*Sections 3809.804 Through 3809.809 State Director Review*

Final §§ 3809.804 through 3809.809 flesh out the mechanics of the State Director review process, and generally follow the process described in the October 1999 supplemental proposal.

*Section 3809.804 When May I Ask the BLM State Director To Review a BLM Decision?*

Final § 3809.804 establishes the time frame for requesting State Director review. It provides that the State Director must receive a request for State Director review no later than 30 calendar days after a person receives or is notified of the BLM decision sought to be reviewed. The supplemental proposed rule did not detail the time frame for requesting State Director review, and the 30-day period is consistent with the period specified in previous § 3809.4(b) for requesting State Director review. Thus, an adversely affected party has 30 days to request State Director review or to file an OHA appeal.

*Section 3809.805 What Must I Send BLM To Request State Director Review?*

Final § 3809.805 specifies what a person must send BLM to request State Director review. It provides that a State Director review request must be a single package that includes a brief written statement explaining why BLM should change its decision and any documents that support the written statement. The envelope should be marked ''State Director Review,'' and a telephone or fax number should be provided. These requirements are consistent with those previously found in § 3809.4(c). A person may accompany his or her request for State Director review with a request for a meeting with the State Director. Holding a meeting is discretionary, but the State Director will notify the person seeking review as soon as possible if he or she can accommodate the meeting request.

*Section 3809.806 Will the State Director Review the Original BLM Decision if I Request State Director Review?*

Final § 3809.806(a) provides that the State Director may, but is not obliged to accept requests for State Director review. Based on factors such as workload or complexity of the issues, the State Director may conclude that it is appropriate for appeals to be heard directly by OHA rather than at the BLM State Director level. The October proposal stated that the State Director would have seven days to decide whether to accept a request for review. BLM has revisited this and has concluded that seven days may not be sufficient for the State Director to determine whether to conduct the review of an earlier decision and thus has provided 21 days to make that determination.

Final §§ 3809.806(b) and (c) describe address possible overlapping OHA appeals and State Director review proceedings. Final § 3809.806(b) provides that a State Director will not begin a review, and will end an ongoing review if the party who requested State Director review or another party files an appeal of the original BLM decision with OHA under § 3809.801 before the State Director issues a decision, unless OHA defers consideration of the appeal pending the State Director decision.

Final § 3809.806(c) provides that a party filing an appeal with OHA after requesting State Director review must notify the State Director. After receiving such a notice, the State Director may request OHA to defer consideration of the appeal. Final § 3809.806(d) provides that if a party who requested State Director review fails to notify the State Director of his or her appeal to OHA, any decision issued by the State Director may be voided by a subsequent OHA decision.

*Section 3809.807 What Happens Once the State Director Agrees to My Request for a Review of a Decision?*

Final § 3809.807(a) directs the State Director to promptly send the requester a written decision. BLM intends to act promptly on requests for State Director review. This is consistent with previous § 3809.4(d). Although there is no consequence if the State Director does not issue the decision promptly, the party may choose to appeal the original BLM decision to OHA at any time before the State Director issues the decision.

Under the final rule, the State Director's decision may be based on any of the following: the information the requester submits; the original BLM decision and any information BLM relied on for that decision; and any additional information, including information obtained from a meeting the requester held with the State Director. The State Director may affirm, reverse, or modify the original BLM decision, and the State Director's decision may incorporate any part of the original BLM decision. If the original BLM decision was published in the **Federal Register**, the State Director will also publish his or her decision in the **Federal Register**.

*Section 3809.808 How Will Decisions Go into Effect When I Request State Director Review?*

Final § 3809.808 describes how decisions go into effect when a person requests State Director review. Under final § 3809.808(a), the original BLM decision remains in effect while State Director review is pending, except that the State Director may stay the decision during the pendency of his or her review. This is consistent with previous § 3809.4(b) and (f). Under final § 3809.808(b), the State Director's decision will be effective immediately and remain in effect, unless a stay is granted by OHA under 43 CFR 4.21.

*Section 3809.809 May I Appeal a Decision Made by the State Director?*

Final § 3809.809 addresses whether a party may appeal a decision made by the State Director. Final § 3809.809(a) provides that an adversely affected party may appeal the State Director's decision to OHA under 43 CFR part 4 except that a party may not appeal a denial of his or her request for State Director review or for a meeting with the State Director. This is consistent with previous § 3809.4(e). Persons who did not participate in the State Director review process, but who participated in the underlying BLM proceeding that was appealed are considered parties and may appeal State Director review decisions.

Final § 3809.809(b) provides that once the State Director issues a decision on the review, only the State Director's decision can be appealed, and not the original BLM decision. This is because when the State Director issues a decision, it replaces the original BLM decision, which is no longer in effect.

*Comments on State Director Review*

Some commenters supported having the opportunity to appeal BLM field office decisions to BLM State Directors. Some stated that they favored State Director review as a mechanism to save time on appeal. Others favored the development of an appeals process that involves and emphasizes the input of local and State managers. Others objected to State Director review. BLM agrees that it is useful to have a process whereby the appeals can be resolved in a timely manner in the State where the decision was made.

A commenter interpreted the proposed regulations as allowing each BLM State Director to grant a stay on a positive Record of Decision for a mining operation. The commenter stated that this power is currently reserved to the Interior Board of Land Appeals,

comprised of a group of judges, and that allowing a decision whether to grant a stay to be determined by one person is contrary to the intent of Congress.

The commenter is correct that under the final rules the BLM State Director may stay a BLM field office or other decision that approves a plan of operation. The commenter is not correct, however, in asserting that this is a new feature. Previous § 3809.4(b) specifically provided that a request for a stay could accompany an appeal to the State Director.

*Section 3809.900 Will BLM Allow the Public To Visit Mines on Public Lands?*

The discussion of final § 3809.900 appears earlier in this preamble under the discussion of comments received on the proposed requirement to allow citizens to accompany BLM inspectors to mine sites, proposed § 3809.600(b).

*Section 9263.1 Operations Conducted Under the Mining Law of 1872*

The discussion of final § 9263.1 appears earlier in this preamble under the discussion of comments received on the proposed penalty provisions at § 3809.700.

## III. How Did BLM Fulfill Its Procedural Obligations?

*Executive Order 12866, Regulatory Planning and Review*

These regulations are a ''significant regulatory action,'' as defined in section 3(f) of Executive Order 12866, and require an assessment of potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions. As a ''significant regulatory action,'' the regulations are subject to review by the Office of Management and Budget.

In accordance with E.O. 12866, BLM performed a benefit-cost analysis for the proposed action. We used as a baseline the existing regulation and current BLM administrative costs. The potential costs associated with the regulation are increased operating costs for miners and increased administrative costs for BLM. The potential benefits are environmental improvements. Both benefits and costs are difficult to quantify because many of the possible impacts associated with the regulation will be site- or mining-operation-specific.

The intent of the benefit/cost/Unfunded Mandate Act analysis and the Regulatory Flexibility Act analysis is to satisfy the requirements of E.O. 12866, the Unfunded Mandates Reform Act (UMRA), and the Small Business and Regulatory Enforcement Flexibility Act (SBREFA). E.O. 12866 and UMRA require agencies to undertake benefit-cost analysis for regulatory actions. The material presented below summarizes the analyses that have been conducted.

*Background and Need for the Regulation*

The need for the regulation is associated with both a compelling public need and market failures. Congress, the General Accounting Office, and the public have increasingly recognized the need for improving BLM's surface management program under the subpart 3809 regulations. Since the original subpart 3809 regulations were issued in 1980, mining technology and processes have changed considerably. The following list of issues related to the 1980 regulations suggests that revisions are warranted:

- Plan-level operations are not required to have financial guarantees; BLM has discretion whether to require a financial guarantee. The regulations do not allow BLM to require financial guarantees for notice-level operations. A large number of operations have gone unreclaimed, causing environmental damage and imposing reclamation costs on taxpayers as a whole. A 1999 survey of BLM field offices found more than 500 operations that operators had abandoned and left BLM with the reclamation responsibility. Many of these were small mining operations conducted under notices. The NRC Report recommended that secure financial assurances be required for reclamation of all disturbances beyond casual use, including notice-level activity and that all mining and milling operations be conducted under plans of operations, and that notices be used only for exploration.
- Some small mining operations with high environmental risks, such as cyanide use or acid drainage potential, can proceed without NEPA review or BLM approval, simply because they disturb less than 5 acres and qualify as a notice.
- The lack of clarity in the types of activities permissible under ''casual use'' has led to inconsistencies and environmental damage in some instances.
- BLM has no official way of clearing records for notices. Notice-level activities are often never completed, or in some cases never started. Without a reclamation bond, or an expiration term, notices are often left open for years with no incentive for the operator to complete the reclamation, notify BLM, and get the notice closed.
- BLM lacks clear, consistent standards for environmental protection in the existing regulations. As the NRC noted, although mining operations are regulated under a variety of environmental protection laws implemented by Federal and State agencies, these laws may not adequately protect all the valuable environmental resources at a particular location proposed for mining development. Furthermore, the existing definition of ''unnecessary or undue degradation'' does not explicitly provide authority to protect all valuable resources.
- Mitigation is not defined in BLM regulations to allow BLM to compensate for impacts offsite where disturbed areas cannot be reclaimed to the point of giving plants, animals, and people the same benefits that existed before disturbance. This fact has resulted in an overall decrease in productivity around the area of operations.
- BLM cannot suspend or nullify operations that disregard enforcement actions or pose a imminent danger to human safety or the environment. Criminal penalties under the existing regulations have often proven ineffective. The existing regulations do not allow BLM to use civil penalties as an enforcement tool. The NRC Report recommended that BLM have the authority to issue administrative penalties for violations of the regulations.
- BLM can require modifications to plans of operations only after review by the State Director concludes that the event could not have reasonably been foreseen in the original approval. The NRC Report recommended that this ''looking backward'' process should be abandoned in favor of one that focuses on what may be needed in the future to correct the environmental harm and that the regulations be revised to provide more effective criteria for BLM to require plan modifications where needed to protect Federal land.
- The existing regulations do not distinguish between temporarily idle mines and abandoned operations. This distinction is needed to determine which mines need just to be stabilized, if idle, or reclaimed, if abandoned. The NRC Report recommended that the regulations be changed to define the temporary versus abandoned conditions and to require interim management plans for operations that are only temporarily closed.
- The existing regulations do not provide for long-term site maintenance, water treatment, or protection of

reclaimed surfaces. The NRC Report recommended BLM plan for and assure the long-term post-closure management of mine sites.

• The lack of clarity in the types of activities permissible under ''casual use'' has led to inconsistencies and, occasionally, environmental damage. Damage results mostly when many people concentrated in a small area engage in casual use. The cumulative impacts of such groups often exceeds the ''negligible disturbance'' in the existing definition of casual use.

• In some operations proposed under the 1980 regulations, the legal status of the material to be mined is in dispute as to locatable under the mining laws or saleable as a common variety mineral. BLM needs regulations to resolve disputes without unreasonably delaying mining operations.

• The 1980 regulations have no requirement for preventing disturbances in areas closed to mineral entry until a discovery is determined to be valid or not. In areas closed to the operation of the mining laws, surface disturbance should be allowed only where the right to mine predates the segregation or withdrawal.

Absent a regulatory intervention, the market alone would be unlikely to ensure that sufficient and timely reclamation occurred or that society had sufficient information to minimize environmental damages and determine appropriate reclamation activities. Without requirements for financial guarantees, firms would have weaker incentives to reclaim disturbed lands. The costs associated with offsite damages would be particularly difficult to internalize absent some type of market intervention. The extent to which the parties could resolve these situations themselves is limited due to the high transaction costs and the unequal bargaining power of the entities involved. Currently, a large class of operators on public lands are not required to provide financial guarantees. These operators have little incentive to restore mined lands to a state where they will be able to provide a pre-mining level of ecosystem services. Absent revisions to the regulations, operators would have fewer incentives to undertake sufficient baseline environmental studies, disclose the nature and extent of their activities to the public, and monitor environmental conditions during and after mining.

*Description of Regulation and Alternatives Considered*

The alternatives we considered are described in detail in the Final EIS and elsewhere in the preamble. Briefly, they include the following:

Alternative 1: Current regulations. The 1980 regulations would be retained.

Alternative 2: State Management. Under this alternative, BLM would rescind the 1980 regulations and return to the prior surface management program strategy, under which State or other Federal regulations governed locatable mineral operations on public land.

Alternative 3: Proposed Regulations. This final rule would replace the regulations at 43 CFR 3809.

Alternative 4: Maximum Protection. Under Alternative 4, the 3809 regulations would contain prescriptive design requirements for resource protection. These requirements would increase the level of environmental protection and give BLM very broad discretion in determining the acceptability of proposed operations. Major changes from the current regulations include the following:

• Expanded application to public lands with any mineral or surface interest.

• Numerical performance standards for mineral operations.

• Required pit backfilling.

• Elimination of notices so that all disturbances greater than casual use require plans of operations.

• Required conformance with land-use plans.

• Prohibitions against causing irreparable harm or having to permanently treat water.

Alternative 5: NRC Recommendations. Alternative 5 would change the existing regulations only where specifically recommended by the NRC Report. Under Alternative 5, the definition of ''unnecessary or undue degradation'' would remain same as the current regulations. The prudent operator standard would be retained, and operators would have to follow ''usual, customary, and proficient'' measures, mitigate impacts, comply with all environmental laws, perform reclamation, and not create a nuisance.

Disturbance categories and thresholds would be the same as under Alternative 3, but Alternative 5 would not expand the types of special status lands. The change threshold would be based on the division between exploration and mining. All mining, milling, and bulk sampling involving more than 1,000 tons would require a plan. Exploration disturbing less than 5 acres would still require a notice unless occurring on special status lands. Actual-cost bonding would be required for all notices and plans.

*Summary of the Benefit/Cost Analysis*

In response to comments on the initial benefit/cost analysis, BLM attempted to account for the economic value of any foregone minerals production that might result from the regulations. This value can change over time, depending on the time path of prices, interest rates, and extraction costs. Estimating these values is also complex due to uncertainty about timing effects, technology changes, and future commodity prices.

Information from mine cost models was used with other data collected by BLM to develop estimates of the annual cost of the regulation. Given the limitations of the models, the uncertainty about the magnitude of permitting costs, the extent to which delays can be attributed to the regulations, and the wide variety of mining activity occurring on public lands, these estimates should be interpreted with some caution. In particular, the baseline cost information best applies to the operations modeled and may not accurately describe the cost conditions associated with operations of different size or commodities. To account for the fact that the cost models may not be representative of the types of mining activity occurring on public land, sensitivity analysis was done by varying the baseline costs by plus or minus 20%.

The economic cost of the permitting/compliance components regulation were developed by estimating the annual cost changes associated with the regulation for new and existing plans of operation and for new and existing notices. This manner in which this was done is described in detail in the benefit/cost analysis. The analysis incorporates a number of behavioral assumptions concerning the extent to which the regulation might affect the number and distribution of future notices and plans. These assumptions parallel those used in the final EIS to project minerals activity.

*New plans of operations:* For new plans of operations, the estimated number of plans was multiplied by the appropriate cost increase for each mine model. This total was then adjusted to account for the fact that only 20% of the plans would be affected by the regulation, given that an estimated 80% of the operators are already complying with the requirements of the regulation. Permitting costs were assumed to increase from $600,000 to $900,000 for the open pit model; from $100,000 to $125,000 for the strip/industrial model; from $50,000 to $80,000 for the medium placer model; from $10,000 to $100,000 for the underground model; and from

$50,000 to $75,000 for the medium exploration model. The maximum protection model assumed that permitting costs increased from $600,000 to $1 million for the open pit model; from $100,000 to $150,000 for the strip/industrial model; from $10,000 to $150,000 for the underground model; from $50,000 to $80,000 for the medium placer model; and from $50,000 to $80,000 for the medium exploration model. For these models, permitting costs are annualized over the life of the model mine using a 7% discount rate. Permitting costs for exploration activities were not annualized, but were included as a lump sum.

Under this final rule, some mining and explorations activities that would have operated under notices previously would now have to operate under plans of operations. For the preferred alternative, BLM assumed that 90% of the new open pit, industrial/strip, exploration, and underground operations that would have operated previously under notices would file plans; 70% of the new placer operations would file plans; and 10% of the exploration operations would file plans. The remaining new notices would be composed only of exploration activities. Notices are not allowed under the maximum protection alternative. The maximum protection alternative assumed that: 70% of the open pit, industrial/strip, exploration, and underground notices would file plans; 60% of the placer notices would file plans; and 80% of the exploration notices would file plans. These assumptions are consistent with the final EIS.

For the preferred alternative, it was assumed that close to 45% of the total number of new notices submitted annually would be required to file plans of operation under the regulation regardless of the type of mining activity. This implies that 270 notices out of the annual baseline number of 600 would be required to submit plans. Adjusting for the estimated reduction in the number choosing to submit plans (10% reduction for open pit, strip, and underground; 30% reduction for placer) gives an estimate of 210 new plans (that formerly would have been notices). Each new plan would bear permitting, reclamation, and bonding costs. For the NRC alternative, the parameters are largely the same, except that the estimated reductions in the number choosing to submit plans are smaller (5% reduction for open pit, strip, and underground; 20% reduction for placer). The cost associated with ''converting'' to a plan vary widely.

For mining activities, permitting costs were assumed to average about $60,000 per plan; permitting costs for exploration activities were assumed to average about $33,000. Sensitivity analysis also examined the implications of conversion costs (for all notices regardless of type of activity) of $100,000 and $20,000. The analysis assumes that the regulation increases reclamation costs for the average 2.5 acre notice by $500 and $1,500 per acre, respectively for exploration and mining activities. Bonding costs were assumed to be $500 per notice. For the purposes of developing a cost estimate, it was assumed that the activities included in the these new plans would occur for 5 years. It was also assumed that given that mining would be conducted under a plan, the acreage disturbed would be somewhat larger than if this class of notices had remained notices. Bonding and reclamation costs were increased 30% to account for this.

*Existing exploration notices:* For the purpose of developing a cost estimate, the following assumptions were used. For exploration notices, in year 1 it was assumed that 5% of the notices were modified or extended and 5% dropped out; in year 2, 10% of the remaining notices modified or extended and 10% dropped out; and in year 3, 25% modified or extended, 25% dropped out, and 3% became plans. In years 4 to 10, 1% of the remaining notices become plans and 5% drop out each year. Over the 10-year period of analysis, this implies that about 4% of the total existing stock of notices become plans and about 40% drop out. Once a notice converts to a plan or modifies/extends, it incurs permitting, reclamation, and bonding costs. It was assumed that all permitting costs were incurred in the year in which the conversion occurred (permitting costs were not annualized); that the duration of all mining activities was 5 years and that reclamation costs were incurred in equal annual increments over this period; and that bonding costs were incurred over the 5-year period during which mining was occurring.

*Existing placer mining notices:* About 20% of the stock of existing notices are associated with placer mining. To estimate the cost of the regulation, the following assumptions were used: in year 1, 5% of the existing notices drop out; in year 2, 10% drop out; in year 3, 20% (or 225) of the remaining placer notices convert into plans and 80% drop out. During years 4–8 these 225 plans continued to operate; however, they ceased to operate beginning in year 9. The placer plans incurred permitting costs of $20,000 per plan in year 3, and bonding ($1,000 per plan) and reclamation costs (an increase of $1,500 per acre relative to the baseline for each plan) in each year they operated. Bonding and reclamation costs were also increased 20% to account for the fact that the placer plans might disturb somewhat larger acreage than if they had remained notices. All other existing notices: 10% were assumed to drop out in year 1; 20% were assumed to drop out in year 2; and in year 3, 50% of the remainder were assumed to drop out and 50% converted into plans. It was assumed that permitting costs were $40,000 per plan and that reclamation costs increased by $1,500 per acre over the existing baseline. Bonding and reclamation costs were also increased 20% to account for the fact that the plans might disturb somewhat larger acreage than if they had remained notices. The parameters for NRC alternative are similar. The maximum protection alternative assumed similar permitting costs, annual bonding costs of $1,500 per ''small'' plan, and a cost increase factor of 30% to account for the fact that plans might disturb somewhat larger acreage.

The net benefits of the alternatives considered cannot be quantified because information on site-specific and other operation-specific factors is not readily available. Implementation of the SIH standard also introduces a substantial degree of uncertainty in estimates of net benefits. At the same time, however, the fact that this standard could be applied to unique resources implies that it may be associated with substantial economic benefits. Costs are somewhat more amenable to analysis, though still subject to considerable uncertainty due to the extent to which prices, production, technology, and costs may change over time. Table 21 in the benefit/cost analysis, reproduced below, summarizes the estimated costs of the alternatives.

