

10/29/2021

Objections-southwestern-regional-office@usda.gov

USDA – Forest Service Southwest Region
Attn: Objection Reviewing Officer
333 Broadway Boulevard SE
Albuquerque, New Mexico 87102

Re: Santa Fe National Forest Plan Revision Objection

Dear Ms. Cress:

As set forth herein, Comexico objects to the proposed designation of the Thompson Peak Wilderness area in the Revised Santa Fe National Forest Plan.

This objection is respectfully filed because the Preferred Action proposed by the Forest Service did not factually consider the evidence provided by Comexico regarding the impact of the Proposed Santa Fe National Forest Plan Revision (“Revised Plan”). As set forth in Volume 1, Section 2 of the Final Environmental Impact Statement (FEIS), the Forest Service has determined that Alternative 2 is the preferred proposed action outlined in the Revised Plan as it supports multiple uses. This is stated to “maintain current levels of use.”¹ Comexico respectfully submits that mining in general and in particular its current exploration and development operations and plans at and around Jones Hill should be maintained as a current multiple use. In formulating the Revised Plan, essentially no consideration was given to Comexico’s comments concerning the historical and current mining operations.² In response to Comexico’s comments, the Forest Service simply states “[t]he historical context of energy and mineral exploration as well as other resources is described in the Assessment.”³ Comexico presumes this description is the short shrift given to

¹ See Vol. 1, FEIS 2.24, page 31.

² See Comexico’s initial comments attached as Exhibit 1.

³ See Vol. 4 FEIS, page 267.

locatable minerals in the Revised Plan that states with no explanation that no commercial mineral production is reasonably foreseeable. The Forest Service's response to Comexico's comments (or lack thereof) underscores a predetermined conclusion that certain lands in and around Comexico's lode mining claims should be designated as wilderness in an effort to stop future exploration and potential for development and/or mining of Comexico's mining assets. Also, as discussed further herein, the Forest Service completely ignores the reality that its proposed actions are in effect a taking of property rights without just compensation.

In order to reach its goal of including the Thompson Peak area as wilderness and scoring the area as "high", the Forest Service had to manipulate its inventory criteria. This was accomplished by ignoring the historic mining and logging evidence in this area and taking the position that there was no potential for commercial production in the foreseeable future. Despite the fact that Comexico has legally located mining claims in the area proposed to be set aside, the Forest Service again ignored the evidence of human activity, provided in comments submitted by Comexico, to achieve the "high" rating for its wilderness designation. It is clear the Forest Service has not spent any field time in the area known as the Thompson Peak addition. A Forest Service response to a Comexico comment regarding significant evidence of unauthorized motorized vehicle use on the pre-existing road network within the Thompson Peak addition simply states "data [does not] indicate there is significant motorized use [of] MVUM roads". Comexico personnel alerted the Forest Service Las Vegas-Pecos District Ranger of unauthorized motor vehicle use via email several times since 2019.

As noted in Comexico's initial comments, Conoco and Santa Fe Mining are reported to have spent a combined total of \$13 million by 1992 in exploration activities at the Jones Hill Mine. In the first half of 2019, Comexico acquired the rights to 20 unpatented lode mining claims from

two individuals and had totaled more than \$750,000 in development expenditures at the time of its initial comments and has spent approximately an additional \$600,000 since that time. Comexico takes great exception to a claim that no commercial production is reasonably foreseeable. The New Mexico Energy and Minerals and Natural Resources Department (NMEMRD) concurred in its comments. Had the Forest Service applied the correct facts to the inventory criteria set out in the Forest Service Handbook, the improvements found in this area would have resulted in a “no” rating to the area. A document from USFS 1987 plan – titled “analyses of the Management Situation, SF National Forest” states “an expanded discovery in the central Pecos River drainage is expected to result in mining, starting in the latter 1980’s.”⁴ The prospecting impetus from this recent discovery will affect the Pecos District and a small part of the Las Vegas District.

As shown by the maps enclosed with Comexico’s initial comments, the proposed Thompson Peak Wilderness (horizontally hatched green polygon) would significantly interact and adversely impact Comexico’s existing located mining claims (thick black and dashed black polygons). The location of the proposed wilderness area would not be compatible with a mining operation since the wilderness abuts too closely to the project area. For example, mine water effluent from the lower adit of the historic/existing Jones Hill mine would flow into the wilderness located just 100 feet from the portal and existing roads accessing prospective areas would be off limits. Similar problems would arise from the location of the proposed wilderness and their interaction with Comexico’s lode claims at Dalton Creek; there are numerous prospects such as small pits, adits, shafts, and outcropping mineralization identified within the boundary of the Thompson Peak addition.

