No. 19-35424

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHILKAT INDIAN VILLAGE OF KLUKWAN, et al.;
Plaintiffs/Appellants,

v.

BUREAU OF LAND MANAGEMENT, et al.,
Defendants/Appellees,

and

ALYU MINING CO; HAINES MINING & EXPLORATION, et al.,
Defendant Intervenors/Appellees.

Appeal from the United States District Court for the District of Alaska
No. 3:17-cv-00253 (Hon. District Judge Timothy Burgess)

ANSWERING BRIEF FOR THE FEDERAL APPELLEES

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GLOSSARY

APA	Administrative Procedure Act
BLM	Bureau of Land Management
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
NEPA	National Environmental Policy Act
RMP	Resource and Management Plan

INTRODUCTION

Plaintiffs, the Chilkat Indian Village of Klukwan and three environmental groups, sued the Bureau of Land Management and agency officials (collectively, "BLM"), to challenge decisions approving a private operator's proposed plan for mining exploration operations on public lands administered by BLM. These lands are open to entry for exploration of valuable mineral deposits under the federal Mining Law of 1872 ("Mining Law"). In approving the plan, BLM complied with the National Environmental Policy Act ("NEPA") by thoroughly analyzing the environmental impacts of the proposed *exploration* operations. Plaintiffs contend that this analysis did not satisfy NEPA because BLM should also have analyzed and considered potential environmental impacts from the private operator's potential future *mine development* operations. However, the operator has not yet proposed (and may never propose) any mine development operations, and BLM properly analyzed impacts from the approved exploration operations.

The district court correctly rejected Plaintiffs' contention and held that NEPA did not require BLM to evaluate hypothetical future development of a full-scale mine before approving the proposed exploration operations. The court accordingly granted summary judgment to BLM. That judgment should be affirmed.

STATEMENT OF JURISDICTION

(a) The district court had jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under a federal statute, namely, NEPA, 42 U.S.C. §§ 4321 et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). 4 Excerpts of Record (E.R.) 824, 846.

(b) The district court's judgment was final because it resolved all claims against all defendants. 1 E.R. 1-2, 53. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The district court entered judgment on May 7, 2019. 1 E.R. 1-2. Plaintiffs filed their notice of appeal on May 13, 2019, or 6 days later. 1 E.R. 56-60. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether BLM satisfied its obligations under NEPA by analyzing the proposed exploration activities that it approved, but deferring analysis of future mine development operations until they are proposed (if that ever occurs).

2. In the event this Court determines that NEPA requires BLM to analyze environmental impacts of a hypothetical future mine development before approving the limited exploration activities, whether this Court should remand to the district court to consider Plaintiffs' requests for remedy.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the addendum following this brief.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. Mining Law of 1872

The Mining Law provides that "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase," subject to applicable regulations and laws. 30 U.S.C. § 22. Thus, for federal lands subject to operation of the Mining Law, the statute provides an open invitation and statutory authority for qualified persons to enter and occupy these lands to explore for minerals, subject to applicable regulation. *See, e.g., Andrus v. Shell Oil Co.*, 446 U.S. 657, 658 (1980) (the Mining Law "provides that citizens may enter and explore the public domain, and search for minerals").[1] The Mining Law's open

[1] At the time of enactment, the Mining Law applied to virtually all minerals. However, subsequent statutes removed many minerals from disposition under the statute. *E.g.*, Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 et seq. (removing oil, oil, shale, gas and certain other minerals); Surface Resources Act of 1955, 30 U.S.C. § 611 (removing common varieties of certain minerals). Currently, therefore, minerals disposed of under the Mining Law generally include "hard rock" minerals, e.g., gold, silver, and copper, and some "uncommon" varieties of industrial minerals.

invitation generally extends to lands managed by BLM (where the United States retains mineral rights) that have not been withdrawn from operation of the statute.[2]

The Mining Law allows miners the option to secure tenure to lands explored and occupied by staking or "locating" mining claims, and it sets forth procedures including posting notice and marking the claim boundaries, recordation, and other applicable statutory or regulatory requirements. *See* 30 U.S.C. §§ 23, 26, 35, 36. To be able to enforce a mining claim against the government, the mining claimant must make a "discovery" of a valuable mineral deposit and comply with all other applicable statutory and regulatory requirements. *See id.* § 23; *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963). A discovery requires the physical disclosure of a mineral deposit that is valuable enough that a prudent person would be justified in expending further labor and money to develop it. *See United States v. Coleman*, 390 U.S. 599, 600-03 (1968). This standard has been further refined to require disclosure of a mineral deposit that can be extracted, removed and

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[2] Congress may withdraw lands from operation of the Mining Law by statute. After enactment of the Federal Lands Policy and Management Act ("FLPMA") in 1976, the Secretary of the Interior ("Secretary") may administratively withdraw lands from operation of the Mining Law "but only in accordance with the provisions and limitations of" 43 U.S.C. § 1714. *Id*. § 1714(a); *see also id*. § 1702(j) (defining withdrawal); *id.* § 1712(e)(3) (public lands may be "removed from or restored to the operation of the Mining Law . . . only by withdrawal action pursuant to section 1714"); *id.* § 1714(b)-(e) (procedures for Secretarial withdrawal); 43 C.F.R. Part 2300 (regulations setting forth procedures for implementation of Section 1714). All Secretarial withdrawals under FLPMA Section 1714 are subject to "valid existing rights." 43 U.S.C. § 1701 note (h).

marketed at a profit (the so-called marketability test). *Id*.; *Chrisman v. Miller*, 197 U.S. 313, 320-21 (1905); *U. S. v. Zweifel*, 508 F.2d 1150, 1154 (10th Cir. 1975).

The Mining Law does not require miners to proceed to develop a mine on their claims within a certain timeframe—or at all—even after making a discovery of a valuable mineral deposit. *Converse v. Udall*, 399 F.2d 616, 622 (9th Cir. 1968). Similarly, although the Mining Law provides an opportunity to obtain fee title, or "patent" to the land, *see* 30 U.S.C. § 29, a mining claimant need not apply for or obtain a patent in order to maintain and exercise rights to explore for valuable mineral deposits on public lands subject to operation of the statute. *E.g.*, *United States v. Locke*, 471 U.S. 84, 86 (1985); *Orion Reserves Ltd. Partnership v. Salazar*, 553 F.3d 697, 699 (D.C. Cir. 2009). However, legal title to federal land underlying an unpatented mining claim remains in the United States, and mining operations on an unpatented mining claim remain subject to BLM regulation described below.

2. Federal Land Policy and Management Act

In 1976, Congress enacted FLPMA, 43 U.S.C. §§ 1701 et seq., to implement congressional policies respecting disposition and administration of public lands. *See id*. § 1701. The policies of the Act "shall become effective only as specific statutory authority for their implementation" is provided by FLPMA or subsequent statutes. *Id*. § 1701(b). FLPMA provides that with limited exceptions, nothing in

the Act, "shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress." *Id*. § 1732(b). One of the exceptions is a provision that in "managing the public lands, the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." *Id*.; *see also id*. § 1740 (authorizing promulgation of rules and regulations to carry out the purposes of FLPMA and of other laws applicable to public lands).

3. BLM's surface management regulations

Under the authority of FLPMA and mining statutes, including the Mining Law, BLM promulgated regulations set forth in 43 C.F.R. Subpart 3809 that govern mining operations on public lands. These regulations establish procedures and standards to "prevent unnecessary or undue degradation of public lands by operations authorized by the mining laws." *Id*. § 3809.1(a). Anyone wishing to conduct mining operations that will cause surface disturbance of more than 5 acres, including operations that comprise only exploration, must submit a mining plan of operations to BLM and obtain BLM's approval for the proposed plan (and for a modification to an approved plan). 43 C.F.R. §§ 3809.10, 3809.11, 3809.21.

The regulations define "exploration" as

> 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.

Id. § 3809.5; *see also id.* (defining operations to include "all functions, work facilities and activities . . . in connection with prospecting, exploration, discovery and assessment work, development, extraction and processing of mineral deposits" and associated uses such as constructions of roads).

The regulations set out detailed requirements for a plan of operations and the process for BLM's review of a request for approval of a proposed plan. *Id.* §§ 3809.311-3809.420. After BLM completes its review of a proposed plan, including NEPA analysis and opportunity for public comment, BLM may approve, approve subject to conditions, or disapprove the plan. *Id.* § 3809.411(c)- (d). The regulations establish specific and limited circumstances under which the agency may disapprove a proposed plan. *Id.* § 3809.411(c)(3); *see also infra* pp. 19-21.

4. National Environmental Policy Act and implementing regulations

NEPA requires federal agencies to prepare an environmental impact statement ("EIS") on the environmental impacts of any "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Council on Environmental Quality ("CEQ") has promulgated regulations, 40 C.F.R. Part 1500, to guide federal agencies' implementation of NEPA. BLM promulgated its own NEPA regulations, *see* 43 C.F.R. Part 46, to supplement and use in conjunction with the CEQ regulations. The CEQ regulations provide that an agency may prepare an Environmental Assessment

("EA") to determine whether there are significant environmental effects requiring an EIS. 40 C.F.R. §§ 1501.4(b)-(c), 1508.9(a)(1), 1508.13. If an agency makes a "finding of no significant impact," preparation of an EIS is not required. NEPA imposes only procedural requirements and does not require federal agencies to reach a particular outcome or to elevate environmental impacts over other concerns. *E.g.*, *DOT v. Public Citizen*, 541 U.S. 752, 756-57 (2004); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989).

B. Factual background

The project area at issue is approximately 6,765 acres of federal land located roughly 35 miles northwest of Haines, Alaska. 2 E.R. 242-46; 3 E.R. 371-74; 4 E.R. 761. The project area is open to entry for mining exploration and location of mining claims under the Mining Law. 3 E.R. 380, 571; 4 E.R. 750.[3] Intervenors Alyu Mining, Inc. and Haines Mining & Exploration Inc. each holds a partial interest in 340 mining claims located within the project area. Supplemental

[3] The project area lies within a much larger area of BLM-administered lands covered by the Ring of Fire Land and Resource Management Plan ("Ring of Fire RMP"), which was adopted by BLM in 2008 to implement FLPMA's land-use planning provisions, 43 U.S.C. § 1712. *See* 3 E.R. 378-83, 570-71; 4 E.R. 757, 761. The Ring of Fire RMP recognized that mineral exploration and mining activities are important uses of land and resources within the project area. 3 E.R. 378. But because FLPMA land-use plans do not approve any site-specific action, the Ring of Fire RMP did not approve any mineral exploration or mining activities in the project area. Approval of mineral exploration and mining activities occurs through the process set forth in BLM's surface management regulations.