**Table 21. Estimated Change in the Cost of the New Regulation Relative to the Existing Regulation [a]**

| | Annualized Cost ($ mil) | | | NPV Cost ($ mil) | | |
|---|---|---|---|---|---|---|
| ***TYPE OF ACTIVITY*** | **Preferred** | **NRC** | **Max protect** | **Preferred** | **NRC** | **Max protect** |
| ***PLANS*** | | | | | | |
| New and existing Plans | 1.6 | 0.3 | 4.8 | 11.5 | 2.0 | 33.5 |
| New Notices required to be Plans | 4.9 | 4.1 | 21.6 | 34.1 | 29.0 | 151.6 |
| Existing Notices required to be Plans | 5.1 | 4.9 | 6.2 | 35.9 | 34.4 | 43.4 |
| Casual use required to be Plans [suction dredge] | 0.6 | 0.6 | 0.5 | 4.4 | 4.4 | 3.5 |
| ***Subtotal*** | 12.2 | 9.9 | 33.0 | 85.9 | 69.7 | 232.0 |
| ***NOTICES*** | | | | | | |
| New notices | 0.4 | 0.43 | 0 | 2.6 | 2.9 | 0 |
| Existing notices that remain Notices (or "small" plans) | 1.0 | 1.03 | 1.6 | 7.2 | 7.2 | 11.3 |
| ***Subtotal*** | 1.4 | 1.5 | 1.6 | 9.8 | 10.2 | 11.3 |
| ***BLM ADMIN COSTS*** | 3.0 | 3.3 | 8.5 | 20.4 | 23.2 | 60.0 |
| **TOTAL PERMITTING/ COMPLIANCE** | 16.5 | 14.3 | 43.2 | 116.2 | 100.4 | 303.4 |
| Total less BLM Admin | 13.6 | 11.4 | 34.7 | 95.8 | 79.9 | 243.4 |
| **Value of forgone prod** | 0 - 133 | 0 - 31.7 | 175.2 - 413.8 | 0 - 934.5 | 0 - 222.5 | 934.5 - 2,610 |
| ***TOTAL COST*** | | | | | | |
| Low forgone production | 16.5 | 14.3 | 209.9 | 116.2 | 100.4 | 1,237.9 |
| High forgone production | 149.6 | 46.0 | 457.0 | 1,050.7 | 322.9 | 2,913.4 |
| **Sensitivity Analysis - compliance costs** | | | | | | |
| +20% | 19.9 | 17.1 | 51.8 | 139.5 | 120.4 | 364.0 |
| -20% | 13.3 | 11.4 | 34.6 | 93.0 | 80.3 | 242.7 |

[a] Costs discounted at 7%.

As discussed in the analysis, in response to many comments concerning the quantification of benefits, BLM's final analysis does not attempt to quantify the net benefits of the regulation. However, it should be noted that a commenter on BLM's initial benefit-cost analysis revised BLM's initial analysis and calculated that the total npv costs ranged from $106 million to $649 million; benefits were recalculated to range from $11 million to $161 million. Even though this commenter was critical of BLM's analysis, their own results suggest that there is a substantial range where there may be positive net benefits. For example, if the costs were at the low end of the range of costs ($106 million) and the benefits at the upper end of the range of benefits ($161 million), then the net benefits would be $55 million.

Because both the costs and benefits vary across the alternatives, it is not possible to compare the cost effectiveness of the alternatives. Some comparisons, however, can be made between the preferred alternative and the NRC alternative.

The results of the analysis suggest that the annual compliance/permitting cost of the preferred and NRC alternatives is about $15–20 million (giving a ±20% range of about $12 million to $24 million). In present value terms (over 10 years and using a 7% discount rate), these annual costs are equivalent to $105–141 million. The annual cost of forgone production for the preferred alternative is estimated to range from $0 to $133 million; for the NRC alternative forgone production is estimated to be $0–$32 million. Note that these values may overstate actual losses because a number of factors will act to mitigate any production losses and because they are calculated using a base of total U.S. gold production, not production originating from public lands. Simply adjusting for production originating on public lands could reduce the value of forgone production by half. Other mitigating factors could include: increasing production from existing mines, shifting production to non-Federal lands, technologic change, the ability to increase recycling, and sales of gold from existing stocks. Similarly, it is expected that both BLM and operators will become more efficient at administering and meeting the requirements of the regulation as time progresses. Assuming that most of the forgone production would be due to the application of the SIH standard, not including this element in the regulation

would leave the preferred and NRC alternatives as providing roughly equivalent levels of net benefits. On this basis, the NRC alternative would appear to have slightly lower costs to attain the same level of benefits as provided by the preferred alternative.

Including the SIH standard could result in substantially higher benefits (if it results in the preservation of unique resources), but it is also likely to have production effects. The opportunity cost associated with preserving these resources is the forgone production. These values could be quite large, but one would need to account for the probability of occurrence (*i.e.,* the probability the SIH standard would be invoked and result in the preservation of a unique resource) and for timing effects. These probability and timing effects are very difficult to evaluate.

The net benefits associated with the maximum protection alternative cannot be easily compared to the other alternatives because both the costs and benefits differ. However, the economic benefits would have to be substantially larger than those associated with the other alternatives to offset the higher estimated costs.

As stated above, it is difficult to quantify the net benefits of the alternatives. However, if the costs are relatively low (as in the preferred and NRC alternatives in the case of low forgone production which have estimated annual costs of about $15–20 million), the benefits would not have to be large to equal or exceed the costs.

Table 26 in the benefit-cost analysis, reproduced below, summarizes the estimated cost of the regulation on a per-capita and per-acre basis. Based on the population and number of households in the study area, the estimated annual cost per capita of the preferred alternative ranges from about $0.23–$2.70. Based on the estimated population residing within 5 miles of a mine, the annual costs per capita range from $5.3–$61; based on the number of households within 5 miles, the annual per household costs range from about $13–$153. Annual cost per acre for the preferred alternative, based on the estimated reduction in the number of acres disturbed could range up to about $2,500 per acre, depending on the change in acreage disturbed. On a per-capita basis, the magnitude of environmental benefits associated with the regulation could be quite small and still offset the estimated costs. Also, in some locations mining has the potential to impact unique resources. The potential environmental benefits of protecting even a small number of unique resources over time could easily offset the costs of the regulation.

**Table 26. Per Capita and Per Acre Estimated Economic Costs**

| Category | | Preferred [a] | | NRC [b] | | Max protection [c] | |
|---|---|---|---|---|---|---|---|
| | | Compliance cost | Including forgone production | Compliance cost | Including forgone production | Compliance cost | Including forgone production |
| **Population** [d] | Pop or hh | ($ per capita or $ per household) | | | | | |
| Est. total study area pop | 57,300,000 | 0.23 - 0.35 | up to 2.7 | 0.2 - 0.3 | up to 0.85 | 0.6 - 0.9 | up to 3.2 |
| Est. no. households in study area | 27,285,714 | 0.5 - 0.74 | up to 5.6 | 0.42 - 0.63 | up to 1.79 | 1.3 - 1.9 | up to 6.8 |
| Est. pop w/in 5 mi of mines | 2,500,000 | 5.3 - 7.9 | up to 61 | 4.6 - 6.9 | up to 19.5 | 13.8 - 20.7 | up to 74.0 |
| Est. households w/in 5 mi. of mines | 1,002,440 | 13.2 - 19.8 | up to 153 | 11.4 - 17.1 | up to 48.7 | 34.5 - 51.7 | up to 184.4 |
| **Estimated change in acres disturbed due to regulation [d]** | | | | | | | |
| *Total reduction in acres disturbed over 10 yrs* | Acres disturbed | ($ per acre) | | | | | |
| Low estimate | 100,000 | 930 - 1,395 | up to 2,493 | 803 - 1,204 | up to 1,320 | 2,227-3,640 | up to 4,364 |
| Medium estimate | 300,000 | 310 - 465 | up to 831 | 268 - 401 | up to 440 | 809-1,213 | up to 1,455 |
| High estimate | 500,000 | 186 - 279 | up to 499 | 161 - 241 | up to 264 | 485 - 728 | up to 873 |

[a] Based on annual permitting/compliance costs ranging from $14 million to $20 million. Annual forgone production estimated at 20%; annual value of production reduction estimated to be $0 - 133 million.

[b] Based on annual permitting/compliance costs ranging from $12 - 18 million. Annual forgone production ranges from 0% - 5%; annual value of production reduction estimated to be $0 - 32 million.

[c] Based on annual permitting/compliance costs ranging from $38 - 57 million. Annual forgone production estimated at 20%; annual value of production reduction estimated to be $133 million.

[d] The per capita and per household costs are based on annual costs; the per acre estimates are based on total acreage disturbed over 10 years and npv costs.

BLM is placing the full benefit/cost analysis on file in the BLM Administrative Record at the Nevada State Office, P.O. Box 12000, Reno, Nevada 89520, or you may contact BLM's Regulatory Affairs Group at 202/452–5030.

**National Environmental Policy Act**

These proposed regulations constitute a major Federal action significantly affecting the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). BLM has prepared a final environmental impact statement (EIS), which will be on file and available to the public in the BLM Administrative Record at the Nevada State Office, P.O. Box 12000, Reno, Nevada 89520, and on BLM's home page at www.blm.gov.

*Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act*

Congress enacted the Regulatory Flexibility Act of 1980 (RFA), as amended, 5 U.S.C. 601–612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The purpose of the final RFA analysis is to estimate the number of entities potentially impacted, the magnitude of the impacts, summarize the significant issues raised in public comment on the proposed rule, and identify the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of the applicable statutes. The final RFA analysis also fulfills the requirements of the Small Business and Regulatory Enforcement Flexibility Act (SBREFA) analysis. SBREFA requires agencies to analyze the impact of regulatory actions on small entities; to prepare and publish an initial regulatory flexibility analysis when proposing a regulation; and a final analysis when issuing a final rule for each rule that will have a significant

economic impact on a substantial number of small entities. The Small Business Administration (SBA) has determined that the size standard for businesses engaged in mining of metals and non-metallic minerals, except fuels, is 500 employees. See 13 CFR 121.201. Thus, any business employing 500 or fewer employees is considered ''small'' for the purposes of this analysis. We believe that virtually all businesses currently engaged in mining on public lands could be considered ''small'' under the SBA 500-employee standard.

In February 1999 BLM published a proposed rule for regulating mining activities on public lands. BLM also prepared and made available for comment an initial RFA analysis. BLM published a summary of the initial RFA analysis along with the proposed rule, made the full initial RFA analysis available along with the proposed rule, and sought public comment on its findings. BLM received about 2,500 public comments on the proposed regulation and associated documents. BLM has undertaken a substantial effort to both consider and disclose the potential implications of the regulation for small entities. The final RFA analysis also summarizes the significant public comments received on the initial RFA analysis and responses to these comments.

The public comments we received enabled us to refine and revise our analysis of the potential impact of subpart 3809 on small entities. BLM has concluded that the final regulation will have a significant economic impact on a substantial number of small entities.

BLM notes that one of the primary differences between the proposed and final rule is the inclusion of the ''significant irreparable harm'' standard. In the interest of informing the public about the impacts of the rule on small entities, the implications of including this provision are summarized below and discussed in more detail in section X of the Final RFA.

You can find detailed information on the alternatives considered in the summary of the benefit/cost analysis above, the preamble, the Final EIS, and the benefit/cost analysis. The alternative selected was judged to be the best in terms of not being inconsistent with the recommendations in the NRC report, being responsive to public comments, maximizing net economic benefits, and minimizing the impacts on small entities while still achieving the desired objectives.

*Comments on the Proposed Rule*

This section summarizes the significant public comments received on the initial RFA analysis and responses to these comments. More detailed responses to comments are found in Appendix A to the final RFA analysis.

Many commenters asserted that the proposed regulation would substantially reduce profits in the mining industry. BLM agrees that the new regulations could reduce profits, but that the extent to which this occurs and which firms are affected depends on a variety of factors that include commodity prices, management expertise and firm capitalization, technological changes over time, location and type of activities, other Federal and non-Federal regulations, as well as any BLM regulation-driven operating and permitting cost changes. BLM also notes that evaluating profit changes is difficult in many situations where small entities are involved due the discretion these entities often have in the treatment of certain costs.

Commenters stated that BLM did not adequately consider what constituted a ''significant impact'' on a small entity. BLM considered these comments and believes its approach is reasonable. The initial RFA analysis specifically identified what BLM considered to be a ''significant impact.'' The final RFA analysis evaluates ''significance'' based on both cost and profit changes. The definition of ''significant impact'' used in this analysis is an impact that causes a 3% or more impact on estimated annual operating costs or on the ratio of the annualized compliance costs to annual gross revenues or a greater than 10% reduction in annual profits.

As with the other concepts, ''significance'' is a relative measure. The criteria used to evaluate ''significant'' are similar to that adopted by other agencies. NOAA defines a ''significant impact'' as: a regulation that is likely to result in a reduction in gross revenues by more than 5%; a regulation that increases total costs of production by more than 5%; a regulation that causes small entities to incur compliance costs that are 10% more than the compliance costs of large entities; or a regulation that causes 2% of small entities to cease business operations. See, for example, 64 FR 6869–75, Feb. 11, 1999 and 64 FR 28143–51, May 25, 1999. EPA defines ''significant'' as an impact of more than 3% on small business sales, cash flow, or profit (Small Business Administration (SBA), undated; EPA, 1997). The 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 and for small miners who may not be involved in commercial scale activities. As recommended by the SBA in their comments on the proposed rule, the revised analysis also shows estimated impacts based on changes in estimated annual profits for the mine models. In commenting on a proposed BLM rule dealing with onshore oil and gas leasing operations, SBA asserted that a 10% impact on a business's profits is the threshold for determining significance (See comments submitted by SBA's Office of Advocacy on proposed rule ''Onshore Oil and Gas Leasing Operations''). SBA did not, however, state whether the 10% threshold is on an annual basis, on a net present value basis over the period of analysis, or whether it represents an average over some period. SBA also did not discuss how it arrived at its estimate of ''significant.'' BLM views the 10% threshold as a percentage that would be considered significant under any terms. Finally, the significance threshold is important in situations where determinations are made that a rule will not have a significant impact on a substantial number of small entities. In this case, as discussed above, BLM has determined that the final rule will have a significant impact.

Commenters stated that BLM did not adequately evaluate the impact of the proposed bonding requirements on small entities. BLM believes that the initial RFA analysis adequately analyzed the bonding requirements in the proposed rule. However, the final RFA analysis includes results from additional mine models that have bonding requirements that vary somewhat depending on the type of mining activity. The final rule has also adopted a number of measures that will mitigate the impact of bonding on small entities. See section IX of the final RFA analysis. Given that bonding for all mining operations is a specific NRC recommendation, BLM's ability to mitigate potential the impacts of bonding requirements on notices is limited (this of course would not preclude non-Federal entities from developing mechanisms to facilitate small entities obtaining appropriate financial guarantees). If small mining entities were not required to have financial guarantees, BLM would not be

in compliance with the direction of Congress not to be inconsistent with the NRC Report recommendations, and the objectives of the rule could not be achieved. BLM also notes that in some States bond pools are available for entities that can't otherwise obtain bonds.

Commenters stated that BLM did little to minimize the compliance burden on small entities. BLM has taken a number of steps in the final rule to minimize the impacts of the rule on small entities. The preamble to the regulation has an extensive discussion on how the rule was changed in response to comments. Section IX highlights some of the specific changes that mitigate the impact of the regulation on small entities.

Commenters stated that the proposed regulation would result in severe reductions in gold production from Alaska. BLM's analysis suggests that the final regulation is unlikely to be the major determinant of any changes in total gold production in Alaska. The regulations may, however, affect which entities produce mineral commodities, with relatively less being produced by small entities.

Commenters stated that BLM used 1992 data in the initial RFA analysis. BLM has used 1997 Census data in the Final RFA analysis, as well as the most recent BLM data available. BLM has also included additional references to the modeling assumptions used. These references are found in the Appendix E of the Final EIS and in the benefit/cost analysis.

Commenters stated that the initial RFA analysis didn't contain a discussion of significant alternatives to the proposed rule. The initial RFA analysis did contain a discussion of the alternatives considered. The final benefit/cost analysis, the final EIS, the preamble to the rule, and Section III of the final RFA contain additional discussion and analysis of the alternatives.

*The Number of Potentially Affected Entities*

Table 9 (reproduced below) from the final RFA analysis summarizes the universe of potentially affected small entities. Estimates are presented using both BLM and Census data. Based on BLM's data and using the SBA's definition of small mining entity, the universe of potentially affected entities would essentially be all existing notices and plans of operation and all new notices and plans. Assuming that each notice and plan of operations represents a unique small entity provides an upper bound estimate for the number of potentially affected entities. A lower bound would be the number of individual operations with plans and notices. Because all operations under subpart 3809 involve ''small'' entities, that is, operations with less than 500 employees, BLM also examined a subset of the industry, operations with fewer than 20 employees, to get a more complete understanding of the impacts of the rule.

TABLE 9.—ESTIMATED NUMBER OF SMALL ENTITIES POTENTIALLY AFFECTED BY THE REGULATION

| Employment category | BLM data | | Census data | |
|---|---|---|---|---|
| | Notices [b] | Plans [b] | Est. number of firms | Estimated percent of companies [d] |
| 500 or fewer employees | All: 6,213 existing; an estimated 350–850 submitted annually by individual operations. | All: 900 existing; an estimated 110–190 submitted annually by individual operations. In addition, 200 existing suchtion dredgers plus 50 submitted annually in the future. | Approx. 700 [c] | 15 |
| Fewer than 20 employees [a] | About 2,604 existing; 350–850 submitted annually. | 342 existing; about 40–70 of the those submitted annually. In addition, 250 existing suction dredgers plus 50 submitted annually in the future. | Approx. 520 [d] | 16 |

[a] Notices—calculated by assuming that all notices have fewer than 20 employees, but that 50% of notices are small in terms of company assets, production, and cash flows; plans—calculated by assuming that 75% of the plans are associated with less than 20 employees and that of these, 50% have sufficient assets, production, and cash flows such as to be relatively unimpacted by the proposed rule.

[b] Annual number of notices and plans: the range represents the approx. 1999 figure (600 notices, 150 plans) plus/minus one standard deviation based on the 1996–99 average.

[c] 1997 Census data indicate that there were a total of 629 metal mining and 3,746 non-metallic mining firms. Assume that 50% of the metal mining activity and 10% of the non-metallic mineral mining occurs on public lands. This suggests that the total number of firms potentially impacted might be 315 + 375 = 690. Percentage based on total number of metal mining and non-metal mining firms.

[d] 1997 Census data indicate that there were 487 metal mining and 2,754 non-metallic mining firms with 0–19 employees. Assume that 50% of the metal mining activity and 10% of the non-metallic mineral mining occurs on public lands. This suggests that the total number of firms potentially impacted might be 244 + 275 = 519. Percentage based on total number of metal mining and non-metal mining firms with 0–19 employees.

Source: BLM; www.sbaonline.sba.gov/advo/stats.

*Estimated Impacts*

We developed cost models for the following types of mines: a small and medium size placer mine; an open pit mine; an industrial/strip mine; an underground mine; and a small and large exploration operation. These models were selected because they capture, in general terms, the wide range of mining activities that occur on public lands. The assumptions used in the models also were designed to represent a wide range of potential costs across the alternatives considered. Additional details on the mine cost models is included in Appendix B of the benefit/cost analysis and in Appendix E of the final EIS. Models do not include estimates for SIH which could not be easily modeled. The impacts of the SIH provision were captured through analysis of potential production declines described below.

Table 24 (reproduced below) from the final RFA analysis summarizes the estimated range of compliance/permitting cost impacts based on the mine models. These impacts vary substantially across the different types of mines modeled. Impacts on some types of entities are significant. Additional detailed information about

the mine models and assumptions used, as well as about the IMPLAN analysis, can be found in Appendix E of the Final EIS and in the benefit/cost analysis.

The IMPLAN analysis offers some indication of the distribution of the costs potentially facing small entities of the regulation across the study area. Direct annual regional economic impacts could vary widely, ranging from $0 to $900 million. However, the degree of impact would vary by State depending primarily on the dominant types of mining and/or commodities mined in each State. For example, in States with relatively little metal mining (Oregon, Washington, and Wyoming), the estimated decrease in value of production would be lower (−5% to −15% in Oregon and Wyoming; −5% to −20% in Washington) than for those States with relatively greater amounts of metal mining (−10% to −30% in Arizona, Colorado, Montana, Nevada, New Mexico, and Utah; −10% to −20% in Alaska; and −10% to −25% in California).

