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# A Regulatory Minefield: Can the Department of Interior say "No" to a Hardrock Mine?

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# A REGULATORY MINEFIELD: CAN THE DEPARTMENT OF INTERIOR SAY "NO" TO A HARDROCK MINE?

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## INTRODUCTION

The General Mining Law of 1872[1] ("Hardrock Act"), although a statutory senior citizen at 130 years old, is not only very much alive, but in remarkably good health. It stands as one of the most potent reminders of an era when the rapid disposition of public lands was practically a federal mandate.[2] The intent of the Hardrock Act is clear: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase . . . by citizens of the United States . . . ."[3] The principle of unrestrained public access explicit in that statement has from the outset proved to be the most contentious aspect of the Act.[4] On one side of the debate are those who proclaim that the Hardrock Act grants an irrevocable and undeniable "right to mine"; on the other are those who oppose the assumption that mineral extraction should automatically trump other potential uses of public lands.[5]

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1. 30 U.S.C. §§ 21–42 (1994).

2. "[O]ur public land policy was basically one of disposal [of lands owned by the United States but not reserved for any specific purpose] into non-Federal ownership to encourage settlement and develop the country." Public Land Law Review Comm'n, *One Third of the Nation's Land, A Report to the President and to the Congress* 28 (1970), *quoted in* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 175 (4th ed., 1998).

3. 30 U.S.C. § 22 (1994).

4. JOHN D. LESHY, THE MINING LAW, A STUDY IN PERPETUAL MOTION 26 (1987).

5. *See id.* at 25–26.

The Hardrock Act allows any citizen the right to enter onto federal public lands and prospect for minerals. Upon proof of a valuable and marketable discovery of hardrock minerals,[6] any would-be miner acquires a vested property right to twenty acres of land.[7] This "unpatented" mining claim remains a vested right indefinitely, so long as the miner complies with annual reporting requirements.[8] The right may be converted to fee simple title (a "patented" claim) upon payment of a nominal fee.[9] The Hardrock Act thus affords the user two exceptionally generous subsidies. First, mining companies are granted the unlimited right to extract and sell minerals from public lands with no royalty payment due the federal treasury whatsoever. Second, the companies may obtain fee simple title to thousands of acres of public land at a price so low by today's standards that it virtually amounts to free land.[10]

Mining operations can exact severe environmental consequences, and may burden taxpayers with the costs of cleanup and reclamation. Approximately fifty billion tons of toxic waste have been abandoned on public land by mining operations.[11] These wastes cause severe pollution of soils and water and kill wildlife and fish.[12] Where mining operators have either vacated their claims or gone bankrupt, it is the taxpayers who are left with the enormous and expensive task of reclamation. The

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6. The so-called "hardrock" minerals include gold, silver, uranium, copper, molybdenum, iron, lead, aluminum and others. They are thus distinguished from energy minerals such as oil, gas, and coal (which are extracted through a leasing regime), and common building materials, such as sand, gravel, and stone (which are extracted through a sales regime). *See* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN 44 (1992).

7. *See id.* at 45. The twenty-acre grant, however, is not comprised of a uniform and contiguous block of land. Rather, each valid claim conveys a property right extending up to fifteen hundred feet along the length of the vein or lode, and three hundred feet on each side, 30 U.S.C. § 23 (1994), as well as an additional five-acre site for ancillary uses, 30 U.S.C. § 42 (1994).

8. *See* WILKINSON, *supra* note 6, at 47.

9. *See id.* at 48. Since 1994, however, Congress has annually enforced a moratorium on filing new patent applications. See Department of the Interior and Related Agencies Appropriation Act of 2002, Pub. L. No. 107-63, 115 Stat. 414, 465 for the most recent moratorium.

10. *See* WILKINSON, *supra* note 6, at 48. Although each mining claim totals twenty acres, see *supra* note 7, there is no limit to the number of claims that any one person or entity can locate or patent. *See, e.g.*, United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975) (in which defendant claimed to have located two thousand mining claims in a single day).

11. WILKINSON, *supra* note 6, at 49.

12. *See id.*

total cost of cleaning up all abandoned hardrock mine sites has been estimated to range from $33 billion to $72 billion.[13]

The Act's intent made sense in the late nineteenth century; it was meant to provide incentive for settlers to brave the perils of the West and fulfill the promise of Manifest Destiny. Its objective was to provide federal legitimacy to the efforts of individual hardscrabble miners, and to facilitate the passage of federal land from public to private ownership. One hundred thirty years later, however, a law guaranteeing substantial federal subsidies to huge mining conglomerates, while simultaneously allowing them to wreak environmental havoc on public lands, is simply an anachronism. Yet despite its manifest obsolescence, the Hardrock Act is still good law today, remaining on the books almost exactly as written in 1872.[14] Legislative attempts to overhaul the outdated statute have consistently failed.[15]

Despite the enormity of its environmental and fiscal consequences, mining remained virtually unregulated for some one hundred years. It was not until the enactment of the Federal Land Policy and Management Act of 1976 (FLPMA)[16] that Congress explicitly granted the Department of the Interior the organic authority to manage the federal public lands, including those containing mining claims located under the Hardrock Act.[17] While noting that the rights conveyed by the Hardrock Act remained otherwise intact, FLPMA imposed the following mandate upon the Secretary of the Interior: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent *unnecessary or undue degradation* of the lands"[18] ("UUD standard" or "UUD mandate"). This directive, however, gave rise to many questions. What is the scope of the word "otherwise?" How far can the Secretary go in regulating mining? What is "undue" degradation, and how is it distinguished from "unnecessary" degradation? Does "any action" include the authority to deny a mining permit application because of potential environmental impacts,

13. *See* Federal Land Management—Information on Efforts to Inventory Abandoned Hard Rock Mines, GAO/RCED-96-30, Feb. 23, 1996, *available at* 1996 WL 326948.

14. *See* WILKINSON, *supra* note 6, at 43.

15. *See* discussion *infra* Part III.E.

16. 43 U.S.C. §§ 1701–1784 (1994).

17. *See* 43 U.S.C. §§ 1701(a), 1702(e) (1994).

18. 43 U.S.C. § 1732(b) (1994) (emphasis added).

or to promote other uses of the land, or does the Hardrock Act convey an absolute right to mine within specified regulatory parameters?

It was not until the 1993 appointment of Bruce Babbitt as Secretary of the Interior and John Leshy as Interior Solicitor that these questions were directly addressed. Secretary Babbitt and Solicitor Leshy took the position that FLPMA, through the imposition of the UUD mandate, effectively amended the Hardrock Act.[19] They maintained, therefore, that the UUD standard granted the Department of the Interior the authority to categorically deny a mining permit application when degradation to the environment, although necessary to mining, would nevertheless be undue.[20]

The Department of Interior's controversial new stance was effectuated in two related actions during the final days of the Clinton administration. First, in January of 2001, Babbitt denied a mining permit to Glamis Gold, Ltd., on the ground that the company could not sufficiently mitigate the environmental degradation that would be caused by the proposed mine, marking the first time in history a mining permit had been denied outright based on environmental concerns.[21] Second, the Bureau of Land Management (BLM) enacted revised mining regulations that took effect in January of 2001, after an exhaustive four-year reform process ("2000 Regulations").[22] These regulations imposed more stringent control over mining operations and redefined the UUD standard by granting the Department of the Interior the right to deny a mining permit where "substantial, irreparable harm to significant scientific, cultural, or

19. *See* Memorandum from Solicitor, U.S. Dep't of the Interior, to the Secretary, U.S. Dep't of the Interior, Regulation of Hardrock Mining, M-36999 (Dec. 27, 1999) (on file with author) [hereinafter Glamis Memo]. This Memorandum, however, has been expressly superseded by the release of a contrary Memorandum from current Interior Solicitor, William G. Myers, III. *See* Memorandum from Solicitor, U.S. Dep't of the Interior, to the Secretary, U.S. Dep't of the Interior, Surface Management Provisions for Hardrock Mining, M-37007, at 20 (Oct. 23, 2001) (on file with author).

20. *See id.* at 7.

21. *See* Press Release, Glamis Gold, Ltd., BLM Denies Plan of Operation For the Glamis Imperial Project (Jan. 17, 2001), *at* http://www.glamis.com/pressreleases/index.html.

22. *See* Mining Claims Under the General Mining Laws; Surface Management, 43 C.F.R. § 3809 (2001) [hereinafter 2000 Regulations]. Although the regulations did not take effect until 2001, they are referred to as the "2000 Regulations" because they were published in their final form in the Federal Register in November 2000.

environmental resource values of the public lands" would result, and could not be "effectively mitigated"[23] ("substantial, irreparable harm" standard).

Industry advocates vehemently opposed this interpretation, dubbing it the "mine veto provision."[24] The controversy was grounded in the fact that for over one hundred years, the right to mine on public land had been unquestioned. This had led many to the erroneous conclusion that the right to mine was guaranteed by the Hardrock Act itself, despite the fact that the statute explicitly excepts that right to "regulations prescribed by law."[25] Many in the mining industry have therefore incorrectly argued that Secretary Babbitt's and Solicitor Leshy's interpretation was impermissible because it attempted to amend legislation through regulatory interpretation.[26] Regardless of its lack of merit, however, this argument was vindicated when the second Bush administration promulgated its own version of the mining regulations in October 2001 ("2001 Regulations")[27] that rescinded key provisions of the 2000 Regulations, including the "substantial, irreparable harm" standard.

This Comment argues that Secretary Babbitt's and Solicitor Leshy's interpretation of the UUD mandate was not only well within agency discretion, but that its implementation is imperative in order to adequately protect public lands from the impacts of hardrock mining. Until Congress sees fit to reform the Hardrock Act, that interpretation brings mining into conformance with the restrictions placed on all other extractive uses of the public lands, comports with modern values, and should not have been rescinded. The Comment concludes that Secretary Babbitt's and Solicitor Leshy's interpretation provides an important model whose lesson should not be lost on

23. 2000 Regulations, *supra* note 22, at § 3809.5.

24. *See* Nat'l Mining Ass'n, *Response to Proposal to Suspend Surface Management Regulations, 66 Fed. Reg. 16162 (March 23, 2001), available at* http://www.nma.org (May 7, 2001); *House-Senate Conferees Drop Rider Backing Tough 3809 Rules*, PUBLIC LANDS NEWS, Oct. 12, 2001, at 4.

25. 30 U.S.C. § 22 (1994).

26. *See* GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 485 (4th ed. 2001).

27. *See* Mining Claims Under the General Mining Laws; Surface Management, 43 C.F.R. § 3809 (2002) [hereinafter 2001 Regulations]. Although the regulations did not take effect until 2002, they are referred to as the "2001 Regulations" because they were published in their final form in the Federal Register in October 2001.

future administrations or legislators seeking reformation of the mining law.

Part I examines the background of the Hardrock Act, putting the statute in its historical context in order to better understand how the circumstances of its enactment impact its present interpretation. Part II sets out the multitude of reasons why the Hardrock Act is in desperate need of reform. This section examines the unwarranted federal subsidy granted to mining companies, the environmental degradation caused by mining activities, the reclamation burden imposed on taxpayers, and the multitude of ways in which the Act's free access provisions have been abused. Part III examines the regulation of mining activities and the inadequacies of the early mining regulations. This section also examines the latest failed legislative attempt at amending the Hardrock Act and explores the reasons why these attempts have been unsuccessful. Part IV discusses Secretary Babbitt's and Solicitor Leshy's reform efforts in detail, including the revised mining regulations, the strengthened UUD standard, and the denial of the Glamis Gold permit. This section concludes with a look at the Bush Administration's 2001 revisions. Part V explores the statutory justification for the implementation of the "substantial, irreparable harm" standard, and the legislative history of FLPMA. This part also examines several cases in which the Supreme Court has upheld federal agencies' interpretations of their statutory mandates that are at least as assertive as the Department of Interior's interpretation of UUD. Part V ends with the conclusion that until Congress enacts meaningful reform, Secretary Babbitt's and Solicitor Leshy's interpretation of the FLPMA mandate was both within agency discretion and the most environmentally effective means to regulate mining. The Comment concludes with the assertion that the Bush administration's repeal actions were therefore unwarranted and environmentally irresponsible.

