IN REPLY REFER TO:
3802/3809
(CA-064.3)

INSTRUCTION MEMORANDUM CDD-95-31
Expires: 09/30/96 JANUARY 18, 1995

To: Area Managers

From: District Manager, California Desert

Subject: Effective Date for Determination of Valid Existing Rights for Mining Law Operations within Wilderness Study Areas

Section 104 (b) of the California Desert Protection Act of 1994 (CDPA; Public Law 103-433) did not release certain lands from wilderness study status which were formerly Section 603 (Federal Land Policy and Management Act, FLPMA; 43 U.S.C. 1701, 1782) wilderness study areas (WSA's). The maps for the areas noted in section 104 (b) of the CDPA include, in some cases, lands which were not previously WSA's. These areas are withdrawn from all forms of entry, including the United States mining laws, as of the date of the Act (October 31, 1994).

All mining activity in these WSA's are to be managed under the regulations at 43 CFR 3802, and under the nonimpairement standards of the Interim Management Policy (IMP). Section 104 (c) of the CDPA establishes that mining claims located prior to the date of the act may have valid existing rights (VER). Mining activity on mining claims located within section 104 (b) WSA's prior to the CDPA, would have to have established VER prior to the date of the FLPMA, October 21, 1976, in order to allow impairing activities to occur within the WSA. With the passage of the CDPA, proposed mining operations that are determined to impair WSA's, will need to have VER established as of October 31, 1994, in order to approve a 3802 plan of operation.

Activities approved under 3802, but prior to passage of the CDPA, will be allowed to continue in accordance with the IMP and regulations. The only change is that the reclamation deadline of June 1988, is no longer valid as only valid mining claims are allowed to operate in these WSA's after passage of the CDPA. As such, mining rights for all proposed new activity determined to impair a WSA will be examined and VER verified before approving the plan of operation.

For all activities approved (plan of operation) or authorized (notice level) under the regulations at 3809 in areas that are now part of a WSA, but were not analyzed under the nonimpairment criteria prior to the CDPA, operators are to be notified that a 3802 plan of operation is required in accordance with 3802.1-1, if conditions warranting a plan apply (see 3802.1-2). The regulations do not allow impairing activities to occur in a WSA unless VER is established. Therefore, you are to examine the activity previously authorized under the nonimpairment criteria. If you conclude that activities previously approved or authorized under 3809 are impairing the WSA, you are to notify the operators that within 30 days from receipt of notice, a VER determination will be conducted, and that all impairing activity specified in the notice is to be suspended pending completion of the VER process.

Should you have any questions regarding this matter, please contact Rob Waiwood in this office at (909) 697-5300.

ALAN STEIN, Acting

Distribution
WO-660 (MIB, Rm. 3411)
SC-500
CA-930
CA-920
CA-950.2

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
California Desert District Office
6221 Box Springs Boulevard
Riverside, California 92507-0714

IN REPLY REFER TO
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(CA-064.3)

INSTRUCTION MEMORANDUM CDD-95-19, Change 1 DECEMBER 29, 1994
Expires: 09/30/95

To: Area Managers

From: District Manager, California Desert

Subject: Procedures to Investigate Valid Existing Rights for Active Plans of Operation and Notices on Mining Claims in BLM Wilderness Areas

DD: 01/11/95

Instruction Memorandum (IM) CDD-95-19 was recently released from this office instructing the field to review their records of notices and plans of operation that are in Wilderness Areas, and provide a list of active cases to CA-064. Please have this information to this office by January 11, 1995.

The IM also directed guidance and policy related to existing operations, and procedures to bring the operation into compliance with the regulations at 43 CFR 3809 and 8560. In the December 12, 1994, IM, you were directed to cease all existing operations pending completion of an examination of the validity of mining claims supporting operations. Because of a possible "takings" issue under the Fifth Amendment to the Constitution, the guidance in IM CDD-95-19 is to be disregarded, and the following policy and procedures are to be followed:

Section 2 of the Wilderness Act of 1964 (16 U.S.C. 1131, 1133) allows "existing private rights" as an exception to the requirement that no development may occur within a wilderness area. In addition, section 103(a) of the California Desert Protection Act of 1994 (CDPA; PL 103-433) states that administration of designated wilderness areas are subject to "valid existing rights". The regulations at 43 CFR 8560.4 provide guidelines on the management of nonconforming uses excepted from the Wilderness Act of 1964. Mining law administration guidance is provided at 8560.4-6.

The BLM may have some discretion in developing a "priority system" for the conduct of valid existing rights determinations in Wilderness Areas. In a Ninth Circuit court case titled Northern Alaska Environmental Center v. Lujan (872 F2d. 901 (1989)), the appellate court ruled in favor of the Secretary of the Interior which allowed the Park Service to prioritize mineral examinations based on limited funding resources and personnel allocations, and recognizing that mineral development activities on mining claims differed based on geographic location and type mining claim.

