

HARDROCK MINING OPERATIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY
AND MINERAL RESOURCES

OF THE

COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

Final Bonding Rule for Hardrock Mining Operations

JUNE 19, 1997—WASHINGTON, DC

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CONTENTS

Hearing held June 19, 1997	Page 1
Statements of Members:	
Christian-Green, Hon. Donna M., a Representative in Congress from the Virgin Islands	9
Cubin, Hon. Barbara, a Representative in Congress from the State of Wyoming	1
Prepared statement	4
Gibbons, Hon. Jim, a Representative in Congress from the State of Ne- vada	7
John, Hon. Christopher, a Representative in Congress from the State of Louisiana	8
Romero-Barceló, Hon. Carlos A., a Delegate in Congress from Puerto Rico	5
Statements of witnesses:	
Glover, Jere, Chief Counsel, Office of Advocacy, U.S. Small Business Administration	12
Prepared statement	42
Leshy, John, Solicitor, U.S. Department of the Interior	10
Prepared statement	39
Additional material supplied:	
Letter from the SBA to BLM	41

FINAL BONDING RULE FOR HARDROCK MINING OPERATIONS ON BLM-ADMINISTERED PUBLIC LANDS

THURSDAY, JUNE 19, 1997

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ENERGY
AND MINERAL RESOURCES, COMMITTEE ON RESOURCES,
Washington, DC.

The Subcommittee met, pursuant to notice, at 1 p.m. in room 1334, Longworth House Office Building, Hon. Barbara Cubin (chairman of the subcommittee) presiding.

Mrs. CUBIN. The Subcommittee on Energy and Mineral Resources will please come to order. I would like to welcome our guests to the hearing today.

STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Mrs. CUBIN. Today, the Subcommittee continues its oversight of the Department of Interior's decision to publish on February 28th of this year a final rulemaking on bonding of hardrock mining operations on public lands administered by the Bureau of Land Management. We first looked into this matter on March 20th after publication of the rule, but before it became effective on March 31st.

At the initial hearing, the Subcommittee did not have the paper trail that we have now, albeit I still have document requests that have not been honored to my satisfaction by the Department. However, from the materials in the Subcommittee's possession, there appeared to be sufficient information to conduct further inquiry into why the Secretary of Interior has allowed this rulemaking to become final after such a long lapse without any new public input.

Furthermore, information from the Small Business Administration's Office of Advocacy, the keeper of the faith, so to speak, on small business and the economic impacts of rules that regulations make, appears to question the legitimacy of the Department's compliance in this matter.

Consequently, I have asked the chief counsel for that part of the SBA to testify before us today as well as the Secretary of Interior's designated representative and assistant within the Department, who has played an important policy-advising role; at least it appears that it has been that way.

Let me say at the outset that I apologize to the other members here that we had to cancel the hearing last week. All day long markups and then the next day when we had to vote 23 or 24 times on the floor certainly affected all of our schedules, and, fortu-

nately, the witnesses were local people so no one had to make a trip in from out in the country. So I do apologize for the delay.

However, let me make it clear to everyone that I do not apologize for conducting this oversight hearing, regardless of the now pending lawsuit brought on behalf of a mining trade association and its members, many of whom are small miners. At least they are small miners as described in the definition of the Small Business Administration.

Correspondence from the Secretary of the Interior to Chairman Young, as well as from Solicitor Leshy to me and to staff counsel on the Full Committee, echoed by the Ranking Member of the Full Committee, would have us believe that to conduct a congressional oversight hearing in matters for which the Secretary is now being sued somehow imperils the good of the Nation.

I don't buy that, and neither does the Chairman, which we stated in our letter of June 11th to Mr. Miller. The filing and prosecution of the Northwest Mining Association v. Babbitt in U.S. District Court does not bar our inquiry. If that were so, practically speaking, no congressional oversight could ever occur, for like most agency heads, Secretary Babbitt is routinely named in litigation, probably about every week.

To quote Shakespeare, "Ah, that is the rub." Why is it that citizens have to bring a Federal court case to be heard on an issue? Clearly, it is because of an unresponsive bureaucracy that said, quote, paraphrase, "no comments are necessary. We know what is best for you." Thank you very much.

Well, it must come as a shock to the Secretary, but there are those who disagree with that, and because no comment period was allowed on the redone rule, what avenue does the disenfranchised public have left? The Secretary has steadfastly refused to withdraw the rule and seek public comment. Public comment in any rule-making, as we all know, is the foundation of the laws that we have to live by. Public comment is the most important aspect of it, and I cannot for the life of me understand why we would take a 6-year-old rule, change it, and just try to force it down the throats of our constituents.

The Secretary has refused to withdraw those rules despite the fact that at least two Democrat Governors, at least one senator, a State Attorney General, the Nevada legislature and the county commissioners representing the biggest mining in that region have joined me in requesting that the rule be put out for comment. It seems inane that a constituent has to go to the courts to be able to have some input on rulemaking.

In apparent contradiction to a statement from the Department that the Bureau of Land Management has reported no problems in implementing the rule, Governor Miller of Nevada has had to seek an amendment to the State law to try to fix the statewide bonding pool to fit the new regulatory requirements of the BLM in order to provide relief for small miners in his State.

As our colleague, Jim Gibbons knows, Nevada has a biennial legislature, and unless they act fast, small miners out there could be left without any access to the pool for another 2 years.

I guess the BLM's "no problems" remark must mean that the Feds don't have any problems; they are doing fine. It is only the

State legislators and the folks they represent that are having problems. And the pity is that the Department merely had to ask for comments to learn this beforehand rather than after the fact.

Likewise, the new requirement for professional engineers to certify the calculation of reclamation costs has brought howls of protest by those who are unable to find engineers who are willing to do that. Is it a bad idea to require professional engineers certification? I don't know. That wasn't the question, but certainly it wasn't contemplated back in 1991 when the Bush Administration published the proposed rule. So why would anyone have anticipated a need to tell the agency about it? No one at the receiving end of the proposed rule did that I can see, but somewhere along the line this Administration's policymakers decided it was necessary to keep the miners honest.

Besides cost recovery concepts mandate mining operators either pay the BLM's own engineers to review such data, or they go outside and pay for government contractors, in essence, to do BLM's work. Again, let me emphasize that my complaint is with the Secretary's refusal to take public comment on this idea, not on the certification requirement, per se, although there certainly seems to be logistical problems worthy of making an analysis. But, I didn't find one in the rulemaking materials I have seen, which address this issue at all.

Again, a simple comment period might have given the BLM a heads up on the reluctance of the professional engineers to put their names and reputations on the line when they don't seem to know just what it is that the Feds want them to certify.

Let me finish by noting that just 2 weeks ago the Clinton Administration named as a runner-up small businessman of the year a gentleman from Idaho, who owns a pumice mining company. My staff contacted the individual, Mr. J. Marvin Hess, to find out if he fit BLM's alleged definition of a small business entity. Mr. Hess says his 95-employee operation is all on private land with reserves encompassing 240 leased acres and a mill on additional private land.

If we were to calculate his operation as if he were on public land, he would clearly exceed the 10 claims or fewer threshold for the so-called small miner exemption which BLM says they used in their economic analysis. Yet, the government agency charged with identifying and rewarding such entrepreneurs, the SBA, has decided that Mr. Hess is the epitome of a small business entity. Go figure.

For my money, I will take the SBA's assessment of small business over that of the Department of Interior any time, or at least the Small Business Administration's view of the adequacy of the Department of Interior's economic analyses, which by any standard falls woefully short. But the bonding rule is only the tip of the 3,809 mining regulations iceberg. Five-sixths of the Secretary's hardrock mining strategy lies below view waiting to sink a passing ship crewed by small miners.

I hereby ask one more time for the Department to swallow its pride, admit it was wrong to rebuff the public comment, and publish a new rule and set out the time for public comment. Failing that happening, I pledge to continue our inquiry with an eye toward drafting generic legislation to prevent this type of rulemaking

abuse in the future. Passage of the Small Business Regulatory Enforcement and Fairness Act in the last Congress has finally given citizens the opportunity to sue agencies for noncompliance with the Regulatory Flexibility Act.

I welcome the lawsuit brought by those affected persons who were denied a voice in this rulemaking. I just find it a very sad state of affairs that they had to do it.

[The statement of Mrs. Cubin follows:]

STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE
STATE OF WYOMING

Today the Subcommittee continues its oversight of the Department of the Interior's decision to publish on February 28th of this year a final rulemaking on bonding of "hardrock" mining operations on the public lands administered by the Bureau of Land Management. We first looked into this matter on March 20th, after publication of the rule but before it became effective on March 31st. At the initial hearing the Subcommittee did not have the "paper trail" we do now, albeit I still have documented requests at the Department which have not been honored to my satisfaction. However, from the materials in the Subcommittee's possession there appeared to be sufficient information to conduct further inquiry into why the Secretary of the Interior has allowed this rulemaking to become final after such a long lapse without new public input.

Furthermore, information from the Small Business Administration's Office of Advocacy, the keeper of the faith, so to speak, for the statutory requirement that agencies fully analyze the economic impacts of rules they make, appears to question the legitimacy of the Department's compliance in this matter. Consequently, I have asked the chief counsel for that part of the SBA to testify before us today, as well as the Secretary of the Interior's designated representative and a special assistant within the Department who has played an important policy-advising role—or so it appears.

Let me say, at the outset, I apologize to our Members for having to reschedule last week's announced hearing on this issue. Day-long mark-ups of reconciliation legislation, and last Wednesday's all-afternoon floor voting affected so many schedules, including mine, as to require postponement. Fortunately, our witnesses were all local.

However, let me make clear to all, I do not apologize for conducting this oversight itself, regardless of the now-pending lawsuit, brought on behalf of a mining trade association and its members—many of whom are small miners (at least under the definition of the term as prescribed by the SBA). Correspondence from the Secretary of the Interior to Chairman Young, as well as from Solicitor Leshy to me and to staff counsel on the Full Committee, echoed by the Ranking Member of the Full Committee, would have us believe that conduct of Congressional oversight in matters for which the Secretary is now being sued somehow imperils the good of the Nation.

I don't buy it, and neither does Chairman Young, as per his reply letter of June 11th to Mr. Miller. The filing and prosecution of the *Northwest Mining Association v. Babbitt* litigation in U.S. District Court does not bar our inquiry. If it were so, practically speaking, no Congressional oversight could occur, for like most agency heads, Secretary Babbitt is routinely named as a defendant in litigation every week.

To quote Shakespeare, "Ah, there's the rub." Why is it that ordinary citizens must bring a Federal court case to be heard on this issue? Clearly, its because an unresponsive bureaucracy said "No comments are necessary, thank you very much. We know best who will be impacted and by how much." Well, it must come as a shock to the Secretary, but there are those who disagree. And, because no comment period was allowed on the redone rule, what avenue for the disenfranchised public was left? Why, the other two co-equal branches of government, Congress and the judiciary. The Secretary has steadfastly refused to withdraw the rule and seek public comment. He has done so despite the fact that at least two Democrat Governors, at least one Senator, a State attorney general, the Nevada legislature, and the county commissioners representing the biggest gold mining region in the country, joining me in requesting the rule be proposed for comment.

In apparent contradiction to a statement from the Department that the Bureau of Land Management has reported no problems in implementing the rule, Governor Miller of Nevada has had to seek an amendment to State law to try to fix the statewide bonding pool to fit the new regulatory requirements of the BLM in order to

provide relief for small miners in his State. As our colleague Jim Gibbons knows, Nevada has a biennial legislature, and unless they act fast, small miners out there could be left without access to the pool for another 2 years. I guess the BLM's "no problems" remark must mean the feds are doing fine—only the State legislators, and the folks they represent, are having any problems.

And the pity is that the Department merely had to ask for comments to learn this beforehand rather than after the fact. Likewise, the new requirement for third party professional engineers to certify the calculation of reclamation costs has brought howls of protest by those unable to find engineers willing to do so. Is it a bad idea to require P.E. certification? I don't know, but it surely wasn't contemplated back in 1991 when the Bush Administration published the proposed rule. So, why would anyone have anticipated a need to tell the agency about it? No one at the *receiving* end of the proposed rule did that I can see, but somewhere along the line this Administration's policymakers decided it was necessary to keep the miners honest. Besides "cost recovery" concepts mandate mining operators either pay BLM's own engineers to review such data, or they go outside and pay for government contractors, in essence, to do BLM's work. Again, let me emphasize my complaint is with the Secretary's refusal to take public comment on this idea, not the certification requirement, *per se*, although there certainly seems to be logistical problems worthy of an analysis. But, I didn't find one in the rulemaking materials I've seen which address this issue at all. Again, a simple comment period might have given the BLM at heads up on the reluctance of professional engineers to put their names and reputations on the line when they don't seem to know just what it is the feds want them to certify.

