Testimony of David S. Jennings

Executive Board, Southern Nevada Home Builders Association

Division Counsel-Las Vegas, D.R Horton, Inc.

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On behalf of nearly 1,000 active members of the Southern Nevada Home Builders Association ("SNHBA"), I appreciate the opportunity to testify today. My name is David Jennings, and I am a member of the Executive Board of the SNHBA. I am also Division Counsel for D.R. Horton, Inc. in its Las Vegas office.

The membership of the SNHBA is diverse and includes homebuilders, trade contractors, mortgage companies, banks, real estate agencies and management companies. Most of our members are local, small businesses that employ local Nevada residents. These members are invested in the Las Vegas community and the State of Nevada as a whole. The SNHBA is devoted to the helping the housing industry, and all of its ancillary industries, to provide safe and affordable housing for Southern Nevada residents, and to contribute to the overall quality of life in Southern Nevada.

The homebuilding industry is one of the primary drivers of Nevada's economy. Factoring in all of the various elements of the homebuilding industry -- homebuilders, subcontractors, professional consultants, real estate agents and financial services -- it employs more than 15,000 people in Clark County. The majority of these people are employed by small businesses within the industry.

SNHBA members understand the need for local and federal regulation in the housing industry and beyond. These regulations must be sensible, however, and tied to legitimate public interests. They should be designed and enforced to protect the public. They should be clear and unambiguous in their application and enforcement not regulation simply for the sake of regulation.

The regulatory scheme on which I would like to offer testimony today is the federal government's mineral materials program. It directly affects the most important element of homebuilding—land. Land makes, and breaks, our business. Federal land comprises the majority of the undeveloped land in Nevada and Clark County. It is a major component of any future growth in the State. The majority of privately-owned land in Clark County was once federally-owned land. Much of that land is encumbered by federal mineral reservations of one form or another.

Smart and fair regulation of federal lands in Nevada is critical to the future success of the homebuilding industry here. It can help keep the industry vibrant and a major contributor to economic growth. On the other hand, costly and cumbersome regulation raises the cost of land acquisition and development which, over time, discourages future investment. As investment in land wanes, the homebuilding industry withers, and consequently, auxiliary businesses also decline.

Certainty and sensibility in the regulation of this important asset is critical for members in the industry. The current regulatory structure for federal land in Nevada lacks certainty and is negatively impacting this important industry.

Background Information

In the Western United States, various acts of Congress (primarily adopted to encourage settlement) have resulted in split-estate ownership (Small Tract Act, Taylor Grazing Act, Stockraising Homestead Act) where the federal government retains ownership of mineral rights on privately-owned land. This is particularly prevalent in Nevada due to the enactment of the Southern Nevada Public Land Management Act of 1998 ("SNPLMA"), Pub. L. No. 105-263, 112 Stat. 2343. Current federal regulation states that surface owners of these split-estate lands may only use a "minimal amount" of mineral materials, which the BLM has concluded includes ordinary soils, for "personal use" (43 C.F.R. 3601.71) and any use beyond that "minimal amount" is considered a trespass in the absence of obtaining a material sale contract or permit from the BLM.

Until recently, homebuilders and developers developed land largely undisturbed by any mineral rights enforcement actions by the BLM. In April, 2014, the Inspector General of the Department of the Interior conducted an audit of the BLM's Mineral Materials Program and issued a report regarding the BLM's opportunity to make mineral claims (the "Report"). The Report was highly critical of the BLM for not obtaining market value for mineral materials and made fifteen recommendations for enhancing BLM's management of its mineral material program. One of those recommendations addressed the loss of revenue from "unauthorized" uses. In response to the Report, BLM has since vigorously pursued mineral material trespass claims. There are now eighty four pending mineral trespass matters in Southern Nevada. The agency has also issued

policy guidance to clarify the distinction between personal use with commercial use in existing regulation (BLM IM-2014-085) (the "BLM Policy").

