PUBLIC LANDS FOR THE PEOPLE

EST. 1990

A 501(C) (3) CORPORATION

USDA – Forest Service

Attn: **Director-MGM Staff**

Sept. 30, 2018

1617 Cole Boulevard Bldg. 17

Lakewood, CO 80401

RE: **2018 Public Lands for the People Comments on changes to 36 CFR 228 subpart A (Locatable Minerals) Regulations**

Dear Director,

Public Lands for the People Inc. (PLP) wishes to comment on the proposed regulatory changes to 36 CFR 228 (Locatable Minerals) regulations. PLP represents thousands of small miners in the United States who have an interest in fair and reasonable mineral regulations throughout the United States upon federally managed public land. PLP has specific comments and language that your office will find extremely helpful in your efforts to comply with EO 13817, the GAO, and our National Minerals Policy codified under 30 U.S.C. 21(a). Most importantly, as far as miners are concerned, our comments and specific, recommended language will provide **regulatory certainty** to a set of regulations that have been woefully deficient since their inception in 1974. It is PLP's position that for this reason alone our country has become over 92% dependent upon foreign sources of raw metals and rare earth minerals to meet America's domestic needs.

The Mining Law presently codified under 30 U.S.C. section 22 states:

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, ***shall be free and open to exploration*** *and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."*

Many legal arguments have been made in various federal courts since 1974 against Forest Service personnel, and courts have ruled that regulations were being administered in a hostile fashion

inconsistent with the intent of Congress. PLP understands that over the years, Congress has given a rather conflicted message , along with some strange 9th Circuit Court of Appeals rulings that have led us to a rather unpredictable situation regarding mineral development upon our public lands such as *Karuk v. Forest Service 681 F. 3d. 1006*. Because of this, America is second to last in the world rankings of conducive regulatory environments to do business. Simply put – America has **way too much** conflicting red tape that is needlessly hampering its domestic producers.

Small Miner Amendments (SMAs)

As your office may already be aware, PLP submitted a courtesy copy of its proposed "Small Miner Amendments" to members of Congress (subcommittee on minerals and resources committees) and to your Washington, DC, Headquarters office of the U.S. Forest Service in March, 2018. PLP is picking up good interest in these committees in addition to words of interest from your D.C. office "to implement as much reform within the Forest Service and not wait for Congress on matters of regulatory clarification for the mining industry". PLP wishes to reiterate that the Forest Service utilize the section of the "Small Miner Amendments" defining significant resource disturbance definitions and the enhanced section regarding notices of non-compliance mirroring the Bureau of Land Management (BLM). This would provide the regulatory certainty the mining community has desired for a very long time plus eliminate abuse by some poorly trained non-minerals staffers PLP has observed and gone to court over in the past 25 years. Several of these cases will be addressed later in this paper.

The following is an excerpt from PLP's "Small Miner Amendments" for which we would like to see as much language as possible integrated into the 36 CFR 228 regulations:

"SECTION 103: UNIFORM FEDERAL REGULATION

(a) 43 U.S.C. § 1702 is amended as follows:

(i) New subsections (q), (r) are added:

"(q) 'mine operator' means any person or entity exercising rights of or through the holder of a federal unpatented mining claim.

"(r) Generally 'mining casual use' means excavation and/or processing (including motorized excavation and processing) of less than 1,000 cubic yards of material annually per claim; or surface disturbance of less than five acres of ground; use, maintenance, or occupancy of visibly-existing or previously-existing roads / trails (implied easements), tunnels, mill sites, refining sites, bridges, or existing mining-related buildings; staging, use or occupancy of portable or removable equipment; subsurface operations; or any combination of the foregoing or similarly-limited mineral development activities."

(b) A new section is created at 43 U.S.C § 1748(c), titled: "Administration of Unpatented Mining Claims" with the following additions:

"(a) Federal unpatented mining claims are tracts of public land dedicated to the particular purpose of mineral development, and the exercise of the property rights in federal mining claims are to be managed exclusively in accordance with this section."

"(b) Notices of Initiation (NOI) and Plans of Operation (POO)-"

"(i) Mine operators may proceed with mining casual use without notice to the Bureau of Land Management (BLM)."

