Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Air Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

SUPPLEMENTARY INFORMATION:

I. General Information

A. What Should I Consider as I Prepare My Comment for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2003–0076.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

B. Where Can I Get a Copy of This Document and Other Related Information?

In addition to being available in the docket, an electronic copy of this notice will also be available on the World Wide Web. Following signature by the Regional Administrator, a copy of this notice will be posted at *http://www.epa.gov/nsr.*

C. What Will Occur at the Public Hearings?

The public hearings will provide interested parties the opportunity to present data, views, or arguments concerning this proposed change. The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the hearing.

Dated: February 13, 2007.

Bharat Mathur,

Acting Regional Administrator, Region 5.

[FR Doc. 07–826 Filed 2–22–07; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 3800

[WO–620–1430–00–24 1A]

RIN 1004–AD69

Surface Management

AGENCY: Bureau of Land Management, Interior.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This advance notice of proposed rulemaking is related to the Bureau of Land Management (BLM) surface management regulations for mining operations authorized by the Mining Law. In a previous Federal district court proceeding, environmental groups challenged the BLM's regulations on surface management under the Mining Law in 43 CFR subpart 3809, issued by the Department in 2001, in part, because the regulations did not require fair market value payment for the use of Federal lands for mining operations when the lands are ''invalidly claimed'' or unclaimed under the Mining Law. For the most part, the court upheld the 3809 regulations, but remanded them in part to the Department ''for evaluation, in light of Congress's expressed policy goal for the United States to 'receive fair market value of the use of the public lands and their resources.' '' This advance notice of proposed rulemaking is intended to assist the BLM in the evaluation ordered by the Court.

DATES: You must submit your comments by April 24, 2007. The BLM may not necessarily consider or include in the Administrative Record for the advance notice of proposed rulemaking comments that the BLM receives after the close of the comment period or comments delivered to an address other than those listed below (see **ADDRESSES**).

ADDRESSES: *Mail:* Director (630), Bureau of Land Management, U.S. Department of the Interior, Mail Stop 401 LS, 1849 C St., NW., Washington, DC 20240, Attention: 1004–AD69.

Personal or messenger delivery: 1620 L Street, NW., Washington, DC 20036.

Internet e-mail: comments_washington@blm.gov (include ''Attn: 1004–AD69''). *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions at this Web site.

FOR FURTHER INFORMATION CONTACT: Scott Haight at (406) 538–1930, for information relating to the surface management program or the nature of

the notice, or Ted Hudson at (202) 452–5042 for information relating to the rulemaking process generally. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact the above individuals.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

Please submit e-mail comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include ''Attn: 1004–AD69'' and your name and return address in your e-mail message.

You may examine documents pertinent to this advance notice of proposed rulemaking at the L Street address.

A. How do I comment on the notice?

If you wish to comment, you may submit your comments by any one of several methods:

- You may mail comments to Director (630), Bureau of Land Management, Administrative Record, Room 401 LS, Director (630), Mail Stop 401 LS, Bureau of Land Management, U.S. Department of the Interior, 1849 C Street, NW., Washington, DC 20240, Attn: 1004–AD69.
- You may deliver comments to Room 401, 1620 L Street, NW., Washington, DC 20036.
- You may access and comment on the notice at the Federal eRulemaking Portal by following the instructions at that site (see **ADDRESSES**).
- You may also comment via e-mail to *comments_washington@blm.gov*. If you do not receive a confirmation that we have received your electronic message, contact us directly (202) 452–5030.

Please make your comments as specific as possible by confining them to issues for which comments are sought in this notice, and explain the bases for your comments.

The comments and recommendations that will be most useful and likely to influence agency decisions are:

1. Those supported by quantitative information or studies; and

2. Those that include citations to, and analyses of, the applicable laws and regulations.

The BLM may not necessarily consider or include in the Administrative Record for the notice comments that we receive after the close of the comment period (see **DATES** or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the address listed under **ADDRESSES**: ''*Personal or messenger* delivery'' during regular hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, except holidays.

C. Can my name and address be kept confidential?

Before including your address, telephone number, e-mail address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

The BLM will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspections in their entirety.

II. Background

In the Federal Land Policy and Management Act (''FLPMA''), Congress declared 13 policy goals for the public lands, among which are that:

- The public lands ''be managed in a manner which recognizes the Nation's need for domestic sources of minerals'' (43 U.S.C. 1701(a)(12)), and
- ''[T]he United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute'' (43 U.S.C. 1701(a)(9)). Following these 13 policy declarations, Congress stated that the ''policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.'' (43 CFR 1701(b)).