Let me finish by noting that just 2 weeks ago the Clinton Administration named as a "runner-up" for "small businessman of the year" a gentleman from Malad, Idaho, who owns a pumice mining company. My staff contacted this individual, a Mr. J. Marvin Hess, to find out if he fit BLM's alleged definition of a "small business entity." Mr. Hess says his 95-employee operation is all on private land with reserves encompassing 240 leased acres and a mill on additional private land. If we were to calculate his operation as if it were on public land he would clearly exceed the ten claims or fewer threshold for the so-called small miner exemption which BLM says they used in their economic analysis. Yet, the government agency charged with identifying and rewarding such entrepreneurs—the SBA—has decided Mr. Hess is the epitome of a small business entity. Go figure. For my money, I'll take the SBA's assessment of the small business community over that of the Department of the Interior, or at least the SBA's view of the adequacy of DoI economic analyses, which by any reasonable standard falls woefully short.

But the bonding rule is only the tip of the "3809 surface management regulations" iceberg. Five-sixths of the Secretary's "hardrock mining strategy" lies below view waiting to sink a passing ship crowded by small miners. I hereby ask one more time for the Department to swallow its pride, admit it was wrong to rebuff public comment, and publish the rule anew. Failing that happening, I pledge to continue our inquiry, with an eye toward drafting generic legislation to prevent this type of rule-making abuse in the future. Passage of the Small Business Regulatory Enforcement and Fairness Act in the last Congress has finally given citizens the opportunity to sue agencies for noncompliance with the Regulatory Flexibility Act. I welcome the lawsuit brought by those affected persons who were denied a voice in this rule-making. I just find it a very sad state of affairs that it has become necessary.

I now recognize our Ranking Member, Mr. Romero-Barceló, for any opening statement he may wish to give.

Mrs. CUBIN. Now, I welcome the Ranking Member, Carlos Romero-Barceló and ask for his comments.

STATEMENT OF HON. CARLOS A. ROMERO-BARCELÓ, A DELEGATE IN CONGRESS FROM PUERTO RICO

Mr. ROMERO-BARCELÓ. Thank you, Madam Chair. The last time I had a hearing, I made it clear that I thought everyone should have been given a chance and should be given a chance, an opportunity. However, on this occasion I think we have a different issue at hand and we are pleased to welcome Mr. John Leshy, the Solicitor General, the Department of Interior, back to the Resources Committee.

Now, in light of the legislation that is now pending against the United States on the bonding rule, we have certain misgivings related to the conduct of this hearing and the way that the documents are being requested and will be made—presented to be made public.

Last week, immediately prior to the postponed hearing on this matter, the senior Democrat on this Committee, George Miller, wrote to Chairman Young raising a series of concerns on issues about whether it is appropriate to release these documents that have been identified by the Solicitor as privileged.

Unfortunately, the Majority has apparently chosen to disregard these concerns and is proceeding against the wishes and advice of the Solicitor and the Democrats on the Committee. I refer to the Chair's intention as noted in the Majority staff's letter of June 9 to the Solicitor, to release or place in the public record a number of confidential documents related to the bonding rule which were provided to the Committee by the Department of Interior.

According to Congressman Miller's letter to the Chairman and advice from the Solicitor, Mr. Leshy, the release of documents transmitted to the Committee and related to the bonding rule which have been identified as privileged may jeopardize the fiscal and environmental interest of the United States independent litigation. Therefore, it is my duty to object to unanimous consent to use or include these privileged documents in the public record of this hearing.

The only way that they should be used is if a vote is taken and then the Committee votes and the Majority have those documents to be made public so those proposed documents being made public could also be put on record that they oppose it, and also give the authority to the Department of the United States, the Solicitor General, to say these documents were made public upon, over and above their opposition, which then would allow them perhaps to litigate the issue in the court.

Whereas, by not having this document made public without any objection, without going through a vote on the Committee, may give the court the opportunity to say that the issues have been waived and therefore that the documents can be used in the litigation. These documents were provided at the request of the Subcommittee Chair prior to the Northwest Mining Association suing the Secretary or the BLM's regulations, and now that the litigation has been filed, it is clearly inappropriate for the Subcommittee to release or make public the privileged documents.

As Mr. Miller stated, to do so could create the impression that the Majority is using the power of Congress to conduct discovery for the mining industry, obtaining and disclosing materials that would not otherwise be available through the normal judicial process. To truly represent the interests of the public, we should focus our interests in this matter on the substance of the rule, not individual questions relating to the release of confidential documents. We must be mindful of the purpose of the bonding rule, because even if the Department erred substantively, the intent of the rule is clearly in the best fiscal and environmental interest of the United States and its citizens.

The rule in question embodies the polluter pays principle. Under this rule, BLM requires all miners to hold financial bonds or guarantees for a full 100 percent of the cost of restoring public land that their activities have disturbed. And this is a significant change from the previous policy that exempted miners disturbing less than 5 acres of public land from providing proof of such protection.

I am sympathetic to the plight of small miners operating on 5 acres or less who find it difficult to find bonds to cover \$1,000 per acre. However, this is the approximate dollar amount the BLM would need to clean up an area after an irresponsible miner who leaves an area without reclaiming the land. Therefore, in the interest of both the polluter pays and the cost recovery policies, it is not unreasonable for the government to require this amount.

Reclamation is required to ensure that environmental damage, such as acid mine drainage and ground and drinking water contamination does not occur. Reclamation ensures that the land can be used for other uses like recreation after mining is complete. American taxpayers have too long borne the cost of cleaning up after unscrupulous miners and the bonding rule will ensure that the cost of cleaning up the disturbance caused by mining will be placed squarely on the mining communities' shoulders where it belongs.

Mr. Leshy, Mr. Alberswerth, and Mr. Glover, we look forward to hearing from you. Thank you.

Mrs. CUBIN. Thank you. I do have to take a little Chairman's privilege here. I want to make it very clear that my objection to what is happening here is not the content of the rule. That is beyond my authority. My job is to see that the process is carried out and that the people of the United States of America have their right and avenue to have input into what happens to them into their government. It is strictly the process that I am addressing.

I also have to point out that the lawsuit hadn't been signed when we had our first hearing, or the lawsuit hadn't been filed, and that is true. But I have to point out that 17 hearings on the Endangered Species Act have taken place, while there are more than 200 lawsuits pending with documents being freely brought to the congressional committees and to the public. Now, I would like to ask Mr. Gibbons if he has an opening statement.

STATEMENT OF HON. JIM GIBBONS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEVADA

Mr. GIBBONS. Thank you very much, Madam Chair, and I would like to thank the gentlelady from Wyoming for her leadership on this Committee, her willingness to undertake a discussion, I think, which clearly demonstrates her understanding of the importance of this issue. These are important times. They are important times for the people of the United States, and they are important times especially for the people of the district that I represent in Nevada. And it has come to my attention, and it is my belief that the final rule on BLM hardrock bonding requirements is detrimental and unneeded.

I would like to take a moment to dissect the issue before us today with information provided to me by the Nevada State legislature. The Bureau of Land Management proposed on July 11th,

1991, to amend its policies governing bonding requirements for reclamation for mining operations on public land as set forth in the regulations involving surface management in Subpart 3, 3809, Supp., Code of Federal Regulations. However, the BLM recently adopted those proposed regulations with the publication of a final rule on February 28th, 1997.

Approximately 5½ years later, the newly amended regulation took effect on March 31st, 1997, and continued new policies that were not a part of the policies proposed on July 11th, 1991, including requirements for certification of reclamation cost estimates by a third party professional engineer. It is also my understanding that the general public was not apprised of the substance of the final version of the regulation and the significant issues involved, and therefore had no opportunity to comment on the new policies included in the final rule, therefore violating the Administrative Procedures Act.

It becomes very relevant to me and to the people of Nevada that this final rule has a negative impact on large and small miners, their suppliers, contractors, as well as the economy. With no opportunity for comment and with no increase in Federal funding, the final rule is increasing the workload for agencies in the State of Nevada that administer programs in the areas of environmental protection and minerals. Even more distressing and just as important is the circumvention of the Tenth Amendment of the United States Constitution.

The final rule to place the BLM in the place of enforcing criteria for water quality, a task that rightfully belongs to the State Department of Conservation and Natural Resources, pursuant to the Nevada revised statutes as well as the Clean Water Act. Further, the BLM has provided no documentation or evidence of problems regarding the failure of miners to carry out required reclamation efforts in the State of Nevada and under existing State bonding requirements, and I believe that the BLM has acknowledged that Nevada is a leader in reclamation.

Likewise, immediately after our last hearing on this issue, I was informed that all State bonding requirements within the last 2 to 5 years have properly ensured that miners carried out their reclamation requirements. If this is true, then why would we need this new rule?

I am looking forward to the opportunity of discovering whether the BLM has successfully met all obligations that are required of a Federal agency before publishing a final rule. I will begin to ask the Secretary to withdraw the final rule for bonding requirements for reclamation of hardrock mining operation on public lands and open up the process to its established and intended requirements. And thank you, Madam Chairman.

Mrs. CUBIN. Thank you. Mr. John, do you have an opening statement?

STATEMENT OF HON. CHRISTOPHER JOHN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. JOHN. Just a brief opening statement. I, too, with respect to Mr. Gibbons want to look at this proposed rule and look at the merits, whether they are good or bad. But I think what we are

looking at here is the substance of the proposed rule, whether it is good or bad, should be voted on on its merits and to, I believe, compromise some of the situations that we are looking at as far as some of this privileged information, and giving away our hand, we need to look very closely at that. And I am looking at this information requested by the Department to stay out of the public, which could really compromise our situation. So I am looking carefully at that.

Mrs. CUBIN. Thank you, Mr. John. My reaction to that is the assertion that they are making that somehow their position will be compromised by releasing the documents to us doesn't stand up to me, and that is because when they go to court, the judge will determine what documents will or will not be entered into the case. So what we have here in the public record or what we use may or may not be allowed in the court case, depending on how the judge would like it.

Mr. ROMERO-BARCELÓ. Madam Chair, our concern is that the judge's decision can be based on whether the document has been made public or not, and we don't know how the judge is going to base his decision. As an attorney, I know in the case of privileged documents, in privileged matters, sometimes not having raised an objection in due time, you are deemed to waive it, and others not. So we don't know how the judge is going to rule. The Department is trying to save its position in terms that they consider these documents privileged, that if they are going to be released, that at least it would be because the Committee has a right to do it, but it has a right to do it by a vote.

I don't think it should be released without bringing it up to a vote, so that those members of the Committee that want to vote against it can vote against it, and at least that would allow the Department to defend itself and raise its position in the court with more substantial documents. I think that is what we are trying to establish here.

Mrs. CUBIN. I think at this time I will not ask to put the documents in the record, but I reserve the right to do that later on in the hearing. I am astounded by the fact that the government is taking the Fifth here. It is just amazing to me that we have a government that cannot share with its people what it has done and what it is doing.

Mr. Thornberry, do you have an opening statement?

Dr. Green?

**STATEMENT OF HON. DONNA M. CHRISTIAN-GREEN, A
REPRESENTATIVE IN CONGRESS FROM THE VIRGIN ISLANDS**

Ms. CHRISTIAN-GREEN. Thank you, Madam Chair, for giving me the opportunity to make a few brief opening remarks. We are here today to once again discuss the concerns raised by the Bureau of Land Management's final rulemaking on hardrock mining on public lands, and in particular, the requirement that all mining operators be required to obtain bonds or financial guarantees.

As you know, Madam Chair, the Subcommittee held a hearing on this issue on March 20th of this year. At that time, the Department of Interior's Solicitor, John Leshy, testified that the proposed rule was necessary for BLM to meet its legal obligation to prevent un-

necessary or undue damage to public land. Without the proposed changes to the rule, BLM would have to use taxpayer dollars to reclaim public lands in cases where mining claims and other operators failed to live up to their legal obligations.

So I thank you, Madam Chair, for yielding me this time and I look forward to working with you and the Subcommittee. I feel this rule is unjust and we do appreciate the gentlelady's decision not to make public those documents at this time because I agree with my Democratic colleagues, that they are sensitive documents, they are privileged, and they are now involved in ongoing litigation.

Mrs. CUBIN. Mr. Brady.

Mr. BRADY. No statement.

Mrs. CUBIN. Mr. Cannon, did you have an opening statement?

Mr. CANNON. No, thank you.

Mrs. CUBIN. Having concluded that portion of the hearing, I now would like to introduce our witnesses and thank them very much for being here and again apologize for the fact that we had to cancel that hearing last week.

Mr. John Leshy, the Solicitor of the U.S. Department of Interior is with us here today; Mr. David Alberswerth, a Special Assistant to the Assistant Secretary for Land Management, and Mr. Jere Glover, Chief Counsel, the Office of Advocacy of the Office of Small Business Administration.

As you three know, I routinely swear in witnesses who testify in front of this Committee, so before we start, I would like to do that. If you would stand and raise your right hand.

[Witnesses sworn.]

Mrs. CUBIN. So, I think we will start the testimony with Mr. Leshy.

STATEMENT OF JOHN LESHY, SOLICITOR, U.S. DEPARTMENT OF THE INTERIOR ACCOMPANIED BY DAVID ALBERSWERTH, SPECIAL ASSISTANT TO THE ASSISTANT SECRETARY FOR LAND AND MINERALS MANAGEMENT, U.S. DEPARTMENT OF THE INTERIOR

Mr. LESHY. Thank you very much, Madam Chair and members of the Committee. I am here today once again to discuss the final rule on bonding for hardrock mining operations. With me is David Alberswerth, Special Assistant to the Assistant Secretary for Land and Minerals Management.