⁴ See portion of 1987 Management Document attached as Exhibit 2.

Comexico's claims located around Jones Hill include the Macho prospects, 9359 Hill prospects, Jones Hill, Picuris and Doctor Creek prospects. Comexico has completed soil geochemical sampling and Controlled Source Audio Magnetotellurics (CSAMT) geophysicals across much of the proposed Thompson Peak Wilderness addition in the Jones Hill, Macho, 9359 Hill, and Picuris prospect areas and identified targets that, in conjunction with mapped geology are highly prospective. Comexico's located claim position at and around Jones Hill currently totals approximately 2,600 acres. If the proposed Thompson Peak Wilderness is allowed, it would put approximately 1,300 acres of the 2,600 acres into wilderness. In addition, at Dalton Creek, Comexico has located lode claims of approximately 600 acres. If Thompson Peak Wilderness goes forward, approximately 450 acres of these 600 acres would be designated wilderness.

The FEIS and the Forest Service's responses to comments essentially ignored Comexico's comments. The Revised Plan contains very little discussion or attention to locatable minerals. The Revised Plan recognizes that the General Mining Act of 1872 (30 U.S.C. §§ 22-42) grants the right to prospect and explore for minerals on lands open to mineral entry. The right of reasonable access for exploration and development is guaranteed. While the Forest Service can require reasonable protection of surface resources and compliance with federal laws, it cannot deny a request to explore and develop the minerals on National Forest Service lands. After stating that it cannot deny exploration and development of valuable mineral resources, the Revised Plan then targets the Jones Hill operation by downplaying the mineral valuation in the Santa Fe National Forest and ignoring the Forest Service's own statements from the 1987 Plan acknowledging that mining in the Pecos Valley Drainage is expected (analyses of management situation doc). The Revised Plan states that "there are a few small-scale (hobby) mining operations for locatable minerals on Santa Fe NF, but no commercial production has occurred since the 1970's *and none is reasonably*

*foreseeable.*⁵ This further suggestion that no commercial operations area reasonably foreseeable is completely inaccurate and ignores Comexico's comments and statements from the 1987 plan (analyses of management situation doc). Notably the Revised Plan also ignores the NMEMRD's comments that the narrative should be corrected to acknowledge that there may be commercial mining in the foreseeable future. The NMEMRD is the New Mexico state agency that is responsible for enforcing the New Mexico Mining Act and its regulations in New Mexico. The purposes of the Act (§§ 69-36-1 to 69-36-20 NMSA 1978) include promoting responsible utilization and reclamation of lands affected by exploration, mining or the extraction of minerals that are vital to the welfare of New Mexico. Clearly, the mineral resources located within the area proposed by the Forest Service for wilderness designation are vital to the welfare of the citizens of New Mexico. The size and location of the proposed Thompson Peak Wilderness area indicated that the Forest Service is targeting Comexico's efforts to establish an exploration operation and potentially develop and mine in a well-known, long established significant resource in the Jones Hill area. The proposed wilderness area would, as noted, deprive Comexico of its valuable property rights.

The USGS examined the potential of the Pecos Wilderness for mineral resources and identified the major discovery at the Jones Hill mine by Conoco in 1978. According to the USGS, the Pecos mine yielded 2.3 million tons of ore containing copper, lead, zinc, gold and silver. The USGS identified the area south of the Pecos Wilderness as containing numerous mineral resources. The Jones Hill mine, which is about four miles southwest of the Pecos mine, is developed as a similar type of deposit, and an important, massive sulfide deposit was discovered by Conoco near the Jones Hill mine. (*Mining World* 1978).

⁵ See page 150 of the Revised Plan.

As shown by Figure 2 to the USGS survey, mineralization occurs in the area around the Jones Hill mine which should be taken into consideration in evaluating the management trade-offs in creating the proposed Thompson Peak Wilderness Area.⁶ The recommendation – which, not coincidentally, would create new wilderness areas incompatible with the development of probably the most promising mineral deposit in the Santa Fe National Forest – presents one additional highly “**tenable**” management tradeoff for USFS. Almost from the beginning of the Wilderness Act, courts recognized that a wilderness designation constituted a “taking” which required the government to compensate the owners of incompatible pre-existing commercial enterprises for the value of the property interest destroyed.