## I. HISTORY OF THE HARDROCK ACT

The mining era in the West was precipitated by the discovery of gold at Sutter's Mill in California in 1848,[28] leading to the legendary rush westward by hordes of fortune-seekers

28. *See* WILKINSON, *supra* note 6, at 34.

when news of the discovery finally made it back East.[29] The early mining towns were no more than hastily constructed encampments.[30] Gold fever ran rampant, and a recognized structure governing claims and mining activities was necessary to keep disputes between the miners to a minimum.[31] The first regulations governing mining activities were thus informal local codes born of necessity, and were a reasonable accommodation to the circumstances of the time, but were nonetheless inadequate. The problem remained that, even though the vast bulk of mining activities took place on federal lands, the miners had no legal right to be there since no federal statute sanctioning mining activity existed.[32] Technically, the miners were trespassers, despite the fact that the federal government implicitly approved of their presence.[33] As mining techniques became more sophisticated and investments more substantial, however, miners, and increasingly, mining companies, became understandably uneasy regarding the uncertainty surrounding the ownership of their claims.[34]

The solution to this uncertainty was the first federal mining act, passed in 1866,[35] which was essentially no more than a federal codification of the local mining rules, providing that mining would be "subject . . . to the local customs or rules of miners in the several mining districts."[36] Nonetheless, it served to fill the vacuum in federal law, and firmly entrenched the right to mine on federal land. The law was refined and expanded in scope over the next six years to become the General Mining Law of 1872.[37] The law opened virtually all of the American West—nearly a billion acres—to mining.[38] It there-

29. *See id.* at 35.
30. *See id.* at 38.
31. *See id.*
32. *See id.* at 40.
33. *Id.*
34. *Id.*
35. Mining Act of 1866, ch. 262, 14 Stat. 251 (repealed 1872).
36. WILKINSON, *supra* note 6, at 43 (citing the Mining Act of 1866, *supra* note 35). An ironic twist to the present thesis is provided by the fact that, at the time the law was passed, there was a competing bill being floated in the House that would have provided for the sale of western mineral lands at auction, and imposed a federal tax on the proceeds of mining activities. The bill was defeated in favor of the Mining Act of 1866, in large part due to the sheer force of personality exhibited by the successful bill's proponent, William M. Stewart, a Nevada senator. *See id* at 42.
37. 30 U.S.C. §§ 21–42 (1994).
38. WILKINSON, *supra* note 6, at 42.

fore allowed miners to enter federal public lands at will, establish exclusive claims, and remove valuable minerals. The Act imposed no taxes or royalty payments to the public treasury in return for this federal largess, a situation that, unbelievably, persists to the present day. Moreover, the Hardrock Act grants the mining operator the option to take full fee simple title to his claim.[39]

The law was indisputably generous. Yet viewed in context, such federal generosity was befitting of the times. Manifest Destiny and the Jeffersonian ideal of the yeoman farmer were firmly established in the national consciousness. Settling and taming the vast lands out West was a national agenda. Legislators viewed it as their duty to distribute the lands of the West to individual settlers, railroads, and entrepreneurs, thus implementing the American ideal. The permanent federal landholdings that are today part of the western landscape were not on the nineteenth-century agenda; the predominant view was that the federal government would eventually distribute all of its holdings to the states and individual settlers. The term "environmentalist" would not be part of the national lexicon for nearly a century. Viewed against this backdrop, the Hardrock Act made sense. It simultaneously provided an incentive for settlers to brave the perils of the West, a means to distribute land to deserving entrepreneurs, and a way to generate the natural resources critical to the young nation's expansion.

## II. THE NEED FOR REFORM

In 2002, however, the purposes of the Hardrock Act are not only grossly outdated, but in most meaningful ways, inimical to today's needs and values. The frontier era is well behind us, the West is settled, and the federal policy of giving away western land fell by the wayside decades ago with the effective demise of the homestead laws.[40] And although hardrock minerals

39. 30 U.S.C. § 22 (1994). Moreover, there is nothing that prevents a miner from prospecting and seeking patents on numerous mining claims. In this manner, some large mining operations have obtained rights to either unpatented or patented claims totaling thousands of acres. *See* WILKINSON, *supra* note 6, at 48.

40. Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976). Homesteading effectively ended in 1934, however, with the passage of the Taylor Grazing Act, 43 U.S.C. § 315-315(r) (1934), even though the Homestead Act itself was not officially repealed until the enactment of FLPMA in 1976. COGGINS ET AL., *supra* note 26, at 80.

are still a necessary component of the national economy, modern values demand that their extraction be subject to stringent environmental regulation and balanced against other legitimate uses of the public lands.

In addition, mineral extraction need not entail an unparalleled federal subsidy to private industry, or the sale of public lands at below-market prices. Mining is the only extractive industry conducted on federal lands that is not subject to either an up-front cost to the user (through a competitive bidding or leasing procedure), payment of royalties on the fruits of the extractive process, or both. It is also the only extractive industry that grants the user the right to purchase the land upon which the user operates.

This Part examines the federal subsidy granted to mining companies, the environmental degradation caused by mining activities, the reclamation burden imposed upon taxpayers, and the multitude of ways in which the Hardrock Act's free access provisions have been abused.

### *A. The Epitome of Generosity: Granting Public Resources to Private Industry*

The Hardrock Act grants two federal subsidies to mining companies that are unparalleled in any other private industry reaping the natural resource bounty of public lands: the ability to extract resources without lease or royalty payments to the federal treasury, and the option to purchase, upon the fulfillment of certain conditions,[41] the lands upon which the company operates for a price significantly below fair market value. In 1994, it was estimated that $472 billion worth of minerals had been extracted from federal lands without compensation to the

41. The miner must prove that he has made a discovery of valuable minerals and put $500 worth of assessment work into the claim, either in labor or improvements, in order to be granted a patent. WILKINSON, *supra* note 6, at 48. Since 1994, however, Congress has annually enforced a moratorium on new patent applications, *see supra* note 9, yet hundreds of pending applications were grandfathered in prior to the moratorium. Telephone interview with Roger Flynn, Attorney, Western Mining Action Project (Dec. 5, 2001) [hereinafter Interview with Flynn]. *See, e.g.*, Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167 (10th Cir. 1997) (holding that the Department of the Interior's failure, based on the congressional moratorium, to proceed with the processing of ten patent applications filed in 1992 constituted unlawful withholding of agency action).

public since the inception of the Hardrock Act.[42] The magnitude of this subsidy was highlighted when Secretary Babbitt, in a showy public relations move, presented an oversized, bogus check from the federal treasury to American Barrick Resources in the amount of ten billion dollars.[43] That was the purported value of the gold underlying 1,949 acres of public land that American Barrick took fee title to through the patenting process for a mere $9,765. Babbitt called it "the biggest gold heist since the days of Butch Cassidy."[44]

In contrast, all other extractive activities allowed on federal land are conditioned upon lease or royalty payments to the federal government. Companies wishing to exploit geothermal resources must engage in a competitive bidding process to obtain the right,[45] then pay royalties on the resource.[46] Ranchers who graze stock on federal land must obtain permits to do so,[47] then pay fees on each head of livestock grazed.[48] Logging contractors must purchase the timber they intend to harvest through a competitive bidding process.[49] Perhaps most analogous to hardrock minerals, companies that extract oil and gas from public lands must pay royalties of up to 12.5% of their gross revenues for the privilege of tapping federal lands.[50] At an estimated extraction rate of $2 billion to $4 billion worth of hardrock minerals each year, a 12.5% royalty imposed on the production of hardrock mines operating on federal lands has the potential to yield up to $400 million to the public treasury annually.[51]

Likewise, no other industry operating on federal public land has the option of purchasing the lands upon which it

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42. *See* Dan Radmacher, *Mining Wars*, SUNDAY GAZETTE MAIL (Charleston, N.C.), Oct. 9, 1994, at 2B.

43. *See* John H. Cushman, Jr., *Forced, U.S. Sells Gold For Trifle*, N.Y. TIMES, May 17, 1994, at A12.

44. *See* Sharon Begley & Daniel Glick, *The Last Great Giveaway*, NEWSWEEK, May 30, 1994, at 67.

45. 43 C.F.R. § 3203.10 (2001).

46. 30 C.F.R. §§ 202.351–352 (2001).

47. 43 C.F.R. § 4130.8-1(b) (2001) (BLM lands); 36 C.F.R. § 222.3(a) (2001) (Forest Service lands).

48. 43 C.F.R. § 4130.8-1(c) (2001) (BLM lands); 36 C.F.R. § 222.50(a)–(c) (2001) (Forest Service lands).

49. 36 C.F.R. § 223.49 (2001).

50. 30 C.F.R. §§ 202.52–53 (2001); Begley & Glick, *supra* note 44, at 66.

51. Mineral Policy Center, *The Last American Dinosaur: The 1872 Mining Law* 6, *at* http://www.mineralpolicy.org/publications/pdf/LastAmericanDinosaur.pdf (last visited Feb. 20, 2002).

works; that unique benefit is—and always has been—bestowed exclusively on those that mine. The Hardrock Act contemplates, through the patenting process, that merely upon proof of the discovery of valuable minerals and $500 worth of assessment work, the mining operator can take fee simple title to his claim for the nominal amount of $2.50 to $5.00 per acre.[52] In addition, there is no limit to the number of claims a mining company can patent. The General Accounting Office (GAO) reported in 1988 that the federal government received less than $4,500 for twenty patents that transferred title to land valued between $13.8 and $47.9 million.[53] Although a miner is not required to obtain title to the land in order to mine, and may choose instead to maintain the claim as an unpatented property right,[54] the option to purchase nonetheless remains open to him. Congress has, however, maintained a moratorium on issuing new patents since 1994, but the moratorium must be reaffirmed annually through an appropriations rider, and there is no certainty how much longer it may remain in effect.[55]

Whenever more rigorous regulations or reform of the Hardrock Act have been proposed, the mining industry has predicted dire consequences. These include the exodus of the American mining industry to greener pastures abroad and the catastrophic demise of local economies.[56] Yet at least one economic analysis, examining the potential effects that would be created by the imposition of a royalty scheme onto mining op-

52. Lode claims (where minerals are embedded within rock) cost $5.00 per acre, while placer claims (where minerals are found in loose deposits of soil or gravel) cost $2.50 per acre. WILKINSON, *supra* note 6, at 40, 48.

53. *See* 139 CONG. REC. 29,237, 29,239 (1993).

54. *See* WILKINSON, *supra* note 6, at 48. The mining claimant need only pay $100 per year to maintain the right to his claim indefinitely, which is itself a vested property right, although not a compensable one. *See id.*

55. Interview with Flynn, *supra* note 41; FEIS: Chapter 1—Introduction: Purpose of and Need for Action 7, *at* http://www.blm.gov/nhp/Commercial/SolidMineral/3809-EIS/1ch-1.html (last visited Dec. 20, 2000). For the most recent moratorium, see Dep't of the Interior and Related Agencies Appropriation Act of 2002, Pub. L. No. 107-63, 115 Stat. 414, 465.

56. *See Mineral Resources Alliance Declares House Mining Bill Disastrous for States, Industry*, PR NEWSWIRE ASSOC., INC., Oct. 28, 1993, *available at* http://www.westlaw.com; Bill Schmitt, *Debate Over Mining Law Reform Heats Up; Miners and Administration Stake Out Opposing Positions; Supplement: Precious Metals*, AM. METAL MARKET, June 14, 1993, at 12; Martin Van Der Werf, *Babbitt Vows Mining-Law Reform Push; Industry Prepares to Fight Overhaul*, ARIZONA REPUBLIC, Mar. 12, 1993, at A1.

erations, indicates that these claims are exaggerated.[57] That analysis determined that while

> profitability would tend to suffer in the short run as a result of higher costs, in the long run, it would tend to return to its prior level, other things being equal. Mining companies would adjust their operations—partly by reducing output and refraining from opening mines whose prospective rates of return had been reduced below company targets by prospective higher costs.[58]

There is no objective reason why hardrock mining should be granted federal subsidies that other extractive industries are not. Commonly accepted economic principles hold that resources are allocated most efficiently if their price reflects the full costs to society. Yet because the price paid by mining companies to use federal lands and extract minerals does not equal the economic value of the resource gained, the Hardrock Act "effectively transfers wealth from the U.S. public to the hardrock mining industry . . . ."[59] A perpetually deficit-ridden federal government has no legitimate reason to continue to subsidize private industry in this manner.

### *B. An Environmentalist's Worst Nightmare*

Not surprisingly for a law enacted in 1872, the Hardrock Act is completely devoid of any reference to environmental protection.[60] Yet the process of mining can exact severe environmental consequences.[61] These include water pollution, acid drainage, erosion, and an estimated fifty billion tons of toxic mining and processing wastes left behind at mining sites.[62] In 1999, the mining industry had the dubious distinction of being the nation's top polluter, contributing slightly over half of the

57. *See* BERNARD A. GELB, HARDROCK MINING, THE 1872 LAW, AND THE U.S. ECONOMY, DOC. NO. 94-540E (1994), *available at* http://cnie.org/NLE/CRSreports/Mining/mine-3.cfm.

58. *Id.*

59. *Id.*

60. *See* WILKINSON, *supra* note 6, at 49.

