United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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Memorandum

To: Secretary

From: Solicitor

Subject: Surface Management Provisions for Hardrock Mining

I. Introduction

The Mining Law of 1872, 30 U.S.C. §§ 22-54 (Mining Law), and the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1784, provide the legal framework for hardrock mining operations on the public lands. In conjunction with the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a., they reflect longstanding congressional intent to support the development of minerals that are critical to the Nation. Since 1980, the Department of the Interior's regulations regarding the surface management of hardrock mining, 43 C.F.R. subpart 3809 (1999) [hereinafter the 1980 regulations], have furthered FLPMA's goal of recognizing "the Nation's need for domestic sources of minerals," 43 U.S.C. § 1701(a)(12), while, at the same time, protecting the environment by preventing "unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). To ensure such environmental protection, the 1980 regulations incorporated other applicable federal and state environmental statutes and regulations. 43 C.F.R. § 3809.0-5(k). In 1999, the National Research Council assessed federal and state laws and the 1980 regulations and concluded that they were generally effective in providing mining-related environmental protection. Hardrock Mining on Federal Lands, 1999 National Research Council Rep. 5.

In November 2000, the Department amended its 1980 regulations. 65 Fed. Reg. 69,998 (Nov. 21, 2000) [hereinafter the 2000 regulations]. The 2000 regulations have been challenged in court as expanding the scope of the regulations beyond the intent of the law. A 1999 Solicitor's Opinion also has been challenged as inconsistent with the law insofar as it created grounds upon which otherwise lawful mining operations may be prohibited. Both the Department's promulgation of the 2000 regulations and its denial of a proposed plan of operations filed by the Glamis Imperial Corporation (Glamis) were based on legal conclusions set forth in the 1999 Solicitor's Opinion. Regulation of Hardrock Mining, M-36999 (Dec. 27, 1999) [hereinafter the 1999 Opinion]. Due to the controversy, including litigation, engendered by the 2000 regulations and the denial of the Glamis plan of operations, I have reviewed the legal bases for both actions and reject certain of the conclusions in the 1999 Opinion. My Opinion

also supports the Department's actions in revising its hardrock mining surface management regulations.

A. Surface Management Regulations for Hardrock Mining

Congress enacted FLPMA on October 21, 1976. 43 U.S.C. §§ 1701-1784. Section 302(b) of FLPMA requires the Secretary of the Interior, in managing the public lands, to "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b) [hereinafter the "unnecessary or undue degradation" standard]. After enactment of FLPMA, the Department published regulations to implement this standard as applied to hardrock mining operations. 45 Fed. Reg. 78,902 (Nov. 26, 1980). The 1980 regulations defined the "unnecessary or undue degradation" standard 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 of similar character and taking into consideration the effects of operations on other resources and land uses." 43 C.F.R. § 3809.0-5(k) (1999). This reflected the ordinary meaning of the terms in the statute and came to be known as the "prudent operator" standard.

On November 21, 2000, the Department published new regulations that substantially amended the 1980 regulations. 65 Fed. Reg. 69,998 (Nov. 21, 2000). Based in part on the legal conclusions in the 1999 Opinion, the regulations revised and expanded the definition of "unnecessary or undue degradation" to include conditions, activities, or practices that "result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated." Id. at 70,115, 70,121-22 (emphasis added) [hereinafter the "substantial irreparable harm" criterion]. The Department's adoption of the "substantial irreparable harm" criterion has generated considerable controversy and litigation because the criterion authorizes the Department to entirely prevent mining activity, even when the mine operator has otherwise complied with all other relevant statutory and regulatory requirements.

Various plaintiffs, including the State of Nevada, have filed four lawsuits challenging the 2000 regulations. On March 23, 2001, the Department published a proposed rule to suspend the 2000 regulations while the Bureau of Land Management (BLM) reviewed "some of the new requirements in light of issues plaintiffs raise in [these] four lawsuits." 66 Fed. Reg. 16,162 (Mar. 23, 2001). While the Department has been engaged in reconsidering the 2000 regulations, I have reviewed the 1999 Solicitor's Opinion and the "substantial irreparable harm" criterion to determine whether the criterion is supported by applicable law.

I conclude that relevant legal authorities require removal of the "substantial irreparable harm" criterion from the definition of "unnecessary or undue degradation" through the rulemaking process currently underway within the Department. The Mining Law opens the public lands to location of mining claims and attendant mining operations. FLPMA amends the Mining Law only in four limited ways, none of which permits disapproval of otherwise allowable mining operations on the assumption that they would cause "substantial irreparable harm" to the

public lands. Moreover, I am satisfied that FLPMA's mandate to prevent unnecessary or undue degradation of the public lands can be accomplished in the absence of a "substantial irreparable harm" criterion, as it had been for twenty years under the predecessor 43 C.F.R. subpart 3809 regulations.

B. The Proposed Glamis Imperial Gold Mine

In December 1994, Glamis filed a proposed plan of operations with BLM for a gold mine to be developed on mining claims in Imperial County, California. The 1,650-acre Glamis Imperial Gold Mine was proposed to be developed in the southeastern part of the 25 million-acre region designated by Congress as the California Desert Conservation Area (CDCA). Although BLM chose approval of the mine as the preferred alternative in two separate Draft Environmental Impact Statements in 1996 and 1997, it nevertheless chose disapproval of the mine as the preferred alternative in the Final Environmental Impact Statement in 2000. Secretary Babbitt denied the proposed plan of operations on January 19, 2001.

Secretary Babbitt's denial was based on the application of the "undue impairment" provision found in section 601(f) of FLPMA, 43 U.S.C. § 1781(f), as interpreted by the 1999 Opinion. For the reasons explained below, I conclude that "undue impairment" in section 601 must be defined by regulation before the Department can apply it to deny a plan of operations. Because no regulations defining "undue impairment" have been promulgated under FLPMA since its enactment in 1976, I recommend the rescission and reconsideration of any decisions by the Department to deny a plan of operations based on the application of the "undue impairment" provision, including the decision to deny the Glamis proposed plan of operations.