Commercial mining is one of the purposes for which public lands are administered. Congress declared in 1970 that ''it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.'' (30 U.S.C. 21a). The Secretary of the Interior has the statutory responsibility to carry out this national policy when exercising his authority under Federal laws such as FLPMA.

In *Mineral Policy Center* v. *Norton*, 292 F. Supp. 2d 30 (D.D.C. 2003), plaintiffs challenged the BLM's surface management regulations for hardrock mining, which are found at 43 CFR subpart 3809. One of the arguments that the plaintiffs made was that, on lands on which there are no valid mining claims, the BLM should be charging fair market value for use of the public lands for mining operations. *Mineral Policy Center*, 292 F. Supp. 2d at 40.

In response, the BLM argued that, ''the 'otherwise provided for by statute' exception set forth in FLPMA section 102(a)(9) exempts mining operations on both claimed and unclaimed lands from the fair market value policy, where such operations are conducted under the Mining Law.'' (Federal Defendants' Consolidated Motion for Summary Judgment at page 38).

Nevertheless, the court concluded that ''[o]perations neither conducted pursuant to valid mining claims nor otherwise explicitly protected by FLPMA or the Mining Law (*i.e.*, exploration activities, ingress and egress, and limited utilization of mill sites) must be evaluated in light of Congress's expressed policy goal for the United States to 'receive fair market value of the use of the public lands and their resources' '' (*Mineral Policy Center*, 292 F. Supp. 2d at page 51). The court then remanded the regulations to the Department to evaluate the competing priorities set forth in FLPMA as applied to invalidly claimed or unclaimed lands ''in light of Congress's expressed policy

goal for the United States to 'receive fair market value of the use of public lands and their resources' '' (*id.* at pages 51 and 57).

III. Analysis and Public Inquiry

The fair market value policy in FLPMA applies ''unless otherwise provided for by statute'' (43 U.S.C. 1701(a)(9)). Based on this exception, the court in *Mineral Policy Center* concluded that the Mining Law authorizes operations, including possession, occupancy, and mineral extraction activities, on valid mining claims without payment of fair market value for that use (292 F. Supp. 2d at pages 47 and 51). The court also concluded that the Mining Law authorizes exploration activities, mill site use in association with valid claims, and ingress and egress to valid claims, without payment of fair market value for that use (*id.*). The court instructed the BLM to evaluate the application of FLPMA's competing priorities, in light of the policy goal to receive fair market value for the use of the public land, to mining activities that amount to more than initial exploration activities conducted on invalidly claimed or unclaimed lands (*id.* at pages 46 and 50).

A. ''Invalidly Claimed'' Lands

The Mining Law establishes the parameters under which mining claimants may locate and hold a mining claim (30 U.S.C. 23, 28). It is without question that ''in order to create valid rights or initiate a title as against the United States a discovery of mineral is essential'' (*Union Oil Co.* v. *Smith*, 249 U.S. 337, 346 (1919)). Nevertheless, ''while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential in the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after location and give validity to the claim as of the time of discovery, provided no rights of third parties have intervened.'' (*Id.*)

Because mining claims are self-initiated and may be located before the claimant discovers a valuable mineral deposit, the BLM cannot know whether an unpatented mining claim on the public lands is valid unless and until it determines the validity of the claim. However, while the BLM has discretion to initiate a mining claim validity examination at any time before a patent is issued, as a practical matter, it determines or verifies claim validity only rarely. *Cameron* v. *United States*, 252 U.S. 450, 460 (1920); Mark Squillace, *The Enduring Vitality of the General Mining Law of 1872*, 18 Envtl. L. Rep. 10,261, 10,266 (1988) (stating that the government rarely considers the validity of an unpatented mining claim). See generally *Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations*, M–37012 (Nov. 14, 2005).

The BLM cannot feasibly embark on a program to make technical determinations of the validity of all unpatented mining claims. The administrative cost per mining claim of conducting a validity determination, including a field examination and an economic analysis, and carrying out a contest hearing, if necessary, is substantial. The BLM estimates that the cost per mining claim for a full validity determination, including an administrative contest hearing, ranges between $12,000 and $80,000. There are over 250,000 active mining claims on the public lands. Conducting validity determinations for all 250,000 mining claims would exceed the BLM's annual operating budget many times over.