61. *See id.*

62. *See id.*

7.77 billion pounds of toxic chemicals released into the environment that year.[63]

A major source of water pollution in the western United States is acid mine drainage, which occurs when minerals present in mining waste combine with the oxygen in water to form sulfuric acid. The acid is flushed downstream, depositing heavy metals on the river bottom, killing fish and destroying aquatic habitat.[64] The devastation is expensive to treat, and treatment is not completely effective.[65] Moreover, the effects of the pollution may continue for centuries. For example, a single silver mine may require treatment for acid mine drainage for at least five hundred years.[66]

The modern procedure of cyanide heap-leaching, used in gold mining operations, can also severely degrade water quality.[67] A cyanide solution is percolated through a pile of low-grade ore to assist in extracting gold from the rock.[68] The cyanide runoff is held in ponds, but containment is sometimes inadequate, or the mine is abandoned, and the containment ponds deteriorate. The result is severe pollution of pristine mountain streams and larger waterways, which in turn destroys wildlife and fish.[69]

### *C. Reclamation Costs Burden Taxpayers*

The western landscape is dotted with an unknown number of abandoned mining operations dating back to the nineteenth century, when environmental protection was virtually unknown and reclamation procedures nonexistent. The negative environmental effects from these abandoned mines are difficult to quantify, but can be substantial. Nevada alone, for example, has thirty-six mining sites where mining companies went bankrupt, leaving taxpayers to foot the environmental clean-up

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63. *See* Karen Dorn Steele, *Mining Waste is Top Pollutant; Industry Argues Rocks Aren't Toxic; EPA Says Water Fouled,* SPOKESMAN REVIEW (Spokane, Wash.), Apr. 14, 2001, at A1.

64. *See* Mining Watch, *Acid Mine Drainage*, *at* http://emcbc.miningwatch.org/emcbc/primer/ (last visited Dec. 4, 2001).

65. *See id.*

66. *See id.*

67. *See* Daphne Werth, Comment, *Where Regulation and Property Rights Collide: Reforming the Hardrock Act of 1872*, 65 U. COLO. L. REV. 427, 446 (1994).

68. *See id.*

69. *See id* at 444–47.

bill.[70] A total of fifty-six Superfund sites are abandoned mining operations, including the largest Superfund site in the country, a Montana gold, silver, and copper mine abandoned in the 1950s.[71] When Summitville Consolidated Mining Company in Colorado filed for bankruptcy in 1992, the federal government was forced to take over its $40,000 per day groundwater cleanup operations.[72]

On a positive note, some regulatory progress has been made with regard to reclamation. The 2000 Regulations increased the scope and amount of financial guarantees required as a condition of permit approval,[73] and the 2001 Regulations expressly retained these provisions.[74] This condition requires mining companies to put up bonds to ensure that reclamation procedures required by the permit are, in fact, completed. Nonetheless, the bonding provisions may still be inadequate. First, mining operations that disturb less than five acres are not required to obtain a permit; hence, they are not subject to any bonding requirements.[75] Second, the 2001 Regulations significantly reduced the performance standards that mining operations must meet; hence, the standards for reclamation are likewise lower.[76] Therefore, despite the retention of the heightened bonding requirements in the 2001 Regulations, reclamation costs may still be imposed on the American public, yet again reinforcing the need for reformation of the law and reinstatement of the 2000 Regulations.

### *D. Imaginative Abuse*

Finally, the mining patent process has been repeatedly abused by individuals who have no intention to mine, but are only seeking to get title to land for a price far below fair market

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70. *See Mining Mistake Redux,* DENV. POST, Mar. 22, 2001, at 10B.

71. *See* Begley & Glick, *supra* note 44, at 67; *see also* WILKINSON, *supra* note 6, at 49.

72. *See* Begley & Glick, *supra* note 44, at 67.

73. *See* 2000 Regulations, *supra* note 22, at § 3809.500; *see also* 65 Fed. Reg. 69,998, 70,066 (explaining that the 2000 regulations now require "financial guarantees for all activities other than casual use.").

74. *See* 2001 Regulations, *supra* note 27, at § 3809.500; *see also* 66 Fed. Reg. 54,834, 54,842 (explaining that the 2001 regulations "are not changing the overall financial guarantee requirements . . . .").

75. See *infra* Part III.B. for a general discussion of the way in which mining activities are categorized.

76. Interview with Flynn, *supra* note 41.

value.[77] In fact, purported claims to entitlements under the Hardrock Act are the single "most common cause of unauthorized occupancies of federal lands."[78] One former director of the BLM estimated that eighty percent of mining claims were located "without a serious intent of mining development."[79] Accordingly, mining claims have been used for home-sites,[80] saloons,[81] health spas,[82] marijuana cultivation,[83] and other uses not remotely connected with mining, a result never intended even by a land-rich nineteenth-century Congress.[84] Mining claims likewise have an uncanny tendency to turn up in areas close to major resorts, or in areas otherwise noteworthy for their stunning scenery. Because the Hardrock Act places no restrictions on the number of claims an individual or mining entity can file, abuse occurs not only in the quality of claims filed, but in their quantity. In one particularly egregious example, an individual claimed to have staked some two thousand claims per day.[85]

The Hardrock Act was never intended to promote these kinds of abuses of the public lands. Yet the fact that such abuses have occurred under the rubric of the Act throughout its long history only serves to further highlight its deficiencies. The quotation above indicating that the *majority* of mining claims are not legitimate proves that such abuse is not the exception, but rather, the rule.

As this multitude of problems indicates, the Hardrock Act begs for radical reform. Commentators have referred to the Hardrock Act as a "flagrant abuse of the public interest,"[86] and

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77. *See* LESHY, *supra* note 4, at 71–77.

78. *Id.* at 71.

79. *Id.* at 72 (quoting SYMPOSIUM ON AMERICAN MINERAL LAW 304 (J.C. Dotson ed., 1966)).

80. *See* WILKINSON, *supra* note 6, at 32–33.

81. *See* United States v. Rizzinelli, 182 F. 675 (D. Idaho 1910).

82. *See* United States v. Springer, 491 F.2d 239 (9th Cir. 1974), *cert. denied*, 419 U.S. 834 (1974).

83. *See* People v. Wilmarth, 183 Cal. Rptr. 176 (Cal. Ct. App. 1982).

84. *See* WILKINSON, *supra* note 6, at 33; *see also* Andrus v. Charlestone Stone Prod. Co., 436 U.S. 604 (1978).

85. *See* United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975) (holding for the government on the ground that, despite his assertions, the defendant could not possibly have complied with the necessary requirements for adequately staking and diligently working all the claims).

86. Tom Kenworthy, *A $1 Billion Return for $275*, WASH. POST, Sept. 7, 1995, at A17 (quoting Interior Secretary Bruce Babbitt).

a "Lord of Yesterday,"[87] which remains as "the last vestige of a nineteenth century congressional public land policy designed to settle and promote development in a now-populous west."[88] Even in the face of this widespread criticism, however, the law remains substantially unchanged. The only inroads possible in the dearth of congressional reform must be made—and were made with the now-defunct 2000 Regulations—through valid regulatory intervention.

## III. THE REGULATION OF MINING ACTIVITIES

Despite the milieu into which it was spawned, even the Hardrock Act as originally written noted that while all public lands were open to exploration and purchase for mining, mining claims were nonetheless subject to "regulations prescribed by law."[89] Although what Congress meant by this was unclear, the vague terminology seemed to implicate the Department of the Interior, simply by virtue of the fact that it administered other public land matters.[90] Thus, by at least the early twentieth century the Department of the Interior was presumed to have some rule-making powers over mining claims, but this regulatory power would not be statutorily codified until the enactment of FLPMA in 1976.

Prior to the enactment of FLPMA, however, although it often invoked its authority to challenge the discovery of valuable mineral resources,[91] the Department of the Interior made no

87. WILKINSON, *supra* note 6, at 20.

88. Sam Kalen, *An 1872 Mining Law for the New Millenium*, 71 U. COLO. L. REV. 343, 343–44 (2000).

89. 30 U.S.C. § 22 (1994).

90. *See* LESHY, *supra* note 4, at 190.

91. When a miner finds a promising site for mineral exploration on federal land, his first step is to literally "stake a claim" to give others notice of the fact that he has established the right to prospect the area. This initial right of exclusive possession is referred to as *pedis possessio*, and functions to prevent disputes until its holder has determined whether the site holds promise for further exploration. While *pedis possessio* is a legitimate property interest (its owner can sell it, or use it to exclude others), it is not a compensable property right protected by the Fifth Amendment and is therefore revocable at will by the government. At the precise moment that the owner of the *pedis possessio* right "discovers" a valuable mineral, however, his *pedis possessio* right is legally transformed into a vested property right. Because the critical moment of "discovery" is almost necessarily a solitary event, the temptation for abuse is extreme. More than one miner has claimed ownership rights based on a questionable or non-existent "discovery."

attempt to enforce any kind of environmental regulation.[92] It is likely that the uncertainty of its pre-FLPMA authority, vis-à-vis the power of the mining industry, left the Department hesitant to expand its regulatory powers.[93] Moreover, environmental awareness did not reach its zenith until the 1970s. As a result, there was likely not a pressing urgency, nor even a focused awareness, within the Department of Interior of the need to regulate environmental concerns. Nonetheless, given the historical validation of its authority to regulate, "the conclusion seems nearly inescapable that the Department of the Interior has long had authority to issue environmental protection regulations governing activities on mining claims on all federal lands."[94]

### *A. FLPMA Amends the Hardrock Act*

It was not until the enactment of FLPMA in 1976, however, that Congress expressly granted the Department of the Interior authorization to assert regulatory control over mining activities on public lands. The statute encompassed the entire management and use of the public BLM lands, including those on which mining claims were located. Section 1744 of FLMPA for the first time imposed a requirement on miners to file official notice of their claims. The section required miners to record their claims both with the local office of records and the BLM, including an affidavit asserting their performance of the required assessment work.[95] Failure to file within the allotted time was deemed an effective abandonment of the claim.[96] In addition to the recordation section, section 1732 of FLPMA also specifically addressed mining claims:

> Except as provided in section 1744,[97] section 1782,[98] and subsection (f) of section 1781[99] of this title *and in the last*

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Thus, one can easily see why this was the earliest and most obvious target of regulatory intervention. *See* WILKINSON, *supra* note 6, at 45–46.

92. *See* LESHY, *supra* note 4, at 191.

93. *See id.*

94. *Id.*

95. 43 U.S.C. § 1744(a)(1)–(2) (1994).

96. 43 U.S.C. § 1744(c) (1994).

97. Section 1744 imposes an annual filing requirement on owners of unpatented mining claims.

98. Section 1782 addresses mining claims located in wilderness areas.

> *sentence in this paragraph,*[100] no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, *by regulation or otherwise*, take *any* action necessary to prevent unnecessary or undue degradation of the lands.[101]

A plain reading of this section proves that it expressly, if backhandedly, amends the Hardrock Act by imposing the UUD standard upon it.[102] That is, the passage states, albeit by negative implication, that the UUD standard expressed in "the last sentence in this paragraph" *does* amend the Hardrock Act. In addition, contained within that last sentence is the clause, "by regulation or otherwise," which in turn indicates that amendment of the Hardrock Act, by the imposition of the UUD standard, can be achieved either through the regulatory process, or "otherwise."

### *B. The BLM's 1980 Mining Regulations*

In response to FLPMA's mandate, the Secretary of the Interior directed the BLM to promulgate regulations governing mining operations on public lands ("1980 Regulations").[103] The regulations divided mining activities on federal lands into three categories, according to the area the mines encompassed and the amount of disturbance they created.[104] These categories were referred to as "casual use," "notice-level," and "plan-level" operations.

Mining activities that did not involve mechanized equipment or explosives and created only negligible disturbance were categorized as "casual use," and exempted from regula-

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99. Section 1781(f) addresses mining claims located in the California Desert Conservation Area.

100. The last sentence in the paragraph is the one included in this quote, i.e., "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." (emphasis added).

101. 43 U.S.C. § 1732(b) (1994) (emphases added).

102. *See* COGGINS ET AL., *supra* note 26, at 519.

103. *See* Mining Claims Under the General Mining Laws; Surface Management, 43 C.F.R. § 3809 (1981) [hereinafter 1980 Regulations].

104. *See id.* at § 3809.10.

tion.[105] Miners engaged in casual use mining activities were not required to notify the BLM of their activities, and therefore needed to provide no plan of operation, no plan for reclamation, nor any financial guarantees.[106]

"Notice-level operations" were mining operations that involved mechanized equipment, explosives, or more extensive excavation activities, but still disturbed five or fewer acres.[107] Five acres, however, is roughly the size of five football fields, and is hardly an inconsequential piece of land. Although these operators were required to notify the BLM of their intentions, the BLM neither approved their notice, nor imposed any specific operational criteria upon their activities.[108] Thus, once these mining companies notified the agency of their intentions, they were free to operate with impunity. Although the 1980 Regulations required notice-level operators to engage in reclamation procedures, the BLM imposed no bonding requirement,[109] thus making any effective enforcement of the reclamation requirement unrealistic.[110]

The third category of mining activities was referred to as "plan-level operations." These were operations that either disturbed more than five acres, or entailed work in wilderness or other areas of critical environmental concern.[111] Mining operators engaged in these more significant activities were required to submit a "plan of operations" to the BLM for its approval, describing all of the anticipated activities of the operation from inception through reclamation.[112] These operators were also required to post bonds to ensure compliance with required reclamation measures when mining was complete.[113]

Ironically, despite the fact that the Forest Service, located in the Department of Agriculture, answers to the BLM as the primary administrative agency for mining on public lands, the

105. *See* 1980 Regulations, *supra* note 103, at § 3809.10 (1981); NATIONAL RESEARCH COUNCIL, HARDROCK MINING ON FEDERAL LANDS 20 (1999), *available at* http://books.nap.edu/books/0309065968/html/20.html [hereinafter NRC REPORT].