II. Background

A. Regulatory History

In the over one hundred years between enactment of the Mining Law and FLPMA, Congress had established no standards for the Secretary of the Interior to use to regulate hardrock mining activities on the public lands. In FLPMA, Congress for the first time created a statutory standard. Section 302(b) of FLPMA states that "[i]n managing the public lands, the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b) (emphasis added). Congress did not define what it meant by "unnecessary or undue degradation," nor does the legislative history provide much assistance.

In 1980, the Department promulgated its first regulations interpreting the "unnecessary or undue degradation" standard as disturbance greater than what would normally result when an activity is being conducted by a prudent operator using standard mining practices. 45 Fed. Reg. 78,902, 78,910 (Nov. 26, 1980); 43 C.F.R. § 3809.0-5(k) (1999). Although the Department's 1980 definition has been applied to thousands of mining operations on the public lands, it has never been challenged in court.

On December 27, 1999, Solicitor John D. Leshy issued an opinion entitled Regulation of Hardrock Mining, M-36999 (Dec. 27, 1999). The 1999 Opinion stated that the 1980 regulations failed to exercise the full extent of the Secretary's authority under section 302(b). 1999 Opinion, at 9. Solicitor Leshy opined that section 302(b) authorizes the Secretary to prohibit activities or practices that the Secretary finds are unduly degrading, even though necessary to mining. Id. at 7. This Opinion is discussed in greater detail in the next section.

On November 21, 2000, the Department published the 2000 regulations regarding surface management of operations on mining claims. These new regulations substantially amended the 1980 regulations. 65 Fed. Reg. 69,998 (Nov. 21, 2000). The preamble to the 2000 regulations quoted some of the language from the 1999 Opinion, id. at 70,017-18, to support a revised and expanded regulatory definition of "unnecessary or undue degradation" that includes conditions, activities, or practices that "[o]ccur on mining claims or millsites located after October 21, 1976 (or on unclaimed lands) and result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated." Id. at 70,115 (emphasis added).

The State of Nevada, a mining trade association, a mining company and an environmental group filed separate judicial challenges to the 2000 regulations. Nevada v. United States Dep't of the Interior, No. CV-N01-0040-ECR-VPC (D. Nev.); National Mining Assoc. v. Norton, No. 00CV-2998 (D.D.C.); Newmont Mining Corp. v. Norton, No. 01CV-23 (D.D.C.); Mineral Policy Center v. Norton, No. 01CV-73 (D.D.C.). On March 23, 2001, the Department published a proposed rule to suspend the 2000 regulations while BLM reviewed "some of the new requirements in light of issues plaintiffs raise in [these] four lawsuits." 66 Fed. Reg. 16,162 (Mar. 23, 2001).

B. Glamis History

In December 1994, Glamis filed a proposed plan of operations with BLM for a gold mine to be developed on mining claims in Imperial County, California. The 1,650-acre Glamis Imperial Gold Mine was proposed to be developed in the southeastern part of the 25 million-acre region designated by Congress as the CDCA.

In November 1996, BLM released a Draft Environmental Impact Statement/ Environmental Impact Report (DEIS/EIR)[1] addressing the Imperial project. On August 1, 1997, in response to Glamis's substantial plan revisions, BLM withdrew the DEIS/EIR and in November 1997, it released a revised DEIS/EIR. In both drafts, BLM's preferred alternative was approval of Glamis's proposed plan of operations, with some additional mitigation measures. On August 24, 1998, BLM requested the Advisory Council on Historic Preservation (Advisory

[1] BLM prepared the DEIS in coordination with Imperial County, California. Under the California Environmental Quality Act, the reporting document is called an environmental impact report (EIR). Cal. Pub. Res. Code §§ 21000 et seq.

Council) to review the Glamis proposal. Under the National Historic Preservation Act (NHPA), federal agencies must "take into account the effect of [an] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]" prior to approval of the undertaking. 16 U.S.C. § 470f. Federal agencies are to give the Advisory Council "a reasonable opportunity to comment" regarding proposed undertakings. However, the NHPA does not give the Advisory Council the authority to require an agency to take any particular action regarding an undertaking it has reviewed and on which it has commented. See id. § 470j.

On November 2, 1998, BLM proposed to withdraw 9,360 acres of land in Imperial County, California, including the entire area of the Glamis project. The Secretary of the Interior is authorized to withdraw lands from the operation of the public land laws under section 204 of FLPMA. 43 U.S.C. § 1714. To do so, the Secretary must first publish a notice of the proposed withdrawal in the Federal Register. Id. § 1714(b)(1). The November 2, 1998 Federal Register notice stated that the proposed withdrawal was intended to "protect the archaeological and cultural resources in the Indian Pass Area of Critical Environmental Concern and Expanded Management Area (collectively the 'Indian Pass area')." 63 Fed. Reg. 58,752 (Nov. 2, 1998). Only 620 acres of the lands included in the proposed withdrawal are within the Indian Pass Area of Critical Environmental Concern (ACEC).[2] The remaining 8,740-acre "expanded management area," which includes the proposed Glamis project area, is outside the ACEC. The Federal Register notice stated that "[t]he Indian Pass area is considered to be a sacred site by the Quechan people." Id. Publication of a withdrawal notice serves to segregate the lands from the operation of the public lands laws, as specified in the notice. 43 U.S.C. § 1714. The proposed withdrawal segregated all of the designated acreage, both inside and outside the ACEC, subject to valid existing rights, from settlement, sale, location, or entry under the general land laws, including the mining laws, for a period of two years. 63 Fed. Reg. 58,752 (Nov. 2, 1998). The land remained open to the operation of the mineral leasing, geothermal leasing, and material sales laws. Id. A segregation ends when one of the following occurs: (1) the Secretary rejects the withdrawal application; (2) the Secretary withdraws the lands; or (3) two years elapse from the date of the notice. 43 U.S.C. § 1714.