In response to the directives in the Report, the BLM in Nevada has for the first time in recent memory begun to pursue developers and homebuilders for use of mineral materials on their own land. Investigations have been made, and a number of mineral trespass notices have been issued, against current members of the SNHBA for common uses of ordinary soil, which may include sand and gravel materials. Below are a few examples of recent mineral rights enforcement activity against SNHBA members in the Las Vegas Valley by the BLM:

1. In a homebuilder's development of a small residential tract in northwest Las Vegas, it was determined that the elevation of the land was too high relative to the surrounding parcels. To allow for development of the property that was compatible with the surrounding parcels, the homebuilder removed several thousand cubic yards of soils from the property to lower the overall grade and match elevations with surrounding property. The property was encumbered by a federal mineral rights reservation under the Small Tract Act. The homebuilder relocated the material to a nearby property that was also encumbered by an identical federal mineral rights reservation. There, the material was used to raise the grade of the second parcel for a similar small residential development. The homebuilder received a mineral trespass notice from BLM for "unauthorized use" and ultimately had to pay tens of thousands of dollars to resolve it.

2. Another homebuilder purchased a large parcel from of land in Henderson from the BLM. The homebuilder later subdivided the parcel into smaller parcels as part of a master-planned combined residential and commercial development. The homebuilder relocated earthen material from one of the smaller parcels to another, but all within the boundaries of the original large parcel purchased from the BLM. The homebuilder received a mineral trespass notice from the BLM for "unauthorized use," and has now spent tens of thousands of dollars contesting the matter.

3. A third builder purchased a parcel of land encumbered by a federal mineral reservation years after the BLM's original conveyance of the property to another party. After the BLM conveyed the property, and before the builder bought it, someone stockpiled earthen material on the property. The builder moved the stockpiled material to another location, because it interfered with the builder's planned development. The builder received a mineral trespass notice from BLM for "unauthorized use" and spent thousands of dollars on legal and other consultant fees trying to resolve the issue.

Current Enforcement of the Mineral Materials Regulation

The BLM's current enforcement policy represents a significant change from the past. That change resulted from the Inspector General's audit and resulting 2014 Report. The Report directs local BLM offices to aggressively enforce the mineral regulations, and provides guidance on what would constitute an "unauthorized use" of mineral materials. The new BLM Policy states, in part: "A surface owner may extract, sever, or remove only minimal amounts of mineral materials from split estate land for personal use under 43 CFR 3601.71(b)(1) for purposes of improving the surface, even if materials are not removed off of the tract." The Policy further states that "Minimal use . . . would not include large-scale use of mineral materials, even within the boundaries of the surface estate." Then, in a misguided attempt to clarify, the Policy then states "mineral materials that must be excavated in connection with surface use of the property may be spread on other parts of the surface of that same property regardless of the amount, so long as the material is unaltered and is not used for or in connection with any construction purpose."

These restrictions on use of the material on land conveyed or purchased from the federal government are at best, confusing, and at worst, arbitrary and unfair. Moreover, the BLM Policy punishes developers who purchased land prior to its adoption or without knowledge of it. Unfortunately for many property owners--including homebuilders and developers--significant acreage was purchased, and is now owned, in reliance on the previous enforcement policies for federal mineral reservations. The fees and fines now threatened with this aggressive enforcement policy were surely not part of these landowners' financial development projections. Furthermore, there are still many unanswered questions about what "minerals" are and are not included within a federal mineral reservation and, more importantly, what use of the surface minerals is allowed and what constitutes an "unauthorized use." The new enforcement policy and these unanswered questions combine to create uncertainty in the industry.

