Answers to Requested Comments on 36 CFR § 228 Rule changes
By Guy Michael, September 18, 2018
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> *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!"

In the Summary you 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 approval of some of these proposals by clarifying the regulations, to increase consistency with…BLM… to increase the Forest Service's nationwide consistency in regulating mineral operations authorized by the United States mining laws…"

These goals are worthy enough and should be required to reach a nationwide consistency in regulating mineral operations authorized by the United States mining laws. However, I sincerely doubt that by changing certain rules, here, it will cause a consistency in how forest personnel implement the rules.

Certainly, some of the rules need to be consistent with BLM regulations on five acres or less, but the rules that govern how each forest district implements those rules are really what you should be looking at, as there is very little accountability when decisions are made to hold off accepted as complete plans.

Currently I am associated with such a plan that has been submitted and accepted as complete in 2007. It is now 2018, and while the US Mining Law authorizes the activity, the Wallow-Whitman National Forest (WWNF) District Rangers, (there have been several Rangers during this time period), never started the environmental assessment nor began consultations with the proper federal agency. So we are looking at 11 years without any approval and many letter writings.

How many small miners can afford to bring an action in court with so many lower court decisions going against the Supreme Court analysis stating that two years at the most with few exceptions to complete the approval process under NEPA?

The WWNF decided to lump all received mining plans together before starting an environmental analysis, waiting years till they could get to it; to do supposedly as a whole. The results are, we have been waiting 11 years now and after many letter writings, nothing would get them to budge and to stop violating the custom, culture, economic and social conditions and rights of us miners in the WWNF. Yet, many actions and projects the WWNF wanted to do has been started and completed long ago in this very watershed and others after our plan was accepted as complete. We are still waiting!

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 personnel as a nationwide consistency.

It states under Background (about the 4th paragraph):

> Thus, the Forest Service may not prohibit locatable mineral operations on lands subject to the Mining Law that otherwise comply with applicable law, nor regulate those operations in a manner which amounts to a prohibition.

Yet that is exactly what the WWNF is doing; using regulation in a manner that amounts to prohibition of an authorized activity. They will claim they are following NEPA requirements! The WWNF will claim they are using the watershed by watershed approach for environmental assessment, as the reason for holding mining plans submitted for so long, before beginning a mining plans environmental assessment.

They will claim they are concerned about cumulative effects from mining because it is in endangered species habitat. However, there are no cumulative effects, as rules and interaction with forest personnel were followed before the plan was accepted as complete to eliminate or minimize any possible impacts. How you will provide a nationwide consistency with this type of regulatory prohibition based on a regulation change with the 36 CFR § 228 would be a wonder to me.

I should note that this plan that I am associated with is for disturbing less than 5 acres at any time and reclamation will be completed before moving to the next area.

It is sated under Background:

> "… 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…"

My concern here is that not even the BLM's regulation is consistent with laws concerning mining and rights granted. BLM has been imposing both the 43 CFR § 3809 and the § 3715 regulations, which even conflict in scope on lands the BLM manages and regulates differently, which violate rights of miners. I am wondering if these 36 CFR § 228 regulation changes will also end up being consistent nationwide following the same inconsistency that BLM's use of regulations impose.

Obviously, you will want to see an example! These two examples will concern "reasonably incident uses and occupancy" under the BLM regulations as being inconsistent with established Law and an inconsistency between implementations of both the § 3809s and the § 3715s.

The 36 CFR § 228 regulations really already follow the casual use, where no notice is required, and notice level work using equipment, or the larger mining that needs a plan in the § 228s, so I do not understand your requiring comments or need to more closely match the BLM regulations at this juncture; they are already similar in this regard and you have stated the same.

I guess the way to begin the first example is that I do not question that the United States has a "naked legal title" in unpatented mining claims (Freese v. US, 1981 639 F.2d 754, 226 Ct. Cl. 252 certiorari denied 102 S Ct. 119, 454 US 827, 70 L.Ed. 2d 103). Nor do I question whether BLM has the authority to declare a mining claim invalid and thereby remove equipment and residence from such. Neither do I question whether BLM has the authority to manage vegetative surface resources "(except mineral deposits subject to location under the mining laws of the United States)" (30 USC § 612 (b). These will also apply to the Forest Service, except only BLM has the authority to invalidate a mining claim.