Excerpts of Record ("S.E.R.") 4. Intervenor Constantine North leases the project area from the mining claimants. S.E.R. 4-5.

Prior to 2016, Constantine conducted "notice-level" exploration on some of the project lands, i.e., exploration operations that resulted in surface disturbance of less than five acres. *See* 3 E.R. 377, 390-92, 569; 43 C.F.R. §§ 3809.10, 3809.21 (requiring operators to submit notice to BLM before commencing such operations). In May 2015, Constantine submitted for BLM's approval a plan of operations for expanded exploration that would cause new surface disturbance greater than five acres in the project area. 2 E.R. 237, 239; 3 E.R. 338; 43 C.F.R. §§ 3809.11. The proposed operations include helicopter- and truck-supported exploratory drilling, construction of drill pads and helipads, construction and use of approximately 2.5 miles of access road (including culverts, bridge installation, berms, and rock stockpiles), and construction of ancillary facilities such as equipment storage areas. 2 E.R. 224, 237-39, 270; 3 E.R. 338, 397. Constantine planned to incorporate its previously authorized notice-level exploration in its exploration plan, such that the total surface disturbance from exploration would be approximately 40 acres. 2 E.R. 239; 3 E.R. 371.

Consistent with its regulations, BLM published notice of, and accepted public comments on, Constantine's proposed exploration plan. *See* 43 C.F.R. § 3809.411(c); 3 E.R. 337-39. BLM also prepared and issued a draft EA for public

comment. 3 E.R. 571. In August 2016, BLM issued a final EA. 3 E.R. 362-564. As explained in these documents, the proposed agency action for purposes of NEPA review was to choose among (1) approving, (2) approving with changes, or (3) disapproving the proposed exploration plan —based on the ability of the plan to meet performance standards and requirements specified in 43 C.F.R. § 3809.420 and to prevent unnecessary or undue degradation of public lands. 3 E.R. 338, 377-78. The Mining Law, FLPMA, the 2008 Ring of Fire RMP, and BLM regulations established the need for BLM's proposed action. *See* 3 E.R. 338, 377.

The final EA evaluated environmental impacts of both disapproving the plan (i.e., the "no action" alternative) and approving the proposed exploration plan with conditions. 3 E.R. 390-424. It addressed numerous resources, including surface water and groundwater resources, fisheries, wildlife, subsistence fishing and hunting, socioeconomic impacts, and recreational use. 3 E.R. 426-38, 447-68, 483-500, 508-16, 536-42. For each resource, the final EA evaluated the cumulative impacts of the proposed action when added to past, present, future, and reasonably foreseeable future actions. *E.g.*, 3 E.R. 437-38, 498-99. BLM did not consider in the cumulative impacts analyses potential impacts from future development of a full-scale mine because such development was not a reasonably foreseeable future action. 3 E.R. 573-74.

Based on the analysis in the final EA, BLM determined that the proposed exploration activities would not result in significant environmental impacts and that an EIS was therefore not required. 3 E.R. 565-68, 570. In an August 2016 decision, BLM accordingly approved Constantine's exploration plan of operations, conditioned on full implementation of specified design features, resource protection and mitigation measures, reclamation requirements, operating procedures, and other stipulations. 3 E.R. 570.

In January 2017, Constantine submitted a proposed modification to the approved exploration plan under 43 U.S.C. § 3809.431, seeking authorization to extend an existing road by 800 feet to access adjoining lands that Constantine leases from the Alaska Mental Health Trust ("Trust"). The extended road would support planned road and drill pad construction on the Trust's lands. The spur road would cause surface disturbance to 0.5 acres of the federal public land and approximately 2.2 to 3.4 acres of surface disturbance on the Trust land. 4 E.R. 755-56. BLM prepared a second EA that incorporated much of the 2016 final EA on the initial plan. 4 E.R. 747-81.

In that second EA, BLM again determined that development of a full-scale mine is not a reasonably foreseeable future action that necessitated evaluation in the cumulative impacts analysis for the proposed agency action of approving the modification to the exploration plan. 3 E.R. 760-63. BLM determined that the

proposed modification would have no significant impact requiring preparation of an EIS and in August 2017 approved the proposed plan modification. 4 E.R. 743-50. (References hereafter to BLM's approval of the proposed exploration plan should be understood to include both the 2016 decision approving the initial plan of exploration operations and the 2017 decision approving the modification to the plan.)

C. Proceedings below

In December 2017, Plaintiffs filed this action to challenge BLM's approval of Constantine's exploration plan. Plaintiffs claimed that BLM's environmental analysis did not satisfy NEPA because BLM did not analyze potential impacts from potential future development of full-scale mining in the project area. The mining claimants and Constantine intervened.

On cross-motions for summary judgment, the district court ruled in favor of BLM, holding that NEPA did not require BLM to consider the potential environmental effects of future mine development in its review of the proposed agency action, i.e., the agency's approval of the exploration plan. The court rejected Plaintiffs' contention that potential future mining development qualifies as a "connected action" and/or "cumulative impact" that NEPA regulations required BLM to consider in its NEPA analysis of the proposed exploration plan. 1 E.R. 37-48, 51-52.

The district court also rejected Plaintiffs' argument that NEPA's timeliness requirements mandated that BLM have considered impacts of potential future mine development *before* approving the exploration plan. 1 E.R. 48-53. Plaintiffs' timeliness argument was based on the following reasoning: (a) information disclosed by Constantine's exploration activities might help Constantine satisfy physical and economic criteria for a "discovery" of a valuable mineral deposit, and a discovery would by operation of law render the unpatented mining claims mining valid claims with vested property rights in Constantine (or the mining claimants); and (b) should the Secretary decide in the future to withdraw the project area from operation of the Mining Law under FLPMA Section 1714, the effectiveness of such future withdrawal in protecting the lands from the effects of mining may be diminished by the existence of valid mining claims. 1 E.R. 49-53. The court rejected this argument, explaining that neither "discovery of an economically profitable mineral deposit, nor withdrawal" of the project area "is at issue here, or under review by the agency." 1 E.R. 51.

The court also observed that the possibility of "discovery" is contingent on the actions of third parties without any action by BLM. 1 E.R. 51-52. And the withdrawal process under FLPMA Section 1714 is entirely distinct and independent from BLM's NEPA review and approval of the proposed exploration plan and the former cannot be said to drive the timeline of the latter. *Id.*

SUMMARY OF ARGUMENT

1. The scope of BLM's analysis for the proposed action of approving the exploration plan was reasonable and not contrary to law. BLM was not required as part of its NEPA analysis to conduct a speculative analysis of potential impacts from hypothetical future mine development operations that may never be proposed. NEPA review of future mine development is appropriately conducted when, if ever, BLM is required to make a decision about such development.

First, Plaintiffs' argument that BLM was required to conduct a NEPA analysis of potential future mine development *before* approving the exploration plan is incorrect. Plaintiffs' supposition that this was required because mining exploration might lead to a diminishment of the effectiveness of any potential future Secretarial withdrawal of the project lands from operation of the Mining Law is unsound for multiple reasons.

Second, contrary to Plaintiffs' argument, BLM reasonably determined that potential future development of a full-scale mine is not a reasonably foreseeable future action that necessitates consideration in the cumulative impacts analysis in EAs that concerned only proposed exploration activities. BLM based its determination on appropriate factors, consistent with relevant cases, NEPA regulations, and BLM's own guidance documents. In the cases on which Plaintiffs rely, the future actions were substantially more concrete, and the scope of future

actions and their impacts were better understood than the potential future mine development here.

Third, the approval of the exploration plan and a potential future proposal for a plan of operations to develop a producing mine are not "connected actions" under 40 U.S.C. § 1508.25(a), such that BLM was required to consider the impacts of both of these actions in a single NEPA document. Not only is there no proposal for future mine development, exploration does not automatically trigger full mine development. It is rational to conduct exploration to gather information needed to make an informed determination whether and where to proceed to full-scale mine development.

The judgment of the district court should be affirmed.

2. If this Court determines that BLM violated NEPA, then the Court should reverse the judgment, deny Plaintiffs' request for injunctive relief, and/or remand to the district court to consider Plaintiffs' requests for relief.

STANDARD OF REVIEW

This Court reviews the district court's summary judgment de novo, applying the same standards to review the agency action that applied in the district court. *Westlands Water District v. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). Judicial review of BLM's action is governed by the Administrative Procedure Act, under which the reviewing court must uphold agency action unless it is "arbitrary,

capricious, an abuse of discretion, or otherwise contrary to law." 5 U.S.C. § 706(2)(A). The "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). As a general rule, this Court "will uphold agency decisions so long as the agencies have considered the relevant factors and articulated a rational connection between the factors found and the choices made." *Protect Our Communities Foundation v. LaCounte*, 939 F.3d 1029, 1034 (9th Cir. 2019) (internal quotation marks omitted).

ARGUMENT

I. BLM was not required to analyze potential impacts from potential future mine development because it did not approve any such development here.

Congress enacted the Mining Law in 1872 to encourage mineral development on federal lands. To that end, the Mining Law authorizes qualified private persons to access public lands for the purpose of exploring for valuable mineral deposits (subject to applicable regulation) and authorizes miners to locate mining claims without prior approval of the government, thus allowing miners to establish valid mining claims by self-initiated action. Although Congress has removed certain minerals from operation of the Mining Law, for nearly 150 years, Congress has chosen to preserve the Mining Law for those minerals that remain

subject to location under the statute. The Mining Law evidences Congress' long-standing view that mining is an important use of federal lands.

