Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining

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BETWEEN A HARD ROCK AND A HARD PLACE: POLITICS, MIDNIGHT REGULATIONS AND MINING

ANDREW P. MORRISS,* ROGER E. MEINERS** & ANDREW DORCHAK***

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INTRODUCTION

Since the California Gold Rush in 1848, the mining of hard rock minerals (e.g., gold, silver, and similar minerals) on public lands has been based on the principle that discovery and development of mineral resources led to private ownership, promoting exploration and discovery of mineral...
resources. As with other nineteenth century land disposal statutes, such as the various homestead laws, the General Mining Law of 1872 provides for provision of mineral rights and even fee simple title to land based on the satisfaction of conditions related to use of the land and does not require significant payments to the federal government for receipt of title. In recent years, however, the 1872 statute has come under increased criticism as "a giveaway of publicly owned resources," often by environmental pressure groups interested in reducing or eliminating mining on public lands altogether. Critics of the Mining Law have been unable to muster sufficient political support to change the law. As Mining Law critic, and former Interior Department Solicitor John Leshy summed it up: "various pressures for reform have tended to cancel each other out in the only arena where final, fundamental change can be provided: the Congress."

After a failed attempt to dramatically change the structure of federal mining law through legislation in the early 1990s, environmental pressure groups and the Clinton Administration turned to administrative actions to bring about the changes that they were unable to persuade Congress to agree. The most dramatic of these changes were embodied in a revision to 43 C.F.R. Subpart 3809 ("the 3809 regulations"), one of the record-breaking number of "midnight regulations" issued in the waning days of the Clinton Administration.

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2. "Fee simple" is a legal term denoting the maximum "bundle of rights" possible in a unit of land: a legal right to perpetual ownership. Under the Mining Law, claimants may opt for full title or mineral rights only. See U.S. GENERAL ACCOUNTING OFFICE, FEDERAL LAND MANAGEMENT: THE MINING LAW OF 1872 NEEDS REVISION, GAO/RCED-89-72, 10 (1989) ("Any U.S. citizen could stake a claim to a mineral deposit and, if it could be mined economically, patent the claim, thereby acquiring fee simple title to both the mineral resources and the land covered by the claim.").
4. One measure of environmental pressure groups' hostility to mining activities is the recent appearance of "precautionary principle" justifications for additional regulation. See, e.g., Johanna H. Wald & Susannah French, The Mining Law of 1872: A Law Whose Time Has Gone, in THE PIRACY OF AMERICA 79 (Judith Scherff ed., 1999) ("In fact, one of the greatest concerns about today's mining boom is that its full environmental legacy may not appear for decades after activities now underway have ended or been abandoned.... Clearly, we are engaged in a dangerous experiment with dire consequences for human health and the environment."). For a discussion of the issues involved in applying the "precautionary principle," see generally INDUR M. GOKLANY, THE PRECAUTIONARY PRINCIPLE: A CRITICAL APPRAISAL OF ENVIRONMENTAL RISK ASSESSMENT (2001).
This paper examines the regulatory history of hard rock mining as a case study of the politicization of environmental regulation. "Midnight regulations," such as those described here, are an increasingly common phenomenon: in 2000, the outgoing Clinton Administration issued a record 26,605 pages of midnight regulations in the *Federal Register* in its last three months. By comparison, in similar periods during the Clinton Administration the *Federal Register* ran about 17,000 pages. The use of midnight regulations is not new—the *Federal Register* was three times its normal size during the last days of the Carter Administration and President John Adams made numerous midnight appointments during his administration's final days, including the appointment of William Marbury, which led to the landmark constitutional law case of *Marbury v. Madison*. Indeed, a Mercatus Center study found that "[s]ince 1948, the long-run tendency is for regulations during the post-election quarter to increase nearly 17 percent (16.8 percent) on average over the volumes prevailing during similar periods in off-election years."

We will show how these regulations represent a growing threat to the rule of law and the rights of individuals. After examining the regulatory history of the 3809 regulations, this article draws conclusions about how the regulatory process might be restructured to prevent the problems associated with "midnight regulations."

I. POLITICS AND REGULATION

Since the New Deal, the federal government's role in the economy has regularly expanded. Much of the federal role has come in the form of regulations issued by federal agencies rather than in the form of statutes passed by Congress. Unlike legislation, which must gain majority support of both houses of Congress as well as the consent of the executive (or the support of two-thirds of both houses to override a presidential veto), regulations are issued by executive action alone. As a result, regulations

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13. One might argue that regulations are issued by the executive branch, at least nominally under the control of the one federal official elected nationally (the President).
are not subject to the political constraints of congressional debate and approval. This is not to say there are no political constraints on regulations, merely that they are different and, as argued below, sometimes weaker.

Of course, not all legislation is actually read and understood by those voting on it. The hundreds of pages of complex statutory provisions contained in the 1977 amendments to the Clean Air Act, for example, passed both houses of Congress on voice votes at the end of the session with almost no chance for the many important changes to be publicized, let alone debated.14 More recently, discovering who was responsible for a politically unpopular provision of a 2002 homeland security statute was difficult.15 Nonetheless, members of Congress were politically accountable for passing these pieces of legislation (even if individual accountability was muffled by measures such as voice votes) and the President was accountable for signing them. This accountability acts as an important check on legislators’ and Presidents’ actions. As Prof. Martin Redish noted, “ultimate accountability to the populace—if only indirectly” was “the sine qua non” of the Founders’ vision of American government.16 It operates as a stronger constraint than the accountability of only the President for regulations issued by executive agencies, particularly during the lame duck period at the end of an administration.

Regulations can also cause problems (and create benefits) for members of Congress and the President. Unpopular regulations can lead to political pressure to change the outcome.17 Giving agencies the job of making the politically unpopular tradeoffs necessary to implement popular legislation can provide legislators with an opportunity to distance themselves from the negative consequences of popular legislation. Regulations thus provide the government actors who are nominally politically responsible a useful, if

However, post-election, lame-duck period regulations are issued during a time in which the President is no longer subject to any realistic political constraints, but more focused on establishing his “legacy,” thus putting him beyond the normal political controls.


15. See, e.g., Behind Closed Doors, INDIANAPOLIS NEWS, Dec. 29, 2002, at B3, available at 2002 WL 104749899 (describing controversy over authorship of a provision exempting vaccine manufacturers from liability in the homeland security bill). As a result of the public outcry, the provision will likely be repealed by later legislation. Helen Dewar, Senate to Repeal Law Shielding Drug Giants, WASH. POST, Jan. 11, 2003, at A4. This further demonstrates the importance of political accountability.


17. Indeed, this can even be a benefit for the politicians, who then get credit for “solving” the problems created by the bureaucracy.
dangerous, tool with which to distance themselves from the more unpopular consequences of regulatory statutes.

In addition to issuing formal regulations, agencies have broad administrative powers that can be used to change department policy. For example, with respect to mining regulations, the Secretary of Interior can do a great deal in addition to issuing regulations:

Acting through the Department's Solicitor, or agency heads, the Secretary may issue legal opinions or instruct the agency to act (or not to act) in a particular way. The Secretary may also assume jurisdiction of and adjudicate an appeal pending before the Office of Hearings and Appeals, or review any decision of any employee of the Department, including any administrative judge or board. Those decisions may include mining claim contests, mineral patent applications, decisions on mining plans of operations, or the exercise of discretion over enforcement actions involving mining claim location, exploration, or mining operations. In the management of public lands, the Secretary has unique authority under the Federal Land Policy and Management Act to withdraw lands from operation of the mining laws. 18

These broad powers allow the Secretary of the Interior to influence policy without utilizing his rulemaking powers.

Although Congress has delegated considerable power to agencies to regulate in different ways under various federal laws, it has also sought to restrict agency autonomy in several important ways. First, Congress requires agencies to follow particular procedures in issuing regulations. These procedures are designed to allow affected parties to have input into the regulatory process and to provide a basis for challenging issued regulations. Thus, for example, many agencies are required to follow the federal Administrative Procedure Act (APA) 19 in issuing regulations. Under the APA's notice and comment rulemaking provisions, agencies must provide public notice of the content of proposed regulations, 20 accept public comments on the rules, 21 and consider and respond to significant comments in framing the final rule. 22 Failure to follow these procedural requirements can lead to the regulations being overturned in court. 23

Second, Congress retains general oversight powers over agencies.

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22. Id. ("After consideration of the relevant matter presented, the agency shall incorporate in the rules a concise general statement of their basis and purpose."); see also United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) ("It is not in keeping with a rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered.").
Through tools short of legislative action, such as holding hearings and placing restrictions on agency appropriations, Congress can apply pressure to agencies to shape regulatory policy. For example, Michigan Democrat John Dingell has often used his position in the House of Representatives to shape the Environmental Protection Agency’s regulation of automobiles in ways favorable to the automobile industry.24

Third, both Congress and the President have created informational requirements for regulations that force agencies to consider particular types of information before acting. For example, the Regulatory Flexibility Act requires federal agencies to consider proposed rules and alternatives that minimize the impact on small entities.25 Although agencies are not required to adopt an alternative that minimizes the burdens, by forcing them to consider the alternatives, Congress requires them to make explicit choices which can then be subject to congressional review.

Fourth, Congress has more recently given itself authority to overrule agency regulations in the Congressional Review Act.26 This act has been used only once, having been used for the first time to remove just one of Clinton’s “midnight regulations” when the new Bush Administration and Republican Congress took office in 2000.27

All of these tools provide important political checks on agency regulatory policy. Agencies must cooperate with Congress to receive funding and to prevent restrictive riders in their appropriations bills. Congressional committees can make agency personnel miserable by subjecting them to harsh oversight hearings. These checks make possible the existence of the agency discretion necessary to implement statutes.28

These political checks rely on the “repeated game” nature of agency interaction with Congress. The key aspect of a repeated game is the existence of a continuing set of future interactions. For example, an agency

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27. See Kelli L. Dutrow, Comment, Working At Home at Your Own Risk: Employer Liability for Teleworkers Under the Occupational Safety and Health Act of 1970, 18 GA. ST. UNIV. L. REV. 955, 958 (2002) (noting that the first use was to overturn Clinton’s OSHA ergonomics regulations.)

28. Whether this is an appropriate accommodation is a different question. Forcing Congress to take political responsibility directly by requiring it to legislate explicit instructions to agencies could be a superior means of introducing political accountability. See generally Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980) (Rehnquist, J., concurring).
that “defects” from an implicit political compromise this year risks retaliation in next year’s budget. Thus, in repeated games the choices made by players (such as administrative agencies or Congress) today are influenced not only by their estimation of the politically-relevant costs and benefits of the particular choice they are making now, but also by their view of how this choice will affect the payoffs from future choices.  

When players expect to face each other in the future, the long-term impacts of choices can dwarf the individual payoffs from any individual choice.  

For the most part, agencies face a long-term future of interactions with powerful members of Congress. During an administration, agencies must cooperate with Congress to prevent congressional retaliation during the remainder of that administration. Even when administrations change, agencies often have powerful reasons to continue to cooperate. When a president is prevented from succeeding himself by term limits, but is succeeded by a president from the same party, agencies have little reason to treat the lame duck period between the election and the incoming administration as an end period, despite the absence of Congress from Washington, D.C. in the post-election period. Even political appointees have strong reasons to continue to play the repeated game, since both political and career appointees can hope for places or career advancement in the incoming administration, the appointees will not wish to complicate the incoming administration’s relations with Congress.  

In one circumstance, however, agencies do have an incentive to defect. When an administration is replaced by an administration of the opposing party, the outgoing administration has little incentive to leave unfinished business for the incoming administration. Oversight by Congress is also weakened during this period: Congress is often out of session after the elections, generally returning to Washington only for a brief “lame duck” session to deal with particularly pressing matters. When party control of a house is shifting with the election results, committee chairs and staff are


31. Consider, for example, the controversial ergonomics regulation issued by the Occupational Safety and Health Administration. “If Gore had won the election, we wouldn’t have seen some of these come out,” says Randel Johnson, vice president of labor and employee benefits at the Chamber of Commerce. “Frankly, I think on ergonomics, if Gore had clearly won, OSHA would have said, “Let’s take a little more time with this.”” Deirdre Davidson & Jenna Greene, Clinton Regulators: Getting the Last Laugh, LEGAL TIMES 24, Dec. 4, 2000, at 24.  

32. See, e.g., Marie Cocco, Special Interests Soar in Lame-Duck Session, NEWSDAY, Nov. 26, 2002, at A33 (“Lame-duck legislatures are wheezing, limping creatures, best buried fast and forgotten quickly.”).
also in flux, minimizing the opportunity for oversight. In these circumstances there is no "next period" reputation effect to limit the behavior of the outgoing political appointees. Indeed, by issuing regulations that complicate the life of the succeeding administration, outgoing regulators can earn political capital with their core constituencies, positioning themselves for rewards in post-administration jobs with interest groups or in a future campaign or administration of their own party. Agencies thus have an incentive to issue regulations during this period, perhaps even holding controversial regulations until the lame duck period.

These last minute regulatory actions are often known as "midnight regulations." Midnight regulations offer three significant defects, according to Senior Federal Circuit Judge S. Jay Plager: (1) both incoming and outgoing administrations expend enormous effort on reviewing and creating the midnight regulations, with presidential oversight of agencies often lost in the rush;\(^3\) (2) the process leads to "sloppiness" and "makes control of the regulatory apparatus appear to be a Washington game;"\(^4\) and (3) the process undermines political accountability, with political constraints on agency heads such as budgetary concerns, congressional oversight, political appointees' concern with their reputations, and personal performance measures absent in the period between the election and the new administration.\(^5\)

The Clinton Administration made particularly heavy use of midnight regulations. Many regulated entities saw the midnight regulations as designed to punish the Administration's enemies and reward its friends.\(^6\) The political director for the U.S. Chamber of Commerce summed up the last weeks of the Clinton Administration as "a gift-wrapping party for his most important and influential contributors" while the legislative director for the Natural Resources Defense Council termed the Bush

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\(^3\) Morrow, supra note 9, at 3; see also Douglas R. Cox, A Proposal for Addressing Future 'Midnight Regulation,' 16(26) LEGAL BACKGROUNDER (Aug. 10, 2001) (noting that midnight regulations "interfere with new Administration's ability to start with a clean slate and to fashion and enforce its own agenda, consistent with its electoral mandate").