106. 1980 Regulations, *supra* note 103, at § 3809.10; NRC REPORT, *supra* note 105, at 41.

107. 1980 Regulations, *supra* note 103, at § 3809.10; NRC REPORT, *supra* note 105, at 41.

108. 1980 Regulations, *supra* note 103, at § 3809.10.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

Forest Service developed mining regulations in 1974—a full six years earlier than the BLM.[114] Moreover, the Forest Service regulations applied more rigorous environmental protection to mining operations than did the BLM's 1980 Regulations.[115] Any mine that disturbed surface resources was required to notify the Forest Service;[116] this requirement thus eclipsed the BLM's blanket exemption of "casual use" operations. In addition, the Forest Service required any mines causing significant disturbance to submit a plan of operations and receive agency approval.[117] Once again, this requirement provided more rigorous regulatory oversight than the BLM's notice-level mines, whose operators, after giving notice, could cause significant amounts of disturbance with no oversight whatsoever.

In summary, under the 1980 Regulations, plan-level operations were the only mining operations that actually had to be approved by the BLM before mining activities could proceed. Thus, both casual use and notice-level operations were bereft of any meaningful regulatory scrutiny. What this meant in practice was that, so long as the total affected area was less than five acres, a mining company could locate a claim in a potentially environmentally-sensitive area, bring in heavy equipment, and detonate explosives, all without approval from or oversight by the BLM.

### C. *Compliance With the National Environmental Policy Act*

Submittal of a plan of operations to the BLM for a plan-level operation in turn triggered the requirements of the National Environmental Policy Act of 1969 (NEPA).[118] NEPA is a sweeping federal statute that imposes comprehensive procedural requirements on all federal agencies.[119] Specifically, NEPA mandates that whenever an agency action has the potential to "significantly affect[] the quality of the human environment," an Environmental Assessment (EA) must be pre-

114. *See* WILKINSON, *supra* note 6, at 57–58.
115. *Id.* at 58; 36 C.F.R. § 228.8 (2001).
116. 36 C.F.R. § 228.4 (2001).
117. 36 C.F.R. § 228.5 (2001).
118. 42 U.S.C. §§ 4321–4361 (1994).
119. *See* COGGINS ET AL., *supra* note 26, at 346–49.

pared.[120] The EA identifies the extent of potential impacts to determine whether a more comprehensive Environmental Impact Statement (EIS) must be prepared.[121]

Even in conjunction with the mining regulations, however, NEPA review does not ensure adequate federal oversight of mining activities. First, only plan-level operations have been deemed of significant scope to trigger NEPA,[122] thus exempting both casual use and notice-level mines from the statute's scrutiny. Second, although NEPA mandates specific procedural requirements (the completion of an EA or EIA), "NEPA itself does not mandate particular results, but simply prescribes the necessary process. . . . If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[123] Therefore, even though the statute mandates that the BLM prepare an EA or an EIS for plan-level mining operations, the agency need not take any particular action as a result of the document.

### *D. The 1980 Mining Regulations Provided Inadequate Environmental Protection*

The environmental protection limitations of the 1980 Regulations are readily apparent. The National Research Council, in its report to Congress on hardrock mining in 1999, stated unequivocally: "It appears that the . . . BLM do[es] not adequately tailor regulations and permitting to match a project's potential for environmental damage."[124] First, by exclud-

120. 42 U.S.C. § 4332(c) (1994).

121. *See* Kendall's Concerned Area Residents, 129 I.B.L.A. 130, 131 (1994), holding that:

> Where an EA does not analyze whether there will be unnecessary or undue degradation, and other documentation does not show that BLM conducted the required review and came to a reasoned conclusion, the record does not support a decision that the plan of operations was adequate to prevent unnecessary and undue degradation of public lands.

122. *See* Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988) (rejecting plaintiff's claim that notice-level mines were a major federal action requiring NEPA compliance).

123. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (holding that, even though an EIS indicated that development of a proposed ski area would adversely affect Washington state's largest migratory deer herd, the Forest Service had no affirmative duty under NEPA to mitigate this effect).

124. NRC REPORT, *supra* note 105, at 12.

ing casual use and notice-level operations from any meaningful BLM oversight, the regulations exempted the vast majority of mining operations—an estimated eighty percent—from regulatory scrutiny.[125] Moreover, even plan-level mines operated with a large degree of impunity under the 1980 Regulations because effective enforcement measures were lacking, and NEPA compliance ensured no mitigative action. If a mining operation failed to comply with its own operating plan, the BLM did not have the authority to shut the mine down under the 1980 Regulations. Instead, the agency was required to go through the lengthy process of obtaining an injunction in order to stop the mining activity. By the time the injunction issued, damage to the environment was sometimes irreversible.[126]

The regulations also provided inadequate provisions to ensure that mining companies engaged in satisfactory reclamation procedures after mining ceased. Although the regulations required notice-level operators to reclaim disturbed land, there were no financial guarantees imposed to enforce compliance with the requirement. As noted earlier, mines whose operators either abandoned the site or went bankrupt account for a sizeable number of Superfund sites, including the nation's largest.[127] Such unreclaimed mining sites have imposed an unwarranted environmental and financial burden on American taxpayers, a burden that could have been at least partially alleviated by requiring more mining operations to post financial guarantees.

Finally, the 1980 Regulations provided an inadequate definition and enforcement mechanism of the UUD standard mandated by FLPMA. Despite the fact that in promulgating its 1980 Regulations, the BLM expressly recognized that FLPMA amended the mining laws by imposing the UUD standard,[128] it nonetheless took a lackluster approach to enforcing the UUD mandate. The regulations vaguely defined UUD as "surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations,"[129] "[f]ailure to

125. *See* WILKINSON, *supra* note 6, at 58.

126. *Id.*; *see also* NRC REPORT, *supra* note 105, at 10.

127. *See* discussion *supra* Part II.C.

128. Surface Management of Public Lands Under U.S. Mining Laws, 45 Fed. Reg. 78,902, 78,902 (Nov. 26, 1980) (to be codified at 43 C.F.R. pt. 3809).

129. 1980 Regulations, *supra* note 103, at § 3809.0–5(k).

initiate and complete reasonable mitigation measures, including reclamation," and [f]ailure to comply with applicable environmental protection statutes . . . ."[130] Moreover, in a clear indication of where its loyalties lay, the BLM prefaced the 1980 Regulations with this statement: "The goal of this final rulemaking is to afford adequate protection to Federal lands from unnecessary and undue degradation at the *least possible burden* to the mining industry . . . ."[131]

This definition of UUD was inadequate in a number of respects. First, it failed to provide any objective criteria against which mining operators were expected to measure their performance. As noted during the 2000 revisions of the 3809 regulations, the regulatory definition needs to provide "specific guidance to operators in understanding their obligations by tying all of the components of the definition to an enforceable requirement."[132] Although subjectivity may be an unavoidable regulatory evil, the "prudent operator" standard simply failed to provide any meaningful guidance whatsoever.

Second, by otherwise defining UUD as compliance with "applicable environmental protection statutes," the BLM shirked its independent FLPMA mandate to prevent UUD by simply passing the buck to other federal agencies. The National Research Council report on hardrock mining was particularly critical of the BLM regulations in this regard.[133] The report emphasized that land management agencies had the responsibility to protect specific environmental resources "not governed by [other] specific laws."[134] It then noted that while the Forest Service's mining regulations had "ample authority to provide protection" to such resources,[135] the BLM's interpretation of UUD "does not explicitly state that the BLM has the ability to provide such reasonable protection."[136]

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130. *Id.*

131. Surface Management of Public Lands Under U.S. Mining Laws, 45 Fed. Reg. 78,902, 78,902 (Nov. 26, 1980) (to be codified at 43 C.F.R. pt. 3809) (emphasis added).

132. Mining Claims Under the General Mining Laws: Surface Management, 64 Fed. Reg. 6421, 6436 (proposed Feb. 9, 1999) (to be codified at 43 C.F.R. pt. 3809).

133. *See* NRC REPORT, *supra* note 105, at 69.

134. *Id.*

135. *Id.*

136. *Id.*

Third, the definition of UUD in terms of failure to comply with mitigation and reclamation procedures was largely a toothless tiger since the regulations provided no broadly effective enforcement provisions for reclamation. Finally, the 1980 Regulations failed to explain any difference between "unnecessary" degradation and "undue" degradation. Presumably, Congress would not have expressly identified the two types of degradation had there not been some distinction between them.

The 1980 Regulations stated that they would be revised in three years, but this did not occur as scheduled.[137] In the late 1980s, the GAO issued a series of reports highlighting abuses of hardrock mining, noting in particular environmental concerns.[138] These reports evidently provided the impetus necessary for the BLM to begin work on revising the mining regulations in 1992. This attempt at revision was put on hold, however, due to legislation pending in Congress that would have revamped the Hardrock Act, thereby rendering the revisions moot.[139]

### *E. A Time of Discontent: The Rahall Bill*

Responding to concern over the many drawbacks of the existing mining law, the 103rd Congress introduced legislation ("Rahall Bill")[140] that would have radically overhauled the Hardrock Act and brought it up to date with "modern business practices and land use philosophies."[141] As originally proposed in the House, the purpose of the Rahall Bill was, in part:

> (1) to devise a more socially, fiscally and environmentally responsible regime to govern the use of public domain lands for the exploration and development of . . . minerals . . . ; (2) to provide for a fair return to the public for the use of public domain lands for mineral activities and for the disposition of minerals from such lands; (3) to foster the diligent development of mineral resources on public domain lands in a manner that is compatible with other resource values and environmental quality; (4) to promote the restoration of

137. *See id.* at 10.

138. *See* GEN. ACCT. OFF. REC. 86-48, 87-157, 88-21, 88-123 (1988).

139. *See* 139 CONG. REC. 29,237 (1993).

140. H.R. 322, 103rd Cong. (1993). The bill was dubbed the Rahall Bill in honor of its proponent, Representative Nick J. Rahall, a West Virginia Democrat.

141. 139 CONG. REC. 29,237, 29,237 (1993).

> mined areas left without adequate reclamation prior to the enactment of this Act and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent the beneficial use of land or water resources, and endanger the health and safety of the public . . . .[142]

The proposed bill then laid out in detail how these goals were to be accomplished, notably including an "unsuitability review"[143] that gave the Secretary of the Interior (and the Secretary of Agriculture, when mining occurred on Forest Service lands) the authority to refuse to allow mining activities to occur in areas they deemed unsuitable. Specifically, the proposed act stated that the Secretary of the Interior

> shall determine that an area open to location is unsuitable for all or certain mineral activities if such Secretary finds that such activities would result in significant, permanent and irreparable damage to special characteristics as described in paragraph (3) which cannot be prevented by the imposition of conditions in the operations permit . . . .[144]

Despite nearly unanimous agreement as to the necessity of reform, extensive debate, and an attempt to compromise the Rahall Bill with an environmentally weaker Senate version,[145] the Rahall Bill ultimately died a protracted death in committee.[146] The reform essentially fell victim to industry lobbyists and western congresspersons who feared the wrath of politically well-connected mining concerns, and the economic impact upon some of their constituents. Many congressional representatives, while acknowledging that mining reform was sorely needed, nonetheless felt that the bill as presented was too radical. They feared that it would cripple domestic mineral production,[147] eliminate a significant economic basis of the western

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142. *Id.* at 29,266.

143. *Id.* at 29,275.

144. *Id.* The "special characteristics" referred to in paragraph (3) included proximity to water sources or critical wildlife habitat, places eligible for registration in the National Register of Historic Places or in the National Conservation System, or simply the presence of "other resource values." *Id.*

145. *See* S. 775, 103d Cong. (1993).

146. *See* 140 CONG. REC. 13,914 (1994).