Plaintiffs' real complaint here is with the Mining Law itself. Plaintiffs' goal is to prevent mining development in the project area through an actual or de facto withdrawal of the lands from operation of the Mining Law. Plaintiffs' primary argument reduces to a contention that BLM must consider the impacts of potential development of full-scale mining before allowing anyone to take the first step authorized by the Mining Law—i.e., exploring for minerals on open lands—because exploration might (depending on interacting contingencies) diminish the effectiveness of a "possible" future withdrawal of these lands from operation of the Mining Law by the Secretary under FLPMA, 43 U.S.C. § 1714.

However, a withdrawal may be made *only* pursuant to the process and conditions of Section 1714. FLPMA does *not* authorize withdrawals (including de facto withdrawals) to be made through the regulatory process for BLM review and approval of proposed exploration operations. Plaintiffs improperly attempt to use NEPA and this regulatory process to block or delay application of the Mining Law to lands that are open and subject to the statute's operation.

As explained below, BLM satisfied NEPA by thoroughly analyzing the environmental impacts of the proposed exploration activities and by reasonably concluding that these activities would have no significant adverse environmental

impacts. Plaintiffs do not challenge BLM's NEPA analysis with respect to the actual proposed agency action, i.e., approval of the exploration plan. Rather, Plaintiffs advance three arguments in support of their contention that NEPA required BLM also to evaluate and consider potential impacts from future full-scale mine development operations (which may never be proposed or occur) as part of the environmental review for the proposed approval of the exploration operations. None of these arguments has merit.

A. BLM was not required to evaluate and consider impacts from potential future mine development before it approved the exploration plan.

Plaintiffs first contend that approving exploration operations without previously analyzing potential impacts from approving potential future mining operations violates NEPA timing requirements. Plaintiffs' theory for this contention is flawed in multiple respects. And the cases on which Plaintiffs rely are inapposite and do not support their contention.

1. The rule of reason dictates that BLM was not required to analyze impacts from potential future mine development because such analysis would have no bearing on the agency action under consideration.

Agencies have substantial discretion to define an appropriate level of inquiry for their NEPA analyses. *See, e.g.*, *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-77 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390, 413-14 (1976). Courts reviewing an agency's NEPA analysis must "focus upon a proposal's

parameters as the agency defines them." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). Inherent in NEPA and its implementing regulations is a rule of reason that allows agencies to consider, when determining the scope of their NEPA inquiry, the usefulness of potential information to its decisionmaking process. *See Public Citizen*, 541 U.S. at 767.

Here, the proposed agency action was BLM's approval of Constantine's proposed exploration plan under 43 C.F.R. Subpart 3809. *See* 3 E.R. 338, 377-78; *see also* 43 C.F.R. § 46.30 (NEPA regulation defines "proposed agency action" as the BLM "activity under consideration," including BLM's "exercise of discretion over a non-Federal entity's planned activity that falls under" federal agency authority to issue an approval). As explained above (pp. 3-7), the Mining Law authorizes qualified persons to enter and explore for valuable mineral deposits on public lands open to the Mining Law, and FLPMA authorizes BLM to regulate the use of the surface of public lands for such exploration operations to prevent unnecessary or undue degradation. When BLM was presented with Constantine's proposed plan to conduct exploration under the Mining Law, the agency was legally obligated to make a decision to approve, approve with conditions, or disapprove the proposed plan based on whether it met regulatory requirements and standards applicable to mining on public lands under FLPMA, 43 C.F.R. § 3809.411(a). BLM's regulations provide that it may disapprove or withhold

approval of a proposed exploration plan of operations only where the plan (1) does not meet the applicable content requirements of 43 U.S.C. § 3809.401; (2) proposes operations in an area segregated or withdrawn from the operation of mining laws (and the operator cannot demonstrate a valid existing right under the Mining Law); or (3) proposes operations that would result in unnecessary or undue degradation of public lands. *Id*. § 3809.411(d)(3).[4]

Here, none of these bases for disapproval was present. The project area was not (and still is not) segregated or withdrawn from the operation of the Mining Law. And BLM reasonably determined that the approved exploration plan satisfied the requirements in 43 C.F.R. Subpart 3809, and that the authorized exploration activities would not result in unnecessary or undue degradation. Having made these determinations, BLM's regulations gave the agency no discretion to disapprove the plan. For example, the regulations do not afford BLM discretion to disapprove an exploration plan on the basis that the proposed

[4] The regulations do not preclude operators from conducting previously authorized mineral exploration activities on lands that the Secretary subsequently withdraws from the operation of the Mining Law. A withdrawal does affect the process used to evaluate a new or modified plan of operations on such lands. BLM will not approve a new or modified plan of operations on withdrawn lands until preparation of a mineral examination report determines that the mining claim was valid prior to the withdrawal and remains valid as of the date of plan proposal. 43 C.F.R. § 3809.100. If mining claims are found valid, BLM approval of a proposed new or modified plan of operations would still be required, and BLM may not approve such proposal unless it first determines that the proposal complies with all regulatory standards.

operations might result in a physical exposure of a valuable mineral deposit or otherwise yield the data necessary to demonstrate a "discovery" of such a deposit. In other words, despite Plaintiffs' suggestion to the contrary, BLM may not preclude an operator from exploring for valuable mineral deposits on open lands on the basis that it actually might find those deposits.

Nor do the regulations give BLM discretion to disapprove an exploration plan in order to maintain the status quo based on the potential impacts that exploration might have on the "effectiveness" of any withdrawal that the Secretary might want to make at some future date under FLPMA Section 1714 (assuming that the purpose of such a withdrawal would be to protect the lands from the effects of mining). Likewise, the regulations give BLM no discretion to impose conditions on approval of an exploration plan that otherwise complies with the regulations to achieve that purpose. As explained below, neither the Mining Law nor FLPMA would allow BLM to make de facto withdrawals through such actions.

Accordingly, the analysis that Plaintiffs seek of potential impacts from future mine *development* could have no bearing on BLM's decisionmaking on the proposed agency action, i.e. the proposed approval of the *exploration* plan. Requiring BLM to perform such an analysis would run afoul of the "rule of reason" that guides judicial review of NEPA analyses and calls for pragmatic judgment on whether the form and content of such analyses are sufficient to inform

agency decisionmaking. *See Public Citizen*, 541 U.S. at 767-68; *cf. Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1225 (9th Cir. 2015) (holding that the rule of reason frees agencies from preparing an EIS on the environmental impact of an action that it could not refuse to perform); *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (holding that Endangered Species Act's no-jeopardy duty did not attach where the agency was required to approve a response plan once it determined that the plan met enumerated criteria).

In sum, the scope of the NEPA review was reasonable and sufficient to inform BLM's exercise of its discretionary authority when reviewing the only action before the agency, namely, the proposed exploration plan.

2. NEPA's timeliness requirements do not mandate that BLM analyze and consider potential impacts from potential future mine development before approving the exploration plan.

Plaintiffs contend that NEPA's mandate that agencies prepare an analysis before an "irreversible and irretrievable commitment[] of resources," 42 U.S.C. 4332(2)(C)(v), required BLM to analyze and consider impacts from potential future development of a full-scale mine, *before* approving the exploration plan. Opening Brief 26, 31-40. Plaintiffs contend that BLM's approval of the exploration plan constitutes a "crucial point of commitment" under NEPA because this approval might diminish the effectiveness of a Secretarial withdrawal should the Secretary decide in the future to withdraw the project lands from operation of

the Mining Law. *Id.* at 33-34. Plaintiffs posit interacting contingencies that could diminish the effectiveness of a subsequent future withdrawal.

In their scenario, (1) Constantine's approved exploration activities *could* yield data about mineral resources that might (if combined with other information, such as economic feasibility and marketability) establish a discovery of a valuable mineral deposit; (2) if Constantine makes a discovery of a valuable mineral deposit (and assuming other requirements for a valid claim are met), the mining claims on which valuable mineral deposits occur would, by operation of the Mining Law, be valid claims without further BLM action; (3) the Secretary *could* decide sometime in the future to make a withdrawal of the project area lands from operation of the Mining Law under FLPMA Section 1714, subject to valid existing rights, and the effectiveness of such a withdrawal might be diminished if it occurs subsequent to Constantine's perfection of valid mining rights. Opening Brief 32-34; *see also supra* p. 4 n.2.

There are several fallacies in Plaintiffs' supposition. First, contrary to Plaintiffs' suggestion, BLM's action of approving the proposed exploration plan did *not* convey to Constantine any rights respecting future mine development or diminish BLM's authority regarding any future mining operations that Constantine may one day propose. BLM retains its full authority under 43 C.F.R. Subpart 3809 to reject or require modification of any future proposed plan of operations,

including a proposal to develop a full-scale mine, that causes unnecessary or undue degradation or otherwise fails to comply with regulatory requirements. 43 C.F.R. § 3809.432. Moreover, BLM's approval of the exploration plan does not authorize Constantine to use any lands or to conduct any operations beyond those specifically described in the approved exploration plan. Nor does BLM's approval of the exploration plan guarantee approval of any future proposed plan of operations for full-scale mining, regardless of whether the lands are withdrawn in the interim.

Similarly, even if Constantine were to make a discovery of a valuable mineral deposit based on operations in the approved exploration plan, that plan would not give Constantine any right to have a future full-scale mine approved with or without a future withdrawal. BLM's review of any future plan to develop a mine would include a NEPA analysis of the impacts of the proposed operations. 43 C.F.R. §§ 3909.11, 3809.411, 3809.31, 3809.432. Thus, the appropriate and requisite time to conduct a NEPA analysis of future mining operations is when an operator proposes and seeks BLM approval for such operations.

Second, to the extent that Plaintiffs are suggesting that NEPA required BLM to consider and analyze impacts from potential future mine development because failing to do so would irretrievably prevent the Secretary from withdrawing the project lands from operation of the Mining Law, this suggestion incorrectly

interprets the Secretary's withdrawal authority and misapplies NEPA's irreversible and irretrievable concept. BLM's action of approving the exploration plan does not, and could not, limit the Secretary's authority to withdraw lands in the project area from operation of the Mining Law under FLPMA Section 1714. Indeed, the Secretary could have proposed, and may yet propose, a withdrawal at any time, including an emergency withdrawal that would be effective immediately. *See* 43 C.F.R. §§ 2310.1, 2310.3-3, 2310.5.