The court ruled that the Secretary was neither arbitrary or capricious, or abused his discretion in managing Alaska Park mining issues under the general authorities of the Administrative Procedures Act (5 U.S.C. 706(2)(A)). In addition, the U.S. Supreme Court ruled that an agency may consider available resources when enforcing a statutory requirement (Heckler v. Chaney, 470 U.S. 821, 831 (1985)). While our regulations require a mineral investigation report be prepared before approving a plan of operation in a Wilderness Area, or allowing ongoing operations to continue (8560.4-6(j)), there appears to be some degree of flexibility in delaying mineral investigations for ongoing operations under previously approved plans, recognizing that there are limited number of qualified mineral examiners available to conduct such examinations.

The Washington Office is developing guidelines which they will issue as instruction, regarding mineral investigation of mining claims in Wilderness Study Areas. In consultation with the Washington Office, the following guidance is in general conformance with the proposed direction. Pending final guidance from the Washington Office, the following interim guidance is to be followed in the District:

1. No mining operations will be allowed without an approved plan of operation as required by 43 CFR 3809. No existing plan of or notice level operation, or proposed plan of operations will be allowed if such activity will cause unnecessary or undue degradation as defined in the regulations at 3809.0-5(k).

2. Existing plans of operation approved under the regulations at 43 CFR 3802 are now to be managed under the regulations under 43 CFR 3809. No new plan of operations will be required to be filed unless the level of proposed activity warrants a plan modification under 3809.1-7.

3. No proposed or modified plan of operation will be approved without an examination and mineral report, prepared in accordance with Bureau of Land Management Manual 3060, verifying that a discovery of a valuable mineral existed on the claims prior to the date of passage of the CDPA (October 31, 1994).

4. If operations are continuing under a previously approved plan of operation, and the activity being conducted is severance and removal of minerals for sale (mining) and uses reasonably incident thereto, there is a presumption that the mining claim(s) is valid. In order to avoid a possible "takings" issue by shutting the operation down while conducting a mineral investigation of the mining claim(s), the operation will be allowed to continue as previously approved. The operator will be notified that a validity examination will be scheduled and conducted. If the claim(s) is determined to be invalid, a complaint will be issued and the operations will be suspended to a level of insignificance. If approved operations are limited to exploration activity, the operator is to be notified that operations are to be suspended pending completion of the validity examination and mineral report (8560.4-6(j)). In this case, the mineral investigation will be prioritized to be completed in the least possible time, in order to limit the burden on the operator.

5. While some areas included as wilderness in the CDPA were classified as multiple use class (MUC) L, M, or I through the California Desert Conservation Area (CDCA) plan, the provisions of the plan state that all Congressionally designated areas will be managed as MUC C (Page 55 of the 1980 CDCA Plan). Therefore, all notice level operations will have to be reviewed and approved under the plan of operation provisions of the regulations (43 CFR 3809.1-4(d)). Notify the notice level operators that a complete plan of operation is required within 30 days from notification. If the notice level operations were limited to exploration activity, notify the operator that operations that are causing disturbance above "insignificance" are to cease pending completion of a mineral examination and report, and approval of the plan of operation. If the level of activity on a mining claim is related to the

severance and removal of minerals for sale, there is a presumption of validity present. In these cases, the operation will be allowed to continue at the previous notice level until the validity examination is complete and the submitted plan is approved. The operator will be notified that a validity examination will be scheduled and conducted, and if the claim(s) is determined invalid, a complaint will be issued and the operations will be suspended to a level of insignificance. For longstanding, active notices where no activity is or has occurred for some time, it is appropriate to require suspension and reclamation in accordance with 3809.3-7.

5. Mineral investigations are to be conducted immediately for all active, ongoing operations, and upon receipt of acceptable plans of operation. The investigation will be completed within the maximum 90 days from receipt of an adequate plan of operation. Where a complaint has charged a lack of discovery, and active plans of operation are involved, the operator is to be notified that operations shall cease pending final administrative action on the charges in the compliant. It is policy to contest all mining claims where valid existing rights have not been established as of the date of the CDPA.

6. There may be plan or notice level reviews within wilderness areas where there has been no activity under the plan for some time, and the case file remains active. If the approved activity has caused surface disturbance, notify the operator that activities on the mining claim have been in an extended period of non-operation and the plan of operation is in suspense under 3809.3-7, and reclamation is to begin immediately. If the operator wishes to proceed with mineral activity, a modification to the plan of operations will be required, with approval by the State Director before any activity can proceed (3809.1-7). Again, before approval of any modification, the mining claims must be determined valid.

Should you have any questions regarding this matter, please contact Rob Waiwood in this office at (909) 697-5300.

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