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RECOMMENDED CHANGES TO H.R. 761 AND TO ENDANGERED SPECIES ACT

For 2015
Recommended changes in HR 761 include:

1) Allowing the Equal Access to Justice Act (EAJA) to in fact apply so that miners have a fighting chance to appeal arbitrary decisions by the surface management agencies that are "unreasonably prohibitive" and for the agencies "failure to act" brought under the Administrative Procedures Act (APA).

2) Clarify that the **Department of Interior (BLM) and the Minerals and Mining Advisory Counsel (MMAC) shall have exclusive jurisdiction over management of surface disturbances in connection with mineral operators operating under 1872 Mining Law** (locatables codified under 30 *USC 21a – 54)* **upon BLM, National Park Service, National Forest, National Monument, State Park or any other agency managed lands.** All other agency regulations governing management of surface disturbances in connection with mineral operators operating under 1872 Mining Law (such as *36 CFR 9.1 subpart A and 36 CFR 228 subpart A)* shall be void. See *16 USC 472* and *Best v. Humboldt, cite: 371 U.S. 334* (DOI and MMAC has plenary and exclusive authority)

Clarify that all references to a discretionary "permit" system shall be struck and replaced with and defined as "Notice of Initiation" (NOI). Classified as: no NOI stage (casual use), NOI stage 1 (Exploration) and NOI stage 2 (Exploration and Production) that all federal and State agencies included but not limited to (BLM) shall respect the rights of "self initiation" under the Mining Act *(30 USC 22*) so that miners and investors have regulatory predictability. (Social Economic certainty) (also see *The Mining Law of 1872 Legal and Historical Analysis 1989* published by the National legal Center for the Public Interest, a legal and judicial interpretation)

3) Modifying the 30 month approval limit by the agency and make it proceed by operation of law after 90 days for operators seeking full exploration & production (stage 2), 30 days for exploration (stage 1) and no notice for casual use. For NOI (stages 1-2) that are submitted and the area is not accessible by the mineral operator shall not be included in the day limit.

4) Modification that all mineral operations operating under the 1872 Mining Law (locatables); regulations under *43 CFR 3809* regulation will not meet the criteria of a Federal Action or Major Federal Action subject to NEPA. The BLM's advisory mitigation of surface disturbance shall be non-discretionary where reasonable compliance to the common and specific Best Management Practices are sought. Mineral operators shall not be forced or otherwise compelled to perform actions or to pay mitigation fees for which the mineral operator finds unreasonable prohibitive. Equal weight shall be applied between the mineral operator and the agency in determinations of unreasonable prohibitive mitigation whereby a consensus can be formed.

5) Modifications and clarification on when operations that are in the casual use stage shall not be required to file a NOI and allowed to proceed by operation of law.
Note:
Clarify as a baseline operation that do not require an NOI at all: Are defined as the use of hand tools, subsurface operations, small mechanized earth moving equipment under 21 Horsepower (HP) (ancillary equipment such as compressors, pumps and generators shall be exempt from the 21 HP limit), use of highway / off road licensed vehicles, trailers and temporary use of mechanized earth moving equipment use that exceeds 21 HP for safety or clearance purposes on visibly existing and prior existing land improvements (previously disturbed lands) such as trenches, workings, shafts, portals and access roads; unless those land improvements have already been included in the National Register of Historic places and the land has been withdrawn from mineral entry.
A road, trail, mine or mill-site shall be allowed to be maintained in good repair at its original nominal width and material, including reasonable disturbances incidental to such maintenance. Where minor improvements, such as drainage ditches, culverts, curbs, short stretches of gravel or pavement or guardrail, and stabilizing efforts are reasonable necessary to reduce erosion, prevent slides, and provide for safety. Previously disturbed land, and previously disturbed roads used for vehicle access may be reopened and repaired for the purpose of exploration and mining. (See *30 USC 612(c))*

A portable mill (hardrock) or Washplant (placer) of scale appropriate to the size of the sampling operation is exempt provided the mineral operator runs no more than an annual process limit of 1000 cu. Yards or surface disturbance of not more than 5 acre per claim.

Modifications and clarification on when operations that are in the exploration stage (stage 1) shall be required to file a NOI but allowed to proceed by operation of law after 30 days if the agency has not completed review of the operators submitted NOI and issued an appeal right to the mineral operator.
Modifications and clarification on when operations that are in the exploration and production stage (stage 2) shall be required to file a NOI but allowed to proceed by operation of law after 90 days if the agency has not completed review of the operators submitted NOI and issued an appeal right to the mineral operator.

Clarify that previously submitted Notices of Intent and Plans of Operations backlogged and submitted to other agencies of the Forest Service, BLM and Park Service prior to this legislation shall be deemed approved and transferable to the BLM by the mineral operator.