TABLE 25.—SUMMARY OF ESTIMATED IMPACTS FROM THE MINE MODELS [a]

| Mine model | Estimated annual percentage | | Comment |
|---|---|---|---|
| | Cost change | Profit reduction | |
| Small and medium placer | 11–13 | 2.6–20.4 | Does not include permitting cost; in worst case scenario (low gold prices-low ore grades), permit costs of $10,000–$20,000 could cause estimated profits to decline to $0. |
| Open pit | 0–6 | 0–13.5 | Results depend on: extent of delay—if any—in mining caused by the regulation; the magnitude of any permit cost increases; and the price of gold. The higher estimates of profit reductions reflect a 1 year delay in mining, permitting costs that increase from $1 million to $1.5 million, and a gold price of $250/ounce. |
| Industrial/strip | 5.8–9.3 | 8.5–15.3 | Results reflect varying increases in permitting costs; price of gypsum = $7/ton. |
| Underground | 0–3.0 | 2.4–62 | Results depend on: the length—if any—of delays in mining caused by the regulation; gold prices; and permitting costs. The higher estimates of profit reductions reflect a 2 year delay in mining, a gold price of $250/ounce, and permitting costs that increase from $10,000 to $100,000. |
| Exploration | | | Results depend on baseline permit costs and the extent of any increases in these costs; whether validity exam is required and who bears this cost; and whether notice is required to convert to a plan. |
| Medium | 0–48 | Not applicable | |
| Small | 6–100+ | | |

[a] Given that the rule has ''significant'' impacts, the impacts for each alternative are not shown. The table summerize results for models under alternatives 3 and 5. The upper end of the range of costs associated with the alternative 4 models would be higher the upper end for the alternatives 3 and 5 models.

For most types of smaller exploration and mining operations (*i.e.* less than five acres), the main components of the proposed regulations affecting mining would be new administrative requirements designed to increase resource protection. The degree to which these factors (workload, time, and cost) would increase would depend on the type of operation and the reason a plan would be required instead of a notice.

Current corporate guarantees will not be affected, but will not be allowed in the future. This will increase the cost of bonding to those operations who use corporate guarantees. This impact would be concentrated in Nevada where corporate guarantees are currently allowed and there are a number of large mining companies using them.

The performance standards under the proposed regulations are expected to have a relatively larger impact on future large operations (*i.e.* greater than five acres) than the administrative-type provisions. Of the performance standards, the requirement to avoid substantial irreparable harm (SIH) to significant resource values which cannot be effectively mitigated has the greatest potential for affecting mining activities (both large and small). In some cases, this provision could preclude operations altogether. It is expected that the substantial irreparable harm standard would preclude exploration or mining only in exceptional circumstances.

The SIH standard has the potential to impact operators who might otherwise engage in mineral exploration and/or development activities. The impacts are site specific and difficult to quantify. The magnitude of the impacts, the incidence of the costs, the potentially affected entities (and their employment size class), and the timing of the impacts are also difficult to determine. All of these factors could affect the costs. We gain some sense of the relative magnitude of the gross costs across the alternatives by comparing the IMPLAN results for alternatives 3 and 5 (for additional discussion of the IMPLAN results see the discussion above and the Final EIS). The gross direct costs associated with alternative 3 were estimated to be $305 million—$877 million; the gross direct costs associated with alternative 5 were estimated to be $22 million—$182 million. However, it should be kept in mind that these costs need to be weighted by their probability of occurrence. It is not possible to estimate this probability.

The performance standard related to pit backfilling is another provision which could affect small and large open pit operations. However, the proposed backfilling provision is similar to existing requirements in Nevada, and is thus expected to have little effect on operations in that State. Other performance standards are also expected to affect operations, although not to the same degree as pit backfilling. Standards for revegetation and protection and restoration of fish and wildlife habitat are expected to have their greatest impact on small exploration projects and small placer mining.

The IMPLAN analysis estimates that the value of mine production originating from public lands under the proposed action will decrease by 10% to 30%, or $169 million to $484 million across the study area. This level of decreased production is associated with the following decreases across the study area: 2,100 to 6,050 jobs, $305 million to $877 million in total industry output, $138 million to $396 million in total personal income (of which $76 million to $218 million is employee compensation), and $157 million to $453 million in value-added. For the study areas's total current value-added as measured by gross state product (GSP), this $157 to $453 million would represent a 2%—6% decrease in GSP-related value in the metals and nonmetallic sectors.

Most States would see decreased levels of mining on public lands, ranging from $101,000 to $302,000 thousand in Oregon to $117 million to $351 million in Nevada. Nevada's share of the loss would be 70% of the loss for the study area as a whole. However, with the exception of the substantial irreparable harm standard, Nevada's existing regulations already incorporate most of the provisions of the proposed action, so the estimated 10%—30% decline in that State's production is likely to be overstated. On the other hand, the impacts in Nevada are based only on the portion of production coming from public lands. To the extent that the affected portion coming from public lands may negatively affect a larger portion of production coming from non-BLM lands, the impacts to Nevada may be understated; conversely, if it leads to more production from non-BLM lands, the impacts may be overstated.

A 10%–30% decline overall in mineral production from current levels would result from a variety of responses by the mining industry. Some potential future operations would now be considered uneconomic and therefore would not be developed. Future operations might have shorter mine lives. Or current operations that might expand under these new regulations might close sooner than they otherwise would, holding constant other factors (*e.g.* technology, commodity prices, and political and economic conditions for mining in other countries). A lower level of exploration due to more restrictions would also tend to decrease opportunities for future development, so some deposits would not even be found.

This analysis is based on BLM's best estimates of potential overall reductions in the level of production of mineral commodities and estimates of increased costs borne by firms. But aggregate levels of output might not change, given more efficient mining and reclamation techniques, a possible shift in production to non-Federal lands, or other changes in market conditions. Total quantity produced could remain unchanged. Alternatively, the regulatory cost burden imposed by the proposed regulations could be overwhelmed by other market forces—such as commodity prices—that might play a relatively more important role in miners' production decisions.

Further, the regulations would not be implemented in a static environment. Both miners and BLM would probably become more efficient in meeting the requirements of the regulations over time. In the long run, the regulations might even create incentives for firms to seek new lower cost approaches to mining and reclamation. This is a reasonable assumption given the inclination most firms have to constantly seek least-cost technology and business practices. This assumption implies that the costs of the regulations could decline over time.

Rural communities might or might not be affected, depending on a variety of factors: the current local level of activity; the degree of dependency or ''specialization'' a community may have in mining subject to proposed regulations; and the size of the community, its isolation, and other factors. Except possibly in Nevada, small rural communities in most States would lose only a small number of jobs and output relative to overall employment and output levels. And some or all of this decrease might be due to forgone future mining rather than current operations shutting down, or closing earlier than originally planned due to a reduction in economic reserves. In other words, there might be no impact to current mining in these communities, but new operations in the future might not be developed.

In Nevada, impacts to rural communities might be greater than in other States due to the greater estimated decrease in activity (1,050 to 3,200 jobs and $181 to 543 million in industry output). But the impact to any particular community in the State would depend on whether it results from existing mines closing prematurely or potential future operations not being developed. Any impacts at the community level would not likely occur in the short term while the proposed regulations are being implemented because mines with existing permits would not be affected unless they submit amendments to their plans of operations. But, as previously stated, Nevada's existing regulations already incorporate most of the provisions of the proposed action, so the estimated 10%–30% decline in production might be overstated.

The conclusion of this analysis is that the regulation would affect a substantial number of small entities in significant manner. The magnitude of the impacts will vary considerably depending on the nature and location of the activities, site specific factors, the particular financial and managerial characteristics of the operations, the presence (and content) of any agreements with States, and when the operation would be subject, if at all, to the new regulations. Given these uncertainties, it is not possible to estimate specifically which entities would be affected, the magnitude of the impacts, or the average impacts on the potentially affected entities. The modeling undertaken suggests that the largest cost impacts would be felt by exploration activities; however, all of the other modeled mines also have the potential to experience significant profit reductions.

*Description of Projected Record Keeping and Other Compliance Requirements*

Final §§ 3809.301 and 3809.401 identify the specific information that must be included in a notice or a plan of operations. The level of detail for specific notices and plans of operations will vary depending upon the type of operation, the local environmental setting, and the issues of concern. Often the information provided for an analogous State requirement would be adequate. The general types of skills that might be required includes mining engineering, geology, hydrology, and other natural resource specialties. Not all notices and plans would require these skills. BLM will assist operators in preparing notices or plans when necessary.

In response to comments stating that plan content requirements were too detailed or were too open-ended, BLM has revised the regulations to specify that the level of detail must be sufficient for BLM to determine that the plan of operations would prevent unnecessary or undue degradation. BLM recognizes that the level of detail required will be determined by the needs of the individual review process.

*Minimizing the Impacts on Small Entities*

This rule is a major rule under SBREFA (5 U.S.C. 804(2)). This rule may have an annual effect on the economy of $100 million or more. See the discussion under E.O. 12866 above. In accordance with SBREFA, BLM has taken steps to minimize the compliance

burden on small miners. During the scoping process for the development of the proposed regulation, BLM actively sought comments from small miners. BLM's activities associated with soliciting comments from interested parties is described in more detail in this final rule preamble.

The following components of the regulation have been explicitly developed to mitigate the potential impacts on small entities. This preamble contains considerable additional detail on changes to the regulation that mitigate the impacts on small entities. Examples include:

• *Plan content and information requirements:* BLM has revised proposed § 3809.401 to specify that the level of detail must be sufficient for BLM to determine that the plan of operations would prevent unnecessary or undue degradation. BLM has also deleted ''fully'' from the paragraph and instead will have the level of detail be driven by the needs of the individual review process. The required level of detail will vary greatly by both type of activity proposed and environmental resources in the project area. On large EIS-level projects scoping may actually start before a plan of operations is submitted through discussion with BLM staff on the anticipated issues and level of details expected. A certain level of detail is needed to begin public scoping. In the initial plan submission it is up to the operator to determine what level of detail to include in the plan. BLM will then advise the operator if more detail is required, concurrent with conducting the scoping under NEPA. BLM has also revised the final regulations to eliminate the ''detailed'' requirement from descriptions of operations and reclamation in order to let the issues of a specific plan of operations determine the appropriate level of detail.

• *Phase in for financial guarantees:* Final § 3809.503 provides that miners do not need to provide a financial guarantee if their existing notice is not changed. Final § 3809.505 provides that miners have 180 days to provide financial guarantee for plans.

• The final regulation does not include contingency bonding because of the uncertainty it might create.

• The final regulation does not prevent BLM field managers from implementing a financial guarantee program on a standard per acre basis as long as the operator posts a financial guarantee covering the full cost of reclamation that is acceptable to BLM.

• *Existing terms and conditions:* Operators can continue to operate under the terms and conditions for existing plans.

• *Pending plans:* If a plan is pending at time regulations are issued, then the pre-existing plan content and performance standards apply.

• *Modifications/extensions:* No changes are required for notices that are not modified or extended.

• *Economically and technically feasible:* The term ''economically and technically feasible'' has been inserted in a number of places in the regulation. For example, requirements to return disturbed wetlands and riparian areas to properly functioning conditions are only required when economically and technically feasible (final § 3809.415); the same ''economically and technically feasible'' standard applies to minimizing surface disturbance associated with roads and structures.

• *Pit backfilling:* Pit backfilling is based on site-specific factors, taking into account ''economic, environmental, and safety concerns'' (section 3809.415). We have removed the proposed presumption from the final rule.

• *Demonstration that implementation is not practical:* Additional site- and operation-specific flexibility in the context of plan modifications is included by providing operators an opportunity to demonstrate to BLM that application of the regulation is ''not practical'' (final § 4809.433).

• *Corporate guarantees:* Existing corporate guarantees can continue to be used (final § 3809.571).

• *Minimize the potential for delays:* The final rule requires to review a notice application within 15 calendar days.

• *Performance standards:* Proposed § 3809.420 was modified in response to comments mainly by providing added flexibility to operators. Requirements to prevent the introduction of noxious weeds, and prevent erosion, siltation and air pollution were replaced with a requirement to minimize introduction of noxious weeds and minimize erosion, siltation, and air pollution. This was done in response to public comments that pointed out an operator cannot always prevent impacts from occurring.

• *Existing State agreements:* Final § 3809.204 provides that portions of existing Federal/State agreements or MOAS that are inconsistent with this final rule can remain in effect for up to three years. For these situations, the implementation of the rule could be delayed for up to three years.

• *State administration:* When requested, BLM must give states the lead where the State program is at least as stringent as BLM requirements. This will allow the surface management program to be tailored to State-specific conditions.

• *State Director appeal:* The regulations provide that individuals who believe a BLM decision adversely affects their interests can appeal to BLM State Directors.

• *Joint and several liability:* BLM revised the final rule (§ 3809.116) to clarify the joint and several liability provisions. The final rule provides that mining claimants are responsible only for obligations arising from activities or conditions on their mining claims or millsites.

• *ESA:* In the final rule, BLM clarified that the reference to ''threatened or endangered species or their critical habitat'' in the proposed rule means Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat.

• *Waiver of penalties:* BLM is allowed to waive and consider ability to pay in civil penalty situations (final § 3809.702).

• *Plain language:* The regulation uses clear and simple language which allows the rule to be easily understood by small entities that do not have access to legal staff or extensive legal experience.

BLM recognized that the requirement to provide a portion of the financial guarantee in a form that would be ''immediately redeemable'' by BLM could impose a cost on operators, particularly small operators. Thus, BLM has deleted this requirement from the final rule.

BLM also has existing procedures in place to mitigate the requirements of the regulation on small entities. These procedures have been used in locations such as the California Desert Conservation Area (CDCA), part of the California Desert District (CDD), where the FLPMA requires stricter permitting requirements. The CDCA area provides an indication of how the regulation will be implemented BLM-wide. The goal in the CDD is to mitigate the burden of the permitting requirements on small entities.

The CDD covers about 12.5 million acres, of which about 11 million are within the CDCA. About 40% of the acreage within the CDCA is classified such that all mineral activity above casual use requires a plan of operation. Recently, CDD averaged about 40–50 plans per year. For a plan that would be a notice in other locations, the information that the operator must submit is not as extensive as that required for a large-scale mining operation. The compliance burdens on small entities are minimized because BLM conducted a programmatic assessment to address most formal ESA section 7 consultation requirements.

Another example of how BLM is likely to undertake program-wide measures to implement the regulation is from Arizona, where BLM prepared a programmatic environmental assessment for processing notices where there are use and occupancy issues (See 43 CFR subpart 3715). Similar programmatic efforts are likely to be undertaken for subpart 3809 in selected areas. This will reduce the burden on small entities. The extent to which this occurs will depend on the nature and extent of the specific activities. One possible case is in locations where known and predictable levels of suction dredging occur.

The final regulation provides substantial opportunities to mitigate the impacts of the regulation on small entities. The elements of the regulation that mitigate the impacts on small entities were identified and discussed above. As required by the Regulatory Flexibility Act, BLM will publish a small entity compliance guide and make the guide readily available.

For additional information, see the final RFA analysis on file in the BLM Administrative Record at the Nevada State Office, P.O. Box 12000, Reno, Nevada 89520, or contact BLM's Regulatory Affairs Group at 202/452–5030.

*Unfunded Mandates Reform Act*

These regulations do not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year; nor do these proposed regulations have a significant or unique effect on State, local, or tribal governments or the private sector.

*Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights (Takings)*

The final rule does not have significant takings implications. It doesn't affect property rights or interests in property, such as mining claims; it governs how an individual or corporation exercises those rights. Therefore, the Department of the Interior has determined that the rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

*Executive Order 13132, Federalism*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires BLM to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Under section 6 of E.O. 13132, BLM may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or BLM consults with State and local officials early in the process of developing the proposed regulation. BLM also may not issue a regulation that has federalism implications and that preempts State law, unless the BLM consults with State and local officials early in the process of developing the proposed regulation.

If BLM complies by consulting, E.O. 13132 requires BLM to provide to the Office of Management and Budget (OMB), in a separately identified section of the preamble to the rule, a federalism summary impact statement. The summary impact statement must include a description of the extent of BLM's prior consultation with State and local officials, a summary of the nature of their concerns and BLM's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when BLM transmits a draft final rule with federalism implications to OMB for review pursuant to E. O. 12866, BLM must include a certification from the agency's Federalism Official stating that BLM has met the requirements of E. O. 13132 in a meaningful and timely manner.

This final rule does have federalism implications in that in certain circumstances it may preempt State law. It will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The final rule will provide States greater opportunities to administer the mining regulatory program on public lands. The following paragraphs contain a description of the extent of BLM's prior consultation with State and local officials, a summary of the nature of their concerns and BLM's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met.

**Extent of Consultation**

In the development of this final rule, BLM engaged in a comprehensive consultation process with the States. BLM recognizes that the States are its primary partners in regulating mining activities on public lands. Throughout the process, BLM solicited the States' views, both collectively and individually, on how best to avoid duplication and encourage cooperation. BLM met with the representatives of State agencies under the auspices of the Western Governors Association (WGA) in April 1997, March 1998, September 1998, and January 2000. We also posted two successive drafts of regulatory provisions on the Internet for public information purposes in February and August 1998. We received and considered many comments from a variety of interested parties, including States, as a result of both the WGA meetings and the Internet postings.

In addition to the meetings sponsored by the Western Governors Association, BLM conducted numerous meetings with representatives of individual States. These meetings typically involved BLM State Directors or their staff members briefing representatives of State legislatures and State agencies. As an example of this activity, we are including the following list of meetings conducted in Nevada, the major hardrock mining State:

March 10, 1999
- BLM public briefing for Nevada and California agencies and State mining associations

March 26, 1999
- BLM public briefing for Nevada Department of Conservation and Natural Resources, Advisory Board on Natural Resources

September 9, 1999
- Public briefing for Nevada Legislative Committee on Public Lands

September 13, 1999
- Public briefing for Nevada State Land-Use Planning Advisory Council meeting

October 1, 1999
- Public briefing for Nevada State Land-Use Planning Advisory Council meeting

January 26, 2000
- Public briefing for Nevada Legislative Committee on Public Lands.

**Nature of State Concerns and BLM's Response to the Concerns**

During the three and one-half years that we have been developing this final rule and throughout the consultation process we have conducted with the

States, we have heard many concerns expressed, both of a general and a specific nature. One general concern expressed by the States in the early stages of our consultation is that BLM must demonstrate a need for any regulatory changes, and in this case, had not demonstrated the need for the 3809 rulemaking. BLM agrees that, in general, a regulatory change should be based on an effort to address a real-world problem. BLM doesn't enter into the lengthy and expensive rulemaking process without sufficient reason. In this case, we responded to the States' concern about the need for the rulemaking by setting forth in detail our reasons for undertaking this rulemaking in the proposed rule preamble. In pertinent part, we said:

''Both the authority and the need exist for this rulemaking. This rulemaking is based upon BLM's non-delegable and independent responsibility under FLPMA to manage the public lands to prevent unnecessary or undue degradation of the public lands, and a recognition that BLM's current rules may not be adequate to assure this result. In enacting FLPMA, Congress intended that the Secretary of the Interior determine what constitutes unnecessary or undue degradation and not that the States would do so on a State-by-State basis. Sections 302(b), 303(a), and 310 of FLPMA reflect this responsibility. This rulemaking, therefore, reflects the Secretary's judgment of the regulations required to prevent unnecessary or undue degradation.

''BLM recognizes that many of the States have upgraded their regulation of locatable minerals mining since 1980. It is clear, however, the Federal rules need upgrading, regardless of State law. Areas where the existing rules require upgrading include financial guarantees (to require financial guarantees for all operations greater than casual use, thereby ensuring the availability of resources for the completion of reclamation); enforcement (to implement section 302(c) of FLPMA and provide administrative enforcement tools and penalties); threshold for notice operations (to require plans of operations for operations more likely to pollute the land and those in sensitive areas); withdrawn areas (to require validity exams before allowing plans of operations to be approved in such areas); casual use (to clarify which activities do or do not constitute casual use); performance standards and the definition of unnecessary or undue degradation (to establish objective standards to reflect current mining technology); and others. As mentioned earlier in this preamble, many of these shortcomings have been pointed out since 1986 in a series of Congressional hearings, General Accounting Office reports, and Departmental Inspector General reports.''

