriving at 3:45 PM. The room was open, podium positioned with a microphone, information displayed, but no government employees were there! Six more people showed up while we waited for 20 minutes. We all left without giving testimony. We were not going to travel 100 miles to come back, or wait more than 2 hours. We all thought that the government did not want our comments and was wasting taxpayers dollars again. 3:30 is mighty early to break for cocktails!

Response: We are sorry we missed your participation in the public hearings. On March 25, 1999, BLM held two public hearings in Elko, Nevada. The first started at 1:00 p.m and ended when all in attendance had been allowed to comment on the draft EIS and proposed regulations. A second hearing started at 6:00 p.m. and ran until all in attendance had been allowed to comment.

- 1.117 **Comment:** The NRC report was commissioned to study the overlap of local, state, and federal programs currently in place and to facilitate the definition of what is the need for this regulatory initiative by BLM. We also request that you extend the comment period from May 10 to 120 days past the July 31 deadline for the NRC study. I believe that this will facilitate proper public disclosure as required under the National Environmental Policy Act (NEPA). Since we're pretty confident that the NRC study will already point out and reaffirm that the existing regulatory programs are doing a pretty good job and a significant regulatory change is really not necessary to prevent undue and unnecessary degradation.

Response: The comment period was extended on October 26, 1999 for 120 days to allow for more public comment in light of the NRC report (NRC 1999). A copy of the NRC report was sent to everyone on the EIS mailing list. The report did recommend

significant changes in the regulations.

- 1.118 **Comment:** I don't understand this payment in kind. It's not clear to me how that would be effective, how it would be effected. I think it's too risky. We're going to end up with acreage in New Hampshire when what we want, even though it's not your jurisdiction, is acreage fixed where it has been disturbed.

Response: The intent is to mitigate the impacts of the operation by providing an alternative resource that compensates for the effect. For example, if an operation would result in the loss of a wildlife watering source, it might be possible to offer alternative sources at another location, compensating for the impact on wild life. While ultimately, reclamation of the disturbed area is desired, it may not be practical to mitigate the effects of many activities during mine operations without using offsite mitigation techniques.

- 1.119 **Comment:** The current draft of the proposed changes contains substantial shortcomings that need to be addressed. The vague language throughout the draft does not address such important issues as ground water protection and the dumping of mine waste on nonmining claims. These failings need to be corrected so that the document will meet your call for strengthening to prevent unnecessary or undue degradation.

Response: Terms used are often indefinite because of the site-specific nature of mining and the potentially affected resources. The main purpose of the regulations is to establish a process that will provide for the review of proposed Plans of Operations and the development of mitigation to prevent unnecessary or undue degradation of the public lands, including such resources as ground water. The legality of placing mine waste on nonmining claims is not within the scope of these regulations. The regulations look at the technical requirements for mine waste facilities regardless of claim status.

- 1.120 **Comment:** All documents, and especially the proposed regulations, use vague and inconsistent wording and terms that are open to a wide range of interpretation with significant opportunity to be inconsistently applied at the field level and between BLM state offices. Sloppy, imprecise wording, and poor/incomplete definitions lead to unrealistic public expectations, uncertainty by BLM staffs responsible for implementing the law and regulations, frivolous administrative appeals, and uncertainty by the owner/operator of BLM's expectations.

Response: Terms used are often indefinite because of the site-specific nature of mining operations and the potentially affected resources. The main purpose of the regulations is to establish a process that will provide for reviewing proposed Plans of Operations and developing mitigation to prevent unnecessary or undue degradation.

- 1.121 **Comment:** The proposed regulations, Benefit-Cost study and draft EIS use anecdotal and biased information. These include: Reference to the Red Dog Mine, Alaska as a

“specific example of the value of collecting more baseline information...” without also noting that the EPA—the federal agency with primacy over water quality issues—was the lead federal agency for the EIS and for water discharge permitting at the Red Dog Mine or that the Red Dog Mine is private land with minerals owned by an Alaska Native Corporation and therefore not subject to either the existing or the proposed 3809 regulations.

Response: The value of more baseline information applies to all agencies involved, whether it’s BLM, EPA, or a state regulatory agency.

- 1.122 **Comment:** The proposed regulations, Benefit-Cost study, and draft EIS use anecdotal and biased information. These include: Inferences to 27 million households that would be adversely affected appear unsupported and overstated as “proof” that the proposed regulations must be adopted (B/C study, page 61), if for no other reason than not all federal lands associated with the referenced 27 million households that were mined at the turn of the last century or earlier and are not now open to mining under the federal mining laws, existing regulations, or the proposed regulations.

Response: The initial analysis referenced the estimated number of people and households in the study area because it is the values that people place on changes to environmental attributes that are important in evaluating the net economic benefits of the regulation. It is widely accepted that people place positive values on improvements to environmental quality. The calculations in the initial analysis were an attempt to show that small positive values held by many people can result in substantial values in the aggregate. The final benefit-cost analysis makes it clear that such calculations are for illustrative purposes. In addition, for illustrative purposes, the final benefit-cost analysis includes some calculations based on the estimated number of people and households living within 5 miles of mine sites.

- 1.123 **Comment:** Environmental Consequences, Water Quality and Other Affected Environment sections for Alternative 2: State Management. These sections should inform the public that many states do not have a NEPA process and that in a number of cases states would not conduct as thorough investigations of environmental impacts for the new mines or expansions. Where state mining agencies do conduct reviews, they seldom evaluate alternatives to determine the least damaging project. Nor do states assess the cumulative impacts as required under NEPA. EPA, the public, and other agencies through the NEPA process have been able to greatly improve the design of several recently proposed mines to avoid acid rock drainage. We are concerned that more acid rock drainage and other impacts may be generated from mines that are not rigorously reviewed following the NEPA process.

Response: We have added some text in the final EIS on state NEPA programs. BLM acknowledges that the NEPA process can give a broader review than media-specific permitting programs alone. At the same time, the in-depth technical review resulting

from these programs is extremely helpful in preventing unnecessary or undue degradation. BLM believes that a combination of the two procedures best addresses the environmental issues of mining on public lands and is the basis for the proposed federal-state programs in the regulations at 3809.200.

- 1.124 **Comment:** Under Section 3809.5 (Definition of Terms) regarding the definition of reclamation, BLM should consider changes (4) to read “Salvage, storage and placement of growth medium;” and make “establishment of self-sustaining revegetation” a separate item.

Response: Salvage and storage activities, while conducted in anticipation of reclamation, are not reclamation themselves. The current item (4) in the definition captures the definition’s intent.

- 1.125 **Comment:** BLM’s response to the statutory command to seek more public comment is focused solely on supporting its 3809 proposal rather than seeking any meaningful dialog on merits of the entire NRC report. In the supplemental proposed rule BLM addresses only a limited number of the NRC report’s recommendations and does not reference any of the NRC report’s conclusions that do not support BLM’s proposed changes to its surface management regulations.

Response: BLM was not seeking comments on the merits of the NRC report in the reopening but comments on its proposed rule, and disclosing changes in that rule that we were proposing in view of the NRC report.

- 1.126 **Comment:** The draft EIS does not state that BLM contacted key federal or state agencies that have data bases on mineral production, revenue, and costs. Likewise, it is not apparent from a review of the References in the draft EIS that BLM contacted any state mining association or mineral policy group for information specific to mineral production.

Response: BLM contacted several organizations and policy groups for information on mineral production and attended meetings with such groups as the Nevada Mining Association, the National Mining Association and the Northwest Mining Association. Minerals data was obtained from sources such as U.S. Geological Survey, industry publications, and the Mineral Policy Center. Industry sources of data for mine cost analysis such as the “Mine Cost Services” were used to develop analysis of impacts. BLM reviewed these data sources and cited in the References the sources used in the analysis of the alternatives.

- 1.127 **Comment:** The U.S. Environmental Protection Agency (EPA) recently finalized its National Hardrock Mining Framework document. That document, which sets forth EPA’s plans and strategies for regulating hardrock mining, envisions a much greater role for EPA in the regulation and oversight of hardrock mining than EPA has traditionally

exercised, including increased EPA input into the proper siting, operation, closure/reclamation, and bonding of hardrock facilities. These plans include in each EPA region designating hardrock mining coordinators who will serve as experts for all mining-related matters within the region and coordinate with state and other federal agencies on hardrock mining issues.

Response: The referenced EPA framework document is not regulatory and as such does not convey any new authority to EPA. The Proposed Action assumes that BLM will continue to coordinate its actions closely with EPA and all other state and federal agencies with oversight roles in hardrock mining regulation.

- 1.128 **Comment:** In June 1995, EPA executed an interagency agreement with BLM, the Forest Service, and the National Park Service to coordinate the agencies' actions for noncoal mines and mineral processing facilities on public lands. The agreement establishes a National Interagency Coordinating Committee of senior management agency officials whose jobs is to coordinate areas of mutual interest, facilitate training and information and personnel exchange, make recommendations to appropriate agencies, and "seek means to reduce the environmental impacts from mining and mineral processing on public lands." These agreements and policies, which are not even mentioned in the draft EIS, certainly are relevant to an assessment of future impacts from the No Action Alternative.

Response: These types of agreements and policies have been added to the final EIS, and the analysis for the alternatives does consider these items. However, the agreement is only an implementation tool and does not change any operating or reclamation requirements.

- 1.129 **Comment:** Should it be deemed necessary to approve all or certain parts of the revisions, then we recommend that it be done in conjunction with the current position of the industry as responsible environmental stewards of the land. We would also hope that the same spirit of cooperation be given in the implementing and enforcement of the revised regulations, should that occur, and that industry be included in developing any highly controversial issues before they are finalized.

Response: BLM will work constructively with the industry, state, and federal agencies, the interested public, and all others involved to ensure that the 3809 regulations are implemented in a balanced and environmentally sound manner.

- 1.130 **Comment:** While I applaud BLM's effort to modernize the mining industry and protect our scarce resources, I believe that BLM should work together with, rather than in opposition to, mining industry leaders to bring about change.

Response: Starting in 1997, BLM has consulted extensively with the industry, state and federal agencies, and involved and interested public through formal scoping and comment

periods, public meetings, and other forms of contact. The Proposed Action is designed to allow the industry to conduct mining operations on public lands and continue to protect natural resources on public lands.

- 1.131 **Comment:** The alternative also provides in very gray wording citizen input in three areas: initial reclamation bonds amounts, mine inspection, and ultimate release of reclamation bonds after closure. The draft EIS failed to study the following effects of citizen input: initial bond amounts, lengthened time frames, increased mine site liability, increased potential for eco-terrorism, increased potential for industrial espionage, and a lengthened process for final bond release.

Response: The analysis of the alternatives includes these types of situations. Appendix E was developed to determine the changes in mineral activity based on the alternatives, and the impacts of citizen input were recognized and discussed..

- 1.132 **Comment:** Some of the studies and sources cited by BLM in the draft EIS have been written by advocacy groups or individuals openly promoting an agenda. Although BLM can certainly reference these publications, it is improper for BLM to cite to those reports as authority for a proposition. To do so raises questions about the reliability, independence, and nonbiased nature of the information BLM relies upon in its analysis. NEPA obligates the preparer of an EIS to use legitimate scientific information pertaining to the proposed action. See 40 CFR Section 1500.1(b).

Response: BLM used a variety of sources, including the most recent and available information, to support its analysis in the draft EIS. If information is presented that is more up to date, specific, or relevant, then that information will be included in the final EIS to strengthen and validate the decision making process.

- 1.133 **Comment:** Please listen to our comments and use good science in making your decisions. Don't hamstring your own agency into becoming more inefficient and less environmentally friendly.

Response: BLM relies on the best available data in reaching its decisions. Our intent is to make the proposed final regulations as efficient as possible and continue to protect natural resources on public lands.

PURPOSE AND NEED FOR ACTION

2.01 **Comment:** I strongly urge, in fact, I demand that the BLM refrain from interpreting, changing, or in any other manner touching existing laws in the USA. The Department of the Interior's stated goal to terminate mining on public ground is contrary to existing law and due process. The new regulations attempt to do with those what special interest groups were unable to do by repealing the 1872 Mining Law and taking away hardrock mining from the public lands.

Response: The 3809 regulations do not change any laws, but implement the requirements of the Federal Land Policy and Management Act, which directs the Secretary of the Interior to prevent unnecessary or undue degradation. The Department of the Interior does not intend to terminate mining on public lands. Mining is and will continue to be a legitimate use of these lands

2.02 **Comment:** BLM failed to adequately describe its proposal during the scoping process. Useful and comprehensive scoping comments could not be provided, and a range of alternatives suggested, until a definitive statement of Purpose and Need for the proposed revision is prepared.

Response: During the scoping process BLM explained the purpose of and need for changing the 43 CFR 3809 regulations, based on the agency's internal review of the regulations and success and failures in the field. During the scoping period and the public comment meetings the public was asked to provide ideas on ways the regulations could be improved and different alternatives to implement these changes. BLM then provided two working drafts of the proposed regulations during the scoping process and met with industry, interest groups, and the states on regulation issues for these working drafts.

2.03 **Comment:** The citation to the 1992 effort in Secretary Babbitt's memorandum is disingenuous at best, for his directive is contrary to the recommendations of a task force of BLM employees. The suggestion by BLM in the preamble, draft EIS, and elsewhere that the present rulemaking is a logical outgrowth of the process that began in 1991 is equally misleading. The 1992 task force report found no need to change the definition of "unnecessary or undue degradation," the performance standards, or the relationship with state governments. The concerns that were raised by the 1992 review have been addressed either by other agency guidance or by adopting the final use and occupancy regulations. The remaining issues raised by the 1992 task force report, the Notice-level threshold and adjustments to the definition of casual use, are relatively minor. This task force also recommended expanding bonding requirements, additional use in occupancy authority, and more manual and handbook guidance to encourage consistency in the field. About 7½ years later, the expert NRC Committee reached similar conclusions. The deficiencies that BLM sets out to correct in its proposed rule were not identified by the BLM's own task force. Many of these so-called "deficiencies" surfaced for the first time

in Secretary Babbitt's January 6, 1997 letter initiating the current rulemaking effort. In short, BLM's attempt in the preamble of this rule to paint a picture of orderly, reasoned deliberation leading up to the proposed rule is fiction.

Response: As commented, the BLM task force in 1992 found deficiencies in the existing regulations. Other concerns were detected later through internal consultation with program specialists, the public scoping process, consultation with the states, and the NRC report (NRC 1999). Many of the same people on the 1992 task force serve on the current task force. The proposed and final regulations represent a continuum of these participants' efforts to date.

2.04 **Comment:** The scope of the proposed 3809 regulations has been greatly expanded, as compared to the existing regulations, in a manner that exceeds the intention and purpose of the original regulations. Fundamentally, this is illustrated by the title of the 3809 regulations, which is "Subpart 3809 - Surface Management." The first objective of the surface management regulations (3809.2(a)) is to "Provide for mineral entry, exploration....pursuant to the mining laws in a manner that will not unduly hinder such activities but will assure that these activities are conducted in a manner that will prevent unnecessary or undue degradation and provide protection of non-mineral resources of the Federal Lands." The intention of 3809 is clearly focused on surface management of federal land. The proposed regulations improperly expand the scope to include management of natural resources that are already within the authority of other federal agencies (wetlands, ground water, surface water). The scope of the proposed regulations should be reduced to respect existing federal authority, as well as state primacy and authority.

Response: The title, Surface Management Regulations, refers to activities that occur on the surface or disturb the surface. But the resources that can be affected by surface disturbance include those both above and below the surface and those outside the area of direct disturbance. This has been the case with the existing regulations. Although there is overlap with the authority of other regulatory agencies, the BLM requirement to prevent unnecessary or undue degradation to these resources exists independent of that overlap. As discussed in the NRC (1999) study, BLM is also the landowner/ manager of public lands and needs to assure that the public resources are protected.

2.05 **Comment:** Section 3809.1(b) provides for "maximum possible coordination with States." The proposed regulations, however, are directly contrary to this stated purpose because they preempt and/or require BLM duplication of state environmental and reclamation programs and standards.

Response: The remaining part of that quotation is, "...to ensure that operators prevent unnecessary or undue degradation of public lands. Preemption would only occur where needed to prevent unnecessary or undue degradation.

2.06 **Comment:** Draft EIS, page 18-24, Introduction. This discussion of the issues raised during scoping is all subjective narrative. In only one case is an actual quantity or weight, of comments provided ("one comment suggested__."). For every other issue, the reader has no indication if an issue was mentioned once or thousands of times. BLM apparently made no attempt to weigh the issues on the basis of the public comment. The quantity or relative magnitude of comments on a particular issue must be provided to discern the real issues of concern.

Response: The purpose of scoping is to identify issues to be considered in the analysis. This section of the EIS simply states what issues and alternatives were identified and is based on qualitative comments that relate specific actions to environmental concerns, and not on popular opinion. A single comment can identify a critical issue. Conversely, 100 comments may not be adequate to make something an issue if it is not within the scope of the analysis.

2.07 **Comment:** The proposed regulations do not consider the other already-existing federal and state laws and as a result will duplicate or conflict with existing requirements. The effect will be significantly higher costs to industry and more costs to BLM without any environmental benefit.

Response: The proposed final regulations and environmental analysis consider other regulations and provide the framework for working cooperatively with the states, while addressing the gaps in the regulatory program identified by the NRC report (NRC 1999) and during agency scoping.

2.08 **Comment:** It is irresponsible for BLM to precede its presentation of the need for these regulation changes with a picture of the Berkeley pit in Montana, when BLM could have chosen from a host of environmentally factual, award-winning projects and showcase mines to depict modern mining practices and to support a factual, truthful version of Alternative 1 as the preferred alternative. I would have thought that the professionalism of the BLM was above using such low-ball tactics as holding today's mining industry responsible for activities that occurred 50 years ago or more as well as insinuating that these practices occur today.

Response: The presentation of the Berkeley pit slide as part of the introduction at the public comment meetings was discontinued as soon as its identity as a historic non-BLM operation became known to the hearings officers. The intent of the slide was to show an open pit and pit lake as a regulatory issue. The use of this specific slide was incorrect. Other pits and pit lakes on public lands should have been used to illustrate the example.

2.09 **Comment:** The regulations need to be revised to include several objectives and policy statements in the existing regulations. The current section 3809.0-6 provision must be included in the scope/purposes section. Proposed 3809.1 states that the purposes of the

proposed regulations are to prevent unnecessary or undue degradation of public lands and provide maximum possible coordination with states to avoid duplication and ensure that result. There is no statement of the legally required purpose to provide for activities under the mining laws in a manner that will not unduly hinder those activities as is provided as follows in 43 CFR 3809.0-2(a) of the current regulations: The objectives of this regulation are to: (a) Provide for mineral entry, exploration, location, operations, and purchase pursuant to the mining laws in a manner that will not unduly hinder such activities but will assure that these activities are conducted in a manner that will prevent unnecessary or undue degradation and provide protection of nonmineral resources of the federal lands; such a statement should be added in Proposed 3809.1. The draft EIS and proposed regulations do not recognize the congressional declaration of policy in section 102 of FLPMA that the “public lands be managed in a manner that recognizes the Nation’s need for domestic sources of minerals...from the public lands including implementation of the Mining and Mineral Policy Act of 1970...” 3809.0-6 states it is the policy of Interior to, “encourage the development of Federal mineral resources and reclamation..” Is this no longer BLM’s policy? If the proposed elimination of these objectives and policy statements from the 3809 regulations signals that BLM has decided to deviate from Congress’ clear statements in FLPMA or the Mining and Mineral Policy Act of 1970 that hardrock mining on federal lands should be encouraged, this significant change should be highlighted in the NEPA analysis.

Response: The Department of the Interior does not intend to terminate mining on public lands. Mining is and will continue to be a legitimate use of these lands. Not including policy statements in the regulations does not and cannot change congressional mineral development mandates under the Mining Law, FLPMA, or the Mining and Mineral Policy Acts of 1970 and 1980. We have many substantive and procedural requirements to follow in managing mineral development on public lands, including the Clean Water Act, the Clean Air Act, the Endangered Species Act, the National Environmental Policy Act, and the National Historic Preservation Act. We decided not to cite them in the regulations because a complete list would be exhaustive. A list of laws, orders, or reviews that apply to mining activities on public lands is presented in Appendix C of the final EIS.

- 2.10 **Comment:** Examples of an antimining agenda include BLM’s proposal to define the term “mitigation” using language from the NEPA rules to give BLM the option of stopping mining by requiring that mining avoid all impacts whether or not those impacts would constitute “unnecessary or undue degradation” within the meaning of Federal Land Policy and Management Act or whether it even would be feasible to avoid the impact. Mining does cause environmental impacts. These impacts, however, can be and are minimized and reduced, but they cannot be eliminated. BLM’s proposal reveals that the agency has lost sight of its basic authority and mission under FLPMA. BLM’s demand for compensation for any residual impacts violates the FLPMA standard.

Response: We have used the definition of mitigation from the NEPA rules so that no particular type of mitigation will be precluded from consideration in preventing unnecessary or undue degradation. The requirement to implement mitigating measures is tied to measures needed to prevent unnecessary or undue degradation and does not create another regulatory standard to preclude all impacts. We understand that many mining-related impacts can be minimized or reduced, but not eliminated. Due and necessary degradation could still occur under the regulations as provided for in FLPMA. In compensatory mitigation the impact in one area is offset, or compensated for, by a resource enhancement or substitution somewhere else. But the standard is still to reduce the overall impacts to what is due and necessary. One example would be to compensate for the loss of a wildlife watering source by building a replacement watering source outside the disturbance. This replacement source would “mitigate” the unnecessary or undue impact to wildlife from the loss of open water in the project area.

- 2.11 **Comment:** The policy statement included in the existing rules (3809.0-6) should be retained within any proposed rules because it is a vital component of the regulations and its inclusion is required to ensure consistency with the congressionally mandated NRC study.

Response: Removal of the policy statement is not inconsistent with the NRC report. NRC did not recommend it be detailed in the regulations or conclude it was essential to regulatory purposes.

- 2.12 **Comment:** The rules that govern hardrock mining on BLM lands (43 CFR 3809) need to be strengthened and enforced to protect the health and safety of communities near mine sites and to prevent the degradation of our public lands. The current rules do not adequately protect our public lands or allow BLM to deny mining operations where they don't belong. Strengthen the existing and proposed rules. Companies go bankrupt and stick the taxpayers with the cleanup costs. The impact of today's massive mines that use chemicals such as cyanide to extract metals have caused one devastation after another.

Response: The final regulations contain increased procedural, performance, and enforcement provisions that will better protect public land from unnecessary or undue degradation. Requirements for all mining to undergo NEPA analysis and public review will improve project planning and resource protection. The enumeration of performance standards and the new definition of unnecessary or undue degradation would give more protection to resources not protected by other statutes and would prohibit substantial irreparable and unmitigatable impacts to significant resources. Expanded bonding requirements for all disturbance greater than casual use, along with provisions for financial penalties, will improve compliance and protect resources where operators are unable or unwilling to implement the required reclamation.

- 2.13 **Comment:** Why do we need the proposed rule? Change is not justified. BLM must

develop a meaningful statement of purpose and need. Current regulations are working fine. Present environmental protection laws are working sufficiently. What's the problem that BLM is trying to fix? We do not need to fix things that are not broken and waste time and agency resources. BLM needs to give examples of where the regulatory system has failed. BLM has either ignored all requests for clear and compelling justification or not been able to document any problems to support the need for the proposed regulations. Problems can be addressed by better administration of the existing rules or by the states.

Response: The purpose and need section of the final EIS has been revised to give more information on the issues and problems BLM needs to address with the proposed regulations and alternatives. Internal and external public scoping has found problems with the existing regulations. In 1999 BLM surveyed its field offices for operations under the existing 3809 regulations that had been abandoned by their operators, and where BLM had spent, or was likely going to have to spend, monies to reclaim the disturbance. The combined field office response reported some 530 operations that had been abandoned under the existing 3809 regulations since 1981, where BLM had, or was going to, spend funds to reclaim the lands. The actual number of abandonments is even greater because not all abandoned operations will require remediation. Another reason for changing the existing regulations is to address the results of the National Research Council report (NRC 1999). Although concluding that the existing program is generally well coordinated and that better implementation presented the greatest opportunity for improved environmental protection, NRC reported that some regulation change was needed. The report listed six key regulatory gaps in the existing 3809 regulations and presented nonregulatory findings or recommendations for changes in the program. A number of the NCR study findings would clearly require regulatory changes to address. Other findings, related to program implementation, may still be best addressed through regulatory changes, without being inconsistent with the NRC recommendations. The final EIS analyzes two alternatives in response to the NRC report and other scoping issues: Alternative 3—the Proposed Action—and Alternative 5—the NRC Recommendations Alternative.

- 2.14 **Comment:** It is BLM's responsibility to be certain that these distant impacts do not degrade public lands, which do include wetland and aquatic habitats.

Response: The requirement under FLPMA to prevent unnecessary or undue degradation applies to public lands both inside and distant from the area of operations. Potential impacts to these lands would be determined during reviews of Notices or Plans of Operations.

- 2.15 **Comment:** The following alternatives will have severe impacts: Alternatives 3 and 4 will cause more adverse environmental impacts because they encourage trespass mining and discourage compliance by making rules that are unnecessary, if not impossible, for most to operate under. Adopt regulations that encourage compliance and that are

enforceable with current BLM staff unsupplemented by the GAGS [Greed Advocacy Groups]. All good rules and laws are based on the concept that they were fairly developed and justified and that the majority of the public will comply. This EIS does not meet any of these criteria.

Response: The environmental analysis is conducted under the assumption that the rules in the alternatives would be fully implemented. The decision maker would have to consider large-scale noncompliance and enforcement needs under certain alternatives in selecting a final alternative for implementation.

- 2.16 **Comment:** For those few who do not follow the current regulations, it is unjust to penalize the majority of miners and mining companies to pay for this small number of infractions. Most miners willingly accept any changes that protect the land and ensure reclamation to be of the highest quality. But new regulations simply for more control without a common sense approach will only hurt BLM-miner working relations.

Response: We have found more than 500 cases where miners have abandoned operations and left us with the reclamation responsibilities. The new regulations are needed in part to make sure that disturbance is reclaimed without taxpayer funding.

- 2.17 **Comment:** I'm opposed to the drafting of the resolution 3809 concerning the federal takeover of land, the closing of roads and waterways, which is a direct violation of our U.S. Constitution. 10th Amendment.

Response: The 3809 regulations do not address closure of state roads or waterways. The regulations are to implement the Federal Land Policy and Management Act (FLPMA). FLPMA was passed by Congress in 1976 and is consistent with Article 4, Section 3, paragraph 2 of the U.S. Constitution, which states in part, "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States..."

- 2.18 **Comment:** Why have my tax dollars been spent to draft the EIS on the 3809 regulations, when Congress placed a moratorium on the spending of my tax dollars for this study? Why have your superiors ignored the orders of the federal court and the spending moratorium issued by the Congress of the United States, and the objections of the Western Governors Association? The funds to produce this report were clearly misappropriated.

Response: There was no spending moratorium on producing the EIS or drafting the regulations. Several years ago Congress required consultation with the states before the regulations could be produced. Last year Congress required that the NRC study be completed and comments obtained for 120 days on the proposed rule before the regulations were finalized. Recently Congress has directed that the final regulations not

be inconsistent with the NRC recommendations.

- 2.19 **Comment:** This wordy expansion goes far beyond the clear and concise wording in the existing 3809.1. It can be read as a somewhat veiled threat. The use of the word “must” is inappropriate and unnecessary. Any regulation is a “must” action; the use of the word is therefore redundant at best.

Response: The use of the word “must” in the proposed regulations is to make operators more aware of their responsibilities and to distinguish between requirements and sections of the regulations that give the operator choices.

- 2.20 **Comment:** Paragraph 3809.1(b) is wordy. In effect, it cedes power to the state over public lands, a position that is spotty at best. With the existing memorandum of understanding between California and BLM, state concerns can be addressed without either duplication or usurping of power. Only when a project proponent is forced to go through the state system for a project wholly on the public lands do duplication and increased costs result.

Response: Proposed 3809.1(b) does not cede power to the states over public lands. Instead it recognizes that state regulations also apply on public lands and emphasizes that one purpose of the regulations is for BLM and states to coordinate their effort so as to avoid wasting resources on duplication, yet ensure the prevention of unnecessary or undue degradation.

- 2.21 **Comment:** On page 11 of the draft EIS, the ‘gap’ beginning with the words “BLM lack provisions for...” is simply untrue and is filled with ‘weasel words’ that arouse a curiosity of what the particulars actually were. It presents a hazy justification for what could lead to many unpleasant situations.

Response: The issue is that in the past it has proven difficult and time consuming to get court orders to enforce violations of the 3809 regulations, even with compelling environmental justification. Most U.S. attorneys and magistrates don’t want to be bothered with such relatively small actions, especially where the regulations are less than clear on the performance standards that must be followed. As a result, BLM is often left with unreclaimed and abandoned operations.

- 2.22 **Comment:** The ‘gap’ beginning on page 11 of the draft EIS with the words “Mitigation is not defined to allow BLM...” reflects the environmental view to taste. The ‘reclamation’ noted is not reclamation but restoration—an outcome proposed by preservationists—a legal distinction with considerable ramifications. “Mitigation” as used here is a punitive action (compensation) or bureaucratise for a fine—an action only a court of law can dispense after due process, a process that would be short-circuited by other changes found elsewhere in the proposed 3809 regulations.

Response: The intent is not to require financial compensation, but to provide a means of mitigating environmental impacts through offsite compensatory actions, such as habitat improvement or building of replacement water sources, to bring the overall project impacts below the level of causing unnecessary or undue degradation.

2.23 **Comment:** Most gold mines are located in the western United States in areas of public land. BLM and to some extent the Forest Service manage these lands. Therefore, any significant changes to the 3809 regulations would greatly affect U.S. gold production and employment at the mines.

Response: Impacts from the proposed 3809 regulations and the alternatives on mineral production and employment are described in Chapter 3 and Appendix G of the EIS.