As described above (p. 23), Plaintiffs' argument is based on the occurrence of interacting contingencies and a scenario in which a possible future Secretarial withdrawal under Section 7415 "*could*" be less effective in precluding future mining operations than could a Secretarial withdrawal of lands where there exist no valid existing rights at the time of withdrawal. *See* Opening Brief 34-35. But none of the events in Plaintiffs' scenario has occurred, and none is even reasonably foreseeable. NEPA's requirements are triggered by a proposed agency action, and the scope of the agency's analysis is defined by that proposed action—not by the mere "possibility" (Opening Brief 33) that, in the future, a separate agency action governed by a distinct and separate process might be proposed.

The mere possibility of a proposal for Secretarial withdrawal sometime in the future and the factors that affect whether that possibility ever becomes a reality do not change the scope of BLM's proposed action approving the exploration plan.

Merely because the Secretary might consider withdrawing land from operation of the Mining Law in the future does not mean that BLM's proposed action approving the exploration plan encompasses all possible mining operations that might ever take place on that land. Here, BLM properly exercised its limited discretion to disapprove (or impose restrictions on approval of) a proposed exploration plan on lands that, now and for the foreseeable future, are open to such exploration. As the district court correctly stated in rejecting Plaintiffs' argument, a withdrawal under FLPMA Section 1714 is not "under review by the agency." 1 E.R. 49.

Moreover, the process prescribed by FLPMA for making a Secretarial withdrawal, *see* 43 U.S.C. § 1714, is entirely separate and distinct from BLM's regulatory action and process for reviewing proposed plans for mining operations under 43 C.F.R. Subpart 3809. That Congress specifically provided an exclusive process for withdrawing lands from the operation of the Mining Law means that BLM may not use other means to achieve the same effect. FLPMA specifically provides that public lands may be removed from the operation of the Mining Law "*only* by withdrawal action pursuant to [43 U.S.C.] section 1714." 43 U.S.C. § 1712(e)(3) (emphasis added). Thus, lands may not be removed from the operation of the Mining Law merely by BLM's land use planning processes or decisions (e.g., by the Ring of Fire RMP) or by regulatory processes or actions

(e.g., by disapproving a plan for exploration operations under 43 C.F.R. 3809.411(d)(3)). *Id.*[5]

In addition, Section 1714 and regulations implementing the Secretary's withdrawal authority set forth detailed procedures governing a federal agency's request that the Secretary withdraw lands and governing a Secretarial proposal and decision to make a withdrawal. *See* 43 U.S.C. § 1714; 43 C.F.R. Part 2300; *see generally National Mining Ass'n v. Zinke*, 877 F.3d 845, 854-57 (9th Cir. 2017) (describing FLPMA Section 1714 withdrawal process). Here, there has been no proposal for such agency action. Moreover, nothing in the administrative record shows that anyone (including Plaintiffs) requested a Secretarial withdrawal of the project area.[6]

In short, there was no proposal to withdraw the project area lands that could trigger a NEPA obligation to consider the environmental effects of such action. Even if there were such a proposal, BLM's review of the exploration plan would not be the appropriate process for considering such action.

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[5] BLM could, in a land-use plan, request or recommend a withdrawal by the Secretary, but BLM lacks authority itself to make the withdrawal. Additionally, BLM cannot make a de facto withdrawal either by attempting to enforce land-use planning provisions or by refusing to approve a mining plan of operations that otherwise complies with the applicable regulations.

[6] None of Petitioners' comments on the NEPA analysis for the proposed action of approving the exploration plan mentioned a Secretarial withdrawal.

Third, Plaintiffs' argument is based on the false premise that BLM's approval of the exploration plan would be the *legal cause* of any accrual of valid rights associated with a potential discovery that might impact the effectiveness of a future Secretarial withdrawal to prevent future mine development. Based on the rule of reason, *Public Citizen* held that an agency need not conduct NEPA review of any effect that "cannot be considered a legally relevant 'cause' of the effect." 541 U.S. at 770. A " 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." *Id*. at 667; *cf. National Ass'n of Home Builders*, 551 U.S. at 667-68 (2007) (*Public Citizen* announced "the basic principle that an agency cannot be considered a legal 'cause' of an action that it had no statutory discretion not to take.").

As explained above, the Mining Law authorizes qualified persons to enter open lands to explore for valuable mineral deposits, and BLM had no discretion to disapprove the exploration plan based on the potential that the exploration activities might yield data relevant to establishing a discovery of a valuable mineral deposit. Valid rights resulting from discovery occur by operation of the Mining Law, not by BLM's discretionary action. 1 E.R. 51-52. Thus, any potential diminishment in effectiveness of a future Secretarial withdrawal due to existence of valid existing rights is legally caused by the Mining Law and by

FLPMA's proviso that Secretarial withdrawals are subject to valid existing rights, not by BLM's approval of the exploration plan.

In sum, Plaintiffs' theory that BLM's approval of the exploration plan was a "point of commitment" that required BLM to conduct a speculative analysis of potential future mining operations *before* approving the exploration plan is flawed and unpersuasive.

3. The cases on which Plaintiffs rely are inapposite and do not dictate that BLM was required to consider impacts of potential future mine development before approving the exploration plan.

The cases on which Plaintiffs rely, *see* Opening Brief 32-33, do not support their argument. Those cases concerned challenges to discretionary agency actions that conveyed rights to lessees which limited the agency's discretion to restrict or prohibit future development activities in light of those rights. In the case on which Plaintiffs primarily rely—*Connor v. Burford*, 848 F.2d 1441 (9th Cir. 1988)—plaintiffs challenged sales of oil and gas leases on National Forest Land pursuant to the Mineral Leasing Act, 30 U.S.C. §§ 181 et seq. The Mineral Leasing Act "effected a complete change of policy" with respect to the disposition of leasable minerals, which include coal, phosphate, sodium, oil, oil shale, and gas on federal lands. *Wilbur v. U.S. ex rel. Krushnic*, 280 U.S. 306, 314 (1930). "Public lands were no longer open to exploration or location for these minerals and there is no opportunity for acquisition of title to lands based on discovery of these minerals."

Id. Private parties have no right to enter public lands to explore for or extract leasable minerals—they would be a trespassers if they did so—unless the Secretary, acting through the BLM, makes an affirmative discretionary decision to issue leases. *See Udall v. Tallman*, 380 U.S. 1, 4 (1965) (The Mineral Leasing Act gave the Secretary broad power to issue oil and gas leases and also left the Secretary discretion to refuse to issue leases); *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975) (same). Generally, a leasing decision is made first as a general matter in the applicable land use plan, followed by a site specific implementation decision. And the agency also has discretion to determine the terms and conditions of leases that it does issue.

Connor held that before selling mineral leases with certain terms, the agencies (BLM and the Forest Service) were required to prepare an EIS that analyzed potential post-lease surface-disturbing activities, including exploration, mineral development and production, and abandonment activities. The pivotal lease terms allowed the agencies to regulate such activities (through review and approval of proposed operations), but they did not permit the agencies to preclude absolutely the lessee from conducting such activities. In other words, the challenged agency action affirmatively, directly, and immediately conveyed rights to the lessees. As noted above, the agencies' decision to sell leases conveying those rights was a matter committed to their discretion.

Plaintiffs' attempt to equate the lease sales in *Connor* with BLM's approval here of the exploration plan is not persuasive. Opening Brief 32-39. The Mining Law authorizes qualified persons to enter and explore for valuable mineral deposits on open lands, subject to applicable regulation. Thus, the Mining Law itself effectively dispenses with need for discretionary agency decisions to issue leases, which was the agency action at issue in *Connor*. However, nothing in the Mining Law or BLM's surface management regulations confers a right for qualified persons to conduct full-scale mining operations absent BLM's regulatory approval. Moreover, BLM's approval of the exploration plan did not convey any property rights. Rather, BLM's approval merely reflected its determination that proposed activities on lands subject to the operation of the Mining Law were consistent with applicable authorities.

In sum, contrary to Plaintiffs' contention, *Connor* does not dictate that the scope of BLM's NEPA analysis here was arbitrary or capricious. Contrary to Plaintiffs' contention, BLM was not required to analyze the impacts of potential future mine development before approving the exploration plan.[7]

[7] The other two cases cited by Plaintiffs also involved leases. *See Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 782-84 (9th Cir. 2006) (lease and lease extension granted to lessee absolute right to develop geothermal steam); *Bob Marshall Alliance v. Hodel*, 852 F. 2d 1223, 1227 (9th Cir. 1988) (issuance of oil and gas leases with terms similar to the leases at issue in *Connor*).

B. BLM reasonably determined that future mine development was not a reasonably foreseeable future action that needed to be addressed in the cumulative impacts analysis for the approval of the exploration plan of operations.

CEQ's NEPA regulations require an agency to consider "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7 (definition of "cumulative impact"). BLM's supplementary NEPA regulations provide:

> Reasonably foreseeable future actions include those federal and non-federal activities not yet undertaken, but sufficiently likely to occur, that a Responsible Official of ordinary prudence would take such activities into account in reaching a decision. These federal and non-federal activities that must be taken into account in the analysis of cumulative impact include, but are not limited to, activities for which there are existing decisions, funding, or proposals identified by the bureau. Reasonably foreseeable future actions do not include those actions that are highly speculative or indefinite.

43 C.F.R. § 46.30.

Here, BLM reasonably determined that potential future development of full-scale mining in the project area was not a reasonably foreseeable future action. BLM explained that the agency is "not required to speculate about future actions," and that "reasonably foreseeable actions are those for which there are existing decisions, funding, formal proposals, or which are highly probable, based on known opportunities or trends." 4 E.R. 762 (quoting BLM's NEPA Handbook

H-1790-1, at 59). BLM also took into account agency guidance stating that for mining exploration plans, the "discussion of the potential impacts should be commensurate with the size, stage, and history of the operations." 4 E.R. 762-63 (quoting BLM's Surface Management Handbook, H-3809-1).

