Notice Webinar

Question and Answers

November 14, 2013

Note: This is not a word for word transcription of responses given in the webinar.

1. From Evan Allen, Las Vegas Field Office:

   Q. Would taking a 100 pound boulder off a mining claim, from an unmaintained road be considered casual use or should we require a notice?

   A. Adam: It is hard to answer that question without knowing a little more detail. As far as the Field Office could tell was it for exploration type purpose? For casual use that might be a little bit murky. My thought process is to answer the question – is it for mining law type action? Or, we might be talking about something that is more a mineral material type action. This would be the first thing I would try to determine.

   Next I would look at is would it require mechanized equipment. A 100 pound rock – two strong guys could lift that and not used any mechanized equipment. Is a car mechanized? If it is on a road that is open for access then I don't think that would count toward being mechanized equipment.

   The next thing I would ask is would it cause negligible disturbance. I don't think we have a clear definition of what negligible disturbance means, but I think when you look at the regs – in the preamble it says, "No _____ disturbance." Negligible is basically it will not create any kind of recognizable disturbance. The lace of vegetation after removal would possibly be more then negligible.

   I think there certain things like this that are going to be on the edge and are going to require a judgment call. They will require a case by case determination.

   Jeff and Mark concur.

2. David Fanning, Pahrump Field Office:

   Q. For Jeff and Adam – Occupancy on a notice – Still confused as to whether we need to do an EA or provide them with the 3715 questions and make a determination on that? In some cases states may already have a programmatic EA for that.

A. - Adam: Arizona is the only state I know that has a programmatic EA. I do not know if there are others. It is a handy document for Arizona. What I understand Dave is that any kind of 3715 if it is occupancy it requires concurrence and concurrence is a decision. This is because a Field Manager can say No, so if that is the case it requires NEPA which then becomes a Federal action. The problem we have is we want to be careful not to make the NEPA all about notice. So it needs to be about or specific to actual occupancy and not try to encompass the entire notice.

A. - Jeff: In Arizona the reason we developed the programmatic EA is because we knew we were going to have - we had a significant number of occupancies already out there that we needed to address. We anticipated that we were going to have to give – giving concurrence to a number of those. In the future we anticipated we were going to have additional occupancies. So, the programmatic EA addresses a certain level of occupancy that would be consistent with what was occurring normally on a exploration type or notice level operation. Anybody that has a – proposing occupancy if it conforms with what was addressed or evaluated in the programmatic then we just do a DNA and the DNA tiers off the programmatic EA and then our NEPA is done. But if we have a notice that exceeds what was evaluated in the programmatic then it would have to have a standalone EA.

3. Second question by David Fanning, Pahrump Field Office:

Q. On the information we are collecting in LR2000 Geo-Report including mining claim report - I think somebody said we need to check that the claimant and the submitter or the operator are the same. A lot of companies lease claims so if the operator and the claimant are not the same do we need to start calling claimant to check if it is OK to go on his claims.

A. – Jeff: Not sure how to address that one. It is kind of a carryover from the old regulations in one aspect in the fact that ultimately we hold the claimant responsible for the disturbance that has occurred their claim. If somebody is an operator they should have permission in some manner ideally from the claimant owner, because if they go out there and do disturbance and we cannot come back on the operator then the entity we are going to back on is the claimant. So it makes – ya – they don't have to have claims and there may be multiple claimants out there they may have junior and senior locators and it can become a mess so we to be on top of it and you know – understand

what is going on and if you can resolve the issue sooner than later your ahead of the game.

4. Stephen Allen, Salt Lake District Office:

Q. Is the only purpose of cultural/biological surveys to ensure that UUD will not occur? Are there any situations where BLM could require the applicant to perform surveys/clearances?

A. – Adam: That is a sticky issue – I know for a lot of Field Offices. One thing that we try to do is work with the cultural program. We don't try to do their job. The way we see it from our prospective is that the purpose of meeting with the archeologist or wildlife biologist is to ensure UUD does not occur. That is our purpose. The reason for that is because we don't really have – as Jeff pointed out – we don't have a lot of options changing what the operator does. We have the modification route, which we can do, but beyond that we are really supposed to do. Look at what the operator is proposing and determine if that particular operation is going to cause UUD. It is not like with the plan of operations where you can run it through NEPA and come up with different sort of alternatives. We really don't have that option here and if we attempt to do that then we're as an Agency we're attempting sort of put the notice through a review process that wasn't really intended to. Thus, we are attempting to append or modify it without the same sort of recourse that one might have going through the NEPA process. So it becomes a little sticky, because I know often there are some archeologists that will say I don't have enough time if you want to do this then you are going to have to get the applicant to pay for it. I am going to say that generally that shouldn't occur, but that probably needs to be better worked out with the cultural folks before I say that is absolutely true. But, generally that is something that BLM needs to and determine, if UUD is going to occur at our own expense.