2.24 **Comment:** Congress has directed BLM to “Foster and Encourage mining.” Changing the 3809 regulations as proposed will cause many mining operations to close down and discourage any new ones.

Response: Congress has also directed BLM to prevent unnecessary or undue degradation of the public lands. The regulations attempt to balance these two mandates and provide for mining operations to continue subject to the prevention of unnecessary or undue degradation.

2.25 **Comment:** The rules are intended to prevent major and minor environmental harm to public lands and are achieving this now. To hamstring the workload of BLM geologists with more review requirements and bonding paperwork will only create more confusion and less on-the-ground or in-the-field inspection time, where the real benefit is for environmental compliance. Don’t hamstring your own agency into becoming more inefficient and less environmentally friendly.

Response: BLM field staff participated in developing the proposed and final regulations. Most staff believe that the added review, bonding, and enforcement requirements would help them perform their jobs and prevent on-the-ground problems.

2.26 **Comment:** The regulatory changes proposed are attempting to address all situations. This approach contradicts the successful approach of the last 200 years. Because of the wide variety of situations, you cannot address every one. You can’t make any regulations totally ironclad. If you try to do that, I don’t think you’re going to be successful. In fact, the result is usually an increase in governmental and corporate bureaucracies designed to either close loopholes or find loopholes. These changes will create needless loss, needless bureaucracy, and increased costs, all of which are unrelated to the primary task, which is good stewardship of our natural resources.

Response: While BLM agrees that it is not possible to address every conceivable situation in the regulations, the regulatory changes proposed in the alternatives respond to problems that have occurred in the past 20 years. BLM also believes that the proposed final regulations content requirements and performance standards for Notices and Plans of Operations have enough flexibility to successfully address site-specific needs.

- 2.27 **Comment:** In case after case, outdated and often inaccurate predictive models were relied on to make regulatory decisions, and emerging technologies, such as in situ mining, were not anticipated when these regs were first developed. There are case studies that make it clear that these regulations need to be updated.

Response: BLM agrees that there have been many changes in mining techniques, reclamation science, and environmental analysis methods since 1980. Updating the regulations to consider these is one of the purposes of the proposed regulations.

- 2.28 **Comment:** Any regulatory review or analysis that fails to look at the question of where and when mining should take place is doomed to fail. What's needed is a clear description of what environmental impacts fail and regulations must prevent and what impacts must be mitigated, and when does the impact of large-scale mining operations on other resources or other land constitute unnecessary or undue degradation of public lands. Others commented that they appreciate BLM's recognition here that the Mining Law precludes the use of the proposed 3809 regulations as an unsuitability mechanism.

Response: Congress has already decided that all public land, unless otherwise withdrawn, is available for entry and development under the Mining Law of 1872. This law is amended by the Federal Land Policy and Management Act of 1976 (FLPMA), which requires that operations conducted under the Mining Law not result in unnecessary or undue degradation. The purpose of the 3809 regulations is to prevent unnecessary or undue degradation and not to decide when and where mining should take place. Other processes, such as land use planning, under Section 202 of FLPMA, and withdrawals, under Section 204 of FLPMA, are used to identify and segregate areas from operation of the Mining Law.

- 2.29 **Comment:** The draft EIS does not adequately address the impact of the proposed regulations on exploration. BLM's approval process for exploration must recognize that mineral exploration is fundamentally a phased and iterative undertaking. All Notice issues or regulatory gaps in the Notice-level process for exploration could be solved by improved administration and implementation of the existing 3809 regulatory program. The proposed changes will not result in improved administration, a higher level of environmental protection, or better reclamation.

Response: BLM does understand that exploration is an iterative process, and that Notices for exploration need to be amended as the results of initial exploration efforts are

received. The Notice process in the proposed final regulations provides for this to occur. NRC (1999) did identify a regulatory gap for Notice-level exploration operations. NRC Recommendation 1 is to require financial assurance for the reclamation of all disturbance greater than casual use, including reclamation.

- 2.30 **Comment:** The rationale for changes in the rule are clearly sufficient. Additionally, we offer the following as further justification for the proposed rule change. The existing rule has allowed the permitting, operation, and expansion of mines that later suffered major failures. If every failure could be demonstrably traced to malfeasance, misfeasance, or nonfeasance, one could conclude that the incompetence or criminal behavior of mining companies was solely at fault. We believe that these failures were predictable and that foreseeable failure is a *prima facie* argument that “unnecessary and undue degradation” has taken place and clearly places the problem on an inadequacy of the rule. Will the final draft acknowledge and incorporate this additional reason for proceeding with the rule?

Response: The final EIS acknowledges the types and numbers of situations where projects have been abandoned and we have been left with reclamation responsibilities due to deficiencies in the regulations. Since this is programmatic analysis, specific cases are not discussed in detail.

- 2.31 **Comment:** After reviewing the proposed 3809 regulation book, one would be led to believe that mining is causing grave environmental danger to public lands. Your own data that I found on the Internet shows very few instances and very low percentages of public land acreage involved of Notice-level mining and no instances of court actions being taken to ensure compliance with the existing regulations. Plans of Operations and large-scale mining (including the small miner) are well regulated by current state and federal rules. Upon first reading the draft EIS, I was interested in the amount of land actually touched by mining. Using figures from BLM, only 0.08% of all public lands managed by BLM have been touched by mining, and this amount includes exploration that is known to have a minimal disturbance on land. This amount also includes reclaimed lands. For an analogy to this, the amount of lands managed by BLM is roughly equal to the size of the states of California and Texas combined. Of that amount, the amount touched by mining is roughly equal to one-third the size of Rhode Island, including reclaimed lands. It is making a mountain out of a molehill. Given the minutely small amounts of land that have been touched by mining, it is crucial to understand that the National Research Council (NRC) has found that no changes need to be made to the 3809 regulations to maintain public land quality.

Response: Court actions have been taken in specific instances, but the individual cases are not discussed in the EIS. While the amount of public lands actually disturbed by mining is a relatively small percent of the total, the impacts are not confined to just the area of direct disturbance. The NRC (1999) report did, in fact, find that the existing 3809 regulations need to be changed to improve environmental protection. The NRC report

recommended six changes (or gaps) to the existing regulations and many nonregulatory changes to be made in the program to maintain public land quality.

- 2.32 **Comment:** Draft EIS, page 1, Summary: BLM states that “Congress...[has] increasingly recognized the need for improvement in BLM’s Surface Management Program under the existing 3809 regulations.” There is no evidence that Congress has endorsed Secretary Babbitt’s plan to revise the 3809 regulations. To the contrary, Congress has acted twice to address problems with BLM’s plan, first, to explicitly require consultation with the Western Governors, and more recently to require the National Academy of Sciences study. Both actions show that Congress has not recognized the need for changes and has, in fact, questioned BLM’s action.

Response: The statement in the draft EIS is referring to the results of several General Accounting Office (GAO) reports prepared in the 1980s (e.g. GAO 1987a,b, 1988, 1989) that recommended that the Interior Department take action to ensure against abuse under the Mining Law. GAO conducts program audits on behalf of Congress.

- 2.33 **Comment:** On February 16, 1999, in public meetings with the Hardrock Mining Committee, Board of Earth Sciences of the National Academy of Sciences, speakers from BLM offered many justifications for BLM’s plan to promulgate the new 3809 rules. But in response to questions from the NAS panel, BLM demonstrated that it has not created a record that will support the major proposed changes to the rule. When asked by panel members for examples of unnecessary or undue degradation (UUD), or the failure of the current regulations or state laws in controlling UUD, Messrs. Leshy, Fry, Schwarz, Anderson, and Boyd all failed to offer a single example of UUD, either that occurred because of the inadequacy of current state or federal regulations, or otherwise. Despite many opportunities to collect and present such evidence, BLM has simply not done it.

Response: In 1999 we surveyed its field offices, asking them to list all operations under the existing 3809 regulations that had been abandoned by operators and where we had spent or were likely to spend funds to reclaim the land. The combined field office response listed some 530 operations. The actual number of abandonments is even greater since not all abandoned operations will require remediation. All of these operations represent example of unnecessary or undue degradation under the existing regulations.

- 2.34 **Comment:** The proposed requirement to backfill open pits would impose an unnecessary economic hardship on companies, but it would do something worse. It would eliminate the access to remaining mineralization in an open pit to future generations.

Response: We have removed the presumption for backfilling from the final regulations. The amount of backfilling required, if any, would depend upon economic, environmental, and safety factors, including the ability to access mineralization in the pit area should economic conditions change.

2.35 **Comment:** BLM should have the lead regulatory role on BLM lands. The states, with New Mexico a notable exception, have generally proven themselves to be unreliable on such matters.

Response: Since in most cases the state regulations also apply to public lands, We have proposed regulations that provide for joint federal-state programs under 3809.200s. These joint programs also list minimum requirements under 3809.203 needed to prevent unnecessary or undue degradation.

2.36 **Comment:** The Federal Government is NOT supposed to be involved in the public sector in this fashion. The Department of the Interior is supposed to manage parks and wilderness areas with approval by the U.S. Senate, only. Declaring all open public lands to be wilderness or under wilderness protection violates the Department's mandate for existence and operation.

Response: Nowhere do the proposed regulations declare, or provide for the declaration of, any public lands to be wilderness or under wilderness protection. The wilderness study and designation process is separate from regulation of mining activities under the 3809 regulations.

2.37 **Comment:** Battle Mountain Gold suggests that the proposed regulatory revisions incorporate one particularly resounding change, which when considered independently from the other problems and mistakes, has the potential to drastically reduce this Nations's ability to develop the mineral resources on which it depends. BLM's proposal would result in its metamorphosis from a land management agency to an environmental protection agency. This despite the fact that other statutory and regulatory programs establish independent environmental protection requirements administered by different authorities. BLM's proposal would impose another layer of regulation, duplicative and potentially contradictory to the comprehensive set of requirements already in place. Such an approach is not consistent with Administration's efforts to reinvent a more effective and efficient government.

Response: BLM is mandated under the Federal Land Policy and management Act (FLPMA) to protect the resources on public lands from unnecessary or undue degradation. This mandate applies to all resources on public lands. Where other statutory and regulatory programs exist, with independent environmental protection requirements administered by different agencies, BLM intends to rely on those agencies to protect the subject resources. But BLM reserves the right to supplement those requirements if they are not sufficient to prevent unnecessary or undue degradation. As discussed in the NRC (1999) study, BLM is also the landowner/ manager of public lands and needs to assure that the public resources are protected.

2.38 **Comment:** BLM is holding itself to a different standard than that applied to industry in

preparing this EIS. No proposed action was originally put forward for scoping at the beginning of this EIS process. And I know from experience, such a hollow proposal from a mining company would have been returned as incomplete, and no NEPA activities would have been initiated.

Response: A different level of detail is obviously required to conduct the site-specific analysis for a mining project than for a programmatic EIS conducted on nationwide regulations. BLM produced two working drafts of the 3809 regulations during the scoping process (February 1998 and August 1998). These regulations are not unlike a mine project proposal that is also refined during the scoping process in response to public and agency comments.

- 2.39 **Comment:** The Interior Department has the audacity to say that without these revised regulations environmental damage will continue, and the taxpayer will have to pay for the cleanup. I would ask the Department of the Interior to explain what environmental damage is occurring and where this damage is taking place. I further ask where BLM has spent taxpayer money cleaning up environmental damage caused by mining activities regulated under a Plan of Operations under the current 3809 regulations.

Response: In 1999 We surveyed our field offices, asking them to list all operations under the existing 3809 regulations that had been abandoned by the operator, and where we had spent, or were likely to have to spend funds to reclaim the land. The combined field office response listed some 530 such operations. The actual number of abandonments is even greater since not all abandoned operations will require remediation. Many of these operations were under a Plan of Operations, and We have had to spend taxpayer money in reclaiming sites.

- 2.40 **Comment:** It is unreasonable to expect state and federal regulators and an operator to agree on or complete bonding agreements within a time frame that competitive small businesses need to survive. Small miners will not have the capital to “work out” disagreements in Federal Court, nor will a small business survive the inevitable delays such a system will generate. A BLM manager hostile to an operator or to mining in general could simply delay a small miner to death. To add a public comment period and include hordes of nonprofessionals is ludicrous. The 2-year review is ludicrous. BLM is subjecting miners who to live in “environmentally oppressed” regions to unfair delays. We cannot all afford to go to court, to go to work. People in rural western states have been economically punished, and this type of rule can only damage us further.

Response: BLM believes that 2 years is more than adequate for the operator and BLM to establish the amount of the financial guarantee for grandfathered Notice-level operations. Presently, even the bonds for large-scale mining projects can be worked out in several months.

2.41 **Comment:** The proposed regulations contain language that could make BLM the de facto judge of title and the controller of water rights as well as giving BLM final veto power over mine planning and production decisions. But changing the regulations will not ensure any more environmental protection.

Response: BLM does not adjudicate water rights. But We have to consider the impacts of its actions on water quantity and quality. Such assessments and decisions are based on preventing unnecessary or undue degradation and in no way can change use or property rights.

2.42 **Comment:** Suction dredging generally causes no surface disturbance at all, and since this activity takes place in the rivers and streams and not on the land, it should be under the State Department of Fish and Game’s authority and regulation, not BLM or Forest Service authority.

Response: First, not all streams are considered navigable in the legal sense of the definition that would make them state lands. Second, activities that support suction dredging, such as equipment staging and access, do occur on BLM lands along streambeds and are subject to BLM regulations.

2.43 **Comment:** The proposed rules go far beyond these five “problem areas,” addressing issues that are unrelated and beyond the scope of these topics.

Response: The five topics mentioned during scoping were initial issues presented for public consideration. Other items were identified by the public during scoping, internally by BLM program specialists, and as a result of the NRC study.

2.44 **Comment:** Prescribing inflexible requirements so that all companies must conform to a “one-size- fits-all” approach to environmental management is unrealistic. The nature of ore bodies is unique, as is the particular geologic, climatic, and social setting in which they occur. Successful environmental management occurs where federal, state, and local agencies can work with industry to solve site-specific problems. Under Alternatives 3 and 4, district and state office BLM people will be limited in their ability to address the unique characteristics of each mine site. Mine personnel will be reluctant to try novel approaches to environmental management because of the more rigid standards imposed by the new regulations. Innovation will be stifled for the sake of uniformity.

Response: The proposed regulations (Alternative 3) are the opposite of the “one-size-fits-all approach” the commenter mentioned. They contain general outcome-based performance standards and rely on site-specific and project-specific reviews to develop any additional detail that may be needed to prevent unnecessary or undue degradation. Alternative 4 is much more prescriptive, in part, to illustrate the difference in regulatory approach and results.

2.45 **Comment:** What about Bureau of Reclamation lands? Some claims pre-date the 1st form withdrawals. .002(c) Include patents in National Wild and Scenic River corridors where the patent is only for the mineral estate.

Response: Without any other specific regulatory requirement, the 3809 regulations would be used to regulate locatable mineral activities on these lands. Decisions on lands under the management of the Bureau of Reclamation (BOR) would be subject to consultation and concurrence by BOR, which is provided for under 3809.411(a)(3)(vii).

2.46 **Comment:** This rulemaking does not focus on outcomes but rather adds troublesome definitions and performance standards. BLM has not reviewed any on the ground “issues” within the context of the current regulations to determine if problems stem from improper implementation. The federal floor that BLM envisions it will receive from these proposed regulations makes no effort to differentiate the wildly diverse climate and geology in the American West.

Response: The proposed regulations do in fact focus on outcomes and do not prescribe designs such as 3H:1V slopes, 24 inches of compacted clay, or 5-foot concrete plugs for drill holes, as would be expected in a design-based set of regulations. Furthermore, the use of terms such as minimize, avoid, feasible, and practical, is intentional to account for the diverse climate and geology across the public lands.

2.47 **Comment:** Throughout the rulemaking process, BLM has asserted that one of the main reasons the 3809 regulations need to be rewritten is the environmental problems caused by Notice-level operations. But the data in the draft EIS do not support this contention. To the contrary, the data presented suggest that problems with Notice-level operations are limited in scope and nature. Congress has already solved the Notice “problem.” To the extent to which a problem existed with the Notice process, it appears that Congress solved this problem in August 1993 with the vote to eliminate assessment work. In August 1993, Congress changed the requirement for mining claimants to perform \$100 of annual assessment work on each unpatented claim and substituted the current requirement to pay an annual claim maintenance fee. Although many claim owners performed sound geologic work (i.e. drilling, sampling, geophysical surveys) to satisfy the assessment work requirement, some claim holders did not. Some claimants would fulfill the assessment work requirement mainly through trenching and other surface disturbance. Mining claimants’ need to perform physical, on-the-ground work to meet the assessment work requirement (and to create visible proof that the work had been done) was thus the driving force behind much of the Notice-level surface disturbance created before 1993. At the very least, the draft EIS should be revised to evaluate the extent to which there are problems with Notices filed since 1993. The unwieldy process outlined in the proposed rule will create enormous administrative and implementation problems for BLM and will result in reduced exploration on BLM-administered lands.

Response: In 1999 BLM surveyed its field offices, asking them to list all operations under the existing 3809 regulations that had been abandoned by the operator, and where BLM had spent, or was likely going to have to spend, funds to reclaim the land. The combined field office response listed some 530 such operations. The actual number of abandonments is even greater since not all abandoned operations will require remediation. Most of these are abandoned Notice-level operations. Although we don't have a breakdown separately list operations abandoned before 1993, the problem with Notices not being secured by reclamation bonding is clearly evident. The requirement for Notice-level exploration to provide a reclamation bond may result in a decrease in exploration on BLM-lands, an issue addressed by the final EIS. But we believe that such bonding is justified to prevent unnecessary or undue degradation caused by abandoned operations.

- 2.48 **Comment:** BLM's proposal to greatly restrict Notice-level operations for surface exploration work affecting fewer than 5 acres is incompatible with the recommendations in the NRC study. Moreover, the NRC study's recommendation to require a financial guarantee for all Notice-level surface disturbances and to eliminate the use of Notices for small mining projects addresses all of BLM's legitimate concerns about Notices.

Response: BLM agrees and has revised its final regulations to eliminate Notices for mining operations and allow Notices to be filed only for exploration projects that would disturb less than 5 acres.

- 2.49 **Comment:** Phelps Dodge Mining Company's previously expressed concerns are only increased by BLM's response to the NRC report. BLM has not taken the opportunity in the supplemental proposal to provide additional rationale for its proposed changes to the existing 3809 Rules.

Response: The purpose of the supplemental proposal was not to further address purpose and need for the proposed regulations, but to advise the public on additional changes BLM was considering in light of the NRC report.

- 2.50 **Comment:** Repeatedly, the NRC report mentions concern about the lack of pertinent information from BLM. It could be argued that the Department of the Interior stonewalled the NRC Committee by withholding or failing to find pertinent information that would permit the committee to make totally informed decisions. The report's shortcomings are a result of the committee's inability to get timely and necessary information. The NRC study findings make it abundantly clear that BLM does not have sufficient information about the 3809 regulations upon which to base any decisions on the effectiveness of the current regulations or the need to change these regulations. Therefore, BLM must not proceed with this ill-conceived rule proposal.

Response: BLM gave the National Research Council (NRC) the best information that

was available. NRC did an excellent job in BLM's estimation of identifying and addressing the program issues of concern. BLM believes the results of agency scoping to date and the NRC report provide enough justification for proceeding with the rulemaking.

- 2.51 **Comment:** We do not need any more hardrock mining regulations such as those contemplated under the proposed 3809 regulatory framework to protect the environment. What is needed is litigation reform for the permitting process and mechanisms to ensure accountability of the regulating agencies and personnel to fairly, objectively, and efficiently carry out their duties.

Response: We have proposed changes to the appeals process that would provide for state director review of third-party appeals. This change may help reduce the Interior Board of Land Appeals backlog. Other changes to the legal process are beyond the scope of these regulations.

- 2.52 **Comment:** If there is a shortcoming in the existing regulations, it is that BLM never has had adequate staffing to do all the field checks it should. Many complaints I hear about the program are really failures in administration.

Response: As with most regulatory programs, problems are often attributable to both a lack of resources and deficiencies in the regulations themselves. The proposed changes and alternatives consider various approaches to addressing the issues associated with the regulations. Allocation of resources for staffing and field work is subject to the budget process, which is outside the scope of the 3809 regulations.

- 2.53 **Comment:** Pages 20-23, and Table 2-1 of the draft EIS do not describe the impacts of concentrated weekend mining in areas that have been mined for a long period of time and in many cases not on land managed by BLM or the Forest Service. (i) The draft EIS does not state the type of equipment being used, e.g. a pan and shovel, or some other form of equipment such as electronic scanners looking for buried metal objects. (ii) The draft EIS does not say whether the asserted, unidentified impacts are actually from recreational mining, or from camping, use of ATVs, or other recreational equipment. (iii) The draft EIS does not say why "concentrated weekend mining by recreational groups" is not appropriately regulated by BLM under its existing regulations governing recreational activities on public lands. (iv) The draft EIS does not say why concentrated weekend rock hounding, gem and agate collecting, fossil collecting, caving, or tramping and picnicking in historic mining areas on public lands is also not proposed for regulation under 3809 as a use of geologic resources under the federal mining laws.

Response: Pages 20-23 describe issues identified during scoping, not impacts. Table 2-1 describes alternatives and would not describe impacts either. Impacts from current casual use activities are described under the impacts of the existing regulations on page 89. This description has been revised in the final EIS. Basically, problems arise any time

concentrated activities that, though individually negligible, create cumulative impacts. One person with any of the equipment described—shovel, gold pan, metal detector, ATV, or camping—would not create more than negligible disturbance. The problems arise when several dozen to more than 100 of these people concentrate their activities in a small area or section of stream. Individually they are still under casual use. Collectively, they are creating impacts greater than were contemplated in the initial regulations, which did not require casual users to file a Notice of Intent with BLM.

- 2.54 **Comment:** Page 21 of the draft EIS discusses an appeal process that appears significantly different from the proposed 3809 regulations.

Response: Page 21 describes issues identified during scoping. This particular text is describing the existing 3809 appeals process that significantly differs from the proposed regulations. The proposed and proposed final regulations provide for appeal to the state director by third parties, instead of directly to the Interior Board of Land Appeals (IBLA). This is a significant change from the existing regulations, which provide only for third-party appeals to IBLA.

- 2.55 **Comment:** Before implementing any final changes to the 3809 regulations, BLM must fully consider the unique characteristics of industrial mineral mining operations and provide a means in the regulations to accommodate those characteristics. In implementing the recommendations of the NRC study, BLM should also consider and appropriately address the NRC recommendations in the industrial minerals context.

Response: The regulations establish a process for addressing mining operations. The process is flexible enough to accommodate a variety of mineral activities from metal mining and processing to the mining of certain industrial minerals with unique and special characteristics that make them locatable. Impacts to industrial mineral mines are evaluated separately for each alternative in Appendix E of the draft EIS. This evaluation has been revised in the final EIS.

- 2.56 **Comment:** The NRC Committee's findings are consistent with comments previously submitted by WMC suggesting that BLM should evaluate its existing authority instead of completely revising the 3809 regulations. As discussed in the WMC's May 1999 letter, an objective analysis of the limited number of problems under the 3809 regulations as they are being implemented by BLM would reveal that BLM already has the authority to address and solve most problems. This analysis would also show that BLM has implemented several important policy changes since the 3809 regulations were promulgated in 1981 to address potential problems and to fine-tune and clarify regulatory requirements. Examples of issues that have been addressed by recent BLM policy guidelines include the following:

-BLM's 1990 Cyanide Management Policy..

- BLM's 1992 Solid Mineral Reclamation Handbook...
- BLM's 1996 Surface Occupancy Policy...
- BLM's 1996 Acid Rock Drainage Policy...

These recently developed guidance documents contribute significantly to the 3809 regulatory program and diminish the potential for problems to develop at mines and mineral exploration sites on BLM-administered lands. Each of the above-cited guidance documents was developed as policy-level decisions that BLM administers with the full force of regulations. It is thus apparent that BLM already has enough authority under the existing regulations to address problems and to improve the results of the 3809 regulatory program. These policy-level decisions dealing with issues are an effective and appropriate way to update the 3809 regulations and to address issues that may develop in the future.

Response: In the past BLM has developed the policies cited in the comment. These policies have been successful, and we believe they should be included in the regulations. During the acid rock drainage policy development BLM received comment from industry that it was using policy to make regulations, thus circumventing the requirements of the Administrative Procedures Act. By incorporating these policies into the regulations, BLM is providing the opportunity for the review requested by some policy commenters. In addition, including in the regulations elements from the cyanide management policy was recommended by one GAO report (GAO 1991a). Using the regulatory approach also allows more consistent application throughout BLM. When requirements and procedures are contained within the regulations, they cannot be regarded as optional, which sometimes occurs with policy.

- 2.57 **Comment:** Throughout this lengthy process, the states and others have requested repeatedly a detailed statement of need for the proposed regulations. To this end, the National Academy of Sciences/National Research Council was called upon to provide expert and impartial analysis. They were asked to consider the adequacy of existing federal and state statutes and regulations to prevent unnecessary or undue degradation of the federal lands. The judgement of NAS is that sweeping revision is not warranted. Instead, implementation of the existing system should be improved to increase its effectiveness. When one compares the findings of the NRC report with the proposed 3809 regulations, it is clear that the scope of the proposed revisions goes far beyond what is needed or warranted. We support a narrowly focused rulemaking consistent with the recommendations of the committee. We do not support the broad revision currently proposed. Better implementation of the existing program would address most problems.

Response: We have revised the final regulations and Alternative 3 so as not to be inconsistent with the NRC (1999) report and recommendations. BLM believes that the proposed final regulations' regulatory changes that are not recommended by NRC are not inconsistent with NRC's recommendations and in some cases address NRC concerns with

program implementation or guidance. Both regulatory and nonregulatory changes to the program can be made as the result of the NRC report. Pursuing both is not inconsistent with NRC's recommendations.

- 2.58 **Comment:** The NRC report found that so-called "gaps" are not primarily regulatory and do not justify the proposed changes. The NRC report concluded that the current regulations are effective. Therefore, any proposed rulemaking that involves major changes is inconsistent with the NRC report.

Response: NRC found the overall federal-state regulatory structure to be "complicated," and concluded that the existing regulations were only "generally effective." NRC made six recommendations for changes in the existing 3809 regulations. These changes, Plans for all mining, bonding for everything greater than casual use, ability to order modifications, etc., by most definitions, would have to be considered major changes. Therefore, making major changes in the existing regulations is not only consistent with the NRC recommendations, it is required in order to implement the NRC's recommendations. Nor would making other regulation changes be inconsistent with the NRC recommendations. While NRC may have recommended certain nonregulatory changes to the program, should BLM chose to implement the recommendation by placing it into the regulations instead of policy or manuals, it would not frustrate or be inconsistent with NRC's recommendation for change.

- 2.59 **Comment:** A flawed justification for imposing these burdensome Section 3809 Regulations consists of reports produced by the General Accounting Office (GAO) that have called for "reform" of the Mining Law. These reports, like BLM analyses discussed above, have suffered fatal flaws from their underlying biases.

Response: GAO is an independent auditing arm of the U.S. Congress. BLM considers the results to be acceptable for identifying issues and establishing a purpose and need for changing the regulations, when considered in combination with the public scoping, internal scoping, and the NRC report.

- 2.60 **Comment:** Authorization of Mining Use of Public Lands. The draft rule correctly states that BLM authorizes the use of nonmineral land for milling, processing, and other mining operations (apart from extraction) through approval of Plans of Operations under subpart 3809, whether the use is on or off of mining claims. This principle is clarified by defining the term "operations" to include "prospecting... development, extraction, and processing ..., and all other reasonably incident uses, whether on a mining claim or not ..." This concept should be retained in the definition but may also be included in the Scope on section 3809.2(a)(1) as follows: "(a)(1) This subpart applies to all operations, as defined in this subpart, authorized by the mining laws on public lands, whether or not the lands are subject to a lode, placer, millsite or tunnel site location or are unclaimed. The approval of a plan of operations under this subpart constitutes authorization for all use

and occupancy of public lands for the purposes described in the approved plan.”

Response: Although we agree that the subpart covers unclaimed lands, the suggested language in 3809.2(a)(1) is not necessary.

- 2.61 **Comment:** The definition of “project areas” (in proposed 3809.5) correctly does not imply that the public lands within the area for which the Plan of Operations will be approved must be embraced in either a mining claim or a millsite claim. The Plan approval rule (in section 3809.411) describes the proper bases on which BLM can withhold approval of a Plan of Operations—based on the determination of the nature of the impacts on surface and other BLM-administered natural resources. The operator’s claim position is not relevant to the decision. This should be retained.

Response: We have not changed anything in the final regulations related to the millsite acreage limitations or claim position. The validity of the mining claims on millsites is relevant to the extent that it could affect BLM’s discretion in deciding whether to approve a Plan of Operations.

- 2.62 **Comment:** A discussion of common variety minerals is confusing because common variety minerals are not “locatable,” which 3809 governs. Common variety mineral issues belongs in the regulations governing mining operations under the federal mineral sale laws. But a discussion is appropriate in the draft EIS on how the proposed environmental protections and permitting standards will apply to other mining operations such as gravel pits, building stone, etc. under the Mineral Leasing or Mineral Sale provisions of federal law and regulation.

Response: The common variety section of the regulations at 3809.101 applies only where BLM and the operator do not agree on whether the mineral is locatable under the Mining Law, and hence regulated under the 3809 regulations, or a salable mineral regulated under the regulations at 43 CFR 3600, which require that a royalty be paid. The 3809 regulations do not change any of the performance requirements for common variety minerals, such as common building stone, and sand and gravel, regulated under 3600. The only change from existing procedures is to detail in the regulations BLM’s current policy of holding in escrow royalties for the mining of common varieties until a final determination is made on whether the deposit is locatable or salable.

