

January 24, 2000

VIA ELECTRONIC & REGULAR MAIL

Bureau of Land Management
Administrative Record
Room 401LS
1849 C St., NW
Washington, DC 20240

Re: Locating, Recording, and Maintaining Mining Claims and Sites

Dear Sir/Madam:

The Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to represent the views of small business before federal agencies and Congress. Advocacy is also required by §612 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) to monitor agency compliance with the RFA. On March 28, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act which made a number of significant changes to the Regulatory Flexibility Act, the most significant being provisions to allow judicial review of agencies' regulatory flexibility analyses.

On August 27, 1999 the Bureau of Land Management (BLM) published a proposed rule in the *Federal Register*, Vol. 64, No. 166, p.47023 on the *Locating, Recording, and Maintaining Mining Claims and Sites*. The purpose of the proposal is to amend regulations on locating, recording, and maintaining mining sites. In the proposal, BLM certified that the proposal would not have a significant economic impact on a substantial number of small entities. The Office of Advocacy asserts that the certification does not comply with the RFA.

REGULATORY FLEXIBILITY ACT REQUIREMENTS

The RFA requires administrative agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. See 5 U.S.C. §§ 601, et. seq.; Northwest Mining Association v. Babbitt, 5 F. Supp. 2d 9. When an agency issues a rulemaking proposal, the RFA requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” which will “describe the impact of the proposed rule on small entities.” 5 U.S.C. § 603(a); *Id.* The law clearly states that an IRFA shall address the reasons that an agency is considering the action; the objectives and legal basis of the rule; the type and number of

small entities to which the rule will apply; the projected reporting, record keeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap or conflict with the proposed rule. The agency must also provide a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. 5 USC § 603(c).

Certification

Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency shall publish such a certification in the Federal Register at the time of the publication of the general notice of proposed rulemaking along with a statement providing the factual basis for the certification.

BLM's Proposal on Millsites Does Not Comply with the Requirements of the RFA

Size Standard

A crucial element in determining whether a particular regulation will have a significant economic impact on a substantial number of small entities is determining the number of small entities in the industry. To determine which businesses qualify as “small”, the RFA requires an agency to use the Small Business Administration’s definition of “small business” for the particular industry. *See*, 5 U.S.C. §601(3).

BLM failed to meet this simple requirement in its decision to certify the rule. In the proposal, BLM states that a small entity is an individual, limited partnership, or small company at arms length from the control of any parent companies, with fewer than 500 employees or less than \$5 million in revenue. 64 Fed. Reg. 47029. The 500-employee threshold is the appropriate size standard for proposal. The \$5 million revenue criterion does not apply to mining operations. The revenue criterion applies to mining services. *See*, 13 C.F.R. § 121.201.

BLM’s failure to distinguish and utilize the proper size standard not only indicates a lack of understanding of the requirements for RFA compliance, it also produces a faulty premise for its preliminary determination of “no significant economic impact”. While the use of an improper size standard may appear to be a mere technical error on the part of the agency, it is in fact substantive. Without the proper size standard, the agency cannot possibly determine impact of the proposed rule on the industry because the agency has no means of determining which businesses are small and whether the rule will impact a significant number of the businesses that fall within the definition of small. As BLM may recall, in Northwest Mining v. Babbitt, 5 F. Supp. 2d 9 (D.D.C. 1998), the United States District Court for the District of Columbia remanded a rule to the agency after finding that BLM violated the RFA by failing to incorporate correct definition of “small entity” in its certification of the final rule in the 3809 Hardrock Mining rulemaking.

Likewise, the Office of Advocacy asserts that BLM's failure to identify and utilize the proper size standard for its threshold analysis of the economic impact of the proposal, may amount to reversible error.

BLM's Certification Fails to Meet the Requirements of the RFA

As stated previously, if an agency decides to certify a proposal, Section 605 of the RFA requires the agency to publish the certification along with a statement providing the factual basis for the agency's finding of no significant impact. In the millsite proposal, BLM has failed to meet that requirement. In its certification, BLM states that:

“We certify that this rule will not have a significant economic effect on a substantial number of small entities. . . . The rule will not have an impact because the fees paid by small entities will not change.” 64 Fed. Reg. 47029

The “factual basis” of the certification implies that the proposal is merely about a fee structure when, by BLM's own admission, the *proposal also redefines agency policy* with regard to locating, recording, and maintaining mining claims and sites. *Id.* at 47023. The Office of Advocacy asserts that the “factual basis” in the certification misrepresents and conceals the true impact of this proposal. The agency's failure to provide a forthright factual basis invalidates its certification.

The Proposal Implements Substantial Changes that Warrant a Full Economic Analysis to Determine the Economic Impact on Small Entities

The preamble states that the rule is BLM's first attempt to consolidate, clarify, and eliminate current conflicting or duplicative information in the mining regulations. *Id.* at 47024. The Office of Advocacy asserts, however, that the proposal exceeds mere clarification, consolidation, and elimination of conflicting information. It seeks, in part, to implement a recent Solicitor interpretation of the law, which, while purporting to interpret it as one of long standing, in fact overturns agency policy that has been followed by agency staff for a number of years. Considering the fact that the interpretation negates long-standing agency practices, on which the industry and agency staff have relied, the characterization of the interpretation as longstanding is questionable.

