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URANIUM MINING: CHALLENGES OF COORDINATION BETWEEN FEDERAL AGENCIES

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Introduction

I have spent over a decade at various times working for the federal government and along the way I gained some "insider's" perspective on how our government does and does not work. There are some days at my office, when I advise energy and mining clients on Federal government permitting; I feel more like a translator than a lawyer. The federal government can seem like a foreign land, with its bureaucracies, alphabet soup of acronyms for agencies, laws and taskforces and "treaties" or Memorandums of Understanding between federal agencies. As Assistant Secretary, I learned that there are even unique cultures in each federal agency including among bureaus in the same agency.

Political change is a constant in the federal government. Politics can influence how laws are interpreted and policy direction for a bureau can change on a dime after a Presidential election. What motivates and drives agency action is not always obvious—there are multiple pressures on an agency bureaucrat that include Congress, their political agency overseers, their immediate career supervisors, their budget, the media, local citizens, litigants, Tribes, Governors, environmental groups, industry groups – each putting demands on that employee that may conflict, compete with or support your project application.

Understanding your government and knowing your "audience" is essential to meeting the coordination challenge of federal permitting. I want to spend a short time doing two things: first, breaking down the coordination challenge – why does it exist and second, what an applicant can do to encourage coordination—including my top 10 tips for making it happen.

Why Can't Federal Agencies Play Well Together?

In-situ uranium mining developers on public land are not entirely alone in the challenges they face in developing a natural resource project on federal land. Multiple state, federal and local laws and agencies are involved in moving any mining or energy project to completion. But I do think uranium mining may have a unique challenge because of the forced "marriage" between two wildly different agencies – the Bureau of Land Management (BLM) and the Nuclear Regulatory Commission (NRC).

In examining the question of why public land projects face the challenge of coordination we need to go back to 1789 and the U.S. Constitution. The Founders, in their wisdom, were

suspicious of concentrated political power and divided up political authority among the three branches of government. Congress enacts the laws, the Executive Branch (President and federal agencies) executes or implements the laws and the Judiciary or courts interpret the laws. In addition, under the principles of federalism, power is shared between the state and federal governments. While this system does a good job of protecting our liberties from an encroaching government – it does create the challenge of agency coordination.

Under Article IV, Section 3 of the U.S. Constitution, Congress has the power to make all "needful rules and regulations" over federal lands. And they have taken full advantage of that provision! We have *substantive environmental laws*—Clean Air Act (CAA), Clean Water Act (CWA), Resource Conservation and Recovery Act (RCRA), Surface Mining Control and Reclamation Act (SMCRA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (Superfund)—*procedural laws*—National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA)—*land management laws*— Federal Land Policy and Management Act (FLPMA), National Forest Management Act (NFMA), Park Service Organic Act and *resource protection laws*—Endangered Species Act (ESA), Migratory Bird Treaty Act (MBTA), Bald and Golden Eagle Protection Act (BGEPA), Archaeological Resources Protection Act (ARPA), Native American Graves Protection and Repatriation Act (NAGPRA) – each of which can apply to one project on federal lands.

How did we get here? The pattern of the federal government is to respond to a crisis by passing a law or changing a policy—*to do something, anything*—to show us that they are fixing the problem that led to the crisis. Look at two recent examples: first, the Dodd-Frank financial legislation purporting to address the 2008 financial crisis by adding layers of regulation; and second, the reorganization of Interior's Minerals Management Service from one bureau into three—the Bureau of Ocean Energy Management, the Office of Natural Resource Revenue and the Bureau of Safety and Environmental Enforcement to respond to the Macondo spill. Laws are passed and agencies created without regard to what already exists. Layers of procedures and public process are added. The result is something a former Chief of the U.S. Forest Service in 2002 called the "Process Predicament"—more money spent on process than results. In a perverse way – although we talk about bringing efficiency to government, making government more like a business—by our actions we seem to prefer an *inefficient* federal government with plenty of process to allow for public oversight.

There is another result from this proliferation of agencies and laws – what federal bureaucrats call "stove-piping." Agencies are created and authorized under a *particular* federal statute – it provides them with their legal authority, their focus and mission. An agency sense of purpose, history and culture is created. An agency budget is passed to fund specific activities and not others. There is no imperative for members of one bureau or agency to know the workings of another federal agency or do anything other than what is in their own "stove-pipe."

