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June 19, 1997

Paul McNutt
3809 / EIS Team Leader
Bureau of Land Management
Nevada State Office
850 Harvard Way
Reno, Nevada 89502-2055

Dear Mr. McNutt:

The State of Alaska has completed a review of the Bureau of Land Management's "scoping phase" to revisions of 43 CFR Section 3809 regulations for hardrock mining on public lands. This letter represents the consolidated views of the state resource agencies.

We commend the BLM for initiating an open dialogue with stakeholders. Alaska has a significant interest in the formulation of any changes to federal mining regulations because:

- there are other overarching federal laws, federal policy, and federal court decisions unique to Alaska;
- no other state has a parallel state mining property right location system; and
- nationwide regulations may not adequately address Alaska's environmental conditions.

Overview

In the scoping process for any change in regulation, BLM should demonstrate the need for any significant changes in existing federal regulation and provide a scientific basis for evaluating the environmental and economic impacts of any revisions to the existing regulations. As a general rule, the State of Alaska is unaware of any compelling failures in the implementation of the existing 43 CFR 3809 federal regulations in Alaska. In fact, the State and other federal regulatory agencies working on mining issues have tended to agree on solutions to identified problems rather than dispute which agency has what authority.

Further, coordination with state regulatory programs should be carefully addressed to avoid "unnecessary and undue degradation" and minimize duplication of permitting requirements - benefiting both the applicant and the regulators.

Process

We request that BLM extend the scoping period and establish a stakeholders working group comprised at a minimum of the BLM Alaska State Office, the State of Alaska, mining industry, and Alaska conservation groups to identify issues and review proposed revisions to the regulations, if any, that are appropriate for miners on BLM land in Alaska. Section 43 CFR 3809.3 provides that State laws and regulations for the conduct of mining and reclamation on federal land will not be preempted. Further the Director can enter into agreements to provide for a joint federal-state program for administration and enforcement.

In addition, we recommend consideration of a second stakeholders group to explore options for assumption of 3809 authority by the State of Alaska. This would complement two existing State-federal processes: the cooperative agreement between BLM and the State of Alaska for use of the State Reclamation Bond Pool, and State of Alaska primacy over coal mining decisions. This second stakeholders group could use the model of the existing financial and federal oversight arrangement between the Department of the Interior and the State of Alaska for the coal program.

In the creation of any stakeholder group(s), we urge BLM to include the US Forest Service and to coordinate any changes of regulations with them so as to resolve discrepancies between the respective federal agency regulatory regimes. This will provide much needed consistency and clarity for industry and the public.

These stakeholder group recommendations are based on the same precedent that was incorporated in Section 708 of the Surface Mining Control and Reclamation Act of 1977 and the subsequent study by the National Academy of Sciences: *An Investigation of the Surface Mining Control and Reclamation Act of 1977 in Relation to Alaskan Conditions*. This study recognizes the challenges facing Alaska stemming from its unique climate, soil conditions, and wildlife.

Coordination With States

The State of Alaska strongly urges the BLM 3809 Task Force to continue to coordinate closely with the western states regarding any revisions to the Section 3809 regulations. Alaska remains concerned that the general direction of the BLM in the recent past has not provided for meaningful and timely stakeholder consultation as evidenced by the unilateral imposition of reclamation bonding and elimination of the 5 acre exemption. The State of Alaska is very pleased to see that the BLM 3809 Task Force has promptly included representatives of the Western Governors' Association in the deliberations over these important issues. The existing 3809 regulations provide for coordination and cooperation with states. In developing any revisions to the 43 CFR 3809 regulations, BLM should be mindful of the mixed federal and private land ownership patterns that are presented in western mines. BLM can best minimize or avoid duplication with state programs by deferring to state environmental and reclamation standards.

Unnecessary and Undue Degradation

A study carried out by BLM in April, 1992 did not identify any need for changes in environmental or reclamation standards as they are being applied in Alaska. The current definition of "unnecessary or undue degradation" appears to have been implemented successfully in Alaska to date, thus meeting the Congressional intent behind FLPMA. If BLM now believes that changes are necessary, such modifications should be thoroughly justified and the need documented so that reviewers can assess the reasonableness of the proposal.

Secretary Babbitt's January 6, 1997, memorandum on the 43 CFR 3809 regulations specifically raised the option of requiring the use of "best available technology and practices." As above, we urge BLM to carefully document and justify the necessity of this possible change. Any change to the unnecessary or undue degradation standard must retain flexibility to ensure that the 3809 regulations can be applied to the widely diverse situations which are encountered in locatable mineral exploration and mining operations.

Care should be taken to insure that a "best available technology" standard would not be misinterpreted to constrain agency discretion, become a basis for litigation, increase the cost of a mining operation with no commensurate gain for other resources, or impede the development of new mining and reclamation technologies.

Another option which BLM should consider to a technology-based performance standard is a system of results-based standards. For example, the standard could be vegetative cover of a certain density and diversity, or it could be designed to provide for an identified end-use such as winter moose browse, caribou insect relief, peregrine falcon nesting, salmon or grayling habitats, wetlands or other important resources. BLM should evaluate how results-based standards might maximize the net public benefit during exploration, development, operation, and close-out of a mining property.

In summary, a "one size fits all" technology-based set of performance standards for federal mining operations in Alaska may be unworkable in widely varying situations. Levels of performance which are achievable, regarding matters such as site recontouring and revegetation, are highly dependent on a myriad factors such as climatic conditions, soil availability, geology, historical land use and type of mining methods employed. Any solution should incorporate flexibility to address such requirements on a site-by site basis allowing for better control and implementation of the individual mining operation.

Defining "earliest feasible time"

We recommend the EIS address discussions of 3809.1-3 (d)(3) for the purpose of defining "earliest feasible time" in a real-time context. As noted earlier, the State of Alaska already has a legislative standard for reclamation that is as contemporaneous as practicable with the mining operation. This Alaska standard applies to any disturbance associated with an approved mining operation, regardless of size.

Impact Evaluation

The EIS should also include discussions of 3809.2-2 (d). Specifically, we suggest widening the scope of impact evaluation to include fish, wildlife, and plant species other than those specified as threatened or endangered, as well as the use of those resources for commercial, sport, personal use and subsistence.

In conclusion, while we believe that Alaska has not experienced major problems with implementation of the existing Section 3809, we recognize BLM's desire to evaluate possible changes and options. Any proposed revisions must be well documented and justified and must be sensitive to Alaska's unique circumstances.

Thank you for the opportunity to comment. We look forward to review of future documents concerning Section 3809. If you have any questions, please call me at 907-269-7477.

Sincerely,



Sally Gibert
State CSU Coordinator

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