

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 3800

[WO-300-1990-00]

RIN 1004-AD22

Mining Claims Under the General Mining Laws; Surface Management

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Land Management (BLM) proposes to revise its regulations governing mining operations involving metallic and some other minerals on public lands administered by BLM. BLM is revising the regulations to improve their clarity and organization, address technical advances in mining, incorporate policies developed after the previous regulations were promulgated, and better protect natural resources and our Nation's natural heritage lands from the adverse impacts of mining. The regulations are intended to prevent unnecessary or undue degradation of BLM-administered lands by mining operations authorized by the mining laws.

DATES: Comments. Send your comments to reach BLM on or before May 10, 1999.

Public Hearings. BLM plans to hold public hearings in conjunction with this proposed rule. The dates and times of the hearings are in the **SUPPLEMENTARY INFORMATION** section under *Public Hearings*.

ADDRESSES: Comments. You may mail comments to Bureau of Land Management, Administrative Record, Nevada State Office, P.O. Box 12000; Reno, Nevada 89520-0006. You may hand deliver comments to BLM at 850 Harvard Way, Reno, Nevada. Submit electronic comments and other data to WOCComment@wo.blm.gov. For other information about filing comments electronically, see the **SUPPLEMENTARY INFORMATION** section under "Electronic access and filing address."

Public Hearings. The locations of the public hearings that BLM is holding in conjunction with this proposed rule are in the **SUPPLEMENTARY INFORMATION** section under *Public Hearings*.

FOR FURTHER INFORMATION CONTACT: Robert M. Anderson, (202) 208-4201; or Michael Schwartz, (202) 452-5198. Individuals who use a telecommunications device for the deaf (TDD) may contact Mr. Anderson or Mr. Schwartz by calling the Federal Information Relay Service at 1-800-

877-8339 between 8:00 a.m. and 4:00 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:

- I. How Can I Comment on this Proposal?
- II. What is the Background of this Rulemaking?
- III. What are the Contents of the Proposal?
- IV. How did BLM Meet its Procedural Obligations?

I. How Can I Comment on this Proposal?*Electronic Access and Filing Address*

You may view an electronic version of this proposed rule at BLM's Internet home page: www.blm.gov. You may also comment via the Internet to: WOCComment@wo.blm.gov. Please also include "Attention: RIN 1004-AD22" and your name and return address in your Internet message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly at (202) 452-5030. BLM is working to set up a system that would allow commenters to send comments via the Internet and to view already submitted comments. When this system is available, we will publish a notice in the **Federal Register**.

Written Comments

Your written comments on the proposed rule should be specific, confined to issues pertinent to the proposed rule, and should explain the reason for any recommended change. Where possible, you should reference the specific section or paragraph of the proposal that you are addressing. BLM may not necessarily consider or include in the Administrative Record for the final rule comments that BLM receives after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

BLM will make comments, including names, street addresses, and other contact information of respondents, available for public review at this address during regular business hours (8:00 a.m. to 4:00 p.m.), Monday through Friday, except Federal holidays. BLM will also post all comments on its Internet home page (www.blm.gov) at the end of the comment period. Individual respondents may request confidentiality. If you wish to request that BLM consider withholding your name, street address, and other contact information (such as: Internet address, FAX or phone number) from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your comment. BLM will honor requests for confidentiality on a case-by-

case basis to the extent allowed by law. BLM will make available for public inspection in their entirety all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses.

Public Hearings

BLM will hold public hearings at the following locations on the dates and local times specified.

Alaska

Fairbanks—March 30, 1999—Carlson Center, 2010 Second Avenue; 1:00 p.m. and 7:00 p.m.

Arizona

Phoenix—March 30, 1999—Sheraton Hotel, 2620 Dunlap Avenue; 1:00 p.m. and 6:00 p.m.

California

San Francisco—April 20, 1999—Holiday Inn Civic Center, 50 Eighth Street; 1:00 p.m. and 6:00 p.m.
Ontario—April 21, 1999—Doubletree Hotel; times to be determined.
Sacramento—April 22, 1999—Red Lion Inn, 1401 Arden Way; 1:00 p.m. and 6:00 p.m.

Colorado

Lakewood—March 30, 1999—Sheraton Denver West Hotel and Conference Center, 360 Union Blvd., Golden Room; 1:00 p.m. and 7:00 p.m.

Washington, D.C.

April 14, 1999—Washington Plaza Hotel, 10 Thomas Circle, NW, Monroe Room; 12:30 p.m.

Idaho

Boise—April 27, 1999—BLM State Office, 1387 S. Vinnell Way, Sagebrush-Ponderosa Conference Room; 6:00 p.m.

Montana

Helena—April 14, 1999—Colonial Inn, 2301 Colonial Drive; 1:30 p.m. and 7:00 p.m.

New Mexico

Socorro—March 31, 1999—Macey Center, 801 Leroy, Galina Room; 3:00 p.m.

Nevada

Reno—March 23, 1999—Silver Legacy Hotel; 2:00 p.m. and 7:00 p.m.
Elko—March 24, 1999—Convention Center; 1:00 p.m. and 6:00 p.m.

Oregon

Eugene—April 22, 1999—BLM District Office, 2890 Chad Street, Conference Room; times to be determined.

Utah

Salt Lake City—April 7, 1999—Department of Natural Resources, 1594 West North Temple, Rooms 1040/50, 1:00 p.m. and 6:00 p.m.

Washington

Spokane—April 20, 1999—Doubletree Inn; times to be determined.

Wyoming

Casper—March 31, 1999—Casper Parkway Plaza Inn, 123 West E Street; 2:00 p.m. and 7:00 p.m.

In order to assist the transcriber and to ensure an accurate record, BLM requests that persons who testify at a hearing give the transcriber a copy of their testimony. The meeting sites are accessible to individuals with disabilities. An individual with a disability who will need an auxiliary aid or service to participate in the hearing, such as interpreting service, assistive listening device, or materials in an alternate format, must notify the person listed under **FOR FURTHER INFORMATION CONTACT** two weeks before the scheduled hearing date. Although BLM will attempt to meet a request received after that date, the requested auxiliary aid or service may not be available because of insufficient time to arrange it.

II. What is the Background of this Rulemaking?

Under the Constitution, Congress has the authority and responsibility to manage public land. See U.S. Const. art. IV, § 3, cl. 2. Through statute, Congress has delegated this authority to agencies such as the Bureau of Land Management (BLM). The Federal Land Policy and Management Act of 1976 (FLPMA) directs the Secretary of the Interior, by regulation or otherwise, to take any action necessary to prevent unnecessary or undue degradation of the public lands. See 43 U.S.C. 1732(b). FLPMA also directs the Secretary of the Interior, with respect to public lands, to promulgate rules and regulations to carry out the purposes of FLPMA and of other laws applicable to the public lands. See 43 U.S.C. 1740. "Public lands" are defined in FLPMA (in pertinent part) as "any land and interest in land owned by the United States . . . and administered by the Secretary of the Interior through the Bureau of Land Management. . . ." See 43 U.S.C. 1702. The law gives the Secretary of Agriculture responsibility for promulgating rules and regulations applicable to lands within the National Forest System. For this reason, none of the regulatory changes discussed in this proposal would apply to the National Forests. See 36 CFR part 228 for regulations governing mining operations on National Forests. These proposed regulations are also authorized by 30 U.S.C. 22, the portion of the mining laws that opens public lands to exploration and purchase "under regulations prescribed by law."

Under this statutory authority, BLM issued regulations in 1980 to ensure that public lands are protected from unnecessary or undue degradation and that areas disturbed during the search for and extraction of mineral resources are reclaimed. See 45 FR 78902–78915, November 26, 1980. These regulations were BLM's first specific regulations to govern surface-disturbing activities on public lands resulting from operations under the mining laws. The basic framework established by the 1980 regulations separates mining activities into three distinct categories based on increasing levels of disturbance, casual use, notice-level operations, and plan-level operations—each with a correspondingly increasing level of BLM involvement.

In recognition of the fact that the 1980 regulations were a first attempt at regulating mining activities on public lands, BLM acknowledged that implementation of the regulations would involve monitoring and a cooperative effort by BLM, the States, the mining industry, and the public. BLM pledged to reassess the regulations and amend them at the end of two years, as necessary to ensure that they protect public lands from unnecessary or undue degradation (45 FR 78903).

Subsequently, a series of developments occurred that collectively had the effect of focusing increased attention on Federal minerals management under the mining laws and on mining law reform in general. One of the most important developments was the widespread use of cyanide leaching technology to extract gold from relatively low-grade ores. According to the U.S. Geological Survey, in 1980 about two-thirds of the 960,000 troy ounces of gold mined in the U.S. was produced using cyanide technology. In 1997, virtually all the 10 million troy ounces of U.S. gold production came through the use of cyanide technology. See *Minerals Information—Gold*, U.S.G.S. (various years) and *Minerals Commodities Summaries—Gold*, U.S.G.S. (Jan. 1988). The mining operations using this technology process relatively large quantities of ore and often disturb large areas, create large pits, require large spoil and waste rock depositories, and utilize a significant amount of water. At the same time, there was concern over migratory birds and other wildlife being killed through contact with cyanide-containing solutions in ponds and impoundments. There was also public concern about the possible effects on human health of the use of cyanide by mining operations. The General Accounting Office issues a series of reports highlighting, among

other things, abuses from hardrock mining, the need for bonding of mining operations, and the need for better reclamation. See GAO/RCED 86–48, GAO/RCED 87–157, GAO/RCED 88–21, and GAO/RCED 88–123BR. As a result, in January 1989, the Director of BLM established a task force to recommend ways to address the issues that had been raised. See also GAO/RCED 91–145.

In late 1989, the task force recommended that BLM (1) expand its bonding policy for exploration and mining, (2) develop a cyanide management program, (3) review current reclamation practices, and (4) address pre-1981 mining operations that have been abandoned. BLM took a number of steps to implement these recommendations, including development of a cyanide policy (BLM Instruction Memorandum 90–566, August 6, 1990, amended November 1, 1990); issuance of a proposed rule to revise the bonding regulations (56 FR 31602, July 11, 1991); and completion of the Solid Minerals Reclamation Handbook (BLM Manual Handbook H–3042–1, February 7, 1992, as amended). However, BLM had not yet conducted a comprehensive review of the 1980 regulations, and the Director decided in July 1991 that the time had come.

Thus, on October 23, 1991, BLM published a notice of intent to propose rulemaking. See 56 FR 54815–54816. The notice solicited comments on a number of issues, including—

- Whether the five-acre threshold for notices should be modified or eliminated,
- Whether the definition of "unnecessary or undue degradation" should be revised,
- Whether the regulations should specify prohibited acts subject to civil and criminal enforcement,
- Whether time frames for review of plans and processing of notices should be specified,
- Whether additional environmental and reclamation requirements should be added to the regulations,
- Whether the regulations should clarify or elaborate the activities authorized under casual use, and
- Whether the regulations should provide for improved coordination and cooperation with States.

As a part of the review, BLM conducted four public workshops in December 1991, in Anchorage, Alaska; Spokane, Washington; Denver, Colorado; and Reno, Nevada. BLM received about 140 written comments, along with petitions containing about 250 signatures. About 250 people attended the four workshops. Following the close of the comment period on

January 3, 1992, a task force of BLM employees began work on proposed revisions to the 1980 regulations. The task force completed its work and presented its recommendations to the Director of BLM in April 1992. The recommendations included changing the five-acre threshold to give BLM greater management control over special areas, sensitive resource values, processing operations, and reclamation and adding enforcement provisions to the regulations.

However, BLM put the initiative on hold due to the legislative proposals for mining law reform then under consideration by the Congress. The legislative changes would have superseded any changes to the 1980 regulations. Ultimately, neither the 103rd (1993/1994) nor the 104th (1995/1996) Congress produced legislative changes. In the meantime, BLM moved forward to complete and implement other proposals that stemmed from initiatives begun earlier, including:

- An acid mine drainage policy to ensure uniform consideration of this issue in plans of operations (BLM Instruction Memorandum 96-79, April 2, 1996);
- A final rule tightening standards and strengthening enforcement against improper use and occupancy of mining claims (61 FR 37116, July 16, 1996); and
- A final rule to strengthen bonding requirements (62 FR 9093, February 28, 1997).

On January 6, 1997, the Secretary of the Interior, expressing the view that, "It is plainly no longer in the public interest to wait for Congress to enact legislation that corrects the remaining shortcomings of the 3809 regulations," directed BLM to restart the rulemaking process. The Secretary identified several regulatory revisions that should be proposed for public comment, including:

- Rewriting the definition of "unnecessary or undue degradation;"
- Developing performance standards for the conduct of mining and reclamation;
- Proposing alternative ways of addressing the issue of notice-level operations; and
- Coordinating with State regulatory programs to minimize duplication and promote cooperation.

On April 4, 1997, BLM issued a notice informing the public of the agency's intent to prepare an environmental impact statement (EIS) for the revision of the 3809 regulations and requesting comments on the scope of the EIS. See 62 FR 16177. To collect a wide range of comments, BLM held public meetings at 11 locations throughout the Western

United States. BLM also held a public meeting in Washington, D.C. Over 1,000 people attended the public meetings. In addition to the verbal comments collected at the public meetings, BLM also received more than 1,800 comment letters from individuals and representatives of State and local governments, the mining industry, and citizens' groups.

As highlighted earlier in this discussion, BLM revised the financial guarantee requirements of the 1980 regulations in a final rule issued on February 28, 1997. See 62 FR 9093. The changes included requiring financial guarantees for all plan-level operations, requiring certification of the existence of financial guarantee for all notice-level operations, requiring third-party certification of reclamation cost estimates, setting minimum per-acre financial guarantee amounts, and expanding the kinds of financial instruments that can be used as financial guarantees. The 1997 financial guarantee changes were challenged by an industry association. On May 13, 1998, a Federal Court remanded the revised regulations on procedural grounds. See *Northwest Mining Association v. Babbitt*, No. 97-1013 (D.D.C. May 13, 1998). This action reinstated the regulations that were in place prior to the 1997 final rule. A significant aspect of this rulemaking is to respond to the remand by re-promulgating strengthened financial guarantee provisions. See the discussion of the proposed financial guarantee regulations in the section-by-section description of the proposed regulations later in this preamble.

Despite the foregoing history and developments related to subpart 3809 which would justify a rulemaking to update subpart 3809, it has been asserted that BLM has not demonstrated a need to revise subpart 3809 in light of improvements in State regulation of locatable minerals mining since 1980. BLM disagrees. Both the authority and the need exist for this rulemaking. This rulemaking is based upon BLM's non-delegable and independent responsibility under FLPMA to manage the public lands to prevent unnecessary or undue degradation of the public lands, and a recognition that BLM's current rules may not be adequate to assure this result. In enacting FLPMA, Congress intended that the Secretary of the Interior determine what constitutes unnecessary or undue degradation and not that the States would do so on a State-by-State basis. Sections 302(b), 303(a), and 310 of FLPMA reflect this responsibility. This rulemaking, therefore, reflects the Secretary's

judgment of the regulations required to prevent unnecessary or undue degradation.

BLM recognizes that many of the States have upgraded their regulation of locatable minerals mining since 1980. It is clear, however, the Federal rules need upgrading, regardless of State law. Areas where the existing rules require upgrading include financial guarantees (to require financial guarantees for all operations greater than casual use, thereby ensuring the availability of resources for the completion of reclamation); enforcement (to implement section 302(c) of FLPMA and provide administrative enforcement tools and penalties); threshold for notice operations (to require plans of operations for operations more likely to pollute the land and those in sensitive areas); withdrawn areas (to require validity exams before allowing plans of operations to be approved in such areas); casual use (to clarify which activities do or do not constitute casual use); performance standards and the definition of unnecessary or undue degradation (to establish objective standards to reflect current mining technology); and others. As mentioned earlier in this preamble, many of these shortcomings have been pointed out since 1986 in a series of Congressional hearings, General Accounting Office reports, and Departmental Inspector General reports. See the Secretary's January 6, 1997 memorandum.

To the extent an overlap with State regulations would exist, BLM is proposing a general set of standards that is intended to set a national floor, but in a manner that will accommodate most State standards. Thus, for the most part, these proposed rules would not mandate specific designs or contain numeric standards. This has been done intentionally so as not to unnecessarily interfere with the current regulation of mining operations in situations where it is working successfully. Also, BLM is proposing a procedure under which BLM would be able to defer in large part to State regulation of locatable minerals mining.

In the development of this proposed rule, BLM engaged in a comprehensive consultation process with the States. BLM recognizes that the States are its primary partners in regulating mining activities on public lands. Throughout the process, BLM has solicited the States' views, both collectively and individually, on how best to avoid duplication and encourage cooperation. BLM met with the representatives of State agencies under the auspices of the Western Governors Association in April

1997, February 1998, and September 1998.

BLM also met with representatives of the Environmental Protection Agency and the Small Business Administration. We also posted two successive drafts of regulatory provisions on the Internet for public information purposes in February and August 1998. We received and considered many comments from a variety of interested parties, including States, as a result of those Internet postings. We also had a series of meetings to receive comments from constituent groups, such as industry representatives and citizens and environmental groups. BLM made many revisions in response to the consultations with States and the informal comments received from constituents. In this preamble, we do not respond to every comment we received. To do so would result in an unnecessarily long and complicated document. In the preamble to the final rule, BLM will respond only to substantive comments received during the comment period on this proposed rule.

III. What are the Contents of the Proposal?

Organization and Format

Using the principles of plain language, BLM is proposing to reorganize and rewrite the surface management regulations to make information easier to find and, once found, easier to understand. From an organizational standpoint, we have arranged the information in the proposed subpart in sequence from the general to the specific and from the less complex to the more complex. Thus, the subpart would first provide general information, including the definitions of terms (proposed § 3809.5) and the

circumstances under which an operator must submit either a notice or a plan of operations (proposed § 3809.11).

Following that, there are four "200" series sections (proposed §§ 3809.201 through 3809.204) that would address agreements between BLM and the States concerning regulation of mining. In the "300" series of sections (proposed §§ 3809.300 through 3809.336), the subpart would address operations conducted under notices. The proposed regulations governing notice-level operations are arranged sequentially so that a person interested in conducting a notice-level operation would first encounter information related to initiating operations, followed by information related to conducting, modifying, and closing operations.

The "400" series of sections of the proposed rule addresses operations conducted under a plan of operations and is divided into two parts. The first part (proposed §§ 3809.400 to 3809.424) would sequentially cover topics related to initiating, conducting, and closing plan-level operations. The second part (proposed §§ 3809.430 to 435) would cover topics related to modifying a plan of operations. The "500" series (proposed §§ 3809.500 through 3809.599) covers financial guarantees and is arranged sequentially from the various kinds of acceptable financial guarantees and how to obtain them through modifying, releasing, and forfeiting a financial guarantee. Finally, in the "600," "700," and "800" series, we have placed provisions that would govern inspection and enforcement, penalties, and appeals respectively.

Underneath the series described above, we propose to divide the information into smaller "bites." The reader will notice that the proposal contains many more sections than the

existing regulations. The purpose of this is to make the table of contents and the section headings themselves more informative so that the reader will be able to more easily locate specific information without having to read a great deal of non-pertinent text.

Another aspect of the proposal that readers will quickly notice is that the section headings are phrased as questions that readers might ask themselves, complete with first-person personal pronouns. For example, the heading of proposed § 3809.430 is "May I modify my plan of operations?" The text of each section contains the answer to the question posed in the heading. Frequently, the answer is stated in terms of what "you" (the reader) must do. For example, the answer to "May I modify my plan of operations?" is, "Yes. You may request a modification of the plan at any time during operations under an approved plan of operations." We propose to use this format because we believe that the regulations are more effective when they speak directly to the reader. Within the text of each section, we are proposing to favor clear and simple language at the expense of jargon and to use active voice in preference to passive voice, among other things, all of which we believe will make the regulations easier to understand. We specifically invite your comments on the organization and format of the proposed rule.

As a result of the reorganization of the subpart, we are proposing to move many of the provisions of the existing regulations. To assist the reader to understand the changes we are proposing, we have prepared the following table that shows the proposed counterpart to each existing provision down to the paragraph level.

Existing regulations	Proposed regulations
§ 3809.0-1	§ 3809.1.
§ 3809.0-2	§ 3809.1.
§ 3809.0-3	Authority citation.
§ 3809.0-5	§ 3809.5.
§ 3809.0-6	§ 3809.1.
§ 3809.1-1	§§ 3809.11(a) and 3809.415.
§ 3809.1-2	§ 3809.11(a).
§ 3809.1-3(a)	§§ 3809.11(b) and 3809.301(a).
§ 3809.1-3(b)	§§ 3809.312 and 3809.313(c).
§ 3809.1-3(c)	§§ 3809.301(b) and 3809.313(c).
§ 3809.1-3(d)	§§ 3809.320 and 3809.420.
§ 3809.1-3(e)	§ 3809.600(a).
§ 3809.1-3(f)	§ 3809.601(a).
§ 3809.1-4(a)	§ 3809.11(c).
§ 3809.1-4(b) and (c)	§ 3809.11(d) and (k).
§ 3809.1-5	§ 3809.401.
§ 3809.1-6(a), (b), and (c)	§ 3809.411(a).
§ 3809.1-6(d)	§ 3809.411(b).
§ 3809.1-6(e)	§ 3809.593.
§ 3809.1-7(a)	§§ 3809.430 and 3809.431(a).
§ 3809.1-7(b) and (c)	§ 3809.432.

Existing regulations	Proposed regulations
§ 3809.1-8	§§ 3809.300 and 3809.400.
§ 3809.1-9(a)	§ 3809.500(a).
§ 3809.1-9(b)	§§ 3809.500(b), 3809.551(a) and (c), § 3809.552(a), and § 3809.570.
§ 3809.1-9(c)	§ 3809.555.
§ 3809.1-9(d)	§§ 3809.551(b) and 3809.560.
§ 3809.1-9(e)	§ 3809.580.
§ 3809.1-9(f)	§ 3809.590.
§ 3809.1-9(g)	§ 3809.594.
§ 3809.2-1	None.
§ 3809.2-2(a)	§ 3809.420(b)(1).
§ 3809.2-2(b)	§ 3809.420(b)(2).
§ 3809.2-2(c)	§ 3809.420(c)(8).
§ 3809.2-2(d)	§ 3809.420(b)(6).
§ 3809.2-2(e)	§ 3809.420(b)(7).
§ 3809.2-2(f)	§ 3809.420(c)(11).
§ 3809.3-1(a)	§ 3809.3.
§ 3809.3-1(b)	None.
§ 3809.3-1(c)	§ 3809.201.
§ 3809.3-2	§§ 3809.601, 3809.603, and 3809.604.
§ 3809.3-3(a)	None.
§ 3809.3-3(b)	§§ 3809.301(b)(2), 3809.401(b)(2), and 3809.420(c)(1).
§ 3809.3-4	§ 3809.420(c)(9).
§ 3809.3-5	§ 3809.420(c)(10).
§ 3809.3-6	§ 3809.600.
§ 3809.3-7	§§ 3809.334 and 3809.424.
§ 3809.4	§ 3809.800.
§ 3809.5	§ 3809.111.
§ 3809.6	§ 3809.2.