I will be very brief and then we can go to questions. I just want to update the Subcommittee on various matters concerning the hardrock bonding rule which have occurred since the last hearing on March 20th. Before I do that, let me say there were several comments made in the opening statement which seemed to indicate that there had been no public comment or public participation in the development of this rule, and I just want to make sure that everyone understands that this rule, and as I went in some detail in my testimony on March 20th, the evolution of this rule goes back to the Reagan Administration.

There were scoping sessions and a long public comment period and many comments received on this rule. Those comments, as typical, were analyzed and taken into account in the development of the final rule, so this was from our standpoint a perfectly normal

rulemaking process governed by the Administrative Procedure Act where there was a substantial period for public comment, that public comment was meaningful and taken into account in the final rule.

The fact that there was a period of delay between the publication of the proposed rule and the publication of the final rule, again, in our view was perfectly normal, explained by the fact that at least during a part of that time Congress was actively reforming the mining law of 1872, and we felt it would be confusing to come out with a final rule in the midst of that debate.

The rule was published in final form on March 30th and went into effect April 30th, and we have asked the BLM to keep an eye on the implementation of that rule. It has now been in effect for nearly 3 months. The BLM is reporting from various field offices that the rule is going into effect normally without any reports of major difficulty. Obviously, there is some change involved with the upgrading of the bonding standards, although I should know in a number of Western States there is no change at all because the new final bonding rule is no more stringent than existing State law, which already governed. So in a number of places, the implementation of this rule simply means no change at all.

In at least one State, a State legislature has amended its State law to make it consistent with the bonding rule, so again in that State there is really no difference in between before the rule and after rule went into effect. That amendment, I think in Idaho, requires full cost bonding for hardrock mining operations just as this rule does.

BLM is continuing its efforts to advance the mining industry's understanding about the rule and what is needed to comply with it. It is using, among other things, the Internet for this purpose. In Alaska, which is a State that has an active hardrock mining industry, the BLM has been working closely with the State of Alaska to develop a Memorandum of Understanding between the State and Federal Governments.

Hopefully, that is not final yet, but hopefully it will be put in final and it will allow the miners in that State to use the bond pool that is available under State law to satisfy the requirements of the rule. So from our standpoint, as with any new rule, obviously there is sort of a startup, implementation period.

We are in that period now without major, major difficulty. Some of the features of the rule, as I explained last time, are actually implemented in a phased manner. They do not all apply to small miners immediately. There is a startup period, and so it is proceeding basically pretty normally. Nothing unexpected in the implementation of this rule.

The second thing I would mention by way of update is the lawsuit that was filed on May 12th by the Northwest Mining Association represented by the Mountain States Legal Foundation against the rule alleging that the rule, the Department in promulgating the rule failed to comply with the Administrative Procedure Act and the regulatory flexibility ability and that lawsuit is proceeding. We are defending the lawsuit because we believe we have fully complied with the law, and eventually the court will answer the question of whether we have or have not.

The last thing I would say is while there has been concern here expressed about the process the Department used in adopting the rule and not the substance of the rule, it is very clear that were the Department to withdraw this rule as some have requested, the effect would be that the taxpayer would be at risk of paying, rather than the miner paying when the miner walks away and leaves a mess on the public lands.

So it is important, in our view, because we think we have fully complied with the law and because we think as the Bush and Reagan Administrations thought that upgrading of the bonding requirements are important in order to protect the taxpayer's interest in not being saddled with unnecessary costs and the industry should bear this cost, that this rule remain in effect. That concludes my prepared testimony. I, of course, will be happy to answer questions. Thank you.

[The statement of Mr. Leshy can be found at the end of the hearing.]

Mrs. CUBIN. Thank you very much, Mr. Leshy. Mr. Alberswerth.

Mr. ALBERSWERTH. I have no statement, Madam Chair.

Mrs. CUBIN. Oh, Okay. Thank you. Mr. Glover.

**STATEMENT OF JERE GLOVER, CHIEF COUNSEL, OFFICE OF
ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION**

Mr. GLOVER. Thank you, Madam Chair. Good afternoon Madam Chair and members of the Subcommittee. I am Jere Glover, U.S. Small Business Administration. I appear to you today to discuss the regulatory flexibility compliance. With me today are Jennifer Smith and Shawne Carter McGibbon, two of my staff attorneys who have been advising me on this matter. As always, I would like to note the views of the Office of Chief Counsel are the views of the Chief Counsel and may not necessarily represent those of the Administrator of SBA or the administration.

The Regulatory Flexibility Act establishes that agencies shall endeavor to fit regulatory and informational requirements to the scale of business organizations in the governmental jurisdiction subject to their regulation. Under the law, Federal agencies are required to determine whether the regulation has a significant impact on a substantial number of small businesses. Agencies also are required to consider flexible regulatory alternatives for small entities and ensure that the proposals are given serious consideration.

The Office of Advocacy reviews approximately 2,500 rules and proposed regulations each year. Of those, we file comments on 97, which is over a 100 percent increase over the previous historical average for the office. We are in a period of transition for the Regulatory Flexibility Act.

As the Chairwoman mentioned, when the Act was first enacted 16, 17 years ago, there was no judicial review. As a result, many agencies did not fully comply with the Regulatory Flexibility Act.

Last year, the Congress did pass remediation providing for judicial review of the Regulatory Flexibility Act. As a general rule, compliance by the Federal agencies had been spotty. Some agencies have been very good, some have not been very good, and often agencies that are very good are very bad on a specific regulation in a specific situation.

We are in a transition period where many regulations had already been proposed and are now being finalized after the judicial review provisions have been provided. In those situations, I am in a somewhat embarrassing situation. For example, my office did not comment when this legislation was originally proposed on the certification in 1991. Quite frankly, many agencies did not—they considered certification an easy way out of compliance with the Regulatory Flexibility Act and agencies did that without depending on a specific agency. That was a fairly common occurrence.

Since judicial review has come into place, this is obviously much more important. In terms of transition period, we are seeing things develop. For example, legislative history does not make it clear what is a substantial number of small businesses or what is a significant economic impact. Those are things that we are working with the agencies.

In the case of the Department of Interior, like many other agencies, their compliance with the Regulatory Flexibility Act has been spotty. We have been working with them very closely. We have had over 600 government officials attend training seminars put on by our office trying to educate the government officials on the requirements of the Regulatory Flexibility Act and we are working very hard.

We have had two such sessions with the Department of Interior personnel in just the last few months. So I think that the long-term view is that we will see far better compliance by all agencies of the Regulatory Flexibility Act, but certainly compliance is spotty from time to time. I would be happy to answer any questions you might have.

[The statement of Mr. Glover can be found at the end of the hearing.]

Mrs. CUBIN. Thank you, Mr. Glover. I think we will go ahead and start with the questioning and we will limit it to 5 minutes and then just do further rounds, I think. I do appreciate your coming to testify today. The Small Business Administration is like a breath of fresh air to us, and all of the jumps that you have to go through we so appreciate.

Do I understand it correctly that the Advocacy Office of the SBA is rather autonomous and your testimony is not subject to editing by the Office of Management and Budget?

Mr. GLOVER. That is true. It was not submitted to anybody before we submitted it to you.

Mrs. CUBIN. And did you send them the testimony anyway?

Mr. GLOVER. After we sent it to you, we did send it to them. We routinely do that.

Mrs. CUBIN. And did OMB return any comments to you about—

Mr. GLOVER. We did not send it to OMB at all. As a courtesy, we send it to the Federal agency that is going to be testifying with us and, quite frankly, we asked for their testimony.

Mrs. CUBIN. And you did not receive any comments back.

Mr. GLOVER. We did not discuss the testimony at all.

Mrs. CUBIN. Okay. I will just go ahead. Mr. Cannon, I know, has an interest in this area and I want him to be able to get his information together, so I will ask a couple more. Do you believe the

agency met the requirements in the Regulatory Flexibility Act in this rulemaking that is in question.

Mr. GLOVER. I am not sure. We would certainly like to have some clear factual basis for their certifications. Certainly, they did some things to accommodate the smaller businesses in their regulation, but the factual basis upon which a certification is made is not clear in the certification when we look at the information. We would certainly have liked to have had a clear statement as to what the certification was based on. We think that would have been better for us to make that determination.

Mrs. CUBIN. Thank you. I will yield the balance of my time to Mr. Cannon—oh, okay. I will go ahead and finish with this. Even if the Interior had made contact with the SBA prior to proposing the draft rule in 1991, how could it have made the argument, then, that this is a, quote, “Congress has spoken on the definition of small miners,” as Mr. Leshy replied to me in his writing this April, when the Act he cites didn’t pass until 1993?

Mr. GLOVER. I am not sure on that. One of the interesting questions in this whole definition area is that the Small Business Act was amended several years ago, and it was provided that agencies should have a consistent definition of small business. We found every agency had a different definition that was causing confusion for the regulators. It was certainly causing confusion for small businesspeople, and so Congress decided that the Small Business Administration would be the central definition unless there was an agreement to change. Prior to the enactment of that legislation, there was a wide variety of definitions that were out there and it varied from situation to situation.

Mrs. CUBIN. More importantly, is it not improper for a Federal agency to attempt to retrofit compliance with Regulatory Flexibility by begging forgiveness for its inattention to this detail?

Mr. GLOVER. I am not sure of that exact characterization, but certainly we try to work with agencies whenever we are asked to try to bring them in. Our job, quite honestly, we have a relatively small staff and the government to look at; we have to try to encourage compliance by the agencies. So we do an awful lot of work with the agencies to encourage them to comply.

Mrs. CUBIN. With respect to the economic impact analysis by the BLM, irrespective of its definition of a small business entity, do you or your staff have an opinion on the adequacy of that, the analysis?

Mr. GLOVER. The analysis is certainly better than some we have seen and not as good as others. The Department of Interior hasn’t done as good a job as perhaps the Environment Protection Agency has in doing those analysis. For the Department of Interior, this is one of the better ones. We still didn’t see the kind of industry analysis we are expecting in the future, and we have advised them that we would like to see more factual analysis.

We are collecting better information and trying to train the economists in the various agencies so they can do a better analysis across the board. We are trying to look at a more factual analysis of what they are doing, and we are for the first time having good factual information from the Census Department so we can share that with agencies. I wish I could tell you we were doing a better

job in the past than we have done, but we are doing the best we can.

Mrs. CUBIN. My time has expired and we do have a vote on the floor. It is on the Solomon amendment to the rule, so I think we will recess long enough to go vote and come back. It is on the DOD bill. So we will be back as quick as we can get here. And thank you. I hope you don't mind waiting.

[Recess.]

Mrs. CUBIN. We will call the hearing to order again. Please, I am sorry it took me so long to get back. Thank you for your patience. Mr. Glover, isn't it true BLM failed to comply with the Regulatory Flexibility Act requirement that it consult with the SBA prior to finalizing the rule?

Mr. GLOVER. They, in fact, did not consult with us prior to finalizing the rule, that is correct.

Mrs. CUBIN. Does the RFA require such a consultation before the rule is finalized?

Mr. GLOVER. It does not unless they vary and change some things. Many agencies don't contact us at all and finalize their regulation. If they are doing something different, they should consult with us, and I think here we were looking at other types of small business, looking at the impact and analyzing the impact on small business. In those situations, they probably should consult, and many agencies do consult with us. So in this case, they probably should and the agency cannot.

Mrs. CUBIN. Okay. I need to back up so I understand your answer. The agency did not consult.

Mr. GLOVER. That is correct.

Mrs. CUBIN. And in your opinion, were their differences that required them to consult?

Mr. GLOVER. I think that if this agency or any other agency is going to do an analysis that deviates from the form, traditional definition of small business, then they should consult with us about that.

Mrs. CUBIN. And in this case, the definition of small business is not the same that the Interior Department established, it is not the same that the SBA, not the same definition; is that correct?

Mr. GLOVER. This is one of those really unique gray areas of the law. The law has two different standards. One is in the regulatory analysis, if they are going to deviate in their analysis from the small business definition, they consult with us in the analysis.

In the final rule stage, if they are going to change the rule itself and use a different definition, then they have to consult with the administrator of SBA. In this case, it is a hybrid in between. They didn't change the rule definition of small business, they changed the way that it was applied. So I can't tell you with total certitude they should have come to us. I think it would have certainly been better policy had they done that and we certainly counseled them to make sure they do this in the future, but this is a gray area and I can't tell you with 100 degree certainty that legally they should have definitely come to us. I think I would have preferred it and we would all be—we would have saved ourselves a lot of time had they done that. We would have been able to point them in a better direction.

Mrs. CUBIN. Maybe we wouldn't be here. Have you or anybody at the SBA informed anyone in the Interior Department of their failure to comply with the RFA?

Mr. GLOVER. Yes, we did. Some of my staff received a phone call from them asking for some advice on the definitions. We are looking at it in an abstract manner of how small businesses were defined, and on that there were some telephone conversations and some memos exchanged where we certainly pointed out that if they were using a different definition of small business, they were missing the point of the law.

Mrs. CUBIN. And there was written communications, I believe.