"(ii) Mine operators must provide a Notice of Initiation (NOI) to the BLM thirty (30) days in advance of commencing mining operations beyond casual use. If BLM fails to respond to the NOI within thirty (30) days, the mine operator may commence operations, unless the operation involves a surface disturbance in excess of 100 acres but less than 1000 acres, in which case BLM shall have twelve (12) months to respond and mitigate impacts, after which the operation is approved by operation of law. All other operations exceeding 1000 acres shall be covered under a plan of operations and approved by operation of law within twenty-four (24) months"

"(c) Upon receipt of a NOI, BLM shall review the proposed operations for compliance with best management practices and issue a determination as to what, if any, additional best management practices are required. NOIs may be of any duration specified by the mine operator, and the BLM's determination with respect to the NOI shall remain effective for so long as operations continue as specified in the NOI and may be assigned to future mine operators."

"(i) Final reclamation activity in general shall only be required if a mine operator and BLM geologist concur that an ore body is exhausted and that the reclamation will not impede future operations. Seasonal reclamation activity may be required if it will not materially interfere with future mining operations."

"(ii) Reclamation bonding shall only apply if surface disturbance exceeds 5 acres or 1000 cu. yards annually of processed material per claim. Haul roads, utility roads, temporary milling sites and portable structures, and any other pre-existing land disturbance shall not be included in the 5-acre calculation. Reclamation costs shall be based upon the average of 3 independent bids. BLM shall recognize and give effect to bonding pools through a memorandum of understanding to assist large and small mine operators in meeting the requirements of this section. The bids for bonds and reclamation costs may not be reviewed more often than once every 7 years. Reclamation bonds shall be refunded to the mining operator within one (1) year of completion of the reclamation, even if the site is subject to continuing monitoring."

"(d) Any personnel employed by BLM to review an NOI shall have qualifications of at least a bachelor's degree in mine engineering with a minimum of three (3) years or more experience in private

sector commercial mining operations or over five (5) years production mining experience in lode, placer and milling operations."

"(e) If BLM determines that any mine operator is conducting operations beyond casual use without providing an NOI, or that any mine operator is conducting operations contrary to published best management practices, BLM must provide formal, written notice to the mine operator through a Notice of Noncompliance. Such notice shall describe the noncompliance and shall specify the action to comply and the time within which such action is to be completed, generally not to exceed thirty (30) days, provided, however, that days during which the area of operations is inaccessible shall not be included when computing the number of days allowed for compliance. The requirements to issue a Notice of Non-compliance shall apply whether or not the operator has a submitted NOI on file with the BLM and shall not be used to shut down the entire mineral operation. Actual notice shall be presumed effective when mailed by certified mail, return receipt requested to the owner of the mining claim and operator of record as specified in BLM records, or personally served upon the mine operator. No enforcement action by any agency, civil or criminal, may be commenced until after delivery of such notice, and no adverse action may be taken against a mine operator until after a hearing with the protections of 5 U.S.C. § 554. No enforcement action shall halt compliant aspects of the operations that the operator qualifies under casual use activities."

"(f) Action with respect to any NOI shall not be 'major federal action' within the meaning of 42 U.S.C. § 4332 or 'agency action' within the meaning of 16 U.S.C. § 1536(a)(2)."

SECTION 104. MINE OPERATION EXEMPTIONS FROM THE CLEAN WATER ACT

(a) "Mining operations which do not add any chemicals to excavated aggregate or ore, other than water, and native materials, shall not be considered an "addition of any pollutant" within the meaning of 33 U.S.C. § 1362(12)."

(b) "Mining and processing discharges from mining and processing involving the use of biodegradable chemicals that have a Material Safety Data Sheet (MSDS) reading, "This product is not classified as dangerous for the environment," "The risk of environmental effects is considered small", or substantially equivalent language."

(c) "Suction dredge and bucket excavation mining within the natural 100-year flood plain of a water body, or operations contained through artificial impoundments to reduce offsite sediment transport comprise incidental fallback and do not represent an "addition" or "discharge" within the meaning of 33 U.S.C. §§ 1341, 1342 or 1344."

(i) "Incidental fallback" is defined as: native rock, sand, soil, or vegetative materials picked up, processed to remove or reclaim the mined metal or minerals, and then backfilled at or near the same

excavation site. Offsite turbidity in connection with incidental fallback is also not an "addition" or "discharge" within the meaning of 33 U.S.C. §§ 1341, 1342 or 1344."

PLP and ICMJ's Prospecting and Mining Journal has presented this language to over 40,000 miners across the United States and received an overwhelming number of endorsements with little-to-no complaints. PLP understands the Forest Service does not implement the Clean Water Act, but none-the-less, we have added this language because it is a major sticking point to the small mining community. So, any clarity from the Forest Service on the issue in coordination with the EPA and Army Corp would be greatly appreciated in order to facilitate regulatory certainty consistent with EO 13817 and EO 13783.