On October 19, 1999, the Advisory Council concluded that the overall impacts of the proposed mine "would result in irreparable degradation of the sacred and historic values" of the land and advised BLM to "take whatever legal means available to deny the proposal for the project." Letter from Cathryn Buford Slater, Chairman, Advisory Council on Historic Preservation, to Bruce Babbitt, Secretary, Department of the Interior 3 (October 19, 1999). Two months later, Solicitor Leshy issued the 1999 Opinion in which he analyzed sections 302(b)

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[2] The Indian Pass Area of Critical Environmental Concern (Indian Pass ACEC) was designated in 1980 as part of BLM's California Desert Conservation Area Plan (CDCA Plan). CDCA Plan, at 104. All but 620 acres of the Indian Pass ACEC were withdrawn from the operation of the Mining Law in 1994 under the California Desert Protection Act. Pub. L. No. 103-433, § 102(27), 108 Stat. 4471, 4481 (1994).

and 601(f) of FLPMA, 43 U.S.C. §§ 1732(b), 1781(f), as applied to the Glamis proposal.

While section 302(b) of FLPMA, which includes the "unnecessary or undue degradation" standard, applies to all public lands, section 601(f) applies only to public lands within the CDCA. Section 601(f) of FLPMA states that any regulations that may be promulgated to implement section 601 "shall provide for such measures as may be reasonable to protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment . . . ." 43 U.S.C. § 1781(f) (emphasis added). With regard to this section, the 1999 Opinion advised BLM that this provision "might also permit denial of a plan of operations if the impairment of other resources is particularly 'undue,' and no reasonable measures are available to mitigate that harm." 1999 Opinion, at 17-18. The 1999 Opinion advised BLM that "[i]f the BLM agrees with the Advisory Council, it has, in our view, the authority to deny approval of the plan of operations." Id. at 19.

On October 27, 2000, the Secretary issued a final withdrawal for the Indian Pass area on which the proposed Glamis Imperial Gold Mine would have been developed from entry under the public land laws, including the mining laws, for a period of twenty years, subject to valid existing rights, "to protect the Native American values, cultural resources, and visual quality of the Indian Pass area." 65 Fed. Reg. 64,456 (Oct. 27, 2000). Because these lands were not withdrawn from mineral entry before Glamis located its mining claims, the withdrawal is subject to Glamis's mining claims to the extent the claims were valid on the date of the withdrawal and continue to be valid today. The Department has not completed a validity determination regarding Glamis's mining claims or mill sites. As a result of the withdrawal, Glamis cannot locate any new mining claims on these lands.

On November 17, 2000, BLM completed a Final Environmental Impact Statement that specified the No Action alternative as the preferred alternative, which meant that BLM preferred disapproving the proposed plan of operations. Secretary Babbitt subsequently signed a Record of Decision for the Imperial Project Gold Mine Proposal by which the Department denied the proposed plan of operations on January 17, 2001. Glamis filed a judicial challenge to that decision and the Indian Pass area withdrawal. Glamis Imperial Corp. v. United States Dep't of the Interior, No. 01-01CV00530 (RMU) (D.D.C.).

Because of the broad-ranging impact of the 1999 Opinion on the regulations and proposed plans of operations for hardrock mining on the public lands, I have reviewed the legal conclusions reached in that Opinion regarding both the "unnecessary or undue degradation" standard and the "undue impairment" provision.

III. The "Unnecessary or Undue Degradation" Standard

A. Mining Law Background

The Mining Law invites citizens to locate mining claims on public lands open to location by declaring that "all valuable mineral deposits in lands belonging to the United States . . . shall

be free and open to exploration and purchase . . . ." 30 U.S.C. § 22. Mining claim location is a self-initiated act that does not require approval of the United States to establish property rights. When a mining claimant properly locates a mining claim, the claimant acquires a "unique form of property." Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963). This unique property interest includes the right to use so much of the surface as is reasonably necessary to develop the discovered valuable mineral deposit and the right to extract all valuable locatable minerals without payment to the United States. As described by the Supreme Court:

> "Discovery" of a mineral deposit, followed by the minimal procedures required to formally "locate" the deposit, gives an individual the right of exclusive possession of the land for mining purposes, 30 U.S.C. § 26; as long as $100 of assessment work is performed annually, the individual may continue to extract and sell minerals from the claim without paying any royalty to the United States, 30 U.S.C. § 28.

United States v. Locke, 471 U.S. 84, 86 (1985). Thus, the Mining Law provides mining claimants with considerable rights to conduct operations to extract minerals from the public lands.

B. Summary of the Pertinent Legal Conclusions in the 1999 Opinion

One of the two issues[3] the 1999 Opinion addresses is whether FLPMA authorizes BLM to protect cultural and historic resources in connection with the Glamis proposal. To answer this question, the 1999 Opinion first discusses the "unnecessary or undue degradation" standard found in section 302(b) of FLPMA. 43 U.S.C. §1732(b). The 1999 Opinion states:

> 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." That the statutory conjunction is "or" instead of "and" strongly suggests Congress was empowering the Secretary to prohibit activities or practices that the Secretary finds are unduly degrading, even though "necessary" to mining.

1999 Opinion, at 7.

The 1999 Opinion discusses a number of reasons for concluding that the word "or" in the "unnecessary or undue degradation" provision suggests this. First, the 1999 Opinion cites two

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[3] The other issue is whether the First Amendment to the United States Constitution places limits on BLM's consideration of the Glamis proposal. In answer to this question, the 1999 Opinion advises that the First Amendment "does not compel rejection of the proposed mining plan on the basis of its potential impact on tribal religious practices." I find no legal basis to disturb this conclusion.

law review articles for the proposition that the "unnecessary or undue degradation" standard "gives BLM the authority to impose restrictive standards in particularly sensitive areas, 'even if such standards were not achievable through the use of existing technology.'" Id. Second, the 1999 Opinion points to a mining industry-supported bill introduced in the Senate in 1998 that, among other things, would have changed the word "or" in the "unnecessary or undue degradation" provision of FLPMA to an "and," thus suggesting that industry felt that the word "or" was disadvantageous to its interests. Id. The 1999 Opinion also cites to a footnote in Utah v. Andrus, 486 F. Supp. 995, 1005 n.13 (D. Utah 1979), where the District Court quoted from an amicus brief by the American Mining Congress to state that "[a] reasonable interpretation of the word 'unnecessary' is that which is not necessary for mining. 'Undue' is that which is excessive, improper, immoderate or unwarranted." Id. at 7-8.