Mr. GLOVER. Yes, there were telephone calls and written documents.

Mrs. CUBIN. I would like to make as part of the record the communications from the SBA informing the BLM that they had failed to comply with the consultation requirement. And since the Interior cannot request privilege, I think that it should be in order. I ask unanimous consent to put it in the record. Without objection.

[The information referred to can be found at the end of the hearing.]

Mrs. CUBIN. I don't have any further questions right at this point in time.

Mr. Romero-Barceló?

Mr. ROMERO-BARCELÓ. Thank you, Madam Chair. I would just like to ask Mr. Leshy, in his letter to the counsel of the Committee on Resources of the House, he talks about the documents requested, in part those covered by privilege, the attorney work product or deliberative process.

Can you tell us more about your concerns on the disclosure of these documents?

Mr. LESHY. Yes, I am happy to. The concern here is not about interfering in any way with Congress' oversight responsibility. We have made available numerous documents upon the request of this Committee. We have made available other documents for inspection in the Department of the Interior. Everything that we have that is covered by the request is available to this Committee to look at.

Our principal concern in this area is the disclosure of some of the draft documents that are covered by a litigation privilege that we can assert in Federal court in the litigation that involves this very rule, and the concern is that if this Committee discloses those documents which are not disclosable to the court under the standard rules of evidence, the disclosure of those documents by this Committee simply waives our privilege, which means we are deprived of a defense and a privilege in the judicial proceedings that we could otherwise assert. And it is of particular concern in this particular context because, you know, we have an inquiry on this rule, and the inquiry of this Committee is two questions concerning that rule; that is, did we comply with the Administrative Procedure Act and did we comply with the Regulatory Flexibility Act. The litigation by one part of the mining industry raises exactly those two questions. They were filed virtually simultaneously with this Committee's inquiry.

The concern is simply that this Committee's inquiry, not in terms of our supplying the documents to this Committee, but in terms of this Committee's putting those documents in the public record would constitute, we fear, a waiver of a privilege we would have in court. We have encountered—I say we in the general sense of the executive branch—encountered this situation in all sorts of different contexts over a period of years.

It is an institutional relationship question between the executive branch and the legislative branch, and in the vast majority of situations we work out a protocol or a way of handling these documents to ensure that the dialog that is taking place between the legislative and executive branch do not strip the executive branch of a defense when they go to court.

In this situation, we haven't worked out that protocol. Our concerns are particularly heightened because in another subcommittee of this Committee recently we made documents available to the Committee, noting that the judicial privilege attached to some of them and requesting the Committee to please talk with us before they put those documents in the public record so we could make the subcommittee aware of our concerns, and without any consultation whatsoever those documents were placed in the public record, in a situation similar to this one in the sense that we had an active lawsuit challenging the very decision that the Committee was inquiring into.

So this concern is not at all about withholding information from the Committee. I can't say that too often. We have made available, and we will make available any documents within the scope of your request that we have. Our concern is what you do with those documents after you get them and your handling of them that could jeopardize a defense that the United States has in the litigation that is ongoing. So that is our concern.

Mr. ROMERO-BARCELÓ. Thank you. I am running out of time.

Mrs. CUBIN. Mr. Gibbons.

Mr. GIBBONS. Thank you, Madam Chairwoman. I appreciate the opportunity to participate here today. As I stated earlier, I welcome the gentlemen to our hearing.

Mr. Leshy, in your testimony that you presented to this Committee, the written testimony, page 1, paragraph 2, specifically, line 2, you state that the BLM staff has recently informally surveyed implementation efforts in nearly all of the Western States.

In a number of States, you don't say how many, the new BLM regulations require no more than existing State law requires. Hence, there is no difficulty in implementation. The conclusion here is that there were no reports of difficulty. Is that what you intended to communicate to this Committee?

Mr. LESHY. I believe my testimony as written says major difficulty, and orally here I said with any rule there are certain transition, startup events that happen. But the informal surveys we did, we basically just had the BLM call the State director's offices in each of these States.

Mr. GIBBONS. What is your definition of a major difficulty?

Mr. LESHY. Some sort of crisis, people thrown out of work, major parts of the industry shutting down, pickets at the State offices. Things of that nature.

Mr. GIBBONS. Would you include the cost to the State for compliance with this rule?

Mr. LESHY. The cost to the industry you mean?

Mr. GIBBONS. Yes, for the State in complying with your rule itself.

Mr. LESHY. Well, the rule doesn't directly require the State to do anything. All it says is there is a Federal floor below, that if the State bonding laws do not come up to the Federal floor, then the Federal bonding rule applies on hardrock mining on Federal land.

If the State bonding requirements that apply to all areas of the State meet or exceed that Federal rule, then there is no change that takes place as a result of the Federal rule going into effect. That is what the testimony means when it says——

Mr. GIBBONS. Mr. Leshy, when I go home to the State of Nevada, I talk to my constituents and they talk to people employed by your Department who reflect the attitude they themselves are very distressed, very upset and are opposed to this rule. These are people who work for the BLM. Have you done an economic impact study on damages that occur in the State of Nevada, has your agency?

Mr. LESHY. You mean as a result of hardrock mining operations?

Mr. GIBBONS. Of this bonding rule.

Mr. LESHY. We were certainly done, and I am happy to supply to the Committee the State director's office has produced a rather complete survey of mining reclamation problems on public lands that really show, in our view, the need for this final rule.

Mr. GIBBONS. Well, just give me a dollar amount for Nevada, what that report states.

Mr. LESHY. It actually is specific to Nevada. The report is, with a cover letter that I will supply copies to the Committee, May 1st, 1997, from the State Director of BLM in Nevada to Assembly Woman Marcia de Braga, Nevada State legislature, and it is a three-page letter which basically——

Mr. GIBBONS. Is there a dollar amount in it, Mr. Leshy?

Mr. LESHY. Well, there is actually, what it does is have an appendix of several pages of, I think, 154 different operations in Nevada where miners have walked away and left the Federal taxpayers with the——

Mr. GIBBONS. Within the last 2 years.

Mr. LESHY. Offhand I can't tell you over what period of time.

Mr. GIBBONS. You are telling this Committee, then, that there has been a failure of the bonding requirements within the last 2 years, if that is what you are saying.

Mr. LESHY. Well, let me read the State director's letter. Since 1981, BLM has processed about 10,000 notices for hardrock mining operations. Currently, about 2,400 of those are active in Nevada. There are about 90 mining sites or exploration sites where reclamation bond, had it been required, would have either probably prevented a new modern day problem or would have been used to reclaim an environmental problem. There are an estimated 225,000 to 310,000 abandoned mine sites in Nevada from over the past 125 years where there are cleanup problems.

Mr. GIBBONS. The statement does require a bonding requirement in this case, doesn't it?

Mr. LESHY. I believe that the State does not. It has the same or had the same small miner exemption that the Federal rule had, and there was exactly this problem that we were trying to upgrade—

Mr. GIBBONS. Well, I understand that completely. I understand that Nevada does have a bonding requirement and has had one.

Mr. LESHY. And a small miner exemption, I believe.

Mr. GIBBONS. Right. But the law is if there is a failure of bonding requirements under the State statutes, it would have been reported. Some of these issues that you are talking about occurred either prior to the State bonding requirements, rather than afterwards. Well, let me move on. Obviously, there is a question here, and Madam Chairman, if you would indulge me one small—

Mrs. CUBIN. Without objection, I will give the gentleman 5 more minutes.

Mr. LESHY. I am happy to supply you the detail on the bonding requirement, the Nevada law.

Mr. GIBBONS. And each of the failures that occurred with the bonding requirement since Nevada's law has taken place.

Mr. LESHY. So I understand, which Nevada law?

Mr. GIBBONS. Bonding requirements.

Mr. LESHY. Is there a recent one? How far back should I look?

Mr. GIBBONS. Five years.

Mr. ALBERSWERTH, you are awfully quiet.

Mr. ALBERSWERTH. I haven't been asked a question.

Mr. GIBBONS. What role did you play in it?

Mr. ALBERSWERTH. I reviewed the effects of the rule prior to its finalization.

Mr. GIBBONS. Did you ever submit memorandum or writings?

Mr. ALBERSWERTH. Yes.

Mr. GIBBONS. Is one of those dated June 19th?

Mr. ALBERSWERTH. I will take your word for it.

Mr. GIBBONS. Well, it may or may not be, but let me just ask you this question, then. In 1995, there was a document that stated the estimated economic impact of this rule on Nevada was reduced by \$80 million, and the memorandum states that the 80 million was, "willed away as an act of management direction." Could you tell us what that or what action does this statement refer to?

Mr. ALBERSWERTH. Is this an e-mail message from a person in the BLM to some other people—

Mr. GIBBONS. Well, regardless of what it is, what would that refer to? Management direction is willed away.

Mr. ALBERSWERTH. I believe what it is referring to is the fact that under the final rule, an interpretation of the final language was made that the BLM would recognize the State of Nevada's State program.

Mr. GIBBONS. Was this a management attempt to influence the outcome of the economic analysis in order to avoid the more stringent procedural requirements for rules with an economic impact exceeding \$100 million.

Mr. ALBERSWERTH. No, it was an attempt to make a determination of whether or not Nevada's existing bonding program would comport with the new regulatory requirements so that we could recognize Nevada's program.

Mr. GIBBONS. Mr. Leshy, what is your hardrock strategy referred to, if you could explain to this Committee, that was stated in your memorandum from Anita Cheek to Monica Burke dated June 7th, 1996.

Mr. LESHY. This is not, I take it, a memo that I wrote.

Mr. GIBBONS. No, it is from Anita Cheek to Monica Burke, dated June 7th, but it refers to your hardrock mining strategy.

Mr. ROMERO-BARCELÓ. May I make a parliamentary inquiry? Is this one of the confidential memoranda?

Mrs. CUBIN. It is not on the list. But we will stand at ease for a second and determine whether or not it is on the list. It is on the list.

Mr. ROMERO-BARCELÓ. It is on the list. You are referring to the text of the message.

Mr. GIBBONS. The message just says hardrock strategy of Mr. Leshy. I am asking—it does not describe that, so I am not disclosing anything other than the fact that it references a strategy of Mr. Leshy. I want to know what Mr. Leshy's strategy is.

Mr. LESHY. I have no idea what Anita Cheek was referring to, if she wrote that memo. I am not sure I have ever seen that memo, so I am unable to respond.

Mr. GIBBONS. On the last paragraph of page 1 and the first paragraph of page 2, you explain that the Mountain States Legal Foundation on behalf of the Northwest Mining Association filed suit against the Department because they failed to comply, they, meaning you, comply with the Administrative Procedures Act and the Regulatory Flexibility Act.

You go on in the next paragraph to refute this claim, but only state that FLPMA directs the Secretary to prevent unnecessary or over or undue degradation of the public lands. Reading on, I do not see where you refute these claims, and I would like you to tell the Committee if you failed to meet the Administrative Procedure Act or the Regulatory Flex Act.

Mr. LESHY. I would be happy to. The testimony actually, this describes the suit as alleging that we have failed to comply. It doesn't say that we have failed to comply. It simply, the complaint in this case alleges that we have failed to comply. Taking them one at a time, under the Administrative Procedure Act, as I understand the Mining Association's complaint here, it is that we should have allowed more public comment on the final rule or at least repropose the rule as drafted rather than going to the final promulgation of the rule.

The issue basically is whether or not there was adequate opportunity for public comment on our general proposal to upgrade hardrock mining operations with the intent to make sure the taxpayers were not saddled with the cost of unreclaimed operations when members of the industry walked away from mining operations. And the 1991 proposal makes it very clear that that was the proposal.

As with all rulemaking, the final rule differed somewhat from the proposed rule and it differed from the proposed rule in substantial part because we responded to public comments we received on the proposed rule. Now, there are some people who believe that if you change a comma between a proposed and a final rule then you

should repropose the rule and seek comment on changing that comma. The law is quite clear on this subject and we have looked very carefully at the law before we promulgate it.

Mrs. CUBIN. The gentleman's time has expired.

Mr. GIBBONS. Thank you, and I was going to ask whether the Chairwoman plans to have additional rounds?

Mrs. CUBIN. Yes, and I ask unanimous consent to extend the questioning period to 10 minutes, instead of 5, to make it a little easier.

Mrs. CUBIN. Mr. Romero-Barceló, do you have any further questions? It is your turn.

Mr. ROMERO-BARCELÓ. No further questions at this time.

Mrs. CUBIN. Thank you. Then it is my turn.

Mr. LESHY, you just stated that some people think that adding a comma would be enough to require a new comment period. I want to follow that line of questioning a little bit. Could you identify for me the portion of the proposed bonding rule 56 Fed. Reg. 31 602 July 11th, 1991, where the BLM provided notice to the public that an operator would have to obtain a third party professional engineer to certify reclamation cost estimates?

Mr. LESHY. I don't believe that part of the proposal was in the draft rule. It was a proposal that was made, as I understand it, by the BLM professional staff in the development of the final rule in response to concerns that it would be difficult for both the industry and the regulatory agency to have a good idea of what the size of the bond would be without a—

Mrs. CUBIN. Do you consider that to be more than just adding a comma?