64 FR 6422, 6424, Feb. 9, 1999. After we published the proposed rule, the NRC Report bolstered our view that regulatory changes are necessary by recommending specific actions to address regulatory ''gaps'' (pp. 7–9). A recent communication from the Western Governors Association confirms that they have changed their original view that there is no need for any regulatory changes. A letter to Secretary of the Interior Babbitt, dated February 23, 2000, and signed by 10 Western Governors, states:

''The NRC's report did identify a few regulatory gaps in the current system. We suggest BLM refocus its efforts on addressing those gaps. We recommend that the BLM coordinate with the states to identify any gaps, which may be different for each state, and develop solutions that are state specific. Closing the gaps in each state could involve a combination of policy and rule development at the state and/or federal level.''

A related general concern expressed by the States in the course of the consultation process is that revising BLM's existing regulations would cause duplication of existing State programs. BLM, too, wants to avoid duplication and has carefully designed this final rule to achieve that purpose. The Secretary's January 6, 1997, memorandum, which re-initiated this rulemaking, specifically directed BLM to carefully address coordination with State regulatory programs to prevent unnecessary or undue degradation while minimizing duplication and promoting cooperation among regulators. Following the Secretary's directive, we have designed a set of regulations under which BLM and a State can have an agreement to divide program responsibilities (final § 3809.200(a)) or an agreement under which BLM defers to State administration of some or all of the requirements of this subpart (final § 3809.200(b)). Under the previous rules, BLM only had the authority for the former agreement (previous § 3809.3–1(c)). Thus, in our view, we have created under this final rule greater opportunities for the States to assume control over the surface management program, subject only to BLM oversight or, in the case of approving plans of operations, BLM concurrence.

Another State concern expressed during the consultation process was whether BLM would provide funding for States who elected to operate the regulatory program under a § 3809.200(b) agreement. Some State representatives felt that BLM should turn over to the State a portion of BLM's budget along with the program management responsibility under a § 3809.200(b) agreement. BLM is sensitive to the funding issue and the impact that BLM's deferral to a State of all or part of a program could have on State-level resources. At the same time, we recognize and have explained to the States that BLM does not have the authority to provide funding to States under a § 3809.200(b) agreement. Only Congress can do that.

Early in the consultation process, before the 3809 task force had developed a written proposal, we met with State representatives under the auspices of the Western Governors Association to discuss at a conceptual level the areas the rulemaking should address. At that meeting, which took place in April 1997, the States expressed views on a number of specific issues. For example, several States shared the view that the rulemaking should avoid prescriptive national reclamation standards. The States believe that the regulations have to take into account the differences between the types of minerals sought, the types of mines, climate, topography, and the nature of various mineral processing activities. There should be no one-size-fits-all design or operating blueprint required by the regulations because it could never take into account the inherent variation of mining operations across the West. Other views expressed by the States include the following:

- A regulatory approach that requires best available control technology (BACT) is not effective since it stifles innovative approaches and doesn't take into account differences in geology and climate.
- BLM should not duplicate or supersede Federally delegated or State-legislated environmental authority.
- Specified time frames for BLM to process notices, plans of operations, and other required documents are an important component of regulatory processes.
- Bonding is an integral part of the regulatory and reclamation process.
- BLM should continue to focus its performance standards on outcomes on the ground.
- BLM should examine implementation of existing tools, recognize legitimacy of different approaches, examine claims carefully and avoid extreme or out-of-date examples.
- The revised regulations should focus on interagency and intergovernmental cooperation.

BLM took these views into account in developing our first draft of proposed regulations. We posted this draft on the Internet in February 1998 for public information. In response to the States' concerns, this first draft retained the time frames for BLM to process notices and plans of operations, reinstated the remanded financial guarantee (bonding)

requirement for notices and plans of operations, included an expanded series of outcome-based performance standards, and, as discussed above, added the opportunity for BLM to defer to States to administer the surface management program.

Shortly after releasing our first draft, we again met with State representatives under the auspices of the Western Governors Association to discuss any concerns related to the first draft. This meeting took place in March 1998. Some of the general concerns expressed by the State representatives at this meeting included whether the regulations would preempt more stringent State law; would BLM pay for States to assume some or all of program responsibilities; that the regulations should specify that BLM would ''concur with'' State approval of plans not ''approve'' them; exactly how would a State receive BLM's approval to administer all or part of the surface management program in a State; the regulations should base inspection frequency on risk associated with each operation; and the definition of ''operator'' may extend liability for a site to stockholders in a corporation, an action that may supersede principles of corporate law. There were also a number of specific comments on the February draft.

Following this meeting, the 3809 task force made changes to the working draft of the regulations and posted a revised version on the Internet in August 1988 for public information. In response to the general comments, we clarified that there would be no conflict between the 3809 regulations and State law or regulations if the State law or regulations require a higher standard of protection for public lands than 3809. We changed the draft to require only that BLM ''concur'' with a State approval of a plan of operations, deleting the requirement that BLM ''approve'' the State approval. We added provisions specifying the process that BLM would follow in approving a State request to administer all or part of the surface management program in a State. We also changed the proposed definition of ''operator'' to avoid inadvertently assigning liability to stockholders by requiring material participation in the management, direction, or conduct of a mining operation as a prerequisite for liability.

After the 3809 task force posted a second revised draft on the Internet in August 1998, we met with State representatives in Denver in September. The purpose of the meeting was to get the States' reaction to the changes we had made in response to their comments from the March meeting. The questions and concerns raised by the State representatives at the meeting include the following:

- Would third parties be able to appeal or sue over a BLM State Director decision to defer to State administration of a program?
- One year may not be enough time to complete the review of existing Federal/State memoranda of understanding.
- BLM should look for a pattern of performance in evaluating State operation of a program, as opposed to focusing on individual actions.
- Concurrence by BLM on plans may be interpreted differently by different BLM offices.
- The definition of ''minimize,'' when equated to prevention implies that disturbance can be prevented. When BLM means ''prevent,'' it should say ''prevent,'' not ''minimize.''
- Will existing operations have to comply with bond release provisions?
- Citizens accompanying inspectors will cause problems with joint State/BLM inspections.
- Could an operator be subject to both State and Federal enforcement for a violation?
- BLM shouldn't require a detailed monitoring plan at the time of plan submittal. The monitoring plan should be conceptual at that point.
- BLM shouldn't require public comment on bond amount.
- BLM shouldn't require operators to comply with standards that are the responsibility of other agencies to enforce.

The task force took the comments from this meeting into account in developing the proposed rule that was published on February 9, 1999 (64 FR 6422). Some of the changes we made to the proposed rule as a result of this meeting include asking in the proposed rule preamble for views on whether one year would be enough time to review existing Federal/State agreements for consistency with the 3809 regulations. In the final rule, we are adopting provisions that allow up to 3 years for the review to be completed. BLM responded to another State comment by clarifying in the preamble to the proposed rule that BLM would not look at isolated incidents in determining that a State is not in compliance with a Federal/State agreement. BLM would consider patterns, trends, and programmatic issues more important indicators of State performance. We also changed the proposed definition of ''minimize'' to accommodate the States' concern about the use of the word ''prevent.'' In response to the States' concern about monitoring plans, we explained in the proposed rule preamble that we recognize that in the initial phase of developing a mining operation, complete and detailed designs and plans are not always available.

After we published the proposed rule and the 120-day comment period had closed, Congress directed that BLM pay for a NRC study of the existing regulations. Congress subsequently directed BLM to reopen the comment period for 120 days to give the public an opportunity to comment on the proposed rule in light of the NRC Report. As described earlier in this preamble, BLM published the reopening notice on October 26, 1999 (64 FR 57613). The comment period extended from October 26, 1999 to February 23, 2000. During the comment period, the 3809 task force again met with State representatives under the auspices of the Western Governors' Association. The purpose of the meeting was primarily to get comments on the proposed rule in light of the NRC Report. The meeting took place in Denver in January 2000. The thrust of the States' comments at that meeting was agreement with the conclusions of the NRC Report—that the current regulatory system is working well, and there is no need for sweeping changes. Also, BLM should focus its rulemaking efforts strictly on addressing NRC-identified gaps. And, BLM and the Forest Service should pursue non-regulatory approaches identified in the NRC Report.

Based on the sequence of events summarized above, BLM believes that we have fully complied with the requirement of the Executive Order to consult with State and local officials early in the process of developing the proposed regulation. BLM also believes that we have addressed the concerns expressed by State representatives to the extent possible given the Secretary of the Interior's independent and non-delegable responsibility to determine what constitutes unnecessary or undue degradation of the public lands.

*Paperwork Reduction Act*

This final rule requires collection of information from 10 or more persons. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), BLM submitted an information collection approval package (OMB Form 83–I) to the Office of Management and Budget (OMB) for review when we published the proposed rule in February 1999. We received numerous comments on the approval package and, as a result, re-examined the information collection

burden that these rules would impose. We discussed this matter in our October 26, 1999, supplemental proposed rule. See 64 FR 57618–9. We have now prepared a revised OMB Form 83–I and submitted it to OMB for review. Our responses to the comments we received on the original approval package are part of the revised package, and we have concluded that it is unnecessary for BLM to seek further public comment at this time. OMB has approved the information collections contained in this final rule and has assigned them OMB Clearance Number 1004–0194.

BLM intends to collect information under this final rule to ensure that persons conducting exploration or mining activities on public land conduct only necessary and timely surface-disturbing activities, determine that proposed exploration or mining will meet the performance standards of subpart 3809, determine appropriate mitigation and reclamation measures for the site, ensure compliance with environmental laws, and comply with NEPA, the Endangered Species Act, and section 106 of the National Historic Preservation Act. A response is mandatory and required to obtain the benefit of conducting exploration or mining activities on public land. BLM estimates the total annual burden for subpart 3809 is 306,536 hours.

*Authors*

The principal authors of this final rule are the members of the Departmental 3809 Task Force, chaired by Robert M. Anderson; Deputy Assistant Director, Minerals, Realty, and Resource Protection; Bureau of Land Management; (202) 208–4201.

**List of Subjects**

*43 CFR Part 2090*

Airports, Alaska, Coal, Grazing lands, Indians-lands, Public lands, Public lands-classification, Public lands-mineral resources, Public lands-withdrawal, Seashores.

*43 CFR Part 2200*

Administrative practice and procedure, Antitrust, Coal, National forests, Public lands.

*43 CFR Part 2710*

Administrative practice and procedure, Public lands-mineral resources, Public lands-sale.

*43 CFR Part 2740*

Intergovernmental relations, Public lands-sale, Recreation and recreation areas, Reporting and recordkeeping requirements.

*43 CFR Part 3800*

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

*43 CFR Part 9260*

Continental shelf, Forests and forest products, Law enforcement, Penalties, Public lands, Range management, Recreation and recreation areas, wildlife.

**Sylvia V. Baca,**

*Assistant Secretary, Land and Minerals Management.*

Accordingly, BLM is amending 43 CFR parts 2090, 2200, 2710, 2740, 3800 and 9260 as set forth below:

## PART 2090—SPECIAL LAWS AND RULES

1. The authority citation for part 2090 continues to read as follows:

**Authority:** 16 U.S.C. 3124; 30 U.S.C. 189; and 43 U.S.C. 322, 641, 1201, 1624, and 1740.

### Subpart 2091—Segregation and Opening of Lands

**§ 2091.2–2 [Amended]**

2. In § 2091.2–2, remove and reserve paragraph (b).

**§ 2091.3–2 [Amended]**

3. In § 2091.3–2, remove paragraph (c) and redesignate paragraph (d) as paragraph (c).

## PART 2200—EXCHANGES: GENERAL PROCEDURES

4. The authority citation for part 2200 continues to read as follows:

**Authority:** 43 U.S.C. 1716 and 1740.

### Subpart 2201—Exchanges—Specific Requirements

**§ 2201.1–2 [Amended]**

5. In § 2201.1–2, remove paragraph (d) and redesignate paragraph (e) as paragraph (d).

## PART 2710—SALES: FEDERAL LAND POLICY AND MANAGEMENT ACT

6. The authority citation for part 2710 continues to read as follows:

**Authority:** 43 U.S.C. 1713 and 1740.

### Subpart 2711—Sales: Procedures

**§ 2711.5–1 [Removed]**

7. Remove § 2711.5–1.

## PART 2740—RECREATION AND PUBLIC PURPOSES ACT

8. The authority citation for part 2740 continues to read as follows:

**Authority:** 43 U.S.C. 869 *et seq.*, 43 U.S.C. 1701 *et seq.*, and 31 U.S.C. 9701.

### Subpart 2741—Recreation and Public Purposes Act: Requirements

**§ 2741.7 [Amended]**

9. In § 2741.7, remove paragraph (d).

## PART 3800—MINING CLAIMS UNDER THE GENERAL MINING LAWS

10. BLM is amending part 3800 by revising subpart 3809 to read as follows:

### Subpart 3809—Surface Management

Sec.

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## Subpart 3809—Surface Management

**Authority:** 16 U.S.C. 1280; 30 U.S.C. 22; 30 U.S.C. 612; 43 U.S.C. 1201; and 43 U.S.C. 1732, 1733, 1740, 1781, and 1782.

### General Information

#### § 3809.1 What are the purposes of this subpart?

The purposes of this subpart are to:

(a) Prevent unnecessary or undue degradation of public lands by operations authorized by the mining laws. Anyone intending to develop mineral resources on the public lands must prevent unnecessary or undue degradation of the land and reclaim disturbed areas. This subpart establishes procedures and standards to ensure that operators and mining claimants meet this responsibility; and

(b) Provide for maximum possible coordination with appropriate State agencies to avoid duplication and to ensure that operators prevent unnecessary or undue degradation of public lands.

#### § 3809.2 What is the scope of this subpart?

(a) This subpart applies to all operations authorized by the mining laws on public lands where the mineral interest is reserved to the United States, including Stock Raising Homestead

lands as provided in § 3809.31(c). When public lands are sold or exchanged under 43 U.S.C. 682(b) (Small Tracts Act), 43 U.S.C. 869 (Recreation and Public Purposes Act), 43 U.S.C. 1713 (sales) or 43 U.S.C. 1716 (exchanges), minerals reserved to the United States continue to be removed from the operation of the mining laws unless a subsequent land-use planning decision expressly restores the land to mineral entry, and BLM publishes a notice to inform the public.

(b) This subpart does not apply to lands in the National Park System, National Forest System, and the National Wildlife Refuge System; acquired lands; or lands administered by BLM that are under wilderness review, which are subject to subpart 3802 of this part.

(c) This subpart applies to all patents issued after October 21, 1976 for mining claims in the California Desert Conservation Area, except for any patent for which a right to the patent vested before that date.

(d) This subpart does not apply to private land except as provided in paragraphs (a) and (c) of this section. For purposes of analysis under the National Environmental Policy Act of 1969, BLM may collect information about private land that is near to, or may be affected by, operations authorized under this subpart.

(e) This subpart applies to operations that involve locatable minerals, including metallic minerals; 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.

### § 3809.3 What rules must I follow if State law conflicts with this subpart?

If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart.

### § 3809.5 How does BLM define certain terms used in this subpart?

As used in this subpart, the term:

*Casual use* means activities ordinarily resulting in no or negligible disturbance of the public lands or resources. For example—

(1) Casual use generally includes the collection of geochemical, rock, soil, or mineral specimens using hand tools; hand panning; or non-motorized sluicing. It may include use of small portable suction dredges. It also generally includes use of metal detectors, gold spears and other battery-operated devices for sensing the presence of minerals, and hand and battery-operated drywashers. Operators may use motorized vehicles for casual use activities provided the use is consistent with the regulations governing such use (part 8340 of this title), off-road vehicle use designations contained in BLM land-use plans, and the terms of temporary closures ordered by BLM.

(2) Casual use does not include use of mechanized earth-moving equipment, truck-mounted drilling equipment, motorized vehicles in areas when designated as closed to ''off-road vehicles'' as defined in § 8340.0–5 of this title, chemicals, or explosives. It also does not include ''occupancy'' as defined in § 3715.0–5 of this title or operations in areas where the cumulative effects of the activities result in more than negligible disturbance.

*Exploration* means creating surface disturbance greater than casual use that includes sampling, drilling, or developing surface or underground workings to evaluate the type, extent, quantity, or quality of mineral values present. Exploration does not include activities where material is extracted for commercial use or sale.

*Minimize* means to reduce the adverse impact of an operation to the lowest practical level. During review of operations, BLM may determine that it is practical to avoid or eliminate particular impacts.

*Mining claim* means any unpatented mining claim, millsite, or tunnel site located under the mining laws. The term also applies to those mining claims and millsites located in the California Desert Conservation Area that were patented after the enactment of the Federal Land Policy and Management Act of October 21, 1976. Mining ''claimant'' is defined in § 3833.0–5 of this title.

*Mining laws* means the Lode Law of July 26, 1866, as amended (14 Stat. 251); the Placer Law of July 9, 1870, as amended (16 Stat. 217); and the Mining Law of May 10, 1872, as amended (17 Stat. 91); as well as all laws supplementing and amending those laws, including the Building Stone Act of August 4, 1892, as amended (27 Stat. 348); the Saline Placer Act of January 31, 1901 (31 Stat. 745); the Surface Resources Act of 1955 (30 U.S.C. 611–614); and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*).

*Mitigation,* as defined in 40 CFR 1508.20, may include one or more of the following:

(1) Avoiding the impact altogether by not taking a certain action or parts of an action;

(2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and

(5) Compensating for the impact by replacing, or providing substitute, resources or environments.

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

*Operator* means any person who manages, directs, or conducts operations at a project area under this subpart, including a parent entity or an affiliate who materially participates in such management, direction, or conduct. An operator on a particular mining claim may also be the mining claimant.

*Person* means any individual, firm, corporation, association, partnership, trust, consortium, joint venture, or any other entity conducting operations on public lands.

*Project area* means the area of land upon which the operator conducts operations, including the area required for construction or maintenance of roads, transmission lines, pipelines, or other means of access by the operator.

*Public lands,* as defined in 43 U.S.C. 1702, means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the BLM, without regard to how the United States acquired ownership, except—

(1) Lands located on the Outer Continental Shelf; and

(2) Lands held for the benefit of Indians, Aleuts, and Eskimos.

*Reclamation* means taking measures required by this subpart following disturbance of public lands caused by operations to meet applicable performance standards and achieve conditions required by BLM at the conclusion of operations. For a definition of ''reclamation'' applicable to operations conducted under the mining laws on Stock Raising Homestead Act lands, see part 3810, subpart 3814 of this title. Components of reclamation include, where applicable:

(1) Isolation, control, or removal of acid-forming, toxic, or deleterious substances;

(2) Regrading and reshaping to conform with adjacent landforms, facilitate revegetation, control drainage, and minimize erosion;

(3) Rehabilitation of fisheries or wildlife habitat;

(4) Placement of growth medium and establishment of self-sustaining revegetation;

(5) Removal or stabilization of buildings, structures, or other support facilities;

(6) Plugging of drill holes and closure of underground workings; and

(7) Providing for post-mining monitoring, maintenance, or treatment.

*Riparian area* is a form of wetland transition between permanently saturated wetlands and upland areas. These areas exhibit vegetation or physical characteristics reflective of permanent surface or subsurface water influence. Typical riparian areas include lands along, adjacent to, or contiguous with perennially and intermittently flowing rivers and streams, glacial potholes, and the shores of lakes and reservoirs with stable water levels. Excluded are areas such as ephemeral streams or washes that do not exhibit the presence of vegetation dependent upon free water in the soil.

*Tribe* means, and *Tribal* refers to, a Federally recognized Indian tribe.

*Unnecessary or undue degradation* means conditions, activities, or practices that:

(1) Fail to comply with one or more of the following: The performance standards in § 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and State laws related to environmental protection and protection of cultural resources;

(2) Are not ''reasonably incident'' to prospecting, mining, or processing operations as defined in § 3715.0–5 of this title;

(3) Fail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas; or

(4) Occur on mining claims or millsites located after October 21, 1976 (or on unclaimed lands) and result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.

### § 3809.10 How does BLM classify operations?

BLM classifies operations as—

(a) Casual use, for which an operator need not notify BLM. (You must reclaim any casual-use disturbance that you create. If your operations do not qualify as casual use, you must submit a notice or plan of operations, whichever is applicable. See §§ 3809.11 and 3809.21.);

(b) Notice-level operations, for which an operator must submit a notice (except for certain suction-dredging operations covered by § 3809.31(b)); and

(c) Plan-level operations, for which an operator must submit a plan of operations and obtain BLM's approval.