Readers should note that the above table does not include provisions we promulgated in 1997 that were remanded on procedural grounds. Also, the proposal contains many new provisions that are not present in the existing regulations. The following section of the preamble describes both the new provisions and changes to existing regulations. We use the terms "BLM" and "we" interchangeably in this preamble to refer to the Bureau of Land Management.

General Information

This portion of the proposed rule (§§ 3809.1 through 3809.116) would provide the reader with general information, including what activities the regulations apply to, how to handle conflicts with State laws, definitions of certain terms, and when you must submit a notice or plan of operations. Consistent with the Secretary of the Interior's January 6, 1997, memorandum, the proposed rule offers two alternatives for regulating mining operations on BLM lands. See the two sections numbered 3809.11. The first alternative preserves BLM's existing scheme of classifying operations according to the scale of their impacts as casual use, notice-level, or requiring a plan of operations. The second alternative incorporates the approach used by the Forest Service to regulate mining operations on National Forests and other lands it manages. Both

alternatives are described more fully below. This portion of the proposal also includes two new sections that would address mining operations on segregated or withdrawn lands (proposed § 3809.100) and situations where it is not clear whether the minerals sought are locatable or common variety (proposed § 3809.101).

Section 3809.1 What Are the Purposes of This Subpart?

This proposed section combines language from existing §§ 3809.0-1, 3809.0-2, and 3809.0-6. We have edited the wording for brevity and clarity. The purposes of the subpart would continue to be to prevent unnecessary or undue degradation of the public lands and to coordinate with responsible State agencies to avoid duplication of efforts.

We considered, but decided not to propose an idea that was suggested by many commenters in the development of this proposal: The regulations should prevent or preclude mining where it would conflict with other uses or resources. The mining laws, which consist of the 1872 Mining Law, as amended and interpreted (30 U.S.C. 22 *et seq.*), provide (in part) that all valuable mineral deposits in lands belonging to the United States shall be free and open to exploration and purchase, unless otherwise provided. BLM does not have the authority to issue a regulation that would nullify or modify the mining laws. For that reason,

the proposed regulations focus on managing the impacts of mining operations. The regulations would not address the question of whether a particular area or class of areas is considered, as a zoning matter, to be suitable or unsuitable for hardrock mining. That is a matter that can be addressed through other means, such as withdrawal and the BLM land-use planning process.

We also considered whether to carry over from existing § 3809.0-6 the expression of Departmental policy to encourage development of Federal mineral resources and reclamation of disturbed lands. For the purposes of simplicity and clarity, we decided not to include this policy statement in this proposal. We are limiting proposed subpart 3809 to operational regulatory provisions.

Section 3809.2 What is the Scope of This Subpart?

This proposed section combines language from the existing definition of "Federal lands" at § 3809.0-5 and existing § 3809.6. Proposed paragraph (a) would apply this subpart to all operations under the mining laws on public lands, including Stock Raising Homestead Lands, as provided in § 3809.11(i), where the mineral interest is reserved to the United States. This provision would allow BLM to approve the use or occupancy, without a millsite, of non-mineral land for milling,

processing, beneficiation, or other operations in support of mining. BLM would approve the use or occupancy of such areas through a plan of operations and only to the extent the activities would support operations on public lands. The mining laws and section 302(b) of FLPMA, 43 U.S.C. 1732(b), allow this type of authorization. We mention it because of a recent legal opinion by the Department of the Interior Solicitor (Limitations on Patenting Millsites under the Mining Law of 1872, M-36988, Nov. 7, 1997) interpreting limits in the millsite provision of the mining laws, 30 U.S.C. 42. BLM's existing policy guidance on this issue may be found in BLM's Instruction Memorandum No. 98-154, dated Aug. 17, 1998, which is posted on BLM's Internet website at www.blm.gov/nhp/efoia/wo/fy98/im98-154.html.

One substantive change we are proposing is to apply the subpart to all operations under the mining laws on Stock Raising Homestead Act lands where the mineral interest is reserved to the United States, subject to proposed § 3809.11(i), discussed below. On these lands, the surface is privately owned, and the minerals are owned by the United States. Applying this subpart to those lands would enable BLM, in cases where surface owner consent is not obtained, to manage surface impacts. This would be in accord with recent amendments to the Stock Raising Homestead Act (Pub. L. 103-23). See 43 U.S.C. 299.

Proposed paragraph (c) would incorporate existing § 3809.6, which applies the surface management regulations to operations on all patents issued on mining claims located in the California Desert Conservation Area (CDCA) after the enactment of FLPMA. We are proposing to modify this existing provision by incorporating the concept of valid existing rights from section 601(f) of FLPMA (43 U.S.C. 1781(f)). That is, this subpart would not apply to operations on any patent issued after October 21, 1976, for which a right to the patent vested before that date.

Despite the urging of certain commenters, BLM is not proposing additional regulations to implement the "undue impairment" standard of section 601(f) of FLPMA. BLM has tentatively concluded that the standards of proposed subpart 3809, plus the specific reference in the definition of "unnecessary or undue degradation" to the stated level of protection for the CDCA, would provide BLM sufficient authority and flexibility to achieve the statutory level of protection.

Proposed paragraph (d) would inform the general reader about the kinds of minerals that are regulated under this subpart. The subpart would apply to minerals that can be "located" under the mining laws. These "locatable" minerals are sometimes referred to as "hardrock" minerals. This section would direct the reader to other parts of BLM's regulations for "leasable" and "salable" minerals. This is an informational section that has no regulatory content, but simply helps the reader understand the scope of the subpart.

Section 3809.3 What Rules Must I Follow if State Law Conflicts With This Subpart?

This proposed section corresponds to existing § 3809.3-1(a), which provides that this subpart shall not be construed to effect a pre-emption of State laws or regulations relating to the conduct of mining operations. BLM recognizes that States may apply their laws to operations on public lands. This proposed section addresses situations where State and Federal law conflict. In the proposal, we are changing the wording to clarify that if State laws or regulations conflict with this subpart, an operator would have to follow the requirements of this subpart. If State laws or regulations require a higher standard of protection for public lands than this subpart provides, then there would be no conflict. The proposed language is in accord with the preamble to the existing regulations, where BLM stated that, "It has been the view of the Department of the Interior that under section 3 of the 1872 Mining Law (30 U.S.C. 26), the States may assert jurisdiction over mining activities on Federal lands in connection with their own State laws. This may be done as long as the laws of the State are not in conflict or inconsistent with Federal law." (45 FR 78908, November 26, 1980)

In developing the proposed language, we have been guided by the Supreme Court's pre-emption analysis, as expressed in the Granite Rock case, which provides that State law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any State law falling within that field is pre-empted. If Congress has not entirely displaced State regulation over the matter in question (such as in the case of the mining laws), State law is pre-empted to the extent it actually conflicts with Federal law. A conflict occurs when it is impossible to comply with both State and Federal law, or where the State law stands as an obstacle to the accomplishment of the full purposes

and objectives of Congress. See *California Coastal Commission, et al. v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). The Supreme Court urged agencies to include their position regarding pre-emption in their regulations. For that reason, BLM proposes to incorporate the 1980 final rule preamble position into the text of subpart 3809.

Section 3809.5 How Does BLM Define Certain Terms Used in This Subpart?

We propose to eliminate the following existing definitions: "Authorized officer," "Federal lands," and "King Range Conservation Area." We propose to change some existing definitions and add the following new definitions, as discussed below: "Minimize," "Mitigation," "Most appropriate technology and practices," "Public lands," "Riparian area," and "Tribe."

Casual use. This proposed definition is based on the existing definition. To address situations that have arisen since the 1980 regulations came out, we propose to add examples of activities that are generally considered "casual use," including collection of mineral specimens using hand tools, hand panning, and non-motorized sluicing. We also propose to expand the list of examples of activities that are not generally considered "casual use" by adding use of truck-mounted drilling equipment, portable suction dredges, and chemicals; "occupancy" as defined in 43 CFR 3715.0-5; and hobby or recreational mining in areas where the cumulative effects of the activities result in more than negligible disturbance. These activities normally would result in greater-than-negligible disturbance and should not be considered "casual use."

Minimize. We are proposing to define the term "minimize" as it is used in a number of the performance standards in proposed § 3809.420 as reducing the adverse impact of an operation to the lowest practical level. During BLM's review of proposed operations, either notice- or plan-level, BLM may determine that "minimize" means to avoid or eliminate specific impacts. BLM would determine the lowest practical level of a particular impact (or whether it should be avoided or eliminated) on a case-by-case basis.

Mitigation. We propose to incorporate with minor editing the Council on Environmental Quality's (CEQ) government-wide definition of "mitigation" as it appears in 40 CFR 1508.20. An operator who must "mitigate" damage to wetlands or riparian areas (See proposed § 3809.420(b)(3).) or who must take

appropriate "mitigation" measures for a pit or other disturbance that is not backfilled (See proposed § 3809.420(c)(7).), would have to take mitigation measures, which may include the measures listed in the proposed definition. BLM does not intend any portion of this definition, including "avoiding the impact altogether by not taking a certain action," to preclude or prevent mining. However, an operator may have to avoid locating certain facilities in sensitive areas to avoid unnecessary impacts. Under the CEQ definition, compensating for an impact by replacing, or providing substitute, resources or environments is an acceptable form of mitigation. We specifically solicit comments on when compensation would be appropriate, how best to evaluate the amount of compensation, and whether compensation should be voluntary or mandatory.

Most appropriate technology and practices (MATP). We propose to define MATP as equipment, devices, or methods that have demonstrable feasibility, success, and practicality in meeting the standards of this subpart. MATP would include the use of equipment and procedures that are either proven or reasonably expected to be effective in a particular region or location. MATP would not necessarily require the use of the most expensive technology or practice. BLM would determine whether the requirement to use MATP is met on a case-by-case basis during its review of a notice or plan of operations. We developed this concept in response to the Secretary of the Interior's direction that the rules should more clearly require the use of "best available technology and practices" or other similar technology-based standards (January 7, 1997 memorandum). However, we received many comments during public meetings asserting that BLM could not successfully apply a best available technology standard on the national level to an industry that is active in a variety of regions and uses a variety of mining techniques. In response, we developed MATP, which would be applied on a case-by-case basis.

Proposed § 3809.420(a)(2) would require an operator to use MATP to meet the standards of this subpart. We developed the concept of MATP in an attempt to allow operators flexibility in deciding how to carry out operations while assuring that the methods that operators employ have reasonable probability of effectiveness and success. We do not expect that the concept of MATP will adversely affect operators'

ability to meet the outcome-based performance standards of proposed § 3809.420.

Operator. This proposed definition is based on the existing definition, but we propose to extend it to include a parent entity or an affiliate who materially participates in the management, direction, or conduct of operations at a project area. This is in accord with the Supreme Court's recent decision explaining the term "operator" in the *Best Foods* case (*U.S. v. Best Foods et al.*, 118 S.Ct. 1876, 141 L.Ed. 2d 43). In discussing the concept of direct parental liability for a facility, the court said that, "The question is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary."

Project area. We are proposing to revise the existing definition to eliminate the idea that a "project area" is a *single tract of land* upon which an operator conducts operations (Emphasis added.). Based on comments from BLM field staff, we believe that limiting a project area to a single tract of land creates an increase in the amount of notices without any concomitant benefits to lands or resources.

Public lands. The proposed definition of "public lands" would replace the existing definition of "Federal lands." We are proposing to use the definition of "public lands" found in FLPMA throughout this subpart for the sake of consistency and clarity.

Reclamation. We are proposing to change the existing definition of "reclamation" to mean measures required by this subpart following disturbance of public lands caused by operations to meet applicable performance standards and achieve conditions at the conclusion of operations required by BLM. The definition would also provide a list of some of the components of reclamation. Finally, the proposed definition would advise that a separate definition of "reclamation" exists for operations conducted under the mining laws on Stock Raising Homestead Act lands. This latter definition is part of another rulemaking that BLM is currently working on.

Riparian area. We are proposing to add a definition of "riparian area" to this subpart. The proposed definition would identify riparian areas as a form of wetland transition between permanently saturated wetlands and upland areas that exhibit vegetation or characteristics reflective of permanent surface or subsurface water influence. The proposed definition would give

some examples of riparian areas and would exclude ephemeral streams or washes that do not exhibit the presence of vegetation dependent upon free water in the soil. Proposed § 3809.420(b)(3) would require an operator to avoid locating operations in riparian areas, where possible; minimize unavoidable impacts; and mitigate damage to riparian areas. It would also require an operator to return riparian areas to proper functioning condition and to take appropriate mitigation measures, if an operation causes loss of riparian areas or diminishment of their proper functioning condition. This definition is currently part of the BLM Manual (BLM 1737, Dec. 10, 1992), and we are proposing to include it in this subpart for the convenience of the public.

Tribe. We are proposing to define "tribe" or "tribal" as referring to a Federally recognized Indian tribe.

Unnecessary or undue degradation (UUD). We are proposing a revised definition of UUD that eliminates the current reference to the "prudent operator" standard because we believe it is too vague and subjective, and it may not be sufficient to prevent UUD, as required by section 302(b) of FLPMA. Instead, the proposed definition would define UUD in terms of failure to comply with the performance standards of this subpart (proposed § 3809.420), the terms and conditions of an approved plan of operations, the operations described in a complete notice, and other Federal and State laws related to environmental protection and protection of cultural resources. UUD would also mean activities that are not "reasonably incident to prospecting, mining, or processing operations as defined in existing 43 CFR 3715.0-5. We believe the proposed definition is more straightforward and easily measured than the "prudent operator" standard.

BLM wishes to emphasize one conceptual difference between the existing and proposed definitions of UUD. The existing definition assumes that a valid operation exists at a location, and the impacts may not exceed those that would be caused by a prudent operator. The proposed definition would recognize that FLPMA amended the mining laws, subject to valid existing rights, by limiting the right to develop locatable minerals to those operations that prevent UUD. Our inclusion of the proposed performance standards in the proposed definition of UUD means that in some situations, BLM could disapprove operations that would fail to satisfy the performance standards. An operator does not have an unfettered right under the mining laws

to develop locatable minerals regardless of the level of surface disturbance.

One commenter on an early draft of this proposed rule that we made publicly available on the Internet objected to the definition of UUD. The commenter asserted that in using the term UUD in section 302(b) of FLPMA, Congress was referring to surface disturbances caused by mining and did not authorize BLM to regulate impacts of mining operations on surface- or ground-water quality. The commenter cited section 603(c) of FLPMA, which deals with lands recommended for designation as wilderness areas, as supporting the assertion. Section 603(c) provides (in part) that the Secretary may take any action to prevent [UUD] of the lands and their resources or to afford *environmental protection*. (Emphasis added.) The commenter interpreted this language to mean that Congress was consciously not giving BLM environmental authority over mining operations on public lands not recommended for designation as wilderness areas. Since FLPMA was enacted, BLM has not ever agreed with with the commenter's view, and does not agree with it now. Section 603(c) establishes a non-impairment standard for wilderness study areas. This is a more environmentally protective standard than UUD. The cited language relates to managing existing uses under the non-impairment standard and providing additional protection to preserve wilderness values. BLM agrees that a non-impairment standard for preserving wilderness values is different from a UUD standard, but does not agree that a UUD standard contains no elements of environmental protection.

Section 3809.10 How Does BLM Classify Operations?

This is a new section that would simply inform the reader of BLM's existing scheme for classifying operations in three categories: casual use, notice-level, and plan-level. For casual use, an operator generally need not notify BLM before initiating operations. For notice-level, an operation must submit a notice to BLM before beginning operations, except for certain suction-dredging operations covered by proposed § 3809.11(h). For plan-level, an operator must submit a plan of operations and obtain BLM's approval before beginning operations.

Section 3809.11 When Does BLM Require That I Submit a Notice or a Plan of Operations?

Proposed § 3809.11 is in the form of a table that would clarify when an operator would need to submit a notice

or a plan of operations to BLM. The table also would provide informative references to other applicable sections of BLM's regulations. We propose to use tables throughout this subpart to reduce complexity and to make it easier for the reader to understand proposed requirements. This proposed section preserves BLM's three distinct levels of involvement dependent on the level of mining activity the operator proposes to conduct: casual use, notice-level, and plan-level.

Proposed § 3809.11(b) would continue the existing five-acre threshold for notice-level operations. See existing § 3809.1-3(a). We are proposing two changes that would clarify exactly how the five-acre threshold would work. First, the threshold would be "unreclaimed surface disturbance of 5 acres or less of public lands." This would clarify some diverse interpretations of the existing threshold wherein some believe that *any* disturbance greater than five acres, even if it is reclaimed, requires a plan of operations. Other BLM offices have interpreted the existing threshold to mean that once a disturbance within the 5 acres is properly reclaimed, the operator can "roll over" that area and disturb an equivalent area without getting a new notice. BLM believes that the latter interpretation is correct, as long as any disturbance is reclaimed to the standards of this subpart, including the appropriate period of time for establishment of vegetation.

We are also proposing to change the amount of advance notice that an operator planning to conduct notice-level operations must give BLM from 15 "calendar" days to 15 "business" days before the operator plans to start operations. We are proposing this change to allow BLM field staff more time to review notices.

This proposed section also includes several new concepts as follows.

Proposed § 3809.11(e) would require the representative of a recreational mining group to contact the local BLM office with jurisdiction over the lands involved at least 15 business days before initiating activities to find out if the group must submit a notice or plan of operations. This would address situations where there are concentrations of recreational mining activities on public lands with resultant surface disturbances. Recreational mining tends to concentrate surface disturbance in areas popular for gold panning and other uses that, on an individual basis, are generally considered casual use. However, BLM is concerned that sustained or aggregated use in certain areas could cause

cumulative impacts greater than casual use. Therefore, the intent of 3809.11(e) is for recreational mining groups to consult with BLM before conducting operations within a project area to ensure that any necessary steps are taken to reclaim impacts of the groups' activities. Under the proposal, the recreational mining group would not have to consult with BLM if it submitted a notice or plan of operations.

Proposed § 3809.11(f) would require an operator to submit a plan of operations for an operation involving any leaching or storage, addition, or use of chemicals in milling, processing, beneficiation, or concentrating activities, regardless of the amount of acreage that the operation would disturb. This would not include chemicals used for fuel or as lubricants for equipment. The potential impacts associated with use of leaching processes and chemicals are greater than the impacts that would be associated with operations that do not involve leaching or chemical use. Some of the chemicals used in leaching and processing, such as cyanide and mercury, are highly toxic. For this reason, BLM believes that the greater scrutiny given to plans of operations is warranted.

Proposed § 3809.11(h) would not require an operator to submit a notice or a plan of operations, if—

- The operations involve use of a portable suction dredge with an intake diameter of 4 inches or less,
- The State in which the operations occur requires authorization for its use, and
- BLM and the State have an agreement under proposed § 3809.201 addressing suction dredging.

This provision would be an exception to the general rule that all use of suction dredges requires either a notice or plan of operations, whichever is applicable. See also the definition of "casual use" in proposed § 3809.5. The impacts of use of the smallest suction dredges (under 4 inches intake diameter) under a State permit and within the parameters of a BLM/State agreement under proposed § 3809.201 would be controlled to the extent that BLM need not also regulate each operation. BLM believes that to also require a notice or plan of operations would be unnecessarily duplicative of State permitting requirements. We specifically request comments on the adequacy of State permitting requirements for suction dredges.

Proposed § 3809.11(i) would cross-reference regulations that BLM plans to promulgate under 43 CFR part 3810, subpart 3814, for operations proposed

on lands where the surface was patented under the Stock Raising Homestead Act and the minerals were reserved to the United States. Under FLPMA, such split-estate lands are "public lands" and are subject to BLM management. If an operator does not have written surface owner consent to conduct mineral activities, the operator would have to submit a plan of operations to BLM. This proposed addition reflects the requirements of the Stock Raising Homestead Amendments Act (Pub. L. 103-23, 43 U.S.C. 299, as amended) which became effective after the effective date of the existing 3809 regulations.

Proposed § 3809.11(j) corresponds to existing § 3809.1-4 and lists special status areas where BLM would require a plan of operations for all operations greater than casual use. We are proposing the following additions: areas specifically identified in BLM land-use or activity plans where a plan of operations would be required to allow a more detailed review of the effects of proposed operations on values listed in the section (proposed § 3809.11(j)(6)); National Monuments and National Conservation Areas administered by BLM (proposed § 3809.11(j)(7)); and all lands segregated in anticipation of a mineral withdrawal or withdrawn from operations under the mining laws (proposed § 3809.11(j)(8)). These areas have officially recognized special values, such as wildlife habitat and cultural resources, where BLM believes it is appropriate to take a closer look at the potential effects of proposed operations in these areas and not to allow operations to begin before BLM approval.

Section 3809.11 "Forest Service" alternative) When Does BLM Require that I Submit a Notice or a Plan of Operations?

Proposed § 3809.11 is an alternative to the one discussed immediately above. Under this alternative, an operator would have to submit to BLM a complete notice of intention to operate 15 days before planned start-up if activities would be greater than those described in paragraph (a) of the table. After reviewing the notice of intention to operate, BLM would determine if proposed operations would be likely to cause significant surface disturbance. If so, the operator would have to submit a plan of operations and obtain BLM approval prior to commencing operations. This alternative would closely align procedures in subpart 3809 with Forest Service mining claim regulations, thereby providing a more consistent regulatory framework for the

public in the area of mining law surface management. See existing Forest Service regulations in 36 CFR part 211.

We specifically request public comments on the pros and cons of selecting this alternative in lieu of the first one. One advantage we perceive is that adoption of the Forest Service alternative would make BLM's and the Forest Service's mining regulations correspond more closely and require an operator to be familiar with only one, rather than two, sets of threshold regulations. It could also simplify a situation where a mining claim overlaps the boundary between land administered by BLM and a National Forest. One disadvantage we perceive is that adoption of the Forest Service alternative could result in an increase in BLM's workload. The increase could come from having to review notices of intention for each proposed operation and possibly from an increased number of plans of operations based on determinations of significant disturbance.

Section 3809.100 What Special Provisions Apply to Operations on Segregated or Withdrawn Lands?

We are proposing to add a new § 3809.100 to govern proposed operations on pre-existing claims on segregated or withdrawn lands. Currently, BLM does not have any regulations to address this topic directly. The proposal would enable BLM to deal with operations on lands where additional protection has been deemed necessary through segregations or withdrawals. We would suspend the time frames for BLM approval of a plan of operations until we complete a validity examination report. Segregations or withdrawals would close lands to operation of the mining laws, subject to valid existing rights. The purpose of this provision is to ensure that BLM approves only mining operations based on valid claims in segregated or withdrawn areas. This furthers the purpose of the segregation or withdrawal in closing the land under the mining laws and prevents disturbance from occurring on claims subsequently determined to be invalid. Preparation of a mineral examination report would be discretionary for segregated lands because some segregations, for example, those in advance of a realty action, occur for purposes other than environmental protection.