\(^4\) Morrow, supra note 9, at 3; see also Cox, supra note 33, at 16 (26) (terming them "rushed, sloppy, and ill-considered initiatives").

\(^5\) Morrow, supra note 9, at 3; see also Cox, supra note 33, at 16 (26) (noting that many midnight regulations would "never see the light of day if their drafters were to remain in office to be held accountable for them").

\(^6\) See Peter H. Stone, Block Those Regs!, NAT'L J., Feb. 17, 2001, at 485 ("A key message of the broad corporate lobbying campaign [against the midnight regulations] is that the Clinton Administration acted capriciously and rammed through new rules and regulations in its final days. Some critics bluntly charge that Clinton acted to punish enemies and reward friends.").
Administration's efforts to undue some of the midnight regulations as political payoffs for campaign contributors. In particular, outgoing Interior Secretary Bruce Babbitt issued midnight regulations that significantly changed the regulatory climate for hardrock mining companies. The heavily publicized (and criticized) pardons issued by President Clinton at the end of his second term are another example of this phenomenon.

II. REGULATING HARD ROCK MINING

Understanding the controversy over the Clinton Administration's midnight regulations of hardrock mining requires some background on the mining industry and mining law. This section provides a brief overview of each before addressing the midnight regulations.

A. Hardrock Mining & The Regulatory Process

For many, mining conjures up images of the California Gold Rush of 1848-1849 and the later mineral rushes of the 19th century West: grizzled prospectors armed with pick, pan, and mule. The reality is that relatively little mining ever conformed to this stereotype because much of America's mineral resources lie deep below the surface of the earth, requiring extensive capital and effort to locate, remove, and process. Mineral deposits "are generally concealed, offer complex metallurgy, and produce large quantities of waste material." The mineral desired is distributed throughout the ore and must be separated. Methods range from gravity separation to hydrometallurgical processes, where ores are treated with chemicals to dissolve out desired metals. For example, one of the most effective means of extracting gold from ore uses cyanide solutions to remove the gold. The development of this process has allowed mining of ores with much lower concentrations of gold, sparking some critics of the Mining Law to argue that the 1980's and 1990's were a new gold rush.

Hardrock mining is far more time consuming and expensive than the 49ers' pans and picks. Mining has also become a heavily capital-intensive
industry. "Modern hardrock mineral exploration requires a continuous effort using vast tracts of land and sophisticated and expensive technology."\(^{42}\) From discovery it takes, on average, ten years to develop a new mine in the United States. \(^{43}\) Locating a target site for further exploration can cost $150,000-$250,000; determining whether to proceed to extraction can cost an additional $500,000-$1,000,000.\(^{44}\)

In 1998, the Rocky Mountain Mineral Law Foundation summed up the characteristics of a modern mine as: "no freedom of site selection;" requiring "considerable lead time and... often risky long-term investment, planning, and projection;" and "costly."\(^{45}\) The Foundation described the industry as cyclical; new mines as "more marginal economic ventures than existing mines;" and having a trend toward fewer but larger mines.\(^{46}\)

Modern American mining law began with the California Gold Rush. The boom in mineral exploration touched off by the discovery of gold at Sutter's Mill in 1848 led tens of thousands of miners to scour the western United States for mineral deposits throughout the mid-1800's. Searching for minerals in the newly acquired and largely empty areas of the West, early prospectors rarely took time to seek formal title to the land they explored.\(^{47}\) When Congress finally addressed the issue in 1866 they had little choice but to ratify existing claims and methods of mineral location and exploitation.\(^{48}\) The 1866 mining law, and the revised version passed in 1872, recognized both the early miners' methods of locating claims, and their right to explore and claim minerals from the federal public land without paying royalties or significant fees to the federal government.\(^{49}\) As the American Law of Mining summarized,

In essence, the location system provides that the first mineral claimant who finds a valuable mineral deposit on vacant, unappropriated, unreserved, and non-withdrawn public domain, and who locates a mining claim and diligently pursues the find, is

\(^{42}\) Humphries and Vincent, \textit{supra} note 3.

\(^{43}\) Lacy, \textit{supra} note 39, at 63.

\(^{44}\) \textit{Id.} at 64.


\(^{46}\) \textit{Id.} at 1-15 – 1-16.


\(^{48}\) The primary issue in the debate was over whether there should be a return to the federal treasury from mineral deposits, favored by Eastern interests, or open access, favored by Western interests. \textit{See AMERICAN LAW OF MINING}, \textit{supra} note 45, at 4-7; \textit{see also} LESHY, \textit{supra} note 5, at 14-15 (describing adoption of 1866 mining law).

\(^{49}\) \textit{See} Morriss, \textit{supra} note 47, at 616-19 (describing displacement of miners' law by government law).
protected against rivals, is entitled to produce all the minerals from the deposit without being required to purchase fee simple title from the United States or make other payment, and, if he chooses, is entitled to obtain fee simple title by means of a patent issued by the United States government.50

Despite the "free" resources, mining claims did not result in mass privatization of federal land and the "giveaway" aspect appears overstated by the Mining Law's critics. Patents under the 1872 statute and its predecessors privatized approximately 3.3 million acres from 1867 through 2000, only 1.5% of all public lands patented under the various federal land disposal laws.51 Although the scope of the Mining Law has been significantly reduced over time through the withdrawal of particular lands and minerals from it,52 "[f]or those hardrock minerals that remain under the Mining Law, however, the claim-patent system is essentially the same as it was when the law was enacted."53 Even a small fee can dramatically affect the number of mineral claims. Imposition of a $100 per claim annual maintenance fee to keep the claim led to a drop from 1.2 million claims in fiscal 1989 to 294,678 in fiscal 1993.54 This suggests that there are large numbers of relatively marginal claims.55 Finally, access to federal land is an important part of a domestic minerals industry. With much of the western half of the United States owned by the federal government (87% of Nevada, for example) and much of the hardrock mineral deposits located in the West, access to federal lands for mining is the only way to have a domestic minerals industry. To the extent that the national security

50. AMERICAN LAW OF MINING, supra note 45, at 30-3.

51. Id.

52. Id. (describing various federal lands (including approximately 165 million acres of the 700 million acres under BLM jurisdiction in 2000) and particular minerals (e.g. oil, gas, oil shale, phosphates, sodium) that have been withdrawn from the claim-patent system, reducing the scope of the claim-patent system).

53. Id.


55. Humphries and Vincent, supra note 3. Such holdings may be speculative or reflect the economics of a claim’s development under current market conditions. See id., supra note 3 ("Critics believe that many claims are held for speculative purposes."). Leshy argued that such claims were being held as a means of "extortion" from mining companies and government bodies that sought to make other uses of the land involved. See LESHY, supra note 5, at 78 ("Even if you have not turned a spadeful of dirt looking for minerals, and have spent only a modest sum, it is often cheaper for the mining company or government to pay you to extinguish your claim than it is for them to crank up the costly, unwieldy machinery to contest it. In the process you can net a nice piece of change.").
arguments for domestic sources of minerals are valid, this is increasingly important.

Even more than when the Mining Law was originally passed in 1872, mining activity has become a regional economic issue. Today, most of the mining activity and mineral claims under the 1872 statute are located in Arizona, California, Montana, Nevada, and Wyoming. Nevada alone had approximately 45% of the claims at the end of fiscal year 2000. This regional nature of the industry has important political consequences, since most of the direct economic benefits (mining jobs, for example) are located in a few sparsely populated western states. Since supporters of the Mining Law contend that it provides necessary incentives for the expense of exploration and development of mineral resources, these arguments are increasingly difficult to sell to those whose constituents lack a direct stake in the industry. As a result, mining issues offer congressional representatives from non-mining states a "free" vote "in favor" of "the environment." Unlike the California Gold Rush, where every state had plenty of residents hoping to strike it rich in mines, mines today are often seen outside their home states as environmental dangers. For non-westerners in general, and non-residents of the five main mining states in particular, increasingly stringent environmental regulation of mining can be portrayed as "pro-environment" action. Indeed, modern critics of the Mining Law generally argue that the 1872 law is "obsolete and inconsistent with other

56. Humphries and Vincent, supra note 3.
57. Id.
58. Humphries and Vincent, supra note 3 ("Industry officials argue that being able to obtain full and clear title to the land enhances a company's ability to bring an economic deposit into production; financing the project, for example, may be more feasible. They contend that restrictions on free access and security of tenure would curtail exploration efforts among large and small mining firms. In their view, the incentive to develop would be lost, long-run costs would increase, and the industry and the country would suffer.").
59. See Hardrock Mining Issues: Hearing Before the Subcomm. on Energy and Mineral Res. of the House Comm. on Res., 105th Cong. 3 (Statement of Rep. Barbara Cubin) (1997) [hereinafter 1997 Hearings] (noting "the folks who want to see the industry leave the U.S. altogether are winning the public relations wars, so the mail to the Eastern representatives and Midwestern Members of Congress is routinely against efforts to restore the multiple use concepts and multiple use for public lands."); Christine Dorsey, Mining Rules Gain Support, LAS VEGAS REV. J., June 13, 2001, at 1D (noting group of eastern Republican congresspeople had written letter to support midnight 3809 regulations and the response from western republicans, such as Jim Gibbons (R-Nev.), head the House Mining Caucus, was "[w]hen it comes to mining, some of these people have been so persuaded by environmental groups to take these radical positions that they will not listen to me. They're listening to the threats by some environmental groups about their campaigns and their election").
federal natural resource policies. Non-westerners also tend to see the mineral resources as “taxpayer assets” which should generate revenue for the government. Since the mining interests are not paying “market value” for these resources, increasing mining interests’ costs through environmental standards and taxes is often seen by non-westerners as appropriate.

Consider, for example, the controversy surrounding the New World mine outside Yellowstone National Park. A proposal to build a mine on Henderson Mountain in Montana to extract $700 million in gold, silver, and copper drew criticism because of perceived threats from its waste disposal system to rivers in Yellowstone. The mining operation offered benefits to those who would receive work at the mine; the problems it posed drew concern from around the nation and globe, with a U.N. World Heritage Committee visiting the site. The conflict was solved by a federal buyout of the company’s mining rights.

The New World story has an important moral. The threat to Yellowstone was eliminated by the purchase of the mining company’s property rights—in theory offering a means of forcing those who sought to protect the park to bear the costs of their actions. Unfortunately, however, opponents of the mine were able to use public money to accomplish their

60. Humphries and Vincent, supra note 3 (“Mining Law critics consider the claim-patent system a giveaway of publicly owned resources because of the absence of royalties and the small charges associated with keeping a claim active and obtaining a patent. They maintain that although such generous terms may have been effective ways to help settle the West and develop minerals, there is no solid evidence that under a different system minerals would not be developed today. They also believe that the current system, by conveying title and allowing other uses of patented lands, creates difficult land management problems through the creation of inholdings, and that current law does not provide for adequate protection of the environment.”). Efforts to change the Mining Law have a long history. See, e.g., Wald & French, supra note 4, at 68 (“Efforts to reform the 1872 Law have been going on for almost as long as it has been on the books. Reports criticizing the Law began appearing as early as the 1930s.”).


62. See New World Cacophony, THE ECONOMIST, Oct. 14, 1995, at 30 (discussing a proposal to dump waste products from the mine into a lake 10,000 feet up the mountain).


goal—thus spreading the cost across all taxpayers, not merely those who cared about the threat the mine posed to Yellowstone National Park. The mining law’s grant of property rights may be criticized as a poor means of privatizing public property, but it nonetheless led to a solution in which those who theoretically benefited from the restriction of mining (i.e. the general public) bore the cost of doing so.65 (Of course, the actual beneficiaries were a subset of the public as a whole, since not all Americans were concerned about the mine.) Not surprisingly, the ability of the mining company to locate near Yellowstone became “a major focus of the national campaign to reform the 1872 mining law”66 since even such partial property rights solutions are unpopular with those who prefer not to pay to implement their preferences.

One more factor is important in understanding the regulatory story told in this paper. In 1976, the Federal Land Policy and Management Act (FLMPA)67 made a significant modification to treatment of public lands under the Mining Law, vastly expanding federal regulatory involvement by granting the Secretary of the Interior authority to regulate the surface impacts of hard rock mining.68 Although the initial regulatory efforts did little more than codify existing practices and require compliance with generally applicable environmental laws and rules, the FLPMA opened the door to more aggressive regulatory action in the late 1990’s. Perhaps anticipating this, opposition to the Act in the Senate came entirely from

65. Of course, eliminating mining operations in the U.S. merely raises the price of mineral resources, thus leading to increased demand for sources of the resources located outside the U.S. As a result, mining increases in places like Indonesia where environmental controls are less strict than in the U.S. The net benefit to the environment of the New World buyout is thus not clearly positive. See, e.g., 1998 Hearings, supra note 61, at 2-4 (statement of Hon. Frank H. Murkowski) (describing how the industry moves “offshore” when regulatory impact increases).