6) Clarify that surface disturbance activity not excepted from submittal of a NOI may require the submittal of an NOI to the agency upon written (certified) notice to the mineral operator in the form of a Notice of Non-Compliance.

7) Clarify the fact MSHA regulations and reporting requirements shall only apply to mineral operators with employees and not owner/operators, contractors or family run operations, however, operators shall make a reasonable effort to apply MSHA safety principles and standards to their operations where applicable. (see *Marshall v. Wait, Cite: 628 F.2d 1255)*

8) Clarify that the Agency (BLM) shall have the sole responsibility in obtaining any and all permits in accordance with EPA/CWA (Water and Air Quality) reflected in *33 USC 1323* for mineral operators while employing Best Management Practices.

9) Clarify for example that suction dredge and bucket excavation operators within the natural 100 year flood plain of a water body, or operations contained through artificial impoundments to reduce offsite sediment transport are exempt from the Federal and State CWA permitting requirement as they do not represent an "addition" rather, it is defined as incidental fallback. (see *American Min. Congress v. U.S., cite:120 F.Supp. 2d 23*)

10) Clarify that agency NOI shall be for the life of the mine, with no expiration, excepting such operations that are engaging in substantial expansions or deviations inconsistent with an existing NOI.

11) Clarify that upon inspection, operators shall receive a notice of non-compliance (certified mail) if the operator is not complying with the BLM regulations or the NOI of record and the operator is given an opportunity to correct the non-compliance within 60 days provided: with an administrative appeal right and to have an opportunity to be heard by the Mineral and Mining Advisory Counsel (MMAC) within 30 days. MMAC shall affirm or deny all appeals from the operator. The requirements to issue a Notice of Non-compliance shall apply whether or not the operator has a submitted NOI on file with the agency and shall not be used to shut down the entire mineral operation. If the agency has not given the operator this due process, the agency is barred from seeking civil or criminal judicial review. The operator shall only be subject to criminal citation and prosecution if the agency fails to receive an administrative appeal from the operator. **Due process requires that notice be given before property interests are disturbed, before assessments are made, and before penalties are assessed. (see *Lambert v. State of California, Cite: 355 US 225*)**

12) Clarify that NOI's are transferable to other family members and new owners without the need for a resubmittal of a duplicative NOI. (see *44 USC 3501 et seq*.)

13) Clarify that surface management under the Endangered Species Act (ESA), Areas of Critical Environmental Concern (ACEC), or any other land management designation shall yield to the dominant and primary needs of the mining claimant. Use of said claim by the public or any agency for purposes other than mining that materially interferes with the prospecting, mining and processing operations and uses reasonably incident thereto, the operator may complain to the surface management agency and if unsatisfied, seek judicial review to enjoin the material

interference consistent with *30 USC 612(b)*. (see *Curtis-Nevada Mines case, cite: 611 F.2d 1277*)

14) Clarify that any and all surface management agencies shall not deny mineral operators motorized access to and use of existing trails, mine sites, mill sites, refining sites and haul roads for mining purposes included but not limited by the boundaries of the mining claims, regardless of land management designations that place limits upon motorized vehicles. Mineral operators shall not be required to submit a NOI for existing visible routes in order that they are used and maintained: regardless of agencies (Forest Service, Park Service, BLM, State Parks, and local governments) designated travel management routes for other agency and recreational purposes.

Clarify again, that <u>No Federal, State, or County agency or any other entity shall close visible roads and trails accessing actively (located) mining claims</u>. This includes such roads and trails outside the boundaries of the mining claim. Mineral operators have a vested and irrevocable property right in vehicular haul road access. The operator can complain and receive satisfactory resolution to the surface management agency if material interference to access is occurring and if unsatisfied, seek judicial review to enjoin the material interference consistent with *30 USC 612(b)*. (see *Curtis-Nevada Mines case, cite: 611 F.2d 1277*)
Note: "**If the builders of such roads to property surrounded by the public domain had only a right thereto revocable at the will of the government, and had no property right to maintain and use them after the roads were once built, then the rights granted for development and settlement of the public domain, whether for mining, homesteading, townsite, mill sites, lumbering, or other uses, would have been a delusion and a cruel and empty vision, inasmuch as the claim would be lost by loss of access, as well as the investment therein.**" (see *U.S. v. 9,947.71 acres of land, cite: 220 F.Supp. 328*)

15) Clarify that mining claim occupancy by mineral operators pursuant to *30 USC 22*, in order to protect the property or equipment from theft, vandalism or for public safety shall not require a NOI unless the operator plans on or has built a permanent all weather surface structure that is not mobile. All permanent surface structures may conform to local and State health & safety codes. (see *U.S. v. Shumway, cite: 199 F.3d 1093*)

16) Clarify that the agency shall employ qualified minerals personnel with a degree in mine engineering and/or licensed mining contractor (General Engineering A) in placer, lode, and milling operations with a minimum of 10 years experience in the private sector in the same field as a prerequisite in order to administer a NOI within each agency district office. The operator's responsibility for negotiating any NOI shall be directly through those qualified minerals personnel. The agency shall employ experts in other fields to help aid the minerals administrator to form mitigation practices for the minerals operator under Best Management Practices.