147. 139 CONG. REC. 29,237, 29,237 (1993) (statement of Rep. Quillen).

states,[148] run roughshod over state primacy,[149] result in a plethora of jurisdictional problems,[150] and unduly burden the small miner.[151] Said one congressman, "[t]he regulatory burdens and increased fees [resulting from this bill] could cripple domestic production and result in significant job loss."[152]

Mining industry analysts painted a dire picture of the demise of mineral production in the United States, leading to an increased dependence on foreign production.[153] Moreover, they asserted that the Rahall Bill would cost 44,000 jobs, reduce economic activity in the twelve western states by $5.7 billion, and result in an annual loss of $420 million to the federal government in reduced corporate taxes.[154] While these are legitimate concerns, considering the lobbying power marshaled by the multi-million-dollar mining industry, one wonders if the viewpoint expressed in *The New Mexican* might be a bit closer to the truth: "The mines' only real argument against reform is that they've had it their way with the West for 120 years, and that any changes could cut into the profits."[155]

The reasons behind the failure of the Rahall Bill, however, cut deeper. First, the powerful mining industry has proven a formidable opponent through the years. The economic significance of the mining industry has not been lost on western congresspersons, who are loathe to alienate some of their most powerful constituents.[156] The most prominent voice comes from the National Mining Association (NMA).[157] The NMA vigorously opposes any increased regulation, and viewed the 2000 Regulations as an end-run around the legislative process.[158] Claiming that the mining industry contributed $524 billion to

148. *See id.* at 29,240 (statement of Rep. Hansen).
149. *See id.* at 29,242.
150. *See id.*
151. *See id.* at 29,247.
152. 139 CONG. REC. 29,237 (1993) (statement of Rep. Quillen).
153. *See* L. Courtland Lee & Paul K. Driessen, *Mining Tackles Legislative Challenges*, 102 AM. METAL MARKET 14 (1994) (excerpt from speech).
154. *See* Senator Larry Craig, *Congress Has Two Alternatives for Reform of Public Land Mining Policy: Choose Mine*, ROLL CALL, Oct. 4, 1993.
155. THE NEW MEXICAN, (Sante Fe, N.M.) Sep. 4, 1993, *quoted in* 139 CONG. REC. 29,237, 29,241 (1993).
156. *See* WILKINSON, *supra* note 6, at 67.
157. *See* Thomas F. Darin, *The Bureau of Land Management's Proposed Surface Management Regulations for Locatable Mineral Operations: Preventing or Allowing Degradation of the Public Lands?*, 35 LAND & WATER L. REV. 309, 322 (2000).
158. *See id.*

the United States economy in 1995, the NMA called for the government to "reassess its attitude toward, and relationship with, the American mining industry."[159] The conclusion that pressure has been similarly exerted on the BLM by this political heavyweight is nearly inescapable.

Second, western congresspersons are reacting to this deeply-entrenched, albeit erroneous, belief among Westerners that extractive industries are the vulnerable backbone of the western economy, and that any restriction upon them will result in the collapse of the economic base.[160] Said one congressperson, "[i]f we continue to drive the ranching, mining, and timber industries off public lands there will be nothing left out there."[161] Statistics prove otherwise. A 1992 Department of Commerce report, for example, noted that sixty-four percent of Montana residents worked in the service industry, seven percent in agriculture, and only six percent in manufacturing concerns, including mining.[162] The NMA's statistics reveal that hardrock mining in 2000 employed a total of 64,197 people in the entire United States, including office, independent shop, and processing plant workers, in addition to surface and underground miners.[163] While this is likewise not an insignificant number, a reasonable imposition of royalties onto the proceeds of mining operations, as well as increased bonding procedures that would reduce the tax burdens caused by reclamation, would more than offset the portion of these jobs that would purportedly be lost.

Finally, the mining industry has successfully managed to perpetuate the romantic myth of the hardscrabble, independent miner who, through individual initiative and raw courage, has managed to scrape his livelihood from the earth. Any basis for this myth has long since evaporated. Modern mining is almost exclusively dominated by multi-million-dollar conglomerates,[164]

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159. *Id.* at 322–23.

160. *See* Donald Snow, *The Pristine Silence of Leaving It All Alone,* NORTHERN LIGHTS, Winter 1994, at 10, 14.

161. 139 CONG. REC. 29,237, 29,255 (1993) (statement of Rep. Skeen).

162. *See* Snow, *supra* note 160, at 14.

163. Nat'l Mining Ass'n, *Mining Industry Employment in the United States, available at* http://www.nma.org/industry%2 (last visited Dec. 18, 2001) (showing statistics through 2000). The total of 64,197 was reached by adding total workers only in the "metal" and "non-metal" sectors, since hardrock mining does not include coal, sand and gravel, or stone. *Id.*

164. *See* WILKINSON, *supra* note 6, at 70–71.

whose operating methods have driven the vision of the grizzled prospector with pickax and burro into romantic oblivion. Modern mining companies, for example, may employ ore-hauling trucks with capacities of up to 130 tons and pumps that can pour ten thousand gallons of cyanide solution per minute over ore heaps.[165] Even if a tiny minority of independent miners exists in the industry, this fact alone hardly justifies the maintenance of an enormous federal subsidy at the cost of significant environmental degradation.

By the final decades of the twentieth century, the regulation of mining activities on federal lands was viewed as inadequate in virtually every political quarter. The GAO had noted that, despite the imposition of the 1980 Regulations, public lands still suffered significant abuse from mining activities.[166] The National Research Council had declared the 1980 Regulations inadequate to address a mine's "potential for environmental damage."[167] In debating the Rahall Bill, congressional delegates were nearly unanimous in their agreement that reform of the Hardrock Act was necessary, yet achievement of political compromise over the specifics ultimately proved too onerous. Initially overlooked in the resultant limbo, however, was the fact that the Hardrock Act itself, by excepting the right to mine to "regulations prescribed by law,"[168] and FLPMA, by mandating the independent and supplemental UUD standard, provided—indeed demanded—a broader scope of regulatory oversight than had been imposed by the 1980 Regulations.

## IV. THE DEPARTMENT OF THE INTERIOR'S REGULATION OF MINING UNDER SECRETARY BABBITT AND SOLICITOR LESHY

The Department of Interior had begun the process of revising the mining regulations in 1992, yet the impending Rahall Bill gave the Department legitimate hope that its own band-aid approach to the problem would eventually become unnecessary and yield to a more effective legislative cure. The failure of the bill, however, once again made revision of the 1980 Regulations

165. Steve Raabe, *A Major Miner of Colorado Gold*, DENV. POST, Jan. 20, 2002, at 1F (describing the mind-boggling proportions of the operations conducted by the Cripple Creek & Victor Gold Mining Company in Colorado).

166. *See* GEN. ACCT. OFF. REC. 86-48, 87-157, 88-21, 88-123 (1988).

167. NRC REPORT, *supra* note 105, at 12.

168. 30 U.S.C. § 22 (1994).

a top priority shortly after Bruce Babbitt's appointment as Secretary of the Interior in 1993. The regulations were ripe for reform not only because of their lax environmental provisions, but because technological advances in mining had rendered them obsolete. The compelling necessity of reform was particularly well-articulated in an editorial which noted that leaving the old regulations in place "would be akin to regulating jet airliners based on the concept of horse-drawn wagons."[169]

Under the leadership of Secretary Babbitt and Solicitor Leshy, the Department of the Interior became more proactive in its approach than any preceding administration. As Secretary Babbitt bluntly stated, "[i]t is plainly no longer in the public interest to wait for Congress to enact legislation that corrects the remaining shortcomings of the 3809 regulations."[170] Thus, in 1996, BLM began a comprehensive review and revision of its mining regulations, including rewriting the UUD standard.[171] The process of rewriting the provisions, complete with a comprehensive NEPA review, a report by the National Research Council, and extensive opportunities for public comment, took approximately four years to complete. These revised regulations were published in the Federal Register in November 2000,[172] and took effect on January 20, 2001, just before President Clinton left office.[173]

### *A. The 2000 Regulations*

In the preamble to the 2000 Regulations, the BLM set forth a concise statement of its intent:

> We are amending the regulations to improve their clarity and organization, address technical advances in mining, incorporate policies we developed after we issued the previous regulations twenty years ago, and better protect natural resources and our Nation's natural heritage lands from the

169. *Mining Mistake Redux, supra* note 70, at 10B.

170. Mining Claims Under the General Mining Laws: Surface Management, 64 Fed. Reg. 6,421, 6,424 (proposed Feb. 9, 1999) (to be codified at 43 C.F.R. pt. 3800); *see also* Darin, *supra* note 157, at 309.

171. *See* Mining Claims Under the General Mining Laws; Surface Management, 64 Fed. Reg. 6,421, 6,428 (proposed Feb. 9, 1999) (to be codified at 43 C.F.R. pt. 3800).

172. 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. pt. 3800).

173. 2000 Regulations, *supra* note 22, at § 3809.

> adverse impacts of mining. We intend these regulations to prevent unnecessary or undue degradation of BLM-administered lands by mining operations authorized under the mining laws.[174]

As the preamble indicates, the revised regulations attempted to correct many of the shortcomings of the previous ones. Moreover, the preamble noted that the use of the conjunction "or" between unnecessary and undue in the UUD standard meant "that the Secretary [of the Interior] has the authority to prevent 'degradation' that is necessary to mining, but undue or excessive. This includes the authority to disapprove plans of operations that would cause undue or excessive harm to the public lands."[175]

The rules retained the three tiers of mining operations—casual use, notice-level, and plan-level[176]—but imposed more rigorous performance standards on these uses. Casual use still did not require notification to the BLM; however, reclamation of disturbed areas was now required.[177] Notice-level operators were required to include a description of their proposed mining activities, a reclamation plan, a cost estimate for reclamation,[178] and a bond to ensure that reclamation took place.[179] Plan-level operations required submission and approval[180] of a more detailed operation plan,[181] as well as the financial guarantees carried over from the previous regulations.

In setting forth performance standards for notice-level and plan-level operations, the new regulations provided detailed measures for preventing environmental damage.[182] They devoted a considerable amount of detail to the provision of financial guarantees, required reclamation procedures, and the circumstances that might cause a mining company to forfeit its bond.[183] Importantly, the revised regulations rectified the enforcement problems of the previous regulations; if a mining

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174. Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 69,998 (Nov. 21, 2000) (to be codified at 43 C.F.R. pt. 3800).
175. *Id.* at 69,999.
176. 2000 Regulations, *supra* note 22, at § 3809.10.
177. *Id.*
178. *Id.* § 3809.301(b)(2)–(4).
179. *Id.* § 3809.312(c).
180. *Id.* § 3809.412.
181. *Id.* § 3809.401.
182. *Id.* § 3809.420(b).
183. *Id.* § 3809.500–599.

company was found in violation of any of the regulations or its own operating plan, the BLM could revoke its plan of operations or nullify its notice after only an informal hearing.[184]

### B. *Revision of the UUD Mandate: The "Substantial, Irreparable Harm" Standard*

A major impetus for the 2000 revision of the mining regulations was rewriting and strengthening the UUD standard, and providing mining companies with meaningful standards against which to measure their compliance.[185] Doing away with the "prudent operator" standard of the previous rules, the 2000 Regulations instead defined UUD in terms of failure to comply with the applicable performance standards, the terms and conditions of a Plan of Operations, other applicable laws, and any activities that are not "reasonably incident" to mining.[186] Most importantly, however, the 2000 Regulations also defined UUD to include activities that "result in substantial, irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated."[187] In addition to the new definition of UUD, in its initial rulemaking, the BLM also set forth a detailed explanation of the UUD standard and the rationale behind the agency's interpretation and application of the standard.[188]

Part and parcel of the new UUD standard was the BLM's distinction between "unnecessary" degradation and "undue" degradation.[189] The preamble to the 2000 Regulations noted that the conjunction "or" between the two types of degradation "strongly suggests Congress was empowering the Secretary to prohibit activities or practices that the Secretary finds are unduly degrading, even though 'necessary' to mining."[190] The BLM noted that the previous definition of UUD only focused on impacts that were necessary to mining, allowing those impacts to occur; thus, this definition did not address "undue" degrada-

184. *Id.* § 3809.602.

185. *See* discussion *supra* Part III.D.

186. 2000 Regulations, *supra* note 22, at § 3809.5.

187. *Id.*

188. *See* Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 70,001, 70,015–70,018 (Nov. 21, 2000) (to be codified at 43 C.F.R. pt. 3800).

189. *See id.* at 70,017.

190. *Id.*

tion as required by FLPMA.[191] For example, if a mining operator otherwise complied with applicable performance standards, but nonetheless claimed that contaminating a major aquifer, or destroying an historical or cultural site was unavoidable and therefore "necessary" to his mining activities, he was free to proceed under the previous interpretation of UUD.

To correct this shortcoming, the BLM specifically modified the UUD definition to include the recognition that undue degradation applies to resource values that "need to be protected from all impacts."[192] The 2000 Regulations acknowledged that while BLM did not have the authority to prevent mining on public lands, Congress was nonetheless granting authority through the FLPMA "undue degradation" standard to prevent "something greater than a modicum of harmful impact from a use of public lands that Congress intended to allow."[193] Moreover, the agency noted that "[t]he question is not whether a proposed operation causes any degradation or harmful impacts, but rather, how much and of what character in this specific location."[194]

The final phrase defining UUD—activities that "result in substantial, irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated"[195]—refers to what the BLM termed the "suitability provision" and the mining industry has called the "mine veto provision."[196] The preamble to the 2000 Regulations explained the new provision this way: "we have introduced an additional threshold for undue and unnecessary degradation. . . . we have also made it clear in the regulation that BLM can deny a proposed mining operation under certain conditions in order to provide protection of significant resources."[197] In other words, if a proposed mining operation could not adequately mitigate environmental damage—if the

191. *Id.*
192. *Id.*
193. *Id.* at 70,017–70,018.
194. *Id.* at 70,118.
195. 2000 Regulations, *supra* note 22, at § 3809.5.
196. *See* Nat'l Mining Ass'n, *supra* note 24. Thus, the "substantial, irreparable harm" standard, the "suitability" provision, and the "mine veto provision" are all references to the same thing—the Secretary of the Interior's authority to deny a mining permit application on the grounds that no mitigation efforts will be sufficient to prevent UUD.
197. Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 70,016 (Nov. 21, 2000) (to be codified at 43 C.F.R. pt. 3800).

damage would be undue—then the Secretary had the authority to deny the permit.