The 1999 Opinion ultimately treats "undue degradation" as a separate standard from "unnecessary degradation." From this premise, the Opinion concludes that "BLM could have adopted (and indeed might be obliged to adopt) more stringent rules in order to ensure prevention of 'undue degradation.'" Id. at 9. However, in answer to the question it first posed -- whether FLPMA authorizes BLM to protect cultural and historic resources in connection with the Glamis proposal -- the 1999 Opinion states that, under the definition of "unnecessary or undue degradation" in the 1980 regulations, "while BLM may mitigate harm to 'other resources,' it may not simply prohibit mining altogether in order to protect them." Id.

C. Review of the "Unnecessary or Undue Degradation" Standard

The Department administratively interpreted and applied the "unnecessary or undue degradation" standard in both its 1980 and 2000 regulations. As will be evident in the analysis to follow, the 1980 regulations provided a reasonable interpretation of the "unnecessary or undue degradation" standard. In contrast, the 2000 regulations interpret and define the standard in a way that, in part, lacks statutory authority.

In interpreting the "unnecessary or undue degradation" standard, the primary question is what Congress meant by the phrase. Although there is a "Definitions" section in FLPMA, it does not define any of the terms in the phrase "unnecessary or undue degradation." See 43 U.S.C. § 1702. Nor is there any other provision of FLPMA that provides any explanation of this phrase. Similarly, FLPMA's legislative history is unavailing.

The starting point in statutory interpretation is the language of the statute itself. Good Samaritan Hospital v. Shalala, 508 U.S. 402, 409 (1993). Courts have concluded that if Congress's intention on a particular question can be ascertained by employing traditional tools of statutory construction, it must be given effect. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984). We will, therefore, focus on the following questions: What is the plain meaning of this phrase? What is the ordinary or common meaning of the terms used in the phrase? Is the phrase clear and unambiguous? If it is not clear and unambiguous, what is a reasonable interpretation of the phrase? How is the meaning of the phrase affected by reading it as part of FLPMA as a whole? See Sutherland Stat. Const.

§§ 46.01, 46.04, 46.05, 47.28 (6th ed. 2000).

Given the recent judicial challenges over the meaning of "unnecessary or undue degradation," we may reasonably conclude that the phrase is not plain and admits of more than one meaning. However, in construing federal statutes, courts presume that the ordinary or common meaning of the words chosen by Congress accurately express the legislative intent. Mills Music, Inc. v. Snyder, 469 U.S. 153, 164 (1985); Sutherland Stat. Const. § 47.28. We will first look at the ordinary meaning of the word on which the 1999 Opinion placed a great deal of emphasis -- the word "or."

1. The "Or" in the "Unnecessary or Undue Degradation" Standard

The word "or" has a number of common meanings. Placed between two words, it signifies that the two words are alternatives. However, there are various kinds of alternatives. In some cases, the two words may differ in nature, as the 1999 Opinion suggested. In other contexts, one of the terms may include or modify the other. According to the Oxford English Dictionary, when two words are coordinated in this way, the two things "may differ in nature, or quality, or merely in quantity, in which case the one may include the other." Oxford English Dictionary, at 2001 (Compact ed. 1971). In addition, "[t]he second member may also express a correction or modification of the first." Id. In some cases, "or," when used after a primary statement, "appends a secondary alternative, or consequence of setting aside the primary statement." Id. Additionally, the two words may be equivalents,[4] such as in the phrase "lessen or abate." FLPMA contains other examples where the word "or" is used between two words that appear to be nearly equivalent or which describe nuances of the same concept, including "designate or dedicate" in section 101, 43 U.S.C. § 1701(a)(4); "department or agency" in section 101, id. § 1701(a)(10); "systems or processes" in section 102, id. § 1702(a); and "principal or major uses" in section 102 which, significantly, Congress defines as a single term. Id. § 1702(l).

It is not clear from the context in which we find the word "or" in section 302(b) of FLPMA what sort of alternatives "unnecessary" and "undue" are. We cannot automatically assume that the terms are disjunctive alternatives with entirely separate meanings. They may be reasonably viewed as similar terms (the second term defining the first) or as equivalents.

The Senate bill that preceded FLPMA did not contain an "unnecessary or undue degradation" standard. See S. 507, 94th Cong. (1976). The standard first appears in the later House bill. H.R. 13777, 94th Cong. § 202(f)(1) (1976). In its section-by-section analysis of the bill, the House Committee on Interior and Insular Affairs paraphrased the section that would become section 302(b) but did not define the phrase "unnecessary or undue degradation." The bill went to a Conference Committee and emerged with the Senate bill number, S. 507, but

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[4] Merriam-Webster's Collegiate Dictionary, at 817 (10th ed. 1998) (defining "or" as a "function word to indicate . . . the equivalent or substitutive character of two words or phrases"); Oxford English Dictionary, at 2001 ("Or connects two words denoting the same thing.").

otherwise more closely resembled the House bill. See H.R. Conf. Rep. No. 94-1724 (1976), reprinted in 1976 U.S.C.C.A.N. 6228. The Conference Committee Report described the ways in which the Conference bill differed from both the House and Senate bills. With regard to the "unnecessary or undue degradation" provision, the Conferees noted that they adopted provisions "giving the Secretary of the Interior general authority to prevent needless degradation of the public lands." Id. at 58, reprinted in 1976 U.S.C.C.A.N. at 6230 (emphasis added). The Conferees' use of the word "needless," which means "not necessary" or "unnecessary," Merriam-Webster's Collegiate Dictionary, at 776, to represent the "unnecessary or undue degradation" standard does not support a view that the terms have disparate meanings. It therefore does not inevitably follow, as the 1999 Opinion contends, that Congress's use of the word "or" necessarily suggests that it was empowering the Secretary to prohibit activities the Secretary finds are unduly degrading, even though necessary to mining.