Mr. LESHY. Well, it is certainly within the scope of the rule. The whole idea of the rule is to upgrade bonding standards and the whole thrust of the rule is to require bonds in the amount of the estimated cost of reclamation.

Mrs. CUBIN. Mr. Leshy, I would suggest to you that there are things about requiring a professional engineer's opinion about the cost of reclamation that public comment could have revealed to the policymakers. Number 1, there are very, very few professional engineers who are willing to put their name on the line as to how much reclamation will actually cost. So it isn't possible in many cases to get what this rule requests.

Also, I am aware that in some States there isn't a definition, not a definition, there—professional engineer certificates or the certification is very different. And I think that public comment certainly would have brought some of the problems to be obvious if it had been allowed, which it wasn't.

Could you identify the portion of the proposed bonding rule for me which provided the public with notice that the financial guarantees for notice level operators would be minimum amounts as opposed to the maximum amounts in the previous rule?

Mr. LESHY. If I could go back to the professional engineer issue for just a second, the basic purpose of the professional engineer requirement was to get an accurate, the most accurate possible estimates of the cost of reclamation. So you could set the size of the bond. The basic purpose of the rule was to require the bond be in an amount sufficient, not in excess—

Mrs. CUBIN. Mr. Leshy, you continue to defend what is in the rule, and I made it very clear at the beginning of the hearing what is in the rule is not the problem here. The problem here is that the public has not had the opportunity that it is guaranteed under law to have to give input into this rule. And if the rule was changed—the first rule was proposed in 1991 and then it came out in 1997 as a final rule with no public input in between. And there are significant changes between the first rule and this final rule.

So that is the discussion I want to have with you, not the good points or the bad points of this rule or how you derived at that. In my opinion, that is not the issue. Could you please identify the portion of the proposed bonding rule which provided the public with notice that the financial guarantees for plan level operators would be a minimum amount as opposed to maximum amounts?

Mr. LESHY. Make sure I understand, you asked me before, I may be one question behind. The earlier—

Mrs. CUBIN. One was for notice, the other was for plan level.

Mr. LESHY. Right. The proposed rule dealt with bonding requirements for notice level operations. The final rule had a somewhat different approach to that and the different approach was, frankly, specifically in response to public comments, including comments of States. For example, the State of New Mexico wrote a formal comment on the draft rule in which they questioned the approach of the draft rule on notice level bonding and said it, frankly, ought to be strengthened, ought to be made more clear. So in part, we were responding to the comments of the State of New Mexico as well as a number of other commenters in strengthening and clarifying that part. That is exactly the way the rulemaking process is supposed to work. You put out a proposal, you get comments on it, you take the comments into account—

Mrs. CUBIN. Was one of those, did one of those comments come from Mr. Alberswerth?

Mr. LESHY. The comment I am thinking of came from a signed letter from the State of New Mexico. I would be happy to supply it.

Mrs. CUBIN. Would you say that Mr. Alberswerth was one of those or was not one of those?

Mr. LESHY. I am not sure. I mean, Mr. Alberswerth may have signed a letter on behalf of the National Wildlife Foundation. I don't recall.

Mrs. CUBIN. I want to go back to the difference between the original rule and the final rule. Would you please identify the portion of the proposed bonding rule that provided notice to the public that BLM would require operators to provide a guarantee sufficient to recover 100 percent of estimated reclamation costs, and please remember, I think that it is probably a good thing for 100 percent of the reclamation costs to be bonded. That is not the point. The point is that I don't think it was in the original rule and now it is.

Mr. LESHY. It is interesting to trace the history of this. The law, of course, that we are acting under says that the BLM and the Secretary are mandated to prevent unnecessary and undue degradation of the public lands—

Mrs. CUBIN. What I want you to do is identify the portion of the original rule.

Mr. LESHY. Well, the original rule that went into effect in 1980 or 1981 said that bond should be set taking into account the cost of reclamation, which is——

Mrs. CUBIN. I am talking about the 1991 proposed rule.

Mr. LESHY. Right, I think it is important to put this in historical context. Under the 1980 or 1981 rules, bonds could be set at the actual amount of reclamation.

Mrs. CUBIN. So I guess what you are saying, you cannot tell me where that is in the proposed rule because it is not there.

Mr. LESHY. In 1990——

Mrs. CUBIN. That is correct?

Mr. LESHY. The Director of the Bureau of Policy Management put out a policy memorandum without seeking public comment which said that bond should be set with a \$1,000 to \$2,000 maximum under plans of operations. The proposed rule that you have been mentioning here in 1991 followed the Jamison policy by recommending or proposing a \$1,000 to \$2,000 maximum, with certain exceptions, and the final rule simply took the maximums off and said there should not be maximums because if a miner walks away, the public shouldn't have to pick up any of the cost——

Mrs. CUBIN. Actually, what you did was absolutely reverse the original position. It went from a maximum to a minimum and that is totally opposite, and to me, Mr. Leshy, that was much more significant than adding a comma, what would require you not to take further public comment. But when you totally reverse the minimum, or the maximum to minimum, certainly a reversal ought to warrant more public comment.

Mr. LESHY. I think the minimum idea came about because——

Mrs. CUBIN. I am not interested in that. I am interested in whether or not changing a maximum to a minimum would warrant more public comment, and I believe that it would.

Could you please identify the portion of the proposed bonding rule which provided notice to the public that BLM will impose civil and criminal penalties for violations of the bonding requirements?

Mr. LESHY. I believe here that the penalty provisions were essentially the same under either the proposed or the final. They were just made more clear in the final. In other words, and this may bring to mind the discussions that have taken place about the law enforcement regulations. There are actually mentality provisions in the statute and various parts of the regulation, and I believe what happened in the final regulations was that the penalties were simply made more clear.

Mrs. CUBIN. Mr. Leshy, there are no civil and criminal penalties. There is no portion of the proposed rulemaking that contain provisions for civil and criminal penalties. So to make nothing more clear makes no sense to me.

My time has expired. Mr. Gibbons, do you have any further questions.

Mr. GIBBONS. Yes, Madam Chairwoman, I appreciate that. What I would like to do is to engage Mr. Glover in a brief discussion, if I could.

Mr. Glover, could you define for this Committee the definition of a small metal mining company under your regulation, under SBA?

Mr. GLOVER. Basically, SBA is under 500 employees, is the SBA's definition for a small metal mining company.

Mr. GIBBONS. So it would be an entity employing not more than or not less than.

Mr. GLOVER. An entity with not more than 500 employees would be considered small business for purposes of the Small Business Act.

Mr. GIBBONS. Mr. Leshy, would you tell the Committee what BLM's definition of a small entity is that applies to this bonding rule?

Mr. LESHY. The BLM's analysis of the economic impact of this rule did not use a—analyze the impact of the rule on the entire industry. It did not use a specific size standard at all to cutoff definitively between small and large. That is why I believe Mr. Glover testified that the discussion that has taken place about the size standard and whether BLM violated the size standard of the SBA in this rule is sort of beside the point because BLM economic analysis actually looked at the whole industry.

I should also say in BLM's experience that the 500 employee cutoff as a small miner definition is rather amazing when you look at the productivity of very large mines that employ, including those in the State of Nevada, that employ well under 500 employees. There are few mines in the country—

Mr. GIBBONS. Let me get the answer to this question before you get off on the sidetrack that you are dragging this discussion into. What is the BLM's consideration? What does it consider a small metal mining company or a small metal mining entity to be, specifically? Is it 50, is it 10, is it 100, or is it 499?

Mr. LESHY. Well, I would note that Congress, in fact, addressed this question specifically in the Omnibus Reconciliation Act of 1993 and, in fact, defined small business was a miner that held 10 claims or less. So at least for that purpose, BLM would certainly have, as it is mandated by law to look at that, and 10 claims or less is a lot different than 500 employees or less.

Mr. GIBBONS. I was just being informed that the mining or the omnibus laws that you were talking to are for purposes of the holding of a claim, rather than discussions under this Act.

BLM considers a small entity to be an individual or limited partnership?

Mr. LESHY. The determination of effects analysis for purposes of the final rule here did—let me see, give me a moment. I think I can produce a copy—actually dealt with the industry structure at some length on pages 8 and 9 of the determination of effects, pointing out that operators and mining claimants conducting work on Federal lands generally fall into one of three categories: Major corporations, junior companies, and small proprietorships and independent prospectors.

The major corporations, obviously, are the American Barracks BHP and RTZ, although I would point out that a number of mines operated by those companies employ 500 or fewer people. Junior companies are the larger limited partnerships, venture capital-

based mining companies. They tend to be producers of gold, generally in volumes of less than 100,000 ounces per year.

Then, the third class the BLM used in its analysis is sole professorship and individual prospector. Class of operators, mostly notice level operators, measured cash-flows in small amounts, often a fashion similar to average middle-class income, et cetera. So there is about two pages of analysis of the structure of the industry in the BLM's determination of effects.

It does not use a specific employee cutoff or any other specific size standard, which is why, in our view, there was no legal obligation to consult with the Small Business Administration's Office of Advocacy because it is only when you change the size standard that you have to go consult with the SBA, and BLM was not changing the size standard. It was, in fact, not using any particular size standard in doing this analysis.

Mr. GIBBONS. We may disagree with your legal opinion on this and I am sure this is part of the court's understanding, as well. Mr. Glover, are you an attorney?

Mr. GLOVER. Yes, sir.

Mr. GIBBONS. Would it be your understanding that if there was a failure on behalf of an agency to comply with the Regulatory Flexibility Act, that that would be reason enough to withdraw a proposed rule or an enacted rule?

Mr. GLOVER. As someone charged with looking after that law, I would certainly have recommended that to agencies in the past. I will tell you historically we have not had anybody redo that. So there at least is a dispute as to whether some people do disagree with me on that issue. It is always the conservative thing to do, when you have a serious question, to consider starting over. There are other reasons people may choose not to do that.

Mr. GIBBONS. Do you have a personal opinion in this regard?

Mr. GLOVER. I think it varies based on the facts of the situation—

Mr. GIBBONS. But in this specific factual situation, do you have a personal opinion?

Mr. GLOVER. I really don't, because that is something that the agency is charged with, a separate mission. I am charged with the mission of pointing out if there is a problem with the compliance or a way to do it better, we do point that out. But the ultimate decision is with the agency itself. We don't have veto authority, we can't stop a rule.

Our authorities are sort of focused. We certainly advise agencies when they have a problem and we encourage them to come into compliance. In fact, we have encouraged agencies after the regulation was in place to go back and do the analysis and at least put it in the record so they can do that. One recent case in the Environmental Protection Agency, we went out and argued that they ought to come into compliance and they went ahead and did that, after the fact.

Mr. GIBBONS. With your tenure in your position or any other position, has any other entity sued under similar circumstances to require a regulatory action to be rescinded.

Mr. GLOVER. Yes, sir, there is another matter pending, also involving the Department of Interior as a secondary part, but basi-

cally the Transportation Department is the prime one. That is involving flying over the Grand Canyon. We have been looking at that particular situation. We know there is a lawsuit that has raised this issue.

Mr. GIBBONS. And that is the only other legal action that has been brought to rescind a regulatory action?

Mr. GLOVER. There are a couple other pending matters. I think the methyl chloride rule is there and my staff mentioned the shark rule, which is NOAA has a rule out on shark fishing, which we think there has either been or is about to be filed judicial action on that.

Mr. GIBBONS. Madam Chairwoman, I will reserve the balance of my time and turn it back to you. Thank you.

Mrs. CUBIN. Thank you. I have to tell you, I don't get this. The remedy that the lawsuit asks for is a comment period. What we are asking for is a comment period. We are spending a lot of money going through this hearing trying to urge you to do that. The government is spending a lot of money defending the lawsuit. Why? Why does a 60-day comment period seem to be such an enormous burden that you can't grant the American people, and don't tell me it is because of degradation that is going to happen in the next 60 days, because I am not buying that.

Mr. LESHY. It is not the degradation, it is the cost to the taxpayer that would result if the new improved bonding rules weren't in effect. I mean, I assume by a comment period you mean suspending—

Mrs. CUBIN. Do you know what that cost is?

Mr. LESHY. Make sure I understand your proposal. Your proposal is for a comment period during which time the rules would be suspended and not be in effect.

Mrs. CUBIN. That is correct.

Mr. LESHY. And if that is true, obviously there is a risk, we think a significant risk to the taxpayer that the taxpayer would be saddled with these costs instead of the industry.

Mrs. CUBIN. There is a bonding regulation. It is not as though there is no protection whatsoever. After all, you sat on it for 6 years.

Mr. LESHY. We agree with the Reagan and Bush Administrations—

Mrs. CUBIN. You sat on this for 6 years. What would 60 days matter?

Mr. LESHY. We agree with the Reagan and Bush Administration that these regulations are inadequate and need to be upgraded and—

Mrs. CUBIN. I think that you intend to not answer my question, so let's just save time. Could you give me, Mr. Leshy, could you provide the Committee with the name of any Federal case that supports your argument for keeping these documents that we talked about earlier out of the public record of this Committee?

Mr. LESHY. There are—I assume what you are asking is that if this Committee were to disclose the documents that we are willing to provide the Committee and put them in the public record, would that waive the privilege that we could otherwise assert in litigation?