68. To get a sense of the scope of the changes introduced by the FLMPA, consider Leshy’s description of the Mining Law in his 1987 book: access to public lands under the Mining Law “was seemingly unregulated, in that the statute gave the federal government as landowner no explicit monitoring or supervisory role and, indeed, no formal means of learning what activity was taking place on its lands pursuant to the Mining Law.” LESHY, supra note 5, at 26. Leshy may be overstating the case a bit — certainly the federal government as landowner had available to it the same common law tools as any landowner to resist damage caused by mineral rights owners, but the general point is correct that prior to the FLMPA, the government had no clear authority to introduce regulatory measures via agency action.
western senators.\textsuperscript{69} Most importantly, the FLPMA for the first time granted a federal agency direct authority to regulate hardrock mining activity on claims made on public lands for reasons other than simply managing the claims process.\textsuperscript{70} Section 1732(b) required the Secretary of the Interior “by regulation or otherwise, [to] take any action necessary to prevent unnecessary or undue degradation of the lands.”\textsuperscript{71} Exactly what the act meant by “unnecessary or undue degradation” was left undefined by both the statute and its legislative history.\textsuperscript{72}

The FLPMA thus introduced two important elements into the hardrock mining industry that would help create later problems.\textsuperscript{73} First, it created space for more expansive regulations\textsuperscript{74} that addressed issues other than the claims process itself\textsuperscript{75} and led to increases in the resources available to BLM to enforce regulations.\textsuperscript{76} By broadening the potential involvement of the federal government, the FLPMA sparked interest in mining regulation with those outside the mining community. In particular, environmental pressure groups could now use the Secretary of the Interior’s regulatory powers under the FLPMA to achieve their goals with respect to public


\textsuperscript{70} The General Mining Law of 1872 had provided that public lands be open to exploration and purchase “under regulations prescribed by law.” 30 U.S.C. § 22 (2000). This provision did not authorize environmental regulations of mining claims.

\textsuperscript{71} 43 U.S.C. § 1732(b) (2000).

\textsuperscript{72} James Butler, Mining on Federal Lands Current Issues—Changes to BLM’s 3809 Regulations, SG039 ALI-ABA 167, 169 (2001) (noting that subsequent examination of the original regulations determined no clarification was necessary).

\textsuperscript{73} The FLPMA also provided important benefits to the mining industry. It limited presidential power to withdraw lands from mineral exploration. See LESHY, supra note 5, at 36-37. It also introduced federal recording of claims that some in the mining industry supported as a means of eliminating abandoned claims and improving security of title. See LESHY, supra note 5, at 81-82.

\textsuperscript{74} See, e.g., Hard Rock Mining, Hearing Before the Subcomm. on Mineral Res. Dev. and Production of the Senate Comm. on Energy and Natural Res., 101st Cong. 36 (April 19, 1990) [hereinafter Jamison] (statement of Cy Jamison, Director of BLM) (“With enactment of the various environmental laws . . . and the development of the NEPA process, BLM’s administration of the mining laws has changed, particularly since enactment of FLPMA.”).

\textsuperscript{75} See LESHY, supra note 5, at 220 (noting agencies have been given “a substantial degree of environmental regulatory authority”).

\textsuperscript{76} See MILLER, supra note 69, at 374 (noting that the FLPMA “had given the BLM more administrative power over mining claims and more personnel to enforce its regulations” and that BLM personnel went from 4,200 before the act to 10,000 by 1979); Jamison, supra note 74, at 29 (noting that BLM funding for surface management activities under the mining law went from 10% of appropriated funds for mining programs in fiscal year 1982 to more than 40% in 1990).
lands indirectly. They could not have done this (or it would have at least been much costlier to do) with the Mining Law’s single focus on disposing of mineral resources located on federal land.

Second, the FLPMA left key terms undefined, creating a valuable resource for the “owner” of the authority to define those terms, in this case the Secretary of the Interior. Given the broad mandates for Interior and the broad regulatory powers of the Secretary of the Interior, individual industries, such as the mining industry, were in a poor position to compete for control of the department. Those same broad powers, however, made the position attractive and valuable to those with broad agendas for public lands. Environmental pressure groups thus focused on the Interior as critical to advancing their agenda. As John Leshy noted in his book on the Mining Law, as a result of pressure from environmental groups, agencies “set their lawyers off to search for the authorities” to justify regulatory action and, unsurprisingly, found them.

As a result of the changes embodied in the FLPMA, in general

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77. “Buying” the entire department was too expensive for those interested only in a particular rule or regulation. Those interested in the entire panoply of powers held by Interior could, on the other hand, “afford” to buy the department, since their purchase would get them multiple means of advancing their interests. Note that the terms “buy” and “afford” need not imply outright bribery, but merely that interest groups with broad agendas will be willing to invest more in capturing political resources that match their agenda since the return will be greater. For elaboration on this point, see David Schoenbrod, Goals Statutes or Rules Statutes: The Case of the Clean Air Act, 30 UCLA LAW. REV. 740, 824 (1983):

First, one could be a national hero by purporting to protect health forever. Who could object without being a kill-joy? Second, when the consequences of the law became clear, and the need to incur costs and stop activities in order to comply became apparent, one could then play hero at home by opposing the application of the Act in the local context. Next, as industry and governors came to Washington for relief, and as environmentalists complained that EPA was not doing enough, one could play statesman and dole out compromises requiring EPA to go through new procedures and write new reports. The same politician could play all roles, protector of nature in national forums and savior of the local economy at home.

78. See, e.g., Rudy Abramson, Environmentalists Get Their Wish: Babbitt Named as Interior Secretary Reform: Improved Prospects Are Seen for Western Water, New Wilderness Areas, Protection of Park Land—and the Endangered Spotted Owl, LOS ANGELES TIMES, December 25, 1992, at A39 (“[E]nvironmentalists on Thursday got what they most wanted from their Santa Claus in Little Rock, Ark.: Bruce Babbitt as secretary of the Interior.”); Michael Milstein, Interior, Ag Nominees to Have Big Effect: Babbitt Seen as Environmentalist, BILLINGS GAZETTE (MONTANA), December 25, 1992, available at 1992 WL 3355701 (“Environmentalists in the West were beaming Thursday at the news that President-elect Bill Clinton had nominated Bruce Babbitt to run the Interior Department.”).

79. LESHY, supra note 5, at 196.
environmental regulatory laws that affect mining, and in various withdrawals of federal land from Mining Law coverage, free access to federal lands "no longer means what it meant in 1872. It does not apply at all to substantial portions of the federal domain. Where it does continue to apply, it is a mere shadow of its former self." The Mining Law applies to a smaller set of public lands and claims under it are subject to more regulation than they were before the FPLMA.

In sum, the hardrock mining industry presents a classic example of an industry vulnerable to majoritarian oppression. The industry is concentrated in a few sparsely populated (and thus politically weak) states, has large assets tied to specific locations, and long time lines for projects. Additionally, the mining industry can be made to bear the brunt of politically popular "pro-environmental" regulations and other administrative actions, whose indirect costs will be virtually imperceptible to the consumers; concealed within the final price of the products containing the minerals mined. Key gaps in statutory regulatory structures make these very actions possible.

The industry's ability to resist such regulation is dependent upon the design of the United States Senate, whose rules magnify the ability of a few senators to block actions of the majority, thereby protecting vulnerable minorities. During normal times, when agencies are held in check by the political constraints imposed through Congress, the mining industry has some ability to withstand regulatory pressure. Through politically powerful senators, such as Nevada's Harry Reid, deputy majority leader during the period of Democratic control of the Senate from 2001 to 2002, the industry was able to hold back the Clinton Administration's willingness to sacrifice western interests for environmental regulatory measures

80. See id. at 186-89 (describing impact of general environmental laws on mining activities).
81. See id., at 29. There was an attempt at altering the Mining Law in the 1970's as well. After passage of the FLPMA, the Carter Administration promoted reform. However, mishandling by Arizona Congressman Morris Udall doomed the efforts to promote a new mining law and stalled efforts at change. See MILLER, supra note 69, at 369-72 (describing Udall's efforts and their impact).
82. Nevada asserted, for example, that it would bear most of the direct costs of the imposition of the midnight 3809 regulations discussed below. See Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 54,834, 54,835 (Oct. 30 2001).
83. Lisa O. Monaco, Comment, Give The People What They Want: The Failure Of "Responsive" Lawmaking, 3 U. CHI. L. SCH. ROUNDTABLE 735, 748 (1996) ("[T]he Congress, particularly the Senate, is governed by rules which make it easier to block legislation than to enact it . . . ").
84. See, e.g., 1997 Hearings, supra note 59 (discussing the use of appropriations riders to control the 3809 rulemaking process).
popular in the more populous eastern states. Once the end game began however, the Senate no longer provided protection.

B. The 1980 Hard Rock Regulations

Prior to the FLPMA, there was little need for rules other than “housekeeping” rules that gave details of how to file claims and the like. The American Law of Mining described the requirements as “de minimus.” The FLPMA “drastically” changed the requirements by introducing initial and annual filing requirements that would result in loss of the claim if not followed. In addition, once the FLPMA introduced multiple goals into federal lands management, mining claims had to be balanced against other goals for federal lands. The point is not that the federal regulators prevented massive environmental destruction, but that the FLPMA created a new regulatory set of tools that codified existing practices and clarified the requirements for mineral rights owners on federal lands. Initially, these new tools had a relatively benign impact. However, once the tools existed they created the opportunity for “policy entrepreneurs” to use them to further their own interests.

Known as the “3809 Regulations” for their location in the Code of Federal Regulations, this first round of final rules issued by the BLM under the FLPMA sought to achieve two objectives for BLM. First, the regulations wanted to protect federal lands from “unnecessary or undue degradation,” as mandated by the statute, and second, the regulations sought to obtain “information that would allow the Bureau of Land Management to know where mining operations are occurring on Federal lands and some knowledge of the extent of those operations” to facilitate “long term planning decisions and multiple use trade offs for all resource values . . . .”

The regulations divided mining activities into categories based on the size of the claim and the types of activities conducted. Activities by part-time miners and prospectors that caused only “negligible” surface

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85. See, e.g., Tom Kenworthy and Paul Overberg, How the Mountain West Was Won by the GOP; Affluent Suburbanites Fleeing California have Made Region the Biggest Republican Bastion, USA TODAY, October 28, 2002, at A1, available at 2002 WL 4736347 (attributing shift to GOP to an influx of migrants from California).

86. AMERICAN LAW OF MINING, supra note 45, at 4-22.

87. Id. at 4-22.

88. A “policy entrepreneur” is one who creates new public policies, much as a traditional entrepreneur is one who creates new goods or services.

disturbance required no notice. Claims that required the operator to disturb less than five acres of public land simply required notice to the BLM. Claims that would disturb five or more acres of public land required submission of a plan for the mining activity to BLM for review and approval. In addition to the claim size distinction, certain activities, including claim location activities and nonmotorized access, were defined as "casual use" and allowed without notice to BLM regardless of the size.

For environmental standards, the 1980 regulations incorporated environmental standards from other state and federal environmental and mining reclamation laws and regulations. This incorporation meant that as those other laws and regulations changed, the environmental standards in the mining regulations also changed automatically. In addition to compliance with these external standards, the 1980 regulations also required operators to comply with a "prudent operator in usual, customary, and proficient operations" standard with respect to surface disturbance, to reclaim disturbed areas, and to implement mitigation measures. The major change made between the proposed and final versions of the 3809 regulations was the reduction of regulatory burdens for smaller operations through the exemptions from the plan requirements based on the size of the operation.

This first set of mining regulations did not significantly change practice under the Mining Law but simply expanded the regulatory scope of the Interior's activities to match the new law's requirements. Perhaps because environmental pressure groups were still busy with the passage of major

_Id._ at 78,910-11 (exempting casual use and defining it as not involving explosives, mechanical earthmoving equipment, or use of motorized vehicles in areas designated as closed to such vehicles) (for convenience, the 1980 regulations are cited to the _Federal Register_ in which they appeared, even though they have now been superseded in the _Code of Federal Regulations_).

91. _Id._ at 78,911.
92. _Id._
93. _Id._ at 78,910.
94. _Id._ at 78,913.
95. This approach was criticized by Mining Law opponents as leaving the environment "at the mercy of a patchwork of Federal, State, and local regulations." _1998 Hearings, supra_ note 61, at 46 (statement of Stephen D'Esposito, President, Mineral Policy Center). _See also_ Wald & French, _supra_ note 4, at 79 ("Today mines are subject to a hodgepodge of federal, state, and local regulations—but no uniform standards designed to protect the environment.").
98. _Id._
99. _Id._ at 78,902.
environmental statutes in the late 1970's and because public lands issues had not yet come to their attention as a focus for regulatory activity, BLM's initial FLPMA regulations made use of common sense approaches such as the five acre distinction and the incorporation of existing federal environmental standards without drawing much attention.

However, as environmental pressure groups began to focus their efforts on federal land policy, the 3809 regulations came under increased scrutiny and attack. In addition, starting in 1986, the General Accounting Office began issuing a series of critical reports on the mining law and BLM's regulations. The GAO criticized BLM for failing to ensure reclamation of mine sites which led to substantial costs for federal and state reclamation efforts, and the Mining Law as "inconsistent" with federal land policies. Opponents of the Mining Law requested some of the GAO reports, including Congressman Nick Rahall, chair of the House Subcommittee on Mining and Natural Resources, as part of his campaign to change the law.

BLM's responded to the political pressure by shifting its focus toward

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environmental issues. The agency formed a task force in 1989 to review the 3809 regulations. The task force ultimately recommended regulatory changes in four areas: bonding of exploration and mining; managing the use of cyanide in operations; reclamation; and addressing abandoned mines from before the institution of the 3809 regulations. BLM adopted consistent national policies and proposed rules to address these areas. For example, BLM released a reclamation handbook in February 1992 that set out "nationwide standards as a basis for site-specific reclamation requirements." The task force recommendations were, however, "put on hold because it appeared that pending changes in the Mining Law would supersede any changes in the surface management regulations."

BLM also supplemented its national regulations and policies with "more detailed guidance developed at the BLM State Office level, frequently in cooperation with state mining regulatory agencies." Perhaps most importantly, BLM issued a notice of intent to revise the 3809 regulations. The notice listed seven major areas of concern that BLM was examining, including whether the definition of "unnecessary or undue degradation" needed to be revised, and whether additional environmental requirements were necessary. However, all work on 3809 rulemaking came to a halt with the new Clinton Administration.