The 30 USC § 612(a) statute, requires that the mining claim "*shall not be used…for any purpose other than prospecting, mining or processing operations and uses reasonably incident thereto*." Occupancy is included as a use reasonably incident since it is also in the statute of 30 USC § 22, which granted the right to explore, mine and occupy mining claim deposits found.

I claim that an intervening change has occurred in rules, where BLM can make a determination based on substantive rules for work requirements that are not required in the law. They will base this on the 612(a) and (b) for surface management, to remove mining claim owners without ever determining whether they complied with the Mining Law and maintained their right of possessory ownership to the property, including occupancy.

The 612(a) and (b) statute is about type of activity, preventing non-mining activity, rather than an allowance to increase the amount or magnitude of work. 30 USC § 28 requires $100 per year work to preserve the possession of the mining claim and rights thereto; however, 43 CFR § 3715.2(b) states: "*Constitute substantially regular work*" and § 3715.2- 1(e), states: "*where 8 hours is considered a 'full shift' not including travel time*" in order to authorize occupancy. This is an increased requirement with a partly undefined amount of work, except whatever it is, it requires "8 hours" of doing it; and by using this rule BLM has taken the discretion, not authorized in statute, to remove occupying mining claim owners even though they have complied with Mining Law work requirements.

This has happened to me and the reason I am able to explain my research. So the question of doubt, which I originally stated, will the Forest Service continue as a nationwide consistency with any hint of this in the § 228's rule change?

It is the miner that has the "*Dominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator*." Curtis 611 F.2d 1277 (9th Cir 1980) Id. at 1283-85 (quoting legislative history concerning the law codified as 30 USC 612(a) and (b)) "*This language, carefully developed, emphasizes the committee's insistence that this legislation not have the effect of modifying long-standing essential rights springing from location of a mining claim*."

Here is another one for the Forest Service to take a hard look at: *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."

Example two:

BLM imposes the § 3715 and the § 3809 regulations together on the same tract of land, which is in an obvious conflict. At § 3909.2(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*". I should note here that most miners are in the public lands subject to the Mining Law (1872) as amended, where the minerals are not reserved to the US. However, BLM has been imposing this rule on all miners whether in lands with minerals reserved to the US or not!

At §3715.0-1(b) it states: "*Scope. 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*." The

obvious conclusion here is that if the 3809s apply, the 3715s do not, and vice-a-versa, if the 3715s apply, the 3809s do not; as one is based on minerals being reserved to the United States and the other is based on the minerals not being reserved to the United States.

Both regulations, based on their stated scopes cannot apply or be imposed together, because minerals can only be reserved or not, on a given tract of land at one time. Yet BLM impose both regulations consistently at the same time on the same tracts of land to regulate mining claim owners in the public lands that have not been withdrawn, even partially. Locatable mineral miners are mostly on lands that are subject to the Mining Law for locatable minerals (1872) and not the various other mining laws. I am concerned here too whether these § 228 rule changes will continue the same inconsistency as a nationwide consistency!

It is unfathomable to me that administrative rules could take tangible property, residence or interferes with an equitable title without any invalidation of the deposit, or findings of insufficiency with work requirements or other filings as measured against the statutory requirements which grants that tile to mining claim owners. See 30 USC § 26.

Under Comments Requested:
It states:

> (2) Submitting, Receiving, Reviewing, Analyzing, and Approving Plans of Operations
> g. Should certain environmental concerns, such as threatened or endangered species, certain mineral operations, such as suction dredging, or certain land statuses, such as national recreation areas, be determinative of the classification of proposed locatable mineral operations? If so, please identify all circumstances which you think should require an opertor to submit a notice before operating, and all circumstances which you think should require an operator to submit and obtain Forest Service approval of a proposed plan of operations?

It appears to me that what you are asking for are comments on whether suction dredging, for example, should have a determinative classification to be required to submit a notice to the District Ranger before conducting the activity. And, in like manner as other mining operators that would require a notice or plan.

I say no. Suction dredge miners, as well as other casual use miners that do not cut down trees or building roads with heavy equipment should not be required to notify any District Ranger before operating. There are substantial reasons that these types of operations should not be added in any § 228 revisions you might make.

First, I would say this would be double permitting where the State already regulates and permits for fish and wildlife. The forest should be managed for sustained yield (National Forest Management Act) - by correctly managing the forests, it will automatically increase water flow, prevent catastrophic wild fires and provide for the custom, culture, social and economic benefit of the citizens, (this is also a NEPA analysis requirement) and allow a balance for protection of the environment and the needs of man.

