Answers to Requested Comments on 36 CFR § 228 Rule changes
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Please submit comments via one of the following methods:

- *Electronically:* Go to the *Federal eRulemaking Portal: http://www.regulations.gov.* In the Search box, enter FS-2018-0052, which is the docket number for this Advanced Notice of Proposed Rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Notice link to locate this document. You may submit a comment by clicking on "Comment Now!"
- *By hard copy:* Submit by U.S. mail to: USDA-Forest Service. Attn: Director—MGM Staff, 1617 Cole Boulevard, Building 17, Lakewood, CO 80401.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us.

In the Summary it is assumed you intended to state:

> The goals of the regulatory revision are to expedite Forest Service review of certain proposed mineral operations authorized by the United States mining laws. And, where applicable, Forest Service clarifying the regulations, to increase consistency with congressionally mandated law (USC's), BLM rules (CFR's) and Presidential Directives. Thus, to increase the Forest Service's nationwide consistency in regulating U.S. owned minerals and their operations authorized by the United States mining laws.

The concerns of the miss perception (political obfuscations) of the proper interpretation of mining law, by several supposed mining lawyers; is an almost impenetrable maze of arguably relevant legislation in no less than a half-dozen statutes, augmented by the regulations of two Departments of the Executive. "[t]here is little cause for wonder that the language of these statutes and regulations has generated considerable confusion". California Coastal Commission v. Granite Rock Co., 480 U.S. 572, 606 (1987) (Powell, J. dissenting)

The important first concept is. in the context of regulating public lands or the public domain as it affects the Locatable mineral deposit property grant and the grantees right to ingress and egress generally, highways; understanding what is the legal extent of Forest Service authority over the surface and BLM's over the mineral as well the States over private property!

Certainly, the rules need to be consistent with BLM rules/regulations., but the rules and policy that govern how each Forest implements those rules are really what you should be looking at. There is very little consistency and or accountability when land surface management decisions are made that impede economic viable mineral development in violation of congressionally passed land use management Law.

Regardless how you change the rules of the 36 CFR § 228 regulations, I doubt you will add a means for small miners to hold accountable forest personal who violate Congressional Land use Law as it pertains to mineral development.

Many small miners cannot afford to bring an action in court, when so many lower court decisions blatantly go against the Supreme Court historical rulings on Congressionally passed Mining Law. The Forest Service may not prohibit nor regulate locatable mineral operations on lands subject to the Mining Law and otherwise comply with applicable Mineral Lands Disposal Law.

Locatable granted mineral miners have substantial rights in Public Lands of mineral character that are to be "dominate and primary" (legislative history for the 30 USC 612(a) and (b) statute). So that any use of the surface or other surfaces resources by Federal agencies must yield to mining- having the first and full Lawful right to surface resources, (*Shoemaker*, 110 IBLA 39, 53 (1989)). Yet the CFR trend is to prevent any impacts or land use at all.

Forest Service authority over mineral grantees' mining claims.

SAVINGS CLAUSES ARE THE NOTWITHSTANDING PROVISIONS FOUND IN MINING LAWS THAT HAVE NOT BEEN INCLUDED IN THE WRITING OF EACH CFR RELATED TO THE CONGRESSIONAL ACTS; AND WHAT THEY MEAN

1866, 1870, and the 1872 mining laws title 30 USC 22 to 53.
Founding of the Forest reserve of 1897.
16 USC 472 and 16 USC 482 The courts have consistently upheld the ruling in *Kansas* v. *Colorado* since 1907.
16 USC 482 Saving claws (notwithstanding any provisions contained in sections 473 to 478,479 to 482 and 551 of this title)

ORGANIC ACT OF 1897 [PUBLIC--No.2.]

And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, **notwithstanding any provisions herein contained.** [Emphasis added]

1897. CIRCULAR P.

DEPARTMENT OF THE INTERIOR. GENERAL LAND OFFICE.

Washington, D. C., June 30, 1897.

LOCATION AND ENTRY OF MINERAL LANDS.

19. The law provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry", **notwithstanding the reservation.** [Emphasis added] *This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner*. [Emphasis added]

Thus, the statements “notwithstanding any provisions herein contained”; “notwithstanding the reservation”; and or “notwithstanding any provisions contained in sections 473 to 478,479 to 482 and 551 of this title”