C. The Failed Legislative "Reform" of the early 1990's

When the Clinton Administration took office in 1993, it endorsed the idea of legislative "reform" of the 1872 law. Clinton appointees at the Interior included several well-known advocates of changes to the 1872 act. Most notable were Secretary Bruce Babbitt, who termed the Mining Law

106. See Jamison, supra note 74, at 29 ("In the past BLM's administration of the mining laws has been mainly concerned with location, recordation, and some patenting. In recent years we have been increasingly emphasizing surface management, including inspection and enforcement.").
110. Butler, supra note 72, at 171.
112. Id. at 54,815-16.
113. Butler, supra note 72, at 172.
114. Garver & Squillace, supra note 18, at 14-4 - 14-5.
“an obscene example of corporate welfare,”115 John Leshy, author of a book critical of the act, The Mining Law: A Study in Perpetual Motion,116 appointed as solicitor for the department, and Jim Baca, a New Mexico public lands official and mining law critic, appointed to head BLM.117 Interior Secretary Bruce Babbitt had a “reform” agenda that involved six major changes to the 1872 law: (1) an end to patenting of mining claims; (2) royalties for the federal government; (3) increased discretion for removal of land from mineral exploration; (4) increased authority for BLM to impose environmental standards; (5) funding for cleaning up abandoned mine sites; and (6) additional enforcement power.118

During the 103d Congress, mining law bills passed the House119 and Senate,120 with the House bill favoring environmental pressure groups’ and Babbitt’s positions, while the Senate bill favored the industry’s position.121 The conference committee to reconcile the two bills was thus critical. During the late spring, summer, and early fall of 1994, Senator [Bennett] Johnston negotiated with House Democrats, western senators, environmental groups, the mining industry, and the Interior Department in an attempt to draft legislation that would be approved by a majority of the members of the Conference Committee, survive votes on the House and Senate floors, and be supported by the President. Despite Senator Johnston’s considerable effort and influence, the Conference Committee failed to agree on a mining law bill. With the 1994 congressional elections looming, neither the House Democrats nor the western senators could accept Chairman Johnston’s final proposal.122

After the elections gave control of both houses to the Republicans, new

116. LESHY, supra note 5.
117. Garver & Squillace, supra note 18, at 14-5.
118. Id. at 14-6.
120. S. 775, 103d Congress (1st Sess. 1993).
121. The regional nature of the hardrock mining industry noted earlier explains this outcome: extracting revenue from the mining industry at the cost of jobs and investment would be popular among non-mining states since they would share in the revenue but not in the burdens imposed. The House, where the five mining states would have proportionately fewer representatives than in the Senate, would thus be more likely to tilt toward the position of environmental pressure groups than the Senate, where mining state interests were better represented. See, e.g., Christian Bourge, The End of ‘Modern American Mining’? 107 AMERICAN METAL MARKET 1 (1999) (“A high-ranking House source close to the issue [a rider concerning the millsite opinion] said the vote showed that the issue was a geographic one, with the rural West losing.”).
mining legislation was introduced and included in the 1995 Budget Bill. The Administration rejected the changes on the grounds that they did "little or nothing to fix the problems posed by the current law." After President Clinton vetoed that bill, legislative change efforts died and the administration turned to administrative efforts to achieve its policy objectives.

The politics of mining law change in the Clinton-Gore Administration are easily understood. Environmentalists were an important part of Clinton’s base of support while he had little hope of gaining significant support in the West among those favorable to mining. The administration regularly used Western lands issues to gain support in the East among urban voters concerned with "the environment" – as when the administration created several new national monuments in Utah without consulting with state officials on their boundaries. In addition, the administration contained many environmental ideologues. Subjecting mining operations on federal land to more stringent environmental regulation would cost Clinton and Gore, who built their reelection strategy for 1996 in part around environmental issues, support of those connected with the mining industry in western states, support they were unlikely to win anyway. The regulations, however, would gain them support of “pro-environment” voters in the more important Midwestern and Eastern states. Western senators, on the other hand, had little incentive to bargain with the administration, since the existing mining law offered mining interests more than they were likely to retain in any compromise. By blocking change, Western senators could deliver more benefits to their constituents

123. See Balanced Budget Act of 1995, H.R. Conf. Rep. 104-350 §§ 5371-5382 (1995). Clinton cited the proposed revision of the mining law as one of the reasons for his veto. See The President’s Radio Address, Pub. Papers 1719 (November 4, 1995) (The budget “allows a giveaway of mining rights to companies at a fraction of their worth. Just recently, a law on the books since 1872 that I am trying hard to change forced the Government to sell minerals worth $1 billion to a private company for $275. That is taxpayer robbery, and it’s going to keep right on happening under the Republican budget.”).

124. 1998 Hearings, supra note 61, at 23 (statement of the Hon. Bruce Babbitt, Secretary, Department of the Interior). See also id. at 26 (“[F]rankly, we would prefer no legislation on environmental regulations to [the bills in the Senate].”).

125. Garver & Squillace, supra note 18, at 14-7 to 14-8. Some legislative efforts did continue, but did not produce successful legislation. See, e.g., 1998 Hearings, supra note 61, at 1 (“For the past 9 years, there has been an extensive, ongoing effort within the Congress to reform [the Mining Law].”).


127. See Jonathan H. Adler, Environmentalism at the Crossroads: Green Activism in America 66 (1995) (“From the start the Clinton Administration took care to place prominent environmentalists in appointive positions.”).
concerned with the mining industry than they could by negotiating with a hostile administration.\textsuperscript{128} Neither side had an incentive to bargain.

\textit{D. The Administrative Campaign}

Having failed to secure legislatively the changes it desired in the Mining Law during the early 1990s, the Clinton Administration turned to administrative changes that did not require congressional approval. As one Senate aide put it, "\textit{[t]here are a lot of tools that were left on the shelf that might now be used. Reform advocates will be using every tactic at their disposal, and I think the administration will be doing everything it can administratively.}"\textsuperscript{129} Secretary Babbitt himself, in his memorandum directing the 3809 rulemaking efforts that would be undertaken during the 1990s, stated

\begin{quote}
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. Instead, the time has come to resume the process of modernizing the 3809 regulations first promised at the end of the Carter Administration and begun at the end of the Reagan Administration.
\end{quote}

To that end, I direct you to restart this role-making [sic] process by preparing and publishing proposed regulations.\textsuperscript{130}

Babbitt's aim, senators charged, was to deny Congress the ability to make policy.\textsuperscript{131} Babbitt characterized it differently, but the message was the same: change in the Mining Law was coming whether from Congress

\textsuperscript{128} Leshy had argued in his book that the Mining Law's inefficiencies imposed substantial transactions costs on mining companies above those that would apply if a leasing system were used. See \textit{LESHY, supra} note 5, at 181 (citing research showing that transactions costs were 5-25 times greater than under a leasing system). The failure of mining interests to embrace reform during the Clinton Administration suggests that either the estimates are incorrect or the additional costs expected by mining companies from royalties or other changes to the system were greater than the expected savings.

\textsuperscript{129} Garver & Squillace, \textit{supra} note 18, at 14-4; \textit{see also} 1997 \textit{Hearings, supra} note 59, at 3 (Statement of Barbara Cubin stating that "in a move that a Washington Post reporter even labeled as stealth mining law reform, Secretary Babbitt has shifted the debate to a forum in which he has the most broad control" away from legislative reform).

\textsuperscript{130} Memorandum from Bruce Babbitt, Secretary of the Interior, to the Assistant Secretary, Land & Minerals Acting Director, Bureau of Land Management (Jan. 6, 1997), \textit{available at} http://www.blm.gov/nhp/efoia/RefDocument/3809jan6.html (last visited December 30, 2002); \textit{see also} Babbitt Creates Mining Reform Task Force, 198(5) \textit{ENGINEERING AND MINING} J. 16 (May 1997) ("It is plainly no longer in the public interest to wait for Congress to enact legislation that corrects the remaining shortcomings.").

\textsuperscript{131} \textit{See 1998 Hearings, supra} note 61, at 20 (statement by Sen. Larry Craig).
Babbitt began to use his non-rulemaking administrative tools aggressively during the late 1990s as well. For example, in November 1997 Babbitt concurred in a legal opinion by the department’s solicitor that reversed years of BLM practice and limited mining claims to a single five acre “dependent” millsite, making the ruling binding on the agency in the future (“the Millsite Opinion”). Interestingly, Solicitor Leshy had earlier suggested in his book on the 1872 statute that “it might even be appropriate for the Interior Department and the courts to consciously reach results that make the statute unworkable” as a means of spurring changes by Congress. Mining Law supporters identified these efforts as attempts to do by regulation what the administration was unsuccessful at obtaining through legislation. Even Mining Law opponents noted the impact of such actions: “[I]t is very possible that the proper interpretation [e.g. Babbitt and Leshy’s] and implementation of the claim limitations will spur congressional reform of the Mining Law.”

As commentators noted afterwards, “the impact of the opinion goes far beyond claim location and patenting issues. Indeed, the opinion, and the subsequent guidance documents and decisions that implement it

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132. Babbitt stated on October 3, 1994 that:
This administration extended its hand to the industry and its congressional supporters. They had their chance at reasonable reform, but chose to block it. We will not abandon our efforts at reform. Next year, we will return on two tracks: We will again pursue legislation and we will also explore the full range of regulatory authority we now possess.

133. Solicitor’s Opinion M-36988, Limitations on Patenting Millsites Under the Mining Law of 1872 (November 7, 1997). Leshy had argued for this interpretation in his book. See LESHY, supra note 5, at 180 (“The mill site is flatly limited to five acres in association with either lode or (since 1960) placer claims.”).

134. LESHY, supra note 5, at 282. Leshy had also argued that the statute’s “true functioning cannot be discerned simply from its text” because “[v]eneers of interpretation and adjustment have been laid on it, some of which . . . are substantially at odds with its words and Congress’s original intent.” Id. at 22-23. Interestingly, Leshy suggested that such interpretations were permissible and could be “deserving of “respect.” Id. at 23.

135. See, e.g., Crown Jewel Mine Decision, Hearing before the Subcomm. On Forests and Public Land Mgmt., Senate Comm. on Energy and Natural Res., 106th Cong. 4 (1999), at 4 [hereinafter 1999 Hearings] (statement of Nevada Sen. Harry Reid that “the Solicitor has taken upon himself to make a very novel interpretation of the Mining Law in an attempt to do what they have been unable to do through cooperative efforts with the Congress; reform of the Mining Law”).

fundamentally alter the process for approving plans of operations for mining on public lands, even where the claimant seeks no patent." The aggressiveness of the Millsite Opinion can be seen in both its attempt to justify its result in the "plain language" of the 1872 statute, despite decades of contrary practice, and the controversy over the validity of the opinion's legal analysis. As Garver and Squillace concluded, "[t]he Department's decision to implement this important policy change without prior notice and an opportunity for public comment suggested to some that the Millsite Opinion is really designed to promote the Department's legislative reform agenda." A short time later in March 1999 the Department used this opinion as the basis for reversing a series of administrative decisions preliminarily approving a plan of operations for a proposed gold mine in Washington state, after eight years and $80 million in project investment, $20 million of which was for permitting. This made clear the impact of the Solicitor's opinion: "the rule established in the Millsite Opinion will, at least in some cases, effectively deny the miner the right that is thought to be enjoyed under the mining law, i.e., the right of self-initiation." Opponents of the 1872 Mining Law hailed the Millsite Opinion and the

137. Garver & Squillace, supra note 18, at 14-12 (citations omitted); see also Flynn, supra note 136, at 306-07 (noting impact of millsite opinion and other actions, calling "into question the status quo" and suggesting that invalidation of claims under millsite opinion will cause "a fundamental re-evaluation of the regulation of public lands hardrock mining").

138. See id. at 14-12 to 14-13 ("There is considerable disagreement among commentators regarding whether the plain language of the statute actually limits the number of millsite locations which may be associated with a mining operation."). Garver and Squillace cite a number of commentators taking both sides of the issue; see also 1999 Hearings, supra note 135, at 2 (statement of Sen. Larry Craig) (opening hearing by noting implications of opinion and that "it appears to fly in the face of over 127 years of common practice within the Department of the Interior"). Leshy defended the legitimacy of his interpretation in testimony before the Subcommittee on Forests and Public Land Management of the Senate Committee on Energy and Natural Resources. See 1999 Hearings, supra note 135, at 5-9 (statement of John D. Leshy, Solicitor, Dep't of the Interior).

139. Garver & Squillace, supra note 18, at 14-17.

140. Garver & Squillace, supra note 18, at 14-18 to 14-19 (citations omitted); see also 1999 Hearings, supra note 135, at 4 (statement of Sen. Harry Reid) (noting $80 million figure).


142. Garver & Squillace, supra note 18, at 14-20. As Leshy had noted in his earlier book, self-initiation was central to the Mining Law. See LESHY, supra note 5, at 25 ("[w]hat preoccupies friend and foe alike is the idea of free, self-initiated access to the federal lands.").
decisions under it as an impetus for change.\textsuperscript{143} Mining interests reacted with alarm, watching as affected companies’ stock prices plummeted.\textsuperscript{144} Congressional reaction was not to revise the statute but to forbid the Interior Department from acting on the opinion and direct the approval of the mine project rejected under it.\textsuperscript{145} The Senate Natural Resources Committee held an oversight hearing on the issue, leading to a recommendation from Senators Frank Murkowski and Larry Craig that language be adopted permanently barring enforcement of the Millsite Opinion\textsuperscript{146} and language in an appropriations rider that barred enforcement.\textsuperscript{147} In response to the rider, the Bush Administration backed away from the Millsite Opinion in 2001.\textsuperscript{148}

The Millsite Opinion was not the only attempt by Babbitt to aggressively remake the General Mining Law of 1872 without legislative changes. Garver and Squillace describe the multiple administrative actions taken by Secretary Babbitt, including “fundamentally alter[ing] the ‘discovery’ test that is at the heart of the 1872 Mining Law;”\textsuperscript{149} use of administrative withdrawals of lands from the mining law coverage,\textsuperscript{150} a “crude but effective method” for promoting legislative changes;\textsuperscript{151} and administrative “reforms” of the patenting process,\textsuperscript{152} which Garver and Squillace conclude were intended “to limit the issuance of patents wherever possible.”\textsuperscript{153}

\textsuperscript{143} Garver & Squillace, supra note 18, at 14-24 (quoting press release from environmental groups as saying the decision would help the industry “feel the pain of a statute far past its expiration date.”); see also Nicole Rinke, The Crown Jewel Decision: Recognizing the Mining Law’s Inherent Limits, 27 ECOL. L. Q. 819, 839 (2000) (describing Mining Law as having “reached its limit”, the “privilege” it provides miners “dated” and “no longer necessary” and applauding the Millsite Opinion as “in step” with modern conditions).