The Takings Clause of the Fifth Amendment of the United States Constitution prohibits the government from taking property for public use without “just compensation.” A compensable taking of property occurs when society imposes a burden on a property interest which, in fairness and justice, society itself should bear. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). A compensable takings claim is created when the government divests a legally recognized property interest without justly compensating the owner for that divestment. *Allred v. United States*, 33 Fed. Cl. 349, 356 (1995).

Divestment may occur through physical or regulatory means. When the government encroaches on or occupies lands – such as by the creation of a park or, as here, a wilderness area – a physical taking occurs. *See, e.g., Palazzolo v. Rhode Island, et al.*, 533 U.S. 606, 607 (2001) (coastal wetlands designation). When the government adopts regulations which are incompatible with the intended use of the property – such as designating roadless areas where the activity being conducted requires roads for operations – a regulatory taking occurs. *See id.* Takings claims of

⁶ A copy of the USGS/Bureau of Land Mines Survey is attached as Exhibit 3 hereto.

the latter type are commonly called claims for “inverse condemnation.” Congress has vested jurisdiction over such claims in the Federal Court of Claims by virtue of 28 U.S.C. § 1491.

Takings of mineral interests have arisen in a wide variety of circumstances. In *United States v. Pee Wee Coal Co.*, 341 U.S. 114 (1951), the U.S. Supreme Court found a taking occurred when the government, pursuant to a wartime order by President Roosevelt to avert a strike, seized a coal mine and took over its operation.

Two other leading cases have arisen in New Mexico. In *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990), the owner submitted a mining plan to the Department of Interior (“DOI”) which conformed to all pertinent regulations. During the pendency of the owner’s lease, regulations were changed giving the Navajo Tribe of Indians, on whose reservation the mining was to be conducted, concurrence authority for the mine plan. The Secretary refused to approve it without concurrence from the Tribe and decided to give the Tribe veto power over approval. The Tribe demanded \$10 million for its approval. The Court determined that a regulatory taking of the mining leases occurred and a settlement of \$64 million was subsequently paid by the government.

In *Bassett v. United States*, 55 Fed. Cl. 63 (Ct. Fed. Cl. 2002), the owner purchased a property containing large quantities of limestone and four patented mining claims containing a quarry where large scale mining operations had previously taken place. EPA, under CERCLA, was remediating the property and dumped lead and other hazardous wastes into the quarry located on the one of the patented claims, rendering it unusable. The Court found that a physical taking occurred and awarded compensation.

Wilderness designations have resulted in successful inverse condemnation claims. For example, in *Pete v. United States*, 531 F.2d 1018 (Fed. Cl. 1976), the Claims Court established

that a wilderness designation which banned commercial enterprises and effectively prohibited access to the owners' business constituted a "taking" requiring "just compensation." There, the owners built floating "cabin barges" on a remote lake in northern Minnesota. The barges were docked on a shoreline parcel they owned. They were built onsite because the lake was virtually landlocked and transport of objects that size and weight was difficult to impossible. The barges were used commercially to transport, house and feed hunting and fishing parties. When the Boundary Waters Canoe Area (BWCA) was created, structures, installations and commercial enterprises were banned by virtue of 16 U.S.C. § 1133(c). *Id.* at 1021. Since the costs of deconstructing the barges exceeded their worth, the court quickly and easily determined that there was a taking and awarded compensation for their value. *Id.* at 1035-36. ("The interference with use or possession may be so substantial and of such a character that it cannot be done without compensation under the Federal Government's regulatory and executive powers.") (citation omitted). *Id.* at 1032.

In a similar case, the court in *Stupak-Thrall v. Glickman*, 988 F.Supp. 1055 (W.D. Mich. 1997), held that amendment to federal legislation banning motorboat use on a lake in a wilderness area constituted a taking of riparian rights of resort owners on the shores of that lake. The court declared: "[R]iparian rights are property and as such are 'protected by the limits of the power of eminent domain.' ... Riparian rights involve property rights that, if interfered with by the government, require[] the payment of just compensation." (citation omitted). *Id.* at 1064-65. The exact same thing is true of the rights of persons who have established mining locations under the General Mining Act of 1872. *See also, Hedstrom Lumber Co. v. United States*, 7 Cl. Ct. 16 (1984) (in adopting an extension of the boundaries of the BWCA, Congress prohibited logging, thus

denying pre-existing logging contractors (since 1914) the opportunity to log: government conceded liability for a taking and court awarded just compensation).