If BLM has not completed the mineral examination report, if the mineral examination report for proposed operations concludes that a mining claim is invalid, or if there is a pending

contest proceeding for the mining claim, BLM would only approve a plan of operations for the purpose of sampling to corroborate discovery points or to comply with assessment work requirements. We considered an alternative approach that would allow BLM the option to approve a plan of operations pending the outcome of a validity determination. We decided not to propose this option because of the potential for unnecessary disturbance of segregated or withdrawn public lands.

Section 3809.101 What Special Provisions Apply to Minerals That May be Common Variety Minerals, Such as Sand, Gravel, and Building Stone?

Proposed § 3809.101 would address the long-standing issue of proposed mining of "common variety minerals" as defined in 3711.1(b) of this title, under the mining laws. Common variety minerals are not locatable under the mining laws and are normally sold at fair market value by BLM to an operator under 43 CFR part 3600. New language would prohibit operations for minerals that may be common variety until BLM has prepared a mineral examination report on the mining claims involved. This new requirement for a mineral report before allowing operations for minerals that may be common varieties would help ensure the public interest and the Federal treasury are protected because it would avoid giving away for free what the law on common varieties says must be disposed of for fair market value. See 30 U.S.C. 601 and 611 and 43 CFR part 3600.

If the report were to conclude that the minerals are common variety, the operator would either relinquish the mining claims, or BLM would initiate contest proceedings. Until BLM prepares a mineral examination report, interim operations could be authorized for sampling, performing minimum necessary annual assessment work, or for mining if an acceptable escrow account was established to cover the fair market value of the common variety mineral. We are proposing that BLM have the authority to dispose of common variety minerals from unpatented mining claims with a written waiver from the mining claimant. This proposal would require that 43 CFR 3601.1-1, concerning mineral material sales on mining claims, be amended to allow disposal. If we adopt this proposed provision, we will make conforming changes to 43 CFR part 3600.

Section 3809.116 As a Mining Claimant or Operator, What are my Responsibilities Under This Subpart for my Project Area?

This is a new section that would set forth clearly the responsibilities under subpart 3809 of mining claimants and operators for their project areas. We are adding this section in response to comments we received during development of this proposal that suggested that there is confusion as to exactly what responsibility mining claimants and operators have for their project areas under subpart 3809, particularly when a project area has been abandoned. Absent a clear assignment of responsibility, society as a whole could have to bear the cost of any problems associated with abandoned operations. Proposed paragraph (a) would establish the principle that mining claimants and operators have joint and several liability for obligations under this subpart that accrued while they held their interests. This means that all mining claimants and operators would be responsible together and individually for obligations, such as reclaiming the project area. In the event obligations are not met, BLM would have the ability to take any action authorized under this subpart against either the mining claimant(s) or the operator(s), or both.

We do not intend proposed § 3809.116 to address or affect in any way obligations established under laws other than FLPMA and the mining laws.

Under proposed paragraphs (b) and (c), we discuss how relinquishment, forfeiture, or abandonment of a mining claim or transfer of a mining claim or operations would affect the liability set forth in proposed paragraph (a). Relinquishment, forfeiture, or abandonment would not relieve a mining claimant's or an operator's responsibility for obligations or conditions created while the mining claimant or operator was responsible for operations on a mining claim or in a project area. Transfer of a mining claim or operation would relieve responsibility if the transferee accepts responsibility and BLM accepts adequate replacement financial guarantee. The parties to the transfer would have to send to BLM documentation that the transferee accepts responsibility. This documentation could take the form of a copy of the transfer agreement.

Federal/State Agreements

This portion of the proposed rule (§§ 3809.201 through 3809.204) would set forth the types of agreements that

BLM and a State may enter to prevent administrative delay and avoid duplication of effort. It would also establish the procedure for setting up an agreement under which BLM would defer to State regulation of mining operations, the limitations on that type of agreement, and the effect of this subpart on existing agreements.

Section 3809.201 What Kinds of Agreements may BLM and a State Make Under This Subpart?

This section would allow BLM and a State to make two kinds of agreements, one for a joint Federal/State program and one under which BLM would defer to State administration of the requirements of this subpart, subject to the limitations in proposed § 3809.203. This section would incorporate existing § 3809.3-1(c), which provides for setting up joint Federal/State programs.

The authority for BLM to defer to State administration of their surface management provisions relating to the regulation of operations derives from section 303(d) of FLPMA, 43 U.S.C. 1733(d). Under that section, BLM may allow States to assist in the "administration and regulation of use and occupancy of the public lands." In connection with the administration and regulation of the use of the public lands, Section 303(d) authorizes the Secretary to cooperate with States' regulatory and law enforcement officials in the enforcement of State law.

Under proposed § 3809.202, States would provide the assistance envisioned in FLPMA by regulating mining operations on public lands under their laws and regulations in lieu of BLM administration of subpart 3809. Despite such deferrals to States, BLM would not delegate its public land management responsibility under FLPMA and would retain certain responsibilities and authorities. These would include concurrence on approval of each plan of operations, concurrence on the approval and release of financial guarantees, and retention of necessary enforcement authority. This cooperative approach would provide meaningful responsibilities to the States, yet maintain both case-by-case and, under proposed § 3809.203(e), programmatic oversight by BLM.

State officials have inquired as to the availability of Federal funding for their activities if they were to enter into agreements under proposed § 3809.202. Although section 303(d) of FLPMA authorizes the Secretary to reimburse States for expenditures incurred by them in connection with activities which assist in the administration and regulation of use and occupancy of the

public lands, no such reimbursement could occur without Congressional appropriation.

SECTION 3809.202 Under What Condition Will BLM Defer to State Regulation of Operations?

This is a new section that sets forth the procedure for a State to request and BLM to approve an agreement under which BLM would defer to State regulation of operations. A State would request an agreement from the BLM State Director. The State Director would provide an opportunity for public comment and would review the request to determine if the State's requirements are consistent with the requirements of this subpart. In determining consistency, the State Director would look at whether non-numerical State standards are functionally equivalent to BLM's counterparts; and whether numerical State standards, such as the five-acre threshold for plans of operations, are the same as corresponding BLM standards, except that State review and approval time frames do not have to be the same as the corresponding Federal time frames. The State Director would consider a State environmental protection standard that exceeds a corresponding Federal standard to be consistent with the requirements of this subpart. The State Director would make a written decision that could be appealed to the Assistant Secretary for Land and Minerals Management, Department of the Interior.

Section 3809.203 What are the Limitations on BLM Deferral to State Regulation of Operations?

This is a new section that would establish limitations on deferral agreements. Even if BLM deferred to State regulation, BLM would have to concur with each State decision approving a plan of operations. This would enable BLM to fulfill its responsibility to assure compliance with this subpart and the National Environmental Policy Act. In comments on an earlier draft, States urged that, in an effort to reduce duplication of effort, BLM base its concurrence on any written findings the State may have prepared to support the State's decision approving a plan of operations. We specifically solicit comments as to whether this would be appropriate.

BLM would continue to be responsible for all land-use planning on public lands and for implementing other Federal laws relating to the public lands for which BLM is responsible. BLM would continue to have the ability to

take any authorized action to enforce the requirements of this subpart or any term, condition, or limitation of a notice or an approved plan of operations. However, BLM would generally avoid subjecting an operator to Federal enforcement action for a violation where a State has already issued an enforcement action for the violation. The amount of the financial guarantee would be calculated based on the completion of both Federal and State reclamation requirements, but could be held as one instrument. If the financial guarantee is held as one instrument, it would have to be redeemable by both the Secretary and the State. BLM would have to concur in the approval and release of a financial guarantee for public lands. If BLM determined that a State was not in compliance with all or part of its Federal/State agreement, BLM would notify the State and provide a reasonable time for the State to comply. If a State does not comply, BLM would take appropriate action, which could include termination of all or part of the agreement. BLM anticipates that it would not look at isolated incidents in determining that a State is not in compliance with a Federal/State agreement. We would consider patterns, trends and programmatic issues more important indicators of State performance than isolated incidents. A State could terminate an agreement by notifying BLM 60 days in advance.

Section 3809.204 Does This Subpart Cancel an Existing Agreement Between BLM and a State?

This is a new section that would allow existing joint program agreements to continue while BLM and a State perform a review to determine whether revisions are required under this subpart. The time frame for completing the review and making any necessary revisions to an agreement would be one year from the effective date of the final rule. We specifically request comments on whether the time frame is too long, too short, about right, or whether there should be a provision for extension of the one-year period. We also request comments on whether, and to what extent, there should be public participation in the review of existing agreements.

Operations Conducted Under Notices

This portion of the proposal (proposed §§ 3809.300 through 3809.336) would govern operations conducted under notices. It is based primarily on existing § 3809.1-3. We are proposing to use two tables: One would cover applicability of this subpart to existing notice-level operations (See

proposed § 3809.300.). This is a transition section to address notices in existence when a final rule becomes effective. The other table would govern when an operator may begin operations after submitting a notice (See proposed § 3809.313.). For the sake of simplicity, we are not proposing a separate set of performance standards applicable only to notices. Instead, proposed § 3809.320 simply references the plan-level performance standards of proposed § 3809.420, where applicable. In many cases, some of the performance standards will not be applicable to notice-level operations. See the discussion of the performance standards of proposed § 3809.420 later in this preamble. Notices would have two-year expiration dates, unless extended. This would significantly reduce the number of outstanding notices where operations have either never occurred or where reclamation has been completed to BLM's satisfaction, but the notice has not been formally closed by BLM.

Section 3809.300 Does This Subpart Apply to My Existing Notice-Level Operations?

Proposed § 3809.300 would allow operators identified in an existing notice already on file with BLM to continue operations for two years. After 2 years, the notice could be extended under proposed § 3809.333. New operators would have to conduct operations under this subpart. If a notice has expired, the operator would have to immediately reclaim the project area or promptly submit a new notice under this subpart.

Section 3809.301 Where Do I File My Notice and What Information Must I Include in It?

Proposed § 3809.301 would replace the notice-content requirements of existing § 3809.1-3. If the required information were not incorporated in the notice, BLM would not consider it to be complete and operations could not commence (See also proposed § 3809.312.). Requirements for information about the operator would clarify the need for one individual point of contact if a corporation is named as the operator. The proposal would require a description of proposed operations, schedule of activities, and a map, as are generally found in existing section 3809.1-3. However, we are proposing several new requirements. The operator would have to describe measures to be taken to prevent unnecessary or undue degradation during operations. In contrast, existing section 3809.1-3(c)(4) requires only a statement that reclamation will be completed to the required standards,

and that reasonable measures will be taken to prevent unnecessary or undue degradation during operations. The operator would have to submit a reclamation plan, not as a separate plan, but as part of the notice. The operator would have to describe how reclamation would be completed to the standards outlined in proposed § 3809.420, as applicable. In addition, the operator would have to submit an estimate of the cost to implement the reclamation as planned. Also, the operator would have to notify BLM within 30 days of either a change of operator, point of contact or mailing address. These requirements are the minimum information needed by BLM to identify who will be conducting operations on the site, what activities are planned, and how reclamation will be accomplished.

Section 3809.311 What Action Does BLM Take When It Receives My Notice?

Proposed § 3809.311 would outline actions BLM would take when it receives a notice. BLM would have 15 "business" days from the time that we receive a notice to review it, compared to the existing 15-calendar day time frame (See existing § 3809.1-3(a).). If BLM were to determine that a submitted notice is incomplete, we would inform the operator of what additional information would be needed to comply with proposed § 3809.301. A new 15-business day review period would commence upon receipt of each re-submittal of a notice, although where feasible, BLM would try to perform its review of the revised notice in a shorter time frame.

Section 3809.312 When May I Begin Operations After My Notice is Complete?

Proposed § 3809.312 would specify that an operator would be able to commence operations 15 business days after BLM receives a complete notice from that operator, or earlier if BLM informs the operator that it has completed its review, and after the operator provides a financial guarantee that meets the requirements of this subpart. This proposed would also alert the operator that operations may be subject to approval under 43 CFR part 3710, subpart 3715, which governs occupancy of public lands.

Section 3809.313 Under What Circumstances May I not Begin Operations 15 Business Days After Filing my Notice?

Proposed § 3809.313 would outline, in table format, cases in which BLM may extend the time to process a notice. Under proposed paragraph (a), if BLM

needs additional time to complete it review of a notice, we would notify the operator of the additional period, not to exceed 15 business days, needed for completing our review. We are proposing to add this provision allowing extension of the notice review period in recognition of the fact that BLM occasionally has difficulty in performing its review within the current 15-day review time period. These cases typically have been due to the complexity of the proposed operations, the proposed location, or the fact that BLM staff specialists needed for the review were not available during the review period.

Under proposed paragraph (b), we would clarify that BLM may require an operator to modify a notice before commencing operations if we believe the operations would likely cause unnecessary or undue degradation. We believe that an express reference to BLM's ability to require changes in notices will avoid administrative processing delays.

Under proposed paragraph (d), BLM could notify an operator that operations may not start until BLM visits the site, and agency concerns about prevention of unnecessary or undue degradation arising from the visit are satisfied. We make an attempt to visit the site of any notice submitted for review to gather information and to consider whether any site-specific factors are present that should be taken into account during review of a notice. Sometimes, due to weather conditions that limit access or scheduling problems, we are unable to conduct the site visit within the 15-day review period. On the theory that an ounce of prevention is worth a pound of cure, we believe that any costs associated with delaying notice-level operations to conduct a site visit would be offset by the benefits of identifying and dealing with site-related problems before they occur.

Section 3809.320 Which Performance Standards Apply to My Notice-Level Operations?

Proposed § 3809.320 would require that notice-level operations meet all applicable performance standards listed in proposed § 3809.420. See the discussion of performance standards later in this preamble under proposed § 3809.420.

Section 3809.330 May I Modify My Notice?

Proposed § 3809.330 is a new provision that would clarify that an operator may modify an existing notice to reflect proposed changes in operations. BLM would review the

modification under the same time frames proposed in §§ 3809.311 and 3809.313. This provision addresses confusion over whether a notice may be modified. The existing regulations are silent on this topic.

Section 3809.331 Under What Conditions Must I Modify My Notice?

Proposed § 3809.331 would require that an operator modify a notice if BLM requires such modification to prevent unnecessary or undue degradation, or if the operator plans to make material changes in the operations. We would interpret material changes to be changes that would disturb areas not described in the existing notice, or result in impacts of a different kind, degree or extent than those described in the existing notice. Where an operator plans to make material changes, the operator would have to submit the modification 15 business days before making the changes. While BLM is reviewing the modification, the operator could halt operations or continue operating under the existing (unmodified) notice. However, BLM could require an operator to proceed with modified operations before the 15-day period has elapsed to prevent unnecessary or undue degradation.

Section 3809.332 How Long Does My Notice Remain in Effect?

Proposed § 3809.332 would provide for an effective period of 2 years for a notice, unless extended under proposed section 3809.333 or unless the operator were to complete reclamation beforehand to the satisfaction of BLM, in which case BLM would notify an operator that the notice is terminated. We are proposing this new provision to address the situation where notices with no expiration dates remain "active" on BLM records even if no operations are being conducted. An operator's obligation to meet all applicable performance standards, including reclamation, would not terminate until the operator has in fact satisfied the obligation.

Section 3809.333 May I Extend My Notice, and, if so, How?

Section 3809.333 would contain a new provision to allow notices to be extended beyond the 2-year effective period outlined in proposed section 3809.332. This provision would accommodate notice-level operations that cannot be completed within 2 years. We are specifically requesting comments on whether the 2-year period is too long, too short, or about right.

Section 3809.334 What if I Temporarily Stop Conducting Operations Under a Notice?

Proposed § 3809.334 would expand existing § 3809.3-7, which addresses periods of non-operation. The proposal would clarify that during such periods, the operator must take all steps necessary to prevent unnecessary or undue degradation as well as maintain an adequate financial guarantee. BLM would require in writing that the operator take such steps if the agency determines that unnecessary or undue degradation would be likely to occur.

Section 3809.335 What Happens When My Notice Expires?

Proposed § 3809.335 is a new provision that tells what must occur when a notice expires and is not extended. The operator would have to cease operations, except reclamation, and promptly complete reclamation as described in the notice. The operator's responsibility to complete reclamation would continue beyond notice expiration, until such responsibilities are satisfied. This provision would help address the problem of abandoned operations by clearly establishing the operator's responsibilities.

Section 3809.336 What if I Abandon My Notice-Level Operations?

Proposed § 3809.336 is a new provision that would outline what characteristics BLM would use to determine if it considers an operation to be abandoned. The section would also specify that BLM may, upon a determination that operations have been abandoned, initiate forfeiture of an operator's financial guarantee. BLM could complete reclamation if the financial guarantee were found to be inadequate, with the operator and all other responsible persons liable for the cost of reclamation. We intend that this provision will also address the problem of abandoned operations by clarifying the steps BLM could take to reclaim abandoned project areas.

Operations Conducted Under Plans of Operations

This portion of the proposed rule (§§ 3809.400 through 3809.424) contains regulations that would govern operations conducted under plans of operations.

Section 3809.400 Does This Subpart Apply to My Existing or Pending Plan of Operations?

In developing this proposed rule, BLM has been mindful of the difficulty inherent in applying new rules to existing operations, particularly the type

of long-term, large scale operations that make up a significant portion of today's mining on public lands. Accordingly, in proposed § 3809.400 and other proposed sections discussed later in this preamble, BLM would apply the performance standards and information collection requirements of this subpart to new operations and modifications and would limit the circumstances where they would apply to pending applications for operations and modifications. The first of these transition sections is in the form of a table that explains how this subpart would affect plans of operations that (1) BLM approved before this subpart becomes effective, or (2) are pending at the time this subpart becomes effective. For plans of operations already approved, these regulations would not change the applicable performance standards. This approach would prevent operators from having to make potentially costly changes in existing facilities and operations. The remaining provisions of this proposed subpart, such as those related to inspection and enforcement, would apply to existing operations.

Similar transition provisions applicable to modifications of plan of operations would be set forth at proposed §§ 3809.433–435. A transition period for financial guarantees for existing operations would be set forth at proposed § 3809.505.

Where an operator has submitted a plan of operations for BLM review, but BLM has not yet approved it when these regulations go into effect, we are proposing a cutoff date under § 3809.400 after which the plan content requirements and performance standards of this subpart would apply to the pending plan of operations. If BLM has already made available to the public an environmental assessment (EA) or draft environmental impact statement (EIS) by the effective date of the final rule, a plan of operations would not be subject to the new content requirements or performance standards since the operator and BLM would have already committed considerable time and resources towards developing the plan under the existing regulations. If BLM had not processed a pending plan of operations to the point where it has made an EA or draft EIS available by that date to the public, then the plan would be subject to all provisions of the proposed regulations.

We considered proposing an 18-month cutoff for pending plans, that is, if BLM had been reviewing a plan for 18 months or more when this subpart becomes effective, the plan would not be subject to the plan content

requirements or performance standards of this subpart. However, we believe that a process milestone (the EA or EIS publication date) is less arbitrary than a fixed amount of time. A process milestone takes into account the specific circumstances of each plan review in a way that a fixed amount of time cannot.

Section 3809.401 Where do I File My Plan of Operations and What Information Must I Include With it?

This section is the counterpart of existing § 3809.1–5 and would tell operators what to include in a plan of operations and what supporting information BLM may also require to conduct its review of a plan. Based on our experience since 1980, the existing regulations do not require enough information about what an operator must submit. As a result, operators frequently do not initially submit the information BLM needs to review the anticipated impacts of a proposed operation, and time and resources are wasted on both sides in an effort to obtain the necessary information. Further, we believe that more specific information requirements will help to ensure that the information submitted in a proposed plan of operations is consistent from State to State. The proposal would require operator information; a description of proposed operations, including a map and a schedule of activities; and a reclamation plan, as are generally found in existing section 3809.1–5. However, we are proposing several new requirements, discussed below.

The introductory language of proposed paragraph (b) would require an operator or mining claimant to demonstrate that the proposed operations would not result in unnecessary or undue degradation of public lands. We intend this provision to place the responsibility for showing no unnecessary or undue degradation on those who are seeking to conduct operations. This provision does not appear in the existing regulations, and some have taken the position that BLM must approve a plan unless BLM can prove the plan will cause unnecessary or undue degradation. The proposal would clarify that the burden is on the operator or mining claimant to make an acceptable demonstration. If the operator or mining claimant fails to do so, BLM would require submittal of additional information, submittal of a modified proposal, or would disapprove the plan.

Proposed paragraph (b)(1) would add to the information that BLM requires to identify an operator the requirement to submit the social security number or

corporate identification number of the operator(s), the BLM serial numbers of any unpatented mining claim(s) where disturbance would occur, and a corporate point of contact. This information is necessary to identify the operator(s), identify and locate the claim(s) involved, and enable contact with the operator. This proposed paragraph would also require the operator to notify BLM in writing within 30 days of any change in the operator, the corporate point of contact, or their addresses. This requirement will allow BLM to maintain an accurate list of contacts.

Proposed paragraph (b)(2) would specify the types of plans that an operator must submit to adequately describe proposed operations, including water management plans, rock handling plans, quality assurance plans, and spill contingency plans, among other things. These plans and the other items listed in this paragraph are necessary for BLM to review and approve a plan of operations. We intend that the information submitted in response to these requirements will be sufficient to fully describe the proposed operations. At the same time, we recognize that in the initial phase of developing a mining operation, complete, detailed designs and plans are not always available. If we adopt this proposal, we would encourage anyone planning to submit a plan of operations for review to contact the local BLM office beforehand to discuss the level of detail that would be responsive to these information requirements.

Proposed paragraph (b)(3) incorporates and expands existing § 3809.1–5(c)(5), which requires measures to prevent unnecessary or undue degradation and to reclaim disturbed areas. We are proposing to add a list of items that the reclamation plan must address, where applicable, including drill-hole plugging, regrading, mine reclamation, riparian mitigation, and wildlife habitat rehabilitation, among other things. This list is not all-inclusive. It is intended to be used as a checklist by the operator to ensure that reclamation activities are adequately described. Depending on the nature of the proposed operations, the reclamation plan might also contain information related to other topics.

Proposed paragraph (b)(4) would require an operator to submit a plan for monitoring the effect of operations. Under this provision, BLM could expressly require an operator to collect data to detect potential adverse impacts before they cause extensive or irreversible damage. Because the existing regulations do not specifically

and explicitly require a monitoring plan, some BLM offices have been reluctant to ask for, and some operators have been reluctant to provide, this type of information, thereby foregoing an important tool for preventing unnecessary or undue degradation. This requirement should benefit both the operator and the Nation as a whole since it is far less costly to remedy a problem when it is detected early.