\textsuperscript{144} See, 1999 Hearings, supra note 135, at 60 (Statement of Danny E. Robertson, Operations Manager, Crown Jewel Mine, Battle Mountain Gold Co.) (noting Crown Resources stock price fell 46% in one day and Battle Mountain lost over $100 million in market value as a result of Crown Jewel decision).


\textsuperscript{146} Garver & Squillace, supra note 18, at 14-25 to 14-26.


\textsuperscript{149} Garver & Squillace, supra note 18, at 14-26 to 14-31.

\textsuperscript{150} Id. at 14-32 – 14-36.

\textsuperscript{151} Id. at 14-32.

\textsuperscript{152} Id. at 14-36 to 14-47.

\textsuperscript{153} Id. at 14-36.
Babbitt’s intent to steer the outcome toward implementing his policy agenda can also be seen in his resistance to attempts by western congressional representatives to use the appropriations process to force inclusion of the Western governors in the rulemaking process. Western senators of both parties viewed the Administration’s efforts to regulate as a threat. Senator Harry Reid (D. Nev.) argued that Babbitt’s “most recent attempt at revising 3809 regulations is another back-door approach to mining law reform.” He further argued that such an “effort illustrates the Secretary’s frustration with not getting mining law reform done his way.” Sen. Conrad Burns (R. Mont.) was more emphatic: “[t]his administration has declared war on mining in our country and are determined to remove it from public lands in any way shape or form.” In short, from the perspective of mining interests, as the president of the National Mining Association summed it up later, “[b]y and large, when you look at our industry, we were clearly out of favor with the Clinton Administration.”

Interior also revived a stalled earlier rulemaking effort and issued a final regulation on bonding requirements in February 1997, over five years after the proposal was first published. This “revival” provoked opposition from some Western states. The House Resources Committee subpoenaed Interior documents to “why the Secretary has allowed this rulemaking to become final after such a long lapse without new public input.” The rule was also challenged by the Northwest Mining

154. See 1997 Hearings, supra note 59, at 2-3 (describing successful administration efforts to prevent rider mandating a committee of western governors to report to Congress on “the proper roles of States in mining, permitting and reclamation matters” to “assure the Governors a place at the 3809 table”).

155. Id. at 6.

156. Id.


158. Stone, supra note 36, at 485.


160. See, e.g., 1997 Hearings, supra note 59, at 260-61 (expressing “outrage” over bonding rule), Miscellaneous Mining Bills, Hearing Before the Subcomm. on Forests and Public Land Management, Senate Comm. on Energy and Natural Resources, 105th Cong. 6 (1998) (remarks by Gov. Miller, Nev.) [hereinafter Miller Speech] (“Since the beginning of this [the 3809 rulemaking] initiative, I have questioned the legitimacy of, in essence, changing the mining law through an administrative process.”).

Association for "failure to follow the requirements of the Regulatory Flexibility Act in relation to assessing the effects on small entities" and overturned by the U.S. District Court.

In January 1997, Secretary of the Interior Bruce Babbitt directed the BLM to begin new rulemaking efforts to revise section 3809. The revisions were to include: "(1) a revision to the definition of 'unnecessary or undue degradation'; (2) new environmental performance standards; (3) changes to the notice level provisions; and (4) coordination with state regulatory efforts." Although the Secretary's directive termed this a "restarting" of the earlier rulemaking process, the new initiative included areas not covered by the earlier process.

BLM began the campaign by publishing a notice of intent to propose an environmental impact statement and request for comments on Babbitt's memorandum and the issues it raised in April 1997. Among other reactions, this prompted Western congressional representatives to use oversight hearings to bring pressure to bear on Babbitt. For example, the Subcommittee on Energy and Mineral Resources of the House Committee on Resources held field hearings throughout the west on mining regulations in 1997. As Subcommittee Chair Representative Barbara Cubin noted at one of those hearings, "[I]n view the role of Congress to protect the system, while I don't always agree with the decisions that are made by those decision-makers in the executive branch, and, therefore, I can't always— or really can't intervene on those decisions once they have followed the correct procedure. But my job, and I think the job of the Congress, and this oversight hearing, is to make sure that we protect the procedure . . . ."

Congressional reaction to the "restarted" 3809 rulemaking was consistently negative, seeing the rulemaking as an attempt to bypass Congress. "On five separate occasions, Congress addressed the 3809

162. Draft EIS, supra note 107, at 2.
164. Butler, supra note 72, at 172.
165. See id. at 173 (noting that Babbitt was "disingenuous at best, since Secretary Babbitt directed the BLM to propose regulatory changes in areas where the 1992 BLM Task Force review explicitly found that no regulatory changes were needed").
168. See Christian Bourge, BLM Proposal Angers Miners, 107(31) AMERICAN METAL MARKET, Feb. 17, 1999, at 6 ("A briefing of congressional staff last week attracted a larger-than-usual crowd, according to one BLM staffer. Interest was high, according to one Senate aide close to mining issues, because Congress believes the BLM is trying to bypass congressional oversight of mining law reform with this move. According to the aide, the proposed rule is likely to garner some sort of congressional action in the coming months. With the National Academy of Sciences report still in the pipeline and a great deal of
rulemaking in appropriations statutes, directing BLM to consider particular
issues or to perform certain tasks before publishing final rules."169 Western
states and western governors also strongly opposed BLM’s efforts, arguing
that “much of the proposed rule is unnecessary, unwarranted, or unwise.”170
Nevada Governor Bob Miller, for example, termed the new rulemaking an
“attempt at seizure of control by Interior” of state powers.171 When BLM
did not respond to the governors’ concerns, Congress added language to the
Interior appropriations bill requiring it to do so.172 This proved ineffective,
however, as the BLM announced that the consultation was complete three
days after the appropriations bill was signed by President Clinton, even
though no additional contact had taken place.173

The opponents of BLM’s proposals, having failed in inducing
consultation, next turned to requiring an independent evaluation of the
3809 regulations by the National Academy of Sciences.174 Interior’s 1999
appropriations bill required that such a report be prepared and submitted to
Congress by September 30, 1999, and prohibited the Interior Department
from publishing final 3809 rules before then.175 The NAS then appointed a

opposition by the mining state representatives on the Hill, I could not imagine some sort of
oversight being initiated,” the aide said.”).  
169. Butler, supra note 72, at 173.
170. Western Governors’ Association, Policy Resolution 00-013, Regulation of Mining
(June 13, 2000), available at http://www.westgov.org/wga/policy/00/000013.htm (last
efforts were part of an agenda of “misguided forces” attempting to stop resource uses of
public land with the result that the Western public lands would become “museum pieces by
which Easterners can travel West in a bus and view the landscape and say, ‘Ah, there was
the West that was.”’ Miscellaneous Mining Bills, Hearing Before the Subcomm. on Forests
and Public Land Management, Senate Comm. on Energy and Natural Resources, 105th
173. See Butler, supra note 72, at 173 (“[j]ust three days after the appropriations bill was
signed into law by the President, and without any further contact between BLM and the
governors, BLM Director Pat Shea announced that the required consultation had been
completed and sent letters to Congressional leaders certifying that the requirement had been
met.”); see also Letter from nine western governors to Pat Shea, Bureau of Land
Management (Feb. 5, 1998) (on file with authors) (expressing “grave disappointment” that
certification had been made and arguing that “the consultation process has yet to truly
begin”). Some consultation had taken place, however, during 1998. See Miller Speech,
supra note 160, at 15 (stating there had been some dialogue “in the last several months”).
174. Westerners sought such an appraisal early. See Miller Speech, supra note 160, at 7
(calling for an NAS study).
175. See Department of Interior and Related Agencies Appropriations Act of 1999, Pub.
L. No. 105-277, Division A, Title I, Sec. 120, 112 Stat. 2681, 2938-39 (1998); see also
thirteen member committee of experts, which began with a meeting in February 1999. Despite the existence of the committee and an explicit request by governors and senators from western states to refrain from doing so until the committee had met, Secretary Babbitt published proposed changes to the 3809 regulations on February 9, 1999 and released a Draft Environmental Impact Statement on the regulations shortly thereafter, requiring comments by May 10, 1999. Babbitt also refused requests to extend the comment period until after the NAS study was completed, which would have allowed commenters to have the benefit of the NAS report in drafting their comments.

BLM justified the February 1999 proposals as necessary to keep up with changes in the mining industry since the 1980 3809 regulations had been issued. For example, BLM noted that production had shifted almost entirely to cyanide leaching technology from two-thirds of production through that method in 1980. BLM also cited the series of GAO reports from the 1980s as “highlighting, among other things, abuses from hardrock mining, the need for bonding of mining operations, and the need for better

Murkowski, Craig, Reid, Bryan, Mining Industry Prevail on Hardrock Regulations Study, ENGINEERING AND MINING JOURNAL, Nov. 1, 1998, at 32 (noting 58 to 40 vote against amendment to strip rider from appropriations bill).

176. See Draft EIS, supra note 107, at 2.

177. See Mining Claims Under the General Mining Law; Surface Management, 64 Fed. Reg. 6,422 (Feb. 9, 1999) (to be codified at 43 C.F.R. pt. 3800) (“Send your comments to reach BLM on or before May 10, 1999.”).

178. See Butler, supra note 72, at 175 (“Secretary Babbitt refused those requests, published proposed revisions to the 3809 regulations on February 9, 1999, and released a Draft EIS a few days later, requiring comments on both the proposed rules and the Draft EIS by May 10, 1999.”); see also Letter from Bruce Babbitt, Secretary of the Interior, to Senator Craig Thomas (Jan. 11, 1999) (on file with authors) (rejecting delay and stating that “any protracted delay in completing this rulemaking is simply not in the public interest. I am committed to seeing that the environment is protected, and that the Nation’s taxpayers are spared further cost burdens of cleaning up after hardrock miners. That is why I intend to see this rulemaking through to completion as soon as practicable”).

179. See Mining Claims Under the General Mining Laws; Surface Management, 64 Fed. Reg. at 6423 (Feb. 9, 1999) (to be codified at 43 C.F.R. pt. 3800) (“BLM took a number of steps to implement these recommendations, including development of a cyanide policy. . .”). This justification mirrored Leshy’s earlier criticism of the Mining Law in his book, in which he argued that the “basic problem” with the law was that from the start “Congress almost wholly ignored major continuing changes in the nature of mining activity.” LESHY, supra note 5, at 17. Babbitt made similar arguments in support of the 3809 rulemaking in testimony before Congress. See Miscellaneous Mining Bills, Hearing Before the Subcomm. on Forests and Public Land Management, Senate Comm. on Energy and Natural Resources, 105th Cong. 25 (1998) (remarks by Babbitt) [hereinafter Babbitt Speech] (“One reason those 3809 regs got underway is precisely because of changing technology in the industry. The heap leaching innovations are all brand new. They are enormously productive. They involve a whole series of issues.”).
reclamation." Finally, BLM cited the FPLMA as giving it a "non-delegable and independent responsibility" to protect the public lands, arguing that the act showed that "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."

This prompted additional Congressional intervention into the rulemaking process, with an additional appropriations rider requiring an additional 120 day comment period on the proposed rule and draft EIS after the NAS report was delivered to Congress and prohibiting the finalizing of the rule until after this comment period was over.

The NAS panel delivered its report on September 29, 1999. The unanimous report, like all NAS panel reports, was subject to peer review before its release. In compliance with the appropriations rider, BLM then began a 120-day comment period on the proposed regulations. Perhaps as a result of the earlier struggles over the 3809 rulemaking process, Congress intervened again and required that the final rules be "not inconsistent with" the NAS report's recommendation. Interior took a narrow view of the appropriations rider, interpreting it to require only consideration of the specific recommendations and not to apply to "subjects

181. Id. at 6424.
184. See id. ("This report has been reviewed by individuals chosen for their diverse perspectives and technical expertise in accordance with procedures approved by the NRC's Report Review Committee."). On the reliability of NAS reports generally, see United States v. Chischilly, 30 F.3d 1144, 1155 (9th Cir. 1994) (NRC reports "at least the functional equivalent of a publication subject to peer review . . . .").
185. See Mining Claims Under the General Mining Laws; Surface Management, 64 Fed. Reg. at 57613 (Oct. 26, 1999) (to be codified at 43 C.F.R. pt. 3800); see also United States v. Chischilly, 30 F.3d 1144, 1155 (9th Cir. 1994) (NRC reports "at least the functional equivalent of a publication subject to peer-review . . . .").
which lie outside the specific recommendations of the NRC Report."\(^{187}\) The fiscal 2000 appropriations conference committee report rejected this interpretation, arguing instead that the rider imposed more significant limitations on BLM in issuing the final rules.\(^{188}\)

Babbitt's administrative campaign had some successes and some failures. Congress exercised oversight over the Interior Department and used its powers to hold hearings and add riders to appropriations bills to prevent some of Babbitt's initiatives and alter others. In addition to the visible impacts of the back-and-forth of administrative action and congressional reaction are the invisible ones we cannot document—the actions advocates of changes in mining law did not take because they knew those actions would provoke unacceptable political retaliation from Congress. Moreover, the advocates of mining law change within Interior had to negotiate within the department and within the administration for where the administration's political capital would be spent, since both the department and the administration had other objectives as well.

The process may be as unpleasant as sausage making, but from the start of the Clinton Administration until the 2000 presidential election was over, the mutual interdependence of executive and legislative branches operated as an effective check on agency action.

\textit{E. The Midnight Regulations}

BLM issued final 3809 regulations on November 21, 2000,\(^{189}\) "the last day that they could be published and still become effective before the end of the Clinton Administration."\(^{190}\) (For convenience, these will be referred to as the "midnight 3809 regulations.") Under the terms of the appropriations rider, BLM could have issued the regulation at any time after January 30, 2000 (i.e., the end of the required comment period following the NAS report under the appropriations rider). Even allowing time for consideration of the comments that BLM received during the final round of public comment, the almost eleven-month delay before the regulations issuance suggests that the post-election timing was not accidental.