2. Preventing Degradation That is "Unnecessary" or "Undue"

Keeping in mind the joinder of the words "unnecessary" and "undue" as just described, we will consider the common meaning of the two terms. The 1999 Opinion does not define either of these terms. To discern what Congress meant by them in the absence of legislative history, it is helpful to consider not only the common meaning of the terms themselves, but also their antonyms, "necessary" and "due."

The word "unnecessary" means simply "not necessary." Merriam-Webster's Collegiate Dictionary, at 1294. The word "undue" means "exceeding or violating propriety or fitness"[5] or "excessive."[6] Id. at 1290. As defined in a case cited in the 1999 Opinion, "[a] reasonable interpretation of the word 'unnecessary' is that which is not necessary for mining. 'Undue' is that which is excessive, improper, immoderate or unwarranted." Utah v. Andrus, 486 F. Supp. 995, 1005 n.13 (D. Utah 1979).

On the other hand, to qualify as "necessary" degradation, the degradation must be required, inescapable or unavoidable. Merriam-Webster's Collegiate Dictionary, at 776. The word also may mean "essential in order to achieve a given objective." Oxford English Dictionary, at 594. To qualify as "due" degradation, the degradation must be "according to accepted notions or procedures" or "required or expected in the prescribed, normal or logical course of events." Merriam-Webster's Collegiate Dictionary, at 357-58. These common definitions illustrate that the terms, while ambiguous, do establish parameters for "degradation."

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[5] The term "propriety" means a "quality or state of being proper." Merriam-Webster's Collegiate Dictionary, at 936.

[6] The dictionary defines "excessive" as "going beyond a normal limit" or "an amount or degree too great to be reasonable or acceptable." Merriam-Webster's Collegiate Dictionary, at 404.

In addition, the meaning of statutory language is determined by context, including the design and purpose of the statute as a whole. Gozlon-Peretz v. United States, 498 U.S. 395, 407 (1991) (quoting Crandon v. United States, 494 U.S. 152, 158 (1990)). We are cautioned by the courts to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)).

As stated in the 1999 Opinion, "FLPMA explicitly acknowledged the continued vitality of the Mining Law of 1872." 1999 Opinion, at 4. In addition, section 302(b) of FLPMA states:

> Except as provided in section 1744, section 1782, and subsection (f) of section 1781 of this title and in the last sentence of this paragraph, 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.

43 U.S.C. § 1732(b) (emphasis added).[7] Thus, Congress stated explicitly that FLPMA does not "amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act," except in four limited ways, the last of which is the "unnecessary or undue degradation" standard. As already mentioned, the "unnecessary or undue degradation" standard in FLPMA states that "[i]n managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." Id. This language, on its face, recognizes that, in managing the public lands, the Secretary is not authorized to prevent degradation caused by mining that is necessary and due. To do so would be an unlawful expansion of Congress's amendment of the Mining Law in FLPMA.

Therefore, when publishing regulations to define the phrase "unnecessary or undue degradation," or in taking any other action to manage the public lands based on this standard, the

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[7] The House Committee on Interior and Insular Affairs described this provision somewhat more emphatically when it stated:

> The section specifies that no provision of the Mining Law of 1872 will be amended or altered by this legislation except as provided in section 207 (recordation of mining claims), subsection 401(f) (regulation of mining in the California desert), section 311 (wilderness review areas and wilderness areas), and except for the fact 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.

H.R. Rep. No. 94-1163, at 6 (1976) (emphasis added).

objective should be to define the type of degradation you may prevent in a way that, as nearly as practicable, reflects the common meaning of each word in the phrase "unnecessary or undue." Because, as we have seen, the common meanings of "unnecessary" and "undue" overlap in many ways, it is appropriate to use the terms jointly to establish parameters for degradation. Such an approach would define the phrase as a whole while giving effect to each word used in the statute. See Williams v. Taylor, 529 U.S. 362, 404 (2000) (citing United States v. Menasche, 348 U.S. 528, 538-539 (1955) (noting the "cardinal principle of statutory construction" that, if possible, every clause and word of a statute must be given effect)). It is appropriate for the definition to be functional in nature, in that it may describe the activities that violate the "unnecessary or undue" degradation standard.

Because the common meaning of the words is somewhat inexact, you may exercise discretion. However, you should exercise that discretion with a view to promulgating a definition that reasonably and fairly encompasses the ordinary or common meaning of the words used by Congress in a way that can be objectively applied. A definition that is more restrictive -- that prevents degradation that would be caused by an operator who is using accepted and proper procedures in accordance with applicable federal and state laws and regulations when such degradation is required to develop a valuable mineral deposit -- would inappropriately amend the Mining Law and impair the rights of the locator.

The two law review articles to which the 1999 Opinion cites do not change this analysis, as the articles merely reflect the commentators' views about how to define the section 302(b) standard. See Michael Graf, Application of Takings Law to the Regulation of Unpatented Mining Claims, 24 Ecology L.Q. 57, 108 n.257 (1997) (acknowledging that the author's suggested definition of "undue degradation" is no more than "potential authority."); Marla E. Mansfield, On the Cusp of Property Rights: Lessons From Public Land Law, 18 Ecology L.Q. 43, 83 (1991) (stating that "[a]ctivities that involve too great a sacrifice of collective values for too little societal gain should be considered 'undue,' even if they would provide a private party with a positive economic return." (emphasis added)). Likewise, the 1998 mining law reform bill to which the 1999 Opinion cites, see 1999 Opinion, at 7, that proposed to change the word "or" in the section 302(b) standard to an "and" is hardly evidence that the mining industry interpreted the "or" in the standard to give the Secretary the authority posited by the 1999 Opinion. The proposed legislation failed to become law and thus never amended the existing statutory standard. See Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 169 (2001) ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute" (quoting Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 187 (1994) (internal quotation marks omitted)). Moreover, the proposed change in the language of section 302(b) to a different conjunction could simply have been the result of an inadvertent drafting error. We note that the current BLM regulations regarding mineral materials sales twice make this error, referring to "unnecessary and undue degradation." 43 C.F.R. §§ 3600.0-5(k) and 3622.4(a)(4)(1999) (emphasis added).