Whether a wilderness designation constitutes a taking of mineral rights – the very issue presented now – was at issue in *Otter Creek Coal. Co.*, 224 Ct. Cl. 697 (1980). The mineral owner claimed a wilderness designation made it impossible to mine a valuable stratum of coal which outcropped in and around the designated area. The government, improbably, sought dismissal on the grounds that the owner could still conduct mining beneath the wilderness area without physical access to the surface if it mined through the outcrops outside the wilderness boundaries and if it obtained permission from the Secretaries of Agriculture and Interior who held regulatory authority over the mining operations. The Claims Court expressed extreme doubt as to whether the government’s hypothetical scenario would ever come to pass: “We have difficulty imagining that any now or future Secretaries of Agriculture and Interior will ever permit removal of the coal involved, and if they were willing, that the alert, zealous and well financed environmental organizations could not and would not promptly obtain injunctions.” *Id.* at 699. The Court, noting that the owner would be effectively deprived of its right to compensation by inevitable regulatory delays, ordered the Secretaries to provide prompt decisions regarding whether mining would be allowed. If, as expected, mining was not to be permitted, the Court determined that the owner’s takings claim could proceed.

As noted, two types of takings exist: physical and regulatory. The mining claims here fall into two categories: those that would be within the proposed new wilderness boundaries, and those that would not but would be in such close proximity that concurrent wilderness and mining uses would be utterly incompatible. As to the claims within the boundaries, wilderness designation would result in physical occupation of the mining claims – however inappropriate that would be

given the current state of the lands described above. We would expect the government to concede the same. As stated in *Palazzolo*, “[t]he clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use.” *Id.* at 617. Use for wilderness purposes would surely qualify.

Regarding the adjacent claims, *Palazzolo* notes that where governmental action “places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may ... occur[.]” *Id.* at 617. Whether it does so “depend[s] on a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.” These are known as the “*Penn Central* factors” derived from the decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Opening or accessing historic mines would cause water inflows into the adjacent wilderness area which would simply not be countenanced by regulatory authorities under modern water quality regulations. *See, e.g.*, Revised Plan at 150 (“The Forest Service can require reasonable protection of surface resources and compliance with other Federal laws (i.e., Clean Water Act, the Endangered Species Act, Archeological Resources Protection Act, etc.) ...”). Mining, no doubt, also inevitably creates traffic and noise completely inconsistent with the concept inherent in wilderness: quiet, solitude and a return to natural surroundings in which man is only a visitor. Without question, therefore, the proposed designation would result effectively in a mining ban. It goes too far. “[A] regulation which ‘denies all economically beneficial or productive use of [an interest in property]’ will require compensation under the Takings Clause” of Amendment V of the U.S. Constitution. *Id.* at 617. As in *Palazzolo*, where a landowner sought to fill coastal wetlands to construct a commercial facility that was sufficient to accommodate 50 cars with boat trailers, a dumpster, porta-potties, picnic

tables, trash receptacles, etc., but was thwarted by local wetlands designation and enforcement of wetlands regulations, the wilderness regulation here goes too far.⁷

The court in *Palmyra Pacific Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1369 (Fed. Cir. 2009), offered a significant insight as to how far is too far. In a dispute over a regulation adversely impacting the plaintiff's commercial fishing rights, the court, citing *United Nuclear* and other similar cases, observed:

To be sure, once it is established that a recognized property interest has been affected by governmental regulation, governmental “**targeting**” may make it more likely that the destruction of property rights will be regarded as appropriative, rather than merely the incidental effect of lawful regulation directed at a different purpose. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (referring to regulation that “*single[s] out*” and “burden[s]” the owner of property). (emphasis added)

Although the court in *Palmyra* did not find “targeting” in the unique circumstances presented there, the record here compels the opposite conclusion. As summarized in the facts outlined above, the following non-exclusive list contains prominent examples.

- In the Jones Hill area, the Thompson Peak addition would include Comexico mining claims covering approximately 1,300 acres of approximately 2,600 acres, thus rendering those claims valueless.
- In the Dalton Creek area, The Thompson Peak addition would include Comexico mining claims covering approximately 450 acres of approximately 600 acres, thereby rendering those claims valueless.
- More than ten percent of the acreage in the 25,000+ acre total addition has a direct effect on Comexico's claims.

⁷ The Court observed that the proposed facilities did not “tend to inspire the reader with an idyllic [] image ...” *Id.* at 615.