- 2.63 **Comment:** BLM has not (a) described its statutory authority to require compensatory mitigation for certain mining-related actions or (b) given any information showing that these mitigation authorities have been and are being uniformly applied for all surface-disturbing actions on public lands, including the construction of campgrounds, concentrated weekend recreation use in sensitive habitats, livestock grazing, material sales, and mineral leases.

Response: The requirement to implement mitigating measures is tied to measures needed to prevent unnecessary or undue degradation, as required by the Federal Land Policy and Management Act (FLPMA). Compensatory mitigation consists of offsetting or compensating for an impact in one area by a resource enhancement or substitution somewhere else. But the standard is still to reduce the overall impacts to what is due and necessary. One example would be to compensate for the loss of a wildlife watering source by building a replacement watering source outside the disturbed area. This new watering source would mitigate the unnecessary or undue impact to wildlife from the loss of open water in the project area. The intent is not to require financial compensation but to provide a way for environmental impacts to be mitigated through offsite compensatory actions, such as habitat improvement or replacement water sources, in order to bring the overall project impacts below the level of causing unnecessary or undue degradation. This type of mitigation is or can be used in many BLM programs where impacts need to be reduced to a specific level.

2.64 **Comment:** The draft EIS is flawed in its lack of a discussion of NRC study Recommendations 12, 15, and 16.

Response: The draft EIS was published 9 months before the NRC (1999) report was published, so it could not have discussed any aspect of the NRC report. The recommendations cited in the comment are not recommendations for specific changes to the regulations, but to program management, which could be implemented under a variety of alternatives. Recommendation 12 is on staff adequacy and allocation, something that all agencies try to do on a constant basis regardless of the program. Recommendation 15 is to prepare guidance manuals to better communicate agency authority to protect valuable resources not protected by other laws. This recommendation assumes BLM has such authority, which is not clear from the existing definition of unnecessary or undue degradation. BLM has proposed regulation changes to the definition of unnecessary or undue degradation to address this authority question. BLM already prepares guidance manuals and conducts training on a national basis for program specialists. Such efforts would continue regardless of the alternative selected. Recommendation 16 is for a more timely permitting process that still protects the environment. This recommendation is the desire of every program manager regardless of the regulations. Many changes in the proposed final regulations will provide increased disclosure and better public access to the Plan of Operations review and approval process and are consistent with NRC's discussion of this recommendation.

2.65 **Comment:** No alternative describes NRC study recommendations and findings, especially Recommendations 15 and 16.

Response: Alternative 5 has been added to the final EIS. It considers changing the regulations only in response to the regulatory gaps identified by the NRC report.

2.66 **Comment:** BLM has not considered the fact that a long-term effluent treatment facility can be used only after “source control” has failed. Likewise, BLM has not described or evaluated the impact to public lands from a BLM-directed unnecessary or undue degradation condition or BLM’s liability of first requiring a “failure” before a tailings pond can be built. I recognize that this is not likely what BLM intends, but the actual words and concepts in this table, the preamble, and the proposed regulations lend themselves to such a restrictive result when there is technical litigation involving the exact regulatory language.

Response: See the previous answer. Also, nowhere in the proposed regulations does BLM require or suggest that “failure” must occur before treatment can be used. The operator is responsible for proposing and implementing an optimum combination of source control and treatment that will prevent unnecessary or undue degradation. The proposed regulations merely articulate BLM’s general preference for pollution prevention measures over having to treat contaminated materials. This preference is both to BLM and the operator’s benefit because generally long-term treatment and maintenance costs will greatly exceed source control measures, and source control measures will provide more reliable long-term resource protection.

2.67 **Comment:** What constitutes a “perceived” water source that may contain cyanide or other leachate and requires warning signs?

Response: A perceived water source is one where persons unfamiliar with the area may mistakenly believe that the impounded process water is potable. Signs are needed to prevent accidental ingestion of such solutions. This provision has been removed from the final regulations, and perceived water will instead be addressed on a site-specific basis.

2.68 **Comment:** BLM has not considered the fact that there are valid reasons for leaving high walls other than mineralization.

Response: BLM acknowledges that there are legitimate reasons for leaving highwalls and not backfilling mine pits. That is why the final regulations at 3809.420 provide for the determination on the amount of backfilling to be based upon economic, environmental, and safety factors.

2.69 **Comment:** Table 2-3 is biased in its presentation of the State Management Alternative in that it indicates that no states, including Alaska, manage their resource in an environmentally responsible manner or that they are not responsive to the best interest of its citizens. It conveys a “Only Big Brother” knows how to “Do it Right.” This bias is repeated in almost all sections of the table for all alternatives and is continued in the Appendix of the draft EIS in the discussion of state management requirements for responsible mining operations.

Response: BLM has reviewed Table 2-3 and believes it to be an accurate and objective summary of the impacts described in Chapter 3. The same applies for Appendix D in its summary of state programs. Both the table and appendix have been revised in the final EIS in response to comments.

- 2.70 **Comment:** Explain how a Plan of Operations will prevent impacts to subsistence resources, since all federal actions, including Notice-level operations under the existing 3809 regulations are required to properly consider subsistence in Alaska.

Response: Requiring a Plan of Operations would ensure that subsistence resources are considered before a project begins.

- 2.71 **Comment:** Pages 63-64 and 66-75, Table 2-3. BLM must revise this table because it is not correctly paginated.

Response: The paging has been reordered to correct this problem in the final EIS.

- 2.72 **Comment:** The preferred alternative (Alternative 3) presented in the draft EIS states that reductions in emissions will be attained because 5% fewer operations will be in business (Table 2-3, draft EIS). I do not think that the public supports BLM's implementing regulations with an objective such as this. It seems that the government and its agencies continue to add burdens to the productive citizens and corporations of this country, and these burdens tend to stifle economic viability. Usually it is not so blatant as this.

Response: The reduction in air emissions is a consequence of the reduced level of mineral activity that would occur due to the overall regulatory burden. Table 2-3 merely acknowledges this consequence. BLM's intent is not to stifle overall mine activity to improve air quality or achieve compliance with air quality standards. Measures needed to control air emissions at individual operations would be developed when the operations are permitted.

- 2.73 **Comment:** The description of Alternative 3 (the proposed regulations) is inaccurate or incomplete in the following respects. The state could not restrict land use on BLM-managed lands, only regulate the activity authorized by the public land laws. The description should recognize the provision in the proposed regulations that "[a] State environmental protection standard that exceeds a corresponding Federal standard is consistent with the [Proposed Regulations]." Proposed 3809.202(b)(3). The description should acknowledge that this extent of regulatory control delegated to states could be applied to restrict, or even prohibit, land use.

Response: BLM does not intend that state regulations be used to zone or prohibit mining that would otherwise be allowed by BLM, but instead just to regulate the activity. Although a regulation may be more restrictive than BLM's, it cannot be so restrictive as

to constitute a de facto state withdrawal of public land from operations authorized under the federal Mining Law.

- 2.74 **Comment:** The description of Alternative 3 should recognize that the proposed regulations are replete with land use restrictive and prohibitory provisions. For example, the definition of “minimize” includes the authority to avoid or eliminate land use impacts, and the definition of “mitigate includes avoiding the impact altogether (proposed 3809.5). Those terms are used throughout the performance standards section of the proposed regulations. Proposed 3809.420.

Response: The definition of “minimize” has been revised in the final regulations to make it clear that where it is practical, the impact would have to be avoided or eliminated. “Practical” as used here means considering both technical and economic factors that would allow the project to proceed with consideration given to other resources. The definition of mitigation includes, “avoiding the impact,” as a way of preventing unnecessary or undue degradation. It does not mean that just because avoidance would result in less impact, the operations must not be allowed to occur. It means that avoidance is one way to prevent unnecessary or undue degradation.

- 2.75 **Comment:** I see that the proposed changes in the regulations pose a serious problem in that there is no indication of timing for actions from the government.

Response: BLM will continue to act in as timely a manner as possible. The final regulations is to remove the 60- day approval time frame for a non-EIS Plan of Operations because BLM believes that this is no longer realistic given the more complex technical issues of mining and the need to consult with other federal and state agencies.

- 2.76 **Comment:** BLM has maintained that there should be access to public lands, and rightfully so. I’m one of the guys that gets really mad when I go someplace and find that it’s closed to public access. But when people are actively mining, there are inherent dangers in that. And if you come to my place and get killed in a cave-in, because you tore a tunnel open—guess what? I get sued. And even though I’m going to win because the Federal Government is ultimately responsible because it’s public land, I’m going to lose my house and my business and my kids’ college education fund because I have to fight it in court. And it should not be that way. And believe it or not, we actually want the area open to the public and have been denied that by the Federal Government. I can’t let you in there. Okay? The other thing I don’t see how they can make us responsible for injury whenever we have no authority to control who is walking over that land. How would you like it if I came and told you I want you to let everybody cross your property to get to this duck pond back here, and if somebody falls down, they’re going to sue you? It’s not fair. It’s not fair to me; it’s not fair to the Federal Government.

Response: Restrictions on public access can be included in the Notice or Plan of

Operations for purposes of safety and security.

- 2.77 **Comment:** The proposed 3809 regulations will jeopardize the documented synergism that can exist between active mining operations and nearby abandoned or inactive mines. By impeding new mineral exploration and development, BLM not only threatens domestic mineral production and jobs, but it reduces the opportunities for re-mining to successfully reclaim abandoned mines on BLM lands.

Response: BLM acknowledges that the changes in mineral activity predicted for the alternatives lowers or raises the number of opportunities for active mining operations to incorporate cleanup needs at adjacent abandoned mines.

- 2.78 **Comment:** The Nevada Mining Association wholeheartedly agrees with and incorporates herein by reference, as Nevada Mining Association's comments, the very thorough and comprehensive comments provided by Newmont Gold Company, Barrick Goldstrike, and other mining organizations (e.g. Crowell & Moring's comments for Placer Dome U.S., Independence Mining Company, Battle Mountain Gold, et al.). In addition, the Nevada Mining Association has attached the comments of the National Mining Association and, as an attachment, considers those comments a material part of these comments. Nevada Mining Association urges BLM to give considerable weight and value to those comments, not only because of the comprehensive nature of those collective efforts but also because they represent the best legal, technical, and scientific efforts of the industry, a factual representation that no other entity (including BLM) could muster or match.

Response: We appreciate the effort and expertise that have generated many of the comments received on the proposed regulations and draft EIS. We considered all comments. Responses to specific comments are in the final EIS.

- 2.79 **Comment:** BLM does not have the authority to issue a regulation that would nullify or modify the mining laws, and, further, BLM has not demonstrated a need to revise subpart 3809 in light of improvements in state regulation of locatable minerals mining since 1980.

Response: We agree that regulations cannot be used to change the law. The 3809 regulations are for implementing the Federal Land Policy and Management Act, which recognized the Mining Law, and amended it to require the prevention of unnecessary or undue degradation. Chapter 1 of the EIS discusses the need to revise the regulations. Other justification can be found in the National Research Council's report (NRC 1999), which found regulatory gaps in the existing program.

- 2.80 **Comment:** We recommend that BLM immediately withdraw the proposed 3809 regulations, draft EIS, and Benefit-Cost analysis. If BLM decides to consider changing

the 3809 regulations in the future, it must first follow the nonregulatory changes recommended by the NRC report, including the need for developing consistent information on the mines now in operation. Only if the data justifies changes to the 3809 regulations should changes be proposed.

Response: The NRC report lists regulatory changes that need to be made and made other suggestions that can be addressed through policy, guidance, or regulation. BLM can implement both regulatory and nonregulatory changes. Both approaches can be pursued independently. The proposed final regulations are not inconsistent with the NRC recommendations as long as they do not prevent or contradict an NRC recommendation.

- 2.81 **Comment:** The Nevada Mining Association respectfully requests that BLM proceed with an open and constructive dialogue based on sound scientific and technical principals coupled with an objective assessment of the many environmental successes the mining industry has achieved under the current regulations.

Response: We will discuss regulatory issues with industry or interest groups. Such discussions have occurred during the scoping process and the comment period on the proposed rule. BLM provided two working drafts of the proposed regulations during the scoping process and met with industry, interest groups, and the states on regulation issues for these drafts.

- 2.82 **Comment:** The American Mining Association agrees with the NRC report (1) that inadequate staffing and training of that staff within BLM affects the agency's ability to properly implement the existing array of federal laws that regulate mining on federal lands, and (2) that delays in implementing the requirements of the existing 3809 rules and the accompanying environmental reviews under NEPA are a major problem for stakeholders and one of the most significant impediments to continued domestic mining investment. [See, e.g. NRC report, pages 74-75, 86-87.] But, the proposed rules do not streamline the regulatory process or clarify the requirements for meeting the unnecessary or undue degradation standard. Rather, the proposed rules will require operators to submit substantially more detail in their submissions and will establish so many new standards and processes that it potentially will take BLM and the regulated community years to understand what needs to be done under the new regulations. As a result, the proposed rules do not help either the regulated community or BLM staff resolve the major problems with the existing 3809 rules.

Response: We have revised the proposed final regulations not to be inconsistent with the NRC recommendations. We believe that the final regulations make the content and review requirements clearer for BLM, industry, and the public.

- 2.83 **Comment:** The comments of the National Mining Association will include a summary chart comparing all of the provisions in the proposed regulations with the NRC report.

Barrick helped prepare that comparative analysis and incorporates it into its own comments. We are not submitting another printed copy of the chart to avoid unneeded duplication in the administrative record.

Response: We have prepared a table comparing the existing and proposed final regulations with conclusions or recommendations from the NRC report. This is Table 2-2 in Chapter 2 of the final EIS.

2.84 **Comment:** Barrick asks that BLM consider and respond to all of the comments that it has submitted for this rulemaking.

Response: We have considered all comments received during scoping on the draft EIS and on the proposed rule and supporting documents. Responses to regulatory issues may be found in the preamble of the final regulations. Responses to substantive comments on the draft EIS are printed in Volume 2 of the final EIS. No individual responses are prepared for scoping comments. Issues raised during scoping are discussed in Chapters 1 and 2 of the draft and final EISs

2.85 **Comment:** The foregoing illustrates that the proposed rule's inconsistency with the NRC report is fundamental and therefore cannot be remedied by tinkering or changing a few provisions. To comply with Section 357, BLM should withdraw the rule and repropose a rule that would accomplish the report's recommendations for regulatory change. To be consistent with the NRC report, that rule proposal should include the following: - Financial assurance for all operations greater than casual use (Recommendation 1, pages 93-93), -Amendment of the Plan of Operations requirement to include all mining and milling operations, even if they disturb less than 5 acres (Recommendation 2 , pages 95-96); -Clear criteria allowing BLM to require a Plan modification when needed to prevent unnecessary or undue degradation (Recommendation 4, pages 99-101), -Regulations that define the conditions of "temporary closure" and the distinctions and requirements that apply to "temporary closure" and "permanent closure" (Recommendation No. 5, pages 101-102), -Pro-visions to involve other federal and state agencies in the approval process at the earliest possible time and provisions to expedite the Plan approval and associated NEPA process (Recommendation 10 and 16, pages 111-113 and 122-123).

Response: We have revised the proposed regulations not to be inconsistent with the NRC (1999) recommendations. The proposed final regulations in Alternative 3 address the recommendations cited by the comment plus other issues brought up during scoping. Changes made to the proposed regulations so they would not be inconsistent with the NRC recommendations were not substantial.

2.86 **Comment:** BLM has not adequately considered the burden the existing rules, let alone these new rules, are placing on the industry today.

Response: We have recently completed a new burden hour estimate for the existing 3809 regulations.

2.87 **Comment:** Unfortunately, after reviewing the February draft, we have concluded that the draft would not significantly improve environmental protection. Certain areas have noticeably improved, such as elements of bonding and public participation, but loopholes and vaguely written performance standards more than overcome these.

Response: The final regulations have been revised to include in the definition of unnecessary or undue degradation, substantial irreparable harm to significant resources that cannot be effectively mitigated. This definition would apply to all operations as an overall performance standard.

MINING LAW AND EXISTING 3809 POLICIES

- 3.01 **Comment:** The Mining Law was written more than 100 years ago and it is out of date, anachronistic, antiquated, and a subsidy. The law was written during a period favorable to resource development. That time has changed, and thus the law needs to change. The Mining Law should be repealed or reformed.

Response: Repeal or reform of the mining laws is not within the jurisdiction of the agency. While the Administration continues to support reform of the mining laws, that process must be undertaken by the Congress, not the Executive Branch. Further, BLM agrees that some of the past practices under the Mining Law have had undesirable environmental results. That is the very reason that the regulations being published today were developed. BLM further notes that the flexibility of the Mining Law allows BLM to incorporate more environmental protection within its own regulations, in addition to any imposed by other agencies under the environmental protection laws.

- 3.02 **Comment:** For more than 100 years the Mining Law has been effective, fair, resilient, and perhaps more efficient than most other federal programs. BLM and the Secretary of the Interior are attempting to administratively effect a ‘back-door’ reform or repeal of the Mining Law. It is not BLM’s job to rewrite the laws. That job belongs to the Congress. Despite the legal constraints on it, including the environmental protection laws, the Mining Law continues to effectively function.

Response: BLM is not attempting a “back-door” reform of the mining laws. We agree that the reform of the Mining Law is the job of the Congress, and the Administration will continue working with the Congress to get common-sense reforms. BLM also agrees with the commenter who noted the legal constraints that apply to operations under the mining laws. In developing these regulations, BLM has been careful to incorporate, where suitable, references to the environmental protection statutes that apply to operations under the Mining Law.

- 3.03 **Comment:** Including of ‘unclaimed’ land within the regulation is an expansion of the scope of the Mining Law of 1872, and we’re opposed to such an expansion.

Response: BLM disagrees with the commenter’s interpretation of the Mining Law. Lands are open to the right to prospect and, if successful, to location of mining claims. The sequence of activity set out in the text of the law itself presupposes that activities will be carried out on unclaimed land. Including unclaimed land within an area of operations subject to these regulations is an idea carried over from the original November 26, 1980, rulemaking. That rulemaking at 45 FR 78903 addressed similar comments on that rulemaking’s definitions of mining operations and noted, “One does not need a mining claim to prospect for or even mine on unappropriated Federal lands.” BLM is simply carrying forward the older definition with minor changes. Nothing about the law or the

regulations has changed, and the right to use unappropriated federal lands to engage in reasonably incident uses remains unaffected.

- 3.04 **Comment:** I strongly object to the removal of language in the Objectives (3809.0-2) section of the original rule. The commenter asserts this is an attempt to divert attention from the rights granted to miners under the mining laws during the applying of the regulations.

Response: BLM consolidated several sections of the regulations in the interest of clarity and brevity, and we reject the assertion that the change is intended to divert attention from the miners' rights. BLM people are acutely aware of those rights, and to the extent that the exercise of these rights prevents unnecessary or undue degradation, miners will be allowed to exercise them.

- 3.05 **Comment:** Some commenters believe that royalties and taxes should be imposed on operations subject to these regulations. Another commenter stated that any royalty or tax must be enacted by Congress.

Response: Even though the Administration will continue to support a fair return to the taxpayer for the miner's use of federal mineral resources, the creation of such taxes and royalties is the sole province of the Congress.

- 3.06 **Comment:** An agency cannot end the patenting process, which allows mining companies to obtain public land for a fraction of its value, because congressional action is required. We object to the low purchase price paid by mining claimants for their mineral patents. The recent inversion in land prices for mineral lands (formerly high to nonmineral lands, but now - low) versus nonmineral land (formerly low relative to mineral lands and but now high) seems to imply the need for a change. The price of a patent should be indexed to account for inflation since 1872.

- 3.07 **Comment:** Patented land reduces BLM's liability, helps protect mining-related improvements and should be restored, albeit at fair market prices. The patent provisions of the Mining Law promote national security. The process to get a patent is neither quick nor cheap and costs significantly more than the purchase price. But an excessive amount of time is required to complete the Secretarial review process.

Response: BLM agrees that congressional action is required to end the patenting process, that the prices for mineral patents are too low, and that the purchase price should be changed. The Administration will continue to support a congressional action that will end patenting once and for all. BLM does not agree that the patent process is the only way to protect mining-related improvements. BLM 43 CFR 3715 regulations create a process to deal with trespass and damage to mining improvements. Further, an operator can seek relief by filing civil complaints in the courts and filing criminal complaints with the

proper authorities. Finally, BLM is bound by the Mining Law to prevent material interference with mining activities on federal lands. Patenting removes that federal support for mining to the detriment of mine operators. BLM agrees that the patent process is expensive and time consuming, but a patent is not required to mine a valuable mineral deposit on federal lands.

- 3.08 **Comment:** BLM already has authority to write policies that made the existing regulations more effective. The developing of policy is the proper way to address and solve problems rather than to undertake wholesale modification of the existing regulations. The cyanide and acid rock drainage policies should be incorporated into the new regulations. BLM's development of the use and occupancy policy has resolved a significant problem.

Response: BLM's authority to develop policies that extend and improve implementation of regulations is limited by the Administrative Procedures Act (APA). When policies go beyond simply explaining or otherwise implementing an existing set of regulatory standards, the APA requires that they be published as rules. BLM's amended bonding rules, invalidated by the court in *NWMA v Babbitt* incorporated bonding amounts from an earlier bonding and cyanide policies at the insistence of the Office of Management and Budget. The final regulations incorporate elements of the bonding, cyanide, and acid rock drainage policies. The occupancy 'policies' originated as a promise to begin a separate rulemaking to give field managers a set of tools to manage legal occupancy and end illegal mining claim occupancy. As such, they predated BLM's 1992 review of the existing 3809 regulations and did not flow from that review as claimed by one commenter.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) PROCESS

4.01 **Comment:** BLM has failed to write regulations that would not reduce the effectiveness of other laws. BLM has written regulations that have exercised preempted powers. The language used in these proposed regulations is misleading and contradictory. The proposed regulations would devastate the economic stability of the mining industry. The proposed regulations are not written in accordance with legislative intent of the Federal Land Policy and Management Act (FLPMA).

Response: The regulations continue to allow state laws to apply as long as they do not conflict with subpart 3809. This is authorized by the Supremacy Clause of the U.S. Constitution as interpreted by the U.S. Supreme Court. The regulations do not change the legislative intent of FLPMA—that mineral development is a legitimate use of public lands. The regulations implement section 302(b) of FLPMA, which provides that such use not result in unnecessary or undue degradation.

4.02 **Comment:** Congress has admonished the Department of the Interior not to usurp the legislative functions of these issues, but BLM has plowed ahead relentlessly. To attempt to legitimize this illegal maneuver through the NEPA process is nothing less than a tragic blow to the separation of powers doctrine, the 10th and 14th amendments, and common decency.

Response: Congress has directed, through FLPMA, that the Secretary of the Interior take whatever action, by regulation or otherwise, needed to prevent unnecessary or undue degradation. The 3809 regulations implement that congressional directive. In later budget riders Congress placed parameters on the type of consultation BLM must conduct with the states, on the requirement for a study by the National Academy of Sciences, and on the type of changes to the 3809 regulations that can be made. BLM is conducting this rulemaking process in conformance with all congressional requirements.

4.03 **Comment:** The draft EIS underestimates the time, the cost of implementing regulations, and the impacts on people and communities that depend on mining. Dee Gold wishes to reemphasize the purpose of NEPA's good decision making.

Response: BLM has sought to accurately portray in the EIS the impacts on the mineral industry of any 3809 regulation changes under the various alternatives, and in turn, upon communities that depend upon mining. These impact assessments are then used by BLM and departmental managers in making a final decision on the what regulations to select for implementation.

4.04 **Comment:** The draft EIS unfairly assess the environmental impacts of the No Action Alternative as compared with the other alternatives (including the Proposed Action). As the draft EIS acknowledges, under the existing 3809 program, individual EISs must be

prepared for significant proposed projects. As part of the NEPA process, BLM must assess all significant impacts of a project, and it can require operators to take appropriate mitigation measures. Although so acknowledging, the draft EIS fails to take this BLM authority into account in evaluating the environmental impacts of the No Action alternative. For instance, BLM touts as a benefit of the Proposed Action the protection of and mitigation of impacts to riparian areas not within the jurisdiction of the Army Corps of Engineers. Yet, as the draft EIS elsewhere acknowledges, impacts to riparian areas are already addressed through the EIS process, and, where necessary and suitable, mitigation measures are required. Similarly, and again as the draft EIS itself acknowledges, under the current regulatory program, during the NEPA process BLM negotiates with operators for mitigation where backfilling a pit is uneconomic or infeasible; where pit lakes are expected to present dangers absent treatment; and where mitigation is necessary to rehabilitate and compensate for damage to fish and wildlife habitats. Likewise, BLM acknowledges that, at present, mitigation for cultural resources is considered during the Plan approval process; and protection of cave resources is considered at that time as well. In sum, all significant impacts are already considered in EISs for significant projects, and mitigation measures are required for all impacts where suitable. NEPA ensures that all significant impacts are fully evaluated before operations can begin and that, where necessary, appropriate mitigation measures are taken. Yet BLM simply ignores these facts when attempting to analyze the impacts of the No Action Alternative compared to the Proposed Action. For these reasons, BLM must reassess the impacts of the No Action Alternative in a supplemental draft EIS.

Response: As pointed out in other comments, NEPA is a procedural requirement that does not mandate any set level of environmental protection. NEPA is designed to make sure federal agencies carefully consider and disclose the environmental consequences of their actions, such as approval of a Plan of Operations. NEPA does not and cannot create set performance standards that operators must follow in conducting their activities. Establishing performance standards is the function of the 3809 regulations. While a careful NEPA analysis may identify such environmental issues as pit backfilling or caves, the 3809 regulations establish the acceptable performance that operators must attain to protect these resources. BLM does not believe it appropriate for a mining regulation program to rely upon “negotiation” with operators under the NEPA process. Mining regulation should be an objective evaluation of the proposed operation’s ability to satisfy the performance standards of the regulations. That is one purpose of the final 3809 regulations, to establish outcome-based performance standards under which a Plan of Operations can be evaluated.

- 4.05 **Comment:** Significant workload by NEPA requiring state certification of federal approvals within the state. State must certify BLM's approval that any operation will meet our environmental quality standards. How would BLM refer the applicant to the state for certification? What funding would be available, and who would be responsible? Point source? Non-point source?

Response: Under the final regulations in section 3809.411, BLM would consult with the state to make sure that the Plan of Operations is consistent with state water quality requirements. The applicant would be notified that this was occurring. This is not a significant additional workload. In the long term it may even save on workload by averting BLM from approving a Plan of Operations that is not consistent with state requirements and would have to be modified before it could be implemented.

- 4.06 **Comment:** The draft EIS does not say that BLM consulted with other federal or state agencies for development, review, or approval of the document before public release, a potential violation of NEPA, especially for a document of this magnitude and impact. Such a review should have been made, if anything, just to ensure that duplicative provisions would not result and to allow other agencies to defend their own regulations and to provide more technical and policy input based on experiences.

Response: There is no requirement that other agencies be consulted in preparing a draft EIS. But BLM did consult with state agencies, Indian tribes, EPA, the U.S. Fish and Wildlife Service, and the Bureau of Indian Affairs in developing the proposed regulations and preparing the draft EIS. This consultation is described in Chapter 4 of the draft EIS. Many of those same entities also commented on the draft EIS. The intent of the draft EIS was not to require other agencies to “defend” their regulatory programs but to evaluate regulatory options that would address issues of concerns on BLM-managed lands.

- 4.07 **Comment:** The draft EIS must identify the problems they are trying to address in order to comply with the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA). Pursuant to NEPA, BLM must include in its EIS a statement of purpose and need. (See 40 CFR Section 1502.13.) BLM has failed to justify the need for revising the 3809 regs, as required by NEPA, and until this requirement is met, this entire process should not proceed further. The draft EIS claims there are “gaps” in state programs but does not say where in California such a gap exists.

Response: The draft EIS does not have to state the problems it is trying to correct in order to comply with NEPA. In other words, there does not have to be a “problem” that requires fixing, but just issues an agency wants to consider for some action. NEPA requires a Purpose and Need section which, “...shall briefly specify the underlying purpose and need to which the agency is responding..” (40 CFR 1502.13) BLM and the National Research Council (NRC) have recognized considerable problems with the current 3809 program. The Purpose and Need section, beginning on page 11 of the draft EIS, gives the reasons BLM is considering changing the 3809 regulations. In addition, since completion of the draft EIS, the NRC report (NRC 1999) has recommended that several changes be made to the 3809 regulations. BLM has updated this section of the EIS in the final document. Significant differences between the California program and the existing 3809 regulations are listed on page A-86 of the draft EIS.

4.08 **Comment:** The NEPA needs revision. NEPA was never anticipated to be used as it is today as a public lands lightning rod and counter growth development tool for radical green groups and others.

Response: NEPA is a broad procedural requirement for all federal agencies to thoroughly analyze and disclose the possible environmental consequences of their actions. Regulations for implementing NEPA are prepared by the Council on Environmental Quality and published in the *Federal Register* at 40 CFR 1500, et seq. Making changes in NEPA, or the regulations implementing NEPA, is beyond the scope of this rulemaking, which is to only consider changes to BLM's Surface Management Regulations for activities under the Mining Law at 43 CFR 3809.

4.09 **Comment:** BLM has not fulfilled its obligations under NEPA and the Council on Environmental Quality (CEQ) regulations to respond to our comments and suggested alternatives. At the very least, the draft EIS should explain why many of the WMC's and NWMA issues and suggested alternatives were eliminated from further consideration. The draft EIS violates NEPA through its failure to assess the many reasonable alternatives that the WMC and other mining interests proposed during the 1997 scoping effort. The omission of any mention of these alternatives in the draft EIS is such a serious and fundamental flaw that a new draft EIS and further public comment are needed to comply with NEPA.