Even if the BLM was appropriated sufficient funds and was able to locate and employ enough qualified mineral examiners to engage in such an extensive program, the open nature of the public lands makes the exercise futile. Mining claimants can locate mining claims only on lands that are open to the operation of the Mining Law. In rare circumstances, the lands on which mining claimants have located mining claims may be subsequently withdrawn from the operation of the Mining Law. However, almost all of the 250,000 existing mining claims are on public lands that remain open to the operation of the Mining Law. On these open lands, a validity determination is an inefficient use if not an outright waste of government resources, because nothing stops the claimant from immediately relocating a new claim on the same lands covered by the invalidated mining claim.

In light of these practical administrative considerations, the BLM reasonably focuses its limited appropriations on conducting validity examinations where they are required. The BLM's regulations at 43 CFR 3809.100 and 3862.1–1 require a complete validity determination only if a claimant:

(1) Proposes mining operations on lands that were withdrawn or segregated from the operation of the Mining Law, or

(2) Has applied for a patent.

No law requires the BLM to determine the validity of mining claims before approving operations on lands that are open to the operation of the Mining Law (*Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations*, M–37012 (Nov. 14, 2005)). See also, Western Shoshone Defense Project, 160 IBLA 32, 56 (2003) (''BLM generally does not determine the validity of the affected mining claims before approving a plan of operations'').

The BLM cannot know whether lands are ''invalidly claimed'' unless it has conducted a validity examination and has determined that a mining claim is in fact invalid, or unless the claim has been voided by operation of law because of the claimant's failure to comply with an applicable annual maintenance requirement. In both instances, once a claim is void by operation of law or void because the BLM has determined that it is invalid, the claim no longer exists. Therefore, as the BLM applies it, the phrase ''invalidly claimed'' only covers lands on which a mining claim was formerly located that the BLM knows to be invalid because (1) The BLM has determined that the claim is invalid or (2) the claim was voided by operation of law because of the claimant's failure to comply with annual maintenance requirements.

On withdrawn lands, the BLM does not approve mining operations for mining claims it has determined to be invalid or that have been voided by operation of law. Consequently, on withdrawn lands, since there is no authorized use of invalidated mining claims, the BLM need not consider whether it should receive fair market value for use of such ''invalidly claimed'' lands.

On open lands, the lands on which voided or invalidated mining claims once existed are nothing more than unclaimed lands. See section C below for further discussion regarding the use of unclaimed lands.

B. Lands on Which Claims of Unknown Validity are Located

The court's decision in *Mineral Policy Center* did not address the use of lands on which mining claims of unknown validity exist. The parties did not brief this issue, and the court's decision did not consider the distinction between claims that the BLM has determined to be invalid and those for which the BLM has made no validity determination. As previously noted, the court concluded that the Mining Law authorizes operations, including possession, occupancy, and mineral extraction activities, on valid mining claims without payment of fair market value for that use (*Mineral Policy Center*, 292 F.

Supp. 2d at page 51). And while the court remanded the regulations in part for the BLM to evaluate whether it should charge fair market value for the use of invalidly claimed lands, we have already explained that, on withdrawn lands, there is no authorized use of invalidated mining claims and, therefore, the BLM need not consider whether it should receive fair market value for use of such ''invalidly claimed'' lands. In addition, we have explained that, on open lands, the lands on which voided or invalidated mining claims once existed are nothing more than unclaimed lands, which are discussed in section C below.

What remains is the use of lands covered by mining claims of unknown validity. For the reasons described below, the BLM tentatively concludes that the use of mining claims of unknown validity for mining operations falls within the ''otherwise provided for by statute'' exception set forth in FLPMA's Section 102(a)(9). Under this interpretation, the BLM may not apply FLPMA's fair market value policy to approved mining operations that occur on mining claims of unknown validity. We solicit your views on this interpretation and the analysis set forth below.

As explained above, mining claims can be located before or after a claimant discovers a valuable mineral deposit (*Union Oil Co.* v. *Smith*, 249 U.S. at 346). Until the BLM examines the validity of a mining claim, it does not know whether a given claim is valid. The BLM cannot simply assume that a mining claim of unknown validity is invalid. The BLM can invalidate a claim without a validity determination only if the claim is void by operation of law because of a mining claimant's failure to comply with particular statutory filing or fee requirements (30 U.S.C.A. 28i (West Supp. 2006); 43 U.S.C. 1744(c)). Otherwise, the BLM must conduct a validity determination and, except in rare instances involving undisputed facts, contest a claim's validity by giving the claimant notice and an opportunity for a hearing before it can declare a claim invalid. *Cameron* v. *United States*, 252 U.S. 450, 460 (1920) (''so long as the legal title remains in the government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void'').