I know that there are arguments against that, I recognize that, and again this is an area that I hope to address when we revise the handbook. One of those arguments is of course that a Field Manager can ask for any additional information that they need. And so the question is what does that mean? Obviously there has got to be sideboards on that. So the sideboards have not been quite determined yet. So this is not a very straight answer and I apologize. But remember that we are reviewing a notice the idea is simply that we are reviewing it to determine if it is simply causing UUD. We are not there to drag this process out or to make it take a long time or place unnecessary burden back on the operator. This is a notice and not a plan so it doesn't require NEPA. So it is a little different than a plan of operations. So fuzzy answer but, with a promise

that we will be getting to the issue in the future either as a policy piece or within a future revision of the handbook.

5. Val Lenhartzen, Bruneau Field Office

   Q. You mentioned that obtaining concurrence for occupancy under 3715 requires NEPA . . . If so, is this applicable to any specific categorical exclusion?

   A. – Adam: I don't think so – that is why Arizona felt the need to do the programmatic EA. With that said here in Washington DC we have already started a conversation with the planners with the planning division to determine whether or not there are areas in 3809 and 3715 programs that would be appropriate for a categorical exclusion. So that is something that we are looking at doing to make it a little easier on folks and to make the review process faster.

6. Marilyn Wegweiser, National Lab – Worland

   Q. Another issue that seems to be expanding is an increase in avoidance area being required by the archeologists. Instead of recommending a 100-200 foot avoidance area, as much as 200 acres is being recommended. That seems to be an excessive request, and even 10 acres seems to be in excess for things like stone chips, fire circles, and teepee rings. In the past sending lat/long or UTMs to the top tier of the company and telling them to ensure that point was avoided was sufficient. Why change? Doesn't this force the notice in to a review process similar to NEPA?

   A. – Adam: I do not understand the 100-200 foot avoidance area as much as 200 hundred acres is that something that is specific to a particular field office? (No response from Marilyn)

   I do not of any policy from the cultural people that are saying that this is a standard practice. I know in my experience that the avoidance areas haven't been that big. I think it is case by case. My opinion is that it shouldn't be one size fits all. These companies don't want to violate NHAP or any other cultural act so communicating with the company is the way to go hopefully the archeologist is OK with that idea. If the company was some sort of UUD your archeologist is going to be helping you make the case.

   Continuing from later in the recording (53.12 min. mark)

Marilyn – Adam asked if it was specific. It seems to be a growing tendency; I'm going to say, in this area. So the District probably and I get a lot of questions about "can we do this?" Of course the regulations – a notice is not a Federal action. Two hundred acres avoidance area with a refusal to tell them why seems to be excessive and it kind of forces a notice into a review process similar to NEPA. I wonder if there is anything from the 3809 prospective we can do about this.

A. – Adam: You are always going to have those situations where you have an archeologist or others who closely protect the resources that they are charged with. In a way it is a good thing and in another it is problematic when dealing with notices. I am not sure that I have a great answer for you. The best thing is to do is to work with your archeologist and Field Managers and try to educate them and also help them understand what is reasonable. There is always going to be interpretations and hopefully you will have a Field Manager that can work this out and ultimately it is going to be the Field Manager's responsibility if they do things that tend to cause notices to be approved that put them through this long review process. It is going to end up being a problem for the Field Manager.

What I would ask is if other offices are experiencing that that they contact me because if it becomes a problem that is big enough outside of Wyoming then that is where the Washington Office can help. If it is just a Wyoming problem then I would ask that you continue to work with Pete Sokolosky and see if you can talk with the archeologists and try to understand why they think such a large area is really necessary when you can drill fairly close to things without causing problems.

7. Anthony Gallegos, Farmington Field Office

   Q. – Would recreational suction dredging (small scale equipment) be considered notice level activity?

   A. – Jeff: In Arizona because the way the regulations are written and our interpretation of those and the handbook, we don't allow any suction dredging in Arizona requires a notice at a minimum.