Proposed paragraph (c) would require an operator to submit certain operational and baseline environmental information to enable BLM to analyze potential environmental impacts as required by the National Environmental Policy Act (NEPA). There is no counterpart to this provision in the existing regulations. BLM must collect this information to fulfill its NEPA responsibilities, as well as to analyze a proposed plan of operations. For the most part, BLM currently collects this information, but this proposed provision would clarify BLM's authority. This proposed provision would also clarify BLM's authority to collect information concerning impacts and activities on non-public lands if BLM needs the information to analyze a plan of operations. This provision is not included in the existing regulations and would clarify the extent of BLM's authority with regard to non-public lands. This provision is not intended to extend BLM's regulatory authority to non-public lands. However, BLM may need information concerning non-public lands that are adjacent to or near proposed operations on public lands to analyze the impact of the operations and the operations' potential for unnecessary or undue degradation of public lands.

The existing financial guarantee regulations do not specify who prepares the financial guarantee calculations, though in many cases the operator has been providing the initial estimate. Proposed paragraph (d) would address any confusion by clearly putting the burden of preparing the initial reclamation cost estimate on the operator. The estimate would be subject to BLM review and acceptance as provided in proposed § 3809.554(b). Because the reclamation cost estimate would likely depend on mitigation measures developed in the NEPA compliance process, the operator would not have to submit the estimate with the initial plan of operations. BLM would tell the operator when to submit the reclamation cost estimate.

Section 3809.411 What Action will BLM Take When it Receives My Plan of Operations?

Proposed § 3809.411 would outline the range of actions BLM could take when it receives a proposed plan of operations. This section corresponds to existing § 3809.1-6, which has been reorganized and edited for clarity. In summary, BLM would review the plan of operations within 30 business days and could—

- Approve the plan of operations as submitted;
- Request additional information;
- Approve the plan of operations subject to required changes;
- Delay approving the plan of operations until certain additional steps are completed, for example, NEPA compliance and Endangered Species Act consultation; or
- Disapprove the plan of operations.

The existing regulations provide for approval of a plan of operations within 30 (calendar) days. The proposed regulations would require BLM to review a proposed plan of operations within 30 "business" days and would remove the time frame by which BLM previously had to approve plan of operations that required preparation of an environmental impact statement. This is not so much a change in procedures as a recognition of current practices. Due to workload demands, staffing levels, NEPA compliance activities, and the increasing need to consult with outside agencies or Tribal governments, setting a review time limit on plans of operations is no longer practical.

The existing regulations do not say under what circumstances BLM will withhold approval or disapprove a plan of operations. As a result, some BLM staff have assumed, and some prospective operators have asserted, that BLM cannot deny a plan of operations. Proposed paragraph (c) would clarify that BLM has the authority to withhold approval for, or disapprove, a plan of operations under certain circumstances to prevent unnecessary or undue degradation.

We considered a provision that would have required BLM to disapprove a plan of operations if it would have predicted permanent water treatment to meet water quality standards. We provided a draft rule with this provision to State and Federal agencies and posted the draft on the Internet on BLM's web page. This provision generated much public interest; many commenters opposed inclusion of it.

We decided not to propose it for a number of reasons. It is often difficult to

determine in advance when permanent treatment will be necessary. If an unanticipated need for permanent treatment becomes apparent during the course of operations, it is too late to disapprove the plan of operations. Precluding operations involving permanent treatment could have the unintended effect of encouraging prospective operators to claim that permanent treatment would not be necessary when, in fact, it would. We concluded that it would make more sense to discuss the nature of required treatment and assurances that it would continue than to argue over whether treatment would be permanent. Under a permanent treatment prohibition, if BLM approves the plan of operations based on a finding that no permanent treatment would be necessary, and it later becomes apparent that permanent treatment is necessary, none of the treatment measures and infrastructure would be in place. Where treatment is the only available technology that will achieve compliance with the water quality standards, a trust fund or other long-term funding mechanism effectively ensures permanent treatment requirements are met. Thus, the proposed regulations would emphasize use of source control methods over long-term or permanent treatment and would allow permanent treatment only after source control methods have been fully applied, or as a backup technology, and only with an adequate long-term funding mechanism in place.

Proposed paragraph (d) would require that before BLM approves a plan of operations, BLM will publish the reclamation financial guarantee amount and an explanation of the basis for the amount in a local newspaper of general circulation or in a NEPA document, and accept comments for 30 days. A NEPA document could be an environmental assessment or an environmental impact statement (EIS). This is a new requirement that would increase the level of public participation in the plan approval process by giving the public access to the cost estimating sources and assumptions used to arrive at the reclamation financial guarantee amount. We are proposing this provision because we believe public participation will result in better informed decisions by BLM in its role as manager of public lands. We specifically request comments on—

- Whether, and to what extent, obtaining public comments on the financial guarantee amount should be integrated into the NEPA process;
- Whether, and to what extent, the public would be interested in

commenting on proposed financial guarantee amounts;

- Whether the 30-day comment period is too long or too short;
- Whether the opportunity for public comment should be limited to operations for which an EIS is prepared; and
- Whether there is any benefit to publication of financial guarantee amounts for small exploration operations.

Section 3809.412 When May I Operate Under a Plan of Operations?

Proposed § 3809.412 would specify that BLM must approve a plan of operations, and the operator must provide the required financial guarantee before the operator may begin conducting operations. This provision would clarify the existing regulations, which, while requiring a plan of operations and reclamation financial guarantee, do not specifically prohibit conducting operations until these requirements are met. A small number of operators have assumed they could proceed with operations prior to plan approval or posting of the financial guarantee.

Section 3809.415 How Do I Prevent Unnecessary or Undue Degradation While Conducting Operations on Public Lands?

The existing regulations define the term, "unnecessary or undue degradation," but do not specify what the operator is expected to do in order to prevent it. Proposed § 3809.415 would provide specific guidance to operators in understanding their obligations by tying all of the components of the definition to an enforceable requirement. BLM anticipates that the clarity of this provision, plus the enumeration of performance standards in proposed § 3809.420, will improve compliance.

Section 3809.420 What Performance Standards Apply to My Notice or Plan of Operations?

The existing regulations provide general performance standards in areas such as performing reclamation and complying with all applicable State and Federal environmental requirements. In reviewing the existing regulations, BLM determined that additional detailed standards would assist both operators and BLM in defining and preventing unnecessary or undue degradation. We considered several alternative approaches for developing standards. One alternative was to create standards that would specify the design and operating requirements for exploration,

mining, and reclamation components. These requirements would then serve as minimum national requirements that would apply to all operations, specifying how operations had to be designed, constructed, and operated. We rejected this approach as too inflexible and impractical given the range of environmental settings on the public lands and the wide variety of exploration and mining activities.

The approach generally chosen for the proposed regulations is to focus on the outcome or accomplishment that the operator must achieve. These "outcome-based" performance standards put minimum emphasis on how the operator conducts the activity so long as the desired outcome is met. This allows the operator maximum flexibility, encourages innovation, and fosters the development of low-cost solutions. In implementing the proposed regulations, BLM would review the notice or proposed plan of operations to determine if it is reasonably likely to meet each outcome-based performance standard, but we would not require any specific design be used.

We are proposing to divide the performance standards in this section of the proposed regulations into three groups:

- General performance standards,
- Environmental performance standards, and
- Operational performance standards.

This would be done to distinguish the broad performance standards such as concurrent reclamation and land use plan conformance from the environmental performance standards that are specific to certain media like air or water; or from the operational standards which describe what operational components of a project must achieve.

General performance standards. Proposed paragraph (a) contains the general performance standards, which would clarify how an operator must conduct overall operations. Proposed paragraph (a)(1) would require an operator to use most appropriate technology and practices (MATP) to meet the standards of this subpart. Commenters on early drafts of this subpart expressed confusion over the relationship between the requirement to use MATP and the requirement to meet the performance standards. We intend that all operations must fully achieve the performance standards. As discussed earlier in this preamble, MATP would be established on a case-by-case basis, which would allow operators to demonstrate that their activities constitute MATP.

Proposed paragraph (a)(2) would require operators to avoid unnecessary impacts by following a reasonable and customary mineral exploration, development, mining, and reclamation sequence. This provision would expand on the "unnecessary" part of the existing definition of "unnecessary or undue degradation." There have been past instances where operators have created unnecessary impacts by not following a reasonable and customary sequence. This requirement would prevent activity from being conducted that was substantially out of sequence with reasonable and customary mineral development practices, resulting in unnecessary impacts. We intend that this performance standard would be applied on a large scale as it relates to sequencing. For example, we do not intend it to be used to regulate the precise number of drill holes needed to define an ore deposit, or the size of a leach pad or waste rock disposal area. We intend it to be applied in those extreme cases where an operator intends to construct extensive access, infrastructure systems, or initiate mining, without having first done any exploration activity to determine whether a mineral deposit is present.

Proposed paragraph (a)(3) would require an operator, consistent with the mining laws, to comply with applicable BLM land-use plans and activity plans and with coastal zone management plans, as appropriate, where such plans have been prepared. Land-use plans, including Management Framework Plans, Resource Management Plans and activity plans, are BLM's main guidance documents for multiple use management of the public lands. The existing regulations do not integrate activities conducted under the authority of the mining laws with resource management guidance developed through the land-use planning process. The purpose of this proposed performance standard is to use the resource information and management guidance developed during the planning process to provide for appropriate consideration of other resources.

Mining industry representatives have asserted that land-use planning does not apply to operations under the mining laws because section 302 of FLPMA states that, with certain exceptions (including the UUD prohibition), FLPMA did not amend the mining laws. BLM disagrees to the extent that BLM's land-use planning can be integrated with the subpart 3809 surface management requirements without impairing rights established under the mining laws. For instance, the management guidance or prescriptions

included in land-use plans cannot be so stringent as to deny rights obtained under the mining laws. Other processes, such as a withdrawal action and/or mineral contest, must be used in areas where mining has to be excluded, subject to valid existing rights, to protect other resource values.

Some commentors on early drafts of this proposed subpart expressed confusion about how the performance standards would mesh with BLM's standards and guidelines for grazing administration (43 CFR part 4100, subpart 4180). The rangeland health standards are expressions of physical and biological conditions or degree of function required of healthy sustainable lands. Operations under this subpart would have to comply with the performance standards of proposed § 3809.420. These performance standards will ensure that rangeland health standards can be met. To the extent that the standards and guidelines are incorporated into BLM's land-use plans, they will be reflected in the plans of operations that BLM approves under this subpart. BLM, in its role as manager of the public lands over the long term, will assess lands affected by operations for progress towards achieving rangeland health after reclamation is completed.

Proposed paragraph (a)(4) would require an operator to take mitigation measures specified by BLM to protect public lands. This requirement is not found in the existing regulations, but would recognize current practice. See also the definition of "mitigation" at proposed § 3809.5. BLM would determine the required mitigation on a case-by-case basis to minimize the impacts and environmental losses from operations. The measures could be developed through the NEPA process.

Environmental performance standards. Proposed paragraph (b) contains environmental performance standards that would describe the outcome an operation must achieve relative to each environmental resource. Many of the proposed environmental performance standards would incorporate a requirement to comply with other State and Federal laws and regulations. The existing regulations currently use this approach so that BLM does not become involved in setting standards in areas where Congress has authorized other agencies to do so. A few commentors on early drafts of this proposed subpart thought BLM was trying to inappropriately extend its jurisdiction or responsibility. We do not agree, and in certain respects, we are merely carrying over existing language

into the proposal. See, for example, existing § 3809.2-2(a), (b), and (c).

For some of the standards, the proposed regulations elaborate on the desired approach to achieve the standard. This is consistent with BLM's authority and responsibility as manager of public lands. In accord with the proposed outcome-based regulatory scheme, however, we generally do not require a particular approach. For example, one standard would require an operator to give preference to the use of pollution prevention technologies (source control) over pollution treatment or remediation, but would not specify what source control techniques the operator must use.

For proposed paragraph (b)(2), the water resources performance standard, we considered an alternative approach that would have established a numeric standard for groundwater affected by operations. Currently, there is no Federal groundwater standard, and some States do not have their own groundwater standards. We decided not to propose a numeric standard because of the difficulty of designing a nationwide numeric standard relevant to the range of groundwater conditions and public-use levels near minesites. We believe the States are better positioned to develop groundwater standards applicable within their borders. Instead, the proposed regulations would adopt a pollution prevention requirement, in preference to treatment or remediation, and rely on applicable State standards for groundwater protection where they are present.

The existing regulations do not have a performance standard for wetlands or riparian areas. We recognize that dredge and fill activities in "jurisdictional wetlands" are regulated by the U.S. Army Corps of Engineers (COE). We are not proposing to duplicate the existing COE regulatory scheme under section 404 of the Clean Water Act. However, not all riparian areas contain vegetation dependent on saturated soil that qualifies them as jurisdictional wetlands. The COE regulates activities that occur in or that impact jurisdictional wetlands. BLM, as a land management agency, manages wetlands and riparian areas to maintain their proper functioning condition. This role is different from and not duplicative of the COE responsibility over jurisdictional wetlands.

This standard would govern wetlands and riparian areas that are not considered "jurisdictional wetlands." Wetland and riparian areas are extremely valuable to the ecosystem, especially in the arid west. Wetlands

and riparian areas often occur in the topographically low portions of the project area, which are also preferred by mine operators as natural containment basins for waste rock placement or construction of tailings impoundments or leaching facilities, and, of course, placer operations almost exclusively operate in these areas. Proposed paragraph (b)(3) would establish a hierarchy of (1) avoiding locating in, (2) minimizing impacts to, and (3) mitigating damage to wetland and riparian areas. This provision would minimize, to the extent feasible, disturbance in these areas and promote restoration of unavoidable disturbance. In applying this hierarchy, we intend that activities directly involved with ore recovery would not be treated the same as activities associated with access, processing, and waste handling. That is, while ore recovery activities might have to be located in a wetland due to their site-specific nature, we would expect operators to avoid locating other activities, such as roads and waste dumps, in wetlands.

Proposed paragraph (b)(5) would incorporate and expand upon the revegetation requirement in the existing regulations. Since BLM issued the existing regulations in 1980, there has been considerable development in the science of revegetation and an increased awareness as to the importance of achieving successful revegetation. The proposed revegetation performance standard would incorporate the concepts of adequate revegetation diversity and density, use of native species, timeliness of reclamation, and the importance of controlling noxious weed infestations into the reclamation requirements. At the same time, the proposal would recognize that where revegetation is not possible, other techniques must be used to prevent erosion and stabilize disturbed areas.

Proposed paragraph (b)(6) would not materially change existing § 3809.2-2(d), the performance standard for fish and wildlife protection. We considered requiring an operator to "enhance" wildlife habitat during reclamation (and included the provision in a draft that we made publicly available). We decided not to propose it because of the subjectivity involved in determining what is an enhancement and because it can be inequitable or impractical to require the operator to improve habitat values above pre-disturbance conditions.

Proposed paragraph (b)(7) would make several changes to existing § 3809.2-2(e) regarding protection of cultural and paleontologic resources. We are proposing to give the same level

of protection to cave resources as the existing regulations give to cultural and paleontological resources. The terms "cave" and "cave resources" are defined at 43 CFR 37.4. Caves may contain important cultural, biological, and geological resources. These resources should be identified before initiating operations so that mitigating measures can be incorporated into proposed operations. We considered adding a separate performance standard for cave resources, but decided to combine this standard with the cultural and paleontological resources standard due to the similarity in procedures used to consider cave resources, and the overlap between the occurrence of cave resources and cultural or paleontological resources.

Proposed paragraph (b)(7)(i) would clarify and make explicit BLM's interpretation of existing § 3809.2-2(e)(1). The existing paragraph provides that operators shall not knowingly disturb, alter, injure, or destroy any scientifically important paleontologic remains or any historical or archaeological site, structure, building or object on Federal lands. This has been construed to preclude such activities by operators, unless such actions are approved in advance by BLM after appropriate site investigation, and necessary actions to protect, remove, or preserve the resource. This procedure would be codified in the proposed rules.

Proposed paragraph (b)(7)(ii) would change the time frame for action on cultural, paleontologic, and cave resources that are discovered after initiating operations from a mandatory 10 working days to 20 working days, unless otherwise agreed to by the operator and BLM, or unless otherwise provided by law. The time frame at existing § 3809.2-2(e)(2) is not adequate to accomplish the site investigation, data recovery, and consultation required with State and Federal cultural resource agencies, or with interested parties. We considered proposing an open-ended suspension of operations until investigation and data recovery is complete. We decided not to propose this alternative due to the possible adverse impacts an indefinite suspension could have on an operator.

In proposed paragraph (b)(7)(iii), we would change the responsibility for costs associated with investigation, recovery, and preservation of resources discovered during operations from the government to the operator. BLM believes that since the operator is responsible for the disturbance and is generating revenue from the extraction of publicly owned locatable minerals,

the operator receives a benefit from the investigation and recovery (the ability to continue to operate) and, thus, generally should be responsible for the costs as a cost of doing business on public lands. If BLM were to incur costs from the investigation, recovery, and preservation of discovered resources, the proposal would provide that BLM will recover the costs as determined on a case-by-case basis after an evaluation of the reasonableness of doing so under the factors set forth in section 304(b) of FLPMA, 43 U.S.C. 1734(b). BLM may decide to recover less than all of the actual costs on a case-by-case basis depending upon the nature of the discovery and the potential benefit to the general public and the other factors specified in section 304(b) of FLPMA.

Operational performance standards. Proposed paragraph (c) contains operational performance standards that describe the outcome that must be achieved by the various project components or facilities associated with mineral exploration and development. Proposed paragraph (c)(1) would incorporate existing § 3809.1-3(d) and a portion of existing § 3809.3-3(b). It would also require an operator to design, construct, and maintain roads and structures to control or prevent erosion, siltation, and air pollution and minimize impacts to resources. Access roads frequently make up the majority of acreage disturbed by exploration and smaller mining operations. For this reason, it is important to control the impacts associated with roads.

Many of the operational performance standards are standard operating practices currently used by the industry. For example, proposed paragraph (c)(2) would require an operator to control drill fluids and cuttings and correctly plug drill holes. This would be a new requirement in the regulations, but one that is already being followed by the majority of operators.

Proposed paragraphs (c)(3) and (4) consist of requirements from BLM's existing acid mine drainage policy (BLM Instruction Memorandum 96-79, April 2, 1996) and cyanide management policy (BLM Instruction Memorandum 90-566, August 6, 1990, amended November 1, 1990), respectively. Incorporating these policies into the proposed regulations will make them more readily available to operators and provide for a more consistent application of the requirements.

While not requiring a specific design, the performance standard for mine components that contain acid-forming, toxic, or other deleterious materials (proposed § 3809.420(c)(3)) requires an operator to make source control and

pollution prevention measures the priority consideration in facility design and operations. It is in this one area that the proposed performance standards go beyond a purely outcome-based standard and require a certain technical approach be taken to meet the applicable water quality standards. BLM believes this is justified because of the long-term, and perhaps permanent, commitment of resources that accompanies proposals for the post-reclamation collection and treatment of acidic, toxic, or other deleterious drainage. Several commenters on early drafts of this proposed rule suggested we provide a definition of "deleterious." We note that the word is found in the existing regulations (§ 3809.1-3(d)(2)), which have been in place for nearly two decades. In the interest of brevity, we decided not to propose a definition at this time.

Proposed paragraph (c)(4), the performance standard for leaching operations and impoundments, would include requirements from the existing BLM cyanide management policy. The requirement for leaching systems to contain precipitation from the local 100-year, 24-hour storm event would be modified slightly from the policy to remove the qualifier "* * * unless otherwise specifically authorized for such facilities under State or Federal law." BLM believes modification of the policy requirement is appropriate and that the ability to contain the precipitation of a 100-year, 24-hour storm event is the minimum performance acceptable for use of leaching systems on public lands. There were some early comments on drafts that we made publicly available that because this performance standard contains a number, it is really a design standard. We do not agree. The standard is the ability to contain a certain excess amount of solution that enters the process circuit as precipitation, thus preventing overflow and release to the environment. The standard does not specify how containment is to be accomplished or what design to use, only the performance that must be achieved. The local 100-year, 24-hour storm event is a way to describe the amount of precipitation that must be contained. The actual size of this storm event varies from location to location.

Proposed paragraph (c)(5) would require an operator to locate, design, construct, operate, and reclaim waste rock, tailings, and leach pads to minimize infiltration and contamination of surface water and ground water; achieve stability; and, to the extent feasible, blend with pre-mining, natural topography. This proposed provision

expands upon existing § 3809.1-3(d)(2), which requires prevention of UUD and adherence to applicable laws in disposing tailings, dumps, deleterious materials or substances, and other waste.

Proposed paragraph (c)(6) is the stability, grading, and erosion control performance standard. Under proposed paragraph (c)(6)(1), an operator would have to grade or otherwise engineer all disturbed areas to a stable condition to minimize erosion and facilitate revegetation. This provision is a restatement of existing § 3809.1-3(d)(4)(iv).

Existing § 3809.1-3(d)(3) allows disturbed areas to remain unreclaimed to preserve evidence of mineralization. Proposed paragraph (c)(6)(ii) would modify this provision by stating that disturbed areas may "temporarily" remain unreclaimed to preserve evidence of mineralization. We are proposing this change to ensure that disturbed areas are not left unreclaimed indefinitely. There are legitimate reasons that certain areas must remain open to show evidence of mineralization (for example, patenting). However, the operator must reclaim all areas for which the operator is responsible. BLM anticipates that the operator will describe any areas left open to establish mineralization in the reclamation plan, along with a time frame for completion of final reclamation.

The existing regulations do not specify a performance standard for mine pit reclamation, stating only the reclamation measures that must be used "where reasonably practicable." Proposed paragraph (c)(7)(i) would require an operator to backfill mine pits unless the operator demonstrates it is not feasible for economic, environmental, or safety reasons. The proposal would change the assumption from generally regarding backfilling as impractical, to one of assuming it is practical unless demonstrated otherwise. BLM believes that the burden of proof regarding the feasibility of pit backfilling should be on the operator to say why backfilling is not practical. The proposal would ensure that operators consider backfilling options for all operations.

We do not intend the economic feasibility determination anticipated under the proposed pit backfilling requirement to be a detailed review of the project economics, such as rate of return on investment. BLM does not intend to determine what is a reasonable profit margin for mine operators. The fact that an operator could conduct complete backfilling and still show a

profit does not automatically mean BLM would require backfilling. Nor does it mean that an operation which appears to be uneconomic, even without any backfilling, is exempt from performing backfilling. When considering the economic feasibility of pit backfilling, BLM would weigh the anticipated environmental benefits in relation to operational economic factors such as: whether the project is a single or multiple pit operation, the distance and grade from mine site to waste rock storage versus backfill location, the direct haul cost versus temporary storage and rehandling cost, and the reclamation costs as a function of disturbance area size.