As currently enforced, the regulations also often ignore the very purposes for which the land was originally sold. A determination of whether a particular substance is included in the mineral estate depends on the use of the surface estate contemplated by Congress when adopted.[1] For example, the declared purpose of the Small Tract Act was to "provide for the purchase of public lands for home, cabin, camp, health, convalescent, recreational and business sites."[2] In the first example cited above, the use of the surface material was entirely consistent with the purposes of the Small Tract Act under which the land was originally sold. It is difficult to see how Congress could have intended to sell the surface for such purposes and contemplate the co-existence of such an incompatible use as mining on the same small five-acre tract. It strains reason to believe that the federal government would be able to enter upon and remove sand and gravel from a

[1] *Watt v. Western Nuclear, Inc*., 462 U.S. 36, 52 (1983).
[2] 43 U.S.C. § 682 (a) (1970), repealed by Pub. L. 94-579, Title VII, § 702, 90 Stat. 2798 (1976)(FLMPA).

parcel sold to a private party under the Small Tract Act without compensation or otherwise authorize a third party to do the same (assuming, of course, that the sand and gravel is commercially valuable). Homeowners would be equally disturbed at this revelation.

Effects on Small Business

The new BLM Policy is adversely impacting the entire homebuilding industry. First and foremost, it results in extra cost to all developers. It is being retroactively applied to parcels that a small business may have purchased in a private transaction several steps removed from any BLM transaction. That extra cost is especially burdensome on small homebuilders because they cannot spread costs and risks across many projects, and these costs consequently serve as a barrier to small business investment.

In addition, the new BLM Policy has injected uncertainty into the process. Land is the lifeblood of the homebuilding industry. It is the most valuable, and most risky, asset. Like anything else, investment in land depends on favorable projections on costs, revenues and risk. The new enforcement policy inserts additional uncertainty into land investment making it impossible to project costs. This applies to large and small homebuilding businesses, but the impact of unforeseen fines and fees, and possible protracted enforcement actions, can be especially crippling for small businesses. It is rarely certain at the time of initial investment in land whether mineral material will need to be imported or exported from a project, or even relocated within the boundaries of that project. Under the new BLM Policy it is now unclear:

(1) what use of sand and gravel (or ordinary soils) will constitute an "unauthorized use";

(2) whether the use will result in fines or fees; and

(3) if so, what the amount of fines and fees might be?

Can a builder cut down high areas and fill lower areas of his property without being fined? Or is that more than "minimal use" even if all material remains on the property? Is relocating earthen material to create lots and building pads allowed under the regulation or will it generate a trespass notice? These questions are not adequately answered under the BLM Policy. Further uncertainty is created as a result of the fines and fees being based on the BLM's market rate for sand and gravel. With the length of time required for entitlement and engineering work, the time between land purchase and development can exceed 12 to 18 months. The BLM's rates can adjust upward over time. While market conditions change over time in many aspects of homebuilding industry, these additional uncertainties make it even more difficult to accurately evaluate future performance on a land investment. For any business, but especially small business, uncertainty means risk. The greater the risks, the less likely the investment will be made.

Regulatory Flexibility Act

In 1980, Congress enacted the Regulatory Flexibility Act to allow small businesses that are heavily impacted by federal regulations to have some input into the development of those regulations. The RFA requires federal agencies to analyze the impact of federal regulations on small businesses and, where the impact would be significant, to adjust the impacts of such regulations to avoid overly burdensome outcomes. The BLM's Policy avoids the requirements of the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). Small businesses may be significantly impacted by the new enforcement policy because (1) they are less likely to have the resources necessary to gain full understanding of the new policy, or to challenge an enforcement action, and (2) the financial impact of the unforeseen fines and fees is magnified in a small business setting. The BLM should be required to reconsider the distinction between personal and commercial use of mineral material and to define what constitutes "minimal" in a common-sense rulemaking where there is adequate public notice and comment as opposed to relying on policy to fill the interpretive gaps in existing regulation. This has been a disturbing trend occurring in many federal agencies (i.e., adopting policies that are inconsistent with existing regulation in lieu of notice and comment rulemaking).