   If you want further discussion on that I did a position paper on that and asked for comments on the Solid Minerals Forum.

8. Ricky Wells, Burns Three River Field Office

   Q. Is the 3715 checklist from Arizona going to be available to other states? If, so when and where?

A. – Jeff: It hasn't been developed yet. Once it is developed we will make it available to anyone who what's to use it.

9. Pauline Adams, Colorado River Valley Field Office

Q. Could you include the Arizona templates (i.e. notice/3715 checklists, BLM correspondence letters, bond calculation spreadsheet) as part of the posting of this WebEx?

A. – Mark: Yes we certainly can.

A. – Jeff: The bond spreadsheet is on our external web site because it is available to anybody that wants to use it.

10. Ron Rogers, Redding Field Office

Q. Per Arizona Checklist: Why serialize and enter in LR2000 if as a result of Land Status check we don't accept filing (i.e., no BLM jurisdiction, wrong BLM office, or casual use)?

A. – Adam: I just think what your saying is as far as the timing of when you do a – you serialize it and especially if it is not supposed to be a notice. I don't know – I'm sort of – it seems like to me that if something comes in that was intended for a particular purpose like the mining law that you would want a record of that so if that ever came up later on you could say this is what we did and this is where it is located. Although it is not technically a case file the person that submitted it intended it to be so. I think it is a good idea for record management and for historical purposes I would have that in place. That is my opinion and if you think that it doesn't belong in a case file that you're a purist if you don't think it should be with the others then I think that is fine too. I don't have a unified position on that except for I think it is OK to keep it for historical purposes and it would be OK.

A. – Jeff: Plus don't we get to count a widget? Adam - There is that. Jeff – and everything is about counting widgets. Right. Adam – Sure is.

A. – Mark: One other potential is that if for some reason they elected to appeal the decision that you returned the notice then you would have a case file to work with on that. Adam – That is a good point. If you return it with a decision then you need to have a case file. If there is a decision on it and there is an appeal period things could

change. Mark – even if you are not writing out a formal decision if you are returning the notice that is still considered a decision by the BLM and appealable to the Board.

11. Jeffrey Johnston, Palm Springs Field Office

Q. – What are the ramifications if you miss the 15 day response time?

A. – Adam: You get a sad face from industry. There isn't a punishment, it doesn't work that way. As public servants we are charged with working effectively and efficiently although sometimes it seems like we work against ourselves with things like budget. We need to strive to make that 15 day period habit – that 15 day review. It is possible that if an office routinely did something like and it is pointed out to IBLA it might weigh negatively when they then review future decisions from that Field Office. I have seen IBLA call out particular Field Offices and sometimes Field Managers and even geologists. You want to try to avoid that if possible. But that is probably the biggest ramification I can think of. Again it part of your duty to strive to uphold these regulations and get the job done timely.

A. – Adam: The other danger to Adam is I think the Operators or the public often miss interpret the regulations that if they don't get a response back from the BLM within that 15 day time period for whatever reason then they are free to go ahead and start their activity. So you run a danger of that occurring if you don't follow your own regulations and guidance. Adam – right and then you go out there and you give them an order of noncompliance and so they come back and say I went out there because BLM did not respond to me within the 15 days and it becomes kind of a mess.

A. – Mark: There is also some case law it is pre the current regulations, but there is some case law out there by the name Charlie Heisen out of Las Vegas. There was a 15 day review period missed the Board responded to that and said that the BLM is obligated to review and to comment back but, if they do not the operator has the right to proceed with the notice at their peril and that peril is that if something is found to be in noncompliance or nonconformance then they would be obligated to take care of that.

12. Stephen Allen, Salt Lake District Office

Q. In regards to the specific performance standard: #6) Compliance with other laws – does this apply to local laws and ordinances as well? For example, those related to noise, dust, and visual impacts.

A. – Jeff: I don't think I know. Adam?

A. – Adam: That an interesting question. It can I think – for example, there are local ordinances that local for example there in Las Vegas, Mark, you have the Clark County Health District, or rather State manages the Air Quality. You may have a situation where these local agencies are somehow helping run one of these federal or state laws then that may apply. But what we don't do is we don't – Zoning ordinances don't apply to Federal lands especially when we talk about mining law activity.