Response: There is no requirement that an agency respond to scoping comments directly to the commenter. The purpose of scoping is to determine the issues for analysis and to help develop alternatives. Page 65 of the draft EIS describes alternatives considered but eliminated from detailed analysis. BLM developed four alternatives for detailed analysis in the draft EIS and five for the Final EIS in response to public comments received during initial scoping or upon the draft EIS. A list of issues, along with suggested alternatives, stated by the public during scoping is presented in the draft EIS starting on page 18. Starting on page 22, the draft EIS lists issues and concerns not addressed along with a rationale for limiting the scope of the analysis.

4.10 **Comment:** Prime examples of bias are BLM's failure to show explicit BLM statutory authority, or BLM or Department of the Interior (DOI) policy, to duplicate existing responsibilities of states and other federal agencies such as the Environmental Protection Agency.

Response: BLM/DOI has independent authority from Congress under section 302(b) of FLPMA to develop a regulatory program as needed to prevent unnecessary or undue degradation of public lands. This authority exists whether or not a state has chosen to apply its regulations to federal lands. The approach BLM has taken under the existing 3809 regulations is to incorporate the state requirements into the regulations so as to reduce or eliminate potential conflict over which regulations take precedent. This same

approach has been carried forward in the final regulations presented under the preferred alternative of the final EIS.

- 4.11 **Comment:** The proposed definition of mitigation, which references the definition issued by the Council on Environmental Quality (CEQ) under the National Environmental Policy Act (NEPA), should be eliminated from these regulations because that definition was written to serve analytical, not regulatory, purposes. Since NEPA and FLPMA goals are not necessarily the same, we feel their definition is inappropriate. As used in the CEQ provision, the all-encompassing language is suitable for ensuring that all types of mitigation will be included for, and no particular type of mitigation will be precluded from, consideration in a NEPA evaluation document. But any definition of mitigation that serves as a basis for regulating mining projects under FLPMA and the mining laws should not, and may not be so open-ended and inclusive. Also, the concept of mitigation compensation is particularly confusing.

Response: BLM has used the same definition of mitigation for the same purpose: so that no particular type of mitigation will be precluded from consideration in preventing unnecessary or undue degradation. The requirement to implement mitigating measures is tied to measures needed to prevent unnecessary or undue degradation and does not create another regulatory standard. Compensatory mitigation consists of compensating or offsetting an impact in one area by a resource enhancement or substitution somewhere else. One example would be to compensate for the loss of a wildlife watering source by building a replacement watering source outside the disturbed project area. This action would mitigate the impact to wildlife of the loss of open water in the project area.

- 4.12 **Comment:** 3809.420(a)(4) In sentence, “The measures could be developed through the NEPA process.” To be consistent with the rest of the proposed rules, it should read “should” or “will.” Please clarify how this would affect patented areas of the operations. If the measures are developed under the NEPA process, the required standards are already there, and BLM does not need to include them in this set of proposed rules.

Response: Mitigating measures would be developed through the NEPA process as needed to prevent unnecessary or undue degradation. Mitigation developed for application on private lands, and required by a non-BLM entity, could also serve to successfully mitigate impacts on BLM-managed lands. But BLM would still have to determine that the mitigation would be effective in preventing unnecessary or undue degradation of public lands, and the mitigation would have to be enforceable.

- 4.13 **Comment:** NEPA requires that an EIS discuss the “means to mitigate adverse environmental impacts...” In the consideration of alternatives, the EIS should also include a discussion of appropriate mitigation measures. BLM has entirely ignored these requirements. No mitigation measures are listed or discussed for either the Proposed Action or the alternatives. For example, the draft EIS discusses impacts to mining-

dependent communities from the preferred alternative. Those impacts might be mitigated by a broader “grandfathering” of existing operations, but the issue is not addressed. Similarly, many of the environmental impacts from Alternative 2 flow from BLM's assumption that Notice-level activities would not be regulated. Those impacts could be mitigated by maintaining some portion of the BLM Notice-level review procedures in Alternative 2. Under the preferred alternative and Alternative 4, additional appeals will lead to delays in implementing of permitting and enforcement decisions. The draft EIS should consider alternatives to the current mechanisms or procedures for appeals as a mitigating measure.

Response: NEPA regulations do not require a separate discussion of mitigation if the mitigation is already included in the description of the alternatives (40 CFR 1502.16(h)). The alternatives were all developed to mitigate the impacts of the Proposed Action and address different aspects of the issues raised during scoping. Designed to present a range of approaches that could address the different scoping issues, the alternatives therefore will have different impacts in different resource sectors. Adding more mitigation to each alternative to reduce its inherent impacts would ultimately lead to a narrowing of the range of alternatives to the point where there would be no significant difference between alternatives for the decisionmaker to consider.

- 4.14 **Comment:** Under the description of the State Management Alternative, the draft EIS (page 36) describes how BLM would defer regulating exploration and mining to the states. The draft EIS states that “BLM would neither review nor approve of any specific project. Nor would any federal decision or undertaking be subject to NEPA review or compliance with Section 106 of the National Historic Preservation Act.” This statement is simply not true. Alternative 2 is not viable in that it would require congressional legislation, and it is not within the scope of the 3809 regulations—an argument BLM is quick to point out when justifying no analysis of agency funding or staffing. This same section of the draft EIS continues, “While the operations would still have to comply with federal laws such as the Clean Water Act and the Endangered Species Act, BLM would not regulate the operations.” Apparently BLM believes that other federal agencies need not comply with NEPA. Clearly, NEPA does apply to every federal agency, and NEPA review must occur before any decision by any federal agency on a proposed project. NEPA itself and the Council on Environmental Quality regulations are both clear that this review under NEPA must consider the whole of the proposed action, regardless of the limits on the jurisdiction of the federal agency or the federal decisions required. Therefore, it is a significant misrepresentation of the facts to inform the commenting public that precious metals mines would not undergo environmental analysis under NEPA under the State Management Alternative. As practically every mine in the western United States falls under the jurisdiction of the Army Corps of Engineers, for example, the Corps would likely become the lead agency for this analysis. Since Section 106 of the National Historic Preservation Act also applies to all other federal agencies, including the Corps and Corps regulations also explicitly require compliance with Section 106, mining

projects subject to Corps jurisdiction would also still be subject to Section 106 of the National Historic Preservation Act (NHPA). This significant error in the description of the alternative prevents any reasonable analysis between alternatives.

Response: Alternative 2 would not require congressional action. The trigger for NEPA review and other processes such as NHPA requirements is that a federal action is taken with the approval of a Plan of Operations. While other federal agencies, such as the Corps of Engineers, may have to follow the same processes, not all mining activities would require other federal permits. If they do, the review would be more targeted to the resource being regulated such as water, air, or wetlands. BLM federal actions are unique in that they are approving the entire mining project, not just one media-specific aspect of that action such as a discharge permit for water or a wetland dredge and fill permit. As such, BLM NEPA analysis and mitigating measures are much broader and more costly to the operator than those imposed by other agencies. BLM wishes to clarify the fact that just because there is no NEPA review or a more limited NEPA review under Alternative 2 does not automatically mean greater environmental impacts. NEPA is a procedural requirement to ensure that federal agencies consider and disclose the environmental consequences of their actions. It does not mandate a higher level of environmental protection by itself, but just careful study. Other substantive environmental laws would still continue to apply under Alternative 2, such as the Endangered Species Act, the Clean Air Act, and the Clean Water Act. The situation would be analogous to pre-1980, before BLM adopted the existing 3809 regulations and BLM did not review or approval requirements to trigger NEPA, NHPA, or other consultations.

- 4.15 **Comment:** Under the Council on Environmental Quality (CEQ) regulations implementing NEPA, BLM must “rigorously explore and objectively evaluate all reasonable alternatives” to the “heart of the environmental impact statement.” BLM's draft EIS violates NEPA by failing to assess all reasonable alternatives. Indeed, the errors of the alternative analyses are so fundamental and pervasive that a new draft EIS, with further public comment, is needed to cure these defects.

Response: BLM believes that the alternatives presented in the draft and final EISs cover a reasonable range of alternative approaches for developing the surface management regulations. BLM has changed the alternative in response to public comments and the National Research Council report (NRC 1999).

- 4.16 **Comment:** An EIS must evaluate the no action alternative 40 CFR [sec]1502.14. Yet, the No Action Alternative in the draft EIS does not describe and evaluate the panoply of existing federal and state environmental laws and regulations that apply to hardrock mining. These laws and regulatory programs have evolved and developed substantially over the past 2 decades and they are working effectively with the existing 3809 regulations to protect the environment and public health and to prevent unnecessary or undue degradation of the public lands. The “Summary of State Mining

Regulations/Programs” in Appendix D is deficient and incomplete. BLM must prepare a new description of existing state and federal laws and regulations, and analyze those requirements in the discussion of the No Action Alternative. This must be done through the release of a new draft EIS for further comments from the public and the states. BLM can use the results of the NAS study to help prepare the new draft EIS.

Response: The draft EIS did include and consider the existing federal and state environmental laws and regulations that apply to hardrock mining. Appendix C lists other major federal laws, regulations, executive orders, permits, licenses, and reviews that may be required of mining projects. Appendix D presents a state-by-state summary of state regulatory programs that apply to hardrock mining. These programs all serve as a backdrop common to all the alternatives presented in the EIS, including the No Action Alternative. In addition, we developed Alternative 2 show the impacts of relying on these other programs without any 3809 regulations. We have refined the analysis in the final EIS in response to comments.

- 4.17 **Comment:** The irony of BLM’s position on these scoping meetings is that BLM would never embark on such a process if the federal action under consideration were the approval of a Plan of Operations for a mine. Indeed, it would be impossible to develop meaningful issues and alternatives for consideration in the EIS without knowing details of the Proposed Action. The EIS could well be compromised by an inadequate and premature scoping effort.

Response: There is considerable difference in the scoping conducted for a site-specific analysis and that to consider programmatic issues on a national basis. The site-specific project requires greater upfront definition of the proposed action to scope out site-specific issues. The program analysis can rely upon issues already of concern with the public on the basis of the existing regulations.

- 4.18 **Comment:** The draft EIS is a flawed document due to BLM’s failure to perform adequate scoping. While BLM held “scoping” meetings and sought public views on how the regulations can and should be changed, these public meetings and written comment periods do not fulfill the function of NEPA scoping. The purpose of NEPA scoping is to allow the public to identify issues and alternatives associated with NEPA review of a proposed agency action. But that purpose was not met regarding the proposed rule because BLM, during this “scoping” activity, never stated how it would propose to change the 3809 regulations. Not once during the “scoping” period did BLM describe the Proposed Action that would allow the public to effectively participate in scoping the draft EIS. Significantly, BLM did not even ask the public to present issues and alternatives for the draft EIS at the scoping meetings. Instead, the public was asked for input on “whether and how the 3809 regulations should be changed.” Similarly, the materials handed out at the scoping meeting asked for comments on eight issues related to possible changes in the regulations. The BLM task force advised participants at the scoping meetings that,

although they could comment on any issue, they were directed to address the eight issues listed by BLM first before commenting on any other issues (e.g. alternatives for the draft EIS). Because of time constraints in the scoping process, few workshop tables could address all eight issues, let alone move on to discuss traditional NEPA scoping topics. For the public to participate properly in scoping, an agency must describe a proposed action with such specificity that the public can determine what the agency is trying to accomplish and suggest alternative means of achieving those objectives. Instead of preparing the draft EIS, BLM should have reviewed the scoping comments it received and developed recommendations for any changes to the 3809 regulations. The recommendations then should have been released in conjunction with the proposed rule. The proposed rule would then serve as the proposed agency action for NEPA scoping.

Response: NEPA scoping for the rulemaking was extensive and complete. The CEQ regulations at 40 CFR 1501.7 mandate early and open scoping. BLM did not want to develop a detailed proposed rule without input from the public on what the scope of such a rulemaking should include. The Proposed Action initially presented to the public was to change the 3809 regulations to address the eight issues that had been listed internally. The public took these under consideration and raised other issues and suggested regulatory alternatives. [See Scoping Report, (BLM 1997a).] During scoping BLM consulted with industry, the states, and environmental groups on content that they wanted to see included in the revised regulations. BLM even asked these groups to submit suggested regulation language as part of their scoping comments. Later in the scoping process BLM put out for review working drafts of the proposed regulations and met with the interest groups to get their feedback during scoping. This occurred not once, but twice. From this feedback BLM developed the alternatives presented in the draft EIS. Also note that scoping does not end until the final decision is made. BLM continued to receive and consider new scoping input, such as the NRC report (NRC 1999) in developing the final rules and EIS.

- 4.19 **Comment:** Selecting the Proposed Action and Preferred Alternative as described in the draft EIS (pages 92-95) would violate NEPA in light of two of the central findings, conclusions, and recommendations presented in the NRC study. First, the NRC study found that better implementation of the existing regulations represents the greatest opportunity to improve environmental protection. Secondly the Committee stated a strong preference for performance-based standards rather than prescriptive standards like those proposed in most appropriate technology and practices (MATP) and [sec] 3809.420. If BLM were to issue a final EIS and final rules that ignore these findings, the agency will be taking actions that, in the judgement of the Committee, will at best miss an opportunity to improve environmental protection, and at worst, may even cause environmental harm. This outcome would violate NEPA as shown by the following citations from the CEQ regulations: [sec] 1500(c) “Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork-even excellent paperwork-but to foster excellent action. The NEPA process is intended to

help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”[sec] 1500.2(e) “Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” [sec]1500(f) “Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.” [sec] 1505.2(b) “Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable.” [sec] 1505.2(c) "State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.”

Response: Although the NRC report determined that better implementation of the existing regulations represents the greatest opportunity to improve environmental protection, it certainly did not say that was the only course of action that should be taken. In fact, NRC made recommendations on changes needed in the regulations. In addition, NRC reached other conclusions on program inadequacies that may best be addressed through regulatory changes. The results of the NRC report should not be regarded as an “either-or” finding, but as a list of possible actions, both regulatory and administrative, that would improve environmental protection. On the second point, BLM agrees with NRC’s performance-based standards recommendation, but does not agree with the commenter that the performance standards in proposed 3809.420 are “prescriptive.” Just the opposite. The performance standards in 3809.420 are nonprescriptive, outcome-based standards that do not mandate the use of certain materials, thicknesses, designs, reagents, processing, or analytical evaluations.

- 4.20 **Comment:** The NRC study recommendations and conclusions, especially the recommendation to correct the identified regulatory gaps, represent a valid alternative to the proposed 3809 rules that should be evaluated in a supplemental EIS before finalizing this rule. Indeed, a supplemental EIS is required by the regulations of the CEQ implementing NEPA, which insist that federal agencies, including BLM, must “[v]igorously explore and objectively evaluate all alternatives to the proposed action.” Moreover, BLM's own NEPA Handbook directs the agency to consider and refine a range of alternatives throughout the EIS process: “New alternatives can and should be developed and defined as the need arises during preparation of the EIS.” Clearly, addressing the regulatory gaps discussed in the NRC study is an example of an alternative that BLM must analyze to comply with the CEQ regulations and internal agency guidelines for implementing NEPA.

Response: As suggested, BLM has added a fifth alternative that addresses only the regulatory gaps discussed by the NRC report. We have also modified Alternative 3, the

Proposed Action, to make it not inconsistent with the NRC recommendations. A supplemental EIS is not needed because the changes in the Proposed Action are within the range of alternatives previously analyzed and are therefore not substantial.

- 4.21 **Comment:** BLM is unable to comply with the NEPA requirement of describing baseline conditions in the draft EIS. That requirement is a prerequisite to effective analysis of impacts of the Proposed Action and its alternatives. Without this exposition of baseline, the impacts analysis is speculative and theoretical at best and cannot comply with NEPA requirement to take a “hard look” at the environmental impacts of the proposed action. BLM should be required to consider these and all other cumulative effects before it can claim that it has conducted an adequate environmental impact analysis. If it does not do so, the draft EIS is flawed, and the failure to satisfy the requirements of NEPA will require an invalidation of the rule.

Response: While other environmental requirements are part of the baseline, they are also common among all alternatives. They were included in the draft and final EISs to provide a comprehensive analysis of the baseline. But since these other requirements are common to all alternatives, their detailed discussion would not help present the environmental impacts of the proposal and alternatives in a comparative form that sharply defined the issues and provided a clear basis for choice among the options, as required by NEPA regulations at 40 CFR 1502.14.

- 4.22 **Comment:** The congressional mandate in section 357 states that the BLM regulations must comply with the bold-face NRC report recommendations so long as these regulations are also not inconsistent with existing statutory authorities. The existing statutory authority binding on the Secretary of the Interior includes the National Environmental Policy Act (NEPA). Under NEPA, an agency must set forth a reasoned explanation for its decision and not simply assert that its decision will have an insignificant effect on the environment. As stated by a recent federal court decision rejecting the Federal Government’s argument that NEPA was not required for small-scale activities: an EA is warranted to determine whether . . . multiple mining operations will have a significant effect on the human environment. The court did not make a distinction between small-scale mining operations and exploration activities under NEPA. Therefore, BLM cannot violate NEPA by ignoring the cumulative environmental impacts from multiple exploration activities. Thus, the regulations must require NEPA review when there may be such cumulative impacts, at a minimum.

Response: Because the processing of a Notice for exploration is not a federal action that would trigger NEPA, no NEPA violation could occur from not conducting NEPA review on a Notice. BLM intentionally did not make Notices a federal action, consistent with the NRC recommendation. BLM believes this is appropriate. Due to most exploration project’s short duration, limited size (5 acres), reclaimability, bonding, and special category land classification, BLM does not expect that environmental impacts from even

multiple exploration projects would be cumulatively significant. Should unnecessary or undue degradation result from the cumulative effects of exploration projects, BLM can direct correct measures be implemented.

- 4.23 **Comment:** Given the CEQ's 'new information' requirement in the NEPA regulations, the fact that the draft EIS did not and could not consider the later NRC Report, Congress's directive to BLM to defer codification of new 3809 regulations until after completion of the NRC report, Congress' directive to codify only those 3809 regulations 'non inconsistent' with that report, and BLM's cursory treatment of the report in its October 26, 1999 *Federal Register* notice, BLM must, at a minimum, supplement its February 1999 draft EIS to incorporate the NAS report's findings and recommendations. BLM may not ignore its legal obligation under NEPA.

Response: BLM has incorporated the results of the NRC report into the environmental analysis and added a fifth alternative that addresses only the regulatory gaps discussed by the NRC report. BLM has also modified Alternative 3, the Proposed Action, so as not to be inconsistent with the NRC report recommendations. A supplemental EIS is not needed because the changes in the Proposed Action are within the range of alternatives previously analyzed and are therefore not substantial.

- 4.24 **Comment:** BLM failed to evaluate the alternative of increased funding and improved implementation of the existing regulations even though BLM acknowledged that "[m]any [scoping] comments noted that BLM does not have adequate funding and staffing to administer the [existing 3809] program and that changes in funding and staffing levels are the best way to address current problems" (See draft EIS, page 23.) Nevertheless, BLM has refused to analyze in detail an alternative of enhanced funding and improved implementation of the existing regulations (page 65). A new draft EIS, with further public comment, is needed to cure these defects.

Response: For two reasons BLM has not added an alternative that addresses increased funding. One, BLM cannot regulate the funding levels through the regulations. Second, and more importantly, the evaluation is on the regulations themselves and has to assume that BLM would be fully funded in order to assess the effectiveness of each regulatory program under the alternatives. Therefore, BLM has analyzed the No Action Alternative and the other alternatives under fully funded conditions.

FEDERAL LAND POLICY AND MANAGEMENT ACT (FLPMA)

5.01 **Comment:** The issue of land manager discretion must be made clear in order to meet FLPMA standards. BLM needs the authority to consider other competing resources and also the history of mining companies. Bad environmental records should lead to denial of permits to some companies. To protect public lands, land managers should have the right and be expected to weigh other uses and be able to deny mining proposals. The final regulations need to give land managers discretion to deny mining permits for these reasons. Small mines must not be exempt from FLPMA standards. BLM must be given discretion to deny approval of Plans for environmental reasons, including operations that would cause unnecessary or undue degradation.

Response: The final regulations allow BLM to deny a Plan of Operations that would result in unnecessary or undue degradation, or revoke a Plan of Operations under section 3809.602 for failure to comply with an enforcement order or where there is a pattern of violations. The regulations cannot provide total discretion to land managers because of the rights to development operators have under the mining laws. The regulations do allow denial of a Plan of Operations if it is determined that an operation would cause unnecessary or undue degradation, including creating substantial irreparable harm to significant resources that cannot be effectively mitigated. Small operators have never been exempt from the FLPMA standard to prevent unnecessary or undue degradation.

5.02 **Comment:** BLM's regulatory authority under FLPMA does not extend to water quality or water quantity issues. FLPMA grants BLM the authority to prevent "unnecessary or undue" degradation of the public lands. Public lands under FLPMA must be owned by the United States and administered by BLM. The United States does not hold title to navigable waters, and thus navigable waters generally are not included within the definition of public lands. 55 Fed Reg. 27111, 27115 (June 29, 1990) (preamble to proposed regulations implementing Alaska Interest Lands Conservation Act (ANILCA)) See also 57 Fed. Reg 22940, 22942 (final regulations excluding navigable waters from the definition of public lands); *State Land Board v. Corvalis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977) (holding that the beds of streams navigable in fact was never considered to be public lands). Consequently, because the United States does not own the navigable waters lying within the states, BLM lacks the statutory authority to issue regulations under FLPMA managing the quality of such waters. BLM's existing regulations recognize that fact and correctly defer water quality regulation to environmental protection statutes and regulations. BLM's enabling statute does not authorize it to become a water quality agency for public lands. With regard to water quantity, BLM has long recognized that it must defer to and comply with state water right laws with respect to matters of water use and allocation.

Response: FLPMA, at section 102(a)(8), states in part that, "the public lands be managed in a manner that will protect the quality of...water resource...values..." The

FLPMA mandate to prevent unnecessary or undue degradation includes degradation of water resources. BLM does have the authority to regulate operations conducted on public land with consideration given to the effects an operation may have on water quality and quantity. In general, BLM relies on operator compliance with state or federal water quality standards to meet this objective. BLM can also require operators to incorporate protective measures for water resources into their operating and reclamation plans. Not all waterways on public land are navigable. In fact, many are not navigable in the legal sense that the state owns title. Even on navigable waters crossing public land, operators often use public land adjacent to the high water mark as part of their operations and are subject to the 3809 regulations to protect the public lands.

- 5.03 **Comment:** The draft EIS and proposed regulations must adequately and accurately reflect the existing governing statutes. The draft EIS and proposed regulations do not recognize the congressional declaration of policy in section 102 of FLPMA that the “public lands be managed in a manner which recognizes the Nation’s need for domestic sources of minerals...from the public lands including implementation of the Mining and Mineral Policy Act of 1970...” 43 U.S.C. Section 1701(a)(12). BLM’s duty as established by Congress, “to encourage development of Federal mineral resources,” must stay intact and not change with these new regulations. The proposed regulation does not change the authorizing language and it is presumptuous for BLM to remove this statement. The BLM regulations remove any reference in the regulations to a fundamental purpose of FLPMA, namely the management of the Nation’s public lands in a manner that “recognizes the Nation’s need for domestic sources of minerals...from the public lands.” If anything, BLM appears intent on reducing the level of mineral activity on the public lands by creating an unnecessary and redundant scheme. BLM is not in compliance with FLPMA unless it takes into account the impacts of cumulative regulations that apply to supplying the Nation’s need for domestic sources of minerals. If BLM truly intends to fulfill its statutory obligation to encourage development of federal mineral resources, then this language is an important part of the rules and should be retained. Deliberate omission of this authorizing language from FLPMA in the proposed regulations is a defiant affront to Congress and United States citizens.

Response: The language has been deleted because it is not necessary for regulatory purposes. This does not change any of the statutory requirements of FLPMA or the Mining and Minerals Policy Act. BLM is still subject to the requirements of these acts and of other acts such as NEPA, the Clean Water Act, and the Endangered Species Act. BLM does not believe it is appropriate to present a complete listing of all applicable acts in the regulations. A list of applicable laws and regulations is presented in Appendix C of the EIS.

- 5.04 **Comment:** Alternative 1 in the proposed regulations on the threshold between a Notice and a Plan of Operations is preferable to Alternative 2; but subpart (j)(6) is without legal authority and must be deleted. Proposed 3809.011 (j)(6) is tantamount to a bureaucratic

withdrawal authority for which no legal authority currently exists and is contrary to the intent of Congress as specified in FLPMA. The intent of Congress as expressed in FLPMA is captured at 43 U.S.C. 1702(a) (1976); 43 CFR 1601.0-5(a)(1985) wherein areas of critical environmental concern are defined as areas where “...special management attention is required...to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems or processes, or to protect life and safety from natural hazards.” This definition of what constitutes an area of critical environmental concern (ACEC) is no different than what BLM cites in proposed regulation 3809.11(Alternative 1) (j)(6) as the basis for “...areas specifically identified in BLM land-use or activity plans...”[emphasis added]. Clearly BLM is usurping the authority to create ACECs for an unauthorized expansion of the power of its land use plans. Subsection (j)(6) of 3809.11 (Alternative 1) should be stricken in its entirety. Subsection (j)(3) captures ACECs as a proper basis for requiring a higher standard of review consistent with the intent of Congress as previously expressed in FLPMA. No expansion of that authority is justified.

Response: Proposed 3809.011(j)(6) would not have withdrawn an area from operation of the mining laws. It just would have served as a threshold for when a Plan of Operations had to be filed instead of a Notice. BLM agrees that the paragraph contains substantial overlap with the ACEC areas that are listed in 3809.011(j)(3). In the final regulations BLM has replaced proposed paragraph 3809.011(j)(6) with a different threshold standard. The new paragraph requires a Plan of Operations in areas that contain proposed or listed threatened or endangered species or their critical habitat.

5.05 **Comment:** BLM states that it lacks “clear, consistent standards for environmental protection” (page 12, draft EIS). More than 20 state and federal environmental regulations control mining industry impacts on the environment. Congress delegated authority for implementing environmental regulations to federal and state agencies to avoid overlapping authority and redundancy. Congress limited BLM’s authority to regulate locatable mineral exploration and development in accordance with FLPMA and has not significantly modified this authority since 1976. The BLM must ensure that its regulatory actions conform to the intent of Congress as reflected in the existing environmental statutes.

Response: The statement from the draft EIS reflects the difficulty BLM often encounters in determining what constitutes unnecessary or undue degradation. The NRC report (NRC 1999) noted this difficulty in its Recommendation 15. Congress intended that the public lands be protected from unnecessary or undue degradation, which covers a wide range of resources found on public lands.

5.06 **Comment:** There are limits on BLM’s authority to impose regulations that will eliminate environmental impacts if those regulations also limit the opportunity to develop mining claims on public lands. This issue was addressed in the final EIS for the original 3809

regulations, as the Department of the Interior explained why it was not adopting an alternative that would have imposed stricter environmental standards. Pursuant to FLPMA, BLM has the authority to take “any action necessary to prevent unnecessary or undue degradation of the public lands.” The word “necessary” limits BLM’s authority and suggests that BLM must demonstrate the need for proposed rule changes predicated upon FLPMA authority. The Proposed Rule would expand BLM’s regulatory role beyond that authorized by FLPMA such as in revising the designated intent of “unnecessary or undue degradation” as defined in FLPMA. The proposed rule would fundamentally change BLM from a land managing agency with jurisdiction shared with the states into an EPA-like agency, setting federal environmental standards that in turn drive standards on federal, state, and private lands. This conception for BLM’s role is far beyond what Congress had in mind when it directed BLM in FLPMA to prevent unnecessary or undue degradation.

Response: The referenced sentence of FLPMA provides that the Secretary of the Interior may develop regulations or take any other action needed to prevent unnecessary or undue degradation. But FLPMA did not expressly define “unnecessary or undue degradation.” BLM believes that the regulation changes are needed to prevent unnecessary or undue degradation. BLM has listed many regulatory issues in the draft EIS that need to be addressed. The NRC report (NRC 1999) has also discussed issues and recommended regulatory changes.

5.07 **Comment:** Under FLPMA, which is what gave BLM its authority, BLM can use specific enforcement—similar enforcement mechanisms in cases when you have a noncompliant operator. But in the proposed regulations, BLM plainly exceeds its authority by giving itself the power to suspend and nullify operations. FLPMA was intended for BLM to limit enforcement capability to promote the dissemination of information and to advise the public and to use administrative resolution rather than prosecution for violation.

Response: BLM has a duty to take any action needed to prevent unnecessary or undue degradation as stated in section 302(b) of FLPMA. Suspending operators that are causing unnecessary or undue degradation is within BLM’s authority.

5.08 **Comment:** BLM’s proposed regulations, though they dispose of the “prudent operator” language of the present regulations, continue to reject implementing FLPMA’s “unnecessary or undue degradation” standard, and this may tie the agency’s hands when a common-sense application of the statutory “unnecessary or undue degradation” standard would enable BLM to avoid immense damage to many valuable resources of the land that a gigantic unreclaimed open pit mine would cause in a particular location.

Response: In the final regulations the definition of “unnecessary or undue degradation” has been modified with the addition of paragraph four to address when degradation is “undue.” The requirement is that operations not result in substantial irreparable harm to

significant resource values and that harm cannot be effectively mitigated. This provision must be applied on a site-specific basis and would not necessarily preclude developing a large open pit mine.

- 5.09 **Comment:** Why state that “Despite the urging of certain commenters, BLM is not proposing additional regulations to implement the "undue impairment" standard of section 601(f) of FLPMA then do it?

Response: BLM is not adding regulations to implement the “undue impairment” standard of section 601(f) of FLPMA, related exclusively to the California Desert Conservation Area. What was done in the proposed and final rule is continue the previous rule’s cross-reference to the section 601(f) standard in the unnecessary or undue degradation definition. BLM will continue to apply the standard on a case-by-case basis, as is currently being done, for instance, in southern California in a plan of operations proposed by Glamis Imperial. BLM continues to believe that such an approach will provide the needed level of protection for the enumerated resources in the California Desert Conservation Area.