I saw this in action while in office. Although both the US Forest Service and BLM manage federal lands, share a multiple use mission and frequently are physical "neighbors" dealing with the same "customer" – the history and cultures of the two agencies are quite different. Here is just one example of how this can play out on a day to day basis. One of the key policy goals of President Bush was the "Healthy Forest Initiative" – addressing the risk of catastrophic wildfire on federal lands. Although the two agencies worked well on several shared

policy initiatives, we tried for three years to get the fire budgets of Interior and the Forest Service to match up on the same system – it proved simply impossible to accomplish because of those agency "cultural" differences.

That's the government side of the coordination challenge, but in the private sector we can erect barriers of our own. Our view of the government can be colored by our private sector experience. People on the outside of the federal government tend to view it as a monolith – the "Government"—and make the assumption that the right hand of the government knows what the left hand is doing. That assumption would be incorrect. Not only does stove-piping create barriers, but communication between agencies or even internally among bureaus in the same agency like Interior is poor. Sometimes that poor communication is inadvertent, but other times it may be purposeful—to allow an agency, office or individual—control. In D.C., "knowledge is power" and not to be lightly shared.

Finally, developers tend to think the government thinks like they do—in terms of financial concerns, timely completion of goals, accountability, efficiency—all towards the end product of actually delivering the federal resource to the public. That would be wrong. A federal agency sees its job through its statutory authority and mission – its mission is usually not your company-specific goal.

The Cultures and Missions of the BLM and NRC

In the case of uranium mining we have two very different agencies—BLM and NRC--with very different missions that need to work together to allow your project to proceed. Who are they?

BLM – BLM is part of Interior --a cabinet level agency created in 1849. BLM came about in 1940 after the Grazing Service and the General Land Office were merged. In simple terms, BLM's original focus was cows and homesteading – getting federal land into the hands of private sector. That changed with the passage of the Federal Land Policy and Management Act of 1976 – when BLM was directed to retain and manage the public lands. These public lands consist of approximately 160 million acres of surface and 700 million acres of minerals located largely in 12 western states. Because of that geographic breadth – BLM is a comparatively de-centralized bureau with plenty of authority in each Field Office or District Office manager as well as the BLM State Directors. The BLM Washington Office can be a long way away.

Furthermore, BLM it is not a regulatory agency but is rather a *land manager* – managing public lands towards a multiple use goal. The U.S. Supreme Court in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) described "multiple use management as a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put." Those competing uses as described by FLPMA include: "recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values." Similarly, BLM's mission is "to sustain the health, diversity and productivity of the public lands for the use and enjoyment of present and future generations."

NRC – First, not all federal agencies are created equal. NRC is not part of a cabinet level agency but is rather an independent, regulatory agency created by statute in 1974. The NRC was created as the result of controversy over the Atomic Energy Commission's dual roles of promoting and regulating nuclear energy. As an independent agency, although located in the Executive branch, the NRC is not under the control of the President in the same way as is a Cabinet level Department. A Cabinet office is headed by a Secretary, appointed by and serving at the pleasure of the President. An independent agency, like NRC, is typically headed by a Commission consisting of Commissioners with staggered terms that may be removed by a President only for *specific statutory* reasons.

The NRC has five Commissioners, is located and "lives" inside the Washington, D.C. "Beltway." The NRC is a regulatory agency – enforcing laws and regulations—it is not a land manager. The NRC deals with a technical and sophisticated source of energy—nuclear power and its culture is focused on safety. The stated mission of the NRC is to oversee nuclear reactor safety, nuclear materials and nuclear waste to protect public safety. Its mission is "Protecting People and the Environment."

In permitting a uranium mining project in addition to BLM and the NRC there are also multiple state and federal agencies that permit aspects of the project. At the state level these can include a mine permitting agency, state environmental regulatory agencies and the State Historic Preservation Office. At the federal end, the U.S. Fish and Wildlife Service, the U.S. Army Corps, the EPA, the Advisory Council on Historic Preservation and tribal governments can each be involved in permitting one project.

How Can These Agencies Work Together?