The definition of "unnecessary or undue degradation" in the 1980 regulations most closely approximates a contemporaneous interpretation of FLPMA and, therefore, deserves

consideration. The definition, which was in effect until the 2000 regulations, stated:

> Unnecessary or undue degradation means surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation. Where specific statutory authority requires the attainment of a stated level of protection or reclamation, such as in the California Desert Conservation Area, Wild and Scenic Rivers, areas designated as part of the National Wilderness System administered by the Bureau of Land Management and other such areas, that level of protection shall be met.

43 C.F.R. § 3809.0-5(k) (1999).

This definition fairly reflected the common meanings of the terms in the "unnecessary or undue degradation" provision. It served only to prevent degradation that would be caused by an operator who is not using accepted and proper procedures, not acting in accordance with applicable laws and regulations, or engaging in activities not required to develop a valuable mineral deposit.

In comparison, in the 2000 regulations, the Department published the following regulatory definition:

> Unnecessary or undue degradation means conditions, activities, or practices that:
> (1) Fail to comply with one or more of the following: The performance standards in § 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and State laws related to environmental protection and protection of cultural resources;
> (2) Are not "reasonably incident" to prospecting, mining, or processing operations as defined in § 3715.0-5 of this title;
> (3) Fail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas; or
> (4) Occur on mining claims or millsites located after October 21, 1976 (or on unclaimed lands) and result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.

65 Fed. Reg. 69,998, 70,115 (Nov. 21, 2000) (to be codified at 43 C.F.R. subpart 3809).

I agree that the first element in the 2000 regulatory definition reasonably comports with the common meaning of the terms "unnecessary or undue degradation." It removes the subjective "prudent operator" standard, and replaces it with a functional definition that objectively references the specific performance standards, plan requirements, and Federal and State laws that a prudent operator would reasonably follow in conducting mining operations. Similarly, the second element -- stopping activities that are not reasonably incident to prospecting, mining, or processing operations -- derives from the Surface Resources Act of 1955 which prohibits the use of mining claims "for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto," 30 U.S.C. § 612, and would prevent wholly unnecessary degradation. The third element merely cross references additional legal authorities which apply by their own terms. This is discussed below in the context of the CDCA. However, the fourth element in the definition, which we will refer to as the "substantial irreparable harm" criterion, presents a significant departure from the 1980 regulatory definition and, therefore, merits additional analysis.

The analysis must begin with the recognition that the phrase "substantial irreparable harm" does not appear in FLPMA. And because the phrase it is itself very susceptible of interpretation, it does little to clarify what is meant by "unnecessary or undue degradation." Consequently, applying such an imprecise criterion only increases the potential for arbitrary decision making by the Department and could be applied in a way that would impede otherwise expected and allowable degradation caused by mining operations. For example, the operations could be essential to the development of a valuable mineral deposit, could follow accepted and proper procedures, could comply with all of the performance standards in § 3809.420, the approved plan, and other applicable federal and state laws and still be disapproved because of this criterion.

As noted above, FLPMA amends the Mining Law only as provided in four limited ways, and preventing necessary and due degradation is not one of them. As the Department stated in the preamble to the 1980 regulations, "Section 302(b) of the Federal Land Policy and Management Act amended the 1872 Mining Law not to prevent irreparable damage, but to prevent unnecessary or undue degradation." 45 Fed. Reg. 78,902, 78,906 (Nov. 26, 1980). The statute's relatively common words and limited legislative history are devoid of evidence that Congress intended to amend the Mining Law to impair claimants' rights by preventing necessary and due degradation. Because the "substantial irreparable harm" criterion as described in the 2000 regulations likely would impede such lawful degradation, FLPMA does not authorize it.

Section 302(b) requires the Secretary to take only those actions that are "necessary" to prevent unnecessary or undue degradation. 43 U.S.C. § 1732(b) ("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)). A "substantial irreparable harm" criterion is not necessary to prevent unnecessary or undue degradation. Rather, there are other

statutory and regulatory authorities available that explicitly authorize the Secretary to take actions that would accomplish the goal of the "substantial irreparable harm" criterion to prevent irreparable harm to significant scientific, cultural, or environmental resource values. These include: the Endangered Species Act, 16 U.S.C. §§ 1531-1534; the Archaeological Resources Protection Act, id. §§ 470aa - 470ll; section 204 of FLPMA, 43 U.S.C. § 1714, for withdrawing lands from the operation of the Mining Law; and section 202(c)(3) of FLPMA, id. § 1712(c)(3), for establishing ACECs as part of the land use planning process.

Importantly, FLPMA defines ACECs as "areas within the public lands where special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards." 43 U.S.C. § 1702(a). Section 202 provides authority for management decisions that offer protection for ACECs by allowing the BLM to eliminate one or more of the principal or major uses of the land. Id. § 1712(e). However, lands within ACECs may be "removed from or restored to the operation of the Mining Law of 1872 . . . only by withdrawal action pursuant to section 1714 of the Federal Land Policy and Management Act or other action pursuant to applicable law." Id. § 1712(e)(3). Although section 202 does not amend the Mining Law and cannot impair the valid existing rights of mining claimants, BLM may establish protective conditions to prevent irreparable damage within ACECs. Id. § 1712. In the CDCA Plan, for example, BLM imposed one or more general management requirements on each of ninety-five ACECs it designated within the CDCA. Those general management requirements include, among others, controlling vehicle access, increasing federal presence, controlling grazing use, and stabilizing features. Thus, FLPMA establishes a specific means to protect important resources on the public lands from irreparable damage. The Secretary can protect these resources by using the statutorily-created land use planning process of establishing ACECs, without relying on an unwarranted definition of "unnecessary or undue degradation."

