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# DRAFT

MEMORANDUM

To: Assistant Secretary, Lands and Minerals Management

From: Director, Bureau of Land Management

Subject: Atlas Asbestos Mine National Priority List Site -- An Issue of Potentially Enormous Legal Precedent and a Strategy for Dealing with the Unintended Consequences of the Law -- Attached Issue Paper.

At the Atlas Asbestos Mine National Priority List Site in California, BLM appears to be facing a relatively small cleanup cost (only a few million dollars at current estimates - subject, of course, to change). As the attached issue paper indicates, however, the precedent established by Bureau of Land Management (BLM)/Department of the Interior (DOI) acceptance of this liability has potentially enormous fiscal ramifications. The issue is the Bureau's liability for the private actions of private claimants on public lands under the Mining Law of 1872, during the period from 1872 to 1979 when the Secreatary had no authority to regulate their activites.

The issue paper proposes a strategy of going to the Office of Management and Budget and the Congress with a request for clarification of the Congressional intent on the issue. The strategy includes the EPA and the Department of Justice in the agreement because of their statutory roles in the process and to show the proper intentions of the DOI/BLM.

I request that you read through the issue paper and support the proposed strategy so that BLM can press forward in the matter. If you have any questions or need clarifications or details contact Bernie Hyde of the Hazardous Materials Staff at 343-5517.

cc: 680, 500, 110, 101, ASLMM-Niebauer, SOL-Clark, SOL-Brown,

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THE ATLAS ASBESTOS MINE NATIONAL PRIORITY LIST SITE
AN ISSUE OF POTENTIAL PRECEDENT
AND A STRATEGY FOR MANAGEMENT OF UNINTENDED CONSEQUENCES OF THE LAW

The Issue:

- While we receive continuing assurances of enduring good relations with the agency at the field level, some people at the Environmental Protection Agency (EPA) are apparently very unhappy with BLM regarding the Bureau position and action (or lack thereof) at the Atlas Mine National Priority List (NPL) site. The Agency's Headquarters Office of General Counsel has recently approached the Department of Justice to enlist DOJ assistance and intervention in resolving the issues on the NPL site so that a (SARA) 120(e) interagency agreement can be cleared and signed before, or simultaneously with, the Administrator's decision on the preferred remedial alternative (2nd Quarter, FY 1989). According to DOJ, some of the EPA enforcement people feel that the Bureau is not being cooperative on Atlas. EPA is apparently considering issuing a cleanup order to the Bureau. Both this office and DOJ question the authority for, and timing of such an order, but the objective: embarassing and getting the attention of the Bureau, might be quite sucessful, especially near the election. DOJ is now requesting meeting on the issue in early August.

- BLM and DOI must consider the precedent and the ultimate fiscal impact of agreeing to liability and cleanup for the Atlas mine. Our defense at Atlas is that in the 107 years from 1872 to 1979, BLM had no authority to regulate the private use of public lands under the Mining Law of 1872 and is therefore, an innocent landowner at the Atlas mine and mill, where the operation was closed before 1979. During that same century-plus period, it is estimated that a quarter of a million mines were opened on public lands under the Mining Law. It is the Bureau's position that the Congress, in passing Section 120 of SARA, did not consider those cases where private parties with no relation to the Federal government would create hazardous substance releases as a by-product of purely private use of public lands. Thus, Congress did not intend for the BLM to pay for the cleanup of such releases resulting from the actions of these private claimants.

- If the Federal Government accepts it, EPA's assertion of BLM liability at Atlas could very well establish the precedent of Bureau liability for all abandoned mines that were created under the 1872 Mining Law. At current prices, such potential liability could easily be in the billions of dollars. With such a precedent, EPA or a State could bring action against the Department and BLM for mine cleanup wherever a release or threat of release of hazardous substances has occured on public land or formerly public land, under the principle of joint and several liability. There is also the risk that the owner of any mine that is currently, or was previously a mining claim, might sue for recovery of some portion of any costs that such mine owner has been required by law to expend for cleanup of a release at the mine, that is covered by CERCLA.

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° A national interagency strategy is needed to resolve this issue, coordinated among BLM/DOI, DOJ, EPA and the Office of Management and Budget (OMB). To attract support, the strategy may require an agreement that if BLM is determined to be liable on Atlas by the Congress or OMB, we will act as expeditiously as funds are available to cleanup the site, and that in any case, BLM will continue to carry out management actions to protect the public at the site under our Resource Management Plan. This approach will reassure EPA of the Bureau's good intent and will protect the site until issue resolution. Due to the need for permanent resolution and the scale of the potential unintended effects of the CERCLA legislation, however, it is essential that the issue be resolved at the highest levels. Signatures will probably need to be at least at the Assistant Secretary level.

STRATEGY FOR DEALING WITH THE POTENTIAL PRECEDENT OF THE ATLAS MINE NPL SITE

° If the strategy is accepted by the Department, DOI/BLM would propose a joint DOI/BLM-DOJ-OMB-EPA agreement at the Secretarial level to go forward to the Congress with a request for clarification of the application of Section 120 of the Superfund Amendments to mines operating under the 1872 Mining Law from 1872 to 1979 (the period prior to the authorization of regulation). If the Congress finds that it did not intend that SARA 120 apply to DOI as a landowner under the Mining Law, Department would be an innocent landowner under the law. Conversely, if the Congress finds that Section 120 is applicable to the Department/BLM under the Mining Law, the Department and BLM would request the fiscal resources adequate to meet this monumental task.