One thing all federal agencies share in common is the National Environmental Policy Act (NEPA) requirement – the need to take a "hard look" through a written analysis (EA or EIS) at the impacts from authorizing a federal action. But each *federal agency* conducts NEPA on the federal action it authorizes *pursuant to its grant of statutory authority.*

In the case of uranium mining, for BLM those statutes are FLPMA and the Mining Law of 1872 and for the NRC, the Atomic Energy Act. Each agency has its own set of NEPA rules and guidance that reflect the laws they implement. However, as a result of specific statutory direction in NEPA, NHPA and the ESA – the NEPA process can serve as an *umbrella process* for other regulatory processes and for interagency coordination. For example, NEPA rules (40 CFR § 1500.2(c)) direct Federal agencies "to the fullest extent possible: "to integrate the requirements of NEPA with other planning and environmental reviews . . . so that such procedures run concurrently rather than consecutively." Federal agencies are encouraged to act as "joint lead agencies" 40 CFR § 1501.5. These same rules (40 CFR § 1550.5 (b)) urge interagency cooperation and the elimination of duplication so that "an agency may adopt appropriate environmental documents prepared by another agency" (40 CFR § 1550.5 (h)). And in the ESA there is a provision for the ESA Section 7 consultation process to be integrated with NEPA and in the NHPA for the Section 106 process to use the NEPA process as a means of compliance.

Despite this encouragement, these methods of NEPA coordination are underutilized. Why? In part, for the reasons I earlier discussed – agency stove-piping, comfort with your own agency culture and lack of knowledge and comfort with another agency's culture. In addition, management leadership and direction in policies to encourage coordination may be lacking. And there is always the very real concern over litigation for inadequate agency compliance with NEPA.

There are tools that can be used to create better agency coordination and ease the permitting path for an applicant. Some are in the control of the agencies—management direction, budget, and implementation of Memorandums of Understanding—but there is also a role for a project applicant in supporting agency cooperation once a Memorandum of Understanding has been signed.

A Memorandum of Understanding (MOU) is a frequently employed tool to increase agency cooperation. In 2009, BLM and NRC signed an MOU to increase cooperation in doing project level NEPA for uranium mining. What is an MOU? In the words of the BLM/NRC Communication Plan, "it expresses a *convergence of will* between organizations, indicating an *intended common line of action, rather than a legal commitment.*" These are significant words – they describe not a legally enforceable "done deal" but rather a shared process towards a goal.

In 2008, the NRC and BLM identified their individual responsibilities to comply with NEPA and sought to improve agency coordination with a stated goal of getting to one NEPA document. The agency-identified hurdles that stood in the way of that goal were several: 1) BLM did not participate as a cooperating agency in the preparation of the NRC umbrella Generic EIS and was limited in its ability to rely on that NEPA; 2) due to different agency missions, the scope and purpose of the two NEPA reviews were not the same; and 3) applicants did not submit the respective agency NEPA triggers – NRC license application and BLM Plan of Operations-- at the same time so the start of NEPA differed for each agency.

Although not completely abandoning the idea of one NEPA document, the 2009 MOU did adjust the goal posts to focus on a "framework" for a cooperative relationship. The improved relationship is designed to lead to a more efficient environmental review process where the agencies could "incorporate by reference" appropriate parts of their NEPA documents rather than duplicating the effort. The MOU reflects the authority in NEPA to coordinate as co-lead agencies, to share information and have concurrent reviews. The MOU contemplates a steering committee to implement the MOU, periodic inter-agency meetings, advance notice of expected actions, sharing of drafts, points of contact at each agency to improve communication and continuing to explore how to get to one document. Results to date have been somewhat unsatisfactory.

I want to share some thoughts and practical advice on how to make this MOU work as intended. Two initial thoughts from my experience in government. First, the mere fact of the MOU is significant. These agreements don't happen without agency will, thought, multiple layers of review, including legal review, and decision-making. An MOU carries *weight in the government.* Second, in government time – it's still early. The MOU is not even two years old yet. These new relationships take time to become part of agency culture – particularly out at the

BLM Field Office level. In the case of MOU's it is by the "*doing*" that these working relationships become reality.

Top Ten Tips to Improving BLM/NRC MOU Implementation and Permitting Coordination

So how can we make this MOU a reality? Here are my top ten tips.