### § 3809.11 When do I have to submit a plan of operations?

(a) You must submit a plan of operations and obtain BLM's approval before beginning operations greater than casual use, except as described in § 3809.21. Also see §§ 3809.31 and 3809.400 through 3809.434.

(b) You must submit a plan of operations for any bulk sampling in which you will remove 1,000 tons or more of presumed ore for testing.

(c) You must submit a plan of operations for any operations causing surface disturbance greater than casual use in the following special status areas where § 3809.21 does not apply:

(1) Lands in the California Desert Conservation Area (CDCA) designated by the CDCA plan as ''controlled'' or ''limited'' use areas;

(2) Areas in the National Wild and Scenic Rivers System, and areas designated for potential addition to the system;

(3) Designated Areas of Critical Environmental Concern;

(4) Areas designated as part of the National Wilderness Preservation System and administered by BLM;

(5) Areas designated as ''closed'' to off-road vehicle use, as defined in § 8340.0–5 of this title;

(6) Any lands or waters known to contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat, unless BLM allows for other action under a formal land-use plan or threatened or endangered species recovery plan; and

(7) National Monuments and National Conservation Areas administered by BLM.

### § 3809.21 When do I have to submit a notice?

(a) You must submit a complete notice of your operations 15 calendar days before you commence exploration causing surface disturbance of 5 acres or less of public lands on which reclamation has not been completed. See § 3809.301 for information on what you must include in your notice.

(b) You must not segment a project area by filing a series of notices for the purpose of avoiding filing a plan of operations. See §§ 3809.300 through 3809.336 for regulations applicable to notice-level operations.

### § 3809.31 Are there any special situations that affect what submittals I must make before I conduct operations?

(a) Where the cumulative effects of casual use by individuals or groups have resulted in, or are reasonably expected to result in, more than negligible disturbance, the State Director may establish specific areas as he/she deems necessary where any individual or group intending to conduct activities under the mining laws must contact BLM 15 calendar days before beginning activities to determine whether the individual or group must submit a notice or plan of operations. (See § 3809.300 through 3809.336 and § 3809.400 through 3809.434.) BLM will notify the public via publication in the **Federal Register** of the boundaries of such specific areas, as well as through posting in each local BLM office having jurisdiction over the lands.

(b) *Suction dredges.* (1) If your operations involve the use of a suction dredge, the State requires an authorization for its use, and BLM and the State have an agreement under § 3809.200 addressing suction dredging, then you need not submit to BLM a notice or plan of operations, unless otherwise provided in the agreement between BLM and the State.

(2) For all uses of a suction dredge not covered by paragraph (b)(1) of this section, you must contact BLM before beginning such use to determine whether you need to submit a notice or a plan to BLM, or whether your activities constitute casual use. If your proposed suction dredging is located

within any lands or waters known to contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat, regardless of the level of disturbance, you must not begin operations until BLM completes consultation the Endangered Species Act requires.

(c) If your operations require you to occupy or use a site for activities ''reasonably incident'' to mining, as defined in § 3715.0–5 of this title, whether you are operating under a notice or a plan of operations, you must also comply with part 3710, subpart 3715, of this title.

(d) If your operations are located on lands patented under the Stock Raising Homestead Act and you do not have the written consent of the surface owner, then you must submit a plan of operations and obtain BLM's approval. Where you have surface-owner consent, you do not need a notice or a plan of operations under this subpart. See part 3810, subpart 3814, of this title.

(e) If your proposed operations are located on lands conveyed by the United States which contain minerals reserved to the United States, then you must submit a plan of operations under § 3809.11 and obtain BLM's approval or a notice under § 3809.21.

### § 3809.100 What special provisions apply to operations on segregated or withdrawn lands?

(a) *Mineral examination report.* After the date on which the lands are withdrawn from appropriation under the mining laws, BLM will not approve a plan of operations or allow notice-level operations to proceed until BLM has prepared a mineral examination report to determine whether the mining claim was valid before the withdrawal, and whether it remains valid. BLM may require preparation of a mineral examination report before approving a plan of operations or allowing notice-level operations to proceed on segregated lands. If the report concludes that the mining claim is invalid, BLM will not approve operations or allow notice-level operations on the mining claim. BLM will also promptly initiate contest proceedings.

(b) *Allowable operations.* If BLM has not completed the mineral examination report under paragraph (a) of this section, if the mineral examination report for proposed operations concludes that a mining claim is invalid, or if there is a pending contest proceeding for the mining claim,

(1) BLM may—

(i) Approve a plan of operations for the disputed mining claim proposing operations that are limited to taking samples to confirm or corroborate mineral exposures that are physically disclosed and existing on the mining claim before the segregation or withdrawal date, whichever is earlier; and

(ii) Approve a plan of operations for the operator to perform the minimum necessary annual assessment work under § 3851.1 of this title; or

(2) A person may only conduct exploration under a notice that is limited to taking samples to confirm or corroborate mineral exposures that are physically disclosed and existing on the mining claim before the segregation or withdrawal date, whichever is earlier.

(c) *Time limits.* While BLM prepares a mineral examination report under paragraph (a) of this section, it may suspend the time limit for responding to a notice or acting on a plan of operations. See §§ 3809.311 and 3809.411, respectively.

(d) *Final decision.* If a final departmental decision declares a mining claim to be null and void, the operator must cease all operations, except required reclamation.

### § 3809.101 What special provisions apply to minerals that may be common variety minerals, such as sand, gravel, and building stone?

(a) *Mineral examination report.* On mining claims located on or after July 23, 1955, you must not initiate operations for minerals that may be ''common variety'' minerals, as defined in § 3711.1(b) of this title, until BLM has prepared a mineral examination report, except as provided in paragraph (b) of this section.

(b) *Interim authorization.* Until the mineral examination report described in paragraph (a) of this section is prepared, BLM will allow notice-level operations or approve a plan of operations for the disputed mining claim for—

(1) Operations limited to taking samples to confirm or corroborate mineral exposures that are physically disclosed and existing on the mining claim;

(2) Performance of the minimum necessary annual assessment work under § 3851.1 of this title; or

(3) Operations to remove possible common variety minerals if you establish an escrow account in a form acceptable to BLM. You must make regular payments to the escrow account for the appraised value of possible common variety minerals removed under a payment schedule approved by BLM. The funds in the escrow account must not be disbursed to the operator or to the U.S. Treasury until a final determination of whether the mineral is a common variety and therefore salable under part 3600 of this title.

(c) *Determination of common variety.* If the mineral examination report under paragraph (a) of this section concludes that the minerals are common variety minerals, you may either relinquish your mining claim(s) or BLM will initiate contest proceedings. Upon relinquishment or final departmental determination that the mining claim(s) is null and void, you must promptly close and reclaim your operations unless you are authorized to proceed under parts 3600 and 3610 of this title.

(d) *Disposal.* BLM may dispose of common variety minerals from an unpatented mining claim with a written waiver from the mining claimant.

### § 3809.111 Will BLM disclose to the public the information I submit under this subpart?

Part 2 of this title applies to all information and data you submit under this subpart. If you submit information or data under this subpart that you believe is exempt from disclosure, you must mark each page clearly ''CONFIDENTIAL INFORMATION.'' You must also separate it from other materials you submit to BLM. BLM will keep confidential information or data marked in this manner to the extent required by part 2 of this title. If you do not mark the information as confidential, BLM, without notifying you, may disclose the information to the public to the full extent allowed under part 2 of this title.

### § 3809.115 Can BLM collect information under this subpart?

Yes, the Office of Management and Budget has approved the collections of information contained in this subpart under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1004–0194. BLM will use this information to regulate and monitor mining and exploration operations on public lands.

### § 3809.116 As a mining claimant or operator, what are my responsibilities under this subpart for my project area?

(a)(1) Mining claimants and operators (if other than the mining claimant) are jointly and severally liable for obligations under this subpart that accrue while they hold their interests. Joint and several liability, in this context, means that the mining claimants and operators are responsible together and individually for obligations, such as reclamation, resulting from activities or conditions in the areas in which the mining claimants hold mining claims or mill sites or the

operators have operational responsibilities.

*Example 1.* Mining claimant A holds mining claims totaling 100 acres. Mining claimant B holds adjoining mining claims totaling 100 acres and mill sites totaling 25 acres. Operator C conducts mining operations on a project area that includes both claimant A's mining claims and claimant B's mining claims and millsites. Mining claimant A and operator C are each 100 percent responsible for obligations arising from activities on mining claimant A's mining claims. Mining claimant B has no responsibility for such obligations. Mining claimant B and operator C are each 100 percent responsible for obligations arising from activities on mining claimant B's mining claims and millsites. Mining claimant A has no responsibility for such obligations.

*Example 2.* Mining claimant L holds mining claims totaling 100 acres on which operators M and N conduct activities. Operator M conducts operations on 50 acres. Operator N conducts operations on the other 50 acres. Operators M and N are independent of each other and their operations do not overlap. Mining claimant L and operator M are each 100 percent responsible for obligations arising from activities on the 50 acres on which operator M conducts activities. Mining claimant L and operator N are each 100 percent responsible for obligations arising from activities on the 50 acres on which operator N conducts activities. Operator M has no responsibility for the obligations arising from operator N's activities.

*Example 3.* Mining claimant X holds mining claims totaling 100 acres on which operators Y and Z conduct activities. Operators Y and Z each engage in activities on the entire 100 acres. Mining claimant X, operator Y, and operator Z are each 100 percent responsible for obligations arising from all operations on the entire 100 acres.

(2) In the event obligations are not met, BLM may take any action authorized under this subpart against either the mining claimants or the operators, or both.

(b) Relinquishment, forfeiture, or abandonment of a mining claim does not relieve a mining claimant's or operator's responsibility under this subpart for obligations that accrued or conditions that were created while the mining claimant or operator was responsible for operations conducted on that mining claim or in the project area.

(c) Transfer of a mining claim or operation does not relieve a mining claimant's or operator's responsibility under this subpart for obligations that accrued or conditions that were created while the mining claimant or operator was responsible for operations conducted on that mining claim or in the project area until—

(1) BLM receives documentation that a transferee accepts responsibility for the transferor's previously accrued obligations, and

(2) BLM accepts an adequate replacement financial guarantee adequate to cover such previously accrued obligations and the transferee's new obligations.

## Federal/State Agreements

### § 3809.200 What kinds of agreements may BLM and a State make under this subpart?

To prevent unnecessary administrative delay and to avoid duplication of administration and enforcement, BLM and a State may make the following kinds of agreements:

(a) An agreement to provide for a joint Federal/State program; and

(b) An agreement under § 3809.202 which provides that, in place of BLM administration, BLM defers to State administration of some or all of the requirements of this subpart subject to the limitations in § 3809.203.

### § 3809.201 What should these agreements address?

(a) The agreements should provide for maximum possible coordination with the State to avoid duplication and to ensure that operators prevent unnecessary or undue degradation of public lands. Agreements should cover any or all sections of this subpart and should consider, at a minimum, common approaches to review of plans of operations, including effective cooperation regarding the National Environmental Policy Act; performance standards; interim management of temporary closure; financial guarantees; inspections; and enforcement actions, including referrals to enforcement authorities. BLM and the State should also include provisions for the regular review or audit of these agreements.

(b) To satisfy the requirements of § 3809.31(b), if BLM and the State elect to address suction dredge activities in the agreement, the agreement must require a State to notify BLM of each application to conduct suction dredge activities within 15 calendar days of receipt of the application by the State. BLM will inform the State whether Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat may be affected by the proposed activities and any necessary mitigating measures. Operations must not begin until BLM completes consultation or conferencing under the Endangered Species Act.

### § 3809.202 Under what conditions will BLM defer to State regulation of operations?

(a) *State request.* A State may request BLM enter into an agreement for State regulation of operations on public lands in place of BLM administration of some or all of the requirements of this subpart. The State must send the request to the BLM State Director with jurisdiction over public lands in the State.

(b) *BLM review.* (1) When the State Director receives the State's request, he/she will notify the public and provide an opportunity for comment. The State Director will then review the request and determine whether the State's requirements are consistent with the requirements of this subpart, and whether the State has necessary legal authorities, resources, and funding for an agreement. The State requirements may be contained in laws, regulations, guidelines, policy manuals, and demonstrated permitting practices.

(2) For the purposes of this subpart, BLM will determine consistency with the requirements of this subpart by comparing this subpart and State standards on a provision-by-provision basis to determine—

(i) Whether non-numerical State standards are functionally equivalent to BLM counterparts; and

(ii) Whether numerical State standards are the same as corresponding numerical BLM standards, except that State review and approval time frames do not have to be the same as the corresponding Federal time frames.

(3) A State environmental protection standard that exceeds a corresponding Federal standard is consistent with the requirements of this subpart.

(c) *State Director decision.* The BLM State Director will notify the State in writing of his/her decision regarding the State's request. The State Director will address whether the State requirements are consistent with the requirements of this subpart, and whether the State has necessary legal authorities, resources, and funding to implement any agreement. If BLM determines that the State's requirements are consistent with the requirements of this subpart and the State has the necessary legal authorities, resources, and funding, BLM must enter into an agreement with the State so that the State will regulate some or all of the operations on public lands, as described in the State request.

(d) *Appeal of State Director decision.* The BLM State Director's decision will be a final decision of BLM and may be appealed to the Assistant Secretary for Land and Minerals Management, but not to the Department of the Interior Office of Hearings and Appeals. See § 3809.800(c) for the items you should include in the appeal.

**§ 3809.203 What are the limitations on BLM deferral to State regulation of operations?**

Any agreement between BLM and a State in which BLM defers to State regulation of some or all operations on public lands is subject to the following limitations:

(a) *Plans of Operations.* BLM must concur with each State decision approving a plan of operations to assure compliance with this subpart, and BLM retains responsibility for compliance with the National Environmental Policy Act (NEPA). The State and BLM may decide who will be the lead agency in the plan review process, including preparation of NEPA documents.

(b) *Federal land-use planning and other Federal laws.* BLM will continue to be responsible for all land-use planning on public lands and for implementing other Federal laws relating to the public lands for which BLM is responsible.

(c) *Federal enforcement.* BLM may take any authorized action to enforce the requirements of this subpart or any term, condition, or limitation of a notice or an approved plan of operations. BLM may take this action regardless of the nature of its agreement with a State, or actions taken by a State.

(d) *Financial guarantee.* The amount of the financial guarantee must be calculated based on the completion of both Federal and State reclamation requirements, but may be held as one instrument. If the financial guarantee is held as one instrument, it must be redeemable by both the Secretary and the State. BLM must concur in the approval, release, or forfeiture of a financial guarantee for public lands.

(e) *State performance.* If BLM determines that a State is not in compliance with all or part of its Federal/State agreement, BLM will notify the State and provide a reasonable time for the State to comply.

(f) *Termination.* (1) If a State does not comply after being notified under paragraph (e) of this section, BLM will take appropriate action, which may include termination of all or part of the agreement.

(2) A State may terminate its agreement by notifying BLM 60 calendar days in advance.

**§ 3809.204 Does this subpart cancel an existing agreement between BLM and a State?**

(a) No, this subpart doesn't cancel a Federal/State agreement or memorandum of understanding in effect on January 20, 2001. A Federal/State agreement or memorandum of understanding will continue while BLM and the State perform a review to determine whether revisions are required under this subpart. BLM and the State must complete the review and make necessary revisions no later than one year from January 20, 2001.

(b) The BLM State Director may extend the review period described in paragraph (a) of this section for one more year upon the written request of the Governor of the State or the delegated representative of the Governor, and if necessary, for a third year upon another written request. The existing agreement or memorandum of understanding terminates no later than one year after January 20, 2001 if this review and any necessary revision does not occur, unless extended under this paragraph.

(c) This subpart applies during the review period described in paragraphs (a) and (b) of this section. Where a portion of a Federal/State agreement or memorandum of understanding existing on January 20, 2001 is inconsistent with this subpart, that portion continues in effect until the agreement or memorandum of understanding is revised under this subpart or terminated.

## Operations Conducted Under Notices

**§ 3809.300 Does this subpart apply to my existing notice-level operations?**

To see how this subpart applies to your operations conducted under a notice and existing on January 20, 2001, follow this table:

| If BLM has received your complete notice before January 20, 2001— | Then— |
|---|---|
| (a) You are the operator identified in the notice on file with BLM on January 20, 2001. | You may conduct operations for 2 years after January 20, 2001 under the terms of your existing notice and the regulations in effect immediately before that date. (See 43 CFR parts 1000-end, revised as of Oct. 1, 1999.) After 2 years, you may extend your notice under § 3809.333. BLM may require a modification under § 3809.331(a)(1). See § 3809.503 for financial guarantee requirements applicable to notices. |
| (b) You are a new operator, that is, you were not the operator identified in the notice on file with BLM on January 20, 2001. | The provisions of this subpart, including § 3809.320, govern your operations for 2 years after January 20, 2001, unless you extend your notice under § 3809.333. |
| (c) You later modify your notice ..... | (1) You may conduct operations on the original acreage for 2 years after January 20, 2001 under the terms of your existing notice and the regulations in effect immediately before that date (See 43 CFR parts 1000-end, revised as of Oct. 1, 2000.) After 2 years, you may extend your notice under § 3809.333. BLM may require a modification under § 3809.331(a)(1). See § 3809.503(b) for financial guarantee requirements applicable to notices.<br>(2) Your operations on any additional acreage come under the provisions of this subpart, including §§ 3809.11 and 3809.21, and may require approval of a plan of operations before the additional surface disturbance may. |
| (d) Your notice has expired ..... | You may not conduct operations under an expired notice. You must promptly submit either a new notice under § 3809.301 or a plan of operations under § 3809.401, whichever is applicable, or immediately begin to reclaim your project area. See §§ 3809.11 and 3809.21. |

**§ 3809.301 Where do I file my notice and what information must I include in it?**

(a) If you qualify under § 3809.21, you must file your notice with the local BLM office with jurisdiction over the lands involved. BLM does not require that the notice be on a particular form.

(b) To be complete, your notice must include the following information:

(1) *Operator Information.* The name, mailing address, phone number, taxpayer identification number of the operator(s), and the BLM serial number(s) of any unpatented mining claim(s) where the disturbance would occur. If the operator is a corporation, you must identify one individual as the point of contact;

(2) *Activity Description, Map, and Schedule of Activities.* A description of the proposed activity with a level of detail appropriate to the type, size, and location of the activity. The description must include the following:

(i) The measures that you will take to prevent unnecessary or undue degradation during operations;

(ii) A map showing the location of your project area in sufficient detail for BLM to be able to find it and the location of access routes you intend to use, improve, or construct;

(iii) A description of the type of equipment you intend to use; and

(iv) A schedule of activities, including the date when you expect to begin operations and the date you expect to complete reclamation;

(3) *Reclamation Plan.* A description of how you will complete reclamation to the standards described in § 3809.420; and

(4) *Reclamation cost estimate.* An estimate of the cost to fully reclaim your operations as required by § 3809.552.

(c) BLM may require you to provide additional information, if necessary to ensure that your operations will comply with this subpart.

(d) You must notify BLM in writing within 30 calendar days of any change of operator or corporate point of contact, or of the mailing address of the operator or corporate point of contact.

**§ 3809.311 What action does BLM take when it receives my notice?**

(a) Upon receipt of your notice, BLM will review it within 15 calendar days to see if it is complete under § 3809.301.

(b) If your notice is incomplete, BLM will inform you in writing of the additional information you must submit. BLM may also take the actions described in § 3809.313.

(c) BLM will review your additional information within 15 calendar days to ensure it is complete. BLM will repeat this process until your notice is complete, or until we determine that you may not conduct operations because of your inability to prevent unnecessary or undue degradation.

**§ 3809.312 When may I begin operations after filing a complete notice?**

(a) If BLM does not take any of the actions described in § 3908.313, you may begin operations no sooner than 15 calendar days after the appropriate BLM office receives your complete notice. BLM may send you an acknowledgement that indicates the date we received your notice. If you don't receive an acknowledgement or have any doubt about the date we received your notice, contact the office to which you sent the notice. This subpart does not require BLM to approve your notice or inform you that your notice is complete.

(b) If BLM completes our review sooner than 15 calendar days after receiving your complete notice, we may notify you that you may begin operations.

(c) You must provide to BLM a financial guarantee that meets the requirements of this subpart before beginning operations.

(d) Your operations may be subject to BLM approval under part 3710, subpart 3715, of this title relating to use or occupancy of unpatented mining claims.