In summary, relevant legal authorities require removal of the "substantial irreparable harm" criterion from both the definition of "unnecessary or undue degradation" in § 3809.5 and the list of reasons why BLM may disapprove a plan of operations in § 3809.411(d)(3)(iii) of the 2000 regulations, 65 Fed. Reg. 69,998, 70,115, 70,121, through the rulemaking process currently underway within the Department. See 66 Fed. Reg. 16,162 (Mar. 23, 2001).

IV. The "Undue Impairment" Issue

A. The California Desert Conservation Area

The 1999 Opinion also discusses the phrase "undue impairment" in section 601 of FLPMA. 43 U.S.C. § 1781. Section 601 pertains only to the California Desert Conservation Area (CDCA) and states that the 25 million-acre region "contains historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources that are uniquely located adjacent to an area of large population." Id.

§ 1781(a)(1). Section 601 also recognizes valid existing mining claims in the CDCA, subject to "reasonable regulations as the Secretary may prescribe to effectuate the purposes of this section." Section 601 states further that "[s]uch regulations shall provide for such measures as may be reasonable to protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment." Id. § 1781(f).

B. Summary of the Pertinent Legal Conclusions in the 1999 Opinion

With regard to section 601 of FLPMA, the 1999 Opinion asks:

> (1) the extent to which the "undue impairment" standard gives BLM authority to protect the California Desert Conservation Area and the cultural and historic resources involved [in the Glamis proposal]; and (2) whether BLM's authority is affected by the classification of the lands on which the proposed Glamis mine is found as Class L (Limited Use) in BLM's CDCA Management Plan.

1999 Opinion, at 11.

The 1999 Opinion states that the three values mentioned in subsection (f) -- scenic, scientific, and environmental -- "are fairly read to include 'archeological,' 'cultural' or 'educational' resources," which the opinion describes as the types of resources threatened by the Glamis proposal. The 1999 Opinion goes on to explain:

> The fact that subsection (f) does not separately list these resources, while they are named in subsection (a)(1), cannot fairly be interpreted to limit BLM's authority under subsection (f) to prevent their undue impairment, when such resources are encompassed by the values enumerated in subsection (f). Indeed, it would defy common sense to construe "scientific" values as excluding "cultural," "historical" and "archaeological" resources.

Id. at 10.

The 1999 Opinion also describes BLM's treatment of the "undue impairment" provision in the 1980 regulations, pointing out that the regulations did not "elucidate the undue impairment standard applicable in the CDCA, nor do they define the values contained in 43 U.S.C. § 1781." Id. at 11. The 1999 Opinion states, however, that "[t]his leaves implementation of the section 1781 standard to the stage of reviewing the plan of operations on a site-specific basis." Id. The 1999 Opinion concludes that this is "an adequate implementation of the statute," even though it acknowledges that "[i]t might be argued that the Department's decision not to promulgate separate, detailed regulations to implement the 'undue impairment' standard, but rather to adopt regulations that implement the directive on a case-by-case basis through the mining plan of operations approval process, is inconsistent with FLPMA's section 601(f)." Id. at 12.

The 1999 Opinion explains that "BLM's decision with respect to the Glamis proposal is governed by both the 'undue impairment' standard of subsection 601(f) and the 'unnecessary or undue degradation' standard of section 302(b)." Id. at 12-13. The Opinion cites to Utah v. Andrus, concluding that the court had "determined that the word 'impairment' as used in FLPMA's wilderness review section . . . means something different from the 'unnecessary or undue degradation' standard." Id. at 13 (citing Utah v. Andrus, 486 F. Supp. 995, 1005 n.14 (D. Utah 1979)). The Opinion states no conclusions on whether the "undue impairment" provision creates a higher level of protection than the "unnecessary or undue degradation" standard. The Opinion does suggest, however, that it reasonably could not be a lesser level of protection.

The 1999 Opinion next considers the CDCA Management Plan, adopted by BLM in 1980, to determine whether the plan limits how the Department may apply the "undue impairment" provision. Id. at 14-18. The Opinion concludes that it does not. The 1999 Opinion states that "the 'undue impairment' standard would permit BLM to impose reasonable mitigation measures on a proposed plan of operations that threatens 'undue' harm to cultural, historic or other important resources in the CDCA." Id. at 17. Beyond that, the Opinion explains, "the 'undue impairment' standard might also permit denial of a plan of operations if the impairment of other resources is particularly 'undue,' and no reasonable measures are available to mitigate that harm" and "the CDCA Plan clearly appears to contemplate such a result." Id.

The Opinion advises BLM that it has "[t]he ultimate responsibility for making the decision on 'undue impairment.'" Id. at 18. The Opinion concludes that:

> [i]n the end, what is determined to be 'undue' is founded on the nature of the particular resources at stake and the individual project proposal. If the BLM agrees with the Advisory Council [on Historic Preservation], it has, in our view, the authority to deny approval of a plan of operations.

Id. at 18-19.

C. Review of "Undue Impairment"

The critical language in section 601(f) states:

> Subject to valid existing rights, nothing in this Act shall affect the applicability of the United States mining laws on the public lands within the California Desert Conservation Area, except that all mining claims located on public lands within the California Desert Conservation Area shall be subject to such reasonable regulations as the Secretary may prescribe to effectuate the purposes of this section. . . . Such regulations shall provide for such measures as may be reasonable to protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment.

43 U.S.C. § 1781(f).

As with the "unnecessary or undue degradation" provision discussed above, Congress did not define in the statute or in legislative history what "undue impairment" means but rather left the matter to administrative interpretation. Since section 601(f) mentions "undue impairment" only in the context of rulemaking, the only appropriate administrative avenue to interpret the terms is through rulemaking.[8] In accordance with the statutory construction analysis set forth above, such an interpretation should reasonably and fairly encompass the common meaning of the terms and be applied objectively.