1. An applicant (and their industry association) can play an important role in encouraging agency cooperation. Your role is to insist that the agencies take advantage of the MOU—it is their policy, and coordination and elimination of duplication makes sense in this climate of concern over jobs and unnecessary federal rules and process. Obviously to the extent you can, seek to coordinate your submission of the Plan of Operations to BLM and the License Application to the NRC so that the respective NEPA processes begin concurrently.

2. Approach the agency with knowledge of their mission and culture; be courteous and straight-forward. Believe it or not your views, ideas and solutions are welcome if the message is delivered in the right way. Consider employing project consultants that can educate you on the agency culture. There are a lot of retired Feds out there – take advantage of their knowledge of how things work inside a federal agency.

3. Schedule early, **pre-application** meetings with the agencies to introduce your company, your consultants and project. Pose the question of NEPA coordination at this meeting – identify the agency "objections" and begin addressing them. Find out who the NEPA leads will be at each respective agency and begin "connecting those dots." Understand that you can foster agency coordination by calling for joint, frequent meetings between and among the relevant permitting authorities.

4. At BLM, start at the Field Office level in asking for a joint NEPA process. Then go up the "food chain" to the District Office and then the State Office involving the respective office managers and the NEPA and Minerals leads for each office. Push for direction from above down to the Field Office to implement the MOU as directed in BLM's March 12, 2010 Information Bulletin transmitting the MOU to the Field. Information Bulletin No. 2010-051 (March 12, 2010) www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_information/2010/IB_2010-051.html.

5. Go to Washington, D.C. and meet at the BLM-WO level—Director Bob Abbey, Deputy Director Mike Pool and the Assistant Director of Minerals, and BLM signatory to the MOU, Mike Nedd. Ask good questions: Have they scheduled the inter-agency meetings with the NRC? Are they frequent enough? Is the BLM-WO showing leadership on the MOU by issuing an Instruction Memorandum to the State and Field Offices providing better direction on how to implement the MOU? If not, why not? Can BLM and NRC sponsor joint training sessions on NEPA integration for uranium mines. Why not? Follow-up with similar conversations at NRC.

6. Involve the Council on Environmental Quality (CEQ). CEQ is an office of the White House, is the NEPA expert agency and plays a role in bringing together agencies to sort out NEPA and environmental disputes. CEQ will work with agencies to address hurdles like finding ways for BLM to rely on the NRC Generic EIS and guiding BLM and NRC in incorporation of their NEPA documents by reference.

7. Work the Hill. Your congressional delegation can help by bringing high-level agency attention to this issue. A letter from a Senator on the authorizing or appropriations Committee for Interior or the NRC asking why the MOU is not working as promised will get the attention of the Director, Secretary or Chair of the NRC – trust me!

8. A Capitol Hill legislative fix for uranium NEPA is not entirely out of the question. Although Congress is loath to make any changes to NEPA, they have frequently included NEPA process fixes in legislation to address delay and duplication. For example, the Energy Policy Act of 2005 provided for NEPA categorical exclusions for oil and gas permitting, the 2005 Transportation Act created a streamlined NEPA process for highway construction and the Stimulus Act of 2009 focused on expediting the NEPA process and required CEQ to report back to Congress quarterly on this issue.

9. Although I don't think it is appropriate in your circumstance – litigation can be used to put an agency back on track. I recently represented the oil and gas industry in a lawsuit in Wyoming to get the Secretary and the BLM to follow the Mineral Leasing Act in issuing leases; a related oil and gas industry lawsuit resulted in a nation-wide injunction directing the BLM to go through a rulemaking if it wanted to make changes to the EPACT 2005 oil and gas categorical exclusions. The National Mining Association (NMA) has been very successful in using federal litigation to move policy in favor of domestic mining.

10. Finally, be persistent. If I learned anything in Washington, DC it is persistence. Change is incremental under our system of government – and persistence and tenacity can pay off.

Conclusion

In closing, I will emphasize two things: First, know and understand the agency you are working with – it makes a difference. Second, recognize that you have a role to play in improving agency coordination. You can't just sit back and rely on **hope** and expect **change** – you need to act to make coordination a reality.

Thank you.