**§ 3809.313 Under what circumstances may I not begin operations 15 calendar days after filing my notice?**

To see when you may not begin operations 15 calendar days after filing your notice, follow this table:

| If BLM reviews your notice and, within 15 calendar days— | Then— |
|---|---|
| (a) Notifies you that BLM needs additional time, not to exceed 15 calendar days, to complete its review. | You must not begin operations until the additional review time period ends. |
| (b) Notifies you that you must modify your notice to prevent unnecessary or undue degradation. | You must not begin operations until you modify your notice to ensure that your operations prevent unnecessary or undue degradation. |
| (c) Requires you to consult with BLM about the location of existing or proposed access routes. | You must not begin operations until you consult with BLM and satisfy BLM's concerns about access. |
| (d) Determines that an on-site visit is necessary ..... | You must not begin operations until BLM visits the site, and you satisfy any concerns arising from the visit. BLM will notify you if we will not conduct the site visit within 15 calendar days of determining that a visit is necessary, including the reason(s) for the delay. |
| (e) BLM determines you don't qualify under § 3809.11 as a notice-level operation. | You must file a plan of operations before beginning operations. See §§ 3809.400 through 3809.420. |

**§ 3809.320 Which performance standards apply to my notice-level operations?**

Your notice-level operations must meet all applicable performance standards of § 3809.420.

**§ 3809.330 May I modify my notice?**

(a) Yes, you may submit a notice modification at any time during operations under a notice.

(b) BLM will review your notice modification the same way it reviewed your initial notice under §§ 3809.311 and 3809.313.

**§ 3809.331 Under what conditions must I modify my notice?**

(a) You must modify your notice—

(1) If BLM requires you to do so to prevent unnecessary or undue degradation; or

(2) If you plan to make material changes to your operations. Material changes are changes that disturb areas not described in the existing notice; change your reclamation plan; or result in impacts of a different kind, degree, or extent than those described in the existing notice.

(b) You must submit your notice modification 15 calendar days before

making any material changes. If BLM determines your notice modification is complete before the 15-day period has elapsed, BLM may notify you to proceed. When BLM requires you to modify your notice, we may also notify you to proceed before the 15-day period has elapsed to prevent unnecessary or undue degradation.

**§ 3809.332 How long does my notice remain in effect?**

If you filed your complete notice on or after January 20, 2001, it remains in effect for 2 years, unless extended under § 3809.333, or unless you notify BLM beforehand that operations have ceased and reclamation is complete. BLM will conduct an inspection to verify whether you have met your obligations, will notify you promptly in writing, and terminate your notice, if appropriate.

**§ 3809.333 May I extend my notice, and, if so, how?**

Yes, if you wish to conduct operations for 2 additional years after the expiration date of your notice, you must notify BLM in writing on or before the expiration date and meet the financial guarantee requirements of § 3809.503. You may extend your notice more than once.

**§ 3809.334 What if I temporarily stop conducting operations under a notice?**

(a) If you stop conducting operations for any period of time, you must—

(1) Maintain public lands within the project area, including structures, in a safe and clean condition;

(2) Take all steps necessary to prevent unnecessary or undue degradation; and

(3) Maintain an adequate financial guarantee.

(b) If the period of non-operation is likely to cause unnecessary or undue degradation, BLM, in writing, will—

(1) Require you to take all steps necessary to prevent unnecessary or undue degradation; and

(2) Require you, after an extended period of non-operation for other than seasonal operations, to remove all structures, equipment, and other facilities and reclaim the project area.

**§ 3809.335 What happens when my notice expires?**

(a) When your notice expires, you must—

(1) Cease operations, except reclamation; and

(2) Complete reclamation promptly according to your notice.

(b) Your reclamation obligations continue beyond the expiration or any termination of your notice until you satisfy them.

**§ 3809.336 What if I abandon my notice-level operations?**

(a) BLM may consider your operations to be abandoned if, for example, you leave inoperable or non-mining related equipment in the project area, remove equipment and facilities from the project area other than for purposes of completing reclamation according to your reclamation plan, do not maintain the project area, discharge local workers, or there is no sign of activity in the project area over time.

(b) If BLM determines that you abandoned your operations without completing reclamation, BLM may initiate forfeiture under § 3809.595. If the amount of the financial guarantee is inadequate to cover the cost of reclamation, BLM may complete the reclamation, and the operator and all other responsible persons are liable for the cost of reclamation.

## Operations Conducted Under Plans of Operations

**§ 3809.400 Does this subpart apply to my existing or pending plan of operations?**

(a) You may continue to operate under the terms and conditions of a plan of operations that BLM approved before January 20, 2001. All provisions of this subpart except plan content (§ 3809.401) and performance standards (§§ 3809.415 and 3809.420) apply to such plan of operations. See § 3809.505 for the applicability of financial guarantee requirements.

(b) If your unapproved plan of operations is pending on January 20, 2001, then the plan content requirements and performance standards that were in effect immediately before that date apply to your pending plan of operations. (See 43 CFR parts 1000–end, revised as of Oct. 1, 1999.) All other provisions of this subpart apply.

(c) If you want this subpart to apply to any existing or pending plan of operations, where not otherwise required, you may choose to have this subpart apply.

**§ 3809.401 Where do I file my plan of operations and what information must I include with it?**

(a) If you are required to file a plan of operations under § 3809.11, you must file it with the local BLM field office with jurisdiction over the lands involved. BLM does not require that the plan be on a particular form. Your plan of operations must demonstrate that the proposed operations would not result in unnecessary or undue degradation of public lands.

(b) Your plan of operations must contain the following information and describe the proposed operations at a level of detail sufficient for BLM to determine that the plan of operations prevents unnecessary or undue degradation:

(1) *Operator Information.* The name, mailing address, phone number, taxpayer identification number of the operator(s), and the BLM serial number(s) of any unpatented mining claim(s) where disturbance would occur. If the operator is a corporation, you must identify one individual as the point of contact. You must notify BLM in writing within 30 calendar days of any change of operator or corporate point of contact or in the mailing address of the operator or corporate point of contact;

(2) *Description of Operations.* A description of the equipment, devices, or practices you propose to use during operations including, where applicable—

(i) Maps of the project area at an appropriate scale showing the location of exploration activities, drill sites, mining activities, processing facilities, waste rock and tailing disposal areas, support facilities, structures, buildings, and access routes;

(ii) Preliminary or conceptual designs, cross sections, and operating plans for mining areas, processing facilities, and waste rock and tailing disposal facilities;

(iii) Water management plans;

(iv) Rock characterization and handling plans;

(v) Quality assurance plans;

(vi) Spill contingency plans;

(vii) A general schedule of operations from start through closure; and

(viii) Plans for all access roads, water supply pipelines, and power or utility services;

(3) *Reclamation Plan.* A plan for reclamation to meet the standards in § 3809.420, with a description of the equipment, devices, or practices you propose to use including, where applicable, plans for—

(i) Drill-hole plugging;

(ii) Regrading and reshaping;

(iii) Mine reclamation, including information on the feasibility of pit backfilling that details economic, environmental, and safety factors;

(iv) Riparian mitigation;

(v) Wildlife habitat rehabilitation;

(vi) Topsoil handling;

(vii) Revegetation;

(viii) Isolation and control of acid-forming, toxic, or deleterious materials;

(ix) Removal or stabilization of buildings, structures and support facilities; and

(x) Post-closure management;

(4) *Monitoring Plan.* A proposed plan for monitoring the effect of your

operations. You must design monitoring plans to meet the following objectives: To demonstrate compliance with the approved plan of operations and other Federal or State environmental laws and regulations, to provide early detection of potential problems, and to supply information that will assist in directing corrective actions should they become necessary. Where applicable, you must include in monitoring plans details on type and location of monitoring devices, sampling parameters and frequency, analytical methods, reporting procedures, and procedures to respond to adverse monitoring results. Monitoring plans may incorporate existing State or other Federal monitoring requirements to avoid duplication. Examples of monitoring programs which may be necessary include surface- and ground-water quality and quantity, air quality, revegetation, stability, noise levels, and wildlife mortality; and

(5) *Interim management plan.* A plan to manage the project area during periods of temporary closure (including periods of seasonal closure) to prevent unnecessary or undue degradation. The interim management plan must include, where applicable, the following:

(i) Measures to stabilize excavations and workings;

(ii) Measures to isolate or control toxic or deleterious materials (See also the requirements in § 3809.420(c)(4)(vii).);

(iii) Provisions for the storage or removal of equipment, supplies and structures;

(iv) Measures to maintain the project area in a safe and clean condition;

(v) Plans for monitoring site conditions during periods of non-operation; and

(vi) A schedule of anticipated periods of temporary closure during which you would implement the interim management plan, including provisions for notifying BLM of unplanned or extended temporary closures.

(c) In addition to the requirements of paragraph (b) of this section, BLM may require you to supply—

(1) Operational and baseline environmental information for BLM to analyze potential environmental impacts as required by the National Environmental Policy Act and to determine if your plan of operations will prevent unnecessary or undue degradation. This could include information on public and non-public lands needed to characterize the geology, paleontological resources, cave resources, hydrology, soils, vegetation, wildlife, air quality, cultural resources, and socioeconomic conditions in and around the project area, as well as information that may require you to conduct static and kinetic testing to characterize the potential for your operations to produce acid drainage or other leachate. BLM is available to advise you on the exact type of information and level of detail needed to meet these requirements; and

(2) Other information, if necessary to ensure that your operations will comply with this subpart.

(d) *Reclamation cost estimate.* At a time specified by BLM, you must submit an estimate of the cost to fully reclaim your operations as required by § 3809.552. BLM will review your reclamation cost estimate and notify you of any deficiencies or additional information that must be submitted in order to determine a final reclamation cost. BLM will notify you when we have determined the final amount for which you must provide financial assurance.

### § 3809.411 What action will BLM take when it receives my plan of operations?

(a) BLM will review your plan of operations within 30 calendar days and will notify you that—

(1) Your plan of operations is complete, that is, it meets the content requirements of § 3809.401(b);

(2) Your plan does not contain a complete description of the proposed operations under § 3809.401(b). BLM will identify deficiencies that you must address before BLM can continue processing your plan of operations. If necessary, BLM may repeat this process until your plan of operations is complete; or

(3) The description of the proposed operations is complete, but BLM cannot approve the plan until certain additional steps are completed, including one or more of the following:

(i) You collect adequate baseline data;

(ii) BLM completes the environmental review required under the National Environmental Policy Act;

(iii) BLM completes any consultation required under the National Historic Preservation Act, the Endangered Species Act, or the Magnuson-Stevens Fishery Conservation and Management Act;

(iv) BLM or the Department of the Interior completes other Federal responsibilities, such as Native American consultation;

(v) BLM conducts an on-site visit;

(vi) BLM completes review of public comments on the plan of operations;

(vii) For public lands where BLM does not have responsibility for managing the surface, BLM consults with the surface-managing agency;

(viii) In cases where the surface is owned by a non-Federal entity, BLM consults with the surface owner; and

(ix) BLM completes consultation with the State to ensure your operations will be consistent with State water quality requirements.

(b) Pending final approval of your plan of operations, BLM may approve any operations that may be necessary for timely compliance with requirements of Federal and State laws, subject to any terms and conditions that may be needed to prevent unnecessary or undue degradation.

(c) Following receipt of your complete plan of operations and before BLM acts on it, we will publish a notice of the availability of the plan in either a local newspaper of general circulation or a NEPA document and will accept public comment for at least 30 calendar days on your plan of operations.

(d) Upon completion of the review of your plan of operations, including analysis under NEPA and public comment, BLM will notify you that—

(1) BLM approves your plan of operations as submitted (See part 3810, subpart 3814 of this title for specific plan-related requirements applicable to operations on Stock Raising Homestead Act lands.);

(2) BLM approves your plan of operations subject to changes or conditions that are necessary to meet the performance standards of § 3809.420 and to prevent unnecessary or undue degradation. BLM may require you to incorporate into your plan of operations other agency permits, final approved engineering designs and plans, or other conditions of approval from the review of the plan of operations filed under § 3809.401(b); or

(3) BLM disapproves, or is withholding approval of your plan of operations because the plan:

(i) Does not meet the applicable content requirements of § 3809.401;

(ii) Proposes operations that are in an area segregated or withdrawn from the operation of the mining laws, unless the requirements of § 3809.100 are met; or

(iii) Proposes operations that would result in unnecessary or undue degradation of public lands. If BLM disapproves your plan of operations based on paragraph (4) of the definition of ''unnecessary or undue degradation'' in § 3809.5,BLM must include written findings supported by a record clearly demonstrating each element of paragraph (4), including—

(A) That approval of the plan of operations would create irreparable harm;

(B) How the irreparable harm is substantial in extent or duration;

(C) That the resources substantially irreparably harmed constitute significant scientific, cultural, or environmental resources; and

(D) How mitigation would not be effective in reducing the level of harm below the substantial or irreparable threshold.

**§ 3809.412 When may I operate under a plan of operations?**

You must not begin operations until BLM approves your plan of operations and you provide the financial guarantee required under § 3809.551.

**§ 3809.415 How do I prevent unnecessary or undue degradation while conducting operations on public lands?**

You prevent unnecessary or undue degradation while conducting operations on public lands by—

(a) Complying with § 3809.420, as applicable; the terms and conditions of your notice or approved plan of operations; and other Federal and State laws related to environmental protection and protection of cultural resources;

(b) Assuring that your operations are ''reasonably incident'' to prospecting, mining, or processing operations and uses as defined in § 3715.0–5 of this title; and

(c) Attaining the stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas.

(d) Avoiding substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.

**§ 3809.420 What performance standards apply to my notice or plan of operations?**

The following performance standards apply to your notice or plan of operations:

(a) *General performance standards.*

(1) *Technology and practices.* You must use equipment, devices, and practices that will meet the performance standards of this subpart.

(2) *Sequence of operations.* You must avoid unnecessary impacts and facilitate reclamation by following a reasonable and customary mineral exploration, development, mining and reclamation sequence.

(3) *Land-use plans.* 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.

(4) *Mitigation.* You must take mitigation measures specified by BLM to protect public lands.

(5) *Concurrent reclamation.* You must initiate and complete reclamation at the earliest economically and technically feasible time on those portions of the disturbed area that you will not disturb further.

(b) *Environmental performance standards.*

(1) *Air quality.* Your operations must comply with applicable Federal, Tribal, State, and, where delegated by the State, local government laws and requirements.

(2) *Water.* You must conduct operations to minimize water pollution (source control) in preference to water treatment. You must conduct operations to minimize changes in water quantity in preference to water supply replacement. Your operations must comply with State water law with respect to water use and water quality.

(i) *Surface water.* (A) Releases to surface waters must comply with applicable Federal, Tribal, State, interstate, and, where delegated by the State, local government laws and requirements.

(B) You must conduct operations to prevent or control the discharge of pollutants into surface waters.

(ii) *Ground water.* (A) You must comply with State standards and other applicable requirements if your operations affect ground water.

(B) You must conduct operations to minimize the discharge of pollutants into ground water.

(C) You must conduct operations affecting ground water, such as dewatering, pumping, and injecting, to minimize impacts on surface and other natural resources, such as wetlands, riparian areas, aquatic habitat, and other features that are dependent on ground water.

(3) *Wetlands and riparian areas.* (i) You must avoid locating operations in wetlands and riparian areas where possible, minimize impacts on wetlands and riparian areas that your operations cannot avoid, and mitigate damage to wetlands and riparian areas that your operations impact.

(ii) Where economically and technically feasible, you must return disturbed wetlands and riparian areas to a properly functioning condition. Wetlands and riparian areas are functioning properly when adequate vegetation, land form, or large woody debris is present to dissipate stream energy associated with high water flows, thereby reducing erosion and improving water quality; filter sediment, capture bedload, and aid floodplain development; improve floodwater retention and ground-water recharge; develop root masses that stabilize streambanks against cutting action; develop diverse ponding and channel characteristics to provide the habitat and water depth, duration, and temperature necessary for fish production, waterfowl breeding, and other uses, and support greater biodiversity.

(iii) You must mitigate impacts to wetlands under the jurisdiction of the U.S. Army Corps of Engineers (COE) and other waters of the United States in accord with COE requirements.

(iv) You must take appropriate mitigation measures, such as restoration or replacement, if your operations cause the loss of nonjurisdictional wetland or riparian areas or the diminishment of their proper functioning condition.

(4) *Soil and growth material.* (i) You must remove, segregate, and preserve topsoil or other suitable growth material to minimize erosion and sustain revegetation when reclamation begins.

(ii) To preserve soil viability and promote concurrent reclamation, you must directly transport topsoil from its original location to the point of reclamation without intermediate stockpiling, where economically and technically feasible.

(5) *Revegetation.* You must—

(i) Revegetate disturbed lands by establishing a stable and long-lasting vegetative cover that is self-sustaining and, considering successional stages, will result in cover that is—

(A) Comparable in both diversity and density to pre-existing natural vegetation of the surrounding area; or

(B) Compatible with the approved BLM land-use plan or activity plan;

(ii) Take all reasonable steps to minimize the introduction of noxious weeds and to limit any existing infestations;

(iii) Use native species, when available, to the extent technically feasible. If you use non-native species, they must not inhibit re-establishment of native species;

(iv) Achieve success over the time frame approved by BLM; and

(v) Where you demonstrate revegetation is not achievable under this paragraph, you must use other techniques to minimize erosion and stabilize the project area, subject to BLM approval.

(6) *Fish, wildlife, and plants.* (i) You must minimize disturbances and adverse impacts on fish, wildlife, and related environmental values.

(ii) You must take any necessary measures to protect Federally proposed or listed threatened or endangered species, both plants and animals, or their proposed or designated critical habitat as required by the Endangered Species Act.

(iii) You must take any necessary action to minimize the adverse effects of your operations, including access, on BLM-defined special status species.

(iv) You must rehabilitate fisheries and wildlife habitat affected by your operations.

(7) *Cultural, paleontologic, and cave resources.* (i) You must not knowingly disturb, alter, injure, or destroy any scientifically important paleontologic remains or any historic, archaeologic, or cave-related site, structure, building, resource, or object unless —

(A) You identify the resource in your notice or plan of operations;

(B) You propose action to protect, remove or preserve the resource; and (C) BLM specifically authorizes such action in your plan of operations, or does not prohibit such action under your notice.

(ii) You must immediately bring to BLM's attention any previously unidentified historic, archaeologic, cave-related, or scientifically important paleontologic resources that might be altered or destroyed by your operations. You must leave the discovery intact until BLM authorizes you to proceed. BLM will evaluate the discovery and take action to protect, remove, or preserve the resource within 30 calendar days after you notify BLM of the discovery, unless otherwise agreed to by the operator and BLM, or unless otherwise provided by law.

(iii) BLM has the responsibility for determining who bears the cost of the investigation, recovery, and preservation of discovered historic, archaeologic, cave-related, and paleontologic resources, or of any human remains and associated funerary objects. If BLM incurs costs associated with investigation and recovery, BLM will recover the costs from the operator on a case-by-case basis, after an evaluation of the factors set forth in section 304(b) of FLPMA.

(c) *Operational performance standards.*

(1) *Roads and structures.* (i) You must design, construct, and maintain roads and structures to minimize erosion, siltation, air pollution and impacts to resources.

(ii) Where it is economically and technically feasible, you must use existing access and follow the natural contour of the land to minimize surface disturbance, including cut and fill, and to maintain safe design.

(iii) When commercial hauling on an existing BLM road is involved, BLM may require you to make appropriate arrangements for use, maintenance, and safety.

(iv) You must remove and reclaim roads and structures according to BLM land-use plans and activity plans, unless retention is approved by BLM.

(2) *Drill holes.* (i) You must not allow drilling fluids and cuttings to flow off the drill site.

(ii) You must plug all exploration drill holes to prevent mixing of waters from aquifers, impacts to beneficial uses, downward water loss, or upward water loss from artesian conditions.

(iii) You must conduct surface plugging to prevent direct inflow of surface water into the drill hole and to eliminate the open hole as a hazard.

(3) *Acid-forming, toxic, or other deleterious materials.* You must incorporate identification, handling, and placement of potentially acid-forming, toxic or other deleterious materials into your operations, facility design, reclamation, and environmental monitoring programs to minimize the formation and impacts of acidic, alkaline, metal-bearing, or other deleterious leachate, including the following:

(i) You must handle, place, or treat potentially acid-forming, toxic, or other deleterious materials in a manner that minimizes the likelihood of acid formation and toxic and other deleterious leachate generation (source control);

(ii) If you cannot prevent the formation of acid, toxic, or other deleterious drainage, you must minimize uncontrolled migration of leachate; and

(iii) You must capture and treat acid drainage, or other undesirable effluent, to the applicable standard if source controls and migration controls do not prove effective. You are responsible for any costs associated with water treatment or facility maintenance after project closure. Long-term, or post-mining, effluent capture and treatment are not acceptable substitutes for source and migration control, and you may rely on them only after all reasonable source and migration control methods have been employed.