Proposed paragraph (c)(7)(ii) would require mitigation for pit areas that are not backfilled. The type of mitigation anticipated is not a dollar-for-dollar cost compensation (That is, for every dollar of backfill cost saved, one dollar must be spent on mitigation.) or necessarily an acre-for-acre compensation (For every acre of unreclaimed pit, one acre must be provided as mitigation.). Instead, the intent of the mitigation requirement is to insure that the impacts associated with not backfilling pit areas are mitigated. For example, if leaving a pit highwall creates a safety hazard, required mitigation may include erecting perimeter fencing and posting hazard signs. If the pit area is in critical wildlife habitat that cannot be restored unless backfilled, then the mitigation may require providing replacement habitat at another location.

Proposed paragraphs (c)(8), (9), (10), and (11) are the performance standards for solid waste, fire prevention and control, maintenance and public safety, and protection of survey monuments respectively. We have carried them over from the existing regulations with minor editing. See §§ 3809.2-2(c), 3809.3-4, 3809.3-5, and 3809.2-2(f) respectively.

Section 3809.423 How Long Does My Plan of Operations Remain in Effect?

Proposed § 3809.423 would provide that a plan of operations remains in effect as long as the operator conducts operations, unless BLM suspends or revokes the plan of operations for failure to comply with this subpart. BLM's suspension and revocation provisions are found in proposed §§ 3809.601 and 3809.602, which are discussed later in this preamble. There is no counterpart to this provision in the existing regulations, which has the effect of allowing a plan of operations to remain in effect indefinitely.

Section 3809.424 What Are My Obligations if I Stop Conducting Operations?

Proposed § 3809.424 would establish an operator's obligations if the operator stops conducting operations. This section appears in table format and would incorporate existing § 3809.3-7 with the changes and additions discussed below.

Proposed paragraph (a)(1) would add two requirements to the existing requirement to maintain the site of operations in a safe and clean condition during any non-operating periods. An operator would also have to take all necessary action to prevent unnecessary or undue degradation and would have to maintain an adequate financial guarantee. Action to prevent unnecessary or undue degradation could include providing adequate maintenance, monitoring, and security and detoxifying process solutions, if any. BLM believes these are the minimum measures necessary to stabilize the site and prevent unnecessary or undue degradation. Proposed paragraph (a)(2) incorporates existing § 3809.3-7, with minor editing.

Proposed paragraph (a)(3) would provide that BLM will review an operation after five consecutive years of inactivity to determine if we should terminate the plan of operations and require final reclamation and closure. We are proposing this provision in an effort to clear the books of long-term, inactive plans of operations. These sites require attention and resources that we believe we could more productively direct at sites where operations are active. It is important to note that if BLM terminated a plan based on inactivity, that action would not affect the status of the mining claim, if any; nor would it prevent the operator from submitting a new notice or proposed plan of operations, as appropriate, for the same project area. Terminating a plan of operations would limit an operator's operations to activities designed to fulfill the operator's reclamation obligation, which continues until satisfied. We specifically request comments on whether the 5-consecutive-year period of inactivity, which would be a prerequisite to BLM's review for possible termination, is too long, too short, or about right.

Proposed paragraph (a)(4) describes the process BLM would follow if we determine that an operator has abandoned an operation. Relying on the indicators of abandonment set forth in proposed § 3809.336(a), BLM would take steps to collect any financial guarantee for the operation. If the

collected financial guarantee were insufficient to pay for reclamation, the operator and all other responsible parties would be held liable for the costs of reclamation not covered by the forfeited amount.

Proposed paragraph (b) would establish the policy that an operator's or mining claimant's reclamation and closure obligations continue until satisfied. This provision is not explicitly stated in the existing regulations, but is necessary to clear up confusion about whether the operator or mining claimant has any residual obligations after financial guarantee forfeiture. Some have argued that financial guarantee forfeiture ends the obligation to reclaim, but in cases where the financial guarantee does not cover the costs of reclamation, this position effectively enables an operator to evade full responsibility for reclamation and closure. BLM believes that operators and mining claimants should not be able to pass the costs of reclamation resulting from their activities to the Nation as a whole. We intend this provision to ensure that they do not.

Modifications of Plans of Operations

This portion of the proposal (proposed §§ 3809.430 through 3809.435) contains provisions governing modification of a plan of operations. Most of these proposed sections are derived without substantive change from existing § 3809.1-7. We discuss changes and new material below.

Section 3798.432 What Process Will BLM Follow in Reviewing a Modification of My Plan of Operations?

Proposed § 3809.432 is the counterpart of existing § 3809.1-7(b) and would set forth the processes BLM would use in reviewing a proposed modification of a plan of operations. Under proposed paragraph (a), BLM would review and approve a modification in the same manner as we did for the initial plan, except that we would not solicit public comment on the financial guarantee amount if the modification does not change the financial guarantee amount, or only changes it minimally. We specifically solicit comments on how we should interpret the term "minimally," such as using a dollar threshold. We did not include in this proposed rule the procedures contained in existing § 3809.1-7(c) relating to BLM State Director review of proposed required modifications. These procedures are unnecessarily detailed and cumbersome. The proposal would allow BLM field staff flexibility to streamline the modification review process.

Under proposed paragraph (b), BLM would accept a modification without formal approval if it does not constitute a substantive change and does not require additional analysis under the National Environmental Policy Act. We are proposing this procedure to expedite processing of non-substantive modifications.

Section 3809.433 Does This Subpart Apply to a New Modification of My Plan of Operations?

Proposed § 3809.433 sets forth the guidelines that BLM would use in applying this subpart to a new modification of a plan of operations. This material is not included in the existing regulations, but BLM believes it is necessary to give operators and the public a clear idea of how and under what circumstances this subpart would apply to modified operations. For the purposes of this section, a "new" modification is one that an operator submits to BLM after the effective date of this subpart.

Under proposed paragraph (a), for a new modification that proposes to add a discrete new facility to an existing operation, the plan contents requirements (proposed § 3809.401) and performance standards (proposed § 3809.420) of this subpart would apply to the new facility. The facilities and areas already existing would continue to operate under the existing plan of operations. We believe that it would not be unduly burdensome to subject a new facility, such as a waste rock repository, leach pad, impoundment, drill site, or road, to any new requirements contained in this subpart. We specifically request comments on whether we would be creating too much confusion by setting up a situation where one set of regulations governs part of an operation and another set governs another part.

Under proposed paragraph (b), for a new modification that proposes to modify an existing facility, the plan contents requirements (proposed § 3809.401) and performance standards (proposed § 3809.420) of this subpart would apply to the modified facility. However, the operator would have the option of demonstrating to BLM's satisfaction that it is not feasible to apply the plan content requirements and performance standards of this subpart for environmental, safety, or technical reasons. If BLM agrees, then the plan contents requirements and performance standards in effect immediately before the effective date of this subpart would apply to the plan of operations. We are proposing to give an operator this option for a modification

of existing facilities, such as expansion of a waste rock repository, leach pad, or impoundment; layback of a mine pit; or widening of a road, because in some cases, it may be burdensome or unnecessarily complicated to apply two sets of regulations to a single facility.

Section 3809.434 Does This Subpart Apply to My Pending Modification for a New Facility?

Proposed § 3809.434 sets forth the guidelines that BLM would use in applying this subpart to a pending modification of a plan of operations to add a new facility. This material is not included in the existing regulations, but BLM believes it is necessary to give operators and the public a clear idea of how and under what circumstances this subpart would apply to modified operations. For the purposes of this section, a pending modification is one that an operator submitted to BLM before the effective date of this subpart, and BLM had not made a final decision by that date.

Under proposed paragraph (a), if an operator submitted a proposed modification of an existing plan of operations to construct a new facility before the effective date of this subpart, and BLM made an environmental assessment (EA) or environmental impact statement (EIS) available to the public before that date, then the new facility would not be subject to the plan content requirements and performance standards of this subpart. In contrast, under proposed paragraph (b), if BLM had not made the EA or EIS publicly available by that date, then the plan content requirements and performance standards of this subpart would apply to the new facility. This is the same cutoff that we propose to apply to pending proposed plans of operations. See the discussion of proposed § 3809.400 earlier in this preamble. The reason for choosing this cutoff date is that by the time an EA or EIS is published, an operator and BLM would have already committed considerable time and resources towards developing the modification under the existing regulations.

Section 3809.435 Does This Subpart Apply to My Pending Modification For an Existing Facility?

Proposed § 3809.435 sets forth the guidelines that BLM would use in applying this subpart to a pending modification of a plan of operations to modify an existing facility. This material is not included in the existing regulations, but BLM believes it is necessary to give operators and the public a clear idea of how and under

what circumstances this subpart would apply to modified operations. For the purposes of this section, a pending modification is one that an operator submitted to BLM before the effective date of this subpart.

Under proposed paragraph (a), if an operator submitted a proposed modification of an existing plan of operations to modify an existing facility before the effective date of this subpart, and BLM made an environmental assessment (EA) or environmental impact statement (EIS) available to the public before that date, then the new facility, when approved, would not be subject to the plan content requirements and performance standards of this subpart. Under proposed paragraph (b), if the EA or EIS had not been published, then the plan content requirements and performance standards of this subpart would apply to the modified facility, unless the operator demonstrates to BLM's satisfaction that it is not feasible to apply it for environmental, safety, or technical reasons.

Financial Guarantee Requirements—General

This proposed rule would establish mandatory provisions for financial guarantees for all activities greater than casual use, expand the types of financial guarantees available, and establish the circumstances and procedures under which BLM would pursue forfeiture of a guarantee. It would also require that financial guarantees be redeemable by the Secretary while allowing BLM to accept financial guarantees posted with the State in which operations take place, provided the level of protection is compatible with this subpart. The rule would also authorize BLM to require the establishment of a trust fund in those circumstances where long term, post-mining water treatment will be necessary. Included in the proposal is a description of when current operations would have to comply with these rules.

On February 27, 1997, BLM published rules affecting financial guarantees under this subpart (62 FR 9093). Those rules were challenged in *Northwest Mining Association v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. May 13, 1998) and remanded on procedural grounds. The effect of the remand is to reinstate the previous financial guarantee regulations. The proposed rules are different from the invalidated rulemaking in several substantial ways:

1. The proposed rule would not differentiate between notice- and plan-level operations.
2. The proposed rule would require all financial guarantees be actual

guarantees, rather than certification that the guarantee exists.

3. The proposed rule would eliminate the requirement that a third party professional engineer certify the amount of the financial guarantee.

4. The proposed rule would require that financial guarantees be posted for the actual amount of the estimated reclamation cost. Thus, if the estimated cost is \$500 per acre, the financial guarantee to be posted must be \$500 times the number of acres disturbed (rounded to the next highest acre). This differs from the remanded requirement that minimum financial guarantee amounts be posted.

5. The rule would also allow for additional types of financial instruments to be used when posting a guarantee.

6. The rule would permit BLM to require the operator to establish a long-term funding mechanism for water treatment and other post-mining maintenance requirements.

7. The rule would establish time frames for existing operations to comply with the financial guarantee requirements.

8. As discussed in the enforcement section of this preamble, BLM would not require a second financial guarantee for operations in non-compliance.

In the section-by-section analysis that follows, we compare the proposal to the regulations in place prior to the remanded 1997 regulations. Readers should note that when we talk about the "existing" financial guarantee regulations in this preamble, we are not referring to the financial guarantee regulations in the current (1997) edition of the Code of Federal Regulations (CFR), which contains the remanded rules (§ 3809.1-9(a)-(q)). Instead, we are referring to the financial guarantee regulations in the 1996 edition of the CFR (§ 3809.1-9(a)-(g)).

Section 3809.500 In General, What Are BLM's Financial Guarantee Requirements?

Proposed § 3809.500 would change existing §§ 3809.1-9(a) and 3809.1-9(b) by requiring operators to provide financial guarantees in advance for all operations other than casual use. The existing regulations make the posting of a financial guarantee discretionary for plans of operations and do not address financial guarantee for notice-level operations. BLM believes that a requirement to provide a financial guarantee for notice- and plan-level operations would ensure that operators will reclaim project areas to the standards of this subpart. We recognize that this requirement imposes a cost on

those conducting operations on public lands. (We have analyzed the cost of this requirement in the course of complying with Executive Order 12866 and the Regulatory Flexibility Act. See part IV of this preamble which discusses how BLM has met its procedural obligations.) We believe that the cost of this requirement is greatly outweighed by the benefits that it produces, namely avoiding the creation of new sources of land and water pollution on public lands.

Section 3809.503 When Must I Provide a Financial Guarantee for My Notice-Level Operations?

Proposed § 3809.503 is a new section that governs when a notice-level operator must provide a financial guarantee. It would not require a current notice-level operator to provide a financial guarantee unless the notice is modified or extended. This provision would minimize the impact of the financial guarantee requirement on existing notice-level operations as long as they are unchanged. It would also make clear that persons filing notices after the effective date of a final rule must provide the financial guarantee before beginning operations.

Section 3809.505 How Do the Financial Guarantee Requirements of This Subpart Apply to My Existing Plan of Operations?

Proposed § 3809.505 is a new section that would allow those operating under an existing plan of operations 180 days from the effective date of a final rule to comply with the financial guarantee requirements of this rule if they have not already done so. We are proposing the 180-day grace period to ensure an orderly transition to the new requirements. We specifically request comments on whether the 180-day time frame is too long, too short, or about right.

Section 3809.551 What Are My Choices for Providing BLM With a Financial Guarantee?

Proposed § 3809.551 restates the requirements of existing § 3809.1-9(b) and (d) in the form of a table. It would allow an operator to provide an individual financial guarantee for a single notice or plan of operations, a blanket financial guarantee for State-wide or nation-wide operations, or to provide evidence of an existing financial guarantee under State law or regulations.

Individual Financial Guarantee

This portion of the proposed rule (§§ 3809.552 through 3809.556) contains

provisions applicable to financial guarantees that cover the reclamation obligations associated with a single notice or plan of operations.

Section 3809.552 What Must My Individual Financial Guarantee Cover?

Proposed § 3809.552 would require that an individual financial guarantee cover reclamation costs as if BLM were to contract for reclamation with a third party. This clarifies current BLM policy under existing § 3809.1-9(b), which does not expressly address the cost of contracting with a third party for reclamation. We are proposing this clarification because the administrative cost of contracting, including overhead, can be significant and may otherwise have to be subtracted from the funds available for on-the-ground work. This might result in on-the-ground reclamation work being incomplete or substandard. The proposal would also clarify that the financial guarantee covers all reclamation obligations arising from an operation, regardless of the areal extent or depth of activities described in the notice or approved plan of operations.

In light of our recent experience with operators who file for bankruptcy protection, BLM intends that reclamation obligations continue and that BLM could forfeit a financial guarantee and use it to meet reclamation obligations in a bankruptcy situation unless specifically precluded by court order. Likewise, in situations where an operator experiences financial problems short of bankruptcy and is unable to meet ongoing environmental protection obligations, BLM intends that we could forfeit a portion of the financial guarantee to satisfy such obligations. This would include, for instance, partial forfeiture to keep pumps running and prevent overflow of ponds in the event an operator ceases operations. In this context, BLM construes the ongoing maintenance activity intended to prevent unnecessary or undue degradation as a reclamation obligation subject to coverage by the financial guarantee. We specifically request comments on whether BLM should require additional funding mechanisms to meet operational or environmental contingencies.

Proposed paragraph (b) of this section is a new provision that would establish the goal of periodic BLM review of the adequacy of the estimated reclamation cost and the long-term funding mechanism, if any, and require increased coverage, if necessary. The purpose of this review is to ensure that the estimated reclamation cost and amount of financial guarantee remain

sufficient throughout the life of the operation. There are many variables inherent in mining operations that can affect the reclamation cost, and we believe there should be a mechanism to take this inherent variability into account and allow appropriate adjustments. We do not want to create the incentive for an operator to forfeit the financial guarantee and walk away from a project area because the reclamation cost has become greater than the financial guarantee amount. We are not proposing a specific frequency for review of the estimated reclamation cost, and by using "will" instead of "must," we do not intend to create an obligation for BLM to conduct any particular review. Accomplishing the goal of periodically reviewing reclamation cost estimates is subject to the availability of resources.

Proposed paragraph (c) of this section would authorize BLM to require an operator to establish a trust fund or other funding mechanism to ensure the continuation of long-term water treatment to achieve water quality standards or for other long-term, post-mining maintenance requirements. The funding would have to be adequate to provide for construction, long-term operation, maintenance, or replacement of any treatment facilities and infrastructure, for as long as the treatment and facilities are needed after mine closure. BLM would identify the need for a trust fund or other funding mechanism during plan review or later. This would be a new requirement designed to deal with the situation where an otherwise fully reclaimed mining operation will continue for the foreseeable future to discharge pollutants, such as acid mine drainage, into surface waters. To avoid unnecessary or undue degradation, we believe there must be some mechanism to fund long-term treatment of the discharge. Under this provision, the operator would have to set aside funds that would be invested to produce income sufficient to pay for the ongoing cost of whatever treatment is required to meet applicable water quality standards for as long as the treatment is necessary. We anticipate that any prediction that long-term treatment will be necessary would have to be based on adequate sampling to determine the acid-generating potential of the ore body and surrounding rock. Under this provision and proposed § 3809.401(c), BLM would have the authority to require an operator to collect and analyze enough samples to ensure that any prediction is based on a statistically adequate number of samples. We are particularly interested

in commenters' views on how well this mechanism would work and on alternate approaches to address the problem of post-mining acid mine drainage.

Section 3809.553 May I Post a Financial Guarantee for a Part of My Operations?

Proposed § 3809.553(a) would provide that financial guarantees may be provided on an incremental basis to cover only those areas being disturbed. This new provision is intended to address confusion about whether an operator has to provide financial guarantee for the entire area to be affected by operations all at once. We believe that where an operation is large or is of long duration or will be developed in phases, there is no need to require financial guarantee for areas that will not be immediately disturbed. The purpose of the financial guarantee requirement is to ensure reclamation of disturbed surface areas. To the extent that the surface is not disturbed, no financial guarantee is needed. However, at any one time, an operator would have to maintain enough financial guarantee to cover all estimated reclamation costs.

Proposed paragraph (b) of this section would establish BLM's goal of reviewing the financial guarantee for each increment of an operation at least annually. We do not consider this provision as creating an obligation for BLM to review any particular increment annually. The number of reviews we conduct annually is subject to available resources.

Section 3809.554 How Do I Estimate the Cost To Reclaim My Operations?

Proposed § 3809.554 would require an operator to estimate the cost to reclaim an operation as if BLM were hiring a third-party contractor to perform reclamation of the operation after the operator had vacated the project area. The estimate would have to include BLM's cost to administer the reclamation contract. An operator could contact BLM to obtain the administrative cost information. The purpose of this new provision is to ensure that the estimated cost of reclamation, on which the financial guarantee amount is based, is sufficient to pay for successful reclamation if the operator does not complete reclamation. In that event, BLM would most likely have to contract for the reclamation work and would incur administrative costs. If funding were not available in the financial guarantee to pay the administrative costs, the costs would have to come out of the funds available for the on-the-ground reclamation. This

could result in incomplete or substandard reclamation.

Section 3809.555 What Forms of Individual Financial Guarantee Are Acceptable to BLM?

Proposed § 3809.555 would expand the kinds of instruments that are acceptable as financial guarantees under existing § 3809.1–9(c). In addition to surety bonds, cash, and negotiable securities, which are acceptable under the existing regulations, the expanded list of acceptable instruments would include letters of credit, certificates of deposit, State and municipal bonds, and investment-grade rated securities. We believe that expanding the list of acceptable instruments will make it easier for an operator to provide the required financial guarantee. In proposed paragraph (a), we are proposing to change the wording to specify that only non-cancelable surety bonds would be acceptable. The intent of this change is to preclude cancellation of a surety bond without the existence of a replacement financial guarantee.

Section 3809.556 What Special Requirements Apply to Financial Guarantees Described in Section 3809.555(e)?

Proposed § 3809.556 is a new section that we intend to ensure that market fluctuations do not erode the security provided by financial guarantees and other instruments that fluctuate in value. Proposed paragraph (a) would require an operator to provide BLM a statement describing the market value of a financial guarantee which is in the form of traded securities. The operator would have to provide the statement before beginning operations and at the end of each calendar year thereafter. Proposed paragraph (b) would require the operator to review annually the value of the guarantee and to post an additional financial guarantee if the value declines by more than 10 percent or if BLM determines that a greater guarantee is necessary. Proposed paragraph (c) would allow the operator to ask BLM to authorize the release of that portion of an account exceeding 110 percent of the required financial guarantee. BLM would honor the request if the operator is in compliance with the terms and conditions of the operator's notice or approved plan of operations.

Blanket Financial Guarantee

This portion of the proposed rule contains one section (proposed § 3809.560) that addresses blanket financial guarantees. We are proposing

to continue the practice of accepting blanket financial guarantees.

Section 3809.560 Under What Circumstances May I Provide a Blanket Financial Guarantee?

Proposed § 3809.560 is identical to existing § 3809.1–9(d), with minor editorial changes, and would permit the operator to provide a blanket guarantee covering state-wide or nation-wide operations. BLM will accept a blanket financial guarantee if we determine that its terms and conditions are sufficient to comply with this subpart. The amount of any blanket financial guarantee would have to be sufficient to cover all of an operator's reclamation obligations.

State-Approved Financial Guarantee

This portion of the proposed rule contains four sections (proposed §§ 3809.570 through 3809.573) that address State-approved financial guarantees. We are proposing to continue the practice of accepting State-approved financial guarantees.

Section 3809.570 Under What Circumstances May I Provide a State-Approved Financial Guarantee?

Proposed § 3809.570 would deem acceptable a State-approved financial guarantee that is redeemable by the Secretary, is held or approved by a State agency for the same operations covered by a notice or plan of operations, and provides at least the same amount of financial guarantee as required by this subpart. We are proposing that any State-approved financial guarantee be redeemable by the Secretary so that, in case of failure to reclaim, we can initiate forfeiture of the financial guarantee to ensure reclamation of public lands. The redeemability requirement would not apply to State financial guarantee pools. See proposed § 3809.571.

Section 3809.571 What Forms of State-Approved Financial Guarantee Are Acceptable to BLM?

Under proposed § 3809.571, BLM would accept a State-approved financial guarantee in any of the forms specified under proposed § 3809.555. BLM would also accept participation in a State financial guarantee pool if the State agrees that, upon BLM's request, the State will use part of the pool to meet reclamation obligations on public lands, and the BLM State Director determines that the pool provides the level of protection required by this subpart. BLM is also proposing to accept a corporate guarantee if it is acceptable to the State, is redeemable by or guaranteed to the Secretary, and the BLM State Director determines that the

corporate guarantee provides a level of protection equal to the estimated cost of reclamation, considering the operator's net income, net working capital and intangible net worth, and total liabilities and assets. We specifically request comments or suggestions on what would be an appropriate standard for an acceptable corporate guarantee.

Section 3809.572 What Happens if BLM Rejects a Financial Instrument in My State-Approved Financial Guarantee?

Under proposed § 3809.572, BLM would notify an operator in writing within 30 days of BLM's receipt of evidence of an operator's State-approved financial guarantee whether the guarantee was acceptable. If BLM rejected a financial instrument in an operator's State-approved financial guarantee, the operator would have to provide BLM with a financial guarantee equal to the amount of the financial guarantee rejected.