The midnight 3809 regulations were only a small part of an overall push

\footnotesize{\begin{itemize}
\item \(^{187}\) Butler, \textit{supra} note 72, at 176 (quoting Memorandum from Department of Interior Solicitor's Office to BLM (Dec. 8, 1999)).
\item \(^{188}\) See \textit{H.R. REP. No. 106-914}, at 154 (2000).
\item \(^{189}\) See \textit{Mining Claims Under the General Mining Laws; Surface Management}, 65 Fed. Reg. 69,998 (Nov. 21, 2000) (to be codified at 43 C.F.R. pts. 2090, 2200, 2710, 2740, 3800, 9260).
\item \(^{190}\) Butler, \textit{supra} note 72, at 177.
\end{itemize}}
by the administration to issue last-minute regulations. As Professor John J. Pitney summarized it, "[t]his was a most unusual conclusion to a most unusual presidency—if anything, Clinton ratcheted up his agenda at the end . . . and was far more active at the end than other Presidents." More colorfully, Bush Administration Press Secretary Ari Fleischer later noted simply that Clinton had "been a busy beaver[]."

The midnight 3809 regulations introduced substantial changes in the 1980 regulations. These included:

- expansion of bonding requirements for mining operations;
- requirement of interim management plans where mines are temporarily closed;
- increase in BLM authority to require modifications in plans;
- a new definition of "unnecessary or undue degradation;"
- institution of a set of administrative penalties;

191. Several last-minute regulations dealt with mining issues. Jack Gerard, President, National Mining Association, was quoted as saying that "[w]e've identified over a dozen of these midnight regulations that have a direct negative impact on mining[]" Carl M. Cannon, The Long Goodbye, NAT'L J., Jan. 27, 2001, at 2001 WL 7181605.

192. Id.

193. Id.

194. See Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998 (Nov. 21, 2000) (to be codified at 43 C.F.R. pts. 2090, 2200, 2710, 2740, 3800, 9260) (For convenience, the midnight 3809 regulations are cited to the provision of the Federal Register in which they were made final, as the current version of the Code of Federal Regulations has the current regulations that succeeded the midnight regulations.).

195. See id. at 70,121.

196. See id.

197. See id. at 70,115; see also id. at 70,016 ("The revised definition of ‘unnecessary or undue degradation’ in the final rule eliminates the current reference to the prudent operator standard because the BLM believes it to be too subjective and vague. Instead the definition defines ‘unnecessary or undue degradation’ in terms of failure to comply with the performance standards of final § 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. ‘Unnecessary or undue degradation’ would also mean activities that are not ‘reasonably incident to prospecting, mining, or processing operations as defined in existing 43 C.F.R. § 3715.0-5.’ Based on public comments about the need for BLM to have explicit regulatory authority to deny a proposed mining operation because of the potential for irreparable harm to other resources, we have introduced an additional threshold for undue and unnecessary degradation.").

198. See id. at 70,130.
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• elimination of notice level mining operations;¹⁹⁹

• introduction of a "mine veto" provision allowing BLM to reject proposed mines;²⁰⁰
  and

• inclusion of new performance standards for mine operations.²⁰¹

Reviewing the details of each of these changes is beyond the scope of this paper (and largely a theoretical exercise in any event, as many of the details have since been changed). Briefly highlighting the more dramatic changes, however, is important for establishing the expansive scope of the midnight 3809 regulations.

Perhaps the most sweeping change the midnight regulations introduced was the creation of a regulatory definition for the FLPMA’s "unnecessary or undue degradation" language. BLM's new definition of "unnecessary or undue degradation" significantly changed BLM’s prior practice, which was based on the concept of a "prudent operator."²⁰² The new definition defined "unnecessary or undue degradation" as "conditions, activities, or practices that... result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated."²⁰³ Notably, neither the draft environmental impact statement nor the proposed regulations included this provision,²⁰⁴ making public comment on the language used impossible (and bringing an immediate legal challenge to the new rules).²⁰⁵

Mining industry advocates found the new definition unacceptable. They argued that BLM’s new definition was "open-ended" and

could be invoked to protect any environmental resource from any perceived harm. It is the uncertain application of this provision that may have the most direct and significant impact on future mining investments. Under this vague and subjective standard, potential investors in mineral exploration and development have no confidence that mines can be permitted. The regulation is an invitation to appeals and litigation, and the risk always remains that BLM may discover “significant resource values” after tens of millions of dollars have been invested in a mineral property. Because mining claimants, operators[,] and investors have no assurance that

¹⁹⁹. See Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 70,002 (Nov. 21, 2000) (codified at 43 C.F.R. pts. 2090, 2200, 2710, 2740, 3800, 9260) ("BLM decided the threshold should generally be set between exploration and mining.").
²⁰⁰. See id. at 70,121.
²⁰¹. See id. at 70,122.
²⁰². See id. at 70,016 (discussing BLM’s decision not to retain prudent operator concept).
²⁰³. Id. at 70,115.
²⁰⁴. See Butler, supra note 72, at 178.
²⁰⁵. See infra note 227.
a plan of operations can be approved – even if all applicable environmental standards are met – they will direct their investments toward less risky ventures.\textsuperscript{206}

The mining industry had argued that leaving the term undefined allowed for evolutionary improvements. As one mining company official stated at an oversight hearing,

I think this is the keystone of 3809 . . . and . . . allows for an evolution of techniques and technical problems, [as well as] resolution of technical problems. As we get better at reclamation and get better at operating, then those standards become commonplace in the industry[,] and the 3809 is then updated by applying the unnecessary and undue degradation rule.\textsuperscript{207}

A second important change was the elimination of notice level operations. The midnight 3809 regulations severely restricted notice level operations.\textsuperscript{208} The mining industry argued that continued notice level operations were important because they provided "the opportunity to gain timely access to prospective areas to further assess their mineral potential before investing the enormous amount of time and money required to permit plan level disturbance."\textsuperscript{209}

A third major change was the introduction of the "mine veto" provision, which allowed BLM to reject plans of operation on widely-expanded grounds. Creating a means of preventing mining was critical to the environmental groups' "reform" agenda.\textsuperscript{210} This provision was also of major concern to the mining industry. National Mining Association President Jack Gerard argued that:

[The "mine veto" provision in particular will deter any future investment or exploration investment opportunities . . . . The disruption in investment confidence from this provision – let alone the cost of any mining activity shut down as a result –

\textsuperscript{206} Butler, supra note 72, at 179.
\textsuperscript{208} See supra text accompanying note 199.
\textsuperscript{210} See, e.g., Wald & French, supra note 4, at 81 ("The greatest weakness of the 1872 Law is that it essentially gives mining companies 'the right to mine,' regardless of the damage their activities may do to other values."); id. at 85 (stating as first priority that "[f]ederal land managers must have explicit authority to exclude or limit mineral exploration and development activities on federal lands as well as to adjust the scope of these activities to protect other public values").
Finally, the midnight 3809 regulations significantly changed the form of the environmental standards applicable to mining regimes. Under the 3809 regulations from 1980, the substantive standards applicable to mining operations came exclusively from federal and state laws and regulations on environmental protection and mine reclamation. Thus, for example, the Clean Water Act provided the substance of water quality rules governing mines. "[A]n operator that had obtained necessary water quality permits from the state or EPA, and complied with water quality standards, had met BLM’s test for preventing unnecessary or undue degradation with respect to water quality." During the 1980s, BLM supplemented the imported environmental regulations with specific guidance on the conduct of particular mining operations (e.g., cyanide and acid rock drainage), but these policies "did not create new water quality standards." Indeed, BLM’s description of its activities in these areas showed a process quite different from the midnight 3809 regulations. BLM reported to Congress that it would "[e]stablish informal groups of experts from BLM personnel who will be knowledgeable in this area[,] . . . [d]evelop an external link to cyanide technology expertise[,]" and coordinate with other agencies and state governments.

Under the midnight 3809 regulations, however, compliance with federal and state environmental and mine reclamation laws became necessary, but not sufficient, for approval of mines. "These new standards, particularly those that deal with water quality, transform BLM’s role from that of a land manager to that of [an] environmental regulatory agency." BLM now required "the lowest practical level" of impacts on water quality, a level
that would be set on a “case-by-case basis.”  

The midnight 3809 regulations also claimed authority for BLM over water quantity issues. “These provisions insert BLM into water allocation and use decisions and raise the possibility that BLM may prevent an operator from using otherwise valid and approved water rights if BLM determines that the environmental impacts of that water use are not ‘minimized.’”

The mining industry opposed federal performance standards not only as an inappropriate one-size-fits-all standard for an area that required different approaches for different locations and types of mining but also as an imposition of potentially inconsistent standards from existing environmental and reclamation standards. As one industry representative noted at an oversight hearing, “Unlike other industries, operators of mines cannot locate their mining sites in settings where compliance with national design standards might be feasible.”

In sum, the midnight 3809 regulations vastly expanded BLM’s authority over mining, significantly increased the regulatory burden for the mining industry, and included a major change in the type and degree of environmental regulation used. They went well beyond generally applicable environmental protection statutes to include mining-specific provisions defined by BLM. The midnight 3809 regulations would have significantly weakened the property rights of mineral rights holders, expanded federal authority, and displaced state level regulation.

Midnight regulations are an important political weapon. As the Atlanta Journal editorialized in November 2001, “The Bush administration is now

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218. Id. at 70,012 (“BLM would determine the lowest practical level of a particular impact on a case-by-case basis.”).
220. See Hardrock Mining Issues, Hearing Before the Subcomm. on Energy and Mineral Resources, House Comm. on Resources, 105th Cong. 8 (1997) [hereinafter Espell Speech] (remarks by Ron A. Espell, Environmental Superintendent, Barrick Goldstrike Mines, Inc.) (“[R]eclamation standards must be tailored to the site where mining occurs and the type of mining that is proposed. . . . A one-size-fits-all standard imposed from BLM in Washington simply cannot accommodate the many different environments where mining will occur.”); Upton Speech, supra note 207, at 10 (noting industry objection to one-size-fits-all regulations); Jones Speech, supra note 205, at 12 (“[S]ite-specific flexibility is an absolute necessity for regulations affecting hardrock mining.”). The NAS panel also rejected one-size-fits-all approaches. See Hardrock Mining, supra note 183 (“Simple ‘one-size-fits-all’ solutions are impractical because mining confronts too great an assortment of site-specific technical, environmental, and social conditions.”).
221. See Espell Speech, supra note 218, at 8 (noting “long list of permitting requirements” already imposed and potential for inconsistency).
caught in the crossfire of special-interest groups on one side and local
governments and industries burdened with the cost of regulations on the
other side.\textsuperscript{223} For example, one of the best-known of the Clinton
Administration's midnight regulations was the imposition of new drinking
water standards for arsenic. The political calculation made the regulation
appear irresistible: "If President Bush revoked it, he would be criticized for
trying to poison citizens' water; if he retained it, he would be responsible
for a costly regulatory choice that would hamper an economy already
edging toward recession."\textsuperscript{224}

Even those who agreed with some of the substance of the midnight
regulations disagreed with the process. The \textit{Cincinnati Post}, for example,
endorsed the substance of one of the midnight rules but argued that
"\textit{[w]hatever the merits of Clinton's decision, the way he went about it was}
wrong—in no small part because he tried to sidestep the opposition [to the}
rule . . . . Clinton is unaccountable both politically and administratively for
his [executive] order."\textsuperscript{225}

The immediate negative impact of the regulations was largely
concentrated in Nevada and the other mining states in the West, areas that
the outgoing administration had little reason to favor. BLM's own Final
Environmental Impact statement had concluded that the midnight 3809
regulations would result in "a loss of up to 6,050 jobs, up to $396 million in
total income[,] and up to $877 million in total industry output."\textsuperscript{226} Outside
the West, however, the political benefits of the new regulations were
considerable, giving the outgoing Democratic administration an important
issue to use against the incoming Republican administration and Congress,
satisfying an important Democratic constituency (i.e., environmental
pressure groups), and punishing an important Republican constituency (i.e.,
the Western states that had voted overwhelmingly for Bush). From a
political point of view, the midnight 3809 regulations were a success.

\textbf{F. Aftermath}

Four separate lawsuits, brought by mining industries, environmental
pressure groups, and the state of Nevada, immediately challenged the
midnight 3809 regulations.\textsuperscript{227} The new Bush Administration undertook a

\begin{footnotesize}
\begin{enumerate}
\item[224.] Douglas R. Cox, \textit{A Proposal for Addressing Future 'Midnight Regulation,'} 16(26)
\item[225.] \textit{Our Forests, His Legacy}, THE CINCINNATI POST, Jan. 6, 2001, at 8A.
\item[226.] Mining Claims Under the General Mining Laws; Surface Management, 66 Fed.
\item[227.] See Roger Flynn & Jeffrey C. Parsons, \textit{The Right to Say No: Federal Authority
over Hardrock Mining on Public Lands}, 16 J. ENVTL. L. & LITIG. 249, 279-80 (2001)
\end{enumerate}
\end{footnotesize}
review of many of the departing Clinton Administration's midnight regulations, including the midnight 3809 regulations.

On March 23, 2001, the Department of the Interior's BLM issued a notice of proposed rulemaking to suspend parts of the midnight 3809 regulations and restore the 1980 regulations while a review was made.\textsuperscript{228} This sparked an organized campaign to encourage public comments in favor of retaining the midnight 3809 regulations that led to over 47,000 "repeated messages" that "succinctly" asked BLM to not change the midnight regulations.\textsuperscript{229} Environmental organizations denounced the review in strong language.\textsuperscript{230} For example, Stephen D'Esposito, President of the Mineral Policy Center, declared that "[t]his is like going back to the

\textsuperscript{228} See Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 16,162 (Mar. 23, 2001) (to be codified at 43 C.F.R. pts 2090, 2200, 2710, 2740, 3800, 9260) (providing notice and comment of the proposed rule).

\textsuperscript{229} See Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 54,834, 54,836 (Oct. 30, 2001) (to be codified at 43 C.F.R. pt 3800) (discussing how the BLM changed the proposed rule in response to public comments).