This clarified the fact that a potential site may simply be unsuitable for mining. This might be because the site was particularly environmentally sensitive, contained significant scientific or cultural resources, the type of mining operation proposed was too damaging, or any combination of these factors. This is precisely the authority that the failed Rahall Bill attempted to convey in its suitability clause.[198] Such an interpretation is hardly radical; it has long been recognized that all other extractive uses of the public lands may be denied permits or leases where the area in question is unsuitable for the contemplated use.[199] Nonetheless, this definition gave rise to the mining industry's argument that this interpretation of the FLPMA mandate was tantamount to regulatory legislation.[200]

The BLM made clear in the 2000 Regulations, however, that it would not invoke the suitability provision casually, and indeed, set out careful limitations in its rule-making that limited the application of the provision.[201] It noted that four significant conditions must be fulfilled before invoking the provision.[202] First, the provision would only apply to protect significant scientific, cultural, or environmental resources; hence the BLM can only invoke the provision after conducting a site-specific analysis.[203] Second, the BLM must determine that the proposed mining activity "will cause substantial, irreparable harm to the resources."[204] Third, the harm "may not be susceptible of being effectively mitigated."[205] Finally, the BLM must thoroughly document its findings for the record to ensure that all elements of the definition have been met.[206] In

198. *See* discussion *supra* Part III.E.

199. *See* discussion *supra* Part II.A.

200. *See, e.g.*, Press Release, National Mining Association, NMA Challenges Unnecessary, Costly and "Unlawful" 3809 Rules, (Dec. 15, 2000), *at* http://www.nma.org/rel%20-%203809%20suit%20Dec%202000.html (on file with author) (stating that "[t]he BLM has conferred upon itself authority and jurisdiction that Congress never granted or considered granting").

201. *See* Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. at 69,998, 70,016 (Nov. 21, 2000) (to be codified at 43 C.F.R. pt. 3800).

202. *Id.* at 70,017.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

addition, the BLM's decision to deny a mining permit could be appealed.[207]

The inclusion of the "substantial, irreparable harm" standard in the 2000 Regulations marked a necessary shift in the Department of the Interior's approach to mining regulation, yet nonetheless provoked intense controversy. The 1980 Regulations reflected the presumption that the Hardrock Act conveyed an absolute right to mine on public lands, a right that could be regulated, but not denied. The 2000 Regulations, by contrast, asserted that the UUD mandate in FLPMA imposed upon the Department of the Interior the independent and supplemental authority to deny the most destructive mining operations from irreparably harming significant environmental and cultural resources.

The mining industry, among other accusations, alleged that the suitability provision "first appeared in the final rule," and hence was not subject to the public notice and comment provisions of the Administrative Procedures Act.[208] This was one of many allegations to which the Bush Administration responded in rescinding the 2000 Regulations.[209] This accusation, however, was unfounded. Although the precise language of the "substantial, irreparable harm" standard first appeared in the Final Rule, the BLM's intention in this regard could hardly have come as a surprise. Notably, one proposed version of the revised regulations, published in the Federal Register in 1999, and specifically seeking public comment, stated the following:

> BLM wishes to emphasize one conceptual difference between the existing and proposed definitions of UUD. The existing definition *assumes* that a valid operation exists at a location, and the impacts may not exceed those that would be caused by a prudent operator. The proposed definition would recognize that FLPMA *amended* the mining laws, subject to valid existing rights, by *limiting* the right to develop locatable minerals to those operations *that prevent UUD*. Our inclusion of the proposed performance standards in the proposed definition of UUD means that, in some

207. *Id.*

208. *See* Nat'l Mining Ass'n, *supra* note 24.

209. *See* Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 54,834, 54,834 (Oct. 30, 2001) (to be codified at 43 C.F.R. pt. 3800).

> situations, *BLM could disapprove operations that would fail to satisfy the performance standards. An operator does not have an unfettered right under the mining laws.*[210]

This passage disproves the industry's allegations that the BLM's intentions regarding the inclusion of the suitability provision were not subject to public comment. In both this proposed version and the final version of the 2000 Regulations, the BLM was clearly stating its authority to deny mining permits outright in specific circumstances, based on its interpretation of the FLPMA mandate.

### *C. Glamis Gold Ltd.'s Proposed Gold Mine Permit Denied*

In addition to promulgating the new mining regulations, the Department of the Interior exercised its newly-asserted ability to deny a mining permit in dramatic fashion on January 17, 2001. Based on the opinion of Solicitor Leshy, the results of an EIS, and consultation with the Advisory Council on Historic Preservation, Secretary Babbitt denied a mining permit submitted by Glamis Gold, Ltd., for a proposed cyanide heap-leaching gold mine in California.[211] This denial was unprecedented in the history of the Department of the Interior, marking the first time a mining permit had been denied outright based on environmental unsuitability.[212] As Secretary Babbitt said at the time:

> This is the first large gold mine we have rejected. The reason is that for a quarter century the mining industry has prevailed in arguing that the Mining Law of 1872 gives them an absolute right to do whatever is necessary to further their mining plans on public land. That's simply not the case. In 1976 in (FLPMA) Congress forbade undue degradation. No previous administration has taken that position. We do.[213]

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210. Mining Claims Under the General Mining Laws: Surface Management, 64 Fed. Reg. 6,421, 6,428 (proposed Feb. 9, 1999) (to be codified at 43 C.F.R. pt. 3800) (emphases added).

211. *See Babbitt Passes on Mill Site Regs, but Not on Glamis Permit*, PUBLIC LANDS NEWS, Feb. 3, 2001, at 3.

212. *See id.*

213. *Id.*

Secretary Babbitt's denial of the Glamis Gold permit (as well as a large part of the UUD language in the 2000 Regulations) had as its source a 1999 memorandum opinion authored by Solicitor Leshy.[214] Although Solicitor Leshy ultimately concluded that the Glamis Gold permit should be denied because it failed to meet the "undue impairment" standard applicable to the California Desert Conservation Area within which the mining claim was located, he discussed both the undue impairment and UUD standards in the memorandum. Solicitor Leshy noted that while Congress clearly intended for *some* mining to occur on public lands,[215] the UUD standard "suggests Congress was empowering the Secretary to prohibit activities or practices that the Secretary finds are unduly degrading, even though 'necessary' to mining."[216] Moreover, Leshy asserted that the "'undue degradation' standard gives BLM the authority to impose restrictive standards in particularly sensitive areas . . . ."[217] The Interior Solicitor concluded that although Glamis Gold had duly complied with all applicable BLM regulations, it was his opinion that the mining company could not sufficiently mitigate the potential environmental damage caused by the proposed gold-mining operation.[218] Therefore, he recommended that the BLM should exercise its authority to deny the permit pursuant to the undue impairment standard.[219]

In response to Solicitor Leshy's memorandum, and ultimately to Secretary Babbitt's concurring action, Glamis Gold decried the new standards as "unlawful," and stated its intention to appeal the decision in federal court and "vigorously defend its property interests."[220] This became a moot point on October 25, 2001, however, when the Department of the Interior, now under Secretary Gale S. Norton, allowed the negative decision to be set aside and Glamis Gold's permitting process to

214. *See* Glamis Memo, *supra* note 19.
215. *See id.* at 9.
216. *Id.* at 7.
217. *Id.*
218. *See id.* at 18.
219. *See id.* at 19. The "undue impairment" standard applicable to the California Desert Conservation Area in which the mining claim was located is a heightened standard as compared to the UUD standard; therefore, the same reasoning would be applicable if the denial was based on the UUD standard. Interview with Flynn, *supra* note 41.
220. Press Release, Glamis Gold, Ltd., *supra* note 21.

once again proceed.[221] This action coincided with the Department of Interior's final rescission of the 2000 Regulations, including the "substantial, irreparable harm" standard.[222]

### *D. The Fallout: The Bush Administration Rescinds the 2000 Regulations*

Despite the fact that the 2000 Regulations were the result of an exhaustive, four-year process that provided ample opportunity for public comment, the Bush administration took action to forestall the effect of the regulations immediately after taking office. In March of 2001, the BLM stated its intention to suspend the 2000 Regulations, citing a need to "review some of the new requirements in light of issues . . . raised since the final rules were published,"[223] including four lawsuits filed to protest the rules.[224] The agency expressed hesitancy in implementing the 2000 Regulations until these issues were resolved, and to avoid an ensuing "regulatory vacuum,"[225] proposed to reinstate the previous (1980) version of the regulations, thus "maintaining the previous status quo."[226] On June 21, 2001, the House of Representatives passed an amendment that would have forced the BLM to retain the 2000 Regulations in their entirety.[227] The longstanding congressional stalemate over mining reform reared its ugly head once again, however, when a conference committee rejected the amendment, which the House had attempted to force through as a rider on an appropriations bill.[228]

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221. *See* Press Release, Glamis Gold, Ltd., Imperial Project Denial To Be Vacated By Department of the Interior (Oct. 25, 2001), *at* http://www.glamis.com/pressreleases/index.html.

222. *See* Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 54,834, 54,837 (Oct. 30, 2001) (to be codified at 43 C.F.R. pt. 3800).

223. *See* Mining Claims Under the General Mining Laws; Surface Management, Proposed Suspension of Rules, 66 Fed. Reg. 16,162, 16,162 (proposed Mar. 23, 2001).

224. *Id.*

225. *Id.*

226. *Id.* at 16,164.

227. *See* Christine Dorsey, *House Votes Against Rolling Back Environmental Mining Rules,* LAS VEGAS REV. J., June 22, 2001, at 8D.

228. *See House-Senate Conferees Drop Rider Backing Tough 3809 Rules, supra* note 24, at 4.

On October 30, 2001, the Department of the Interior under Secretary Norton published its final version of the (revised) mining regulations in the Federal Register[229] (the "2001 Regulations"), thereby sealing the doom of the carefully-wrought 2000 Regulations. The Bush administration took this action in spite of the fact that, in response to the announcement in the Federal Register stating the BLM's intention to rescind the 2000 Regulations,[230] over ninety-five percent of the comments urged the BLM to retain the 2000 regulations "because they would better protect the environment."[231] In addition, although the 2000 Regulations were the result of a multi-year public comment and review process, the 2001 Regulations were developed and implemented in a matter of months.

Although the 2001 Regulations retain the tougher bonding provisions of the 2000 Regulations, they nonetheless categorically reject the "substantial, irreparable harm" standard, as well as the revised definition of UUD that allowed that interpretation.[232] Instead, the 2001 Regulations in essence reinstate the obsolete definition of UUD from the 1980 Regulations by defining it in terms of how an "operator would comply with the performance standards in this subpart and other environmental protection statutes, which describe a prudent way to conduct operations to prevent surface disturbance greater than necessary."[233]

This standard returns to the old way of doing business, essentially eviscerating the BLM's authority to protect public lands. First, the requirement that a prudent operator "comply with the performance standards in this subpart" is of little substance in light of the fact that the 2001 Regulations significantly weakened or eliminated the environmental protections of those performance standards. Second, this standard once again passes the buck by requiring a mining operator to comply with "other environmental protection statutes." This requirement means little; a mining operator is *already* required to comply with all applicable environmental statutes, regardless

229. *See* Mining Claims Under the General Mining Laws; Surface Management; 66 Fed. Reg. 54,834 (Oct. 30, 2001) (to be codified at 43 C.F.R. pt. 3800).

230. Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 16,162 (proposed Mar. 23, 2001).

231. 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).

232. *See id.* at 54,838.

233. *See id.*

of the imposition of this "standard." Most significantly, however, by negating the "substantial, irreparable harm" standard, the 2001 Regulations completely disregard the fact that FLPMA imposes an *independent obligation* onto the Interior Department to prevent UUD, over and above the requirements imposed by other environmental statutes. In short, the 2001 Regulations make the FLPMA mandate to prevent UUD a nullity.