Section 3809.573 What Happens if the State Makes a Demand Against My Financial Guarantee?

Under proposed § 3809.573, if the State makes a demand against an operator's financial guarantee and reduces the available balance, the operator would have to replace or augment the financial guarantee to cover the remaining reclamation cost.

Modification or Replacement of a Financial Guarantee

This portion of the proposed rule (proposed §§ 3809.580 through 3809.582) addresses modification or replacement of a financial guarantee.

Section 3809.580 What Happens if I Modify My Notice or Approved Plan of Operations?

Proposed § 3809.580 incorporates existing § 3809.1–9(e) and would require an operator to increase the financial guarantee if the operator modifies a plan or a notice and the estimated reclamation cost increases. This section would not preclude an operator from requesting BLM's approval for a decrease in the financial guarantee if the estimated reclamation cost decreases as a result of a modification.

Section 3809.581 Will BLM Accept a Replacement Financial Instrument?

Proposed § 3809.581 covers the procedure for review and approval of a replacement financial instrument. This topic is not addressed in the existing regulations. If an operator wants to replace a financial instrument any time after BLM's approval of the initial

instrument, the operator would request BLM review of the replacement. Within 30 days of the request, BLM would complete its review and, if we reject the request, issue a decision in writing.

Section 3809.582 How Long Must I Maintain My Financial Guarantee?

Proposed § 3809.582 would establish a requirement for maintaining the financial guarantee. This topic is not addressed in the existing regulations. An operator would have to maintain the financial guarantee until the operator, or a new operator, replaces it, or until BLM releases the requirement to maintain the financial guarantee after completion of successful reclamation.

Release of Financial Guarantee

This portion of the proposed rule (§§ 3809.590 through 594) addresses when and how BLM releases a financial guarantee after completion or transfer of operations. As noted below, the proposal would incorporate several portions of the existing regulations. In general, the process for release of financial guarantee described in this portion of the proposal would apply to all operations once this subpart becomes effective. However, for existing operations that are not subject to the performance standards of this subpart (See proposed § 3809.400), the standards for release would be those included in the existing plan of operations.

Section 3809.590 When Will BLM Release or Reduce the Financial Guarantee for My Notice or Plan of Operations?

Proposed § 3809.590 incorporates existing § 3809.1–9(f) with the substantive changes discussed below. When the operator completes all or any portion of the reclamation of an operation according to the notice or approved plan of operations, the operator would notify BLM that the reclamation has occurred and request a reduction in the financial guarantee or BLM approval of the adequacy of the reclamation, or both. BLM will then promptly inspect the reclaimed area. Under the proposal, BLM would encourage the operator to accompany the BLM inspector. Under the existing regulations, BLM is required to inspect the operation with the operator. This change would not preclude the operator from accompanying the BLM inspector and would facilitate final inspections where the operator is unable to be present. Subsequently, BLM would notify the operator, in writing, whether the reclamation is acceptable and

whether the operator may reduce the financial guarantee under § 3809.591.

Under proposed paragraph (c), BLM would publish notice of final release of financial guarantee in a local newspaper of general circulation and accept comments for 30 days. This would give the public an opportunity to participate in the financial guarantee release process. BLM believes that this opportunity for public participation could result in information pertinent to financial guarantee release coming to BLM's attention. We specifically request comments on whether the proposed 30-day comment period is too long, too short, or about right.

Section 3809.591 What Are the Limitations on the Amount by Which BLM May Reduce My Financial Guarantee?

Proposed § 3809.591 would govern incremental financial guarantee release, a topic that is not covered by the existing regulations. Proposed paragraph (a) would provide that this section does not apply to any long-term funding mechanism. The financial guarantee release provisions in this section apply only to the financial guarantee.

Under proposed paragraph (b), BLM could reduce the financial guarantee by not more than 60 percent of the total guarantee when the operator completes backfilling, regrading, establishment of drainage control; and stabilization and detoxification of leaching solutions, heaps, tailings, and similar facilities. An operator could apply for financial guarantee release for a portion of the project area. For example, if an operator completed regrading on 50 acres of a 100-acre project area, the operator could seek release of 60 percent of the financial guarantee applicable to the 50 acres.

Under proposed paragraph (c), BLM could release the remainder of the financial guarantee for a portion of the project area when BLM determines that the operator has successfully completed reclamation, including revegetation, and water quality standards have been met for one year without need for further water treatment unless a long-term funding mechanism under proposed § 3809.552(c) has been established. If so, BLM could release the financial guarantee (but not the long-term funding mechanism) when water quality standards have been achieved for one year regardless of whether the discharge is being treated.

Section 3809.592 Does Release of My Financial Guarantee Relieve Me of All Responsibility for My Project Area?

BLM intends proposed § 3809.592 to address the issue of whether a mining claimant or operator has any residual responsibility for a project area after final release of the financial guarantee. This is an issue that is not addressed in the existing regulations and has come up many times since BLM issued them in 1980. Under proposed paragraph (a), an operator's (or mining claimant's) liability would not terminate upon release of the financial guarantee if reclamation should fail to meet the standards of this subpart. We believe that this provision is necessary to cover situations where, for example, a totally regraded and revegetated slope begins to slump or fail. If BLM could not require the operator or mining claimant to come back and fix the problem, unnecessary or undue degradation of public lands caused by the operator's activities would be a likely result. BLM does not anticipate a large number of cases of this type and, in any event, must balance an operator's reasonable expectation of the finality of final financial guarantee release with BLM's responsibility to prevent unnecessary or undue degradation.

In a similar manner, proposed paragraph (b) would provide that release of the financial guarantee under subpart 3809 does not release or waive claims by BLM or other persons under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, or under any other applicable statutes or regulations. We intend this provision to clarify this aspect of the relationship between this subpart and other laws and regulations. Release of an operator's financial guarantee under this subpart does not affect any responsibility that an operator may have under other laws, such as laws governing handling and disposal of hazardous waste. This is not a new concept, but it is an important one that, in BLM's experience, operators sometimes are not aware of.

Section 3809.593 What Happens to My Financial Guarantee if I Transfer My Operations?

Proposed § 3809.593 would incorporate and expand existing § 3809.1–6(e), which provides that in the event of a change of operators involving an approved plan of operations, the new operator shall satisfy the financial guarantee requirements. The existing regulations do not address whether the original

operator or transferee is responsible for obligations created before the transfer, nor at what point after the transfer BLM should release the original financial guarantee. Thus, the proposal would provide that when an operator transfers an operation, the operator remains responsible for obligations or conditions created while that operator conducted operations, unless the transferee accepts responsibility and BLM accepts an adequate replacement financial guarantee. Therefore, the original operator's financial guarantee would remain in effect until BLM determines that the original operator is no longer responsible for all or part of an operation. The proposal would allow for incremental release of the original financial guarantee. The proposal also would provide that the new operator may not begin operations until BLM accepts the new operator's financial guarantee. BLM believes it is important to establish clear responsibility for reclamation of all portions of a transferred operation to ensure that responsible parties carry out their reclamation obligations. Otherwise, the transfer could cause confusion over who is responsible for reclaiming different areas and delays in achieving the necessary reclamation.

Section 3809.594 What Happens to My Financial Guarantee When My Mining Claim Is Patented?

Proposed § 3809.594 incorporates existing § 3809.1-9(g) with minor editorial changes and sets forth the conditions under which BLM would release a financial guarantee when a mining claim is patented.

Forfeiture of Financial Guarantee

This portion of the proposed rule (§§ 3809.595 through 3809.599) addresses when and how BLM carries out forfeiture of a financial guarantee. This topic is not addressed by the existing regulations. This portion of the proposal incorporates the remanded 1997 regulations governing forfeiture. We are incorporating these procedures to ensure a degree of uniformity in the procedures used by various BLM offices to collect and use financial guarantees and to complete the logical sequence of events that encourage reclamation.

Section 3809.595 When Will BLM Initiate Forfeiture of My Financial Guarantee?

Under proposed § 3809.595, BLM would initiate forfeiture of all or part of a financial guarantee for any project area or portion of a project area if the operator refuses or is unable to complete reclamation as provided in the notice or

approved plan of operations, if the operator fails to meet the terms of the notice or decision approving the plan of operations, or if the operator defaults on any condition under which the operator obtained the financial guarantee. BLM believes these provisions are the minimum necessary to ensure that BLM initiates forfeiture in appropriate circumstances.

Section 3809.596 How Does BLM Initiate Forfeiture of My Financial Guarantee?

Proposed § 3809.596 describes the process that BLM would follow to initiate forfeiture of a financial guarantee and the contents of the written forfeiture notice BLM would send. The section also explains that once an operator receives a forfeiture notice, the operator could avoid forfeiture by demonstrating, in writing, to BLM that the operator or another person will complete reclamation or by obtaining written permission from BLM for a surety to complete reclamation. BLM believes that sending an operator a forfeiture notice and giving the operator an opportunity to avoid forfeiture balances the need to provide a fair process with BLM's responsibility to quickly obtain funding for necessary reclamation work.

Section 3809.597 What if I Do Not Comply With BLM's Forfeiture Notice?

Under proposed § 3809.597, the next step in the forfeiture process would occur. If an operator fails to meet the requirements of the forfeiture notice, fails to appeal the notice, or if the decision appealed is affirmed, BLM would collect the forfeited amount and use the funds collected to implement the reclamation plan on the area or portion of the area to which the financial guarantee applies. An operator could appeal a forfeiture notice under the procedures outlined in proposed § 3809.800.

Section 3809.598 What if the Amount Forfeited Will Not Cover the Cost of Reclamation?

Under proposed § 3809.598, if the amount of the financial guarantee forfeited is insufficient to pay the full cost of reclamation, the operator(s) and mining claimant(s) would be jointly and severally liable for the remaining costs. As discussed under proposed § 3809.116, joint and several liability means that the mining claimant(s) and operator(s) would be responsible together and individually for the remaining cost of reclamation. BLM would have the ability to take action to recover the remaining reclamation cost

against either the mining claimant(s) or the operator(s), or both.

Section 3809.599 What if the Amount Forfeited Exceeds the Cost of Reclamation?

Under proposed § 3809.599, BLM would return the unused portion of a forfeited guarantee to the party from whom we collected it if the reclamation costs are less than the amount forfeited.

Inspection and Enforcement

This portion of the proposed rule (proposed §§ 3809.600 through 3809.604) would set forth BLM's policies applicable to inspection of operations under subpart 3809, including the possibility of allowing members of the public to accompany BLM inspectors to the site of a mining operation. It would also set forth the procedures BLM would use to enforce the subpart, including identifying several types of enforcement orders, specifying how they would be served, and outlining the consequences of noncompliance. The inspection and enforcement rules would apply to all operations on the effective date of the final rule.

Section 3809.600 With What Frequency Will BLM Inspect My Operations?

Proposed § 3809.600 would clarify BLM's authority, as the manager of the public lands under FLPMA and the entity that administers the mining laws, to conduct inspections of mining operations. This section would incorporate existing §§ 3809.1-3(e) and 3809.3-6. Paragraph (a) would provide that at any time, BLM may inspect operations, including all structures, equipment, workings, and uses located on the public lands. The inspection may include verification that the operations comply with this subpart.

BLM is proposing a new provision in paragraph (b) that would allow a member of the public to accompany the BLM inspector if the presence of the public does not materially interfere with the mining operations or with BLM's administration of this subpart, or create safety problems. When BLM authorizes a member of the public to accompany the inspector, the operator would have to provide access to operations. This section would be added to provide a degree of openness to BLM's program and to satisfy the public's interest in the administration of BLM's surface management rules. BLM does not intend this provision to create an obligation for BLM to allow the public to accompany inspectors, nor does BLM intend it to confer on the public the right to accompany an inspector. The decision

to allow the public to accompany a BLM inspector would be at BLM's discretion. The public should be aware that mine sites are frequently located in remote areas and where access is difficult. Once on a mine site, a member of the public may be exposed to dust, noise, vibration, heavy equipment, and rocky or uneven ground. BLM expects that members of the public who accompany BLM inspectors would knowingly and voluntarily assume liability risks associated with their activities. In addition, an operator may ask a member of the public to sign a release of liability for injury and to wear protective equipment.

Proposed paragraph (c) would incorporate existing BLM policy with regard to inspection of those operations at which greater potential hazard exists. See Cyanide Management Policy, Instruction Memorandum 90-566, August 6, 1990, amended November 1, 1990. It would provide that at least 4 times each year, BLM will inspect operations using cyanide or other leachate or where there is significant potential for acid drainage. BLM believes that cyanide and acid-generating operations have the potential for greater adverse impacts to the public lands than other types of operations and should receive a greater quantity of BLM's inspection resources.

Section 3809.601 What Type of Enforcement Action May BLM Take if I Do Not Meet the Requirements of This Subpart?

Proposed § 3809.601 would specify the types of enforcement orders that BLM may issue.

Noncompliance orders. Existing § 3809.3-2, provides for the discretionary issuance of notices of non-compliance for failure to file a notice or plan of operations (§ 3809.3-1(a)) or for a failure to reclaim (§ 3809.3-2(b)). Proposed § 3809.601(a) would provide for the discretionary issuance of noncompliance orders, which are equivalent to notices of noncompliance. Noncompliance orders could be issued for operations that do not comply with any provision of a notice, plan of operations, or any requirement of subpart 3809.

Administrative enforcement—suspension orders. The existing rules do not provide for administrative orders to enforce notices of noncompliance. Existing § 3809.3-2(c) provides for judicial enforcement of notices of noncompliance. Judicial enforcement is not always practical, however. The agency must work with the local United States Attorney to bring judicial actions, which can result in delays, or in some

cases no enforcement at all.

Administrative enforcement is available to BLM under section 302(c) of FLPMA, which provides for suspensions or revocations of instruments providing for the use occupancy or development of the public lands.

Existing subpart 3809 does not address the suspension or revocation authority of section 302(c) of FLPMA, but the proposed rule would. The proposed rules would establish BLM's suspension or revocation authority without requiring insertion of such language into each notice or plan of operations. Inclusion of language in the rule would be more convenient than requiring operators to insert the necessary text into the notices and plans of operations that they submit to BLM, and would not be substantively different.

In comments on earlier versions of the rule, industry representatives asserted that section 302(c) of FLPMA does not apply to notices and plans of operations under subpart 3809. BLM disagrees. Plans of operations constitute FLPMA authorizations. See *James C. Mackey*, 96 IBLA 356. Although notices under subpart 3809 are not considered as Federal actions or authorizations (See *Sierra Club v. Michael Penfold*, 857 F.2d 1307 (9th Cir. 1988)), they can be considered as instruments providing for a use under the language of FLPMA.

Proposed § 3809.601(b) would provide for the issuance of suspension orders for all or any part of operations that fail to timely comply with a noncompliance order for a significant violation issued under § 3809.601(a). Although section 302(c) does not require that BLM first issue a noncompliance order or make the distinction between significant and non-significant violations, BLM believes that an operator should ordinarily be given an opportunity to abate a violation before having its operations suspended and that non-significant violations should not result in suspensions. The proposal would define a significant violation as one that causes or may result in environmental or other harm or danger or that substantially deviates from the complete notice or approved plan of operations.

Under the proposal, before the issuance of a suspension order, BLM would notify an operator of its intent to issue a suspension order; and provide the operator an opportunity for an informal hearing before the BLM State Director to object to a suspension.

The informal hearing requirement before the BLM State Director is included to satisfy the hearing requirement of FLPMA section 302(c).

In the case of *Dvorak Expeditions*, 127 IBLA 145, 155 (1993), the Interior Board of Land Appeals (IBLA) addressed the type of a hearing that is required by section 302(c) of FLPMA, and the BLM's responsibilities. The IBLA concluded that section 302(c) does not require a hearing "on the record." A hearing before an administrative law judge is not required before issuance of a suspension order. Thus, the proposed rule would be consistent with section 302(c). Like other BLM orders, suspension orders would be appealable to the IBLA.

Temporary immediate suspensions. Section 302(c) contains a proviso allowing for temporary immediate suspensions prior to a hearing or final administrative finding upon a determination that such a suspension is necessary to protect health or public safety or the environment. Proposed § 3809.601(b)(2) would implement this proviso. Under this paragraph, BLM would be authorized to order an immediate, temporary suspension of all or any part of an operation without issuing a noncompliance order, notifying an operator in advance, or providing the operator an opportunity for an informal hearing if the operator does not comply with any provision of a notice, plan of operations, or subpart 3809; and an immediate, temporary suspension is necessary to protect health, safety, or the environment *from imminent danger or harm*. Although FLPMA does not expressly mention imminent danger or harm, BLM views an element of imminence as necessary to forgo the normal procedures for an advance hearing.

The proposed rule would include a provision that BLM may presume that an immediate suspension is necessary if a person conducts plan-level operations without an approved plan of operations or conducts operations other than casual use without submitting a complete notice. Plans of operation and notices are essential to assure that operations proceed in an orderly manner without causing environmental harm. The conduct of mining operations in the absence of an approved plan or a complete notice on file with BLM is a reasonable basis to conclude that a threat exists to the health, safety or the environment, and that a temporary immediate suspension is warranted.

Proposed § 3809.601(b)(3) would specify that BLM will terminate a suspension order under § 3809.601(b)(1) or (b)(2) no later than the date by which an operator corrects the violation. This provision would implement a proviso of FLPMA section 302(c).

Contents of enforcement orders. Proposed § 3809.601(c) would enumerate the contents of enforcement orders. In part, it is based on existing § 3809.3-2(d). It would provide that enforcement orders will specify (1) how an operator is failing or has failed to comply with the requirements of subpart 3809; (2) the portions of the operations, if any, that must be suspended; (3) the actions necessary to correct the noncompliance and the time, not exceed 30 days, within which corrective action must begin; and (4) the time to complete corrective action. These items would provide the information that an operator receiving the order should know.

Portion of remanded section 3809.3-2 not re-proposed. Section 3809.3-2(e) of the rules remanded in May 1998 contained a provision requiring operators with records of noncompliance to provide financial guarantees to BLM for all of their operations, and that financial guarantees held by a State were not acceptable for purposes of that section. Upon consideration, BLM has decided not to re-propose this remanded provision. BLM has concluded that if a State is holding an adequate financial guarantee that is otherwise acceptable, no good reason exists to require an operator to provide a second separate financial guarantee with BLM.

Section 3809.602 Can BLM Revoke My Plan of Operations or Nullify My Notice?

Proposed § 3809.602 would be a new section and would implement the revocation portion of FLPMA section 302(c). It would provide that BLM may revoke a plan of operations or nullify a notice upon finding that (1) a violation exists of any provision of the notice, plan of operation, or subpart 3809, and the operator has failed to correct the violation within the time specified in the enforcement order issued under § 3809.601; or (2) a pattern of violations exists at the operations. The finding would not be effective until BLM notifies the operator of its intent to revoke the plan of operations or nullify the notice, and affords the operator with an opportunity for an informal hearing before the BLM State Director. The provision would specify that if BLM nullifies a notice or revokes a plan of operations, the operator must not conduct operations on the public lands in the project area, except for reclamation and other measures specified by BLM.

Section 3809.603 How Does BLM Serve Me With an Enforcement Action?

Proposed § 3809.603 would identify the means by which BLM will serve a noncompliance order, a notification of intent to issue a suspension order, a suspension order, or other enforcement order. The existing service provision appears in § 3809.3-2(b)(1).

Under the proposal, service would be made on the person to whom it is directed or his or her designated agent, either by (1) offering a copy at the project area to the designated agent or to the individual who, based upon reasonable inquiry, appears to be in charge. If no such individual can be located at the project area, BLM may offer a copy to any individual at the project area who appears to be an employee or agent of the person to whom the notification or order is issued. Service would be complete when the notice or order is offered and would not be incomplete because of refusal to accept. Optionally service could occur by sending a copy of the notification or order by certified mail or by hand to the operator or his or her designated agent, or by any means consistent with the rules governing service of a summons and complaint under rule 4 of the Federal Rules of Civil Procedure. Service is complete upon offer of the notification or order or of the certified mail. The service rules would recognize that mining claimants, as well as operators, are responsible for activities on a mining claim or mill site and provide that BLM may serve a mining claimant in the same manner an operator would be served.

The proposal would allow a mining claimant or operator to designate an agent for service of notifications and orders. A written designation would have to be provided in writing to the local BLM field office having jurisdiction over the lands involved.

Section 3809.604 What Happens If I Do Not Comply With a BLM Order?

Proposed § 3809.604(a) would reiterate the provision of existing § 3809.3-2(c) that failure to comply with a BLM enforcement order could lead to judicial enforcement. Under the proposed rule, if a person does not comply with a BLM order issued under §§ 3809.601 or 3809.602, the Department of the Interior may request the United States Attorney to institute a civil action in United States District Court for an injunction or order to enforce its order, prevent the person from conducting operations on the public lands in violation of subpart 3809, and collect damages resulting

from unlawful acts. This judicial relief may be in addition to the enforcement actions described in proposed §§ 3809.601 and 3809.602 and the penalties described in §§ 3809.700 and 702.

Proposed § 3809.604(b) would embody the substance of existing § 3809.3-2(e). It would provide that if an operator fails to timely comply with a noncompliance order issued under § 3809.601(a), and remains in noncompliance, BLM may require submittal of plans of operations for current and future notice-level operations.

Penalties

This portion of the proposed rule (§§ 3809.700 through 3809.703) would set forth the penalties applicable to violations of this subpart. These penalty provisions would apply to existing operations as of the effective date of the final rule.

Section 3809.700 What Criminal Penalties Apply to Violations of This Subpart?

Proposed § 3809.700 would be included for information purposes and identify the criminal penalties established by statute for individuals and organizations for violations of subpart 3809. It was previously included in § 3809.3-2(f) of the rules that were remanded in May 1998. Proposed paragraph (a) would specify that individuals who knowingly and willfully violate the requirements of subpart 3809 may be subject to arrest and trial under section 303(a) of FLPMA (43 U.S.C. 1733(a)). Individuals convicted are subject to a fine of not more than \$100,000 or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571, or imprisonment not to exceed 12 months, or both, for each offense. Proposed paragraph (b) would specify that organizations or corporations that knowingly or willfully violate the requirements of subpart 3809 are subject to trial and, if convicted, will be subject to a fine of not more than \$200,000, or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571.

Section 3809.701 What Happens if I Make False Statements to BLM?

Proposed § 3809.701 would inform the public of the existing criminal sanctions for making false statements to BLM. Under statute (18 U.S.C. 1001), persons are subject to arrest and trial before a United States District Court if, in any matter under this subpart, they knowingly and willfully falsify, conceal, or cover up by any trick, scheme, or

device a material fact, or make any false, fictitious, or fraudulent statements or representations, or make or use any false writings or document knowing the same to contain any false, fictitious, or fraudulent statement or entry. If a person is so convicted, he or she will be fined not more than \$250,000 or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571, or imprisoned not more than 5 years, or both.