Why Clean up the language of Notices of Non-Compliance consistent with the SMAs?

While the Forest Service and the BLM both admittedly have many civil and criminal remedies available to them in order to rectify miner's noncompliance with federal regulations, most fundamentally as founded in our countries Bill of Rights under the 5th Amendment to our Constitution is the right of Due Process. Citing a miner under 36 CFR 261 without first providing a hearing at a meaningful time and place is not Constitutional nor acceptable under normal legal jurisprudence unless you are the 9th Circuit Court of Appeals. (Regarding U.S. v. Godfrey, where he got the shaft and the 9th averted their eyes to the fact no administrative hearing was provided and 36 CFR 228.7, 14 was not complied with by the Forest Service in order to gain a criminal conviction on two of the 5 counts.) If the Forest Service does not rectify these abuses in the application of their regulations under 36 CFR 228, it will never comport with future legal challenges PLP has prepared that are not within the 9th Circuit jurisdiction. And, as such, the Forest Service is encouraged to adopt the notice of non-compliance language provided in PLP's "Small Miner Amendments" in order to cure its existing constitutional defects.

Why define Significant Surface Resource Disturbance?

Fundamentally, the word "significant" is an arbitrary term that invites a wide range of perception not at all fitting to use for regulatory certainty. Significant surface resource disturbance as to require the submission of a NOI or POO is a horrible regulatory standard that invites abuse every time. As stated by judge Carlton in U.S. v Lex, 300 F. Supp. 2d 951: *"There is a serious argument to be made that the regulation was 'so vague and standard-less that it leaves the public uncertain as to' what is prohibited. City of Chicago v. Mo-rales, 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (quoting Giaccio v. Pennsylvania, 382 U.S. 399, 402–403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966)). As such, the enforcement of the regulation would offend due process. In any event, the rule of lenity requires that courts infer the rationale most favorable to defendants in construing the residential purpose element. See United States v. Martinez, 946 F.2d 100, 102 (9th Cir.1991)".*

The Forest Service regulatory intent in dealing with this Lex decision in 2005 *(70 FR 32713)* stated:

*"Two respondents specifically requested the deletion of the phrase and its replacement by the prefatory *32725 language of § 228.4(a)(1) and the language of § 228.4(a)(1)(i)-(v). Those respondents commented that this change would ensure the continuation of the historic application of the terms 'disturbance' and "significant disturbance."*

Response: The intent in adopting § 228.4(a)(1) of the interim rule was not to authorize a District Ranger to require a plan of operations for operations which will not exceed the scope of one or more of the exemptions in § 228.4(a)(1)(i)-(v) of the interim rule. To ensure that the final rule is not interpreted in such an unintended manner, the phrase "unless the District Ranger determines that an operation is causing or will likely cause a significant disturbance of surface resources" is not included in the final rule. Thus, pursuant to § 228.4(a)(3) of the final rule, it is clear that prior submission and approval of a proposed plan of operations is not required if the proposed operations will be confined in scope to one or more of the exempted operations mentioned in that paragraph." (Emphasis added.)

Unfortunately, in actual practice, PLP has documented that the Forest Service routinely requires POO's for de-minimus operations. In our opinion, the regulatory intent should discourage this practice among competent minerals officers and stop wasting government time and the miner's patience. Such abuse has, in fact, continued, as demonstrated in *U.S v. Tierney, District court, AZ (2012)* where the court found that 36 CFR 228 and 261 regulations were to be applied in such a manner to not pass the vagueness test. It was the original intent of the 1974 regulations to allow the miner to make the first call in what was significant surface resource disturbance, so long as the miner is not cutting trees or using a back hoe or bulldozer. (See *Pearson v. Madrid, Plumas National Forest et. al, unpublished case from 2001 District court for the Eastern District of Cal*.)

And as such, the Forest Service is encouraged to adopt the definitions and language provided in PLP's "Small Miner Amendments" to cure the defects.

