April 24th, 2007

Dear Secretary Kempthorne,

We write to provide comments and to express our concern over the advance notice of proposed rulemaking to revise the Bureau of Land Management's (BLM) 3809 regulations. The notice contains BLM's tentative legal conclusions as to the agency's authority to regulate mining activities proposed for federal public lands not subject to valid mining claims filed under the 1872 Mining Law. These conclusions purport to substantially limit the BLM's ability to consider, let alone investigate, the validity of any mining claims on federal public lands proposed for disturbance or use. However, in forming these tentative conclusions, the BLM failed to properly recognize the limitations of the 1872 Mining Law, the BLM's broad multiple use land management authority over federal lands not subject to valid claims, and the Administrative Procedure Act's mandate requiring reasonable agency determinations based on substantial evidence in the administrative record.

In rendering its tentative conclusions, the BLM references Mineral Policy Center v. Norton, 292 F.Supp.2d 30 (D.D.C. 2003) as the basis for the proposed rulemaking. In that case, the BLM's surface management regulations under the Mining Law, issued by the Department of Interior in 2001, were successfully challenged because they did not properly apply BLM's full land management authority, including requiring a fair market value payment for the use of Federal lands for mining operations, when the lands are either not covered by valid claims or unclaimed under the Mining Law.

The 1872 Mining Law distinguishes between valid and invalid claims, giving rights against the United States only to those who hold a valid mining claim. In order for a placer or lode claim to be considered valid under the 1872 Mining Law, the claimant must discover a commercially valuable mineral deposit. In addition, the 1872 Mining Law puts limits on the size, location, and number of mining and millsite claims, with millsite claims being smaller, allowed to be staked only on non-mineralized lands, and only in limited numbers. Thus, under the Mining Law, claim validity means more that just properly filing the claimstaking paperwork with the BLM; it also requires proper location of the claim on the ground and most importantly, the discovery of a valuable mineral deposit. Only if all requirements are satisfied do any rights vest in the claimant against the United States.

In the Mineral Policy Center case, the Court recognized that the BLM must regulate mining activities proposed on valid claims differently from those proposed for lands not subject to valid mining claims. Lands not subject to valid claims are not protected by the Mining Law and must

be managed under the full discretionary authority provided to the BLM in the Federal Land Policy and Management Act (`FLPMA'). Indeed, the Court upheld challenged portions of the regulations based on an express finding that BLM had committed to conduct a full FLPMA multiple use review for any lands proposed for mining not covered by valid claims

Instead of recognizing the critical distinction between valid and invalid claims, and ensuring appropriate measures to ensure BLM uses the proper regulatory authority, BLM argues that need not even inquire into the validity of mining claims before approving operations on public lands open to mining claim location. As discussed, such a position openly ignores the Mining Law's hallmark discovery requirement and improperly renders FLPMA's resource protection requirements meaningless. As such, any draft regulations must contain provisions to ensure that BLM properly applies its resource protection authority when considering mining plans of operation.

The BLM's tentative legal conclusion that it may ignore validity concerns when processing mining plans also runs afoul of the Administrative Procedure Act (APA). The BLM admits that it "cannot simply assume that a mining claim of unknown validity is invalid." The reason for this is simple: the APA requires rational and reasonable decisions based on substantial evidence contained in the administrative record. However, the BLM fails to acknowledge that the same reasoning applies to the BLM's proposal to assume validity. This is especially problematic in cases where evidence in the record indicates invalidity of mining claims, such as waste dumping and other ancillary uses on lode claims.

In short, the BLM cannot move to approve mining operations on mining claims for which the only record evidence demonstrates invalidity. The BLM is obligated to conduct at least some analysis to rationally justify any assumption of validity. Contrary to BLM's exaggerated claims in the advance notice, this review need not require a full-blown mineral examination and contest proceeding. Indeed, recent Department of the Interior pronouncements set forth an effective and efficient method for conducting these reviews. See *Use of Mining Claims for Purposes Ancillary to Mineral Extraction*, M-37004 (Jan. 18, 2001).

The method set forth in M-37004 would require the BLM to conduct a preliminary inquiry where an operator's proposed use of mining claims raises legitimate questions about the whether the claims are valid. In particular, this preliminary review would consider whether the mining plan proposes to site purely ancillary facilities (as opposed to ore extraction) on mining claims requiring the discovery of a valuable mineral in order to be valid. Where these ancillary facilities are of a permanent nature, such as waste rock dumps, tailings facilities, heap leach pads, etc., so that future ore extraction would be frustrated, if not made virtually impossible, the BLM must review the validity of those mining claim. Certainly not all mining operations would present this problem. However, in this way, the BLM can easily limit the number of validity reviews required, while ensuring compliance with the Mining Law, FLPMA, and the APA.

The validity review method proposed above is certainly a far cry from BLM's overblown statements in its advance notice that imposing any validity review at all would immediately require formal contest proceedings for each and every mining located on public land. Rather, the

BLM would conduct the preliminary validity review only where a mining plan has been filed, and only where the record raises the questions as to validity. In any case, and regardless of any Interior Department legal pronouncements affecting M-37004, it sets forth an alternative to BLM's proposal to ignore validity all together that must be fully considered in the current rulemaking process.

Overall, the 1872 Mining Law already fleeces taxpayers by allowing mining companies to purchase public lands for $2.50 or $5 an acre, by allowing mining companies to take precious metals from public lands for free with no royalty paid to the taxpayer and by allowing mining to occur regardless of the destruction it may inflict on other resources, such as rivers, streams or groundwater. The Bureau of Land Management has a duty under the law to distinguish between valid and invalid mining claims. Only in this way can it properly apply its resource protection authority and provide fair market value for the use of invalid or unclaimed lands under the mining law. Instead of eschewing this duty as mandated by the court, the BLM should do everything it can to make sure that all mining occurs on valid claims, and when a mining claim is invalid, either a mining company loses their rights to that area or taxpayers receive what they are due.

With respect to this rulemaking, the BLM's advance notice of rulemaking does not indicate the measures the agency will take to ensure compliance with the National Environmental Policy Act (NEPA). In general, "new or revised agency rules, regulations . . . or procedures," such as this rule, constitute "major federal actions" requiring an EA or EIS pursuant to NEPA. 40 C.F.R. § 1508.18 (a). Further, the Council on Environmental Quality has explained: An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. 40 C.F.R. Section 1508.18. In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS. 40 C.F.R. Section 1508.18.

The only exemption from this requirement is pursuant to categorical exclusions for categories of actions "which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." 40 C.F.R. § 1508.4. However, by contrast, the BLM's proposed rulemaking at issue here could allow much more permissive use of federal lands covered by mining claims, including for major mining facilities such as waste rock and tailings dumps, which become permanent features of the landscape and can create long-term water quality and other resource damage. As such, the BLM cannot categorically exclude this rulemaking from NEPA.

We look forward to seeing and commenting in more detail on the draft rules, and hope that these comments are helpful to you and the BLM in the preparation of the draft.

Sincerely,
Stephen D'Esposito, President, EARTHWORKS