The Supreme Court has indicated as a general proposition that statutory "notwithstanding" clauses broadly sweep aside potentially conflicting laws. *See Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993) ("As we have noted previously in construing statutes, the use of such a `notwithstanding' clause clearly signals the drafter's intention that the provisions of the `notwithstanding' section override conflicting provisions of any other section. Likewise, the Courts of Appeals generally have interpreted similar `notwithstanding' language . . . to supersede all other laws, stating that `[a] clearer statement is difficult to imagine.'" (omission and alteration in original) (citation and internal quotation marks omitted)); *see also* *Student Loan Fund of Idaho, Inc. v. U.S. Dep't of Educ.*, 272 F.3d 1155, 1166 (9th Cir.2001) ("[T]he `[n]otwithstanding any other provision of law' clause demonstrates that Congress intended to supersede any previously enacted conflicting provisions." (second alteration in original)).
As we have noted previously in construing statutes, the use of such a "notwithstanding" clause clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section. See *Shomberg v. United States*, 348 U.S. 540, 547-548, 75 S.Ct. 509, 512-513, 99 L.Ed. 624 (1955). Likewise, the Courts of Appeals generally have "interpreted similar 'notwithstanding' language . . . to supersede all other laws, stating that ' "[a] clearer statement is difficult to imagine." ' " *Liberty Maritime Corp. v. United States*, 289 U.S.App.D.C. 1, 4, 928 F.2d 413, 416 (1991) (quoting *Crowley Caribbean Transport, Inc. v. United States*, 275 U.S.App.D.C. 182, 184, 865 F.2d 1281, 1283 (1989) (in turn quoting *Illinois National Guard v. FLRA*, 272 U.S.App.D.C. 187, 194, 854 F.2d 1396, 1403 (1988))); see also *Bank of New England Old Colony, N.A. v. Clark*, 986 F.2d 600, 604 (CA1 1993), *Dean v. Veterans Admin. Regional Office*, 943 F.2d 667, 670 (CA6 1991), vacated and remanded on other grounds, 503 U.S. ----, 112 S.Ct. 1255, 117 L.Ed.2d 486 (1992); *In re FCX, Inc.*, 853 F.2d 1149, 1154 (CA4 1988), cert. denied *sub nom.* *Universal Cooperatives, Inc. v. FCX, Inc.*, 489 U.S. 1011, 109 S.Ct. 1118, 103 L.Ed.2d 181 (1989); *Multi-State Communications, Inc. v. FCC*, 234 U.S.App.D.C. 285, 291, 728 F.2d 1519, 1525, cert. denied, 469 U.S. 1017, 105 S.Ct. 431, 83 L.Ed.2d 358 (1984); *New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 283 (CA3), cert. denied *sub nom.* *Government Employees v. New Jersey Air National Guard*, 459 U.S. 988, 103 S.Ct. 343, 74 L.Ed.2d 384 (1982)

Thus, the Congressional drafter's intention that the provisions before the `notwithstanding' section override potential conflicting provisions of the Forest Service laws and rules as they pertain to locatable mining law of 1872 that 30 USC 26 “exclusive possession of the surface” would override any Forest Service Land management law or rule as stated in 43USC1732(b).

This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner as if there was no Forest reserves or Forest Service managed lands.

Congress has stated in the Organic Act of June 4, 1897, the Eastern Forests (Week's) Act of 1911, and the Taylor Grazing Act of 1934, **that there was no intention to retain federal jurisdiction over private interests within national forests.** [Emphasis added]

1955 surface resource Act removed salable minerals but maintained locatable rights with saving clause in 30 612 (b)

> "Rights under any mining claim hereafter located under the mining laws of the [US] shall be subject, prior to issuance of patent therefore, to the right of the [US] to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof **(except mineral deposits subject to location under the mining laws of the [US])**." [Emphasis added]

In fact, Congress has reaffirmed its historic policy of encouraging development of the nation's mineral resources. In 1970, Congress enacted the Mining and Minerals Policy Act, 30 U.S.C. sec. 21a, which provides: The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining . . . [and] the orderly and economic development of domestic mineral resources … See also National Materials and Minerals Policy, Research and Development Act of 1980, 30 U.S.C. 1601 -1605.

In 1976 FLPMA title 43 sec 1701 was enacted where USC 471 and 471(b) were repealed, and replaced with **43 USC 1740 as the statutory enabling authority for the Secretary of Agriculture;** [Emphasis added] requires the Secretary, "with respect to lands within the National Forest System, shall promulgate rules and regulations to carry out the purposes of this Act…";

> And where 43USC 1732 states the exclusionary saving claws for locatable mineral grantee
> 43 **§** 1732. Management of use, occupancy, and development of public lands
> (a) Multiple use and sustained yield requirements applicable; exception
> ". . . . **except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.** [Emphasis added]
> (b) 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,** [Emphasis added] including, but not limited to, rights of ingress and egress.

under Background the FS request it is sated:

> "… the Forest Service contemplates increased consistency with the BLM's regulations regarding reasonably incident uses and occupancy, classification of operations (i.e., casual use, notice-level, and plan of operations-level), requirements for operating on segregated or withdrawn lands…"

Concern here is that not even the BLM's regulation policy is consistent with laws concerning locatable mineral law and mining rights granted. BLM has been wrongfully imposing both the 43 CFR § 3809 and the § 3715 regulations, which even conflict in scope on the different classes of BLM managed lands and regulates differently from congressional policy, which violate rights of locatable mineral miners.

At § 3809.2(a) it states: "*This subpart applies to all operations authorized by the mining laws on public lands where* ***the mineral interest is reserved to the United States***".
At §3715.0-1(b) it states: "*This subpart applies to public lands BLM administers. They do not apply to state, or private lands* ***in which the mineral estate has been reserved to the United*** *States*."
Note the 3809 and 3715 are mineral's owned or controlled by the US and not part of granted mineral rights as stated in before Congressional policy and thus would be covered by

- Subpart B - Leasable Minerals (§ 228.20-228.39)
- Subpart C - Disposal of Mineral Materials (§§ 228.40 - 228.67)
- Subpart D - Miscellaneous Minerals Provisions (§ 228.80)
- Subpart E - Oil and Gas Resources (§§ 228.100 - 228.116)

All ready;

Subpart A – Locatable Minerals (228.1 to 228.15) As written are not lawful, Locatable Minerals do not belong to the U.S.: *In re Shoemaker*, 110 IBLA 39, 53 (1989), "When it does [interfere], Federal surface management activities must yield to mining as the 'dominant and primary use,' the mineral locator having a first and full right to use the surface and surface resources."; The locatable minerals are private property not US owned minerals."

The Forest Service has not even addressed the fact that Federal management must yield to private property and in fact is to protect and assist in the mineral development for all of society. Until the Forest Service properly recognizes its obligations further comment would be futile.

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