(4) *Leaching Operations and Impoundments.* (i) You must design, construct, and operate all leach pads, tailings impoundments, ponds, and solution-holding facilities according to standard engineering practices to achieve and maintain stability and facilitate reclamation.

(ii) You must construct a low-permeability liner or containment system that will minimize the release of leaching solutions to the environment. You must monitor to detect potential releases of contaminants from heaps, process ponds, tailings impoundments, and other structures and remediate environmental impacts if leakage occurs.

(iii) You must design, construct, and operate cyanide or other leaching facilities and impoundments to contain precipitation from the local 100-year, 24-hour storm event in addition to the maximum process solution inventory. Your design must also include allowances for snowmelt events and draindown from heaps during power outages in the design.

(iv) You must construct a secondary containment system around vats, tanks, or recovery circuits adequate to prevent the release of toxic solutions to the environment in the event of primary containment failure.

(v) You must exclude access by the public, wildlife, or livestock to solution containment and transfer structures that contain lethal levels of cyanide or other solutions.

(vi) During closure and at final reclamation, you must detoxify leaching solutions and heaps and manage tailings or other process waste to minimize impacts to the environment from contact with toxic materials or leachate. Acceptable practices to detoxify solutions and materials include natural degradation, rinsing, chemical treatment, or equally successful alternative methods. Upon completion of reclamation, all materials and discharges must meet applicable standards.

(vii) In cases of temporary or seasonal closure, you must provide adequate maintenance, monitoring, security, and financial guarantee, and BLM may require you to detoxify process solutions.

(5) *Waste rock, tailings, and leach pads.* You must locate, design, construct, operate, and reclaim waste rock, tailings, and leach pads to minimize infiltration and contamination of surface water and ground water; achieve stability; and, to the extent economically and technically feasible, blend with pre-mining, natural topography.

(6) *Stability, grading and erosion control.* (i) You must grade or otherwise engineer all disturbed areas to a stable condition to minimize erosion and facilitate revegetation.

(ii) You must recontour all areas to blend with pre-mining, natural topography to the extent economically and technically feasible. You may temporarily retain a highwall or other

mine workings in a stable condition to preserve evidence of mineralization.

(iii) You must minimize erosion during all phases of operations.

(7) *Pit reclamation.* (i) Based on the site-specific review required in § 3809.401and the environmental analysis of the plan of operations, BLM will determine the amount of pit backfilling required, if any, taking into consideration economic, environmental, and safety factors.

(ii) You must apply mitigation measures to minimize the impacts created by any pits or disturbances that are not completely backfilled .

(iii) Water quality in pits and other water impoundments must comply with applicable Federal, State, and where appropriate, local government water quality standards. Where no standards exist, you must take measures to protect wildlife, domestic livestock, and public water supplies and users.

(8) *Solid waste.* (i) You must comply with applicable Federal, State, and where delegated by the State, local government standards for the disposal and treatment of solid waste, including regulations issued under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*).

(ii) You must remove from the project area, dispose of, or treat all non-mine garbage, refuse, or waste to minimize their impact.

(9) *Fire prevention and control.* You must comply with all applicable Federal and State fire laws and regulations, and take all reasonable measures to prevent and suppress fires in the project area.

(10) *Maintenance and public safety.* During all operations and after mining—

(i) You must maintain structures, equipment, and other facilities in a safe and orderly manner;

(ii) You must mark by signs or fences, or otherwise identify hazardous sites or conditions resulting from your operations to alert the public in accord with applicable Federal and State laws and regulations; and

(iii) You must restrict unaccompanied public access to portions of your operations that present a hazard to the public, consistent with §§ 3809.600 and 3712.1 of this title.

(11) *Protection of survey monuments.* (i) To the extent economically and technically feasible, you must protect all survey monuments, witness corners, reference monuments, bearing trees, and line trees against damage or destruction.

(ii) If you damage or destroy a monument, corner, or accessory, you must immediately report the matter to BLM. BLM will tell you in writing how to restore or re-establish a damaged or destroyed monument, corner, or accessory.

**§ 3809.423 How long does my plan of operations remain in effect?**

Your plan of operations remains in effect as long as you are conducting operations, unless BLM suspends or revokes your plan of operations for failure to comply with this subpart.

**§ 3809.424 What are my obligations if I stop conducting operations?**

(a) To see what you must do if you stop conducting operations, follow this table:

| If— | Then— |
|---|---|
| (1) You stop conducting operations for any period of time | (1) You must follow your approved interim management plan submitted under § 3809.401(b)(5); (ii) You must submit a modification to your interim management plan to BLM within 30 calendar days if it does not cover the circumstances of your temporary closure per § 3809.431(a); (iii) You must take all necessary actions to assure that unnecessary or undue degradation does not occur; and (iv) You must maintain an adequate financial guarantee. |
| (2) The period of non-operation is likely to cause unnecessary or undue degradation. | The BLM will require you to take all necessary actions to assure that unnecessary or undue degradation does not occur, including requiring you, after an extended period of non-operation for other than seasonal operations, to remove all structures, equipment, and other facilities and reclaim the project area. |
| (3) Your operations are inactive for 5 consecutive years | BLM will review your operations and determine whether BLM should terminate your plan of operations and direct final reclamation and closure. |
| (4) BLM determines that you abandoned your operations | BLM may initiate forfeiture under § 3809.595. If the amount of the financial guarantee is inadequate to cover the costs of reclamation, BLM may complete the reclamation, and the operator and all other responsible persons are liable for the costs of such reclamation. See § 3809.336(a) for indicators of abandonment. |

(b) Your reclamation and closure obligations continue until satisfied.

## Modifications of Plans of Operations

**§ 3809.430 May I modify my plan of operations?**

Yes, you may request a modification of the plan at any time during operations under an approved plan of operations.

**§ 3809.431 When must I modify my plan of operations?**

You must modify your plan of operations when any of the following apply:

(a) Before making any changes to the operations described in your approved plan of operations;

(b) When BLM requires you to do so to prevent unnecessary or undue degradation; and

(c) Before final closure, to address impacts from unanticipated events or conditions or newly discovered circumstances or information, including the following:

(1) Development of acid or toxic drainage;

(2) Loss of surface springs or water supplies;

(3) The need for long-term water treatment and site maintenance;

(4) Repair of reclamation failures;

(5) Plans for assuring the adequacy of containment structures and the integrity of closed waste units;

(6) Providing for post-closure management; and (7) Eliminating hazards to public safety.

**§ 3809.432 What process will BLM follow in reviewing a modification of my plan of operations?**

(a) BLM will review and approve a modification of your plan of operations in the same manner as it reviewed and approved your initial plan under §§ 3809.401 through 3809.420; or

(b) BLM will accept a minor modification without formal approval if it is consistent with the approved plan of operations and does not constitute a substantive change that requires additional analysis under the National Environmental Policy Act.

**§ 3809.433 Does this subpart apply to a new modification of my plan of operations?**

To see how this subpart applies to a modification of your plan of operations that you submit to BLM after January 20, 2001, refer to the following table.

| If you have an approved plan of operations on January 20, 2001 | Then— |
|---|---|
| (a) *New facility.* You subsequently propose to modify your plan of operations by constructing a new facility, such as waste rock repository, leach pad, impoundment, drill site, or road. | The plan contents requirements (§ 3809.401) and performance standards (§ 3809.420) of this subpart apply to the new facility. Those facilities and areas not included in the modification may continue to operate under the terms of your existing plan of operations. |
| (b) *Existing facility.* You subsequently propose to modify your plan of operations by modifying an existing facility, such as expansion of a waste rock repository, leach pad, or impoundment; layback of a mine pit; or widening of a road. | The plan contents requirements (§ 3809.401) and performance standards (§ 3809.420) of this subpart apply to the modified portion of the facility, unless you demonstrate to BLM's satisfaction it is not practical to apply them for economic environmental, safety, or technical reasons. If you make the demonstration, the plan content requirements (43 CFR 3809.1–5) and performance standards (43 CFR 3809.1–3(d) and 3809.2–2) that were in effect immediately before January 20, 2001 apply to your modified facility. (See 43 CFR parts 1000–end, revised as of Oct. 1, 2000.) |

**§ 3809.434 How does this subpart apply to pending modifications for new or existing facilities?**

(a) This subpart applies to modifications pending before BLM on January 20, 2001 to construct a new facility, such as a waste rock repository, leach pad, drill site, or access road; or to modify an existing mine facility such as expansion of a waste rock repository or leach pad.

(b) All provisions of this subpart, except plan content (§ 3809.401) and performance standards (§§ 3809.415 and 3809.420) apply to any modification of a plan of operations that was pending on January 20, 2001. See § 3809.505 for applicability of financial guarantee requirements.

(c) If your unapproved modification of a plan of operations is pending on January 20, 2001, then the plan content requirements (§ 3809.1–5) and the performance standards (§§ 3809.1–3(d) and 3809.2–2) that were in effect immediately before January 20, 2001 apply to your modification of a plan of operations. (See 43 CFR parts 1000–end, revised as of Oct. 1, 2000).

(d) If you want this subpart to apply to your pending modification of a plan of operations, where not otherwise required, you may choose to have this subpart apply.

## Financial Guarantee Requirements—General

**§ 3809.500 In general, what are BLM's financial guarantee requirements?**

To see generally what BLM's financial guarantee requirements are, follow this table:

| If— | Then— |
|---|---|
| (a) Your operations constitute casual use, ..... | You do not have to provide any financial guarantee. |
| (b) You conduct operations under a notice or a plan of operations ..... | You must provide BLM or the State a financial guarantee that meets the requirements of this subpart before starting operations operations. For more information, see §§ 3809.551 through under a 3809.573. |

**§ 3809.503 When must I provide a financial guarantee for my notice-level operations?**

To see how this subpart applies to your notice, follow this table:

| If— | Then— |
|---|---|
| (a) Your notice was on file with BLM on January 20, 2001 ..... | You do not need to provide a financial guarantee unless you modify the notice or extend the notice under § 3809.333. |
| (b) Your notice was on file with BLM before January 20, 2001 and you choose to modify your notice as required by this subpart on or after that date. | You must provide a financial guarantee before you can begin operations under the modified notice. If you modify your notice, you must post a finacial guarantee for the entire notice. |
| (c) You file a new notice on or after January 20, 2001 ..... | You must provide a financial guarantee before you can begin operations under the notice. |

**§ 3809.505 How do the financial guarantee requirements of this subpart apply to my existing plan of operations?**

For each plan of operations approved before January 20, 2001, you must post a financial guarantee according to the requirements of this subpart no later than July 19, 2001 at the local BLM office with jurisdiction over the lands involved. You do not need to post a new financial guarantee if your existing financial guarantee satisfies this subpart.

**§ 3809.551 What are my choices for providing BLM with a financial guarantee?**

You must provide BLM with a financial guarantee using any of the 3 options in the following table:

| If— | Then— |
|---|---|
| (a) You have only one notice or plan of operations, or wish to provide a financial guarantee for a single notice or plan of operations. | You may provide an individual financial guarantee that covers only the cost of reclaiming areas disturbed under the single notice or plan of operations. See §§ 3809.552 through 3809.556 for more information. |
| (b) You are currently operating under more than one notice or plan of operations. | You may provide a blanket financial guarantee covering statewide or nationwide operations. See § 3809.560 for more information. |
| (c) You do not choose one of the options in paragraphs (a) and (b) of this section. | You may provide evidence of an existing financial guarantee under State law or regulations. See §§ 3809.570 through 3809.573 for more information. |

## Individual Financial Guarantee

**§ 3809.552 What must my individual financial guarantee cover?**

(a) If you conduct operations under a notice or a plan of operations and you provide an individual financial guarantee, it must cover the estimated cost as if BLM were to contract with a third party to reclaim your operations according to the reclamation plan, including construction and maintenance costs for any treatment facilities necessary to meet Federal and State environmental standards. The financial guarantee must also cover any interim stabilization and infrastructure maintenance costs needed to maintain the area of operations in compliance with applicable environmental requirements while third-party contracts are developed and executed.

(b) BLM will periodically review the estimated cost of reclamation and the adequacy of any funding mechanism established under paragraph (c) of this section and require increased coverage, if necessary.

(c) When BLM identifies a need for it, you must establish a trust fund or other funding mechanism available to BLM to ensure the continuation of long-term treatment to achieve water quality standards and for other long term, post-mining maintenance requirements. The funding must be adequate to provide for construction, long-term operation, maintenance, or replacement of any treatment facilities and infrastructure, for as long as the treatment and facilities are needed after mine closure. BLM may identify the need for a trust fund or other funding mechanism during plan review or later.

**§ 3809.553 May I post a financial guarantee for a part of my operations?**

(a) Yes, BLM may authorize you to provide a financial guarantee covering a part of your operations if—

(1) Your operations do not go beyond what is specifically covered by the partial financial guarantee; and

(2) The partial financial guarantee covers all reclamation costs within the incremental area of operations.

(b) BLM will review the amount and terms of the financial guarantee for each increment of your operations at least annually.

**§ 3809.554 How do I estimate the cost to reclaim my operations?**

(a) You must estimate the cost to reclaim your operations as if BLM were hiring a third-party contractor to perform reclamation of your operations after you have vacated the project area. Your estimate must include BLM's cost to administer the reclamation contract. Contact BLM to obtain this administrative cost information.

(b) Your estimate of the cost to reclaim your operations must be acceptable to BLM.

**§ 3809.555 What forms of individual financial guarantee are acceptable to BLM?**

You may use any of the following instruments for an individual financial guarantee, provided that the BLM State Director has determined that it is an acceptable financial instrument within the State where the operations are proposed:

(a) Surety bonds that meet the requirements of Treasury Department Circular 570, including surety bonds arranged or paid for by third parties;

(b) Cash in an amount equal to the required dollar amount of the financial guarantee, to be deposited and maintained in a Federal depository account of the United States Treasury by BLM;

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

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

(e) Either of the following instruments having a market value of not less than the required dollar amount of the financial guarantee and maintained in a Securities Investors Protection Corporation insured trust account by a licensed securities brokerage firm for the benefit of the Secretary of the Interior, acting by and through BLM:

(1) Negotiable United States Government, State and Municipal securities or bonds; or

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

(f) Insurance, if its form and function is such that the funding or enforceable pledges of funding are used to guarantee performance of regulatory obligations in the event of default on such obligations by the operator. Insurance must have an A.M. Best rating of ''superior'' or an equivalent rating from a nationally recognized insurance rating service.

**§ 3809.556 What special requirements apply to financial guarantees described in § 3809.555(e)?**

(a) If you choose to use the instruments permitted under § 3809.555(e) in satisfaction of financial guarantee requirements, you must provide BLM, before you begin operations and by the end of each calendar year thereafter, a certified statement describing the nature and

market value of the instruments maintained in that account, and including any current statements or reports furnished by the brokerage firm to the operator or mining claimant concerning the asset value of the account.

(b) You must review the market value of the account instruments by December 31 of each year to ensure that their market value continues to be not less than the required dollar amount of the financial guarantee. When the market value of the account instruments has declined by more than 10 percent of the required dollar amount of the financial guarantee, you must, within 10 calendar days after its annual review or at any time upon the written request of BLM, provide additional instruments, as defined in § 3809.555(e), to the trust account so that the total market value of all account instruments is not less than the required dollar amount of the financial guarantee. You must send a certified statement to BLM within 45 calendar days thereafter describing your actions to raise the market value of its account instruments to the required dollar amount of the financial guarantee. You must include copies of any statements or reports furnished by the brokerage firm to you documenting such an increase.

(c) If your review under paragraph (b) of this section demonstrates that the total market value of trust account instruments exceeds 110 percent of the required dollar amount of the financial guarantee, you may ask BLM to authorize a written release of that portion of the account that exceeds 110 percent of the required financial guarantee. BLM will approve your request only if you are in compliance with the terms and conditions of your notice or approved plan of operations.

## Blanket Financial Guarantee

### § 3809.560 Under what circumstances may I provide a blanket financial guarantee?

(a) If you have more than one notice- or plan-level operation underway, you may provide a blanket financial guarantee covering statewide or nationwide operations instead of individual financial guarantees for each operation.

(b) BLM will accept a blanket financial guarantee if we determine that its terms and conditions are sufficient to comply with the regulations of this subpart.

## State-Approved Financial Guarantee

### § 3809.570 Under what circumstances may I provide a State-approved financial guarantee?

When you provide evidence of an existing financial guarantee under State law or regulations that covers your operations, you are not required to provide a separate financial guarantee under this subpart if—

(a) The existing financial guarantee is redeemable by the Secretary, acting by and through BLM;

(b) It is held or approved by a State agency for the same operations covered by your notice(s) or plan(s) of operations; and

(c) It provides at least the same amount of financial guarantee as required by this subpart.

### § 3809.571 What forms of State-approved financial guarantee are acceptable to BLM?

You may provide a State-approved financial guarantee in any of the following forms, subject to the conditions in §§ 3809.570 and 3809.574:

(a) The kinds of individual financial guarantees specified under § 3809.555;

(b) Participation in a State bond pool, if—

(1) The State agrees that, upon BLM's request, the State will use part of the pool to meet reclamation obligations on public lands; and

(2) The BLM State Director determines that the State bond pool provides the equivalent level of protection as that required by this subpart; or

(c) A corporate guarantee that existed on January 20, 2001, subject to the restrictions on corporate guarantees in § 3809.574.

### § 3809.572 What happens if BLM rejects a financial instrument in my State-approved financial guarantee?

If BLM rejects a submitted financial instrument in an existing State-approved financial guarantee, BLM will notify you and the State in writing, with a complete explanation of the reasons for the rejection within 30 calendar days of BLM's receipt of the evidence of State-approved financial guarantee. You must provide BLM with a financial guarantee acceptable under this subpart at least equal to the amount of the rejected financial instrument.

### § 3809.573 What happens if the State makes a demand against my financial guarantee?

When the State makes a demand against your financial guarantee, thereby reducing the available balance, you must do both of the following:

(a) Notify BLM within 15 calendar days; and

(b) Replace or augment the financial guarantee within 30 calendar days if the available balance is insufficient to cover the remaining reclamation cost.

### § 3809.574 What happens if I have an existing corporate guarantee?

(a) If you have an existing corporate guarantee on January 20, 2001 that applies to public lands under an approved BLM and State agreement, your corporate guarantee will continue in effect. BLM will not accept any new corporate guarantees or increases to existing corporate guarantees. You may not transfer your existing corporate guarantee to another operator.

(b) If the State revises existing corporate guarantee criteria or requirements that apply to a corporate guarantee existing on January 20, 2001, the BLM State Director will review the revisions to ensure that adequate financial coverage continues. If the BLM State Director determines it is in the public interest to do so, the State Director may terminate a revised corporate guarantee and require an acceptable replacement financial guarantee after due notice and a reasonable time to obtain a replacement.

## Modification or Replacement of a Financial Guarantee

### § 3809.580 What happens if I modify my notice or approved plan of operations?

(a) If you modify a notice or an approved plan of operations under § 3809.331 or § 3809.431 respectively, and your estimated reclamation cost increases, you must increase the amount of the financial guarantee to cover any estimated additional cost of reclamation and long-term treatment in compliance with § 3809.552.

(b) If you modify a notice or an approved plan of operations under § 3809.331 or § 3809.431 respectively, and your estimated reclamation cost decreases, you may request BLM decrease the amount of the financial guarantee for your operations.

### § 3809.581 Will BLM accept a replacement financial instrument?

(a) Yes, if you or a new operator have an approved financial guarantee, you may request BLM to accept a replacement financial instrument at any time after the approval of an initial instrument. BLM will review the offered instrument for adequacy and may reject any offered instrument, but will do so by a decision in writing, with a complete explanation of the reasons for the rejection, within 30 calendar days of the offering.

(b) A surety is not released from an obligation that accrued while the surety

bond was in effect unless the replacement financial guarantee covers such obligations to BLM's satisfaction.

**§ 3809.582 How long must I maintain my financial guarantee?**

You must maintain your financial guarantee until you or a new operator replace it with another adequate financial guarantee, subject to BLM's written concurrence, or until BLM releases the requirement to maintain your financial guarantee after you have completed reclamation of your operation according to the requirements of § 3809.320 (for notices), including any measures identified as the result of consultation with BLM under § 3809.313, or § 3809.420 (for plans of operations).