BLM's rationale for concluding that development of a full-scale mine is not a reasonably foreseeable future action is consistent with the regulatory definitions and Handbook guidance. In general, as BLM explained, very few exploration projects make it to a point that a full-scale mine is developed. 4 E.R. 762 (1 out of every 200 projects that reaches the discovery stage moves to development). BLM further explained that, given exploration challenges "and the state of resource information here," Constantine's project has a greater chance of not becoming a mine than it does of becoming a mine. 4 E.R. 762-63. When Constantine submitted its exploration plan for approval, its previous notice-level exploration entailed only limited sampling for minerals on some of the lands within the project area; at that time, the mineral resources were defined as "inferred resources," a designation meaning there is "low confidence about what's really there." 4 E.R. 761; *see also* 4 E.R. 763 (Constantine's operations are "currently focused on the Exploration step and refinement of their inferred resources"). BLM observed that Constantine had "not reached a point in their exploration work to make an informed decision to consider moving to a development phase." 4 E.R. 762.

For those reasons, and because Constantine rather than BLM would be the initiator of potential future mining operations, BLM was "limited in its ability to fully analyze a future mine at Constantine's Project." 4 E.R. 763. Until a feasibility study is initiated—which would occur subsequent to additional exploration—"BLM would need to speculate on the scope of a future mine." *Id.* "Any assumptions about the scope of the mine, prior to a feasibility determination, would be speculative considering that mining is not automatically triggered by exploration." 4 E.R. 764. Thus, BLM rationally concluded that future mine development is not reasonably foreseeable based on several factors, including the fact that no plan of operations for a full-scale mine had been proposed under 43 C.F.R. Subpart 3809 or meaningfully described informally; that Constantine had insufficient information to determine whether to proceed to planning development; and that any attempt by BLM at analysis of such hypothetical, undefined development would have been highly speculative. 4 E.R. 760-62.

BLM's rationale is also consistent with this Court's decisions. As this Court has held, although actions need not be finalized or formally proposed before they are reasonably foreseeable, they must be more than merely contemplated. *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 762 (9th Cir. 2014).[8] An

[8] Plaintiffs assert that the district court erred by holding that reasonably foreseeable future actions include only proposed actions in reliance on language in an initial opinion in *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005), which was

agency is "not required to engage in speculative analysis" or to "do the impractical, if not enough information is available to permit meaningful consideration." *Northern Plains Resource Council, Inc. v. Surface Transportation Board*, 668 F.3d 1067, 1078 (9th Cir. 2011) (internal quotation marks omitted); *see also California*, 690 F.2d at 761 (NEPA's timeliness requirements for a multi-step project are "tempered by the preference to defer detailed analysis until a concrete development proposal crystallizes the dimensions of a project's probable environmental consequences"); *Jones v. National Marine Fisheries Service*, 741 F.3d 989, 100-1001 (9th Cir. 2013) (cumulative impacts analysis of expanded mining that a private party contemplated pursuing was not required because there were no reliable studies, projections, or information as to the scope or location of future projects).[9]

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subsequently deleted in an amended opinion, 1 E.R. 43-44. *See* Opening Brief 43. (The amended opinion explained that this issue did not need to be addressed because the parties had agreed that one future project did not need to be considered and plaintiffs represented that its argument as to another project was moot. *Id*. at 1029.) The district court's quotation of the deleted language is of no moment because, as explained above, BLM did not base its determination solely on the fact that future mine development was not a proposed action.

[9] The Supreme Court described NEPA's requirements in similar terms in *Kleppe*, 427 U.S. at 403, where the question was whether NEPA required a present analysis of the environmental impacts of future actions that were "contemplated," but not yet proposed. The Court rejected that proposition, holding that the agency must prepare an EIS only "prior to the formal recommendation or a report on a proposal." *Id.* at 404; *see also id*. at 405-06 (citing 42 U.S.C. § 4332(2)(C)). In order to satisfy NEPA's rule that the agency consider all relevant impacts, including "cumulative or synergistic" impacts, an EIS must consider all proposals

Plaintiffs argue that BLM erred by justifying its determination here on a "formalistic, bright-line" rule that mine development is never reasonably foreseeable during exploration without consideration of the facts. Opening Brief 43. But that is not what BLM did. Consistent with its policy guidance, BLM considered appropriate factors, including past work in the area, what was known about resources in the project area, and whether there was sufficient information to meaningfully assess the scope and potential impacts of a full-scale mine that Constantine might (or might never) propose. *See supra* pp. 32-34.

The record also supports BLM's conclusion that there was insufficient information to meaningfully analyze future full-scale mining. The record does not support Plaintiffs' assertions to the contrary. Plaintiffs cite, for example, a map showing the location of past and proposed exploratory drill holes, which are concentrated in five areas; these five areas are spread across the project area. Opening Brief 23 (citing 2 E.R. 239); *see also* 2 E.R. 260. The location of exploratory drill holes is hardly indicative of where a mine might be developed and says nothing about the size, scope, or intensity of any potential future mine development. Nor does the cited map convey the level of detail that would be sufficient for BLM to meaningfully determine the impacts of potential future mine

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that are "pending concurrently before an agency," but it need not consider other "contemplated projects in the region" that are "less imminent." *Id*. at 410 & n.20.

development. *See* 43 C.F.R. § 3809.401(b) (describing the level of detail required for a proposed mine plan). Plaintiffs also cite articles that purportedly show "the kind of environmental impacts typical of hardrock mining." Opening Brief 23 (citing 4 E.R. 604-16, 624-44, 668-723, 733-42). But Plaintiffs fail to explain how such information provided BLM with sufficient information to ascertain and meaningfully analyze the scope of a full-scale mine that Constantine might propose in the future.

Plaintiffs likewise fail to explain how a technical report discussing geology prepared by Constantine would have provided sufficient information to analyze full-scale mining. Opening Brief 23 (citing 4 E.R. 652-667). In any event, that report is highly technical; to the extent that BLM determined that the record did not provide sufficient basis to conduct more detailed analysis with respect to a future mine, it is well established that when analysis of relevant documents "'requires a high level of technical expertise,'" the reviewing court "must defer to 'the informed discretion of the responsible federal agencies.'" *Marsh*, 490 U.S. at 377 (quoting *Kleppe*, 427 U.S. at 412).

Plaintiffs also argue that because Constantine is spending money to conduct the exploration activities, future development of a full-scale mine is necessarily reasonably foreseeable future action. Opening Brief 41-42. To the contrary, "reasonably foreseeable" in this context means more than a party's spending

money to gather information to help it determine whether to proceed with planning or proposing a project. The mining industry acts rationally by spending money on exploration even though in most instances no mine development is thereafter pursued. *See supra* pp. 33-34; *infra* pp. 43-44.

In the cases on which Plaintiffs rely, the future actions were substantially more concrete, and the potential scope of those future actions and their impacts were better understood, than potential future development of a full-scale mine in the project area here. In *Northern Plains Resource Council*, a separate EIS had already projected and evaluated the potential effects from future mining activity, and such activity was described with a level of detail (e.g., specific numbers of wells, field compressors, roads, and pipelines) that did not exist here. *See* 668 F.3d at 1077-79. In *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), "the record contain[ed] *substantial evidence* that timber sales were in fact *at an advanced stage of planning* by the time that the [challenged] decision to build the road was made." *Id*. at 760 (emphasis added). In fact, the agency itself had *concurrently* planned the road and one of the timber sales. *Id.* at 758 n.2, 760-61.

By contrast, the record here shows that at the time of BLM's decision, the project had not yet progressed to the development planning phase. *E.g.*, 2 E.R. 293 (Constantine anticipated that after five years of implementing the proposed exploration operation, it would (assuming positive results) shift from exploration to

planning development); 4 E.R. 762 ("Constantine has not reached a point in their exploration work to make an informed decision to consider moving the project to the Development phase").

Finally, NEPA's purposes are not served by requiring BLM to speculate about the scope and impacts of potential future mine development for purposes of the cumulative impacts analysis in the EAs for the proposed agency action. As explained above, such speculative analysis would have no bearing on the proposed action of approving the exploration plan because BLM did not have the authority to decline to approve the exploration plan on the basis of potential impacts of future full-scale mining, or even the authority to require mitigation of such impacts as a condition of approval.

C. The exploration operations and potential future mine development operations are not connected actions that must be considered in one NEPA document.

Finally, Plaintiffs contend that the proposed mine exploration plan and hypothetical future mine development are "connected actions" within the meaning of NEPA regulations, such that both actions must be analyzed in a single NEPA document. Opening Brief 46. This contention is meritless. The regulatory requirement to analyze "connected actions" in a single NEPA document stems in part from 40 C.F.R. § 1502.4(a), which provides:

> Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall

> use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

Pursuant to this regulation, each connected action must itself be a "proposal." *See Kleppe*, 427 U.S. at 410 n. 20 (NEPA "speaks solely in terms of Proposed actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions."). There was only one proposed action here: whether to approve Constantine's exploration plan. For that reason alone, Plaintiffs' "connected actions" argument, which requires at least *two* "proposals or parts of proposals," must fail.

Even if the hypothetical future full-scale mine could be considered a "proposal" within the meaning of CEQ's regulations, the approved exploration plan and the yet-to-be-contemplated future mine still fail to fit within the definition of "connected actions." The regulation setting forth criteria for the scope of actions that should be discussed in the same EIS provides that actions are "connected" if they—

> (i) Automatically trigger other actions which may requirement environmental impact statements.
>
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
>
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1). Court decisions have boiled down this criteria to an "independent utility" test to determine whether multiple proposed actions are so connected as to mandate consideration in a single NEPA document. *See, e.g.*, *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006). "The crux of the test is whether each of two projects would have taken place with or without the other and thus had 'independent utility.'" *Id*. (internal quotation marks omitted). When one of two projects might reasonably have been completed without the existence of the other, the two projects have independent utility and are not connected for NEPA's purposes. *Great Basin Mine Watch*, 456 F. 3d at 969.