The BLM manages mining claims of unknown validity as active mining claims under the Mining Law, as ratified repeatedly by Congress. In FLPMA, Congress recognized the existence of these active mining claims of unknown validity that are located under the Mining Law. In Section 314 of FLPMA (43 U.S.C. 1744), Congress amended the Mining Law to require mining claimants—

(1) To record each mining claim with the BLM by filing a copy of the notice of location, and

(2) to file annual proof of having conducted the assessment work that is required by the Mining Law for each mining claim.

Claimants are not required to demonstrate claim validity before complying with these filing requirements. Nor is the BLM required to determine the validity of any mining claim before it accepts these filings. Congress applied these requirements to all mining claims located under the Mining Law regardless of the validity of the claims, thereby allowing claimants to maintain mining claims of unknown validity. At the same time, by making these filings, a claimant does not make valid a claim that is not otherwise valid under applicable law (43 U.S.C. 1744(d)).

In 1992, Congress continued to recognize the existence of active mining claims of unknown validity when it passed the Department of the Interior and Related Agencies Appropriations Act of 1993, (Pub. L. 102–381, 106 Stat. 1374 (1992) (Appropriations Act)). The Appropriations Act required holders of unpatented mining claims to pay an annual rental fee of $100 per claim for 1993 and 1994, without regard to the underlying validity of the claims. Rent is defined as a ''fixed periodical return made by a tenant or occupant of property to the owner for the possession or use thereof'' (Merriam-Webster's Collegiate Dictionary 991 (10th ed. 1998)). Congress has extended this rental or maintenance fee requirement four times in subsequent legislation. See 107 Stat. 312, 405–407 (1993); Public Law 105–240, Section 116 (1998); Public Law 107–63 (2001) (codified at 30 U.S.C.A. 28f. (West Supp. 2002)); Public Law 108–108 (2003) (codified at 30 U.S.C.A. 28f. (West Supp. 2006)). The currently applicable law requires the fee payment until 2008. Congress also gave the BLM authority to make periodic adjustments to this fee based on changes in the Consumer Price Index (30 U.S.C.A. 28j(c) (West Supp. 2006)). In 2004, the BLM increased the fee from $100 to $125 (69 FR 40294, July 1, 2004). Since 1992, the BLM has collected over $300 million from mining claimants in fee payments.

Because Congress allows mining claimants to locate mining claims under the Mining Law and maintain them by making annual payments to the BLM while the validity of the claims is unknown, the use of these mining claims for mining operations falls within the ''otherwise provided for by statute'' exception set forth in FLPMA's Section 102(a)(9). Therefore, the BLM has tentatively concluded that it may not apply FLPMA's fair market value policy to approved mining operations that occur on mining claims of unknown validity.

C. Unclaimed Lands

''Unclaimed lands'' are lands on which no mining claims are located. The BLM is not aware of any instance in which a miner or mining company would use unclaimed lands to conduct mining and mineral production operations or related uses. The BLM is not aware of any miner or mining company that would be willing to invest money or resources in the development of a mine without some tenure in the land in the form of a mining claim or mill site. If a mining company were to file a plan of operations to develop a mine on unclaimed lands, a third party could easily locate mining claims over the area and assert adverse rights to the lands. Therefore, it is the BLM's tentative conclusion that no one uses unclaimed lands for mining operations that go beyond exploration activities on the public lands.

Nevertheless, the BLM requests public comments regarding whether any miners or mining companies in fact use unclaimed lands for such mining operations. The BLM asks for detailed examples of any such use. After the BLM receives and considers these comments, it will determine whether further evaluation of FLPMA's competing priorities is needed with regard to any mining operations that go beyond exploration activities on unclaimed lands.

Author

The principal author of this notice is Scott Haight of the Montana State Office, assisted by Ted Hudson of the Division of Regulatory Affairs, Washington Office, Bureau of Land Management, and Karen Hawbecker, Office of the Solicitor, Department of the Interior.

Dated: February 5, 2007.

C. Stephen Allred,

Assistant Secretary of the Interior.

[FR Doc. E7–3077 Filed 2–22–07; 8:45 am]

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