## Release of Financial Guarantee

**§ 3809.590 When will BLM release or reduce the financial guarantee for my notice or plan of operations?**

(a) When you (the mining claimant or operator) have completed all or any portion of the reclamation of your operations in accordance with your notice or approved plan of operations, you may notify BLM that the reclamation has occurred and request a reduction in the financial guarantee or BLM approval of the adequacy of the reclamation, or both.

(b) BLM will then promptly inspect the reclaimed area. We encourage you to accompany the BLM inspector.

(c) For your plan of operations, BLM will either post in the local BLM office or publish notice of final financial guarantee release in a local newspaper of general circulation and accept comments for 30 calendar days. Subsequently, BLM will notify you, in writing, whether you may reduce the financial guarantee under § 3809.591, or the reclamation is acceptable, or both.

**§ 3809.591 What are the limitations on the amount by which BLM may reduce my financial guarantee?**

(a) This section applies to your financial guarantee, but not to any funding mechanism established under § 3809.552(c) to pay for long-term treatment of effluent or site maintenance. Calculation of bond percentages in paragraphs (b) and (c) of this section does not include any funds held in that kind of funding mechanism.

(b) BLM may release up to 60 percent of your financial guarantee for a portion of your project area when BLM determines that you have successfully completed backfilling; regrading; establishment of drainage control; and stabilization and detoxification of leaching solutions, heaps, tailings, and similar facilities on that portion of the project area.

(c) BLM may release the remainder of your financial guarantee for the same portion of the project area when—

(1) BLM determines that you have successfully completed reclamation, including revegetating the area disturbed by operations; and

(2) Any effluent discharged from the area has met applicable effluent limitations and water quality standards for one year without needing additional treatment, or you have established a funding mechanism under § 3809.552(c) to pay for long-term treatment, and any effluent discharged from the area has met applicable effluent limitations and water quality standards water for one year with or without treatment.

**§ 3809.592 Does release of my financial guarantee relieve me of all responsibility for my project area?**

(a) Release of your financial guarantee under this subpart does not release you (the mining claimant or operator) from responsibility for reclamation of your operations should reclamation fail to meet the standards of this subpart.

(b) Any release of your financial guarantee under this subpart does not release or waive any claim BLM or other persons may have against any person under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, or under any other applicable statutes or regulations.

**§ 3809.593 What happens to my financial guarantee if I transfer my operations?**

You remain responsible for obligations or conditions created while you conducted operations unless a transferee accepts responsibility under § 3809.116, and BLM accepts an adequate replacement financial guarantee. Therefore, your financial guarantee must remain in effect until BLM determines that you are no longer responsible for all or part of the operation. BLM can release your financial guarantee on an incremental basis. The new operator must provide a financial guarantee before BLM will allow the new operator to conduct operations.

**§ 3809.594 What happens to my financial guarantee when my mining claim or millsite is patented?**

(a) When your mining claim or millsite is patented, BLM will release the portion of the financial guarantee that applies to operations within the boundaries of the patented land. This paragraph does not apply to patents issued on mining claims within the boundaries of the California Desert Conservation Area.

(b) BLM will release the remainder of the financial guarantee, including the portion covering approved access outside the boundaries of the mining claim, when you have completed reclamation to the standards of this subpart.

## Forfeiture of Financial Guarantee

**§ 3809.595 When may BLM initiate forfeiture of my financial guarantee?**

BLM may initiate forfeiture of all or part of your financial guarantee for any project area or portion of a project area if—

(a) You (the operator or mining claimant) refuse or are unable to conduct reclamation as provided in the reclamation measures incorporated into your notice or approved plan of operations or the regulations in this subpart;

(b) You fail to meet the terms of your notice or your approved plan of operations; or

(c) You default on any of the conditions under which you obtained the financial guarantee.

**§ 3809.596 How does BLM initiate forfeiture of my financial guarantee?**

When BLM decides to require the forfeiture of all or part of your financial guarantee, BLM will notify you (the operator or mining claimant) by certified mail, return receipt requested; the surety on the financial guarantee, if any; and the State agency holding the financial guarantee, if any, informing you and them of the following:

(a) BLM's decision to require the forfeiture of all or part of the financial guarantee;

(b) The reasons for the forfeiture;

(c) The amount that you will forfeit based on the estimated total cost of achieving the reclamation plan requirements for the project area or portion of the project area affected, including BLM's administrative costs; and

(d) How you may avoid forfeiture, including—

(1) Providing a written agreement under which you or another person will perform reclamation operations in accordance with a compliance schedule which meets the conditions of your notice or your approved plan of operations and the reclamation plan, and a demonstration that such other person has the ability to satisfy the conditions; and

(2) Obtaining written permission from BLM for a surety to complete the reclamation, or the portion of the reclamation applicable to the bonded

phase or increment, if the surety can demonstrate an ability to complete the reclamation in accordance with the reclamation measures incorporated in your notice or approved plan of operations.

### § 3809.597 What if I do not comply with BLM's forfeiture decision?

If you fail to meet the requirements of BLM's forfeiture decision provided under § 3809.596, and you fail to appeal the forfeiture decision under §§ 3809.800 to 3809.807, or the Interior Board of Land Appeals does not grant a stay under 43 CFR 4.321, or the decision appealed is affirmed, BLM will—

(a) Immediately collect the forfeited amount as provided by applicable laws for the collection of defaulted financial guarantees, other debts, or State bond pools; and

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

### § 3809.598 What if the amount forfeited will not cover the cost of reclamation?

If the amount forfeited is insufficient to pay for the full cost of reclamation, the operators and mining claimants are jointly and severally liable for the remaining costs. BLM may complete or authorize completion of reclamation of the area covered by the financial guarantee and may recover from responsible persons all costs of reclamation in excess of the amount forfeited.

### § 3809.599 What if the amount forfeited exceeds the cost of reclamation?

If the amount of financial guarantee forfeited is more than the amount necessary to complete reclamation, BLM will return the unused funds within a reasonable amount of time to the party from whom they were collected.

## Inspection and Enforcement

### § 3809.600 With what frequency will BLM inspect my operations?

(a) At any time, BLM may inspect your operations, including all structures, equipment, workings, and uses located on the public lands. The inspection may include verification that your operations comply with this subpart. See § 3715.7 of this title for special provisions governing inspection of the inside of structures used solely for residential purposes.

(b) At least 4 times each year, BLM will inspect your operations if you use cyanide or other leachate or where there is significant potential for acid drainage.

### § 3809.601 What types of enforcement action may BLM take if I do not meet the requirements of this subpart?

BLM may issue various types of enforcement orders, including the following:

(a) *Noncompliance order.* If your operations do not comply with any provision of your notice, plan of operations, or requirement of this subpart, BLM may issue you a noncompliance order; and

(b) *Suspension orders.* (1) BLM may order a suspension of all or any part of your operations after—

(i) You fail to timely comply with a noncompliance order for a significant violation issued under paragraph (a) of this section. A significant violation is one that causes or may result in environmental or other harm or danger or that substantially deviates from the complete notice or approved plan of operations;

(ii) BLM notifies you of its intent to issue a suspension order; and

(iii) BLM provides you an opportunity for an informal hearing before the BLM State Director to object to a suspension.

(2) BLM may order an immediate, temporary suspension of all or any part of your operations without issuing a noncompliance order, notifying you in advance, or providing you an opportunity for an informal hearing if—

(i) You do not comply with any provision of your notice, plan of operations, or this subpart; and

(ii) An immediate, temporary suspension is necessary to protect health, safety, or the environment from imminent danger or harm. BLM may presume that an immediate suspension is necessary if you conduct plan-level operations without an approved plan of operations or conduct notice-level operations without submitting a complete notice.

(3) BLM will terminate a suspension order under paragraph (b)(1) or (b)(2) of this section when BLM determines you have corrected the violation.

(c) *Contents of enforcement orders.* Enforcement orders will specify—

(1) How you are failing or have failed to comply with the requirements of this subpart;

(2) The portions of your operations, if any, that you must cease or suspend;

(3) The actions you must take to correct the noncompliance and the time, not to exceed 30 calendar days, within which you must start corrective action; and

(4) The time within which you must complete corrective action.

### § 3809.602 Can BLM revoke my plan of operations or nullify my notice?

(a) BLM may revoke your plan of operations or nullify your notice upon finding that—

(1) A violation exists of any provision of your notice, plan of operation, or this subpart, and you have failed to correct the violation within the time specified in the enforcement order issued under § 3809.601; or

(2) a pattern of violations exists at your operations.

(b) The finding is not effective until BLM notifies you of its intent to revoke your plan or nullify your notice, and BLM provides you an opportunity for an informal hearing before the BLM State Director.

(c) If BLM nullifies your notice or revokes your plan of operations, you must not conduct operations on the public lands in the project area, except for reclamation and other measures specified by BLM.

### § 3809.603 How does BLM serve me with an enforcement action?

(a) BLM will serve a noncompliance order, a notification of intent to issue a suspension order, a suspension order, or other enforcement order on the person to whom it is directed or his or her designated agent, either by—

(1) Sending a copy of the notification or order by certified mail or by hand to the operator or his or her designated agent, or by any means consistent with the rules governing service of a summons and complaint under rule 4 of the Federal Rules of Civil Procedure. Service is complete upon offer of the notification or order or of the certified mail and is not incomplete because of refusal to accept; or

(2) Offering a copy at the project area to the designated agent or to the individual who, based upon reasonable inquiry, appears to be in charge. If no such individual can be located at the project area, BLM may offer a copy to any individual at the project area who appears to be an employee or agent of the person to whom the notification or order is issued. Service is complete when the notice or order is offered and is not incomplete because of refusal to accept. Following service at the project area, BLM will send an information copy by certified mail to the operator or the operator's designated agent.

(b) BLM may serve a mining claimant in the same manner an operator is served under paragraph (a)(1) of this section.

(c) The mining claimant or operator may designate an agent for service of notifications and orders. You must provide the designation in writing to the

local BLM field office having jurisdiction over the lands involved.

### § 3809.604 What happens if I do not comply with a BLM order?

(a) If you do not comply with a BLM order issued under §§ 3809.601 or 3809.602, the Department of the Interior may request the United States Attorney to institute a civil action in United States District Court for an injunction or order to enforce its order, prevent you from conducting operations on the public lands in violation of this subpart, and collect damages resulting from unlawful acts. This relief may be in addition to the enforcement actions described in §§ 3809.601 and 3809.602 and the penalties described in §§ 3809.700 and 3809.702.

(b) If you fail to timely comply with a noncompliance order issued under § 3809.601(a), and remain in noncompliance, BLM may order you to submit plans of operations under § 3809.401 for current and future notice-level operations.

### § 3809.605 What are prohibited acts under this subpart?

Prohibited acts include, but are not limited to, the following:

(a) Causing any unnecessary or undue degradation;

(b) Beginning any operations, other than casual use, before you file a notice as required by § 3809.21 or receive an approved plan of operations as required by § 3809.412;

(c) Conducting any operations outside the scope of your notice or approved plan of operations;

(d) Beginning operations prior to providing a financial guarantee that meets the requirements of this subpart;

(e) Failing to meet the requirements of this subpart when you stop conducting operations under a notice (§ 3809.334), when your notice expires (§ 3809.335), or when you stop conducting operations under an approved plan of operations (§ 3809.424);

(f) Failing to comply with any applicable performance standards in § 3809.420;

(g) Failing to comply with any enforcement actions provided for in § 3809.601; or

(h) Abandoning any operation prior to complying with any reclamation required by this subpart or any order provided for in § 3809.601.

## Penalties

### § 3809.700 What criminal penalties apply to violations of this subpart?

The criminal penalties established by statute for individuals and organizations are as follows:

(a) *Individuals.* If you knowingly and willfully violate the requirements of this subpart, you may be subject to arrest and trial under section 303(a) of FLPMA (43 U.S.C. 1733(a)). If you are convicted, you will be subject to a fine of not more than $100,000 or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571, or imprisonment not to exceed 12 months, or both, for each offense; and

(b) *Organizations.* If an organization or corporation knowingly and willfully violates the requirements of this subpart, it is subject to trial and, if convicted, will be subject to a fine of not more than $200,000, or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571.

### § 3809.701 What happens if I make false statements to BLM?

Under Federal statute (18 U.S.C. 1001), you are subject to arrest and trial before a United States District Court if, in any matter under this subpart, you knowingly and willfully falsify, conceal, or cover up by any trick, scheme, or device a material fact, or make any false, fictitious, or fraudulent statements or representations, or make or use any false writings or document knowing the same to contain any false, fictitious, or fraudulent statement or entry. If you are convicted, you will be subject to a fine of not more than $250,000 or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571 or imprisonment for not more than 5 years, or both.

### § 3809.702 What civil penalties apply to violations of this subpart?

(a)(1) Following issuance of an order under § 3809.601, BLM may assess a proposed civil penalty of up to $5,000 for each violation against you if you—

(i) Violate any term or condition of a plan of operations or fail to conform with operations described in your notice;

(ii) Violate any provision of this subpart; or

(iii) Fail to comply with an order issued under § 3809.601.

(2) BLM may consider each day of continuing violation a separate violation for purposes of penalty assessments.

(3) In determining the amount of the penalty, BLM must consider your history of previous violations at the particular mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether you were negligent; and whether you demonstrate good faith in attempting to achieve rapid compliance after notification of the violation.

(4) If you are a small entity, BLM will, under appropriate circumstances including those described in paragraph (a)(3) of this section, consider reducing or waiving a civil penalty and may consider ability to pay in determining a penalty assessment.

(b) A final administrative assessment of a civil penalty occurs only after BLM has notified you of the assessment and given you opportunity to request within 30 calendar days a hearing by the Office of Hearings and Appeals. BLM may extend the time to request a hearing during settlement discussions. If you request a hearing, the Office of Hearings and Appeals will issue a decision on the penalty assessment.

(c) If BLM issues you a proposed civil penalty and you fail to request a hearing as provided in paragraph (b), the proposed assessment becomes a final order of the Department, and the penalty assessed becomes due upon expiration of the time allowed to request a hearing.

### § 3809.703 Can BLM settle a proposed civil penalty?

Yes, BLM may negotiate a settlement of civil penalties, in which case BLM will prepare a settlement agreement. The BLM State Director or his or her designee must sign the agreement.

## Appeals

### § 3809.800 Who may appeal BLM decisions under this subpart?

(a) A party adversely affected by a decision under this subpart may ask the State Director of the appropriate BLM State Office to review the decision.

(b) An adversely affected party may bypass State Director review and directly appeal a BLM decision under this subpart to the Office of Hearings and Appeals (OHA) under part 4 of this title. See § 3809.801.

### § 3809.801 When may I file an appeal of the BLM decision with OHA?

(a) If you intend to appeal a BLM decision under this subpart, use the following table to see when you must file a notice of appeal with OHA:

| If— | And— | Then if you intend to appeal, you must file a notice of appeal with OHA— |
|---|---|---|
| (1) You do not request State Director review | ..... | Within 30 calendar days after the date you receive the original decision. |
| (2) You request State Director review ..... | The State Director does not accept your request for review. | On the original decision within 30 calendar days of the date you receive the State Director's decision not to review. |
| (3) You request State Director review ..... | The State Director has accepted your request for review, but has not made a decision on the merits of the appeal. | On the original decision before the State Director issues a decision. |
| (4) You request State Director review ..... | The State Director makes a decision on the merits of the appeal. | On the State Director's decision within 30 calendar days of the date you receive, or are notified of, the State Director's decision. |

(b) In order for OHA to consider your appeal of a decision, you must file a notice of appeal in writing with the BLM office where the decision was made.

**§ 3809.802 What must I include in my appeal to OHA?**

(a) Your written appeal must contain:

(1) Your name and address; and

(2) The BLM serial number of the notice or plan of operations that is the subject of the appeal.

(b) You must submit a statement of your reasons for the appeal and any arguments you wish to present that would justify reversal or modification of the decision within the time frame specified in part 4 of this chapter (usually within 30 calendar days after filing your appeal).

**§ 3809.803 Will the BLM decision go into effect during an appeal to OHA?**

All decisions under this subpart go into effect immediately and remain in effect while appeals are pending before OHA unless OHA grants a stay under § 4.21(b) of this title.

**§ 3809.804 When may I ask the BLM State Director to review a BLM decision?**

The State Director must receive your request for State Director review no later than 30 calendar days after you receive or are notified of the BLM decision you seek to have reviewed.

**§ 3809.805 What must I send BLM to request State Director review?**

(a) Your request for State Director review must be a single package that includes a brief written statement explaining why BLM should change its decision and any documents that support your written statement. Mark your envelope ''State Director Review.'' You must also provide a telephone or fax number for the State Director to contact you.

(b) When you submit your request for State Director review, you may also request a meeting with the State Director. The State Director will notify you as soon as possible if he or she can accommodate your meeting request.

**§ 3809.806 Will the State Director review the original BLM decision if I request State Director review?**

(a) The State Director may accept your request and review a decision made under this subpart. The State director will decide within 21 days of a timely filed request whether to accept your request and review the original BLM decision. If the State Director does not make a decision within 21 days on whether to accept your request for review, you should consider your request for State Director review declined, and you may appeal the original BLM decision to OHA.

(b) The State Director will not begin a review and will end an ongoing review if you or another affected party files an appeal of the original BLM decision with OHA under section § 3809.801 before the State Director issues a decision under this subpart, unless OHA agrees to defer consideration of the appeal pending a State Director decision.

(c) If you file an appeal with OHA after requesting State Director review, you must notify the State Director who, after receiving your notice, may request OHA to defer considering the appeal.

(d) If you fail to notify the State Director of your appeal to OHA, any decision issued by the State Director may be voided by a subsequent OHA decision.

**§ 3809.807 What happens once the State Director agrees to my request for a review of a decision?**

(a) The State Director will promptly send you a written decision, which may be based on any of the following:

(1) The information you submit;

(2) The original BLM decision and any information BLM relied on for that decision;

(3) Any additional information, including information obtained from your meeting, if any, with the State Director.

(b) Any decision issued by the State Director under this subpart may affirm the original BLM decision, reverse it completely, or modify it in part. The State Director's decision may incorporate any part of the original BLM decision.

(c) If the original BLM decision was published in the **Federal Register**, the State Director will also publish his or her decision in the **Federal Register**.

**§ 3809.808 How will decisions go into effect when I request State Director review?**

(a) The original BLM decision remains in effect while State Director review is pending, except that the State Director may stay the decision during the pendency of his or her review.

(b) The State Director's decision will be effective immediately and remain in effect, unless a stay is granted by OHA under § 4.21 of this title.

**§ 3809.809 May I appeal a decision made by the State Director?**

(a) An adversely affected party may appeal the State Director's decision to OHA under part 4 of this title, except that you may not appeal a denial of your request for State Director review or a denial of your request for a meeting with the State Director.

(b) Once the State Director issues a decision under this subpart, it replaces the original BLM decision, which is no longer in effect, and you may appeal only the State Director's decision.

## Public Visits to Mines

**§ 3809.900 Will BLM allow the public to visit mines on public lands?**

(a) If requested by any member of the public, BLM may sponsor and schedule a public visit to a mine on public land once each year. The purpose of the visit is to give the public an opportunity to view the mine site and associated facilities. Visits will include surface areas and surface facilities ordinarily made available to visitors on public tours. BLM will schedule visits during normal BLM business hours at the

convenience of the operator to avoid disruption of operations.

(b) Operators must allow the visit and must not exclude persons whose participation BLM authorizes. BLM may limit the size of a group for safety reasons. An operator's representative must accompany the group on the visit. Operators must make available any necessary safety training that they provide to other visitors. BLM will provide the necessary safety equipment if the operator is unable to do so.

(c) Members of the public must provide their own transportation to the mine site, unless provided by BLM. Operators don't have to provide transportation within the project area, but if they don't, they must provide access for BLM-sponsored transportation.

## PART 9260—LAW ENFORCEMENT—CRIMINAL

11. The authority citation for part 9260 continues to read as follows:

**Authority:** 16 U.S.C. 433; 16 U.S.C. 460l–6a; 16 U.S.C. 670j; 16 U.S.C. 1246(i); 16 U.S.C. 1338; 18 U.S.C. 1851–1861; 18 U.S.C. 3551 *et seq.*; 43 U.S.C. 315(a); 43 U.S.C. 1061, 1063; 43 U.S.C. 1733.

12. BLM is amending part 9260 by adding the text of subpart 9263 consisting of § 9263.1 to read as follows:

## Subpart 9263—Minerals Management

### § 9263.1 Operations conducted under the 1872 Mining Law.

See subpart 3809 of this title for law enforcement provisions applicable to operations conducted on public lands under the 1872 Mining Law.

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