Over the quarter century since enactment of FLPMA, the Department has not exercised the statutory discretion to promulgate regulations under section 601 defining "undue impairment." The 1999 Opinion does not suggest a generally applicable definition of "undue impairment" because it concludes that the provision can be appropriately applied on a case-by-case basis. 1999 Opinion, at 13. The Opinion states that undue impairment "means something different from the 'unnecessary or undue degradation' standard" and "is distinct from and

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[8] The preamble for the 1980 regulations explained that the Department had received several comments urging it to promulgate a separate rulemaking for the CDCA. The Department decided not to publish separate regulations for the CDCA, explaining:

> The final rulemaking includes provisions that will afford the area adequate protection. Separate regulations are not warranted. The final rulemaking requires the filing of a plan of operations for any activity in the California Desert Conservation Area beyond that covered by casual use. The plan would be evaluated to ensure protection against "undue impairment" and against pollution of the streams and waters within the Area.

45 Fed. Reg. 78,902, 78,909 (Nov. 26, 1980). The preamble also addressed comments apparently related to the objectives section which advised the Department that "the phrase 'scenic and scientific' is not appropriate and exceeds the responsibility of the Secretary of the Interior under sections 302(b) and 603(c) of the Federal Land Policy and Management Act." Id. at 78,903. The Department explained that "[a]lthough this may be true as to those sections, this rulemaking also implements section 601(f) of the Act relating to the California Desert Conservation Area." Id. The Department thus appears to have intended to apply this generally-applicable statutory provision on a case-by-case basis without defining the pertinent terms of the provision. The Supreme Court has noted, however, that "[t]he Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations." Morton v. Ruiz, 415 U.S. 199, 232 (1974). Consequently, contrary to the preamble statements, separate rulemaking would be necessary to define and implement the "undue impairment" provision.

stronger than the prudent operator standard applied by the [1980] subpart 3809 regulations on non-CDCA lands." Id. at 13. The Opinion also advises BLM to apply the "undue impairment" provision to protect not only the "scenic, scientific, and environmental values," which are explicitly mentioned in section 601(f), but also cultural, historical and archaeological resources that are nowhere mentioned in section 601(f). Id. at 10.

The 1980 regulations stated only: "Where specific statutory authority requires the attainment of a stated level of protection or reclamation, such as in the California Desert Conservation Area . . . that level of protection shall be met." 43 C.F.R. § 3809.0-5(k) (1999). Likewise, the 2000 regulations state only that "unnecessary or undue degradation" means conditions, activities, or practices that "[f]ail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area." 65 Fed. Reg. 69,998, 70,115 (Nov. 21, 2000). The preamble for the 2000 regulations explains the lack of any separate rulemaking regarding the CDCA by stating that "application of the CDCA's undue impairment standard for proposed operations in the CDCA is likely to substantially overlap the undue degradation portion of the definition of 'unnecessary or undue degradation' adopted today." Id. at 70,018.

These passing references in the regulatory text to the CDCA neither mention "undue impairment" nor cite the section of FLPMA that applies to the CDCA. The 1999 Opinion acknowledged that the 1980 regulations did not "elucidate the undue impairment standard applicable in the CDCA, nor [did] they define the values contained in 43 U.S.C. § 1781." 1999 Opinion, at 11. This is readily apparent. Without an objective definition of "undue impairment," it would be impossible to defend administrative decisions based on the phrase. I, therefore, cannot agree that the "undue impairment" provision in section 601(f) was implemented by either the 1980 or 2000 regulations. Consequently, notwithstanding the 1999 Opinion, the Department's existing regulations do not qualify as departmentally-prescribed "reasonable regulations" that define "undue impairment."

I advise rescission and reconsideration of any decisions made by the Department to deny a plan of operations based on the application of the phrase in section 601(f). This includes Secretary Babbitt's decision denying Glamis's plan of operations. Following any such rescissions, the Department would have an opportunity to reconsider those proposed plans of operations and any impacts they might have on resource values protected by section 601 under the applicable 43 C.F.R. subpart 3809 regulations to decide whether to approve or disapprove the plan of operations.

This is not to suggest that the Department must adopt regulations. Section 601 states that "all mining claims located on public lands within the California Desert Conservation Act shall be subject to such reasonable regulations as the Secretary may prescribe to effectuate the purposes of this section." 43 U.S.C. § 1781(f) (emphasis added); see United States v. Rodgers, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."). However, unless the Department promulgates substantive regulations to define

"undue impairment" under section 601(f) of FLPMA, the Department should not apply the provision to deny a plan of operations. This conclusion is supported by section 310 of FLPMA. Section 310 authorizes the Secretary to promulgate regulations to carry out the purposes of FLPMA, but states that "[p]rior to the promulgation of such rules and regulations," the public lands "shall be administered under existing rules and regulations." 43 U.S.C. § 1740. Rulemaking, with notice and opportunity for public comment, is the required process for the Department to establish standards for "undue impairment" under section 601 of FLPMA. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984) ("'The 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.' Morton v. Ruiz, 415 U.S. 199, 231 (1974). If 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 regulation.").

V. Conclusion

Relevant legal authorities require removal of the "substantial irreparable harm" criterion from the definition of "unnecessary or undue degradation" in § 3809.5 of the 2000 regulations, 65 Fed. Reg. 69,998, 70,115, through the rulemaking process currently underway within the Department. In addition, the Department should not apply the "undue impairment" provision in section 601(f) of FLPMA to deny a plan of operations unless and until it completes rulemaking to establish standards for the meaning of "undue impairment." Because the Department has not promulgated regulations to define "undue impairment" under section 601 of FLPMA, I advise the rescission and reconsideration of any decisions made by the Department to deny a plan of operations based on the application of the "undue impairment" provision, including the Glamis proposal. This Opinion supersedes all previous Solicitor's Office opinions that conflict with this Opinion.

William G. Myers III
Solicitor

I concur: _____ 10/23/01
Secretary of the Interior Date