Mrs. CUBIN. No, I am asking you to name any Federal case that supports your argument. That is what I am asking.

Mr. LESHY. Well, I want to make sure I understand what you think my argument is. Our concern is that documents——

Mrs. CUBIN. We understand your concern.

Mr. LESHY.[continuing] made available to the Committee, if they are disclosed by this Committee, would strip us of the defense against disclosure of those documents in litigation that we would otherwise have. And there are, there is at least administrative decisions that say that——

Mrs. CUBIN. No, Federal court. I am asking Federal court.

Mr. LESHY. As far as we can tell, we have not done exhaustive research on this, but when we have inquired of people who I think should know at the Justice Department and other places, they say it is quite likely that would be the result, but it couldn't come up——

Mrs. CUBIN. Yes or no, so you cannot name a Federal case for me.

Mr. LESHY. Well, other than what happened a few weeks ago with a Subcommittee of this Committee where——

Mrs. CUBIN. Please limit.

Mr. LESHY. Have said are of concern——

Mrs. CUBIN. Would you please submit later on an answer to that so we don't have to go through all this now? Would you just submit that to the Committee in writing, any Federal case that supports your argument for keeping these documents out of the public record of this Committee?

Mr. LESHY. I am sure I can give you lots of occasions that says when a document in discovery——

Mrs. CUBIN. Has a Federal judge ever ruled that a privilege that can be asserted in court can be waived by release of a document by Congress?

Mr. LESHY. As I said, I can give you lots of cases that say the disclosure of a document on which a privilege is claimed waives that privilege. That is black letter, fundamental——

Mrs. CUBIN. I would appreciate that answer in writing, as well. We will get the question to you. I have one more question of you, Mr. Leshy. I know you are glad. So am I. It is back to the differences in the original rule and the final rule. Could you identify the portion of the proposed bonding rule which provided notice that financial guarantees will not be released until water quality standards have been met?

Mr. LESHY. On the release issue, I am working from a little chart here that I think we have supplied the Committee. The original 3809 rules adopted in 1981 authorizes complete release of the bond on reclaimed portions once they were reclaimed, and that remained true through the proposed bonding rule.

The final bonding rule actually calls, and this is a change that was made in response to public comment, and industry comment, would allow phased release of bonds, which is actually of benefit to the industry. It means they got their bonding money back earlier, so there was a change where the proposed rule has changed between the proposed and the final in response to industry comments.

In terms of water quality standards, that may have been specified more in the final rule than the draft rule. I don't have that in front of me, but I am happy to supply a written answer if you would like.

Mrs. CUBIN. Thank you very much. Mr. Alberswerth, have you been involved in the decisionmaking process on the BLM's proposed bonding regulations for hardrock mining? You have been, isn't that correct.

Mr. ALBERSWERTH. Yes.

Mrs. CUBIN. Did you make specific suggestions on how the proposed regulations should be modified to require increased bonding requirements and broader coverage?

Mr. ALBERSWERTH. Yes.

Mrs. CUBIN. If so, how and when were those recommendations made?

Mr. ALBERSWERTH. I think the Committee has been supplied with a couple of memorandums that articulate some recommendations. I don't have them in front of me at the moment, but yes; that is correct.

Mrs. CUBIN. Mr. Alberswerth, could you speak a little louder?

Mr. ALBERSWERTH. Sure.

Mrs. CUBIN. When I look at the documents that are marked confidential that were provided to the Committee, you seem to have developed some fairly strong opinions on these complex issues. I wonder, how long had you been working at the Department before making those recommendations?

Mr. ALBERSWERTH. I came to the Department in approximately late June or July 1993.

Mrs. CUBIN. So by 1994—I am going to quit that line of questioning. You came in 1993, and then you were asked for—I have trouble here because I am trying to work with you on not having the things put into the record, but still be able to ask the questions so that we can know what we need to. When did you first start working on the bonding regulations at the Interior Department?

Mr. ALBERSWERTH. I am not sure of the precise date. I can tell you, though, that I was, prior to working on the bonding regulations, I was involved as a staff member at the Interior Department in developing various proposals on the 1872 mining law reform, which, of course, you are familiar with, the 103d Congress spent a lot of time on, and during that period of time, there was really no work being done on the draft bonding regulations at the Department because our assumption was that Congress would pass mining law reform and we wished not to finalize those regulations and preempt Congress on those issues.

Mrs. CUBIN. If I—from one of these documents, said that August 1993 you were working on those regulations, would you accept that as being so?

Mr. ALBERSWERTH. August 1993, I don't think so.

Mrs. CUBIN. August 6th, 1993.

Mr. ALBERSWERTH. Are you referring to a document's date there?

Mrs. CUBIN. Pardon me?

Mr. ALBERSWERTH. Let's see, I simply can't recall. But if you have evidence of that, I will accept it.

Mrs. CUBIN. What I am wondering is after such a short time on the job, it appears that you had some very strong feelings about what should go into this final, into the rule, and I just wondered if you had been at the Department long enough to know all sides of the issue and to really understand whether or not enough public comment had been made to come up with this final rule. Obviously, you think that you did know enough.

Mr. ALBERSWERTH. Yes.

Mrs. CUBIN. I can see that my time has expired. Do you have anything, Carlos?

Mr. ROMERO-BARCELÓ. No, Madam Chair, I have nothing.

Mrs. CUBIN. Mr. Gibbons, do you have some more?

Mr. GIBBONS. Yes, Madam Chairwoman, I do, and I want to go into current operations of the Bureau of Land Management under what is known in circles in the mining industry as the 3809 Task Force. Could you describe for this Committee, Mr. Lesby, what this task force, or who is on this task force, the composition of the task force?

Mr. LESHY. I am happy to supply a list of members. It is an internal task force composed primarily of BLM field people, career people in the field who work on hardrock mining regulation day-by-day. The task force came about in—

Mr. GIBBONS. Well, you have answered the question. Do you have contact with these individuals on this task force, have any conversations with them?

Mr. LESHY. Me personally, no.

Mr. GIBBONS. Anybody in your staff?

Mr. LESHY. There is a lawyer on my staff who provides some legal advice to the members of the task force as they need it. Frankly, I don't know how much they would need it and how much they have drawn upon him for advice, but it is primarily a BLM career staff field people task force.

Mr. GIBBONS. Now, what is—is the scope of this 3809 task force limited in any way?

Mr. LESHY. Well, its basic charge is to address and review and assess the adequacy of the 2809 regulations, what we call the 3809 regulations.

Mr. GIBBONS. Right. Now, this bonding rule, does it fall within the 3809 regulation?

Mr. LESHY. Well, the bonding rule and the issue of bonding is an issue that may be addressed by the task force.

Mr. GIBBONS. Does the bonding rule fall within the specific 3809 regulations?

Mr. LESHY. Well, the bonding rule is part of the 3809 regulations.

Mr. GIBBONS. Thank you.

Mr. LESHY. We took the same position that the Reagan and Bush Administrations took, which is that bonding is important enough as a separate matter to be addressed by a separate rulemaking. That decision was made in 1987, I believe, and continued through the next 10 years. So the bonding upgrade has always been a separate feature, done separately except at the time of rulemaking. That decision was made 10 years ago and we reaffirmed it.

Mr. GIBBONS. But it is not excluded from the scope of hearings in this task force, is it, yes or no?

Mr. LESHY. Well, I assume and as I have said, I am not in contact with the task force, but I assume if the task force which has conducted and will conduct a lot more field hearings, talking to States, talking to environmental groups in the stakeholder and regulatory process and if they hear a lot of outcry good or bad about the bonding rule, I am sure—

Mr. GIBBONS. Let me make this question a little more specific, and I hope I am speaking clearly, and I hope that you understand what I am asking. Because obviously you get sidetracked on some of your answers and you don't go directly to the question. Is there any restriction on this 3809 task force from considering the bonding regulations as proposed or as enacted by the BLM.

Mr. LESHY. The general charge to the 3809 task force is in memoranda, I think, we have already supplied to you, but I am happy to supply further copies of the Secretary's memorandum of January 1997 and then there was a BLM Director's memorandum of a few weeks later.

Mr. GIBBONS. Have you read that memorandum?

Mr. LESHY. I am sure I have.

Mr. GIBBONS. Then you would know if the bonding requirements have been eliminated from their consideration or are not eliminated from their consideration; isn't that true?

Mr. LESHY. Well, I believe my recollection is that bonding is not eliminated from consideration. As I said, they are holding hearings on the whole and examining the whole scope of regulation of hardrock mining, and if they hear during this process, which will take several months, a couple years probably to complete, that there is a problem with bonding rules, either that they are too stringent or not stringent enough, I am sure they will make recommendations to the Secretary about it.

Mr. ALBERSWERTH. Mr. Gibbons, could I help out with that? I have been in contact with the 3809 task force and meet with them frequently, and that group has met on a number of occasions with representatives of the mining industry, State regulators, environmental organization people, and we have told them, the 3809 task force has informed the mining industry that, in fact, if they would like to offer suggestions on how to improve the bonding regulation, we would certainly consider them in the context of the 3809 task force. So in effect, we have broadened the scope of the charge of the task force to deal with bonding, and I can't tell you if we received any input on that to date or not.

Mr. GIBBONS. Mr. Glover, one final question to you, and we appreciate your patience. I appreciate everyone's patience with us because this is an educational process to us as well as people who are interested in this process. Assuming again, and as an attorney you are well aware of making assumptions in a case and how things would flow, what would be required if there was a difference in a definitional phase, for example, small metal mining entity, between the agency proposing the rule and the SBA or your agency? What requirements, procedural steps would they have to go through if, in fact, there was a difference in the definition.

Mr. GLOVER. The way it would work is during, in the preproposal stage they would come to us and say we are thinking about a different definition. We would discuss that, we would bring in the SBA people who do size determinations and discuss that with the agency.

Mr. GIBBONS. Now, we can assume that there is a different definition.

Mr. GLOVER. That's right, assume that the agency wants to have a different definition. We can say for the purposes of your regulatory flexibility analysis, go ahead and use that definition, but we would give them some ranges and tell them to look at it in a broader area. They would propose their regulation laying out what they thought the right definition would be and ask for public comment.

The SBA concurrently would look at that compared to its size determination and the criteria we normally look at for determining what is the appropriate size. The SBA uses different definitions from the same industry for different purposes. So we would look at that and say in case of mining, the argument is well, gee, 500 employees is way too big. Maybe it should be a smaller number. We would look at that number, propose it to the public, ask for public comment during this proposed period of time. Then, when the regulation was ready to be finalized, we would look at the public comments, the SBA's office of size standards would look at the public comments that addressed the issue of size, and consistent with what we had probably told them before, unless there was an outcry that that was a wrong definition, we would probably approve that and if the final regulation was finalized, that could happen concurrently. So there is a process, if you start this early enough, where we really don't hold up the agency in going forward in doing their analysis.

What we found with most agencies is they don't think about small business until it is way down the process and one of the things I think this Committee has done today, and we all always look for the good side of things. One of the things you have done is helped not only educate the Department of Interior, but some other agencies that someone cares about small business and is looking at these issues, and it will make not only this agency, but other agencies in the future be more sensitive to small business concerns at the earliest stage.

One of the reasons we want and the Regulatory Flexibility Act provides for early involvement and early concern about small businesses is what we found is the later small business is considered in the regulatory development process, the less likely the results are going to be fair to small business. So we want that process to occur as early as we can, and I want to thank the Committee and the Chairwoman for having this hearing, because it certainly has helped focus everybody's attention on the fact that Congress cares very much about small business and the Regulatory Flex Act.

Mr. GIBBONS. So let me just summarize what you have said, very eloquently, I might add, that if there is a difference in the definition, that it requires consultation, that there must be public comment and then it must be published in the Federal Register.

Mr. GLOVER. That's right.

Mr. GIBBONS. In essence, those three things must be met.

Mr. GLOVER. That is right, that is what the law requires.

Mrs. CUBIN. The gentleman's time has expired. I don't have many more questions. Mr. Alberswerth, did you file official comments for the National Wildlife Federation on the proposed bonding regulations when they were first proposed in 1991?

Mr. ALBERSWERTH. Yes, I signed comments that the Federation submitted to the BLM on that proposal.

Mrs. CUBIN. As I went over those comments, it looked like just about everything you asked for ended up in the final rule.

Mr. ALBERSWERTH. I don't think—unfortunately perhaps, that is not the case. Some of the comments did, I think, have an impact on the final rule. There were a number of those comments that were tracked by other commentators as well. For example, on the issue that you discussed earlier regarding the bonding amounts, the State of New Mexico submitted comments criticizing the draft proposal for being inadequate.

Mrs. CUBIN. Could you speak a little louder? Thank you.

Mr. ALBERSWERTH. Sure. And interestingly enough the State of Nevada submitted comments as well questioning whether or not that proposal provided the BLM with sufficient flexibility to impose bonds that would completely cover the cost of reclamation. So there were quite a few comments on that subject from commentators on that rule.

Mrs. CUBIN. I want—I asked you this question about—I didn't write the answer down. What date was it when you left your portion at the NWF?

Mr. ALBERSWERTH. I joined the Department, I am not sure of the exact date, but it was around the end of June, beginning of July 1993.