Second, there has never been an issue documented anywhere, where a take of a threatened or endangered species or any fish for that matter from suction dredging, or from any other casual use miner. I can provide a stack of scientific studies that show there is no harm to the environment from suction dredging; in fact some of that stack of studies show there was a benefit.

The FS is still allowed to come visit and based on what they see, they can tell me (in writing) that I need to stop, because I am creating a significant disturbance (and specify what that disturbance is), before any notice or plan requirement. However, there is no authority to criminalize an activity that has years of studies showing no harm.

There will not be any past experiences or sound scientific projections for the Ranger to analyze impacts to National Forests System lands and resources. The Forest Service will need to take a hard look at many of the scientific studies that have already been completed, or they will find objections to any proposed § 228 changes on this topic. I will submit a few quotes of studies here, so that you will be informed beforehand:

1. **Crittenden Study by Dr. Robert N, Crittenden "Regarding Dredging, Sluicing and Panning" March 1996**
   If properly conducted (for example, according to the present guidelines in Washington State — WDW 1987) dredging, panning, and sluicing reduce the amount of fine sand and silt in the streambed and, thereby, improve its porosity. These activities will, therefore, result in better interstitial flow, a better interstitial oxygen supply for eggs and alevins, and more interstitial space for alevins. The net result is improved survival for salmonid eggs and alevins. Thus, dredging, panning, and sluicing improve existing salmonid habitat and can also create new habitat. These activities should be encouraged.
2. **Harvey, Bret C., 1986**
   Adult fish are not acutely affected or likely to be sucked into dredges. Benthic communities were significantly altered, but alterations were localized and associated with changes in degree of embeddedness of cobbles and boulders. Suction dredging effects could be short-lived on streams where high seasonal flows occur. Six small dredges (<6in.) on a 2 km stretch had no additive effects. ***"If there were a cumulative effect of dredging, an increasing number of taxa should have declined in abundance after June at downstream stations."*** **No such decline appeared in the data.** *"Fish and invertebrates apparently were not highly sensitive to dredging in general, probably because the streams studied naturally have substantial seasonal and annual fluctuations in flow, turbidity, and substrate."* Substrate changes were gone after one year. (emphisis added)
3. **Effects of Suction Dredging on Streams (USDA WO 9/29/95)**
   I am pleased to forward to you a report – Effects of Suction Dredging on Streams: A Review and Evaluation Strategy. This report is completed pursuant to your Charter of April 18, 1995, and the Stipulation for Dismissal of June 7, 1995, in the case of National Wildlife Federation, et al v. Agpaoa, et al.

   This report could not have been completed without the expert assistance of Dr. Bret Harvey and Dr. Thomas Lisle, both of the Pacific Southwest Station, and Dr. Tracy Vallier, U.S. Geological Survey.

   "Effects of individual suction dredging operations tend to be localized and shorter. Off-site and long-term effects are commonly not apparent and are poorly understood."

   "Griffith and Andrews (1981) provided the only available data on this topic: **all of the 36 juvenile and adult rainbow and brook trout (Salvelinus fontinalis) they intentionally entrained survived**." (bold type added)

"The only attempt to measure cumulative effect of dredging on fish and invertebrates (Harvey 1986) suggested that a moderate density of dredges does not generate detectable cumulative effects."

Since cumulative effects have been further studied, paid for by the Siskiyou National Forest, here is one more quote where effects were so small it could not be measured as being bad or good!

4. **Response of fish to cumulative effects of suction dredge and hydraulic mining in the Illinois subbasin**, Siskiyou National Forest, Oregon" by Peter B. Bayley, Dept. Fisheries & Wildlife, Oregon State University (2005). "The statistical analyses did not indicate that suction dredge mining has no effect on the three responses measured, but rather any effect that may exist could not be detected at the commonly used Type I error rate of 0.05." [In other words, if there is an effect, it's so small they can't measure it!]

   "Given that this analysis could not detect an effect averaged over good and bad miners and that a more powerful study would be very expensive, it would seem that public money would be better spent on encouraging compliance with current guidelines than on further study."

There are many more studies completed on suction dredging, I believe that it is time for governing officials to stop pushing an agenda that eliminates man from the environment, especially suction dredging that is rightly regulated as casual use mining that explores for or mines locatable minerals.