Under the regulatory criteria and independent utility test, Constantine's potential future development of a mine and BLM's approval of the exploration plan are not "connected actions" that must be analyzed in a single NEPA document. First, mineral exploration does not "automatically trigger" mine development. 40 C.F.R. § 1508.25(a)(1)(i). "Very few exploration projects actually make it to the point that a mine can be developed." 4 E.R. 62. Even where exploration reveals the presence of mineralization, only 1 out of 200 projects moves to development. *Id.* Second, mineral exploration may proceed without prior or simultaneous mine development. *See* 40 C.F.R. § 1508.25(a). Indeed, it is the customary practice in the industry to conduct exploration before starting mine development activities. *See* 4 E.R. 760-61.

Third, data-gathering activities such as mineral exploration have independent value regardless of whether they ultimately lead to development projects. *See Greater Yellowstone Coalition v. Reese*, 392 F. Supp. 2d 1234, 1240 (D. Idaho 2005); *Concerned Citizens & Retired Miners Coalition v. U.S. Forest Service*, 279 F. Supp. 3d 898 (D. Ariz. 2017).

In the context of multi-phase projects, this Court has held that agencies may limit their NEPA analyses to the initial phase of a potentially larger project if the utility of the initial phase does not depend on completion of later phases. NEPA analyses must cover all possible project phases only when the "dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken." *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974); *see also Thomas*, 753 F.2d at 760 ("'independent utility' means utility such that the agency might reasonably consider constructing only the segment in question"). Here, it would not be irrational or unwise for Constantine to explore for valuable mineral deposits and then, based on the results of exploration and/or other factors, ultimately decide not to pursue full-scale mine development on these lands. Indeed, as noted above, this frequently occurs in the mining industry.

Plaintiffs' rely on *Thomas*, *see* Opening Brief 46-47, but that case is readily distinguishable. *Thomas* held that the construction in a National Forest of a road to

facilitate logging and three specific timber sales in areas that would be accessed by the road were "connected actions" that must be addressed in a single EIS. 753 F.2d at 758-59. That holding was predicated on a record showing that the "timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales." *Id*. at 758. As noted above, all of the timber sales were in advanced stages of planning when the agency issued a decision to build the road. The Court explained that the record showed such a close interdependence between the road and timber sales, such that it would have been irrational to build the logging road to access the timber and then not to sell the timber. *Id*. at 760.

Here, there is only one specific and concrete proposed action, i.e., Constantine's exploration operations. Not only was BLM not concurrently planning development of a full-scale mine, it would have no cause to do so because mineral exploration and development under the Mining Law, unlike the road and timber sales in *Thomas* (or mineral leasing in *Connor*), are not activities initiated by BLM. BLM has received no proposal from Constantine, formal or otherwise, to develop a full-scale mine. And no such proposal appears imminent given that the exploration activities were projected to take place over five or more years.

Plaintiffs assert that *Thomas* supports the contention that mineral exploration and full-scale mining are "connected actions" because mineral exploration lacks any justification independent of the "possibility" of future mine development.

Plaintiffs observe that miners will see a return on their investment in exploration activities only if they ultimately develop a mine. Opening Brief 47. *Id*. But as BLM explained, it is well-recognized in the mining industry that companies routinely conduct exploration activities without proceeding to develop a mine. *See supra* pp. 33-34.

BLM's choice to not consider the potential approval of a hypothetical full-scale mine as a "connected action" is plainly rational not only because it was consistent with the agency's experience that exploration without further development commonly occurs, but also because the purpose of exploration activities is to gather information needed to make an informed determination of whether and where to proceed to full-scale mine development. By contrast, the purpose of the road in *Thomas* was not to explore and determine whether merchantable timber existed in the timber sale areas; rather, the road's purpose was to access those areas for logging of trees known to exist. In short, mineral exploration and mine development are simply not analogous to the "inextricably intertwined" logging road and timber sales in *Thomas*.

BLM's approach here does not divide "a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9th Cir. 2000) (internal quotation marks

omitted). There is no risk of improper segmentation in this case. If Constantine ever seeks BLM approval of a proposed plan for full-scale mining operations, BLM will be required to conduct a full analysis of the potential environmental impacts of the proposed mining operations, including cumulative impacts from past exploration. *Kleppe*, 427 U.S. at 414 n.26. And unlike now, BLM would have sufficient detail about the location, duration, and methods of mining to be in a position to meaningfully analyze potential direct, indirect, and cumulative impacts of approving any future proposed mining operations at that point in time. *See* 43 C.F.R. § 3809.401 (listing extensive requirements for a plan of operations).

* * * * *

For these reasons, BLM was not required to analyze potential impacts from potential future mine development because it approved no such development here.

II. If this Court finds a NEPA violation, it should reverse the judgment and remand to the district court to determine the appropriate remedy.

The APA provides that a reviewing court shall "hold unlawful" and "set aside" agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). However, a reviewing court may decline to vacate an agency action based on balancing two factors: (1) the seriousness of the agency's error and (2) the disruptive consequence of vacatur, in light of the fact that it is "an interim change that may

itself be changed." *California Communities Against Toxics v. U.S. EPA*, 688 F.3d 989, 992-93 (9th Cir. 2012).

Before this Court rules, it is not possible to address fully the first factor, i.e., the seriousness of the error. However, one factor relevant to the seriousness of any violation is that BLM found that the approved exploration activities themselves would not cause significant environmental impacts, and Plaintiffs did not challenge that finding. Further, because Constantine has been operating under the challenged approvals, vacatur may have disruptive consequences to Constantine. A district court is ordinarily better suited to consider in the first instance a remedy that may necessitate consideration of current or additional information. Accordingly, should this Court concude that BLM's NEPA analysis was inadequate, the Court should reverse the judgment and remand to the district court to determine whether vacatur is appropriate in this circumstance. [10]

Plaintiffs' alternative request for injunctive relief enjoining Constantine from engaging in the approved exploration activities should be denied. The only

[10] If BLM's decisions were vacated, Constantine could no longer rely on these approvals to continue exploration activities. However, it should be recognized that BLM would retain discretion to order or to allow Constantine to take action in the project area, including work to ensure safety and to prevent unnecessary or undue degradation of resources. *Cf. Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 131, 156-160 (vacatur of a complete deregulation decision based on a NEPA violation did not provide warrant for the district court to enjoin the agency from deciding to deregulate temporarily or partially while an EIS was being prepared).

relief to which Plaintiffs are entitled in this APA case is to hold unlawful and set aside BLM's approval decisions. And if this relief were granted, there would be no warrant for Plaintiffs' requested injunctive relief.

Moreover, Plaintiffs have not met their burden to obtain injunctive relief. A plaintiff seeking an injunction must always satisfy the four-factor test: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto*, 561 U.S. at 156-57 (quoting *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)). Principles of equity require that an injunction be narrowly tailored to remedy the violation and the specific harm alleged, and be "no more burdensome to the defendant than necessary." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

To establish irreparable harm, Plaintiffs rely on standing affidavits from individual members to assert that Constantine's exploration activities have lessened these members' enjoyment of use of the project area and surrounding areas due to displacement, noise disturbance, and increased traffic volume. Opening Brief 52-53. Even assuming that such temporary disturbances could constitute irreparable harm, a proper balancing of harm should weight BLM's

reasonable determination that the severity of adverse effects from the exploration activities does not rise to a level of significance. *E.g.*, 3 E.R. 565-70; *see also* S.E.R. 95-96 (comment letter from one of the Plaintiffs stating that "the currently proposed actions are not in themselves a reason for significantly raised environmental concerns").

Contrary to Plaintiffs' suggestion, Opening Brief 54-55, harm from the requested injunction is not necessarily limited to economic harm to Constantine. The proposed exploration operations were expected to generate employment, including for 15 to 20 local employees. 3 E.R. 514. The loss of those jobs and local income derived therefrom should be considered in balancing the hardships between the parties and in weighing the public interest. In addition, an unplanned and sudden cessation of approved exploration work has potential to cause safety concerns or harm to resources if the injunction precludes, for example, stabilization or reclamation work.

Accordingly, Plaintiffs' request for an injunction should be denied. Alternatively, the Court should remand to the district court to determine, based on additional submissions and current information, whether an injunction is warranted and, if so, to determine the parameters of an injunction to ensure it is narrowly tailored and no more burdensome than necessary.

In sum, if this Court finds a NEPA violation, it should reverse the judgment, deny Plaintiffs' request for an injunction, and/or remand to the district court to consider Plaintiffs' requests for remedy.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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90-2-4-15262

STATEMENT OF RELATED CASES

The undersigned is aware of no related cases within the meaning of Circuit Rule 28-2.6.

ADDENDUM

Mining Law

30 U.S.C. § 22:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Federal Land Policy and Management Act

43 U.S.C. § 1712(e)(3):

> e) Management decisions for implementation of developed or revised plans
>
> The Secretary may issue management decisions to implement land use plans developed or revised under this section in accordance with the following:
>
> * * * * *
>
> (3) Withdrawals made pursuant to section 1714 of this title may be used in carrying out management decisions, but public lands shall be removed from or restored to the operation of the Mining Law of 1872, as amended (R.S. 2318-2352; 30 U.S.C. 21 et seq.) or transferred to another department, bureau, or agency only by withdrawal action pursuant to section 1714 of this title or other action pursuant to applicable law: Provided, That nothing in this section shall prevent a wholly owned Government corporation from acquiring and holding rights as a citizen under the Mining Law of 1872.

43 U.S.C. § 1714(a)-(e), (h):

> (a) Authorization and limitation; delegation of authority
>
> On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.
>
> (b) Application and procedures applicable subsequent to submission of application
>
> (1) Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary

shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice. The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice.

(2) The publication provisions of this subsection are not applicable to withdrawals under subsection (e) hereof.