Section 3809.702 What Civil Penalties Apply to Violations of This Subpart?

Proposed subpart 3809 would provide authority for BLM to issue administrative civil penalties. Existing subpart 3809 does not provide for the issuance of administrative penalties. BLM believes that the issuance of administrative penalties for violations of subpart 3809 would be an important means of deterring violations and to encourage abatement of violations that do occur. As stated earlier, section 302(b) of FLPMA provides that "[i]n managing the public lands, the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." This provision confers upon the Secretary, acting through BLM, both the authority and the responsibility to take necessary actions to protect the public lands. Enforcement of subpart 3809 would be strengthened if operators understood that administrative enforcement orders can be backed up by administrative penalties. The possibility of such penalties should prevent unnecessary or undue degradation of the public lands by deterring the occurrence of violations of subpart 3809, and should also prevent the further degradation of the public lands by operators who fail to see the need for promptly acting to abate violations. Providing the authority for such administrative action would allow the agency to help itself in enforcing the law without having to resort to the judicial system for the assessment of penalties. Although industry representatives have understandably objected to the administrative penalty provisions, BLM believes that the authority and need exist for administrative penalties.

Proposed § 3809.702(a)(1) would provide that following issuance of a noncompliance or suspension order under section 3809.601, BLM may assess a proposed civil penalty of up to \$5,000 for each violation against any persons who (i) violate any term or condition of a plan of operations or fail to conform with operations described in a notice; (ii) violate any provision of this

subpart; or (iii) fail to comply with an order issued under proposed § 3809.601. To encourage timely compliance, the proposal would specify that BLM may consider each day of continuing violation a separate violation for purposes of penalty assessments.

The amount of the administrative penalty would be discretionary. To assure that the penalty amount assessed would be reasonable proposed § 3809.702(a)(3) would provide that in determining the amount of the penalty, BLM must consider the person's history of previous violations at the particular mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the person was negligent; and the person's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. Also, to conform with section 323(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121 (March 29, 1996), the proposal would provide that if the person assessed the penalty is a small entity, BLM will, under appropriate circumstances, consider reducing or waiving a civil penalty and may consider ability to pay in determining a penalty assessment.

The proposal would also establish procedures to assure fairness in the penalty assessment process. Under proposed § 3809.702(b), a final administrative assessment of a civil penalty would occur only after BLM has notified the person of the assessment and given the person opportunity to request within 30 days a hearing by the Department's Office of Hearings and Appeals (OHA). BLM would have the ability to extend the time to request a hearing if it is conducting settlement discussions. If a hearing occurs, OHA would issue any final penalty assessment. Under proposed § 3809.702(c), if BLM issues a proposed civil penalty and the recipient fails to request a hearing, the proposed assessment would become a final order of the Department, and the penalty assessed becomes due upon expiration of the time allowed to request a hearing.

Section 3809.703 Can BLM Settle a Proposed Civil Penalty?

Proposed § 3809.703 would clarify BLM's authority to negotiate a settlement of civil penalties, in which case BLM would prepare a settlement agreement. Under the proposal, the BLM State Director or his or her designee must sign the agreement.

Appeals

Section 3809.800 What Appeal Rights do I Have?

Proposed § 3809.800 would specify the rights of any person adversely affected by a decision made under subpart 3809. Existing appeal rights are contained in § 3809.4, and require operators to appeal to the BLM State Director before an appeal may be taken to the Interior Board of Land Appeals. Under the proposal, any person adversely affected by a decision made under subpart 3809 may appeal the decision to the Office of Hearings and Appeals under 43 CFR parts 4 and 1840. Review of a decision by the BLM State Director would be discretionary and could take place if consistent with 43 CFR part 1840. BLM expects in the near future to propose changes to the State Director review process to address which decisions would be appealable to the State Director.

Under proposed § 3809.800(b), in order for the Department of the Interior to consider the appeal of a decision, the person appealing must file a notice of appeal in writing with the BLM office where the decision was made within 30 days after the date the decision is received. This provision would carry over the terms of existing § 3809.4(b).

Under proposed § 3809.800(b), all decisions under this subpart would go into effect immediately and remain in effect while appeals are pending unless a stay is granted under 43 CFR section 4.21(b). This provision also would carry over the terms of existing § 3809.4(b).

Proposed § 3809.800 (c) and (d) would continue the provisions of existing § 3809.4(c) concerning the contents of an appeal. Under the proposal, a written appeal must contain the appellant's name and address and the BLM serial number of the notice or plan of operations that is the subject of the appeal. It would also require an appellant to submit a statement of reasons for the appeal and any arguments the appellant wishes to present that would justify reversal or modification of the decision within the time frame specified in part 4 of this chapter (usually within 30 days after filing an appeal).

Existing paragraph (e) would not be proposed because it deals with the specifics of State Director review. Such procedures would be proposed separately as part of another regulatory proposal. Similarly, existing § 3809.4(g) is not necessary because although a correct statement, it does not need to be stated in the rules. Agency actions do not become final until appeals to OHA have been finally resolved.

IV. How Did BLM Meet Its Procedural Obligations?

Executive Order 12866, Regulatory Planning and Review

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

In accordance with E.O. 12866, BLM performed a benefit-cost analysis for the proposed action. We used as a baseline the existing regulation and current BLM administrative costs. The potential costs associated with the regulation are increased operating costs for miners and increased administrative costs for BLM. The potential benefits are environmental improvements. Both benefits and costs are difficult to quantify because many of the possible impacts associated with the regulation will be site- or mining operation-specific. Costs were analyzed in two ways: (1) a simple supply and demand approach; and (2) a simple cost modeling approach. Both approaches were designed to provide rough estimates of the potential costs and were not expected to provide precise estimates of costs. The analysis does serve, however, to establish a rough estimate of the range of potential costs. The site specific nature of most of the potential economic benefits prevented their quantification. However, the analysis developed sufficient information to demonstrate that it was plausible to assume that the benefits were at least equal to the costs. The annual costs of the proposed regulation are estimated to range from \$12.1 million to \$89.4 million. BLM has placed the full assessment on file in the BLM Administrative Record at the address specified in the **ADDRESSES** section.

Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these proposed regulations easier to understand, including answers to

questions such as the following: (1) Are the requirements in the proposed regulations clearly stated? (2) Do the proposed regulations contain technical language or jargon that interferes with their clarity? (3) Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? (4) Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A "section" appears in bold type and is preceded by the symbol "\$" and a numbered heading, for example § 3809.430.) (5) Is the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand?

Please send any comments you have on the clarity of the regulations to the address specified in the **ADDRESSES** section.

National Environmental Policy Act

These proposed regulations constitute a major Federal action significantly affecting the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). BLM is in the process of preparing a draft environmental impact statement (DEIS) which will be on file and available to the public in the BLM Administrative Record at the address specified in the **ADDRESSES** section. We will publish a notice in the **Federal Register** when the DEIS becomes publicly available.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. 601-612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The Small Business Administration (SBA) has determined that the size standard for businesses engaged in mining of metals and non-metallic minerals, except fuels, is 500 employees. See 13 CFR 121.201. Thus, any business employing 500 or fewer employees is considered "small" for the purposes of this analysis. Based on the 1992 Census of Mineral Industries (MIC 92-S-1, U.S. Department of Commerce, Bureau of the Census, August 1996), we believe that virtually all businesses currently engaged in mining on public

lands could be considered "small" under the SBA 500-employee standard. Based on the 1992 Census of Mineral Industries and information collected from BLM field staff, we estimate that the proposed regulations will apply to 672 small entities (289 metal mining plus 383 non-metallic mineral mining companies). This represents about 3 percent of the total number of companies involved in the mineral industry in 1992 and about 15 percent of the companies involved in metal and non-metallic minerals mining in 1992.

Cost models developed by BLM suggest that the cost impact of the proposed rule would vary according to the type of mining operation. On a present value basis, the estimated percent cost increases were 2.9%, 5.6%, and 7.8% respectively for the modeled placer, open pit, and strip operations. These cost increases represent 1.7%, 0.13%, and 3.9% of the present value of estimated gross annual revenues over the expected life of placer, open pit, and strip operations respectively. We expect nearly all exploration activities would face cost increases of less than 5 percent.

The modeled exploration and placer mine probably best represent the potential impact on small entities. We do not consider the potential effect of this proposed rule on the modeled placer operation to be significant, given that the compliance cost represents less than 2 percent of gross revenues. Nor do we consider exploration cost increases below 5 percent significant. While the proposed rule affects a significant number of entities, the impacts cannot be classified as significant. Therefore, BLM has determined under the RFA that this proposed rule would not have a significant economic impact on a substantial number of small entities. For additional information, see the Regulatory Flexibility Act analysis on file in the BLM Administrative Record at the address specified in the **ADDRESSES** section.

Unfunded Mandates Reform Act

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

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

The proposed rule does not have significant takings implications. The

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

Executive Order 12612, Federalism

The proposed rule will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. It would provide States greater opportunities to administer the mining regulatory program on public lands. In accordance with Executive Order 12612, BLM has determined that this proposed rule does not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

Paperwork Reduction Act

Sections 3809.301 and 3809.401 contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), BLM has submitted a copy of the proposed regulations to the Office of Management and Budget (OMB) for review. BLM will not require collection of this information until OMB has given its approval.

This set of information collections, Management of Public Lands under the U.S. Mining Laws, is comprised of information about proposed operations on public lands, including information necessary to identify and contact the operator; a description of the operation (whether notice- or plan-level); the reclamation plan; the reclamation cost estimate; and, in the case of plan-level operations, a plan for monitoring the effect of the operation. Respondents are those individuals and corporations who plan to conduct operations on public lands. The information would have to be submitted each time an operator proposed to conduct a new operation. We estimate the average burden for these information collections is 16 hours per notice and 32 hours per plan of operations. Since BLM processes about 350 notices each year, we estimate the annual total burden for notices is 5,600 hours. We process about 325 plans of operations each year for an estimated total yearly burden of 10,400 hours.

Organizations and individuals desiring to submit comments on the information collection requirements

should direct them to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Department of the Interior.

BLM considers comments by the public on this proposed collection of information in—

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of BLM, including whether the information will have practical use;
- Evaluating the accuracy of BLM's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; such as permitting electronic submittal of responses.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to BLM on the proposed regulations.

Authors

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

List of Subjects in 43 CFR Part 3800

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

Dated: November 13, 1998.

Sylvia V. Baca,

Assistant Secretary, Land and Minerals Management.

Accordingly, BLM proposes to amend 43 CFR part 3800 as set forth below:

PART 3800—MINING CLAIMS UNDER THE GENERAL MINING LAWS

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

Subpart 3809—Surface Management

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General Information:

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- 3809.2 What is the scope of this subpart?
- 3809.3 What rules must I follow if State law conflicts with this subpart?
- 3809.5 How does BLM define certain terms used in this subpart?
- 3809.10 How does BLM classify operations?
- 3809.11 (Alternative 1) When does BLM require that I submit a notice or a plan of operations?
- 3809.11 ("Forest Service" Alternative) When does BLM require that I submit a notice of intention to operate or a plan of operations? (Forest Service Alternative)
- 3809.100 What special provisions apply to operations on segregated or withdrawn lands?
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- 3809.111 Public availability of information.
- 3809.115 Information collection.
- 3809.116 As a mining claimant or operator, what are my responsibilities under this subpart for my project area?

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- 3809.203 What are the limitations on BLM deferral to State regulation of operations?
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Subpart 3809—Surface Management

General Information

§ 3809.1 What are the purposes of this subpart?

The purposes of this subpart are to:

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

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

§ 3809.2 What is the scope of this subpart?

(a) This subpart applies to all operations authorized by the mining laws on public lands, including Stock Raising Homestead lands, as provided in § 3809.11(i), where the mineral interest is reserved to the United States.

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

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

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

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

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

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

As used in this subpart, the term:

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

(1) Casual use generally includes the collection of mineral specimens using hand tools, hand panning, and non-motorized sluicing.

(2) Casual use does not include use of mechanized earth-moving equipment, truck-mounted drilling equipment, portable suction dredges, motorized vehicles in areas designated as closed to "off-road vehicles" as defined in § 8340.0–5 of this title, chemicals, or explosives; "occupancy" as defined in § 3715.0–5 of this title; or hobby or recreational mining in areas where the cumulative effects of the activities result in more than negligible disturbance.

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

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

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

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

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

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

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

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

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

Most appropriate technology and practices (MATP) means equipment, devices, or methods that have demonstrable feasibility, success, and practicality in meeting the standards of this subpart. MATP includes the use of equipment and procedures that are either proven or reasonably expected to be effective in a particular region or location. MATP does not necessarily require use of the most expensive technology or practice. BLM determines whether the requirement to use MATP is met on a case-by-case basis during its review of a notice or plan of operations.

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

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

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

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

Public lands, as defined in 43 U.S.C. 1702, means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the

BLM, without regard to how the United States acquired ownership, except—

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

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

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

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

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

(3) Rehabilitation of fisheries or wildlife habitat;

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

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

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

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

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

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

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

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

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

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

Wilderness System, and BLM-administered National Monuments and National Conservation Areas.

§ 3809.10 How does BLM classify operations?

BLM classifies operations as—
 (a) Casual use, for which an operator generally need not notify BLM;
 (b) Notice-level operations, for which an operator must submit a notice

(except for certain suction-dredging operations covered by § 3809.11(h)); and
 (c) Plan-level operations, for which an operator must submit a plan of operations and obtain BLM's approval.

§ 3809.11 (Alternative 1) When does BLM require that I submit a notice or a plan of operations?

To see when you must submit a notice or a plan of operations, follow this table:

If your operations . . .	Then . . .
(a) Consist of casual use,	You do not need to notify BLM or seek permission to conduct operations. You must reclaim casual-use disturbance. BLM may monitor your operations to ensure that unnecessary or undue degradation does not occur.
(b) Consist of unreclaimed surface disturbance of 5 acres or less of public lands,	You must give BLM a complete notice of your planned activities 15 business days before you plan to start operations. You have the option to file a plan of operations. You must not segment a project area by filing a series of notices solely to avoid filing a plan of operations. See §§ 3809.300 through 3809.336.
(c) Consist of unreclaimed surface disturbance of more than 5 acres of public lands,	You must submit a plan of operations and obtain BLM's approval before beginning operations. See §§ 3809.400 through 3809.435.
(d) Cause any surface disturbance greater than casual use in the special status areas described in paragraph (j) of this section,	You must submit a plan of operations and obtain BLM's approval. See §§ 3809.400 through 3809.435.
(e) Involve any recreational mining activities by a group, such as a mining club,	The group's representative must contact BLM at least 15 business days before initiating activities to find out if BLM will require the group to file a notice or a plan of operations. This contact is not required if the group submits a notice or plan of operations.
(f) Involve any leaching or storage, addition, or use of chemicals in milling, processing, beneficiation, or concentrating activities (This does not include chemicals used solely for fuel or as lubricants for equipment.),	You must submit a plan of operations and obtain BLM's approval. See §§ 3809.400 through 3809.435.
(g) Require you to occupy or use a site for activities "reasonably incident" to mining, as defined in § 3715.0-5 of this title,	Whether you are operating under a notice or a plan, you must also comply with part 3710, subpart 3715, of this title.
(h) Involve the use of a portable suction dredge with an intake diameter of 4 inches or less, the State requires an authorization for its use, and BLM and the State have an agreement under § 3809.201 addressing suction dredging,	You need not submit a notice or plan of operations unless otherwise required by this section. For all other use of a suction dredge, you must submit to BLM either a notice or a plan of operations, whichever is applicable under this section.
(i) Are located on lands patented under the Stock Raising Homestead Act and you do not have the written consent of the surface owner,	You must submit a plan of operations and obtain BLM's approval. Where you have surface-owner consent, you do not need a notice or a plan of operations under this subpart. See part 3810, subpart 3814, of this title.

(j) The special status areas where BLM requires a plan of operations for all operations greater than casual use include:

- (1) Lands in the California Desert Conservation Area (CDCA) designated by the CDCA plan as "controlled" or "limited" use areas;
- (2) Areas in the National Wild and Scenic Rivers System, and areas designated for potential addition to the system;
- (3) Designated Areas of Critical Environmental Concern;
- (4) Areas designated as part of the National Wilderness Preservation System and administered by BLM;

- (5) Areas designated as "closed" to off-road vehicle use, as defined in § 8340.0-5 of this title;
- (6) Any areas specifically identified in BLM land-use or activity plans where BLM has determined that a plan of operations is required to provide detailed review of project effects on unique, irreplaceable, or outstanding historical, cultural, recreational, or natural resource values, such as threatened or endangered species or their critical habitat;
- (7) National Monuments and National Conservation Areas administered by BLM; and
- (8) All areas segregated in anticipation of a mineral withdrawal and all

withdrawn areas, except for areas segregated or withdrawn under the Alaska Native Claims Settlement Act, the Alaska National Interest Lands Conservation Act, and the Alaska Statehood Act.

(k) If your operations do not qualify as casual use, you must submit a notice or plan of operations, whichever is applicable.

§ 3809.11 ("Forest Service" Alternative) When does BLM require that I submit a notice of intention to operate or a plan of operations?

To see when you must submit a notice of intention to operate or a plan of operations, follow this table:

If . . .	Then . . .
(a) Your proposed operations—	You do not need to notify BLM or seek permission to conduct your operations. You must reclaim your operations, and BLM may monitor them to ensure that unnecessary or undue degradation does not occur.

If . . .	Then . . .
<p>(1) Are limited to the use of vehicles on existing public roads or roads used and maintained for BLM purposes;</p> <p>(2) Involve individuals desiring to search for and occasionally remove small mineral samples or specimens;</p> <p>(3) Consist of prospecting and sampling that will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study;</p> <p>(4) Are limited to marking and monumenting a mining claim;</p> <p>(5) Involve subsurface operations that will not cause significant surface resource disturbance; or</p> <p>(6) Do not involve the use of mechanized earthmoving equipment, such as a bulldozer or a backhoe, and will not involve the cutting of trees;</p> <p>(b) You propose to conduct operations that—</p>	<p>You must file with BLM a complete notice of intention to operate 15 business days before you plan to start operations. See §§ 3809.300 through 3809.336.</p>
<p>(1) Are not described in paragraph (a) of this section; and</p> <p>(2) Might cause disturbance of surface resources,</p> <p>(c) After reviewing your notice of intention to operate, BLM determines that your operations are likely to cause significant disturbance of surface resources,</p>	<p>You must submit a plan of operations and obtain BLM's approval. See §§ 3809.400 through 3809.435.</p>

(d) You always have the option to submit a plan of operations in lieu of the notice of intention to operate required under paragraph (b) of this section.

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

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

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

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

(2) Approve a plan of operations for the operator to perform the minimum

necessary annual assessment work under § 3851.1 of this title.

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

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

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

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

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

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

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

(3) Operations to remove possible common variety minerals if you establish an escrow account in a form acceptable to BLM. You must make regular payments to the escrow account

for the appraised value of possible common variety minerals removed under a payment schedule approved by BLM. The funds in the escrow account must not be disbursed to the operator or to the U.S. Treasury until a final determination of whether the mineral is a common variety and therefore salable under part 3600 of this title.

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

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

§ 3809.111 Public availability of information.

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

§ 3809.115 Information collection.

(a) The Office of Management and Budget has approved the collections of information contained in this subpart 3809 under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1004-____. BLM will use this information to regulate and monitor mining and exploration operations on public lands. Response to requests for information is mandatory in accordance with 43 U.S.C. 1701 *et seq.* The information collection approval expires _____.

(b) BLM estimates that the public reporting burden for this information averages 8 hours per response for notices and 80 hours per response for plans of operations. This includes reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer (783), Bureau of Land Management, Washington, D.C. 20240, and the Office of Management and Budget, Attention Desk Officer for the Interior Department, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, referring to information collection clearance number 1004-____.

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

(a) Mining claimants and operators (if other than the mining claimant) are jointly and severally liable for obligations under this subpart that accrued while they held their interests. Joint and several liability, in this context, means that the mining claimants and operators are responsible together and individually for obligations, such as reclaiming the project area. In the event obligations are not met, BLM may take any action authorized under this subpart against either the mining claimants or the operators, or both.

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

(c) Transfer of a mining claim or operation does not relieve a mining claimant's or operator's responsibility under this subpart for obligations or

conditions created while the mining claimant or operator was responsible for operations conducted on that mining claim or in the project area until—

- (1) BLM receives documentation that a transferee accepts responsibility, and
- (2) BLM accepts an adequate replacement financial guarantee.

Federal/State Agreements**§ 3809.201 What kinds of agreements may BLM and a State make under this subpart?**

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

- (a) An agreement to provide for a joint Federal/State program; and
- (b) An agreement under § 3809.202 which provides that, in place of BLM administration, BLM defers to State administration of some or all of the requirements of this subpart subject to the limitations in § 3809.203.

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

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

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

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

- (i) Whether non-numerical State standards are functionally equivalent to BLM counterparts; and
- (ii) Whether numerical State standards, such as the 5-acre threshold for plans of operations, are the same as corresponding BLM standards, except that State review and approval timeframes do not have to be the same as the corresponding Federal timeframes.

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

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

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

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

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

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

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

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

(d) *Financial guarantee.* The amount of the financial guarantee must be calculated based on the completion of both Federal and State reclamation

requirements, but may be held as one instrument. If the financial guarantee is held as one instrument, it must be redeemable by both the Secretary and the State. BLM must concur in the approval and release of a financial guarantee for public lands.

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

(f) *Termination.* (1) If a State does not comply after being notified under

paragraph (e) of this section, BLM will take appropriate action, which may include termination of all or part of the agreement.

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

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

No. A Federal/State agreement or memorandum of understanding in effect on (effective date of the final rule.) will continue while BLM and the State

perform a review to determine whether revisions are required under this subpart. BLM and the State must complete the review and make necessary revisions no later than one year from (effective date of the final rule.)

Operations Conducted Under Notices

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

To see how this subpart applies to your operations conducted under a notice and existing on (effective date of the final rule.), follow this table:

If you are conducting operations under a notice filed before (effective date of the final rule.) and . . .	Then . . .
(a) You are the operator identified in the notice on file with BLM on (effective date of the final rule.),	You may conduct operations under the terms of your existing notice for 2 years after (effective date of the final rule.), or longer if your notice is extended under § 3809.333. See § 3809.503 for financial guarantee requirements applicable to notices.
(b) You are a new operator, that is, you were not the operator identified in the notice on file with BLM on (effective date of the final rule.),	You must conduct operations under the provisions of this subpart, including § 3809.320 for 2 years after (effective date of the final rule.), unless extended under § 3809.333.
(c) Your notice has expired,	You may not conduct operations under an expired notice. You must reclaim your project area immediately or promptly submit a new notice under § 3809.301.

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

(a) If you qualify under § 3809.11, you must file your notice with the local BLM office with jurisdiction over the lands involved. BLM does not require that the notice be on a particular form.