Mrs. CUBIN. And then that is when you joined the Department. How long—were you unemployed any time or did you go straight from the NWF to the Department?

Mr. ALBERSWERTH. Pretty much straight from the NWF to the Department, yes.

Mrs. CUBIN. So that was June or July you said that you started working at the Department, and then you started working on these bonding rules in August, it looks like, from some of this documentation that I have. Did you officially or unofficially notify your agency ethics officer about a possible conflict on any of the public lands issues having just been the Executive Director, I believe, of the NWF?

Mr. ALBERSWERTH. I was not the Executive Director. I was Director of the Public Lands and Energy Program for the Federation.

Mrs. CUBIN. Right.

Mr. ALBERSWERTH. No, I did not.

Mrs. CUBIN. Did you seek or receive prior authorization from your agency ethics officer to participate in the bonding regulations that you now had personally lobbied the Interior Department just months earlier or on any other issues?

Mr. ALBERSWERTH. I did not seek guidance on that from the ethics officer.

Mr. LESHY. Could I interject here, Madam Chair? This issue, we have looked at this issue in many different contexts in the past. To the extent that you are raising a possible conflict of interest con-

cern about someone coming in from outside into government to work on a matter, that is the same matter that they had represented or worked outside the government, in the rulemaking context, the rule and the principles are very clear.

A rulemaking such as we are concerned with here with the bonding rule is a legislative matter, not an adjudicatory matter, so it is quite clear, and I can cite you and am happy to supply court cases that address the subject, that in a rulemaking kind of process, the fact that Mr. Alberswerth signed comments for an outside organization on a rule in no way limits his ability to work on the rule inside the government because it is considered a legislative type of function.

And frankly, the purpose for that, and the courts talk about this, is it is important that the government at all levels, including the executive branch have access to expertise, and it is certainly an advantage to hire employees who know something about the issues that they are working on. And often the way those employees get that experience and knowledge is by working for industry associations or other environmental groups, and it would be a severe problem for the government generally, and that, again, goes to the legislative branch as well as the executive branch, if people were disabled from coming in and lending their expertise to rules that they participated in on the outside.

So that is all assuming, by the way, that someone in Mr. Alberswerth's position is a real decisionmaker on the rules. Mr. Alberswerth obviously played a role here, but the decisionmakers on the rules, in fact, were the Assistant Secretary for Land and Minerals, the Director for the BLM. On the legal issues it was my office and obviously the Secretary ultimately has responsibility as decisionmaker on these rules.

Mrs. CUBIN. Thank you.

Mr. LESHY. So the decisionmaker can certainly draw upon expert staff, and if they have had knowledge gained by outside experience, there is nothing wrong with that, and if you would like I can supply case law.

Mrs. CUBIN. I have two reactions to that. Number 1, I wonder if you would be as adamant in your response if it were a miner who got everything they asked for in comments in the next rule; and number 2, the proper way to cure conflicts of interests problems is to allow the public to comment on the rule before it goes final. In this case the public was not allowed to do that after Mr. Alberswerth became an employee of the Department of Interior.

Mr. ALBERSWERTH. But there is no conflict of interest here at all. I have no financial interest in this matter. The organization I worked for had no financial interest.

Mrs. CUBIN. I am not implying that there is a conflict of interest. I am not implying that at all.

Mr. ALBERSWERTH. Thank you.

Mrs. CUBIN. I merely bring that up because, like I said, the cure for this problem or perceived problem would be to allow public comment, because the appearance isn't very pretty. I mean, it really looks bad, and, it would be so easy to alleviate the whole problem by allowing other people to have their opinions in, not 6 years old, dealing with all of the issues I brought up earlier with Mr. Leshy,

that are the differences in the original as opposed to the final rule, it would be so simple to take care of all that and I don't understand why you want to do it.

Let's see, I just want you to respond to that? I think I do. Do you think that there could be an appearance of impropriety in the rules as they came out? When I look at—and this, I guess, is not additional as well, but the items that were in your testimony that ended up in—excuse me, the comments, I always say testimony—in your comments that ended up in the final rule that were changes from the original proposed rule, don't you think there is an appearance of impropriety at least?

Mr. ALBERSWERTH. I would say if I were the only commenter who made those comments, and if the agency had adopted every single comment that I had signed on to in exactly the way that I had proposed it, yes. But, see, that simply wasn't the case here. I mean, some of the comments that I had made as a staff person at the National Wildlife Federation were addressed in a fashion by the final regulation, and in addition there were a number of other commentators who made similar comments, both private individuals organizations and even State government agencies in at least one instance.

If, on the other hand, I had been the only person and everything was exactly the same as I had suggested, I would say that there might be an appearance of, you know, something that was improper. But in this case, I really don't think that is the case, and what the BLM did is evaluate all of the comments they got in. They made changes to accommodate some of the mining industry's concerns, which we haven't discussed here at all, which were different from the draft proposal, as well as comments that came in from State agencies and others.

Mr. LESHY. If I could just interject, I would point out that Mr. Alberswerth is not a lawyer, and when you talk about possible appearances of conflicts of interest, to the extent that has a legal cast to it, or a legal definition—

Mrs. CUBIN. I said impropriety, I didn't say conflict of interest. I clarified that earlier. I did not imply in any way that there was a conflict of interest. I do think that when you look at the environmental laws that we have in the Regulatory Flex Act, and when you put all of that together there, is a flaw here.

Mr. LESHY. I just wanted to point out that in terms of how the courts look at appearance of impropriety in these situations, in rulemaking situations the courts don't consider there is any appearance of impropriety whatsoever. The same way that when a different party takes over Congress, that party may hire staff members predominantly from a particular industry, or if another party takes over, they hire my staff members predominantly from a different kind of interest group, and that is kind of the way life is, and that is no problem with that as long as—

Mrs. CUBIN. As long as your philosophy goes along with the person that is making the decision. I go back to if it were a miner, and that miner had a totally different philosophy about what should be in that rule, you might not be so magnanimous about saying, hey, this is no problem. And I go back to the bottom line that this is so easily done away with by allowing a 60-day comment

period, by withdrawing the rule and allowing a 60-day comment period.

Mr. LESHY. Again, just to make clear our position on this, I think what you are requesting is a 60-day comment period, and obviously to make that meaningful, we would have to look at the comments, evaluate them, and possibly make changes in the final rule. So it is not just 60 days; it is really effectively, I don't know, 9 months or a year.

Mrs. CUBIN. But it was 6 years from the time the public comment came until the rule was put out; 6 years, so this holds no water at all.

Mr. LESHY. Well, in that respect we probably should have done it faster.

Mrs. CUBIN. I think so, and in retrospect when you look back on this, you are going to think you should have had public comment, too. You can't abuse the system sometime and expect it not to come back and abuse the environment or you or the agency another time. You have to preserve the system. And you have violated the system with this 6-year delay, and now a 60-day comment period is too long for you. I don't get this. I don't understand what is going on here.

Mr. LESHY. Well, we don't think we have abused the system, and I guess a Federal court sitting in Washington, DC, actually just down the street, will tell us sooner or later whether we have complied with the law. We think we have. I guess we agree to disagree on that.

Mrs. CUBIN. How much do you suppose you will spend on this lawsuit?

Mr. LESHY. It is actually a pretty simple lawsuit to try. I don't think it will take very much. Frankly, I think I can honestly say it will take less to defend this lawsuit than it would to reopen a comment period and do a new phase of the rulemaking, and it almost certainly would be far less than it could cost the taxpayer if we don't have stronger bonds during this bonding season.

Mrs. CUBIN. Again we have to agree to disagree.

Mr. Cannon, do you have any questions of the witnesses?

Mr. CANNON. Thank you, Madam Chairman, I apologize for my absence.

Let me ask you directly, Mr. Leshy, are you considering in the Department at all the possibility of reissuing these rules for comment?

Mr. LESHY. We have—after the last hearing when I told the Committee I would get back and we would take another look at this issue and I would talk to the Secretary about it, we have done so, and we believe that we are on very solid legal ground; that these rules are good and being implemented without disruption, and it would be, frankly, more disruptive to suspend the rules and go through another comment period.

Mr. CANNON. Let me say that I have sensed significant disagreement on both sides of the aisle here on this Committee with that conclusion. Mr. Romero-Barceló in the beginning of this hearing pointed out that—and in the end of the last hearing pointed out that when you get the participation of people who are governed,

there is a tendency to go along better with the rules and regulations.

Personally, I believe that given this time of rather tense relationships between the States and the Federal Government, that it would be a particularly—that care should be exercised in how you approach that relationship and what you cram down on the States and allow people who are interested to express themselves about it currently, not in the context of 5 years ago.

So I would encourage you to rethink that just because I think it is a matter of good government. I think that the system works better when you have input from those who have to live under the regulation. Frankly, I have been a little confused about some of the testimony because you keep talking about how little—how easy to the implement this rule, how little the cost is, how most of the States already have systems, that other States have already changed their law. I think you mentioned that Alaska had changed its law, was it?

Mr. LESHY. Idaho.

Mr. CANNON. Idaho.

And then I talked to Jim Gibbons of Nevada, and they changed their law, and given the fact that you have two of the major hard rock mining areas of the country with a stricter State law, it might be advisable to step back. Your suspension of your regulation would not affect those State laws.

I am a little concerned about the conflict of interest or the appearance of proprietary issue that was talked about. Let me state what I think the issue is and get a response. I understand Mr. Alberswerth is not a lawyer, and therefore, the appearance of impropriety that lawyers are under a mandate to avoid is not relevant to him. But, in fact—and, of course, there is a distinction you made between legislative and adjudicatory, and an important and powerful distinction. But the Congress, as a legislative body there are times when there can be a conflict of interest, and certainly most legislators would try and make it clear by talking to legislative counsel or others about what those conflicts would be in advance so that they are cleared, and, in fact, what happens in that process is that people who may have a conflict have a public airing of that process.

Maybe the rulemaking would be a good time to do that, but certainly I think the thrust of the Chairwoman's question was what kind of cleansing process have we gone through to evaluate the prior interests and the effect of those prior interests on the decisionmaking process of someone who is in a decisionmaking mode?

So let me just ask that question: What did—and let me direct this to you, Mr. Alberswerth: What did you do to make it clear what your prior interests were and how that would affect your decisionmaking process in whatever capacity you were in in the Interior Department?

Mr. ALBERSWERTH. Well, my boss, Assistant Secretary Armstrong, was well aware of my previous employment and my interest in the whole issue of mining law reform.

Mr. CANNON. Is he a lawyer?

Mr. ALBERSWERTH. Yes, he is an attorney, but—

Mr. LESHY. He doesn't practice law.

Mr. CANNON. Neither do I, thank heaven.

Mr. ALBERSWERTH. I would say, sir, that I think an analogous situation in terms of my role in the development of this rule is analogous to a congressional staff person's role in the development of a legislation. That is I make recommendations. My job is to make some recommendations to various individuals in the Department who had decisionmaking authority with respect to this matter. I was not the decisionmaker, and I made those recommendations, very similar to the congressional staff person making recommendations to a Member of Congress or a committee. And I think my role is very analogous in that regard, so I think what you might want to ask yourself is would you apply the same sort of standards to a congressional staff person as you would to me in this instance?

Mr. CANNON. Well, I think the relevant regulations require that absent prior authorization, which requires—that is, someone in authority giving the authority to you to do this, an employee shouldn't participate in a particular matter involving the specific parties which he knows is likely to affect the financial interest of a member of his household, or if he knows a person with whom he has a covered relationship or represents a party, if he determines—it goes on.

Mr. ALBERSWERTH. I am quite confident of that.

Mr. CANNON. Of what?

Mr. ALBERSWERTH. Of the fact that I have no financial interest in this matter.

Mr. CANNON. The point is if you continue, you have a definition of covered relationship, including any person for whom the employee has within the last year served as financial or as officer, director, trustee, general partner, et cetera.

It seems to me there are two issues here that I would like to understand. In the first place, you were employed by NWF and received a salary, and therefore had an interest; and in addition, I understand you were a director. Don't those with particularity qualify you as having to be in a position where you need a prior authorization before you participate in that process?

Mr. ALBERSWERTH. The National Wildlife Federation has no interest, no financial interest whatsoever.

Mr. CANNON. You had a financial interest because they paid you a salary. You also had a covered relationship because you were a director. Is that true?

Mr. ALBERSWERTH. No, sir, I was a director of the program. I was not on the board of directors.

Mr. CANNON. Oh, okay.

Mr. LESHY. I should go back because I think there is a fundamental misunderstanding. First of all, he severed all his ties when he came to the Department. Second, the regulation you were quoting talks about a particular matter, and the rules and the case law in this are quite clear. A legislative rulemaking is not a particular matter. That was the point I was trying to make earlier.

In other words, the principles and the constraints that you apply when you come into government or go out of government in terms of working on particular matters that you worked on in one place or another, a legislative rule is not a matter. It is well understood

that that is the case. The courts basically said that. So we really don't have that kind of problem in this case.

Everybody in the Department knew where Mr. Alberswerth came from and knew of his interest, but he has not, in our view, behaved inappropriately at all by working on this kind of rule, having worked on it outside, because it is not a particular matter involving a particular party.