(c) Congressional approval procedures applicable to withdrawals aggregating five thousand acres or more

(1) On and after October 21, 1976, a withdrawal aggregating five thousand acres or more may be made (or such a withdrawal or any other withdrawal involving in the aggregate five thousand acres or more which terminates after such date of approval may be extended) only for a period of not more than twenty years by the Secretary on his own motion or upon request by a department or agency head. The Secretary shall notify both Houses of Congress of such a withdrawal no later than its effective date and the withdrawal shall terminate and become ineffective at the end of ninety days (not counting days on which the Senate or the House of Representatives has adjourned for more than three consecutive days) beginning on the day notice of such withdrawal has been submitted to the Senate and the House of Representatives, if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the Presidential recommendation. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and

those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same Presidential recommendation. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(2) With the notices required by subsection (c)(1) of this section and within three months after filing the notice under subsection (e) of this section, the Secretary shall furnish to the committees--

(1) a clear explanation of the proposed use of the land involved which led to the withdrawal;

(2) an inventory and evaluation of the current natural resource uses and values of the site and adjacent public and nonpublic land and how it appears they will be affected by the proposed use, including particularly aspects of use that might cause degradation of the environment, and also the economic impact of the change in use on individuals, local communities, and the Nation;

(3) an identification of present users of the land involved, and how they will be affected by the proposed use;

(4) an analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use, together with a statement of the provisions to be made for continuation or termination of existing uses, including an economic analysis of such continuation or termination;

(5) an analysis of the manner in which such lands will be used in relation to the specific requirements for the proposed use;

(6) a statement as to whether any suitable alternative sites are available (including cost estimates) for the proposed use or for uses such a withdrawal would displace;

(7) a statement of the consultation which has been or will be had with other Federal departments and agencies, with regional, State, and local government bodies, and with other appropriate individuals and groups;

(8) a statement indicating the effect of the proposed uses, if any, on State and local government interests and the regional economy;

(9) a statement of the expected length of time needed for the withdrawal;

(10) the time and place of hearings and of other public involvement concerning such withdrawal;

(11) the place where the records on the withdrawal can be examined by interested parties; and

(12) a report prepared by a qualified mining engineer, engineering geologist, or geologist which shall include but not be limited to information on: general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential, present and potential market demands.

(d) Withdrawals aggregating less than five thousand acres; procedure applicable

A withdrawal aggregating less than five thousand acres may be made under this subsection by the Secretary on his own motion or upon request by a department or an agency head--

(1) for such period of time as he deems desirable for a resource use; or

(2) for a period of not more than twenty years for any other use, including but not limited to use for administrative sites, location of facilities, and other proprietary purposes; or

(3) for a period of not more than five years to preserve such tract for a specific use then under consideration by the Congress.

(e) Emergency withdrawals; procedure applicable; duration

When the Secretary determines, or when the Committee on Natural Resources of the House of Representatives or the Committee on Energy and Natural Resources of the Senate notifies the Secretary, that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost, the Secretary notwithstanding the provisions of subsections (c)(1) and (d) of this section, shall immediately make a withdrawal and file notice of such emergency withdrawal with both of those Committees. Such emergency withdrawal shall be effective when made but shall last only for a period not to exceed three years and may not be extended except under the provisions of subsection (c)(1) or (d), whichever is applicable, and (b)(1) of this section. The information required in subsection (c)(2) of this subsection shall be furnished the committees within three months after filing such notice.

* * * * *

(h) Public hearing required for new withdrawals

All new withdrawals made by the Secretary under this section (except an emergency withdrawal made under subsection (e) of this section) shall be promulgated after an opportunity for a public hearing.

43 U.S.C. § 1732(b):

> . . . Nothing in this Act shall modify or change any provision of Federal law relating to migratory birds or to endangered or threatened species. Except as provided in section 1744, section 1782, and subsection (f) of section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

§ 3802.4–5 Maintenance and public safety.

During all operations, the operator shall maintain his structures, equipment, and other facilities in a safe and orderly manner. Hazardous sites or conditions resulting from operations shall be marked by signs, fenced, or otherwise identified to protect the public in accordance with applicable Federal and State laws and regulations.

§ 3802.4–6 Inspection.

The authorized officer shall periodically inspect operations to determine if the operator is complying with these regulations and the approved plan of operations, and the operator shall permit access to the authorized officer for this purpose.

§ 3802.4–7 Notice of suspension of operations.

(a) Except for seasonal suspension, the operator shall notify the authorized officer of any suspension of operations within 30 days after such suspension. This notice shall include:

(1) Verification of intent to maintain structures, equipment, and other facilities, and

(2) The expected reopening date.

(b) The operator shall maintain the operating site, structure, and other facilities in a safe and environmentally acceptable condition during nonoperating periods.

(c) The name and address of the operator shall be clearly posted and maintained in a prominent place at the entrance to the area of mining operations during periods of nonoperation.

§ 3802.4–8 Cessation of operations.

The operator shall, within 1 year following cessation of operations, remove all structures, equipment, and other facilities and reclaim the site of operations, unless variances are agreed to in writing by the authorized officer. Additional time may be granted by the authorized officer upon a show of good cause by the operator.

§ 3802.5 Appeals.

(a) Any party adversely affected by a decision of the authorized officer or the State Director made pursuant to the provisions of this subpart shall have a right of appeal to the Board of Land Appeals, Office of Hearings and Appeals, pursuant to part 4 of this title.

(b) In any case involving lands under the jurisdiction of any agency other than the Department of the Interior, or an office of the Department of the Interior other than the Bureau of Land Management, the office rendering a decision shall designate the authorized officer of such agency as an adverse party on whom a copy of any notice of appeal and any statement of reasons, written arguments, or brief must be served.

§ 3802.6 Public availability of information.

(a) All data and information concerning Federal and Indian minerals submitted under this subpart 3802 are subject to part 2 of this title. Part 2 of this title includes the regulations of the Department of the Interior covering the public disclosure of data and information contained in Department of the Interior records. Certain mineral information not protected from public disclosure under part 2 may of this title be made available for inspection without a Freedom of Information Act (5 U.S.C. 552) request.

(b) When you submit data and information under this subpart 3802 that you believe to be exempt from disclosure to the public, you must clearly mark each page that you believe includes confidential information. BLM will keep all data and information confidential to the extent allowed by § 2.13(c) of this title.

[63 FR 52954, Oct. 1, 1998]

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.

SOURCE: 65 FR 70112, Nov. 21, 2000, unless otherwise noted.

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(d) and (e). 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.

[65 FR 70112, Nov. 21, 2000, as amended at 66 FR 54860, Oct. 30, 2001]

§ 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 a person conducting or proposing to conduct operations.

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 chapter; or

(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.

[65 FR 70112, Nov. 21, 2000, as amended at 66 FR 54860, Oct. 30, 2001]

§ 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) For other than Stock Raising Homestead Act lands, 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.

[65 FR 70112, Nov. 21, 2000, as amended at 66 FR 54860, Oct. 30, 2001]

§ 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

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.

If BLM reviews your notice and, within 15 calendar days—	Then—
(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)(12)(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.

[65 FR 70112, Nov. 21, 2000, as amended at 66 FR 54860, Oct. 30, 2001]

§ 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.

[65 FR 70112, Nov. 21, 2000, as amended at 66 FR 54860, Oct. 30, 2001]

§ 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.

[65 FR 70112, Nov. 21, 2000, as amended at 66 FR 54861, Oct. 30, 2001]

§ 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.

(6) *Compliance with other laws.* You must conduct all operations in a manner that complies with all pertinent Federal and state laws.

(b) *Specific standards*—(1) *Access routes.* Access routes shall be planned for only the minimum width needed for operations and shall follow natural contours, where practicable to minimize cut and fill. When the construction of access routes involves slopes that require cuts on the inside edge in

excess of 3 feet, the operator may be required to consult with the authorized officer concerning the most appropriate location of the access route prior to commencing operations. An operator is entitled to access to his operations consistent with provisions of the mining laws. Where a notice or a plan of operations is required, it shall specify the location of access routes for operations and other conditions necessary to prevent unnecessary or undue degradation. The authorized officer may require the operator to use existing roads to minimize the number of access routes, and, if practicable, to construct access roads within a designated transportation or utility corridor. When commercial hauling is involved and the use of an existing road is required, the authorized officer may require the operator to make appropriate arrangements for use and maintenance.

(2) *Mining wastes.* All tailings, dumps, deleterious materials or substances, and other waste produced by the operations shall be disposed of so as to prevent unnecessary or undue degradation and in accordance with applicable Federal and state Laws.

(3) *Reclamation.* (i) At the earliest feasible time, the operator shall reclaim the area disturbed, except to the extent necessary to preserve evidence of mineralization, by taking reasonable measures to prevent or control on-site and off-site damage of the Federal lands.

(ii) Reclamation shall include, but shall not be limited to:

(A) Saving of topsoil for final application after reshaping of disturbed areas have been completed;

(B) Measures to control erosion, landslides, and water runoff;

(C) Measures to isolate, remove, or control toxic materials;

(D) Reshaping the area disturbed, application of the topsoil, and revegetation of disturbed areas, where reasonably practicable; and

(E) Rehabilitation of fisheries and wildlife habitat.

(iii) When reclamation of the disturbed area has been completed, except to the extent necessary to preserve evidence of mineralization, the authorized officer shall be notified so that an inspection of the area can be made.

(4) *Air quality.* All operators shall comply with applicable Federal and state air quality standards, including the Clean Air Act (42 U.S.C. 1857 *et seq.*).

(5) *Water quality.* All operators shall comply with applicable Federal and state water quality standards, including the Federal Water Pollution Control Act, as amended (30 U.S.C. 1151 *et seq.*).

(6) *Solid wastes.* All operators shall comply with applicable Federal and state standards for the disposal and treatment of solid wastes, including regulations issued pursuant to the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*). All garbage, refuse or waste shall either be removed from the affected lands or disposed of or treated to minimize, so far as is practicable, its impact on the lands.

(7) *Fisheries, wildlife and plant habitat.* The operator shall take such action as may be needed to prevent adverse impacts to threatened or endangered species, and their habitat which may be affected by operations.

(8) *Cultural and paleontological resources.* (i) Operators shall not knowingly disturb, alter, injure, or destroy any scientifically important paleontological remains or any historical or archaeological site, structure, building or object on Federal lands.

(ii) Operators shall immediately bring to the attention of the authorized officer any cultural and/or paleontological resources that might be altered or destroyed on Federal lands by his/her operations, and shall leave such discovery intact until told to proceed by the authorized officer. The authorized officer shall evaluate the discoveries brought to his/her attention, take action to protect or remove the resource, and allow operations to proceed within 10 working days after notification to the authorized officer of such discovery.