## V. THE "SUBSTANTIAL, IRREPARABLE HARM" STANDARD WAS LEGALLY VALID AND ENVIRONMENTALLY RESPONSIBLE

The "substantial, irreparable harm" standard of the 2000 Regulations was not only a valid interpretation and application of the UUD mandate, it was a more accurate rendering of that directive than any previous or subsequent interpretation. Although Secretary Babbitt's and Solicitor Leshy's analysis of the UUD mandate was a departure from the Department of Interior's previous interpretation, this did not make it unjustified, nor, as the mining industry contends, illegal. To the contrary, this interpretation reflected the idea that FLPMA imposed a duty to prevent *both* unnecessary and undue degradation. As stated in the preamble to the 2000 regulations:

> The regulations change the definition of "unnecessary or undue degradation" to clarify that operators must not cause substantial irreparable harm to significant resources that cannot be effectively mitigated. Clarifying that the definition specifically addresses situations of "undue" as well as "unnecessary" degradation will more completely and faithfully implement the statutory standard, by protecting significant resource values of the public lands without presuming that impacts necessary to mining must be allowed to occur.[234]

The 1980 Regulations and the 2001 Regulations, by contrast, reflect the idea that any activity that is necessary to a mining operation—no matter how detrimental to the environment—is acceptable. In other words, this standard prohibits only actions that are *unnecessarily* damaging, but not actions

234. Mining Claims Under the General Mining Law; Surface Regulations, 65 Fed. Reg. 69,998, 70,001 (Nov. 21, 2000) (to be codified at 43 C.F.R. pt. 3800).

that are *unduly* damaging. This interpretation ignores fully one-half of the FLMPA directive to prevent both unnecessary or undue degradation of the public lands.

### A. *The "Substantial, Irreparable Harm" Standard Was Statutorily Justified*

Both the Hardrock Act itself and FLPMA provide ample justification for the Babbitt/Leshy interpretation of the UUD standard, as well as the denial of the Glamis Gold permit. Seemingly lost in the outcry over the 2000 Regulations is the fact that the Hardrock Act itself states that mining activities are subject to "regulations prescribed by law."[235] Although the means of its application is indisputably imprecise, the intention of the statement could not be clearer: mining can be regulated. In addition, courts have repeatedly recognized that where Congress has left a statutory void, then it is clearly within the province of the affected agency to fill that void through regulation,[236] provided that interpretation is "based on a permissible construction of the statute."[237]

More importantly, however, FLMPA did not merely authorize the Secretary of the Interior to prevent damage to public lands, it explicitly *required* the Secretary to do so,[238] to wit: "In managing the public lands the Secretary *shall*, by regulation or otherwise, take *any action necessary* to prevent unnecessary or undue degradation of the lands."[239] Moreover, Congress indicated that, in creating the UUD mandate, it was explicitly amending the Hardrock Act by imposing upon it both a superseding regulatory framework ("by regulation"), and a

235. 30 U.S.C. § 22 (1994).

236. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 231 (1974) (stating that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress"); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844–45 (1984) (stating that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulations").

237. *Chevron*, 467 U.S. at 843.

238. *See* LESHY, *supra* note 4, at 191.

239. 43 U.S.C. § 1732(b) (1994) (emphases added).

discretionary standard ("or otherwise").[240] The intent of Congress in imposing this directive, however, is obviously the subject of much debate.

Congress passed FLPMA in 1976 essentially as an organic act for the BLM, providing the agency with a "multiple use mandate" to regulate the "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values" of the public lands.[241] As explained by Senator Haskell, the sponsor of the Natural Resource Lands Management Act, a direct predecessor to FLPMA:

> In the vacuum created by the absence of this authority, the unnecessary waste and destruction of our country's most valuable resource—its land—is almost awesome in its dimensions . . . examples of the degradation of our public domain land due to the fact that the BLM lacks an adequate statutory base to protect them makes our continuing failure to enact necessary legislation an embarrassment and, worse, a dereliction of duty.[242]

In addition to these general purposes, FLPMA specifically requires the BLM to ensure that its management "best meet[s] the present and future needs of the American people,"[243] and to disallow "permanent impairment of the productivity of the land and the quality of the environment . . . ."[244] Finally, FLPMA also states that "Congress declares that it is the policy of the United States that . . . (9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute."[245] These excerpts provide clear evidence that in passing FLPMA, Congress was predominantly concerned with protecting the long-term environmental sustainability of the public lands. This interpretation was verified by the National Research Council, in its report to Congress

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240. *Id.*; *see also* LESHY, *supra* note 4, at 191. This interpretation, as noted earlier, necessarily requires a reading of the last sentence of FLPMA § 1732(b) by negative implication. *See* discussion *supra* Part III.A. and accompanying notes.

241. COGGINS ET AL., *supra* note 26, at 656.

242. 121 CONG. REC. 1847 (1975) (statement of Sen. Haskell), *reprinted in* COMM. ON ENERGY AND NATURAL RESOURCES, U.S. SENATE, LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 (PUBLIC LAW 94-579), S. DOC. NO. 95-99, at 54 (1978).

243. 43 U.S.C. § 1702(c) (1994).

244. *Id.*

245. *Id.*

in 1999 on the regulatory framework for hardrock mining. The Council stated that

> [t]he federal agencies as land managers on the public's behalf stand in a different relationship to the land and its resources than simply as regulators of impacts. The federal land managers have a mandate for long-term productivity of the land, protection of an array of uses and potential future uses, and management of the federal estate for diverse objectives.[246]

Section 1732 of FLPMA, however, makes it clear that FLPMA does not override the rights conveyed by the Hardrock Act, except in four explicit ways,[247] the only meaningful one for the present discussion being the imposition of the UUD standard. Therefore, although the pertinent inquiry would be the specific legislative history of the UUD standard itself, this history is unavailing. The House Committee on Interior and Insular Affairs merely stated that "the Secretary of the Interior is given specific authority, by regulation or otherwise, to provide that prospecting and mining under the Mining Law will not result in unnecessary or undue degradation of the public lands. The Secretary is granted *general authority* to prevent such degradation."[248]

Unsurprisingly, then, in the absence of more explicit legislative intent, the controversy over the UUD standard—and whether the "substantial, irreparable harm" provision was a legally tenable interpretation of it—has centered around the plain meaning of the words. Solicitor Leshy opined that the "conjunction 'or' between 'unnecessary' and 'undue' speaks of a Secretarial authority to address separate types of degradation—that which is 'unnecessary' and that which is 'undue.'"[249] He found further support for this interpretation in the fact that an unsuccessful mining-industry-supported bill introduced in the Senate in 1998 would have changed the "or" to an "and," thereby indicating industry's concern with the disjunctive implications.[250]

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246. NRC REPORT, *supra* note 105, at 40.
247. *See* discussion *supra* Part III.A.
248. H.R. REP. NO. 94-1163, at 6 (1976) (emphasis added).
249. Glamis Memo, *supra* note 19, at 7.
250. *Id.*, *citing to* 144 CONG. REC. S10335-02, S10340 (1998).

Solicitor Leshy's interpretation, in turn, led to the promulgation of the "substantial, irreparable harm" standard in the 2000 Regulations. As stated in the preamble to those regulations, "it is clear from the use of the conjunction 'or' that the Secretary has the authority to prevent 'degradation' that is necessary to mining, but undue or excessive. This includes the authority to disapprove plans of operations that would cause undue or excessive harm to the public lands."[251]

The mining industry and new Interior Solicitor William Myers have charged that the promulgation of the "substantial, irreparable harm" standard, as well as the denial of the Glamis Gold mining permit, were the result of an unwarranted, and possibly illegal, interpretation of statutory authority.[252] Solicitor Myers argues that "[w]e cannot automatically assume that the terms [unnecessary and undue] are disjunctive alternatives with entirely separate meanings."[253] He suggests instead that "or" can indicate two words that are equivalents, or "describe nuances of the same concept," such as "lessen or abate," and "designate or dedicate."[254] Following an examination of the dictionary definitions of the words, Solicitor Myers concluded that the meanings of "unnecessary" and "undue" are so related that the terms should be used "jointly to establish parameters for degradation," and that any more restrictive interpretation—such as that applied in the 2000 Regulations—would "inappropriately amend the mining law."[255]

Solicitor Myers' condemnation of the "substantial, irreparable harm" standard rings hollow, however. While the definitions of the words "unnecessary" and "undue" may certainly be construed to overlap in certain regards, the words—unlike

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251. Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 69,999 (Nov. 21, 2000) (to be codified at 43 C.F.R. § 3809).

252. *See* Memorandum from Solicitor, U.S. Dep't of the Interior, to the Secretary, U.S. Dep't of the Interior, Surface Management Provisions for Hardrock Mining, M-37007, at 4 (Oct. 23, 2001) (on file with author) (listing the industry lawsuits filed to challenge the 2000 Regulations); *id.* at 8 (stating that "the 2000 regulations interpret and define the [UUD] standard in a way that, in part, lacks statutory authority."); *id.* at 3 (recommending the "rescission and reconsideration" of the decision to deny the Glamis Gold plan); *see also* Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 54,834, 54,834 (Oct. 30, 2001) (listing the lawsuits filed protesting the 2000 Regulations, and the accompanying allegations of statutory violations).

253. Memorandum from Solicitor, *supra* note 252, at 9.

254. *Id.*

255. *Id.* at 12.

"designate or dedicate," or "lessen or abate"—decidedly do not have the same meaning. While "unnecessary" means "not necessary or required,"[256] "undue" means "not appropriate or suitable, improper, excessive, or immoderate."[257] Legal drafting experts suggest that although the use of "or" can be ambiguous, its meaning is usually inclusive (i.e., "A or B, or both").[258] Putting these definitions together, it does not require much of a stretch to conclude that while some activities may be necessary to mining, those activities might still be inappropriate or unsuitable in certain locations. Finally, interpreting the UUD standard in this manner—with the "or" interpreted as disjunctive—comports with the oft-repeated rule of statutory construction to give each word used individual effect whenever possible.[259]

Given this analysis, there are a multitude of reasons why the "substantial, irreparable harm" standard of the 2000 Regulations was a morally and legally valid interpretation of the UUD mandate. First, although section 1732 of FLPMA explicitly asserted the continuing validity of the Hardrock Act, Congress's overall intent in passing FLPMA was the reasonable protection of public lands. Courts have recognized that the meaning of statutory language should be interpreted with a view to the purpose of the statute as a whole.[260] Second, the Supreme Court has stated that agencies should be accorded considerable deference in interpreting their statutory mandates, particularly when such interpretations require technical expertise and the reconciliation of competing interests.[261] Third, the dearth of any environmental protection provided by

256. WEBSTER'S NEW WORLD DICTIONARY 1461 (3d college ed. 1988).

257. *Id.* at 1456.

258. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 624 (2d ed. 1995).

259. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 404 (2000) (citing United States v. Menasche, 348 U.S. 528, 538-39 (1955)).

260. *See, e.g.*, Gozlon-Peretz v. United States, 498 U.S. 395, 407 (1991) (quoting Crandon v. United States, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.")).

261. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984) (stating that "[i]n these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies").

the Hardrock Act, combined with a concerned, yet irreconcilably stalemated Congress, indicate the absolute necessity of an assertive regulatory stance in order to adequately protect public lands. Finally, as noted earlier, the regulatory imposition of certain standards and operating conditions on industry is hardly unusual.[262] Every other extractive use to which the public lands are subject grants the applicable federal agency the inherent discretion to deny leases or permits, if in the agency's judgment, such activities are unsuitable for the area in question. Granting such discretion to the Department of the Interior to deny mining permits in certain instances is therefore neither unique nor unusual.

The Department of the Interior, under Secretary Babbitt and Solicitor Leshy, did no more than assert its obligation under FLPMA to mitigate the environmental drawbacks of hardrock mining to the maximum of its organic power. Given the fiscal and environmental obsolescence of the Hardrock Act, the inability of Congress to enact reform, and the political power wielded by the mining industry, imposing such assertive regulatory oversight is not only warranted, but imperative. Although after one hundred years, such assertive action undoubtedly came as an unwelcome surprise to an industry grown accustomed to federal largess on a grand scale, one quite imagines that those engaged in industries such as securities, nuclear energy, or manufacturing would find it difficult to muster up much sympathy for the mining industry.

### *B. The Supreme Court Has Consistently Acknowledged the Validity of Similar Regulatory Interpretations*

Despite the increasingly common practice of judicial review of agency actions, courts nonetheless remain deferential both to an agency's interpretation of its own statutory mandate, and its interpretation of its own regulations.[263] The Supreme Court has held that in determining the legitimacy of an agency's interpretation, a reviewing court must answer two questions.[264] First, it must determine whether Congress has "directly spoken

262. *See* discussion *supra* Part II.A.

263. *See Chevron*, 467 U.S. at 842–45; Udall v. Tallman, 380 U.S. 1 (1965); W. RODGERS, ENERGY AND NATURAL RESOURCES LAW 190–240 (2d ed. 1983).