17) Clarify that the federal agency (BLM) and (MMAC) shall have exclusive jurisdiction over mitigating mineral operators impacts. State, Counties and other federal agencies shall not have concurrent permitting authority over mining activities except for lands whereby patent has issued and federal title has passed. Local county recording and location rules shall not be amended by this legislation governing the (unpatented) possessory title. (see *30 USC 26*)

18) Clarify that reclamation bonding shall only apply if surface disturbance exceeds 5 acre or 1000 cu. yards of processed material per claim **(NOI stage 2)**. Haul roads, utility roads, temporary milling sites and portable structures, and any other pre-existing land disturbance shall not be included in the 5-acre calculation. Reclamation costs shall be based upon the average of 3 independent bids (not at Davis- Bacon rates). The bids for bonds shall be reviewed every 7 years.

19) Clarify that the Agency (BLM) shall promulgate regulations in accordance with the principles of this legislation, National Minerals Policy Act (*30 USC 21a*), the Paperwork Reduction Act (44 *USC 3501 et seq*.), the Regulatory Flexibility Act and the Mining and Mineral Advisory Counsel (MMAC). No regulations shall become final until the Mining and Mineral Advisory Counsel has given approval. No outside agency management plans or judicial settlement shall be enforceable without the written consent of MMAC whereby it will affect mining claims.

20) Clarify that the Mining and Mineral Advisory Counsel (MMAC) will function under the authority of the respective Mining Districts codified under *30 USC 22* and shall be made up of 3 to 5 individuals per district. Each district boundaries shall be the same as each U.S. State boundary or subdivisions thereof. The individuals shall be elected from the mining industry based upon active mining claim holders every 4 years with a minimum 10 years experience in all fields of mining placer, lode, milling and refining. The Counsel's mission, as legal federal agents, is to provide guidance and balance to the important interests involved as they are intended to and can coexist. The Agency (BLM) have been given the responsibility and the power to maintain and protect our lands from undue harm, while recognizing that prospecting, locating, and developing of mineral resources in the United States may not be prohibited nor so unreasonably circumscribed.

21) Clarify that MMAC may promulgate rules consistent with federal statute in accordance with the APA just as any other federal agency within the United States.

22) Repeal the delegated authority of the Dept. of Interior (BLM) under the Federal Land Management & Policy Act (FLPMA *43 USC 1701 et seq*) the authority to withdrawal land from mineral entry and location laws. The BLM shall only retain the authority to petition congress for mineral withdrawals.

Constitutional ESA Reform Recommendations

1) The ESA's critical habitat shall only apply to lands having the written consent of the property owners. No critical habitat shall exist within the boundaries of private property or unpatented mining claims without the written consent of the owner of record. Nor can any legal settlement brought under the ESA by non-owners of record void the above requirement without the owners willing written consent.

2) No private property owner or holder of an unpatented mining claim shall be coerced into consenting to an ESA habitat as a term or condition of approval for any agency approvals or permits.

3) Legal standing to sue under the ESA shall be limited to physical proof of actual harm to species - not speculative or opinion. Standing shall include proof that the individual(s) or organization members bringing suit live or work within 100 miles of the subject litigation.

4) Legal standing under the ESA shall also include individual(s) or organizations with purely economic interests.

5) No critical habitat shall be completed without the U.S. Fish & Wildlife service first performing an Environmental Impact Statement that includes any and all socio-economic impacts upon commerce and private enterprise.

6) The State's ESA laws shall be consistent with the above Federal requirements.

7) Individual(s) or organization members contesting agency action under the ESA shall not be entitled to attorney's fees and costs unless they are determined to be a prevailing party by judicial review.

EAJA Reform Recommendation

Strike the words: "*unless the agency was substantially justified*". And Striking the words: "*... but excludes an adjudication ... for the purpose of granting or renewing a license ....*" *5 U.S.C. § 504(b)(1)(C) (i)*.

Too many property owners (as Plaintiffs and Defendants) cannot get attorney fees and costs when they challenge an agency and the property owner was the prevailing party. By removing "*unless the agency was substantially justified*" the EAJA will then be truly equal (and a level playing field) and property owners can be made whole for challenging arbitrary and capricious agency actions. See Eno v. Salazar No. CIV–S–10–1691 KJM JFM.Dec. 19, 2012. (attached)

Al l these changes are acceptable by the Minerals and Mining Federal Stakeholders

Sincerely

Minerals and Mining Advisory Council
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