\textsuperscript{230} See Stop the Mining Rollback!, at http://www.minesandcommunities.org/Action/action2.htm (last visited July 5, 2003) (In a campaign against the "rollbacks" and offering a site to submit comments to BLM on the revision of the 3809 regulations, the website stated: "Unless concerned citizens stop them, President Bush and Secretary of Interior Gale Norton will revoke environmental mining safeguards and replace them with weak, outdated rules. The current mining rules govern the activities of the mining industry on publicly owned lands managed by Bureau of Land Management (BLM) and would better protect wildlife and rural communities threatened by toxic pollution. Bush/Norton want to rescind the current mining safeguards, and replace them with old mining rules that left a wake of environmental devastation and taxpayer-funded mine pollution cleanups. We need your comments to oppose the Bush/Norton mining rollback."). But see Stop the Distortion!!: A Response to the Mineral Policy Center's "Stop the Rollbacks Web Page, at http://www.e-mj.com/ar/mining_stop_distortion_response (last visited July 5, 2003) (containing the response of the mining industry in a site countering the "Stop the Rollbacks" site).
James Watt era of public-lands management[.]\textsuperscript{231} BLM adopted a phased strategy for revising the midnight 3809 regulations. The first step was the revision of the bonding rules to exempt those plans of operation approved before January 20, 2001. This allowed time for BLM and the states to implement the new rules while retaining the new requirements prospectively. On June 15, 2001, BLM issued a new final rule (known as the “2001 bonding regulations”) modifying, but retaining, the bonding requirements imposed by the midnight 3809 regulations.\textsuperscript{232} The mining industry association supported the retention of the bonding requirement.\textsuperscript{233} By doing so, the new administration undercut support for mining law opponents to push through appropriations riders preventing rollback of other portions of the midnight 3809 regulations.\textsuperscript{234} Mining law opponents had succeeded in moving a rider through the House on a 216-194 vote to prevent rollback of the midnight 3809 regulations,\textsuperscript{235} but Democratic Senator Harry Reid of Nevada, a long-time champion of the mining industry and the assistant majority leader,\textsuperscript{236} was able to block it in the Senate.\textsuperscript{237}

The second phase was the October 2001 revision of the remaining provisions, reverting to the mining performance standards in place before the midnight 3809 regulations, removing the “substantial irreparable harm” provision, changing the joint and several liability rules, and removing civil

\textsuperscript{231} Charlie Cray, Mining Their Own Business, MULTINATIONAL MONITOR, May 2001, at 16.


\textsuperscript{234} See Christian Bourge, BLM Keeping Tougher Bonds for Mines on Federal Land, AM. METAL MARKET 13 (June 18, 2001) (“[T]he timing of the announcement limits the ability of supporters to fight on Capitol Hill for retaining the revised 3809 provisions in their entirety, making it much harder to attach a rider to the fiscal 2001 Interior appropriations bill aimed at blocking such a rollback.”).

\textsuperscript{235} See Christine Dorsey, House Votes Against Rolling Back Environmental Mining Rules, LAS VEGAS REV. J. (June 22, 2001).

\textsuperscript{236} Christian Bourge, Capitol Hill Vote on Regs Irks Miners, AMERICAN METAL MARKET 25 (June 25, 2001).

\textsuperscript{237} See Christian Bourge, Land Management Agency Inches Ahead on Mine Regs, AMERICAN METAL MARKET 12 (August 31, 2001) (“Supporters of the tougher 3809s admit that they do not have the votes needed, in conference negotiations over a final House-Senate compromise measure, to keep long time metals mining industry supporter Sen. Harry Reid (D. Nev.) from striking the rider.”).
penalty provisions.\textsuperscript{238} BLM justified its action as necessary to allow time for examination of the concerns raised in the lawsuits challenging the midnight 3809 regulations.\textsuperscript{239} The third phase was to seek, simultaneously with the October 2001 revision, comments on the actions taken then as well as on additional changes.\textsuperscript{240}

We summarize the evolution of the 3809 regulations through their various incarnations in Table 1. Briefly, of the thirty-nine categories of rule changes considered significant enough to warrant inclusion in the BLM’s summary of changes made by the 2001 regulations,\textsuperscript{241} eighteen substantially returned to the 1980 regulations’ provisions, eighteen retained the midnight regulations’ provisions, and three (UUD definition, penalty provisions, and environmental performance standards) contained unique features or significant alterations.

In short, the 2001 regulations made five major changes to the midnight 3809 regulations:

\begin{itemize}
  \item restoration of the 1980 regulations’ definition of operator;\textsuperscript{242}
  \item revision of the definition of “unnecessary or undue degradation” by removing the “substantial irreparable harm” clause of the definition, which had been the subject of challenges in several of the lawsuits over the midnight 3809 regulations because it was not contained in the proposed rule that led to those
\end{itemize}


\textsuperscript{239} See id. at 54,835 (stating that “undertaking implementation of certain provisions of the new regulatory program applicable to hardrock mining on public lands before additional examination of the legal, economic, and environmental concerns that plaintiffs raise could prove unnecessarily disruptive and confusing to the mining industry and the states that, together with BLM, regulate the mining industry”).

\textsuperscript{240} See id. (stating that “we recognize that because of the high level of interest in this rule among affected industry groups, environmental organizations, and states, we might benefit from providing an opportunity to comment on the specific changes we are adopting today”).

\textsuperscript{241} See generally id. at 54,850-58 (providing background on the rulemaking).

\textsuperscript{242} The key to this change was to eliminate the suggestion that BLM could routinely pierce the corporate veil to attribute liability to corporate parents of the entity operating the mining claim, as is done under the Superfund statute. See id. at 54,837 (“BLM adopted the ‘material participation’ standard in the 2000 rules based on a concept authorized under CERCLA, as enunciated in a recent Supreme Court decision. However, there is no indication that Congress intended to override state laws in this regard under FLPMA . . . . Thus, we decided we will not include the concept of ‘parent’ or ‘affiliate’ responsibility in the definition of the term ‘operator’ in subpart 3809. Under these final rules, we will hold the appropriate entity liable through established state common law principles.”).
regulations; 

- revision of the liability provisions to remove joint and several liability for environmental damage and provide for liability only for obligations that accrue while a claimant or operator holds its interest, essentially returning the rule to the pre-midnight regulation practice;

- removal of many of the specific environmental and performance standards in the midnight 3809 regulations, retaining only the sections codifying "longstanding BLM policies on acid mine drainage and the use of cyanide" and the general standard, which "form[s] a foundation upon which operators should base their plans of operations" and about which BLM had not received "widespread concern;" and

- elimination of the administrative civil penalty provisions, for which BLM now argued the legal authority was unclear.

243. *Id.* at 54,836. BLM justified the change by stating that:

BLM has concluded that, as a matter of basic fairness, we should not have adopted this truly significant provision without first providing affected entities an opportunity to comment both as to its substance and as to its potential impacts. Because the potential impacts of the SIH standard are so dramatic, BLM is reluctant to continue to include such a provision at all. BLM is also concerned that it would be very difficult to implement the standard fairly as it relates to significant cultural resource values. *Id.* at 54,837. BLM also noted that it had significant regulatory tools under other statutes to address environmental concerns without adding to the 3809 regulations. *Id.*

244. See Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 54,834, 54,836, 54,837 ("In effect, this [change] returns the regulation to that in place prior to the 2000 rule."). BLM justified this change by arguing that "[t]he 1980 rules contained no express provision addressing the apportionment of liability among operators and mining claimants." Under the previous (1980) regulatory scheme, liability was established on a case-by-case basis under state common law principles. The BLM Manual in effect since 1985 reflected that under the 1980 rules both operators and mining claimants could be liable for reclamation. The Manual provided: "Reasonable reclamation of surface disturbance is required of all operators, regardless of the level of operations. Mining claims are commonly leased and the claimants are often unaware of the level of operations occurring on the claims. The mining claimants are ultimately responsible for reclamation if the operator abandons the operation." (citing BLM Manual, Section 3809.11). Thus, even without an express regulatory provision, BLM considered operators and mining claimants responsible for reclamation. *Id.* at 54,838.

245. *Id.* at 54,836.

246. See *id.* ("Throughout the process of preparing the 2000 rule, BLM was aware, as was the NRC, that BLM's authority to impose civil penalties is uncertain. Therefore, we have decided to remove these sections. At the same time, we intend to work with the Congress to clarify our authority. BLM's authority to establish an administrative penalty scheme is uncertain and, until such authority is clearly established, administrative penalties should not be part of subpart 3809."); see also *id.* at 54,843 (stating that "this is an unsettled
As noted earlier, a number of changes introduced by the midnight 3809 regulations remained in effect. The vast majority of these were relatively minor, resulting in a regulatory impact assessment by BLM that the new rules would have no appreciable economic impact.

The new Administration eventually returned most of the substance of the 3809 regulations to their state under the 1980 regulations, with some clarifying and codifying changes and with alteration of the bonding requirements. The most controversial of the midnight 3809 regulations were undone within a year of taking effect and the future of the 3809 regulations once again is subject to the political oversight of Congress.

III. SOLVING THE PROBLEM OF MIDNIGHT REGULATIONS

"This whole move toward midnight regulations is something on which Congress should send a clear message to future presidents. The kind of things you haven't been able to do during your term, you shouldn't try to do as you're closing the door."


The 1996 Congressional Review Act ("CRA") provides one means of dealing with midnight regulations. Under the CRA, regulations can be overturned by a majority vote of both houses of Congress, without requiring a full notice and comment rulemaking proceeding as would simply repealing the regulation. Such a vote must be taken within sixty days of the official publication of a final rule in the Federal Register, however, which significantly limits the ability of Congress to address the large quantity of midnight regulations that often accompany a change in control in the executive branch. Moreover, when a rule's impacts are concentrated in a particular region or on a particular industry, there may not

area for which it is prudent to await clear guidance from Congress before promulgating rules.

247. See, e.g., id. at 54,838 (making no change to provisions on submission of plans of operations); see also id. at 54,840 (making no change to provisions on acid mine drainage and leaching operations and impoundments).

248. See Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 54,844 (stating that "we do not expect today's rule to have significant annual impacts on the economy").


251. See, e.g., Audrey Hudson, Republicans Expect No Further Use of Review Law to Void Clinton Rules, THE WASHINGTON TIMES (March 14, 2001) ("'The time problem is a factor. The clock is ticking pretty loudly at the moment,' said Sen. Larry E. Craig, Idaho Republican and chairman of the Republican Policy Committee.").
be sufficient political support to change the rule.  

In his book, John Leshy attempted to justify administrative strategies remarkably like those he implemented at the Interior Department by arguing that the Mining Law is "obsolete." Although conceding that the statute was technically not obsolete, since Congress had regularly amended it in minor ways, he relied on Congress' "inability to achieve major reform" as sufficient proof of obsolescence. But that a law has not been changed when one wishes it had been is not sufficient to declare open season on its express provisions through administrative means. Politics may block a major "reform" but change is not an end in itself. Politics has virtues — our political institutions provide accountability and the obstacles that prevent "reform" of the Mining Law are largely ones put in place by the Founders to block legislation that might oppress a regional or other minority. Indeed, the Founders deliberately created a federal government in which legislating is difficult to accomplish. If eastern interests seeking increased revenue for the general treasury from lands located largely in the west must negotiate with westerners for the terms of the revenue extraction because of westerners' political power, easterners' attempts to extract revenue from the west will be moderated by westerners' sense of self-preservation.

Politics rescued the 3809 regulations from the Babbitt-Leshy administrative campaign, as Congress used the appropriations process to force the administration to take into account western interests in mining

252. See, e.g., id. ("Many of the regulations created by the Clinton administration involved Western issues and have little national support to overturn them, Republicans said. 'If you are going to create a monument in Utah, what do people in New Hampshire care about that?’ asked Sen. Rick Santorum, Pennsylvania Republican and chairman of the Republican Conference. ‘They may, but it’s harder to set up those kind of votes, to get that kind of support for something that’s much more of a local issue.’").

253. LESHY, supra note 5, at 270.

254. Id.

255. Id. at 271.

256. See Jonathan L. Entin, Separation of Powers, the Political Branches, and the Limits of Judicial Review, 51 OHIO ST. L. J. 175, 184-85 (1990) (noting that the founders "established a system designed to prevent overreaching by one branch at the expense of another and of liberty"); see also id. at 219 (noting that framers expected Congress and the executive "to rely primarily upon their own political self-defense mechanisms when interbranch disputes arose").

257. See, e.g., THE FEDERALIST NO. 62 para. 9 (James Madison) (Roy P. Fairfield ed., 1981) ("The necessity of a Senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of a sudden and violent passion, and to be seduced by factious leaders into intemperate and pernicious resolutions."); see also Redish, supra note 16, at 673 (arguing that the Framers "inserted numerous republican-like speed bumps to democratic rule").
law changes. Although not all of the administrative "tools" used by Babbitt and Leshy could be blocked, they were prevented from implementing most of their major initiatives through appropriations riders. Despite Leshy's theories of obsolescence, mining law change was forced back into the Congressional arena where the administration had to negotiate with those directly affected by changes to 3809.

The political process of creating legislation has several important advantages over midnight regulations. Perhaps the single most important advantage is forcing policymakers to consider federalist solutions. As Nevada Senator Harry Reid argued in a statement at a 1997 oversight hearing on Babbitt's administrative campaign, "[t]he Secretary's prescription for mining law reform is a one-size-fits-all approach. He wants to direct uniform Federal standards for a gold placer operation in Alaska, surface copper mines in Arizona, and underground gold mines in Nevada. As any miner knows, this will not work." The political process improves (perhaps only slightly) the quality of regulations.

The fundamental problem of midnight regulation is that the incentive structure for regulators is wrong (or, perhaps, more wrong than usual).