- The Energy and Minerals Department of the State of New Mexico concluded that USFS's statement that there would be no foreseeable mining in the proposed addition was incorrect as follows: "The narrative should be corrected to acknowledge that there may be commercial mining in the foreseeable future in the forest. (p. 150)" Final EIS, Vol. 4 at p. 266. Nonetheless, USFS did not correct its error demonstrating that USFS is acting upon a predisposed anti-mining agenda.
- The proposed boundaries would place the remaining Comexico claims virtually on the doorstep of wilderness, also rendering mining of those claims unlikely under current regulations or infeasible economically, again demonstrating USFS's anti-mining agenda.
- USFS representatives, in verbal discussions with Comexico representatives, have stated that, upon Revised Plan adoption, they will treat lands in the proposed wilderness addition as already designated wilderness, thus effectively prohibiting mining before Congress has even acted.
- As expressed in comments from Comexico, much of the land in the Thompson Peak addition is totally unsuited to wilderness, containing adits, numerous existing old roads, drill sites, tunnels, mine waste piles, exploration sites, etc., yet USFS has inappropriately proposed these areas for wilderness designation knowing full well the deleterious impact that such a designation would have on Comexico's claims and mining in general.
- At the same time USFS personnel was preparing an environmental assessment of Comexico's proposed exploration plan, it was rushing to complete revisions to the Revised Plan proposing wilderness designation covering a majority of Comexico's

claims thus indicating full knowledge of what Comexico was proposing and the impact of the Revised Plan on these proposals.

- USFS’s unwarranted conclusion that mining in the proposed area is “untenable” even absent wilderness designation is unsupported by any evidence and fails to take economic and social (employment and renewable energy transition) benefits of mining into account.
- USFS has disregarded information presented by Comexico personnel indicating the economic viability of mining within or near the proposed area based upon the Conoco/Santa Fe Pacific Mining/Champion Resources/etc. analysis and the evidence of historical mining from 1870 to mid-1980s, as well as the fact that new mining often takes place in the same areas (and, importantly, the same orebodies) where mining previously occurred successfully.
- USFS is aware of sites in other parts of the country, particularly Idaho, where wilderness designation has thwarted proposed mining, i.e., the Frank Church Wilderness, Payette Idaho, Golden Hand case.

The final *Penn Central* factor for concluding that a regulatory taking has occurred is interference with reasonable invest-backed expectations. This requirement is easily met. Comexico’s predecessors conducted extensive evaluations of the claimed areas from Dalton Creek, through Macho Creek, 9359 Hill, Jones Hill, and Doctor Creek aimed at determining the scope and nature of the mineral deposits and the feasibility of removing them. This work was done at a cost (to them) of approximately \$20 million in 2019-equivalent dollars. The value of that work was reflected in the acquisition price Comexico agreed to for the claims and the cost of locating unpatented lode mining claims in 2019. For its own part Comexico has invested upwards of \$1.3

million in continuing this work. Given the size of the deposits as established by prior and continuing minerals evaluation work, and the investment in the properties made by other sophisticated parties, the expectations of Comexico to develop this “important massive sulfide deposit,” which USFS admits it “cannot deny”, absent wilderness designation, is *per se* reasonable.⁸

To further confirm the reasonableness of Comexico’s expectations and to underscore the risk that USFS would be undertaking on behalf of the government in the form of a just compensation judgment should USFS continue on its present course, Comexico discusses below a range of valuations for the historically defined mineral resource at current market prices. Comexico stresses that the valuations are only approximations, not projections, and are based on gross, not net, valuations of minerals in the ground without deduction for the material cost of extraction. Nonetheless, they may provide an order of magnitude of the rights USFS is proposing to materially disrupt.

Conoco’s resource in 1981 was:

- 5,784,307 tonnes @
 - 1.96 grams/tonne gold
 - 1.02% copper
 - 0.24% lead
 - 1.46 % zinc
 - 21.4 grams/tonne silver

Current metal prices as of October 8, 2021:

- Gold = \$1759/ounce = \$56 gram
- Copper = \$9289/tonne
- Lead = \$2220/tonne
- Zinc = \$3039/tonne
- Silver = \$22.66/ounce = \$0.73/gram

Approximate in ground value of contained metal, based on resource tonnage and current metal price:


⁸ See, Volume 1 FEIS, pg. 444, 3.15.1.3 Locatable Minerals.

- Gold: \$320 million
- Copper: \$530 million
- Lead: \$30 million
- Zinc: \$250 million
- Silver: \$90 million
- Total: \$1.22 billion

For the foregoing reasons, USFS should withdraw its endorsement of Alternative 2 to the extent that it proposes wilderness designation of areas of the Thompson Peak addition which conflict with Comexico's unpatented lode mining claims and a buffer of 1000 ft.

Respectfully submitted,

Comexico LLC



By: _____

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