(iii) The Federal Government shall have the responsibility and bear the cost of investigations and salvage of cultural and paleontology values discovered after a plan of operations has been approved, or where a plan is not involved.

(9) *Protection of survey monuments.* To the extent practicable, all operators shall protect all survey monuments, witness corners, reference monuments, bearing trees and line trees against unnecessary or undue destruction, obliteration or damage. If, in the course of operations, any monuments, corners, or accessories are destroyed, obliterated, or damaged by such operations, the operator shall immediately report the matter to the authorized officer. The authorized officer shall prescribe, in writing, the requirements for the restoration or reestablishment of monuments, corners, bearing and line trees.

(10) *Fire.* The operator shall comply with all applicable Federal and state fire laws and regulations, and shall take all reasonable measures to prevent and suppress fires in the area of operations.

(11) *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.

(12) *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.

(13) *Maintenance and public safety.* During all operations, the operator

shall maintain his or her structures, equipment, and other facilities in a safe and orderly manner. Hazardous sites or conditions resulting from operations shall be marked by signs, fenced, or otherwise identified to alert the public in accordance with applicable Federal and state laws and regulations.

[66 FR 54861, Oct. 30, 2001]

§ 3809.421 Enforcement of performance standards.

Failure of the operator to prevent unnecessary or undue degradation or to complete reclamation to the standards described in this subpart may cause the operator to be subject to enforcement as described in §§ 3809.600 through 3809.605 of this subpart.

[66 FR 54862, Oct. 30, 2001]

§ 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.

If—	Then—
(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.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to ''utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment,'' as specified by §1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in §1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in §1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by §1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in §1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under §1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report.

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not

repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of ''effects'' (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

Legislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.;* treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

Matter includes for purposes of part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

Mitigation includes:

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

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

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

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

§ 1508.21 NEPA process.

NEPA process means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§ 1508.22 Notice of intent.

Notice of intent means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

Referring agency means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental

consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement

Subpart E—Environmental Impact Statements

AUTHORITY: 42 U.S.C. 4321 *et seq.* (The National Environmental Policy Act of 1969, as amended); Executive Order 11514, (Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977)); 40 CFR parts 1500–1508 (43 FR 55978) (National Environmental Policy Act, Implementation of Procedural Provisions).

SOURCE: 73 FR 61314, Oct. 15, 2008, unless otherwise noted.

Subpart A—General Information

§ 46.10 Purpose of this part.

(a) This part establishes procedures for the Department, and its constituent bureaus, to use for compliance with:

(1) The National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*); and

(2) The Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508).

(b) Consistent with 40 CFR 1500.3, it is the Department's intention that any trivial violation of these regulations will not give rise to any independent cause of action.

§ 46.20 How to use this part.

(a) This part supplements, and is to be used in conjunction with, the CEQ regulations except where it is inconsistent with other statutory requirements. The following table shows the corresponding CEQ regulations for the sections in subparts A—E of this part. Some sections in those subparts do not have a corresponding CEQ regulation.

SUBPART A 40 CFR	
46.10	Parts 1500–1508
46.20	No corresponding CEQ regulation
46.30	No corresponding CEQ regulation
SUBPART B	
46.100	1508.14, 1508.18, 1508.23
46.105	1506.5
46.110	No corresponding CEQ regulation
46.115	1508.7
46.120	1502.9, 1502.20, 1502.21, 1506.3
46.125	1502.22
46.130	1502.14
46.135	1502.21
46.140	1502.20
46.145	No corresponding CEQ regulation
46.150	1506.11
46.155	1502.25, 1506.2
46.160	1506.1
46.170	No corresponding CEQ regulation
SUBPART C	
46.200	1501.2
46.205	1508.4
46.210	1508.4
46.215	1508.4
46.220	1501.5
46.225	1501.6
46.230	1501.6
46.235	1501.7
46.240	1501.8
SUBPART D	
46.300	1501.3
46.305	1501.7, 1506.6
46.310	1508.9
46.315	No corresponding CEQ regulation
46.320	1506.3
46.325	1501.4
SUBPART E	
46.400	1502.5
46.405	1502.7
46.415	1502.10
46.420	1502.14
46.425	1502.14
46.430	1502.25
46.435	1503

46.440 1506.2
46.445 1506.8
46.450 1505.2

(b) The Responsible Official will ensure that the decision making process for proposals subject to this part includes appropriate NEPA review.

(c) During the decision making process for each proposal subject to this part, the Responsible Official shall consider the relevant NEPA documents, public and agency comments (if any) on those documents, and responses to those comments, as part of consideration of the proposal and, except as specified in paragraphs 46.210(a) through (j), shall include such documents, including supplements, comments, and responses as part of the administrative file.

(d) The Responsible Official's decision on a proposed action shall be within the range of alternatives discussed in the relevant environmental document. The Responsible Official's decision may combine elements of alternatives discussed in the relevant environmental document if the effects of such combined elements of alternatives are reasonably apparent from the analysis in the relevant environmental document.

(e) For situations involving an applicant, the Responsible Official should initiate the NEPA process upon acceptance of an application for a proposed Federal action. The Responsible Official must publish or otherwise provide policy information and make staff available to advise potential applicants of studies or other information, such as costs, foreseeably required for later Federal action.

§ 46.30 Definitions.

For purposes of this part, the following definitions supplement terms defined at 40 CFR parts 1500–1508.

Adaptive management is a system of management practices based on clearly identified outcomes and monitoring to determine whether management actions are meeting desired outcomes; and, if not, facilitating management changes that will best ensure that outcomes are met or re-evaluated. Adaptive management recognizes that knowledge about natural resource systems is sometimes uncertain.

Bureau means bureau, office, service, or survey within the Department of the Interior.

Community-based training in the NEPA context is the training of local participants together with Federal participants in the workings of the environmental planning effort as it relates to the local community(ies).

Controversial refers to circumstances where a substantial dispute exists as to the environmental consequences of the proposed action and does not refer to the existence of opposition to a proposed action, the effect of which is relatively undisputed.

Environmental Statement Memoranda (ESM) are a series of instructions issued by the Department's Office of Environmental Policy and Compliance to provide information and explanatory guidance in the preparation, completion, and circulation of NEPA documents.

Environmentally preferable alternative is the alternative required by 40 CFR 1505.2(b) to be identified in a record of decision (ROD), that causes the least damage to the biological and physical environment and best protects, preserves, and enhances historical, cultural, and natural resources. The environmentally preferable alternative is identified upon consideration and weighing by the Responsible Official of long-term environmental impacts against short-term impacts in evaluating what is the best protection of these resources. In some situations, such as when different alternatives impact different resources to different degrees, there may be more than one environmentally preferable alternative.

No action alternative.

(1) This term has two interpretations. First ''no action'' may mean ''no change'' from a current management direction or level of management intensity (*e.g.*, if no ground-disturbance is currently underway, no action means no ground-disturbance). Second ''no action'' may mean ''no project'' in cases where a new project is proposed for implementation.

(2) The Responsible Official must determine the ''no action'' alternative consistent with one of the definitions in paragraph (1) of this definition and appropriate to the proposed action to

be analyzed in an environmental impact statement. The no action alternative looks at effects of not approving the action under consideration.

Proposed action. This term refers to the bureau activity under consideration. It includes the bureau's exercise of discretion over a non-Federal entity's planned activity that falls under a Federal agency's authority to issue permits, licenses, grants, rights-of-way, or other common Federal approvals, funding, or regulatory instruments. The proposed action:

(1) Is not necessarily, but may become, during the NEPA process, the bureau preferred alternative or (in a record of decision for an environmental impact statement, in accordance with 40 CFR 1505.2) an environmentally preferable alternative; and

(2) Must be clearly described in order to proceed with NEPA analysis.

Reasonably foreseeable future actions include those federal and non-federal activities not yet undertaken, but sufficiently likely to occur, that a Responsible Official of ordinary prudence would take such activities into account in reaching a decision. These federal and non-federal activities that must be taken into account in the analysis of cumulative impact include, but are not limited to, activities for which there are existing decisions, funding, or proposals identified by the bureau. Reasonably foreseeable future actions do not include those actions that are highly speculative or indefinite.

Responsible Official is the bureau employee who is delegated the authority to make and implement a decision on a proposed action and is responsible for ensuring compliance with NEPA.

Subpart B—Protection and Enhancement of Environmental Quality

§ 46.100 Federal action subject to the procedural requirements of NEPA.

(a) A bureau proposed action is subject to the procedural requirements of NEPA if it would cause effects on the human environment (40 CFR 1508.14), and is subject to bureau control and responsibility (40 CFR 1508.18). The determination of whether a proposed action is subject to the procedural requirements of NEPA depends on the extent to which bureaus exercise control and responsibility over the proposed action and whether Federal funding or approval are necessary to implement it. If Federal funding is provided with no Federal agency control as to the expenditure of such funds by the recipient, NEPA compliance is not necessary. The proposed action is not subject to the procedural requirements of NEPA if it is exempt from the requirements of section 102(2) of NEPA.

(b) A bureau shall apply the procedural requirements of NEPA when the proposal is developed to the point that:

(1) The bureau has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal; and

(2) The effects of the proposed action can be meaningfully evaluated (40 CFR 1508.23).

§ 46.105 Using a contractor to prepare environmental documents.

A Responsible Official may use a contractor to prepare any environmental document in accordance with the standards of 40 CFR 1506.5(b) and (c). If a Responsible Official uses a contractor, the Responsible Official remains responsible for:

(a) Preparation and adequacy of the environmental documents; and

(b) Independent evaluation of the environmental documents after their completion.

§ 46.110 Incorporating consensus-based management.

(a) Consensus-based management incorporates direct community involvement in consideration of bureau activities subject to NEPA analyses, from initial scoping to implementation of the bureau decision. It seeks to achieve agreement from diverse interests on the goals of, purposes of, and needs for bureau plans and activities, as well as the methods anticipated to carry out those plans and activities. For the purposes of this Part, consensus-based management involves outreach to persons, organizations or communities who may be interested in or affected by a proposed action with an assurance

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