Mr. CANNON. Thank you. I yield back the remainder of my time.

Mrs. CUBIN. I don't think I have any further questions either. So I would like to thank the witnesses for being here today. It is a hard—it is a hard thing to disagree. And I appreciate your appearance and thank you again. I am sure I will see you again. I am sure we will disagree again.

Mr. LESHY. It is hard for us, too, but thank you very much for letting us have the opportunity.

[Whereupon, at 3:50 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows.]

STATEMENT OF JOHN LESHY, SOLICITOR, DEPARTMENT OF THE INTERIOR

Madam Chair and members of the Subcommittee, I am here today once again to discuss the final rule on bonding for hardrock mining operations. With me is David Alberswerth, Special Assistant to the Assistant Secretary for Land and Minerals Management. I will update the Subcommittee on various matters concerning the BLM's hardrock bonding rule which have occurred since your last hearing on this matter held on March 20, 1997.

First, implementation of the rule, which took effect March 30, 1997, is proceeding without any reports of major difficulty. BLM staff have recently informally surveyed implementation efforts in nearly all the western States. In a number of States the new BLM regulation requires no more than existing State law requires; hence, there is no difficulty in implementation. At least one State has amended its mining reclamation law since the BLM rule became final. That amendment requires full cost bonding, just as the BLM rule does.

BLM is continuing its efforts to advance the mining industry's understanding about the rule and what is required to comply with it. It continues to use, among other things, an Internet Newsgroup for this purpose. In Alaska, BLM and the State have been working on a proposed Memorandum of Understanding that would allow miners to utilize the State bond pool to satisfy the requirements of the new rule.

Second, on May 12, 1997, the Mountain States Legal Foundation, on behalf of the Northwest Mining Association (NMA), filed suit against the Department seeking a withdrawal of the rule and an order enjoining the BLM from enforcing the rule against the members of the IRMA. The suit alleges that the Department failed to comply with the Administrative Procedure Act and the Regulatory Flexibility Act in promulgating the final rule.

Section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA) directs the Secretary to prevent unnecessary or undue degradation of the public lands from, among other things, activities conducted pursuant to the Mining Law of 1872 (mining of locatable minerals, such as gold, lead, silver, uranium, and bentonite).

We continue to believe that this rule is a most reasonable forward step to carry out our mandate, given to us by Congress, to prevent unnecessary or undue degradation of the public lands from, among other things, activities conducted pursuant to the Mining Law of 1872. As I pointed out earlier, the consequences to the health of the public lands and the implications for the American taxpayer from inadequate steps to carry out this mandate are potentially very large, even staggering. The Departments of Agriculture and the Interior are currently defendants in several lawsuits seeking to hold the government, as landowner, liable for the cost of cleaning up toxic wastes from defunct mining operations carried out throughout the west under the Mining Law of 1872. The irony is that after over a century of making publicly owned minerals available for next to nothing, the taxpayers may face clean-up costs running into billions of dollars. Most members of the hardrock mining industry are responsible operators. But there is no denying that when protective measures are not taken, or are inadequate, the consequences can be costly. It is in the interests of providing a deterrent to such environmental costs, and such fiscal costs to the Nation's hardworking taxpayers, that BLM promulgated its final bonding rule.

Some idea of the potential scope of the problem is described in a GAO Report of April 1988 to the House Subcommittee on Mining and Natural Resources. The GAO estimated that 424,049 acres of Federal land were then unreclaimed as a result of hardrock mining operations in the 11 western States. 281,581 of these unreclaimed acres related to abandoned, suspended or unauthorized mining operations. The estimated cost to reclaim this land was about \$284 million. The remaining 142,468 acres of Federal land were being mined at that time and would eventually need reclamation.

The Bureau of Land Management's (BLM) original regulations implementing section 302(b) of FLPMA became effective on January 1, 1981. That rule, 43 CFR 3809, required mining claimants to complete reclamation on Federal lands administered by the BLM during and upon termination of exploration and mining activities under the mining laws. The rule classified mining-related activities into three categories: casual use, notice, and plan of operations. Activities are termed "casual use" if they involve negligible surface disturbance and do not use mechanical excavating equipment. However, if there is surface disturbance involving mechanical excavating equipment, notice of the operation must be provided to BLM. Plans of operations were required where surface disturbance of more than 5 acres, or any disturbance greater than casual use in some special category lands, was involved. At BLM's dis-

cretion, bonding was required on plans of operation. No bonds were required for casual use or notice operations unless there was a pattern of violations.

The preamble to these regulations promised a review of them within 3 years. Since they took effect, much internal and external (GAO and Congressional committees) attention has been directed at, among other things, the adequacy of BLM's bonding policies. In addition, the dramatic rise of the gold mining industry in Nevada during the 1980's increased the public's awareness of the need for reclamation. Near the end of the Reagan Administration, the BLM Director established a Mining Law Administration Program Task Force to address significant issues. The Task Force's December 1989 report recommended that BLM's program "needs to be strengthened to meet BLM's responsibilities," and addressed bonding, among other things. As a result, a revised bonding policy was issued in August 1990 as a short term change. In July 1991, a proposed rule on Hardrock Bonding was published in the **Federal Register**. The preamble to this proposed rule explained that the Department's history under the 3809 bonding regulations led BLM "to conclude that bonding or other financial or surety arrangements would be useful additions to the tools available to land managers to protect against unnecessary or undue degradation of the land caused by [notice] operations. ..." (56 FR 31602). The published summary of the proposed rule explained:

The proposed rule would require submission of financial guarantees for reclamation for all operations greater than casual use, create additional financial instruments to satisfy the requirement for a financial guarantee, and amend the noncompliance section of the regulations to require the filing of plans of operations by operators who establish a record of noncompliance. (56 FR 31602).

During the 90-day comment period, which expired on October 9, 1991, the BLM received over 200 comments on the proposed rule. Some said the policy went too far; others said it did not go far enough. All of the comments were carefully considered in developing this final rule.

In August 1992, BLM completed a preliminary draft of the final rule incorporating changes suggested during the comment period. Internal Departmental review of the preliminary draft final rule was then begun. In addition to the proposed bonding rule, on September 11, 1992, BLM published a proposed rule which strengthened the BLM's enforcement program against the illegal occupancy of mining claims for non-mining purposes.

Because it appeared at the beginning of the 103rd Congress that action on comprehensive legislation to reform the 1872 Mining Law was likely, completion of BLM's bonding and occupancy regulations was suspended. If enacted, the reforms being considered would have superseded the rules.

Once the 103rd Congress adjourned without enacting Mining Law reform, the Department resumed work on a number of efforts to address shortcomings in regulation of hardrock mining, including the bonding rule. Among these efforts, BLM also published an acid rock drainage policy in April 1996. The occupancy rule was completed and published in final form on July 16, 1996. Work then focused on finalizing the bonding rule.

In response to public comment, and after due consideration, some changes were made between the draft and final rule. These changes are a logical outgrowth of the proposed rule. While the proposed rule will enhance environmental protection by ensuring consistent application of bonding requirements, the overall impact of the rule on the hardrock mining industry is actually relatively limited for several reasons. First, as was noted earlier, the Department already has the discretionary authority to impose bonds for up to 100 percent of the costs of reclamation on plan level operators, and some States already require this level of bonding. In other States, which do not currently require 100 percent reclamation bonds, the BLM will be cooperating with operators and State mining administrators throughout the remainder of 1997 to achieve a smooth transition. Second, the bonding requirement for notice level operators, which was part of the proposed as well as final BLM rule is not a new requirement in most States. Moreover, the requirement will be phased in, which will ameliorate its impact where it is new. Operators with existing notices on file with BLM which have initiated operations will not be required to provide 100 percent bonding until they file a new notice. With past history as our guide, we expect that it will take 4 years before all notice level operators are covered.

As I mentioned last time, the BLM has implemented an extensive program to inform interested parties of this final rule. BLM's homepage on the Internet (<http://www.blm.gov>) includes the final rule as well as background documents including a press release, question and answer sheet, and a fact sheet. Other outreach efforts include BLM staff visits to various mining centers and meetings with miners and mining industry officials, as well as State regulators.

We believe this rule is a reasonable forward step to carry out our statutory mandate. We will do all we can in implementing this rule to ensure that the health of the land is preserved, taxpayers' interests are protected, and any negative implications for the mining community are minimized.

This concludes my statement. I will be pleased to answer questions.

LETTER FROM THE SBA TO THE BLM

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

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

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



OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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WASHINGTON, D.C. 20416

TESTIMONY

of

JERE W. GLOVER

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U.S. Small Business Administration

before the

SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

COMMITTEE ON RESOURCES

Unites States House of Representatives

June 19, 1997

on

**Compliance with the Regulatory Flexibility Act: Final Rule on Bonding
of Hardrock Mining Operations by the Department of Interior Bureau
on Land Management**



Good afternoon Madam Chairwoman and members of the Subcommittee. I am Jere W. Glover, Chief Counsel for Advocacy of the U.S. Small Business Administration.¹ I am pleased to appear before you today to discuss Regulatory Flexibility Act compliance issues as they relate to the final rule on bonding of hardrock mining operations promulgated by the Department of Interior Bureau of Land Management (BLM).² I am also here to address whatever questions the Subcommittee may have regarding discussions between the Office of Advocacy and the BLM on the issue of compliance. With me today are Jennifer Smith and Shawne Carter McGibbon, two of the attorneys on my staff who have been advising me on this issue.

The Regulatory Flexibility Act (RFA) establishes that agencies shall endeavor to fit regulatory and informational requirements to the scale of the businesses, organizations and governmental jurisdictions subject to regulation. Under the law, Federal agencies are required to determine whether a regulation has a significant economic impact on a substantial number of small entities. Agencies also are required to consider flexible regulatory alternatives for small entities and assure that such proposals are given serious consideration. The Office of Advocacy reviews approximately 2500 RFA certifications annually. I am happy to provide you a copy of our 1996 annual report on implementation of the RFA.

The specific question I have been asked to address today is whether the BLM complied with the RFA as it relates to establishing the definition of a small entity—in this instance, a small miner. In defining “small business,” the RFA refers to Section 3 of the Small Business Act which defines the term as an entity independently owned and operated and not dominant in its field. The statutory definition must be interpreted using the Small Business Administration’s established industry classifications found in 13 CFR 121, Small Business Size Standards. According to SBA’s regulations, a small miner is one with 500 or fewer employees. If an agency wishes to deviate from this standard, the RFA requires that the agency seek the approval of the Administrator of the SBA. Furthermore, if an agency wishes to deviate from the standard for purposes of the RFA analysis, they must consult with the Office of Advocacy before doing so. In both instances the SBA must certainly be contacted prior to publication of a final rule. The only exception to this rule is where size is defined by some other statutory authority.

In this particular case, the BLM promulgated the final rule and contacted the Office of Advocacy after the fact regarding whether or not they had complied with the RFA. Initially, my staff was asked to review the size standard issue out of the context of the entire rule. In so doing, my staff concluded that the requirements of the RFA had not

¹ The Office of Advocacy, established by Public Law 94-305, is an independent office charged with representing the views and interests of small businesses before the Federal government and monitoring compliance with the Regulatory Flexibility Act. 5 U.S.C. §§ 601 *et seq.*

² The notice of proposed rulemaking for this rule was published in the *Federal Register* in 1991, prior to my appointment to Chief Counsel. See 56 Fed. Reg. 31,602 (July 11, 1991).

been met with regard to establishing a size standard different from the one outlined in SBA's regulations.

Discussions between my staff and the BLM focused on the size issues raised in your correspondence, Madam Chairwoman, dated March 24, 1997. My staff briefed the BLM staff on the requirements of the RFA. At this point, the BLM indicated for the first time that the size standard was mandated by statute. We advised them that that was an exception to the RFA requirements on size. However, we subsequently learned that the statute to which they were referring was the Omnibus Budget Reconciliation Act of 1993, and not a statute of particular applicability.

In all of this discussion about size a major issue was lost; namely, no matter what size standard is chosen, the impact of the rule is directly related to the amount of acreage and not the size of the firm.

Having said this, the larger problem is the faulty certification. According to the RFA, an agency head must certify that a rule will not have a significant economic impact on a substantial number of small entities. The BLM certified that the final rule would not have a significant economic impact on a substantial number of small entities without proper justification. In fact, we are unable to ascertain whether the impact is significant or not based on the information provided in the final rule. Although the BLM provides information about the cost of the rule and about the steps taken to minimize the impact on small business, the BLM provided no information on industry structure so that impact on different sized firms could be analyzed. For example, the BLM asserts that smaller firms may not be able to undertake new projects in the future because of the economic impact of this rulemaking, but the agency does not state the likely or actual economic loss that a small firm may experience or the impact that it may have on a firm's earnings or viability.

We encourage the BLM and other agencies to consult with the Office of Advocacy early in the rulemaking process to avoid situations such as this. Based on numerous conversations with the BLM, we believe that the agency has a better understanding of its obligations under the RFA. The BLM staff have demonstrated substantial interest in heading-off compliance problems in the future.

Thank you for the opportunity to appear today. I am happy to answer any questions that you may have about my testimony.