- 5.10 **Comment:** The only statement in the proposed definition of most appropriate technology and practices (MATP) or in the explanation of the proposed rule on cost is that “MATP would not necessarily require the use of the most expensive technology or practice.” This statement not only fails to address how BLM would consider cost, but suggests that BLM could require the use of the most expensive technology or practice for a mine regardless of whether the mine meets performance standards by using a less expensive technology or the most expensive technology produces only a small marginal benefit. If BLM claims authority to require use of a particular technology under such circumstances, the proposed rules would clearly violate FLPMA, the general mining laws, and the Mineral Development Act. Requiring the use of a costly technology that may make mining impossible or uneconomical to achieve minimal or no environmental benefits would ignore FLPMA’s limit on BLM’s authority only to prevent unnecessary or undue degradation of public lands, would impair the rights of locators and claims located under the general mining laws in violation of 43 U.S.C. 1732(b), and would contravene Congress’ policy and intent for BLM to manage public lands in a manner that recognizes the Nation’s need for domestic sources of minerals and to implement the Mining and Minerals Policy Act of 1970, as set forth in 43 U.W.C. 1701(a)(12). The proposed rules do not explain how BLM will reconcile its proposed authority to impose technology-based requirements with its legal authority and obligations under FLPMA.

Response: It is unclear how a statement that was added to assure operators they would not have to use the most expensive technology could be interpreted to mean they would be required to use the most expensive technology or practice regardless of whether the mine meets performance standards. Nevertheless, MATP has been deleted from the final regulations. In its place a requirement has been added to the performance standards that

requires operators to use equipment, devices, and practices that will meet the performance standards. The purpose of this requirement is to make sure that the methods employed are technically feasible for meeting the performance standards.

- 5.11 **Comment:** These regulations also are not written in accordance with the legislative intent of the Federal Land Policy Management Act. Proposed regulations at 3809.3 provide that “if State laws or regulations conflict with this subpart...you must follow the requirement of this subpart.” This provision, coupled with the proposed section on the federal/state relationship (3809.201-204) and the proposed performance standards (3809.420), will have a preemptive effect on state laws. FLPMA does not provide for express preemption of state laws.

Response: The intent of this section is to establish a minimum level of protection for public lands. This is within BLM’s authority under FLPMA. Under FLPMA, federal rules may preempt state law when the two conflict. There is no conflict if the state regulation requires a higher level of environmental protection. In most cases satisfying the state requirements will also satisfy BLM’s requirements. Or satisfying BLM requirements will also satisfy the state requirements. Only under very rare circumstances would it be impossible to satisfy both state and BLM requirements at the same time. In those cases the operator must satisfy BLM requirements to operate on public lands.

- 5.12 **Comment:** In enacting the FLPMA, Congress granted BLM only limited license to regulate mining on public lands. BLM's authority to regulate is Section 302(b) of FLPMA, which provides: “In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the public lands.” Congress obviously realized that mining on public lands, which it sanctions expressly in the General Mining Law, necessarily causes some impacts. Congress did not completely prohibit all such impacts or empower BLM to do so in its stead. Rather, it charged BLM with preventing “unnecessary or undue degradation” of public lands, a decidedly limited mandate. FLPMA, in short does not grant BLM the authority to prevent all degradation of public lands, but rather only to prevent degradation beyond what a prudent miner causing necessary or appropriate degradation would cause. Many of the provisions in the proposal overstep this critical limitation. By focusing on “degradation...of the public lands,” Congress consciously tasked BLM with managing the surface impacts of mining. Congress did not authorize BLM to regulate or limit the effects of mining on ground water, surface water, or other environmental media. It could have taken that step. Indeed, it clearly knew how to do so, as evidenced by other sections in FLPMA, which grant BLM that power in limited contexts not germane to the present rulemaking. In so limiting BLM’s authorities, however, Congress did not ignore the need for environmental protections on the public lands. Instead, it empowered BLM to incorporate state and other federal environmental laws into its regulatory program. And indeed, in the 18-odd years that the 3809 regulations have been on the books, that is exactly what BLM has done, and Nevada’s mining program stands out as a clear example.

In the proposed rule, as in the predecisional drafts, BLM is now seeking to tread heavily in environmental areas Congress said were off limits.

Response: BLM does not contend that it is required to prevent all degradation. Nor would such an effort be practical in any reasonable regulatory scheme. But since “unnecessary or undue degradation” was not defined in FLPMA, what is due and necessary degradation is left for the agency to define through a regulatory program that considers mining technology, reclamation science, and site-specific resource concerns. BLM disagrees with the comment that unnecessary or undue degradation does not consider the effects of mining on ground water, surface water, or other environmental media. FLPMA, at section 102(a)(8), states in part that, “the public lands be managed in a manner that will protect the quality of... ecological, ...environmental, air,...[and] water resource...values...” The FLPMA mandate to prevent unnecessary or undue degradation includes degradation of water resources or of any other resource on the public lands. BLM has the authority to regulate operations on public land with consideration given to the effects an operation may have on any of these resources. In general, BLM relies on operator compliance with state or federal media-specific standards and programs to meet this objective. But BLM can also require operators to incorporate protective measures for environmental media into their operating and reclamation plans.

- 5.13 **Comment:** The WMC’s June 1997 comments on reclamation of abandoned mines remain unanswered. Although the Secretary’s January 6, 1997 memorandum does not contemplate changes to the 3809 regulations to create incentives for reclamation and remediation of abandoned mines, beneficial social and economic impacts on the local, regional, and national levels could accrue from selected changes. The WMC believes that regulatory changes stimulate cleanup of abandoned mines would significantly enhance mineral exploration levels without compromising the high level of environmental protection and reclamation success realized under the present regulatory system. The WMC strongly urges BLM to expand the scope of the draft EIS to evaluate revisions to the 3809 regulations to encourage and facilitate environmentally responsible mining and reclamation of abandoned mines.

Response: The 3809 regulations provide requirements for locatable mineral operations under the mining laws where an operator is proposing or conducting operations. Including in the regulations requirements for reclaiming abandoned mine lands that predate the 3809 regulations is outside the intended scope of this rulemaking. BLM believes that it would be inappropriate to expand the scope of the rulemaking to address both abandoned mines and those with a viable operator, under a single set of regulations because of the unique circumstances of the two situations. With abandoned operations remediation of existing problems, sometimes decades after the operation was conducted, is the issue. But active operations offer an opportunity to address environmental concerns upfront during project planning and incorporate protective measures into the design, operation, and reclamation phases. The feasibility of developing performance standards

that apply to both situations is doubtful.

- 5.14 **Comment:** The Secretary of the Interior should take his enforcement authority under FLPMA and put it into action under the proposed regulations. BLM should be required to issue cessation orders and revoke permits when certain infractions or violations occur.

Response: The final regulations allow BLM to deny a Plan of Operations that would result in unnecessary or undue degradation or revoke a Plan of Operations under section 3809.602 for failure to comply with an enforcement order, or where there is a pattern of violations. The regulations also provide for criminal and civil penalties with fines of up to \$5,000 per violation. BLM does not want believe the regulations should require mandatory cessation orders for certain infractions because of the need to consider the circumstances of each case before determining that a cessation order is warranted.

- 5.15 **Comment:** Citizens and tribes should have the right to petition for inspection and enforcement to spur BLM into fully implementing its FLPMA obligations.

Response: Individuals can presently request that BLM conduct inspections and can obtain copies of inspection reports.

- 5.16 **Comment:** The draft EIS has not established a need or statutory basis for the proposed regulations. FLPMA's directive to prevent unnecessary or undue degradation is a subjective nonquantifiable concept. As currently interpreted, this directive has led the United States toward effective environmental mining regulations that lead the world. The draft EIS does not identify deficiencies in the current regulations for hardrock mining on federal lands. Regulation is at present sufficiently protective and restrictive to protect the surface from "unnecessary or undue degradation" as defined in FLPMA. The hallmarks of the current 3809 regulations are flexibility and reasonableness—characteristics that have served the mining industry, BLM, and the public well in assuring economically and environmentally sound mineral development. The draft EIS must state the problems BLM is trying to address in order to comply with NEPA.

Response: FLPMA does not define "unnecessary or undue degradation." The 3809 regulations do that. The purpose and need for the regulations and the issues identified for consideration are described in Chapter 1 of the draft EIS. The finding and recommendations from the NRC report (NRC 1999) on changes that should be made in the regulations have been included in the final EIS.

- 5.17 **Comment:** Applicability of subpart 3809 to unclaimed land. Groups oppose applying subpart 3809 to unclaimed land. The proposal improperly treats such lands as having valid claims. The proposed rule would codify the industry position. A decision to allow mining on such lands is discretionary and not based on property rights. BLM should base its decisions regarding mining operations on unclaimed lands on FLPMA's multiple use

mandate rather than treating operations on such lands as equivalent to operations on lands where operators have property rights under the Mining Law. 43 CFR Subpart 2920 should apply, not subpart 3809. Subpart 2920 does not authorize the exclusive and permanent use of public lands. Increased costs of subpart 2920 might result in lower grade ores not being mined. Will BLM's interim directive be extended when it expires in September 1999?

Response: Approval under the 3809 regulations cannot be used to create property rights where none previously existed. The purpose of the regulations is to review the operation for unnecessary or undue degradation, not to adjudicate or convey rights under the Mining Law. We agree that the decision to approve mining operations on unclaimed lands is governed by FLPMA's multiple use mandate. Using the 3809 regulations to review proposals on excess mill site acreage lands is appropriate, however, because the performance standards and review procedures for this type of activity are detailed there. The BLM policy directive on processing Plans of Operations where there may be excess mill site acreage has been renewed.

- 5.18 **Comment:** At the time the rules were adopted in the FLPMA 1976 act, the requirement was not to burden the small miner with "confiscatory" bonding or undue impairment to the point that mining was no longer feasible. That was called unreasonable enforcement of rules and the taking of capital to mine through bonding, a hardship that took the operating capital from a small-entity operation.

Response: Since 1981 BLM has documented more than 500 cases where operators, most at the Notice level, have abandoned their operations without performing the required reclamation. BLM now believes that bonding is needed to ensure performance of reclamation. The bonding provisions have been structured so that the amount of financial assurance can be incrementally posted and released to correspond with the on-the-ground disturbance or the performance of reclamation. This provision should keep the impact to operating capital at a minimum while promoting performance of reclamation.

- 5.19 **Comment:** BLM, in the Proposed Rule under Section II, "What is the Background of Rule making?" quotes the authority granted by Congress to the Secretary of the Interior, by regulation or otherwise, to take any action necessary to prevent unnecessary or undue degradation of public lands. "Public Lands" are defined in FLPMA (in pertinent part) as "any land interest in land owned by the United States...and administered by the Secretary of the Interior through the Bureau of Land Management..." see 43 U.S.C. 1702. In part this is correct, but BLM failed to include the first paragraph of 1702 Definitions: "Without altering in any way the meaning of the following terms as used in any other statute, whether or not such statute is referred to in, or amended by this Act, as used in this Act..."

Response: Repeating the lead-in statement is not necessary. It simply says that if the same terms are used in other legislation, that these definitions do not alter their meaning in those other statutes. Since the 3809 regulations are issued under FLPMA, the FLPMA definition of public lands apply.

- 5.20 **Comment:** I suggest that the 3809 regs don't properly incorporate FLPMA's requirement of suitability analysis, which is the multiple use mandate that governs BLM activities on the public land, and regulatory activities. FLPMA requires BLM to balance competing resources to determine what is in the best interests of the American people. And to do this BLM needs to determine the benefits of a proposed activity and balance that against the impacts on other competing activities, including water quality, recreation, wildlife habitat, and so forth. And also, FLPMA has an eye toward preserving public land resources for future generations. Now, this mandate alone suggests that BLM should do everything it can to protect public land values for future generations, such as require the most up-to-date technology to minimize—in fact, not minimize but prevent undue degradation of the public land. So given those concessions that BLM appears to be making to the mining industry, that at the same time, the agency should require the most up-to-date, best available technology to control and threats to public land values. And again, that sort of approach is underlined by FLPMA's attention to preserving land value for future generations.

Response: BLM uses the land use planning process under section 202 of FLPMA to determine the long-term management of lands, balance competing resource concerns, and decide if any areas should be withdrawn (determined unsuitable) from operation of the Mining Law to protect other resources. Once an area is selected for withdrawal from the Mining Law, a withdrawal is processed under section 204 of FLPMA. The 3809 regulations are applied where the area is open to operation of the Mining Law, or if closed, there are valid existing rights. The regulations are not intended to be a vehicle for suitability determinations. BLM has added a requirement in the final regulations to the definition of unnecessary or undue degradation that protects significant resources from substantial irreparable harm if identified during review of a proposal. But this definition does not replace the need for land use planning or mineral withdrawals to protect significant resource values.

- 5.21 **Comment:** Even without the limits placed on BLM in section 357, we believe that neither the Federal Land Policy and Management Act of 1976 nor any other authority grants BLM the power to issue the regulations as proposed. What it could not do without the added restrictions of section 357 it certainly cannot do with those restrictions. In addition to a general lack of authority to promulgate the 3809 proposal, we also believe that Congress' specific and direct commands in section 357 further restricting BLM's authority to issue regulations related to 43 CFR Subpart 3809 independently demonstrates that the proposed regulation is not authorized by law.

Response: The final regulations have been changed to address the requirements of section 357 and are not inconsistent with the recommendations in the NRC report. For the reasons expressed in this EIS and in the preamble to the rules, BLM concludes that the rules are lawfully within BLM's authority.

5.22 **Comment:** These proposed regulations do not seem to be based on 'unnecessary or undue degradation,' but conflict with the 1970 Mining and Mineral Policy Act and the 1980 National Materials Policy Research and Development Acts, because your preferred alternative would not only inhibit most small-scale operations, but also keep new people from wanting to get into prospecting and mining to begin with.

Response: The final regulations, with the addition of the NRC recommendation that all mining submit a Plan of Operations, would have a definite impact on the small miner who works on an individual basis. Unfortunately this cannot be helped because the small, Notice-level, mining operations create a disproportionate share of the abandonment and compliance problems. A 1999 survey of BLM field offices reported more than 500 abandoned 3809 operations where BLM was left with the reclamation responsibility. Most of these were Notice-level operations. BLM believes the changes to the 3809 regulations are needed to address this problem, prevent unnecessary or undue degradation, and provide for environmentally responsible mineral operations as directed in the 1970 and 1980 policies.

REGULATORY FLEXIBILITY ANALYSIS

6.01 **Comment:** The Small Business Administration (SBA) commented that the proposed regulations would be a “massive assault on profitability within the industry” (p. 7, SBA letter) and that the “vast majority of miners operate at the very edge of profitability.”

Response: SBA based its conclusion on 3 years of tax data collected by the Statistics of Income Division (SOI) of the Internal Revenue Service (IRS). SBA’s analysis suggested that if “small” were defined as an entity owning assets valued at \$5 million or less, then the average profit for these entities was \$0 or less over the 1991-93 period. SBA’s analysis is substantially incomplete in important respects and cannot be used to evaluate the mining industry as a whole or any particular subcategory of the industry.

First, SBA requires that the Regulatory Flexibility Analysis for BLM’s rule to analyze impacts based on *employment*, not asset size. Second, issues arise in attempting to use tax data to analyze impacts that suggest that any analysis based on tax data is flawed. SBA itself acknowledges that tax data must be used with caution (see pages 18 and 67, SBA, 1998). [also look on SBA’s web site] Some of the difficulties that make the use of tax data problematic include the following:

Net taxable income is a poor measure of economic income (or profit) because it includes special deductions, adjustments, and preferences that corporate entities whose main activities are mining are permitted to take. Including these items obscures the true economic income (or profit) of an industry. For the mining industry, the difference between taxable income and economic income can be significant because of the ability of firms to take advantage of mining-specific tax preferences and adjustments. During the 1990s net taxable income was often less than 50% of economic income for copper, lead, zinc, gold, and silver mining corporations.

All entities have a strong incentive to reduce their net taxable income to the greatest extent possible to minimize their tax liability. There are many ways to accomplish this by taking advantage of certain aspects of the tax code that allow deductions and tax preferences. Small businesses in particular are known to take advantage of particular aspects of the tax code that reduce net income. For example, small businesses may pay relatively large salaries to their owners and take other deductions that could have the effect of reducing their taxable income below zero.

As a general rule, about 50% of all businesses are not profitable in any given year. For example, based on SOI data, more than 40% of the manufacturing entities had negative net income in 1996. Copper, lead, zinc, gold, and silver mining corporations are generally consistent with the record for manufacturing entities, with more than half of the returns in each year during the 1990-97 showing negative net income. These statistics do not mean, however, that firms with negative net income were unprofitable or that the

industry is on the verge of collapse. But because tax data does not track individual firms over time, it is impossible to determine the extent to which the same entities had zero net income in any given set of years during the period.

Over 50% of the corporate tax returns filed by entities identifying themselves as copper, lead, zinc, gold, and silver mining corporations also had zero gross receipts over the 1990-1997 period. This suggests that these firms may not have been actively engaged in mining at the time, perhaps for a variety of reasons. That a firm has zero gross receipts or negative net income in a given year, or set of years, does not imply that the firm is unprofitable or on the verge of bankruptcy. Years of negative net income may be years in which capital investments are being made or in which other large expenses are incurred. For mining in particular these years might be preproduction years, postmining or reclamation years, years in which large capital investments are being made, years in which commodity prices are relatively low, or years in which the firm reduced the level of its activities for a variety of other reasons. Tax data represents a snap shot at a particular moment. Ideally, one would want to examine the same set of firms over a specific period or a relevant cycle. The tax data used by SBA does not allow this.

Tax data will not track economic impacts for individuals, partnerships, and subchapter S corporations. Subchapter S corporations and partnerships are subject to tax only at the individual level where gains and losses of any activity can be used to offset each other.

SBA (The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies, 1998, p. 17-18) discusses the use of criteria to determine “significance.” SBA identifies several examples where federal agencies have used cost-based criteria. SBA goes on to state, “Moreover, over 60 percent of small businesses do not claim a profit and do not pay taxes; therefore, an agency would not be able to apply a profit-based criterion to these firms.” This point is particularly relevant for exploration activities.

6.02 **Comment:** The rule would have a significant impact on a substantial number of small entities.

Response: BLM agrees that the final rule would have a significant impact on a substantial number of small entities. But given the objectives BLM seeks to achieve and the recommendations in the National Research Council report (NRC 1999), these impacts cannot be avoided.

6.03 **Comment:** BLM should separately consider the impacts of the proposed rule on independent geologists and small exploration companies.

Response: The proposed regulation would not affect individuals or entities engaged in casual use. At least a portion of the exploration undertaken by independent geologists and small exploration companies would fall into this category of use. Data are not readily

available to quantify the portion of “casual” and “noncasual” exploration. The proposed regulation could adversely affect persons or entities that are now engaged in Notice-level activities and that under the regulation would be required to file a Plan of Operations. The extent of the effects would depend on the nature and magnitude of the activities. In the extreme case where persons or entities are engaged in mining for “lifestyle” reasons, the requirement to prepare a Plan might preclude their involvement in future mining or substantially reduce the scale of their mining.

It is difficult to evaluate the potential impact on subcategories of occupational categories, such as independent geologists, because consistent sources of data on occupational categories not readily available. This lack of data makes the causal link between the prospects for occupational groups and the potential impact of the regulation on those groups difficult to systematically evaluate. Note that if independent geologists are involved in exploration that is categorized as “casual,” then the proposed rule would not affect their activities.

But some data on the numbers of persons in mining- and exploration-related occupations is available. The most recent data from Department of Labor, Bureau of Labor Statistics (BLS) shows that in 1996 about 47,000 persons identified themselves as geologists, geophysicists, and oceanographers. This number is projected to increase by about 15% by the year 2006. Of those in the occupational category in 1996, 15% or 7,050 reported being self-employed (this compares to 14% self-employed for all occupations in 1996). BLS projects that the number of excavation and loading machine operators will grow from 97,000 in 1996 to 107,000 in 2006. About 19%, or 18,000 of these people were identified as self-employed in 1996. BLS is projecting that the number of mining engineers will remain constant at 3,000 between 1996 and 2006. The number of people identified as mining, quarrying, and tunneling occupations is projected to decline from 16,000 in 1996 to 12,000 in 2006.

These data do not allow one to infer how the regulations will affect the numbers of people in these occupational categories, or the nature and magnitude of their work. In addition, because these data are national in scope and not specific to the affected region, as well as including people not involved in hard rock mining, they over estimate the number of people in these occupations that might be affected by the regulation. If one focuses on self-employed geologists, geophysicists, and oceanographers—estimated at 7,050 nationally in 1996—and consider that only a portion of these people would be involved in mining on public lands, the number of potentially affected people is relatively small.

Some other information on the extent to which independent geologists are employed in the mining industry may be obtained from the State of Nevada’s “Nevada Exploration Survey 1998.” This survey is not necessarily representative of the entire U.S. hardrock mining industry, but does probably capture some of the trends in Nevada. Table 1 data from the companies that responded to this survey (the response rate has generally been

about 35% in each year over the 1994-98 period) shows that the number of geologists has fluctuated somewhat over the 1994-98 period, with employment in 1998 being the lowest of the 5-year period. The extent to which the 1998 figure represents a trend is uncertain. Within the total, for companies having annual exploration budgets of less than \$1 million, the data shows a fairly constant level of employment in Nevada and the United States. for 1994-97, with reductions in 1998. If the 1998 employment levels continue, they would represent about a 35% reduction from 1994. To the extent that the 1988 data represent a trend, this trend has developed independently of BLM’s regulation.

The extent to which civil penalties may affect a small business is difficult to determine. All businesses are required to have insurance. The liability changes for small businesses—such as contract geologists—should be minimal.

Table 1. Geologists Employed in Nevada and the United States					
Company annual exploration budget	1994	1995	1996	1997	1998
< \$1 mil					
Nevada	74	30	24	38	27
Rest of U.S.	49	10	na	na	40
> \$1 mil					
Nevada	248	239	249	271	187
Rest of U.S.	135	139	na	na	40
All respondents					
Nevada	322	269	273	309	214
Rest of U.S.	184	149	na	na	80
Source: State of Nevada, Commission on Mineral Resources, Division of Minerals, “Nevada Exploration Survey 1998,” page 8.					

6.04 **Comment:** The Small Business Administration (SBA) definition of “small” used for the Regulatory Flexibility Analysis (RFA) (which defines an entity employing 500 or fewer employees as small) is not suitable for evaluating the impact of the proposed regulation on small entities. BLM’s analysis of “multi-establishments” is inappropriate for an RFA analysis.

Response: BLM agrees with the part of this comment related to use of the SBA size standard. The RFA analysis requires BLM to use SBA’s definition of a small mining entity, with is based on the 500-employee definition. Because BLM wished to present more information to the public on the potential impacts of the regulation on small entities, BLM also analyzed the impact of the regulation for a subcategory of firms employing 19

or fewer. Many mining companies are multi-establishment. The most suitable approach to evaluating impacts is on a business-level rather than an establishment-level basis. Assuming that every Notice-level operation represented a unique business would clearly over estimate the number of potentially affected entities, since many entities hold multiple Notices. BLM's RFA assumed that *all* metal mining business—as identified by Census data—were potentially affected. In the final RFA, BLM has used more recent data from the 1997 Economic Census and has assumed that each Notice-level operation represents a potentially affected entity. In the interest of informing the public of the potential impacts of the regulation, that many mining companies have significant cash flow and assets should be recognized. In providing this information BLM did not avoid or misinterpret SBA's size standard.

- 6.05 **Comment:** BLM did not adequately consider what constituted a “significant impact” on a small entity. The level of significance criteria used in analysis—an increase of 3% or more in operating costs—is inappropriate. Significance should be associated with a measure of profitability. BLM also improperly focused its analysis of “substantial” not on the “number” of entities as the RFA direct, but rather on those entities’ percentage of “value-added” for the mining industry and their percentage of the total employment in the mining industry. BLM should also have considered the impact on entities that provide goods and services to the mining industry.

Response: Determining the level of significance is subjective. Cost-based measures are appropriate in many instances and are often used in RFAs. One reason cost-based approaches are used is that information on profits may be difficult to obtain on a consistent and accurate basis. Profits—especially those for small businesses—can be affected by variables such as salaries paid to owners, taxes, and other business expenses. To a certain extent, it is in the interest of business owners to combine these variables so as to minimize income and thus profits. This said, the mine models—except for the exploration models—in the final analysis include impact estimates based on estimated profits. Cost-based measures are more appropriate for exploration activities because these activities do not generate profits in the same way as might be generated by an ongoing active mine.

BLM evaluated “significance” from estimates of cost changes resulting from the regulation. This is a standard technique. BLM evaluated “substantial” on the basis of the number of entities potentially affected by the regulation. BLM presented information on value added and employment to give the public more information on the nature and size of the potential impacts.

- 6.06 **Comment:** The requirement to obtain a bond to operate under a Notice or Plan will drive most small miners out of business.

Response: The requirement to obtain a bond will represent an increased cost for miners

who are not currently bonded. The extent to which this requirement will “drive most small miners out of business” is questionable. If their activities constitute “casual use,” many small miners will not be subject to the bonding requirement. Whether a small miner remains active depends on the nature and size of the mining activities, prices, management sophistication, and the quality and quantity of the resource involved. BLM notes that several states have bond pools to help small miners obtain reclamation bonds.

6.07 **Comment:** Many small miners would have trouble preparing a Plan to meet the requirements of the proposed regulations.

Response: On the basis of its experience, BLM believes that small miners could prepare a Plan if so required. Many small miners now operate under Plans. For example, miners—many of them small—in the California Desert Conservation Area operate under Plans. BLM will help miners prepare Plans if they cannot do so. BLM will continue this practice under the new regulations.

6.08 **Comment:** Small miners would not be able to comply with the increased monitoring requirements of the proposed regulation.

Response: Other state and federal agencies impose monitoring requirements, and BLM is requiring little monitoring that would not have to be undertaken anyway. Monitoring programs will not be of a “one size fits all” variety. Small mines will engage in small monitoring programs. In addition, many “small” miners are technically sophisticated and would not have trouble meeting the monitoring requirements.

6.09 **Comment:** BLM has done little to minimize the compliance burden on small miners. BLM needs to consider other alternatives that are less burdensome to small miners. More effective administering and implementing of the existing 3809 regulations with limited, targeted rulemaking aimed at filling discrete existing regulatory gaps could achieve BLM’s objectives.

Response: BLM has attempted to minimize the compliance burden on small miners, to the extent that minimizing any such burden would not compromise meeting the objectives of the regulation. The SBA definition of “small” includes many large mining companies that would not have trouble meeting the requirements. BLM recognizes that the compliance burden on small miners would increase and could preclude mining under some circumstances. Given the recommendations in the NRC report (NRC 1999) for the Notice/Plan threshold, compliance costs are likely to be relatively higher for small miners.

6.10 **Comment:** BLM inappropriately created subcategories of small entities to minimize the potential impact of the proposed regulation.

Response: BLM did not inappropriately create subcategories in an attempt to minimize the impact of the proposed regulation. BLM used the appropriate employment category identified by Small Business Administration for mining. We did analyze the impacts on a subcategory of entities employing 19 or fewer people because we believed that this information was relevant and of interest to the public. In the final RFA BLM also analyzed the impact of the rule on the universe of Notice-level activities. Although data is not readily available to link employment levels and Notices, Notice-level activities are clearly at smaller scale than Plan-level activities.

- 6.11 **Comment:** Small entities would potentially be held responsible above and beyond the amount supplied by any bonding. In many cases, such costs would bankrupt small operators, effectively discouraging them from considering any new mining activity.

Response: BLM disagrees. The regulations merely made clear what miners are already responsible for. No new risks were created. Entities that are properly bonded and fulfill the terms of their permits and reclamation requirements will not be liable for civil penalties.

- 6.12 **Comment:** The proposed regulation would result in gold production in Alaska being severely curtailed, even if proposed regulation increased costs by 5%. A 5% increase would switch some mines from profitable to unprofitable.

Response: The regulation could result in reductions in gold production on BLM-managed lands in Alaska, but the extent to which this may occur depends on commodity prices, the geology of any specific deposit, the efficiency of the particular operation, the opportunity costs facing smaller operators, and any regulatory costs. But the same commenter goes on to state that "...production in existing gold mines is likely to continue in mines where prices remain higher than variable costs... ...these Alaskan mines would remain in operation for a while" (p. 29 of comment letter). BLM does agree that if variable per-unit production costs exceed per-unit commodity prices, then operations would indeed switch from profitable to unprofitable. But the extent to which this occurs also depends on how one defines "variable costs." For many small miners, labor and capital costs may be minimal because miners are not paying themselves wages and are relying on used equipment that they own or borrow. For operators with these characteristics, mining may be less of an occupation than an activity undertaken during a particular part of the year to supplement other sources of income.

To a large extent, the permitting costs that would be imposed by the regulation are in the nature of one-time fixed costs. In an active ongoing mine these costs would normally be amortized over the life of the operation. But, depending on the amount of these fixed costs, for operations that make annual decisions on whether or not to operate (e.g. small placer miners), these costs could represent a substantial barrier to initiating mining. Whether these fixed costs represent an actual barrier depends on commodity prices, ore

grade, and a miner's operating efficiency. For the medium-sized placer operation modeled by BLM, annual with regulation profits (assuming that gold is priced at \$250 per ounce)—not accounting for the fixed permitting costs—were estimated to range from \$47,000 to \$130,000, depending on the ore grade. For the small placer mine annual profits were estimated to range from \$16,000 to \$57,000 (also depending on ore grade and assuming gold is priced at \$250 per ounce). These results suggest that there is some margin for meeting the fixed permitting costs, especially if they are relatively low (e.g., ~\$5,000-10,000). But the results also suggest that in some situations the fixed costs could present a substantial barrier to entry. If operators do not have enough capital (or can't borrow or access such capital) to cover the one-time fixed costs, they may be unable to obtain the needed permits and thus unable to mine on BLM lands. The extent to which this situation would occur would depend largely on the amount of permitting costs.