Whether or not the Solicitor's interpretation is correct, however, is immaterial for RFA purposes. If the “clarifications” in the proposal modify standard industry and agency practices in a manner that may impose additional costs and have a significant economic impact on a firm's revenue, then such “clarifications” require an economic analysis to provide the public with accurate information about the actual impact of the proposal. The agency cannot ignore the fact that these “clarifications” and amendments are changing agency practices upon which the industry has come to rely.

A few examples of “clarifications” or amendments that may have a significant economic impact are:

- 1) Pursuant to an agency interpretation that has been in effect for decades¹, there is no limitation on the number of millsites that a particular claimant may hold. The proposed “clarification” would limit a claimant to no more than an aggregate of 5 acres of mill site land for each associated placer or lode mining claim. The penalty for having more than one 5-acre claim, in the aggregate, is loss of any additional claims, even those claims that were established prior to the finalization of the proposed rule. This “clarification” limits company growth and promotes decline by negating existing claims for businesses that hold more than one claim. The agency needs to determine how many claimants would be affected as well as the extent of loss to miners that currently hold more than one aggregated 5-acre mill site claim.
- 2) In the past, miners were allowed to correct errors in a mining claim or site location, even if the error was in excess of 10%. The proposal also “clarifies” this 10% rule. In the “clarification”, the miner is allowed to correct a defect in a mining claim or site location if it exceeds the size limitations only if it is oversized by 10% or less. If a miner exceeds its measurements by more than 10%, the claim or site is void as of the date that it was located. *Id.* at 47038 The Office of Advocacy asserts that invalidating a claim, rather than allowing for a correction, because it exceeds the size limitation by greater than 10% is significant. Moreover, the language implies that it is retroactive in that the regulation applies back to the date that the claim was located. A company may have invested valuable resources in a claim, only to lose it because it exceeds the limits by 11% instead of 10%. Query: If the site is invalid as of the date that it is located, does the miner have to provide BLM with any revenue that it has garnered from the claim? These impacts need to be addressed in the economic analysis.
- 3) Another requirement that may impose an economic impact on small entities is the “metes and bounds” description for lode claims. Such a description has never been required. Although the proposal states that the description does not require a professional surveyor or engineer, considering the consequences, losing the entire claim for an inaccurate description, a company would be imprudent not to employ such a professional. The costs of a professional description may be significant for a small business, and needs to be quantified by BLM for the purposes of assessing the economic impact on small entities.

In essence, the proposed “clarifications” and changes will likely result in harsh consequences resulting from minor errors and the invalidation of claims by miners that established their claims in accordance with BLM’s earlier longstanding practices. Such measures need to be analyzed openly to allow for public comment.

BLM’s failure to provide an economic analysis of the proposed “clarifications” and changes is disturbing for another reason. BLM has the data to provide a thorough and thoughtful analysis to insure that its “clarifications” and changes solicit good public comments. Specifically, in the background section of the proposal, BLM states that in

¹ See, Department of Interior, Mineral Survey Procedures Guide 1980, p. 26.

FY 1998, there were 289,054 mining claims and sites maintained on Federal lands. In FY 1998, claimants recorded 34,756 sites. BLM also processed 4,121 waiver documents for claims and sites. *Id.* at 47019. Advocacy asserts that if the agency has information about the number and size of claims held by the claimants, the agency should be able to determine which claimants will be adversely impacted and the extent of that adverse impact. Moreover, the fact that 4,121 waiver documents were filed provides an indication of the number of small businesses in the industry, provided, of course, that the waiver provisions are based on SBA size standards and that the majority of the small businesses were aware of the waiver provisions and utilized them.

Finally, the impact of the retroactive application of the proposal should be analyzed. There is no indication that BLM has considered the impact of the retroactive enforcement of the regulation or considered alternatives to a retroactive application such as a grandfather clause. Even without an analysis, it should be clear to BLM that it is fundamentally unfair to impose retroactive restrictions upon businesses that were established with the agency's acquiescence.

A forthright approach to and analysis of the true nature of the proposal provides the public with the information that is necessary to provide informed, provocative comments, rather than promoting a perception that the agency is insensitive to the true impact of the "clarifications". From a public policy standpoint, such an action would be in harmony with the principles underlying the APA and the RFA, rather than in opposition to them.

Conclusion

BLM's cavalier approach to the statutorily imposed requirements for promoting informed rulemaking is disconcerting. Because of the absence of substantive information in the proposal, the Office of Advocacy and the public are unable to ascertain the extent of the impact of that the proposal will have. The agency's certification provides no information and Advocacy can only conclude that determine that BLM failed to perform any sort of economic analysis that would provide a factual basis to support its finding of "no significant impact".

To correct its noncompliance, BLM needs to perform and publish an economic analysis in order to determine the true nature of the impact of the proposal in small entities. If BLM finds that there is no significant economic impact on a substantial number of small entities, it needs to provide the public with an intelligent and accurate factual basis in support of its certification. If BLM finds that there is a significant economic impact on a substantial number of small entities, it needs to provide the public with an initial regulatory flexibility analysis that analyzes the economic impact on the industry and considers substantive alternatives to the proposal. Failure to publish the requisite information, prior to the finalization of the rule, interferes with the public's right to provide comments on the agency's findings and alternatives and may render the rule invalid and deprives the BLM of the opportunity to review informed feedback from the

industry that it regulates. *See, Southern Offshore Fishery Association v. Daley*, 995 F. Supp. 1411 (M.D. Fl. 1998).

If you have any questions, please feel free to contact me at (202) 205-6533. Thank you for allowing me to comment on this important proposal.

Sincerely,

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