Another item under Comments Requested

(2) Submitting, Receiving, Reviewing, Analyzing, and Approving Plans of Operations
g. Should certain environmental concerns, such as threatened or endangered species, certain mineral operations, such as suction dredging, or certain land statuses, such as national recreation areas, be determinative of the classification of proposed locatable mineral operations? If so, please identify all circumstances which you think should require an opertor to submit a notice before operating, and all circumstances which you think should require an operator to submit and obtain Forest Service approval of a proposed plan of operations?

In the recent Final Blue Mountain Forest Plan revision for the Wallowa-Whitman National Forest (WWNF), it discussed requiring all mining activity that had notice level work to have a Plan of Operations (Poo). Everyone knows that exploration is generally not a significant impact to the environment, even in areas of endangered species. The FEIS notes that "Most of the modern mining activity in the Blue Mountains is conducted be small-scale miners". So, certainly the Ranger should review the notice parameters to determine if the proposed mining activity is significant.

However, in the Final EIS Volume 2, chapter 3 part 2, Locatable Minerals, Page 485, it states "Approved plans of operation are required to conduct exploration or mining operations on National Forest System lands". This is a significant change from the current 36 CFR § 228 regulations and it is totally unnecessary. It also does not appear to be consistent with the BLM regulations with the three categories of casual use, notice, and plan requirements.

The WWNF currently does not approve plans, let alone a notice to add to that lack of approvals. There are many, including a plan submitted in 2007 and accepted as complete, which I am associated with that has never been let to start on Deer Creek. This is 11 years now, and the owner of that operation is still waiting! While other actions the

Forest Service took were long ago started and completed. Miners have ownership rights on locatable minerals, yet it does not bother the WWNF to continue to withhold plans and now want to require notice level work to have a Poo. I have discussed this above, based on the summary for requesting comments.

So I state again, I doubt that any rule changes you can make to the 36 CFR § 228 regulations will change how the Forest Service will implement the rules or allow for accountability of Rangers or any other decision maker and thereby expedite the permitting process.

(3) Modifying Approved Plans of Operations.

There is really no need to change the § 228 regulation, as requirements that the forest personnel must follow are already laid out in 26 CFR § 219 Subpart A and B and this includes procedures for amending or modifying plans. To me, most of these questions being posed for comments are just for sophistry; it looks good, but does not really impose any structural strength to the building, or to expediting the permitting process.

Secondly, there is always interaction with designated forest personnel when a notice or plan is submitted and before any approval, all procedural requirements needed have already been discussed with the mining proprietor before accepting the plan or notice as complete. So if having even more analysis for future unforeseen reasons to modify a plan will have been looked at already.

Establishing more of this in the § 228s just makes these regulations even longer and less expeditious to the permitting process for locatable minerals. Besides, in most of the plans I have looked at, the Forest Service had required a clause in the plan that discussed amending or modifying a plan and the requirements of the holder of that plan. So I suggest if you think more instruction is needed, put it in the rules that govern forest personnel rather than in the rules miners must follow.

Commentary Conclusion

The more I read revision plans for forest, or rule changes for miner's, it is the more I see that your concentration is on endangered species or their habitats, rather than on a balance of needs for man and creatures in the environment. Even in plan development at § 219.10 it requires forest personnel to look at multiple use and at (2) mineral resources and (7) Reasonably foreseeable risks to ecological, social, and economic sustainability.

Even just reading (7), we see the environment is balanced between social and economic sustainability, and the environment is really only a third of that balance here. The social and economics undoubtedly apply to mans' part of the multiple use in the forests.

Some impacts are unavoidable and some are unforeseeable but that does not change the fact that mining is necessary from an economic, cultural and social view point, besides the fact miners have substantial rights in public mineral lands 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 right to surface resources, (*Shoemaker*, 110 IBLA 39, 53 (1989)). Yet the trend is to prevent any impacts at all, even though it might have been later designated endangered species habitat.

My complaint in all of this, is that changing 36 CFR § 228 regulations will not do much to expedite the permitting process or help much for discovering the minerals on the critical minerals list in Executive Order 13817, A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals, issued December 20, 2017.

What I believe is that by not increasing the accountability of forest personnel, perhaps by rule changes on how the forest personnel implement the rules and laws already on the books, you will never truly get an expedited permitting process that will meet the needs of both man and the environment.

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