A factor that could mitigate the impact of the regulation on mining in Alaska is the ongoing process of land selection by the state. Claimants on lands that were or will be selected by the State of Alaska have the option of maintaining a federal claim or switching to a state claim. BLM's final EIS assumes that virtually all existing placer mining in Alaska would eventually move off public land. The situation is as follows:

- Federal claims on BLM nonselected lands will remain with the U.S.
- Federal claims on Native selected land will remain with the U.S. until the land is conveyed. The timing on this is uncertain.
- Federal claims on state selected land will remain with the U.S. until the land is conveyed to the state *and* the claimant transfers the claim to the State.
- Federal claims on state land will remain with the U.S. until the claimant transfers the claims to the state.

6.13 **Comment:** The RFA used 1992 data as the base for analysis and contained a mix of data that is not comparable.

Response: The RFA used data from the 1992 Mineral Census, which provided nationally consistent data on the mining industry. A nationally consistent data source is needed for a regulation that potentially affects an industry operating in many states. The final RFA uses more recent data from the 1997 Economic Census. The data sources used in the analysis also provide a consistent source of information with which to evaluate the impacts of the regulation.

6.14 **Comment:** The potential effects of the proposed regulation cannot be extrapolated from looking at gold mining.

Response: The analysis is designed to present information on a very broad basis about the potential economic effects of the regulation. It is not readily possible to model every single type of mining activity, in all locations, in the affected region. Gold is a suitable proxy because it represents a significant portion of the total value of locatable mineral

production in the study area. In 1996 gold represented 87% of the total value (see the draft EIS, page 197).

6.15 **Comment:** The RFA used a 10-year time frame for analysis; the draft EIS used 20 years.

Response: There is no conceptual or legal requirement that the draft EIS and the RFA use the same time period of analysis. Given that both analyses present the annual impacts of the regulation, the different periods of analyses do not affect the results of the analysis.

6.16 **Comment:** The analysis neglects the impacts of bonding on small miners.

Response: BLM's initial analysis did examine the impact of bonding on small miners. BLM explicitly included bonding costs in the mine models and discussed the use of bond pools.

6.17 **Comment:** The Department of the Interior does not understand the relationship between small miners, small exploration companies, junior minerals companies, and major mining companies. The initial RFA assumes that most exploration is conducted by the large mining companies. Further, any impact that delays or reduces exploration has a direct bearing on the timing of new mines. For example a 5% reduction in exploration might mean a 100% reduction in new mines during the analysis period.

Response: The initial RFA modeled a small Notice-level exploration operation and estimated the cost increases associated with these activities. BLM made no assumptions that these activities would be conducted solely by large mining companies. The final RFA models another exploration operation to provide more information on the potential impacts of the rule on these types of activities. The commenter does not present any analysis to support the assertion that a 5% reduction in exploration might mean a 100% reduction in mining. BLM recognizes the link between exploration and future mining (and the analysis has been altered to elaborate on this relationship). An alternative hypothesis to the commenter's is that under the new regulation, exploration will be more likely to focus on areas or prospects where the probability of discovering minerals is highest. The commenter also seemed to assume that exploration reductions today implied production changes today. This is not the case. If exploration were to be reduced from some baseline level, it is unclear when (and if) such changes might translate into production changes.

6.18 **Comment:** The commenter states that BLM considered only mining operations that were extracting minerals under Plans of Operations.

Response: BLM considered and analyzed the impacts for both Notice- and Plan-level operations, including exploration. BLM has added two Notice-level models to its analysis.

6.19 **Comment:** There are at least 200,000 currently recorded mining claims on BLM-administered lands, and each claim represents a small miner that would be affected by the regulation.

Response: The RFA requires BLM to evaluate the impacts by employment size categories. For the mining industry, the relevant size standard is 500 or fewer employees. As of 1998, there were about 289,000 active mining claims. But the number of claims is a poor indicator of the number of potentially affected entities. For example, 1997 BLM data shows that there were 46,344 total owners of mining claims. Of this total, 37,232 individuals owned from 1 to 10 claims. Individuals also often hold multiple claims.

6.20 **Comment:** BLM's initial RFA failed analyze the impact on small miners in Alaska and that BLM did not consider the EPA data referenced in the analysis.

Response: BLM included a model of a small Alaska placer mine in the initial RFA. The final RFA includes changes to this model to more accurately reflect the costs of complying with the regulation. The analysis also includes another model of a small placer mine. The models are designed to show potential impacts on an average basis. While a model may show that a particular type or size of mine is uneconomic, in actuality a variety of factors—in addition to commodity prices—determine whether a given mine operates. For “small” mines these factors could include the extent to which operators pay themselves a salary and the extent to which they incur capital costs.

6.21 **Comment:** The proposed 3809 regulations would require almost all small miners to prepare operating plans for any and all mining activities on their claims. The cost to process thousands of additional operating claims would require a significant increase in funding. The Secretary of the Interior's failure to disclose whether the proposed rule would require significant additional funding is a significant failure, and that failure to disclose therefore renders the draft EIS and the regulations inadequate.

Response: The Executive Order 12866 analysis listed the other potential implementation costs facing BLM. The regulation is unlikely to result in thousands of additional Plans of Operations. Existing Notices can continue unchanged, assuming they are bonded within 2 years, as long as they remain within their authorized “footprint.” Where Plans are required, the level of detail required will be commensurate with the type and nature of the mining activity. This will reduce BLM's administrative burden.

6.22 **Comment:** BLM's economic analysis and its Initial Regulatory Flexibility Analysis (initial RFA) fail to consider properly the economic impacts that the proposed rule would have on small businesses.

Response: BLM properly considered the impacts on small entities potentially impacted by the rule. BLM analyzed the impacts according the employment size category

established by the SBA. BLM also developed several mine models to evaluate the impacts on different types of mining entities. BLM found that the impacts of the regulation are relatively greater for small entities.

- 6.23 **Comment:** BLM did not consider the impacts of the regulation on small miners, small companies, their suppliers, consultants, and their micro-communities.

Response: The final RFA properly considered the impacts of the regulation on small mining entities. The RFA does not require BLM to evaluate the impacts on suppliers, consultants, and micro-communities.

- 6.24 **Comment:** The NRC study (NRC 1999) adds more requirements on small entities as well as suggesting ameliorations for small businesses such as prospecting, small miners, small exploration companies, and suction dredging.

Response: BLM agrees that some of the recommendations in the NRC report would affect small entities to a relatively greater extent. To the extent that they are consistent with achieving the overall objectives of the rule, BLM has included measures to mitigate the impact of the rule on small entities.

- 6.25 **Comment:** Mine operators could be required to provide large cash bonds if a portion of the financial guarantee must be in a funding mechanism that would be immediately redeemable by BLM.

Response: Small miners are not required to put up cash bonds. Plans do not need to specify the form of the surety as long as the requirements of the Plan are met. In response to comments, BLM has dropped this provision from the final regulation.

- 6.26 **Comment:** The RFA requires that the changes proposed by BLM in the October 1999 *Federal Register* notice be analyzed for their impact on small entities and published in an initial RFA.

Response: BLM believes that the changes made to the regulatory proposal in response to the NRC study (NRC 1999) were within the bounds of the initial analysis. For example, BLM's initial analysis evaluated the implications of requiring a larger proportion of Notices to be bonded as well as the requirement that a proportion of Notices would be required to convert to Plans. For example, BLM's initial analysis assumed that 20% of all new Notices submitted annually would be required to convert to Plans. The analysis also assumed that all Notices would be required to be bonded.

- 6.27 **Comment:** The RFA prepared by BLM did not contain a description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small

entities.

Response: The initial FRA prepared by BLM analyzed the proposed alternative and discussed measures the agency took to minimize the potential impact on small entities. The initial FRA did not contain a detailed analysis of other potential alternatives because BLM believes that other alternatives would preclude achievement of the objectives of the rule. No regulation is not a realistic alternative given that a set of regulations currently exist. For the analysis, the correct baseline is not “no regulation” but the existing regulations. The initial analysis considered extensively the impact of the rule relative to the existing baseline. Leaving the existing regulations unchanged would preclude achieving the objectives BLM sought to achieve. The final EIS considered alternatives to the rule in detail. These alternatives were formulated as potential alternatives to the rule and each would achieve BLM’s objectives to a lesser degree than the rule. The impacts on small entities are analyzed in the EIS for each alternative. The final RFA references the alternatives considered in the final EIS. The final rule contains measures that will mitigate, to the extent possible, the impacts of the rule on small entities.

- 6.28 **Comment:** BLM did not make a reasonable and good faith effort, before issuing a final rule, to inform the public about potential adverse effects of the proposal and potential alternatives.

Response: As of this writing BLM has not yet issued a final rule. BLM believes that it made a good faith effort to analyze the impacts of the rule on small entities and to inform the public through the EIS process. BLM received many comments on its analysis that have been incorporated into the final RFA. BLM has carefully considered the extent to which the rule would significantly affect a substantial number of small entities and agrees with the commenters that the rule would have significant impacts.

- 6.29 **Comment:** The BLM initial RFA did not contain a description of the reasons the action by the Agency is being considered or a description of the projected reporting, record keeping, and other compliance and skill requirements of the proposed rule.

Response: The initial Benefit-Cost Analysis and the initial RFA contained a lengthy discussion of the need for the agency action. A discussion of the types of skills and record keeping requirements has been added to the final RFA.

- 6.30 **Comment:** In its initial RFA, BLM estimates that the proposed rule will affect only 20% of entities mining on public lands. There is no explanation for this conclusion.

Response: BLM based this assumption on its best professional judgment about the extent to which the rule would affect entities mining on public lands. To give more information on the potential impacts of the regulation, BLM’s analysis also analyzed the impacts under the assumption that 40% of the Notice-level activity would be affected and

the impacts under the assumption that 40% of the Plan-level activity would be affected.

- 6.31 **Comment:** BLM's analysis of the impacts of the regulation were based on production changes rather than on the potential cost changes facing small entities.

Response: The mine models in BLM's initial RFA analyzed the cost changes that might face miners as a result of the regulation. The final RFA includes more mine models to give more information on potential cost changes.

- 6.32 **Comment:** The draft EIS did not discuss the impacts of the proposal on small entities, nor did the regulation propose to monitor the effects of the proposed regulation on small entities.

Response: The draft and final EISs do analyze the impacts of the rule on small entities. For example, see the discussion of mine models. BLM does not believe that it needs to establish monitoring procedures for small entities by regulation.

ECONOMIC ANALYSIS AND THE UNFUNDED MANDATES REFORM ACT

7.01 **Comment:** The analysis did not fully consider the relationship between current exploration and future production.

Response: The relationship between the regulation and future exploration is complex. In recent years it is clear that exploration expenditures on precious metals have declined. Driesner (1998) surveyed 51 companies and reports a 32% decline in exploration expenditures in Nevada relative to 1997. Dobra (1999, page 6), in discussing the current trends in exploration, states,

“Exploration spending in the U.S. is projected to fall at current price levels both in total in as a percentage of the total. Based on these trends alone, it is not possible to conclude that the declining share of worldwide exploration expenditures projected for the U.S. is the result of a perceived increase in political risk in the U.S. There are those in the industry that have clearly raised this issue and, indeed, threats of royalties and increased regulatory burdens related to the acquisition of permits to conduct exploration on federally owned lands in the U.S. certainly play a role in companies’ exploration investment decisions. Moreover, it should be noted that the decline in exploration activity and development in the U.S. relative to other parts of the world began before 1996 when prices began to decline. Political risk considerations simply exacerbate an already weak market...”

7.02 **Comment:** Not a single exploration activity will be viable if costs increase as projected in the BLM analysis (Dobra/Evans, p.30).

Response: BLM’s initial analysis modeled a very simple exploration activity. The final analysis includes an additional exploration model designed to illustrate the impacts on a very small exploration effort. The permitting costs used in the initial model overstated the costs that typically would be incurred by most exploration activities. BLM agrees that if permitting costs *in every situation* were as stated in the model, mining companies would most likely invest much more selectively in acquiring exploration information. To the extent that exploration activities are undertaken by independent companies, their costs would increase and some activities might not be viable. In the revised analysis BLM models several exploration activities with different permitting costs. But “viability” depends on a variety of factors, some of which include the following:

- A distinction between “prospecting” and “exploration.” Prospecting involves the search for deposits. Exploration represents the evaluation of deposits once they have been found. The regulation is unlikely to affect prospecting.
- How a “successful” exploration effort is defined.
- How a particular exploration project fits into the mining company’s portfolio of projects and exploration planning.

- The period over which “viability” is considered. Exploration typically involves long lead times, and financial returns tend to be uneven from year to year. The productivity of exploration needs to be evaluated over relatively long periods, say 15 years.

- 7.03 **Comment:** The mine models used in the analysis underestimated permitting costs, did not include the costs of delays in complying with the proposed regulations, and used operating costs that were unrealistically low (58% of prices compared to the 48% used in the analysis). One commenter concluded that the proposed BLM regulations would double the regulatory burden over current levels and increase the average permitting time from 4 to 5 years.

Response: The mine models included estimated permitting costs from information collected by BLM during the preparation of the EIS. BLM believes that these costs are broadly representative of the permitting costs experienced by miners. BLM has developed several new models that attempt to portray the impacts of the regulation on a wider variety of types of mining operations with various permitting costs. Delays. BLM recognizes that delays in receiving a permit can be costly. But commenters focused on the *gross* costs of delays and did not present a complete picture of the circumstances associated with delays. A “delay,” assuming that the Notice or Plan is complete when it is submitted (which may not be the case), could imply forgone minerals production *and* forgone operating costs. In addition, during the period of the “delay” the labor and capital used in mining might be employed in other activities. Thus the *net* cost of a delay would be the returns earned by the labor and capital during the period of “delay” less the forgone returns that would have been earned had no mining “delay” been experienced. For an individual miner, the cost of the delay would be the wages, salary, etc. earned during the period of delay less the wages, salary, etc. that would have been earned as a result of mining. From a national perspective, if the delay does not appreciably reduce production, the conclusion is that there are no foregone opportunity costs for such lost production.

- 7.04 **Comment:** The analysis should have considered the implications of the proposed regulations under gold price scenarios where the price of gold is less than \$300 per ounce.

Response: The analysis now includes an estimate of the impacts of the regulation if the price of gold is \$250 per ounce.

- 7.05 **Comment:** Commenters questioned the assumption that only 5% of exploration activities would be affected by the proposed regulation.

Response: Changes to the level of exploration activities, as well as to other mining activities, are discussed in the final EIS. The estimates of magnitude of the change in minerals activity have been changed from the draft EIS to reflect the changes to the proposed regulation.

7.06 **Comment:** Commenters questioned the extent to which the proposed regulation would reduce the probability of “catastrophic” events.

Response: BLM recognizes that quantifying the change in the probability of a “catastrophic” event occurring as a result of the regulations is difficult given the site-specific nature of many mining issues. But relative to the existing baseline, the regulations will give BLM more and better information on which to base permitting decisions, greater enforcement powers, and a stronger bonding program. The combination of these factors will result in a small—but positive—probability that fewer catastrophic events will occur on public lands. Even very small changes in this probability can reap large environmental and economic benefits.

7.07 **Comment:** One comment raised several questions about the potential effect of the proposed regulation on placer mining (Dobra/Evans). This commenter questioned whether having to file a Plan would actually change the amount of streambed disturbed and asserted that one potential effect of the regulation would be to keep miners in existing workings longer since these operations are already permitted.

Response: Under the existing regulations, having to file a Plan would not keep miners in existing gold placer workings longer. There is a finite amount of area to mine. Once an area is mined, there is not reason to remain in existing workings. The rate at which the area is mined is determined by physical capability but also such financial considerations as the price of gold and the return expected by the miner. Miners will remain in an area only as long as there are minerals to remove and they are making a profit. Even if the rate of material removal decreased, it is not clear that the magnitude and extent of the disturbance would change.

7.08 **Comment:** BLM received many comments stating that it had overestimated the economic benefits of the proposed rule (p. 2-29). The most detailed of these comments stated that BLM should have adopted restoration costs as the most suitable measure of the potential economic benefits. In addition, the analysis ignored recent noncompliance trends that would reduce net benefits under the proposed regulation; and did not establish a baseline from which to estimate benefits. BLM also received many comments stating that it failed to address costs potentially imposed on state, local, and tribal governments; did not evaluate the “total costs” of the proposed regulation, including costs of permitting delays; did not include the costs of all federal regulations or the incremental cost of the proposed regulation; should have used the cost of mitigating the damage caused by noncompliance as a measure of economic benefits; failed to consider the effect on jobs and international competitiveness of U.S. goods and services; and should not include environmental benefits of resources that BLM does not regulate or control. The Mercatus Center commented that if the regulation were associated with NEPA compliance costs of \$80,000 when going from a Notice to a Plan of Operations, and the Notice-level reclamation costs were about 1/4 of this, then the regulation would not pass

a benefit-cost test.

Response: BLM made a number of changes to its analysis in response to these comments. The most significant of these changes was to alter the analysis to remove the material that directly attempted to quantify in monetary terms the potential environmental benefits of the proposed regulation. The analysis still includes a substantial discussion of the potential environmental benefits of the proposed regulation as well as information to place the potential costs of the regulation in perspective. This change was made because it was determined that it is extremely difficult to monetize the potential environmental benefits of the regulation without site-specific information. This determination was made in light of the extensive data collection that would be required, the many potential sources of error that would accompany such estimates, and the programmatic nature of the proposed regulation, which does not easily allow analysis of the economic benefits of environmental improvements that significantly depend on site, operational, climatic, and other characteristics. The Executive Order 12866 analysis that accompanied the proposed regulation attempted to develop order of magnitude estimates of the environmental benefits of the regulation. BLM continues to view these estimates as adequate order of magnitude estimates of the environmental benefits of the regulation. But BLM also recognizes that the lack of site-specific and other information raised questions about the usefulness of this analysis. For these reasons we have revised this component of the analysis. This is not meant to imply that the regulation does not have significant environmental benefits, only that the benefits are difficult to quantify.

BLM's analysis included an example drawn from an economic analysis conducted to estimate individual's willingness to pay for cleaning up areas damaged by mining in the Clark Fork Basin. This information was provided to show that people place a positive value on cleaning up areas damaged by mining. The example was not presented as a benefits transfer exercise.

Despite the above discussion, the comments that focused on measuring environmental benefits deserve another response. Alternatives for measuring economic benefits values fall into two categories: behavioral and nonbehavioral. Behavioral methods use either observed behavior or indirect observation or expressed preferences (simulated behavior) of households and firms to link values to resource services. Nonbehavioral methods exclude the use of individuals' behavioral responses—e.g. visiting a substitute recreation site—in valuing resource services. These methods disregard the opportunity cost of expenditures used for replacement or restoration, thus omitting any role for behavioral changes or preferences. Individuals' willingness to pay for restoration of the resource may or may not be equal to the cost of replacement. From an economic perspective, the analyst attempts to value the losses in services from the natural resource. These values are tied to people's behavior or preferences. With a "use value" criterion note that damages are the sum of the values, without double counting, for all of the losses in services from the injury.

The use of restoration costs as a measure of economic benefit (or the value of environmental damage avoided by imposing the rule) depends only on the cost of restoring the lost services caused by the “injury.” In effect, the restoration cost criterion emphasizes physical relationships, a return to the level of services without the injury to the natural resources. The criterion requires detailed information on the physical, biological, and other technical features of the resource to understand how restoration could be achieved. With its physical emphasis, restoration costs do not explicitly consider people’s preferences or behavior in determining values. Implicitly, the approach assumes that people value environmental improvements as much as the cost of their restoration. When used alone, restoration cost is inconsistent with economic principles.

The restoration cost criterion attempts to measure the minimum amount of money necessary to restore the resource to the level of the services without the injury. This criterion assumes that the dollar amount needed for restoration is the dollar amount of damages. As least implicitly, the damages are assumed to reflect individuals’ values for the loss in resource services.

The basic objection to replacement cost is that it is an arbitrary valuation of natural resources that may bear little relationship to true social values. There is no guarantee that the replacement cost equals the amount that society is willing to pay for resource recovery. Other issues associated with the use of restoration cost as a measure of damages include the following:

The extent to which restoration is “adequate” or is accomplished to the baseline premining level.

The extent to which restoration costs account for interim losses that occur during period of mining.

The extent to which the correct “baseline” is used.

The reclamation cost information in one NMA comment appears to be drawn from a single reclamation plan approved for bonding by the USDA Forest Service. It is not clear whether these figures are representative of all hard rock mining activities, the extent to which the particular restoration activities resulted in a return of ecosystem function to the baseline premining level, the period over which ecosystem services were restored to this level, and what was the baseline level of ecosystem services. All of these issues would need to be addressed in the context of using restoration costs as a measure of the economic benefits of an environmental improvement. Data in a recently published report on bonding for hardrock mining in the West (Center for Science in Public Participation and National Wildlife Federation 2000) suggests that hardrock mining activities should be bonded for a *minimum* of \$5,000 per acre, suggesting that the commenters’ analysis may underestimate actual reclamation costs. In addition, at this level of reclamation only

minimal restoration may be accomplished.

NMA comment asserted that the most appropriate measure of the potential environmental benefits of the regulation was the cost of mitigating damage. This comment assumed that the best measure of damages consisted of the costs of reclaiming disturbed areas for which a notice of noncompliance had been issued. In general, restoration costs are likely to understate the potential economic benefits of the environmental improvements resulting from the regulation. This type of measure is most appropriate where there is information about the baseline, interim losses, and restoration period, and where there are no offsite impacts from the mining. Relying only on Notice-level noncompliance information is likely to underestimate the value of the potential damages because such reliance (1) does not consider the value of lost services and value of the services lost while ecosystem returns to the baseline level; (2) underestimates the number of situations where potential environmental damage is occurring because, in general, issuing a notice of noncompliance is a last resort for BLM and in many situations BLM may not issue such a notice of for various reasons; and (3) ignores the Plan-level activity. Data in *Public Land Statistics* (BLM 2000a) shows that in 1999 BLM reviewed 155 Plans of Operations.

Judging by the analysis in NMA comment, the commenter believed that the most appropriate way to evaluate and scale benefits is on a per-acre basis. It is not clear how to reconcile this with the economists' notion that individuals' willingness to pay is the most appropriate measure of benefits.

7.09 **Comment:** The benefit-cost analysis should have evaluated the estimated streams of benefits and costs using a 7% discount rate. The initial analysis used a 3% rate to discount benefits and a 15% rate to discount costs.

Response: The 3% discount rate used in the benefits analysis is supported by a number of detailed studies, including Freeman (1993). Indeed, Freeman states (on page 216), "I would feel comfortable using a rate of 2 to 3%, at least where the streams of benefits and costs accrue to people in the same generation." In the benefits analysis, BLM estimated benefits over a 10-year period. BLM believes that those benefits would accrue to people in the same generation.

While OMB Circular A-94 recommends a 7% discount rate, a 3% discount rate is supported by the economics literature for natural resource valuation (e.g. Freeman 1993). Federal rulemakings also support a 3% discount rate for lost natural resource use valuation (61 FR 453; 61 FR 20584). The revised analysis evaluates the stream of benefits and costs using a 7% discount rate, as well as the 3% and 15% rates used in the initial analysis.

7.10 **Comment:** The only benefits of the Proposed Action consist of reducing the failure to

reclaim disturbed streambeds. These benefits would be achieved by bonding requirements, not changes in the level of activities.

Response: The potential economic benefits of the regulation go well beyond failure to reclaim streambeds. Just considering streambeds, the extent to which bonding requirements would address these reclamation activities depends on the magnitude of the bond, the types and number of entities to which the bonding requirements apply, and the extent to which reclamation is required. Economic benefits result from changes in the level of mining activity. Lower levels of mining activity imply higher levels of environmental quality.

7.11 **Comment:** BLM made an error in calculating the water quality benefits (page 2-46).

Response: The text said “0.05%,” which is 0.0005. Using this figure would give the \$1.5 million result calculated by the commenter. The text should have said “0.5%, or 0.005,” which would give result stated in the text.

7.12 **Comment:** The analysis should state how many mining operations on public lands would cease to exist, the size of those operations, and the direct and indirect employment of those mining operations on a state-by-state basis.

Response: The IMPLAN analysis in the EIS estimated the distributional impacts of the regulation, including the direct and indirect impacts of the regulation. The mine models were developed to provide information on the magnitudes of impacts of various mining activities. Data is not readily available to estimate exactly how many mining operations would cease (or not begin) and the location of these operations.

7.13 **Comment:** The analysis should include the value of minerals that are forgone as a result of the proposed regulation.

Response: The economic analysis did account for these values. The conceptual analysis based on the shift in supply curves reflects the values in forgone mineral production. If the regulation does not result in eventual production changes, then there would be no forgone values to include. There may, of course, be changes in the distribution and extent of production. Total production of gold and other commodities has been steady or increasing in recent years. BLM notes that in the context of a benefit-cost analysis the gross value of any forgone production will overstate *economic costs* because the correct concept that is relevant is that of “producer surplus” (somewhat loosely defined as profits). Gross values overestimate producer surplus because they do not net out production costs.

7.14 **Comment:** The analysis considered only benefits that could be easily monetized.

Response: The Benefit-Cost Analysis issued with the proposed regulation did attempt to quantify in monetary terms the economic values of the potential environmental benefits of the regulation. The analysis did not, however, attempt to quantify nonuse values. Estimating nonuse values was determined to be too time consuming, expensive, and controversial. The final analysis also does not attempt to monetize the value of changes in environmental quality because we do not have site-specific data on the extent and magnitude of these changes.

7.15 **Comment:** The proposed regulations do impose an unfunded mandate on state, local, or tribal governments or the private sector of more than \$100 million per year.

Response: The regulations do not impose mandates on state, local, or tribal governments. The regulated entities are miners.

7.16 **Comment:** Do the proposed regulations impose unfunded mandates to the states?

Response: The regulations do not mandate that the states take over or implement parts of BLM programs but merely offer the states that option.

7.17 **Comment:** BLM has stated that the roughly estimated cost for these proposed regulations (to the government) would be between \$12.1 million to \$89.4 million. I propose that BLM get this money. Not to fund these proposed regulations, but to determine where problem areas are (if there are any) and help claim owners reclaim these problem areas. Such a program would create local jobs and would lessen the animosity between claimants and BLM. The money would be better spent on assistance and action than it would be on administrative cost to the government. Local government might supply community service labor. Mining organizations and environmentally concerned individuals could assist in this effort. This would be responsible land management. To implement these proposed regulations without considering this issue would be a disservice.

Response: The commenter is incorrect. The commenter mistakenly appears to believe that the cost to government would be \$12.1 - \$89.4 million, rather than these costs being overall economic costs to the Nation as stated in the analysis.

7.18 **Comment:** The costs generated by the Supply Curve shift (page 37) cause the government to estimate the cost to the industry of the proposed rule at \$89.4 million per year. There is no basis for this estimate, only assumption.

Response: The commenter is correct that the supply curve shift is based on the assumption that the regulation would cause at most a 5% reduction in mineral activity on federal lands. The justification and derivation for this assumption can be found in the final EIS.

7.19 **Comment:** The estimated costs of preparing environmental assessments (11280s) for all Notices would exceed any potential environmental benefits that might be gained as a result of such analysis. 11280s do not provide incentives for reclamation.

Response: The initial analysis modeled the costs of NEPA compliance in a simple manner for a selected group of mining activities. The models were not intended to represent every possible situation or every possible type of mining. BLM does not fully agree that costs of NEPA compliance would necessarily exceed the potential environmental benefits of undertaking such analysis (which the commenter assumes are equal to reclamation costs). The NEPA analysis is designed to elicit information that can be used to increase the probability that adverse environmental impacts can be eliminated or mitigated. Without this information BLM's decisions would be less informed and potentially could result in greater environmental damage than what otherwise might be the case. Costs of NEPA compliance for many Notice-level activities will not approach the upper boundary identified in the initial analysis. NEPA analysis is not a "one-size-fits-all" process. The required NEPA analysis will be suitable for the nature, scale, and scope of the proposed mining activities. BLM has revised the analysis to include more mine models with a range of NEPA compliance costs.

7.20 **Comment:** Executive Order 12866 requires BLM to assess "all costs and benefits of available regulatory alternatives, including the alternative of not regulating."

Response: In the economic analysis BLM analyzed the proposed alternative relative to the status quo. The analysis also examined several alternative approaches that were not deemed able to achieve the objectives of the regulation. The alternative of not regulating is not directly relevant because regulations currently exist to govern surface management. The draft EIS analyzed the impacts of allowing the states to assume much of the regulatory responsibility for managing mining on public lands.

7.21 **Comment:** The Unfunded Mandates Reform Act (UMRA) requires estimates of the effect of regulations on the creation of jobs and international competitiveness of U.S. goods and services. The U.S. hardrock mining industry has drastically curtailed its domestic mineral exploration and mine developments and has moved those activities to other countries, largely because of the mining and environmental regulatory climate in the United States. The analysis should consider these impacts.

Response: BLM does not believe that the regulation creates any unfunded mandates that would impact non-federal governmental entities. The Benefit-Cost Analysis addresses the economic costs of the regulation. The Final EIS and the Regulatory Flexibility Act analysis address the economic impacts of the regulation on a state and regional basis (including estimates of the impact of the regulation on the number of jobs). UMRA also contains consultation requirements. The upper end of the estimated impacts--should they occur--would obviously have a large impact on the U.S. mining industry. However, the

impact estimates are associated with a number of very strong assumptions that suggest they should be used with caution. BLM also consulted extensively with states and other non-federal entities during the development of the regulation. See the Preamble and Final EIS for additional details and for responses to comments submitted by state entities. BLM also made numerous changes to the proposed regulation to reduce the burden of the regulation on impacted entities and still achieve the objectives the rule.