Reclamation Bonding

PLP is aware that the Forest Service does not have the Congressional authority to require a financial assurance before a miner proceeds to exercise his rights under the U.S. Mining Act (30 U.S.C. §§ 22-54). In *Pearson v. Madrid, Plumas National Forest et. al, unpublished case from 2001 District court for the Eastern District of Cal*., Pearson was able to demonstrate to the court that he availed himself to 26 bonding companies (approved list of reclamation bonding companies) the Forest Service provided, where not one would issue and bond! Judge Peter Nowinski stated in open court that Pearson had done his due diligence to obtain a bond and the Forest Service could not prevent him from proceeding without a financial assurance (bond) in part because it would be an unreasonable circumscription of his placer mining rights and in order for an agency such as the Forest Service to require monies from the public in light of their mining rights it must be accompanied by an express intent of Congress.

The problem (as PLP sees it), was created by the Forest Service itself on this matter not just because the Forest Service lacks the legal authority to require a bond, but the fact in many cases the Forest Service

regulates the miner out of business over time and does not refund the bond even after reclamation is performed to the conditions of the agreed reclamation plan. The monies are held for "ongoing monitoring"—which can be endless until the monies are used up—all the while the miner has no say in this arbitrary process. Bonding companies stay away from bonding mining projects for the fact there is a lack of regulatory certainty. If the miner performs the labor to reclaim the site as specified by the conditions of his approval, then the money should be refunded—not held forever. This is a sign that "Best Management Practices" are not being applied in a fair and reasonable matter. As stated in the 1974 Congressional oversight hearing on the proposed 36 CFR 252 (now 36 CFR 228) regulations: "...the regulations must be fair to the miner and fair to the Forest Service...". Therefore, the Forest Service is encouraged to adopt the definitions and language provided in PLP's "Small Miner Amendments" to cure the defects.

Expiring POO's before orebodies are exhausted

A common problem PLP has observed for the last 28 years is the Forest Service practice of placing an expiration date on the terms of an NOI or approval of a POO. This practice must stop. BLM does not do this, and this practice does not provide regulatory certainty consistent with EO 13817. The original point of submitting a NOI or POO in 1974 was to give the Forest Service a reasonable opportunity to mitigate surface impacts in connection with mineral operations. The Forest Service is reminded that operations under 36 CFR 228 and 30 U.S.C. 22-54 is not for the purposes of exercising a term lease system where the Federal government retains mineral ownership. Therefore, the Forest Service is encouraged to adopt the definitions and language provided in PLP's "Small Miner Amendments" to cure the defects in the application of the 36 CFR 228 regulations.

POO Approval Time Limits

Everywhere across the United States, PLP has fielded complaints from miners that they are being delayed for years on the approval of their POO; some have been delayed for ***over a decade***! Most miners give up and the activists within the Forest Service think they have won and deterred another "evil miner" in their eyes. PLP is aware that not all the Forest Service plays this game, so it does vary from district to district wholly dependent on each staff and their training within their districts. Mark Amodei's Critical Minerals bill passed into law FY 2019 deals with this problem in part. This new law, under the National Defense Authorization Act, places a 30-month limit on the time the Forest Service must mitigate and place terms and conditions upon the approval of a POO. Amodei's bill will not cure the problem. It is PLP's opinion that all it will accomplish is more litigation against the Forest Service (for their failure to act or undue delay after 30 months has gone by) brought forth under the Administrative Procedures Act.

In light of the fact that in *Karuk v. Forest Service 681 F. 3d. 1006* the 9th Circuit told the Forest Service that an inaction under a NOI is still an action within the meaning of NEPA, the Forest Service is not foreclosed in adopting the language of PLP's "Small Miner Amendments" in its fullest (cited above).

Providing regulatory certainty in the smoke-filled air of the 9th Circuit where miners presently loath to submit is a real incentive now and down the road.

Therefore, the Forest Service is encouraged to adopt the definitions and language provided in PLP's "Small Miner Amendments" to cure the defects.

Conclusion

PLP's "Small Miner Amendments" presently sitting in committee gaining sponsorship does, in our opinion, cure the problem–it helps the Forest Service and helps all miners. Why? Because PLP is asserting that while the government has a reasonable right to mitigate surface impacts under the various environmental laws The MINER still retains the bundle of rights to extract those minerals he or she has lawfully laid claim to under federal mining law. These rights, albeit not unlimited,, referred to in the library of Congress (Mining Law – Legal and Historical Analysis published in 1989) teaches us that miners have a "Right of Self-Initiation" that cannot be unreasonably circumscribed that is not to be confused with a lease system. PLP's "Small Miner Amendments" attempt to place clear guidance to this contentious issue of minerals development upon public lands in the 21st Century.

Thank you for your consideration in this matter from the entire Board of Directors of Public Lands for the People.

Ron Kliewer

President,

Public Lands For The People