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

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

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

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

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

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

(iv) A schedule of activities, including the date when you will begin operations

and the date by which you will complete reclamation;

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

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

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

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

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

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

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

(c) BLM will review your additional information within 15 business days to ensure it is complete. BLM will repeat this process until your notice is complete.

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

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

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

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

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

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

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

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

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

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

§ 3809.330 May I modify my notice?

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

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

§ 3809.331 Under what conditions must I modify my notice?

(a) You must modify your notice—
 (1) If BLM requires you to do so to prevent unnecessary or undue degradation; or

(2) If you plan to make material changes to your operations. Material changes include the addition of planned surface disturbance up to the threshold described in § 3809.11, undertaking new drilling or trenching activities, or changing reclamation.

(b) You must submit your notice modification 15 business days before making any material changes. If BLM determines your notice modification is complete before the 15-day period has elapsed, BLM may notify you to proceed. When BLM requires you to modify your notice, it may also notify you to proceed before the 15-day period has elapsed to prevent unnecessary or undue degradation.

§ 3809.332 How long does my notice remain in effect?

If you filed your notice on or after (effective date of the final rule.), it remains in effect for 2 years, unless

extended under § 3809.333, or unless you notify BLM beforehand that operations have ceased and reclamation is complete. BLM will conduct an inspection to verify whether you have met your obligations, will notify you promptly in writing, and terminate your notice, if appropriate.

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

Yes. If you wish to conduct operations for 2 additional years after the expiration date of your notice, you must notify BLM in writing on or before the expiration date. You may extend your notice more than once.

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

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

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

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

(3) Maintain an adequate financial guarantee.

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

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

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

§ 3809.335 What happens when my notice expires?

(a) When your notice expires, you must—

(1) Cease operations, except reclamation; and

(2) Complete reclamation promptly according to your notice.

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

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

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

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

Operations Conducted Under Plans of Operations

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

To see how this subpart applies to your existing or pending plan of operations, follow this table:

If you submitted your plan of operations to BLM before (effective date of final rule.), and . . .	Then . . .
(a) BLM approved your plan of operations before that date,	The performance standards of this subpart (§ 3809.420) do not apply to your existing plan of operations. The performance standards in effect at the time BLM approved your plan of operations continue to apply. All other provisions of this subpart apply to your plan of operations. See § 3809.505 for applicability of financial guarantee requirements.

If you submitted your plan of operations to BLM before (effective date of final rule.), and . . .	Then . . .
(b) BLM made an environmental assessment or a draft environmental impact statement available to the public before that date,	The plan content requirements (43 CFR 3809.1–5) and performance standards (43 CFR 3809.1–3(d) and 3809.2–2) that were in effect immediately before (effective date of final rule.) apply to your plan of operations. All provisions of this subpart, except §§ 3809.401 and 3809.420, apply to your plan of operations.
(c) BLM has not yet made an environmental assessment or a draft environmental impact statement available to the public,	All provisions of this subpart apply to your plan of operations.

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

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

(a) If you are required to file a plan of operations under § 3809.11, you must file it with the local BLM field office with jurisdiction over the lands involved. BLM does not require that the plan be on a particular form.

(b) Operators or mining claimants must demonstrate that the proposed operations would not result in unnecessary or undue degradation of public lands. Your plan of operations must describe fully the proposed activity and contain the following information with a level of detail appropriate to the type, size, and location of the planned activity:

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

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

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

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

(iii) Water management plans;

(iv) Rock characterization and handling plans;

(v) Quality assurance plans;

(vi) Spill contingency plans;
 (vii) A general schedule of operations from start through closure; and
 (viii) Plans for all access roads, water supply pipelines, and power or utility services;

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

(i) Drill-hole plugging;
 (ii) Regrading and reshaping;
 (iii) Mine reclamation;
 (iv) Riparian mitigation;
 (v) Wildlife habitat rehabilitation;
 (vi) Topsoil handling;
 (vii) Revegetation;
 (viii) Isolation and control of acid, toxic or deleterious materials;
 (ix) Facilities removal; and
 (x) Post-closure management;

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

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

(1) Operational and baseline environmental information for BLM to analyze potential environmental impacts as required by the National Environmental Policy Act. BLM will also use this information to determine if your plan of operations will prevent unnecessary or undue degradation. This

could include information on public and non-public lands needed to characterize the geology, hydrology, soils, vegetation, wildlife, air quality, cultural resources, and socioeconomic conditions in and around the project area. This may also include requiring static and kinetic testing to characterize the potential for your operations to produce acid drainage or other leachate. BLM can advise you on the exact type of information and level of detail needed to meet these requirements; and
 (2) Other information, if necessary to ensure that your operations will comply with this subpart.

(d) *Reclamation cost estimate.* At a time specified by BLM, you must submit an estimate of the cost to fully reclaim your operations as required by § 3809.552.

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

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

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

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

(3) BLM approves your plan subject to changes or conditions that are necessary to meet the performance standards of § 3809.420;

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

(i) You complete collection of adequate baseline data;
 (ii) BLM completes the environmental review, required under the National Environmental Policy Act;
 (iii) BLM completes the consultation required under the National Historic

Preservation Act or Endangered Species Act;

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

(v) BLM conducts an on-site visit;

(vi) BLM completes review of public comments on the amount of the financial guarantee;

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

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

(5) BLM disapproves your plan of operations under paragraph (c) of this section.

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

(c) BLM must disapprove, or withhold approval of, a plan of operations if it—

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

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

(3) Proposes operations that would result in unnecessary or undue degradation of public lands.

(d) Before BLM approves your plan of operations, it will publish in a local newspaper of general circulation or in a NEPA document and accept comments for 30 days on the amount of financial guarantee required and an explanation of the basis for the amount. Detailed calculations will remain part of the record, subject to public inspection.

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

You must not begin operations until BLM approves your plan of operations and you provide the financial guarantee required under §§ 3809.411(d) and 3809.552.

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

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

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

(b) Assuring that your operations are “reasonably incident,” as defined in § 3715.0–5 of this title; and

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

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

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

(a) *General performance standards.*

(1) *Technology and practices.* You must use MATP to meet the standards of this subpart.

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

(3) *Land-use plans.* Consistent with the mining laws, your operations and post-mining land use must comply with the applicable BLM land-use plans and activity plans, and with coastal zone management plans under 16 U.S.C. 1451, as appropriate.

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

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

(b) *Environmental performance standards.* (1) *Air quality.* Your operations must comply with applicable Federal, Tribal, and State laws and requirements.

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

(i) *Surface water.* (A) Releases to surface waters must comply with applicable Federal, Tribal, and State laws and requirements.

(B) You must handle earth materials and water in a manner that minimizes the formation of acidic, toxic, or other deleterious pollutants of surface water systems.

(C) You must manage excavations and other disturbances to prevent or control the discharge of pollutants into surface waters.

(ii) *Ground water.* (A) Ground water affected by your operations must comply with State standards and other applicable requirements.

(B) You must handle earth materials and water in a manner that minimizes the formation of acidic, toxic, or other deleterious infiltration to ground water systems and manage excavations and other disturbances to minimize the discharge of pollutants into ground water.

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

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

(ii) Where feasible, you must return disturbed wetlands and riparian areas to a properly functioning condition.

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

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

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

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

(ii) To preserve soil viability and promote concurrent reclamation, you

must directly transport topsoil from its original location to the point of reclamation without intermediate stockpiling, where feasible.

(5) *Revegetation*. You must—

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

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

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

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

(iii) Use native species to the extent feasible;

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

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

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

(ii) You must take necessary measures to protect threatened or endangered species and their habitat as required by the Endangered Species Act.

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

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

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

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

(B) You propose action to protect, remove or preserve the resource; and

(C) BLM specifically authorizes such action in your plan of operations, or does not prohibit such action under your notice.

(ii) You must immediately bring to BLM's attention any previously unidentified historic, archaeological, cave-related, or scientifically important paleontologic resources that might be altered or destroyed by your operations. You must leave the discovery intact until BLM authorizes you to proceed. BLM will evaluate the discovery and take action to protect, remove, or

preserve the resource within 20 business days after you notify BLM of the discovery, unless otherwise agreed to by the operator and BLM, or unless otherwise provided by law.

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

(c) *Operational performance standards*. (1) *Roads and structures*. (i) You must design, construct, and maintain roads and structures to control or prevent erosion, siltation, and air pollution and minimize impacts to resources.

(ii) You must minimize surface disturbance, using existing access where feasible, while maintaining safe design, following natural contour where feasible, and minimizing cut and fill.

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

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

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

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

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

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

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

deleterious leachate generation (source control);

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

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

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

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

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

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

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

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

solutions and materials. Upon completion of reclamation, all materials and discharges must meet applicable standards.

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

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

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

(ii) You must recontour all areas to blend with pre-mining, natural topography to the extent feasible. You may temporarily retain a highwall or other mine workings in a stable condition to preserve evidence of mineralization.

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

(7) *Pit reclamation.* (i) You must partially or fully backfill pits unless you demonstrate to BLM's satisfaction it is

not feasible for economic, environmental, or safety reasons.

(ii) You must take mitigation measures if you do not completely backfill a pit or other disturbance.

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

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

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

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

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

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

(ii) You must mark by signs or fences, or otherwise identify hazardous sites or

conditions resulting from your operations to alert the public in accord with applicable Federal and State laws and regulations; and

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

(11) *Protection of survey monuments.*

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

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

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

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

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

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

If . . .	Then . . .
(1) You stop conducting operations for any period of time,	You must— (i) Maintain the project area, including structures, in a safe and clean condition; (ii) Take all necessary actions to assure that unnecessary or undue degradation does not occur, including those specified at § 3809.420(c)(4)(vii); and (iii) Maintain an adequate financial guarantee.
(2) The period of non-operation is likely to cause unnecessary or undue degradation,	BLM will require you to take all necessary actions to assure that unnecessary or undue degradation does not occur, including requiring you, after an extended period of non-operation for other than seasonal operations, to remove all structures, equipment, and other facilities and reclaim the project area.
(3) Your operations are inactive for 5 consecutive years,	BLM will review your operations and determine whether BLM should terminate your plan of operations and direct final reclamation and closure.
(4) BLM determines that you abandoned your operations,	BLM may initiate forfeiture under § 3809.595. If the amount of the financial guarantee is inadequate to cover the costs of reclamation, BLM may complete the reclamation, and the operator and all other responsible persons are liable for the costs of such reclamation. See § 3809.336(a) for indicators of abandonment.

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

Modifications of Plans of Operations

§ 3809.430 May I modify my plan of operations?

Yes. You may request a modification of the plan at any time during

operations under an approved plan of operations.

§ 3809.431 When must I modify my plan of operations?

(a) You must modify your plan of operations to reflect proposed

operations not described in the approved plan; and

(b) You must modify your plan of operations when required by BLM to prevent unnecessary or undue degradation.

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

(a) BLM will review and approve a modification of your plan of operations in the same manner as it reviewed and approved your initial plan under §§ 3809.401 through 3809.420, except that BLM may not obtain public comment on the financial guarantee

amount if the modification does not change the financial guarantee amount or only changes it minimally; or

(b) BLM will accept the modification without formal approval if it does not constitute a substantive change and does not require additional analysis under the National Environmental Policy Act.

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

To see how this subpart applies to a new modification of your plan of operations, see the following table. A “new” modification is one that you submit to BLM after this subpart becomes effective:

If you have an approved plan of operations on (effective date of the final rule.) and . . .	Then . . .
(a) <i>New facility.</i> You subsequently propose to modify your plan of operations by constructing a new facility, such as waste rock repository, leach pad, impoundment, drill site, or road,	The plan contents requirements (§ 3809.401) and performance standards (§ 3809.420) of this subpart apply to the new facility. Those facilities and areas not included in the modification may continue to operate under the terms of your existing plan of operations.
(b) <i>Existing facility.</i> You subsequently propose to modify your plan of operations by modifying an existing facility, such as expansion of a waste rock repository, leach pad, or impoundment; layback of a mine pit; or widening of a road,	The plan contents requirements (§ 3809.401) and performance standards (§ 3809.420) of this subpart apply to the modified facility, unless you demonstrate to BLM's satisfaction it is not feasible to apply them for environmental, safety, or technical reasons. If you make the demonstration, the plan content requirements (43 CFR 3809.1–5) and performance standards (43 CFR 3809.1–3(d) and 3809.2–2) that were in effect immediately before (effective date of final rule.) apply to your modified facility. Those facilities and areas not included in the modification may continue to operate under the terms of your existing plan of operations.

§ 3809.434 Does this subpart apply to a pending modification for a new facility?

To see how this subpart applies to a pending modification for a new facility, see the following table. A “pending” modification is one that you submitted to BLM before this subpart became effective, and BLM has not yet approved it.

If you have an approved plan of operations on (effective date of the final rule.) and before that date, you submitted to BLM a proposed modification to construct a new facility, such as waste rock repository, leach pad, impoundment, drill site, or road and . . .	Then . . .
(a) BLM made an environmental assessment or a draft environmental impact statement available to the public before that date,	The plan content requirements (43 CFR 3809.1–5) and performance standards (43 CFR 3809.1–3(d) and 3809.2–2) that were in effect immediately before (effective date of final rule.) apply to the new facility. Those facilities and areas not included in the modification may continue to operate under the terms of your existing plan of operations.
(b) BLM has not yet made an environmental assessment or a draft environmental impact statement available to the public,	All provisions of this subpart apply to the modified facility. Those facilities and areas not included in the modification may continue to operate under the terms of your existing plan of operations.

§ 3809.435 Does this subpart apply to my pending modification for an existing facility?

To see how this subpart applies to your pending modification for an existing facility, follow this table:

If you have an approved plan of operations on (effective date of the final rule.) and before that date, you submitted to BLM a proposed modification of an existing facility, such as expansion of a waste rock repository, leach pad, or impoundment; layback of a mine pit; or widening of a road, and . . .	Then . . .
(a) BLM made an environmental assessment or a draft environmental impact statement available to the public before that date,	The plan content requirements (43 CFR 3809.1–5) and performance standards (43 CFR 3809.1–3(d) and 3809.2–2) that were in effect immediately before (effective date of final rule.) apply to the new facility. Those facilities and areas not included in the modification may continue to operate under the terms of your existing plan of operations.

<p>If you have an approved plan of operations on (effective date of the final rule.) and before that date, you submitted to BLM a proposed modification of an existing facility, such as expansion of a waste rock repository, leach pad, or impoundment; layback of a mine pit; or widening of a road, and . . .</p>	<p>Then . . .</p>
<p>(b) BLM has not yet made an environmental assessment or a draft environmental impact statement available to the public,</p>	<p>The plan contents requirements (§ 3809.401) and performance standards (§ 3809.420) of this subpart apply to the modified facility, unless you demonstrate to BLM's satisfaction it is not feasible to apply them for environmental, safety, or technical reasons. If you make the demonstration, the plan content requirements (43 CFR 3809.1–5) and performance standards (43 CFR 3809.1–3(d) and 3809.2–2) that were in effect immediately before (effective date of final rule.) apply to your plan of operations. Those facilities and areas not included in the modification may continue to operate under the terms of your existing plan of operations.</p>

Financial Guarantee Requirements—General

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

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

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

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

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

If . . .	Then . . .
<p>(a) Your notice was on file with BLM on (effective date of final rule.), (b) Your notice was on file with BLM before (effective date of final rule.) and you choose to modify your notice as required by this subpart on or after that date, (c) You file a new notice on or after (effective date of final rule.)</p>	<p>You do not need to provide a financial guarantee unless you modify the notice or extend the notice under § 3809.333. You must provide a financial guarantee before you can begin operations under the modified notice. You must provide a financial guarantee before you can begin operations under the notice.</p>

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

For each plan of operations approved before (effective date of final rule.), you must post a financial guarantee according to the requirements of this subpart no later than (date 180 days after effective date of final rule.) at the local BLM office with jurisdiction over the lands involved.

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

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

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

Individual Financial Guarantee

§ 3809.552 What must my individual financial guarantee cover?

(a) If you conduct operations under a notice or a plan of operations and you provide an individual financial guarantee, it must cover the estimated cost as if BLM were to contract with a third party to reclaim your operations

according to the reclamation plan, including construction and maintenance costs for any treatment facilities necessary to meet Federal and State environmental standards.

(b) BLM will periodically review the estimated cost of reclamation and the adequacy of any funding mechanism established under paragraph (c) of this

section and require increased coverage, if necessary.

(c) When BLM identifies a need for it, you must establish a trust fund or other funding mechanism available to BLM to ensure the continuation of long-term treatment to achieve water quality standards and for other long term, post-mining maintenance requirements. The

funding must be adequate to provide for construction, long-term operation, maintenance, or replacement of any treatment facilities and infrastructure, for as long as the treatment and facilities are needed after mine closure. BLM may identify the need for a trust fund or other funding mechanism during plan review or later.

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

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

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

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

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

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

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

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

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

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

(a) Non-cancelable surety bonds, including surety bonds arranged or paid for by third parties;

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

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

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

(e) Either of the following instruments having a market value of not less than the required dollar amount of the

financial guarantee and maintained in a Securities Investors Protection Corporation insured trust account by a licensed securities brokerage firm for the benefit of the Secretary of the Interior, acting by and through BLM:

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

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

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

(a) If you choose to use the instruments permitted under § 3809.555(e) in satisfaction of financial guarantee requirements, you must provide BLM, before you begin operations and by the end of each calendar year thereafter, a certified statement describing the nature and market value of the instruments maintained in that account, and including any current statements or reports furnished by the brokerage firm to the operator or mining claimant concerning the asset value of the account.

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

(c) If your review under paragraph (b) of this section demonstrates that the total market value of trust account instruments exceeds 110 percent of the required dollar amount of the financial guarantee, you may ask BLM to authorize a written release of that portion of the account that exceeds 110 percent of the required financial

guarantee. BLM will approve your request only if you are in compliance with the terms and conditions of your notice or approved plan of operations.

Blanket Financial Guarantee

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

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

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

State-Approved Financial Guarantee

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

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

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

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

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

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

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

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

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

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

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

(c) A corporate guarantee if—

(1) The corporate guarantee is acceptable to the State;

(2) The corporate guarantee is redeemable by or guaranteed to the Secretary; and

(3) The BLM State Director determines that the corporate guarantee

provides a level of protection equal to the estimated cost of reclamation under §§ 3809.552 and 3809.554, considering the operator's net income, net working capital and intangible net worth, and total liabilities and assets.

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

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

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

When the State makes a demand against your financial guarantee, thereby reducing the available balance, you must replace or augment the financial guarantee if the available balance is insufficient to cover the remaining reclamation cost.

Modification or Replacement of a Financial Guarantee

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

In the event you modify a notice or an approved plan under § 3809.331 or § 3809.431 respectively and your estimated reclamation cost increases, your revised financial guarantee must comply with § 3809.552. You must adjust the amount of the financial guarantee to cover the estimated additional cost of reclamation and long-term treatment, as modified.

§ 3809.581 Will BLM accept a replacement financial instrument?

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

§ 3809.582 How long must I maintain my financial guarantee?

You must maintain your financial guarantee until you or a new operator replace it, with BLM's written concurrence, by another adequate financial guarantee, or until BLM

releases the requirement to maintain your financial guarantee after you have completed reclamation of your operation according to the requirements of § 3809.320 (for notices), including any measures identified as the result of consultation with BLM under § 3809.313, or § 3809.420 (for plans of operations).

Release of Financial Guarantee

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

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

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

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

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

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

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

(c) BLM may release the remainder of your financial guarantee for the same portion of the project area when BLM determines that you have successfully completed reclamation, including revegetating the area disturbed by operations, and when—

(1) Any effluent discharged from the area has met applicable effluent limitations and water quality standards

for one year without needing additional treatment; or

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

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

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

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

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

You remain responsible for obligations or conditions created while you conducted operations unless a transferee accepts responsibility under § 3809.16, and BLM accepts an adequate replacement financial guarantee. Therefore, your financial guarantee remains in effect until BLM determines that you are no longer responsible for all or part of the operation. BLM can release your financial guarantee on an incremental basis. The new operator must provide a financial guarantee before BLM will allow the new operator to conduct operations.

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

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

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

(c) BLM will continue to regulate under this subpart existing access for mining purposes across public lands to patented mining claims, including the

requirement to have an adequate financial guarantee.

Forfeiture of Financial Guarantee

§ 3809.595 When will BLM initiate forfeiture of my financial guarantee?

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

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

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

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

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

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

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

(b) The reasons for the forfeiture;

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

(d) How you may avoid forfeiture, including—

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

(2) Obtaining written permission from BLM for a surety to complete the reclamation, or the portion of the reclamation applicable to the bonded phase or increment, if the surety can demonstrate an ability to complete the reclamation in accordance with the reclamation measures incorporated in your notice or approved plan of operations.

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

If you fail to meet the requirements of BLM's forfeiture notice provided under § 3809.596, if you fail to appeal the forfeiture notice under § 3809.800, or if the decision appealed is affirmed, BLM will—

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

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

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

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

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

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

Inspection and Enforcement

§ 3809.600 With what frequency will BLM inspect my operations?

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

(b) BLM may authorize a member(s) of the public to accompany a BLM inspector. However, BLM will not authorize a member of the public to accompany an inspector if the presence of the public would materially interfere with the mining operations or with BLM's administration of this subpart, or create safety problems. When BLM authorizes a member of the public to accompany the inspector, the operator must provide access to operations.

(c) At least 4 times each year, BLM will inspect your operations if you use

cyanide or other leachate or where there is significant potential for acid drainage.

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

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

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

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

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

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

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

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

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

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

(3) BLM will terminate a suspension order under paragraph (b)(1) or (b)(2) of this section no later than the date by which you correct the violation.

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Offering a copy at the project area to the designated agent or to the individual who, based upon reasonable inquiry, appears to be in charge. If no such individual can be located at the project area, BLM may offer a copy to any individual at the project area who appears to be an employee or agent of the person to whom the notification or order is issued. Service is complete when the notice or order is offered and is not incomplete because of refusal to accept; or

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

(b) BLM may serve a mining claimant in the same manner an operator is served under paragraph (a)(2) of this section.

(c) The mining claimant or operator may designate an agent for service of notifications and orders. You must provide the designation in writing to the local BLM field office having jurisdiction over the lands involved.

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

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

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

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

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

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

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

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

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

imprisoned not more than 5 years, or both.

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

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

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

(ii) Violate any provision of this subpart; or

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

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

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

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

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

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

§ 3809.703 Can BLM settle a proposed civil penalty?

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

Appeals**§ 3809.800 What appeal rights do I have?**

(a) Any person adversely affected by a decision made under this subpart may appeal the decision under parts 4 and 1840 of this title. Review of a decision by the BLM State Director will take place if consistent with part 1840 of this title.

(b) In order for the Department of the Interior to consider your appeal of a decision, you must file a notice of

appeal in writing with the BLM office where the decision was made within 30 days after the date you received the decision. All decisions under this subpart go into effect immediately and remain in effect while appeals are pending unless a stay is granted under § 4.21(b) of this title.

(c) Your written appeal must contain:

(1) Your name and address; and

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

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

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