ALTERNATIVES

No Action Alternative

8.01 **Comment:** The existing regulations work just fine to ensure the protection of our environment. The existing regulations are flexible and are accomplishing their stated purpose of preventing unnecessary or undue degradation and requiring reclamation of mine sites on public lands. This flexibility under the current regulations allows BLM to recognize the level of review needed for different activities. Currently, all mining on public lands is subject to numerous federal and state laws and regulations that require mining companies operate and reclaim sites in an environmentally responsible manner. As the draft EIS clearly documents, BLM already has adequate authority under the existing 3809 regulations. There is no need to go through an elaborate rulemaking process to achieve what the agency can already do through guidelines, policy decisions, and project-specific stipulations and requirements. No changes should be made to the existing regulations.

8.02 **Comment:** The current 3809 regulations do not adequately protect public health, welfare, and the resources of our public lands. An environmental regulatory program is ineffective if it fails to address issues that communities, companies, and regulators face at today's mines. There are a number of issues that the current regulations simply fail to address or anticipate. The No Action Alternative is unacceptable; none of the existing problems or impacts from mining would be resolved.

Response: We received many comments on the advantages and disadvantages of the current 3809 regulations. This alternative is the No Action Alternative, as required by NEPA. The No Action Alternative forms the baseline for analyzing the regulatory impacts of each alternative and is one response to the purpose and needs identified in the EIS.

State Management Alternative

8.03 **Comment:** The states are in a far better position to judge the impacts both environmentally and economically of what regulations are needed regarding locatable minerals. Based on the information provided in the draft EIS, Alternative 2, the State Management Alternative, is demonstrated to be the most cost efficient and protective of the environment. BLM should adopt Alternative 2 or find some compromise that relies more heavily on state standards and management.

8.04 **Comment:** Alternative 2, State Management, is not acceptable. BLM cannot abrogate its Federal Land Policy and Management and Act mandated responsibility to "take any action necessary to prevent undue or unnecessary degradation of the lands." Giving authority over public lands to the states would result in nonuniform application and weak

standards. Some states have extremely weak environmental protection and mine reclamation standards and laws.

Response: We received many comments on the advantages and disadvantages of Alternative 2—the alternative approach to meeting the purpose and need identified in the EIS by relying on existing state regulatory programs.

- 8.05 **Comment:** The draft EIS does not accurately present or analyze Alternative 2 as a reasonable alternative as defined by the National Environmental Policy Act. To assume reversion to pre-1981 management and no federal involvement in decisions is simply imaginary. Alternative 2 would have been better represented by a thorough examination of current state mining regulations with emphasis on state oversight for the programs.

Response: A summary of state regulatory programs is presented in Appendix D of the final EIS. The state regulatory programs are an underlying component of all the alternatives. The concept behind Alternative 2 is not to revert to pre-1981 management or to assume no federal involvement in decisions. Rather it is a recognition that many of the federal procedural requirements are triggered when a decision is required by BLM. Under the current 3809 regulations the approval of a Plan of Operations is considered a federal action, whereas the review of a Notice is not. Submitting a Notice does not require preparing a NEPA document, or conducting NHPA or ESA consultations. The idea behind Alternative 2 is to present a reasonable regulatory alternative to the proposed 3809 regulations where the role of the regulator would reside with other federal, state, and local agencies. BLM would function only as a concerned manager of the public lands.

Alternative 3, Proposed Action

- 8.06 **Comment:** Mineral exploration and development should be conducted in a manner that does not do unnecessary or undue damage to the environment, both on and off site, and there should be reasonable land reclamation after the mining use is finished. The proposed 3809 regulations accomplish these goals.
- 8.07 **Comment:** The proposed regulations are vaguely worded, onerous, and inflexible; duplicate existing regulations; and constitute an inadequate solution to a highly challenging set of circumstances. BLM has a directive to allow multiple land uses, including mineral development, on public lands. The proposed regulations attempt to eliminate impacts to the environment. To avoid or eliminate impacts would require eliminating mining altogether. The prescriptive standards appear to have been borrowed and modified in more onerous ways from the Surface Mining Control and Reclamation Act (SMCRA) regulations. The proposal is too restrictive to allow “mom and pop” operations and small mining companies to explore for and develop mineral resources on public land. The proposed regulations will place a heavy burden on the industry and BLM to implement with very little, if any, environmental benefit. In addition, the

proposal may jeopardize the existing relationship that has been developed among BLM, state agencies, and industry.

- 8.08 **Comment:** Certain provisions of Alternative 3, the Proposed Action, and Alternative 4 should be combined into another alternative that the mining industry would consider more realistic but would offer more environmental protection than the Proposed Action. The following components of Alternative 4 could render it unrealistic due to its economic impacts to mining operations: (1) applying regulation changes to existing operations, (2) the appeals process, and (3) pit backfilling and reclamation. Therefore, the corresponding components of the Proposed Action may be more acceptable to the industry and would not seriously affect BLM's ability to protect valuable environmental resources.
- 8.09 **Comment:** The Department of the Interior's rationale for believing the proposed regulation provisions are needed for responsible stewardship of public lands is well documented and discussed in Chapter 3, Affected Environment and Environmental Consequences, of the draft EIS. In particular, we are concerned about resources discussed in the sections on Water Resources, Vegetation, Riparian-Wetland Resources, Aquatic Resources, and Wildlife Resources, and we are concerned about projected impacts to these resources under the Proposed Action. In many cases these impacts are unacceptable and would not meet the requirements of other federal and state regulations, such as impacts to wetlands and riparian areas. Impacts predicted for Alternative 4 are less damaging to fish and wildlife resources.
- 8.10 **Comment:** The current draft rules need to be strengthened to prevent unnecessary or undue degradation of our public lands. The proposal contains loopholes and vague language, lacks specific standards, and fails to address fundamental issues such as ground water protection and perpetuating the use of the Notice concept. The proposal is inadequate to protect the public lands. The proposal should adopt a number of the Alternative 4 provisions, including the definition of "casual use" and "unnecessary or undue degradation," elimination of the Notice provision, state and federal coordination, Plan of Operations content, financial guarantee requirements, penalties, and specific performance standards—wetlands and riparian area protection, revegetation requirements, and fish and wildlife protection and habitat restoration.

Response: We received many comments on the advantages and disadvantages of the Proposed Action. This alternative is the agency's Preferred Alternative for meeting the purpose and need identified in the EIS. The alternative is presented as a balancing of the agency's multiple statutory responsibilities. The Proposed Action focuses on federal-state coordination and outcome-based performance standards and provisions to address specific regulatory needs, such as Notice bonding. The February 1999 proposed regulations has been changed in response to many public comments received on the draft EIS and draft regulations. The modifications, including changes to the definitions of casual use and unnecessary or undue degradation and elimination of Notice-level mining,

are presented in the final EIS.

Alternative 4, Maximum Protection

8.11 **Comment:** Alternative 4, Maximum Protection, is the best alternative for environmental protection. Some of the requirements for ensuring environmentally responsible mining include stringent environmental performance standards, environmental documentation, applying the regulation changes to existing operations, mandatory backfilling, greater enforcement provisions, and bonding for unplanned events. Alternative 4 requires what is the only acceptable choice: The full cost of mining should be borne by the operator, not the public. This alternative should be carefully considered versus BLM's Preferred Alternative.

8.12 **Comment:** Alternative 4 is unreasonable and would violate the letter and spirit of a number of laws, including Federal Land Policy and Management Act (FLPMA) and the Mining Law of 1872. Many of the requirements, including the performance standards and transition and appeal provisions, would make it impossible to mine on public lands. Alternative 4 goes far beyond BLM's authority to regulate unnecessary or undue degradation.

(A) BLM has no authority to "determining the acceptability of proposed operations" other than to work with the operator to develop a sound Plan of Operations including a reclamation plan.

(B) BLM has no authority to "required pit backfilling." Excavation is a necessary and vital part of the mining process and are therefore necessary and unavoidable.

(C) The elimination of Notices so that all disturbances greater than casual use would require a Plan of Operations is unwarranted. This decision is best made on a case-by-case basis on the local level.

(D) A requirement for conformance with land use plans is contrary to FLPMA. Some mineral deposits are not known to exist when Plans are written. Does this also mean that BLM land use plans that allow mining must be followed when the President or Secretary wants to withdraw an area from mining use? For example the two new national monuments designated in Arizona were open to mining under BLM land use plans. Now they are not. Will this provision make land use plans superior to political whims?

8.13 **Comment:** The only reasonable acceptable alternative is Alternative 4. But even this alternative does not go far enough in providing adequate long-term protection and consideration for cumulative impacts on surface and ground water resources.

Response: We received many comments on the advantages and disadvantages of Alternative 4, including whether BLM has the authority to propose such an alternative. This alternative approach to meeting the purpose and need identified in the EIS focused on designed standards to ensure the maximum protection of the environment.

Other Alternatives

8.14 **Comment:** The CEQ regulations require an EIS to “rigorously explore and objectively evaluate all reasonable alternatives” to the Proposed Action. The draft EIS failed to address a number of issues, concerns, and alternatives, including several reasonable alternatives to the proposal, all of which were suggested during scoping. BLM failed to consider and fully evaluate all reasonable alternatives to the Proposed Action. The draft EIS has explored only one truly reasonable alternative to the proposal—the No Action Alternative. The other alternatives explored (Alternatives 2 and 4) are unreasonable courses of action for regulating surface mining on public lands.

Response: In considering all reasonable alternatives to the proposed action, BLM focused on addressing regulatory issues determined by the agency and the public, including (1) coordination between BLM and state regulatory agencies, (2) Notice-Plan of Operations threshold, (3) defining performance standards, (4) financial assurance for performing reclamation, and (5) regulation enforcement and penalties for noncompliance. Although other relevant issues were considered, these five issues formed the basis for defining the alternatives to be analyzed in detail. The alternatives presented in the draft EIS, including Alternatives 2 and 4, represent what BLM considers a reasonable range of regulatory responses to the areas of concern identified by the agency and public. In response to recommendations presented in the National Research Council report *Hardrock Mining on Federal Lands* (NRC 1999) and public comments we received on the draft EIS, we added another alternative to the analysis. Alternative 5 is limited to the bold-faced recommendations presented in the NRC report. The alternatives considered but eliminated from detailed analysis are discussed in detail in the EIS.

8.15 **Comment:** The proposed rules seem to be reasonable, but they could be improved by adding the statement that 3-inch or smaller suction dredges are considered casual use, and that persons can do disturbance necessary to demonstrate a valid discovery without fear of being found guilty of trespassing.

Response: In 1993, the Interior Board of Land Appeals (IBLA) ruled (*Pierre J Ott, 122 IBLA 371 (1993)*; and *Lloyd L Jones 125 IBLA 94 (1993)*) that the use of a suction dredge is not casual use under the current definition. The provision on suction dredge use in the February 1999 proposed rules has been modified to provide for some small use of suction dredging under casual use. The modified provision is presented in the final EIS.

8.16 **Comment:** The existing regulatory system, which is effectively a combination of state and federal programs, works well. Certainly there have been problems in the past, and others may still exist. But any current problems can be addressed by proper implementing and administering of the existing regulations. These problems are of insufficient size to justify the extensive revisions proposed. The final EIS needs to analyze better implementation of the existing regulations.

Response: The EIS must consider the complete implementation of the proposed regulations and alternatives to fully consider the potential environmental impacts of each alternative. Efficient and effective implementation of the Surface Management program is a BLM concern.

- 8.17 **Comment:** BLM is perpetually underfunded. Adequate funding for its regulatory program is a major issue. The deficiencies with the existing regulations discussed in the draft EIS are mainly due to shortfalls in funding, staffing, and training. BLM does not appear to have analyzed its funding, staffing, and training needs under the current regulations. BLM must consider in the EIS the existing regulations with all needed resources and personnel.

Response: Public scoping comments and comments to the draft EIS requested that more alternatives be evaluated in the draft EIS, supplemental draft EIS, or final EIS. One of the main issues of concern was the analysis of the alternatives assuming adequate funding. This was, however, considered redundant because the EIS must consider the *complete* implementation of the proposed regulations and alternatives to fully consider the potential environmental impacts of each alternative.

- 8.18 **Comment:** BLM should adopt reasonable Notice-level bonding provisions. The other problems in managing the public lands can be effectively handled by properly implementing and funding the existing regulations. The final EIS needs to analyze an alternative that includes the existing regulations plus Notice-level bonding.

Response: Such an alternative addresses one of the five main issues of concern: ensuring adequate financial guarantees for reclamation. But BLM felt that an alternative limited to only Notice-level bonding did not sufficiently aid in defining the issues or provide a clear basis for choice among options by the decision maker and the public to warrant a stand-alone alternative.

- 8.19 **Comment:** BLM should adopt regulatory changes that are tailored to gaps in the current regulations. The proposed 3809 regulations go way beyond the problems BLM found during public scoping, the purpose and need discussed in the draft EIS, and the gaps recognized in the NRC report. The appropriateness and reasonableness of this alternative reflects the charge Congress gave NRC to investigate the adequacy of the existing state and federal laws and regulations to prevent unnecessary or undue degradation of the public lands. This alternative must be presented in the EIS with a suitable comment period.

Response: Following issuance of the NRC (1999) report, we provided the public with a 120-day period to comment on the proposed regulations and draft EIS, specifically requesting comments on issues and concerns that needed to be brought forth due to the

findings and recommendations found in the NRC report. The final EIS analyzes a new alternative—Alternative 5—which is limited to the recommended regulatory changes in the NRC report.

- 8.20 **Comment:** If BLM’s preferred alternative is selected, it will substantially increase BLM’s workload. BLM has failed to consider the very real possibility that the proposed rules will be adopted and the increase in funding needed to implement the regulations will not materialize. Such a likely scenario will have widespread negative environmental and economic impacts. The Proposed Action with no funding increase must be analyzed in the EIS.

Response: The EIS must consider the complete implementation of the proposed regulations and alternatives to fully consider the potential environmental impacts of each alternative. Adequate funding and staffing of the Surface Management program is a BLM concern. We will continue to work through the budget process to ensure adequate funding.

- 8.21 **Comment:** BLM failed to evaluate an increase in training and education alternative, which was suggested in the public scoping process. Such an alternative would rely on education and training of operators, particularly small operations, on what are the federal and state requirements, and encourage compliance. This alternative must be analyzed in the EIS.

Response: Educating users on the acceptable uses of the public lands is a critical component of implementing the surface management program under all alternatives. The EIS must consider the complete implementation, including educating the public, of the proposed regulations and alternatives to fully consider the potential environmental impacts of each alternative.

- 8.22 **Comment:** The description of the affected environment in the draft EIS acknowledges significant variations in environmental parameters across the public lands. This variability suggests an alternative modeled after BLM’s Rangeland Reform regulations to emphasize statewide or regional-level performance standards and guidelines supported by federal “fallback” standards and guidelines. The “fallback” performance standards should be based on the current 3809 performance standards. The federal regulations could specify what issues must be addressed by the state-level standards and the proper public participation and review procedures, but the specific standards would be developed at the state or regional level on an as-needed basis. Such an alternative would not preclude other regulatory changes such as a Notice-level bonding if there is a demonstrated need. This alternative is an obvious and essential component of any programmatic analysis of the 3809 regulations and must be included in the EIS.

Response: The Rangeland Reform regulations included the developing of rangeland health performance standards that were incorporated into BLM’s land use planning documents for all activities. The guidelines were developed specifically for grazing. The proposed regulations require compliance with these rangeland health standards. In the proposed regulations, 3809.420(a)(3) states “Consistent with the mining laws, your operations and post-mining land use must comply with the applicable BLM land-use plans and activity plans, and with coastal zone management plans under 16 U.S.C. 1451, as appropriate.” Because the rangeland health performance standards have already been incorporated in the land use planning documents, this proposed provision requires compliance with these standards. BLM believed that an alternative limited to this one issue did not sufficiently aid in defining the issues or provide a clear basis for choice among options by the decision maker and the public to warrant a stand alone alternative.

A separate alternative based on statewide or regionwide standards supported by federal “fallback” standards is also not necessary because Alternatives 1, 2, 3, and 5 can be viewed as consisting of state regulations with a federal fallback as suggested by the commenter. Under each of those alternatives, existing state regulations would continue to apply. The varying federal standards can be viewed as different fallback standards. Alternative 1 uses the existing rules as the federal fallback. Alternative 3 has the proposed federal rules as the fallback. And Alternative 5 has a combination of the preferred alternative and the existing rules. Alternative 2 applies state rules with no federal fallback. BLM recognizes that the commenter’s suggested alternative would not have BLM actively involved in case-by-case decision making. But from an impacts standpoint, the standards included in this EIS (a combination of federal and state rules) would be equivalent to the alternative suggested by the commenter.

- 8.23 **Comment:** I am sending along a plan termed, “Mining Claim Reclamation,” which I feel is directed toward a more productive end. (1) BLM takes charge of reclamation. (2) No hold ups on review and approval. Exploration projects are approved within 30 days, and mining operations are approved within 1 year. (3) The government charges \$1.00/oz. gold or equivalent to be placed into the reclamation fund. (4) The mining company or operator can do its own reclamation as may be desired, and the reclamation fund will then go to operator. (5) When the mine closure is declared, the government agency will take charge and prescribe a reclamation plan and estimate a sum of money. (6) The project will be submitted for bid (sealed) with the mine operator receiving a first right of refusal to receive the reclamation project. (7) The operator will pay the government the balance between funds collected by the government and by the operator. Based on sealed bids. Maximum bid will be \$3,000,000. (8) The government agency in charge will have 2/3 of its staff as trained and experienced mining people. All too often, BLM and the U.S. Forest Service conduct affairs that affect our mining projects with staffs that have no background and little interest in mining. (9) No public scoping is required during the process. (10) Each project will be designed so that a recreational-tourist attraction can be established, such as Virginia City, NV or Tombstone, AZ. Also, an end goal could be a

retirement village with all facilities available after employees leave when mine closure is complete.

Response: We do not feel that such a proposal is a reasonable response to address the purpose and need in the EIS. In addition, many aspects of this proposal directly conflict with existing statutes or are not within BLM's statutory authority. Specifically, BLM does not have the authority to charge a royalty on the production of locatable minerals, waive the public scoping process prescribed by National Environmental Policy Act, or the establish retirement communities.

8.24 **Comment:** The draft EIS should consider alternatives to facilitate mining and to create reclamation and environmental incentives. A number of beneficial social and economic impacts could accrue. Regulatory changes to streamline the review process and stimulate cleanup of abandoned mines would significantly enhance mineral exploration without compromising the high level of environmental protection and reclamation success under the present regulatory system. BLM should expand the scope of the draft EIS to evaluate revisions to the 3809 regulations to encourage and facilitate environmentally responsible mining and reclamation of abandoned mines. An alternative must be developed to "Encourage Mineral Development/ Streamlining" and balance the "Maximum Protection Alternative" described in the draft EIS and reflected in the proposed regulations. This Encourage Mineral Development/Streamlining Alternative should, at the least, include an unbiased evaluation of the following factors:

1) NRC study Recommendation 10 with BLM lead in coordinating information needed by all federal, state, local, Native American, and other private surface owners so that the owner/operator only has to file one application. This would be similar to the multi-agency permit application and review process established with active participation of BLM-Alaska a number of years ago, and the large mine permitting decision process developed by the State of Alaska and used successfully with full public and agency participation for the Fort Knox Mine, the Illinois Creek Mine, and for advanced exploration of the Pogo Mineral Property.

2) BLM becomes a one-window/one stop shop for mining related operations under BLM jurisdiction.

3) NRC study Recommendations 3, 9, 10, 12, and 14 with BLM establishing coordinated decision time lines with participating federal agencies and state, local, Native, owner/operation of the proposed mining operation, and any other private surface owner decision time lines.

4) NRC study Recommendation 16 that would have BLM and all other federal agencies have a single public notice process. This process would be similar to the state-EPA joint public notice process in Alaska. As it is now, BLM publishes, the U.S. Army Corps of

Engineers publishes, and other state and local entities publish the fact that a mining operation is under consideration.

5) NRC study Recommendations 3 and 16, which would shorten, or at least maintain, existing 3809 decision time lines rather than always lengthen time lines.

6) Maintaining the existing cost structure and data requirements that are a fundamental responsibility of BLM and Forest Service to collect as part of their stewardship role of providing proper management and land use planning rather than shifting the cost to the owner/operator.

7) BLM and the Forest Service (FS), in cooperation with other state, local, and tribal governments developing cooperative agreements and a single environmental inspection punch-lists so that the total number of individual visits, operational interruptions, and agency costs are reduced.

8) BLM and FS approving a reduced financial guarantee to the owner/operator based on financial credit for baseline information that is required from the owner/operator when those data are also required by BLM for the proper and effective discharge of its stewardship responsibility as the manager of public resources under FLPMA and other federal statutes. This should include requiring the owner/operator to give BLM or the FS basic inventory data on wildlife, vegetation, soils, water supply, and/or quality, cultural and historic resources. The financial credits would only be for data available to BLM, FS, and other permitting agencies and the public without restriction. This could be a financial credit program similar to the Alaska law providing exploration incentive credits.

9) BLM and FS should adopt the Alaska standard that administrative appeals and litigation can be initiated only by persons who meaningfully participated in the public participation elements of the decision process leading to a decision about a proposed mining operation.

10) A “no net-loss” policy that retains a constant amount of federal minerals for discovery, development, and production.

Response: As directed by the Mining and Mineral Policy Act of 1970, BLM’s policy is to encourage environmentally responsible hardrock mining on public lands. Implementation improvements are an effective way to promote this policy. These are implementation measures that may be suitable for several of the alternatives presented in the EIS and do not require a separate alternative.

8.25 **Comment:** Under the 1992 Memorandum of Understanding signed by BLM with the State of California Department of Conservation, cities and counties are responsible for approving reclamation plans for surface mining operations on BLM-administered lands,

subject to California’s Surface Mining and Reclamation Act of 1975 (SMARA). Why was this existing arrangement not considered as a viable alternative rather than being considered with the No Action Alternative?

Response: Such an implementation arrangement can be considered under a number of the alternatives presented in the EIS, including the No Action Alternative.

8.26 **Comment:** The current 3809 regulations are cumbersome and in many instances redundant with state regulations. Instead of making the regulations more onerous, BLM should be eliminating duplication and improving the time frame for approval.

Response: Eliminating duplication and unnecessary time delays are BLM objectives under all of the alternatives presented in the EIS.

8.27 **Comment:** The EIS should include a Plain English Alternative. This alternative would be the current 3809 regulations rewritten in “Plain English” format.

Response: The current 3809 regulations rewritten in “Plain English” format would no environmental consequences different from the No Action Alternative. Such an alternative would be redundant.

Alternatives Considered but Eliminated

8.28 **Comment:** BLM needs to explain why many of the issues and suggested alternatives were eliminated from further consideration. The draft EIS sections entitled “Alternatives Considered but Eliminated” and “Issues and Concerns Not Addressed” makes no mention of many of the issues and alternatives we suggested.

Response: The draft EIS (page 65) discusses alternatives considered but eliminated from detailed analysis. Other suggestions were made during the scoping process that were not eliminated from consideration but were also not developed into stand-alone alternatives. Many of these comments involved funding and staffing levels. As discussed above, the EIS must consider the complete implementation of the proposed regulations and alternatives to fully consider the potential environmental impacts of each alternative, including full funding and staffing on each alternative.

Supplemental Draft EIS

8.29 **Comment:** The draft EIS is so fundamentally flawed that BLM must prepare a supplemental draft EIS to modify and clarify the alternatives and their environmental consequences. Deficiencies include an inadequate consideration of existing federal and state laws, regulations, and policies and a failure to consider all reasonable alternatives, including the Gap Alternative in the NRC (1999) report. The draft EIS is woefully

inadequate when one considers the magnitude and number of mining operations affected by the proposed changes. In addition, the NRC report presents additional, objective information that must be analyzed and available for public review in a supplemental draft EIS.

Response: Given the programmatic nature of the Proposed Action, the draft EIS presented a reasonable range of alternatives and adequately presented the affected environment and environmental consequences of the presented alternatives. The NRC report did not present any new alternatives or issues that were not previously covered in the draft EIS. A more detailed discussion of state laws and a NRC Recommendations Alternative are presented in the final EIS.

Scoping

- 8.30 **Comment:** There never was an adequate scoping process in which to determine real problems and to discuss alternatives to address regulatory gaps. Had BLM stated a clear “purpose and need” at the outset of the public scoping process, changes could have been publicly discussed and proposed in public comments. Based on the “purpose and need” statement in the draft EIS, a few changes to the existing rules should have been proposed for public comment. Examples are financial assurance for Notice-level activity, Plans of Operations for operations with high environmental risks, enforcement provisions, mitigation for unavoidable environmental impacts, clarifying casual use, clarifying existing environmental protection standards, more reporting requirements for Notice-level activities, procedures and criteria for “common variety” minerals (should be in a different set of rules), and procedures for review of proposed activities within closed areas (should be in a different set of rules).

Response: We conducted an extensive outreach, scoping, consultation, and comment process with the public, stakeholders, and government officials starting in March 1997. In addition, a second comment period followed the issuance of the NRC report to allow for comments on the proposed regulations and draft EIS related to concerns and recommendations in the NRC report. This process is described in Chapter 1 of the final EIS.

Adequacy of the Alternatives, Analysis and Specific Provisions

- 8.31 **Comment:** Past, present, and reasonable foreseeable future actions from existing state, federal (CAA, CWA, NEPA, ESA, RCRA, CERCLA, TSCA, Emergency Planning Community Right to Know Act, Migratory Bird Treaty Act, NHPA, ARPA, SDWA), and local laws and regulations are not adequately addressed in the four alternatives presented in the draft EIS. In addition, the draft EIS must fully evaluate the effect of national BLM and EPA policies, manuals and handbooks, interagency agreements, and the mitigation requirements imposed under NEPA. The draft EIS failed to fully and objectively evaluate

all reasonable foreseeable significant impacts of the Proposed Action and its reasonable alternatives as required in the CEQ regulations (40 CFR 1502.16). These deficiencies are particularly important in adequately considering the No Action Alternative and Alternative 2.

Response: The cumulative effects of existing laws, regulations, and policies are reflected in resource-specific discussions in Chapter 3 of the final EIS. The affected environment describes the current situation, which includes the cumulative impacts of actions and events that have already occurred. For future mineral activity, BLM opted to define the future under the No Action Alternative from a set of assumptions (Appendix E). This set of assumptions includes the future actions and events that the EIS team felt could be reasonably assumed. BLM took this approach because of limitations in data, the large numbers of mineral properties potentially affected by the proposed regulations and alternatives, and many potential events that could define the reasonably foreseeable future.

- 8.32 **Comment:** No mitigation measures are proposed or discussed for either the Proposed Action or the alternatives. The EIS must discuss appropriate mitigation measures as required in the CEQ regulations (40 CFR 1502.16(h)).

Response: The CEQ regulations 40 CFR 1502.16(h) require discussions of means to mitigate adverse environmental impacts that are not fully covered under 40 CFR 1502.14(f). 40 CFR 1502.14(f) requires the inclusion of proper mitigation measures not already included in the proposed action or alternatives. The proposal and alternatives presented in the final EIS are the alternative measures to mitigate the adverse environmental impacts. Mitigating measures are already built into the alternatives.

- 8.33 **Comment:** The draft EIS is internally inconsistent. It asserts increased environmental benefits under the Proposed Action while also stating that the environmental proposed performance standards are similar to current BLM policies and guidelines in various states and as such the impacts to industry would be slight. The benefit-cost analysis accompanying the proposed rule concludes that 80% of operations are already in compliance with the standards of the Proposed Action. The environmental benefits of the proposed changes are greatly exaggerated and based on speculation. There is no evidence that the proposed changes will enhance environmental protection. But the draft EIS grossly underestimated the costs of implementing the regulations, the substantial new workload and associated permit delays, and impacts on people and communities that depend on mining.

Response: Slight differences exist between the performance standards presented for the Proposed Action and the existing industry and BLM practices, policies, and guidelines. The environmental benefits gained mainly relate to the exceptions to the existing practices, where individual operators or BLM offices are currently not fully employing

these protection measures. In addition to the environmental benefits of the performance standards, there are environmental benefits from better permitting information, increased financial guarantees, better enforcement tools, and other ancillary provisions. This expected reduction in mineral activity represents both environmental benefits and a cost to the industry and communities that depend on mining. These impacts and the methodology for arriving at the estimates of change in mineral activity are presented in the final EIS. In addition, the requirements in the proposed regulations will increase the cost to BLM of implementing the regulations. These costs are also discussed in the final EIS.

- 8.34 **Comment:** The draft EIS dramatically understates the environmental and economic impacts of Alternative 4.

Response: We agree with this comment. The environmental consequences of Alternative 4 have been reevaluated and are presented in the final EIS.

- 8.35 **Comment:** BLM must continue to maintain the balance between environmental protection and mine activity. BLM can not abandoned its obligations under the Mining Law, FLPMA and the Mining and Mineral Policy Act of 1970, to encourage hardrock mining on federal lands. The language in the existing regulations (“... it is the policy of the Department of the Interior to encourage the development of Federal mineral resources ...”) should be retained to assure that the public understands that mineral resource development is just as important to BLM as riparian habitat and roadless recreation. If BLM is contemplating a change in policy, this would be a significant change that would need to be fully analyzed in the EIS. It would also be a violation of the Mining and Mineral Policy Act of 1970 (30 USC Section 21a).

Response: BLM is not contemplating a change in the policy directive in the Mining and Mineral Policy Act of 1970, nor does it have the authority to do so.

- 8.36 **Comment:** The draft EIS overstates the environmental and economic impacts of Alternative 2.

Response: The environmental and economic effects of Alternative 2 would mainly result from the potential reduced regulatory burden. Under this alternative, BLM would function mainly as a land owner and not a regulatory decision maker. Depending on state requirements, BLM’s reduced involvement could reduce the regulatory burden on the operator. We estimate that mineral activity would increase by 0 to 5% under this alternative.

- 8.37 **Comment:** BLM should have reclamation standards that require the restoration of mine sites to premining conditions.