258. 1997 Hearings, supra note 59, at 6 (statement of Senator Harry Reid).
259. See, e.g., Western Governors' Association, supra note 170 ("Western states also have comprehensive state mineral exploration, development and reclamation programs, enforced in coordination with federal land management agencies. These state programs set criteria for permitting exploration, development and reclamation of mining operations, with provisions for financial assurance, protection of surface and ground water, inspection and enforcement, designation of post-mining land use, and public notice and review.").
260. One concern with federalist solutions is that they leave open the possibility of a race-to-the-bottom, as states compete for industry by lowering standards. That concern should be less in the mining industry since mines must be located where minerals are. Of course, decisions about which deposits to develop are affected by regulatory considerations (which can make development uneconomic by increasing costs), but the fixed location of mineral resources makes capital-intensive mining industries more vulnerable to expropriative taxation and regulation than other industries, suggesting that the real concern is not a race-to-the-bottom but a race-to-expropriate. Even by the 1880's, mining had become a capital-intensive industry. See JOEL K. WATERLAND, GOLD & SILVER OR SWEAT & TEARS 11 (1988) (describing in detail the equipment used in the 1880s).
What role then exists for the federal government? The mining industry has suggested "[o]versight in the context of looking at the standards between States, and applying and assuring some reasonable level of consistency between States." See 1997 Hearings, supra note 59, at 15 (statement of Bill Upton, Manager, Environmental Affairs, Placer Dome U.S., Inc.).
Regulators in the lame duck period are not only freed from political fallout from their actions but have positive incentives to cause problems for the incoming administration. Fixing that incentive structure requires eliminating the benefits of midnight regulations for the regulators. We offer two proposals to do so.

First, the attractiveness of midnight regulations could be reduced by making midnight regulations less durable. Currently, repealing a regulation (regardless of when it is issued) requires a rulemaking proceeding similar to that necessary to create a new regulation. Making regulations issued "at midnight" (after the election, for example) able to be repealed without a new rulemaking process but simply by issuing a notice in the Federal Register would make pre-midnight rules more attractive. Bureaucrats would then have an incentive to issue rules during the pre-midnight period, when the outgoing administration could still be made to pay a political price if it overreached. Rules might also be prohibited from going into effect for a period after the new administration was inaugurated, allowing withdrawal of proposed final rules without new rulemaking.

Second, midnight regulations could be made more costly to bureaucracies. Limits on the substance of new regulations issued during the midnight period could be imposed (only regulations that were related to emergency needs, for example) or agencies given a limit on the number or size of regulations they could issue during the midnight period. If agencies faced a “budget” of regulations, they would have to make choices on which subjects to “spend” their budget.

The problem with such changes is that not all regulations issued in the post-election period are illegitimate. The functioning of government requires the regular issuance of a myriad of rules, notices, and the like. Weakening all regulations issued “after midnight” will unnecessarily weaken these regulations as well. Further, granting too much ability to new administrations to “undo” prior administrations' rules may well create a new problem of “sunrise regulations” in which the prospect of change induces a frenzy of lobbying as a new administration takes office.

Although we recognize that these are serious problems, we contend that control of midnight regulations are more important because the new administration is subject to the normal political constraints. Any changes in the prior administration’s regulations will be subject to public scrutiny and will have to be defended by the new administration. Thus, on balance, we think the reforms we suggest will improve the regulatory process.

261. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").
CONCLUSION

The story of the midnight 3809 regulations ended "happily"—the endgame effects of the closing days of the Clinton-Gore administration were largely undone and the regulatory balance restored. Is the midnight regulation story thus of little long term importance (at least until the next change in administration)?

No. Midnight regulation is a serious problem for three reasons. First, it undermines the system of political accountability for regulatory policy provided by Congressional oversight of regulatory agencies. This oversight can at times turn into capture and undue influence; it nonetheless plays a critical role in restraining the unelected bureaucrats in federal regulatory agencies from overreaching. Second, it costs incoming administrations political capital and attention. Diverting a new administration from its own regulatory agenda is costly and reduces the responsiveness of government to popular will. Third, it undermines the rule of law by encouraging agencies to deliberately overreach in an effort to embarrass the new administration. In this case, an administration whose lawyers saw statutory law as "itself an obstacle" to change, used its powers to attempt to obtain through regulation what it could not obtain through the Congress.

Ending the opportunity for midnight regulation is thus an important step in improving the regulatory process. The measures suggested above offer some means of doing so by raising the cost of midnight regulations.


263. Id. at 6. Leshy argued that "its text has frequently been supplanted by judicial or administrative agency decisions, and much of the practice under it is unwritten, fashioned more by custom and official acquiescence than by positive decision. Such encrustations on the statute tend to make the Mining Law a special preserve for a relatively few hardy souls who deal with it in a professional context." LESHY, supra note 5, at 6.
**APPENDIX**

**Table 1: Selected Alternative 3809 Regulations**

<table>
<thead>
<tr>
<th>§ 3809.5</th>
<th>Definition of Operator</th>
<th>1980</th>
<th>Midnight</th>
<th>2001</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Person conducting or proposing to conduct operations</strong></td>
<td></td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td><strong>Includes parent company or affiliate who materially participates (joint and several liability)</strong></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§ 3809.5</th>
<th>Definition of Public Lands</th>
<th>1980</th>
<th>Midnight</th>
<th>2001</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>BLM lands under Mining Laws</strong></td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td><strong>Lands where mineral estate is federal and surface estate is private</strong></td>
<td></td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td><strong>Stock Raising Homestead Act amendments require BLM involvement when surface owner does not consent.</strong></td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
</tbody>
</table>

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266. 43 C.F.R. § 3809.31(d) (2002).
<table>
<thead>
<tr>
<th>§ 3809.5</th>
<th>Unnecessary or Undue Degradation Definition (UUD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prudent operator standard (usual, customary &amp; proficient)</td>
<td>√</td>
</tr>
<tr>
<td>Mitigate impacts.</td>
<td>Not defined; but part of NEPA analysis(^{267})</td>
</tr>
<tr>
<td>Comply with environmental laws.</td>
<td>√</td>
</tr>
<tr>
<td>Reclamation</td>
<td>&quot;Reasonable&quot;; at earliest feasible time(^{272})</td>
</tr>
<tr>
<td>Comply with performance standards.</td>
<td>√</td>
</tr>
<tr>
<td>Activity must be reasonably incident to mining.</td>
<td>√</td>
</tr>
<tr>
<td>No substantial irreparable harm (without mitigation)</td>
<td>√</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§ 3809.11</th>
<th>Notice vs. Plan Operation Threshold (Non-Casual Use)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notice required</td>
<td></td>
</tr>
<tr>
<td>&lt; 5 acres per year</td>
<td>√</td>
</tr>
<tr>
<td>&lt; 5 acres, exploration in non-special area</td>
<td>√</td>
</tr>
<tr>
<td>Plan required</td>
<td></td>
</tr>
<tr>
<td>&gt; 5 acres, or special status area</td>
<td>√</td>
</tr>
<tr>
<td>&gt; 5 acres, or exploration in special status area</td>
<td>√</td>
</tr>
<tr>
<td>Mining, milling, and bulk sampling over</td>
<td>√</td>
</tr>
</tbody>
</table>

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268. 43 C.F.R. § 3809.420(a)(4), see also Barringer, supra note 264, at 2-6; Butler, supra note 264, at 5-3-5-4.
269. 43 C.F.R. § 3809.5; 3809.420(a)(4) (2002).
| 1,000 tons | Special status areas expanded (e.g. monuments, T & E species, critical habitats) | ✓ | ✓ |

### § 3809.100  Mining Claim Validity, Existing Rights, and Mine Economics

| | Not addressed in 3809 regulations. Wilderness areas per 8560 regulations | ✓ | | ✓ |
| | BLM option (discretion: 2000) to determine validity rights before approving plans in segregated (or withdrawn: 1980) areas. | ✓ | ✓ | ✓ |
| | Required validity exams before approval. | ✓ | ✓ |

### § 3809.201-.204  State and Federal Government Coordination

| | MOUs in each state provide coordination. States may lead some program elements. | BLM gives state the lead when requirements are as strict. | BLM gives state the lead when requirements are as strict. |
| | BLM must concur on Plan approvals. | ✓ | ✓ |
| | BLM retains inspection and enforcement option. | ✓ | ✓ |
| | BLM retains NEPA, NHPA, Tribal-Govt. coordination and T&E responsibilities. | ✓ | ✓ |

### § 3809.301-313  Notice and Plan of Operations Contents and Processing

| BLM review of Notices in 15 calendar days; Plans (for completeness: 2000), 30 days, (with | ✓ | ✓ | ✓ |

---

<table>
<thead>
<tr>
<th>Option of 60 more days: (1980)</th>
<th>Open-ended time frame for Plans for NEPA (EIS), NHPA, and T&amp;E species compliance</th>
<th>Public Comment period</th>
<th>Expanded detail on Notices and Plan contents (including plan for interim management during temporary closures)</th>
<th>Operators required to provide all studies/data BLM needs to comply with NEPA.</th>
<th>§ 3809.334</th>
<th>§ 3809.336</th>
<th>§ 3809.424</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>√[276]</td>
<td>√[277]</td>
<td>√[278]</td>
<td>On Environmental Analysis, if sufficient interest</td>
<td>On Plans, at least 30 days</td>
<td>On Plans, at least 30 days</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>√</td>
<td>√</td>
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<td></td>
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<td></td>
<td></td>
<td></td>
<td>279</td>
<td>279</td>
<td>279</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Maintain site in safe and clean condition.</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>May require site reclamation after unspecified period of non-operating (consider time and condition of site/equipment: 2000).</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Notice expires after 2 years.</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Plans may be terminated after 5 consecutive years of inactivity.</td>
<td>√</td>
<td>√</td>
</tr>
</tbody>
</table>

276. *Id.*
279. Not specified.
### § 3809.500-.599  
**Financial Guarantee Requirement (i.e., Bonding)**

<table>
<thead>
<tr>
<th>Plan Requirement</th>
<th>2003</th>
<th>2001</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial Guarantee Requirement (i.e., Bonding)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Bonds required only for Plans at BLM's discretion.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Actual cost bonding required for all Notices and Plans.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Operator provides initial reclamation cost estimate.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Financial guarantee must cover 100% of reclamation costs.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>No new corporate guarantees accepted.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

### § 3809.600  
**Inspection and Monitoring**

<table>
<thead>
<tr>
<th>Inspection Requirement</th>
<th>2003</th>
<th>2001</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Operators must allow BLM to inspect operations.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Inspections four times annually where cyanide is used or significant potential for acid rock drainage.</td>
<td>Policy</td>
<td>Mandatory</td>
<td>Mandatory</td>
</tr>
<tr>
<td>Inspections twice annually for all other operations.</td>
<td>Policy</td>
<td>Policy</td>
<td>Policy</td>
</tr>
</tbody>
</table>

### § 3809.700  
**Type and Adequacy of Penalties for Non-Compliance**

<table>
<thead>
<tr>
<th>Penalty Requirement</th>
<th>2003</th>
<th>2001</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>BLM issues notices and records of noncompliance.</td>
<td>✓</td>
<td>✓/281</td>
<td>✓/282</td>
</tr>
<tr>
<td>Federal injunctions and criminal prosecution may be used.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>BLM can suspend or revoke Plan and nullify</td>
<td>Can seek court injunction to cease</td>
<td>✓/284</td>
<td>✓/285</td>
</tr>
</tbody>
</table>

---

281. 64 C.F.R. § 3809.601 (2000).
282. 64 C.F.R. § 3809.601 (2002).
<table>
<thead>
<tr>
<th>Notice for failure to comply with enforcement orders.</th>
<th>operations and liability for damages.</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>BLM would issue discretionary administrative penalties ($5,000/ day).</td>
<td></td>
<td>√</td>
</tr>
<tr>
<td>Under MOUs, BLM would refer certain noncompliance actions to other federal and state agencies for enforcement.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Standards**

**Surface and Ground Water Protection**

| All operators must (shall: 2001) comply with federal and state water quality standards (including Federal Water Pollution Control Act: 2001). |  | √ & minimize water pollution 290 |
| Pit water quality must not endanger wildlife, public water supplies, or users. |  | √ |
| Operators would use operation and reclamation practices that minimize water pollution and changes in flow in preference to water treatment or |  | √ |

---

285. 64 C.F.R. § 3809.602 (2002).
290. 64 C.F.R. § 3809.420(b)(2) (2000) (65 Fed. Reg. 69,998, 70,122); see also Butler, supra note 64, at 5-6-5-8.
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<table>
<thead>
<tr>
<th>Replacement.</th>
<th>American Indian Traditional Cultural Values, Practices, and Resources.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consultation with American Indian is used to develop mitigation (where possible: 2000).</td>
<td>Case-by-case basis</td>
</tr>
<tr>
<td>Handling of Potentially Acid-Forming, Toxic, or Other Deleterious Materials.</td>
<td></td>
</tr>
<tr>
<td>Reclamation must include measures to isolate, remove, or control toxic or deleterious materials.</td>
<td>✓</td>
</tr>
<tr>
<td>Other requirements imposed based on site-specific review according to BLM policies and BEEN (acid rock drainage) policy.</td>
<td>✓</td>
</tr>
<tr>
<td>BEEN control measures must be fully integrated with operational procedures, facility design, and environmental monitoring programs.</td>
<td></td>
</tr>
<tr>
<td>Static or kinetic testing must be used with respect to potentially acid forming materials.</td>
<td></td>
</tr>
<tr>
<td>BEEN control must focus on prevention or control of acid-forming reaction.</td>
<td></td>
</tr>
<tr>
<td>Potential migration of BEEN must be prevented or controlled.</td>
<td></td>
</tr>
<tr>
<td>Effluent treatment</td>
<td></td>
</tr>
</tbody>
</table>

292. 64 C.F.R. § 3809.5 (2002).
<table>
<thead>
<tr>
<th><strong>required if source and migration controls do not prove effective.</strong></th>
<th>Air Quality</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Applicable Federal and state air quality standards, including the Clean Air Act</strong></td>
<td>Shall comply</td>
</tr>
</tbody>
</table>

293. And with applicable tribal and local laws/requirements. 64 C.F.R. § 3809.420(b) (2000). 65 Fed. Reg. 69,998, 70,122.