264. *Chevron*, 467 U.S. at 842.

to the precise question at issue."[265] If so, that statement is determinative. If not, however, then the court must determine "whether the agency's answer is based on a permissible construction of the statute."[266] The Court has noted that deference to the agency interpretation is warranted in these circumstances because "'understanding [] the force of the statutory policy in the given situation [depends] upon more than ordinary knowledge . . . .'"[267]

An early judicial validation of an agency's interpretation of its mandate occurred in the seminal case of *Light v. United States*.[268] There, a rancher challenged the authority of the Department of Agriculture to impose regulations requiring ranchers to procure grazing permits and pay fees to allow their animals to graze on federal lands.[269] The statutory mandate granting the Department of Agriculture its authority mentioned nothing whatsoever about grazing. Instead, it simply conferred general authority to regulate "occupancy and use" within the national forests.[270] It was far from settled at that time that the Department of Agriculture could interpret its mandate that broadly and wield that kind of power.[271] Yet the Supreme Court upheld the authority of the Department of Agriculture to impose grazing regulations pursuant to its mandate to regulate occupancy and use, stating that "[t]he United States can prohibit absolutely or fix the terms on which its property may be used."[272] Thus, this case early on established a broad and liberal standard under which an administrative agency could interpret and apply its mandate.

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265. *Id.*

266. *Id.* at 843.

267. *Id.* at 844 (quoting National Broadcasting Co. v. United States, 319 U.S. 190 (1943)).

268. 220 U.S. 523 (1911).

269. *See id.* Light was not capriciously challenging federal authority; he was convinced that he was in the right. State law at the time allowed grazing animals to roam freely, and it was the responsibility of adjacent landowners to fence the animals *out*, not the responsibility of ranchers to fence their animals *in*. Hence, Light had every reason to believe that his animals could graze freely in the national forests, not realizing that the enactment of federal grazing regulations had automatically preempted state law. *See* WILKINSON, *supra* note 6, at 92.

270. *See* WILKINSON, *supra* note 6, at 92.

271. *See id.*

272. *Light*, 220 U.S. at 536.

In *United States v. Riverside Bayview Homes, Inc.*,[273] the Court stated unequivocally that "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."[274] In that case, the Army Corps of Engineers, under its administrative authority to enforce the provisions of the Clean Water Act,[275] had promulgated regulations that prohibited discharge of fill materials into "navigable waterways" of the United States.[276] The term "navigable waterways" was understood at the time to refer to any rivers that either naturally or in an improved condition[277] were passable by ships.[278] Yet the Corps' regulations prohibited discharge into "all 'freshwater wetlands' . . . adjacent to other covered waters."[279] In essence, the Corps was extending the term "navigable waterways" to encompass swamplands. When a developer challenged this sweeping interpretation, the Supreme Court granted certiorari specifically to consider "the proper interpretation of the Corps' regulations defining 'waters of the United States' and the scope of the Corps' jurisdiction under the Clean Water Act."[280] The Court upheld the Corps' interpretation, stating that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act."[281]

As recently as 1995, the Supreme Court continued to maintain this liberal stance in regard to the broad deference

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273. 474 U.S. 121 (1985).

274. *Id.* at 131.

275. 33 U.S.C. § 1344 (1994).

276. 33 U.S.C. § 323.2(c) (1994).

277. An improved condition refers to the construction of manmade features such as dams or locks to enhance navigability.

278. *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940). The term "navigability" had undergone an interpretive evolution even earlier. *See generally* Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824); River and Harbors Act, 48 U.S.C. § 1399 (1930) (repealed 1982).

279. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 124 (1985).

280. *Id.* at 126.

281. *Id.* at 135. *But see* Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001). In that case, the Court rejected the Corps' regulatory jurisdiction over isolated wetlands *not* adjacent to other bodies of water. However, the Court expressly noted that it was not deferring to the Corps' interpretation of the statute in this instance only because that interpretation extended beyond the confines of congressional jurisdiction under the Commerce Clause. *See id.* at 166.

given regulatory interpretation and authority in *Babbitt v. Sweet Home Chapter of Communities For a Greater Oregon.*[282] In that case, the Department of the Interior had promulgated regulations pursuant to the Endangered Species Act.[283] The regulations interpreted the statute's prohibition on "takings" of endangered or threatened species to include harm resulting from "significant habitat modification or degradation."[284] Like the interpretation of "navigable" in *Riverside Bayview Homes*, this interpretation of "takings" went well beyond the commonly understood legal definition.[285] Northwestern loggers challenged the Department of the Interior's regulatory interpretation, arguing that the legislative history did not indicate an intent to interpret the language this broadly.[286] The Supreme Court once again upheld the agency's interpretation, noting that the purpose of the Endangered Species Act supported the Secretary's interpretation to prevent any and all harm to the endangered species.[287]

The most decisive and enduring Supreme Court statement on the extent of deference to agency interpretation is that set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[288] In that case, the Court upheld an interpretation made by the Environmental Protection Agency (EPA) in its regulations implementing specific mandates of the 1977 Amendments to the Clean Air Act.[289] The statute authorized the EPA to promulgate regulations implementing certain requirements on states in order to meet the goals of the statute.[290] Specifically, the regulations required the states to order that stringent pollution control devices be placed on certain "stationary sources" of air pollution. The EPA's rules allowed the states to adopt a "plantwide" definition of the term "stationary source," such that individual sources of pollution within

282. 515 U.S. 687 (1995).

283. 16 U.S.C. § 1531 (1994).

284. Babbitt v. Sweet Home Chapter of Communities For a Greater Oregon, 515 U.S. 687, 691 (1995).

285. The term "taking" commonly referred to the deliberate killing or capturing of an animal, not indirect harm caused by destruction of its habitat. *Id.* at 717 (Scalia, J., dissenting).

286. *See Sweet Home*, 515 U.S. at 691.

287. *See id.* at 697.

288. 467 U.S. 837 (1984).

289. 42 U.S.C. § 7502(b)(6) (1994).

290. *Id.*

the same plant were grouped under a single "bubble."[291] In short, the EPA set forth a definition of "stationary source" that in turn affected the manner in which its regulations were applied.

The *Chevron* Court determined that the EPA's definition of a "stationary source" was made according to an implicit legislative delegation of authority.[292] The Court noted that the legislative history of the Clean Air Act clearly indicated that "in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality."[293] This language echoes the apparent intent of Congress in mandating the UUD standard. Indeed, the need to achieve a reasonable balance between the economic interests of the mining industry and the protection of federal lands could not be stated more clearly.

In decrying the 2000 Regulations and denial of the Glamis Gold permit, the mining industry has repeatedly argued that these actions "entirely ignore[d] long-standing BLM interpretation and practice,"[294] "revised twenty-five years of administrative practice and interpretation,"[295] and are "a clear usurpation of the legislative function by the executive branch."[296] However, the Supreme Court rejected these exact arguments in *Chevron*, holding that:

> The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact the agency

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291. *Chevron*, 467 U.S. at 838.

292. *Id.* at 851.

293. *Id.*

294. *The Effect of Federal Mining Fees and Mining Policy Changes on State and Local Revenues and the Mining Industry: Oversight Hearing Before the House Comm. on Resources, Subcommittee on Energy and Mineral Resources, available at* http://www.glamis.com/properties/california/imperial.html (last visited Apr. 20, 2001) (testimony of Charles A. Jeannes, Senior Vice President Administration and General Counsel, Glamis Gold, Ltd.).

295. *Id.* at 5.

296. *Id.* at 7.

> has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute .... In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.[297]

### *C. The Foregoing Cases Set a Precedent for BLM Interpretation and Application of Its UUD Mandate*

The FLPMA administrative mandate to the BLM to "prevent unnecessary and undue degradation" is of the same nature as the Department of Interior's mandate to prevent "takings" of endangered or threatened species,[298] the Army Corps of Engineers' mandate to prevent discharge of fill materials into the "navigable waters" of the United States,[299] and the EPA's mandate to promulgate regulations and definitions applicable to the states under the Clean Air Act.[300] The UUD mandate is even narrower than the Department of Agriculture's mandate to "make rules and regulations as to the use, occupancy and preservation of the forests,"[301] Yet the disposition of all four cases in favor of the agency's interpretations indicates a remarkably consistent stance by the Supreme Court, spanning some eighty years.

One factor that the Supreme Court consistently applied in interpreting the validity of these agency regulations was legislative intent. The intent of FLPMA, *inter alia*, was to regulate the operations of mines on federal lands, and to prevent "unnecessary and undue" degradation of those lands.[302] The extent of that regulation is obviously the object of much controversy.

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297. *Chevron*, 467 U.S. at 863–65 (citations omitted).

298. *See* Babbitt v. Sweet Home Chapter of Communities For a Greater Oregon, 515 U.S. 687, 691 (1995).

299. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

300. *See Chevron*, 467 U.S. at 837.

301. *See* Light v. United States, 220 U.S. 523, 534 (1911).

302. 42 U.S.C. § 1732(b) (1994).

In interpreting the Endangered Species Act[303] in *Sweet Home,*[304] however, the Supreme Court was straightforward in its approach. Because the intent of the Endangered Species Act was to protect threatened and endangered species from harm, any regulation necessary to serve that end was appropriate.[305] Similarly, because the intent of the Clean Water Act[306] in *Riverside Bayview Homes*[307] was to prevent water pollution, and the intent of the Clean Air Act[308] in *Chevron*[309] was to prevent air pollution, any regulation that aimed toward that end was permissible. Despite the fact that the Army Corps of Engineers' interpretation of "navigable" and the Department of Interior's interpretation of "takings" went far beyond the pale of the precedential and historical definitions of those words, the Court upheld them because they nonetheless carried out the intent of Congress.

Analogously, because one goal of FLPMA is to regulate the operations of mines on federal land, and prevent "unnecessary and undue" degradation, a regulatory interpretation that seeks to achieve that goal would be granted deference by the Court. This negates the mining industry's allegations that promulgation of the "substantial, irreparable harm" standard was in excess of the BLM's authority and tantamount to regulatory legislation. Although mining companies understandably resisted the expanded interpretation of the BLM's mandate evident in the "substantial, irreparable harm" standard of the 2000 Regulations, it was nonetheless clearly within the scope of the BLM's power to do so, as evidenced by the Supreme Court's consistent holdings.[310] In light of those rulings, interpreting the UUD standard to include the BLM's authority to deny mining permits based on a suitability standard is not even a questionable extension of authority. It is certainly no more of a stretch than interpreting the "taking" of an endangered species

303. 16 U.S.C. § 1531 (1994 & Supp. 1999).
304. 515 U.S. 687 (1995).
305. *See id.* at 702, 704.
306. 33 U.S.C. §§ 1251–1387 (1994 & Supp. 1999).
307. 474 U.S. 121 (1985).
308. 42 U.S.C. §§ 7401–7671 (1994).
309. Chevron U.S.A., Inc. v. Natural Resources, 467 U.S. 837 (1984).
310. *See* discussion *supra* Part V.B.

to include habitat degradation.[311] It is perhaps less of a stretch than calling a marshy bog a "navigable" waterway.[312]

In addition, and more importantly, the "substantial, irreparable harm" standard more faithfully fulfills the legislative intent of FLPMA than does the watered-down version of the prudent operator standard in the 2001 Regulations. The overall intent of FLPMA was to protect the integrity and environmental sustainability of public lands.[313] To achieve that end, while still recognizing the validity of the Hardrock Act, Congress included the UUD standard in FLPMA. Read in both the general context of the legislative intent, as well as in its specific wording, the UUD mandate grants the BLM independent and supplemental authority to prevent mining operations from significantly damaging public resources. The authority includes the ability to prevent undue damage in addition to unnecessary damage. The "substantial, irreparable harm" provision of the 2000 Regulations encompasses this authority, and is therefore a more faithful rendering of the FLPMA mandate than is the interpretation of UUD in the current 2001 Regulations.

## CONCLUSION

No one but the most radical environmentalists is advocating that no mining occur on public lands; indeed, the necessity for minerals is clear. Everyone involved in the controversy over the Hardrock Act, including Democratic and Republican congresspersons, agency personnel, mining watchdog groups, and the general public, acknowledges that some mining must and should occur. What this Comment asserts, however, is that the BLM can and must affirm and enforce reasonable regulatory authority, as it did when it promulgated the "substantial, irreparable harm" standard. That interpretation was clearly within agency discretion, and would have, had it not been rescinded by the Bush administration, survived judicial scrutiny. The BLM must ensure that mining is conducted within reasonable environmental parameters, permits in envi-

311. *See* Babbitt v. Sweet Home Chapter of Communities For a Greater Oregon, 515 U.S. 687, 691 (1995); *see also* discussion *supra* Part V.B.

312. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985); *see also* discussion *supra* Part V.B.

313. *See* discussion *supra* Part V.A.

ronmentally sensitive areas are denied, and competing uses of the federal lands are reasonably accommodated.

Congress has the fiscal, environmental, and moral responsibility to conduct a long-overdue, major overhaul of the General Mining Law of 1872. A compromise between competing interests and both Houses of Congress can and must be forged. When that occurs, the 2000 Regulations can serve as an important model, providing a means whereby the nation's need for minerals may be fairly balanced against environmental integrity and other legitimate uses of federal lands. Until Congress acts, however, the regulatory approach, while a less effective means of correcting the Hardrock Act's many failings, may be the only way to adequately protect our public lands. The Babbitt and Leshy approach achieved that end. The Bush administration's rescission of this long overdue and hard-won attempt at reform therefore flies in the face of both reasonable environmental responsibility and common sense.