Response: BLM considered this alternative but eliminated it from further consideration. Complete restoration was considered technically and economically unreasonable by making most mining operations on public lands infeasible. The reasons for eliminating this alternative are discussed in greater detail in the final EIS.

- 8.38 **Comment:** The 3809 regulations and their implementation should be guided by the concepts that the level of effort and review should be commensurate with the size of the proposed operation, potential environmental risk, and significance of the potentially affected resources.

Response: We agree with your comment. The proposed final regulations retain in a modified form the dividing of uses into casual use, Notice-level use, and Plan-level use. In addition, we expect that the level of detail and analysis required in a Notice review or Plan of Operations approval will be commensurate with the potential environmental risk and significance of the resource to be affected.

- 8.39 **Comment:** Draft EIS, page 29, Description of Alternatives. The description of public lands to which the 3809 regulations apply should be the same as the study area.

Response: The potential environmental, social, and economic impacts of the Proposed Action and alternatives go beyond the affected public lands. NEPA requires a description of the affected environment and the direct, indirect, and cumulative environmental consequences of the Proposed Action and alternatives. Such a description requires considering the impacts beyond the public lands described in the EIS.

DEFINITIONS

- 9.01 **Comment:** BLM defines only 15 terms in the draft regulations. Other terms are defined in the regulatory language throughout the proposed rule, leading to circular definitions. BLM should define all significant terms having application and scope to a proposed mining operation and BLM decision criteria. Also, different combinations of words should not be used for the same thing.
- 9.02 **Comment:** Several terms used by the National Research Council should be defined in this subpart: prospector, mining and milling, modification, permanently closed, small miner, small exploration company,
- 9.03 **Comment:** BLM has broadened the definitions by language used in the performance standards in subpart 3809.420. This broadening of definitions exceeds BLM's authority and is inconsistent with the NRC report.
- 9.04 **Comment:** Small miners should be treated in different category than commercial mining operations.

Response: In developing the final rule, BLM has streamlined and clarified language in subpart 3809.5 (definitions) and 3809.420 (performance standards) to address concerns about circular definitions and clarity of regulatory language. We have modified definitions of several terms in response to public comment. We have retained the concept of appropriate technology but dropped the term "most appropriate technology and practice" to reduce confusion. We have not attempted to define terms used in the National Research Council (NRC) report (NRC 1999) unless they specifically related to terms in the 3809.5 regulations and are pertinent to this regulatory effort.

The Federal Land Policy and Management Act authorizes the Secretary of the Interior to prevent undue or unnecessary degradation of the public lands. We believe that this broad authority allows changes in the definitions and the related performance standards. Many definitions in the final rule are derived directly from the Federal Land Policy and Management Act (FLPMA), Council on Environmental Quality (CEQ) regulations, or long-standing and publicly available BLM policy. As such, we believe that the definitions to be consistent with federal law and regulation and not inconsistent with the NRC report.

We received many requests to define such terms such as "feasible," "significant," "necessary," and "substantial." We have chosen to use established definitions of these words to ensure the greatest understanding of the terms rather than to introduce a regulatory definition. In addition, we have changed the language of the performance standards and elsewhere in the regulations to make these terms more clearly understood in the regulatory context.

Casual Use

- 9.05 **Comment:** BLM should place more focus on mining operations of less than 5 acres instead of on many changes in the definition of casual use.
- 9.06 **Comment:** BLM needs to revise the definition of casual use to be consistent with NRC Recommendations 1, 2, and 3.
- 9.07 **Comment:** BLM should assure that the definition of casual use is similar to the Forest Service definition.
- 9.08 **Comment:** BLM should develop a detailed list of what casual use is to ensure that there is no confusion in anyone's mind about when an activity is considered casual use and when it falls under a Notice.
- 9.09 **Comment:** The current definition of casual use needs to be strengthened to ensure protection of public lands and resources, particularly riparian areas. The amount of area to be disturbed should be defined.
- 9.10 **Comment:** The current definition of casual use had worked well for nearly 20 years and does not need to be changed. The NRC study support BLM's retaining the definition. The existing definition of casual use provides adequately for prospecting and recreational mining according to BLM's own data.
- 9.11 **Comment:** I object to BLM's expanding the items that are not be to considered casual use.

Response: The final rule definition of casual use is based on the existing definition, which the rule has modified to address situations that have arisen since the 1981 regulations were published. We have included examples of activities that are generally considered casual use and examples of activities that are not considered casual use. Occupancy as defined in 43 CFR 3715.0-5 is not considered casual use. Surface disturbance from operations where the cumulative effects of the activities result in more than negligible disturbance is not casual use.

- 9.12 **Comment:** The definition of casual use is too restrictive. The definition should allow not only hand tools but also equipment used by recreational miners. Some mechanized equipment should be allowed under casual use. Casual use has always included the use of mechanized equipment. Some offices could interpret the definition of casual use in a way that would result in eliminating prospecting and recreational mining on public lands. The revised definition will preclude geochemical sampling and adversely affect mineral exploration.

9.13 **Comment:** We are concerned about the new provision requiring hobby and recreational miners to file a Notice instead of operating under casual use, where the cumulative effect of their operations results in more than negligible disturbance. Active prospecting is virtually excluded without the ability to conduct these activities as casual use.

Response: It is not BLM's intention to unduly restrict mineral prospecting and exploration on the public lands. Revisions in the final rule are intended to address concerns about cumulative impacts to the environment resulting from multiple operations in a single area. The requirement for operations above the "casual use" level to file a Notice and obtain a financial guarantee is intended to increase environmental protection for public land and resources. Clearly, exploration techniques involving negligible surface disturbance will not require a Notice or financial guarantee. In response to the number and substance of comments about the public's continued desire for operations causing negligible surface disturbance to be casual use, we have expanded the definition of casual use in this final rule to include geology-based sampling and nonmotorized prospecting and small suction dredges.

Suction Dredging

9.14 **Comment:** The proposed regulations are contrary to the NRC finding that states adequately regulate suction dredging under their own permitting. BLM does not acknowledge the NRC finding that BLM properly regulates small suction dredge operations under current regulations. BLM should allow at least some suction dredging under casual use.

9.15 **Comment:** Suction dredging should be regulated by state fish and game departments.

9.16 **Comment:** Public comments on suction dredging and its' impacts covered a broad range. Some members of the public said that suction dredging should not be handled as a casual use because of associated environmental impacts. Some commenters did not view the damage caused by suction dredging to be a major environmental concern. Another commenter said that the major impacts (in California) from suction dredging are from abandoned junk, long-term camping, sewage and waste management, and interference with other public land users.

9.17 **Comment:** BLM should give more credence to the U.S. Geological Survey study on the Forty Mile River in Alaska. This study found no adverse impacts to water quality from suction dredges with an intake diameter of 10 inches (Wanty and others 1999). Suction dredges with intake diameters of 4", 5", and 6" have essentially the same impacts and are not environmentally damaging.

Response: In response to public comment and recommendations in the NRC (1999) report, BLM modified the proposed rule. Some small-scale suction dredging may be

conducted as casual use under the Proposed Action. Suction dredge operators must contact BLM to determine if the proposed activity may proceed as casual use, or if a Notice or Plan of Operations will be required. The suction dredge operator would not be required to contact BLM if (1) the state requires an authorization for suction dredging and (2) BLM and the state have an agreement under proposed 389.200 for BLM to accept state authorizations for regulating suction dredging on BLM-administered lands.

BLM has considered technical information including studies about water quality in evaluating impacts of suction dredging. Suction dredge operations may affect benthic (bottom dwelling) and/or invertebrates, fish, fish eggs, and fry, other aquatic depending plant and animal species, channel morphology, which includes the bed, bank, channel and flow of rivers, water quality and quantity and riparian habitat adjacent to streams and rivers. Because of the potential for these impacts, except as noted above, uses of a suction dredges, will require that the public submit to BLM a Notice pursuant to subpart 3809.21 or a Plan of Operations pursuant to 3809.400 through 3809.435.

Use of Chemicals

- 9.18 **Comment:** The exclusion of chemicals from casual use operations is unrealistic and too far reaching. Only chemicals hazardous to land or water should be prohibited.
- 9.19 **Comment:** The definition of casual use should not include small miners because they might not have the expertise to use chemicals properly and might not be able to afford the financial guarantee.

Response: BLM's intent in defining casual use as not including the use of chemicals is not to exclude the use of small amounts of gasoline or oil or similar products for small operations, but to address concerns with the use of cyanide and other leachates.

Truck-Mounted Drill Rigs

- 9.20 **Comment:** Many commenters supported the use of truck-mounted drilling equipment under casual use when no new road building or surface disturbance would be required.

Response: BLM recognizes the desire of those conducting mineral exploration using truck-mounted drilling equipment to maximize their access to drill sites on public lands with minimum regulation. But we believe that drilling should be conducted under a Notice or a Plan to increase consideration of potential impacts to the environment, including to riparian areas, cultural resource sites, and wildlife habitat. Therefore, BLM has not included truck-mounted drilling activities under casual use.

Hobby and Recreational Mining

9.21 **Comment:** The 1872 Mining Law has no provision for recreational mining, and it should not be regulated under subpart 3809. The term “recreational mining,” if used at all, should be defined in BLM’s recreation management regulations (43 CFR 3840). Recreational prospecting is generally allowed in most states and should not be constrained on BLM-administered lands.

9.22 **Comment:** We question BLM’s jurisdiction over mining in rivers and streams with navigable waters.

Response: We agree with comments that the 1872 Mining Law does not provide for recreational and hobby mining. Accordingly, the terms recreational and hobby mining are removed from the definition of casual use. BLM’s intent is that the casual use definition continue to apply to exploration and prospecting that do not cause greater than negligible disturbance. The subpart 3809 will not preclude prospecting under state law but may require that a Notice be filed with the BLM if exploration or prospecting reaches a level of disturbance beyond casual use. Many streams on public lands have been determined not to be navigable, and BLM will regulate activities on these also. As to streams and rivers that have been determined to be navigable, typically, access and other activities will occur on the public land and will require BLM involvement.

9.23 **Comment:** Recreational or weekend miners will not be able to prospect and extract minerals if they are required to operate under a Notice rather than casual use provisions. They would not be able to afford the cost of filing a Notice and obtaining a bond.

9.24 **Comment:** Recreational mining should not be included in the category of casual use because it would allow for uncontrolled use of public lands with associated impacts.

9.25 **Comment:** If weekend recreational miners inflict inappropriate impacts to the land, stiffer fines is a more appropriate response than a broad-scale restriction of land use. Designations or constraints should be included in the regulations rather than in the land use plans.

9.26 **Comment:** BLM should select areas in land use plans where people can engage in hobby or recreational mining

9.27 **Comment:** All recreation and hobby use should be casual use.

Response: We recognize that some weekend prospectors and recreational miners may now be required to obtain a Notice or Plan rather than operate under the casual use provision. This is consistent with BLM’s intent that all operations that cause more than negligible surface disturbance should be conducted under a Notice or a Plan to ensure

proper review of environmental concerns and development of suitable mitigation.

Recommended Modification to Definition of Casual Use

- 9.28 **Comment:** The term “recreational mining” should be more clearly defined or deleted. The lack of definition of recreational mining will lead to inconsistent interpretation of what it includes.
- 9.29 **Comment:** The definition casual use should be changed to include some version of the following: “The term casual use should include the following activities: use of metal detectors, gold spears, and other battery-operated devices for sending the presence of minerals; battery-operated and motorized high bankers; hand, battery-operated, and motorized drywashers; and motorized gold concentrating wheels.”
- 9.30 **Comment:** The definition of casual use should be modified to state “Non-profit organizations or societies, hobbyists, and recreational miners are classified as casual use as long as they do not use motorized tools.”
- 9.31 **Comment:** The definition of casual use is too restrictive. The new definition could eliminate rock hounding. There should be a provision for collecting mineral specimens with hand tools, hand panning, and motorized sluices. The definition should include sampling of rocks and soils.
Response: BLM agrees with the recommendations to include various types of sampling, prospecting, and equipment in the definition of casual use to clarify that these type of activities are acceptable as long as they create only negligible surface disturbance. We have modified the definition to address this concern. We did not, however, elect to include high bankers and other similar equipment in this definition because of concerns about their surface-disturbing impacts.

Military Lands

- 9.32 **Comment:** BLM needs to define the term “military lands” and clarify to what extent subpart 3809 applies to minerals on military lands that are also under BLM’s jurisdiction.

Response: Public Law 106-65 extended the withdrawals for Fort Greely, Alaska, the Yukon Range of Fort Wainwright, Alaska, Nellis Air Force range, Nevada, Naval Air Station Fallon Range, Nevada, McGregor Range of Fort Bliss, New Mexico, and Barry M. Goldwater Range, Arizona. The mining language in the prior Public Law 99-606 withdrawal for these ranges was carried forward into Public Law 106-65. Section 3021 for all ranges, except the Barry M. Goldwater Range, Arizona.

Public Law 99-606 provided for land use planning on these military ranges. BLM has completed land use plans on all the Public Law 99-606 except for Bravo-20 Range at the

Naval Air Station at Fallon, Nevada. No lands were found suitable to open to entry under the mining or mineral leasing laws, except at McGregor Range, in New Mexico. Public Law 106-66 calls for the update of these land use plans. No implementing regulations for these public laws have been issued to date. BLM's responsibilities of the BLM would be outlined at such time as these regulations are developed.

Minimize and Prevent

- 9.33 **Comment:** The definition of minimize is fundamentally at odds with the National Research Council (NRC) findings (NRC 1999) because NRC assumes that mining will change the landscape. This definition should be deleted because it is confusing, and minimize is defined differently than its commonly understood meaning. Minimize is not synonymous with eliminate or avoid.
- 9.34 **Comment:** The precise meaning of some terms within the definition “most,” “practical level” are unclear. The second sentence in the proposed regulations has significantly reduce BLM’s flexibility from the current 3809 rule.

Response: BLM agrees with NRC that mining changes the landscape. But we believe that the NRC recommendations do not preclude attempts to reduce or avoid impacts to public land and resources. We have modified the second sentence of the proposed definition of minimize to reduce confusion and increase flexibility of the authorized officer in evaluating proposed mining operations. By changing the final rule in this manner, we will still define the term minimize as it is used in a number of the performance standards in section 3809.420 as reducing the adverse impact of an operation to the lowest practical level. During our review of proposed operations, either Notice or Plan level, we might determine that it is necessary to avoid or eliminate specific impacts. On a case-by-case basis we would determine the lowest practical level of a particular impact or whether it should be avoided or eliminated.

Mining Claim

- 9.35 **Comment:** The definition of mining claim should be included in this section instead of referencing 3833.5. The definition should include any citizen or entity in the United States. The definition should be similar to the current definition.

Response: BLM has referenced the definition in 3833.5 to promote consistency in definition of terms across the Title 43 Code of Federal Regulations. The definition provides for citizens of the United States to hold mining claims.

Mitigation

9.36 **Comment:** The term “mitigation” should be deleted from the regulations unless BLM can show statutory authority for mitigation. BLM has no authority to require compensatory mitigation. When is compensation suitable, and does BLM have the statutory authority to require it? The definition of mitigation, which comes from the Council on Environmental Quality definition, should be eliminated because in that context it was used for analytical purposes rather than regulatory purposes, as in this case. The revised definition, included in the draft rule, gives BLM too much latitude without a standard for comparison.

Response: Section 302(b) and 303(a) of FLPMA, 43 U.S.C. 1732 (b) and 1733 (a), and the Mining Law, 30 U.S.C., Section 22, give BLM the authority to require mitigation. Mitigation measures fall squarely within the actions that the Secretary of the Interior can direct to prevent undue or unnecessary degradation of the public lands. An impact that can be mitigated, but is not, is unnecessary. Section 303 (1) directs the Secretary to issue regulations for the management, use, and protection of the public lands. In addition, 30 U.S.C., section 22, allows the location of mining claims subject to regulation. Taken together, these statutes authorize the regulation of environmental impacts of mining through measures such as mitigation. The final rule does not *require* compensatory mitigation. But many companies are voluntarily completing compensatory mitigation, which is clearly an available form of mitigation.

BLM believes it is appropriate to retain the Council on Environmental Quality’s government wide definition of “mitigation” as it appears in 40 CFR 1508.20. An operator who must “mitigate” damage to wetlands or riparian areas (see section 3809.420 (b)(3) or who must take appropriate mitigation measures for a pit or other disturbance would have to take mitigation measures, which may or may not in all cases include the measures listed in the definition. BLM does not intend any portion of this definition, including “avoiding the impact altogether by not taking a certain action” to preclude or prevent mining.

Most Appropriate Technology and Practices

9.37 **Comment:** Some commenters said that the NRC report said that existing state and federal law are okay with respect to technology. Others said that no statutory authority exists for most appropriate technology and practice (MATP). Still others felt that BLM should abandon the concept of MATP in favor of best available technology (BAT). Many commenters agree that the definition in the draft regulations is confusing and difficult to enforce. Even commenters who liked the concept of MATP over BAT were critical of BLM’s definition. A few commenters raised a concern about whether this definition would conflict with state law or technical standards.

Response: BLM agrees with concerns raised about MATP, and we have deleted the term from the definitions in the final rule. Information and performance requirements are incorporated into sections 3809.11, 3809.21, and 3809.420.

Operator and Operations

9.38 **Comment:** The definition of “operations” needs to clarify that FLPMA gives BLM the authority to regulate activities only on federal public lands. The definition needs to include any facility used for the beneficiation of ore. Including “reclamation” in the definition of operations might cause confusion.

Response: In the final rule BLM did not modify the definition. The definition is intended to be broad in scope to address “cradle to grave” activities authorized under the 1872 Mining Law on the public lands. Therefore, reclamation is included in the definition. The definition clearly states that it applies to activities on public lands. BLM may request information about activities on adjoining or nearby private lands because a proposed operation may occur on mixed ownership or environmental analysis under the National Environmental Policy Act may require that BLM have a complete picture of the proposed operation.

9.39 **Comment:** It is beyond BLM’s authority to include all persons who own mining claims or otherwise have interests in claims in the definition of “operator.” This definition, when combined with the new provisions for joint and several liability, are contrary to NRC report Recommendation 7. The definition of operator seems like the Surface Management Conservation and Reclamation Act (SMCRA) approach, but FLPMA has no authority for this approach.

9.40 **Comment:** The definition of operations should be defined to include geologic-based or hobby activities such as rock and fossil collecting, hobby mining, spelunking, and other similar activities.

Response: BLM evaluated the proposed definition in the context of public comments but did not change it. FLPMA does not define “operator,” but the term has been used in this subpart since 1981, although the proposed and final rule have been strengthened. As written, the proposed definition would cover all activities under the 1872 Mining Law, as amended, which occur on public lands as casual use, or under a Plan of Operations or Notice. As such, those conducting geology-based activities would be considered operators. See the preamble discussion of joint and several liability for BLM’s perspective on those issues and how they relate to the definition of operator.

Project Area

9.41 **Comment:** There is no legal basis for the definition of “project area” as proposed in the

draft rule. The definition suggests that BLM is attempting to manage private and state land. This term needs to be unambiguously defined to show how it will apply to all mineral ownerships, especially because enforcement provisions say that mineral owner is financially liable for the actions taken by the operator. The definition should apply only to federal public land. Clarification is needed on how BLM intends to deal with adjacent private lands.

9.42 **Comment:** Several commenters who had concerns about the intent of BLM with regard to private land within a project area tied their concerns to the relationship of joint and several liability to the project area and the definition of operator.

9.43 **Comment:** At least one state has raised a concern about the relationship of a project area as defined by BLM, for regulatory purposes, and an area defined by a state for similar purposes, but defined differently. Others raised concerns that mines should not be able to expand mine waste dumps by using surrounding public land.

Response: In the final rule, BLM has clarified its intentions relative to the definition of project area in subpart 3809.2(d). BLM's intent is to regulate operations on public lands managed by the Secretary of the Interior through BLM. But BLM may collect and evaluate information from private lands for analysis under the National Environmental Policy Act.

The project area concept is used to facilitate defining an area of operations for the purpose of analysis and decision making but will not preclude a state from using its own means of defining a project area. BLM and the state can work out differences through cooperative agreements or other means. Since the location and management of mine waste are part of the Plan of Operations and related environmental analysis, they should be considered during the processing of the Plan or Operations or the Notice and should be within the established project area for a given mine.

Public Lands

9.44 **Comment:** The draft rule definition of public land caused much confusion and consternation about what BLM's intent is with regard to private and state land. How do the regulations apply to Stock Raising Homestead Act lands, where the surface is private and the mineral estate is federally owned.

9.45 **Comment:** Does BLM have authority to regulate activities on Stock Raising Homestead Act lands without the consent of the land owner. The proposed regulations did not cite the 1993 amendments to the Stock Raising Homestead Act as an authority, and the proposed means of handling Stock Raising Homestead Act are not consistent with the 1993 amendments.

Response: The definition of public lands in the final rule replaces the definition of federal lands in the existing 3809 regulations. This definition is taken from FLPMA and used throughout this subpart for the sake of consistency. Therefore, the definition was not modified from the proposed to the final rule. Public land, as defined in FLPMA and in this regulation, means land or interest in land owned by the United States and administered through the Secretary of the Interior by BLM. Public land does not mean state land or private land, whether neither the surface nor minerals are privately owned. See Section 3809.2(d), which addresses the scope of these regulations.

Under provisions of the Stock Raising Homestead Act of 1916 (43 U.S.C. 299), coal and other minerals were reserved to the United States. Persons were allowed to enter on these private lands to locate and develop these mineral deposits as long as they did not injure, damage, or destroy the permanent improvements of the entryman and they compensated the entryman or patentee for all damage to crops caused by the prospecting or development. Including these Stock Raising Homestead Act lands under the revised 3809 rule does not change the statutory requirements established in 1916 or in the later 1993 amendments, which clarified requirements for minerals operations on these lands. The intent of the final rule and the to-be-published rule on Stock Raising Homestead Act lands (43 CFR 3814) is to provide requirements for mineral exploration and development of the federal mineral estate to ensure consistency and equity for those prospecting and conducting development operations on federal minerals.

Reclamation

- 9.46 **Comment:** The definition of reclamation needs to retain the concept of “reasonable reclamation” from the existing regulations.
- 9.47 **Comment:** The definition is too onerous because the terms used are problematic—terms like “applicable performance standards” and “achieve conditions required by BLM.” The requirement for regrading and reshaping to conform to the surrounding landscape needs clarification. The requirement to provide for post-mining monitoring, maintenance, or treatment raises the question about whether backfilling would be required.
- 9.48 **Comment:** An operation should not be authorized or allowed if postclosure treatment is required.
- 9.49 **Comment:** The words “placement of a growth medium” should be removed because this is a “how” standard, not a performance standard.
- 9.50 **Comment:** Reclamation needs to be defined as something that is ongoing, not just at the end of the project. The definition should state that the performance standards for reclamation will be deemed as met when requirements in Plans of Operation or Notices have been met.

Response: We have carefully considered the concerns expressed by the public about the definition. The intent of the proposed definition will be unchanged in the final rule in both intent and content. Reclamation means measures required by BLM in this subpart to meet performance standards and achieve conditions at the end of surface-disturbing operations. Subpart 3809.420(a)(5) provides for concurrent reclamation. Reclamation is deemed satisfactory on a Plan- or a Notice-level operation when it meets the standards established in the accepted Notice or the approved Plan of Operations. The final rule does not retain the presumption of backfilling included in the draft rule. There is no intent or requirement in the final rule that regrading or reshaping means backfilling. Postclosure monitoring, maintenance, and treatment will be addressed at least twice in the life cycle of a mining operation. To the extent possible at the time a Notice or a Plan of Operations is filed, needs for postclosure activities should be determined and included in the initial Plan or Notice. In addition, at the time of mine closure, BLM will evaluate the requirements for later management and maintenance of the site. The more information provided by operators at the beginning of the process, the less “open-ended” the process will be. The definition also provides a list of the components of reclamation. Finally the proposed definition would advise that a separate definition of reclamation exists for operations conducted under the mining laws on Stock Raising Homestead Act lands. This definition is part of another rulemaking that BLM is currently working on.

Riparian Area

- 9.51 **Comment:** The definition of riparian should be deleted unless BLM can show statutory authority for riparian management on all lands. NRC recommended that BLM issue guidance but leave the regulation of wetlands to EPA or the Army Corps of Engineers. Further, BLM does not have authority over non-jurisdictional wetlands or nonwetland habitats. The requirement to avoid, minimize, or provide compensatory mitigation would have major effect on Alaska placer miners. Proper functioning condition needs be defined.

Response: BLM has been using its definition of riparian area since 1987. BLM’s statutory authority for protecting riparian areas is derived from FLPMA. Section 302(b) and 303(a) of FLPMA, 43 U.S.C. 1732 (b) and 1733 (a), and the Mining Law, 30 U.S.C., Section 22, give BLM the authority to require protection of riparian areas. Protection of riparian areas falls squarely within the actions that the Secretary of the Interior can direct to prevent undue or unnecessary degradation of the public lands. An impact that can be mitigated, but is not, is unnecessary. Section 303(a) directs the Secretary to issue regulations for the management, use, and protection of the public lands. In addition, 30 U.S.C., Section 22 allows the location of mining claims subject to regulation. Taken together, these statutes clearly authorize the regulation of environmental impacts of mining through measures such as protecting riparian areas. The final rule is not attempting to usurp jurisdiction of either the Corps of Engineers or the Environmental

Protection Agency relative to wetlands. The intent of this subpart is to provide proper environmental protection for one of the critical resources on public lands—riparian areas. The policy for protecting riparian areas has been in place in BLM internal guidance for more than 13 years. We believe that including this guidance as part of the rulemaking makes the policy clearer and more accessible to the public.

The final rule does not *require* compensatory mitigation, but mitigation of impacts. But many companies are voluntarily completing compensatory mitigation, and compensatory mitigation is clearly an available form of mitigation.

The definition of riparian area was added to this subpart in the proposed rule and will be retained in the final rule to identify riparian areas as a form of wetland transition between permanently saturated wetlands and upland areas that exhibit vegetation or characteristics reflective of permanent surface or subsurface water influence. The proposed definition would give some examples of riparian areas and would exclude ephemeral streams or washes lacking vegetation that depends on free water in the soil. Subpart 3809.420 will require an operator to avoid locating operations in riparian areas, where possible; minimize unavoidable impacts; and mitigate damage to riparian areas. This subpart would also require an operator to return riparian areas to proper functioning condition, or at least the condition that predated operations, and to take proper mitigation measures if an operation causes loss of riparian areas or diminishes their proper functioning condition. This definition is part of the BLM Manual (BLM Manual, Dec. 10, 1993), and the final rule will retain the riparian area definition in this subpart for the convenience of the public.

Unnecessary or Undue Degradation

- 9.52 **Comment:** The proposed definition of unnecessary or undue degradation is ambiguous, circular, inflexible, and duplicative of existing state and federal laws.
- 9.53 **Comment:** The definition is working well and the current language should be retained.
- 9.54 **Comment:** The new definition introduced new terms that were not defined.
- 9.55 **Comment:** The proposed definition is moving BLM from an unnecessary or undue degradation standard provided for in Section 302(b) of FLPMA to a “California Desert” standard of no degradation taken from 601(f) of FLPMA.
- 9.56 **Comment:** The new definition would impose significant additional costs on industry.
- 9.57 **Comment:** Whether a mining company can afford proper environmental protection measures should not be the determining factor as to whether those measures are required.

- 9.58 **Comment:** There should be a list of actions or situations that would constitute unnecessary or undue degradation.
- 9.59 **Comment:** BLM should take the dictionary definition of “undue” (inappropriate or unwarranted) and apply it to these regulations.
- 9.60 **Comment:** There is a lack of clear language giving BLM the authority to deny a Plan of Operations or reject a Notice.
- 9.61 **Comment:** Any operation resulting in permanent post-closure water treatment should be deemed unnecessary or undue degradation.
- 9.62 **Comment:** Best available technology and practice (BATP) should be included in the concept of undue or unnecessary degradation.
- 9.63 **Comment:** The draft regulations fall far short of steps that should be taken to prevent undue or unnecessary degradation of the public lands. The draft regulations don’t provide for accountability of BLM line managers.
- 9.64 **Comment:** The definition of unnecessary or undue degradation needs to reference the impacts of mining operations on other resources on and off of the mining property.
- 9.65 **Comment:** BLM should retain the “prudent operator” concept, currently incorporated into the undue or unnecessary degradation standard. The provision of the prudent operator concept for comparison of similar operations to determine what is reasonable and prudent is beneficial. The use of the prudent operator standard allows the required flexibility for BLM to make reasoned decisions based on experience and sound judgement.
- 9.66 **Comment:** Narrowly defining unnecessary degradation in by “failure to do...” reduces needed flexibility in real-world regulatory situations.
- 9.67 **Comment:** The current prudent operator standard gives BLM too much latitude and makes it difficult to hold the authorized officer accountable.
- 9.68 **Comment:** The concept of the prudent operator used in the current 3809 regulations should be combined with the prudent man concept established by case law after passage of the 1872 Mining Law. Both concepts should be retained.

Response: The revised definition of unnecessary or undue degradation in the final rule will eliminate the current reference to the prudent operator standard because BLM believes it to be too vague. Instead BLM will define unnecessary or undue degradation by failure to comply with the following:

- The performance standards of the subpart section 3809.420.
- The terms and conditions of approved Plans of Operations.
- The operations described in complete Notices.
- Other federal and state laws for environmental protection and protection of cultural resources.

Unnecessary or undue degradation would also mean activities that are not reasonably incident to prospecting, mining, or processing operations as defined in existing 3715.0-5. In response to public comments on BLM's need to have explicit regulatory authority to deny a proposed mining operation because of the potential for irreparable harm to other resources, we have introduced another threshold for undue and unnecessary degradation. We have also made it clear in the regulations that a BLM authorized officer can deny a proposed mining operation under certain conditions to protect significant resources. We believe that the definition in the final rule is more comprehensive, straightforward, and easily measured than the prudent operator rule. See the preamble to the final regulations for further explanation of this term.