° The request to the Congress will be based on the fact that the cost of BLM mine waste cleanups and the sharing of the cost of private cleanups on formerly public lands would probably soon exceed the Bureau's total budget. At current EPA cost estimates, one to several billion dollars could easily be consumed over ten years and a huge work force would be required to provide the activities. As the situation currently stands, the only options appear to be imposing what is essentially a new "Superfund" program with enormous cleanup, administrative, and litigation costs on the Bureau of Land Management (which has no experience, infrastructure or enforcement authority), or relieving the BLM of this unintended liability for private actions on public lands, finding new ways to make the responsible parties pay for cleanups and using the statutory EPA "Superfund" to supplement enforcement efforts. Under the latter option, agencies with experience, funding and authority to require private response (i.e., EPA and the States) will handle the enforcement and recovery cases and BLM will not be automatically liable for all past claims in civil actions for recovery. BLM could then deal with such safety and resource management issues as each site presented through the Bureau's management role.

- If EPA supports this approach, the multi-agency agreement proposal can be brought to OMB rather quickly and with luck, the request can go equally quickly to the Congress. If EPA reject the strategy, however, the issue will still go to OMB but on a slower schedule, through the dispute resolution provisions of Executive Order 12088 which provides for OMB decision on environmental policy issues. It is possible that the DOJ will support the strategy of going to the Hill because of the cost of dealing with the potential explosion of litigation from the precedent. Staff with whom we discussed the issue feel that it may be ripe for a decision. The reception of the issue at OMB is more unknown, but the probable hemmorhage of Federal outlays resulting from a precedent establishing BLM as liable for private actions at mines on public lands and formerly public lands, should at least entitle the Bureau and Department to a hearing. If necessary to achieve concurrence, the multi-agency agreement could act as a SARA Section 120(e) agreement through which the Bureau would accept a schedule for cleanup of the Atlas mine. Contrary to normal EPA procedure, however, such a agreement would provide a schedule based on an indefinite starting date that could only be triggered by OMB or the Congress upon the resolution of the issue. It is probable that EPA will oppose any such proposal unless it is supported at a very high level of DOI.

REQUEST TO ASSISTANT SECRETARY, LANDS AND MINERALS MANAGEMENT

BLM requests permission to pursue the strategy set out above through negotiations with EPA, DOJ and OMB and to bring back to you a draft agreement intended to bring the issue before the OMB and the Congress as quickly as possible. We will provide monthly status reports on progress in the negotiations.

I concur/do not concur with the strategy and action plan set out above.

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Assistant Secretary, Lands and Mineral Management

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Date

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MEMORANDUM

To: State Director, California

From: Director

Subject: Preparing For Bureau Legal Defense on the Atlas Asbestos Mine and Mill National Priority List "Superfund" Site.

In the event that the Department or thge Office of Management and Budget reject the Bureau's proposal to deal with the precedent problems arising from EPA assertion of BLM liability at the site, the staff attorney at the Department of Justice has requested the following action of the Bureau. The State Office and District need to assemble all documents and information relating to the defense in litigation on the Atlas site: specifying all players (private, financial, state, local, etc.) involved in the site, dates of use and contamination, BLM's relation to the claimant(s) and other users (what authorizations were issued?), compiling available maps, aerial photos, legal documentation (including authorizations, filings, SOL opinions, records of operations, etc.), compiling any data on local conditions on and around the mine (regardless of source), assembling records of what BLM did (directly or through the claimant) to control conditions at the mine before or after it was abandoned, and the timing of Bureau knowledge of the problem conditions at the mine. If this information indicates that contamination was added after 1979, the current defense postion may be unworkable. The assembly of this information is essential for the DOJ to prepare a proper defense for the Bureau in this case. It should be available before December 1, 1988.

If there are any indication that EPA will also pursue action on the Clear Creek Management Area as a whole or as a recreation area, the State and District Offices need to assemble all documents relating to the Bureau's defense in litigation: specifying all players (private, state, local, etc.) involved in the area and its management, dates of use and contamination, what was BLM's relation to the users (what authorizations were issued and what level of control is exerted?), maps, aerial photos, legal documentation (including authorizations, filings, SOL opinions, records of operations, etc.), any data on local conditions(regardless of source), records of what BLM has done, is doing or plans to control conditions on the recreation area (for example) and the timing of Bureau knowledge of the problems. Information or data relating to the historical levels of air or water borne contaminations of the area by asbestos will be very important, especially pre-ORV use. The assembly of this information is essential for the DOJ to prepare a defense for the Bureau. The information should be compiled by March 1, 1989.

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On the Clear Creek recreation area, and other serpentine zones in the Hollister RA, the basic condition in question by EPA is that of natually occurring asbestos (not covered by Federal law) and non-point source and therefore, should require no cleanup activities. This is not to say that no management control requirements will be imposed to avoid, minimize or control risk, or that efforts will not be made to close certain public lands to certain uses, but that cleanup costs should be minimal. No Section 120(e) agreement should be necessary for this, although EPA may want some sort of agreement in order to formalize completion of the action. On the other hand, EPA may insist on a 120(e) agreement and try to include several smaller cleanup sites (especially mines) in such an agreement. BLM should resist any 120(e) agreements on the non-NPL portions of the area; other agreements can be negotiated.

These non-NPL areas will also require additional future supervision and compliance work and efforts to avoid an attractive nuisance problem. EPA may wish to participate more or less directly in the Bureau's management of these lands. Where this is required such intervention should be formal (i.e., in writing) prepared as an order, or at least as a formal risk assessment based on individual land uses.

cc: 680, 500, SOL-Clark, SOL- Brown,

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