Reform of the Federal Land Policy and Management Act ("FLMPA")

Currently, BLM has discretion as to whether to convey reserved minerals to a surface estate owner. FLMPA provides a process for the conveyance to occur, but it is cumbersome and expensive. Applicants must pay all costs for the preparation of a mineral potential report, and reimburse the agency for any incurred administrative costs, and the process can take up to three years to complete. An expedited process should be developed for surface estates conveyed under certain types of patents (i.e., Small Tract Act patents where Congress could not have intended to provide for the simultaneous development of homes and the mining of mineral materials) to expedite much needed certainty for surface estate owners.

Regulation is Costly to Challenge

It is extremely difficult for small business owners to challenge regulations they deem to be erroneous and/or resulting in unfair enforcement. They often lack the resources to mount a legal challenge against the BLM and their enforcement policies or actions. Small businesses typically do not have internal counsel or engineers on staff to help contest trespass matters. The resolution of BLM enforcement actions includes multiple steps of administrative process and appeal. Only after all administrative remedies are exhausted may the BLM be challenged in federal court. The cost of any challenge often will exceed the fine, even where the challenge has merit. As a result, the only options for small business owners are to either pay the fine or, if they know of the risk, elect not to purchase the property in the first instance.

Insufficient Publicity

Until this week, there has been little or no publication or education on this new BLM Policy. Most small business owners are unaware of it. They may be subject to future fees or fines without any knowledge of that potential liability. Lack of education within the industry and, more generally, in the landowning populace creates a myriad of challenges that are difficult to overcome. When fined, developers are surprised at the extra costs associated with the current mineral regulation. Sometimes those costs can be the difference between a development project being viable or not. Additionally, landowners do not appreciate the extra costs associated with the current mineral regulation. Because those costs are not known, they are not yet reflected in the market. The cost of the private land, coupled with the potential costs associated with the current mineral regulation, are artificially high and often make investment in that land cost prohibitive.

Are Landowners Getting the Benefit of Their Bargain?

Because there has been little or no publication about BLM's new Policy, land owners may not be able to obtain all the benefits of their purchase. They believe they own a piece of land free and clear to develop. It turns out they do not. The very materials that make up the useable land are somehow still the property of the government, and everything short of "minimal use" is prohibited unless that landowner goes through a cumbersome approval process and pays the government additional money. This does not seem right.

Conclusion

Homebuilding is a complex and highly regulated industry. As costs and regulatory burdens increase, the small businesses that make up a majority of the industry must adapt. This can include paying higher prices for land, purchasing smaller parcels, redrawing development or house plans, and/or completing mitigation. All of these adaptations are financed by the builder, and ultimately result in higher prices for consumers and lower production for the industry. As production declines and jobs are lost, other sectors that buy from or sell to the construction industry also contract and lose jobs. Builders and developers, still struggling to emerge from the economic downturn, cannot depend upon the future home buying public to absorb the multitude of costs associated with overregulation.

Compliance costs for regulations are often incurred prior to home sales, so builders and developers have to finance these additional carrying costs until the property is sold. Because of the increased price, it may take longer for the home to be sold. Carrying these additional costs only adds more risk to an already risky business. This new enforcement policy increases costs and decreases certainty for large and small builders alike. It adds to the headwinds that our industry faces.

Homebuyers are extremely price sensitive, and even moderate cost increases can have significant negative market impacts. This is of particular concern in the context of affordable housing where relatively small price increases can have an immediate impact on low to moderate income homebuyers. As the price of the home increases, those who are on the verge of qualifying for a new home will no longer be able to afford this purchase. The National Association of Home Builders has estimated the number of households priced out of the market for a median priced new home from a $1,000 price increase--nationwide, if the cost of a median priced new home were to increase from $225,000 to $226,000, a total of 232,447 households would no longer be able to afford that home. Here in Clark County, 1,806 households are "priced out" of the market for every $1,000 increase in home price according to Home Builders Research. Simply put, something must be done to curb the tide of federal overregulation and overzealous enforcement. These actions ultimately damage the American public.

Thank you again for the opportunity to testify today.