A. – Jeff: That brings to mind an experience I had years ago where we were drilling for uranium on split estate lands and we pulled up in front in somebody front yard where there trailer was and house and we started drilling a hole a deep hole. They called the sheriff who came and visited us. We were very careful about not operating when people would be a sleep. We were also careful not to be spewing dust out; we used water to keep the dust down. So I suspect if we hadn't done that and there were local ordinances there that we as drillers or operators that we if we were not careful we would have been cited for breaking those ordinances and requirements and well we should have been. To me I think that if there is a noise ordinance that says you cannot have loud noises after 10 o'clock then you don't have them. If there is an air ordinance that says you can't be putting up so much dust up on certain days then you would do things to keep that from occurring.

A. – Adam: Right but what we don't want to do is we don't want BLM to be somehow be responsible for enforcing those particular ordinances. If there are other state laws or Federal laws then we really need to be working with the agencies that are responsible for those. We don't do the enforcing on those we need to make sure the operators are complying with them but, we don't do the actual enforcement.

13. Ron Rogers, Redding Field Office

Statement: He believes that we should be notifying when we are returning a notice and not send a decision on returning a notice.

A. – Mark: I am going to answer that. I don't think it really matters one way or the other. It would be consider a decision whether you are notifying them by sending them an informal letter or sending them a formal decision letter. The Board would consider it the same. From that prospective I don't think it matters too much.

A. – Adam: I will just say one thing to Ron's question. I will look into that – it is currently in the handbook that way. We will consider whether or not that should be changed. For whatever reason we felt that was appropriate – that by telling someone that you cannot do a notice felt like a fairly strong action and it felt like something that you should submit a plan of operations it seemed like a decision was appropriate. But,

like what Mark said, if someone files an appeal with you and it's a notice where you sent them a notification and it is an appeal you're going to treat that as an appeal anyway. But the difference is going to be in a notification they would have to know about their appeal rights where in the decision you're giving them their appeal rights. So there is a little bit of difference there.

That basically is all the questions that we have received.

Jeff: Mark I see another question on the Q&A from Tim Carroll that we did not respond to. He says:

Tim Carroll, Mother Lode Field Office

Can e-mail serve as an official correspondence for acknowledgement of a notice or adequacy of a reclamation bond?

A. – Jeff and Adam: No.

14. Marilyn Wegweiser, National Lab – Worland

Q. I have observed in both Wyoming and Montana a growing tendency for the addition of suggestions being added to the notice complete letter for which we always use template 3.2-3. The way it was written it is clear that the suggestions are really intended to be stipulations such as winter timing and things like that. So this puts the onus on the operator to choose whether to follow the suggestions or not because they are written as suggestions, but they fully understand that they are stipulations not suggestions. All the operators here know the 3809 regulations and they know they can't be stipulations added to a notice. So what do we do about this problem that is growing?

A. – Adam: So here is the problem for BLM. If you put something in as a recommendation then they go out there and do it anyways what are you going to do at that point. Say we are going to give you a – issue a noncompliance because you did not follow our recommendations. It is sort of meaningless to put in suggestions like that unless you expect the operator to be willing to comply because they want to do what is right in their mind.

A. – Mark: If you are putting in the recommendations or suggestion because you feel like it is going to cause an undue or unnecessary degradation then why aren't you going back to them with the notice and saying you need to adjust, modify or conform or bring into some format to eliminate this UUD.

A. – Adam: And that is the key. If you are saying that without this recommendation you are going to cause UUD then you really have a different beast there. Then you should be asking for a modification. So that is really what you need to do is make that determination; are these necessary to prevent UUD if not then they are not necessary.

Now that said we have the specific standards – performance standards at 420(b) and those are performance standards. I think it can be OK because they are performance standards that they have to follow – that if there is something that needs to be clarified in the performance standards than those should be included. That's part of the performance standards you're not mitigating at that point there not stipulations. They are part of the performance standards.

15. Stephanie Carter, Royal Gorge Field Office

Comment: Just a note on "local ordinances" . . . if local regulations conflict with Federal law in situations where they might stand as an obstacle to the accomplishment of the project . . . that is another story!

Comment: Mark: I agree that local ordinances; it is intended not to, we should not be using them as ways to block or allow them to block Federal activity on Federal lands.

Q. Does BLM have any type of guidance on how to separate the measuring sticks of mining law UUD and NEPA significant impact? This seems to be where a lot of the confusion stems from. . .

A. – Adam: I don't have a good answer for you. I think that would be a great topic to look into and get back to you on about what type of guidance on how to avoid confusion there. We can defiantly tackle that.